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November 4, 2024

Superior Court of New Jersey
Appellate Division

STATE OF NEW JERSEY,

Plaintiff-Respondent

v.

DERRICK JOHNSON,

Defendant-Appellant.

: Docket No. A-1304-23T1
:
: CRIMINAL ACTION
:
: On Appeal from an Order Denying
: Petition for Post-Conviction Relief in
: the Superior Court of New Jersey,
: Law Division, Atlantic County.
:
: Sat Below:
: Hon. Jeffrey R. Wilson, J.S.C.
:
: Indictment No. 06-08-1865

BRIEF SUBMITTED ON BEHALF OF
DEFENDANT-APPELLANT DERRICK JOHNSON

Defendant is confined.

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¹ A copy of the verdict sheet could not be found after a diligent search and is not relevant to the issues raised in this appeal.

² A petition is tantamount to a complaint. Therefore, Mr. Johnson's PCR petition papers are appropriately included in this appendix. R. 2:6-1a(1). Pro se materials are included in this appendix, as neither first PCR counsel nor the PCR court adequately addressed the pro se claims.

³ The brief contained at Da67 to Da93 is relevant and part of the PCR record below, which addresses first PCR counsel's performance, thus permitting its inclusion in the appendix pursuant to Rule 2:6-1a(2). See also Da94-249; Da297-339.

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⁴ The exhibits attached to the second PCR filings at Da 340 to Da559 are preserved in the order in which they were attached to second PCR Counsel’s submission. They were edited to remove duplicative or unnecessary exhibits. It appears these exhibits were materials provided to first PCR counsel to assist in the representation. Therefore, the Brief and exhibits are relevant to this appeal, thus permitting their inclusion in the appendix pursuant to Rule 2:6-1a(2).

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⁵ It appears that Appellant wanted these issues raised in the first PCR. The legal analysis prepared to aid in the first PCR was attached as an exhibit in the second PCR.

⁶ This also was attached as an exhibit to the second PCR but was research Appellant did to assist in earlier litigation.

⁷ This is legal research Appellant prepared in connection with the first PCR and was attached as an exhibit in the second PCR.

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⁸ This filing at Da560 to Da576 is part of the record below, thus permitting their inclusion in the appendix pursuant to Rule 2:6-1a(2).

⁹ This is the most legible copy available and as it appeared in the second PCR submission due to copying. It appears to be a letter from Appellant inquiring about the status of his direct appeal.

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STATEMENT OF PROCEDURAL HISTORY

This matter arises from a second petition for post-conviction relief (PCR) filed by Petitioner Derrick Johnson (“Appellant” or “Mr. Johnson”).

The Atlantic County Grand Jury returned Indictment No. 06-08-1365. (Da1 to Da40) Therein, Appellant, along with co-defendants Gary Sayers and Steven McQuire, was charged with various offenses stemming from the June 22, 2006 robbery at a T.G.I. Fridays in Somers Point, Atlantic County, New Jersey. (Da1 to Da41)

After trial before the Honorable James E. Isman, J.S.C., and a jury, on diverse dates from September 9, 2008, until September 19, 2008, Mr. Johnson was convicted of first-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1; five counts of first-degree robbery, N.J.S.A. 2C:15-1; two counts of second-degree burglary, N.J.S.A. 2C:18-2; five counts of third-degree criminal restraint, N.J.S.A. 2C:13-2; five counts of fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); three counts of second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); three counts of third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and two counts of second-

degree certain persons not to have weapons, N.J.S.A. 2C:39-7. (2T-14T¹⁰; Da42 to Da45)

On November 12, 2008, Judge Isman sentenced Mr. Johnson to an aggregate seventy years' incarceration subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. (15T45-15 to 49-24; Da42 to Da44)

¹⁰ The following designations will be used in the brief:

“Da” refers to the defense appendix;

“1T” refers to the pretrial motion transcript of 2/26/08

“2T” refers to the trial transcript of 9/8/08.

“3T” refers to the trial transcript of 9/9/08 (Volume 1).

“4T” refers to the trial transcript of 9/9/08 (Volume 2).

“5T” refers to the trial transcript of 9/10/08 (Volume 1).

“6T” refers to the trial transcript of 9/10/08 (Volume 2).

“7T” refers to the trial transcript of 9/11/08 (Volume 1)

“8T” refers to the trial transcript of 9/11/08 (Volume 2).

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“15T” refers to the jury verdict transcript of 9/19/08.

“16T” refers to the sentencing transcript of 11/12/08.

“17T” refers to the transcript of the 2/26/16 PCR hearing.

“18T” refers to the transcript of the 7/21/16 PCR hearing.

“19T” refers to the transcript of the 5/4/17 PCR hearing.

“20T” refers to the transcript of the 11/15/17 PCR hearing.

“21T” refers to the transcript of the 1/11/18 PCR hearing.

“22T” refers to the transcript of the 11/1/23 Second PCR hearing.

On January 7, 2013, the Appellate Division affirmed Mr. Johnson's convictions in State v. Johnson, No. A-4627-08 (App Div. Jan. 7, 2013), and remanded to merge the conspiracy conviction with the robbery convictions. (Da46 to Da62, pursuant to R. 1:36-3) The New Jersey Supreme Court denied Mr. Johnson's petition for certification. State v. Johnson, 214 N.J. 118 (2013) (Da63).

Mr. Johnson filed a timely PCR on September 25, 2013. (Da64) On April 9, 2018, the Honorable Patricia Wild, J.S.C., denied Mr. Johnson's first PCR petition without an evidentiary hearing. (Da250) On October 23, 2020, the Appellate Division affirmed. State v. Johnson, A-0702-18T4 (App. Div. Oct. 23, 2020) (Da268 to Da285, attached pursuant to R. 1:36-3) On January 22, 2021, the New Jersey Supreme Court denied certification. State v. Johnson, 245 N.J. 61 (2021) (Da286).

On September 20, 2021, the Atlantic County Criminal Division received a second PCR petition that Mr. Johnson signed on September 8, 2021. (Da287 to Da296) Counsel was assigned, and the Honorable Jeffrey R. Wilson, J.S.C., heard oral argument on November 1, 2023. (22T) On December 1, 2023, Judge Wilson issued an order and written opinion denying Mr. Johnson PCR without an evidentiary hearing. (Da580 to Da586; Da587)

This appeal follows. (Da588 to Da590)

STATEMENT OF FACTS

The Underlying Robbery

On June 22, 2006, at around 11:20 P.M., the T.G.I. Fridays in Somers Point, Atlantic County, New Jersey, was robbed. (4T197-5 to 6; 4T198-1 to 2; 4T199-7 to 8; 4T203-12 to 17) The bartender was pulling the cash drawer out of the register for the night when he heard his coworker call his name. (4T203-12 to 15) The bartender turned around to a man with a gun in his face. (4T203-16 to 17) The man was wearing a ski mask. (4T203-25 to 204-2) The man told the bartender to take him to the safe. (4T204-15) The man also took about \$800 to \$900 from the cash drawer. (4T205-13 to 19) The man walked a foot or two behind the bartender with the gun pointed at the bartender's head, as the bartender led him to the office where the safe was. (4T207-3 to 16)

When they got to the office, the bartender opened the safe. (4T208-25 to 208-9) After the bartender emptied the contents of the safe and gave it to the robber, the robber demanded that the bartender open the "bottom safe," a separate section beneath the safe they had emptied that had its own combination lock . (4T209-13 to 210-11; 4T210-8 to 11) But the bartender was unable to get into it. (4T210-12 to 15) The robber began jabbing the bartender in the back of the head with his pistol and told him to open the "f'n safe."

(4T210-17 to 18) After the bartender explained why he could not open the bottom safe, the bartender offered another cash drawer of server money and the change fund, which the robber declined. (4T211-5 to 17)

The robber next directed the bartender outside the office to the kitchen. (4T211-19 to 24) The robber still had the gun pointed at the bartender as they walked to the kitchen. (4T212-2 to 12) The robber reunited the bartender with some of the other T.G.I. Fridays workers, who were with a second masked robber in the kitchen. (4T212-21 to 213-2) The robbers forced the group into the beer cooler. (4T213-5) When they got to the beer cooler, the bartender saw a third robber, whose face was obscured by a stocking or netting, with two more of the T.G.I. Fridays workers. (4T213-15 to 19)

The resulting police investigation came to center on Gary Sayers, Steven McGuire, and Appellant Derrick Johnson. Steven McGuire called his girlfriend, Jennifer Tracton, early in the morning of June 23, 2006, and told her that he committed a robbery with his uncle, Sayers, and Appellant. (10T130-22 to 134-24) Tracton contacted the police, and McGuire surrendered and inculpated Sayers and Appellant. (6T188-18 to 189-3; 6T218-3 to 219-7) The investigation was also aided by Sayers's ex-girlfriend, who lived in New Hampshire. (5T66-14 to 67-8)

Sergeant Wendy Foley of the Windham, New Hampshire Police Department explained. (6T131-12 to 23) In early July 2006, Sergeant Foley responded to a call to check at a local motel in Windham for individuals that New Jersey detectives were looking for. (6T134-2 to 6) Sergeant Foley went to the motel and encountered two men outside a room. (6T134-19 to 20) Later, New Jersey detectives showed Sergeant Foley some photographs, and she identified the men in the photographs as the ones she encountered at the motel: one who identified himself as Christopher McGuire and the other man who called himself Sleeper. (6T137-16 to 22) The New Jersey investigators told Sergeant Foley that Sleeper was Derrick Johnson. (6T137-21 to 23)

Direct Appeal

On the direct appeal, Mr. Johnson argued: (1) the trial judge erred in allowing N.J.S.A. 404(b) evidence; (2) the prosecutor's summation was improper; (3) the prosecutor's speaking objection to the defense summation was misplaced and conveyed information not adduced at trial to the jury; (4) the trial judge failed to merge a burglary charge with the robbery charges; (5) the trial judge failed to merge the conspiracy charge with the robbery charges; and (6) the trial judge imposed an excessive sentence. (Da50 to Da51) Mr. Johnson also submitted a supplemental brief, arguing: (7) there was no

probable cause hearing; (8) the trial judge was biased against Mr. Johnson; (9) the prosecutor violated a duty to correct misinformation; (10) the prosecutor failed to subpoena key witnesses; (11) the improper admission of one green/orange glove before the jury; and (12) the prosecutor failed to allege a prima facie case against Mr. Johnson. (Da51 to Da52)

The First PCR

In the first PCR, through counsel assigned by the Office of the Public Defender, Johnson argued that trial counsel was ineffective in: (1) failing to provide complete discovery to Mr. Johnson; (2) failing to adequately investigate and interview witnesses; (3) failing to file a motion in limine to bar McGuire from testifying that he feared Mr. Johnson was going to kill him; and (4) cumulative error. (Da81 to Da92) Mr. Johnson's pro se briefing containing more points was attached and counsel incorporated those points by mere reference to the pro se brief. (Da94 to Da174)

First PCR counsel later filed a supplemental brief with five additional points: (1) trial and appellate counsel should have argued that the State violated the discovery rule for failing to provide a full and complete copy of the affidavit of probable cause; (2) trial and appellate counsel should have argued that the State should have provided the complete affidavit of probable

cause as mandated by the Court Rules; (3) trial and appellate counsel failed to argue that the arrest was illegal and based on an illegal arrest warrant; (4) trial counsel failed to advise Mr. Johnson of his sentencing exposure; and (5) trial counsel failed to investigate the matter and interview witnesses. (Da240 to Da247) First PCR counsel also presented additional pro se issues gleaned from Mr. Johnson's submission: (1) counsel failed to review discovery, particularly as to a glove found in a vehicle with McGuire's identification; (2) counsel failed to review the audio of McGuire's statement with Mr. Johnson; (3) counsel failed to interview alibi witnesses; (4) counsel failed to interview Joelle Bailey, who testified about McGuire's fears in jail; (5) counsel failed to obtain mental health records for Bailey;¹¹ (6) counsel failed to interview two of the victims; (7) counsel failed to file a motion to bar testimony that McGuire was worried Mr. Johnson would kill him for "snitching;" (8) counsel failed to obtain and review the affidavit of probable cause for the arrest warrant and to argue evidence gathered was the result of an illegal arrest warrant; and (9) counsel failed to advise Mr. Johnson of the strength of the State's case so Mr. Johnson could make an informed decision about the State's plea offer of eight

¹¹ First PCR counsel unsuccessfully moved to obtain those records.

years. (Da237 to Da246) Judge Wild denied this first PCR petition without an evidentiary hearing. (Da250)

Appellant appealed, arguing through appellate counsel:

POINT I

THE [PCR JUDGE] ERRED IN DENYING . . .
DEFENDANT'S MOTION FOR ACCESS TO [A]
WITNESS['S] . . . MENTAL HEALTH RECORDS.

POINT II

DEFENDANT WAS DENIED THE EFFECTIVE
ASSISTANCE OF TRIAL COUNSEL IN
VIOLATION OF THE UNITED STATES AND NEW
JERSEY CONSTITUTIONS[,] U.S. CONST.,
AMENDS. VI, XIV[;] N.J. CONST. ART. I., PAR. 10.

A. Trial Counsel Provided Ineffective Assistance Of
Counsel By Failing To Provide Discovery To . . .
Defendant.

B. Trial Counsel Provided Ineffective Assistance Of
Counsel By Failing To Adequately Investigate And
Interview Witnesses.

C. Trial Counsel's Failure To File A Motion In
Limine Barring [A] Witness . . . From Testifying That
He Feared [Defendant] Was Planning On Killing Him
Constituted Ineffective Assistance Of Counsel.

D. Trial Counsel Was Ineffective For Failing To
Argue That The [State] Violated The Discovery Rule
For Failing To Provide A Full And Complete Copy Of
The Affidavit In Support Of Probable Cause In
Support Of The Issuance Of The Arrest Warrant For
Defendant.

E. Trial Counsel Was Ineffective For Failing To Argue That Law Enforcement Officers Failed To Provide The Prosecutor's Office With A Copy Of The Detailed Affidavit In Support Of Probable Cause For . . . [Defendant's] Arrest As Mandated Pursuant To R[ule] 3:2-1(b).

F. Trial Counsel Was Ineffective By Failing To Argue That Defendant's Arrest Was Illegal Thus Rendering All Evidence Gathered As A Result Of That Illegal Arrest Inadmissible.

G. Trial Counsel's Ineffective Representation During The Pre-Trial Proceedings Impacted . . . The Plea Process Causing [Defendant] Substantial Prejudice.

H. [Defendant's] Pro Se Submissions Set Forth Numerous Allegations Regarding Ineffective Assistance Of Trial Counsel Which Were Not Addressed By The [PCR Judge] Thereby Requiring A Remand On Those Issues.

POINT III

THE CUMULATIVE EFFECT OF THE ERRORS COMPLAINED OF RENDERED THE TRIAL UNFAIR.

POINT IV

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL[.]

POINT V

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF PCR COUNSEL[.]

POINT VI

THE [PCR JUDGE] ERRED IN DENYING [DEFENDANT'S PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING.

[Da270 to Da272].

In a pro se appellate brief, defendant raised the following points, which the Appellate Division summarized and renumbered:

POINT [VII]

[IN HER DECISION, THE PCR JUDGE MENTIONED POINTS THAT HAD NOTHING TO DO WITH THIS CASE SO HER DECISION MUST BE VACATED BECAUSE HER ACTIONS VIOLATED THE MODEL CODE OF JUDICIAL CONDUCT (8)(C)(1).]

POINT [VIII]

[DEFENDANT'S LEGAL RIGHT TO BE AT HIS PCR HEARING WAS VIOLATED AND THE PCR JUDGE VIOLATED RULE 3:22-10. THE JUDGE ALSO VIOLATED THE MODEL CODE OF JUDICIAL CONDUCT (B)(5); (B)(7); (B)(8); (C)(2); (E)(1) AND (E)(1)(A).]

POINT [IX]

[D]EFENDANT ASSERTS THAT THERE IS (NO WAY) THE [PCR] JUDGE COULD HAVE VIEWED ALL OF DEFENDANT'S (545) EXHIBITS AND STILL DENIED [DEFENDANT'S] APPLICATION FOR [PCR] OR AN EVIDENTIARY HEARING. [THE PCR JUDGE] VIOLATED THE CODE OF JUDICIAL

CONDUCT CANON I, CANON 2A, [AND] CANON 3 (A-1)(B-1).

POINT X

[D]EFENDANT WANTS HIS GRAND JURY ISSUE HE SUBMITTED FULLY ADDRESSED; [A] DETECTIVE . . . LIED TO THE GRAND JURY. DEFENDANT HAS PROOF WITHIN THE INDICTMENT ITSELF. HOWEVER [THE PCR JUDGE] NEVER ADDRESSED THIS ISSUE ALONG WITH MANY OTHERS, VIOLATING THE CODE OF JUDICIAL CONDUCT, CANON 3 (A-1)(7) [AND] (B-1).

POINT [XI]

[TRIAL COUNSEL WAS INEFFECTIVE BECAUSE DEFENDANT WOULD HAVE TAKEN THE PLEA DEALS OF EIGHT YEARS OR FIFTEEN YEARS.]

POINT [XII]

[DEFENDANT] SUBMITTED A BRIEF REGARDING . . . HOW [THE TRIAL JUDGE] WAS NOT A SUPERIOR COURT JUDGE, BUT WAS IN FACT A TAX JUDGE DURING THE TRIAL OF . . . DEFENDANT . . . DEFENDANT SUBMITTED THE BRIEF [HIMSELF] MAKING REFERENCE TO [THIS ISSUE] SO THE [PCR JUDGE] COULD ADDRESS IT, [RULE] 3:22-6(D)[.]

POINT [XIII]

[D]EFENDANT SUBMITTED HIS COMPLAINT AND WARRANT ISSUE, DEFENDANT ASSERTS THAT [THE PCR JUDGE] COULD NOT HAVE PROPERLY VIEWED ALL THE EXHIBITS OR

GIVEN THEM EACH ITS PROPER
CONSIDERATION OR WEIGHT. THUS RUSHING
TH[ROUGH] OR NOT LOOKING AT ALL [OF]
DEFENDANT'S MOVING PAPERS[.]

POINT [XIV]

THE [P]ROSECUTOR VIOLATED BRADY BY
WITHHOLDING EXCULPATORY EVIDENCE AND
LYING TO THE JURY.

[Da272 to Da271].

The Appellate Division rejected these arguments and affirmed Judge
Wild's PCR decision. (Da275 to Da274) The New Jersey Supreme Court
denied Appellant's petition for certification for the first PCR. (Da286)

The Second PCR

In his pro se second PCR petition, Mr. Johnson argued:

POINT I – [FIRST-] PCR COUNSEL WAS
INEFFECTIVE BY DESTROYING DEFENDANT'S
LEGAL PAPERS, LYING ABOUT IT AND FAILING
TO RAISE ISSUES TO THE PCR COURT THAT
COULD HAVE BEEN RAISED, AS A RESULT OF
THIS INEFFECTIVENESS, DEFENDANT[']S
CONSTITUTIONAL RIGHTS [. . .] WERE
VIOLATED[.]

[. . .]

POINT II – PETITIONER IS NOT PROCEDURALLY
(OR OTHERWISE) BARRED FROM RAISING THE
CLAIMS ADVANCED HEREIN[.]

[. . .]

POINT III – PETITIONER HAS ESTABLISHED A PRIMA FACIE SHOWING SUFFICIENT TO WARRANT THE ORDERING OF AN EVIDENTIARY HEARING[.]

[Da291 to Da294].

In the counseled submission, Mr. Johnson presented the following claims:

POINT I – PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF PCR COUNSEL, AND THEREBY HIS DUE PROCESS RIGHTS WHEN HIS PCR COUNSEL FAILED TO ADEQUATELY REPRESENT ON POST-CONVICTION RELIEF.

- 1) PCR Counsel failed to provide Mr. Johnson with Discovery from The Case File.
- 2) PCR Counsel Should Have Relieved Himself as PCR Counsel Given That The Attorney-Client Relationship Was Irretrievably Broken.

POINT II – ALL POINTS RAISED BY PETITIONER TO THE COURT ARE HERETOFORE INCORPORATED BY REFERENCE INTO THIS SUPPLEMENTAL BRIEF.

POINT III – THE PETITIONER HAS DEMONSTRATED EXCUSABLE NEGLECT JUSTIFYING A RELAXATION OF THE ONE YEAR FILING PERIOD UNDER N.J. RULE 3:22-12 FOR A SECOND PCR AND THE PCR IS JUSTICIABLE AS A SECOND PCR PURSUANT TO 3:22-4(A).

POINT IV – PETITIONER IS ENTITLED TO AN
EVIDENTIARY HEARING.

[Da298].

Counsel also attached hundreds of pages of exhibits, detailing what Mr. Johnson wanted his first PCR counsel to cover. (Da340 to Da562) Counsel later filed a reply brief and exhibits, explaining Appellant’s excusable neglect in filing the second PCR petition when he did. (Da563 to Da579)

The Second PCR Opinion

In a seven-page opinion, the PCR judge denied the PCR petition without an evidentiary hearing. (Da580) First, the PCR judge ruled that the second PCR was time-barred and refused to consider Appellant’s pursuit of appellate relief in the first PCR to be excusable neglect. (Da582) Second, the PCR judge ruled that Appellant did not demonstrate that first PCR counsel was ineffective when counsel lied about receiving Appellant’s initial legal papers, because Appellant did not offer any proof. (Da584) Without analysis, the judge rejected Appellant’s second PCR claim that first PCR counsel should have raised “40 plus issues.” (Da585) The judge wrote, “Counsel is not required to present all non-frivolous claims and may use his or her professional judgment

in deciding whether those claims have merit.” (Da585) Finally, the PCR judge did not grant an evidentiary hearing, because she dismissed all of Appellant’s claims as “bald assertions.” (Da586)

LEGAL ARGUMENT

POINT I

THE PCR COURT ERRED WHEN IT DENIED PCR, BECAUSE THE TIME BAR SHOULD HAVE BEEN RELAXED. (Raised below: Da582)

The time bar should have been relaxed in this case. The timeline of Appellant's filings reveals an attempt to comply with the Court Rules in a way that would make sense, especially given the advice he received. First PCR appellate counsel raised ineffectiveness in his appellate brief, and Mr. Johnson understandably left the lawyering to the lawyers. (Da575 to Da576) Nothing in the record indicates that anyone told Mr. Johnson about the one-year deadline from the denial of the first PCR to file a second PCR. And in applying the time bar, the PCR court perpetuated the fundamental injustice of first PCR counsel's ineffective representation that robbed the first PCR process of its truth-seeking purpose.

Rule 3:22-12(a)(1) sets forth the time limitation for a first PCR application: a defendant has five years after the date of the judgment of conviction to file a PCR petition. After that, a defendant must show excusable neglect and a reasonable probability that enforcing the time bar would result in fundamental injustice. R. 3:22-12(a)(1); State v. Cann, 342 N.J. Super. 93,

101-02 (App. Div. 2001). There is great judiciary interest in ensuring that PCR hearings are held before the passage of time renders it more difficult to rule upon the allegations. State v. Goodwin, 173 N.J. 583 (2002); State v. Dillard, 208 N.J. Super. 722, 727 (App. Div.), certif. den. 105 N.J. 527 (1986). There is also a recognized need to achieve and respect the finality of judgments. State v. Mitchell, 126 N.J. 565, 575-76 (1992). With these principles in mind, excusable neglect requires exceptional, compelling, and extenuating circumstances. Id. at 577; State v. Afanador, 151 N.J. 41, 52 (1997) (internal citations omitted).

Circumstances that constitute excusable neglect include when a defendant never received letters from his lawyer. State v. McQuaid, 147 N.J. 464, 476 (1997) (trial court accepted as excusable neglect the fact that defendant never received counsel's letters). While not a low bar, meeting the standard of excusable neglect is possible for a litigant who was not informed of a court decision.

Fundamental injustice is found in "exceptional circumstances." Mitchell, 126 N.J. at 580. The Court must consider "the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claim in determining whether there has been an 'injustice' sufficient to relax the time

limits.” Afanador, 151 N.J. at 52 (internal citations omitted). The fundamental-injustice inquiry requires the petitioner to make some showing that the deficiency played a role in the finding of guilt. State v. Nash, 212 N.J. 518, 546 (2013). Moreover, New Jersey courts “will not yield to an injustice merely because no court has yet to address in any meaningful way the issue of newly discovered evidence,” or, for that matter, new information about the validity of a plea. Nash, 212 N.J. at 547. And the Court Rules governing PCR petitions and proceedings do not render courts “powerless to correct a fundamental injustice.” Ibid. Even the passage of time alone cannot itself bar relief to a defendant deprived of a fair proceeding and the opportunity to present a full defense. State v. Hannah, 248 N.J. 148, 190 (2021). The courts may grant relief in the interest of justice. State v. Franklin, 184 N.J. 516, 528 (2005).

Finally, in this case, it is important to note that Rule 3:22-6A(2) provides:

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 [for PCR] within 90 days of the judgment on direct appeal, including consideration of a petition for certification, or within five years after the date of the entry pursuant to Rule 3:21-5 of the judgment of conviction being challenged, it shall be considered a first petition for post-conviction relief.

Mr. Johnson demonstrated in his second PCR filing that his delay in filing the second PCR was based on first PCR appellate counsel's own failure to correct Mr. Johnson's belief it was sufficient that they were raising the issue in the first PCR appeal. (Da575 to 576) Relying on a misunderstanding that was perpetuated by an improvidently raised ineffectiveness argument in a first PCR appeal is excusable neglect, especially when there is nothing in the record that suggests that Mr. Johnson was ever given the correct timeline. And of course, the Appellate Division declined to address the improperly raised issue of first PCR counsel's ineffectiveness in its October 23, 2020 decision. (Da283) Mr. Johnson cannot be held responsible for this ineffective appellate lawyering.

As soon as he knew better, Petitioner filed his second PCR within one year of the conclusion of the first PCR appeal. (Da578 to 579; Da575 to Da576) Appellant certified to that delay and maintains that he filed the second PCR petition in September 2021, shortly after receiving the letter from the Office of the Public Defender. (Da575 to Da576)

Finally, there is no prejudice to the State or court efficiency in allowing a second PCR to proceed on the merits. After all, had Appellant timely filed a second PCR, it would have been dismissed without prejudice under R. 3:22-6(A)(2), pending the outcome of the first PCR appeal. The second PCR would have

commenced at the same time anyway, when Appellant received word that his first PCR appeal was denied certification.

POINT II

**THE PCR COURT ERRED WHEN IT
CONCLUDED THAT COUNSEL IS NOT
OBLIGATED TO RAISE NON-FRIVOLOUS
CLAIMS. THE ORIGINAL PRO SE CLAIMS
SHOULD BE RESTORED AND CONSIDERED.
(Raised below: Da584 to Da585)**

PCR counsel is not the gatekeeper of PCR claims. Unlike trial counsel, PCR counsel has a different set of obligations that accords with the truth-seeking purpose of PCR. In the second PCR, Appellant demonstrated the tension between himself and his first PCR attorney that culminated in first PCR counsel determining the merits of the pro se claims himself. (Da518) First PCR counsel was ineffective, because he mistook himself for the PCR judge in how he presented Mr. Johnson's claims that Mr. Johnson ultimately had to specifically raise himself.

New Jersey Court Rule 3:22-1 allows those convicted of offenses to petition for PCR. Such a petition is cognizable if based upon, among other grounds, the "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey." R. 3:22-2(a). Among a defendant's most important

rights under the Constitution of the United States and the Constitution of the State of New Jersey is the right to the effective assistance of competent counsel, because effective legal representation ensures that the accused is not unjustly convicted. U.S. CONST. amend. VI; N.J. CONST. art. 1, para. 10; Strickland v. Washington, 466 U.S. 668, 684 (1984); Nash, 212 N.J. at 540. .

The seminal case addressing the Sixth Amendment guarantee of competent counsel is Strickland v. Washington. In State v. Fritz, the Supreme Court of New Jersey adopted the two-prong Strickland test. 105 N.J. 42 (1987). When applying for PCR based on a theory of ineffective assistance of counsel, a defendant must show that (1) trial counsel was incompetent and (2) it was reasonably probable that the incompetence altered the outcome of the proceeding. Fritz, 105 N.J. at 52. A petitioner must establish his right to such relief by a preponderance of the credible evidence. State v. Preciose, 129 N.J. 451, 459 (1992). The PCR court must view the facts in the light most favorable to the defendant. Id. at 462-63.

With respect to the first Strickland prong, the petitioner must cite to specific unprofessional deficiencies by counsel. These deficiencies must be “so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” Id. at 52 (quoting Strickland, 466 U.S. at 687). “The

proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Strickland, 466 U.S. at 687-88. With respect to the second prong, the petitioner must show that counsel’s errors deprived him of a fair proceeding and that the result of the proceeding is therefore unreliable. State v. Pierre, 223 N.J. 560, 577-78 (2015).

Likewise, PCR counsel is expected to perform competently. Otherwise, “[t]he remedy for [PCR] counsel’s failure to meet the requirements imposed by Rule 3:22-6(d) is a new PCR proceeding.” State v. Hicks, 411 N.J. Super. 370, 376 (App. Div. 2010). Among the expectations of PCR counsel is that “[c]ounsel should advance any grounds insisted upon by defendant notwithstanding that counsel deems them without merit,” wrote the New Jersey Supreme Court in State v. Rue, 175 N.J. 1, 19 (2002) (quoting R. 3:22-6(d)). At a minimum, PCR counsel must review the pro se PCR petition with the client and explain the merits of the client’s arguments. Ibid. If the client cannot be dissuaded from raising a particular point, then PCR counsel must still present the point. State v. Webster, 187 N.J. 254, 257 (2006) (requiring presentation of all client claims, even if counsel simply references the claims without further detail). This rule accords with the underlying purpose of PCR: to test the State’s case against meaningful challenges. State v. Velez, 329 N.J.

Super. 128, 135 (App. Div. 2000). Without even the barest presentation of a petitioner's claims, the reviewing PCR court is unable to address the merit.

The PCR judge's conclusion about the sufficiency of first PCR counsel's representation is flawed as a matter of law. The PCR judge transposed the latitude accorded to trial counsel to the obligations imposed on PCR counsel. This Court reviews the trial court's decision de novo when the trial court applies the wrong legal standard. See State v. Trinidad, 241 N.J. 425, 448 (2020) (evidentiary decisions are reviewed de novo if trial court applied wrong legal standard).

First PCR counsel failed to perform as required in the first PCR. First PCR counsel referred to Appellant's pro se brief and vaguely incorporated the points, but he did not specifically list them for the PCR court's direct consideration in the initial brief. (Compare Da75 to Da92 (first PCR counsel's brief) and Da240 to Da249 (first PCR counsel's supplemental brief with Da94 to Da239 (pro se claima) In a supplemental brief, first PCR counsel articulated more pro se claims specifically, but the list did not contain all of them. (Da240 to Da249) And as was attached to the second PCR submission, Mr. Johnson tried to supply ideas and research to first PCR counsel that went largely dismissed. (Da340 to Da559; see, e.g., Da518)

First PCR counsel should have at least explicitly presented all of those claims, even without exposition. In mistaking himself as the judge of what claims had merit, first PCR counsel improperly denied Appellant the benefit of any adversarial tenor in the first PCR. See Rue, 175 N.J. at 10.

In the second PCR, the judge incorrectly stated the law: “Counsel is not required to present all non-frivolous claims and may use his or her professional judgment in deciding whether those claims have merit.” (Da585) This statement of law is the opposite of the holdings in Rue and Webster. Under the caselaw, first PCR counsel should have at least set forth the pro se claims in his own brief. In comparing first PCR counsel’s briefs with Mr. Johnson’s pro se submission, the following points appear to have never been specifically raised by first PCR counsel to the PCR court and are merely referred to in the counseled briefing¹²:

1. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to file a motion pursuant to Rule 3:10-2(b) and argue the

¹² These claims have been summarized and appear to constitute the claims that Mr. Johnson wanted raised by counsel in his first PCR but were not. Should any be missing, the undersigned encourages the Appellate Division to accept and review any pro se appellate submissions by Mr. Johnson.

way in which the complaint/warrants were signed-filed and processed was improper.

2. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to argue that Atlantic County did not have legal jurisdiction over the defendant's person or the subject matter captioned in the invalid complaint.
3. Defendant was deprived of his due process rights.
4. The attorneys James Leonard Jr. and Lee J. Hughes were ineffective for failing to challenge the indictment.
5. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to report prosecutorial misconduct under various, specifically averred rules.
6. Attorney Lee J. Hughes was ineffective for filing a frivolous suppression motion regarding evidence seized from Sayers's car.
7. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to file a motion to exclude evidence the defendant's one

odd glove based on the fact that it was not described as a glove used in this case.¹³

8. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to move to disqualify the judge.
9. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to address defendant's concerns based on his personal investigation that ACPO was moving forward without a proper indictment.
10. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to obtain a copy of McGuire's statement.¹⁴
11. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to inform defendant he could have pled guilty and still preserved his appeal rights to address the pretrial motions.
12. The prosecutor never produced a copy of McGuire's statement to counsel.

¹³ First PCR counsel raised the argument that Mr. McGuire's identification was found in a vehicle with a glove but did not mention the odd glove. (Da245)

¹⁴ First PCR counsel later phrased this as Leonard and Hughes simply failed to review the statement with Mr. Johnson. (Da245)

13. Attorney Lee J. Hughes was ineffective for failing to challenge the jurisdiction of this matter after the guilty verdict.
14. The appellate attorney was ineffective for not arguing that 404(b) evidence should have been excluded.
15. The appellate attorney raised frivolous points in her brief.
16. The appellate attorney was ineffective for failing to comply with the rules governing petitions for certification.
17. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to move to exclude evidence pertaining to the one odd glove.
18. The appellate attorney was ineffective for not raising the ineffectiveness of trial counsel in the direct appeal and the other points raised in the pro se brief.
19. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to challenge the probable cause undermining the complaint-warrant.
20. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to argue that there were equal-protection violations in this case.

21. There were violations under Brady v. Maryland, 373 U.S. 83, (1963).
22. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to move to exclude hearsay testimony.
23. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for not objecting to the prosecutor's presentation of testimony that was known to be false.
24. Attorneys James Leonard Jr. and Lee J. Hughes were both ineffective for failing to argue that the State failed to subpoena and present a key witness.
25. Attorney Lee J. Hughes was ineffective for failing to file an interlocutory appeal stating that Mr. Johnson's right to a fair trial by an impartial jury was violated.
26. The appellate attorney was ineffective for failing to challenge the jury instruction.

These remaining points were never specifically presented by first PCR counsel in his briefs. The resulting prejudice is the implication to the PCR court that they were without merit. First PCR certainly seemed to think so. (Da518)

Based on an inaccurate statement of the law governing PCR counsel's obligations, the PCR judge in the second PCR excused first PCR counsel's ineffectiveness in not specifically listing the pro se claims as a non-issue. (Da585) Because the PCR judge should have concluded that first PCR counsel was ineffective, the PCR judge should have gotten to the merits of the original pro se PCR claims. Accordingly, this Court should exercise de novo review, conclude first PCR counsel was ineffective, and remand for a full review of the unexplored first PCR claims.

POINT III

FIRST PCR COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO PROVIDE APPELLANT WITH DISCOVERY. (Raised below by counsel at Da323 and not decided by the PCR court¹⁵)

PCR counsel's duty to investigate pro se claims is meaningless if there is no obligation for PCR counsel to review discovery from the case file with a petitioner. Here, first PCR counsel did not review the case file evidence with Appellant, impeding his ability to pursue the first PCR.

¹⁵ The PCR court did not address this issue. (See Da585) However, second PCR counsel properly preserved this issue. (Da320)

As noted above, PCR counsel must review the pro se PCR petition with the client and explain the merits of the client's arguments. Further, the purpose of PCR is to test the State's case against meaningful challenges. Velez, 329 N.J. Super. at 135. And defendants have a right to a "vigorous defense," which requires trial counsel and, later, PCR counsel to "investigate all substantial defense available." See State v. Russo, 333 N.J. Super. 119, 139 (App. Div. 2000). Finally, the Strickland/Fritz test requires a petitioner to show that (1) counsel was incompetent and (2) it was reasonably probable that the incompetence altered the outcome of the proceeding. Fritz, 105 N.J. at 52.

To demonstrate prejudice, i.e., that the mistake altered the outcome of the trial, based on a preponderance of the evidence, the PCR attorney must marry the specific errors to evidence in the case. This requires a substantive discussion of the case file discovery with the petitioner. Without providing to and reviewing the discovery with the PCR petitioner, the rights a PCR petitioner holds – to an attorney's investigation of their pro se claims, to a meaningful adversarial challenge against the conviction, and to a vigorous defense – are meaningless.

Appellant was denied his right to review the significance of his PCR claims, particularly his remaining pro se claims, in the context of the discovery

that his PCR lawyer failed to provide him. The record is clear that PCR counsel never provided the complete case file to Appellant. PCR counsel initially provided some discovery to Appellant. (Da549) But PCR counsel faltered in providing Appellant with complete discovery, and it came to a head at a February 26, 2016 PCR hearing date:

THE COURT: Okay. All right. And let me just go over what I have as notes from the last time. Your client at the time wanted his original attorney's file

PCR COUNSEL: That is correct, Your Honor.

THE COURT: And did you get that?

PCR COUNSEL: Well, I have spoken to my client's brother, and I will indicate that we did not send him the original attorney's file. And I had asked his brother to try and narrow down what was it about that file that he wanted and I have not heard from his brother since then.

I— Your Honor, my client's file is five boxes, and I'm not exaggerating. It's five boxes. And Mr. Hughes' file is not in one file. I think it has been separated. So, it makes it very difficult for me to recreate Mr. Hughes' trial file.

I can go back and try to look and see anything that my client sent to Mr. Hughes. But I have those, and I've made them part of my motion, letters to Mr. Hughes about not getting discovery, et. Cetera.

THE COURT: Right

PCR COUNSEL: I can go back and look at Mr. Hughes' letters to my client if they exist. The discovery in Mr. Hughes' file has already been provided to my client. My client's position was that, because of all of the moves he's made and the briefs that he's written, that it was taken apart, and it was left behind, and he doesn't have it anymore. So, when they did refuse to make another copy, I made another copy for my client. But I believe he still is seeking, if I'm not mistaken, another copy of discovery...

[17T 5-25 to 7-11]

First PCR counseled continued to discuss how Appellant's brother had not returned his calls or described what Appellant was looking for. (17T7-22 to 8-10) But as the Court pointed out, the Appellant's brother was not counsel's client and dismissed the discussion about the brother as delay tactics. (17T9-21 to 25)

Six months later, as of August 12, 2016, the PCR was apparently still dragging on and PCR counsel still did not provide discovery. Appellant wrote:

Sir, not long ago I wrote you a letter and sent copy's to you, Judge Wilde, and Case Management. Requesting that you go threw [sic] (my jury selection transcripts) as stated in another letter I'm sending to you that I know you got two month's ago I have proof. I'm still waiting on a complete copy of the requested discovery I mailed to you! Along with copies of the stuff I've given to you in Court.
[...]

Sir, for reasons I don't fully understand I'm giving you or sending to you Discovery or otherwise, and your misplacing or losing my stuff.

[Da419 to Da420].

The irony here is that first PCR counsel criticized trial counsel for the same deficiency. (Da81) As first PCR counsel argued, denying a defendant access to discovery and the discussion of the merits of a case that goes with it. (Da82) Examining discovery would yield grounds for further defense investigation, raise questions of a State-witness's credibility, and, most importantly, advance a defendant's constitutional right to assist in his own defense. (Da82 to Da83) And while first PCR counsel is correct in all of this, he engaged in this deficiency himself, never getting discovery to Appellant and never fully reviewing with Appellant the evidence and opportunities embedded in that evidence. As first PCR counsel argued against his predecessor, this is a deficiency of performance that prejudiced Appellant by forcing him to proceed to trial with an incomplete understanding of the case.

POINT IV

**THIS COURT SHOULD HAVE GRANTED AN
EVIDENTIARY HEARING TO ADDRESS THE
PCR CLAIMS. (Raised below: Da586)**

As explained in each point addressing individual PCR claims, Mr. Johnson was entitled to, at a minimum, an evidentiary hearing to resolve particular and genuine issues of material fact. Rule 3:22-10 entitles a defendant to a PCR evidentiary hearing when the defendant establishes a prima facie case in support of post-conviction relief, the court determines there are material issues of disputed fact, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. The standard of review applied to a PCR court's legal analysis is de novo. Nash, 212 N.J. at 540-41 . When the PCR court does not hold an evidentiary hearing, as in the case at bar, the Appellate Division may exercise de novo review over the PCR court's factual inferences drawn from the documentary record. State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145 (2005). Thus, in situations where no evidentiary hearing is held, the appellate court properly exercises its authority to review the PCR court's factual findings and legal conclusions de novo. Id. at 421.

Appellant has raised the requisite prima facie case that first PCR counsel was ineffective. Indeed, Appellant has proven by a preponderance of the sufficient

credible evidence that first PCR counsel was ineffective. With respect to the second-PCR claim that first PCR counsel was ineffective in failing to set forth the pro se claims, the evidence is sufficient and credible, because that claim is based on court filings. It cannot be disputed that first PCR counsel simply referred to the pro se claims without listing them for the court's understanding. With respect to the second-PCR claim that first PCR counsel failed to send and review discovery with Appellant, the sufficient and credible evidence in this case also proves this claim by a preponderance of the evidence. There are letters and extensive discussion on the record about first PCR counsel's failure to provide discovery and, indeed, to bother working with Appellant. First PCR counsel was even admonished by the PCR court for working with Appellant's brother and not directly with Appellant. The result of this compelling evidence that exists right in the record is a half-hearted PCR submission by first PCR counsel. At a minimum, there is a prima facie case of first PCR counsel's deficiencies and the prejudice incurred to Appellant. Accordingly, at a minimum, this matter should be remanded for an evidentiary hearing to address first PCR counsel's performance and, moreover, remanded for consideration of the first PCR claims.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the order denying of post-conviction relief and grant relief or, alternatively, remand the matter for an evidentiary hearing.

Respectfully submitted,

JENNIFER N. SELLITTI
PUBLIC DEFENDER
ATTORNEY FOR THE DEFENDANT-APPELLANT

By: /s/ Kayla Rowe
Kayla Rowe, Esq.

Dated: November 4, 2024

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January 30, 2025

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Attorney
On the Letter-Brief

LETTER IN LIEU OF BRIEF
ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: STATE OF NEW JERSEY (Plaintiff-Respondent),
v.
DERRICK JOHNSON (Defendant-Appellant).
Docket No. A-001304-23T1

Criminal Action: On Appeal from an Order Denying Defendant's
Second PCR Petition in the Superior Court of New Jersey, Law
Division, Atlantic County.

Indictment No.: 06-08-1865

Sat Below: Hon. Jeffrey R. Wilson, J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-2(b) and Rule 2:6-4(a), please accept this letter in lieu of a
formal brief on behalf of the State of New Jersey.

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¹ This point responds to the related Points I, II, III, and IV of defendant’s brief. (Db17-36).

PRELIMINARY STATEMENT

As second PCR counsel characterized this action below, defendant brought this “twice a telephone book size” second PCR petition as the next step in his comprehensive litigation path, but he brought this second PCR too late. (22T9-3 to 10).

Defendant rightfully conceded on appeal and below that defendant’s second PCR petition was subject to dismissal under the time bar for having been filed more than two-and-one-half years after Rule 3:22-12’s one-year time limit expired (and, 13 years after his jury conviction). The PCR court properly dismissed defendant’s second PCR petition, duly rejecting defendant’s lament that he was not aware of the time limit.

While the time bar is alone dispositive, the PCR court also properly rejected defendant’s well-tread ineffective assistance claims as lacking merit and support, and therefore, not warranting an evidentiary hearing for lack of proof beyond mere “bald assertions.” This Court should affirm the PCR court’s dismissal of defendant’s untimely second PCR petition.

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS¹

Following an eight-day jury trial, defendant, Derrick Johnson, was convicted on all counts, including first-degree conspiracy to commit robbery, in violation of N.J.S.A. 2C:5-2/15-1; 5 counts of first-degree robbery, in violation of N.J.S.A. 2C:15-1; 2 counts of second-degree burglary, in violation of N.J.S.A. 2C:18-2; 5

¹ The State is combining the Counterstatement of Procedural History and Facts for the Court's convenience, given the narrow focus of this out-of-time second PCR appeal.

The State is following defendant's transcript designations:

- "1T" refers to the pre-trial motion transcript, dated 2/26/08.
- "2T" refers to the trial transcript, dated 9/8/08.
- "3T" refers to the trial transcript, dated 9/9/08 (Vol. I).
- "4T" refers to the trial transcript, dated 9/9/08 (Vol II).
- "5T" refers to the trial transcript, dated 9/10/08 (Vol. I).
- "6T" refers to the trial transcript, dated 9/10/08 (Vol II).
- "7T" refers to the trial transcript, dated 9/11/08 (Vol. I).
- "8T" refers to the trial transcript, dated 9/11/08 (Vol II).
- "9T" refers to the trial transcript, dated 9/15/08 (Vol. I).
- "10T" refers to the trial transcript, dated 9/15/08 (Vol II).
- "11T" refers to the trial transcript, dated 9/16/08.
- "12T" refers to the trial transcript, dated 9/17/08.
- "13T" refers to the trial transcript, dated 9/18/08 (Vol. I).
- "14T" refers to the trial transcript, dated 9/18/08 (Vol II).
- "15T" refers to the verdict transcript, dated 9/19/08.
- "16T" refers to the sentencing transcript, dated 11/12/08.
- "17T" refers to the PCR hearing, dated 2/26/16.
- "18T" refers to the PCR transcript, dated 7/21/16.
- "19T" refers to the PCR transcript, dated 5/4/17.
- "20T" refers to the PCR transcript, dated 11/15/17.
- "21T" refers to the PCR transcript, dated 1/11/18.
- "22T" refers to the Second PCR transcript, dated 11/1/23.
- "Db" refers to defendant's brief.
- "Da" refers to the five-volume appendix to defendant's brief.

counts of third-degree criminal restraint, in violation of N.J.S.A. 2C:13-2; five counts of fourth-degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(4); 3 counts of second-degree possession of a firearm for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a); 3 counts of third-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5(b); and 2 counts of second-degree certain persons not to have weapons, in violation of N.J.S.A. 2C:39-7. (Da42-45).

In its January 7, 2013 opinion denying defendant's direct appeal, this Court summarized the facts, as follows:

“At 11:00 p.m. on June 22, 2006, the T.G.I. Friday's restaurant in Somers Point closed. About twenty minutes later, only five employees remained: Eric Yaeger, William McCamy, Eugenia Juarez, Brian Katinas, and Shawn Brown. Katinas dragged several garbage cans from the kitchen out to the dumpster, leaving one to prop open the back door. He was confronted by a masked gunman pointing a gun at him. A second masked, armed man stood nearby. The first gunman ordered Katinas to tell him how many people were left in the building and where they were located. Katinas did so. The masked man brought Katinas inside at gunpoint to the dry goods storage area. Along the way he encountered Juarez and Brown. They were also escorted to the storage area. By the time they reached the storage area, a third masked gunman joined them. McCamy noticed the gunmen approaching and alerted Yaeger, who was busy tending to the cash drawer. The first gunman then followed McCamy back toward the storage area at gunpoint, while the second gunman emptied the cash drawer and demanded that Yaeger bring him to the safe in the office. The first gunman told the third gunman to shoot McCamy, but after an interruption from Brown, decided instead to rob McCamy, along with Juarez and Katinas, taking cell phones and money from their pockets. He then produced a roll of duct tape and ordered

McCamy to bind everyone else's hands.

Meanwhile, the second gunman followed Yeager to the office. Once there, Yaeger emptied the safe and handed over the contents. The gunman then ordered him to empty the bottom part of the safe, where money already prepared for deposit is dropped. Initially, when Yaeger told him that he could not access that part of the safe, the gunman 'jabbed [him] in the back of the head with the pistol and told [him] to open the [f***ing] safe.' Soon, though, he accepted Yaeger's explanation that the only key was held by an armored guard that picked up the contents twice weekly, and directed Yaeger back to the storage area.

The gunmen promptly herded everyone into the beer cooler and told them to stay put. Unknown to the gunmen, the cooler had a faulty lock. The employees waited a short time to ensure the robbers had left before escaping and calling the police."

[Da48-49.]

Co-defendant McGuire admitted that he participated in the robbery with defendant and co-defendant Sayers, and defendant was then arrested. (Da49). Defendant did not testify at trial but presented several witnesses, including his girlfriend who offered an alibi. (Da50).

On November 12, 2008, defendant was sentenced to an aggregate seventy-year NERA prison term. (Da42-45; 16T1, et seq.).

As noted above, on January 7, 2013, this Court affirmed defendant's convictions in an unpublished opinion, remanding only to merge defendant's conspiracy conviction into his robbery conviction. (Da46-62); State v. Johnson, No. A-4627-08 (App. Div. Jan. 7, 2013).

On June 28, 2013, the New Jersey Supreme Court denied defendant's petition for certification. (Da63); State v. Johnson, 214 N.J. 118 (2013).

On September 13, 2013, defendant filed his first PCR application, which was denied on April 9, 2018 in a comprehensive written opinion, following an extensive evidentiary hearing. (Da64-66; Da250-67; 17T; 18T; 19T; 20T; 21T).

On October 23, 2020, this Court affirmed the denial of defendant's PCR in an unpublished opinion. (Da268-85); State v. Johnson, No. A-0702-18 (App. Div. Oct. 23, 2020).

On January 19, 2021, the New Jersey Supreme Court denied defendant's petition for certification. (Da286).

On or about September 8, 2021, almost three years after the denial of his first PCR, defendant filed a pro se second PCR petition. (Da287-96).

On December 1, 2023, after hearing argument and considering the briefs of assigned counsel and the State, the Honorable Jeffrey R. Wilson, J.S.C., denied defendant's second PCR in a comprehensive written opinion, as being untimely and lacking in merit. (Da580-87; 22T1, et seq.). Specifically, Judge Wilson first found that defendant's second PCR petition was procedurally time-barred. (Da582-84). The judge recognized that defendant conceded that he filed his second PCR petition more than two-and-one-half years after the initial PCR denial. (Da584). As the judge recognized, defendant's initial PCR was denied on April 9,

2018, and he did not file his second PCR petition until September 8, 2021, which is more than two years after the one-year time limit. (Da584). Recognizing that, under Rule 3:22-12, an appeal of the denial of an initial PCR petition does not stay or toll the time bar, and that there is no provision for excusable neglect, the judge denied defendant's second PCR petition as time-barred. (Da582-84).

Notwithstanding the conceded time-bar, Judge Wilson also found that defendant's ineffective assistance claims lacked merit, and did not warrant an evidentiary hearing for lack of proof beyond mere "bald assertions." (Da584-86). Accordingly, the PCR judge denied defendant's second PCR petition as time-barred and lacking in merit. (Da586).

On or about January 2, 2024, defendant filed a notice of appeal with this Court. (Da588-90).

This appeal follows.

LEGAL ARGUMENT

POINT I

THE PCR COURT PROPERLY DISMISSED DEFENDANT’S SECOND PCR PETITION AS UNTIMELY BY MORE THAN TWO YEARS, ALONE JUSTIFYING AFFIRMANCE; DEFENDANT’S INEFFECTIVE ASSISTANCE OF PCR COUNSEL CLAIMS WERE NEVERTHELESS ALSO PROPERLY DENIED AS MERE “BALD ASSERTIONS” THAT WERE PREVIOUSLY LITIGATED AND LACKING IN MERIT AND SUPPORT (Da580-87; 22T1, et seq.). [Raised Below.]²

Acknowledging on appeal that defendant’s second PCR petition was subject to dismissal under the time bar for having been filed more than two-and-one-half years after the one-year time limit expired (and, 13 years after his jury conviction), defendant nevertheless seeks relaxation based on the unavailing exceptions of ignorance of the law and excusable neglect, claiming he was not advised of the time limit. (Db17-21). Notwithstanding the unforgiving procedural infirmity, defendant claims the second PCR court erred by not finding first PCR counsel ineffective for allegedly 1) only “vaguely incorporating” defendant’s pro se claims, and 2) failing to provide defendant with discovery, despite this Court’s prior rejection of that claim on appeal, warranting an evidentiary hearing. (Db21-36).

The State respectfully maintains that this Court should affirm the trial

² This point responds to the related Points I, II, III, and IV of defendant’s brief. (Db17-36).

court's dismissal of defendant's second PCR petition as patently untimely, and nevertheless lacking in merit.

First, and alone justifying affirmance, the PCR court correctly dismissed defendant's second PCR petition as untimely. (Da582-84). When a petitioner files a second PCR petition, they must meet the requirements set forth in Rule 3:22-4. Pursuant to Rule 3:22-4(b)(1), "[a] second or subsequent petition for post-conviction relief shall be dismissed unless: (1) it is timely under [Rule] 3:22-12(a)(2)...." See R. 3:22-4(b) (emphasis added). Accordingly, in relevant part, Rule 3:22-12(a)(2) requires that a second or subsequent petition for PCR shall be filed within one year of the denial of the last PCR to address ineffective assistance of PCR counsel. R. 3:22-12(a)(2).

Moreover, as the court below properly recognized, the deadline is not stayed or tolled by appellate proceedings. See State v. Murray, 162 N.J. 240, 249 (2000) (the Rule 3:22-12 time bars are "generally neither stayed nor tolled by an appellate or other proceeding"); State v. Dugan, 289 N.J. Super. 15, 19-21 (App. Div.), certif. denied, 145 N.J. 373 (1996) (holding a defendant's failure to comprehend the meaning of Rule 3:22-12 does not constitute excusable neglect); State v. Dillard, 208 N.J. Super. 722, 727 (App. Div. 1986).

And, of course, it is well-settled that "[i]gnorance of the law and rules of court" cannot make an untimely PCR timely. State v. Brewster, 429 N.J. Super.

387, 400-01 (App. Div. 2013) (noting in the excusable neglect context applicable to first PCRs that “[i]f excusable neglect for late filing of a petition is equated with incorrect or incomplete advice, long-convicted defendants might routinely claim they did not learn about the deficiencies in counsel’s advice on a variety of topics until after the...limitation period had run”); cf. State v. Marola, 365 N.J. Super. 203, 218 (Law Div. 2002), aff’d, 365 N.J. Super. 82 (App. Div. 2003), certif. denied, 179 N.J. 312 (2004) (finding that a “lack [of] sophistication in the law does not” constitute excusable neglect justifying the untimely filing of a first PCR).

Finally, the time bar imposed in these court rules may not be relaxed or enlarged on the grounds of “excusable neglect” or “fundamental injustice.” See R. 3:22-12(a)(1); State v. Jackson, 454 N.J. Super. 284, 293 (App. Div.), certif. denied, 236 N.J. 35 (2018). Viewing the rules in light of their dual purposes of ensuring the passage of time does not prejudice the State’s retrial of a defendant, and to respect the need to achieve finality, this Court noted, in Jackson:

By mandating in Rule 3:22-12(a)(2) that the one-year time limit applied ‘[n]otwithstanding any other provision of this rule,’ the Supreme Court made clear that the late filing of a second or subsequent PCR petition could not be excused in the same manner as the late filing of a first PCR petition.

[Jackson, 454 N.J. Super. at 293.]

The Jackson court explained, relaxation of the time limits provided in Rule 3:22-12 is also prohibited by Rule 1:3-4(c), which provides that “[n]either the parties nor

the court may...enlarge the time specified by...R. 3:22-12 (petitions for post-conviction relief)[.]” Id. at 292-93 (quoting R. 3:22-12(a)(2)). This Court has made clear that the time limits under Rule 3:22-12 are to be strictly enforced. State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018), certif. denied, 236 N.J. 374 (2019).

Here, the second PCR judge properly found that defendant’s second PCR petition was untimely. Both before the second PCR judge and in the instant appeal, defendant rightfully has conceded that defendant’s second PCR petition was untimely. Defendant’s initial PCR was denied on April 9, 2018, and defendant did not file his second PCR petition until September 8, 2021, which is approximately two-and-one-half years after the one-year time limit. (Da584). Recognizing that, under Rule 3:22-12, an appeal of the denial of an initial PCR petition does not stay or toll the time bar, and that there is no provision for relaxation based on ignorance of the rules or excusable neglect, the judge properly denied defendant’s second PCR petition as time-barred. (Da582-84).

And, second, while the time bar is dispositive, the PCR court also properly rejected defendant’s ineffective assistance claims as lacking merit and support, and therefore, not warranting an evidentiary hearing for lack of proof beyond mere “bald assertions.” (Da584-86). Specifically, both claims that defendant raised below—that original PCR counsel was ineffective for allegedly merely

incorporating defendant's pro se claims, and for allegedly failing to review discovery with defendant--lacked merit as they were flatly belied by the record. (Db21-34).

At the outset, defendant's renewed challenge, that original PCR counsel was ineffective for allegedly merely "vaguely incorporate[ing]" defendant's pro se claims, was procedurally barred under Rule 3:22-5, as previously adjudicated by this Court. This procedural bar applies where the claim raised is "identical or substantially equivalent" to a claim raised on direct appeal or in a prior PCR petition. State v. McQuaid, 147 N.J. 464, 484 (1997) (internal quotation omitted); see also State v. Marshall, 173 N.J. 343, 351 (2002) (explaining that Rule 3:22-5 precludes "consideration of an argument presented in [a PCR] proceeding...if the issue is identical or substantially equivalent to that adjudicated previously on appeal") (citations omitted). In this Court's October 23, 2020 opinion affirming the denial of defendant's appeal of his original PCR appeal, this Court disposed of this very issue. (Da268-85). Specifically, this Court rejected defendant's same claim that PCR counsel was ineffective for having failed to raise unspecified issues, and expressly credited the original PCR judge's representation that she considered all of defendant's contentions. (Da283-84).

Notwithstanding that additional procedural bar, the second PCR court properly rejected defendant's claim as wholly lacking both factual and legal

support. (Da585). Defendant admits that original PCR counsel “vaguely incorporated” the points raised in defendant’s pro se brief. (Db24). Rule 3:22-6(d) requires counsel’s brief in the PCR court to advance the legitimate grounds for relief raised by a pro se defendant, and to list other grounds that defendant insists be asserted. State v. Webster, 187 N.J. 354 (2006); State v. Rue, 175 N.J. 1, 19 (2002). Those cases interpreting this rule do not require counsel to orally argue his client’s grounds for relief. Rather, “as in any case in which a brief is filed, counsel may choose to stand on it at the hearing, and is not required to further engage in expository argument.” Webster, 187 N.J. at 257 (quoting Rue, 175 N.J. at 19).

Here, original PCR counsel fully incorporated all of defendant’s pro se claims on the record, and in his brief. Directly citing Rue and Webster at the January 11, 2018 PCR hearing, original PCR counsel stated, “[W]e’re specifically requesting that you consider Mr. Johnson’s pro se pleadings,” at one point expressly incorporating the entirety of defendant’s thirty-two point brief (19T4-19 to 25). (21T25-23 to 26-1). Likewise, the original PCR judge stated that she indeed considered all of defendant’s contentions, and this Court properly deferred to that representation: “[T]he PCR judge indicated that she considered all of defendant’s contentions, and we have no reason to believe otherwise.” (Da284). Original PCR counsel was not ineffective, as this Court previously found.

Likewise, defendant's claim that original PCR counsel was ineffective for allegedly failing to provide defendant with discovery is specious and flatly belied by the record. The record is clear that defendant indeed once had received and reviewed all of his discovery (1T61-20 to 62-17); the only issue at the original PCR hearing related to the fact that defendant had since lost some of it, and so defendant was expressly requesting only a copy of the trial file of his original attorney, Mr. Hughes, and a copy of defendant's attorney's direct appeal brief. (17T6-22 to 7-3; 17T14-1 to 5). Specifically referencing defendant's original attorney's file, original PCR counsel averred that "[t]he discovery in Mr. Hughes' file has already been provided to my client." (17T6-23 to 25). Original PCR counsel continued, "My client's position was that, because of all the moves he's made and the briefs that he's written, that it was taken apart, and it was left behind, and he doesn't have it anymore." (17T6-25 to 7-3). Indeed, original PCR counsel averred, "I made a whole other copy for my client, but he doesn't have it anymore." (17T7-5 to 6; 17T7-9). Original PCR counsel clearly went above and beyond to provide replacement copies for defendant. As the original PCR judge observed, "there's a difference between discovery and the file." (17T7-12 to 13).

Finally, as the second PCR recognized, defendant's "bald assertions" failed to establish a prima facie showing to warrant an evidentiary hearing. (Da586).

The second PCR judge properly denied defendant's second PCR petition as time-barred and lacking in merit. (Da586).

Accordingly, the State respectfully asks this Court to affirm the denial of defendant's untimely second PCR petition.

CONCLUSION

For the reasons expressed, the State respectfully requests that this Court affirm the denial of defendant's second PCR petition as time-barred, and without merit.

Respectfully submitted,

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February 10, 2025

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
DOCKET NO. A-1304-23T1

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Appeal From Order Denying
v.	:	A Petition for Post-Conviction Relief
DERRICK JOHNSON,	:	in the Superior Court of New Jersey,
Defendant-Appellant	:	Law Division, Atlantic County
	:	Sat Below:
	:	Hon. Jeffrey R. Wilson, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

Honorable Judges,

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter-brief in lieu of a formal brief is submitted on behalf of Defendant-Appellant.

DEFENDANT IS CONFINED

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STATEMENT OF PROCEDURAL HISTORY

Appellant relies on his Statement of Procedural History as set forth in his initial brief at Db1 to Db3.¹

¹ The following abbreviations will be used in this reply brief:
Db refers to Appellant's initial merits brief;
Sb refers to the State's response brief;
Da refers to Appellant's appendix attached to the initial permits brief;
"1T" refers to the pretrial motion transcript of 2/26/08
"2T" refers to the trial transcript of 9/8/08.
"3T" refers to the trial transcript of 9/9/08 (Volume 1).
"4T" refers to the trial transcript of 9/9/08 (Volume 2).
"5T" refers to the trial transcript of 9/10/08 (Volume 1).
"6T" refers to the trial transcript of 9/10/08(Volume 2).
"7T" refers to the trial transcript of 9/11/08 (Volume 1)
"8T" refers to the trial transcript of 9/11/08(Volume 2).
"9T" refers to the trial transcript of 9/15/08 (Volume 1).
"10T" refers to the trial transcript of 9/15/08(Volume 2).
"11T" refers to the trial transcript of 9/16/08.
"12T" refers to the trial transcript of 9/1708.
"13T" refers to the trial transcript of 9/18/08 (Volume 1).
"14T" refers to the trial transcript of 9/18/08 (Volume 2).
"15T" refers to the jury verdict transcript of 9/19/08.
"16T" refers to the sentencing transcript of 11/12/08.
"17T" refers to the transcript of the 2/26/16 PCR hearing.
"18T" refers to the transcript of the 7/21/16 PCR hearing.
"19T" refers to the transcript of the 5/4/17 PCR hearing.
"20T" refers to the transcript of the 11/15/17 PCR hearing.
"21T" refers to the transcript of the 1/11/18 PCR hearing.
"22T" refers to the transcript of the 11/1/23 Second PCR hearing.

STATEMENT OF FACTS

Appellant relies on his Statement of Facts as set forth in his initial brief at Db4 to Db16.

LEGAL ARGUMENT

Point I

The time-bar should be relaxed in this particular case.

Mr. Johnson should not have to lose his PCR rights because his prior attorneys failed to keep him updated about the PCR appellate timeline or the continued vindication of his rights. Further, whether the one-year limitations period on second PCRs in Rule 3:22-12(a)(2) is as absolute as the second PCR judge believes it to be is a gray area. Arguably, it is not absolute.

Rule 3:22-12 sets forth all of the time bars for first PCR petitions in subsection (a)(1) and for second and subsequent PCR petitions in subsection (a)(2). Subsection (b) provides that “[t]hese time limitations shall not be relaxed, except as provided herein.” R. 3:22-12(b). While there is no language about exceptions that are specific to subsection (a)(2), nothing limits the application of the subsection (a)(1) exceptions. This seems to be a gray area in our PCR procedural rules.

The caselaw does not offer a final word on the issue. Like the second PCR court, the State relies on State v. Jackson, 454 N.J. Super. 284 (App. Div.), certif. denied, 236 N.J. 35 (2018), and State v. Brown, 455 N.J. Super. 460 (App. Div.), certif. denied, 236 N.J. 374 (2019). (Sb9 to Sb10) A close reading of the holdings

in Jackson and Brown reveals that neither decision explicitly stands for the proposition that the time bar in Rule 3:22-12(a)(2) is absolute.

The decisions suggest that there may be exceptional circumstances, higher than excusable neglect, that still merit allowing the filing of a second PCR petition beyond the one-year limitations period. In Jackson, the panel acknowledged that the formulation of excusable-neglect-plus-fundamental-injustice that can justify the late filing of a first PCR does not apply to second or subsequent petitions: “[T]he filing of a second or subsequent PCR petition could not be excused in the same manner as the late filing of a first PCR petition.” Jackson, 454 N.J. Super. at 294. While the late filing of second PCR petitions are not analyzed “in the same manner” as late first PCR petitions, this language does not preclude other manners of analyzing late second PCR petitions.

And in reaching its holding, the Jackson panel wrote,

Defendant has not shown exceptional circumstances justifying filing his second PCR petition fourteen years after his judgment of conviction, and eight years after his first PCR petition. In his second PCR petition, he made no effort to show excusable neglect. He has not shown reliance on the pre-amendment rules. He did not file his second PCR petition within one year of the rule amendments. In short, there is no basis to exempt him from the rules applicable at the time he filed his second petition

Id. at 295-96.

This holding is a highly fact-sensitive one. It is not based on a brightline rule that the time-bar in Rule 3:22-12(a) is absolute. The panel’s analysis implies that had Petitioner Jackson demonstrated “exceptional circumstances,” there might have been justification to allow his second PCR petition. The Jackson holding implies that there may be a standard higher than the standard for late first PCR petitions that applies to late second PCR petitions – it is just that Petitioner Jackson did not come close to meeting that standard. It does not mean that the standard does not exist.

The Brown case does not address a second PCR application. See Brown, 455 N.J. Super. 460, 464-65 (setting forth procedural history of case, starting with guilty plea, the absence of a direct appeal, and that this PCR appeal arose from a first PCR petition that was filed six years late). Initially, the State did not challenge the timeliness of the Brown PCR application, and the appellate panel sua sponte raised the issue for the first time during the appeal. Id. at 467. The central holding in Brown was that in all first PCR petitions, the judge “has an independent, non-delegable duty to question the timeliness of the petition, and to require that defendant submit competent evidence to satisfy the standards for relaxing the rule’s time restrictions pursuant to Rule 3:22-12.” Id. at 470. But the Brown holding does not address second PCR petitions and only acknowledges the public policy concerns advanced by having time limits on PCR applications. See id. at

470 (quoting State v. McQuaid, 147 N.J. 464, 485 (1997) and State v. Mitchell, 126 N.J. 565, 575-76 (1992) for the policy reasons underlying the Rule 3:22-12 time bar).

It is respectfully submitted that there is a way forward for late-filing second PCR petitioners under the caselaw, as implied by Jackson. The existence of that path accords with other public policy concerns addressed by PCRs. Finality and repose are one thing, but the Rules governing PCR petitions also “do not render our courts ‘powerless to correct a fundamental injustice.’” State v. Hannah, 248 N.J. 148, 178 (quoting State v. Nash, 212 N.J. 518, 547 (2012)). For example, in Hannah, the New Jersey Supreme Court overlooked substantive Rule 3:22-2 procedural bars on Petitioner Hannah’s second PCR petition that was also litigated piecemeal over fourteen years to reach the merits of his PCR claims. Id. at 175. Petitioner Hannah prevailed, and his matter was remanded for a new trial, twenty-seven years after he was sentenced. Id. at 176. The Court concluded:

The passage of time alone cannot be a basis to bar relief to a defendant deprived of a fair trial because he was denied the opportunity to present a complete defense. This remedy may come late for Hannah, who was convicted twenty-seven years ago and has been toiling through the post-conviction relief process for fourteen years – but it would be a far greater injustice if it never came at all.

Ibid.

Therefore, it is submitted that the caselaw holds space for circumstances that save an untimely second PCR petition. It is also submitted that those circumstances exist here: ineffective performance of first PCR counsel, no notification about the one-year deadline for second PCRs, the first PCR appeal, and a delay of months before Mr. Johnson learned about the outcome of the first PCR appeal. (See Db20 to Db21; Da575 to Da576; Da578 to Da579; Da575 to Da576)

In this case and in many others, information about second PCRs is not announced in the same way direct appeal rights and first PCR rights are acknowledged at sentencing. It should be noted that, at the end of the first PCR oral argument on January 11, 2018, the court said of the PCR litigation, “It needs to have some finality [as the first PCR was initially filed on September 13, 2013]. And if he’s unhappy with finality, then that can be addressed at the Appellate Division if there’s a negative decision on your client’s PCR.” (20T60-13 to 16) The court did not inform Petitioner that a second PCR to address the ineffective assistance of first PCR counsel is an option. In the court’s April 9, 2018 written decision, the court did not advise Johnson of the option of filing a second-PCR or the timeline for that. (See Da267) Unlike with direct appeal rights and first PCR rights, there is no standard court warning about second PCR rights and the timeline. To avoid this repeated issue with second PCRs, perhaps there should be a similar instruction given to second PCR petitioners. But right now, there is no such

instruction, while second PCR petitioners are often held to the timeline in R. 3:22-12(a)(2). Second PCR petitioners like Mr. Johnson, who almost always begin the second PCR process pro se, should not be held to what they do not know.

For the above reasons and as set forth in the initial merits brief, this Court should look past the time bar and evaluate the substantive merits of Mr. Johnson's application.

Point II

Mr. Johnson's substantive points have merit, and the second PCR court did not address the substantive merit of the second PCR claims.

Through the exhibits attached to second PCR counsel's brief, Mr. Johnson demonstrated years of first PCR counsel's ineffective assistance of counsel. He tried to get help with his ineffective first PCR attorney during the five-year pendency of that application. He tried writing the judge and the Office of the Public Defender for help, and he tried writing to first PCR counsel, asking him to do different things. (Da406 to Da413; Da414 to Da417; Da418 to Da419; Da420 to Da422; Da423 to Da429; Da430 to Da434; Da435 to Da437; Da444 to Da455) On November 15, 2017, he moved for removal of first PCR counsel. (Da355) On February 10, 2020, Mr. Johnson wrote first PCR counsel with PCR issues he wanted raised. (Da374 to Da375) Mr. Johnson asked first PCR counsel to research

the issues and advised that he was still waiting to see the discovery and for a copy of first PCR counsel's brief. (Da375) It seems that first PCR counsel had either not notified Mr. Johnson of his unsuccessful first PCR petition or explained its significance.

The State argues that first PCR counsel's perfunctory request that the first PCR court consider Mr. Johnson's pro se points (19T4-19 to 25) fulfilled his obligations under and State v. Webster, 187 N.J. 354 (20006) and State v. Rue, 175 N.J. 1 (2002). (See Sb12) This is not so. While Rue and Webster do not require PCR counsel to fully brief the pro se claims or argue them, simply referring to the existence of the pro se pleadings was ineffective. Mr. Johnson had thirty-two pro se claims, and counsel did not even acknowledge that there were thirty-two separate points for the first PCR judge to consider, let alone list them out in a coherent fashion in the counseled amended petition or in the counseled brief. A PCR attorney still has to present a PCR petitioner's points in an effective way, and part of that is guiding the PCR court through the pro se claims. First PCR counsel did not attempt to do that here, making it easier for the first PCR court to similarly gloss over these claims. (Da284) First PCR counsel's presentation of the pro se claims was ineffective in its vagary.

The appropriate relief, then, is to grant a renewed first PCR, where second PCR counsel can explicitly lay out every single of Mr. Johnson's thirty-two points,

and the PCR court can evaluate those thirty-two points, alongside the counseled first PCR claims.

CONCLUSION

For the foregoing reasons set forth in this reply brief and in Appellant's initial brief, it is respectfully requested that this court grant Mr. Johnson post-conviction relief. Alternatively, it remains respectfully requested that this court remand the PCR and an evidentiary hearing on the underlying and unexplored thirty-two initial PCR claims.

Respectfully submitted,

JENNIFER N. SELLITTI
PUBLIC DEFENDER
ATTORNEY FOR THE DEFENDANT-APPELLANT

By: /s/ Kayla Rowe
Kayla Rowe

Dated: February 10, 2025