SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1381-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NIL CHOUDHURY,

Defendant-Appellant.

Submitted February 13, 2023 – Decided September 5, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 14-06-0087.

Jacobs & Barbone, PA, attorneys for appellant (Louis M. Barbone, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Amanda G. Schwartz, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Nil Choudhury appeals from the December 22, 2021 order of the Law Division denying his petition for post-conviction relief (PCR) after an evidentiary hearing. We affirm.

I.

In 2012, State Trooper Brett Munch, while conducting an investigation of the Peer2Peer file sharing network ARES, downloaded several files containing depictions of pornographic images of children from a publicly shared folder on a computer. The IP address associated with the computer sharing those files was connected to the home of defendant's parents, where defendant lived.

Munch subsequently went to defendant's home and administered Miranda warnings to all present, including defendant.[1] Ultimately, defendant admitted that he had been downloading child pornography on his notebook computer using ARES. Munch arrested defendant.

At the police station later that day, defendant, after receiving a second set of Miranda warnings, gave a recorded audio statement in which he admitted downloading ARES, which he knew was a file sharing network, and that he was the only person in the household who used the program. Defendant admitted that he downloaded the files containing child pornography and knew the material

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

on his computer, once downloaded, was available for distribution to other ARES users. Defendant described how he used particular search terms for pornography that included numbers indicative of the age of child depicted. Defendant admitted that he was aroused by the child pornography he downloaded, which he watched every five days for a few hours at a time. Defendant then asked the trooper, "I can't plea now, can I?" A forensic analysis of defendant's notebook computer confirmed the presence of child pornography.

In 2013, the Attorney General held a press conference regarding the investigation and several arrests, including that of defendant. After the press conference, defendant sent text messages to Munch on the trooper's State-issued cellphone. In the texts, defendant stated that he was tormented by his arrest and the publicity it generated and had no desire to go to trial. Defendant stated

> I have hurt my parents, I lied to them to protect them from the truth. I have just revealed to my mother that I knew there was one pornographic video on my computer among the other grotesque imagery. I have destroyed their image of their son.
>
> I keep thinking about what I did. The pornography wasn[']t the worst of it. I keep thinking of the motivation for downloading this grotesque material. It was torture, rape, bestiality, even murders among the images of children. I keep thinking how I didn't see a majority of the downloaded content, and that I kept downloading especially in the weeks before the raid

> even though I had long climaxed and gained nothing sexual from them.
>
> . . . .
>
> I didn[']t want my parents to pay for a lawyer even though they requested to do so not even knowing a fraction of the truth. I had wanted to unload my heart's weight as soon as possible with the state so that this could end quickly without hurting others. Now my life and those of others are collapsing. I don't know how to contact sparke [(likely DAG Sharpe, who was representing the State)] to make my plea. [I] don't have you[r] number and that of the state police.

In one text, defendant threatened suicide. Because of the threat, Munch requested local police and EMS respond to defendant's home. He was transported to the hospital for an evaluation and later released.

Subsequently, defendant, who was represented by counsel, wrote a letter again admitting guilt. In the letter, he described the "imagery depicted in the content" that he downloaded as "grotesque, horrifying, and of the most awful things found among humanity." He admitted to setting the search filters on ARES, which he had previously used to download music, to obtain videos, which resulted in him downloading "the videos which the investigation [sic] were particularly targeting." Defendant admitted to downloading the videos "to indulge [his] curiosity . . . ." He stated, "[t]hat is my confession of what I had done" and said he "wanted to talk to the prosecutor and ask for a plea deal."

Despite his multiple confessions and requests to plead guilty, in April 2014, defendant, against the advice of his attorney, sent a letter rejecting the State's then-pending plea offers. In the letter, defendant expressed his "desire that this matter should head to trial so that [he] may be given the chance to prove [his] innocence." He claimed that he was forced to confess to Munch at gunpoint and by threats of false imprisonment and that Munch lied in his police report. In addition, defendant claimed he was forcibly taken to the hospital after he threatened self-harm and was not allowed to leave until he confessed to downloading child pornography.

In June 2014, a grand jury indicted defendant, charging him with: (1) two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(a) (distributing child pornography); and (2) one count of fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b) (possessing child pornography). Shortly thereafter, defendant terminated his attorney because he did not agree with defendant's desire to reject the then-pending plea offer and proceed to trial.

Defendant's new counsel retained an expert to examine defendant's notebook computer for evidence supporting a possible defense that the child pornography was downloaded by a hacker and hidden from defendant. The

attorney explained that defendant had "a chance at trial" only if the expert could opine "scientifically . . . that [defendant's] computer was hacked or there was some way that these images were on [defendant's] computer and [he] could not see them . . . ." He advised defendant that in the event that the expert concluded he cannot provide testimony supporting the proposed defense it would be in his best interest to accept the then-pending plea offer.

Defendant's expert subsequently wrote to defendant's counsel, stating that "it does not look good for" defendant and that he would be "crazy not to take the plea." He stated that if the matter were to proceed to trial, he could provide only "very weak testimony" regarding the possibility of hacking of defendant's computer. He had uncovered no evidence that the computer had been hacked and said that "[h]opes are fading" and "it looks grim."

In 2016, defendant, who was still represented by counsel, entered a guilty plea to one count of second-degree endangering and one count of fourth-degree endangering. Prior to taking the plea, the court explained to defendant that the charges exposed him to a maximum eleven-and-a-half-year term of incarceration. However, the court explained, the State had agreed to permit defendant to be sentenced as if he pled guilty to a third-degree offense and would argue for a four-year term. Defendant, the court explained, would be permitted

to argue for a three-year term at sentencing. The court noted that defendant would be subject to the registration requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23. The court continued, "[t]here'll be no objection" by the State to his application for admission to the Intensive Supervision Program (ISP), R. 3:21-10(b) and (e), "that's a release on a supervisory program. It's up to the Department of Corrections and the court later on as to whether or not you would get that." Defendant acknowledged that he understood the plea agreement.

Defendant then admitted that he used the internet to possess, offer, and distribute approximately forty files containing child pornography, both in video format and as still images, using a computer in his home. He admitted that the files depicted both boys and girls under the age of sixteen engaged in acts of sexual contact.

At sentencing, defendant's counsel told the court that "I think under the circumstances, he will be eligible to apply for ISP. We don't know how that's going to turn out, but the attorney general's office has agreed not to object." A Deputy Attorney General representing the State agreed that "[t]he State has no objection to ISP."

After weighing the aggravating and mitigating factors and noting that defendant "has taken steps toward counseling and rehabilitation prior to

sentencing," the court sentenced him to an aggregate four-year term of incarceration and Megan's Law registration. The court noted that "[i]t is likely the defendant will respond affirmatively to ISP and should be considered by the resentencing panel at the earliest opportunity."

On the day of his sentencing, defendant applied for ISP. Three months later, the ISP Screening Board (Board) denied defendant's application. The Board stated

> Your application to the [ISP] has been evaluated. It has been determined that upon review of your case, your application was deemed ineligible for the following reason: Aggravating factors in the instant offense.

In response to a request from defendant's mother that the Board reconsider its decision, the Board's Chief sent her a letter stating:

> The [ISP] is an intermediate form of punishment between incarceration and probation. The program provides a structure within which certain offenders sentenced to State[] Prison are afforded an opportunity to work their way back into the community under intensive supervision.
>
> The program is highly selective with many factors considered. In your son's case, as an offender subject to Megan's [L]aw registration, he was not a suitable candidate for ISP.

Defendant thereafter filed a petition for PCR in the Law Division. He alleged ineffective assistance of counsel, prosecutorial misconduct, and

ineffective assistance of appellate counsel. The central issue raised in the petition is defendant's allegation that his plea attorney was ineffective because he gave defendant inaccurate advice that he was eligible for ISP. Defendant alleged that he relied on that advice and would not have accepted the plea offer had he known he was ineligible for ISP.

The trial court issued a written opinion granting defendant an evidentiary hearing on his petition. The court found that it was clear that "egregious errors were made contributing to the outcome" of defendant's criminal proceedings because counsel for both parties, defendant, and the court did not realize that defendant would be ineligible for ISP because he pled guilty to a Megan's Law offense. The court noted, "a single phone conversation with . . . the ISP Supervisor in Camden, revealed that any Megan's [L]aw conviction acts as an automatic bar from the ISP program." Therefore, the court concluded, defendant "clearly presented a prima facie case of ineffective assistance of counsel" in his petition, entitling him to an evidentiary hearing.

At the hearing, defendant's plea counsel, who was highly experienced in criminal defense, testified that he was retained by defendant after plea negotiations had begun. According to his testimony, it was "real clear to me based on what I had read in discovery and the interaction between [defendant]

and his mother and father . . . that he was lying to them." The discovery reviewed by the attorney included "pictures in a share file[,] . . . a confession to the police[,] . . . a whole series of text messages that were sent by [defendant] to the police officer that was a restatement of his confession[,] . . . [and] a letter he wrote also confessing."

The attorney testified that he felt the only thing that could help defendant's case was "if the expert could tell us that we had some scientific way of . . . relying on the presumption," and arguing that the State "couldn't establish that [the files] were knowingly and intelligently put on his computer." However, the expert reported back that it was his "opinion that he really couldn't say that they were hacked" and defendant should take the plea.

The attorney testified that despite defendant's desire to go to trial, he reached out to the State "because [he] felt it was [his] obligation to find out what this young man's options were." Although the State was offering four years of imprisonment, instead of the three years the attorney was seeking, he advised defendant to accept the plea offer because it was better than the sentence he faced if convicted at trial.

The attorney testified that when he discussed the plea offer with defendant he informed him about ISP and said "that he would go in front of a panel of

judges and then if he got into ISP . . . without an objection he can be out in two or three months." He did not tell defendant he definitely would be accepted into ISP. He testified that he also did not tell defendant he was ineligible for ISP because he was, in the attorney's view, "clearly eligible under the statute . . . ." N.J.S.A. 2C:43-11(b), which authorized the ISP and set forth disqualifying offenses, did not exclude from admission to ISP persons convicted of sex offenses or Megan's Law offenses.

The attorney addressed the fact that the application for the ISP stated:

> Am I eligible to apply to ISP?
>
> You are eligible if you have been convicted and sentenced to a State Institution UNLESS the crime was HOMICIDE (including DEATH BY AUTO), ROBBERY or a SEX OFFENSE. Also a conviction for a FIRST DEGREE OFFENSE will make you INELIGIBLE.

The attorney testified that he thought there was a significant legal distinction between offenses that were statutorily barred from consideration for ISP and those that the ISP excluded from the program as a matter of policy. He testified, "[i]f it said statutorily disqualified, then there's nothing to talk about[,]" but if it was an exclusion based on an internal ISP policy, "they could follow [that] or not follow [that] based on an individualized evaluation of every case." He testified that he knew "from other lawyers that [ISP] made exceptions" to its

policy regarding disqualifications from the program and that he had been assured by ISP personnel that defendant's application would be considered.

The attorney also testified that his main focus was attempting to secure a shorter sentence for defendant than he faced at trial, obtain reduced or no parole ineligibility periods, and avoid defendant's incarceration at the Adult Diagnostic and Treatment Center instead of State prison. The attorney expressed his belief that defendant would have taken the plea offer even if he knew he was ineligible for ISP, given the strength of the evidence and because the four-year term sought by the State was below the term provided for his offenses in its plea guidelines.

Defendant's mother testified that her son's attorney told her that defendant would serve only two months in jail. She stated that she would not have encouraged her son to accept the plea offer had she known he was ineligible for ISP.

Rather than testifying at the evidentiary hearing, defendant submitted an affidavit. He stated that he "never knew from the beginning to end of all proceedings in the trial court, that [he] was simply ineligible for" ISP. Rather, he stated, his attorney had assured him that he was a viable candidate for the program based on his age, lack of convictions, and the structure of the plea

agreement. He stated that he "never would have entered into a plea agreement" had he known he was ineligible for ISP.

After the hearing, the trial court issued a written opinion granting defendant PCR and vacating his convictions. The court concluded defendant was barred from admission to ISP because "[t]he Megan's [L]aw statute clearly controls the definition of sex offense under N.J.S.A. 2C:14-1" and was, therefore, incorporated in the ISP internal policy excluding defendants who are convicted of a sex offense. In a prior oral decision, the court concluded that defendant's counsel provided erroneous advice when he informed him that he was eligible for admission to ISP. Based only on its finding that defendant's plea counsel was ineffective, the court found he was entitled to PCR.

The State subsequently moved for reconsideration, highlighting that the trial court had not made a decision as to the second prong of the Strickland/Fritz test: that the outcome of defendant's criminal proceeding would have been different had he not been provided with ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984) and State v. Fritz, 105 N.J. 42 (1987). The State argued that the court failed to determine whether defendant would have accepted the plea agreement even if he had been provided with accurate advice about his eligibility for ISP.

Before deciding the State's motion, the trial court issued a supplementary written opinion addressing the second prong of the Strickland/Fritz test. The court relied on the testimony of defendant's mother to conclude that defendant would not have accepted the plea agreement had he known he was ineligible for ISP.

The trial court subsequently denied the State's motion for reconsideration. The court acknowledged that its first written opinion did not address the second prong of the Strickland/Fritz test. While recognizing that its supplemental written opinion did address that prong of the test, the court concluded that the supplemental decision was inadequate because it relied on the testimony of defendant's mother and not that of defendant. The court noted that "the expected practice was to have [d]efendant testify under oath" at the evidentiary hearing. Although defendant submitted an affidavit instead of testifying, the court found that the State, by consenting to the submission of defendant's affidavit, waived its opportunity to cross-examine him and question the veracity and credibility of his written testimony. Given those conclusions, the court adopted the assertions in defendant's affidavit that he would not have accepted the plea offer had he known he was ineligible for admission to ISP. Thus, the court concluded, defendant had satisfied the second prong of the Strickland/Fritz test.

The State subsequently filed a second motion for reconsideration. With respect to the first prong of the Strickland/Fritz test – whether defendant's plea counsel was ineffective – the State argued that the trial court "erred in relying upon ex parte evidence" obtained in a telephone call with the Camden County ISP Director. With respect to the second prong of the test, the State argued that the trial court erred when it relied on defendant's affidavit without making any credibility determinations.

The trial court granted the State's second reconsideration motion, vacated its order granting defendant PCR, and scheduled the matter for assignment to a different judge for resolution of defendant's PCR petition. The court's order granting the motion was not accompanied by findings of fact and conclusions of law.

Defendant moved for reconsideration. The trial court issued a written opinion denying defendant's motion that explained its reasoning for granting reconsideration and vacating its prior order granting defendant PCR. The court found that it was error for it to direct its law clerk to contact the Camden County ISP Director to obtain information about the program. The court noted that the parties were not given an opportunity to test the credibility of the information the clerk obtained.

Judge Sarah Beth Johnson was assigned to the matter. The judge scheduled the matter for an evidentiary hearing and gave the parties the opportunity to submit supplemental briefs addressing how ISP defined "sex offense" for purposes of its internal admission exclusion policy.

Defendant testified. He claimed that his counsel told him that "because [he] did not have any contact with a minor that [he] would be eligible for ISP." Defendant testified that in light of that advice and considering the State's agreement not to object to ISP, he expected to be accepted into the program and released from incarceration in two months. He also testified that although he preferred to go to trial, he accepted the plea offer because his parents had spent over $95,000 on his defense and, as a result, he "felt that the best interest [was] just to end the case there and go back to [his] studies and get a job to help [his] parents financially." Defendant acknowledged that "[t]here was the option to go to trial, but at that time, given [his] family's financial situation, [he] believed that was the best option, for me to take a plea." He testified that he believed he would not have been convicted at trial because there was still potential for a defense based on his computer's forensic examination, but it was too expensive to obtain the necessary evidence.

Defendant also testified that the texts he sent to Munch were lies to get the trooper's attention after he did not respond to defendant a few days earlier. Similarly, defendant asserted that the confession he wrote in a letter was fabricated and meant to qualify him for pretrial intervention.

On December 22, 2021, Judge Johnson issued a comprehensive written opinion denying defendant's petition. The judge found defendant's plea attorney to be highly credible and candid. She accepted the attorney's testimony that he discussed ISP with defendant extensively, including downloading material from the ISP website, which he gave to defendant, who also conducted his own research. The judge also found credible the attorney's testimony that he told defendant that "ISP is a process" and did not guarantee that he would be accepted into the program. Judge Johnson found credible the attorney's testimony that, based on his research and conversations with other criminal defense attorneys, he believed defendant was not statutorily barred from ISP. He, therefore, did not tell defendant that his convictions would render him disqualified or ineligible for ISP.

Judge Johnson concluded that defendant had not established the first prong of the Strickland/Fritz test because she could find no authority that definitively rendered defendant ineligible for ISP based on his convictions.

Thus, the judge found that defendant's counsel did not provide him with inaccurate information regarding the program.

The judge explained that ISP was first established through adoption of a court rule in 1983. It is "essentially a post-sentence, post-incarceration program of judicial intervention and diversion back to the community." State v Clay, 230 N.J. Super. 509, 512 (App. Div. 1989). N.J.S.A. 2C:43-11, which was adopted in 1993, clarified the circumstances under which an inmate would be ineligible for participation in the program. The statute does not include sex offenses as ineligible. It does, however, provide that "[n]othing in this subsection shall be construed to preclude [ISP] from imposing more restrictive standards for admission." N.J.S.A. 2C:43-11(a).

The judge found that ISP developed standards more restrictive than the statute, which appear in the program application published on the court's website. As noted above, the application states that a conviction of a "[s]exual [o]ffense" rendered an inmate ineligible for admission.

Under Megan's Law, a sex offense includes endangering the welfare of a child by knowingly storing or maintaining child pornography using a file-sharing program. See N.J.S.A. 2C:7-2(b)(2) and N.J.S.A. 2C:24-4(b)(5)(a)(iii).

However, offenses under Megan's Law, which was adopted two years after N.J.S.A. 2C:42-11, are not listed as convictions ineligible for admission to ISP.

Judge Johnson concluded that in these authorities, there is no definitive declaration that ISP considers all Megan's Law offenses to be sex offenses rendering an applicant ineligible for admission. Thus, the judge concluded, defendant's counsel correctly determined that there was no statutory bar to defendant's admission to ISP. Defendant's counsel, the court concluded, was not ineffective when he advised defendant that he had a chance to be admitted to ISP based on the ISP Board's individualized consideration of defendant's application. The judge found that this conclusion was corroborated by the fact that the State's counsel and the trial court at the plea also held the view that defendant was not ineligible for admission to ISP. As a result, the judge found that defendant did not establish the first prong of the Strickland/Fritz test.

The judge also concluded that even assuming defendant had established the first prong of the Strickland/Fritz test, he did not establish that there was a reasonable probability that he would not have pled guilty had he been told that he was ineligible for ISP.

The judge found defendant's testimony to lack credibility, concluding he testified with a flat demeanor and in a slightly defensive manner. In addition,

the judge found some of defendant's answer to have been rehearsed and unconvincing and his claims regarding his multiple confessions incredible and unreasonable. To the contrary, the judge found it unlikely that defendant fabricated the comprehensive and detailed confessions. Instead, the judge found that the quality and character of the statements were consistent with defendant seeking a quick and easy way to resolve his charges by admitting his guilt.

In addition, Judge Johnson found that defendant's clear and unequivocal statements at the plea hearing that he knowingly downloaded child pornography contradict his claims at the PCR hearing. The judge found:

> The essence of [defendant's] testimony appears to be that, at every turn in the process, he freely gave law enforcement, the State, and even the court false statements because he thought those lies would benefit him. Only when his lies failed to produce the desired result – i.e. his acceptance into ISP and release from prison after 60 days – did [defendant] seek to retract them and reveal the truth. In short, [defendant] urges me to find that, although he admittedly lied many times before, now he's telling the truth.
>
> . . . .
>
> I do not find that [defendant] would not have plead guilty but for [his attorney's] advice regarding this one aspect of the plea agreement because [defendant's] testimony is largely incredible.
>
> In fact, the only testimony that I do find credible is that portion which overlaps with [the attorney's]: the fact

> that both witnesses testified [defendant] did not possess the emotional or financial resources to proceed to trial at the time of the plea.

Judge Johnson found that defendant was likely motivated to take the plea by the State's agreement to a sentence in the third-degree range and the end of the extreme stress he visited on himself and his family for over three years. The judge found that defendant was an intelligent and educated man who understood that applying to ISP was not a guarantee of his admission to the program. Finally, the judge noted her discomfort with defendant's willingness to testify, albeit untruthfully, to having manipulated the criminal justice system by lying on several occasions to get the outcome he desired. Because defendant established neither prong of the Strickland/Fritz test, the judge denied his petition for PCR.[2]

This appeal follows. Defendant raises the following arguments for our consideration.

> POINT I
>
> THE STATUTORY INTERPRETATION AND FINDINGS OF THE SECOND PCR JUDGE AS TO ISP ELIGIBILITY FOR A "SEXUAL OFFENSE"

[2] It is unclear if the judge entered an order to effectuate its December 22, 2021 written opinion. If she did, it has not been included in the record. If not, we consider the December 22, 2021 letter opinion to incorporate an order denying defendant's PCR petition.

CONSTITUTES ERROR AS A MATTER OF LAW AND MUST BE REVERSED ON DE NOVO REVIEW.

POINT II

THE COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT DEFENSE COUNSEL WAS CONSTITUTIONALLY EFFECTIVE.

II.

Under Rule 3:22-2(a), a defendant is entitled to PCR if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey . . . ." "A petitioner must establish the right to such relief by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992). "To sustain that burden, specific facts" which "would provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

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, 466 U.S. at 686; Fritz, 105 N.J. at 58). 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.

The right to the effective assistance of counsel extends to legal assistance related to the entry of a guilty plea. State v. Gaitan, 209 N.J. 339, 350-51 (2012).

To set aside a guilty plea based on ineffective assistance of counsel, the defendant must "show that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases'; and, (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" State v. Nunez-Valdez, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994) (citations omitted) (alteration in original)).

We "defer to [the] trial court's factual findings made after an evidentiary hearing on a petition for PCR." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). "An appellate court 'should give deference to those findings of the trial judge which are substantially influenced by [their] opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'" State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

Having carefully reviewed defendant's arguments in light of the record and applicable legal principles, we affirm the December 22, 2021 order for the reasons stated by Judge Johnson in her thorough and well-reasoned written opinion. We find no basis in the record to disturb Judge Johnson's findings of fact or her conclusion that defendant's counsel was not ineffective when he

advised defendant that there was a possibility that he would be accepted into ISP. While it should have been readily apparent to defendant's counsel that the ISP had an internal policy of excluding defendants convicted of "sex offenses," there was no clear authority defining "sex offenses" for this purpose as including all offenses subject to Megan's Law. Nor does the record reveal any prohibition on the ISP judges creating an exception to their internal policy based on the individual considerations of a particular defendant.

In addition, there is ample support in the record for Judge Johnson's conclusion that defendant would have accepted the plea offer, even if he had been informed that the ISP internal policy excluded those convicted of offenses subject to Megan's Law. Defendant confessed to downloading child pornography, being sexually aroused by the unlawful material, and making the contraband available on his computer for distribution to others. Nothing in the record suggests that defendant's repeated inculpatory statements would have been inadmissible at trial. A forensic report confirmed that files containing child pornography were stored on his computer. Defendant's expert uncovered no evidence supporting the belatedly raised theory that the child pornography was placed on defendant's computer by a hacker and hidden from his view – a theory directly at odds with defendant's confessions and the physical evidence observed

in the forensic analysis of his notebook computer. Defendant's chances of being acquitted at trial were minimal.

In addition, defendant acknowledged that his family had incurred significant legal expenses on his behalf and that he had a strong desire to staunch the drain on their assets by bringing the criminal proceedings against him to a conclusion. The desire to relieve his family's financial burden and the favorable four-year sentence the State offered for repeated acts of distribution of child pornography likely would have motivated defendant to accept the plea offer, regardless of whether he had a possibility of being accepted into ISP.

Affirmed.