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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0431-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES JOHNSON,

Defendant-Appellant.

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Submitted May 1, 2023 – Decided May 30, 2024

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 15-06-1409.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Suzannah Brown, Designated Counsel, on the briefs).

Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

SMITH, J.A.D.

Defendant James Johnson appeals from the denial of his post-conviction relief (PCR) petition. Defendant contends trial counsel was ineffective by failing to investigate and present alibi evidence at trial. Defendant further argues he is entitled to a new hearing because PCR counsel failed to provide the court with trial transcripts. We reverse and remand for a new evidentiary hearing to include evaluation of trial counsel's investigation of alibi footage.

I.

We adopt the facts as summarized in defendant's direct appeal:

Jose Rosario is an electrician and owner of Rosemar Construction. After finishing a job in Newark on December 9, 2013, around 5:00 p.m., Rosario and an electrician's helper were traveling to the Home Depot on Springfield Avenue, Newark. The electrician's helper was driving a small SUV Mercedes-Benz Rosario used as a business and personal vehicle. Rosario was in the passenger seat. The vehicle was stopped at a red light at the intersection of Springfield Avenue and South 14th Street in Newark when it was rear-ended by another vehicle.

Rosario exited and walked to the rear of the Mercedes to examine the damage. Defendant, who had a garment covering the area from his bottom lip to his neck, was wearing military-like black clothing, and what looked like a bullet-proof vest, exited the passenger side of a black Range Rover, which had struck the Mercedes. According to Rosario, defendant threatened him with a boxy black handgun, and,

between two and four times, aggressively ordered, "Give me the fucking key." Rosario responded, "No, you're not getting my key."

At that point, defendant lunged at Rosario and ripped off the gold chain Rosario was wearing. Defendant then ran back to the Range Rover. The electrician's assistant exited the Mercedes and [laid] on the nearby sidewalk in a fetal position.

Believing the ordeal was over, Rosario returned to the passenger side of the Mercedes. However, before Rosario could enter the Mercedes, defendant entered the vehicle and sat in the driver's seat. Rosario testified defendant attempted to push Rosario out of the vehicle with the hand in which he held the gun while Rosario's body was "halfway in, halfway out of the vehicle."

Defendant started to drive the Mercedes while Rosario was in it, causing Rosario's legs to drag on the street while he held the door handle of the vehicle. According to Rosario, defendant turned onto South 14th Street, and continued to "drag[ ] [Rosario until] . . . the vehicle hopped on the sidewalk," causing Rosario to fall out of the Mercedes. Rosario testified he "tumbled and rolled" and hit his shoulder and head on the curb. Rosario observed defendant drive the Mercedes down South 14th Street, with the Range Rover following immediately behind. Rosario suffered abrasions on his shoulder, knees, and face, his pants were ripped, and his ankle was twisted.

Rosario described defendant as a bit taller than 5'8", between 160 and 170 pounds, and testified he saw defendant's eyebrows, forehead, nose, and cheeks during the incident. Rosario also testified his wallet containing six credit cards, a briefcase containing his

laptop and permits, and his checkbook were in the Mercedes at the time.

Detective Joseph Domicoli, a Belleville detective, was assigned to the county-wide carjacking task force from June 2013 to June 2014. He had investigated over fifty carjackings during this one-year period. Domicoli traveled to the scene with other officers and did not locate any witnesses or surveillance cameras in the area. In December 2013, Domicoli took a video-taped statement from Rosario who described defendant as "a black youth, [in his early thirties] or . . . late [twenties] . . . [whose] height was between five-eight and five-nine, because he was just an inch or so over me." Rosario stated "[defendant] was wearing a full black outfit [which was] vest-like in the front. He had a ski mask, but it was down to underneath his nose. His nose was flat . . . [h]e had a wide nose . . . dark eyes and had a lot of hair on his eyebrows."

After the interview, Rosario discovered activity on his missing credit card. He informed Domicoli, who traveled to Lori's Gift Shop at Beth Israel Hospital, Newark, where the card had been used. Domicoli looked at two receipts from the shop and a video from the surveillance camera in the hospital's lobby. Catherine Municchi, a district manager responsible for Lori's Gift Shop, testified and authenticated the receipts, which showed a MasterCard in Rosario's name had been used at the shop on December 10, 2013, at 1:14 p.m. and 1:32 p.m. The surveillance video from the camera in the lobby near the gift shop showed two black males during the time of the credit card activity. He also saw a female, identified as a hospital employee named Kimberly Rivers, hug defendant before he entered the gift store.

Domicoli interviewed Rivers at the hospital on December 13, 2013. At trial, Rivers testified she was acquainted with defendant and noticed him and another individual whom she did not know in the hospital lobby on December 10, 2013. Defendant and Rivers hugged and briefly spoke with each other. Rivers had known defendant for about four or five months and had seen him in the neighborhood where she lived. Domicoli showed Rivers a still shot from the video depicting defendant. Upon seeing the photo, Ms. Rivers stated, "Oh, that Beay–Beay," referring to defendant by his nickname. She told Domicoli Beay–Beay's first name is James, and later recalled his last name was Johnson. At trial, Rivers identified defendant in the video and in court.

Municchi also authenticated a video from a surveillance camera located in the gift shop. The video depicts that defendant and another man purchased items on December 10, 2013, at 1:14 p.m. and 1:32 p.m., and the man with defendant used the credit card to make the purchases and signed the receipts.

Domicoli assembled a photo array consisting of defendant's photograph and the photographs of five other men with similar characteristics as defendant. On December 13, 2017, a member of the carjacking task force arranged to have Prosecutor's Detective Luigi Corino, who was not involved in any way in the investigation of the case, show the array to Rosario. Domicoli did not tell Rosario about the video and receipts from the hospital gift store, his conversation with Rivers, or that he had identified a suspect. Nor did he show Rosario any video. Likewise, Detective Domicoli did not tell Detective Corino anything about the case.

Corino read Rosario the photo display instructions, promulgated by the Attorney General's guidelines. These instructions informed Rosario: (1) he did not have to select a photograph; (2) the photograph of the person who committed the crime may or may not be in the array; (3) the mere display of a photograph did not suggest the police believed the culprit was in one of the photographs; (4) appearances may have changed because of changes in hairstyle, the presence or absence of facial hair, and weight gain or loss; (5) the detective did not know who the suspect was and Rosario would not receive feedback from him; and (6) it was Rosario's choice that counts. Rosario signed the form containing the instructions and appeared to understand them. Detective Corino showed Rosario each of the six photographs separately.

Upon seeing defendant's photograph, Rosario stated, "That's him. That's the guy, clearly. I can't forget, with the gun, I'll never forget that." Rosario signed defendant's photograph and initialed the other photographs. On the photograph identification form, Rosario stated defendant's photograph was of a "black male who carjacked me with a gun." Rosario acknowledged on the form no one threatened or coerced him to select a photograph. At trial, Rosario explained he signed defendant's photograph because "it was the person who tried to steal my car, or did steal my car." Rosario had time to look at the photographs, but he "picked that one right away, immediately." Rosario identified defendant in court.

On December 16, 2013, Officer Michael Grainger was on patrol when the license plate recognition system, which alerts an officer to vehicles that were stolen or involved in serious crimes, alerted him to a Mercedes Benz located at Renner Avenue in Newark. Once activated, the license plate recognition

system provides the name of the vehicle's owner, its vehicle identification number, and the date of the crime in which it was involved. The system indicated the Mercedes on Renner Avenue was involved in a carjacking at gunpoint and was stolen. Officer Grainger had the vehicle towed and notified the task force of the vehicle's recovery. On December 16, 2013, defendant was arrested pursuant to a warrant.

On December 23, 2013, Crime Scene Unit Identification Officer Jacquenetta Moton processed the Mercedes at the towing company location. She was unable to recover usable fingerprints or anything else of evidential value from the vehicle.

Defendant was indicted under Essex County Indictment Number 15-06-1409 with the following crimes: count one, second-degree conspiracy to commit carjacking, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-2; count two, first-degree carjacking, inflicting bodily injury or using force against . . . Rosario, N.J.S.A. 2C:15-2(a)(1); count three, second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); count four, second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a); count five, second-degree attempt to cause serious bodily aggravated assault, N.J.S.A. 2C:12-1(b)(1); count six, third-degree credit card theft, N.J.S.A. 2C:21-6(c)(5), amended before trial to fourth-degree credit card theft, N.J.S.A. 2C:21-6(c)(1); and count seven, fourth-degree forgery, N.J.S.A. 2C:21-1(a)(3). Defendant was convicted of all charges, except aggravated assault.

Following the jury's verdict, defendant pled guilty to the charge of second-degree certain persons not to possess a handgun, N.J.S.A. 2C:39-7, contained in Essex County Indictment No. 14-08-2088. Also,

during his trial defendant was sentenced, consistent with the plea agreement, to an aggregate term of five-years incarceration on Essex County Indictment No. 15-[0]3-617, which has been disposed of by defendant pleading guilty to second-degree eluding, third-degree receiving stolen property, and fourth-degree simple assault on a law enforcement officer. Indictment No. 15-03-617 had no connection to Indictment No. 15-06-1409.

[State v. Johnson, No. A-1502-16 at 1–3 (App. Div. Apr. 6, 2018) (alterations in original).]

On November 4, 2016, defendant was sentenced to an aggregate thirty-year extended prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Id. at 10. On April 6, 2018, we upheld defendant's convictions and sentence on appeal. Id. at 19. On March 21, 2019, the Supreme Court denied defendant's petition for certification. State v. Johnson, 237 N.J. 201 (2019).

Defendant filed a timely PCR petition alleging ineffective assistance of counsel and requested an evidentiary hearing. On March 25, 2021, Judge John Zunic held a hearing remotely via Zoom. At the hearing, the court heard the testimony of: defendant; Tadir Black, defendant's girlfriend at the time defendant was arrested; Steven Roth, Esq., defendant's bail counsel; and Steven Plofsky, Esq., defendant's trial counsel.



The following facts were adduced at the PCR evidentiary hearing. On December 9, 2013, defendant was interning at a local mechanic shop approximately ten houses away from his grandmother's housing complex. He arrived at the complex sometime between 5:10 p.m. and 5:20 p.m. Black testified defendant was home when the alleged carjacking occurred. On December 18, 2013, defendant was arrested. Defendant instructed Black to recover video tape footage showing his arrival at the housing complex. To prevent erasure, Black immediately retained bail counsel to subpoena the housing complex manager to retrieve the film. The video had "digital clarity" issues and Black brought the video to a technician for enhancement and alteration into a different format. Black could not recall the video technician's name or location, however, she was able to view the video and saw defendant walking in the housing complex.

Bail counsel also viewed the video and identified defendant because he had visited defendant twice in jail and recalled defendant "just happens to look like football player Hers[c]hel Walker." Prior to defendant's bail hearing, bail counsel attempted to show the video to the assistant prosecutor to negotiate a favorable deal for defendant's release. However, the video would not play on the courthouse system, and bail counsel testified "[y]ou could see James there,

but . . . it just kept jamming." Instead, bail counsel placed on the record that he viewed the video and saw defendant entering the housing complex. As a result, defendant's bail was reduced, and he was released pending trial. Bail counsel still had a copy of the video, but maintained it was no longer "readable."

Defendant testified he viewed the video with Black and trial counsel. Defendant "asked [trial counsel if he was] going to use the video and [counsel] said the judge will not permit him to." Defendant also testified he informed trial counsel he wished to use Black as an alibi witness, but trial counsel did not think it was necessary because the suspect was "wearing a mask." Defendant claimed counsel advised him he would be charged at most with credit card fraud.

The State asked trial counsel if he was familiar with Tadora Black. Trial counsel responded, "The name doesn't ring a bell to me." Trial counsel could not recall whether "a family or friend of [defendant indicated] . . . they were willing or wanted to testify at his trial." He also could not recall whether he met with defendant at his West Orange office or public defender's office to review discovery and discuss a defense strategy. Counsel discussed trial strategy, primarily efforts to impeach Rosario based on the co-defendant's misidentification and the State's "sloppy police work."

On July 19, 2021, Judge Zunic issued a nineteen-page written decision in which he made extensive credibility findings on the four witnesses. First, the judge found defendant's testimony was "inconsistent and . . . not credible," and concluded defendant made no mention of his alibi defense or internship at the time of trial or prior proceedings. The court also reasoned defendant's testimony was not credible because he pled guilty to possessing a handgun in connection to this case, reasoning "[t]his plea undermines his claim of innocence." The court was also skeptical trial counsel would "view[] a video potentially exonerating [defendant] of a carjacking charge, [and] simply cast it aside and not use it." The court concluded it was more believable the video did not work and was returned.

The judge found Black "not a fully credible witness." However, the judge did find her credible on the existence of housing complex video. Nonetheless, he found her testimony unsupported when she "failed to provide an explanation as to the nature of, or reason for, the enhancement." Addressing the chronology of events, the court found Black's testimony "inconsistent." The judge noted defendant testified he arrived home between 5:15 p.m. and 5:20 p.m. and entered the complex with Black. In contrast, Black testified she was at home at 5:00 p.m. defendant was already home to let her in. Overall, the judge found her

testimony "casts doubt" and their acts were "not possible based on their testimony."

Addressing bail counsel's testimony, the judge found him "to be credible and . . . [had] no reason to disbelieve his testimony, although it did not assist the [c]ourt . . . [because his testimony] was limited to the bail hearing and he was not contacted by anyone after that." The court believed bail counsel viewed the tape; however, there were issues with the clarity of the video after the bail hearing, which was consistent with everyone's testimony.

Next, the court found trial counsel presented "a sound legal defense . . . on a theory of mistaken identification." Trial counsel rationalized he could not pursue an alibi defense because he had nothing to support defendant's alibi, including a playable video tape or list of potential witnesses. The court also noted trial counsel testified he gave the video back to defendant, which is consistent with the itemized list received by subsequent counsel which did not include the video.

Overall, the court concluded defendant failed to establish a prima facie case showing ineffective assistance of counsel, and therefore, was not entitled to PCR.

The court first addressed counsel's election not to file a Wade<sup>1</sup> motion. The judge found defendant failed to satisfy the first prong of the Strickland-Fritz<sup>2</sup> standard because counsel's "strategy to demonstrate that the victim had identified the wrong suspect as the perpetrator's accomplice, and in doing so, cast doubt on the victim's identification of [d]efendant" was "a sound legal strategy." The court next found defendant failed to meet the second prong because "[d]efendant failed to show that the [Wade] motion would have any merit or that it would have been a successful defense."

The PCR court addressed whether defendant established an ineffective assistance claim when trial counsel "fail[ed] to use the surveillance footage to present an alibi defense." The court found "[n]o credible proof as to an alibi has been presented by [d]efendant or anyone else." The court stated "[t]he crime was committed not far from where [d]efendant lived, approximately ten blocks or less than a mile. It is certainly plausible that [d]efendant committed the carjacking as described by the victim before returning to the apartment complex and then entering with [Black] a short time later . . . ."

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<sup>1</sup> United States v. Wade, 388 U.S. 218 (1967).

<sup>2</sup> Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42 (1987).

The court concluded defendant failed to "show that the deficient performance prejudiced the defense." The court found "[n]othing presented by [d]efendant demonstrates the outcome would have been different. No playable version of the video has been presented." The court also found "[t]he evidence against [d]efendant in this case was substantial." Ultimately, the court found defendant was not deprived of his Sixth Amendment right to counsel at trial.

Defendant argues the following points on appeal:

I. THE PCR COURT ERRED IN DENYING [DEFENDANT]'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE AND PRESENT ALIBI EVIDENCE AT TRIAL.

II. DEFENDANT IS ENTITLED TO A NEW EVIDENTIARY HEARING BECAUSE PCR COUNSEL FAILED TO MEET THE MINIMUM STANDARDS OF PROFESSIONAL CONDUCT IMPOSED ON PCR ATTORNEYS UNDER RULE 3:22-6(D) BY NOT PROVIDING THE TRANSCRIPTS OF PROCEEDINGS BEFORE THE TRIAL COURT TO THE PCR.

III. THE PCR COURT MISTAKENLY EXERCISED ITS DISCRETION BY HOLDING THE EVIDENTIARY HEARING REMOTELY AND THE MATTER SHOULD BE REMANDED FOR AN IN-PERSON EVIDENTIARY HEARING.

II.

"[PCR] is New Jersey's analogue to the federal writ of habeas corpus." State v. Afanador, 151 N.J. 41, 49 (1997) (citing State v. Preciose, 129 N.J. 451, 459 (1992)). "It is a safeguard to ensure that a defendant was not unjustly convicted." Ibid. (citing State v. McQuaid, 147 N.J. 464, 482 (1997)). It provides a final opportunity for a defendant to raise a legal error or constitutional issue, including violation of the right to the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article I, Paragraph [Ten] of the New Jersey Constitution, which may have caused an unjust result. State v. Hess, 207 N.J. 123, 144-46 (2011); see also Afanador, 151 N.J. at 49 ("Ordinarily, PCR enables a defendant to challenge the legality of a sentence or final judgment of conviction by presenting contentions that could not have been raised on direct appeal." (citing McQuaid, 147 N.J. at 482-83)).

Where the PCR court has conducted an evidentiary hearing, our review "is necessarily deferential to [the] PCR court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013). Additionally, we defer to a judge's credibility findings because they are "substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot

enjoy." State v. Rockford, 213 N.J. 424, 440 (2013) (alteration in original) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Where an evidentiary hearing has been held, we do not disturb "the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting Nash, 212 N.J. at 540). We review any legal conclusions of the PCR court de novo. Nash, 212 N.J. at 540-41.

Although we do not typically address claims raised for the first time on appeal, an appellate court will do so when "the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Robinson, 200 N.J. at 20 (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). We also "retain the inherent authority to 'notice plain error not brought to the attention of the trial court[,] provided it is 'in the interests of justice' to do so." Ibid. (second alteration in original) (quoting R. 2:10-2).

### III.

#### A.

We first consider defendant's argument that trial counsel was ineffective for failing to present alibi evidence. Defendant argues trial counsel should have presented video evidence showing he entered the housing complex at the time the carjacking was taking place and called Black as an alibi witness. Defendant



then argues the PCR court relied too heavily on trial counsel's strategy which viewed the evidence as not strong enough to justify forgoing an alibi defense.

We analyze ineffective assistance of counsel claims using the two-prong test established by the Supreme Court in Strickland. See Preciose, 129 N.J. at 459; see also State v. Fritz, 105 N.J. 42, 58 (1987). The first prong of the Strickland test requires a petitioner to establish counsel's performance was deficient. Preciose, 129 N.J. at 463. There is a strong presumption counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. "[I]f counsel makes a thorough investigation of the law and facts and considers all likely options, counsel's trial strategy is 'virtually unchallengeable.'" Nash, 212 N.J. at 542 (alteration in original) (quoting State v. Chew, 179 N.J. 186, 217 (2004)). "The second, and far more difficult, prong of the [Strickland] test is whether there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 463-64 (quoting Strickland, 466 U.S. at 694).

The "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction." State v. Porter, 216 N.J. 343, 353 (2013). Indeed, "few defenses have greater potential for creating reasonable

doubt as to a defendant's guilt in the minds of the jury [than an alibi]." Ibid. (alterations in original) (quoting State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977)). "[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Cummings, 321 N.J. Super 154, 170 (1999).

Counsel's decision to "forego evidence that could have reinforced [an] alibi" may "f[all] below the objective standard of reasonableness guaranteed by the United States and New Jersey constitutions." Pierre, 223 N.J. at 583. "But strategy decisions made after less than complete investigation are subject to closer scrutiny." State v. Savage, 120 N.J. 594, 617-18 (1990). Indeed, when counsel conducts an inadequate or no investigation, "counsel deprive[s] himself [or herself] of a reasonable basis on which to later make informed tactical defense decisions." Id. at 620-21.

We acknowledge the thorough findings and credibility determinations which the PCR court made, that are entitled to significant deference. Nash, 212 N.J. at 540. The PCR court noted that bail counsel claimed to have viewed the video, but his copy became corrupted or otherwise not viewable. Trial counsel

then indicated he was given a copy that was not viewable and returned it to defendant or Black. The record shows the video was corrupted. However, our thorough review of the record shows no indication that trial counsel attempted to retrieve a viewable copy. The PCR court found counsel exercised a "sound legal strategy" for focusing on impeaching Rosario's testimony and "sloppy police work." On this record, however, we are persuaded that remand for further hearing regarding trial counsel's efforts to obtain a viewable copy of the video is appropriate.

When we consider these facts under the first Strickland prong, we conclude a reasonable attorney under the circumstances would have made attempts to retrieve a viewable copy of potentially exonerating video evidence. If no attempt was made, then counsel failed to "make[] a thorough investigation of the law and facts." Nash, 212 N.J. at 542. Although trial counsel's strategic decision to impeach Rosario was reasonable, that strategic decision does not account for the fact that counsel was in possession of a corrupted, potentially exonerating film, and chose to "forego evidence that could have reinforced [an] alibi." Pierre, 223 N.J. at 583; see also Savage, 120 N.J. at 617-18 ("[S]trateg[ic] decisions made after less than complete investigation are subject to closer scrutiny.") An attorney exercising "reasonable professional judgment,"

Strickland, 466 U.S. at 690, would have conducted a "thorough investigation," Nash, 212 N.J. at 542, of a potential alibi defense, which would have included attempting to obtain a viewable copy of the video or to have the corrupted version restored.

The second prong of Strickland requires defendant show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Pierre, 223 N.J. at 583 (quoting Strickland, 466 U.S. at 694). Had a viewable film been produced and shown at trial, a jury could have reasonably concluded defendant did not commit the crimes. While the evidence inculpatory defendant is significant, a video purporting to show defendant entering the complex between 5:15 and 5:20 could have generated reasonable doubt. We conclude defendant made a sufficient showing that he was prejudiced by an insufficient investigation by trial counsel.

## B.

We next consider defendant's claim that he is entitled to a new hearing because the PCR court was not provided with trial transcripts. We note the right to the effective assistance of counsel extends to PCR counsel. See State v. Rue, 175 N.J. 1, 18-19 (2002). PCR counsel must "advance all of the legitimate

arguments requested by the defendant that the record will support," Rule 3:22-6(d), and "make the best available arguments in support of them," Rue, 175 N.J. at 19. Even if PCR counsel deems the claims to be meritless, counsel must "list such claims in the petition or amended petition or incorporate them by reference." R. 3:22-6(d); see also State v. Webster, 187 N.J. 254, 257-58 (2006).

Defendant does not raise an ineffective assistance of counsel claim against his PCR counsel, but rather argues the PCR court relied on this court's statements of facts without the benefit of reviewing the trial transcripts. Having reviewed the record, we conclude PCR counsel failed to provide the PCR judge with relevant trial transcripts. Judge Zunic presided over defendant's trial in March 2016. The evidentiary hearing was held in March 2021, five years after defendant was convicted. Although there is no indication the judge relied on his memory to recall the facts of this case, the PCR court did not have pertinent transcripts to make a proper assessment of defendant's PCR petition. Defendant makes claims grounded within and without the trial record. It is extremely difficult, if not impossible, to verify defendant's claims without the trial record. We conclude PCR counsel did not meet the minimum standards under Rue and Webster.

C.

Finally, we consider defendant's argument the PCR court abused its discretion by holding a remote evidentiary hearing. The right of an accused individual to be present at his trial "is among the most fundamental of constitutional rights." State v. Grenci, 197 N.J. 604, 614 (2009). This right can be waived "[i]n appropriate circumstances." Grenci, 197 N.J. at 615. Under Rule 3:16(b), "[a] waiver may be found . . . from . . . the defendant's express written or oral waiver placed on the record."

In response to the COVID-19 pandemic, the Supreme Court of New Jersey suspended in-person hearings and trials to comply with stay-at-home mandates. State v. Smith, 465 N.J. Super 515, 522-23 (App. Div. 2020). The Court balanced "the competing interests of those involved in jury trials, such as defendants, victims, jurors, counsel, and members of the judiciary." Ibid. On February 23, 2021, the Court, through the Administrative Office of the Courts (AOC), promulgated an order detailing the rapidly changing pandemic protocols for remote hearings.<sup>3</sup> The directive "provide[d] a protocol to support consistent management of cases that require the consent or lack of objection of all parties to proceed in a remote format during the temporary modifications necessitated

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<sup>3</sup> Admin. Off. of the Cts., Administrative Directive #06-21, COVID-19 – Protocol for Matters that Cannot Proceed in a Remote Format Without Consent (Feb. 23, 2021).

by the ongoing COVID-19 pandemic . . . ." (emphasis added). Among the matters directed to be "conducted remotely using video and/or phone options only with the consent of all parties[,]" were "[e]videntiary hearings and bench trials in [c]riminal matters."

Defendant argues he never consented to a virtual evidentiary hearing and is entitled to a remand. The record shows no indication the parties consented to a virtual hearing. However, the record also indicates defendant or defense counsel did not object to the remote hearing. We conclude the PCR court committed harmless error by failing to ask the parties if they wished to proceed virtually. The court's detailed credibility findings indicate it had no difficulty observing the witnesses' demeanor and non-verbal cues. The record neither reflects any adverse impact on defendant's right to confront witnesses nor due process violations.

Reversed and remanded for a new evidentiary hearing and assignment of new PCR counsel.

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

  
CLERK OF THE APPELLATE DIVISION