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June, 4th, 2024

Joseph Orlando, Clerk
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R. J. Hughes Justice Complex
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NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

State of New Jersey v. Luqman Abdullah

Docket No. A-3416-22

CRIMINAL ACTION

ON APPEAL FROM A FINAL ORDER ENTERED IN THE SUPERIOR COURT OF NEW JERSEY - LAW DIVISION, UNION COUNTY DENYING A PETITION FOR POST-CONVICTION RELIEF

PRO-SE SUPPLEMENTAL LETTER-BRIEF

Dear Your Honorable Justices:

Please accept defendant's pro-se supplemental letter-brief in lieu of a more formal brief in support of his appeal from a final order entered in the Superior Court of New Jersey - Union County, Law Division denying a Petition for Post-Conviction Relief (PCR) to be filed on his behalf.

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PROCEDURAL HISTORY

The defendant will rely on the procedural history as set forth in the brief filed by appellate counsel in this matter with addition to the fact that PCR counsel moved for reconsideration of the PCR court's June 9, 2023 order denying the PCR and an evidentiary hearing. (Aa 1 to 26)[1] The motion for reconsideration was supported by a certification of Peter Valentin, Forensic Expert (Aa 21 to 23), and Nasir Bin Muhammad El Arabi. (Aa 24 to 26)

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1 To avoid any confusion, the defendant has referenced his appendix to the pro-se supplemental brief by (Aa). The defendant also relies on the appendix to appellate counsel's brief referenced as (Da) and the transcript listings.

STATEMENT OF FACTS

The defendant will rely on the statement of facts as set forth in the brief filed by appellate counsel in this matter.

LEGAL ARGUMENT

POINT ONE

THE PCR COURT ERRED BY DENYING THE DEFENDANT'S CLAIMS SUPPORTED BY CERTIFICATIONS WITHOUT AN EVIDENTIARY HEARING CONTRARY TO STATE V. PORTER, 216 N.J. 343 (2013), ESPECIALLY WHERE DEFENDANT MADE A PRIMA FACIE SHOWING THAT TRIAL COUNSEL WAS INEFFECTIVE, THEREFORE, THE ORDER SHOULD BE REVERSED AND THE MATTER SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING (Da 53 and Da 95)

The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution require that a defendant receive "the effective assistance of counsel" during a criminal proceeding. Strickland v. Washington, 466 U.S. 668, 685-86 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). The New Jersey Supreme Court adopted Strickland's two-pronged standard for claims pursuant to Article 1, Paragraph 10 of the New Jersey Constitution. Fritz, supra, 105 N.J. at 58.

An ineffective assistance of counsel claim may occur when counsel fails to conduct an adequate pre-trial investigation. [State v. Preciose, 129 N.J. 451, 464 (1992); State v. Savage, 120 N.J. 594, 621-22 (1990); State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002). "'[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" State v. Chew, 179 N.J. 186, 217 (2004) (quoting Strickland, supra, 466 U.S. at 691); see also State v. Russo, 333 N.J. Super. 119, 139 (App. Div. 2000) ("'[I]t is the duty of the lawyer to conduct a prompt investigation of

the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.'" (quoting The American Bar Association Standards, The Defense Function § 4.1 (1971))); see also Savage, supra, 120 N.J. at 621 (noting American Bar Association guidelines "emphasize the importance of interviewing potential witnesses during pre-trial investigation" (quotation omitted)). A counsel's failure to do so will "'render the lawyer's performance deficient.'" Chew, supra, 179 N.J. at 217 (quoting Savage, supra, 120 N.J. at 618).

Failure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction. Indeed, "few defenses have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury [than an alibi]." State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977). State v. Porter, 216 N.J. 343, 352-53 (2013).

"[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.) (citing R. 1:6-6), certif. denied, 162 N.J. 199 (1999). "In that context, [an appellate court] consider[s] petitioner's contentions indulgently and view[s] the facts asserted by him in the light most favorable to him." *Ibid.* Porter, supra, at 353.

The judge deciding a PCR claim should conduct an evidentiary hearing when there are disputed issues of material facts related to the defendant's entitlement to PCR, particularly when the dispute regards events and conversations that occur off

the record or outside the presence of the judge. Russo, supra, 333 N.J. Super. at 138 (citing [State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998))]; see also Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 3:22-10 (2013) (noting that Preciose "mak[es] clear that [an evidentiary] hearing is required if there is a dispute of fact respecting matters which are not on the record"). In a similar vein, we observed that [j]ust as when determining whether a defendant is entitled to an evidentiary hearing in connection with his petition for post-conviction relief the facts should be 'view[ed] in the light most favorable to a defendant,' so too, in determining whether to entertain oral argument, the facts should be viewed through the same generous lens. [State v. Parker, 212 N.J. 269, 282 (2012) (quoting Preciose, supra, 129 N.J. at 463).]

Certain factual questions, "including those relating to the nature and content of off-the-record conferences between defendant and [the] trial attorney," are critical to claims of ineffective assistance of counsel and can "only be resolved by meticulous analysis and weighing of factual allegations, including assessments of credibility." Pyatt, supra, 316 N.J. Super. at 51. These determinations are "best made" through an evidentiary hearing. *Ibid.* Even a suspicious or questionable affidavit supporting a PCR petition "must be tested for credibility and cannot be summarily rejected." State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008). Porter, supra, at 354-55.

In the case at bar, the defendant raised claims supported by certifications that his trial counsel deprived him of effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution. The defendant supported

his claims of trial counsel's deficiencies by certifications from himself, Private Investigator Mark A. Rusin (Da 132 to 133), Forensic Expert Peter Valentin (Aa 21 to 23), and Nasir Bin Muhammed El Arabi (Aa 24 to 26). However, the PCR court denied the PCR petition without the benefit of an evidentiary hearing contrary to State v. Porter, 216 N.J. 243 (2013). The PCR court also improperly engaged in credibility determinations concerning the certifications without any testimony from the witnesses, which is also contrary to Porter, supra.

The defendant averred that his trial counsel explained to him that his partial fingerprint was found on a kilogram cocaine wrapper, which he was advised fingerprints are normally not found on such material, that he was reportedly observed on certain days of surveillance entering 129 Chancellor Avenue, Apartment D2, and DNA evidence was reportedly recovered from a water bottle and gloves retrieved from the apartment. (Da 121) Defendant informed his trial attorney that the days he was reportedly viewed during alleged surveillance he was not even in the State of New Jersey because he was in Charlotte, North Carolina. The defendant subsequently presented trial counsel with a receipt for the Hilton Hotel he stayed at while in Charlotte and requested trial counsel to have an investigator interview the Hilton Hotel employees and seek the video footage. (Da 121) The defendant also requested trial counsel to obtain a fingerprint expert, a cross-racial identification expert, and a DNA expert. The defendant's family subsequently paid trial counsel $1000.00 for the fingerprint expert, Robert Garrett to travel to Elizabeth, New Jersey to review the state's evidence. (Da 121)

Trial counsel informed the defendant that Mr. Garrett was officially retained as "our fingerprint expert," and that his report should be prepared within the next 30 days. (Da 121) The defendant further averred that he never received Mr. Garrett's report from trial counsel, therefore, he had written to trial counsel requesting an update. (Da 121)

Several weeks after writing to trial counsel, the defendant was advised by trial counsel that he found another fingerprint expert, David T. Gamble, and that Mr. Gamble would be going to the Union County Prosecutor's Office to examine the State's evidence. (Da 121) The defendant's family paid trial counsel an additional $5,000.00 to secure Mr. Gamble for the defendant's trial. (Da 121)

Up to the start of trial, the defendant was reassured by trial counsel during conversations and letters that Mr. Gamble would be called as a defense witness on his behalf. It was not until the close of the State's case, that the defendant was apprised that no fingerprint expert or DNA expert would be called on his behalf. The defendant was clearly stunned! (Da 122)

On August 5, 2016, trial counsel in continuing the charade that he retained experts, had written to the Union County Prosecutor's Office maintaining that Mr. Gamble was a defense witness. Trial counsel had also written to the Honorable Judge Peim, on September 8, 2016, listing Mr. Garrett as the defense's fingerprint expert. (Da 122) However, for some inexplicable reason, trial counsel never called a fingerprint expert on the defendant's behalf.

The defendant's family also paid trial counsel money to retain a DNA expert to address the issue that the gloves allegedly found were already "unsealed" when they were sent to the lab in May of 2009 for testing. (Da 123) However, trial counsel failed to call a DNA expert on the defendant's behalf.

The false assurances by trial counsel that he retained the fingerprint expert, DNA expert, and had investigated the receipt/invoice of the defendant's stay at the Hilton Hotel in Charlotte, North Carolina at the time he was misidentified during surveillance significantly played a role in the defendant's decision to go to trial. (Da 123) Trial counsel had represented to the defendant that he had subpoenaed a representative from the Hilton Hotel in Charlotte, North Carolina. However, it was not until a court appearance before the trial judge on or about October 20, 2016, when trial counsel told the Judge that he had not subpoenaed any witnesses from the Hilton Hotel in Charlotte, North Carolina. (Da 123 to 124) (15T 152).

The defendant's certification and Verified PCR Petition places material issues of fact in dispute that trial counsel was paid to obtain the services of several experts, which he knowingly misrepresented to the defendant were retained and would be called on his behalf for the trial.

Mark A. Rusin, a licensed private investigator, provided a certification averring that he interviewed Michael McCullar, a former employee of the Hilton Hotel in Charlotte, North Carolina. Mr. McCullar stated that he worked for the Hilton Hotel in Charlotte, North Carolina from 2016 to 2017 as the director of the hotel's front office at the time. Also, that he did not recall being contacted to testify,

provide documentation and/or to produce any tangible evidence such as surveillance videos relating to a legal matter in the State of New Jersey. Mr. McCullar further advised that Mr. Rusin should contact the Human Services or Legal Compliance Team if any further assistance was needed. Mr. Rusin established that after review of the PCR file, that trial counsel attempted to serve a subpoena on the Hilton Hotel in Short Hills, New Jersey, and that the proper Hilton Hotel to be served was the Hilton Charlotte University Place, 8629 J.M. Keynes Drive, Charlotte, North Carolina, which was clearly on the receipt/invoice the defendant provided to trial counsel. (Da 132 to 133) Mr. Rusin also interviewed Nasir Bin Muhammed El Arabi in March of 2023. (Aa 24 to 26)

On June 28, 2023, Mr. El Arabi provided a certification (Aa 24 to 26) that he was in fact interviewed by Mr. Rusin. Also, that he told Mr. Rusin that he was in the physical presence of the defendant at the Hilton Hotel on J.M. Keynes Drive, in Charlotte, North Carolina from February 27, 2009 through March 1, 2009. Mr. El Arabi stated that a few years after the defendant's stay in North Carolina, he (Mr. El Arabi) personally returned to the Hilton Hotel to obtain proof of the defendant's stay at the Hilton Hotel, which he sent to the defendant who was detained in the Union County Jail, and that he was never contacted by the defendant's trial attorney. (Aa 24 to 26)

Peter Valentin, a forensic expert provided a certification in support of the defendant's PCR (Aa 21 to 23) that he reviewed the discovery materials for the defendant's case. Following his review, Mr. Valentin issued a nine (9) page report

highlighting trial counsel's deficient performance with respect to the necessity for a forensic expert or crime scene expert to rebut the issues concerning the chain of custody for the DNA and fingerprint evidence, the failure of the detectives to adhere to the evidence storage policies of the Union County Prosecutor's Office, and evidence bags being opened and unsealed evidence envelopes. (Aa 21 to 23)

A prima facie case is established when a defendant demonstrates "a reasonable likelihood that his or her claim, *viewing the facts alleged in the light most favorable to the defendant*, will ultimately succeed on the merits." R. 3:22–10(b). Porter, supra. (Emphasis added)

[I]n order to establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard performance. Thus, when a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification. Porter, supra.

Turning to the matter at hand, it is abundantly clear that an evidentiary hearing was warranted. The defendant has made a prima facie showing that trial counsel's failure to conduct the necessary pre-trial investigation of the witnesses and evidence highlighted above deprived the defendant of effective assistance of counsel for a pre-trial suppression hearing and the trial.

The dereliction of trial counsel irreparably prejudiced the defendant by trial counsel's failure to appropriately move for a pre-trial suppression hearing of the sneak and peek evidence and to effectively represent him at trial. However, the PCR court in addressing the defendant's claims, which were supported by certifications did not hold an evidentiary hearing as required by State v. Porter, 216 N.J. 343 (2013). Further, the PCR judge made credibility determinations on the certifications without hearing from the witnesses as also required by Porter, supra.

The PCR court engaged in an unreasonable application of the Strickland test in its ruling by failing to address the issue that the defendant was significantly prejudiced by trial counsel's knowingly misleading the defendant into believing he had investigated and secured witnesses relevant for his trial.

Trial counsel was aware of the importance of the witnesses or video footage from the Hilton Hotel in Charlotte, North Carolina. Also, that the witnesses or video footage was necessary to establish that the defendant had either been misidentified by detectives who represented in the Affidavit in support of the sneak and peek warrant that the defendant had been identified during surveillance on specific days he was not even in New Jersey, or that the detectives knowingly falsified evidence of an identification.

Trial counsel had not only misrepresented to the defendant that he interviewed and secured a witness from the Hilton Hotel in North Carolina, but he had also misrepresented to the trial judge who had inquired about this matter just a week prior to the trial when counsel was asked:

> COURT: Well, then, I mean I assume you got somebody subpoenaed.
>
> MR. ASHLEY: Well, Judge at this point in time, I can't say that I do, but I will make every effort, as soon as I'm leaving, going back to my office and –
>
> COURT: You had somebody in North Carolina that you're going to call as a witness. I would assume that you would have –
>
> MR. ASHLEY: We made some contact and effort. I just have to find out to what extent we've been successful and what the plan is. I'm not ignoring it, believe me. But there's one person that I have been working on.
>
> COURT: But I would have thought that if you had a witness from North Carolina, that you would have at least had that person on call.

(15T 152). The defendant supported his claim with a certification from Mark A. Rusin, a licensed private investigator who had reviewed defendant's case file and reported that he personally interviewed Michael McCullar, a former employee of the Hilton Hotel in Charlotte, North Carolina, who stated that he worked for the Hilton Hotel in Charlotte, North Carolina from 2016 to 2017 as the director of the hotel's front office at the time. Mr. McCullar further stated that he did not recall being contacted to testify, provide documentation and/or to produce any tangible evidence such as surveillance videos relating to a legal matter in the State of New Jersey. (Da 132-133)

At the start of trial, defense counsel caught up in his own web of misrepresentations to the trial court attempted to call Andrew Olesnycky, an attorney presumably on behalf of the Hilton Hotel from Short Hills, New Jersey, and David Mast, an employee of the Hilton in Short Hills in lieu of the witnesses

and video footage defendant requested from the Hilton Hotel in Charlotte, North Carolina. (17T 33-1 to 35-8) The trial judge not only denied this ploy, but scolded trial counsel stating that:

> THE COURT: I'm not happy that we're dealing with this now. I've heard about this for weeks and weeks and weeks and weeks, and this should have been dealt with months ago, not by serving somebody two days ago at the Short Hills Hilton.

(17T 37-3 to 9).

The defendant argued on his PCR that he also requested trial counsel to obtain a cross-racial identification expert given that the detectives that alleged to have witnessed the defendant during surveillance operations on specific dates and times the defendant was not in the State of New Jersey. Trial counsel failed to honor any of these requests as well although he led defendant to believe he had honored his requests.

The fingerprint and DNA forensic experts the defendant was assured by trial counsel would be called for trial were equally significant to a pre-trial suppression hearing to challenge the sneak and peek as well. The defendant raised the claim that trial counsel was grossly ineffective for not appropriately challenging the sneak and peek via a suppression hearing, by failing to obtain the fingerprint expert, DNA expert, and by not challenging the chain of custody for the seized evidence, not investigating any witnesses or obtaining the video footage from the Hilton Hotel in Charlotte, North Carolina, and more importantly, not being prepared to challenge the sneak and peek search warrant and misrepresentations in the affidavit in

support of the search warrant. This may explain trial counsel's complete failure to file the appropriate motion to suppress the sneak and peek evidence.

The defendant argued that there was no judicial authority for the issuance of a sneak and peek warrant in the State of New Jersey, as no legislative promulgation of such a heightened intrusion into a citizen's Fourth Amendment Constitutional right to be free from unreasonable intrusions has ever been adopted or approved at the time of defendant's case. This is more problematic given that New Jersey's State Constitution affords greater protections than its federal counterpart.

The sneak and peek warrant involved numerous misrepresentations by the lead prosecutor on this matter down to the detectives that averred that the purpose of the sneak and peek warrant was to install listening devices and cameras because the use of confidential informants and surveillance proved unsuccessful. Also, the judge hearing the sneak and peek application was told that **no items would be seized** because that was not the purpose of the warrant. (1T 71-1 to 75-19) (Emphasis added) The detectives **never** installed a listening device or camera in the apartment. Instead, the detectives seized samples of drugs they allegedly stated was visible, and various other items. More troubling, is the fact that the detectives then applied for a search warrant the next day for the apartment, thereby making clear that the sneak and peek was nothing more than a pretext to establish probable cause for a formal search warrant.

The PCR court ruled that the issue concerning the sneak and peek was already addressed by the Appellate Division on direct appeal but did ultimately address the defendant's issue. However, it should be noted that the defendant's Sixth Amendment claim on PCR that his trial attorney was ineffective for failing to file a suppression motion for the sneak and peek and failing to be properly prepared to argue such a motion is not the Fourth Amendment claim raised on direct appeal challenging the sneak and peek. See State v. Johnson, 365 N.J. Super. 27 (App. Div. 2003), where the Appellate stated:

> First, we reject outright the State's counter-argument that defendant waived his Sixth Amendment claim of ineffective assistance of counsel by not litigating below his Fourth Amendment claim to suppress the handgun found in his possession. There is absolutely no merit to the contention that defendant should not be allowed to vindicate on appeal his constitutional right to effective assistance of counsel where counsel's primary error is failure to make a timely request for the exclusion of illegally seized evidence that is often the most probative information bearing on the defendant's guilt or innocence. Although failure to move to suppress evidence constitutes a waiver of any objection at trial to the admission of evidence on the ground that it was unlawfully obtained, R. 3:5-7(f); State v. Cox, 114 N.J. Super. 556, 559-60 (App. Div.), certif. denied, 58 N.J. 93 (1971), and of the right to question the search on appeal on Fourth Amendment grounds, State v. Robinson, 224 N.J. Super. 495, 499 (App. Div. 1988), this procedural bar does not extend to Sixth Amendment claims of ineffective assistance of counsel where based on counsel's very failure to timely file a suppression motion. See Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583, 91 L. Ed. 2d 305 (1986). Defendant's Sixth Amendment claim of ineffective assistance of counsel is not in fact a Fourth Amendment claim directly controlled by Rule 3:5-7(f). Thus, while defendant's defaulted Fourth Amendment claim may be one element of his Sixth Amendment right to counsel claim, the two claims have separate identities, reflect different constitutional values, and are distinct both in nature and the requisite elements of proof. Kimmelman, supra, 477 U.S. at 375, 106 S. Ct. at 2583, 91 L. Ed. 2d at 319.

Johnson, supra.

Based on the above, the defendant's ineffective assistance of trial counsel and appellate counsel claims were appropriately before the PCR court, although, incorrectly adjudicated.

The defendant argued in his motion for reconsideration that the PCR court failed to address the claims of ineffective assistance supported by certifications with respect to trial counsel's failures to file a proper suppression motion (as opposed to a motion to dismiss), failure to make reasonable investigations, failing to have an organized plan of defense, failure to present an adequate defense, failure to communicate with the client, etc. under the first prong of Strickland. (Aa 3 to 16)

The defendant has made a prima facie showing that he was irreparably prejudiced by trial counsel's failure to file the appropriate suppression motion challenging the sneak and peek. In the defendant's case, there is no doubt that trial counsel was aware that the affidavit in support of the sneak and peek involved 1,270 pages, which he argued only about 84 pages makes any references to the defendant, that there were about 21 co-defendants, almost 25,000 wire-tap audio recordings and none of which directly incriminated the defendant, numerous inconsistencies and misrepresentations in the affidavit by the detectives and the lead prosecutor as well. The defendant even paid trial counsel to obtain experts, which trial counsel misrepresented to the defendant he secured. However, there is no reasonable justification that could possibly explain away trial counsel's gross negligence, misleading the defendant and the court.

The Sixth Amendment provides, inter alia: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI; see Bey [v. Morton, 124 F.3d 524, 528 (3d Cir. 1997)]. The right to counsel attaches at arraignment, extends through the first appeal and guarantees an accused the assistance of counsel at all critical stages of a proceeding. Michigan v. Harvey, 494 U.S. 344, 357, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990). A pretrial hearing considering the suppression of the [evidence] is such a critical stage because its "**results might settle the accused's fate and reduce the trial itself to a mere formality.**" See id. at 358 n. 5, 110 S. Ct. 1176 (quoting United States v. Wade, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Henderson v. Frank, 155 F.3d 159 (3d Cir. 1998) (Emphasis added).

Trial counsel's complete abandonment of his duty to effectively advocate for his client by filing a suppression motion in addition to his knowingly misleading him as well, clearly establishes that defendant was deprived of his Sixth Amendment Constitutional right to effective representation.

The PCR court in addressing the defendant's claims on the one hand stated the defendant failed to offer certifications or affidavits in support of his claims concerning trial counsel's ineffective representation for failing to investigate and obtain experts. (Da 89 to 94) On the other hand, the PCR court goes on to address the certifications presented in support of defendant's claims and to make credibility assessments and determinations (Da 110 to 113), which is prohibited by State v. Porter, supra.

The PCR court also failed to consider the prejudice to the defendant in terms of trial counsel's misrepresentations to the defendant that he secured the experts on his behalf as well as a witness from the Hilton Hotel in Charlotte, North Carolina, in terms of the defendant rejecting the State's plea offer. Also, the prejudice in terms of the complete failure to appropriately challenge the most damning evidence against the defendant by filing a suppression motion.

There is no substitute for placing a witness on the stand and having the testimony scrutinized by an impartial fact finder. Porter, supra.

The defendant asserts that the failure of the PCR court to grant an evidentiary hearing based on the certifications offered in support of the defendant's PCR claims pursuant to Porter, supra, warrants a reversal of the order denying the PCR petition and a remand for an evidentiary hearing.

CONCLUSION

Based on the aforementioned reasons, the order denying the defendant's PCR without an evidentiary hearing in light of the fact that his claims were supported by certifications, and the court's credibility assessments and determinations on the certifications without hearing from the witnesses warrants the order to be reversed and a full evidentiary hearing to be ordered pursuant to State v. Porter, 216 N.J. 343 (2013).

Respectfully submitted,

June, 4th, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-3416-22T1

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	Criminal Action
v.	:	On Appeal from a Final Order of the Superior Court of New Jersey,
LUQMAN ABDULLAH,	:	Law Division, Union County,
Defendant-Appellant	:	Denying Defendant's Petition for Post-Conviction Relief
	:	Sat Below: Hon. Richard C. Wischusen, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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DATED: September 23, 2024

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COUNTER-STATEMENT OF PROCEDURAL HISTORY[1]

In October 2009, a Union County Grand Jury returned Indictment No. 09-10-00928, charging defendant-appellant Luqman Abdullah with two counts of first-degree racketeering, in violation on N.J.S.A. 2C:41-2(c) (counts one and two); second-degree conspiracy, in violation of N.J.S.A. 2C:5-2 (count three); first-degree maintaining or operating a controlled dangerous substance production facility, in violation of N.J.S.A. 2C:35-4 (count four); three counts of third-degree possession of a controlled dangerous substance, in violation of N.J.S.A. 2C:35-10(a)(1) (counts five, eight, and eleven); first-degree possession of a controlled dangerous substance with intent to distribute, in

[1] Da refers to defendant's appendix on appeal.
Db refers to defendant's brief on appeal.
1T refers to motion transcript, dated July 17, 2015.
2T refers to motion transcript, dated July 21, 2015.
3T refers to pretrial motion transcript, dated September 7, 2016.
4T refers to pretrial motion transcript, dated September 8, 2016.
5T refers to pretrial motion transcript, dated September 27, 2016.
6T refers to trial transcript, dated September 28, 2016. (Vol. I).
7T refers to trial transcript, dated September 28, 2016. (Vol. II).
8T refers to trial transcript, dated September 29, 2016.
9T refers to trial transcript, dated October 4, 2016.
10T refers to trial transcript, dated October 5, 2016.
11T refers to trial transcript, dated October 6, 2016.
12T refers to trial transcript, dated October 13, 2016.
13T refers to trial transcript, dated October 18, 2016.

violation of N.J.S.A. 2C:35-5(a)(1) and (b)(1) (count six); two counts of third-degree possession of a controlled dangerous substance with intent to distribute on or within 1,000 feet of school property, in violation of N.J.S.A. 2C:35-7 (counts seven and ten); third-degree possession of a controlled dangerous substance with intent to distribute, in violation of N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count nine); second-degree unlawful possession of a weapon (assault firearm), in violation of N.J.S.A. 2C:39-5(f) (count twelve); second-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b) (count thirteen); second-degree possession of a firearm in the course of committing a violation of N.J.S.A. 2C:35-5, in violation of N.J.S.A. 2C:39-4.1(a) (count fourteen); third-degree receiving stolen property, in violation of N.J.S.A.

14T refers to trial transcript, dated October 19, 2016.
15T refers to trial transcript, dated October 20, 2016.
16T refers to trial transcript, dated October 25, 2016.
17T refers to trial transcript, dated October 27, 2016. (Vol. I).
18T refers to trial transcript, dated October 27, 2016. (Vol. II).
19T refers to trial transcript, dated November 1, 2016.
20T refers to trial transcript, dated November 2, 2016.
21T refers to trial transcript, dated November 3, 2016.
22T refers to trial transcript, dated November 4, 2016.
23T refers to trial transcript, dated November 7, 2016.
24T refers to trial transcript, dated November 9, 2016.
25T refers to sentencing transcript, dated July 21, 2017.
26T refers to transcript of PCR hearing, dated April 28, 2023.
27T refers to transcript of motion hearing, dated October 6, 2023.

2C:20-7 (count fifteen); fourth-degree prohibited device, in violation of N.J.S.A. 2C:39-3(d) (count sixteen); third-degree financial facilitation of criminal activity, in violation of N.J.S.A. 2C:21-25(a) (count seventeen); two counts of fourth-degree resisting arrest (by flight), in violation of N.J.S.A. 2C:29-2(a) (counts eighteen and twenty-two); third-degree hindering apprehension or prosecution, in violation of N.J.S.A. 2C:29-3(a) (count nineteen); third-degree apprehension or hindering prosecution, in violation of N.J.S.A. 2C:29-3(a)(4) (count twenty); third-degree false government documents, in violation of N.J.S.A. 2C:21-2.1(c) (count twenty-one); and third-degree hindering apprehension, in violation of N.J.S.A. 2C:29-3(b)(1) (count twenty-three).[2] (Da1 to 22). Defendant was also charged under Indictment No. 09-10-00929 with second-degree certain persons not to have weapons, in violation of N.J.S.A. 2C:39-7 (count one). (Da23 to 24).

Defendant filed a motion to suppress. On September 7, 8, and 28, 2016, the Honorable Stuart L. Peim, J.S.C., heard testimony and oral argument on defendant's motion. (3T; 4T; 6T). Judge Peim denied defendant's motion on September 28, 2016. (6T36-17 to 21).

Trial commenced before Judge Peim and a jury on September 28, 2016,

[2] Defendant's codefendants were charged in counts twenty-four through forty-two. (Da16 to 22).

and continued until November 9, 2016, when the jury found defendant guilty on all counts. (24T18-4 to 24-16; 24T41-8 to 19).

On July 21, 2017, defendant appeared before Judge Peim for sentencing. The judge merged the following counts: count two into count one; count three into count six; count five into count six; and count eight into count nine. (25T75-6 to 15). The State elected to pursue a discretionary extended term sentence on the RICO conviction in count one. (25T76-10 to 16). The judge then sentenced defendant on count one to thirty-two years imprisonment with an eighty-five percent period of parole ineligibility, followed by a five-year period of special parole supervision. (Da25; 25T76-14 to 81-2). On count sixteen, the judge sentenced defendant to four years in prison, with a two-year period of parole ineligibility, to run consecutive to count one. (Da29; 25T81-3 to 5). On count eighteen, the judge imposed a term of eighteen months in prison, to run consecutive to counts one and sixteen. (Da29; 25T80-25 to 81-12). On count fourteen, defendant was sentenced to a term of eight years in prison, with a four-year period of parole ineligibility, to run consecutive to counts four and six. (Da28 to 29; 25T81-19 to 21; 25T85-6 to 10). Counts seven, ten, twenty-one, twenty-two, and twenty-three had been dismissed prior to trial, and the judge imposed concurrent sentences on the remaining counts. (Da25 to 29; 25T81-13 to 14). As to Indictment No. 09-10-00929, the judge

sentenced defendant to a concurrent, eight-year-prison term, with a five-year period of parole ineligibility. (Da30; 25T84-23).

Defendant appealed (Da33 to 38), and on October 18, 2019, the Appellate Division affirmed defendant's convictions and sentence. (Da39 to 50). The New Jersey Supreme Court denied defendant's Petition for Certification on February 11, 2020, and the United States Supreme Court denied defendant's Petition for a Writ of Certiorari on June 22, 2020. State v. Abdullah, 241 N.J. 60 (2020); Abdullah v. N.J., 141 S.Ct. 140 (2020).

On May 20, 2020, defendant filed a Petition for Post-Conviction Relief (PCR). (Da51 to 52). A verified Petition for Post-Conviction Relief was filed on June 21, 2022. (Da118 to 129). The parties appeared before the Honorable Richard C. Wischusen, J.S.C., for oral argument on April 28, 2023. (26T). On June 9, 2023, Judge Wischusen denied defendant's petition in a written order and opinion. (Da53 to 94). Defendant filed a Motion for Reconsideration which was argued before Judge Wischusen on October 6, 2023. (27T). On December 8, 2023, the judge denied defendant's motion in a written order and opinion. (Da95 to 113).

On December 14, 2023, defendant filed an amended Notice of Appeal. (Da114 to 117). The State's response now follows.

COUNTER-STATEMENT OF FACTS

In 2009, the Union County Prosecutor's Office, Elizabeth Police Department, the Federal Bureau of Investigation, Union County Sheriff's Office, Union County Police Department, and other law enforcement agencies began a large narcotics investigation which resulted in twenty-four individual arrests, including the arrest of defendant. (6T93-11 to 17; 6T148-7).

At the onset of the investigation, detectives targeted Anthony Love who was suspected of drug trafficking. (6T92-19 to 22). In February 2009, law enforcement obtained a wire-tap order to monitor Love's cellphone. (6T94-2 to 10). As a result of the investigation, law enforcement learned that Love was a street-level drug dealer, who sold drugs in the area of Elizabeth, and that Abdul Hassan was Love's drug supplier. (6T102-4 to 20; 6T106-18 to 20). On or about February 20, 2009, law enforcement initiated an investigation of Abdul Hassan and obtained wire-tap orders to monitor seven of Hassan's cellphones. (6T107-17 to 21). Law enforcement installed a listening device in Hassan's car and an outdoor pole camera outside of Hassan's residence at 1311 Carrington Street in Elizabeth, and they began physical surveillance of Hassan. (6T108-20 to 109-22; 6T110-18 to 20).

During the surveillance period, Hassan was observed with defendant at Hassan's residence on Carrington Street and on Chancellor Avenue in Newark.

(6T111-25 to 112-10). At that time, defendant resided at 352 Bergen Street in Newark with his girlfriend Quiana James, but he also stayed at 123 Winding Wood Lane, Apartment 2B, in Sayreville. (6T112-19 to 25; 6T113-1 to 8). In addition to primarily driving a 2002 blue Chevrolet Monte Carlo, defendant was observed driving a red Toyota Corolla, a 2007 BMW 650, a green Nissan Quest minivan, and a Pontiac Grand Prix. (6T113-25 to 114-19). At various times during the surveillance, defendant took measures while driving to avoid being potentially followed by law enforcement, such as pulling over on a highway or erratically changing lanes. (11T93-6 to 94-13).

As the investigation continued through March and April, defendant was observed by the officers in person and via camera surveillance frequently visiting 129 Chancellor Avenue in Newark. (8T54-19 to 61-23; 8T71-18 to 77-15; 8T78-16 to 91-5; 8T100-2 to 101-4; 8T119-3 to 129-17; 8T141-13 to 149-12; 8T158-1 to 165-22; 8T167-10 to 173-25; 8T199-5 to 211-3; 9T10-21 to 23-25; 9T26-3 to 53-13; 9T57-8 to 18; 9T61-23 to 62-24; 9T64-15 to 66-6; 9T66-20 to 67-25; and 9T77-8 to 79-7). Defendant typically drove into the rear parking lot and entered the building through the rear entrance. Id. Defendant would remain at 129 Chancellor Avenue for a brief period of time and then exit the building and drive away. Id.

Between March 1, 2009 and April 21, 2009, further investigation

revealed that the electric bill of one of the apartments, Apartment D2, was significantly lower than the other units in the building. (8T195-20 to 196-19). Undercover Officer Alana Walker was sent into the building to observe the location to determine whether defendant and other co-conspirators had contact with Apartment D2. (8T197-25 to 198-24; 10T139-20 to 141-8). On March 30, 2009, Officer Walker observed Hassan enter 129 Chancellor Avenue, but she was unable to determine which apartment he entered. (10T145-25 to 146-12). On March 31, 2009, when Officer Walker was at 129 Chancellor Avenue, she observed Hassan enter the building and unlock and enter an unmarked door between Apartments D1 and D3, which was determined to be Apartment D2. (10T150-1 to 151-10; 10T162-3 to 16). Thereafter, Officer Walker observed Hassan exit that apartment and leave the building. (10T152-23 to 153-10).

As a result of the undercover investigation, law enforcement installed a camera at 129 Chancellor Avenue in the hallway outside of Apartments D2 and D3. (9T54-6 to 18). The hallway surveillance camera captured defendant as he entered and exited Apartment D2 on April 12, 2009 and April 14, 2009. (9T63-4 to 13; 9T64-25 to 67-13).

On or about April 21, 2009, a Superior Court judge authorized law enforcement to place a listening device in Apartment D2. (9T82-24 to 83-3).

In connection with this order, the court permitted law enforcement to conduct a covert entry and search of the apartment to determine where a listening device could be installed, also known as a "sneak and peek" entry. (9T83-4 to 16).

On April 22, 2009, detectives entered the apartment and noted that it was scarcely furnished with only three chairs and a couch, and the apartment did not have a refrigerator, toiletries, or a bed. (9T89-18 to 23; 9T87-8 to 89-14; 9T101-5 to 9). The detectives also noticed that there was powder residue, believed to be CDS, coating the floor and other surfaces of the apartment. (9T90-1 to 4). In the kitchen, the detectives observed: baking soda, Pyrex containers with a powder substance, a scale with a powdery substance on it, knives and razor blades covered with a white powdery substance, zip-lock bags, plastic bags, and rubber gloves. (9T90-19 to 22). A search of the kitchen cupboards revealed large rock-like substances in plastic bags, which the officers suspected to be cocaine. (9T91-6 to 13). The kitchen did not contain any food or silverware. (9T91-14 to 92-1).

Additionally, when detectives first entered the apartment, they observed a rifle and a handgun in the closets. (9T92-6 to 9). The detectives completed the search at approximately 2:15 a.m. on April 22, 2009. (9T101-5 to 9). Approximately eleven hours later, at 1:53 p.m., the hallway camera recorded

defendant exiting the apartment. (9T102-8 to 13).

Surveillance continued until April 23, 2009. (9T107-12 to 15). On that day, at approximately 7:29 p.m., officers observed defendant enter the passenger side of Hassan's Cadillac CTS. (9T127-8 to 13). At that time, officers believed that defendant suspected he was being investigated and decided to cease their investigation. (9T127-14 to 25). Law enforcement arranged for physical surveillance of defendant and the co-conspirators to determine their locations. (9T129-20 to 130-4). Subsequent analysis of the cellular phones seized in connection with the investigation revealed that at 7:40 p.m. that night, defendant sent texts to an individual whose contact was listed as "HEL," asking if something was done to the door in Newark because the bottom lock used to be upside down. (16T69-5 to 21; 16T71-7 to 25).

Law enforcement officers obtained arrest warrants for defendant and Hassan and, at approximately 8:00 p.m., officers received information to go to the Cheesecake Factory at Menlo Park Mall to locate the Cadillac CTS driven by Hassan in which defendant was a passenger. (10T169-17 to 170-10; 10T172-22 to 23). Detective Timothy Durkin and a surveillance team arrived at the location. Because weapons had been observed during the search of the apartment, other members of law enforcement, including the SWAT team and the Emergency Response Team, arrived to assist in effectuating the arrest of

defendant and Hassan. (10T171-25 to 172-23; 11T35-9 to 21).

Detective Durkin observed the vehicle in the parking lot and entered the Cheesecake Factory to locate defendant and Hassan. (10T173-5 to 7). Detective Durkin confirmed that Hassan and a male he believed to be defendant were inside the restaurant. Officer Durkin decided to make the arrest in the parking lot. (10T173-12 to 175-3; 10T181-19 to 25; 11T35-22 to 37-18).

At approximately 9:25 p.m., Hassan and defendant exited the restaurant. At that time, law enforcement officers identified themselves and converged on the two. (10T182-7 to 24; 11T44-5 to 8). Officers used a distraction device and a foot pursuit ensued as defendant and Hassan attempted to flee the parking lot. (10T182-20 to 183-10; 11T38-10 to 39-13; 11T45-23 to 46-4). Hassan ran across the street and was apprehended. (10T183-1 to 3; 11T46-21 to 47-4). Officers recovered a cell phone that Hassan dropped as he was running. A search of Hassan incident to arrest revealed his wallet and identification, the key to the Cadillac, an iPhone and $1,400 in United States currency. (11T47-8 to 48-9; 11T49-23 to 50-8). Defendant disregarded officers' commands to stop and ran, so he was not apprehended at that time. (10T185-19 to 25).

Law enforcement continued the investigation and executed search

warrants at various locations connected with defendant and the co-conspirators. On the night of April 23, 2009, officers went to 401 Roselle Street in Linden to execute an arrest warrant for Darrell Brignolle. As officers approached the location, they observed a black Pontiac Grand Prix, a car Brignolle was known to drive. (11T51-16 to 52-12). Officers learned from the building's superintendent that Brignolle resided in apartment 406. (11T52-14 to 53-4). Officer's knocked on the apartment door several times but received no response. (11T53-5 to 8). Officers subsequently applied for a search warrant of the premises which ultimately revealed Brignolle's driver's license, utility and credit card bills, a car title for the Pontiac, three cell phones, and $40,000 in cash. (11T53-9 to 16; 11T59-17 to 75-9).

On that same night, officers executed a search warrant at 352 Bergen Street, the residence of defendant and his girlfriend, Quiana James. (11T97-9 to 98-22). As a result of the search, officers recovered mail addressed to defendant, utility bills addressed to Ms. James, two cellular phones, pictures of defendant and $5,000 in cash. (11T101-13 to 102-20; 11T105-8 to 107-5; 11T110-14 to 111-5; 11T113-24 to 115-24).

A search warrant was also executed that night at 123 Winding Wood Drive, Apartment 2B, in Sayreville, New Jersey. (10T126-15 to 127-8). During that search, officers recovered documents in defendant's name,

including a New Jersey Insurance identification card, a document from an attorney containing defendant's name, a checkbook in the name of Linda Perkins (defendant's mother), three cell phones, a checkbook in defendant's name, a bank statement in defendant's name, a contract for a BMW car in the names of defendant and Daniel Williams, a driver's license in defendant's name and $21,995 in cash. (10T135-7 to 137-4; 10T139-21 to 141-20; 10T142-12 to 148-18; 10T148-19 to 149-14).

Officers also executed a search warrant at 129 Chancellor Avenue, Apartment D2 that night and immediately noted that the apartment was a studio apartment that did not have a bed or refrigerator, and there were no clothes in the closets. (12T106-8 to 107-6). A search of the apartment revealed a .45 caliber automatic firearm loaded with four rounds, a 7.62x39 Saiga AK-47 rifle with two magazines containing thirty-three rounds, a Ruger gun case, a loaded Smith and Wesson .40 caliber handgun, 45 count .9 mm Lugar pistol cartridges, respirator masks, morphine pills, 16 bricks of heroin, four black garbage bags containing suspected packaging materials, four gloves, suspected heroin, suspected CDS residue, a scale, Pyrex measuring cups, a digital scale, two boxes of zip-lock sandwich bags, baking soda, box cutters and knives, two boxes of gloves, one kilo of suspected cocaine contained in two plastic bags, multiple bags containing rock-like formations of suspected

cocaine, an apartment lease in the name of Tara Nash, and motor vehicle paperwork for a 1995 Nissan Quest. (12T26-2 to 22; 12T30-2 to 33-17; 12T36-20 to 37-2; 12T37-5 to 13; 12T38-18 to 39-1; 12T40-9 to 15; 12T41-24 to 42-10; 12T46-3 to 5; 12T48-1 to 5; 12T51-23 to 52-6; 12T57-1 to 15; 12T59-18 to 60-1; 12T60-10 to 62-1; 12T62-10 to 63-4; 12T69-21 to 70-1; 12T70-12 to 85-8; 12T90-15 to 99-14). The suspected CDS was sent to the Union County Prosecutor's Lab for testing and it was determined that the substances seized were morphine, heroin, and cocaine. (14T72-7 to 18; 14T72-19 to 74-13; 14T74-15 to 86-25). Law enforcement learned that Tara Nash was asked by Darrell Brignolle to rent the apartment in her name. After Ms. Nash picked up the keys to the apartment, she delivered them to Brignolle and did not enter the apartment again. (13T158-25 to 169-20).

Additionally, officers searched a 2002 Chevrolet Monte Carlo that was parked in the rear of 129 Chancellor Avenue, which revealed: an insurance card issued to defendant, a Bank of America checkbook issued to defendant, various receipts in defendant's name, an Alamo rental car receipt, estimates for a construction job in the name of Linda Perkins, a New Jersey vehicle registration card for the Monte Carlo in the name of Sameerah Scudder, and a motor vehicle registration renewal notice in defendant's name. (12T110-18 to 111-1; 12T111-25 to 113-9; 12T119-2 to 17; 13T10-14 to 20).

On April 23, 2009, officers executed a search warrant at 1311 Carrington Street, the residence associated with Abdul Hassan. (14T27-14 to 21). Law enforcement seized numerous documents, including a passport in Hassan's name, a key to a Cadillac, six empty SIM card holders, seven SIM cards inside holders, five cellular phones and cellular phone batteries. (14T32-20 to 34-20; 14T35-11 to 38-9). On April 24, 2009, officers executed a search warrant for the Cadillac CTS, driven by Abdul Hassan, and recovered $3,699 in United States currency in the center console, three cellular phones and two SIM cards for cellular phones. (12T114-24 to 115-12; 13T63-3 to 13).

On May 4, 2009, the garbage bags collected as evidence from Apartment D2, were brought to the Union County Sheriff's Office, in Elizabeth. Various items recovered from the bags were separated and subsequently tested for DNA, fingerprints, or CDS. (13T83-25 to 85-11). Latent fingerprints were recovered from a box and a sandwich bag removed from the bag and were identified as belonging to Brignolle. (13T102-19 to 103-15). Latent fingerprints were recovered from plastic bags removed from the garbage bag and were identified as belonging to Hassan. (13T108-20 to 109-8). A latent fingerprint was recovered from an empty kilo wrapper and identified as defendant's left middle finger. (13T117-10 to 118-14; 13T123-22 to 124-11).

A vitamin water bottle and multiple latex gloves recovered from the

garbage bags were submitted for DNA testing, and it was determined that the DNA on the bottle and eleven latex gloves was from a single source which matched the DNA profile for defendant. (13T89-10 to 90-21; 14T167-14 to 169-10; 14T174-11 to 23; 15T8-22 to 9-20). Three of the latex gloves recovered indicated that Hassan and Brignolle could be excluded as a contributor to the DNA found, but defendant could not be excluded as a source of the DNA. (15T9-23 to 13-5). DNA testing of other gloves recovered from the garbage bags indicated the presence of a single donor, but because of possible intervening environmental factors, the profiles were incomplete. (15T13-18 to 14-1; 15T15-21 to 16-14). The DNA analysis of those gloves revealed that, although Hassan and Brignolle could be excluded as contributors, defendant could not be excluded. (15T14-15 to 15-20). DNA testing of one glove revealed a mixture of DNA, and defendant could not be excluded as a major contributor of DNA to that sample. (15T18-14 to 22-22). Of the thirty gloves that underwent DNA analysis, twenty-eight contained a DNA profile that either matched defendant or presented a profile in which defendant could not be excluded as a contributor. (15T31-20 to 32-5).

On September 24, 2009, Clifton police stopped a Jeep Grand Cherokee on Route 3, being driven by Seon Patton. (14T122-13 to 123-22). At some point, defendant, who was the front passenger, was asked to exit the vehicle

and sit on the curb. (14T125-9 to 23). While walking towards the curb, defendant took off on foot across the Route 3 east and westbound lanes. (14T126-3 to 128-14). Once defendant reached the woods across Route 3, the officers lost sight of defendant. (14T128-15 to 16). Despite a subsequent search, defendant was not apprehended. (14T133-2 to 134-3). Officers noted that defendant had tattoos of a spider web on his left elbow and dog tags on his right elbow. (14T129-20 to 130-10). Officers also noted that as defendant fled the scene, his Atlanta Braves baseball hat fell off of his head. (14T130-13 to 19). The baseball hat was subsequently submitted to the Union County Prosecutor's Lab for DNA testing, which matched defendant's DNA profile. (14T170-19 to 173-19; 14T174-5 to 175-6). Defendant finally surrendered to law enforcement about three years later, on December 28, 2012, and was taken into custody. (19T99-8 to 10; 22T3-19 to 22).

LEGAL ARGUMENT

POINT I

THE PCR COURT PROPERLY DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING SINCE DEFENDANT FAILED TO ESTABLISH A PRIMA FACIE SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL.[3] (Da53 to 113).

Defendant argues that he established a prima facie case of ineffective assistance of trial counsel, and his petition for post-conviction relief was improperly denied without an evidentiary hearing. Specifically, defendant contends that his attorney was ineffective for failing to: challenge the "sneak and peak" warrant as unconstitutional, investigate or present potential alibi evidence that defendant was at a hotel in North Carolina from February 27, 2009 to March 1, 2009, and for failing to have the "juror letter" independently tested by DNA and fingerprint experts. Defendant's arguments are without merit, and the PCR court properly denied his petition without an evidentiary hearing after finding defendant failed to establish a prima facie claim of ineffective assistance of counsel. Since the PCR court's findings are amply

[3] Addressing the arguments raised in appellate counsel's brief and defendant's pro se brief.

supported by the record, the court's order denying defendant's petition should be affirmed on appeal.

When a defendant attempts to substantiate a prima facie claim of ineffective assistance of counsel, he must satisfy the two-prong test formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must show that counsel's performance was deficient such that the "representation fell below an objective standard of reasonableness," and that such a deficiency prejudiced the defendant. Strickland, 466 U.S. at 687-88; Fritz, 105 N.J. at 58. Moreover, a defendant must establish both prongs of the Strickland/Fritz standard for his claim to be successful. State v. Parker, 212 N.J. 269, 280 (2012).

To satisfy the first prong, a defendant must "identify specific acts or omissions [committed by counsel] that are outside the wide range of reasonable professional assistance." State v. Jack, 144 N.J. 240, 249 (1996) (internal quotation marks and citation omitted); see State v. Mitchell, 126 N.J. 565, 579 (1992). Moreover, a defendant has to overcome the strong presumption that counsel exercised reasonable professional judgment and sound trial strategy in fulfilling his responsibilities. Strickland, 466 U.S. at 687-90; State v. Nash, 212 N.J. 518, 542 (2013). The defendant must show

that the advice rendered fell outside the range of competence demanded of attorneys in criminal cases and was not reasonable considering all the circumstances. Strickland, 466 U.S. at 687-88. Under this standard, "[j]udicial scrutiny of counsel's performance must be highly deferential," and the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. See also State v. Pierre, 223 N.J. 560, 579 (2015).

A valid conviction will not be overturned merely because a defendant is dissatisfied with counsel's exercise of judgment during trial. State v. Coruzzi, 189 N.J. Super. 273, 319-20 (App. Div.), cert. denied, 94 N.J. 531 (1983). Indeed, ineffective assistance of counsel is not proven by merely showing, with the benefit of hindsight, that counsel's strategic decisions did not succeed. State v. DiFrisco (IV), 174 N.J. 195, 220-21 (2002), cert. denied, 537 U.S. 1220 (2003). Strategic decisions that are objectively reasonable, albeit debatable or unsuccessful, are "'within the wide range of reasonable professional assistance' to which an accused is entitled." State v. Arthur, 184 N.J. 307, 333 (2005) (quoting Strickland, 466 U.S. at 689). Similarly, simple mistakes, bad strategy, or bad tactics "do not amount to ineffective assistance of counsel unless, taken as a whole, the trial was a mockery of justice." State v. Bonet, 132 N.J. Super. 186, 191 (App. Div. 1975). Simply stated, the fact

that a trial strategy fails does not necessarily mean that counsel was ineffective. State v. Bey, 161 N.J. 233, 251 (1999).

As our Supreme Court has recognized:

> The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt. As a general rule, strategic miscalculations or trial mistakes are insufficient to warrant a reversal except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of a fair trial.
>
> [State v. Allegro, 193 N.J. 352, 366 (2008) (quoting State v. Castagna, 187 N.J. 293, 314-15 (2006))].

To establish the second prong, a defendant must show that he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 692-93. Under this analysis, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Rather, a defendant must show by a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Fritz, 105 N.J. at 52-53. A reasonable probability has been defined as "probability sufficient to undermine confidence in the outcome." Pierre, 223 N.J. at 583 (quoting Strickland, 466 U.S. at 694).

In satisfying the second prong, because prejudice is not presumed, a

defendant must demonstrate "how specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659 n. 26 (1984) (citation omitted). Further, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. For that reason, "[i]mportant to the prejudice analysis is the strength of the evidence that was before the fact finder at trial." Pierre, 223 N.J. at 583.

Where, as here, a PCR judge does not hold an evidentiary hearing, appellate courts "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (quoting State v. Harris, 181 N.J. 391, 421 (2004)). Here, the PCR court properly denied defendant's petition after hearing oral argument because defendant's claims of ineffectiveness were without merit. The court's findings are amply supported by the record and, thus, they should not be disturbed on appeal. As such, this Court should affirm the PCR court's denial of defendant's Petition for Post-Conviction Relief.

A. The PCR Court Properly Found That Counsel Was Not Ineffective For Failing To Challenge The "Sneak And Peak" Warrant.

In his first point, defendant argues that trial counsel was ineffective for failing to challenge the sneak and peak warrant as a violation of the New Jersey Constitution, and that the PCR court improperly denied his petition without an evidentiary hearing. The issue concerning the constitutionality of a sneak and peek warrant has been previously presented to the Appellate Division during defendant's direct appeal, and, as such, the PCR court properly found it was procedurally barred from being raised in defendant's petition. Moreover, even after considering the merits of defendant's argument, the PCR court properly found that the "sneak and peak" warrant was constitutional, and counsel was not ineffective for failing to challenge the constitutionality of it.

Foremost, the issue concerning the constitutionality of the sneak and peek warrant has been previously presented to the Appellate Division. "A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings." R. 3:22-5. Post-conviction relief proceedings are not an opportunity to re-litigate claims

already decided on the merits in prior proceedings. State v. McQuaid, 147 N.J. 464, 483 (1997); State v. Afanador, 151 N.J. 41, 50 (1997); R. 3:22-5. If an issue has been determined on the merits in a prior appeal, it cannot be re-litigated in a later appeal of the same case, even if the matter is of constitutional dimension. McQuaid, 147 N.J. at 483-84; State v. White, 260 N.J. Super. 531, 538 (App. Div. 1992), certif. denied, 133 N.J. 436 (1993).

In this case, appellate counsel presented the following argument in Point V of his brief on direct appeal, "THE TRIAL COURT COMMITTED ERROR IN RULING THAT PROBABLE CAUSE EXISTED FOR THE SNEAK AND PEEK WARRANT." (Da45). Thereafter, defendant filed a pro se brief in which he argued:

> THE COURT'S FAILURE TO ARTICULATE ANY FINDINGS OR CONCLUSIONS OF LAW ON DEFENDANT'S SUPPRESSION MOTION, AND ADMISSION OF EVIDENCE OBTAINED AS A RESULT OF THE SNEAK AND PEEK WARRANT WHICH WAS NOT SUPPORTED BY PROBABLE CAUSE NOR STATUTORILY AUTHORIZED, WAS A VIOLATION OF THE FOURTH AMENDMENT, AND A DENIAL OF DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL THEREFORE THE CONVICTION SHOULD BE REVERSED.
>
> [Da45] (Emphasis added).

Here, the PCR court found that "the Appellate Division already addressed the validity of the search warrant," and since "multiple courts have

already deemed that the warrant was constitutional ... defendant cannot attempt to repackage an argument about the validity of the warrant as a constitutional issue" since the issue had been previously considered on direct appeal. (Da73). In his PCR petition, though, defendant reframed his argument as one of ineffective assistance of counsel and rehashed his argument challenging the constitutionality of the warrant. (Da126). Since PCR petitions are not "an opportunity to relitigate matters already decided on the merits," McQuaid, 147 N.J. at 483; Afanador, 151 N.J. at 50, the PCR court's finding was correct and should not be disturbed on appeal. However, even if this Court decides to review the merits of defendant's argument, it fails since sneak and peek warrants are constitutionally permissible, and counsel was not ineffective for failing to challenge the warrant's constitutionality.

In almost identical language, the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protect against "unreasonable searches and seizures." U.S. Const., amend IV; N.J. Const. art. I, ¶7; State v. Nyema, 249 N.J. 509, 527 (2022); State v. Smart, 253 N.J. 156, 165 (2023). In order to protect an individual's right to privacy from government seizures, the Constitution requires that the government have probable cause and "particularly describe the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A search that is

conducted pursuant to a warrant is "presumptively valid," and a defendant who challenges the issuance of that warrant has the burden to "establish a lack of probable cause 'or that the search was otherwise unreasonable.'" State v. Boone, 232 N.J. 417, 427 (2017) (quoting State v. Watts, 223 N.J. 503, 513-14 (2005)). "In considering such a challenge, '[courts] accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant.'" State v. Jones, 179 N.J. 377, 388 (2004) (quoting State v. Sullivan, 169 N.J. 204, 211 (2001)). Additionally, since New Jersey's Wiretap Act models federal law, courts "give careful consideration to federal decisions interpreting the federal statute." State v. Ates, 217 N.J. 253, 266, 269 (2014); see also State v. Feliciano, 224 N.J. 351, 371 (2016).

The warrant at issue, here, has colloquially been termed a "sneak and peek" or "covert entry" warrant. A "covert entry" warrant "refers to the physical entry by a law enforcement officer into private premises without the owner's permission or knowledge in order to install bugging equipment." Dalia v. United States, 441 U.S. 238, 241 n.2 (1979). In Dalia, the Supreme Court found "no basis for a constitutional rule proscribing all covert entries." Id. at 247. The Court stated that "[i]t is well established that law officers constitutionally may break and enter to execute a search warrant where such entry is the only means by which the warrant effectively may be executed."

Ibid. The Court rejected the defendant's argument that covert entries were unconstitutional for their lack of notice as "frivolous." Ibid. (citing Katz v. United States, 389 U.S. 347, 355 n. 16 (1967)). The Court then "ma[de] explicit" what it has long implicitly held, finding that: "[t]he Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment." Id. at 248. Indeed, the Court noted that the District Court found that the "safest and most successful method of accomplishing the installation of the wiretapping device was through breaking and entering [the office]." Id. at 248 n. 8. Lastly, the Court concluded that the Fourth Amendment did not require specific authorization in the order permitting electronic surveillance for law enforcement to enter the premises covertly. Id. at 258-59. The Court recognized that "we would promote empty formalism were we to require magistrates to make explicit what unquestionably is implicit in bugging authorizations: that a covert entry, with its attendant interference with Fourth Amendment interests, may be necessary for the installation of the surveillance equipment." Id. at 258.

Defendant argues, though, that sneak and peek warrants are not legally recognized in New Jersey under Rule 3:5-5, and that there is no basis for covert entries or delayed notifications of such a search. Rule 3:5-5 provides,

in pertinent part:

> A search warrant may be executed by any law enforcement officer ... . The warrant must be executed within 10 days after its issuance and within the hours fixed therein by the judge issuing it, unless for good cause shown the warrant provides for its execution at any time of day or night. The officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property is taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made and verified by the officer executing the warrant in the presence of the person from whom or from whose premises the property is taken or, if such person is not present, in the presence of some other person. ... The executing law enforcement agency shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken.
>
> [Rule 3:5-5(a)].

Defendant contends that since the Rule does not mention a covert entry, and since a return and a written inventory was not given to defendant or left at the premises, the sneak and peek search conducted here was unconstitutional. In this case, though, law enforcement sought and obtained a valid warrant to intercept oral communications pursuant to N.J.S.A. 2A:156A-9, which is part of the Wiretap Act. N.J.S.A. 159A-1, et. seq.

It is well settled that "statutes are presumed to be constitutional." State

v. Comer, 249 N.J. 359, 384 (2022) (citing State v. A.T.C., 239 N.J. 450, 466 (2019)); Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 172 (2011)). "A statute 'will not be declared void unless its repugnancy to the constitution is clear beyond a reasonable doubt.'" Ibid. (quoting Gangemi v. Berry, 25 N.J. 1, 10 (1957)). Moreover, defendant shoulders the burden to overcome the strong presumption that a statute is constitutional. Ates, 217 N.J. at 268 (citing State v. One 1990 Honda Accord, 154 N.J. 373, 377 (1998)).

Here, as previously mentioned, New Jersey's Wiretap Act models federal law, which the Supreme Court has found to be constitutional. Dalia, 441 U.S. at 247-48 (finding law enforcement officers could constitutionally break and enter to execute a search warrant if such entry was the only means by which the warrant could effectively be executed). Defendant has failed to meet his burden to show that the statute is unconstitutional, and he has failed to establish a prima facie case that counsel was ineffective for failing to challenge the constitutionality of the statute.

When applying for a wiretap, the statute requires an application to include a "particular statement of the facts," including: (1) the identity of the alleged offender; (2) the details of the offense; (3) the type of communication to be intercepted and a showing of probable cause; (4) the character and

location of the wire or electronic facilities involved; (5) the period of time the wiretap will last; and (6) "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." N.J.S.A. 2A:156A-9(c).

Thereafter, the judge may authorize an application to intercept a wire, electronic, or oral communication if probable cause is found to believe that:

> a. The person whose communication is to be intercepted is engaging or was engaged over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an [enumerated] offense ... ;
>
> b. Particular communications concerning such offense may be obtained through such interception;
>
> c. Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ; [and]
>
> d. Except in the case of an application meeting the requirements of [N.J.S.A. 2A:156A-9, the roving wiretap provision], the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted, are or have been used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, such individual.
>
> [Feliciano, 224 N.J. at 368 (quoting N.J.S.A. 2A:156A-10(a)-(d))].

Here, the PCR court correctly found that the warrant at issue met all of the statutory requirements and was constitutional. (Da108). As a preliminary matter, it should be noted that the location at issue in this case was not a home but was a stash house, which was used by narcotics dealers to store drugs for future distribution. See State v. Berry, 140 N.J. 280, 295 (1995). Indeed, the application for the sneak and peek was rife with examples of the premises being used as a stash house, in which the Appellate Division noted "apartment D2's uncharacteristically low electric bills indicative of a stash location, and defendant's and the drug suppliers' frequent and short visits to the Chancellor Avenue building where none of the three lived." (Da46).

Additionally, in compliance with the Wiretap Act and in support of the application for a warrant, the detective provided a lengthy and detailed affidavit which: outlined numerous phone calls about suspected cocaine sales, referencing quantities and prices; included accounts of surveillance or defendant or the codefendants entering and quickly exiting 129 Chancellor Avenue; noted that the electric bill, which was in the name of someone who did not live at the apartment, was significantly lower than the surrounding apartments, indicating it was a stash house; and included information provided by confidential informants. (Dca25; Dca30 to 114; Dca119 to 122). The

detective explained that using normal investigative techniques in the future would not prove successful, certifying that the detectives would be unable to ascertain the scope of the conspiracy and the roles of the conspirators without the use of a listening device and camera inside the apartment. (Dca114 to 121; Dca123 to 124). The detective also explained that a search warrant of the apartment would be premature and would expose the investigation before they fully learned the scope of the illegal activity. (Dca121). Moreover, the detective requested permission to search for various illegal items without seizing them since law enforcement wanted to continue the covert operation after the listening device was installed and since seizure of items at the time would uncover their investigation. (Dca128 to 129). Finally, in order to maintain the covert aspect of the investigation, the detective requested authorization not to turn over a copy of the search warrant or receipt of evidence until ninety days after the sealing of the DVD(s) of the conversations over the listening device or ten days after the arrest of defendant or codefendants. (Dca129).

On April 17, 2009, the Honorable Joseph P. Donohue, J.S.C., found probable cause existed to enter, search, and install a listening device at 129 Chancellor Street, Apartment D2. (Dca1 to 2). Judge Donohue further authorized law enforcement to give delayed notice of the search warrant

(Dca2) and ordered that "[t]he search must be conducted contemporaneous with the entry into the apartment in order to prepare to install, install, replace, repair, enhance, move and remove such equipment, if necessary, during the period of interception[.]" (Dca2).

Further, as law enforcement explained in its application, "[t]he use of a search warrant [was] premature," since a search warrant "would expose the investigation before the full knowledge of the illegal activity is uncovered." (Dca121). As such, law enforcement sought the use of electronic surveillance in order to "fully reveal the manner and scope in which the subjects and others as yet unknown engage in the narcotic offenses as set forth in this affidavit." (Dca124). Law enforcement believed that normal investigative procedures were not practical since it had failed in the past to identify certain suspects, stash locations, or activities. (Dca123 to 124). Instead, law enforcement believed that the use of electronic surveillance was needed to develop the scope of the narcotics enterprise, the actors involved, and the roles played by each person. (Dca124).

Defendant contends that the search warrant, here, was unconstitutional because there was no statutory basis for delayed notification of the search. Typically, after the completion of a search conducted pursuant to Rule 3:5-5, a return and a list of the inventory taken shall be given to the person from whom

the property was taken or shall leave a copy and receipt at the premises. However, the instant warrant was authorized under the Wiretap Act, which does allow for delayed notice of the return and inventory receipt. Specifically, after the termination of the electronic surveillance, the Wiretap Act requires:

> Within a reasonable time but not later than [ninety] days after the termination of the period of the order or of extensions or renewals thereof, ... the issuing or denying judge shall cause to be served on the persons named in the order or application, persons arrested as a result of the interception of their conversations, persons indicted as a result of the interception of their conversations, persons whose conversations were intercepted and against whom indictments are likely to be returned, persons whose conversations were intercepted and who are potential witnesses to criminal activities, and such other parties to the intercepted communications as the judge may in his discretion determine to be in the interest of justice, an inventory which shall include:
>
> a. Notice of the entry of the ... ;
>
> b. The date of the entry of the order ... ;
>
> c. The period of authorized or disapproved interception; and
>
> d. The fact that during the period wire, electronic or oral communications were or were not intercepted.
>
> [N.J.S.A. 2A:156A-16].

Here, it would have been impossible for law enforcement to give defendant notice of the search and list of inventory seized since he ran from

police at the Cheesecake Factory and from the traffic stop in Clifton in which defendant was a passenger. Indeed, defendant remained a fugitive until he was arrested, about three-and-one-half years later, in December 2012. (Da41; Da108; Da110). Codefendant Hassan, though, was "served the roster as soon as he was arrested." (Da110). Thus, as the PCR court found, the fact that defendant was not given a list of the items taken until after his arrest, several years later, was "of de minimus consequence because Defendant had eluded police for four years." (Da110). As such, the PCR court properly found that "even if Counsel had brought up this argument in Court, the argument likely would not have succeeded given the fact Defendant was a fugitive in the time he was meant to have received the list." (Da110). The court concluded by finding that the warrant was valid under New Jersey law. (Da110).

After considering defendant's argument, the PCR court aptly found that the State's application for a warrant met statutory requirements and was constitutional. (Da108). Indeed, law enforcement was permitted to covertly enter the stash location for the purpose of installing or preparing to install the electronic surveillance. Although a return or inventory was not given to defendant within the time period provided in the warrant, codefendant Hassan received a copy after his arrest, and the only reason defendant did not receive it until several years later was due to his fugitive status. Based on this, the

PCR court properly found that trial counsel was not ineffective for failing to challenge the constitutionality of the warrant, and this Court should affirm.

B. Counsel Was Not Ineffective For Failing To Investigate Or Present Potential Alibi Evidence.

Defendant argues that counsel was ineffective for failing to investigate or present potential alibi evidence that defendant was in North Carolina at a time when he was identified by a detective in New Jersey. Contrary to defendant's argument, the PCR court properly denied post-conviction relief without granting an evidentiary hearing, finding that defendant failed to establish a prima facie claim of ineffective assistance of counsel.

Counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," Strickland, 466 U.S. at 691, and a failure to do so will render the lawyer's performance deficient. State v. Chew, 179 N.J. 186, 217 (2004). When a defendant claims that his attorney failed to adequately investigate the case, "he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Porter, 216 N.J. 343, 353 (2013) (internal quotations and citation omitted); State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), cert. denied, 162 N.J. 1999 (1999); R. 3:22-10(c).

Indeed, a defendant must do more than make "bald assertions" that he was denied the effective assistance of counsel. Cummings, 321 N.J. Super. at 170.

Moreover, "[d]etermining which witnesses to call to the stand is one of the most difficult strategic decisions that any trial attorney must confront." Arthur, 184 N.J. at 320. Defense counsel's decision as to which witnesses he or she will call is "an art," Id. at 321 (quoting Strickland, 466 U.S. at 693), and review of such a decision should be "highly deferential." Ibid. (quoting Strickland, 466 U.S. at 689).

Here, defendant argues that trial counsel rendered ineffective assistance of counsel for failing to investigate or confirm that defendant was in North Carolina when a detective reported seeing defendant in New Jersey. Specifically, defendant became aware of a surveillance report by Detective David Conrad reporting that defendant was observed in Newark on February 28, 2009. (Da123). Defendant avers, though, that he was in Charlotte, North Carolina, between February 27, 2009 and March 1, 2009, and he provided his attorney with an invoice from the Hilton in Charlotte and asked his attorney to conduct further investigation. (Da123 to 124). Defendant argued that counsel was ineffective for failing to present a witness employed at that hotel to authenticate the invoice.

After considering defendant's argument, the PCR court found that

defendant failed to establish a prima facie claim of ineffective assistance of counsel. Although defendant provided a certification from his private investigator, Mark Rusin, there were no affidavits or certifications from any witness who could authenticate the Hilton invoice or testify that defendant, indeed, was seen in North Carolina on the dates in question.

In his certification, Rusin stated he interviewed Michael McCullar, who was the director of the front office at the Hilton in Charlotte. (Da132). McCullar told Rusin that he did not recall being contacted by trial counsel to provide evidence about defendant. (Da132 to 133). McCullar stated that each Hilton has its own operating system, so any information required from a Hilton property would need to be requested directly from the property involved. (Da133). McCullar then directed Rusin to contact Human Services or the Legal Compliance Team for any additional assistance. (Da133). Nothing in Rusin's certification indicates that McCullar authenticated the invoice supplied by defendant to his trial counsel, and McCullar did not verify that defendant was in North Carolina during the time period in question. Based on this, the PCR court properly found that, "[i]n the absence of a certification from the witness, there is no way that defendant has shown a prima facie case of ineffective assistance of counsel" and properly denied relief. (Da77).

Additionally, defendant failed to establish that he was prejudiced by

counsel's failure to introduce the Hilton invoice at trial. The Hilton invoice did not reflect that defendant stayed at this hotel in North Carolina, or that he was in North Carolina, in general. (Da75 to 76). Indeed, the mere fact that defendant's credit card was used at the hotel would not have been relevant to prove that he personally stayed there.

"'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action," N.J.R.E. 401, and except as otherwise provided in the rules or by law, "all relevant evidence is admissible." N.J.R.E. 402. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury, or (b) undue delay, waste of time, or needless presentation of cumulative evidence." N.J.R.E. 403. Evidence is deemed probative when "it has a tendency 'to establish the proposition that it is offered to prove.'" State v. Burr, 195 N.J. 119, 127 (2008) (quoting State v. Allison, 208 N.J. Super. 9, 17 (App. Div.), certif. denied, 102 N.J. 370 (1985)). In other words, the evidence must be probative of a fact that is "really in issue in the case." State v. Buckley, 216 N.J. 249, 261 (2013) (quoting State v. Hutchins, 241 N.J. Super. 353, 359 (App. Div. 1990)). Thus, in order to determine the admissibility of evidence, the trial court must conduct a fact-specific evaluation of the evidence. State v.

Cole, 229 N.J. 430,448 (2017).

Lastly, the burden of proof rests on defendant to show actual undue prejudice, and not that the mere possibility of prejudice, substantially outweighs the probative value. State v. Swint, 328 N.J. Super. 236, 253 (App. Div.), certif. denied, 165 N.J. 492 (2000). Here, defendant has fallen short of his burden. While counsel may be deficient for "fail[ing] to conduct an adequate pre-trial investigation," the defendant "'must assert the facts that an investigation would have revealed, supported by affidavits or certifications upon the personal knowledge of the affiant or the person making the certification.'" Porter, 216 N.J. at 352-53 (quoting Cummings, 321 N.J. Super. at 170); accord R. 3:22-10(c). Accordingly, when "absent witnesses ... have never been identified and their potential testimony has never been described," then counsel's failure to investigate them is "purely speculative" and "insufficient to justify reversal." Fritz, 105 N.J. at 64.

At trial, there was no testimony introduced concerning defendant's whereabouts on the dates in question and no testimony introduced alleging that defendant was in North Carolina during this time. The only reference to February 28, 2009, came in the discovery supplied to defendant, which indicated that Detective David Conrad observed defendant in a group of eight adults and two children leave Jersey Gardens Mall in Elizabeth and go to a

barber shop. (Da131). Since these observations were not relevant to the charges at trial, the activities of February 28, 2009, were not admitted at trial. Additionally, the observations made on February 28, 2009, were not relied upon in the search warrant affidavit or at trial. Since no testimony was introduced at trial that defendant was in New Jersey on these dates, defendant's assertion that he was in North Carolina would not have been relevant and would not have been admissible. See N.J.R.E. 401. Indeed, the PCR court noted that defendant's "reference to a witness who would have been able to testify as to [his] presence in North Carolina, [was] only that: a reference." The PCR court found that defendant's failure to provide any certification of any witness who could have testified as to his actual presence in North Carolina resulted in his inability to establish a prima facie claim of ineffective assistance of counsel. (Da76 to 77).

The PCR court, further, properly found that "even assuming that [defendant] was in North Carolina on February 28, 2009, and that Detective Conrad misidentified him, that does not prove that the other police officers who identified [defendant] during the surveillance, both in person and by way of surveillance camera, were likewise incorrect." Indeed, as the court found, "the pre-trial record ... and the trial had numerous dates and times where [defendant] was clearly identified by the officers on the video." (Da77).

Additionally, as argued above, defendant failed to provide a certification from McCullar regarding the invoice or defendant's presence in North Carolina. Indeed, defendant provided no certifications by any other Charlotte Hilton employee or Mr. El Arabi, who was allegedly with defendant during the time in question. (Da77). Because of this, the PCR court properly found that defendant failed to establish a prima facie claim of ineffective assistance of counsel.

In short, defendant failed to present any facts establishing that the investigation trial counsel allegedly failed to undertake would have yielded evidence either undermining the State's evidence in this regard or supporting his defense. See State v. Warlock, 117 N.J. 596, 625 (1990) (citing Strickland, 466 U.S. at 688) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel."). Defendant has failed to proffer "the facts that an investigation would have revealed, supported by affidavits or certifications." Cummings, 321 N.J Super. at 170, and as such has failed to satisfy his burden. Therefore, defendant has failed to establish prima facie evidence of ineffective assistance of counsel based on trial counsel's alleged failures to investigate, and, as such, the PCR court properly denied defendant's Petition for Post-Conviction Relief without an evidentiary hearing.

C. Counsel Was Not Ineffective For Not Having A Juror Letter Tested By An Independent Laboratory.

Defendant argues that counsel was ineffective for failing to have a "juror letter" independently tested by DNA and fingerprint experts. Contrary to defendant's argument, the PCR court properly denied defendant's claim without an evidentiary hearing after defendant failed to establish a prima facie claim of ineffective assistance of counsel.

On direct appeal, appellate counsel argued that the trial court should have recalled the jurors and conduct a voir dire examination to determine if their verdict was tainted based on allegations contained in an anonymous letter that was received in the judge's chambers on December 12, 2016. (Da138; 25T15-13 to 14). The letter was sent by "Ms. Honest" from a fictional address, and it alleged that the jurors had googled defendant's name while at lunch and saw that he was a leader of a street gang. (Da134; 25T16-5 to 16). The letter also alleged that the jurors saw defendant in handcuffs, which "Ms. Honest" stated made defendant look more "menacing" and "darker." (Da134). The letter was collected by the Union County Sheriff's Office, secured in a larger envelope, and placed in storage to be processed for latent prints and DNA. (Da138; Da140).

On December 16, 2016, Detective Adrian Gardner, of the Union County

Sheriff's Office, processed the letter for prints. (Da141). Detective Gardner reported that he found five latent prints, which were photographed and marked as L1 to L5. (Da141 to 142). On December 21, 2016, Detective Gardner and Officer Johnathan Regan collected the prints of anyone in the judge's chambers who might have touched the letter. (Da144). Those individuals included: the judge, the judge's secretary, Sergeant Ryan Wilson, and Officer Frank Dotro, Jr. (Da144). After comparing their prints to the latent prints processed from the letter, Detective Gardner concluded that prints L1, L3, and L5 did not contain sufficient ridge characteristics for comparison, and Officer Dotro was identified as the source of L2. (Da144). The detective's findings as to L4 were inconclusive – the prints of all individuals were excluded except for the right pinky of Officer Dotro, which did not have value for AFIS. (Da144 to 146). Subsequent DNA and serological analysis were conducted on the envelope, but no evidence of human saliva was detected on the samples retrieved from three areas of the envelope flap. (Da148 to 152).

After considering defendant's argument on direct appeal, the Appellate Division concluded that "[p]resented with only an unreliable and anonymous letter, the trial judge did not abuse his discretion in declining to exercise the very extraordinary remedy of recalling the jury." (Da50). In defendant's PCR, he argued that counsel was ineffective for failing to have the letter

independently tested for fingerprints and DNA. Contrary to defendant's argument, the PCR court properly found that defendant's "bald assertions" did not establish a prima facie claim of ineffective assistance of counsel. (Da86). As the PCR court found "defendant has not provided the court with certifications or affidavits from employees or experts from state-run or private labs, that there would be different results had an independent state-run or private lab run the tests." (Da86).

Additionally, the Appellate Division on direct appeal found the anonymous letter to be unreliable. (Da50). The Appellate Division upheld the trial judge's decision not to recall the jury, based on the allegations in the letter, in deference to the trial judge's "unique perspective" of the layout of his courtroom and the procedures followed at trial. Specifically, the Appellate Division found:

> During deliberations, defense counsel told the judge that defendant thought the jurors had seen him with handcuffs on, although counsel had not witnessed that. No further information was provided, such as when this occurred or which jurors may have seen defendant cuffed.
>
> The trial judge advised defendant it would have been "impossible" for any juror to see him in handcuffs because the door to the hallway was always locked when defendant was brought in or out of the courtroom. A sheriff's officer was stationed outside the jury room door during these times and the jury was

> not permitted outside the room when defendant was in transit.
>
> The anonymous letter raised this issue again, stating that on one or two occasions, jurors saw defendant wearing shackles and "he looked darker and more menacing while in handcuffs." In response, the trial judge reiterated his courtroom procedures. He also reviewed the court surveillance footage with counsel. Over the three months of trial, the judge stated he only saw a glance of defendant's handcuffs for a "matter of seconds." However, when considering the distance from defendant's seat to the jury room, the judge was confident defendant could not be seen by the jurors. Moreover, at the specific time viewed in the footage, a sheriff's officer was standing in the jury room doorway; no jurors could be seen.
>
> [Da50]. See also (25T41-13 to 43-20).

Here, the PCR court properly found that the claims in the anonymous letter were nothing more than "bald assertions." Defendant has not provided any affidavits or certifications from any other lab to support his baseless allegations. Lastly, as previously found, the allegations contained in the letter were found to be baseless and unreliable. The Appellate Division properly found that the trial judge did not abuse his discretion not to recall the jury in order to obtain their fingerprints. Similarly, defendant's baseless claims that counsel should have had the letter tested by an independent laboratory is without merit and was properly rejected by the PCR court. The letter was properly examined by the Union County Sheriff's Office and Union County

Prosecutor's Office Laboratory, and there is nothing to support defendant's claim that there was any impropriety in the testing conducted. Because defendant failed to establish a prima facie claim of ineffective assistance of counsel, the Order denying his Petition for Post-Conviction Relief should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Order denying post-conviction relief be affirmed.

Respectfully submitted,

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s/ Meredith L. Baló

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NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

State of New Jersey v. Luqman Abdullah

Docket No. A-3416-22

CRIMINAL ACTION

ON APPEAL FROM A FINAL ORDER ENTERED IN THE SUPERIOR COURT OF NEW JERSEY - LAW DIVISION, UNION COUNTY DENYING A PETITION FOR POST-CONVICTION RELIEF

PRO-SE SUPPLEMENTAL LETTER-BRIEF-REPLY

Dear Your Honorable Justices:

Please accept defendant's pro-se supplemental letter-brief reply to the Respondent's answering brief in lieu of a more formal brief in support of his appeal from a final order entered in the Superior Court of New Jersey - Union County, Law Division denying a Petition for Post-Conviction Relief (PCR) to be filed on his behalf.

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PROCEDURAL HISTORY

The defendant will rely on the procedural history as set forth in the brief filed by appellate counsel in this matter with addition to the fact that PCR counsel moved for reconsideration of the PCR court's June 9, 2023, order denying the PCR and an evidentiary hearing. (Aa 1 to 26)[1] The motion for reconsideration was supported by a certification of Peter Valentin, Forensic Expert (Aa 21 to 23), and Nasir Bin Muhammad El Arabi. (Aa 24 to 26)

[1] To avoid any confusion, the defendant has referenced his appendix to the pro-se supplemental brief by (Aa). The defendant also relies on the appendix to appellate counsel's brief referenced as (Da) and the transcript listings.

STATEMENT OF FACTS

The defendant will rely on the statement of facts as set forth in the brief filed by appellate counsel in this matter.

LEGAL ARGUMENT

POINT ONE

THE PCR COURT ERRED BY DENYING THE DEFENDANT'S CLAIMS SUPPORTED BY CERTIFICATIONS WITHOUT AN EVIDENTIARY HEARING CONTRARY TO STATE V. PORTER, 216 N.J. 343 (2013), ESPECIALLY WHERE DEFENDANT MADE A PRIMA FACIE SHOWING THAT TRIAL COUNSEL WAS INEFFECTIVE, THEREFORE, THE ORDER SHOULD BE REVERSED AND THE MATTER SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING (Da 53 and Da 95)

When a lower Post-Conviction Relief (PCR) court does not hold an evidentiary hearing, appellate courts "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (quoting State v. Harris, 181 N.J. 391, 421 (2004)). Here the respondent seeks to gloss over the fact that the defendant's claims were supported by certifications, but were however, denied without the benefit of an evidentiary hearing contrary to State v. Porter, 216 N.J. 343, 352-53 (2013).

"[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.) (citing R. 1:6-6), certif. denied, 162 N.J. 199 (1999). "In that context, [an appellate court] consider[s] petitioner's contentions indulgently and view[s] the facts asserted by him in the light most favorable to him." *Ibid.* Porter, supra, at 353.

The judge deciding a PCR claim should conduct an evidentiary hearing when there are disputed issues of material facts related to the defendant's entitlement to PCR, particularly when the dispute regards events and conversations that occur off the record or outside the presence of the judge. Russo, supra, 333 N.J. Super. at 138 (citing [State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998))]; see also Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 3:22-10 (2013) (noting that Preciose "mak[es] clear that [an evidentiary] hearing is required if there is a dispute of fact respecting matters which are not on the record"). In a similar vein, we observed that [j]ust as when determining whether a defendant is entitled to an evidentiary hearing in connection with his petition for post-conviction relief the facts should be 'view[ed] in the light most favorable to a defendant,' so too, in determining whether to entertain oral argument, the facts should be viewed through the same generous lens. [State v. Parker, 212 N.J. 269, 282 (2012) (quoting Preciose, supra, 129 N.J. at 463).]

Certain factual questions, "including those relating to the nature and content of off-the-record conferences between defendant and [the] trial attorney," are critical to claims of ineffective assistance of counsel and can "only be resolved by meticulous analysis and weighing of factual allegations, including assessments of credibility." Pyatt, supra, 316 N.J. Super. at 51. These determinations are "best made" through an evidentiary hearing. *Ibid.* Even a suspicious or questionable affidavit supporting a PCR petition "must be tested for credibility and cannot be summarily rejected." State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008). Porter, supra, at 354-55.

Contrary to the State's assertion that the defendant did not provide any certifications in support of his PCR claims of ineffective assistance of trial counsel, the defendant did in fact offer three separate certifications in addition to his own certification in support of his PCR petition. The defendant raised claims supported by certifications that his trial counsel deprived him of effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution. The defendant supported his claims of trial counsel's deficiencies by certifications from himself, Private Investigator Mark A. Rusin (Da 132 to 133), Forensic Expert Peter Valentin (Aa 21 to 23), and Nasir Bin Muhammed El Arabi (Aa 24 to 26). However, the PCR court denied the PCR petition and subsequent motion for reconsideration without the benefit of an evidentiary hearing contrary to State v. Porter, 216 N.J. 243 (2013). The PCR court also improperly engaged in credibility determinations concerning the certifications without any testimony from the witnesses, which is also contrary to Porter, supra.

The defendant's certification, Verified PCR Petition supported by multiple certifications placed material issues of fact in dispute that trial counsel was paid to obtain the services of several experts, which he knowingly misrepresented to the defendant they would be called on his behalf for the trial.

Mark A. Rusin, a licensed private investigator, provided a certification averring that he interviewed Michael McCullar, a former employee of the Hilton Hotel in Charlotte, North Carolina. Mr. McCullar stated that he worked for the Hilton Hotel in Charlotte, North Carolina from 2016 to 2017 as the director of the

hotel's front office at the time. Also, he did not recall being contacted to testify, provide documentation and/or to produce any tangible evidence such as surveillance videos relating to a legal matter in the State of New Jersey. Mr. McCullar further advised that Mr. Rusin should contact the Human Services or Legal Compliance Team if any further assistance was needed. Mr. Rusin established that after review of the PCR file, that trial counsel attempted to serve a subpoena on the Hilton Hotel in Short Hills, New Jersey, and that the proper Hilton Hotel to be served was the Hilton Charlotte University Place, 8629 J.M. Keynes Drive, Charlotte, North Carolina, which was clearly on the receipt/invoice the defendant provided to trial counsel. (Da 132 to 133) Mr. Rusin also interviewed Nasir Bin Muhammed El Arabi in March of 2023. (Aa 24 to 26)

On June 28, 2023, Mr. El Arabi provided a certification (Aa 24 to 26) that he was in fact interviewed by Mr. Rusin. Also, he told Mr. Rusin that he was in the physical presence of the defendant at the Hilton Hotel on J.M. Keynes Drive, in Charlotte, North Carolina from February 27, 2009, through March 1, 2009. Mr. El Arabi stated that a few years after the defendant's stay in North Carolina, he (Mr. El Arabi) personally returned to the Hilton Hotel to obtain proof of the defendant's stay at the Hilton Hotel, which he sent to the defendant who was detained in the Union County Jail, and that he was never contacted by the defendant's trial attorney. (Aa 24 to 26)

Peter Valentin, a forensic expert provided a certification in support of the defendant's PCR (Aa 21 to 23) that he reviewed the discovery materials for the

defendant's case. Following his review, Mr. Valentin issued a nine (9) page report highlighting trial counsel's deficient performance with respect to the necessity for a forensic expert or crime scene expert to rebut the issues concerning the chain of custody for the DNA and fingerprint evidence, the failure of the detectives to adhere to the evidence storage policies of the Union County Prosecutor's Office, and evidence bags being opened and unsealed evidence envelopes. (Aa 21 to 23)

A prima facie case is established when a defendant demonstrates "a reasonable likelihood that his or her claim, *viewing the facts alleged in the light most favorable to the defendant*, will ultimately succeed on the merits." R. 3:22–10(b). Porter, supra. (Emphasis added)

The respondent ignores the fact that the defendant has established a prima facie claim and has done more than make bald assertions that he was denied the effective assistance of counsel. Defendant has alleged facts sufficient to demonstrate counsel's alleged substandard performance. Also, that his trial attorney inadequately investigated his case, which he has asserted facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification. Porter, supra. As such, an evidentiary hearing was warranted.

The defendant has made a prima facie showing that trial counsel's failure to conduct the necessary pre-trial investigation of the witnesses and evidence highlighted in his initial briefs deprived the defendant of effective assistance of counsel for his pre-trial suppression hearing and the trial. The PCR court in

addressing the defendant's claims, which were supported by certifications, did not hold an evidentiary hearing as required by State v. Porter, 216 N.J. 343 (2013). Further, the PCR judge made credibility determinations on the certifications without hearing from the witnesses as also required by Porter, supra.

The defendant also asserts that PCR court engaged in an unreasonable application of the Strickland test in its ruling by failing to address the issue that the defendant was significantly prejudiced by trial counsel's knowingly misleading the defendant into believing he had investigated and secured witnesses relevant for his suppression hearing and trial.

The defendant argued that there was no judicial authority for the issuance of a sneak and peek warrant in the State of New Jersey, as no legislative promulgation of such a heightened intrusion into a citizen's Fourth Amendment Constitutional right to be free from unreasonable intrusions has ever been adopted or approved at the time of defendant's case. This is more problematic given that New Jersey's State Constitution affords greater protections than its federal counterpart.

The respondent attempts to play fast and loose with the facts by asserting that the defendant's Sixth Amendment claim that his trial attorney was ineffective for failing to file a suppression motion for the sneak and peek and failing to be properly prepared to argue such a motion is the same Fourth Amendment claim raised on direct appeal challenging the sneak and peek. The respondent ignores and/or fails to address the Appellate Division's ruling in the case of State v.

Johnson, 365 N.J. Super. 27 (App. Div. 2003) (quoting Kimmelman v. Morrison, 477 U.S. 365, 375 1986)), which clearly makes a distinction between a Sixth Amendment ineffective assistance of trial counsel claim and an underlying Fourth Amendment suppression hearing claim raised on direct appeal. The respondent also engages in an extensive conversation about everything but the fact that there is no legal authorization in the State of New Jersey for a sneak and peek warrant. The respondent also does not address the fact that the detectives knowingly misrepresented to the court that they needed to surreptitiously enter the apartment to locate an area to place a surveillance camera inside the apartment. However, the State skirts the issue that the detectives never even attempted to perform the reasons provided to the court in the affidavit in support of the warrant, which was to place a camera in the apartment. Instead, the detectives entered the apartment with the singular focus to search and seize evidence. Trial counsel failed miserably in his responsibility to the challenge the egregious misconduct of the detectives' conduct, which the State does not address. Because there is a clear distinction between a Sixth Amendment ineffective assistance of trial counsel claim raised on a PCR and an underlying Fourth Amendment claim raised on a direct appeal, the defendant's claim is properly before this Court.

The respondent, like the PCR court in addressing the defendant's claims, on the one hand states the defendant failed to offer certifications or affidavits in support of his claims concerning trial counsel's ineffective representation for failing to investigate and obtain experts for his suppression hearing and trial. (Da 89 to 94)

On the other hand, respondent goes on to mention only the certification of Mark Rusin, Private Investigator, and to minimize the impact of the certification by engaging in speculative credibility assessments which defendant argues is the same error made by the PCR judge. The respondent does not address the certifications of Forensic Expert Peter Valentin (Aa 21 to 23), and Nasir Bin Muhammed El Arabi (Aa 24 to 26). Also, the respondent overlooks defendant's argument that this approach is contrary to State v. Porter, supra, as there is no substitute for placing a witness on the stand and having the testimony scrutinized by an impartial fact finder.

The defendant asserts that the failure of the PCR court to grant an evidentiary hearing based on the multiple certifications offered in support of the defendant's PCR claims pursuant to Porter, supra, warrants a reversal of the order denying the PCR petition and a remand for an evidentiary hearing.

CONCLUSION

Based on the aforementioned reasons, the order denying the defendant's PCR without an evidentiary hearing in light of the fact that his claims were supported by certifications, and the court's credibility assessments and determinations on the certifications without hearing from the witnesses warrants the order to be reversed and a full evidentiary hearing to be ordered pursuant to State v. Porter, 216 N.J. 343 (2013).

Respectfully submitted,

November 6, 2024

Luqman Abdullah