FILED, Clerk of the Appellate Division, August 21, 2023, **A-003292-22, AMENDED**
FILED, Clerk of the Supreme Court, 02 Apr 2024, **089274**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3292-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order Granting PCR of the Superior Court,
v.	:	Law Division, Ocean County.
JUAN C. HERNANDEZ-PERALTA	:	Indictment Nos. 19-06-0946 19-09-1370
Defendant-Appellant.	:	Sat Below: Hon. Steven F. Nemeth, Jr., J.S.C.
	:	Hon. Therese A. Cunningham, J.S.C. Hon. Guy P. Ryan, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
P.O. Box 46003
Newark, New Jersey 07101
973-877-1200

STEFAN VAN JURA
Assistant Deputy
Public Defender
ID# 039952004

Of Counsel and
On the Brief
Stefan.VanJura@OPD.nj.gov
August 14, 2023

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF JUDGMENTS, RULINGS, AND ORDERS BEING APPEALED

INDEX TO APPENDIX[1]

PAGE NOS.

[1] This appendix duplicates some of the documents in the State's appendix but contains additional materials for chronological context "necessary to the proper consideration of the issues." Rule 2:6-3.

TABLE OF AUTHORITES

PAGE NOS.

Cases

Statutes

TABLE OF AUTHORITES (CONT'D)

PAGE NOS.

Statutes (Cont'd)

Other Authorities

PROCEDURAL HISTORY

Ocean County indictment number 19-06-0946 charged the defendant, Juan C. Hernandez-Peralta, with third-degree burglary, contrary to N.J.S.A. 2C:18-2a(1) (count one); and third-degree theft, contrary to N.J.S.A. 2C:20-3a (count two). (Da 1-2)[2] In addition, defendant was charged in Ocean County indictment number 19-09-1370 with: two counts of third-degree burglary, contrary to N.J.S.A. 2C:18-2a(1) (counts one and four); two counts of fourth-degree criminal mischief, contrary to N.J.S.A. 2C:17-3a(1) (counts two and seven); second-degree robbery, contrary to N.J.S.A. 2C:15-1 (count three); third-degree theft, contrary to N.J.S.A. 2C:20-3a (count five); third-degree aggravated assault on a law enforcement officer, contrary to N.J.S.A. 2C:12-1b(5)(a) (count six); fourth-degree criminal mischief, contrary to N.J.S.A. 2C:17-3a(1) (count seven); third-degree resisting arrest, contrary to N.J.S.A.

---

[2] The following abbreviations will be used:
Da – appendix to this brief
PSR – pre-sentence report
Sb – State-Appellant's brief
1T – transcript of November 22, 2019
2T – transcript of December 10, 2019
3T – transcript of February 24, 2020
4T – transcript of August 17, 2020
5T – transcript of April 4, 2023
6T – transcript of May 23, 2023

2C:29-2a(3) (count eight); and fourth-degree resisting arrest, contrary to N.J.S.A. 2C:29-2a(2) (count nine). (Da 3-6)

On September 30, 2019, defendant appeared before the Honorable Therese A. Cunningham, J.S.C., for arraignment on the charges. (Da 7-8) In the form order memorializing that appearance, the portion inquiring whether counsel discussed immigration status with defendant was left blank, as was the line provided to indicate defendant's place of birth. (Da 8)

On November 22, 2019, defendant appeared before the Honorable Steven F. Nemeth, Jr., J.S.C., to enter a guilty plea to select charges from both indictments, including three counts of third-degree burglary and one count of second-degree robbery. (Da 9-15) In exchange, the State agreed to allow defendant to serve a five-year term of special probation in Ocean County Drug Court, with an alternate five-year NERA custodial sentence. N.J.S.A. 2C:43-7.2 (Da 11)

On December 10, 2019, defendant appeared before Judge Nemeth for sentencing, and was sentenced in accordance with the plea agreement. (Da 16-23) On February 24, 2020, defendant appeared before Judge Nemeth on a violation of probation. Defendant pled guilty to the violation with the agreement that the court would "leave sentencing open" to allow defendant to remain in Drug Court. (3T 5-21 to 10-18) On August 17, 2020, defendant

appeared before Judge Nemeth on a second violation of probation. After pleading guilty to that violation, defendant was sentenced to the alternate prison sentence: five years with an 85% period of parole ineligibility. (4T 9-24 to 16-11; Da 24-30)[3]

On July 11, 2022, defendant filed a timely petition for post-conviction relief (PCR), alleging ineffective assistance of counsel regarding the immigration consequences of his guilty plea. (5T 87-12 to 14; Da 31-33) The Honorable Guy P. Ryan, J.S.C., granted an evidentiary hearing on the PCR, which was held on April 4, and May 23, 2023. On the second day, Judge Ryan granted the PCR, delivering an oral opinion on the record, and later issuing a written amplification of the oral opinion. (6T 72-22 to 114-15; Da 34-55)

This Court granted the State's motion for leave to appeal on July 3, 2023. (Da 56)

[3] An amended judgment of conviction was issued on September 9, 2020, to clarify the terms of confinement. (Da 27-30)

STATEMENT OF FACTS

The facts of the underlying crimes are not of particular importance to this appeal, which challenges the propriety of the PCR court's ruling that defendant received ineffective assistance of counsel for providing deficient advice concerning the deportation consequences of his guilty plea. Accordingly, the facts here will focus on the plea and sentencing proceedings, and the facts adduced at the evidentiary hearing on the PCR.

During the trial court proceedings, defendant had three attorneys representing him at various times: Frank McCarthy (his "trial" attorney, who would represent him had the case been resolved by trial or plea outside of drug court), Carol Wentworth (his drug court attorney who would typically handle the plea and sentencing proceedings for entry into drug court), and Michael Vito (Wentworth's supervisor, who handled the plea proceedings in Wentworth's absence). (6T 4-22 to 5-23; 24-5 to 7; 33-1 to 13)

On September 30, 2019, defendant appeared before Judge Cunningham for arraignment on the charges and was represented by McCarthy. The State has not provided the parties with a copy of that transcript, but the order memorializing the proceeding was left blank on the question:

> Did defense counsel discuss with the defendant his/her immigration status, the potential consequences of a guilty plea or conviction and his/her right to seek legal

> advice on his/her immigration status. (State v. Nunez-Valdez, 200 N.J. 129 (2009))?

(Da 8) Likewise, the order was silent where it directs counsel to indicate defendant's "Place of Birth." (Ibid.)

On November 22, 2019, defendant appeared before Judge Nemeth, Jr., to enter a guilty plea and was represented by Vito. When asked by the court whether he was a U.S. citizen, defendant replied, "Yes, sir." And when asked where he was born, defendant replied, "I was born in New York." (1T 5-8 to 12) Consistent with this belief, question 17a of the plea form – which asks, "Are you a citizen of the United States?" – was marked "Yes." (Da 12)

At the PCR hearing, defendant testified that he is not, in fact, a U.S. citizen. He explained that he has a green card and a social security card, and that based on those documents, in addition to discussions with family members, he believed that he was a U.S. citizen. (5T 10-6 to 17) Defendant testified that he was born in Mexico, was brought here before he turned two years old, and grew up in New York before moving to New Jersey as a teenager. (5T 10-22 to 11-23) Defendant further testified that he met with Vito about two times before entering his plea, and that he did not recall having any conversation with Vito about his citizenship. (5T 13-23 to 14-22)

According to defendant, he first learned that he was not a U.S. citizen when he received deportation papers while in custody. (5T 18-3 to 14)

Defendant explained that he told the court that he was born in New York because that was where he was raised from a young age, and he had forgotten that he was born in Mexico. (5T 21-18 to 22-5) Defendant testified that his ability to read and write English is "50-50," that he dropped out of high school in his senior year, and that he was not sure that he understood everything that Vito had explained to him. (5T 25-10 to 18) However, when pressed by questioning from the PCR court, defendant acknowledged that knew it was not true when he told Vito and the plea judge that he was born in New York. Defendant struggled to explain the discrepancy, maintaining that he was not able to think clearly and that, "I guess I was paranoid around that time." (5T 25-24 to 27-10; 36-14 to 21)

Vito testified that, prior to entering the guilty plea, he went over the plea forms with defendant. Vito read section 17 of the plea form to defendant, and defendant told him that he was born in New York. (6T 5-21 to 6-11) Vito accepted that representation and did not conduct any investigation to confirm that defendant was, in fact, born in New York. (6T 7-17 to 24) Vito further testified that McCarthy was defendant's attorney at the arraignment, and Vito did not recall ever seeing the arraignment order. (Da 7-8)

On December 10, 2019, defendant appeared before Judge Nemeth for sentencing and was represented by his third attorney, Wentworth. There were

no discussions on the record about defendant's immigration status. (2T 3-1 to 10-25) Wentworth represented to the court that:

> We received and reviewed the presentence report, Your Honor. It does appear to be accurate for the purposes of sentencing.

(2T 3-11 to 13) The first page of that PSR indicates that defendant was born in Mexico, and the box for his social security number was left blank. (PSR 1) Similarly, page ten indicates that defendant was born in Mexico and the "Alien Status" and "Other Citizenship (Nationality)" boxes were left blank. (Ibid.) In addition, the "Citizenship" box – which includes a check box for "US" and "Other" – was left blank. (Ibid.)

At the PCR hearing, defendant testified that he had had an interview with a probation officer who prepared the PSR prior to sentencing. He told the officer that he was born in Mexico and that he had a green card. At that time, defendant still did not understand his true immigration status. (5T 15-13 to 16-9) Defendant further testified that he discussed the PSR with Wentworth for "probably like a couple seconds" immediately prior to sentencing, but he did not tell her that he had previously told the plea judge and Vito that he was born in New York. (5T 41-1 to 19)

Wentworth testified that she met with defendant for the first time on the day of sentencing, prior to going on the record with him, and that she had had

the file and PSR for a couple of days before sentencing. (6T 33-6 to 34-4) Wentworth noted that the PSR indicated that defendant was born in Mexico, yet she was aware that the plea form said he was a U.S. citizen. (6T 35-5 to 7) She testified that she had assumed that defendant had also told McCarthy and Vito that he was born in Mexico, but if she had known that he had said he was born in New York, she would have explored that discrepancy. (6T 35-16 to 23; 43-3 to 10) She also testified that defendant having been born in Mexico did not raise a concern for her because it was common for her to have clients born outside the U.S. who are U.S. citizens. (6T 36-13 to 37-4)

According to Wentworth, when she asked defendant if he was born in Mexico, he said yes; when she asked him if he was a U.S. citizen, he again said yes. (6T 37-18 to 22) When she asked defendant his social security number, he said he did not recall, so she left that box of the form blank. (6T 35-10 to 16) Wentworth did not believe it was unusual for a client to not know his social security number. (6T 42-12 to 19) Ultimately, Wentworth did not have any documentation that revealed a discrepancy between what defendant said during the plea proceedings and what he told the probation officer who prepared the PSR, so she did not attempt to contact the immigration law specialist with the Public Defender's Office. (6T 50-19 to 51-9; 44-21 to 45-4) However, she acknowledged, she did possess the plea form indicating that

defendant was U.S. citizen, which the PSR contradicted, or at least did not confirm. (6T 52-5 to 53-5)

In granting the PCR, the PCR court delivered a thorough oral opinion and written amplification. (6T 72-22 to 114-15; Da 34-55) First, it found Vito's testimony to be credible, and it found that he was not ineffective because he had no evidence to contradict defendant's assertion that he was a U.S. citizen. (6T 37-14 to 18; 92-24 to 93-4) The court observed that defendant admitted that he knew it was not true when he told Vito and the plea court that he was born in New York, and that "defendant essentially had no explanation" for the inconsistency between that and telling the probation officer that he was born in Mexico. (6T 82-15 to 83-11)

Next, the court found that the second-degree robbery conviction is an "aggravated felony" for immigration purposes, so conviction for that offense mandates defendant's removal from the country. (6T 92-2 to 15) And, under prevailing caselaw, a defendant must be informed that his plea to an aggravated felony will have that definite effect. (6T 112-6 to 12)

Finally, the court found that Wentworth was presented with sufficient evidence that defendant would be subjected to deportation to require further investigation. (6T 93-13 to 20) The court shared the State's concern that granting the PCR could be perceived as rewarding defendant for being

untruthful to Vito and the plea court. (6T 97-19 to 23) But the court found that page 10 of the PSR showed that defendant was born in Mexico, and the failure to check the citizenship box indicated a problem that Wentworth needed to investigate. (6T 97-23 to 98-17) The written amplification elaborated:

> This court finds that a competent defense attorney in the shoes of sentencing counsel would have been expected, under prevailing professional norms, to address the discrepancy between the plea form and the PSR on the record with defendant in the presence of the sentencing judge and to advise defendant that because of his foreign place of birth and other missing information that, if he was not a U.S. citizen, he faced deportation from the United States, would be barred from reentering and would not be able to become a naturalized citizen.

(Da 54)

The court noted that plea withdrawals are much more liberally granted pre-sentencing, which is when the discrepancy should have been investigated. (6T 104-1 to 16) The court also acknowledged that Wentworth had been put in a difficult situation due to the way the case was handled by three different attorneys. (6T 107-25 to 108-4) Wentworth assumed defendant's place of birth was Mexico (as indicated on the PSR) because she did not represent defendant at the plea and did not have the plea hearing transcript. Instead, she relied on the plea agreement, which said that he was a U.S. citizen, but said nothing of his place of birth. (6T 108-14 to 21)

Moreover, the court found, counsel could not consider the missing information in isolation. The lack of a social security number; place of birth being Mexico; the U.S. citizenship box not checked; a mother who was not in the U.S.; no contact with the father; and the present matter being a first felony conviction led to the conclusion that "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." (6T 109-12 to 110-5)

The court recognized that the case presented a "close call." (6T 111-13 to 112-5) But defendant was repeatedly advised on the record that if the PCR were granted, the original charges would be reinstated, at which point he could face a substantially longer prison sentence, and then deportation. Despite this risk, defendant was steadfast in his desire to withdraw from the plea agreement, evincing the judgment that avoiding deportation was his paramount concern. (6T 70-22 to 72-11; 113-17 to 115-6; 5T 6-9 to 7-7; 37-18 to 38-13)

LEGAL ARGUMENT

POINT I

THE PCR COURT PROPERLY GRANTED THE PETITION BECAUSE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO ADVISE HIM THAT HIS GUILTY PLEA TO AN AGGRAVATED FELONY WOULD RESULT IN MANDATORY REMOVAL. (6T 72-22 to 114-15; Da 34-55)

The PCR court correctly determined that defendant had proven a claim of ineffective assistance of counsel by a preponderance of the evidence. This Court should affirm that decision, which was based on well-supported findings of fact and a proper application of controlling caselaw.

To establish a prima facie claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong test under Strickland v. Washington, 466 U.S. 668, 687 (1984). Defendant must establish (1) that his counsel's performance was deficient and he made errors so serious that counsel was not functioning as counsel as guaranteed by the Sixth Amendment, and (2) that defendant was prejudiced such that there existed a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Id. at 694. See also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting Strickland standard). A "reasonable probability" must be "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A petitioner must

establish the right to relief by a preponderance of the credible evidence. State v. Presciose, 129 N.J. 451, 459 (1992).

In the context of plea agreements of non-citizen defendants, the performance of plea counsel is deficient under the first prong of the Strickland standard where counsel "provides false or misleading information concerning the deportation consequences of a plea of guilt." State v. Nuñez–Valdéz, 200 N.J. 129, 138 (2009). In addition, in Padilla v. Kentucky, 559 U.S. 356 (2010), the United States Supreme Court held that plea counsel "is required to address, in some manner, the risk of immigration consequences of a non-citizen defendant's guilty plea." State v. Blake, 444 N.J. Super. 285, 295 (App. Div. 2016) (citing Padilla v. Kentucky, 559 U.S. 356, 367 (2010)). The Padilla Court created a "two-tiered analytical structure for assessing the duty of effective assistance," which "depend[s] on the certainty of immigration consequences flowing from the plea." State v. Gaitan, 209 N.J. at 339, 356, 380 (2012).

"[I]mmigration law is often complex, and the consequences of a conviction are often far from clear." Blake, 444 N.J. Super. at 295 (citing Padilla, 559 U.S. at 369). In circumstances where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]," then an attorney is obliged to be "equally clear." Padilla, 559

U.S. at 368–69. Counsel's failure "to point out to a noncitizen client that he or she is pleading to a mandatorily removable offense," constitutes "deficient performance of counsel." Blake, 444 N.J. Super. at 296 (quoting Gaitan, 209 N.J. at 380).

Where "the deportation consequences of a particular plea are unclear or uncertain[,] . . . 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." Padilla, 559 U.S. at 369. Where "removal is not 'mandated' in the sense that a state offense is not identified on published lists of offenses equating to aggravated felonies or like mandatorily removable offenses, counsel must highlight for noncitizen clients that entering a guilty plea will place them at risk of removal" and advise clients to seek immigration advice. Gaitan, 209 N.J. at 381; see also Blake, 444 N.J. Super. at 301 ("[W]here the law is 'highly complex and not capable of being reduced to any clear, succinct, or certain answer,' an attorney may fulfill his duty by conveying to his client that the immigration consequences of his plea are uncertain." (quoting State v. Telford, 420 N.J. Super. 465, 469 (App. Div. 2011), certif. denied, 209 N.J. 595 (2012))).

Here, there is no question that second-degree robbery is an aggravated felony, and that defendant is subject to mandatory deportation by virtue of his

conviction for this offense. See 8 U.S.C.A. § 1101(a)(43)(F) (defining "aggravated felony" to include "a crime of violence … for which the term of imprisonment [is] at least one year"); 8 U.S.C.A. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). The State does not challenge the PCR court's finding in this regard. (Sb 1-24) Thus, because the law is clear that an aggravated felony mandates deportation, counsel's duty to advise defendant of that certain consequence was equally clear. Padilla, 559 U.S. at 368–69.

Rather, the State's primary contention is that "defendant lied to plea counsel and the plea court regarding his birthplace," yet the PCR court imposed on sentencing counsel "an independent obligation to second-guess defendant's firm claims of U.S. citizenship." (Sb 12) This reductive formulation of the PCR court's ruling overlooks important considerations.

First, the court expressly recognized that defendant provided inconsistent information: he told Vito and the plea court that he was born in New York, but thereafter consistently maintained that he was born in Mexico, which he said to Wentworth and the probation officer who prepared the PSR.[4] But defendant's misrepresentation that he was born in New York was not

[4] At two subsequent violation of probation proceedings, defendant further maintained that he was born in Mexico. (3T 4-21; 4T 4-6)

material to his incorrect belief that he was a U.S. citizen. To his mind – although not to the mind of an immigration law practitioner – where he was born was insignificant because he believed he was a U.S. citizen by virtue of actions taken by his family, which included obtaining a green card and a legitimate social security number. He had no memory of crossing the Mexican border and knew only life in America.

Contrary to the manipulative duplicity posited by the State, defendant was likely displaying the innocent bumbling of youth. Defendant is neither well-educated nor sophisticated, having dropped out of high school and stunted his emotional and intellectual growth through serious drug use beginning at an early age. See PSR 12 (regular cocaine, marijuana, and alcohol used beginning at age 14, and later including opiates and alprazolam). See also Winters KC, Arria A. Adolescent Brain Development and Drugs. Prev Res. 2011;18(2):21-24 ("Early drug use may alter brain maturation [and] contribute to lasting cognitive impairment of certain functions…."). In this light, defendant's inability to explain the inconsistency makes perfect sense: he was (and remains) confused by the circumstances; he was not plotting to deceive.

Second, through no fault of his own, defendant received piecemeal legal representation. McCarthy was his trial attorney, but he was handed off to Wentworth because he sought admission into drug court, but he was handed off

to Vito for the plea because Wentworth was unavailable for reasons not disclosed in the record. Perhaps that is the most efficient way to run a regional office of the Public Defender, but in individual cases, it could leave gaps in counsel's knowledge. For example, Vito did not know what was explained to defendant at the arraignment, and Wentworth did not know that defendant told Vito that he was born in New York. She only knew – from the plea forms – that defendant believed he was a U.S. citizen.

The State argues 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." (Sb 15) That is not accurate. Defendant's mistaken belief that he was a U.S. citizen is to blame. Whether he said he was born in New York or Mexico, he also would have told Vito that he was a U.S. citizen. That would have been the end of the inquiry for Vito.

Thus, as the PCR court correctly recognized, it was Wentworth who was first presented with a discrepancy warranting further investigation. In this regard, this case is strikingly similar to the recent unpublished case of State v. Cruz, A-2517-18T4, 2020 WL 2988877, at *1 (App. Div. June 4, 2020), where this Court found that "trial counsel provided ineffective assistance for failing to notice defendant's pre-sentence report provided she was a Mexican national,

which was contrary to her assertions in her plea form and plea colloquy that she was a United States citizen."[5] In Cruz,

> During the plea colloquy, the judge, who was also the sentencing and PCR judge, asked defendant, "[y]ou're a United States citizen?" to which she replied, "[y]es." The response was consistent with her plea form, where she indicated "[y]es" to the question inquiring whether she was a citizen of the United States. Defendant also responded "[y]es" when the judge asked her whether she "had enough time to discuss this matter, not just the plea forms, but the case in [total] with [her counsel], is that correct?"

Cruz, 2020 WL 2988877, at *1. In denying the subsequent PCR, "the judge determined counsel had no reason to discuss the immigration consequences of defendant's pleas because she indicated she was a United States citizen." Id. at *2. "The judge noted defendant's presentence report, 'indicated that [defendant] was born in Mexico and was a resident alien[,]' and that counsel 'testified that prior to sentencing he would have reviewed defendant's presentence report, but he did not remember taking note that [defendant's] place of birth was in Mexico.'" Ibid. "The judge, however, reasoned that since 'defendant misrepresented her citizenship status under oath[,]' it 'was relied upon by counsel ..., the State and [him] at the time of plea and at sentence.'" Ibid. For that reason, relief was denied. Ibid.

---

[5] Undersigned counsel has appended this case to the brief, and is unaware of contrary unpublished authority for the narrow proposition cited. (Da 57-62)

Before this Court, Cruz argued that "given the conflicting indications in her discovery (police reports) regarding her citizenship status and counsel's failure to see her naturalization papers, the presentence report should have alerted counsel to her lack of United States citizenship." Ibid. This Court recognized that "defendant lacked credibility based upon her conflicting representations as to her citizenship status." Id. at *4. "A cornerstone of the attorney-client relationship is candor. It is apparent defendant has not satisfied her responsibility within that relationship." Ibid.

> That said, when information concerning a client's citizenship status is presented to an attorney contradicting their client's representations and has deportation consequences, it is the attorney's professional duty to bring it to the client's attention first, and then the court.

Ibid. (emphasis added). This Court continued:

> We cannot disregard counsel's failure to address defendant's citizenship status in the presentence report with defendant, regardless of her lack of candor with counsel and the judge.

Ibid.

Such is the case here, where Wentworth was presented with a PSR indicating that defendant was born in Mexico, and neither of the two options for "Citizenship" – "U.S." or "Other" – were checked. (PSR 10) True, this could have been an oversight by the probation officer. And there was certainly

a possibility that defendant was born in Mexico but was a U.S. citizen. But "[t]his was not an onerous burden on counsel." Cruz, 2020 WL 2988877, at *4. Wentworth had an obligation to inquire further, at which point defendant presumably would have said that he was a citizen because he had a green card and social security number. Competent counsel would have recognized that these documents do not confer citizenship and inquired further. Or, at the very least, competent counsel would have referred the matter to the Public Defender's in-house immigration expert, who is employed for exactly this purpose.

The State's final argument on appeal is that defendant did not establish the second prong of Strickland because "it would not have been rational for him to go to trial and face a very strong possibility of receiving a significant state prison sentence … and then face deportation afterwards anyway." (Sb 22-23) In response, defendant submits that there is no better indicator for what an individual might do under given circumstances that what that individual actually did under essentially the same circumstances. The PCR court repeatedly warned defendant that, if the PCR was granted, the original charges would be reinstated, he could face significant additional prison time, and then he would be deported. The PCR court all but told defendant that it was going

to grant the PCR unless he wanted to withdraw the petition in light of those risks. (6T 70-22 to 72-11) He chose to forge ahead. (6T 114-16 to 115-5)

"In the specific context of showing prejudice after having entered a guilty plea, a defendant must prove 'that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial.'" Gaitan, 209 N.J. at 351 (quoting Nuñez–Valdéz, 200 N.J. at 139 (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994))). Putting aside whether defendant's decision was "rational," he has clearly proven by a preponderance of the evidence that he insists on going to trial after receiving the proper advice that a conviction for an aggravated felony will result in his removal from the country.

Having correctly determined that defendant established both the deficient performance and prejudice prongs of Strickland, the PCR court properly granted the petition. This Court should affirm that determination, which was based on well-supported findings of fact and a proper application of controlling caselaw.

CONCLUSION

The order granting defendant's petition for post-conviction relief should be affirmed.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: /s/ Stefan Van Jura
STEFAN VAN JURA
Assistant Deputy Public Defender
Attorney Id. No. 039952004

Dated: August 14, 2023