SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2213-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JORGE ALVARADO,

Defendant-Appellant.

Submitted March 19, 2018 – Decided May 25, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 03-07-1190.

Joseph E. Krakora, Public Defender, attorney for appellant (Durrell Wachtler Ciccia, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Erin M. Campbell, Assistant Prosecutor, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Jorge Alvarado's appeal from the denial of post-conviction relief (PCR) returns to us following our remand four

years ago for an evidentiary hearing to determine whether newly discovered evidence, a letter by a key witness for the State to defendant after the verdict, warranted a new trial and if appellate counsel's failure to raise the denial of the new trial motion on direct appeal constituted ineffective assistance of counsel. For reasons unexplained, the only witness to testify at the remand hearing was appellate counsel. We conclude on the basis of that testimony that counsel's failure to argue the issue on appeal was deficient. But because no court has yet to hold an evidentiary hearing to evaluate the letter to determine whether it entitles defendant to a new trial, we cannot determine whether appellate counsel's conduct resulted in any prejudice to him.

Defendant was convicted in 2004 of the murder of Jan Carlos Torres, the seventeen-month-old son of his girlfriend Maria Delcarmen Torres. State v. Alvarado (Alvarado I), No. A-6010-05 (App. Div. Mar. 6, 2008) (slip op. at 1). Both defendant and Torres were indicted for the child's murder, although there was no dispute that defendant was alone with the baby in the hours before the child's death. Id. at 2. He told police he pressed the child to his chest when the baby started to cry, and laid him on the bed when he quieted. Ibid. When he heard the baby gasp for air, he called Torres, who immediately returned home.

Ibid. When she got there minutes later, the baby was not moving. Ibid. Rescue personnel were unable to revive him. Ibid. Defendant admitted his actions caused the child's death, but insisted he had no intent to kill. He claimed the death was an accident and, at worst, his conduct was reckless.

The State's forensic pathologist testified at defendant's trial that the cause of death was suffocation caused by squeezing the child's chest for approximately a minute. The expert further testified the compression injuries that caused the baby's death were not the only ones he suffered in his short life. Id. at 3-4. The pathologist identified several different aging bruises and rib fractures he opined were inflicted in the days and weeks leading up to the child's death. Ibid.

Defendant claimed the bruises on the baby's body at the time of his death were as a result of an argument he had with Torres the night before. He said he was trying to bring the baby into their bed, and Torres wanted to let the baby continue to cry in his own bed in the next room. Defendant claimed he was holding the baby and Torres was trying to grab the child from out of his arms, causing the bruising.

After Torres pled guilty to child endangerment and agreed to testify against defendant, she claimed he inflicted the old injuries the pathologist found, at times when he was alone with

her son. Id. at 4. At an N.J.R.E. 104 hearing to determine the admissibility of her allegations, she also claimed defendant once put hot sauce on the nipple of the baby's bottle and on another occasion ice in his diaper. Id. at 4-5.

The trial judge, although acknowledging Torres was "going to be the only witness who is going to be able to testify to these incidents" and that he had "some questions and some concerns regarding her reliability," ultimately concluded he "believe[d] her testimony" and "that the evidence [was] reliable enough." In examining whether its probative value was outweighed by its prejudice to defendant under Cofield,[1] the judge acknowledged the testimony was "clearly . . . inflammatory," but found it probative of the issue as to whether defendant's conduct was the product of an accident or mistake. The judge explained:

> [W]ithout this testimony, I could see a reasonable juror wondering, hmm, was this a mistake, was he just trying to be quiet with the baby. Was there a tug-of-war between mom and Mr. Alvarado or was there something more, and it's probative to the issue of knowledge and intent which goes to the charge of murder. Knowledge, intent and purpose.

[1] State v. Cofield, 127 N.J. 328, 338 (1992).

In addition to Torres, two other fact witnesses testified against defendant. Defendant's ex-girlfriend testified to a conversation she had with defendant when she visited him at the county jail following his arrest. He told her he was playing with the baby, tossing him up in the air, and slipped on some spilled milk and could not catch the child. A jailhouse informant testified he heard defendant bragging he slammed the baby against the wall and "the prosecutors that they didn't have nothing on him." The informant also testified defendant told him "[h]e had hit the baby before and that his girlfriend had found [out] about it and he told her that he promised he wouldn't do it again."

As the informant stepped away from the witness stand, defendant, who used the services of an interpreter throughout the trial, said in English in a voice loud enough for jurors to hear, "I'm going to make sure people in jail know you're a fucking snitch." The judge refused defense counsel's request for a mistrial and declined to voir dire the jurors as to whether they heard the comment. The judge instead delivered a general curative instruction advising

> [s]ometimes, people who are involved in a trial, the attorneys, the participants, the parties say something, they get excited. . . . If it happened in this trial and you think you heard a party say

> something in the case, it must — I'm going to emphasize, it must be disregarded by you.

Presented with charges of murder, aggravated manslaughter and reckless manslaughter, the jury convicted defendant of murder in September 2004. Alvarado I, slip op. at 5. Defendant, however, was not sentenced for over a year. While in jail awaiting sentencing, defendant received a letter from Torres dated March 7, 2005. We reprint the translation included in the record in full.

> Dear Mr. Alvarado,
>
> This letter is to tell you and hoping in God you are in good health and stability. Well, I imagine you have to be surprised about my letter, "yes" Luis,[2] I am Maria, I am writing you because I felt I had to do it before I get over this nightmare.
>
> I need to leave my resentment and grudge behind, leave it here and not carry it with me when I come out. I has not been easy for me the lost of my son. Luis, I asked, what happened that day? everything was fine between the two of us, nobody wants to tell me what really happened, I know you are a good man and specially a good father, I know you lost your mind perhaps for something I said it against you, but I had no other alternative, I had to tell you that you were who did everything so I can come good out this, this was the deal I had to do with the prosecutor, forgive me my love. I know you

[2] Defendant's name is apparently Jorge Luis Alvarado. Torres referred to him as Jorge Luis at times in her testimony at the N.J.R.E. 104 hearing.

are suffering a lot in that place, I know you love your sons a lot, and that to me, hurts me. However, I always was very stern with the poor boy, that hurts me a lot, but I think you were guilty, because you always liked to leave me alone and you left with your friends and I came to think that you had someone else, that made me mad, very angry, Luis, you had no idea "yes" I punished that boy, but it was not to kill him, I know he had several black and blue marks and that is why they put me in jail, because I had said I knew of the blows and the black and blue marks, and by not had called the police, I know, you did not know about it, but because of that the prosecutor asked me to give the last statement, so they can find you guilty, as I said, I had no other option, I had to do something to save myself, I did not want it, but if I did not do it, the prosecutor would not take the charges away from me, forgive me. Now, I know you are thinking in appealing your case, that means if you do it, perhaps I had to testify again and I will have to say same thing, because of the deal with the prosecutor. Luis, it was not easy for me to take the decision of writing you, but I feel that everything that is happening in someway is my fault, I know you were right in willing to go to trial and to know how everything happened and where all these blows came from, the broken rib that had for several months.

I am begging you to forgive me and I forgive you and I tell you it will not easy to forget you, because I love you very much even though I harmed you but I had no other alternative, I explained to you well, I will be coming out soon from here and you do not the time they will be giving you, it hurts me what is going on, specially regarding your sons, I am sorry for my handwriting, you know that I have been through. I was

> under treatment while I was here, in the Hudson County, I am going to give you an advice, I am telling you for your own good, when you go to prison take good care of yourself, trust in God, what else I can tell you, I wish you the best and forgive me because I have lied, I want to you to understand me better, nobody knows how is been in here, I did not want to harm you but if I did not do it, I would be like you, remember I love you and it when I come out, I am going to try to help you O.K.
>
> I wish you can write down to me, to this address
>
> 875867C/506072 (BRAVO)(EAST WING 3 ROOM)
> PO Box 4004
> CLINTON N.J. 08809
>
> I love you, M. Maria (MC)

Defendant, with new counsel, moved for a new trial claiming the verdict was against the weight of the evidence, his trial counsel was ineffective, and the letter from Torres constituted newly discovered evidence. The trial judge denied the motion on the record in October 2005 without conducting an evidentiary hearing on the newly discovered evidence claim.

As to that claim, the judge stated he found Torres's testimony at trial "to be extremely credible and straightforward." He further stated he did not "find her 'recantation' to be credible." Indeed, he did not "even find it to be a recantation." The judge concluded defendant had not met

the Carter[3] standard "for showing that this is recantation testimony. It's certainly not straightforward. I don't believe it is recantation, but even if I believed it was recantation, he's not met his burden."

The judge the following month sentenced defendant, who was then thirty years old with no prior record, to life in prison, subject to the periods of parole ineligibility and supervision required by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant will serve sixty-three years, nine months and three days before becoming eligible for parole.

We affirmed defendant's conviction on direct appeal, rejecting his arguments regarding the admissibility of Torres's testimony about his prior bad acts toward the baby, errors in the jury charge and that his sentence was excessive. Alvarado I, slip op. at 5-6. Appellate counsel did not argue error in the denial of the post-trial motion based on newly discovered evidence.

The Supreme Court denied defendant's petition for certification. State v. Alvarado, 195 N.J. 521 (2008). Defendant's federal habeas petition was ultimately deemed untimely. Alvarado v. D'Ilio, No. 15-3878 (SRC) (D.N.J. Aug.

[3] State v. Carter, 85 N.J. 300, 314 (1981).

23, 2016), aff'd sub nom. Alvarado v. Adm'r N.J. State Prison, No. 16-3798 (3d Cir. Sep. 11, 2017).

Defendant filed a timely petition for PCR, alleging ineffective assistance of trial and appellate counsel, which was denied by a different judge in May 2012. There was no evidentiary hearing. We affirmed the decision dismissing the claims relating to the performance of trial counsel, but reversed those claims related to the representation provided defendant on appeal and remanded for an evidentiary hearing. State v. Alvarado (Alvarado II), No. A-0861-12 (App. Div. May 1, 2014) (slip op. at 22).

Quoting the letter from Torres, we acknowledged her letter certainly "could be read as an effort to assuage her conscience and excuse herself for having testified truthfully against Alvarado," as the trial judge concluded. Id. at 19. But it was obvious to us the letter could "also be read as an apology and explanation for having testified untruthfully with respect to some or all of her testimony." Ibid. Indeed, because the letter, interpreted most favorably to defendant, "would be highly material particularly with respect to whether Alvarado's conduct . . . amounted to murder or one of the lesser included offenses charged to the jury," was "certainly not available at the time of trial," and "had the potential to impeach Torres's

testimony at a new trial sufficiently to result in a different verdict, if not necessarily an outright acquittal," we found the letter could likely satisfy the test for a new trial based on newly discovered evidence established in Carter, 85 N.J. at 314. Alvarado II, slip op. at 21-22.

Accordingly, we remanded the matter to the PCR judge for "an evidentiary hearing to determine why appellate counsel chose not to include the denial of the motion for a new trial in the appeal, to evaluate fully the letter from Torres, and to determine whether it would have warranted a new trial." Id. at 22. The remand was assigned to a third judge, who conducted a brief evidentiary hearing limited to the testimony of appellate counsel. Inexplicably, Torres was not called to testify about her letter.

Appellate counsel, an assistant deputy public defender of thirty-two years' experience, testified that after reviewing the entire record, she determined the admission of Torres's testimony regarding defendant's prior bad acts, "the [N.J.R.E.] 404(b) issue" was "[t]he main point." Asked about Torres's letter, counsel testified she "thought about it, . . . did a little research and . . . decided not to raise it," concluding she "did not feel it was viable for appellate review at that point." Asked why, counsel responded:

> Primarily[,] it just wasn't ready for appellate review . . . . It was not authenticated. So I don't know who wrote it. It wasn't certified, which we kind of require for new evidence or a motion for a new trial. It wasn't clearly exculpatory to me. It was very muddy.

Asked to elaborate on what she meant by saying it was not "clearly exculpatory," counsel testified:

> It was very, as I recall, it didn't say I did it, you didn't, or I lied, you didn't do it. It was kind of more apologetic. And, also, included the witness saying, and I'd testify the same way again. It wasn't clear whether she was just sorry for him or whether she had information she concealed.
>
> Had I done it as the sentencing attorney[,] I would have sent an investigator out, taken the certified statement and made it very clear whether or not she was really exculpating the defendant or merely sad. So it had to be much more specific in my opinion. It was very muddy.

Counsel added:

> Also, strategically, there were a few problems. I didn't want to raise it [then] or in the appellate process. Because in my opinion[,] there was no way it was going to be granted and no way it was going to be reversed. And that would be a problem later on at a PCR. Because if you raise something on direct appeal you can't raise it later on PCR.
>
> And what I thought was the better approach was to save it for later PCR on the sentencing attorney for not sending an investigator out and getting a clear statement. And that would have a bigger

> chance of success than raising it on appeal — so those are my reasons.

Asked whether she believed the letter was a recantation, counsel responded:

> It did not [appear] like a recantation. To me it was at best ambivalent. And, certainly, not to the level of getting a reversal of a homicide conviction. There needed to be something very specific.
>
> And I, also, remember her testimony was very clear, very angry. So I was a little surprised at the tone of this letter. And I . . . would have wanted to have a very clean record with a certified signature as to what exactly she meant.

Asked if there was anything she wanted to add, counsel stated:

> No. I mean I was going by the record and I, you know, had it been done properly I might have raised it, but it wasn't. It was an uncertified, unauthenticated, ambivalent, non-exculpatory letter that came from, I don't know where. And I would have preferred to raise it as a PCR down the road on a sentencing attorney.

What we have quoted constituted almost the whole of counsel's testimony on direct examination. On cross examination, defense counsel asked fewer than ten questions. He established with the witness that the State did not contest the authenticity of the letter on the post-trial motion, but failed to ask whether counsel, having expressed concern for the rule

barring issues previously adjudicated, R. 3:22-5, gave any thought to R. 3:22-4's bar against issues that could have been raised earlier.

Defendant's PCR counsel also did not ask appellate counsel whether she considered arguing the trial court should not have denied defendant's new trial motion without an evidentiary hearing and requesting a remand for such a hearing. Finally, defendant's counsel failed to ask if appellate counsel was concerned about the authenticity of the letter, she did not do what she claimed sentencing counsel should have done: send an investigator out to take a certified statement from Torres.

Following the hearing, the judge in a written opinion determined appellate counsel "conducted a thorough analysis regarding the viable issues on appeal and her conduct was strategic and reasonable in light of the circumstances." Although having previously noted our findings in Alvarado II that Torres's letter, if interpreted in a manner most favorable to defendant, would be material to whether defendant's conduct amounted to murder and had the potential to so impeach her testimony as to alter the verdict, the PCR judge nevertheless found Torres's letter was only "impeaching or contradictory to [her] trial testimony" and "[c]onsequently, the first prong of [Carter's] three-part test is not satisfied."

The judge further found defendant "failed to demonstrate a reasonable probability that the new testimony is true, and the trial testimony false" because "the letter at issue lacked authenticity, certification, and did not exculpate" defendant. He accordingly concluded Torres's letter did not meet Carter's third prong as evidence of the sort that would probably change the jury's verdict if a new trial were granted. The PCR judge ultimately concluded counsel's "decision to not raise this issue on appeal would not have likely affected the outcome of this case, based on the evidence against the [d]efendant."

Defendant appeals raising the following issue through counsel:

> POINT I
>
> THE LOWER COURT ERRED IN CONCLUDING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE.

He adds the following issues in a pro se supplemental brief:

> POINT I
>
> DEFENDANT WAS DENIED INEFFECTIVE (SIC) ASSISTANCE OF COUNSEL BY FAILING TO SUBPOENA THE WITNESS FOR PCR EVIDENTIARY HEARING IN VIOLATION UNDER BOTH FEDERAL AND STATE CONSTITUTION AMENDMENT XIV; N.J. CONST. ART.I PARA.10.
>
> POINT II
>
> INEFFECTIVE ASSISTANCE OF DIRECT APPEAL COUNSEL BY FAILING TO INVESTIG[ATE] THE EVIDENCE PROVIDED IN THE MOTION FOR NEWLY

DISCOVERY EVIDENCE IN VIOLATION UNDER BOTH FEDERAL AND STATE CONSTITUTION AMENDMENT XIV; N.J. CONST. ART.I PARA.10.

POINT III

DEFENDANT WAS DENIED INEFFECTIVE (SIC) ASSISTANCE OF COUNSEL BY CREATING A CONFLICTS INTEREST IN VIOLATION UNDER BOTH FEDERAL AND STATE CONSTITUTION AMENDMENT XIV; N.J. CONST. ART.I PARA.10.

Having considered the testimony of appellate counsel, we find her failure to have argued that defendant's motion for new trial based on newly discovered evidence should not have been denied without an evidentiary hearing fell "outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984). Whether this failure caused defendant any prejudice, however, remains unknown as no court has yet to conduct an evidentiary hearing to determine whether Torres's letter would have been sufficient to change the jury's verdict that defendant was guilty of murder. See State v. Nash, 212 N.J. 518, 547 (2013). Accordingly, we again remand for an evidentiary hearing on that critical issue.

To succeed on a claim of ineffective assistance, defendant must establish, first, that "counsel's representation fell below an objective standard of reasonableness" and, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different." Strickland, 466 U.S. at 687-88, 694. A defendant must do more than demonstrate that an alleged error might have "had some conceivable effect on the outcome of the trial," State v. Sheika, 337 N.J. Super. 228, 242 (App. Div. 2001); instead, he must prove the error is so serious as to undermine the court's confidence that the "defendant's trial was fair, and that the jury properly convicted him," State v. Pierre, 223 N.J. 560, 583, 588 (2015).

There is no question but that a defendant's "right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." State v. O'Neil, 219 N.J. 598, 610-11 (2014) (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985)). As the Court has stated on several occasions, "[a] PCR petition is not a substitute for raising a claim on direct appeal." State v. Hess, 207 N.J. 123, 145 (2011); see also R. 3:22-3. Unless one of "the prescribed exceptions" apply, claims that could have been, but were not, raised in prior proceedings cannot be asserted on PCR. State v. Preciose, 129 N.J. 451, 476 (1992).

The trial judge in 2005, although purporting to apply the Carter test to determine whether defendant was entitled to a new trial based on Torres's letter, determined the letter was not credible based only on the document and the judge's impression

of Torres's trial testimony. He never convened an evidentiary hearing where he could judge Torres's credibility upon being confronted with the letter she wrote defendant following his conviction for murder. Quoting the Court's statement in State v. Carter, 69 N.J. 420, 427-28 (1976) that "[c]ourts generally regard recantation testimony as suspect and untrustworthy," and that "[t]he determination of the credibility or lack thereof of recantation testimony is peculiarly the function of the trial judge who sees the witnesses, hears their testimony and has the feel of the case," the court proceeded to apply "the intangibles available to the trial judge in evaluating the credibility of recantation testimony," that is, "[m]anner of expression, sincerity, candor and straightforwardness," to the letter. The judge, for example, noted, "If we go straightforwardness, the letter is certainly not straightforward."

As the Carter test for whether newly discovered evidence entitles a defendant to a new trial entails a fact-sensitive inquiry, the trial judge plainly should not have determined defendant could not carry his burden on the motion without affording him an evidentiary hearing. As the law on this point is well settled, we are confident had the issue been raised on direct appeal in 2008, the panel would have done as the panel considering the issue did in 2014: remand for an evidentiary

hearing. Accordingly, even applying the "highly deferential" review accorded counsel's performance on PCR, Hess, 207 N.J. at 147, we conclude appellate counsel's failure to raise the issue on direct appeal cannot be ascribed to reasonable professional judgment.

The issue in this case was not whether defendant was guilty, defendant conceded he recklessly caused the child's death, it was whether he was guilty of murder. Given the pathologist's testimony of the child's history of prior non-accidental injuries, the single, most probative evidence on that question was undoubtedly Torres's testimony of defendant's prior bad acts toward the child. Evidence that she lied about that would shake the State's case to its core.[4] Accordingly, it was incumbent on appellate counsel faced with Torres's letter and the trial court's refusal to hold an evidentiary hearing at which Torres would testify, to try to secure that evidentiary hearing on direct appeal. There was no reason to defer the claim to a later PCR proceeding.

[4] Although the prosecution and various trial judges have described the State's case as "strong" and the evidence "overwhelming," we note the evidence for murder came almost exclusively from two witnesses, Torres and the jailhouse informant.

Although claims for new trial based on newly discovered evidence often implicate ineffective assistance issues because of the requirement that the evidence not have been discoverable "by reasonable diligence beforehand," Carter, 85 N.J. at 314, there was no such issue here as the Torres letter is dated months after the verdict. A defendant need not prove his counsel was ineffective in order to establish his right to a new trial. See Nash, 212 N.J. at 555 (affirming PCR court's conclusion that defense counsel performance was not constitutionally deficient but granting a new trial on all issues based on newly discovered evidence). As the Court emphasized in Nash, the effect of the passage of time on the memories and the availability of witnesses makes it imperative "that meritorious newly discovered evidence claims receive timely hearings." Ibid. Deferring defendant's claim to PCR here ignored that imperative.[5]

Finally, we note that if appellate counsel were truly concerned about the authenticity of the letter, notwithstanding

[5] Although the Court's opinion in Nash was not available to appellate counsel when she filed her brief in 2007, its observation that "[t]he holding of an evidentiary hearing to decide the merits of the newly discovered evidence claim should not have taken eight years," was certainly not new law, Nash, 212 N.J. at 554. See State v. Ways, 180 N.J. 171, 197 (2004) (noting the difficulties the passage of time can make for correcting an injustice).

the State's failure to oppose the new trial motion on that basis, she could have employed an investigator to confirm Torres's authorship. Her failure to investigate the facts prior to deciding "the better approach was to save it for later PCR on the sentencing attorney for not sending an investigator out and getting a clear statement," robs her strategic choice of the presumption of competence. See State v. Chew, 179 N.J. 186, 218 (2004).

Because Torres has yet to testify at an evidentiary hearing, notwithstanding our remand in Alvarado II for such a hearing "to evaluate fully the letter from Torres, and to determine whether it would have warranted a new trial," Alvarado II, slip op. at 22, we cannot determine whether "the evidence discovered since the first trial would probably lead to a different result if presented to a newly impaneled jury," Nash, 212 N.J. at 553, and thus whether defendant is entitled to a new trial, see Ways, 180 N.J. at 197. The PCR judge, like the trial court, erred in attempting to make that determination based on Torres's letter alone.[6]

[6] To the extent the PCR judge determined defendant did not satisfy the first prong of the Carter test, because Torres's letter was only "impeaching or contradictory to [her] trial testimony," Ways makes clear he erred. See Ways, 180 N.J. at 188-89 ("Determining whether evidence is 'merely cumulative, or (continued)

As we have already determined that "[i]f Torres's statements are interpreted in the manner most favorable to Alvarado, Preciose, 129 N.J. at 463, the letter would be highly material," the letter was not available at the time of trial and it "had the potential to impeach Torres's testimony at a new trial sufficiently to result in a different verdict, if not necessarily an outright acquittal," Alvarado II, slip op. at 21-22, all that remains is an evidentiary hearing to determine whether Torres's letter, which ends with a request that defendant "forgive [her] because [she has] lied," was intended to recant her trial testimony and, if so, whether her statement is believable. As the Supreme Court has explained:

> The test for the judge in evaluating a recantation upon a motion for a new trial is whether it casts serious doubt upon the truth of the testimony given at the trial and whether, if believable, the factual recital of the recantation so seriously impugns the entire trial evidence as to give rise to the conclusion that there resulted a possible miscarriage of justice. His first

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(continued)
impeaching, or contradictory,' and, therefore, insufficient to justify the grant of a new trial requires an evaluation of the probable impact such evidence would have on a jury verdict. . . . [E]vidence that would have the probable effect of raising a reasonable doubt as to the defendant's guilt would not be considered merely cumulative, impeaching, or contradictory.").

> duty is, therefore, to determine whether the recanting statement is believable.
>
> [Carter, 69 N.J. at 427 (quoting State v. Puchalski, 45 N.J. 97, 107-08 (1965)).]

If the PCR judge on remand determines Torres has either not recanted her trial testimony or her recantation is not believable, then defendant would not be entitled to a new trial based on newly discovered evidence and "would clearly be unable to satisfy the second prong of the ineffective-assistance-of-counsel test because the deficient performance of appellate counsel would not have prejudiced the defense." See State v. Bray, 356 N.J. Super. 485, 499 (App. Div. 2003). Conversely, if defendant is successful in establishing that Torres has recanted her trial testimony and that her subsequent testimony "is probably true and the trial testimony probably false," Carter, 69 N.J. at 427, or other evidence convinces the court that defendant's right to a fair trial was substantially prejudiced entitling him to a new trial in the interests of justice, "the PCR court would be in a position to evaluate and determine whether the deficient performance by appellate counsel did, in fact, prejudice the defense because there is a reasonable probability that the result would have been different," Bray, 356 N.J. Super. at 499 (citing Strickland, 466 U.S. at 694-95).

Our disposition of the appeal makes discussion of the points defendant raises in his supplemental pro se brief unnecessary. We note, however, that defendant complains he was prejudiced by being assigned the same counsel at both PCR hearings in the trial court. That circumstance resulted in appellate counsel implicitly criticizing the PCR counsel questioning her for failing to raise Torres's letter on defendant's first application for PCR. Although we do not suggest that affected counsel's cross-examination of appellate counsel, the history of this case may be such that the Office of the Public Defender should consider assigning new counsel for defendant on remand.

In light of that history and the prior rulings entered in connection with the PCR petition, we direct, in an abundance of caution, that a different judge be assigned to conduct the evidentiary hearing on remand. See State v. Pierre-Louis, 216 N.J. 577, 580 (2014).

Reversed and remanded. We do not retain jurisdiction.