STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

GIOVANNI MARCELLO MENDIOLA,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. **CV 2004 8005**

MEMORANDUM DECISION AND ORDER ON POST-CONVICTION RELIEF

I. PROCEDURAL BACKGROUND.

On October 29, 2003, Petitioner Giovanni Marcello Mendiola (Giovianni) was sentenced for the felony crime of Second Degree Murder, as follows:

> **SECOND DEGREE MURDER, (a felony), Idaho Code § Idaho Code Section 18-4001, 18-4003(g), committed on October 11, 2002 – to the custody of the Idaho State Board of Correction for a fixed term of EIGHT (8) years followed by an indeterminate term of LIFE, for a total term not to exceed LIFE, and a fine of FIFTY THOUSAND ($50,000.00) dollars.**

Giovanni was sent to prison that day. On November 3, 2004, Giovanni, *pro se*, filed his Petition for Post-Conviction Relief. On September 26, 2005, Giovanni, through counsel, filed his First Amended Petition for Post-Conviction Relief. Respondent State of Idaho (State) filed its Answer on October 28, 2005. On February 1, 2006, Giovanni filed

"Petitioner's Motion for Summary Judgment and Evidentiary Hearing and Memorandum in Support Thereof". The State responded on March 9, 2006 by filing "Respondent's Motion for Summary Disposition". This was a responsive pleading and memorandum that not only responded to Giovanni's motion for summary judgment, but also sought summary dismissal in favor of the State on Giovanni's grounds of 1) involuntary guilty plea, 2) lack of factual basis for Alford plea, and 3) ineffective assistance of counsel. Oral argument was held on Respondent's Motion for Summary Disposition on April 4, 2006. On June 16, 2006, this Court issued its "Order Denying Petitioner's Motion for Summary Judgment, Order Denying Respondent's Motion for Summary Dismissal, and Order Granting Evidentiary Hearing." Essentially, the Court had before it cross-motions for summary judgment.

Following that decision, the matter was scheduled for an evidentiary hearing on October 16, 2006. That hearing was stipulated by both parties to be reset. The evidentiary hearing was scheduled for January 16, 2007. When that date did not work for the parties it was again reset for April 17, 2007. That hearing was stipulated by both parties to be reset. The evidentiary hearing was scheduled for August 21, 2007. That hearing was stipulated by both parties to be reset. A status conference was ordered by the Court on October 15, 2007. Giovanni's counsel requested another status conference be scheduled. A status conference was scheduled on November 6, 2007, and at that time the evidentiary hearing was scheduled for December 18, 2007. The evidentiary hearing was held on December 18, 2007. Giovanni was present and testified; as did his trial counsel, John Adams; Suzanne Graham, attorney for Piero Mendiola; and Giovanni's mother Alicia Mendiola. Following hearing, a briefing schedule was established by the Court.

The last brief was filed by Giovanni on March 13, 2008. Accordingly, the matter is now at issue.

In the next section, this Court's analysis as set forth in that June 16, 2006, "Order Denying Petitioner's Motion for Summary Judgment, Order Denying Respondent's Motion for Summary Dismissal, and Order Granting Evidentiary Hearing" is reiterated to provide context to this Court's decision on Giovanni's Post-Conviction Relief claims. It is also reiterated because the State in its briefing following the evidentiary hearing has raised the same issue concerning Idaho Code § 19-4901(a) and (b), that was decided against the State at summary judgment.

II. ANALYSIS AT SUMMARY JUDGMENT.

A. Giovanni's claims that: 1) his plea was coerced and 2) there was an inadequate factual basis for the Alford plea, are the types of claims cognizable under I.C. § 19-4901(a) and (b).

The State argued Giovanni's first two claims of involuntary guilty plea and lack of factual basis for Alford plea are not the type of claims cognizable under I.C. §19-4901(a). The State contended these claims could have been brought on direct appeal. As part of his plea agreement, Giovanni waived his right to appeal. Giovanni did not appeal from this Court's sentencing decision. Idaho Code §19-4901(b) provides that any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings. Idaho Code § 19-4901 reads:

> **Remedy – To whom available – Conditions**
> (a) Any person who has been convicted of, or sentenced for, a crime and who claims:
> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;

> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint.
> (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense,
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory of other writ, motion, petition, proceeding, or remedy: may institute, without paying a filing fee, a proceeding under this act to secure relief.
> (b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal but was not, is forfeited an may not be considered in post-conviction proceedings, unless appears to the court, on the basis of a substantial factual showing by affidavit, deposition, or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. Except as otherwise provided in this act, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

Idaho appellate courts have considered the merits of each type of claim in post-conviction proceedings. In *Ricca v. State,* 124 Idaho 894, 865 P.2d 985 (Ct App. 1993) the Court of Appeals determined that the Uniform Post-Conviction Procedure Act provides an appropriate mechanism for considering the claim that a plea of guilty was accepted in violation of the requirements set forth in I.C.R. 11. The Act is available "to cure fundamental errors occurring at the trial which affect either the jurisdiction of the court or the validity of the judgment, even though these errors could have been raised on appeal." 124 Idaho 894, 896, 865 P.2d 985, 987.

In Giovanni's case, his application for post-conviction relief was his first challenge to the validity of his plea of guilty to the charge of second degree murder. However, the relief requested by Giovanni in his application for post-conviction relief

was not withdrawal of his plea as was the case in *Ricca, Gomez v. State,* 120 Idaho 632, 818 P.2d 336 (Ct.App. 1992) and *Nellsch v. State,* 122 Idaho 426, 835 P.2d 661 (Ct.App. 1992). The relief sought by Giovanni is "reversal of his conviction and sentence imposed in this matter." First Amended Petition for Post-Conviction Relief, p. 8. While this might not be the appropriate relief sought under a post-conviction relief application, other Idaho Cases have considered the merits of voluntariness of the plea, and the factual basis for the plea in post-conviction proceedings without mentioning the relief sought in the post-conviction application. *Odom v. State* 121 Idaho 625, 826 P.2d 1337 (Ct.App. 1992); *Amerson v. State,* 119 Idaho, 994, 812 P.2d 301 (Ct.App. 1991); *Simons v. State,* 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989); *Schmidt v. State,* 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982); *Fowler v. State,* 109 Idaho 1002, 712 P.2d 703 (Ct. App. 1985).

If Idaho Code §19-4901 was to be interpreted the way the State argues, nothing, other than that which is stated in 19-4901(a), could be brought on a post-conviction relief application, including an ineffective assistance of counsel claim. Idaho Case law indicates that is not what our legislature intended. In *Sparks v. State,* 140 Idaho 292, 295-96, 92 P.3d 542, 545-46 (Ct.App. 2003) the Court stated,

> In his application for post-conviction relief, Sparks argued that he was denied his Sixth Amendment right to effective assistance of counsel because his counsel labored under an actual conflict of interest and failed to "investigate, locate and interview" witnesses. With regard to Sparks' allegations, the district court found that, because Sparks failed to raise these issues on direct appeal, he waived them. We disagree. Ordinarily, we do not address claims of ineffective assistance of counsel on direct appeal because the record on direct appeal is rarely adequate for review of such claims. *State v. Hayes,* 138 Idaho 761, 766, 69 P.3d 181, 186 (Ct.App.2003). Such claims are more appropriately presented through post-conviction relief proceedings where an evidentiary record can be developed. *State v. Mitchell,* 124 Idaho 374, 376, 859 P.2d 972, 974 (Ct.App.1993).

At summary judgment in this case, this Court then held:

> Claims of plea coercion and inadequate factual basis for an *Alford* plea may also be brought on post conviction relief proceedings. Often, an evidentiary record can more fully be developed on these claims as well. Although the transcript from the plea and sentencing hearing was provided to the Court and was available for review, either Giovanni or the State can further develop the record with trial counsel's testimony or other evidence. While the relief sought by petitioner under the Amended Post Conviction application (reversal and conviction and sentence) may be inappropriate for a post-conviction relief application, an evidentiary hearing on all issues raised in this application would be appropriate to develop the record and for judicial economy. The other option for the Court would be to deny post-conviction relief based on the relief sought (reversal of conviction and sentence), and re-sentence Mendiola, which would allow him the opportunity to raise these issues and relief sought on appeal. This Court believes that at this time the more appropriate procedure is to hold an evidentiary hearing on all claims brought under Mendiola's post conviction relief application.

Order Denying Petitioner's Motion for Summary Judgment, Order Denying Respondent's Motion for Summary Dismissal, and Order Granting Evidentiary Hearing, pp. 4-5. In spite of that ruling, the State, in its briefing filed after the evidentiary hearing, continues to argue that which has already been decided. The State makes the same argument in its briefing following the evidentiary hearing that it did at summary judgment. Just as at summary judgment, the State in post hearing briefing cites not one single case to support its argument. The State argues Giovanni has waived his right to claim that his guilty plea was coerced. (State's) Brief in Opposition to Petition for Post-Conviction Relief, pp. 5-7. For the reasons stated above at the time of summary judgment, the State's arguments regarding waiver are again, without merit.

The Court discussed the remaining issues on Summary Judgment as follows:

B. An evidentiary hearing is warranted on Giovanni's claims that his plea was coerced and that there was an inadequate factual basis for the *Alford* plea.

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the Court must determine whether a genuine issue of fact exists

based on the pleadings, depositions, and admissions together with any affidavits on file which, if true, would entitle the application to relief. *Murphy v. State,* 143 Idaho 139, 145, 139 P.3d 741, 747. (Ct.App. 2006). Moreover, the court liberally construes the facts and reasonable inferences in favor of the non-moving party. *Id.*

In order for a guilty plea to be in compliance with constitutional due process standards, it must be entered voluntarily, knowingly, and intelligently. *State v. Gardner,* 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct.App.1994); *State v. Detweiler,* 115 Idaho 443, 446, 767 P.2d 286, 289 (Ct.App.1989); *Brooks v. State,* 108 Idaho 855, 857, 702 P.2d 893, 895 (Ct.App.1985). Compliance with these standards turns upon whether: (1) the plea was voluntary in the sense that the defendant understood the nature of the charges and was not coerced; (2) the defendant knowingly and intelligently waived his rights to a jury trial, to confront adverse witnesses, and to avoid self-incrimination; and (3) the defendant understood the consequences of pleading guilty. *State v. Huffman,* 137 Idaho 886, 887, 55 P.3d 879, 880 (Ct.App. 2002).

In addition, the state need not show the factual basis of a plea beyond a reasonable doubt. Nor does a plea require a mini-trial of the case. Instead, the goal behind ascertaining a factual basis is to assure that the defendant's plea is made knowingly, intelligently and voluntarily. *Amerson v. State,* 119 Idaho 994, 996. 812 P.2d 301, 303 (Ct.App. 1991).

"The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it." *Brady v. United States,* 397 U.S. 742, 750, 90 S.Ct. 1463, 1469 (1970). Because of the unusual circumstances of this case, in particular because the plea agreement was a "package deal," this Court believes that defendant and

the state should be given an opportunity to present evidence on both of these issues at a post-conviction hearing.

C. Giovanni's claim of ineffective assistance of counsel warrants an evidentiary hearing.

In *Murphy v. State of Idaho*, 143 Idaho 139, 139 P.3d. 741 (Ct.App. 2006), the Idaho Court of Appeals clearly laid out the standard of review for a post conviction application. The Court stated:

> An application for post-conviction relief initiates a proceeding that is civil in nature. Similar to a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post conviction relief is based. An application for post-conviction relief differs from a complaint in an ordinary civil action, however, for an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.
>
> Idaho Code Section 19-4906 authorizes summary disposition of an application for post conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. Allegations contained in the application are insufficient to prevent summary dismissal if they are clearly disproved by the record of the original proceedings, or do not justify relief as a matter of law. Summary dismissal of an application for post conviction relief may be appropriate when the state does not controvert the applicant's evidence because the court is not required to accept the applicant's mere conclusory allegations unsupported by admissible evidence. (citations omitted)

Murphy v. State, 143 Idaho 139, 144-45, 139 P.3d 741, 746-47.

In order to prevail on a claim of ineffective assistance of counsel, the United States Supreme Court has held that the petitioner must establish that: 1) the attorney's conduct fell below an objective standard of reasonableness or competence; and, 2) the deficient conduct so undermined the proper functioning of the adversarial process that the trial process cannot be relied upon as having produced a just result. *Strikland v. Washington,* 446 U.S. 668 (1984). Satisfaction of the prejudice element requires a showing that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59. 106 S.Ct. 366, 370 (1985).

In this case, Giovanni raises a material issue of fact as to whether defense counsel had evidence of or knew prior to the sentencing that Giovanni acted in self defense. Giovanni claims his trial counsel argued that this was a manslaughter case yet failed to present evidence to support that claim, including the testimony of eyewitnesses to the killing. First Amended Petition for Post-Conviction Relief, p. 7. Also, Giovanni contends the trial counsel was aware that Giovanni had been threatened with a gun by Brendan Butler when the struggle occurred. *Id.* at 7. In Giovanni's First Amended Petition for Post-conviction Relief, Giovanni supplied the Court with transcripts of the change of plea and sentencing hearings, an affidavit of Alicia Mendiola, an affidavit of Marco Garcia, and an autopsy report of the victim Brendan Butler. However, testimony at the sentencing hearing seems to contradict the notion put forth by Giovanni in his post conviction application and the affidavit of Alicia Mendiola. In the sentencing hearing transcript, Mr. Adams states:

> [M]y advice to Giovanni was to not plead to this. I told him and I still believe I thought the worst he would do in a jury trial was manslaughter, but it's his life,

> it's not mine and he made the decision he felt would protect his family, not expose his sisters to the threat of indictment or prosecution that was being made…he entered the plea over the advice of his lawyer.

Sentencing Transcript, p. 21, Ll. 22-25, p. 22, Ll. 1-7.

Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact, which if resolved in applicant's favor, would entitle the applicant to the requested relief. *Murphy v. State of Idaho,* 143 Idaho 139, 145, 139, P.3d 741, 747 (Ct.App. 2006). The pleadings, admissions, and affidavits on file raise a genuine issue of material fact as to the ineffective assistance of counsel and therefore warrant an evidentiary hearing.

D. Decision at Summary Judgment.

The Court the denied Giovanni's motion for summary judgment and denied State's motion for summary dismissal. The Court granted Giovanni's motion for an evidentiary hearing.

III. STANDARD OF REVIEW.

An application for post-conviction relief initiates a proceeding that is civil in nature and is governed by the Idaho Rules of Civil Procedure. *Pizzuto v. State*, 127 Idaho 469, 470, 903 P.2d 58, 59 (1995). In order to prevail in a post-conviction proceeding, the applicant bears the burden of proving the allegations upon which the request for relief is based by a preponderance of the evidence. I.C. §19-4907; *Nevarez v. State,* 2008 Opinion No. 36, 08.10 ICAR 480 (Ct.App. April 30, 2008); *Stuart v. State,* 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990). The credibility of the witnesses, the weight given to their testimony, and the inferences to be drawn from the evidence in the proceeding are

all matters solely within the province of the District Court. *Larkin v. State,* 115 Idaho 72, 73, 764 P. 2d 439, 440 (Ct.App. 1988).

IV. ANALYSIS OF POST-CONVICTION RELIEF CLAIMS FOLLOWING EVIDENTIARY HEARING.

Giovanni challenges his conviction of Second Degree Murder for the killing of Brendan Butler, on the following three grounds: (A) Giovanni's guilty plea pursuant to *North Carolina v. Alford* was not freely and voluntarily entered, and the trial court failed to establish the plea was voluntarily entered (Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, pp. 1-2), later this is characterized as "Petitioner's *Alford* Plea is Constitutionally Invalid Because it Was Coerced by the State" (*Id.*, p. 5); (B) At the time the plea was entered the trial court failed to establish that a factual basis existed for the *Alford* plea (*Id.*, p. 2), later characterized as "The Trial Court Failed to Establish a Strong Factual Basis for the *Alford* Plea at the Time the Plea Was Entered" (*Id.*, p. 12) and (C) Giovanni was denied the effective assistance of trial counsel. *Id.*, p. 2, 15.

A. GIOVANNI'S CLAIM THAT HIS GUILTY PLEA PURSUANT TO *NORTH CAROLINA V. ALFORD* WAS NOT FREELY AND VOLUNTARILY ENTERED (BECAUSE IT WAS COERCED BY THE STATE), AND THAT THE TRIAL COURT FAILED TO ESTABLISH THAT HIS PLEA WAS VOLUNTARILY ENTERED, IS DENIED.

1. Introduction.

Giovanni first challenges his conviction of Second Degree Murder for the killing of Brendan Butler on the grounds that his guilty plea pursuant to *North Carolina v. Alford,* 400 U.S. 25, 915 S.Ct. 160 (1970), was not freely and voluntarily entered, and the trial court failed to establish the plea was voluntarily entered (Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, pp. 1-2), later this is characterized as "Petitioner's *Alford* Plea is Constitutionally Invalid Because it Was Coerced by the State". *Id.*, p. 5.

Giovanni claims the transcripts from the change of plea and sentencing hearings and the evidentiary hearing on his post-conviction proceeding show Giovanni entered his guilty plea pursuant to *Alford* to the second degree murder charge: "solely because the state threatened to prosecute Petitioner's family with more serious offenses if Petitioner did not accept the offered plea agreement" (Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, pp. 5-6); "…the plea was entered solely because of the threat to prosecute his sisters and because of the benefit to his other family members" (*Id.,* p. 6); "…the plea was based entirely on the threats to the family members" (*Id.)*; and "The record reveals that Petitioner felt compelled to accept the plea bargain in order to spare his siblings further prosecution and to save his mother from the pain of losing all of her children to prison." (*Id.,* p. 7). Simply because Giovanni repeats this claim many times in his briefing does not make the claim true. This Court finds Giovanni's claim that the sole reason he entered into this package plea agreement was to save his sisters, siblings, mother (the reason shifts in Giovanni's briefing), to be false. The credibility of the witnesses, the weight given to their testimony, and the inferences to be drawn from the evidence in the proceeding are all matters solely within the province of the District Court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct.App. 1988).

Giovanni's claim that it was only his concerns for his family that he entered his *Alford* plea to second degree murder is not credible for two reasons. First, was the outstanding benefit to *Giovanni* in pleading guilty to second degree murder. Second, is the fact that Giovanni *and all other family* members had done some very bad things that led to the initial charges (or potential charges) against each of them, and each of them had significant reductions in those charges (or no charges), as well as very beneficial

recommendations by the State at sentencing, as a result of this package deal. A third issue lurks in Giovanni's claim of lack of voluntariness and coercion. This third issue is primarily focused on Giovanni's next basis on post-conviction relief (lack of a factual basis for the plea), discussed in the next section of this opinion, but is also relevant in Giovanni's claim that his plea was not free and voluntary due to coercion by the State. That third issue is Giovanni's claim that he lacked the second degree murder element of malice.

In his briefing on his post-conviction claim, Giovanni conveniently limited his discussion about the facts of this crime to the few seconds that comprise the actual stabbing of Brendan Butler. For good reason Giovanni ignores what he and his family members did the days and months that led up to Giovanni's fatally stabbing Brendan Butler, and Giovanni ignores the cover up and running that he and his family members engaged in following that killing.

Those facts are set forth in the Grand Jury transcripts. At the August 27, 2003, plea change hearing, Giovanni's attorney stipulated the Grand Jury transcripts supplied the factual basis for the plea. August 27, 2003, Change of Plea Transcript, p. 17, Ll. 14-19. Once all of these facts are discussed, the reader will understand why the Court determines Giovanni's claim that the *only* reason he plead guilty was to save his sisters, brother and/or mother, is simply not credible. Accordingly, neither is Giovanni's claim that his plea was not free and voluntary due to coercion by the State.

2. The Facts as Established by the Grand Jury Transcript.

a. The June 2002 Event.

Brendan Butler was a 20 year-old Korean male. He was small in stature, about five foot, two inches, 110 pounds, "skin and bones". Jeff Sheffield, Grand Jury Transcript, Vol.

2, p. 244, Ll. 15-19. He was an area drug dealer. Brendan Butler was engaged in having physically fit young men, "runners", drive through North Idaho to near the Canadian border, park their vehicle in a remote place, then cross the border in the wilderness, hook up with a supplier, obtain as much high grade marijuana (B.C. Bud) as they could carry on their backs, then return to Brendan Butler to have his people sell the product. Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 132, L. 8 – p. 133, L. 14. In so doing, they could double or nearly double their money on what they paid for the marijuana. A 50-pound backpack cost $75,000, but would sell for between $125,000 and $150,000. *Id.*, p. 133, Ll. 2-14. Brendan Butler's close friend, roommate and business partner Nate Ferguson testified before the Grand Jury. He testified that they would make around $60,000 a week doing this. Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 63, Ll. 8-13; p. 67, Ll. 67, Ll. 8-10; p. 76, Ll. 16-19.

Apparently, doubling their money wasn't good enough. Brendan Butler had competitors, Nate Norman and Ben Scozzaro, who had the same business plan. Jeffrey Sheffield, Grand Jury Transcript, Vol. 2, p. 137, Ll. 14-25. Brendan Butler hatched a plan that if Norman and Scozzaro could be killed or intimidated into leaving, Brendan Butler would then have a monopoly on the area market. Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 54, Ll. 10-20. This plan was explained by Brendan Butler to Giovanni Mendiola, Eddie Mendiola, and Marco Antonio (Tony) Garcia, with Nate Ferguson present at Justin Miller's house. *Id.*, p. 74, Ll. 1-24; Detective Daniel Mattos, Grand Jury Transcript, Vol. 1, p. 120. In order to implement that plan, Brendan Butler felt he needed to bring in someone to provide the services of killing or intimidating others. As it occurred, while this was organized crime, it wasn't organized very well nor was it organized over a long period of

time. With no professional hit men at his disposal, Brendan Butler turned to one of his business associates. A friend of Brendan Butler's, and one of the "runners", Jeff Sheffield testified before the Grand Jury in these cases. Sheffield had played baseball until age 20, then began smoking pot, then selling pot, and finally running marijuana for Brendan Butler. Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 132, Ll. 12-14. Sheffield knew a young man named Justin Miller. Justin Miller was a hockey player and played professionally in Las Vegas for the 2002-2003 season. Justin Miller spent his early years in the Spokane area, then moved to Southern California in sixth-grade where he attended a large Catholic High School (19 different 6th grade classes). Justin Miller had known Giovanni Mendiola for quite some time. Justin Miller had grown up with Giovanni Mendiola. Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 71, Ll. 16-25. When Justin Miller first moved to California he got in fights a lot and nobody really liked him, and Giovanni was the only one that eventually took to him. *Id.*, p. 72, Ll. 1-5. They knew each other from then on as pals. *Id.*, p. 72, Ll. 6-18.

Jeff Sheffield, 23 years old in 2003, was a baseball player at University High School in Spokane, Washington. Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 128, Ll. 9-12, p. 131, Ll. 2-9. Jeff Sheffield is also known to his friends as Josh. Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 69, Ll. 11-24. Sheffield lived with Brendan Butler until about three to four weeks before Brendan Butler was killed by Giovanni on October 11, 2002. Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 136, Ll. 5-9. Sheffield's best friend growing up was Ryan Miller, and Ryan's cousin is Justin Miller. *Id.*, p. 131, L. 13 – p. 132, L. 4. Justin Miller knew some people that could be this "backup" for Brendan Butler, "more or less people who would go rob people", "If someone stole from him [Brendan Butler], that they

would come to town and take care of it", "Uh, he [Brendan Butler] actually wanted people to be killed." *Id.*, p. 137, Ll. 1-16. This plan all came together quite quickly, as this discussion that Brendan Butler wanted someone to kill or rob Norman and Scozarro took place only a couple of weeks before Giovanni and some of Giovanni's family came up from Southern California to Coeur d'Alene to do just that. *Id.*, p. 137, p. 16 – p. 138, L. 14. Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 67, L. 21 – p. 69, L. 7.

Parker Dixon Brooks testified before the Grand Jury. Parker Brooks, Grand Jury Transcript, Vol. 3, pp. 348, L. 14 – p. 376, L. 16. Brooks was friends with Justin Miller, meeting him while at Spokane Falls Community College where they both played baseball. *Id.*, p. 350, L. 23 – p. 351, L. 7. Brooks was also friends with Jeffrey ("Josh") Sheffield, and played baseball with Sheffield through high school in Spokane. *Id.*, p. 352, Ll.6-22.

At the time of the events in question, Giovanni Mendiola lived in Seattle, Washington, with his sisters Giaconda and Giuliana Mendiola, at the time both students at the University of Washington. State's Trial Brief, RE: Admissibility of Co-Consiprator's Statements and Other Evidence, July 31, 2003 and lodged in State v. Giovanni Mendiola, Kootenai County Case No. CRF 2003 6008, pp. 3, 16. Lake Forest, California, as did his mother, Alecia Mendiola and father Edgardo Mendiola. Lake Forest is South of Los Angeles, California. At the time of the events in question, Piero Mendiola, John (B.J.) Altamirano lived in Lake Forest, California as well. Eddie Mendiola lived in Mission Viejo, California, which is adjacent to Lake Forest, California, and Marco Antonio "Tony" Garcia lived in Stanton, California, which is just North of Lake Forest. He married a sister of Giovanni Mendiola, Piero Mendiola and Eddie Mendiola, but they were divorced at the time of the events in question.

Justin Miller arranged for Sheffield to meet Giovanni and Eddie Mendiola, as well as Marco Antonio (Tony) Garcia, at Justin Miller's house in Spokane, Washington, in March, 2002. However, it wasn't until about late May or early June 2002 that Brendan Butler voiced that he wanted Giovanni to be used as "muscle". Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 139, L. 1 - p. 143, L. 20.

Giovanni , Eddie Mendiola and Marco Antonio (Tony) Garcia came back to the area in June, 2002, and Sheffield met them all at that time. *Id.* p. 143, L. 19- p. 145, L. 13. They were in the area for a week at that time and were "called up to Spokane to jack people." *Id.*, p. 144, L. 9 – p. 145, L. 15. During that time Brendan Butler met with them in Justin Miller's basement. *Id.*, p. 145, L. 16 – p. 146, L. 8. Sheffield testified:

> The meeting was actually because the Mendiolas wanted to meet Brendon [Brendan Butler] because they were up here to work for him. They wanted to know who the person was that they were working for um, pretty much. The information that had been relayed to them wasn't good enough. They wanted maps of the house um, floor plans.

Id., p. 146, Ll. 9-16. Nate Ferguson was also present at this meeting, and his recollection of the events is completely consistent with Sheffield's. Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 73, L. 7 – p. 77, L. 5. The plan was to "Take Ben [Scozzaro], make him take them to Nate Norman's house where they were to take his money", and "the money was gonna be divided evenly between them [Giovanni and his gang] and Brendon [Brendan]". *Id.*, p. 94, Ll. 10-18. At this first meeting "Brendon [Brendan Butler] was telling the Mendiolas that – that if they went inside and got Ben that Ben was worth 60 to $100,000", and "Ben could lead them to Nate, who was worth 300 to $500,000 possibly." Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 148, Ll. 3-8. Even at this first meeting, Giovanni's brother Eddie Mendiola was angry with Brendan Butler for not putting any money up front to do these

robberies and killings, and eventually Brendan Butler agreed to pay $5,000 up front. *Id.*, p. 150, L. 2 – p. 252, L. 15; p. 153, Ll. 1-5. Sheffield testified:

> He [Brendan Butler] had stated that they would receive another $15,000 if they had killed Ben when they went in the house. Um, the only way that they could get to Nate was if they captured – or if they grabbed Ben, meaning that they had to grab him, they had to torture him. Um, numerous different ways of torture, cut his fingers off.

Id., p. 151, Ll. 17-22. "Tony had expressed to Brendon [Brendan] that they don't care, that they'll kill anybody, it didn't matter", and they [Giovanni and Eddie Mendiola] made Tony out like he was crazy, like this guy's killed over 20 people." *Id.*, p. 155, Ll. 15-25. Nate Ferguson recalled Giovanni stating that "…they ("Giovanni and his crew") had already been out and bought rope and duct tape and um, scissors to cut off fingers, those sorts of things." Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 76, Ll. 2-7. Giovanni told them that "He collected the fingers of the people from before." *Id.*, p. 95, Ll. 10-19. Sheffield was asked by the Grand Jury if Giovanni or any of his people acknowledged that they would go ahead and kill them for money, to which Sheffield answered: "Oh, yeah. They – during that conversation um, they had acknowledged that they were crazy, that they didn't care if it was a little sister, if it was a brother, if it was a mom, a dad, it didn't matter who it was, they'd kill anybody." Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 290, Ll. 10-19.

Sheffield then drove Giovanni, Justin Miller, Eddie Mendiola and Marco Antonio (Tony) Garcia to the Hayden Lake area to confirm the location of Ben Scozzaro's house and to check out the logistics. *Id.*, p. 163, L. 1 – p. 167, L. 24. Giovanni indicated the house had too many exits in the house for them to just go in, and that "he was gonna call in some more people, meaning more of the crew." *Id.*, p. 168, L. 10 – p. 169, L. 14. Giovanni was worried they could have guns and return fire, so they all returned to Justin Miller's house,

where Giovanni said "they were gonna call in some more people", and "after they'd called in the other people that they were gonna go do the job." *Id.*, p. 169, Ll. 15- 25.

Sheffield testified that two or three days after this meeting between Brendan Butler, Sheffield, Giovanni Mendiola, Eddie Mendiola and Marco Antonio (Tony) Garcia, they met up with Piero Mendiola (another brother of Giovanni Mendiola and Eddie Mendiola) and John "B.J." Altamirano, a friend of Giovanni's. *Id.*, p. 154, Ll. 1-16; p. 156, Ll. 8-11. Justin Miller took the Mendiolas to the store where they purchased pruning shears with which to cut off fingers, and purchased ski masks, gloves, duct tape, rope, and later Brendan Butler and Sheffield gave the Mendiolas some weapons. *Id.*, p. 158, L. 7 – p. 160, L. 11; p. 170, Ll. 10-23. Right after the other two (Piero Mendiola and John "B.J." Altamirano) arrived, they were going to rob the people that night, and Brendan Butler "had an alibi party for his workers and himself." *Id.*, p. 173, Ll. 2-22; Nate Norman, Grand Jury Transcript, Vol. 1, p. 77, Ll. 8-13. Sheffield went to that party at Brendan Butler's house in Coeur d'Alene. Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 174, Ll. 4-11. While at the party, Sheffield received a call from Justin Miller, who was with the Mendiolas. Miller told Sheffield to get a hotel, that they had committed the robbery and stolen a bunch of weed and "didn't wanna drive with weed and/or cash and/or guns uh, all the way back to Spokane." *Id.*, p. 175, L. 7 – p. 176, L. 10. Sheffield got the hotel room, left Brendan Butler's party about five or six in the morning and went to Justin Miller's house in Spokane. *Id.*, p. 177, Ll. 13-23. Justin Miller told Sheffield they went into Ben Scozzaro's house, robbed him, stole eight pounds of marijuana and $20,000 to $25,000, and that John "B.J." Altimarano socked Ben Scozorro in the face. *Id.*, p. 178, Ll. 3-23. Giovanni later told Sheffield that "…he [Giovanni] had the gun set up or held at Ben's head…", that "BJ [Altamirano] was running around the room

looking for stuff to steal, weed, everything…", "…that BJ was stupid, he couldn't find the weed that was sitting in front of him the whole time". *Id.,* p. 280, Ll. 5-19.

Benjamin Scozzaro testified before the Grand Jury as well. Benjamin Scozarro, Grand Jury Transcript, Vol. 1, p. 16, L. 6 – p. 39, L. 20. He testified that in mid-June 2002: "I was woken in the middle of the night and uh, held at gun point and robbed", that he woke to "three unknown men standing in my bedroom doorway all pointing weapons, guns at me", "..they asked me – they were looking for a Ben or a Nate, and I said 'I'm Ben.'" *Id.,* p. 18, Ll. 12-16; p. 19, Ll. 18-25. They told him to lay on the floor face down, put a gun to his head, put zip-ties on his hands, then was taken downstairs to his basement, laid face down on a mattress while he heard them "…just tearing through the house." *Id.,* p. 20, Ll. 1-25. Scozzaro testified they all had dark clothing, the leader was about six feet tall, Spanish looking, had a shaved head and a long goatee. *Id.,* p. 21, Ll. 1-7. The leader "…told me that I was going to take them to Nate's house", and "me and the leader got in my car and we drove to the end of my street into which all of his friends came in their getaway car, I'd assume, and they did some conversing", "and he got out and told me to drive the other way and they were gonna go the other way, and that's what I did." *Id.,* p. 23, Ll. 1-9. Scozzaro reported his wallet was simply stolen, but otherwise did not report this to the police because they told him that "if we phoned the police, then they would come back", and he did not want the police to know he was trafficking marijuana. *Id.,* p. 35, Ll. 13-15; p. 36, Ll. 17-23. Scozarro testified that among themselves they all spoke in Spanish. *Id.,* p. 23, Ll. 12-13. The problem was Scozzaro was getting his marijuana from two "Nates", Nate Norman and Nate Ferguson, and he did not know which Nate to whom they were referring. *Id.,* p. 24, Ll. 3-9. Scozzaro testified he had at his home some marijuana and a lot of cash, about $40,000,

from the sale of marijuana. *Id.*, p. 18, L. 17 – p. 19, L. 15.

Scozarro's fiancée (*Id.*, p. 39, Ll. 14-15), Chrystal Rose Stone, testified before the Grand Jury. *Id.*, p. 38, L. 22 – p. 59, L. 17. She testified three men came in to their bedroom with guns, she was undressed in bed, they told me to wake my boyfriend, and took him away, they allowed her to put clothes on, had her get face-down on the ground, zip-tied her hands, led her at gun point down the stairs, put her face down on a couch. *Id.*, p. 45, L. 3 – p. 47, L. 25. When they left with Scozzaro, they duct taped her mouth shut, and said "I'm sorry I have to do this, but I do, uh, for obvious reasons, you can't tell anybody we were here", and then he left. *Id.*, p. 51, Ll. 17-25. She undid the zip-ties as they were very loose, got up, then heard a car come back, so she bound herself up again because she didn't want them to know she got out of the ties, but it was only Scozzaro driving back. *Id.*, p. 52, L. 1-9; p. 55, Ll. 1-11.

b. The October 2002 Event.

After the June robbery of Ben Scozzaro, Brendan Butler told Nate Ferguson that "he would like to have them [Nate Norman and Ben Scozzaro] dead, which is about the same meeting that I told him that I didn't want anything to do with it." Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 64, L. 12 – p. 65, L. 11.

According to Sheffield, "…the next time I saw the Mendiolas was in October." Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 185, L. 25 – p. 186, L. 2. Sheffield picked Giovanni up from the Spokane airport the first part of October and took him out for breakfast. *Id.*, p. 186, Ll. 3-9. Giovanni was here for a meeting with Brendan Butler. *Id.*, p. 188, L. 9 – p. 187, L. 1. Giovanni told Sheffield that Brendan Butler had agreed to pay $50,000 a month to Giovanni to "have their back—or have his [Brendan's] back and myself

[Sheffield], me [Sheffield] being part of [Brendan's] crew." *Id.,* p. 188, Ll. 1-6. Giovanni told Sheffield he had been "on-call for two months" and "He was just saying he's kind of in town to collect (inaudible)…he wants some money." *Id.,* p. 188, Ll. 3-23. When Giovanni arrived at Brendan's house, Giovanni "…told him [Brendan] that he had been on-call for how ever many months now. Uh, he was expecting at least $100,000." *Id.,* p. 190, Ll. 3-8. Brendan told Giovanni that he had "…got in a little bit over my head, I was talking a little bit too much. I can only afford to pay you like 20 to $30,000 a month." *Id.,* p. 190, Ll. 9-13. Brendan and Giovanni discussed another robbery of Ben Scozzaro and Nate Norman, and that in Brendan's mind "the first job was never done because they [the Mendiolas] didn't kill the guy." *Id.,* p. 192, Ll. 3-10. Brendan "was pretty upset that he had to pay money out and they didn't kill him." *Id.,* Ll. 11-14. At this meeting, Brendan told Giovanni that Ben Scozzaro and Nate Norman "were both worth the same amount of money that he indicated before." *Id.,* Ll. 15-22. Brendan was upset that Giovanni had been in town a week before seeing friends and didn't stop by to see Brendan to do the work he was supposed to be doing (killing Scozzaro and Norman), now that Brendan had the information on Scozzaro and Norman that Giovanni needed (they didn't have a picture of Scozarro when they robbed him the first time and "they didn't know if it was the right guy.") *Id.,* p. 189, Ll. 14-23; p. 193, L. 17 – p. 195, L. 5. Brendan "just told him (Giovanni) that the information had been waiting, get your crew together, pretty much." *Id.,* p. 195, Ll. 10-17. During the meeting, Brendan was disrespectful to Giovanni, telling him "…they were suppose to be professionals, they were suppose to know what they're doing" and "Why didn't he kill this guy." *Id.,* p. 197, L. 27 – p. 198, L. 2. The meeting lasted 45 minutes to an hour, then Sheffield drove Giovanni back to Spokane to Justin Miller's house. *Id.,* p.

196, Ll. 4-14. On the way, Giovanni called Justin Miller on Giovanni's cell phone, and twice said to Justin Miller "I just snapped his neck", and after the second time, Giovanni stated "I'm joking". *Id.*, p. 196, L. 15 – p. 197, L. 17. Sheffield then took Giovanni to the Spokane airport that same evening. *Id.*, p. 200, Ll. 4-10.

The next time Sheffield saw Giovanni was later that same week, within a couple of days. On that occasion, Giovanni was with Eddie Mendiola and Marco Antonio (Tony) Garcia and Brian Weathersby. *Id.*, p. 200, L. 11 – p. 201, L. 4. On that day, October 7, 2002 (*Id.*, p. 212, L. 10 – p. 213, L. 19), Sheffield got a call from Justin Miller, telling Sheffield to get the Mendiolas a downtown hotel room, which he did (Best Western on Division in Spokane), and then Sheffield met them and gave them the key to the room. *Id.*, p. 201, L. 5 – p. 203, L. 10. The next day (October 8, 2002) Sheffield got a call from Giovanni on his cell phone. *Id.*, p. 203, Ll. 11-23. Giovanni told Sheffield that they were waiting for Brendan Butler, that Brendan hadn't showed up with the information that he wanted (addresses and pictures of Ben Scozzaro and Nate Norman) and Giovanni told Sheffield that they were "back up here to complete the June job", "[m]eaning that they were here to rob Ben Scozarro and Nate Norman and/or kill them both." *Id.*, p. 204, Ll. 15-23; p. 210 Ll. 13-21. Sheffield then testified he was supposed to meet all of them for dinner, but could not find them so he called them, and they told Sheffield to meet them at a pawn shop. Sheffield arrived at the pawn shop and met up with Giovanni, Eddie, Tony and Brian. Giovanni bought two knives, keeping the larger bladed one for himself and giving the smaller bladed knife to Brian. *Id.*, p. 205, L. 9 – p. 208, L. 13. They all went to an Italian restaurant in downtown Spokane. Sheffield then went home and later met them at their hotel room. *Id.*, p. 208, L. 16 – p. 209, L. 24. They were still waiting for a phone call from

Brendan Butler and the information (address and pictures of Ben Scozzaro and Nate Norman). *Id.,* p. 210, Ll. 10-21. When Sheffield arrived, Tony had cut his finger pretty bad, and one "of the Mendiolas, I'm not sure which one, or Bria, had stated that they were getting impatient, they're cutting their own fingers off." *Id.,* p. 210, Ll. 2-7. Then they got information that Ben Scozzaro was living in the same house that he was in when they robbed him in June. *Id.,* p. 211, Ll. 1-21. About two days later, Giovanni called Sheffield and asked Sheffield to come down to the hotel because they were going to go out to Brendan's house. *Id.,* p. 213, L. 20 – p. 215, L. 11. Sheffield went to the downtown Spokane hotel room and then drove Giovanni, Eddie Mendiola, Marco Antonio (Tony) Garcia and Brian Weathersby out to Brendan's house in Coeur d'Alene in Sheffield's Jeep about eight o'clock that night. *Id.,* p. 215 Ll. 11-23. There was no communication to Brendan that they were coming. Sheffield mentioned to Giovanni that Brendan "wouldn't appreciate us just showing up at his house" and "Giovanni kinda gave me the, we don't really care what Brendon [Brendan] appreciates type deal." *Id.,* p. 216, Ll. 1-12; p. 218, Ll. 19-25. Giovanni went up to the door of Brendan's house, walked into the house past the girl that answered the door, then stepped back out of the house and signaled (snapped his fingers) to one of the others to give him a knife, and Sheffield cannot recall which one of the others handed him the shorter (4-5 inch) bladed knife purchased from the pawn shop. *Id.,* p. 217, L. 11 – p. 220, L. 15. Sheffield testified that Brendan was surprised to see him, and told Giovanni to meet him down at the gas station. *Id.,* p. 220, L. 16 – p. 221, L. 5. Giovanni and Brendan got in Brendan's Cadillac, and the rest went in Sheffield's Jeep to the gas station about two miles down the road at the east end of Sherman Avenue in Coeur d'Alene, Idaho. *Id.,* p. 221, L. 5 – p. 222, L. 22. Sheffield went into the gas station

convenience store, followed shortly by Giovanni, and Giovanni told Sheffield that Brendan had given him the information that he was seeking but that Nate Norman had now become the main target. *Id.,* p. 223, L. 1 – p. 224, L. 20. Sheffield took Giovanni and the others back to the hotel. *Id.,* p. 224, Ll. 20-25. The next day at the hotel in Spokane, Sheffield saw a map that Brendan had provided Giovanni. *Id.,* p. 225, Ll. 1-20. Giovanni complained about the "shitty map" and "how's he suppose to find out anything about this—about the place, the house or whatever, with no names, no street addresses, no nothing." *Id.* p. 225, L. 23 – p. 226, L. 12. Giovanni indicated to Sheffield that Brendan told him he wasn't sure if it was a map to Nate Norman's house or Nate Norman's parent's house, and that Brendan told him if it is the parent's house, to not kill the parents. *Id.,* p. 230, Ll. 2-18. Sheffield then went back to his house. *Id.,* p. 231, Ll. 14-18.

On October 10, 2002, Sheffield talked to Brendan Butler on the phone and said that when Brendan got back into town he wanted to check out Sheffield's new house. Brendan told Sheffield to "be careful" and "To make sure I had an alibi". *Id.,* p. 232, Ll. 3-13.

The next day, Friday, October 11, 2002, Giovanni called Sheffield and asked him to come to their hotel in downtown Spokane. Sheffield went to the hotel, and Giovanni mentioned in front of Eddie, Tony and Brian, that Brendan was going to show Giovanni the spots that he wanted his bodies dumped that day, and that they were going to "go out there". *Id.,* p. 232, L. 17 – p. 234, L. 11. The last time Nate Ferguson saw Brendan Butler that day was about noon or one o'clock in the afternoon. Nate Ferguson, Grand Jury Transcript, Vol. 1, p. 85, L. 25 – p. 86, L. 16. Later that same afternoon, Giovanni called Sheffield and Giovanni indicated he was driving back from Coeur d'Alene on the freeway, "he told me he needed a hotel", "That we had some shit that we needed to talk about", and "That he needed

to clean up". Jeff Sheffield, Grand Jury Transcript, Vol. 2, p. 235, Ll. 1-3; p. 234, Ll. 12-20. Sheffield told him he didn't have his ID and couldn't get him a hotel. *Id.,* p. 234, Ll. 20-21. They agreed to meet at a downtown Spokane hotel called the Shangri-La. *Id.,* p. 235, L. 4 – p. 236, L. 15. At the Shangri-La, Sheffield saw Giovanni, Eddie, Tony and Brian. *Id.,* p. 236, Ll. 16-19. Sheffield also saw the Dodge Neon the Mendiolas had been renting for the last few days, and he saw Brendan Butler's Cadillac. *Id.,* p. 236, Ll. 19-25. The men were standing outside the vehicles when Sheffield arrived. *Id.,* p. 237, Ll. 1-11. Brendan Butler was not with them. Sheffield testified "It was pretty much obvious to me that Brendon [Brendan] wasn't around." *Id.,* p. 237, Ll. 21-22. Giovanni again told Sheffield that he needed a hotel, again Sheffield told him he couldn't find his ID. *Id.,* p. 237, Ll. 12-14. Giovanni told him that they needed a spot to park the Cadillac. *Id.,* p. 237, Ll. 15-25. Sheffield told him that we could go park the Cadillac down in the parking lot and we did that, we went to a bar casino across the street from Rosauers, Tony driving the Cadillac and Giovanni the passenger. *Id.,* p. 237, L. 23 – p. 238, L. 22. Giovanni then told Sheffield they should go somewhere that was safe, so Sheffield took them up to his house. *Id.,* p. 238, L. 23 – p. 239, L. 11. They all ended up at the garage of Sheffield's house in Spokane. Giovanni pulled their Dodge Neon rental car in. *Id.,* p. 241, Ll. 14-25. Giovanni told Sheffield to go in the house and tell Sheffield's girlfriend not to come out. *Id.,* p. 242, Ll. 6-12. Sheffield complied, came back out to the garage and asked Giovanni "What the hell happened?" *Id.,* p. 242, Ll. 13-14. Sheffield testified before the grand jury:

> Giovanni told me that he grabbed Brendon [Brendan] by the throat. He squeezed him. Squeezed his throat until blood came out of his mouth and nose. He indicated that Brendon [Brendan] tried to grab his glove off. He indicated that he had squeezed Brendon's [Brendan's] throat so hard that he made an incision with his hand. Uh, I said to him, I asked – I was pretty much in tears, I said, "Are you sure he's not up there suffering? I mean, you just left this guy strangle." I mean, I just –

that was my comment back to him. And he said – then is when he told me he slit his throat.
Q. Okay. Did he say how he –
A. He indicated –
Q. (inaudible) …slit his throat?
A. – to me that he grabbed his –
Q. Okay.
A. – grabbed him like this. He didn't say how he slit his throat or anything like that. He just said he slit his throat. He indicated that he had grabbed him. He also had said that – I remember later on at dinner he had stated that his hand hurt, or his wrist hurt from doing it.
Q. Okay.
A. That told me that he did it so hard –
Q. Well, later –
A. Yeah.
Q. Later statements that he'd made to you?
A. Yes.
Q. Okay. Now, could you describe Brendon's physical size to the Jury, or how big was he?
A. Everybody on the Jury is about double the size of Brendon [Brendan].
Q. Okay. Your estimation as to –
A. Brendon's [Brendan's] 5 foot 2, 110 pounds – 115 pounds. Five three.
Q. Okay. And what type of build did Brendon [Brendan] have?
A. Skin and bones.
Q. Okay. And what about Gio, how was he built?
A. He's a pretty fit man.
Q. How tall is Gio?
A. Uhn five six – five seven – five eight.
Q. Okay.
A. Actually he's probably five eight.
Q. All right. And his physical stature?
A. Uh, 5 foot 8, 175 pounds, pretty solid build.

Id., p. 243, L. 9 – p. 245, L. 2. Brian Weathersby also told Sheffield that Giovanni grabbed Brendan Butler by the throat. *Id.*, p. 242, Ll. 13-15. Giovanni, Eddie Mendiola, Marco Antonio (Tony) Garcia and Brian Weathersby then said they were going to go to Brendan's house and load up all of Brendan's stuff, and they talked about killing anybody that was in the house. *Id.*, p. 245, L. 5 - p. 246, L. 25. Giovanni then said "I'm hungry, I wanna go get something to eat", and they left. *Id.*, p. 247, L. 1 – p. 248, L. 8. Then Giovanni on his cell phone called Sheffield and said his crew had broken into the condo and robbed the weed,

and for Sheffield to open his garage. *Id.*, p. 248, L. 11 – p. 249, L. 5. Giovanni, Eddie Mendiola, Marco Antonio (Tony) Garcia and Brian Weathersby arrived back at Sheffield's garage in the Dodge Neon rental car. *Id.*, p. 249, Ll. 5-10. Sheffield testified that Giovanni told him they had broken into Brendan Butler's studio or condo in Spokane, (Brendan Butler also had a house in the Silver Beach area in Coeur d'Alene) using a credit card. *Id.*, p. 289, Ll. 6-17. Sheffield testified:

> I saw them open up the trunk, take out a whole crap load of weed. Uh, they told – they – Giovanni asked me where the money was, I told him that I don't know. Giovanni told me that Brendon [Brendan] had told him he just got a half-million dollars worth of product. Told him "I don't know. They asked me what the weed was worth. Giovanni asked me what it was worth, I told him, "I don't know." Uh, he asked me how long it would take for me to get rid of it…

Id., p. 249, Ll. 14-22. Sheffield testified that they also had two black plastic trash bags they pulled out of the trunk of the Dodge Neon, and "they gave me the bags and they [Giovanni and everyone else] told me that every – that all the contents inside of the bags needed to be burned." *Id.*, p. 260, L.4 – p. 263, L. 9.

> I don't know if the bags were given to me before I said "What – what's going on here?" or af – before he told me that he had murdered Brendon [Brendan]. I just know that I had the bags and I was told to burn them.

Id., p. 262, Ll. 20-25. They all then went Libby's house (Justin Miller's girlfriend) to store the marijuana, as Sheffield did not want that much marijuana stored at his house. After arriving at Libby's house and unloading the approximately 56 pounds of marijuana, they loaded it back up in Sheffield's Jeep and went back to Sheffield's house. *Id.*, p.250, L. 12 – p. 252, L. 12. Giovanni indicated they didn't have enough money to leave, they were pretty excited about the marijuana "[b]ut they weren't too excited about not having any cash." *Id.*, p. 252, Ll. 12-25. The marijuana was put in Sheffield's garage. *Id.*, p. 253, Ll. 18-25. Sheffield had between five and seven thousand dollars cash in his bedroom, went in and got

it and "I gave it to Giovanni." *Id.*, p. 263, Ll. 11-23. Giovanni asked Sheffield if Sheffield had something Giovanni could wear, and Sheffield gave him a white polo sweatshirt. *Id.*, p. 255, Ll. 2-15. Giovanni used Sheffield's restroom, then Giovanni invited Sheffield and his girlfriend to go have dinner with them, which they did, and then "they proceeded on to Seattle." *Id.*, p. 255, L. 16 – p. 259, L. 17. Giovanni told Sheffield they were going to Seattle. *Id.*, p. 264, Ll. 9-24. Sheffield testified that whenever the Mendiolas didn't want he or his girlfriend to hear what they were saying, they spoke in Spanish. *Id.*, p. 265, Ll. 1-12. After dinner, Sheffield went back to his house with them, then took the Mendiolas back to get their car, "…their car now. Brendon's [Brendan's] car." *Id.*, p. 66, L. 22 - p. 268, L. 9. The Mendiolas left. The next day, Giovanni called Sheffield, "asked me if I was all right", "[i]f the weed was still all right" and "I told him that I didn't wanna deal with the weed, that I didn't want the weed." "He [Giovanni] said, 'Okay. Yeah, maybe its better that you don't have it over there anyways. Pack it up in your car, bring it over here.'" *Id.*, p. 268, L. 10 – p. 269,L. 11. Sheffield then drove to Seattle with his girlfriend and all the marijuana. In Seattle he met up with Giovanni, Eddie Mendiola, Marco Antonio (Tony) Garcia, and Brian Weathersby. While he was there he saw Brendan Butler's Cadillac. Sheffield dropped off the marijuana, left after about 15-20 minutes and returned to Spokane that same day, even though Giovanni asked Sheffield if they wanted to stay the night or go out to dinner. *Id.*, p. 269, L. 12 – p.271, L. 2. Sheffield was also introduced to two of Giovanni's sisters. *Id.*, p. 282, L. 14 – p. 283, L. 16. Sheffield testified "Giovanni had indicated to me that it was his sister's house and he lived in the basement." *Id.*, p. 283, Ll. 17-21. Three to four days later, Sheffield made another trip to Seattle to deliver some more cash to Giovanni. The cash was obtained from the sale of about five pounds of marijuana

which Sheffield had retained. On that trip Sheffield again met Giovanni at the same place in Seattle, and gave Giovanni between $13,000 and $15,000. Again, Sheffield saw Brendan's Cadillac. Sheffield left after about an hour and a half. *Id.*, p. 271, L. 3 – p. 273, L. 17.

Sheffield was asked by the Grand Jury why he didn't go to the police when Giovanni gave him the plastic bag and told him to destroy it, to which Sheffield testified: "I had been told that these people are organized crime, meaning that they were Mafia or work for the Mafia", "I was very scared" (*Id.*, p. 292, Ll. 4-11), and that "the Mendiolas had been provided [Sheffield's] family's information." *Id.*, p. 293, Ll. 1-3.

Following the killing of Brendan Butler, Justin Miller drove from Spokane, Washington, to Knoxville, Tennessee, with his friend Parker Brooks. Parker Brooks, Grand Jury Transcript, Vol. 3, p. 356, L. 22 – p. 357, L. 23. The purpose of the trip was that Justin Miller had a tryout for a professional hockey team. Parker Brooks, Grand Jury Transcript, Vol. 3, p. 357, Ll. 14-20. Although Brooks knew Sheffield and Miller, knew that they had been trafficking in drugs, and had met Brendan Butler through Sheffield and Miller, Brooks himself had not delved into running marijuana. *Id.*, p. 350, L. 23 – p. 355, L. 7.

Before that trip to Knoxville, on October 14, 2002, three days after the killing, Brooks met Giovanni in Seattle. *Id.*, p. 353, L. 24 – p. 254, L. 9. Sheffield verified this in his testimony before the Grand Jury. Jeffrey Sheffield, Grand Jury Transcript, Vol. 2, p. 271, L. 3 – p. 273, L. 17. Brooks drove to Seattle with Sheffield, and they arrived in Seattle about 10:30 at night, and met Giovanni. Parker Brooks, Grand Jury Transcript, Vol. 3, p. 365, L. 21 – p. 367, L. 14. They went to Seattle for Sheffield to deliver $15,000 to Giovanni, and Brooks saw Sheffield deliver the money to Giovanni. *Id.*, p. 373, L. 7 – p. 374, L. 1. While there, Brooks saw Brendan Butler's Cadillac. *Id.*, p. 367, L. 15 – p. 368,

L. 2. In the hour and a half that Brooks was at the house in Seattle, Brooks testified before the Grand Jury that Giovanni told Brooks:

> Gio told – well, first of all he – he told me that it's not – it's not very hard for him and his family to find out who – who snitched on him if he gets in trouble. And that – that the person, whoever does it, they're – them and their family will be hurt or dead because of it.

Id., p. 368, Ll. 8-18.

> …he told me that if anybody found out and that, you know, if it – whoever told on him, whoever told the authority or who – you know, anybody to get im in trouble that them and their family would pay the price. That – that they would die and that he would make sure that – he said that it wasn't very hard to find out how or who told.

Id., p. 374, L. 16 - p. 375, L. 1. At that same residence but at a different time, Giovanni told Brooks that:

> …he was mad at Justin because Justin was suppose to leave him a gun and that he had to use a knife. But he told me that – to me – to me he said that "That's okay, because I'm really good with a knife."

Id., p. 368, L. 19 – p. 369, L. 8. Brooks testified he heard Giovanni tell Sheffield:

> …that Brendon [Brendan] offered him everything, money and everything else right before he killed him, like when he realized that he was gonna die.
> Q. 'cuse me?
> A. When Brendon [Brendan] like saw, you know, that Gio had a knife and everything and he – he said that he was uh – that Brendon [Brendan] offered Gio money and like whatever, you know, drugs or an – I don't know what else, bu he just he said he offered him pretty much whatever just to spare his life.
> Q. To spare his life.
> A. And he – and he killed him anyways.
> Q. And when Gio made these statements, again, who was present? Just for the record here.
> A. Um, Josh Sheffield and Shwn, I don't know his name, and Gio and I.
> Q. And he said he had killed Brendon [Brendan]?
> A. Yes.
> Q. Did he say – tell you how he killed Brendon [Brendan]?
> A. With a knife.
> Q. What statements, if any, were made by Gio concerning um, how this was done?
> A. Um –
> Q. Well, wait a minute, let's let me back up a little bit. What statements, if any, did

> Gio say who he was with then happened, when he killed Brendon [Brendan]?
> A. He told me that he was with like three or four other people. And that they were also from California, wherever he was from. And that um, they all had black gloves on the whole time that they were with Brendon [Brendan]. And that Brendon [Brenda] wa – thought that they were in town to – to either kill somebody for him, or rob somebody, or something. And Brendon [Brendan] was gonna take them to the place where, if they did kill somebody, that he wanted them to leave their body. And um, Gio told me that one of the people that he was with in the car, when they were riding to that place, kept asking Brendon [Brendan] to pull over so that he would go pee, and finally when he did, that's when they killed him.
> Q. That's what he told you?
> A. Yes.

Id., p. 369, L. 20 – p. 371, L. 11. Giovanni told Brooks: "He told me that it was messy." *Id.*, p. 372, Ll. 11-19.

2. The Initial Charges and the Potential Consequences.

This section discusses the initial charges that Giovanni, the initial charges his family members and friends faced, and the potential punishment for those crimes, compared to the amended charges resulting from the plea agreements. This is necessary as Giovanni claims: "His sole reason in entering the plea was to stop the threat of prosecution of his sisters." Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, p. 4. That is simply not credible given the totality of the charges against him alone. As mentioned above, the credibility of the witnesses, the weight given to their testimony, and the inferences to be drawn from the evidence in the proceeding are all matters solely within the province of the District Court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct.App. 1988).

Giovanni was indicted on nine felony counts, plus a sentencing enhancement charge of Exhibition of a Deadly Weapon. Those charges and potential punishments are as follows:

Count I – Conspiracy to Commit Robbery, I. C. § 18-1701, minimum sentence of five (5) years, maximum life sentence (I.C. § 18-6503), and $50,000 (I.C. § 18-112A), plus

an additional 15 years for the deadly weapon enhancement.

Count II- Robbery. I.C. § 18-6501, minimum sentence of five years, maximum life sentence (I.C. § 18-6503), and $50,000 (I.C. § 18-112A), plus an additional 15 years for the deadly weapon enhancement.

Count III- Kidnapping, I.C. § 18 4501, 18-4502, and 18-4503, (the indictment does not specify whether it is first degree kidnapping or second degree kidnapping, but because the grand jury testimony discusses torture of Ben Scozzaro, it could be first degree which carries a mandatory life or death sentence), if second degree, twenty-five (25) years and $50,000, plus an additional fifteen (15) years for the deadly weapon enhancement.

Count IV- Kidnapping, I.C. § 18 4501, 18-4502, and 18-4503, if first degree, mandatory life or death sentence; if second degree, twenty-five (25) years and $50,000, plus an additional fifteen (15) years for the deadly weapon enhancement.

Count V- Conspiracy to (First Degree) Commit Murder, I.C. §18-4003(a), minimum ten (10) years, maximum life or death, up to $50,000 fine, plus an additional fifteen (15) years for the deadly weapon enhancement.

Count VI- Conspiracy to Commit Robbery, I.C. § 18-1701, minimum sentence of five (5) years, maximum life sentence (I.C. § 18-6503), and $50,000 (I.C. § 18-112A)

Count VII- Conspiracy to Commit Kidnapping, I.C. § 18-4501, 18-4502 and 18-4503, if first degree, mandatory life or death sentence; if second degree, twenty-five (25) years and $50,000, plus an additional fifteen (15) years for the deadly weapon enhancement.

Count VIII- Conspiracy to Commit (First Degree) Murder, I.C. § 18-4001, 18-4002, 18-4003, minimum ten (10) years, maximum life or death, up to $50,000 fine.

Count IX- First Degree Murder, I.C. § 18-4001, 18-4002, 18-4003; minimum ten

(10) years, maximum life or death, up to $50,000 fine.

Counts I-V concern the June robbery of Ben Scozzaro and the conspiracy involved therein. The exhibition of a deadly weapon enhancement was added to the June events and increases the maximum possible punishment on Counts I-V by fifteen (15) years on each count. Count VI- VIII concern the conspiracy to commit the October robbery and/or murder of Ben Scozzaro and/or Nate Norman. Count IX is the First Degree Murder of Brendan Butler that occurred on October 11, 2002. In Idaho, Conspiracy to commit a crime is punished the same as the underlying offense. I.C. §18-1701.

Thus, Giovanni alone faced three potential mandatory minimum life sentences for the kidnapping charges, two mandatory minimum ten years on the first degree murder charge and conspiracy to commit first degree murder charge, and mandatory minimum sentences of five years on each of the three robbery charges. That means up to three life sentences, plus an additional 25 years, **at a minimum.** At a maximum, Giovanni could have faced the death penalty, or nine life sentences plus 75 years on the combined deadly weapons enhancements. Some or all of these sentences could have been imposed consecutively. For Giovanni to now claim that the only reason he took the State's offer to recommend no more than a twelve (12) year fixed sentence (with the recommendation for any indeterminate portion of the sentence left open to the State) on **one** count of **Second** Degree Murder (which obviated the mandatory ten-year minimum in the charged First Degree Murder) was to "save his family" is simply not credible. Giovanni took the plea because it was highly advantageous **to him.**

The plea was also highly advantageous to his family members. While the evidence of what actually happened in the seconds before Brendan Butler's death is mostly

circumstantial, there was a great deal of direct evidence presented to the Grand Jury as to Giovanni's guilt on the various kidnapping, robbery, conspiracy and weapons enhancement provisions. Giovanni, as well as Eddie Mendiola, Marco Antonio (Tony) Garcia, and B.J. Altamirano, had a great deal of evidence against them on these charges that arose out of the June 2002 events, based on the testimony before the Grand Jury.

Giovanni's brother, Eddie Mendiola, was charged with everything Giovanni was charged with, except the First Degree Murder charge. The Amended Indictment charged him simply with Accessory to Commit a Felony, I.C. § 18-205 and 18-206, punishable by up to only five (5) years and up to a $50,000 fine, with the State agreeing to recommend no more than two (2) years in prison with a recommendation for a retained jurisdiction (where you spend up to six-months in prison and then can be placed on probation), and a $10,000 fine.

Giovanni's brother, Piero Mendiola, due to a migraine headache during the June 2002 event, is the least culpable of the three brothers. Still, Piero Mendiola was charged with Count I – Conspiracy to Commit Robbery, Count II – Robbery, Counts III and IV – Second Degree Kidnapping and Count V – Conspiracy to Commit Murder, and the deadly weapon enhancement on these five charges. The Amended Indictment charged him simply with Accessory to Commit a Felony, I.C. § 18-205 and 18-206, punishable by up to only five (5) years and up to a $50,000 fine, with the State agreeing to recommend no more than two (2) years in prison with a recommendation for a retained jurisdiction and a $10,000 fine.

Giovanni's brother-in-law Marco Antonio (Tony) Garcia was also charged with everything Giovanni was charged with, except the First Degree Murder charge. The Amended Indictment charged him simply with Accessory to Commit a Felony, I.C. § 18-

205 and 18-206, punishable by up to only five (5) years and up to a $50,000 fine, with the State agreeing to recommend no more than two (2) years in prison with a recommendation for a retained jurisdiction and a $10,000 fine.

Giovanni's friend, John (B.J.) Altamirano, was also only involved in the June events. Altamirano was charged with Count I – Conspiracy to Commit Robbery, Count II – Robbery, Counts III and IV – Second Degree Kidnapping and Count V – Conspiracy to Commit Murder, and the deadly weapon enhancement on these five charges. The Amended Indictment charged him simply with Accessory to Commit a Felony, I.C. § 18-205 and 18-206, punishable by up to only five (5) years and up to a $50,000 fine, with the State agreeing to recommend no more than two (2) years in prison with a recommendation for a retained jurisdiction and a $10,000 fine.

Giovanni's friend Justin Miller was also only involved in the June events. Altamirano was charged with Count I – Conspiracy to Commit Robbery, Count II – Robbery, Counts III and IV – Second Degree Kidnapping and Count V – Conspiracy to Commit Murder, and the deadly weapon enhancement on these five charges. The Amended Indictment charged him simply with Accessory to Commit a Felony, I.C. § 18-205 and 18-206, punishable by up to only five (5) years and up to a $50,000 fine, with the State agreeing to recommend no more than two (2) years in prison with a recommendation for a retained jurisdiction and a $10,000 fine.

The plea agreement also involved Giovanni's sisters. The State had obtained the agreement of the United States Attorney for the applicable district that no charges would be brought against Giovanni's sisters. Keep in mind Brendan Butler's Cadillac, Giovanni, Eddie Mendiola and Marco Antonio (Tony) Garcia all wound up in Seattle where

Giovanni's sisters lived.

This is a very favorable plea agreement for all the others involved. However, it is not coercive. It is not coercive for two reasons. First, every charge initially filed against Giovanni, and every charge initially filed against all others, was legitimate. All charges were well supported by the Grand Jury transcript. Second, while all others were receiving very favorable treatment as a result of their collective agreement, **so was Giovanni!** Giovanni actually received the most favorable treatment, given the extent of his involvement in the June conspiracy, robbing and kidnapping of Ben Scozzaro, the October conspiracy to rob and kill Ben Scozzaro and Nate Norman, and the actual killing of Brendan Butler.

3. Giovanni Mendiola's Plea was Made Voluntarily.

In *North Carolina v. Alford,* the Supreme Court held that, while most guilty pleas include a waiver of trial and an admission of factual guilt, such admission is not a constitutional requirement to the imposition of a prison sentence so long as the guilty plea was entered voluntarily, knowingly, and intelligently. *Alford,* 400 U.S. 25, 37 (1970). Alford pleas are recognized by Idaho Courts. *State v. Leon,* 142 Idaho 705, 707, 132 P.2d 462, 464 (Ct. App. 2006). The three-part test to determine whether a plea was entered voluntarily, knowingly, and intelligently is: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty. *State v. Carrasco,* 117 Idaho 295, 297, 787 P.2d 281, 283 (1990); *State v. Hawkins,* 117 Idaho 285, 288, 787 P.2d 271, 274 (1990). The Supreme Court, in *Brady v. United States,* 397 U.S. 742, 755 (1970),

established a standard for the voluntariness of guilty pleas (as earlier defined by the 5th Circuit):

> A plea of guilty entered by one fully aware of the direct consequences, including the value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfullfillable promises), or perhaps by promises that are by their nature improper as having no relationship to the prosecutor's business (e.g. bribes). *Shelton v. U.S.*, 246 F. 2d 571, 572 n. 2 (5th Cir. 1957).

Here, Giovanni does not dispute that he knowingly and intelligently waived his rights to a jury trial, right to confront his accusers, and his right against self-incrimination. Nor does Giovanni deny understanding the consequences of pleading guilty. Instead, Giovanni argues his plea was not voluntary because, although he understood the nature of the charges, it was coerced. Giovanni claims the State threatened to prosecute members of Giovanni's family if he did not accept the plea. Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, pp. 5-6.

"'Package' plea agreements in which dismissal of charges against a spouse or other family member of the principal malefactor is part of the deal are common." *United States v. Spilmon*, 454 F.23d 657, 658 (7th Cir. 2006). "They are not improper or forbidden." *Id., citing Politte v. Unites States*, 852 F.2d. 924, 929-30 (7th Cir. 1988); *United States v. Marquez*, 909 F.2d 738, 741-43 (2d Cir. 1990); *United States v. Mescual-Cruz*, 387 F.2d 1, 7-8 (1st Cir. 2004); *United States v. Hodge*, 412 F.3d 479, 490-91 (3d Cir. 2005). "It would be in no one's interest if a defendant could not negotiate for leniency for another person." *Id.* Package plea deals are not impermissible; however, federal courts have recognized that special care should be taken in reviewing guilty pleas entered in exchange for a prosecutor's promise of lenient treatment of a third

party. *United States v. Wheat,* 813 F.2d 1399, 1405 (9th Cir. 1987); *United States v. Carr,* 80 F. 3d 413, 416 (10th Cir. 1996). The Washington Court of Appeals has held that pleas are not coerced or equivocal simply because they are motivated by an inducement offered by the State. *State v. Williams,* 117 Wn.App. 390, 401-02, 71 P.3d 686 (2003) (the desire to help a loved one does not, standing alone, render a guilty plea invalid). The *Williams* court stated that:

> Altruistic or subjective reasons for entering a plea are not grounds to set aside the plea. A plea is not invalid if entered pursuant to a plea agreement that includes leniency for a third party or in response to a prosecutor's justifiable threat to prosecute a third party if the plea is not entered. *Williams,* 117 Wn.App. at 400.

See also Cortez v. U.S., 337 F.2d 699 (9th Cir. 1964); *U.S. v. Castello,* 724 F.2d 813 (9th Cir. 1984). Rather, a plea is involuntary if it is obtained by coercion which is overbearing on the will of the defendant. *Williams,* 117 Wn. App. at 398; *Brady,* 397 U.S. at 750.

In *In re Ibarra,* the Supreme Court of California set forth factors to consider in determining whether unduly coercive factors may have rendered a plea that is part of a package involuntary. *In re Ibarra,* 34 Cal.3d 277, 288-90, 193 Cal.Rptr. 538, 544-45, 666 P.2d 980, 986-87 (Cal. 1983). These factors are: 1) whether the inducement for the plea is proper; 2) consideration of the factual basis for the plea; 3) careful examination of the nature and degree of coerciveness; 4) the significance of the promise of leniency to a third party; (the Supreme Court of California then added three additional factors without further discussion): 5) age of defendant; 6) by whom plea negotiations were initiated; and 7) whether charges have already been pressed against a third party. 34 Cal.3d at 290, 193 Cal.Rptr. at 545, 666 P.2d at 987. The *Ibarra* Court states that

package-deal plea bargains may approach the line of unreasonableness if "extraneous factors not related to the case or the prosecutor's business" "are brought into play." 34 Cal.3d at 287, 193 Cal.Rptr. at 544, 666 P.2d at 986.

It appears no Idaho appellate court has ever adopted *Ibarra* in analyzing package deal plea bargains. It might not be adopted, as not all jurisdictions have required a different analysis for package deal cases. "Not all cases endorse a double standard whereby package deals receive stricter scrutiny than other plea agreements." *United States v. Spilmon*, 454 F.23d 657, 658 (7th Cir. 2006). The Court of Appeals of New York specifically rejected the *Ibarra* analysis in package deal cases. *People v. Fiumefreddo,* 605 N.Y.S.2d 671, 626 N.E.2d 646, 82 N.Y.2d 536 (Ct.App.N.Y. 1993). That court held:

> We recognize that connected pleas can present concerns which require special care, particularly where leniency in a promised sentence for a loved one is part of the bargain. While the specific inquiries required by the California and Arizona courts may be relevant considerations in particular cases, we decline to adopt them or any other formalized procedure for determining the ultimate issue of whether a defendant's connected guilty plea was voluntary. We believe that what seems to be the consensus view of the Federal courts is the proper approach: i.e., while a connected plea entailing benefit to a third person can place pressure on a defendant, the "inclusion of a third-party benefit in a plea bargain is simply one factor for a [trial] court to weigh in making the overall determination whether the plea is voluntarily entered" (*Marquez, supra,* 909 F.2d at 742; *see, Politte v. United States*, 852 F.2d 924, 930-931 [7th Cir1988] [recognizing that connected pleas may require special care, but holding that the court should consider the totality of circumstances in determining the ultimate issue of voluntariness]). This rejection of any mandated procedure or ritualistic form in favor of a careful exercise of the court's discretion on an individual basis is consistent with the policy that we have long followed in New York (*see, People v. Nixon, supra,* 21 N.Y.2d at 355, 287 N.Y.S.2d 659, 234 N.E.2d 687). Indeed, there is New York precedent for assessing the validity of connected pleas by viewing the tied-in nature of the plea as one factor to be carefully weighed with the totality of the circumstances in the determination of whether the plea was voluntary (*see, People v. Rodriguez,* 79 Misc.2d 1002, 362 N.Y.S.2d 116 [SupCt, Bronx County, Sullivan, J.]).

605 N.Y.S.2d 671, 677, 626 N.E.2d 646, 651, 82 N.Y.2d 536 545-46. In *Odom v. State* 121 Idaho 625, 826 P.2d 1337 (Ct.App. 1992), decided well after *Ibarra* had been decided, the Idaho Court of Appeals dealt with a situation in which the prosecution allegedly threatened to seek the maximum sentence for the defendant's wife unless the defendant plead. The Idaho Court of Appeals did not use the *Ibarra* analysis in deciding that case. 121 Idaho 625, 628, 826 P.2d 1337, 1340 (Ct.App. 1992) In an abundance of caution, this Court will analyze the facts of these cases in light of the *Ibarra* criteria, as if the Idaho appellate courts had adopted *Ibarra*.

In the present case, Giovanni states that he opted to enter the plea solely to spare his siblings further prosecution. Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief p. 6. The Court took Giovanni's plea on August 27, 2003. At that hearing, when asked by the Court if there had been threats against him, Giovanni responded:

> THE DEFENDANT: Not – not threats but just, um – I don't know how to say it. Just – I'm just trying to take advantage – trying to salvage whatever is left of my family. That's what's making me agree to this. I don't know if that makes sense.
> THE COURT: Okay. Well, I need to know if anyone has threatened you in any way to get you to enter this plea.
> THE DEFENDANT: Not – not like physically or anything like that.
> THE COURT: Okay. And then I need to find out how you feel that there may be threats against you.
> THE DEFENDANT: Well, it's not against me. It's like toward my family. If I don't agree to this, my brother's lose their – how do I say – their plea agreements, and I'm not ready to take their fathers away from my nephews and nieces and my sisters.
> THE COURT: Okay. You understand that –
> THE DEFENDANT: I'm agreeing – I'm agreeing a hundred percent, but I'm just putting it on record the only reason I'm doing this is because I'm trying to save my family, you know, at least what's left of it. Better one go down than four of us.

Plea Change Transcript, p. 12, L. 23 – p. 13 L. 24. The Court then inquired further:

> THE COURT: Do you feel that you are making this plea freely and voluntarily?
> THE DEFENDANT: It is hard to say. I mean, I'm doing it wilfully, but I feel like I'm cornered. I know – I understand I got a choice to take it to trial, but then my brothers lose their deals. I can't do that to my mama, so I understand. I just want closure. I just want to get this over with.
> THE COURT: Even though there are ties in this agreement with your brother's cases, do you feel that you have weighed all of the pros and cons, and based on that weighing process that this is a voluntary decision on your part?
> THE DEFENDANT: Yes, sir. My family means more to me than my freedom.

Id., p. 16, Ll. 1-15. When it comes to discerning whether Giovanni was making a free and voluntary decision, this Court wonders what more it could have done in light of Giovanni's answer to its last question?

What is obvious from Giovanni's statements to the Court, is that it is **Giovanni** who is putting the pressure on himself. How can the Court conduct further inquiry into that? Not once does Giovanni say: "You know judge, its my mother who is pressuring me to take this deal", or "My brothers are really pressuring me to take this deal" or "My sisters are putting pressure on me to take this." Had any statements like that been made, this Court could have inquired: "What exactly did your mother tell you?", "What fear do you have that your brothers will harm you?", "What do you think your sisters will do if you do not take this deal?" Giovanni specifically stated he was not being threatened. *Id.*, p. 12, L. 21 – p. 24, L. 6. Giovanni also specifically stated: "I'm just trying to take advantage – trying to salvage whatever is left of my family", "I'm doing this is because I'm trying to save my family, you know, at least what's left of it", and "I can't do that to my mama". There isn't any mention of any threat in Giovanni's words. Instead, the impetus is all self originated by Giovanni. This isn't coercion, because the reason he finds himself trying to salvage his family and save his family, is because Giovanni and some members of his family did some very bad things. "It is not duress to offer someone

a benefit you have every right to refuse to confer, in exchange for suitable consideration." *United States v. Spilmon,* 454 F.23d 657, 659 (7th Cir. 2006). In *Spilmon,* the Seventh Circuit Court of Appeals then stated: "That is all that happened here. There is no suggestion that the government believed either Spilmon or his wife to be innocent or that it lacked probable cause to prosecute either of them." *Id.* Indeed, if Giovanni would have ever stated that certain family members were putting pressure on him, the Court would have had a duty to inquire. *United States v. Caro,* 997 F.2d 657, 659-60 (9th Cir. 1992). That did not happen here.

More than four years later at the post-conviction evidentiary hearing, Giovanni claims he was "threatened" by the prosecution. Post-Conviction Relief Evidentiary Hearing, December 18, 2007, p. 4, L. 23; p. 9, Ll. 11-14. That claim is not supported by any facts or any specific statements about what any prosecutor might have said to Giovanni that could be construed as a threat. Giovanni's unsubstantiated claims of threats four years after sentencing, after all his family members have received their benefit, ring hollow. If something was said at the family meeting before Giovanni changed his plea that was in any way threatening, Giovanni has had over four years to recall what that was. He hasn't come up with it.

Giovanni argues: "The record is unequivocal that although the details of the package deal were placed on the record, no 'special care' was taken to insure that the structure of the package deal was not coercing Petitioner's plea." Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief p. 10. The *Ibarra* court used both "special scrutiny" (34 Cal.3d at 287, 193 Cal.Rptr. at 544, 666 P.2d at 986) and "special care" (34 Cal.3d at 288, 193 Cal.Rptr. at 544, 666 P.2d at 987), to inquire into the totality

of the circumstances on a package-deal plea, to determine whether, in fact, a plea has been unduly coerced, or is instead freely and voluntarily given. 34 Cal.3d at 288, 193 Cal.Rptr. at 544, 666 P.2d at 986. Yet Giovanni's counsel gives not a hint as to what the Court should have asked Giovanni, or what Giovanni's responses to those questions would have been. If, for example, Giovanni had Eddie Mendiola ready in the wings to testify he witnessed the entire encounter between Brendan Butler and Giovanni, and personally saw a drug-crazed Brendan Butler pointing a gun at Giovanni, and Brendan Butler began to pull the trigger, but Giovanni stabbed Brendan Butler to protect himself, we might have something. But we don't. It is curious that Giovanni would, for the first time, make the claim at sentencing that Brendan Butler was some drug-crazed lunatic that caused Giovanni to fear for his safety, when Giovanni himself told Parker Brooks that Brendan Butler was driving the car the entire time prior to the killing. Parker Brooks, Grand Jury Transcript, Vol. 3, p. 371, Ll. 3-9. The Court finds Giovanni's claim that this Court did not provide the "special scrutiny" enunciated by *Ibarra* to be without merit.

The transcript of the plea change hearing shows that Giovanni was afforded every opportunity to explain the plea deal(s) and express his reservations in open court, and he always indicated that he wished to proceed **despite his reservations**.

Giovanni was simply not credible on August 27, 2003, when he stated: "the only reason I'm doing this is because I'm trying to save my family." *Id.*, p. 13, Ll. 21-23. Giovanni is not credible when he testified similarly at his post-conviction relief hearing on December 18, 2007:

> Q [Andrew Parnes]: If there had been no benefits to your sisters or brothers would you have entered a plea in this case.
> A [Giovanni Mendiola]: Not in this lifetime, no.

Testimony of Giovanni Mendiola, December 18, 2007, p. 4, Ll. 14-16**.** Giovanni is not credible in arguing such in his briefing. Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief p. 6. Giovanni admits to killing Brendan Butler. The testimony before the Grand Jury shows that he spoke directly about this killing to Jeffrey (Josh) Sheffield on several occasions, and directly about the killing to Parker Brooks on one occasion. Never once in all these conversations did Giovanni mention the words "self defense" or anything remotely consistent with self defense. Not only that, but Giovanni threatened to kill Parker Brooks or his family if he told anyone what Giovanni had told him. There would be absolutely no reason for Giovanni to threaten Brooks if in fact Giovanni had acted in self defense. Even if Giovanni **had** acted in self defense, this would not have been a bad plea bargain for Giovanni, given: 1) the recommendation that the State had limited itself to, and 2) the plethora of other crimes Giovanni faced, all bearing potential life sentences, which the State was dismissing. But there is **no credible evidence in the record** that Giovanni's actions were in self-defense. It is Giovanni's burden on this post-conviction relief petition to come forward with such evidence. The only evidence he has come up with is his own testimony months and years after the fact, which this Court finds not credible. The record is replete with evidence from Giovanni's own mouth, immediately after the killing, showing he committed this killing with malice.

Giovanni claimed at his post-conviction relief hearing that he had never seen the grand jury transcripts. Testimony of Giovanni Mendiola, December 18, 2007, p. 8, Ll. 15-18. But then Giovanni admitted he had spoken to his attorney John Adams about "the hearsay evidence that you guys have". *Id.*, p. 8, Ll. 19-23. The Grand Jury transcripts were released by this Court to all counsel in all these related cases on April 23, 2003, and

again on June 20, 2003. Thus, Giovanni at least had access to all the evidence against him a minimum of two months before he entered his guilty plea on August 27, 2003. In any event, in his post-conviction relief, Giovanni has not made any claim of ineffective assistance of counsel for counsel not getting him this information. While Giovanni may consider this evidence "hearsay", he has come forward with no explanation as to why that evidence would not be allowed in at trial, and he has come forward with no credible evidence that would support his self defense claim.

That being the case, Giovanni's claim that the only reason his is pleading guilty is to save his sisters, or his brothers, or his family, is not credible. Giovanni was represented by counsel and well understood the consequences of pleading guilty. He knowingly and intelligently waived his rights. Giovanni offers no evidence that the State coerced his plea other than that the State motivated his plea by offering an inducement, the package deal offered to Giovanni, his co-defendant brothers, and his unrelated co-defendants.

Again, the *Ibarra* factors are: 1) whether the inducement for the plea is proper; 2) consideration of the factual basis for the plea; 3) careful examination of the nature and degree of coerciveness; 4) the significance of the promise of leniency to a third party; 5) age of defendant; 6) by whom plea negotiations were initiated; and 7) whether charges have already been pressed against a third party. Each will be discussed.

1) Whether the inducement for the plea is proper. The inducement for the plea is proper in this case. As stated in *Ibarra:* " The court should be satisfied that the prosecution has not misrepresented facts to the defendant, and that the substance of the

inducement is within the proper scope of the prosecutor's business." 34 Cal.3d at 288-89, 193 Cal.Rptr. at 544-45, 666 P.2d at 986-87.

Giovanni does not even address these issues. Instead, Giovanni argues: "The validity of a grand jury indictment as evidence of prosecutorial good faith or a factual basis for a plea is questionable", citing to some commentators who opine that the grand jury is merely a "rubber stamp" for the prosecutor and that the grand jury system should be abolished. Petitioner's Brief on the Merits of the Petition for Post Conviction Relief, pp. 8-9. That is all well and good, but what about the **evidence** that was placed before the Grand Jury. While Giovanni can rail that: "…the evidence presented to the grand jury was an exclusive product of the prosecution and as such was not subject to all rules of evidence or to cross-examination" (*Id.,* p. 10), this Court must keep in mind all the charges and all the **evidence.** Giovanni had described the killing to not one but two people, Sheffield and Brooks. The two people robbed and kidnapped by Giovanni, Eddie Mendiola and Antonio (Tony) Garcia, testified. There was evidence of Giovanni's post-killing actions that are consistent with murder and inconsistent with self-defense. Even if Giovanni is critical of the Grand Jury system, he has not given one single argument as to how that system failed in light of the **evidence** presented. This is not even a close case. It is especially odd that Giovanni takes umbrage with the Grand Jury indictment when Giovanni's counsel stood up at the Plea Change hearing and **stipulated that the Grand Jury transcript established probable cause for the Amended Indictment!** August 27, 2003, Change of Plea Transcript, p. 17, Ll. 5-19.

While Giovanni only complains about the nature of the Grand Jury system, the Court must analyze the first criteria under *Ibarra*, whether the "inducement for the plea

was proper." This Court is "satisfied that the prosecution has not misrepresented facts to the defendant". Indeed, Giovanni alleges no misrepresentation of facts by the State. None of the facts surrounding the package deal were misrepresented to the Court or to Giovanni. This Court is convinced that "that the substance of the inducement is within the proper scope of the prosecutor's business", quoting again from *Ibarra.* 34 Cal.3d at 288-89, 193 Cal.Rptr. at 544-45, 666 P.2d at 986-87. As noted in *Ibarra:*

> We recognize that the "package-deal" may be a *valuable tool* to the prosecutor, who has a need for *all* defendants, or none, to plead guilty. The prosecutor may be properly interested in avoiding the time, delay and expense of trial of all the defendants. He is also placed in a difficult position should one defendant plead and another go to trial, because the defendant who pleads may become an adverse witness on behalf of his codefendant, free of jeopardy. Thus, the prosecutor's motivation for proposing a "package-deal" bargain may be strictly legitimate of extrinsic forces.

34 Cal.3d at 289, 193 Cal.Rptr. at 545, 666 P.2d at 987, n. 5. (emphasis in original). This Court finds these legitimate reasons were in play in these related cases. Giovanni has made no argument to the contrary, let alone produced any facts to the contrary. As discussed in *Ibarra*, the State in this case did not threaten Giovanni, nor did the State promise to discontinue improperly harassing Giovanni. 34 Cal.3d at 287, 193 Cal.Rptr. at 543, 666 P.2d at 985. Giovanni has not made any such claims. The package plea that Giovanni argues was coercive, while providing the benefit to Giovanni's bothers and unrelated co-defendants, also benefitted Giovanni a great deal. The Tenth Circuit stated in *Carr* that: "we have insisted that an accused's choice be respected, and if he 'elects to sacrifice himself for such motives, that is his choice'". *United States v. Carr,* 80 F. 3d 413, 417 (citing *Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir. 1986), and *Kent v. United States.*, 272 F.2d 795, 798 (1st Cir. 1959). This tracks the Unites States Supreme Court language in Alford, that "reasons other than the fact that he is guilty may induce a

defendant to so plead, and he must be permitted to judge for himself in this respect." 400 U.S. 25, 34, 91 S.Ct. 160, 166. In *Mosier,* the Tenth Circuit upheld a package-plea that protected the defendant's wife and mother-in-law from prosecution, after analyzing the legitimacy of the charges against those relatives. 790 F.2d at 66. In this case, the charges against family members Eddie Mendiola, Piero Mendiola and Marco Antonio (Tony) Garcia were legitimate. No charges were brought against the sisters, although it is to his sisters where Giovanni fled and took the car of the person he killed. In other words, if prosecutions were threatened against the sisters, they would not have been veiled threats of prosecution. In any event, Giovanni has brought forth no evidence that any such prosecution was baseless, and it was his duty to do so. *Mosier* also cited *United States v. Nuckols,* 606 F.2d 566 (5th Cir. 1979). In *Nuckols* there was no evidence either way as to the legitimacy of the charges against defendant's wife. 606 F.2d 566, 570. In the present case, there is more than ample evidence showing the merit of the charges against Eddie Mendiola, Peiro Mendiola and Marco Antonio (Tony) Garcia.

Coercion indicates something underhanded or sinister, but Giovanni has provided no evidence of that. Giovanni criticizes the State for claiming:

> …this concept of 'coercion' suggests something underhanded or sinister, but the change of plea reveals nothing of the sort, " (RB, p. 11.) The State cites no legal authority for this proposition and ignores the long line of cases relied upon by Petitioner, which not that package deal plea agreements while not per se impermissible, pose an additional risk of cercion not present when the defendant is dealing with the government alone.

Petitioner's Reply to Respondent's Opposition to Petition for Post-Conviction Relief, pp. 3-4. That is not true. The State cited *State v. Turner,* 95 Idaho 206, 506 P.2d 103 (1973) (Brief in Opposition to Petition for Post-Conviction Relief, pp. 11-12), and its quote that "The voluntariness of appellant's pleas can be determined only by considering all of the

relevant circumstances", and that upon doing so the Idaho Supreme Court held:

> Assuming that appellant was, in fact, influenced by the factors attributed to him as engendering psychological coercion, it can only be said that these were factors incident in the normal criminal process. * * *
> Because the record is free from any inference of impropriety on the part of the State in inducing appellant Turner's pleas of guilty, and because the record indicates that appellant Turner entered intelligent and understanding pleas of guilty, we can find no abuse of discretion by the trial court in denying appellant's motion to allow him to withdraw his previously entered pleas of guilty.

Brief in Opposition to Petition for Post-Conviction Relief, pp. 12-13. (emphasis added). That certainly suggests that for a plea to be coercive there must be something improper in its inducement. You can call it improper, underhanded or sinister it doesn't matter. The State has filed no inappropriate charges, nor has Giovanni proven any impropriety by the State. This Court agrees with the State that "it is alarming that Mendiola seeks now to undo his end of the plea agreement long after the State has satisfied its end of the plea deal." *Id.,* p. 14. Giovanni then tries to distinguish *Turner,* noting that it does not involve a package deal situation. Petitioner's Reply to Respondent's Opposition to Petition for Post-Conviction Relief, pp. 3-4. While a package deal situation raises concerns, the point in *Turner* that coercion requires something improper on the part of the State, is still valid. Here is an illustration. Had the State argued that it would charge one of his sisters for a zoning violation in Seattle, that would be improper, as it would have had nothing to do with Giovanni's case. But where the sisters were involved with Giovanni while he was avoiding law enforcement following the killing, and driving the victim's car, there may well be proper criminal charges. Because those were the facts stipulated to by Giovanni's counsel at the plea change, what further inquiry is necessary? Giovanni doesn't tell us.

2) Consideration of the factual basis for the plea. A proper factual basis for the plea requires that the guilty plea be supported by the evidence and that the bargained-

for sentence be in proportion to the accused's culpability. *Ibarra*, 34 Cal. 3d 277, 289. 193 Cal.Rptr. 538, 545, 666 P.2d 980, 987. Once again, Giovanni rails against the Grand Jury system and discusses no *facts.* Giovanni's argument in its entirety is:

> Part Two: The State claims that trial counsel's stipulation that the grand jury transcript established "probable cause" for the second degree murder charge constitutes a sufficient factual basis for the plea. However, a finding of probable cause does *not* constitute a strong factual basis. Rather, it merely means there was reasonably sufficient evidence for the charge, not that Petitioner was actually guilty of the crime. Moreover, the evidence presented to the grand jury was an exclusive product of the prosecution and as such was not subject to all rules of evidence or to cross-examination. This factor is neutral at best.

Petitioner's Brief on the Merits of the Petition for Post Conviction Relief, pp. 9-10. While a grand jury makes a determination of facts on a more probable than not basis, as opposed to proof beyond reasonable doubt at trial, the **evidence** before the Grand Jury from several sources and witnesses, including the mouth of Giovanni, was not only that Giovanni "was actually guilty of the crime" of Second Degree Murder, but was guilty of several other crimes as well. Giovanni has brought forth no facts and no evidence to the contrary. (*See infra* for further discussion of the factual basis for the plea).

The sentence imposed (an indeterminate life sentence with eight years fixed) was not disproportionate to Giovanni's culpability. Giovanni admitted: "I am responsible. I had a lot to do with the fact that the young man- the young man died. He died in my hands." October 29, 2003, Sentencing Transcript, p. 7, L. 24 – p. 8, L. 1. At the time of sentencing the Court reviewed the Grand Jury transcripts and was aware of the overwhelming evidence against Giovanni, not just on the crime he pled guilty to, but all the crimes originally charged. October 29, 2003, Sentencing Hearing Transcript, p. 25, Ll. 10-15. The Court made it clear that any uncertainty as to what actually happened on October 11, 2002, was due to the State not bringing in Sheffield and Weathersby to

testify under oath at the sentencing hearing. *Id.* However, the Court made it clear it had read the transcript of the Grand Jury testimony of Sheffield and others. *Id.* The Court stated:

> What I do know is that you killed Brendan Butler. You've admitted it. You pled guilty to the crime. You're claiming some sort of self-defense. The State claims you did it maliciously. You pled guilty to the crime that involves malice as an element of that crime. I'm not quite so naïve as to believe that you were out for an afternoon drive with Mr. Butler when this crime occurred. Every indication from the grand jury testimony is that you came up here as muscle, as an enforcer, and you came up here specifically in October to work out the issues in some way about the money that was owed by Mr. Butler.
>
> I think a fair reading of the grand jury proceedings, and that's why I took so long in going through, is that there is malice here, that this wasn't a situation where someone under the influence of drugs suddenly freaked out and that's why this ensued, but trying to do justice here and trying to understand what the facts are is like trying to pick up a novel, and you read the first ten pages and understand what the story line maybe is and then you read the last ten pages and you find out what happened, but I don't have a clue, due to the lack of evidence before me, as to the details of malice and the extent of malice.
>
> The eight-year fixed term is I think more than a typical manslaughter sentence would warrant. The indeterminate life sentence is something that a second degree murder offense would warrant if this were conducted with the malice that the state claims.
>
> I guess what I'm doing is I'm giving you the opportunity over the next eight years, in the next seven years and however many months that remain on the fixed portion of your sentence, giving you the opportunity to determine how much time you spend. If you behave yourself in prison, I don't see any reason why you shouldn't be out in eight years. If you acted with malice, I think eight years is an absolute minimum that I can feel comfortable with sentencing you and still meeting all the criteria of sentencing that I have to keep in mind, deterrence to you and others, to society as a general, rehabilitation, restitution [retribution].
>
> I appreciate all those who have written letters on your part, and I appreciate all those who have testified here, and I don't mean to belittle that testimony, but even without Mr. Weathersby's testimony and even without Mr. Sheffield's testimony here today, all these people who have testified how honest, caring and loving you are need to know that you've admitted to killing a man and that you left him there dead, then left the scene, refused to be accountable for that, refused to be accountable for that act until an investigation could piece together what happened here, and I have no doubt that you are a kind man, a loving man, a spiritual man. The amount of people that have testified and have written letters in support of you have been unanimous to that effect, and so you have a lot of good in you, but at least certainly on this occasion and I think the grand jury testimony

> indicates throughout the summer of 2002 that you had a lot of evil in you, too, and I think on the balance the scales tip towards there being malice.
>
> I think given the crime that you've pled guilty to, if I were to sentence you to anything less I would not be serving the goal of punishment, of deterrence to others. You've committed a murder. I can't overlook that. You walked away from the murder and tried to get away with it, and I can't overlook that.

October 29, 2003, Sentencing Hearing Transcript, p. 26, L. 16 – p. 28, L. 20. The sentence was not disproportionate to Giovanni's culpability.

3) Careful examination of the nature and degree of coerciveness. In examining the nature and degree of coerciveness of the plea, the court should particularly scrutinize the voluntariness of a plea bargain which contemplates special concession to a sibling or loved one. *In re Ibarra,* 34 Cal. 3d at 289. Here, the Court asked, "Even though there are ties in this agreement with your brothers' cases, do you feel that you have weighed all of the pros and cons, and based on that weighing process that this is a voluntary decision on your part?" August 27, 2003, Plea Change Transcript, p. 16, Ll. 9-13. To this Giovanni replied, "Yes, sir. My family means more to me than my freedom." *Id.* p. 16, Ll. 14-15. Further, Giovanni stated: "…I understand that I got a choice to take it to trial, but then my brothers lose their deals. I can't do that to my mama, so I understand. I just want closure. I just want to get this over with." *Id.*, p. 16, Ll. 5-8. Having questioned Giovanni directly on this point, this Court was conscious of the psychological pressures upon Giovanni, and respected his choice as contemplated by the case law set forth in *Carr, Mosier* and *Kent, supra.*

4) The significance of the promise of leniency to a third party. The fourth *Ibarra* factor asks the court to consider whether the promise of leniency to the third party was an insignificant consideration in the decision to plead guilty. *In re Ibarra,* 34 Cal. 3d at 289-90. If the court finds that the promise was of insignificant or unsubstantial

importance to the defendant, the plea cannot be said to have been coercive. *Id.* Giovanni has claimed that the promise of leniency to his siblings was not only a very significant consideration in his decision to plead, but the only consideration. The Court has already addressed why it finds that claim not believable. Obviously, there was significant upside to Giovanni taking this plea for his own benefit. However, the leniency shown to his two brothers, brother-in-law, and forbearance as to his sisters, had to be "significant". This is the only *Ibarra* criteria that tips in Giovanni's favor. Thus, this court's analysis must continue and evaluate all other factors.

5) Age of defendant. The genesis for this *Ibarra* criteria is *People v. Rodriguez,* 79 Misc.2d 1002, 362 N.Y.S.2d 116 (Sup.Ct.N.Y. Bronx Co. 1974). 34 Cal.3d at 290, 193 Cal.Rptr. at 546, 666 P.2d at 988. In *Rodriguez,* the defendant was seventeen and under intense pressure from his co-defendants to plead guilty to allow a package-deal to go through. In the present case, Giovanni was 32 years old at the time of entering his guilty plea. Giovanni has never made the claim that any of his brothers, his brother-in-law or his sisters were pressuring him to take this plea. He assumed that mantle on his own. Giovanni's argument in its entirety is:

> Factor five: That Petitioner was mature in age, well-educated and had time to confer with counsel about the plea bargain does not cure the coercive nature of the package deal. As the eldest son in a tight knit immigrant family, Petitioner was duty-bound to care for his younger brothers and sisters and to protect the interests of his siblings and his mother. Thus, it was precisely because the State tied Petitioner's plea bargain to the fate of his brothers and sisters that Petitioner was coerced into accepting the deal. His age, education, and the advice of counsel all became irrelevant when Petitioner's family was at risk. Moreover, the prosecution knew about his family situation because his mother met with the prosecutors, which itself is unusual. This factor weighs in favor of Petitioner.

Petitioner's Brief on the Merits of the Petition for Post Conviction Relief, pp. 10-11. The first sentence is really a concession that this *Ibarra* criteria cuts against Giovanni, as he

was "mature in age, well-educated and had time to confer with counsel", as opposed to the defendant in *Rodriguez.* The remainder of Giovanni's argument is circular, conclusory, and finds no support in the record. Giovanni never testified he was "duty bound to care for his younger brothers and sisters and to protect the interests of his siblings and his mother". Giovanni, or his post-conviction relief counsel on Giovanni's behalf, is making things up. This *Ibarra* factor weighs in the State's favor.

6) By whom plea negotiations were initiated. Giovanni claims: "The record does not reveal which party initiated the plea negotiations. This factor is neutral." Petitioner's Brief on the Merits of the Petition for Post Conviction Relief, p. 11. Giovanni is false in that claim. Giovanni repeats this false claim at pages 5 and 6 of Petitioner's Reply to Respondent's Opposition to Petition for Post-Conviction Relief. At the Post-Conviction Relief evidentiary hearing on December 18, 2007, John Adams, the criminal defense attorney for Giovanni testified as follows:

> Q: Do you remember who started the plea negotiations, who made the first offer?
> A: Probably the defense. That's typically were it starts.

Testimony of John Adams, December 18, 2007, p. 27, Ll. 11-14. *Ibarra* cites *People v. Duran,* 179 Colo. 129, 498 P.2d 937 (Colo. 1972), as the progenitor for this criteria that the court should analyze who initiated the negotiations. 34 Cal.3d at 290, 193 Cal.Rptr. at 546, 666 P.2d at 988. It is clear from the Colorado Supreme Court's discussion in *Duran,* that if the defendant initiates the negotiations, it cuts against the defendant on a later claim of coercion and lack of voluntariness. 179 Colo. 129, 132, 498 P.2d 937, 939. The only evidence we have in this case is from John Adams, and he says "Probably the defense" started plea negotiations. Testimony of John Adams, December 18, 2007, p. 27, Ll. 11-14.

7) Whether charges have already been pressed against a third party.

The Court in *Ibarra* cited *Seybold v. State,* 61 Wis.2d 227, 212 N.W.2d 146 (Wis. 1973) as the basis for this final criteria. 34 Cal.3d at 290, 193 Cal.Rptr. at 546, 666 P.2d at 988. *Seybold* in turn cites *Phillips v. State,* 29 Wis.2d 521, 139 N.W.2d 41 (Wis. 1966), and *Bosket v. State,* 31 Wis.2d 586, 143 N.W.2d 533 (Wis. 1966). 61 Wis.2d 227, 234, 212 N.W.2d 146, 149-50. The defendant in *Phillips* was charged with robbery and the prosecution threatened to take Phillips' girlfriend into custody on the grounds that they were living together. The Wisconsin Supreme Court said: "We think this factor is of no great significance under the circumstances" and "standing in context with other facts, insufficient to render the confession coerced." 29 Wis.2d 521, 529, 139 N.W.2d 41, 45. In *Phillips,* the threat of a cohabitation charge had nothing to do with Phillips' robbery. In the present case, any involvement of Giovanni's sisters came while Giovanni was running and hiding from law enforcement following the killing, all the while driving the decedent victim's car he had stolen. Giovanni's brothers and brother-in-law had long since been charged when Giovanni entered his plea. The situation with Giovanni's sisters does not inure to Giovanni's favor. Not only that, but Giovanni's own counsel said the United States Attorney General would not be pursuing federal prosecution against Giovanni's brothers and former brother-in-law, and that that was an inducement for this plea change. Giovanni's counsel then mentioned that "there would be no prosecution of those sisters", but failed to mention that such was an inducement for the plea change. Change of Plea Transcript, August 27, 2003, p. 7, Ll. 17-20.

In *Bosket,* the Wisconsin Supreme Court held that any threat to prosecute Bosket's wife did not change his testimony. "[T]he alleged threat to prosecute the

defendant's wife had no issue on the truthfulness of the confession and defendant's admissions." 31 Wis.2d 586, 597, 143 N.W.2d 533, 558-59. "We might add there was very little discrepancy between defendant's testimony of what occurred the morning of the killing and what the police witnesses testified the defendant had told them." *Id.* In the present case, this reasoning weighs immensely against Giovanni. In *Bosket,* had Bosket's story become more culpable after the threat to prosecute his wife, clearly coercion would be an issue. But the Wisconsin Supreme Court looked at what Bosket had told other witnesses and it was consistent with what he was contending at present to law enforcement. In other words, Bosket was not becoming more culpable due to coercion. In the present case, what Giovanni told the State's witnesses shortly after the killing is damning. Giovanni's testimony is just the opposite of what happened in Bosket. How can Giovanni's plea to Second Degree Murder be coerced when his statements to the State's witnesses, Sheffield and Brooks, supports a First Degree Murder charge? How can Giovanni's plea to Second Degree Murder be coerced when, after any alleged threats of prosecution against his sisters, his testimony gets significantly *less culpable*?

In conclusion, Giovanni argues:

> The evidence reveals that Petitioner's plea was the direct result of the threat of prosecution to his family members, and it was entered for no other purpose than to spare his siblings; his plea was coerced and is therefore constitutionally invalid." See Waley v. Johnson, 316 U.S. 101 (1942); *Bram v. United States,* 168 U.S. 532, 543 (1897); *Chambers v. Florida,* 309 U.S. 227 (1940). Five of the seven Ibarra factors support Petitioner's claim, and the remaining two factors are neutral and they do not detract from Petitioner's claim and do not benefit the state's position. Therefore, the Petition should be granted, Petitioner's sentence vacated, and his conviction reversed.

Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, p. 11. Giovanni has perhaps proven that one of the seven criteria under *Ibarra* leans his way, the

"significance of the promise of leniency to a third party." But even that criteria begs the question: "How is it a threat to his family when all the charges against his family were very legitimate charges?"

Both Giovanni and the State claim the *Ibarra* factors weigh in *their* favor. The reasons cited by each side are not persuasive. The analysis given by the Court above, however, shows that other than one criteria, all the *Ibarra* factors weigh heavily in favor of the State. Giovanni offers no new evidence. Giovanni argues vehemently that he entered the plea for no other purpose than to spare his siblings. This Court finds that claim to be not credible. Most importantly, Giovanni sets forth no evidence that, in structuring the package deal, the State improperly considered any factors unrelated to the case or the State's business. No such evidence is apparent upon review of the record.

The burden of establishing the claim of a lack of a free and voluntary plea and coercion is upon Giovanni in this Post-Conviction case. That claim is in turn based on Giovanni's claim that the only reason he pled guilty to second degree murder was to save his sisters, his brothers or his family. The latter claim is not credible, given the evidence placed before the Grand Jury. Giovanni's self defense claim is not credible. In preparation for sentencing, a Pre-Sentence Report is ordinarily prepared. I.C.R. 32. A Pre-Sentence report was prepared for Giovanni's sentencing. The Pre-Sentence investigator asked Giovanni his version of the killing, to which Giovanni wrote: "At the advice of my counsel I will address this at a later time." Giovanni Mendiola Pre-Sentence Report, Kootenai County Case No. CRF 2003 6008, p. 3. The "later time" was obviously the sentencing hearing, where Giovanni for the **first time** mentioned his claim that Brendan Butler was brandishing a gun. None of this is borne out by other evidence. As part of Giovanni's Pre-

Sentence Report, his brother Eddie Mendiola, submitted a letter which was attached to that Pre-Sentence Report. Giovanni Mendiola Pre-Sentence Report, Kootenai County Case No. CRF 2003 6008, attachment, pp. 44-45. The Pre-Sentence investigator noted:

> Eddie Mendiola, the defendant's brother, submitted a letter which is attached. In it he wrote, "He is NOT a cold blooded killer, he merely acted in self defense and I for one am a witness to that unfortunate incident."

Giovanni Mendiola Pre-Sentence Report, Kootenai County Case No. CRF 2003 6008, p. 3. Eddie Mendiola's two page, single-spaced handwritten letter discusses at length Giovanni's good qualities as Eddie's "…brother as well as my best friend." Giovanni Mendiola Pre-Sentence Report, Kootenai County Case No. CRF 2003 6008, attachment, p. 44. Only the following sentence pertains to the killing: "He is NOT a cold blooded killer, he merely acted in self defense and I for one am a witness to that unfortunate incident." *Id.*, p. 45. (emphasis in original). No additional details were given, and Eddie Mendiola did not testify at Giovanni's sentencing. This statement of Eddie Mendiola is not under oath. **Most importantly, there is no reference at all that Brendan Butler had a gun.** Eddie Mendiola's claim of his brother's self-defense **completely lacks any detail**. Piero Mendiola also wrote a letter to the Court, attached to Giovanni's Pre-Sentence Report. *Id.*, pp. 46-47. Piero also considered Giovanni to be "..not only a brother but a best friend…" *Id.*, p. 46. Piero then writes: "I can't amagine [sic] how scared he must have been to see a mad man attack him with a gun like that", and "Self defense should not be considered 2nd degree murder…" *Id.*, pp. 46-47. The problem with Piero's statement is **Piero wasn't at the killing of Brendan Butler.** Eddie Mendiola was, and Eddie Mendiola in his statement makes **no mention of a gun.** Giovanni also wrote a letter to the Court, attached to his Pre-Sentence Report. Giovanni Mendiola Pre-Sentence Report, Kootenai County Case No. CRF

2003 6008, attachment pp. 8-19. That twelve-page, single-spaced handwritten letter makes no reference to the killing, other than to conclude those twenty pages with: "I also know that no matter what the media says, 'God' knows what happened and in the bible it says 'The truth shall set you free!'" *Id.* p. 19. That does little, if anything, to corroborate Giovanni's claim of self defense, first announced at sentencing.

At that sentencing hearing, Giovanni made no specific statements about this alleged gun Brendan Butler had, no description of the type, caliber, size, color, nothing. At the sentencing hearing, Giovanni made no specific statements about the altercation the larger and athletic Giovanni allegedly had with the diminutive Brendan Butler. All we have is:

> I know for a fact had Brendan Butler not been under the influence we both wouldn't be in this situation. He was just scared, just scared. His mind was clogged. He wasn't thinking straight. I panicked. I defended myself the best I could. I didn't punch him. I didn't kick him. I didn't beat him down like everyone thinks I did. We wrestled. I did the best I could to get the gun out of his hand. I succeeded. Unfortunately, your son lost his life.

Sentencing Hearing Transcript, October 29, 2003, p. 4, L. 19 – p. 5, L. 2. What little we have from Giovanni's own testimony, makes no sense. Giovanni told Parker Brooks that Brendan Butler drove them out to where the killing took place. Parker Brooks, Grand Jury Transcript, Vol. 3, p. 371, Ll. 3-9. Why would Giovanni let Brendan Butler drive the entire time out to the north end of Hayden Lake, a twisting, winding road, if Brendan Butler was under the influence? According to Giovanni they wrestled and Giovanni got the gun out of Brendan Butler's hand. If that is the case, why then did Giovanni subsequently stab Brendan Butler in the throat? Giovanni does not say when he stabbed Brendan Butler, why he stabbed him, or what the circumstances of the stabbing were. Giovanni testified:

> I'm guilty to a point. I did not murder your son. We fought. It was an accident. It should have never happened. Like I said, I take full responsibility.

Id., p. 6, Ll. 5-10. Again, no detail whatsoever. At his post-conviction relief evidentiary hearing, Giovanni gave no further detail as to the events in question.

Absolutely incredible are Giovanni's statements at sentencing:

> I read – I read Mrs. Butler's [Brendan Butler's mother] statements twenty times. I got the pleasure to meet the Brendan Butler that you spoke of in the first few pages. I was in the process of opening up a restaurant with him. He was supposed to invest some money, but there was a little disagreement in regards to, uh, he wanted 50-50 percent. I wanted just as an investor, but I saw that young bright man that you guys speak of, very intelligent for his age, and the guy had a gift. I mean, he was really brilliant. He had a knack of business, and I was hoping maybe we could become business partners and possibly maybe friends.
>
> I had no idea of his involvement with drugs until it was too late.

Sentencing Hearing Transcript, October 29, 2003, p. 3, Ll. 12-25. Other than the 50/50 split (for the marijuana and the money found during the robbery, not for opening a restaurant), not one word of this is supported by the various witnesses who testified before the Grand Jury. Why the black clothes, the pruning shears to cut off fingers, robbing and kidnapping a competing drug dealer, if the end game is opening a restaurant?

Even if Brendan Butler had a gun, and again this Court finds Giovanni not credible on this claim, the sequence of the events as told by Giovanni to Sheffield must be reviewed. Giovanni told Sheffield that he "grabbed" Brendan Butler by the throat, then squeezed the throat of Brendan Butler so hard that he bled from his mouth and his nose, he squeezed so hard he made an incision in his throat with his finger, he squeezed so hard it made his wrist hurt hours later, **then** he slit his throat. Grand Jury Transcript, Vol. 2, p. 243, Ll. 9-18; p. 244, Ll. 1-4. Even though Giovanni never told Sheffield anything about a gun, if Brendan Butler ever actually had a gun, the story told by Giovanni to Sheffield clearly indicates Giovanni at all times had the situation well under control as he is squeezing Brendan Butler's throat so hard that he made an incision in the throat with his finger and squeezed so

hard blood came out of Brendan Butler's nose and mouth. At that point, any potential threat of a gun, if a gun existed, has been more than neutralized. Mendiola then tells Sheffield he stabs Brendan Butler. Those are facts which would support a finding of malice necessary for Second Degree Murder. Those are not facts which support a claim of self defense.

As the State correctly notes, Giovanni chose to plead guilty after the State filed its forty-four page trial brief and after some co-defendants had reached agreements with the State to testify against Giovanni. The trial brief is part of the record in this case, and in it the State disclosed Justin Miller (who did not testify before the Grand Jury) would testify that:

> Giovanni visited Justin Miller in Las Vegas after killing Brendan Butler, and: described how he choked Brendan while he pleaded for his life…until he bled from the nose and mouth, and that he cut him on the throat. He stated that the others watched this happen and that they thought Giovanni was crazy for doing this to Brendan. He described to Justin how he disposed of Miller's [sic Butler's] body before they left the scene in Brendan's Cadillac.

Brief in Opposition to Petition for Post-Conviction Relief, pp. 15-16, citing State's Trial Brief, p. 18. Obviously, this is not sworn testimony, but it was a document filed before Giovanni entered his guilty plea, and it is very consistent with what Giovanni told Sheffield and Parker, who did testify before the Grand Jury.

Giovanni argues that the Court had a duty to inquire as to whether Giovanni's guilty plea was induced by "threats to prosecute or promises of leniency to third persons" and whether "the 'special care' was taken to insure that the plea was in fact entered voluntarily and not the product of coercion." Petitioner's Reply to Respondent's Opposition to Petition for Post-Conviction Relief, p. 3. Giovanni argues that "The court did not inquire into the specific details of the package deal or the potential prosecution of Mendiola's sisters or the impact their prosecution would have on the Mendiola's [sic] family." *Id.* The fact that the deal involved Giovanni's sisters was placed on the record by Giovanni's counsel:

MR. ADAMS (Giovanni's counsel): Judge, before you get to that, I'd like to place the agreement we have with the State on the record --
THE COURT: All right.
MR. ADAMS: -- so that we're all clear what we're doing here. We have reached an agreement by the State, pursuant to which Giovanni will enter an *Alford* plea of guilty to the Amended Information. We have no objection to the filing of that.

The intent of the parties in the filing of the Amended Indictment is that the original indictment, the charges therein will be dismissed, and Giovanni will face no further jeopardy on those charges.

There's additional inducement to Giovanni to enter the *Alford* plea of guilty to the Amended Indictment. The State at sentencing will limit their recommendation to an indeterminate life with twelve and a half years fixed with the defendant free to offer any recommendations to the Court that it desires.

As further inducement and the real substantial inducement for Giovanni's plea here is that, additionally, the State for Piero Mendiola, Eddie Mendiola, Giovanni's brothers, and Marco Antonio Garcia, Giovanni's former brother-in-law, the father of his nephews or nephew, will be offered by the State an Amended Indictment, their original indictments will be dismissed, and they'll face no further jeopardy on those original charges. The Amended Indictment will charge one count of accessory to a felony.

At sentencing, the State will recommend the Court sentence each of those three gentlement to two years fixed and retained jurisdiction and place them on a rider.

Additionally, the State will stipulate to a $10,000 bond be set on each of those three men, and that's a cash bond, and that is the real substantive inducement for which Giovanni has agreed to enter his *Alford* plea of guilty to the Amended Indictment. Thank you. Judge.
THE COURT: Thank you, Mr. Adams. And Mr. Douglas, do you agree that those are the correctly stated --
MR. DOUGLAS (Prosecutor): Yes, Your Honor. Agree, Your Honor.
THE COURT: All right. Mr. Mendiola, I need to go through a few more questions with you just to make sure that you understand all of your rights, and at the end of that questioning I'll place you under oath, ask you just a few more questions and then ask you for your plea again. By asking for your plea again under oath, I'm giving you one last chance to change your mind and enter a different plea. Do you understand that procedure?
THE DEFENDANT: Yes, sir.
THE COURT: Okay.
MR. ADAMS: Judge, excuse me. There was one more thing that I forgot to mention.
THE COURT: Okay.
MR. ADAMS: Ms. Graham has reminded me that both sides have had communications with Nancy Cooke, the Assistant U.S. Attorney for this district. She has specifically stated she has no interest in pursuing federal charges against these men.

Mr. Douglas has specifically told me that he has also had those discussions

> with the U.S. Attorney's Office and there would be no federal prosecution, and that's a further inducement for these pleas. Thank you.
>
> Yes. As well as Mr. Mendiola's sisters, there would be no prosecution of those sisters.

Change of Plea Transcript, August 27, 2003, p. 5, L. 2 – p. 7, L. 20. Following which the Court asked Giovanni:

> THE COURT: Okay. And Mr. Mendiola, you've heard the substance of the plea agreement that your attorney has set forth, correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: And is that your understanding of the plea agreement?
> THE DEFENDANT: Yes, sir.

Id., p. 7, L. 21 – p. 8, L. 5. It was later in the plea change hearing where, as noted above, Giovanni made the claim that he was doing this for his sisters, brothers, and/or family (depending on the point in time during the hearing), whereupon the Court then asked Giovanni:

> THE COURT: Do you feel that you are making this plea freely and voluntarily?
> THE DEFENDANT: It is hard to say. I mean, I'm doing it wilfully, but I feel like I'm cornered. I know – I understand I got a choice to take it to trial, but then my brothers lose their deals. I can't do that to my mama, so I understand. I just want closure. I just want to get this over with.
> THE COURT: Even though there are ties in this agreement with your brother's cases, do you fell that you have weighed all of the pros and cons, and based on that weighing process that this is a voluntary decision on your part?
> THE DEFENDANT: Yes, sir. My family means more to me than my freedom.

Id., p. 16, Ll. 1-15. Giovanni has not suggested what more should have been done, what "special care" he should have been given.

Giovanni notes the standard that the Court should adhere to in a "package-deal" plea:

> We therefore hold that the state must fully inform the trial court of the details of these arrangements at the time a defendant enters a "package deal" plea, and the trial court must then conduct further inquiries to determine whether the plea is voluntarily made.

Petitioner's Reply to Respondent's Opposition to Petition for Post-Conviction Relief, p. 6. That occurred in this case, except it was Giovanni's counsel who made the Court aware of all the details of the plea, and the prosecutor agreed with Goivanni's counsel's recitation. Change of Plea Transcript, August 27, 2003, p. 5, L. 2 – p. 7, L. 20. Again, following which the Court asked Giovanni:

> THE COURT: Okay. And Mr. Mendiola, you've heard the substance of the plea agreement that your attorney has set forth, correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: And is that your understanding of the plea agreement?
> THE DEFENDANT: Yes, sir.

Id., p. 7, L. 21 – p. 8, L. 5. And later:

> THE COURT: Do you feel that you are making this plea freely and voluntarily?
> THE DEFENDANT: It is hard to say. I mean, I'm doing it wilfully, but I feel like I'm cornered. I know – I understand I got a choice to take it to trial, but then my brothers lose their deals. I can't do that to my mama, so I understand. I just want closure. I just want to get this over with.
> THE COURT: Even though there are ties in this agreement with your brother's cases, do you fell that you have weighed all of the pros and cons, and based on that weighing process that this is a voluntary decision on your part?
> THE DEFENDANT: Yes, sir. My family means more to me than my freedom.

Id., p. 16, Ll. 1-15. It is simply unknown what further inquiry could have been made, and Giovanni fails to make any suggestions.

B. GIOVANNI'S CLAIM THAT THE TRIAL COURT FAILED TO ESTABLISH A STRONG FACTUAL BASIS FOR THE *ALFORD* PLEA AT THE TIME THE PLEA WAS ENTERED, IS DENIED.

In determining whether a factual basis for a guilty plea exists, the court is required to look at the entire record <u>*available*</u> at the time the plea was accepted. *Fowler v. State*, 109 Idaho 1002, 1005, 712 P.2d 703, 706 (Ct.App. 1985). The Court has done this. Giovanni is accurate that "This Court did not read the grand jury transcript before accepting the plea. (Exhibit 1, p. 17)" August 27, 2003, Change of Plea, Transcript, p. 17, Ll. 10-16. However,

the grand jury transcript was part of the record "available" to this Court at the time the plea was taken, and that is all that *Fowler* requires. Additionally, Giovanni's counsel stipulated that the Grand Jury transcript established probable cause for the Amended Indictment. August 27, 2003, Change of Plea Transcript, p. 17, Ll. 5-19.

And although a Court is not generally required to establish a factual basis before accepting a guilty plea, *State v. Coffin,* 104 Idaho 543, 545-46, 661 P.2d 328, 330-31 (1983), exceptions to this rule exist where the defendant does not recall the facts of the incident resulting in the charge, is unwilling or unable to admit to his participation in the crime, or couples his plea with continues assertions of innocence. *Schmidt v. State*, 103 Idaho 340, 345, 647 P.2d 796, 801 (Ct. App. 1982). Where the Court should establish such a factual basis, it does so to ensure that the plea is knowingly, intelligently, and voluntarily being entered, despite the Defendant's claim of innocence or inability to recall. *State v. Hoffman*, 108 Idaho 720, 722, 701 P.2d 668, 670 (Ct. App. 1985). The Court of Appeals has stated that "[i]n determining whether a factual basis for a guilty plea exists, we look to the entire record before the trial judge at the time the plea was accepted. *Fowler v. State*, 109 Idaho 1002, 1005, 712 P.2d 703, 706 (Ct. App. 1985). *State v. Ramirez* establishes that, in the case of an *Alford* plea, an accused may consent to the imposition of a prison sentence despite professing his innocence as long as a factual basis for the plea is demonstrated by the state and he clearly expresses a desire to enter such a plea. *State v. Ramirez*, 122 Idaho 830, 834, 839 P.2d 1244, 1248 (Ct. App. 1992); *Amerson v. State*, 119 Idaho 994, 996, 812 P.2d 301, 303 (Ct. App. 1991). An inquiry into the factual basis should be made where an *Alford* plea is accepted. *Id.*

In *Perez v. Mukasey*, 512 F. 3d 1222, 1226 (9th Cir. 2008), the Ninth Circuit determined that because the defendant agreed that the court may "review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea, there existed "an explicit statement in which the factual basis for the plea was confirmed by the defendant." *See also Shepard v. U.S.*, 544 U.S. 13, 26 (2005), (The transcript of colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant is sufficient to determine whether a plea of guilty is necessarily an admission of the elements of an offense.)

Here, the Court asked, "…since this is an *Alford* plea, I need to ask Mr. Douglas or Mr. Adams the factual record that would establish this charge" (August 27, 2003, Plea Change Transcript, p. 17, Ll. 14-16), to which Giovanni's counsel replied: "Well, Judge, I would stipulate that the grand jury transcript establishes probable cause for the Amended indictment." *Id.*, Ll. 16-19. The Court then asked whether the prosecutor agreed with that statement, and the prosecutor replied, "Yes, your Honor." *Id.*, L. 22. Giovanni's counsel clearly made an explicit statement which confirmed the factual basis of the plea.

Giovanni argues that the essential element of malice was missing, and that the transcript of sentencing hearing indicates it was self defense. Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, p. 14. The Court will not reiterate the extensive findings it made in the previous section. Simply summarized, the Court does not have to believe Giovanni in his claims of self defense, and does not believe him due to the extensive Grand Jury testimony.

C. GIOVANNI'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS DENIED.

To prevail on a claim of ineffective assistance of counsel, an applicant must demonstrate both that his attorney's performance was deficient and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Nevarez v. State*, 2008 Opinion No. 36, 98.10 ICAR 480 (Ct.App. April 30, 2008). To show deficient performance, a defendant must first overcome the strong presumption that counsel's performance was adequate by demonstrating that the "representation did not meet objective standards of competence." *Id.; Nevarez, citing Roman v. State*, 125 Idaho 644, 648-49, 873 P.2d 898, 902-03 (Ct. App. 1994). Strategic or tactical decisions will not be found to be deficient performance "unless those decisions are made upon a basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243. If a defendant succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; *Roman*, 125 Idaho at 649, 873 P.2d at 903. A reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id.*

1. Giovanni's trial counsel was not ineffective because his investigator allegedly argued against Giovanni's interest by advising the State that Giovanni was guilty of murder when the defense was attempting to settle the case as a manslaughter.

In a post-conviction relief proceeding, the court alone determines the credibility of the witnesses, the weight given to their testimony, and any inferences to be drawn

from the evidence; these are all matters solely within the province of the District Court. The credibility of the witnesses, the weight given to their testimony, and the inferences to be drawn from the evidence in the proceeding are all matters solely within the province of the District Court. *Larkin v. State,* 115 Idaho 72, 73, 764 P. 2d 439, 440 (Ct. App. 1988); I.R.C.P. 52(a). On review, a court's findings of fact shall not be set aside unless clearly erroneous. *Id.*

Giovanni states that his trial counsel was ineffective, and that he was ultimately prejudiced because trial counsel's investigator was overheard by Giovanni's mother advising the prosecutor that Giovanni was guilty of murder. Giovanni offers no proof that this conversation occurred, other than Giovanni's mother's affidavit claiming that she "overheard Mark Durrant telling Lansing Haynes that the charge should be murder." Affidavit of Alicia Mendiola, p. 2. Giovanni's trial counsel, John Adams, as Giovanni concedes, testified at the December 18, 2007, Post-Conviction Evidentiary Hearing that he had not heard the investigator's comment, but trusted that his investigator would not make such a statement. Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, p. 16. The testimony of Adams was as follows:

> Q. In reference to her [Alicia Mendiola] allegation that she overheard Mark Durant telling Lansing Haynes [chief deputy prosecutor at the time] that the charge should be murder?
> A. I've read that portion of her affidavit.
> Q. Did you recall ever hearing Mr. Durant say any such thing to Mr. Haynes?
> A. I never heard any statement like that.
> Q. And Ms. Mendiola in her affidavit says that the day after she shays this happened on August 19th, 2003, she spoke to you on August 20th, 2003, and you told her that Mr. Durant's comment was about a separate murder case, not about Giovanni's?
> A. That's what Alicia's affidavit states, yes.
> Q. Do you agree with that?
> A. I can't disagree with it. I don't recall. I didn't hear any statement that Mr. Durant made, but I remember shortly after the meeting, uh, Alicia saying that she

heard a statement, and I remember that I discussed it with both Mr. Durant and Mrs. Mendiola but I don't remember the specifics, so if she says that's what I told her, maybe that's what I did tell her. I can't say either way.
Q. Did you have any concern your investigator had done anything improper at that time?
A. No.
Q. In fact, your investigator has worked with you for a long time pretty closely?
A. Yes.
Q. Do you generally have faith in his ability to do a good job for you and your clients?
A. Yes.
Q. Have you ever known him to deliberately try to undercut one of your cases?
A. No.
Q. Would he have remained employed for you if you felt he was capable of doing such a thing?
A. No.

Testimony of John Adams, Post-Conviction Relief Evidentiary Hearing, December 18, 2007, p. 46, L. 3 – p. 47, L. 14. This Court finds Ms. Mendiola's affidavit to be less credible than Mr. Adams' testimony. It could be that Ms. Mendiola simply only heard part of the conversation. In any event, this Court finds that no conversation occurred where Giovanni's investigator told the deputy prosecutor that the charge should really be a murder charge.

Giovanni has also failed to demonstrate whether, if this statement was in fact made about Giovanni, and could somehow be attributed to Giovanni's trial counsel, he has wholly failed to show that any alleged comments by counsel's investigator amounted to inadequate preparation, ignorance of the law, or other shortcomings capable of objective evaluation. Giovanni has also wholly failed to show that he was prejudiced by the alleged comment such that the outcome of his case would have been different if the comment had not been made.

2. Giovanni's trial was not counsel ineffective because he allegedly failed to challenge the factual basis for Giovanni's *Alford* plea.

Where the court establishes a factual basis for a plea, it does so to ensure that the plea is knowingly, intelligently, and voluntarily being entered, even where the Defendant claims innocence. *State v. Hoffman,* 108 Idaho 720, 722, 701 P.2d 668, 670 (Ct. App. 1985). And, again, to prevail on a claim of ineffective assistance of counsel, an applicant must demonstrate both that his attorney's performance was deficient and that he was prejudiced thereby. *Strickland,* 466 U.S. 668 (1984). Strategic or tactical decisions will not be found to be deficient performance "unless those decisions are made upon a basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." *Davis v. State,* 116 Idaho 401, 406, 775 P.2d 1243. A reviewing court will only evaluate the performance of counsel at the time of the alleged error and not in hindsight. *Roberts v. State,* 132 Idaho 494, 498, 975 P.2d 782, 784 (Idaho 1999).

Giovanni states that:

> [t]rial counsel acknowledged that he should have done more to present evidence at the sentencing hearing to support his client's assertion that the killing was committed in self-defense. While there was some evidence presented on this issue, trial counsel did not present any witnesses to support the claims of his client in this regard.

Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, p. 16. Giovanni has not shown that, had trial counsel presented more evidence to support Giovanni's assertion of self-defense, the outcome of sentencing would have been different. Further, Giovanni stated on the record that trial counsel ably represented him and thanked his entire defense team (October 29, 2003, Sentencing Transcript, p.11, Ll. 10-13), and he cannot not now, in hindsight, be permitted to question strategic decisions he previously made with trial counsel.

3. Giovanni's trial counsel was not ineffective because he failed to present evidence at sentencing that that the case was manslaughter despite the fact that trial counsel knew/should have known that such evidence existed.

Again, in order to demonstrate that trial counsel was ineffective, Giovanni must show that trial counsel's performance was deficient *and* that he was prejudiced thereby. *Strickland*, 466 U.S. 668 (1984) (emphasis added). And again, strategic decisions will not be found deficient unless they are made due to inadequate preparation, ignorance of the relevant law, or shortcomings capable of objective evaluation. *Davis*, 116 Idaho 406.

Giovanni does not tell us what the evidence is that was not presented that would support his claim. The only assumption at this point is…that there is none. Giovanni has not demonstrated that his trial counsel's decisions to not present evidence of the victim's drug use, and to present only some evidence of Giovanni's self-defense claim, were due to inadequate preparation, ignorance of the law, or any other shortcoming, or due to anything other than strategy. Absent such a showing, Giovanni does not get to the second part of the test: whether this decision by trial counsel *prejudiced* Giovanni. The Court will discuss that issue briefly.

Giovanni claims his trial counsel's failure to present evidence that the victim, Brendan Butler, was under the influence of numerous drugs or that Giovanni allegedly acted in self-defense resulted in the Court imposing a longer indeterminate sentence than it would have had this evidence been presented. Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, p. 16. The quote is: "Had trial counsel presented the evidence to support the argument that at most this was a manslaughter case, there is a reasonable probability this Court would have imposed a different sentence." *Id.* First of all, WHAT evidence? Giovanni submits Marco Antonio (Tony) Garcia's affidavit,

which, if believed (it is not believed), only states that there was a gun in the vicinity and that Giovanni claimed that Brendan had pulled a gun, but that neither Garcia nor anyone else saw any of the struggle between Giovanni and Brendan Butler. The reason Garcia's new claim about a gun is not believed is because Marco Antonio (Tony) Garcia was sentenced by the undersigned. At no time during his sentencing or in his pre-sentence investigation did he make such a claim. In fact, Garcia's Pre-Sentence Report does not even mention his involvement in any way with the October 11, 2002, events. Garcia is now making a statement, over four years later in an affidavit which is not subject to cross-examination. This Court finds Garcia's affidavit is wholly devoid of any credibility. As of June 30, 2004, Garcia had served his time and had successfully completed his supervised probation. Kootenai County Case No. CRF 2003 6010 Petition for Court Probation and Case End Summary, filed June 30, 2004. As of March 17, 2008, he had completed his unsupervised probation as well. Kootenai County Case No. CRF 2003 6010, Order for Court Probation filed July 6, 2004.

Second, Giovanni has not set forth any credible evidence his attorney had that could have been used to negate intent. Garcia wasn't talking at the time, under advice of counsel, so that "evidence" is simply not available to Giovanni. Third, as pointed out above, if Brendan Butler was so under the influence of drugs, why did Giovanni allow himself to be driven around Hayden Lake by such a person? Third, if Brendan Butler was under the influence of drugs at the time of the killing, wouldn't Giovanni have mentioned that fact to Sheffield or to Parker Brooks? Finally, Giovanni concedes that some evidence as to his self-defense claim was presented by trial counsel. Petitioner's Brief on the Merits of the Petition for Post-Conviction Relief, p. 16.

V. ORDER.

For the reasons stated above, Giovanni's Petition for Post-Conviction Relief is DENIED in all aspects.

DATED this 30th day of May, 2008.

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of June, 2008 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Andrew Parnes Fax 208.726.1187
Giovanni Mendiola IDOC # 71876

Kootenai County Prosecuting Attorney

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

By:_____ Deputy