

HABEAS CORPUS

*Judge Edwin H. Stern**

It is hard in a short piece like this to answer a comprehensive paper such as the one prepared for this program by the Professors Risinger. Their presentation demonstrates scholarship and legitimate concern for legal principles, but it neither cites nor reveals a single case in which the criticized Rules produced an unjust result or denied relief which would have been granted before the Rules were amended in 2009. In fact, nothing in the New Jersey Constitution (1947) prohibits or limits the Supreme Court's rule making power regarding practice and procedure with respect to Habeas Corpus and post-conviction relief (PCR).

Article I, paragraph 14 of our 1947 Constitution provides that "the writ of habeas corpus shall not be suspended" except in cases of rebellion or invasion when the public's safety requires it. The Constitution has no provisions regarding how or when the Writ may be obtained or any procedural provisions concerning its issuance. There are few statutes that address the Writ, including N.J.S.A. 9:7, which is focused on child custody, and N.J.S.A. 2A:67-14, which indicates when the Writ is not available. But the absence of any statutes focused on the implementation of Habeas Corpus suggests recognition by the New Jersey Legislature of the Supreme Court's exclusive rule making power over practice and procedure.

While the 2007-2009 Criminal Practice Committee Report embodied proposed Rule changes to encourage convicted defendants "to bring their claims swiftly" and avoid delay,¹ citing *State v. Mitchell*,² it also recommended the prohibition of relaxation of time limits.³ The Committee Report cited *State v. Milne*,⁴ which made clear that the five time year bar in R. 3:22-12 could be relaxed because of a defendant's

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¹ CRIM. PRAC. COMM., REP. OF THE SUP. CT. CRIM. PRAC. COMM. 2007-2009 TERM 37 (N.J. 2009).

² 601 A.2d 198 (N.J. 1992).

³ See N.J. Ct. R. 1:3-4; see also N.J. Ct. R. 3:22-12(c).

⁴ 842 A.2d 140, 143-44 (N.J. 2004).

excusable neglect or if the “interests of justice demand it.”⁵ The Committee Report proposed amendments “to incorporate *Milne*,” including the exceptions to bars based on the failure to previously raise an issue or claim.⁶ A further amendment proposed to R. 3:22–12(a)(1) in 2010 requires a probable showing of injustice, in addition to excusable neglect, to avoid the time bar on the first petition for PCR.⁷

There is no improper policy, nor reason, to suggest that all grounds for PCR should not be asserted simultaneously, where possible, and expeditiously. Finality is a long-standing policy goal, and the Rules require adherence to that endeavor. The discussion in *State v. Preciose* of the federal jurisprudence makes that clear even though New Jersey was taking a different path at the time.⁸ Moreover, claims should be advanced in as close proximity to the alleged offense as possible, in the interest of asserting, developing, and considering matters while witnesses are still available and to afford victims the opportunity to have their day in court. When the grant of PCR permits retrial of a matter, it should be retried expeditiously for the same policy reasons.

The only post-2009 Supreme Court opinion relevant to our discussion is *State v. Porter*.⁹ *Porter* involved claims of ineffective assistance of trial counsel for failure to investigate an alibi defense despite the existence of an alibi witness, failure to interview the witness, and failure to convey a plea offer.¹⁰ The Supreme Court reversed the denial of PCR and held that the defendant was entitled to an evidentiary hearing on the claim of ineffective assistance of counsel.¹¹ The showing of a possible injustice warranted the evidentiary hearing.¹²

We recognize that *Porter* apparently involved a first petition for PCR and an issue which could not have been raised during trial by the attorney alleged to have been ineffective for not raising it or for not pursuing a defense,¹³ but there is no language in *Porter* to suggest the Supreme Court stepped back from making sure justice will be served in every case.¹⁴

⁵ See N.J. Ct. R. 3:22–4.

⁶ CRIM. PRAC. COMM., *supra* note 1, at 36.

⁷ N.J. Ct. R. 3:22–12(a)(1), 2010 Amendment.

⁸ 609 A.2d 1280, 1285 (N.J. 1992).

⁹ 80 A.3d 732 (N.J. 2013).

¹⁰ *Id.* at 734–35.

¹¹ *Id.* at 740–41.

¹² *Id.* at 740.

¹³ *Cf. Preciose*, 609 A.2d at 1293–94.

¹⁴ See generally *Porter*, 80 A.3d 732; see also *State v. Jackson*, 185 A.3d 262, 267 (N.J. Super. Ct. App. Div. 2018).

In *Mitchell*, although the defendant's PCR claim was time barred and he did not claim excusable neglect nor allege any facts excusing his delay, the Court indicated that fundamental injustice requires the relaxation of such procedural rules.¹⁵ There, the defendant did not meet the test set forth by the Court, but the Court nonetheless emphasized that "fundamental injustice" is an exception to the bar.¹⁶ Likewise, in *Preciose*, the Court repeated that, while procedural rules are "a means of serving the ends of justice" and importantly achieve the state goal of finality, "considerations of finality and procedural enforcement count for little when a defendant's life or liberty hangs in the balance."¹⁷ Additionally, this principle is repeated in *State v. Ways*, where the Court states that "the passage of time must not be a bar."¹⁸

However, as needs change, judicial and public policy can be modified within constitutional bounds, and the Rules of practice and procedure can be amended. As developed in *State v. Jackson*, the 2009 amendments excluded the relaxation provisions of the rules governing PCR petitions.¹⁹ In making the recommendations, the Criminal Practice Committee explicitly stated the proposed amendments to R. 1:3–4(c) and R. 3:22–12(c) made clear that the general time limits in which to file a PCR petition could no longer be enlarged or relaxed except as specifically set forth in R. 3:22–12(a), which does not include a "fundamental injustice" exception.²⁰

While the new rules may limit filing and reduce the time in many circumstances, there is nothing in the New Jersey Constitution which precluded the Supreme Court from imposing or adopting the time limitations for filing as well as the number of petitions a defendant may file. The Supreme Court has exclusive constitutional rule making authority over practice and procedure and administration of the Judiciary.²¹ The Constitutional right to habeas corpus does not mean that it can be circumscribed by governing Rules relating to practice and procedure, and we cannot forget that in addition to the Rules governing PCR, the New Jersey Rules also permit relief through a motion for new trial whenever warranted. Of great significance, R. 3:20 permits a new trial to be granted at any time, based on newly discovered evidence, which suggests a serious injustice has occurred. There have also been

¹⁵ 601 A.2d at 204 (N.J. 1992).

¹⁶ *Id.* at 210.

¹⁷ 609 A.2d at 1292–1293.

¹⁸ 850 A.2d 440, 449 (N.J. 2004).

¹⁹ 185 A.3d at 267 (N.J. Super. Ct. App. Div. 2018).

²⁰ CRIM. PRAC. COMM., *supra* note 1, at 11.

²¹ N.J. CONST. (1947), art. VI, § 2. par. 3.

joint applications, made by the prosecutor and defendants as a result of “Cold Case reviews,” which have resulted in judgments of dismissal filed years after convictions were entered.

The New Jersey Constitution excludes language that precludes reasonable limitations on the processing of PCR applications, and the Constitution lacks a provision which makes the present Rules unconstitutional. I recognize that the 2009 and 2010 amendments to the PCR Rules do embody state procedural requirements and limitations that can pose a bar to federal habeas corpus relief on State procedural grounds for those who might otherwise obtain federal habeas jurisdiction.²² And I do appreciate that the Criminal Practice Committee and Supreme Court, while having meritorious and reasonable dissents at the time consideration of the amended rules were being reviewed, did not have the benefit of the paper the Professors Risinger now offer, together with the others being presented today. As a result, I believe that consideration of their positions, and updates by present members of the Committee, may well be warranted for presentation and consideration by the Supreme Court. The passage of time, experience in developing state and federal jurisprudence warrant such study in the interest of justice, with the polestar remaining focused on the interpretation and history of the New Jersey Constitution.

²² See *Preciose*, 609 A.2d at 1294.