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SUPREME COURT OF NEW JERSEY

DOCKET NO. 089274

APP. DIV. DOCKET NO. A-3292-22

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 ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS NOT CONFINED

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PROCEDURAL HISTORY[1]

On June 19, 2019, Defendant, Juan C. Hernandez-Peralta, was indicted under Ocean County Indictment No. 19-06-0946 with burglary (3rd degree), contrary to N.J.S.A. 2C:18-2a(1), and count two, theft (3rd degree), contrary to N.J.S.A. 2C:20-3a. (Sa 19-21).

On September 4, 2019, Defendant was indicted under Ocean County Indictment No. 19-09-1370. Count one charged Defendant with burglary (3rd degree), contrary to N.J.S.A. 2C:18-2a(1); count two charged Defendant with criminal mischief (4th degree), contrary to N.J.S.A. 2C:17-3a(1); count three charged Defendant with robbery (2nd degree), contrary to N.J.S.A. 2C15-1; count four charged Defendant with burglary (3rd degree), contrary to N.J.S.A. 2C:18-2a(1); count five charged Defendant with theft (3rd degree), contrary to N.J.S.A. 2C:20-3a; count six charged Defendant with aggravated assault on a law enforcement officer (3rd degree), contrary to N.J.S.A. 2C:12-1b(5)(a); count seven charged Defendant with criminal mischief (4th degree), contrary to

[1] Sa refers to the State's appendix
1T refers to the plea transcript dated November 22, 2019
2T refers to the sentence transcript dated December 10, 2019
3T refers to the violation of probation transcript dated, February 24, 2020
4T refers to the violation of probation transcript dated, August 17, 2020
5T refers to the PCR evidentiary hearing transcript dated, April 4, 2023
6T refers to the PCR evidentiary hearing transcript dated, May 23, 2023

N.J.S.A. 2C:17-3a(1); count eight charged Defendant with resisting arrest (3rd degree), contrary to N.J.S.A. 2C:29-2a(3); count nine charged Defendant with resisting arrest (4th degree), contrary to N.J.S.A. 2C:29-2a(2). (Sa 22-26).

On November 22, 2019 Defendant appeared before the Honorable Steven F. Nemeth, J.S.C., to enter a guilty plea to count one of indictment 19-06-0946 and counts one, three, and four of indictment 19-09-1370. In exchange for Defendant's guilty plea, the State agreed to recommend a sentence of five years of Drug Court probation with an alternative sentence of 5 years incarceration subject to NERA on indictment 19-09-1370, concurrent to five years incarceration flat on indictment 19-06-0946. In addition, the State agreed to dismiss the remaining counts of both indictments. (Sa 27-33; 1T 3-9 to 4-10).

On December 10, 2019, Defendant appeared before Judge Nemeth for sentencing. In accordance with the plea agreement, Judge Nemeth sentenced Defendant to five years of Drug Court probation with an alternative sentence of 5 years incarceration subject to NERA on indictment 19-09-1370, concurrent to five years incarceration flat on indictment 19-06-0946 (2T 6-18 to 7-14; Sa 34-41).

Defendant failed to comply with the terms of probation and his Drug Court probation was terminated. On August 17, 2020, he was sentenced to the

alternate sentence of 5 years incarceration subject to NERA on indictment 19-09-1370, concurrent to five years incarceration flat on indictment 19-06-0946. (Sa 42-48).

Defendant did not file a direct appeal.

On July 5, 2022, Defendant filed this petition for PCR. (Sa 53-57).

On March 15, 2023, The Honorable Guy P. Ryan, J.S.C., determined that oral argument on the PCR was unnecessary in light of the briefs submitted and ordered an evidentiary hearing on Defendant's PCR petition. (Sa 50).

On April 4, 2023, an evidentiary hearing was conducted on Defendant's PCR petition with PCR counsel calling Defendant as the sole witness. (5T) At the close of the hearing, the Court determined that it needed to hear from prior plea and sentencing counsel before ruling on the application and directed PCR counsel to call those witnesses at a subsequent continuation of the evidentiary hearing. (5T 47-21 to 51-21).

On May 23, 2023, the evidentiary hearing was continued and PCR counsel called prior plea and sentencing counsel as witnesses. (6T). The Court granted Defendant's petition at the conclusion of the hearing by oral decision and reversed Defendant's convictions on both indictments. (6T 72-22 to 114-15; Sa 51).

On June 12, 2023, the State filed a motion for leave to appeal with the

Appellate Division.

On July 3, 2023, the Appellate Division granted the State's motion for leave to appeal.

On July 6, 2023, the PCR Court filed a written amplification of its previous decision. (Sa 58-77).

On March 8, 2024, the Appellate Division issued a decision affirming in part and denying in part the PCR Court's decision. The panel held that the PCR Court properly found that sentencing counsel was ineffective pursuant to prong one of Strickland for failing to investigate Defendant's citizenship and warn him of potential deportation, but the PCR Court failed in its analysis of prong two of the Strickland test by failing to consider a Slater analysis in determining prejudice. (Sa 102, 105). The panel ultimately remanded the matter to the PCR Court for re-evaluation of prong two of the Strickland test. (Sa 105-06).

The State filed a motion for leave to appeal the Appellate Division's Decision, and On June 11, 2024, this Court granted the State's motion.

STATEMENT OF FACTS

Indictment 19-06-0946

On April 14, 2019, at approximately 11:56 p.m., Lakewood police officers responded to The Donor's Fund at 328, 3rd St in Lakewood, NJ, in response to a reported burglary. The officers spoke with the owner of the business, Yakov Travis, and his partner Ahron Schlesinger, and they reported that they were alerted to the possible burglary when their motion detector – installed after a previous burglary a week prior – detected motion in their office. The owners arrived at the business and observed three young males walking near the municipal parking lot and police headquarters. Schlesinger recognized one of the males from the still images captured by the security system during the burglary that occurred the week prior. The pair confronted the three men, and all parties ended up walking into the Lakewood PD lobby where officers intervened. Schlesinger pulled up the footage from The Donor Fund's security cameras that was captured just earlier on his Iphone which showed the officer that the suspect who made entry into the business was wearing the exact same clothing as one of the young men, Defendant. (Sa 3).

The officers walked the perimeter of the business and noticed a broken window on the first floor and broken glass on the floor inside the building by the window. They were able to access the security footage for the business

which captured the suspect walking through the building, rifling through items, before walking out the front door. Based on the fact that only one suspect was captured on the video and that Defendant was wearing an exact match of the clothing of the suspect, he was arrested and the other two males were released. (Sa 3-4).

Indictment 19-09-1370

On June 27, 2019, at approximately 1:01 a.m., officers were called to The Donor Fund again for a report of a burglary in progress. Upon the officers' arrival, the suspect had already fled. They began canvassing the area when an officer heard a crash indicative of glass breaking near Clifton Avenue. The officer observed a Hispanic male who was shirtless with a red hat on exiting the rear of a building on Clifton Avenue. The male picked up a large rectangular box and began to flee, ignoring the officers' commands to stop. He was eventually apprehended and identified as Defendant. One of the officers reported that Defendant had thrown the rectangular objects, later identified as two cash registers, at him during the arrest. (Sa 11).

The officers made contact with an owner of the business, Yosef Michael, who was able to show them the security footage of the incident which showed Defendant using a tire iron to break a window to enter the building, stealing

two cash registers, then exiting through the broken window. A search of Defendant's person after arrest uncovered the keys to the building's thermostat and a gray item of clothing that was on a rack in the business. (Sa 11).

PCR Facts

On November 22, 2019, immediately before entering his plea, the Plea Court asked Defendant if he was a US citizen and he responded affirmatively, and when asked where he was born, he responded that he was born in New York. (1T 5-8 to 5-14). Following the plea, a presentence report (PSR) was generated which listed Defendant's birthplace as Mexico (Sa 107) and the citizenship box was blank (Sa 116).

On April 4, 2023, Defendant testified before the PCR court at the evidentiary hearing in connection with his PCR petition. Defendant stated that at the time of his plea he believed he was a US citizen because he had a green card and social security number, and his family and other unnamed persons gave him the impression that these were akin to citizenship. (5T 10-2 to 10-12). He stated that he knew he was born in Mexico, traveled to the USA when he was 1 or 2, and spent most of his life growing up in New York until he moved to New Jersey. (5T 10-22 to 11-20). He said he did not learn that he was not a US citizen until deportation proceedings were brought against him in

2022. (5T 18-3 to 18-14).

Defendant stated that when he met with plea counsel, Michael Vito, he told Vito that his concern was that he didn't want to go to jail and that Vito told him he could probably get him into Recovery Court because he was a first time offender. Defendant found this option to be agreeable at the time. (5T 13-23 to 14-17). Defendant testified that he did not discuss his nationality or citizenship with Vito, but he couldn't remember filling out question 17 on the plea form. (5T 14-18 to15-8). Upon being presented with the plea form, Defendant's recollection was refreshed and he remembered going over the plea form with counsel and directing "one of the persons that was on the case" to fill out the answers on the plea form as he reviewed it. (5T 18-22 to 20-18).

When Defendant was asked on cross-examination why he told the Plea Court that he was born in New York, he answered that he just decided to say that and forgot where he was born at the time:

> MR DEEN: Why did you answer it you were born in New York when you knew you were born in Mexico?
>
> DEFENDANT: I have no idea. I just – I was raised in New York my whole life. So I just – I kind of forgot and just decided to say that.
>
> MR DEEN: So you're saying you just – you forgot where you were born during this question and you just answered –
>
> DEFENDANT: Yeah.

> MR DEEN: because you were raised here in New York; is that right?
>
> DEFENDANT: Yes, sir.
> (5T 22-1 to 22-12).

Upon similar questioning by the Court, Defendant admitted that he misled the Plea Court about being born in New York because he was "paranoid at that time." (5T 26-10 to 26-18). It was only at the PCR evidentiary hearing that Defendant testified and revealed that his actual immigration status at the time was that he had a green card and a social security number (5T 10-6 to 10-10). Defendant also admitted that he never told either plea or sentencing counsel about his lies afterwards, or that he had a green card. (5T 41-1 to 41-9; 43-21 to 44-7).

Plea counsel, Michael Vito, testified at the continuation of the evidentiary hearing on May 23, 2023. Vito stated that at the time of his representation of Defendant, he was the Recovery Court attorney for the Office of the Public Defender in Ocean County and was covering the case for Carol Wentworth, sentencing counsel, who was unavailable at the time, and that Defendant's trial counsel was previously Frank McCarthy, Esq., who went over the discovery with Defendant and transferred him to Vito for the Recovery Court plea process. (6T 4-20 to 5-16). Vito testified that he recalled that Defendant told him prior to the plea being entered in open court that

Defendant was born in New York and that he was a US citizen. (6T 6-1 to 6-20).

Despite Defendant's allegations of citizenship, Vito said that consistent with his custom and practice, he still went over the remaining questions on the plea form – regarding the effect of guilty pleas for non-citizens – with Defendant and crossed them out one by one as he did so. (6T 6-20 to 7-2). Vito stated that if he received an ambiguous response from a client regarding their citizenship status, he would ask further questions of the client in order to be sure of their citizenship for the plea. (6T 9-13 to 9-22). Vito stated that Defendant never mentioned any concern about immigration consequences to him, nor did any family member or other third party. (6T 10-24 to 11-12).

Carol Wentworth, sentencing counsel, testified that she was a Recovery Court attorney with the Office of the Public Defender in Ocean County during the time she represented Defendant at his sentencing before Judge Nemeth. (6T 32-15 to 33-8). She did not have the opportunity to meet with Defendant prior to sentencing, but she was able to go over the PSR with him for about ten minutes. (6T 33-17 to 34-21). Wentworth testified that she did have the opportunity to review Defendant's immigration status with him by asking for his social security number – which was blank on the plea forms – to which Defendant responded that he didn't recall what it was. (6T 35-1 to 35-25).

She asked him if he was a US citizen that was born in Mexico, as was indicated on the PSR, and he responded that that was accurate. (6T 37-16 to 37-24). Wentworth stated that this was not alarming to her because she had often represented clients who were citizens despite being born in other countries, and that she did not have a custom or practice of suspecting that her own clients are lying to her. (6T 36-20 to 37-22). She further stated that incomplete information on the PSR was common with her clients. (6T 47-2 to 47-17) She stated that she had no evidence or documentation reflecting that Defendant had lied at the plea hearing about his place of birth, but she would have investigated further had she known of such evidence (6T 50-19 to 51-5).

Significantly, Defendant was questioned about his citizenship status during his subsequent violation of probation in 2020, and in both the plea and sentencing transcripts he states under oath that he is a citizen of the United States, and he was born in Mexico. Vito appeared at the plea and Wentworth appeared at sentencing. (3T 4-6 to 4-11; 4T 4-21 to 4-24).

The PCR Court found Vito and Wentworth's testimony to be credible. (6T 76-14 to 76-18, 108-6 to 108-7). The Court also found that Defendant was untruthful with Vito and the Plea Court. (6T 96-5 to 96-8).

Ultimately, the Court concluded that Defendant had failed to establish a claim of ineffective assistance of counsel with respect to plea counsel, Vito,

because Defendant's false statements about being born in New York to Vito and the Plea Court deprived Vito of any evidence to suspect that Defendant was not a US citizen. See (6T 112-6 to 112-11). However, the Court found that sentencing counsel, Wentworth, was ineffective because she had a duty to investigate the citizenship of Defendant based on incomplete information in the PSR coupled with Defendant's birthplace being listed as Mexico:

> So at this point I find there was an obligation triggered by all the facts and circumstances at the time of sentencing to require Ms. Wentworth to make some type of inquiry and then to rectify that inquiry on the record. While I'm troubled by the fact that the defendant has been untruthful, including continuing to be untruthful when he got to the point of his violations of Probation, the Court finds that there was sufficient information in possession of Ms. Wentworth and in 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 those are discussed in the Gaitan and Padilla cases.
>
> (6T 110-1 to 110-14).

LEGAL ARGUMENT

POINT ONE

SENTENCING COUNSEL ARE NOT REQUIRED TO PROVIDE IMMIGRATION ADVICE TO DEFENDANTS WHO WERE DECEPTIVE ABOUT IMMIGRATION STATUS. (Sa 97-106).

In State v. Gaitan, 209 N.J. 339 (2012), and its progeny, this Court set forth a simple, straightforward duty for defense counsel with respect to advising their clients about the potential immigration consequences for a guilty plea to a criminal offense: counsel must inform a non-citizen client when a guilty plea may carry adverse consequences to their immigration status, and when those consequences are "truly clear," then counsel must correctly inform their clients of the immigration consequences of the plea. Id. at 356. The PCR Court's and Appellate Division's decisions in this case have effectively expanded this simple duty by holding that the Sixth Amendment requires defense attorneys to not only provide immigration advice when the immigration consequences of a plea are clear, but also to provide correct advice when their own clients have intentionally deceived their own attorneys and the courts about their immigration status. In finding sentencing counsel ineffective, the lower courts failed to adhere to the Strickland standard, and instead, engaged in hindsight analysis that didn't consider the reasonableness of sentencing counsel's actions in the context of the facts of this case. This

expansion of the Gaitan and Strickland standards imposes an impracticable burden on sentencing counsel that is entirely unsupported by our Constitution or caselaw.

To establish a claim of ineffective assistance of counsel, A defendant must demonstrate the reasonable likelihood of succeeding under the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984)," which New Jersey courts adopted in State v. Fritz, 105 N.J. 42, 58 (1987). State v. Preciose, 129 N.J. 451, 462 (1992). A Defendant making an ineffective assistance of counsel claim must satisfy "both prongs of the Strickland/Fritz test." State v. Buonadonna, 122 N.J. 22, 41 (1991); see Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; State v. Nunez-Valdez, 200 N.J. 129, 139 (2009); State v. Castagna, 187 N.J. 293, 313-15 (2006).

Defendant must first establish that counsel's representation was "truly deficient, with such grievous errors that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment." Buonadonna, 122 N.J. at 41 (internal citations omitted); see also State v. Arthur, 184 N.J. 307, 318-19 (2005). Further, effective assistance of counsel is measured by a standard of "reasonable competence." Fritz, 105 N.J. at 60-61. Reasonable competence does not require "the best of attorneys," but rather that

Defendant's attorney is "not so ineffective as to make the idea of a fair trial meaningless." State v. Davis, 116 N.J. 341, 351 (1989).

Pursuant to the second prong of the Strickland/Fritz test, Defendant must also demonstrate that he was prejudiced by trial counsel's ineffective assistance. See Fritz, 105 N.J. at 52. Defendant must prove 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.'" Buonadonna, 122 N.J. at 41 (quoting Fritz, 105 N.J. at 52).

Following an evidentiary hearing, a reviewing court should defer to the lower court's factual findings, but "need not defer to a PCR court's interpretation of the law; a legal conclusion is reviewed de novo." State v. Nash, 212 N.J. 518, 540–41 (2013). The PCR Court's legal reasoning must be supported by a preponderance of the evidence. Ibid.

In Padilla v. Kentucky, 559 U.S. 356 (2010), the United States Supreme Court held that the Sixth Amendment required trial attorneys to inform defendants of the potential deportation consequences that may arise as a result of a guilty plea to a criminal offense and that the failure to provide such advice might constitute ineffective assistance of counsel. In specifying the responsibility of defense counsel, the Padilla Court stressed that accurate

immigration advice was only required to be given in situations where the immigration consequences of a guilty plea were "truly clear":

> There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.
>
> Id. at 369.

In Gaitan, this Court incorporated the decision in Padilla and held that ". . . affirmative advice must be conveyed as part of the counseling provided when a client enters a guilty plea to a state offense that equates to an aggravated felony, triggering eligibility for mandated removal." Gaitan, 209 N.J. at 380.

A.) As a Result of Defendant's Deception, it was not "Clear" to Sentencing Counsel Whether Defendant was a Noncitizen and what Immigration Consequences would Follow from his Guilty Plea. (Sa 97-102, 105-06).

It should be recognized at the outset that, on appeal, deference must be given to the credibility findings of the PCR Court which found that both Wentworth and Vito testified credibly (6T 76-14 to 76-18, 108-6 to 108-7) and that Defendant was "affirmatively untruthful" with both plea counsel and the Plea Court. (6T 52-23 to 53-4; 96-5 to 96-12); See State v. Locurto, 157 N.J. 463, 474 (1999). The record demonstrates that it was Defendant's own actions in lying to his attorney and the Plea Court that prevented him from receiving accurate immigration advice at the time of his plea. See (5T 41-1 to 41-9; 43-21 to 44-7

Had Defendant been truthful throughout the plea proceedings, he almost certainly would have received accurate advice about the immigration consequences of his guilty plea. However, he gave false statements about his birthplace and citizenship status, likely to evade his "paranoid" concerns about potential immigration consequences (See 5T 26-10 to 26-18). Nevertheless, placing the burden on sentencing counsel to assume that these immigration issues were not fully explored at the time of the plea, particularly when Defendant was still representing that he was a US citizen at the time of sentencing, is an absurd delegation of responsibility that is entirely

unsupported by Padilla, Gaitan, or their progeny. It is particularly difficult for sentencing counsel to uncover a defendant's true immigration status when, as here, the defendant himself is lying to conceal this fact. See (5T 10-6 to 10-10).

Padilla and Gaitan clearly establish that defense counsel only have an obligation to provide advice to clients who are not US citizens. See Padilla, 559 U.S. at 373; Gaitan, 209 N.J. at 380. However, as Justice Alito addressed in his concurrence in Padilla, "it may be hard, in some cases, for defense counsel even to determine whether a client is an alien." Padilla, 559 U.S at 379–80. Recognizing their concurring and dissenting colleagues' combined concerns regarding the difficulties of having defense attorneys provide accurate and precise immigration advice, the majority in Padilla acknowledged that immigration law is sometimes "not succinct and straightforward", and so they set forth a lesser standard of minimum performance for counsel when immigration consequences of a plea were unclear such that counsel only had to inform their noncitizen clients that a plea "may carry a risk of adverse immigration consequences." Id. at 369.

Thus, the Padilla Court recognized that the duty to provide correct immigration advice is not absolute, which is in accordance with the long-standing principle of Strickland that PCR courts "must judge the

reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The natural extension of this reasoning is that when a defendant intentionally obfuscates their own citizenship status, Padilla no longer mandates his defense counsel to provide accurate immigration advice. See Ibid. To hold otherwise is to reward defendants for committing frauds upon the court and places an unreasonable and impossible burden on defense counsel to provide accurate advice when their clients are actively deceiving them.

In this regard, Defendant was not entitled to have the ramifications of his prior deception at the plea stage corrected by sentencing counsel, who rightfully assumed that he was honest and forthcoming with plea counsel when discussing immigration concerns as was memorialized on the plea forms. This reasoning is similar to the rationale underlying the doctrine of invited error. See State v. A.R., 213 N.J. 542, 561 (2013)("Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal'"). The A.R. Court held that "[t]he doctrine is implicated 'when a defendant in some way has led the court into error'" and that it "is meant to 'prevent defendants from manipulating the system." Id. at 562. Defendant was afforded the opportunity to receive correct immigration advice, but pursuant to the invited

error doctrine he forfeited the right to this advice when he intentionally circumvented the safeguards in place to ensure he received it. See Ibid. We cannot reward Defendant for attempting to manipulate the system by lying to avoid potential deportation consequences, and then waiting to raise a complaint about a lack of immigration advice – which was a direct result of those lies – only once deportation proceedings began. See (5T 24-9 to 24-24).

B.) Considering the Factual Context, Sentencing Counsel did not Commit any Errors that Rendered her Performance Deficient under Strickland. (Sa 97-102, 105-06).

The lower courts premised their decisions on the principle that sentencing counsel had a duty to investigate Defendant's immigration status as a result of suspicions based on inferences from the PSR. This erroneous conclusion expands the responsibilities of sentencing counsel beyond what our Constitution and caselaw have established, and it attributes an unwarranted level of significance to the probation officer generated PSR.

The PCR Court held that despite Defendant's intentional duplicity at the plea stage, sentencing counsel had an independent duty to conduct her own investigation into Defendant's citizenship status notwithstanding his clear and unambiguous assertion of US citizenship:

> The Court concludes that the evidentiary hearing established that defendant was, in fact, untruthful with

> plea counsel and with the plea Judge, and established that Mr. Vito was very thorough. However, the Court is also convinced that the information available to Ms. Wentworth established that there were signs which indicated defendant may be subject to mandatory deportation. So even applying the standard measure of deference to a defendant -- to the conduct of an attorney, the Court finds that there was sufficient evidence for Ms. Wentworth to look into the matter further.
>
> (6T 96-9 to 96-20).

To support this ruling, the Court strangely concluded that the fact that the box on the PSR which asked about citizenship was *blank* was equivalent to evidence that "really he's not a US citizen." (6T 97-23 to 98-6). The Court went on to note that other blank boxes for the questions about Defendant's driver's license number, social security number, telephone number, as well as the indications that his mother was not in the country and he has no contact with his father, were all "discrepancies" that any reasonable attorney should have concluded warranted further investigation at the time of sentencing. (6T 98-7 to 98-17). In its amplification, the PCR Court characterized the blank citizenship box as an "inconsistency" which "should have put sentencing counsel on notice as to defendant's citizenship which would require further investigation." (Sa 73).

To be clear, the PSR did not directly indicate in any way that Defendant was not a US citizen: it simply had a blank box with respect to citizenship, and

as sentencing counsel testified, PSR's often have blank boxes for certain information which are not viewed as "inaccuracies" as the PCR Court concluded. (Sa 116; 6T 47-2 to 47-25). Requiring an attorney to suspect a client is not a citizen when they unambiguously insist that they are, without any direct evidence to the contrary, imposes an obligation on sentencing counsel that has never been established and is arguably discriminatory against foreign-born citizens on its face. Any person who has become a naturalized US citizen should not be subjected to extra scrutiny at every court proceeding simply by virtue of having connections to another country. A thorough investigation of Defendant's citizenship was properly conducted at the time of the plea, after which the issue should have been concluded barring any new direct evidence in contradiction. Furthermore, requiring such an investigation at the sentencing stage places an untenable burden on sentencing attorneys who are reasonably assuming that incomplete, as opposed to incorrect, information on the PSR does not render the PSR inaccurate for the purposes of sentencing. The State is unaware of any published decision holding that a PSR is insufficient simply on the basis of blank entries, particularly on subject matters that were explored in-depth at the plea stage like citizenship status. Indeed, the lower courts' decisions render the lengthy plea discussions and plea colloquy about defendant's immigration status a nullity and places the

burden on sentencing counsel to fully investigate the immigration issues anew – solely prompted by suspicions based on inferences – at a procedural stage when they have limited time and resources to do so.

When questioned, sentencing counsel testified that she would not have changed her performance on the day of sentencing other than, perhaps, asking the Plea Court to mark the citizenship box as "U.S." after she had consulted with her client. (6T 53-6 to 53-23). The illogical nature of the lower courts' decisions is revealed when considering whether it would still have been ineffective assistance of counsel had sentencing counsel done exactly that, requesting the Court to mark the citizenship box by citing to the fact that Defendant's citizenship was indicated on the plea forms and he had just confirmed to her that he was a citizen. (6T 41-17 to 42-19). The lower courts seem to baselessly assume that the Sentencing Court would have required an investigation had this been pointed out, but there is no reason to believe that the Sentencing Court would have required any further verification or investigation beyond the defendant's personal confirmation that he was a citizen, particularly considering the fact that the sentencing judge is presumed to have reviewed the PSR as well, and he proceeded with sentencing despite the blank entries. See N.J.S.A. 2C:44-6a.

It is important in this context to recognize that PSRs are not generated by any official executive branch authority that verify the information therein; they are the product of judiciary probation officers relying largely on self-reported information by a defendant during an interview. See N.J.S.A. 2C:44-6. Indeed, citizenship is not even one of the enumerated types of information that are required to be on the PSR by statute. See N.J.S.A. 2C:44-6b. As such, when Defendant's interview with a probation officer resulted in blank boxes for certain information like citizenship status, it raises the question how it could have been unreasonable for sentencing counsel to rely on the functional equivalent of the PSR interview by simply questioning her client and having him confirm that he was a U.S. citizen, as was indicated on the PSR?

Moreover, there is no published authority which mandates an attorney to investigate the citizenship of their clients based purely on *suspicions* of alien status. The appellate panel's only cited legal authority which was purportedly in support of such a duty was a quote from State v. L.G.-M. which merely stated that Padilla and Gaitan also apply to cases which didn't originate in guilty pleas; it said nothing about a sentencing counsel's duty to investigate in any capacity. See State v. L.G.-M., 462 N.J.Super. 357, 366 (App. Div. 2020); Hernandez-Peralta, No. A-3292-22 (Slip op at *8)(Sa 101). Expanding sentencing counsels' minimum responsibilities under the Sixth Amendment to

include investigating suspicions based on inferences introduces an impossible standard for them on what was previously a narrow and well-defined process.

Indeed, in Gaitan, the focus on providing immigration advice was firmly centered on the plea phase of the proceedings when Defendant is counseled about making a choice about the disposition of his offenses, not the sentencing phase of the proceedings where that disposition is simply enacted by the Court:

> Prospectively from the time when the decision in *Padilla* was announced, counsel's failure to point out to a noncitizen client that he or she is pleading to a mandatorily removable offense will be viewed as deficient performance of counsel; **affirmative advice must be conveyed as part of the counseling provided when a client enters a guilty plea** to a state offense that equates to an aggravated felony, triggering eligibility for mandated removal.
>
> Gaitan, 209 N.J. at 380 (emphasis added).

The Appellate Division correctly noted that the L.G. -M. Court held that neither Gaitan nor Padilla were expressly limited to cases involving guilty pleas. (Sa 101). However, the Appellate Division overlooked the fact that L.G. -M. was analyzing counsels' obligations during the functional equivalent of plea counseling in the context of a PTI application, and the L.G. -M. Court ultimately concluded that defense attorneys must "advise their clients of the potential immigration consequences of any criminal disposition whether that disposition will result from a guilty plea, trial, or diversionary program." Ibid.

The State does not dispute that a defendant has the right to be advised of the immigration consequences of a criminal disposition, but it has never been established that once a Defendant has received such counseling, there is a continuing duty to investigate the issue anew at every subsequent court proceeding. As discussed above, an inquiry into the effective performance of counsel under Strickland must take into account the facts surrounding the performance. See Strickland, 466 U.S. at 690. Here, sentencing counsel reasonably relied on evidence in the record which indicated that Defendant went through the plea process to the satisfaction of his plea counsel and the Plea Court, as evidenced in the responses to question 17 of the plea forms, and she had no direct evidence to contradict that presumption. See (6T 50-19 to 51-5; Sa 30). When confronted with a blank box for citizenship on the PSR, a document that relies almost purely on self-reported information to a probation officer, sentencing counsel duplicated the probation officer's interview by directly asking Defendant about his U.S. citizenship to which he gave an unambiguous affirmative response. (6T 51-10 to 53-23). In this context, sentencing counsel's actions cannot reasonably be construed as falling below minimum standards of performance under the Sixth Amendment. See Strickland, 466 U.S at 694.

CONCLUSION

For the foregoing reasons, the State asks this Court to reverse the Appellate Division's decision.

Respectfully Submitted,

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