**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| PHILLIP TARVER,<br><br>Plaintiff,<br><br>v.<br><br>KEISHA FISHER, et al.,<br><br>Defendants. | No. 22-cv-0012 (NLH) (AMD)<br><br>OPINION |

APPEARANCE:

Phillip Tarver
1200321/ SBI 344789C
South Woods State Prison
215 South Burlington Road
Bridgeton, NJ 08302

Plaintiff Pro se

HILLMAN, District Judge

Plaintiff Phillip Tarver has filed a complaint under 42 U.S.C. § 1983. ECF No. 1. For the reasons stated below, the complaint will be dismissed for failure to state a claim.

I. BACKGROUND

Plaintiff is a convicted and sentenced state prisoner presently incarcerated in South Woods State Prison, New Jersey. ECF No. 1. Petitioner was sentenced on a two-count accusation to a term of "twelve years with 5 ½ years ineligibility, also with 5 years with a 5 year parole ineligibility." Id. at 6.



Appendix-A

"Petitioner was sentenced under a six count indictment No. 18-04-00751. The Indictment was dated 4-24-18." Id.

Plaintiff filed a postconviction relief ("PCR") petition in the state courts on July 15, 2019. Id. at 7. The PCR court "concluded Petitioner made a prima facie showing of ineffective assistance of counsel and ordered an evidentiary hearing." Id. at 7. The hearing took place on October 21, 2020. Id. Plaintiff asserts "PCR counsel called retained counsel, appointed counsel and Defendant as witnesses. The state called no witnesses and introduced no evidence." Id.

II. STANDARD OF REVIEW

Section 1915(e)(2) requires a court to review complaints prior to service in cases in which a plaintiff is proceeding in forma pauperis. The Court must sua sponte dismiss any claim that is frivolous, is malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. This action is subject to sua sponte screening for dismissal under 28 U.S.C. § 1915(e)(2)(B) because Plaintiff is proceeding in forma pauperis.

To survive sua sponte screening for failure to state a claim, the complaint must allege "sufficient factual matter" to show that the claim is facially plausible. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). "'A claim has facial plausibility when the plaintiff pleads factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Fair Wind Sailing, Inc. v. Dempster, 764 F.3d 303, 308 n.3 (3d Cir. 2014) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "[A] pleading that offers 'labels or conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Iqbal, 556 U.S. at 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

III. DISCUSSION

Plaintiff captions his filing as a motion under Federal Rule of Civil Procedure 60(b), asking the Court "to correct a mistake made at the evidentiary hearing by the trial court and ask[s] this Court to vacate the convictions . . . ." ECF No. 1 at 8. The Court may relieve a party from a final judgment, order, or proceeding based on a "mistake" under Rule 60(b)(1). "Rule 60(b) motions (other than motions under Rule 60(b)(4)) should generally be raised in the rendering court." Budget Blinds, Inc. v. White, 536 F.3d 244, 254 (3d Cir. 2008). Nor can the filing proceed as a new complaint under § 1983 because the Court cannot vacate Plaintiff's state convictions in a federal civil rights action.

Plaintiff asks this Court to reverse his convictions "based upon Petitioner's showing of prima facie evidence of ineffective assistance of counsel at the PCR hearing and also at the

evidentiary hearing, where the state called no witnesses, nor introduced no evidence in opposition." ECF No. 1 at 8. "A prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his confinement." Aruanno v. New Jersey, 215 F. App'x 157, 158 (3d Cir. 2007). "[W]henever the challenge ultimately attacks the 'core of habeas' – the validity of the continued conviction or the fact or length of the sentence – a challenge, however denominated and regardless of the relief sought, must be brought by way of a habeas corpus petition." Leamer v. Fauver, 288 F.3d 532, 542 (3d Cir. 2002).

Section 2254 is the federal habeas statute that applies to "a person in custody pursuant to the judgment of a State court[.]" 28 U.S.C. § 2254(a). The Court declines to convert the present action to a petition under § 2254 because there are significant differences in the filing requirements for § 2254 petitions as well as legal consequences under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 22 U.S.C. § 2244. See Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000). AEDPA requires a prisoner challenging the legality of a sentence imposed by a state court under § 2254 to include all potential claims in a single, comprehensive petition which must be filed within one year of the date when the judgment of conviction became final. A § 2254 petition may not be granted unless the

prisoner has exhausted the remedies available in the state courts. 28 U.S.C. § 2254(b)(1).

It is not clear to the Court whether Plaintiff is still in the process of challenging his convictions in state court. Plaintiff does not specifically state the outcome of the October 21, 2020 hearing, but the Court presumes the PCR Court denied his PCR petition. It is not clear whether Plaintiff filed an appeal. Moreover, Plaintiff may have more claims to present to the Court. The Court will dismiss the current complaint for failure to state a claim and deny leave to amend because this type of claim cannot proceed under § 1983. The dismissal is without prejudice to Plaintiff's right to reassert his arguments under § 2254, and the Court will direct the Clerk to mail Petitioner a blank § 2254 habeas petition for any future use.[1]

## IV. CONCLUSION

For the reasons stated above, the Court will dismiss Plaintiff's complaint for failure to state a claim. Leave to amend will be denied.

An appropriate order follows.

Dated: April 11, 2022
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

[1] The Court makes no findings as to whether Petitioner has otherwise satisfied § 2254's filing requirements.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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|---|---|---|
| PHILLIP TARVER, | : | |
| Plaintiff, | : | Civ. No. 22-0012 (NLH) (AMD) |
| v. | : | ORDER |
| KEISHA FISHER, et al., | : | |
| Defendants. | : | |

For the reasons expressed in the accompanying Opinion,

IT IS on this 11th day of April, 2022,

ORDERED that the complaint, ECF No. 1, be, and hereby is, dismissed for failure to state a claim, 28 U.S.C. § 1915(e)(2)(B)(ii). Leave to amend is denied; and it is further

ORDERED that the Clerk of the Court shall send Plaintiff a blank petition under 28 U.S.C. § 2254, AO 241 (modified):DNJ-Habeas-008(Rev.01-2014); and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Opinion and Order upon Plaintiff by regular U.S. mail and mark this case closed.

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 22-1761

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PHILIP TARVER,
Appellant

v.

KEISHA FISHER, ADMIN;
SOUTH WOODS STATE PRISON

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(D.N.J. No. 1-22-cv-00012)

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SUR PETITION FOR REHEARING

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Present: CHAGARES, Chief Judge, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, and SCIRICA*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

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* As to panel rehearing only.

APPENDIX-B

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Date: November 16, 2022
SLC/cc: Phillip Tarver
Melissa H. Raksa, Esq.

| | | |
|---|---|---|
| STATE OF NEW JERSEY<br><br>v.<br><br>PHILLIP TARVER,<br>Defendant. | : | SUPERIOR COURT OF NEW JERSEY<br>OCEAN COUNTY<br>LAW DIVISION- CRIMINAL PART<br><br>Indictment No.: 18-04-00751<br>Accusation No. 18-10-01755 |



OPINION

Argued: August 26, 2020.

Evidentiary Hearing: October 21, 2020.

Decided: October 30, 2020

Dina R. Khajezadeh, Assistant Prosecutor, for the State (Bradley D. Billhimer, Ocean County Prosecutor).

Ernest G. Ianetti, Esq., for defendant.

GUY P. RYAN, J.S.C.

## PROCEDURAL HISTORY[1]

This matter comes before the court on a petition for post-conviction relief (PCR).

On April 24, 2018, Phillip Tarver (defendant) was indicted by an Ocean County grand jury under Indictment No. 18-04-00751-I, and charged with:

**Count One:** Possession of CDS, a third-degree crime, in violation of N.J.S.A. 2C:35-10a (1);

[1] Defendant's appendix is referred to as "Da" followed by the page number; "1T" refers to transcript of plea dated October 29, 2018; "2T" refers to the transcript of sentence dated January 18, 2019.



APPENDIX-C

**Count Two:** Possession of CDS with intent to distribute, a first-degree crime, in violation of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(1);

**Count Three:** Obstructing the Administration of Law or Other Governmental Function, a fourth-degree crime, in violation of N.J.S.A. 2C:29-10;

**Count Four:** Hindering Apprehension or Prosecution, a fourth-degree crime, in violation of N.J.S.A. 2C:29-3b(4);

**Count Five:** Unlawful Possession of Hollow Point, Dum-Dum or Armor Piercing Ammunition, a fourth-degree crime, in violation of N.J.S.A. 2C:39-3f(1);

**Count Six:** Unlawful Possession of Large Capacity Ammunition Magazine, a fourth-degree crime, in violation of N.J.S.A. 2C:39-9h.

On October 29, 2018, defendant was charged by way of Accusation No. 18-10-01755 with:

**Count One:** Possession of CDS with intent to distribute, a first-degree crime, in violation of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(1);

**Count Two:** Certain Persons not to have Weapons, a second-degree crime, in violation of N.J.S.A. 2C:39-7b(1).

On October 29, 2018, defendant appeared before Judge Therese A. Cunningham. He was represented on Indictment No. 18-04-751 by Ali Homayouni ("retained counsel") and on Accusation No. 18-10-01755 by Brian O'Malley ("appointed counsel"). At that time, defendant consented to the filing of Accusation 18-10-1755 and pled guilty to count two of Indictment 18-04-00751 and counts one and two of Accusation 18-10-1755.

On January 18, 2019, defendant was sentenced on count one of Accusation number 18-10-1755 to a term of 12 years New Jersey State Prison with five and a half years of parole ineligibility concurrently to a term of 5 years New Jersey State Prison with five years of parole ineligibility on

count two. Under Indictment No. 18-04-751-I, defendant was sentenced on count one to a term of 11 years New Jersey State Prison with five and a half years of parole ineligibility, concurrent to Accusation 18-10-1755. Defendant was awarded jail credits of three hundred and forty-one days. Pursuant to the plea agreement, the remaining counts of the indictment and accusation were dismissed. JOC 18-10-1755 A, Da 13-16. JOC 18-04-00751 I, Da 9-12.

Defendant did not file a direct appeal.

On July 15, 2019, defendant filed a pro se post-conviction relief petition.

On July 22, 2019, this court filed an order assigning counsel and designating judge.

On September 16, 2019, the Conviction Integrity Unit of the New Jersey Office of the Public Defender determined the matter should proceed as a PCR and advised the case was being prepared for attorney assignment.

On December 16, 2019, Ernest Ianetti, Esq. was assigned to represent defendant.

On January 3, 2020, this court ordered defendant's brief in support of his PCR application to be filed and served by March 2, 2020. The State's brief was to be filed and served by April 2, 2020. Oral argument was scheduled for May 27, 2020.

On March 16, 2020, the State requested a 30-day extension on filing its brief due to scheduling conflicts. Defendant's counsel did not oppose same.

On March 16, 2020, this court filed an amended scheduling order. However, that order did not contain both indictment/accusation numbers pertaining to this defendant. Therefore, on April 7, 2020, the court entered an order pursuant to Rule 1:13-1 correcting that clerical error. The State's brief was to be filed and served by May 2, 2020. Oral argument remained scheduled for May 27, 2020.

On April 30, 2020, the State filed and served its brief in opposition.

On May 26, 2020, due to the continued COVID-19 situation, defendant's counsel requested an adjournment so defendant could appear in person. Oral argument was rescheduled for August 26, 2020.

Oral argument was held on August 26, 2020, via electronic connection with counsel.[2] At oral argument, the court heard from counsel for both sides and defendant personally. At the conclusion of oral argument, the court concluded defendant made a prima facie showing of ineffective assistance of counsel and ordered an evidentiary hearing. The evidentiary hearing was held on October 21, 2020. PCR counsel called retained counsel, appointed counsel and defendant as witnesses. The State called no witnesses and introduced no evidence.

Having thoroughly considered testimony and the record, the court makes the following findings.

## STATEMENT OF FACTS[3]

Between November 19, 2017 and December 11, 2017, two confidential sources ("CS1" and "CS2") purchased quantities of heroin from Wali Hobbs and Phillip Tarver. For each controlled purchase, the confidential source was provided with the amount of money necessary to complete the transaction. Members of the Toms River Police Department, Drug Enforcement Administration ("DEA") and Monmouth Ocean HIDTA Task Force ("MHTF") maintained surveillance of the confidential sources while making the purchases, established surveillance of all predetermined meeting locations and surveilled defendant's residence and stash house. After the

[2] Oral argument was held electronically due to COVID-19 restrictions. Despite the earlier objection, defendant's counsel informed the court defendant consented to oral argument being conducted electronically.
[3] This court adopts the statement of facts as recited by both the State and defendant in their briefs. The court made additional factual findings after the evidentiary hearing which are set forth later in this opinion.

transactions were made, the confidential sources met with police at a pre-determined location and submitted the contraband for testing.

In late November of 2017, CS2 advised police that defendant, a/k/a "Justice," was distributing large amounts of suspected CDS from his residence located at 215 Washington Street in Toms River and from a "stash house" located at 48 South Main Street in South Toms River. CS2 advised that defendant sold CDS in quantities of no less than five ounces or ten bricks at a time.

On December 4, 2017, CS2 contacted defendant via cell phone to negotiate the purchase of heroin. Defendant advised CS2 to meet at Manitou Park in Berkeley, New Jersey to make the transaction. At this time, police established surveillance of defendant's residence located at 215 Washington Street in Toms River and his "stash house" at 48 South Main Street in South Toms River. Police observed defendant leave his residence in a black caravan and travel towards the meet with CS2. Upon defendant's arrival, CS2 exited his vehicle and entered the front passenger side of defendant's vehicle for a short time and exited. Police followed defendant as he traveled to 48 South Main Street in South Toms River. He exited the vehicle carrying a black backpack and entered the residence for a short time before returning to his vehicle and leaving the area. Police met with CS2 after the transaction. CS2 advised that defendant had additional heroin in the backpack he was carrying. CS2 provided police with suspected heroin stamped "Empire" with a picture of the Empire State Building. Investigative reports do not note the quantity of suspected heroin purchased in this transaction.

CS2 contacted defendant on December 10, 2017 to negotiate the purchase of heroin. Police overheard defendant on the phone tell CS2 "old girl" would conduct the sale at Manitou Park in Berkeley, New Jersey. Police observed a black female, later identified as Yolanda Richardson, exit

48 South Main Street and travel toward the meeting place operating a white Oldsmobile Achieva. Ms. Richardson met with CS2 at the park and departed shortly thereafter. Ms. Richardson traveled directly back to 48 South Main Street. Police maintained surveillance of the residence and observed defendant arrive in a dark SUV. He entered the residence briefly and returned to his vehicle and left the area. CS2 provided police with suspected heroin stamped "Black Jack" given to him by Ms. Richardson.

**Accusation number 18-10-1755:**

On December 18, 2017, police applied for search warrants for: 18 10th Street, Berkeley, New Jersey; 48 South Main Street, South Toms River, New Jersey; 215 Washington Street, Apartment 5, Toms River, New Jersey; and the white Oldsmobile Achieva, which was operated by Ms. Richardson. Judge James M. Blaney approved the warrants the following day.

Police executed the search warrants. Present at the 215 Washington Street, Apartment 5 in Toms River, were Kimberly Tolbert and Fatinah Dillard, both of whom were placed under arrest. However, defendant was not present at that apartment nor any of the other warrant execution locations.

A search of the apartment at 215 Washington Street yielded: one (1) plastic bag containing white powder indicative of cocaine in a sneaker in a bedroom allegedly belonging to defendant; one (1) plastic bag containing a white powdery substance indicative of cocaine in a dresser; one (1) plastic bag containing an unknown crystal substance indicative of MDMA; one (1) digital scale; numerous plastic bags; one (1) handgun located under a bed allegedly belonging to defendant; one (1) police scanner; one (1) 9 millimeter Walther semi-automatic handgun; 9 millimeter ammunition; numerous vacuum-sealed plastic bags containing approximately $210,000

in United States currency; and a blue sneaker containing a white powdery substance indicative of cocaine. All of the suspected contraband was seized.

At headquarters, Ms. Tolbert provided a statement to the police. She informed the police she resided at 215 Washington Street, Apartment 5 in Toms River. She stated defendant lived with her at the time for most of each week. She also advised the suspected cocaine and Walther handgun located at her residence belonged to defendant. She further advised the police defendant often used rental vehicles to conduct business.

Ms. Richardson also spoke to the police. She advised them she resided at 48 South Main Street in South Toms River, New Jersey, and the Oldsmobile Achieva was hers. She stated that the suspected CDS seized from her residence belonged to her, but she denied manufacturing the CDS. When she was advised the police had previously observed her conduct a drug sale and surveilled defendant to her residence, Ms. Richardson stated, "What do you want me to say? If you've been watching you know the truth." (PSR5).

Although not present at any of the warrant executions, defendant was charged by Trooper B. Oliver of the New Jersey State Police on Complaint-Warrant 2017-2376-1507, dated December 20, 2017, with three counts of possession of CDS, third-degree crimes, one count of possession with intent to distribute CDS (cocaine), a second-degree crime, possession of a handgun, a second-degree crime and possession of drug paraphernalia, a disorderly persons offense. However, he was not arrested on that warrant until February 8, 2018 when he was charged in connection with the incident described below.

**Indictment number 18-04-751:**

During the month of January, CS1 advised the police defendant was still distributing quantities of CDS throughout Ocean County. CS1 advised them defendant was operating a white van he was renting.

On February 8, 2018, Brick Township police were conducting surveillance in the area of the Waterside Garden Apartments in Brick, New Jersey, after receiving information of CDS-related activity.[4] While at the complex, the police observed a white Nissan Maxima travel into the complex at a high rate of speed. The vehicle stopped in the middle of Schindler Drive and sat idle. After approximately ten minutes, a black female, later identified as Rajuonna Baker, exited one of the apartments and entered the vehicle as the driver, while a black male occupied the front passenger seat. Police followed the vehicle as it traveled on Drum Point Road at approximately 60 miles per hour in a 40 mile per hour zone. Police also observed that all four windows of the vehicle were illegally tinted.

Police conducted a motor vehicle stop of the above vehicle on Route 70 in Lakewood, New Jersey. Police approached Ms. Baker, the driver of the vehicle, and immediately detected the smell of marijuana emanating from inside the vehicle. At this time, police asked Ms. Baker to exit the vehicle, and she complied. While speaking with the police, Ms. Baker was uncooperative and stated "I know my rights." Police spoke to the front passenger, later identified as defendant, and noticed he continuously reached into the center console of the vehicle. He was asked to show his hands and exit the vehicle. After initially refusing the officer's request, he eventually exited the

[4] It is unclear from the parties' briefs and reports submitted if the police were specifically surveilling defendant or were conducting surveillance of the apartment complex, in general, for drug activity. PCR counsel contends the police were specifically surveilling defendant. Defendant later made the same allegation during his testimony.

vehicle with his hands up. As defendant exited the vehicle, police observed a green leafy substance fall from his shirt and that his pants were not zipped up. Defendant became uncooperative after the police asked why the vehicle smelled of marijuana. At this time, additional units arrived, and defendant was moved to the rear of the vehicle and asked to put his hands on the trunk, which he refused to do. Instead, he kept his hands in his pockets. Defendant physically attempted to obstruct the search of the vehicle and refused to comply with the officer's commands. He was placed under arrest for obstruction and seated on a guardrail ten feet from the vehicle.

A K-9 unit then arrived on scene to conduct a sniff of the vehicle. The K-9 gave a positive indication of CDS being present in the vehicle. Police conducted a "probable cause" search. In the center console, they located a large sum of United States currency folded in multiple bundles and a Samsung flip phone. A search of the trunk yielded: a red bag containing two 30 round magazines of .223 ammunition; 51 hollow-point rounds of .223 ammunition; 292 rounds of .223 ammunition; and 90 rounds of .40 caliber ammunition. Defendant was placed in a police vehicle and read his Miranda rights.[5] Defendant initially told police his name was "Anthony Calhoun" and stated the money in the vehicle belonged to Ms. Baker. He denied ownership of the ammunition. Defendant was transported to police headquarters.

A more thorough search of defendant was conducted at headquarters. According to the police report, the officer felt "an unnatural bulge inside of [defendant's] front waist line." The officer "reached in and pulled out an elongated object," which appeared to be suspected heroin wrapped in cellophane. According to the report, the suspected heroin weighed approximately 200 grams or over seven ounces.

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[5] Miranda v. Arizona, 384 U.S. 436 (1966).

As a result of the arrest on February 8, 2018, defendant was charged with possession of heroin; possession of heroin with intent to distribute; prohibited weapons; transporting of weapons; and obstruction. At that time, defendant was also processed on the outstanding complaint-warrant from the December 2017 incident. The State moved to detain defendant on both cases.

On February 21, 2018, a detention hearing was held before the undersigned judge. Retained counsel appeared and represented defendant on both cases. At conclusion of the hearing, the court ordered defendant detained on both cases. The case was thereafter assigned to Judge Cunningham.

As set forth above, defendant ultimately enter guilty pleas to counts one and two of the Accusation (Possession with Intent to Distribute Cocaine in an amount over five ounces, a first-degree crime, and being a Certain Person not to Possess a Firearm, a second-degree crime), and count two of the Indictment (Possession with Intent to Distribute Heroin in an amount over five ounces, a first-degree crime.)

**Evidentiary Hearing**

Retained counsel testified he was admitted to practice in December 2011 and worked principally as a landlord-tenant attorney until being hired by the Nappen Law Firm in November 2017. Since joining Nappen, he testified seventy percent of his practice involves criminal defense. However, retained counsel had handled only one testimonial suppression motion which was in Passaic County at approximately the same timeframe as defendant's guilty pleas. He did not indicate whether he has any criminal trial experience.

Defendant contacted Evan Nappen in December 2017 as a result of the execution of the search warrants. According to retained counsel, defendant was interested in having Nappen represent him but, because he had not been served with any complaints, Nappen told defendant to call back when he was arrested. In February 2018, defendant, after his arrest for both incidents and

while being held in the Ocean County Jail, retained the Nappen firm. Retained counsel was assigned by Mr. Nappen to handle the matter. Retained counsel claimed defendant only retained the firm for representation on the February 2018 charges and never reached an agreement with the firm for representation on the December 2017 charges.[6] However, he had no answer as to why he represented defendant on both cases at the detention hearing on February 21, 2018. No retainer agreement was produced at the evidentiary hearing to support counsel's contention his representation was limited to one case.

During the proceedings before Judge Cunningham, including the plea and sentencing, the State was represented by Assistant Ocean County Prosecutor Michael Abatemarco with regard to the February 2018 charges and by Deputy Attorney General Sarah Mielke with regard to the December 2017 charges.

Retained counsel admitted he had many discussions with the State regarding a "global plea" on both cases. In April 2018, defendant was indicted by an Ocean County grand jury with regard to the February 2018 incident. From the testimony, it appears at the arraignment or some subsequent status conference, Judge Cunningham raised the issue of defendant not having counsel of record on unindicted charges from the December 2017 incident. Retained counsel testified he advised Judge Cunningham his firm had not been retained for that matter. After some discussion, Judge Cunningham evidently directed defendant to complete a Form 5a which resulted in the assignment by the Office of the Public Defender (OPD) of "pool counsel"[7] for defendant.

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[6] For ease of reference, the facts and circumstances surrounding the execution of search warrants in December 2017 are referred to as the December 2017 incident. The same was later the subject of Accusation 18-10-1755. The facts and circumstances surrounding the motor vehicle stop and arrest on February 8, 2018 are referred to as the February 2018 incident, which were later the subject of Indictment 18-04-751.

[7] The OPD is authorized to maintain and compensate "trial pools of lawyers" on a case-by-case basis. N.J.S.A. 2A:158A-7(c)-(d). Pool attorneys may be engaged "whenever needed to meet case load demands, or to provide independent counsel to multiple defendants whose interests may be in conflict." N.J.S.A. 2A:158A-9; see also State

defendant did have a lab report for that case. He was not aware of the weight of the CDS seized in December 2017. Although negotiating a global resolution of both cases, retained counsel did not independently make any effort to confirm the CDS seized from the December 2017 incident tested positive for CDS or was "first degree weight." Instead, retained counsel stated he was advised defendant was originally charged with second-degree possession with intent to distribute charges from the December 2017 incident but those charges were "upgraded" to first degree based upon the weight.

With regard to the February 2018 charges, retained counsel admitted defendant maintained he was illegally strip searched at police headquarters when being processed, although he stated defendant did not expressly describe having to remove his clothing and undergarments. He testified the police report disclosed "an unnatural bulge" in defendant's pants. However, during the plea hearing, both retained counsel and the assistant prosecutor questioned defendant about CDS being recovered from defendant during a "strip search" at police headquarters.

Retained counsel testified defendant wanted to challenge the strip search but retained counsel advised defendant of 2017 appellate decision, which he believed to be State v. Evans, which upheld a "plain feel" observation and seizure by an officer. Defendant did not get into details with counsel about what clothing, if any, was removed. Defendant also claimed the strip search was recorded by video at police headquarters but retained counsel advised the assistant prosecutor contended no such video existed.

Accordingly, retained counsel was of the opinion a suppression motion would come down to "credibility" between the officer and defendant. He advised against it because he believed a motion to suppress the evidence seized via strip search would not be successful. He also advised appointed counsel of the "risks" of filing a suppression motion for the December 2017, including

a potential escalation of the plea offer by the State. While admitting defendant discussed with his attorneys his desire to file suppression motions on both cases, retained counsel stated defendant never insisted they do so, nor did defendant ever say he was agreeing to "waive" those motions. However, due to defendant's extensive prior record, retained counsel testified defendant was facing potential life imprisonment as extended-term eligible on the first-degree charges. Retained counsel testified that appointed counsel indicated he had handled many suppression motions and "you need a video" to be successful on such a motion. Retained counsel believed he obtained a very favorable resolution of the matters for defendant.

Upon re-direct by PCR counsel, retained counsel conceded he was not familiar with any statute or guidelines governing strip searches. He denied familiarity with N.J.S.A. 2A:161A-1 et seq. Retained counsel indicated he believed there were Attorney General guidelines on strip searches but did not review the guidelines but "he would have if we were going to proceed with a motion."

With regard to the stop and search of the vehicle in which defendant was a passenger on February 8, 2018, retained counsel admitted defendant wanted to challenge both. Defendant allegedly raised the case of State v. Pena-Flores with retained counsel who responded by advising him Pena-Flores had been overruled in State v. Witt. However, retained counsel did not make any distinction between an unanticipated stop by police or a targeted stop by narcotics detectives. Retained counsel advised he was of the opinion the search of the vehicle's trunk, after a K-9 alerted near the rear of the vehicle, would be based upon "probable cause and search incident to arrest." Therefore, such a motion, in his view, would be "an uphill battle." He was also of the opinion that police had cause to stop the vehicle based upon their alleged observations of speeding and tinted

windows. Retained counsel stated the State would escalate the plea offer to 20 years with 6 years of parole ineligibility if any motion was pursued.

Retained counsel testified he had four in-person meetings with defendant at the Ocean County Jail: August, September, October and December 2018. He claimed the October meeting took place prior to defendant's guilty pleas on October 29, 2018. Retained counsel stated he frequently made copies of discovery documents and gave the same to defendant in the courtroom during status conferences before Judge Cunningham. Retained counsel and appointed counsel had one "joint meeting" with defendant at the jail, but that was not until December 2018, shortly before defendant's sentencing. There was no meeting of both counsel with defendant at the jail prior to his plea hearing.

While the December 2018 meeting was originally intended to review the pre-sentence report, retained counsel admitted defendant again raised his desire to pursue suppression of the evidence, including the possibility of moving to withdraw his pleas.

Retained counsel testified, in his view, defendant "lacked standing" to pursue any suppression motion for the December 2017 charges because "it was not his apartment" where the search occurred. Retained counsel admitted nothing was placed on the record at sentencing to memorialize whether defendant agreed not to proceed with a motion to withdraw his pleas and/or to acknowledge a waiver of any suppression motions.

Appointed counsel, O'Malley, testified he was assigned the case and there "was a compressed timeframe" because the matter was coming up for court quickly. He did not meet with

defendant at the jail before his first court appearance but claims to have provided defendant copies of discovery in the courtroom for defendant to take back to the jail.[8]

Appointed counsel met with defendant at the jail after his first court appearance. He went over the charges, the consequences of sentencing and the defendant's eligibility for an extended term. Upon being confronted by PCR counsel that noticeably absent from his description of the meeting was the discussion of any defenses, appointed counsel testified the "AG case" (December 2017 incident) was "pre-speedy trial" while the other case was "speedy trial" and there was "time pressure" to get the case resolved.

Appointed counsel admitted he did not conduct any independent investigation, nor request any defense investigator be assigned to interview witnesses. When asked if verified the weight of the CDS involved, he replied "I didn't weigh it." When asked about whether the State had produced any lab reports, appointed counsel conceded there was a lab report on one case, but not the other. When asked whether he felt he had any responsibility to verify the weight of the CDS involved to support a first-degree charge, appointed counsel did not answer the question directly. Instead, he stated that discovery usually includes a document confirming the CDS was sent to a laboratory. He had no recollection whether the discovery in defendant's case including that documentation or any results thereof. Appointed counsel admitted if the discovery demonstrates

[8] Both counsel testified they provided discovery to defendant in the courtroom which he allegedly took back to the jail. This court is aware the Ocean County Department of Corrections prohibits inmates returning from the courtroom to bring any paperwork with them, including court notices and discovery. Court clerks are required to deliver court notices to the jail directly for examination before the same are transmitted to an inmate by jail staff. The court intended, but neglected, to question defendant on this issue during the evidentiary hearing. Moreover, defendant admitted to receiving most discovery, except for certain items discussed later in this opinion. Since this issue was not addressed on the record and the plea occurred before a different judge, the court does not take it into account in evaluating the credibility of counsel but notes it in the event of future proceedings.

grounds to file a suppression motion and the defendant expresses an interest in pursuing one, counsel should "ordinarily" file such a motion.

Appointed counsel testified defendant was "not happy" with certain aspects of the February 2018 case including the representation by retained counsel. Appointed counsel stated he had discussions with defendant as to the meaning of an "analog" with regard to CDS but had no discussion regarding the weight of the CDS involved. When asked whether there was a discussion of what quantity qualified for a first-degree crime arising from the December 2017 incident, appointed counsel testified defendant "knew that" because it was "in the indictment." When confronted with the plea transcript, appointed counsel conceded there was no indictment from the December 2017 case. Defendant pled guilty to an accusation drafted by the Deputy Attorney General with was presented to him for the first time on the day of the plea.

Appointed counsel conceded the weight of CDS is a "critical piece of evidence" and acknowledged the weight was not recited in count one of the accusation despite it being labeled as a first-degree crime. Appointed counsel also acknowledged no lab report was ever produced by the State to establish the first-degree weight of the CDS. He stated, words to the effect, "I admit, the weight I did not address, and it was inappropriate." Upon cross-examination by the State, appointed counsel was asked if he reviewed discovery with defendant. He stated he "thought [he] did . . . [but] maybe no since [they] didn't have the weight." Regarding whether there was a discussion with defendant as to whether he was waiving his right to file any suppression motions when pleading guilty, appointed counsel testified he "guessed [they] discussed that as well."

Defendant testified he contacted Mr. Nappen in December 2017, discussed the charges but did not pay any fee at that time. After being arrested on February 8, 2018 and charged with crimes in both cases, defendant contacted his girlfriend who retained the Nappen firm. Defendant believed

he retained the firm for both cases. Defendant met retained counsel for the first time at the detention hearing. He believed he would be represented by Mr. Nappen on both cases.

Defendant testified retained counsel came to see him at the jail on only two occasions prior to the plea hearing, and one additional time with appointed counsel prior to sentencing. Defendant testified he discussed both cases with retained counsel but that counsel was not familiar with the discovery from the December 2017 case. Defendant claimed he was confused as to why he was being charged with crimes arising out of the execution of search warrants in December 2017 because he never resided at any of those residences. Defendant admitted he was ultimately provided discovery for the December 2017 case but it was from retained counsel not appointed counsel. He noted co-defendant Yolanda Richardson admitted to ownership of the CDS found. He questioned counsel as to why he was being charged with those drugs and being asked to plead guilty when Richardson allegedly admitted ownership.

Defendant testified he has not seen a lab report "to this day" regarding the CDS recovered in the December 2017 incident. According to defendant, at one of the court appearances prior to the plea, Judge Cunningham raised the issue of defendant not having counsel with regard to the December 2017 charges, despite the fact he thought retained counsel was representing him on both matters. Defendant confirmed retained counsel advised him if a suppression motion was filed the plea offer would increase from eleven years with five and one-half years of parole ineligibility to twenty years with six years of parole ineligibility. Retained counsel opined defendant would lose any such motion on credibility grounds.

Defendant testified he requested his attorney investigate whether the officers had "dash-cam videos" during the February 2018 motor vehicle stop as well as to challenge the strip search because he believed it showed "non-compliance with a commanding officer." Defendant also

challenged the officers' version of events at the motor vehicle stop, including the search of the vehicle.

Regarding the strip search, defendant claimed he was "patted down" three times at the scene of the stop and two more times in police headquarters before the officers took him to a small room and ordered him to remove his clothing and underwear. He claims he was asked to "bend over," "lift his testicles" and was searched. Defendant testified, "I thought all police stations had to have video" so he asked counsel to investigate that possibility.

Defendant claims he asked retained counsel to file a motion to suppress the stop of the vehicle, the search of the vehicle's trunk and the strip search at police headquarters. In response, he claimed retained counsel did not discuss the strength of the motion but instead stated, "this is the best deal you're going to get so you don't want to risk getting more time."

Defendant disputed the quality of any consultation with counsel stating communications in the courtroom were hurried and crowded. He was in the jury box with other inmates and counsel was trying to talk to him while other proceedings were taking place. The judge was asking counsel to "keep in down." When he pled guilty, defendant admitted he "lied to the court" when he said he had enough time to discuss the cases with his attorneys. He likewise lied when he said he reviewed discovery and was satisfied with the representation he received. Defendant explained he made these false statements because when he tried to discuss the suppression motions with his attorneys, they told him "this was the best deal" he could get and if he challenged the State he would get two life sentences.

## LEGAL ANALYSIS

Defendant asserts plea counsel was legally ineffective in violation of the United States Constitution, Sixth Amendment and the New Jersey State Constitution. Defendant makes several

claims why he believes retained counsel was ineffective in his petition and brief in support of his PCR. First, defendant asserts his counsel failed to investigate. Defendant claims this is supported because retained counsel failed to meet with him and failed to review the discovery with him or even provide discovery to him. Defendant claims his only option was to take a plea or go to trial without full discovery and not be prepared. Second, defendant claims his retained counsel failed to file a suppression motion to challenge the warrantless car stop. Defendant claims police did not have probable cause to search the car nor to search his person. Furthermore, defendant claims the police search of the vehicle's trunk was patently unreasonable because the bare circumstance of a small amount of marijuana did not constitute probable cause that more marijuana or other contraband might be elsewhere in the automobile. Third, defendant claims retained counsel and appointed counsel failed to file a motion to suppress a search pursuant to a warrant. Defendant claims the facts stated in the affidavit of probable cause are untruthful. Defendant asserts his supplemental certification, also a sworn statement, constitutes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Defendant also asserts both counsel failed to verify the weight of the CDS involved supported the first-degree charge against him.

The State contends defendant's claims are meritless and belied by the record.

**Ineffective assistance of Plea Counsel**

In bringing forth a claim of ineffective assistance of counsel, the defendant bears the burden of proving a two prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42 (1987). Under this test, a defendant must show that prior counsel's performance was deficient as measured by an objective standard of reasonableness and that these deficiencies

materially contributed to the outcome of the matter. Strickland, 466 U.S. at 687–88; State v. Buonadonna, 122 N.J. 22, 41 (1991); State v. Nunez-Valdez, 200 N.J. 129, 139 (2009).

Under the first prong, a court should review a defense counsel's performance with "extreme deference" and with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Fritz, at 52. Reasonable competence does not require the best of attorneys, but rather that a defendant's attorney "is not so ineffective as to make the idea of a fair trial meaningless." State v. Davis, 116 N.J. 341, 351 (1989). If the defendant's prior counsel's performance falls below the objective standard of reasonableness contained in the first prong, under the second prong of the test for ineffective assistance of counsel, the defendant must still show a reasonable probability that but for counsel's unprofessional errors, the result of a proceeding would have been different. Moreover, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689.

In order to establish a prima facie case of ineffectiveness of counsel, defendant must show that there is a reasonable likelihood, that when viewed in a light most favorable to the defendant, his or her claim will ultimately succeed on the merits. R. 3:22-10(b). A defendant must do more than make "bald assertions" to establish a prima facie claim of ineffective assistance of counsel; he must allege facts sufficient to demonstrate counsel's alleged substandard performance and must support those facts through affidavits or certifications by those witnesses possessing personal knowledge. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). In a post-conviction relief proceeding, the burden is on the defendant to prove his right to the relief requested by a preponderance of the evidence. State v. Goodwin, 173 N.J. 583, 593 (2002).

With respect to a guilty plea, our Supreme Court has explained that

> [T]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases"; and (ii) "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial."

[State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (second alteration in original) (quoting State v. DiFrisco, 137 N.J. 434, 457 (1994).]

The defendant must also show "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010); see also State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1967 (2017).

It is well-settled that solemn declarations in open court carry "a strong presumption of verity." State v. Simon, 161 N.J. 416, 444 (1999). "Generally, representations made by a defendant at plea hearings concerning the voluntariness of the decision to plead, as well as any findings made by the trial court when accepting the plea, constitute a 'formidable barrier' which defendant must overcome before he will be allowed to withdraw his plea." Simon, 161 N.J. at 444 (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977)); see also State v. Means, 191 N.J. 610, 619-20.

Guided by the well-settled law set forth above, this court concludes both retained counsel and appointed counsel were ineffective in several respects. First, defendant credibly testified he believed retained counsel was representing him on both cases. He contacted the Nappen firm after the December 2017 incident. Upon being arrested in February 2018 and charged with crimes arising out of both incidents, defendant retained the Nappen firm. Retained counsel appeared for

defendant and represented him at the detention hearing involving both cases. Both orders for pretrial detention recite the appearance of retained counsel. Defendant reasonably labored under the understanding retained counsel represented him on both cases until Judge Cunningham correctly noted no appearance was filed by counsel regarding the December 2017 case. The court concludes defendant was credible when testifying about his belief retained counsel was representing him on both cases. Notably, retained counsel did not produce a retainer agreement to establish otherwise nor did the State inquire into same.

**Weight of the CDS recovered from the December 2017 incident.**

When Judge Cunningham noted defendant was unrepresented on the unindicted case, she directed counsel be appointed. This court finds appointed counsel essentially deferred to retained counsel. He took a lackadaisical role with regard to his representation of defendant. The court finds defendant was provided with most of the discovery materials but further finds neither counsel verified the weight of the CDS involved in the December 2017 incident. Even assuming defendant was willing to admit the substance seized was cocaine, it is elementary that the weight of the CDS in a critical element in a distribution case, particularly one with a first-degree charge. The offense could only be a first-degree crime if the amount involved exceeded five (5) ounces. N.J.S.A. 2C:35-5 b(1). Between a half-ounce and five ounces is a second-degree crime, while less than a half ounce is a third-degree crime. Ibid.

The plea transcript and other discovery materials support the claims of defendant and undermine the credibility of both counsel. Appointed counsel claimed defendant would have been aware of the weight of the CDS involved in the December 2017 incident by the language in the "indictment." However, defendant was never indicted for the December 2017 incident. Defendant was indicted for the February 2018 incident and the Ocean County Prosecutor's Office produced

a laboratory report verifying the weight of the CDS involved in that case. The December 2017 case was being prosecuted by a DAG and, from the plea transcript as well as the testimony at the evidentiary hearing, the supposedly five plus ounces of cocaine was never sent for a laboratory analysis. As part of the "global" plea agreement, the DAG prepared an accusation. Count one of accusation alleged defendant possessed cocaine with intent to distribute same, a "first-degree crime." But the accusation did not allege the weight involved. Arguably, the accusation does not even correctly allege a first-degree crime. Appointed counsel failed to recognize this critical deficiency.

During his plea colloquy, the DAG, after asking if defendant reviewed discovery, questioned defendant about the amount of CDS involved in the December 2017 incident:

> Q. And in that discovery you were aware that the cocaine referenced in Count 1 of this accusation was not sent for testing to a State Police lab, is that right? [Emphasis added.]
>
> A. No, I just found that out 10 minutes ago.
>
> Q. Okay. And you're aware, however, in reviewing the discovery that this cocaine was weighed by police involved in this investigation, correct?
>
> A. I guess. You didn't send it to the lab. I don't know what (inaudible) or what not --."
>
> 1T24-18 to 1T25-2.
>
> Regarding this critical issue, the DAG continued to question defendant:
>
> Q. Do you have any – and this was genuine cocaine to your knowledge, correct?
>
> A. Yeah, I guess.
>
> Q. Okay, do you have any reason to –
>
> THE COURT: Well, hold on. Is that a yes or no?
>
> THE DEFENDANT: Yes, I guess. This is crazy.

[1T25-9 to 1T25-15.]

When defendant testified it was "crazy" neither counsel intervened and sought to clarify what their mutual client thought was crazy or confusing. Defendant's contemporaneous testimony during the plea hearing supports his testimony at the evidentiary hearing that neither counsel verified the weight of the CDS involved in the December 2017 incident, nor even discussed it with him until minutes before the plea. Moreover, neither counsel discussed with him in advance that the cocaine which formed the basis of count one of the accusation had never been submitted for testing or analysis. Thus, the State had not even established a positive test for the supposedly first-degree cocaine charge in the December 2017 incident – much less verified same weighed over five ounces.

The court recognizes a defendant can choose to waive the production of a lab report. But a waiver contemplates a knowing and voluntarily relinquishment of known right. See State v. Urbina, 221 N.J. 509, 528-529 (2015). A "waiver cannot be deemed knowing, intelligent, and voluntary 'unless the defendant possesses an understanding of the law in relation to the facts.'" Ibid., quoting McCarthy v. United States, 394 U.S. 459, 466 (1969). Here, appointed counsel never discussed with defendant what constituted "first-degree weight", believing defendant would have seen that in the "indictment" but there was no indictment arising from the December 2017 incident. Defendant was not aware the State failed to analyze the cocaine seized. Further, he did not even realize his counsel failed to investigate the weight of the CDS involved in the December 2017 incident. At no time during the evidentiary hearing did the State ever produce any police report or other document showing the cocaine was weighed by anyone, police officers or otherwise, to demonstrate it exceeded five ounces. Notably, count one of the accusation resulted in the longest

sentence imposed of any of the three sentences involved. Thus, there was clear prejudice to defendant by counsel's failures to recognize this critical deficiency.

The presentence report also should have alerted any competent counsel to this issue. On page one of the PSR, the investigator recited defendant pled guilty to possession with intent to distribute "over .5 oz of cocaine . . ., a first[-]degree offense." PSR at 1. That statement is legally incorrect as such a weight does not constitute a first-degree crime. The PSI investigator noted the discovery "did not contain lab results" from the December 2017 incident. Therefore, he contacted the DAG via telephone who advised the CDS was analyzed at a DEA lab. No lab report was provided but the DAG reported the lab results were recorded as 3.01 grams of cocaine and 2.21 grams of heroin, plus a small amount of marijuana. Both amounts are well below one-half ounce each, nowhere near the five ounces required for a first-degree crime. Neither counsel recognized this deficiency when reviewing the PSR in preparation for sentencing. At the beginning of the sentencing hearing, appointed counsel advised Judge Cunningham he had reviewed the PSR with defendant and "it is factually accurate and adequate for sentencing purposes." 2T5-11. Retained counsel concurred in that assessment stating he had also reviewed the PSR and "everything is accurate." 2T5-20. If the amounts of the CDS listed on page 3 of the PSR were "accurate," both counsel should have immediately realized there was no basis for a first-degree crime arising out of the December 2017 incident.

It is not clear to this court if those small amounts of CDS listed on page 3 of the PSR were separate from the allegedly greater than five ounces of cocaine recovered, or if no such first-degree weight was ever seized. Compounding this matter was the State's decision during the evidentiary hearing to call no witnesses and submit no documents. This court has not been provided with any police report which substantiates an informal weighing of the cocaine by the investigating

detectives. PCR counsel contends he has never seen any documents supporting the first-degree weight. If the State had reports confirming an alleged weight in excess of five ounces, the court assumes the State would have submitted same during the evidentiary hearing. Similarly, the State has never offered a reason for its apparent failure to submit over five ounces of cocaine to a laboratory for analysis in the ten months which elapsed from the date of seizure to the date of plea.[9]

In preparing this opinion, the court reviewed the original complaint warrant, W-2017-2376-1507, upon which defendant was charged by the State Police. Count five of that warrant alleges defendant possessed with intent to distribute CDS, "to wit, possess approximately forty-eight (48) grams of a white powdery substance, suspected CDS cocaine . . . a crime of the second degree." Count five is the only count which alleged distribution or possession with intent and the 48 grams is the largest quantity of any CDS mentioned in the warrant. 48 grams of cocaine equates to approximately 1.69 ounces, far below the requisite five ounces to support a first-degree charge. Retained counsel testified the CDS charge against defendant had been "upgraded" to a first-degree from a second-degree. No other complaint-warrant filed against defendant appears in the case jacket on e-Courts and defendant was never indicted on the December 2017 case. Therefore, the only "upgrade" was when both defense counsel agreed to the filing of Accusation No. 18-10-1755 against defendant alleging a first-degree CDS crime, without any proof to support the degree of the charge.

During his testimony, appointed counsel recognized his conduct in this regard was "inappropriate." The court concludes he deferred to retained counsel to review the case and

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[9] The court uses the term "State" generically in this regard. The December 2017 charges were prosecuted by the Attorney General's office while the February 2018 charges were prosecuted by the Ocean County Prosecutor's Office. At the beginning of oral argument on August 26, 2020, the court was advised the prosecutor's office was authorized to handle both matters for the purposes of the PCR.

negotiate the plea agreement. Appointed counsel, essentially, appeared in form only. Although retained counsel was not counsel of record for defendant regarding the December 2017 case, appointed counsel assumed retained counsel would address the discovery and evidence in the matter. Neither counsel did so. Both counsel were ineffective with regard to a critical element of the State's case – the weight of the CDS – and defendant suffered prejudice by pleading guilty to a first-degree offense where there was no proof of five ounces or more of cocaine. A basic obligation of defense counsel was to investigate the proof of the substance involved and whether the weight reached the first-degree level. This obligation should have been obvious to any reasonably competent attorney because the complaint-warrant alleged an amount well below five ounces of cocaine.

It appears both defense counsel committed these oversights due to a concern the State would "escalate" the plea offer if suppression motions were filed. Retained counsel repeatedly expressed concerns during his testimony about escalation. This court recognizes prosecutors often conditioned pleas on acceptance within a specific time frame and/or deem offers revoked if a defendant seeks suppression of the evidence. However, neither attorney claimed the offer would escalate if defense counsel simply requested a lab report.

Appointed counsel testified the "AG case" (December 2017 incident) was "pre-speedy trial" while the other case was "speedy trial" and there was "time pressure" to get the case resolved. It's unclear what appointed counsel meant by one case being "pre-speedy trial" as both of defendant's cases were filed after the effective date of the Criminal Justice Reform Act on January 1, 2017. As indicated above, this court detained defendant on both cases on February 21, 2018. Thus, both cases were originally "speedy trial" cases. However, the Attorney General's office did not present the matter to a grand jury within 90 days, or ever, since defendant ultimately consented

to a filing of an accusation. A review of e-Courts shows the DAG withdrew the detention motion and consented to defendant's "release" on May 7, 2018 with regard to the December 2017 case only. Therefore, defendant, while remaining detained in Ocean County Jail on the February 2018 charges, was not longer speedy trial eligible on the December 2017 case. The DAG was therefore not required to present that case to a state grand jury within 90 days and evidently felt no obligation to have the drugs timely submitted for analysis. This resulted in prejudice to defendant as his attorneys handled the matter ineffectively.

The court finds any explanations by defense counsel regarding potential escalation of the plea offers are not appropriate when applied to the December 2017 case because (1) the case had never been indicted and defendant was never arraigned on those charges; and (2) it is customary that plea offer escalation may be made in response to motion practice by defendant, not a simple request for laboratory results. In fact, it would have been unreasonable for the State to escalate the offer if defendant simply sought results confirming the positive test and weight of the CDS involved. The court finds the explanations of both defense counsel lack credibility to the extent "time pressure" allegedly justified counseling defendant to pled guilty to an unindicted first-degree crime, set forth in a deficient accusation, with no laboratory analysis. As this was the longest recommended sentence and longest period of parole ineligibility imposed by the sentencing court, defendant clearly suffered prejudice due to the deficiencies of both counsel. If the state was truly asserting "time pressure" on counsel, it was incumbent on counsel to advise the judge any global resolution was premature absent laboratory results or other sufficient proof of first-degree weight of the cocaine. Reasonably competent counsel would have done so.

**Suppression Motions**

This court finds defendant expressed a desire to pursue suppression motions regarding both cases. While defendant testified to same, the court need not rely solely on the credibility of defendant's testimony as both counsel confirmed defendant expressed this intention both before the guilty pleas and again prior to sentencing. He also considered pursuing a motion to withdraw his guilty plea in order to do so.

With regard to the December 2017 case, retained counsel testified he advised defendant he "lacked standing" to bring a suppression motion. Even though retained counsel was not counsel of record for that case, it is clear to the court retained counsel was taking the lead in negotiating a so-called global resolution and appointed counsel deferred to retained counsel regarding that global resolution. Under federal law, a defendant can only challenge a search and seizure if he can establish a reasonable expectation of privacy, or standing, in the place or thing searched. Rawlings v. Kentucky, 448 U.S. 98 (1980). However, in New Jersey, a criminal defendant has standing to move to suppress evidence from a claimed unreasonable search or seizure "if he has a proprietary, possessory or participatory interest in either the place searched or the property seized." State v. Alston, 88 N.J. 211, 228 (1981). The advice of retained counsel was fundamentally flawed in this regard. Counsel was evidently laboring under the standing requirement for federal jurisdiction. Appointed counsel did not provide any remedial or corrective advice. Defendant was charged with possession with intent to distribute CDS and possession of a firearm so he clearly had a "possessory" interest in the CDS and gun sufficient to confer standing. Long before this case, well-settled case law established a defendant who was not at the searched premises at the time of warrant execution has standing to challenge the issuance of the warrant and manner of entry. See, e.g., State v Carlino, 373 N.J. Super. 377, 384 (App. Div. 2004), certif. den. 182 N.J. 430 (2005)

(holding defendant had standing to challenge issuance of "no-knock" warrant when he was neither the homeowner nor resident and was not present at the time of the no-knock entry).

This court recognizes "[a] plea of guilty amounts to a waiver of all issues, including constitutional claims, that were or could have been raised in prior proceedings." State v. Marolda, 394 N.J. Super. 430, 435 (App. Div. 2007). While such a waiver includes any unfiled or undecided suppression motions, the court finds defendant could not have freely, voluntarily or intelligently waived such motions associated with the December 2017 incident because he was erroneously advised by retained counsel he lacked the legal "standing" to bring such a motion. That advice was clearly ineffective. Because of the gravity of the erroneous advice, the court need not consider whether such a motion would have been potentially meritorious. The incorrect advice vitiates the voluntary nature involving the waiver of rights and guilty plea. Moreover, the incorrect advice of retained counsel, when coupled with the failure of appointed to verify the weight of the first-degree CDS charge stemming from the very same incident, leads this court to conclude the actions of counsel were not within the range of competence demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pleaded guilty and would have insisted on obtaining a lab report and pursuing a suppression motion. State v. Nuñez-Valdéz, 200 N.J. at 139.

Having concluded defendant is entitled to have his convictions on the accusation stemming from the December 2017 incident vacated, the court likely does not need to consider defendant's remaining arguments. Both sides agree defendant pled guilty as part of a "global" resolution of both cases. Vacating the convictions on the accusation also requires the conviction on the indictment be vacated as well.

However, for the sake of completeness, the court considered defendant's remaining arguments and concludes defendant would still be entitled to relief because he received further ineffective assistance from retained counsel in connection with the February 2018 incident.

**February 2018 Incident.**

Defendant alleges his attorney was ineffective for not pursuing a suppression motion in connection with (1) the stop of the motor vehicle, (2) the search of the trunk of the car and (3) the alleged strip search at headquarters. When defense counsel's "failure to litigate a Fourth Amendment claim is the principal allegation of ineffectiveness, 'the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.'" State v. Johnson, 365 N.J. Super. 27, 35 (App. Div. 2003) (quoting Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)). Thus, when counsel fails to file a suppression motion, the defendant must satisfy both parts of the Strickland test and also prove that his Fourth Amendment claim is meritorious. State v. Goodwin, 173 N.J. 583, 597 (2002).

As to the motor vehicle stop, the court concludes defendant has not shown there was any meritorious basis for a motion to challenge the stop of the vehicle. The State claims the vehicle was stopped for speeding and tinted windows. Motor vehicle stops are seizures for Fourth Amendment purposes. See State v. Sloane, 193 N.J. 423, 430 (2008). An officer may stop a motor vehicle only upon "articulable and reasonable suspicion" that a criminal or motor vehicle violation has occurred. Delaware v. Prouse, 440 U.S. 648, 663 (1979); State v. Scriven, 226 N.J. 20, 33-34 (2016) ("Under both the Fourth Amendment [of the United States Constitution] and Article I, Paragraph 7 [of the New Jersey Constitution], ordinarily, a police officer must have a reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-

vehicle violation or a criminal or disorderly persons offense to justify a stop."); State v. Locurto, 157 N.J. 463, 470 (1999) (motor vehicle stop based upon officer's observation of speeding without any radar or other measuring device constituted valid stop). The State bears the burden of proving that an investigatory stop is valid. State v. Maryland, 167 N.J. 471, 489 (2001).

"A motor vehicular violation, no matter how minor, justifies a stop without any reasonable suspicion that the motorist has committed a crime or other unlawful act." State v. Bernokeits, 423 N.J. Super. 365, 370 (App. Div. 2011). The State does not need to prove that the motor vehicle violation occurred, only that "the police lawfully stopped the car." State v. Heisler, 422 N.J. Super. 399, 413 (App. Div. 2011) (quoting State v. Williamson, 138 N.J. 302, 304 (1994)). In accordance with N.J.S.A. 39:3-74, a person is prohibited from driving a "vehicle [with tinted windows] . . . as to unduly interfere with the driver's vision to the front and to the sides." Tinted windows obstructing vision are a basis for a lawful stop. State v. Cohen, 347 N.J. Super. 375, 378-81 (App. Div. 2002). While the stop was warrantless, defendant's mere denials are insufficient to show counsel failed to pursue a meritorious motion regarding the stop.

In the alternative, PCR counsel claims defendant was under surveillance and was being targeted by the police. Assuming that contention is accurate, there was certainly grounds to stop defendant as he was wanted on outstanding complaint-warrants from the December 2017 incident. Thus, any challenge to the vehicle stop was meritless.

The court reaches a different result regarding the search of the trunk and the alleged strip search of defendant at police headquarters. Defendant argues the mere smell of marijuana or the recovery of a small amount of marijuana in the passenger compartment does not permit the police to conduct a search of the trunk of the vehicle. The extent of the search depends on the degree of probable cause. The scope of a warrantless search of a vehicle is defined by the object of the search,

and thus the scope of the search are the locations within the vehicle where further contraband of that kind may be found. State v. Gonzales, 227 N.J. 77, 100 (2016).

In State v. Murray, the warrantless search of the defendant's trunk was unreasonable in scope. 151 N.J. Super. 300, 308 (App. Div. 1977). The only evidence initially found was a roach clip and a minimal amount of marijuana dust, yet the officer took a pin out of a passenger seat to lift it and proceeded to use a knife to open a compartment hidden below the seat. Murray, 151 N.J. Super. at 303-05. The court in Murray held that, "whether the trunk of the vehicle may properly be opened and searched depends entirely on the factual circumstances apparent to the searching officer." Murray, N.J. Super. at 308. Similarly, in State v. Patino, 83 N.J. 1, 12 (1980), the Court expressed that other factors such as defendant's demeanor, erratic driving, or other incriminating activity must be considered in determining the scope of the search. The Court stated "a small amount of marijuana does not alone without other circumstances that suggest participation in drug traffic or possession of more contraband provide justification to extend the zone of the exigent search further than the persons of the occupants or the interior of the car." Patino, 83 N.J. at 14–15.

Regarding the February 2018 incident, police also called a K-9 which allegedly alerted on the rear of the car. But the record is unclear whether that alert was consistent with the small amount of marijuana in the passenger compartment or some other indication. Further, the court finds retained counsel failed to recognize the stop was made by several narcotics officer during a planned drug operation. In fact, PCR counsel alleges – and defendant testified – it was a planned drug operation targeting defendant. While retained counsel correctly pointed out the parameters of State v. Witt, 223 N.J. 409, 447 (2015) (warrantless searches of vehicles are permitted when two conditions are met: first, the police must have probable cause to believe the vehicle has contraband

or evidence of a criminal offense; second, the circumstances that give rise to probable cause must be "unforeseeable and spontaneous"), the police report submitted as Exhibit D-2 during the evidentiary hearing may not be supportive of a claim the stop was "unforeseeable and spontaneous." The police report clearly states undercover officers were conducted surveillance at an apartment complex "for information received about CDS activity." The stop of the vehicle may not have been a spontaneous and unforeseen stop of a car such as one a uniformed officer based upon an observed traffic violation. The case may be more analogous to State v. Dunlap, 185 N.J. 543, 551-552 (2006), where the Court affirmed suppression of a warrantless vehicle search of a vehicle by multiple detectives during a targeted narcotics investigation of the defendant in a safe area when the officers had sufficient time to seek a warrant. While the court is not ruling defendant is entitled to suppression of the evidence, the court finds defendant wished to file a potentially meritorious suppression motion which his retained counsel failed to pursue. Further, the court's conclusion is buttressed by retained counsel's belief that a search of a vehicle incident to arrest was still a viable warrantless search by police. That previously recognized exception to the warrant requirement has been rejected with regard to motor vehicles in New Jersey since 2006. Once the suspects are removed from a car and secured elsewhere, the justification for a search incident to arrest (officer safety and preventing destruction of evidence), no longer justifies a warrantless search incident to arrest. State v. Eckle, 185 N.J. 523, 540-541 (2006). Retained counsel testified he was of the opinion the search of the vehicle's trunk could be based upon "probable cause and search incident to arrest." Therefore, a suppression motion, in his view, would be "an uphill battle."

To the extent retained counsel relied upon the search incident to arrest exception in giving that advice, his reasoning was fundamentally flawed.[10]

Finally, retained counsel was clearly ineffective in investigating a suppression motion regarding the alleged strip search. While the police reports do not clearly show the officer conducted a strip search, both defense counsel and the assistant prosecutor relied upon a strip search when questioning defendant regarding the factual basis for the guilty plea for possession with intent to distribute heroin found on defendant's person. Retained defense counsel testified he was unfamiliar or unaware of the statute governing strip searches, N.J.S.A. 2A:161A-1, as well as the Attorney's General's guidelines regarding same. Counsel's testimony that he "would have reviewed" those legal authorities if a suppression motion was filed amply demonstrates the ineffectiveness of any advice about *whether* to pursue such a motion. Instead, retained counsel testified he relied upon a 2017 Appellate Division decision upholding the "plain feel" doctrine to justify a strip search, presumably a reference to State v. Evans, 449 N.J. Super. 66, 88 (App. Div. 2017). However, that decision did not uphold the strip search in that case; the appellate panel found the contraband was not "immediately apparent" to the officer during the search. This court is aware that conclusion was reversed by the Supreme Court on June 28, 2018 in State v. Evans, 235 N.J. 125 (2018), four months before defendant's guilty plea, when the Court concluded the strip search in that case was valid. It is unclear if retained counsel was perhaps referring to the

[10] Under prior federal law, police officers were permitted to conduct a search of the passenger compartment of a motor vehicle incident to a lawful custodial arrest of the driver or one of the occupants. New York v. Belton, 453 U.S. 454 (1981). In 2006, the New Jersey Supreme Court, relying upon Article I, paragraph 7 of the New Jersey Constitution, expressly rejected the Belton rule in Eckle, 185 N.J. at 540-541. Three years later, the U.S. Supreme Court overruled the Belton rule in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). To the extent retained counsel was evidently relying upon the Belton rule in giving advice, his understanding of the law was significantly outdated.

Supreme Court's opinion rather than the Appellate Division opinion. Regardless, counsel's failure to review the strip search statute and the AG guidelines, coupled with his other fundamental misunderstandings of search and seizure jurisprudence, leads this court to conclude retained counsel was ineffective in providing advice as to the risk/benefits of seeking suppression for the evidence recovered in the alleged strip search. Here again, the heroin recovered weighed approximately seven ounces and constituted grounds for the first-degree crime. Since it was located on defendant's person, the issue of possession was established. The fundamental duty of defense counsel was to determine if the manner of searching for and seizing that evidence was constitutional. It may very well be the police had concerns about defendant being in possession of a firearm after large quantities of ammunition were located in the vehicle. It might also be established the officer identified a bulge or through "plain feel" recognized contraband. But retained counsel had no knowledge of the standards for a strip search during the time he had a duty to advise defendant about a motion to suppress.

Further, the police were denying a strip search occurred. Such a search was not clearly disclosed in any reports produced to this court. Thus, counsel had the obligation to pursue the video recording defendant requested as well as any proof the strip search occurred, particularly because the assistant prosecutor apparently admitted the use of strip search while questioning defendant during the plea hearing. If counsel proved defendant was strip searched, but the officers failed to disclose such a search in their reports, credibility issues may have y arisen for the officers.

Again, while not ruling defendant is entitled to suppression of the CDS found during the alleged strip search, this court finds retained counsel was ineffective in investigating the potential for such a motion such that defendant could not freely, voluntarily and intelligently waive said motion when pleading guilty.

## CONCLUSION

In conclusion, the court finds defendant is entitled to have his convictions in both cases vacated. Likewise, Accusation 18-10-1751 is **DISMISSED**. All indicted and unindicted charges from both cases are hereby reinstated. The matter shall be restored to the trial court calendar. For all the foregoing reasons, the Petition for Post-Conviction Relief is **GRANTED**.

**ALD-224** **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 22-1761

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PHILLIP TARVER,
Appellant

v.

KEISHA FISHER, ADMIN.;
SOUTH WOODS STATE PRISON

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:22-cv-00012)
District Judge: Honorable Noel L. Hillman

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Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

August 18, 2022

Before: JORDAN, RESTREPO, and SCIRICA, Circuit Judges

(Opinion filed: October 17, 2022)

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OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

**PER CURIAM**

Phillip Tarver, proceeding pro se, appeals the District Court's order dismissing his complaint for failure to state a claim. We will affirm.

Tarver is incarcerated at South Woods State Prison in New Jersey. In January 2022, he filed a form complaint in the District of New Jersey, checking a box that asserted that court's jurisdiction pursuant to the federal civil-rights statute, 42 U.S.C. § 1983. He claimed that he is "being held in violation of an erroneous sentence that has already been adjudicated in [his] favor by a state court vacating [his] convictions." Compl. 4, ¶ 4(b). He styled his filing as a motion under Federal Rule of Civil Procedure 60(b), asserting that he sought to correct a "mistake" made by the state trial court in adjudicating his post-conviction relief petition, and asked the District Court to vacate his convictions. Id. at 6.

The District Court screened and dismissed the complaint for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). The District Court explained that motions under Rule 60(b) should generally be raised in the court that issued the purportedly mistaken decision. See Dist. Ct. Op. 3 (citing Budget Blinds, Inc. v. White, 536 F.3d 244, 254 (3d Cir. 2008)). The opinion also explained that Tarver's challenge to his convictions cannot be raised under the guise of § 1983, but must be brought according to the rules established for "a person in custody pursuant to the judgment of a State

court." Id. at 4 (quoting 28 U.S.C. § 2254). Accordingly, the District Court found that Tarver's complaint failed to state a claim for relief. Tarver now appeals that decision.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review dismissal pursuant to § 1915(e)(2)(B)(ii) under the same de novo standard of review that we apply to our review of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000). To avoid dismissal, a complaint must set out "sufficient factual matter" to show that its claims are facially plausible. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). We accept all factual allegations in the complaint as true and construe those facts in the light most favorable to the plaintiff, Fleisher v. Standard Ins. Co., 679 F.3d 116, 120 (3d Cir. 2012), and we construe Tarver's pro se complaint liberally, see Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam).

We agree with the District Court that Tarver failed to state a claim for relief. To the extent that he invoked Rule 60(b) to correct a "mistake," that procedural rule is not an appropriate mechanism for a federal court to review a state-court decision. To the extent that he sought to employ § 1983 to invalidate his convictions and secure his release, as the District Court here fully explained, the proper manner of lodging a challenge in federal court to his continued confinement is via habeas corpus, according to the procedures established under § 2254 and related statutes.[1] See Preiser v. Rodriguez, 411

[1] Like the District Court, we express no opinion on the merits or timeliness of any future petition Tarver may file under § 2254.

U.S. 475, 500 (1973). Thus, this appeal presents no substantial question, and we will summarily affirm the judgment of the District Court. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam); 3d Cir. L.A.R. 27.4; I.O.P. 10.6.