Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NO. A-002138-24T5

STATE OF NEW JERSEY,	CRIMINAL ACTION
Plaintiff-Respondent,	ON APPEAL FROM A DENIAL OF POST-CONVICTION RELIEF AND A MOTION TO WITHDRAW A GUILTY
v.	PLEA IN SUPERIOR COURT, LAW DIVISION, MONMOUTH COUNTY
SERGIO A. FAUSTINO,	MONMOUTH COUNTY INDICTMENTS NO. 96—09-01507-I
Defendant-Appellant.	NO. 00-03-00444-I
	Hon. Michael A. Guadagno, J.A.D (ret. & t/a) Sat Below

BRIEF ON BEHALF OF
DEFENDANT-APPELLANT SERGIO A. FAUSTINO

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PRELIMINARY STATEMENT

This is a case about a 24-year-old young man from Portugal who lacked the maturity to refrain from sleeping with another man's girlfriend and using cocaine. The Defendant engaged in a consensual fight with another individual who was the initial aggressor. The initial aggressor forced his way int the Defendant's apartment and the brawl ensued throughout several rooms in the Defendant's apartment. The fight concluded in the bedroom with the Defendant hitting the initial aggressor in the head with a glass of water that was sitting on his nightstand. Instead of calling for the police, the Defendant left the scene of the fight. He entered a guilty plea on August 4, 1997 to Aggravated Assault with a deadly weapon causing bodily injury, contrary to the provisions of N.J.S.A. 2C:12-1b(2) (Third Degree). He was sentenced to probation.

The Defendant was charged on November 27, 1999 for possessing a very small amount of cocaine (0.09 grams). The Defendant had a drug problem and received treatment. On June 12, 2000, the Defendant entered a

guilty plea to Possession, Use or Being Under the Influence, or Failure to Make Lawful Disposition of Cocaine, contrary to the provisions of N.J.S.A. 2C:35-10a(1) (third degree). The Defendant was deported because of this conviction.

He has since turned his life around to become a successful businessman, husband, father and stepfather. He has not been in trouble since these two incidents. This is a case where the punishment (banishment to a county he never intended to return to) far exceeds his crimes.

The defendant was misadvised by the two prior plea counsels that he would not be deported. The defendant received incorrect advice from his prior immigration attorney to accept deportation with the understanding that he would be returning to the United States in a few months based on his marriage to a United States citizen. Prior criminal defense counsel also failed to discuss PTI with the Defendant.

PROCEDURAL HISTORY

Defendant-petitioner Sergio A. Faustino ("defendant") was charged on June 4, 1996, in the City of Long Branch, Monmouth County with the offenses of: Count One – Aggravated Assault – Attempts to Cause Serious Bodily Injury, contrary to the provisions of N.J.S.A. 2C:12-1b(1) (Second Degree) [Dismissed]; and Count Two – Aggravated Assault with a deadly weapon causing bodily injury, contrary to the provisions of N.J.S.A. 2C:12-1b(2) (Third Degree)[Guilty]; and Count Three – Possession of Other Weapons for Unlawful Purposes, contrary to the provisions of N.J.S.A. 2C:39-4d (Third Degree)[Dismissed]. Da1.

The Grand Jurors of the State of New Jersey, for the County of Monmouth, indicted the Defendant under Case No. MON-96-002286 and Indictment No. 96-09-01507-I. Da2-3.

On February 5, 1997, the defendant appeared before the Honorable Robert A. Coogan, J.S.C., for an arraignment and entered a plea of not guilty to all

counts. Transcripts for ALL court proceedings are unavailable.

On August 4, 1997, the defendant appeared before the Honorable Robert A. Coogan, J.S.C., and entered a plea of guilty to Count Two – Aggravated Assault with a deadly weapon causing bodily injury, contrary to the provisions of N.J.S.A. 2C:12-1b(2) (Third Degree). Transcripts for ALL court proceedings are unavailable. Da4-6.

On September 19, 1997, the defendant was sentenced by the Honorable Robert A. Coogan, J.S.C. Judge Coogan sentenced the defendant to a period of non-custodial probation of two years. Defendant successfully completed all conditions and made all payments regarding the sentence. Da7-8.

The defendant entered a plea to the Indictment described above. He was represented in all pretrial matters and at the plea and sentencing by Paul E. Zager, Esq., who was privately retained. Da9-11.

Defendant-petitioner Sergio A. Faustino ("defendant") was charged on November 27, 1999, in the City of Long Branch, Monmouth County with the offenses of: Count One – Possession, Use or Being Under the Influence, or Failure to Make Lawful Disposition of Cocaine, contrary to the provisions of N.J.S.A. 2C:35-10a(1)(third degree)[Guilty]. Da12; Da13-16.

The Grand Jurors of the State of New Jersey, for the County of Monmouth, indicted the Defendant under Case No. MON-99-005205 and Indictment No. 00-03-00444-I. Da17.

On May 1, 2000, the defendant appeared before the Honorable Patricia D. Cleary, J.S.C., for an arraignment and entered a plea of not guilty to Count One. Transcripts for ALL court proceedings are unavailable.

On June 12, 2000, the defendant appeared before the Honorable Patricia D. Cleary, J.S.C., and entered a plea of guilty to Count One – Possession, Use or Being Under the Influence, or Failure to Make Lawful

Disposition of Cocaine, contrary to the provisions of N.J.S.A. 2C:35-10a(1)(third degree). Da18-21.

On August 4, 2000, the defendant was sentenced by the Honorable Patricia D. Cleary, J.S.C. Judge Cleary sentenced the defendant to a period of non-custodial probation of one year. Defendant successfully completed all conditions and made all payments regarding the sentence. Da22-23.

The defendant entered a plea to the Indictment described above. He was represented in all pretrial matters and at the plea and sentencing by Van W. Lane[1], Esq. of the Monmouth County Office of the Public Defender.

No appeal was taken either to the Appellate Division or to the New Jersey Supreme Court.

On October 16, 2024, PCR counsel filed a post-conviction petition (Da49-65) and Motion to Withdraw a Guilty Plea.

On October 22, 2024, without the filing of a brief

[1] Now deceased having past unexpectedly.

or oral argument, the Honorable Jill G. O'Malley, P.J.Cr. denied the petition based on Rule 3:22-12(a)(1) and Rule 3:21-5. Da66.

On October 22, 2024, the Defendant filed a Notice of Motion for Reconsideration. Da67-68.

On November 6, 2024, the Honorable Jill G. O'Malley, P.J.Cr. granted the Motion for Reconsideration. Da69.

On February 25, 2025, the Hon. Michael A. Guadagno, J.A.D (ret. & t/a), conducted a non-evidentiary PCR and Motion to Withdraw hearing via Zoom. 1T[2].

On March 5, 2025, Hon. Michael A. Guadagno, J.A.D (ret. & t/a), rendered a written decision denying the PCR and the Motion to Withdraw via Zoom. Da85.

On March 21, 2025, the Defendant filed a Notice of Appeal from the denial of his PCR and the Motion to Withdraw petition. Da70-73.

On March 25, 2025, the Defendant filed an Amended

[2] 1T refers to the Transcript of Post-Conviction Relief and Motion to Withdraw Hearing of February 24, 2025.

Notice of Appeal from the denial of his PCR and the Motion to Withdraw petition. D74-77.

On April 25, 2025, a certification of Transcript Completion and Delivery was filed. Da79.

STATEMENT OF FACTS

Sergio A. Faustino came to the United States legally from Portugal in 1995 when he was 20 years old. Mr. Faustino was born on September 4, 1974 and is now 50 years old. He is married (5/25/2001) to Denise Faustino a United States citizen who resides in the United States. He has two children. One is his adult stepson (Richard Kevin Rodriquez dob 3/24/1995) who was born in the United States and resides in the United States. The second is his minor daughter Z.A.F. who was born on August 22, 2021 and is a United States citizen. An order of deportation was entered on October 15, 2010 because he pled guilty to possession of a very small amount of cocaine. Da24-25.

Defendant's entire family is here in the United States. He misses his wife, children, and all his wife's family – all reside in the United States. The

Defendant has made grave mistakes several decades ago but is a hardworking, caring husband and father who has not been in trouble since 1999. He has paid the ultimate price for his misdeeds – banishment to a country that he left in 1995 and never intended on returning to.

By way of "Notice to Appear", Immigration and customs Enforcement (ICE) alleged that the defendant "was subject to removal from the United States based on Section 237(a)(1)(B) and Section 237(a)(2)(B)(i) of the Immigration and Nationality Act", specifically for overstaying his visa and for the above conviction in the Monmouth County Superior Court for the offense of Possession of CDS, to wit: cocaine, contrary to the provisions of N.J.S.A. 2C:35-10a(1). Da26-27.

On September 7, 2010, the Defendant was arrested by the Wall Township Police Department for motor vehicle violations from Old Bridge and Wall Township. He was incarcerated at the Monmouth County jail. On September 9, 2010, ICE placed an immigration detainer on Mr.

Faustino without the possibility of bond as he was subject to Mandatory Detention and Mandatory Deportation. ICE began deportation proceedings. Da28-34. The Defendant was deported on November 4, 2010. Da35.

MATERIAL FACTS FROM THE EVIDENTIARY HEARING OF FEBRUARY 24, 2025

The Defendant tried to resolve this matter, but the State's position was that it would be impossible to discuss a resolution as no documents are available. 1T4:7-11. The transcripts are unavailable, but many other documents were provided to the State. Transcripts from this time period often do not address immigration. 1T15:7-16[3]; 1T26:5-10.

The Defendant was charged in Count Three of the Indictment with Possession of Other Weapons for Unlawful Purposes, contrary to the provisions of N.J.S.A. 2C:39-4d (Third Degree). The Defendant could have pled guilty to 2C:39-5(d), Unlawful possession of

[3] 1T15:7-16 refers to the Transcript of the PCR Oral Argument at page 15, lines 7 through 16.

weapons without any negative immigration consequences.

The line at 1T4:22 should read "for" not "poor".

The Defendant was placed in U.S. Immigration and Customs Enforcement (ICE) custody approximately 10 years after his cocaine conviction. He immediately hired an immigration attorney who misadvised him to voluntarily depart the United States with the understanding that she could return him to the United States in a few months based on his marriage to a United States citizen. This is inaccurate. 1T8:2-12.

The Defendant (through his stepson) sought the advice of immigration attorney Stefan R. Latorre on February 11, 2016. Mr. Latorre's advice was that there was nothing that could help his situation. Da80-81. 1T10:3-13.

The Defendant maintains his position that prior plea counsel's certification at Da9-11 eviscerates the compulsory, mandatory, required affirmative based Question 17 of the plea forms. 1T14:1-11.

The State is conflating excusable neglect with

ineffective assistance of counsel. The Defendant is claiming that the misadvice given by the two prior immigration attorneys supports his excusable neglect argument. The Defendant is not claiming that the two prior immigration attorneys had an obligation under the Sixth Amendment. Perhaps someday, State vs. Alarez, N.J. 448, 456 (App. Div. 2022)[4] will be revisited when immigration counsel is an integral part of a Defendant's criminal defense representation. 1T15:17 to 16:1.

The State argued that the Defendant did not provide a certification from prior immigration counsel. The Defendant argued that the letter from prior immigration counsel (Da36-37) at that critical deportation point in time was better evidence than a 2025 certification from immigration counsel.

The Defendant did supply a certification from prior plea counsel on the aggravated assault charge.

[4] Mentioned by the State in a footnote in its brief on p.7. Da82.

The Defendant attempted to obtain a certification from prior plea counsel on the cocaine charge, but counsel was deceased. The Defendant provided a certification corroborating his position that the Pre-Trial Intervention Program (PTI) was never discussed with him by either counsel. Prior plea counsel on the aggravated assault indicated the same.

Throughout these proceedings, the Defendant has maintained that he was innocent of the aggravated assault charge and claimed mutual consensual fighting. The Defendant has asserted, based on the fact that the initial aggressor came to his apartment and started the fight, that a self-defense claim should have been explored. The Defendant provided a second certification. Da83-84. 1T18:15 to 19:10.

There is undisputed evidence of misadvice. PCR counsel has seen numerous times where criminal defense counsel advises that a foreign national will not be deported due to an insignificant amount of drugs. 1T22:6-12.

The State argued that the Defendant knew that he had immigration issues in 2010 when ICE detained him. The Defendant agrees but the State fails to recognize that the Defendant immediately hired an immigration attorney to fix those issues. The Defendant was married to the United States citizen and could have applied to obtain a green card based on that marriage but for the drug and aggravated assault convictions. The prior immigration attorneys failed to advise the Defendant to seek post-conviction relief.

The State maintains that without the files they are prejudiced. Numerous documents have been provided by the Defendant including a police report. The Defendant has always maintained that he is not seeking a trial but will absolutely replead to a non-deportable offense even with a county jail component. 1T23:13-22.

The State appears to be saying that because prior plea counsel states in his certification that he discussed immigration there can be no misadvice. The State also appears to be conflating immigration law

with immigration policy. The immigration law has not changed. These convictions result in mandatory deportation. We are lawyers, prosecutors and judges. We follow and adhere to the law not policies that erratically change due to the political whims of our country's leaders. A political policy to enforce or not enforce the deportation laws at a particular point in time has no bearing on the Defendant's legal rights under the Sixth and Fourteenth Amendment. 1T24:19-21.

MATERIAL FACTS FROM PCR JUDGE'S DECISION OF MARCH 5, 2025

The PCR Judge on P.4 of the Court's Opinion indicates that Defendant now expands his ineffective assistance claims to include prior plea counsel on the cocaine charge and prior immigration counsel. The Defendant has always claimed that prior plea counsel on the drug offense was ineffective by misadvising the Defendant that such a small amount of cocaine (.09 grams) would not result in deportation. The Defendant has never claimed that prior immigration counsel was ineffective under the Sixth Amendment. The Defendant

has claimed that the misadvice that prior immigration counsel, namely accept the deportation order and we will return you to the United States in a few months because you are married to a United States citizen, provides support for his excusable neglect claim.

The PCR Judge on P.6 of the Court's Opinion indicates that the Defendant ignored the lengthy delays in his brief from the dates of the convictions and focuses on the delay from the time of his deportation in 2010 to the filing of his petition on October 24, 2024. Defendant concurs and responds that he was unaware at the time of the convictions that there would be any negative immigration consequences because he was advised so by his prior criminal defense attorneys. He was made aware of this misadvice when he was arrested and thrown into ICE jail in 2010.

The PCR Judge on P.9 of the Court's Opinion indicates that

> "Faustino is clearly distinguishable from the instant matter as Faustino's immigration attorney conceded he had given wrong advice and the plea in

> Faustino was entered after the Supreme Court decided Padilla v. Kentucky, 559 U.S. 356 (2010), requiring plea counsel to advise a client regarding the risk of deportation. Id. at 367. There was no such obligation when defendant entered his guilty pleas in 1997 and 2000. Nor was there an obligation then for the sentencing court to inform defendant of the PCR time limitations as presently required by Rule 3:21-4(i).”

The PCR Judge appears to be conflating ineffective assistance of counsel pursuant to the Sixth Amendment with misadvice given by an immigration attorney to support an excusable neglect claim. The Defendant has never argued the applicability of Padilla to this “pre-Padilla” matter. The Defendant has never argued that Padilla applies to proving excusable neglect. The Defendant is arguing that his prior immigration attorney’s misadvice (accept deportation and I will return you to the United States because you are married to a Unites States citizen) or lack of advice (you need to file a PCR) was another building block in the excusable neglect wall.

The PCR Judge on P.9 of the Court’s Opinion indicates that

> "As will be explained later, Ms. Basarian did not provide ineffective assistance. Even if she did, a defendant cannot assert excusable neglect simply due to receiving inaccurate deportation advice from defense counsel. State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013). Additionally, assertions that a defendant is ignorant of the law, see State v. Murray, 162 N.J. 240, 246 (2000), or of legal consequences, Brown, 455 N.J. Super. at 470-71), do not constitute excusable neglect under Rule 3:22-12(a)."

A defendant cannot assert excusable neglect simply due to receiving inaccurate deportation advice from defense counsel. Prior immigration counsel was not the Defendant's defense counsel. Prior immigration counsel did not provide ineffective assistance of counsel under the Sixth Amendment but failed to provide accurate advice as detailed above.

Additionally, assertions that a defendant is ignorant of the law, or of legal consequences, do not constitute excusable neglect under Rule 3:22-12(a). The Defendant concurs but argues that paying for and obtaining the advice (misadvice) from four different attorneys shields him from allegations that he sat on his rights and remained ignorant.

The PCR Judge on P.13 of the Court's Opinion indicates that

> "There has been no showing that a successful PCR petition attacking either or both convictions would have had any effect on defendant's deportation. In fact, the defendant has been removable since 1995, when he remained in the United States without authorization. The CDS conviction in 2000 was listed as "Additional Charges of Inadmissibility/Deportability," but was not the primary reason for removal. Simply put, defendant was not being deported because of his drug conviction, but because he remained in this country illegally. There has been no showing that any additional actions that either plea counsel could have taken would have altered the ultimate consequence of removal."

The PCR Court takes a somewhat unique position in that the PCR should not be granted because the Defendant had no relief in immigration court. In other words, even with a successful PCR, the Defendant would still have been deported. The Defendant was married to a United States citizen much like in Chau. If the PCR was successfully, the Defendant would have been entitled to apply for an Immigrant Visa for a Spouse of a U.S. Citizen (IR1 – green card) and return to the United States after being deported.

The PCR Judge on P.13 of the Court's Opinion indicates that

> Prior Immigration Counsel filed a notice of appearance on October 14, 2010. By that time, an order had already been entered in absentia removing defendant from the United States. The subsequent order, entered on October 15, 2010, while Ms. Basarian was representing defendant, merely waives defendant's right to appeal the deportation order; it is not a "consent" to deportation as defendant now claims.

This is inaccurate. There was no deportation order entered in abstentia. The "in absentia box ()" was **NOT** checked. Da24. The Defendant did not contest the deportation and agreed to be deported with the understanding from prior immigration counsel that he would be returning shortly. The Defendant and the Government waived their appeal rights. Da25.

The PCR Judge on P.14 of the Court's Opinion indicates that

> "As to defendant's 1997 guilty plea to aggravated assault, Mr. Zager has no independent recollection of the matter but recalls that ICE was not deporting foreign nationals for offenses like this at the time and he might have informed defendant of that. Mr. Zager explains that he did not discuss PTI with defendant because the State had a policy

> against admitting foreign nations into PTI. Mr. Zager did not provide ineffective assistance…"

Prior plea counsel for the aggravated assault states in his certification that based on past practice he might have advised the Defendant that the aggravated assault would not result in deportation. This is misadvice. Aggravated assault is a crime involving moral turpitude rendering the Defendant deportable. Baptiste v. Att'y Gen., 841 F.3d 601 (3d Cir. 2016); Leslie v. Att'y Gen. of U.S., 208 F. App'x 108, 110 (3d Cir. 2006); Salomon-Bajxac v. Att'y Gen. of U.S., 558 F. App'x 160 (3d Cir. 2014); Andres v. Att'y Gen. of U.S., 263 F. App'x 212 (3d Cir. 2008). In addition, prior plea counsel failed to discuss PTI with this Defendant.

The PCR Judge on P.14 of the Court's Opinion indicates that

> "The 2000 Guilty Plea - Defendant makes the same argument as to the 2000 conviction."

The Court did not address the Defendant's argument and certification that prior plea counsel for the drug

offense misadvised the Defendant that he would not be deported for such a small amount of cocaine (.09 grams).

The PCR Judge on P.15 of the Court's Opinion indicates that

> "In defendant's October 16, 2024, certification, he makes no claim of innocence on either the assault or the drug charge and concedes that if he went to trial "the prospect of winning was slim." After oral argument, defendant submitted a certification claiming for the first time that he was attacked in the assault case and he only fought back in self-defense. Defendant does not explain why he agreed to plead guilty when he now claims he was the one who was initially assaulted."

PCR Counsel admits that this error is his. The Defendant initially explained to PCR counsel the circumstances and facts surrounding the aggravated assault. PCR counsel "labeled" this incident in the PCR petition and in the Defendant's brief as mutual fighting. Although the initial aggressor entered the Defendant's apartment, PCR counsel was of the opinion that the Defendant (despite being punched in the face) could have refused to fight and could have left his apartment but instead engaged in "mutual fighting". PCR

counsel should have argued self-defense as another grounds in the PCR petition and in the brief. PCR counsel failed to explain why the Defendant agreed to plead guilty. He agreed to plead guilty because he left the initial aggressor alone in the hallway of his apartment after the confrontation. Had he remained at the scene and called the police, the outcome of this case would have been very different.

LEGAL ARGUMENT

POINT I

THE PETITION IS NOT TIME BARRED I. (Raised Below: 1T7-23 to 10:12)

A. Defendant Has Established Excusable Neglect

The PCR Court denied the petition due to the Defendant's failure to establish excusable neglect without an evidentiary hearing. Where no evidentiary hearing was conducted in the denial of a PCR petition, "we may review the factual inferences the court has drawn from the documentary record de novo." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). We

also review de novo the trial court's conclusions of law. Ibid.

We respectfully submit that Defendant has established excusable neglect for not complying with the time limits set forth in R.3:22-12 and enforcement of the time bar would result in a fundamental injustice.

A plain reading of the above rule makes it clear that the five-year time limit is not absolute. The New Jersey Supreme Court has stated, application of the time limit "is not rigid and monolithic... as with all of our Rules, where the interests of justice so require, the Rule will be relaxed.'" State v. Mitchell, 126 N.J. 565, 576 (1992).

Facts demonstrating that the delay was due to the defendant's excusable neglect. State v. Mitchell, 126 N.J. 565, 576, 601 A.2d 198, 203, 1992 WL 11106 (1992): Immediately upon being arrested by the Wall Township Police Department on September 7, 2010 and subsequently by ICE on September 9, 2010, the Defendant immediately

hired Immigration Counsel. Da36-37. Her advice was for the Defendant to accept deportation and that she would be able to return him to the United States with an immigrant visa based on his marriage to a United States citizen in the not-too-distant future. That was misadvice as the Defendant is not able to obtain a green card based on these two convictions. This prior advice from this immigration attorney was facially flawed. "Defendant established excusable neglect for his failure to file his petition within five years" due to immigration attorneys' misadvice. State v. Chau, 473 N.J. Super. 430, 441, 281 A.3d 278, 284 (App. Div. 2022). Prior Immigration Counsel had an obligation to provide accurate advice, namely that his only option was to file for post-conviction relief and a motion to withdraw his guilty plea. If successful, then the Defendant could apply for a green card. In addition, the second immigration and criminal defense attorney Stefan R. Latorre, Esq. should have advised the Defendant to file for post-conviction relief. Da80-81.

Enforcement of the five-year rule because the defendant did not *sua sponte* investigate his lawyers' performances places an unreasonable burden on defendants. The facts of Mr. Faustino's case show that his neglect is excusable.

"Defendant cannot decide to remain intentionally ignorant of the legal consequences of his decision as a means of establishing excusable neglect". State v. Brown, 455 N.J. Super. 460, 471, 190 A.3d 531, 538 (App. Div. 2018). His attorneys were retained to properly advise him of those legal consequences and unfortunately failed to do so but he was not intentionally ignorant.

There is an abundance of evidence that prior plea counsel and assigned plea counsel provided misadvice and two immigration attorneys gave defendant inaccurate and misleading advice.

Under the circumstances, the injustice of holding him to the timetable prescribed by the above is

manifest and the Defendant has therefore established excusable neglect.

B. The Petition was filed within one year of discovering the factual predicate for the relief sought (1T10-17 to 11-23)

In the alternative, if this Court determines that Defendant has not established excusable neglect, R.3:22-12(a)(2)(B) permits a one-year limitation period if the defendant discovers a previously unknown factual predicate that warrants relief from the conviction.

Although the plain language of the above rule refers to a "second or subsequent petition," in State v. Brewster, 429 N.J. Super. 387 (2013), this Court held that the additional one-year period should also apply to the first petition.

In order for the Court to determine whether Defendant filed his petition within the one-year supplemental period, it "would have to make a threshold finding that the petition shows...a new 'factual predicate' that could not have been discovered earlier through the exercise of reasonable diligence." Id.

The previous misadvice came from prior plea counsels and the defendant's immigration attorneys. The previously unknown factual predicate came from current PCR counsel on August 28, 2024 when the Defendant was advised that the only solution was the filing of a PCR and a motion to withdraw.

The Defendant and his family had no clue that he should explore the possibility of vacating these convictions until August 28, 2024. The Defendant, prior to being advised to seek post-conviction relief in 2024, had no idea that such a vehicle or potential grounds for relief even existed. He was previously advised that only immigration relief had the potential to return him home to the United States or there was nothing that could be done. This is simply incorrect and inaccurate. There are NO immigration forms, petitions or other immigration-based relief for this Defendant. The only potential relief is through our New Jersey state courts. A court should determine that the procedural rule as applied is unjust only when a

significant liberty interest is at stake and the petitioner has offered something more than a bare allegation that that is so. State v. Mitchell, 126 N.J. 565, 580, 601 A.2d 198, 205, 1992 WL 11106 (1992). The Defendant has established both elements and has offered a GREAT DEAL MORE than a bare allegation.

C. Enforcement of the Time Bar Would Result in a Fundamental Injustice

R. 3:22-12 permits the time bar to be relaxed or dispensed with in cases where its enforcement would result in a fundamental injustice. R. 3:22-12(a)(1). In the present case, Mr. Faustino raised fundamental constitutional issues in support of his petition for PCR relief. At stake is the rest of his life without his family who are in the United States. Mr. Faustino would not be in this position if not for counsels' multiple prejudicial failures.

The New Jersey Supreme Court has proven willing to relax the time bar in cases where defendants face particularly horrible consequences. In one death penalty matter, the Court relaxed the five-year bar for

a defendant based on excusable neglect when his counsel did not fully understand the ramifications of other decisions that were issued around the same time. State v.DiFrisco, 187 N.J. 156, 166-68 (2006).

Although Mr. Faustino is not facing physical death, government-imposed exile and estrangement from his family is fundamentally unjust and equally horrendous. The significance of DiFrisco is that the Court held it was excusable neglect for a lawyer to not fully understand the legal significance of court decisions. How can Mr. Faustino be held to a higher standard than a lawyer so experienced he was at handling death-penalty cases and arguing before the Supreme Court?

POINT II

FORMER COUNSEL WAS INEFFECTIVE FOR NOT EXPLAINING THE PRE-TRIAL INTERVENTION PROGRAM, FOR NOT ADVISING AS TO THE IMMIGRATION CONSEQUENCES OF PTI, FOR NOT FILING FOR PTI[5] AND A SUBSEQUENT PTI APPEAL IF PTI WAS DENIED (RAISED BELOW: 1T12:7-24)

The Pre-trial Intervention Program ("PTI")

[5] Court records confirm no such PTI application was ever made.

closely resembles probation, which has been recognized as a criminal sanction. However, punishment in the form of probation normally follows a finding of guilt. By its nature PTI is designed to furnish rehabilitative services in the place of the normal findings of guilt. Upon admission of a defendant charged with a penal or criminal offense into PTI, all further proceedings may be postponed. N.J.S.A. 2C:43-13b and c; R. 3:28(b). Upon successful completion of PTI, the criminal complaint may be dismissed with prejudice. N.J.S.A. 2C:43-13d; R. 3:28(c)(1).

It is well-settled that "Any defendant charged with a crime is eligible for PTI." State v. Caliguiri, 1578 N.J. 28, 36 (1999). "The Guidelines require the prosecutor to evaluate each application individually." Id. at 39. "The nature of the PTI program suggests that categorical rejections must be disfavored." Ibid. "The PTI Guidelines explicitly provide that all defendants must be permitted to apply, and the Criminal Division Manager must consider the merits of the

application". State v. Green, 407 N.J. Super. 95, 98, 969 A.2d 519, 521 (App. Div.), certification granted, cause remanded, 200 N.J. 471, 983 A.2d 197 (2009).

The defendant was eligible for the Pretrial Intervention Program ("P.T.I.") as to the aggravated assault charge and no plea was required in 1996 for this second-degree charge in order to be admitted into PTI as is the law today. Given the facts underlying the aggravated assault charge, prior plea counsel should have ordered the Grand Jury minutes and analyzed whether a motion to dismiss the indictment was required. A dismissal of the second-degree aggravated assault would have lessened the entry into PTI.

Plea counsel had a legal obligation to discuss and advise the Defendant regarding PTI. Plea counsel failed to do so. No PTI applications were ever filed. Even if the State had objected to the PTI, plea counsels could have filed an appeal for the Judge to review and determine whether the Defendant should have been admitted into PTI. Prior criminal defense counsels had

a legal obligation to discuss PTI with this foreign national defendant regardless of whether he was accepted into the program or not.

In the case at bar, prior plea counsels failed to explain PTI and failed to have the Defendant apply for PTI because "this was not a PTI case". This may have been counsel's strategy, but the Defendant had nothing to lose by filing. "Even misinformation about a collateral consequence may vitiate a guilty plea if the consequence is a material element of the plea." State v. Jamgochian, 363 N.J. Super. 220, 225 (App. Div. 2003). The absence of the above is ineffective assistance of counsel.

For these reasons, the defendant's conviction should be vacated.

POINT III

THE DEFENDANT WAS DENIED HIS UNITED STATES CONSTITUTIONAL RIGHT AND NEW JERSEY STATE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY STATE CONSTITUTION DUE TO COUNSELS' MISADVICE AS TO THE CRYSTAL CLEAR IMMIGRATION CONSEQUENCES OF HIS CHARGES NAMELY THAT HE WOULD NOT BE DEPORTED A

PRESUMPTION OF PREJUDICE EXISTS OR, AT THE VERY LEAST, A REASONABLE PROBABILITY EXISTS THAT BUT FOR THE ERRORS THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT; THE DEFENDANT'S CONVICTION SHOULD BE VACATED (RAISED BELOW: 1T11:24 TO 1T13:21)

The defendant respectfully submits that he was deprived of his right to effective assistance of counsel under both the federal and New Jersey Constitutions, mandating the vacation of his conviction.

Prong One – Ineffective Assistance of Counsel

THE LAW CONCERNING EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey State Constitution guarantee the right to effective assistance of legal counsel.

The New Jersey Supreme Court in State v. Nunez-Valdez, 200 N.J. 129, 975 A.2d 418 (2009), stated:

> "This case essentially presents a claim of ineffective assistance of counsel based on defendant's assertions that counsel provided misleading information on the consequences of a

> guilty plea. Defendant contends that his attorneys told him to accept the plea offer in exchange for a probationary sentence and that the plea would not affect his immigration status.

The matter currently before the Court is exactly on point with Nunez-Valdez. The Nunez-Valdez Court assessed whether the defendant met his burden of proving that he was deprived of his state constitutional right to effective assistance of counsel by first outlining the immigration law in effect at the time defendant entered his plea. That Court concluded that the crime to which defendant Nunez-Valdez pled guilty to required mandatory deportation. This is on point with Defendant's case herein. Plea counsel misadvised that his guilty plea would not affect his immigration status. Da9-11.

In this case, defendant respectfully alleges incorrect and mistaken legal advice given by his prior defense counsels. They essentially told defendant that there would be no deportation. This similar set of facts in Nunez-Valdez (i.e., guilty plea to a crime

resulting in mandatory deportation plus defense counsel's assurances that deportation will not occur) persuaded that Court to find that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases.

The transcripts are unavailable and therefore we do not know what the Court said to the Defendant.

> "We have recognized the distinct roles of the trial judge and counsel, concluding a "judge's statements may not be imputed to counsel. The judge is obliged to ascertain that a plea is entered voluntarily .... That obligation is related to, but distinct from the attorney's obligation to render effective assistance." State v. Blake, 444 N.J. Super. 285, 297, 132 A.3d 1282 (App. Div. 2016). State v. L.G.-M., 462 N.J. Super. 357, 368, 226 A.3d 954, 960 (App. Div.), cert. denied, 241 N.J. 514, 229 A.3d 870 (2020)

In other words, a judge is providing a Defendant with warnings, not advice. Judges are prohibited from practicing law (i.e., providing legal advice). Although a judge's warnings are important, they are NOT a substitute for an attorney's obligation under the 6th Amendment to provide correct advice to foreign nationals as to the immigration consequences of their

plea. Today, they also serve a more important function. To alert defense counsel of the requirement to provide some form of immigration advice based on the simplicity or complexity of the immigration law. Misadvice as to the immigration consequences of the charges, failure to apply to PTI, coupled with a failure to try to negotiate a non-deportable plea are violations of the defendant's 6th amendment right to counsel. The certification of counsel and defendant are *prima facie* evidence as to the misadvice given to the Defendant.

Therefore, the first Strickland prong (Ineffective Assistance of Counsel) is established by a preponderance of evidence.

Prong Two – Prejudice to the Defendant

Defendant must show he was prejudiced such that there existed a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Strickland, supra, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

In Lee v. United States[6], 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), the Supreme Court of the United States explained their reasoning in Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (extending the two-part test in Strickland). The inquiry prescribed in Hill v. Lockhart focuses on a defendant's decision making, which may not turn solely on the likelihood of conviction after trial. Common sense (not to mention precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See INS v. St. Cyr, 533 U.S. 289, 322–323, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive.

[6] Our United States Supreme Court in the seminal case Lee v. United States has drastically changed the "prejudice prong".

In this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." Roe v. Flores-Ortega, 528 U.S. 470, 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place." Id., at 482–483, 120 S.Ct. 1029. We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." Id., at 483, 120 S.Ct. 1029. As we held in Hill v. Lockhart, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to

accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S., at 59, 106 S.Ct. 366. Lee v. United States, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017).

Defendant Faustino was prejudiced by the "denial of the entire judicial proceeding to which he had a right". In short, when reviewed under the proper standard for a post-conviction relief proceeding alleging a violation of the principles recognized in Nunez-Valdez, the court's consideration of the rationality of a decision whether to accept or reject a plea agreement must include a properly advised defendant's desire to avoid a negative impact on his immigration status. Here, Mr. Faustino stated in his certification that had he been properly advised by prior defense counsel, he would have gone to trial, requested that counsel negotiate a non-deportable plea,

applied for PTI, and filed a PTI appeal if he was rejected.

Indeed, when objectively viewed, it is difficult even to imagine that this Defendant would not have gone to trial or pled guilty to something that would NOT have subjected him to absolute, certain, inevitable, and mandatory removal from the United States and his family.

Defendant Faustino satisfied the prejudice prong of the ineffective-assistance-of-counsel analysis by showing that he would have proceeded to trial, applied to PTI or accepted an alternative "Safe Haven" plea WITH A JAIL SENTENCE but for the failure of counsel to correctly advise him.

THE DEFENDANT'S CONVICTION MUST BE VACATED

Defendant submits that, as stated in his Verified Petition and other supporting documents, the only reason that he proceeded to enter a guilty plea was his misunderstanding of the immigration consequences, namely that there would not be any AND lack of advice

as to PTI (not a PTI case and you are a foreign national). HE DID NOT KNOW THAT HE WAS FACING MANADATORY DEPORTATION upon a guilty plea to this charge. He did not know that he was eligible for PTI. For these reasons and under the legal authority cited, the defendant's conviction must be vacated.

POINT IV

PLEA COUNSELS' MISADVICE TO DEFENDANT CONCERNING THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA RENDERED DEFENDANT'S PLEA INVOLUNTARY AND UNKNOWING UNDER RULE 3:9-2 AND, THEREFORE, DEFENDANT SHOULD BE PERMITTED TO WITHDRAW HIS GUILTY PLEA (RAISED BELOW: 1T6: 9 to 1T7:22)

Due Process Violation

The Defendant was misadvised as to the immigration consequences of the plea. The guilty plea was therefore NOT made knowingly with an understanding of the consequences of the plea. A guilty plea violates due process and is, thus, constitutionally defective if it is not voluntary and knowing. McCarthy v. United States, 394 U.S. at 466, 89 S.Ct. at 1171, 22 L.Ed.2d at 425.

The matter currently before the Court is a case where the immigration consequences resulting from the possession of cocaine under N.J.S.A. 2C:35-10a(1) are truly clear and that one need not be an immigration expert, only very basic legal research is required. The same holds true for the aggravated felony. The immigration consequences of drug possession charges are certain, clear, and easily discerned therefore prior criminal defense counsel should have given accurate advice once he gave advice.

The immigration consequences resulting from pleading guilty to the charge against Mr. Faustino were material to the defendant's decision. Applying for PTI was important to this foreign national defendant. The defendant reasonably relied on the misinformation provided by his attorney in deciding to plead guilty, the defendant has met his burden and demonstrated by a preponderance of evidence that his guilty plea was not made knowingly, voluntarily, or intelligently.

Mr. Faustino did not know that he was eligible for PTI and he did not know that he was pleading guilty to an immigration mandatory removable conviction that would result in certain deportation with no immigration relief available therefore his guilty plea was "unknowing" pursuant to R.3:9-2 and must be vacated as a Due Process infirmity.

POINT V

PURSUANT TO STATE V. SLATER, 198 N.J. 145 (2009), DEFENDANT MEETS THE "MANIFEST INJUSTICE" FOUR FACTOR BALANCING TEST IN ORDER TO WITHDRAW GUILTY PLEA (RAISED BELOW: 1T18:15 to 1T:21-23)

In State v. Slater, 198 N.J. 145 (2009), the Court ruled that the defendant was entitled under R. 3:9-3(e) to withdraw before sentencing his plea of guilty to second-degree possession of a controlled dangerous substance (CDS) with intent to distribute, even though the plea was part of a plea bargain; the defendant unequivocally asserted his innocence and presented potentially plausible facts supporting his defense. Defendant Faustino has done so also.

Courts should consider and balance all of the factors discussed above in assessing a motion for withdrawal of a plea. No factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief. State v. Slater, 198 N.J. 145, 162, 966 A.2d 461, 471, 2009 WL 291183 (2009).

WHETHER DEFENDANT HAS ASSERTED A COLORABLE CLAIM OF INNOCENCE

As explained in Slater, "[c]ourts are not to conduct a mini trial at this juncture, though. They should simply consider whether a defendant's assertion of innocence is more than a blanket, bald statement and rests instead on particular, plausible facts." State v. Slater, 198 N.J. 145, 158 (2009). The Defendant can claim and does claim innocence on the first offense. This was a case of mutual consent fighting with a strong self-defense component.

THE NATURE AND STRENGTH OF DEFENDANT'S REASONS FOR WITHDRAWAL

As explained in Slater, "This second factor focuses on the basic fairness of enforcing a guilty plea by

asking whether defendant has presented fair and just reasons for withdrawal, and whether those reasons have any force." State v. Slater, 198 N.J. 145, 159 (2009).

As further explained in Slater:

Our case law has identified several reasons for withdrawal, and whether those reasons have any force. Our case law has identified several reasons that warrant withdrawal of a plea.

Prior defense counsels (with all due **Respect** unintentionally) misinformed the defendant of a material element of the plea negotiations, namely that these convictions would not affect his immigration status; (2) the defendant was not informed and thus did not understand material terms and relevant consequences of the plea (he could not apply to PTI and he would not be deported for this offense). In addition, (3) defendant's reasonable expectations under the plea agreement were not met.

Finally, (4) the defendant has not only made a plausible showing of a valid defense against the

charges, but also credibly demonstrated why that defense "was forgotten or missed" at the time of the plea. A guilty plea was the most cost-effective way of resolving the matters versus costly motion practice followed by a trial. The Defendant just was unaware of exactly how costly – mandatory deportation.

This entire case is about "basic fairness" — the defendant, never remotely imagined that he would be jailed by ICE indefinitely and deported for life back to a county that he had no intention of ever returning, and he relied upon his former attorneys' misadvice in formulating this belief regarding deportation. Prior plea counsel gave misadvice and took no measures to obtain the correct advice. This factor weighs in favor of the Defendant.

WAS THE PLEA ENTERED AS PART OF A PLEA BARGAIN?

There was no plea bargain with respect to 00-03-00444-I. The Defendant pled guilty to the entire indictment. This factor weighs in favor of the Defendant.

WOULD WITHDRAWAL OF THE PLEA RESULT IN UNFAIR PREJUDICE TO THE STATE OR UNFAIR ADVANTAGE TO THE ACCUSED?

Withdrawal of the conviction will not result in any prejudice to the State because the defendant is not seeking a trial but a guilty plea to an offense that would not affect his immigration status.

Society's mores change over time. The drug offense is certainly a PTI case today. The Defendant had an insignificant amount of cocaine. There is no unfair prejudice to the state or unfair advantage to the accused. It is only the previously unforeseen consequences that will differ—defendant's life sentence in a country that he NEVER wanted to return to. This factor weighs heavily in the Defendant's favor.

CONCLUSION

The defendant has NOT been in trouble since 2000 whether here or in Portugal. Quite to the contrary, he has become a successful businessman, good husband, and caring father.

Mr. Faustino's petition for Post-Conviction relief, or alternatively his motion to withdraw his guilty

plea, should be granted or remanded for an evidentiary hearing because he has was denied effective assistance of counsel as required by the federal and New Jersey constitutions.

Respectfully Submitted,

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Dated: June , 2025

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August 29, 2025

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Honorable Judges of the
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Post Office Box 006
Trenton, New Jersey 08626

Re State of New Jersey (Plaintiff-Respondent)
v. Sergio A. Faustino (Defendant-Appellant)
Appellate Division Docket No. A-2138-24T5
Indictment Nos. 96-09-1507; 00-03-0444
Case Nos. 96002286; 99005205
Criminal Action: On Appeal from the Denial of a Petition for Post-Conviction Relief in the Superior Court of New Jersey, Law Division (Criminal), Monmouth County

Sat Below: Honorable Michael A. Guadagno, J.A.D. (ret. & t/a)

Honorable Judges:

Please accept this letter memorandum, pursuant to R. 2:6-2(b), in lieu of a more formal brief submitted on behalf of the State of New Jersey.

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TABLE OF APPENDIX

COUNTERSTATEMENT PROCEDURAL HISTORY AND FACTS[1]

Defendant was indicted on Indictment Number 96-09-1507 with second-degree Aggravated Assault, contrary to N.J.S.A. 2C:12-1b(1), third degree Aggravated Assault, contrary to 2C:12-1b(2), and third-degree Possession of a Weapon for Unlawful Purpose, contrary to N.J.S.A. 2C:39-4d, for an assault that took place on June 4, 1996 in Long Branch. Da2-3.[2] August 7, 1997, defendant plead guilty to third-degree aggravated assault in exchange for a sentence recommendation of probation with no county jail time. Da4-6. On the plea paperwork, defendant circled "yes" to Question 17 asking him if he was aware of the deportation risks associated with the guilty plea. Da6. On September 19, 1997, defendant was sentenced by the Honorable Patricia D. Cleary, J.S.C., in accordance with that plea. Da7-8. Defendant was represented by Paul Zager, Esq. at that time. Ibid.

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[1] Because the pertinent facts and procedural history are integrally intertwined, and to divide them would render their recitation duplicative and/or incomprehensible, the State has combined its Counterstatement of Procedural History with its Counterstatement of Facts.

[2] Based upon the age of the case, there are no transcripts and all of the State's files have been destroyed in accordance with Record Series #0018-0005 of the Records Retention and Disposition Schedule for County Prosecutors from the Division of Archives and Records Management
(Available at: https://www.nj.gov/treasury/revenue/rms/pdf/c310000.pdf).
Therefore, the State relies on the official documents provided in Defendant's Appendix

On November 27, 1999, defendant was pulled over by Long Branch police after they observed a suspected CDS transaction. Da15. They confirmed the driver was defendant and determined he had an active warrant out of Woodbridge. Ibid. They arrest him and searched his car after receiving consent. Ibid. They found a small cigarette wrapper containing two small, blue glassine baggies of suspected crack cocaine. Da15-16.

On March 2, 2000, defendant was indicted with one count of third-degree Possession of a Controlled Dangerous Substance (cocaine), contrary to N.J.S.A. 2C:35-10a(1), under Indictment Number 00-03-00444. Da17. On June 12, 2000, defendant plead guilty to that count in exchange for a sentencing recommendation of noncustodial probation conditioned on defendant entering and completing an outpatient drug rehabilitation program. Da18-21. Again, on the plea paperwork defendant circled "yes" to Question 17 asking him if he was aware of the deportation risks associated with the guilty plea. Da20. On August 4, 2000, Judge Cleary sentenced defendant in accordance with the plea deal. Da22-23.

On September 9, 2010, a Warrant Arrest of Alien, a Notice of Custody Determination and a Notice to Appear from the Department of Homeland Security was signed for defendant. Da26-29. Defendant acknowledge receipt of this notification and was detained. Ibid. Defendant had been admitted to the

United States on July 25, 1995, but was removable because he remained in the United States past the temporary period of August 23, 1995 without authorization from the Immigration and Naturalization Service or its successor the Department of Homeland Security. Da26. In the Additional Charges of Inadmissibility/Deportability, dated October 6, 2010, defendant was also subject to removal based on his 2000 Possession of CDS conviction. Da30. On October 15, 2010, defendant was ordered removed from the United States to Portugal by the Honorable Margaret R. Reichenberg of the United States Immigration Court in Newark, New Jersey. Da24-25.

On December 20, 2024 defendant filed his motion for Post-Conviction Relief with this Court. Da83-84. On February 24, 2025, the Honorable Michael A. Guadagno, J.A.D., (Ret. & t/a) heard oral arguments for defendant's PCR. (see 1T).[3] On March 5, 2025, Judge Guadagno denied defendant's petition without an evidentiary hearing. Da85; Pa1-18Pa[4].

[3] 1T refers to the Transcript of PCR Hearing, dated February 24, 2025.

[4] Pa refers to the State's appendix, Judge Guadagno's opinion denying defendant's petition.

LEGAL ARGUMENT

POINT I

THE LOWER COURT PROPERLY FOUND DEFENDANT'S PCR PETITION TIME-BARRED.

As he did below, defendant argues that he has established excusable neglect to relax the time bar under R. 3:22-12 due to misadvice from his immigration attorney and that no one advised him of his right to file for relief until August 28, 2024. Db23-30. However, the PCR court did not err when it found Defendant's PCR petition—filed more than 27 years after the entry of his 1997 guilty plea for aggravated assault and 24 years after the entry of his 2000 guilty plea for possession of CDS—failed to establish a plausible explanation in the delay in filing to constitute excusable neglect. Pa6-10. Moreover, the PCR court correctly found that defendant failed to demonstrate any change in circumstances since his deportation to establish the one-year limitation period under R. 3:22-12(a)(2)(B). Pa10.

An appellate court reviews the legal conclusions of the lower court on a petition for post-conviction relief de novo. State v. Nash, 212 N.J. 518, 541 (2013); State v. Harris, 181 N.J. 391, 420, certif. denied, 545 U.S. 1145 (2005). Where no evidentiary hearing has been held, such as in this case, this

Court "may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge]." State v. Reevey, 417 N.J. Super. 134, 146–47 (App. Div.), certif. denied, 206 N.J. 64 (2011).

New Jersey law requires a PCR to be filed within five years after entry of the judgment of conviction sought to be attacked, unless the defendant, "alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice[.]" R. 3:22-12(a)(1)(A). "[E]xcusable neglect encompasses more than simply providing a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super 149, 159 (App. Div. 2009).

In order to prove excusable neglect, the defendant "must offer something more than a 'bare allegation.'" State v. Goodwin, 173 N.J. 583, 594 (2002) (quoting State v. Mitchell, 126 N.J. 565, 580 (1992)). A court should "only relax the bar of Rule 3:22-12 under exceptional circumstances." State v. Afandor, 151 N.J. 41, 52 (1997). In determining whether a defendant has asserted grounds sufficient for relaxation of the Rule, a court "should consider the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claim in determining whether there has been an 'injustice'

sufficient to relax the time limits." Goodwin, 173 N.J. at 594 (2002) (quoting Afanador, 151 N.J. at 52 (1997)).

Incorrect or incomplete legal advice does not qualify as excusable neglect, because "long-convicted defendants might routinely claim they did not learn about the deficiencies in counsel's advice on a variety of topics until after the five-year limitation period had run." State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013). Further, "ignorance of the law and rules of court does not qualify as excusable neglect." State v. Murray, 162 N.J. 240, 246 (2000); See State v. Dugan, 289 N.J. Super. 15, 22 (App. Div. 1996) (holding a misunderstanding of the meaning of Rule 3:22-12 does not constitute excusable neglect). Moreover, R. 3:22-12(a)(1)'s time limitations provide "finality of judgments." State v. Mitchell, 126 N.J. 565, 576 (1992). The purpose of the PCR five-year time bar "is to encourage defendants reasonably believing they have grounds for [PCR] to bring their claims swiftly and discourages them from sitting on their rights until it is simply too late for a court to render justice." State v. Cummings, 321 N.J. Super. 154, 165 (App. Div. 1999). In order to show claim a fundamental injustice, "the petitioner must show that the error 'played a role in the determination of guilt." Brewster, 429 N.J. at 401 (quoting Mitchell, 126 N.J. at 587).

Here, as Judge Guadagno properly found, defendant entered his guilty plea for aggravated assault on August 7, 1997 and was sentenced September 19, 1997. Da4-8. Defendant then pled guilty to possession of CDS on June 12, 2000, and was sentenced August 4, 2000. Da4-8. Defendant filed his petition for PCR on November 7, 2024, twenty-four years after having pled guilty to his second offense. In order for his petition to be timely, defendant would have had to file his petition on August 4, 2005. Instead, defendant waited nineteen years after the five-year deadline had passed to file his petition for PCR. Thus, defendant's PCR is wholly out of time. What is more, it is clear defendant knew of potential immigration issues when went over and filled out his plea paperwork with his attorney and then again when he was detained by ICE in 2010. Da28.

Additionally, the State's files in relation to this matter were destroyed in 2009 and 2011, respectively, in accordance with the Record Series #0018-0005 of the Records Retention and Disposition Schedule for County Prosecutors from the Division of Archives and Records Management. Had defendant's petition been filed timely (or even in 2010 when defendant was first detained by ICE), the State would have been in a better position to address defendant's claims. However, the State at this point is hamstrung to reply because of the length of delay in filing.

Moreover, defendant fails to demonstrate that his untimeliness in filing his petition was due to excusable neglect. Firstly, when defendant was sentenced, the court was not required to inform defendants of the time within which a PCR petition had to be filed, as presently required by Rule 3:21-4(i). See R. 3:21-4(h), amended by R. 3:21-4(i)(2009). Nonetheless, defendant's ignorance of the law regarding the availability of PCR is insufficient to establish excusable neglect. Brewster, 429 N.J. Super. at 400; Murray, 162 N.J. at 246; Dugan, 289 N.J. Super. at 22. Further, defendant cannot claim that he had mis-advice or ineffective assistance of counsel because he had an immigration attorney in 2010, when he was detained by ICE, and that attorney advised him, at that time to accept deportation. Even so, defendant offers no certification from immigration counsel to this Court.

To this point, defendant again relies on State v. Chau, 472 N.J. Super. 430, 411 (App. Div. 2022), to argues that advice from immigration counsel resulted in excusable neglect to relax the time bar. However, as Judge Guadagno found below, defendant's reliance on this case is misplaced and properly found that,

> Chau is clearly distinguishable from the instant matter as Chau's immigration attorney conceded he had given wrong advice and the plea is Chau was entered after the Supreme Court decided Padilla v. Kentucky, 559 U.S. 356 (2010), requiring plea counsel to advise a client regarding the risk of deportation. Id. at 367. There was no

> such obligation when defendant entered his guilty pleas in 1997 and 2000. Nor was there an obligation then for the sentencing court to inform defendant of the PCR time limitations as presently required by Rule 3:21-4(i).

Pa9. Therefore, the circumstances in Chau to relax the time bar are not present in this case and the PCR court properly found that defendant did not show "excusable neglect" because he was aware of the immigration consequences, as required at that time, of his conviction when he plead guilty.

Finally, Judge Guadagno did not err when he held that defendant had not asserted any newly discovered factual predicate(s) for relief sought that could not have been discovered earlier through the exercise of diligence under R. 3:22-12(a)(2)(B). Judge Guadagno further found that defendant did show "exceptional circumstances" between the time of his pleas in 1997 and 2000 until now sufficient to relax the time bar. Pa10.

Firstly, there is no certification from prior immigration counsel as to the extent of the advice and counsel she gave him in 2010 when she was retained as a result of his detainment by ICE. However, as Judge Guadagno found, even if there was a certification, all of the facts used by defendant in support of his motion and petition have been known by the defendant and were known to all his previous counsels. Additionally, like in Brewster, defendant here has not claimed he was innocent of the charges in both pleas. Finally, the delay in

filing the petition is significant and the State would be substantially prejudiced if it would be required to relitigate this matter, as plea counsel for the 2000 plea has since passed away, there are no transcripts from both the plea and sentence, and the State's files have been destroyed due to time. Pa9.

As such, the State requests this Court to deem defendant's PCR as time barred, thus is there no need for this this Court go further with defendant's claims of ineffective assistance of counsel.

POINT II[5]

THE PCR COURT DID NOT ERR IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT THE GRANT OF AN EVIDENTIARY HEARING.

Defendant argues that the lower court erred in denying his petition for post-conviction relief without an evidentiary hearing because he alleges he was given incorrect and mistaken advice by his prior plea counsels. Db35. However, Judge Guadagno did not err when he held that defendant failed to establish any error by prior plea counsel and, as such, no resulting prejudice. Pa12-18.

R. 3:22-10(b) directs that an evidentiary hearing be granted on post-conviction relief when "there are material issues of disputed fact that cannot be resolved by reference to the existing record." State v. Porter, 216 N.J. 343, 354 (2013). While a "PCR court should view the facts in the light most favorable to the defendant," State v. Jones, 219 N.J. 298, 311 (2014), "a defendant is not entitled to an evidentiary hearing if the allegations are too vague, conclusory, or speculative." Porter, 216 N.J. at 355; State v. Bey, 161 N.J. 233, 262 (1999).

Defendant must establish a prima facie case of ineffective assistance of counsel, e.g., a "reasonable likelihood" of success on the merits, to warrant the grant of a hearing. Ibid. Defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 169, (App. Div.), certif. denied, 162 N.J. 199 (1999). "[A] defendant asserting ineffective assistance of counsel on a PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012); State v. Echols, 199 N.J. 344, 357 (2009).

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[5] This point responds to POINT II, POINT III and POINT IV of defendant's brief.

In State v. Fritz, 105 N.J. 42, 58 (1987), our Supreme Court adopted the two-prong test set forth in Strickland v. Washington, 466 U.S. 688 (1984), for reviewing ineffective assistance of counsel claims. In order to meet the Strickland/Fritz test, a defendant must show that counsel's performance was prejudicially deficient. State v. O'Neil, 219 N.J. 598, 611 (2014); Gaitan, 209 N.J. at 349–50; Cummings, 321 N.J. Super. at 169.

"Attorneys are held to a standard of 'reasonableness under prevailing professional norms.'" Gaitan, 209 N.J. at 350 (citation omitted). As such, under the first prong the defendant must establish that counsel's performance fell below this "objective standard of reasonableness." Strickland, 466 U.S. at 688; State v. Paige, 256 N.J. Super. 362, 376 (App. Div.), certif. denied, 130 N.J. 17 (1992). "The test is not whether defense counsel could have done better, but whether he met the constitutional threshold for effectiveness." Nash, 212 N.J. at 542. The first prong of the Strickland/Fritz test requires a defendant establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. (quoting Strickland, 466 U.S. at 687). In reviewing such a claim, "[t]he court 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the

challenged action might be considered sound trial strategy.'" State v. Allen, 398 N.J. Super. 247, 253–54 (App. Div. 2008) (quoting State v. Arthur, 184 N.J. 307, 319 (2005)).

Prejudice under the second prong will not be presumed and, therefore, must be proven by defendant by a preponderance of the evidence. State v. Fisher, 156 N.J. 494, 500 (1998); see also Gaitan, 209 N.J. at 376 (noting "[t]he PCR court was mistaken in giving 'the benefit of the doubt'" to defendant's bare allegations of prejudice). The defendant must demonstrate a reasonable probability that the alleged deficiency "affected the outcome of the proceedings." State v. Savage, 120 N.J. 594, 614 (1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Both parts of the Strickland/Fritz test must be met, or else defendant's claim will fail. Echols, 199 N.J. at 358; See also State v. Parker, 212 N.J. 269, 280 (2012) ("If defendant establishes one prong of the Strickland/Fritz standard, but not the other, his claim will be unsuccessful.").

This test applies to attorney performance during the plea process as well as at trial. Hill v. Lockhart, 474 U.S. 52, 58 (1985). Both guilty pleas were entered prior to the United States Supreme Court's decision in Padilla v. Kentucy, 559 U.S. 356 (2010), which held that defense attorneys "must advise

their clients of potential immigration consequences of pleading guilty or risk providing a constitutionally deficient assistance of counsel," State v. Gaitan, 209 N.J. 339, 346 (2012). However, that holding was determined to only be applied prospectively. Chaidez v. United States, 568 U.S. 342, 358 (2013). Therefore, guilty pleas entered prior to Padilla are reviewed to determine whether counsel provided affirmative misadvice regarding the plea's immigration consequences. State v. Santos, 210 N.J. 129, 144 (2012). Specifically, the Court held that ineffective assistance of counsel can be shown by "proving that his guilty plea resulted from 'inaccurate information from counsel concerning the deportation consequences of his plea.'" State v. Brewster, 429 N.J. Super. 387, 392 (App. Div. 2013) (quoting State v. Nunez-Valdez, 200 N.J. 129,143 (2009)).

Additionally, when a defendant has plead guilty, he must establish "that there is a reasonable probability that, but for counsel's errors, [he] would not have plead guilty and would have insisted on going to trial." Nunez-Valdez, 200 N.J. at 139. Therefore, to satisfy the second prong when a defendant pleads guilty, defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla, 599 U.S. at 377).

With the State's files being destroyed, the State is constrained to defendant's exhibits set forth in his petition. The PCR court properly held that defendant has failed to meet his burden that both of his trial counsels below were ineffective as the limited record does not support a claim of affirmative misadvice about the immigration consequences of the guilty plea. Nor does the limited record show any resulting prejudice that with "reasonable probability" that the result would have been different had defendant received proper advice from plea counsel.

First, with regards to his 1997 plea, Judge Guadagno found that neither defendant's certification nor the certification from plea counsel contain statements regarding mis-advice about immigration consequences. In fact, plea counsel stated that based on the common practices in 1996, he discussed immigration consequences with defendant. Pa14. Additionally, defendant, himself, acknowledged the possible immigration consequences by circling "yes" to question 17 on the plea paperwork. Da6. Similarly, with his 2000 plea, while there is no certification due to trial counsel's passing, defendant's plea paperwork negates any claim of infective assistance since he affirmatively answered the question regarding immigration consequences before he plead guilty. Da20.

Additionally, Judge Guadagno properly found that defendant's assertion that trial counsel was ineffective due to PTI never being considered had no merit. Trial counsel for the 1997 plea states in his certification that he did not discuss PTI with defendant because it "was not a PTI type case." Da10. Indeed, under Guideline 3(i)(3) in R. 3:28, crimes of violence and crimes that involve victims are factors considered for admission into PTI. It is not ineffective assistance to not have conversations that are meritless. As Judge Guadagno found, a failure to make an unsuccessful argument does not constitute ineffective assistance of counsel. State v. Echols, 199 N.J. 344, 365 (2009); Pa14-15. Counsel cannot be deemed ineffective for failing to discuss sentencing measures provisions that do not apply in the first place.

Having established no error on the part of either of his trial counsel, much less one of material significant to the outcome of case or his guilty pleas, defendant fails to make a prime facie showing of ineffective assistance of counsel or any resulting prejudice. Additionally, defendant has not shown an evidentiary hearing would aid in the court's analysis regarding his petition. The record before this court, albeit limited due to length of the delay, wholly negates all of defendant's claims. Accordingly, Judge Guadagno properly found that no evidentiary hearing is warranted, and the petition should be denied. Strickland, 466 U.S. at 694; Pa14.

POINT III

THE PCR COUR PROPERLY DENIED DEFENDANT'S WITHDRAW OF HIS ASSAULT GUILTY PLEA.

For defendant to withdraw his guilty plea after sentencing, he must meet a higher standard of showing a "manifest injustice." State v. Slater, 198 N.J. 145, 156 (2009). With this standard in mind, the Court must evaluate four factors in assessing whether a defendant has demonstrated a valid basis for withdrawing a guilty plea: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether the withdrawal would result in unfair prejudice to the State or unfair advantage to the defendant. Id. at 157-58. "No single Slater factor is dispositive; 'if one is missing, that does not automatically disqualify or dictate relief.'" State v. McDonald, 211 N.J. 4, 16-17 (2012) (quoting Slater, 198 N.J. at 162).

For the first factor, "[a] bare assertion of innocence is insufficient to justify withdrawal of a plea." Slater, 198 N.J. at 158. For the second factor, the focus is "on the basic fairness of enforcing a guilty plea by asking whether defendant has presented fair and just reasons for withdrawal, and whether those reasons have any force." Id. at 159. The Court in Slater noted that for the third factor "defendants have a heavier burden in seeking to withdraw pleas

entered as part of a plea bargain." Ibid. Finally, for the fourth factor, "courts must examine this factor by looking closely at the particulars of each case" and that the main inquiry is "whether the passage of time has hampered the State's ability to present important evidence." Ibid.

First, Judge Guadagno properly found that defendant made no colorable claim of innocence and that defendant included no facts in his certification in support of his PCR alleging that he did not commit either of the offenses to which he plead guilty. Therefore, this factor should weigh in favor of the State. Pa15-17. Second, defendant's reasons for withdrawal are essentially based on his claims of ineffective assistance of counsel that there would be immigration consequences for this plea. However, as stated above, these claims have no merit as plea counsel did advise him on immigration consequences as required in 1996. See Da9-11. Additionally, as Judge Guadagno held, "[the assault charge] did not carry a sanction of 'mandatory deportation' and when defendant was deported, thirteen years later, it was no because of his conviction but because he remained in this country illegally." Pa16-17. Therefore, this factor should weight in favor of the State. Thirdly, both of defendant's pleas were the result of a plea bargain. Both of these pleas were favorable to defendant as he received probation for both with no county jail time. Ibid. Therefore, this factor should weight in favor of the State, noting

that this factor does not receive great weight under Slater.

Finally, Judge Guadagno properly found that the fourth factor weighs heavily against defendant and that "the prejudice to the State is clear as the files in this matter were destroyed in 2009. To allow defendant to withdraw this plea twenty-nine years after the indecent occurred would result in unfair prejudice to the State and unfair advantage to the defendant." Ibid. The same is true, as Judge Guadagno found, the files with regard to his possession of CDS offense have been destroyed for thirteen years. The State would be significantly prejudiced to relitigate this case at this point. Ibid. As such, the State would have no ability to relitigate either of these cases—regardless if it is a plea or a trial. Importantly, under the Victim's Bill of Rights, the victim of the aggravated assault would have the right to be notified. See N.J.S.A 52:4b-36.

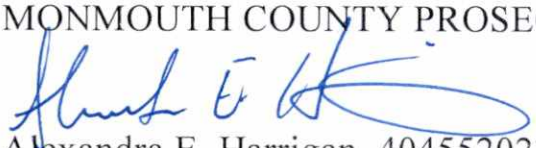
Based on the weight of all these factors, defendant has failed to meet his heavy burden that the withdrawal of his plea would "correct a manifest injustice." Id. at 156.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully requests that the denial of defendant's petition for post-conviction relief without an evidentiary hearing be affirmed.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR



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