

**SUPREME COURT OF NEW JERSEY**

It is ORDERED that the attached amendments to Rules 3:22-4, 3:22-6A, 3:22-10, 3:22-11, and 3:22-12 of the Rules Governing the Courts of the State of New Jersey are adopted to be effective February 1, 2010.

For the Court,

/s/ Stuart Rabner

Chief Justice

Dated: January 14, 2010

3:22-4. Bar of Grounds Not Raised in Prior Proceedings; Bar of Second or Subsequent Petitions; Exceptions

(a) First Petition for Post-Conviction Relief. Any ground for relief not raised [in a prior proceeding under this rule, or] in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds:

[ (a) ] (1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

[ (b) ] (2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or

[ (c) ] (3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

A ground could not reasonably have been raised in a prior proceeding only if defendant shows that the factual predicate for that ground could not have been discovered earlier through the exercise of reasonable diligence.

A denial of relief would be contrary to a new rule of constitutional law only if the defendant shows that the claim relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings.

(b) Second or Subsequent Petition for Post-Conviction Relief. A second or

subsequent petition for post-conviction relief shall be dismissed unless:

(1) it is timely under R. 3:22-12(a)(2); and

(2) it alleges on its face either:

(A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or

(B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted; or

(C) that the petition alleges a prima facie case of ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief.

Note: Source – R.R. 3:10A-4; caption amended, introductory paragraph amended and designated as paragraph (a), former paragraphs (a), (b), and (c) redesignated as subparagraphs (a)(1), (a)(2), and (a)(3), and new paragraph (b) adopted January 14, 2010 to be effective February 1, 2010.

3:22-6A. Notifying Court of Assignment; Filing of Appearance

(1) ... no change

(2) If a direct appeal, including a petition for certification, is pending, the Public Defender shall notify the court, and the petition shall be dismissed without prejudice. If the defendant refiles the petition within 90 days of the date of the judgment on direct appeal, including consideration of a petition for certification, or within five years after [rendition] the date of the entry pursuant to Rule 3:21-5 of the judgment of conviction being challenged [or sentence sought to be attacked, whichever is later], it shall be considered a first petition for post-conviction relief.

(3) ... no change

(4) ... no change

Note: Adopted July 16, 2009 to be effective September 1, 2009; paragraph (2) amended January 14, 2010 to be effective February 1, 2010.

3:22-10. Presence of Defendant at Hearing; Evidentiary Hearing

(a) A defendant in custody may be present in court in the court's discretion, [and] The defendant shall be entitled to be present when oral testimony is adduced [on a material issue of fact within the defendant's personal knowledge]. However, the defendant's presence may be waived by counsel upon request of the defendant.

(b) [ (a) ] A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

(c) [ (b) ] Any factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing.

(d) [ (c) ] The scope of an evidentiary hearing shall be limited to the issue of whether the defendant was improperly convicted.

(e) [ (d) ] A court shall not grant an evidentiary hearing:

(1) if an evidentiary hearing will not aid the court's analysis of the

defendant's entitlement to post-conviction relief;

(2) if the defendant's allegations are too vague, conclusory or speculative;

or

(3) for the purpose of permitting a defendant to investigate whether additional claims for relief exist for which defendant has not demonstrated a reasonable likelihood of success as required by R. 3:22-10(b) [R. 3:22-10(a)] .

Note: Source – R.R. 3:10A-11; amended July 13, 1994 to be effective September 1, 1994; caption amended, first sentence of former rule deleted, remaining text of former rule retained as introductory language, and new paragraphs (a), (b), (c), and (d) adopted July 16, 2009 to be effective September 1, 2009; introductory paragraph of rule amended and designated as new paragraph (a), former paragraphs (a), (b), and (c) redesignated as paragraphs (b), (c), and (d), and former paragraph (d) amended and redesignated as paragraph (e) January 14, 2010 to be effective February 1, 2010.

3:22-11. Determination; Findings and Conclusions; Judgment; Supplementary Orders

The court shall make its final determination not later than 60 days after the hearing or, if there is no hearing, not later than 60 days after the filing of the last amended petition or answer, with discretion to extend the final determination an additional 30 days, if approved by the Criminal Presiding Judge. In making final determination upon a petition, the court shall state separately its findings of fact and conclusions of law, and shall enter a judgment, which shall include an appropriate order or direction with respect to the judgment or sentence in the conviction proceedings and any appropriate provisions as to arraignment, retrial, custody, bail, discharge, correction of sentence, or as may otherwise be required.

Note: Source – R.R. 3:10A-12; amended July 16, 2009 to be effective September 1, 2009; amended January 14, 2010 to be effective February 1, 2010.

3:22-12. Limitations

(a) General Time Limitations. [A petition to correct an illegal sentence may be filed at any time.]

(1) First Petition For Post-Conviction Relief. Except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this rule, no [No other] petition shall be filed pursuant to this rule more than 5 years after [rendition] the date of entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged [or sentence sought to be attacked] unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice.

(2) Second or Subsequent Petition for Post-Conviction Relief.

Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of:

(A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or

(B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or

(C) the date of the denial of the first or subsequent application for



post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.

(3) Dismissal Without Prejudice When Direct Appeal Is Pending. A petition dismissed without prejudice pursuant to R. 3:22-6A(2) because a direct appeal, including a petition for certification, is pending, shall be treated as a first petition for purposes of these rules if refiled within 90 days of the date of the judgment on direct appeal, including consideration of a petition for certification, or within five years after [rendition] the date of the entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged [or sentence sought to be attacked, whichever is later].

(4) Dismissal Without Prejudice As Not Cognizable or For Insufficient Verification or Contents. A petition dismissed pursuant to R. 3:22-6A(3) without prejudice as not cognizable under R. 3:22-2, or for failing to meet the requirements of R. 3:22-8, shall be treated as a first petition for purposes of these rules if amended and refiled within 90 days after the date of dismissal, or within five [5] years after [rendition] the date of the entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged [or sentence sought to be attacked, whichever is later].

(b) ... no change

(c) ... no change

Note: Source – R.R. 3:10A-13. Caption added and text designated as paragraph (a), and new paragraph (b) added July 12, 2002 to be effective September 3, 2002; paragraph (a) amended and new paragraph (c) adopted July 16, 2009 to

be effective September 1, 2009; former paragraph (a) amended and allocated into subparagraphs (a)(1), (a)(3), and (a)(4), captions adopted for subparagraphs (a)(1), (a)(3), and (a)(4), and new subparagraph (a)(2) caption and text adopted January 14, 2010 to be effective February 1, 2010 .