SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1652-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYRELL JACKSON, a/k/a
TYRELL T. JACKSON,

Defendant-Appellant.

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Submitted October 13, 2022 – Decided August 11, 2023

Before Judges Gooden Brown, DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 10-04-0439.

Joseph E. Krakora, Public Defender, attorney for appellant (John V. Molitor, Designated Counsel, on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent (Meredith L. Balo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Tyrell Jackson appeals from an August 27, 2020 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm in part, and reverse in part.

I.

Tried separately to a jury from his codefendant, Dwayne Dricketts, defendant was convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(a). On September 16, 2011, after appropriate mergers, defendant was sentenced on the murder conviction to a forty-eight-year term of imprisonment, with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

In an unpublished opinion, we affirmed defendant's convictions and sentence, and our Supreme Court denied certification. State v. Jackson, No. A-2372-11 (App. Div. Sept. 12, 2016), certif. denied, 230 N.J. 556 (2017). Codefendant Dricketts was also convicted of the same offenses in a subsequent jury trial, and his convictions were also affirmed on direct appeal. State v. Dricketts, No. A-3677-13 (App. Div. Apr. 18, 2018), certif. denied, 236 N.J. 20 (2018). Dricketts is not a participant in this appeal.

We incorporate by reference the detailed recitation of the facts contained in our unpublished opinion. To summarize, "[t]he charges stemmed from the shooting death of Dana Reid. The State's theory was that defendant was engaged in a drug-dealing operation with . . . Dricketts, and killed Reid after Reid failed to pay for drugs that Dricketts gave him to sell." Jackson, slip op. at 1-2. Reid's girlfriend, F.B.,[1] was an eyewitness to the shooting and testified at the 2011 trial that,

> at approximately 12:30 a.m. on May 9, 2005, she and Reid were walking on Madison Avenue in Elizabeth on their way to a store to get cigarettes and food. Immediately preceding the shooting, she heard running footsteps coming from behind the couple at an angle, looked over her shoulder, and saw a "guy," who she later identified as defendant, pointing a gun at them. Reid threw her to the ground and laid on top of her while shots were being fired. F.B. testified that she had never seen the shooter prior to or after the shooting and that the shooter did not speak during the incident. However, she testified about the trauma the incident caused her and indicated that she "remember[ed] his eyes [and] his face." At trial, she identified defendant as the shooter.
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> [Id. at 3-4 (alterations in original).]

Ten days after the shooting, F.B. identified defendant as the shooter during a photo array identification procedure. Id. at 11. At that time, F.B. said

[1] We use initials to protect the confidentiality of the civilian witnesses.

she was ninety percent sure of her identification. Ibid. However, at trial, she testified she was "[a] hundred percent sure" defendant was the shooter, and repeated that she could not forget his eyes because "[she] looked directly at him and he looked directly at [her]." On direct examination, F.B. explained that although she was 100 percent sure of her identification during the identification procedure, she said she was slightly less certain because she was afraid of retaliation.

Around the time of the shooting, drug dealers and drug users congregated at a house in Elizabeth called the "Honeycomb." Id. at 4. "L.P. was, at the time of Reid's murder, a drug user who operated the Honeycomb . . . ." Ibid. "In exchange for drugs, L.P. allowed drug dealers to stay at the house and deal drugs from it." Ibid. "Dricketts was the leader of a small group of drug dealers which included defendant." Ibid. Dricketts's group dealt drugs from the Honeycomb and defendant was known as Dricketts's "enforcer." Id. at 4, 6. According to L.P.,

> [d]efendant was . . . the "trigger man" at the Honeycomb and, in exchange for his use of the house, assured that: no one was stealing drugs or money; debts were paid; and if someone got out of line, he was to shoot them. Reid was a drug user who occasionally sold drugs for Dricketts. L.P. also testified that shortly before Reid's murder, she was in the hallway of the Honeycomb with Reid, Dricketts and defendant.

> Dricketts gave Reid fifty vials of cocaine to sell and told him not to "mess up like [the] last time."
>
> [Id. at 4 (second alteration in original).]

"J.W., a drug dealer who also routinely sold drugs at the Honeycomb," witnessed the transaction between Reid, Dricketts, and defendant. Ibid. At trial, J.W. testified that,

> Dricketts told Reid to bring back the money and they would split the profits down the middle.[2] At around the same time as the shooting on May 9, 2005, he was selling drugs outside a convenience store, and saw Dricketts and defendant running down Williams Street away from Madison Avenue.
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> [Id. at 4-5.]

According to J.W., a couple of weeks after the shooting, Dricketts told him that he and defendant had been running because they "'got at'" Reid, meaning that they killed him. J.W. said Dricketts specified that defendant was the one who shot Reid. The State's experts testified that Reid was shot four times, and all four bullets came from the same gun. Id. at 5-6.

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[2] J.W. explained that Dricketts gave Reid $500 worth of drugs and expected $250 back once the product was sold. He said he knew Reid never paid Dricketts back because Dricketts later asked him if he knew where Reid was because Reid owed him money.

The State produced other witnesses from the Honeycomb to confirm the motive for the murder.

> M.R., a prostitute and drug dealer, testified at trial that she knew defendant, Dricketts and Reid through the Honeycomb. At one point, she and Reid were in a relationship. Sometime before Reid's murder, Dricketts approached her about paying off a drug debt Reid owed him, but she refused.
>
> T.B., another prostitute and drug dealer at the Honeycomb, testified at trial that in early May 2005, Dricketts told her that Reid owed him money for drugs. She also testified that on one particular occasion, possibly just two days before Reid's murder, she, Dricketts, and defendant were in a car together, when Dricketts spotted Reid on the street and said to her and defendant that Reid was "[the one] that owes me money." In T.B.'s presence, Dricketts said to Reid "if you don't have my money in two hours I will fucking put a cap in your ass[.]" Dricketts then told T.B. that he would not "bother putting a cap in [Reid's] ass, [but would] have somebody else do it so [Reid] won't even see it coming[.]"
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> [Id. at 5 (alterations in original).]

Defendant filed a timely pro se PCR petition, which was later supplemented by assigned counsel. In his petition, defendant asserted he was denied effective assistance of trial and appellate counsel. As to trial counsel, defendant asserted his attorney failed to: (1) call numerous witnesses and produce certain evidence to establish an alibi and a third-party guilt defense; (2)

effectively cross-examine F.B. and J.W.; (3) object to testimony concerning defendant's involvement with drug dealing; and (4) move for dismissal of the indictment based on a violation of the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15. As to appellate counsel, defendant claimed his attorney failed to challenge: (1) his sentence as excessive; and (2) the indictment based on a violation of State v. Bankston, 63 N.J. 263 (1973), during the grand jury presentation. In addition, defendant argued the State engaged in prosecutorial misconduct in violation of Brady v. Maryland, 373 U.S. 83 (1963), by failing to turn over statements from two individuals, H.P. and P.L., which he alleged would have implicated a third party in the murder. Defendant asserted he was entitled to an evidentiary hearing on his claims.

Following oral argument, the judge entered an order on August 27, 2020, denying defendant's petition for PCR. In an accompanying written opinion, the judge determined defendant failed to meet his burden to show that counsel's performance fell below the objective standard of reasonableness set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 49-58 (1987). Further, the judge found even if there was deficient performance, defendant failed to show that the outcome would have been different but for the deficiency as required under the

second prong of the Strickland/Fritz test. Thus, the judge concluded defendant failed to demonstrate a reasonable likelihood that his claims, viewed indulgently, would ultimately succeed on the merits. As a result, according to the judge, defendant "[was] not entitled to an evidentiary hearing."

In support, the judge recounted the substantial evidence of guilt presented at defendant's trial as follows:

> Multiple witnesses testified that [d]efendant worked for Dricketts, primarily as an enforcer, and that Reid sold drugs for Dricketts. Multiple witnesses also testified that they had knowledge that Dricketts and [d]efendant were looking for Reid because he owed them a debt. . . . [F.B.] witnessed the shooting and identified [d]efendant as the shooter, with 100% certainty, saying she would never forget his eyes and face. [J.W.] saw [d]efendant and Dricketts running from the area of the shooting sometime after it occurred, and Dricketts later told him that they, specifically [d]efendant, killed Reid.

Additionally, in rejecting defendant's claim that the prosecutor's failure to turn over witness statements amounted to a Brady violation, the judge applied the standard set forth in State v. Russo, 333 N.J. Super. 119 (App. Div. 2000), where this court stated that "[i]n order to establish a Brady violation," among other things, defendant must show that "the evidence is material." Russo, 333 N.J. Super. at 134. Applying that standard, the judge found the withheld statements were "not material, as there was not a reasonable probability that the

result of the proceeding would have been different had the information been disclosed to the defense."

On appeal, defendant raises the following points for our consideration:

> POINT I
>
> THE PCR JUDGE'S DECISION TO DENY DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING VIOLATED PORTER, PYATT, CUMMINGS, AND O'DONNELL.[3]
>
> POINT II
>
> THIS COURT SHOULD REVERSE THE PCR JUDGE'S DECISION TO DENY . . . DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING SO . . . DEFENDANT CAN PRESENT A WITNESS WHO CAN ESTABLISH THIRD-PARTY GUILT.
>
> POINT III
>
> THIS COURT SHOULD REMAND THIS MATTER TO A DIFFERENT JUDGE. (NOT RAISED BELOW).
>
> POINT IV
>
> THIS COURT SHOULD REVERSE THE PCR JUDGE'S DECISION TO DENY . . . DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE . . . DEFENDANT'S TRIAL COUNSEL DID NOT EFFECTIVELY CROSS-EXAMINE [J.W.] WITH EVIDENCE THE POLICE WERE PAYING

[3] State v. Porter, 216 N.J. 343 (2013); State v. Pyatt, 316 N.J. Super. 46 (App. Div. 1998); State v. Cummings, 321 N.J. Super. 154 (App. Div. 1999); State v. O'Donnell, 435 N.J. Super. 351 (App. Div. 2014).

[J.W.] IN CONNECTION WITH [J.W.'s] COOPERATION.

POINT V

THIS COURT SHOULD REVERSE THE PCR JUDGE'S DECISION TO DENY . . . DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE . . . DEFENDANT'S TRIAL COUNSEL DID NOT EFFECTIVELY CROSS-EXAMINE [F.B.] WITH EVIDENCE OF THE UNCERTAINTY OF HER IDENTIFICATION OF THE SHOOTER AND WITH EVIDENCE OF THIRD-PARTY GUILT.

POINT VI

THIS COURT SHOULD REVERSE THE PCR JUDGE'S DECISION TO DENY . . . DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE THE PROSECUTION VIOLATED BRADY V. MARYLAND AND GIGLIO V. UNITED STATES.[4]

POINT VII

THIS COURT SHOULD REVERSE THE PCR JUDGE'S DECISION TO DENY . . . DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE . . . DEFENDANT'S TRIAL COUNSEL SHOULD BE COMPELLED TO EXPLAIN WHY HE DID NOT OBTAIN VIDEO FOOTAGE TO SUPPORT . . . DEFENDANT'S ALIBI DEFENSE.

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[4] Giglio v. United States, 405 U.S. 150 (1972).

POINT VIII

THIS COURT SHOULD REVERSE THE PCR JUDGE'S DECISION TO DENY . . . DEFENDANT'S CLAIM THAT HIS ATTORNEY AT SENTENCING AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO CHALLENGE HIS SENTENCE.

POINT IX

THIS COURT SHOULD REVERSE THE PCR JUDGE'S DECISION TO DENY . . . DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF BECAUSE . . . DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL ON THE BASIS OF THE CUMULATIVE EFFECT OF HIS ATTORNEYS' ERRORS. (NOT RAISED BELOW).

POINT X

. . . DEFENDANT INCORPORATES BY REFERENCE THE ARGUMENTS RAISED IN . . . DEFENDANT'S PRO SE BRIEF.

II.

We set out guideposts that inform our review. "[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing." State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an

evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

An evidentiary hearing is only required when a defendant establishes "'a prima facie case in support of [PCR],'" the court determines that there are "'material issues of disputed fact that cannot be resolved by reference to the existing record,'" and the court determines that "'an evidentiary hearing is necessary to resolve the claims'" asserted. Porter, 216 N.J. at 354 (alteration in original) (quoting R. 3:22-10(b)). "[W]here . . . no evidentiary hearing was conducted," as here, "we may review the factual inferences the [trial] court has drawn from the documentary record de novo," and "[w]e also review de novo the court's conclusions of law." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016).

"To establish a prima facie case, defendant must demonstrate 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). To establish a prima facie ineffective assistance of counsel (IAC) claim, a defendant must demonstrate "by a preponderance of the credible evidence," State v. Echols, 199 N.J. 344, 357 (2009), that: (1) counsel's performance was

deficient; and (2) the deficient performance prejudiced the defense, Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58.

The same Strickland/Fritz standard applies to claims of ineffective assistance of trial and appellate counsel. State v. Gaither, 396 N.J. Super. 508, 513 (App. Div. 2007). However, "a defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue that defendant requests on appeal." Id. at 515 (citing Jones v. Barnes, 463 U.S. 745, 753-54 (1983)). Instead, counsel may "winnow[] out weaker arguments on appeal and focus[] on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751-52. Furthermore, appellate counsel must "examine the record with a view to selecting the most promising issues for review." Id. at 752. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome[.]" Smith v. Robbins, 528 U.S. 259, 288 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Failure to meet either prong of the Strickland/Fritz test results in the denial of a petition for PCR. State v. Parker, 212 N.J. 269, 280 (2012) (citing Echols, 199 N.J. at 358). That said, "courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim

without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (citation omitted) (citing Strickland, 466 U.S. at 697).

When considering Strickland's first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689. To that end, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Ibid. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

To satisfy the prejudice prong, a defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Ultimately, "[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." Id. at 691. "Important to the prejudice analysis is the strength of the evidence that was before the fact-finder at trial." State v. Pierre, 223 N.J. 560, 583 (2015). As such, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

"Merely because a trial strategy fails does not mean that counsel was ineffective," State v. Bey, 161 N.J. 233, 251 (1999), and "an otherwise valid conviction will not be overturned merely because the defendant is dissatisfied with his or her counsel's exercise of judgment during the trial." State v. Castagna, 187 N.J. 293, 314 (2006). "As a general rule, strategic miscalculations or trial mistakes are insufficient to warrant reversal 'except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of [a] fair trial.'" Id. at 314-15 (alteration in original) (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)). Further, "[t]he 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." Id. at 314.

III.

We now turn to defendant's arguments on appeal.

A. Failure to Investigate Alibi Defense

Defendant contends the PCR judge erred in rejecting his claim that his trial attorney was ineffective by failing to investigate a potential alibi defense. Specifically, defendant contends that counsel neither contacted nor produced three witnesses who would have stated that he was with them at a motel from

the evening of May 8 until the morning of May 9, 2005, when the murder occurred. He also argues that counsel failed to obtain surveillance video footage from the motel to corroborate his alibi defense. He asserts the PCR judge should have conducted an evidentiary hearing before summarily rejecting his alibi witnesses' affidavits as lacking credibility. He also asserts a hearing was necessary so that his attorney could explain why he did not pursue an alibi defense through witness testimony and surveillance footage.

In a supplemental certification submitted in support of his PCR petition, defendant averred he provided his attorney "with the names of the people [he] was with" while "at a motel on the night of the shooting" and "asked that he investigate." However, according to defendant, his attorney "never interviewed any of the people," "never completed an investigation[,] and never checked into the motel." The alibi witnesses were Brandon King, Reginald Cook, and Robert Leven. Defendant submitted undated witness lists he purportedly provided to his trial attorney prior to trial that included King's and Cook's names.

William Vogel, defendant's investigator, interviewed all three witnesses in 2018 and prepared investigation reports that were submitted to support defendant's PCR petition. Cook told Vogel that he and defendant were close friends, and that defendant could not have killed Reid because "[Cook and

defendant] were together when it happened." Cook stated the two were "staying at the Econo Lodge in Elizabeth when the murder happened," along with King and other individuals.

King told Vogel that defendant "was with [King] all day on May 8[] and into the morning of May 9[, 2005]," and that the two "dr[ove] around in a red car going back and forth between Elizabeth . . . and New York City." King stated they "spent the day hanging out, smoking 'weed' and going about their business." Then, around midnight on May 9, 2005, King and defendant went to a motel in Elizabeth, where they spent "the rest of the night." According to King, at some point, defendant's girlfriend joined them. However, King "could not recall the name of the motel" and did not mention seeing Cook at the motel.

Lastly, Leven told Vogel that defendant "could not have committed the murder" because he, defendant, and "several other individuals" were at a motel in Elizabeth at "the time of the murder." Although Leven could not recall the name or address of the motel, or "the names of the other individuals who were staying at the motel with them," he said that he and defendant went to a nearby barber shop "[o]n the day of the murder" and then "hung out together the rest of the day." According to Leven, "[they] were on foot the whole day."

Defendant submitted certifications[5] prepared by Cook, King, and Leven to support his petition. In Cook's September 18, 2018 certification, he stated that he "was with" defendant in "Elizabeth on the night of May 9[,] 2005[,] through the morning of May 10, 2005," and that he "was never contacted by anyone representing [defendant] about testifying at his trial." In King's May 25, 2020 affidavit, he reiterated what he had told Vogel and added that although they had heard about the shooting, "it had nothing to do with [them]" because "there were never any disagreements or arguments" between them and "anybody in Elizabeth." King also said he was never contacted about testifying at trial. In Leven's June 5, 2020 affidavit, he simply reiterated what he had told Vogel.[6]

Regarding the motel surveillance footage, at trial, Harold Coral, an employee of the Econo Lodge motel where defendant claims he and his friends stayed at the time of the shooting, testified that defendant and Dricketts both rented rooms in April and May 2005. Specifically, defendant rented Room 115 on May 8 and 9, 2005. However, neither party asked Coral whether the motel had surveillance cameras in 2005, and defense counsel did not cross-examine Coral.

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[5] We refer to certifications and affidavits interchangeably.

[6] Leven's affidavit was not provided in the record.

In his decision, the PCR judge noted there were discrepancies between defendant's alleged alibi witnesses' affidavits and Vogel's investigation reports, and between the different witnesses' accounts. As to the motel surveillance footage, the judge found that even if they were available, any such videos would have been cumulative of the motel records presented with Coral's testimony.

An IAC claim may be established "when counsel fails to conduct an adequate pre-trial investigation." Porter, 216 N.J. at 352. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

"Failure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction." Porter, 216 N.J. at 353; see also Pierre, 223 N.J. at 582-88 (holding that counsel's presentation of an alibi defense was deficient and prejudicial because he failed to interview known, key witnesses who could have bolstered that defense and "chose to forego evidence that could have reinforced that alibi," entitling defendant to a new trial). Indeed, "few defenses have greater potential for creating a 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).

When a defendant claims his attorney inadequately investigated an alibi defense, "[the defendant] 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." Cummings, 321 N.J. Super. at 170 (citing R. 1:6-6). When supported by the witness's affidavit or certification, the testimony of an alibi witness should not be dismissed as not credible without an evidentiary hearing. See State v. Jones, 219 N.J. 298, 313-16 (2014) (holding that where the State's case turned on questions of credibility and the alibi witness's account could have bolstered the defendant's version of events, the PCR court erred by not conducting an evidentiary hearing at which the alibi witness and counsel could testify); Porter, 216 N.J. at 356 ("The court's findings regarding [the] defendant's and his girlfriend's credibility, based only on their affidavits, was an improper approach to deciding th[e] PCR claim and effectively denied [the] defendant an opportunity to establish ineffective assistance of trial counsel.").

The testimony of an alibi witness does not have to be free of credibility issues; it must simply have the ability to bolster the defense or refute the State's

position if believed by the jury. See Pierre, 223 N.J. at 586-88. Thus, "[e]ven a suspicious or questionable affidavit supporting a PCR petition 'must be tested for credibility and cannot be summarily rejected.'" Porter, 216 N.J. at 355 (quoting State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008)).

Here, the PCR judge summarily rejected the alibi witnesses' affidavits as lacking credibility. However, "[a]ssessment of credibility is the kind of determination 'best made through an evidentiary proceeding with all its explorative benefits, including the truth-revealing power which the opportunity to cross-examine bestows.'" Id. at 347 (quoting Pyatt, 316 N.J. Super. at 51). Because the judge incorrectly made credibility determinations without first conducting an evidentiary hearing, we are constrained to reverse and remand for an evidentiary hearing on defendant's claim that trial counsel rendered ineffective assistance by failing to investigate and call Cook, King, and Leven as alibi witnesses. On remand, the judge should make "a qualitative judgment as to whether that evidence, after being subjected to cross-examination, is sufficient to engender a reasonable probability that the result of the [trial] would have been different" if it had been presented. Russo, 333 N.J. Super. at 140.

As to the judge's denial of PCR without an evidentiary hearing on the issue of counsel's failure to obtain surveillance footage from the Econo Lodge, we

discern no abuse of discretion. Defendant was charged with Reid's murder five years after it had occurred. Defendant provided no evidence that surveillance footage existed in the first place or would still have been available at the time defense counsel was preparing for trial. Thus, defendant made nothing more than a bald assertion that counsel should have presented the footage, which does not constitute a prima facie case of IAC requiring a hearing. Cummings, 321 N.J. Super. at 170 ("[A] petitioner must do more than make bald assertions that he was denied the effective assistance of counsel."). Moreover, as the PCR judge noted, "[a]t best, if any surveillance video could have been available . . . , it would have been cumulative of the existing discovery and testimony of . . . Coral."

B. Failure to Call Third-Party Guilt Witness

Defendant argues that his attorney was ineffective by failing to call D.B., who had previously given a statement to members of the Union County Prosecutor's Office (UCPO) that allegedly implicated a third party in Reid's murder. The third party is a fellow drug dealer by the name of M.M., also known as "Q." Defendant asserts that D.B.'s testimony would have created a reasonable doubt as to his guilt because Q fit the description of the shooter F.B. initially gave police better than he did and was "someone who could kill Reid without

Reid suspecting it," as Dricketts wanted. Defendant contends that the PCR judge erred by denying his request for an evidentiary hearing on this issue because "it is impossible to know what factors went into the decision not to call [D.B.]" without testimony from her and counsel.

By way of background, on November 29, 2005, UCPO Detective Michael Manochio interviewed D.B. D.B. told Manochio that in April 2005, Q began selling cocaine out of Sierra Gardens, an apartment complex in Elizabeth where she also lived. She described Q as "[a] black male, probably like 5'7["] or 5'8["]," with "[A]sian[-]looking . . . eyes," "[light-]brown skin," and "shoulder [-]length hair, usually loose or box braids, or some type of braids." According to D.B., Q was "the number [one] drug dealer at Sierra Gardens," and she had seen him with a black handgun in April 2005.

D.B. told Manochio that F.B. began staying at Sierra Gardens in April or May 2005 and spent time there with Reid. She said Reid sold drugs at the complex and although Q was aware of it, he may not have "authorized" it. D.B. stated she thought Q was responsible for Reid's death based on F.B.'s statements and Q's change in behavior after the murder. She said that after the murder, "[F.B.] was going around saying it was . . . Q," and around the "end of June, or early July [2005]," F.B. told "[her] and a group of friends" that on the night of

the murder, "she saw a group of men in [a] car parked and [Q] came from the car and . . . approached [Reid]." D.B. also said that after Reid was shot, Q "start[ed] to change his appearance" and did not "com[e] around as much."

During defendant's trial, on February 1, 2010, defense counsel's investigator informed the court outside the presence of the jury that he had delivered a subpoena to D.B. and had spoken with her, but she had "made it clear she [did not] want to come." As a result, the court issued a bench warrant for D.B.'s arrest. Later that day, D.B. came to court, at which point the judge told her she would have to return at 9:00 a.m. the following day or be arrested. The following morning, defense counsel told the court he had talked with D.B. and "decided [he was] not going to use her as a witness." After "[b]oth sides agree[d]," the court released D.B.

In his PCR certification, defendant asserted that he and his attorney "discuss[ed] calling [D.B.] as a witness, and it was [his] understanding that she had been subpoenaed and was ready to be called at trial." However, he was "shocked when [he] discovered at the last minute [his] attorney was not calling her," and his attorney "did not discuss this decision with [him] prior to making it."

The PCR judge found that D.B. "did not have firsthand knowledge on whether Q killed Reid," and only "told detectives that she heard [F.B.] implicate Q." Therefore, the judge determined that "her [proposed] testimony would have been [inadmissible] hearsay," and, under the circumstances, "it was reasonable for trial counsel to not call her as a witness." The judge also found that if D.B. had testified and then F.B. had been asked about her alleged statement to D.B. implicating Q, "it [was] unlikely that [F.B.] would have faltered in her identification [of defendant], which she stated was with 100% certainty."

A defendant has "a constitutional right to introduce probative evidence tending to establish third party guilt." State v. Timmendequas, 161 N.J. 515, 620 (1999). To be admissible, such evidence must have "'a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case.'" State v. Loftin, 146 N.J. 295, 345 (1996) (quoting State v. Sturdivant, 31 N.J. 165, 179 (1959)). However, the defendant need not show "a probability of a third-party['s] guilt," but only "proof capable of raising a reasonable doubt on the issue of [the] defendant's guilt." State v. Millett, 272 N.J. Super. 68, 100 (App. Div. 1994) (citing State v. Koedatich, 112 N.J. 225, 299 (1988)).

Choosing which witnesses to call is considered "one of the most difficult strategic decisions that any trial attorney must confront." State v. Arthur, 184 N.J. 307, 320 (2005). Counsel

> must consider what testimony a witness can be expected to give, whether the witness's testimony will be subject to effective impeachment by prior inconsistent statements or other means, whether the witness is likely to contradict the testimony of other witnesses the attorney intends to present and thereby undermine their credibility, whether the trier of fact is likely to find the witness credible, and a variety of other tangible and intangible factors.
>
> [Id. at 320-21.]

For that reason, a court's review of a defense attorney's decisions in that regard "should be 'highly deferential.'" Id. at 321 (quoting Strickland, 466 U.S. at 689). This is particularly so where counsel chooses not to call a witness after an investigation into the above factors, including speaking to the witness and reviewing any previous statements made by the witness to police and others. See id. at 322-23 (holding that counsel's decision not to call a third-party guilt witness was a reasonable strategic choice because it was based on research and upon the fact that the witness may have recanted his earlier statements to avoid implicating himself).

Indeed, counsel cannot be found ineffective if the evidence an uncalled witness may have provided "would probably have been inadmissible in any event," would have undermined the defense strategy, or would likely be considered not credible due to being contradicted by a great deal of other evidence. State v. Coruzzi, 189 N.J. Super. 273, 321-23 (App. Div. 1983) (noting defense counsel met with witnesses prior to trial and became "thoroughly familiar with the testimony that they could have offered," rendering his choice not to call them a "conscious strategic decision" that could not support an allegation of IAC).

Here, we are satisfied the judge did not err in finding that not calling D.B. was a reasonable strategic decision by defense counsel. "Decisions as to trial strategy or tactics are virtually unassailable on ineffective assistance of counsel grounds." State v. Cooper, 410 N.J. Super. 43, 57 (App. Div. 2009). Counsel's choice not to present D.B.'s testimony was made after adequate investigation. See Arthur, 184 N.J. at 322-23. Critically, D.B.'s testimony could not have affected the outcome because it constituted inadmissible hearsay and would not have been allowed in any event. Thus, defendant did not establish a prima facie case of IAC under the Strickland/Fritz test on this issue.

C. Insufficient Cross-Examination of State Witnesses

Defendant also argues that his trial attorney was ineffective because he did not cross-examine J.W. and F.B. with sufficient rigor. He asserts that the testimony elicited from these witnesses by Dricketts's counsel in his subsequent trial was more harmful to their credibility, thus establishing a prima facie case of IAC on the part of defendant's attorney, necessitating an evidentiary hearing.

A defendant exercises his Sixth Amendment right of confrontation "through cross-examination, which has been described as the '"greatest legal engine ever invented for the discovery of truth."'" State v. Branch, 182 N.J. 338, 348 (2005) (quoting California v. Green, 399 U.S. 149, 158 (1970)). As a result, a defense attorney's failure to launch an appropriate attack on a witness's credibility through cross-examination may form the basis of an IAC claim. See State v. Holmes, 290 N.J. Super. 302, 314 (App. Div. 1996) (holding that counsel's failure to "launch an attack" on "the State's principal witnesses" regarding "their prior criminality" and "expectations in light of a similar attack advanced against [the] defendant" fell outside "the wide range of reasonable professional assistance" and "undermined the proper functioning of the adversarial process").

Defendant argues that his counsel did not sufficiently question J.W. about his "cooperation with law enforcement," specifically the fact that he was receiving payment from the UCPO to incriminate other drug dealers in Elizabeth. Defendant avers that counsel's failure to elicit such testimony at his trial, which would have revealed to the jury that J.W. had a motive to "lie to assist his allies in law enforcement" or that the State "may have [had] a hold" over J.W., constituted IAC.

A defendant has a constitutional right "to explore potential bias on the part of a prosecution witness." Id. at 313. Although a witness may not have an "express agreement" with the State that he or she will benefit from assisting the government or suffer from failing to do so, the defendant has a right to present evidence "that the State has a 'hold' of some kind over the witness, the mere existence of which possesses the potential of prompting [the witness] to color his [or her] testimony in favor of the prosecution." Id. at 312-13 (emphasis omitted).

In other words, the defense "must have the opportunity to probe the witness's self-interested belief" that he or she might "curry favor with the State" by giving testimony that will help the prosecution and harm the defense. State v. Parsons, 341 N.J. Super. 448, 458 (App. Div. 2001). As a result, defense

counsel's failure to raise the issue of a witness's possible bias in favor of the State may constitute IAC. Holmes, 290 N.J. Super. at 314. Nevertheless, a new trial is not "an inevitability" whenever counsel fails to probe a witness's prior record or pending charges. Ibid. Instead, a case-by-case evaluation of counsel's assistance must still be made under Strickland. Holmes, 290 N.J. Super. at 314.

Here, in support of his PCR petition, defendant submitted a portion of J.W.'s testimony at Dricketts's trial. A review of J.W.'s testimony reveals that, in both trials, J.W. testified about his cooperation with law enforcement, admitted that he had been paid to help narcotics officers find drug dealers in Elizabeth, stated he had no expectation that law enforcement was going to help him with his unrelated cases because of his testimony, and acknowledged that he had received help to leave the state for his safety from one of the detectives who had investigated Reid's murder.

Additionally, at defendant's trial, in an attempt to discredit J.W., defense counsel cross-examined J.W. about inconsistencies between his trial testimony and prior statements. Those inconsistencies included J.W.'s prior statements that he had not previously seen defendant with a gun, and that Dricketts had not told him who killed Reid. J.W. explained that his inconsistent statements were due to him being nervous and unable to remember details.

In rejecting defendant's argument that counsel was ineffective by failing to cross-examine J.W. more strenuously on the issue of his cooperation with law enforcement, the PCR judge determined defendant's contention was not supported by the record. In that regard, the judge found that

> [J.W.] was not paid to help detectives related to this homicide, but to help with drug dealing in Elizabeth. Additionally, [J.W.] stated that he helped the narcotics detectives because he was looking to make money but did not make enough. This suggests that even if he did expect favors by helping the detectives, he was not happy with what he received and he confirmed that the detectives never helped him with any charges.

As a result, the judge concluded

> [t]rial counsel was . . . not deficient for not eliciting more out of [J.W.] once it was revealed that he had been paid for helping detectives on an unrelated case. Defendant also has not shown that a more thorough cross-examination would have changed the outcome of [d]efendant's case, especially because the more thorough cross-examination in co-[d]efendant Dricketts's subsequent trial did not result in an acquittal for Dricketts.

We agree with the judge's assessment. When evaluating his credibility, the jury was able to consider J.W.'s criminal record, receipt of money from the government, and possible belief that he might curry favor with the State by

testifying against defendant.[7] Parsons, 341 N.J. Super. at 458. Any more pointed questioning by counsel would not have changed the outcome, particularly since J.W. adamantly denied receiving any help to escape penal consequences in his unrelated criminal matters and explicitly stated that his compensation for assisting with drug investigations was inadequate. Moreover, counsel also attacked J.W.'s credibility on other fronts by exposing prior inconsistent statements. Therefore, we are convinced defendant did not establish a prima facie case of IAC under the Strickland/Fritz test in connection with this issue.

Turning to F.B., defendant asserts that had his counsel effectively cross-examined her to elicit testimony about Q at his trial, it would have undermined her eyewitness identification of defendant and provided "strong evidence" of third-party guilt. To support his argument, defendant contends that during Dricketts's trial, Dricketts's attorney elicited more damaging information about Q while cross-examining F.B., including: Q flirting with F.B. despite knowing that she was dating Reid, thus establishing a motive for Q to remove Reid from

[7] The fact that some of the testimony was elicited on direct and re-direct examination, rather than cross-examination, has no constitutional significance. Once the testimony was elicited, there was no need for counsel to question J.W. further on the subject.

the picture; F.B. seeing the shooter coming from the same direction where she had last seen Q moments before the murder; and F.B. expressing her belief that Q was involved before identifying defendant as the shooter.

In support of his petition, defendant submitted a transcript of F.B.'s first statement to law enforcement officers given immediately following the shooting. In the statement, F.B. said that while she and Reid were walking together earlier that night, "a kid walked by and brushed past [her]" and "kept going," and then walked past the couple again in the other direction. According to F.B., "[m]aybe a minute later," she "heard . . . foot steps [coming] from behind [her]," and turned and saw "a man . . . running across the street," pointing a gun at them. Although the shooter came from the same direction as the "kid," F.B. stated the "kid" was not the shooter.

In her statement, F.B. also described the "kid" as a "black male," "about 5'9"," wearing "corn rows," a "white t-shirt," and "blue jeans." She described the shooter as a "black guy," "about 5'8" or 5'9"," with "brown skin, about two shades darker th[an hers]," and wearing a "black hoody" and "black jeans." She said the gunman was "young," in his "earl[y] twent[ies]," and "just really skinny." When asked if she had "any idea who would have shot [Reid], or why," F.B. replied, "No."

Defendant also submitted an excerpt from F.B.'s testimony at Dricketts's trial to support his petition. There, F.B. testified that Reid had introduced her to people at Sierra Gardens, including Q, whom she saw every day for the two-and-a-half weeks she lived there leading up to the shooting. She said Reid sold cocaine out of an apartment at Sierra Gardens and Q was his supplier. F.B. described the events surrounding the shooting in much the same way she had in her statement to police. However, when talking about the "kid" who brushed past her, she stated that she realized it was Q and thought it was "strange" that he did not greet her or Reid. F.B. admitted that when she gave her initial statement to police, she did not identify the "kid" as Q. She explained that she was afraid to name Q because "[she] did[not] know why [Reid] was murdered or who did it" and was concerned that Q "had something to do with" Reid's murder.

At defendant's trial, F.B. gave similar testimony about how she knew Q from Sierra Gardens. On direct examination, she described how Q had walked past her before the shooting and was in the crowd of onlookers surrounding them while she was trying to help Reid after the shooting. F.B. admitted she did not tell police during the initial questioning that she knew Q was the person who had walked past her, but insisted that she was "100 percent sure" Q was not the

gunman. On cross-examination, defense counsel pressed F.B. about her failure to identify Q as the "kid" during the initial police questioning, but did not elicit her earlier suspicion that Q was involved in Reid's murder. He also questioned her about lying to police when asked about the origin of a crack pipe found in the back of the police car she was placed in. Additionally, he pointed out discrepancies between her initial description of the shooter and defendant's actual appearance, and stressed that in her second statement to police given on May 19, 2005, during a photo array identification procedure, F.B. stated she was only ninety percent certain that the person in the photo she chose was the shooter, whereas in her trial testimony, she was absolutely certain.

In his decision, the PCR judge rejected defendant's claim that his attorney's cross-examination of F.B. was ineffective. The judge found,

> [I]t was reasonable trial strategy by trial counsel to attempt to discredit [F.B.] based on her inconsistent descriptions of the shooter, including his height and skin tone, and to not delve further into Q and why she withheld information from the police early on. That Dricketts's trial counsel's strategy was different, at Dricketts's subsequent trial, does not make trial counsel in this case ineffective.
>
> Additionally, the potential third-party guilt theory, that Q was involved in Reid's death, is an idea that was introduced to the jury at [d]efendant's trial. The jury knew, based on [F.B.'s] testimony, that Q was in the area and had walked by Reid and [F.B.] prior to

> the shooting. The jury also knew that [F.B.] did not reveal to the police that she knew the man who walked past them that night, and that it was Q. [F.B.] even stated on cross that "it seemed odd" that Q was there at the time. Q also testified and stated that he was at Sierra Gardens around midnight on May 9, 2005, and saw [F.B.] and Reid on the corner of Madison and East Grand on his way to the Chicken Shack to get food. He stated that he walked by them and did not say anything to them, corroborating [F.B.'s] testimony. When he returned from getting food, on his way back to Sierra Gardens, he saw police officers "taking off" on Madison. . . . On cross, the State asked Q whether he shot and killed Reid and Q testified that he did not. . . .
>
> Moreover, at Dricketts's trial, the more extensive cross-examination regarding [F.B.] suspecting Q may have been involved was not effective, as the jury still convicted Dricketts, clearly believing [F.B.'s] testimony that she was sure [d]efendant was the shooter and not Q, despite [F.B.] admitting that she . . . at first thought Q was involved.
>
> [(Citations omitted).]

We agree with the judge. Essentially, the only difference between F.B.'s testimony at defendant's and Dricketts's trials was that at the latter, she expressed her earlier suspicion that Q might have "had something to do with" Reid's murder. However, as the judge pointed out, the guilty verdict following Dricketts's trial showed that the jury credited F.B.'s identification of defendant as the shooter, notwithstanding her earlier suspicion about Q.

Moreover, defense counsel rigorously attacked F.B.'s credibility in other crucial areas, particularly the discrepancies between her descriptions of the shooter and defendant's physical appearance, which the jurors could observe in court for themselves. See State v. Harris, 181 N.J. 391, 449-51 (2004) (rejecting the "accusations of deficiency in trial counsel's cross-examination" of a State witness despite counsel's failure to press the witness on "minor inconsistencies" because counsel challenged the witness's credibility by raising other crucial inconsistencies, her involvement with drugs, and her bias towards the prosecution).

D. Failure to Object to Drug Related Evidence

Defendant argues that his attorney was ineffective by failing to object to witness testimony about his involvement with drug dealing and the evils of drug use. He asserts that the evidence should have been analyzed and excluded under N.J.R.E. 404(b) as "prior bad acts," and failure to do so deprived him of a fair trial.

Although defendant raised the argument in his pro se brief before the PCR court, the PCR judge did not address the argument in his decision. Nevertheless, in our unpublished opinion affirming defendant's convictions, we rejected defendant's contention that the trial court erred in admitting the drug-related

evidence. Jackson, slip op. at 6-11 We concluded that "[b]ecause the other wrongs evidence was also admissible as intrinsic evidence, it was not subject to an N.J.R.E. 404(b) analysis." Id. at 10-11.

We reject defendant's attempt to relitigate this issue as an IAC claim. "Post-conviction relief is neither a substitute for direct appeal, R. 3:22-3, nor an opportunity to relitigate cases already decided on the merits, R. 3:22-5." State v. Preciose, 129 N.J. 451, 459 (1992). To that end, "a prior adjudication on the merits ordinarily constitutes a procedural bar to the reassertion of the same ground as a basis for post-conviction review." Id. at 476 (citing R. 3:22-5).

Thus, defendant is barred from raising this issue in his PCR petition because he unsuccessfully raised a substantially equivalent issue in his direct appeal. State v. Marshall, 173 N.J. 343, 351 (2002) ("If the claims are substantially the same, the petition is procedurally barred . . . ."); State v. McQuaid, 147 N.J. 464, 484 (1997) ("If the same claim is adjudicated on the merits on direct appeal a court should deny PCR on that issue, thereby encouraging petitioners to raise all meritorious issues on direct appeal."). In any event, our decision in defendant's direct appeal precludes a finding that defendant established a prima facie case of IAC under the Strickland/Fritz test on this issue.

E. Failure to Move for Dismissal Under the IAD

Defendant argues that his trial counsel was ineffective because he failed to move for dismissal of the indictment after the time limit set by the IAD passed without trial commencing. Once again, although this argument was raised in defendant's pro se brief before the PCR court, the PCR judge did not address the argument in his decision.

In our unpublished decision, we rejected defendant's contention that the indictment should have been dismissed because of a violation of the IAD on the ground that defendant waived his rights. Jackson, slip op. at 20-23. We explained:

> The IAD is "a compact entered into by [forty-eight] States, the United States, and the District of Columbia to establish procedures for resolution of one State's outstanding charges against a prisoner of another State." New York v. Hill, 528 U.S. 110, 111 (2000). . . .
>
> When a state seeks to prosecute a person who is incarcerated in another state, the prosecuting state must file a detainer with the institution where the prisoner is located. Hill, supra, 528 U.S. at 112. Once the detainer is lodged, disposition of the charges can be initiated by the defendant, in which case the time period is 180 days, or by the prosecuting agency, which has 120 days. If the defendant is not brought to trial within the applicable period, the indictment is subject to dismissal with prejudice. N.J.S.A. 2A:159A-5(c). However, this provision is not self-executing, as these timeframes are

subject to any "necessary or reasonable" continuances granted by the trial court on good cause shown. N.J.S.A. 2A:159A-4(c); see also State v. Miller, 299 N.J. Super. 387, 397 (App. Div.), certif. denied, 151 N.J. 464 (1997).

A defendant will be deemed to have waived rights under the IAD if his counsel requests or agrees to a trial date beyond the relevant timeframe. Hill, supra, 528 U.S. at 114; see also State v. Buhl, 269 N.J. Super. 344, 357 (App. Div.), certif. denied, 135 N.J. 468 (1994). Such a waiver will also bar the defendant from later seeking a dismissal of the indictment on those same grounds. The Court in Hill stated that the defendant is "deemed bound by the acts of his lawyer," and "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." Hill, supra, 528 U.S. at 115. When the trial date is at issue under the IAD, "only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case." Ibid.

Defendant was indicted in New Jersey on April 23, 2010, and arraigned on June 28, 2010. It appears that the State of New York lodged a detainer for defendant on June 24, 2010, which was not discharged until September 29, 2011. Pursuant to the IAD, defendant was to be tried by November 14, 2010. Trial was scheduled for November 8, 2010. Defendant filed pre-trial motions that were not disposed of until after the trial date. Defense counsel did not object when the trial was adjourned past the expiration date of the detainer in order to dispose of the motions. Consequently, defendant is deemed to have waived his rights under the IAD because his counsel agreed to a trial date beyond the relevant timeframe.

> [Id. at 21-23 (first and third alterations in original) (parallel citations omitted).]

In his pro se brief submitted to the PCR court, defendant asserted that he did not wish to waive the IAD trial deadline, and had attempted to file a pro se motion to dismiss after the deadline expired but was unable to do so because he was represented by counsel. Although defendant acknowledged that his trial was delayed largely because of extensive pre-trial motion practice on his part, he argued that his rights were "deeply compromised" by the Hobson's choice between proceeding with his critical motions or an on-time trial.

We conclude that defense counsel's failure to move for dismissal under the IAD does not constitute IAC under the circumstances. Defendant's trial began just two months after the IAD trial deadline.[8] Counsel's prioritization of the pre-trial motions which were essential to the defense was not outside the bounds of reasonable representation. Further, the continuance was "necessary or reasonable" under N.J.S.A. 2A:159A-4(c), and there is no evidence that defendant was prejudiced by the relatively short delay, "either through unavailable witnesses or through lost evidence," Millett, 272 N.J. Super. at 107.

[8] The delay was due in part to court holidays and the judge's mandatory attendance at Judicial College.

F. Failure to Challenge Sentence

Defendant argues that his appellate counsel was ineffective by not challenging his sentence as excessive. Specifically, he contends that the trial court should have found mitigating factor thirteen, that he was a youthful defendant whose conduct was substantially influenced by a more mature person. N.J.S.A. 2C:44-1(b)(13). Defendant asserts that he was eighteen at the time of Reid's murder and had been acting as a subordinate to twenty-four-year-old Dricketts in the drug ring. He argues that the PCR judge erred by finding that mitigating factor thirteen would not have reduced his sentence.

At sentencing, defense counsel[9] conceded that aggravating factor three, the risk that defendant would commit another crime, N.J.S.A. 2C:44-1(a)(3), and nine, the need for deterrence, N.J.S.A. 2C:44-1(a)(9), applied, but argued that they should be given "limited and light weight." Counsel argued that mitigating factor nine, that it was unlikely he would commit another offense, N.J.S.A. 2C:44-1(b)(9), applied and asked the court to sentence defendant to thirty years' imprisonment.

On the other hand, the State argued that in addition to aggravating factors three and nine, factor six, defendant's past criminal history, N.J.S.A. 2C:44-

[9] Defendant's trial and sentencing attorneys were different.

1(a)(6), applied and that there were no mitigating factors. In support, the prosecutor pointed out that defendant was "[eighteen] or [nineteen]" when he murdered Reid in May 2005, and, just two days later, he committed a theft-related offense. Two weeks after that, defendant committed attempted murder with a gun in New York. Defendant subsequently pled guilty to the New York offense, served part of a sentence, and then violated his parole.

The sentencing court was "clearly convinced" that aggravating factors three, six, and nine "outweigh[ed] no mitigating factors." The judge found that defendant was "clearly involved in the drug trade, [and was] brought over from New York to act as an enforcer." The judge characterized Reid's murder as "a cold-blooded execution for a small amount of merchandise, about $250 worth." The judge made no mention of defendant's age when giving the reasons for his decision.

The PCR judge found that given the sentencing court's explanation for its findings, "it was reasonable for appellate counsel not to argue against the[aggravating] factors and it [was] unlikely that the Appellate Division would have found that [the sentencing judge's] analysis was not supported by competent credible evidence." The PCR judge stated that while youth may be a mitigating factor, it need not always be found, and given defendant's criminal

record and the circumstances of the offense, it was "unlikely that . . . [d]efendant's age would have outweighed the three aggravating factors" and "reduced the sentence." Thus, the judge concluded that defendant did not demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.

Even if appellate counsel was ineffective for not raising defendant's youth as a mitigating factor, we are satisfied that the argument did not have "a reasonable probability" of reducing defendant's sentence. State v. O'Neil, 219 N.J. 598, 617 (2014) (quoting Strickland, 466 U.S. at 694). A trial court enjoys "considerable discretion in sentencing," State v. Blann, 429 N.J. Super. 220, 226 (App. Div. 2013), rev'd on other grounds, 217 N.J. 517 (2014), and "[a]ppellate review of sentencing decisions is relatively narrow," State v. Blackmon, 202 N.J. 283, 297 (2010).

> An appellate court is bound to affirm a sentence, even if it would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record. Assuming the trial court follows the sentencing guidelines, the one exception to that obligation occurs when a sentence shocks the judicial conscience.
>
> [State v. O'Donnell, 117 N.J. 210, 215-16 (1989) (citations omitted).]

"Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors." State v. Case, 220 N.J. 49, 64 (2014). "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." State v. Natale, 184 N.J. 458, 488 (2005).

Here, the sentencing court explained its reasons for finding three aggravating and no mitigating factors, and its findings are supported by competent credible evidence in the record. Moreover, the length of the sentence does not "shock the judicial conscience." State v. Roth, 95 N.J. 334, 365 (1984). Defendant's forty-eight-year NERA sentence complied with N.J.S.A. 2C:11-3(b)(1), which provides that a sentence for murder may be thirty years without parole, or between thirty years and life imprisonment, with thirty years of parole ineligibility.

Defendant's conduct in shooting Reid was not an immature, impulsive, or childish act, but a "cold-blooded execution" carried out in line with his role as Dricketts's enforcer. See State v. Torres, 313 N.J. Super. 129, 162-64 (App. Div. 1998) (finding no abuse of discretion where sentencing court did not consider defendant's youth as a mitigating factor because defendant planned and

carried out a "cold-blooded, execution-style murder" of the victim with "'meticulous detail'" and "'malevolence'"). Thus, we are satisfied that raising defendant's youth as a mitigating factor did not have a reasonable probability of reducing defendant's sentence in order to satisfy the prejudice prong of the Strickland/Fritz standard.[10]

G. Failure to Raise Bankston Issue

Defendant asserts that his appellate counsel was deficient by failing to argue a violation of Bankston on direct appeal. Specifically, defendant complains that without stating where the information came from, Manochio improperly testified before the grand jury that he received information suggesting defendant shot Reid. He asserts that as a result, the indictment was "based on hearsay from an unknown source that . . . [Manochio] never [revealed]." Although defendant raised this argument in his pro se brief before the PCR court, the PCR judge did not address the argument in his decision.

Under Bankston, an officer may not repeat "what some other person told him [or her] concerning a crime" to explain why the officer considered the defendant a suspect or took any other action. 63 N.J. at 268. This is because

[10] We reach the same conclusion regarding trial counsel's failure to raise defendant's youth as a mitigating factor at sentencing.

the "logical implication" of the latter sort of testimony will "lead[] the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt." Id. at 271. Such testimony thus violates the rule against hearsay because the non-testifying witness is not present in court and not subjected to cross-examination. Ibid. The Bankston rule applies at trial before a petit jury, rather than during a grand jury presentation. See Branch, 182 N.J. at 350 (explaining that the Bankston rule "[is] violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged" (emphasis added)). By contrast, "[a] grand jury may return an indictment based largely or wholly on hearsay testimony." State v. Vasky, 218 N.J. Super. 487, 491 (App. Div. 1987).

Here, prior to trial, defense counsel moved to dismiss the indictment raising the same arguments defendant advances in this appeal. The trial court denied the motion, noting that an indictment may be based on hearsay and other evidence that would not be admissible at trial, and concluding that the State presented proper evidence to the grand jury disclosing Manochio's sources of information during the investigation.

Although the issue was preserved for appeal purposes, we are satisfied that defendant's appellate counsel was not ineffective by not raising the Bankston issue in connection with Manochio's grand jury testimony, as the claim would not have been meritorious. See Jones, 463 U.S. at 753-54; Gaither, 396 N.J. Super. at 515. Moreover, as the trial court pointed out in denying the motion, defendant's claim that Manochio did not identify his sources of information before the grand jury is not supported by the record. On the contrary, Manochio's testimony revealed his sources, including J.W. and F.B.

H. Brady Violation

Defendant argues that the PCR judge erred by denying his petition without first holding an evidentiary hearing on his assertion that the State failed to disclose purported Brady material—a DVD recording of an interview of H.P. by Elizabeth Police Department (EPD) officers during which H.P. stated that D.B. and her mother, P.L., implicated Q in Reid's murder. He asserts that the evidence was "unquestionably favorable" to him, that it would have impacted the outcome of his case by pointing his counsel toward potential third-party guilt witnesses, undermining F.B.'s identification and calling into question the thoroughness of law enforcement's investigation.

Two years after defendant's trial, on February 12, 2013, a supervising assistant prosecutor provided defense counsel with discoverable materials that had not been previously disclosed. In an accompanying letter, the prosecutor stated that a "DVD-recorded interview of [H.P.] by [EPD] Detective Thomas Dubeau was inadvertently overlooked and was not turned over to [defendant] as part of . . . discovery." The prosecutor explained that "[a]lthough the interview contain[ed] solely inadmissible hearsay information," he was "of the opinion that the DVD should still have been released . . . in discovery."

The prosecutor expounded that "[u]pon learning that a copy of th[e] interview was not given to [defendant]," he "had the circumstances surrounding the discovery of the DVD memorialized." Additionally, "after watching the interview of [H.P.], [he] ordered UCPO [investigators] to conduct a recorded interview of [P.L.], a potential witness identified by [H.P.], who was apparently never interviewed by EPD Detective Dubeau." The prosecutor also forwarded to defense counsel "a DVD copy of [P.L.'s] interview," which was conducted on February 7, 2013, "along with the corresponding [i]nvestigation [r]eport."

H.P.'s interview with Dubeau was conducted on April 28, 2006, at the Essex County Prosecutor's Office. Dubeau told H.P. he was being questioned because "two names [were] being thrown around" in connection with Reid's

killing—"[H.P.'s] name and Q's name." In response, H.P. stated he was "locked up" at the time, but his girlfriend, D.B., and her mother, P.L., had told him that "Q" had killed Reid. According to H.P., P.L. had told him that "she [had] seen [Q] ditch the gun in the sewer." H.P. also said he had heard that Reid "was going around beating people [for drugs]," that Reid could have ripped off Q, and that Reid's girlfriend and Q had "set [Reid] up."

H.P. agreed to call P.L. from the interview room to confirm his account. During the call, although P.L. denied knowing anything about "a gun" in connection with the shooting, she stated, "[t]hat gun is gone." H.P. also called D.B., who told him she only knew what she had heard and did not have any personal knowledge about the shooting.

During P.L.'s February 7, 2013 interview with UCPO investigators, P.L. stated she "did[not] see anything" and everything she knew about Reid's shooting she had heard from "other people talking in the building." She said that although she had been "clean [for] six years," "back then," she "drank and did drugs" and "was kind of in a fog." As a result, she could not even recall who had told her about the incident.

In the accompanying memo explaining the circumstances surrounding the late discovery of H.P.'s DVD, Manochio stated that in August 2010, while

gathering evidence related to the investigation of Reid's murder from the EPD in preparation for defendant's upcoming trial, Manochio saw a DVD on Dubeau's desk with H.P.'s name and April 2006 printed on it. Manochio asked Dubeau if the video was part of the Reid homicide investigation. Dubeau replied that H.P. was a suspect in a home invasion that had also occurred in 2005 and that there was "'nothing on the video'" because H.P. "'did[not] say anything important.'" As a result, Manochio believed the DVD was not pertinent to the Reid murder investigation.

Nevertheless, the DVD was included in the box of evidence that the EPD turned over to the UCPO. Manochio stated that while going over the evidence with the assigned prosecuting attorney, he observed the DVD and told the prosecutor that it was "from another investigation" and must have been provided "in error." Manochio further explained that following the trial, while cataloging the evidence in preparation for its return to the EPD, he again came across the DVD and viewed it for the first time in January 2013 "[o]ut of curiosity." He "immediately realized its subject matter concerned the . . . Reid homicide, not the home invasion as [he] had assumed," and "immediately" informed the prosecutors.

Addressing defendant's claim of a Brady violation based on the late disclosure, the PCR judge found that neither H.P. nor P.L. had "firsthand knowledge of the murder and only knew what they had heard from other, often unidentified, people." The judge determined that "[a]ny testimony they could have presented therefore would have been hearsay." The judge also found that Q had testified at trial, giving the jury the chance to consider whether he killed Reid, and F.B. had "confirmed with 100% certainty that the individual she saw was [d]efendant and not Q." Thus, the judge concluded that any information H.P. and P.L. could have provided, if they could have testified at all, would not have changed the outcome. As a result, the judge determined that defendant did not demonstrate that "the information unintentionally withheld from the defense" was material evidence and that the State had violated Brady.

The suppression by the prosecution of evidence favorable to a defendant is a violation of due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. Three elements must be considered when deciding whether a Brady violation has occurred: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and

(3) the evidence must be material to the defendant's case." State v. Brown, 236 N.J. 497, 518 (2019).

Here, it is clear H.P.'s statement contained evidence favorable to the defense and the State conceded that it "inadvertently" failed to disclose the evidence, satisfying the first two elements of a Brady violation. Evidence is favorable to the accused where it simply bolsters a defendant's claims. State v. Nelson, 155 N.J. 487, 497 (1998). Further, "the Brady disclosure rule applies . . . to information of which the prosecution is actually or constructively aware," and knowledge, for Brady purposes, may be imputed from police to prosecutor. Id. at 497-500; see id. at 519 (Handler, J., concurring in part and dissenting in part) (collecting cases); see also State v. Mustaro, 411 N.J. Super. 91, 102 (App. Div. 2009) (imputing police officer's knowledge of a videotape of defendant's arrest to the prosecutor).

As to the third element:

> The materiality standard is satisfied if [the] defendant demonstrates that there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Stated another way, the question is whether in the absence of the undisclosed evidence . . . the defendant receive[d] a fair trial[,] which is understood as a trial resulting in a verdict worthy of confidence. If the undisclosed evidence was merely cumulative or

> repetitious as to the purpose for which it could have been used, the conviction should not be set aside.
>
> [Russo, 333 N.J. Super. at 134 (citations omitted).]

Thus, a new trial is not "automatically" warranted "whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" Giglio, 405 U.S. at 154 (quoting United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968)). Instead, to determine "whether there is a reasonable probability that the result of defendant's trial would have been different had the suppressed evidence been disclosed," we must consider the evidence suppressed as a whole and not "view in isolation the impact of each discrete item withheld." Russo, 333 N.J. Super. at 135. To that end, the potential effect of the withheld information must be considered "in the context of the entire record," State v. Marshall, 123 N.J. 1, 199-200 (1991), with attention to "the strength of the State's case, the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility," Brown, 236 N.J. at 519. Because "the issue of materiality is a mixed question of law and fact," the trial judge's "conclusion regarding whether defendant sustained his burden of proof is not entitled to the same deference as [the judge's] factual findings." Russo, 333 N.J. Super. at 135.

Applying these principles, we find no error in the PCR judge's determination that H.P.'s statement was not material. The statement itself and any testimony H.P. could potentially have given would not have been admissible. H.P. only reported to police things he had heard from others. He had no personal knowledge about the shooting or about any alleged gun disposal by Q. Thus, his testimony would have been inadmissible hearsay. Further, in her statement, P.L. did not corroborate H.P.'s account that she had seen Q drop a gun down a sewer. Instead, like H.P., P.L. only reported things she had heard from others and had no personal knowledge about the shooting.[11]

Although P.L. told H.P. during their telephone conversation, "[t]hat gun is gone," under the circumstances, that comment would not have created a reasonable doubt as to defendant's guilt given P.L.'s admission of impaired memory from extensive drug and alcohol use, Q's trial testimony denying any involvement in the killing, and F.B.'s eyewitness identification of the shooter. See Kyles v. Whitley, 514 U.S. 419, 434-35 (1995) (explaining that a "reasonable probability" of a different result is shown when the undisclosed, favorable evidence "could reasonably be taken to put the whole case in such a

[11] Defense counsel was already aware of D.B. as a potential witness, rendering her part in H.P.'s interview "merely cumulative" of other evidence made available to the defense. Russo, 333 N.J. Super. at 134.

different light as to undermine confidence in the verdict"); see also United States v. Agurs, 427 U.S. 97, 112 (1976) ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."). Here, there was no Brady violation warranting an evidentiary hearing or a new trial.

I. Cumulative Error

We reject defendant's assertion that the alleged errors require reversal because of their aggregate and cumulative impact. See State v. Jenewicz, 193 N.J. 440, 447 (2008) (holding the cumulative impact of trial errors may merit a new trial when it "casts doubt on the fairness of [a] defendant's trial and on the propriety of the jury verdict that was the product of that trial").

J. Conclusion

In sum, with one exception, we reject each of defendant's arguments and affirm the denial of PCR without an evidentiary hearing. We reverse and remand for an evidentiary hearing limited to the issue of defendant's claim that his trial attorney was ineffective by failing to investigate and call his alleged alibi witnesses. Contrary to defendant's contention, we do not believe it is necessary for the case to be assigned to a different judge on the remand.

We acknowledge that Rule 1:12-1(d) and (g) provide that a judge shall be disqualified from presiding if he or she "has given an opinion upon a matter in question in the action," or "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." The rule has been applied to disqualify a judge from hearing matters on remand if he or she has demonstrated a "commitment to [his or her] findings," N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 617 (1986), or "has already engaged in weighing the evidence and has rendered a conclusion on the credibility of . . . witnesses" where such weighing was improper at the current stage of the proceeding, In re Guardianship of R., 155 N.J. Super. 186, 195 (App. Div. 1977).

In State v. Thompson, 405 N.J. Super. 163 (App. Div. 2009), we determined that the defendant "made out a prima facie case of [IAC] sufficient to require . . . an evidentiary hearing" and assigned the matter "to another judge on remand" because "the PCR judge seem[ed] committed to the outcome of the trial based on his comments in reconstructing the record." Id. at 171-72 (citing R. 1:12-1(d)). However, on this record, we discern no such commitment to the outcome on the part of the PCR judge.

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