FILED, Clerk of the Supreme Court, 21 Oct 2024, **089274**

Supreme Court of New Jersey

DOCKET NO. 089274

CRIMINAL ACTION

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JUAN C. HERNANDEZ-PERALTA,

Defendant-Respondent.

On Leave to Appeal Granted From a Decision of the Superior Court of New Jersey, Appellate Division.

Sat Below:

Hon. Michael J. Haas, J.A.D.
Hon. Arnold L. Natali, Jr., J.A.D.

BRIEF AND APPENDIX ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY AMICUS CURIAE

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Da = Defendant's Appendix to the Appellate Division Brief
Db = Defendant's Brief to the Appellate Division
Dsb = Defendant's Supplemental Brief
Dsa = Defendant's Appendix to its Supplemental Brief
Sa = State's Appendix to its Appellate Division and Supplemental Briefs
Sb = State's Brief to the Appellate Division
Ssb = State's Supplemental Brief to the Supreme Court dated July 29, 2024
PSR = Defendant's Adult Pre-Sentence Report
1T = Plea transcript dated November 22, 2019
2T = Sentencing transcript dated December 10, 2019
3T = Violation of Probation ("VOP") transcript dated February 24, 2020
4T = VOP Hearing and Sentencing transcript dated August 17, 2020

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5T = Post-Conviction Relief ("PCR") Evidentiary Hearing transcript dated April 4, 2023
6T = PCR Evidentiary Hearing transcript dated May 23, 2023

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PRELIMINARY STATEMENT

In this case, as the PCR court found, defendant was untruthful with both his plea counsel and the court when he informed both that he was a U.S. citizen, and maintained that misrepresentation to his sentencing counsel and at post-sentencing VOP hearings. Plea counsel nevertheless informed defendant of the deportation consequences of pleading guilty if he were a noncitizen, as was counsel's normal practice, a finding no party contests. Defendant claims, however, that sentencing counsel was constitutionally ineffective for failing to repeat the same advice regarding deportation consequences that plea counsel already had provided. Defendant cannot prevail on that claim where, as here, nothing in the record available to sentencing counsel contradicted defendant's consistent claim that he was a U.S. citizen, and where defendant had already been prophylactically (and competently) advised of the deportation consequences by plea counsel in any event.

A defense attorney's obligation to warn a client of adverse immigration consequences when pleading guilty presupposes that the attorney has received accurate information from the client. Here, defendant stated to both plea counsel and the court that he was a U.S. citizen born in New York when, in fact, he was born in Mexico. And while sentencing counsel was unaware that defendant had claimed at his plea hearing to have been born in New York, when she saw that

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the Pre-Sentence Report (PSR) indicated he had been born in Mexico, she specifically asked him to confirm his U.S. citizenship, which he did without equivocation. Moreover, at two post-sentencing Violation of Probation hearings, defendant again represented to the court, under oath, that he was a U.S. citizen who had been born in Mexico. By asking defendant to confirm his U.S. citizenship, sentencing counsel satisfied her obligation under Padilla/Gaitan, and she had no further obligation to warn defendant about immigration consequences of a guilty plea.

Critically, defendant's PSR did not contradict defendant's claim that he was a U.S. citizen, and it was reasonable for defense counsel to believe that she had been accurately informed. While certain information was missing from the PSR (which is not an uncommon occurrence), none of that missing information directly contradicted defendant's claim to be a U.S. citizen, nor did the PSR contain any other information (such as a Permanent Resident Card number, visa, or immigration detainer) that would have reasonably led sentencing counsel to surmise that her client was being dishonest in claiming U.S. citizenship.

Where, as here, the PSR lacked clear indicia of noncitizen status and defendant steadfastly maintained that he was a U.S. citizen, sentencing counsel was entitled to rely on her client's verbal confirmation of citizenship and had no obligation to investigate further her client's own assertions of his citizenship.

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Absent contradictions between the PSR and defendant's representation to sentencing counsel, counsel's performance could not have been deficient.

In any event, even if defendant could establish deficient performance (which he cannot), he cannot establish prejudice, since plea counsel competently warned him of the deportation consequences anyway, despite which he nevertheless pleaded guilty. Because he cannot establish either deficient performance or prejudice, defendant cannot show a constitutional violation of his right to effective assistance of counsel. This Court should reverse on either or both bases and hold that defendant is not entitled to post-conviction relief under the circumstances presented here.

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QUESTION PRESENTED

Whether sentencing counsel was constitutionally ineffective for not investigating defendant's citizenship status, where defendant had misrepresented to both plea and sentencing counsel that he was a U.S. citizen, and plea counsel had nevertheless already warned defendant of the immigration consequences of pleading guilty.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Attorney General relies on the Procedural History and Statement of Facts in the State's supplemental brief, (Ssb1-12), but adds the following facts:

A. Underlying Criminal Proceedings.

Defendant was charged in two separate indictments arising from three burglaries and a robbery in early 2019. On June 19, 2019, he was indicted by a grand jury on charges of third-degree burglary, N.J.S.A. 2C:18-2(a)(1), and third-degree theft, N.J.S.A. 2C:20-3(a). (Sa19-21). In a separate indictment returned on September 4, 2019, defendant was charged with two counts of third-degree burglary, N.J.S.A. 2C:18-2(a)(1), two counts of fourth-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1), second-degree robbery, N.J.S.A. 2C:15-1, third-degree theft, N.J.S.A. 2C:20-3(a), third-degree aggravated assault on a law enforcement officer, N.J.S.A. 2C:12-1(b)(5)(a), third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3), and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2). (Sa22-26).

Defendant was arraigned on September 20, 2019. Information regarding his citizenship was left blank on page two of defendant's Arraignment/Initial Case Disposition Conference form. (Da008). After defendant's successful

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[1] Because they are closely related, the Procedural History and Statement of Facts are combined for the Court's convenience.

appeal of the denial of his entry into Recovery Court, the file was transferred to plea counsel, as the Recovery Court backup attorney. (6T4-22 to 5-3).

At the November 22, 2019 plea hearing, defendant entered a guilty plea related to both indictments. At the hearing, plea counsel reviewed the plea forms with defendant (Sa27-33), including subsections b. through f. of Question 17 regarding the immigration consequences for noncitizens who plead guilty:

> 17.a. Are you a citizen of the United States? If you have answered "No" to this question, you must answer Questions 17b – 17f. If you have answered "Yes" to this question, proceed to Question 18.
>
> b. Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States?
>
> c. Do you understand that you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status?
>
> d. Have you discussed with an attorney the potential immigration consequences of your plea? If the answer is "No," proceed to question 17e. If the answer is "Yes," proceed to question 17f.
>
> e. Would you like the opportunity to do so?
>
> f. Having been advised of the possible immigration consequences and of your right to seek

> individualized legal advice on your immigration consequences, do you still wish to plead guilty?
>
> [Sa30.]

To the right of each of these six questions appears a "yes" or "no" box to be checked. (Ibid.).

The Plea Court's first question to defendant, who was then 22 years old, and had been sworn, related to his U.S. citizenship.

PLEA COURT:	And, sir, you're a citizen of the United States?
DEFENDANT:	Yes, sir.
PLEA COURT:	And where were you born?
DEFENDANT:	I was born in New York.
PLEA COURT:	New York?
DEFENDANT:	Yes.

[1T4-24 to 5-16.]

Defendant further stated that plea counsel had answered all his questions; he understood "everything" about the plea forms, his plea, and the recommended sentence; and he freely and voluntarily signed the plea forms. (1T6-8 to 7-25).

A PSR was completed prior to defendant's December 10, 2019 sentencing. Pages one and ten of the PSR indicated that defendant had been born in Mexico. (Sa107; Sa116). Regarding defendant's citizenship, the "US" or "Other" boxes

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on page ten were left unchecked. (Sa116). The boxes inquiring about defendant's Social Security number, driver's license, residence phone numbers, "Alien Status," and "Other Citizenship (Nationality)" were also left blank. (Sa107; Sa116). Defendant was sentenced consistent with the plea agreement to five years of Recovery Court probation with an alternative of five years imprisonment with a NERA parole disqualifier for his robbery conviction and to two concurrent terms of five years flat for his burglary convictions. (Sa34-41; 2T6-18 to 19).

Defendant subsequently violated the terms of probation, and appeared for a Violation of Probation (VOP) hearing on February 24, 2020. (3T). Despite six sets of charges, defendant was given another opportunity to satisfy Recovery Court's probationary requirements. (4T7-7 to 9-25). Defendant violated probation again and incurred another set of six charges for his second VOP. Ibid. Consequently, on August 17, 2020, Judge Nemeth re-sentenced defendant to the alternative sentence of five years imprisonment with a NERA parole disqualifier for his robbery conviction and to two concurrent terms of five years flat for his burglary convictions. (Sa42-48; 4T16-1 to 11). Notably, at both VOP hearings, defendant was sworn and represented to the court that while he was born in Mexico, he is a U.S. citizen. (3T4-21 to 24; 4T4-6 to 11).

Defendant did not file a direct appeal.

B. Post-Conviction Relief (PCR) Proceeding.

On or about July 11, 2022, defendant filed a PCR petition, claiming that defense counsel was ineffective for failing to advise him, as a noncitizen, of the immigration consequences of pleading guilty. (Sa53-57). The PCR court held evidentiary hearings on April 4, and May 23, 2023, during which defendant, plea counsel, and sentencing counsel testified. (5T; 6T).[2]

1. Defendant's Testimony

Defendant testified that in 2019, he thought he was a U.S. citizen. (5T10-8 to 17). He stated, "I have my green card and my Social Security, and I thought that I was a U.S. citizen already 'cause that's what I heard. … Well, my family, the people that did the—they gave me the permanent residence at the Social, that's what they told me." Ibid. Defendant admitted, however, that he had not discussed his nationality, birthplace, or citizenship with plea counsel at the plea hearing and that he had directed counsel to circle "yes" on Question 17 of the plea form to indicate he was a U.S. citizen. (5T14-18 to 20; 5T19-7 to 20-22). When confronted with his testimony from the plea hearing, defendant admitted that he had told the Plea Court he was born in New York. (5T21-12 to 25).

[2] Defendant included his Social Security number on page four of five of his PCR petition. See Sa56.

Defendant also admitted that when he told the Plea Court he had been born in New York, he knew he had actually been born in Mexico. (5T22-1 to 3).

The PCR judge specifically questioned defendant about why he told the Plea Court on November 22, 2019 that he was born in New York, but then in early December 2019 told the author of the PSR that he had been born in Mexico. (5T29-19 to 34-16). Defendant again testified that he had "no idea" what caused him to change his birthplace answer, or "guessed" he "was paranoid around that time" and "wasn't thinking clearly – [and] just said it because [he] just – ." He "was just trying to get out of this situation [he] was in." (5T22-1 to 5; 5T26-10 to 18; 5T34-11 to 19). Defendant admitted that he did not inform either plea or sentencing counsel that he had been "wrong" when he said he was born in New York or that he "was a green card holder." (5T41-6 to 9; 5T43-21 to 25).

2. Plea Counsel's Testimony

Plea counsel testified that defendant was easy to communicate with, they did not "rush" through the review of the plea forms, and defendant understood the process. (6T6-14 to 18). Regarding Question 17, plea counsel testified that

> I asked him if he was a U.S. citizen. He indicated, yes, he was born in New York. And it's my pattern and practice to really read the balance of all the subsections of that which would encompass, you know, that you may be removed or you may not be able to re-enter the country in these other subsections [of Question 17]. That's the pattern and practice with regard to what I do

> with the plea form for anyone, whether it's [defendant] or someone else, really.
>
> [6T6-14 to 7-2.]

Plea counsel further testified that he

> wasn't made aware from [defendant's] trial counsel that I could remember or anyone, a family member or from the Court, regarding an immigration detainer that was placed on him. So, in essence, not only did I not get anything from [defendant] in this particular matter that there may be an immigration hold on him or consequence with regard to his plea, but I didn't have any external [information] funneled to me in any way that would alert me to that.
>
> [6T11-4 to 12.]

Nevertheless, as was his "practice," plea counsel reviewed subsection questions 17b to 17f with defendant and crossed out the "yes" or "no" boxes as inapplicable. (6T15-12 to 16-20; Sa30). The PCR judge specifically questioned plea counsel about his pattern and practice:

THE COURT: So question 17 has various subparts, the first part of which is whether the defendant is a United States citizen, and the answer yes is circled; correct?

PLEA COUNSEL: That's correct, Your Honor.

THE COURT: If you look at the remaining subparts, though, they weren't just skipped. It looks like they were affirmatively crossed out.

PLEA COUNSEL: That's correct, Your Honor, by me.

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THE COURT:	By you? That's my next question. So it was by you. And you had just testified that I think your pattern and practice was to review all the sections of question 17—I should say all the sub-sections of question 17 with a defendant even if his answer was, "Yes, I'm a U.S. citizen."
PLEA COUNSEL:	That's correct.
THE COURT:	And is the fact that you affirmatively crossed those out, you're consistent with that or does that help refresh your recollection, or otherwise have any relevance?
PLEA COUNSEL:	It's consistent, yes. I'd go through each one and then cross that out.
THE COURT:	This question actually would have allowed you just to skip to 18 without that advisement.
PLEA COUNSEL:	I understand. That's not pattern and practice.
THE COURT:	But you don't—
PLEA COUNSEL:	That's not my pattern and practice.

[6T15-12 to 16-20; accord Sa30.]

3. Sentencing Counsel's Testimony

Sentencing counsel testified that she reviewed the PSR with defendant and asked him specifically about his U.S. citizenship, given that the report indicated

he had been born in Mexico. (6T41-17 to 42-5). She testified that, while she did not discuss deportation or immigration status with defendant, she

> reviewed the Presentence Report and although the plea form says he's a U.S. citizen, the Presentence Report said he was born in Mexico. So in going through the Presentence Report, at the top of the first page when you—you know, I'm always making sure their address is correct, their Social Security number. You don't have one. "You were born in Mexico. I know the Presentence Report, the plea paperwork says you're a U.S. citizen. What's your Social Security number?"
>
> "I don't recall."
>
> Okay. So I don't fill it in. If he had recalled his Social Security number, I would have put it in. At that time I didn't know that there was an issue with it being a change from New York to Mexico as his residency. I only knew his residency to be Mexico and assumed, maybe wrongfully, but assumed that that was the same information that was previously provided to the plea attorney, the trial attorney. I didn't have any other information to the contrary.
>
> [6T35-4 to 23.]

Sentencing counsel further testified that

> [b]ecause the client indicated he was a U.S. citizen and wasn't asking any questions that would've changed his mind. I don't—it's not a normal practice for me. I don't know the normal practice for most attorneys that at sentencing were rehashing and re-going over all of the immigration. That's something that's done usually by the trial team while you're negotiating, again when you're going over the plea form. And at the time I had sentencing it was Mexico, he says he was a U.S. citizen. I inquired, "Are you a U.S. citizen?

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> "Yes."
>
> "What's your Social Security number," because it was blank.
>
> "I don't recall."
>
> [6T41-17 to 42-5.]

(Accord 6T35-11 to 14; 6T37-6 to 8; 6T37-18 to 24; 6T43-3 to 4; 6T52-8 to 11).

While she knew that the PSR indicated that defendant was born in Mexico, that fact did not raise any red flags for sentencing counsel because she had "a lot of clients who are born outside this country that are U.S. citizens." (6T37-1 to 4). She was also confident that the Plea Court had reviewed defendant's citizenship, stating: "as I know Judge Nemeth [the Plea Court] always asks about citizenship. Are you a U.S. citizen?" (6T42-24 to 43-4); see supra at AGab7 (noting Plea Court's first question to defendant was about his U.S. citizenship). Counsel testified that she did not ask defendant whether he was lying, explaining, "you're not a U.S. [citizen]—I didn't assume or ask that, no I did not. … I don't think I should ever ask my clients, 'Are you lying to me?'" (6T37-10 to 15).

Sentencing counsel further testified that defendant never indicated that he "did not have" a Social Security card. (6T42-12 to 13). Rather, defendant told her that he just "did not recall the number." (6T42-12 to 17). Sentencing

counsel explained that "[a] lot—most of my clients actually don't know their Social Security number whether they're a U.S. citizen or not." (6T42-17 to 19).

Counsel acknowledged the Office of the Public Defender's questionnaire that public defenders may submit to obtain advice when they become aware that a client has an immigration problem. But, sentencing counsel explained, she would only submit the form if she "were aware that he [defendant] was not a U.S. citizen." (6T43-22 to 44-20 (emphasis added)). And here, defendant "indicated to me he was a U.S. citizen. So, I mean, I can't—I'm not sure what more I would do to explore that." (6T40-4 to 6). Counsel testified that had she "known that in the past there [were] claims he was born in New York, that would have rung bells for me because that would've been a change, a difference. … I was not aware of that." (6T43-4 to 11).

In response to the PCR court's question whether a defense attorney must "place this information on the record and try to verify it?," counsel testified,

SENTENCING COUNSEL:	I absolutely could have said on the record that that box wasn't checked. I just asked him, "You a[re] a U.S. citizen, if we could check that box." I absolutely could have done that. I did not do that.
PCR COURT:	Well, it confirms on the record whatever he told the Judge --
SENTENCING COUNSEL:	Exactly.

. . . .

SENTENCING COUNSEL:	But it wouldn't—I would not have changed what I would have done on that day other than maybe having that box checked for the record.
PCR COURT:	See, defendant claims when he testified that he told the presentence investigator that he was born in Mexico and that he had a, quote, "green card."
SENTENCING COUNSEL:	He may have.
PCR COURT:	But the presentence investigator didn't say that either.
SENTENCING COUNSEL:	He may have.
PCR COURT:	It's just put down that he wasn't—he just didn't check U.S. citizenship or any other nationality for citizenship.
SENTENCING COUNSEL:	[Defendant] may have very well said that to her [PSR writer]. Again I'm not—I wouldn't be aware of that discrepancy, as I wasn't part of that interview and it wasn't—the box wasn't checked off. That would have been another red flag, obviously.

[6T53-10 to 54-14.]

4. PCR Court's Findings

The PCR court granted defendant's petition on May 23, 2023. The PCR judge found plea counsel's "testimony credible, that it was his practice and procedure" to address each of Question 17's sub-questions with his client, and defendant's "plea form contain[ed] strike-outs indicating that each subpart was addressed" with defendant, and plea counsel "didn't just jump to question 18 by skipping the other subparts. Again defendant initialed that specific page as well as signed the entire form." (6T76-14 to 18; 6T79-8 to 80-2). The judge also credited sentencing counsel's testimony that when she saw the PSR's indication that defendant was born in Mexico, she asked defendant about his citizenship, and he confirmed to her that he was a U.S. citizen. (6T108-6 to 8; 6T108-22 to 24).

By contrast, the PCR court found that "defendant was, in fact, untruthful with plea counsel and with the plea Judge" and that plea counsel "was very thorough." (6T96-9 to 12; accord 6T97-19 to 23). The court further found that defendant was untruthful about his citizenship status at his sentencing and VOP hearings. (6T110-5 to 8; 6T112-15 to 18). The PCR judge stated, "I'm troubled by the fact that the defendant has been untruthful, including continuing to be untruthful [even] when he got to the point of his violations of Probation," and

"these immigration issues are a mine field and it becomes even worse when a defendant is untruthful with his counsel and with the Court." (Ibid.).

While the court found that plea counsel's performance was effective because he had "zero information defendant was not a U.S. citizen," it found sentencing counsel's performance ineffective, reasoning that counsel

> indicated she asked the defendant if he had a Social Security number and was told he couldn't remember it. But he couldn't remember Social Security, there's no driver's license listed, there's no telephone number listed, his mother is not in the country, he doesn't have contact with his father. So there's a series of deficient information which should have raised flags to the attorney to conduct an investigation.
>
> [6T98-9 to 17.]

(Accord 6T84-23 to 85-4; 6T97-23 to 98-17; 6T108-9 to 113-3). The court also opined that the PSR "show[ed] that defendant is not a U.S. citizen." (6T108-12 to 13). Based on that information, the court reasoned that there was "sufficient information in" sentencing counsel's possession and within "her knowledge as sentencing counsel to trigger a duty to advise the defendant of the mandatory deportability of the conviction under so-called prevailing professional norms" as discussed in Gaitan and Padilla. (Sa51-52; 6T110-5 to 14).

On July 6, 2023, the PCR court issued an amplified opinion which additionally concluded that sentencing counsel's deficient performance prejudiced defendant because it "would have been illogical" for defendant to

"accept Drug Court probation and expect to complete same if he knew he was going to be deported. . . . . [D]efendant has proven to a reasonable probability that he would have rejected the State's plea offer and not pled guilty had he been properly advised of the adverse immigration consequences." (Sa76-77).

The Appellate Division vacated and remanded. The panel agreed with the PCR court's finding that "defendant did not satisfy the performance prong of Strickland with respect to plea counsel," while also agreeing that sentencing counsel's performance was deficient. State v. Hernandez-Peralta, No. A-3292-22 (App. Div. Mar. 8, 2024) (slip op. at 23-25; 28). (Sa100-102; Sa105). But the panel remanded for the PCR court to determine whether defendant demonstrated prejudice with respect to sentencing counsel's performance, reasoning that "the record is insufficient" to perform this analysis. Ibid.

The State filed a motion for leave to appeal from the Appellate Division's ruling, which this Court granted on June 14, 2024.

LEGAL ARGUMENT

Defendant failed to prove either the deficiency or prejudice prongs under Strickland v. Washington, 466 U.S. 668 (1984) to demonstrate ineffective assistance of counsel. Under the first Strickland prong, defendant has not shown deficient performance by either his plea counsel or sentencing counsel where he consistently claimed to both counsel that he is a U.S. citizen and there was no basis to question his repeated claim of citizenship. And because plea counsel nevertheless warned defendant of the deportation consequences for a noncitizen who pleads guilty, defendant cannot establish that he was prejudiced by a lack of knowledge of the consequences of his plea.

POINT I

DEFENDANT DID NOT RECEIVE CONSTITUTIONALLY DEFICIENT REPRESENTATION.

Defendant has not established the first prong of the Strickland test, with respect to either plea counsel or sentencing counsel. New Jersey has adopted the two-part test for claims of ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984). See State v. Fritz, 105 N.J. 42, 58 (1987); see also State v. Gideon, 244 N.J. 538, 550 (2021). First, a defendant must prove that counsel's performance was deficient, meaning "counsel made errors so serious that counsel was not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 693. Second, even if a defendant makes that showing, he must also prove he was prejudiced by that deficient performance. Ibid. Both prongs must be met to establish that defendant's conviction resulted from a "breakdown in the adversary process that renders the result unreliable." Gideon, 244 N.J. at 550; see Fritz, 105 N.J. at 52 (prejudice must be proved; "it is not presumed"). If either prong is not met, a court may dispose of the claim without considering the remaining prong. State v. Miller, 216 N.J. 40, 62 (2013). Courts thus may "choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012). At the PCR stage, defendant "bears the burden of proving his or her right to relief by a preponderance of the evidence" as to both prongs. Ibid.

Under Strickland's first prong, establishing deficiency requires "proving that 'counsel's acts or omissions fell 'outside the wide range of professionally competent assistance' considered in light of all the circumstances of the case.'" Gaitan, 209 N.J. at 350; see Strickland, 466 U.S. at 688 (noting defendant must show that "counsel's representation fell below an objective standard of reasonableness," with the "proper measure" of performance being "reasonableness under prevailing professional norms"). "Prevailing norms of

practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides." Strickland, 466 U.S. at 688. And courts indulge in "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Courts thus "must make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" State v. Pierre, 223 N.J. 560, 579 (2015) (quoting Strickland, 466 U.S. at 689).

Where a guilty plea carries deportation consequences, it "is quintessentially the duty of counsel," who knows their client is a noncitizen, to furnish "available advice about an issue like deportation, and the failure to do so 'clearly satisfies the first prong of the Strickland analysis.'" Padilla v. Kentucky, 559 U.S. 356, 371 (2010). Given the "severity of deportation," id. at 373, "counsel has an affirmative obligation to inform a client-defendant when a plea places the client at risk of deportation." Gaitan, 209 N.J. at 356 (citing Padilla, 559 U.S. at 374). That obligation presupposes, however, that the client is truthful with their plea counsel and the court, including in answering the plea form's Question 17 regarding U.S. citizenship. See People v. Carty, 947 N.Y.S.2d 617, 620 (N.Y. App. Div. 2012) ("Padilla and its progeny presuppose that defense counsel is aware at the time of the plea that a client is a noncitizen.")

(citing Padilla, 559 U.S. at 370-71); accord Padilla, 559 U.S. at 370 (noting counsel's obligation arises "[w]hen attorneys know that their clients face possible exile from this country" (emphasis added)). Thus, a defendant's "own failure to cooperate with counsel in order to apprise him of allegedly relevant information cannot now provide a basis for ineffectiveness claims." Commonwealth v. Uderra, 706 A.2d 334, 340 (Pa. 1998).

A. Plea Counsel's Performance Was Not Constitutionally Deficient.

As an initial matter, no one argues that plea counsel's performance was deficient. For good reason: the PCR court found that plea counsel was definitively told by defendant that he was a U.S. citizen and that counsel had "zero information defendant was not a U.S. citizen." (6T112-6 to 12). Counsel nonetheless did warn defendant of the immigration consequences of his guilty plea, by reviewing Questions 17b through 17f, which apply only to noncitizens. (6T76-14 to 18; 6T79-8 to 80-2). Those fact findings, as well as the court's finding that plea counsel was a credible witness, are amply supported by the record and entitled to deference. See Gideon, 244 N.J. at 551 (appellate courts "'will uphold the PCR court's findings that are supported by sufficient credible evidence in the record.'"); C.R. v. M.T., 248 N.J. 428, 440 (2021) (appellate courts defer to trial court's credibility determinations given its "'better perspective than a reviewing court in evaluating the veracity of a witness'");

State v. Nash, 212 N.J. 518, 542 (2013) (an "appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand."). Simply put, "[c]ounsel cannot be ineffective for failing to ask [defendant] about the client's citizenship status when that client remains silent after being warned that, if he or she is a noncitizen, [defendant] may be subject to removal from the United States by pleading guilty." Okeowa v. State, 337 So. 3d 767, 773-74 (Ala. Crim. App. 2021).

B. Sentencing Counsel's Performance Was Not Constitutionally Deficient.

Nor has defendant proven deficiency with respect to sentencing counsel. As the PCR court found, when sentencing counsel saw that the PSR indicated Mexico as defendant's birthplace, she asked defendant about his citizenship, and he confirmed that he was a U.S. citizen. (6T108-6 to 8; 6T108-22 to 24). That defendant claimed to be a Mexico-born U.S. citizen was corroborated by his sworn testimony at the two subsequent VOP hearings in 2020, when he made the same assertion of U.S. citizenship. (Accord 3T4-21 to 24; 4T4-6 to 11). The PCR court found sentencing counsel to be a credible witness (6T108-6 to 8), and its fact findings and credibility determinations are entitled to deference. See Gideon, 244 N.J. at 551; Nash, 212 N.J. at 542.

Sentencing counsel thus acted reasonably under the circumstances when she did not repeat the Padilla/Gaitan warning plea counsel had already given. As sentencing counsel testified, the PSR's indication that defendant was born in Mexico did not raise any red flags because counsel had "a lot of clients who are born outside this country that are U.S. citizens." (6T37-1 to 4). Indeed, that belief is consistent with federal constitutional and immigration law, which recognizes that people who are not born in the United States can still become citizens either through naturalization or, under certain circumstances, by being born to a parent or parents who are U.S. citizens. See Miller v. Albright, 523 U.S. 420, 423-24 (1998) (citing United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898)); U.S. Const. amend. XIV, § 2. "There are 'two sources of citizenship, and two only: birth and naturalization.'" Id. at 423 (quoting ibid.). "Within the former category, the Fourteenth Amendment of the Constitution guarantees that every person 'born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.'" Ibid. (quoting ibid.). For instance, under 8 U.S.C. §§ 1401(c) and (g), "married parents who are both citizens pass citizenship to their child at birth so long as either parent had a residence in the United States (or an outlying possession) prior" to the child's birth. See Mize v. Pompeo, 482 F. Supp. 3d 1317, 1324 (N.D. Ga. 2020); see also USCIS Policy Manual, Volume

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12, Part A, Chapter 2 (current as of July 18, 2024) (children "born outside of the United States may be U.S. citizens at birth if one or both parents were U.S. citizens at their time of birth.").

Also, lawful permanent residents of the United States can procure citizenship through the naturalization process. 8 U.S.C. §§ 1421 - 1459; 8 U.S.C. § 1427 ("Requirements of naturalization"); see also USCIS Policy Manual, Volume 12, Part A, Chapter 2 Becoming a U.S. Citizen (naturalization is the process by which U.S. citizenship is granted to a lawful permanent resident after meeting the requirements established by Congress in the Immigration and Nationality Act).

The PCR court nonetheless found that other fields in the PSR — the absence of defendant's Social Security, driver's license, and telephone numbers, and "Alien Status, Citizenship (US or Other) Other Citizenship (Nationality)," and the facts that his mother lived abroad, he allegedly had no contact with his father, and his being born in Mexico — should have alerted sentencing counsel to potential immigration consequences. (6T36-20 to 24; see also 6T84-23 to 85-4; 6T97-23 to 98-17; Sa107; Sa116). The PCR court also opined that the PSR "show[ed] that defendant is not a U.S. citizen." (6T108-12 to 13). But, the PCR Court findings were erroneous, based on the record and on the law, particularly as the PSR did not "show" that defendant was a noncitizen.

Indeed, the record establishes that when sentencing counsel reviewed the PSR and saw that it indicated defendant was born in Mexico, she asked defendant about his citizenship. Defendant told her in no uncertain terms that he was indeed a U.S. citizen. (6T41-17 to 42-5). Defendant's confirmation of U.S. citizenship, notwithstanding his being born in Mexico, was corroborated by his later sworn testimony to the VOP Court, where he twice told the judge that he was a U.S. citizen who had been born in Mexico. (3T4-21 to 24; 4T4-6 to 11); see also supra at AGab8. Further, sentencing counsel was entitled to rely on the prior plea proceedings (where defendant's citizenship was addressed), and in particular defendant's plea form, which reflected that he answered "yes" to Question 17a, "Are you a citizen of the United States?" (6T37-5 to 6; Sa30). As sentencing counsel testified, immigration issues are "something that's done usually by the trial team while you're negotiating, again when you're going over the plea form. And at the time," she was handling sentencing. (6T41-22 to 25).

Likewise, sentencing counsel reasonably relied on her knowledge that the Plea Court would have questioned defendant about his citizenship. Counsel credibly testified that she was confident the Plea Court addressed that issue: "as I know Judge Nemeth [the Plea Court] always asks about citizenship. Are you a U.S. citizen?" (6T42-24 to 43-4). Sentencing counsel was correct on that score (1T4-24 to 5-16), as the Plea Court's first question to defendant was, "And,

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sir, you're a citizen of the United States?" (1T5-8 to 9). Defendant, under oath, responded that he had been born in New York. (1T4-24 to 5-14). The Plea Court followed up defendant's response and asked him to confirm "New York?" to which defendant answered, "Yes." (1T5-13 to 14).

Given the information counsel had from the plea form and plea hearings, she satisfied her Padilla obligation by asking defendant about his citizenship. A defense counsel's obligation under Padilla arises only when she knows or should know that her client is a noncitizen. See Padilla, 559 U.S. at 370-71. Indeed, the "only issue" Padilla "decided was whether defense counsel had a duty to inform his client, known to be a resident alien, of the effect of a guilty plea on the client's immigration status." State v. Stephens, 265 P.3d 574, 577 (Kan. Ct. App. 2011), review denied, 294 Kan. 947 (2012). But Padilla did not "impose upon counsel the duty to investigate the citizenship or immigration status of every client in a criminal case." Ibid. The duty of counsel "who lacks knowledge of the citizenship status of a client" is thus "to ask" about the client's citizenship status. Najera v. State, 422 P.3d 661, 668-69 (Haw. Ct. App. 2018). That duty "can, for example, be satisfied by simply including on an intake questionnaire, the question: 'Are you a United States citizen?'" Ibid. If the client then "informs or even misinforms defense counsel that he ... is a citizen," counsel "would be absolved of the responsibility of providing advice to the

client regarding the deportation consequences of the client's guilty or no contest plea." Ibid. Prevailing professional norms are in accord. See ABA Criminal Justice Standards for Defense Function Standard, § 4-5.5(a), "Special Attention to Immigration Status and Consequences" (4th ed. 2017) (expecting defense counsel to "determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation. . . . Counsel should avoid any actions that might alert the government to information that could adversely affect the client."). (AGaa1-2).

That is consistent with the "highly deferential" "evaluation of counsel's performance" under Strickland, which entitles counsel to credit the information she receives from the client. Commonwealth v. Jones, 912 A.2d 268, 299-300 (Pa. 2006). This Court has cautioned judges "to eliminate the distorting effects of hindsight" in assessing the reasonableness of counsel's decisions, Pierre, 223 N.J. at 579, and "reasonableness in this context depends, in critical part, upon the information supplied by the defendant." Jones, 912 A.2d at 299-300; cf. Commonwealth v. Mason, 130 A.3d 601, 648 (Pa. 2015) ("reasonableness of counsel's investigation . . . may depend upon the information provided by defendant, 'and counsel cannot be deemed ineffective for not introducing information uniquely within the knowledge of the defendant and his family which is not supplied to counsel'"); Uderra, 706 A.2d at 340 ("The

reasonableness of counsel's investigation and preparation depends critically on the information supplied by the defendant."). In other words, a defendant's own inability to truthfully answer his counsel's questions is not a basis to find counsel's performance deficient. That should be dispositive: nothing in the record available to sentencing counsel required her to disbelieve her client's steadfast and seemingly honest claim of U.S. citizenship, particularly given the possibility that a person born in Mexico can be a U.S. citizen. See supra at AGab25.

Nor were the missing entries in the PSR or information about defendant's parents "deficiencies" that "show[ed] that defendant is not a U.S. citizen" or otherwise obligated counsel to challenge defendant's claims of U.S. citizenship. (6T98-12 to 17; 6T108-12 to 13). The missing information in the PSR, which was not uncommon in sentencing counsel's experience, should not have reasonably caused counsel to be suspicious or raise any red flags about defendant's U.S. citizenship. (See 6T37-1 to 8; 6T52-8 to 54-14).

First, sentencing counsel credibly testified that defendant "indicated to me he was a U.S. citizen. So, I mean, I can't—I'm not sure what more I would do to explore that." (6T40-4 to 6). That the "Alien Status; Citizenship (US or Other); Other Citizenship (Nationality)" boxes in the PSR were blank did not disprove defendant's persistent claim to counsel that he is a U.S. citizen.

The PCR court's findings about defendant's relationship with his parents are hardly more probative of his citizenship status. For one, the PSR merely indicated that defendant's father lived in New York and that defendant was "unsure if [his father] is employed" (Sa120) — but it did not state that "defendant doesn't have contact with his father," as the PCR court found. (6T98-9 to 17). That finding thus does not have sufficient credible evidence in the record, let alone prove anything about defendant's citizenship. That defendant's mother lives in Mexico was equally unhelpful in the citizenship calculus, because children of a U.S. citizen father and a noncitizen mother can be U.S. citizens at birth. Accord 8 U.S.C. § 1401; Padilla, 559 U.S. at 380 n.1; USCIS Policy Manual, Volume 12, Part A, Chapter 3 "U.S. Citizens at Birth." This Court is thus not bound by those findings by the PCR court. See State v. Alessi, 240 N.J. 501, 517 (2020) (reviewing courts not bound by fact findings that "are so clearly mistaken 'that the interests of justice demand intervention and correction'"). Likewise, to the extent the PCR court presumed a person born in Mexico cannot be a U.S. citizen, that finding is inconsistent with federal law and not entitled to deference. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (a "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference").

Nor did the lack of a telephone number in defendant's PSR contradict his claim of U.S. citizenship. While the absence of a telephone number is not probative of whether defendant is a U.S. citizen in the first place, notably, sentencing counsel told the Sentencing Court that defendant had a new telephone number and promised to provide it to probation to enable it to verify defendant's attendance at his outpatient program. (2T5-12 to 18).

With respect to defendant's Social Security number, sentencing counsel was clear in her testimony that defendant never indicated he "did not have" a Social Security card. (6T42-12 to 13). Rather, defendant told her that he just "did not recall the number." (6T42-12 to 17). As sentencing counsel explained, "[a] lot — most of my clients actually don't know their Social Security number whether they're a U.S. citizen or not," (6T42-17 to 19), and "young teenage kids don't recall their Social Security number either. I mean, it's not uncommon for a young person not to have their Social Security number, like you or I might." (6T42-12 to 17). That defendant <u>did</u> have a Social Security number, but simply did not recall the number, was corroborated by defendant's own PCR petition in which he provided his Social Security number. (<u>See</u> Sa56 to the State's Appendix to its June 12, 2023 Brief to the Appellate Division for defendant's unredacted Social Security number on page four of five of his PCR petition)). In any event, the possession of a Social Security number is not determinative of

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U.S. citizenship, since Permanent Resident Card (or "green card") and visa holders — who are noncitizens — can be issued Social Security cards. See Social Security Numbers for U.S. Permanent Residents, https://www.ssa.gov/ssnvisa/Handout_11_1.html.

Last, while defendant's driver's license number was left blank on pages one and ten of the PSR, that is not dispositive either. For one, pages eight and sixteen indicated that defendant, as an adult, received fines and a six-month driver's license suspension in Lakewood Municipal Court on July 14, 2016. (Sa107; Sa114; Sa116; Sa122), which suggests that it is possible defendant had a driver's license at the time and the author of the PSR was unable to locate the number. More importantly, not having a driver's license says little about one's citizenship status, and this Court can take judicial notice of the fact that even many U.S. citizens do not have one, see N.J.R.E. 201(b)(1). Thus, the absence of a driver's license number in the PSR—even assuming it meant defendant did not have a driver's license—was not determinative of defendant's citizenship status. At bottom, the PSR lacked any irrefutable indication that defendant was a noncitizen, such as a Permanent Resident Card, an A-number (or "Alien Registration Number"), visa, re-entry permit, Employment Authorization Card,

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or any other indicia of noncitizenship,[3] which would have triggered a duty for counsel to challenge her client's unwavering claims of U.S. citizenship.

In sum, on this record, sentencing counsel acted reasonably under the circumstances and in accordance with professional norms by asking defendant to confirm his U.S. citizenship status, which he unequivocally did. Accord Najera, 422 P.3d at 668-69; ABA Criminal Justice Standards for Defense Function Standard, § 4-5.5(a), "Special Attention to Immigration Status and Consequences." (AGaa1-2). This Court need not decide whether a more fulsome investigation would be required where the PSR is flatly inconsistent with a client's claims of citizenship, as those facts are not presented here. Nor does this Court need to decide whether it would be deficient performance for a defense attorney to fail to confirm citizenship with the client at all, or to fail to investigate an equivocal answer by the client regarding citizenship, as sentencing counsel here did in fact inquire of defendant and he unequivocally asserted his U.S. citizenship.

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[3] An "A-Number/Alien Registration Number/Alien Number (A-Number or A#)" is a unique number "assigned to a noncitizen by the Department of Homeland Security;" a "Re-Entry Permit" is a permit which allows permanent or conditional residents to re-enter the United States from having traveled abroad; and an Employment Authorization Document, also known as a "work permit," is a card issued to noncitizens who are authorized to work in the U.S. USCIS Glossary, https://www.uscis.gov/tools/glossary.

POINT II

DEFENDANT WAS NOT PREJUDICED, AS HE WAS ADVISED OF THE DEPORTATION CONSEQUENCES OF PLEADING GUILTY.

This Court need not even evaluate deficiency, or await a remand regarding prejudice, because defendant has not met his burden to establish prejudice as he was warned of the deportation consequences of a guilty plea for a noncitizen. See Gaitan, 209 N.J. at 350 (courts may "choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient").

The prejudice prong of the Strickland/Fritz test is "far more difficult" to prove and subject to an "exacting standard." Gideon, 244 N.J. at 550-51. A defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also State v. Castagna, 187 N.J. 293, 315 (2006) (counsel's error must be "so serious as to undermine the court's confidence in the jury's verdict or the result reached.").

In the context of an assertion of prejudice following a guilty plea, a defendant must demonstrate a "reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted

on going to trial." Lee v. United States, 582 U.S. 357, 364-65 (2017); accord State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009); see also State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (to obtain PCR relief "following a plea, 'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" (quoting Padilla, 559 U.S. at 372)). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies," and should "instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee, 582 U.S. at 369.

Here, as the PCR court found (and defendant does not contest), plea counsel did review Questions 17b to 17f with defendant, which explain the immigration consequences for noncitizens who plead guilty, and defendant initialed and signed this plea form. (Sa30-31; 6T78-25 to 80-2). Defendant also stated under oath at his plea hearing that he understood "everything" about his plea and the recommended sentence, had reviewed all the plea forms, and understood "everything in those forms," which included Questions 17b to 17f on page four of the plea form. (1T6-8 to 17-18; Sa30). Because the record shows that defendant was advised of the immigration consequences of his guilty plea, he cannot establish he was prejudiced by sentencing counsel's not repeating that warning. Defendant had already been told by plea counsel what

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he argues sentencing counsel should have told him, and had already pleaded guilty after having been properly advised. Consequently, there is no reason to conclude that he would have approached the situation differently if the warning had been repeated at sentencing. In sum, if this Court reaches Strickland's second prong, this Court should hold that defendant was not prejudiced and that therefore there was no constitutional violation, meaning that no remand is necessary.

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CONCLUSION

This Court should hold that defendant failed to meet his burden to demonstrate ineffective assistance of counsel and reverse.

Respectfully submitted,

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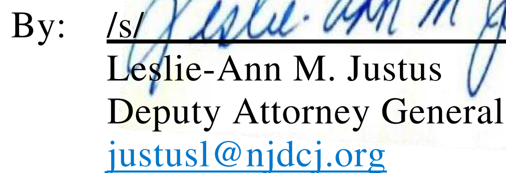
By: /s/ 
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DATED: August 28, 2024