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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1553-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HAROLD A. TUCKER, a/k/a
HI-WOO, and HAROLD
ANTHONY TUCKER,

Defendant-Appellant.

Submitted March 13, 2023 – Decided April 18, 2023

Before Judges Gooden Brown and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 11-05-0707.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

Appellant filed pro se supplemental briefs.

PER CURIAM

Defendant appeals from the November 18, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm in part, and remand for further proceedings.

I.

On May 10, 2011, defendant was charged in a Middlesex County indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(1). The charges stemmed from the August 22, 2010 shooting death of Quadir Ali-Muslim and defendant's subsequent flight from the state. Following a 2012 jury trial, defendant was convicted of all counts and sentenced to an aggregate term of thirty-five years of imprisonment, with a thirty-year period of parole ineligibility. We affirmed his convictions and sentence in an unpublished opinion, State v. Tucker, No. A-1398-12 (App. Div. Oct. 13, 2015), and the

Supreme Court subsequently denied certification, State v. Tucker, 224 N.J. 282 (2016).

We incorporate by reference the recitations of the facts contained in our unpublished opinion as well as the second PCR judge's written opinion. For context, we recount the following evidence supporting defendant's convictions. A few days before the murder, defendant's cousin had been the victim of a separate shooting allegedly perpetrated by a friend of the victim. Tucker, slip op. at 2. Defendant confronted his cousin's shooter, and, according to trial testimony, feared for his life as a result. On August 22, 2010, the day of the murder, defendant and the victim were separately staying at a hotel in South Plainfield with their respective romantic partners. "Defendant brought a loaded gun with him to the hotel," reportedly for self-protection. Ibid.

As we related in our opinion:

Defendant left his hotel room to buy food at the vending machine. At the same time, the victim was standing near the vending machine. Defendant's girlfriend then heard gun shots, exited the hotel, hid in some bushes, and called 9-1-1. Meanwhile, the victim's lover left their room in search of her companion. In the hallway, she observed blood on the wall, bullet holes in the glass doors, and noted numerous police officers at the scene.

A police officer located the victim just beyond the hotel lobby on the floor in a pool of blood. The

officer detected no signs of life. He continued searching the scene, saw shell casings at the far end of the hallway, and then spotted the victim's lover. She identified the victim and the police then removed her from the hotel. . . .

Defendant ran to a nearby parking lot after the shooting and called his former girlfriend. She arrived at the lot, picked him up, and then drove him to her house. The former girlfriend discarded defendant's clothing and boots, and then provided clothing for him to wear. She drove him to a friend's house and never saw him again.

The police continued with their investigation at the crime scene and discovered that a hotel surveillance camera recorded defendant chasing the victim down the hallway. Another camera captured defendant's girlfriend running out of the hotel and dropping her purse. In the hallway, the police discovered nine-millimeter cartridge casings, and the day after the murder, they located a gun in the hotel parking lot.

The State's ballistics expert testified that the recovered firearm was a nine-millimeter semi-automatic pistol. The expert tested the gun and casings and opined that five shots were fired from the gun. The medical examiner verified that the victim's wounds were caused by one of the bullets.

[Id. at 2-4.]

Defendant testified on his own behalf. We recounted his trial testimony as follows:

At trial, defendant claimed self-defense, testifying that he feared for his life because he had

previously confronted the shooter of his cousin. Defendant believed that the victim and the shooter of defendant's cousin knew each other, and defendant testified that the victim had a reputation for being a killer. On direct examination, defendant also testified about his own convictions and general violence in his neighborhood, including murders relating to drugs and other wrongdoings.

Defendant testified that he saw the victim standing near the vending machine and observed the victim holding the barrel of a gun. Defendant stated that he directed the victim to "chill," and after that, he noticed the victim pull a gun out of his pocket. Defendant testified that he heard gun shots, but was "not certain" if the victim was shooting at him. Defendant looked up and saw his girlfriend, who was screaming. Defendant testified that he "got mad," and fired his own gun "like twice" as the victim ran down the hall. Defendant testified that he ran out of the hotel, threw the gun near a parked car, which is where the police found it, and called his former girlfriend.

[Id. at 4-5 (footnote omitted).]

We pointed out that notwithstanding defendant's testimony, "[t]he victim's alleged gun was not found at the crime scene." Id. at 5 n.2. During his testimony, defendant also admitted fleeing New Jersey "to avoid the police and because he was afraid for his life." Id. at 5. He was apprehended when he returned to New Jersey "[a]bout two months after the murder." Id. at 4. During his arrest, police seized defendant's bag and searched it without a warrant. Ibid.

The bag contained "\$3,600] in cash, as well as clothing and prepaid cell phone cards." Ibid.

Defendant filed a timely pro se petition for PCR asserting he received ineffective assistance of trial and appellate counsel (IAC). Regarding trial counsel, defendant averred his attorney: (1) failed to confer and consult with him and provide him with discovery; (2) failed to prepare and present a defense by investigating the crime scene and interviewing witnesses; (3) failed to hire expert witnesses; (4) failed to inform defendant about the effect of the court sanitizing defendant's prior convictions prior to him testifying; (5) failed to cross-examine State witnesses about prior misconduct; (6) failed to file pre-trial motions to suppress evidence; (7) failed to negotiate a plea with the State; and (8) failed to object to instances of prosecutorial misconduct. As to appellate counsel, defendant asserted his attorney: (1) failed to raise IAC claims; (2) failed to request discovery; (3) failed to obtain voir dire transcripts; and (4) failed to raise purported error related to the jury charge.

In a supporting certification, defendant averred that despite telling his attorney that "[he] did not want to testify if [his] past convictions for aggravated assault/possession with a weapon would be told to the jury," his attorney elicited his prior convictions during his testimony despite the court's ruling sanitizing

his prior record. Defendant also cited several instances of trial counsel's failure to investigate or present certain evidence that could have been used to either bolster his credibility or impeach the State's witnesses, the adverse impact of which was allegedly demonstrated by the jury's questions regarding omitted evidence.

In particular, defendant claimed that prior to trial, Dontay Royster,¹ a close friend of the victim, had told defendant that the victim had a .38-caliber revolver in his possession the night before the shooting. Defendant suggested that because the State's ballistics expert had been unable to conclusively determine the source of a bullet found at the scene, the unidentified bullet could have come from a .38-caliber gun. Defendant certified that although he had informed his attorney about Royster's willingness to testify on his behalf, his attorney was resistant to the idea and allegedly instructed Royster "to stop speaking" with defendant. Defendant attributed his attorney's actions to a conflict of interest caused by his attorney's admitted representation of Royster in an unrelated matter.²

¹ Royster also appears in the record as "Dante Royster."

² In its opposition to defendant's PCR petition, the State acknowledged that defendant's attorney had confirmed that Royster was a current client. However,

Additionally, defendant claimed the State's theory that he intentionally sought out the victim to kill him could have been rebutted by evidence showing that defendant and his girlfriend had stayed at the hotel the night before the murder. However, his attorney failed to obtain the hotel log sheet, interview hotel staff, or view the contents of a hard drive obtained from the hotel containing surveillance footage pre-dating the murder.³ Defendant indicated that the significance of the omitted evidence on the jury's deliberation was demonstrated by the jury asking whether defendant had been at the hotel the night before the murder.⁴

To support his contention that his attorney failed to address instances of prosecutorial misconduct, including discovery violations, defendant submitted a certification by Tyejuan Tucker, the cousin who had been shot, who attested that the victim was not the person who had shot him, and that, to his knowledge,

the State asserted there was no conflict because Royster was not a witness in the case.

³ The State countered in its opposition that defendant's attorney had inspected the hard drive at the prosecutor's office.

⁴ During jury deliberations, the jury had asked whether there were "any documents in evidence besides witness testimony confirming [defendant's] stay" at the hotel the night before the murder. After consulting with counsel, the judge had responded there were "no documents in evidence," only "testimony relative to that."

a police report documenting his statement to that effect was not provided to defendant. According to Tyejuan's certification, the report was "very important" because it would have contradicted the State's claim that defendant shot the victim as revenge for shooting Tyejuan. Tyejuan also certified that he "was never contacted by trial counsel" to testify on defendant's behalf but would have done so had he been called as a witness.

Following oral argument, the PCR judge entered an order on October 23, 2017, granting defendant an evidentiary hearing. In his accompanying written opinion, the judge limited the evidentiary hearing to two issues—whether trial counsel's alleged conflict of interest and resulting failure to call Royster as a witness deprived defendant of effective assistance, and whether trial counsel's failure to present to the jury the hotel surveillance footage from the night before the murder constituted IAC.

In granting the hearing, the judge stated:

Th[e c]ourt requests clarification on whether there was a conflict created between trial counsel and client and whether trial counsel represented . . . Royster prior to this trial leading to obstruction of [defendant's] representation. Since[] trial counsel did not call . . . Royster, who allegedly would have corroborated the [d]efense's testimony, th[e c]ourt is requesting further evidence of the alleged conflict created between counsel and client.

Additionally, there was question of footage available of the hotel on August 21, 2010, a day before the murder occurred. Trial counsel did not present the video during trial. Th[e c]ourt is of the opinion that this footage deprived the jury of the opportunity to view footage of the hotel the night before the murder. Defense contends that this evidence would prove that [defendant] had not acted purposefully. Th[e c]ourt requests further evidence on this issue because the video was not presented during trial to the jury.

Other than reciting defendant's other arguments in support of PCR, the judge neither addressed nor adjudicated any other claim.

Consistent with his decision, on November 16, 2017, the judge entered an order requiring defense counsel to appear at an evidentiary hearing scheduled on January 26, 2018. However, defendant's attorney was unable to appear for medical reasons, and, following several adjournments, passed away before the evidentiary hearing was conducted. After defense counsel's death, the judge entered an order on December 12, 2018, dismissing defendant's PCR petition without prejudice.⁵ In a written statement accompanying the order, the judge

⁵ Defendant filed a notice of appeal from the December 12, 2018 order, but the appeal was ultimately dismissed because the order was not final.

concluded that without testimony from trial counsel, the evidentiary hearing would serve no purpose.⁶

Defendant refiled his PCR petition on November 6, 2019. In the petition, defendant added IAC claims against his first PCR counsel, asserting that counsel was ineffective by failing to: (1) "investigate claims raised by [defendant]" and "raise [c]onstitutional issues on his own"; (2) "contact witnesses to gather certifications"; (3) "inform [defendant] that his petition . . . [had been] dismissed"; and (4) "request discovery." The petition was subsequently amended to include supplemental briefing by newly-appointed PCR counsel, which briefing incorporated the claims raised in the original petition and maintained that an evidentiary hearing had already been granted by the first PCR judge based on a finding that defendant had established a prima facie case of IAC.

A second PCR judge conducted oral argument on the refiled petition on August 19, 2021. On November 18, 2021, the judge entered an order and issued a written statement of reasons denying defendant's petition without an evidentiary hearing. In her written opinion, the judge specified that she would

⁶ The judge also observed that defendant had "been given access to [trial counsel's] file and ha[d] not presented any evidence to support [his conflict of interest] claim."

"only address" the two IAC claims for which an evidentiary hearing had been granted by the first judge, namely: (1) the claim "related to [d]efense counsel's failure to call . . . Royster as a witness; and (2) the . . . claim related to [d]efense counsel's failure to present video surveillance from the . . . [h]otel of the night before the incident." As to both claims, based on an "independent review of the record," the judge concluded that defendant had failed to show either that counsel's performance fell below the objective standard of reasonableness set forth in Strickland v. Washington, 466 U.S. 688, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 49-53 (1987), or that the outcome would have been different without the purported deficient performance as required under the second prong of the Strickland/Fritz test to warrant PCR or a hearing.

Regarding the claim that trial counsel did not have Royster testify due to his concurrent representation of both defendant and Royster, as a threshold matter, the judge acknowledged trial counsel's admission during the trial that he represented Royster. Nonetheless, the judge rejected defendant's claim that trial counsel's representation of Royster during the trial violated the New Jersey Rules of Professional Conduct, stating:

[RPC 1.7] makes expressly clear a lawyer shall not represent a client if the representation involves a

concurrent conflict of interest. [PCR] counsel has not alleged with any specificity how trial counsel's representation of . . . Royster affected his representation of [defendant] or qualifies as a concurrent conflict of interest. Even more, [PCR] counsel has not provided any support or documentation in support of this argument. The record does not support such an allegation and to date, neither does . . . Royster. However, even assuming trial counsel's representation of . . . Royster qualified as a concurrent conflict of interest, trial counsel may still have been able to represent both of his clients concurrently under subsection (b) of [RPC] 1.7.^[7]

⁷ RPC 1.7(b) provides that

[n]otwithstanding the existence of a concurrent conflict of interest under [RPC] 1.7(a), a lawyer may represent a client if:

- (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation . . . ;
- (2) the lawyer reasonably believes that [he or she] will be able to provide competent and diligent representation to each affected client;
- (3) the representation is not prohibited by law; and
- (4) the representation does not involve the assertion of a claim by one client against another client . . . in the same litigation . . . before a tribunal.

Further, in rejecting defendant's claim that trial counsel's failure to call Royster as a witness met the Strickland/Fritz test to establish a prima facie case of IAC, the judge noted:

The allegation that . . . Royster would have testified on [d]efendant's behalf and more specifically, that the decedent had a .38[-]caliber revolver is not supported by the record. More importantly, it's not supported by . . . Royster himself inasmuch as a certification from . . . Royster has not been provided.

The judge continued, "even if . . . Royster had testified, there was not a reasonable probability his testimony would have changed the outcome of the trial, given the weight of the evidence against [defendant] and the lack of evidence supporting [defendant's] allegations." The judge elaborated:

Arguably, the purported testimony of . . . Royster would not credibly negate the proofs shown on video. . . .

Even if . . . Royster testified according to [defendant's] expectations . . . , there was no evidence presented [that] the decedent had a weapon in his possession on the date of the murder. [Defendant's] claim of self-defense on account of the decedent having a weapon was supported only by his testimony. The only weapon recovered from the . . . crime scene[] was the nine-millimeter . . . semi-automatic pistol, which was in [d]efendant's possession. As a result, even if . . . Royster had testified that the decedent had a weapon, this weapon was not located at the crime scene and was not a credible claim given the remaining evidence presented during trial. . . . Therefore, there is not a reasonable probability that, but for counsel's

failure to call . . . Royster as a witness, the result of the proceeding would have been different.

[(citation omitted).]

The judge likewise rejected defendant's claim that trial counsel was ineffective by failing to present at trial hotel surveillance footage from the night before the shooting. The judge reasoned:

It is purported that this evidence, along with hotel logs and introducing the front desk clerk as a witness, would have shown [defendant] entering the hotel and was an important fact that the jury believed it needed to know before rendering a decision in the case. During jury deliberations, the jury had asked whether there were any documents in evidence besides witness testimony confirming [defendant] stayed at the hotel on August 21[[]]. On June 1, 2012, [the trial judge] told the jury there was no documentary evidence. In its per curiam decision, the Appellate Division held that [the trial judge] "correctly answered the jury's question in the negative because the State did not introduce into evidence any document showing defendant in the hotel the night before the murder." At the time of the decision, trial counsel admitted he had not confirmed whether there was any footage of the hotel the night before the murder. [Defendant's] contention that trial counsel's failure to procure the footage and introduce it into evidence was determinative to the outcome of th[e] trial is not supported by the record. [Defendant's] use of the jury's question to allege [the] same is an improper "speculation about a jury's deliberative thought process." State v. McNeil-Thomas, 238 N.J. 256, 273 (2019) (quoting State v. Wilder, 193 N.J. 398, [416] (2008)). The jury's question is not indicative of whether such evidence would have changed the

outcome of the trial and the error is not so "serious that counsel was not functioning as the 'counsel' guaranteed [defendant] by the Sixth Amendment." Strickland, 466 U.S. at 687.

Equally as important, whether or not footage existed of [defendant] checking in to the hotel would not have changed the outcome of the case under the second Strickland prong. This evidence, if it existed, would not bolster [defendant's] claim of self-defense. Video footage was shown during trial of [defendant] chasing the decedent and shooting him down a hallway while he was unarmed at the vending machine [Defendant] admitted to shooting the decedent. The evidence against [defendant] was overwhelming. Critically, there was also no evidence submitted that the decedent was . . . in possession of a weapon. Therefore, a reasonable possibility does not exist that but for trial counsel's failure to obtain hotel footage from August 21, 2010, the night before the incident, the outcome of the trial would have been different.

Finally, without addressing defendant's other claims, the judge rejected defendant's claim of cumulative error, explaining that "[t]rial counsel's failure to present . . . Royster as a witness and failure to procure [hotel surveillance] footage from August 21[,], 2010, when considered together, did not amount to an unfair result." This appeal followed.

II.

On appeal, in his counseled brief, defendant raises the following points for our consideration:

POINT I

DEFENDANT'S CONVICTIONS MUST BE REVERSED BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR ELICITING FROM DEFENDANT HIS PRIOR AGGRAVATED ASSAULT CONVICTION; IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS.

POINT II

DEFENDANT'S MURDER CONVICTION MUST BE REVERSED BECAUSE THE STATE WITHHELD EXCULPATORY DISCOVERY EVIDENCE, WHICH EXTINGUISHED A COMPELLING MOTIVE CONSTITUTING A PURPOSEFUL OR KNOWING MURDER.

POINT III

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE TYEJUAN TUCKER AND HAVING HIM TESTIFY AS AN EXCULPATORY WITNESS.

POINT IV

IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED FOR THE PCR COURT TO ADDRESS DEFENDANT'S CLAIMS AS SET FORTH IN POINTS I, II AND III.

Defendant also filed a pro se supplemental brief raising the following points:

POINT I

THE PCR COURT ERRED IN FAILING TO ADDRESS THE ACTUAL POINT II RAISED IN COUNSEL[']S PCR BRIEF WHICH WAS "THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT BY WITHHOLDING BRADY MATERIAL AND BY MATERIALLY MISREPRESENTING THE FACTS TO THE JURY AT TRIAL.["]

POINT II

THE PCR COURT ERRED IN DENYING DEFENDANT[']S PETITION FOR [PCR] WHEREAS [DEFENDANT] ESTABLISHED A PRIMA FACIE CASE UNDER BRADY V. MARYLAND AND PROSECUTORIAL MISCONDUCT ENTITLING AN EVIDENTIARY HEARING.

POINT III

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR [PCR] WHEREAS [DEFENDANT] MADE A PRIMA FACIE CASE IN REGARDS TO THE DISCOVERY VIOLATIONS BY THE PROSECUTOR AND MISCONDUCT UNDER BRADY.

POINT IV

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR [PCR] WITHOUT CONDUCTING AN EVIDENTIARY HEARING

WHERE [DEFENDANT] PRESENTED A PRIMA FACIE CASE OF [IAC].

A. The PCR Court Erred In Denying [Defendant] An[] Evidentiary Hearing For Trial Counsel[']s Failure To Review The Video Of . . . Defendant Registering On [August 21, 2010].

B. The PCR Court Erred In Denying [Defendant] An Evidentiary Hearing Where Counsel Was Ineffective In Failing To Investigate . . . The Dismissal Of The Forfeiture Complaint And Put Forth A Suppression Motion During Trial Of The Seized Funds.

C. The PCR Court Erred By Denying [Defendant] An Evidentiary Hearing Where [Defendant] Has Made A Prima Facie Case For Counsel['s] Ineffectiveness By Not Investigating And Properly Responding To The Jury[']s Question, One [Video] From The Time [Defendant] "Walks In" To [The Victim's Girlfriend] Being Escorted Out.

D. The PCR Court Erred In Denying [Defendant's] Petition Without Conducting An Evidentiary Hearing, For Trial Counsel Was Ineffective For His Failure To Conduct A Pre-Trial Investigation And Request Documentary Evidence From The State.

E. The PCR Court Erred In Denying [Defendant's] Petition For PCR Where Trial Counsel[']s Failure To Investigate And Obtain Experts To Establish The Truth And Challenge The State[']s Case Denied [Defendant] Of A Fair Trial.

F. The PCR Court Erred In Failing To Grant [Defendant] An Evidentiary Hearing In Regards To Counsel[']s Failure To Obtain His Own Ballistic Expert And Effectively Cross [-]Examine The State[']s Ballistic Expert.

G. The PCR Court Erred By Denying [Defendant's] Petition For [PCR] And Denying Him An Evidentiary Hearing Where [Trial Counsel] Was Ineffective For Not Excusing Several Jurors During The Jury Voir Dire.

H. The PCR Court Erred By Denying [Defendant's] Petition Without Conducting An Evidentiary Hearing Where Counsel Was Ineffective In Not Investigating And For Not Calling Tyejuan Tucker To Testify.

I. The PCR Court Erred In Denying [Defendant] An Evidentiary Hearing Where Defense Counsel Failed To Call Dontay Royster As A Witness D[ue] To A "Conflict [Of] Interest."

J. The PCR Court Erred [In] Denying [Defendant] An Evidentiary Hearing Where Counsel Was Ineffective In Not Conducting A Pre-Trial Investigation And Contacting The Hotel Manager.

III.

We begin by setting out some guideposts that inform our review. "We review the legal conclusions of a PCR judge de novo," State v. Reevey, 417 N.J. Super. 134, 146 (App. Div. 2010), but "we review under the abuse of discretion

standard the PCR court's determination to proceed without an evidentiary hearing," State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013). Where, as here, no evidentiary hearing was conducted, "it is within our authority 'to conduct a de novo review of both the factual findings and legal conclusions of the PCR court.'" Reevey, 417 N.J. Super. at 147 (quoting State v. Harris, 181 N.J. 391, 421 (2004)).

Under our court rules, a defendant is entitled to an evidentiary hearing only if: (1) the defendant establishes a prima facie PCR claim; (2) "there are material issues of disputed fact that cannot be resolved by reference to the existing record"; and (3) "an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b). "To establish a prima facie case, defendant must demonstrate 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." Ibid.

IAC claims are "grounded in the Sixth Amendment and the New Jersey Constitution." State v. Preciose, 129 N.J. 451, 460 (1992). To establish a prima facie IAC claim, a defendant must demonstrate "by a preponderance of the credible evidence," State v. Echols, 199 N.J. 344, 357 (2009), that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the

defense, Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. Failure to meet either prong of the Strickland/Fritz test results in the denial of a petition for PCR. State v. Parker, 212 N.J. 269, 280 (2012) (citing Echols, 199 N.J. at 358). Consequently, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." Strickland, 466 U.S. at 697.

Strickland's first prong requires a defendant to "show[] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "that counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. "[I]n making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" Id. at 689. As such, a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Ibid. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

To satisfy the prejudice prong, "[t]he error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694). This prong generally requires that a defendant establish a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

In United States v. Cronic, 466 U.S. 648, 659-62 (1984), the United States Supreme Court identified three rare instances in which counsel's performance is so deficient that prejudice is presumed. The first and "[m]ost obvious . . . is the complete denial of counsel" during "a critical stage of . . . trial." Id. at 659. The second occurs when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Ibid. The third occurs "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not," such as a conflict-of-interest situation. Bell v. Cone, 535 U.S. 685, 696 (2002) (citing Cronic, 466 U.S. at 659-62). In State v. Miller, 216 N.J. 40, 61-62 (2013), our Supreme Court determined there was "no authority in this Court for the expansion of the presumption of prejudice beyond the narrow parameters set in Cronic."

We first address defendant's contention that trial counsel's concurrent representation of defendant and Royster, which trial counsel acknowledged on the record, created a conflict of interest warranting a presumption of prejudice. Defendant alternately asserts that he established actual prejudice from the conflict because the failure to call Royster as a witness deprived the jury of

evidence that would have bolstered defendant's claim that he acted in self-defense.

Under both the State and Federal Constitutions, a conflict of interest may render an attorney's performance presumptively ineffective. Cronic, 466 U.S. at 662 n.31 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)); State v. Bellucci, 81 N.J. 531, 543-46 (1980). We have repeatedly invoked "the accepted principle that a criminal defendant has the right to counsel 'whose representation is unimpaired and whose loyalty is undivided.'" State v. Alexander, 403 N.J. Super. 250, 255 (App. Div. 2008) (quoting State v. Murray, 162 N.J. 240, 249 (2000)). "That being the case, it becomes clear that an attorney hobbled by conflicting interests that so thoroughly impede his ability to exercise single-minded loyalty on behalf of the client cannot render the effective assistance guaranteed by our constitution." State v. Cottle, 194 N.J. 449, 467 (2008).

Our courts apply "a two-tiered approach in analyzing whether a conflict of interest has deprived a defendant of his state constitutional right to the effective assistance of counsel." Ibid. (citing State v. Norman, 151 N.J. 5, 24-25 (1997)). First, the court must determine whether the conflict is a "per se conflict"—one of the "certain attorney conflicts [that] render the representation per se ineffective." Cottle, 194 N.J. at 467, 470. If so, then "prejudice is

presumed in the absence of a valid waiver, and the reversal of a conviction is mandated." Id. at 467. For example, a per se conflict arises when "a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of codefendants." Norman, 151 N.J. at 24-25. Likewise, a per se conflict arises where "an attorney . . . is contemporaneously under indictment in the same county as his client, and being prosecuted by the same prosecutor's office." Cottle, 194 N.J. at 473.

Otherwise, absent a per se conflict, "the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown in that particular case to establish constitutionally defective representation of counsel." Id. at 467-68 (quoting Norman, 151 N.J. at 25). This approach "provide[s] for broader protection against conflicts under the State Constitution than are provided by the Federal Constitution." Norman, 151 N.J. at 25.

Applying these principles, we reject defendant's claim that a conflict of interest deprived him of his state or federal constitutional right to effective assistance of counsel. While we acknowledge that a potential conflict of interest existed from trial counsel's concurrent representation of defendant and Royster, we are satisfied that it was not a per se conflict from which prejudice is

presumed. Instead, we must examine whether the potential conflict generated a significant likelihood of prejudice to warrant setting aside defendant's convictions. In so doing, we note that "not every potential attorney conflict rises to such an unacceptable level that it deprives a defendant of the right to effective assistance of counsel. The relevant inquiry in potential conflict of interest situations is the potential impact the alleged conflict will likely have upon defendant." Murray, 162 N.J. at 249-50.

Defendant relies on his attorney's failure to call Royster as a witness to support his claim of prejudice. Thus, to determine whether the failure to call Royster "gave rise to a great likelihood of prejudice arising from a conflict of interest, we must consider whether [Royster's] proposed testimony was admissible and relevant to the defense and whether it realistically could have affected the verdict." Norman, 151 N.J. at 30. At trial, defendant advanced a theory of self-defense predicated upon his claim that the victim had a weapon. We agree with the second PCR judge that even if admissible, Royster's testimony could not realistically have affected the verdict. As the judge pointed out, the proofs adduced at trial included surveillance footage that showed defendant chasing the unarmed victim down a hallway while shooting at him, directly contradicting defendant's self-defense claim. Moreover, as the judge

observed, the only weapon recovered from the scene belonged to defendant. Thus, even if Royster had testified as suggested by defendant, given the damning evidence, Royster's testimony would not have realistically affected the verdict.

For similar reasons, we agree with the judge that defendant failed to establish a prima facie IAC claim under the Strickland/Fritz standard in connection with his attorney's failure to review and present the hotel surveillance footage. Defendant alleged that the surveillance footage showing him checking into the hotel the night before the murder would have contradicted the State's claim that he purposely sought out the victim to kill him. However, the allegations "'are too vague, conclusory, [and] speculative'" to warrant relief, particularly since defendant has produced no evidence to corroborate the purported content of the footage. State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). In any event, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceedings." State v. Arthur, 184 N.J. 307, 319 (2005) (alteration in original) (quoting Strickland, 466 U.S. at 693). Even if we assumed the footage is as defendant suggested, its omission is not "sufficient to undermine confidence in the outcome" in light of the State's compelling proofs. Strickland, 466 U.S. at 694.

On the other hand, we agree with defendant that a remand is necessary to address the remaining claims advanced in this appeal. Under our rules, a trial court "must state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s]." Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594 (App. Div. 2016) (alterations in original) (quoting Monte v. Monte, 212 N.J. Super. 557, 565 (App. Div. 1986)); see also R. 1:7-4(a). Additionally, a PCR judge's duty to "state separately [his or her] findings of fact and conclusions of law" is expressly delineated in Rule 3:22-11.

Here, although the PCR judge specified that she adopted the findings of the previous judge as her own, our review of the record reveals that the first PCR judge did not make any findings of fact or state conclusions of law regarding defendant's other claims. As such, defendant's remaining claims have yet to be adjudicated. "[O]ur function as an appellate court is to review the decision of the trial court, not to decide the motion tabula rasa." Est. of Doerfler v. Fed. Ins. Co., 454 N.J. Super. 298, 302 (2018) (emphasis omitted).

In sum, we affirm the PCR judge's ruling rejecting defendant's IAC claims regarding his attorney's potential conflict of interest, failure to call Royster as a witness, and failure to review the hotel surveillance footage from the night

before the murder. We are constrained to remand the matter for the judge to address defendant's remaining arguments advanced in this appeal and to issue appropriate findings under Rule 1:7-4 and Rule 3:22-11. We express no opinion on the merits of those claims.

Affirmed in part; remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION