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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0140-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GREGORY HARRIS,

Defendant-Appellant.

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Submitted November 2, 2022 – Decided January 4, 2023

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey,  
Law Division, Gloucester County, Indictment No. 04-  
01-0055.

Joseph E. Krakora, Public Defender, attorney for  
appellant (Andrew R. Burroughs, Designated Counsel,  
on the briefs).

Christine A. Hoffman, Acting Gloucester County  
Prosecutor, attorney for respondent (Jonathan I.  
Amira, Special Deputy Attorney General/Acting  
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In 2005, the Law Division entered a judgment of conviction sentencing defendant Gregory Harris to an aggregate fifty-five-year sentence subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, following his conviction by a jury of aggravated manslaughter, felony murder, attempted murder, attempted robbery, multiple counts of aggravated assault, and weapons offenses. Twelve years later, defendant filed a post-conviction relief (PCR) petition claiming his appellate counsel was ineffective by failing to file a brief in support of defendant's direct appeal, thereby causing the appeal's dismissal. Defendant appeals from an order denying his PCR petition without an evidentiary hearing based on the court's determination the appeal was not timely filed under Rule 3:22-12. Based on our review of the record, we vacate the court's order and remand for further proceedings.

## I.

### Defendant's Trial, Conviction, and Sentencing

The evidence at his trial showed that in August 2003, defendant and Lamar Young had a physical altercation during which Young struck defendant and rendered him unconscious. Subsequently, defendant obtained a gun in Philadelphia. Two weeks after the altercation, defendant brought the gun, which he described to others as "a cannon," to an apartment complex.

Defendant fired the gun and confronted and threatened Young. While armed with the gun, defendant also demanded money from Young, stating, "What you got to donate?"; "Are you ready to 'fing' die?"; and "Give me all your money . . . ."

Young used another individual, Joseph Bluford, as a shield and retreated to a nearby apartment building that he later exited, leaving the scene on a bicycle. When Bluford attempted to stop the confrontation between defendant and Young, defendant struck Bluford with the gun. Bullets fired from the gun struck Dwayne Martin in the arm and back, and Alexander Burgos in the chest, causing his death.

Defendant fled the scene in a vehicle driven by his cousin Whitney Harris.<sup>1</sup> They went to Philadelphia, where defendant delivered the gun, which was never recovered, to his sister. Whitney Harris later entered into a plea agreement on charges related to her involvement in the incident. In accordance with the plea agreement, she testified for the State at defendant's trial. She testified defendant told her he had a problem with Young, whom defendant said owed him money, and he would handle the problem. She further testified she saw defendant holding a gun during the confrontation with

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<sup>1</sup> We refer to Whitney Harris by her full name throughout the opinion because she shares the same surname as defendant.

Young at the apartment complex, saw defendant fire the gun, and heard defendant ask Young, "Where my money at?"

Whitney Harris also explained Bluford tried to intervene in the confrontation, defendant struck Bluford in the head with the gun, and the gun then discharged. She further testified she drove with defendant to Philadelphia, where he left the gun with his sister.

Martin testified at trial, explaining he was at the apartment complex and saw defendant pull a handgun out of his pants as Young tried to escape. Martin stated Bluford "tried to calm the two men down" and defendant struck Bluford in the head with the gun, knocking Bluford out. Martin testified a bullet struck him in the arm, but he did not know if defendant shot him. He recalled hearing three-to-five shots fired.

Another witness, Grant Brackett, testified defendant and Young each had a child with the same woman. Brackett explained that during the altercation between Young and defendant earlier in August, Young knocked out defendant, and defendant was "depressed" because Young had overpowered him. On August 29, 2003, the day of the shooting, Brackett spent time drinking with defendant and Whitney Harris before returning with defendant to the apartment complex, where Whitney Harris later rejoined them. Brackett

testified he heard shots, and saw defendant and Whitney Harris run toward, and enter, Whitney Harris's vehicle.

Young also testified at trial. He stated he lived near the apartment complex, had known defendant for eight or nine years, and had a fight with defendant a few weeks before the August 29, 2003 shooting incident. According to Young, during the fight earlier in August, he knocked out defendant twice.

Young also testified that on August 29, 2003, he heard what he thought were firecrackers while at the apartment complex, and saw defendant fire a gun in his direction three times. He also explained defendant ran up to him and demanded money. Young further testified he hid behind Bluford, and then saw Bluford on the ground. Young ran to an apartment and heard another gunshot. He ran from the apartment and fled on his bicycle.

Defendant's aunt, Lori Burt, testified defendant told her he wanted to get even with Young because Young had done something to him. Burt further testified defendant was "mad" at Young and intended to "get" him.

DNA testing of a baseball cap found at the scene revealed defendant could not be excluded as a contributor to the mixed DNA found on the cap. In addition, defendant's fingerprints were found on a cigarette package recovered

from Whitney Harris's vehicle. The State presented evidence that three forty-five caliber shell casings — all fired from the same gun — were recovered at the scene.

#### Defendant's Direct Appeal and Its Dismissal

Following his conviction of multiple offenses arising from the shooting incident, and the court's imposition of sentence and April 5, 2005 entry of a judgment of conviction, defendant retained appellate counsel who filed a timely notice of appeal on May 20, 2005. Appellate counsel obtained a number of extensions of time to file a brief in support of the direct appeal. On January 10, 2006, we dismissed the appeal because appellate counsel failed to file the requisite brief.

Appellate counsel later employed other counsel to seek reinstatement of the appeal. Those efforts were unsuccessful. In an October 21, 2013 order, we denied a motion for reinstatement of the appeal. In 2015, we dismissed a second motion to reinstate the appeal because it was not accompanied by the requisite filing fee, counsel was provided notice of the deficiency, and the deficiency was not cured. In a May 13, 2015 order, we denied a third motion to reinstate the appeal, finding in part defendant's counsel offered no explanation for the delay between the 2006 order dismissing the appeal and the

2013 filing of the initial reinstatement motion or the further delay in filing the subsequent reinstatement motions following the denial of the 2013 motion.

### Defendant's PCR Petition

In October 2017, twelve years after entry of his judgment of conviction and eleven years after dismissal of his direct appeal, defendant filed a pro se PCR verified petition asserting his appellate counsel was ineffective by "not filing [the] direct appeal in a timely fashion."<sup>2</sup> Following the assignment of counsel, defendant filed a verified First Amended Petition For Post-Conviction Relief asserting appellate counsel was ineffective by "fail[ing] to perfect and file the required [a]ppellant's [b]rief in accordance with the [r]ules of [a]ppellate [p]ractice," thereby causing the dismissal of defendant's appeal "with prejudice."

In his amended petition, defendant offered an explanation for his long delay in filing the PCR petition. Defendant explained that following his conviction, he retained appellate counsel to prosecute the appeal. On May 20, 2005, appellate counsel filed a notice of appeal and thereafter obtained "one or

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<sup>2</sup> Defendant's original assertion appellate counsel failed to file a timely appeal was incorrect. As we have explained, appellate counsel timely filed a notice of appeal, but the appeal was later dismissed because counsel failed to file a brief on defendant's behalf.

more extensions" of time to file an "initial or principal" brief on defendant's behalf.

Defendant further explained appellate counsel did not "fulfill his professional undertaking" because he failed to file a brief and, as a result, the court dismissed the direct appeal. According to defendant, he and his family "inquired repeatedly with . . . [appellate counsel] as to the appeal's status" and appellate counsel "revealed in part that there was a problem with the appeal, but [appellate counsel] repeatedly assured [defendant] and [his] family that he was working on straightening out the problem and getting the appeal back on track." Defendant also asserted a 2017 inspection of appellate counsel's files by defendant's PCR counsel revealed appellate counsel "enlist[ed] other counsel's assistance in perfecting and filing a motion to reinstate the appeal," but those efforts were unsuccessful.

According to defendant, following appellate counsel's retention and filing of the notice of appeal, and following what defendant later discovered was the dismissal of the appeal, appellate counsel "remained in periodic communication with [defendant] and his family and assured them that he was taking steps to further the appeal." Defendant asserted he "and his family relied upon [appellate counsel's] assurances, despite the passage of many



months and ultimately several years." It was not until "late 2017" that appellate counsel "apparently became resigned to the fact that none of his efforts or the exertions of other counsel assisting him were succeeding" in obtaining "an opening or re-instatement of his dismissed appeal," and appellate counsel "admitted . . . he had caused [defendant] to lose his appellate rights."

In November 2017, defendant filed his PCR petition asserting ineffective assistance of appellate counsel. Defendant's amended PCR petition also detailed a series of claimed errors by the trial court he asserted should have been raised by appellate counsel on the direct appeal that had been dismissed.<sup>3</sup> Defendant's amended petition also included a claim his trial counsel was ineffective by failing to argue in summation he should not be convicted of felony murder because the evidence did not establish Burgos's death occurred during the commission of a robbery.

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<sup>3</sup> Defendant claimed appellate counsel should have argued in the brief failed to file in support of the direct appeal that the trial court erred by: denying defendant's requests for continuances of the trial "to permit completion of investigation and expert analysis for the defense"; failing to instruct the jury on the lesser-included offense of passion-provocation manslaughter; denying defendant's motion for a mistrial "based on the fact that an image of [d]efendant wearing prison attire was displayed on a [television] monitor that was . . . used to replay courtroom testimony"; and by limiting trial counsel's cross-examination of Whitney Harris.

The amended petition was also supported by a certification from defendant's appellate counsel who acknowledged he "failed to file the required appellate brief" in support of defendant's direct appeal and, "[a]s a result," the court dismissed the appeal. Appellate counsel explained that based on personal issues at the time, he "found [himself] unable to meet the demands of [his] practice."

Appellate counsel further stated that "[w]hen defendant inquired from time to time about the status of the appeal," he "would assure [defendant] that [he] was working with the court and other counsel to perfect the appeal." Counsel also represented that "[i]n fairly short order," he informed defendant he "had failed to meet a briefing deadline and that the court . . . dismissed the appeal, but [he] assured [defendant he] was working on undoing that development and making the appeal go forward." According to appellate counsel, he engaged other counsel "to try to resuscitate the appeal," including the filing of the 2013, 2014, and 2015 unsuccessful motions to reinstate the appeal.

Appellate counsel also explained that "[d]uring these several years," defendant and his family inquired as to the status of the case. In response to the inquiries, appellate counsel "continued to assure them that [he] was

working to get the appeal re-instated." According to appellate counsel, in the Spring of 2017, he met with defendant's current PCR counsel and explained "the mishaps and failures on [his] attempts to resuscitate [the] appeal." During the meeting, appellate counsel also explained "that [defendant] and his family had trusted in [his] assurances that [he] would rectify these errors."

#### The PCR Court's Decision

Following oral argument on defendant's PCR petition, the court issued a written memorandum of opinion. The court found defendant's petition time-barred under Rule 3:22-12(a)(1) because it was filed more than five years following entry of his judgment of conviction. The court noted the Rule in part permits the filing of a PCR petition beyond the five-year deadline where a defendant demonstrates excusable neglect for the late filing, but the court concluded appellate counsel's assurances over the years that "he would pursue the appeal" did not excuse defendant's "extreme tardiness in filing [his] petition." The court also found it "highly likely" the late filing of the petition would prejudice the State if the case were retried because the shooting incident occurred sixteen years earlier and the State would have difficulty locating witnesses and evidence.

Although it concluded defendant's petition was time-barred, the court also addressed defendant's arguments in the amended PCR petition that the trial court committed various errors requiring reversal of his conviction and defendant's trial counsel was ineffective. Thus, the court addressed, decided, and rejected the arguments concerning the purported errors of the trial court defendant claimed appellate counsel should have made on the direct appeal.

The court entered an order denying the PCR petition without an evidentiary hearing. This appeal followed. On appeal, defendant presents the following arguments for our consideration:

POINT I

THE INTEREST OF JUSTICE AND FAIR PLAY  
REQUIRE RELAXATION OF THE TIME BAR IN  
THIS CASE.

POINT II

AS DEFEND[A]NT HAD DEMONSTRATED THAT  
GROSS NEGLIGENCE BY APPEL[LATE]  
COUNSEL DENIED HIM A CONSTITUTIONAL  
RIGHT TO A DIRECT APPEAL, THE PCR COURT  
ERRED WHEN IT APPLIED THE WRONG  
STANDARD OF REVIEW.

POINT III

AS DEFENDANT HAS SHOWN THAT TRIAL  
COUNSEL PROVIDED INEFFECTIVE LEGAL  
REPRESENTATION WHEN HE FAILED TO

CONTEST THE FELONY MURDER CHARGE, HE  
WAS ENTITLED TO POST-CONVICTION RELIEF,  
OR IN THE ALTERNATIVE TO AN  
EVIDENTIARY HEARING.

(1) Trial counsel's failure to contest the felony murder charge denied defendant his Sixth Amendment right to a complete defense.

(2) As there were genuine issues of material facts in dispute an evidentiary hearing was required before the PCR court denied defendant's post-conviction relief petition.

II.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard of review applies to mixed questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply that standard here.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee that a defendant in a criminal proceeding has the right to the assistance of counsel in his or her defense. The right to counsel includes "the right to the effective assistance of

counsel." State v. Nash, 212 N.J. 518, 541 (2013) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).

In Strickland, the Court established a two-part test, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), as the standard applicable under the New Jersey Constitution, to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687. Under the first prong of the Strickland standard, a petitioner must show counsel's performance was deficient. Ibid. A petitioner must demonstrate counsel's handling of the matter "fell below an objective standard of reasonableness" and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88.

Under the second prong of the Strickland standard, a defendant must "affirmatively prove" "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Strickland, 466 U.S. at 694). A petitioner must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. "The error committed must be so serious as to

undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694).

"The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." State v. O'Neil, 219 N.J. 598, 610-11 (2014); accord State v. Guzman, 313 N.J. Super. 363, 374 (App. Div. 1998); see also State v. Morrison, 215 N.J. Super. 540, 545 (App. Div. 1987) (citing Evitts v. Lucey, 469 U.S. 387 (1985)) ("[D]ue process guarantees a criminal defendant effective assistance of counsel on a first appeal as of right"). We apply the Strickland standard to assess an ineffective assistance of appellate counsel claim. Harris, 181 N.J. at 518; Morrison, 215 N.J. Super. at 545.

Defendant argues he established a prima facie ineffective assistance of counsel claim because he presented competent evidence — his amended verified petition and appellate counsel's certification — demonstrating appellate counsel's failure to file a brief resulted in the dismissal of the direct appeal. We agree. It is undisputed appellate counsel's failure to file a brief resulted in the dismissal of defendant's direct appeal, and we are convinced the failure constituted a deficient performance under the first prong of the Strickland standard. See Strickland, 466 U.S. at 687. Appellate counsel's

failure to file the brief is an "error[]" so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88.

Indeed, the error is so serious defendant was not required to demonstrate prejudice under Strickland's second prong because where "counsel's deficient performance 'led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself[,] . . . the 'denial of the entire judicial proceeding . . . demands a presumption of prejudice.'" State v. Carson, 227 N.J. 353, 354 (2016) (alterations in original) (quoting Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000)).

Additionally, where, as here, "counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." Flores-Ortega, 528 U.S. at 484; see also Carson, 227 N.J. at 354; State v. Jones, 446 N.J. Super. 28, 33 (App. Div. 2016) (quoting Flores-Ortega, 528 U.S. at 484) (explaining a defendant in a PCR proceeding "is not required to show he 'might have prevailed'" in an appeal that is forfeited by the actions of counsel).



In apparent reliance on Rule 3:22-12(a)(1)(A), the court deemed the petition untimely based on its findings the petition was not filed within five years of defendant's April 2005 sentencing and defendant failed to demonstrate excusable neglect for the late filing.<sup>4</sup> The court found appellate counsel's assurances to defendant the appeal would be reinstated "constitute[d] a breach of an attorney's duty of care to his client," but they did "not excuse" defendant's "extreme tardiness in filing his petition."

Rule 3:22-12 prescribes the time limitations for filing first petitions for PCR. Pertinent here, the Rule generally provides that "no petition shall be filed . . . more than [five] years after the date of the entry . . . of the judgment of conviction that is being challenged." R. 3:22-12(a)(1). There are two exceptions to the five-year time limitation. First, the five-year time limitation does not apply where the PCR petition "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." R. 3:22-12(a)(1)(A). Second, the five-year limitation does not apply where the PCR petition "alleges a claim for relief as set forth in [Rule 3:22-12(a)(2)(A)

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<sup>4</sup> The PCR court does not expressly refer to Rule 3:22-12 in its discussion of the timeliness of defendant's petition.

or (a)(2)(B)] and is filed within the one-year period set forth in [Rule 3:22-12(a)(2)]." R. 3:22-12(a)(1)(B). We address the application of the first exception — under Rule 3:22-12(a)(1)(A) — because it provided the basis for the PCR court's determination the appeal was untimely, and the parties do not argue on appeal the second exception — under Rule 3:22-12(a)(1)(A) — applies.

The court entered defendant's judgment of conviction on April 5, 2005. Thus, Rule 3:22-12(a)(1) required the filing of defendant's first PCR petition no later than April 5, 2010, unless an exception to that requirement applied. Defendant filed his petition on October 25, 2017, more than seven years after the five-year deadline. He claims he timely filed the petition under the first exception to the five-year deadline under N.J.S.A. 3:22-12(a)(1)(A) because he demonstrated excusable neglect for the late filing and his factual assertions, if found to be true, establish enforcement of the time bar would result in a fundamental injustice.

"Excusable neglect provides the means for a court to address and correct a criminal judgment where 'adherence to it would result in an injustice.'" State v. Norman, 405 N.J. Super. 145, 159 (App. Div. 2009) (quoting State v. McQuaid, 147 N.J. 464, 485 (1997)). To establish "excusable neglect" under

Rule 3:22-12(a)(1)(A), a defendant must demonstrate "more than simply providing a plausible explanation for a failure to file a timely PCR petition."

Ibid.

In assessing whether a defendant has demonstrated excusable neglect, a court must weigh "the extent of the delay," "the purposes advanced by the five-year rule," "the nature of defendant's claim[,] and the potential harm . . . realized" by defendant, State v. Murray, 162 N.J. 240, 251 (2000) (citing State v. Mitchell, 126 N.J. 565, 580 (1992)), as well as the "cause of the delay, the prejudice to the State, and the importance of the [defendant's] claim in determining whether there has been an 'injustice' sufficient to relax the time limits," Norman, 405 N.J. Super. at 159 (quoting State v. Afanador, 151 N.J. 41, 52 (1997)). "Ignorance of the law and rules of court does not qualify as excusable neglect," State v. Merola, 365 N.J. Super. 203, 218 (Law Div. 2002), aff'd, 365 N.J. Super. 82 (App. Div. 2003) (citing Murray, 162 N.J. at 246), and a defendant's decision to "remain intentionally ignorant of . . . legal consequences" does not support a finding of excusable neglect, State v. Brown, 455 N.J. Super. 460, 471 (App. Div. 2018).

Measured against these principles, defendant's amended petition and appellate counsel's certification support a finding of excusable neglect. They

demonstrate appellate counsel forfeited defendant's direct appeal by failing to file the required brief in support of the appeal. As we have explained, that failure and the resultant dismissal of the appeal constituted a deprivation of defendant's constitutional right to the effective assistance of counsel, even in the absence of any demonstration of prejudice under the Strickland standard. Carson, 227 N.J. at 354. Thus, application of the five-year time bar will result in the injustice of providing no remedy for a defendant who was deprived of his constitutional right to the effective assistance of appellate counsel.

Moreover, defendant's allegations of fact and those of his appellate counsel submitted provide more than a plausible explanation for the delay in filing his PCR petition claiming his appellate counsel was ineffective. Most simply stated, the assertions of fact demonstrate that following the 2006 dismissal of the appeal and through the Spring of 2017, appellate counsel provided consistent periodic assurances to defendant and his family that the appeal, which at some undefined time counsel informed defendant had been dismissed, would be reinstated. It was not until 2017 that appellate counsel apparently first acknowledged to defendant's PCR counsel that, contrary to his many prior assurances to defendant and his family, the appeal would not be reinstated. Defendant explains he relied on appellate counsel's assurances the

appeal would be reinstated, and appellate counsel represented he understood defendant and his family relied on the assurances concerning reinstatement he provided over the many years following the dismissal of the appeal.

What is particularly troubling is it appears appellate counsel's representations throughout the years following the dismissal of the appeal may have been intentionally false and misleading, and they were successful in assuring defendant and his family the appeal would be reinstated and decided on the merits. Indeed, there is no evidence that following our rejection of the reinstatement motions in 2013, 2014, and 2015, appellate counsel took any further action to reinstate the appeal yet appellate counsel continued to provide assurances until 2017 that the appeal would be reinstated even though he knew three motions to obtain reinstatement had been rejected by orders of this court. In other words, the record suggests appellate counsel had absolutely no basis for his assurances following the denial of the last reinstatement motion in 2015, but he nonetheless continued to provide assurances to defendant until he met with defendant's PCR counsel in 2017.

Based on those circumstances, we are persuaded defendant made a prima facie showing of excusable neglect supporting the filing of his PCR petition under the first exception to the five-year time bar in Rule 3:22-12(a)(1)(A).

Defendant's PCR petition shows the lengthy delay in filing the petition was the result of appellate counsel's groundless and perhaps intentionally misleading assurances the appeal would be decided on the merits, and defendant's reliance on those assurances. That showing supports a determination there is excusable neglect for the late filing of the petition, and we are further convinced the dismissal of defendant's appeal due to appellate counsel's failures separately constitutes the denial of defendant's constitutional right to the effective assistance of appellate counsel, Flores-Ortega, 528 U.S. at 483, sufficient to satisfy the "fundamental injustice" requirement of Rule 3:22-12(a)(1)(A).

We are not convinced, however, defendant's factual assertions supporting a finding of excusable neglect are dispositive of the timeliness issue. That is, defendant's self-serving assertions of fact, and those asserted by his appellate counsel, are not dispositive of whether there was excusable neglect permitting the otherwise untimely filing under Rule 3:22-12(a)(1)(A). In our view, the State is entitled to test the factual assertions, which it challenges as "preposterous," to determine their veracity based on a fulsome evidentiary record and whether they support, as a matter of actual fact and law, excusable neglect for the late filing under the Rule.

For example, and not by way of limitation, defendant's amended petition and appellate counsel's certification do not reveal when defendant first learned his appeal was dismissed or when defendant was first advised the appeal was dismissed due to counsel's failure to file a brief. Similarly, the amended petition and appellate counsel's certification do not detail the actual "assurances" counsel provided, whether defendant had reason to know appellate counsel's performance was deficient despite the assurances, and whether defendant "remain[ed] intentionally ignorant of the legal consequences of" the appellate counsel's failure to file brief on appeal and the resultant dismissal of his appeal. Brown, 455 N.J. Super. at 471. The factual assertions also do not directly explain why defendant did not file a timely PCR from trial counsel's alleged errors after first learning the appeal was dismissed. See, e.g., Merola, 365 N.J. Super. at 217 (citing State v. Dugan, 289 N.J. Super. 15, 19 (App. Div. 1996)) (explaining "the pendency of a direct appeal" does not toll the five-year bar under Rule 3:22-12(a)(1)(A)); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 3:22-12 (2021) ("The five-year period prescribed by paragraph (a)(1) commences when the judgment of conviction is entered and is neither stayed nor tolled by appellate or other review proceedings.").

Further, the record shows defendant retained PCR counsel by the Spring of 2017, which suggests he had reason to know prior to that time, and before appellate counsel admitted his prior assurances concerning the appeal were incorrect, he had a basis for a PCR claim. When and what defendant knew prior to his retention of PCR counsel is pertinent to whether defendant has excusable neglect for not filing his PCR petition until October 25, 2017.

We do not suggest such issues exhaust those pertinent to whether defendant had excusable neglect sufficient to support the otherwise late filing of his PCR. We note them only to illustrate that although the PCR petition and appellate counsel's certification make a preliminary showing supporting a finding of excusable neglect, defendant's excusable neglect claim under Rule 3:22-12(a)(1)(A), and the numerous fact issues it presents, require resolution at an evidentiary hearing.

For those reasons, we vacate the court's order dismissing the PCR petition and remand for an evidentiary hearing on the issue of whether defendant established excusable neglect permitting the late filing of the petition under Rule 3:22-12(a)(1)(A) as to his separate ineffective-assistance-of-counsel claims against appellate and trial counsel. At the hearing, the parties may present evidence concerning any and all factors pertinent to the



determination and make all available legal arguments. That is, our observations concerning possible pertinent issues shall not be construed as limiting the factual and legal issues that may be raised by the parties under Rule 3:22-12(a)(1)(A).<sup>5</sup>

Because we conclude an evidentiary hearing is required to determine if there is excusable neglect allowing the late filing of defendant's petition under Rule 3:22-12(a)(1)(A), it is unnecessary to consider the PCR court's separate findings rejecting defendant's claims of alleged trial court, appellate counsel, and trial counsel errors. If the PCR petition is deemed timely filed under Rule 3:22-12(a) as to defendant's ineffective-assistance-of-counsel claims against appellate counsel, the forfeiture of defendant's direct appeal resulting from appellate counsel's failure to file a brief requires defendant be permitted to file a direct appeal anew. Flores-Ortega, 528 U.S. at 484; see also Carson, 227 N.J. at 354; Jones, 446 N.J. Super. at 33. If the PCR court determines defendant's petition was timely filed as to defendant's ineffective-assistance-of-counsel claim against trial counsel, the court shall address the merits of that claim based on the record presented at that time. On remand, the court shall be

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<sup>5</sup> We also do not limit the parties' arguments, or the court's analysis, to whether defendant's petition was timely under Rule 3:22-12(a)(1)(A). As noted, there is a second exception to the five-year time bar under Rule 3:22-12(a)(1)(B).

permitted to hear arguments, accept submissions, and conduct such hearings as it deems appropriate to address and decide the issues presented.

Vacated and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION