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Case Number 179,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAURICIO HERNANDEZ-MARTINEZ,	)	
	)	No. 179, 2022
Defendant-Below/Appellant,	)	
v.	)	
STATE OF DELAWARE	)	On appeal from the Superior Court of the State of Delaware
Plaintiff-Below/Appellee.	)	

STATE'S CORRECTED ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On May 25, 2021, a Sussex County Grand Jury indicted Mauricio Hernandez-Martinez ("Hernandez-Martinez" or "Defendant") on the following charges: Operation of a Vehicle Causing Death; Leaving the Scene of a Collision Resulting in Death; Driving Without a Valid License; Inattentive Driving; Unreasonable Speed; Fail to Report a Collision Resulting in Injury or Death.[1] The same day, the Superior Court issued a Rule 9 warrant for Hernandez-Martinez's arrest, which was returned on June 8, 2021.[2] Hernandez-Martinez pled not guilty and requested a jury trial.[3]

On October 4, 2021, the Superior Court held a case review.[4] At that time, Hernandez-Martinez pled guilty to Operation of a Vehicle Causing Death and Leaving the Scene of a Collision Resulting in Death.[5] He also signed a Plea Agreement and a Truth-in-Sentencing Form/Guilty Plea Form ("TIS Form").[6] The court ordered a pre-sentence investigation, set a date of December 10, 2021, for

[1] A12-14.

[2] A1 at D.I. 6, 7. "D.I." refers to the Superior Court docket item numbers in *State v. Mauricio Hernandez-Martinez,* ID No. 2105008322.

[3] A1 at D.I. 7.

[4] A4 at D.I. 23.

[5] A4 at D.I. 23.

[6] A4 at D.I. 23; A36; B9-11.

sentencing, and performed a plea colloquy with Hernandez-Martinez.[7] On October 7, 2021, the Department of Homeland Security placed an ICE detainer for Hernandez-Martinez.[8]

Subsequently, Hernandez-Martinez obtained new counsel, Edward Gill, Esquire, who filed a Motion to Withdraw Plea.[9] The State opposed the motion.[10] The court heard oral argument on February 11, 2022.[11] At the hearing, Mr. Gill requested that the court allow Hernandez-Martinez and his brother to testify.[12] The State objected.[13] The court ordered the parties to submit supplemental briefing on whether it had to conduct an evidentiary hearing on the motion.[14] After reviewing the parties' submissions,[15] the Superior Court determined an evidentiary hearing was unnecessary.[16]

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[7] A4 at D.I. 23; B19-20.

[8] A4 at D.I. 24.

[9] A4 at D.I. 26-29; A15-20.

[10] A5 at D.I. 33.

[11] A5 at D.I. 38.

[12] A22.

[13] A22.

[14] A8 at D.I. 38; A22-23.

[15] A5 at D.I. 39, 40.

[16] A8-9 at D.I. 41.

On May 5, 2022, the Superior Court denied the Motion to Withdraw Plea and sentenced Hernandez-Martinez.[17] After making technical corrections, the court issued a revised order that sentenced Hernandez-Martinez, effective May 20, 2022, to an aggregate of four years at Level V incarceration, with credit for 229 days previously served, suspended after three years for one year of Level II probation.[18]

Hernandez-Martinez timely appealed the denial of his Motion to Withdraw Plea.[19] On appeal, he argued the Superior Court erred by not holding an evidentiary hearing for his motion.[20] In response, the State moved to remand the case to the Superior Court to conduct an evidentiary hearing and to reconsider the motion in light of the record.[21] Hernandez-Martinez did not oppose.[22] This Court remanded the case on September 6, 2022, and directed the Superior Court to conduct an evidentiary hearing on the Motion to Withdraw Plea.[23] In addition, this Court retained jurisdiction.[24]

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[17] A6 at D.I. 43; A22-29.

[18] A8-11 at D.I. 45, 46.

[19] *State v. Hernandez-Martinez*, 2023 WL 3221888, at *2 (Del. Super. Ct. May 3, 2023).

[20] A31.

[21] A31-32.

[22] A32.

[23] A32-33; B6 at D.I. 56.

[24] *Id*.

On remand, the Superior Court held an evidentiary hearing on March 27, 2023.[25] Mr. Andrew Whitehead, Esquire ("trial counsel") was the only witness who testified at the remand hearing.[26] Both parties submitted written arguments to support each of their positions on the Motion to Withdraw Plea.[27] On May 3, 2023, the Superior Court denied the motion.[28]

Hernandez-Martinez filed a timely notice of appeal, followed by his opening brief, appendix, and exhibit. This is the State's answering brief.

[25] B7 at D.I. 65; *Hernandez-Martinez*, 2023 WL 3221888, at *2.

[26] A39-100.

[27] B7 at D.I. 67-70.

[28] B7-8 at D.I. 71; *Hernandez-Martinez*, 2023 WL 3221888, at *7.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court did not abuse its discretion or otherwise err in denying Hernandez-Martinez's Motion to Withdraw Plea. The court properly denied the motion and concluded Hernandez-Martinez failed to demonstrate a fair and just reason to withdraw the plea. None of the procedural defects show Hernandez-Martinez misunderstood his legal rights or that he did not voluntarily enter his guilty plea. Trial counsel erroneously marked one wrong box on the TIS Form, but correctly marked the previous question about whether Hernandez-Martinez understood pleading guilty would cause him to forfeit a right to own or possess a deadly weapon. The court told Hernandez-Martinez the incorrect maximum sentence but remedied the error by sentencing him to the maximum time listed on the Truth in Sentencing Guilty Plea Form ("TIS Form"). Hernandez-Martinez's voluntary guilty plea waived his right to challenge an alleged defect in Count I of the indictment. The court properly found Hernandez-Martinez knowingly, intelligently, and voluntarily pled guilty to the two lead charges because he wanted to take responsibility for his actions. Hernandez-Martinez cannot claim legal innocence because evidence showed he sought to take responsibility for his actions by pleading guilty. And, in fact, he did plead guilty. The court correctly concluded trial counsel was not ineffective. Trial counsel employed a reasonable strategy in representing Hernandez-Martinez. Hernandez-Martinez has failed to

allege any facts to meet his burden of showing prejudice. Finally, the facts supported the court's conclusion that the State and the court would be prejudiced if Hernandez-Martinez were allowed to withdraw his guilty plea.

II. The Appellant's argument is denied. The Superior Court did not abuse its discretion by relying on testimony and documentary evidence in reaching its conclusions. A court may look to anything that has some "minimal indicia of reliability" when determining facts. The background paragraphs in the court's decision were not germane facts—those came from trial counsel and the parties' written submissions as well as the TIS Form and plea colloquy.

III. The Appellant's argument is denied. The Superior Court did not impermissibly comment on Hernandez-Martinez's exercise of his right to remain silent or make any adverse inferences from his decision not to testify at the hearing. Counsel stated that Hernandez-Martinez wanted he and his brother to testify at an evidentiary hearing on the Motion to Withdraw Plea, but Hernandez-Martinez changed his mind after his successful appeal and the remand of the case. The court noted the absence of any testimony from Hernandez-Martinez, but its comments did not show it adversely inferred his guilt.

IV. The Appellant's argument is denied. The Superior Court, as the factfinder, may permissibly ask witnesses questions *sua sponte*. The court's duty is

to see that justice is done and to conduct proceedings that bring about a fair result. Hernandez-Martinez has not shown how the court's questions displayed bias.

STATEMENT OF FACTS[29]

On November 7, 2020, police were dispatched to a hit and run collision. When police officers arrived on scene they found Robert Root ("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.[30] 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.

On November 9, 2020, Defendant went to see Andrew Whitehead, Esquire.[31] Mr. Whitehead provided a translator for the meeting. Mr. Whitehead testified that he advises clients of immigration ramifications as a matter of course during initial

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[29] The facts are taken verbatim from the Superior Court's decision in *Hernandez-Martinez*, 2023 WL 3221888, at *1-2.

[30] The collision was also captured on a civilian witness' dash camera.

[31] A46; B14-20.

consultations.[32] Further, Mr. Whitehead testified that it is his practice to advise clients with possible immigration issues to consult an immigration attorney.[33] Mr. Whitehead also testified that before a police interview is conducted it is his practice to advise the client of their fifth amendment rights.[34] Although he had no specific recollection and his notes do not reflect he had these conversations with Defendant, Mr. Whitehead was clear that these things are routinely discussed with his clients.[35]

Mr. Whitehead explained that Defendant was adamant about wanting to take responsibility for the collision at this first meeting.[36] Defendant's desire did not waiver despite Mr. Whitehead advising Defendant he had no duty to talk with the police and could simply leave his office, potentially not incurring criminal charges.[37] Mr. Whitehead explained Defendant wanted to take responsibility for the incident in order to protect his family member who owned the car.[38] When Defendant made it clear that he needed to take responsibility, Mr. Whitehead discussed the strategies and benefits to early acceptance of responsibility by meeting with the police.[39] Mr.

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[32] A54-55.

[33] A55-56, 59, 81.

[34] A56-57.

[35] A54-57, 59, 81.

[36] A58.

[37] A58-61.

[38] A59, 61, 79.

[39] A62-63.

Whitehead further testified that he advised Defendant they could argue early acceptance of responsibility as a mitigating factor.[40]

Mr. Whitehead then contacted Detective Argo on November 9, 2020, and indicated that Defendant, his client, wanted to turn himself in regarding a hit and run.[41] Detective Argo interviewed Defendant on November 11, 2020.[42] During the interview, Defendant admitted to driving the white Nissan Altima that was involved in the collision. Defendant also stated his cousin, Carlos Hernandez was in the car at the time of the collision. During this interview Defendant told Detective Argo that he returned to the scene of the collision that night but did not make contact with the police officers that were there. Defendant stated he saw a news story regarding the collision and wanted to contact the police to do the right thing.

Detective Argo also interviewed Carlos Hernandez. Hernandez corroborated all of Defendant's statements. Hernandez stated Defendant was driving the car, returned to the scene of the collision, and turned himself in after seeing the news story.

[40] A72, 83, 91.

[41] A79-80.

[42] A79-80.

Prior to the entry of the plea, Mr. Whitehead testified he spoke with Defendant at least three times by phone and met with him once more in the office.[43]

[43] A70.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED HERNANDEZ-MARTINEZ'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Question Presented

Whether the Superior Court abused its discretion by denying Hernandez-Martinez's motion to withdraw his guilty plea when he failed to show a fair and just reason for its withdrawal.

Standard and Scope of Review

"A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court."[44] Under Superior Court Criminal Rule 32(d), a defendant must show a fair and just reason exists to permit the withdrawal of a plea.[45] In addition, Superior Court Criminal Rule 11 applies."[46] "Only where the judge determines that 'the plea was not voluntarily entered or was entered because of misapprehension or mistake of defendant as to his legal rights' should the court grant the defendant's request to withdraw his guilty plea."[47]

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[44] *Chavous v. State*, 953 A.2d 282, 285 (Del. 2008); *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007) (*quoting Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999)).

[45] *Scarborough*, 938 A.2d at 649 (Del. 2007) (*citing State v. Cabrera*, 891 A.2d 1066, 1069 (Del. 1999)).

[46] *Scarborough*, 938 A.2d at 649 (*quoting Wells v. State*, 396 A.2d 161, 162 (Del. 1978)) (internal citation and quotation marks omitted).

[47] *Scarborough*, at 649-50 (*quoting State v. Insley*, 141 A.2d 619, 622 (Del. 1958)).

Merits of Argument

Hernandez-Martinez claims the court should have granted his Motion to Withdraw Plea because "there were procedural defects" when the court accepted his plea.[48] He also claims he did not knowingly and voluntarily consent to the Plea Agreement "due to the ineffective assistance of counsel."[49] In addition, Hernandez-Martinez asserts he is legally innocent, did not have adequate legal counsel, and "there was no prejudice to the State."[50] His claims are unavailing.

A. The Procedural Defects in This Case Do Not Show That Hernandez-Martinez Misunderstood His Legal Rights.

Hernandez-Martinez claims procedural defects in his case.[51] He asserts trial counsel told him the wrong range of sentences and the court improperly advised him on the wrong range of sentences.[52] Hernandez-Martinez argues trial counsel improperly advised him that the offenses to which he would plead guilty would not cause him to lose the right to own or possess a deadly weapon.[53] He notes that on the TIS Form in answer to the question, "Is this an offense which results in the loss

[48] Opening Br. at 17.

[49] Opening Br. at 17.

[50] Opening Br. at 17-18.

[51] Opening. Br. at 17-18.

[52] Opening Br. 18; B9.

[53] Opening Br. at 18.

of the right to own or possess a deadly weapon?" trial counsel marked "no."[54] However, Hernandez-Martinez pled guilty to Count II, Leaving the Scene of a Collision Resulting in Death,[55] which is a Class E felony with a penalty of one to two years of incarceration.[56] Because this is a felony offense, pleading guilty to Count II causes Hernandez-Martinez to lose the right to own or possess a deadly weapon.[57]

Hernandez-Martinez also claims his indictment was defective.[58] Count I required both causing a death while in the course of driving plus a violation of another section of the motor vehicle code (other than 21 *Del. C.* § 4177).[59] Hernandez-Martinez argues nothing in Count I showed he violated any other section of the Code.[60] Furthermore, he claims the State did not introduce evidence that allowed him to determine which motor vehicle offense (other than 21 *Del. C.* § 4177) he was alleged to have violated in causing Mr. Root's death.[61] He argues the only

[54] Opening Br. at 18; A36.

[55] 21 *Del. C.* § 4202(a).

[56] Opening Br. at 18.

[57] *See* 21 *Del. C.* § 1448.

[58] Opening Br. at 19.

[59] Opening Br. at 19.

[60] Opening Br. at 19.

[61] Opening Br. at 19.

evidence at the hearing about how the accident happened came from trial counsel.[62] Trial counsel said Hernandez-Martinez told him he had been driving within the speed limit and had passed another vehicle in a passing zone.[63] Hernandez-Martinez argues that "[a] defendant cannot be deemed to knowingly plead to a crime as to which he does not know an element."[64] But, none of these minor procedural errors show that Hernandez-Martinez misunderstood his legal rights or that he did not voluntarily enter his guilty plea.

(1) *The Superior Court's Failure to State on the Record the Correct Sentencing Range is Not a Fatal Error.*

Under Superior Court Criminal Rule 32(d), a defendant may withdraw a guilty plea upon a motion made before sentencing, but only if the defendant shows "any fair and just reason."[65] To determine whether a "fair and just reason" exists, this Court uses a five-factor test that considers: (1) the procedure of the colloquy; (2) whether the plea was intelligent, knowing, and voluntary; (3) whether the defendant had a basis to assert legal innocence; (4) whether the defendant had adequate legal counsel throughout the proceedings; and (5) whether the State would be prejudiced or the court would be unduly inconvenienced if the defendant were permitted to

[62] Opening Br. at 19-20.

[63] Opening Br. at 19-20 (citing A72-76).

[64] Opening Br. at 20.

[65] Del. Super. Ct. Crim. R. 32(d).

withdraw his guilty plea.[66] These "are not factors to be balanced; indeed, some of the factors of themselves may justify relief."[67]

On remand, trial counsel testified that before the plea hearing, he advised Hernandez-Martinez about the correct maximum penalty for the two charges.[68] And, trial counsel indicated on the TIS Form the correct statutory minimum and maximum penalties for Operation of a Vehicle Causing Death and Leaving the Scene of a Collision Causing Death but made a mistake when he added the two sentences together for the total maximum penalty.[69] But, the TIS Form listed the correct penalties next to each of the charges.[70] Simply put, this was a math error committed by trial counsel and relied upon by the court.

Although the court mistakenly advised Hernandez-Martinez during the colloquy that his maximum sentence would be less than what is provided under

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[66] *Jones v. State*, 2022 WL 1134744, at *2 (Del. Apr. 18, 2022); *McNeill v. State*, 2002 WL 31477132, at *1 (Del. Nov. 4, 2002); *Scarborough*, 938 A.2d at 649.

[67] *Jones*, 2022 WL 1134744, at *2; *Scarborough*, 938 A.2d at 649; *Patterson v. State*, 684 A.2d 1234, 1239 (Del. 1996).

[68] Initially, trial counsel testified that he had advised Hernandez-Martinez the maximum sentence for a guilty plea would be three years and six months at Level V (A66, 84-86); however, later he confirmed that he told Hernandez-Martinez the maximum time would be four years and six months (A86-87, 93).

[69] A84-87.

[70] A84-87; *Hernandez-Martinez*, 2023 WL 3221888, at *3.

Delaware law, this error is not fatal.[71] On remand, the court acknowledged the TIS Form erroneously described (and the plea colloquy erroneously explained) that Hernandez-Martinez faced a maximum of three years and six months at Level V.[72] However, the actual potential maximum incarceration time was four years and six months at Level V.[73] But the court sentenced Hernandez-Martinez to less time than what was stated on the TIS Form and in the plea colloquy.[74] The court found this action corrected the procedural error.[75] Moreover, Hernandez-Martinez cannot complain of prejudice from receiving a sentence of less time than both the maximum mandatory time and the time written on the TIS Form.[76] In fact, Hernandez-Martinez benefitted from the mistake.[77] The record evidence demonstrates that Hernandez-

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[71] *State v. Webster*, 1992 WL 91142, at *3 (Del. Super. Ct. Apr. 30, 1992), (*citing Allen v. State*, 509 A.2d 87, 88 (Del. 1986)), *aff'd sub nom*. *Webster v. State*, 1993 WL 227340 (Del. June 7, 1993).

[72] *Hernandez-Martinez*, 2023 WL 3221888, at *3.

[73] *Id.*; A24.

[74] *Hernandez-Martinez*, 2023 WL 3221888, at *3.

[75] *Id.*; A24.

[76] *See, e.g., Smith v. State*, 2014 WL 1017277, at *3 (Del. Mar. 13, 2014) (holding defendant could not establish prejudice when his counsel incorrectly listed statutory maximum sentence on the plea form as less than what the law required because the judge corrected the error by reducing the sentence to match what was listed on the plea form).

[77] *Hernandez-Martinez*, 2023 WL 3221888, at *3; *see Shorts v. State*, 2018 WL 2437229, at *3 (Del. May 30, 2018) (holding although plea form inaccurately stated maximum penalty for offense was 25 years when defendant faced a life sentence, procedural defect was cured when State withdrew its petition to declare defendant a

Martinez was aware of the maximum penalties he faced. The procedural errors here do not weigh in favor of finding a fair and just reason to allow Hernandez-Martinez to withdraw his guilty plea.

(2) *The Mistake on The TIS Form Does Not Show Hernandez-Martinez Did Not Voluntarily Enter Into the Plea or That He Failed To Understand He Could Not Own a Firearm If He Pled Guilty.*

Hernandez-Martinez claims trial counsel improperly advised him that if he pled guilty, he would not lose the right to own or possess a deadly weapon.[78] In answer to the question, "Is this an offense which results in the loss of the right to own or possess a deadly weapon?" trial counsel marked "no" on the TIS form.[79] Trial counsel said he checked the wrong box when noting Hernandez-Martinez's answer and was confident that Hernandez-Martinez was aware that by pleading guilty, he would lose his right to own or possess a firearm.[80] Indeed, Hernandez-Martinez acknowledged that he would lose his right to own or possess a firearm when he answered "Yes" to the following question:

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habitual offender; defendant's sentencing range then became the same as listed on the plea form).

[78] Opening Br. at 18-19.

[79] Opening Br. at 18; A36.

[80] *Hernandez-Martinez*, 2023 WL 3221888, at *5.

> Do you understand that a guilty plea to a felony will cause you to lose your right to vote, to be a juror, to hold public office, *to own or possess a deadly weapon*, and other civil rights?[81]

Hernandez-Martinez pled guilty to Leaving the Scene of a Collision Resulting in Death, which is a Class E felony.[82] A mistake on a TIS Form—here, a wrongly checked box—does not by itself amount to an error entitling a defendant to withdraw a guilty plea.[83] Hernandez-Martinez does not explain how an error on the TIS Form caused him to involuntarily enter into the Plea Agreement. Nor does Hernandez-Martinez explain how the technical mistake about his ability to own or possess a deadly weapon would have changed his decision to plead guilty. In the absence of any demonstrable prejudice, the errors on the TIS Form were inconsequential to Hernandez-Martinez's plea.[84]

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[81] A30 (emphasis added).

[82] 21 *Del. C.* § 4202(a).

[83] *See Jones v. State*, 2021 WL 1259520, at *1-2 (Del. Apr. 5, 2021) (finding defendant received the sentence for which he bargained and his guilty plea was not invalid even though TIS Form, prosecutor, defense counsel, and the court erroneously stated the maximum statutory penalty for second degree murder was 25 years rather than life imprisonment).

[84] *Id.*

(3) *Hernandez-Martinez Waived Any Challenges to the Indictment by Pleading Guilty.*

Hernandez-Martinez claims the indictment in his case was defective because of the wording in Count I—one of the two counts to which he pled guilty.[85] Count I of the indictment charged Hernandez-Martinez with Operation of a Vehicle Causing Death under 21 *Del. C.* § 4176A(a).[86] Hernandez-Martinez asserts 21 *Del. C.* § 4176A(a) requires that a defendant "be driving in the causing of the death of another person but while in the course of the driving" the defendant must also violate another section of the motor vehicle code other than 11 *Del. C.* § 4177.[87] Hernandez-Martinez argues that Count I in the indictment fails to indicate that he violated any other section of the Delaware Code.[88]

The Superior Court agreed that the indictment for Hernandez-Martinez was defective regarding 21 *Del. C.* § 4176A(a); however, the court correctly concluded that Hernandez-Martinez had waived this procedural defect.[89] "A voluntary guilty

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[85] Opening Br. at 19.

[86] A12 (Count I states as follows: "MAURICIO HERNANDEZ-MARTINEZ, on or about the 7th day of November, 2020, in the County of Sussex, State of Delaware, while in the course of driving or operating a motor vehicle, did cause the death of Robert Root, in violation of Title 21, Section 4176A(a) of the Delaware Code.")

[87] Opening Br. at 19.

[88] Opening Br. at 19.

[89] *Hernandez-Martinez*, 2023 WL 2331888, at *3.

plea waives a defendant's right to challenge any errors or defects before the plea,[90] even those of constitutional dimension."[91] Such was the case here.

B. The Superior Court Properly Found Hernandez-Martinez Pled Intelligently, Knowingly, and Voluntarily.

The second requirement the five-part *Scarborough*[92] test also does not weigh in favor of Hernandez-Martinez because sufficient evidence showed he made his plea intelligently, knowingly, and voluntarily. Hernandez-Martinez claims "it is difficult to see how a plea can be knowing and voluntarily if a defendant is not advised of the proper range of penalties," the consequences regarding his 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 could have raised at trial.[93] But the Superior Court properly concluded that Hernandez-Martinez's plea colloquy, and his answers on the Plea Agreement and TIS Form, demonstrated he fully understood the consequences of his guilty plea and that he made his plea knowingly and voluntarily.[94]

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[90] *Smith v. State*, 2004 WL 120530, at *1 (Del. Jan. 15, 2004); *see*, *e.g.*, *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (finding guilty plea constituted a waiver of a trial and of the constitutional rights to which defendant would have been entitled to exercise at a trial).

[91] *Smith*, 2004 WL 120530, at *1.

[92] *Scarborough*, 938 A.2d at 649.

[93] Opening Br. at 20.

[94] *Hernandez-Martinez*, 2023 WL 2331888, at *5.

"[A] defendant's statements to the Superior Court during the guilty plea colloquy are presumed to be truthful."[95] Furthermore, the defendant has the burden to prove that the plea was not entered voluntarily.[96] "Only where the judge determines that 'the plea was not voluntarily entered or was entered because of misapprehension or mistake of defendant as to his legal rights' should the judge grant the defendant's request to withdraw his guilty plea."[97] Here, Hernandez-Martinez cannot show, by clear and convincing evidence, that he did not sign the Plea Agreement and TIS Form knowingly and voluntarily.[98]

The Superior Court noted that at the plea colloquy, an interpreter assisted Hernandez-Martinez with understanding and answering questions from the court.[99] Trial counsel affirmed that he had reviewed with Hernandez-Martinez the Plea Agreement and the TIS Form line by line.[100] And, trial counsel stated he was satisfied that Hernandez-Martinez understood the contents of the forms and the rights that Hernandez-Martinez would be relinquishing by pleading guilty.[101]

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[95] *Scarborough*, 938 A.2d at 650 (*quoting Somerville*, 703 A.2d at 632).

[96] *Somerville*, 703 A.2d at 632.

[97] *Scarborough*, 938 A.2d at 649-50 (*quoting Insley*, 141 A.2d at 622).

[98] *Scarborough*, 938 A.2d at 650 (*citing Savage v. State*, 2003 WL 214963, at *2 (Del. Jan. 31, 2003)).

[99] *Hernandez-Martinez*, 2023 WL 2331888, at *4; B14-20.

[100] *Id.*; B14-20.

[101] *Id.*; B14.

The Superior Court also addressed Hernandez-Martinez directly during the plea colloquy and confirmed that he understood the two charges to which he would plead guilty.[102] The court verified that Hernandez-Martinez understood he would receive mandatory jail time and would be taken into custody after the hearing.[103] Then the court confirmed with Hernandez-Martinez that he had reviewed all of the questions on the TIS Form with trial counsel, that his answers had been truthful, that no one was forcing him to plead guilty, and that he was relinquishing his right to a trial and all other rights listed on the TIS Form by pleading guilty.[104] Finally, the court asked Hernandez-Martinez whether he had plenty of time to discuss the case with his trial counsel and whether he was satisfied with trial counsel's representation of him.[105] Hernandez-Martinez confirmed both.[106] These facts support the Superior Court's conclusion that Hernandez-Martinez made his plea knowingly, intelligently, and voluntarily.[107] Absent clear and convincing evidence to the contrary, which Hernandez-Martinez has not identified, he is bound by his representations during the

[102] *Id.*; B15, 18-19.

[103] *Hernandez-Martinez*, 2023 WL 2331888, at *4; B15-16.

[104] *Id.*; B16-17, 19.

[105] *Id.*; B18.

[106] *Id.*

[107] *Hernandez-Martinez*, 2023 WL 2331888, at *4; B19.

guilty plea colloquy and in the TIS Form.[108] Under this second factor, Hernandez-Martinez has failed to establish a fair and just reason to grant withdraw of his plea.

(1) *Trial Counsel's Mismarking of a Box on the TIS Form Does Not Show He Failed to Advise Hernandez-Martinez About the Loss of His Right to Own a Firearm.*

Hernandez-Martinez claims he did not make his plea voluntarily because the TIS Form had an error.[109] The TIS Form was marked "no" next to the question "[i]s this an offense which results in the loss of the right to own or possess a deadly weapon?[110] But, directly above that question the answer "yes" had been marked to another question that states, "[d]o you understand that a guilty plea to a felony will cause you to lose your right . . . to own or possess a deadly weapon[?]"[111] Trial counsel admitted he made a clerical error in checking the "no" box.[112] But, trial counsel confirmed that he would have made Hernandez-Martinez aware that Hernandez-Martinez would lose the right to own or possess a deadly weapon if he pled guilty to the charges.[113]

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[108] *Morrison v. State*, 2022 WL 790507, at *4 (Del. Mar. 16, 2022); *Barnett v. State*, 2007 WL 1314664, at *3 (Del. May 7, 2007); *Somerville*, 703 A.2d at 632.

[109] Opening Br. at 18.

[110] A67-69.

[111] A68-69.

[112] A67-69, 89.

[113] A89.

Hernandez-Martinez bears the burden to show the fair and just reason for the withdrawal of a guilty plea.[114] And, Hernandez-Martinez bears the burden to prove that he did not voluntarily enter into the guilty pleas.[115] Moreover, a defendant's statements to the court during a plea colloquy are presumed to be truthful.[116] During the plea colloquy, Hernandez-Martinez said he understood the rights he was relinquishing.[117] Both the TIS Form and Hernandez-Martinez himself indicated that no one was forcing him to enter into the Plea Agreement.[118] Hernandez-Martinez stated he was satisfied with trial counsel's representation and had been fully advised of his rights.[119]

In addition, Hernandez-Martinez acknowledged he had read and understood all of the information on the TIS Form and his answers were truthful.[120] Trial counsel confirmed that he had discussed those loss of rights with Hernandez-Martinez.[121] During the plea colloquy, Hernandez-Martinez told the Superior Court

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[114] *Scarborough*, 938 A.2d at 649; *Cabrera*, 891 A.2d at 1069; *Brown v. State*, 250 A.2d 503, 504 (Del. 1969).

[115] *Somerville*, 703 A.2d at 632.

[116] *Id.*

[117] *Hernandez-Martinez*, 2023 WL 2331888, at *5; B17.

[118] *Id.*; B9-11, 19.

[119] *Id.*; B17-18.

[120] *Id.*; B15-17.

[121] A89.

that entering into the plea agreement was how he wanted to resolve the case against him.[122] Thus, Hernandez-Martinez entered into the Plea Agreement voluntarily and knowing that there would be immigration consequences.[123] As the court correctly noted, the procedural defect of checking one box wrong did not cause Hernandez-Martinez's pleas to be made involuntarily.[124] This is especially true given that Hernandez-Martinez acknowledged his guilty plea to a felony offense would cause him to lose his right to own or possess a deadly weapon.[125] Hernandez-Martinez has not shown that he did not understand the consequences of pleading guilty, nor has he shown had a misapprehension or mistake as to his legal rights.

C. Hernandez-Martinez Does Not Have a Basis to Assert Legal Innocence.

Hernandez-Martinez claims that at trial, he would have been able to show "there were no actions in violation of the motor vehicle code committed by [him] which caused the death of Mr. Root."[126] Hernandez-Martinez argues that trial counsel admitted he did not discuss any possible defenses with him and that this

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[122] *Hernandez-Martinez*, 2023 WL 2331888, at *5; B17.

[123] *Id*.; A54-55, 59, 81; B17-18.

[124] *Id.*

[125] A89.

[126] Opening Br. at 21.

violated defense counsel's duty towards his client.[127] But Hernandez-Martinez's arguments are belied by the facts.

Trial counsel did, in fact, discuss a strategy with Hernandez-Martinez.[128] That strategy was Hernandez-Martinez "elected to take responsibility for what had happened."[129] Trial counsel testified several times that Hernandez-Martinez wanted "to do the right thing" and take responsibility for the hit and run accident.[130] Hernandez-Martinez also wanted to protect his brother who owned the car involved in the accident.[131] Based on Hernandez-Martinez's decision, trial counsel entered into negotiations with the State immediately.[132] Subsequently, Hernandez-Martinez voluntarily admitted to the police what he had done.[133]

Trial counsel testified that Hernandez-Martinez wanted to accept the plea and knew that he would be going into Sussex Correctional the same day that he entered his plea.[134] Hernandez-Martinez's admissions "formed a basis for his guilty plea."[135]

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[127] Opening Br. at 21-22 (citing *Rios v. Rocha*, 299 F.3d 796 (9th Cir. 2002)).

[128] A60-61.

[129] A52, 58, 72, 79.

[130] A52, 58, 61, 72, 79, 83, 91.

[131] A58, 61, 79.

[132] A72.

[133] A51, 62-63, 79-81.

[134] A83.

[135] *Hernandez-Martinez*, 2023 WL 2331888, at *5.

Whatever defenses Hernandez-Martinez could have used at trial cannot be negated by the evidence that showed Hernandez-Martinez clearly intended to take responsibility for his actions. "This Court will not disturb conclusions of fact made by the Trial Judge when supported by competent evidence."[136] Furthermore, some of the judge's findings were based upon his assessment of the credibility of trial counsel. Because the trier of fact is the sole judge of credibility,[137] this Court defers to the Superior Court's findings of fact.[138]

Hernandez-Martinez cites to *Rios v. Rocha* to argue that trial counsel failed to meet his duty to discuss defenses with Hernandez-Martinez.[139] However, the court in *Rios* was discussing the *Strickland* standard when it stated,

> A defense attorney's failure to consider alternate defenses constitutes deficient performance when the attorney "neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so."[140] Thus, counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[141]

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[136] *State v. Rooks*, 401 A.2d 943, 949 (Del. 1979).

[137] *See Tyre v. State*, 412 A.2d 326, 330 (Del. 1980) (finding matters of credibility of witness and defendant were properly submitted to jury).

[138] *State v. Rollins*, 922 A.2d 379, 382 (Del. 2007).

[139] Opening Br. at 22.

[140] *Rios*, 299 F.3d at 805; *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).

[141] *Strickland v. Washington*, 466 U.S. 688, 691 (1984).

Here, Hernandez-Martinez has shown nothing to support his conclusory allegation that trial counsel failed to make an informed decision about how to conduct his defense strategy. Hernandez-Martinez admitted his guilt to the Superior Court during the guilty plea colloquy.[142] "Conclusory allegations of innocence are not sufficient to require withdrawal of a guilty plea, especially when the defendant has admitted his guilty in the plea colloquy."[143]

D. Trial Counsel Was Not Constitutionally Ineffective

Hernandez-Martinez argues that trial counsel provided ineffective assistance.[144] He claims no evidence showed trial counsel advised him about the immigration consequences of turning himself into the police, his right to remain silent, and how he may be found guilty of a felony and incarcerated in addition to being deported if his identity were to be revealed to the police.[145] He argues that it is "difficult if not impossible to believe" that trial counsel advised Hernandez-Martinez about these rights but did not make any notations on any documents as support.[146] Hernandez-Martinez further alleges trial counsel did not advise him

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[142] B14-19.

[143] *Savage*, 2003 WL 214963, at *2 (*quoting Russell v. State*, 1999 WL 507303 (Del. June 2, 1999)).

[144] Opening Br. at 22-23.

[145] Opening Br. at 22.

[146] Opening Br. at 23.

about whether to reveal his identity to the police, failed to meet with him between the time of his confession to the police and the time he pled guilty in court, did not obtain any benefit by pleading guilty, and advised him improperly on the elements of the offense to which he was charged and the consequences.[147] But all of these conclusory allegations fail to meet the *Strickland* standard.

The court found that Hernandez-Martinez was second-guessing the decisions made by trial counsel[148] and rejected Hernandez-Martinez's argument that trial counsel was ineffective because postconviction counsel would have advised him differently.[149] The court found no facts that demonstrated trial counsel failed to advise Hernandez-Martinez properly.[150] Rather, the court found trial counsel's testimony to be credible and concluded that Hernandez-Martinez wanted to turn himself into the police so that he could take responsibility for his actions and ensure that his brother (who owned the car used in the accident) would not get into trouble.[151] And, trial counsel explained his strategy:

> [I]n my opinion, once [Hernandez-Martinez] elected to proceed this way was [sic] all about early responsibility for acceptance of what happened. So at sentencing we could present the mitigation that we wanted to present.... [T]hen the prosecution, the judge, everyone

[147] Opening Br. at 23-24.

[148] *Hernandez-Martinez*, 2023 WL 2331888, at *6.

[149] *Id*.

[150] *Id*.

[151] *Id*.; A52, 58, 61, 72, 79, 83, 91.

> involved would see that [Hernandez-Martinez] accepted responsibility for what he did and that would be how we would get our best sentence in my opinion. I couldn't make any guarantees of that, but I wanted everyone involved, including the family of the deceased, to see that [Hernandez-Martinez] had done, quote, the right thing. That was my strategy when we got to sentencing.[152]

Contrary to Hernandez-Martinez's allegations,[153] the court found trial counsel's practice was to advise clients of immigration consequences.[154] It also found trial counsel had advised Hernandez-Martinez of same.[155] The court noted the plea colloquy supported this because trial counsel advised both the court and Hernandez-Martinez that there could be immigration consequences before the plea was entered.[156] The court also concluded that trial counsel advised Hernandez-Martinez on potential penalties and loss of rights.[157] "Defendant knew all he was facing and still proceeded with the plea."[158]

Moreover, no evidence demonstrated that trial counsel failed to advise Hernandez-Martinez properly, nor can Hernandez-Martinez show trial counsel's

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[152] A83.

[153] Opening Br. at 22.

[154] *Hernandez-Martinez*, 2023 WL 2331888, at *6.

[155] *Id.*

[156] *Id.*; B15.

[157] *Id.*; *see* A54 ("I told him, as I tell all of my clients, that any criminal conviction could result in immigration proceedings, deportation, removal, ineligibility for citizenship, detention. I advised him [sic] of that every time.")

[158] *Id.*; A72, 79-80.

actions fell below an objective level of reasonableness.[159] The evidence showed trial counsel acted competently by using a reasonable strategy to support his client's objectives. Once Hernandez-Martinez made his decision to "do the right thing" and resolve his case,[160] trial counsel acted according to his client's wishes, arranged for the police interview, accompanied him to the interview, and negotiated a plea with the State.[161] Trial counsel believed that if Hernandez-Martinez took early responsibility for what happened, he could present the mitigation at sentencing.[162] "[T]hen the prosecution, the judge, everyone involved would see that he accepted responsibility for what he did and that would be how we would get our best sentence in my opinion."[163]

Pleading guilty allowed Hernandez-Martinez to argue he accepted responsibility for his actions, which is a mitigating factor during his sentencing. Trial counsel's actions did not fall below an objective standard of reasonableness. Rather, they permitted him to potentially obtain a favorable resolution of the case.

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[159] *Id.*

[160] A52-53, 72, 79-80; B19.

[161] A62-63, 72, 79-83.

[162] A83, 91.

[163] A58, 79.

Trial counsel's actions met the standard of objectively reasonable professional representation.[164]

Hernandez-Martinez bears the burden to show a reasonable probability that but for his trial counsel's error, he would have insisted on going to trial and that the court would have granted his Motion to Withdraw Plea.[165] He fails. Hernandez-Martinez has not alleged or demonstrated *Strickland* prejudice. Thus, the fourth factor from *Scarborough* does not weigh in favor of Hernandez-Martinez.

E. The State Would Be Prejudiced, and the Court Would Be Unduly Inconvenienced, if Hernandez-Martinez Were Permitted to Withdraw His Guilty Plea.

The Superior Court found that both it and the State "will likely be prejudiced by allowing Defendant to withdraw his guilty plea."[166] The court recognized that the victim's family attended the hearing for Hernandez-Martinez's guilty plea.[167] Thus, the court concluded that if it were to allow withdrawal of the plea, the victim's family would experience further emotional turmoil.[168] In addition, the court found it would have to expend additional judicial resources.[169]

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[164] *Green v. State*, 238 A.3d 160, 174 (Del. 2020).

[165] *Morrison*, 2022 WL 790507, at *4; *Reed v. State*, 258 A.3d 807, 829 (Del. 2021).

[166] *Hernandez-Martinez*, 2023 WL 2331888, at *7.

[167] *Id*.

[168] *Id*.

[169] *Id*.

Furthermore, the court noted that although the State had established prejudice, it "need not show . . . prejudice when a defendant has failed to demonstrate that the other factors support a withdrawal of the plea."[170] Even if the State would have suffered no significant prejudice, the court acted within its discretion in denying Hernandez-Martinez's motion.[171] The court concluded that Hernandez-Martinez had not demonstrated any fair and just reason to withdraw his guilty plea. The record shows the court did not abuse its discretion by denying Hernandez-Martinez's Motion to Withdraw Plea.[172]

[170] *State v. Barksdale*, 2015 WL 5676895, at *6 (Del. Super. Ct. Sept. 14, 2015); *United States v. Jones*, 336 F.3d 245, 252 (3d Cir. 2003).

[171] *Roten v. State*, 2005 WL 2254202, at *1 (Del. Sept. 15, 2005); *Patterson*, 684 A.2d at 1238.

[172] Super. Ct. Crim. R. 32(d); *see Sanchez v. State*, 1993 WL 61707, at *3 (Del. Feb. 25, 1993) (finding no abuse of discretion in denying motion to withdraw plea where court found defendant made measured and intelligent decision to enter pleas and motion appeared to be another attempt to secure new trial); *Brown*, 250 A.2d at 504 (holding denial of motion to withdraw plea was proper where evidence showed defendant made plea voluntarily after consulting with attorneys, had long criminal record, and made motion only after State's witness against him disappeared).

II. THE SUPERIOR COURT DID NOT ERR WHEN IT RELIED ON FACTS PROVIDED BY THE STATE IN WRITTEN SUBMISSIONS AND TESTIMONY FROM TRIAL COUNSEL AT THE HEARING.

Question Presented

Whether the Superior Court erred by relying on facts provided by the State as well as on testimony from trial counsel to make factual findings for its decision.

Scope of Review

"A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court."[173] Accordingly, this Court reviews the denial for abuse of discretion.[174] Factual findings are reviewed for clear error.[175] Questions of fact must be affirmed if they are supported by substantial evidence on the record and are the product of an orderly and logically deductive process.[176]

Merits of Argument

Hernandez-Martinez claims the Superior Court abused its discretion when it outlined the factual background of his charges.[177] He argues these facts were

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[173] *Chavous*, 953 A.2d at 285; *Scarborough*, 938 A.2d at 649 (*quoting Blackwell*, 736 A.2d at 972).

[174] *Chavous*, 953 A.2d at 285; *Blackwell*, 736 A.2d at 972; *Patterson*, 684 A.2d at 1237; *Brown*, 250 A.2d at 504.

[175] *In re Hurley*, 257 A.3d 1012, 1017 (Del. 2021).

[176] *Baker v. Long*, 981 A.2d 1152, 1156 (Del. 2009); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

[177] Opening Br. at 25, 26-28.

unsupported by any record evidence.[178] However, Hernandez-Martinez does not dispute the correctness of the court's brief factual background for the case. Rather, he contends only that the court failed to cite to the record when it denied the Motion to Withdraw Plea.[179] With no legal support, Hernandez Martinez asserts he is entitled to a new trial because the court's decision accepted assertions by the State that were unsupported by any record evidence.[180] Hernandez-Martinez is wrong.

This Court has recognized that a judge can look to anything that has some "minimal indicia of reliability" when determining facts.[181] Here, the factual background outlined by the court, which Hernandez-Martinez does not contest, lacked significance to the matter at hand. The court merely described the date and location of the accident, the death of the victim, and the police officers' initial investigation.[182] The court was not rendering a verdict or sentencing Hernandez-Martinez. Rather, the court was determining whether it would permit Hernandez-Martinez to withdraw his guilty plea. Thus, the germane facts for the court's analysis

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[178] Opening Br. at 25, 28.

[179] Opening Br. at 28.

[180] Opening Br. at 28.

[181] *See Mayes v. State*, 604 A.2d 839, 840 (Del. 1992) (holding court "comported with due process by relying on information meeting the 'minimal indicium of reliability beyond mere allegation' standard."); *Smack v. State*, 2017 WL 4548146, at *2 (Del. Oct. 11, 2017) ("To fix the sentence within that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability.")

[182] *Hernandez-Martinez*, 2023 WL 2331888, at *1.

came from the testimony of trial counsel at the hearing, trial counsel's notes,[183] and the documentary evidence (*e.g.*, the TIS Form and the plea colloquy).

This Court has held it will not overturn a Superior Court's factual findings unless they are clearly erroneous.[184] "Factual findings are not clearly erroneous 'if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'"[185] Such was the case here. This claim fails.

[183] Defense Exhibit 1 at A48.

[184] *Ocean Bay Mart, Inc. v. City of Rehoboth Beach Del.*, 285 A.3d 125, 136 (Del. 2022), *reargument denied* (Nov. 21, 2022); *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 94 (Del. 2021) (*quoting Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014)).

[185] *Ocean Bay Mart, Inc.*, 285 A.3d at 136; *Bäcker*, 246 A.3d at 94-95 (*quoting Klaassen*, 106 A.3d at 1043).

III. THE SUPERIOR COURT DID NOT IMPERMISSIBLY COMMENT ON HERNANDEZ-MARTINEZ'S EXERCISE OF HIS RIGHT TO REMAIN SILENT, NOR DID IT DRAW AN ADVERSE INFERENCE FROM HIS DECISION NOT TO TESTIFY.

Question Presented

Whether comments the Superior Court made in its decision denying Hernandez-Martinez's Motion to Withdraw Plea constituted impermissible commentary on his right against self-incrimination, thus warranting reversal.

Scope of Review

"A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court."[186] Accordingly, this Court reviews the denial for abuse of discretion.[187] Factual findings are reviewed for clear error.[188] But questions of fact must be affirmed if they are supported by substantial evidence on the record and are the product of an orderly and logically deductive process.[189]

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[186] *Chavous*, 953 A.2d at 285; *Scarborough*, 938 A.2d at 649 (*quoting Blackwell*, 736 A.2d at 972).

[187] *Chavous*, 953 A.2d at 285; *Blackwell*, 736 A.2d at 972; *Patterson*, 684 A.2d at 1237; *Brown*, 250 A.2d at 504.

[188] *In re Hurley*, 257 A.3d at 1017.

[189] *Baker*, 981 A.2d at 1156; *Levitt*, 287 A.2d at 673.

Merits of Argument

Hernandez-Martinez claims the Superior Court erred when it commented on his exercise of the right to remain silent at the evidentiary hearing and drawing an adverse inference from that conduct.[190]

"The United States Supreme Court stated that the 5th and 14th Amendments forbid comment by the prosecutor on the accused's silence or instructions by the Court that such silence is evidence of guilt."[191] In evaluating claims of impermissible comment on the defendant's right to remain silent, the comment "must be examined in context."[192] "These claims may be asserted if they arise from actions of a prosecutor or a trial judge."[193] This Court has held "that the comment 'must be uninvited, must create an improper inference of guilt, and must be prejudicial' to constitute reversible error."[194] "While the State may not put a penalty

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[190] Opening Br. at 29-30.

[191] *Sykes v. State*, 953 A.2d 261, 267 (Del. 2008) (quoting *Boyer v. State*, 436 A.2d 1118, 1123 (Del. 1981)); *see Griffin v. California*, 380 U.S. 609, 615 (1965) (holding Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt").

[192] *Sykes*, 953 A.2d at 267; *U.S. v. Robinson*, 485 U.S. 25, 33 (1988).

[193] *Sykes*, at 267; *Richards v. State*, 865 A.2d 1274, 1279 (Del. 2004).

[194] *Sykes*, at 267-68; *Miller v. State*, 2000 WL 313484, at *2 (Del. Feb. 16, 2000); *Robertson v. State*, 596 A.2d 1345, 1357 (Del. 1991) (*quoting Richards*, 865 A.2d at 1279).

on the exercise of a constitutional right, 'every reference to the exercise of the right to remain silent [does not] mandate . . . reversal.'"[195]

Here, the Superior Court's references to the absence of any testimony from Hernandez-Martinez at the evidentiary hearing on remand were invited comments that did not create an improper inference of guilt and were not prejudicial. The court made the comments in the context of deciding a motion to withdraw a guilty plea.

The Superior Court's first comment, that Hernandez-Martinez "changed course," when read in context, was invited commentary because Hernandez-Martinez changed his position about whether he (or his brother) would testify.[196] In February 2022, Hernandez-Martinez said he wanted he and his brother to testify, but the court denied his evidentiary hearing request.[197] On May 20, 2023, at the hearing

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[195] *Burns v. State*, 76 A.3d 780, 787 (Del. 2013); *Revel v. State*, 956 A.2d 23, 27-28 (Del. 2008) (alteration in original) (omission in original) (*quoting Lewis v. State*, 626 A.2d 1350, 1358 (Del. 1993)).

[196] *Hernandez-Martinez*, 2023 WL 3221888, at *2 ("Curiously, Mr. Gill changed course and did not solicit testimony from his client or his brother who were available in the court room. Mr. Whitehead was the only witness who testified at the remand hearing.").

[197] At the May 20, 2022 hearing, the court stated the following: "I forget the exact date, but the Court heard argument from the parties on the defendant's motion to withdraw his plea. ***At the end of the argument, the defense indicated they wanted to present witness testimony from the defendant and the defendant's brother***, having to deal with the representation of Mr. Whitehead. . . ." (emphasis added). A22-23.

on remand, the court asked who would be testifying.[198] Hernandez-Martinez said trial counsel would testify, "and there may be other witnesses, but it depends on the testimony."[199] The court responded, "I thought the last time we were here you wanted your client and his brother to testify?"[200] Hernandez-Martinez confirmed he and his brother were present and could be called to testify "depending on what testimony we hear from Mr. Whitehead, or it may not be necessary to do that . . . ."[201]

Hernandez-Martinez's "changed course" comment was invited because he previously told the court he would testify and then decided not to testify.[202] The court did not indicate that it adversely inferred anything about Hernandez-Martinez's guilt when it stated that he decided not to testify or solicit testimony from his brother.[203]

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[198] A41.

[199] A41.

[200] A41.

[201] A42.

[202] *Hernandez-Martinez*, 2023 WL 3221888, at *2 (Mr. Gill "did not solicit testimony from his client or his brother, and trial counsel was the only witness who testified at the remand hearing.").

[203] *See Richards*, 865 A.2d at 1280 (holding judge's comments made after verdict were proper and did not violate defendant's right to remain silent during hearing; judge stated she had no basis to assess the credibility of defendant's out-of-court denial of involvement in the crime because defendant did not present to her during the trial any such testimonial evidence).

The second comment, when read in context, responds to Hernandez-Martinez's attempt to introduce facts not in the record to support his legal innocence theory. Because Hernandez-Martinez stated he wanted to testify and then changed his mind, the court's comments about "reconstructing the events" were invited. In addition, this comment did not show the court adversely inferred about Hernandez-Martinez's guilt. Rather, this comment qualifies as a statement about the uncontroverted nature of the evidence.[204]

The third comment addresses Hernandez-Martinez's allegation that trial counsel was constitutionally ineffective and failed to properly advise him regarding his guilty plea. A defendant bears the burden of demonstrating that trial counsel was constitutionally ineffective.[205] Here, Hernandez-Martinez elected not to present evidence in support of his claim. The court's comment accurately noted that fact. Nothing from this comment indicates the court adversely inferred about Hernandez-Martinez's guilt.[206]

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[204] *See Lockett v. Ohio*, 438 U.S. 586, 595 (1978).

[205] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[206] *See Richards*, 865 A.2d at 1280; *City of Akron v. Thomas*, 2003 WL 22093217, at *3 (Ohio Ct. App. Sept. 10, 2003) (holding judge's comment was proper when he stated that although defendant did not have to testify, none of the evidence against defendant had been controverted or denied); *Corsini v. State*, 238 Ga. App. 383, 519 S.E.2d 39, 41 (1999) (holding judge did not improperly consider defendant's failure to testify in the context of explaining the State's evidence was uncontradicted).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT ASKED HERNANDEZ-MARTINEZ QUESTIONS DURING THE HEARING.

Question Presented

Whether the Superior Court abused its discretion when it questioned a witness during a hearing.

Scope of Review

"A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court."[207] Accordingly, this Court reviews the denial for abuse of discretion.[208] Factual findings are reviewed for clear error.[209] But questions of fact must be affirmed if they are supported by substantial evidence on the record and are the product of an orderly and logically deductive process.[210]

Merits of Argument

Hernandez-Martinez claims the court improperly interjected itself into the hearing by questioning trial counsel three times during direct examination and once

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[207] *Chavous*, 953 A.2d at 285; *Scarborough*, 938 A.2d at 649 (*quoting Blackwell*, 736 A.2d at 972).

[208] *Chavous*, *supra* at 285; *Blackwell*, 736 A.2d at 972; *Patterson*, 684 A.2d at 1237; *Brown*, 250 A.2d at 504.

[209] *In re Hurley*, 257 A.3d at 1017.

[210] *Baker*, 981 A.2d at 1156; *Levitt*, 287 A.2d at 673.

during cross examination.[211] He alleges the court used leading questions in an attempt to support the adequacy of trial counsel's representation of Hernandez-Martinez[212] and that the court's decision clearly reflected it "abandoned it's [sic] role as a neutral arbiter and became an advocate."[213] Hernandez-Martinez's claims lack merit.

Delaware Rule of Evidence 614(b) permits the court to question witnesses "whether called by itself or a party."[214] Moreover, "[t]he court is, 'properly interested in seeing that all salient facts are presented . . . to bring about a just result."[215] But, a court "is required to exercise self-restraint and preserve an atmosphere of impartiality when questioning witnesses" because it has an "absolute duty of neutrality." "Departure from that rule may be grounds for reversal on the basis of plain error."[216]

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[211] Opening. Br. at 32.

[212] Opening Br. at 32.

[213] Opening Br. at 33.

[214] D.R.E. 614(b); *Lawrence v. State*, 2007 WL 1329002, at *2 (Del. May 8, 2007); *Lagola v. Thomas*, 867 A.2d 891, 898 (Del. 2005).

[215] *Reynolds v. Div. of Fam. Servs.*, 2002 WL 31895281, at *5 (Del. Dec. 27, 2002) (citing *United States v. Ramos*, 291 F. Supp. 71, 73 (D.R.I. 1968), *aff'd*, 413 F.2d 743 (1st Cir. 1969) ("[T]he fundamental duty of the trial judge . . . is to see that justice is done and to conduct the trial according to law, to bring about a just result.")).

[216] *Lawrence*, 2007 WL 1329002, at *2 (internal quotation marks and citations omitted).

Here, the Superior Court properly asked trial counsel questions in an attempt to clarify answers that he had already given. Because the court was the factfinder, it was important for the court to understand the testimony. As such, the court may permissibly ask a witness to repeat what he has previously stated.[217] This was the case here.

The court first asked trial counsel questions after he seem to contradict himself. Mr. Gill asked whether trial counsel had told Hernandez-Martinez that if the attorney gave his identity to the police, Hernandez-Martinez would likely be deported.[218] Trial counsel responded: "I told him, as I tell all of my clients, that any criminal conviction could result in immigration proceedings, deportation, removal, ineligibility for citizenship, detention. I advised him [sic] of that every time."[219] Trial counsel then added twice that he did not specifically recall whether he told Hernandez-Martinez that, "but it is my practice to do so."[220] In response, the court asked trial counsel to repeat the testimony that he had just given:

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[217] *See State v. Arnold*, 62 N.E.3d 153, 154 (Ohio 2016) (concluding trial court did not take impermissibly biased, adversarial role when counsel prompted court to repeatedly ask whether a statute required physical harm; defense counsel repeatedly argued the state failed to prove its case without showing victim had been physically harmed, and court attempted to clarify language of the statute at issue).

[218] A54.

[219] A54.

[220] A54-55.

> THE COURT: Let me interrupt there, but Mr. Whitehead, you may not have an independent recollection of your conversation with this defendant, but is your testimony that you do that in all cases when you first meet with a client who may have immigration issues?
>
> THE WITNESS: I do, and that is because it's required of me, and it's also on any plea forms. Typically, it's on most plea forms as well. So I don't like that to be the first time they hear that when we go to court, but also there could be further conversations with immigration counsel that we should have before we go to court.

As the factfinder, the court may permissibly ask a witness to repeat what he has previously stated.[221]

Next, Mr. Gill asked whether trial counsel recalled advising Hernandez-Martinez that it would be best before he took any action to consult with an immigration attorney.[222] Trial counsel replied, "I would have told him that in the meeting. There is—in any meeting that I would have with clients, but I don't have a specific recollection, and it is not in my notes."[223] Shortly thereafter, the court asked:

> Mr. Whitehead, I want to go back to there was a question earlier about advising—your practice—your normal practice of advising people of an immigration attorney. Is that like you told me that it was your normal practice to advise people of possible deportation proceedings?

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[221] *See Reynolds*, 2002 WL 31895281, at *5 ("The court is, "properly interested in seeing that all salient facts are presented . . . to bring about a just result.")

[222] A56.

[223] A56.

> Is it your normal practice to also indicate that they have a right to talk to an attorney, an immigration attorney?[224]

Trial counsel responded "yes," and added, "I make them aware of what we call the collateral consequences of pleas, but I also encourage them to seek their own independent immigration counsel."[225] This, again, was the court asking a witness to repeat what he had previously stated.

The court asked questions the third time when it asked trial counsel about information on the TIS Form.[226] Trial counsel admitted he had erroneously marked "no" to a question on the form that asked whether a guilty plea would result in losing the right to possess a deadly weapon.[227] In response, the court asked whether there was a question above the one that had been marked "no" and whether that earlier question asked about civil rights and the [loss of the] right to own or possess a deadly weapon.[228] Trial counsel confirmed he had marked "yes" to this question.[229] The court's questions on this topic simply focused on clarifying the facts.[230]

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[224] A59.

[225] A59.

[226] A59.

[227] A67-68.

[228] A68-69.

[229] A69.

[230] *See Lawrence*, 2007 WL 1329002, at *2 (holding judge's comment and inquiry about how a witness did not understand where New Castle County was located

The court asked questions the fourth time after the prosecutor elicited testimony about how trial counsel had committed a math error on the TIS Form when he erroneously added up the maximum penalties for the two Counts.[231] After the prosecutor asked what trial counsel had verbally advised Hernandez-Martinez regarding the maximum penalty, trial counsel responded, "I—I would have verbally advised him of three-and-a-half that day, but we would have reviewed the penalties before coming to court, and I just don't—I made a mistake on that morning."[232] The prosecutor confirmed trial counsel printed out and used sentencing guidelines to review the plea offer made to Hernandez-Martinez.[233] This prompted the following exchange:

> THE COURT: Mr. Gardner, let me interrupt. I just want to make sure I understood. So I understand on the form it indicates a maximum of four-and-a-half years, but when you totaled it, it was three-and-a-half years, three years and six months, and you noted Level 5 and a fine. Did you advise the defendant that the maximum was four-and-a-half at some point?
>
> THE WITNESS: Prior to the hearing, Your Honor, yes.
>
> THE COURT: Okay.

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merely fairly and impartially drew attention to and resolved the witness' confusion over an otherwise obvious question).

[231] A85.

[232] A85-86.

[233] A86.

> WITNESS: I wrote it incorrectly on the form when I was adding up the incarceration.
>
> THE COURT: That answered my question. I just wanted to make sure I understood your answer.[234]

Again, this exchange shows the Superior Court trying to clarify facts—not advocating against Hernandez-Martinez.

Hernandez-Martinez's reliance on *Price v. Blood Bank of Delaware, Inc*.[235] and *Lagola v. Thomas*[236] is misplaced.[237] Both cases are factually distinguishable and are not dispositive here. Those cases held that the Superior Court committed error when it questioned witnesses in front of the jury because the court's manner, tone, or both adversely affected the jury's opinion.[238] Here, however, the court acted as the factfinder for Hernandez-Martinez's hearing. And, Hernandez-Martinez has not demonstrated how the court's questions were biased in favor of the State and against him. His claims lack evidentiary support and should be rejected.

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[234] A86-87.

[235] *Price*, 790 A.2d 1203 (Del. 2002).

[236] *Lagola*, 867 A.2d 891 (Del. 2005).

[237] Opening Br. at 33.

[238] *Lagola*, 867 A.2d at 898; *Price*, 790 A.2d at 1210 ("The need for the trial judge to exhibit impartiality is particularly important where the judge, as here, engages in direct questioning of a witness in the presence of the jury, who may later be called upon to evaluate the credibility of the expert.").

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: July 11, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAURICIO HERNANDEZ-MARTINEZ,	)	
	)	No. 179, 2022
Defendant-Below/Appellant,	)	
v.	)	
STATE OF DELAWARE	)	On appeal from the Superior Court of the State of Delaware
Plaintiff-Below/Appellee.	)	

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Date: July 11, 2023

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