STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: September 20, 2012)

ELIECER TORRES	:	
(AKA HENRY ESPINAL)	:	
	:	
vs.	:	**C.A. NO. PM-08-6570**
	:	
STATE OF RHODE ISLAND	:	

DECISION

SAVAGE, J. This case is before this Court on an Amended Application for Post-Conviction Relief filed by Petitioner Eliecer Torres (also known as Henry Espinal). Petitioner seeks to vacate his prior plea of nolo contendere, entered on February 28, 2000, to one count of possession of cocaine with intent to deliver, carrying an offense date of February 5, 1997, for which he received a sentence of six years suspended with six years probation. See State v. Eliecer Torres, alias John Doe, C.A. No. P2-97-1201A (R.I. Super. 1997). In his Amended Application, Petitioner claims ineffective assistance of counsel, arguing that he entered his plea based on the erroneous advice of counsel that the conviction resulting from the plea would not result in his deportation. Petitioner contends that he was removed from the United States to the Dominican Republic in February of 2009, ostensibly because of his conviction. After consideration of Petitioner's Amended Application, the record from the evidentiary hearing on his petition, materials in related criminal and civil court files and the parties' memoranda and arguments, this Court denies Petitioner's Amended Application for Post-Conviction Relief in its entirety.

I

FACTS AND TRAVEL[1]

On February 5, 1997, Eliecer Torres, a/k/a Henry Espinal and Henry Lama, who provided a date of birth of February 7, 1975 and an address of 77 Knight Street in Providence, Rhode Island, was arrested in the City of Providence and charged with possession of cocaine with intent to deliver after officers seized eight small bags of cocaine from his person. See State v. Eliecer Torres, alias John Doe, C.A. No. P2-97-1201A (R.I. Super. 1997) (the "1997 case"). The original Rhode Island District Court Criminal Complaint that documents that charge contains handwritten notations that appear to be written at the time of arraignment, indicating that Petitioner is also known as Henry Lama, is from the Dominican Republic, has been a resident for fifteen years, has a green card and receives SSI.

On April 2, 1997, the State filed a criminal information against Eliecer Torres, alias John Doe, in the Superior Court charging him with one count of possession of cocaine with the intent to deliver. See id. The police reports and arrest report included in the information package list the defendant as a twenty-one year old Hispanic male named "Eliecer Torres" of "77 Knight Street, Providence, Rhode Island" with a date of birth of "February 7, 1975." Id. The arrest report also lists the defendant as a United States citizen from "Puerto Rico" (contrary to the notes on the District Court Criminal Complaint) with a Social Security Number listed, but no BCI

[1] The facts outlined in this Decision are culled from the parties' memoranda and the evidence adduced at the evidentiary hearing, as well as information that this Court gleaned from its independent review of the relevant criminal and civil court files and of which it takes judicial notice. These facts are set forth in detail because they highlight the importance of ensuring that the attorney of record in a criminal case appears at all stages of the Court proceedings and especially at the time the Court takes a plea. They also highlight the need for all parties and the Court to be aware of all prior proceedings in a case and related cases. The tortuous procedural history of this case also illustrates that it is imperative that the parties and the Court are sure that it is, in fact, the defendant who is before the Court for pre-trial proceedings and, especially, at the time of the plea and that the defendant identifies himself or herself by the correct name at all times.

number. Id. The arrest report further lists the defendant as a white man of Hispanic origin with a height of 5' 6", weight of 160 pounds and brown eyes with no marks or tattoos. Id.

Attorney Donna Uhlmann filed an Entry of Appearance in this Court as counsel of record for "Elecier Torres" at the pre-arraignment conference on April 17, 1997 and actively represented him at his arraignment and in pre-trial proceedings in this case. Id. On May 1, 1997, at his arraignment in the Superior Court, the defendant posted surety bail through a bail bondsman, under the name "Eliecer Torres," with an address of 77 Knight Street, Providence, Rhode Island. Id. On July 3, 1997, after Attorney Uhlmann filed various pre-trial motions and discovery requests, the State filed a copy of defendant's Criminal History Information, as part of its response to discovery, based on fingerprinting done on the defendant on July 1, 1997. Id. This document lists the defendant as "Henry Espinal," a black male, with a date of birth of February 3, 1973, no social security number and known aliases of "Elicer Torres" (date of birth March 2, 1973), "Henry Lama" (date of birth March 20, 1973) and "Henry Espinal" (date of birth February 3, 1973).[2] Id. On July 10, 1997, at a scheduled pre-trial conference, Attorney Uhlmann passed the case for trial. Id.

It is noteworthy that Ms. Uhlmann also represented defendant Henry Lama a/k/a Henry Espinal with respect to another pending drug case at this time in which the State charged the defendant with felony possession of heroin with the intent to deliver. See State v. Henry Lama, P2-96-2110B (R.I. Super. 1996) (the "1996 case"). She filed an Entry of Appearance as counsel

[2] This description of the defendant stands in contrast to the arrest report, dated February 5, 1997, which described the defendant as a white male of Hispanic origin from Puerto Rico with a social security number. The criminal history references six arrests dated: (1) February 5, 1997 for possession of cocaine (presumably the arrest for possession of cocaine with intent to deliver in the criminal case underlying this action); (2) March 29, 1996 for possession of heroin with intent to deliver and conspiracy (presumably the subject of the plea of nolo contendere entered by "Henry L. Lama" to an amended charge of possession of heroin in State v. Henry Lama, P2-96-2110B (R.I. Super. 1996)); (3) August 14, 1995 for domestic assault; (4) January 7, 1994 for domestic assault; (5) June 5, 1993 for domestic assault; and (6) May 1, 1993 for assault. No dispositions of the four earliest charges are recorded in the criminal history.

of record for Henry Lama in the 1996 case on May 5, 1997, shortly after she entered her appearance as counsel of record in the 1997 case. The arrest report in the 1996 case states that the defendant was born in Puerto Rico. Id. On March 28, 1998, Henry Lama a/k/a Henry Espinal entered a plea of nolo contendere in the 1996 case to an amended charge of possession of heroin and received a sentence of three years straight probation. Id.[3]

On April 2, 1998, shortly after the disposition of the 1996 case, the Court reached the defendant's 1997 case for trial. See State v. Eliecer Torres, alias John Doe, C.A. No. P2-97-1201A (R.I. Super. 1997). Attorney Uhlmann appeared on the defendant's behalf, and a warrant issued for his failure to appear. Id. The Clerk's note indicates that that the trial justice asked that the defendant appear before him should he later be brought in on the warrant. Id. Notwithstanding that request, on October 16, 1998, the defendant appeared before a different hearing justice for presentment as a bail violator and cancellation of the warrant. Id. The Court ordered that the defendant be held without bail and reassigned the case for a status conference three days later, with notice, to Attorney Edward St. Onge. Id. It is unclear why notice went to Attorney St. Onge, rather than Attorney Uhlmann, as she was counsel of record for the defendant.

On October 19, 1998, Attorney St. Onge appeared on behalf of the defendant for a status conference and made an oral motion to reduce his bail. Id. The Court granted the motion, set bail at $35,000 with surety, and scheduled the matter for a trial calendar call on December 14, 1998. Id. The defendant posted bail, and the bail affidavit refers to him as "Elicer Torres (Henry

[3] At his arraignment in the 1996 case, the defendant gave his address as 77 Knight Street, Providence, Rhode Island and his date of birth as March 20, 1973. His bail affidavit identified him as Henry Espinal with a date of birth of March 2, 1973. Clerk's notes in the file indicate that Joseph Bevilacqua represented him in the case at pre-trial conference and also represented the co-defendant (though he never filed an Entry of Appearance for the defendant in the case). After his representation, a Public Defender represented the defendant briefly and then withdrew. Attorney Uhlmann then entered her appearance as counsel of record for the defendant.

Lama)." Id. The order setting bail refers to him as Defendant "Henry Espinal 3/2/73" and is signed by Defendant "Eliecer Torres, 11 Glenham, Providence, Rhode Island 02907." Id.

On December 7, 1998, Attorney St. Onge filed a motion to suppress the evidence in the case on the grounds that it was seized during an illegal search (which was duplicative of the motion previously filed on behalf of the defendant by Attorney Uhlmann on June 26, 1997). Id. The court file reflects no trial calendar call until March 25, 1999, at which time Attorney St. Onge appeared. Id. As the defendant failed to appear, the Court again issued a warrant. Id. The defendant next appeared on the outstanding warrant on August 16, 1999, with Attorney St. Onge, at which time the Court released him on the same bail, cancelled the warrant, and assigned the case for a trial calendar call to October 4, 1999. After several continuances, the matter came before the Court for disposition on February 28, 2000. Id.[4]

The Clerk's note, dated February 28, 2000, indicates that, on that date, Eliecer Torres appeared before a Magistrate for hearing, represented by Attorney St. Onge, and pled nolo contendere to one count of possession of cocaine with intent to deliver, in violation of R.I. Gen. Laws § 21-28-4.01(A)(2)(a), and received a sentence of six years suspended with six years probation.[5] Id. The plea form, dated February 28, 2000, but inexplicably not filed until the day after the plea, lists the defendant as "Eleicer Torres" and bears the signature of the defendant as "Eliecer Torres" and the printed name of the defendant as "Eleicer Torres." Id. (Emphasis

[4] During Attorney St. Onge's purported representation of the defendant from October 19, 1998 through the date of disposition of the 1997 case on February 28, 2000, there is no evidence that Attorney St. Onge ever filed an Entry of Appearance as counsel of record for the defendant. Id. In addition, there is no evidence that Attorney Uhlmann ever withdrew as counsel of record for the defendant or received notice of the defendant's court appearances during this timeframe. Id. This Court does not know whether she knew of or consented to Attorney St. Onge's representation of the defendant or whether the defendant was clear as to the two attorneys' roles in representing him. Id. Obviously, counsel should not represent a defendant in a criminal case without filing an Entry of Appearance. When the defendant is already represented by counsel, that Entry of Appearance must be preceded by a withdrawal of prior counsel, sanctioned by the Court.

[5] The Clerk's note also lists "O'Brien" as the prosecutor, notably the ninth prosecutor to handle this case in the Superior Court by the time of the plea.

added). It is signed by Edward St. Onge, as attorney for the defendant. Id. The Judgment of Conviction and Commitment, entered on April 17, 2000, essentially conforms to the Clerk's note.[6] Id. A transcript of the plea colloquy, dated February 28, 2000, however, records Attorney William Clifton as counsel of record for defendant with respect to the plea.[7] See Eliecer Torres (a/k/a Henry Espinal) v. State of Rhode Island, PM 08-6570 (R.I. Super. 2008) (Tr. at 1, 5 & cover page). It further indicates that the Clerk called the case as "Eliecer Torres, from the handwritten calendar." Id. (Tr. at 1.) Upon inquiry, the transcript reveals that defendant identified himself as "Eliecer Torres" with a date of birth of "2/7/75" and an address of "11 Glenham Street." Id. The transcript states further that when the Clerk read the charge and asked the defendant to respond to it, "Mr. Clifton" responded "nolo contendre." Id.[8]

Attorney Clifton did not file an Entry of Appearance as counsel of record for the defendant in this case, however, until November 8, 2001, when the State filed a Rule 32(f) Violation Report against Henry Espinal, a/k/a Elicer Torres (DOB: 2/7/75), charging Henry Espinal with violating his probation based on a new charge of domestic assault against Luz Torres with an offense date of September 18, 2001. See State v. Eliecer Torres, alias John Doe, C.A. No P2-97-1201A (R.I. Super. 1997). The police reports and victim's statements attached to the violation report identify the defendant as Henry Espinal—a black male from the United States, of Hispanic origin, with no social security number, a date of birth of March 3, 1973 and an address of 15 Evergreen Street, Apt. 9, East Providence, Rhode Island. Id. The alleged

[6] It records C. Leonard O'Brien as the prosecutor (presumably an error as he is a criminal defense attorney), whereas the Clerk's note lists "O'Brien" as the prosecutor. This Court surmises that the prosecutor may have been Thomas O'Brien. The Judgment records Attorney St. Onge as defense counsel, in conformance with the Clerk's note.

[7] A copy of the transcript is filed in the Court file for the instant post-conviction relief action. See Eliecer Torres (a/k/a Henry Espinal) v. State of Rhode Island, PM 08-6570 (R.I. Super. 2008). Like the Judgment, it appears to erroneously list C. Leonard O'Brien as the prosecutor. Id.

[8] The transcript of the plea indicates, therefore, that Attorney Clifton represented the defendant at the time of his plea on February 28, 2000, whereas the Clerk's note from that date and the plea form, filed a day later, indicate that Attorney St. Onge represented the defendant with respect to his plea.

victim identifies Henry Espinal as her ex-husband from whom she has been separated for five years and the father of her seven-year old son, Edison Espinal. Id. According to the District Court Criminal Complaint attached to the Notice of Violation, defendant Henry Espinal gave a date of birth of February 3, 1973 and an address of 11 Glenham Street at his arraignment in District Court. Id. The Criminal History Record, dated November 1, 2001, for Henry Espinal lists him as a black male with birth dates of February 3, 1973, March 2, 1973 or March 20, 1973, known by the aliases of Henry Lama and Elicer Torres, with an address of 1184 Elmwood Avenue, Providence, Rhode Island and with a height of 5' 7", a weight of 160 pounds, brown hair and eyes and scars of the elbow and right hand.[9] Id.

In his Entry of Appearance, filed in the 1997 case, Attorney Clifton states that he is entering his appearance for defendant "Henry Espinal," as does the Clerk's note for the presentment on violation dated November 8, 2001. Id. The Clerk's note lists the defendant's date of birth as "February 7, 1975." Id. The bail affidavit for the violation and the order for bail also list the defendant as Henry Espinal. The defendant signed the order releasing him on $10,000 surety bail as "Henry E," with an address of "11 Glenham, Providence, R.I. 02907." Id. His signature on this document appears distinctly different from that of "Eliecer Torres" that appears on the earlier plea form and order for bail. Id. On November 30, 2001, the State, for unknown reasons, withdrew the violation. Id.

On November 17, 2003, the Federal Immigration and Naturalization Service initiated removal proceedings against Henry Edison Espinal in the Federal Immigration Court in Boston,

[9] The FBI number on this record in the 1997 case is the same as that recorded on his Criminal History Record filed on July 3, 1997 in the 1997 case. Both records contain a similar description of the defendant and the same criminal history (although the more recent record shows the disposition of the 1996 charges as a dismissal of the conspiracy charge and three years straight probation to an amended charge of possession of heroin and the disposition of the 1997 charge as six years suspended with six years probation to the charge of possession with the intent to deliver cocaine). Again, contrary to the arrest report of the defendant, this Criminal History Record describes the defendant as a black male with scars on the elbow and right hand as opposed to the description of him in the arrest report as a white man of Hispanic origin with no marks or tattoos.

Massachusetts, pursuant to section 240 of the Immigration and Nationality Act. See Eliecer Torres (a/k/a Henry Espinal) v. State of Rhode Island, PM 08-6570 (Pl.-Pet'r's Supp. Mem. in Supp. of App. for Post-Conviction Relief, filed December 13, 2010, Ex. 4). It alleged that Henry Espinal was a citizen of the Dominican Republic, immigrated to the United States on January 30, 1987 and was convicted on February 28, 2000 of manufacturing/delivery of cocaine for which he received a six-year sentence. Id. On that basis, it sought his removal under the Act for conviction of a controlled substance offense and an aggravated felony relating to illegal trafficking in a controlled substance. Id.

On January 26, 2004, "Henry Espinal, a/k/a Eliecer Torres," with an address of "90 evergreen drive, Apt. #127, ~~Prov~~ East Prov. R.I. 02914," filed in this Court a pro se motion to expunge and seal the record in the 1997 case, listing the case caption as "Henry Espinal/AKA Eliecer Torres" and scheduling it for hearing on February 12, 2004. See State v. Eliecer Torres, alias John Doe, P2-97-1201A (R.I. Super. 1997). The Clerk's note, dated February 12, 2004, indicates that the defendant Eliecer Torres failed to appear, and the motion to expunge and seal the record passed. Id. On that same date, Henry Espinal, listing the same address, appeared on a pro se motion to expunge and seal the record in the 1996 case in which he pled nolo contendere to possession of heroin and received a sentence of three years straight probation. See State v. Henry Lama, P2-96-2110B (R.I. Super. 1996). The Court denied that motion. Id.

Apparently due to a change in venue, the federal removal proceedings proceeded in 2004 before the Immigration Court in New York, New York, and Henry Espinal hired Attorney Thomas H. Nooter, a New York attorney, as his counsel with respect to those proceedings. See Eliecer Torres (a/k/a Henry Espinal) v. State of Rhode Island, PM 08-6570 (R.I. Super. 2008) (Pl-Pet'r's Supp. Mem. in Supp. of App. for Post-Conviction Relief, filed December 12, 2010,

Ex. 5). Attorney Nooter filed an application for cancellation of removal and then moved, on December 13, 2004, to continue the hearing on that application on the grounds that there was pending in the Rhode Island Superior Court a motion to vacate the conviction upon which the government based its request for removal (namely, the conviction for possession of cocaine with the intent to deliver in the 1997 case for which the defendant received a sentence of six years suspended with six years probation). Id. Attorney Nooter filed an affidavit dated December 13, 2004, in support of his motion for a continuance, which states, in pertinent part, as follows:

> 1. I am the attorney of record for the Respondent, HENRY EDISON ESPINAL, herein.
>
> 2. I make this application for a continuance because my client has a motion pending in the Superior Court of Rhode Island, in Providence, Rhode Island, to vacate the criminal conviction which is the basis of the Petition for Removal in the Notice to Appear. (See Exhibit 1, copy of motion.)
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> 3. The circumstances for the late filing of the motion to vacate and this motion for a continuance are as follows: after Respondent was released from Oakdale and venue was transferred to the New York District, Respondent retained an attorney in Rhode Island to file a motion to vacate the conviction because at the time he entered a guilty plea he thought that the conviction was for simple possession and that there would be no immigration consequences of pleading guilty.
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> 4. On information and belief the attorney, Steven DiLibero of Providence, Rhode Island, filed a motion (attached here as Exhibit 2) in May 2004, but then failed to follow-up on submitting the supporting documentation because Respondent was unable to pay the balance of the retainer which was due.
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> 5. Thereafter Respondent obtained employment but continued to have a great deal of difficulty earning enough money to sufficiently pay the attorney for his services in filing the motion to vacate.

6. After I called the attorney several times I discovered that the motion heretofore filed was directed to the wrong conviction: the Respondent had previously been convicted of a simple possession charge in Rhode Island Superior Court, and the Rhode Island criminal attorney had filed the motion directed to that conviction rather than the one which is the basis of the removal petition.

7. Thereafter the Respondent obtained additional funds toward the attorney's fees required by the Office of Steven DiLibero who filed a motion **today** to vacate the correct conviction, based on the client's lack of understanding of the plea he had entered.

8. I do not know what the outcome will be of the motion to vacate; nevertheless if the Respondent was misinformed as to the nature of the charge to which he was pleading guilty in most jurisdictions he would be permitted to withdraw his guilty plea. In this case if that happens, he may be convicted after trial or he may be permitted to enter a guilty plea to a simple possession count (as he had thought all along he was doing). Although a simple possession conviction is a basis of removal, it would not necessarily be (as argued in a previously-submitted Memorandum of Law) a bar to Cancellation of Removal pursuant to I.N.A. § 240A.

. . .

10. The motion to vacate the criminal conviction in Rhode Island is Respondent's only hope of being able to remain in the country of his residence for sixteen years, and his family's only hope of having his presence and financial support in the future. I submit that the interests of justice support the granting of this one application to simply postpone the Individual hearing in this matter so that the motion in Rhode Island can be decided.

11. The motion in Rhode Island Superior Court is noticed for December 30, 2004. Even if the motion is decided on that date, if the plea is vacated a new disposition of the case will have to occur, and it is anticipated that this may take several months. For that reason, I am requesting a continuance of 90 days or more for the Individual Hearing in this matter.

See Espinal v. State, PM 08-1107 (R.I. Super. 2008) (Aff. of Nooter ¶¶ 1-8, 10 (Dec. 13, 2004) (attached to Application for Post-Conviction Relief)) (emphasis added).[10]

[10] The Nooter Affidavit suggests that Attorney DiLibero "filed a motion [to vacate] (attached here[to] as Exhibit 2) in May 2004" in the Rhode Island Superior Court. Id. (Aff. of Nooter, ¶ 4). While no copy of that motion to vacate is attached as Exhibit 2 to the copy of the Nooter Affidavit in the Court file for the original post-conviction relief action, a review of the Court file in the 1996 case indicates that, on May 20, 2004, on behalf of defendant "Henry Espinal," Attorney DiLibero filed a Motion to Vacate "the sentence entered" in that case—a sentence of three years straight probation entered by the Court pursuant to the defendant's plea of nolo contendere to an amended charge of possession of heroin; as the Nooter Affidavit reflects, Attorney DiLibero did not file that motion in the 1997 case – the more problematic case for immigration purposes—where the defendant received a sentence of six years suspended with six years probation for possession of cocaine with the intent to deliver. Compare State v. Henry Lama, P2-96-2110B (R.I. Super. 1996) with State v. Eliecer Torres, P2-97-1201A (R.I. Super. 1997). The Motion to Vacate filed in the 1996 case notices a hearing date of June 1, 2004 and a date of service on the Department of Attorney General on May 18, 2004, but there is no indication that it was ever docketed, scheduled for hearing, requested to be heard or heard. See State v. Henry Lama, P2-96-2011B (R.I. Super 1996). The Nooter Affidavit suggests that Attorney DiLibero claimed that he took no action to press the Motion to Vacate because defendant still owed him a balance on his retainer. See Espinal v. State, PM 08-1107 (R.I. Super. 2008) (Aff. of Nooter ¶ 4). Although Attorney DiLibero filed the Motion to Vacate on behalf of defendant Henry Espinal, he never entered his appearance as counsel of record for that defendant in the 1996 case, nor is there evidence that the defendant's attorney of record, Attorney Uhlmann, ever withdrew her appearance as his counsel of record. See State v. Henry Lama, P2-96-2110B (R.I. Super. 1996). This Court does not know whether she knew of or consented to Attorney DiLibero's representation of the defendant or whether the defendant knew of the two attorneys' roles in representing him.

Attorney Nooter also states in his affidavit that Attorney DiLibero filed a Motion to Vacate "the correct conviction" in the 1997 case, on December 13, 2004, and represents that a copy of that motion is attached as Exhibit 1 to the Affidavit. See Espinal v. State, PM 08-1107 (R.I. Super. 2008) (Aff. of Nooter ¶¶ 2-7 and Ex. 1 (Dec. 13, 2004)). That Motion to Vacate seeks to "vacate criminal complaint pending against him" and evidences that it was faxed from Attorney DiLibero's office to Attorney Nooter's office on December 13, 2004. See id. The Motion to Vacate certifies that it was mailed to the Department of Attorney General on December 7, 2004 (inexplicably a week prior to it being faxed to Attorney Nooter) and notices a hearing date of December 30, 2004. Id. Notwithstanding the averments in the Nooter Affidavit and Exhibit 1 attached to it, however, there is no evidence that Attorney DiLibero actually filed this motion in the Court file referenced in the Motion to Vacate. See id.; State v. Eliecer Torres, P2-97-1201A (R.I. Super. 1997).

There is evidence, however, that, on December 10, 2004, Attorney DiLibero filed a similar Motion to Vacate with the same content for the second time in the 1996 case—the wrong case—and captioned that motion "State v. Henry Espinal." See State v. Henry Lama, P2-96-2110B (R.I. Super. 1996). His office certified that Motion to Vacate as having been served on the Department of Attorney General, on December 7, 2004, and noticed it for hearing on December 16, 2004. Id. It bears a handwritten notation (which appears to be written by a Clerk of the Court) of "copy sent 12/14." Id. There also is evidence that Attorney DiLibero filed the Motion to Vacate attached as Exhibit 1 to the Nooter Affidavit—his third filed Motion to Vacate—in the 1996 case (because the pleading has its 1997 case number crossed out and the 1996 case number penciled in) not on December 13, 2004 in the 1997 case, as he purportedly represented to Attorney Nooter, but in the 1996 case on December 15, 2004. See id; State v. Eliecer Torres, P2-97-1201A (R.I. Super. 1997); Espinal v. State, PM 08-1107 (Aff. of Nooter ¶ 2 and Ex. 1). It bears a handwritten notation (which appears to be written by a Clerk of the Court) of "copy sent 12/15." See State v. Henry Lama, P2-96-2110B (R.I. Super. 1996). It notices the motion for hearing, on December 30, 2004, and contains a certificate of service of December 7, 2004. Id. There is no evidence in either the 1996 or the 1997 criminal case files, however, that any of these motions to vacate filed by Attorney DiLibero in December 2004 were received by the Department of Attorney General, docketed, scheduled for hearing, requested to be herd or heard. See State v. Eliecer Torres, P2-97-1201A (R.I. Super. 1997); State v. Henry Lama, P2-2110B (R.I. Super. 1996). These facts are particularly troubling in light of the representations in the Nooter Affidavit that Attorney Nooter had to call Attorney DiLibero multiple times before learning that Attorney DiLibero filed the Motion to Vacate in the wrong case, that Attorney Nooter had to clarify for Attorney DiLibero the correct case in which to file

On January 7, 2005, Attorney Nooter appeared in the Immigration Court in New York on behalf of Henry Edison Espinal and obtained a continuance of the removal proceedings until February 4, 2004, pending decision on the Motion to Vacate defendant's conviction in the 1997 case ostensibly filed by Attorney DiLibero and pending in Rhode Island. See Espinal v. State, PM 08-1107 (R.I. Super. 2008) (partial transcript of January 7, 2005 Immigration Court hearing attached to Application for Post-Conviction Relief). The Immigration Court also asked the parties to be prepared to address whether the "other conviction"—presumably for possession of heroin in the 1996 case—could be classified as an aggravated felony that would warrant removal if the Rhode Island Superior Court were to vacate the conviction for possession with intent to deliver in the 1997 case. Id.

Apparently unbeknownst to Attorney Nooter or defendant, Attorney DiLibero had not at that point filed a Motion to Vacate or a request that any such motion be heard. See n.10**,** supra. On January 14, 2005, Attorney DiLibero finally filed a Motion to Vacate "the judgment" entered against Henry Espinal in the 2000 case based on his plea, though he failed to specify the grounds for the motion. See State v. Eliecer Torres, P2-97-1201A (R.I. Super. 1997). Attorney DiLibero never filed an Entry of Appearance as counsel of record for the defendant—a defendant who his motion lists as "Henry Espinal" and not the named defendant in the case, Eliecer Torres. Id. Again, there is no evidence that defendant's attorney of record in this case, Attorney Uhlmann, ever withdrew her appearance nor is there evidence as to whether she knew of other counsels' actions. Id. Attorney DiLibero noticed the motion for hearing on January 28, 2005. Id. The Clerk's note for that date indicates that defendant's Motion to Vacate came on for

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the Motion to Vacate, that defendant obtained additional funds with which to pay the attorney's fees demanded by Attorney DiLibero to press the Motion to Vacate, and that Attorney DiLibero still did not properly file or press the motion, contrary to what he told Attorney Nooter. See Espinal v. State, PM 08-1107 (Aff. of Nooter, ¶¶ 2-7).

hearing that date, but there is no indication that Attorney DiLibero appeared; the Court took no action, ostensibly because no Judge was available, and continued the motion for hearing to February 17, 2005.[11] Id. There is no Clerk's note in the file for February 17, 2005, but the docket sheet indicates that the February 17, 2005 hearing date was deleted and "date changed Judge not available." Id.

On February 18, 2005, the Immigration Judge issued a bench decision denying's Henry Espinal's application for cancellation of removal and ordered him removed to the Dominican Republic. See Eliecer Torres (a/k/a Henry Espinal) v. State of Rhode Island, PM 08-6570 (R.I. Super. 2008) (Pl.-Pet'r's Supp. Mem. in Supp. of App. for Post-Conviction Relief, filed Dec. 13, 2010, Ex. 5.) He found that the defendant's conviction for cocaine possession with intent to deliver in the 1997 case was an aggravated felony that precluded cancellation of removal. Id. (Ex. 5 at 3.) While he did not reach the issue of whether the defendant's conviction for heroin possession in the 1996 case also constituted an aggravated felony that would preclude cancellation of removal, he stated that "it would appear to be so" under recent Immigration Court precedent. Id. Although he referenced the fact that Henry Espinal was attempting to vacate his conviction in the 1997 case in this Court, he refused to delay his order of deportation pending decision on such motion. Id. (Ex. 5 at 4.) He reasoned that the Immigration Court typically disapproved of granting adjournments for the purpose of pursuing post-conviction relief. Id.

Notwithstanding the decision of the Immigration Court, Attorney DiLibero proceeded, over the ensuing months in 2005, to file in the 1997 case numerous duplicate motions to vacate

[11] A Clerk's note, dated January 28, 2005, indicates that the matter was "scheduled in error" for hearing on a motion to vacate a no contact order and should have been a hearing on a motion to vacate a plea; the motion passed, without prejudice, by Attorney Dion who apparently appeared on behalf of the defendant. There is no motion to vacate in the court file filed by Attorney Dion and no Entry of Appearance filed by him.

on behalf Henry Espinal.[12] See State v. Eliecer Torres, P2-97-1201A (R.I. Super. 1997). He never entered his appearance as counsel of record for the defendant and none of the motions were ever scheduled to be heard or heard. Id.[13]

[12] On May 25, 2005, Attorney DiLibero filed a second Motion to Vacate on behalf of defendant "Eliecer Torres," arguing that the "criminal complaint pending against him pursuant to R.I.G.L. § 12-12-22(c) [should be vacated,] as the Court failed to properly inform the Defendant of consequences of his plea as evidence [sic] by the attached transcript." See State v. Eliecer Torres, alias John Doe, P2-97-1201A (R.I. Super. 1997). He attached to the motion a copy of the transcript of the plea colloquy of February 28, 2000. Id. Attorney DiLibero still did not file an Entry of Appearance in the case, and there is no explanation for why he would file another motion to vacate rather than scheduling his earlier filed motion for hearing. Id. The Court scheduled this motion for hearing three times in June 2005, but Attorney DiLibero continued it each time "pending further investigation." Id.

It is unclear why Attorney DiLibero would state in his various filed motions to vacate that he was seeking to vacate a criminal complaint, as opposed to a conviction, when the defendant already had pled to that charge. Attorney DiLibero noticed this second Motion to Vacate for hearing on May 31, 2005. According to the Clerk's note, it was not heard on that date, ostensibly because the Judge was unavailable (although there is no docket entry to that effect). On June 14, 2005, the second Motion to Vacate was continued for hearing to June 21, 2005, "pending further investigation," and continued again on that date to June 22, 2005, again "pending further investigation." There is no Clerk's note for June 22, 2005 in the file and no indication of any further hearing or request for hearing on the motion by Attorney DiLibero. The docket sheet for that date indicates that the motion was continued again "pending further investigation," but there is no indication of a continuance date.

On September 21, 2005, Attorney DiLibero, again on behalf of defendant "Eliecer Torres," inexplicably filed a third Motion to Vacate, a motion identical in substance to that filed on May 25, 2005. Id. He still did not file an Entry of Appearance in the case and again there is no explanation as to why he filed a new Motion to Vacate rather than scheduling a hearing on one of his two previously filed motions to vacate. Id. While the third Motion to Vacate noticed the motion for hearing on September 27, 2005, there is no indication of a hearing or request for hearing on the motion on that date or thereafter by Attorney DiLibero. Id.

On October 20, 2005, Attorney DiLibero, again on behalf of defendant "Eliecer Torres," filed his fourth Motion to Vacate—a motion identical in substance to the two motions that he had filed previously on May 25, 2005 and September 21, 2005. Id. He still filed no Entry of Appearance in the case and again there is no explanation for why he filed a new Motion to Vacate rather than scheduling a hearing on one of his three previously filed motions. Id. The Court never heard this motion. Id.

It is noteworthy that in connection with all four of the motions to vacate that Attorney DiLibero filed on behalf of defendants Henry Espinal and Eliecer Torres in the 1997 case, he never certified them as being served on any specific prosecutor in the Department of the Attorney General. Other than the first Motion to Vacate that was certified as hand-delivered to the Department of the Attorney General, ostensibly by a lawyer associated with Mr. DiLibero, the next three motions to vacate were certified as having been mailed with the certificates of service bearing signatures that appear to be those of Paula Simao (although each signature is in different handwriting). It is also noteworthy that, with regard to all of the hearings on the motions to vacate, a different prosecutor appeared on almost each occasion. None of those prosecutors handled the original plea or the numerous proceedings in the case before the plea. The Clerk's notes for the hearing dates on the fourth motion to vacate (October 25, 2005 and November 1, 2005) do not even list an appearance by a prosecutor.

Attorney DiLibero noticed the fourth Motion to Vacate for hearing on October 25, 2005, at which time, like the hearing on the second Motion to Vacate, the hearing was continued "pending further investigation" to November 1, 2005. On November 1, 2005, the Clerk's note and docket sheet indicate that Attorney DiLibero appeared and withdrew the motion. There is no indication of a hearing or a request for hearing on the motion by Attorney DiLibero. As a result, the Court never heard a single one of the multitude of motions to vacate that Attorney DiLibero filed on defendant's behalf in his two separate cases.

[13] The motion practice engaged in by Attorney DiLibero cannot be sanctioned by this Court. He not only filed motions in cases in which he never entered his appearance as counsel of record for the defendant, but he filed improper, duplicative motions that he never asked to be heard. It also appears that he may have misrepresented his

Three years later, on May 30, 2008, earlier counsel of record, Attorney Uhlmann, filed a Motion to Vacate Plea on behalf of the defendant in the 1997 case which included nineteen allegations. Id. This motion referred to the defendant as Henry Espinal, even though she previously had entered her appearance on behalf of Eliecer Torres. Id. It alleged, inter alia, that: (1) Eliecer Torres was not the person before the Court at the time of the plea; (2) various clerical defects existed in the Judgment of Conviction and transcript of the plea, and the transcript was incomplete; (3) the plea colloquy did not comport with Rule 11 of the Rhode Island Superior Court Rules of Criminal Procedure; (4) the plea was invalid because the Court failed to advise the defendant of the possible immigration consequences of the plea under R.I. Gen. Laws § 12-12-22; (5) the plea was involuntary and entered without knowledge of all possible immigration consequences; and (6) counsel was constitutionally ineffective for a number of specific reasons. Specifically, in criticizing counsel, the Motion to Vacate Plea stated:

> Counsel, with full knowledge of HENRY ESPINAL'S immigration status and knowing that said plea would result in, at minimum, deportation from the United States, coerced and induced the plea in the name of ELIECER TORRES, advising HENRY ESPINAL that as TORRES was a U.S. citizen, ESPINAL could not be deported.

Id. The motion represented that Henry Espinal, as a result of the plea, was under an order of deportation and incarcerated at the Plymouth House of Corrections in the custody of Homeland Security. Id. Attorney Uhlmann did not request a hearing on the motion or notice it for hearing and certified it as having been served on the Department of Attorney General on May 23, 2008. Id. She inexplicably took no further action with regard to the motion. Id.

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actions to the defendant's immigration attorney (and, by extension, to the defendant and the Immigration Court). It appears that he may have obtained monies from the defendant to fuel his motion practice, which is particularly troubling because the motions were all for naught. Perhaps most disturbing to this Court, however, is that but for counsel's action, defendant may have had the opportunity to appear before the Court in person, testify and obtain relief that could have spared him deportation or it could have been made clear that the relief defendant sought was baseless.

On July 2, 2008, Attorney Uhlmann refiled the Motion to Vacate Plea in the same form, although this filing noticed the motion for hearing on July 1, 2008 (the date prior to the filing of the motion), stated that Petitioner was held at the Plymouth House of Corrections in Plymouth, Massachusetts, and certified service on the Department of Attorney General on May 18, 2008, a date earlier than the certification date on her earlier filed motion. Id. On July 1, 2008, according to the Clerk's note, she continued the hearing on the motion to vacate, pending further investigation, to July 15, 2008, at which time the prosecutor was unavailable. She continued the motion again until July 22, 2008, with notice to Eliecer Torres at 90 Evergreen Drive, Apt. 127, East Providence, R.I. 02914, even though she had represented previously that he was incarcerated. Id. On that date, Attorney Uhlmann was unavailable and the motion passed. Id. Counsel took no further action with regard to the motion. It is unclear which one of her two filed motions was the subject of these continuances. Id. In any event, she never sought or received a hearing on either of the motions to vacate that she filed. Id.[14]

On February 22, 2008, apparently at the time he was incarcerated in federal prison and awaiting deportation, Henry Espinal filed an unverified pro se application for post-conviction relief to vacate his plea in the 1997 case. See Espinal v State, C.A. No. PM-08-1107 (R.I. Super. 2008). He claimed implicitly that his prior counsel, Attorney DiLibero, lied to him about filing a motion to vacate that he never asked the Court hear. Id. He also claimed that he was not apprised of the immigration consequences of his plea by the Court. Id. At the time the Court scheduled this matter for hearing, it could not appoint him counsel or grant him a hearing because he was

[14] The motion practice and representation of defendant by Attorney Uhlmann, too, cannot be countenanced by this Court. There is nothing to explain her long hiatus as counsel to the defendant in this case or why, if she were prior counsel of record and did not withdraw, she allowed her client to plead nolo contendere in the 1997 case with other counsel. Similarly, there is no explanation for why she filed motions to vacate on behalf of the defendant in the 1997 case, and, like Attorney DiLibero, never requested that they be heard—especially where in one motion she suggested that it was not the defendant who was before the Court at the time of the plea.

no longer incarcerated and had provided no other address. Id. On April 2, 2008, apparently facing imminent deportation, Henry Espinal refiled the same pro se application for post-conviction relief. See Espinal v. State, C.A. No. PM-08-2658 (R.I. Super. 2008).

On October 16, 2008, before the scheduling of any hearing on that petition, Petitioner filed an Application for Post-Conviction Relief with the assistance of current counsel in the instant action, supported by his affidavit and an affidavit of his wife that were both notarized in Massachusetts. See Eliecer Torres (a/k/a Henry Espinal) v. State, PM 08-6570 (R.I. Super. 2008). In this third application, Petitioner claimed ineffective assistance of counsel, asserting that he entered the plea in the 1997 case based on counsel's advice that the disposition would not result in deportation. Id. He also argued that the Court's sentencing colloquy did not comply with Rule 11 of the Rhode Island Superior Court Rules of Criminal Procedure. Id.

On November 1, 2010, Petitioner filed an Amended Application for Post-Conviction relief, without verification or any supporting affidavits, in which he withdrew his earlier allegation concerning the propriety of the sentencing colloquy under Rule 11 and alleged only ineffective assistance of counsel. Id. He alleged, in relevant part, that his attorney did not advise him that his plea constituted an aggravated felony conviction under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), which would result in automatic deportation, and instead, "advised him that he would not be deported since he was not in the system." Id. He claimed that these failures on the part of his defense counsel constituted ineffective assistance of counsel under the dictates of Padilla v. Kentucky, 130 S. Ct. 1473 (2010). Id. Petitioner alleged further that he would have gone to trial had he known that his plea of nolo contendere would result in deportation. Id. Given the pendency of his duplicative applications for post-conviction relief, this Court, on November 1, 2010, granted Petitioner's motion to withdraw both of his

prior filed pro se applications for post-conviction relief, leaving only his Amended Application for Post-Conviction Relief filed that date, with benefit of counsel, for adjudication.[15] The State never filed an answer to any of Petitioner's three applications for post-conviction relief, but did file an objection to Petitioner's original application in Espinal v. State, C.A. No. PM 08-1107 (R.I. Super. 2008).[16]

Representing that Petitioner had been deported, his attorney next filed a motion, in early 2009, for leave to conduct a deposition in the Dominican Republic in support of Petitioner's Amended Application for Post-Conviction Relief. The State objected, arguing that: (1) the Rhode Island Superior Court Rules of Civil Procedure do not permit testimony via satellite or the Internet from a foreign country; (2) other state courts have rejected testimony from remote locations; and (3) this Court would be unable to administer a valid and meaningful oath to a witness testifying from a foreign country, thereby rendering the deposition testimony inadmissible. This Court granted Petitioner's motion, without prejudice to the State, to allow the deposition to be taken in the Dominican Republic, with a proper oath to be administered. In granting the motion, this Court preserved the State's right to later object to the admissibility of the deposition at any post-conviction relief hearing.

At the hearing on Petitioner's Amended Application, however, Petitioner failed to appear. His counsel represented, without further explanation, that he was unable to secure the deposition of Petitioner in the Dominican Republic. Counsel went forward with the hearing, with no

[15] Petitioner filed an order of dismissal in Espinal v. State, C.A. No. PM 08-1107 (R.I. Super. 2008), but this Court cannot locate any similar order in Espinal v. State, C.A. No. PM 08-2658 (R.I. Super. 2008).

[16] It appears that Petitioner takes no issue with the State's failure to answer his Amended Application at issue here. This Court reminds the State—as it frequently neglects to formally answer petitions for post-conviction relief—that it has an obligation in any civil action for post-conviction relief to file a timely answer or risk default. See R.I. R.Civ.P. 12(a), 55.

objection from the State, and relied solely on Petitioner's memorandum and the testimony of Petitioner's wife, Isis Espinal, and Petitioner's former attorney, Edward St. Onge.

Ms. Espinal testified that she met Henry Espinal in 1997 and was aware of his conviction from 2000 that is the subject of this post-conviction relief application. She testified that Attorney St. Onge was defendant's attorney at the time defendant pled nolo contendere in 2000 in the 1997 case and that, prior to the plea, she accompanied defendant to some of his meetings with Attorney St. Onge. Ms. Espinal also testified that Petitioner's true name is Henry Espinal, not Eliecer Torres, and that, as she recalled, Attorney St. Onge called Petitioner by the name of Henry Espinal. Ms. Espinal testified that Henry Espinal told Attorney St. Onge that he was concerned about his immigration status because he was a domiciliary of the Dominican Republic, not Puerto Rico. Additionally, Ms. Espinal testified that Attorney St. Onge told her and her husband that Petitioner would not be deported because he was listed as Puerto Rican in the system.[17] The witness testified that Henry Espinal was detained in the United States beginning in January 2008 and deported to the Dominican Republic in February 2009.

Attorney St. Onge testified that he was familiar with the immigration consequences of pleas and had dealt with this issue many times as a criminal defense lawyer. He did not recall Petitioner telling him that he was a resident of the Dominican Republic or that Petitioner was concerned about deportation or immigration consequences. Attorney St. Onge testified that, at the time of the plea, he understood that Petitioner was Puerto Rican. He believed that he learned that from Petitioner's wife. No testimony was elicited from Attorney St. Onge indicating that he knew, at the time of the plea, that Petitioner was a non-citizen. Attorney St. Onge testified that "it was [his] practice to get to the bottom of the citizenship issue immediately in terms of

[17] The State posed a hearsay objection to Ms. Espinal's testimony concerning the communications between Petitioner and Attorney St. Onge to which she testified. This Court allowed receipt of the testimony, but reserved decision regarding its ultimate admissibility.

representing Hispanic people" and that he did not advise Petitioner in this case concerning any potential immigration consequences. He testified that "to the best of [his] knowledge," he referred to Petitioner only as Elicier Torres throughout the course of representation in this case. Attorney St. Onge did concede, however, that he had represented Petitioner in a subsequent case in which he referred to him as Henry Espinal. Attorney St. Onge indicated that it was possible that Petitioner lied to him about his immigration status, saying it would not have been the first time that a defendant lied to him.

Petitioner submitted a copy of the criminal information package from the 1997 case into evidence, which included the complaint from his underlying conviction in this case. In type-written font, the complaint identified the defendant as Eliecer Torres, alias Henry Espinal, and a handwritten notation listed Henry Lama as an additional alias. The information package listed Puerto Rico as the defendant's place of birth, but also contained the following handwritten notations: "DR resident – 15 years" and "green card." When asked about the information package, Attorney St. Onge testified that he did not recall whether the handwritten notations existed on the criminal information package at the time of the plea.

Following the evidentiary hearing, counsel for Petitioner in this case argued that this Court should vacate defendant's plea and sentence in the 1997 case because Petitioner was denied effective assistance of counsel. He argued that defense counsel had actual knowledge of Petitioner's immigration status at the time of the plea, adding that he had no motive to hide his immigration status from his attorney. He also contended that, notwithstanding former counsel's knowledge of defendant's immigration status at the time of the plea, Attorney St. Onge failed to advise defendant properly as to the immigration consequences of his plea. According to Petitioner, Attorney St. Onge told him affirmatively that he would not be deported if he entered

the plea. Counsel for Petitioner maintained that his former counsel's advice in this regard was erroneous and fell below the standard of representation expected of competent counsel. He claimed further that Petitioner was prejudiced by Attorney St. Onge's deficient representation, as he rejected multiple plea offers because of their immigration consequences and ultimately accepted the plea at issue only because his former counsel assured him that he would not be deported.

The State countered that former counsel's representation of Petitioner was not deficient, asserting that Attorney St. Onge understood that Petitioner was from Puerto Rico and that, considering Petitioner's criminal record and aliases, Petitioner was probably lying to his former counsel about his immigration status. In defense of former counsel's competency, the State argued that Attorney St. Onge secured Petitioner a favorable disposition in a case that could have carried a prison sentence. The State questioned the credibility of Petitioner's witness, Ms. Isis Espinal, arguing that her testimony was biased and incapable of revealing Petitioner's motivation in accepting the plea. Arguing that Petitioner was not prejudiced by his former counsel's representation of him, the State contended that, had Petitioner chosen to go to trial rather than plead, the outcome of his case would have been the same or more adverse to his interests. The State finally argued that the doctrine of laches bars Petitioner's Amended Application for Post-Conviction Relief because Petitioner entered his plea over ten years ago and reopening that plea now would be per se unreasonable to the State.[18]

[18] This Court will not address the State's laches argument because it did not press this issue at the hearing or present any evidence of unreasonable delay or prejudice. Evidence of delay, without more, is insufficient to prove laches. See Raso v. Wall, 884 A.2d 391, 394 (R.I. 2005).

II

STANDARD OF REVIEW

In Rhode Island, post-conviction relief is available to "any person who has been convicted of . . . a crime . . . and who claims [t]hat the conviction . . . was in violation of the constitution of the United States or the constitution or laws of [Rhode Island]." R.I. Gen. Laws 1956 § 10-9.1-1(a)(1); see also Neufville v. State, 13 A.3d 607, 610 (R.I. 2011). The petitioner must prove, by a fair preponderance of the evidence, that post-conviction relief is warranted. Bleau v. State, 968 A.2d 276, 278 (R.I. 2009) (citing Thornton v. State, 948 A.2d 312, 315-16 (R.I. 2008)).

Our Supreme Court analyzes a post-conviction relief petition that is premised on an ineffective assistance of counsel claim according to the two-prong test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). To satisfy the first prong of the Strickland test, the [petitioner] must show that "counsel's performance was deficient, to the point that [his or her] errors were so serious that . . . counsel did not function at the level guaranteed by the Sixth Amendment." Guerrero v. State, 47 A.3d 289, 300 (R.I. 2012) (quoting Brennan v. Vose, 764 A.2d 168, 171 (R.I. 2001); Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). This component may be established "only by showing that counsel's performance fell below an objective standard of reasonableness." Id. (quoting Brenan, 764 A.2d at 171). Counsel's performance "must be assessed in view of the totality of the circumstances and in light of 'a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.'" Hazard, 968 A.2d at 892 (quoting Heath v. Vose, 747 A.2d 475, 478 (R.I. 2000)).

As our Supreme Court recently reminded applicants, "the decision to enter a plea is not one to be taken lightly." Guerrero, 47 A.2d at 301 (quoting Cote v. State, 994 A.2d 59, 63 (R.I.

2010)). As such, the "sole focus of an application for post-conviction relief . . . is the nature of counsel's advice concerning the plea and the voluntariness of the plea. Id. (quoting Gonder v. State, 935 A.2d 82, 87 (2002)). "The burden is on the applicant to demonstrate that 'the advice was not within the range of competence demanded of attorneys in criminal cases.'" Id. (quoting Tollett v. Henderson, 411 U.S. 258, 266 (1973)). With regard to immigration advice, our Supreme Court quoted the United States Supreme Court in Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), stating that "as a matter of federal law deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on non-citizen defendants. . . ." Id. at 302 (quoting Padilla, 130 S. Ct. at 1480). "To ensure that no criminal defendant—whether a citizen or not—is left to the mercies of incompetent counsel[,] . . . counsel must inform her [or his] client whether [the] plea carries a risk of deportation." Id. (quoting Padilla, 130 S. Ct. at 1486) (citing Neufville, 12 A.2d at 612).

According to the Rhode Island Supreme Court, "[i]f (but only if) it is determined that there was deficient performance, the Court proceeds to the second prong of the Strickland test under which petitioner must "show that the deficient performance prejudiced the defense." Guerrero, 47 A.3d at 300-301**.** Under this prong**,** Petitioner must prove that the "deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of [his or her] right to a fair trial. Id. at 301 (quoting Brennan, 764 A.2d at 171.) As to a plea, **"**[t]he applicant must . . . demonstrate that, but for his [or her] attorney's errors, he [or she] would not have entered a . . . plea, but rather would have proceeded to trial." Gonder, 935 A.2d at 87 (citing Hassett v. State, 899 A.2d 430, 434 (R.I. 2006)). The applicant also must show "that the outcome of that trial would have been different." Neufville, 13 A.3d at 614 (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985)).

III

ANALYSIS

Petitioner proceeds solely on his claim that Attorney St. Onge was constitutionally ineffective for failing to advise Petitioner of the immigration consequences of his plea of nolo contendere.[19] Specifically, Petitioner argues in his Supplemental Memorandum of Law that Attorney St. Onge knew Petitioner's true name and immigration status and that Attorney St. Onge "gave incorrect advice about potential immigration consequences in order to facilitate [Petitioner's] acceptance of a plea agreement." Petitioner argues that Attorney St. Onge's advice prejudiced him because, had Petitioner known that his conviction would result in automatic deportation, there is a reasonable probability that he would have insisted on going to trial rather than entering a plea to an aggravated felony charge of possession of cocaine with intent to deliver in exchange for a sentence of six years suspended with six years probation.

[19] Petitioner's Amended Application for Post-Conviction Relief does not allege that the trial justice's plea colloquy was deficient for failure to address the immigration consequences of Petitioner's plea. Even if Petitioner had raised such an allegation, it would have failed. When Petitioner entered his plea on February 28, 2000, the applicable statute did not require a trial justice to address with the defendant the potential immigration consequences of the plea before accepting a plea of guilty or nolo contendere. See R.I. Gen. Laws 1956 § 12-12-22 (1956) (as written prior to amendment of July 20, 2000). The General Assembly later amended the statute to require a trial justice, before accepting a plea of guilty or nolo contendere, to inform a non-citizen defendant that a plea may have specific immigration consequences. Pub. L. No. 2000, ch. 501 § 1, R.I. Gen. Laws § 12-12-22 (1956) (amended July 20, 2000) ("[p]rior to accepting a plea of guilty or nolo contendere in the district or superior court, the court shall inform the defendant that if he or she is not a citizen of the United States, a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization pursuant to the laws of the United States"). As the Legislature amended the statute subsequent to Petitioner's plea, the amended statute does not control the outcome of this case. See Tavarez v. State, 826 A.2d 941, 944 (R.I. 2003) (citing Ducally v. State, 809 A.2d 472, 474 (R.I. 2002) (per curiam) (quoting Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1141 (R.I. 2002) (holding that R.I. Gen. Laws § 12-12-22, as amended by Pub. L. No. 2000, ch. 501 § 1, did not control the outcome of applicant's post-conviction relief petition because the Court entered the underlying plea fourteen days before the enactment of the amended statute)).

a.

Dismissal for Lack of Prosecution

Rhode Island Rule of Civil Procedure 41(b)(1) states, in relevant part, that "[t]he court may, in its discretion, dismiss any action for lack of prosecution . . . at any time[ ] for failure of the plaintiff to comply with these rules or to proceed when the action is reached for trial." Such dismissal operates as an adjudication on the merits and thus constitutes a dismissal with prejudice. See Super. R. Civ. P. 41(b)(3).

Petitioner here did not appear for the hearing before this Court nor did he provide any direct testimony whatsoever in support of his Amended Application. When this Court granted Petitioner leave to provide testimony via deposition in a foreign country, subject to later ruling on its admissibility, he failed to do so. As a result, he did not prove his identity at the time of his plea or his discussions with his various attorneys that preceded it, nor did he substantiate any of the allegations in his Amended Application. He deprived the State of the right to cross-examine him. This Court is of the view, therefore, that his failure appear and to prosecute his action for post-conviction relief warrants its dismissal with prejudice under Rule 41(b)(1).[20]

[20] It is noteworthy that Petitioner also failed to comply with the dictates of R.I. Gen. Laws §§ 10-9.1-3 and 10-9.1-4 in filing his Amended Application for Post-Conviction Relief. He did not verify his Amended Application. He did not file a sworn affidavit setting forth the facts that were within his personal knowledge to accompany his Amended Application. He did not attach any affidavits, records or other evidence supporting his Amended Application or indicate why they were not attached. Finally, he did not identify all previous proceedings that he took to secure relief (such as his prior applications for post-conviction relief and the multitude of motions to vacate filed on his behalf in related criminal cases). These defects further justify dismissal.

b.

Ineffective Assistance of Counsel

i.

Deficient Representation

Assuming, arguendo, that this Court lacks the authority to dismiss this case under Rule 41(b)(1), it next must determine whether Petitioner proved deficient representation of counsel. Petitioner asserts in his Amended Application for Post-Conviction Relief that the performance of his prior counsel, Edward St. Onge, was objectively unreasonable because his counsel failed to advise him of the immigration consequences of his nolo contendere plea to an aggravated felony and affirmatively advised Petitioner that he would not be deported "since [Petitioner] was not in the system."

In addressing Petitioner's claim of deficient representation, it is again important to note that Petitioner provided no direct testimony at the evidentiary hearing on his claim for post-conviction relief. Given leave to have his testimony presented via a deposition taken in a foreign country, Petitioner also failed to avail himself of that opportunity.

As a result, this Court had no direct testimony before it, under oath from Petitioner, as to his identity or what discussions he had, if any, with Attorney St. Onge regarding his name, citizenship status, country of origin, and the deportation consequences of his plea. He did not testify, nor could he be examined, as to whether he signed the plea form or appeared at the plea hearing. He could not be examined as to who represented him at the plea hearing and in other proceedings. He did not testify, nor could he be examined, as to whether he knew about the immigration consequences of his plea from any other attorney who had represented him or was

representing him in the underlying criminal case or in other criminal or immigration proceedings.[21]

Moreover, the evidence that Petitioner's counsel presented on his behalf fell short of proving counsel's deficient performance. The pertinent testimony provided by Petitioner's wife, Isis Espinal, consisted almost entirely of inadmissible hearsay statements to which the State properly objected. The majority of Ms. Espinal's testimony recounted alleged conversations between Petitioner and Attorney St. Onge that occurred before the Petitioner entered into his nolo contendere plea and thus was inadmissible hearsay. See R.I. Super. Ct. R. Evid. 801(c) & 802; State v. Robinson, 989 A.2d 965, 979 (R.I. 2010). Indeed, Petitioner does not suggest otherwise.

In addition, Ms. Espinal's admissible testimony on direct examination was not helpful to Petitioner in that she stated that she herself had never asked Attorney St. Onge questions about Petitioner's immigration status. On cross-examination, the State elicited testimony from Ms. Espinal indicating that she was not present during all of the meetings or for all of the phone calls between Petitioner and Attorney St. Onge. She made no mention of other attorneys who represented her husband in the underlying criminal case or other criminal or immigration proceedings, nor did she recount any discussions that Petitioner may have had with them concerning immigration consequences. Her testimony, therefore, even if credited, does not establish that Attorney St. Onge knew that Petitioner was a non-citizen and failed to advise Petitioner or affirmatively gave him incorrect advice as to the immigration consequences of his plea, nor does it prove that Petitioner was unaware of those consequences.

[21] This Court is not even certain as to who signed the plea form as defendant and who appeared at the plea hearing. It likewise is not certain that Attorney St. Onge represented Petitioner at the plea hearing.

The testimony of Petitioner's only other witness, Attorney St. Onge, did not provide evidence of counsel's own deficiency. Indeed, as Petitioner did not testify against his former attorney, Attorney St. Onge's testimony went essentially unrebutted. Attorney St. Onge testified that he did not recall being told by either Petitioner or Ms. Espinal that Petitioner was from the Dominican Republic or was concerned about immigration issues, and thus did not advise Petitioner concerning immigration risks. Attorney St. Onge at no point substantiated Petitioner's claim that he had advised Petitioner that Petitioner would not be deported because "he was not in the system." Though the criminal information package contained a notation indicating that Petitioner is from the Dominican Republic, Petitioner failed to prove that Attorney St. Onge was on notice of the notation or even that the notation appeared on the criminal complaint at the time of the plea.[22]

Significantly, the underlying criminal case file, the criminal case file with reference to his prior plea and the immigration records filed by Petitioner, suggest that he has lied repeatedly regarding his true identity. He entered the plea at issue here in the name of Eliecer Torres, entered his plea in the 1996 case in the name of Henry Lama, and represented himself before the Immigration Court and in his post-conviction relief applications as Henry Espinal. Given the extent to which Petitioner has used different aliases, addresses, dates of birth and countries of origin—as reflected in the various police reports, court appearances and pleadings in the court files—it is not inconceivable that Petitioner may have lied to his attorney about his immigration status. He may have told Attorney St. Onge that he was from Puerto Rico rather than the Dominican Republic—an assertion corroborated by what he told the police at the time of his arrest, as evidenced in the criminal information packet underlying this action. Petitioner thus

[22] The copy of the information package which Petitioner submitted into evidence originated from the Attorney General's Department file and not the criminal case file. This Court has subsequently compared this document to the document filed in the criminal case file and found them to be identical.

may have played games about his identity and country of origin and not raised any immigration concerns with his attorney. In addition, it is possible that it was not even Henry Espinal who Attorney St. Onge counseled or who appeared in Court with respect to these pleas. The descriptions of the defendant in the different court files and his different signatures on court documents make this more than an abstract possibility. Perhaps Attorney St. Onge counseled a person who purported to be Henry Espinal, but who was a citizen of Puerto Rico. Accordingly, Attorney St. Onge may have advised him properly.

It also is possible that attorney and client knew that Eliecer Torres was "in the system" as a resident of Puerto Rico. Perhaps counsel told Petitioner that fact might spare him deportation—a gamble Petitioner was willing to take.

Considering the dearth of admissible evidence in support of Petitioner's claim that his attorney was deficient in representing him, and attaching special significance to Petitioner's lack of appearance and direct testimony, this Court finds that Petitioner did not prove his counsel's deficiency by a preponderance of the evidence. Failure to succeed on the deficiency prong of the Strickland test defeats Petitioner's ineffective assistance of counsel claim. Strickland, 466 U.S. at 700, 104 S. Ct. at 2071; Guerrero, 47 A.3d at 300.

ii.

Prejudice

Even assuming, arguendo, that Petitioner could satisfy the deficiency prong of Strickland, he cannot succeed with his Amended Application unless he also proves prejudice. In arguing that counsel's ineffective assistance caused him prejudice, Petitioner asserts that he would not have pled and would have insisted on going to trial had he known of the immigration

consequences of his conviction. In his Amended Application, he seeks to vacate his plea and conviction and, presumably, go to trial.

Our Supreme Court has held that "when counsel has secured a shorter sentence than what the defendant could have received had he gone to trial, the defendant has an almost insurmountable burden to establish prejudice." Neufville, 13 A.3d at 614 (citing Rodrigues v. State, 985 A.2d 311, 317 (R.I. 2009)). Here, officers seized eight small bags of cocaine from Petitioner's person and charged him with one count of possession of a controlled substance with intent to deliver. At the time, this offense carried a maximum sentence of thirty years imprisonment. R.I. Gen. Laws 1956 § 21-28-4.01(a)(2)(A) (Supp. 1998). After approximately three years, Petitioner accepted the State's offer of six years suspended sentence with six years probation. This Court is hard-pressed to find—particularly in the absence of any supporting testimony by Petitioner—that but for the alleged deficiency of his attorney, Petitioner would have opted for a trial rather than his plea. Petitioner has not testified nor has he otherwise proven that in the face of a trial and sentence, after trial, of up to thirty years in prison, he would not have entered a plea that spared him any jail sentence, even if that plea could have resulted in his deportation. Perhaps Petitioner knew he could suffer immigration consequences and hoped that, by hiding behind his alias, he would be spared deportation.

In addition, courts that have interpreted the prejudice prong for purposes of Padilla have found that a petitioner's own knowledge of immigration consequences of a plea from a source other than trial counsel also defeats a claim of prejudice. See Wang v. U.S., No. 10 Civ. 4425 (BMC), 2011 WL 73327, at * 5 (E.D.N.Y. Jan. 10, 2011); Gonzalez v. U.S., Nos. 10 Civ. 5463 (AKH), 08 Cr. 146 (AKH), 2010 WL 3465603, at *1 (S.D.N.Y. Sept. 3, 2010); Brown v. U.S., No. 10 Civ. 3012 (BMC), 2010 WL 5313546, at * 6 (E.D.N.Y. Dec. 17, 2010). This knowledge

can come from the Court. See Wang, 2011 WL 73327, at * 5 ("[b]ut even if his trial counsel did not apprise him of his basic rights and the risks of pleading guilty, [petitioner] cannot prove prejudice because he was so informed by this Court at the plea hearing"); Gonzalez, 2010 WL 3465603, at *1 ("[a]ssuming that [petitioner's] trial attorney failed to advise him that he could be deported as a result of pleading guilty, that failure was not prejudicial since, prior to accepting his plea, [the Court] advised [petitioner] that he could be deported as result of his guilty plea"). It also can come from some other source. See Brown, 2010 WL 5313546, at * 6 ("[a]s courts applying Padilla have recognized, when a defendant learns of the deportation consequences of his plea from a source other than his attorney, he is unable to satisfy Strickland's second prong because he has not suffered prejudice").

Here, Petitioner has not testified that he had no knowledge of the immigration consequences of his plea from his counsel at the time of the plea, the plea form, any other attorneys who represented him, or some other source. In particular, at the evidentiary hearing before this Court, Petitioner did not present the testimony of his counsel of record in this case, Attorney Uhlmann, leaving this Court to wonder whether she had advised Petitioner concerning immigration issues.[23] Furthermore, the plea form that Petitioner signed in this case stated in bold uppercase print: "I understand that if I am a resident alien, a sentence imposed as a result of my plea may result in deportation proceedings over which this court has no control." See Neufville, 13 A.3d at 613 (considering the notification of immigration consequences contained in petitioner's plea form when assessing the "multiple layers of advice" petitioner received as to the

[23] This Court also takes judicial notice that Attorney Uhlmann previously represented Petitioner on another drug possession charge. See State v. Lama, C.A. No. P2-96-2110B (R.I. Super. 1996). Attorney Uhlmann entered her appearance for Petitioner in that case on March 5, 1997 and actively represented him at the time of his nolo contendere plea to possession of heroin on March 20, 1998. Id. The Immigration Court's decision in Petitioner's removal proceedings, which was submitted to this Court as part of Petitioner's Supplemental Memorandum of Law, in fact referenced Petitioner's heroin conviction. See In the Matter of Henry Edison Espinal, File A 40 549 273, at 3 (Feb. 18, 2005). Query whether Petitioner received immigration advice of counsel in that case that had a bearing on his understanding of immigration consequences in the case underlying this post-conviction relief action?

immigration consequences of his plea). Considering this evidence, Petitioner's failure to testify, the entry of his plea form and the dearth of evidence showing he had no knowledge of immigration consequences, Petitioner has failed to prove that he had no knowledge of the immigration consequences of his plea at issue here.

Finally, the existence of Petitioner's prior conviction also serves to eviscerate Petitioner's claim of prejudice. Even if this Court were to vacate his plea and conviction that is the subject of his Amended Application, Petitioner still could have been deported as a result of his prior conviction. See, e.g., U.S. v. Perez, No. 8:02CR296, 2010 WL 4643033, at * 3 (D. Nebraska Nov. 9, 2010) (questioning whether defendant could establish prejudice where, even if judgment was vacated in instant matter, pending charges likely would have been reinstated in another jurisdiction leaving defendant still subject to deportation). Using the alias of Henry Lama, Petitioner pled nolo contendere on March 20, 1998 to one count of possession of heroin, in violation of R.I. Gen. Laws § 21-28-4.01(a)(2)(A), and received a sentence of three years' probation. State v. Henry Lama, C.A. No. P2-96-2110B (R.I. Super. 1996). The Immigration Judge presiding over Petitioner's removal proceedings that preceded this post-conviction relief action found that Petitioner was ineligible for cancellation of removal because of his cocaine conviction, but noted: "[b]ecause I found this conviction is an aggravated felony, I do not need to reach the issue of whether the respondent's heroin conviction is also an aggravated felony, although it would appear to be so […]." In the Matter of Henry Edison Espinal, File A 40 549 273, at 3 (Feb. 18, 2005). The Judge specifically stated that "[…] it does not appear to me that [Petitioner] is eligible for any other relief under the [Immigration and Nationality Act], particularly in view of the fact that the respondent has multiple convictions for drug offenses." Id. at 4. As noted by the Immigration Court, therefore, Petitioner's previous drug conviction

likely would have made him subject to deportation; therefore, even if Petitioner had gone to trial for the charge underlying this case and succeeded, he still could have been subject to removal as a result of his prior conviction. He thus cannot establish prejudice from the alleged ineffective assistance of counsel here because, even were this Court to vacate his plea, he has failed to prove that he would be spared deportation in the face of his prior plea. See U.S. v. Perez, 2010 WL 4643033, at * 3.

For all of these reasons, even if Petitioner could prove that his counsel was deficient, he has failed to prove prejudice. His claim of ineffective assistance of counsel, therefore, must be rejected.

IV

CONCLUSION

Petitioner's Amended Application for Post-Conviction Relief is dismissed, with prejudice, pursuant to Rhode Island Superior Court Rule of Civil Procedure 41(b)(1) for Petitioner's failure to appear to press his application. Such dismissal is supported by his failure to comply with the dictates of R.I. Gen. Laws § 10-9.1-3. Alternatively, Petitioner's Amended Application is denied and dismissed on its merits, as Petitioner failed to testify or otherwise prove that counsel's performance in connection with his plea was deficient or, even assuming deficiency, that he suffered prejudice.

Counsel are directed to confer and to submit to this Court forthwith for entry an agreed upon form of Order and Judgment that are consistent with this Decision.