

# **RECORD IMPOUNDED**

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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2243-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN GONZALEZ,

Defendant-Appellant.

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Submitted May 11, 2022 – Decided January 17, 2023

Before Judges Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-02-0503.

Joseph E. Krakora, Public Defender, attorney for appellant (John J. Bannan, Designated Counsel, on the brief).

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Natalie A. Schmid Drummond, Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

The opinion of the court was delivered by  
GOODEN BROWN, J.A.D.

Defendant appeals from the February 24, 2021 Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

Both defendant and codefendant Steven Alicea were charged in a twenty-nine-count indictment with numerous crimes related to two separate incidents that occurred on September 30, 2011. The first incident involved the robbery and murder of L.B., and the second incident involved a home invasion during which one resident, G.T., was robbed, and the other resident, B.C., was robbed and sexually assaulted. Although defendant was born in May 1995 and was sixteen years old at the time of the incidents, he was charged and tried as an adult.

Following separate trials in 2016, during which G.T., B.C., and several other witnesses testified, defendant was convicted of ten crimes primarily related to the home invasion. The convictions consisted of: second-degree burglary, N.J.S.A. 2C:18-2 (count eleven); first-degree armed robbery, N.J.S.A. 2C:15-1 (count twelve); first-degree aggravated sexual assault during the

commission of a burglary, N.J.S.A. 2C:14-2(a)(3) (count thirteen); three counts of second-degree conspiracy to commit each substantive offense, N.J.S.A. 2C:5-2, N.J.S.A. 2C:18-2, N.J.S.A. 2C:15-1, and N.J.S.A. 2C:14-2(a)(3) (counts twenty-two, twenty-three, and twenty-four); two counts of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (counts five and fifteen); and two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts seven and seventeen). The jury also found defendant guilty of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two), in connection with L.B.'s homicide. However, the trial judge granted defendant's motion to vacate that conviction based on the jury acquitting defendant of the remaining charges involving L.B. Following defendant's trial, codefendant Alicea was also convicted by a jury of various offenses related to both incidents, including L.B.'s murder.

Defendant was sentenced to an aggregate term of forty-one years of imprisonment, with thirty-two years and eighteen days of parole ineligibility. The sentence included consecutive terms on counts five (unlawful possession of a weapon), twelve (armed robbery), and thirteen (aggravated sexual assault). Defendant was also sentenced to parole supervision for life, N.J.S.A. 2C:43-6.4,

as well as restrictions under Megan's Law, N.J.S.A. 2C:7-1 to -23, and Nicole's Law, N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8.

Defendant appealed his convictions and sentence, and we affirmed in an unpublished opinion. See State v. Gonzalez, No. A-0066-16 (App. Div. Oct. 19, 2018). The Supreme Court subsequently denied certification. State v. Gonzalez, 237 N.J. 562 (2019). In our unpublished opinion, we detailed the substantial evidence underlying defendant's convictions as follows:

On September 30, 2011, C.B., a friend of L.B., had made arrangements to meet her at his home. Anticipating her arrival, C.B. was looking out a window on the second floor of his house. In the evening, he saw L.B. arrive in a white van. C.B. then saw three Hispanic men in hooded sweatshirts approach the van. He noted that one of the men's sweatshirts had a cartoon character's face on the front. One of the men went to the driver's side of the van and the other two men went to the passenger's side.

L.B. exited the van and began walking towards C.B.'s door. C.B. left the window and walked downstairs to open the door for L.B. Before he opened the door, he heard L.B. say: "I don't have anything," and "stay away from me[.]" He then heard gunshots. C.B. went back upstairs, looked out the window, and saw L.B. sitting on his front steps. A few minutes later, he saw another woman he knew as "Cookie" come around the street corner, approach L.B., and he heard L.B. tell Cookie[,] "they shot me." Cookie called 911.

That same night, G.T. was at his home, which was located less than two blocks from where L.B. was

shot. G.T. was over eighty years old at the time, and B.C., his former caretaker and friend, was living with him.

Just after 11[:00] p.m., G.T. and B.C. heard bangs on their door. G.T. opened the door and . . . . three men then entered the home, two of whom had guns and one of whom was pointing a gun at G.T. The men demanded money from G.T. The men then told B.C. to take her clothes off and forced her to perform oral sex on G.T. Thereafter, B.C. was forced to perform oral sex on the three men and each of the men raped her vaginally and anally. When B.C. tried to resist the assaults, she was punched and hit with a gun.

While at the home, the men searched for and took various items, including watches, keys, a cell phone, a camera kit, coins, and a chain. The men also threatened G.T. and B.C. throughout the time that they were at the home. Eventually, the men left the home. G.T. then called the police.

The police arrived shortly thereafter and began to search the area for the suspects. Police officers saw three men who began to run when the officers stopped to question them. The officers pursued and eventually apprehended defendant and Alicea. The third suspect[] escaped and apparently has not been located.

While pursuing defendant, an officer saw defendant discard a blue sweatshirt that was later recovered. Inside the sweatshirt, the police found a handgun. When defendant was searched incident to his arrest, the police found two watches and a chain belonging to B.C. and G.T. After being arrested, defendant was taken to G.T.'s home and G.T. identified defendant as one of the men involved in the robbery and sexual assaults.

In the meantime, B.C. was taken to the hospital and evaluated by a sexual assault nurse examiner (SANE nurse). During the examination, B.C. described the sequence of events leading up to the sexual assaults and what the suspects looked like. After her examination, B.C. was taken to the police station where she identified defendant in a photo array.

Following defendant's arrest, he was read his Miranda<sup>[1]</sup> rights and agreed to give a statement. Thereafter, he admitted to being at the scenes of the murder and home invasion. He also acknowledged that he had been wearing a blue hooded sweatshirt and that he had been carrying a gun. Prior to trial, defendant moved to suppress his statement, but the court denied that motion.

[Gonzalez, slip op. at 3-6 (first alteration in original).]

Defendant testified on his own behalf. In our opinion, we recounted defendant's trial testimony thusly:

Defendant told the jury that he was selling drugs in Camden on September 30, 2011. He acknowledged wearing a blue "Cookie Monster" sweatshirt and having a gun when he met up with Alicea and the third suspect, who[m] he referred to as "D.J." He also acknowledged walking up to a white van to sell drugs. During the sale, he heard yelling and then gunshots from the other side of the van. He started to run and followed Alicea and D.J. Alicea told defendant: "I shot that bitch, because she didn't want to give me nothing." Defendant claimed, however, that he did not know that Alicea and D.J. were planning to rob anyone.

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

Defendant then related that he and his two companions ran until they reached G.T.'s home. Alicea told defendant that the woman who lived there owed him money. Defendant explained that when he went into the home, he was frightened about what had happened down the street and he wanted "a little hideaway" from the police. Defendant denied having anything to do with the crimes committed at the home. He acknowledged, however, that he saw Alicea put a gun in G.T.'s mouth and he saw Alicea and D.J. sexually assault B.C.

[Id. at 6-7.]

In affirming defendant's convictions and sentence, we rejected his challenges to the trial judge's (1) denial of his motion to suppress his statement; (2) failure to sua sponte charge trespass as a lesser-included offense of burglary; (3) failure to sua sponte charge the jury on accomplice liability for lesser-included offenses; (4) failure to sua sponte preclude the SANE nurse from providing hearsay testimony about the sexual assault; and (5) imposition of a purportedly illegal sentence that, because of his youth, violated constitutional prohibitions against cruel and unusual punishment. Id. at 7-8.

Regarding the trial judge's denial of defendant's suppression motion, we stated:

The trial court here conducted a multi-day evidentiary hearing to evaluate defendant's motion to suppress his statement. The court heard testimony from

five law enforcement officials, defendant's attorney, and defendant's mother.<sup>[2]</sup> After hearing that testimony, the court made findings of facts. In that regard, the court found that in October 2011, defendant asked to give a statement to law enforcement officials. Members of the prosecutor's office then spoke with defendant's attorney. After conferring with defendant's mother, defense counsel authorized the prosecutor to speak with defendant. Defense counsel was invited to be present while defendant gave his statement, but counsel stated that he had to be in municipal court and, therefore, could not attend the interview. Thus, the trial court found that the prosecutor's office believed it had been given permission to interview defendant by defense counsel and, through defense counsel, by defendant's mother.

The trial court also found that there was no dispute that defendant was read his Miranda rights, understood those rights, and waived those rights. Accordingly, the trial court concluded that the State had used its best efforts to have defendant's attorney or parent present for the interview and, under the totality of the circumstances, the interview was lawful. Thus, the trial court denied defendant's motion to suppress his statement.

[Id. at 11.]

We concluded:

[T]he record supports the trial judge's findings that defendant voluntarily, knowingly, and intelligently waived his Miranda rights. The record also supports the trial judge's finding that the law enforcement

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<sup>2</sup> Defendant's trial counsel was different from the attorney who represented him pre-indictment.



officers involved in interviewing defendant had received permission to conduct the interview from defense counsel and defense counsel had informed them that defendant's mother had also authorized the interview. Indeed, when defendant was interviewed, defendant himself acknowledged that his mother had spoken to his attorney, his attorney had spoken with him, and his attorney knew that he was being interviewed. Thus, there was a showing that the relevant law enforcement officials had used their best efforts to inform and obtain permission from defendant's lawyer and mother before questioning defendant. Therefore, under the totality of these circumstances, we discern no error in the trial court's denial of defendant's motion to suppress his statement.

[Id. at 12-13.]

In rejecting defendant's contention that the trial judge's failure to charge trespass as a lesser-included offense of burglary required reversal of his convictions, we explained:

The jury found defendant guilty of multiple crimes during the home invasion, including robbery of G.T. and aggravated sexual assault of B.C. Defendant, however, claims he entered G.T.'s home because he was afraid of being arrested following L.B.'s murder. He claims that he had no intent to commit a robbery or sexual assault while in the home. The evidence, however, did not clearly indicate that the jury should be instructed on trespass. Defendant himself testified that he had a gun when he entered G.T.'s home and he also testified that he saw that Alicea had a gun. Defendant also acknowledged that he saw Alicea and D.J. acting aggressively towards G.T. and repeatedly sexually assaulting B.C. Finally, defendant was found to be in

possession of property stolen from G.T. and B.C. Accordingly, to accept defendant's argument, we would have to assume that if charged on trespass, the jury would have found defendant not guilty of the robbery and the sexual assault that occurred at the home. The testimony and evidence at trial simply does not support such a conclusion.

[Id. at 16-17.]

We similarly rejected defendant's argument that the trial judge erred in failing to charge accomplice liability for lesser-included offenses, reasoning:

During defendant's trial, the court repeatedly instructed the jury that defendant could not be found guilty of a crime if he did not possess the requisite criminal state of mind. In that regard, the court explained that to be found guilty of robbery, burglary, or aggravated sexual assault as an accomplice, defendant needed to "posses[s] [the] criminal state of mind that is required to be prove[n] against the person who actually committed the criminal act." Consequently, having evaluated the jury charge in its entirety, the jury was clearly instructed that defendant could not be convicted of any crime as an accomplice unless he had the criminal intent for that crime.

[Id. at 19 (alterations in original).]

Next, addressing defendant's assertion that the SANE nurse's testimony did not fall within the ambit of the medical diagnosis or treatment exception to the hearsay rule, N.J.R.E. 803(c)(4), and improperly bolstered B.C.'s credibility, we stated:

At trial, the SANE nurse testified that she went to the hospital to find out what had happened to B.C., who[m] she viewed as a "patient" and explained that her "primary goal [wa]s the patient's emotional and physical well-being." The SANE nurse also explained that part of her job was to make sure that the patient did not have injuries, or if she was injured, to have those injuries treated.

The SANE nurse then testified as to what B.C. recounted to her concerning the sexual assaults. In that regard, the SANE nurse explained that B.C. had told her that three men, two of whom were armed, forced their way into her home, directed her to strip off her clothes, and forced her to perform oral sex. B.C. also explained that she was raped anally and vaginally by all three assailants. B.C. did not provide the SANE nurse with a specific identification of any of the assailants; rather, she described them as "Spanish."

Having reviewed the SANE nurse's testimony, we find no plain error in the admission of that testimony. The majority of the testimony fell within the medical diagnosis and treatment exception to the hearsay rule. The SANE nurse did not testify concerning B.C.'s identification of defendant. Instead, B.C. herself testified at trial and identified defendant as one of the men who had robbed and sexually assaulted her. In short, the testimony by the SANE nurse was not clearly capable of leading a jury to an unjust result. R. 2:10-2.

[Gonzalez, slip op. at 20-21 (second alteration in original).]

Finally, we considered whether defendant's sentence comported with the strictures of State v. Zuber, 227 N.J. 422 (2017), where our Supreme Court held

that when a juvenile is sentenced to a lengthy overall term of imprisonment that includes multiple consecutive sentences, a sentencing court must consider the "traditional" factors set forth in State v. Yarbough, 100 N.J. 627, 643-44 (1985), as well as "the mitigating qualities of youth" identified in Miller v. Alabama, 567 U.S. 460, 476 (2012). Zuber, 227 N.J. at 429 (quoting Miller, 567 U.S. at 478); see also Miller, 567 U.S. at 477-80 (identifying factors that "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

In rejecting defendant's argument that his sentence violated Zuber and Miller, we reasoned:

In imposing that sentence, the court found four aggravating factors and considered, but rejected, mitigating factors. Specifically, the court found aggravating factors three, "[t]he risk that the defendant will commit another offense[,]" N.J.S.A. 2C:44-1(a)(3); six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted[,]" N.J.S.A. 2C:44-1(a)(6); nine, "[t]he need for deterring the defendant and others from violating the law[,]" N.J.S.A. 2C:44-1(a)(9); and twelve, "[t]he defendant committed [an] offense against a person who he knew or should have known was [sixty] years of age or older," N.J.S.A. 2C:44-1(a)(12).

The sentencing court rejected defense counsel's argument for mitigating factor thirteen, that the conduct of defendant, who was sixteen at the time of the

offenses, was substantially influenced by another more mature defendant. See N.J.S.A. 2C:44-1(b)(13). In discussing mitigating factor thirteen, the sentencing court considered defendant's youth at the time the crimes were committed. The court also considered the heinous nature of the crimes.

In summary, the sentencing judge analyzed applicable aggravating and mitigating factors and explained the basis for those factors. In imposing consecutive sentences, the sentencing judge also discussed the Yarbough factors and explained the reason for imposing consecutive sentences. As part of both of those analyses, the sentencing judge considered defendant's age, but ultimately found that his youth was not a mitigating factor given the nature of the crimes.

Read in full context, we are satisfied that the court sufficiently considered defendant's youth in imposing the consecutive sentences. In that regard, we note that the sentence, while lengthy, is not the equivalent of a life sentence. Defendant was twenty years of age when he was sentenced and, thus, accounting for jail credits, he will be eligible for parole when he is still in his forties. Accordingly, we discern no abuse of discretion, State v. Blackmon, 202 N.J. 283, 297 (2010), nor an illegal sentence requiring a remand for a new sentence, Zuber, 227 N.J. at 447-48.

[Gonzalez, slip op. at 23-25 (all but last alteration in original).]

Defendant filed a timely pro se petition for PCR alleging that his trial counsel was ineffective for failing to: (1) "[r]equest [a c]harge [o]f [t]respas [a]s [a l]esser-[i]ncluded [o]ffense [f]or [b]urglary"; (2) "[r]equest [a l]esser

[o]ffense [a]s [a]n [a]ccomplice"; (3) "[o]bject [t]o [t]he SANE [n]urse[']s testimony [a]t . . . [t]rial"; and (4) "[i]nvestigate" codefendant Alicea "[c]oncerning [the c]ontents [o]f [a] letter[]," purportedly sent by Alicea to his brother, in which Alicea allegedly confessed to the homicide. Defendant also asserted that his sentence was illegal because it violated both the federal and state constitutions as well as the principles enunciated in Zuber and Miller, and that the trial court erroneously considered "[a]ggravating [f]actor [s]ix" in imposing the sentence. In a supplemental petition and brief submitted on defendant's behalf by assigned PCR counsel, defendant added that "[he] was deprived of his constitutional rights to the effective assistance of trial counsel, due process of the law and of his right to a fair trial" because his attorney consented to but did not attend defendant's interview with law enforcement, "failed to obtain the consent of . . . defendant's mother before allowing him to be interrogated," and "failed to argue at the suppression hearing that . . . defendant's statement should have been barred" based on his "invocation of his right to remain silent," which law enforcement allegedly ignored.

After hearing oral argument on February 24, 2021, the PCR judge denied defendant's petition and ruled that "defendant [was] not entitled to an evidentiary hearing with respect to his claims." In an oral decision, the PCR judge first

detailed the facts and procedural history of the case and recited the governing legal principles. Then, viewing the facts in the light most favorable to defendant, the PCR judge determined that defendant failed to show either that counsel's performance fell below the objective standard of reasonableness set forth in Strickland v. Washington, 466 U.S. 668, 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. Accordingly, the judge concluded that defendant failed to establish a prima facie case of ineffective assistance of counsel (IAC) by a preponderance of the evidence.

The judge rejected defendant's claims on both procedural and substantive grounds. First, the PCR judge determined defendant's claim that his sentence was illegal because the trial court erroneously considered aggravating factor six was procedurally barred. The judge explained that the improper weighing of factors related to the excessiveness of a sentence, not its legality, and was therefore not a cognizable ground for post-conviction relief. See State v. Acevedo, 205 N.J. 40, 45-46 (2011) ("[M]ere excessiveness of sentence otherwise within authorized limits, as distinct from illegality by reason of being beyond or not in accordance with legal authorization, is not an appropriate

ground for post-conviction relief and can only be raised on direct appeal from the conviction." (quoting State v. Clark, 65 N.J. 426, 437 (1974))). The PCR judge also noted that, notwithstanding the "procedural[] bar[], a review of the sentencing transcript demonstrates that the trial court was within reason to consider and give weight to [aggravating factor six]."

Similarly, the PCR judge determined that defendant's claims that he received IAC as a result of his attorney's failure to request jury charges on criminal trespass and accomplice liability for lesser offenses were barred under Rule 3:22-5 because "substantially similar" claims were expressly adjudicated in his direct appeal. See State v. Afanador, 151 N.J. 41, 51 (1997) ("Under Rule 3:22-5, prior adjudication of an issue, including a decision on direct appeal, will ordinarily bar a subsequent post-conviction hearing on the same basis.").<sup>3</sup> The PCR judge added that "[e]ven if th[e] [c]ourt were to consider the[] arguments" on the merits, "defendant [could] not demonstrate either prong" of the Strickland/Fritz test "because counsel cannot be found ineffective for failing to

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<sup>3</sup> In State v. Berisha, 458 N.J. Super. 105, 114 n.6 (App. Div. 2019), we pointed out that in applying the Rule 3:22-5 bar, there is a distinction between a claim that a judge failed to give a charge sua sponte that is raised in a direct appeal, and a claim that "counsel was ineffective for failing to request the charge" raised in a PCR proceeding. If, as was the case here, the trial judge would have correctly refused the request had counsel made it, then the distinction is of no moment.



request a charge that is not supported by the evidence at trial, nor can defendant claim prejudice as a result."

Likewise, the judge rejected defendant's challenge to the admissibility of the SANE nurse's testimony because "[t]he issue . . . was raised, thoroughly considered, and decided on appeal," and was therefore procedurally barred by Rule 3:22-5. The judge stated further that:

Even if this claim were not procedurally barred, the argument fails . . . because defendant cannot demonstrate that counsel was deficient in failing to object to the testimony at trial or that he was prejudiced by the failure to object to admissible testimony that falls clearly within a defined hearsay exception.

As for defendant's contentions regarding the illegality of his sentence and the constitutional violations resulting from both his attorney's ineffectiveness and the trial court's failure to apply Zuber and Miller, the PCR judge noted that "[w]hile the trial court did not expressly state it was addressing the Miller factors, the record shows consideration was given to the type of concerns raised in Miller." The PCR judge recounted that at sentencing, the trial court commented that "while [defendant] was of tender years" when he committed the crimes, "he was no neophyte" and he "lack[ed] . . . remorse." The PCR judge also noted that the trial court "found [that] defendant's crimes were neither childish nor impulsive, but calculated and cold-blooded."

Further, the PCR judge explained that "[a] review of the Appellate Division's opinion show[ed] that the appellate court thoughtfully considered and analyzed the trial court's reasons for imposing the sentence at issue" and "conducted th[e] review in accordance with the bi[n]ding Supreme Court decision in Zuber." Moreover, the PCR judge stressed that the sentence imposed on defendant, who "will be eligible for parole in his [forties] st[ood] in stark contrast to those imposed in Zuber where defendants would be in their [seventies] and [eighties] when eligible for parole."

Additionally, the PCR judge pointed out that defendant relied on "[nothing] more than bald assertions" to support his claim. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999) ("[I]n order to establish a prima facie claim [of IAC], a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." (emphasis omitted)). According to the PCR judge, defendant "offer[ed] no explanation as to why [his] age was a mitigating factor other than age itself or why other Miller factors [were] applicable or how the record support[ed] a finding of th[ose] factors." Thus, the PCR judge found no basis to conclude that our decision upholding the trial court's consideration of defendant's age was "demonstrably erroneous" to overcome Rule 3:22-5's procedural bar. See Berisha, 458 N.J.

Super. at 115 (holding that Rule 3:22-5's "bar of pursuing in a PCR petition an argument previously decided on appeal cannot possibly encompass an earlier appellate ruling that was demonstrably erroneous").

The PCR judge also rejected defendant's argument that trial counsel was ineffective for failing to investigate codefendant Alicea or call Alicea as a witness at trial to authenticate the letter he purportedly wrote confessing to the homicide. The judge explained:

Trial counsel called Christopher Mangaro, a Camden County Correctional Officer, as a witness. Mangaro testified that he found a letter from Alicea in the cell of his brother in which [Alicea] admits to killing a woman. Defendant argues that trial counsel's failure to call Alicea to authenticate the letter was objectively unreasonable and would have resulted in defendant being acquitted on all charges of the indictment.

. . . .

. . . Alicea was charged with multiple offenses arising from the same murder and home invasion as defendant. It is reasonable that counsel did not find it prudent to call the codefendant as a witness where Alicea could have . . . contradicted defendant's version of the events that happened on September 30[] or could have implicated defendant in those crimes. Thus, deference should be given to those decisions.

Moreover, while defendant criticizes counsel's failure to call Alicea, he fails to provide a certification from Alicea or other proof indicating that he would

have testified at the hearing and as to the contents of that testimony. While he was convicted of all counts of the indictment, following a jury trial, he never admitted to any accusations. Alicea filed an appeal and petition for post-conviction relief in which he argue[d] that neither the letter, nor Mangaro's testimony should have been admissible and assert[ed] he did not author the letter at issue. This directly contradicts the unsubstantiated claim of defendant that Alicea would have implicated himself in L.B.'s murder, thereby exonerating . . . defendant. Defendant's reliance upon the bald assertion that counsel was ineffective for not calling Alicea as a witness is insufficient to show trial counsel was deficient or that defendant was prejudiced as a result and relief must be denied on this ground.<sup>[4]</sup>

Next, the PCR judge considered whether defendant's various challenges to the admission of his statement at trial presented grounds for post-conviction relief. The PCR judge first addressed whether defendant's constitutional rights were violated by the absence of his mother and his then-attorney during the interrogation. In that regard, the PCR judge acknowledged that "[t]here [was] no dispute that . . . defendant provided a taped statement to law enforcement officers on October 18[,], 201[1], that . . . defendant was not accompanied to the

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<sup>4</sup> In unpublished decisions, we affirmed Alicea's convictions in his direct appeal, see State v. Alicea, No. A-1363-16 (App. Div. Oct. 19, 2018), and affirmed the denial of his petition for PCR, see State v. Alicea, No. A-2159-20 (App. Div. June 24, 2022). The Supreme Court denied Alicea's respective petitions for certification. See State v. Alicea, 237 N.J. 564 (2019); State v. Alicea, \_\_\_ N.J. \_\_\_ (2022).

interview by his lawyer or a parent [and] that defendant made numerous admissions at that time."

Further, the PCR judge noted that following a pretrial evidentiary hearing, the trial court "conducted a thorough analysis" under State v. Presha, 163 N.J. 304, 308 (2000), governing the standard for reviewing the admissibility of confessions by juveniles in custody. The PCR judge emphasized that "[t]he [trial] court ultimately concluded and the appellate court affirmed that defendant knowingly, voluntarily, and intelligently waived his Miranda rights." After reviewing the record, the PCR judge agreed that "at no time during the interview was [defendant's] will overborne. He understood why he was there and was desirous of giving the statement." Accordingly, the PCR judge reaffirmed that "[u]nder the totality of the circumstances, defendant's statement was lawful, despite the absence of his attorney or parent." Moreover, because "[t]he transcript of the suppression motion and the appellate court opinion ma[d]e clear that the issue underlying . . . [defendant's] PCR was adjudicated on the merits," the PCR judge concluded that the claim was barred under Rule 3:22-5.

Turning to the merits, the PCR judge also rejected defendant's contention that "counsel was deficient because he failed to meaningfully explain to defendant's mother her right to be present during the statement." The PCR judge

found that defendant's contention was "belied by the finding that defendant confirmed that [his mother] spoke with his attorney before he provided the statement and acknowledge[d] she was aware that he would be giving a statement." The PCR judge likewise rejected defendant's contention that counsel was deficient by failing to "accompany [defendant] to the interview." The PCR judge determined that defendant "fail[ed] to set forth any binding authority to support this contention" and Presha did not "conclude that it [was] unreasonable for a juvenile to ever provide a statement without an attorney or a parent present." The PCR judge explained that Presha held only that an attorney's or parent's "absence [was] a factor to be given great weight under the totality of the circumstances under which the statement [was] given in determining the admissibility of the statement." Further, the PCR judge stated that since neither the trial nor appellate court "found [that] defendant's [statement] should be suppressed, trial counsel's performance was not deficient."

The PCR judge also found that defendant "fail[ed] to demonstrate that he was prejudiced as a result of counsel's performance" in connection with defendant's interrogation. The judge explained:

Defendant asserts that he was prejudiced because he gave a statement used to implicate guilt and impeach his credibility at trial. He gave a statement voluntarily. Absent that, it is not prejudicial simply because the

statement was used against him. No prejudice can be discerned where the trial court found and the appellate court affirmed that defendant knew why he was present to give the statement and wanted to give the statement to law enforcement.

Moreover, the evidence against defendant . . . was so overwhelming even without the admission of his statement into evidence so as to support each of the convictions in this case.

. . . [T]he evidence in this case consisted of consistent testimony from multiple victims and witnesses, law enforcement observations, surveillance video,<sup>[5]</sup> and extensive physical evidence, including defendant's sweatshirt and gun and the items stolen from G.T. and B.C. recovered on his person incident to arrest. Considering the weight of the evidence, a conviction would have resulted absent any statement, thus, defendant cannot show he was prejudiced by the use of his voluntary statement at trial.

Finally, the PCR judge determined defendant "failed to demonstrate a prima facie claim of [IAC]" based on trial counsel's failure to argue during the suppression motion that he had invoked his right to remain silent "once he

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<sup>5</sup> While recounting the facts of the case, the PCR judge described "surveillance videos recovered from . . . a liquor store from the evening of September 30[] near the location of the crimes." These videos, which the State presented at trial, "showed three and then four men walking down the street and corroborated G.T., B.C., and C.B.'s identification of . . . defendant" and their descriptions of the men's "distinctive clothing."

advised interviewing detectives that he wished to call his mom." The judge stated:

[T]here is no dispute that defendant was appropriately advised of and waived his Miranda rights at the inception of the interview. The issue now is whether defendant's request to call his mother constitutes an invocation of his right to remain silent and whether counsel was ineffective for failing to raise this issue in the suppression motion.

. . . .

About one-third of the way through the interview[,] defendant asked to speak with his mother and the questioning continued without a break as requested by defendant. Defendant did not ask to speak with his mother or anyone else at any other time during the interview.<sup>[6]</sup>

Even if for argument sake the remaining portion of the interview was inadmissible, defendant cannot establish prejudice based on counsel's failure to argue this point on the suppression motion. At the point in which he requested to make a phone call, defendant had already told officers much of what had happened on the evening . . . of September 30[.]. He placed himself with Alicea at the scene of both crimes in possession of a gun and wearing a blue Cookie Monster sweatshirt. He acknowledged that Alicea told him that he shot L.B.,

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<sup>6</sup> During the interview, after defendant had admitted being at the scene of both the murder and the home invasion, and acknowledged that he had been wearing a blue hooded sweatshirt and carrying a gun, defendant asked, "can I . . . make a phone call? I want to call my mom." The interrogating officer replied, "[w]e will think about lettin' you make a phone call. Just let us talk real quick." Thereafter, the interrogation continued.



yet, followed him to G.T.'s home. . . . The information up [to] this point in which defendant asked to call his mother is undeniably . . . admissible even if counsel filed a suppression motion based on defendant's request to make a phone call.

Based on the confession before he arguably invoked his right to remain silent, the evidence was strong. Moreover, the evidence presented, apart from his statement, was sufficient at trial to maintain a conviction in this matter. Thus, no prejudice resulted from counsel's failure to argue that defendant's request to . . . make a telephone call amounted to an invocation of his right to remain silent.

The judge entered a memorializing order, and this appeal followed.

On appeal, in his counseled brief, defendant raises the following points for our consideration:<sup>7</sup>

#### POINT I

DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, DUE PROCESS OF THE LAW AND OF HIS RIGHT TO A FAIR TRIAL, AND RECEIVED AN ILLEGAL SENTENCE.

[(A)] Counsel [C]onsented [T]o [T]he Juvenile Defendant [B]eing Interviewed [I]n [H]is Absence, Failed [T]o Obtain [T]he Consent [O]f [T]he Defendant's

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<sup>7</sup> We have eliminated the point headings describing the standards governing PCR applications and other redundancies and have renumbered the remaining points accordingly.

Mother [B]efore [A]llowing Him [T]o [B]e Interrogated[,] and Failed [T]o Argue [A]t [T]he Suppression Hearing [T]hat [T]he Defendant's Statement [S]hould [H]ave [B]een Barred [B]ecause [T]he Defendant's Invocation [O]f [H]is Right [T]o Remain Silent [W]as Ignored.

[(B)] The Proper Factors [W]ere [N]ot Considered [W]hen [T]he Defendant Was Sentenced.

[(C)] Co-Defendant Alicea [W]as [N]ot Called [A]s [A] Witness [T]o Authenticate [A] Letter [I]n [W]hich He Admitted [T]o Committing [T]he Homicide.

## POINT II

IN THE ALTERNATIVE, BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

Defendant also filed a pro se letter brief raising the following single point:

[DEFENDANT'S] ASSIGNED TRIAL COUNSEL DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT [BY] FAILING TO PROPERLY ADVISE HIM OF [A] PLEA OFFER, THEREBY[] CAUSING HIM [TO] REJECT [THE] PLEA, INSTEAD GOING TO TRIAL WHEREBY AFTER CONVICTION HE RECEIVED FORTY[-]ONE YEARS IN PRISON WITH THIRTY-TWO YEARS, EIGHTEEN DAYS OF PAROLE INELIGIBILITY, PLUS MEGAN['S] LAW SUPERVISION FOR LIFE, INSTEAD OF [THE]

PLEA OFFER OF [TWENTY] YEARS [WITH  
EIGHTY-FIVE PERCENT PAROLE  
INELIGIBILITY].

II.

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 "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). Rule 3:22-10(b) provides that 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." Indeed, "[i]f the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief, . . . then an evidentiary hearing need not be granted." Brewster, 429 N.J. Super. at 401 (second alteration in original) (quoting State v. Marshall, 148 N.J. 89, 158 (1997)).

"To establish a prima facie case, [a] 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." R. 3:22-10(b). Moreover, a defendant must make this showing "by a preponderance of the credible evidence." State v. Goodwin, 173 N.J. 583, 593 (2002). "Rule 3:22-2 provides four grounds for post-conviction relief: (a) 'substantial denial in the conviction proceedings' of a defendant's state or federal constitutional rights; (b) a sentencing court's lack of jurisdiction; (c) an unlawful sentence; and (d) any habeas corpus, common-law, or statutory grounds for a collateral attack." State v. Preciose, 129 N.J. 451, 459 (1992) (quoting R. 3:22-2). However, "[p]ost-conviction relief is neither a substitute for direct appeal, R. 3:22-3, nor an opportunity to relitigate cases already decided on the merits, R. 3:22-5." Preciose, 129 N.J. at 459. Consequently, a defendant is procedurally barred from post-conviction relief when an issue was previously adjudicated on the merits "in the proceedings resulting in the conviction or . . . in any appeal taken from such proceedings." R. 3:22-5.

IAC claims "grounded in the Sixth Amendment and the New Jersey Constitution" are "particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." Preciose, 129 N.J. at 460. To establish a prima facie IAC claim, a defendant must demonstrate 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. When reviewing IAC claims, "[j]udicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689. Thus, establishing deficient performance "requires showing 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. The prejudice prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Moreover, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A defendant must establish both prongs of the Strickland/Fritz test to obtain a reversal of the challenged conviction. Strickland, 466 U.S. at 697; Fritz, 105 N.J. at 58. Although a failure to satisfy either prong results in the denial of a PCR petition based on IAC, State v. Parker, 212 N.J. 269, 280 (2012), "[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; see also State v. Gaitan, 209 N.J. 339, 350 (2012)

("Although a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." (citation omitted) (citing Strickland, 466 U.S. at 697)).

In addition to the effective assistance of counsel, under the Sixth Amendment, a defendant is entitled to "receive a fair trial[,] which is understood as a trial resulting in a verdict worthy of confidence." State v. Russo, 333 N.J. Super. 119, 134 (App. Div. 2000). The Fourteenth Amendment right to due process of law also "includes a guaranty of [a] fair trial." State v. Izaguirre, 272 N.J. Super. 51, 56 (App. Div. 1994). Indeed, "[o]ur state-based concept of due process of law . . . guarantees a 'fair and impartial trial in which there is a legitimate and decor[o]us recognition of the substantive rights of the defendant.'" State v. Savage, 120 N.J. 594, 628 (1990) (quoting State v. Morriggi, 15 N.J. Super. 479, 481 (App. Div. 1951)).

Applying these principles, we first address defendant's contention that he was deprived of his constitutional right to effective assistance of counsel, due process of law, and a fair trial because defense counsel (1) consented to defendant being interrogated in his absence; (2) "failed to obtain the consent

of . . . defendant's mother" before allowing defendant to be interrogated; and (3) "failed to argue" at the evidentiary hearing that "defendant's statement should have been suppressed" after the interrogating officers ignored his request to call his mother. Defendant asserts he was prejudiced by the substantive admission of his statement at trial, as well as by the use of his statement "to attack his credibility" during his testimony.

During the suppression hearing conducted by the trial judge, defendant's pre-indictment attorney, Frankie Fontanez, testified for the defense. He stated that following defendant's arrest, on October 17, 2011, he accompanied defendant to an interview to provide investigators with the "name" of a homicide suspect. According to Fontanez, he was advised that defendant was not a suspect in the homicide, and, at the time, defendant had been charged as a juvenile only in connection with the home invasion only, not L.B.'s murder. After about fifteen minutes, Fontanez "stopped the interview" because "there was really no name given" and the interview became more intrusive.

Fontanez explained that the next day, October 18, 2011, when defendant returned to court, investigators asked to take defendant back to the prosecutor's office to get "a name" in L.B.'s murder. In response, Fontanez told the investigators that he (Fontanez) was "not going to the prosecutor's office." He

told them that "if [they] want[ed] to talk, let's talk here." When the investigators insisted on taking defendant to the prosecutor's office, Fontanez refused to agree to an interview other than to "give a name" in the homicide and "left" the courthouse to attend to a municipal court matter while defendant was transported to the prosecutor's office for questioning, without his lawyer or mother. Fontanez recalled that he "left right when the investigators were coming in."

Fontanez testified that he did not give permission for a "stem to stern interview." He also testified that even though he "refused" to go with defendant to the prosecutor's office, and told investigators that defendant was "not going to make a statement," ultimately, he "ha[d] no control [over] whether they t[ook] him or not." Fontanez admitted that he had spoken to defendant's mother on October 17, 2011, about defendant being interviewed, but had assured her that it was only to "give a name" in a homicide. He also acknowledged that once he learned defendant had given a statement to investigators, he was not surprised when the family retained a different lawyer. He stated he "probably would have done the same thing," considering it was reported that "[t]he attorney . . . [had] allowed someone to talk to" defendant. However, Fontanez maintained that he had never agreed to defendant being interviewed.



Although the trial judge ultimately determined there was no violation of defendant's Fifth Amendment right and denied the application to suppress the statement, the judge found that Fontanez's "recollection" of "crucial issues . . . was not dependable." The judge determined that Fontanez was "invited back to the [p]rosecutor's [o]ffice" to be present while defendant gave his statement but did not attend the interview because "he had responsibilities in the municipal court." The judge found that the prosecutor's office believed it "had been given permission" to interview defendant by Fontanez and, through Fontanez, by defendant's mother. Consequently, the judge rejected defendant's assertion that his constitutional rights were violated because neither his attorney nor his mother was present when he was interviewed.

The trial judge also implied that Fontanez's performance raised Sixth Amendment concerns. In that regard, the judge posited:

[I]n all candor, the Sixth Amendment issue does raise a problem . . . . [A]t the end of the day . . . on a PCR type analysis . . . if . . . Fontanez made . . . , for whatever reason, an improvident decision . . . that would rise to the level of depriving . . . defendant [of] his rights to be properly represented, should I take that into account at this point in time?

The judge ultimately declined to consider the issue.

Given the trial judge's factual findings at the suppression hearing, we are persuaded that Fontanez's performance in connection with defendant's interrogation on October 18, 2011, was deficient. Our State has "long accorded juveniles special protections when they are subjected to [custodial] interrogation," rendering counsel's absence during defendant's interrogation objectively unreasonable under the circumstances. State ex rel. A.W., 212 N.J. 114, 128 (2012); see also In re Gault, 387 U.S. 1, 36 (1967) (holding juvenile defendants "require[] the guiding hand of counsel at every step in the proceedings against [them]" because of their immaturity, lack of experience, and susceptibility to coercion (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932))); cf. People v. Claudio, 629 N.E. 2d 384, 385 (N.Y. 1993) (stating "[w]e accept the premise, which was shared by every court that has considered this case, that retained counsel's conduct in advising defendant to confess to the police—at a time when there was no concrete evidence against him and no possibility of a plea offer—represented gross professional incompetence").

Thus, we conclude defendant has established the first prong of the Strickland/Fritz test on this ground. However, because defendant is unable to satisfy the prejudice prong, his PCR petition still fails. As the PCR judge recounted, evidence of defendant's guilt was overwhelming. Consequently, on

this record, we are not convinced that counsel's deficient performance "materially contributed to defendant's conviction." Fritz, 105 N.J. at 58.<sup>8</sup> For the same reason, we reject defendant's contention that his trial attorney was ineffective by "fail[ing] to argue that [his] statement should have been suppressed because he invoked his right to remain silent." As the PCR judge pointed out, even without defendant's statement, the State's proofs were strong, and defendant's significant admissions occurred before defendant's arguable invocation of his right to remain silent.

We also reject defendant's contention that trial counsel was ineffective by failing to call "Alicia [to] testify that he wrote the letter" purportedly confessing to "the homicide." "In addressing an ineffective assistance claim based on a

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<sup>8</sup> In United States v. Cronin, 466 U.S. 648 (1984), the United States Supreme Court identified three rare instances in which counsel's performance is so deficient that prejudice is presumed. Id. at 659-662. 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 Cronin, 466 U.S. at 659-662). In State v. Miller, 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 Cronin." 216 N.J. 40, 61-62 (2013). None of the rare circumstances delineated in Cronin are present here and defendant does not argue otherwise.

counsel's failure to call an absent witness, a PCR court must unavoidably consider whether the absent witness's testimony would address a significant fact in the case, and assess the absent witness's credibility." State v. L.A., 433 N.J. Super. 1, 15 (App. Div. 2013) (citing McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996) ("[T]he credibility of the uncalled witnesses is a part of determining prejudice.")).

Notably, when defendant's trial was conducted, Alicea's trial was still pending. As the PCR judge noted, defendant provided no certifications demonstrating that Alicea would have testified or the content of his testimony. PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity the facts" establishing the alleged deficient performance. State v. Jones, 219 N.J. 298, 312 (2014). In the absence of such supporting submissions, defendant's petition fails. In any event, inasmuch as defendant was acquitted of L.B.'s murder and Alicea challenged the authenticity of the letter in his PCR petition, we discern no prejudice.

Regarding defendant's contention that his constitutional rights were violated by the sentencing court's "fail[ure] to consider the factors mandated" by Zuber and Miller and trial counsel's failure to object to the court's omission,

we agree with the PCR judge that the claim is procedurally barred under Rule 3:22-5. See State v. McQuaid, 147 N.J. 464, 483 (1997) ("[A] defendant may not use a petition for post-conviction relief as an opportunity to relitigate a claim already decided on the merits." (citing R. 3:22-5)). Although not raised as a separate point, in his counseled brief, defendant "included and incorporated . . . by reference th[e] issues set forth in [d]efendant's pro se petition and brief." Those challenges are likewise procedurally barred substantially for the reasons stated by the PCR judge.

As for defendant's newly minted pro se claim that counsel failed to properly advise him of an "informal or verbal plea offer," defendant neither raised the issue in his PCR petition nor presented the argument to the PCR judge. Therefore, the issue was not properly "preserved for appellate review." State v. Witt, 223 N.J. 409, 419 (2015).

[I]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.

[State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).]

Because neither concern is implicated here, we decline to address the issue.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION