

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF  
: PENNSYLVANIA

v.

JOSE ELIA DIAZ,

Appellant

No. 1465 EDA 2017

Appeal from the PCRA Order April 4, 2017  
in the Court of Common Pleas of Lehigh County  
Criminal Division at No(s): CP-39-CR-0002870-2011,  
CP-39-CR-0002871-2011

BEFORE: OTT, J., STABILE, J., and MUSMANNO, J.

MEMORANDUM BY MUSMANNO, J.:

**FILED MAY 29, 2018**

Jose Elia Diaz ("Diaz"), *pro se*, appeals from the Order denying his first Motion for relief filed pursuant to the Post Conviction Relief Act ("PCRA").<sup>1</sup> We affirm.

In a prior appeal, this Court summarized the relevant factual history underlying the instant appeal as follows:

On the morning of April 25, 1997, [Diaz], wearing a mask and armed with a knife, snuck into the home where his 15-year old stepdaughter lived with her aunt, and attacked, bound, gagged, and perpetrated two violent rapes on his stepdaughter in her upstairs bedroom.

One of the victim's friends entered the bedroom, saw the victim bound on the bed, saw and identified [Diaz] as the victim's stepfather, screamed, and ran down the stairs. [Diaz] followed, grabbed the friend by the hair, and dragged her back upstairs to

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<sup>1</sup> 42 Pa.C.S.A. §§ 9541-9546.

the victim's room while attempting to stab her with a knife. As [Diaz] chased the friend, the victim freed her hands, pulled down her gag, and retrieved a gun from a drawer in her room. The victim pointed the gun at [Diaz] and yelled at him to release her friend. When the friend was free, the victim instructed her to call 911. The friend ran out of the house and called 911. The victim attempted to shoot [Diaz], but the safety was engaged on the gun. Next, the victim grabbed various household items, including vases and perfume bottles, and threw them at [Diaz], who turned and fled. Before he fled, the victim was able to identify [Diaz] as her stepfather. [Diaz] remained at large until his apprehension in 2011.

On March 5, 2012, [Diaz] pled guilty to rape, burglary, and aggravated assault. Following the preparation of a presentence report and a Megan's Law evaluation, on June 5, 2012, the trial court sentenced [Diaz] to an aggregate term of 25 to 50 years' imprisonment. On June 15, 2012, [Diaz] filed a post-sentence [M]otion for reconsideration of sentence, which the trial court denied on June 25, 2012....

**Commonwealth v. Diaz**, 151 A.3d 1154 (Pa. Super. 2016), unpublished memorandum at 1-3 (footnotes omitted). Ultimately, Diaz was permitted to file a direct appeal, *nunc pro tunc*. This Court affirmed Diaz's judgment of sentence on May 20, 2016. **See id.** Diaz did not petition for allowance of appeal to the Pennsylvania Supreme Court.

In its Opinion, the PCRA court described what next transpired as follows:

[O]n August 23, 2016, [Diaz] filed a Motion for Post Conviction Collateral Relief. On September 19, 2016, [the PCRA court] appointed Sean Poll, Esquire [("Attorney Poll")], to represent [Diaz] on his Motion for Post Conviction Collateral Relief. Later, on October 4, 2016, Attorney Poll authored a "[N]o [M]erit" [L]etter pursuant to the requirements of **Commonwealth v.**

**Finley**, 379 Pa. Super. 390, 550 A.2d 213 (1988).<sup>[2]</sup> A hearing relative to [Diaz's] [M]otion was conducted before [the PCRA court] on December 5, 2016. At the evidentiary hearing, [Attorney Poll] represented to [the PCRA court] that after thoroughly reviewing the file, he found no legal basis on which to proceed with [Diaz's] Motion for Post Conviction Collateral Relief. Therefore, [the PCRA court] permitted Attorney Poll's withdrawal from the matter. Additionally, [Diaz] indicated his desire to proceed at a later date with his Motion ..., and that he would try to retain private counsel. The hearing was continued to February 22, 2017, and then to April 3, 2017, at the request of [Diaz]. Then, on April 3, 2017, [after a hearing, the PCRA court] denied [Diaz's] Motion for Post Conviction Collateral Relief. The within appeal followed on May 5, 2017.

PCRA Court Opinion, 5/30/17, at 3 (footnote added). Thereafter, Diaz, *pro se*, filed a court-ordered Pa.R.A.P. 1925(b) Concise Statement of matters complained of on appeal.

Diaz presents the following claims for our review:

- I. Did the PCRA court err in denying relief[,] finding [that] plea counsel was not ineffective?
- II. Did the PCRA court err when it failed to address appellate counsel's ineffectiveness?
- III. Did the PCRA court err when it did not address [Diaz's] claim [that] he was denied due process of law by [Attorney Poll's] ineffective assistance?
- IV. Did the PCRA court deny [Diaz] due process of law by requiring [Diaz] to represent himself during a hearing on the matter when the PCRA court had full knowledge [that Diaz] is an uneducated, non-English speaking defendant with no knowledge of the legal process?

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<sup>2</sup> **See also Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988) (providing the appropriate procedures for the withdrawal of appointed counsel in collateral proceedings).

Brief for Appellant at 5.

“In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination is supported by the record and free of legal error.” ***Commonwealth v. Montalvo***, 114 A.3d 401, 409 (Pa. 2015) (citation and internal quotation marks omitted). This Court’s scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court’s hearing, viewed in the light most favorable to the prevailing party, in this case, the Commonwealth. ***Commonwealth v. Fahy***, 959 A.2d 312, 316 (Pa. 2008).

In his first claim, Diaz argues that his plea counsel rendered ineffective assistance by not preparing for trial or investigating his case. Brief for Appellant at 15. Diaz further argues that his plea counsel did not communicate with him, and failed to give him a copy of materials produced by the Commonwealth during discovery. ***Id.*** Diaz asserts that if counsel was unable to develop his case because of the 14-year delay, “then counsel should have moved for a dismissal of the charges due to the inordinate delay by the government in executing the warrant when the government was fully aware of [Diaz’s] residency [during] the entire fourteen[-]year period.” ***Id.*** Diaz argues that counsel was unable to mount a defense because of the inordinate delay, and points out that he had voluntarily turned himself in to police upon discovering the outstanding warrant for his arrest. ***Id.*** at 16.

Regarding his claim of an unknowing plea, Diaz contends that his counsel misrepresented to him that Diaz would most likely be sentenced to five years in prison, but no more than eight and one-half years. ***Id.*** at 15. Diaz argues that no rational person would plead guilty, when the outcome would be the same as going to trial. ***Id.*** at 18.

In its Opinion, the PCRA court set forth the appropriate law, addressed Diaz's claim, and concluded that it lacks merit. ***See*** PCRA Court Opinion, 4/4/17, at 5-8. We agree with the sound reasoning of the PCRA court, and affirm on the basis of its Opinion with regard to Diaz's first claim.<sup>3</sup> ***See id.***

In his second claim, Diaz argues that the PCRA court erred when it did not address whether his direct appeal counsel rendered ineffective assistance by failing to file a motion to withdraw his guilty plea based upon a claim that the plea was unknowing and involuntary. Brief for Appellant at 21. As set forth above, however, we conclude that Diaz's claim of ineffective assistance of plea counsel, resulting in an unknowing and involuntary plea, lacks merit. Consequently, Diaz's ineffectiveness claim premised upon plea counsel's ineffectiveness lacks merit. ***See Commonwealth v. Fears***, 86 A.3d 795, 804 (Pa. 2014) (holding that counsel cannot be deemed ineffective for failing

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<sup>3</sup> We further point out that, "[u]pon entry of a guilty plea, a defendant waives all claims and defenses other than those sounding in the jurisdiction of the court, the validity of the plea, and what has been termed the 'legality' of the sentence imposed." ***Commonwealth v. Eisenberg***, 98 A.3d 1268, 1275 (Pa. 2014).

to raise a claim that lacks merit). Therefore, we cannot grant Diaz relief on his second claim of error.

In his third claim, Diaz asserts that his direct appeal counsel should have challenged the legality of his sentence based upon the United States Supreme Court's decision in ***Alleyne v. United States***, 570 U.S. 99 (2013). Brief for Appellant at 21-22. According to Diaz, the United States Supreme Court issued its decision in ***Alleyne*** while his direct appeal was pending. ***Id.*** at 22. Diaz asserts that "[t]he ***Alleyne*** decision invalidated the mandatory minimum statutes under 42 Pa.C.S.A. § 9700 *et seq.*" Brief for Appellant at 22. Diaz argues that, because his sentence was rendered illegal pursuant to ***Alleyne***, his direct appeal counsel rendered ineffective assistance by not raising this claim. ***Id.***

Our review of the record discloses that at sentencing, the trial court did not consider or apply any of the mandatory minimum sentencing statutes rendered unconstitutional as a result of the United States Supreme Court's holding in ***Alleyne***. Rather, the trial court chose to sentence Diaz outside of the guidelines ranges, and explained its reasons for doing so on the record. ***See*** N.T., 6/5/12, at 25-27 (summarizing the facts and heinous nature of the crimes, and stating its reasons for sentencing Diaz outside of the guidelines ranges). Because Diaz was not sentenced pursuant to a mandatory minimum sentencing statute, he is not entitled to relief on this claim.

In his fourth claim, Diaz argues that the PCRA court denied him due process by forcing him to represent himself at the PCRA hearing. Brief for Appellant at 30. According to Diaz, the PCRA court knew that he is “an uneducated, non-English speaking defendant with no knowledge of the legal process.” **Id.** (some capitalization omitted). Diaz asserts that the PCRA court improperly denied him the opportunity to present witnesses and advance his claims of ineffective assistance of counsel. **Id.**

An indigent PCRA petitioner is entitled to the appointment of counsel during litigation of the petitioner's first PCRA petition, including any appeal. **See** Pa.R.Crim.P. 904(C), (F)(2) (explaining that the PCRA court shall appoint counsel to represent an indigent defendant during litigation of the first PCRA petition; the appointment of counsel shall be effective throughout post-conviction collateral proceedings, including any appeal from disposition of petition for post-conviction collateral relief). However, where the court accepts a **Turner/Finley** no-merit letter and permits counsel to withdraw, the petitioner is not entitled to the appointment of new PCRA counsel, and he must retain private counsel or proceed *pro se* in future proceedings. **Commonwealth v. Rykard**, 55 A.3d 1177, 1183 n.1 (Pa. Super. 2012); **see also Commonwealth v. Maple**, 559 A.2d 953, 958 (Pa. Super. 1989) (stating that where appointed post-conviction counsel has been permitted to withdraw pursuant to **Turner/Finley**, the appointment of new counsel is unnecessary and improper).

As set forth above, the PCRA court granted the Petition to withdraw from representation, filed by Diaz's PCRA counsel in accordance with the requirements of **Turner/Finley**. The PCRA court granted Diaz continuances from December 5, 2016, to February 22, 2017, and from February 22, 2017, to April 3, 2017, to secure new counsel or proceed *pro se*. On April 3, 2017, when Diaz had not secured new counsel, the PCRA court proceeded to a hearing. N.T., 4/3/17, at 5. At the hearing, Diaz claimed that his plea counsel had represented that Diaz would receive a sentence of no more than eight years and two months. **Id.** at 6. The PCRA court then read to Diaz the transcript from the guilty plea colloquy, wherein Diaz had stated that he understood the maximum sentences that could be imposed, and that the sentences could be imposed consecutively. **Id.** at 7-9. In response, Diaz stated, "I admitted to everything. I admitted to everything.... But they haven't given me the evidence, when I asked for evidence on the table." **Id.** at 9. Diaz offered nothing further that would support his claims for PCRA relief.

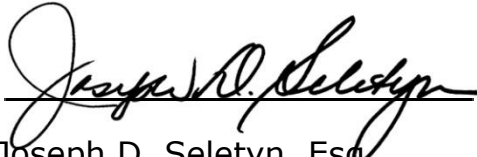
Under these circumstances, we discern no error or abuse of discretion by the PCRA court in dismissing Diaz's PCRA Petition. **See Rykard**, 55 A.3d at 1183 n.1. We therefore affirm the Order of the PCRA court.

Order affirmed.



J-S11043-18

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 5/29/18

**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA**

**CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA )  
 )  
 vs. )  
 )  
 JOSE ELIA DIAZ, )  
 Defendant )

Case No. 2870/2011  
2871/2011

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APPEARANCES:

MATTHEW S. FALK, ESQUIRE,  
SENIOR DEPUTY DISTRICT ATTORNEY,  
On behalf of the Commonwealth

JOSE DIAZ, PRO SE,  
Defendant

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**OPINION**

FILED  
2011 APR -4 A 10:09  
CLERK OF COURTS  
LEHIGH COUNTY, PA

MARIA L. DANTOS, J.

Defendant, Jose Elia Diaz, filed a Post Conviction Collateral Relief Petition on August 23, 2016. An evidentiary hearing relative to this petition was conducted before this Court on April 3, 2017. The relevant facts are as follows. On January 4, 2012, the Defendant came before this Court to enter pleas of guilty to Rape by Forcible Compulsion (18 Pa. C.S.A. § 3121(1)) and Burglary (18 Pa. C.S.A. § 3502(a)) in Case No. 2870/2011, and Aggravated Assault (18 Pa. C.S.A. § 2702(a)(4)) in Case No. 2871/2011. In exchange for entering the guilty pleas, the Commonwealth agreed not to pursue the other counts of the information. In all other respects, it was an open plea. On June 5, 2012, this Court sentenced the Defendant to a term of imprisonment of not less than ten (10) years nor more than twenty (20) years in a

state correctional institution on each of the counts of Rape by Forcible Compulsion and Burglary in Case No. 2870/2011. These sentences were ordered to run consecutively to each other. Additionally, on the charge of Aggravated Assault, the Defendant was sentenced to a term of state imprisonment of not less than five (5) years nor more than ten (10) years. This sentence imposed in Case No. 2871/2011 was to ordered to run consecutively with the sentence imposed in Case No. 2870/2011.

Thereafter, on June 15, 2012, the Defendant filed a Motion to Reconsider Sentence that was denied by this Court on June 26, 2012. Then, on July 24, 2012, the Defendant filed a direct appeal to the Superior Court of Pennsylvania. On November 16, 2012, the Defendant's appeal was dismissed. Then, on May 6, 2014, the Defendant filed a pro se Post Conviction Collateral Relief Petition. On July 1, 2014, this Court held a hearing on the Defendant's petition. Then, by Order of July 7, 2014, this Court dismissed the Defendant's petition as untimely. However, by Order of the same date, this Court allowed the Defendant to file a notice of appeal *nunc pro tunc*. The Defendant did subsequently file an appeal *nunc pro tunc*. Thereafter, on June 3, 2015, the Superior Court of Pennsylvania vacated this Court's Orders of July 7, 2014, and remanded the matter to this Court for further consideration. In particular, the Superior Court of Pennsylvania found the two (2) Orders of July 7, 2014, to be inconsistent with each other, and directed this Court *either* to find the Defendant's petition untimely filed or meritorious. Upon realizing the inconsistency of these two (2) Orders, and after hearing on August 5, 2015, and upon agreement of counsel, this Court allowed the Defendant to file an appeal *nunc*

*pro tunc*. The Defendant appealed on September 8, 2015. Thereafter, on May 20, 2016, the Superior Court of Pennsylvania affirmed this Court's judgment of sentence.

Then, on August 23, 2016, the Defendant filed the within Motion for Post Conviction Collateral Relief. On September 19, 2016, this Court appointed Sean Poll, Esquire, to represent the Defendant on his Motion for Post Conviction Collateral Relief. Later, on October 4, 2016, Attorney Poll authored a "no merit" letter pursuant to the requirements of Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d 213 (1988). A hearing relative to Defendant's motion was conducted before this Court on December 5, 2016. At the evidentiary hearing, Court-appointed counsel represented to this Court that after thoroughly reviewing the file, he found that there was no legal basis on which to proceed with the Defendant's Motion for Post Conviction Collateral Relief. Therefore, this Court permitted Attorney Poll's withdrawal from the matter. Additionally, the Defendant indicated his desire to proceed at a later date with his Motion for Post Conviction Collateral Relief and that he would try to retain private counsel. The hearing was continued to February 22, 2017, and then to April 3, 2017, at the request of the Defendant.

Presently before the Court is Defendant's Motion for Post Conviction Collateral Relief that was filed on August 23, 2016. A hearing relative to Defendant's motion was conducted before this Court on April 3, 2017. At that time, Defendant presented argument in support of his motion. However, the Defendant failed to sustain his burden.

The record evidence shows that David Nicholls, Esquire, a private criminal defense attorney, was retained to represent the Defendant in the above-captioned case.

Attorney Nichols was prepared to go to trial in the within matter. However, on the day of trial, March 5, 2012, the Defendant accepted the offer extended by the Commonwealth. On the same date, the Defendant entered his guilty plea. This Court conducted an extensive verbal colloquy with the Defendant at the time of his guilty plea. During the Defendant's oral plea colloquy, the Defendant acknowledged the terms of his plea agreement (N.T. 3/5/12, pp. 4-5); denied having any drugs, alcohol or other medication that would affect his ability to know what he was doing (N.T. 3/5/12, p. 3); indicated that he read and understood the written plea colloquy (N.T. 3/5/12, p. 3); stated that he understood that he did not have to give up his rights but could proceed to trial (N.T. 3/5/12, p. 3); indicated that he understood the possible maximum sentences that could be imposed on each charge as set forth by the Court (N.T. 3/5/12, pp. 4-5); posed no questions to the judge (N.T. 3/5/12, p. 5); articulated that no one was forcing or threatening him to plead guilty (N.T. 3/5/12, p. 5); testified that no promises were made to him other than the plea agreement (N.T. 3/5/12, p. 5); expressed satisfaction with his attorney (N.T. 3/5/12, p. 5); and acknowledged the facts as set forth by the prosecutor (N.T. 3/5/12, pp. 5-12).

Prior to sentencing, a Pre Sentence Investigation Report was prepared. The Defendant reviewed the Pre Sentence Investigation Report with Attorney Nicholls. The Pre Sentence Investigation Report clearly set forth the terms of the plea agreement. Attorney Nicholls never promised or guaranteed the Defendant a specific sentence, as the plea was open and sentencing was at the discretion of the Court. In addition, the attorney for the Commonwealth provided defense counsel with a copy of

the sentencing guidelines that were relevant in the within matter.<sup>1</sup> (N.T. 6/5/12, p. 4).

On June 5, 2012, at the time of sentencing, the plea agreement was once again stated on the record. (N.T. 6/5/12, pp. 3-4). This Court sentenced the Defendant to a term of imprisonment of not less than ten (10) years nor more than twenty (20) years in a state correctional institution on each of the counts of Rape by Forcible Compulsion and Burglary in Case No. 2870/2011. (N.T. 6/5/12, pp. 26-27). These sentences were ordered to run consecutively to each other. (N.T. 6/5/12, pp. 26-27). Additionally, on the charge of Aggravated Assault, the Defendant was sentenced to a term of state imprisonment of not less than five (5) years nor more than ten (10) years. (N.T. 6/5/12, pp. 26-27). This sentence imposed in Case No. 2871/2011 was to ordered to run consecutively with the sentence imposed in Case No. 2870/2011. This sentence was in compliance with the negotiated plea agreement.

In his motion for Post Conviction Collateral Relief, Defendant contends that Attorney Nicholls rendered ineffective assistance of counsel by: (1) inducing him to enter into a guilty plea despite his innocence; and (2) failing to inform him of the maximum sentence that he could receive. Initially we note that claims of ineffective assistance of counsel are subject to a three part analysis:

To establish an ineffective assistance of counsel claim, [defendant] must first demonstrate that the underlying claim is of arguable merit; then, that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate [defendant's] interest; and finally, that but for the act or omission in question, the outcome of the proceedings would have been different.

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<sup>1</sup> Due to the age of this case, as the Defendant absconded for fifteen (15) years, the Lehigh County Department of Probation was unable to provide the sentencing guidelines in the Pre Sentence Investigation Report.

Commonwealth v. Travaglia, 541 Pa. 108, 118, 661 A.2d 352, 356-357 (1995), U.S. cert. denied, 116 S.Ct. 931 (1996) (citations omitted). Counsel is presumed effective and the Defendant bears the burden of proving all three prongs of this standard. Id.; Commonwealth v. Meadows, 567 Pa. 344, 787 A.2d 312, 319-320 (2001). With the above standards in mind, we address the Defendant's contentions.

The Defendant argues that Attorney Nicholls was ineffective for unlawfully inducing him to enter into a guilty plea despite the Defendant's innocence and for failing to inform him of the maximum sentence that he could receive. These arguments lack a factual basis.

David Nicholls, Esquire was prepared to go to trial in the within matter. However, on the day of trial, March 5, 2012, the Defendant accepted the offer extended by the Commonwealth. On the same date, the Defendant entered his guilty plea. This Court conducted an extensive verbal colloquy with the Defendant at the time of his guilty plea. During the Defendant's oral plea colloquy, the Defendant acknowledged the terms of his plea agreement; denied having any drugs, alcohol or other medication that would affect his ability to know what he was doing; indicated that he read and understood the written plea colloquy; stated that he understood that he did not have to give up his rights but could proceed to trial; indicated that he understood the possible maximum sentences that could be imposed on each charge as set forth by the Court; posed no questions to the judge; articulated that no one was forcing or threatening him to plead guilty; testified that no promises were made to him other than the plea agreement; expressed satisfaction with his attorney; and acknowledged the facts as set forth by the prosecutor.

Prior to sentencing, a Pre Sentence Investigation Report was prepared on May 11, 2012. The Defendant reviewed the Pre Sentence Investigation Report with Attorney Nicholls. The Pre Sentence Investigation Report clearly set forth the terms of the plea agreement. Attorney Nicholls never promised or guaranteed the Defendant a specific sentence, as the plea was open and sentencing was at the discretion of the Court. In addition, the attorney for the Commonwealth provided defense counsel with a copy of the sentencing guidelines that were relevant in the within matter. On June 5, 2012, at the time of sentencing, the plea agreement was once again stated on the record .

“Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea.” Commonwealth v. Yager, 454 Pa. Super. 428, 685 A.2d 1000, 1004 (1996), *appeal denied*, 549 Pa. 716, 701 A.2d 577 (1997).

[I]n order to determine the voluntariness of the plea and whether the defendant acted knowingly and intelligently, the trial court must, at a minimum, inquire into the following six areas:

- (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he has a right to trial by jury?
- (4) Does the defendant understand that he is presumed innocent until he is found guilty?
- (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
- (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Young, 695 A.2d 414, 417 (Pa. Super. 1997). The oral colloquy and



the written plea filed of record clearly established the voluntary, knowing and intelligent nature of the guilty plea. Commonwealth v. Myers, 434 Pa. Super. 221, 225-226, 642 A.2d 1103, 1105 (1994). The six (6) particular above-mentioned areas were thoroughly covered in the written and oral colloquies in this case as indicated above. As such, Defendant cannot now allege that Attorney Nicholls unlawfully induced him to enter an involuntary, unknowing and unintelligent guilty plea.

In light of the foregoing, this Court cannot find Attorney Nicholls ineffective, and we deny Defendant's Motion for Post Conviction Collateral Relief.