IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

RAMIRO NAVARRO, JR., Petitioner, v. MARK NOOTH, Superintendent Snake River Correctional Institution, Defendant.	Case No. 12C-20024 DEFENDANT'S TRIAL MEMORANDUM **ORS 20.140 - State fees deferred at filing**

A.

BACKGROUND

On January 17, 2011, petitioner was driving his wife, Veronica Navarro, and their two year-old son, R, to Navarro's place of work. (Ex 105, Police Reports, p. 9). Petitioner became upset at Navarro, refused to take her to her place of work, refused to let her out of the car, and told her: "Say good bye to your son. This is the last time you're going to see him. Take a picture." *Id.* After ten minutes of aimless driving, petitioner drove Navarro to her place of work. *Id.* at 10. Navarro tried to take R with her, but petitioner reached into the backseat, gripped R tightly, and began pulling "very hard on him." *Id.* Navarro relinquished R, and petitioner got out of the car and walked down the street with R. *Id.* Police found marijuana, drug-dealing paraphernalia, and a rifle in the car. *Id.* at 12. Police did not find petitioner until January 25, after he showed up at Navarro's apartment in violation of a restraining order. *Id.* at 17. On February 2, 2011, petitioner was charged with delivery of marijuana for consideration, coercion, first-degree child neglect, and endangering the welfare of a minor. (Ex 1, Indictment). On April 1, petitioner entered a plea to delivery of marijuana and coercion. (Ex 107, Plea Petition; Ex

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103, 4/1/11 Transcript). Petitioner's plea petition provided in relevant part: "I also understand that the conviction may prevent me from serving in the United States Armed Forces[.]" *Id.* at 2.

On April 21, counsel for petitioner, Theodore Coran, moved to withdraw petitioner's guilty plea. (Ex 6, Motion to Withdraw Plea). In his supporting affidavit, Coran stated that petitioner entered his plea with the understanding that his plea "would not result in his forced discharge from the Oregon National Guard [ONG]" and that he was not advised of any other impact his plea might have on his ONG career. *Id.* at 1. Coran stated that petitioner realized after entering his plea that his plea precluded him from ever achieving "any type of upward advancement" in ONG. *Id.* at 1-2. Had petitioner known this, Coran averred, petitioner would not have entered a plea and would have taken his chances at trial. *Id.* at 2. In its written response, the state pointed to several jail calls in which petitioner articulated his belief that his guilty plea would end his ONG career. (Ex 102, State's Response to Defendant's Motion to Withdraw Guilty Plea, pp. 1-2).

At an April 28 hearing on petitioner's motion to withdraw, counsel stated,

> Mr. Navarro had done some investigation on his own, made some phone calls from the facility which the State was able to record and spoke with his staff sergeant. His staff sergeant gave him some very specific information that suggested that his military career would be over if he pled guilty. In fact, she said "really" -- to him -- "whether you plead guilty or not doesn't really matter. Your career's over anyway. We've washed our hands of you."

(Ex 103, Transcript of 4/28/11 Hearing, p. 11). The trial court denied the motion to withdraw the plea. (Ex 108, Order Denying Defendant's Motion to Withdraw Guilty Plea). Petitioner was subsequently sentenced to 18 months on the delivery of marijuana charge and 24 months of probation on the coercion charge at a July sentencing hearing. (Ex 2, Judgment; Ex 106, Sentencing Transcript). Petitioner did not appeal. Petitioner has now filed a Formal Petition for Post-Conviction Relief and makes the following allegations.

TRIAL COUNSEL CLAIMS

Petitioner further alleges that he was denied effective assistance of trial counsel in violation of Article 1, Section 11 of the Oregon Constitution and the 6th Amendment of the U.S. Constitution, made applicable to the states by the 14th

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Amendment to the United States Constitution and Strickland v. Washington in the following manner:

a. Trial counsel was ineffective in failing to adequately represent Petitioner pending plea in that trial counsel failed to adequately investigate Petitioner's case and advise Petitioner accordingly. Trial counsel failed to speak with Veronica Navarro regarding the charges pending Petitioner's change of plea. Ms. Navarro would have stated that the drugs with which Petitioner was charged were not Petitioner's and that Petitioner had no knowledge of those drugs. However, trial counsel did not speak with Ms. Navarro about the charges prior to Petitioner entering guilty pleas. Ms. Navarro did, however, write a letter to the District Attorney's Office concerning this information after Petitioner had entered his plea on the record. Had Petitioner known that Ms. Navarro would testify in this manner, he would not have pled guilty on these charges.

b. Trial counsel was ineffective in failing to adequately represent Petitioner pending plea in that trial counsel failed to adequately advise Petitioner regarding the consequences of his plea. At the time Petitioner pled guilty, he was an active member of the National Guard. Petitioner made it clear to trial counsel that he wished to remain in the National Guard, and that he did not wish to enter any plea that might affect his military career. Trial counsel advised Petitioner that he would still be able to serve in the National Guard, yet after Petitioner entered guilty pleas, he was informed by the National Guard that he had been discharged. Had petitioner been aware of this information prior to entering his guilty pleas, he would have chosen to proceed to trial. His pleas were not intelligently, knowingly, or voluntarily made.

Petitioner's claims are incorrect and his Formal Petition for Post-Conviction Relief should be denied and dismissed. The petition must "set forth specifically the grounds upon which relief is claimed." ORS 138.580; *Bowen v. Johnson,* 166 Or App 89, 92 (2000). Any grounds not asserted in the Petition are "deemed waived," are not claims properly before the court, and cannot provide grounds for post-conviction relief. ORS 138.550(3); *Bowen v. Johnson,* 166 Or App 89, 92 (2000); *Hagel v. Hill,* 200 Or App 361, 364-65 (2005); *Ramirez v. State of Oregon,* 214 Or App 400, 401 (2007); *Leyva-Grave-De-Peralta v. Blacketter,* 232 Or App 441 (2009). Consequently, the State will respond only to the claims alleged in the petition. Furthermore, a post-conviction proceeding is "not intended to provide a second trial of every criminal case in which a disappointed convict, with a new lawyer, a new theory, and new ideas about trial strategy, might think the first trial (and appeal) was not properly conducted by his counsel." *Howell v. Gladden*, 247 Or 138, 142 (1967).

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B.

ARGUMENT

In a post-conviction proceeding, "[t]he burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence." ORS 138.620(2); *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991) (a petitioner must show, "by a preponderance of the evidence, facts demonstrating that trial counsel failed to exercise reasonable professional skill and judgment and that [the] petitioner suffered prejudice as a result.") Petitioner cannot meet this burden and will not establish any basis for post-conviction relief.

Petitioner received adequate assistance of trial counsel.

The clearest outline of the principles by which a claim of constitutionally ineffective assistance of counsel is to be measured is that of the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984):[1]

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

The first component of the *Strickland* standard requires petitioner to point to:

> * * * acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

[1] *Krummacher v. Gierloff*, 290 Or 867 (1981), as reaffirmed by the Oregon Supreme Court, requires a petitioner to show the omissions by trial counsel prejudiced his case, and "that the requisite 'prejudice' consists of acts or omissions 'which would have a tendency to affect the result.'" *Stevens v. State of Oregon*, 322 Or 101, 110 fn 5 (1995).

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466 U.S. at 690. A petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness, *id.* at 688. The second component of the *Strickland* standard requires petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

At a more general level, in assessing whether counsel achieved the required level of performance, the performance must be evaluated from counsel's perspective at the time of the alleged error, *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986), and the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington, supra*, 466 U.S. at 689. Put differently, an attorney need not automatically do the defendant's bidding or suspend his or her professional judgment, because "the strategy, tactics, and manner of advocacy of the defense are for counsel to determine based upon the exercise of professional skill and judgment." *Krummacher v. Gierloff, supra*, 290 Or at 874-75.

For a plea of guilty to be considered knowing, intelligent and voluntary, a defendant must be aware that he is waiving certain constitutional rights. The United States Supreme Court has identified those essential rights as the privilege against self-incrimination, the right to a trial by jury, and the right to confront one's accusers. *Boykin v. Alabama*, 395 US 238, 243 (1969). Oregon has codified this requirement at ORS 135.385 and expanded the list to include a warning of the possible maximum sentence the defendant may receive, the possibility (where appropriate) of receiving dangerous offender sentencing, and the possibility of deportation if the defendant is not a United States citizen. ORS 135.385(2); *see also, Lyons v. Pearce*, 298 Or 554, 561 (1985). Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). A defendant who pleads guilty upon the advice of counsel "may only

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attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). As the United States Supreme Court confirms, "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (U.S. 1985).

The two-part test for determining whether counsel was effective set forth in *Strickland v. Washington* , 466 U.S. 668 (1984), applies to ineffective assistance of counsel claims arising out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). The first component of the *Strickland* standard requires petitioner to point to, "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. "[C]ounsel's functions include informing the defendant, in a manner and to the extent appropriate to the circumstances and to the defendant's level of understanding, of the existence and consequences of non-tactical choices which are the defendant's to make, so as to assure that the defendant makes such choices intelligently." *Krummacher v. Gierloff*, 290 Or 867 , 875 (1981).

The second component of the *Strickland* standard requires petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of guilty pleas, "the second, or 'prejudice,' requirement [of *Strickland*] focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Moen v. Peterson*, 312 Or 503, 513 (1991) (adopting the *Hill* test for determining prejudice in regard to guilty pleas, rather then the

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"tendency to affect the outcome" standard of *Krummacher,* 290 Or at 883); *Long v. State of Oregon,* 130 Or App 198 (1994) (holding that in order to prevail on his claim of post-conviction relief, petitioner must prove he would not have entered into the plea agreement had counsel informed him the sex abuse conviction was not expugnable). As explained below, petitioner cannot meet her burden on *Strickland* and its progeny.

When a petitioner alleges that his guilty plea was based on incorrect advice from counsel, the proper analysis is whether the petitioner would have gone to trial rather than plead if he had been correctly advised. *Moen v. Peterson,* 312 Or 503, 513, 824 P2d 404 (1991); *Chew v. State of Oregon,* 121 Or App 474, 479, 855 P2d 1120, *rev den* 318 Or 24 (1993) ("petitioner must prove by a preponderance of the evidence that he would not have pleaded guilty if his attorney had properly advised him"); *Hill v. Lockhart,* 474 US 52, 59, 106 S Ct 366, 88 L Ed 2d 203 (1985) (petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). *See also Premo v. Moore,* 562 US ___, 131 S Ct 733, 741, 178 L Ed 2d 649 (2011) (emphasizing the "substantial burden" on the petitioner to show ineffective assistance, and reiterating that policy considerations underlying plea bargains "make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage.").

The same rationale applies where a petitioner contends that counsel did not investigate potentially favorable witnesses. *Saroian v. State of Oregon,* 154 Or App 112, 117, 961 P2d 252 (1998) (applying *Hill v. Lockhart* and *Moen v. Peterson* to a claim that the petitioner would have gone to trial, rather than pleading guilty, if her attorney had arranged for a particular witness to testify on her behalf at trial).

The United States Supreme Court has now held that the right to counsel extends to pretrial negotiations. *Missouri v. Frye,* 566 US ___, 132 S Ct 1399, 1408 (2012) ("defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). In another opinion announced the

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same day, the Court held that a petitioner may seek to vacate a conviction obtained following a "full and fair" jury trial on the theory that counsel performed ineffectively during plea negotiations. *Lafler v. Cooper*, 566 US ___, 132 S Ct 1376, 1388 (2012) ("The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining."). In *Missouri v. Frye*, trial counsel completely failed to advise the petitioner of the offer; the petitioner ultimately pleaded guilty with no plea agreement and received a harsher sentence than contemplated by the plea offer. *Frye,* 132 S Ct at 1404. In *Lafler v. Cooper*, trial counsel advised the petitioner to reject the offer on the ground that the state would be unable to prove the requisite intent to obtain a conviction at trial; the petitioner was convicted and received a harsher sentence than under the plea offer. *Cooper,* 132 S Ct at 1383.

The Court applied the familiar principles set out in *Hill v. Lockhart*, 474 US 52, 59, 106 S Ct 366, 88 L Ed 2d 203 (1985), and described the manner of proving prejudice, if a petitioner proves that counsel performed ineffectively during negotiations resulting in the *rejection* of a plea offer and a trial:

> In contrast to *Hill,* here the ineffective advice led not to an offer's acceptance but to its rejection. *Having to stand trial, not choosing to waive it, is the prejudice alleged.* In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S Ct at 1385 (emphasis added).[2] *See also Premo v. Moore*, 562 US ___, 131 S Ct 733, 741-42, 745-46, 178 L Ed 2d 649 (2011) (discussing formidable burdens on claimants to

[2] The Court declined to make clear the appropriate remedy if a petitioner who is convicted by trial proves both ineffective performance in negotiations and prejudice. "In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of

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demonstrate inadequate assistance in guilty-plea context given speculative nature of the plea decision itself and given absence of formal record demonstrating what would have occurred).

1. Claim 8(a): Petitioner waived his ability to question witnesses when he took the plea deal.

Petitioner alleges that trial counsel failed to speak to one of the victims, Veronica Navarro. This claim fails as a matter of law because, by accepting the plea offer, petitioner knowingly, intelligently, and voluntarily waived his right to investigate Navarro. Coran reviewed petitioner's right to confront, cross examine, and present witnesses at a trial with petitioner. (Ex 107, Plea Petition, p. 1; Ex 101, Declaration of Theodore Coran, p. 1). Petitioner knew that, by entering a plea, he was giving up the right to have an attorney assist them in all aspects of a trial, including the investigation of witnesses before trial. (Ex 101, Declaration of Theodore Coran, pp. 1-2). This claim fails as a matter of law and is patently meritless.

2. Claim 8(b): Petitioner believed his military career would be over by entering a guilty plea to felony charges.

Petitioner alleges that trial counsel erroneously advised him that he would be able to stay in ONG after entering his guilty plea. Petitioner presents no proof of discharge from ONG. Countervailing evidence indicates that petitioner has not been *banned* from ONG, but simply *precluded from promotion*:

> When Mr. Navarro got out and actually went to the Oregon National Guard, he confirmed that, in fact, **he could return to his unit, but what he found out additionally to that was that he would have no opportunity for advancement, that he would serve the rest of his career, such as it would be, under those conditions, at the rank that he was at at the time**, which is not very high, Your Honor. At this point, I don't know exactly what Mr. Navarro's rank is, but I know he has quite a bit of room -- or would otherwise have had quite a bit of room for advancement. He was told that he would not be -- have those opportunities, and **he would be limited to where he is. That would be the extent of his career.** Mr. Navarro, when he found out about that, contacted me and said, "Had I known that, I would not have made the decision that I made."

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state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion." *Lafler*, 132 S Ct at 1389.

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(Emphasis added). (Ex 109, Transcript on 4/21/11 Hearing, pp. 12-13). Without more, this claim should be denied.

Even if petitioner presents proof of discharge, this claim still fails. Petitioner would have entered into his plea regardless of counsel's representations about the impact of the plea on his military career. As a general rule, defendants are not entitled to advice about "collateral" consequences of a plea. *See Gonzalez v. State of Oregon*, 340 Or 452, 458, 134 P3d 955 (2006) (if defendant seeks no further detail, counsel performs adequately by advising that the defendant may be deported; counsel need not "specify the likelihood that a particular defendant will be deported"); *Chew v. State of Oregon*, 121 Or App 474, 477-78 (counsel need not advise petitioner that subsequent charges for DWS could be prosecuted as a felony, if he pleaded guilty to DUII; attorneys are not required to "predict their clients' future criminal activities"); *Jones v. Cupp*, 7 Or App 415, 416, 419-20, 490 P2d 1038 (1971) (defendant need not be advised that, if he pleads guilty to murder, he will be ineligible for parole for 7 years); *Gaffey v. State of Oregon*, 55 Or App 186, 191, 637 P2d 634 (1981) (counsel need not inform petitioner that, if he pleads guilty to reckless driving, license will be suspended).

Collateral consequences become significant if the defense attorney affirmatively misadvises a defendant about collateral consequences and that misadvice affects the defendant's decision to enter a plea. *Long v. State of Oregon*, 130 Or App 198, 202-03, 880 P2d 509 (1994) (although counsel "was under no obligation to tell petitioner that his conviction could not be expunged," he acted unreasonably by affirmatively misrepresenting a collateral consequence of the plea). In *Long*, the criminal defense attorney's misrepresentation concerned whether the defendant's conviction for sexual abuse could be expunged. There, it was reasonable to expect the criminal defense attorney to know whether a conviction for sexual abuse was expungeable, because that sort of inquiry falls within a criminal defense lawyer's expertise. Here, petitioner's query concerned a matter outside the realm of criminal law. Trial counsel relied upon an expert, petitioner's own commander, to ascertain the impact of petitioner's plea on his ONG career. (Ex

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103, 4/28/2011 Transcript, pp. 11-12). Trial counsel's reliance on petitioner's commander's representations was reasonable. Petitioner cannot prove that trial counsel's reliance on petitioner's commander "breached standards of professional skill and judgment and constituted inadequate assistance of counsel." *Long*, 130 Or App at 203.

Even if this Court concludes otherwise, petitioner still cannot prove prejudice. Misrepresentations of penal consequences do not automatically constitute inadequate assistance of counsel. To prove prejudice from such a misrepresentation, "petitioner must establish that he would not have entered into the plea agreement if his counsel had [correctly] informed him" of the collateral consequence. *Long*, 130 Or App at 203, *citing Moen v. Peterson*, 312 Or 503, 513 (1991); *Chew v. State of Oregon*, 121 Or App 474, 479, 855 P2d 1120 *rev den* 318 Or 24 (1993). A petitioner cannot obtain post-conviction relief from his attorney's failure to advise him if petitioner independently knew of the relevant information from another source. *Hartzog v. Keeney*, 304 Or 57, 64, 742 P2d 600 (1987), *modified on other grounds by Moen v. Peterson*, 312 Or 503, 824 P2d 404 (1991) (if there is evidence "from which the post-conviction court finds that before pleading guilty the criminal defendant was otherwise aware * * * appointed counsel's failure to advise does not render the conviction void."); *Dixon v. Gladden*, 250 Or 580, 587, 444 P2d 11 (1968) (constitutional requirement for a valid guilty plea "is that the defendant have understanding, not that it be imparted to him in some particular manner.").

Here, counsel moved to withdraw petitioner's guilty plea because, to his knowledge, petitioner did not believe his plea would result in his forced discharge from the Oregon National Guard [ONG]" . *Id.* at 1. Had petitioner known that, counsel averred, petitioner would not have entered a plea and would have taken his chances at trial. *Id.* at 2. This Court should take note of the trial court's finding that petitioner's plea was knowing and voluntary at the hearing on the motion to withdraw. (Ex 112, Motion Hearing Transcript, p. 21).

Other evidence points to petitioner's knowing waiver of the impact of his plea on his military career. First, petitioner's plea petition provided: "I also understand that the conviction

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may prevent me from serving in the United States Armed Forces[.]" (Ex 107, Plea Petition, p. 2). Second, petitioner's plea bars him from possessing a firearm. *Id.* Third, and most compellingly, petitioner participated in multiple jail calls in which he stated his belief that his plea would result in termination of his military career.

On March 30, 2011 (two days before his plea on April 1, 2011), petitioner was told by an unidentified female "[A]s of right now, Navarro, you are out of the military." (Ex 104, Jail Call Transcripts, p. 4).[3] She also told him: "If you don't take the plea, you know, what would be the maximum penalty, just try to look at that. As of right now the Army is trying to wash their hands of you until the end of this, so." *Id.* at 10. Petitioner replied:

> I really care about my military career and I can't have a freakin' felony and be in the military and I can't be on probation and be in the military. So I'm not gonna take that plea.

Id. at 7. Notably, On March 30, 2011, petitioner told his mother he would be kicked out of the military as a consequence of entering a plea:

> MR. NAVARRO: Nothin', trying to figure out what the hell am I supposed to do. They said that fuckin' I got court tomorrow and I...and they're gonna offer me a plea bargain which is they're gonna make me take two felonies. I get kicked out of the Army, and I get three years probation.
>
> FEMALE: You're not gonna get kicked out of the Army.
>
> MR. NAVARRO: I have a felony. You can't have a weapon if you...if you're a felon.
>
> FEMALE: You're not gonna get kicked out of the Army. I talked to Melissa and I already talked to Sergeant and you're not getting kicked out of the Army.
>
> MR. NAVARRO: I talked to Melissa yesterday and she said that the Army washed their hands of me.
>
> FEMALE: No.
>
> MR. NAVARRO: I talked to her yesterday.

[3] She explained: "They are working on kicking you out, so I'm not saying...like if this all goes through and...and you're not guilty, then, you know, then this whole military thing will be taken care of. But as of right now you need to worry about you and that is you not, um...getting these felony charges on your record." (Ex 104, Jail Call Transcripts, p. 4).

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Id. at 37-38. On March 31, 2011, petitioner told his sister that he would be kicked out of the military as a consequence of entering a plea:

> I need to know if she's gonna help me or not because they're giving me a plea. They're gonna let me out on probation, but I have to plead to a felony and then I have to take two years probation, I can never own a gun. They're gonna kick me out of the Army.

Id. at 24-25. Petitioner entered a guilty plea to two felonies the next day, April 1, 2011. (Ex 1, Indictment; Ex 107, Plea Petition). The claim should be denied.

C.

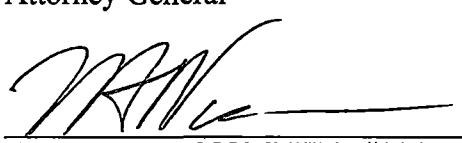
CONCLUSION

For the reasons discussed above, petitioner's Formal Petition for Post-Conviction Relief is incorrect and should be denied.

DATED September 25, 2013.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General



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CERTIFICATE OF SERVICE

I certify that on September ___, 2013, I served the foregoing Defendant's Trial Memorandum upon the parties hereto by the method indicated below, and addressed to the following:

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