

=====

**IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY**

THE STATE OF NEW JERSEY
Respondent,

Bergen County
Superseding Indictment #
05-10-01905-I

-against-

BARRY LORENZO CAREY,
Defendant-Appellant.

Appellate
Division Docket #
A-002023-17

**AMENDED BRIEF AND APPENDIX
IN SUPPORT OF PETITION FOR CERTIFICATION**

SAT BELOW (Bergen County Superior Court):
Hon. CHRISTOPHER R. KAZLAU, J.S.C (Trial Court Judge)

SAT BELOW: (Appellate Division):
Hon. RICHARD J. GEIGER and Hon. LISA A. FIRKO, J.A.D.

PATRICK MICHAEL MEGARO, ESQ.
Halscott Megaro, P.A.
Attorney for Appellant
1300 North Semoran Boulevard, Suite # 195
Orlando, Florida 32807
(o) 407-255-2164
(f) 855-224-1671
pmegaro@halscottmegaro.com
Florida Bar ID # 738913
New Jersey Bar ID # 3634-2002
New York Bar ID # 4094983
North Carolina Bar ID # 46770
Texas Bar ID # 24091024
Washington State Bar ID # 50050

TABLE OF CONTENTS

Table of Judgments Being Appealed	i
Table of Transcripts	ii
Table of Authorities	iv
Preliminary Statement	1
Procedural History	1
Statement of Facts	5
Argument	12
REVIEW IS NECESSARY TO DETERMINE WHETHER THE FUNDAMENTAL INJUSTICE EXCEPTION APPLIES TO SECOND OR SUCESSIVE POST-CONVICTION RELIEF PETITIONS IN SITUATIONS WHERE THE FIRST POST-CONVICTION RELIEF PETITION WAS DENIED AS THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL	13
A. This Court Should Review the Claim on the Merits to Prevent a Fundamental Injustice Because Appellant Has Presented Strong and Uncontradicted Evidence That Law Enforcement Fabricated Evidence and That Evidence Played a Central Role in His Conviction	13
B. Under a Logical Construction of the Rules, Appellant's Motions for Post-Conviction Relief Were Timely; In the Alternative, Appellant Has Demonstrated Excusable Neglect	17
C. Merits of the Ineffective Assistance of Counsel Claim	18
CONCLUSION	19

APPENDIX

Order Denying Post-Conviction Relief Motion
dated 12-19-2017.....A-1

Opinion of the Appellate Division
dated December 11, 2018.....A-2

Notice of Petition of Certification
dated December 28, 2018.....A-16

TABLE OF JUDGMENTS BEING APPEALED

Order Denying Post-Conviction Relief Motion
dated 12-19-2017.....A-1

Opinion of the Appellate Division
dated December 11, 2018.....A-2

TABLE OF TRANSCRIPTS

Transcripts of 11/15/2005	1T
Transcripts of 01/25/2006 Vol. 1	2T
Transcripts of 01/25/2006 Vol. 2	3T
Transcripts of 01/26/2006 Vol. 1	4T
Transcripts of 01/26/2006 Vol. 2	5T
Transcripts of 01/31/2006 Vol. 1	6T
Transcripts of 01/31/2006 Vol. 2	7T
Transcripts of 02/01/2006 Vol. 1	8T
Transcripts of 02/01/2006 Vol. 2	9T
Transcripts of 02/02/2006	10T
Transcripts of 02/07/2006 Vol. 1	11T
Transcripts of 02/07/2006 Vol. 2	12T
Transcripts of 02/09/2006	13T
Transcripts of 02/14/2006	14T
Transcripts of 02/15/2006	15T
Transcripts of 12/12/2017	16T

TABLE OF AUTHORITIES

Cases

State v. Afonidore, 697 A.2d 529 (N.J.1997)..... 11

State v. Mitchell, 126 N.J. 565, 578 (1992)..... 12, 16

State v. Preciose, 129 N.J. 451, 475 (1992).....13

Statutes

N.J.S.A § 2C:5-1..... 2, 3

N.J.S.A § 2C:13-1b..... 2

N.J.S.A § 2C:14-2a(1)..... 2, 3

N.J.S.A § 2C:14-2c(3)..... 2

Rules

R. 3:22-3..... 17

R. 3:22-6(a) (2)..... 17

R. 3:22-12(a) (2).....17

PRELIMINARY STATEMENT

Appellant requests that this Court grant him permission to appeal from an Order of the Appellate Division (Hon. Richard J. Geiger and Hon Lisa A. Firko), Docket # A-002023-17, dated December 11, 2018, which affirmed an Order of the Bergen County Superior Court (Hon. Christopher R. Kazlau, J.S.C.), dated December 19, 2017, denying Appellant's motion for post-conviction relief to vacate a judgment of conviction and sentence entered against him on October 17, 2006.

This motion is filed in good faith, presents a substantial question of basic constitutional law, and is not filed for the purpose of any delay.

PROCEDURAL HISTORY

Superseding Indictment # 05-10-1905-I was filed on October 21, 2005 in the Bergen County Superior Court charging Barry Carey with Count #1, First degree kidnapping, in violation of N.J.S.A. 2C:13-1b; Count # 2, and # 3, First degree aggravated sexual assault in violation of N.J.S.A. 2C:14-2a(3); Count # 4, Second degree sexual assault in violation of N.J.S.A. 2C:14-2c(1), Count # 5, and # 8, Second degree attempted kidnapping, in violation of N.J.S.A. 2C:13-1b and N.J.S.A. 2C:5-1, Count # 6, and # 9, Second degree attempted aggravated sexual assault, in violation of N.J.S.A. 2C:14-2a(3), and N.J.S.A. 2C:5-1, and Count # 7, and #

10, Second degree attempted sexual assault in violation of N.J.S.A. 2C:14-2c(1) and N.J.S.A. 2C:5-1. (Da1-6).

The case was tried before the Honorable Harry G. Carroll, P.J.C., and a jury from January 31, 2006 through February 15, 2006. (Da7-8). At the conclusion of trial, Carey was convicted of counts # 1, # 2 and # 4 and was acquitted of counts # 6, # 7, # 9 and # 10. Id. The State dismissed count three prior to trial. Judgment was entered upon Carey's sentencing on October 7, 2006. Id. Count # 4 was merged into count # 2. Id. Carey was sentenced to twenty-five (25) years imprisonment, eighty-five (85) percent to be served without parole under the No Early Release Act (NERA) and five years parole supervision on count # 1. Id. He was sentenced to a consecutive four years imprisonment on Count # 5. Id. On count # 2 he was sentenced to seventeen (17) years imprisonment, eighty-five (85) percent to be served without parole and five years of parole supervision to run concurrent. Id. On count # 8 he was sentenced to four years imprisonment also to run concurrent. Id. His aggregate term was twenty-nine (29) years imprisonment, with twenty-one (21) years and three months to be served without parole. Id. The court also imposed fines, Megan's Law registration, and community supervision for life. Id. The judgment of conviction was entered on October 17, 2006. Id.

On November 22, 2006, Carey filed a notice of appeal. (Da9). On appeal he alleged he was deprived of due process by the

prosecutor's improper use of race-based peremptory challenges; he was denied a fair trial due to the prosecutor's improperly conducting an investigation of a potential juror; the trial court erred in not severing offenses for his trial; the trial court erred in admitting hearsay statements which impermissibly bolstered the testimony of the State's principal complaining witness; the trial court erred by permitting the jury to consider evidence that he had an alias; prosecutorial misconduct; that his convictions should be reversed because the prosecutor ordered witnesses not to speak with defense investigators; the trial court erred in denying his motion to permit its expert witness to conduct a psychiatric examination on the "victim;" cumulative errors required reversal; the trial court improperly found aggravating factors at sentencing; and the trial court abused its discretion in sentencing him to consecutive terms of imprisonment. (Da11-41).

On April 19, 2010, a three-judge panel of the Appellate Division affirmed his conviction and sentence. Id. On December 28, 2010 Carey filed a notice of petition for certification to the New Jersey Supreme Court. On April 14, 2011, Carey's Petition for Certification was denied. (Da42).

On October 17, 2011, Carey filed a timely First Petition for Post-Conviction Relief (PCR) that included a notice of motion to extend time to complete additional investigation, file an amended petition if warranted, and file a supplemental brief. (Da43-44).

Carey alleged his attorney was ineffective for failing to challenge the competency of a State witness; his attorney was ineffective for failing to request a Rule 104 hearing on the issue of whether the prosecutor's office unduly influenced witnesses to decline to speak with the defense; his attorney was ineffective for failing to object to inadmissible hearsay statements at trial; his attorney was ineffective for failing to object to numerous improper comments made by the prosecutor during summations; and his attorney was ineffective for failing to adequately advise him of his right to testify. Id.

On November 3, 2011, the Honorable Donald R. Venezia, J.S.C. entered an order dismissing defendant's PCR petition without prejudice to re-file pending additional investigation. Id. On May 24, 2013, Carey filed an Amended PCR Petition, raising identical issues to those presented in his October 17, 2011 PCR petition with additional documents that included additional evidence. (Da45-55).

On November 22, 2013, Carey's amended PCR Petition was heard by the Honorable Edward A. Jerejian, J.S.C. Id. On February 7, 2014, Judge Jerejian issued a Letter Opinion and Order denying defendant's amended PCR petition. Id. On March 14, 2014, Carey filed a notice of appeal. (Da56-59). On August 1, 2014 he filed his initial brief. (Da75). On October 21, 2014, the State of New

Jersey filed a reply brief. Id. On November 21, 2014, Carey filed a reply letter in lieu of a brief. Id.

On October 1, 2015, the Appellate Division affirmed the trial court's denial of post-conviction relief without an evidentiary hearing. (Da60-69). On December 9, 2015, Carey moved for discretionary review to the Supreme Court of New Jersey, but on February 17, 2016, the Supreme Court of New Jersey denied Carey's Petition. (Da70).

On September 30, 2016, Appellant filed a second motion for post-conviction relief in the Bergen County Superior Court. (Da71-103). Oral arguments were heard on December 12, 2017 and an order denying the second motion for post conviction relief was issued on December 19, 2017. (Da133, 20T).

Appellant perfected an appeal to the Appellate Division, which affirmed on December 11, 2018. This petition follows.

STATEMENT OF FACTS¹

On April 17, 2003, the Hackensack Police Department received a call from the Friendship House, a vocational rehabilitation agency regarding an allegation that an individual lured a woman to his car and raped her. (Da12). The alleged victim of the sexual assault, M.C.S. described the vehicle as a red sports car. Id. No further information was obtained about the suspect at that time.

¹ Due to the limitations on the length of this brief, only the relevant facts to this petition are included.

The Police Department received another call from Helene Simms, a counselor at the Friendship House on August 19, 2003. (Da14). She told the police that an individual in a Toyota Camry attempted to lure a woman outside the Friendship House into his car. (Da78). She wrote down the license plate number and gave it to the police. Id. The registered owner of the Toyota Camry was Blessing Ocobay, who is the mother of Gisabelle Ocobay. Id. Gisabelle Ocobay was Carey's girlfriend. After running a background check on Mrs. Ocobay and Carey, officers found Carey's home address. On January 22, 2004, officers went to Carey's home and asked if he and Mrs. Ocobay would go to the police station to answer questions. They both agreed.

At the station, officer Lustmann presented Carey with a Miranda form. (Da78). He testified that he read aloud each of the constitutional rights and asked Carey if he understood them. (Da79). He asked Carey to read the form and if he understood its contents to write "yes" and initial next to each question if he understood. Id. He testified that he saw Carey write the word "yes." Id. Officer Lustmann then asked Carey to read the waiver of rights portion and if he understood the rights to sign his name. Id. at 19. He testified that he observed him sign his name. Id. at 19. The document was signed, "Barry Lorenzo Carey" at 7:40 a.m. on January 21, 2004. Id. Officer Lustmann then proceeded to interrogate Carey. Id.

During the interrogation, Carey stated that his girlfriend was Gisabelle Colby. Id. He stated that he worked as a driver for "Community Surgical" which is located in Kenilworth, New Jersey. Id. He told Officer Lustmann that as part of his job, he had previously driven to Bergen County to go to Hackensack University Medical Center. Id. The medical center is located near the Friendship House. Officer Lustmann testified that if Carey had done deliveries at the medical center, he would certainly be familiar with where the Friendship House was. Id.

Officer Lustmann testified that Carey stated that Ms. Colby drives him to work every day in a 2000 Toyota Camry. Id. At first Carey told the officers that he never drove the Toyota Camry, but later stated to them that he occasionally drove it. Id. During Mrs. Colby's conversation with Officer Lustmann, she said Carey used the car at least five to ten times when she was not with him at a variety of times and places including when she would go to work. (Da80). Officer Lustmann testified that during the interrogation, Carey began to degrade the mentally challenged females. Id. Officer Lustmann testified, "[h]e looked at me and he said, do I look like I need to rape retarded women?" Id. Officer Lustmann testified that Carey then got up and started banging on his chest. Id. Carey then asked him if he had seen his girlfriend and told Officer Lustmann that he had a "piece of that the first day." Id. at 154. During the interrogation, and after supposedly

reading the Miranda rights, Officer Lustmann asked Carey if he would consent to providing a DNA sample. (1T: p.32). Officer Lustmann had previously obtained a court order to obtain a DNA sample. Id. at 32. Carey first responded by telling him that he was not going to permit him to put anything in his mouth. Id. at 33. When Officer Lustmann said that he was going to take a DNA sample from him, Mr. Carey stated "this is bullshit." Id.

When asked if he was ever in the company of M.C.S., Officer Lustmann testified that Carey denied it and stated that any DNA sample taken would not match. Id. Carey then denied that he ever got into a car with M.C.S. on April 17, 2003. Id.

At the end of the interrogation, Detective O'Boyle testified that he presented Carey with a "consent to search" form and explained it to him. (Da81). He stated Carey read the form and signed it. Id. The signature on the form reads, "Barry Carey" and was signed at 10:00 a.m. on January 21, 2004. Id.

Officer Lustmann testified that after obtaining the consent to search, he went to Carey's home. There, he obtained registration information for a red Saturn from Carey's bedroom and various sports jerseys from his closet. Id. After investigating the vehicle registration, he spoke to Patrick Aubontron, a detective in Leominster, Massachusetts who confirmed that Carey formally owned a 1997 Red four-door Saturn with Massachusetts registration 91HM20. Id. He found that Carey sold the vehicle to Jenny Inrosky

in January, 2004. Id. Officer Lustmann testified that he spoke with Ms. Inrosky and was able to take pictures of the vehicle. Id. Those pictures were offered into evidence at trial. Id. Carey was subsequently arrested and charged.

Carey hired Wanda Akin Esq. to represent him. He advised her that he never signed, initialed, or wrote on the Miranda form, or the Consent to Search form. Id.

The trial court held an evidentiary hearing on November 15, 2005 to hear Akin's motion to suppress statements, and evidence obtained at Carey's residence. (1T). At the suppression hearing she argued that officers told Carey he was signing a document to obtain his wallet and he did not know it was a document to permit a search of his residence. (1T: p.144). She argued the officers engaged in a form of trickery to get him to sign. Id. She also argued his statements should be excluded in violation of Miranda because the circumstances of the interrogation were coercive in nature. Id. at 145. It was coercive because officers picked up Carey at his house early in the morning and waited until later in the interrogation to tell him why they were questioning him. Id. 145, 146.

She informed the trial court it was her position that Carey never signed the Miranda form, but did not present any evidence to support that theory. Id. at 146. After the witnesses testified and during her argument to the court, she admitted she wanted to

submit an affidavit from Carey stating he was coerced, but never did. Id. at 142. The trial court held that it "accept[ed] the testimony of the officers that in fact Carey did sign that form after it had been read to him and also after he himself had the opportunity to read the Miranda form." Id. at 158. The court accepted the officer's testimony that they read the consent to search form to Carey, he read it, and he signed it. Id. at 165. The Court denied Carey's motion to suppress.

At trial, the State argued Carey's statements to Sergeant Lustman at the police station on January 21, 2004 proved consciousness of guilt. (16T: p.12-13). The items recovered as a result of the search were received in evidence. He was convicted and sentenced as indicated above.

After his conviction, Carey's mother retained Dr. Joe Alexander to analyze Carey's signatures on both forms. Dr. Alexander is a certified forensic document examiner and certified forensic physician. (DA109-114). He examined the photocopies of the Miranda and consent to search forms and examined five pages of writings submitted from Carey as exemplars of his known genuine writing and signature. Id. He concluded that it was highly likely that someone other than Barry Carey signed the Consent to Search form and the Miranda form.

On September 30, 2016, Carey filed a Petition for Post Conviction Relief. (Da71-133). A hearing was held on December 12,

2017 before the Honorable Christopher R. Kazlau. (20T). Carey argued that the facts show a prima facie case of ineffectiveness and potentially fraudulent activity on the part of law enforcement. (20T p.4).

Carey also argued that the filing was timely, and in the alternative, there is an exception in Rule 3:22-9 12(a)(1)(a) to prevent a fundamental injustice. Id. The prosecution's first argument was that the motion was not timely filed. Id. at 14. The prosecution's second argument was that evidence of guilt was overwhelming. Id. at 16.

The Superior Court found that the petition was time barred. Id. at 31. Even though the petition was found to be time barred the Superior Court still addressed the substance of the claim and found that "defendant did not establish a reasonable probability that but for counsel's performance, the outcome of his conviction would have been different." Id. at 42.

The Appellate Division affirmed, finding that Appellant's second post-conviction relief petition was not timely under Rule 3:22-12(a)(2)(A), (B), or (C), ruling that the fundamental injustice exception to the time bar does not apply to second PCR petitions. (Decision and Order of Appellate Division, p. 12).

ARGUMENT

REVIEW IS NECESSARY TO DETERMINE WHETHER THE FUNDAMENTAL INJUSTICE EXCEPTION APPLIES TO SECOND OR SUCCESSIVE POST-CONVICTION RELIEF PETITIONS IN SITUATIONS WHERE THE FIRST POST-CONVICTION RELIEF PETITION WAS DENIED AS THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL

"Procedural rules shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay". Id. In determining whether to relax the time bar, courts should consider the following factors; (1), the extent and cause of the delay; (2), the prejudice to the State; and (3) the merits of the defendant's claim. See State v. Afonidore, 697 A.2d 529 (N.J.1997).

This Court has noted that "in exercising discretion, courts must be guided by the polestar of justice and 'our procedures must ever be molded and applied with that in mind... Our Rules are not ends in themselves, they are a means to achieving a functioning and just system.'" State v. Mitchell, 126 N.J. 565, 578 (1992). The central purpose of the five-year time bar is to encourage defendants to bring claims swiftly instead of sitting on their rights until it is too late for a court to render justice. Id. at 576.

"Where meritorious issues are presented, our interest in affording defendants access to both state post-conviction and federal habeas review outweighs our interest in finality through

an unnecessarily-rigid enforcement of state procedural rules.”
State v. Preciose, 129 N.J. 451, 475 (1992).

Here, citing a 2018 Appellate Division case, the Appellate Division held that “enlargement of Rule 3:22-12’s time limits is ‘absolutely prohibited.’”

This Court has not made that same determination. This case will give this Court the opportunity to interpret the 2009 revisions to the Rules,

A. This Court Should Review the Claim on the Merits to Prevent a Fundamental Injustice Because Appellant Has Presented Strong and Uncontradicted Evidence That Law Enforcement Fabricated Evidence and That Evidence Played a Central Role in His Conviction

New Jersey courts have held that to merely claim that an injustice has transpired does not satisfy the rule; the petitioner must be prepared to “establish, by a preponderance of the credible evidence, that he is entitled to the requested relief.” Id. at 579. Fundamental injustice will be found if the prosecution or the judiciary abused the process under which the defendant was convicted or, absent conscious abuse, if inadvertent errors mistakenly impacted a determination of guilt or otherwise “wrought a miscarriage of justice for the individual defendant.” Id. at 587.

Although a petitioner would not have to prove that the issue of concern cost him the case, “to establish injustice there should at least be some showing that the alleged violation played a role in the determination of guilt. Id. at 587.

Here, Appellant has presented expert witness evidence that the Miranda waiver bearing his purported signature was forged. The clear implication is that law enforcement officers, the only other people with access to the Miranda form, were responsible for the forgery. In the court below, the State offered no evidence that challenged Appellant's expert witness opinion that his signature was forged.

The prejudice to Appellant resulting from this forgery was not just significant, it was the sine qua non in this case. The statements attributed to the Appellant as a result of this alleged Miranda waiver was central to the State's theory of prosecution, as they forcefully argued at summation:

When the Defendant spoke to Sergeant Lustman on January 22, 2004, it says it all about the defendant's criminal intent.....
First they talked about where he lives, where does he work, who does he live with and the very first question that he was confronted that had to do with this case was had you been to the area of the Friendship House in a Toyota Camry and do you use the Toyota Camry that belongs to your girlfriend. And what was his response to both of those questions? No way. He would not admit to using his girlfriend's car. He would not admit to being on Atlantic Street in August of 2003. Why? Why? Why does this defendant not admit to such innocent behavior, to being on Atlantic Street to using your girlfriend's car? Because it shows the consciousness of guilt. The defendant knew that he had committed a crime at the friendship House. The defendant knew that he had committed a crime in April of 2003 and raped [M.C.S.]. He knew that at that point it was

going to be because he has no way of knowing. He has absolutely no way of knowing that we have DNA in this case.

(Da86).

The State then argued that not only did Carey's statements to Officer Lustmann prove he was guilty of raping M.C.S. but also proves his intent towards I.G. and K.R.:

So when he is interviewed his posture is one of it's their word against mine. It's their word against my word. What does he do? He doesn't admit to being at the Friendship House on Atlantic Street in August of 2003. Why not admit that you just approached two girls on Atlantic Street but that you weren't there to do anything wrong, that maybe they misconstrued what he was trying to do. He cannot admit it. He knows that he cannot admit to even being at Atlantic Street, let alone being in the Toyota Camry because he knows that he went there to commit a crime. And that's exactly what [I.G.] saw and that's exactly what [K.R.] saw.

(Da87).

The admission of Carey's statements undermined Akin's defense theory at trial. She argued that Carey had consensual intercourse with M.C.S. That argument was not credible given Carey's statement to Officer Lustmann that he never had intercourse with her, that she never got in his car, and in an ineloquent manner Carey stated, "do I look like I need to rape retarded women?" (Da99). He also denied having any involvement with any of the women at the Friendship House, yet Akin argued that he went back to the Friendship House in August and spoke with I.G. and K.R. (Da99).

Carey's statements contradicted his own trial lawyer's theory of defense, which prejudiced him in a significant way and the State capitalized on it and argued vociferously that Carey's defense did not comport with his own statements. Akin could have had a viable defense if the statements were properly excluded. M.C.S. did not suffer any injuries; she repeatedly stated to police that she thought Carey was good looking; she told them he was a nice man; and she gave a rendition of all these events as someone who has the intellect of a five-year old. (Da100). If the statements had been excluded, Akin could have persuasively argued the intercourse was consensual.

While the defense is mindful that the State may face some difficulty relitigating the case, ultimately the facts of this case raise serious questions about the validity of the judgment of conviction and the integrity of the law enforcement agents' conduct in this investigation. The interests of justice require that fraudulent activity on the part of the law enforcement be litigated on the merits at an evidentiary hearing, particularly so where Defendant has independent,. When the defendant is prepared to provide factual evidence to support his claim sufficient grounds for relaxing the rule may exist. State v. Mitchell, at 580. Carey has an expert witness to reinforce his claim that law enforcement forged his signature. This directly impeaches the credibility of law enforcement and corroborates Carey's defense.

**B. Under a Logical Construction of the Rules,
Carey's Motions for Post-Conviction Relief Were Timely;
In the Alternative, Carey Has Demonstrated Excusable Neglect**

Rule 3:22-3 prohibits filing of a post-conviction relief motion while a direct appeal is pending. Rules 3:22-6(a) and 3:22-12(a) (3) require courts to dismiss a post-conviction relief motion while a direct appeal is pending. The rationale behind this rule is simple: it would make no sense to require defendants to file multiple petitions for relief and have them pending in different courts, at different stages, which would waste resources. This conforms with the rule that a conviction is not final until it has been heard on direct appeal, or the opportunity to do so has run.

Here, a logical construction of the Rules indicates that because a motion for post-conviction relief must be dismissed while a direct appeal is pending, a defendant cannot file one until the direct appeal is concluded. Then, the time periods contained in Rule 3:22-12 would not begin to run until the conviction is final.

Here the record indicates that Appellant diligently pursued his rights throughout the New Jersey courts. He directly appealed his conviction to this Court, sought certification in the New Jersey Supreme Court, and then promptly filed his first PCR motion. He retained counsel, and then refiled his motion within a reasonable time, then appealed the denial, and again sought certification in the Supreme Court. Finally, he promptly filed the instant PCR motion within a few months of the denial of

certification from the Supreme Court. This is not a person who sat on his rights.

Accordingly, Appellant's motion should be deemed timely for the reasons set forth on the record at the December 12, 2017 hearing. In the alternative, this Court should find excusable neglect.

C. Merits of the Ineffective Assistance of Counsel Claim

Carey received ineffective assistance of counsel when counsel failed to investigate and present evidence to corroborate Carey's claim that the signatures were forged, which would have directly contradicted the State's theory of prosecution and credibility of the State's witnesses. Moreover, this would have directly lead to suppression of critical evidence that was unlawfully obtained.

Carey respectfully incorporates the arguments set forth in his brief in the Appellate Division as to the merits of his ineffective assistance of counsel claims in the interest of brevity.

CONCLUSION

Based upon the foregoing reasons, Barey Lorenzo Carey urges this Court to grant his petition for certification and review this case on the issues presented herein, and grant such other and further relief as this Court may deem just, proper and equitable.

Dated: Orlando, Florida
January 25, 2019

Respectfully Submitted,

PATRICK MICHAEL MEGARO, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel for the State of New Jersey via United States Postal Service, first class mail, on January 25, 2019:

William P. Miller, Esq.
Office of the Bergen County Prosecutor
Two Bergen County Plaza
Hackensack, New Jersey 07601

PATRICK MICHAEL MEGARO, ESQ.

v.

INDICTMENT #: 15-10-01905-I

Barry Lorenzo Carey
Defendant

CASE OR PROMIS #:04-0319

**ORDER ON POST-CONVICTION APPLICATIONS
ON INDICTABLE OFFENSES**

This matter being opened on the application of defendant, Barry Carey, by:

- Petition for Post-Conviction Relief determined to be defendant's
 - first petition
 - second or subsequent petition

FILED

DEC 19 2017

Motion for Change or Reduction of Sentence pursuant to *Rule 3:21-10*

SUPERIOR COURT OF NEW JERSEY
CHRISTOPHER R. KAZLAU, J.S.C.

Motion for _____ and the defendant having been represented by
_____, Assistant Deputy Public Defender
_____, Retained or Designated Counsel (*circle one*) or

The court having concluded that there was no good cause entitling the assignment of counsel on the application, and the State having been represented by:
_____ Assistant Prosecutor; and

- There having been proceedings conducted on the record on December 12, 2017 or
- The matter having been disposed of on the papers;

It is on this 19 day of December, 2017 ORDERED THAT DEFENDANT'S APPLICATION IS
HEREBY:

- Granted
- Denied
- Other:

For the reasons:

Expressed in the court's written opinion of _____

Expressed orally on the record on December 12, 2017



RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-2023-17T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BARRY LORENZO CAREY,
a/k/a LORENZO CAREY, and
MALIK CAREY,

Defendant-Appellant.

Submitted November 7, 2018 – Decided December 11, 2018

Before Judges Geiger and Firko.

On appeal from Superior Court of New Jersey, Law
Division, Bergen County, Indictment No. 05-10-1905.

Halscott Megaro, PA, attorneys for appellant (Patrick
M. Megaro, on the brief).

Dennis Calo, Acting Bergen County Prosecutor,
attorney for respondent (William P. Miller, Special
Deputy Attorney General/Acting Assistant Prosecutor,
of counsel; Catherine A. Foddai, Legal Assistant, on the
brief).

PER CURIAM

Defendant Barry Lorenzo Carey appeals from the denial of his second petition for post-conviction relief (PCR) without an evidentiary hearing. We hold that defendant's second petition was untimely under the time limits imposed by Rule 3:22-12(a)(2), which cannot be relaxed. Accordingly, we affirm.

I.

Defendant was charged with kidnapping and sexually assaulting a mentally incapacitated victim in April 2003, and attempting to sexually assault two other victims four months later. Defendant gave a statement to police and his residence was searched. Defendant moved to suppress his statement and the results of the search of his residence. The trial court conducted a testimonial suppression hearing. Sergeant Alan Lustman of the Sex Crimes and Child Abuse Unit of the Bergen County Prosecutor's Office and Detective Kevin O'Boyle of the Hackensack Police Department testified for the State. Defendant did not testify or present any witnesses at the hearing.

In addition to arguing defendant was not told by police why they wanted to talk to him and that the interview was conducted in a hostile and coercive environment, defense counsel argued defendant did not sign the Miranda¹ form

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

or the consent to search form. Defendant claimed he only signed and initialed a document giving the police permission to retrieve his wallet at his request. Defendant contended he did not understand the paper to be a Miranda form. Instead, he claimed he was under the impression anything he signed was simply to gather his personal belongings in order to facilitate providing the items to the police. In the alternative, defense counsel argued the forms were not executed knowingly and intelligently due to the purported coercive environment and because defendant "did not understand and appreciate what was going on."

Following lengthy oral argument, the suppression motion judge issued an oral decision denying the motions. Based on Lustman's and O'Boyle's collective testimony, which the motion judge found credible and reliable, the judge made the following findings. Defendant voluntarily agreed to go to the police station. He was not handcuffed. His girlfriend accompanied him. Defendant was taken to an interview/coffee room where Lustman advised him of his Miranda rights both verbally and in writing. First, Lustman read the Miranda form to defendant. After verbally indicating he understood each of his rights, defendant read the form himself, initialed it, and answered the questions "yes." Defendant then signed the form in the presence of Lustman and O'Boyle, and printed his name alongside. He signed the Miranda form after being advised of his rights and

having the opportunity to read the form. Lustman then asked defendant if he would agree to be interviewed without an attorney. Defendant said that he would and the interview began. The interview started at about 7:40 a.m. and ended around 10:00 a.m. The length of the questioning was not coercive in nature. Defendant was offered the opportunity to use the bathroom and was asked if he wanted anything to drink. No threats, promises, or other inducements were made to defendant. The police did not use any trickery or ruse to get defendant to agree to go to police headquarters.

The judge found Miranda rights were properly administered, defendant indicated he understood his rights, answered each question on the form "yes," placed his initials alongside each, and signed and printed his name on the form. The judge then analyzed the totality of the circumstances to determine whether defendant waived his rights voluntarily. The judge noted defendant was thirty-one years old, had at least some college, and was employed at Community Medical. The judge concluded there was "nothing in the circumstances presented regarding [defendant's] age, intelligence, [or] education which would lead you to conclude that he did not understand what was being done, what was going on around him." The judge held defendant waived his rights voluntarily.

The suppression motion judge also relied on the testimony of Lustman and O'Boyle with regard to the search of defendant's residence. The judge found the police searched defendant's residence without a search warrant based on his consenting to the search. O'Boyle read and explained the consent to search form to defendant. He then let defendant read the form. Defendant indicated he understood the consent to search and signed it, telling Lustman and O'Boyle he did not have a problem with them searching his residence. Lustman and O'Boyle also signed the form. The form advised defendant of his right to refuse to give consent to the search and that he was waiving that right. The judge found defendant voluntarily executed the consent to search, with no threats or coercion by police, and otherwise valid. As to the scope of defendant's consent to search, the judge held the consent was to search the entire residence for evidence, not just to obtain his wallet or identification. Therefore, the scope of the consent given by defendant was not exceeded.

Tried to a jury in 2006, defendant was convicted of kidnapping, the aggravated assault of one victim, and his attempts to lure two other victims into a motor vehicle with the purpose of committing a crime against them. All of the victims were clients of Friendship House, a non-profit vocational rehabilitation agency in Hackensack that serves clients who are developmentally, emotionally,

or physically disabled. Defendant was sentenced to an aggregate term of twenty-nine years imprisonment, subject to a twenty-one-year and three-month period of parole ineligibility. The trial court also imposed Megan's Law registration, community supervision for life, and applicable fines and penalties. The judgment of conviction was entered on October 17, 2006.

On direct appeal, we affirmed his convictions and sentence. State v. Carey, No. A-1783-06 (App. Div. Apr. 19, 2010), certif. denied, 205 N.J. 520 (2011). The facts underlying his convictions are set forth in our opinion and need not be repeated here.

Defendant told his trial counsel that he did not sign the Miranda form or the consent to search form. Although counsel argued defendant did not sign either form, she did not retain an expert to analyze the validity of the signatures. After defendant's conviction, defendant's mother hired Dr. Joe B. Alexander, a certified forensic document examiner, to analyze photocopies of the Miranda form and consent to search form to determine if defendant's purported signatures were genuine. Dr. Alexander examined copies of the Miranda form, consent to search, and five exemplars of defendant's genuine signature.

In his report dated April 9, 2014, Dr. Alexander opined the signature of defendant on the Miranda form "is consistent with the known signatures of

[defendant], but since a photocopy was all that was presented for examination, I was unable to determine how the signature was affixed to this document." However, Dr. Alexander concluded it is "highly unlikely that [defendant] recorded the answers and affixed his initials" to the Miranda form.

Regarding the consent to search, Dr. Alexander opined the author of defendant's signature "is highly likely someone other than [defendant]. Significant differences were found in all aspects of this signature when compared to the known signature of [defendant]."

Defendant filed a timely first PCR petition on October 17, 2011. He retained attorney Lora B. Glick to represent him in his application for PCR. The petition did not allege trial counsel was ineffective for failing to retain a forensic document examiner to determine if defendant's purported signatures on the Miranda form and the consent to search form were genuine. On November 3, 2011, the petition was dismissed without prejudice subject to refileing at a later date.

Defendant filed an amended PCR petition on May 24, 2013, raising identical issues to those presented in his original petition but with additional exhibits attached. Glick represented defendant on the amended petition. Glick took no action with regard to the forged signature allegation. On November 22,

2013, the PCR judge heard oral argument and took the matter under advisement. On February 7, 2014, the PCR judge issued a letter opinion and order denying the amended petition without an evidentiary hearing, finding the petition time-barred under the five-year time limit imposed by Rule 3:22-12(a)(1). The judge also considered the merits of defendant's arguments, and found defendant failed to present a prima facie case of ineffective assistance of counsel. Defendant appealed. Glick also represented defendant in the appeal. We affirmed, finding no merit in any of defendant's arguments. State v. Carey, No. A-2988-13 (App. Div. Oct. 1, 2015), certif. denied, 224 N.J. 247 (2016).

Defendant filed a second PCR petition on September 30, 2016. He retained different counsel for the second PCR proceeding. The second petition alleged ineffective assistance of PCR counsel on his amended PCR petition. Following oral argument, the PCR judge issued a lengthy oral decision denying the petition without an evidentiary hearing. The judge found defendant's second petition was untimely, having been filed more than one year after the denial of the amended petition.

The PCR judge also considered the merits of the petition. The judge held defendant failed to meet either prong of the test for establishing a prima facie case of ineffective assistance of counsel, finding defendant failed to show

counsel's performance was deficient, or that there was a reasonable probability that but for appellate counsel's conduct, the outcome of the proceeding would have been different. Accordingly, the judge denied the petition without an evidentiary hearing.

The PCR judge noted the suppression motion judge found defendant did sign the Miranda form after it had been read to him and after defendant had the opportunity to read it himself. The PCR judge further noted the motion judge also found defendant read and signed the consent to search form.

The PCR judge also concluded even if defendant's statement and the evidence from the search of defendant's residence were suppressed, defendant did not demonstrate this would have changed the outcome of the trial as there was overwhelming evidence of guilt presented at trial.

This appeal followed. Defendant argues:

THE TRIAL COURT ERRED WHEN IT FOUND DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WAS TIME BARRED BECAUSE A FUNDAMENTAL INJUSTICE OCCURRED.

A. This Court Should Review the Claim on the Merits to Prevent a Fundamental Injustice Because Defendant Has Presented Strong and Uncontradicted Evidence That Law Enforcement Fabricated Evidence and That Evidence Played a Central Role in His Conviction.

B. Under a Logical Construction of the Rules, Defendant's Motions for Post-Conviction Relief Were Timely; In the Alternative, Defendant Has Demonstrated Excusable Neglect.

C. Merits of the Ineffective Assistance of Counsel Claim

1. Counsel Was Ineffective For Failing to Investigate and Present Evidence to Corroborate Defendant's Claim That His Signature on the Miranda Form Was Forged.

2. Counsel was Ineffective For Failing to Investigate and Present Evidence to Corroborate Defendant's Claim That His Signature on the Consent To Search Was Forged.

3. Counsel's Strategy was Objectively Unreasonable.

4. Prejudice.

We conduct a de novo review when the PCR court did not hold an evidentiary hearing on the claim defendant now raises on appeal. State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018).

In his second PCR petition filed on September 30, 2016, defendant argues his first PCR counsel was ineffective for failing to investigate and present evidence to corroborate defendant's claim that his signatures on the Miranda form and consent to search were forged. The PCR judge found defendant's second PCR petition was time-barred because he waited more than two and one-

half years after his first PCR petition was denied on February 7, 2014. We agree defendant's claim is time barred.

Rule 3:22-4(b) states that "[a] second or subsequent petition for post-conviction relief shall be dismissed unless: (1) it is timely under [Rule] 3:22-12(a)(2)[.]" Rule 3:22-12(a)(2) provides:

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

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

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

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

Defendant's second PCR petition was not timely under Rule 3:22-12(a)(2)(A) because he claims no newly recognized constitutional right.

Defendant's second petition was not timely under Rule 3:22-12(a)(2)(B). Defendant's ineffectiveness claim is not based on evidence or information that could not have been discovered earlier through the exercise of reasonable diligence because he knew Dr. Alexander had concluded it was highly unlikely the initials and answers on the Miranda form and his signature on the consent to search were his as of April 9, 2014. See State v. Brewster, 429 N.J. Super. 387, 399-400 (App. Div. 2013) (finding the defendant's PCR petition untimely under Rule 3:22-12(a)(2)(B) because he discovered "'the factual predicate for the relief sought'" in 2007 yet waited until 2010 to seek post-conviction relief).

Defendant's second petition is also untimely under Rule 3:22-12(a)(2)(C). Although it alleged ineffective assistance of counsel who represented defendant on his first PCR petition, defendant's second petition was not filed within one year of the date of the denial of his first PCR petition on April 27, 2007. Accordingly, the PCR court properly dismissed his second PCR petition under Rule 3:22-4(b)(1).

Defendant argues enforcement of the time bar would result in a fundamental injustice. However, that exception to the time limitations no longer applies to second PCR petitions. Jackson, 454 N.J. Super. at 294. The case law

cited by defendant predates the amendments to Rule 3:22-12 and Rule 1:3-4, and is no longer controlling.

Rule 1:3-4(c) was amended, effective since September 1, 2009, to prohibit the parties and the court from enlarging the time specified by Rule 3:22-12. Id. at 292. As such, "Rule 1:1-2(a), which generally provides that 'any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice[,]'" can no longer be invoked to relax the time limits imposed by Rule 3:22-12. Ibid.

As explained in Jackson:

Like the simultaneous amendment to Rule 1:3-4(c), the amendment resulting in Rule 3:22-12(b) was intended "to make clear that the general time limits to file a petition for post-conviction relief as set forth in R. 3:22-12 cannot be enlarged or relaxed except as specifically set forth in R. 3:22-12(a)." Report of the Supreme Court Criminal Practice Committee 2007-2009 Term at 4-5 (Feb. 17, 2009).

Finally, effective February 1, 2010, the Supreme Court again amended Rule 3:22-12 by adding a new subparagraph, Rule 3:22-12(a)(2), requiring that "no second or subsequent petition shall be filed more than one year after" the date one of three claims accrued, as defined in that subparagraph. The Court also added Rule 3:22-4(b), requiring second or successive petitions to be dismissed unless they alleged one of those three claims and were "timely under R. 3:22-12(a)(2)."

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.

[Id. at 293.]

"Thus, enlargement of Rule 3:22-12's time limits is 'absolutely prohibited.'" Id. at 292 (citations omitted).

We do not reach the merits of defendant's remaining arguments because his second PCR petition was untimely under Rule 3:22-12(a)(2), and must be dismissed pursuant to Rule 3:22-4(b)(1). See id. at 297.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

Patrick Michael Megaro, Esq.
Attorney for Defendant
1300 North Semoran Boulevard, Suite 195
Orlando, Florida 32807
(o) 407-255-2164
(f) 855-224-1671
pmegaro@halscottmegaro.com
Florida Bar ID # 620738913
New Jersey Bar ID # 3634-2002
New York Bar ID # 4094983
North Carolina Bar ID # 46770
Texas Bar ID # 24091024
Washington Bar ID # 50050

-----X
STATE OF NEW JERSEY

v.

BARRY LORENZO CAREY,
Defendant-Petitioner.

-----X
To:

Clerk of the Supreme Court
Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625-0970

Clerk of the Appellate Division
Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625-0006

Bergen County Prosecutor's Office
10 Main Street
Hackensack, NJ 07601

Assistant Prosecutor William P. Miller argued on appeal for the State. Also representing the State are Dennis Calo, Acting Bergen County Prosecutor

PLEASE TAKE NOTICE that Patrick Michael Megaro, Esq. shall petition the Supreme Court for an Order certifying the entire judgment entered by the Appellate Division in the above matter on December 11, 2018. The filing fee of \$200 is enclosed within.

Dated: December 28, 2018



PATRICK MICHAEL MEGARO

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2018, a copy of the foregoing **Notice of Petition for Certification** was served via USPS first class mail upon the following parties:

Clerk of the Supreme Court
Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625-0970

Clerk of the Appellate Division
Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625-0006

Bergen County Prosecutor's Office
10 Main Street
Hackensack, NJ 07601

Dated: December 28, 2018



PATRICK MICHAEL MEGARO