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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3115-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VERONICA AGUILAR,

Defendant-Appellant.

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Submitted May 1, 2024 – Decided May 24, 2024

Before Judges Vernoia and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment Nos. 15-03-0183 and 15-07-0581.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Steven J. Sloan, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Lauren P. Haberstroh, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Veronica Aguilar pleaded guilty to three counts of first-degree carjacking and the court imposed an aggregate fifteen-year sentence in accordance with the terms of her plea agreement with the State. Defendant appeals from an order denying her post-conviction relief (PCR) petition, which asserted claims her plea counsel was ineffective by failing to argue that the sentencing court should have found a statutory mitigating factor and appellate counsel was ineffective by failing to file a direct appeal from her sentence. We affirm.

## I.

A grand jury returned an indictment charging that on June 9, 2014, defendant committed the following offenses: second-degree robbery, N.J.S.A. 2C:15-1(a)(1), and first-degree carjacking, N.J.S.A. 2C:15-2(a)(1) and (2).

In a subsequent indictment, a grand jury charged defendant with: first-degree carjacking, N.J.S.A. 2C:15-2(a)(1), (2), and (3); first-degree robbery, N.J.S.A. 2C:15-1(a)(1), (2), and (3); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a). The indictment alleged defendant committed those offenses on March 9, 2015. The indictment also charged defendant with committing a separate first-degree carjacking and associated second-degree possessory weapons offenses on the same day. The indictment

further charged that on the same day defendant committed the crimes of third-degree eluding, N.J.S.A. 2C:29-2(b), and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2).

Represented by counsel, defendant negotiated a plea agreement with the State pursuant to which defendant agreed to plead guilty to the three counts of first-degree carjacking in exchange for the State's recommendations that the court impose an aggregate custodial sentence not to exceed twenty years subject to the requirements of No Early Release Act, N.J.S.A. 2C:43-7.2, and the court dismiss all the remaining charges. As a condition of the plea agreement, the court stated it would impose an aggregate sentence not to exceed fifteen-years—five years less than the State had agreed to recommend.

Defendant testified at her plea proceeding about her commission of the three carjackings. She testified that on June 9, 2014, she had followed the first victim to the victim's vehicle, pushed the victim out of the way as the victim attempted to enter the vehicle, and entered the vehicle and drove it away for the purpose of stealing it. Defendant acknowledged the victim held onto the vehicle as she drove away, and the victim suffered bodily injuries when defendant crashed the vehicle into another car.

Defendant also testified she committed two carjackings on March 9, 2015. In the first, she approached a victim entering a vehicle at the victim's home. Defendant explained she pointed a handgun at the victim and instructed the victim to "get out of the car." Defendant entered the vehicle for the purpose of stealing it, but she could not start it. Defendant exited the vehicle and went to the front door of the victim's home. When the victim's father exited the home, defendant pointed a gun at him and asked for his wallet. After taking the wallet, defendant returned to the vehicle, took a cellphone and twenty dollars from it, and fled the scene on foot.

Defendant further testified that after fleeing the scene, she saw an individual in a vehicle and approached it. Defendant pointed a handgun at the individual in the vehicle and directed her to get out. The individual and her daughter exited the vehicle, and defendant entered it, drove away, and police apprehended her a few blocks away.

The court accepted defendant's guilty pleas to the three first-degree carjackings. At defendant's sentencing proceeding, her plea counsel attributed defendant's actions to her long-term addiction to heroin. Counsel argued defendant's commission of the offenses was, in part, the fault of "a system that doesn't help people at this late age of their life with the addictions."

The court questioned counsel's argument, noting defendant had attended an outpatient drug treatment program in 2014, but did not complete it, and defendant had been released on bail pending trial after her arrest for the June 9, 2014 carjacking and never sought treatment during the months prior to her commission of the March 9, 2015 carjackings. Defendant's mother also addressed the court, attributing defendant's actions to her heroin addiction and explaining the hardship defendant's incarceration would have on defendant's children.

Defendant informed the court she was "truly sorry for the things [she] did and the horrific grip of [her] addiction." She referred to the "extreme hurt[]" she had suffered during the prior eighteen years she had raised her child and the "domestic violence" she had "endured." Defendant also stated that an "accident enabled [her] to receive medication that seemingly numbed all of that," and she "began to self-medicate" and "ended up doing heroin and . . . the mental and physical need for the drug le[]d [her] to commit" the crimes to which she had pleaded. Defendant further explained she had "a legitimate drug problem" and argued the fifteen-year sentence provided for in her plea agreement was "excessive" because she needed "an opportunity" for drug rehabilitation.

In imposing its sentence, the court explained that it recognized "the scourges of heroin" and its "very, very debilitating effects on people." The court further observed that although it understood defendant "was consummately addicted," defendant had committed three separate crimes involving violence, two of which involved threats of violence with a handgun.

The court then detailed defendant's actions during the commission of each of the offenses, as well as defendant's substance abuse and personal histories and circumstances. The court found aggravating factor three, defendant's risk of re-offense, N.J.S.A. 2C:44-1(a)(3), based on the drug addiction that defendant claimed provided the impetus for her commission of the crimes. The court also found aggravating factor nine, the need to deter defendant and others from committing offenses, N.J.S.A. 2C:44-1(a)(9), based on the need to deter the commission of the serious crimes for which defendant was convicted. The court found mitigating factor seven, the lack of any significant prior criminal history, N.J.S.A. 2C:44-1(b)(7), and eleven, that defendant's incarceration would entail excessive hardship to her children, N.J.S.A. 2C:44-1(b)(11).

The court found the aggravating factors strongly outweighed the mitigating factors. The court sentenced defendant to concurrent fifteen-year terms on each of the first-degree carjackings in accordance with her plea

agreement. On July 29, 2016, the court entered defendant's judgment of conviction.

On May 27, 2021, defendant filed a pro se verified PCR petition. Pertinent here, defendant asserted plea counsel was ineffective at sentencing by failing to raise and "vigorously advocate the existence of" mitigating factor four "based on" defendant "being intoxicated at the time of the incident[s]."<sup>1</sup>

Following the assignment of counsel, defendant filed a certification in further support of her petition. In the certification, defendant claimed plea counsel was ineffective at sentencing by failing "to explain . . . what led [defendant] to abuse drugs and essentially commit these crime[s]." Defendant further averred that her drug addiction was "spurred" by being subject to "both physical and mental cruelty," and "domestic violence and sexual assaults" by her "son's father." Defendant claimed that "[d]rugs were a way for [her] to

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<sup>1</sup> The petition also alleged plea counsel was ineffective by failing to argue at sentencing mitigating factor two, that defendant did not contemplate her conduct would cause or threaten serious harm, N.J.S.A. 2C:44-1(b)(2). Defendant also claimed the trial court denied her "equal protection rights" by not permitting her "equal opportunity for alternat[iv]e sentencing programs." To the extent those claims were rejected by court in its denial of the PCR petition, defendant does not challenge the court's determination on appeal. We therefore do not address those claims. See generally Drinker Biddle & Reath LLP v. N.J. Dep't of L. & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (explaining an issue not briefed on appeal is deemed abandoned).

escape the pain and suffering [she] endured," and plea counsel at sentencing did not provide that information to the court "in mitigation of [her] actions."

Defendant also explained her interactions with appellate counsel on the direct appeal from her sentence. Defendant stated she "wanted to appeal [her] sentence as excessive" but appellate counsel advised her she "had no issues to appeal" or any "arguments." She claimed that "[b]ased on [appellate counsel's] advice, [she] missed her opportunity to appeal [the] sentence as excessive." In her petition and certification, defendant did not assert any other facts concerning her direct appeal or appellate counsel's alleged ineffective representation.

In her certification, defendant also stated she did not seek to disturb her plea or plea agreement and proceed to trial. Instead, she sought only re-sentencing in the second-degree range for each of the three carjackings, arguing that if plea counsel had correctly advanced the statutory sentencing factors, the mitigating factors would have outweighed the aggravating factors and she "could have been sentenced in the second-degree range."<sup>2</sup>

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<sup>2</sup> Defendant's argument is premised on an incorrect statement of the standard for imposition of a sentence appropriate to a crime one degree lower than the first-degree carjackings for which she was convicted. Under N.J.S.A. 2C:44-1(f)(2), a "court may sentence [a] defendant" convicted of a first- or second-degree offense "to a term appropriate to a crime of one degree lower" only "where the court is clearly convinced that the mitigating factors substantially



After hearing argument, the court found that based on the record presented, defendant's claimed drug addiction following her use of prescription medications began "long before" her relationship with the individual—the father of her youngest child—she claimed had committed acts of domestic and sexual violence against her. The court further found defendant's petition and certification offered multiple reasons for the drug addiction she attributed to her decision to commit the carjackings, including prescription drugs she took as the result of injuries suffered in an accident, the stresses of being a single mother, and her mental and physical need for heroin following her addiction to it.

The PCR court rejected defendant's claim plea counsel was ineffective by failing to argue mitigating factor four at sentencing because the court determined the mitigating factor "does not apply." The court noted it had considered defendant's drug addiction in its imposition of sentence but concluded it did not

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outweigh the aggravating factors and where the interest of justice demands." See generally State v. Trinidad, 241 N.J. 425, 453-55 (2020). Thus, even accepting defendant's claim that the court would have found the mitigating factors outweighed the aggravating factors had plea counsel argued in support of the additional mitigating factor at sentencing, that finding would not have supported a determination defendant should have been sentenced in the second-degree range. We also observe the sparse facts offered in support of defendant's claim plea counsel was ineffective do not establish any basis for a finding that the interest of justice would have demanded a sentence in the second-degree range for the three carjackings, two of which were committed while defendant threatened the victims with a handgun.

constitute "substantial grounds [t]ending to excuse or justify the defendant's conduct" because her drug addiction did not excuse or justify defendant's violence during the commission of the carjackings. The court further explained defendant's domestic violence claims were unsupported by "any detail[s]" other than a "brief reference" in "a sentence" in her certification.

The court further explained that defendant "not only committed these horrific crimes, but had planned them." The court found defendant's use of a handgun during the second and third carjackings "indicates planning and intent," and the court noted defendant told one of the victims "that someone is going to die if [the victim] did not comply with [defendant's] demands." The court also determined that although defendant's primary goal was to obtain money or items that could be sold for drugs, she was willing to harm others, and had harmed others, during her commission of the crimes.

The PCR court, which had also been the sentencing court, concluded that even if defendant had been the victim of domestic violence—"little details" about which were included in defendant's verified petition and certification—"it would not have changed [defendant's] sentence." The court noted defendant "brutally threatened her victims, who were strangers, did so at gunpoint in two of the incidents," and physically injured one the victims by driving off and

crashing the carjacked vehicle as the victim held onto it. The court further explained the presentence investigation report, and defendant's statements to the probation department during its preparation of the presentence report, showed defendant's drug addiction began before her relationship with the individual she claimed had committed acts of domestic violence against her. The court noted that defendant had attributed her drug addiction to medications she had been prescribed following an accident. The court therefore rejected defendant's claim plea counsel was ineffective by failing to argue mitigating factor four at sentencing.

The court also found defendant had been fully informed at sentencing of her right to appeal and defendant had signed the appeals rights form at sentencing. The court did not expressly address defendant's claim—asserted in her certification—that appellate counsel had informed defendant she had no valid arguments supporting an appeal and, based on appellate counsel's advice, she had missed her opportunity to appeal. In defendant's brief in support of the PCR petition, she had argued only that appellate counsel was ineffective by failing to file an appeal from defendant's sentence. The PCR court also did not directly address that argument in its decision denying the petition.

The court entered an order denying the PCR petition. This appeal followed. Defendant offers the following arguments in support of her challenge to the court's order:

POINT I

THE PCR COURT MISAPPLIED THE LAW IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HER AN EVIDENTIARY HEARING TO FULLY ADDRESS HER CONTENTION SHE WAS PROVIDED WITH INEFFECTIVE ASSISTANCE OF COUNSEL.

1. This matter must be remanded for an evidentiary hearing because plea counsel was ineffective for failing to properly argue mitigating factor four at sentencing.
2. Defendant is entitled to [PCR], or, at a minimum, an evidentiary hearing, because appellate counsel, who filed a Notice of Appeal on her behalf, withdrew the appeal.

II.

We review the PCR court's legal conclusions de novo. State v. Nash, 212 N.J. 518, 540-41 (2013). The de novo standard of review also applies to mixed questions of fact and law. State v. Harris, 181 N.J. 391, 420 (2004). Where, as here, the PCR court did not conduct an evidentiary hearing, we also "conduct a de novo review" of the court's "factual findings." Id. at 421; see also State v. Lawrence, 463 N.J. Super. 518, 522 (App. Div. 2020).

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee defendants in criminal proceedings the right to the assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 50 (1987). The right to counsel includes "the right to the effective assistance of counsel." Nash, 212 N.J. at 541 (quoting Strickland, 466 U.S. at 686).

To establish a prima facie case of ineffective assistance of counsel, a defendant must show a "reasonable likelihood" of success under the two-prong standard outlined in Strickland, 466 U.S. at 694. State v. Preciose, 129 N.J. 451, 463 (1992); see also Fritz, 105 N.J. at 58. The Strickland standard requires that a defendant show: (1) "counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment"; and (2) counsel's "deficient performance prejudiced the defense." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). A defendant seeking PCR based on an ineffective-assistance-of-counsel claim "bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012) (citations omitted). An ineffective-assistance-of-counsel-claim must be denied if a defendant does not sustain the burden under either prong of the standard. Strickland, 466 U.S. at 687.

Under the first prong, a defendant must show "'counsel's acts or omissions fell outside the wide range of professionally competent assistance considered in light of all the circumstances of the case.'" State v. Allegro, 193 N.J. 352, 366 (2008) (quoting State v. Castagna, 187 N.J. 293, 314 (2006)). Our analysis under the first prong is highly deferential to counsel. State v. Arthur, 184 N.J. 307, 318-19 (2005) (citing Strickland, 466 U.S. at 689). There is "'a strong presumption' that [counsel] provided reasonably effective assistance" and counsel's "'decisions followed a sound strategic approach to the case.'" State v. Pierre, 223 N.J. 560, 578-79 (2015) (quoting Strickland, 466 U.S. at 689). A defendant may rebut the presumption of effectiveness by proving trial counsel's actions were not "'sound trial strategy.'" Arthur, 184 N.J. at 319 (quoting Strickland, 466 U.S. at 689).

Proof of prejudice under Strickland's second prong "'is an exacting standard.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Allegro, 193 N.J. at 367). A defendant must "'affirmatively prove"' "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Ibid. (quoting Strickland, 466 U.S. at 693-94). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Ibid. (quoting Strickland, 466 U.S. at 694).

Defendant argues the court erred by denying her claim plea counsel was ineffective at sentencing by failing to request that the court find statutory mitigating factor four, "[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense," N.J.S.A. 2C:44-1(b)(4). We reject the claim because defendant's drug addiction does not support a finding of mitigating factor four. State v. Ghertler, 114 N.J. 383, 390 (1989). Plea counsel's performance was not deficient under Strickland's first prong, and did not result in any prejudice under Strickland's second prong, by failing to offer a meritless argument at sentencing. See, e.g., State v. O'Neal, 190 N.J. 601, 619 (2007) (holding "[i]t is not ineffective assistance of counsel for defense counsel not to file a meritless motion"); State v. Worlock, 117 N.J. 596, 625 (1990) (stating "[t]he failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel").

Defendant also argues plea counsel was ineffective at sentencing by failing to argue her experience as a domestic violence victim "caused her psychological trauma" that resulted in the drug addiction that propelled her to commit the carjackings. Defendant claims that had plea counsel made that argument at sentencing, "it would have allowed the court to conclude" mitigating factor four applied and would have resulted in a sentence less than

the aggregate fifteen-year custodial term imposed by the court. We are unpersuaded.

In the first instance, because defendant's drug addiction does not support a finding of mitigating factor four, see Ghertler, 114 N.J. at 389-90, we discern no basis in logic or the law to conclude that the purported reason for her drug addiction supports a finding of the mitigating factor. Additionally, the premise of defendant's argument—that her drug addiction was caused by psychological trauma resulting from alleged domestic and sexual violence—is untethered to any competent evidence. Cf. State v. Jarbath, 114 N.J. 394, 414-15 (1989) (affirming a finding of mitigating factor four where the record, including information from a medical doctor, showed defendant's intellectual disability rendered her "impossible to cope emotionally, and has even [caused] breaks with reality" when "placed in inappropriate environments"); see also State v. Briggs, 349 N.J. Super. 496, 504 (App. Div. 2002) (finding expert reports establishing the defendant suffered from post-traumatic stress disorder consistent with spousal abuse supported a finding of mitigating factor four in the sentencing of a defendant convicted of killing her spouse).

Indeed, in support of the claim, defendant provides only bald assertions her drug addiction is the result of her being a victim of domestic violence, and



those assertions are otherwise contradicted by her claims her drug addiction was the result of prescription medications she received to treat injuries suffered in an accident and the burdens of being a single mother. Her claim she suffered "psychological trauma" from domestic violence resulting in her drug addiction is made only in her brief on appeal.

PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity," State v. Jones, 219 N.J. 298, 312 (2014), "'facts sufficient to demonstrate counsel's alleged substandard performance,'" ibid. (quoting State v. Porter, 216 N.J. 343, 355 (2013)). Defendant's "bald assertions" of fact are insufficient to sustain her burden of establishing a prima facie case of ineffective assistance of counsel under the Strickland standard. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). And the arguments of her counsel in a brief are insufficient to establish facts upon which a court may properly rely in rendering a decision. See generally Baldyga v. Oldman, 261 N.J. Super. 259, 265 (App. Div. 1993) ("The comments following [Rule 1:6-6] illustrate that its purpose is to . . . eliminate the presentation of facts which are not of record by unsworn statements of counsel made in briefs and oral arguments.").

Lacking any competent evidence that her drug addiction—which defendant erroneously claims supports a finding of mitigating factor four—resulted from the domestic violence to which she claims to have been a victim, defendant failed to sustain her burden of establishing plea counsel's performance was deficient by failing argue at sentencing domestic violence caused the drug addiction. Again, counsel's performance was not deficient by failing to make a meritless argument at sentencing, O'Neal, 190 N.J. at 619; Worlock, 117 N.J. at 625, and defendant did not, and could not, demonstrate she suffered any prejudice as the result of her counsel's purported error in failing to make a meritless argument at sentencing.

For those reasons, we are unpersuaded by defendant's claim the court erred by rejecting her contention plea counsel was ineffective by failing to argue defendant's drug addiction and the purported reason for the addiction—her history of being a victim of domestic violence—supported a finding of mitigating factor four at sentencing. Defendant's failure to satisfy her burden under both prongs of the Strickland standard as to each claim required, and requires, denial of her PCR petition asserting ineffective assistance of plea counsel. See State v. Parker, 212 N.J. 269, 280 (2012) (citations omitted)

(explaining a failure to satisfy either prong of the Strickland standard requires the rejection of an ineffective-assistance-of-counsel PCR claim).

### III.

For the first time on appeal, defendant argues appellate counsel was ineffective by withdrawing a direct appeal from her sentence that had been filed on her behalf. Before the PCR court, defendant had made a different argument. In her brief in support of her petition to the PCR court, defendant argued appellate counsel was ineffective because defendant had "asked counsel to file an appeal, but counsel did not file the appeal as requested."<sup>3</sup> Defendant abandons that argument here and therefore we do not address it. See Drinker Biddle & Reath LLP, 421 N.J. Super. at 496 n.5. She instead makes a wholly different argument. She claims appellate counsel was ineffective by filing a direct appeal from her sentence and then withdrawing it.

In support of her newly-minted argument, defendant includes in her appendix a November 1, 2016 notice of appeal from her sentence and a March

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<sup>3</sup> Although briefs submitted to the trial court shall not be included in a party's appendix on appeal, defendant includes in her appendix on appeal counsel's brief on her behalf to the PCR court. See R. 2:6-1(a)(2). In any event, in the brief defendant argues only that appellate counsel was ineffective because defendant "asked . . . counsel to file an appeal, but counsel did not file the appeal as requested." Defendant does not reprise this argument in her brief on appeal.

20, 2017 letter from the Office of the Public Defender to defendant. Based on its plain language, the letter advises defendant that appellate counsel had been assigned to represent her, counsel had reviewed documents, and counsel had concluded there was "no basis to argue for a reduction of [defendant's] sentence." Counsel noted defendant had faced "[ninety] years of imprisonment if convicted at trial" of the three carjackings, and the court had imposed a fifteen-year aggregate sentence, which counsel described as "significantly less than the [twenty]-year recommendation by the prosecutor."<sup>4</sup> The letter further states appellate counsel intended to withdraw the appeal if he did not hear from defendant "to the contrary by March 29th" and, according to defendant's brief on appeal, "upon information and belief" counsel withdrew the appeal on March 31, 2017.

We do not consider or rely on the March 20, 2017 letter as a basis for our analysis of defendant's arguments on appeal. It would be inappropriate to do so. The record does not reflect that the letter was provided to the PCR court or that defendant relied on the letter in support of her claims and arguments before the

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<sup>4</sup> The sentencing range for each of the first-degree carjacking offenses to which defendant pleaded guilty is ten to thirty years. N.J.S.A. 2C:15-2(b). Thus, if defendant had been convicted at trial of the three separate carjackings, she faced a maximum ninety-year custodial term on those charges alone.

PCR court. See, e.g., State v. Golotta, 178 N.J. 205, 211-12 (2003) (quoting State v. Wilson, 178 N.J. 7, 14 (2003)) (explaining a party "'cannot rely on factual testimony or other proof that was not submitted as part of the lower court's record'"); see also R. 2:5-4(a) (providing "[t]he record on appeal shall consist of all papers on file in the court or courts . . . below"). Thus, we reject any arguments based on the letter—and any purported facts that might be gleaned from it—made in support of defendant's claim the PCR court erred by rejecting her contention appellate counsel was ineffective.<sup>5</sup>

Without the letter and the purported facts it might have established, the only evidence presented by defendant in support of her claim appellate counsel was ineffective were the assertions, included in defendant's certification, that appellate counsel had told her she "had no issues to appeal" and "no arguments" to make in support of her appeal. Defendant added only that "based on [appellate counsel's] advice," she "missed [her] opportunity to appeal [her] sentence as excessive." We therefore consider those facts, when viewed in the

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<sup>5</sup> We also reject defendant's reliance on the letter because it is unaccompanied by any affidavit or certification establishing its authenticity. See R. 1:6-6. Defendant's verified petition and certification do not refer to the letter, state that she received it, or otherwise provide any facts concerning it. Counsel's decision to include the letter in an appendix on appeal is insufficient to render the letter competent evidence supporting any findings of fact. See generally Celino v. Gen. Accident, Ins., 211 N.J. Super. 538, 544 (App. Div. 1986).

light of defendant's abandonment of her claim appellate counsel failed to file a direct appeal from her sentence, in our analysis of whether the PCR court correctly rejected defendant's claim appellate counsel was ineffective.

A defendant is entitled to effective assistance of counsel at all stages of the proceedings, including on a first appeal as of right. State v. Morrison, 215 N.J. Super. 540, 545 (App. Div. 1987). We review an order rejecting an ineffective-assistance-of-appellate-counsel claim under the two-pronged Strickland standard. State v. Gaither, 396 N.J. Super. 508, 513-14 (App. Div. 2007). "[I]n applying the Strickland standard to assess a claim of ineffective assistance of appellate counsel, defendant must show not only that [her] attorney's representation fell below an objective standard, but also that [she] was prejudiced, i.e., but for counsel's unprofessional errors, the result would have been different." Id. at 513 (quoting Morrison, 215 N.J. Super. at 546).

In its assessment of the first prong of the Strickland standard, a court must be mindful that "appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant." Morrison, 215 N.J. Super. at 549 (citing Jones v. Barnes, 463 U.S. 745, 754 (1983)); see also Gaither, 396 N.J. Super. at 516 (holding that appellate counsel is not "required to advance every claim insisted upon by a client on appeal"). In that regard, a criminal

defendant's counsel is not ineffective by failing to raise a meritless legal argument in support of an appeal on the defendant's behalf. O'Neal, 190 N.J. at 619; Worlock, 117 N.J. at 625.

Where an attorney forfeits a defendant's right to appeal, there is a presumption of prejudice under the Strickland standard. See generally Roe v. Flores-Ortega, 528 U.S. 470 (2000); State v. Jones, 446 N.J. Super. 28 (App. Div. 2016). Thus, where an attorney "disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable," Jones, 446 N.J. Super. at 32 (quoting Flores-Ortega, 528 U.S. at 477), and the failure to file a notice of appeal leads to the "forfeiture of the proceeding itself," id. at 33 (quoting Flores-Ortega, 528 N.J. Super. at 483), there is a "presumption of prejudice," ibid. (quoting Flores-Ortega, 528 N.J. Super. at 483). Stated differently, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that [she] would have otherwise taken, the defendant has made out a successful ineffective assistance of counsel [claim] entitling [her] to an appeal." Ibid. (quoting Flores-Ortega, 528 N.J. Super. at 484).

As noted, defendant argued before the PCR court that appellate counsel was ineffective by failing to file a direct appeal from defendant's sentence. She

no longer makes the same claim in apparent recognition that appellate counsel had in fact filed a notice of appeal on her behalf. And, although the notice of appeal was not submitted to the PCR court, defendant includes it in the record on appeal and we may properly take judicial notice of it as a record of this court. N.J.R.E. 202(b); see also Williamson v. Treasurer of State of N.J., 350 N.J. Super. 236, 242 (App. Div. 2002) (observing that courts may take judicial notice of documents on file in the Superior Court as public records); Brick v. Vannell, 55 N.J. Super. 583, 587-88 (App. Div. 1959). Thus, we are not presented with a situation where appellate counsel failed to file a notice of appeal on defendant's behalf as in Flores-Ortega or Jones.

Instead, we are left with the sparse and vague facts offered by defendant in her certification as the only bases for her claim appellate counsel was ineffective.<sup>6</sup> The certification does not assert appellate counsel provided misadvice, failed to provide essential advice, or acted in a manner such that he engaged in deficient performance under Strickland's first prong. In Flores-Ortega, the Court explained that in assessing a claim appellate counsel is ineffective in the absence of evidence establishing counsel's performance "rendered [an appeal] proceeding presumptively unreliable or entirely non-

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<sup>6</sup> Defendant's verified PCR petition does not mention appellate counsel.



existent," it is not appropriate to "presum[e] prejudice with no further showing . . . of the merits of [her] underlying claims." 528 U.S. at 484; see also Jones, 446 N.J. at 36 ("[T]here is no existing evidence that our Supreme Court would do other than follow Flores-Ortega").

Here, defendant's certification does not address the merits of her underlying claims. That is, defendant's vague assertions in her certification did not identify any arguments that could have been made by appellate counsel in support of a challenge to her sentence and, even on this appeal, she does not offer any meritorious claims that could have been asserted by her appellate counsel in support of a challenge to her sentence. Indeed, the only argument defendant has mustered in support of her sentencing claims is that trial counsel should have argued in support of mitigating factor four based on her drug addiction—and the purported cause of it—but, for the reasons we have explained, that argument finds no support in the evidence or law.

The limited facts defendant provided concerning appellate counsel similarly do not establish deficient performance. Defendant also failed to provide any facts establishing she suffered prejudice from appellate counsel's advice concerning her appeal under Strickland's second prong because she failed to present any evidence or argument that there were meritorious grounds

supporting an appeal from her sentence. The PCR court therefore did not err by rejecting defendant's ineffective-assistance-of-appellate-counsel claim.

#### IV.

Defendant also claims the PCR court erred by denying her petition without an evidentiary hearing. An evidentiary hearing is required only when (1) a defendant establishes "a prima facie case in support of [PCR]," (2) the court determines that there are "material issues of disputed fact that cannot be resolved by reference to the existing record," and (3) the court determines that "an evidentiary hearing is necessary to resolve the claims" asserted. Porter, 216 N.J. at 354 (alteration in original) (quoting R. 3:22-10(b)); see also R. 3:22-10(e)(2) (providing "[a] court shall not grant an evidentiary hearing . . . if the defendant's allegations are too vague, conclusory or speculative"). "If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

"[W]e 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). We find no abuse of discretion here. The court correctly denied the petition without an evidentiary hearing because

defendant failed to establish a prima facie case of ineffective assistance of plea and appellate counsel and the record otherwise did not present any disputes as to any material facts that could not be resolved without resort to the record. Porter, 216 N.J. at 354.

Any remaining arguments presented on defendant's behalf that we have not expressly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION