

STATE OF NEW JERSEY,

Plaintiff,

vs.

EUGENE CADY,

Defendant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-000908-24T5

Criminal Action

On Appeal From
Superior Court of New Jersey,
Law Division, Union County

Indictment No. 13-06-00597-I

Sat Below:
Hon. Candido Rodriguez, Jr., J.S.C.

BRIEF ON BEHALF OF APPELLANT

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N.J.S.A. 2C:39-4a2

N.J.S.A. 2C:39-5b2

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U.S. Const. Amend. VI13

PRELIMINARY STATEMENT

This appeal arises out of the denial of Appellant Eugene Cady’s (“Cady”) application for post-conviction relief. In his application, Cady asserted that he had informed his trial counsel multiple times of an eyewitness who could testify regarding Cady’s whereabouts the night of the shooting in question, testimony which would undercut the State’s witnesses and exculpate Cady. Yet, despite the obvious importance of such testimony, Cady’s counsel declined to call the witness. Indeed, Cady’s PCR counsel was later able to obtain an affidavit from the witness certifying to that very fact. Cady further testified to this effect at an evidentiary hearing, testimony his trial counsel was unable to rebut.

Also presented as part of the PCR application was the fact that the State had engaged in ex parte communications with the trial judge regarding supposed allegations of juror interference in violation of the Confrontation Clause. This ultimately led to the trial court undertaking a voir dire of the juror despite having made no effort to establish the veracity of the State’s allegations or make a record of the sum and substance of the ex parte communications.

Contrary to the PCR court’s holding, Cady is entitled to a new trial due to both ineffective assistance of counsel and the violation of the Confrontation Clause due to the ex parte communications. This Court should reverse.

STATEMENT OF FACTS

This case stems from the August 21, 2011, shooting death of Kason Wilson (“Wilson”) in Linden, New Jersey. Da5. Cady was later indicted for that shooting and charged with (1) Murder, first degree, in violation of N.J.S.A. 2C:11-3(a)(1) and (2); (2) Unlawful Possession of a Weapon, second degree, in violation of N.J.S.A. 2C:39-5b; and (3) Possession of a Weapon for an Unlawful Purpose, second degree, in violation of N.J.S.A. 2C:39-4a. Da4. The State alleged the shooting was the result of an ongoing feud between Bloods and Crips gang members and that both Cady and Wilson were participants in the feud. Da5-Da6.

At trial, Officer James Edgar testified that, on August 21, 2011, he was dispatched to the 900 block of Union Street at approximately 10:50 p.m. after reports of gunshots in the area. 1T13:9-13. Officer Edgar arrived on the scene where a man he identified as Kason Wilson lay dead in the street. 1T14:2-10. In an initial check of the scene, Officer Edgar found three shell casings and a projectile near Wilson’s body. 1T17:24-18:5.

The State’s case against Cady was built on the testimony of several witnesses, many of whom recanted prior statements they had given to police implicating Cady. 2T111:6-114:9; 4T33:17-38:3; Da38. One of the State’s key witnesses was Anthony Pearson who testified Cady was at a party in Linden at

the home of Tynetta Howard, left the party with an associate, and returned shortly after where he shared details of the shooting. 3T166:1-174:25. Pearson also testified that he heard gunshots after Cady left the party and that several other witnesses were at the party when Cady shared the shooting details. 3T169:1-171:13.

The State also offered evidence of jailhouse conversations between Pearson and Cady via testimony from Pearson and a video without sound that showed the men interacting in an area of the Union County Jail. Da7; 3T45:1-46:17. The State offered an additional jailhouse witness, Lorenzo “Rennie” Johnson, who had previously stated that Cady admitted to killing Wilson. 2T105:3-107:5. At trial, however, Johnson repudiated his prior statement, testifying that he had been told by police that he was a suspect and thereafter gave the police false information as a result. 2T107:6-10; 111:6-114:7.

Another State witness was Tyasiah Cook, the mother of Cady’s children. 4T23:16-24:3. In 2012, Cook gave police a statement implicating Cady. See 4T28:2-17; 37:19-25. At trial however, Cook testified that police threatened to take her children from her if she did not cooperate with their investigation against Cady. 4T33:17-38:3. Similarly, another witness, Dyanne Simons, testified at trial regarding seeing Cady at Howard’s residence on the night of the shooting and about various statements Cady gave. Da38. Simons later admitted

in a certification that she was pressured into those statements by law enforcement, that Mr. Cady was not at Howard's residence, and that she never saw or spoke to him that evening. Da38. At the time she testified, Simons was incarcerated and was told that if she gave a statement implicating Cady it would result in her being released and helped with her own charges. Da38.

The only other witness testimony implicating Cady in the shooting of Wilson was from Milad Shenouda. Shenouda testified that Cady had confessed to the murder when they shared a jail cell in August 2012. Da7.

In addition, during the trial, the State was informed that one of the jurors in the case had been seen conversing during a lunch break with a known Crips gang member who had been a spectator in the trial earlier in the day. 3T4:4-9; 7:5-8:21. The State informed the court outside the presence of either Cady or defense counsel. See 3T8:18-21. Based on this ex parte communication, the trial court summoned the juror, Juror 7, the next day in the presence of Cady and defense counsel for questioning. 3T9:18-14:9. The court did so without taking any measures to confirm the State's allegation or otherwise requiring the State to submit sworn affidavits or provide testimony attesting to what exactly was observed. See 3T14:23-15-13.

In the end, after sixteen days of trial, Cady was convicted on all counts. Da4. On June 30, 2017, Cady was sentenced to forty-two years imprisonment

for murder subject to a mandatory eighty-five percent period of parole ineligibility. Da4-Da5. Cady was also sentenced to concurrent seven-year terms with forty-two months of parole ineligibility for the weapons offenses. Da5. Thereafter, Cady appealed his conviction to the Appellate Division on October 11, 2017. Da5. The Appellate Division affirmed the conviction on February 12, 2020. Da5.

PROCEDURAL HISTORY

On June 29, 2022, Cady filed a Petition for Post-Conviction Relief (“PCR”). Da5. Cady raised four arguments in his PCR Petition: (1) ineffective assistance of counsel based on trial counsel’s failure to investigate an alibi defense; (2) that the trial court’s improper interrogation of Juror 7 impacted Cady’s right to a fair and impartial jury; (3) that the introduction of video evidence depicting Cady in the county jail lacked probative value and thereby violated his right to a fair trial; and (4) that statements made by the prosecutor in summation amounted to prosecutorial misconduct and merited reversal of the conviction. Da9.

In support of Cady’s ineffective assistance of council claim, PCR counsel provided a signed affidavit from Chelsea Jacobs. Da37. In her affidavit, Jacobs certified that there was no party at Tynetta Howard’s house on the night that Wilson was killed. Da37. Instead, she certified that the only people at Howard’s

house that night were herself, Howard, and Howard's children. Da37. Jacobs further certified that the party at Howard's house took place "1 or 2 days prior to Kason Wilson being killed." Da37. Despite the exculpatory nature of Jacobs certification, Jacobs was not called as a witness during Cady's trial. Da37. Cady maintained that counsel's failure to call Jacobs as a witness was ineffective assistance of counsel as Jacobs provided an alibi defense. Da37.

Oral argument on Cady's PCR application was held on April 4, 2023, before the Hon. Robert Kirsch, J.S.C., and an evidentiary hearing was thereafter held on September 13, 2024, before the Hon. Candido Rodriguez, Jr., J.S.C. Da10; Da12.

At the evidentiary hearing, both Cady and his trial counsel, Alan Bowman, testified with respect to the ineffective assistance of counsel claim. Da12-Da15. Cady testified that on multiple occasions during the trial he asked Bowman to call Jacobs as a witness and that Bowman had refused to do so. 5T32:15-45:25.¹ Bowman did not refute Cady's testimony but rather testified that he could not recall either way whether Cady had asked him to call Jacobs as a witness. 5T11:1-15:2. Moreover, Bowman no longer had the case file or any notes from

¹ 1T refers to the March 1, 2017, Trial Transcript; 2T refers to the March 7, 2017, Trial Transcript; 3T refers to the March 8, 2017, Trial Transcript, 4T refers to the March 9, 2017, Trial Transcript, and 5T refers to the September 13, 2024, PCR Hearing Transcript.

the trial that might have helped refresh his memory as to what had occurred regarding any decision not to call Jacobs as a witness. 5T7:6-8:1.

On October 16, 2024, the PCR court denied Cady's PCR application. Da31. In doing so, the PCR court concluded that Cady did not have ineffective assistance of counsel because Appellant's proposed alibi witness was biased and unreliable, did not actually provide an alibi defense, and that her testimony would not have changed the jury's verdict. Da26. The PCR court also concluded that the trial court's interrogation of Juror 7 did not warrant reversal of Cady's conviction as the interrogation was not an ex parte communication or otherwise improper. Da29. Finally, the PCR court rejected Cady's third and fourth arguments regarding the admission of video evidence and the prosecutor's statements in summation as claim barred because Cady had previously raised those arguments when he initially appealed his conviction. Da30-Da31.

Cady now appeals the denial of his PCR application with respect to the ineffective assistance of counsel claim and his argument that the trial court's ex parte communications with the State regarding Juror 7 were improper. Da1.

LEGAL ARGUMENT

This Court reviews the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004), cert. denied, 545 U.S. 1145 (2005). Where the PCR court holds an evidentiary hearing, this Court reviews the PCR court's

factual conclusions that are based on a review of live witness testimony using a deferential standard. State v. Nash, 212 N.J. 518, 540 (2013). In that instance, the Appellate Division will only uphold the PCR court’s factual findings “that are supported by sufficient credible evidence in the record.” Ibid.; State v. Elders, 192 N.J. 224, 244 (2007) (“An appellate court ‘should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses’” (quoting State v. Johnson, 42 N.J. 146, 161 (1964))). Where no evidentiary hearing was held, however, an appellate court “may review the factual inferences the court has drawn from the documentary record de novo.” State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing Harris, 181 N.J. at 420-21).

I. The PCR Court Should Have Granted Cady’s PCR Petition Due to Ineffective Assistance of Counsel. (Da16).

“Post-conviction relief is New Jersey’s analogue to the federal writ of habeas corpus.” State v. Preciose, 129 N.J. 451, 459 (1992). “Ineffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding.” Id. at 460; see R. 3:22-4(c). In seeking post-conviction relief, “[a] petitioner must establish the right to such relief by a preponderance of the credible evidence.” State v. Russo, 333 N.J. Super. 119, 138 (App. Div. 2000) (citing Preciose, 129 N.J. at 459; State v. Mitchell, 126 N.J. 565, 579 (1992)).

“[T]he Sixth Amendment right to counsel exists ‘in order to protect the fundamental right to a fair trial.’” Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)). “Thus, ‘the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.’” Id. at 369 (quoting United States v. Cronin, 466 U.S. 648, 658 (1984)). Under Strickland, courts must apply a two-part test in analyzing an ineffective assistance of counsel claim:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

[Strickland, 466 U.S. at 687.]

With regard to the second prong, a “defendant must show that there is 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.” Id. at 694.

The Supreme Court of New Jersey adopted the Strickland test for analyzing ineffective assistance of counsel claims under the New Jersey Constitution. State v. Fritz, 105 N.J. 42, 58 (1987).

In addition, the Supreme Court adopted a three-part test regarding newly discovered evidence that may warrant a new trial:

To meet the standard for a new trial based on newly discovered evidence, defendant must show that the evidence is 1) material, and not merely cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was not discoverable by reasonable diligence beforehand; and 3) that the evidence would probably change the jury's verdict if a new trial were granted. We have held that all three prongs of that test must be satisfied before a defendant will gain the relief of a new trial.

[State v. Ways, 180 N.J. 171, 187 (2004) (internal quotation marks and citations omitted).]

Here, contrary to the findings of the PCR court, Cady has satisfied the three prongs of the Ways test as well as the Strickland test, entitling him to a new trial.

First, Cady testified at the PCR evidentiary hearing that he repeatedly asked his trial counsel, Bowman, to call Jacobs as a witness as she could corroborate the fact that Cady was not at Howard's residence on the night of the murder nor was there a party at Howard's residence on the night of the murder. Jacobs' testimony would have undercut the witness testimony identifying Cady

as Wilson's killer based on those very facts. For his part, Bowman, who also testified at the PCR evidentiary hearing, was unable to rebut Cady's testimony. Indeed, Bowman testified that he was unable to recall whether Cady had requested that he call Jacobs as a witness. Thus, the evidence at the evidentiary hearing was un rebutted that Cady had indeed asked Bowman to call Jacobs as a witness, but Bowman failed to do so.

Moreover, given the exculpatory nature of Jacobs' testimony, trial counsel's failure to call her as a witness was an error so serious that counsel was not acting as the counsel guaranteed by the Sixth Amendment. Further, had Jacobs been called as a witness and the jury credited her testimony, the result of the trial could not have been a guilty verdict. As such, there is a reasonable probability that, but for counsel's failure to call Jacobs, the result of the proceeding would have been different. Hence, the failure to call Jacobs as a witness was so serious a violation of the Sixth Amendment that Cady was deprived of a fair trial, that is, a trial whose result is reliable.

Indeed, PCR counsel obtained a certification from Jacobs, which states she would have provided that exculpatory testimony. Jacobs' certification further satisfies the Ways test for a new trial based on newly discovered evidence.

First, given the importance of the witness testimony placing Cady's location at a supposed party at Howard's residence on the night of the murder, there can be no doubt that evidence he was not there is material and not cumulative. See Ways, 180 N.J. at 189 ("[E]vidence that would have the probable effect of raising a reasonable doubt as to the defendant's guilt would not be considered merely cumulative, impeaching, or contradictory.").

Second, Cady is uncertain as to why a certification from Jacobs was not obtained prior to trial or why his trial counsel did not contact Jacobs or call her to testify at trial. Certainly, she was known to both the State and trial counsel. The fact that she was not called to testify by the State sheds light on how the State chose to rely on witnesses it could cajole through threats of the loss of custody or a promise to make pending charges disappear. Regardless of the reason for not obtaining this information pre-trial, the material was obtained post-trial in an investigation conducted by PCR counsel.

The third Ways prong is whether the evidence would have impacted the decision of the jury. As demonstrated above, had Jacobs been called as a witness and the jury credited her testimony, the result of the trial could not have been a guilty verdict. The State failed to provide any objective, physical, or independent evidence that Cady had been in Howard's apartment around the time of the murder. This evidence would have counteracted the testimony of the

State's witnesses and called into doubt the veracity of the testimony of the State's witnesses and the motivations ascribed to them.

When taken in sum, the evidence was certainly material and relevant and not cumulative and would have influenced the verdict. To not permit a new trial pursuant to Strickland and Ways where Cady could properly defend himself would be a manifest denial of justice. The PCR Court's conclusions otherwise were erroneous and should be reversed.

II. The PCR Court Should Have Granted Cady's PCR Petition Due to The Trial Court's Improper Ex Parte Communication with The State Regarding Juror 7. (Da26).

The United States Constitution's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. The Fourteenth Amendment makes the Confrontation Clause's guarantees "obligatory upon the States." Illinois v. Allen, 397 U.S. 337, 338 (1970) (citing Pointer v. Texas, 380 U.S. 400 (1965)). "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Ibid. Due process likewise requires a criminal defendant the opportunity to be present where their absence would hinder a fair and just hearing. State v. Hudson, 119 N.J. 165, 171, (1990). "Institutionally, the defendant's right to be present at trial ensures public confidence in the courts as

instruments of justice.” Id. at 172. The right of a criminal defendant to be present at trial is further embodied in the New Jersey Court Rules which provide that “[a]ll trials . . . shall be conducted in open court unless otherwise provided by rule or statute.” R. 1:2-1.

Here, Cady’s constitutional right to be present at every stage of trial, his right to a fair trial with due process of law, and his right to confront witnesses against him were all violated when, without a knowing and voluntary waiver by him, the State engaged in an ex parte discussion with the trial judge regarding potential activity of jurors and spectators. None of this conversation should have been conducted ex parte. At a minimum, it should have been recorded and/or proceeded by letter copied to Cady’s counsel. The interrogation of Juror 7 without the consent or input of the defense violated this most basic of rights. There is nothing in the record to adequately describe the State’s ex parte communication or what fully occurred in the communication. And while the subsequent communications with the jurors were recorded, that is insufficient as the potential impact of the interrogation was never probed or considered by the trial court.

The trial court’s failure to develop a complete record based on the totality of circumstances, and the potential for tainting of the jury and introducing extraneous information into the deliberations, ramifications evident at the time

of the violation, mandates reversal. The PCR's conclusion otherwise was erroneous.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that the Court reverse the PCR Court's Decision and Order denying his application for post-conviction relief.

Respectfully submitted,

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Dated: March 5, 2025

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-0908-24T5
Ind. No.: 13-06-00597

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	<u>Criminal Action</u>
v.	:	On Appeal from a Final Order of
EUGENE CADY,	:	the Superior Court of New Jersey,
Defendant-Appellant	:	Law Division, Union County,
	:	Denying Defendant's Petition for
	:	Post-Conviction Relief.
	:	Sat Below:
	:	Hon. Candido Rodriguez, Jr., J.S.C.

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COUNTER-STATEMENT OF PROCEDURAL HISTORY¹

On or about June 28, 2013, a Union County Grand Jury returned Indictment No. 13-06-00597, charging defendant-appellant Eugene Cady (hereinafter “defendant”) with first-degree murder of Kason Wilson, contrary to N.J.S.A. 2C:11-3a(1) and/or (2) (count one); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b) (count two); and second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a) (count three). (Da34 to 35).

Commencing on March 1, 2017, a sixteen-day trial was conducted before a jury and the Honorable Robert A. Kirsch, J.S.C. On March 30, 2017, the jury found defendant guilty of all charges. (Da4).

On June 30, 2017, the trial court sentenced defendant to forty-two years’ imprisonment subject to a mandatory eighty-five percent period of parole ineligibility under the No Early Release Act (hereinafter “NERA”), N.J.S.A. 2C:43-7.2, for the murder conviction, a concurrent seven-year term with forty-two months of parole ineligibility for the unlawful possession of a weapon,

¹ Da refers to Defendant’s Appendix.

Sa refers to State’s Appendix.

1T refers to the trial transcript dated March 1, 2017.

2T refers to the trial transcript dated March 7, 2017.

3T refers to the trial transcript dated March 8, 2017.

4T refers to the trial transcript dated March 9, 2017.

5T refers to the PCR hearing transcript dated September 13, 2024.

and a concurrent seven-year term with forty-two months of parole ineligibility for the possession of a weapon for an unlawful purpose. (Da4 to 5).

On October 11, 2017, defendant filed an Amended Notice of Appeal. On February 12, 2020, the Appellate Division affirmed defendant's conviction and sentence. State v. Cady, No. A-0358-17T4 (App. Div. Feb. 12, 2020). Defendant's subsequent Petition for Certification to the New Jersey Supreme Court was denied on June 1, 2021. State v. Cady, 246 N.J. 436 (2021).

On June 29, 2022, defendant filed a Petition for Post-Conviction Relief. On April 4, 2023, oral argument was held before the Honorable Robert Kirsch, J.S.C. (Da5). An evidentiary hearing was held before the Honorable Candido Rodriguez, Jr., J.S.C. on September 13, 2024. (5T). On October 16, 2024, Judge Rodriguez issued an order and decision denying defendant's petition. (Da4 to 32; Da33).

On November 27, 2024, defendant filed a Notice of Appeal. This appeal follows.

COUNTER-STATEMENT OF FACTS

On August 21, 2011, Officer James Edgar of the Linden Police Department responded to the 900 block of Union Street in Linden at approximately 10:50 p.m., after receiving a call of possible gunshots. State v. Cady, No. A-0358-17T4 (App. Div. Feb. 12, 2020) (Slip Op. at 1; Sa1).² Upon arrival, Officer Edgar observed a man dead in the street with three bullet wounds. He recognized the man from the community as Kason Wilson. Officer Edgar also observed three spent shell casings, a spent projectile, and a small amount of brain matter near the man's body in the street. (Ibid., Slip op at 2; Sa2).

Earlier that night, at approximately 9:00 p.m. or 10:00 p.m. on the night of August 21, 2011, several fellow members of the "Rollin 30's Crips," including defendant, Anthony Pearson, and Fontaine Smith, attended a birthday party at Tynetta Howard's apartment on Lincoln Street and Jackson Avenue in Linden. (3T158-17 to 159-3; 3T160-5 to 15; 3T161-3 to 5; 3T162-7 to 9; 3T165-22 to 25; Ibid. at Slip Op. 2; Sa2). People at the party included Ms. Howard, Lorenzo Johnson (a/k/a "Rennie"), Dyanne Simons, and an

² The State relies upon the transcripts submitted to this Court by defendant and facts set forth in the Appellate Division decision affirming defendant's conviction and sentence. State v. Cady, No. A-0358-17T4 (App. Div. Feb. 12, 2020) (Attached to State's Appendix).

individual identified as “Loco.” (3T164-16 to 165-11). At a certain point, a number of the guests left Ms. Howard’s apartment, including Ms. Simons and Mr. Johnson. (3T166-13 to 22). Subsequently, defendant grabbed a nine-millimeter handgun from a closet in Ms. Howard’s apartment, as well as a black hoodie, and exited the apartment. (3T166-25 to 168-22). Loco – a “Crip,” who was a subordinate of defendant – exited approximately one to two minutes after defendant, while Mr. Pearson, Ms. Howard, and an individual identified as Chelsea remained in the apartment. (3T167-21 to 168-3; 3T170-2 to 14).

After defendant and Loco left the apartment, Mr. Pearson heard two gunshots. (3T168-23 to 169-5). Shortly thereafter, defendant and Loco returned to the apartment. (3T169-7 to 14). As soon as they re-entered, defendant told Mr. Pearson, Ms. Howard, Loco, and Chelsea that he walked up to the victim at Union Street, shook the victim’s hand, and said, “[y]ou remember me?” (5T171-3 to 24; 5T173-8 to 10; 2T163-22 to 25). Defendant then pulled out his gun and shot the victim (3T171-8 to 9; 3T171-18 to 24) three times – once in the chest and, as the victim was falling to the ground, twice in the back of the head. (2T163-18 to 164-2).

Following the murder, Dyanne Simons had a conversation with defendant in the bedroom of Ms. Howard’s apartment. State v. Cady, No. A-

0358-17T4, Slip Op. at 2 to 3. Ms. Simons informed defendant that the victim had been killed around the corner, to which defendant responded, “[y]eah, I know. I did that.” Ibid.

The day after the murder, defendant called his girlfriend, Tyashiah Cook, and asked her for \$200 to go to Indiana. (Da6). He explained to Ms. Cook that he was involved in the shooting that had occurred the previous night. Defendant called Fontaine Smith, and arrived at Mr. Smith’s house the next day, August 22, 2011. (Da8). From there, defendant traveled with Mr. Smith to Perdue University in Indiana to watch Michael Eargle play football. (Da6). Thereafter, defendant was arrested.

In August of 2012, defendant shared a prison cell at the Union County Jail with Milad Shenouda, a member of the Rollin 60’s Crips. (Da7). Mr. Shenouda knew defendant as “Lil-490.” Ibid. During the two weeks that they shared a cell, defendant told Mr. Shenouda that he murdered a “G-Shine Blood” named Kason near the tracks in Linden. Ibid.

At trial, the State called Lieutenant Michael Sanford, a ballistics expert, to testify. Sanford performed a “bullet identification” analysis and opined that the bullet projectiles recovered next to Wilson’s body correlated to a homicide in Elizabeth and came from the same gun. State v. Cady, No. A-0358-17T4, Slip Op. at 4.

The PCR Petition

On September 13, 2024, the Honorable Candido Rodriguez, Jr., J.S.C. held an evidentiary hearing with regard to defendant's claim that counsel was ineffective for failing to call certain witnesses at trial. (5T).

Defendant first called his prior trial counsel, Alan D. Bowman. Mr. Bowman testified that he no longer had defendant's file and believed that he had given it to defendant's family. (5T6-19 to 7-19). As a result, Mr. Bowman did not retain any of his notes regarding his involvement with this case. (5T7-20 to 8-1). Mr. Bowman recalled representing defendant at trial and later for his appeal of his conviction. (5T8-20 to 23).

Mr. Bowman recalled that prior to the trial and then during the trial, he consulted with defendant on numerous occasions. (5T9-6 to 8). Counsel could not recall during his discussions with defendant that Mr. Cady wanted to call Chelsea Jacobs as a witness, though he indicated that it was possible. (5T11-5 to 23). Mr. Bowman agreed that if he had received a statement that Ms. Jacobs provided to police around the time of the murder, and knew that she was on the State's witness list, he would have reviewed her statement in preparation for trial. (5T26-20 to 27-23).

Mr. Bowman stated that as the trial progressed he and defendant collaborated every day and discussed every witness that the State intended to call, but he did not recall being asked to put on a particular defense witness. (5T12-11 to 19; 5T22-9 to 25). Mr. Bowman described defendant as one of the most “pleasurable” clients he ever had and their relationship was “almost like a father and son.” (5T23-1 to 9).

Mr. Bowman testified that if defendant had asked him to call a specific witness he either would have called the witness or, he would make a motion to be removed as counsel. (5T23-11 to 24-1).

Defendant testified on his own behalf. He stated that at the time of his trial he was twenty-seven-years-old. He also noted that he had two other trial attorneys prior to Mr. Bowman. (5T30-1 to 31-2). Defendant agreed that Mr. Bowman met with him prior to trial while he was in the Union County Jail and that they had discussions about the case and their trial strategy. (5T31-3 to 17).

Defendant stated that during his trial preparation he discussed with Mr. Bowman his desire to call Chelsea Jacobs as a witness. (5T32-15 to 20). Defendant stated that multiple witnesses were claiming that he lived at Tanetta Howard’s house and stayed there on the weekends. Defendant proffered that Chelsea Jacobs would testify that he did not live at the location in question.

(5T32-21 to 33-5). Defendant also stated that Chelsea Jacobs would testify that there was no party at Ms. Howard's house on the night of the murder, and that the party others had testified about occurred two days before the murder. (5T33-5 to 25). Defendant explained the significance of this information, noting that witnesses placed him at the party, wherein he was observed leaving with a gun in a sweatshirt just before shots were heard outside. (5T34-16 to 20).

Defendant testified that he became aware of Chelsea Jacobs as a potential witness when she came to visit him in the county jail. (5T36-4 to 12). Defendant claimed that he had two conversations with Mr. Bowman about calling Ms. Jacobs as a witness, one before the trial, in December or January, and one during the trial. (5T40-3 to 10). Defendant recalled that Mr. Bowman declined to call her because he did not know what she was going to say; defendant did not believe Mr. Bowman hired a private investigator to interview Ms. Jacobs. (5T42-17 to 44-23).

On cross-examination, defendant acknowledged that Ms. Jacobs had been interviewed by police around the time of the murder and gave three different accounts of where she was on the night Mr. Wilson was killed. Specifically, defendant agreed that Ms. Jacobs first told police that she was at her house when she found out about the incident. (5T47-10 to 13). She then

changed her story and told police that she got a telephone call about the murder and walked to Tanetta's house and then went to Dunkin Donuts to console a friend. (5T47-14 to 20). In her third account, Ms. Jacobs stated that she was at Tanetta's house with other people who were there to celebrate her brother Renny's birthday. (5T51-14 to 52-16). Defendant also acknowledged that Chelsea Jacobs had changed her name to "Chelsea Jacobs-Cady," that she had visited him sixty-five times while he was incarcerated and had visited him three times while he was in jail awaiting trial. (5T57-5 to 24).

Defendant agreed that he advised the trial judge that he was happy with Mr. Bowman's representation and did not tell the judge that Mr. Bowman would not call witnesses he wanted to testify. (5T59-3 to 24). Defendant claimed that he did not know that Mr. Bowman had to call these witnesses if that was what defendant wanted. (5T59-21 to 24).

LEGAL ARGUMENT

POINT I

THE PCR COURT CORRECTLY DENIED DEFENDANT’S PCR PETITION AFTER AN EVIDENTIARY HEARING AS DEFENDANT FAILED TO ESTABLISH THAT HE DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL. (Da16).

Defendant claims that the PCR court erred in denying his PCR petition because his trial counsel failed to call Chelsea Jacobs at trial. Specifically, defendant asserts that Ms. Jacobs would have corroborated defendant’s claim that he was not at Howard’s residence on the night of the murder, and that no party was held at Howard’s home that night. (Db10). However, after carefully reviewing the record, including the testimony at trial, the statements that were made by Ms. Jacobs and the testimony at the PCR hearing, the PCR court correctly determined that trial counsel’s decision not to call Ms. Jacobs was strategic and, even if she had testified, it likely would not have changed the outcome of the trial. (Da20 to 26). Additionally, the PCR court appropriately found that Ms. Jacobs’ statement provided to PCR counsel was not newly discovered evidence as set forth in State v. Carter, 85 N.J. 300, 314 (1981), and would not have changed the jury’s verdict if defendant was granted a new

trial. The PCR court's findings are amply supported by the record and should not be disturbed on appeal.

A. The PCR Court Correctly Found That Defendant Failed To Establish That His Counsel Was Ineffective And That He Was Prejudiced By Counsel's Purported Errors.

Despite defendant's claims, the record clearly supports the PCR court's finding that trial counsel was not ineffective. Specifically, after considering trial counsel's and defendant's testimony at the PCR evidentiary hearing, the court correctly found that defendant failed to establish that counsel failed to investigate a potential alibi defense or that he was prejudiced by his counsel's allegedly deficient representation. Therefore, defendant's claims are without merit.

In a PCR proceeding, the burden is on the defendant to establish, by a preponderance of the credible evidence, his entitlement to relief. State v. Preciose, 129 N.J. 451, 459 (1992). Pursuant to R. 3:22-10(b), a defendant is entitled to an evidentiary hearing upon the filing of a PCR petition only upon (1) the establishment of a prima facie case in support of the petition, (2) a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and (3) a determination that an evidentiary hearing is necessary to resolve the claims for relief. 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.” R. 3:22-10(b).

To establish a prima facie claim, “[a]ny factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to R. 1:4-4 and based upon personal knowledge of the declarant before the Court may grant an evidentiary hearing.” R. 3:22-10(c).

However, a defendant is not entitled to an evidentiary hearing if the “allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing.” State v. Marshall, 148 N.J. 89, 158 (1997). Rather, defendant must allege specific facts and evidence which support his allegations. State v. Porter, 216 N.J. 343, 355 (2013).

After a court has held an evidentiary hearing an appellate court “is necessarily deferential to [the] court’s factual findings based on its review of live witness testimony.” State v. Nash, 212 N.J. 518, 540 (2013).

Nonetheless, the appellate court will review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 420 (2004). The de novo standard of review also applies to mixed questions of fact and law and when the PCR court does not conduct an evidentiary hearing. Ibid. (citing McCandless v. Vaughn, 172 F.3d 255, 265 (3d Cir. 1999)).

When a defendant attempts to substantiate a claim of ineffective assistance of counsel, such defendant must satisfy the two-prong test formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must first show that counsel's performance was deficient in that the "representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88. The defendant must also show that counsel's deficient performance resulted in prejudice. Id. at 692-93.

To satisfy the first prong, a defendant has to overcome the strong presumption that counsel exercised reasonable professional judgment and sound trial strategy in fulfilling his/her responsibilities. Id. at 687-90; State v. Nash, 212 N.J. at 542. The advice must fall outside the range of competence demanded of attorneys in criminal cases and be unreasonable under prevailing professional norms considering all the circumstances. Strickland, 466 U.S. at 687-88. Under this standard, "[j]udicial scrutiny of counsel's performance must be highly deferential" and the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Thus, for a PCR evidentiary hearing to even be considered, "a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to

demonstrate counsel's alleged substandard performance.” State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

To establish the second prong, a defendant must show that he suffered prejudice due to counsel's deficient performance. Strickland, 466 U.S. at 692-93. Under this analysis, “[i]t is not enough for defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Rather, a defendant must show by a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Fritz, 105 N.J. at 52-53. A reasonable probability has been defined as “probability sufficient to undermine confidence in the outcome.” State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694). Moreover, if a “defendant establishes one prong of the Strickland/Fritz standard, but not the other, his claim will be unsuccessful.” State v. Parker, 212 N.J. 269, 280 (2012).

As detailed below, defendant's claims fail as a matter of law. Defendant failed to establish that trial counsel's performance fell outside prevailing professional norms to satisfy the first prong of the Strickland/Fritz analysis. Further, defendant failed to establish any resulting prejudice to satisfy the second prong of the Strickland/Fritz analysis. Accordingly, the PCR court correctly denied defendant's petition for PCR after an evidentiary hearing.

Defendant claims that his trial counsel was ineffective for failing to call Chelsea Jacobs as a witness because she would have impeached the State's witnesses who testified that on the night of the murder, defendant was at a party at Tynetta Howard's house and at one point in the night, defendant left the party to kill Kason Wilson and then returned. According to defendant, Ms. Jacobs' testimony would have discredited these witnesses because she would have stated that defendant was not at Tynetta Howard's house on the night of the murder and, in fact, that there was no party that night. (Db12). However, as the PCR court observed, Ms. Jacobs had significant credibility problems and, importantly, her proffered testimony would not have eliminated the possibility that defendant killed Mr. Wilson.

Specifically, the PCR court noted that Ms. Jacobs provided law enforcement with several contradicting accounts of what transpired on the night of the murder. (Da22). The PCR court reviewed the police report and Ms. Jacobs' statement to detectives on October 6, 2011, and observed Ms. Jacobs first stated that she was at her home on Charles Street in Linden when she heard about Mr. Wilson's death from Valencia West. (Da22; Sa1 to 2). Later in the interview, Ms. Jacobs changed her story and told detectives that she was at Tynetta Howard's house on Jackson Avenue in Linden and stayed there leaving only to go to console a friend, Valencia West, and several others

at the Dunkin Donuts. (Da22; Sa24 to 25). Finally, when confronted with information regarding people who were at Ms. Howard's house that night, she admitted that she was there with her brother, cousin, and other friends. Significantly, in that part of her statement, she said that some people left Ms. Howard's house and walked to St. Georges Avenue to "hangout and drink." (Da22; Sa25). A short time later two female friends returned and told her that Mr. Wilson had been killed down the street and that the police were there. (Da22; Sa25). Ms. Jacobs stated that she did not leave Ms. Howard's house for the remainder of the night. Thus, Ms. Jacobs' previous statements clearly contradicted her certification submitted by defendant in his PCR petition.

The court also noted that Ms. Jacobs was confronted by detectives with several other inconsistencies in her statement, including the nature of her relationship with the victim, location of her car and where she slept the night of the murder, and whether her cell phone was operational. (Da22 to 23). Additionally, the court noted that Ms. Jacobs appears to be romantically involved with defendant and visited him sixty-five times before trial and three times after the trial had started. (Da23). Accordingly, the PCR court aptly found there was little basis to support defendant's contention that the jury would have believed her testimony and disregarded the four other witnesses

who placed defendant at Ms. Howard's house on the night of the murder. (Da23).

Further, the PCR court noted that Ms. Jacobs' certification indicates only that on the night of the murder, she was at Ms. Howard's house, alone with Ms. Howard and her children, and that she did not see defendant or Anthony Parsons there that night. Ms. Jacobs' further stated that no party was held that night. Based upon this statement, the PCR court found that this information would have contradicted other witnesses who placed defendant at Ms. Howard's house at that time, but would not have eliminated the possibility that defendant was the shooter. (Da23). Indeed, the PCR court correctly questioned whether, "Ms. Jacobs' testimony, if believed, would affect the outcome of the verdict because it does not preclude Petitioner from being at the scene of the crime." (Da23).

Based upon the significant credibility issues presented with Ms. Jacobs' testimony, the PCR court correctly concluded that trial counsel's decision not to question her at trial did not amount to ineffective assistance of counsel. (Da24). Moreover, the PCR court rightly found that Ms. Jacobs' testimony might even have had an adverse effect on defendant's case, noting that the State would have been permitted to cross examine her with prior inconsistent statements, several of which corroborated the State's case. (Da24).

Accordingly, the PCR court's finding that defendant had not met the first prong of Strickland was fully supported by the record.

Similarly, the PCR court found that defendant was not prejudiced by counsel's decision to not call Ms. Jacobs as a witness. As set forth above, Ms. Jacobs' testimony, as proffered in her certification, would have served only to contradict an ancillary part of the testimony provided by other trial witnesses, yet would have presented "too great a minefield of inconsistencies and credibility issues." (Da25). Most significantly, Ms. Jacobs' testimony had very limited value and would not have exonerated defendant, particularly where several of the States' witnesses testified that defendant confessed to the murder in their presence. (Da6 to 8).

Moreover, defendant did not even call Ms. Jacobs to testify at the PCR hearing where she would have faced cross-examination regarding the numerous inconsistencies in her various accounts of the incident, as well as her ongoing romantic relationship with defendant. Accordingly, the PCR court properly found that defendant failed to show that but for counsel's purported error of not calling Ms. Jacobs as a witness, the result would have been different. Because defendant failed to establish either prong of Strickland/Fritz, the PCR court properly denied defendant's claims. The court's Order should be affirmed by this Court.

B. The PCR Court Correctly Found That Defendant Failed To Meet The Three Prong Test For Newly Discovered Evidence Under State v. Carter.

In addition to claiming his trial counsel was ineffective, defendant argued that he should be granted a new trial because Ms. Jacobs' testimony was newly discovered evidence. Defendant's claim is without merit. The PCR court reviewed all of the evidence in this case, as well as Ms. Jacobs' proffered testimony and correctly determined that defendant failed to meet any of the requirements set forth in State v. Carter, 85 N.J. 300 (1982), that would require vacating defendant's conviction and ordering a new trial. The findings of the PCR court are supported by the record and should not be disturbed on appeal.

"A motion for a new trial upon the ground of newly discovered evidence is not favored and should be granted with caution by a trial court since it disrupts the judicial process." State v. Conway, 193 N.J. Super. 133, 171 (App. Div. 1984) (citing State v. Haines, 20 N.J. 438, 443 (1956)).

"Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial." Id. at 187-88.

To meet the standard for a new trial based on newly discovered evidence, defendant must show that the evidence is 1) material, and not "merely" cumulative, impeaching, or contradictory; 2) that the

evidence was discovered after completion of the trial and was “not discoverable by reasonable diligence beforehand”; and 3) that the evidence “would probably change the jury’s verdict if a new trial were granted.” We have held that all three prongs of that test must be satisfied before a defendant will gain the relief of a new trial.

[State v. Ways, 180 N.J. 171, 187 (2004) (citation omitted) (quoting Carter, 85 N.J. at 314 (1981))].

Under prong one of the Carter test, a defendant must show the evidence “ha[s] some bearing on the claims being advanced.” Id. at 188 (quoting State v. Henries, 306 N.J. Super. 512, 531 (App. Div. 1997)). This requires the court to engage in “an evaluation of the probable impact such evidence would have on a jury verdict.” Id. at 188-89. Because the issue of materiality inquires whether the evidence would change the jury’s verdict, the court should evaluate the first and third prong of the test together. Id. at 189.

Under prong two of the Carter test, “the new evidence must have been discovered after completion of trial and must not have been discoverable earlier through the exercise of reasonable diligence.” Id. at 192. A defendant must “act with reasonable dispatch in searching for evidence before the start of the trial.” Ibid.

Prong three of the Carter test requires a defendant to show the evidence “would probably change the jury’s verdict if a new trial were granted.” Id. at 187 (quoting Carter, 85 N.J. at 314). “The power of the newly discovered

evidence to alter the verdict is the central issue ... ” before the trial judge. Id. at 191. “[T]he test is whether the evidence if introduced is such as ought to have led the jury to a different conclusion — one of probability and not mere possibility[.]” Haines, 20 N.J. at 445. Here, none of the arguments raised by defendant satisfy the Carter test and, thus, the PCR court properly denied his Motion for a New Trial.

Here, the court addressed prongs one and three of the analysis, the materiality of the purported newly discovered evidence and whether the evidence would probably have altered the jury’s verdict. After reviewing the evidence presented at trial and at the PCR hearing, the PCR court correctly found that it is extremely unlikely that Ms. Jacobs’ testimony would have changed the jury’s verdict. Foremost, the PCR court noted that Ms. Jacobs’ proffered testimony does not support an alibi defense for defendant, but only contradicts other trial testimony that placed defendant at a party at the home of Tynetta Howard on the night of the murder. (Da20). Importantly, the court observed that the State’s case did not hinge on whether defendant was at Ms. Howard’s house that night because the victim was not murdered at that location; Mr. Wilson was found dead on the street on Union Avenue in Linden.

In making this finding, the PCR judge aptly analogized this case to the facts in State v. Allegro, 193 N.J. 352 (2008). There, the defendant, who had

been convicted of maintaining and operating a drug facility, alleged his trial counsel was ineffective for failing to call witnesses who would have testified that he had moved out of the apartment prior to law enforcement discovering the facility located therein. (Da21). Yet, none of the witnesses proffered in Allegro directly or tangentially addressed the State's proofs that the defendant in fact operated the drug facility. Ibid. The PCR judge highlighted the Supreme Court's finding that it was irrelevant where defendant lived because the State's case did not hinge on where the defendant resided. (Da21, citing Allegro, 193 N.J. 369-70).

Similarly here, Ms. Jacobs' statement would have been offered to impeach the credibility of several witnesses who testified that defendant was at Ms. Howard's apartment on the night of the murder and left to kill Mr. Wilson. However, Ms. Jacobs' testimony, if believed, does not eliminate the possibility that defendant shot Mr. Wilson. In fact, even if her testimony raised questions about the credibility of the four witnesses who said they saw defendant at Ms. Howard's house that night and heard him say he shot Mr. Wilson, it did not negate the testimony of two who were not at Ms. Howard's apartment but to whom defendant either admitted to the murder or admitted his involvement in the crime, namely Milad Shenouda and Fontaine Smith. (Da21).

Further, the PCR court found that in addition to the fact that numerous witnesses placed defendant at Ms. Howard's house the night of the murder, Ms. Jacobs' statement faced significant credibility problems in light of the numerous contradicting statements she previously had provided to police. (Da21 to 22). Notably, the PCR court recounted that Ms. Jacobs gave three different versions of her whereabouts on the night of the murder, stating first that she was home when she found out about Mr. Wilson's death. She then changed her story and said that she was at Ms. Howard's house, but they were alone with Ms. Howard's children. Later, Ms. Jacobs admitted that she was in and around Ms. Howard's house with several other people, shortly before the murder. (Da22).

Now, years later, defendant has submitted a certification from Ms. Jacobs attesting to the truthfulness of her second version of events, i.e., that she was at Ms. Howard's house with only Ms. Howard and her children. (Da37). Yet, as the PCR court indicated after reviewing her statement to detectives, Ms. Jacobs told them that she was lying when she gave this account. (Da22). Additionally, the PCR court noted the numerous other inconsistencies in her statement, including what her relationship was with Mr. Wilson, whether her cellphone worked and where she slept the night of the

murder. (Da22). Indeed, the PCR court stressed that Ms. Jacobs did not deny lying to the detectives. (Da23).

Additionally, the PCR judge found that Ms. Jacobs was and perhaps still is romantically involved with defendant. The court cited to the numerous times she visited defendant before and after trial, and the fact that she changed her name on social media to “Chelsea Jacobs-Cady.” (Da23). As a result, the PCR court found that Ms. Jacobs’ personal relationship with defendant, coupled with her numerous inconsistent statements, “severely undermine[d] her credibility to testify truthfully.” (Da23). The PCR judge’s findings that defendant failed to meet prongs one and three of the Carter analysis, namely that Ms. Jacobs’ statement was not material and would not have changed the outcome of the trial, is clearly supported by the record.

Further, the PCR judge correctly found that defendant failed to establish the evidence proffered by defendant was newly discovered. (Da25). The PCR court observed that, by counsel’s own admission, Ms. Jacobs was a known witness to the State and the defense prior to trial. (Da25). Similarly, as the PCR record reflects, defendant acknowledged that Ms. Jacobs visited him sixty-five times prior to trial and three times during the trial. (Da15). Clearly defendant was aware of her availability as a witness and what she would say if called at trial, yet chose not to call her. To be sure, defendant did not even call

her as a witness during his PCR hearing. Accordingly, defendant failed to establish any of the prongs set forth in State v. Carter and the denial of his PCR petition and motion for a new trial based upon newly discovered evidence should be affirmed.

POINT II

THE PCR COURT PROPERLY DENIED DEFENDANT’S CLAIM THAT HE WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT WAS CONTACTED EX PARTE BY THE STATE REGARDING POTENTIAL JURY TAMPERING. (Da26).

Defendant claims that the PCR court erred in finding that defendant’s right to a fair trial was not violated when the trial court was advised by the State, in an ex parte communication, about potential jury tampering involving Juror No. 7. Specifically, defendant claims he had the right to be present during the trial court’s conversation with the prosecutor about information received that Juror No. 7 had been approached by a spectator, who also was a member of the Rollin’ 30’s Crip gang,³ during a lunch break. (Db14).

Because the contact between the State and the court was to alert the court that the issue should be addressed the following morning, i.e., a scheduling and security matter, rather than a substantive discussion, defendant’s claims are without merit.

³ Testimony at trial supported the State’s theory of the case that defendant was a member of the Rollin 30’s Crips gang, who killed Kason Wilson, who was believed to be the highest-ranking member of rival G-Shine Blood gang on the street in Linden. State v. Cady, supra, No. A-0358-17T4, Slip Op. at 4; Sa4.

The Judicial Code of conduct provides that a judge may not “initiate or consider ex parte or other communications concerning a pending or impending proceeding.” Code of Judicial Conduct Rule 3.8. However, “[i]n general ... discussions regarding scheduling ... are not considered to constitute ex parte communications in violation of [the] rule.” Code of Judicial Conduct, cmt. 4 on Rule 3.8; See Goldfarb v. Solimine, 460 N.J. Super. 22, 31 (App. Div. 2019).

An ex parte communication is “one that concerns the matter, that is between a lawyer representing a client and a judicial officer, and that occurs outside of the presence and without the consent of other parties to the litigation or their representatives.” Restat 3d of the Law Governing Lawyers, § 113, cmt. c. Importantly, the prohibition applies to “communication about the merits of the cause and to communications about a procedural matter the resolution of which will provide the party making the communication substantial tactical or strategic advantage.” Ibid. The prohibition does not apply to routine and customary communications for the purpose of scheduling a hearing or similar communications, but does apply to communications for the purpose of having a matter assigned to a particular court or judge. Ibid. “In an emergency involving a matter of vital importance, such as a threat to the life or

safety of the presiding officer, a juror, or a witness, necessary communication may be made without notice.” Id. at cmt. e.

Here, the trial court set forth on the record its observations regarding potential witness and jury tampering that had taken place during the trial and the fact that there were pending investigations into those matters. (Da28). The trial judge then stated on the record the substance of a conversation he had the night before with regard to an incident involving a juror. Specifically, the judge noted that it was brought to his attention “that an individual who was a spectator yesterday, who is a known Rollin’ 30’s Crip member, approached one of the jurors and had a conversation.” (Da27 to 28, citing 3T4-4 to 9). The trial court specifically relayed to counsel the information that had been provided and noted, “My communications with [the prosecutor] this morning involved prophylactically, additional security measures.” (3T8-23 to 25). The trial judge assured counsel that there had been no ex parte communications about the case, to which counsel responded “I’m not concerned about that.” (3T9-3). Indeed, the trial court stated to counsel and defendant: “I didn’t want Mr. Cady to think I’m having substantive conversations about the actual merits.” (3T9-9 to 11). Defense counsel replied: “I think your Honor’s comments clear that up for both of us.” (Da28; 3T9-12 to 13).

Following up on the information, the court then questioned Juror Nos. 7 and 15, as well as the individuals who claimed to have seen the interaction with the juror, to determine whether anyone had been approached during a break in the proceedings. Significantly, defendant was present and listening to the colloquy via headphones and was aware of the purpose of the inquiry. (Da28; 3T7-1 to 34-15). Additionally, the trial court permitted counsel to ask any questions related to the inquiry, including how the matter was brought to the court's attention and what information was provided. (3T14-11 to 15-12; 3T19-12 to 20-18; 3T25-8 to 28-1; 3T34-7 to 11). Thus, there is nothing in the record to suggest that the trial court had an inappropriate ex parte communication with the prosecutor that would have given the State a strategic advantage in the trial.

Because the record did not support defendant's claim, the PCR court correctly found that the communication at issue did not implicate defendant's constitutional right to a fair trial. (Da29). The PCR court aptly noted that defendant failed to establish by a preponderance of the evidence that the communication rendered trial counsel's performance deficient or that defendant was in any way prejudiced as a result of counsel's performance. Further, the court acknowledged that the Appellate Division already had rejected defendant's claim that the jury was improperly tainted or prejudiced

as a result of the voir dire conducted by the trial court related to this matter.

See State v. Cady, supra, No. A-0358-17T4, Slip Op. at 11-15; Sa11 to 15.

Accordingly, the PCR court correctly found that defendant failed to establish either prong of Strickland/Fritz and denied defendant's claim. The record clearly supports the findings of the PCR judge. The order of the court denying defendant's petition should be affirmed.

CONCLUSION

For all of the foregoing reasons and on the basis of the authority cited herein, the order of the PCR denying defendant's petition for Post-Conviction Relief and Motion for a New Trial without an evidentiary hearing should be affirmed by this Court.

Respectfully submitted,

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s/ Michele C. Buckley

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MCB/mg

STATE OF NEW JERSEY,

Plaintiff,

vs.

EUGENE CADY,

Defendant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-000908-24T5

Criminal Action

On Appeal From
Superior Court of New Jersey,
Law Division, Union County

Indictment No. 13-06-00597-I

Sat Below:

Hon. Candido Rodriguez, Jr., J.S.C.

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PRELIMINARY STATEMENT

Appellant Eugene Cady's ("Cady") application for post-conviction relief was erroneously denied.

Cady informed his trial counsel multiple times that eyewitness Chelsea Jacobs ("Jacobs") could testify regarding Cady's whereabouts the night of the shooting that formed the basis of Cady's criminal convictions, exculpatory testimony that would have undercut the testimony of the State's witnesses.

The State's brief does not wrestle with this and, instead, simply adopts the erroneous reasoning of the PCR court. In doing so, the State fails to appreciate the significance of Jacobs' testimony and, with it, the extent of the prejudice caused by its absence. But contrary to both the PCR court and State's position, the failure to call Jacobs as a witness at trial, coupled with the certification obtained by PCR counsel post-trial as to the exculpatory nature of her testimony, satisfies both the test for ineffective assistance of counsel and newly discovered evidence meriting a new trial.

Moreover, the State's assertion that its ex parte communications with the trial judge regarding juror interference was merely a conversation about "scheduling" is not believable. An ex parte scheduling conversation does not lead a court to undertake an extensive voir dire of a juror about potential interference, much less without any effort to establish the veracity of the State's

allegations. These ex parte communications, of which there is no record whatsoever, were in clear violation of the Confrontation Clause.

For all these reasons as more fully set forth below, the PCR court's denial of Cady's petition for post-conviction relief should be reversed and a new trial ordered.

LEGAL ARGUMENT

I. The PCR Court erred when it denied Cady's PCR Petition (Da16).

In seeking post-conviction relief, "[a] petitioner must establish the right to such relief by a preponderance of the credible evidence." State v. Russo, 333 N.J. Super. 119, 138 (App. Div. 2000) (citing State v. Preciose, 129 N.J. 451, 459 (1992); State v. Mitchell, 126 N.J. 565, 579 (1992)). Here, contrary to the findings of the PCR court and the arguments raised in the State's Respondent's Brief, Cady has satisfied the three prongs of the Ways test as well as the Strickland test, entitling him to a new trial.

As an initial matter, the State concedes that, in bringing a PCR Petition, one is entitled to an evidentiary hearing where three criteria are met: (1) the petitioner has established a prima facie case in support of the petition; (2) there is a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record; and (3) it is determined that an evidentiary hearing is necessary to resolve the claims for relief. Resp't

Br. at 11 (citing R. 3:22-10(b)). There should be no evidentiary hearing where the petitioner’s “allegations are too vague, conclusory, or speculative to warrant” such a hearing. State v. Marshall, 148 N.J. 89, 158 (1997). As the State acknowledges, a petitioner “must allege specific facts and evidence which support his allegations.” Resp’t Br. at 12 (citing State v. Porter, 216 N.J. 343, 355 (2013)).

Here, there was an evidentiary hearing. That is, Cady established a prima facie case in support of his petition. Further, there was a determination by the court that there existed material issues of disputed fact unresolvable by reference to the existing record and that, instead, an evidentiary hearing was necessary to resolve those material issues.

A. Cady has established a claim for ineffective assistance of counsel.

Turning to the evidentiary hearing itself, the first issue to be resolved was whether Cady had a claim for ineffective assistance of counsel based on his trial counsel’s failure to call Jacobs as a witness to testify as to Cady’s whereabouts on the night of the shooting. Indeed, “[i]neffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding.” Preciose, 129 N.J. at 459 (1992); see R. 3:22-4(c).

To that end, Cady needed to, and indeed did, satisfy the two-prong test formulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). That is, Cady established that (1) his counsel's "representation fell below an objective standard of reasonableness" and (2) that said deficient performance was prejudicial. Strickland, 466 U.S. at 687-88, 692-93. As set forth more fully in Cady's opening brief, Cady testified at the PCR evidentiary hearing that he repeatedly asked his trial counsel to call Jacobs as a witness during trial because Jacobs could corroborate the fact that Cady was not at Tynetta Howard's residence on the night of the murder, nor was there a party at Howard's residence on the night of the murder. 5T32:15-45:25. Cady's trial counsel, who also testified at the PCR evidentiary hearing, was unable to rebut Cady's testimony, instead testifying that he was unable to recall whether Cady had requested that he call Jacobs as a witness. 5T11:1-15:2. In fact, trial counsel no longer had the case file or any notes from the trial that could have refreshed his memory as to what occurred regarding his failure to call Jacobs as a witness. 5T7:6-8:1. Thus, the evidence at the evidentiary hearing was unrebutted that Cady had indeed asked his counsel to call Jacobs as a witness and that his counsel failed to do so.

The significance of Jacobs' testimony lies in the fact that it would undercut witness testimony identifying Cady as Wilson's killer based on those

very facts. The State, for its part, maintains that Cady has not satisfied the Strickland/Fritz test because “Ms. Jacobs had significant credibility problems and, importantly, her proffered testimony would not have eliminated the possibility that defendant killed Mr. Wilson.” Resp’t Br. at 13.

With regard to Jacobs’ credibility, the State notes that Jacobs had previously provided inconsistent statements to investigators regarding her own as well as Cady’s whereabouts on the night of the shooting as well as her relationship with Cady, among other things. Id. at 15-17. But the State’s position is undermined by two important facts. First, the State’s witnesses, the ones who actually testified at the trial, also had credibility problems, including the fact that many of them recanted prior statements they had given to police implicating Cady. 2T111:6-114:9; 4T33:17-38:3; Da38.

For example, one of the State’s witnesses was Lorenzo “Rennie” Johnson, who previously stated that Cady admitted to killing Wilson but at trial repudiated his prior statement and testified that he had been told by police that he was a suspect and thereafter gave the police false information as a result. 2T105:3-107:10; 111:6-114:7.

The same is true for State witness Tyasia Cook, the mother of Cady’s children, who at first implicated Cady to police but later testified that police threatened to take her children from her if she did not cooperate with their

investigation against Cady. 4T23:16-24:3; 28:2-17; 33:17-38:3. And then there is Dyanne Simons, who testified at trial that she saw Cady at Howard's residence on the night of the shooting, and about various statements Cady gave, but then later admitted in a certification that none of it was true and that she had testified falsely in an attempt to gain her own early release. Da38. For the State to now argue that Jacobs' testimony would not have made a difference because of credibility issues while at the same time having relied on so many incredible witnesses to secure Cady's conviction highlights the logical failure in the State's position.

Nevertheless, the State tries to downplay the importance of Jacobs' testimony, maintaining that the PCR court correctly concluded that the testimony "does not preclude Petitioner from being at the scene of the crime." Resp't Br. at 17. In taking that position, the State concludes that Jacobs' testimony "would have served only to contradict an ancillary part of the testimony provided by other trial witnesses," that her testimony "had very limited value," and "would not have exonerated defendant." Resp't Br. at 18.

But, again, the State's position ignores that there was no eyewitness to the shooting who testified at trial. Instead, Cady's conviction was heavily dependent on the jury crediting the testimony of witnesses who testified that the shooting occurred on the same night as a party at Howard's residence, that the witnesses

along with Cady were present at that party, and that Cady left the party, committed the shooting, and then returned with details. In fact, this was the very testimony of Anthony Pearson, one of the State's key witnesses. 3T166:1-174:25.

To now take the position that the testimony used to convict Cady was somehow "ancillary" further weakens the merits of the State's position. Far from being ancillary, this testimony was a critical aspect of the State's case and, as Jacobs' testimony would have undermined that critical testimony, her testimony was not of "very limited value." On the contrary, her testimony was of such significant importance that it calls into question the jury's verdict. As such, not only does counsel's failure to call Jacobs at trial demonstrate that his "representation fell below an objective standard of reasonableness" but also that it was prejudicial in that the result of the proceeding would have been different. See Strickland, 466 U.S. at 687-88, 692-93.

Accordingly, Cady has satisfied both prongs of the Strickland/Fritz ineffective-assistance-of-counsel test, entitling him to a new trial.

B. Cady has established a right to a new trial based on newly discovered evidence.

In addition to having satisfied the Strickland/Fritz test, Cady has also satisfied the test set forth by the New Jersey Supreme Court in State v. Ways for the granting of a new trial based on newly discovered evidence.

To meet the standard for a new trial based on newly discovered evidence, defendant must show that the evidence is 1) material, and not merely cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was not discoverable by reasonable diligence beforehand; and 3) that the evidence would probably change the jury's verdict if a new trial were granted. We have held that all three prongs of that test must be satisfied before a defendant will gain the relief of a new trial.

[State v. Ways, 180 N.J. 171, 187 (2004) (internal quotation marks and citations omitted).]

Here, after trial, PCR counsel obtained a signed affidavit from Jacobs certifying that there was no party at Howard's on the night of the shooting, that the only people at Howard's home that night were herself, Howard, and Howard's children, and that the party at Howard's home where witnesses saw Cady took place "1 or 2 days prior to Kason Wilson being killed." Da37. Jacobs' certification satisfies all three elements of the Ways test.

As the State points out, "[b]ecause the issue of materiality inquires whether the evidence would change the jury's verdict, the court should evaluate the first and third prong of the test together." Resp't Br. at 20; Ways, 180 N.J. at 189. The State's position on prongs one and three is similar to its position with regard to Cady's ineffective-assistance-of-counsel claim. That is, the State maintains that prongs one and three of the Ways test are not satisfied because Jacobs' testimony is not material in that it does not constitute an alibi defense

and that her testimony is further undermined due to her credibility issues. Resp't Br. at 21-23.

Additionally, the State also follows the PCR court's lead in relying on State v. Allegro, 193 N.J. 352 (2008), for the proposition that Jacobs' testimony would not exculpate Cady. Resp't Br. at 21-22. But Allegro is distinguishable from this case. There, the defendant's conviction arose from the operation of a drug facility in the defendant's former apartment, and the issue was counsel's failure to call a witness who would testify that the defendant had moved out of the apartment prior to the police discovering the drug facility there. Allegro, 193 N.J. 369-70.

Here, however, the shooting occurred on the street, and no witnesses testified that Cady was present at the time of the shooting. Rather, the closest testimony placing Cady at the scene of the crime was that of witnesses attending the party at Howard's residence, who testified that the shooting occurred that same night, that Cady was present at the party, and that Cady left the party, committed the shooting, and thereafter returned to provide details of the crime. See, e.g., 3T166:1-174:25. Moreover, many of the State's witnesses recanted their testimony. See, e.g., 2T105:3-107:10; 111:6-114:7 (Rennie Johnson repudiating his prior statement that Cady admitted to killing Wilson); 4T23:16-24:3; 28:2-17; 33:17-38:3 (Tyasia Cook recanting her prior implication of

Cady); Da38 (Dyana Simons admitting she never actually saw Cady at Howard's residence on the night of the shooting in contrast to her trial testimony).

Accordingly, in the absence of eyewitness testimony from the scene of the shooting, the closest thing to an alibi witness would be one who could undercut Cady's presence at Howard's home on the night of the shooting. That is precisely the testimony that Jacobs was prepared to offer at trial – that she was at Howard's home the night of the shooting, that Cady was not there, and, indeed, the party at Howard's house did not even occur on the night of the shooting. Da37.

But as set forth in Cady's opening brief and additionally above, the State downplays the importance of Jacobs' testimony while at the same time ignoring that its own case was built on witnesses with credibility issues. The fact remains that Cady's conviction was highly dependent on witnesses who placed the shooting as having occurred on the same night as the party at Howard's residence, that the witnesses along with Cady were present at that party, and that Cady left the party, committed the shooting, and then returned with details. As with Cady's ineffective-assistance-of-counsel claim, Jacobs' testimony to the contrary is undoubtedly material under the first prong of the Ways test and, in so being, would likely change the jury's verdict if a new trial were granted in satisfaction of prong three of the Ways test.

With respect to prong two, “that the evidence was discovered after completion of the trial and was not discoverable by reasonable diligence beforehand,” the certification from Jacobs laying out her testimony was not obtained until PCR counsel undertook an investigation of his own after the trial. The State, on the other hand, maintains that the certification does not amount to new evidence and echoes the PCR court’s observation that Jacobs was a known witness to both the State and defense prior to trial. Resp’t Br. at 24. While it is true that Jacobs was a known witness to both the State and the defense, the evidence as to her testimony – that is, the certification, was not then available.

Cady is uncertain as to why the certification was not obtained at that time but, regardless of the reason, it was eventually obtained as part of PCR counsel’s post-trial investigation. And the fact that the State knew about Jacobs as well, yet elected not to call her as a witness, is telling given the fact that multiple witnesses the State did call recanted their statements implicating Cady at one point or another on grounds that those statements were made as a result of the State’s threats or promises.

The State further avers that “[c]learly defendant was aware of her availability as a witness and what she would say if called at trial, yet chose not to call her.” Resp’t Br. at 24. But this highlights the merit in Cady’s ineffective-assistance-of-counsel claim. Indeed, Cady was aware that Jacobs was available

as a witness and what she would say if called to testify at trial, but it was trial counsel, not Cady, who failed to call her at trial, despite repeated requests from Cady to do so. Regardless, though, the certification attesting to how Jacobs would testify was not available at the time of trial. As such, the certification “was discovered after completion of the trial” and, in light of trial counsel’s ineffective representation, there is no evidence that it was “discoverable by reasonable diligence beforehand.” Accordingly, in addition to having satisfied prongs one and three, Cady has also satisfied prong two of the Ways test.

The PCR court’s holding otherwise should be reversed and a new trial granted based on the discovery of new evidence.

II. The State’s ex parte communications with the trial court violated the Confrontation Clause and warrant a new trial. (Da26).

The State’s assertion that it was merely discussing a “scheduling and security matter” when it in engaged in ex parte communications with the Court regarding purported juror interference should be rejected.

The State engaged in ex parte communications with the trial court, without a knowing and voluntary waiver by Cady, during which the State discussed with the trial court the conduct of jurors and spectators. These ex parte communications, of which there is no record whatsoever, ultimately led to the trial court conducting a voir dire the next day of Juror 7 without either the consent or input of the defense ahead of time. The law on this is clear. “One of

the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (1970). And due process likewise requires a criminal defendant the opportunity to be present where their absence would hinder a fair and just hearing. State v. Hudson, 119 N.J. 165, 171, (1990); see R. 1:2-1 ("All trials . . . shall be conducted in open court unless otherwise provided by rule or statute.").

There is no New Jersey rule or statute that allows for the type of ex parte communications that took place here between the State and the trial court. Knowing this to be the case, the State instead tries to couch the communication as one related to scheduling or security. The State notes that "[i]n an emergency involving a matter of vital importance, such as a threat to the life or safety of the presiding officer, a juror, or a witness, necessary communication may be made without notice." Resp't Br. at 27-28. But the State provides no evidence that the communication here involved any kind of threat to the life or safety of anyone. Indeed, there is no evidence as to the communication at all because no effort was made to record or otherwise capture its substance.

Similarly, the State asserts that, "[i]n general . . . discussions regarding scheduling . . . are not considered to constitute ex parte communications in violation of [the] rule." Id. at 27 (quoting Code of Judicial Conduct Rule 3.8

cmt. 4). But the idea that a discussion regarding purported juror interference is tantamount to a routine scheduling discussion is equally ludicrous. The State was not inquiring as to the date of a hearing or motion. Rather, the clear implication is that the State was relaying to the trial court serious allegations of juror misconduct, allegations which led the court to extensively voir dire Juror 7 the very next day and without any effort to establish the veracity of the State's allegations. That is not the product of "routine and customary communications for the purpose of scheduling a hearing or similar communications." See Resp't Br. at 27.

Instead, these ex parte communications, of which there is no record whatsoever, were in clear violation of the Confrontation Clause. Moreover, this violation was compounded by the trial court's failure to develop any sort of record based on the circumstances and had the potential of tainting the jury as a result of introducing extraneous information into the deliberations. The mere fact that subsequent communications with the jurors were recorded and that Cady was present for those proceedings is insufficient. The trial court made no effort to probe or even consider the negative impact of either its ex parte communication with the State or the subsequent voir dire.

Accordingly, the State's ex parte communications with the court were in violation of the Confrontation Clause, violating Cady's fundamental right to be

present at every stage of his trial, his right to a fair trial with due process of law, and his right to confront witnesses against him. The PCR Court's holding to the contrary was in error and should be reversed.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that the Court reverse the PCR court's Decision and Order denying his application for post-conviction relief.

Respectfully submitted,

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Dated: June 16, 2025