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

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1517-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIM MCGEACHY, a/k/a  
TIMOTHY MCGEACHY,

Defendant-Appellant.

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Submitted January 11, 2023 – Decided January 18, 2023

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law  
Division, Hudson County, Indictment No. 10-06-1064.

Joseph E. Krakora, Public Defender, attorney for  
appellant (Monique Moyse, Designated Counsel, on the  
briefs).

Esther Suarez, Hudson County Prosecutor, attorney for  
respondent (Erin M. Campbell, Assistant Prosecutor,  
on the brief).

PER CURIAM

Defendant Tim McGeachy appeals from the Law Division's February 14, 2020 order dismissing his petition for post-conviction relief (PCR) after he failed to file an interlocutory appeal from the trial court's January 21, 2020 order permitting the State to call two of defendant's prior attorneys as witnesses at the evidentiary hearing. For the reasons that follow, we reverse and remand for further proceedings.

The underlying facts concerning the offenses involved in this matter are set forth in our prior opinion on defendant's direct appeal from his convictions for second-degree reckless homicide and fourth-degree burglary. State v. McGeachy (McGeachy I), Docket No. A-0454-13 (App. Div. Mar. 1, 2016), certif. denied, 226 N.J. 213 (2016). Therefore, those facts will not be repeated here.

Defendant thereafter filed a timely petition for PCR. In his petition, defendant

raised nine separate arguments in support of his claim that [one or more of his four trial attorneys] provided him with ineffective assistance, and an additional contention that his resentencing on the burglary charge was illegal. He also presented three grounds supporting his assertion that his appellate counsel on direct appeal was ineffective.

[State v. McGeachy (McGeachy II), Docket No. A-2097-17 (App. Div. Mar. 7, 2019) (slip op. at 11).]

The PCR court denied defendant's petition without conducting an evidentiary hearing. Id. at 6. In its decision, "the court only briefly mentioned four of [defendant's] arguments concerning [his] trial attorney[s], and none of the assertions defendant raised about his appellate counsel." Id. at 11-12. For the reasons set forth in McGeachy II, we reversed the court's decision and remanded the matter "so that all of defendant's contentions [could] be considered" at an evidentiary hearing. Id. at 12, 14-15.

On remand, defendant filed a motion to recuse the PCR judge and for a change of venue. The judge conducted oral argument on the motion on July 22, 2019. Although there is no written order in the record concerning defendant's motion, the parties have presumed the judge denied it.

During oral argument, parties advised the judge that Robert S. Lane, Esq., the attorney who represented defendant at his trial, had passed away. However, the prosecutor stated she intended to call Anthony R. Gualano, Esq., who was one of the three other attorneys who had represented defendant prior to the trial, as a witness at the evidentiary hearing. Although defendant was represented at oral argument by an attorney, he told the judge that Lane's performance at the trial would be the focus of his case.

The judge scheduled the evidentiary hearing for January 13, 2020. Although defendant had told the court that he was now limiting his case to Lane's actions during the trial, the judge did not conduct a pre-hearing conference with the parties to determine which of the nine separate issues defendant raised concerning his trial attorneys would be raised during the proceeding.

Instead, at the start of the January 13, 2020 hearing, the prosecutor again stated she intended to call Gualano as a witness because he "undertook many of the investigations that [defendant] allege[d] that . . . Lane did not do." The prosecutor also stated she intended to call defendant's appellate attorney, Frank J. Pugliese, Esq., as a witness. Defendant objected to the testimony of both attorneys. Through counsel, and through his own presentation, defendant asserted he was no longer raising any claims of ineffective assistance concerning either Gualano or Pugliese, and was limiting his contentions to Lane's performance during the trial. The prosecutor continued to argue that Gualano's testimony would shed light on Lane's actions because Gualano had prepared the case for trial and was "qualified to speak about the investigations undertaken on [defendant's] behalf . . . ."

The PCR judge did not ask defendant or his attorney to specify the issues they intended to raise at the hearing. The judge also did not require defendant

to present his case first, which would have had the same effect. Instead, the judge found that defendant waived his attorney-client privilege as to Gualano's and Pugliese's testimony when he filed his petition for PCR,<sup>1</sup> and directed the State to call Gualano as its first witness.

Gualano took the stand, but the judge immediately asked him if he wanted to appeal the judge's ruling that defendant had waived his attorney-client privilege as to his testimony. Gualano stated he was prepared to testify. The prosecutor began to question Gualano, and defendant's attorney noted for the record that defendant "continued to object" to Gualano's testimony. The judge asked defendant if he wanted to appeal his ruling, and defendant said he did. The judge then excused Gualano and Pugliese, and adjourned the hearing.

On January 21, 2020, the judge issued a written order stating that defendant's attorney-client privilege was deemed waived as to Gualano's and

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<sup>1</sup> In our recitation of the facts in McGeachy II, we noted that "[a]t various times throughout the trial court proceedings, defendant was represented by four different attorneys." Id. at 3 n.2. We also stated that for purposes of our opinion, we had "no reason to distinguish among the attorneys involved[.]" Ibid. By making this statement, we were merely acknowledging that defendant's petition was not always clear as to which attorney was involved in each of his individual claims of ineffective assistance. We certainly did not intend, as the State suggested in its arguments to the PCR judge, that defendant was barred from limiting his claims to one or more of his attorneys at the evidentiary hearing we ordered, or that any waiver of his privilege concerning his communications with Lane would automatically extend to his discussions with Gualano and Pugliese.

Pugliese's testimony. When defendant did not follow through by filing an interlocutory appeal from this order, the State moved to dismiss defendant's petition for PCR.

On February 14, 2020, the judge issued a written order granting the State's motion. In the order, the judge stated that because defendant refused to waive his attorney-client privilege as to Gualano and Pugliese, defendant could not proceed on the merits of his petition.<sup>2</sup> This appeal followed.

On appeal, defendant raises the following contentions:

POINT ONE

THE PCR COURT ERRED BY WAIVING  
[DEFENDANT'S] ATTORNEY-CLIENT PRIVILEGE  
AND THE MATTER MUST BE REMANDED FOR A  
PROPER WAIVER DETERMINATION.

POINT TWO

THE PCR COURT ERRED BY DISMISSING  
[DEFENDANT'S] PETITION AND THE MATTER  
MUST BE REINSTATED AND REMANDED  
CONSISTENT WITH THE APPELLATE DIVISION'S  
OPINION.

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<sup>2</sup> Because we reverse the judge's decision for the reasons expressed herein, we need not address his alternate conclusion that once defendant failed to file an interlocutory appeal from the judge's ruling, the petition had to be dismissed. Suffice it to say, we also disagree with this portion of the February 14, 2020 order.

### POINT THREE

#### THE MATTER SHOULD BE REMANDED BEFORE A NEW PCR JUDGE (Not Raised Below).

Because the PCR judge did not apply the correct legal precedents or follow the appropriate procedures in resolving the issue of defendant's attorney-client privilege, we reverse and remand for additional proceedings. We conclude that instead of immediately ordering a blanket waiver of defendant's privilege as to Gualano and Pugliese, the judge should have first made a determination as to which of defendant's PCR claims were still extant and a determination as to whether the proposed testimony of either attorney was relevant to those claims.

Our conclusion is based upon the principle that "[o]rders declaring a wholesale waiver of the attorney-client privilege should not be entered; rather, there should be a careful delineation of permissible avenues of inquiry[.]" Halbach v. Boyman, 369 N.J. Super. 323, 330 (App. Div. 2004). In a PCR proceeding, the attorney-client privilege "does not extend to communications relevant to an ineffective-assistance-of-counsel claim." State v. Bey, 161 N.J. 233, 296 (1999). However, the party seeking to overcome the bar of the privilege typically bears the burden of establishing why it should not apply. See Halbach, 369 N.J. Super. at 328-29.

"[A] trial court must proceed with caution and circumspection in this area." Id. at 330. Although a PCR petition based on a theory of ineffective assistance of counsel must logically be deemed to encompass a waiver of the attorney-client privilege as to matters bearing upon the issues raised, see N.J.R.E. 504(2)(c), the waiver cannot be seen to be so broad as to supersede all the interests the privilege protects. See Kinsella v. Kinsella, 150 N.J. 276, 301 (1997); In re Kozlov, 79 N.J. 232, 243-44 (1979).

Here, defendant concedes that "[i]n his petition, [he] alleged that all four of his attorneys were ineffective[.]" However, after we remanded the matter to the PCR court for an evidentiary hearing, defendant told the judge he was only interested in proceeding with the claims he made concerning Lane's representation of him at the actual trial.

At that point, the judge should not have ordered a blanket waiver of defendant's privilege as to Gualano and Pugliese. Instead, the judge should have required defendant to specify which of the nine trial court issues he intended to raise at the hearing, and to make a specific waiver of his claims concerning his appellate attorney. Once the issues were delineated and limited, the judge should have required defendant to make a proffer of what evidence he intended to produce in support of each of his remaining claims.



At that point, the State would have been in a position to attempt to meet its burden of establishing why the attorney-client privilege should not apply to the proposed testimony of Gualano and Pugliese, who were no longer the subject of defendant's PCR petition. See Halbach, 369 N.J. Super. at 328-29. As the State argues on appeal, Gualano's testimony may have been relevant to defendant's allegations concerning Lane if, for example, Gualano performed pre-trial investigations that defendant now claims Lane should have conducted and advised Lane of his findings. However, because the PCR judge did not require the State to make a proffer demonstrating the relevancy of either Gualano's or Pugliese's proposed testimony to Lane's actions or inactions, the judge's blanket waiver of defendant's privilege as to both attorneys cannot stand.

Therefore, we reverse the February 14, 2020 order and remand for additional proceedings consistent with this opinion.<sup>3</sup>

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<sup>3</sup> Contrary to defendant's contention in Point Three, we perceive no basis for requiring the assignment of a different judge to rule on the privilege issues and conduct the evidentiary hearing on the remand. See Strahan v. Strahan, 402 N.J. Super. 298, 318 (App. Div. 2008) (stating that a party's contention that a trial judge was unfair or biased "cannot be inferred from adverse rulings against a party"). However, the Assignment Judge may assign this matter to any available judge as he deems appropriate. In this regard, we note that the PCR judge is no longer assigned to the vicinage where this case originated.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION