No. 20180870-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

_____

Benjamin Arriaga,
Petitioner and Appellant,

v.

State of Utah,
Respondent and Appellee.

_____

PETITIONER'S OPENING BRIEF

_____

On certiorari from *Arriaga v. State*, 2018 UT App 160 (August 23, 2018)

_____

Petitioner Benjamin Arriaga is currently incarcerated.

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ORAL ARGUMENT REQUESTED

List of Parties

All parties to this appeal, with their appellate counsel, are as follows:

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State of Utah
Represented by Sean Reyes, Utah Attorney General, and Mark Field, Assistant Solicitor General

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Introduction

Benjamin Arriaga pleaded guilty to first-degree murder while vocally maintaining during the plea colloquy—in his native Spanish tongue—that he acted in self-defense.

Mr. Arriaga is a native of Mexico, speaks Spanish, and has a fifth-grade education. In 2010, Mr. Arriaga shot Benacio Herrera after the two struggled over a gun. The State charged Mr. Arraiga with first-degree murder and two second-degree felonies. The State and Mr. Arriaga's trial counsel negotiated a plea deal where Mr. Arriaga would plead guilty only to the first-degree murder charge.

Prior to the plea hearing, trial counsel met with Mr. Arriaga privately about the plea deal. But English-speaking trial counsel did not speak Spanish, and Spanish-speaking Mr. Arriaga did not speak English except for a few random words. Mr. Arriaga left that meeting believing he had to plead guilty.

During the plea colloquy, Mr. Arriaga twice asserted that he acted in self-defense. Neither the district court nor trial counsel explained to Mr. Arriaga the impact of his self-defense claim on his first-degree murder plea. Rather, the plea colloquy soldiered onward, and the district court accepted Mr. Arriaga's guilty plea to murder.

After his sentencing, Mr. Arriaga petitioned for postconviction relief. He asserted that his plea was not knowing or voluntary, and he argued that trial counsel was ineffective for not having an interpreter present in the meeting

before the plea hearing. The State moved for summary judgment on Mr. Arriaga's petition, and the district court granted that motion.

Mr. Arriaga then appealed to the Utah Court of Appeals, making the same arguments. The Utah Court of Appeals affirmed the district court. This Court then granted certiorari on the question of whether the Utah Court of Appeals improperly affirmed the dismissal of Mr. Arriaga's postconviction relief petition.

Issue Presented

Issue: Did the Court of Appeals err in affirming the district court's denial of Mr. Arriaga's petition for postconviction relief, when (1) the court held that Mr. Arriaga's plea to first-degree murder was knowing and voluntary despite Mr. Arriaga's self-defense assertions during the plea colloquy and (2) Mr. Arriaga's English-speaking trial counsel did not have a Spanish-speaking interpreter during their meeting to explain the plea?

Standard of review: The district court dismissed Mr. Arriaga's postconviction petition on summary judgment. In reviewing that ruling, the Court of Appeals "viewed the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party and reviewed the court's legal conclusions and ultimate grant or denial of summary judgment for correctness." *Judge v. Saltz Plastic Surgery, P.C.*, 2016 UT 7, ¶ 11, 367 P.3d 1006 (quotation omitted and cleaned up).

"A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law that [an appellate court] review[s] for correctness." *State v. Ring*, 2018 UT 19, ¶ 18, 424 P.3d 845 (quotation omitted and cleaned up).

"On a writ of certiorari, [the Supreme Court] review[s] the decision of the Court of Appeals . . . and appl[ies] the same standard of review used by the Court of Appeals. [The Supreme Court] conduct[s] that review for correctness, ceding no deference to the Court of Appeals." *State v. Wilder*, 2018 UT 17, ¶ 15, 420 P.3d 1064 (cleaned up).

Preservation: Mr. Arriaga argued in the district court and in the Court of Appeals that his plea was not knowing and voluntary and that trial counsel was ineffective for failing to have an interpreter present at their meeting. (R. 1108–12, 1117–18, 1323–41.)

Statement of the Case

1. Mr. Arriaga Shoots Mr. Herrera During a Struggle[1]

In 2010, Mr. Arriaga became distraught and angry after discovering that Benacio Herrera had an affair with his wife. (R. 105, 166, 176, 213–14.)[2] Mr. Arriaga confronted Mr. Herrera about the affair. (R. 167, 228.) The two exchanged punches. (R. 167.) Then Mr. Arriaga pulled a gun out of his waistband, intending to scare Mr. Herrera but not shoot. (R. 228.) Mr. Herrera asked Mr. Arriaga to forgive him, and Mr. Arriaga said that "this kind of thing is not forgiven." (R. 694.) Mr. Herrera lunged at Mr. Arriaga and tried to grab the gun. (R. 167, 228.) The gun went off, and Mr. Herrera was shot five times—twice in front, twice in the back, and once in the back of his head. (R. 141.)

2. Mr. Arriaga Meets with Trial Counsel about a Plea

The State charged Mr. Arriaga with first-degree murder and two other second-degree felonies. (R. 61, 77.)

The district court found Mr. Arriaga indigent and appointed him counsel. (Add. D, Docket in *State v. Arriaga*, No. 101400853, at 3.) Trial counsel litigated

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[1] Because the district court dismissed Mr. Arriaga's petition on summary judgment after a partial evidentiary hearing, the facts below are recited in the light most favorable to Mr. Arriaga. *See Judge*, 2016 UT 7, ¶ 11. The evidentiary hearing in this case was not completed (and consequently did not include testimony about the issues raised in this appeal), so the facts are drawn from Mr. Arriaga's postconviction petition, evidence submitted with the parties' filings, and relevant material from the evidentiary hearing.

[2] Although they were still married, Mr. Arriaga was separated from his wife at the time the affair occurred. (R. 200.)

a preliminary hearing and a failed motion to suppress. (Add. D at 7, 14.) In an April 2011 hearing, trial counsel informed the court that the matter would be resolved by Mr. Arriaga pleading guilty to first-degree murder. (R. 410.)

Immediately prior to that hearing, Mr. Arriaga met with trial counsel. (Add. C, R. 1178.)

Mr. Arriaga is a native of Mexico, speaks Spanish, and has a fifth-grade education. (R. 1339–40.) At the time of the shooting, Mr. Arriaga did not speak English except for a few random words. (Add. C, R. 1177.) English-speaking trial counsel did not speak Spanish. (*Id*.)

Even though trial counsel and Mr. Arriaga had a language barrier, trial counsel did not have a Spanish-speaking interpreter present during their meeting. (Add. C, R. 1177–78.) Because no interpreter was present at that meeting, Mr. Arriaga believed trial counsel told him he had already been found guilty and that he had to plead guilty that day. (Add. C, R. 1177.) Mr. Arriaga did not understand that he did not have to plead guilty and that he was innocent until proven guilty. (Add. C, R. 1178.) Had Mr. Arriaga known that he did not have to plead guilty, he would not have pleaded guilty and would instead have insisted on going to trial. (Add. C, R. 1179.)

3. Mr. Arriaga Pleads Guilty to First-Degree Murder Maintaining Self-Defense

After meeting with trial counsel, Mr. Arriaga walked into the hearing. When he walked into the hearing, he was given a plea affidavit that was written in

Spanish, but he did not read it prior to signing it. (Add. C, R. 1178.) And during the hearing, Mr. Arriaga was operating under what he understood from trial counsel—that he had to plead guilty that day. (*Id*.)

At the plea hearing, an interpreter translated for Mr. Arriaga. (R. 78.) The district court informed Mr. Arriaga of his rights and then asked for a factual basis:

> THE COURT: Okay. Counsel, can you give me a factual basis?
>
> [TRIAL COUNSEL]: Your Honor, on April 4th 2010 in Salt Lake County Mr. Arriaga-Luna confronted a man who had been sleeping with his wife. An argument and subsequent fight took place at which time he pulled out a firearm and he shot the man[,] killing him.
>
> THE COURT: Is that what happened, Mr. Arriaga-Luna?
>
> THE DEFENDANT: I defended myself. It was not my intention. I never thought about hurting him.
>
> THE COURT: Okay. Does that change the plea at all, counsel?
>
> [TRIAL COUNSEL]: Your Honor, we had—we had discussed the imperfect self-defense concept and that he did pull out a gun to get the man to confess to his sleeping with his wife. And that the man charged at him but was unarmed. So that is why he used a gun.

THE COURT: I will find that that is a sufficient factual basis.

THE DEFENDANT: He was drugged and drunk and I didn't know if he had a weapon, a knife and that's why I . . . .

THE COURT: Okay. . . . Mr. Arriaga-Luna, do you understand that by pulling the trigger you knew you could cause the death of the gentleman?

THE DEFENDANT: Yes.

THE COURT: Okay. Thank you. I will accept that factual basis. Has anyone threatened you or forced you to enter this plea today?

THE DEFENDANT: No.

THE COURT: Has anyone made any promises to you?

THE DEFENDANT: No, not [inaudible].

THE COURT: Thank you. . . . Mr. Arriaga-Luna, then to the charge of murder, a first-degree felony, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

(Add. B, R. 413–15.)

The district court accepted Mr. Arriaga's guilty plea and sentenced him.

(Add. B., R. 415–16.)

4. Mr. Arriaga Petitions for Postconviction Relief

After he was sentenced, Mr. Arriaga timely petitioned for postconviction relief. (R. 77, 1263.) In the petition, Mr. Arriaga asserted, among other things, that his guilty plea was not knowing and voluntary and that trial counsel was ineffective for failing to communicate with Mr. Arriaga in Spanish about his plea. (R. 1263–64.) [3] He supported his petition with an affidavit, where Mr. Arriaga described the meeting with trial counsel before the plea hearing and the language barrier between the two. (Add. C, R. 1176–80.)

The district court held an evidentiary hearing on the petition. (R. 443, 505.) The court received the testimony of the prosecutor; however, it only heard some testimony from trial counsel because it suspended the hearing to allow Mr. Arriaga to file an amended petition to add an allegation not relevant to this appeal. (R. 548–49.)

Before the district court set another evidentiary hearing, the State moved for summary judgment on Mr. Arriaga's entire amended petition. (R. 552–53, 1320–21.) The district court granted the motion.

In granting the motion, the district court held that Mr. Arriaga's plea was knowing and voluntary and that trial counsel was not ineffective. (Add. A, R. 1220.) It held that Mr. Arriaga had "not shown that he should not be bound by

[3] Mr. Arriaga originally filed a petition pro se. (R. 1.) The district court then appointed counsel, and the appointed counsel filed an amended petition. (R. 65.) The original counsel withdrew, and the district court appointed new counsel, who filed a second amended petition. (R. 445.) The State moved for summary judgment on the second amended petition. (R. 566.)

the representations he made during the change-of-plea colloquy" and had "not shown that he could not adequately understand his counsel's advice about the guilty plea." (Add. A, R. 1269.) The court also held, "Even if Mr. Arriaga misunderstood his counsel's advice in relation to the guilty plea, any misunderstanding was cured by the Court's plea colloquy and the Plea Statement," so as a matter of law "Mr. Arriaga ha[d] not shown that his guilty plea was not knowing and voluntary." (Add. A, R. 1270.)

5. The Court of Appeals Affirms the Dismissal of the Postconviction Petition

Mr. Arriaga appealed to the Utah Court of Appeals. He raised two issues. First, he argued that his guilty plea was not knowing or voluntary; twice during the plea colloquy he made self-defense claims that negated an essential element of the murder charge and provided objective evidence that he did not understand the plea. Second, he argued that his guilty plea was the result of ineffective assistance of counsel; trial counsel should have had an interpreter present at the meeting before the plea, because trial counsel and Mr. Arriaga had a significant language barrier. Because of that language barrier, Mr. Arriaga misunderstood the necessity of entering a plea.

In an opinion, two judges on the Court of Appeals held that Mr. Arriaga's plea was knowing and voluntary because nothing in the record suggested that Mr. Arriaga lacked an understanding of the elements of murder. *Arriaga v. State*, 2018 UT App 160, ¶ 15. One judge—Judge Pohlman—concurred in the result.

Judge Pohlman expressed doubt about whether the district court adequately resolved Mr. Arriaga's self-defense assertions during the plea colloquy. *Id.* ¶ 25. But she ultimately concurred in the result because she concluded that Mr. Arriaga was not prejudiced. *Id.* ¶ 27. All three judges agreed that Mr. Arriaga did not show he was prejudiced by trial counsel's failure to have an interpreter during their meeting before the plea hearing. *Id.* ¶ 20.

Mr. Arriaga filed a petition for certiorari. This Court granted that petition on the question of "[w]hether the court of appeals erred in affirming the post-conviction court's denial of [Mr. Arriaga's] petition for post-conviction relief."

Summary of the Argument

Mr. Arriaga challenged his guilty plea under the Postconviction Remedies Act, which allows a court to vacate a guilty plea if the plea was not knowing or voluntary or if the plea was a result of ineffective assistance of counsel. The Court of Appeals erred when it affirmed the dismissal of Mr. Arriaga's postconviction petition.

Mr. Arriaga's guilty plea was not knowing or voluntary. Twice during the plea colloquy he asserted self-defense, which negated an essential element of the murder plea and provided objective evidence that he did not understand the plea. And looking beyond the record of the plea colloquy, Mr. Arriaga produced

evidence that the language barrier between him and trial counsel prevented him from understanding the plea.

Mr. Arriaga's guilty plea was also the result of ineffective assistance of counsel. English-speaking trial counsel spoke no Spanish, and Mr. Arriaga is a native Spanish speaker who spoke almost no English. Right before the plea colloquy, Mr. Arriaga met with trial counsel without an interpreter. After that meeting, Mr. Arriaga believed trial counsel told him that he had to plead guilty. He would not have entered his plea had he not believed trial counsel told him he had to.

Mr. Arriaga's plea was not knowing or voluntary, and his plea was a result of ineffective assistance of counsel. The Court of Appeals erred when it affirmed the dismissal of Mr. Arriaga's postconviction petition on summary judgment.

Argument

The Court of Appeals incorrectly affirmed the district court's dismissal of Mr. Arriaga's petition for postconviction relief. The Court of Appeals erred when it concluded that Mr. Arriaga's guilty plea was (1) knowing and voluntary and (2) not the result of ineffective assistance of counsel. Mr. Arriaga will take each argument in turn.

1. Mr. Arriaga's Plea Was Not Knowing or Voluntary

Mr. Arriaga pleaded guilty to first-degree murder while vocally maintaining—in his native tongue—that he acted in self-defense. But a self-defense claim belies a first-degree murder plea. Neither the district court nor the attorneys adequately resolved the contradiction.

Mr. Arriaga's self-defense statements rendered his plea not knowing or voluntary, and thus subject to challenge under the Postconviction Remedies Act. Under that act, a defendant may challenge his conviction if it was obtained in violation of the United States Constitution. Utah Code § 78B-9-104(1)(a). A guilty plea is valid under the United States Constitution if "it is made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." *State v. Alexander*, 2012 UT 27, ¶ 16, 279 P.3d 371 (quotation omitted). Consequently, a court must determine that a defendant "actually understood the charges, the constitutional rights, and the likely consequences of the plea and voluntarily chose to plead guilty." *State v. Candland*, 2013 UT 55, ¶ 16, 309 P.3d 230.

In determining whether a plea is knowing or voluntary, appellate courts examine not only the transcripts of the plea hearing but also the evidence about the circumstances surrounding the plea. *Id*. Both the plea hearing transcript and the evidence of the circumstances surrounding the plea—viewed in the light most favorable to Mr. Arriaga—show that his plea was not knowing or voluntary. During the plea colloquy, Mr. Arriaga made self-defense statements that negated

his plea to first-degree murder. And the circumstances surrounding the plea show that Mr. Arriaga did not understand his plea, because trial counsel discussed the plea with him in English when Mr. Arriaga could only speak Spanish. The Court of Appeals' conclusion, then, that Mr. Arriaga's plea was knowing and voluntary was simply incorrect.

1.1 Mr. Arriaga's Self-Defense Statements Negated an Essential Element of His Murder Plea

Mr. Arriaga twice asserted self-defense during the plea colloquy. Those statements show that his murder plea was not knowing or voluntary.

A plea is not knowing or voluntary when the defendant does not understand the "essential elements of the crime to which he pled guilty." *Alexander*, 2012 UT 27, ¶ 30 (quotation omitted). "A necessary element of a murder conviction is the absence of affirmative defenses." *State v. Low*, 2008 UT 58, ¶ 45, 192 P.3d 867. An affirmative defense to murder is imperfect self-defense. Utah Code § 76-5-203(4)(a), (c)(i). Imperfect self-defense reduces a murder conviction to manslaughter—a second-degree felony that does not carry a potential life sentence. Utah Code §§ 76-5-203(c)(i) (affirmative defense), 76-5-205(3) (manslaughter is a second-degree felony), 76-3-203(2) (sentencing parameters for felonies).

Mr. Arriaga made two statements during the plea colloquy evidencing that he did not understand the essential elements of murder.

When the district court asked for a factual basis, trial counsel responded that Mr. Arriaga and Mr. Herrera got into a fight, and Mr. Arriaga pulled out a gun and shot Mr. Herrera. (Add. B, R. 413.) Mr. Arriaga then stated, "I defended myself. It was not my intention. I never thought about hurting him." (*Id*.) The district court then asked if Mr. Arriaga's statement changed the plea, and trial counsel stated that he had discussed the "imperfect self-defense concept." (*Id*.) Immediately after trial counsel finished talking, the district court noted, "I will find that that is a sufficient factual basis." (*Id*.) Mr. Arriaga again interjected, "He was drugged and drunk and I didn't know if he had a weapon, a knife and that's why I . . . ." (*Id*.) The district court then asked Mr. Arriaga if he understood that by pulling the trigger he could kill Mr. Herrera, and Mr. Arriaga said yes. (Add. B, R. 414.) Mr. Arriaga then pleaded guilty. (Add. B, R. 415.)

In circumstances where a defendant pleads guilty but makes statements during a plea colloquy evidencing either that he does not understand the charged crime or that negate an element of the charged crime, such pleas are not knowing or voluntary. *See United States v. Culbertson*, 670 F.3d 183, 190 (2d Cir. 2012) (vacating guilty plea when the defendant persistently disavowed responsibility for a certain amount of drugs, and the amount of drugs was an essential element of the crime); *United States v. Suarez*, 155 F.3d 521, 525 (5th Cir. 1998) (holding that the defendant did not plead guilty to possession with intent to distribute when the defendant stated, "I am *only* guilty of possession"); *State v. Thurman*, 911 P.2d 371, 375 (Utah 1996) (holding that even though defendant acknowledged

at one point he had the appropriate mental state, he made repeated comments that negated his admission and consequently did not admit to the requisite mental state).

For example, in *United States v. Fernandez*, the Seventh Circuit held that a native of Mexico who had only a fifth-grade education and a very limited understanding of English (the exact same situation Mr. Arriaga is in) did not understand the charges or the acts to which he was pleading guilty. 205 F.3d 1020, 1026–27 (7th Cir. 2000). When the district court asked the defendant if he had done the things in the factual proffer, the defendant responded, "Not all the acts, partially"; when the district court asked what acts he did not commit, the defendant responded, "Yes, your Honor, I did." *Id.* at 1026. The district court did not clear up the defendant's confusion and accepted the defendant's guilty plea. *Id*. The Seventh Circuit vacated the plea. *Id.* at 1030.

Similarly, in *People v. Ramirez*, the court reasoned that a defendant who pleaded guilty to burglary made statements during the colloquy that negated the plea. 839 N.Y.S.2d 327, 329–30 (N.Y. Sup. Ct. 2007). Specifically, the "defendant insisted during the plea colloquy, albeit in a confused and rambling manner, that he had permission to enter the residence through an open door and retrieve the items that he took. These statements explaining defendant's presence in the house effectively negated his admission to the elements of knowingly entering unlawfully and intent to commit a crime therein at the time of entry." *Id.* at 329. Because the district court did not conduct a sufficient inquiry into the defendant's

mental culpability after making his statements, "there is no indication in the record that defendant's misapprehension of the charges was corrected or that the plea was voluntary and rational." *Id.* at 330.

Along the same lines, the Seventh Circuit held that a Spanish-speaking defendant did not understand the nature of the conspiracy charges against him; the defendant made statements during the colloquy that showed he did not understand the concept of conspiracy or the specific acts to which he was pleading guilty. *United States v. Pineda-Buenaventura*, 622 F.3d 761, 771 (7th Cir. 2007).

Similar to the defendants in these cases, Mr. Arriaga asserted twice during the plea colloquy that he acted in self-defense. (Add B., R. 413.) Although Mr. Arriaga seemed to claim perfect self-defense during the colloquy, he admits—for purposes of this appeal—that he would only be entitled to an imperfect self-defense claim. If the State did not disprove Mr. Arriaga's imperfect self-defense claim, Mr. Arriaga's criminal culpability would drop from murder to manslaughter. But trial counsel and the prosecutor informed the district court that a sufficient factual basis existed for murder if Mr. Arriaga admitted only that he had knowingly and intentionally killed Mr. Herrera. (Add. B, R. 414.) This representation was incorrect because Mr. Arriaga made assertions that he was

trying to avail himself of a self-defense argument, an element that is completely separate from the knowingly and intentional killing element.[4]

No one explained to Mr. Arriaga that he should not plead guilty to murder where the imperfect self-defense claim, if successful, would result in a reduction of the murder charge to a manslaughter charge. (*See* Add. B, R. 413–415.) Trial counsel never asked for a brief recess to discuss the self-defense issue with Mr. Arriaga and clear up his confusion. *See Pineda-Buenaventura*, 622 F.3d at 772 ("At any point during the colloquy, the district court could have taken a brief recess in order to allow counsel to talk with his client confidentially, address [the defendant's] apparent confusion, and determine if he did indeed wish to proceed with a plea. Such a conference might have helped to avoid the problems that occurred here."

The district court—whose responsibility it is to "ensure that defendants enter pleas knowingly and voluntarily"—never asked Mr. Arriaga directly if he understood the implications of his self-defense claim. *See Candland*, 2013 UT 55, ¶ 14. The court did ask trial counsel if the first self-defense assertion changed the plea, and trial counsel said that he had talked with Mr. Arriaga about imperfect self-defense. (Add. B, R. 413–15.) But immediately after trial counsel told the

[4] Murder is the knowing and intentional killing of another person. Utah Code § 76-5-203(2)(a). Imperfect self-defense applies when a defendant knowingly and intentionally kills someone but does it under a mistaken but reasonable belief that the killing was justified by law. Utah Code § 76-5-203(4)(a).

court about that discussion, Mr. Arriaga again claimed self-defense; the hearing soldiered on without any further explanation. (*Id.*)

Without understanding that he could admit to knowingly or intentionally killing Mr. Herrera *and* that he could still defeat the State's murder charge through a claim of imperfect self-defense, Mr. Arriaga could not intelligently weigh the risks and benefits of going to trial versus pleading guilty. Mr. Arriaga's admission that he knowingly or intentionally caused the death of Mr. Herrera did not resolve the issue of whether the killing was done in self-defense. Mr. Arriaga's plea was not knowing because he did not understand that his imperfect self-defense claim would reduce his criminal culpability from murder to manslaughter.

The evidence on the record at the plea colloquy shows that Mr. Arriaga did not knowingly plead guilty.

1.2 The Circumstances Surrounding the Guilty Plea Show that Mr. Arriaga's Guilty Plea Was Not Knowing or Voluntary

In deciding whether a defendant has entered a valid plea, courts examine both the transcript of the plea colloquy and the circumstances surrounding the plea, including the information the defendant received from his attorney. *Candland*, 2013 UT 55, ¶ 16; *Moench v. State*, 2004 UT App 57, ¶ 17, 88 P.3d 353.

The circumstances surrounding Mr. Arraiga's plea show that Mr. Arriaga did not understand his plea because of a language barrier between him and trial counsel.[5]

Mr. Arriaga is a native of Mexico, speaks Spanish, has a fifth-grade education, and did not speak English except for a few random words at the time he pleaded guilty. (Add. C, R. 1177; R. 1339–40.) Trial counsel spoke English and not Spanish. (Add. C, R. 1177.)

Immediately before the plea hearing, Mr. Arriaga met with trial counsel. (Add. C, R. 1178.) No interpreter was present, so Mr. Arriaga did not fully understand trial counsel. (Add. C, R. 1177.) In fact, what Mr. Arriaga believed trial counsel told him was that Mr. Arriaga had already been found guilty and that there was no need for a trial; that if Mr. Arriaga won at trial, he would still get prison time; that Mr. Arriaga had no choice but to sign the plea agreement to get a sentence of 15 years to life imprisonment; and that Mr. Arriaga had to plead guilty that day. (Add. C, R. 1177–78.) Because of the language barrier, Mr. Arriaga did not understand that he did not have to plead guilty and that he was innocent until proven guilty. (Add. C, R. 1178.)

[5] Mr. Arriaga made the factual assertions about the circumstances surrounding his guilty plea in his second amended petition. (R. 445–50.) The State did not answer the second amended petition; rather, the State moved for summary judgment. (R. 1321.) There was no evidentiary hearing on the second amended petition. (R. 1321; *see* R. 502–51.) But the State's summary judgment motion and reply did not dispute any of the facts that Mr. Arriaga alleged about the circumstances surrounding his plea. (R. 823–28; 1198–1204.)

When Mr. Arriaga walked into the hearing, he was given a plea affidavit that was written in Spanish, but he did not read it prior to signing it. (*Id*.) And during the hearing, Mr. Arriaga was operating under what he understood from his trial counsel. (*Id*.)

Viewing this evidence in the light most favorable to Mr. Arriaga—which is required at the summary judgment stage—this Court should conclude that Mr. Arriaga completely misunderstood the nature of his guilty plea. From his trial counsel he believed he had to plead guilty, he did not read the plea affidavit before signing it, and during the plea colloquy he was operating under what he believed trial counsel told him. (Add. C, R. 1177–78.) His two self-defense statements during the plea colloquy evidence his confusion.

The circumstances surrounding the guilty plea show that Mr. Arriaga did not knowingly plead guilty.

1.3 The Court of Appeals Erred When It Upheld the Plea

Although Mr. Arriaga pointed to his self-defense statements during the plea colloquy and his language barrier with trial counsel, the Court of Appeals still determined that the plea was knowing and voluntary. It founded its analysis on Mr. Arriaga signing a plea affidavit and the district court resolving the tension between the plea affidavit and the self-defense statements. It also disregarded Mr. Arriaga's postconviction affidavit as self-serving and contrary to his statements during the plea colloquy. And the concurring judge concluded that

even if there was an error with the plea, Mr. Arriaga was not prejudiced. Mr. Arriaga will take each of these issues in turn.

1.3.1 The Plea Affidavit Did Not Render the Plea Voluntary

The Court of Appeals reasoned that because Mr. Arriaga told the district court that "he had reviewed and understood his plea affidavit, there is no doubt that [Mr. Arriaga] understood the elements of the murder charge at the time of his guilty plea." *Arriaga*, 2018 UT App 160, ¶ 12.

But the Court of Appeals is wrong. The plea affidavit did not mention self-defense at all. (Add. F, R. 79–89.) The elements of murder are simply listed as "Def. did knowingly and intentionally cause[] the death of another." (Add. F, R. 81.)

But the lack of an affirmative defense is an essential element of murder. *See Low*, 2008 UT 58, ¶ 45 (affirmative defense is essential element of murder); Utah Code § 76-5-203(4)(a), (c)(i) (imperfect self-defense an affirmative defense). Because the plea affidavit said nothing about the affirmative defense of imperfect self-defense, the plea affidavit did not inform Mr. Arriaga of all the essential elements of murder. Mr. Arriaga could not have understood the impact of his self-defense claim by reading the plea affidavit.

1.3.2 Mr. Arriaga Has Overcome the Presumption That Trial Counsel Adequately Informed Him

The Court of Appeals also reasoned that the plea was voluntary because trial counsel informed the district court he had explained imperfect self-defense to Mr. Arriaga. It explained: "Trial counsel assured the district court that the concept of imperfect self-defense had been explained to [Mr. Arriaga], and where [Mr. Arriaga] had previously told the court he understood everything counsel had explained to him, it was reasonable for the court to conclude that [Mr. Arriaga] understood how the imperfect self-defense theory applied in his case. Furthermore, with the benefit of an interpreter during the plea colloquy, [Mr. Arriaga] made no objection to trial counsel's assurance that [Mr. Arriaga] understood." *Arriaga*, 2018 UT App 160, ¶ 13.

This reasoning ignores the realities of Mr. Arriaga's situation.

"Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). However, the presumption that a defendant's trial counsel has appropriately informed the defendant can be overcome by statements a defendant makes during the plea colloquy.

For example, in *Hicks v. Franklin*, the Tenth Circuit held that the defendant overcame the presumption that his counsel adequately informed him about the elements of the crime to which he was pleading guilty—second-degree

(depraved mind) murder. 546 F.3d 1279, 1285 (10th Cir. 2008). In that case, the defendant first affirmed during the plea colloquy that he had "talked over the charges" with his attorney. *Id.* But when the district court asked whether the defendant understood the charge, the defendant stated that he did not know what a "dangerous act" meant. *Id.* Furthermore, the district court's explanation of "dangerous act" was erroneous, and the defendant's attorney remained silent and did not correct the district court's misstatement. *Id.* The Tenth Circuit concluded, "[W]here a defendant affirmatively indicates to the court that he does not understand a critical element of the charge against him, the presumption that a defendant has been sufficiently notified by defense counsel of what he is being asked to admit will typically be unwarranted." *Id.*

In *United States v. Weeks*, the Tenth Circuit again held that a defendant's statements during a plea colloquy rebutted the presumption that his counsel adequately informed him of the elements of the crime to which he was pleading. 653 F.3d 1188, 1202 (10th Cir. 2011). Again in that case, the defendant affirmed during the plea colloquy that he fully discussed his conspiracy charge with his attorney. *Id.* But his statements during the plea colloquy showed that he did not understand the elements of conspiracy; specifically, he denied that he had "knowingly" done an act but was just a "party to it." *Id.* The district court attempted to clear up the confusion; the defendant eventually affirmed that he *now* knew that there was a violation of the law. *Id.* at 1203. But the Tenth Circuit

held that the defendant's admission "that he *now* knows those activities violated the law, is not definitively an admission he knew at the time he agreed to the activities that they were illegal." *Id.*

Similar to the defendants in *Hicks* and *Weeks*, Mr. Arriaga affirmed during the plea colloquy that he understood his conversations with his attorney, that he had been through a plea affidavit with his attorney, and that he did not have questions. (Add. B, R. 412–13.) But the plea colloquy did not stop there. Mr. Arriaga made self-defense assertions after his attorney gave a factual basis for his murder plea, and Mr. Arriaga *again* asserted self-defense *after* his attorney informed the district court that he had spoken with Mr. Arriaga about imperfect self-defense. (Add. B, R. 413.) At no time did the district court or trial counsel explain to Mr. Arriaga the implications of his self-defense claim, and Mr. Arriaga's trial counsel did not ask for a recess to clear up Mr. Arriaga's confusion. (Add. B, R. 413–414.) Mr. Arriaga's statements during the plea colloquy itself—self-defense assertions that were never sufficiently mitigated by the court or trial counsel—rebut the presumption that Mr. Arriaga's trial counsel adequately explained the implications of Mr. Arriaga's self-defense claims.

Furthermore, Mr. Arriaga never recanted his self-defense assertions on the record during the plea colloquy. (*Id.*) Rather, he affirmed that he knew he would kill the victim by pulling the trigger. (Add. B, R. 414.) But merely affirming that he pulled the trigger, in the face of self-defense claims, is insufficient for a valid

first-degree murder plea. *See Low*, 2008 UT 58, ¶ 45 ("[T]he absence of affirmative defenses is an element of murder."). Because Mr. Arriaga made statements that he was acting in self-defense and did not recant those statements, he did not understand the elements of murder.

The presumption that trial counsel adequately explained the implications of the self-defense claim to Mr. Arriaga is rebutted by evidence on the record—Mr. Arriaga's self-defense assertions during the colloquy (one of which was made after trial counsel said he had explained imperfect self-defense to Mr. Arriaga), the failure of the district court or trial counsel to explain the self-defense claims to Mr. Arriaga on the record, and the absence of any information about self-defense in the plea affidavit.

1.3.3 The District Court Did Not Resolve the Confusion Between the Plea Affidavit and the Self-Defense Statements

The majority of the Court of Appeals reasoned that the district court did sufficiently address the conflict between the plea affidavit and Mr. Arriaga's self-defense statements when the court asked Mr. Arriaga "whether he knew that his actions, specifically pulling the trigger of the gun, would cause Victim's death. Defendant acknowledged that he did." *Arriaga*, 2018 UT App 160, ¶ 14.

However, the concurring judge expressed concern about whether the district "court's attempts to resolve the conflict were successful." *Id.* ¶ 22. Mr. Arriaga's acknowledgment that he knew that pulling the trigger would cause the

victim's death, the concurring judge continued, "did not speak to the conflict created by his assertions: whether he understood that in pleading guilty to first degree murder he was conceding that the concept of imperfect self-defense did not apply." *Id.* ¶ 24.

The concurring judge was right.

Murder is the knowing and intentional killing of another person. Utah Code § 76-5-203(2)(a). Imperfect self-defense applies when a defendant knowingly and intentionally kills someone *but* does it under a mistaken but reasonable belief that the killing was justified by law. Utah Code § 76-5-203(4)(a). The affirmative defense is another element of murder that must be disproved by the State. *Low*, 2008 UT 58, ¶ 45.

The district court merely asking Mr. Arriaga if he knew that he would kill someone by pulling the trigger did nothing to resolve Mr. Arriaga's self-defense claims. That comment did not address the additional element of the State being required to disprove Mr. Arriaga's imperfect self-defense claim.

1.3.4 Mr. Arriaga's Affidavit Is Not Self-Serving

The Court of Appeals also concluded that Mr. Arriaga's claims that he did not read the plea affidavit contradicted his own statements during the plea colloquy. "Here, there is no valid reason to doubt the truthfulness of [Mr. Arriaga's] statements to the district court during his plea colloquy because an interpreter was present and [Mr. Arriaga] professed to understand everything

discussed with counsel and the contents of his plea affidavit." *Arriaga*, 2018 UT App 160, ¶ 15.

It is true that a defendant cannot merely allege in a postconviction petition that he did not understand what was going on during the plea colloquy. But that is not the case here. Mr. Arriaga's postconviction affidavit explains why he made multiple self-defense assertions during his plea colloquy, despite his attorney representing to the district court that he had explained the implications of the self-defense claims to Mr. Arriaga. His postconviction petition affidavit does not contradict what happened during the plea colloquy; it explains why Mr. Arriaga acted the way he did during the plea colloquy.

1.3.5 Mr. Arriaga Was Prejudiced

The concurring judge was concerned about the validity of Mr. Arriaga's guilty plea. But she concurred in the result because, she concluded, Mr. Arriaga could not show prejudice—he could not show it would have been rational to reject the State's plea offer. *Arriaga*, 2018 UT App 160, ¶ 27.

Under the Postconviction Remedies Act, "[t]he court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding." Utah Code § 78B-9-104(2). The prejudice standard in the act is the same as the prejudice standard under an ineffective assistance of counsel claim: a "reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Utah courts have looked to the prejudice prong in ineffective-assistance-of-counsel caselaw when deciding whether defendants have shown prejudice in their postconviction claims. *Landry v. State*, 2016 UT App 164, ¶ 23 n.6, 380 P.3d 25 ("The *Strickland* prejudice requirement is the same standard a petitioner must demonstrate to obtain postconviction relief."). This Court has also looked to ineffective-assistance-of-counsel caselaw when deciding whether a defendant has shown prejudice under the plain error doctrine. *See State v. Johnson*, 2017 UT 76, ¶ 21, 416 P.3d 443; *State v. Powell*, 2007 UT 9, ¶¶ 21-23, 154 P.3d 788; *State v. Dean*, 2004 UT 63, ¶ 22, 95 P.3d 276.

This Court should continue to use the ineffective-assistance-of-counsel prejudice framework to decide whether Mr. Arriaga was shown prejudice. In a recent case, the United States Supreme Court considered how a defendant could show prejudice when he had pleaded guilty because of ineffective assistance of counsel. *Lee v. United States*, 137 S. Ct. 1958, 1964–69 (2017).

In that case, the government charged a lawful permanent resident, Jae Lee, with drug possession with intent to distribute. *Id.* at 1963. Government officials had found drugs and cash in Lee's home, and Lee had admitted that he had given drugs to his friends. *Id.* When offered a plea to drug distribution, Lee's attorney told him to take the plea because he would likely receive a lighter sentence. *Id.*

Lee asked his attorney if he could be deported, and his attorney said no. *Id.* So Lee took the plea. *Id.* He later found out that his drug distribution conviction required deportation, and he sought to withdraw his plea because of ineffective assistance of counsel. *Id.*

The United States Supreme Court concluded that although Lee's trial prospects were grim, he could show prejudice—he would have rejected the plea had he known that it carried the consequence of mandatory deportation. *Id.* at 1967.

The Court reasoned, "When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain." *Id.* at 1965. Rather, a court considers whether "the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (quotation omitted).

In deciding whether a defendant would have been better off going to trial, the Court differentiated between two types of claims: claims that trial counsel's errors affected the defendant's prospects of success at trial (such as trial counsel not filing a motion to suppress) and claims that trial counsel's errors affected the defendant's understanding of the consequences of pleading guilty. *Id.* at 1965. For the first set of claims—attorney error effecting the prospects of success at

trial—a defendant must show he would have been better off going to trial. *Id.* But for the second set of claims—attorney error effecting the defendant's understanding of the plea—a defendant need not show he would have done better at trial. *Id.*

Consequently, the Court rejected a per se rule that a defendant with no viable defense cannot show prejudice. *Id.* at 1966. It reasoned, "The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id.* at 1966. "For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Id.* at 1966–67.

According to the Court, "avoiding deportation was *the* determinative factor" for Lee, and Lee said that he "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." *Id.* at 1967. Because deportation was so important to Lee, it was not "irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly." *Id.* at 1968. "Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so." *Id.* at 1969.

In this case, the State charged Mr. Arriaga with first-degree murder, possession of a dangerous weapon (a second-degree felony), and obstructing justice (a second-degree felony). Mr. Arriaga pleaded guilty to first-degree murder, and the State dropped the two lesser charges. (Add. B, R. 410.) The State did not make a sentencing recommendation. The presumptive sentence for first-degree murder is 15 years to life, Utah Code § 76-5-203(3)(b), and that is what Mr. Arriaga got. (Add. B, R. 416.) As the Court noted in *Lee*, the consequences of pleading guilty and going to trial were "similarly dire," so "even the smallest chance of success at trial may look attractive." *Lee*, 137 S. Ct. at 1966.

And the error here was not one that affected Mr. Arriaga's trial prospects. Rather, the error is the failure to inform Mr. Arriaga about the relationship between his self-defense claim and his murder plea. Like the defendant in *Lee*, Mr. Arriaga made statements during the plea colloquy about what really mattered to him—his self-defense claim. And he submitted a postconviction affidavit where he said that if he actually understood the nature of his plea, he would not have pleaded guilty. (Add. C, R. 1179.)

Admittedly, Mr. Arriaga's chances at trial may have been slim. He shot Mr. Herrera five times, two of which hit him in the back and one that hit him in the back of the head. But the only evidence against Mr. Arriaga was a statement that he made to the police, where Mr. Arriaga said that he got into a fight with Mr. Herrera and that Mr. Herrera lunged at Mr. Arriaga *before* Mr. Arriaga shot him.

(R. 215.)[6] That evidence would support an imperfect self-defense instruction. *See Low*, 2008 UT 58, ¶ 34 (holding that district court properly instructed the jury on imperfect self-defense when the defendant testified that he shot the victim after the victim charged him).

Through his postconviction affidavit and his self-defense statements during the plea colloquy, Mr. Arriaga has shown a reasonable probability that "he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1966 (quotation omitted). And given that the plea bargain was not substantially better than what he would have received had he been found guilty at trial, it was not irrational for him to decline the plea and go to trial.

In sum, this Court should conclude that Mr. Arriaga's plea was not knowing or voluntary. His self-defense statements during the plea colloquy, left unresolved by the district court and trial counsel, negated an essential element of his plea. And given the evidence of the language barrier between trial counsel and Mr. Arriaga—evidence that must be viewed in the light most favorable to Mr. Arriaga—trial counsel's brief assertion that he talked about imperfect self-defense with Mr. Arriaga does not correct the error. Furthermore, Mr. Arriaga's self-

[6] According to trial counsel, the State's case relied on two main pieces of evidence: a statement from Mr. Arriaga's brother and Mr. Arriaga's statement to the police. (R. 527–28.) The brother fled the country and was likely unavailable to testify. (R. 528.) That left only Mr. Arriaga's statement to the police.

defense statements and postconviction affidavit show that had he known about the impact of his self-defense assertions on his murder plea, he would have chosen to forgo the plea and go to trial. Consequently, this Court should reverse the Court of Appeals.

2. Mr. Arriaga's Counsel Was Ineffective

Before the Court of Appeals, Mr. Arriaga also argued that his guilty plea was a result of ineffective assistance of counsel.

Under the Postconviction Remedies Act, a defendant may challenge his conviction if it was the result of ineffective assistance of counsel. Utah Code § 78B-9-104(1)(d). Mr. Arriaga's trial counsel was ineffective when he did not use an interpreter to explain the plea to Mr. Arriaga. As a result of that failure, Mr. Arriaga believed he was required to plead guilty to murder.

For claims of ineffective assistance of counsel, Mr. Arriaga must satisfy the *Strickland* standard, which requires him to prove "(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Larrabee*, 2013 UT 70, ¶ 18, 321 P.3d 1136 (quotation omitted). Mr. Arriaga satisfies the *Strickland* standard.

2.1 Mr. Arriaga's Trial Counsel Was Deficient

Trial counsel was deficient when he did not use an interpreter to advise Mr. Arriaga about his guilty plea in a meeting before the plea hearing.

"[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler v. Cooper*, 566 U.S. 156,

169 (2012). That is because our criminal justice system "is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.*

As our system is one of pleas, a defendant has a right to effective assistance of counsel when being advised whether to enter a guilty plea. *Id.*; *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). Also, an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Utah R. Prof. Cond. 1.4(b). "[C]ourts in other jurisdictions have explained in addressing the constitutional concerns raised by failing to provide an interpreter for an accused, every criminal defendant—if the right to be present is to have meaning—[must] possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Ling v. State*, 702 S.E.2d 881, 883 (Ga. 2010) (quotation omitted). In fact, "[o]ne who is unable to communicate effectively in English and does not receive an interpreter's assistance is no more competent to proceed than an individual who is incompetent due to mental incapacity." *Id.*

Mr. Arriaga is a native Spanish speaker with a fifth-grade education who did not speak English (with the exception of a few random words) at the time he pleaded guilty, and his trial counsel did not speak Spanish. (Add. C, R. 1177; R. 1339–40.)

No interpreter was present when Mr. Arriaga met with trial counsel before the plea hearing; because there was no interpreter, Mr. Arriaga misunderstood

trial counsel's advice about the plea. (Add. C, R. 1177–78.) Mr. Arriaga believed trial counsel told him that he had already been found guilty and that there was no need for a trial; that if Mr. Arriaga won at trial, he would still get prison time; and that Mr. Arriaga had to plead guilty that day. (*Id*.) Because of the language barrier, Mr. Arriaga did not understand that he did not have to plead guilty and that he was innocent until proven guilty. (Add. C, R. 1178.)

When Mr. Arriaga walked into the hearing, he was given a plea affidavit that was written in Spanish, but he did not read it prior to signing it. (*Id*.) And during the hearing, Mr. Arriaga was operating under what he understood from trial counsel. (*Id*.) That Mr. Arriaga misunderstood what was going on is evidenced by his two assertions during the plea colloquy that he acted in self-defense. (Add. B, R. 413.)

Trial counsel was deficient when he did not use an interpreter to communicate with Mr. Arriaga about his guilty plea. A criminal defendant must adequately understand the contours of his constitutional rights and the facts underlying his plea before he can make an informed decision about whether to plead guilty. *See Alexander*, 2012 UT 27, ¶ 16. When the substantive conversation between an attorney and his client about those protections and those facts takes place without an interpreter, and the attorney and the client do not speak the same language, the attorney's conduct falls below the objective standard of

reasonableness. *See Ling*, 702 S.E.2d at 883.[7] An attorney cannot fulfill his duties to communicate with his client and to give his client sufficient information to make an informed decision when the attorney and the client speak different languages and no means of translation is available. Trial counsel was ineffective when he did not use an interpreter to communicate with Mr. Arriaga.

The Court of Appeals, however, determined that trial counsel was not deficient. In so doing, it did not view the facts in the light most favorable to Mr. Arriaga, as it is required to do on summary judgment. Rather, it flatly dismissed his assertions of a language barrier because Mr. Arriaga did not inform the district court during the plea colloquy that he could not communicate with trial counsel. *Arriaga*, 2018 UT App 160, ¶ 18.[8]

Mr. Arriaga's acknowledgment in the plea colloquy that he understood his conversations with trial counsel is undermined by his self-defense assertions. (Add. B, R. 412, 414–15.) If Mr. Arriaga truly understood what trial counsel told

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[7] Even if trial counsel does use an interpreter, "[t]rial counsel may breach a duty owed to his client through the ineffective assistance of an interpreter. When an intermediary, such as an interpreter, is the only means of communication for a defendant and his attorney, any deficient conduct on the part of the intermediary can be imputed to the attorney as ineffective assistance." *Ledezma v. State*, 626 N.W.2d 134, 149 (Iowa 2001).

[8] One Court of Appeals judge also expressed skepticism at oral argument about the claims of a language barrier because Mr. Arriaga's postconviction affidavit is written in English. But the hand that wrote the English portion of the affidavit was not the same hand that signed the affidavit. Mr. Arriaga received significant help from bilingual inmates when preparing his legal papers in English.

him about the plea, he would not have raised self-defense claims during the hearing. This Court should choose to "credit more fully [Mr. Arriaga's] *repeated* statements" during a plea colloquy about self-defense—evidencing his misunderstanding of what trial counsel told him—rather than a one-worded "acknowledg[ment] at one point" that he understood his conversations with trial counsel. *See Thurman*, 911 P.2d at 375.

Viewing the evidence in the light most favorably to Mr. Arriaga, trial counsel was deficient when he did not have an interpreter at the meeting with Mr. Arriaga before the plea hearing.

2.2 Mr. Arriaga Was Prejudiced

Mr. Arriaga can also show that he was prejudiced by trial counsel's deficient performance.

To show prejudice, a defendant must prove that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The reasonable probability standard does not mean that the defendant must show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Court of Appeals concluded that Mr. Arriaga could not show prejudice because, given the evidence that Mr. Herrera was shot three times in the back

and twice it front, it was irrational for Mr. Arriaga to reject the plea to murder and go to trial. *Arriaga*, 2018 UT App 160, ¶ 20. But in making this decision, the Court of Appeals ignored binding United States Supreme Court precedent that changed the prejudice analysis for cases where a defendant took a guilty plea because of ineffective assistance of counsel: *Lee v. United States*, 137 S. Ct. 1958 (2017). When an issue is a "matter of federal jurisprudence, our courts must be in lockstep with the United States Supreme Court." *State v. Fullerton*, 2018 UT 49, ¶ 3, 428 P.3d 1052.[9]

Mr. Arriaga has discussed *Lee* extensively in section 1.3.5, above. In short, *Lee* held that for attorney error that effects the defendant's understanding of the consequences of his plea—not attorney error that effects the defendant's prospects of success at trial—a defendant does not have to prove that he would have had a viable defense at trial. 137 S. Ct. at 1965–67. "The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id.* at 1966. "For example, a defendant with no realistic defense to a charge carrying a 20–year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Id.* at 1966–67.

[9] *Lee* was issued after the briefing concluded in this case, but before the Court of Appeals issued its opinion. Mr. Arriaga filed a Rule 24(j) letter with the Court of Appeals informing it of *Lee*.

In *Lee*, "avoiding deportation was *the* determinative factor" for Lee, and Lee said that he "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." *Id.* at 1967. Because deportation was so important to Lee, it was not "irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly." *Id.* at 1968. "Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so." *Id.* at 1969.

As argued above, trial counsel's error was not one that effected Mr. Arriaga's prospects at trial; therefore, Mr. Arriaga does not have to prove that he would have prevailed at trial. Rather, trial counsel's error went to Mr. Arriaga's understanding about his plea. Because the error effected his understanding of his plea, Mr. Arriaga has to show whatever he misunderstood was important and determinative to him. He can do that.

Viewing the facts in the light most favorable to Mr. Arriaga—as this Court must do when reviewing a summary judgment order—this Court should conclude that trial counsel's error in not having an interpreter at the meeting before the plea prejudiced Mr. Arriaga. Mr. Arriaga stated in his postconviction affidavit that he completely misunderstood trial counsel during that meeting. (Add. C, R. 1177–78.) He believed he had to plead guilty. (Add. C, R. 1178.) And his assertions of self-defense during the plea colloquy show that he was operating under a

significant misunderstanding from his conversation with trial counsel. Mr. Arriaga stated in his affidavit that had he understood his conversation with trial counsel, he would not have pleaded guilty. (Add. C, R. 1179.)

And like the defendant in *Lee*, it was perfectly rational for Mr. Arriaga to go to trial. The plea was not a significantly better deal. Yes, the State dropped two second-degree felonies, but the first-degree murder charge with a 15-to-life sentence still remained. (R. 410, 416.) And Mr. Arriaga did have a defense, unlike the defendant in *Lee*. The defendant in *Lee* had no defense to his drug distribution claim—the government had found drugs and money in his house, and the defendant had admitted that he gave drugs to his friends. 137 S. Ct. at 1963. But here, Mr. Arriaga had an imperfect self-defense claim; Mr. Herrera lunged at him before Mr. Arriaga shot the gun. That self-defense claim was so important to Mr. Arriaga that he raised it twice during the plea colloquy.

Under *Lee*, Mr. Arriaga can show prejudice—that if trial counsel had an interpreter at the meeting, Mr. Arriaga would not have pleaded guilty and would have proceeded to trial.

This Court should reverse the Court of Appeals.

Conclusion

Viewing the evidence in the light most favorable to Mr. Arraiga, this Court should conclude that Mr. Arriaga's plea was not knowing or voluntary and was

the result of ineffective assistance of counsel. Mr. Arriaga requests that this Court reverse the Court of Appeals and reverse the district court's order granting summary judgment in favor of the State.

DATED this 9thth day of March 2019.

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/s/ Emily Adams

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Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(a)(11) and 24 (g) because this brief contains 9,872 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21.

DATED this 9th day of March, 2019.

_____/s/ Emily Adams_____

Certificate of Service

This is to certify that on March 9, 2019, I emailed a true and correct copy of this brief, and on March 11, 2019, I caused two true and correct copies of the foregoing to be served on the following via first class mail, postage prepaid, along with a courtesy brief on CD:

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_____/s/ Emily Adams_____

Addendum A

District court orders: Memorandum Decision (R. 1219–21) and Order (R. 1262–70)

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, WEST JORDAN DEPARTMENT

BENJAMIN ARRIGA, Petitioner, vs. STATE OF UTAH, Respondent.	MEMORANDUM DECISION Case No.120404690 Judge: Charlene Barlow

This matter came before the Court on the State's motion for summary judgment on petitioner's second amended petition for relief under the post-conviction remedies act. The Court recognizes the assistance of James D. Gilson who was appointed by the Court to represent petitioner *pro bono*; the Court appreciates his willingness to assist in this case.

BACKGROUND

Mr. Arriaga filed a pro se petition for relief under the post-conviction remedies act on April 6, 2012. The Court reviewed the petition and ordered the appointment of counsel on April 12, 2012.

As directed in rule 65C, Utah Rules of Civil Procedure, the Court reviewed the petition and found that its claims of ineffective assistance of counsel were not frivolous on their face and dismissed all claims not involving the ineffective assistance of counsel allegations. A copy of the pleadings were sent to the Utah Attorney General's Office. The ineffective assistance of counsel claims were allowed to proceed.

The counsel originally appointed to represent Mr. Arriaga was allowed to withdraw and Mr. Gilson was appointed to represent Mr. Arriaga and was given time to become familiar with the case. Discovery was pursued and an evidentiary hearing was set for May 23, 2014.

At the hearing on May 23, 2014, Mark Mathis, prosecutor for Mr. Arriaga's case, testified regarding the charging of the case, the strength of the case in his opinion, and discussions with defense counsel regarding plea negotiations. Rudy Bautista, trial counsel for Mr. Arriaga, testified as to his experience, his filing of the motion to suppress Mr. Arriaga's statements to the police, plea discussions with Mr. Mathis, his investigation into the evidence, the flight of Mr. Arriaga's brother

(who had been considered a potential witness) after release from jail, and (to a limited extent) his discussions with Mr. Arriaga regarding resolution of the case. The hearing ended when counsel for Mr. Arriaga asked for time to amend the petition, which request was granted.

The second amended petition was filed on September 19, 2014, with supporting exhibits. The State filed a motion for summary judgment on November 19, 2014, with supporting exhibits. A corrected memorandum in support was filed on November 20, 2014. On May 4, 2015, Mr. Arriaga filed a memorandum in opposition to the State's motion and, on June 8, 2015, the State filed a reply memorandum.

The Court heard oral argument on the motion for summary judgment on September 4, 2015. Mr. Arriaga was present with counsel, James D. Gilson; the State was represented by Mark C. Field, Assistant Attorney General. The Court received argument and took the matter under advisement. Having reviewed the submissions, including exhibits, and the arguments, the Court now enters its ruling.

DECISION

The Court finds that summary judgment for the State is appropriate in this case for the reasons stated in the State's memorandum and reply memorandum in support of the motion. Generally, the Court finds that Mr. Arriaga's trial counsel acted within reason in his handling of the case. The Court finds that Mr. Arriaga assured the Court in the plea statement and in the colloquy that he was satisfied with the advice of his counsel and understood the rights he was giving up. His self-serving current claims that he didn't read the statement and didn't understand what he was doing are unavailing to negate his statements at the time of the plea. The Court also finds that there is not a *reasonable* likelihood that Mr. Arriaga would have rejected the plea and taken the matter to trial. His confession was not suppressed and, even if it had not been used at trial, the fact that the victim was shot five times, twice in the back, and once in the back of the head could have convinced any reasonable jury that the shooting was not accidental as claimed by Mr. Arriaga.

Within this general outline of the Court's reasoning, the Court adopts the specific arguments that the State made in its memoranda to support the Court's conclusion that summary judgment is appropriate in this matter.

ORDER

The State's motion for summary judgment is GRANTED and the petition for post-conviction relief is DENIED.

The State is ordered to prepare an order with findings of fact and conclusions of law consistent with this decision.

DATED this 8th day of October, 2015.

BY THE COURT:

Charlene Barlow
DISTRICT COURT JUDGE

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Attorneys for Respondent

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

BENJAMIN ARRIAGA, Petitioner, vs. STATE OF UTAH, Respondent.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER** Case No. 120404690 Judge Charlene Barlow

THIS MATTER COMES BEFORE THE COURT on the State's Motion for Summary Judgment filed on November 19, 2014. Petitioner Benjamin Arriaga filed his opposition memorandum on May 4, 2015. The State's reply memorandum was filed on June 8, 2015. Oral argument on the State's motion was heard on September 4, 2015. Mr. Arriaga was present and represented by his attorney, James D. Gilson. The State was represented by Mark Field, Assistant Attorney General. The Court has reviewed the parties' memoranda, the relevant case law, all applicable rules and statutory provisions, and considered the oral arguments presented by

counsel. Now being fully advised, the Court enters the following findings of fact and conclusions of law and order GRANTING the State's motion for summary judgment.

Background

On April 4, 2010, Mr. Arriaga confronted Benacio Herrera in an open field in West Jordan about claims that Mr. Herrera had slept with Mr. Arriaga's wife. At some point during the confrontation, Mr. Arriaga pulled a gun out of his waistband. A struggle ensued and the gun discharged several times. During his interview with police, Mr. Arriaga admitted that he asked Mr. Herrera whether he had sexual relations with his (Mr. Arriaga's) wife, that Mr. Herrera said "no," that this made Mr. Arriaga angry and they fought, and that he shot Mr. Herrera, but he only meant to scare him.

The State charged Mr. Arriaga with several offenses, including murder, a first-degree felony. Trial counsel, Rudy Bautista filed a motion to suppress Mr. Arriaga's incriminating statements to police, which the Court denied. Mr. Arriaga then accepted a plea offer from the prosecutor and agreed to plead guilty to the murder charge in exchange for the other charges being dismissed. After pleading guilty, he was immediately sentenced to the mandatory term of 15 years to life in prison. He did not pursue a direct appeal.

Mr. Arriaga timely filed a petition for post-conviction relief, an amended petition, and then a second amended petition. He raised several arguments that his conviction should be vacated. First, he challenged the effectiveness of his attorney's representation. Mr. Arriaga argued that he spoke little English and because his attorney did not have a Spanish interpreter present during their private conversations, he misunderstood counsel's advice concerning his

guilty plea. He also claimed that counsel did not seek discretionary review of the Court's denial of the motion to suppress, did not use the potentially appealable ruling as a basis for negotiating a better plea agreement with the prosecutor, did not seek concessions of the prosecutor in exchange for the guilty plea, did not advise him to go to trial where the defenses of self-defense, extreme emotional distress, lack of the required mental state, and lack of proof beyond a reasonable doubt as to all the elements of the murder charge could have been pursued, and did not investigate the facts of the case, hire experts, and interview witnesses.

Second, Mr. Arriaga argued that his guilty plea was not knowingly and voluntarily entered. He asserted that because of his limited ability to speak English and trial counsel's failure to have a Spanish interpreter present during their private discussions, he did not understand that he was innocent until proven guilty, that he did not have to plead guilty, and that winning at trial would mean no prison time. Third, Mr. Arriaga asserted that because of the misunderstanding that resulted from his limited ability to speak English and trial counsel's failure to have a Spanish interpreter present during their private discussions prior to the change-of-plea hearing, he did not understand his right to appeal his conviction, nor did he understand the time limit for filing an appeal.

The State responded to the second amended petition with a motion for summary judgment, arguing that relief was not warranted because Mr. Arriaga's post-conviction proffer failed as a matter of law to establish that he received ineffective representation, that his guilty plea was invalid, or that he was denied his right to appeal. Mr. Arriaga opposed the State's motion.

Findings of Fact

1. Mr. Arriaga was charged on April 14, 2010 with murder, a first-degree felony, purchase, transfer, or possession, or use of a firearm by a restricted person, a second-degree felony, and obstructing justice, also a second-degree felony.

2. The medical examiner's report established that Mr. Herrera was shot five times, once in the abdomen, once in the leg, twice in the back, and once in the back of the head.

3. A Spanish interpreter was not present when Mr. Arriaga's appointed attorney, Rudy Bautista, met with him for approximately an hour at the jail and several times when Mr. Arriaga was transported to the courthouse for a hearing in the case.

4. Trial counsel filed a motion to suppress Mr. Arriaga's incriminating statements to the police, which the Court denied.

5. Counsel did not seek interlocutory review of the Court's order denying the motion.

6. The prosecutor offered to dismiss the obstructing justice and possession of a firearm by a restricted person charges in exchange for Mr. Arriaga's guilty plea to the murder charge.

7. Mr. Arriaga accepted this offer.

8. A Spanish interpreter was present at the change-of-plea hearing for the benefit of Mr. Arriaga and the Court.

9. Mr. Arriaga acknowledged that he was not suffering from any physical or mental impairment that would affect his ability to understand the proceedings.

10. Mr. Arriaga acknowledged that he and his attorney fully discussed the contents of the Statement of Defendant in Support of Guilty Plea ("Plea Statement"), as well as his rights and

the consequences of pleading guilty.

11. The Plea Statement was written in both English and Spanish,

12. Mr. Arriaga acknowledged that he understood the contents of the Plea Statement and that he adopted each statement in it as his own, that he was satisfied with his attorney's advice and assistance, and that he understood everything that his attorney had discussed with him.

13. Mr. Arriaga told the Court that he had no questions about anything in the Plea Statement.

14. Mr. Arriaga acknowledged in the Plea Statement and during the plea colloquy that he understood his right against self-incrimination, the right to a jury trial, and the right to confront witnesses.

15. Mr. Arriaga acknowledged that he understood his right to the presumption of innocence, and that if he wanted to fight the charges against him and go to trial, all he had to do was plead not guilty and his case would be set for a trial.

16. Mr. Arriaga acknowledged that the elements of the crime of murder to which he was pleading guilty were that he intentionally or knowingly caused the death of another.

17. After trial counsel provided the factual basis for the offense, Mr. Arriaga told the Court that the victim was on drugs and drunk, that he was unsure whether the victim had a weapon, that he defended himself against the victim, and that it was not his intention to hurt the victim.

18. Trial counsel explained that he and Mr. Arriaga previously discussed the possibility of raising a defense of imperfect self-defense because the victim charged at Mr. Arriaga and that

is why he used the gun.

19. The prosecutor explained that in order for the guilty plea to be valid, Mr. Arriaga would need to state that he either intentionally caused the death or knowingly caused the death of the victim.

20. Without objection from Mr. Arriaga, trial counsel stated that Mr. Arriaga had authorized him to tell the Court that by pulling the trigger he knew that it would cause the victim's death.

21. Mr. Arriaga specifically acknowledged that he understood that by pulling the trigger of the gun he knew he could cause the death of the victim.

22. Mr. Arriaga acknowledged that he understood he would be pleading guilty to a first-degree felony and that the minimum and maximum punishment was a prison term of 15 years to life at the Utah State Prison.

23. Mr. Arriaga also acknowledged that he understood that by pleading guilty he would be waiving his right to appeal his conviction and that if he wanted to appeal his sentence, he would need to file a notice of appeal within 30 days after his sentence was entered.

24. Mr. Arriaga pleaded guilty to the charge of murder and requested the Court to immediately sentence him to the mandatory term of 15 years to life in prison.

25. Mr. Arriaga did not pursue a direct appeal.

Conclusions of Law

1. Mr. Arriaga bears the burden of pleading and proving the facts necessary to entitle him to post-conviction relief. *See* Utah Code Ann. § 78B-9-105(1).

2. As the moving party on summary judgment, the State satisfies its burden "by showing, by reference to 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' that there is no genuine issue of material fact." *Orvis v. Johnson*, 2008 UT 2, ¶18, 177 P.3d 600 (quoting Utah R. Civ. P. 56(c)).

3. Although Mr. Arriaga is entitled to the benefit of having the Court consider the facts and inferences in a light most favorable to him, to survive summary judgment he must show that he "could, if given a trial [or evidentiary hearing], produce evidence which would reasonably sustain a judgment in his favor." *Archuleta v. Galetka*, 2011 UT 73, ¶43, 267 P.3d 232.

4. To succeed on his ineffective assistance of counsel claims, Mr. Arriaga must "show that counsel's performance was deficient" and that the "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

5. While Mr. Arriaga must show that counsel's actions "fell below an objective standard of reasonableness," *id.* at 688, to prove deficient performance, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

6. To satisfy the prejudice element of the *Strickland* standard in the context of a guilty plea challenge based on counsel ineffectiveness, Mr. Arriaga "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 and that such a decision would have been rational under the circumstances." *Ramirez–Gil v. State*, 2014 UT App 122, ¶8, 327 P.3d 1228 (citations and internal quotation marks omitted). *See also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *Hill*

v. Lockhart, 474 U.S. 52, 59 (1985).

7. Mr. Arriaga has not shown that he should not be bound by the representations he made during the change-of-plea hearing. *See Burket v. Angelone*, 208 F.3d 172, 191 (4th Cir. 2000). *Cf. Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983)

8. Mr. Arriaga has not shown that he could not adequately understand his counsel's advice about the guilty plea, even though a Spanish interpreter was not present, and therefore has not shown that counsel performed deficiently for not having a Spanish interpreter present during their private discussions.

9. Mr. Arriaga has not shown that his attorney performed deficiently for not seeking interlocutory review of the Court's order denying the motion to suppress, not seeking a better plea agreement, not advising Mr. Arriaga go to trial and raise defenses of self-defense, extreme emotional distress, lack of the required mental state, and lack of proof beyond a reasonable doubt as to all the elements of the murder charge could have been pursued, and not investigating the facts of the case, hiring experts, and interviewing witnesses.

10. Mr. Arriaga also has not shown prejudice because he provides no facts or argument establishing a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial and that such a decision would have been rational under the circumstances.

11. As a matter of law, Mr. Arriaga has not shown that his trial attorney was ineffective.

12. A valid plea is "one that has a factual basis for the plea and ensures that the defendant understands and waives his constitutional right against self-incrimination, the right to

a jury trial, and the right to confront witnesses." *Nicholls v. State*, 2009 UT 12, ¶20, 203 P.3d 976.

13. All the constitutional prerequisites for a valid guilty plea were satisfied in Mr. Arriaga's case.

14. Even if Mr. Arriaga misunderstood his counsel's advice in relation to the guilty plea, any misunderstanding was cured by the Court's plea colloquy and the Plea Statement.

15. As a matter of law, Mr. Arriaga has not shown that his guilty plea was not knowing and voluntary.

16. Because Mr. Arriaga was fully informed at the change-of-plea hearing of his right to appeal and that the notice of appeal had to be filed within 30 days after his sentence was entered, as a matter of law he has not shown that he did not understand his right to appeal.

ORDER

IT IS HEREBY ORDERED that the State's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that Petitioner Benjamin Arriaga's petition for post-conviction relief is DENIED.

This is the final order of the Court. No further action is necessary to effectuate the Court's order.

In accordance with rule 10(e), Utah Rules of Civil Procedure, the Judge's electronic signature appears at the top of the first page of this Order. END OF DOCUMENT

Addendum B

Transcript of change-of-plea hearing (R. 408–16)

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. BENJAMIN ARRIAGA-LUNA, Defendant.	)	Case No. 101400853 SENTENCE, JUDGMENT & COMMITMENT

BEFORE THE HONORABLE CHARLENE BARLOW

WEST JORDAN COURTHOUSE
8080 Redwood Road
West Jordan, Utah 84088

APRIL 19, 2011

A P P E A R A N C E S

FOR THE STATE:
Marc C. Mathis, Esq.
Robert Neill, Esq.
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: 801-363-7900

FOR THE DEFENSE:
Rudy Bautista, Esq.
ANDERSON & KARRENBERG
50 West Broadway
Salt Lake City, Utah 84101-2035
Telephone: 801-534-1700

APRIL 19, 2011

* * *

THE COURT: This is Case Number 101400853, Mr. Bautista is here. Who is here for the state?

MR. MATHIS: Mark Mathis, Rob Neill for the state.

THE COURT: Okay. Mr. Mathis and Mr. Neill for the state.

And Mr. Arriaga-Luna has joined us. What are we going to do today?

MR. BAUTISTA: Your Honor, we're going to resolve this matter. What's anticipated is Benjamin will be entering a guilty plea to count one, murder, a first degree felony. In exchange, the remaining counts will be dismissed.

THE COURT: Is that the State's understanding?

MR. MATHIS: It is, Your Honor.

THE COURT: Okay. Mr. Arriaga-Luna, will you please state your full name?

THE DEFENDANT: Arriaga-Luna.

THE COURT: First name?

THE DEFENDANT: Benjamin Arriaga-Luna.

THE COURT: Okay. Thank you. How old are you?

THE DEFENDANT: I'm 38.

THE COURT: Okay. Do you have any physical or mental problem that interferes with your ability to understand what you're doing today?

THE DEFENDANT: No.

THE COURT: Have you taken any medication, drugs or alcohol today that would impact your ability to understand?

THE DEFENDANT: No.

THE COURT: Okay. You are giving up certain rights. Was there a preliminary hearing held in this?

MR. BAUTISTA: There was, Your Honor.

THE COURT: Okay. You are giving up certain trial rights by pleading guilty today. You have the right to be presumed to be innocent. You have the right not to testify against yourself.

You have the right to a speedy and public trial in front of an impartial jury. You have the right to cross examine the state's witness and call your own witnesses. You have the right to an unanimous verdict on all elements beyond a reasonable doubt. You have certain appeal rights if you go to trial.

You are giving up these rights by pleading guilty today, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. There are certain immigration consequences by pleading guilty, too. And you -- you address or you know that you have these consequences, you might be deported by pleading guilty, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. Thank you. The change that you're looking at is a first degree felony.

Is there a minimum?

MR. BAUTISTA: It's 15 years to life.

THE COURT: Fifteen to life. Thank you.

The potential punishment is 15 years to life in the Utah State Prison and a $10,000 fine. That's the potential punishment, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. Counsel, do you believe that he's competent to enter this plea?

MR. BAUTISTA: I do.

THE COURT: Do you believe he understands the rights that he's giving up?

MR. BAUTISTA: I do. We've been working together for over a year. We did the preliminary hearing, as well as, the motion to suppress which was denied.

THE COURT: Okay. Mr. Arriaga-Luna, are you satisfied with the help that your attorney has given you?

THE DEFENDANT: Yes.

THE COURT: Do you fully understand everything that he's talked to you about?

THE DEFENDANT: Yes. I understand.

THE COURT: Okay. Have you been through a plea form with your attorney?

THE DEFENDANT: Yes.

THE COURT: Do you have anymore questions about what's in that form?

THE DEFENDANT: No. None.

THE COURT: Okay. Counsel, can you give me a factual basis?

MR. BAUTISTA: Your Honor, on April 4th 2010 in Salt Lake County Mr. Arriaga-Luna confronted a man who had been sleeping with his wife. An argument and subsequent fight took place at which time he pulled out a firearm and he shot the man killing him.

THE COURT: Is that what happened, Mr. Arriaga-Luna?

THE DEFENDANT: I defended myself. It was not my intention. I never thought about hurting him.

THE COURT: Okay. Does that change the plea at all, counsel?

MR. BAUTISTA: Your Honor, we had -- we had discussed the imperfect self-defense concept and that he did pull out a gun to get the man to confess to his sleeping with his wife. And that the man charged at him but he was unarmed. So that is why he used a gun.

THE COURT: I will find that that is a sufficient factual basis.

THE DEFENDANT: He was drugged and drunk and I didn't know if he had a weapon, a knife and that's why I...

THE COURT: Okay. Mr. Mathis?

MR. MATHIS: Your Honor, I think for the colloquy to be valid that the defendant will have to state that he did intentionally take the life of Benacio Hernandez-Herrera. He had stated earlier that he did not intend for that to happen. I think, for it to be a valid plea, he would need to state to this court that he did intend to take his life.

MR. BAUTISTA: Or knowingly, Your Honor.

THE COURT: Or knowingly. Yes.

MR. MATHIS: Intentionally or knowingly.

THE COURT: Yeah.

MR. BAUTISTA: He is prepared to say, Your Honor, he's asked that I say it, that by pulling the trigger he knew that it would cause the death of the man.

THE COURT: Mr. Arriaga-Luna, do you understand that by pulling the trigger you knew you could cause the death of the gentleman?

THE DEFENDANT: Yes.

THE COURT: Okay. Thank you. I will accept that factual basis. Has anyone threatened you or forced you to enter this plea today?

THE DEFENDANT: No.

THE COURT: Has anyone made any promises to you?

THE DEFENDANT: No, not [inaudible].

THE COURT: Thank you. If you feel like you

understand what you're doing and you want to do this today, I will have you go ahead and sign that plea form.

Thank you. Mr. Arriaga-Luna, then to the charge of murder, a first degree felony, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Okay. Thank you. I find that Mr. Arriaga-Luna is competent to enter this plea, that he understands the rights that he's giving up, he's had the advantage of counsel, that it's a knowingly and voluntarily plea. I will accept the plea and sign the plea form.

You have the right to be sentenced in no fewer than two, nor more than 45 days from today. You have the right up until the time of sentencing to request to withdraw this plea. But the request has to be in writing and you would have to have good cause. You would have to have a good reason not just that you changed your mind.

What's anticipated with sentencing?

MR. BAUTISTA: Your Honor, we had discussed his options. He would ask the court to sentence him today. He understands that he is going to the Utah State Prison. He's asking to start his time there. He also understands that by being sentenced today he will be waiving an opportunity to file a motion, withdraw his plea and understands so and is willing to do so.

THE COURT: Is that is correct, Mr. Arriaga-Luna?

THE DEFENDANT: Yes.

THE COURT: Okay. Thank you.

Does the state have any input?

MR. MATHIS: No, the state would go along with that recommendation, Your Honor. This case has involved the murder of an individual who was an illegal alien. To our knowledge in speaking with the ME's office and law enforcement, there is no known family members that are here. I believe that they are still all in Mexico. And so as far as, like, representing to the court anything from their side, I think that the crime speaks for itself.

THE COURT: Okay. Anything further, Mr. Bautista?

MR. BAUTISTA: None, Your Honor. We would submit.

Anything else you want to tell me, Mr. Arriaga-Luna?

THE DEFENDANT: No, that's all.

THE COURT: Okay. Thank you.

It is the order of the court then that you serve a prison term of 15 years to life at the Utah State Prison and I will have you taken there forthwith.

MR. BAUTISTA: Your Honor, that's my only matter, may I be excused?

THE COURT: Yes, thank you.

(End of Hearing.)

Addendum C

Mr. Arriaga's affidavit (R. 1176–81)

James D. Gilson (5472)
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Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

BENJAMIN ARRIAGA, Petitioner, vs. STATE OF UTAH, Respondent.	AFFIDAVIT OF BENJAMIN ARRIAGA IN SUPPORT OF SECOND AMENDED PETITION FOR RELIEF UNDER THE POST-CONVICTION REMEDIES ACT Case No. 120404690 Judge Charlene Barlow

I, Benjamin Arriaga, having been duly sworn, testify and allege as follows:

1. I am the Petitioner in the above-titled matter.

2. At the time I plead guilty to the charges at issue, I did not speak English, except for a few random words.

3. When I met with my trial-attorney, Rudy Bautista, in private to discuss the option of pleading guilty, since there was no interpreter there, my understanding of Bautista was not complete.

4. At the time I plead guilty to the charges at issue, my trial-attorney, Bautista, did not speak Spanish.

5. As a result of the language barrier between Bautista and myself, I understood that Bautista told me, in effect, that:

a. "They have already found you guilty and there is no need for a trial."

b. "Even if you go to trial and win, you will still get 20-25 years in prison."

c. "Even if you win, you will get prison time."

d. "You don't have a choice but to sign the plea agreement to get a 15-years-to-life sentence."

e. "You have to plead guilty today."

f. "You have to be sentenced today."

g. "There is no appeal of this outcome."

6. As a result of the language barrier, I did not understand that winning at trial would mean that I would not have any prison time.

7. As a result of the language barrier, I did not understand that I did not have to plead guilty.

8. As a result of the language barrier, I did not understand that I was innocent until proven guilty at trial.

9. The conversation between Bautista and myself took place immediately prior to my Court hearing, and, although the guilty plea questionnaire was printed in Spanish, I did not read the guilty plea questionnaire prior to signing it.

10. I did have an interpreter's assistance in Court when the Judge went through the guilty plea colloquy with me, but I was still operating under what I understood from my attorney. In fact, during the plea colloquy, I told the Court that I acted in self-defense, manifesting

that I did not agree that I had committed the crime of murder. (See Exhibit 3).

11. If I had known that I was indeed innocent until proven guilty at trial, that winning at trial would mean no prison time, and that I did not have to plead guilty, I would not have pleaded guilty but would have insisted on going to trial.

12. As a result of the foregoing, I did not understand my right to appeal my conviction, nor did I understand the time limit for filing an appeal.

13. Bautista failed to take the time necessary to adequately learn the facts of my case or to explain my legal rights, options, and defenses.

14. Had Bautista taken the time to adequately investigate my case, I believe there is a reasonable likelihood I would have been acquitted of murder at trial or may have been convicted under one of the manslaughter statutes.

15. Bautista did not tell me about any legitimate defenses available to me if I went to

trial.

16. I learned from other inmates, after I plead guilty, about Extreme Emotional Distress Manslaughter and Imperfect Self-Defense Manslaughter.

17. Based on my version of the facts, as outlined in my original pro se 65C petition and as related to trial-counsel, I was entitled to jury instructions on Extreme Emotional Distress Manslaughter and Imperfect Self-Defense Manslaughter if I had been allowed to proceed to trial.

18. For these reasons, and for others fully explained by the supporting brief for this second amended petition, I ask that I be granted permission to withdraw my plea and my conviction and sentence be vacated.

SWORN TO this 10-3- day of October, 2014.

Benjamin Arriaga Luna
Benjamin Arriaga

NOTARY:

Subscribed and sworn to by Benjamin Arriaga before me, a Notary Public, on this 3rd day of October, 2014.

NOTARY PUBLIC

JAMES GULL
NOTARY PUBLIC • STATE OF UTAH
COMMISSION# 654699
COMM. EXP. 04-18-2016

Addendum D

Docket in original case

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH vs. BENJAMIN ARRIAGA-LUNA
CASE NUMBER 101400853 State Felony

CHARGES

Charge 1 - 76-5-203 - MURDER 1st Degree Felony
Offense Date: April 04, 2010
Plea: April 19, 2011 Guilty
Disposition: April 19, 2011 Guilty
Charge 2 - 76-10-503(2)(A) - POSSESSION OF A DNGR WEAP BY RESTRICTED 2nd Degree Felony
Offense Date: April 04, 2010
Plea: August 09, 2010 Not Guilty
Disposition: April 19, 2011 Dismissed (w/o prej)
Charge 3 - 76-8-306(1) - OBSTRUCTING JUSTICE 2nd Degree Felony
Offense Date: April 04, 2010
Plea: August 09, 2010 Not Guilty
Disposition: April 19, 2011 Dismissed (w/o prej)

CURRENT ASSIGNED JUDGE

DIANNA GIBSON

PARTIES

Defendant - BENJAMIN ARRIAGA-LUNA
Represented by: RUDY J BAUTISTA
Plaintiff - STATE OF UTAH
Also Known As - BEN ARRIAGA (ARRIAGA-LUNA, BENJAMIN)
Also Known As - BENJAMIN LUNA (ARRIAGA-LUNA, BENJAMIN)
Also Known As - BENJAMIN ARRIAGA-LUNA (ARRIAGA-LUNA, BENJAMIN)
Also Known As - BENJAMIN ARRIAGA (ARRIAGA-LUNA, BENJAMIN)

DEFENDANT INFORMATION

Defendant Name: BENJAMIN ARRIAGA-LUNA
Offense tracking number: 34332767
Date of Birth: August 29, 1972
Jail Booking Number:
Law Enforcement Agency: WEST JORDAN POLICE
LEA Case Number: 10H004593
Prosecuting Agency: SALT LAKE COUNTY

Agency Case Number: 10011724
Sheriff Office Number: 244670

ACCOUNT SUMMARY

TOTAL REVENUE Amount Due: 22.47
Amount Paid: 22.47
Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY
Amount Due: 10.00
Amount Paid: 10.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY
Amount Due: 10.00
Amount Paid: 10.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: POSTAGE-COPIES
Amount Due: 2.47
Amount Paid: 2.47
Amount Credit: 0.00
Balance: 0.00

PROCEEDINGS

04-14-10 Judge STEPHEN ROTH assigned.
04-14-10 Case filed
04-14-10 Filed: From an Information
04-14-10 Filed: Information
04-14-10 Notice - WARRANT for Case 101400853 ID 12906534
04-14-10 Warrant ordered on: April 14, 2010 Warrant Num: 985195963 Bail Allowed
Bail amount: 1000007.00
04-14-10 Warrant issued on: April 14, 2010 Warrant Num: 985195963 Bail Allowed
Bail amount: 1000007.00
Judge: MARK KOURIS
Issue reason: Based on the probable cause statement
04-15-10 INITIAL APPEARANCE scheduled on April 16, 2010 at 08:32 AM in

WJ Courtroom 31 with Judge KOURIS.
04-16-10 Minute Entry - Minutes for Appointment of Counsel
Judge: MARK KOURIS
PRESENT
Clerk: salomet
Defendant Present
Interpreter: Patti McCoy (Spanish)

Language: Spanish
Sheriff Office#: 244670
Audio
Tape Count: 9:00

INITIAL APPEARANCE

A copy of the Information is given to the defendant.
The Information is read.
Advised of charges and penalties.
The defendant is advised of right to counsel.
The defendant is advised that this offense may be used as an enhancement to the penalties for a subsequent offense.
HEARING

COUNT: 9:00
Court orders bail to remain.
Hearing end 9:10 Courtroom 31
APPOINTMENT OF COUNSEL

Court finds the defendant indigent and appoints SL County Legal Defender to represent the defendant.

Appointed Counsel:

Name: SL County Legal Defender
City:
Phone:

Affidavit of indigency has been completed by the defendant

Instructions to the defendant:

1. You are to immediately contact and consult with appointed counsel.

2. You are to cooperate with the appointed counsel in the defense of this case.

3. You are to keep appointed counsel advised at all times of an address and a telephone number where you can be reached.

4. Attorney's fees for services of counsel may be assessed at the time of sentence.

ROLL CALL is scheduled.
Date: 04/26/2010
Time: 08:30 a.m.
Location: WJ Courtroom 33
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: STEPHEN ROTH

04-16-10 ROLL CALL scheduled on April 26, 2010 at 08:30 AM in WJ Courtroom 33 with Judge ROTH.

04-16-10 ROLL CALL rescheduled on April 26, 2010 at 08:30 AM Reason:.

04-16-10 Filed: Affidavit Requesting Appointment of Legal Defender, Signed by Judge M Kouris.

04-20-10 Filed: Salt Lake County Sheriff's Office (Booking information)

04-26-10 Minute Entry - ROLL CALL continued
Judge: MICHELE CHRISTIANSEN
PRESENT
Clerk: alysons
Prosecutor: HILL, JOSEPH S
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Sheriff Office#: 244670

Audio
Tape Number: CR 33 Tape Count: 959

CONTINUANCE

Whose Motion:
The Stipulation of counsel.
Continued as counsel has just received discovery.
The motion is granted.
ROLL CALL is scheduled.
Date: 05/24/2010
Time: 08:30 a.m.
Location: WJ Courtroom 33
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: MICHELE CHRISTIANSEN

04-26-10 ROLL CALL Continued.
04-26-10 ROLL CALL scheduled on May 24, 2010 at 08:30 AM in WJ Courtroom 33 with Judge CHRISTIANSEN.
04-26-10 Filed: Appearance of counsel ATD Rudy Bautista
04-26-10 Filed: Formal request for discovery pursuant to rule 16 of the rules of criminal procedure
04-26-10 Filed: Notice of bond hearing
04-26-10 Filed: Supplemental request for discovery
05-24-10 Minute Entry - Minutes for Roll Call
Judge: MICHELE CHRISTIANSEN
PRESENT
Clerk: debbiem
Prosecutor: HAMILTON, TYSON V
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J
Interpreter: Patty McCoy (Spanish)

Language: Spanish
Sheriff Office#: 244670
Audio
Tape Number: ct rm 33 Tape Count: OTR

HEARING

TAPE: ct rm 33 COUNT: OTR
The spanish interpretor Patty came to me that the deft needs continuance. She said deft was transported, and he's in cellroom.
Roll Call hrg continued.
ROLL CALL.
Date: 06/07/2010
Time: 08:30 a.m.
Location: WJ Courtroom 33
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: MICHELE CHRISTIANSEN
05-24-10 ROLL CALL scheduled on June 07, 2010 at 08:30 AM in WJ Courtroom 33 with Judge CHRISTIANSEN.
05-27-10 Warrant recalled on: May 27, 2010 Warrant num: 985195963
Recall reason: Defendant was booked
06-07-10 Filed: Motion to withdraw as court-appointed counsel
06-07-10 Minute Entry - Minutes for Roll Call
Judge: MICHELE CHRISTIANSEN
PRESENT
Clerk: debbiem
Prosecutor: MATHIS, MARC C
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Sheriff Office#: 244670
Audio
Tape Number: ct rm 33 Tape Count: OTR

HEARING

TAPE: ct rm 33 COUNT: OTR
The deft was transported from jail. On ATD's request, the preliminary hrg set. He requested for 2 Spanish interpreter.
PRELIMINARY HEARING is scheduled.
Date: 07/21/2010
Time: 01:30 p.m.

Location: WJ Courtroom 33
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: STEPHEN ROTH
06-07-10 PRELIMINARY HEARING scheduled on July 21, 2010 at 01:30 PM in WJ Courtroom 33 with Judge ROTH.
06-07-10 PRELIMINARY HEARING rescheduled on July 21, 2010 at 08:30 AM Reason:.
06-15-10 Filed: Appearance of Counsel (ATD)
06-24-10 Filed: First Supplemental Request for Discovery
06-24-10 Filed: Demand that the State Produce the Preparers of All Reports and Chain of Custody Witnesses at Trial.
07-21-10 Minute Entry - Minutes for Preliminary Hearing
Judge: DENNIS M FUCHS
PRESENT
Clerk: alysons
Prosecutor: HILL, JOSEPH S
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J
Interpreter: Pablo Silveira (Spanish), Randy Harrington (Spanish)

Language: Spanish
Sheriff Office#: 244670
Audio
Tape Number: CR 33 Tape Count: 855-957

HEARING

This is time set for preliminary hearing. Susan Sprouse is present as the court reporter. Neither party offers an opening statement. The state calls James Bigelow and Brandon Turner. The witnesses are sworn, testify and are cross examined.
The state offers exhibits 1, the medical examiner's report and 2, certified copy of a prior conviction for the defendant. They are received by the court. The state rests.
Counsel advises that the defendant elects not to testify on his own behalf. The defense rests. The courts finds probable cause as to all counts and binds the case over to the district court. Matter

is set for arraignment.
The state moves to withdraw the exhibits. The court grants the motion and they are returned to the state.
PRETRIAL/BO is scheduled.
Date: 08/09/2010
Time: 01:30 p.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: ROBERT ADKINS
07-21-10 PRETRIAL/BO scheduled on August 09, 2010 at 01:30 PM in WJ Courtroom 36 with Judge ADKINS.
07-21-10 Judge ROBERT ADKINS assigned.
08-01-10 Filed: TRANSCRIPT for Hearing of 07-21-2010
08-02-10 Filed: Response to Request for Discovery, by Marc Mathis.
08-03-10 Filed: Transcript of Preliminary Hearing dated July 21, 2010.
08-09-10 Minute Entry - Minutes for Change of Plea
Judge: ROBERT ADKINS
PRESENT
Clerk: mindeec
Prosecutor: MARTINEZ, ANDREA T
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Sheriff Office#: 244670
Audio
Tape Number: courtroom 36 Tape Count: 248

CHANGE OF PLEA

Defendant waives the reading of the Information.
Change of Plea Note
Spanish Interpreter present.
08-09-10 SCHEDULING CONFERENCE scheduled on September 07, 2010 at 01:30 PM in WJ Courtroom 36 with Judge ADKINS.
09-07-10 Minute Entry - Minutes for SCHEDULING CONFERENCE
Judge: ROBERT ADKINS
PRESENT

Clerk: pamfw
Prosecutor: HILL, JOSEPH S
Defendant Present
Defendant's Attorney(s): CLARK, KIMBERLY A

Sheriff Office#: 244670
Audio
Tape Number: Courtroom 36

HEARING

TAPE: Courtroom 36 Off the record, parties agree to reset the Scheduling Conference.
SCHEDULING CONFERENCE.
Date: 09/20/2010
Time: 01:30 p.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: ROBERT ADKINS

09-07-10 SCHEDULING CONFERENCE scheduled on September 20, 2010 at 01:30 PM in WJ Courtroom 36 with Judge ADKINS.

09-20-10 Minute Entry - Minutes for INCOURT NOTE
Judge: ROBERT ADKINS
PRESENT
Clerk: mindeec
Prosecutor: MITCHELL, JENNIFER C
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Sheriff Office#: 244670
Audio
Tape Number: courtroom 36 Tape Count: 146

SCHEDULING CONFERENCE is scheduled.
Date: 10/04/2010
Time: 01:30 p.m.
Location: WJ Courtroom 36

8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: ROBERT ADKINS
09-21-10 SCHEDULING CONFERENCE scheduled on October 04, 2010 at 01:30 PM
in WJ Courtroom 36 with Judge ADKINS.
10-04-10 Minute Entry - Minutes for INCOURT NOTE
Judge: ROBERT ADKINS
PRESENT
Clerk: mindeec
Prosecutor: MATHIS, MARC C
Other Attorneys: JOEL J KITTRELL
Defendant Present

Sheriff Office#: 244670
Audio
Tape Number: courtroom 36 Tape Count: 203

Spanish Interpreter Patty Mccoy present
PRETRIAL CONFERENCE is scheduled.
Date: 11/01/2010
Time: 01:30 p.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: ROBERT ADKINS
10-05-10 PRETRIAL CONFERENCE scheduled on November 01, 2010 at 01:30 PM
in WJ Courtroom 36 with Judge ADKINS.
11-01-10 Minute Entry - Minutes for INCOURT NOTE
Judge: ROBERT ADKINS
PRESENT
Clerk: mindeec
Prosecutor: MATHIS, MARC C
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Sheriff Office#: 244670
Audio

Tape Number: courtroom 36 Tape Count: 259

MOTION HEARING is scheduled.
Date: 12/20/2010
Time: 08:30 a.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: ROBERT ADKINS

11-01-10 MOTION HEARING scheduled on December 20, 2010 at 08:30 AM in WJ Courtroom 36 with Judge ADKINS.

11-30-10 Filed: Motion and memorandum in support thereof to suppress statements of defendant
Filed by: BAUTISTA, RUDY J

12-17-10 MOTION HEARING scheduled on January 27, 2011 at 01:30 PM in WJ Courtroom 36 with Judge ADKINS.

12-17-10 Notice - NOTICE for Case 101400853 ID 13464130

MOTION HEARING is scheduled.
Date: 1/27/2011
Time: 01:30 p.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: ROBERT ADKINS

12-17-10 MOTION HEARING Modified.

12-17-10 Filed: Motion To Continue
Filed by: STATE OF UTAH,

12-17-10 Filed order: Order of Continuance
Judge ROBERT ADKINS
Signed December 17, 2010

12-17-10 MOTION HEARING scheduled on January 27, 2011 at 01:30 PM in WJ Courtroom 36 with Judge BARLOW.

12-22-10 Judge CHARLENE BARLOW assigned.

12-27-10 Filed: Notice of Motion Hearing, returned to sender for Rudy Bautista

01-13-11 Filed: Affidavit re: Application for material witness warrant and order

01-13-11 Filed: Application for material witness warrant
01-13-11 Filed order: Material witness warrant
Judge CHARLENE BARLOW
Signed January 11, 2011
01-13-11 Filed order: Order for material witness warrant
Judge CHARLENE BARLOW
Signed January 11, 2011
01-27-11 Filed: Response to request for discovery
01-28-11 Minute Entry - Minutes for INCOURT NOTE
Judge: CHARLENE BARLOW
PRESENT
Clerk: mindeec
Prosecutor: HILL, JOSEPH S
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Sheriff Office#: 244670
Audio
Tape Number: courtroom 36 Tape Count: 226

MOTION HEARING is scheduled.
Date: 02/09/2011
Time: 01:30 p.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: CHARLENE BARLOW
01-28-11 MOTION HEARING scheduled on February 09, 2011 at 01:30 PM in WJ
Courtroom 36 with Judge BARLOW.
02-04-11 Filed: Motion to continue
Filed by: STATE OF UTAH,
02-08-11 Filed order: Order of continuance
Judge CHARLENE BARLOW
Signed February 08, 2011
02-09-11 MOTION HEARING scheduled on March 10, 2011 at 01:30 PM in WJ
Courtroom 36 with Judge BARLOW.
02-09-11 Notice - NOTICE for Case 101400853 ID 13570716
MOTION HEARING is scheduled.

Date: 03/10/2011
Time: 01:30 p.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: CHARLENE BARLOW
02-18-11 Filed: Response To Defendant's Motion and Memorandum In Support Thereof To Suppress Statements Of Defendant
03-10-11 Minute Entry - Minutes for MOTION HEARING
Judge: CHARLENE BARLOW
PRESENT
Clerk: mindeec
Prosecutor: MATHIS, MARC C
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Sheriff Office#: 244670
Audio
Tape Number: courtroom 36 Tape Count: 413

HEARING

TAPE: courtroom 36 COUNT: 425
State's witness #1 Detective Brandon Turner, sworn and testified.
COUNT: 446
Mr. Mathis argues motion to suppress
COUNT: 509
Mr. Bautista argues motion to suppress
COUNT: 521
Mr. Mathis responds.
COUNT: 528
Mr. Bautista responds.
The Court takes the matter under advisement.
The State has until 3-15-11 to provide any supplemental briefing, Mr. Bautista to respond by 3-18-11.
Spanish Interpreter Patty Mccoy present
PRETRIAL CONFERENCE is scheduled.
Date: 03/24/2011

Time: 01:30 p.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: CHARLENE BARLOW
03-10-11 Filed: Stipulated Statement of Facts submitted by Mr Marc C.S. Mathis.
03-10-11 PRETRIAL CONFERENCE scheduled on March 24, 2011 at 01:30 PM in WJ Courtroom 36 with Judge BARLOW.
03-24-11 Minute Entry - Minutes for MOTION HEARING
Judge: CHARLENE BARLOW
PRESENT
Clerk: mindeec
Prosecutor: NEILL, ROBERT G
Other Attorneys: JOEL J KITTRELL
Defendant Present

Sheriff Office#: 244670
Audio
Tape Number: courtroom 36 Tape Count: 216

HEARING

TAPE: courtroom 36 COUNT: 216
Parties address the Court
The Court denies motion to suppress, the State to prepare the Finding, Conclusion and Order.
Spanish Interpreter Patty Mccoy present
PRETRIAL CONFERENCE is scheduled.
Date: 04/07/2011
Time: 08:30 a.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: CHARLENE BARLOW
03-24-11 PRETRIAL CONFERENCE scheduled on April 07, 2011 at 08:30 AM in WJ Courtroom 36 with Judge BARLOW.

04-07-11 Minute Entry - Minutes for Pretrial Conference
Judge: CHARLENE BARLOW
PRESENT
Clerk: leahr
Prosecutor: NEILL, ROBERT G
Defendant Present
Interpreter: mccoy patty (Spanish)

Language: Spanish
Sheriff Office#: 244670
Audio
Tape Number: courtroom 36 Tape Count: 11:11

HEARING

TAPE: courtroom 36 COUNT: 11:11
On Record, Defendant present, Patty Mccoy Spanish Interperter present. On Defense counsels motion, court orders case set for a Pre-Trial Conference.
PRETRIAL CONFERENCE.
Date: 04/19/2011
Time: 08:30 a.m.
Location: WJ Courtroom 36
8080 S REDWOOD ROAD
SUITE 1701
WEST JORDAN, UT 84088
Before Judge: CHARLENE BARLOW
04-07-11 PRETRIAL CONFERENCE scheduled on April 19, 2011 at 08:30 AM in WJ Courtroom 36 with Judge BARLOW.
04-07-11 Filed order: Findings of Fact Conclusions of Law. (Signed as approved as to form by Rudy Bautista, and Marc C.S. Mathis)
Judge CHARLENE BARLOW
Signed April 07, 2011
04-19-11 Filed: Sentence, Judgment, Commitment
04-19-11 Filed: Statement of Defendant in Support of Guilty Plea and Certificate of Counsel
04-19-11 Minute Entry - Minutes for INCOURT NOTE
Judge: CHARLENE BARLOW
PRESENT
Printed: 03/09/19 15:54:34 Page 15

Clerk: mindeec
Prosecutor: MATHIS, MARC C
Defendant Present
Defendant's Attorney(s): BAUTISTA, RUDY J

Audio
Tape Number: courtroom 36 Tape Count: 1039

Defendant waives the reading of the Information.
Defendant waives time for sentence.
SENTENCE PRISON
Based on the defendant's conviction of MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than fifteen years and which may be life in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

ALSO KNOWN AS (AKA) NOTE
BEN ARRIAGA
BENJAMIN LUNA
BENJAMIN ARRIAGA-LUNA
BENJAMIN ARRIAGA

Spanish Interpreter Patty Mccoy present.
04-19-11 Charge 1 Disposition is Guilty
04-19-11 Charge 2 Disposition is Dismissed
04-19-11 Charge 3 Disposition is Dismissed
04-19-11 Note: INCOURT NOTE minutes modified.
04-19-11 Case Closed
Disposition Judge is CHARLENE BARLOW
04-29-11 Note: Archived Physical File FP-0079
05-04-11 Fee Account created Total Due: 10.00
05-04-11 AUDIO TAPE COPY Payment Received: 10.00
Note: Mail Payment;
12-12-11 Filed: Letter from Defendant
12-14-11 Note: Copies of letter given to the LDA's and DA's office.
06-18-12 Filed: Letter from the defendant

07-13-12 Note: Copy of letter from Mr. Arriaga-Luna submitted to the DA and LDA's office.
08-13-12 Filed: Motion for release of record and transcripts
Filed by: STATE OF UTAH,
08-13-12 Note: Paperwork to Judge for signature
08-14-12 Filed order: Order releasing record and transcripts
Judge CHARLENE BARLOW
Signed August 14, 2012
08-15-12 Note: File mailed to: OFFICE OF THE ATTORNEY GENERAL, ATTN: MARK C. FIELD, ASSISTANT ATTORNEY GENERAL, 160 EAST 300 SOUTH, SIXTH FLOOR, PO BOX 140854, SALT LAKE CITY UT 84114-0854. Certified.
08-22-12 Filed: Certifide mail return receipt
09-17-12 Fee Account created Total Due: 10.00
09-17-12 Fee Account created Total Due: 2.47
09-17-12 AUDIO TAPE COPY Payment Received: 10.00
Note: POSTAGE-COPIES
09-17-12 POSTAGE-COPIES Payment Received: 2.47
09-18-12 Filed: Request for Recording-Bryan Stoddard
09-18-12 Note: CD mailed
11-26-12 Filed: Request for Recording-AG
11-26-12 Note: CD ready for pick up in Jury Room
12-31-12 Filed: Request for Recording-AG
12-31-12 Note: CD ready for pick up in Jury Room
09-16-13 Filed: Letter from Defendant
12-24-13 Filed: Response to Subpoena Duces Tecum
03-15-14 Filed: TRANSCRIPT for Hearing of 04-19-2011
03-18-14 Filed: Received Transcript of Sentence, Judgment and Commitment, dated 4/19/2011
04-30-14 Filed: Request fot Status
07-02-16 Judge HEATHER BRERETON assigned.
01-11-19 Judge DIANNA GIBSON assigned.

Addendum E

Opinion of the Court of Appeals

2018 UT App 160

THE UTAH COURT OF APPEALS

BENJAMIN ARRIAGA,
Appellant,
v.
STATE OF UTAH,
Appellee.

Opinion
No. 20150911-CA
Filed August 23, 2018

Third District Court, West Jordan Department
The Honorable Charlene Barlow
No. 120404690

Emily Adams, Attorney for Appellant[1]

Sean D. Reyes and Mark C. Field, Attorneys
for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which JUDGE MICHELE M. CHRISTIANSEN FORSTER concurred. JUDGE JILL M. POHLMAN concurred in part and concurred in the result in part, with opinion.

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1. Postconviction proceedings are civil in nature, and defendants who bring such petitions do not have the right to appointed counsel. *See Hutchings v. State*, 2003 UT 52, ¶ 20, 84 P.3d 1150. But when Appellant filed his postconviction petition pro se, he requested that counsel be appointed, and the district court granted this request. If a petition is not summarily dismissed, the court may appoint counsel "on a pro bono basis" to represent the defendant. *See* Utah Code Ann. § 78B-9-109(1) (LexisNexis 2012). We appreciate the district court's decision to appoint counsel in this case because it has helped us better understand Appellant's claims and arguments. And we appreciate the willingness of appellate counsel, as well as that of James D. Gilson, who represented Appellant below, to accept these appointments.

ORME, Judge:

¶1 Appellant Benjamin Arriaga (Defendant) appeals the district court's order granting the State's summary judgment motion and denying his petition for postconviction relief. Defendant pled guilty to murder, a first degree felony, and was sentenced to prison in 2011. He now challenges his guilty plea on the grounds that it was not knowing or voluntary and that he received ineffective assistance of counsel. We affirm the summary judgment denying his petition for postconviction relief.

BACKGROUND

¶2 Defendant admitted to police that, on April 4, 2010, he shot and killed the man (Victim) who was having an affair with his wife. He explained that, having discovered the affair, he angrily confronted Victim in a park. Defendant then pointed a gun at Victim, intending to scare him into admitting to the affair. When Victim admitted to sleeping with Defendant's wife, Defendant replied that "this kind of thing is not forgiven." Defendant said that Victim then lunged for the gun, and a struggle ensued. Defendant told police that the gun discharged several times in the course of the struggle, and Victim was shot once in the abdomen, once in the leg, twice in the back, and once in the back of the head.

¶3 The State charged Defendant with murder, a first degree felony, *see* Utah Code Ann. § 76-5-203(3)(a) (LexisNexis 2017); the purchase, transfer, possession, or use of a firearm by a restricted person, a second degree felony, *see id*. § 76-10-503(2)(a); and obstruction of justice, a second degree felony, *see id.* § 76-8-

306(3)(a).[2] Defendant entered into a plea bargain, agreeing to plead guilty to murder if the other charges were dismissed. At the plea hearing, Defendant acknowledged he knew that by pleading guilty he was waiving his constitutional rights, including the right to the presumption of innocence and the right to a jury trial.[3] Defendant further acknowledged that he understood everything that his counsel had discussed with him, including the plea affidavit. The court then inquired whether Defendant had any questions about the plea affidavit, to which Defendant replied that he did not.

¶4 After trial counsel described the factual basis for Defendant's murder charge, Defendant made statements implying that he acted in self-defense:

> [TRIAL COUNSEL]: Your Honor, on April 4th 2010 in Salt Lake County [Defendant] confronted a man who had been sleeping with his wife. An argument and subsequent fight took place at which time he pulled out a firearm and he shot the man killing him.
>
> THE COURT: Is that what happened, [Defendant]?

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2. Because the statutory provisions in effect at the relevant time do not differ in any material way from those now in effect, we cite the current version of the Utah Code for convenience.

3. Defendant's primary language at the time of the plea hearing was Spanish. To ensure Defendant understood the court proceedings, interpreters were present and the plea affidavit was written in both English and Spanish. However, an interpreter was not present during out-of-court discussions between Defendant and his trial counsel.

> THE DEFENDANT: I defended myself. It was not my intention. I never thought about hurting him.
>
> . . . .
>
> [TRIAL COUNSEL]: Your Honor, we had—discussed the imperfect self-defense concept and that he did pull out a gun to get the man to confess to sleeping with his wife. And that the man charged at him but he was unarmed. So that is why he used a gun.
>
> THE COURT: I will find that that is a sufficient factual basis.
>
> THE DEFENDANT: He was drugged and drunk and I didn't know if he had a weapon, a knife and that's why I—

After Defendant made these statements, the district court clarified with Defendant that he intentionally killed Victim by asking Defendant whether he knew that by pulling the trigger he would cause Victim's death. Defendant acknowledged that he did. After entering his guilty plea, Defendant asked to be sentenced immediately and waived the right to withdraw his plea.

¶5 After a few months in prison, Defendant filed a petition under the Post-Conviction Remedies Act, s*ee* Utah Code Ann. §§ 78B-9-101 to -405 (LexisNexis 2012), arguing that his plea was involuntary because his attorney explained his plea to him without the assistance of an interpreter. He also raised an ineffective-assistance-of-counsel claim on that same basis, specifically arguing that counsel's failure to use an interpreter resulted in Defendant not knowing that he had a valid self-defense argument and could have taken his case to trial. The State filed a response to his petition, asserting that Defendant

had not carried his burden of establishing by a preponderance of the evidence that his trial counsel's performance was deficient and prejudicial. The State also contended that the nature of Defendant's plea was both voluntary and knowing because any misunderstandings regarding his plea that arose out of his communications with his attorney were cured by his plea affidavit and plea colloquy, both of which had been translated into Spanish.

¶6 An evidentiary hearing was held, but suspended, and in the meantime, the State moved for summary judgment. Granting the State's motion, the district court concluded that Defendant had failed to show that trial counsel's performance was deficient and that all constitutional prerequisites for a valid guilty plea had been satisfied in Defendant's case. Defendant appeals.

ISSUES AND STANDARDS OF REVIEW

¶7 Defendant contends that the district court erred in granting the State's motion for summary judgment for two reasons. First, he argues that his plea was not knowing or voluntary, asserting he did not understand the essential elements of his murder charge at the time of his plea. Second, he argues that his trial counsel's performance was deficient for failure to use an interpreter during their out-of-court discussions.

¶8 "We review an appeal from an order dismissing or denying a petition for postconviction relief for correctness without deference to the lower court's conclusions of law." *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115 (citation and internal quotation marks omitted). "Similarly, we review a grant of summary judgment for correctness, granting no deference to the lower court." *Ross v. State*, 2012 UT 93, ¶ 18, 293 P.3d 345 (brackets, citation, and internal quotation marks omitted).

ANALYSIS

I. Defendant's Plea

¶9 Defendant contends that his self-defense statements and the circumstances surrounding his guilty plea demonstrate that he did not understand the elements of the murder charge against him, which rendered his plea unknowing and involuntary.[4] For a guilty plea to be valid under the Due Process Clause of the Fourteenth Amendment, it must be made "voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (citation and internal quotation marks omitted). For that reason, "[i]t is the responsibility of the district court to ensure that defendants enter pleas knowingly and voluntarily." *State v. Candland*, 2013 UT 55, ¶ 14, 309 P.3d 230. And rule 11 of the Utah Rules of Criminal Procedure provides courts with a "roadmap for ensuring that defendants receive adequate notice of their rights and for examining defendants' subjective understanding and intent." *Id.*

¶10 Rule 11 states that a district court may not accept a guilty plea until it has found that the defendant understands his constitutional rights, including his right to the presumption of innocence and his right to a jury trial. Utah R. Crim. P. 11(e)(3). Additionally, the court must ensure that the defendant knows

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4. The State argues that Defendant's involuntary plea claim is procedurally barred as Defendant did not raise it in a motion to withdraw his plea before being sentenced. *See* Utah Code Ann. § 78B-9-106(1)(c) (LexisNexis Supp. 2017) (stating that a person is ineligible for postconviction relief on any ground that "could have been but was not raised at trial or on appeal"). Defendant's argument is unsuccessful in this appeal, so we do not dwell on whether it is also procedurally barred.

"the nature and elements of the offense to which the plea is entered." *Id.* R. 11(e)(4)(A). It is not enough for the district court to give notice to the defendant; the court must also find that "the defendant *actually* understood the charges, the constitutional rights, and the likely consequences of the plea and voluntarily chose to plead guilty." *Candland*, 2013 UT 55, ¶ 16 (emphasis added).

¶11 Defendant asserts that he lacked a meaningful understanding of the murder charge, and he points to his self-defense statements during the plea colloquy to demonstrate this lack of understanding. But the transcript of the plea colloquy shows that any misunderstanding Defendant may have had was inconsequential given his acknowledgements during the plea colloquy that he understood the contents of his plea affidavit and that he understood everything counsel had explained to him.

¶12 Within the plea affidavit, prepared in both English and Spanish, Defendant stated that the elements of the crime for which he was pleading guilty were that "[Defendant] did knowingly and intentionally cause[] the death of another." He also stated that the facts providing a basis for these elements were that on April 4, 2010, he "confront[ed] a man who slept [with his] wife" and "fought with the man and subsequently shot him, killing him." Based on Defendant's assurances in the plea colloquy that he had reviewed and understood his plea affidavit, there is no doubt that Defendant understood the elements of the murder charge at the time of his guilty plea.

¶13 Defendant also argues that his self-defense claims "negated an essential element of the murder charge and provided objective evidence that he did not understand the proceedings." When a defendant puts an affirmative defense at issue during trial, "the State carries the burden of proving beyond a reasonable doubt each element of an offense, including

the absence of an affirmative defense[.]" *State v. Low*, 2008 UT 58, ¶ 45, 192 P.3d 867 (citation and internal quotation marks omitted). Accordingly, a "necessary element of a murder conviction is the absence of affirmative defenses." *Id.* When Defendant made his statements indicating that he acted in self-defense, his trial counsel explained to the court that the concept of imperfect self-defense had been explained to Defendant, specifically in relation to the facts of his case, including counsel's assessment that it was not a viable defense.[5] And "[w]here a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." *Bradshaw v. Stumpf*, 545

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5. Imperfect self-defense "is an affirmative defense to a charge of murder" in cases where "the defendant caused the death of another . . . under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances." Utah Code Ann. § 76-5-203(4)(a) (LexisNexis 2017). And so the "difference between perfect self-defense and imperfect self-defense is the determination of whether the defendant's conduct was, in fact, legally justifiable or excusable under the existing circumstances." *State v. Low*, 2008 UT 58, ¶ 32, 192 P.3d 867 (citation and internal quotation marks omitted). *Cf.* Utah Code Ann. § 76-2-402(1)(b) (LexisNexis 2017) (providing that, in cases of perfect self-defense, lethal force is justified "only if the person reasonably believes that force is necessary to prevent death or serious bodily injury . . . as a result of another person's imminent use of unlawful force"). But the use of lethal force is not justified when the defendant "initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant" or when the defendant "was the aggressor" and did not withdraw from the encounter. *Id.* § 76-2-402(2)(a)(i), (iii).

U.S. 175, 183 (2005). Trial counsel assured the district court that the concept of imperfect self-defense had been explained to Defendant, and where Defendant had previously told the court he understood everything counsel had explained to him, it was reasonable for the court to conclude that Defendant understood how the imperfect self-defense theory applied in his case. Furthermore, with the benefit of an interpreter during the plea colloquy, Defendant made no objection to trial counsel's assurance that Defendant understood.

¶14 We do, however, recognize that Defendant's statements suggesting possible self-defense did raise a question of whether he intended to kill Victim because he stated, "It was not my intention. I never thought about hurting him." It was therefore necessary for the court to address the conflict between this statement and his plea affidavit. *See State v. Maguire*, 830 P.2d 216, 217 (Utah 1991) ("'Any omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy.'") (quoting *State v. Smith*, 812 P.2d 470, 477 (Utah Ct. App. 1991)). And the court did address this conflict by asking Defendant whether he knew that his actions, specifically pulling the trigger of the gun, would cause Victim's death. Defendant acknowledged that he did.

¶15 Defendant further contends that he did not understand his guilty plea because he "speaks Spanish, has a fifth-grade education, and did not speak English except a few random words at the time he pleaded guilty," while "[h]is trial counsel did not speak Spanish." He additionally claims not to have read the plea affidavit before signing it. But these claims contradict Defendant's statements to the district court during his plea hearing. Defendant is bound by his statements because "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any

subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977). "Accordingly, the truth and accuracy of a defendant's statements during the [plea colloquy] should be regarded as conclusive in the absence of a believable, valid reason justifying a departure from the apparent truth of his [plea colloquy] statements." *United States v. Weeks*, 653 F.3d 1188, 1205 (10th Cir. 2011) (citation and internal quotation marks omitted). Here, there is no valid reason to doubt the truthfulness of Defendant's statements to the district court during his plea colloquy because an interpreter was present and Defendant professed to understand everything discussed with counsel and the contents of his plea affidavit. Because there is nothing in the record that suggests Defendant lacked an understanding of the elements of the murder charge against him or anything but his own later assertions that he did not actually understand the essence of imperfect self-defense, the district court did not err in concluding on summary judgment that his plea was voluntarily and knowingly made.

II. Assistance of Counsel

¶16 Defendant contends that his trial counsel's performance was deficient because no interpreter was present during their out-of-court discussions prior to his plea hearing. To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) "counsel's performance was deficient in that it 'fell below an objective standard of reasonableness'" and (2) "counsel's performance was prejudicial in that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Menzies v. Galetka*, 2006 UT 81, ¶ 87, 150 P.3d 480 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

¶17 Defendant must first show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*,

466 U.S. at 688. Defendant asserts that the language barrier with his trial counsel prevented him from becoming aware of his right to the presumption of innocence and his right to plead not guilty. He claims that his counsel's conduct fell below the standard of reasonableness when he did not secure an interpreter to better communicate these rights to Defendant. Nevertheless, any "[j]udicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. And whether counsel's conduct was reasonable "may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691.

¶18 Here, Defendant claims that he only knew a few words of English at the time of his plea hearing and that trial counsel did not speak Spanish. But with an interpreter present, Defendant never advised the court that there was any issue in communicating with his counsel. He specifically acknowledged in the plea colloquy, during which an interpreter was present, that he understood everything counsel had explained to him. Had there been an insurmountable language barrier, Defendant had the opportunity to raise this issue with the court in the plea hearing on several occasions when asked by the court whether he understood everything his counsel had discussed with him and whether he had questions about the plea affidavit. We therefore are not persuaded that trial counsel acted unreasonably in failing to secure an interpreter for his out-of-court consultations with Defendant.

¶19 We do appreciate the importance of interpreters, but any suggestion that we should err on the side of requiring an interpreter in this case is dispelled by the other basis on which Defendant's ineffective assistance claim can be rejected. Defendant does nothing to establish that counsel's failure to secure an interpreter was prejudicial. To contest his guilty plea

on the ground of ineffective assistance of counsel, 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 *and* that such a decision would have been rational under the circumstances." *Rippey v. State*, 2014 UT App 240, ¶ 14, 337 P.3d 1071 (emphasis in original) (citation and internal quotation marks omitted). Defendant must do more than allege that he would not have pled guilty had his counsel secured an interpreter for their out-of-court discussions. Rather, we "look to the factual circumstances surrounding the plea" and whether it would have been rational for Defendant to reject the plea and insist on a trial. *Id.* (citation and internal quotation marks omitted).

¶20 At the time of the State's plea offer, Defendant had already confessed to killing Victim, and a motion to suppress that confession had been denied by the district court. Defendant asserts that, had trial counsel better explained the elements of murder to Defendant, he would have known he had a valid claim for imperfect self-defense based on his statement to officers that Victim lunged at him during the confrontation. But the imperfect-self-defense theory is substantially undermined by the fact that, in what Defendant characterized as a tussle over the gun that he brought only to scare Victim, Victim was shot five times, including twice in the back and once in the back of the head. Based on these circumstances, there is nothing to suggest that it would have been rational for Defendant to reject the State's offer to dismiss the other two felony charges against him in exchange for his guilty plea to the murder charge.

CONCLUSION

¶21 Defendant's statements and actions do not demonstrate that his guilty plea was unknowing or involuntary or that his counsel performed deficiently by not having an interpreter

present during their out-of-court discussions. Additionally, he fails to establish any prejudice as a result of this decision by counsel. We thus presume Defendant's counsel rendered constitutionally adequate assistance, exercising reasonable professional judgment, and the district court did not err in granting summary judgment to the State. Accordingly, we affirm.

POHLMAN, Judge (concurring in part and concurring in the result in part):

¶22 I concur with the lead opinion except as to Part I, in which I concur in the result. I am troubled by my colleagues' conclusion that the district court adequately remedied the conflict between the statements in Defendant's plea affidavit and his self-defense assertions during the plea colloquy. *See supra* ¶ 14. Defendant interjected statements that created a conflict about the nature of his plea. In my view, it is questionable whether the court's attempts to resolve the conflict were successful.

¶23 The court apparently recognized the significance of Defendant's initial assertion that he "defended [him]self," and it attempted to resolve the apparent conflict between his plea affidavit and that assertion by asking defense counsel if it changed the plea. But although counsel explained that he had "discussed the imperfect self-defense concept" with Defendant, he did not explain what Defendant understood. Thus, counsel's representation did not resolve the conflict or demonstrate that Defendant understood he was waiving any potential defenses in pleading guilty to first degree murder.

¶24 Defendant further added to the confusion when he interjected that he shot Victim because "[Victim] was drugged and drunk and [Defendant] didn't know if [Victim] had a

weapon." The court again tried to resolve the conflict, this time asking Defendant whether he knew that his actions would cause Victim's death. Defendant acknowledged that he knew "by pulling the trigger" of the gun he could cause Victim's death, but that acknowledgement did not speak to the conflict created by his assertions: whether he understood that in pleading guilty to first degree murder he was conceding that the concept of imperfect self-defense did not apply.

¶25 Thus, I question whether the ambiguities introduced in the plea hearing regarding the nature of Defendant's plea were resolved by the court's colloquy. *See State v. Lehi*, 2003 UT App 212, ¶ 16, 73 P.3d 985 (recognizing the district court's obligation to clarify discrepancies during the plea colloquy). However, I concur in the result and would affirm the district court's decision based on Defendant's failure to demonstrate prejudice.

¶26 Under the Post-Conviction Remedies Act, "[t]he court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing." Utah Code Ann. § 78B-9-104(2) (LexisNexis 2012); *see also Gardner v. State*, 2010 UT 46, ¶ 62, 234 P.3d 1115. A petitioner must satisfy the same standard to obtain relief based on a claim of ineffective assistance of counsel. *Landry v. State*, 2016 UT App 164, ¶ 23 n.6, 380 P.3d 25.

¶27 On appeal, Defendant relies on the same arguments to satisfy this standard for his claims based on the voluntariness of his plea and his claims based on ineffective assistance of counsel. In addressing Defendant's challenge based on ineffective assistance of counsel, we conclude that he failed to demonstrate that, absent the claimed errors, he would have rejected the State's plea offer and that it would have been rational under the

circumstances to do so. *See supra* ¶¶ 19–20; *see also Rippey v. State*, 2014 UT App 240, ¶ 14, 337 P.3d 1071 (requiring a petitioner challenging the voluntariness of his plea based on ineffective assistance of counsel to "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 *and* that such a decision would have been rational under the circumstances" (quotation simplified)). I believe this deficiency is equally fatal to Defendant's challenge based on the voluntary nature of his plea. For the same reasons he fails to demonstrate prejudice arising out of his ineffective assistance of counsel claim, he has failed to demonstrate prejudice arising out of his claim based on the voluntariness of his plea. *See supra* ¶¶ 19–20. On this basis, I would affirm the district court's decision granting summary judgment to the State on Defendant's postconviction challenge to the voluntariness of his plea.

Addendum F

Plea affidavit (R. 79–89)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

EN EL TRIBUNAL JUDICIAL DEL TERCER DISTRITO
CONDADO DE SALT LAKE, ESTADO DE UTAH

STATE OF UTAH ESTADO DE UTAH	:	STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY PLEA AND CERTIFICATE OF COUNSEL AFIRMACIÓN DEL ACUSADO EN APOYO A SU DECLARACIÓN DE CULPABILIDAD Y CERTIFICADO DEL ASESOR LEGAL
Plaintiff, VS Demandante	:	
Benjamin Arriaga-Luna, Defendant Acusado.	:	Case No. 101400853 No. de caso. _____

I, B. Arriaga-Luna hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

Yo, _____, por medio de la siguiente reconozco y certifico que he sido asesorado y que entiendo los siguientes hechos y derechos:

Notification of Charges
Notificación de Cargos

I am pleading guilty (or no contest) to the following crimes:
Me declaro culpable (o sin argumento) de los siguientes delitos:

	Crime & Statutory Provision Delito y provisiones estatutarias	Degree Grado	Punishment Min/Max and / or Minimum Mandatory Pena Min/Max y/o Mínimo Mandatorio
A.	Murder	1°	15 years to Life prison and/or up to $10000 fine + 35% surcharge
B.			
C.			
D.			

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty (or no contest).

He recibido una copia (reformada) del Documento acusatorio en mi contra. Lo he leído, o me lo han leído y entiendo la naturaleza y los elementos del(os) delito(s) por el (los) cual(es) me declaro culpable (o sin argumento).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:
Los elementos del (los) delito(s) por el (los) cual(es) me declaro culpable (o sin argumento) son:

Def. did knowingly and intentionally caused the death of another.

I understand that by pleading guilty I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty (or no contest) pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

Entiendo que al declararme culpable estaré admitiendo que cometí el delito (los delitos) mencionado(s) anteriormente. (O, si me declaro sin argumento, no disputaré que cometí los delitos que anteceden). Yo estipulo y estoy de acuerdo (o si me declaro sin argumento, no disputo ni refuto) que los siguientes hechos describen mi conducta y la conducta de otras personas por las cuales soy responsable legalmente. Estos hechos proveen las bases para que el tribunal acepte mi declaración de culpabilidad (o sin argumento) y comprueba los elementos del delito (los delitos) por el cual (los cuales) me estoy declarando culpable (o sin argumento):

On 4/4/10, in SL Co, I, while confronting a man who slept w/ my wife, fought with the man and subsequently shot him, killing him.

Waiver of Constitutional Rights
Renuncia de los derechos constitucionales

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

Doy esta declaración voluntariamente. Entiendo que tengo los siguientes derechos bajo la constitución de Utah y de los Estados Unidos. También entiendo que si me declaro culpable (o sin argumento) renunciaré a los siguientes derechos

Counsel: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

Asesoramiento: Se que tengo el derecho de ser representado por un abogado y que si no puedo costear uno, se me asignará un abogado por parte del tribunal sin costo alguno para mí. Entiendo que posteriormente, si el juez determinara que soy solvente se me requerirá pagar por los servicios del abogado que me fue asignado.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

He (no he) renunciado a mi derecho de asesora miento legal. Si he renunciado a mi derecho de asesoramiento legal, lo he hecho a sabiendas, inteligente y voluntariamente por las siguientes razones:

_____

_____

_____

If I have waived my rights to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

Si yo he renunciado a mi derecho de asesoramiento legal, certifico que he leído esta afirmación y que entiendo la naturaleza y los elementos de los cargos y delitos por los cuales me declaro culpable (o sin argumento). También entiendo mis derechos en este caso y otros casos y las consecuencias de mi(s) declaración(es) de culpabilidad

If I have not waived my right to counsel, my attorney is Rudy Bentley. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

Si **no** he renunciado a mi derecho de asesoría legal, mi abogado es _____. Mi abogado y yo hemos platicado a fondo de esta afirmación, mis derechos y las consecuencias de mi(s) declaración(es) de culpabilidad (o sin argumento)

Jury Trial: I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

Juicio por jurado. Sé que tengo el derecho a un juicio público y sin demora ante un jurado imparcial (sin prejuicio) y que estaré renunciando a ese derecho al declararme culpable (o sin argumento).

Confrontation and cross-examination of witnesses: I know that if I were to have a trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

Careo y contra interrogatorio de los testigos. Sé que si tuviera un juicio, a) Tendría el derecho de ver y observar a los testigos que testifiquen en mi contra y b) mi abogado, o yo si renunciara a mi derecho de abogado, tendrían la oportunidad de contra interrogar a todos los testigos que testifiquen en mi contra.

Right to compel witnesses: I know that if I were to have a trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

Derecho de obligar a testigos. Sé que si tuviera un juicio, podría elegir llamar a testigos, y podría obtener comparendos requiriendo la asistencia y testimonio de esos testigos. Si no pudiera costear el pago de los testigos, el Estado cubriría las costas.

Right to testify and privilege against self-incrimination: I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

Derecho a testificar y el privilegio en contra de la auto-incriminación. Sé que si tuviera un juicio, yo tendría el derecho de dar testimonio a mi favor. También sé que si no deseara testificar, nadie podría obligarme a dar testimonio o presentar pruebas en contra de mí mismo. También se que si yo eligiera no dar testimonio, al jurado se le indicaría que no podrían usar mi decisión en mi contra.

Presumption of innocence and burden of proof: I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charges(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

Presunción de inocencia y responsabilidad de prueba. Sé que si no me declaro culpable (o sin argumento), se me presume ser inocente hasta que la fiscalía compruebe que soy culpable del (los) delito(s) imputado(s). Si elijo pelear los cargos en mi contra, solo necesito declararme "no culpable," y mi caso será fijado para juicio. En el juicio, la fiscalía tendría la responsabilidad de comprobar cada uno de los elementos del (los) cargo(s) más allá de una duda razonable. Si el juicio fuera ante un jurado, el veredicto deberá ser unánime, quiere decir que cada miembro del jurado tendrá que encontrarme culpable

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

Entiendo que si me declaro culpable (o sin argumento), renuncio a la presunción de inocencia y admitiré que cometí el (los) delito(s) previamente mencionado(s).

Appeal: I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest). I understand that if I wish to appeal my sentence I must file a notice of appeal within 30 days after my sentence is entered.

Apelación. Sé que bajo la Constitución de Utah, si fuera condenado por un jurado o juez, tendría el derecho de apelar mi condena y sentencia. Si no pudiera costear las costas de la apelación, el Estado cubriría esas costas. Entiendo que al declararme culpable (o sin argumento) renuncio a mi derecho de apelar mi condena. Entiendo que si deseo apelar mi sentencia debo presentar notificación de mi apelación dentro de treinta días después de asentada mi sentencia

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

Sé y entiendo que al declararme culpable, renuncio y cedo todos mis derechos estatutarios y constitucionales previamente explicados.

Consequences of Entering a Guilty (or No Contest) Plea

Consecuencias de dar una declaración de culpabilidad (o sin argumento)

Potential penalties: I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

Penas potenciales. Sé la pena máxima que se podría imponer por cada delito del cual me estoy declarando culpable (o sin argumento). Sé que al declararme culpable (o sin argumento) de un delito que lleve consigo una pena obligatoria, me estaré sujetando a servir la pena obligatoria por ese delito. Sé que mi sentencia puede incluir un término en la prisión, una multa o ambos

I know that in addition to a fine, an ninety percent (90%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

Se que aunado a una multa, se impondrá un noventa por ciento (90%) en recargos. También se que se me podría ordenar reintegrar a cualquier víctima de mis delitos, incluyendo reintegro que se deba por cargos que sean desestimados como parte del trato declaratorio.

Consecutive/concurrent prison terms: I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

Términos de prisión consecutivos/simultáneos. Sé que si hubiera más de un delito involucrado, las penas podrían ser impuestas una después de la otra (consecutivamente), o podrían ser servidas al mismo tiempo, (simultáneamente). Sé que se me podría cobrar una multa adicional por cada delito por el cual haya dado mi declaración. También sé que si estoy bajo libertad provisional o preparatoria, ó si estoy esperando recibir sentencia por algún otro delito por el cual haya sido condenado o me haya declarado culpable (o sin argumento), mi(s) declaración(es) de culpabilidad (o sin argumento) que doy ahora podrían resultar en la imposición de sentencias consecutivas. Si el delito por el cual me estoy declarando culpable sucedió cuando me encontraba preso o bajo libertad preparatoria, se que la ley requiere que el tribunal imponga sentencias consecutivas a menos que el tribunal falle y haga constar en el acta que las sentencias consecutivas serían inapropiadas.

Plea agreement: My guilty (or no contest) plea(s) (is/are) (is/are not) the result of a plea agreement between myself and the prosecuting attorney. All the promises, duties and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below:

Trato declaratorio. Mi(s) declaración(es) de culpabilidad (o sin argumento) es (son) el resultado de un trato declaratorio que he hecho con el abogado fiscal. Todas las promesas, deberes y provisiones de este trato declaratorio, si hubiera alguno, se encuentran en su totalidad en esta afirmación, incluyendo aquellas explicadas a continuación:

_____

_____

_____

_____

_____

_____

Trial judge not bound: I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

El juez de primera instancia no está obligado. Sé que cualquier cargo, o concesión de sentencia o recomendación de libertad condicional, o sentencia suspendida, incluyendo una reducción de los cargos para el dictado de la sentencia, que haya sido hecho o solicitado ya sea por el abogado de defensa o el fiscal no son obligatorias para el juez. También se que cualquier idea expresada ante mi concerniente a lo que se piensa que el juez pueda hacer no son obligatorias para el juez.

Immigration/Deportation: I understand that if I am not a United States citizen, my plea(s) today may, or even will, subject me to deportation under United States immigration laws and regulations, or otherwise adversely affect my immigration status, which may include permanently barring my re-entry into the United States. I understand that if I have questions about the effect of my plea on my immigration status, I should consult with an immigration attorney.

Inmigración/Deportación: Entiendo que si no soy ciudadano de los Estado Unidos, mi(s) declaración(es) del día de hoy podría, o ciertamente me sujetará a deportación bajo las leyes y reglamentos de inmigración de los Estado Unidos, o de otra manera afectarán negativamente mi estado migratorio, que podría incluir el impedir mi reingreso a los Estados Unidos. Entiendo que si tengo preguntas acerca del efecto que tendrá mi declaración de culpabilidad en mi estado migratorio, debo consultar con un abogado de emigración.

Defendant's Certification of Voluntariness
Certificación de voluntariedad del acusado

I am entering this plea of my own free will and choice. No force, threats or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

Estoy dando esta declaración por mi propia y libre voluntad. No se han utilizado fuerza ni amenazas o coacción de ningún tipo para convencerme de declararme culpable (o sin argumento). No se me ha hecho ninguna promesa con excepción de aquellas que se encuentran en esta afirmación.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

He leído esta afirmación, o me la ha leído mi abogado, entiendo sus contenidos y adopto cada afirmación aquí contenida como mía propia. Sé que soy libre de cambiar o borrar cualquier afirmación contenida en este documento pero no deseo hacer ningún cambio porque todas las afirmaciones en este son correctas.

I am satisfied with advice and assistance of my attorney.
Estoy satisfecho(a) con el asesoramiento y servicio de mi abogado(a).

I am 38 years of age. I have attended school through the 5th grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

Tengo ___ años de edad. He asistido hasta el ____ grado escolar. Puedo leer y entender el idioma inglés. Si no entiendo el inglés, se me ha proporcionado un intérprete. No me encontraba bajo la influencia de ningún estupefaciente, medicina, o embriagante que pudiera impedir mi sano juicio cuando decidí declararme culpable. En este momento no me encuentro bajo la influencia de ningún estupefaciente, medicina, o embriagante que pueda impedir mi sano juicio.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

Me considero de mente sana, capaz de discernir y entender este procedimiento y las consecuencias de mi declaración. Estoy libre de cualquier enfermedad mental, defecto o impedimento que me evite entender lo que estoy haciendo o que evite que dé mi declaración a sabiendas, inteligente y voluntariamente.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

Entiendo que si quisiera retirar mi(s) declaración(es) de culpabilidad (o sin argumento), debo presentar una petición escrita para retirar mi(s) declaración(es) antes que se pronuncie la sentencia. Entiendo que para una Declaración en suspenso, la petición para retirarme del trato declaratorio debe ser hecha dentro de treinta días de mi declaración de culpabilidad o sin argumento. Solamente se me permitirá retirar mi declaración de culpabilidad si demuestro que no fue dada a sabiendas y voluntariamente. Entiendo que para disputar mi(s) declaración(es) de culpabilidad después de recibida la sentencia deberé hacerlo bajo la Ley de Remedios Post-condenatorios Título 78, Capítulo 35a, y la Regla 65C del las Reglas del Procedimiento Penal de Utah.

Dated this 19 day of April, 2011.

Fechado este día ____ de _____ del 20____.

Benjamin Arriaga Cruz
DEFENDANT'S SIGNATURE
FIRMA DEL ACUSADO

Certificate of Defense Attorney
Certificado del abogado defensor

I certify that I am the attorney for B. Arriaga-Luna, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

Certifico que soy el abogado de _____, el acusado previamente mencionado, y que se que él/ella ha leído la afirmación o que yo se la he leído a él/ella; He hablado con él/ella de esta afirmación y me parece que él /ella entiende completamente el significado de su contenido y es competente física y mentalmente. A mi leal saber y entender, después de una investigación apropiada, los elementos del(los) delito(s) y la sinopsis de los hechos de la conducta penada del acusado son correctos; Esto, junto con los otros comentarios y aseveraciones hechos por el acusado en el afidávit previo son correctos y verdaderos.

_____
ATTORNEY FOR DEFENDANT
Bar No. _____
ABOGADO DEL ACUSADO
No. del colegio de abogados _____

Certificate of Prosecuting Attorney
Certificado del abogado fiscal

I certify that I am the attorney for the State of Utah in the case against B. Arriaga-Luna, defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered to defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.

Certifico que soy el abogado representando al Estado de Utah en el caso en contra del acusado _____. He repasado esta Afirmación del acusado y encuentro que los hechos en los que se basa la conducta penal del acusado constituyen el delito y son verdaderos y correctos. No se ha ofrecido al acusado ningún incentivo, amenaza o intimidación para alentar su declaración. Las negociaciones para la declaración se encuentran en su totalidad en esta afirmación y en el Trato declaratorio adjunto, se han suplementado en el acta ante el tribunal. Hay causas razonables para creer que la evidencia respaldará la condena del acusado por el (los) delito(s) por el (los) cual (cuales) da su(s) declaración(es) y que la aceptación de la(s) declaración(es) servirá los intereses del público.

PROSECUTING ATTORNEY
Bar No. 11278
ABOGADO FISCAL
No. del colegio de abogados _____

Order
Orden

Based on the facts set forth in the foregoing Statement and the certifications of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds the defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

Basado en los hechos previamente presentados y en la certificación del(a) acusado(a) y su asesor jurídico, y basado en las afirmaciones dadas ante el tribunal, el juez como testigo de las firmas falla que la(s) declaración(es) de culpabilidad (o sin argumento) del acusado ha (han) sido dada(s) libre, a sabiendas y voluntariamente

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

POR LO TANTO SE ORDENA que la(s) declaración(es) de culpabilidad (o sin argumento) del acusado presentada en esta Afirmación, sea aceptada y asentada.

Dated this 19th day of April, 2011.

Fechado este día _____ de _____ del 2_____

Charlene Barlow
District Court Judge
JUEZ DEL TRIBUNAL DE DISTRITO

STATE OF UTAH
3RD DISTRICT COURT
WEST JORDAN

10/10 felony plea/cd