

8-28-2014

Garcia v. State Appellant's Reply Brief Dckt. 41248

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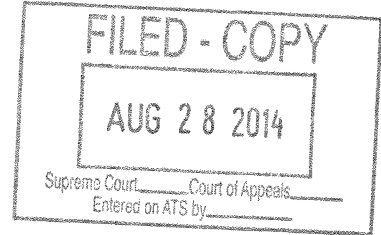
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RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS

AUG 28 2014

ARMANDO GARCIA
29287/I.S.C.C./L-Pod
P.O.Box 70010
Boise, Idaho. 83707



IN THE SUPREME COURT OF THE
STATE OF IDAHO

ARMANDO GARCIA,
APPELLANT,

Vs-

STATE OF IDAHO,
Respondent.

:
:
:
:
:
:
:
:
:
:
:

Case No. 41248

Ada Co. Case No CV 2010-24962

ANSWER TO BRIEF OF RESPONDENT

ARMANDO GARCIA 29287
P.O. Box 70010-I.S.C.C.
Boise, Idaho. 83707

Pro-Se Appellant

JOHN C. MCKINNEY
Dupt. Att. General
Crim. Lwa Division
P.O. Box 83720
Boise, Idaho. 83720

Attorney for Respondent

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STIPULATION

Garcia stipulates to the fact that the respondent believes the contents found in A thru. C of their Brief.

Garcia argues respondents brief section D.

Garcia has Failed to Show
Error In The District
Court's Summary Dismissal
Of His Post-Conviction
Claims.

The state says that Garcia, "makes several arguments for the first time on appeal"[sic]

Stating- "First" that the district court erred by not finding out, at the time of Garcia's plea, "just what it was that [he] did not agree with, and that [he] understood the ramifications of his guilty plea, and not just rolling with it, for some unknown reason."

This issue is not brought for the first time, Garcia has complained about this issue from the onset of his post-conviction petition, See: (Att. A. P.3 Li. 9.(a)) "Lied to me about the plea agreement, got me to plea under **false** pretenses and manipulation."

This issue is also seen in, (Att. B. P.7 Li. 5-8); (att. C. P.4, Li. 14.)

Then the state says that Garcia has not brought out the

argument that the plea 11(f)(1)(c) is invalid, because a plea 11 (f)(1)(c) requires "that a specific sentence is the appropriate disposition of the case."

This issue has been brought, as ineffective assistance, **NOT!** as (Trial Court Error"[sic] It was in trickery of Garcia's counsel "DeFranco" that got him to sign the ambiguous plea agreement.

As plead in the Appellants Brief P. 12-13, DeFranco "bated" Garcia into the agreement, but, the issue at this moment is that the agreement that DeFranco Bated, Garcia into signing, is not a valid plea agreement, as it is ambiguous by its nature.

This is a ineffective assistance of counsel claim, as it was counsel who tricked Garcia into signing the agreement.

which is proven hereinafter. for now Garcia wish's just to show the Court how and why the document is ambiguous, but also states that his uncontraverted claim of actual innocence superseeds any cause for procedural default, (App. Br. P.19-20.)

Therefore even if the court would decide that this is a new issue it would stil be exceptable, due to both the ineffective assistance of counsel claim, and the claim of actual innocence.

Either way the plea was ambiguous, when the Statute says that the rule 11 (f)(1)(c) must contain a specific sentence, and Garcia's Rule 11 (f)(1)(c) does not contain any such specific sentence.

This court must rule that the attorney was ineffective and

the statute/rule I.C.R. 11 (f)(1)(c), must be interpreted as it was written, see: State v. Herrera-Brito, 131 Idaho 383, 957 P.2d 1099, (1998) Citing State v. Mius, 128 Idaho 426, 429, P.2d 1196 (Ct. App. 1996) stating lenity requires that criminal statute be strictly construed in favor of the accused.

Further, when a statute is unambiguous it must be interpreted in accordance with its language, courts must follow it as enacted and a reviewing court may not apply rules of construction. State v. Wiermeier, 121 Idaho 189, 191, 834 P.2d 120, 122 (1992) Transcending this principle is the rule of lenity, which pronounces that criminal statutes should be strictly construed in favor of the accused...

This is why Garcia ask this court to find that the statute was violated by the attorney, when he got [him] to sign the plea agreement when the plea agreement did not comply to the statute.

This issue would have been presented in the original petition had the post-conviction attorney not been ineffective as well.

Attorney, David Larello, came to the prison, only talked to me for ten (10) minutes, where he ask me some questions and was taking notes. [or so I thought at the time] but then he said he had to go [i'm running late] [he] had a prison employee notarize his notes with my signature on them, at the time I did not know why he was doing it, but at a later i found out that [he] had added it to my post-conviction, (after I got a copy), se (Att. A. P. 7-9).

If the court would read (Att. A, P. 7-9), it will see that

the document (if it can be called that) is nothing more than a bunch of jumbled, bald, unsupported allegations.

The attorney knew that he was filing an inadmissible document, which ended up causing Garcia to be blocked from expanding on his ineffective assistance of counsel claim, it is not, as the State puts it (a trial court error), it was ineffective when attorney DeFranco, tricked Garcia into signing the plea agreement in the first place.

Then it was ineffective assistance of counsel when attorney Larillo did not put that into the post-conviction.

It was never a trial court error, Garcia has never made that claim.

Garcia does not know where the State got that claim from, but knows that it did not originate from [his] pleadings. Garcia believes that the statement is out of order, and hereby objects to its use in these proceedings.

Garcia wishes more, to focuss on the fact that [he] has preserved his ineffective claim, (Att. A, P.2. Li. 7 (a)), it is not [his] fault, that the claim was not properly expanded on, in the second affidavit in support of the petition for post-conviction relief. It was David Larillo's ineffectiveness, that must be blamed for that one.

Garcia is not presenting anew, an issue, [he] is simply expanding on the issue presented in the original post-conviction petition.

The fact that David Larillo was ineffective is proven by the fact that Larillo filed a document in a court of law, that

is bearly ledgible, the document (if it can be called that) is, in its entirety, inadmissable, see: I.C.§19-4906;

"the bald and unsupported allegation recited by defendant that he was being held in custody unlawfully since the plea of guilty was entered underduress, unsubstiated by any fact, was insufficient to entitle him to an evidentiary hearing. Pulver v. State 93 Idaho 687, 471 P.2d 74 (1970) overruled on other grounds , State v. Tucker, 97 Idaho 4, 539 P.2d (1975)!"

ALSO;

"A conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing, therefore, where in a second application for post-conviction relief, there were no affidavits, records or other evidence offered the conclusory allegations were not substantiated as required by statute: and, insofar as the application was dismissed for failure to provide sufficient reason to show why the groundsalleged in that application were not raised in the first application the district courts determination was correct." King v. State, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

Decisions of this nature, by this court go on and on, Nguyen v. State, -Idaho- 887 P.2d 39 (1994); Pratt V. State 134 idaho 581, 6 P.3d 831 (2000); Cowger V. State, 132 Idaho 681, 978 P.2d (Ct. App. 1999); Self . State, 145 Idaho 578, 181 P.3d 504 (Ct.App. 2007.

The fact is, the attorney knew by the case's that [he] could not file bald, unsubstantiated allegations with the court and **ex**pect those allegations to be admissable.

Had the attorney done his job, all the issues presented in the "Brief of Appellant" filed on or about the 27th. day of May 2014, would have been in the petition for post-conviction relief.

Had the issues in the "Brief of Appellant" been in the Post conviction petition, Garcia would have won his post-conviction. And/or gained an evidentiary hearing.

That attorney's actions not only contributed to Garcia's loss at post-conviction, but in truth caused Garcia to lose his post-conviction, this was ineffective assistance of counsel

"it must be shown that conduct of counsel contributed to the conviction. Drapeau V. State, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982)."

Garcia has shown this and met the standard in "Drapeau", Garcia's sixth amendment rights were violated under the "Strickland" standard;

"Benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of adversarial testing process that trial cannot be relied on as having produced a just result."

Should the court need more, the fact that Garcia is simply expanding his issue of ineffectiveness in the plea process, that Garcia states [he] is not procedurally defaulted, from bringing the issues now on appeal.

This is because, ineffective assistance of counsel constitutes

"cause"for procedural default... Kimmelman V. Morrison, 477 U.S. 365, 91 L.Ed. 2d 305, 106 S.Ct. 2574 (1986);

"Where the court held that "[t]he constitution constrains our ability to allocate as we see fit the cost of ineffective assistance. the sixth Amendment mandates that the state [or the government] bears the risk of constitutionally deficient assistance of counsel."

The state says that "However, Garcia omitted the subsequent and more pertinent testimony by his trial counsel as follows:"

Garcia has a problem with that statement, not just that he does not care for the implication, but it is not an accurate statement.

Whereas the subsequent part of it may be true, it is most certianly NOT more pertinent.

first of all, the "Exhibit" offered by the state, does not even exist, there is not now nor has there ever been an Ex.G. in any of these pleadings.

Garcia believes that the respondent has invented the imaginary (Ex. G.), to prevent the Court from reading the actual transcripts, which are attached herein as (ATT.D).

The reason the respondent does not want the court to read the actual transcripts is plain to see, because the portions of the transcripts that the respondent presents in [his] brief (Br. Resp. P.8-9,) are incomplete.

The respondent has skipped over a large "important part of

the testimony.

All the court needs to do is compare (Br. Resp. P. 8-9) with the actual transcripts presented herein as (Att. D. P.42 Li.6-14).

The court will see that an entire question/statement is omitted by the state, for reasons that will become clear momentarily².

The respondent says this testimony is more pertinent, but that's not true at all.

The testimony [I] presented in my original appellant brief (App. Br. P.5) is not incorrectly cited, nor is it less pertinent than what the respondent has attempted to cite, (due to his omissions in the document.)

What the respondent has offered, is no more than reply's to a handful of (leading questions.)

What Garcia presents is the attorney's answer to a very specific question, put in [his] own words.

Q. "I'm just wondering what words you used to explain the plea agreement." (Att.D. P.40, Li.6-25)

Certainly it is more pertinent to the issue, what, what DeFranco had to say in his own words, as opposed to a bunch of half hearted replies to leading questions.

Garcia has to point out, that time and again, throughout Mr. DeFranco's testimony, not once did [he] say that Garcia understood the terms of the plea agreement, (Att. D. P.42, Li.21-24 & P. 48).

². See: ambiguous nature of plea, invalidates plea in page 2-3, herein.

Li.21-22 &P. 48, 23-25, &P. 49, Li. 1, & P. 49, Li. 17-19, & P.49, Li.25, & P. 50, Li.1-5, & P. 50, Li. 11, & P.55, Li. 10-15.)

the attorney DeFranco, in a nutshell states that [he] tried his best to explain it to Garcia, but was never sure that Garcia understood.

Therein lies the problem, "DeFranco" allowed his client to enter into a plea agreement, not knowing if he understood it or not. That's gleaned from [his] testimony.

However, if the totality of the circumstances are examined, we see that Garcia was actually tricked into signing a plea agreement, that not only did he not understand, but by its very nature was ambiguous.

The respondent again attempts to cite (Resp. Ex. G.): (Br. Resp. P.9) eventhough no such exhibit exist.

Even so, respondent states "contrary to Garcia's assertion that his trial counsel's testimony did not explain anything and was vague, the record reflects that counsel clearly testified (a) he told Garcia the state was free to argue for a fixed term of up to life, (b) he explained to Garcia in greater detail that the trial judge was the final arbiter of his sentence, (c) he never told Garcia he was guaranteed a sentence of ten years fixed, and (d) he explained the rule 11 plea agreement before Garcia signed it and entered his plea."

That entire paragraph is nothing but wishful thinking on the part of the respondent, taken a point at a time, DeFranco disproves

each of those assertions.

When DeFranco was ask to state in his own words, how he explained the plea agreement, his answer was seen on (Att. D. P. 40 Li. 8-25,).

Reading DeFranco's own words [he] never explained any of that to Garcia. In fact in his own words throughout [his] testimony, he was never sure Garcia understood any of what was going on, and seemed to believe that he was getting a ten(10) year sentence.

In fact as we will see in the next issue, DeFranco bated Garcia in to signing the plea agreement...

Still it must not be overlooked, that it is an unrefuted fact, that out of the four times "DeFranco" came into the room to convay the states offer(s), all together adding up all four trips "DeFranco" made into the room, [he] spent no more then five (5) minutes in the room talking to Garcia, (Att. D. P.13, Li. 5-7,); (App. Br. P.8 Para. 4.)

Anyone can say whatever they want, but Garcia's uncontraverted testimony (Att.D. P.13, Li.5-7,) is supported by "DeFranco's" testimony, (Att. D. P.45 Li. 25, & P.46, Li. 1-3.)

Now the respondent wants the court to believe that Mr. DeFranco explained all this complex information, in four separate conversations that lasted 1-minute and 15-seconds each, on top of all that information, DeFranco also had to relay four different plea offers from the state to Garcia at the same time .

Simply put, it didnt happen, it could not have taken place,

it is physically impossible for one person to deliver that much information, then have another person assimilate that much information, in the choppy time frame attested too!

So the question is, why is everyone so concerned that Garcia, understood all of what was going on?

Garcia believes that the following issue answers that question.

The respondent goes to far hear, [he] is totally misquoting what is said in (Br. Resp. P. 10 para.2.)

What is said in the transcripts, (Att.D. P.48, Li. 6-12,) is; " and I knew that Ms. Reilly was not going to come in and ask for 10 years. I knew that. And I made that clear to Armando that, just because she's willing to amend the charge--in a way, its almost as if it were--I don't want to use bait; that you know, lets get you into an agreement."

This testimony is an admission from DeFranco that Garcia was baited into signing the plea agreement.

It was not as the state puts it, "was when he explained his wariness that the prosecutor might have offered to amend the charge in order to bait Garcia into pleading guilty."

Because that is exactly what they did to Garcia, Bait him into signing the plea agreement, and that is exactly what the testimony suggest...

If the court needs to see just how he was baited, look to (Att. D. P. 47, Li. 16-24.) That says it all right there, right out of DeFranco's own mouth.

It is for these reasons along with the reasons set fourth in the original appellants brief, that this court should grant the relief requested, thank you!

Dated this 22nd day of Aug. 2014

Sincerly Submitted: Armando Garcia
ARMANDO GARCIA

CERTIFICATE OF MAILING

In compliance with State V. Lee, I, Armando Garcia, have caused to be mailed the foregoing, by placing same into properly addressed envalopes with first class postage attached into the prison's legal mailing system on the date indicated below...

Mailed to:

IDAHO SUPREME COURT
Court of Appeals
P.O. Box 83720
Boise, Idaho. 83720

Idaho Attorney General
P.O. Box 83720
Boise, Idaho. 83720

Done on this date 08 /22 /2014

By me: Armando Garcia
Armando Garcia

RECEIVED
DEC 20 2010
Ada County Clerk

original

NO. _____
A.M. _____ FILED P.M. 5

DEC 20 2010

J. DAVID NAVARRO, Clerk
BY L. AMES
REPLY

Inmate Name Armando Garcia
IDOC No. 29287
Address I.C.C. P.O.Box 70010
Boise, Idaho 83707

TIMOTHY HANSEN

Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CV PC 1024962

ARMANDO GARCIA,)
)
 Petitioner,)
)
 vs.)
)
STATE OF IDAHO,)
)
 Respondent.)
_____)

Case No. _____

PETITION AND AFFIDAVIT
FOR POST CONVICTION
RELIEF

The Petitioner alleges:

1. Place of detention if in custody: Idaho Correctional Center
2. Name and location of the Court which imposed judgement/sentence: Fourth
Judicial District Court, Ada County, Boise Idaho
3. The case number and the offense or offenses for which sentence was imposed:
 - (a) Case Number: CR-FE-2008-000062
 - (b) Offense Convicted: Trafficking In Heroin
4. The date upon which sentence was imposed and the terms of sentence:
 - a. Date of Sentence: November 9, 2009
 - b. Terms of Sentence: 15 Fixed with 15 Indeterminate(30years)

3.

5. Check whether a finding of guilty was made after a plea:

Of guilty Of not guilty

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes No

If so, what was the Docket Number of the Appeal? _____

7. State concisely all the grounds on which you base your application for post conviction relief: (Use additional sheets if necessary.)

(a) Breach of Plea Agreement _____

Ineffective assistance of Counsel _____

(b) _____

(c) _____

8. Prior to this petition, have you filed with respect to this conviction:

a. Petitions in State or Federal Court for habeas corpus? no

b. Any other petitions, motions, or applications in any other court? no

c. If you answered yes to a or b above, state the name and court in which each petition, motion or application was filed:

9. If your application is based upon the failure of counsel to adequately represent you, state concisely *and in detail* what counsel failed to do in representing your interests:
- (a) Lied to me about the plea agreement, got me to plead under false pretenses and manipulation(TT.p.220-221.Ls-24-25)
- (b) Failed to file a Notice of Appeal
- (c) Failed to argue 5th Amend. violation, coercion to make statement, No notification of Marendia, and waiver.

10. Are you seeking leave to proceed in forma pauperis, that is, requesting the proceeding be at county expense? (If your answer is "yes", you must fill out a Motion to Proceed in Forma Pauperis and supporting affidavit.)

Yes No

11. Are you requesting the appointment of counsel to represent you in this case? (If your answer is "yes", you must fill out a Motion for the Appointment of Counsel and supporting affidavit, as well as a Motion to Proceed In Forma Pauperis and supporting affidavit.)

Yes No

12. State specifically the relief you seek:

Compliance with Rule 11 Agreement for 10 years fixed not 30
right to appeal restored and Appeal filed

AFFIDAVIT OF FACTS IN SUPPORT OF POST-CONVICTION PETITION

STATE OF IDAHO)
) ss
COUNTY OF ADA)

Armando Garcia, being first duly sworn on oath, deposes and says:

1) That the grounds and facts of Ineffective Assistance of counsel stated
are of my personal knowledge.

2) That my attorney failed to file a Notice of Appeal after I requested
he do so after the Rule 11 Breach.

3) That Detective C. Christansen coerced my statement with indirect threats
of arrest of my sister in law, and threatened me with years of imprison-
ment if I did not cooperate, and my attorney cooperated and participated

4) That at this time I cannot gain access to the record and Exhibits but
will attempt to get them through discovery or other means and than provide
them.

5) That this stament is true and correct to the best of my knowledge

Handwritten notes: "Lance", "Mire", "10/12"

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
Boise, Idaho 83702
Telephone: (208) 429-1200
Facsimile: (208) 429-1100
Idaho State Bar No. 4640

NO. _____
A.M. _____ FILED P.M. *10/17*

OCT 17 2011

CHRISTOPHER D. RICH, Clerk
By PATRICIA A. DWONCH
DEPUTY

Conflict Counsel for Petitioner

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

ARMANDO GARCIA,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV PC 2010-2496*7*
**SECOND AFFIDAVIT IN
SUPPORT OF PETITION FOR
POST CONVICTION RELIEF**

Petitioner in the above entitled action hereby files the attached 2nd Affidavit of Facts in support of Post-Conviction Petition attached hereto as Exhibit A and incorporated herein as though set forth in full.

DATED this 17th day of OCTOBER, 2011.

LORELLO LAW PLLC

By *[Signature]*
D. David Lorello, Jr.
Conflict Counsel for Defendant

Handwritten initials: "Luo"

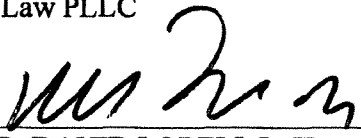
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 17th day of OCTOBER, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecutor
200 W. Front St., Rm. 3191
Boise, ID 83702

- U.S. MAIL
- HAND DELIVERED
- FACSIMILE
- OVERNIGHT MAIL

Lorello Law PLLC

By 
D. DAVID LORELLO, JR.
Conflict Counsel for Defendant

2nd Affidavit of Facts in Support of
Post-Conviction Petition

State of Idaho] ss
County of Ada]

Armando Garcia, being first duly sworn on oath,
deposes & says:

1. My Attorney did not thoroughly investigate the Confidential Informant's agreement w/ DEA.
2. My Attorney failed to adequately investigate the warrantless search & seizure & did not adequately investigate possible suppression issues in the warrantless search & seizure.
3. My attorney did not investigate the fact that the Confidential Informant may have tampered with the evidence & the chain of custody may have been affected.
4. My attorney did not investigate whether there was adequate probable cause for the traffic stop.

Exhibit A

000061

Att. A-P. 7

5. My attorney did not investigate whether or not surveillance footage of the parking lot where the stop occurred may have revealed suppression issues.

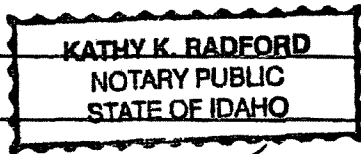
6. My attorney did not adequately investigate whether or not Det. Christensen exerted undue influence + pressure on me during my interrogation.

7. My attorney did not adequately investigate whether or not I was coerced into taking the trip to Salt Lake City, + the controlled buy.

8. My attorney did not investigate the fact that I had numerous discussions w/ law enforcement w/out my attorney present after I had requested counsel.

9. My attorney didn't adequately investigate whether or not law enforcement followed proper procedures for collection of evidence.

10. That these statements are true & correct
to the best of my knowledge.



Armando Garcia

Armando Garcia

Kathy K Radford
9-16-2017

Hansen
Misen
5/18/12
Sk

NO. 9
FILED
A.M. P.M.

MAY 17 2012

CHRISTOPHER D. RICH, Clerk
By MAURA OLSON
DEPUTY

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
Boise, Idaho 83702
Telephone: (208) 429-1200
Facsimile: (208) 429-1100
Idaho State Bar No. 4640

Conflict Counsel for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ARMANDO GARCIA,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)
)

Case No. CV PC 2010-24962

**PETITIONER'S BRIEF IN
OPPOSITION TO THE STATE'S
MOTION FOR SUMMARY
DISMISSAL**

COMES NOW, the Petitioner, by and through his attorney, D. David Lorello, Jr.,
Lorello Law PLLC, in association with the law firm Davis & Walker, and hereby files this Brief
in Opposition to the State's Motion for Summary Dismissal.

Introduction

This matter is predicated on one (1) central concept – a breakdown in communication
between Petitioner and his attorney(s). Throughout Petitioner's lengthy court cases, Petitioner
had no less than four (4) attorneys. Additionally, the criminal charges Petitioner was facing are
some of the most serious charges in the Idaho criminal justice system and were the result of
some of the most complex investigations commonly undertaken in Ada County. Coupled
together, these circumstances make it not only plausible, but inevitable, that Petitioner didn't
fully understand the incident proceedings. Additionally, Petitioner's counsel failed to undertake

DL

reasonable investigation of various facts and circumstances surrounding the underlying charges as directed by Petitioner. For these reasons, Petitioner's Petition should be granted and Petitioner should be allowed to withdraw his guilty plea.

Facts

1. On or about December 10, 2007, Petitioner was charged with one (1) count of Conspiracy to Traffic Heroin (CR-FE-2008-00062).
2. On December 31, 2001, Petitioner's counsel, Meacham, filed a notice of appearance.
3. On January 15, 2008, Petitioner was indicted on one (1) count of Conspiracy to Traffic Heroin.
4. On January 16, 2008, Petitioner retained new counsel, Gordon.
5. On or about February 1, 2008, the court set this matter was set for jury trial on May 27, 2012.
6. On May 22, 2008, Petitioner's counsel, Gordon, filed a Motion for Leave to Withdraw.
7. On May 23, 2008, the court vacated the jury trial and permitted Gordon to withdraw.
8. On June 27, 2008, the court entered a not guilty plea for the Petitioner and set the matter for jury trial on December 8, 2008.
9. On June 30, 2008, counsel DeFranco entered an appearance for Petitioner.
10. On October 1, 2008, Petitioner was charged with one (1) count of Trafficking in Heroin (CR-FE-2008-17452).
11. On October 8, 2008, the State filed a Motion to Consolidate case nos. CR-FE-2008-00062 and CR-FE-2008-17452.
12. On October 16, 2008, DeFranco appeared for Petitioner on CR-FE-2008-17452 thereby representing Petitioner on both matters.
13. On November 17, 2008, the Court consolidated both cases CR-FE-2008-00062 and CR-FE-2008-17452 and set a jury trial date of March 9, 2009.

14. On February 27, 2009, the jury trial date was vacated.
15. On March 13, 2009, a new jury trial date of July 13, 2009 was set.
16. On June 12, 2009, the parties filed a Stipulation to Continue Jury Trial and such trial was continued until September 14, 2009.
17. On September 9, 2009, the Court denied Petitioner's Motion to Suppress and Motion to Dismiss for Vindictive Prosecution in both CR-FE-2008-00062 and CR-FE-2008-17452.
18. On or about September 15, 2009, Petitioner entered guilty pleas in both CR-FE-2008-00062 and CR-FE-2008-17452.
19. On November 9, 2009, the Petitioner was sentenced to 15 years fixed plus 15 years indeterminate for case no. CR-FE-2008-00062 and three years fixed plus 27 years indeterminate for case no. CR-FE-2008-17452. Both sentences were to run concurrently.
20. On November 19, 2009, Petitioner filed a Rule 35 motion for reduction in sentence and a Motion to Withdraw Guilty Pleas in both CR-FE-2008-00062 and CR-FE-2008-17452.
21. Additionally, on November 19, 2009, DeFranco filed a Motion to Withdraw as counsel of record.
22. The court allowed DeFranco to withdraw on December 23, 2009. Attorney Taber replaced DeFranco as counsel of record.
23. On April 27, the court denied Petitioner's Rule 35 Motions.
24. On April 29, 2010, the court denied Petitioner's Motions to Withdraw Guilty Pleas.

Summary Dismissal Standards

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. *State v. Bearshield*, 104 Idaho 676, 678 (1983). The petitioner must submit

verified facts within his personal knowledge and produce admissible evidence to support his allegations. *Id.* (citing I.C. § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." *State v. Lovelace*, 140 Idaho 53, 72, (2003) (citing *Pratt v. State*, 134 Idaho 581, 583, (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 only "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. *Workman v. State*, 144 Idaho 518, 522, (citing I.C. § 19-4906(b), (c)). Additionally, and perhaps most importantly, when considering the evidence before the court, the court must view the facts set forth in the Petition in the light most favorable to the Petitioner. *Id.*

Argument

Petitioner Has Raised A Genuine Issue of Material Fact Regarding Whether His

Trial Counsel Adequately Investigated His Case.

Trial counsel has an affirmative duty to investigate a client's case and failure to do so shall be considered deficient performance. In *Murphy v. State*, 143 Idaho 139, 139 P.3d 741 (Ct. App. 2006), the Idaho Court of Appeals incorporated the ABA standards and stated:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Murphy at 147. Moreover, the *Murphy* court also states “[c]ounsel is bound to make reasonable efforts to obtain and review material that the prosecution will probably rely on as evidence.” *Id.* Therefore, trial counsel has a duty to investigate each case.

Petitioner has alleged that his trial counsel did not adequately investigate his case prior to recommending that he plead guilty to the alleged offense. Specifically, Petitioner states in his Petition and accompanying Affidavit, as well as the accompanying Second Affidavit, that trial counsel was deficient in the following ways:

1. Petitioner’s counsel was ineffective. Petition, pg. 2;
2. Petitioner’s counsel failed to file a notice of appeal as directed by Petitioner. Petition pg. 3; Affidavit at ¶2.
3. Petitioner’s counsel failed to investigate and present evidence concerning potential issues concerning Petitioner’s 5th Amendment rights, and possible violations of various Constitutional theories concerning *Miranda*, coercion and waiver. Petition at pg. 3; Second Affidavit ¶¶6–7. Such evidence may have resulted in additional suppression motions.
4. Petitioner’s counsel failed to investigate and prepare evidence regarding potentially coerced statements made by Petitioner. Affidavit at ¶3. Such evidence could have altered the outcome of plea negotiations and or resulted in various suppression issues.
5. That Petitioner’s counsel did not investigate the relationship between the State’s confidential informant and the DEA. Second Affidavit ¶1. Such evidence may have resulted in impeachment evidence thereby affecting the potential outcome of this matter.

6. That Petitioner's counsel did not thoroughly and adequately investigate possible suppression issues associated with a warrantless search. Second Affidavit ¶2. Evidence in this regard may have resulted in additional suppression issues.
7. That Petitioner's counsel did not adequately investigate chain of custody issues. Second Affidavit ¶3 and ¶9. These issues could have resulted in suppression issues or may have affected trial and or settlement strategy.
8. That Petitioner's counsel did not investigate whether there was adequate probable cause to initiate a traffic stop. Second Affidavit ¶4. Such evidence may have resulted in various suppression motions.
9. That Petitioner's counsel did not investigate whether or not various surveillance footage of the Petitioner would reveal suppression issues or would corroborate the recorded recollections of law enforcement officers. Second Affidavit at ¶5. Such evidence may have resulted in suppression issues or could have impacted trial strategy and settlement negotiations.

Petitioner's statements, when construed in the light most favorable to Petitioner as the court is required to do under *Workman*, creates a genuine issue of fact as to what counsel did (or did not) investigate on Petitioner's behalf. Further, Petitioner's statements are not "bare and conclusory." Petitioner's statements are quite specific and are well above the summary dismissal threshold. Accordingly, a factual issue arises as to counsel's conduct. The only method of adequately addressing Petitioner's claims is to conduct an evidentiary hearing. Accordingly, the State's Motion must be denied.

Petitioner maintains that counsel did inadequate investigation and, if true, this failure to investigate could constitute deficient performance. The allegations that counsel did not thoroughly investigate the issues identified above, if true, may have dramatically altered the

posture of this case. Considering the severe sentence imposed by the court, Petitioner deserves the opportunity to have a hearing as to what his counsel actually did (or did not do) and what, if any, conclusions were drawn. Since there is a factual issue as to trial counsel's investigative actions, summary dismissal is not appropriate and Respondent's Motion must be denied.

Petitioner Has Raised A Genuine Issue of Material Fact About Whether
His Plea Was Knowing, Voluntary and Intelligent.

Petitioner's guilty plea is invalid because he was not fully aware of the proceedings and potential consequences of entering a guilty plea. Petitioner had multiple attorneys and these attorneys were not able to adequately convey the terms and consequences of the plea agreement to the Petitioner. Petitioner is entitled to fully understand the ramifications of pleading guilty, regardless of any communication issues present between Petitioner, the court, and counsel. All parties must ensure that Petitioner is fully understanding and comprehending the entire scope of a guilty plea. In this matter, it appears there are genuine issues of fact as to what the Petitioner understood his plea to represent and under what terms the State was bound.

For a guilty plea to be valid, the **entire** record must demonstrate that the plea was entered into in a voluntary, knowing, and intelligent manner. *State v. Heredia*, 144 Idaho 95, 96, (2007) (emphasis added). Whether a plea is voluntary and understood entails inquiry into three areas: (1) whether the defendant's plea was voluntary in the sense that she understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived her rights to a jury trial; and (3) whether the defendant understood the consequences of pleading guilty. *State v. Colyer*, 98 Idaho 32, 34, (1976).

Trial counsel is under an obligation to advise a client and ensure any guilty plea is knowing and voluntary. "Where a defendant is represented by counsel during the plea process and enters a plea upon the advice of counsel, the voluntariness of the plea depends on whether

DATED this 17th day of May, 2012.

LORELLO LAW PLLC



D. DAVID LORELLO, JR. ISB# 6232
Attorney for Petitioner


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of May, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Ada County Prosecutor
200 W. Front St., Rm. 3191
Boise, ID 83702

<input type="checkbox"/>	U.S. MAIL
<input checked="" type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	FACSIMILE
<input type="checkbox"/>	OVERNIGHT MAIL

DAVIS & WALKER

By  _____
Layne Davis
Conflict Counsel for Defendant

(View box B-1105)

HANSON

Allen

2-4-13



ORIGINAL

Layne Davis
DAVIS & WALKER
200 North 4th Street, Suite 302
Boise, ID 83702
Telephone: (208) 429-1200
Facsimile: (208) 429-1100
Idaho State Bar No. 4640

NO. _____ FILED _____
A.M. 9 P.M.

FEB 01 2013

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

Conflict Counsel for Petitioner

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA**

ARMANDO GARCIA,)	
)	
Petitioner,)	Case No. CV-PC-2010-24962
)	
vs.)	SUPPLEMENTAL MEMORANDUM IN
)	OPPOSITION TO THE STATE'S
STATE OF IDAHO,)	MOTION FOR SUMMARY DISMISSAL
)	
Respondent.)	
_____)	

COMES NOW, the above-named Petitioner ("Mr. Garcia"), by and through counsel, and hereby submits the following second supplemental memorandum in opposition to the state's motion for summary dismissal.

MEMORANDUM

I. A GENUINE ISSUE OF MATERIAL FACT EXISTS

A. There Exists a Genuine Issue Whether Mr. Garcia Received Ineffective Assistance Of Counsel Because Counsel did not Adequately Inform Mr. Garcia of the Consequences of his Plea.

1. General Standards for Ineffective Assistance of Counsel

In *State v. Soto*, the Idaho Court of Appeals explained the standards applicable to cases such as this:

sl

The standard for determining whether counsel's assistance was effective was enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and applied in Idaho in *Gibson v. State*, 110 Idaho 631, 718 P.2d 283 (1986):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986), quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). **The test enunciated in *Strickland* also applies to ineffective assistance of counsel claims that arise after entry of a guilty plea.** *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Carter v. State*, 116 Idaho 468, 776 P.2d 830 (Ct.App.1989). The Court in *Hill* stated that

The second, or "prejudice," requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, the defendant must show that there is a **reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.**

121 Idaho 53 (1991) (emphasis added).

2. Ineffective Assistance of Counsel During the Plea Negotiations Stage

On March 21, 2012, the U.S. Supreme Court issued two opinions addressing ineffective assistance of counsel during the plea negotiation process: *Missouri v. Frye*, 132 S.Ct. 1399, and *Lafler v. Cooper*, 132 S.Ct. 1376. In *Frye*, the Court addressed an ineffective assistance claim in which the attorney received a plea offer but failed to communicate it to his client. The client ultimately plead guilty, but on much more severe terms. The un conveyed offer involved a plea to a misdemeanor that carried a maximum sentence of a year, but the client ultimately plead guilty to a felony and received three years. In *Lafler*, the attorney conveyed the offer, but still committed ineffective assistance of counsel during the plea negotiation process.

One of the issues in both cases was the appropriate standard for whether a defendant was prejudiced by ineffective assistance at the plea bargaining phase of a criminal case. *Lafler* held that “If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.” 132 S.Ct. at 1387. *Frye* held that “To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or has been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.” 132 S.Ct. at 1409.

The *Frye* Court also stated that “where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, [the] inquiry [is] whether he would have accepted the offer to plead pursuant to the terms earlier proposed.” *Id.* at 1410. Prejudice can be shown if there existed a reasonable probability that, but for the deficient performance, the defendant would have accepted the offer. It is also critical that *Frye* specifically distinguished between the issue of ineffective assistance and the issue of whether a plea was knowing and voluntary, stating that it “**rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel.**” *Id.* at 1406 (emphasis added). Therefore, a knowing and voluntary guilty plea does not negate a claim of ineffective assistance of counsel during the plea bargaining phase.

3. A Genuine Issue of Material Fact Exists

Mr. Garcia's Petition alleges that he suffered ineffective assistance of counsel because his attorney "lied to me about the plea agreement [and] got me to plead under false pretenses and manipulation." Petition for Post Conviction Relief, p. 3 ¶ 9. In Paragraph 12, the Petition expands on the ineffective assistance allegation, specifying the precise misunderstanding between him and counsel. Mr. Garcia was under the clear understanding that he would receive an agreement "for 10 years fixed not 30." According to Mr. Garcia, his attorney lied to him about the effect of the plea agreement, causing Mr. Garcia to believe that he was pleading to a different agreement than the agreement in the record.

The disparity is hardly trivial. Mr. Garcia was led to believe that he would receive "10 years fixed," when he ultimately received thirty. Thus, the issue now is fairly straightforward. Mr. Garcia must demonstrate counsel's deficient performance, and resulting prejudice. *See, Huck v. State*, 124 Idaho 155, 158 (Ct. App. 1993) (stating the the *Strickland* standards "have equal applicability to the entry of a guilty plea.") It is self-evident that an attorney's performance is deficient when he lies to his client regarding the consequences of his plea. *Griffith v. State*, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct.App.1992) ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.") It is also self-evident that prejudice results from such deficient performance. The plea agreement entailed a more severe sentence than the agreement contemplated by Mr. Garcia, which of course results in prejudice to Mr. Garcia. In response, the state has provided an Affidavit of Counsel in Support of Motion to Withdraw, in which attorney John Defranco maintained that he "explained in great detail the

ramifications of the plea agreement[;] specifically, the fact that the State was free to argue for a fixed sentence of more than ten years.” Mr. Defranco’s affidavit also contains legal conclusions regarding the clarity of the sentencing colloquy and the written plea agreement. As legal conclusions, the statements are not relevant.


Thus, the Court is left with a pair of dueling affidavits, neither one of which is more facially persuasive than the other. Summary dismissal is not appropriate where the alleged facts are facially sufficient, and the only opposing facts are no more persuasive than the facts alleged. Such was the case in *Huck*, in which “Huck filed an application for post-conviction relief seeking to set aside the conviction on grounds that his guilty plea was the result of both ineffective assistance of counsel and coercion. *After an evidentiary hearing*, the district court dismissed the petition. Huck now appeals that order.” 124 Idaho at 157. Thus, the district court in *Huck* recognized the impossibility of finding *as a matter of law* that the attorney’s affidavit was more persuasive than the petitioner alleging that the attorney coerced the guilty plea. When the evidence is in such diametric opposition, the appropriate remedy is to hold an evidentiary hearing wherein the Court may weigh each witness’s respective credibility.

II. CONCLUSION

For the foregoing reasons, this Court should deny the state’s motion for summary dismissal.

DATED THIS 30 DAY OF January, 2013.

DAVIS & WALKER

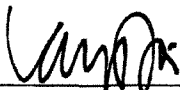


Layne Davis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ___ day of _____, 20___, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Heather Reilly	<input type="checkbox"/>	U.S. MAIL
Ada County Prosecutor	<input type="checkbox"/>	HAND DELIVERED
200 W. Front St.	<input type="checkbox"/>	FACSIMILE
Boise, ID 83702	<input type="checkbox"/>	OVERNIGHT MAIL



Attorney or Legal Assistant

STATE OF IDAHO vs. ARMANDO GARCIA, SR.

1 IN THE SUPREME COURT OF THE STATE OF IDAHO
 2 STATE OF IDAHO,) Docket No. 37142
 3)
 4 Plaintiff-Respondent,)
 5 vs.)
 6 ARMANDO GARCIA, SR.,)
 7)
 8 Defendant-Appellant.)
 9
 10 Appealed from the District Court of the Fourth Judicial District
 11 of the State of Idaho, in and for the county of Ada, in the city
 12 of Boise, the Honorable Timothy Hansen, District Judge.
 13
 14 MOLLY J. HUSKEY
 State Appellate Public Defender
 Boise, Idaho
 Attorneys for Appellant
 15
 16 LAWRENCE G. WASDEN
 Attorney General
 State of Idaho
 Attorneys for Respondent
 17
 18 JEANNE M. HIRMER, RPR, CSR No. 318
 Official Court Reporter Pro Tem
 Accurate Court Reporting
 13601 W. McMillan Rd., Box 261
 Boise, Idaho 83713
 208.841.8289
 22
 23
 24
 25

1 IN THE SUPREME COURT OF THE STATE OF IDAHO
 2 STATE OF IDAHO,) Docket No. 37142
 3)
 4 Plaintiff-Respondent,) Motion to Withdraw
 5 vs.) Guilty Plea
 6 ARMANDO GARCIA, SR.,)
 7)
 8 Defendant-Appellant.) NOTICE OF LODGING
 9)
 10 Received from Jeanne M. Hirmer,
 11 Official Court Reporter Pro Tem of the above-entitled
 12 action, and lodged with me this _____ day of
 13 _____, 2010, the Original and three (3)
 14 copies of the Reporter's Transcript on Appeal.
 15
 16
 17
 18
 19 J. DAVID NAVARRO, Clerk
 of the District Court.
 20
 21
 22
 23
 24
 25 Deputy Clerk

1 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 2 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
 3
 4 STATE OF IDAHO,) No. H08-00062/
 5) FE-08-17452
 6 Plaintiff,)
 7 vs.) Motion to Withdraw
 8) Guilty Plea
 9 ARMANDO GARCIA, SR.,)
 10)
 11 Defendant.)
 12)
 13
 14 REPORTER'S TRANSCRIPT ON APPEAL
 BE IT REMEMBERED, that the above-entitled matter
 15 came on regularly for hearing on Friday, April 9, 2010,
 16 before the Honorable Timothy Hansen, District Judge,
 17 in a courtroom of the Ada County Courthouse, in Boise, Idaho.
 18
 19 APPEARANCES:
 For the State: GREG H. BOWER
 Ada County Prosecuting Attorney
 By: Heather C. Reilly
 Deputy Prosecuting Attorney
 200 W. Front Street
 Suite 3191
 Boise, Idaho 83702
 21
 22 For the Defendant: PAUL R. TABER, III
 Attorney at Law
 200 N. 4th Street
 Suite 302
 Boise, Idaho 83702
 23
 24
 25

1 I N D E X
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 (April 9, 2010)
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STATE OF IDAHO vs. ARMANDO GARCIA, SR.

1 BOISE, IDAHO, FRIDAY, APRIL 9, 2010, 3:20 P.M.
 2
 3 THE BAILIFF: All rise, please. District
 4 Court is again in session. The Honorable Timothy Hansen,
 5 Judge presiding.
 6 THE COURT: Be seated, please. Good
 7 afternoon. Continuing with matters on the calendar this
 8 afternoon, we're going to take up now the cases of the
 9 State of Idaho vs. Armando Garcia, H08-00062 and
 10 CR-FE-08-17452. We do have Ms. Reilly here on behalf of
 11 the State. We have Mr. Taber here on behalf of Mr. Garcia
 12 who is present and in custody at this time.
 13 Counsel, we're here today on the defendant's motion
 14 to withdraw his guilty plea. Are the parties prepared to
 15 address that motion today?
 16 MR. TABER: I believe so.
 17 MS. REILLY: I believe so, Judge.
 18 THE COURT: Counsel, then before doing so, we
 19 do have one preliminary matter that I believe we need to
 20 take up. The State had filed a motion to waive
 21 attorney/client privilege as between Mr. Garcia and his
 22 previous counsel Mr. DeFranco as to issues related to the
 23 motion to withdraw the guilty plea today. And I think we
 24 need to take that issue up first before proceeding with the
 25 hearing.

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1 parties prepared, then, to proceed at this time?
 2 MS. REILLY: I believe so, Judge. And if I
 3 may, for the record, I did file back in December, after
 4 receipt of the Motion to Withdraw Guilty Plea, the State's
 5 objection. And I just wanted to make sure that Your Honor
 6 and counsel have the State's objection on this.
 7 MR. TABER: Yes.
 8 THE COURT: And, Counsel, I believe we
 9 do. Yes.
 10 Mr. Taber, then, in this situation the defendant's
 11 motion being one to withdraw his guilty plea
 12 postsentencing, it is clear that the burden is on
 13 Mr. Garcia to go forward with evidence to demonstrate
 14 manifest injustice that would result if the motion is
 15 denied.
 16 Are you prepared to proceed with your evidence at
 17 this time?
 18 MR. TABER: I am, Your Honor.
 19 THE COURT: Counsel, before hearing any
 20 evidence, did either side wish to make any kind of an
 21 opening comment or statement at this point?
 22 MS. REILLY: Your Honor, no opening. Just,
 23 also, similarly to my prior request, I did also file a
 24 notice of -- a Request for Judicial Notice for a number of
 25 specific items pursuant to the Rule, and I just want to

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1 Mr. Taber, in this case, is there going to be an
 2 objection from the defense to that motion?
 3 MR. TABER: Your Honor, I don't think that
 4 there is going to be any objection to that, so long as we
 5 confine it to these issues that we bring up. I don't want
 6 to just open the door --
 7 THE COURT: No. Counsel, I agree and I
 8 understand. In this case, again, my understanding of the
 9 motion is it would be limited to information by
 10 Mr. DeFranco concerning Mr. Garcia's claim for withdrawal
 11 of his plea.
 12 MR. TABER: Correct.
 13 THE COURT: And, then, that would be the only
 14 matters that would be gotten into with Mr. DeFranco. There
 15 is no objection, then, to that; is that correct?
 16 MR. TABER: That's correct, Your Honor.
 17 THE COURT: Counsel, in that case, then, there
 18 certainly appears to be good cause. The defense having no
 19 objection, I will grant the motion at this time, and will
 20 go ahead and sign the Order for Waiver of Attorney/Client
 21 Privilege, again, related to information by Mr. DeFranco
 22 concerning the defendant's claim to withdraw the guilty
 23 plea. I'll sign the Order, then, to that effect.
 24 Counsel, then, that brings us to the motion itself
 25 to withdraw the guilty plea. And, in this case, are the

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1 make sure that that's before the Court as well.
 2 MR. TABER: I don't think I have that in my
 3 file. If I may just take a quick look at Counsel's.
 4 THE COURT: Okay.
 5 MR. TABER: I don't think I'm going to have
 6 any objection to that either, but --
 7 (Reviewing file.)
 8 MR. TABER: I have no objection, Judge.
 9 THE DEFENDANT: Could I see what you guys are
 10 talking about before there is no more objections?
 11 (The document was handed to
 12 the defendant by Mr. Taber.)
 13 (Discussion off the record between
 14 Mr. Taber and the defendant.)
 15 THE COURT: Okay. Again, counsel, then, there
 16 being no objection, the Court would take notice of those
 17 parts of this file related to the Guilty Plea Advisory
 18 Form; the Rule 11 Plea Agreement in this case; the audio
 19 recording of the September 14th, 2009, entry of plea; and
 20 a transcript of the Motion to Suppress as well.
 21 MS. REILLY: Thank you, Judge.
 22 THE COURT: Counsel, then, in this case, any
 23 other matters, then, before the Court hears evidence from
 24 the defense, first, and then from the State, if they so
 25 choose?

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1 MR. TABER: No, Your Honor.
 2 THE COURT: Mr. Taber, then, again, where it
 3 is your burden, as I've indicated, I would hear any
 4 evidence that you would like to offer at this time.
 5 MR. TABER: Thank you, Your Honor. In
 6 furtherance of that, I would call Mr. Garcia to the stand.
 7 THE COURT: Okay.
 8
 9 ARMANDO GARCIA, SR.,
 10 having been first duly sworn under oath, testified
 11 as follows:
 12
 13 THE COURT: And Mr. Taber, then, you may begin
 14 when you're ready, sir.
 15 MR. TABER: Okay. Thank you.
 16
 17 DIRECT EXAMINATION
 18 BY MR. TABER:
 19 Q. Are you seated there all right now, Armando?
 20 A. **(No verbal response.)**
 21 Q. Mr. Garcia, the first thing I'm going to ask
 22 you to do is state your full name and spell your last name.
 23 A. **My name is Armando Garcia, Sr., G-A-R-C-I-A.**
 24 Q. Mr. Garcia, you are the same person who was
 25 prosecuted in this case -- actually, there's a couple of

1 cases that you were prosecuted on. But in this case that
 2 we're moving to withdraw your guilty plea, you were the
 3 defendant in that case; is that correct?
 4 A. **Yes.**
 5 Q. And just as a little background; Mr. Garcia,
 6 can you tell us who represented you during the pendency of
 7 this case?
 8 A. **I had three different attorneys --**
 9 Q. Okay.
 10 A. **-- Mr. Darrell Meachams (sic), Phil Gordon --**
 11 **paid attorneys --**
 12 Q. All right.
 13 A. **-- and then I had Mr. John DeFranco as a**
 14 **public defender.**
 15 Q. Now, Mr. Garcia, when you entered into a
 16 guilty plea in this case, who was the attorney at that
 17 time?
 18 A. **Uh, John.**
 19 Q. John DeFranco?
 20 A. **Yes.**
 21 Q. Mr. Garcia, did you enter into a Rule 11 Plea
 22 with this Court and with the prosecution?
 23 A. **Well, I want to make one thing clear. Uh,**
 24 **when --**
 25 Q. Well, just answer that question first. Okay?

1 A. **Okay. Your question is?**
 2 Q. Did you enter into a Rule 11 guilty plea in
 3 the court?
 4 A. **Not knowing what I had entered into, yes.**
 5 Q. Okay. But there was a Rule 11 Plea?
 6 A. **I thought it was, uh, something that was going**
 7 **to bind the courts to my agreement.**
 8 Q. We'll get there, Mr. Garcia. We're going to
 9 get there. Okay?
 10 Mr. Garcia, under the plea agreement that you
 11 entered into, what was your understanding was going to
 12 happen when it came time to sentence you?
 13 A. **I was led to believe that I was getting a**
 14 **10-year sentence.**
 15 Q. Do you mean 10 years --
 16 A. **Fixed.**
 17 Q. -- fixed? Okay.
 18 Now, Mr. Garcia, what led you to believe that that
 19 was going to be the case?
 20 A. **John explained to me that the prosecutor had**
 21 **made four different offers. The last offer was a 10-year**
 22 **fixed term if I pled guilty today, is what he said to me.**
 23 Q. And did you discuss that plea agreement with
 24 Mr. DeFranco?
 25 A. **For about five seconds. He didn't go into**

1 **detail.**
 2 Q. Well, you must have gone into some detail,
 3 though, right? He told you what was going to happen; did
 4 he not?
 5 A. **He told me four different other times what was**
 6 **going on, and what the deal was, and I refused every time**
 7 **except for the very last time. He says -- these were his**
 8 **exact words: "Ten years is the best it's gonna get.**
 9 **That's what you're gonna get if you plead guilty today,**
 10 **with a Rule 11 on it," they told me -- he told me.**
 11 Q. All right. Now --
 12 A. **I wasn't aware that there was A, B, and C**
 13 **category in those. He never once explained to me that**
 14 **there was different categories which would bind the courts**
 15 **to it.**
 16 Q. Mr. Garcia, now I want you to just -- we're
 17 going to move towards what you're talking about now, but we
 18 have to take some steps here first.
 19 On the day that you pled guilty and you signed that
 20 Rule 11 guilty plea, about how long did you talk to
 21 Mr. DeFranco before you -- on that day?
 22 A. **I just told you; it was about five seconds.**
 23 Q. Now, I don't want to diminish your sentiments
 24 here, but when you say it's five seconds, I take it that
 25 you're saying --

1 **A. He didn't go into very much detail as to what**
 2 **I was agreeing to.**
 3 Q. I would like, Mr. Garcia, just a little bit
 4 more realistic time period about how long he talked to you.
 5 **A. In the four times that he came and went from**
 6 **that room I was in, I would say he spent maybe five minutes**
 7 **altogether with me.**
 8 Q. All right.
 9 **A. He kept going back to the prosecutor, and**
 10 **said, "Okay. Well, this is the last offer she has to**
 11 **make."**
 12 Q. All right. And prior to that date that you
 13 signed the Rule 11, were you housed at the Ada County Jail
 14 at that time?
 15 **A. Yes.**
 16 Q. And did Mr. DeFranco ever come out to the jail
 17 and speak with you?
 18 **A. On occasions, yeah, he did. He was always**
 19 **busy. He didn't have a whole lot of time to talk to me.**
 20 Q. But you did speak with him?
 21 **A. Yes.**
 22 Q. All right. Now, that Rule 11 Plea
 23 Agreement -- it states on the Plea Agreement that nobody is
 24 bound by the 10-year mandatory minimum, correct?
 25 **A. I wasn't aware of that part that nobody's**

1 anybody to 10 years. Okay?
 2 Take that representation even though -- you said you
 3 didn't read it?
 4 **A. Well, you know, I probably did read it, but I**
 5 **didn't -- wasn't understanding.**
 6 Q. Okay. Did -- all right.
 7 **A. I was just happy that I was gettin' a 10-year**
 8 **sentence. I even turned around and thanked Heather over**
 9 **there. I said, "Thank you," you know, "that's --**
 10 **that's" --**
 11 Q. I understand. But was it your impression --
 12 on the day you signed that plea agreement, what was the
 13 impression that -- what did you believe at that time that
 14 you were going to get as a mandatory minimum sentence?
 15 **A. Ten years.**
 16 Q. Okay. Now, Mr. Garcia, it doesn't say that in
 17 the plea agreement, but that was still your impression,
 18 right?
 19 **A. Sure. That's what he led me to believe.**
 20 Q. So tell me what Mr. DeFranco said to you that
 21 led you to believe that.
 22 **A. He said there was one last offer of 10 years**
 23 **if I pled guilty today, which was that Friday before we had**
 24 **to go to jury trial. So I said -- you know, "That's the**
 25 **best it's gonna get" --**

1 **bound to it. I mean, they told me "sign it today," and**
 2 **that's what the deal was gonna be. So that's what I was**
 3 **led to believe.**
 4 Q. Did you read the plea agreement?
 5 **A. Uh, not very well, obviously. I wasn't**
 6 **understanding, I should say.**
 7 Q. Well, did Mr. DeFranco read it to you?
 8 **A. Uh, you know, the day that we sat out here in**
 9 **front of the judge and everybody, uh, I was under the**
 10 **impression that all I needed to do was sit there and agree.**
 11 Q. Now, you say that you were under the
 12 impression. Why were you under the impression of that?
 13 **A. Because an agreement is an agreement. I mean,**
 14 **I was led to believe, like I say, that that's what I was**
 15 **going to get was 10 years fixed. That's why I pled guilty.**
 16 Q. I understand that. But did somebody tell you
 17 that that's what was --
 18 **A. Why, sure --**
 19 Q. -- going to happen?
 20 **A. -- John told me that that's what was going on.**
 21 **That letter that you have there that he wrote to the**
 22 **attorneys in Salt Lake, that pretty much, uh, tells you**
 23 **again.**
 24 Q. So if I tell you that I've read the Rule 11
 25 Plea Agreement, the Rule 11 Plea Agreement does not bind

1 Q. All right.
 2 **A. -- so I took it.**
 3 Q. Now, did Mr. DeFranco say that the Rule 11 --
 4 that the judge could give you up to life; 15 years or more
 5 as a fixed period?
 6 **A. You know, after he led me to believe that I**
 7 **was gettin' 10 years, uh, I just kinda -- just wasn't**
 8 **paying very much attention to what else was goin' on. I**
 9 **was just, you know, bein' thankful that that's what I was**
 10 **gettin' was a 10-year sentence. So everything else just**
 11 **bypassed me. I mean --**
 12 Q. Okay.
 13 **A. I was, honestly, led to believe that's what**
 14 **the deal was, and that's why I agreed to plead guilty that**
 15 **day.**
 16 Q. Well, I take it that in your prior
 17 conversations with Mr. DeFranco -- either in the
 18 courthouse, or at the jail, or wherever these conversations
 19 took place, did you discuss potential plea agreements with
 20 him?
 21 **A. Potential agreement -- uh, agreements as --**
 22 **like -- like more --**
 23 Q. More --
 24 **A. -- more than the 10 --**
 25 Q. Right. Were you ever made aware of offers

1 coming from the State for more than 10 years fixed?
 2 **A. You know, I would have to say no to that.**
 3 **I -- you know, I was just happy that I was gettin' a**
 4 **10-year sentence and that's -- that's all I could hear.**
 5 Q. Well --
 6 **A. I was, uh -- you know, I was happy that I was**
 7 **gettin' a 10-year-fixed sentence. And that -- that --**
 8 Q. Right.
 9 **A. I --**
 10 Q. But that was the date --
 11 **A. Otherwise, I would never have pled guilty. I**
 12 **would have fought it and went to jury with it.**
 13 Q. Mr. Garcia, I'm just going to ask you to just
 14 follow along with me and just answer the questions that I
 15 ask. Okay? 'Cause -- it's kind of important. We're
 16 putting this case on -- so that we have some order to it.
 17 Did you talk with Mr. DeFranco out at the jail, or
 18 downstairs in this building, or in the annex, or
 19 wherever -- did you speak with Mr. DeFranco, prior to the
 20 day that you entered the guilty plea, about potential plea
 21 agreements?
 22 **A. Ahhhhhhh. You know, I -- I don't remember,**
 23 **uh, any specific, uh -- uh, talk about anything over the**
 24 **10-year sentence.**
 25 Q. Now, did Mr. DeFranco tell you that if you

1 have.
 2 Q. Now, when you came to that conclusion -- when
 3 you came to the determination that you were going to
 4 receive no more than ten years on the date that you pled
 5 guilty, did you have confidence in Mr. DeFranco?
 6 **A. I -- I -- you know, I did, yes. I -- I -- I**
 7 **really thought the man was doing a very good job for me.**
 8 **And every day he came to see me I would thank him.**
 9 Q. All right.
 10 **A. I was very polite to him, yes.**
 11 Q. And so I take it, then, that there was no
 12 reason for you to mis- -- took -- you were satisfied with
 13 his services?
 14 **A. Completely.**
 15 Q. And part of it -- was part of it, then,
 16 because you --
 17 **A. 'Cause I was led to believe that he -- well,**
 18 **he said he got the best he could for me, which was the 10**
 19 **that I thought that I had gotten, yes. That's why I was**
 20 **happy with his services.**
 21 Q. Okay. Now, you just decided to do this motion
 22 to withdraw your guilty plea after you were sentenced,
 23 correct?
 24 **A. Yeah. Because I thought it was an agreement.**
 25 **I mean, it's like a contract. You sign a contract. It's**

1 pled guilty you would receive no more than 10 years on the
 2 mandatory minimum portion of your sentence?
 3 **A. Did he tell me that?**
 4 Q. Yes.
 5 **A. Yes, he led me to believe that.**
 6 Q. Did he say something to the effect of
 7 "Armando, if you plead guilty today you will receive no
 8 more than 10 years fixed"?
 9 **A. Yes --**
 10 Q. All right.
 11 **A. -- that's what my understanding is.**
 12 Q. Okay.
 13 **A. We're talking about the fixed part, right?**
 14 Q. Yes, just the fixed part. That's all I'm --
 15 **A. Yes, that's correct.**
 16 Q. Now, had you been under the impression that
 17 you could receive 11, or 12, or 13, 14, 15 years fixed,
 18 would you have taken that deal? Would you have pled
 19 guilty? Maybe I didn't phrase that very well.
 20 **A. No, you didn't.**
 21 Q. If the offer had been that you were going to
 22 get at least 10 years, but it could be more than 10
 23 years, as a fixed portion of your sentence, would you have
 24 pled guilty?
 25 **A. I don't think I would -- I don't think I would**

1 **an agreement. It's binding to everybody.**
 2 Q. Okay.
 3 **A. That's why I said, "Yes, let's do it."**
 4 Q. You understood it to be binding on the State,
 5 as well as the Court, and you, and your counsel?
 6 **A. Yes. And the judge and everybody. That's why**
 7 **I pled guilty. That's what -- you know, what I was led to**
 8 **believe.**
 9 Q. And so when you came into this courtroom on
 10 the day of your sentencing, did you believe that you were
 11 going to receive a 10-year fixed sentence and then some on
 12 top of it?
 13 **A. Yes. I was totally convinced of that.**
 14 Q. Okay. And when you say you were convinced,
 15 there was no doubt in your mind? Is that what you're
 16 saying?
 17 **A. There was no doubt in my mind that that's what**
 18 **the agreement was with the Rule 11; a 10-year sentence.**
 19 MR. TABER: That's all I have for right now,
 20 Mr. Garcia.
 21 THE COURT: Thank you.
 22 Ms. Reilly, you may cross-examine.
 23 MS. REILLY: Thank you.
 24
 25

1 CROSS-EXAMINATION
 2 BY MS. REILLY:
 3 Q. Good afternoon, again, Mr. Garcia.
 4 A. **How are you doin', Ms. Reilly?**
 5 Q. I'm just fine. Thank you. I just have a
 6 couple questions for you.
 7 A. **Okay.**
 8 Q. You just stated, Mr. Garcia, that you believed
 9 that there was a contract and it was binding on all the
 10 parties; is that right?
 11 A. **Yes, ma'am.**
 12 Q. You would agree with me, sir, that when you
 13 enter into a contract it's important to read it carefully
 14 and understand the terms; would you not?
 15 A. **I would say yes.**
 16 Q. And you can read and write the English
 17 language?
 18 A. **Yes. But the law is -- is very complex, as**
 19 **you well know. That's -- I've -- I've never had to deal**
 20 **with it the way I had to deal with it now. I wish I would**
 21 **have paid more attention.**
 22 Q. But your answer to the question is yes, you
 23 can read and write in English?
 24 A. **Yes, I can.**
 25 Q. Mr. Garcia, you are aware, are you not, that

1 to have to say no, I'm not aware of what you're trying to
 2 say.
 3 Q. So you don't remember sitting here in court,
 4 and me standing up and filing with the Court a document
 5 called an "Amended Information"?
 6 A. **I don't think, uh, Mr. DeFranco ever explained**
 7 **to me what it was you were trying to tell me.**
 8 Q. That's not what I asked you. ← ?
 9 A. **Well, that's what I'm saying. I mean --**
 10 Q. You were here in court --
 11 A. **-- I didn't understand it.**
 12 Q. You were here in court, right?
 13 A. **I believe so.**
 14 Q. And when you were here in court in front of
 15 Judge Hansen, would you pay attention to what was going on?
 16 A. **Yes.**
 17 Q. I've heard you say a lot during your
 18 testimony, Mr. Garcia, that you were "led to believe."
 19 What do you mean by that?
 20 A. **That's what Mr. John DeFranco led me to**
 21 **believe I was getting; a 10-year fixed sentence. That's**
 22 **what I mean by that.**
 23 Q. And when you say "led to believe," are you
 24 testifying under oath that John DeFranco told you "You will
 25 only get 10 years fixed"?

1 the State did file an Amended Information reducing the
 2 charge down to a trafficking-in-heroin charge in excess of
 3 seven grams or more, rather than the ounce or more that you
 4 originally faced, right?
 5 A. **You lost me.**
 6 Q. You knew an Amended Information was filed in
 7 this case, correct?
 8 A. **An Amended Information?**
 9 Q. The charging document. You were originally
 10 indicted?
 11 A. **When I was originally indicted I was, uh,**
 12 **indicted on a charge with a, uh, possession of controlled**
 13 **substance. Then it went up to trafficking. And, uh, after**
 14 **that is where it was at.**
 15 Q. But would you agree with me that prior to
 16 entering your guilty plea in this case the charge was
 17 reduced, correct?
 18 A. **No.**
 19 Q. You wouldn't agree with me?
 20 A. **Reduced from what to what?**
 21 Q. Reduced from trafficking an ounce or more of
 22 heroin to trafficking seven grams or more?
 23 A. **It is the same thing; ain't it?**
 24 Q. No.
 25 A. **Well, then, uh, no -- I mean, then I'm going**

1 A. **Fixed, yes. I would say yes.**
 2 Q. That's your testimony?
 3 A. **Yes, it is.**
 4 Q. If I may, I'm going to ask that Page 1 of a
 5 three-page document entitled "Rule 11 Plea Agreement," in
 6 case No. CR-FE-2008-62 be handed to the witness, if there's
 7 no objection. First, I'll show it to Counsel.
 8 THE COURT: Counsel, perhaps for the benefit
 9 of the record, I understand that -- the Court has indicated
 10 it can take notice of its file related to those documents.
 11 But I think, perhaps, for the benefit of the record, we may
 12 want to mark that as an exhibit just to make sure that that
 13 is preserved.
 14 MS. REILLY: Understood, Judge.
 15 MR. TABER: That's fine. I would have no
 16 objection to the exhibit.
 17 THE COURT: Okay.
 18 MS. REILLY: Would it be appropriate to take
 19 the file-stamped one from the court record and mark it or
 20 just use my copy?
 21 THE COURT: We're not doing file-stamped ones
 22 out of the court file.
 23 MS. REILLY: Okay. I just wasn't sure, Judge.
 24 We can use my copy, then.
 25 THE COURT: If you want to do that one as an

1 exhibit, let's mark it as State's Exhibit 1.
 2 MR. TABER: Were you just going to admit the
 3 first page?
 4 MS. REILLY: I was just going to have him read
 5 No. 2, and see if he could read that for us.
 6 MR. TABER: I would just as soon have -- if
 7 one page is going to come in, just have the whole thing in
 8 the record.
 9 MS. REILLY: Judge, why don't I move forward
 10 on that.
 11 THE COURT: Okay.
 12 MS. REILLY: I'll withdraw, since it's in the
 13 court file.
 14 THE DEFENDANT: Can somebody explain to me
 15 what's goin' on -- what's being said here?
 16 THE COURT: Counsel, if you want to take a
 17 moment to talk with Mr. Garcia, you may.
 18 MR. TABER: Just -- up there?
 19 THE COURT: And you may approach, Counsel.
 20 That's fine.
 21 MR. TABER: Okay.
 22 (Discussion at the witness stand.
 23 between the defendant and Mr. Taber.)
 24 THE COURT: Counsel, are we ready to proceed?
 25 MR. TABER: Yes.

1 September 4th, 2009, which was the pretrial conference,
 2 which would have been the Friday before the jury trial?
 3 A. I think that's the date that we're talking
 4 about.
 5 Q. And then it's not until ten days later, on
 6 September 14th, 2009, that you actually entered your guilty
 7 plea and the Rule 11 is presented to the Court.
 8 So do you recall two different dates where the
 9 Rule 11 or the plea agreement is discussed?
 10 A. You know, I don't remember, honestly.
 11 Q. Well, would you agree with me that that's
 12 possible that there was more than one day that the
 13 agreement was discussed?
 14 A. No, huh-uh. That agreement came at me that
 15 day only.
 16 Q. Which day?
 17 A. On September -- the Friday that we were just
 18 talkin' about. Was that September the 4th?
 19 Q. September the 4th was the date of the pretrial
 20 conference.
 21 A. Okay. That's the day that he came to me four
 22 times in the back room back there with offers from you
 23 supposedly.
 24 Q. But you didn't enter your guilty plea that
 25 date?

1 THE COURT: Ms. Reilly, you may proceed when
 2 you're ready.
 3 MS. REILLY: Thank you, Judge.
 4 Q. (BY MS. REILLY) Mr. Garcia, you stated in
 5 your Direct Examination just a few minutes ago that
 6 Mr. DeFranco spoke to you about the agreement the day that
 7 you pled guilty.
 8 A. Four different times he came at me with a
 9 different offer that you had proposed supposedly.
 10 Q. And on what date was that? Do you recall?
 11 A. I do.
 12 Q. What date was it?
 13 A. That was, uh, on, uh -- was it, uh, November
 14 the 9th, 2009?
 15 Q. Well, November 9 is the date of the sentence.
 16 A. Okay. Well -- okay. Your question is?
 17 Q. I'm just wondering if you recall what date it
 18 was that you're saying Mr. DeFranco spoke to you four
 19 different times?
 20 A. That was the day before we had jury trial -- a
 21 Friday. It was on a Friday.
 22 Q. What --
 23 A. Because he -- four different times he -- he --
 24 he came back with "This is the last offer."
 25 Q. Do you recall being here in court on

1 A. No. But I think that was the date that, uh,
 2 I -- that we came in here and, uh, I agreed to sign a form,
 3 uh, that would bind the courts to their agreement -- the
 4 10-year sentence I was gonna receive.
 5 Q. And then you came back ten days later, and
 6 that's the day that you entered your guilty plea; on
 7 September 14, 2009?
 8 A. I -- you know, honestly, I don't remember if
 9 that's the date or not.
 10 Q. Fair enough, Mr. Garcia.
 11 Think back to the day that you actually entered your
 12 guilty plea. We were here in court. Judge Hansen was
 13 here. Mr. DeFranco was sitting beside you. Do you
 14 remember that day?
 15 A. Yeah, I think -- very vaguely, yes. I think I
 16 remember somethin' about it. I think I just sat there
 17 and -- and -- and nodded my head, because that's what -- I
 18 wasn't given an opportunity to say anything.
 19 Q. So you're saying you weren't given the
 20 opportunity to say anything that day?
 21 A. Well, John was talking. He was, uh -- he was
 22 doing most of the talking. I mean, he was there
 23 representin' me. I was just tryin' to figure out what
 24 all was bein' said.
 25 Q. Well, Judge Hansen asked you a number of

1 questions that day. Do you recall that?
 2 **A. Yes, I think I do.**
 3 Q. And did you try to pay attention to
 4 Judge Hansen when he was asking you questions?
 5 **A. I always pay attention.**
 6 Q. And you did, in fact, sign the Rule 11 Plea
 7 Agreement, correct?
 8 **A. Um, yes, I -- I think I do remember**
 9 **signing it.**
 10 Q. And we went over this once before, I recall,
 11 when we were talking about whether or not you signed a
 12 consent to search your apartment. You had a little trouble
 13 remembering if you'd signed that document as well. Do you
 14 remember that?
 15 **A. Yes. And you had a little bit of trouble, uh,**
 16 **listening to me when I kept telling you that I was doing it**
 17 **under threat. You wouldn't believe me. It's like you**
 18 **don't believe me now.**
 19 Q. Did you, in fact, sign the Rule 11 Plea
 20 Agreement in this case?
 21 **A. Under the impression that I was getting a**
 22 **10-year sentence, yes, I did. Yes, I did.**
 23 Q. Did you read it before you signed it?
 24 **A. You know, I can't, uh -- I believe I did. I**
 25 **think I did, yes --**

1 Q. That probably was in --
 2 **A. -- thinkin' -- thinkin' that everybody was**
 3 **binding to that agreement -- you and the judge and**
 4 **everybody. I, uh -- yes, I would say yes, that, uh --**
 5 **that's why I signed it.**
 6 Q. And as we discussed when I first stood up
 7 here, it's important to read a document that's going to
 8 bind you?
 9 **A. I'm not an attorney, Ms. Reilly. You know,**
 10 **I -- I -- I mean --**
 11 Q. You don't have to be an attorney --
 12 **A. -- I'm just a regular citizen. The law -- the**
 13 **law -- I mean, the law is very complex. I wasn't**
 14 **understanding, Ms. Reilly. That's all there was to it.**
 15 Q. So it's your testimony, in this case, that
 16 affected your life, an incarceration, you weren't
 17 understanding the document that you signed? Is that what
 18 you're telling the Court?
 19 **A. What I'm sayin' is, John DeFranco led me to**
 20 **believe that I was given a 10-year sentence, and that's**
 21 **what this is all about. Otherwise, I -- I wouldn't be here**
 22 **arguing. Or -- I mean, this is my freedom we're talking**
 23 **about here.**
 24 Q. I agree. It's important.
 25 **A. And -- and the reason, like I kept sayin',**

1 **Is I thought you-all were giving me a 10-year sentence.**
 2 **That's why I agreed to plead -- plead guilty. That's the**
 3 **truth.**
 4 Q. Mr. Garcia, on November 9th, 2009 -- that's
 5 the date of the sentencing hearing. Do you remember that
 6 date?
 7 **A. What year?**
 8 Q. 2009, November.
 9 **A. Last year?**
 10 Q. Yes.
 11 **A. Yes, it was.**
 12 Q. That's the day that Judge Hansen sentenced
 13 you?
 14 **A. Yes.**
 15 Q. And do you recall that Detective Christensen,
 16 who was here, testified at that hearing, correct?
 17 **A. Well, I -- yes.**
 18 Q. And then I stood up and asked Judge Hansen to
 19 sentence you to 15 years, followed by 15 years -- or I
 20 might have requested 25 on the end. Do you remember that?
 21 **A. Yes, I do. And I'm sure John remembers, too,**
 22 **because that's the exact minute I told him to withdraw my**
 23 **guilty plea, because I -- that was not the agreement that I**
 24 **was led to believe, when you started saying 15 -- 30 -- or**
 25 **whatever.**

1 Q. Well, you got an opportunity to speak after I
 2 spoke, right?
 3 **A. You know, that day I -- I was -- after being**
 4 **sentenced to some harsh deal -- after that I really -- I**
 5 **remember cryin', and -- and -- and bein', you know, uh,**
 6 **hurt, because, uh, Mr. DeFranco led me to believe that I**
 7 **was gettin' a deal, which I wasn't it turns out.**
 8 Q. Well, the question for you, Mr. Garcia, is:
 9 After you heard me stand up and ask the judge to sentence
 10 you to 15 years fixed, the judge gave you an opportunity to
 11 speak. And you didn't ever say "Wait a minute. She can't
 12 ask for that. I'm only supposed to get 10 years"?
 13 **A. That's what John was there for.**
 14 Q. Oh, so you let Mr. DeFranco do all your
 15 talking?
 16 **A. Well, he's -- yes, that's what he's there for,**
 17 **to advise me.**
 18 Q. So you're saying that --
 19 **A. And I have been told to just let my attorney**
 20 **talk, numerous times while I have been in this court,**
 21 **because he's there as my representative.**
 22 Q. And that's also because that, in the past,
 23 you've spoken --
 24 **A. The truth.**
 25 Q. -- when it wasn't your turn?

1 A. Well, but I -- I tend to speak the truth,
 2 though.
 3 Q. You tend to speak the truth?
 4 A. Yes. And -- and -- and sometimes, uh, when
 5 not asked to. But I feel this is my freedom. I have to
 6 stand up for myself here.
 7 Q. Exactly.
 8 A. Yes, exactly.
 9 Q. But you didn't do that after you heard me ask
 10 for 15 years, when the judge gave you an opportunity to
 11 speak?
 12 A. I was -- I asked John at that minute to
 13 withdraw my guilty plea, because that was not what I was
 14 led to believe.
 15 Q. But you didn't ask that yourself that day?
 16 A. Ummm, no, I --
 17 Q. Yes or no?
 18 A. No, I don't think I did.
 19 Q. No?
 20 A. Unless -- unless the -- the -- the lady that
 21 does all the --
 22 MS. REILLY: Thank you, Mr. Garcia.
 23 I have no further questions, Your Honor.
 24 THE DEFENDANT: -- you know, "swear to God" --
 25 THE COURT: Thank you.

1 Q. If I tell you I have read that agreement, and
 2 it does not say that the State, or anybody else, is bound
 3 by just a 10-year mandatory minimum sentence -- okay?
 4 A. That's not what I was led to believe.
 5 Q. I know. I know. But if I told you that's the
 6 case, would you believe me?
 7 A. Yeah.
 8 Q. Okay. Now, when you signed that agreement,
 9 the fact that there is no 10-year mandatory minimum
 10 restriction; notwithstanding, did you believe, as a result
 11 of what Mr. DeFranco told you, that you were only going to
 12 get 10 years fixed, plus certain years indeterminate, when
 13 you went to sentence?
 14 A. You're asking if I believe that that's what I
 15 was believing?
 16 Q. Right. I'm saying that there's -- we have
 17 been talking about Rule 11 plea negotiations -- all that
 18 kind of stuff. But when you entered the guilty plea, did
 19 you believe that it meant that you were going to get a
 20 10-year fixed sentence and no more fixed?
 21 A. Yes. That's --
 22 Q. Okay.
 23 A. That's what I believed.
 24 Q. And did you believe that because of certain
 25 things that Mr. DeFranco told you?

1 Mr. Taber, any further questions?
 2 MR. TABER: Just a couple more, Your Honor.
 3
 4 REDIRECT EXAMINATION
 5 BY MR. TABER:
 6 Q. Mr. Garcia, the Rule 11 Plea Agreement, you
 7 said you didn't read it very closely -- or whatever. I
 8 didn't --
 9 A. I didn't understand.
 10 Q. Okay.
 11 A. Let's say that.
 12 Q. I'll tell you that it does not limit the State
 13 to only recommend 10 years fixed. Okay? Would you take my
 14 word for that?
 15 A. Uh, take your word for what?
 16 Q. That the Rule 11 Agreement -- I've read it.
 17 It does not limit the State to just asking for a 10-year
 18 period of incarceration fixed. Okay?
 19 A. You know, there's, what -- there's like A, B,
 20 and C sections on Rule 11? True or not? I -- I wasn't
 21 aware of this until after I got out to prison and some of
 22 the --
 23 Q. But I'm talking about the specific Rule 11
 24 that you signed. Okay?
 25 A. Okay.

1 A. Yes.
 2 Q. And if you had not -- if you were facing any
 3 more time in custody -- fixed time -- than ten years, would
 4 you have entered the guilty plea?
 5 A. No.
 6 MR. TABER: Okay. Thank you. That's it.
 7 Thank you, Your Honor.
 8 THE COURT: Sir, thank you. You may stand
 9 down.
 10 (The Defendant left the stand.)
 11 THE COURT: Mr. Taber, any further evidence
 12 that you have to offer at this time?
 13 MR. TABER: No, Judge. Thank you. I'll rest.
 14 THE COURT: Ms. Reilly, then, evidence from
 15 the State?
 16 MS. REILLY: Your Honor, the State would call
 17 Mr. John DeFranco.
 18 THE COURT: Okay.
 19
 20 JOHN DeFRANCO,
 21 having been first duly sworn under oath, testified
 22 as follows:
 23 THE COURT: Ms. Reilly, you may proceed when
 24 you're ready.
 25 MS. REILLY: Thank you, Judge.

1 DIRECT EXAMINATION

2 BY MS. REILLY:

3 Q. Good afternoon.

4 A. Good afternoon.

5 Q. Could you please state your name and spell
6 your last name.

7 A. My name is John DeFranco, D-e, capital F-,
8 r-a-n-c-o.

9 Q. Thank you. And you are an attorney?

10 A. Yes.

11 Q. And Mr. DeFranco, you took over representation
12 of Mr. Garcia in this case after his second attorney,
13 Mr. Philip Gordon, withdrew; is that correct?

14 A. That's correct.

15 Q. And in looking at my file, it looks like that
16 goes back -- do you recall exactly when you took over?

17 A. I don't recall. It was far enough in advance
18 of trial, and I think I moved for a continuance on a few
19 different occasions.

20 Q. It looks like, according to my file notes, you
21 had appeared by June 27th, 2008, in front of Judge Hansen,
22 on the -00062 case. Does that sound about right?

23 A. It does.

24 Q. During your representation of Mr. Garcia, did
25 you have an opportunity to speak with him in person?

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1 because the plea agreement contemplated Rule 11s, which
2 would need to be drafted by myself.

3 So on the weekend I drafted a Rule 11 Plea
4 Agreement. I remember coming to court in the morning,
5 which would have been our trial date, and telling the Court
6 the substance of the Rule 11 Plea Agreement. But I didn't
7 have the ability to print it out. I was having some
8 problem. And the Court indicated that the Court wanted the
9 Rule 11 in writing contemporaneous with the plea. So we
10 came back in the afternoon, I believe, and entered the
11 plea.

12 And I recall this from my own memory -- but I also
13 looked at my billing statements while I was looking at the
14 file and recollecting what had happened with Armando. I
15 think Armando talking about the multiple back and forth
16 into the conference room outside of the courtroom is from
17 the Friday pretrial conference, but the actual plea was on
18 a Monday.

19 On both the Friday pretrial conference, as well as
20 the Monday entry of plea, I explained to Armando how the
21 Plea Agreement would work; referenced the amendment to
22 10 years, but the State not being bound to a fixed sentence
23 per se.

24 Q. And what words did you use to explain that,
25 Mr. DeFranco?

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1 A. Yes.

2 Q. Did you also speak with him at times over the
3 telephone?

4 A. Yes.

5 Q. I want to focus mostly on September of '09,
6 which was really the relevant time period that we're
7 talking about, if I may.

8 Mr. DeFranco, can you please explain to Judge Hansen
9 your recollection of your discussions and explanation to
10 Mr. Garcia about the Plea Agreement in this case?

11 A. Certainly. We have been talking about a
12 Friday and a Monday. And I believe that September 11th may
13 have been the Friday, and September 14th was the Monday.

14 There was a pretrial conference on a Friday
15 afternoon where you, Ms. Reilly, and myself had reached a
16 tentative agreement regarding settling this case. And it
17 was an agreement that I had been working on for some period
18 of time. My primary goal, as Armando's defense attorney,
19 was to get away from a trafficking sentence that
20 contemplated a 15-year mandatory minimum.

21 And, for whatever reason, there was a combination of
22 things that resulted in us resolving the matter with an
23 amendment to a charge that contemplated a minimum fixed
24 sentence of 10 years. But the plea itself didn't occur
25 till the following Monday. And part of the reason why is

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1 A. I know how desperately my client wanted a
2 10-year sentence. And my client was a -- despite the fact
3 that a 10-year sentence is not a positive outcome in any
4 case, he felt like 10 years was a lot more fair than
5 15 years. And -- I forgot the question.

6 Q. I'm just wondering what words you used to
7 explain the Plea Agreement?

8 A. The words I used to explain the Agreement -- I
9 just remember having conversations with Armando that
10 Ms. Reilly could go in there and argue for fixed life if
11 she wanted. I know Armando was really in tune with the
12 mandatory minimum sentence of 10 years. And we discussed
13 it in the context of Mr. Gordon's offer. Mr. Gordon had an
14 offer for basically the same thing. It would have been an
15 amendment to a charge of 10 years. And I believed that you
16 would have limited yourself to a recommendation of 13 years
17 fixed. So I used that as a basis to explain how the
18 Agreement would work.

19 Basically, it would be my job to try to convince
20 Judge Hansen that a 10-year sentence was enough in terms of
21 satisfying the four corners of sentencing, and appealing to
22 the Court's reason for fashioning a sentence that took into
23 account all the sentencing factors. At the same time, it
24 gave Armando a break. So that was my goal going into it,
25 and that's how I explained it.

Page 40

Come back when we go to hearing

1 Q. And in that explanation I've already heard you
2 say that you told him -- or explained to him that the
3 State -- specifically myself -- would be free to argue for
4 fixed life, correct?

5 A. Yes.

6 Q. And did you also explain to Mr. Garcia that
7 the ultimate sentence would be up to Judge Hansen?

8 A. Yes, I did.

9 Q. Did you ever tell Mr. Garcia that he was
10 guaranteed to be sentenced to 10 years fixed only?

11 A. I never said that.

12 Q. Did you ever give any words that would lead
13 him to believe that, in your opinion?

14 A. I did not. I made it perfectly clear to
15 Armando that that's what I would be arguing for. And
16 that's what I declared a success in terms of my personal
17 benchmark that I set for myself in representing him.
18 But I also knew that I don't get to make those
19 important decisions with regards to the defendant and what
20 a reasonable sentence is. That's the Court's
21 responsibility. And that while I would be making a
22 recommendation, and you would be making a recommendation
23 the final arbiter as to what the sentence would be would,
24 in fact, be the Court.

25 Q. And you explained that to Mr. Garcia?

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1 Q. And, obviously -- I apologize, I haven't shown
2 that to you today.

3 A. In all fairness, I probably -- it wouldn't
4 trigger any memory just simply looking at the form.

5 Q. Understood. And finally, Mr. DeFranco, you
6 recall, do you not, when the plea was as actually taken and
7 the Rule 11 submitted -- I have it as September 14th,
8 2009 -- Judge Hansen going through the guilty plea rights
9 with Mr. Garcia?

10 A. I do remember that.

11 Q. And during the time that you represented
12 Mr. Garcia, would you say that he was open when he had a
13 question for you?

14 A. Yes.

15 Q. And, in fact, fairly insistent if he disagreed
16 with something?

17 A. Uh, respectfully inquisitive. But he made his
18 point known to me.

19 MS. REILLY: Thank you, Mr. DeFranco. I don't
20 have any further questions of you.

21 THE COURT: Thank you.

22 Mr. Taber, questions?

23 MR. TABER: Thank you.

24 THE COURT: You may proceed.

25

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1 A. I believe I did that in great detail.

2 Q. Sir, I'm also looking at the Rule 11 Plea
3 Agreement and I'm wondering if you went over this Plea
4 Agreement with Mr. Garcia as well?

5 A. I did.

6 Q. Specifically, the Rule 11 Plea Agreement for
7 case No. CR-FE-2008-62, item 2 states as follows: "The
8 parties are open to argue the terms of the defendant's
9 sentence, meaning the defense may argue the Court simply
10 impose the mandatory minimum sentence of 10 years, and the
11 State may argue the Court impose up to a maximum of life in
12 prison as a fixed sentence."

13 Did you go over that term with Mr. Garcia?

14 A. I did.

15 Q. And you did that before he signed the Rule 11?

16 A. Yes.

17 Q. And before he entered his guilty plea?

18 A. Yes.

19 Q. As I recall, there was also a written guilty
20 plea form in this case; is that right?

21 A. I believe there was.

22 Q. And do you recall going over that form with
23 the defendant as well?

24 A. I did, but I don't have an independent
25 recollection of doing that.

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1 CROSS-EXAMINATION

2 BY MR. TABER:

3 Q. Good afternoon, Mr. DeFranco.

4 A. Good afternoon, Mr. Taber.

5 Q. Mr. DeFranco, when you reached a plea
6 agreement on September 11th, I take it that there was no
7 guilty plea or anything on that day. You had just talked
8 with Ms. Reilly and decided you would reach an agreement;
9 is that correct?

10 A. That is correct.

11 Q. And when you went and talked to Mr. Garcia
12 about this, where did you speak with him -- physically
13 where? Was that here or out in the jail?

14 A. I believe that the conversations I had with
15 him occurred in the ante conference room outside of the
16 actual courtroom.

17 Q. And from September 11th to September 14th, did
18 you go actually visit him at the Ada County Jail and -- go
19 over there?

20 A. I looked at my billing statement, and I did
21 not.

22 Q. Now, when you came back on the 14th -- did you
23 have to schedule that date for the 14th so that you could
24 enter a plea prior to vacating the jury trial? Is that
25 what happened?

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1 A. I don't have an independent recollection of
 2 exactly how it happened, but I think it was -- I think
 3 September 11th was a long Friday afternoon. And we had,
 4 at the eleventh hour, truly resolved the case. And because
 5 of the fact that it was going to need to be a written
 6 Rule 11, we had simply said that he's on -- we'll go in
 7 with the understanding that the trial is vacated, but he'll
 8 come back at that time that he was previously scheduled to
 9 appear for trial, and that's when he would enter his plea.
 10 That's my recollection. And that's -- my
 11 recollection is probably based, too, on my experience that
 12 I have been in that situation before. If there was some
 13 issue that needed to be cleaned up, and it was of a
 14 last-minute detail, that it wouldn't be uncommon to bring
 15 the individual back for the entry of plea. But even if
 16 things fell apart, that the trial would be vacated so as to
 17 alleviate all the State's subpoenaed witnesses from having
 18 to appear on Monday, given that we had resolved the case.
 19 Q. So you stated that your recollection is that
 20 it was a long Friday. And I know just exactly what those
 21 are, and I'm sure the Judge does, and the prosecutor does,
 22 too.
 23 About how much time do you think you got to actually
 24 speak with Armando on that day?
 25 A. Mr. Garcia is accurate in terms of there were

1 desperately wanted it?
 2 A. And that's -- I believe that's the truth. I
 3 really -- Armando was -- like I said, he probably has a
 4 little bit of a reputation for his behavior in the
 5 courtroom, but he was a reasonable man. And I remember
 6 having conversations with him about what a reasonable
 7 sentence would be, and how long things were, and what his
 8 history was, and what the facts of his case were. But he
 9 certainly was not off base in terms of understanding kind
 10 of what the price of bread is in the courtroom for certain
 11 criminal behaviors.
 12 Q. Well, I take it that -- your negotiations with
 13 Ms. Reilly were probably, as you said, back and forth, back
 14 and forth. You were trying to get this 10-year deal,
 15 correct, and she finally relented. Okay.
 16 When you went back and said, "Okay, Armando, we can
 17 do a Rule 11 where the mandatory minimum is 10 fixed." And
 18 that's what he wanted. What was his reaction? I
 19 mean -- he's in custody and all that, but was he quite
 20 pleased?
 21 A. Yes. I remember him thanking me. And I
 22 remember, like, he thanked Ms. Reilly at different times
 23 throughout this process. And, subjectively, it's possible
 24 that he thought that it was a 10-year fixed sentence.
 25 But I know that I made a mental note of his

1 multiple times going back in. It literally felt like I was
 2 in a marketplace with Ms. Reilly, having to entertain
 3 offers, and I was really doing my level best to get off
 4 with 15. And I will say that Ms. Reilly was very much
 5 insistent that that wouldn't happen. It really was at the
 6 eleventh hour.
 7 And there was, like I said, I believe some other
 8 issues that may have related to her being willing to
 9 consider that amendment. But that's -- we struck that
 10 offer. And I went in and I did my level best to explain it
 11 to him.
 12 And I am remembering how important it was to make it
 13 known to Armando that, listen, just because the parties
 14 agree that there's going to be an amendment to a lesser
 15 offense, that that's not a lock that you're going to get
 16 10 years. That was so important, because that was -- it
 17 was an opportunity to make that sentence a reality that, to
 18 me, had real value. And when I got that offer from
 19 Ms. Reilly, frankly, I was very excited.
 20 But I'm an experienced attorney and I know that
 21 that's not a guarantee. That's only a couple steps in the
 22 right direction. And I do remember making that -- as best
 23 as I was able to -- understandable for Armando.
 24 Q. Now, is it fair to say that Armando really
 25 wanted that 10-year sentence? You said earlier that he

1 subjective belief and tried to bring him back to a position
 2 of objectivity in terms of explaining to him that this
 3 isn't -- this is, by no means, a guarantee. And I did that
 4 for two reasons.
 5 Number one, I know my opponent, Ms. Reilly.
 6 Ms. Reilly is a skilled prosecuting attorney. And I knew
 7 that Ms. Reilly was not going to come in and ask for
 8 10 years. I knew that. And I made that clear to Armando
 9 that, just because she's willing to amend the charge --
 10 in a way, it's almost as if it were -- I don't want to
 11 use -- bait; that, you know, let's get you into an
 12 agreement.
 13 But I knew that Ms. Reilly was not going to ask for
 14 the 10-year sentence, because she hadn't in the body of the
 15 case previously. She's not going to reward somebody with a
 16 better plea agreement than it had ever been, especially
 17 under the circumstances of Armando's case.
 18 Q. Well, I understand that. But when Armando
 19 hears this 10 years, it's kind of like a eureka moment for
 20 him; was it not?
 21 A. Absolutely. And you make your point.
 22 Subjectively, he thought that he was on his way.
 23 Q. So you do agree that at one point at least
 24 Armando was subjectively -- incorrectly -- of the
 25 impression that he was looking at no more than 10 years?

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1 A. I do.
 2 Q. And, of course, the Court's --
 3 A. If I may, I do on September 11th, 2009.
 4 Q. All right. And that's the date that you broke
 5 through that ice and got that agreement?
 6 A. Right.
 7 Q. And so Armando, then, had the weekend, as did
 8 you. And was it -- when you came back on the next Monday,
 9 is that when you're saying that you started -- you told
 10 Armando, you know, "This is not a certain thing that you're
 11 only going to get 10 years fixed"?
 12 A. No. That was on the Friday.
 13 Q. That was on the Friday?
 14 A. Right.
 15 Q. Then was it your impression that Armando fully
 16 understood that at that time?
 17 A. I believed he understood. But I also believed
 18 that, through hook or crook, he was getting himself to
 19 10 years.
 20 Q. Now, what do you mean?
 21 A. What I mean is that Armando is never willing
 22 to let go of what he's perceiving reality should be. And
 23 he's an advocate for his position.
 24 Q. Okay.
 25 A. And while I think I -- I made the point that

1 A. You probably know exactly what I'm talking
 2 about.
 3 Q. Yes, I'm not saying that it was personal or
 4 anything like that.
 5 A. Okay.
 6 Q. What I'm getting to is, when you talk to
 7 somebody, you're trying to tell them -- or that person --
 8 something, and they interrupt you and start talking about
 9 other stuff. Did you get the impression that maybe he's
 10 not listening to me? He's a talker. He listens with his
 11 mouth, so to speak?
 12 A. I had that impression, but I also had the
 13 impression that he's a bright guy, and that he processed
 14 things, and that he understood what I was talking about.
 15 Q. Now, do you recall that Armando also had some
 16 attorneys down in Salt Lake City?
 17 A. Yes.
 18 Q. And did you correspond with them about this
 19 case?
 20 A. I did. Jardine Law Office.
 21 Q. And did you write them a letter saying that
 22 Armando had pled guilty?
 23 A. I believe I did.
 24 Q. And in that letter did you say that he had
 25 pled guilty to an offense that carried a mandatory 10-year

1 this is not a guarantee of a 10-year sentence, I know
 2 that -- in his mind that he was still examining it as an
 3 opportunity for a 10-year sentence. Objectively, I did my
 4 very best to explain to him that it was not a guarantee,
 5 that it was an opportunity.
 6 Q. You say that -- "objectively" -- or that --
 7 then are you saying that you do believe that Armando
 8 believed that he was going to get a 10-year sentence?
 9 A. No.
 10 Q. Okay.
 11 A. I think he understood.
 12 Q. He wanted -- all right.
 13 A. Or I wouldn't -- I wouldn't have left the
 14 courtroom -- I wouldn't have left the anteroom unless I
 15 satisfied myself that he had an adequate understanding of
 16 what the agreement was.
 17 Q. Now, a little bit has been said today about
 18 how Armando talks. Armando, himself, even said that
 19 sometimes his remarks are uninvited by the Court or anybody
 20 he's talking to.
 21 When you talked to Armando, did he have a tendency
 22 to interrupt you, perhaps?
 23 A. Yeah, he did. But it never was
 24 personal. I --
 25 Q. Oh, I'm not saying that.

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1 minimum?
 2 A. I believe I did.
 3 Q. But in that letter -- well, did Armando see
 4 that?
 5 A. I don't think he -- maybe I sent him a copy,
 6 but I didn't, certainly, show him the contents of it prior
 7 to sending it.
 8 Q. In that letter you did not specify that it was
 9 a 10-year mandatory minimum, but he could face up to life
 10 as well?
 11 A. I didn't -- I'm taking your word for the
 12 content, but I -- knowing the way I write letters, if I can
 13 be brief, I will be.
 14 Q. It was about three sentences long or that
 15 long?
 16 A. Consistent with -- with the way I would write
 17 the letter. And the other thing is, I don't think I wrote
 18 the letter because I wanted to write the letter. I wrote
 19 the letter because Armando had asked me to, because they've
 20 had an active case with him in Box Elder County
 21 in Utah.
 22 MR. TABER: Okay. That's all I have.
 23 THE COURT: Thank you.
 24 Ms. Reilly. Ms. Reilly, do you need a moment?
 25 MS. REILLY: I was just hoping to take a look

1 at the letter that has been referred to.
 2 (Reviewing document.)
 3
 4 REDIRECT EXAMINATION
 5 BY MS. REILLY:
 6 Q. Just referring to that letter, why was it, to
 7 your understanding, that Mr. Garcia wanted you to write
 8 that letter?
 9 A. Mr. Garcia, I believe, had some private money
 10 locked up in a defense firm in Box Elder County, Utah, and
 11 he wanted to let them know that he wanted some form of a
 12 resolution in his case. He had explained to me that
 13 there's a lot of different things going on with that case.
 14 There was, potentially, a motion to suppress. There was a
 15 codefendant. That may be, you know, one of the reasons why
 16 he was traveling to Utah. And he felt like it was
 17 important for me to let the law firm know that he had
 18 resolved his matter here. So I believe the purpose of it
 19 was to put them on notice that he would be coming there to
 20 deal with that case in short fashion.
 21 Q. Mr. DeFranco, I'm going to ask you a couple of
 22 questions that are pretty obvious. Being an attorney is
 23 your career?
 24 A. Yes.
 25 Q. And you are primarily a defense attorney; is

1 that correct?
 2 A. Yes.
 3 Q. Is that fair to say?
 4 A. Yes. Criminal defense attorney, yes.
 5 Q. And it's an important part of your job to
 6 counsel your clients accurately; is it not?
 7 A. It is.
 8 Q. And you take it seriously?
 9 A. I do.
 10 Q. And I can tell from the things that you're
 11 saying, and from my history of working with you, that it is
 12 important to you to carry out your duties well?
 13 A. It's important to me to be compassionate, and
 14 make sure that my clients understand that they matter, and
 15 spend time with them.
 16 Q. And in Mr. Garcia's case you've already
 17 testified that you could tell that the 10-year mandatory
 18 minimum was kind of his end-all, be-all; is that right?
 19 A. That was kind of our Holy Grail.
 20 Q. And so I took, from some of the things that
 21 you testified about, that recognizing that in your client,
 22 you wanted to be sure and be clear with him that that was
 23 not a guarantee?
 24 A. Yes.
 25 Q. And you explained that to him on more than one

1 occasion in this case?
 2 A. I did. And I also drafted a Rule 11, probably
 3 as much for the benefit of protecting myself, as much as
 4 benefitting my client.
 5 Q. And you went over that Rule 11 with
 6 Mr. Garcia?
 7 A. I did.
 8 Q. So you've said that it was your opinion that
 9 Mr. Garcia understood the Rule 11 Plea Agreement?
 10 A. I guess what I want the tag line to be is that
 11 I did my absolute level best to make sure that Mr. Garcia
 12 understood the ramifications of the Rule 11 Plea Agreement.
 13 I listened to Mr. Garcia's testimony as well. And he
 14 testified under oath that, subjectively, he believed he was
 15 entitled to 10 years.
 16 Q. Well, what Mr. Garcia chose to hear you say
 17 and what he chose to believe, at this point, is somewhat
 18 separate from what you explained to him prior to his
 19 entering a guilty plea; is it not?
 20 A. It is.
 21 Q. Because now he's been sentenced, and he
 22 doesn't like the sentences that he got; is --
 23 A. I'm sure.
 24 Q. -- that fair to say?
 25 A. But prior to his entry of the guilty plea, and

1 prior him signing the Rule 11, you had explained to him the
 2 terms of the Rule 11 and that there was no guarantee that
 3 he would be sentenced only to mandatory minimum of 10
 4 years?
 5 A. Unequivocally, yes.
 6 MS. REILLY: Thank you, sir. I don't have any
 7 further questions.
 8 THE COURT: Thank you.
 9 Mr. DeFranco, then, thank you, sir. You may stand
 10 down.
 11 (The witness left the stand.)
 12 THE COURT: Counsel, is this a witness that
 13 may be excused?
 14 MS. REILLY: I have no objection.
 15 MR. TABER: I have no objection.
 16 THE COURT: Mr. DeFranco, you are excused at
 17 this time, sir. If you wish, you are free to go, for you
 18 will not be recalled again. Obviously, you may remain as
 19 well, if you so choose.
 20 Ms. Reilly, any further evidence, then, from the
 21 State?
 22 MS. REILLY: No, Judge. Thank you.
 23 THE COURT: Mr. Taber, any rebuttal evidence
 24 at this time?
 25 MR. TABER: No, Judge.

STATE OF IDAHO vs. ARMANDO GARCIA, SR.

1 THE COURT: Both sides, then, having rested
2 their evidence in the case, Mr. Taber, I would hear
3 argument from the defense as to your motion.

4 MR. TABER: Thank you. Your Honor, I want to
5 just say that I think that if the Court is inclined to
6 accept Mr. Garcia's version of events, and his version of
7 his understanding of what happened, that there is a
8 manifest injustice if he -- if the Court is inclined to
9 believe him.

10 Now, there are a couple of things that are going on
11 here. The plea negotiations, you know, went down to the
12 very last minute on Friday afternoon before the trial where
13 you've got to get either the case settled or go to trial.

14 And so you've got to fish or cut bait on that date. And
15 things are moving as they move in this building.

16 Now, Mr. Garcia states -- I think importantly --
17 that he was under the impression that he was going to
18 receive a 10-year mandatory minimum sentence. And, of
19 course, I'm not ready to deal with any of the indeterminate
20 period, but since -- you know, Mr. Garcia has testified,
21 unequivocally, that he understood this plea agreement to be
22 a 10-year mandatory minimum period.

23 And even Mr. DeFranco says that when he came to
24 Mr. Garcia to present him with this Rule 11, that
25 contemplated at least the possibility that the Court could

1 only give Mr. Garcia 10 years, that Mr. Garcia was pleased.
2 He was happy. You know, that's what he had been working
3 for. And it even appeared to Mr. DeFranco that he was of
4 the impression at that time that this Plea Agreement got to
5 him subjectively -- if incorrectly (that he was only
6 going to receive 10 years.)

7 Now, then we come back the next day -- or the
8 following Monday, anyway, and Mr. DeFranco says that he
9 says certain things. And I appreciate the things that
10 Mr. DeFranco said, and I believe that Mr. DeFranco probably
11 said them. I don't believe he probably said them. I do
12 believe he said them. The real question is: How was that
13 perceived by Mr. Garcia?

14 There was also testimony from Mr. DeFranco that
15 sometimes Mr. Garcia does not listen real well, and he
16 interrupts. And even though it doesn't -- Mr. DeFranco
17 says he doesn't take it personally, but the real point of
18 that is that Mr. Garcia did not understand the consequences
19 of what he was about to enter into.

20 And that being said, I think that if -- the defense,
21 in this case, has to establish that the Plea Agreement was
22 not entered into knowingly and voluntarily, as Mr. Garcia
23 says. Then that is a manifest injustice, and we ask that
24 you allow Mr. Garcia to withdraw his guilty plea.

25 Thank you.

1 THE COURT: Thank you. Mr. Taber, just one
2 point of clarification. The focus of the evidence in
3 this case has been on the agreement and sentencing in
4 Case No. H08-062, the one where the Court imposed the
5 10-year -- or the 15-year fixed sentence, I should say,
6 rather. There really has not been a suggestion of the
7 -17452 case, where the Court simply imposed a 30-year
8 sentence with 3 years fixed. Nonetheless, there had been a
9 Motion to Withdraw a Guilty Plea in both cases.

10 Do I understand that although the focus has been on
11 the 10-year sentence in this case, there is still a request
12 to withdraw the guilty plea in both cases?

13 MR. TABER: Yes, Your Honor. Yes. But I
14 think -- I think that the evidence suggests that it
15 wasn't -- knowingly and voluntarily in one, I think that
16 carries over into the next one.

17 THE COURT: Okay. Thank you.

18 MR. TABER: Thank you.

19 THE COURT: Ms. Reilly; any final comments?

20 MS. REILLY: Thank you, Judge.

21 Your Honor, as I know, you're very willing, and as
22 I've stated in the objection to the Defendant's Motion to
23 Withdraw a Guilty Plea: A motion made after sentencing to
24 withdraw a guilty plea pursuant to Rule 33(c) may only be
25 granted to correct a manifest injustice. And the defendant

1 bears the burden of demonstrating a manifest injustice.
2 The defendant has failed to present any evidence to support
3 his claim that he didn't understand the Plea Agreement, or
4 that there is a manifest injustice in this case.

5 What Your Honor has before you is not only the
6 Defendant's Guilty Plea Advisory Form that he signed on the
7 date that the guilty plea was taken, but the Rule 11 Plea
8 Agreement the defendant signed and was recited on
9 September 14th, 2009. But also, I know Your Honor was
10 provided with an audio recording of the entry of plea. And
11 I would ask Your Honor also to reflect back on the
12 defendant's testimony during the Motion to Suppress, as
13 well as his prior history with the criminal justice system.

14 I think all of those things, from the State's view,
15 make it very clear that this defendant understood exactly
16 what he was doing when he entered his guilty plea. He
17 understood what the potential penalty was. And he didn't
18 only understand that because Mr. DeFranco carefully
19 explained it to him on more than one occasion, but
20 Your Honor explained it to him on September 14, 2009. And
21 he also brings with him his history with the criminal
22 justice system in the past.

23 Postsentencing, now, the defendant tells you that he
24 was led to believe something other than was stated anywhere
25 on the record. The defendant has failed to carry his

*Got to fish /
or Cut Bait.*

*Then that is a manifest
INJUSTICE*

1 burden to show any manifest injustice. And, frankly, from
2 the State's view, that he didn't understand what was
3 going on.

4 As Your Honor has cited before in the suppression
5 issue, the defendant is not afraid to state his opinion, is
6 articulate, and, clearly, intelligent. And for him to now
7 come back and try to attack his guilty plea when it was
8 carefully taken and explained to him, I think is
9 disingenuous.

10 He doesn't like the sentence. And that's what we're
11 here for today, because he's not happy with the fact that
12 he didn't get the 10 years that he was hoping to get, even
13 though it was explained to him carefully that the potential
14 was up to fixed life if that's what the Court so chose to
15 do. I ask Your Honor to deny the motion.

16 THE COURT: Thank you.

17 Mr. Taber, any final comments?

18 MR. TABER: No, thank you.

19 THE COURT: Okay.

20 Counsel, the law in this area is clear that the
21 Court need not enter written findings on a Motion to
22 Withdraw a Guilty Plea. And the Court does not intend to
23 do so in this case today. I think the Court was very
24 familiar with the background of these two cases, was very
25 familiar with the matters that Ms. Reilly asked the Court

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1 here, was based upon, arguably, an issue of ineffective
2 assistance of counsel in that his attorney did not
3 adequately advise him of the consequences of entering a
4 guilty plea pursuant to the written Rule 11 Agreement in
5 this case.

6 As to that particular allegation, the Court has
7 considered the testimony of Mr. DeFranco and of Mr. Garcia.
8 And the testimony of Mr. Garcia is more in the nature that
9 he was led to believe that he would receive no more than a
10 10-year fixed sentence.

11 In this situation, from Mr. DeFranco's testimony, it
12 is very clear from that testimony that Mr. DeFranco -- not
13 once, but more than once -- was very careful to explain to
14 Mr. Garcia that, in fact, that was not a sentence that was
15 a maximum that he would receive on the fixed portion, and
16 was very careful to explain to him that the State was free
17 to argue anything that it wished to up to the maximum, and
18 the Court was free to impose any sentence that it wished to
19 up to the maximum.

20 As to that particular allegation, the Court will
21 find the defense has failed to meet its burden of proof.
22 However, in the arguments of counsel here today and the
23 testimony that has been offered, an additional basis has
24 been raised for the first time. And that is a claim that,
25 in fact, Mr. Garcia -- although Mr. DeFranco may have

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1 to take notice of, and which the Court has done so, there
2 being no objection from the defense. And also has had the
3 opportunity to consider the testimony both of Mr. Garcia
4 and Mr. DeFranco for the Court's consideration here today.

5 The parties have correctly noted the standard in
6 this case on a withdrawal of a guilty plea after
7 sentencing, and that is contained in Idaho Criminal Rule
8 33(c). And it's clear, then, that the Court may allow
9 withdrawal of the guilty plea after sentence has been
10 imposed to correct a manifest injustice. And that is,
11 clearly, the standard that the Court must apply in this
12 case.

13 It is also clear that this is a matter of a
14 discretion for the Court. That in this case the Court may
15 do so in its discretion. And I think the standard we're
16 all familiar with in terms of how appellate courts look at
17 this issue, as to whether or not the Court is aware that it
18 has the discretion to do this, whether or not it bases its
19 decision on an exercise of reason, and whether or not that
20 is within the scope of its discretion in entering the
21 decision that it does.

22 The defense has the burden of demonstrating the
23 manifest injustice in the case. And in this matter,
24 originally the Motion to Withdraw a Guilty Plea was based
25 upon -- and as Mr. Garcia himself testified on the stand

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1 adequately advised him of the nature of the plea in this
2 case and its consequences, that Mr. Garcia did not, in
3 fact, understand that that was what the agreement was.
4 That raises a different question for the Court. And the
5 Court will address it today, even though it had not been
6 previously raised.

7 In this case the Court finds instructive the case of
8 "State vs. Carrasco," 117 Idaho 295, 787 P.2d 281, a 1990
9 decision by our State Supreme Court. In this case, the
10 Supreme Court went to great lengths to examine a situation
11 of whether or not a guilty plea was knowingly and
12 voluntarily made, and with an understanding of the
13 consequences. And noted that in Mr. Carrasco's case there
14 were a series of issues that led them to conclude that, in
15 fact, it was not knowingly and voluntarily made and,
16 therefore, the Motion to Withdraw a Guilty Plea should have
17 been granted in that case.

18 They included the fact that the defendant in that
19 case was not fluent in the English language, and, in fact,
20 spoke no English, had no prior contact with the State legal
21 system. That even though he had the benefit of an
22 interpreter, his lack of familiarity with the legal system
23 and his lack of understanding of the English language
24 raised real issues or concerns as to his full understanding
25 about, for example, the ability to -- what the consequences

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*Mr Garcia did not
in fact understand*

1 of a guilty plea would be in terms of raising defenses and
 2 things such as that. And the Court in that case concluded
 3 that there was sufficient evidence presented to raise an
 4 issue of manifest injustice if the plea were not allowed to
 5 be withdrawn. That is not the case that we have here.
 6 In this situation, Mr. Garcia has testified today
 7 that he does read and understand the English language. In
 8 this situation the Court, in taking notice of prior
 9 hearings, would note that it is -- as it is noted
 10 previously in the earlier rulings, that Mr. Garcia is very
 11 familiar with the criminal justice system.
 12 -- In this situation, the Court is further satisfied in
 13 this case, from the review of the written Rule 11 Agreement
 14 itself that in fact, Mr. Garcia, in that Agreement was
 15 never informed that the 10-year sentence was a binding
 16 maximum that the State could request or that the Court
 17 could impose.
 18 The Court would also note, in the review of the
 19 guilty plea, colloquy that was entered into between the
 20 Court and Mr. Garcia the 14th day of September 2009, the
 21 Court went to great lengths to explain to Mr. Garcia the
 22 nature of the agreement in this case, including the fact
 23 that the State was not bound by the Agreement and could
 24 make any recommendation up to the maximum.
 25 And furthermore, that the State -- the Court was not

1 for my consideration before I take both matters up.
 2 Mr. Taber, did you wish to submit any additional
 3 materials for my consideration?
 4 MR. TABER: Your Honor, I think that the Court
 5 is probably about as well versed in this case, as the case
 6 may be.
 7 THE COURT: Ms. Reilly, did you wish to submit
 8 any additional material for the Court's consideration?
 9 MS. REILLY: No, Your Honor.
 10 THE COURT: Again, then, counsel, what I will
 11 do is, I will review those motions and rule upon them. If
 12 the Court feels that a hearing is necessary, it will
 13 certainly set one. If not, as is allowed by Rule 35 of the
 14 Criminal Rules, it will simply rule on the motions without
 15 a hearing.
 16 Counsel, then, I want to thank you for your evidence
 17 and your argument here today.
 18 Is there anything further that we need to take up in
 19 these matters at this time?
 20 MR. TABER: No, Your Honor.
 21 MS. REILLY: Not from the State, Judge.
 22 THE COURT: Okay. Counsel, then, thank you.
 23 We'll be in recess at this time.
 24 (Whereupon, the proceedings
 25 were concluded at 4:41 p.m.)

1 bound by the agreement and could impose any sentence up to
 2 the maximum. Mr. Garcia indicated he understood that. And
 3 in this situation, again, we continued with his guilty
 4 plea. And the Court, at the conclusion of that time,
 5 found that his guilty plea was knowingly and voluntarily
 6 made, with an understanding of the consequences and a
 7 sufficient factual basis. There has been nothing offered
 8 in this case that has changed that Court's perception.
 9 The Court, in this case, therefore, finds that the
 10 defense has failed to meet its burden of proof that there
 11 was manifest injustice in this case, or would be manifest
 12 injustice if the guilty plea was not withdrawn, and would,
 13 therefore, deny the motion to withdraw the guilty plea that
 14 was found in both cases.
 15 Counsel, in this case, if you wish to submit an
 16 Order consistent with that, I would go ahead and sign that
 17 upon receipt. The matter has already been appealed,
 18 however. However, there is still pending a Rule 35 Motion
 19 to Reconsider in each case. The Court has deferred ruling
 20 upon those until it was able to rule on the Motion to
 21 Withdraw the Guilty Pleas in the case, because the Rule 35
 22 motions would have become moot if that were the case.
 23 Given my ruling today, counsel, I will deem them a
 24 Rule 35 submitted for my consideration, unless, Mr. Taber,
 25 or Ms. Reilly, you wish to submit an additional materials

1 REPORTER'S CERTIFICATE
 2 STATE OF IDAHO)
 3 COUNTY OF ADA) ss.
 4
 5 I, JEANNE M. HIRMER, RPR, CSR, (Idaho
 6 Certified Shorthand Reporter Number 318) a Notary Public in
 7 and for the State of Idaho, do hereby certify:
 8
 9 That said proceedings were taken down by
 10 me in shorthand at the time and place therein named and
 11 thereafter transcribed by means of computer-aided
 12 transcription and that the foregoing transcript contains a
 13 full, true, and verbatim record of the said proceedings.
 14 I further certify that I have no interest in
 15 the event of the action.
 16
 17 WITNESS my hand and seal this 4th day of
 18 October, 2010.
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 23
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Judge Hansen
 said →
 Mr. Garcia was
 never
 informed?
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