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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1118-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LANDEAN O. MALCOLM,

Defendant-Appellant.

Submitted December 21, 2022 – Decided January 3, 2023

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 13-05-0500.

Joseph E. Krakora, Public Defender, attorney for appellant (Kathryn Ann Sylvester, Deputy Public Defender, on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent (Joseph M. Nielsen, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Landean O. Malcolm appeals from the denial of his petition for post-conviction relief (PCR). We reverse and remand for procedural reasons.

Following a jury trial, defendant was convicted of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). He was sentenced to an aggregate seven-year custodial term with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, as reflected in the trial court's April 9, 2015 conforming judgment of conviction (JOC).

Defendant challenged his convictions and we affirmed, see State v. Malcolm, No. A-2054-16 (App. Div. Oct. 26, 2018) (slip op. at 2), and the Supreme Court denied certification, see State v. Malcolm, 237 N.J. 567 (2019). He filed his first PCR petition pro se on December 24, 2020, more than five years after entry of his JOC. In that petition, defendant argued his trial counsel was constitutionally ineffective by failing to: 1) provide him with discovery, and 2) inform the trial court he was interested in entering a guilty plea. Instead, he contended his trial counsel forced him to proceed to trial by "promising a better outcome" than that assumedly offered during plea negotiations.

Rather than appointing counsel, the PCR court summarily denied defendant's application as "untimely." The Office of the Public Defender (OPD) filed an application to reconsider, which the PCR court denied on September 30, 2021 in a letter-opinion. In its decision, the PCR court noted defendant failed to file his petition within the five-year period prescribed by Rule 3:22-12 by missing the deadline "by over eight months." The PCR court found defendant's petition was not "proper" because it failed to explain the delay or identify any circumstance warranting a finding of excusable neglect. See R. 3:22-12(a)(1)(A). As a result of these deficiencies, the PCR court determined a referral to the OPD was not required.

Before us, defendant contends:

THE PCR [COURT] ERRED IN SUMMARILY
DENYING [DEFENDANT]'S FIRST MOTION FOR
[PCR] WITHOUT REPRESENTATION.

Defendant specifically argues the PCR court violated Rule 3:22-6(a) and binding precedent by rendering its decision as to his first petition without first appointing counsel. He maintains his entitlement to PCR representation is well-settled and particularly necessary here as appointed counsel would have been able to establish excusable neglect for his late filing, as well as "make changes and correct deficiencies in [his] petition." Finally, defendant contends the PCR

court's decision amounted to an "out of hand" denial requiring a reversal and remand for consideration of his petition on the merits following the appointment of counsel.

The State agrees with defendant's request for a remand, while reserving all of its rights to contest the petition on the merits. We agree with defendant that the PCR court committed error when it denied defendant's petition without first appointing counsel.

In New Jersey, there is an absolute right to counsel on a first PCR petition. R. 3:22-6(a). The PCR court must refer the matter for representation even if, on its face, the petition appears to lack merit. State v. King, 117 N.J. Super. 109, 111 (App. Div. 1971); State v. Ellis, 116 N.J. Super. 330, 334 (App. Div. 1971). This is so because "[i]t is of advantage to the judicial system to have a first [PCR] petition raise all possible issues in existence at the time the petition is heard." King, 117 N.J. Super. at 111. Further, as a defendant may articulate his arguments poorly or present the issues piecemeal or inadequately, an attorney is required to "make a complete investigation and file any amended petition . . . that may be necessary to raise all possible issues upon which [a] defendant might be entitled to relief." Id. at 112. That safeguard was incorrectly nullified by the PCR court's dismissal order here.

Reversed and remanded for the appointment of PCR counsel and further proceedings. Nothing in our opinion should be interpreted as an expression of our view as to the merits of defendant's petition.

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



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