



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

ROGER BARLOW,	)
	) No. 240,2024
Defendant Below-	)
Appellant,	) ON APPEAL FROM
	) THE SUPERIOR COURT OF THE
v.	) STATE OF DELAWARE
	) ID No. 2201006578 & 2109014511
STATE OF DELAWARE,	)
	)
Plaintiff Below-	)
Appellee.	)

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE IN AND FOR NEW CASTLE COUNTY

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**OPENING BRIEF**

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ASSOCIATES, P.A.**

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Dated: October 14, 2024

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## **NATURE OF THE PROCEEDINGS**

### ***Indictment and pretrial matters***

Roger C. Barlow, Jr. was charged by indictment with two separate sets of charges. The first is Id No. 2109014511 wherein Mr. Barlow was charged with Unlawful Sexual Contact in the Second Degree.<sup>1</sup> Mr. Barlow was indicted by the Grand Jury on February 7, 2022, and the Public Defender's office entered its appearance on March 29, 2022.<sup>2</sup> The first case review was scheduled for March 29, 2022, and scheduled for a final case review on June 1, 2022 with a trial date of June 6, 2022.<sup>3</sup>

On May 23, 2022, the Public Defender's Office declared a conflict, and the case was assigned to Andre Beauregard, Esquire ("former counsel").<sup>4</sup> This case was rescheduled multiple times to follow Id No. 2201006578.<sup>5</sup>

In the second case, Id No. 2201006578, the grand jury indicted Mr. Barlow on April 4, 2022 on charges of Rape First Degree, Strangulation, and Sexual Extortion.<sup>6</sup> On May 23, 2022, the Public Defender's Office declared a conflict, and the case was also assigned Andre Beauregard, Esquire.<sup>7</sup>

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<sup>1</sup> A001.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Id at 002.

<sup>5</sup> *Id.*

<sup>6</sup> A007.

<sup>7</sup> *Id.*

At the final case review on June 29, 2022, the State extended a plea offer to Rape 2nd Degree and open sentencing.<sup>8</sup> One of the conditions of the plea included that the State and defense agree that Mr. Barlow is a habitual offender pursuant to 11 *Del. C.* § 4214(c) due to prior convictions for Trafficking Cocaine (5-11-07), Escape after conviction (5-11-07), Possession with Intent to Deliver (3-28-03), Conspiracy Second Degree (3-28-03), Aggravated Menacing (8-22-01), Aggravated Menacing (6-14-00), Robbery Second Degree and Receiving Stolen Property (3-26-97).<sup>9</sup> As part of the plea, the State agreed to enter a *nolle prosequi* on Id No. 2109014511.<sup>10</sup> Mr. Barlow rejected the plea offer, and the matter was set for trial.<sup>11</sup>

***Plea agreement and post-plea efforts by former counsel***

On October 3, 2022, the trial date, the State requested that the judge conduct another plea rejection colloquy due to the amount of time Mr. Barlow faced if convicted.<sup>12</sup> The plea offer at issue was the same that was extended at the final case review.<sup>13</sup> Former counsel opposed claiming that it was unnecessary: "I mean where do we cut the line? We do it once, twice three times, I don't understand."<sup>14</sup> The judge found that there was no harm in conducting another colloquy with Mr. Barlow

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<sup>8</sup> A008; A017.

<sup>9</sup> A017.

<sup>10</sup> *Id.*

<sup>11</sup> A008.

<sup>12</sup> A019.

<sup>13</sup> A021.

<sup>14</sup> A019.

"to ensure that Mr. Barlow has not had a change of heart over the course of the last three months."<sup>15</sup>

During the plea colloquy, the State explained that it had re-extended the previous plea offer and described the terms of it.<sup>16</sup> The judge asked Mr. Barlow a series of questions which ended with: "Do you wish to discuss the plea that has been offered to you any further with Mr. Beauregard."<sup>17</sup> Mr. Barlow responded "Yes, Ma'am."<sup>18</sup> The judge told Mr. Barlow that he would be given additional time to speak with his attorney.<sup>19</sup>

Later, former counsel informed the judge that he had an executed plea agreement.<sup>20</sup> The plea was the same as the one previously extended with open sentencing, except the State agreed to cap its Level V recommendation at fifty (50) years Level V.<sup>21</sup> Thereafter, the judge conducted a thorough plea colloquy with Mr. Barlow. Based upon Mr. Barlow's answers during the colloquy, the judge found that Mr. Barlow entered his plea knowingly, voluntarily and intelligently.<sup>22</sup> The Court ordered presentence investigation and deferred sentencing to December 14, 2022.<sup>23</sup>

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<sup>15</sup> A021.

<sup>16</sup> A031-2.

<sup>17</sup> A037.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> A44, A053;

<sup>21</sup> A056.

<sup>22</sup> A053.

<sup>23</sup> *Id.*

On November 22, 2022, the State filed a Motion to Declare Mr. Barlow an Habitual Offender.<sup>24</sup> On December 12, 2022, the State filed its sentencing memorandum with the Court in which the State requested a sentence of 50 years Level 5.<sup>25</sup> The sentencing date was moved to January 23, 2023 by the Court.<sup>26</sup>

Despite the provision in the plea agreement wherein the parties acknowledged that Mr. Barlow was an habitual offender, on December 21, 2022, former filed a response in opposition to the State’s Motion to Declare Mr. Barlow an Habitual Offender.<sup>27</sup> The basis of the opposition was an argument that there was “patent ambiguity in the documents provided by the State” and thus, “reasonable doubt” existed to justify “denial of the State’s Motion to declare Mr. Barlow as a (sic) habitual offender.”<sup>28</sup> Specifically, former counsel argued since Mr. Barlow had previously been convicted of Trafficking and Possession with Intent to Deliver, statutes which were repealed, "the State's reliance upon these convictions produced patent ambiguity respecting whether the conduct of the two convictions qualify as predicate felonies under 11 *Del. C.* § 4214(c)."<sup>29</sup>

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<sup>24</sup> A009.

<sup>25</sup> *Id.*; A109-116.

<sup>26</sup> A009.

<sup>27</sup> *Id.*

<sup>28</sup> A125.

<sup>29</sup> *Id.*

On January 3, 2023, the State filed its response to the defense Motion.<sup>30</sup>

The motion and sentencing were rescheduled to February 13, 2023.<sup>31</sup>

***Former counsel's suspension and new counsel's efforts to withdraw the plea***

By Order dated January 23, 2023, this Court imposed a two-year suspension with conditions on Mr. Beauregard.<sup>32</sup> On February 3, 2022, undersigned counsel was appointed as new counsel for Mr. Barlow.<sup>33</sup> Following a status conference on March 1, 2023, undersigned counsel notified the judge that the defense did not intend to pursue the previously-filed opposition to the Motion to Declare Mr. Barlow an habitual offender, but did intend to file a motion to withdraw the guilty plea entered on October 3, 2022.<sup>34</sup>

The Motion to Withdraw Guilty Plea was filed on June 9, 2023.<sup>35</sup> The State filed its response on July 6, 2023, and the reply was filed on July 25, 2023.<sup>36</sup> By letter dated July 25, 2023, undersigned counsel notified the judge of this Court's recent decision in *Kinderman v. State*<sup>37</sup> which had just been decided on July 20,

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<sup>30</sup> A010.

<sup>31</sup> *Id.*

<sup>32</sup> *In the Matter of a Member of the Bar of the Supreme Court of Delaware*, 291 A.3d 192, 206 (Del. 2023).

<sup>33</sup> A010.

<sup>34</sup> A011-12; A138.

<sup>35</sup> A013.

<sup>36</sup> *Id.*

<sup>37</sup> 2023 WL 4670217 (Del. 2023).



2023.<sup>38</sup> The judge ordered supplemental briefing on July 31, 2023 to address this Court's *Kinderman* decision.<sup>39</sup> The defense supplemental briefing was filed on August 25, 2023, and the State's was filed on September 14, 2023.<sup>40</sup>

The judge held oral argument on January 8, 2023, after which, the judge issued a bench decision denying the Motion to Withdraw Guilty Plea.<sup>41</sup>

### ***Sentencing***

On May 31, 2024, the judge granted the State's Motion to Declare Mr. Barlow an Habitual Offender.<sup>42</sup> Thereafter, the judge sentenced Mr. Barlow to 75 years Level V suspended after 50 years with decreasing levels of probation to follow.<sup>43</sup>

Mr. Barlow timely filed a Notice of Appeal on June 25, 2024. This is Mr. Barlow's Opening Brief.

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<sup>38</sup> A214

<sup>39</sup> A216.

<sup>40</sup> A014-15.

<sup>41</sup> A014.

<sup>42</sup> A014.

<sup>43</sup> A334-35.

## **SUMMARY OF ARGUMENT**

### **I. THE SUPERIOR COURT ERRED IN DENYING MR. BARLOW'S MOTION TO WITHDRAW GUILTY PLEA WHEN HE HAD DEFICIENT LEGAL COUNSEL WITH A HISTORY OF MISREPRESENTATION TO THE COURT AND HAD A BASIS TO ASSERT HIS LEGAL INNOCENCE.**

Mr. Barlow rejected a plea offer to Rape Second Degree with a recommendation of open sentencing at his final case review on June 29, 2022. The plea agreement noted that Mr. Barlow was an habitual offender. On the day of trial, October 3, 2022, over the objection of former counsel, the Court conducted a second colloquy with Mr. Barlow regarding the same plea offer that Mr. Barlow had previously rejected. After the colloquy, the Superior Court granted Mr. Barlow's request for additional time to speak with former counsel.

During such time, former counsel told Mr. Barlow that despite the notations on the plea agreement to the contrary, Mr. Barlow was not an habitual offender because the State could not prove it. Former counsel told Mr. Barlow that despite what was written on the plea agreement, the maximum sentence he faced for Rape Second Degree was 25 years Level V because he was not an habitual offender. Former counsel's erroneous advice induced Mr. Barlow to accept the State's plea offer.

The plea that was entered was the same plea that had previously been rejected but for a cap of 50 years at Level V. At the time he entered the plea, Mr. Barlow was 43 years old.

Prior to sentencing, the State filed a Motion to Declare Mr. Barlow an Habitual Offender. Former counsel filed an opposition to the State's Motion, arguing, erroneously, that the State could not meet its threshold requirements to declare Mr. Barlow an habitual offender based upon the repeal of former drug statutes under which Mr. Barlow had been convicted. Such argument, while wrong, was the same thing former counsel told Mr. Barlow to induce him to enter the plea.

After this Court suspended former counsel from the practice of law for two years, in large part due to former counsel's knowing false statements to the Superior Court, current counsel was appointed to represent Mr. Barlow and filed a Motion to Withdraw Guilty Plea. The Superior Court held no hearing, and did not ask former counsel to file an affidavit in response to the allegations in Mr. Barlow's motion.

After oral argument, the trial judge denied Mr. Barlow's motion. Despite former counsel's history of knowing false statements to the Superior Court, the judge, in denying Mr. Barlow's Motion, gave significant weight to former counsel's representations to the Court during the entry of Mr. Barlow's plea. Significantly, the trial judge afforded former counsel the presumption of honesty and candor, which in light of this Court's decision suspending former counsel, was an abuse of discretion warranting reversal.

Moreover, the trial judge did not find in favor of Mr. Barlow on any of the *Scarborough* factors even though there was ample evidence presented supporting a

finding of ineffective assistance of counsel, the basis to assert legal innocence, and that Mr. Barlow did not knowingly and voluntarily consent to the plea agreement. As such, the Superior Court's decision denying Mr. Barlow's Motion to Withdraw Guilty Plea should be reversed.

## **STATEMENT OF FACTS**

### ***Investigation leading to Mr. Barlow's arrest***

On March 20, 2021, Delaware State Police responded to Ollie's located at 1732 S. Governors Avenue, Dover, Delaware in reference to two subjects who walked out the store without paying for items.<sup>44</sup> The police spoke to a manager who reported that a person who was standing at the checkout counter called out to the shoplifters and chased them around the corner of the building.<sup>45</sup> The manager reported that this person, a black male wearing a gray sweatsuit, later returned inside the store to pay for his own items.<sup>46</sup> When paying for his items, the man reported that he had grabbed the female shoplifter by the arm and she bit him on the hand.<sup>47</sup> The manager could not identify the man in the sweatsuit.<sup>48</sup>

The police recovered surveillance footage which showed a black male, later identified as Ernest Samuels, and a woman, later identified as Karisha Morgan, exiting the store without paying for their merchandise.<sup>49</sup> The surveillance showed a black male in a gray sweatsuit watch the events at the cash register, leave the store, and run around the corner after the two shoplifters.<sup>50</sup>

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<sup>44</sup> A352.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

The following day, on March 21, 2021, reported an incident to the police and agreed to participate in a sexual assault examination ("SANE") at Bay Health Hospital.<sup>51</sup> In her statement to the police, Morgan admitted that she and Samuels stole items from Ollies, and as they were fleeing, a black male grabbed her and acted like he was an employee from the store, and said he was going to call the police.<sup>52</sup> Morgan told the police that the male said she needed to have sex with him or he would have her arrested.<sup>53</sup> Morgan told police that the man grabbed her and placed his arm around her neck and choked her.<sup>54</sup> She told police that she bit the male on his arm.<sup>55</sup> She further told police that the male forced her to have anal intercourse and ejaculated inside of her anus.<sup>56</sup> Morgan told police that after the incident, she walked home, but it was difficult.<sup>57</sup>

A press release was generated to identify the male subject, but no investigative leads resulted.<sup>58</sup> In August, 2021, the police received an email from the Delaware Division of Forensic Science ("DFS") which included a letter from the Combined DNA Index System Administrator which advised that the rectal swab from Morgan's

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<sup>51</sup> A353.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> A354

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

SANE kit was linked to Roger Barlow.<sup>59</sup> The police reviewed a photograph of Mr. Barlow and determined it was a positive match to the subject in the Ollie's surveillance footage.<sup>60</sup>

Mr. Barlow was arrested and a search warrant was executed to take his DNA.<sup>61</sup> The police received an email from DFS indicated that Mr. Barlow was a match to the rectal swabs and swab of a stain in Morgan's underwear.<sup>62</sup> The police interviewed Mr. Barlow who denied involvement and knowing both Samuels and Morgan.<sup>63</sup>

Later, Mr. Barlow explained that he had known Morgan since 2001 and that he and Morgan engaged in a sexual relationship wherein he provided her drugs in exchange for sex.<sup>64</sup> Mr. Barlow contended that hem Morgan and Samuels were working together as part of their shoplifting operation.<sup>65</sup> After leaving Ollie's, he drove Morgan and Samuels home, had consensual sex with Morgan, and he gave her drugs.<sup>66</sup> Thereafter, he returned to Ollie's to pay for his items.<sup>67</sup>

### ***Former counsel's suspension***

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> A355.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> A288.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Former counsel's two-year suspension stemmed from his representation of Ahmir Bailey who was charged murder in the first degree.<sup>68</sup> During the course of that representation, former counsel retained the services of a private investigative agency and tasked that agency with interviewing several people for purposes of substantiating Bailey's motion for a new trial.<sup>69</sup> One of persons interviewed by the investigative agency was a juror in Bailey's trial.<sup>70</sup> Former counsel learned that the juror had been interviewed when the investigator contacted him by telephone on November 5, 2019, and told him.<sup>71</sup> Thereafter on November 12, 2019, the investigative agency provided former counsel with a report which included a summary of the investigator's interview with the juror.<sup>72</sup> A hearing with the Superior Court was held on December 13, 2019.<sup>73</sup> Between November 5th and December 13th, former counsel never told the Court or the prosecutor of the interview with the juror.<sup>74</sup>

During the hearing, the Court made clear that by granting the continuance requested by former counsel, the Court was not authorizing interviews with any

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<sup>68</sup> *In the Matter of a Member of the Bar of the Supreme Court of Delaware*, 291 A.3d at 195.

<sup>69</sup> *Id.* at 197

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* 196

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 198.

<sup>74</sup> *Id.* 197-198.



jurors from the trial.<sup>75</sup> Former counsel did not disclose the juror contact at that time.<sup>76</sup> It was only after the prosecutor specifically stated that he assumed no juror contact had occurred during the defense investigation that former counsel revealed that the investigator had "limited contact" with the juror.<sup>77</sup>

A panel of the Board on Professional Responsibility ("Board") found that former counsel made several knowing misrepresentations to the Superior Court during the December 13, 2019 hearing.<sup>78</sup> This Court found that the Board's conclusion regarding the knowing misrepresentations was "supported by substantial evidence."<sup>79</sup> This Court determined that "false statements and a lack of candor have a 'significant adverse on legal proceedings' given their impact on the administration of justice."<sup>80</sup> This Court went further:

It is critical for lawyers "to maintain the standards of personal integrity and honesty" to uphold public confidence in the law, which itself "is the foundation of our entire system of justice." As we have observed before, "the potential for harm in misrepresentations to the court is enormous."<sup>81</sup>

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<sup>75</sup> *Id.* at 198.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 202-03.

<sup>79</sup> *Id.* at 204.

<sup>80</sup> *Id.* at 206 (citing *In re Vanderslice*, 2015 WL 3858865, at \*15-16 (Del. June 19, 2015)(ORDER)).

<sup>81</sup> *Id.* (internal citations omitted).

Ultimately, this Court adopted the recommended two-year suspension for former counsel.<sup>82</sup>

Former counsel and the Office of Disciplinary Counsel agreed that his two-year suspension would begin on February 3, 2023.<sup>83</sup> However, there were on-going filings with this Court and discussions between former counsel and ODC through May 10, 2023 when former counsel submitted a request for a certificate of retirement to be effective immediately.<sup>84</sup> Ultimately, on July 24, 2023, this Court directed the Clerk of the Court to issue a certificate of retirement to former counsel with sixteen (16) conditions.<sup>85</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> *In the Matter of a Member of the Bar of the Supreme Court of Delaware*, 2023 WL 4714901 at \*1 (Del. Jul. 24, 2023)

<sup>84</sup> *Id.* at \*2.

<sup>85</sup> *Id.* at \*2-3.

## **ARGUMENT**

### **I. THE SUPERIOR COURT ERRED IN DENYING MR. BARLOW'S MOTION TO WITHDRAW GUILTY PLEA WHEN HE HAD DEFICIENT LEGAL COUNSEL WITH A HISTORY OF MISREPRESENTATION TO THE COURT AND HAD A BASIS TO ASSERT HIS LEGAL INNOCENCE.**

#### **A. Question Presented**

Whether the Superior Court erred in denying Mr. Barlow's Motion to Withdraw Guilty Plea when Mr. Barlow had deficient legal counsel with a history of misrepresentation to the court and had a basis to assert his legal innocence. This issue was preserved by the filing of the Motion to Withdraw Guilty Plea.<sup>86</sup>

#### **B. Standard and Scope of Review**

A denial of a motion to withdraw guilty plea is reviewed for an abuse of discretion.<sup>87</sup>

#### **C. Merits of Argument**

##### ***Applicable legal precepts***

Superior Court Rule 32(d) provides:

If a motion for withdrawal of a plea of guilty or nolo contendere is made before imposition or suspension of sentence or disposition without entry of a judgement of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.<sup>88</sup>

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<sup>86</sup> A139-150.

<sup>87</sup> *Schofield v. State*, 2012 WL 589274 at \*1 (Del. 2012); *Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999).

<sup>88</sup> Super. Ct. Crim. R. 32(d).

A motion to withdraw guilty plea is addressed “to the sound discretion of the trial court.”<sup>89</sup> In evaluating whether to allow a defendant to withdraw the guilty plea, the judge must address five (5) questions:

- (1) Was there a procedural defect in taking the plea;
- (2) Did the defendant knowingly and voluntarily consent to the plea agreement;
- (3) Does the defendant presently have a basis to assert legal innocence;
- (4) Did the defendant have adequate legal counsel throughout the proceedings; and
- (5) Does granting the motion prejudice the State or unduly inconvenience the court.<sup>90</sup>

This Court has held that the factors “are not factors to be balanced; indeed some of the factors of themselves may justify relief.”<sup>91</sup>

***This Court's decision in *Kinderman v. State****<sup>92</sup>

While Mr. Barlow's Motion to Withdraw Guilty Plea was pending in the Superior Court, this Court announced its decision in *Kinderman v. State*. On appeal, Kinderman challenged the Superior Court's denial of his motion withdraw guilty plea after a plea withdrawal hearing wherein Kinderman testified as well as plea

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<sup>89</sup> *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007) (citing *Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999)).

<sup>90</sup> *Scarborough*, 938 A.2d at 649 (citing *State v. Cabrera*, 891 A.2d 1066, 1069-70 (Del. Super. 2005)).

<sup>91</sup> *Id.* (citing *Patterson v. State*, 684 A.2d 1234, 1239 (Del. 1996)).

<sup>92</sup> 2023 WL 4670217 (Del. 2023).

counsel.<sup>93</sup> First, Kinderman argued that he did not knowingly and voluntarily consent to the plea agreement as he was not fully informed by plea counsel of its essential terms.<sup>94</sup> This Court did not exclusively rely upon Kinderman's answers during the plea colloquy in order to assess the knowing and voluntary nature of his plea. Instead, this Court relied heavily upon correspondence from plea counsel to Kinderman and the testimony of plea counsel at the evidentiary hearing.<sup>95</sup>

Next, Kinderman argued appeal that plea counsel were ineffective in failing to conduct a mitigation investigation of obtain a mitigation report which he argued, "prevented them from negotiating a better plea agreement...."<sup>96</sup> He also argued that plea counsel did not advise him adequately of the likely outcome at sentencing.<sup>97</sup> In analyzing this claim, this Court applied the *Strickland* two-part test:

To succeed on an effective assistance of counsel claim, a movant must demonstrate the counsel's representation fell below an objective standard of reasonableness and that the deficiencies in counsel's representation caused him substantial prejudice.<sup>98</sup>

As to whether plea counsel's representation fell below a reasonable standard, this Court applied a "strong presumption that counsel's conduct falls within a wide

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<sup>93</sup> *Id.* at \*1.

<sup>94</sup> *Id.* at \*5.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at \*6 (citing *Owens v. State*, 2023 WL 4534933, \*5 (Del. 2023)). (Internal quotations omitted).

range of reasonable professional assistance."<sup>99</sup> In evaluating plea counsel's reasonableness, again, this Court did not just rely upon the statements that Kinderman made during the plea colloquy. Instead, this Court looked to plea counsel's testimony during the evidentiary hearing regarding their attempts to negotiate a better plea.<sup>100</sup>

***Former counsel's erroneous advice is a fair and just reason for Mr. Barlow to withdraw his guilty plea***

Former counsel told Mr. Barlow that he was not an habitual offender, and he could prove it.<sup>101</sup> Former counsel told Mr. Barlow that because he was not an habitual offender, he faced a maximum sentence of 25 years Level 5 on the Rape Second Degree.<sup>102</sup> Former counsel assured Mr. Barlow that despite the terms of the plea agreement, since his prior convictions for Trafficking and Possession with Intent to Deliver were based upon statutes that had been repealed, the State could not prove he was an habitual offender.<sup>103</sup> Mr. Barlow relied upon former counsel's erroneous advice in deciding to accept the State's plea offer. Thus, the plea was not knowingly, voluntarily and intelligently entered due to the erroneous advice of former counsel.

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<sup>99</sup> *Id.* (citing *Owens*, 2023 WL 4534933 at\*5.

<sup>100</sup> *Id.*

<sup>101</sup> A146.

<sup>102</sup> *Id.* 146-47.

<sup>103</sup> A210-211.

***The trial court's reliance upon representations by former counsel was an abuse of discretion***

In denying Mr. Barlow's Motion to Withdraw Guilty Plea, the judge held that: "Mr. Barlow offers no evidence of this contention aside from stating that plea counsel's filed contains no record of explaining to Mr. Barlow his habitual offender status." Not so. To support his contention, Mr. Barlow pointed to the Opposition to the State's Motion to Declare Mr. Barlow an Habitual Offender filed by former counsel wherein he argued the State's reliance on two prior felony drug convictions where the statutes were subsequently repealed, produced patent ambiguity as to whether such convictions qualify as predicate felonies.<sup>104</sup>

Moreover, Mr. Barlow pointed to the fact that he had previously rejected the same plea offer but for a 50-year Level V cap.<sup>105</sup> At the time of his plea, Mr. Barlow was 43 years old.<sup>106</sup> It is illogical that he would enter a plea that he had previously rejected that would yield him a *de facto* life sentence unless he believed what his lawyer had told him: he was not an habitual offender.<sup>107</sup>

In denying relief, the judge relied upon former counsel's representations to the Court during and before Mr. Barlow's plea. The judge determined, without an evidentiary hearing or affidavit from former counsel, that former counsel "did

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<sup>104</sup> A210-11; A275-76.

<sup>105</sup> A241

<sup>106</sup> A211.

<sup>107</sup> *Id.*

represent that Mr. Barlow is being sentenced this way because he is a habitual offender before the Court engaged in a plea colloquy with Mr. Barlow.” Moreover, the judge found that former counsel “made at least two references to Mr. Barlow being a habitual offender before the plea colloquy.”<sup>108</sup> Such reliance upon representations by former counsel to Court was an abuse of discretion in light of this Court’s decision to suspend former counsel based, in large part, upon his knowing false statements to the Superior Court.

The judge gave no weight to former counsel’s misrepresentations to a judge of the same court finding that they had “no bearing on Mr. Barlow’s case.”<sup>109</sup> This Court, however, takes a broader view about the impact of knowing misrepresentations by former counsel. In this Court’s view, “false statements and lack of candor have a ‘significant adverse effect on legal proceedings’ given their impact on the administration of justice.”<sup>110</sup> This Court determined that public confidence in the law, which is the foundation of our entire system of justice is undermined when lawyers fail to maintain the standards of personal integrity and

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<sup>108</sup> A296.

<sup>109</sup> A295.

<sup>110</sup> *In the Matter of a Member of the Bar of the Supreme Court of Delaware*, 291 A. 3d. at 206 (citing *In re Vanderslice*, 2015 WL 3858865, at \*15-16 (Del. June 19, 2015)).



honesty.<sup>111</sup> In other words, when a lawyer makes knowing misrepresentations to a court, there can be no confidence in our system of justice.

Here, the judge presumed former counsel's honesty in his representations to the Court. The judge then relied upon those presumptions in determining that no erroneous advice was given. In other words, the judge presumed that former counsel would not represent to the Court that Mr. Barlow was an habitual offender, yet tell Mr. Barlow that he was not. However, such presumption was an abuse of discretion especially when former counsel did not testify at an evidentiary hearing or provide an affidavit in response to Mr. Barlow's claims of ineffectiveness in his Motion to Withdraw Guilty Plea. Given the pervasive impact of an attorney's misrepresentations to a court, and in this case former counsel's misrepresentations to the same Court at issue here, affording former counsel the presumption of honesty and candor to the Court at the entry of the plea was an abuse of discretion. Certainly, the judge could have held a hearing and made credibility determinations. However, that did not happen here. Instead, the judge, knowing former counsel's recent history of false statements to the Superior Court, afforded former that counsel the presumption of candor and honesty that should be given to lawyers without a history of misrepresentations to the Court.

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<sup>111</sup> *Id.*

Moreover, the judge determined that even if such erroneous advice were given, “Mr. Barlow failed to show that but for counsel’s errors, Mr. Barlow would not have entered the plea.” That is because Mr. Barlow “affirmed everything that plea counsel said to the Court and that those statements were accurate.”<sup>112</sup> The judge went further to find that “[a]bsent any evidence that plea counsel later contradicted that statement, Mr. Barlow cannot show that plea counsel’s representation of him fell below an objection standard of reasonableness.”<sup>113</sup>

Here again, the judge erroneously afforded former counsel the presumption of honesty and candor in his representations to the Superior Court. Given former counsel’s history, there was also no basis to afford former counsel the presumption that he would disclose unfavorable information to the Court. In its decision suspending former counsel, this Court found: “Between November 5, 2019, and December 13, 2019 (the date of the hearing discussed below), Beauregard did not inform the Superior Court or the prosecutor of [the investigator’s] contact with the Juror.”<sup>114</sup> At the December 13 hearing, the Superior Court judge told former counsel: “So the Court will not authorize any investigation that is by contacting any jurors that served in this case.” Former counsel still did not reveal the juror contact.<sup>115</sup> It

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<sup>112</sup> A295-96.

<sup>113</sup> A296.

<sup>114</sup> *In the Matter of a Member of the Bar of the Supreme Court of Delaware*, 291 A.3d at 197-98

<sup>115</sup> *Id.* at 198.

was only after specific prodding by the prosecutor that former counsel indicated that the investigator had “limited contact” with the juror.<sup>116</sup>

Based upon this Court’s 2023 decision suspending former counsel, the judge committed reversible error by affording former counsel a presumption of honesty and candor to the court. As such, reversal is warranted.

***The trial court erred by failing to find that Mr. Barlow had a basis to assert legal innocence***

Mr. Barlow had a basis to assert his legal innocence. There was nothing in this case other than the potential testimony of Morgan to show that the encounter between her and Mr. Barlow was not consensual.<sup>117</sup> Morgan did not fully cooperate with the medical examination at the hospital, and the examination that was completed, showed no injury to Morgan’s neck where she claimed to have been held and choked by Mr. Barlow.<sup>118</sup>

In denying relief, the judge found:

Conclusory allegations of innocence are not sufficient to require withdrawal of a guilty plea, especially when the defendant has admitted his guilt in the plea colloquy. Once the defendant admits to an offense as Mr. Barlow has done, he cannot later assert legal innocence in the absence of some other support. Mr. Barlow has not presented any new evidence in support of his assertion that he is innocent.

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<sup>116</sup> *Id.*

<sup>117</sup> A211.

<sup>118</sup> A212.

The Court asked Mr. Barlow if it was his intention to enter into this plea because you are, in fact, guilty of Rape Second Degree. Mr. Barlow affirmed that he was, in fact, guilty of Rape Second Degree.

Thus, absent some other support, this Court cannot find Mr. Barlow has a basis to assert his legal innocence.<sup>119</sup>

The judge's findings were an abuse of discretion. Mr. Barlow's assertions of innocence were not conclusory. Rather, he pointed to specific facts that support his innocence claims; namely, significant flaws with the State's case. He pointed to the DNA swabs of Morgan's neck which produced DNA from multiple people.<sup>120</sup> He also pointed to statements that he made wherein he admitted to his involvement in a shoplifting scheme, but indicated that the encounter between him and Morgan was consensual.<sup>121</sup>

Regardless of his answers during the plea colloquy, Mr. Barlow has a basis to assert his legal innocence, and such claims are supported by evidence. The judge committed reversible error in failing to give any weight to this *Scarborough* factor. As such, the decision of the Superior Court should be reversed.

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<sup>119</sup> A298.

<sup>120</sup> A251.

<sup>121</sup> *Id.*

## **CONCLUSION**

For the foregoing reasons, Appellant Roger Barlow respectfully requests that this Court reverse the judgment of the Superior Court.

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