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**IN THE SUPREME COURT  
STATE OF ARIZONA**

STATE OF ARIZONA,

Petitioner,

v.

HECTOR SEBASTION NUNEZ-DIAZ,

Respondent.

No. \_\_\_\_\_

Court of Appeals  
No. 1 CA-CR 16-0793 PRPC

Maricopa County  
Superior Court  
No. CR 2013-430489-001 DT

**PETITION FOR REVIEW FROM A  
COURT OF APPEALS MEMORANDUM  
DECISION IN RULE 32 PROCEEDINGS**

**OVERVIEW**

Respondent was a deportable alien before his drug-possession arrest in Maricopa County. That fact should have been dispositive of Respondent's post-

conviction relief/Rule 32 petition. The essence of Respondent's Rule 32 complaint was: but for my lawyer's deficient representation I would not have been deported. Had the trial court given effect to sworn testimony about Respondent's illegal status and had the trial court applied the correct standard for measuring a colorable claim, the result here would have been a denial of post-conviction relief. Instead, the trial court granted relief. The trial court remained firm in its grant of relief despite the State's Rule 32.9(a) motion citing the newly clarified definition of a colorable claim under *State v. Amaral*, 239 Ariz. 217, 220 ¶ 11 (2016), and applying that standard to the facts. (Electronic Index of Record, EIR at 66 and 82.)

Having lost in the trial court, the State achieved a slightly better result on review to the court of appeals under Rule 32.9(c). A split decision by a three-judge panel of Division One now places an issue of statewide importance before this Court. The law and facts compel the conclusion reached by the dissenting judge--Respondent was a deportable alien with an Immigration and Customs Enforcement detention hold before he pled guilty to state court drug charges. *State v. Nunez-Diaz*, No. 1 CA-CR 16-0793 PRPC, 2018 WL 4500758, memorandum decision 09/18/2018, at ¶ 14. "Under these circumstances, the superior court erred in finding that Nunez-Diaz established prejudice." *Id.*

## **ISSUE**

Whether Respondent, an undocumented alien arrested for violating Arizona law by speeding, failing to have identification while operating a motor vehicle, possessing dangerous drugs (methamphetamine), possessing narcotic drugs (cocaine), and whose arrest resulted in an Immigration and Customs Enforcement hold being lodged against him, should be granted post-conviction relief on an ineffective-assistance-of-counsel claim where no counsel could have navigated around Respondent's pre-existing deportable alien status.

## **REASONS FOR GRANTING REVIEW**

The trial court's reliance upon *State v. Schrock's* incorrect definition of a colorable claim under the now-rejected might-have-changed-the-outcome standard was error. The trial court's error persisted and was apparently unaffected by *State v. Amaral's* clarification that the proper standard for assessing a colorable claim is one that "probably" (not "might") have affected the outcome. Had the trial court applied the correct legal standard to the relevant, objective facts adduced through sworn testimony, the result would have been different.

...

## **FACTS<sup>1</sup> AND INITIAL PROCEDURAL HISTORY**

At 2 a.m. on June 29, 2013, Respondent was stopped for speeding on Indian School Road. When Respondent was asked for his identification he did not comply. He was initially arrested for failing to provide identification required of a motor vehicle operator.

A search incident to Respondent's arrest yielded two different drugs—methamphetamine wrapped in a dollar bill and cocaine stored in a plastic baggie. Respondent was transported for booking and later charged with two class 4 felonies, one count of possession of dangerous drugs and one count of possession of narcotic drugs.

Respondent, represented by defense counsel Julia Cassels and assisted by a court interpreter, was taken to Regional Court Center ("RCC") where he participated in a group advisement about immigration consequences, then waived a preliminary hearing and pled guilty to possession of drug paraphernalia (dollar-bill-drug-wrapper) as a class 6, undesignated offense. (EIR 12/plea agreement.) That plea agreement included a paragraph about immigration consequences. As is the practice in RCC, there was no delay between entry of plea and sentencing. On July 22, 2013, imposition of sentence was suspended

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<sup>1</sup> Facts are taken from EIR 3, probable cause statement, and are consistent with the facts presented to the courts below.

and Respondent was placed on 18 months unsupervised probation. (EIR 14.) Thereafter, Respondent resolved his federal immigration matter by agreeing to voluntary deportation. (EIR 70/RT 10/27/2015 at 8.)

### **PROCEDURAL HISTORY IN TRIAL COURT—RULE 32**

Respondent's Rule 32 petition was premised upon a hypothetical—"Had immigration considerations been considered in plea negotiations, however, Mr. Nunez Dias could have pled to Solicitation to Possess Marijuana as opposed to actual possession, he would have been eligible for bond as a "solicitation" offense is not considered to be a controlled substance offense for purposes of mandatory detention." (EIR 33/Amended Petition for Post-Conviction Relief at 5, lines 7-10, citations omitted.) Essentially, Respondent's contention was if he had pled guilty to solicitation to possess marijuana he would have avoided immigration penalties. Respondent ignored the fact that he was not caught with marijuana. He blamed his attorney for not obtaining a better plea and, under *Padilla v. Kentucky*, 559 U.S. 356 (2010), he blamed his attorney for his deportation. (EIR 33/Amended Petition at 8, lines 18-26.) His prayer for relief was a request for a better plea: "Mr. Nunez Diaz requests that this Court allow him to withdraw from his plea to allow him to plead to a different offense that will not place him in removal proceedings and subject him to mandatory detention." (EIR 33 at 13, lines 3-5.)

Respondent's argument avoided an inconvenient fact: there was no marijuana involved in this case. The only drugs found on Respondent were methamphetamine and cocaine. There were no facts supporting a solicitation-to-possess-marijuana plea. Furthermore, the only plea offered by the State was the one Respondent accepted and the one for which there was a factual basis. The critical fact, Respondent's deportable-alien status, was clarified through testimony at the Rule 32.8 evidentiary hearing.

A Rule 32.8 hearing was held on October 27, 2015. Respondent appeared and testified, under oath, from Mexico using Skype video conferencing and was assisted by a court interpreter. The State asked Respondent the following question: "When you appeared in court, that day for your change of plea, there was already an immigration hold on you, wasn't there?" Respondent answered: "Yes." (EIR 70/RT 10/27/2015 at 13, lines 2-5).

Respondent's sister testified in person. She said Respondent's undocumented status was the impetus for having consulted with a lawyer named Frank Carrizoza who explained that Respondent had two different cases, the criminal case and the immigration case. Respondent's sister testified that "our concern all the time, which he got arrested and concern was immigration since my brother doesn't have a legal status in here." (EIR 70 at 16, lines 11-13.)

Respondent's attorney Ms. Cassels also testified at the hearing. She said her representation was limited to the criminal case, and that she had referred Respondent's family to an immigration lawyer, but to her knowledge the family did not retain that lawyer. (EIR 70 at 30, lines 23-25; at 31, lines 1-4.) On cross-examination Respondent's attorney asked Ms. Cassels the following questions and received the following answers:

Q. You have been working in E.D.C. and R.C.C. for how long?

A. For a long time.

Q. And you had plenty of undocumented clients with ICE holds, have you not?

A. Yes, of course.

Q. So you knew that they were picked up very quickly, did you not?

A. Yes.

(EIR 70 at 41, lines 19-25; at 42, lines 1-2.)

Ms. Cassels agreed it was a certainty that Respondent would be deported or otherwise returned to Mexico. (EIR 70 at 42, lines 9-14; 21-14.)

Ms. Cassels recounted key events from the day Respondent signed the plea agreement. She said she told her client he would go into ICE custody, he might face voluntary deportation or some other consequence, and that "he absolutely knew that he was going to immigration custody". (EIR 70 at 47, lines 4-25.)

Respondent testified that his immigration case concluded with his voluntary departure. (EIR 70 at 8, lines 20-21.) He explained his decision,

“Because I didn’t have—I didn’t have an attorney anymore and they were telling me that there was no solution.” (EIR 70 at 8, lines 22-25; at 9, line 1.)

On December 30, 2015, the trial court filed an order granting Rule 32 relief and setting aside Respondent’s plea agreement. The court found Ms. Cassels was ineffective and Respondent had suffered prejudiced:

The court finds that as a direct result of Ms. Cassel’s failure to properly advise Defendant of his immigration consequences, defendant was placed in removal proceedings and was held without bond. Furthermore, the reason defendant was unable to attend the TASC program no longer exists in light of the ruling in *Lopez-Valenzuela v. Arpaio*, 770 F. 3<sup>rd</sup> 772 (9<sup>th</sup> Cir. 2014).

(EIR 66/Minute Entry filed 12/30/2015 at 4 ¶ 3.)

The trial court believed Respondent would not have signed the plea had he been “adequately advised” of the immigration consequences, despite the fact that Respondent’s prayer for relief was for a better plea agreement, not a request for a trial. (EIR 66 at 4 ¶ 3.) The trial court further found that Respondent’s family was upset when they learned there was nothing they could do and that, “[t]his is a reasonable reaction in light of the fact they were told the attorney could help with the immigration case.” (EIR 66 at 4, ¶ 1.) Respondent “was placed in removal proceedings because of the consequences of the Possession of Drug Paraphernalia conviction and later deported to Mexico.” (EIR 66 at 4, ¶ 3.)



The State immediately began gathering the record in preparation for filing a Rule 32.9(a) motion for rehearing. Transcripts of the hearing were requested and finally completed in March 2016. In between the time of the trial court's grant of post-conviction relief in December 2015, and the extended due date for filing rehearing, this Court's February 4, 2016 opinion in *Amaral* issued. After reading *Amaral*, and reviewing both the transcripts and the record, the State realized that the parties and the trial court had relied upon the incorrect colorable claim standard under *State v. Schrock*, 149 Ariz. 433, 441 (1986). *Schrock* had defined a colorable claim as one that might have changed the outcome. Under *Amaral* a colorable claim requires more than a showing that the alleged facts "might" have changed the outcome; rather, the correct standard is "whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence. If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal. Ariz. R. Crim. P. 32.6(c)." *Amaral*, 239 Ariz. at 220 ¶ 11.

The State's motion for rehearing and the State's reply cited *Amaral* and maintained that under the facts and the applicable legal standard relief should not have been granted. These efforts were ultimately unavailing. The State's motion acknowledged that the parties and the court had relied upon the incorrect

might-have-changed-the-outcome standard of *State v. Schrock*, 149 Ariz. 433, 441 (1986). The State's contention was if *Amaral* had been applied and even if the facts as alleged in Respondent's post-conviction petition were true, the resulting deportation would have occurred without regard to defense counsel's representation.

Respondent and his family admitted Respondent was in the United States illegally. (EIR 66/ Evidentiary Hearing 10/27/2015 at 13, 16.) Respondent failed to show that a lawyer, other than Ms. Cassels, could have obtained a better result for him. (EIR 72/Motion for Rehearing at 6.)

The State argued the standard under *Strickland v. Washington*, 466 U.S. 668 (1984), as well as the distinction between Respondent and the defendant in *Padilla v. Kentucky*, 559 U.S. 356 (2010):

Unlike the defendant in *Padilla*, Defendant Nunez-Diaz was not a lawful permanent resident who reasonably would choose a trial in order to fight to stay in this country. In essence, Padilla had nothing to lose by going to trial and hoping for a miracle.

By contrast, Nunez-Diaz had no legal status. He was under an ICE hold from the beginning. Nunez-Diaz never said he wanted a trial. Whether he was convicted at trial or convicted under a plea, he was still going to be deported.

(EIR 72 at 8.)

If Respondent had gone to trial and lost, he would have stood “convicted of two, class 4 felonies and the immigration consequences would remain.” (EIR 72 at 6.)

Respondent’s claimed prejudice was not due to Ms. Cassels’ representation.

The State returned to *Strickland* in its reply in Rule 32.9(a) proceedings, urging the trial court to set aside the fact that Respondent’s family was upset by the result and instead evaluate the reasonableness of defense counsel’s conduct under this standard:

A fair assessment of attorney performance requires that every effort be made to **eliminate the distorting effects of hindsight**, to reconstruct the circumstances of counsel’s challenged conduct, and to **evaluate the conduct from counsel’s perspective at the time**. Because of the difficulties inherent in making the evaluation, **a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance**.

*Strickland*, 466 U.S. at 689 (1984) (emphasis added).

On October 24, 2016, the court issued a seven-line order “reaffirming the Court’s December 23, 2015 ruling”. (EIR 82.) The trial court’s order contained no explanation and made no reference to *Amaral*.

## **PETITION FOR REVIEW TO THE COURT OF APPEALS**

The State then took a petition for review to the court of appeals contending that the trial court erred in two key ways: 1) by failing to recognize the objective facts--Respondent had an unsolvable, strict-liability-type immigration problem

due to his being an undocumented alien, separate from his state court drug charges; and 2) by failing to apply the *Amaral* standard after it was brought to the court's attention under Rule 32.9(a). The State sought review of the following trial court errors:

- Failure to acknowledge and apply *Amaral*.
- Rejection of objective facts.
- Failure to acknowledge Respondent's undocumented status and instead relying upon Respondent's sister's testimony about immigration attorneys: "In this case, the State's evidence was directly contradicted by the Defendant's witness, Maria Josefina Nunez-Diaz." (EIR 66/Minute Entry 12/30/2015 at 3-4, and included in the Petition for Review to the Court of Appeals at page 8.)
- Failure to hold Respondent to his burden. It was Respondent's burden to establish both deficient performance by counsel and prejudice resulting from counsel's deficiency. *See State v. Bowers*, 192 Ariz. 419 ¶ 25 (App. 1998). *See also* Petition for Review to the Court of Appeals at page 8.
- Failure to correctly apply *Padilla v. Kentucky* to the facts despite the State providing the trial court with a summary of facts from *Padilla v. Kentucky* and with the analysis employed by Kentucky after the United States

Supreme Court remanded the case. *Padilla v. Commonwealth*, 381 S.W. 3d 322 (App. 2012). A key fact for the Kentucky appellate court on remand was Jose Padilla's lawful permanent resident status in the United States which he had maintained for over forty years:

- Under these circumstances, Padilla's insistence that he would have gone to trial was deemed reasonable. *Id.* at 324.
- Padilla's acceptance of a plea on the day of trial was premised upon an erroneous belief that he would not be subject to mandatory deportation. *Id.* at 329.
- Had Padilla known that mandatory deportation remained a possibility, it would have been reasonable for him to choose a trial and therein lies the prejudice. *Id.* at 330.
- The trial court's reliance upon *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9<sup>th</sup> Cir. 2014), in support of a prejudice finding was error. As the State pointed out, *Lopez-Valenzuela* was decided after Respondent's July 22, 2013, plea and sentencing. The trial court erred in considering an inapplicable change in the law as support for Respondent's claimed prejudice.

- On the record established in the trial court it cannot be said that the standard announced in *Strickland* and clarified in *Amaral* was applied to the facts here.

On September 18, 2018, a majority of the court of appeals' panel denied relief.

### **PETITION FOR REVIEW TO THIS COURT**

The appellate court's error lies in according deference to the trial court's findings. The trial court's findings were saturated in subjectivity and did not reflect the objective standard required by *Strickland*. The trial court's rejection of an objective fact—Respondent's deportable-alien status—as well as the trial court's application of the wrong colorable claim definition and silence about whether the correct standard under *Amaral* was considered, is not a record the appellate court should have relied upon. The intermediate appellate court's errors are:

- Failure to recognize that ICE had lodged a hold on Respondent before Respondent pled guilty in state court.
- Failure to apply an objective standard to Respondent's Rule 32.8(c) testimony admitting there was an immigration hold before he pled guilty.
- Failure to consider the *Padilla* analysis and to distinguish between a lawful permanent resident (*Padilla*) and a deportable alien (Respondent).

- Failing to review the superior court’s witness-credibility finding and failing to review the superior court’s prejudice finding that was based upon the belief that Respondent entered a plea not understanding the immigration consequences of pleading guilty, while ignoring the fact that Respondent’s immigration consequences did not flow from his guilty plea.
- According deference to the trial court’s finding of constitutional defect and the State’s failure to prove the defect harmless, where there was no constitutionally deficient representation by Ms. Cassels because Ms. Cassels’ representation was not the cause of, nor could she have prevented, Respondent’s deportation.

The dissent ascertained the legal significance of Respondent’s undocumented status. As Respondent himself testified, there was an ICE hold on him before he entered a plea agreement. (EIR 66/RT, 10/27/2015 at 13) The dissent is correct. The only claimed prejudice on these facts would be a “potential” claim arising from a “possibility” of “discretionary” relief. *Nunez Diaz*, No. 1 CA-CR 16-0793 PRPC, 2018 WL 4500758, memorandum decision at ¶ 14. And, as the dissent concludes, there was no prejudice here. *Id.*

*Strickland v. Washington* is cited in the court of appeals’ majority decision and was cited by the trial court. But it wasn’t applied to the facts. As the Ninth

Circuit recently observed, “it is not enough to cite *Strickland*—a court’s analysis must reflect it too.” *Mann v. Ryan*, 828 F. 3d 1143, 1166 (9<sup>th</sup> Cir. 2016) (en banc).

The State asks this Court only to apply the law to these facts, especially one key fact. Respondent’s pre-existing deportable alien status dictated the outcome of his immigration case, independent from anything that happened in his state court criminal case. Deportation was not a byproduct of Respondent’s state court guilty plea. Defense counsel should not be blamed and labeled ineffective for failing to achieve an unachievable result. By applying the law to this critical, dispositive fact Ms. Cassels will be vindicated from an unwarranted and erroneous finding of ineffectiveness, Respondent’s plea entered knowingly, voluntarily, and intelligently will be given effect, and the incorrect legal standard will have been replaced with the correct standard announced in *Amaral*.

The trial court’s findings are not a faithful application of *Strickland* and therefore, not a sound exercise of discretion. A majority of the court of appeals applied a deferential analysis that only compounded the root error—deportation was a foregone conclusion. The State asks this Court to examine the record and conclude that Respondent failed to articulate a colorable claim for relief.

...



## Conclusion

For all these reasons the State asks this Court to vacate the memorandum decision of the court of appeals and reinstate Respondent's guilty plea and conviction.

Respectfully submitted this 17<sup>th</sup> day of October, 2018, by

/s/ \_\_\_\_\_

KAREN KEMPER

DEPUTY COUNTY ATTORNEY

IN THE MARYVALE JUSTICE COURT COURT  
STATE OF ARIZONA, COUNTY OF MARICOPA

\*\*\*FINAL\*\*\*

RELEASE QUESTIONNAIRE

DEFENDANT'S NAME HECTOR SEBASTION NUNEZ-DIAZ DOB 1986-08-04 BOOKING NO. P985421

ALIAS(ES) \_\_\_\_\_ CASE NO. PF2013430489001

**A. GENERAL INFORMATION**

**Charges**

1 Cts. 13-3407A1 DANGEROUS DRUG-POSS/USE F4  
1 Cts. 13-3408A1 NARCOTIC DRUG-POSSESS/USE F4

Pursuant to A.R.S. §41-1750 ten-print fingerprints were taken of the arrested person?  Yes  No

If yes, PCN = \_\_\_\_\_

Pursuant to A.R.S. §13-610 one or more of the above charges requires the arresting agency to secure a DNA sample from the arrested person?  Yes  No

If yes, does the defendant have a valid DNA sample on file with AZDPS?  Yes  No

If no, Arresting Agency has taken required sample?  Yes  No

Offense Location: 5850 W INDIAN SCHOOL ROAD  
Offense Date: 2013-06-29  
Arrest Location: 5850 W INDIAN SCHOOL PHOENIX AZ 85033  
Date: 2013-06-29 Time: 02:15

**B. PROBABLE CAUSE STATEMENT**

1. Please summarize and include the facts which establish probable cause for the arrest:  
ON 062913 AT APPROXIMATELY 0157 HOURS DEF. WAS CONTACTED AT 5850 WEST INDIAN SCHOOL ROAD IN REFERENCE TO A TRAFFIC STOP FOR A TRAFFIC VIOLATION. DEF. WAS OBSERVED TRAVELING EASTBOUND ON INDIAN SCHOOL ROAD FROM 67TH AVE TRAVELING 50MPH IN A 40MPH ZONE. A TRAFFIC STOP WAS CONDUCTED. AFTER DEF. WAS CONTACTED HE WAS NOT ABLE TO PROVIDE I.D. DEF. WAS THEN ASKED TO EXIT THE VEHICLE FOR THE CRIMINAL VIOLATION OF OPERATOR FAIL TO PROVIDE I.D.

AFTER DEF. PROVIDED HIS INFO A RECORDS CHECK WAS CONDUCTED AND HE WAS FOUND TO HAVE NO VALID DRIVERS LICENSE. DEF. WAS THEN SEARCHED AND FOUND TO HAVE A SMALL AMOUNT OF METH IN HIS RIGHT FRONT COIN POCKET TUCKED INSIDE A DOLLAR BILL. AFTER CONTINUING THE SEARCH A SMALL CLEAR PLASTIC BAGGY CONTAINING COCAINE WAS FOUND IN DEF. FRONT LEFT PANTS POCKET. DEF. WAS THEN PLACED IN CUSTODY AND TRANSPORTED TO THE MARYVALE PRECINCT. DEF. CHARGED WITH POSSESSION OF NARCOTIC DRUGS AND POSSESSION OF DANGEROUS DRUGS AND POSSESSION OF DRUG PARAPHERNALIA.

**C. OTHER INFORMATION (Check if applicable)**

1.  Defendant is presently on probation, parole or any other form of release involving other charges or convictions:  
Explain:

Michael K Jeanes, Clerk of Court  
\*\*\* Electronically Filed \*\*\*  
Rachel Krane  
7/2/2013 4:31:00 PM  
Filing ID 5325037

2. List any prior Arrests?

Convictions?

F.T.A.'s?

3. Is there any indication the defendant is:

- An Alcoholic?  An Addict?  
 Mentally disturbed?  Physically Ill?

4.  Defendant is currently employed  
With whom

How long:

5. Where does the defendant currently reside? 8422 WEST ROMA AVENUE PHOENIX, AZ 85037

With whom

How long: \_\_\_\_\_years \_\_\_\_\_months \_\_\_\_\_days

6. What facts indicate the defendant will flee if released?  
Explain:

7. What facts does the state have to oppose an unsecured release? Explain:

**D. CIRCUMSTANCES OF THE OFFENSE(Check if applicable)**

1.  Firearm or other weapon was used  
Type:

Someone was injured by the defendant

Medical attention was necessary

Nature of injuries: N/A

2.  Someone was threatened by the defendant  
Nature and extent of threats:

3. If property offense, value of property taken or damaged:

Property was recovered

4. Name(s) of co-defendant(s):

**E. CRIMES OF VIOLENCE**

1. Relationship of defendant to victim:

Victim(s) and defendant reside together

2. How was the situation brought to the attention of the police?

Victim  Third Party  Officer observed

3.  There are previous incidents involving these same parties  
Explain:

4. Is defendant currently the subject of:

An order of protection  Any other court order

Injunction against harassment

Explain:

**F. DOMESTIC VIOLENCE ISSUES (Check if applicable)**

Defendant's actions

- Threats of homicide/suicide/bodily harm
- Control/ownership/jealousy issues  Crime occurs in public
- Prior history of DV  Kidnapping
- Frequency/intensity of DV increasing  Depression
- Access to or use of weapons  Stalking behavior
- Violence against children/animals
- Multiple violations of court orders

**G. CIRCUMSTANCES OF THE ARREST (Check if applicable)**

1. Did the defendant attempt to:

Avoid arrest  Resist arrest  Self Surrender

Explain:

N/A

2.  Defendant was armed when arrested

Type:

3.  Evidence of the offense was found in the defendant's possession

Explain: DEF. HAD METH IN HIS RIGHT FRONT COIN POCKET

4. Was the defendant under the influence of alcohol or drugs at the time of the offense?

Yes  No  Unk

**H. DRUG OFFENSES**

1. If the defendant is considered to be a drug dealer, please state the supporting facts:

2. What quantities and types of illegal drugs are directly involved in the offense? COCAINE AND METH

Drug field test completed

Defendant admission of drug type  
Approximate monetary value: \$50.00

3. Was any money seized?

Yes  No

Amount: \$

**I. ADDITIONAL INFORMATION**

**1. Military Service:**

Has the defendant served in the military services of the United States?  Yes  No  Unknown

If yes, currently on active duty?  Yes  No

Branches Served In: \_\_\_\_\_  
(AF - Air Force AR - Army CG - Coast Guard MC - Marine Corp  
MM - Merchant Marines NG - National Guard NV - Navy  
RS - Reserves)

**2. Is the defendant homeless?**

Yes  No  Unknown

\*\*If a fugitive arrest, a Form IVA must also be completed\*\*

I certify that the information presented is true to the best of my knowledge.

MESCHNARK, RAYMOND/8389  
ARRESTING OFFICER/SERIAL NUMBER

AZ0072300/602-495-5008  
ARREST AGENCY/DUTY PHONE NUMBER

2013-06-29  
DATE

201301147982/AZ0072300  
DEPARTMENTAL REPORT NO.

/  
DEPARTMENTAL REPORT NO.

/  
DEPARTMENTAL REPORT NO.

# PRETRIAL SERVICES AGENCY REPORT

State of Arizona vs. HECTOR SEBASTIAN NUNEZ-DIAZ

Booking #: P985421

Reviewed By: Tania L Newman-Juarez

IA Type: Superior Court New Case

Interview Type: Full

Superior Court of Arizona, at 01:17 PM on 06/29/2013

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## SUMMARY

Final Risk Score:	11	Interview Refused/Unfit:	No
Final Risk Level:	1	Prior FTA:	None
Highest Severity ARS Code:	13-3407A1 DANGEROUS DRUG-POSS/USE	Prior Felony Convictions:	None
Class Felony:	F4	Resides Alone:	Hector Nunez/Maricela Diaz
Indigence Selection:	Defendant is indigent	Weapons Used:	No
		Injury to Victim:	No

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**Open Cases:** Case# : None

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## NOTES AND OTHER INFORMATION

### Holds:

Immigration Yes  
None

### Statuses:

Substance Abuse Yes  
Interpreter Spanish  
ADA Needs  
Hold Yes  
10 Fingerprint Needed Yes

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**Notes:** ICE hold

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## RECOMMENDATIONS

**Recommendation Level:** Release Own Recognizance

**Special Conditions:**

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### **Additional Recommendations:**

#### **Contact**

You are not to return to the scene of the alleged crime  
You are not to initiate contact with the arresting officers

#### **Prohibitions**

You are not to possess any weapons  
You are not to possess any drugs without a valid prescription  
You are not to possess or consume any alcohol  
You are not to drive a motor vehicle without a valid driver's license

# PRETRIAL SERVICES AGENCY FINANCIAL INFORMATION

Defendant's Name: HECTOR SEBASTIAN NUNEZ-DIAZ

Booking #: P985421

The Judicial Officer needs to know about your financial situation in determining whether to require you to post bond and, if so, the amount of bond. The Judicial Officer must also determine if you are entitled to have a lawyer appointed to represent you.

Number of Dependents:	1		
Employment/Student/Caregiver Status:	Employed/Full Time		
Employment Verified:	No	Occupation :	packing
Employment Status:	Current	Length of Employment :	5 Years
Employer Name:	Terramar Staffing		

**Income (Monthly):**

Pay Amount:	\$1,200.00
Payroll Deductions for Savings, Stocks, etc.:	
Spouse Income:	
Public Assistance/Food Stamps:	
Disability Benefits:	
Veteran Benefits:	
Social Security Benefits:	
Accident Benefits:	
Retirement Benefits:	
Allotment Checks(Tribal):	
Interest:	
Dividends:	
Child Support Received:	
Alimony Or Maintenance Received:	
Unemployment Benefits:	
Other Income:	
<b>Net Income:</b>	<b><u>\$1,200.00</u></b>

**Expense (Monthly):**

Rent / Home Payment:	\$300.00
Utilities:	
Food:	\$100.00
Gas:	\$640.00
Cell Phone:	\$55.00
Cable:	\$0.00
Charge Account Payments:	\$0.00
Loan Payments:	\$0.00
Car Loan Payments:	\$30.00
Car Insurance:	\$80.00
Child Support:	\$0.00
Medical Care:	\$0.00
Court Fines and Fees:	\$0.00
Alimony:	\$0.00
Child Care:	\$0.00
Union Dues:	
Other Expense:	
Delinquent Expense:	
<b>Total Expenses:</b>	<b><u>\$1,205.00</u></b>

**Asset:**

Cash Asset:	\$0.00
Checking Amount:	\$400.00
Savings Amount:	\$0.00
Cash Owed To This Person:	\$0.00
Cash Value Of Stock Or Bonds:	
Value: \$0.00 Owed: \$0.00 Net:	\$0.00
Real Estate Location: 0	
Value: \$0.00 Owed: \$0.00 Net:	\$0.00
Automobile 1: Dodge Avon '08	
Value: \$12,000.00 Owed: \$6,000.00 Net:	\$6,000.00
Automobile 2:	
Value: \$0.00 Owed: \$0.00 Net:	\$0.00
Trailer: 0	
Value: \$0.00 Owed: \$0.00 Net:	\$0.00
Boat: 0	
Value: \$0.00 Owed: \$0.00 Net:	\$0.00

**Asset (Continued):**

Stereos:	\$0.00
Televisions:	\$0.00
Musical Instruments:	\$0.00
Stock In Trade:	\$0.00
Tools:	\$0.00
Jewelry:	\$0.00
Jail Property:	\$41.00
Other Assets:	
<b>Total Assests:</b>	<b><u>\$6,441.00</u></b>

# PRETRIAL SERVICES AGENCY FINANCIAL INFORMATION

Defendant's Name: HECTOR SEBASTIAN NUNEZ-DIAZ

Booking #: P985421

The Judicial Officer needs to know about your financial situation in determining whether to require you to post bond and, if so, the amount of bond. The Judicial Officer must also determine if you are entitled to have a lawyer appointed to represent you.

Number of Dependents: 1  
Employment/Student/Caregiver Status: Employed/Full Time  
Employment Verified: No Occupation : packing  
Employment Status: Current Length of Employment : 5 Years  
Employer Name: Terramar Staffing

**Acknowledgement by Defendant**

**OATH UNDER PENALTY OF PERJURY: I have truthfully given the information, which appears in this statement. I have not concealed, or in any way misrepresented my financial resources. I am aware that I can be held in contempt of court or prosecuted for perjury, if I made any false statements. If the Public Defender or a court appointed attorney accepts my case, I will notify them of any changes in financial resources, employment, income or re-arrest. I also give permission for the Pretrial Services Agency staff to contact anyone named above or any agency or business concerning their investigation into the statement I made. I hereby make these statements under oath.**

HECTOR SEBASTIAN NUNEZ-DIAZ

---

**HECTOR SEBASTIAN NUNEZ-DIAZ**

STATE OF ARIZONA, COUNTY OF MARICOPA  
RELEASE QUESTIONNAIRE SUPPLEMENTAL - PROP 100 QUESTIONS

DEFENDANTS NAME: HECTOR NUNEZ-DIAZ DOB: 08/04/86 BOOKING NO \_\_\_\_\_  
ALIASES: \_\_\_\_\_ CASE NO. \_\_\_\_\_

1. Is the alleged offense a class 1, 2, 3, or 4 felony or a violation of A.R.S. 28-1383?

YES                       NO                       UNKNOWN

If yes, as to guilt, proof is evident or presumption is great for the following reasons. Explain in detail (e.g., arresting officer or other law enforcement officers witnessed offense, physical evidence directly connects defendant to offense, multiple eyewitnesses, defendant admissions, victim statements, nature of injuries, incriminating photographic, audio, visual, or computer evidence, defendant attempted to flee or resist arrest).

SEE ATTACHED

2. Has the person entered or remained in the United States illegally?

YES                       NO                       UNKNOWN

If yes, probable cause is established for the following reasons. Explain in detail (e.g., admission of the person, statements of codefendants at the time of arrest, verification of illegal presence, information provided at the issuance of a warrant in conjunction with a direct complaint or grand jury proceeding establishes illegal presence).



Bk#: P985421  
NUNEZ-DIAZ, HECTOR SEBASTION  
Bk Dt: 6/29/2013  
8/4/1986                      Sex: Male                      v3

I certify that the information presented is true to the best of my knowledge.

SELVUS 8745  
ARRESTING OFFICER / SERIAL NUMBER

PHOENIX 602 495-5008  
ARREST AGENCY / DUTY PHONE NUMBER

06/29/13  
DATE

IN THE SUPERIOR COURT  
OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA

vs.

Hector Sebastian Nunez Diaz

DOB: Aug. 4, 1986

Booking No. 0985421

Defendant

SUPERIOR COURT CASE # CR 2013-430489-001

WAIVER OF PRELIMINARY HEARING  
WITH PLEA AGREEMENT

PAGE 1 OF 2

13 JUL 22 PM 4:18

FILED  
M. Caswell  
MICHAEL R. JENNINGS, CLERK  
JEP

DECLARATION by defendant as follows

Defendant is represented by his/her attorney

*Julia Caswell* 021578

I hereby voluntarily waive my right to a preliminary hearing understanding that I will be held to answer and an information will be filed charging me with having committed:

Count 1: Possession or Use of Dangerous Drugs, a class 4 felony;

Count 2: Possession of Narcotic Drugs, a class 4 felony;

Committed on June 29, 2013

This is a non dangerous, non repetitive offense under the criminal code.

I understand and acknowledge that:

- A. I have a right to a preliminary hearing.
- B. I am represented by an attorney now. Further, I know I have a right to an attorney for all further proceedings in this case. If I cannot afford one, then one will be appointed to represent me at this preliminary hearing as well as in the Superior Court for all purposes including trial, free of charge.
- C. I am giving up the right to confront and cross-examine witnesses.
- D. I am giving up the right to present evidence in my behalf and that I am giving up the right to have the magistrate determine if there is sufficient evidence against me to establish probable cause to hold me to answer in the Superior Court on the above stated charges, as well as the right to a dismissal of charges against me if the evidence is insufficient.

1. The State of Arizona and the defendant hereby agree to the following disposition of this case:

Plea: The defendant agrees to waive the preliminary hearing and plead guilty to: Count 1 (as amended): Possession of Drug Paraphernalia, a class 6 undesignated felony, in violation of A.R.S. §§13-3401, 13-3407, 13-3415, 13-3418, 13-610, 12-269, 13-701, 13-702, 13-801, 13-707, 13-802, 13-901.01(D), and 13-901.01(H)(4), committed on June 29, 2013.

This is a non dangerous, non repetitive offense under the criminal code.

Terms: On the following understandings, terms, and conditions:

The crime carries a presumptive sentence of 1.0 years; a minimum sentence of 0.5 years (0.33 years if trial court makes exceptional circumstances finding); and a maximum sentence of 1.5 years (2.0 years if trial court makes exceptional circumstances finding). Probation is available. Restitution of economic loss to the victim and waiver of extradition for probation revocation procedures are required. The maximum fine that can be imposed is \$150,000 plus an 83% surcharge plus \$20 probation surcharge, plus a \$13 assessment pursuant to ARS 12-116.04 (for crimes occurring on/after 07/20/2011), plus \$15 assessment pursuant to ARS 13-3423 (for crimes occurring on or after 08/02/12). If the defendant is sentenced to prison, the defendant shall also be sentenced to serve a term of community supervision equal to one-seventh of the prison term to be served consecutively to the actual period of imprisonment. If the defendant fails to abide by the conditions of community supervision, the defendant can be required to serve the remaining term of community supervision in prison. Special conditions regarding sentence, parole, or commutation imposed by statute (if any) are: If the Defendant is eligible for sentencing under ARS §13-901.01, the court shall require participation in an appropriate drug treatment or education program. Defendant shall submit to DNA testing for law enforcement purposes pursuant to A.R.S. §13-610. If offense is designated a misdemeanor, the maximum penalty is six months jail plus a fine of \$2,500 plus an 84% surcharge.

83%<sub>10</sub>

2. The parties stipulate to the following additional terms: The defendant shall be placed on unsupervised probation with compliance monitoring. The Defendant shall pay a fine of \$750 plus an 83% surcharge for a total fine of \$1372.50. The offense shall not be designated a misdemeanor unless or until the defendant successfully completes all terms of probation.

3. The following charges are dismissed, or if not yet filed, shall not be brought against the defendant: Count(s) 2.



vs.  
**HECTOR SEBASTIAN NUÑEZ DIAZ**  
DOB: Aug- 4, 1986  
Booking No.                       
Defendant                       
                    9995421

4. This agreement serves to amend the complaint or information, to charge the offense to which the Defendant pleads, without the filing of any additional pleading. However, if the plea is rejected by the court or withdrawn by either party, or if the conviction is subsequently reversed, the original charges and any charges that are dismissed by reason of this plea agreement are automatically reinstated.

5. If the Defendant is charged with a felony, he hereby waives and gives up his rights to a preliminary hearing or other probable cause determination on the charges to which he pleads. The Defendant agrees that this agreement shall not be binding on the State should the Defendant be charged with or commit a crime between the time of this agreement and the time for sentencing in this cause: nor shall this agreement be binding on the State until the State confirms all representations made by the Defendant and his attorney, to-wit: Defendant avows to having no more than 0 prior felony convictions and that (s)he was NOT on felony probation, release, parole, or community supervision at the time of this offense. The Defendant is not eligible for sentencing pursuant to A.R.S. 13-901.01 (Proposition 200). Defendant further avows that (s)he has no other pending felony matters in any jurisdiction. If the Defendant fails to appear for sentencing, the court may disregard the stipulated sentence and impose any lawful sentence which is the same as or exceeds the stipulated sentence in the plea agreement. In the event the court rejects the plea, or either the State or the Defendant withdraws the plea, the Defendant hereby waives and gives up his right to a preliminary hearing or other probable cause determination on the original charges.

6. Unless this plea is rejected by the court or withdrawn by either party, the Defendant hereby waives and gives up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement. By entering this agreement, the Defendant further waives and gives up the right to appeal.

7. The parties hereto fully and completely understand and agree that by entering into a plea agreement, the defendant consents to judicial fact-finding by preponderance of the evidence as to any aspect or enhancement of sentence and that any sentence either stipulated to or recommended herein in paragraph two is not binding on the court. In making the sentencing determination, the court is not bound by the rules of evidence. The State's participation in this plea agreement is conditional upon the Court's acceptance its terms conditions or provisions. If after accepting this plea the court concludes that any of the plea agreement's terms conditions or provisions regarding the sentence or any other aspect of this plea agreement are inappropriate, it can reject the plea. If the court decides to reject any of the plea agreement's terms conditions or provisions, it must give both the state and the Defendant an opportunity to withdraw from the plea agreement. Should the Court reject this plea agreement, or the State withdraws from the agreement, the Defendant hereby waives all claims of double jeopardy and all original charges will automatically be reinstated. The Defendant in such case waives and gives up his/her right to a probable cause determination on the original charges.

8. I understand that if I am not a citizen of the United States that my decision to go to trial or enter into a plea agreement may have immigration consequences. Specifically, I understand that pleading guilty or no contest to a crime may affect my immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. My plea or admission of guilt could result in my deportation or removal, could prevent me from ever being able to get legal status in the United States, or could prevent me from becoming a United States citizen. I understand that I am not required to disclose my legal status in the United States to the court.

9. If the court decides to reject the plea agreement provisions regarding sentencing and neither the State nor the Defendant elects to withdraw the plea agreement, then any sentence either stipulated to or recommended herein in paragraph 2 is not binding upon the court, and the court is bound only by the sentencing limits set forth in paragraph 1 and the applicable statutes.

10. This plea agreement in no way restricts or limits the ability of the State to proceed with forfeiture pursuant to A.R.S. §§13-4301 et seq.; 13-2314 or 32-1993, if applicable. Nor does the plea agreement in any way compromise or abrogate any civil action, including an action pursuant to A.R.S. § 13-2301 et seq. or the provisions of A.R.S. §§ 13-2314(G) or 13-4310.

*I have read and understand the provisions of pages one and two of this agreement. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading GUILTY I will be waiving and giving up my right to a determination of probable cause, to a trial by jury to determine guilt and to determine any fact used to impose a sentence within the range stated above in paragraph one, to confront, cross-examine, compel the attendance of witnesses, to present evidence in my behalf, my right to remain silent, my privilege against self-incrimination, presumption of innocence and right to appeal. I agree to enter my plea as indicated above on the terms and conditions set forth herein. I fully understand that if, as part of this plea agreement, I am granted probation by the court, the terms and conditions thereof are subject to modification at any time during the period of probation. I understand that if I violate any of the written conditions of my probation, my probation may be terminated and I can be sentenced to any term or terms stated above in paragraph one, without limitation.*

I have personally and voluntarily placed my initials in each of the above boxes and signed the signature line below to indicate I read and approved all of the previous paragraphs in this agreement, both individually and as a total binding agreement.

Date 7/22/13 Defendant Héctor Nuñez Díaz  
I have discussed this case with my client in detail and advised him of his constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

Date 7/22/13 Defense Counsel Julia Conells 021578

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interest of justice.

Date 7/22/13 Prosecutor epidicone 029097

7-24-13 8:00am

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2013-430489-001 DT

07/22/2013

COMMISSIONER PHEMONIA L. MILLER  
FOR COMMISSIONER MONICA GARFINKEL

CLERK OF THE COURT  
M. Cabral  
Deputy

STATE OF ARIZONA

HEATHER LEE KIRKA

v.

HECTOR SEBASTION NUNEZ-DIAZ (001)  
DOB: 08/04/1986

JULIA CASSELS

APO-SENTENCINGS-CCC  
APPEALS-CCC  
CITS - CCC SPANISH  
DISPOSITION CLERK-CSC  
RFR

SUSPENSION OF SENTENCE - UNSUPERVISED PROBATION

11:04 a.m.

Courtroom 2A - South Court Tower

State's Attorney: Casey Mundell for Heather Kirka  
Defendant's Attorney: Julia Cassels  
Defendant: Present  
Interpreter: Fernando Venegas

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Let the record reflect prior to the proceeding, Fernando Venegas is sworn to act as interpreter of the Spanish language.

Count(s) 1: WAIVER OF TRIAL: The Defendant knowingly, intelligently and voluntarily waived all pertinent constitutional and appellate rights and entered a plea of guilty.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2013-430489-001 DT

07/22/2013

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 1 (Amended): Possession of Drug Paraphernalia  
Class 6 Undesignated Felony  
A.R.S. § 13-3401, 13-3407, 13-3415, 13-3418, 13-610, 12-269, 13-701, 13-702, 13-801,  
13-707, 13-802, 13-901.01(D) and 13-901.01(H)(4)  
Date of Offense: June 29, 2013  
Non Dangerous - Non Repetitive

IT IS ORDERED suspending imposition of sentence and placing defendant on  
Unsupervised Probation to be monitored by the Adult Probation Department (APD) in  
accordance with APD's Compliance Monitoring Standards:

Count 1 Probation Term: 18 months

To begin 07/22/2013.

Conditions of probation include the following:

Condition 11 - Actively participate and cooperate in the following program(s):

Substance Abuse Counseling

Condition 15: Restitution, Fines and Fees:

FINE: Count 1 - Total amount of \$1372.50, which includes surcharges of 83%, monthly  
payment and beginning date to be determined by the Adult Probation Department.

Fine is to be paid to the Arizona Drug Enforcement Fund.

Count 1: Time payment fee pursuant to A.R.S. § 12-116 in the amount of \$20.00 payable  
on a date to be determined by the Adult Probation Department.

PENALTY ASSESSMENT - A.R.S. §12-116.04: Count 1 - \$13.00 payable on a date to  
be determined by the Adult Probation Department.

Investigative Agency:

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2013-430489-001 DT

07/22/2013

Phoenix Police Department

Count 1: \$15.00 to the Drug Lab Remediation payable on a date to be determined by the Adult Probation Department.

All amounts payable through the Clerk of the Superior Court.

Condition 17: Complete a total of 24 hours of community restitution. Complete 5 per month. Complete these hours at a site approved by the APD.

Condition 22: Other - Defendant must show proof of completion of terms 11 and 17 no later than April 22, 2014.

IT IS FURTHER ORDERED that Defendant shall submit to fingerprint identification processing by the Maricopa County Sheriff's Office if directed to do so by the Adult Probation Department. The Adult Probation Department shall direct any Defendant placed on probation who has not already had a State Identification Number (SID) established to submit to fingerprint processing.

Defendant is advised pursuant to A.R.S. § 13-805 that failure to maintain contact with the Probation Department may result in the issuance of:

1. A criminal restitution order in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed.
2. A criminal restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered.

IT IS ORDERED granting the Motion to Dismiss the following: Count 2.

IT IS FURTHER ORDERED Defendant be released from custody for this case only.

IT IS FURTHER ORDERED that Defendant must submit to DNA testing for law enforcement identification purposes in accordance with A.R.S. §13-610.

Defendant has waived the preparation of a presentence report.

11:09 a.m. Matter concludes.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

COMMISSIONER PHEMONIA MILLER FOR  
COMMISSIONER MONICA GARFINKEL

Date: 07/22/13

CLERK OF THE COURT

M. Cabral

Deputy

No. CR 2013-430489-001

STATE v. Nunez-Diaz

Let the record reflect that the Defendant's right index fingerprint is permanently affixed to this sentencing order in open court.

(right index fingerprint)



*Phemonia L. Miller*

JUDICIAL OFFICER OF THE SUPERIOR COURT

1 JAZMIN J. ALAGHA  
2 State Bar No. 026302  
3 LAW OFFICE OF RAY A. YBARRA MALDONADO, PLC  
4 2637 N. 16<sup>th</sup> Street, Unit 1  
5 Phoenix, Arizona 85006  
6 Phone: 602-910-4040  
7 Fax: 602-910-4000  
8 jazmin@abogadoray.com

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

State of Arizona,

Plaintiff,

vs.

Hector Nunez Diaz,

Defendant

CR 2013-430489-001

***AMENDED PETITION FOR  
POST-CONVICTION RELIEF***

Petitioner, Hector Nunez Diaz, by and through counsel undersigned, hereby requests that this Court hold an evidentiary hearing and, thereafter, order his guilty plea withdrawn.

This petition is based upon Rules 32.1(a) and 32.8 of the Arizona Rules of Criminal Procedure (“ARCP”), the right to effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the United States Constitution, Article 2, Sections 3, 4 and 24 of the Arizona Constitution, his right to due process, and the following memorandum of points and authorities.

Pursuant to Rule 32.5 Counsel hereby states that every ground knowing to him for vacating judgment or sentence is contained herein.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Facts**

On June 29, 2013, Mr. Hector Nunez Diaz was arrested and charged by direct complaint on July 2, 2013 with one count of Possession of Dangerous Drugs and one count of Possession of Narcotic Drugs.

Mr. Hector Nunez Diaz notified his family who promptly retained Alcock & Associates to represent him in his pending criminal matter. During their initial consultation, Mr. Nunez-Diaz's family advised an Alcock & Associates representative that they were concerned because Mr. Nunez-Diaz was undocumented as well. They were advised that they would resolve the case in a way that would minimize any exposure and help him out in immigration court. The attorney aht they met with, Frank Carrizoza, went as far as to draw a diagram depicting the criminal and immigration process and explaining the plan that would be taken to protect Hector Nunez Diaz. Despite the fact that Mr. Carrizoza met with the family on two differnet occasions and was their point of contact, Alcock & Associates assigned Ms. Julia Cassels to represent Mr. Nunez Diaz.

Mr. Nunez-Diaz was set for a preliminary hearing in Early Disposition Court (EDC) on July 8, 2013. Ms. Cassels filed a motion to continue the preliminary hearing for two weeks due to being newly retained on the case. Commissioner Garfinkel reset the matter for a preliminary hearing on July 22, 2013.

On July 22, 2013, Mr. Nunez-Diaz was presented with a plea for the charges to be reduced to a class 6 undesignated felony in exchange for him to plead guilty to possession of drug paraphernalia. At the hearing, the standard advisement was conducted. However, prior to the formal hearing, Hector was told it was the best plea available to him and the higher charges would be dropped.

He was also under the impression that he would be referred to an immigration attorney with Alcock & Associates and they would continue to take care of his matter. The plea was to possession of drug paraphernalia, a class 6 undesignated felony. This

1 plea was the original plea offered by the State. A review of the file does not indicate,  
2 Ms. Cassels, or any other attorney from her office, submitted any deviation request or  
3 alternative plea given Mr. Nunez-Diaz immigration considerations.

4 Additionally, the file does not indicate that Hector Nunez Diaz properly advised  
5 of the immigration consequences. There are simply, no notes in this matter. As such,  
6 there is no indication that Ms. Cassels advised him of the immigration consequences  
7 and despite the original consideration and goals, i.e. to preserve his ability to fight his  
8 immigration case in immigration court, were ignored.

9 To the contrary, Alcock and Associates were repeatedly told about the priorities  
10 and immigration considerations in the representation of the case. Such considerations  
11 were flat out ignored. *See Exhibit A. Affidavit of Maria Josefina Nunez Diaz; also*  
12 *Exhibit B. Affidavit of Hector Nunez Martinez.*

13 Maria Josefina Nunez Diaz, sister of Hector Nunez Diaz, acted as his spokesperson  
14 in Mr. Nunez Diaz case. She signed the formal contract and met with the attorneys on at  
15 least three occasions, each time reiterating the immigration concerns of her brother. She  
16 met with attorneys from Alcock and Associates on July 1, 2013 and July 5, 2013, each  
17 time told that they would take care of any immigration concerns. *Exhibit A. Affidavit of*  
18 *Maria Josefina Nunez Diaz*, at 1 para. 1& 7. Additionally, these concerns were addressed  
19 prior to the entry of any plea with lead counsel, Ms. Cassels. *Exhibit A. Affidavit of*  
20 *Maria Josefina Nunez Diaz*, at 2 para. 11-13. Again, the family was assured that they  
21 need not worry since the charges would be minimal it would not affect Mr. Nunez Diaz  
22 immigration situation. *Exhibit A. Affidavit of Maria Josefina Nunez Diaz*, at 2 para. 13.  
23 Hector Nunez Martinez, father of Hector Nunez Diaz, was present when these assurances  
24 were made. *See Exhibit B. Affidavit of Hector Nunez Martinez* at 1 para. 5; 2 at para. 11

25 Most notably, Ms. Cassels acknowledges that she had direct knowledge of Mr.  
26 Hector Nunez Diaz immigration consequences. In her own words, she addresses the  
court at the time of sentencing regarding Mr. Nunez Diaz and the families desire to keep



1 fighting the case despite the fact that Mr. Nunez Diaz' immigration fate was destined for  
2 failure upon signing the plea.

3 At sentencing the following exchange takes place:

4 THE COURT: Ms. Cassels?

5 MS. CASSELS: Yes, Your Honor. We'd ask that you place Mr. Nunez-Diaz on a  
6 short term of unsupervised probation.

7 I'd also ask that you allow the probation department to make a determination as  
8 to when payment on the fines should begin, given that Mr. Nunez-Diaz is in a little bit of  
9 limbo as to what his custody status will be in the next little bit here.

10 His family is present in the courtroom, they're in about the middle row there. And  
11 they're very concerned about him, and they'll do everything they can to assist him once  
12 he's released.

13 Change of Plea Transcript, State of Arizona v. Hector Sebastian Nunez Diaz, CR2013-  
14 430489-001, p. 11 (previously submitted.)

15 Moreover, Ms. Cassels makes these remarks and alludes to the fact that Mr.  
16 Nunez Diaz may have a fighting chance at immigration, knowing that no such research  
17 or defensive actions were taken to protect Mr. Nunez Diaz's exposure. Similar insight  
18 into the communications between Ms. Cassels and Mr. Nunez Diaz is evidenced in the  
19 transcript when Mr. Nunez Diaz informs the court that he would like to be released.  
20 Change of Plea Transcript, State of Arizona v. Hector Sebastian Nunez Diaz, CR2013-  
21 430489-001, p. 12 ("Well, I ask for forgiveness for everyone. I am remorseful and I learn  
22 my lesson. And I would like to be released. That's all.") (Previously submitted.)

23 Upon returning to Maricopa County Jail, Hector Nunez Diaz was processed  
24 through the Immigration and Customs Enforcement 287(g) officer and was transferred to  
25 the Eloy Detention Center. Hector Nunez Diaz' family hired Jillian Kong-Sivert, Esq. to  
26 represent him in removal proceedings. Counsel advised Hector Nunez Diaz that he was  
unfortunately ineligible for immigration bond as he was subject to mandatory detention

1 under the Immigration and Nationality Act (“INA”) §236(c) due to his plea he took. The  
2 reason that he was ineligible for bond and subject to mandatory detention was because a  
3 conviction for possession of drug paraphernalia is classified as a “controlled substance  
4 offense” under the immigration laws of the United States. Under INA §236(c), an  
5 individual with a controlled substance offense conviction is subject to mandatory  
6 detention and an immigration judge is jurisdictionally barred from granting bond. See  
7 *§INA 236(c)*.

8 Had immigration considerations been considered in plea negotiations, however,  
9 Mr. Nunez Diaz could have pled to Solicitation to Possess Marijuana as opposed to  
10 actual possession, he would have been eligible for bond as a “solicitation” offense is not  
11 considered to be a controlled substance offense for purposes of mandatory detention. See  
12 *Coronado Durzao v. INS*, 123 F.3d 1322, 1326 (9<sup>th</sup> Cir. 1997). Moreover, a conviction for  
13 drug paraphernalia renders Mr. Nunez Diaz ineligible for various potential remedies.

14 A. Ms. Cassels should have been aware of the fact that a conviction for  
15 possession of paraphernalia would have a severe impact on Hector’s Nunez  
16 Diaz immigration status in this country.

17 Ms. Cassels should have been aware of the severe impact, including deportation  
18 and subjection to man datory detention, that a plea to drug paraphernalia would have  
19 on Mr. Nunez Diaz for two reasons. First, Ms. Cassels firm, Alcock and Associates  
20 employs three full-time immigration attorneys, Katie Sarreshteh, Claudia Lopez, and  
21 Jordan Clegg (who ultimately reviewed Mr. Nunez Diaz file post-conviction and who was  
22 immediately able to spot that such a conviction would secure his deportation). See  
23 Exhibit C. Alcock and Associates website (attorney printout), [www.alcocklaw.com](http://www.alcocklaw.com)

24 Second, the availability of such information is readily available. A free legal chart  
25 regarding immigration consequences prepared in part by the Maricopa County Office of  
26 the Public Defender is widely available among criminal lawyers in Maricopa County.  
This chart clearly indicates that A.R.S. 13-3405 (Possession of Drug Paraphernalia)

1 is "NOT A SAFE PLEA; will have severe consequences and cause both deportability  
2 and inadmissibility...." See *Excerpt from Quick Reference Chart and Annotation for*  
3 *Determining Immigration Consequences of Selected Arizona Offences*, p. 15, Exhibit D  
4 (emphasis in original).

5 In addition, Mr. Nunez Diaz is not eligible for state rehabilitative relief under the  
6 Federal First Offender's Act as this relief was discontinued for immigration cases in the  
7 9<sup>th</sup> Circuit by the Court's holding in *Nunez-Reyes v. Holder* on July 14, 2011. See, *Nunez-*  
8 *Reyes v. Holder*, 602 F.3d 1102, 1104 (9<sup>th</sup> Cir. 2011)(overruling *Lujan-Armendariz v.*  
9 *INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) for purposes of convictions received on or after July 14,  
10 2011.)

11 B.The plea to drug paraphernalia recommended by Ms. Cassels had  
12 severals5yjtyui9] negative immigration consequences not known to Mr.  
13 Nunez Diaz at the time he':signed the plea

14 Upon being transferred to immigration custody, the U.S. Department of Homeland  
15 Security determined that Mr. Nunez Diaz was to be held detained, without bond, pending  
16 the outcome of his immigration proceedings. Subsequently, Ms. Jillian Kong Sivert was  
17 able to avoid his deportation and secured a voluntary departure/return in his case. Mr.  
18 Nunez Diaz outside the United States awaiting disposition of this matter so that he may  
19 reopen his immigration proceedings and re-enter the United States some day in the future.

20 As a direct result of Mr. Nunez Diaz plea, which was accepted on the advice of his  
21 attorney, he is out of the country and away from his family for the last year. This could  
22 have been remedied by a plea to Solicitation to Possess a Controlled Substance rather  
23 than possession of drug paraphernalia. A review of the formal file as received per the  
24 orders of this Court gives no indication that any of this information was reviewed or that  
25 Ms. Cassels requested this alternative plea from the State. Likewise, the file provides no  
26 indication that Mr. Nunez Diaz was affirmatively advised of the severe consequences the  
plea would have on his immigration status, which was priority, and that he knowingly and  
voluntarily chose to take that plea and ignore such consequences.

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**II. Issue**

Whether, under the prevailing professional norms of this community, Ms. Julia Cassels, rendered ineffective assistance of counsel to Mr. Nunez Diaz during the plea process by failing to provide specific advice about the immigration consequences of the resulting conviction and whether the court erred in not individually advising him of the possible immigration consequences of the criminal conviction.

**III. Law and Arguments**

**A. General Principles Governing PCRs**

A petition for post-conviction relief (“PCR”) provides a remedy for constitutional error during the plea process. *See McMann v. Richardson*, 397 U.S 759, 90 S.Ct. 1441 (1970). An allegation of ineffective assistance of counsel is encompassed in ARCP Rule 32.1; a claim that the defendant’s conviction was the result of ineffective assistance is a violation of both the United States and Arizona Constitutions. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (Ariz. App. 1995); *State v. Febles*, 210, Ariz. 589,595, 115 P.3d 629, 636 (Ariz. App. 2005).

In order to be entitled to an evidentiary hearing on a Rule 32 petition, the petitioner must present a “colorable claim for relief.” *State v. Puls*, 176 Ariz. 273, 275, 860 P.2d 1326, 1328 (Ariz. App. 1993). A colorable claim is one which, if the allegations are true, might have changed the outcome of the trial verdict. *Id.* In short, it is a claim that, factually, has the appearance of validity. *State v. Verdugo*, 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (Ariz. App. 1995).

If an evidentiary hearing is granted, the burden is on the petitioner to prove the actual allegations by a preponderance of the evidence. *Id.* A PCR is addressed to the sound discretion of the trial court, and there is a strong presumption that counsel acted reasonably competently. *Herrera, supra*, at 647 and 1382, *Febles, supra*, at 596 and 636; *see also, Strickland v. Washington*, 466 U.S. 668, 689 (1984). There is no question that

1 the constitutional right to counsel is the right to **effective** counsel, whether that counsel is  
2 appointed or retained. *United States v. Cronin*, 466 U.S 648, 654 (1984); *Strickland*,  
3 *supra*, at 685-686, 690.

4 The proper measure of an attorney's performance is "reasonableness under  
5 prevailing professional norms." *Id.* In *State v. Ysea*, the Arizona Supreme Court held that:

6 Under Arizona law, a finding of ineffective assistance of counsel  
7 requires that a defendant show: (1) trial counsel performed  
8 deficiently under prevailing professional norms; and (2) counsel's  
9 deficiency prejudiced the defendant. [Citations omitted.] A  
defendant who makes both of these showing is entitled to have his or  
her conviction reversed. [Citation omitted.]

10 *State v. Ysea*, 191 Ariz. 372, 377, 956 P.2nd 499, 504 (1998). In addition, the United  
11 States Supreme Court has held that a fair trial is imperative:

12 in giving meaning to the requirement...we must take its purpose-  
13 to ensure a fair trial- as the guide. The benchmark for judging any  
14 claim of ineffectiveness must be whether counsel's conduct so  
15 undermined the proper functioning of the adversarial process that the  
trial cannot be relied on as having produced a just result.

16 *Strickland, supra*, at 692-693.

## 17 **B. Legal Arguments**

18 Mr. Nunez diaz has established a colorable claim that he was denied effective  
19 assistance of counsel during the plea proceedings in this case. In *Padilla v. Kentucky*, the  
20 United States Supreme Court held that, "counsel must inform her client whether his plea  
21 carries a risk of deportation." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010).

22 In the present case, Ms. Cassels file provides no indication that Mr. Nunez Diaz  
23 was properly advised of the immigration consequences of the plea and that he chose to  
24 voluntarily and knowingly ignore and/or accept such consequences and take the plea  
25 to drug paraphernalia anyway. Indeed, the file is void of any documentation that such  
26 consequences were ever addressed via independent legal research, consultations with one

1 of the three fulltime immigration attorneys in Ms. Cassels firm, or via the Immigration  
2 Consequences Handbook.

3 No action appears to be have been taken to fully advise Mr. Nunez Diaz of the  
4 clear immigration consequences that would result as the file is void of any documentation  
5 whatsoever.

6 The relevant portion of the Immigration and Nationality Act relating to convictions  
7 for controlled substance offenses clearly states that such a conviction will have serious  
8 consequences. 8 U.S.C §1182(a)(2)(A)(i) states that, “any alien convicted of, or who  
9 admits having committed, or who admits committing acts which constitute the essential  
10 elements of – (II) a violation (or a conspiracy or attempt to violate) any law or regulation  
11 of a State, the United States, or any foreign country relation to a controlled substance (as  
12 defined in section 802 of title 21) is inadmissible.”

13 The plain language of the statute is clear – an alien is inadmissible for a controlled  
14 substance conviction. Further, binding 9th Circuit precedent clearly indicates that a plea  
15 to Solicitation to Possess Marijuana will shield an alien from the adverse consequences  
16 of deportation and mandatory detention that ordinarily stem from a controlled substance  
17 violation. *See Coronado Durazo, supra.*

18 Had Ms. Cassels made a diligent inquiry into Mr. Nunez Diaz’s immigration  
19 situation and advised him of the preclusive effect on relief of this conviction, the outcome  
20 would have been different and Mr. Nunez Diaz would be not have been eligible for a  
21 bond and potentially other remedies before the immigration court. Here, Ms. Cassels did  
22 not even request any other plea than the first plea offered. She did not request a plea to  
23 Solicitation to Possess a Narcotic Substance from the County Attorney’s Office. Had  
24 she done so, there is a good chance that the plea would have been modified as the county  
25 attorney regularly offers pleas to Solicitation to Possess a Narcotic Substance in first time  
26 possession cases.

1 Had Ms. Cassels complied with the prevailing norms of the legal community, she  
2 would have consulted with one of the three on staff immigration attorneys at her firm  
3 and would have immediately known that a plea to drug paraphernalia would have serious  
4 negative immigration consequences. She could then have requested an alternative plea  
5 based on the advice of such attorneys and/or she could have researched 9<sup>th</sup> Circuit law  
6 regarding controlled substance offenses.

7 Had Ms. Cassels acted effectively she would have complied with Padilla and  
8 “informed her client whether the plea carries a risk of deportation.” *Padilla v. Kentucky*,  
9 *supra*. Instead, she made an affirmative representation to Mr. Nunez Diaz that the plea  
10 would not have significant immigration consequences. This affirmative representation  
11 rises to the level of ineffective assistance of counsel. But for this ineffective assistance  
12 of counsel, Mr. Nunez Diaz would have been eligible for a bond and could have fought  
13 his case outside of immigration custody and been alongside his family. Instead, he was  
14 subject to mandatory detention, any remedies available were significantly thwarted, and  
15 he finds himself outside the United States waiting for his case to reopen and fight his case.

16 The fact of the matter is, the conviction Ms. Cassels recommended had such severe  
17 immigration consequences (placing Mr. Nunez Diaz in deportation proceedings and being  
18 held without bond) that failing to advise him of such consequences constitutes ineffective  
19 assistance of counsel. Not giving specific advice of each of those consequences of the  
20 conviction in this case constitutes ineffective assistance of counsel pursuant to *Padilla*.  
21 Under these circumstances, it is evident that (1) trial counsel performed deficiently under  
22 prevailing professional norms; and (2) counsel’s deficiency prejudiced the defendant.  
23 Accordingly, Mr. Nunez Diaz has established a claim for ineffective assistance of counsel  
24 under the standard set forth by the Arizona Supreme Court in *State v. Ysea*, *supra* at 377.

25 Additionally, the court denied due process to Mr. Nunez Diaz in failing to  
26 individually advise Mr. Nunez Diaz of the immigration consequences of his guilty plea.  
The transcript does not mention that Mr. Nunez Diaz was advised individually of his

1 rights, nor does it contain the standard immigration warning commonly given before  
2 please of guilty are accepted by the court. The transcript states the following:

3 THE COURT: Mr. Nunez-Diaz, you were present this morning when I went over  
4 your constitutional rights and the immigration advisement; is that correct?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Do you understand your constitutional rights?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Any questions about your constitutional rights?

9 THE DEFENDANT: No, Your Honor.

10 THE COURT: Do you understand the immigration advisement?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Any questions about the immigration advisement?

13 THE DEFENDANT: No, Your Honor.

14 Change of Plea Transcript, State of Arizona v. Hector Sebastian Nunez Diaz,  
15 CR2013-430489-001, p. 8-9 (previously submitted.) The Court should have individually  
16 addressed Hector Nunez Diaz the potential immigration consequences, as opposed to  
17 simply asking him if he had any questions about a series of rights that were read to a  
18 larger group due to the fact that Mr. Nunez Diaz was under the impression that Ms.  
19 Cassels and the firm of Alcock & Associates would be formulating a plea agreement  
20 that would minimize his exposure in immigration court. Moreover, an individualized  
21 advisal would have protected the spirit and the language of the Arizona Rules of Criminal  
22 Procedure. Rule 17.2 of the Arizona Rules of Criminal Procedure states the following:

22 [b]efore accepting a plea of guilty or no contest, the court shall address the  
23 defendant **personally in open court**, informing him or her of and  
24 determining that he or she understands the following:...(f.) That if he or she  
25 is not a citizen of the United States, the plea may have immigration  
26 consequences, Specifically the court shall state, "If you are not a citizen of  
the United States., pleading guilty or no contest to a crime may affect your  
immigration status. Admitting guilt may result in deportation even if the  
charge is later dismissed. Your plea or admission of guilt could result in



1 your deportation or removal, could prevent you from ever being able to get  
2 legal status in the United States, or could prevent you from becoming a  
3 United States citizen." The court shall also give the advisement in this  
4 section prior to any admission of facts sufficient to warrant finding of guilt,  
or prior to any submission on the record. The defendant shall not be  
required to disclose his or her legal status in the United States to the court.

5 Arizona Rules of Criminal Procedure, Rule 17.2. (emphasis added). Mr. Nunez  
6 Diaz was not addressed personally, but rather in a group, which contained an undefined  
7 number of people with under undeterminable circumstances. The transcript states the  
8 following: "THE COURT: Mr. Nunez-Diaz, you were present this morning when I went  
9 over your constitutional rights and the immigration advisement; is that correct?--...."  
10 Change of Plea Transcript, State of Arizona v. Nunez Diaz, CR2013-430489-001, p. 8  
11 (previously submitted.) It is unclear how many people were in the group and whether  
12 the group advisement took place over a video screen or in open court. It is also unclear  
13 at what time the advisement took place, all is stated is that it was in the morning. The  
14 change of plea transcript lists the time that the proceeding began as 10:57 a.m.. An  
15 advisement given to Mr. Nunez Diaz in the morning, in a group, is not addressing him  
16 personally in open court and advising him of the possible immigration consequences of  
his plea as required by Rule 17.2.

#### 17 **IV. Conclusion and Requests**

18 The allegations in this petition are sufficient to raise a colorable claim of  
19 ineffective assistance of counsel during the plea proceedings and a violation of due  
20 process during the change of plea hearing. They have the factual appearance of validity,  
21 which entitles Mr. Nunez diaz to an evidentiary hearing. At the hearing, he will prove, by  
22 a preponderance of the evidence, that Ms. Cassels failed to comply with prevailing  
23 professional norms in the community by providing Mr. Nunez Diaz with specific,  
24 accurate advice about the immigration consequences of the plea agreement. He will  
25 further prove that the deficiency in counsel's performance gives rise to the reasonable  
26

1 Indeed, as a direct result of Ms. Cassel's deficiency, Mr. Nunez Diaz was placed in  
2 removal proceedings and was held without bond. As a result of Ms. Cassel's deficient  
3 performance as counsel, Mr. Nunez Diaz requests that this Court allow him to withdraw  
4 from his plea to allow him to plead to a different offense that will not place him in  
5 removal proceedings and subject him to mandatory detention.

6 Mr. Nunez Diaz is currently outside of the United States awaiting resolution of this  
7 pending post-conviction relief proceedings. As such, counsel respectfully requests that  
8 this Court set an evidentiary hearing as quickly as the Court's calendar will allow.

9 **RESPECTFULLY SUBMITTED** this 9th day of September, 2014,

10  
11 s/ Jazmin J. Alagha

12 JAZMIN J. ALAGHA, ESQ.  
13  
14

15 **DECLARATION OF HECTOR SEBASTIAN NUNEZ DIAZ**

16  
17 I, Hector Sebastian Nunez Diaz, certify under penalty of perjury that I have reviewed the  
18 petition for post-conviction relief and its attachments; I hereby certify, under penalty of  
19 perjury, that the statements as well as the affidavits and/or attachments provided in  
20 support are true and correct to the best of my knowledge.

21 Signed this 9<sup>th</sup> day of September, 2014.

22  
23 /s/  10-Sep-2014

24 HECTOR SEBASTIAN NUNEZ DIAZ  
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**CERTIFICATE OF SERVICE**

**Petition for Post-Conviction Relief and Memorandum of Points and Authorities filed electronically with the Clerk of Court, Maricopa County Superior Court this 9th day of September, 2014. Copy mailed this 10th day of September 2014 to:**

Maricopa County Attorney's Office  
Criminal Appeals - PCR  
301 West Jefferson St.  
Phoenix, AZ 85003

s/ Jazmin J. Alagha

JAZMIN J. ALAGHA, ESQ.

A

Exhibit

A

**AFFIDAVIT OF MARIA JOSEFINA NUNEZ DIAZ**

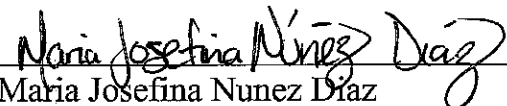
STATE OF ARIZONA     )  
  ) ss  
County of Maricopa     )

I, Maria Josefina Nunez Diaz, being first duly sworn, upon my oath, depose and say:

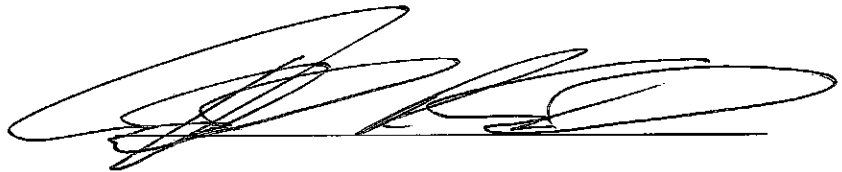
1. My Name is Maria Josefina Nunez Diaz and I am the sister of Hector Nunez Diaz.
  
2. On June 28, 2013, our family got news that my brother had been arrested and was held in custody. My father called Alcock and Associates on a Saturday and secured a consultation on Monday.
  
3. On July 1, 2013, I accompanied my father to have a consultation with Alcock and Associates. At this meeting we met with Attorney, Frank Carrizoza.
  
4. During our meeting, my father and I told Mr. Carrizoza that we were concerned because my brother did not have legal status and we wanted to protect him as much as possible.
  
5. Mr. Carrizoza looked up the case online and told us that while it may be a difficult case it was not impossible. He then proceeded to draw us a diagram of the charges to be dropped and the goals in the case. He drew out the process of representation for criminal and immigration court. He stated the goal was reduce his charges and that way he would be protected when transferred to immigration custody.
  
6. Despite the cost of representation, which was difficult for us to manage economically, we scheduled a meeting to sign a contract a few days later since we felt assured that they would take care of my brother and minimize any exposure in his criminal and immigration matter.
  
7. On or about July 5, 2014, I met with attorney Frank Carizozza, to sign a contract for the criminal representation of my brother, Hector Nunez Diaz. We discussed our concerns over my brother’s immigration status and he assured me that they could resolve the case in a way that would not affect his immigration status.

8. I requested that he go visit my brother at the jail because he was very anxious and worried about his case. Mr. Carizozza told me that he had not been assigned to the case yet and was unsure if who would be assigned but if he was going to the jail the following week he would go and visit him.
9. On July 8, 2013, my brother had his first court hearing. However, we found that Frank would not be representing my brother. Instead, Ms. Julia Cassels would represent him. She continued our brother's case which worried my family and I quite a bit.
10. Our family decided to meet with her to address some of our concerns.
11. On July 10, 2013 more or less, my dad and I met with Ms. Cassels. She told us she continued the case because she knew of an individual who could provide treatment or a type of counseling to my brother and that would help in resolving the case.
12. We told Ms. Cassels some of our concerns, including his immigration status. Ms. Cassels assured us that this was the best plan of action because the judge would see he was getting treatment and his exposure would be minimal so it would not affect his immigration situation.
13. We felt reassured after our meeting with Ms. Cassels that she had the best interest in mind in representing my brother and understood our priorities, which was his immigration status, although the meeting was brief.
14. On July 22, 2013, we went for my brother's court hearing and were surprised to hear he had taken a plea and was sentenced. To our knowledge, he had never met with any counselor as previously indicated.
15. On July 26, 2013, my my sister and I went to meet with Ms. Cassels. She informed us that her portion of legal representation was over and there was nothing that could be done at this point regarding his criminal case. She then took us down the hall to one of the immigration attorney from Alcock and Associates by the name of Jordan Clegg.

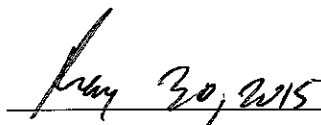
16. Mr. Clegg reviewed our file and laughed stating there was nothing that could be done. My sister and I were shocked by his reaction. We stated we were sure something could be done. He smirked and said not with that conviction, he would most assuredly be deported based on the plea he took and there was nothing that could be done in his case.
17. We consulted with several other immigration attorneys, all who confirmed a drug offense like the one he pled to would assure deportation and there was nothing that could be done.
18. We subsequently hired the Law Office of Ray Ybarra Maldonado to help us with Post Conviction Relief and the Law Office of Jillian Kong-Sivert to try and help him in immigration court.
19. Ms. Kong Sivert tried to get his case continued in immigration court to allow for Post Conviction Relief in this case, however, the continuance was denied. She was able to avoid his deportation and secured a voluntary departure/return to Mexico.

  
\_\_\_\_\_  
Maria Josefina Nunez Diaz

SUBSCRIBED AND SWORN to before me this 17th day of January, 2013.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

  
\_\_\_\_\_  
May 30, 2015



**B**

Exhibit

**B**



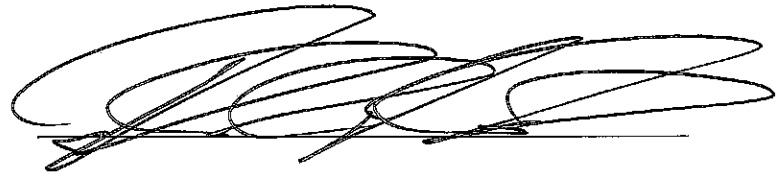


7. A few days later, on or about July 5, 2014, my daughter Maria Josefina Nunez Diaz signed the contract on our behalf. My daughter met with attorney Frank Carizzo again where he made the same assurances regarding representation he had told my daughter and I a few days prior on our first meeting of July 2, 2013.
8. My daughter also requested that they go and visit her brother, and he told her that if he was going to the jail the following week he would go and visit him.
9. On July 8, 2013, we appeared for my son's court hearing. We called Frank from Alcock and Associates since he was the attorney we had been dealing with. However, he informed us that the attorney Ms. Julia Cassels would be representing my son. This was the first time we became concerned since Ms. Cassels we had not met with Ms. Cassels. Additionally, she was requesting a continuance, which we were not expecting; she stated that she did not have any documentation and was not prepared.
10. We met with Ms. Cassels on approximately July 10, 2013. She told us she had continued the case because she knew of an individual who could potentially provide treatment, counseling or classes to my son and that this would help in his case.
11. In this meeting, we discussed some of our concerns with Ms. Cassels. Specifically, we told her that we had immigration concerns for our son and we asked whether these classes would help our son. She said that it would and that this plan would be the best plan for helping him out with his immigration situation because his sentence would be minimal since the judge could see that he is getting treatment and that it would not affect his immigration situation. We felt very assured with our meeting because she spoke with confidence and we felt she could take care of our son's situation and left the meeting, which was brief.
12. On July 22, 2013, my son had court again and my wife and daughters were present at this hearing. They informed me that my son took a plea and was sentenced.
13. On or about July 26, 2013 I learned from my daughters that they had met with Ms. Cassels and an immigration attorney on staff at Alcock and Associates and where told the immigration attorney told them there was no hope for my son due to his criminal conviction and that he would be deported.

14. I began to contact different immigration attorneys to see if there was anything that could be done for my son, time and again we were told that deportation was inevitable due to plea he took and the criminal conviction against him.
15. Eventually I met with Ms. Jillian Kong Sivert to represent him in his immigration case. Ultimately, she was able to secure voluntary departure/return to Mexico.
16. I met with the Law Office of Ray A. Ybarra Maldonado, PLC which practices both immigration and criminal law. After a full recantation of events, we knew his only option was to file for post-conviction relief due to the misinformation received regarding the plea.
17. I have read the foregoing Affidavit and know the contents thereof and the same is true to the best of my own personal knowledge.

Hector Nunez Martinez  
Hector Nunez Martinez

SUBSCRIBED AND SWORN to before me this 17th day of January, 2013.



Notary Public

My Commission Expires:

May 30, 2015



C

Exhibit

C

## DECLARACION JURADA DE HECTOR SEBASTIAN NUNEZ DIAZ

Yo, Hector Sebastian Nunez Diaz, habiendo sido debidamente juramento, bajo juramento, declaro y digo:

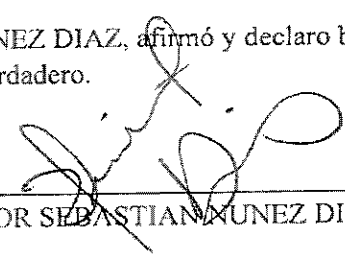
1. Me llamo Hector Sebastian Nunez Diaz.
2. Después de que fui arrestados, mis padres contrataron con los abogados de Alcock & Associates.
3. En mi primer encuentro o visita de un abogado de Alcock & Associates, el abogado Frank A. Carrizosa fue a visitarme en la cárcel.
4. tuve una entrevista con el Abogado Carrizosa en la cual le platique como pasaron las cosas sobre el incidente de cual me habían arrestado.
5. En esa misma junta, hablamos sobre mi estatus inmigratorio. Yo le explique cuantos años que tenía en los Estados Unidos. Estuve muy feliz cuando él me dio buenas noticias. El abogado me dijo que todo iba a salir muy bien y que no iba a ver problema.
6. El me aclaro, que mi caso no era un caso muy fácil pero el iba hacer lo posible para que yo saliera sin problemas.
7. Yo tuve una segunda visita con los abogados de Alcock & Associates. Pero esta vez no era el abogado Frank Carrizosa. Era una abogada Julia Cassells.
8. Julia Cassells llevo con una intérprete porque ella no habla español. La Sra. Cassells me dijo lo mismo que el otro abogado. Yo le explique otra vez todo mi caso. De nuevo, ella me aconsejo que sí se podía defender mi caso. La Sra. Cassells me aseguro que iba a ser lo posible para que todo resultara bien para mí.
9. En la segunda visita con la abogada Cassells, ella me aconsejo que tenía buenas noticias para mí. Ella me dijo que ya había arreglado mi caso: que ella ya había analizado el caso. Me dijo que teníamos dos puertas de salida: la primera era pagar tomando clases y haciendo horas de servicio. La segunda opción, era declararme culpable de todo.
10. La abogado Cassells me aseguro que ninguna de las dos me iba a afectar en mi situación migratoria.
11. En la tercera visita llega con la abogada Cassells, ella me dijo que se negó una primera opción. Específicamente, que la maestra no me había aceptado en sus clases y que el curso ya iba avanzado. También me dijo que ya teníamos la última corte con el juez y la única salida era el declararse culpable. Pero otra vez me aseguro que no iba a ver problema alguno con mi situación inmigratoria. También me aseguro que ella

iba a luchar muy fuerte y que además que en casos de inmigración ellos, los abogados de Alcock & Associates, tenían los mejores abogados.

12. Entonces ella me aconsejo del procedimiento que iba ocurrir en la siguiente corte. Específicamente, que en el día de la corte yo me declaro culpable y entonces voy a salir con una fianza, con horas de servicio me mandan a inmigración.
13. Pero las cosas no sucedieron como ella me había explicado. Y allí es donde surgen los problemas porque nunca me dieron un derecho a fianza por el tipo de felonía en mi record, aunque ella me había asegurado que ella iba pelear por mi y mi caso.
14. Además, lo más problemático, fue que ningún abogado de Alcock & Associates me quiso representar porque me dijeron que mi caso era imposible porque el tipo de felonía de cual me declare culpable.
15. Si la abogada Julia Cassels hubiese consultado con un abogado de inmigración cuando estaba negociando mi caso criminal o a lo mínimo si ella hubiese investigado las consecuencias inmigratorias y aconsejándome con la verdad yo viera podido tomar una decisión sabiendo las consecuencias realísticas. En cambio, ella me aseguro varias cosas, incluyendo que iba resolver mi caso de una manera que no me iba afectar ni estatus inmigratorio y que yo iba poder obtener fianza. Nada de eso ocurrió.

Yo, HECTOR SEBASTIAN NUNEZ DIAZ, he leído la declaración jurada anterior y conozco el contenido del mismo y lo mismo es cierto en lo mejor de mi conocimiento personal.

Adicionalmente, yo, HECTOR SEBASTIAN NUNEZ DIAZ, afirmo y declaro bajo pena de perjurio que lo contenido del mismo es cierto y verdadero.

  
\_\_\_\_\_  
HECTOR SEBASTIAN NUNEZ DIAZ

11-Jul-14

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

12/30/2015 @ 8:00 AM

CR2013-430489-001 DT

12/23/2015

COMMISSIONER PHEMONIA L. MILLER

CLERK OF THE COURT  
Y. King  
Deputy

STATE OF ARIZONA

KAREN B KEMPER

v.

HECTOR SEBASTION NUNEZ-DIAZ (001)

RAY ANTHONY YBARRA

COURT ADMIN-CRIMINAL-PCR

**UNDER ADVISEMENT – POST CONVICTION RELIEF RULING**

After an Evidentiary Hearing on October 27, 2015, the Court took the Defendant's Motion for Post-Conviction Relief under advisement.

Due to the complexity of the issues, the Court finds that extraordinary circumstances existed in this case which required this court to consider this matter longer than the time required under Arizona Rules of Procedure 32.8(d).

The Court has considered the initial motions and associated pleadings, the testimony and exhibits introduced at the evidentiary hearing, and the arguments of counsel. The Court has observed the demeanor of the witnesses while testifying and the following findings are based on the evidence as well as the Court's assessment of credibility:

The following evidence was presented at the Evidentiary Hearing:

- On June 29, 2013, the Defendant was charged with one count of Possession of Dangerous Drugs and Possession of Narcotic drugs, both class four felonies.
- Defendant's sister, Maria Josefina Nunez-Diaz testified that she and her family met with Frank Carrizoza, an attorney at Alcock & Associates to discuss her brother's case. They informed the attorney that they were really concerned about defendant's case because he was not a citizen of the United States. She further testified that the attorney went as far as to draw a diagram depicting the criminal and immigration process and the plan to

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2013-430489-001 DT

12/23/2015

minimize any exposure and help him with immigration court. The family met with the attorney on more than one occasion. The family retained the attorney because they were told there would be no immigration consequences.

- Despite meeting with Mr. Carrizoza, defendant's case was assigned to another attorney, Julia Cassels.
- On July 8, 2013, at the preliminary hearing, Defendant met with Ms. Cassels. A motion to continue the preliminary hearing was filed. Defendant indicated that Ms. Cassels met with him three times for about 10-15 minutes each time.
- Ms. Cassels indicated that she met with Defendant on July 12, 2013 and went over the immigration consequences with him. She also indicated that she referred defendant's family to the head of the Immigration Department in her office.
- Ms. Cassels testified that Defendant could either go to TASC (suspended prosecution) or plead to Possession of Drug Paraphernalia, a Class 6 undesignated felony. However, because of defendant's non-bondable status, he was not eligible for TASC.
- Ms. Cassels indicated that she tried to get a solicitation offer for Defendant, but her request was denied. She further stated that she learned that the plea was the "kiss of death" before defendant took the plea.
- Ms. Nunez-Diaz indicated that she met with Ms. Cassels after her brother's first court date. She was told that the preliminary hearing was continued because there was a way to help her brother by meeting with someone else so that he could be free and immigration would not be bad.
- Defendant testified that Ms. Cassels informed him that he was not going to have any consequences pleading guilty nor would he have any immigration consequences because her office had attorneys for that and it would not be a problem.
- Defendant further testified that he relied on the statements from his attorney and entered into the plea agreement. Defendant also stated that although the court told him there might be immigration consequences, he signed the plea because his attorney said there would be no immigration consequences.
- Defendant trusted his attorney because she assured him there would be no problems.
- Defendant further testified that if his attorney would have told him of the consequences, he would not have signed the plea.
- On July 22, 2013, Defendant plead guilty to Possession of Drug Paraphernalia, a Class 6 undesignated felony and was sentenced.
- Ms. Nunez-Diaz further testified that after defendant entered into the plea and was sentenced, the attorney said there was nothing she could do. That the matter was now in immigration hands. This made Ms. Nunez-Diaz and her family upset.
- Ms. Nunez-Diaz also testified that Ms. Cassels referred them to another attorney in her office, who said there was nothing they could do to help defendant because he pled guilty to Possession of Drug Paraphernalia.



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- Defendant was processed through Immigration and Customs Enforcement and was transferred to the Eloy Detention Center. Once in immigration court, defendant had problems. He tried to contact his attorney at Alcock and Associates, but did not receive a response.
- Ms. Nunez-Diaz and her family contacted another attorney about Defendant's immigration consequences.
- Defendant later hired the attorney to represent him at the removal proceedings. Defendant was ineligible for bond and subjected to mandatory detention because of the Possession of Drug Paraphernalia conviction. In order to minimize the damage, Defendant agreed to be deported back to Mexico.

**CONCLUSIONS OF LAW**

The issue before the Court is whether Defendant's counsel was ineffective. Deciding this issue is a question of credibility on the facts.

To establish a claim of ineffective assistance of counsel, a petitioner must show that counsel's actions fell below an objective standard of reasonableness and that petitioner was prejudiced by the alleged ineffective assistance of counsel. *Summers v. Schriro*, 2009 WL 1531847 (D. Ariz), *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 252, 2064 (1984). In ineffective assistance of counsel claims, the prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. ... *Summers*, supra, *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370.

As the Arizona Standard 18, RAJI (Criminal) 3<sup>rd</sup> instructs, this Court considers the following when determining who is credible on a given fact: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness has any motive, bias, or prejudice; whether the witness is contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence. Consider all of the evidence in light of reason, common sense, and experience. Standard 18, RAJI (Criminal) 3<sup>rd</sup>; Credibility of Witnesses.

The Court finds Defendant's testimony and Maria Josefina Nunez-Diaz's testimony credible.

As part of determining credibility, the trier of fact must consider whether a witness's testimony is contradicted by anything the witness said or wrote before trial or by other evidence. In this case, the State's evidence was directly contradicted by the Defendant's witness, Maria

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Josefina Nunez-Diaz. Ms. Nunez-Diaz stated that the reason her family retained Alcock and Associates is so that her brother could avoid any immigration consequences. She further testified that after the first hearing she was told by Ms. Cassels representative that the hearing was continued and they were working to get her brother free and so that immigration wouldn't be bad. She further stated that at the second hearing defendant entered into a plea and was sentenced. She spoke to Ms. Cassels and was told there was nothing else she could do.

The Court can also consider the reasonableness of the witness's testimony when considered in the light of the other evidence, in determining the credibility of the witness. The Court finds the testimony of Ms. Nunez-Diaz not only credible but also reasonable. After Ms. Cassels told Ms. Nunez-Diaz and her family there was nothing she could do, they became upset. This is a reasonable reaction in light of the fact they were told the attorney could help with the immigration case. Additionally, it was also a reasonable reaction for defendant to call Alcock and Associates when he learned that there would be immigration consequences as a result of his plea. When defendant did not get a response, it was reasonable for defendant and his family to contact another immigration attorney.

In this case, the Defendant presented overwhelming evidence that his court-appointed counsel's actions fell below an objective standard. Defendant has shown that counsel's ineffective performance affected the outcome of the plea process. The Court finds that defense counsel misrepresented the immigration consequences to defendant. Counsel was well aware that the defendant and his family were concerned about the immigration consequences because of defendant's status in the United States. One of the main reasons Alcock and Associates was retained was because defendant's family was told there would be no immigration consequences. Counsel referred defendant's family to an immigration attorney; however, counsel failed to refer the *defendant* to an immigration attorney prior to him entering into the plea. An immigration attorney from counsel's firm could have easily spoken to the defendant about the immigration consequences. Based on the evidence presented, this court finds that counsel's actions fell below an objective standard of reasonableness.

The second prong of the ineffective assistance of counsel claim is for the defendant to show that he was prejudiced by the ineffective assistance of counsel. In this case, Defendant has shown that he was prejudiced by the ineffective assistance of counsel. Defendant was placed in removal proceedings because of the consequences of the Possession of Drug Paraphernalia conviction and later deported to Mexico. Defendant would not have signed the plea if he was adequately advised of the immigration consequences. The court finds that as a direct result of Ms. Cassel's failure to properly advise Defendant of his immigration consequences, defendant was placed in removal proceedings and was held without bond. Furthermore, the reason defendant was unable to attend the TASC program no longer exists in light of the ruling in *Lopez-Valenzuela v. Arpaio*, 770 F. 3<sup>rd</sup> 772(9<sup>th</sup> Cir. 2014)

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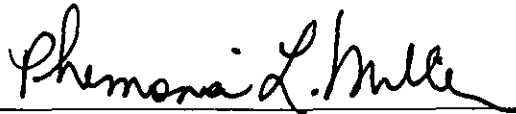
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For these reasons, IT IS ORDERD granting Defendant's Petition For Post-Conviction Relief.

IT IS ORDERED setting aside Defendant's plea of guilty.

IT IS ORDERED signing this minute entry as a formal written order of the Court.



JUDICIAL OFFICER OF THE SUPERIOR COURT

**PHEMONIA L. MILLER  
COMMISSIONER/JUDGE PRO TEM**



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WITNESS

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FOR THE PLAINTIFF

Nunez-Diaz Hector

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Nunez-Diaz, Maria

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Cassels, Julia

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## 1 APPEARANCES:

2 For the Plaintiff Karen Kemper  
Deputy County Attorney

3 For the Defendant Ray Anthony Ybarra  
Attorney at Law

4 Interpreter Kathleen Penney

5 BEFORE THE HONORABLE PHEMONIA L. MILLER

6 \*\*\*\*\*

7  
8 Phoenix, Arizona

9 October 27, 2015

10 THE COURT: This is the time set for  
11 evidentiary hearing on the defendant's petition for  
12 Post-Conviction Relief. It is CR2013-430489-001.

13 In the matter of the State of Arizona  
14 versus Hector Nunez-Diaz.

15 Will the parties announce for the record.

16 MS. KEMPER: Karen Kemper appearing for the  
17 state.

18 MR. YBARRA: Good afternoon, Your Honor.  
19 Ray Ybarra Maldonado on behalf of Mr. Nunez-Diaz.

20 THE COURT: And Mr. Nunez-Diaz, will you  
21 please state your full name and date of birth for the  
22 record?

23 THE DEFENDANT: Hector Sebastian  
24 Nunez-Diaz, August 4 of 1986.

25 THE COURT: And good afternoon to you, sir.

1 THE DEFENDANT: Good afternoon.

2 THE COURT: Mr. Nunez-Diaz, by chance, do  
3 you have ID on you so that I can verify that you are, in  
4 fact, Mr. Nunez-Diaz?

5 THE DEFENDANT: Yes, of course.

6 THE COURT: Will you please put it up to  
7 the camera. Okay. Go back a little. Go back. Go back.  
8 Okay. Can anyone see? Can you guys see. All right. It  
9 is a little bit blurry, can you put it closer, slowly  
10 closer to the camera.

11 All right. Stop. Go back just a little.  
12 Okay. I am going to rely on the people with glasses to  
13 help me out. Can you see the name?

14 THE CLERK: It is a picture of him.

15 THE COURT: Can you see that is him?

16 MR. YBARRA: No, Your Honor.

17 THE COURT: All right.

18 So will the person next to you, can you  
19 give her the ID and have her read the name and date of  
20 birth for me.

21 Okay. She is going to give you the phone,  
22 she's giving, she is going to tell you the name and the  
23 date of birth.

24 THE COURT: Your name, ma'am.

25 THE INTERPRETER: The name on the ID says

1 Hector Sebastian Nunez-Diaz. Martha Bravo is her name.

2 THE COURT: And the date of birth on the  
3 ID?

4 THE INTERPRETER: It says August 4 of 1986.

5 THE COURT: Thank you, Ms. Bravo.

6 You can give the ID back to Mr. Nunez-  
7 Diaz.

8 Mr. Nunez-Diaz, we will conduct this  
9 hearing over the phone so the interpreter will interpret  
10 to you over the phone.

11 The Skype may or may not work, but we will  
12 still have you on the phone to listen to the hearing if  
13 by chance Skpye gets disconnected. Do you understand?

14 THE DEFENDANT: Okay. Yes, I understand.

15 THE COURT: Okay. All right. So I will  
16 need for you to raise your right hand so that my clerk  
17 can swear you in.

18

19 HECTOR SEBASTIAN NUNEZ-DIAZ

20

21 Called as a witness herein, having been first duly sworn,  
22 was examined and testified as follows:

23

24 THE COURT: Thank you. All right.

25 I have had the chance to review the



1 defendant's petition for Post-Conviction relief.

2 I have also had the chance to review  
3 state's response.

4 Mr. Ybarra, is the defense read to proceed  
5 with the evidentiary hearing?

6 MR. YBARRA: Yes, we are, Your Honor.

7 THE COURT: And Ms. Kemper, is the state  
8 read to proceed?

9 MS. KEMPER: Yes, Your Honor.

10 THE COURT: All right. Mr. Ybarra, it is  
11 your motion so let me hear from you first. Call your  
12 first witness.

13 MR. YBARRA: Thank you, Your Honor. We  
14 call Hector Sebastian Nunez-Diaz.

15 THE COURT: Okay.

16 And Mr. Nunez-Diaz, you were previously  
17 sworn in.

18 Mr. Ybarra, you can proceed.

19 MR. YBARRA: May I approach, Your Honor, to  
20 try to visual.

21 THE INTERPRETER: Maybe you can stand here  
22 and have him, turn the thing around.

23 MR. YBARRA: Sure.  
24  
25

## 1 DIRECT EXAMINATION

2 BY MR. YBARRA:

3 Q Mr. Nunez-Diaz, what did your attorney explain  
4 to you as far as the immigration consequences of your  
5 plea?6 A I was told that I was not going to have any  
7 consequences pleading guilty. That I would not have any  
8 problem at immigration. That they had attorneys for that  
9 to be able to solve my problem.10 Q And was this an attorney appointed by the court  
11 or someone that you paid?

12 A It was someone here, I hired.

13 Q And when she explained to you the plea  
14 agreement, do you remember going over that, I believe it  
15 is two pages?

16 A Yes.

17 Q And do you remember it saying that your plea of  
18 guilty might have immigration consequences?

19 A Yes.

20 Q So why did you go forward and sign that plea  
21 agreement if it is written in the plea that it could have  
22 immigration consequences?23 A Because the attorney told me that there were not  
24 going to be any consequences.

25 Q And then, again, didn't the judge tell you that

1 morning that your plea might have immigration  
2 consequences?

3       **A**     Yes.

4       **Q**     So who did you trust more, what your attorney  
5 was telling you or what the judge and the plea agreement  
6 said?

7       **A**     I trusted more in my attorney because she  
8 assured me that I would not have any problems.

9       **Q**     And then when you went over to immigration, did  
10 you in fact have problems there?

11       **A**     Yes, that is where I have problems. They did  
12 not want to back me up and they did not want to respond  
13 for me.

14       **Q**     When you say they, are you referring to your  
15 attorneys or who are you referring to?

16       **A**     My attorney.

17       **Q**     And what about immigration, did they end up  
18 letting you go on bond?

19       **A**     No.

20       **Q**     What ended up happening?

21       **A**     I signed a voluntary departure.

22       **Q**     And why didn't you decide to fight your case in  
23 immigration?

24       **A**     Because I didn't have -- I didn't have an  
25 attorney anymore and they were telling me that there was

1 no solution.

2 Q So did you end up getting another attorney?

3 A No.

4 Q So who told you there was no option to fight  
5 your case?

6 A The same attorney that I hired at the beginning.

7 Q What was the name of the attorney who  
8 represented you, if you remember her name?

9 A I don't really remember the attorney's name, but  
10 the law firm is Alcock and Associates.

11 Q How many times did that attorney visit you?

12 A Three times.

13 Q And for how long did she meet with you?

14 A For about ten minutes, 15 minutes.

15 Q And if she would have told you that it was going  
16 to have immigration consequences, would you still have  
17 signed the plea offer?

18 A No.

19 Mr. YBARRA: Pass the witness, Your Honor.

20 THE COURT: Ms. Kemper?

21

22 CROSS-EXAMINATION

23 BY MS. KEMPER:

24 Q Thank you. Sir, you were charged with  
25 possessing drugs, correct?

1           **A**     Yes.

2           **Q**     And the day you appeared in court, you signed a  
3 plea, correct?

4           **A**     Yes.

5           **Q**     And that is the day you met your lawyer,  
6 correct?

7           **A**     Well, I had already met her before, we had  
8 already talked before.

9           **Q**     So she met with you in the jail, right?

10          **A**     Yes.

11          **Q**     And that was before she saw you again in court,  
12 correct?

13          **A**     Uh-huh, yes.

14          **Q**     So you had met with her at least twice before  
15 you signed a plea?

16          **A**     Yes.

17          **Q**     But you say that she promised you there would be  
18 no immigration consequences if you signed the plea,  
19 correct?

20          **A**     Yes.

21          **Q**     So you signed a plea?

22          **A**     Yes.

23          **Q**     But a judge had told you that there could be  
24 immigration consequences if you signed a plea?

25          **A**     Yes.

1           Q     And you had a written plea agreement, didn't  
2 you?

3           A     Yes, of course.

4                   MS. KEMPER:   And, Your Honor, we had  
5 previously marked the plea as state's exhibit number 1,  
6 however, I don't think that I can meaningfully show the  
7 defendant the plea.

8                   But I would like leave to be able to ask  
9 him questions about it.

10                   MR. YBARRA:   No objection, Your Honor.

11           Q     BY MS. KEMPER:   Sir, you read your plea  
12 agreement with the help of the interpreter, correct?

13           A     Yes.

14           Q     I am going to read paragraph 8 and I will break  
15 it up in individual sentences.   Okay.

16                   Paragraph 8 says, I understand that if I am  
17 not a citizen of the United States, that my decision to  
18 go to trial or enter into a plea agreement may have  
19 immigration consequences.

20                   Do you recall reading that?

21           A     Yes.

22           Q     Now, the next line.

23                   Specifically, I understand that by pleading  
24 guilty or no contest to a crime may affect my immigration  
25 status.

1 Do you recall that?

2 A Yes.

3 Q The next line, admitting guilt may result in  
4 deportation, even if the charge is later dismissed.

5 Do you recall reading that?

6 A Yes.

7 Q The next line, my plea or admission of guilt  
8 could result in my deportation or removal, could prevent  
9 me from ever being able to get legal status in the United  
10 States or could prevent me from becoming a United States  
11 citizen.

12 Do you recall reading that?

13 A Yes.

14 Q Sir, the judge asked you about this plea  
15 agreement, do you remember being asked about your plea  
16 agreement?

17 A Yes. Yes, I remember.

18 Q And she asked you whether you had read it and if  
19 you understood it and you said you did, isn't that right?

20 A Yes.

21 Q You were also asked if anyone had made you any  
22 promises. Do you remember that?

23 A Yes.

24 Q And you told the court no one had made you any  
25 promises to get you to sign the plea, isn't that correct?

1           **A**     Uh-huh, yes.

2           **Q**     When you appeared in court, that day for your  
3 change of plea, there was already an immigration hold on  
4 you, wasn't there?

5           **A**     Yes.

6                   MS. KEMPER:  Nothing further.

7                   THE COURT:  Mr. Ybarra.

8                   MR. YBARRA:  No further questions, Your  
9 Honor.

10                   Can we excuse Mr. Nunez-Diaz and hang up or  
11 are you, no, we don't.  I still want him to hear what is  
12 going on.

13                   THE COURT:  Okay.  All right.

14                   MR. YBARRA:  But I will ask for permission  
15 to remove the labtop from the stand.

16                   THE COURT:  Do you have any objection to  
17 Mr. Ybarra?

18                   MS. KEMPER:  No.

19                   THE COURT:  All right.  You have permission  
20 to remove the labtop from the witness stand.

21                   Mr. Nunez-Diaz will remain on the phone for  
22 the rest of the proceedings.

23                   MR. YBARRA:  Your Honor, defense calls  
24 Maria Josefina Nunez-Diaz.

25                   MS. KEMPER:  Your Honor, just so the court



1 knows, we had previously invoked the rule.

2 THE COURT: All right. Thank you.

3 Mr. Ybarra, she will need to be sworn in,  
4 first. Come forward.

5 THE CLERK: Full name, please.

6 THE WITNESS: Maria Josefina Nunez-Diaz.  
7 J. O. S. E. F. I N. A. and then the last name. N. U. N.  
8 E. Z.. and N. U. N. E. Z. all right and.

9 THE COURT: MR. YBARRA.

10

11

MARIA JOSEFINA NUNEZ-DIAZ

12

Called as a witness herein, having been first duly  
13 sworn, was examined and testified as follows:

14

15

THE CLERK: I didn't hear you.

16

A PANEL MEMBER: I said I swear.

17

THE COURT: Louder.

18

THE WITNESS: I swear.

19

THE COURT: Okay.

20

Thank you. Please be seated.

21

22

DIRECT EXAMINATION

23

BY MR. YBARRA:

24

Q And can you please explain your relationship to

25

the defendant?

1           **A**     He is my brother.

2           **Q**     And were you involved at all with the hiring of  
3 an attorney for him?

4           **A**     Yes, I went with my dad.

5           **Q**     Louder, please.

6           **A**     Sorry. I went with my dad, and to get an a  
7 lawyer when he called us that he was that he got into  
8 jail. That he was returned to jail.

9                   THE COURT: Ms. Nunez-Diaz, will you please  
10 state your full name for the record.

11                   THE WITNESS: Maria Josefina Nunez-Diaz.

12                   THE COURT: All right. Thank you.  
13 Proceed, Mr. Ybarra.

14           **Q**     BY MR. YBARRA: And if we can please speak  
15 slowly, because trying to interpret for your brother and  
16 you have to give a little bit of pause to make sure the  
17 interpreter translates.

18                   THE INTERPRETER: I am gonna interpret  
19 simultaneous, she doesn't have to go slow, but just loud.  
20 I don't hear a microphone over there, is there a  
21 microphone?

22                   THE WITNESS: Here, pull it closer.

23                   THE COURT: It isn't. Could you touch it  
24 and see that it is on. It is not on. All right. It is  
25 -- it is on, it just doesn't amplify.

1 THE COURT: So you just have to speak loud.

2 THE WITNESS: Louder.

3 THE COURT: Okay.

4 Q BY MR. YBARRA: Okay. Who did you meet with  
5 when you went to look for a lawyer?

6 A We went to Alcock and Associates, that is how  
7 yeah, and in there we met with Frank, I believe Frank  
8 Carrizoza and we explained to him that case, my brother's  
9 case.

10 Q Did you explain his immigration status?

11 A Yes. That was our concern all the time, which  
12 he got arrested and concern was immigration since my  
13 brother doesn't have a legal status in here.

14 Q And what did they explain to you how they were  
15 going to deal with that situation?

16 A Frank did like a diagram. He explained to us he  
17 is the criminal case first and then he explained to us  
18 the immigration case, which in there was when I  
19 understood, there were two different cases. And they  
20 needed two different lawyers for that.

21 He explained the criminal first, he said  
22 that he had to lower his sentence I believe, I don't know  
23 how to explain it.

24 And then after he was done with the  
25 criminal, he will be able to go to an immigration, but he

1 -- we wanted to make sure that he, his criminal was to  
2 ended up good for his, for his immigration status.

3 Q And did they give you any promises that it would  
4 be okay?

5 A Yes, they did. That is why we were okay by  
6 hiring them like to let, they will help my brother  
7 because he said that there was a way to help my brother  
8 with immigration after that.

9 Q And did he go on to represent your brother?

10 A Frank.

11 Q Yes?

12 A No.

13 Q Who ended up representing your brother?

14 A Julia Cassels.

15 Q And did you ever meet with Ms. Cassels?

16 A Before my brother's first court, no.

17 Q Did you meet with her at all?

18 A Yes, after her first -- my brother's first  
19 court, we met with her because his first court, just she  
20 wasn't there and we were worried because my brother was  
21 already anxious and when she --

22 THE INTERPRETER: He was what?

23 A Anxious. Anxious. Sorry.

24 So we when we got to the court, she  
25 extended it, she extended the court date and we were

1 worried because we didn't know what was happening before,  
2 why she was representing my brother. So after that, we  
3 went to Alcock and we met with her and that is when we  
4 told her if she could explain to us what was going on.

5 Q And what did she explain to you was going on?

6 A Well, she said she extended the case because  
7 there was a way that she can help my brother by I think  
8 meeting with I think it was the teacher, like some kind  
9 of program that he could take so the sentence will get  
10 lowered. And he will be free and immigration wouldn't be  
11 as bad when he was done with criminal.

12 Q Was that the only time you met with her?

13 A Well, after my brother's second hearing, we went  
14 to ask her if we she was done with the case because after  
15 the second one, there was a second hearing and that is  
16 when my brother pled guilty and we didn't know that they  
17 made that decision. So we met with her and we told her  
18 if it was okay, she said that it was okay, that there  
19 was, no, nothing she could do anymore, that it was all in  
20 immigration's hands.

21 Q And did you meet with anybody else at Alcock and  
22 Associates?

23 A Yeah, after that, we asked her to give us an  
24 advice to represent my brother in the immigration side  
25 and we met with another lawyer, I don't know his name.

1 And with that lawyer and that same time that we met with  
2 her after my brother pled guilty, we told her if she  
3 could tell the lawyer to take over the case, she, we met  
4 with them and after that, after we met with them, it was  
5 when he told us that there was nothing to do for my  
6 brother.

7 Q In what way did he tell that to you?

8 A Well, we were really, we were really excited  
9 because we in a way, we knew that it was over that  
10 according to Cassells we, my brother could get out as  
11 faster, easier.

12 So when we met with him, he reviewed the  
13 case and he talked, he asked us questions and told us  
14 about his why, what, why he is sentenced because he pled  
15 guilty, there was nothing else to do, but he said it in a  
16 mocking way. He was even laughing at us like there is  
17 nothing else to do and he was smiling. And we were  
18 serious. We were trying to help my brother. And we when  
19 we left there, because my brother, my sister was with me,  
20 we were really angry because he was laughing at us, not I  
21 mean we are young, we look young, but we were trying to  
22 help my brother.

23 So that wasn't, that wasn't the way we  
24 wanted a lawyer to look at us because he was kind of  
25 making fun of us or just thinking that we were foolish

1 for thinking that my brother could get out of the  
2 immigration.

3 Q And did other attorneys give you different  
4 advice or did they say the same thing?

5 A We did after that, we met with other lawyers,  
6 there was a lawyer that my dad hired, I don't know her  
7 name, I don't know her, but she said that she all she  
8 could do was help my brother get out of since he pleaded  
9 guilty, there was nothing that actually could be done,  
10 but she said that there was a different way that she  
11 could leave and not be too bad for him so there was if  
12 since there was nothing for us to do, then we told her to  
13 talk to my brother and see what was best.

14 Q And has your brother been able to legally come  
15 back to the county since this?

16 A No.

17 MR. YBARRA: No further questions. Pass  
18 the witness, Your Honor.

19 THE COURT: Mr. Kemper.

20

21 CROSS-EXAMINATION

22 BY MS. KEMPER:

23 Q MS. Nunez-Diaz, I hear you telling us that you  
24 are angry with the immigration lawyer, is that right?

25 A Yes.

1           Q       Do you know what your brother was charged with,  
2 the crimes?

3           A       Yes, I do.

4           Q       What was it?

5           A       Drugs.

6           Q       Do you know what kind?

7                   MR. YBARRA:  Objection relevance, Your  
8 Honor.

9                   THE COURT:  What was the question again,  
10 Mr. Kemper.

11                  MS. KEMPER:  I asked her if she knew what  
12 her brother was charged with and what type of drugs  
13 because that goes directly to what type of resolution he  
14 could have gotten.

15                  THE COURT:  The objection is overruled.

16                  THE WITNESS:  No, I don't know what kind.  
17 The when we met with the lawyer, the lawyer, the  
18 immigration lawyer, he did said if my brother was found  
19 with marijuana, that it could have been easier for him to  
20 do it, but since there were other drugs involved, that he  
21 couldn't do nothing.

22           Q       BY MS. KEMPER:  How old is your brother?

23           A       He is 28.

24                  MS. KEMPER:  No further questions.

25                  THE COURT:  Mr. Ybarra.



1 MR. YBARRA: No questions.

2 THE COURT: Thank you.

3 Ms. Nunez-Diaz, you can step down.

4 MR. YBARRA: Defense rests, Your Honor.

5 THE COURT: Mr. Kemper, do you have any  
6 witness?

7 MS. KEMPER: I did. MS. Cassels which  
8 appears telephonically. I thought we were doing Skype  
9 and so I told her she can appear telephonically so I.

10 THE COURT: She is out of state.

11 MS. KEMPER: Yes, ma'am. She lives in  
12 California now and she has been standing by all day today  
13 for this.

14 THE COURT: She is not going to be able to  
15 call in. Can she call in on your phone?

16 MS. KEMPER: Yes.

17 THE COURT: Mr. Ybarra you are aware she  
18 was appearing telephonically?

19 MR. YBARRA: Yes, Your Honor. I we just  
20 assume that my client would be on Skype and then her  
21 client will call on the phone.

22 And if too much of a problem, I can speak  
23 with my client about waiving his presence for the last  
24 witness or remaining on Skype. I think he can ask still.

25 THE COURT: Well, I don't know if he is

1 available on Skype, he is available on the phone, why  
2 don't you check with him.

3 MR. YBARRA: Your Honor, he says he is  
4 okay.

5 Your Honor, I spoke with my client, he  
6 said he's okay waiving his presence for the last witness  
7 so we can get Ms. Cassels on the phone.

8 THE COURT: So he understands that he will  
9 hang up and then the rest of the proceedings will proceed  
10 without him?

11 MR. YBARRA: That is correct, Your Honor.  
12 And I did tell him I'd get him a copy of the transcript  
13 at a later point. Yes.

14 THE COURT: Okay. Mr. Nunez Diaz, you are  
15 excused.

16 THE INTERPRETER: Thank you.

17 THE COURT: All right. You are welcome.

18 MS. KEMPER: She should be calling.

19 THE INTERPRETER: The interpreter is  
20 excused, Your Honor?

21 THE COURT: And interpreter excused, thank  
22 you.

23 MS. KEMPER: She's calling into the  
24 506-1887, is that --

25 THE bailiff: That is this one.

1 MS. KEMPER: Well, I thought so. Just a  
2 second let me see what is going on.

3 Your Honor, I'd like to just like to place  
4 a call to her and see why she's not.

5 THE COURT: Go right ahead.

6 MS. KEMPER: Thank you.

7 Judge, Ms. Cassels is calling in.

8 THE COURT: And, Ms. Cassels, this is  
9 commissioner Miller, can you hear me?

10 MS. CASSELS: I can hear you a little bit.  
11 Good afternoon.

12 THE COURT: Good afternoon.

13 You are in court and we are in the -- we  
14 just finished with the defense's case now. The state is  
15 presenting its case. Ms. Kemper is here representing the  
16 state and I will need for you to raise your right hand so  
17 that my clerk can swear you in.

18

19 JULIA CASSELS

20 Called as a witness herein, having been first duly sworn,

21 was examined and testified as follows:

22

23 THE COURT: Put it on speakerphone. Let  
24 her be on speaker.

25 All right, Ms. Kemper.

1 MS. KEMPER: Thank you, Your Honor.

2

3 DIRECT EXAMINATION

4 BY MS. KEMPER:

5 Q Ms. Cassels, will you please state your full  
6 name?

7 A I am having a hard time hearing you.

8 THE COURT: Ms. Kemper, you are welcome to  
9 go to the podium.

10 MS. KEMPER: Certainly.

11 Q BY MR. KEMPER: Is that better, can you hear me?

12 A That is better.

13 Q Okay. Will you please state your full name.

14 A Julia Bass Cassels.

15 Q And how are you employed? Did you hear the  
16 question?

17 A I am sorry, it is really echoey.

18 THE COURT: Hang up the phone and press the  
19 speaker.

20 Q BY MR KEMPER: Are you still there?

21 A I am here.

22 Q All right. Are you an attorney?

23 Ms. Cassels, can you hear me?

24 A Now I can. Yes.

25 Q Okay. How are you employed?

1           **A**     I am recently self-employed, I own my own law  
2 firm.

3           **Q**     How long have you been a lawyer?

4           **A**     I was admitted to the Arizona bar  
5  
6  
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1 May of 2002.

2 Q Have you ever represented Hector Nunez-Diaz?

3 A Yes.

4 Q When was that?

5 A It was in the summer of 2013.

6 Q And at that time, what type of practice did you  
7 have?

8 A I was at that time working on a contract basis  
9 for Alcock and Associates.

10 Q Did you handle criminal cases?

11 A Yes.

12 Q Was Mr. Nunez-Diaz a criminal case client?

13 A Yes, he was.

14 Q Do you recall meeting with him?

15 A Yes, I remember meeting with him on a number of  
16 occasions.

17 Q And can you recall what he was charged with?

18 A He had two different counts, there was  
19 possession of narcotic drugs, and a possession of  
20 dangerous drugs, both of class 4 felonies, it was cocaine  
21 and methamphetamine specifically.

22 Q In your representation of Mr. Nunez-Diaz, what  
23 would you say his goal was for these charges?

24 A He was hopeful for a reduction in charges that  
25 could lead to the best possible resolution for his

1 immigration situation.

2 Q Did you try to achieve that goal?

3 A I certainly did.

4 Q What did you do?

5 A Initially the plea offer that I received from  
6 the state indicated he had an option, either plead guilty  
7 to a class 6 open felony for a possession of drug  
8 paraphernalia or that he was eligible for Tasc.

9 Tasc, excuse me, will have been the best  
10 option for him. And I pursued trying to get him into the  
11 Tasc program, but unfortunately due to their rules or  
12 policies, he was being deemed ineligible.

13 Q And you determined that by speaking with someone  
14 who worked for Tasc?

15 A Yes, I did. I e-mailed the woman who was the  
16 administrator, then I met with her personally in her  
17 office on the second floor of the court building.

18 Q Once. You learned that Tasc was not available,  
19 what did you do next?

20 A I approached the assigned prosecutor on the  
21 case, and requested a plea deviation to a solicitation  
22 charge.

23 Q Were you successful in getting a plea deviation?

24 A I was informed by the prosecutor that she had  
25 staffed it with her supervisor and the request was denied

1 because Mr. Nunez-Diaz was in possession of two different  
2 drugs and, therefore, they were unwilling to make that  
3 modification.

4 Q And those two different drugs, were those  
5 methamphetamine and cocaine?

6 A Correct.

7 Q Did you explain this to Mr. Nunez-Diaz?

8 A I did. I explained it to him on two different  
9 occasions as well as two to his family.

10 Q Did Mr. Nunez-Diaz ever tell you that he wanted  
11 to go to trial?

12 A No. He indicated he did not want to go to  
13 trial.

14 Q Were you able to obtain a plea offer for him?

15 A Yes. He was then presented with the option of  
16 accepting the offer to the drug paraphernalia as a class  
17 6 open and he elected to accept that plea offer.

18 Q Did you tell him that there would be  
19 consequences for his immigration status?

20 A Yes, absolutely.

21 Q How familiar were you at that time with the  
22 requirement under Padilla P. A. D. I L. L. A. versus  
23 Kentucky?

24 A Padilla was decided I believe in 2010 and it was  
25 the subject of a great deal of conversation and C. L. E



1 training in the following month after it happened.

2 I attended the C. L. E. classes. I  
3 additionally had a copy of the a chart, the lengthy chart  
4 that was the prepared by the Florence immigration project  
5 to assist criminal lawyers in and clients with clients  
6 who have immigration concerns.

7 Q Did you use that chart with Mr. Nunez-Diaz?

8 A I consulted with the chart when I was  
9 negotiating the plea deviation. I also spoke with one of  
10 the immigration attorneys who were employed by the firm  
11 about his case.

12 Q So when you were not able to get a solicitation  
13 offer, and you had a client who did not want a trial, was  
14 this then the best alternative you could attain?

15 A Yes, this is absolutely the best result that I  
16 unfortunately it carried the immigration consequences.

17 Q Do you recall meeting with Mr. Nunez-Diaz'  
18 family at your office at Alcock and Associates?

19 A Yes, I met with them on at least one occasion  
20 formally. And there perhaps were a couple of other times  
21 when I would see them more informally, they had a lot  
22 more contact with my assistant at the time.

23 Q Were you retained to handle the immigration  
24 cases in addition to the criminal case?

25 A No. I referred the family to speak with

1 Mr. Jordan Clegg, C. L. E. G. G. He was the head of the  
2 firm's immigration department and he met with them for a  
3 consultation. They ultimately did not hire the firm for  
4 the immigration portion.

5 Q Returning now to the plea agreement, did you  
6 review the plea agreement with your client?

7 A Sorry, I think you cut out there at the end.  
8 All I heard was did you review the plea agreement with.

9 Q Your client?

10 A Yes, I did. I reviewed the general nature of it  
11 and then once I had the written plea agreement, I went  
12 over it paragraph by paragraph with the court  
13 interpreter's assistance.

14 Q Did you have any concern about Mr. Nunez-Diaz'  
15 ability to understand the agreement?

16 A No, not at all.

17 Q I now want to turn to the actual entry of the  
18 plea?

19 A Yes.

20 Q You're familiar with early disposition court, is  
21 that correct?

22 A Very much so, yes.

23 Q Are you familiar with a group advisement that is  
24 given to all of the defendants on the calendar?

25 A Yes. Early in the morning the court pulled all

1 the defendants into the courtroom and reads them their  
2 constitutional rights for people who are contemplating  
3 accepting a plea and that recitation of rights also  
4 includes an immigration advisement.

5 Q In your review of Mr. Nunez-Diaz case, was he  
6 given that group advisement?

7 A I am aware that he was because I attempted to go  
8 up and speak with him in the holding area and was advised  
9 that I needed to come back in a few minutes because they  
10 were still in group and that was early in the morning  
11 shortly before nine o'clock.

12 Q And that same morning, did you and  
13 Mr. Nunez-Diaz stand before the court and enter his  
14 guilty plea?

15 A Yes, we were able to enter his plea and proceed  
16 with sentencing later that morning.

17 Q And during the sentencing proceeding, was there  
18 a time when you referred to his custody status as being  
19 in limbo?

20 A Yes, I asked the court to allow the adult  
21 probation department to determine the start date for his  
22 fees and fines that were being imposed because it was  
23 unknown when he we would be released from custody.

24 Q And that was unknown because of what?

25 A It was unknown because he had an ICE hold.

1 Typically when a defendant is sentenced and they have no  
2 further time that they need to serve for their sentence  
3 and they don't have any hold, they will be processed out  
4 of the jail in usually about 24 hours. When someone has  
5 a hold, they then get transferred to that other facility  
6 and they need to go through steps of that process so at  
7 that time I have had no idea of knowing when he would be  
8 released from custody.

9 Q Did you know what Mr. Nunez-Diaz' view on being  
10 held in the Maricopa County jail was?

11 A He and his family, well, expressed to me that he  
12 was really unhappy there. He was in the Durango jail,  
13 the conditions are tough, the food is not great. And it  
14 is hard for his family members to visit and I remember  
15 his sister was very concerned about him. I believe her  
16 name is Maria.

17 Q You stated that you are familiar with some of  
18 the consequences of a plea agreement as they affect  
19 immigration status, is that correct?

20 A Yes.

21 Q You mentioned that there are two types of  
22 processes, voluntary departure is one, is that correct?

23 A Yes, voluntary departure is one of the ways for  
24 a person to resolve their immigration matter.

25 Q What is the other one?

1           **A**     A person can also apply for some forms of  
2 relief, have an asylum claim, they may be eligible for  
3 cancelation of removal or may chose to go through and the  
4 entire proceeding and until the point of at which the  
5 judge order them to be removed. I am speaking generally  
6 in that matter.

7           **Q**     Right. And I'm asking you a hypothetical  
8 question, and drawing on your experience, if someone  
9 wanted to complain about their state court lawyer during  
10 immigration proceedings, what would be the best way to do  
11 that?

12          **A**     Generally, a person who is pending an  
13 immigration matter, if it comes to light that there has  
14 been a problem with the proceedings in the criminal case,  
15 they can ask for a stay of the immigration proceeding in  
16 order to address the issue in the criminal case.

17                    You can do that when in court in the state  
18 court via the Rule 32 or the federal court via Higgins  
19 petition under section 2255.

20          **Q**     During your representation of Mr. Nunez-Diaz  
21 did, were you ever told by him that you had failed him?

22          **A**     No, absolutely not.

23                    MS. KEMPER: Pass the witness.

24                    THE COURT: Thank you.

25                    Mr. Ybarra?

1 MR. YBARRA: Thank you.

2 THE COURT: Is it Ybarra Maldonado?

3 MR. YBARRA: Ybarra Maldonado, yes.

4

5 CROSS-EXAMINATION

6 BY MR. YBARRA:

7 Q Mr. Cassels, how long have you been employed or  
8 contracted to work at Alcock and Associates when you took  
9 Mr. Nunez-Diaz' case?

10 A I started working for Mr. Alcock August of 20,  
11 sorry, August of 2012.

12 And his case was in July of the following  
13 year so a year almost.

14 Q So for a year, you had been doing E. D. C., R.  
15 C. C. court?

16 A Definitely for a year there and additionally  
17 from the time that I started practicing Maricopa County  
18 in 2002.

19 Q Did you previously work for the public  
20 defender's office?

21 A I did for three years.

22 Q And at what point did you learn that the plea  
23 that he accepted is essentially the kiss of death in  
24 immigration?

25 A In regard to Mr. Nunez-Diaz specifically or

1 generally?

2 Q Generally. Specifically, that what he pled to,  
3 that it is a, you are not going to get any traction in  
4 immigration court, when did you learn that?

5 A I have been aware of that for quite some time  
6 through various family proceedings and through my own  
7 work in other cases.

8 Q So it is prior to representing Mr. Nunez-Diaz,  
9 correct?

10 A Oh, yes, for sure.

11 Q And you said that you also talked to immigration  
12 attorneys at your office about his case?

13 A I did.

14 Q Why would you do that if you are already certain  
15 it was not a good plea for immigration?

16 A It was the policy of our office that we need to  
17 do immigration consultations informally for lawyers to be  
18 sure that we are getting the best possible result and to  
19 stay up to date with any changes in the law.

20 Q So on every single case you've handled, you  
21 consulted with an immigration attorney within the office  
22 on that specific case?

23 A Yes. And we will also regularly have group  
24 meetings and e-mails about immigration consequences for  
25 our criminal clients.

1           Q       And in July of 2013, how many clients were you  
2 representing?

3           A       I'm not sure. There was were probably active  
4 cases in the area of 30.

5           Q       And you felt or did you feel you had enough time  
6 to work on all your cases and meet with all your clients?

7           A       Yes, for sure.

8           Q       And you also submitted letters and even motions  
9 to the court about this case, didn't you?

10          A       Yes.

11          Q       And in that letter, did you state that you  
12 explained to him clearly that he will get nowhere in  
13 immigration court with this charge?

14          A       Sorry, I don't understand.

15          Q       In the letter, if you remember, what did you say  
16 in regards to the consequences in immigration court?

17          A       I said that he would be facing definitely  
18 consequences in immigration court and the situation was  
19 very difficult.

20          Q       That is what you put in your letter?

21          A       Not sure what letter exactly you are referring  
22 to. Sorry.

23          Q       Okay. Do you remember writing a letter dated  
24 January of 29th of 2015?

25          A       Yes, I do.



1           Q       Okay. Do you possibly have that the in front of  
2 you?

3                   MR. YBARRA: Your Honor, it has been marked  
4 as defense exhibit B. B. as in boy.

5           A       If I can pull it up on my computer.

6           Q       So if you can read to us the second paragraph,  
7 that looks like the third sentence starts with that the  
8 jail visit, do you see that, Ms. Cassels?

9           A       Sorry, which paragraph are you on?

10          Q       The second paragraph, the second full paragraph  
11 and looking for the sentence that starts with at a jail  
12 visit on July 12?

13          A       Yes.

14          Q       Can you read the sentence for us, please?

15          A       At the jail visits on July 12 of 2013, I  
16 explained to Mr. Nunez-Diaz with the assistance of an  
17 interpreter that his charges in the plea that had been  
18 offered could have consequences in the immigration  
19 proceedings due to his status.

20          Q       Now, you had just testified that you said with  
21 certainty, it would have consequences, not that it could  
22 have consequence, is that correct?

23          A       Yes.

24          Q       So is there a difference between could have  
25 consequences and most certainly will have consequences?

1           **A**     On July 12th, I was not aware of whether or not  
2 he would be eligible for Tasc so I explained the  
3 difference between a paraphernalia plea, a solicitation  
4 plea and being able to enter into Tasc.

5           **Q**     Okay. So when did you find out he cannot get  
6 into Tasc?

7           **A**     I sent the e-mail on the 15th, I believe a  
8 couple of days before his court appearance and then I  
9 spoke with the representative the morning of his hearing.

10          **Q**     So the morning of his hearing, did you advise  
11 him that it would certainly have immigration  
12 consequences?

13          **A**     Yes, I did.

14          **Q**     Okay. If you can go down to the 4th paragraph  
15 in that same letter, and read to us the third sentence  
16 with I again advised him?

17          **A**     I again, sorry, I again advised him that a plea  
18 could have consequences for immigration.

19          **Q**     So again you write here, could have consequences  
20 for immigration, not will certainly have consequences in  
21 immigration. Is that correct?

22          **A**     That is what I wrote, correct.

23          **Q**     Okay. So when you were writing here it says  
24 after on July 22nd, that is what you told him so are we  
25 to understand that is what you told him or are we to



1     bate stamped as bates 11, Ms. Cassels, in that document?

2           **A**     Yes.

3           **Q**     Could you read to us the part at the bottom  
4 starting on line 19 where you say ,I also ask and to line  
5 22?

6           **A**     One second to pull it up.

7                     On page 13.

8           **Q**     Yes, page 11, sorry, bate stamped page 11, line  
9 19?

10          **A**     Reading from the transcript, I also ask that you  
11 allow the probation department to make a determination as  
12 to when payment on the fines should begin given that  
13 Mr. Nunez-Diaz is in a little bit of limbo as to what his  
14 custody status will be in the next little bit here.

15          **Q**     Now, I heard you try to explain that, but it  
16 didn't make any sense to me so please help me clarify,  
17 what is the little bit of limbo that he was in?

18          **A**     His release date would be uncertain.

19          **Q**     You have been working in E. D. C. and R. C. C.  
20 for how long?

21          **A**     For a long time.

22          **Q**     And you had plenty of undocumented clients with  
23 ICE holds, have you not?

24          **A**     Yes, of course.

25          **Q**     So you knew that they were picked up very

1 quickly, did you not?

2       **A**     Yes.

3       **Q**     So what is limbo? What is a little bit of  
4 limbo? Wasn't it a certainty that ICE was going to come  
5 get him?

6       **A**     It was ceratin that ICE would pick him up,  
7 however, it was uncertain as to how long he will be in  
8 ICE custody.

9       **Q**     So a little bit of limbo as to what his custody  
10 status will be in the next little bit here, is it more  
11 accurate to say that certain he will go with immigration  
12 and certain he will be either involuntary departure or  
13 deported from the country?

14       **A**     Yes.

15       **Q**     And then further down, line 25, you speak about  
16 his family, could you read to us starting at line 24,  
17 that sentence starts with and they are very concerned?

18       **A**     And they are very concerned about him and they  
19 will do everything they can to assist him once he's  
20 released.

21       **Q**     So once he is released, I mean, lawyer terms, he  
22 can say you mean released to Mexico, is that what you  
23 meant when you said those words?

24       **A**     That is what I meant.

25       **Q**     And then Mr. Nunez-Diaz, your client at the time

1 you were representing goes on to say I on page 12, I am  
2 remorseful and I did learn my lesson and I would like to  
3 be released. That is all. Now, at that point, do you  
4 remember when you heard that?

5       **A**     Not specifically, but yes that is something in  
6 the transcript.

7       **Q**     When you are in court with your client, they are  
8 being sentenced and they are speaking, do you listen to  
9 what they are saying?

10       **A**     Of course, I do.

11       **Q**     Because it is your job to give that person  
12 advice?

13       **A**     Of course.

14       **Q**     It is your job to make sure they know what is  
15 going on in their case?

16       **A**     Absolutely.

17       **Q**     So when you hear the words and I would like to  
18 be released, did anything click in your mind that, hey,  
19 maybe I should explain to my client that judge doesn't  
20 have the power to release him?

21       **A**     Well, he was aware he was being released from  
22 the custody of the sheriff and to immigration custody.  
23 He was very unhappy with the conditions in the Durango  
24 jail so, no, that did not set off a red flag to me. I  
25 knew he was anxious to get out of the Durango jail.

1           Q       So you thought he was just saying release to  
2 immigration as fast as you can?

3           A       That was what I understood, yes.

4           Q       And what efforts again did you make to get the  
5 solicitation offer?

6           A       I spoke to Ms. Pedicone about, the assigned  
7 county attorney about the fact that Tasc was finding him  
8 ineligible and requested that based on the circumstances  
9 of the case, the fact that he had that prior criminal  
10 history, he had strong family support, that he consider a  
11 plea to solicitation.

12          Q       That was to who again, sorry?

13          A       I believe the County Attorney who was assigned  
14 to the case was Erin Pedicone.

15          Q       And you did that in e-mail you said?

16          A       I spoke to her in person.

17          Q       And you have done deviation requests before in  
18 the past?

19          A       Yes, at length.

20          Q       Have you ever taken the time to write them down?

21          A       Yes. Yes, of course.

22          Q       You ever attach the letter from the family?

23          A       Yes.

24          Q       Did you do that in this case?

25          A       In this case, we found out he was not eligible

1 for Tasc on that day. I have the letters already with me  
2 and prepared to be submitted to the court. And so I  
3 showed Ms. Pedicone his letters when I discussed the  
4 family support and but, no, in this situation I did not  
5 submit a written deviation request because we were there  
6 present in court and Mr. Nunez-Diaz was anxious to  
7 resolve his case.

8 Q And on the E. D. C. plea offer sheet, did you  
9 request solicitation?

10 A I don't recall if I wrote it on the sheet. I do  
11 know that I spoke to her about it.

12 MR. YBARRA: No further question.

13 THE COURT: Mr. Kemper.

14 MS. KEMPER: Thank you.

15

16 REDIRECT EXAMINATION

17 BY MS. KEMPER:

18 Q So back on July 12, you did not know at that  
19 time for certain that Mr. Nunez-Diaz would not be  
20 eligible for Tasc, is that right?

21 A Correct. I did not know for sure. I had  
22 mentioned to him that I was concerned about it. Due to  
23 my experience in other cases, but that I would certainly  
24 speak with the representative again and try to get him  
25 into the program.



1           Q       When you used the phrase, could have  
2 consequences for immigration, and now on speaking about  
3 your letter of January 29 of 2015, and that would be the  
4 fourth paragraph, could you expound on that a little bit  
5 for us?

6           A       Any of the three plea agreements were going to  
7 have different consequences.

8                       If you were able to enter into Tasc, and  
9 have the deferred prosecution, then he would be in a much  
10 different situation with immigration because he will not  
11 have a conviction on his record.

12                      If he were to enter a solicitation plea, he  
13 would be in a much better situation in terms of  
14 immigration court because of the way that the laws deal  
15 with solicitation language.

16                      So my point was that each of the three  
17 things have different consequences. And which  
18 consequence he will suffer wouldn't be known until we  
19 were clear which plea we can get the state or the Tasc  
20 program to agree to.

21           Q       And wouldn't you say that that is true anytime  
22 you are advising a person charged with a crime that there  
23 are various options?

24           A       Generally, yes.

25           Q       So really what matters here is perhaps not what

1 was written in a letter, but what you told  
2 Mr. Nunez-Diaz?

3       **A**     Yes, I will agree with that.

4       **Q**     And what you told Mr. Nunez-Diaz just, so that  
5 we can all refresh our recollection after having sort of  
6 taken those detours, was on the day that he was signing  
7 the plea agreement, what did you tell him about  
8 immigration?

9       **A**     That after his sentencing, he would be released  
10 to ICE custody. At that point, he would make -- have to  
11 make a decision about how to proceed with his case,  
12 whether he wanted to attempt to do voluntary departure,  
13 whether he had some other claims for release that he  
14 could pursue. Or exactly how he wanted to handle that  
15 part of his matter.

16       **Q**     So you were using the word release with  
17 Mr. Nunez-Diaz in the way that we have used it here in  
18 the courtroom today meaning not that you get to walk out  
19 on to the street, but that you go from one custody  
20 situation to another?

21       **A**     He absolutely knew that he was going to  
22 immigration custody, as did his family because we  
23 discussed how long it would take for him to be  
24 transported, roughly, and what to expect in those days to  
25 follow.

1           Q     And you were standing with him when the plea  
2 colloque was being given, right?

3           A     Yes, of course.

4           Q     And if there has been any doubt in your mind  
5 whether he was doing this knowingly, voluntarily and  
6 intelligently, would you have done something?

7           A     If I had any concerns that he wasn't  
8 understanding, I would have stopped the proceedings and  
9 asked to a either reset the matter or have a few moments  
10 to speak with him.

11          Q     And did you --

12          A     I would have addressed it.

13          Q     Did you have any concern that day that he didn't  
14 understand the consequences?

15          A     I was confident he understood the consequences.

16                   MS. KEMPER: No further questions.

17                   THE COURT: Thank you.

18                   MS. Cassels, I have a couple of questions  
19 for you, this is Commissioner Miller.

20                   Did you ever talk to MS. Pedicone, about a  
21 solicitation offer?

22                   THE WITNESS: Sorry, it's a little bit hard  
23 to hear you, can you repeat that.

24                   THE COURT: Did you ever talk to MS.  
25 Pedicone about a solicitation offer?

1 THE WITNESS: Yes, I specifically requested  
2 if she can amend the plea offer to a solicitation charge.

3 THE COURT: And was the state willing to  
4 amend it to a solicitation charge at that time?

5 THE WITNESS: I was told no because he was  
6 in possession of two different drugs.

7 THE COURT: All right.

8 THE WITNESS: They were not willing to make  
9 that amendment in that situation.

10 THE COURT: All right.

11 Ms. Kemper, any additional questions?

12 MS. KEMPER: No, thank you.

13 THE COURT: Mr. Ybarra Maldonado, any  
14 questions?

15 MR. YBARRA: No, Your Honor, thank you.

16 THE COURT: All right. Thank.

17 You Ms. Cassels, you are excused.

18 MS. CASSELS: Thank you.

19 THE COURT: Any additional witnesses?

20 MS. Kemper.

21 MS. KEMPER: Your Honor, MS. Pedicone was  
22 in trial, the state is going to rest, thank you.

23 THE COURT: All right. Mr. Ybarra  
24 Maldonado, any rebuttal witnesses?

25 MR. YBARRA: No, your honor, defense rests.

1 THE COURT: All right. Thank you.

2 Any argument, Mr. Ybarra Maldonado?

3 MR. YBARRA: Thank you, Your Honor.

4 I believe we have met our burden of showing  
5 that Mr. Nunez-Diaz relied on the advice of his  
6 immigration of his defense counsel that it would not have  
7 immigration consequences and that is the sole reason why  
8 he accepted the plea agreement.

9 I heard from the family members who the  
10 only reason that they hired Alcock and Associates was so  
11 that their loved one could stay in the country. They  
12 were forced to pay thousands of dollars to get the same  
13 results that the public defender would have got, but  
14 probably with better advice in the public defender's  
15 office than they got from Alcock and Associates.

16 And I think it is clear that Mr. Nunez-Diaz  
17 was not aware. He did of course hear Your Honor say the  
18 immigration consequences, he did read that in the plea  
19 agreement as he admitted and but the most important  
20 evidence is him saying I relied on my attorney telling me  
21 that it would not have immigration consequences.

22 MS. Cassels, as she testified was well  
23 aware of the time that this plea would have severe  
24 immigration consequences, as she wrote in her letter to  
25 the court that she advised her client, it could have

1 immigration consequences.

2           That is very key, your honor. I think on  
3 that alone, we should win this case. Based on the  
4 Padilla case and subsequent case law about the importance  
5 of advising clients with certainty what the immigration  
6 results would be.

7           She knew that results would be, she  
8 neglected to clearly explain that to the client even  
9 months later on when she knew she was being investigated,  
10 when she knew there was a microscope on her, she writes a  
11 letter to the court and doesn't say with certainty I  
12 informed him this was going to be the result. She  
13 specifically says, I informed him it could have  
14 immigration consequences.

15           Now she said is that on July 12 and I can  
16 understand if her explaining, well, I am still trying to  
17 get solicitation, still trying to get Tasc. Then, when  
18 you go further down to that letter, when she says on July  
19 22, when I was explaining to him the plea that she  
20 signed, I said it could have consequences and that is not  
21 what she should have said. She should have said, it will  
22 have immigration consequences.

23           Based on that fact, Your Honor, I ask the  
24 court to grant our petition for petition for  
25 Post-Conviction relief.

1           Addressing our additional argument simply  
2 that the person should be given the immigration  
3 advisement individually when they are in front of the  
4 court and not in the morning ask if they simply remember  
5 it, but of course, I will leave that to the discretion of  
6 the court. I think our stronger argument is the Padilla  
7 that she did not say with certainty the result will have,  
8 when she knew and had consulted with immigration  
9 attorneys in her office what the results would be.

10           THE COURT: All right. Thank you.

11           Ms. Kemper.

12           MS. KEMPER: Your honor, in all  
13 Post-conviction proceedings, there is a strong  
14 presumption that counsel was ineffective.

15           So today, we have heard from MS. Cassels  
16 about the efforts that she made. She met with the  
17 defendant more than once, more than twice. She met with  
18 the family. She tried to get a better offer, she met  
19 with the person from Tasc. She couldn't get it done  
20 based on what he was found in possession of.

21           And it was because he was possessing two  
22 drugs, cocaine and methamphetamine. That she couldn't  
23 get a deal that will have given him a little bit of  
24 latitude relative to the immigration consequences.

25           This is a lawyer who testified that she was

1 well familiar with the Padilla versus Kentucky  
2 requirements, she had attended C. L. E. she even  
3 referred to the family when they came to see her on the  
4 immigration lawyer there in her office.

5 She did everything she could. So even if  
6 the law didn't require a strong presumption of effective  
7 assistance, it is the state's belief that MS. Cassels'  
8 testimony demonstrates effective assistance.

9 The defendant heard it from his defense  
10 lawyer, he heard it from this court and he saw it in the  
11 plea agreement. Three times he was told that there were  
12 potential immigration consequences.

13 He was told specifically by his lawyer that  
14 there were immigration consequences. But the defendant  
15 chose to go forward with the plea and telling the it is,  
16 that he chose then to elect voluntary departure, he  
17 didn't want to stay and fight and complain about the  
18 lawyer or seek a stay, no. He chose voluntary departure.  
19 So, again, this dove-tails very much with what Ms.  
20 Cassels was testifying to.

21 That once arrested, once in custody, the  
22 defendant's goal was to just get released into the next  
23 custody situation and to be done with this.

24 He chose voluntary departure.

25 Your Honor, the grant of a Post-Conviction



1 relief petition is truly resolved as the Carriger case,  
2 C. A. R. R. I. G. E. R.

3 For the situation where justice is run its  
4 course, but it has run awry, this is not that situation.

5 This defendant had all of the protections,  
6 he all the advisement. Heard the plea agreement. He had  
7 an attorney who was skilled and knowledgeable standing at  
8 his side, who will have stopped the proceedings if she  
9 had any doubt about his ability to understand.

10 It is not this lawyer's fault that this  
11 defendant was caught with drugs of such a type that a  
12 better offer wasn't available and so for all of these  
13 reasons, I will ask that you not grant the petition for  
14 Post-Conviction relief.

15 THE COURT: And Mr. Ybarra-Maldonado.

16 MR. YBARRA: Your Honor, just we like to  
17 emphasize that we didn't bring a claim alleging  
18 ineffective negotiations of a better plea. Ineffective  
19 investigation of the case. Because we thought so  
20 strongly that the immigration advice or misadvice was  
21 such that was our winning argument, it is just as clear  
22 as can be.

23 With regards to what can happen in the  
24 future, I know Mr. Kemper and I have discussed this  
25 before, and it is almost like, well, we win the case,

1 then how do we get him back and he gets back, they  
2 already said won't give solicitation, they won't do this  
3 and won't do that.

4 I will just ask the court to not take that  
5 into consideration. To take into consideration what our  
6 legal arguments are, what the constitution of the United  
7 States says.

8 What the Supreme court said regarding the  
9 Padilla case and its progeny. You find that there was  
10 ineffective assistance and in my experience in doing  
11 criminal immigration work in Phoenix, this is not the  
12 first I have heard of Alcock and Associates law firm  
13 giving misadvice to someone who is undocumented.

14 It is, unfortunately, very common within  
15 our community.

16 MR. KEMPER: Your Honor, I will seek to  
17 object to that. It is improper argument. There was no  
18 evidence adduced about Alcock and Associates, what  
19 their practices are.

20 MR. YBARRA: That is, fine Your Honor, I  
21 will retract that.

22 THE COURT: All right. Thank you.

23 Mr. YBARRA: I do want to state that if we  
24 do get him back over here, it is now a different ball  
25 game. Because when he was in custody, we still had Prop

1 100. Prop 100 has since been ruled unconstitutional, but  
2 now we can get him a bond, which should in fact make him  
3 now eligible for Tasc.

4           Because the reason they were denying Tasc  
5 because he had an ICE hold so get him back and I don't in  
6 other cases given the C. R. number. I have got the  
7 person released to immigration custody, bonded out or let  
8 out on the street by immigration, returned and say, hey,  
9 this guy no longer has an ICE hold, he is out here in the  
10 community and I know he is here and then there should be  
11 and that should be, that has been sufficient enough to  
12 get the Tasc offer.

13           Thank you, Your Honor.

14           THE COURT: You are welcome.

15           I will take this matter under advisement,  
16 issue my ruling by way of minute entry.

17           Anything further from the state?

18           MS. KEMPER: No, Your Honor. Thank you.

19           THE COURT: Any further from the defense?

20           MR. YBARRA: Judge, thank you and your  
21 staff for being very generous with the unbelievably  
22 difficult technological problems.

23           THE COURT: You are welcome. It was an  
24 experience for all of us.

25           Thank you.

1                   Can we, Ms. Kemper and Mr. Maldonado, move  
2 to admit all the exhibits?

3                   MS. KEMPER: Certainly.

4                   MR. MALDONADO: Yes, Your Honor. No  
5 objection.

6                   THE COURT: Exhibits 1, 2 and 3 an are  
7 admitted. Thank you .

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I, Yvonne M. De La Torre, RPR, do hereby certify that the foregoing pages constitute a complete, accurate, typewritten record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

DATED this 2nd day of February, 2016.

\_\_\_\_\_/S/\_\_\_\_\_  
Certified Reporter  
No. 50470

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,

Plaintiff,

v.

HECTOR SEBASTION NUNEZ-DIAZ,

Nunez-Diaz.

NO. CR 2013-430489-001

**MOTION FOR REHEARING  
PURSUANT TO RULE 32.9(a)**

(Oral argument hearing requested)

(The Honorable Phemonia L. Miller)

The State of Arizona, through undersigned counsel, asks this Court to set this matter for oral argument and rehearing. The following memorandum supports this request.

Submitted March \_\_\_\_\_, 2016.

WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY  
BY /s/ \_\_\_\_\_  
Karen Kemper  
Deputy County Attorney

## MEMORANDUM OF POINTS AND AUTHORITIES

I. Rehearing under Rule 32.9(a) is necessary because a recent decision of the Arizona Supreme Court, which issued after this Court's December 30, 2015 ruling, directly impacts this Court's analysis and ruling on Defendant's Rule 32.

**A. The holding in and effect of *State v. Amaral*.**

An amended ruling is requested in light of a Rule 32 case recently decided by the Arizona Supreme Court case, *State v. Amaral*, No. CR-15-0090-PR, ¶¶ 10-11, 2016 WL 423761 (Feb. 4, 2016) (clarifying that a colorable claim requires more than a showing that the alleged facts "might" have changed the outcome).

In *Amaral* the Court looked back at earlier Rule 32 cases and found that the word "might" originated in *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). *Id.* at ¶ 10. That word, "might", was a misstatement of the standard which had been articulated under earlier case law. *Id.* (citations omitted). The Court went on to state: "A standard based on what "might" have changed the sentence or verdict is inconsistent with Rule 32 and most of the case law." *Id.* at ¶ 11.

The relevant inquiry for determining whether a Rule 32 petitioner is entitled to an evidentiary hearing is, according to the Arizona Supreme Court: "whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence. **If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal.** Ariz. R. Crim.

P. 32.6(c).” *Id.* at 11 (italics in original, emphasis in bold added). Because *Amaral* clarifies the standard to be applied, *Amaral* is not a change in the law.

Here, both the State and Defendant relied upon the “might” standard. His reliance upon “might” is found on page 7 of his amended petition for post-conviction relief, under Roman numeral III. “Law and Arguments”, subsection “A. General Principles Governing PCRs”. Defendant states: “A colorable claim is one which, if the allegations are true **might** have changed the outcome of the trial verdict.” (Amended Petition dated September 9, 2014, at 7, *citing State v. Puls*, 176 Ariz. 273, 275, 860 P.2d 1326, 1328 (App. 1993).

*Puls* was a Court of Appeals, Division 2, opinion that relied, upon *Schrock*. *Id.* *Schrock* is the case that the State cited in its response, and upon which Defendant relied via *Puls*. Reliance upon the misstatement found in *Schrock*, and compounded by cases relying upon *Schrock*, cannot stand. The State recognizes that the parties and this Court could not have presaged the Arizona Supreme Court’s clarification of the applicable standard. But now that the standard has been clarified, the State asks this Court to reconsider whether the facts as alleged by the Defendant would have, under the correct standard, *probably* have changed his sentence.

Procedurally, this matter is at an appropriate juncture for implementing and considering the now clarified standard. Rather than proceed on a petition for review to the appellate court, the correct standard can be more swiftly implemented by returning to the trial court under Rule 32.9(a). Furthermore, this



action is timely. This Court's ruling issued on December 30, 2015. The State timely filed a motion asking for additional time to obtain a transcript of the evidentiary hearing and to review that transcript. (Motion to Set Due Date filed February 1, 2016.) The transcript was received on February 8, 2016. On February 22, 2016 the State filed a notice and asked for a due date of March 10, 2016. The State has, then, timely filed today, March 8, 2016, this motion under Rule 32.9(a). As stated earlier, rehearing will provide the most immediate forum for this issue.

**B. Under the clarified standard the facts as alleged, if true, would not have changed the outcome.**

**i. The facts here, where no better offer existed, would result in the same outcome no matter who represented Defendant.**

It is well to recall that Defendant was stopped for speeding by two police officers, in a marked patrol unit, at around 2 a.m. When they asked Defendant for identification he failed to comply. Defendant was then arrested. The result of a search incident to arrest yielded small quantities of methamphetamine and cocaine. The methamphetamine was wrapped in a dollar bill. The cocaine was in a plastic bag. Defendant was later charged with possession of narcotic drug and possession of a dangerous drug, both Class 4 felonies. Eventually, Defendant elected to take a plea. He was present for the group advisement which included the immigration advisement. That same day he entered a plea to possession of drug paraphernalia as a class 6, undesignated offense.

In his Rule 32 petition, Defendant contended that if he had pled to solicitation to possess marijuana, he would have avoided immigration consequences. (Petition at 5, 9.) But Defendant did not produce any evidence in his pleadings or at his evidentiary hearing that a solicitation plea was even a possibility. Furthermore, the factual basis for a plea to solicitation to possess marijuana could not have been made since there was no marijuana found when Defendant was arrested. The only plea was to a class 6, undesignated possession of drug paraphernalia.

Defendant's claim that his attorney, Ms. Cassells, promised him a favorable immigration outcome should be reconsidered in light of the applicable standard in *Amaral*. From the time Defendant first appeared in Court, there was an ICE hold on him. (Evidentiary Hearing, Reporter's Transcript, hereafter RT, 10/27/2015 at 13.) His family admitted that Defendant was here illegally. (*Id.* at 16.) Defendant knew he was here illegally, and given the ICE hold, he knew he had an immigration problem. Defendant also knew that he was not in possession of marijuana the night he was stopped. The fact that Defendant was in possession of cocaine and methamphetamine when he was stopped is a set of facts beyond change. The State's best offer was a plea to a class 6 undesignated offense for possession of drug paraphernalia. At that time, that plea had unfavorable immigration consequences for the Defendant. The fault for the unfavorable immigration consequences, on this record, does not lie with defense counsel, Ms. Cassells. Defendant failed to show that another lawyer

could have obtained a better result. The first prong of the *Strickland* test, as to plea negotiations and plea realities, should be reconsidered.

**ii. Prejudice flowed from Defendant's choice to possess cocaine and methamphetamine, not from advice about immigration consequences.**

This was a strong case for the State. Defendant was stopped for speeding and officers found drugs in his possession. Had he gone to trial and lost, the result would have been worse. He would stand convicted of two, class 4 felonies and the immigration consequences would remain.

With regard to a non-trial disposition, there is nothing in this record to support a claim that the State's offer would have been better if Defendant had a different lawyer. The State's offer was the State's offer. So whether Defendant had Ms. Cassells as his attorney or someone else, the offer made at Early Disposition Court/EDC was the State's offer.

Defendant has argued that his complaint is with the immigration advice he received and that the advice took the form of a promise. But that contention is undermined in two ways. First, it is undermined by the in-court, on-the-record plea colloquy. This Court would not have accepted his plea if Defendant had said that his plea was induced by a promise or promises. (RT 07/22/2013 at 9-10.) Second, whether *Strickland* was offended by what occurred here merits further inquiry. As the United States Supreme Court held in *Padilla*,

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

*Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482, (2010)

In *Padilla*, the United States Supreme Court found that the duty to give correct advice, when the deportation consequences are clear, can satisfy the first prong of *Strickland*. *Id.* at 369. But whether *Padilla* was prejudiced by the errant advice and whether that would lead to a finding of prejudice was left to Kentucky to decide,

Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

*Padilla*, 559 U.S. at 369, 130 S. Ct. at 1483-84.

When the defendant in *Padilla* returned to the Commonwealth's court, he was able to demonstrate that if he had been properly informed of the immigration consequences of his guilty plea, he would have insisted upon going to trial. *Padilla v. Commonwealth*, 381 S.W. 3d 322, 328-29 (App. 2012). In assessing whether Jose Padilla's insistence that he would have gone to trial was reasonable under the circumstances, the appellate court looked at the fact that Jose Padilla had been a lawful permanent resident of the United States for over forty years. *Id.* at 324. The court also considered the fact that Padilla took a plea

offer the day of trial under an erroneous belief that he would not be subject to mandatory deportation. *Id.* at 329. Had Padilla known that either way he faced a possibility of mandatory deportation, it would have been reasonable for him to choose a trial, therefore Padilla had suffered prejudice. *Id.* at 330.

The same analysis utilized in *Padilla* applies here. Under the second prong of *Strickland*, the inquiry is whether there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 326 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984)). Here, even if counsel had repeatedly told Defendant that there absolutely, positively would be immigration consequences, is there a reasonable probability the result of the proceeding would have been different? Unlike the defendant in *Padilla*, Defendant Nunez-Diaz was not a lawful permanent resident who reasonably would choose a trial in order to fight to stay in this country. In essence, Padilla had nothing to lose by going to trial and hoping for a miracle.

By contrast, Nunez-Diaz had no legal status. He was under an ICE hold from the beginning. Nunez-Diaz never said he wanted a trial. Whether he was convicted at trial or convicted under a plea, he was still going to be deported. Furthermore, Nunez-Diaz said he wanted a plea. Yet, the only plea on offer was one that would result in his deportation, albeit without having two, class 4 felonies on his record. These are the inescapable facts. Nunez-Diaz' claimed prejudice is illusory.

...

## II. Requested relief

In light of the Arizona Supreme Court's recent decision in *Amaral*, the State asks this Court to reconsider:

- the standard to be applied to post-conviction claims, and specifically to set aside the misstatement of the law in *Schrock*; and
- whether, under *Amaral*, Defendant articulated a colorable claim for relief.

The State also requests oral argument or, in the alternative, rehearing. Because the *Amaral* decision changes the standard to be applied, and because Defendant and the State relied upon cases which the Arizona Supreme Court has identified as a misstatement of the law, the State believes that the interests of justice would be well served by setting this matter for oral argument.

## III. Conclusion

For all the reasons argued here, and in view of newly clarified and applicable law, the State urges this Court to set this matter for rehearing as soon as practicable.

Submitted March \_\_\_\_\_, 2016.

WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY

BY /s/ \_\_\_\_\_  
Karen Kemper  
Deputy County Attorney

Copy of the foregoing  
mailed\delivered this  
\_\_\_\_\_ day of March, 2016,  
to:

The Honorable Phemonia L. Miller  
Judge of the Superior Court

*Counsel for Petitioner*  
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BY /s/ \_\_\_\_\_  
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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,  
Plaintiff,  
v.  
HECTOR SEBASTION NUNEZ-DIAZ,  
Defendant.

NO. CR 2013-430489-001

**REPLY IN RULE 32.9(a)**  
**PROCEEDINGS**

(The Honorable Phemonia L. Miller)

The State of Arizona, through undersigned counsel, has received Defendant's response filed May 20, 2016. This is the State's reply.

Submitted May 27, 2016.

WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY  
BY /s/ \_\_\_\_\_  
Karen Kemper  
Deputy County Attorney



## MEMORANDUM OF POINTS AND AUTHORITIES

I. A recent opinion by the Arizona Supreme Court clarifying what constitutes a colorable claim under Rule 32, *State v. Amaral*, 239 Ariz. 217, 368 P.3d 925, 928 (2016), is both relevant and applicable here.

Defendant argues, on page 2 of his response, that the Arizona Supreme Court's recent decision in *Amaral* is "irrelevant to this Court's ruling." Defendant also argues, on page 2, that "[i]t is irrelevant what is cited in briefs." He also complains, "[i]nterestingly, the State does not even one time quote from the order." (Response at 3.) The State, for the reasons that follow will quote from the order and thereby demonstrate the relevance of the standard articulated in *Amaral* to the sworn facts as adduced during the hearing and transcribed by the court reporter.

*Amaral* clarifies that the standard to be applied in Rule 32 cases is whether the defendant has alleged facts which, if true, would **probably** have changed the verdict or sentence. *Amaral*, 239 Ariz. 217, ¶ 11, 368 P.3d 925, 928 (2016) (emphasis added). As with all grounds for post-conviction relief, the defendant has the burden of proving the allegations by a preponderance of the evidence. Ariz. R. Crim. P. 32.8(c); *State v. Verdugo*, 183 Ariz. 135, 901 P.2d 1165 (1995). In order to carry that burden, the defendant must present evidence of a "provable reality, not mere speculation." *State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983). Therefore, and under the *Amaral* standard, the issue is: Whether, on the facts as they were adduced at the hearing, did defendant prove by a preponderance of the evidence that he is entitled to relief.

a. **The omissions/variations between the court's factual findings and the court reporter's transcript of sworn witness testimony should be considered under *Amaral*, under *Strickland* and Rule 32 case law, and under witness credibility standards.**

The State acknowledges that much of the testimony at the hearing was hard to hear. One of the witnesses, Defendant's sister, was soft-spoken and had to be reminded to keep her voice up. Another witness, the Defendant, appeared via Skype. The State's witness, Ms. Cassels, appeared telephonically. The State further recognizes that the certified court reporter who transcribed these proceedings had the best vantage point in the courtroom to hear witness testimony. The State also acknowledges that the entire context of the proceedings is important. Therefore, the State has attached the October 27, 2015 transcript as Exhibit 1, and asks that this Court consider the entire transcript. That said, the following chart lists excerpts from the trial court's ruling on the left and on the right side cites excerpts from the court reporter's transcript of the October 27, 2015. The transcript excerpts are offered for context and, in some instances, content.

Factual findings by the trial court from Minute Entry dated December 23, 2015	Transcript of witness testimony taken from Reporter's Transcript, hereafter R.T., October 27, 2015
<p><i>From second bullet point, pages 1-2 (emphasis added):</i>            "She further testified that the attorney went as far as to draw a diagram depicting the criminal and immigration process and the plan to minimize any exposure and help him with immigration court." . . . <b>"The family retained the attorney</b> because they were told there would be no immigration consequences."<sup>1</sup></p>	<p><i>Direct examination of Defendant's sister Maria Josefina Nunez-Diaz at pp. 16, lines 16-20; and 17, lines 9-12: (emphasis added)</i>            Q. And what did they explain to you how they were going to deal with that situation?            A. Frank did like a diagram. He explained to us he is the criminal case first and then he explained to us the immigration case, which in there was when I understood, there were two different cases. And they needed two different lawyers for that.</p>

<sup>1</sup> The "attorney" referenced here, when taken in the context of the entire quote, appears to be Frank Carrizoza. Bullet point #2 in its entirety reads: "Defendant's sister, Maria Josefina Nunez-Diaz testified that she and her family met with Frank Carrizoza, an attorney at Alcock & Associates to discuss her brother's case. They informed the attorney that they were really concerned about defendant's case because he was not a citizen of the United States. She further testified that the attorney went as far as to draw a diagram depicting the criminal and immigration process and the plan to minimize any exposure and help him with immigration court. The family met with the attorney on more than one occasion. The family retained the attorney because they were told there would be no immigration consequences."

	<p>Q. And did he go on to represent your brother?</p> <p>A. Frank</p> <p>Q. Yes?</p> <p>A. No.</p>
<p><i>From bullet point #6, page 2:</i></p> <p>"Ms. Cassels testified that Defendant could either go to TASC (suspended prosecution) of plead to Possession of Drug Paraphernalia, a Class 6 undesignated felony. However, because of defendant's non-bondable status, he was not eligible for TASC."</p>	<p><i>Direct examination of Julia Cassels at p. 28, lines 18-25, and p. 29, lines 1-19:</i></p> <p>Q. Once, [sic] You learned that Tasc was not available, what did you do next?</p> <p>A. I approached the assigned prosecutor on the case, and requested a plea deviation to a solicitation charge.</p> <p>Q. Were you successful in getting a plea deviation?</p> <p>A. I was informed by the prosecutor that she had staffed it with her supervisor and the request was denied because Mr. Nunez-Diaz was in possession of two different drugs and, therefore, they were unwilling to make that modification.</p> <p>Q. And those two different drugs, were those methamphetamine and cocaine?</p> <p>A. Correct.</p> <p>Q. Did you explain this to Mr. Nunez-Diaz?</p> <p>A. I did. I explained it to him on two different occasions as well as two to his family.</p> <p>Q. Did Mr. Nunez-Diaz ever tell you that he wanted to go to trial?</p> <p>A. No. He indicated he did not want to go to trial.</p> <p>Q. Were you able to obtain a plea offer for him?</p> <p>A. Yes. He was then presented with the option of accepting the offer to the drug paraphernalia as a class 6 open and he elected to accept that plea offer.</p> <p>Q. Did you tell him that there would be consequences for his immigration status?</p> <p>A. Yes, absolutely.</p>
<p><i>From bullet point #10, page 2:</i></p> <p>"Defendant further testified that he relied on the statements from his attorney and entered into the plea agreement. Defendant also stated that although the court told him there might be immigration consequences, he signed the plea</p>	<p><i>Cross-examination of Defendant at pp. 10, lines 17-25; 12-13, lines 21-25, 1-5: (emphasis added)</i></p> <p>Q. But you say that she promised you there would be no immigration consequences if you signed the plea, correct?</p> <p>A. Yes.</p>

<p>because his attorney said there would be no immigration consequences.”</p>	<p>Q. So you signed a plea?  A. Yes.  Q. But a judge had told you that there would be immigration consequences if you signed a plea?  A. Yes  ...  Q. You were also asked if anyone had made you any promises. Do you remember that?  A. Yes.  Q. <b>And you told the court no one had made you any promises to get you to sign the plea, isn't that correct?</b>  <b>A. Uh-huh, yes.</b>  Q. When you appeared in court, that day for your change of plea, there was already an immigration hold on you, wasn't there?  A. Yes.</p>
<p><i>From bullet point #14, page 2:</i>  “Ms. Nunez-Diaz further testified that after defendant entered into the plea and was sentenced, the attorney said there was nothing she could do. That the matter was now in immigration hands. This made Ms. Nunez-Diaz and her family upset.”</p>	<p><i>Direct examination of Defendant's sister, Josefina Nunez-Diaz at 18, lines 13-25 (emphasis added):</i>  A. Well, after my brother's second hearing, we went to ask her if we she was done with the case because after the second one, there was a second hearing and that is when my brother pled guilty and we didn't know that they made that decision. So we met with her and we told her if it was okay, she said that it was okay, that it was all in immigration's hands.  Q. And did you meet with anybody else at Alcock and Associates?  A. Yeah, after that, we asked her to give us an advice to represent my brother in the immigration side and <b>we met with another lawyer, I don't know his name.</b>  ...  <i>Cross-examination of Defendant's sister, Josefina Nunez-Diaz at 20, lines 22-25; p. 21, lines 11-21:</i>  Q. Ms. Nunez-Diaz, I hear you telling us that you are angry with the immigration lawyer, is that right?  A. Yes.  ...  Ms. Kemper: I asked her if she knew what her brother was charged with and what type of drugs because that goes directly to what type of</p>

	<p>resolution he could have gotten.  The Court: The objection is overruled.  The Witness: No, I don't know what kind. The when we met with the lawyer, the lawyer, the immigration lawyer, he said if my brother was found with marijuana, that it could have been easier for him to do it, but since there were other drugs involved, that <b>he couldn't do nothing</b>.</p>
<p><i>From bullet point #16, page 3:</i>  Defendant was processed through Immigration and Customs Enforcement and was transferred to the Eloy Detention Center. Once in immigration court, defendant had problems. He tried to contact his attorney at Alcock and Associates, but did not receive a response.</p>	<p><i>Cross-examination of Defendant at page 13, lines 2-5:</i>  Q. When you appeared in court, that day for your change of plea, there was already an immigration hold on you, wasn't there?  A. Yes.</p>

**Promises**

Here, the facts show that Mr. Nunez-Diaz knew that there would be immigration consequences should he accept the State's offer. The State offered to resolve his cocaine and methamphetamine possession charges with a guilty plea to a Class 6, undesignated offense. Despite defense counsel's request for a better plea, no better plea was offered. Yet, Mr. Nunez-Diaz did not want a trial. Instead, he knowingly, intelligently, and voluntarily waived his right to a trial during change of plea proceedings. During those same proceedings Mr. Nunez-Diaz stood before the court and avowed that no promises had been made to him. Had he told the court that promises had been made, as he now claims, the court would not have accepted his plea.

Yet now on PCR before this Court, he claims that promises were made to him. As this Court noted in its order, credibility findings must include consideration of "whether a witness's testimony is contradicted by anything the witness said or wrote before trial or by other

evidence.” (M.E. 12/23/2015 at 3.) Where credibility of a witness is at issue, such an about face should be considered, but the Court’s order is silent on this point. Instead, and without any specific reference to his testimony, this Court made the following finding: “The Court finds Defendant’s testimony and Maria Josefina Nunez-Diaz’s testimony credible.” The State requests rehearing/reconsideration on whether this Court found Mr. Nunez-Diaz’s statements at the Rule 32 regarding promises to be contradictory to his pre-trial, plea colloquy statement, which he affirmed under oath during the Rule 32 hearing, that no promises had been made to him.

## II. Application of *Strickland*

### a. The first prong of *Strickland* is not supported by the facts.

This Court found “overwhelming evidence” that Defendant’s counsel fell below an objective standard because, in part, the Court found Defendant and his family credible about what he and his family were told and the consequences which followed. As argued above, Defendant’s credibility on the promise/not promise issue has been called into question. Be that as it may, the standard to be applied under *Strickland* is as follows:

A fair assessment of attorney performance requires that every effort be made to **eliminate the distorting effects of hindsight**, to reconstruct the circumstances of counsel’s challenged conduct, and to **evaluate the conduct from counsel’s perspective at the time**. Because of the difficulties inherent in making the evaluation, **a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.**

*Strickland v. Washington*, 466 U.S. 668, 689 (1984) (emphasis added).

This Court apparently premised its below-the-standard finding in large part upon the “reasonableness” of Defendant’s reactions and the reactions of his family when, after having been on an ICE hold since his arrest, he entered ICE custody. See M.E. at 4. The fact that Defendant and his family were upset is of little utility and it is not the focus under *Strickland*.

Many defendants are upset by the outcome of their cases. A finding of deficient performance must focus on the reasonableness of the lawyer. That is to say, her conduct, her duty, all the while indulging a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. And the context for assessing defense counsel's reasonableness must be the facts of the case she was dealing with and the reality that the State would not consider any other offer than the offer the State tendered, and Defendant accepted. Here, the testimony clearly established that Defendant was caught in possession of cocaine and methamphetamine. Defendant did not want to go to trial. Defendant knowingly, voluntarily, and intelligently entered a plea of guilty. Defendant was advised of immigration consequences by the trial court and by his lawyer. Despite whatever concerns there may be about Alcock and Associates, this record is insufficient to sustain a *Strickland*-based finding of deficient performance by defense counsel.

**b. The second-prong finding of prejudice under *Strickland* was impermissibly premised on an after-the-fact change in the law announced in *Lopez-Valenzuela v. Arpaio*, 770 F. 3d 772 (9<sup>th</sup> Cir. 2014).**

This Court's finding of prejudice, on page 4 of the December 23, 2015 minute entry, included the following:

The court finds that as a direct result of Ms. Cassel's failure to properly advise Defendant of his immigration consequences, defendant was placed in removal proceedings and was held without bond. Furthermore, the reason defendant was unable to attend the TASC program no longer exists in light of the ruling in *Lopez-Valenzuela v. Arpaio*." (citation omitted).

Defendant entered his guilty plea on July 22, 2013. The *Lopez-Valenzuela* case cited by this Court in its order granting relief was decided over a year after Defendant pled. *Lopez-Valenzuela* was decided on October 15, 2014. The law in effect at the time of Defendant's

crime, and at the time of his admission of guilt, and at the time of his sentencing was the law as it was before *Lopez-Valenzuela*. That is to say, the law in effect at all relevant periods and as applied to Mr. Nunez-Diaz legally barred his admission into a deferred prosecution program because he was non-bondable under Proposition 100<sup>2</sup>. At the time of his arrest, Defendant was in the category of offenders to which Proposition 100 applied. Absent retroactivity, a change in the law which occurs after Defendant has been convicted is not grounds for a finding of prejudice.

**c. There is no basis for the finding that had Defendant known there were immigration consequences he would not have signed the plea.**

The testimony adduced at the hearing was: Defendant was caught with methamphetamine and cocaine, he pled guilty to a crime that had immigration consequences despite his attorney's efforts to obtain a better plea, and he suffered the consequences of his crime. This Court found, "Defendant would not have signed the plea if he was adequately advised of the immigration consequences." Yet, the record shows that Defendant was aware of immigration consequences and that he clearly stated he did not want a trial.

If Defendant had not signed a plea, he would have proceeded to trial on two, class 4 felonies. The facts, which the State recited in its response to Defendant's Rule 32 petition, were straightforward. On June 29, 2013, at about 2 a.m., two police officers were patrolling West Indian School in their marked patrol unit. They noticed Defendant driving a vehicle in excess of the posted 40 m.p.h. speed limit. The officers paced the speeding vehicle then pulled the driver over. When they asked Defendant for identification he failed to comply.

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<sup>2</sup> Proposition 100 mandated that state courts could not set bail for serious felony offenses if the person charged had entered or remained in the United States illegally and if the proof was evident or the presumption great as to the present charge.



Defendant was then arrested. The result of a search incident to arrest yielded small quantities of methamphetamine and cocaine. The methamphetamine was wrapped in a dollar bill. The cocaine was in a plastic bag.

Defendant's counsel incorrectly opines that the State "assumes a guilty verdict following a jury trial". Response at 7. The State makes no such assumption. The State simply asserts that in the pantheon of cases tried every day in Superior Court, this would appear to be a strong case for the State. Defendant's immigration status is not the issue for trial. The issue for trial would be whether the State could prove drug possession charges.

Defendant's current lawyer also argues that he "has attained not guilty verdicts following jury trials on behalf of undocumented immigrants", but again this is not a consideration under the prejudice prong of *Strickland*. Nor is defense counsel's argument that he "has also attained TASC for individuals with ICE holds" in a 2015 cause. Response at 8. The result he touts was achievable after the change in the law announced in *Lopez-Valenzuela*, but it was not available when Mr. Nunez-Diaz was charged with his crimes.

Had Mr. Nunez-Diaz chosen to forgo a guilty plea, he would have been tried for two counts of drug possession. TASC would still not have been an option even if jurors found him guilty of only drug paraphernalia. The possible options for Mr. Nunez-Diaz at trial were: not guilty on both counts; guilty on one count; guilty on both counts; or a mistrial. Only one of those options out of four could result in a favorable outcome with immigration. A mistrial, barring misconduct, would simply result in a re-trial. There were no good options for Mr. Nunez-Diaz because of the inescapable fact that the State had an officer and an expert who would testify. The officer would say that he stopped Mr. Nunez-Diaz and that, as a result of a search, he found drugs. The expert would identify the drugs found as methamphetamine and

cocaine. The fact that Mr. Nunez-Diaz's charged crime pre-dates *Lopez-Valenzuela* is unfortunate, but that fact is not the type of prejudice contemplated by *Strickland*.

**III. Authority cited by the parties and relied upon by the Court should be reconsidered in light of *Amaral*.**

In reaching its grant of relief this Court relied upon the motions filed by the parties. See Minute Entry 12/23/2015 at 1, ¶ 3. Defendant argues that what is cited in the briefs is "irrelevant" yet he admits that his citation to *State v. Puls*, 176 Ariz. 273, 860 P.2d 1326 (App. 1983), articulated the might-have-changed-the-outcome standard that has been rejected under *Amaral*. Defendant then argues "there is no issue whether the alleged facts might have or probably would have changed the verdict or sentence. It is with 100% certainty that Mr. Nunez-Diaz would not have accepted the plea." Response at 2. But the record before this Court is otherwise.

The State maintains, and has shown, that the standard announced in *Amaral* does matter; the applicable law matters; the focus under *Strickland* matters; and the underlying facts that defense counsel had to work with matter. The applicable legal standards and the facts of record do not support a grant of relief.

**Conclusion**

For all the reasons argued herein, the State asks this Court to reconsider its ruling.

Submitted May \_\_\_\_\_, 2016:

WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY

BY /s/ \_\_\_\_\_  
Karen Kemper  
Deputy County Attorney

Copy of the foregoing  
mailed\delivered this  
\_\_\_\_\_ day of May, 2016;  
to:

The Honorable Phemonia L. Miller  
Judge of the Superior Court

*Counsel for Petitioner*  
Ray Ybarra Maldonado  
Law Office of Ray A. Ybarra Maldonado, PLC  
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Phoenix, AZ 85006

BY \_\_\_\_\_  
/s/Karen Kemper  
Deputy County Attorney

# EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
Vs	)	CR2013-430489-001
	)	
HECTOR SEBASTION NUNEZ-	)	
DIAZ,	)	
	)	
	)	
	)	
<u>Defendant.</u>	)	

BEFORE THE HONORABLE PHEMONIA L. MILLER  
REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING

Phoenix, Arizona  
October 27, 2015

COPY  
For:

BY: YVONNE M. DE LA TORRE, RPR  
Certified Reporter  
No. 50470

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FOR THE PLAINTIFF

Nunez-Diaz Hector

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Nunez-Diaz, Maria

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Cassels, Julia

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## 1 APPEARANCES:

2 For the Plaintiff Karen Kemper  
Deputy County Attorney

3 For the Defendant Ray Anthony Ybarra  
Attorney at Law

4 Interpreter Kathleen Penney

5  
6 BEFORE THE HONORABLE PHEMONIA L. MILLER

7 \*\*\*\*\*

8 Phoenix, Arizona  
9 October 27, 2015

10 THE COURT: This is the time set for  
11 evidentiary hearing on the defendant's petition for  
12 Post-Conviction Relief. It is CR2013-430489-001.

13 In the matter of the State of Arizona  
14 versus Hector Nunez-Diaz.

15 Will the parties announce for the record.

16 MS. KEMPER: Karen Kemper appearing for the  
17 state.

18 MR. YBARRA: Good afternoon, Your Honor.  
19 Ray Ybarra Maldonado on behalf of Mr. Nunez-Diaz.

20 THE COURT: And Mr. Nunez-Diaz, will you  
21 please state your full name and date of birth for the  
22 record?

23 THE DEFENDANT: Hector Sebastian  
24 Nunez-Diaz, August 4 of 1986.

25 THE COURT: And good afternoon to you, sir.

1 THE DEFENDANT: Good afternoon.

2 THE COURT: Mr. Nunez-Diaz, by chance, do  
3 you have ID on you so that I can verify that you are, in  
4 fact, Mr. Nunez-Diaz?

5 THE DEFENDANT: Yes, of course.

6 THE COURT: Will you please put it up to  
7 the camera. Okay. Go back a little. Go back. Go back.  
8 Okay. Can anyone see? Can you guys see. All right. It  
9 is a little bit blurry, can you put it closer, slowly  
10 closer to the camera.

11 All right. Stop. Go back just a little.  
12 Okay. I am going to rely on the people with glasses to  
13 help me out. Can you see the name?

14 THE CLERK: It is a picture of him.

15 THE COURT: Can you see that is him?

16 MR. YBARRA: No, Your Honor.

17 THE COURT: All right.

18 So will the person next to you, can you  
19 give her the ID and have her read the name and date of  
20 birth for me.

21 Okay. She is going to give you the phone,  
22 she's giving, she is going to tell you the name and the  
23 date of birth.

24 THE COURT: Your name, ma'am.

25 THE INTERPRETER: The name on the ID says



1 Hector Sebastian Nunez-Diaz. Martha Bravo is her name.

2 THE COURT: And the date of birth on the  
3 ID?

4 THE INTERPRETER: It says August 4 of 1986.

5 THE COURT: Thank you, Ms. Bravo.

6 You can give the ID back to Mr. Nunez-  
7 Diaz.

8 Mr. Nunez-Diaz, we will conduct this  
9 hearing over the phone so the interpreter will interpret  
10 to you over the phone.

11 The Skype may or may not work, but we will  
12 still have you on the phone to listen to the hearing if  
13 by chance Skpye gets disconnected. Do you understand?

14 THE DEFENDANT: Okay. Yes, I understand.

15 THE COURT: Okay. All right. So I will  
16 need for you to raise your right hand so that my clerk  
17 can swear you in.

18

19 HECTOR SEBASTIAN NUNEZ-DIAZ

20

21 Called as a witness herein, having been first duly sworn,  
22 was examined and testified as follows:

23

24 THE COURT: Thank you. All right.

25 I have had the chance to review the

1 defendant's petition for Post-Conviction relief.

2 I have also had the chance to review  
3 state's response.

4 Mr. Ybarra, is the defense read to proceed  
5 with the evidentiary hearing?

6 MR. YBARRA: Yes, we are, Your Honor.

7 THE COURT: And Ms. Kemper, is the state  
8 read to proceed?

9 MS. KEMPER: Yes, Your Honor.

10 THE COURT: All right. Mr. Ybarra, it is  
11 your motion so let me hear from you first. Call your  
12 first witness.

13 MR. YBARRA: Thank you, Your Honor. We  
14 call Hector Sebastian Nunez-Diaz.

15 THE COURT: Okay.

16 And Mr. Nunez-Diaz, you were previously  
17 sworn in.

18 Mr. Ybarra, you can proceed.

19 MR. YBARRA: May I approach, Your Honor, to  
20 try to visual.

21 THE INTERPRETER: Maybe you can stand here  
22 and have him, turn the thing around.

23 MR. YBARRA: Sure.

24

25

## 1 DIRECT EXAMINATION

2 BY MR. YBARRA:

3 Q Mr. Nunez-Diaz, what did your attorney explain  
4 to you as far as the immigration consequences of your  
5 plea?6 A I was told that I was not going to have any  
7 consequences pleading guilty. That I would not have any  
8 problem at immigration. That they had attorneys for that  
9 to be able to solve my problem.10 Q And was this an attorney appointed by the court  
11 or someone that you paid?

12 A It was someone here, I hired.

13 Q And when she explained to you the plea  
14 agreement, do you remember going over that, I believe it  
15 is two pages?

16 A Yes.

17 Q And do you remember it saying that your plea of  
18 guilty might have immigration consequences?

19 A Yes.

20 Q So why did you go forward and sign that plea  
21 agreement if it is written in the plea that it could have  
22 immigration consequences?23 A Because the attorney told me that there were not  
24 going to be any consequences.

25 Q And then, again, didn't the judge tell you that

1 morning that your plea might have immigration  
2 consequences?

3       **A**     Yes.

4       **Q**     So who did you trust more, what your attorney  
5 was telling you or what the judge and the plea agreement  
6 said?

7       **A**     I trusted more in my attorney because she  
8 assured me that I would not have any problems.

9       **Q**     And then when you went over to immigration, did  
10 you in fact have problems there?

11       **A**     Yes, that is where I have problems. They did  
12 not want to back me up and they did not want to respond  
13 for me.

14       **Q**     When you say they, are you referring to your  
15 attorneys or who are you referring to?

16       **A**     My attorney.

17       **Q**     And what about immigration, did they end up  
18 letting you go on bond?

19       **A**     No.

20       **Q**     What ended up happening?

21       **A**     I signed a voluntary departure.

22       **Q**     And why didn't you decide to fight your case in  
23 immigration?

24       **A**     Because I didn't have -- I didn't have an  
25 attorney anymore and they were telling me that there was

1 no solution.

2 Q So did you end up getting another attorney?

3 A No.

4 Q So who told you there was no option to fight  
5 your case?

6 A The same attorney that I hired at the beginning.

7 Q What was the name of the attorney who  
8 represented you, if you remember her name?

9 A I don't really remember the attorney's name, but  
10 the law firm is Alcock and Associates.

11 Q How many times did that attorney visit you?

12 A Three times.

13 Q And for how long did she meet with you?

14 A For about ten minutes, 15 minutes.

15 Q And if she would have told you that it was going  
16 to have immigration consequences, would you still have  
17 signed the plea offer?

18 A No.

19 Mr. YBARRA: Pass the witness, Your Honor.

20 THE COURT: Ms. Kemper?

21

22 CROSS-EXAMINATION

23 BY MS. KEMPER:

24 Q Thank you. Sir, you were charged with  
25 possessing drugs, correct?

1           **A**     Yes.

2           **Q**     And the day you appeared in court, you signed a  
3 plea, correct?

4           **A**     Yes.

5           **Q**     And that is the day you met your lawyer,  
6 correct?

7           **A**     Well, I had already met her before, we had  
8 already talked before.

9           **Q**     So she met with you in the jail, right?

10          **A**     Yes.

11          **Q**     And that was before she saw you again in court,  
12 correct?

13          **A**     Uh-huh, yes.

14          **Q**     So you had met with her at least twice before  
15 you signed a plea?

16          **A**     Yes.

17          **Q**     But you say that she promised you there would be  
18 no immigration consequences if you signed the plea,  
19 correct?

20          **A**     Yes.

21          **Q**     So you signed a plea?

22          **A**     Yes.

23          **Q**     But a judge had told you that there could be  
24 immigration consequences if you signed a plea?

25          **A**     Yes.

1           Q     And you had a written plea agreement, didn't  
2 you?

3           A     Yes, of course.

4                     MS. KEMPER:  And, Your Honor, we had  
5 previously marked the plea as state's exhibit number 1,  
6 however, I don't think that I can meaningfully show the  
7 defendant the plea.

8                     But I would like leave to be able to ask  
9 him questions about it.

10                    MR. YBARRA:  No objection, Your Honor.

11           Q     BY MS. KEMPER:  Sir, you read your plea  
12 agreement with the help of the interpreter, correct?

13           A     Yes.

14           Q     I am going to read paragraph 8 and I will break  
15 it up in individual sentences.  Okay.

16                    Paragraph 8 says, I understand that if I am  
17 not a citizen of the United States, that my decision to  
18 go to trial or enter into a plea agreement may have  
19 immigration consequences.

20                    Do you recall reading that?

21           A     Yes.

22           Q     Now, the next line.

23                    Specifically, I understand that by pleading  
24 guilty or no contest to a crime may affect my immigration  
25 status.

1 Do you recall that?

2 A Yes.

3 Q The next line, admitting guilt may result in  
4 deportation, even if the charge is later dismissed.

5 Do you recall reading that?

6 A Yes.

7 Q The next line, my plea or admission of guilt  
8 could result in my deportation or removal, could prevent  
9 me from ever being able to get legal status in the United  
10 States or could prevent me from becoming a United States  
11 citizen.

12 Do you recall reading that?

13 A Yes.

14 Q Sir, the judge asked you about this plea  
15 agreement, do you remember being asked about your plea  
16 agreement?

17 A Yes. Yes, I remember.

18 Q And she asked you whether you had read it and if  
19 you understood it and you said you did, isn't that right?

20 A Yes.

21 Q You were also asked if anyone had made you any  
22 promises. Do you remember that?

23 A Yes.

24 Q And you told the court no one had made you any  
25 promises to get you to sign the plea, isn't that correct?



1           **A**     Uh-huh, yes.

2           **Q**     When you appeared in court, that day for your  
3 change of plea, there was already an immigration hold on  
4 you, wasn't there?

5           **A**     Yes.

6                   MS. KEMPER: Nothing further.

7                   THE COURT: Mr. Ybarra.

8                   MR. YBARRA: No further questions, Your  
9 Honor.

10                   Can we excuse Mr. Nunez-Diaz and hang up or  
11 are you, no, we don't. I still want him to hear what is  
12 going on.

13                   THE COURT: Okay. All right.

14                   MR. YBARRA: But I will ask for permission  
15 to remove the labtop from the stand.

16                   THE COURT: Do you have any objection to  
17 Mr. Ybarra?

18                   MS. KEMPER: No.

19                   THE COURT: All right. You have permission  
20 to remove the labtop from the witness stand.

21                   Mr. Nunez-Diaz will remain on the phone for  
22 the rest of the proceedings.

23                   MR. YBARRA: Your Honor, defense calls  
24 Maria Josefina Nunez-Diaz.

25                   MS. KEMPER: Your Honor, just so the court

1 knows, we had previously invoked the rule.

2 THE COURT: All right. Thank you.

3 Mr. Ybarra, she will need to be sworn in,  
4 first. Come forward.

5 THE CLERK: Full name, please.

6 THE WITNESS: Maria Josefina Nunez-Diaz.

7 J. O. S. E. F. I N. A. and then the last name. N. U. N.  
8 E. Z.. and N. U. N. E. Z. all right and.

9 THE COURT: MR. YBARRA.

10

11 MARIA JOSEFINA NUNEZ-DIAZ

12 Called as a witness herein, having been first duly  
13 sworn, was examined and testified as follows:

14

15 THE CLERK: I didn't hear you.

16 A PANEL MEMBER: I said I swear.

17 THE COURT: Louder.

18 THE WITNESS: I swear.

19 THE COURT: Okay.

20 Thank you. Please be seated.

21

22 DIRECT EXAMINATION

23 BY MR. YBARRA:

24 Q And can you please explain your relationship to  
25 the defendant?

1           **A**     He is my brother.

2           **Q**     And were you involved at all with the hiring of  
3 an attorney for him?

4           **A**     Yes, I went with my dad.

5           **Q**     Louder, please.

6           **A**     Sorry. I went with my dad, and to get an a  
7 lawyer when he called us that he was that he got into  
8 jail. That he was returned to jail.

9                   THE COURT: Ms. Nunez-Diaz, will you please  
10 state your full name for the record.

11                   THE WITNESS: Maria Josefina Nunez-Diaz.

12                   THE COURT: All right. Thank you.  
13 Proceed, Mr. Ybarra.

14           **Q**     BY MR. YBARRA: And if we can please speak  
15 slowly, because trying to interpret for your brother and  
16 you have to give a little bit of pause to make sure the  
17 interpreter translates.

18                   THE INTERPRETER: I am gonna interpret  
19 simultaneous, she doesn't have to go slow, but just loud.  
20 I don't hear a microphone over there, is there a  
21 microphone?

22                   THE WITNESS: Here, pull it closer.

23                   THE COURT: It isn't. Could you touch it  
24 and see that it is on. It is not on. All right. It is  
25 -- it is on, it just doesn't amplify.

1 THE COURT: So you just have to speak loud.

2 THE WITNESS: Louder.

3 THE COURT: Okay.

4 Q BY MR. YBARRA: Okay. Who did you meet with  
5 when you went to look for a lawyer?

6 A We went to Alcock and Associates, that is how  
7 yeah, and in there we met with Frank, I believe Frank  
8 Carrizoza and we explained to him that case, my brother's  
9 case.

10 Q Did you explain his immigration status?

11 A Yes. That was our concern all the time, which  
12 he got arrested and concern was immigration since my  
13 brother doesn't have a legal status in here.

14 Q And what did they explain to you how they were  
15 going to deal with that situation?

16 A Frank did like a diagram. He explained to us he  
17 is the criminal case first and then he explained to us  
18 the immigration case, which in there was when I  
19 understood, there were two different cases. And they  
20 needed two different lawyers for that.

21 He explained the criminal first, he said  
22 that he had to lower his sentence I believe, I don't know  
23 how to explain it.

24 And then after he was done with the  
25 criminal, he will be able to go to an immigration, but he

1 -- we wanted to make sure that he, his criminal was to  
2 ended up good for his, for his immigration status.

3 Q And did they give you any promises that it would  
4 be okay?

5 A Yes, they did. That is why we were okay by  
6 hiring them like to let, they will help my brother  
7 because he said that there was a way to help my brother  
8 with immigration after that.

9 Q And did he go on to represent your brother?

10 A Frank.

11 Q Yes?

12 A No.

13 Q Who ended up representing your brother?

14 A Julia Cassels.

15 Q And did you ever meet with Ms. Cassels?

16 A Before my brother's first court, no.

17 Q Did you meet with her at all?

18 A Yes, after her first -- my brother's first  
19 court, we met with her because his first court, just she  
20 wasn't there and we were worried because my brother was  
21 already anxious and when she --

22 THE INTERPRETER: He was what?

23 A Anxious. Anxious.. Sorry..

24 So we when we got to the court, she  
25 extended it, she extended the court date and we were

1 worried because we didn't know what was happening before,  
2 why she was representing my brother. So after that, we  
3 went to Alcock and we met with her and that is when we  
4 told her if she could explain to us what was going on.

5 Q And what did she explain to you was going on?

6 A Well, she said she extended the case because  
7 there was a way that she can help my brother by I think  
8 meeting with I think it was the teacher, like some kind  
9 of program that he could take so the sentence will get  
10 lowered. And he will be free and immigration wouldn't be  
11 as bad when he was done with criminal.

12 Q Was that the only time you met with her?

13 A Well, after my brother's second hearing, we went  
14 to ask her if we she was done with the case because after  
15 the second one, there was a second hearing and that is  
16 when my brother pled guilty and we didn't know that they  
17 made that decision. So we met with her and we told her  
18 if it was okay, she said that it was okay, that there  
19 was, no, nothing she could do anymore, that it was all in  
20 immigration's hands.

21 Q And did you meet with anybody else at Alcock and  
22 Associates?

23 A Yeah, after that, we asked her to give us an  
24 advice to represent my brother in the immigration side  
25 and we met with another lawyer, I don't know his name.

1 And with that lawyer and that same time that we met with  
2 her after my brother pled guilty, we told her if she  
3 could tell the lawyer to take over the case, she, we met  
4 with them and after that, after we met with them, it was  
5 when he told us that there was nothing to do for my  
6 brother.

7 Q In what way did he tell that to you?

8 A Well, we were really, we were really excited  
9 because we in a way, we knew that it was over that  
10 according to Cassells we, my brother could get out as  
11 faster, easier.

12 So when we met with him, he reviewed the  
13 case and he talked, he asked us questions and told us  
14 about his why, what, why he is sentenced because he pled  
15 guilty, there was nothing else to do, but he said it in a  
16 mocking way. He was even laughing at us like there is  
17 nothing else to do and he was smiling. And we were  
18 serious. We were trying to help my brother. And we when  
19 we left there, because my brother, my sister was with me,  
20 we were really angry because he was laughing at us, not I  
21 mean we are young, we look young, but we were trying to  
22 help my brother.

23 So that wasn't, that wasn't the way we  
24 wanted a lawyer to look at us because he was kind of  
25 making fun of us or just thinking that we were foolish

1 for thinking that my brother could get out of the  
2 immigration.

3 Q And did other attorneys give you different  
4 advice or did they say the same thing?

5 A We did after that, we met with other lawyers,  
6 there was a lawyer that my dad hired, I don't know her  
7 name, I don't know her, but she said that she all she  
8 could do was help my brother get out of since he pleaded  
9 guilty, there was nothing that actually could be done,  
10 but she said that there was a different way that she  
11 could leave and not be too bad for him so there was if  
12 since there was nothing for us to do, then we told her to  
13 talk to my brother and see what was best.

14 Q And has your brother been able to legally come  
15 back to the county since this?

16 A No.

17 MR. YBARRA: No further questions. Pass  
18 the witness, Your Honor.

19 THE COURT: Mr. Kemper.

20

21 CROSS-EXAMINATION

22 BY MS. KEMPER:

23 Q MS. Nunez-Diaz, I hear you telling us that you  
24 are angry with the immigration lawyer, is that right?

25 A Yes.



1           Q     Do you know what your brother was charged with,  
2 the crimes?

3           A     Yes, I do.

4           Q     What was it?

5           A     Drugs.

6           Q     Do you know what kind?

7                   MR. YBARRA:  Objection relevance, Your  
8 Honor.

9                   THE COURT:  What was the question again,  
10 Mr. Kemper.

11                   MS. KEMPER:  I asked her if she knew what  
12 her brother was charged with and what type of drugs  
13 because that goes directly to what type of resolution he  
14 could have gotten.

15                   THE COURT:  The objection is overruled.

16                   THE WITNESS:  No, I don't know what kind.  
17 The when we met with the lawyer, the lawyer, the  
18 immigration lawyer, he did said if my brother was found  
19 with marijuana, that it could have been easier for him to  
20 do it, but since there were other drugs involved, that he  
21 couldn't do nothing.

22           Q     BY MS. KEMPER:  How old is your brother?

23           A     He is 28.

24                   MS. KEMPER:  No further questions.

25                   THE COURT:  Mr. Ybarra.

1 MR. YBARRA: No questions.

2 THE COURT: Thank you.

3 Ms. Nunez-Diaz, you can step down.

4 MR. YBARRA: Defense rests, Your Honor.

5 THE COURT: Mr. Kemper, do you have any  
6 witness?

7 MS. KEMPER: I did. MS. Cassels which  
8 appears telephonically. I thought we were doing Skype  
9 and so I told her she can appear telephonically so I.

10 THE COURT: She is out of state.

11 MS. KEMPER: Yes, ma'am. She lives in  
12 California now and she has been standing by all day today  
13 for this.

14 THE COURT: She is not going to be able to  
15 call in. Can she call in on your phone?

16 MS. KEMPER: Yes.

17 THE COURT: Mr. Ybarra you are aware she  
18 was appearing telephonically?

19 MR. YBARRA: Yes, Your Honor. I we just  
20 assume that my client would be on Skype and then her  
21 client will call on the phone.

22 And if too much of a problem, I can speak  
23 with my client about waiving his presence for the last  
24 witness or remaining on Skype. I think he can ask still.

25 THE COURT: Well, I don't know if he is

1 available on Skype, he is available on the phone, why  
2 don't you check with him.

3 MR. YBARRA: Your Honor, he says he is  
4 okay.

5 Your Honor, I spoke with my client, he  
6 said he's okay waiving his presence for the last witness  
7 so we can get Ms. Cassels on the phone.

8 THE COURT: So he understands that he will  
9 hang up and then the rest of the proceedings will proceed  
10 without him?

11 MR. YBARRA: That is correct, Your Honor.  
12 And I did tell him I'd get him a copy of the transcript  
13 at a later point. Yes.

14 THE COURT: Okay. Mr. Nunez Diaz, you are  
15 excused.

16 THE INTERPRETER: Thank you.

17 THE COURT: All right. You are welcome.

18 MS. KEMPER: She should be calling.

19 THE INTERPRETER: The interpreter is  
20 excused, Your Honor?

21 THE COURT: And interpreter excused, thank  
22 you.

23 MS. KEMPER: She's calling into the  
24 506-1887, is that --

25 THE bailiff: That is this one.

1 MS. KEMPER: Well, I thought so. Just a  
2 second let me see what is going on.

3 Your Honor, I'd like to just like to place  
4 a call to her and see why she's not.

5 THE COURT: Go right ahead.

6 MS. KEMPER: Thank you.

7 Judge, Ms. Cassels is calling in.

8 THE COURT: And, Ms. Cassels, this is  
9 commissioner Miller, can you hear me?

10 MS. CASSELS: I can hear you a little bit.  
11 Good afternoon.

12 THE COURT: Good afternoon.

13 You are in court and we are in the -- we  
14 just finished with the defense's case now. The state is  
15 presenting its case. Ms. Kemper is here representing the  
16 state and I will need for you to raise your right hand so  
17 that my clerk can swear you in.

18

19

JULIA CASSELS

20 Called as a witness herein, having been first duly sworn,  
21 was examined and testified as follows:

22

23 THE COURT: Put it on speakerphone. Let  
24 her be on speaker.

25

All right, Ms. Kemper.

1 MS. KEMPER: Thank you, Your Honor.

2

3 DIRECT EXAMINATION

4 BY MS. KEMPER:

5 Q Ms. Cassels, will you please state your full  
6 name?

7 A I am having a hard time hearing you.

8 THE COURT: Ms. Kemper, you are welcome to  
9 go to the podium.

10 MS. KEMPER: Certainly.

11 Q BY MR. KEMPER: Is that better, can you hear me?

12 A That is better.

13 Q Okay. Will you please state your full name.

14 A Julia Bass Cassels.

15 Q And how are you employed? Did you hear the  
16 question?

17 A I am sorry, it is really echoey.

18 THE COURT: Hang up the phone and press the  
19 speaker.

20 Q BY MR. KEMPER: Are you still there?

21 A I am here.

22 Q All right. Are you an attorney?

23 Ms. Cassels, can you hear me?

24 A Now I can. Yes.

25 Q Okay. How are you employed?

1           **A**     I am recently self-employed, I own my own law  
2 firm.

3           **Q**     How long have you been a lawyer?

4           **A**     I was admitted to the Arizona bar  
5  
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25

1 May of 2002.

2 Q Have you ever represented Hector Nunez-Diaz?

3 A Yes.

4 Q When was that?

5 A It was in the summer of 2013.

6 Q And at that time, what type of practice did you  
7 have?

8 A I was at that time working on a contract basis  
9 for Alcock and Associates.

10 Q Did you handle criminal cases?

11 A Yes.

12 Q Was Mr. Nunez-Diaz a criminal case client?

13 A Yes, he was.

14 Q Do you recall meeting with him?

15 A Yes, I remember meeting with him on a number of  
16 occasions.

17 Q And can you recall what he was charged with?

18 A He had two different counts, there was  
19 possession of narcotic drugs, and a possession of  
20 dangerous drugs, both of class 4 felonies, it was cocaine  
21 and methamphetamine specifically.

22 Q In your representation of Mr. Nunez-Diaz, what  
23 would you say his goal was for these charges?

24 A He was hopeful for a reduction in charges that  
25 could lead to the best possible resolution for his

1 immigration situation.

2 Q Did you try to achieve that goal?

3 A I certainly did.

4 Q What did you do?

5 A Initially the plea offer that I received from  
6 the state indicated he had an option, either plead guilty  
7 to a class 6 open felony for a possession of drug  
8 paraphernalia or that he was eligible for Tasc.

9 Tasc, excuse me, will have been the best  
10 option for him. And I pursued trying to get him into the  
11 Tasc program, but unfortunately due to their rules or  
12 policies, he was being deemed ineligible.

13 Q And you determined that by speaking with someone  
14 who worked for Tasc?

15 A Yes, I did. I e-mailed the woman who was the  
16 administrator, then I met with her personally in her  
17 office on the second floor of the court building.

18 Q Once. You learned that Tasc was not available,  
19 what did you do next?

20 A I approached the assigned prosecutor on the  
21 case, and requested a plea deviation to a solicitation  
22 charge.

23 Q Were you successful in getting a plea deviation?

24 A I was informed by the prosecutor that she had  
25 staffed it with her supervisor and the request was denied



1 because Mr. Nunez-Diaz was in possession of two different  
2 drugs and, therefore, they were unwilling to make that  
3 modification.

4 Q And those two different drugs, were those  
5 methamphetamine and cocaine?

6 A Correct.

7 Q Did you explain this to Mr. Nunez-Diaz?

8 A I did. I explained it to him on two different  
9 occasions as well as two to his family.

10 Q Did Mr. Nunez-Diaz ever tell you that he wanted  
11 to go to trial?

12 A No. He indicated he did not want to go to  
13 trial.

14 Q Were you able to obtain a plea offer for him?

15 A Yes. He was then presented with the option of  
16 accepting the offer to the drug paraphernalia as a class  
17 6 open and he elected to accept that plea offer.

18 Q Did you tell him that there would be  
19 consequences for his immigration status?

20 A Yes, absolutely.

21 Q How familiar were you at that time with the  
22 requirement under Padilla P. A. D. I L. L. A. versus  
23 Kentucky?

24 A Padilla was decided I believe in 2010 and it was  
25 the subject of a great deal of conversation and C. L. E

1 training in the following month after it happened.

2 I attended the C. L. E. classes. I  
3 additionally had a copy of the a chart, the lengthy chart  
4 that was the prepared by the Florence immigration project  
5 to assist criminal lawyers in and clients with clients  
6 who have immigration concerns.

7 Q Did you use that chart with Mr. Nunez-Diaz?

8 A I consulted with the chart when I was  
9 negotiating the plea deviation. I also spoke with one of  
10 the immigration attorneys who were employed by the firm  
11 about his case.

12 Q So when you were not able to get a solicitation  
13 offer, and you had a client who did not want a trial, was  
14 this then the best alternative you could attain?

15 A Yes, this is absolutely the best result that I  
16 unfortunately it carried the immigration consequences.

17 Q Do you recall meeting with Mr. Nunez-Diaz'  
18 family at your office at Alcock and Associates?

19 A Yes, I met with them on at least one occasion  
20 formally. And there perhaps were a couple of other times  
21 when I would see them more informally, they had a lot  
22 more contact with my assistant at the time.

23 Q Were you retained to handle the immigration  
24 cases in addition to the criminal case?

25 A No. I referred the family to speak with

1 Mr. Jordan Clegg, C. L. E. G. G. He was the head of the  
2 firm's immigration department and he met with them for a  
3 consultation. They ultimately did not hire the firm for  
4 the immigration portion.

5 Q Returning now to the plea agreement, did you  
6 review the plea agreement with your client?

7 A Sorry, I think you cut out there at the end.  
8 All I heard was did you review the plea agreement with.

9 Q Your client?

10 A Yes, I did. I reviewed the general nature of it  
11 and then once I had the written plea agreement, I went  
12 over it paragraph by paragraph with the court  
13 interpreter's assistance.

14 Q Did you have any concern about Mr. Nunez-Diaz'  
15 ability to understand the agreement?

16 A No, not at all.

17 Q I now want to turn to the actual entry of the  
18 plea?

19 A Yes.

20 Q You're familiar with early disposition court, is  
21 that correct?

22 A Very much so, yes.

23 Q Are you familiar with a group advisement that is  
24 given to all of the defendants on the calendar?

25 A Yes. Early in the morning the court pulled all

1 the defendants into the courtroom and reads them their  
2 constitutional rights for people who are contemplating  
3 accepting a plea and that recitation of rights also  
4 includes an immigration advisement.

5 Q In your review of Mr. Nunez-Diaz case, was he  
6 given that group advisement?

7 A I am aware that he was because I attempted to go  
8 up and speak with him in the holding area and was advised  
9 that I needed to come back in a few minutes because they  
10 were still in group and that was early in the morning  
11 shortly before nine o'clock.

12 Q And that same morning, did you and  
13 Mr. Nunez-Diaz stand before the court and enter his  
14 guilty plea?

15 A Yes, we were able to enter his plea and proceed  
16 with sentencing later that morning.

17 Q And during the sentencing proceeding, was there  
18 a time when you referred to his custody status as being  
19 in limbo?

20 A Yes, I asked the court to allow the adult  
21 probation department to determine the start date for his  
22 fees and fines that were being imposed because it was  
23 unknown when he we would be released from custody.

24 Q And that was unknown because of what?

25 A It was unknown because he had an ICE hold.

1 Typically when a defendant is sentenced and they have no  
2 further time that they need to serve for their sentence  
3 and they don't have any hold, they will be processed out  
4 of the jail in usually about 24 hours. When someone has  
5 a hold, they then get transferred to that other facility  
6 and they need to go through steps of that process so at  
7 that time I have had no idea of knowing when he would be  
8 released from custody.

9 Q Did you know what Mr. Nunez-Diaz' view on being  
10 held in the Maricopa County jail was?

11 A He and his family, well, expressed to me that he  
12 was really unhappy there. He was in the Durango jail,  
13 the conditions are tough, the food is not great. And it  
14 is hard for his family members to visit and I remember  
15 his sister was very concerned about him. I believe her  
16 name is Maria.

17 Q You stated that you are familiar with some of  
18 the consequences of a plea agreement as they affect  
19 immigration status, is that correct?

20 A Yes.

21 Q You mentioned that there are two types of  
22 processes, voluntary departure is one, is that correct?

23 A Yes, voluntary departure is one of the ways for  
24 a person to resolve their immigration matter.

25 Q What is the other one?

1           **A**     A person can also apply for some forms of  
2 relief, have an asylum claim, they may be eligible for  
3 cancelation of removal or may chose to go through and the  
4 entire proceeding and until the point of at which the  
5 judge order them to be removed. I am speaking generally  
6 in that matter.

7           **Q**     Right. And I'm asking you a hypothetical  
8 question, and drawing on your experience, if someone  
9 wanted to complain about their state court lawyer during  
10 immigration proceedings, what would be the best way to do  
11 that?

12           **A**     Generally, a person who is pending an  
13 immigration matter, if it comes to light that there has  
14 been a problem with the proceedings in the criminal case,  
15 they can ask for a stay of the immigration proceeding in  
16 order to address the issue in the criminal case.

17                     You can do that when in court in the state  
18 court via the Rule 32 or the federal court via Higgins  
19 petition under section 2255.

20           **Q**     During your representation of Mr. Nunez-Diaz  
21 did, were you ever told by him that you had failed him?

22           **A**     No, absolutely not.

23                     MS. KEMPER: Pass the witness.

24                     THE COURT: Thank you.

25                     Mr. Ybarra?

1 MR. YBARRA: Thank you.

2 THE COURT: Is it Ybarra Maldonado?

3 MR. YBARRA: Ybarra Maldonado, yes.

4

5 CROSS-EXAMINATION

6 BY MR. YBARRA:

7 Q Mr. Cassels, how long have you been employed or  
8 contracted to work at Alcock and Associates when you took  
9 Mr. Nunez-Diaz' case?

10 A I started working for Mr. Alcock August of 20,  
11 sorry, August of 2012.

12 And his case was in July of the following  
13 year so a year almost.

14 Q So for a year, you had been doing E. D. C., R.  
15 C. C. court?

16 A Definitely for a year there and additionally  
17 from the time that I started practicing Maricopa County  
18 in 2002.

19 Q Did you previously work for the public  
20 defender's office?

21 A I did for three years.

22 Q And at what point did you learn that the plea  
23 that he accepted is essentially the kiss of death in  
24 immigration?

25 A In regard to Mr. Nunez-Diaz specifically or

1 generally?

2 Q Generally. Specifically, that what he pled to,  
3 that it is a, you are not going to get any traction in  
4 immigration court, when did you learn that?

5 A I have been aware of that for quite some time  
6 through various family proceedings and through my own  
7 work in other cases.

8 Q So it is prior to representing Mr. Nunez-Diaz,  
9 correct?

10 A Oh, yes, for sure.

11 Q And you said that you also talked to immigration  
12 attorneys at your office about his case?

13 A I did.

14 Q Why would you do that if you are already certain  
15 it was not a good plea for immigration?

16 A It was the policy of our office that we need to  
17 do immigration consultations informally for lawyers to be  
18 sure that we are getting the best possible result and to  
19 stay up to date with any changes in the law.

20 Q So on every single case you've handled, you  
21 consulted with an immigration attorney within the office  
22 on that specific case?

23 A Yes. And we will also regularly have group  
24 meetings and e-mails about immigration consequences for  
25 our criminal clients.



1           Q     And in July of 2013, how many clients were you  
2 representing?

3           A     I'm not sure. There was were probably active  
4 cases in the area of 30.

5           Q     And you felt or did you feel you had enough time  
6 to work on all your cases and meet with all your clients?

7           A     Yes, for sure.

8           Q     And you also submitted letters and even motions  
9 to the court about this case, didn't you?

10          A     Yes.

11          Q     And in that letter, did you state that you  
12 explained to him clearly that he will get nowhere in  
13 immigration court with this charge?

14          A     Sorry, I don't understand.

15          Q     In the letter, if you remember, what did you say  
16 in regards to the consequences in immigration court?

17          A     I said that he would be facing definitely  
18 consequences in immigration court and the situation was  
19 very difficult.

20          Q     That is what you put in your letter?

21          A     Not sure what letter exactly you are referring  
22 to. Sorry.

23          Q     Okay. Do you remember writing a letter dated  
24 January of 29th of 2015?

25          A     Yes, I do.

1           Q     Okay. Do you possibly have that the in front of  
2 you?

3                     MR. YBARRA: Your Honor, it has been marked  
4 as defense exhibit B. B. as in boy.

5           A     If I can pull it up on my computer.

6           Q     So if you can read to us the second paragraph,  
7 that looks like the third sentence starts with that the  
8 jail visit, do you see that, Ms. Cassels?

9           A     Sorry, which paragraph are you on?

10          Q     The second paragraph, the second full paragraph  
11 and looking for the sentence that starts with at a jail  
12 visit on July 12?

13          A     Yes.

14          Q     Can you read the sentence for us, please?

15          A     At the jail visits on July 12 of 2013, I  
16 explained to Mr. Nunez-Diaz with the assistance of an  
17 interpreter that his charges in the plea that had been  
18 offered could have consequences in the immigration  
19 proceedings due to his status.

20          Q     Now, you had just testified that you said with  
21 certainty, it would have consequences, not that it could  
22 have consequence, is that correct?

23          A     Yes.

24          Q     So is there a difference between could have  
25 consequences and most certainly will have consequences?

1           **A**     On July 12th, I was not aware of whether or not  
2 he would be eligible for Tasc so I explained the  
3 difference between a paraphernalia plea, a solicitation  
4 plea and being able to enter into Tasc.

5           **Q**     Okay. So when did you find out he cannot get  
6 into Tasc?

7           **A**     I sent the e-mail on the 15th, I believe a  
8 couple of days before his court appearance and then I  
9 spoke with the representative the morning of his hearing.

10          **Q**     So the morning of his hearing, did you advise  
11 him that it would certainly have immigration  
12 consequences?

13          **A**     Yes, I did.

14          **Q**     Okay. If you can go down to the 4th paragraph  
15 in that same letter, and read to us the third sentence  
16 with I again advised him?

17          **A**     I again, sorry, I again advised him that a plea  
18 could have consequences for immigration.

19          **Q**     So again you write here, could have consequences  
20 for immigration, not will certainly have consequences in  
21 immigration. Is that correct?

22          **A**     That is what I wrote, correct.

23          **Q**     Okay. So when you were writing here it says  
24 after on July 22nd, that is what you told him so are we  
25 to understand that is what you told him or are we to



1   bate stamped as bates 11, Ms. Cassels, in that document?

2       **A**    Yes.

3       **Q**    Could you read to us the part at the bottom  
4 starting on line 19 where you say ,I also ask and to line  
5 22?

6       **A**    One second to pull it up.

7                    On page 13.

8       **Q**    Yes, page 11, sorry, bate stamped page 11, line  
9 19?

10       **A**    Reading from the transcript, I also ask that you  
11 allow the probation department to make a determination as  
12 to when payment on the fines should begin given that  
13 Mr. Nunez-Diaz is in a little bit of limbo as to what his  
14 custody status will be in the next little bit here.

15       **Q**    Now, I heard you try to explain that, but it  
16 didn't make any sense to me so please help me clarify,  
17 what is the little bit of limbo that he was in?

18       **A**    His release date would be uncertain.

19       **Q**    You have been working in E. D. C. and R. C. C.  
20 for how long?

21       **A**    For a long time.

22       **Q**    And you had plenty of undocumented clients with  
23 ICE holds, have you not?

24       **A**    Yes, of course.

25       **Q**    So you knew that they were picked up very

1 quickly, did you not?

2       **A**     Yes.

3       **Q**     So what is limbo? What is a little bit of  
4 limbo? Wasn't it a certainty that ICE was going to come  
5 get him?

6       **A**     It was ceratin that ICE would pick him up,  
7 however, it was uncertain as to how long he will be in  
8 ICE custody.

9       **Q**     So a little bit of limbo as to what his custody  
10 status will be in the next little bit here, is it more  
11 accurate to say that certain he will go with immigration  
12 and certain he will be either involuntary departure or  
13 deported from the country?

14       **A**     Yes.

15       **Q**     And then further down, line 25, you speak about  
16 his family, could you read to us starting at line 24,  
17 that sentence starts with and they are very concerned?

18       **A**     And they are very concerned about him and they  
19 will do everything they can to assist him once he's  
20 released.

21       **Q**     So once he is released, I mean, lawyer terms, he  
22 can say you mean released to Mexico, is that what you  
23 meant when you said those words?

24       **A**     That is what I meant.

25       **Q**     And then Mr. Nunez-Diaz, your client at the time

1 you were representing goes on to say I on page 12, I am  
2 remorseful and I did learn my lesson and I would like to  
3 be released. That is all. Now, at that point, do you  
4 remember when you heard that?

5       **A**     Not specifically, but yes that is something in  
6 the transcript.

7       **Q**     When you are in court with your client, they are  
8 being sentenced and they are speaking, do you listen to  
9 what they are saying?

10       **A**     Of course, I do.

11       **Q**     Because it is your job to give that person  
12 advice?

13       **A**     Of course.

14       **Q**     It is your job to make sure they know what is  
15 going on in their case?

16       **A**     Absolutely.

17       **Q**     So when you hear the words and I would like to  
18 be released, did anything click in your mind that, hey,  
19 maybe I should explain to my client that judge doesn't  
20 have the power to release him?

21       **A**     Well, he was aware he was being released from  
22 the custody of the sheriff and to immigration custody.  
23 He was very unhappy with the conditions in the Durango  
24 jail so, no, that did not set off a red flag to me. I  
25 knew he was anxious to get out of the Durango jail.

1           Q     So you thought he was just saying release to  
2 immigration as fast as you can?

3           A     That was what I understood, yes.

4           Q     And what efforts again did you make to get the  
5 solicitation offer?

6           A     I spoke to Ms. Pedicone about, the assigned  
7 county attorney about the fact that Tasc was finding him  
8 ineligible and requested that based on the circumstances  
9 of the case, the fact that he had that prior criminal  
10 history, he had strong family support, that he consider a  
11 plea to solicitation.

12          Q     That was to who again, sorry?

13          A     I believe the County Attorney who was assigned  
14 to the case was Erin Pedicone.

15          Q     And you did that in e-mail you said?

16          A     I spoke to her in person.

17          Q     And you have done deviation requests before in  
18 the past?

19          A     Yes, at length.

20          Q     Have you ever taken the time to write them down?

21          A     Yes. Yes, of course.

22          Q     You ever attach the letter from the family?

23          A     Yes.

24          Q     Did you do that in this case?

25          A     In this case, we found out he was not eligible



1 for Tasc on that day. I have the letters already with me  
2 and prepared to be submitted to the court. And so I  
3 showed Ms. Pedicone his letters when I discussed the  
4 family support and but, no, in this situation I did not  
5 submit a written deviation request because we were there  
6 present in court and Mr. Nunez-Diaz was anxious to  
7 resolve his case.

8 Q And on the E. D. C. plea offer sheet, did you  
9 request solicitation?

10 A I don't recall if I wrote it on the sheet. I do  
11 know that I spoke to her about it.

12 MR. YBARRA: No further question.

13 THE COURT: Mr. Kemper.

14 MS. KEMPER: Thank you.

15

16 REDIRECT EXAMINATION

17 BY MS. KEMPER:

18 Q So back on July 12, you did not know at that  
19 time for certain that Mr. Nunez-Diaz would not be  
20 eligible for Tasc, is that right?

21 A Correct. I did not know for sure. I had  
22 mentioned to him that I was concerned about it. Due to  
23 my experience in other cases, but that I would certainly  
24 speak with the representative again and try to get him  
25 into the program.

1           **Q**     When you used the phrase, could have  
2 consequences for immigration, and now on speaking about  
3 your letter of January 29 of 2015, and that would be the  
4 fourth paragraph, could you expound on that a little bit  
5 for us?

6           **A**     Any of the three plea agreements were going to  
7 have different consequences.

8                     If you were able to enter into Tasc, and  
9 have the deferred prosecution, then he would be in a much  
10 different situation with immigration because he will not  
11 have a conviction on his record.

12                    If he were to enter a solicitation plea, he  
13 would be in a much better situation in terms of  
14 immigration court because of the way that the laws deal  
15 with solicitation language.

16                    So my point was that each of the three  
17 things have different consequences. And which  
18 consequence he will suffer wouldn't be known until we  
19 were clear which plea we can get the state or the Tasc  
20 program to agree to.

21           **Q**     And wouldn't you say that that is true anytime  
22 you are advising a person charged with a crime that there  
23 are various options?

24           **A**     Generally, yes.

25           **Q**     So really what matters here is perhaps not what

1 was written in a letter, but what you told  
2 Mr. Nunez-Diaz?

3       **A**     Yes, I will agree with that.

4       **Q**     And what you told Mr. Nunez-Diaz just, so that  
5 we can all refresh our recollection after having sort of  
6 taken those detours, was on the day that he was signing  
7 the plea agreement, what did you tell him about  
8 immigration?

9       **A**     That after his sentencing, he would be released  
10 to ICE custody. At that point, he would make -- have to  
11 make a decision about how to proceed with his case,  
12 whether he wanted to attempt to do voluntary departure,  
13 whether he had some other claims for release that he  
14 could pursue. Or exactly how he wanted to handle that  
15 part of his matter.

16       **Q**     So you were using the word release with  
17 Mr. Nunez-Diaz in the way that we have used it here in  
18 the courtroom today meaning not that you get to walk out  
19 on to the street, but that you go from one custody  
20 situation to another?

21       **A**     He absolutely knew that he was going to  
22 immigration custody, as did his family because we  
23 discussed how long it would take for him to be  
24 transported, roughly, and what to expect in those days to  
25 follow.

1           Q     And you were standing with him when the plea  
2 colloque was being given, right?

3           A     Yes, of course.

4           Q     And if there has been any doubt in your mind  
5 whether he was doing this knowingly, voluntarily and  
6 intelligently, would you have done something?

7           A     If I had any concerns that he wasn't  
8 understanding, I would have stopped the proceedings and  
9 asked to a either reset the matter or have a few moments  
10 to speak with him.

11          Q     And did you --

12          A     I would have addressed it.

13          Q     Did you have any concern that day that he didn't  
14 understand the consequences?

15          A     I was confident he understood the consequences.

16                   MS. KEMPER: No further questions.

17                   THE COURT: Thank you.

18                   MS. Cassels, I have a couple of questions  
19 for you, this is Commissioner Miller.

20                   Did you ever talk to MS. Pedicone, about a  
21 solicitation offer?

22                   THE WITNESS: Sorry, it's a little bit hard  
23 to hear you, can you repeat that.

24                   THE COURT: Did you ever talk to MS.  
25 Pedicone about a solicitation offer?

1 THE WITNESS: Yes, I specifically requested  
2 if she can amend the plea offer to a solicitation charge.

3 THE COURT: And was the state willing to  
4 amend it to a solicitation charge at that time?

5 THE WITNESS: I was told no because he was  
6 in possession of two different drugs.

7 THE COURT: All right.

8 THE WITNESS: They were not willing to make  
9 that amendment in that situation.

10 THE COURT: All right.

11 Ms. Kemper, any additional questions?

12 MS. KEMPER: No, thank you.

13 THE COURT: Mr. Ybarra Maldonado, any  
14 questions?

15 MR. YBARRA: No, Your Honor, thank you.

16 THE COURT: All right. Thank.

17 You Ms. Cassels, you are excused.

18 MS. CASSELS: Thank you.

19 THE COURT: Any additional witnesses?

20 MS. Kemper.

21 MS. KEMPER: Your Honor, MS. Pedicone was  
22 in trial, the state is going to rest, thank you.

23 THE COURT: All right. Mr. Ybarra  
24 Maldonado, any rebuttal witnesses?

25 MR. YBARRA: No, your honor, defense rests.

1 THE COURT: All right. Thank you.

2 Any argument, Mr. Ybarra Maldonado?

3 MR. YBARRA: Thank you, Your Honor.

4 I believe we have met our burden of showing  
5 that Mr. Nunez-Diaz relied on the advice of his  
6 immigration of his defense counsel that it would not have  
7 immigration consequences and that is the sole reason why  
8 he accepted the plea agreement.

9 I heard from the family members who the  
10 only reason that they hired Alcock and Associates was so  
11 that their loved one could stay in the country. They  
12 were forced to pay thousands of dollars to get the same  
13 results that the public defender would have got, but  
14 probably with better advice in the public defender's  
15 office than they got from Alcock and Associates.

16 And I think it is clear that Mr. Nunez-Diaz  
17 was not aware. He did of course hear Your Honor say the  
18 immigration consequences, he did read that in the plea  
19 agreement as he admitted and but the most important  
20 evidence is him saying I relied on my attorney telling me  
21 that it would not have immigration consequences.

22 MS. Cassels, as she testified was well  
23 aware of the time that this plea would have severe  
24 immigration consequences, as she wrote in her letter to  
25 the court that she advised her client, it could have

1 immigration consequences.

2                   That is very key, your honor. I think on  
3 that alone, we should win this case. Based on the  
4 Padilla case and subsequent case law about the importance  
5 of advising clients with certainty what the immigration  
6 results would be.

7                   She knew that results would be, she  
8 neglected to clearly explain that to the client even  
9 months later on when she knew she was being investigated,  
10 when she knew there was a microscope on her, she writes a  
11 letter to the court and doesn't say with certainty I  
12 informed him this was going to be the result. She  
13 specifically says, I informed him it could have  
14 immigration consequences.

15                   Now she said is that on July 12 and I can  
16 understand if her explaining, well, I am still trying to  
17 get solicitation, still trying to get Tasc. Then, when  
18 you go further down to that letter, when she says on July  
19 22, when I was explaining to him the plea that she  
20 signed, I said it could have consequences and that is not  
21 what she should have said. She should have said, it will  
22 have immigration consequences.

23                   Based on that fact, Your Honor, I ask the  
24 court to grant our petition for petition for  
25 Post-Conviction relief.

1                   Addressing our additional argument simply  
2 that the person should be given the immigration  
3 advisement individually when they are in front of the  
4 court and not in the morning ask if they simply remember  
5 it, but of course, I will leave that to the discretion of  
6 the court. I think our stronger argument is the Padilla  
7 that she did not say with certainty the result will have,  
8 when she knew and had consulted with immigration  
9 attorneys in her office what the results would be.

10                   THE COURT: All right. Thank you.

11                   Ms. Kemper.

12                   MS. KEMPER: Your honor, in all  
13 Post-conviction proceedings, there is a strong  
14 presumption that counsel was ineffective.

15                   So today, we have heard from MS. Cassels  
16 about the efforts that she made. She met with the  
17 defendant more than once, more than twice. She met with  
18 the family. She tried to get a better offer, she met  
19 with the person from Tasc. She couldn't get it done  
20 based on what he was found in possession of.

21                   And it was because he was possessing two  
22 drugs, cocaine and methamphetamine. That she couldn't  
23 get a deal that will have given him a little bit of  
24 latitude relative to the immigration consequences.

25                   This is a lawyer who testified that she was



1 well familiar with the Padilla versus Kentucky  
2 requirements, she had attended C. L. E. she even  
3 referred to the family when they came to see her on the  
4 immigration lawyer there in her office.

5 She did everything she could. So even if  
6 the law didn't require a strong presumption of effective  
7 assistance, it is the state's belief that MS. Cassels'  
8 testimony demonstrates effective assistance.

9 The defendant heard it from his defense  
10 lawyer, he heard it from this court and he saw it in the  
11 plea agreement. Three times he was told that there were  
12 potential immigration consequences.

13 He was told specifically by his lawyer that  
14 there were immigration consequences. But the defendant  
15 chose to go forward with the plea and telling the it is,  
16 that he chose then to elect voluntary departure, he  
17 didn't want to stay and fight and complain about the  
18 lawyer or seek a stay, no. He chose voluntary departure.  
19 So, again, this dove-tails very much with what Ms.  
20 Cassels was testifying to.

21 That once arrested, once in custody, the  
22 defendant's goal was to just get released into the next  
23 custody situation and to be done with this.

24 He chose voluntary departure.

25 Your Honor, the grant of a Post-Conviction

1 relief petition is truly resolved as the Carriger case,  
2 C. A. R. R. I. G. E. R.

3 For the situation where justice is run its  
4 course, but it has run awry, this is not that situation.

5 This defendant had all of the protections,  
6 he all the advisement. Heard the plea agreement. He had  
7 an attorney who was skilled and knowledgeable standing at  
8 his side, who will have stopped the proceedings if she  
9 had any doubt about his ability to understand.

10 It is not this lawyer's fault that this  
11 defendant was caught with drugs of such a type that a  
12 better offer wasn't available and so for all of these  
13 reasons, I will ask that you not grant the petition for  
14 Post-Conviction relief.

15 THE COURT: And Mr. Ybarra-Maldonado.

16 MR. YBARRA: Your Honor, just we like to  
17 emphasize that we didn't bring a claim alleging  
18 ineffective negotiations of a better plea. Ineffective  
19 investigation of the case. Because we thought so  
20 strongly that the immigration advice or misadvice was  
21 such that was our winning argument, it is just as clear  
22 as can be.

23 With regards to what can happen in the  
24 future, I know Mr. Kemper and I have discussed this  
25 before, and it is almost like, well, we win the case,

1 then how do we get him back and he gets back, they  
2 already said won't give solicitation, they won't do this  
3 and won't do that.

4 I will just ask the court to not take that  
5 into consideration. To take into consideration what our  
6 legal arguments are, what the constitution of the United  
7 States says.

8 What the Supreme court said regarding the  
9 Padilla case and its progeny. You find that there was  
10 ineffective assistance and in my experience in doing  
11 criminal immigration work in Phoenix, this is not the  
12 first I have heard of Alcock and Associates law firm  
13 giving misadvice to someone who is undocumented.

14 It is, unfortunately, very common within  
15 our community.

16 MR. KEMPER: Your Honor, I will seek to  
17 object to that. It is improper argument. There was no  
18 evidence of adduced about Alcock and Associates, what  
19 their practices are.

20 MR. YBARRA: That is, fine Your Honor, I  
21 will retract that.

22 THE COURT: All right. Thank you.

23 Mr. YBARRA: I do want to state that if we  
24 do get him back over here, it is now a different ball  
25 game. Because when he was in custody, we still had Prop

1 100. Prop 100 has since been ruled unconstitutional, but  
2 now we can get him a bond, which should in fact make him  
3 now eligible for Tasc.

4           Because the reason they were denying Tasc  
5 because he had an ICE hold so get him back and I don't in  
6 other cases given the C. R. number. I have got the  
7 person released to immigration custody, bonded out or let  
8 out on the street by immigration, returned and say, hey,  
9 this guy no longer has an ICE hold, he is out here in the  
10 community and I know he is here and then there should be  
11 and that should be, that has been sufficient enough to  
12 get the Tasc offer.

13           Thank you, Your Honor.

14           THE COURT: You are welcome.

15           I will take this matter under advisement,  
16 issue my ruling by way of minute entry.

17           Anything further from the state?

18           MS. KEMPER: No, Your Honor. Thank you.

19           THE COURT: Any further from the defense?

20           MR. YBARRA: Judge, thank you and your  
21 staff for being very generous with the unbelievably  
22 difficult technological problems.

23           THE COURT: You are welcome. It was an  
24 experience for all of us.

25           Thank you.

1                   Can we, Ms. Kemper and Mr. Maldonado, move  
2 to admit all the exhibits?

3                   MS. KEMPER: Certainly.

4                   MR. MALDONADO: Yes, Your Honor. No  
5 objection.

6                   THE COURT: Exhibits 1, 2 and 3 an are  
7 admitted. Thank you .

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[Faint, mostly illegible text, likely the stenographic notes mentioned in the certification.]

I, Yvonne M. De La Torre, RPR, do hereby certify that the foregoing pages constitute a complete, accurate, typewritten record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

DATED this 2nd day of February, 2016.

[Faint, mostly illegible text, likely the signature of the reporter.]

\_\_\_\_\_/S/\_\_\_\_\_  
Certified Reporter  
No. 50470

10/27/2016

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2013-430489-001 DT

10/24/2016

COMMISSIONER PHEMONIA L. MILLER

CLERK OF THE COURT  
Y. King  
Deputy

STATE OF ARIZONA

KAREN B KEMPER

v.

HECTOR SEBASTION NUNEZ-DIAZ (001)

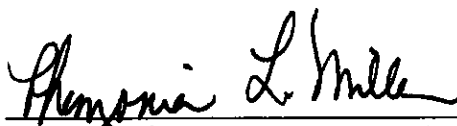
RAY ANTHONY YBARRA

**UNDER ADVISMENT RULING**

After Oral Argument, on the State's Motion For Rehearing Pursuant to Rule 32.9(a), the Court took the matter under advisement. The Court has considered the initial motions and associated pleadings, the Defendant's Response and the State's Reply. After careful consideration, the Court rules as follows:

IT IS ORDERED reaffirming the Court's December 23, 2015 ruling.

IT IS ORDERED signing this minute entry as a formal written Order of the Court, pursuant to *Rule 81 of the Arizona Rules of Family Law Procedure*.



\_\_\_\_\_  
The Honorable Phemonia L. Miller  
JUDICIAL OFFICER OF THE SUPERIOR COURT