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APPROVAL OF THE APPELLATE DIVISION**

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-2789-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

COREY CAUTHEN, a/k/a JAMES  
MARROW,

Defendant-Appellant.

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Submitted April 19, 2018 – Decided April 27, 2018

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,  
Law Division, Passaic County, Indictment No.  
09-01-0006.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Steven M. Gilson, Designated  
Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor,  
attorney for respondent (Christopher W. Hsieh,  
Chief Assistant Prosecutor, of counsel and on  
the brief).

PER CURIAM

Defendant Corey Cauthen appeals from the January 27, 2017 Law  
Division order, which denied his petition for post-conviction

relief without an evidentiary hearing. On appeal defendant raises the following contentions:

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVNESS.

A. Trial Counsel Failed To Investigate/Have An Alibi Witness Testify.

B. Trial Counsel Effectively Induced Defendant Not To Testify.

We have considered defendant's contention that trial counsel effectively induced him not to testify in light of the record and applicable legal principles and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Defendant provided no description of his purported testimony or explanation as to how it may have altered the result. However, we reverse and remand for an evidentiary hearing on defendant's contention that trial counsel failed to investigate and have an alibi witness testify.

We incorporate herein the facts set forth in State v. Cauthen, No. A-0591-12 (App. Div. June 9, 2014) (slip op. at 3-7).<sup>1</sup> The following facts inform our review.

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<sup>1</sup> We affirmed defendant's conviction for attempted murder, aggravated assault, and related weapons charges. Id. at 16. Our Supreme Court denied defendant's petition for certification. State v. Cauthen, 220 N.J. 100 (2014).

The charges of attempted murder, aggravated assault, and related weapons charges against defendant stemmed from the shooting of Alphonso Gee at approximately 5:45 a.m. on August 2, 2008. Gee told a police officer that he was shot by both defendant's co-defendant, Amar Bease, and "a tall dark skinned male with dreadlocks," whom the police believed was defendant. Id. at 6. Gee subsequently identified defendant from a photograph as the second individual involved in the shooting. Id. at 7. At trial, Gee identified both defendant and Bease as the men who shot him. Ibid.

In support of his PCR petition, defendant certified he was with Tanicia Thompson at her apartment in Paterson when the shooting occurred. He said he arrived there the evening of August 1, 2008, spent the entire night there, and did not leave until the following day. He was not certain of the time he left, but was "positive that there was already daylight." He told trial counsel about his alleged alibi, but counsel failed to interview Thompson or call her to testify at trial.

Thompson certified that defendant arrived at her residence on the evening of August 1, 2008, but she did not recall the exact time he arrived. She said defendant spent the night at her apartment and did not leave until the following morning. She was not certain of the exact time he left, but "remember[ed] that

there was already daylight." She said that had she been asked, she would have testified at trial to establish defendant was at her home.

Without conducting an evidentiary hearing, the PCR judge found that in a videotaped statement Thompson gave to the police in 2008,<sup>2</sup> she was unable to provide specific facts or details about what time defendant arrived at and/or left her apartment. The judge also found the alleged alibi was factually deficient, and thus, trial counsel's decision not to rely on Thompson as an alibi witness was a strategic decision and not an unprofessional error. The judge also concluded that Thompson's testimony would not have changed the outcome of the proceedings.

An ineffective assistance of counsel claim may occur when counsel fails to adequately conduct a pre-trial investigation. State v. Porter, 216 N.J. 343, 352 (2013). Counsel has a duty to "conduct a prompt investigation of the circumstances of the case . . . relevant to [the defendant's] guilt and degree of guilt or penalty." Id. at 353 (quoting State v. Russo, 333 N.J. Super. 119, 139 (App. Div. 2002)). Accordingly, "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction[,]" because of the great potential for

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<sup>2</sup> The videotaped statement was not supplied on appeal.

creating reasonable doubt as to a defendant's guilt in the minds of the jury. Ibid. (quoting State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977)).

A defendant is "entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of [PCR]," there are "material issues of disputed fact that cannot be resolved by reference to the existing record," and such a "hearing is necessary to resolve the claims for relief." Id. at 354 (alteration in original) (quoting R. 3:22-10(b)). For ineffective assistance of counsel claims, an evidentiary hearing should ordinarily be granted "because the facts often lie outside the trial record." Ibid. (quoting State v. Preciose, 129 N.J. 451, 462 (1992)). However, a defendant is not entitled to an evidentiary hearing when his or her claims are "too vague, conclusory, or speculative." Id. at 355 (quoting State v. Marshall, 148 N.J. 89, 158 (1997)).

If a defendant claims his counsel inadequately investigated an alibi, he or she "must assert facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant[.]" Id. at 353 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). We must consider a defendant's contentions "indulgently," by viewing


the asserted facts in a light most favorable to the defendant.

Ibid.

Applying the above standards, we conclude defendant established a prima facie case supporting PCR and an evidentiary hearing is necessary to resolve his claim for relief. Accordingly, we reverse and remand for an evidentiary hearing on defendant's claim that trial counsel rendered ineffective assistance by failing to investigate and call Thompson as an alibi witness. On remand, defendant must satisfy both prongs of the Strickland<sup>3</sup> test.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. 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

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<sup>3</sup> Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).