



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAURICIO HERNANDEZ MARTINEZ, :

Defendant Below, :
Appellant, :

v. : Case No: 179, 2022

STATE OF DELAWARE :

Plaintiff Below,
Appellee.

**DEFENDANT APPELLANT'S OPENING BRIEF IN SUPPORT OF
HIS MOTION TO WITHDRAW GUILTY PLEAS AFTER REMAND
TO THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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DATED: May 22, 2023

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B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN RELYING ON ALLEGATIONS MADE BY THE STATE WHICH WERE NOT

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C. MERITS OF ARGUMENT: THE TRIAL COURT SHOULD NOT HAVE CONSIDERED ALLEGATIONS MADE BY THE STATE WHICH WERE NOT SUPPORTED BY ANY WITNESSES OR EVIDENCE PRODUCED AT THE EVIDENTIARY HEARING IN THIS CASE.

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B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN DRAWING AN ADVERSE INFERENCE FROM THE DEFENDANT'S SILENCE AT THE EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW GUILTY PLEAS.

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NATURE AND STAGE OF THE PROCEEDINGS

Mauricio Hernandez Martinez was charged in the Superior Court of the State of Delaware by indictment on May 25, 2021. (A12-A14) On October 4, 2021, Mr. Martinez pled guilty to the two lead charges of the indictment, operation of a vehicle causing death and leaving the scene of a collision resulting in death. (A1-A7)

On November 22, 2021, prior to sentencing, Mr. Martinez filed a Motion to withdraw the guilty pleas. (A15-A20) On May 20, 2022, the Trial Court denied Mr. Martinez's Motion to Withdraw Guilty Pleas. (A21-A29)

On May 20, 2022, this Court sentenced Mr. Martinez to four years level five incarceration, suspended for probation after three- and one-half years. (A6) Mr. Martinez took a timely appeal to the Supreme Court.

In the Supreme Court the State acknowledged that an Evidentiary Hearing should be held and informed this Court. The matter was remanded to the Superior Court on September 1, 2022 (A31-A33)

An Evidentiary Hearing was held on March 27, 2023. After receiving submissions by the parties, the Court denied Mr. Martinez's Motion to Withdraw the Guilty Pleas by Memorandum Opinion on May 3, 2023. *State v. Mauricio Hernandez Martinez*, No. 2105008322 (Conner, J., May 3, 2023)(Exhibit A)

This is Mr. Martinez's Opening Brief after remand since this Court retained jurisdiction when remanding the matter.

SUMMARY OF ARGUMENT I

THIS COURT SHOULD GRANT MR. MARTINEZ'S MOTION TO WITHDRAW GUILTY PLEAS WHERE THERE WERE PROCEDURAL DEFECTS, THE PLEAS WERE NOT KNOWING DUE TO INEFFECTIVE ASSISTANCE, MR. MARTINEZ WAS LEGALLY INNOCENT, HE DID NOT RECEIVE ADEQUATE LEGAL COUNSEL AND THE STATE FAILED TO SHOW PREJUDICE BY THE ATTEMPT TO WITHDRAW THE PLEA.

SUMMARY OF ARGUMENT II

THE TRIAL COURT ERRED IN ITS DECISION BY INCLUDING ASSERTIONS THAT WERE MADE BY THE STATE IN ITS SUBMISSIONS IN SUPERIOR COURT WHICH WERE NOT SUPPORTED BY THE EVIDENTIARY RECORD IN MAKING ITS DECISION.

SUMMARY OF ARGUMENT III

THE TRIAL COURT ERRED IN MAKING ITS DECISION DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS BY TAKING INTO ACCOUNT DEFENDANT'S SILENCE AT THE EVIDENTIARY HEARING ON THIS MATTER AND USING THAT AGAINST HIM.

SUMMARY OF ARGUMENT IV

THE TRIAL JUDGE ABANDONED HIS ROLE AS A NEUTRAL AND DETACHED ARBITER AT THE EVIDENTIARY HEARING IN THIS CASE BY ASKING LEADING QUESTIONS WHICH ONLY BENEFITED THE STATE AND INTERJECTING HIMSELF AS AN ADVOCATE IN THE PROCESS.

STATEMENT OF FACTS

On November 7, 2020, pedestrian Robert Root was walking on the opposite side of the road from where Defendant Appellant Mauricio Hernandez Martinez was driving at night. This was a dark roadway and Mr. Root had dark clothing on with no reflective materials. He was walking on a dark portion of the roadway without a lamp in violation of *21 Del. Code Secs. 4146 and 4148*. (A72-A73, A75-A76) Mr. Martinez was operating a motor vehicle at 50 miles per hour. There was no evidence that that was an excessive speed produced at the Evidentiary Hearing in this case. (A75)

A vehicle in front of Mr. Martinez suddenly slowed down and stopped in the roadway. In order to prevent colliding with that vehicle Mr. Martinez had to go into the passing lane and pass that vehicle. This occurred in a legal passing zone. (A73-A75)

Unfortunately Mr. Root, who had an opiate in his system, was walking in the roadway at that same spot. Mr. Martinez's vehicle struck and killed Mr. Root. Mr. Martinez did not realize he had struck a person and proceeded on home. (A75-A76)

Mr. Martinez then went and sought the assistance of legal counsel who testified at the Evidentiary Hearing in this case on March 27, 2023, to those facts as set forth. At the interview Mr. Martinez's prior counsel did not

attempt to ascertain whether Mr. Martinez was a citizen of the United States, what Country he was from, or his immigration status. (A53)

The entirety of counsel's notes was introduced at the hearing. They consist of two pages. (A34-A35) There is no mention of any discussion of the immigration status of Mr. Martinez. There is no mention of the fact that if Mr. Martinez's identity was revealed to the police that he would be deported from the United States and separated from his family. There is no mention of any rights to silence or the fact that he would be guilty of a felony if he turned himself in and would likely go to prison.

Counsel testified at the hearing that he had no independent memory of advising Mr. Martinez on any of those matters. (A56-A57) However, he testified that it is his normal practice to advise clients of such matters. (A54)

Counsel testified at the hearing that at that time the police did not have any indication that Mr. Martinez was in any way involved with this case. (A58) Despite that, counsel testified that Mr. Martinez instructed him to contact the police and reveal his identity to the police as the driver of the vehicle. Mr. Martinez, with counsel, subsequently made a statement which was recorded to the Delaware State Police.

Counsel, despite being asked repeatedly, did not indicate that he ever gave advice to Mr. Martinez as to whether to reveal his identity and give a statement to the police or not. (A62)

The State proceeded to indict Mr. Martinez regarding the incident. (A12-A14) The indictment was defective. The lead count, Count I, which Mr. Martinez eventually pled guilty to, simply indicates that he is charged with driving or operating a motor vehicle and causing the death of Robert Root in violation of *Title 21, Section 4176 A(a)*. For there to be a violation of this statute a person not only must be driving and causing the death but while in the course of the driving there must be a violation of the motor vehicle code other than *21 Del. Code Sec. 4177*. Counsel at the Evidentiary Hearing testified that he never, even up until his time of testimony, recognized that defect in the indictment. (A64) Thus, it is clear that he never explained that defect to Mr. Martinez nor attempted in any way to ascertain what violation of the motor vehicle code Mr. Martinez allegedly violated to cause the death of Mr. Root.

On October 4, 2021, without any sentencing recommendation being given by the State prior counsel had Mr. Martinez plead guilty to the two lead charges. Mr. Martinez gained absolutely no benefit from that plea and actually ended up being sentenced to a greater sentence than he was told he was exposed to. (A8-A11)

A guilty plea form was filled out and submitted to the Court. (A36) This form was defective as to the range of sentence which actually caused the Court to advise the defendant of incorrect information. As the Court

acknowledged in its original decision denying the Motion to Withdraw Guilty Plea the maximum time that Mr. Martinez was facing was indicated to be three and a half years and the Court in open Court advised him of such. This is despite the fact that there was a four and a half year exposure for Mr. Martinez. (reference pages A8-A11 of the appendix here)

There was another procedural error in the guilty plea form. The form asks if this is an offense which results in a loss of the right to own or possess a deadly weapon and the answer on there indicates no. In fact, Count II, which the defendant pled guilty to, leaving the scene of a collision resulting in death, pursuant to *21 Del. Code Sec. 4202 (a)* is a Class E felony with a penalty of one to two years incarceration. Pursuant to *11 Del. Code Sec. 1448*, this is a felony offense which does result in a loss of the right to own or possess a deadly weapon. While another question on the form does indicate a loss of civil rights this incorrect answer makes the form at the very best ambiguous.

Mr. Martinez was factually innocent of the crime for which he pled guilty. Despite that counsel acknowledged the complete failure to discuss any defenses with the Defendant. (A76-A78)

11 Del. Code Sec. 264 deals with causation in strict liability offenses. This defense deals with issues of foreseeability. The defense which would have been able to be introduced at Trial successfully on behalf of Mr.

Martinez would have been that Mr. Root's death was caused by him walking out in a travel lane of a roadway in the dark at night with dark clothing without having any sort of lamp.

Furthermore, the defense of Choice of Evils pursuant to *11 Del. Code Sec. 4463* would have applied. When the vehicle in front of Mr. Martinez suddenly slowed down and stopped the choice for Mr. Martinez was to either pass that vehicle or cause a collision by running into the rear of the vehicle in front of him. Thus, this defense also would have applied in the case at bar.

The State originally alleged in this Court that there was prejudice in that Mr. Root's family will have to deal with the reopening of the case if the guilty plea was allowed to be withdrawn and the matter proceeded to Trial. There was no allegation that any evidence would have been lost or the State actually prejudiced in any way in presenting its case.

ARGUMENT I

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN DENYING DEFENDANT/APPELLANT'S MOTION TO WITHDRAW GUILTY PLEAS? THE ISSUE REGARDING THE DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS WAS PRESERVED IN THE TRIAL COURT BY THE FILING OF DEFENDANT/APPELLANT'S MOTION TO WITHDRAW GUILTY PLEAS. (A15-A20)APPENDIX – PUT THIS INTO THE APPENDIX)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT/APPELLANT'S MOTION TO WITHDRAW GUILTY PLEAS. *BROWN V. STATE*, 250 A.2d 503 (Del. 1969)

C. MERITS OF ARGUMENT: THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS WHEN THERE WERE PROCEDURAL DEFECTS IN THE TAKING OF THE PLEA, DEFENDANT HAD NOT KNOWINGLY AND VOLUNTARILY CONSENTED TO THE PLEA AGREEMENT DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, THE DEFENDANT IS LEGALLY INNOCENT, THE DEFENDANT DID NOT HAVE ADEQUATE LEGAL COUNSEL, AND

THERE WAS NO PREJUDICE TO THE STATE. SCARBOROUGH V. STATE, 938 A.2D 644 (Del. 2007).

Any analysis of whether a guilty plea should be allowed to be withdrawn starts with *Superior Court Criminal Rule 32 (d)*. That rule makes clear that a guilty plea should be allowed to be withdrawn prior to sentencing for any fair and just reason.

The analysis which this Court should undertake in deciding whether to allow the guilty plea to be withdrawn is set forth in Scarborough v. State, 938 A.2d 644 (Del. 2007). This is a five-step analysis.

The first issue which this Court should analyze is whether there were procedural defects. There is no dispute in the case at bar procedural defects did occur. Not only did Trial Counsel advise the defendant of the wrong range of sentences but the Court, relying on what counsel had placed in the paperwork, also improperly advised Mr. Martinez. (A24-A25)

The Defendant also was improperly advised as to whether the offenses to which he pled resulted in the loss of a right to own or possess a deadly weapon. On the guilty plea form the answer is no. (A36)

Count II, which the Defendant pled guilty to, leaving the scene of a collision resulting in death, pursuant to *21 Del. Code Sec. 4202 (a)* is a Class E felony with a penalty of one to two years incarceration. Pursuant to *11*

Del. Code Sec. 1448 this is a felony offense which does result in the loss of a right to own or possess a deadly weapon.

There was also another defect in the indictment. Mr. Martinez pled guilty to the lead charge in the indictment, driving while operating a motor vehicle in causing the death of Robert Root in violation of *21 Del. Code Sec. 4176 A(a)*.

For there to be a violation of this statute there must not only be driving in the causing the death of another person but while in the course of the driving there must be a violation of a section of the motor vehicle code other than *21 Del. Code Sec. 4177*. There is no indication in the defective indictment that Mr. Martinez was in violation of any other section of the Delaware Code in Count I which he pled guilty to.

Trial Counsel was asked about this matter at the Evidentiary Hearing and indicated that he still was not aware of this defect even through the time of his testimony. (A64) Therefore, this clearly had never been discussed with Mr. Martinez. Counsel was not aware of this crucial element of the crime and thus could not have discussed it with Mr. Martinez.

Furthermore, there is absolutely no evidence introduced to allow Mr. Martinez to attempt to determine what motor vehicle offense, other than *21 Del. Code Sec. 4177*, that he was alleged to have violated in causing the death of Mr. Root. The only evidence as to how the accident occurred came

from Trial Counsel relaying what Mr. Martinez told him. This constituted him driving within the speed limit and passing another vehicle in a passing zone. (A72-A76)

The second factor for this Court to consider in deciding whether to allow the withdrawal of a guilty plea is whether the guilty plea was knowing and voluntary. Certainly, in the case at bar, all of the knowing and voluntary boxes were checked both in the paperwork and the plea colloquy. However, it is difficult to see how a plea can be knowing and voluntary if a Defendant is not advised of the proper range of penalties, the consequences with regards to the right to own or possess a deadly weapon, the elements of the lead crime to which he was pleading guilty, or the defenses which he would have been able to raise at Trial. A defendant cannot be deemed to knowingly plead to a crime as to which he does not know an element.

Furthermore, it is clear from a review of counsels file and testimony that there had been no discussion of the case between counsel and his client from the time of the statement being given to the police all the way up until the time of the guilty plea. There are no notes regarding any such conversations. There are no notations on counsel's calendar as to any meetings, whether in person, phone, by zoom or in any other manner between counsel and his client. Counsel did testify that despite such an

absence that he would have talked to Mr. Martinez at least three times by phone and one time in person. (A70-A71)

The third factor is the legal innocence of Mr. Martinez. At Trial Mr. Martinez would have been able to show that he was following another motor vehicle on a dark road at night. The vehicle in front of him suddenly slowed and stopped in the roadway causing Mr. Martinez to have to make the choice of evils of either running into the back of the vehicle or passing the vehicle. This caused Mr. Martinez, in a passing zone, to come into the oncoming lane of travel which appeared clear since there were no vehicles and no lights in that lane. (A72-A76)

When he did so unfortunately Mr. Root was walking on the roadway in dark clothing without any lamp in violation of *21 Del. Code Secs. 4146 and 4148*. (A75-A76) Thus, there were no actions in violation of the motor vehicle code committed by Mr. Martinez which caused the death of Mr. Root. Perhaps even more troubling counsel admitted that he never even discussed any of the possible defenses with Mr. Martinez to allow Mr. Martinez to make the decision to assert the defenses and go to Trial or to plead guilty. (A76-A78)

Mr. Martinez would have had the defenses at Trial dealing with causation in strict liability cases and foreseeability pursuant to *11 Del. Code Sec. 264*. Mr. Root's death was caused by him walking out in a travel lane

on a roadway in the dark at night with dark clothing without having any sort of lamp.

Furthermore, the defense of choice of evils pursuant to *11 Del. Code Sec. 4463* would have applied. When the vehicle in front of Mr. Martinez suddenly slowed down and stopped the choice for Mr. Martinez was to either pass that vehicle or cause a collision by running into the rear of the vehicle in front of him. Thus, both of these defenses if properly asserted would have led to his acquittal.

Defense counsel has a duty to discuss defenses with a defendant. *Rios v. Rocha*, *9th Cir.*, *299 F3d 796 (2002)* It is clear that that duty was not met in this case.

The next factor is the adequacy of legal counsel. There is absolutely no evidence in this case that Mr. Martinez was advised of the immigration consequences of him turning himself in, his rights to remain silent under the Delaware and United States Constitutions, and the fact that if his identity was revealed he may have been found guilty of a felony and incarcerated along with being deported and separated from his family in the United States.

Counsel at the Evidentiary Hearing testified that he had no memory of speaking to Mr. Martinez regarding any of those items. The notes from that meeting make absolutely no mention of any such conversations. (A34-A35)

It is difficult if not impossible to believe that a member of the Bar would advise a client of such important matters and not make any notations whatsoever in any sort of documents. Counsel only indicated that it was his practice to go ahead and advise of such matters. (A53-A57)

However, counsel made clear that he did not provide any advice to Mr. Martinez as to whether to have his identity revealed to the police. (A62) This is true despite the fact that the police did not know of Mr. Martinez's involvement, despite being repeatedly questioned on this matter. This is also true despite the fact that of course Mr. Martinez came to counsel for such advice as to what to do. Therefore, when this is coupled with the fact that there were no meetings between Mr. Martinez and counsel of any sort between the time of his giving the statement and the time of his guilty plea, the fact that counsel admitted that none of the defenses were discussed with Mr. Martinez, and the fact that counsel did not even know all of the elements of the lead offense, it is clear that counsel's conduct fell far below that of constitutionally adequate counsel. *Strickland v. Washington*, 466 US 668 (1984)

Then, in the Court process, his counsel had him plead guilty to the two lead charges without obtaining any benefit whatsoever from the State including any recommendation as to what the appropriate sentence would be. His Trial Counsel advised him improperly with regards to the elements

of the offense to which he was charged, the possible penalties to which he was pleading guilty, the consequences with regards to whether he would be allowed to have a deadly weapon, and the defenses which he would have been able to use at Trial. It is difficult to see how the State can contend that that sort of representation in any way constituted constitutionally adequate counsel.

The last fact is the prejudice to the State. The State could not and did not allege that there was any inability of the State to move forward and prosecute this case since Mr. Martinez had promptly filed his Motion to withdraw the guilty plea well before sentencing.

While certainly all may and should sympathize with Mr. Root's family and their desire for finality that should not override the search for truth and the necessity of justice in the criminal justice system.

Therefore, it is respectfully submitted that this Court should reverse the ruling of the Trial Court denying Mr. Martinez's Motion to Withdraw his Guilty Pleas and remand the matter to Superior Court for a Trial on the merits so that justice may be achieved.

ARGUMENT II

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN RELYING ON ALLEGATIONS IN ITS MEMORANDUM DECISION BY THE STATE WHICH WERE NOT SUPPORTED BY THE EVIDENTIARY RECORD? THIS ISSUE WAS PRESERVED BY DEFENDANT APPELLANT FILING HIS REPLY IN SUPPORT OF HIS MOTION TO WITHDRAW GUILTY PLEA IN THE SUPERIOR COURT ON APRIL 25, 2023, OBJECTING TO THE COURT CONSIDERING ALLEGATIONS BEING MADE BY THE STATE OF FACTS OUTSIDE THE EVIDENTIARY RECORD. (A37-A38)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN RELYING ON ALLEGATIONS MADE BY THE STATE WHICH WERE NOT SUPPORTED BY THE EVIDENTIARY RECORD AT THE HEARING IN THIS CASE.

C. MERITS OF ARGUMENT: THE TRIAL COURT SHOULD NOT HAVE CONSIDERED ALLEGATIONS MADE BY THE STATE WHICH WERE NOT SUPPORTED BY ANY WITNESSES OR EVIDENCE PRODUCED AT THE EVIDENTIARY HEARING IN THIS CASE.

The State in response to the Defendant's request to withdraw his guilty pleas prior to sentencing and for an Evidentiary Hearing to provide a

record initially opposed both requests. The Trial Court denied both of the requests by Mr. Martinez. (A21-29) When the case was appealed to this Court the State admitted error and acknowledged that an Evidentiary Hearing should have been held. The matter was remanded back to the Superior Court to hold an Evidentiary Hearing by Order of the Supreme Court dated September 1, 2022 (A31-A33)

The Evidentiary Hearing was held on March 27, 2023. The only witness who was called was called by Mr. Martinez. This was his prior trial counsel. The State declined to submit any evidence or call any witnesses. (A95)

At the close of the hearing the Trial Court ordered the parties to provide written submissions. The State did provide a written submission to the Trial Court dated April 11, 2023 (A101-A120) In that submission on pages two through three the State alleged as follows:

“On November 7, 2020, the police were dispatched to a hit and run collision. Upon arriving on the scene, the police discovered that Robert Root was hit by a vehicle as he was walking upon East Trap Pond Rd in Georgetown, DE. Mr. Root died as a result of his injuries. The police interviewed several witnesses to the collision.

Two witnesses indicated that they were in a vehicle traveling east bound on East Trap Pond Rd. As they were traveling down the road, a white sedan passed them at a high rate of speed. The witnesses estimated that the sedan was a white

Nissan Altima. As the sedan was passing them, the operator of the sedan struck a pedestrian who was walking eastbound in the westbound lane. The white sedan never stopped after striking Mr. Root. The collision was captured on the witness' dash camera.

During the investigation, the police were able to locate several bits of evidence. The police located numerous identifying pieces of the white sedan that were left on the scene. Most importantly, the police located pieces of the Defendant's mirror. After a computer search of the parts identifying numbers, Det. Argo determined that the white sedan was a 2008 to 2013 Nissan Altima.”

There were no citations to any record. In fact, there was nothing in the evidentiary record to back up any of those alleged assertions.

On May 3, 2023, the Trial Court issued its Memorandum Opinion denying the Motion. *State v. Mauricio Hernandez Martinez*, No. 2105008322 (Conner, J., May 3, 2023)(Exhibit A) On pages one through two of the decision the Court, once again without reference to anything in the evidentiary record, wrote:

“On November 7, 2020, police were dispatched to a hit and run collision. When police officers arrived on scene they found Robert Root (the "victim"). The victim had been struck by a car while walking along East Trap Pond Road in Georgetown, Delaware. The victim died as a result of his injuries.

Police officers interviewed two eyewitnesses to the collision.¹ The witnesses stated they observed a white sedan, what they thought to be a Nissan

Altima, pass them at a high rate of speed. After passing them, the sedan struck the victim who was walking eastbound in the westbound lane. The operator of the white sedan did not stop after striking the victim.

Investigating police officers discovered numerous pieces of the white sedan left behind at the scene of the accident due to the collision. Among the pieces was part of the white sedan's mirror, which enabled police to narrow their search to a 2008 to 2013 white Nissan Altima.”

This Court will note that the words are not exactly the same in the two documents. However, the facts that are alleged, without reference to any sort of evidentiary record, are in fact the same.

Therefore, it is respectfully submitted that it is an abuse of discretion for the Trial Court to simply accept assertions by the State which were not supported by any evidentiary record in rendering its decision. For that reason, the decision of the Trial Court should be set aside and the Defendants Motion to Set Aside Guilty Plea be granted and a new trial on the merits ordered.

ARGUMENT III

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN COMMENTING ON THE DEFENDANT APPELLANT'S EXERCISING HIS RIGHT TO REMAIN SILENT AT THE POST CONVICTION EVIDENTIARY HEARING AND DRAWING AN ADVERSE INFERENCE FROM THAT IN ITS DECISION? THIS ISSUE WAS NOT ABLE TO BE PRESENTED IN THE TRIAL COURT SINCE IT WAS ONLY APPARENT WHEN THE TRIAL COURT ISSUED ITS DECISION DENYING THE DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS.

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN DRAWING AN ADVERSE INFERENCE FROM THE DEFENDANT'S SILENCE AT THE EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW GUILTY PLEAS.

C. MERITS OF ARGUMENT: THE TRIAL COURT SHOULD NOT HAVE DRAWN AN ADVERSE INFERENCE FROM DEFENDANT'S FAILURE TO TESTIFY AT THE EVIDENTIARY HEARING IN THIS CASE.

The Trial Court in denying the Motion for a New Trial three times in it's decision commented, adversely, on Mr. Martinez's exercise of his right

to remain silent at the Evidentiary Hearing held in this matter. On page five of the decision the Court stated, “Curiously, Mr. Gill changed course and did not solicit testimony from his client or his brother who were available in the court room.” State v. Mauricio Hernandez Martinez, No. 2105008322 *Conner, J., May 3, 2023* (Exhibit A, page 5)

On page fifteen of the Court’s decision, it reiterated regarding facts of the case, “This is especially true since Defendant elected not to testify at the remand hearing.” State v. Mauricio Hernandez Martinez, No. 2105008322 *Conner, J., May 3, 2023* (Exhibit A, page 15)

Finally, the Trial Court wrote on page eighteen, “There was no evidence elicited from Defendant or any other witness demonstrating Mr. Whitehead failed to advise Defendant properly.” State v. Mauricio Hernandez Martinez, No. 2105008322 *Conner, J., May 3, 2023* (Exhibit A, page 18)

It is absolutely clear that this is the Trial Court making adverse inferences from the Defendant’s exercise of his right to remain silent at the Evidentiary Hearing. This is in direct contradiction to the 5th Amendment to the United States Constitution and Article 1, Section 7 of the Delaware Constitution.

A Trial Court comment regarding a Defendant's failure to testify must be uninvited, must create an improper inference of guilt and must be prejudicial to be reversible. *Richards v. State*, 865 A.2d 1274 (Del. 2004)

In the case at bar there is no question about these comments being invited. The comments clearly are part of the improper inference since they are placed in the decision of the Court denying the Defendant's Motion. They were also clearly prejudicial in that the Judge emphasized three times the Defendant not testifying to the detriment of the Defendant.

In fact, even at sentencing a Court cannot find a lack of remorse from a Defendant not testifying. *Jackson v. State*, 643, A.2d 1360 (1994).

Therefore, it is respectfully submitted that this error taints the Memorandum Opinion of the Trial Court. That opinion should be set aside and the Defendant's Motion to Withdraw Guilty Plea be granted with the matter being sent back to the Trial Court for a trial on the merits of this matter so that justice may be done.

ARGUMENT IV

A. QUESTION PRESENTED: DID THE TRIAL COURT ABANDON ITS ROLE AS A NEUTRAL AND DETACHED ARBITER AND BECOME AN ADVOCATE IN THE CASE BY ASKING LEADING QUESTIONS WHICH ONLY FAVORED THE STATE? THIS ISSUE WAS RAISED IN THE TRIAL COURT BY MR. MARTINEZ'S OBJECTION TO THE JUDGE INTERJECTING HIMSELF INTO THE PROCESS WHICH WAS OVERRULED BY THE TRIAL COURT. (A68)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY BECOMING AN ADVOCATE FOR ONE PARTY.

C. MERITS OF ARGUMENT: THE TRIAL COURT ABANDONED ITS ROLE AS A NEUTRAL ARBITER BY ASKING LEADING QUESTIONS FAVORING ONE PARTY.

The Trial Judge interjected himself into the Evidentiary Hearing by asking questions of prior Trial Counsel three times during the direct examination and one time during the cross examination of prior Trial Counsel. (A55, A59, A68-A69, A86-A87) Each of those four occasions benefited the State and ultimately the Trial Judge's position in the case. All were leading questions which were an attempt to support the adequacy of Trial Counsel's representation of the defendant.

A trial judge may not assume the role of an advocate. A judge has a duty of neutrality and self-restraint. *Price v. Blood Bank of Delaware, Inc.*, 798 A.2d 1203 (Del. 2002); *Lagola v. Thomas*, 867 A.2d 891 (Del. 2005).

It is noted that both of those cases dealt with situations where a Trial Judge's questioning occurred in the presence of a jury. However, it is also noted that both of those decisions dealt with the plain error standard since no contemporaneous objection was made. In the case at bar a contemporaneous objection was made. (A68)

In the case at bar the record and the Court's decision make clear that the Trial Court abandoned its role as the neutral arbiter and became an advocate to attempt to support the position of the State in upholding the guilty pleas in this case and denying Mr. Martinez a trial on the merits. Therefore, while it is the Defendant's position that the entirety of this appeal should support a complete reversal of the decision with an order setting aside the guilty pleas if this Court should not grant that relief it is respectfully submitted that the matter should be remanded to the Superior Court once again with orders for a different Trial Judge to be assigned to the case.

CONCLUSION

For the reasons set forth herein Defendant Appellant, Mauricio Hernandez Martinez, respectfully prays that the Court's decision denying his Motion to Withdraw Guilty Pleas be set aside and that this Court order the guilty pleas to be set aside and the matter be remanded for Trial. If this Court shall not grant that remedy then alternatively this Court should overturn the decision of the Trial Court denying the Motion to Withdraw the Guilty Pleas and remand the matter to Superior Court to be assigned to a new Trial Judge.

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DATED: May 22, 2023

AFFIDAVIT OF ELECTRONIC MAILING

BE IT REMEMBERED that on this 22nd day of May, 2023, Ashley Whalen, Paralegal, for the Law Office of Gill, Welsh & Chamberlain, P.A., does state that she forwarded to Maria Teresa Knoll, Esquire, with the Attorney General's Office by Lexis Nexis file and Serve, Defendant Appellant's Opening Brief in Support of His Motion to Withdraw Guilty Pleas After Remand to the Superior Court of the State of Delaware

to: Maria Teresa Knoll, Esquire
Department of Justice
Carvel State Building
820 North French Street
Wilmington, DE 19801

/s/ Ashley Whalen
Paralegal