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

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0665-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEONARD K. JOHNSON,  
a/k/a LEONARD K. FLAGG,  
KEITH L. FLAGG,  
KEITH JOHNSON,  
MARCUS W. FLAGG,  
and LEONARD K. JOHNSON,

Defendant-Appellant.

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Submitted May 28, 2024 – Decided June 10, 2024

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law  
Division, Cumberland County, Indictment No.  
15-09-0825.

Jennifer Nicole Sellitti, Public Defender, attorney for  
appellant (Steven M. Gilson, Designated Counsel, on  
the brief).

Jennifer Webb-McRae, Cumberland County  
Prosecutor, attorney for respondent (Stephen  
Christopher Sayer, Assistant Prosecutor, of counsel and  
on the brief).

## PER CURIAM

Defendant Leonard Johnson appeals from the September 21, 2022 order of the Law Division denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We reverse and remand for an evidentiary hearing.

### I.

Tried by a jury, defendant was convicted of the first-degree armed robbery, N.J.S.A. 2C:15-1, of a Vineland bank. The court sentenced defendant to a fifteen-year term of incarceration, subject to an eighty-five-percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Prior to trial, defendant moved pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), to suppress inculpatory statements he made during an interview with police and a Federal Bureau of Investigation (FBI) agent. In support of his motion, defendant argued that the officers continued to interrogate him after he invoked his right to remain silent. Defendant relied on an exchange with a detective during which he said "I don't have anything to say about it[,] "I'm

saying, if we've got to go to court, that what (inaudible)[,]" and "I don't have anything to say. You all want to ask a question, I'll answer the question."

The trial court denied the motion. After reviewing the video recording of the interrogation, the court concluded that defendant did not make a clear invocation of his right to remain silent. The court appears to have examined only the passage identified by defendant in his motion papers.

We affirmed the trial court's decision on the suppression motion, as well as defendant's convictions and sentence. State v. Johnson, No. A-2312-17 (App. Div. Jan 13, 2020). Our decision was based on "the specific portion of the interview [defendant] identifies as his statement that he no longer wanted to answer questions . . . ." Id. slip op. at 15.

The Supreme Court denied certification. State v. Johnson, 243 N.J. 259 (2020). Justice Albin dissented. After recounting defendant's unsuccessful motion to suppress and this court's decision, Justice Albin stated,

[t]he trial court and Appellate Division, however, failed to consider Johnson's seemingly unambiguous assertion of his right to remain silent later in the interrogation. Significantly, Johnson's appellate and trial counsel apparently never brought that part of the interrogation to the courts' attention.

[Id. at 260.]

The Justice then "detail[ed] the critical part of the colloquy overlooked by counsel and the courts that raises a substantial question under our jurisprudence." Ibid. Justice Albin recounted an exchange between defendant and a detective that begins at approximately the fifty-minute mark of the recording of the interrogation. Id. at 260-61. During that exchange, in response to a statement by the detective intended to illicit a confession, defendant said "I have nothing to say." Id. at 261. The officers continued to interrogate defendant after he made that statement.

Justice Albin expressed the view that the statement was a clear invocation of defendant's right to remain silent that was ignored by the officers, warranting a grant of certification for correction of a plain error. Id. at 261-62. The Justice concluded,

[a]lthough the majority has voted not to grant Johnson's petition for certification, he is not without a remedy. In a post-conviction-relief petition, he can still seek relief on the claim that his counsel rendered ineffective assistance of counsel by not bringing to the court's attention Johnson's later attempt to invoke his right to remain silent in words a layperson – not a constitutional scholar – would use.

[Id. at 262.]

Defendant subsequently filed a PCR petition in the Law Division. He alleged that his trial and appellate counsel were ineffective for failing to argue

that the statement identified by Justice Albin was an unequivocal invocation of his right to remain silent that was ignored by the officers.<sup>1</sup>

The PCR court dismissed the petition without holding an evidentiary hearing. In a written opinion, the court concluded that the motion court and this court considered the full recording of defendant's interrogation when rejecting defendant's arguments. The PCR court continued, "[t]he fact that motion counsel and appellate counsel may have limited their argument to certain parts of the record appears to have not limited either court since each indicted that they reviewed and considered the entire record." In addition, the court found that even if defendant's trial and appellate counsel failed to identify the second purported invocation, such a decision was likely strategic, the failure of which does not constitute ineffective assistance of counsel. Finally, the court concluded that "[t]he Miranda issue had already been fully vetted by the

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<sup>1</sup> This argument was asserted for the first time in a written submission by defendant's counsel. Defendant's petition, which he drafted and filed without assistance of counsel, raised a number of issues relating to the grand jury and trial errors. The trial court found that the allegations in the petition were vague, lacking in specificity, and without reference to the record. In addition, the trial court concluded that defendant raised several of the issues in his direct appeal, where they were rejected. Defendant's counsel raised a number of other arguments before the trial court, but the only issue defendant raises before this court is his allegation of ineffective assistance of trial and appellate counsel relating to their failure to identify the purported invocation identified by Justice Albin as a basis for his suppression motion.

Appellate Division and as such is barred by R. 3:22-5 for this court to consider it substantively." A September 21, 2022 order memorializes the trial court's decision.

This appeal follows. Defendant raises the following argument.

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL AND APPELLATE COUNSELS' INEFFECTIVENESS FOR FAILING TO RAISE DEFENDANT'S UNAMBIGUOUS ASSERTION OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT DURING HIS INTERROGATION, WHICH WOULD HAVE RENDERED HIS CONFESSION INADMISSIBLE.

## II.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a defendant is entitled to post-conviction relief if there was a "'substantial denial in the conviction proceedings' of a defendant's state or federal constitutional rights." Ibid. (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Ibid. "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. Mitchell, 126 N.J. at 579.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland, and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58.

Under Strickland, a defendant first must show that his or her attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense[,]" id. at 687, because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[,]" id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Ibid. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies." Id. at 697; State v. Marshall, 148 N.J. 89, 261 (1997). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

We review a judge's decision to not hold a PCR evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing Marshall, 148 at 157-58). A hearing is required only when: (1) a defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). "A prima facie case is established when a defendant demonstrates '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.'" Id. at 355 (quoting R. 3:22-10(b)).

Where a PCR court does not hold an evidentiary hearing, this court's standard of review is de novo as to both the factual inferences drawn by the trial court from the record and the court's legal conclusions. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016); see State v. Lawrence, 463 N.J. Super. 518,



522 (App. Div. 2020) (quoting State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)).

"[T]o establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). A PCR petition must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity[,]" State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance[,]" Porter, 216 N.J. at 355 (quoting Cummings, 321 N.J. Super. at 170); see also R. 3:22-10(c).

We have carefully reviewed the record in light of these principles and conclude the PCR court erred when it rejected defendant's ineffective assistance of counsel claims without holding an evidentiary hearing. Defendant set forth with specificity a prima facie case in support of PCR. He alleged that his trial and appellate counsel were ineffective because they failed to identify what he alleges to be a clear invocation of his right to remain silent at about the fifty-minute mark of the interrogation recording. Although the PCR court found that both the motion court and this court considered that purported invocation when rejecting defendant's motion to suppress, a review of our decision does not

support that conclusion. We identify only the purported invocation of defendant's right to remain silent shortly after the FBI agent joined the interrogation much earlier than the fifty-minute mark in the recording. The record does not support the conclusion that judicial consideration was given to whether the second purported invocation effectively invoked defendant's right to remain silent.

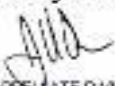
In addition, the PCR court found that even if trial and appellate counsel failed to identify the later purported invocation, doing so was a strategic decision. This finding, however, was made without the benefit of testimony from trial and appellate counsel. It is not possible on the record before this court to determine if there is sufficient support for the PCR court's finding on this point.

Finally, in order to determine whether defendant is entitled to PCR, the PCR court must determine whether, if trial and appellate counsel failed to raise the second purported invocation, either as a matter of strategy or through oversight, their failure to do so led to a result that would not otherwise have occurred. Put another way, the PCR court must determine whether the motion court or this court would have suppressed defendant's inculpatory statements had his counsel relied on the second purported invocation.

We therefore vacate the September 21, 2022 order and remand for an evidentiary hearing. We offer no opinion with respect to whether defendant is entitled to PCR.

Reversed and remanded for 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