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

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0032-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AHMAD JOHNSON,

Defendant-Appellant.

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Argued December 21, 2017 – Decided January 16, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey,  
Law Division, Hudson County, Indictment No.  
06-10-1770.

John V. Molitor argued the cause for  
appellant.

Jennifer E. Kmiecik, Deputy Attorney General,  
argued the cause for respondent (Christopher  
S. Porrino, Attorney General, attorney;  
Jennifer E. Kmiecik, of counsel and on the  
brief).

PER CURIAM

Defendant appeals from the July 21, 2016 Law Division order  
denying his petition for post-conviction relief (PCR). We reverse  
and remand for an evidentiary hearing.

We incorporate herein the procedural history and facts set forth in our prior opinion on defendant's direct appeal from his conviction on the underlying offenses. State v. Johnson, No. A-6238-09 (Mar. 27, 2013) (slip op. at 1-14), certif. denied, 216 N.J. 13 (2013). The parties are fully familiar with this history and, therefore, we need not repeat it here.

In support of his PCR petition, defendant submitted his own certification, a certification from his trial attorney, and written statements from five other individuals. Among other things, defendant relied upon these certifications to allege that his trial attorney provided him with ineffective assistance because the attorney: (1) did not object to the judge's decision to modify the Administrative Office of the Court's (AOC's) directives governing how a judge must conduct the jury voir dire process; (2) failed to object to the judge's alleged cursory voir dire of a juror who was a casual acquaintance of one of the State's witnesses; (3) failed to call available witnesses who would have provided testimony that contradicted the accounts provided by the State's witnesses; (4) did not call a witness who would have provided an alibi for defendant; and (5) failed to ensure that defendant was able to meaningfully participate in the sidebar discussions with the judge. Defendant also argued that his

attorney on his direct appeal was ineffective because he did not raise these and other contentions in his appellate brief.

The PCR judge rejected all of defendant's allegations without conducting an evidentiary hearing. In his decision, the judge discounted the assertions raised by defendant and the six individuals who provided certifications and statements. The judge found that the information contained in the statements did not match his own recollection of what transpired at trial,<sup>1</sup> or was inconsistent with the trial testimony of the State's witnesses. Therefore, the judge concluded that defendant did not meet either prong of the Strickland test. Strickland v. Washington, 466 U.S. 668, 687 (1984). This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO FIND ITS NUMEROUS INTENTIONAL VIOLATIONS OF THE LAW GOVERNING JURY SELECTION WERE NOT REVERSIBLE ERRORS.

POINT II

THE TRIAL COURT'S DECISION TO DENY DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING VIOLATED PORTER, PYATT, CUMMINGS, AND O'DONNELL. (PARTIALLY CONSIDERED BELOW)

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<sup>1</sup> The PCR judge also presided at defendant's trial on the charges involved in this matter.

POINT III

THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO DENY DEFENDANT'S CHALLENGE TO HIS EXCLUSION FROM SIDEBAR CONFERENCES.

POINT IV

THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO HOLD DEFENDANT'S CHALLENGES TO HIS TRIAL AND APPELLATE ATTORNEYS' FAILURES TO ADDRESS POTENTIAL JURY TAIN T WERE WITHOUT MERIT AND PROCEDURALLY BARRED.

POINT V

THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO HOLD DEFENDANT'S SIXTH AMENDMENT CONFRONTATION CLAUSE ARGUMENT WAS PROCEDURALLY BARRED.

POINT VI

THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO HOLD DEFENDANT'S CHALLENGE TO THE TRIAL COURT'S FAILURE TO PROVIDE A CROSS-RACIAL IDENTIFICATION CHARGE WAS PROCEDURALLY BARRED.

When petitioning for PCR, the defendant must establish "by a preponderance of the credible evidence" that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the

deficiency prejudiced his right to a fair trial. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 60-61 (1987).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Rather, trial courts should grant evidentiary hearings and make a determination on the merits only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed facts lie outside the record, and resolution of the issues necessitates a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. Preciose, 129 N.J. at 462.

When determining whether to grant an evidentiary hearing, the trial judge must consider the facts in the light most favorable to the defendant. Id. at 462-63. "If there are disputed issues as to material facts regarding entitlement to post-conviction relief, a hearing should be conducted." State v. Russo, 333 N.J. Super. 119, 138 (App. Div. 2000).

Applying these principles, we conclude that the PCR judge mistakenly exercised his discretion by denying defendant's request for an evidentiary hearing. As our Supreme Court stated in Porter:

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." [State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998).] These determinations are "best made" through an evidentiary hearing. Ibid.

[Porter, 216 N.J. at 355 (first alteration in original).]

Moreover, the testimony of an alibi witness, when supported by the witness's affidavit or certification, should usually not be dismissed as not credible without an evidentiary hearing. See State v. Jones, 219 N.J. 298, 314 (2014) ("Although the timing and motivation of [the alibi witness's] statement and her reasons for not voluntarily appearing to testify as apparently had been expected [to] raise important questions, those questions cannot be assessed and resolved without determining credibility."); Porter, 216 N.J. at 356 (2013) ("The court's findings regarding defendant's and his girlfriend's credibility, based only on their affidavits, was an improper approach to deciding this PCR claim and effectively denied defendant an opportunity to establish ineffective assistance of trial counsel."). "Even a suspicious or questionable affidavit supporting a PCR petition 'must be tested for credibility and cannot be summarily rejected.'" Id. at 355

(quoting State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008)).

Here, defendant submitted a number of certifications and statements supporting his PCR petition that could only be properly assessed by conducting an evidentiary hearing and making credibility determinations based on the testimony provided by the affiants. Under the idiosyncratic circumstances of this case, an evidentiary hearing was also necessary to ferret out the facts and possible strategies underlying the actions of defendant's trial and appellate attorneys in connection with defendant's claims of ineffective assistance.

Therefore, we reverse and remand for an evidentiary hearing on all of the assertions raised by defendant in his PCR petition. In remanding, we express no view on the merits of any of defendant's contentions.

Reversed and remanded. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION