



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**PEOPLE OF GUAM,**  
Plaintiff-Appellee,

**v.**

**PATRICK MUNA CASTRO,**  
Defendant-Appellant.

**OPINION**

**Cite as: 2016 Guam 16**

Supreme Court Case No.: CRA15-014  
Superior Court Case No.: CF0296-12

Appeal from the Superior Court of Guam  
Argued and submitted on October 27, 2015  
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

**MARAMAN, J.:**

[1] Defendant-Appellant Patrick Muna Castro appeals the trial court’s denial of his two motions to withdraw his guilty plea: one motion pursuant to contract law and the other pursuant to the plea not being made voluntarily, knowingly, and intelligently. Castro argues that the governing statute for withdrawal of a guilty plea, 8 GCA § 120.42, suggests such motions be liberally granted because there is no language restricting withdrawing pleas in the period after acceptance but before sentencing. Castro further contends that if the correct standard, “fair and just” reason, is used, then the trial court should grant his motions to withdraw in part based on his claim of ineffective assistance of counsel.

[2] For the reasons stated herein, we adopt the “fair and just” reason standard whereby a defendant must present a plausible reason to justify a withdrawal of a guilty plea after a trial court’s acceptance but before sentencing, and affirm in part, reverse in part and remand to the trial court to determine whether Castro presented a “fair and just” reason to withdraw his guilty plea arising from his ineffective assistance of counsel claim.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[3] The Grand Jury returned an indictment charging Castro with four counts of theft by receiving stolen property, three counts as a second degree felony and one count as a third degree felony. At arraignment, Castro entered pleas of not guilty and asserted his right to a speedy trial of twelve jurors. The trial court appointed the Public Defender Service Corporation as counsel. Castro subsequently waived his request for a speedy trial. The trial court was prepared for jury selection and received jurors in the courtroom. Subsequently, Castro and the People indicated to

the trial court that Castro agreed to enter a guilty plea. As a result, the court reconvened later that afternoon to conduct the Change of Plea Hearing.

#### **A. Plea Agreement and Plea Colloquy**

[4] Castro entered into the Plea Agreement (“Agreement”) with the People. The Agreement contained several terms including: Castro to plead guilty on two counts of theft by receiving stolen property (as a Second Degree Felony), the People to drop the other two charges, and Castro to serve a prison sentence and pay a fine. Castro agreed to cooperate with the Attorney General’s Office (“AG”) in the prosecution against Irvin White in CF0387-12, and his sentencing was held in abeyance. If Castro does not fully cooperate with the AG, then the AG may withdraw the Agreement and prosecute Castro to the full extent of the law, but the determination of whether Castro fully cooperated was reserved for and in the sole discretion of the AG.

[5] In the Agreement, Castro waived certain constitutional and statutory rights. These rights included: the right to a jury trial; the right against self-incrimination; the right to prosecution by indictment or preliminary hearing; the right to speedy sentencing; the right to move for a reduction in sentence; and the right to appeal conviction. Before Castro’s signature on the Agreement, it states “[b]y his signature, [Castro] attests he has read this [A]greement and its provisions have been fully explained by his attorney. [Castro] believes his lawyer has done all that anyone could do to counsel and assist him and is satisfied with the advice and help received.” Record on Appeal (“RA”), tab 44 at 7 (Plea Agreement, July 19, 2012). Other provisions in the Agreement pertinent to this appeal include: “[Castro] voluntarily, and without coercion or promises apart from this [A]greement, agrees to enter guilty pleas,” and “[Castro] states he has told his lawyer all the facts and circumstances known about the charges.” *Id.* at 2,

6. More so, the Agreement states that “[h]is lawyer has counseled and advised him on the nature of each charge as well as on any and all lesser included charges.” *Id.* at 6.

[6] At the Change of Plea Hearing, the trial court determined that defense counsel fully explained the Agreement to Castro, that Castro was aware of the maximum penalties, understood the nature of the charges and the rights he was waiving, was not threatened or forced, did not receive any non-written promises, and agreed to cooperate in the prosecution of White. Castro also confirmed that his counsel gave him good legal advice and that Castro was satisfied with the help he received. The trial court again asked, and Castro affirmed, that he was satisfied with the help from his defense counsel. Castro pleaded guilty to the two charges, admitting that he did commit the two offenses. After finding Castro’s guilty plea was knowingly and voluntarily made, the trial court accepted the plea and the Agreement, with sentencing to be conducted later.

### **B. Counsel Discharged**

[7] Months later, Castro stated in open court that he wished to discharge defense counsel, alleging he had been deceived by counsel and that he wished to withdraw his guilty plea. In his Motion to Withdraw as Attorney of Record, defense counsel requested withdrawal not only because he was discharged, but also because he disagreed with the deception claim. Further, counsel fundamentally disagreed with Castro’s decision to withdraw his guilty plea, and counsel believed there was no meritorious claim to withdraw the Agreement. New counsel was appointed to represent Castro.

### **C. Motions to Withdraw Agreement**

[8] Before sentencing, Castro filed two separate motions to withdraw the Agreement, one based on contract law filed on August 29, 2013, and the other based on Castro’s guilty plea not

being made voluntarily, knowingly, and intelligently. Castro included a declaration supporting the second motion.

### **1. Based on Contract Law**

[9] In the motion based on contract law, Castro claimed the “[AG] offered a contingent unilateral Plea Agreement.” RA, tab 67 at 2 (Mot. Vacate Plea Agreement Pursuant to Contract Law & Mem. P. & A., Aug. 29, 2013). Basing his argument on “standard contract interpretation of unilateral option contracts,” Castro claimed that the “[AG] created a bilateral contract conditioned on [Castro’s] [p]erformance” and “[i]t [was] clear that [Castro] may choose not to cooperate and if he chooses to not cooperate . . . the [Agreement] is not accepted by the Court.” *Id.* at 2-3. Castro also stated that “if the People may withdraw from a plea then [Castro] may withdraw from a plea agreement.” *Id.* at 3. Castro also indicated his intent to decline to exercise his option contract with the AG to cooperate in the prosecution of White, and that this motion to vacate should be considered a withdrawal of the Agreement.

[10] The People filed an opposition claiming the Agreement was not equivalent to an option contract, and if Castro refused to cooperate with the AG, then it was not an automatic nullification of the Agreement. The People supported its claim by citing to the provision in the Agreement which states “if [Castro] refuses to cooperate . . . the People ‘may withdraw the [Agreement].’” RA, tab 76 at 1, 3 (People’s Opp’n Def.’s Mot. Vacate Plea Agreement Pursuant to Contract Principles, Oct. 22, 2013). The People also contended that contract law principles do not allow for withdrawal of the Agreement, and that “the People can and do choose to keep the [Agreement] in place, despite [Castro’s] refusal to perform as promised.” *Id.* at 4.

## **2. Based on Not Being Made Voluntarily, Knowingly, and Intelligently**

[11] In the motion based on Castro's guilty plea not being made voluntarily, knowingly, and intelligently, Castro claimed ineffective assistance of counsel in that he was "not probably [sic] counseled on the penalty he would receive" and that he did not understand the full risks of going to trial and the law in relation to the facts. RA, tab 69 at 2-3 (Mot. Vacate Plea Agreement Pursuant to Plea Not Being Made Voluntarily & Mem. P. & A., Sept. 17, 2013). Castro ultimately asserted that his plea was not made knowingly and intelligently because of his lack of understanding of the law in relation to the facts. In Castro's declaration, he stated he did not enter his "guilty peal [sic] voluntarily, knowingly, and intelligently." *Id.* at 5. Castro claimed he took the plea based upon omissions and statements of his prior lawyer including that: his attorney was not ready for trial, his wife would be arrested and charged if Castro did not enter into the Agreement, he would receive a better deal than offered if he signed the Agreement, and Castro only waived his right to speedy trial because the judge was going to a conference and would be mad.

[12] The People opposed this motion. The People argued that Castro could not have been under any illusions of receiving a better deal once he read the Agreement, or after the trial court read the Agreement at the plea hearing, or after Castro answered in the negative when asked if anyone promised him anything or coerced him into accepting the Agreement. Also, the People stated that there was no deviation from the original Agreement. The People further contended that the trial court conducted a proper plea colloquy under 8 GCA §§ 60.50 and 60.60 to ensure that Castro was entering his plea voluntarily, knowingly, and intelligently.

[13] After hearing both motions to vacate Castro's guilty plea, the trial court issued a Decision and Order denying both motions. The trial court concluded that a proper colloquy pursuant to 8

GCA §§ 60.50 and 60.60 was conducted to ensure Castro was entering into his plea knowingly, voluntarily, and without coercion or promises apart from the Agreement. In the decision, the trial court agreed with the People that if Castro did not cooperate with the AG, it does not automatically nullify the Agreement, and that the Agreement is still in place because the People so chose. The court finally noted that contract law cannot be rigidly applied to plea agreements but contract law principles are useful analytical frameworks.

#### **D. Motion to Reconsider**

[14] Castro filed a Motion to Reconsider the trial court's decision. In this motion, Castro claimed newly discovered information regarding the officer ("Officer") who arrested and read him his *Miranda* rights. Castro claimed that the Officer was recently accused of falsifying a police report, which meant that Castro's "waiver of his right to go to trial cannot be considered freely given when [it is] based upon evidence that could have been suppressed if the truthfulness of the Officer had been known." RA, tab 84 at 1-2 (Mot. Recons. & Mem. P. & A., Mar. 4, 2014). Castro also requested the trial court conduct an evidentiary hearing to determine if ineffective assistance of counsel caused Castro to enter into the Agreement. Lastly, Castro claimed the Agreement is illegal because the Agreement did not require the People to seek permission from the trial court before withdrawing from the Agreement. The People opposed this motion. After its hearing, the trial court issued a Decision and Order denying Castro's Motion to Reconsider. The trial court reasoned that the the Officer's misconduct was a part of a separate and distinct matter which occurred over one year after the Agreement date. As such, the trial court stated it did not constitute a new material fact sufficient to warrant reconsideration of Castro's motion to vacate his guilty plea. The court also noted that, based on what was indicated in the record, Castro's oral statements at the time of his arrest were not obtained unlawfully, and

that the Agreement is valid because there was no evidence of coercion or impropriety on the part of the People when negotiating the Agreement. The trial court agreed with Castro that an evidentiary hearing based on his ineffective assistance of counsel claim was needed and deferred ruling on Castro's Motion to Reconsider based on this claim.

[15] After an evidentiary hearing, the trial court denied Castro's Motion to Reconsider. After reviewing the record, the court found that: Castro was informed of his right to confront and cross-examine witnesses; he was advised of his privilege against self-incrimination; the People were required to prove guilt beyond a reasonable doubt; the Agreement was read in court; the court informed Castro of the maximum possible penalty that could be imposed; Castro stated he was satisfied with counsel's performance; Castro pleaded guilty on his own free will; and Castro acknowledged that there were no promises outside of what was contained in the Agreement.

[16] At his sentencing hearing, Castro was sentenced, in accordance with the Agreement, to eight years of incarceration with direct time of five years and with credit for time served. Judgment was filed, and Castro timely filed a notice of appeal.

## II. JURISDICTION

[17] This court has appellate jurisdiction over this matter pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-115 (2015)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA § 130.15(a) (2005).

## III. STANDARD OF REVIEW

[18] "The denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion." *United States v. Rios-Ortiz*, 830 F.2d 1067, 1069 (9th Cir. 1987) (citing *United States v. Johnson*, 760 F.2d 1025, 1026 (9th Cir. 1985)); *see also United States v. Davis*, 428 F.3d 802, 805 (9th Cir. 2005) (citing *United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (9th Cir. 2004)).



#### IV. ANALYSIS

[19] Castro challenges the trial court’s denial of his motions to withdraw his guilty plea as an abuse of discretion. He argues that the trial court failed to apply the correct legal standard for when a plea may be withdrawn given that motions should be granted liberally. *See* Appellant’s Br. at 10, 11 (June 23, 2015). Castro seeks to withdraw his guilty plea and proceed to trial. *Id.* at 6, 11.

##### A. When Withdrawal of a Plea is Permitted

[20] Castro’s pre-sentence motion to withdraw his guilty plea is governed by 8 GCA § 120.42, which states:

A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

8 GCA § 120.42 (2005). A Compiler’s note states that “[s]ection 120.42 is identical to former Rule 32(d). See also Fed. R. Crim. P. 32(d) (same). See generally 8A Moore, Federal Practice ¶ 32.07 (1974).” *Id.* at cmt. Section 120.42 was enacted by Guam Public Law 13-186. Guam Pub. L. 13-186 (Sept. 2, 1976). It has since remained unchanged while its counterpart, Rule 32(d) of the Federal Rules of Criminal Procedure (“FRCP”), was amended in 1994 and again in 2002 to what it is now, FRCP 11(d).<sup>1</sup> FRCP 11(d) reads in pertinent part:

A defendant may withdraw a plea of guilty or nolo contendere . . . (2) after the court accepts the plea, but before it imposes sentence if . . . (B) the defendant can show a fair and just reason for requesting the withdrawal.

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<sup>1</sup> Before December 1, 2002, FRCP 11(d)(2)(B) was found in FRCP 32(e), and before that in FRCP 32(d). *See* Fed. R. Crim. P. 11 advisory committee’s note (2002 Amendments); Fed. R. Crim. P. 32 advisory committee’s note (1994 Amendments); *see also United States v. Nostratis*, 321 F.3d 1206, 1208 n.1 (9th Cir. 2003); *Ortega-Ascanio*, 376 F.3d at 883 n.1.

Fed. R. Crim. P. 11(d). Guam’s equivalent statute, section 120.42, predates these amendments to the federal rules and did not incorporate the “fair and just” reason standard.<sup>2</sup> See 8 GCA § 120.42. In fact, section 120.42 is silent on the standards to be used when considering a motion to withdraw a guilty plea after its acceptance but before sentencing. See *id.* We turn to federal law for guidance.

[21] Our precedent has recognized the persuasive aspect federal case law holds on certain Guam laws modeled after federal laws. “Generally, when a legislature adopts a statute which is identical or similar to one in effect in another jurisdiction, it is presumed that the adopting jurisdiction applies the construction placed on the statute by the originating jurisdiction.” *Sumitomo Constr. Co. v. Zhong Ye*, 1997 Guam 8 ¶ 7 (citing Sutherland’s Stat. Const. § 52.01 (5th Ed.)); see also *People v. Natividad*, 2005 Guam 28 ¶ 15 n.9. “The interpretation of the statutes by federal courts, however, is only persuasive and does not bind or control this court’s analysis.” *Sumitomo*, 1997 Guam 8 ¶ 7 (citation omitted).<sup>3</sup> Prior to enactment of section 120.42 in 1976, federal courts applied the “fair and just” reason standard despite the lack of formal

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<sup>2</sup> The “fair and just” reason standard is derived from United States Supreme Court dicta in *Kercheval v. United States*, 274 U.S. 220, 224 (1927) (“The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.”). Since the *Kercheval* decision, courts have applied this standard even before it was codified in the Federal Rules of Criminal Procedure.

<sup>3</sup> There is an abundance of Guam precedent discussing how certain Guam codes are modeled after other jurisdictions’ codes. In these cases, we either adopted that particular jurisdiction’s interpretation or used the interpretation as persuasive authority. See, e.g., *People v. Chinell*, 2013 Guam 24 (adopted test as expressed in the federal jurisdiction because a Guam Rules of Evidence statute is similar to a Federal Rules of Evidence statute); *Castino v. G.C. Corp.*, 2010 Guam 3 ¶ 22 (Guam adopted mechanics’ liens statutes from California, therefore, the court used California case law to interpret those statutes as persuasive authority); *Ueda v. Bank of Guam*, 2005 Guam 23 ¶ 16 n.7 (finding California case law is persuasive authority in the interpretation of 21 GCA § 1254, as that section was derived from California Civil Code section 711); *May v. People*, 2005 Guam 17 ¶ 9 (“Section 1473 of the California Penal Code is identical to Title 8 GCA § 135.10, and thus California cases interpreting section 1473 are persuasive.”); *People v. Hall*, 2004 Guam 12 ¶ 18 (finding California case law interpreting a California statute from which a Guam statute was derived is persuasive authority, and adopting such case law absent a compelling reason to deviate); *Fajardo v. Liberty House Guam*, 2000 Guam 4 ¶ 17 (adopting California case law construing a similar Guam statute where there was no compelling reason to deviate from that jurisdiction’s interpretation of these statutes); *Torres v. Torres*, 2005 Guam 22 ¶ 33 (California is the source of 6 GCA §§ 2511 and 2515, therefore, the court looked to substantial precedent developed within California to assist in interpreting parallel Guam provisions).

codification in the Federal Rules of Criminal Procedure. For example, in 1972, the Ninth Circuit stated in *United States v. Webster*, “It has long been clear that leave to withdraw a guilty plea should be freely granted prior to sentencing where there is a *fair and just* reason for doing so.” 468 F.2d 769, 771 (9th Cir. 1972) (emphasis added) (citing *Kercheval*, 274 U.S. at 224). Again, in 1973, a Ninth Circuit decision expressed that the “fair and just” reason standard should be used. See *United States v. Erlenborn*, 483 F.2d 165, 168 (9th Cir. 1973) (“In cases where a motion to withdraw a guilty plea is made, as here, before sentencing, the motion should be granted ‘if for any reason the granting of the privilege seems fair and just.’” (quoting *Kercheval*, 274 U.S. at 224)). Therefore, because pre-1976 federal precedent applied the “fair and just” reason standard, the Guam Legislature implicitly adopted the “fair and just” reason standard to be used when considering a motion to withdraw a guilty plea before sentencing but after court acceptance.

### **B. Federal “Fair and Just” Reason Standard**

[22] Both parties discuss the federal “fair and just” reason standard in their briefs. See Appellant’s Br.; Appellant’s Reply Br. (Aug. 5, 2015); Appellee’s Br. (July 24, 2015). Legislative intent and Guam precedent are silent on the standard for withdrawal of a guilty plea after acceptance but before sentencing. As discussed above, because 8 GCA § 120.42 is identical to and based on former FRCP 32(d) (now FRCP 11(d)(2)(B)), and because courts prior to Guam’s codification of 8 GCA § 120.42 used the “fair and just” reason standard in their analysis of FRCP 32(d), we hereby adopt the federal “fair and just” reason standard where a defendant must present a plausible reason to justify a withdrawal of a guilty plea after a trial court’s acceptance but before sentencing.

### 1. Federal Rules of Criminal Procedure – Rule 11(d)(2)(B)

[23] Under the federal “fair and just” reason standard, a defendant may withdraw a plea of guilty before sentencing if “the defendant can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2)(B). The defendant holds the burden of demonstrating a “fair and just” reason. *United States v. McTiernan*, 546 F.3d 1160, 1166-67 (9th Cir. 2008) (citing *Davis*, 428 F.3d at 805); *see also Nostratis*, 321 F.3d at 1208 (citation omitted). An alleged “fair and just” reason raised by a defendant must demonstrate a *plausible* reason for withdrawal. *Webster*, 468 F.2d at 771.

[24] “While the defendant is not permitted to withdraw his guilty plea ‘simply on a lark,’” the “fair and just” reason standard is generous, must be applied liberally, and should be freely allowed if a defendant can show a “fair and just” reason for requesting withdrawal. *McTiernan*, 546 F.3d at 1167 (quoting *United States v. Hyde*, 520 U.S. 670, 676-77 (1997)); *see also United States v. Bonilla*, 637 F.3d 980, 983 (9th Cir. 2011); *Ortega-Ascanio*, 376 F.3d at 883; *Kercheval*, 274 U.S. at 224. However, it is also important to note that there is no absolute right to withdraw a guilty plea. *Rios-Ortiz*, 830 F.2d at 1069; *Webster*, 468 F.2d at 771; *Sherman v. United States*, 383 F.2d 837, 840 (9th Cir. 1967).<sup>4</sup>

[25] “[T]he standard of a ‘fair and just’ reason must extend beyond a challenge to the validity of the plea.” *Ortega-Ascanio*, 376 F.3d at 885 (citing *Rios-Ortiz*, 830 F.2d at 1069). Therefore, “[p]rior to sentencing, the proper inquiry is whether the defendant has shown a fair and just reason for withdrawing his plea even if the plea is otherwise valid.” *McTiernan*, 576 F.3d at

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<sup>4</sup> More so, courts in the Second Circuit have expressed how public policy supports the notion that guilty pleas should be final and not freely withdrawn once accepted by the court because “[s]ociety has a strong interest in the finality of guilty pleas, and allowing withdrawal of pleas not only undermines confidence in the integrity of [the] judicial procedures, but also increases the volume of judicial work, and delays and impairs the orderly administration of justice.” *United States v. Doe*, 537 F.3d 204, 211 (2d Cir. 2008) (quoting *United States v. Maher*, 108 F.3d 1513, 1529 (2d Cir. 1997)).

1167 (quoting *Davis*, 428 F.3d at 806). “[E]ach case must be reviewed in the context in which the motion arose to determine whether, ultimately, a ‘fair and just’ reason exists.” *Id.*

## 2. Examples of “Fair and Just” Reasons

[26] While not an exclusive list, “[f]air and just reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, *or any other reason for withdrawing the plea that did not exist when the defendant entered his plea.*” *Id.* (alteration in original) (quoting *Davis*, 428 F.3d at 805) (internal quotation marks omitted); *see also Ortega-Ascanio*, 376 F.3d at 883. More so, “[e]rroneous or inadequate legal advice may also constitute a fair and just reason for plea withdrawal, even without a showing of prejudice.” *McTiernan*, 546 F.3d at 1167 (citing *Davis*, 428 F.3d at 806). A defendant’s good faith change of heart or unsupported protestations of innocence is not an adequate “fair and just” reason. *See Rios-Ortiz*, 830 F.2d at 1069. Consideration should be given to certain factors such as: whether a defendant asserts his legal innocence; reasons why defenses were not asserted at the time of original pleading; any delay and length of time between the entering of the plea and the filing of the motion to withdraw the plea; whether withdrawal will cause prejudice to the government; whether it will inconvenience the court and waste judicial resources; and degree to which the defendant has had prior experience with the criminal justice system. *See McTiernan*, 546 F.3d at 1167 (quoting Fed. R. Crim. P. 32 advisory committee’s note (1983)); *United States v. Nicholson*, 676 F.3d 376, 384 (4th Cir. 2012); *United States v. Goddard*, 638 F.3d 490, 495 (6th Cir. 2011).

[27] Because our precedent has not discussed nor have we applied the “fair and just” reason standard, it is understandable that the trial court proceeded in the manner that it did. However, we now choose to adopt the “fair and just” reason standard when considering whether to grant or

deny a motion to withdraw a guilty plea after acceptance but before sentencing. Accordingly, we must review the trial court's analysis of Castro's claims to determine whether a "fair and just" reason exists to allow withdrawal of Castro's guilty plea.<sup>5</sup>

### **C. The Trial Court did not Address or Apply the "Fair and Just" Reason Standard**

[28] In the trial court's Decision and Order pertaining to Castro's Motions to Vacate his Guilty Plea, the trial court failed to address and make mention of section 120.42. RA, tab 82 at 1-6 (Dec. & Order (Def.'s Mot. Vacate Plea Agreement), Feb. 25, 2014). The trial court concluded that a proper plea colloquy pursuant to 8 GCA §§ 60.50 and 60.60 was conducted to ensure Castro was entering into his plea knowingly, voluntarily, and without coercion or promises apart from the Agreement. *Id.* at 5. However, an improper plea colloquy is only one "fair and just" reason to withdraw a guilty plea. In its decision, the trial court also agreed with the People that if Castro did not cooperate with the AG, it did not automatically nullify the Agreement, and that the Agreement was still in place because the People chose to keep the Agreement in place despite Castro's refusal to perform as promised. *Id.* at 6. The trial court dispels Castro's arguments on these grounds and did not address Castro's ineffective assistance of counsel arguments in its Decision and Order on the motion to vacate. *Id.* at 1-6.

### **D. Application of FRCP 11(d)(2)(B) – "Fair and Just" Reason Standard**

[29] Although the trial court did not make a specific cite to the "fair and just" reason standard, we may still affirm the trial court's decision if it is supported by the record. *See, e.g., People v.*

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<sup>5</sup> We have not previously addressed this issue. However, the District Court of Guam Appellate Division briefly discussed the standard. *See People v. Tedtaotao*, No. 96-00013A, 1996 WL 875739, at \*3 n.6 (D. Guam. App. Div. Sept. 30, 1996). The issue in that case concerned an *Anders* brief and whether there was a basis for an appeal. *Id.* at \*1. The court, nonetheless, addressed the "fair and just" reason standard and stated that "[i]f the defendant establishes a 'fair and just' reason for withdrawal, the court, in exercising its discretion, should allow the defendant to substitute a guilty plea with a plea of not guilty [sic] and have a trial." *Id.* at \*3 (quoting *Kercheval*, 274 U.S. at 224).

*Chinel*, 2013 Guam 24 ¶¶ 40-41 (“Although the trial court did not have the benefit of an appellate opinion articulating the applicable test, the trial judge chose to rely upon some of the factors set forth in *LeMay*. . . . We hold that the trial court did not abuse its discretion in applying the test.”).

[30] As required, a separate review of each of Castro’s claims will be made to determine whether a “fair and just” reason exists to allow withdrawal of Castro’s guilty plea. Only one “fair and just” reason is needed and if found, withdrawal should be liberally and freely granted.

### **1. Contract Law**

[31] At issue is whether the use of contract principles will provide a “fair and just” reason to withdraw Castro’s guilty plea after acceptance but before sentencing.

[32] On appeal, Castro initially contends his motion to withdraw his guilty plea should be granted based on contract law. *See* Appellant’s Br. at 6; RA, tab 67 at 1-4 (Mot. Vacate Plea Agreement Pursuant to Contract Law & Mem. P. & A.). He states because the People were not required to seek court permission in order to withdraw the Agreement, an illegal agreement was created. RA, tab 84 at 3 (Mot. Recons. & Mem. P. & A.). The crux of Castro’s contract claim is that because of his decision not to cooperate with the AG, that “in itself, is [a] fair and just reason for withdrawal as it is any other reason for withdrawing the plea that did not exist when the defendant entered his plea.” Appellant’s Br. at 10 (internal quotation marks omitted).

[33] The People oppose by claiming the Agreement is not an option contract and automatic nullification of the Agreement did not occur when Castro refused to cooperate. RA, tab 76 at 1-4 (People’s Opp’n Def.’s Mot. Vacate Plea Agreement Pursuant to Contract Principles). The People also claim that the determination of adequate cooperation and performance was in the sole discretion of the AG. *Id.* at 4. The People argue that because Castro breached by not

cooperating, the People were the injured party and should have the right to a remedy, rather than Castro benefitting from his own wrongdoing at the People's expense. *See* Appellee's Br. at 14.

[34] The trial court discussed this matter, and agreed with the People, stating Castro's refusal to cooperate with the AG was not an automatic nullification of the Agreement. RA, tab 82 at 6 (Dec. & Order (Def's Mot. Vacate Plea Agreement)). The court determined that because the People chose to keep the Agreement in place, despite Castro's refusal to perform, this was not grounds for the Agreement to be withdrawn. *Id.*

[35] The trial court was correct in concluding that on the basis of contracts, a plea agreement should not be withdrawn. Therefore, the Agreement became a valid and binding agreement once accepted by the trial court.<sup>6</sup> Rescinding the Agreement based on contract principles does not amount to a "fair and just" reason. At Castro's Change of Plea Hearing, he agreed on numerous occasions to cooperate with the AG. *See* Transcript ("Tr.") at 15-17 (Change of Plea, July 12, 2012). Castro's lack of performance is not newly discovered evidence or an intervening circumstance out of his control. Therefore, the trial court's decision to deny Castro's motion to withdraw his guilty plea based on contract principles was not an abuse of discretion, as this argument does not meet a "fair and just" reason.

## 2. Officer Misconduct

[36] Castro's next claim is that the misconduct committed by the Officer may be considered "newly discovered evidence," and therefore is a "fair and just" reason to withdraw his guilty plea.

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<sup>6</sup> *See* 8 GCA § 120.42 (a defendant must file a motion to withdraw a guilty plea and cannot rescind an agreement on his or her own accord once accepted by the trial court); *see, e.g., People v. Camacho*, 2016 Guam 13 ¶ 26 (holding that once the court accepts a plea agreement, it is bound by the terms contained therein and cannot impose a sentence less favorable than the one agreed upon between the defendant and the People). *Contra* 8 GCA § 60.80(d) (if the trial court rejects the plea agreement, the court shall inform the parties in open court that it is not bound by the terms of the plea agreement).



[37] In Castro's Motion to Reconsider he asserts he was not read his *Miranda* rights by the Officer, despite the fact the police report indicates otherwise. RA, tab 84 at 1 (Mot. Recons. & Mem. P. & A.). Castro argues that because the Officer was accused of falsifying reports (which occurred one year after the Agreement), Castro's waiver of his right to go to trial cannot be considered freely given when it is based on evidence that could have been suppressed if the truthfulness of the Officer had been known. *Id.* at 2. The People oppose, claiming the Officer's alleged misconduct in a completely unrelated matter is not only immaterial, it is wholly irrelevant with regards to Castro's change of plea. RA, tab 91 at 3 (Dec. & Order (Def.'s Mot. Recons.), July 10, 2014) ("July 2014 Dec. & Order"); RA, tab 98 at 1-5 (Dec. & Order (Def.'s Mot. Recons.), Dec. 1, 2014) ("December 2014 Dec. & Order").

[38] "[N]ewly discovered evidence wholly unrelated to a defendant's case would surely not entitle him to withdraw his guilty plea . . . ." *United States v. Garcia*, 401 F.3d 1008, 1011 (9th Cir. 2005) (citing *United States v. Morgan*, 567 F.2d 479, 493 (D.C. Cir. 1977)). But "the generous 'fair and just reason' standard does not require that the defendant show that the new evidence exonerates him or that there is a reasonable probability he would not have been convicted had the case gone to trial." *Id.*

[39] In *Garcia*, the defendant sought to withdraw his guilty plea partly based on newly discovered evidence. *Id.* The Court of Appeals for the Ninth Circuit found a witness's statement constituted newly discovered evidence that was sufficient to justify the withdrawal of that defendant's plea under the "fair and just" reason standard. *Id.* at 1012. In that defendant's motion to withdraw, the defendant attached a witness declaration, the contents of which contradicted certain statements of an incriminating witness against the defendant. *Id.* at 1010, 1012. That court found that the witness's declaration "raise[d] new questions about [the

defendant's] involvement in the illegal activity . . . . Had [that defendant] known about this evidence earlier, he may well have changed his mind about whether to plead guilty." *Id.* at 1011. The court also noted that "[i]t is sufficient that this evidence was relevant evidence in [that defendant's] favor that could have at least plausibly motivated a reasonable person in [that defendant's] position not to have pled guilty had he known about the evidence prior to pleading." *Id.* at 1011-12.

[40] Here, the trial court found that the Officer's "subsequent arrest does not constitute a 'new material fact' sufficient to warrant reconsideration of [Castro's] prior motions to vacate [the Agreement]." RA, tab 91 at 4 (July 2014 Dec. & Order); *see* RA, tab 98 at 1-5 (December 2014 Dec. & Order). The trial court reasoned that "the [Officer's] misconduct occurred over one year after [the Agreement] was issued" and the "alleged misconduct is in relation to a matter that is separate and distinct from the matter presently before [the c]ourt," concluding that such information is both immaterial and irrelevant to the case at hand. RA, tab 91 at 4 (July 2014 Dec. & Order). The trial court also reviewed the facts of the case and did not find anything in the record to indicate Castro's oral statements were obtained unlawfully. *Id.* at 5.

[41] The trial court's reasoning is logical. The Officer's misconduct is in a matter wholly irrelevant to Castro's decision to enter into the Agreement with the People because it occurred one year after the Agreement was entered into and it did not involve or affect Castro in any manner. Distinguishable from *Garcia*, the Officer's misconduct could not have raised new questions about Castro's involvement and participation in the illegal activity for which he pleaded guilty. *See Garcia*, 401 F.3d at 1011-12. Even if Castro knew about the Officer's misconduct at the time Castro was entering into the Agreement, the Officer's misconduct pertains to a different matter and is not exculpatory evidence in Castro's favor. As such,

Castro's attempt to find a nexus between the Officer's misconduct and the events of his arrest fails. In line with the trial court's conclusion, we also find that the record does not support Castro's allegation that he was not read his *Miranda* rights or that his statements were obtained unlawfully.

[42] Therefore, the trial court was correct in concluding that Castro's claim regarding the Officer's misconduct does not allow a withdrawal of his guilty plea because this does not qualify as "newly discovered evidence" under the "fair and just" reason standard.

### **3. Voluntary, Knowingly, Intelligently**

[43] We now turn to the trial court's analysis of Castro's second motion to withdraw based on the plea not being made voluntary, knowingly, and intelligently as a "fair and just" reason permitting him to withdraw his guilty plea after its acceptance but before sentencing.

[44] Castro asserts he did not enter the Agreement voluntarily, knowingly, and intelligently because the trial court conducted an improper plea colloquy, Castro was coerced into entering into the Agreement, and Castro received ineffective assistance of counsel.

#### **a. Plea Colloquy**

[45] Castro contends he did not understand the law in relation to the facts so he did not make his plea knowingly and intelligently, thereby making his claim valid. RA, tab 69 at 3 (Mot. Vacate Plea Agreement Pursuant to Plea Not Being Made Voluntarily, Knowingly, and Intelligently & Mem. P. & A.). The People oppose this argument by noting there was no deviation from the original Agreement and the trial court made proper colloquy under 8 GCA § 60.50 to ensure that Castro was entering his plea knowingly and intelligently. RA, tab 77 at 5 (People's Opp'n Def.'s Mot. Vacate Plea Agreement Pursuant to Plea Not Being Made Voluntarily, Knowingly, and Intelligently, Oct. 22, 2013).

[46] A trial court may not accept a guilty plea unless the defendant is adequately informed personally in open court, and the trial court determines that he understands: the nature of the charge(s) against him; he has a right to plead not guilty; by pleading guilty, he waives the right to trial; and the maximum possible penalty provided by law for the offense to which the plea is offered. *See* 8 GCA § 60.50 (2005); *see also* *People v. Van Bui*, 2008 Guam 8 ¶ 11.

[47] In the *Van Bui* case, a guilty plea was not accepted voluntarily and knowingly. 2008 Guam 8 ¶ 1. At the defendant's change of plea hearing, his counsel orally requested the plea agreement be changed to reflect that the defendant committed his crime pursuant to a different statute section rather than the one originally stated in the plea agreement. *Id.* ¶ 6.<sup>7</sup> The defendant sought to withdraw his plea, and appealed the conviction, claiming that he was not advised of the elements of the statute and that his plea was therefore not made knowingly, intelligently, and voluntarily. *Id.* ¶ 8. This court found that the last-minute change in the criminal offense to which the defendant was pleading guilty along with the record containing no indication that there was an explanation to the defendant of the crime to which he was pleading guilty, resulted in a finding that his plea was not made knowingly and intelligently. *Id.* ¶ 28.

[48] In *People v. Chung*, the plea agreement was accepted in violation of 8 GCA § 60.50. 2004 Guam 2 ¶ 17. This court reviewed the transcripts from the change of plea hearing and found no indication or acknowledgement, by the defendant, that he understood the trial court's explication of the nature of the charges. *Id.* ¶ 16. The record in this instance differs from *Chung* and *Van Bui*. Prior to accepting Castro's guilty plea, the trial court complied with all of the statutory provisions of 8 GCA § 60.50. Tr. (Change of Plea). In numerous instances, the trial

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<sup>7</sup> Counsel requested the court to revise the plea agreement to indicate that Van Bui was pleading guilty to 9 GCA § 16.50(a)(2) as opposed to subsection (a)(1). *Van Bui*, 2008 Guam 8 ¶ 7. Subsection (a)(1) and subsection (a)(2) differ regarding the defendant's *mens rea* at the time he committed the crime. *Id.* ¶ 6.

court addressed Castro personally in open court and informed him of the nature of the charges brought against him, each element the People needed to prove, and the maximum possible penalty for those offenses. *Id.* at 5-6, 10, 12. During the hearing, the trial court went through several of Castro's rights, including the right to a jury trial and the right to appeal, and Castro affirmatively responded that he understood each and every one. *Id.* at 6-9, 10-11, 22-23. The trial court asked Castro whether he read the Agreement before signing it, whether his attorney explained the Agreement to him, and whether he understood the Agreement, to all of which Castro responded in the affirmative. *Id.* at 4, 23-24. A factual basis for the plea was presented by the People. *Id.* at 12-15. Based on Castro's responses to these questions, the trial court determined that Castro was knowingly and intelligently entering his guilty plea. *Id.* at 27. There were no deviations from the original Agreement. The totality of the relevant circumstances supports the trial court's determination that Castro's guilty plea was made knowingly and intelligently.

[49] The facts do not support a finding that Castro was given an improper plea colloquy, and there is not a "fair and just" reason to withdraw his guilty plea on this ground.

**b. Voluntariness and Alleged Coercion**

[50] Castro asserted involuntariness and coercion as reasons for why he pleaded guilty. In one of his motions and at the Evidentiary Hearing, Castro argued that he signed the Agreement based upon the alleged statements by the prosecution that his wife would be arrested and charged if he did not enter into the Agreement. RA, tab 69 at 5 (Mot. Vacate Plea Agreement Pursuant to Plea Not Being Made Voluntarily, Knowingly, and Intelligently & Mem. P. & A.); Tr. at 21-22, 27-31, 34-35 (Evidentiary Hr'g, Sept. 16, 2014). Castro also stated he believed he would receive a better deal than offered if he signed the Agreement. RA, tab 69 at 5 (Mot. Vacate Plea

Agreement Pursuant to Plea Not Being Made Voluntarily, Knowingly, and Intelligently & Mem. P. & A.). The People opposed and stated that Castro could not have been under any illusions of receiving a better deal once Castro read the Agreement, or when the trial court read the Agreement at the Change of Plea Hearing, or even after Castro affirmed there were no promises made outside the Agreement. RA, tab 77 at 4-5 (People's Opp'n Def.'s Mot. Vacate Plea Agreement Pursuant to Plea Not Being Made Voluntary, Knowingly, and Intelligently).

[51] The trial court acknowledged Castro's claims but found that Castro's plea was voluntary because Castro acknowledged there were no promises outside what was contained in the Agreement. RA, tab 98 at 4 (December 2014 Dec. & Order). The trial court also stated that the record clearly established that Castro's plea was not only voluntary but also that he was pleading guilty of his own free will. *Id.* We agree with the trial court's conclusions.

[52] Title 8 GCA § 60.60 governs the determination of a defendant's voluntariness when pleading guilty. This section states in pertinent part, "[t]he court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." 8 GCA § 60.60 (2005).

[53] The record supports the trial court's conclusions. In open court, the trial judge asked Castro appropriate questions to determine his voluntariness. At the Change of Plea Hearing, the trial court asked Castro if he was threatened, forced, or made any promises not written in the Agreement in exchange for his guilty plea. Tr. at 9 (Change of Plea). Castro answered "no" to all questions. *Id.* The court then confirmed with Castro, "[you are] voluntarily and without any coercion or any promises apart from what's written in this [Agreement], you're agreeing to enter into guilty pleas." *Id.* at 11. Castro answered in the affirmative. *Id.* It is evident that the trial

court inquired whether Castro was voluntarily entering a guilty plea without any outside promises, in compliance with 8 GCA § 60.60. At the Evidentiary Hearing, Castro could not indicate any portion in the Agreement stating his wife would not be arrested in exchange for Castro signing the Agreement. Tr. at 56 (Evidentiary Hr'g).

[54] Therefore, Castro's coercion argument does not present a "fair and just" reason supporting a withdrawal of his guilty plea.

### c. Ineffective Assistance of Counsel

[55] In his motion to withdraw, Castro claims that he was "not probably [sic] counseled on the penalty he would receive" and that he did not understand the full risks of going to trial and the law in relation to the facts. RA, tab 69 at 2-3 (Mot. Vacate Plea Agreement Pursuant to Plea Not Being Made Voluntarily, Knowingly, and Intelligently & Mem. P. & A.). He asserts that he entered into the Agreement based on alleged statements from his prior counsel, including counsel allegedly stating he was not ready for trial. *Id.* at 5. The People counter this argument, contending Castro expressed satisfaction regarding his prior counsel's representation, and Castro's testimony to the contrary was not enough to persuade the trial court. Appellee's Br. at 16.

[56] As stated previously, "[e]rroneous or inadequate legal advice may . . . constitute a fair and just reason for plea withdrawal."<sup>8</sup> *Bonilla*, 637 F.3d at 983 (second alteration in original) (quoting *McTiernan*, 546 F.3d at 1167). A "defendant who moves to withdraw a guilty plea

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<sup>8</sup> Application of the *Strickland* test is used to determine whether a defendant received ineffective assistance of counsel. This test requires a defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, in the context of plea withdrawals, a defendant need only show that ineffective assistance of counsel plausibly could have motivated his decision to plead guilty; nothing in the statutory rules require a defendant to show he was prejudiced in order to satisfy the "fair and just" reason standard. See *McTiernan*, 546 F.3d at 1167.

before a sentence is imposed is not required to show that he would not have pled, but only that the proper legal advice of which he was deprived *could have at least plausibly motivated a reasonable person in [the defendant's] position not to have pled guilty.*" *Id.* (alteration in original) (emphasis added) (quoting *Garcia*, 401 F.3d at 1011-12); *see also McTiernan*, 546 F.3d at 1167 (quoting *Davis*, 428 F.3d at 808). However, an "erroneous prediction by a defense attorney concerning sentencing does not entitle a defendant to challenge his guilty plea." *Garcia*, 909 F.2d at 1348 (citing *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir. 1989)).

[57] To illustrate, in *Bonilla*, the defendant pleaded guilty to a felony and as a result of this guilty plea, the defendant would have been deported after serving his sentence. 637 F.3d at 982. Prior to the change of plea hearing, a question arose whether the defendant would be deported if he pleaded guilty. *Id.* The defendant's attorney in that case said she would look into the matter but never did, and failed to provide the defendant with information about immigration consequences prior to the plea hearing. *Id.* The attorney explained she had mistakenly believed, at the time he pleaded, that he was a United States citizen. *Id.* The court concluded that had the defendant's attorney provided the defendant with advice about possible immigration consequences of his guilty plea, such advice could have at least plausibly motivated a reasonable person in the defendant's position not to have pleaded guilty. *Id.* at 986.

[58] Here, to determine whether Castro entered into the Agreement as a direct result of ineffective assistance of counsel, the trial court held an evidentiary hearing. Tr. at 8-9 (Evidentiary Hr'g). The court found Castro expressed satisfaction with his prior counsel and that counsel advised him of waiver of certain privileges by pleading guilty. RA, tab 98 at 4 (December 2014 Dec. & Order). The trial court concluded, based on the plea colloquy, the



record clearly established Castro's plea was voluntary, and therefore defense counsel did not render deficient performance. *Id.*

[59] At Castro's Change of Plea Hearing, the court asked if the Agreement was fully explained to him by his attorney, to which Castro replied it was. Tr. at 4 (Change of Plea). Castro also twice affirmed that he had ample time to discuss the charges, grand jury proceedings, and police report with counsel. *Id.* at 4, 23. Castro also affirmed he was advised of any potential immigration consequences that the Agreement may have. *Id.* at 10. Castro answered "yes" when asked if counsel gave him good legal recommendations and advice, and if he was satisfied with the help received. *Id.* To confirm Castro's satisfaction with his counsel, the trial court again asked Castro if he believed counsel did all that anybody could do to counsel him and assist him, and that he was satisfied with the advice and help received. *Id.* at 24-25. Castro also affirmed that he read all thirteen paragraphs of the Agreement, including a portion stating the Agreement was fully explained to him by his attorney, and he believed his attorney has done all anyone could do to counsel and assist him and he is satisfied with the advice and help received. *Id.* at 24; RA, tab 44 at 7 (Plea Agreement).

[60] Castro did affirm on numerous occasions he was satisfied with counsel. These statements contradict any subsequent attack on his guilty plea (i.e., the Evidentiary Hearing on September 16, 2014, where Castro was claiming dissatisfaction with counsel), and Castro may not have presented sufficient evidence to suggest that it was plausible that he would have chosen to go to trial had he been given proper legal advice.

[61] However, the trial court concluded that Castro's attorney did not render deficient performance simply because Castro's plea was voluntary. RA, tab 98 at 4 (December 2014 Dec. & Order). Although a plea is voluntarily made, that does not necessarily mean counsel

performed adequately and effectively. Castro's burden was to show that proper advice "could have at least plausibly motivated a reasonable person in [his] position not to have pled guilty." See *McTiernan*, 546 F.3d 1168. There is no indication that the trial court applied this standard. Moreover, the trial court failed to address Castro's allegations that counsel informed him on the day of trial that he was not ready to proceed with trial. As stated previously, the trial court simply made a blanket statement citing to the entire Evidentiary Hearing transcript that Castro entered into the Agreement on his own free will without a showing that the trial court gave consideration to Castro's statements at the Evidentiary Hearing that his lawyer stated he was not prepared to go to trial. At the Evidentiary Hearing, Castro stated he was in the holding cell hours before trial was to commence with jury selection, when his counsel made such statements. Tr. at 21 (Evidentiary Hr'g). Castro stated, "I was bombarded with a lot of doubts from [counsel] saying that there [is] no way we [are] . . . going to come out on top during the trial," and "[counsel] told me himself that he [is] not ready [for trial]." *Id.* at 21, 26. The trial court should have inquired into whether Castro's defense counsel's alleged statements were improper legal advice and that this could have at least plausibly motivated a reasonable person in Castro's position not to have pleaded guilty.

## V. CONCLUSION

[62] Although the trial court did not have the benefit of an appellate opinion from this court articulating the "fair and just" reason standard and did not address or apply this standard, the trial court did not abuse its discretion in denying Castro's motion to withdraw his guilty plea on the basis of contract law or officer misconduct. Likewise, the trial court did not err in finding that Castro entered into the Agreement voluntarily, knowingly, and intelligently because the trial court conducted a proper plea colloquy, and Castro was not coerced into entering into the

Agreement. However, the trial court should have inquired into whether Castro’s defense counsel’s alleged statements, that he was not ready for trial, were improper legal advice and that this could have at least plausibly motivated a reasonable person in Castro’s position not to have pleaded guilty had the alleged statements not been made.

[63] Based on the foregoing, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for the trial court to make an explicit finding of whether Castro’s defense counsel’s alleged statements of not being ready for trial were made and if they constituted improper legal advice; and if improper, whether the improper legal advice could have at least plausibly motivated a reasonable person in Castro’s position not to have pleaded guilty. If the trial court so finds, then it must vacate the judgement and permit Castro to withdraw his guilty plea under the “fair and just” reason standard.

/s/

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F. PHILIP CARBULLIDO  
Associate Justice

/s/

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KATHERINE A. MARAMAN  
Associate Justice

/s/

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ROBERT J. TORRES  
Chief Justice