

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2702

COREY MORRIS,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 3-14-cv-06023)
District Judge: Honorable Michael A. Shipp

Argued: February 13, 2019

Before: HARDIMAN, SCIRICA, and COWEN, *Circuit Judges*

(Filed: April 26, 2019)

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APPENDIX A.1

OPINION*

SCIRICA, Circuit Judge

Petitioner Corey Morris appeals the District Court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Morris asserts that he received ineffective assistance of counsel in pretrial plea dealings in New Jersey state court. Particularly, he alleges his state trial counsel advised him that his aggregate sentencing exposure across several charges was 25 years' imprisonment, leading him to reject a package plea deal for 5 years' imprisonment, when in fact his actual aggregate sentence exposure was greater. He seeks an evidentiary hearing to develop that claim, which the New Jersey courts and the District Court have rejected. To merit federal habeas relief, Morris must show his counsel's performance was deficient and that deficiency prejudiced him, *see Strickland v. Washington*, 466 U.S. 668, 687 (1984); moreover he must do so under the highly deferential standard imposed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Because Morris has not shown prejudice under AEDPA's demanding standard, we will affirm.

I.

The facts underlying Morris's petition for habeas relief involve three criminal incidents: first, the April 2002 robbery of Andrew Keresztury, for which Morris was

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

charged (*inter alia*) with Second Degree Robbery; second, the July 2002 robbery of Joseph Spivak, for which Morris was also charged (*inter alia*) with Second Degree Robbery; and finally, a burglary, for which the government later withdrew the charge.

In New Jersey, Second Degree Robbery—at issue, as noted, in both the Spivak and Keresztury robberies—calls for a sentence of 5 to 10 years. *See* N.J. Rev. Stat. § 2C:43-6(a)(2); *id.* § 2C:15-1. Burglary, as initially charged in a third indictment, calls for a prison term of 3 to 5 years. *Id.* § 2C:43-6(a)(3); *id.* § 2C:18-2. When a defendant has a history as a repeat, or “persistent,” offender, he is eligible for an “extended term” of 10 to 20 years for a Second Degree crime. *Id.* §§ 2C:43-7(a)(3), 2C:44-3(a). But when a defendant faces multiple sentences, New Jersey law provides “[n]ot more than one sentence for an extended term shall be imposed.” *Id.* § 2C:44-5(a)(2).

The three charges at issue were initially brought before the same New Jersey trial court, and Morris was represented by the same attorney in defending all of them. Morris’s counsel submitted a pretrial memorandum to the court covering all three charges. Counsel there represented that Morris qualified for an “extended term,” and that Morris’s “[m]aximum sentence if convicted,” “[i]ncluding extended term,” was 25 years’ imprisonment. *Morris v. D’Ilio*, 3:14-cv-06023, Dkt. No. 18-1, at 51 (D.N.J. Aug. 11, 2015).

The court held a status conference on the charges on March 31, 2003, at which it discussed Morris’s sentence exposure and the plea arrangement the state had offered. In regard to Morris’s potential sentence, the judge first stated that for the Keresztury robbery Morris faced “a maximum of ten years,” for the Spivak robbery he faced additional time,

and for the third charge he faced five years. App'x 48–49. The judge added that if Morris was convicted, he “could face an extended term because of [his] record,” *i.e.*, his history of past convictions; the judge also clarified Morris would be subject to New Jersey’s No Early Release Act, under which he would not be eligible for parole until he served 85 percent of his sentence. App'x 49. The court then discussed the potential aggregate sentence Morris faced with Morris’s attorney, looking to the pretrial memorandum as the basis of its discussion:

THE COURT: [Defense counsel] has written in here the maximum sentence, if convicted, is 25 years. How did you conclude the maximum is 25 years?

[DEFENSE COUNSEL:] It would be two ten-year sentences running consecutive, and then a five-year sentence if you take the ordinary terms and run them max and consecutive.

THE COURT: Max terms. Okay. Seems reasonable. He might have an extended term, though, on one of them. If he gets convicted of a second-degree robbery, is he eligible for an extended term?

[PROSECUTOR]: I believe so, yes, your Honor.

THE COURT: Well, if he is, then it could be more than 25 years.

App'x 50. The court then addressed the plea deal the state had offered Morris. It confirmed the plea was “five years at 85 percent” with credit for time served, and was a “package offer” for all three indictments. App'x 51. It then explained: “[Y]ou’re looking at running a risk of 25 years if you’re convicted of several of these offenses with 17-year minimum parole ineligibility as opposed to four years with 51 months” under the plea. App'x 51. With that explanation, the court asked: “So you want to go to trial?” App'x 51. Morris responded “Yes.” App'x 52.

Morris first stood trial in October 2003 for the Spivak robbery. A jury found

Morris guilty, and on December 5, 2003 he was sentenced to an extended term of 16 years. Morris then stood trial for the Keresztury robbery in March 2004. After a jury found him guilty, he was sentenced in July 2004 to an extended term of 20 years, to be served consecutively to the Spivak robbery term. At some point after the status conference, the state withdrew the third indictment. Morris directly appealed his convictions and sentences; ultimately, the appellate process yielded no changes to his 36 year combined sentence.

Morris next challenged his sentence through New Jersey's post-conviction relief process. He raised several challenges, including one that his counsel was ineffective in failing to accurately advise him of his sentencing exposure if he went to trial. Morris also challenged the imposition of two extended term sentences as a violation of New Jersey law, N.J. Rev. Stat. § 2C:44-5(a)(2), which provides "[n]ot more than one sentence for an extended term shall be imposed" when a defendant faces multiple sentences. *See also id.* § 2C:44-5(b)(1); *State v. Pennington*, 14 A.3d 790 (N.J. Super. Ct. App. Div. 2011). Morris's sentence for the Keresztury robbery was accordingly reduced in 2011 from 20 years to 10 years. *See State v. Morris*, Nos. A-5057-10T3 & A-1705-11T2, 2014 WL 503941, at *6–7 (N.J. Super. Ct. App. Div. Feb. 4, 2014). The post-conviction relief and appellate courts dismissed as meritless nearly all of Morris's other challenges, including those concerning ineffective assistance of counsel. *See generally id.*

Morris filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court on September 16, 2014, contending (*inter alia*) he received ineffective assistance of counsel in his plea dealings before trial. The court considered

Morris's challenges and endorsed the state courts' findings and conclusions, including that: Morris was accurately informed of his sentencing exposure; he would not have accepted any plea arrangement whether or not he was accurately informed; and he could not have accepted a plea arrangement because he maintained his innocence. *See Morris v. D'Ilio*, No. 14-6023, 2017 WL 3081670, at *4–5 (D.N.J. July 19, 2017). It denied Morris's petition and rejected his request for a certificate of appealability.

Morris sought a certificate of appealability from this court, which we issued for three of Morris's claims: "Morris' claim that trial counsel failed to advise him regarding (1) the aggregate maximum sentence to which he was subject for both of his robbery convictions, (2) the maximum sentence, including the extended term, to which he was subject for the robbery at issue in this case, and (3) the consecutive parole supervision terms to which he was subject." Order, Third Circuit Dkt. (Jan. 23, 2018). We have appellate jurisdiction to review those claims under 28 U.S.C. § 2253 and § 1291.

II.

Because the District Court did not conduct an evidentiary hearing in ruling on Morris's petition, "our review of its legal conclusions is plenary," and we review the state court record from the same position as the District Court. *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009). That review is governed by AEDPA, which mandates deference to state court conclusions and findings. *See generally Harrington v. Richter*, 562 U.S. 86 (2011); *Lewis*, 581 F.3d at 109–12. Under AEDPA,

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Accordingly, AEDPA calls for significant deference to state court decisionmaking.

To establish that a state court's decision was contrary to or involved an unreasonable application of Supreme Court law, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. And in reviewing claims that allege state court decisions were based on unreasonable factual findings, we recognize "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Eley v. Erickson*, 712 F.3d 837, 846 n.11 (3d Cir. 2013); *Lewis*, 581 F.3d at 100, 111.

III.

Morris's petition for habeas relief turns on the claim that he received ineffective assistance of counsel in his plea dealings. The Supreme Court has recognized the right to counsel "extends to the plea-bargaining process," and habeas relief may be warranted "where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." *Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012). The

question whether counsel's assistance was ineffective is governed by the familiar *Strickland* framework: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."

Strickland, 466 U.S. at 687. We apply that framework with AEDPA's deferential requirements in mind. *See Burt v. Titlow*, 571 U.S. 12, 15, 19–20 (2013).

Morris primarily asserts that his counsel's allegedly erroneous advice concerning his aggregate sentencing exposure violated his right to effective counsel, and the District Court erred by failing to hold an evidentiary hearing on that question. We first address that claim, then turn to Morris's additional allegations of ineffective assistance.

A.

In evaluating Morris's primary ineffective assistance claim, we begin with the question whether Morris's counsel was deficient. Morris asserts that his counsel warned him he faced an aggregate maximum sentence of 25 years when in fact his sentencing exposure was notably greater. The New Jersey post-conviction court disagreed, stating in full: "I find trial counsel was not deficient for writing his potential sentence on the pretrial sentence form because defendant was orally instructed regarding the potential of extended term." App'x 80.

Failure to properly advise a defendant about sentencing exposure in plea dealings may constitute ineffective assistance of counsel: "When addressing a guilty plea, counsel is required to give a defendant enough information 'to make a reasonably informed

decision whether to accept a plea offer.” *United States v. Bui*, 795 F.3d 363, 367 (3d Cir. 2015) (quoting *Shotts v. Wetzel*, 724 F.3d 364, 376 (3d Cir. 2013), and *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)); see also *Lafler*, 566 U.S. at 162–63. A defendant who rejects a guilty plea and receives a more severe sentence after trial makes a claim of ineffective assistance when “he alleges that the advice he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer.” *Day*, 969 F.2d at 43. Accurate information about maximum sentence exposure “will often be crucial to the decision whether to plead guilty,” the *Day* court explained, because it enables a defendant to conduct “comparative” analysis essential to the decision whether to take the plea. *Id.* Indeed in *Day* itself, we held “if Day is correct that he was seriously misled about his sentence exposure”—there receiving advice he faced roughly 11 and a half years in prison when he was ultimately sentenced to nearly 22 years—and “the likelihood of his conviction was overwhelming, he received ineffective assistance of counsel.” *Id.* at 44.

The record supports Morris’s contention that he received similarly erroneous advice from counsel. First, counsel represented Morris was only facing an aggregate term of 25 years in a pretrial memorandum submitted to the court before Morris rejected the 5 year plea deal. In response to the question “Does the defendant qualify for an extended term?” counsel circled “yes.” D. Ct. Dkt. 18-1, at 51. On the same page of the memorandum, only a few lines down, in response to the prompt “Maximum sentence if convicted. (Including extended term, if applicable),” counsel wrote 25 years. *Id.* Second, at the March 2003 status conference where Morris rejected his plea deal, the court

reviewed counsel's representations in the memorandum; counsel stated again that Morris was subject to a 25 year maximum aggregate term. *See App'x 50.*

Despite that advice, Morris was in fact exposed to a maximum aggregate sentence of at least 35 years. For one of the two second-degree robbery charges he faced, he was exposed to an extended term of 20 years. For his second second-degree robbery charge he faced a maximum of 10 years, as New Jersey Revised Statute § 2C:44-5 makes clear that Morris's extended term exposure was only for one of his-Second Degree charges, not both. And for crimes charged in the third indictment, he faced 5 years. Morris is in fact now serving an aggregate term of 26 years—one year greater than the maximum exposure his counsel warned him of.¹ There is no record evidence that counsel ever corrected his error, and the state does not contend counsel ever did so.

We need not, however, determine whether the state court's finding on deficiency was "incorrect by clear and convincing evidence," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003): Were Morris's counsel deficient, Morris would still need to show that deficiency was prejudicial to prevail. Morris has not done so under AEDPA's standard.

To establish prejudice in the context of ineffective plea advice, the Supreme Court

¹ Morris was initially sentenced to 36 years total for the Spivak and Keresztury robberies, with a 16 year extended term sentence for the former and a 20 year extended term sentence for the latter. (As noted, the indictment for the third charge was withdrawn at some point after the March 2003 status conference.) Morris successfully challenged the imposition of the second extended term sentence as a violation of New Jersey Revised Statute § 2C:44-5, which provides "[n]ot more than one sentence for an extended term shall be imposed." *Id.* § 2C:44-5(a)(2); *see also id.* § 2C:44-5(b)(1). The New Jersey post-conviction court "determined that the extended term imposed" for the Keresztury robbery "was an illegal sentence" and vacated that extended term. 2014 WL 503941, at *5–6. On November 4, 2011, the court imposed a corrected 10 year term of imprisonment for the Keresztury robbery. *See id.* at *6.

has explained:

a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164. We have before found prejudice was possible in circumstances similar to Morris's, noting "we do not find it at all implausible that a young man would think twice before risking over 3800 extra days in jail [*i.e.*, nearly 10.5 years] just to gain the chance of acquittal of a crime that he knew he had committed." *Day*, 969 F.2d at 45. In those circumstances, we concluded an evidentiary hearing was warranted to further probe prejudice. *Id.*

But as noted, we review for prejudice in light of AEDPA's deference to state court findings and conclusions. The New Jersey post-conviction court here found Morris was not prejudiced. Among other grounds, it reasoned that correct "information would not have altered [Morris's] decision to proceed to trial. The record reflects his conscious decision to proceed to trial." App'x 79. The court noted that in a January 2003 conference concerning Morris's indictment in the Spivak robbery, it warned him he might face an extended term sentence in that case. Morris nonetheless proceeded to trial. *See* App'x 79; App'x 33. The court reasoned that Morris's conduct during the March 2003 pretrial status conference "demonstrates that defendant's decision to reject the plea bargain would not have been altered by attorney advice." App'x 80. It also noted that the judge at that point mitigated counsel's potential error when he "warned the defendant he could face an

extended term if convicted,” App’x 80, stating that Morris’s term “could be more than 25 years,” App’x 50. Knowing he could face “more than 25 years” in prison, Morris rejected a 5 year package plea deal and proceeded to trial.

The court’s “factual determination that” Morris would have proceeded to trial regardless of his counsel’s error is “entitled to a presumption of correctness,” and “the burden” is on Morris “to rebut this presumption with clear and convincing evidence.” *Lewis*, 581 F.3d at 111. Morris does not point to any specific record evidence to rebut the presumption, instead generally relying on the logic of *Day* to suggest the difference between the sentence exposure he was apprised of and that he actually faced was sufficient to warrant an evidentiary hearing. But that cannot overcome the New Jersey court’s contrary finding—a finding, as we have noted, that is entitled to a presumption of correctness. Morris accordingly has not shown by clear and convincing evidence that the court’s finding he was not prejudiced is incorrect.²

B.

Morris’s Certificate of Appealability extends to two other claims of ineffective assistance in plea bargaining, but Morris cannot prevail on either. First, Morris contends his counsel was ineffective in failing to inform him of the maximum sentence he faced, with an extended term, for the Keresztury robbery. But Morris’s sentence for that robbery

² Insofar as Morris suggests the state court unreasonably applied the law in failing to offer him an evidentiary hearing in its own post-conviction proceedings, he also cannot meet AEDPA’s high bar. Morris does not point to any Supreme Court law that clearly requires a post-conviction court to hold an evidentiary hearing, particularly on its own initiative; he accordingly cannot show the court’s decision to rely on record evidence rather than hold a hearing was an unreasonable application of Supreme Court law. *See Harrington*, 562 U.S. at 102–03.

was reduced in state post-conviction proceedings to 10 years in light of N.J. Stat. § 2C:44-5 and *Pennington*, which legally bar the imposition of extended terms for multiple sentences. Morris does not dispute that he was apprised he could face a 10 year term of imprisonment for that sentence. Because Morris correctly understood this charge could yield a 10 year sentence at the time he rejected the plea, he cannot show any potential error was prejudicial. Second, Morris contends his counsel was ineffective in failing to warn him that he faced consecutive parole supervision terms. But again, Morris cannot show any potential error on this front was prejudicial. The trial court warned Morris that he faced a mandatory term of parole. *See App'x 49, 50.* Moreover, the state court's reasoning that Morris was not reasonably likely to have accepted the plea deal had he known he was exposed to several additional years of parole is persuasive and entitled to deference under AEDPA. *See App'x 84.* Accordingly, Morris has not shown an evidentiary hearing was warranted to develop either of these claims.

IV.

For those reasons, we will affirm the District Court's denial of habeas relief.

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

COREY MORRIS,

Petitioner,

v.

STEPHEN M. D'ILIO,¹ et al.,

Respondents.

Civil Action No. 14-6023 (MAS)

MEMORANDUM OPINION

SHIPP, District Judge

Petitioner Corey Morris, confined at New Jersey State Prison in Trenton, New Jersey, files the instant Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging a conviction and sentence imposed by the State of New Jersey for robbery and related crimes. Respondents filed a Response, and Petitioner filed a Traverse, so the Petition is now ripe for disposition. For the reasons stated below, the Court denies the Petition.

I. FACTUAL BACKGROUND

For the purposes of this Opinion, the Court relies on the following description of the crime by the Appellate Division on review of the denial of post-conviction relief ("PCR"):

This case arose from the robbery of a seventy-year-old disabled victim, Andrew Keresztury, on April 12, 2002. As in the companion case, the proofs against defendant were overwhelming.²

¹ The Court notes that Stephen D'Ilio was improperly pled as Stephen D'LLio. (See Petition 1, ECF No. 1.)

² The Appellate Division opinion dealt with two separate robbery convictions levied against Petitioner. Petitioner also filed a habeas petition challenging the other conviction, which the Court denied. See *Morris v. D'Illio*, No. 15-1502 (D.N.J. June 30, 2016).

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At the trial, which took place in March 2004, Keresztury testified that the robber assaulted him and stole a black fanny pack. The police recovered the pack when they arrested defendant, and Keresztury identified the pack for the jury at the trial. A passing motorist, who witnessed the robbery, testified that he yelled at the robber to leave the victim alone, and the assailant ran away. However, upon driving home, this eyewitness saw the robber enter a house next door to the witness's home. The eyewitness then told the police, who had been chasing defendant, where to find the robber. A few moments later, the eyewitness saw the police bringing defendant out of the house.

The State also presented evidence from a police officer who saw the robbery as it occurred, and chased defendant until he lost sight of him. The officer testified that the civilian eyewitness then told him that the defendant had entered a nearby house and, on entering that house with his partner, the officer found defendant and arrested him. The partner testified that he recovered the victim's fanny pack in the room where defendant was arrested. The owner of the house where defendant was arrested testified that she did not know him and he did not have her permission to enter the premises.

In his trial testimony, defendant denied any involvement in the robbery. He claimed he was a drug dealer and he happened to be in the vicinity of the robbery because it was a high drug sale area, and he intended to sell marijuana there. Evidently, the jury was unimpressed with that testimony.

State v. Morris, Indictment No. 02-12-1658, 2014 WL 503941, at *4-5 (N.J. Sup. Ct. App. Div. Feb. 4, 2014). Petitioner was convicted of second-degree robbery, theft from the person, resisting arrest, and criminal trespass, and sentenced to twenty years of imprisonment. *Id.*

Petitioner appealed the conviction and sentence, and the Appellate Division affirmed his conviction, but remanded for re-sentencing. *Id.* After re-sentencing, Petitioner appealed again, and the case was remanded for re-sentencing a second time. (Pet'r's Mot. for Stay 6, ECF No. 1-7.) Ultimately, the trial court imposed the same sentence. *Id.* Petitioner did not appeal from that sentence. *Id.* at 7. Petitioner then filed a PCR application. *Morris*, 2014 WL 503941, at *9. The court denied the PCR application, and the denial was affirmed on appeal. *Id.* Petitioner filed a

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petition for certification with the New Jersey Supreme Court, but before a decision was made, Petitioner preemptively filed the instant habeas Petition here, in federal court, in order to avoid any statute of limitations problems. (Pet'r's Mot. for Stay 12.) During the pendency of this case, the New Jersey Supreme Court denied certification. *See State v. Morris*, 220 N.J. 573 (2015).

II. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). When a claim has been adjudicated on the merits in state court proceedings, a writ for habeas corpus shall not issue unless the adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Parker v. Matthews*, 132 S. Ct. 2148, 2151 (2012).

A state-court decision involves an "unreasonable application" of clearly established federal law if the state court (1) "identifies the correct governing legal [rule] from [the Supreme] Court's [cases] but unreasonably applies [it] to the facts of the [particular case]"; or (2) "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). Federal courts must follow a highly deferential standard when evaluating, and thus give the benefit of the doubt to, state court decisions. *See Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011); *Eley v. Erickson*, 712 F.3d 837, 845 (3d Cir.

2013). A state court decision is based on an unreasonable determination of the facts only if the state court's factual findings are objectively unreasonable in light of the evidence presented in the state-court proceeding. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Moreover, a federal court must accord a presumption of correctness to a state court's factual findings, which a petitioner can rebut only by clear and convincing evidence. 28 U.S.C. § 2254(e); see *Rice v. Collins*, 546 U.S. 333, 339 (2006) (petitioner bears the burden of rebutting presumption by clear and convincing evidence); *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001) (factual determinations of state trial and appellate courts are presumed to be correct).

III. DISCUSSION

Petitioner raises six grounds for relief in his Petition, all of which relate to ineffective assistance of counsel. Ground I alleges that appellate counsel was ineffective for failing to challenge as defective the criminal complaint used to indict Petitioner. Grounds II, III, and IV allege that trial counsel was ineffective for failing to suppress the black fanny pack and photographs taken of the fanny pack from evidence, for a variety of reasons. Grounds V and VI allege that trial counsel was ineffective in advising Petitioner of his maximum sentence, maximum parole ineligibility, and parole supervision requirement, which resulted in Petitioner rejecting a favorable plea offer that would have imposed a shorter sentence.

A. **Ineffective Assistance of Counsel Standard**

The Sixth Amendment guarantees the accused the "right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel is the right to the effective assistance of counsel, and counsel can deprive a defendant of the right by failing to render adequate legal assistance. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A claim that counsel's assistance was so defective as to require reversal of a conviction has two components, both of

which must be satisfied. *Id.* at 687. First, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To meet this prong, a “convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Id.* at 690. The court must then determine whether, in light of all the circumstances at the time, the identified errors fell “below an objective standard of reasonableness[.]” *Hinton v. Alabama*, 134 S. Ct. 1081, 1083 (2014) (per curiam). To satisfy the prejudice prong, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693.³ To establish prejudice, the defendant must show that “there is a reasonable probability that the result of the trial would have been different absent the deficient act or omission.” *Hinton*, 134 S. Ct. at 1083. “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 1089 (quoting *Strickland*, 466 U.S. at 695).

B. Ground I – Ineffective Assistance of Appellate Counsel

In Ground I, Petitioner argues that his appellate counsel provided ineffective assistance when he failed to challenge as defective the criminal complaint used to indict Petitioner. Petitioner appears to further argue that had appellate counsel raised the issue and was successful, the proper remedy would have been the dismissal of the indictment. (Pet. 27, ECF No. 1.) The PCR appellate court, in affirming the PCR denial, held that the argument was without merit to warrant discussion in a written opinion. *Morris*, 2014 WL 503941, at *8. Although the PCR appellate court did not articulate a reason for its affirmance, “[w]here there has been one reasoned state judgment rejecting

³ The reasonable probability standard is less demanding than the preponderance of the evidence standard. See *Nix v. Whiteside*, 475 U.S. 157, 175 (1986); *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999).

a federal claim, [federal courts presume] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.” *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). “To decide the present case, therefore, we begin by asking which is the last *explained* state-court judgment[.]” *Id.* at 805 (emphasis in the original); see *Robinson v. Beard*, 762 F.3d 316, 324 (2014) (“In considering whether [deference] applies, we review the ‘last reasoned decision’ of the state courts on the petitioner’s claims.”). As such, the Court looks to the PCR trial court’s reasoning in denying PCR in the first instance.

In addressing this claim, the PCR trial court first addressed a related claim, not raised here, regarding trial counsel’s failure to challenge the alleged defective complaint, holding that “the complaint warrant was supported by sufficient probable cause,” and that even if it was defective, “it does not taint the trial’s result, that is, the verdict of the jury.” (Tr. of PCR Hearing Part I 33, ECF No. 14-13.) The PCR trial court further found that “[u]nder case law . . . a defendant must demonstrate both *Strickland* . . . prongs to indicate a [challenge] would have been successful, and defendant has not presented any evidence to satisfy this argument.” (Tr. of PCR Hearing Part II 3, ECF No. 14-14.)

With regard to the argument that appellate counsel was similarly ineffective for failing to raise this claim on direct appeal, the PCR trial court stated that:

Defendant argues appellate counsel was ineffective for failing to raise particular issues in the direct appeal. However, the Court has examined the arguments in this PCR motion and concluded they are meritless. Appellate counsel cannot be deemed deficient or ineffective for failing to raise baseless claims in the direct appeal.

(Tr. of PCR Hearing Part II 3, ECF No. 14-14.) The Court finds no reason to disturb that holding.

To begin, the Court notes that Petitioner makes inconsistent arguments regarding the potential prejudice to him. While Petitioner argues here that the proper remedy would have been

the dismissal of the indictment, it is clear from the record that he argued for a different remedy in the state courts. At the PCR hearing, he asserted, instead, that the proper remedy was the exclusion of the criminal complaint and any accompanying testimony from evidence. (Tr. of PCR Hearing Part I 15, ECF No. 14-13.) Assuming, for the sake of argument, that exclusion was the proper remedy, the Court agrees with the PCR trial court that Petitioner would not be able to establish a reasonable probability that he would not have been convicted.

As summarized above, the State had proffered, at trial, the testimony of the victim, the eye witness, the police officer who observed the crime, and the property owner on whose property Petitioner trespassed while attempting to evade capture. Here, Petitioner does not challenge that those witnesses testified against him and that the testimony of those witnesses would have been more than enough to establish guilt, with or without the criminal complaint. Even if the proper remedy was dismissal of the indictment, Petitioner still could not demonstrate that the result would have been different—the State could have simply re-indicted Petitioner. *See Benabe v. United States*, 68 F. Supp. 3d 858, 865 (N.D. Ill. 2014) (finding that the petitioner failed to establish prejudice in an ineffective assistance of counsel claim for counsel's failure to investigate the validity of the indictment, because the government could re-indict the petitioner even if the indictment was dismissed). As this Court already noted above, there was more than enough evidence to convict Petitioner, which means there was enough evidence to re-indict him. Thus, the Court finds that the state court's denial of this claim was a reasonable application of *Strickland* based on a reasonable determination of the facts, and Petitioner is not entitled to relief on this ground.

7
~~EXHIBIT~~
APP. B >

C. Failure to Suppress Evidence Related to the Fanny Pack

Petitioner argues that trial counsel was ineffective for failing to suppress the fanny pack, and pictures of the fanny pack, from evidence, because the seizure of the fanny pack was not supported by probable cause or based on a valid criminal complaint. The PCR appellate court held that Petitioner's argument was without merit to warrant discussion in a written opinion. *Morris*, 2014 WL 503941, at *8. The PCR trial court held that "[t]here's nothing before me to show that a motion to suppress would be successful," and that "the argument was raised prior to trial . . . [and] trial counsel's argument on the motion was adequate." (Tr. of Plea Hearing Part II 23.) The PCR trial court did not elaborate on this holding or cite to any part of the record showing that trial counsel did indeed file a motion to suppress. Petitioner, nevertheless, does not challenge its finding that his trial counsel filed a motion.

The Court finds that the state court's holding was a reasonable application of established law, based on a reasonable application of the facts. While the PCR trial court may have premised its holding primarily on the first prong of the *Strickland* analysis, "AEDPA requires that [federal courts] 'determine what arguments or theories supported or . . . could have supported, the state court's decision.'" *Collins v. Sec. of Pa. Dep't of Corr.*, 742 F.3d 528, 548 (3d Cir. 2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). Here, regardless of the PCR trial court's findings with respect to the first prong of the *Strickland* analysis, Petitioner's claims clearly fail the second prong. As the Court concluded above, there was overwhelming evidence to convict Petitioner, so even if evidence relating to the fanny pack was excluded, the outcome of the trial would not have been different. Moreover, even if the Court were to consider the aggregate effect of excluding both the criminal complaint, *supra*, and the fanny pack from evidence, the outcome of the trial still would not have been different. Indeed, several witnesses observed the commission of the crime

first-hand and testified at trial, so even with the evidence excluded, there was still no reasonable doubt that Petitioner committed a robbery. The Court, therefore, finds that Petitioner cannot establish the prejudice prong of these *Strickland* claims, and that the state court's holding was a reasonable application of Supreme Court law based on a reasonable application of the facts. Thus, relief on these grounds is not warranted.

D. Ineffective Assistance Relating to Plea

Finally, Petitioner argues that because his trial counsel failed to adequately advise him of (1) his aggregate maximum sentence and parole ineligibility when taking into consideration both of his robbery convictions, and (2) the fact that he would be subject to consecutive parole supervision terms, Petitioner erroneously rejected the State's plea offer of a five-year term of imprisonment.⁴ Applying *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), the PCR appellate court held that Petitioner was not "misadvised and misinformed by his attorney":

[The PCR trial court] found that defendant was told, in detail, about his sentencing exposure in this case and still turned down a plea offer of five years; he concluded defendant was determined to go to trial and would not have accepted any plea bargain. We agree. Defendant did not present a prima facie case of ineffective assistance of counsel on that, or any other issue, and was not entitled to an evidentiary hearing.

Morris, 2014 WL 503941, at *8. The PCR trial court further explained that Petitioner was informed, by both counsel and the trial court, that he: (1) could be subject to discretionary extended term sentences; (2) could be subject to a maximum of 20 years for *each* conviction; and (3) was otherwise adequately informed of the penal consequences if he proceeded to trial on each indictment. (Tr. of Plea Hearing Part I 25-28.) Applying *Strickland*, the PCR trial court found

⁴ The plea offer applied to both robbery convictions, *i.e.* the State offered a single five-year sentence in exchange for guilty pleas in both criminal cases. (Tr. of Plea Hearing Part I 26.)

that based on the record, Petitioner would not have pled guilty even if he received what he deemed was adequate advice from counsel, in particular because of his continued insistence that he was innocent. *Id.* at 26.

To begin, the state court's application of *Lafler* and *Strickland* was not only a reasonable application of established law, but the correct one. In *Lafler*, the Supreme Court held that where counsel's ineffective advice led to a plea offer's rejection, and where the alleged prejudice is having to stand trial,

a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court . . . , that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

132 S. Ct. at 1386. No argument can be made that *Lafler* was inapplicable to Petitioner's claims. As such, the Court can only grant relief if it finds that the state courts applied the law to an unreasonable application of the facts.

"A determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). "The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* Here, Petitioner does not challenge any of the aforementioned factual findings, but instead continues to assert that had he been informed of the maximum aggregate sentence and the parole exposure, he would have accepted the plea offer. Petitioner, however, submits no supporting evidence other than his own self-serving assertions. While the PCR trial court made no specific factual findings that directly contradicted Petitioner's assertions, based on the facts that it did find, it was not unreasonable for it to conclude that Petitioner would not have accepted the plea offer. Indeed, if Petitioner was willing to reject a five-year offer after being informed that he may be subject to 20-year sentences for *each* robbery, plus

the possibility of extended terms, however long, there may have been nothing that could have convinced him not to go to trial, regardless of what additional information trial counsel could have provided him. Petitioner's testimony before the trial court reflected that he appeared quite convinced and motivated by his belief that he was innocent.⁵ (See Tr. of Plea Hearing Part I 26-27.) Accordingly, Petitioner has not established that the state courts' holding was an unreasonable application of Supreme Court law, or that it was based on an unreasonable determination of the facts, and relief on these grounds is not warranted.

E. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C.


§ 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

Here, Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, no certificate of appealability shall issue.

⁵ In addressing the other robbery conviction, the PCR trial court may have shed some light as to a possible motivation for Petitioner's desire to go to trial. On Petitioner's claim that the trial court erred in denying his motion for self-representation, the PCR trial court found that Petitioner had desired to make an argument for jury nullification to the jury despite admitting that he was guilty. (Tr. of Plea Hearing Part II 7.) While this finding plays no part in the Court's disposition of the instant Petition, it does provide the Court with some background information regarding Petitioner's potential state of mind.

IV. CONCLUSION

For the reasons set forth above, the Petition is DENIED, and the Court DENIES a certificate of appealability.



MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated:

7/19/17

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2702

COREY MORRIS,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

(D.C. Civ No. 3-14-cv-06023)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, SCIRICA*, and COWEN*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

*As to panel rehearing only.

APP. C 1

concurrent in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: August 2, 2019

CJG/cc: Corey Morris
R. Damien Schorr, Esq.
Heather M. Hadley, Esq.

APP. C 2

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-5057-10T3
A-1705-11T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

COREY MORRIS,

Defendant-Appellant.

Argued Telephonically December 17, 2013 -
Decided February 4, 2014

Before Judges Reisner, Ostrer and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment Nos.
02-10-1464 and 02-12-1658.

Jennifer L. Gottschalk argued the cause for
appellant (Joseph E. Krakora, Public
Defender, attorney; Richard Sparaco,
Designated Counsel, on the brief).

Al Garcia, Assistant Prosecutor in A-5057-
10, and Michael A. Nardelli, Assistant
Prosecutor in A-1705-11, argued the cause
for respondent (Joseph L. Bocchini, Jr.,
Mercer County Prosecutor, attorney; Mr.
Garcia, on the brief; Mr. Nardelli, of
counsel and on the brief).

Appellant filed pro se supplemental briefs.

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PER CURIAM

Defendant Corey Morris appeals from two orders, both dated May 13, 2011, denying his petitions for post-conviction relief (PCR) arising from two separate robbery convictions (Indictment No. 02-10-1464 and Indictment No. 02-12-1658).¹ In A-1705-11, he amended his notice of appeal to include a November 28, 2011 amended judgment of conviction, reflecting his re-sentencing on Indictment No. 02-12-1658. We consolidated the appeals for purposes of this opinion. We affirm on both appeals, substantially for the reasons stated by Judge Edward M. Neafsey, in his oral opinion issued on May 13, 2011, and for the reasons stated by Judge Thomas Brown at the re-sentencing hearing on November 4, 2011.

I.

We begin by addressing the appeal in A-5057-10, which corresponds to Indictment No. 02-10-1464. In this case, defendant was convicted of robbing a sixty-year-old man named Joseph Spivak on July 11, 2002. Defendant was tried and

¹ The PCR court heard oral argument on both petitions on May 13, 2011, but issued a separate order on each petition. While denying both petitions, the judge reserved decision on a separate sentencing issue concerning the imposition of a second extended term on Indictment No. 02-12-1658. On August 17, 2011, he ordered that defendant be re-sentenced on that indictment. The parties provided us with the August 17, 2011 order, but did not provide us with the transcript of the judge's statement of reasons.

convicted in October 2003. The trial evidence can be summarized briefly. A taxi cab driver witnessed the robbery as it was occurring. The cab driver followed defendant until he entered a car. At that point the cab driver called in the car's description and license plate number to the police, followed the vehicle until he saw the police car arriving, and then blocked in the vehicle with his taxi to prevent defendant's escape. The police immediately arrested defendant and a companion, Cynthia Bazil, who was driving the vehicle. The taxi driver identified defendant to the police, and also identified him at trial as the robber. Spivak likewise identified defendant as the robber, both shortly after the arrest and at trial. After waiving his Miranda² rights, defendant confessed, and his confession was introduced at his trial. Bazil also testified against him.

Defendant insisted on wearing jail garb at his trial. He was convicted of second-degree robbery, N.J.S.A. 2C:15-1, and third-degree theft by unlawful taking, N.J.S.A. 2C:20-3, and on December 12, 2003, he was sentenced as a persistent offender to a sixteen-year extended prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

~~XXXXXXXXXX~~
APP. D. 3

On his direct appeal, defendant raised the following issues:

POINT I - DEFENDANT'S CONVICTIONS MUST BE REVERSED BECAUSE HIS INVOLUNTARY CONFESSIONS VIOLATED THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

POINT II - DEFENDANT'S SENTENCE MUST BE VACATED AND THIS MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCE VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. (Not Raised Below)

He raised these additional arguments in a pro se brief:

POINT I - THE COURT COMMITTED TRIAL ERRORS THAT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL THUS REQUIR[ING] THE CONVICTION TO BE REVERSE[D].

A. The Court Erred By Not [Conducting] Voir Dire, Giv[ing] Instruction And Charging The Jurors To Not Form An Opinion Of Guilt Based On The Prison's Clothes The Appellant Wore At Trial.

B. The Court's Charge And The Verdict Sheet Did Not Include What Constitutes A Violent Crime [And] Thus Violated The Appellant's Right To A Fair Trial.

We affirmed his conviction, but remanded for re-sentencing pursuant to State v. Natale, 184 N.J. 458 (2005). State v. Morris, Docket No. A-3961-03 (App. Div. Aug. 23, 2005). On remand, the trial court imposed the same sentence on September 8, 2006.

APP. 4

Defendant did not appeal from that sentence. However, he filed a PCR petition, which was supplemented by his assigned PCR attorney. In his PCR petition and supplemental brief, defendant claimed, on multiple bases, that his trial attorney had rendered ineffective assistance of counsel. In a certification accompanying the petition, defendant addressed only one of those issues. He attested that his trial counsel failed to discuss with him the court's offer to instruct the jury that neither defendant's prison attire nor his Public Defender representation should be considered as indicia of his guilt. At the trial, defense counsel waived those instructions, reasoning to the judge that they would merely call additional attention to the issues. In his certification, defendant contended that if his attorney had discussed the matter with him, he would have insisted that the judge give the proposed instructions.

After hearing oral argument from counsel, and permitting defendant to present argument, Judge Neafsey placed a forty-four page oral opinion on the record, addressing each of defendant's PCR contentions. We will not repeat his opinion here. However, among other arguments, he rejected defendant's assertion that his counsel did not advise him of "the maximum consecutive sentences that he was exposed to" if convicted. Quoting the pre-trial and trial transcripts, Judge Neafsey found that

defendant's trial counsel and the trial judge had both advised defendant that he faced decades of prison time in this case and in the other pending robbery indictment, and that he could avoid that risk by taking the State's offer of concurrent five-year terms to resolve both cases. Defendant repeatedly refused the plea offer and insisted on going to trial. Judge Neafsey found that further advice on the subject would have been futile because defendant was determined to go to trial.

Judge Neafsey found that trial counsel was not ineffective in failing to ask for a Wade³ hearing, because there was no evidence that the witnesses' identifications were the result of suggestive police procedures. He also found that trial counsel vigorously cross-examined Bazil, and that the prosecutor brought out her prior criminal record on direct examination. He found that the trial court did not improperly deny defendant's motion for an acquittal, because the evidence of his guilt was overwhelming.

Judge Neafsey found that defendant rejected the trial judge's offer to provide him with civilian clothing and insisted on wearing jail garb. Judge Neafsey found that trial counsel's decision not to request a jury instruction on the jail garb was

³ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

sensible, since, as the attorney noted, the outfit was tan and the jurors might not realize it was a jail uniform. Had the trial judge given an instruction, it would have drawn their attention to defendant's clothing. Judge Neafsey likewise found that defense counsel exercised reasonable judgment in declining a jury instruction concerning the fact that defendant was represented by a Public Defender.

Judge Neafsey further concluded that trial counsel was not ineffective in failing to object to the State's request to compare defendant's height to the victim's height. He concluded that the comparison was relevant to show that the victim accurately recalled that the robber was taller than he was. Hence, an objection, even if made, would have been overruled. He found that defendant's speedy trial motion was properly denied, and therefore, appellate counsel was not ineffective in failing to raise the issue on appeal. Judge Neafsey also found that on January 31, 2003, the trial judge thoroughly questioned defendant on his request to represent himself and properly denied that application.

On this appeal, defendant raises the following arguments:

POINT I - THE DEFENDANT WAS ENTITLED TO POST-CONVICTION RELIEF WHERE TRIAL COUNSEL FAILED TO EXPLAIN TO HIM THE FULL PUNITIVE CONSEQUENCES OF REFUSING THE PLEA OFFER SHOULD THE CASE RESULT IN TRIAL AND CONVICTION.

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POINT II - TRIAL COUNSEL FAILED TO ADVISE DEFENDANT OF THE THREE-YEAR PAROLE SUPERVISION REQUIREMENT PURSUANT TO THE NO EARLY RELEASE ACT ON INDICTMENT NUMBER 02-10-1464 AND INDICTMENT NUMBER 02-12-1658 WHICH IN THE AGGREGATE AMOUNTED TO SIX YEARS.

POINT III - TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S REQUEST FOR A COMPARISON OF DEFENDANT'S HEIGHT WITH THAT OF THE VICTIM'S.

POINT IV - TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO REQUEST THAT THE COURT CHARGE THE JURY TO NOT FORM AN OPINION OF GUILT DUE TO THE REPRESENTATION OF THE DEFENDANT BY THE OFFICE OF THE PUBLIC DEFENDER.

POINT V - TRIAL COUNSEL FAILED TO REQUEST THAT THE COURT CHARGE THE JURY TO NOT FORM AN OPINION OF GUILT DUE TO THE PRISON GARB WORN BY THE DEFENDANT.

POINT VI - TRIAL COUNSEL FAILED TO PROVIDE THE COURT WITH A SUPPLEMENTAL LIST OF VOIR DIRE QUESTIONS REGARDING THE USE OF CDS BY THE DEFENDANT.

POINT VII - TRIAL COUNSEL WAS INEFFECTIVE IN THAT HE FAILED TO IMPEACH THE CREDIBILITY OF WITNESS BAZIL BASED UPON HER CRIMINAL RECORD.

POINT VIII - APPELLATE COUNSEL FAILED TO ARGUE THE TRIAL COURT'S ERROR IN DENYING DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS.

POINT IX - BECAUSE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, AND THE DEFENDANT WAS PREJUDICED THEREBY, THE COURT SHOULD HAVE GRANTED HIS PETITION FOR POST-CONVICTION RELIEF; IN THE ALTERNATIVE, BECAUSE THE DEFENDANT PRESENTED PRIMA FACIE

EVIDENCE THAT HE HAD BEEN DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, THE COURT SHOULD HAVE GRANTED HIM AN EVIDENTIARY HEARING.

POINT X - THE DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS ASSERTION THAT DEFENSE COUNSEL WAS INEFFECTIVE IN HIS FAILURE TO FILE A WADE MOTION TO EXCLUDE EVIDENCE OF THE OUT OF COURT IDENTIFICATION.

POINT XI - POST-CONVICTION RELIEF WAS REQUIRED BECAUSE OF THE CUMULATIVE EFFECT OF THE ERRORS AND THE INEFFECTIVENESS SET FORTH IN POINTS I THROUGH X.

In a supplemental pro se brief, defendant raises these additional arguments:

POINT I - THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I [1] 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE PCR COURT'S REFUSAL TO HOLD A POST-CONVICTION RELIEF HEARING TO ADJUDICATE THE DEFENDANT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. Appellate Counsel Rendered Ineffective Assistance Of Counsel By Failing To Order The Pre-Trial Hearing Transcript To Decide Pro Se Self-Representation Proceedings And Counsel Failed To Raise The Error On Direct Appeal. It Was An Error For The Court To Not Allow The Defendant To Represent Himself.

B. Trial Counsel Was Ineffective For Not Presenting Defendant With All The Material Information He Needed In Making His Decision To Testify Or Not Testify, I.E., Counsel Failed To Advise Defendant Of His Right To Testify And Call Him As A Witness At The Pre-Trial Miranda Hearing Was Not A

Meaningful Decision Made By Him Not To Testify.

C. Trial Counsel Was Ineffective For Failing To Subpoena A Crucial Defense Witness, Police Officer Lieutenant Joseph G. Valdona.

D. Trial Counsel Failed To Challenge N.J.S.A. 2B:12-21(b) Regarding The Administration Of The Oath.

E. Trial Counsel Failed To Suppress The Defendant's Statement As Involuntary Due To The Fact That The Police Promised To Release Him On ROR Bail. (Not Raised Below)

POINT II - THE PROSECUTOR ENGAGED IN MISCONDUCT.

POINT III - THE PROCEDURAL BAR TO RELIEF UNDER RULE 3:22-4 SHOULD NOT APPLY TO APPELLANT'S CLAIM UNDER POINT II.

Having reviewed the record, we conclude that these contentions are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following comment.

After reading the trial transcript, we agree with Judge Neafsey that the evidence of defendant's guilt was overwhelming. Moreover, most of defendant's PCR contentions are attempts to present, in the guise of ineffective assistance of counsel, arguments that are barred by Rule 3:22-4 or Rule 3:22-5, because they either could have been raised on direct appeal or were raised on appeal and rejected. Nonetheless, Judge Neafsey carefully considered, and properly rejected, defendant's

arguments on the merits. We find no basis to disturb his well-reasoned decision and we affirm the denial of defendant's PCR petition.

II.

We next address defendant's appeal in Docket No. A-1705-11, which corresponds to Indictment No. 02-12-1648. This case arose from the robbery of a seventy-year-old disabled victim, Andrew Keresztury, on April 12, 2002. As in the companion case, the proofs against defendant were overwhelming.

At the trial, which took place in March 2004, Keresztury testified that the robber assaulted him and stole a black fanny pack. The police recovered the pack when they arrested defendant, and Keresztury identified the pack for the jury at the trial. A passing motorist, who witnessed the robbery, testified that he yelled at the robber to leave the victim alone, and the assailant ran away. However, upon driving home, this eyewitness saw the robber enter a house next door to the witness's home. The eyewitness then told the police, who had been chasing defendant, where to find the robber. A few moments later, the eyewitness saw the police bringing defendant out of the house.

The State also presented evidence from a police officer who saw the robbery as it occurred, and chased defendant until he

APP. 2. 11

lost sight of him. The officer testified that the civilian eyewitness then told him that the defendant had entered a nearby house and, on entering that house with his partner, the officer found defendant and arrested him. The partner testified that he recovered the victim's fanny pack in the room where defendant was arrested. The owner of the house where defendant was arrested testified that she did not know him and he did not have her permission to enter the premises.

In his trial testimony, defendant denied any involvement in the robbery. He claimed he was a drug dealer and he happened to be in the vicinity of the robbery because it was a high drug sale area, and he intended to sell marijuana there. Evidently, the jury was unimpressed with that testimony.

Defendant was convicted of second-degree robbery, theft from the person, resisting arrest, and criminal trespass. After merger, he was sentenced to an extended term of twenty years, subject to NERA, on the robbery conviction, consecutive to the extended sentence previously imposed on the robbery conviction in Indictment No. 02-10-1464. He received lesser, concurrent terms for trespass and resisting arrest.

On defendant's direct appeal, we affirmed the conviction and remanded the sentence. State v. Morris, Docket No. A-0695-04 (App. Div. Feb. 10, 2006), certif. denied, 186 N.J. 605

(2006). In our opinion (slip op. at 2-3), we summarized the appellate issues, and our determination of those issues, as follows:

On appeal, defendant challenges his convictions, claiming his involuntary absence from the courtroom during portions of the jury selection and the beginning of trial violated his state and federal constitutional rights. He also challenges his sentence as excessive, arguing the trial court failed to recognize appropriate mitigating factors and abused its discretion in imposing an extended term. Defendant further contends the court violated the Sixth and Fourteenth Amendments of the United States Constitution by imposing a sentence above the then-presumptive statutory term solely on the finding of aggravating factors other than defendant's criminal record. We affirm defendant's conviction, but remand for resentencing in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and State v. Natale, 184 N.J. 458 (2005) (Natale II).

On remand, the trial court imposed the same sentence. Defendant once again appealed. We heard the appeal on an excessive sentence calendar and remanded a second time for resentencing pursuant to State v. Pierce, 188 N.J. 155 (2006). State v. Morris, No. A-1228-06 (App. Div. May 1, 2008). On

March 3, 2006, the trial court again re-imposed the twenty-year NERA extended term sentence.⁴

Defendant filed a PCR petition in December 2008. In his petition, defendant asserted a plethora of arguments concerning his trial counsel's alleged ineffective assistance. Defendant also asserted a litany of allegedly incorrect decisions by the trial court, including erroneous evidentiary rulings and errors in denying various defense motions made prior to and during the trial. In support of the PCR, defendant submitted a certification asserting that trial counsel failed to advise him concerning the extent of his sentencing exposure if convicted, and asserting that, had defendant known the amount of prison time he faced if convicted, he would have accepted the State's five-year plea offer.

In a lengthy oral opinion, also placed on the record on May 13, 2011, Judge Neafsey rejected defendant's PCR arguments. Again, we will not repeat his entire opinion here. However, among other rulings, he found that both defendant's counsel and the trial judge advised defendant of "the penal consequences of going to trial." Citing State v. Taccetta, 200 N.J. 183, 195-96 (2009), the judge further reasoned that because defendant

⁴ The parties did not provide the JOC that resulted from the resentencing. We derive this information from Judge Neafsey's PCR opinion.

strenuously and continuously maintained his innocence, including in his trial testimony, he would not have accepted a plea bargain. Additionally, relying on Taccetta, the judge reasoned that "[d]efendant cannot plead guilty to a crime when he consistently maintains his innocence." In other words, a defendant cannot obtain PCR by claiming that he would have perjured himself in exchange for a favorable plea bargain.

The judge also concluded that none of the alleged trial errors defendant cited would have made a difference to the outcome. The judge further concluded that most of those arguments were barred by Rule 3:22-4, because they should have been raised on direct appeal. He found that the trial judge properly denied the defense motion for a judgment of acquittal. Judge Neafsey also concluded that appellate counsel was not ineffective in failing to raise the issue of consecutive sentencing, because the robbery in this case was a separate crime from the robbery in the other case, and the trial court did not err in imposing a consecutive sentence.

Although he denied the PCR petition on May 11, 2011, Judge Neafsey requested further briefing on a discrete sentencing issue concerning the imposition of consecutive extended terms. Applying the then-recent decision of State v. Pennington, 418 N.J. Super. 548 (App. Div. 2011), Judge Neafsey determined that

the extended term imposed in this case was an illegal sentence. By order dated August 17, 2011, Judge Neafsey vacated the extended term sentence in Indictment No. 02-12-1658 and scheduled a re-sentencing for September 27, 2011. The re-sentencing was handled by another judge, after giving the attorneys the opportunity to submit written sentencing memoranda.

On November 4, 2011, Judge Brown conducted a sentencing hearing. During that hearing, defendant's attorney argued facts concerning defendant's current situation. Among other things, he pointed out that defendant "continues to attempt to compensate the victims . . . through money taken out of his [prison] account on a monthly basis." Defense counsel also told the judge that defendant was participating in "prison community service such as the paralegal class and the MA, Legal Association classes, and those certificates were submitted to the court." Counsel argued that during the past nine years of his incarceration, defendant was "rehabilitating himself" and thus was unlikely to re-offend. He also stated that defendant was trying, when possible, to give money to his son's mother for the child's support. Defendant also addressed the court, stating that he had finally tried to address his drug problem and was attempting to turn his life around.

The judge acknowledged that defendant had improved his education while in prison but did not accept that as a mitigating factor relevant to his sentence. He also reasoned that the scope of Judge Neafsey's order did not encompass whether the sentence was to be concurrent or consecutive but only what ordinary-range sentence should be imposed. After considering defendant's extensive criminal record, the seriousness of the offenses, and the fact that the victim in this case was elderly and disabled, the judge imposed a term of ten years subject to NERA.

On this appeal, defendant presents these points for our consideration:

POINT I - THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. The Prevailing Legal Principles Regarding Claims Of Ineffective Assistance Of Counsel, Evidentiary Hearings And Petitions For Post Conviction Relief.

B. The Defendant Failed To Receive Adequate Legal Representation From His Original Trial Attorney Since, As A Result Of His Attorney's Failure To Accurately Inform Him With Respect To The State's Plea Offer, He Rejected The Plea Recommendation And Instead Proceeded To Trial, Subsequently Receiving A Sentence Significantly Greater Than That Embodied In The Plea Offer.

i. Trial Counsel Failed To Accurately Explain To The Defendant The Maximum Sentence He Faced If Convicted, Including The Maximum Parole Ineligibility, And The Consequences Of Refusing The Plea Offer And Going To Trial.

ii. Trial Counsel Failed To Advise Defendant Of The Three Year Parole Supervision Requirement Pursuant To The No Early Release Act On Indictment Number 02-10-1464 And On Indictment Number 02-12-1658 Which In The Aggregate Amounted To Six Years.

In a pro se brief, defendant also presents the following additional points:

POINT I - THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I , [1] 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE PCR COURT'S REFUSAL TO HOLD A POST-CONVICTION RELIEF EVIDENTIARY HEARING TO ADJUDICATE THE DEFENDANT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. Appellate Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise On Direct Appeal N.J.S.A. 2B:12-21(b) Is Unconstitutional Under The Fourth Amendment To The United States Constitution Because The Statue Confer[s] Authority To The Police To Administer Oaths For Complaints, Which Serve As A Basis For A Warrant, And Thus Would Warrant Dismissal Of Defendant's Criminal Complaint As Being Constitutionally Defective.

B. Defendant Was Denied The Effective Assistance Of Counsel When His Attorney Failed To File A Motion To Suppress The Black Fanny Pack And The Photographs Taken Of The Fanny Pack Based Upon Officer Medina's Affidavit Of Probable Cause

Supporting The Complaint Warrant Was Insufficient As A Basis For Probable Cause.

C. Defendant Was Denied The Effective Assistance Of Counsel When His Attorney Failed To File A Motion To Suppress The Black Fanny Pack And The Photographs Taken Of The Fanny Pack Based Upon Defendant's Complaint-Warrant Was Constitutionally Defective.

D. Defendant Was Denied The Effective Assistance Of Counsel When His Attorney Failed To File A Motion To Suppress The Black Fanny Pack And The Photographs Taken Of The Fanny Pack Based Upon The Municipal Court Judge's Finding Of Probable Cause Found On Defendant's Complaint-Warrant Was Erroneous.

POINT II - DEFENDANT'S SENTENCE IS BOTH ILLEGAL AND EXCESSIVE.

A. The Lower Court Erred In Failing To Recognize Appropriate Mitigating Factors At Defendant's New Sentencing Hearing Based Upon Evidence Of His Post-Sentencing Rehabilitation When Reconsidering His Sentence.

B. The Lower Court Erred When It Relied On A Presentence Report Prepared In 2003 And 2005 Regarding Other Charges.

C. The Lower Court Erred In Failing To Provide A Statement Of Reasons For Consecutive Maximum Sentences.

POINT III - THE PROCEDURAL BAR TO RELIEF UNDER RULE 3:22-4 DOES NOT APPLY TO DEFENDANT'S CLAIM UNDER POINT I, SUB-POINTS B, C AND D.

In a supplemental pro se brief, he contends:

POINT I - TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST FOR A RELAXATION OF THE PLEA CUT-OFF DUE TO A MATERIAL CHANGE OF CIRCUMSTANCE.

We conclude that these arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following comments.

As in the PCR court, defendant once again argues that, had he not been "misadvised and misinformed by his attorney" he would have accepted a plea agreement. Relying on Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), he claims he was not told about his maximum exposure on the other pending cases against him and the possibility of consecutive sentencing, nor was he told about the possibility of multiple periods of parole supervision, and these errors caused him to reject the State's plea offer. Judge Neafsey found that defendant was told, in detail, about his sentencing exposure in this case and still turned down a plea offer of five years; he concluded defendant was determined to go to trial and would not have accepted any plea bargain. We agree. Defendant did not present a prima facie case of ineffective assistance of counsel on that, or any other issue, and was not entitled to an evidentiary hearing. See Lafler, supra, ___ U.S. at ___, 132 S.

Ct. at 1385, 182 L. Ed. 2d at 407; Taccetta, supra, 200 N.J. at 193; State v. Preciose, 129 N.J. 451, 462-63 (1992).

Defendant's sentencing argument is likewise unconvincing. Relying on Rule 3:21-2(a), defendant argues that Judge Brown re-sentenced him without obtaining a current pre-sentence report (PSR). See State v. Randolph, 210 N.J. 330, 354 (2012) (discussing the circumstances in which a court should consider a defendant's current circumstances in a re-sentencing hearing). First, the record simply does not reflect whether the judge obtained an updated PSR, and defense counsel certainly did not raise that issue before Judge Brown. Further, defendant has not provided us with Judge Neafsey's oral opinion on the re-sentencing issue, and hence we cannot determine with precision what he intended be considered on re-sentencing. See Randolph, supra, 210 N.J. at 354 (the materials to be considered on re-sentencing may depend on the terms of the decision directing re-sentencing).

However, it is clear from the re-sentencing transcript that defendant's attorney did place before Judge Brown facts concerning defendant's current circumstances, including his obtaining education while in prison and his efforts to compensate his victims. Judge Brown considered those facts, even though he determined they were not entitled to weight in

his sentencing decision. Hence, even if Judge Brown did not obtain an updated PSR, we find no basis to disturb the sentence he imposed. Accordingly, we affirm the denial of PCR by Judge Neafsey and the sentence imposed by Judge Brown.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION