

## Garden State CLE Presents:



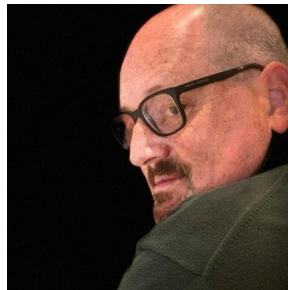
### **Saving Your Clients from Catastrophe DWI PCR (with Forms)**



**Robert Ramsey, Ed.D.**



**Ronald P. Mondello, Esquire**



**John Menzel, Attorney**

### **Lesson Plan**

# I.

## In General

- 1) PCR may have value for any offense that requires enhanced sentencing based upon a prior conviction (e.g., N.J.S.A. 2C:20-11).
  
- 2) A successful collateral attack on a prior DWI conviction can often save the defendant from a mandatory jail term. Moreover, depending upon the date of the prior offense(s), the defendant may be instantly transformed from a third offender to a first offender based upon the 10-year step-down in N.J.S.A. 39:4-50(a)(3).
  
3. The outcome of a successful collateral attack on a prior offense can also be critical in cases involving N.J.S.A. 2C:40-26 (See State vs. Faison, 452 N.J.Super 390(App.Div.2017); See also State vs. Konecny, 250 N.J. 321(2022) (A conviction for which a defendant has been granted Laurick relief cannot be used to increase a driving on the revoked list sentence pursuant to N.J.S.A. 2C:40-26(b) [or N.J.S.A. 39:3-40(f)(2) and (3) – see also State vs. Thomas, 401 N.J.Super 180(LawDiv.2007)]).

## II. Characteristics of PCR:

- 1) Civil Action, the equivalent of federal habeas corpus petition.
- 2) Petitioner bears burden of production.
- 3) Burden of proof by preponderance of the evidence – State vs. Preciose, 129 N.J. 451, 462(1992).
- 4) Not a substitute for direct appeal; Cannot be filed during a pending appeal.
- 5) Hearings required for outside the trial record (e.g., ineffective assistance);
- 6) Granting the PCR petition returns the parties to the *status quo ante* – See State vs. Roddy, 210 N.J.Super 62, 68(App.Div.1986).
- 7) A defendant may not be punished twice for the same offense – State vs. Schubert, 212 N.J. 295, 304(2012) citing NJ Const. Art I, para 11.
- 8) If a PCR application is granted which vacates a prior DWI or refusal conviction, that outcome should immediately be reported by the Court Administrator to MVC on a “Corrected MF-1” card. This will remove the violation and conviction from the defendant’s certified MVC abstract.

### III. Time Limitations

1) Five years for ordinary PCR - Rule 7:10-2(b)(2);

A petition based on any other grounds shall not be accepted for filing more than five years after entry of the judgment of conviction or imposition of the sentence sought to be attacked, unless it alleges facts showing that the delay in filing was due to defendant's excusable neglect.

Note that relaxation per Rule 1:1-2 should be granted only under “exceptional circumstances” to avoid an injustice - State vs. Mitchell, 126 N.J. 565, 580(1992). Courts should consider the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claim in determining whether there has been an injustice sufficient to relax the time limits. State vs. Milne, 178 N.J. 486, 492(2004) (quoting State vs. Afanador, 151 N.J. 41, 52(1997)).

2) Time begins to run on date of conviction.

3) Laurick applications – NONE (State vs. Patel, 239 N.J. 424(2019)).

4) ZINGIS petitions – NONE (State vs. Zingis, \_\_\_ N.J. \_\_\_ (2024)).

5) Illegal sentence- NONE – Rule 7:10-2(b)(1).

6) Motion to withdraw a plea to correct a manifest injustice under Rule 7:6-2(b) – NONE.

7) Motion to reduce or change a sentence under Rule 7:9-4 – NONE

The court, in its discretion, may reduce or change a sentence, either on its own motion or on the motion of defendant, which may be either oral or written, at any time during which the court retains jurisdiction over the matter.

## 8) New trial under Rule 7:10-1 – Various time limitations

On defendant's motion, the court may, pursuant to the time limitations of this rule, grant the defendant a new trial if required in the interest of justice. The court may vacate the judgment if already entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial, based on the ground of newly discovered evidence, shall be made within two years after entry of a final judgment. A motion for a new trial on the grounds of fraud or lack of jurisdiction may be made at any time. A motion for a new trial, based on any other grounds, shall be made within twenty days after the entry of judgment of conviction or within such further time as the court fixes during the twenty-day period.

## IV. Types of PCR in DWI Cases

### A) ZINGIS Petitions

- 1) Prior conviction should have occurred between November 5, 2008 and April 9, 2016.
- 2) Prior offense should have occurred in one of the following counties: Union, Somerset, Monmouth, Ocean, Middlesex (USMOM).
- 3) Prior conviction should be based, at least in part, on a blood alcohol level that was obtained through testing on an Alcotest 7110.
- 4) Contents of petition should include these exhibits:
  - (a) Alcohol Influence Report (AIR)
  - (b) Dennis calibration related to date of Defendant breath test signed by Sgt. Dennis.
  - (c) Ticket number & date of conviction
  - (d) Sentence imposed
  - (e) Certification that the BAC influenced the trial/plea decision.
  - (f) Certification that sentence imposed by the Court has been completed.
  - (g) Open questions relate to blowing refusals.
- 5) Assignment of Counsel – Rule 7:10-2(e)

Assignment of Counsel. A defendant may annex to the petition a sworn statement asserting indigency in the form (Form 5A) prescribed by the Administrative Director of the Courts, which form shall be furnished by the municipal court

administrator. If the court finds that the defendant is indigent as herein provided, and that the original conviction involved a consequence of magnitude, it shall order counsel assigned to represent defendant and shall further order a transcript of testimony of any proceeding shown to be necessary in establishing the grounds of relief asserted. Absent a showing of good cause, which shall not include lack of merit of the petition, the court shall not substitute new assigned counsel. If counsel is assigned, the court shall not thereafter substitute new assigned counsel absent a showing of good cause, which shall not, however, include lack of merit of the petition.

### **B. Laurick Petition – Rule 7:10-2(g)**

1) This application is only available to defendant's who were pro se when the DWI case was resolved.

This form of post-conviction relief does not prohibit the imposition of enhanced financial or administrative penalties, such as a period of license suspension. By "un-counseled" the Court meant an unrepresented defendant who was not advised by the municipal court of his right to retain counsel or, if indigent, of his right to appointed counsel without cost; who otherwise did not know of his right to counsel in the proceeding and did not waive that right; and who, if properly advised of his rights, would have secured counsel or accepted appointed counsel. The defendant has the burden of proving he was un-counseled but is not required to establish that the outcome would have been different had he been represented.

2) A non-indigent defendant must demonstrate that in the earlier un-counseled DWI proceeding:

(a) He was not advised or did not know of his right to counsel; and

(b) Had he known of his right to counsel, he would have retained a lawyer.

3) An indigent defendant must establish that in the earlier un-counseled DWI proceeding:

(a) He was not advised and did not know of his right to appointed counsel;

(b) He was entitled to the appointment of counsel under the applicable financial means test, R. 7:3-2(b); and

(c) Had he been properly informed of his rights; he would have accepted appointed counsel.

4) Because denial of counsel is a structural defect in the proceeding, to secure relief from an enhanced custodial sentence, neither an indigent nor a non-indigent defendant needs to show that the outcome would have been different had he been represented.

5) Burden of production - The defendant has the burden of proving that his prior un-counseled DWI conviction was based on the municipal court's failure to advise him of his right to counsel. If municipal courts retain the records mandated by our rules and jurisprudence, determining whether there was compliance with the notice requirements related to representation by counsel should not be difficult.

6) Lack of court records - The defendant must secure the relevant court documents or the electronic recording or transcript of the proceeding to establish a violation of the notice requirement. In the absence of documentary evidence or witnesses with a recollection, the defendant is in a position to do no more than file an affidavit or certification averring that he was not advised of his right to counsel and did not know that he could retain counsel. The defendant who claims he was indigent at the time of the prior proceeding should attest that he was not advised and did not know of his right to appointed counsel and was unable to afford an attorney. He also should attach to his affidavit or certification relevant documents -- bank statements or other financial documents that would establish his indigence in accordance with the standards set forth in N.J.S.A. 2A:158A-14 and N.J.S.A. 2B:24-9.

7) Appeals from denial or grant - Appeals from a denial of post-conviction relief from the effect of a prior conviction must be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under Rule 3:23-2(a).

8) The order granting relief should state that the underlying DWI conviction may not be used to enhance the custodial term associated with a subsequent conviction. This would include drunk-driving cases, N.J.S.A. 2C:40-26 and N.J.S.A. 39:3-40(f)(1) and (2). See State vs. Konecny, 250 N.J. 321(2022).

**Sample Laurick PCR Forms under Rule 7:10-2(g)**

**LAW OFFICE OF ROBERT RAMSEY  
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HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

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**STATE OF NEW JERSEY** : **EWING TOWNSHIP MUNICIPAL COURT**  
**Plaintiff** : **MERCER COUNTY**

**vs.** : **SUMMONS NO. 123456**

**SCOTT A. BROWN** :  
**Defendant** : **CERTIFICATION OF  
SCOTT A. BROWN**

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I, Scott A. Brown, of full age do certify the following to be true:

1) On or about March 12, 1983, I was charged with a violation of N.J.S.A. 39:4-50 in Mansfield Township, Burlington County, New Jersey.

2) My first appearance on the drunk-driving charge was set for March 24, 1983. I appeared in the Ewing Township Municipal Court on March 24, 1983 and entered a plea of guilty to the original charge of drunk driving.

3) When I appeared in court and pled guilty, an attorney did not represent me, nor had I spoken to an attorney about the case because I could not afford one at the time. In 1983, I was employed making \$7.00 per hour processing x-rays for a living and raising 2 small children. There was just no way that I could afford the retainer of a lawyer to represent me. As a result, I simply pled guilty.

4) During my first appearance, I was not informed by the judge of my right to an appointed, free attorney. Had I been made aware of this option, I would have

asked for a lawyer because I wanted to be represented by a lawyer, but I could not afford one.

5) I have requested through my lawyer, Robert Ramsey, Esquire a copy of my plea and sentencing hearing from March 24, 1983. The Court Administrator has informed us that no such transcript exists. I have attached hereto a copy of her letter dated March 11, 2005 marked as Exhibit A.

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

---

Scott A. Brown

Dated: \_\_\_\_\_

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

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**STATE OF NEW JERSEY** : **EWING TOWNSHIP MUNICIPAL COURT**  
**Plaintiff** : **MERCER COUNTY**  
**vs.** : **SUMMONS NO. 123456**  
**SCOTT A. BROWN** : **ORDER**  
**Defendant** :

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This matter having been opened to the court upon the application of the Law Office of Robert Ramsey, Attorneys at Law, Robert Ramsey, Esquire appearing, and the Court having considered the arguments of counsel and other good cause having been shown;

**IT IS ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2024**

**ORDERED** that Defendant's conviction for a violation of N.J.S.A. 39:4-50(a), entered in this court on March 24, 1983 shall not be used to enhance the custodial aspect of any future conviction for a violation of N.J.S.A. 39:4-50(a).

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Dudley Doright, J.M.C.

**LAW OFFICE OF ROBERT RAMSEY  
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(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

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<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	
<b>vs.</b>	<b>:</b>	<b>SUMMONS NO. 123456</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>NOTICE OF MOTION FOR RELIEF FROM A PRIOR CONVICTION</b>
<b>Defendant</b>	<b>:</b>	<b>PURSUANT TO <u>RULE</u> 7:10-2(g)</b>

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**PLEASE TAKE NOTICE** that on a date to be set by the Court, pursuant to Rule 7:9-4(a), the undersigned counsel for Defendant, Scott A. Brown, will make an application before the Ewing Township Municipal Court for relief from a prior conviction pursuant to Rule 7:10-2(g).

In support of the within application, the undersigned counsel will rely upon the annexed Memorandum of Law and oral argument.

**RAMSEY LAW OFFICE**

**ROBERT RAMSEY**

Dated: December 4, 2024

## C. Standard PCR Petitions

The prototypical PCR application under Rule 7:10-2(a) will allege ineffective assistance of counsel. Another common application is based upon unintended collateral consequences of which the defendant was never informed prior to a plea, especially those involving immigration (removal or inability to attain green card status or become a USC).

The briefing and related documentary submissions in the PCR should provide support for the following legal issues:

i) Ineffective assistance of counsel - To establish a claim for ineffective assistance of counsel, a defendant must show deficient performance by counsel so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the defendant was prejudiced by the attorney's performance.

The Sixth Amendment of the United States Constitution and the New Jersey Constitution guarantee criminal defendants the right of counsel, which requires that defendants receive effective assistance of counsel. Strickland vs. Washington, 466 U.S. 668, 686 (1984).

To establish an ineffective assistance of counsel claim, a defendant must establish: 1) the performance prong—i.e., whether counsel's representation "fell below an objective standard of reasonableness" and 2) the prejudice prong- i.e., whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

New Jersey adopted the identical standard in State vs. Fritz, 105 N.J. 42, 58(1987) as a matter of New Jersey constitutional doctrine.

ii) Immigration collateral consequences

With the Strickland standard in mind, both the New Jersey Supreme Court and the United States Supreme Court decided cases concerning ineffective assistance of counsel claims in which guilty pleas were followed by immigration consequences. In 2009, the New Jersey Supreme Court in Nuñez-Valdéz, 200 N.J. 129(2009) imposed a duty on counsel to avoid providing false or affirmatively misleading

information about the deportation consequences of a guilty plea. A year later, the United Supreme Court in Padilla vs. Kentucky, 559 U.S. 356(2010) mandated that defense attorneys must affirmatively advise their clients of the potential immigration consequences of pleading guilty or essentially the attorney is at risk of providing constitutionally defective assistance of counsel.

### iii) Contents of petition

(a) Petition for Relief. A person convicted of an offense may, pursuant to this rule, file with the municipal court administrator of the municipality in which the conviction took place, a petition for post-conviction relief captioned in the action in which the conviction was entered.

#### (b) Limitations and Exclusiveness.

(1) A petition to correct an illegal sentence may be filed at any time.

(2) A petition based on any other grounds shall not be accepted for filing more than five years after entry of the judgment of conviction or imposition of the sentence sought to be attacked, unless it alleges facts showing that the delay in filing was due to defendant's excusable neglect.

(3) A petition for post-conviction relief shall be the exclusive means of challenging a judgment of conviction, except as otherwise required by the Constitution of New Jersey, but it is not a substitute for appeal from a conviction or for a motion incident to the proceedings in the trial court and may not be filed while appellate review or the filing of a motion in the municipal court is available.

(c) Grounds. A petition for post-conviction relief is cognizable if based on any of the following grounds:

(1) substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of New Jersey;

(2) lack of jurisdiction of the court to impose the judgment rendered on defendant's conviction;

(3) imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law; or

(4) any ground previously available as a basis for collateral attack on a conviction by habeas corpus or any other common law or statutory remedy.

(d) Bar of Grounds Not Raised in Prior Proceedings; Exceptions.

(1) The defendant is barred from asserting in a proceeding under this rule any grounds for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of Rule 3:22-4, or in any appeal taken in any of those proceedings, unless the court on motion or at the hearing finds that:

(A) the grounds for relief not previously asserted could not reasonably have been raised in any prior proceeding;

(B) enforcement of the bar would result in fundamental injustice; or

(C) denial of relief would be contrary to the Constitution of the United States or New Jersey.

(2) A prior adjudication on the merits of any grounds for relief asserted in the petition is conclusive, whether made in the proceedings resulting in the conviction or any prior post-conviction proceeding, or in any appeal taken from those proceedings.

(e) Procedure.

(1) The municipal court administrator shall make an entry of the filing of the petition in the proceedings in which the conviction took place, and if it is filed pro se, shall forthwith

transmit a copy to the municipal prosecutor. An attorney filing the petition shall serve a copy on the municipal prosecutor before filing.

(2) The petition shall be verified by defendant and shall set forth with specificity the facts upon which the claim for relief is based, the legal grounds of the complaint asserted and the particular relief sought. The petition shall include the following information:

(A) the date, docket number and contents of the complaint upon which the conviction is based and the municipality where filed;

(B) the sentence or judgment complained of, the date it was imposed or entered, and the name of the municipal court judge then presiding;

(C) any appellate proceedings brought from the conviction, with copies of the appellate opinions attached;

(D) any prior post-conviction relief proceedings relating to the same conviction, including the date and nature of the claim and the date and nature of disposition, and whether an appeal was taken from those proceedings and, if so, the judgment on appeal;

(E) the name of counsel, if any, representing defendant in any prior proceeding relating to the conviction, and whether counsel was retained or assigned; and

(F) whether and where defendant is presently confined. A separate memorandum of law may be submitted.

(G) In addition, the moving papers in support of such an application shall include, if available,

records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(3) Amendments of the petitions shall be liberally allowed. Assigned counsel may, as a matter of course, serve and file an amended petition within 25 days after assignment. Within 30 days after service of a copy of the petition or amended petition, the municipal prosecutor shall serve and file an answer to the petition or move on ten days' notice for dismissal. If the motion for dismissal is denied, the government's answer shall be filed within fifteen days after entry of the order denying the dismissal.

(4) A defendant in custody shall be present in court if oral testimony is adduced on a material issue of fact within the defendant's personal knowledge. A defendant in custody may otherwise be present in court only in the judge's discretion.

(5) In making a final determination on a petition, either on motion for dismissal or after hearing, the court shall state separately its findings of fact and conclusions of law and shall enter judgment or sentence in the conviction proceedings and any appropriate provisions as to re-arraignment, retrial, custody, bail, discharge, correction of sentence or as may otherwise be required.

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ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

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<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	<b>SUMMONS NO. 123456</b>
<b>vs.</b>	<b>:</b>	<b>QUASI-CRIMINAL ACTION</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>ORDER GRANTING</b>
<b>Defendant</b>	<b>:</b>	<b>POST-CONVICTION RELIEF</b>

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**THIS MATTER** having been opened to the Court by the Law Office of Robert Ramsey, Attorneys-at-Law, Robert Ramsey, Esquire, appearing on behalf of the defendant, Scott A. Brown, James Thorpe, Esquire, Municipal Prosecutor, appearing on behalf of the State of New Jersey, and the Court having considered the arguments of counsel, the pleadings and other moving papers submitted and good cause having been shown;

**IT IS ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2024;**

**ORDERED** that Defendant's petition for Post-Conviction relief in the within matter is granted and the plea of guilty and resulting conviction entered be and is hereby vacated;

**IT IS FURTHER ORDERED** that the within matter be rescheduled in the Ewing Township Municipal Court for further proceedings.

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Dudley Doright, J.M.C

## **D. Motion to Vacate a Plea – Rule 7:6-2(b)**

A motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice.

See State vs. J.J., 397 N.J.Super 91(App.Div.2007).

Pre-sentence (interests of justice) vs. post-sentence burdens (manifest injustice).

Commentary - The main advantages to the use of this rule are that it has no statute of limitations and does not require the formal pleadings of a conventional PCR application. Technically, the application be made orally (Rule 7:7-2(a)) and can be relaxed to permit written submissions in support of the motion under Rule 1:1-2.

It has utility in the following circumstances:

i) No factual basis for the guilty plea - State vs. Barboza, 115 N.J. 415(1989) – Slater plea withdrawal factors do not apply for these applications. State vs. Tate, 220 N.J. 393(2015).

ii) Significant collateral consequences of which defendant was not made aware prior to plea (e.g., forfeiture of public office, lifetime loss of commercial driving privileges, loss of ability to purchase/possess firearms). See discussion in State vs. Bellamy, 178 N.J. 127(2003).

iii) No advisement as to immigration consequences – Directive 09-11.  
See: [https://www.njcourts.gov/sites/default/files/administrative-directives/2011/12/dir\\_09\\_11.pdf](https://www.njcourts.gov/sites/default/files/administrative-directives/2011/12/dir_09_11.pdf)

iii) Illegal sentence.

iv) Lack of jurisdiction in the court (territorial or subject-matter).

## **E. Motion to Reduce a Sentence**

a) Time. The court, in its discretion, may reduce or change a sentence, either on its own motion or on the motion of defendant, which may be either oral or written, at any time during which the court retains jurisdiction over the matter.

(b) Procedure. All changes of sentence shall be made in open court upon notice to the defendant and the prosecuting attorney. An appropriate order setting forth the revised sentence and specifying the change made and the reasons for the change shall be entered on the record.

## **F. Appeals from PCR by Defendant and State**

### i) Appeals by Defendant – Rule 7:10-2(g)(5)

Appeals from a denial of post-conviction relief from the effect of a prior conviction shall be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under Rule 3:23-2(a).

### ii) Appeals by the State

The defendant, a defendant's legal representative, or other person aggrieved by a judgment of conviction, or the defendant or State, if aggrieved by a final post judgment order entered by a court of limited jurisdiction shall appeal therefrom by filing a notice of appeal with the clerk of the court below within 20 days after the entry of judgment.

## **G. New Trial – Rule 7:10-1**

On defendant's motion, the court may, pursuant to the time limitations of this rule, grant the defendant a new trial if required in the interest of justice. The court may vacate the judgment if already entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial, based on the ground of newly discovered evidence, shall be made within two years after entry of a final judgment. A motion for a new trial on the grounds of fraud or lack of jurisdiction may be made at any time. A motion for a new trial, based on any other grounds, shall be made within twenty days after the entry of judgment of conviction or within such further time as the court fixes during the twenty-day period.

## **H. Sample PCR Forms**

**LAW OFFICE OF ROBERT RAMSEY  
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ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

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<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	
<b>vs.</b>	<b>:</b>	<b>SUMMONS NO. 123456 QUASI-CRIMINAL ACTION</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>MOTION FOR POST-CONVICTION RELIEF PURSUANT TO <u>RULE 7:10-2</u></b>
<b>Defendant</b>	<b>:</b>	

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**PLEASE TAKE NOTICE** that on a date to be set by the Court, the undersigned counsel for defendant-petitioner, Scott A. Brown, will make an application before the Ewing Township Municipal Court for Post-Conviction Relief in connection with the above captioned matters pursuant to Rule 7:10-2.

In support of this application, the defendant-petitioner will rely upon the annexed Memorandum of Law, transcript of prior sentencing proceedings, Verified Petition of defendant-petitioner and oral argument.

The defendant-petitioner will also rely upon certain precedents of the New Jersey Supreme Court which are set forth with more specificity in the attached memorandum of law.

**RAMSEY LAW OFFICE**

**ROBERT RAMSEY**

Dated: December 4, 2024

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(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

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<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	
<b>vs.</b>	<b>:</b>	<b>SUMMONS NO. 123456 QUASI-CRIMINAL ACTION</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	
<b>Defendant</b>	<b>:</b>	<b>VERIFICATION OF DEFENDANT</b>

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I, Scott A. Brown, of full age, do certify the following to be true:

- 1) I am the defendant in the above captioned matter.
- 2) I petition the Ewing Township Municipal Court for Post-Conviction Relief in the above-captioned matter.
- 3) I am seeking relief for substantial denial of my rights in the conviction proceedings under the Constitution of the United States and the Constitution and Laws of the State of New Jersey.
- 4) I make this application for Post-Conviction Relief in light of certain Supreme Court cases, which have been decided since the date of my offense. I also certify that this type of application is permissible by virtue of a decision by the Supreme Court of New Jersey decided after the date of my conviction.
- 5) In compliance with Rule 3:22-8, I provide the following information:
  - a) The docket number is SPY00000 - N.J.S.A. 39:6b-2.

b) Complaint SPY00000 was resolved by way of a guilty plea in the Ewing Township Municipal Court on April 8, 1999, before the Honorable Bo Did, J.M.C.

c) There have been no appellate proceedings brought in my case.

d) There have been no Post-Conviction Relief proceedings related to this conviction.

e) I was not represented by counsel during the plea and sentencing hearing, which took place on April 8, 1999.

f) I am not presently incarcerated.

Pursuant to Rule 1:4-4(b), I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

---

Scott A. Brown

Dated: \_\_\_\_\_

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

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<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	
<b>vs.</b>	<b>:</b>	<b>SUMMONS NO. 123456 QUASI-CRIMINAL ACTION</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	
<b>Defendant</b>	<b>:</b>	<b>NOTICE OF MOTION FOR A NEW TRIAL PURSUANT TO <u>RULE 7:10-1</u></b>

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**PLEASE TAKE NOTICE** that on a date to be set by the Court, pursuant to Rule 7:10-1, the undersigned counsel for Defendant, Scott A. Brown, will make an application before the Lawrence Township Municipal Court for a new trial on complaint no. 123456.

In support of the within application, the undersigned counsel will rely upon the annexed Memorandum of Law and oral argument.

**RAMSEY LAW OFFICE**

**ROBERT RAMSEY**

Dated: December 4, 2024

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

---

**STATE OF NEW JERSEY : EWING TOWNSHIP MUNICIPAL COURT  
MERCER COUNTY**  
**Plaintiff :  
vs. : SUMMONS NO. 123456**  
**SCOTT A. BROWN : QUASI-CRIMINAL ACTION**  
**Defendant : NOTICE OF MOTION FOR CHANGE OF  
SENTENCE PURSUANT TO RULE 7:9-4(a)**

---

**TO: John Doe, Municipal Prosecutor      Honorable Dudley Doright, J.M.C.  
Ewing Township Municipal Court      Ewing Township Municipal Court  
2 Jake Garzio Drive                      2 Jake Garzio Drive  
Ewing, New Jersey 08628                Ewing, New Jersey 08628**

**Mary Martin, Court Administrator  
Ewing Township Municipal Court  
2 Jake Garzio Drive  
Ewing, New Jersey 08628**

**PLEASE TAKE NOTICE** that on a date to be set by the Court, pursuant to Rule 7:9-4(a), the undersigned counsel for the defendant, Scott A. Brown, will make an application before the Ewing Township Municipal Court for a change of sentence previously imposed on complaint no. 123456.

In support of the within application, the undersigned counsel will rely upon the annexed Memorandum of Law and oral argument.

**RAMSEY LAW OFFICE**

**ROBERT RAMSEY**

Dated: December 4, 2024

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

---

<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	<b>SUMMONS NO. 123456</b>
<b>vs.</b>	<b>:</b>	<b>QUASI-CRIMINAL ACTION</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>CERTIFICATION OF DEFENDANT</b>
<b>Defendant</b>	<b>:</b>	

---

I, Scott A. Brown, do certify the following statements to be true:

- 1) I am the defendant in the above captioned matter.
- 2) On or about September 2, 2002, I received a speeding ticket from the Ewing Township Police Department. I subsequently paid the above captioned speeding ticket through the violations bureau in the Ewing Township Municipal Court.
- 3) As the result of the payment of this traffic ticket, I have been subject to a variety of collateral consequences, which I was not anticipating. Nor was I informed that I would be subject to these consequences by payment of the ticket.
- 4) I was not aware that this was going to happen as a result of my entering this plea of guilty through the Ewing Township violations window.

5) I have been informed that I could possibly resolve this case in a more beneficial way to myself through the plea-bargaining process or by taking the case to trial. I was not aware that any of these possibilities existed for me.

Pursuant to Rule 7:6-2(b), I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

---

Scott A. Brown

Dated: \_\_\_\_\_

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

---

<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	<b>SUMMONS NO. 123456</b>
<b>vs.</b>	<b>:</b>	<b>QUASI-CRIMINAL ACTION</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>ORDER GRANTING WITHDRAW OF GUILTY PLEA</b>
<b>Defendant</b>	<b>:</b>	

---

**THIS MATTER** having been opened to the Court by the Law Office of Robert Ramsey, Attorneys-at-Law, Robert Ramsey, Esquire, appearing on behalf of the defendant, Scott A. Brown, and the Court having considered the arguments of counsel and other moving papers submitted and good cause having been shown;

**IT IS ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2024;**

**ORDERED** that the guilty plea entered in the above captioned matter through the Ewing Township Violation's Bureau be and hereby is vacated;

**IT IS FURTHER ORDERED** that the within matter be scheduled in the Ewing Township Municipal Court for further proceedings.

---

Dudley Dorigt, J.M.C.

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

---

<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	
<b>vs.</b>	<b>:</b>	<b>SUMMONS NO. 123456</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>QUASI-CRIMINAL ACTION</b>
		<b>NOTICE OF MOTION TO WITHDRAW A GUILTY PLEA PURSUANT TO <u>RULE</u> 7:6-2(b)</b>

---

**PLEASE TAKE NOTICE** that on a date to be set by the Court, the undersigned counsel for the defendant, Scott A. Brown, will make an application before the Ewing Township Municipal Court for Defendant to withdraw his plea of guilty pursuant to Rule 7:6-2(b).

In support of the within application, Defendant will rely upon the annexed Certification as well as oral argument.

**RAMSEY LAW OFFICE**

**ROBERT RAMSEY**

Dated: December 4, 2024

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

---

**STATE OF NEW JERSEY : EWING TOWNSHIP MUNICIPAL COURT  
MERCER COUNTY  
Plaintiff :  
SUMMONS NO. 123456  
vs. :  
QUASI-CRIMINAL ACTION  
SCOTT A. BROWN :  
NOTICE OF MOTION FOR CHANGE OF  
Defendant : SENTENCE PURSUANT TO RULE 7:9-4(a)**

---

**TO: John Doe, Municipal Prosecutor      Honorable Dudley Doright, J.M.C.  
Ewing Township Municipal Court      Ewing Township Municipal Court  
2 Jake Garzio Drive                      2 Jake Garzio Drive  
Ewing, New Jersey 08628                Ewing, New Jersey 08628**

**Mary Martin, Court Administrator  
Ewing Township Municipal Court  
2 Jake Garzio Drive  
Ewing, New Jersey 08628**

**PLEASE TAKE NOTICE** that on a date to be set by the Court, pursuant to Rule 7:9-4(a), the undersigned counsel for the defendant, Scott A. Brown, will make an application before the Ewing Township Municipal Court for a change of sentence previously imposed on complaint no. 123456.

In support of the within application, the undersigned counsel will rely upon the annexed Memorandum of Law and oral argument.

**RAMSEY LAW OFFICE**

**ROBERT RAMSEY**

Dated: December 4, 2024

**LAW OFFICE OF ROBERT RAMSEY  
2000 HAMILTON AVENUE  
HAMILTON, NEW JERSEY 08619  
(609) 584-1919  
ATTORNEY FOR DEFENDANT  
ATTORNEY ID. 0000000000**

---

<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL COURT MERCER COUNTY</b>
<b>Plaintiff</b>	<b>:</b>	<b>SUMMONS NO. 123456</b>
<b>vs.</b>	<b>:</b>	<b>QUASI-CRIMINAL ACTION</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>ORDER GRANTING DEFENDANT'S RECONSIDERATION OF SENTENCE PURSUANT TO <u>RULE 7:9-4(a)</u></b>
<b>Defendant</b>	<b>:</b>	

---

**THIS MATTER** having been opened to the Court upon the application of the Law Office of Robert Ramsey, Esquires, Robert Ramsey, Esquire, appearing, and the Court having considered the arguments of counsel, and other good cause having been shown;

**IT IS ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2024;**

**ORDERED** that Defendants application for reconsideration of sentence pursuant to Rule 7:9-4(a) on the above captioned complaints be and is hereby granted.

---

Dudley Dorigt, J.M.C.

**JOHN MENZEL, J.D.**  
603 Mattison Avenue, Suite 320  
Asbury Park, New Jersey 07712  
(732) 899-1899  
Attorney for Defendant  
Attorney ID Number 037231984

---

STATE OF NEW JERSEY, : **LONG BRANCH TOWNSHIP MUNICIPAL COURT**  
 : **MONMOUTH COUNTY**  
 :  
Plaintiff-Respondent, : *Quasi Criminal (Traffic) Action*  
 :  
 : Cpt.No. N.J.S.A. Issued on  
v. : E15-891234 39:4-50 Sept. 9, 2010  
 : E15-891235 39:4-96 Sept. 9, 2010  
 : E15-891236 39:4-51b Sept. 9, 2010  
DONNA BEGUILTY, :  
 :  
Defendant-Petitioner. : **NOTICE OF PETITION**  
 : **FOR POST-CONVICTION RELIEF**

---

To: Terri L. Turner, Court Administrator  
Long Branch Township Municipal Court  
344 Broadway  
Long Branch, New Jersey 07740

To: James Nelson Butler, Jr., Municipal Prosecutor  
Long Branch Township Municipal Court  
344 Broadway  
Long Branch, New Jersey 07740

**PLEASE TAKE NOTICE:**

**A.**  
**Grounds for Petition**

Defendant DONNA BEGUILTY files this petition for post-conviction relief ["PCR"] from the conviction for operating a motor vehicle while under the influence of alcohol ["DWI"] in the above captioned matter, on the following grounds:

1. Breath test results used in support of the DWI were obtained with an Alcotest model 7110 MK-III-C instrument calibrated by Breath Test Coordinator Instructor Marc W. Dennis.

2. There was a substantial denial in the conviction proceedings of Beguilty's rights under the Constitution of the United States or the Constitution or laws of New Jersey the municipal court failed to (a) review penalties with Beguilty prior to the guilty plea, (b) obtain a sufficient factual basis for the guilty plea, and (c) advise Beguilty of the right to appeal its decisions.

**B.**  
**Time of Filing**

This petition is filed more than five years after the entry of judgment of conviction and imposition of sentence sought to be attacked but is permitted by leave of our Supreme Court in *State v. Cassidy*, 235 N.J. 482 (2018).

**C.**  
**Records Related to the Underlying Conviction**

The following records required under R. 7:10-2(f)(2)(G) are included herewith:

Complaint E15-891234.....	1a
Complaint E15-891235 [Reserved].....	2a
Complaint E15-891236.....	3a
Docket.....	4a
Alcohol Influence Report Form.....	5a
Alcotest 7110 Calibration Record.....	6a
Alcotest 7110 Calibration Certificate, Part I-Control Tests.....	7a

Alcotest 7110 Calibration Certificate, Part II-  
Linearity Tests.....8a  
Calibrating Unit, New Standard Solution Repot.....9a  
Transcript of Plea, January 20, 2011 (9pp).....T\_\_-\_\_

**D.**

**Facts Upon Which Claim for Relief Is Based**

The facts on which this application is based are set forth in the *Verified Petition for Post-Conviction Relief* submitted herewith.

**E.**

**Legal Grounds of the Complaint Asserted**

The legal grounds supporting Defendant's PCR request are set forth at length in the Brief submitted herewith.

**F.**

**Particular Relief Sought**

BegUILTY seeks vacation of her guilty plea and restoration her case to the municipal court's calendar for disposition in the ordinary course.

**G.**

**Procedure**

1. The municipal court administrator shall make an entry of the filing of the petition in the proceedings in which the conviction took place. R. 7:10-2(f)(1).
2. Amendments of the petition shall be liberally allowed. R. 7:10-2(f)(3).

3. Within 30 days after service of a copy of the petition, the municipal prosecutor shall serve and file an answer to the petition or move on ten days' notice for dismissal. If the motion for dismissal is denied, the government's answer shall be filed within 15 days after the entry of the order denying the dismissal. R. 7:10-2(f)(3).

4. In making the final determination on a petition, either on motion for dismissal or after hearing, the Court shall state separately its findings of fact and conclusions of law and shall enter judgment or sentence in the conviction proceedings and any appropriate provisions as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or as may otherwise be required. R. 7:10-2(f)(5).

Respectfully submitted,

John Menzel, J.D.  
Attorney for Defendant

Date: December 18, 2018

**JOHN MENZEL, J.D.**  
603 Mattison Avenue, Suite 320  
Asbury Park, New Jersey 07712  
(732) 899-1899  
Attorney for Defendant  
Attorney ID Number 037231984

---

STATE OF NEW JERSEY, : **LONG BRANCH TOWNSHIP MUNICIPAL COURT**  
 : **MONMOUTH COUNTY**  
 :  
Plaintiff-Respondent, : *Quasi Criminal (Traffic) Action*  
 :  
 : Cpt.No. N.J.S.A. Issued on  
v. : E15-891234 39:4-50 Sept. 9, 2010  
 : E15-891235 39:4-96 Sept. 9, 2010  
 : E15-891236 39:4-51b Sept. 9, 2010  
DONNA BEGUILTY, :  
 :  
Defendant-Petitioner. : **VERIFIED PETITION**  
 : **FOR POST-CONVICTION RELIEF**

---

To: Terri L. Turner, Court Administrator  
Long Branch Township Municipal Court  
344 Broadway  
Long Branch, New Jersey 07740

—

To: James Nelson Butler, Jr., Municipal Prosecutor  
Long Branch Township Municipal Court  
344 Broadway  
Long Branch, New Jersey 07740

—

1. Defendant DONNA BEGUILTY files this petition for post-conviction relief ["PCR"] from the conviction in the above captioned matter, on the following grounds:

A. Breath test results used in support of the DWI were obtained with an Alcotest model 7110 MK-III-C

instrument calibrated by Breath Test Coordinator Instructor Marc W. Dennis and are, thus, tainted.

B. There was a substantial denial in the conviction proceedings of my rights under the Constitution of the United States or the Constitution or laws of New Jersey the municipal court failed to (i) review penalties with me prior to the guilty plea, (ii) obtain a sufficient factual basis for the guilty plea, and (iii) advise me of the right to appeal its decisions.

2. The following records required are included herewith as an appendix to the Brief submitted by my present attorney together with the transcript of the plea proceeding:

Complaint E15-891234.....	1a
Complaint E15-891235 [Reserved].....	2a
Complaint E15-891236.....	3a
Docket.....	4a
Alcohol Influence Report Form.....	5a
Alcotest 7110 Calibration Record.....	6a
Alcotest 7110 Calibration Certificate, Part I-Control Tests.....	7a
Alcotest 7110 Calibration Certificate, Part II-Linearity Tests.....	8a
Calibrating Unit, New Standard Solution Repot.....	9a
Transcript of Plea, January 20, 2011 (9pp).....	T__-__

3. On September 5, 2010, Police Officer Vincent A. Roselli issued complaints E15-891234, E15-891235, and E15-891236 charging me with "operating under influence of liquor or drugs" ["DWI"], "reckless driving," and "open container of alcohol in motor vehicle" in violation of *N.J.S.A. 39:4-50*, *N.J.S.A. 39:4-96*, and *N.J.S.A. 39:4-51b*, respectively. Dala-3a.

4. On January 20, 2011, the Hon. George Cieri, J.M.C., convicted me of DWI sentenced me to pay a \$300 fine, \$33 court costs, and \$350 in various assessments, to a driver's license

revocation ["DLR"] of seven months with no requirement for an alcohol ignition interlock ["IID"]; and to attend an Intoxicated Driver Resource Center ["IDRC"] for 12 hours. T6-7/14; see Da4a. The remaining charges were dismissed. T6-15/16, 8-6/12.

5. No appellate proceedings were brought from this conviction.

6. No prior post conviction relief proceedings were brought relating to this conviction.

7. I was represented by retained counsel Clarence Darrow in the prior proceedings relating to the conviction.

8. I am not presently confined, and I have completed my sentence.

9. The municipal court failed to review penalties with me prior to the guilty plea.

10. The municipal court failed to obtain a factual basis for the guilty plea. See T3-12/5-7.

11. The municipal court failed to advise me of the right to appeal its decisions.

12. Breath test results used in support of the DWI were obtained with an Alcotest model 7110 MK-III-C instrument calibrated by Breath Test Coordinator Instructor Marc W. Dennis and, thus, are tainted. See Da5a-9a.

13. The legal grounds supporting Defendant's request for post-conviction relief are set forth at length in the Brief submitted herewith.

14. I ask this Court to vacate my guilty plea and restore my case to the trial calendar for disposition in the ordinary course.

15. I certify that the facts set forth herein by me are true. I am aware that if any of the facts set forth herein by me are willfully false, I am subject to punishment.

s\ *Donna Begilty*  
Donna Begilty

Date: December 18, 2018

**JOHN MENZEL, J.D.**  
603 Mattison Avenue, Suite 320  
Asbury Park, New Jersey 07712  
(732) 899-1899  
Attorney for Defendant  
Attorney ID Number 037231984

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STATE OF NEW JERSEY, : **LONG BRANCH TOWNSHIP MUNICIPAL COURT**  
 : **MONMOUTH COUNTY**  
 :  
Plaintiff-Respondent, : *Quasi Criminal (Traffic) Action*  
 :  
 : Cpt.No. N.J.S.A. Issued on  
v. : E15-891234 39:4-50 Sept. 9, 2010  
 : E15-891235 39:4-96 Sept. 9, 2010  
 : E15-891236 39:4-51b Sept. 9, 2010  
DONNA BEGUILTY, :  
 :  
Defendant-Petitioner. : **BRIEF IN SUPPORT OF PETITION**  
 : **FOR POST-CONVICTION RELIEF**

---

To: Terri L. Turner, Court Administrator  
Long Branch Township Municipal Court  
344 Broadway  
Long Branch, New Jersey 07740

—

To: James Nelson Butler, Jr., Municipal Prosecutor  
Long Branch Township Municipal Court  
344 Broadway  
Long Branch, New Jersey 07740

—

Date submitted: December 18, 2018  
Date returnable: To be set.  
On the Brief: John Menzel, J.D.

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    Complaint E15-891236.....3a

    Docket.....4a

    Alcohol Influence Report Form.....5a

    Alcotest 7110 Calibration Record.....6a

    Alcotest 7110 Calibration Certificate, Part I-Control Tests.....7a

    Alcotest 7110 Calibration Certificate, Part II-Linearity Tests.....8a

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### PROCEDURAL HISTORY

On September 5, 2010, Police Officer Vincent A. Roselli issued complaints E15-891234, E15-891235, and E15-891236 charging Defendant Donna Beguilty with "operating under influence of liquor or drugs" ["DWI"], "reckless driving," and "open container of alcohol in motor vehicle" in violation of N.J.S.A. 39:4-50, N.J.S.A. 39:4-96, and N.J.S.A. 39:4-51b, respectively. Dala-3a.

On January 20, 2011, Beguilty, represented by retained counsel Clarence Darrow, plead guilty to DWI before the Hon. George Cieri, J.M.C. Here is the plea colloquy:

THE COURT: \*\*\*\* Were you operating a motor vehicle in the City of Long Branch on September 5th, 2010?

Ms. BEGUILTY: Yes.

THE COURT: And did you have an accident or were you stopped by a police officer?

Ms. BEGUILTY: I was stopped by a police officer.

THE COURT: Where were you going?

Ms. BEGUILTY: Home.

THE COURT: What time was it, approximately?

Ms. BEGUILTY: 8:30 in the evening.

THE COURT: 8:30 p.m.?

Ms. BEGUILTY: Yes.

THE COURT: Before you began driving had you had any alcohol to drink?

Ms. BEGUILTY: Yes.

THE COURT: What kind of alcohol was it?

Ms. BEGUILTY: Beer.

THE COURT: Cans? Glasses? Bottles?

Ms. BEGUILTY: They poured it in a cup.

THE COURT: In a cup?

Ms. BEGUILTY: It was in a restaurant.

THE COURT: Ball park. How many cups did you have?

Ms. BEGUILTY: Maybe 3.

THE COURT: 3? And you say t was at a restaurant, which one?

Ms. BEGUILTY: Avenue.

THE COURT: How did you feel when you began driving? Did you feel that there might be something wrong? Like you were a little bit woozy?

Ms. BEGUILTY: I was tired.

THE COURT: Tired.

Ms. BEGUILTY: I was on the beach all day.

THE COURT: That will do it, okay. The officer who arrested you took you down to police headquarters and you had a breath test and the reading was a .20?

Ms. BEGUILTY: Yes.

THE COURT: What do you think of that reading? I bet you would have guessed?

Ms. BEGUILTY: Yes.

THE COURT: That's the effect of alcohol. Okay, I'm satisfied there's a factual basis for the plea of guilty. I'm going to accept same.

[T3-12/5-7.]

Judge Cieri sentenced BegUILty to pay a \$300 fine, \$33 court costs, and \$350 in various assessments, to a driver's license revocation ["DLR"] of seven months with no requirement for an alcohol ignition interlock ["IID"]; and to attend an Intoxicated Driver Resource Center ["IDRC"] for 12 hours. T6-7/14; see Da4a. The remaining charges were dismissed. T6-15/16, 8-6/12. BegUILty neither appealed nor brought any prior proceedings for post-conviction relief ["PCR"] relating to this conviction. She is not presently confined and has served her entire sentence.

BegUILty now files this PCR petition from the above captioned conviction on the following grounds:

1. Breath test results used in support of the DWI were obtained with an Alcotest model 7110 MK-III-C instrument calibrated by Breath Test Coordinator Instructor Marc W. Dennis and, thus, tainted.

2. There was a substantial denial of BegUILty's rights under the Constitution of the United States or the Constitution or laws of New Jersey in the conviction proceedings in that the municipal court failed to (a) review penalties with her prior to the guilty plea, (b) obtain a sufficient factual basis for the guilty plea, and (c) advise BegUILty of the right to appeal its decisions.

### **FACTS**

On September 5, 2010, at about 8:30 p.m., Defendant Donna BegUILty was tired as she drove home in Long Branch from Avenue Restaurant, where she had consumed maybe three cups of beers after a day on the beach. T3-12/4-21. After she was arrested, she submitted breath samples that yielded alcohol results in excess of the legal limit. T4-22/5-1. These breath test results were obtained with an Alcotest model 7110 MK-III-C instrument calibrated by Breath Test Coordinator Instructor Marc W. Dennis and, thus, tainted. See Da5a-9a.

## LEGAL ARGUMENT

### I.

#### **BECAUSE DEFENDANT'S CONVICTION WAS OBTAINED WITH TAINTED EVIDENCE, DEFENDANT IS ENTITLED TO RELIEF PURSUANT TO *STATE V. CASSIDY***

To admit breath test results obtained using an Alcotest 7110 MK-III-C, the State must establish by clear and convincing evidence that the Alcotest 7110 instrument was in proper operating condition. The officer performing the tasks necessary to establish this is a Breath Coordinator Instructor assigned to the New Jersey State Police ["NJSP"] Alcohol and Drug Test Unit ["ADTU"] and certified as such by the New Jersey Attorney General. Part of the procedure required to certify an Alcotest instrument is the use of a digital thermometer the measurements of which are traceable to the National Institute of Standards and Technology ["NIST"] as established by the NJSP Office of Forensic Sciences in accordance with *N.J.A.C. 13:51-1 et seq.* and adopted by the New Jersey Supreme Court in *State v. Chun*, 194 *N.J.* 54 (2008).

The person certifying the Alcotest instrument in the present case was Marc W. Dennis. "Dennis was indicted in 2016 for failing to use a thermometer that produces temperature measurements traceable to [NIST] to measure the temperature of simulator solutions used to calibrate Alcotest devices." *State v. Cassidy*, 225 *N.J.* 482, \_\_\_, 197 *A.3d* 86, 89 (2018) (2018). "[F]ailure to use a thermometer that produces NIST-traceable

temperature readings in the calibration process undermines the reliability of the Alcotest.” *Id.*

“Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). “The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Giglio v. United States*, *supra*, 405 U.S. at 153, quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). “When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.” *Giglio v. United States*, *supra*, 405 U.S. at 154, quoting *Napue v. Illinois*, *supra*, 360 U.S. at 269.

“[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government.” *Giglio v. United States*, *supra*, 405 U.S. at 155. Suppression of material evidence justifies a new trial “irrespective of the good faith or bad faith of the prosecution.” *Id.* at 153, quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). “Because public

confidence in the criminal-justice system depends on the integrity of the courts, the prosecutors, and the police, the system can never disregard misconduct by such actors in the fulfillment of their public duties." *State v. Gookins*, 135 N.J. 42, 48 (1994).

The use of breath testing "derives from its objectivity, which forecloses many pretextual defenses predicated on a defendant's individual reaction to alcohol intake." *Id.* at 44. "However, the objectivity, and hence the value, of the breathalyzer is irreparably undermined when the person operating the machine falsifies the results to fabricate evidence of guilt." *Id.* In *State v. Gookins*, a Breathalyzer operator was convicted of falsifying breath test results. To our Supreme Court, "The official conduct which is the predicate of this appeal profoundly shocks the judicial conscience. It was a brazenly lawless attempt to seek a conviction at the expense of fundamental individual rights." *Id.* at 51.

BegUILTY's conviction rests principally on the breath test results used by the State in obtaining the conviction. There is substantial doubt as to the validity of these breath test results. In *State v. Gookins*, our Supreme Court "require[ed] the State to prove defendants' guilt with evidence that is free of the taint of [officer's] pattern of misconduct." *Id.* at 51. The procedure implemented was this:

Each of these matters shall be remanded to the municipal court. The prosecution shall certify to the municipal court all the evidence that it considers to be untainted that would sustain the prosecution of these cases, thus excluding the testimony of [officer]. For example, the State may show whether other witnesses were present at the scene of the arrest who observed the conduct of the accused or whether exclusion of the breathalyzer results is not required because other officers' participation in the breathalyzer testing assures the test's reliability. The municipal court shall then set a date for a hearing to determine whether such evidence is sufficient to permit the State to proceed with the case, and thereafter conduct further proceedings as necessary and appropriate. Defendants will have the continuing right throughout such prosecution to challenge the legality of the State's presentation.

[*Id.* at 51-52.]

Without valid breath test results, there is significant doubt that BegUILTY would have offered a plea or whether the State would have convicted him at trial. Indeed, the factual basis for the plea rests entirely on his admissions to driving, drinking, and giving breath samples yielding results in excess of the legal limit. The use of such tainted evidence to obtain a conviction in this case constitutes a manifest injustice entitling BegUILTY to relief. See *State v. Cassidy, supra*.

## II.

### **THE MUNICIPAL COURT FAILED TO ADHERE TO PROCEDURAL SAFEGUARDS REQUIRED FOR THE PROTECTION OF BOTH DEFENDANT AND THE STATE**

A guilty plea is the final relinquishment of the most cherished right: to be presumed innocent until the trier of fact determines guilt beyond a reasonable doubt. *State v. Smullen,*

118 N.J. 408, 414 (1990). Indeed, a guilty plea is more serious than a confession because it is tantamount to conviction. *Id.*, quoting *Parker v. North Carolina*, 397 U.S. 790, 800-01, 90 S.Ct. 1458, 25 L.Ed. 2d 785 (1970). New Jersey has consistently demanded that its courts afford meticulous protection to a defendant who elects to plead guilty, emphasizing the necessity that a defendant understands the consequences of the plea. *State v. Kovack*, 91 N.J. 476, 487 (1982).

Our municipal courts may accept guilty pleas only after certain exacting requirements have been met. *State v. Gale*, 226 N.J.Super. 699, 704 (Law Div. 1988). R. 7:6-2(a)(1) provides:

A defendant may plead not guilty or guilty, but the court may, in its discretion, refuse to accept a guilty plea. The court shall not, however, accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant and, in the court's discretion, of others, that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea...."

As our Supreme Court stated in *State v. Campfield*, 213 N.J. 218 (2013):

[W]hen accepting a guilty plea, the trial court should inquire "among other things, (1) whether anyone had forced, threatened, or put [defendant] under pressure to plead guilty, (2) whether the defendant understood that he was relinquishing certain constitutional rights, (3) whether the defendant understood the nature of the charge and content of the sentencing recommendation, and (4) whether the defendant was in fact guilty of the specific charge[.]"

*Id.* at 336, citing *State v. Smullen, supra* at 411-12.

Thus, there must be a searching and painstaking inquiry by a trial judge before the defendant may accept a guilty plea. *State v. Abbondanza*, 201 N.J.Super. 181, 184 (App.Div. 1985). It must be made voluntarily, knowingly, and intelligently. *State v. Howard*, 110 N.J. 113, 122 (1988); *State v. Bailey*, 226 N.J.Super. 559, 565 (App.Div. 1988); *State v. Regan*, 209 N.J.Super. 596, 607 (App.Div. 1986); *State v. Rhein*, 117 N.J.Super. 112, 117, (App.Div. 1971). The requirement that the court personally address the defendant before accepting a guilty plea is designed to assure that the defendant understands the charges, that a factual basis for the plea exists, and that the plea is voluntary. *State v. Lavoy*, 259 N.J.Super. 594, 599-600 (App.Div. 1992); *State v. Carey*, 230 N.J.Super. 402, 404 (App.Div. 1989); *State v. Barboza*, 115 N.J. 415, 420-21 (1989). "This procedure ensures judicial oversight of 'the final relinquishment' of the defendant's core constitutional right to be presumed innocent until proven guilty." *State v. Campfield, supra* at 336, citing *State v. Smullen, supra* at 414. It "affords the court an opportunity to observe the conditions under which the plea is made, provides a better record for appellate review...and aids correctional agencies in the performance of their functions." *Id.*; *State v. Barboza, supra*

at 421. This requirement also protects the State from a subsequent attempt to retract a plea because the defendant is innocent or did not understand the plea's consequences or that the prosecutor or defendant's own attorney improperly induced the defendant to plead guilty. *State v. Lavoy, supra* at 600; *State v. Barboza, supra* at 421.

A failure to comply with the rules regarding the acceptance of a guilty plea, namely that a plea be understandably and voluntarily entered, is a failure of due process. *State v. Owczarski, 236 N.J.Super. 52, 55* (Law Div. 1989); *State v. Barboza, supra* at 421; *State v. Rhein, supra* at 118. This is because a guilty plea requires a defendant to waive important constitutional rights, including the right to avoid self-incrimination and to confront his or her accusers. See *State v. Barboza, supra* at 420-21; *State v. Owczarski, supra* at 55.

Courts will indulge every reasonable presumption against the waiver of fundamental constitutional rights and will not presume their loss by acquiescence. *State v. Gale, supra* at 703, quoting *State v. Guerin, 208 N.J.Super. 527, 533* (App.Div. 1986). Where little or no advice was given to the defendant concerning entry of the guilty plea, where none of the requirements of our court rules are met, the plea must be set aside. *State v. Gale, supra* at 705.

Given the absence of adherence to our rules concerning pleas together with the prejudice already suffered by BegUILty through the denial of constitutional rights, an unsupported finding of guilt, and full execution of an unwarranted sentence, BegUILty is entitled to relief.

**A.**

**THE MUNICIPAL COURT FAILED TO REVIEW PENALTIES WITH DEFENDANT PRIOR TO THE GUILTY PLEA**

Before a judge may accept a guilty plea, R. 7:6-2(a)(1) requires that a defendant understand "the consequences of the plea." *State v. Abbondanza, supra* at 185. The judge must also explain the range of allowable punishments under a charge to which an accused pleads guilty. *Id.* This was not done for BegUILty.

As a first DWI offender, BegUILty faced:

\*\*\*\* a fine of not less than \$300 nor more than \$500 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than seven months nor more than one year....

[N.J.S.A. 39:4-50(a)(1)(ii).]

Also, nothing was said of any of these other consequences of a DWI plea, including:

1. Drunk Driving Enforcement Fund surcharge of \$100 for each charge. *N.J.S.A.* 4-50.8.
2. Additional \$125 surcharge on a DWI conviction. *N.J.S.A.* 4-50(i).
3. Victims of Crime Compensation Board assessment of \$50 for a DWI conviction. *N.J.S.A.* 2C:43-3.1(c).
4. Safe Neighborhoods Services Fund assessment of \$75 for a DWI conviction. *N.J.S.A.* 2C:43-3.2(a)(1).
5. Court costs of \$40. *N.J.S.A.* 22A:3-4.
6. Merit Rating Plan surcharges of \$3,000 to \$4,500. See *N.J.S.A.* 17:29A-35b(2).
7. Suspension of the commercial motor vehicle driving privilege for no less than one and no more than three years for a first offense, *N.J.S.A.* 39:3-10.20(a)(1), and for life for a second or subsequent offense and certain first offenses, *N.J.S.A.* 39:3-10.20(c).
8. Disqualification to get courtesy license plates for 10 years. *N.J.S.A.* 39:3-33.5(a), *N.J.A.C.* 13:20-34.4(b).
9. Disqualification to get personalized license plates forever. *N.J.S.A.* 39:3-33.5a; see *N.J.A.C.* 13:20-34.4(b), *N.J.A.C.* 13:20-39.10(a).
10. Elimination of any cause of action to recover economic or non-economic loss sustained as the result of an accident for any person convicted of a violation of DWI or breath test refusal. *N.J.S.A.* 39:6A-4.5(b).
11. Disqualification from employment as a driver for a livery transportation service. *N.J.A.C.* 10:50-1.10(d)(1).
12. Payment of unspecified fees as designated by the Division of Addiction Services upon referral or evaluation to the IDRC and Intoxicated Driver Program ["IDP"]. *N.J.A.C.* 10:162-2.4.

13. Suspension of the driver's license for failure to comply with IDRC and IDP program or fee requirements. *N.J.A.C.* 10:162-2.5.
14. Cancellation of an existing automobile insurance policies. *N.J.A.C.* 11:3-8.9; see *N.J.A.C.* 11:3-34.4, *N.J.A.C.* 11:3-34 App. (re assessment of nine insurance eligibility points).
15. Denial of an application for automobile insurance coverage. See *N.J.A.C.* 11:3-33, App.B; see also *N.J.A.C.* 11:3-34.4, *N.J.A.C.* 11:3-34 App. (re assessment of nine insurance eligibility points).
16. Disqualification as a motor vehicle defensive driving course instructor or provider of an on-line or computer assisted course. *N.J.A.C.* 13:21-24.4(a) and (b); see *N.J.A.C.* 13:23-2.36(d), *N.J.A.C.* 13:23-3.12(b).
17. Disqualification as a motorcycle safety education rider coach. *N.J.A.C.* 13:85-6.1(a).

Nor was Beguilty advised of any immigration consequences, which were relevant as a result of her status as a non-citizen permanent resident of the United States. See T3-9/11.

"[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here." *State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009). "[W]hether a defendant should be advised of 'certain consequences of a guilty plea should not depend on ill-defined and irrelevant characterizations of those consequences'" as either direct or collateral. *Id.*, citing *State v. Bellamy*, 178 N.J. 127, 139 (2003), quoting *State v. Heitzman*, 107 N.J. 603, 606 (1987) (Wilentz, C.J., dissenting).

In *State v. Nunez-Valdez*, *supra*, our Supreme Court,

discussing deportation, has elected to decide such claims "under our state constitution because we recognize that a federal remedy may depend on whether deportation is a penal or collateral consequence," rejecting the distinction between those consequences that are direct versus those that are collateral. *Id.* at 139. Indeed, even the U.S. Supreme Court "has never distinguished between direct and collateral consequences in defining the scope of constitutionally 'reasonable professional assistance'" required under federal standards. *Padilla v. Kentucky* 559 U.S. 356, 365, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). When there are consequences that may affect a defendant's decision to plead, even when the law is unclear, counsel must say something about those consequences. See *Padilla v. Kentucky*, *supra*, 559 U.S. at 369, n.10. "[T]here is no relevant difference 'between an act of commission and an act of omission' in this context." See *id.*, 559 U.S. 370, citing *Strickland v. United States*, *supra*, 466 U.S. at 690.

A plea will be set aside as neither voluntary nor knowing nor intelligent when there is no questioning directed to maximum exposure before a plea is taken. See, e.g., *State v. Regan*, *supra* at 607. Cf. *State v. Kovack*, *supra*; *State v. Womack*, 206 N.J.Super. 564 (App.Div. 1985); *State v. Smith*, 109 N.J.Super. 9

(App.Div. 1970), *certif.den.* 56 N.J. 473 (1970). So, too, should a plea be set aside when a defendant is not questioned about the plea's significant consequences. In other words, a defendant should be permitted to withdraw from a plea if all of its material terms and relevant consequences were not fully understood. *State v. Smullen, supra* at 417, citing *State v. Howard, supra*; *State v. Kovack, supra*. Because the municipal court did not fully advise BegUILTY of all material consequences of her plea before it was accepted, BegUILTY is entitled to relief.

**B.**

**THE MUNICIPAL COURT FAILED TO OBTAIN A FACTUAL BASIS FROM DEFENDANT  
FOR THE GUILTY PLEA**

Our Supreme Court "has been very sensitive to the requirement that there be an adequate factual basis for a plea of criminal guilt." *State v. Smullen, supra* at 414. Even if a defendant wished to plead guilty to a crime she did not commit, she may not do so. *Id.* at 415. No court may accept such a plea. *Id.* "[I]f an appellate court subsequently determines that a plea has been accepted without an adequate factual basis, the plea, the judgment of conviction, and the sentence must be vacated, the dismissed charges re-instated, and the defendant allowed to re-plead or to proceed to trial...." *State v. Barboza, supra* at 420. In New Jersey, except in capital cases,

the trial court must be "satisfied from the lips of the defendant that he committed the acts which constitute the crime." *Id.* at 422 (quoting *State v. Stefanelli*, 78 N.J. 418, 439 (1979) (Schreiber, J., concurring); *State v. Campfield*, *supra* at 236. Most New Jersey appellate courts, finding an insufficient factual basis to support a guilty plea, have simply vacated the conviction and allowed withdrawal of the guilty plea without any further discussion. *State v. Barboza*, *supra* at 424; *State v. Tate*, 220 N.J. 393 (2015); *State v. Gregory*, 220 N.J. 413 (2015); *State v. Perez*, 220 N.J. 423 (2015). As our Supreme Court said in *State v. Tate*, *supra*:

The standard of review of a trial court's denial of a motion to vacate a guilty plea for lack of an adequate factual basis is *de novo*. An appellate court is in the same position as the trial court in assessing whether the factual admissions during the plea colloquy satisfy the essential elements of an offense. When reviewing the adequacy of the factual basis to a guilty plea, the trial court is not making a determination based on witness credibility or the feel of the case, circumstances that typically call for deference to the trial court. In short, if a factual basis has not been given to support a guilty plea, the analysis ends and the plea must be vacated.

[*Id.* at 403-04.]

The factual basis for BegUILty was almost entirely dependent on the breath test result. Without a valid result, BegUILty essentially plead guilty to operating a motor vehicle while tired after drinking three beers. This factual basis does not make out a violation of N.J.S.A. 39:4-50. Thus, because

there is no sufficient factual basis for the present guilty plea, this Court should vacate it.

**C.**

**THE MUNICIPAL COURT FAILED TO ADVISE DEFENDANT OF THE RIGHT TO  
APPEAL ITS DECISION**

BegUILTY was never advised of the right to appeal in the municipal court, even though both the Sixth and Fourteenth Amendments require one to be advised of any state-created right of appeal in addition to the right to counsel on an appeal. *State v. Allen*, 99 N.J.Super. 314 (Law Div. 1968).

The Appellate Division held that the omission to advise defendant with regard to her right to appeal and the applicable time frame was another departure from fundamental requirements, the dictates of the Rules of Court, and common practice that should not have occurred. *State v. Martin*, 335 N.J.Super. 447, 451 (App.Div. 2000), citing R. 7:14-1(c); cf. R. 3:21-4(h). They regarded "the errors made in the municipal court to be so clear and so fundamentally flawed as to require, beyond question, that the judgment of conviction entered therein be vacated and the matter remanded for a new trial." *State v. Martin*, supra at 452. See *State v. Allen*, supra at 317-18, discussing at length *United States ex rel. Thurmond v. Mancusi*, 275 F.Supp. 508 (E.D.N.Y. 1967). The court in *State v. Allen*,

*supra*, emphasized the importance of advising defendants of the right to appeal upon conviction:

If defendants are advised of their right to counsel only after filing the notice of appeal, the right to counsel on appeal would become meaningless in cases such as the present one. Convicted persons, unaware of the right to appeal, certainly would be deprived of the assistance of counsel in an important post-trial proceeding. In effect, form would subordinate substance, for the judicial system would then discriminate between those who know of the right to appeal and the ignorant defendant....

Surely, the Constitution must protect the rights of convicted defendants immediately after trial. The period following a judgment of conviction is critical, for a defendant must determine whether to undertake any post-trial legal action.

[*Id.* at 320 (citations omitted).]

The *Allen* court concluded, "Neither the seriousness of the offense nor the conclusiveness of guilt can be considered with the demand that a defendant be afforded the effective assistance of counsel...." *Id.* at 322. It held that not advising a defendant of a right to appeal and right to counsel to prosecute an appeal was a deprivation of the right to effective assistance of trial counsel. *Id.*; see *State v. Martin, supra*.

Because the municipal court failed to advise or discuss the right to appeal either its findings or sentence, Beguilty is entitled to relief.

**CONCLUSION**

For the foregoing reasons, Defendant Donna BegUILty asks this Court to vacate her guilty plea and restore her case to the Court's calendar for disposition in the ordinary course.

Respectfully submitted,

John Menzel, J.D.  
Attorney for Defendant

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