

PROCEDURAL HISTORY

I. THE PLEA TO MONMOUTH COUNTY
ACCUSATION 01-11-2018

On August 20, 2001, the appellant Mr. DeBenedictis was charged in Spring Lake, Monmouth County, New Jersey, with several drug possession and drug paraphernalia offenses; and, several motor vehicle summonses. The drug possession offense was charged under N.J.S.A. 2C:35-10a(1), Possession of a Controlled Dangerous Substance, a third degree crime. This offense was subsequently resolved via the captioned accusation Da 1, with the entry of a retraxit guilty plea before the Honorable James A. Kennedy J.S.C. on November 5, 2001, to an amended charge of N.J.S.A. 2C:5-2 Conspiracy to Possess a Controlled Dangerous Substance in violation of N.J.S.A. 2C:35-10a(1), as a third degree crime. At the time of the plea hearing, a record of the proceedings was made and a copy of the transcript of those proceedings is attached as an Exhibit in the Appendix, (Da4, 1T).

II. THE SENTENCING ON MONMOUTH COUNTY
ACCUSATION 01-11-2018

On December 21, 2001, the appellant was sentenced by Judge Kennedy, pursuant to the terms of the plea agreement, with Mr. DeBenedictis being sentenced to a two-year term of probation with monetary costs and assessments. A copy of the Judgment of

Conviction is attached in the Appendix (Da12). At the time of the sentencing hearing, a record of the proceedings was made and a copy of the transcript of those proceedings is attached as an Exhibit in the Appendix (Da14, 2T). No Appellate proceedings were ever instituted by the Appellant in regards to this matter.

III. THE HEARING OF THE POST CONVICTION RELIEF PETITION
ON MONMOUTH COUNTY ACCUSATION 01-11-2018

A Post Conviction Relief Petition was filed with the Middlesex County Superior Court on August 13, 2008, pursuant to Court Rule 3:22-1 et seq. pertaining to the guilty plea entered on November 5, 2001. This Petition, a copy of which is attached in the Appendix (Da20, was filed out-of-time, having been filed more than five years after the plea date of November 5, 2001. The Petition was heard before the Hon. Anthony J. Mellaci, Jr. JSC, on December 5, 2008, in regards to the issue of whether 'Excusable Neglect' was established, as required by New Jersey Court Rule 3: 22-12(a). As set forth in the Appellant's brief supporting the Petition, attached in the Appendix (Da24), the Petition and the basis for Excusable Neglect were based upon R. 3:22-2(c), given the Appellant's arguments regarding the deficient factual basis relied upon by the plea court to accept the guilty plea.

On December 5, 2008, Judge Mellaci denied the Petition, finding that Excusable Neglect had not been established. A copy of the transcript of the hearing of the Post Conviction Relief Petition is attached as an Exhibit in the Appendix (Da40, 3T), with a copy of the Order issued by Judge Mellaci denying the Petition also attached as an Exhibit in the Appendix (Da55). This appeal follows the timely filing of an appeal of that Order, with a copy of the filed Notice of Appeal attached in the Appendix (Da 57).

Transcript - Plea Proceedings, Dated: November 5, 2001 Da4 (1T)
Transcript - Sentencing, Dated: December 21, 2001 Da14 (2T)
Transcript - PCR Hearing, Dated: December 5, 2008, Da40 (3T)

STATEMENT OF FACTS

On August 20, 2001, Mr. DeBenedictis was stopped by a Spring Lake Police Officer for two observed motor vehicle violations. During the stop, the officer made certain physical observations of Mr. DeBenedictis; including his trembling hands, profuse sweating and heavy breathing. As the traffic stop continued, the officer noted that Mr. DeBenedictis appeared to be more nervous than the officer considered appropriate to the motor vehicle stop. Mr. DeBenedictis was asked to exit the vehicle, and had his hands in his pockets, which he removed when requested to by the officer.

Further questioning resulted in the seizure of a pipe having a burnt residue, rolling papers and a clear baggie containing an orange substance from inside the vehicle. Mr. DeBenedictis told the officer that the substance was Opium. Mr. DeBenedictis was then placed under arrest and subsequently charge with the offenses of N.J.S.A. 2C:35-10a(1), Possession of a Controlled Dangerous Substance; two counts of N.J.S.A. 2C:36-2, Possession of Drug Paraphernalia; and three Motor Vehicle Summonses, respectively issued for alleged violations of N.J.S.A. 39:3-76.2f (Failure to Wear a Seatbelt); N.J.S.A. 39:3-33 (Unclear Plates); and, N.J.S.A. 39:4-49.1 (Possession of CDS in a MV).

The seized items were submitted for examination by the New Jersey State Police Forensic Science Bureau, resulting in an analysis that the orange powder was not a Controlled Dangerous Substance, but also determining that a small amount of Marijuana (a Schedule I CDS) was present. It is noted that the police reports are silent on the issue of the observation, or seizure, of any marijuana during the arrest procedures and that the analysis from the State Police Laboratory was the first indication that this substance was present in the items seized during the arrest of the Appellant. These reported observations by the police and the results obtained from the laboratory analysis were the evidential basis upon which the State relied in the prosecution of Mr. DeBenedictis in the captioned Accusation. No Motion to Suppress was filed in this matter by plea counsel. The dates on which the retraxit plea and sentencing were heard by the Court are set forth above in the Procedural History.

During the hearing on the Petition on December 5, 2008, Judge Mellaci rendered a decision on the record, which is contained in the transcript of that proceeding, attached in the Appendix as Exhibit Da40, (3T at Da47-Da53). Judge Mellaci denied the Petition based upon his opinion that the Ignorance of the law is not a defense Exhibit Da40 (3T at Da49, P.19, Lines 15-17); the Court's analysis that Mr. DeBenedictis entered the

plea voluntarily and knowingly Exhibit Da40 (3T at Da51, P.22, Lines 13-24; and, the Court's analysis that the factual basis given by Mr. DeBenedictis was sufficient to establish a conspiracy between the buyer (Mr. DeBenedictis) and the seller Exhibit Da 40 (3T at Da51, P. 23, Line 3-22).

LEGAL ARGUMENT

ISSUE I

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S PETITION FOR
POST CONVICTION RELIEF

SUBSECTION A

EXCUSABLE NEGLIGENCE IS ESTABLISHED BY THE UNIQUE FACTS AND
CIRCUMSTANCES SUPPORTING THE POST CONVICTION RELIEF PETITION

As acknowledged by the Appellant before the Law Division Court during the hearing on the Petition for Post Conviction Relief, such an application (hereinafter Post Conviction Relief or "PCR") made pursuant to R. 3:22-1 is, under most circumstances, required to be made within five years of the date of the plea. The plea in the within matter having been entered on December 21, 2001, this application would ordinarily be time-barred by the application of the five-year rule contained in R. 3:22-12.

In regard to the issue of whether 'excusable neglect' should have been found by the Court below, it is respectfully submitted, that where the defect in the proceedings below are of such a nature that the defect asserted would ordinarily be accepted as a sufficient basis to grant a Petition for Post Conviction Relief (if it were raised within the five year period contained in R. 3:22-12), then the fact that the defect exists, regardless of when it is raised, should be accepted as a factor in determining whether R. 1: 1-2 should be used to relax the

five year rule contained in R. 3:22-12; or, as a sufficient basis by itself for the Court to find that 'Excusable Neglect' has been established. Respectfully, anything less than this level of consideration of such a defect in the proceedings demeans the concept of R. 1:1-2, that it is to be used to avoid an 'injustice'.

As asserted in the Appellant's Affidavit Establishing Excusable Neglect submitted as part of the PCR documentation to Judge Mellaci, attached as an Exhibit in the Appendix (Da61); but for the fact that Mr. DeBenedictis lost his job - for the sole reason that a recent record check by his employer established the existence of a criminal conviction - Mr. DeBenedictis would never have questioned the entry of the plea, or learned that the basis for the plea was legally deficient, or that this type of Petition was ordinarily required to be made within five years of the entry of the plea. These facts were only ascertained by Mr. DeBenedictis after he received the transcripts of the Plea (Da4 1T) and the Sentencing (Da14 2T)). Obviously, given the date on the last page of each transcript, respectively (Da11, 1T) and (Da19. 2T), these transcripts were received after the lapse of the five-year period, respectively on November 5, 2006 (Plea) and December 21, 2006 (Sentencing), and there was therefore, prior to that date, no reason for Mr. DeBenedictis to think that the plea was defective; or, any

reason for him to attempt to comply with the five-year rule until he had learned of the defective factual basis.

Upon review of the transcripts, Mr. DeBenedictis was for the first time made aware of the fact that the offense he had pled guilty to be not supported by the factual basis he had actually placed before the Court. Essentially, the Appellant learned for the first time that the very thing which cost him his livelihood and the means to support his family (the conviction) was not supported by a legally sufficient basis to establish his guilt in committing the crime. It is respectfully submitted that this effect, the loss of his livelihood, based upon the defective factual basis, constitutes a 'manifest injustice'; and, that if it had been discovered prior to the expiration of the five year period, the defective factual basis would have established a sufficient basis for the granting of his Petition for Post Conviction Relief. At this juncture, given the facts and circumstances of this case, this deficiency should at a minimum be taken into consideration as a factor in determining whether 'excusable neglect' has been established; if not itself a sufficient basis to grant the PCR petition.

As set forth in State v Norman, (Da63) ___ NJ. Super ___, (App. Div. 2009) A-5662-06T4, (Approved for Publication Feb. 4, 2009),

The concept of "excusable neglect" encompasses more than simply providing a plausible explanation for a failure to file a timely PCR petition. To determine whether a defendant has asserted a sufficient basis for relaxing the Rule's time restraints, we "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 v. Afanador, 151 N. J. 41, 52 (1997). Excusable neglect provides the means for a court to address and correct a criminal judgment where "adherence to it would result in an injustice." State v. McQuaid, 147 N.J. 464, 485 (1997); State v. Mitchell, 126 N.J. 565, 580 (1992).

State v Norman, supra, Da75.

Applying this standard to the present case, upon learning of the defective factual basis and the fact that he was now out of time to address this matter as-of-right, Mr. DeBenedictis acted as expeditiously as possible to present these matters to the Court, with the PCR petition being filed on August 13, 2008. In this regard, it is noteworthy that the State does not argue that the Appellant acted without due diligence or further sought to delay the filing of the Petition once he had ascertained the noted deficiencies. Respectfully, Mr. DeBenedictis should not be penalized for his ignorance of both the court rule and the consequences of his plea, given the deficient and defective factual basis the State and the Court accepted during the plea, especially when at the time of the plea the State was

represented by a lawyer who knew or should have known of the deficiency in the factual basis supporting the plea, not to mention that Mr. DeBenedictis' own lawyer, and the plea Court knew or should have known of the deficiency.

It is respectfully submitted that given the circumstances set forth in this brief and presented to the Court below, that this Court should reverse the decision of the Law Division Court, as the Norman Court did, and remand with instructions that the Law Division should have found 'Excusable Neglect', and permitted this PCR to reach the merits of this case, in order to rectify the injustice that this deficient plea has had on Mr. DeBenedictis.

In arguing the basis for a finding of 'Excusable Neglect', the appellant acknowledges that the court should only relax the procedural bar of R. 3:22-12 in "exceptional circumstances".

In the context of post-conviction relief, a court should relax *Rule 3:22-12's* bar only under exceptional circumstances. The court 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. As we have made clear, the longer the time-span since the original trial, the more difficult a retrial becomes. Absent compelling, extenuating circumstances, the burden of justifying a petition filed after the five-year period will increase with the extent of the delay. The prejudice to the State's ability to litigate the case after a long delay is also relevant. If the key

witnesses are unlikely to be available, evidence has disappeared, or other obstacles are present, allowing the petition for post-conviction relief will unduly prejudice the State's ability to bring its case. These concerns must, however, be balanced against the significance of the petitioner's interest in raising his or her petition. If the petitioner articulates facts that demonstrate a serious question about his or her guilt or the propriety of the sentence imposed and is prepared to provide factual evidence to support it, then sufficient grounds for relaxing the Rule might exist. In other words, a court should determine that the procedural rule as applied is unjust only when a significant liberty interest is at stake and the petitioner has offered something more than a bare allegation that that is so.

State v Mitchell, 126 NJ at 580.

The application of this standard to excusable neglect is admittedly a difficult standard to reach, however, as established in the present case, it is respectfully submitted that when the petitioner establishes by clear evidence that he is not guilty (and therefore innocent) of the charge he actually pled guilty to, based upon a patently deficient factual basis, and has thereafter been subjected to a manifestly improper sentence based off of the improvidently accepted plea, then the court should relax the time constraints of R. 3:22-12. Contrary to the claim by the State that Mr. DeBenedictis did not assert a claim of 'innocence' in his Post Conviction Relief Petition, (Da 36, Lines 11-12; and, Da46 (3T, P.13, Lines 12-14) Mr. DeBenedictis did contest the fact that he had not committed the

crime of conspiracy by contesting the factual basis he actually placed before the Court during his retraxit plea. This assertion of 'innocence' rests upon the fact that the factual basis elicited by, and accepted by the plea Court, (Da9, 1T, P6, Lines 1-12) was patently deficient to support the plea to conspiracy with anyone, much less the seller. As a result, Mr. DeBenedictis has suffered such an 'injustice' sufficient to relax the time limits, in that the gradation of the charge to which his factual basis was entered, resulted in him having a criminal record to a crime he did not commit, and to which he did not admit. In this regard, the direct and collateral sentencing consequences have resulted in a criminal record of an indictable nature, which was improvidently accepted by the Court when it accepted the factual basis for the plea. (Da9, 1T, P6 Line 19 to P7 Line 1).

Clearly, the interpretation of a 'manifestly improper sentence' should not be limited to the direct sentencing consequences, such as an improper period of incarceration, or an improper fine. It is respectfully submitted that under the circumstances presented in this case, that the term must be considered to include all ramifications of an improvidently accepted plea by the court, and that the definition of an 'improper sentence', must include the collateral consequences of a conviction, such a conviction that cannot be expunged for ten years, rather than the collateral consequence of a lesser

offense, such as a Disorderly Persons offense that may be appropriate to the factual basis actually admitted by Mr. DeBenedictis during the plea.

LEGAL ARGUMENT

SUBSECTION B

THE DEFICIENT FACTUAL BASIS TO CONSPIRACY CLEARLY ESTABLISHES THAT THE PLEA WAS NOT VOLUNTARY OR KNOWING, AND SHOULD NOT HAVE BEEN ACCEPTED BY THE COURT

It is respectfully submitted that established case law indicates that when a defendant's plea is accepted without an adequate factual basis, the plea, judgment of conviction and sentence should be vacated, the dismissed charges reinstated, and the defendant either allowed to re-plead or proceed to trial.

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. See, e.g., State v. Lightner, 99 N.J. 313, 316, 491 A.2d 1273 (1985); State v. Paladino, 203 N.J. Super. 537, 549, 497 A.2d 562 (App.Div.1985) ("an illegal sentence becomes 'inoperative in its entirety and [is] properly vacated' "); State v. Pitman, 201 N.J. Super. 21, 27, 492 A.2d 680 (App.Div.1985); State v. Stackhouse, 194 N.J. Super. 371, 376, 476 A.2d 1268 (App. Div. 1984) (permitting defendant the option of providing a sufficient factual basis for the second-degree armed burglary offense to which he pleaded guilty or withdrawing his

plea and proceeding to trial on all counts, including dismissed counts). Likewise, where a guilty plea taken in federal court is determined not to contain a sufficient factual basis, the conviction is generally vacated and the defendant permitted to plead anew. See Fed.R.Crim.P. 11(f).

State v. Barboza, 115 N.J. 415, 424-425 (1989).

As set forth in the transcript of Mr. DeBenedictis' plea colloquy (Da9, 1T, P6, Lines 1-12) it is clearly established that although the plea Court found a factual basis for a plea to Conspiracy to Possess a CDS, the facts admitted by the defendant do not legally establish a conspiracy, and as such, the plea lacks a factual and legal basis and is therefore faulty and legally insufficient to sustain the plea.

Contrary to the PCR Court's (Da50, 3T P.21 Lines 7-13) and, the State's reliance (Da 46, 3T P.13 Line 9 - mis-cited as DDL; and, Da36-37) on State v D.D.M., 140 N.J. 83, (1995) to establish that a factual basis is not required in a case such as this, the Appellant notes (as previously stated above) that there was an 'assertion of innocence' during the plea proceedings, given the deficient factual basis asserted in regards to his actual conduct and the clear intent of the language actually used by the Appellant in entering the factual basis. It is respectfully submitted that there is a clear distinction between what the Appellant was saying in his factual

basis, and what the Court was interpreting the Appellant's words to mean.

Having taken a factual basis, the Court was required to take one that actually supported the charge to which the factual basis was supposed to apply; or, to reject the plea as having a deficient factual basis. R. 3:9-2 requires 'The Court...shall not accept such a plea without questioning the defendant personally...and determining...that there is a factual basis for the plea...'. Respectfully, neither Judge Kennedy nor Judge Mellaci required that the factual basis meet this standard, certainly not as to each element of the crime. In this regard State v Pineiro, 385 N.J. Super. 129 (App. Div. 2006), requires that the plea court must determine that there is a factual basis for every element of the crime pleaded guilty to, and must reject the plea if there is not.

A court may accept a guilty plea only after personally addressing the defendant and determining "by inquiry of the defendant ... that there is a factual basis for the plea." R. 3:9-2; State v. Smullen, 118 N.J. 408, 415, 571 A.2d 1305 (1990). The requirement is designed in part to protect a defendant who is willing to plead guilty " 'without realizing that his conduct does not actually fall within the charge.' " State v. Barboza, 115 N.J. 415, 421, 558 A.2d 1303 (1989) (citation omitted). As the Supreme Court stated in State v. Sainz, 107 N.J. 283, 526 A.2d 1015 (1987), "[t]he essential thing is that the defendant is in fact guilty of the crime for which he is being sentenced." Id. at 292, 526 A.2d 1015. To that end, [t]he

factual basis for a guilty plea must obviously include defendant's admission of guilt of the crime or the acknowledgement of facts constituting the essential elements of the crime.

Pineiro, 385 N.J. Super. at 137.

Unlike the conspiracy alleged in State v Roldan, 314 N.J. Super. 173 (App. Div. 1998) the 'conspiracy' to which Mr. DeBenedictis plead was not what is commonly referred to as a 'chain conspiracy'. In a 'chain conspiracy' there are successive communications and cooperation between the participants, over an extended period. Each member of a 'chain conspiracy' may not be involved in each communication or action, and the State need not prove a direct connection or knowledge of each communication between all of the conspirators. "Such a drug distribution conspiracy falls outside of the general rule that a simple agreement to buy drugs is insufficient to establish a conspiracy between the seller and the buyer". Id. at 182; citing as additional authority, United States v. West, 15 F.3d 119, 121 (8th Cir.), *cert. denied*, 513 U.S. 863, 115 S.Ct. 177, 130 L.Ed.2d 112 (1994); United States v. Mancillas, 580 F.2d 1301, 1307 (7th Cir.), *cert. denied*, 439 U.S. 958, 99 S.Ct. 361, 58 L.Ed.2d 351 (1978); Hernandez v. State, 182 Ga. App. 797, 357 S.E.2d 131, 134 (1987); and, McBride v. State, 440 N.E.2d 1135, 1137 (Ind.App.1982).

However, when the evidence shows that two or more parties have entered into an agreement

to engage in concerted criminal activity which goes beyond the kind of simple agreement inevitably incident to the sale of contraband and consequently makes possible the attainment of ends more complex than those which one criminal could accomplish, (Citations omitted) the participants may be found guilty of conspiracy.

Roldan, 314 N.J. Super. at 182-183.

The federal courts have identified various factors which may support the conclusion that a defendant was a participant in a drug distribution con-conspiracy rather than simply a seller or buyer in an isolated drug transaction. For example, "evidence of transactions done on a consignment or credit basis may ... give rise to an inference of [a conspiracy because such an arrangement shows] a level of cooperation and trust not typically found absent some type of agreement." (Citation omitted). Another indication of a conspiracy is "a pattern of frequent and repeated transactions" between the participants. (Citation omitted). The amount of drugs involved in a transaction also may give rise to an inference that each of the participants had to have been aware "he was 'a part of a venture which extended beyond his individual participation.'" (Citations omitted). "Conspiracies, like all business ventures, are typically distinguished [from simple agreements to buy criminal contraband] by cooperative relationships between the parties that facilitate achievement of the goal." (Citation omitted).

Roldan, 314 NJ Super. at 183

Clearly, the transcript of the plea proceedings are devoid of any reference to a 'chain conspiracy', an agreement more complex than a mere 'buyer and seller' relationship, consignment

or credit type distributions, or a pattern of repeated distributions. Quite the contrary, it is clear that Mr. DeBenedictis was the dupe in a transaction involving the purchase of fake drugs. Obviously, not the type of actions trusted co-conspirators do to each other to facilitate an on-going relationship.

But for the loss of his job, this factual-basis deficiency would most likely never have come to light, a fact that it is respectfully submitted must be considered in establishing the existence of both "excusable neglect"; and ultimately, whether this PCR should have been granted after a full consideration of the merits of the PCR basis.

"It is clear that before accepting a guilty plea, the trial court must be satisfied that (1) there is a factual basis for the plea, (2) the plea is made voluntarily, and, (3) defendant understands the nature of the charge and the consequences of the plea." State v. Bellamy, 178 N.J. 127, 134 (2003), citing State ex rel T.M., 166 N.J. 319, 325 (2001); State v. Barboza, supra; and, State v. Howard, 110 N.J. 113, 122 (1989).

In the instant case, Mr. DeBenedictis' plea elicited a factual basis for his actions; however, that factual basis does not support the finding that the crime of conspiracy had been committed by him. Mr. DeBenedictis pled guilty to conspiracy to possess CDS with the 'seller' of the CDS. (Da4, 1T at Da6, Lines

3-12). This is clearly a deficient factual basis, as both the New Jersey State Courts and the U.S. Courts have long held that a "simple agreement to buy drugs is insufficient to establish a conspiracy between the seller and the buyer." State v. Roldan, 314 N.J.S. 173, 182 (App. Div. 1998). See United States v. West, 15 F.3d 119, 121 (8th Cir.), *cert. denied*, 513 U.S. 863, 115 S. Ct. 177, 139, 130 L. Ed. 2d 143 (1994); United States v. Mancillas, 580 F. 2d 1301, 1307 (7th Cir.), *cert. denied*, 513 U.S. 863, 99 S. Ct. 361, 58 L. Ed. 2d 351 (1978). In essence, this is the elucidation of Wharton's rule which holds that,

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. . . . In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense -- e. g., adultery -- shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy."

Iannelli v. United States, 420 U.S. 770, 773 (1975); citing 2 F. Wharton, Criminal Law § 1604, p. 1862 (12th ed. 1932).

Stated perhaps more succinctly, when a crime necessitates an agreement to be committed, that agreement does not create a conspiracy. When there is already a crime for the conduct at

issue, the state must charge that crime, Wharton's Rule therefore mandates that the State cannot charge a conspiracy instead of correct offense which was actually committed. For crimes involving a single buyer and single seller, an agreement to sell X for Y is a logically necessary part of the alleged crime; the State may not therefore charge Conspiracy to Possess, when there has in fact been no such conspiratorial offense committed. Just as the state cannot legally cannot charge conspiracy under such facts the Court should not have accept a plea based upon the articulated facts. Either the plea should have been rejected by the Court, or the State should have objected, or the State could have decided to amend the plea offer to a Disorderly Persons offense which arguably fit the facts admitted by the Appellant.

Respectfully, the acceptance of the plea basis is in direct contravention of the case law set forth above, which accepts Wharton's rule regarding the establishment of conspiracies for crimes that necessarily entail an agreement. Iannelli, 420 U.S. 770; Roldan, 314 N.J.S. 173. Therefore the 'crime' Mr. DeBenedictis pled guilty to, under the facts accepted by the plea Court, does not exist under either New Jersey or Federal law. Judge Kennedy may have found facts that supported a charge; however, these facts do not support a charge of conspiracy to possess a CDS. The facts elicited only establish an agreement

between a buyer and a seller, which by Wharton's Rule cannot be a conspiracy.

Respectfully, neither Mr. DeBenedictis; nor, his plea attorney, the prosecuting attorney, nor the plea Judge, realized that the factual basis that was entered and accepted by the Court did not support the amended offense. Had any of the lawyers or the Court realized the deficiency at that time, none of them would have sanctioned or accepted the plea to a crime that does not exist under either New Jersey or Federal law. In this case, although the judge found a factual basis, he found one for a charge that is both illegal and unconstitutional under both New Jersey and United States case law precedent. This court should recognize the mistake made by the plea Court, and find that 'excusable neglect' was established, reversing the decision of Judge Mellaci; or, determine that the PCR not only established 'excusable neglect' but also a sufficient basis for the granting of the PCR. Mr. DeBenedictis plead guilty to a charge that the factual basis does not support; and, therefore in the interest of justice, the court should grant the requested relief.

CONCLUSIONS

Based upon the foregoing, it is respectfully requested that the Court hold that a sufficient ground has been asserted to establish that "excusable neglect" has been established in the present case. It is further respectfully requested that the Court either remand this matter to the Court below with instructions for further proceedings to be held consistent with the finding of 'excusable neglect'; or, that the Court also hold that a sufficient basis to grant the PCR is asserted by the arguments presented to the Law Division to support the granting of the Petition for Post-Conviction Relief.

Respectfully submitted,

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