No. 71748-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALVIN WALKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina Cahan

REPLY BRIEF

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A. ISSUES ADDRESSED IN MR. WALKER'S REPLY

1. Lawyer Torres established an attorney-client relationship with appellant Alvin Walker to represent him, but then, in delivering the final product of the representation, she endeavored to escape from any liability for providing ineffective assistance. Under these facts, was lawyer Torres laboring under an actual conflict of interest that warranted that Mr. Walker be allowed to withdraw his Guilty Plea?

> Answer: **Yes.** The Rules of Professional Conduct make it improper for a lawyer, who is hired to perform a Task, to perform that Task *conditionally* i.e., while requiring or endeavoring to require the client to promise to never argue the Task was performed ineffectively.

2. Was Mr. Walker's Guilty Plea entitled to be withdrawn, under the Due Process clause of the Fourteenth Amendment, for involuntariness, based on the circumstances described in the Appellant's Opening Brief?

> Answer: **Yes.** Under the totality of the circumstances, considering the dramatically too-short time which Mr. Walker was given to decide whether to *abandon* his highly tenable CrR 7.8 motion, and the degree to which his then-existing punishment was gravely *over-exaggerated* as 'Life in Prison,' his plea was involuntary.

B. REPLY ARGUMENT

1. TORRES' CONFLICT OF INTEREST MEANT THAT MR. WALKER SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS PLEA.

(a). The context of Mr. Walker's CrR 7.8 motion and the present appeal of the withdrawal denial. During the course of representation for purposes of post-judgment challenge, lawyer Torres had a conflict of interest based upon the lawyer's desire to insulate the representation from claims of ineffective assistance of counsel. Appellant's Opening Brief, at pp. 21-24.

In all practical effect, in this case, an attorney engaged for purposes of representation in a given task -- post-conviction resolution of the client's criminal case -- delivered that final work product with a clause in which the client was required to make a factual stipulation of satisfaction. Requiring Mr. Walker to sign such a stipulation – *as part of the plea itself* – can only be for the purpose of waiving any challenge the client might have that the attorney's work product was defective.

This is a conflict. Such a conflict completely undermines the very fundamentals of the representation.

(b). Mr. Walker's timely and proper arguments asking for withdrawal and to vacate the determinate 138 months sentence, so that Mr. Walker can go forward with his CrR 7.8 motion to

challenge his indeterminate ISRB sentence to Life maximum. with minimum 159 months. To summarize the case background, Mr. Walker had proceeded to the trial where he was convicted of assault in the second degree, rape in the second degree, and harassment, and he was given an "indeterminate" sentence of a maximum Life imprisonment but with review by the ISRB (Indeterminate Sentence Review Board) available commencing at the conclusion of a term of 159 months as sentenced. CP 9; see WAC 381-90-050(3).

When Mr. Walker later was represented by lawyer Torres to give up his post-trial CrR 7.8 motion, which he had filed in order to seek a new trial, he then entered a guilty plea to negotiated counts and obtained the now determinate sentence, which sets a term of 139 months. CP 13; Appellant's Opening Brief, at pp. 2-6.

In the present case, the applicable sentencing provisions, including the definitional section of RCW 9.94A.030, make clear that a "determinate" sentence means, *inter alia*, a sentence that states the imprisonment and custody "with exactitude [as to] the number of actual years [months]."

(i) The CrR 7.8 motion was foregone, in favor of Torres' advice to enter a guilty plea. After his trial, Mr. Walker entered into representation by lawyer Torres with IPNW and filed a CrR 7.8 motion,

in which he requested that the court should give him a second trial on the charges. CP 31-240. While awaiting his CrR 7.8 to be heard, under representation by Torres, Mr. Walker was persuaded to abandon that CrR 7.8 request for a second trial, and instead to plead guilty to lesser modified charges of assault first degree and entered an *Alford* guilty plea to rape third degree. CP 294-315, RP 4-21.

As part of that plea, lawyer Torres ultimately drafted the final version of the additional plea document entitled "Exhibit A to Statement of Defendant on Plea of Guilty." CP 304, 314. The exhibit added to the plea, additional language including a crossed-out statement, and finally, the language, "I am satisfied with the representation and counsel I have received from my attorneys[.]"

Mr. Walker now seeks to withdraw the plea, which he sought to do below <u>without delay</u>, and in which he precisely identified the reasons supporting his first argument for withdrawal. To begin with, a strong reason was that his lawyers had told him that his original sentence was basically a sentence to Life, and further, his lawyers told him that he would not prevail on his upcoming CrR 7.8 motion. CP 400-01; CP 402-03.

Notably, lawyer Torres ***admitted*** that the additional statement Mr. Walker was obligated to agree to -- that he was satisfied with the

representation he received -- was "designed to make it harder" for Walker to claim ineffective assistance of counsel. RP 93.

This is a crucial point of argument in this appeal. Torres admitted at the plea withdrawal hearing below that the 'satisfaction' clause she persuaded Mr. Walker to sign had the purpose of making it harder for her client -- Alvin Walker – if he ever wanted to argue in a court of law that she had failed to perform the task of the representation.

Put another way, lawyer Torres was hired to provide professional legal services in the specific, narrow and defined area of post-conviction representation. Here, this was Mr. Walker's challenge to the judgment under CrR 7.8, and any other related resolution of the case. A post-trial motion attacking the judgment always raises the related legal representation of any resulting resolution of the case by negotiated plea.[1]

But in this case, the attorney delivered the work product with a clause in which the client purported to waive any claim that the work was deficient. That is a fundamental conflict of interest.

For example, this case is like a situation where a surgeon, hired to perform an operation, delivers the surgery while simultaneously requiring

[1] The State recognizes that Innocence Project Northwest counsel was engaged, not to represent Mr. Walker in a limited scope solely for purposes of either a CrR 7.8 motion or a possible plea, but properly for his entire pursuit of relief after his direct appeal. Brief of Respondent, at pp. 2, 18. The purpose of the representation was to represent the defendant in pursuit of the broad goals of the post-judgment litigation.

the patient to factually repudiate any claim of malpractice, even where the malpractice might be greater than negligent – i.e., reckless, or knowingly defective.

Lawyer Torres' testimony at the plea withdrawal hearing *supported*, rather than defeated, Mr. Walker's claim of conflict of interest. When Torres testified at the plea hearing that the satisfaction clause "doesn't make a difference is what I would have explained to him," RP 93, counsel effectively asserted that the lawyer induced Mr. Walker to sign a clause that she later claimed was *meaningless*. This is either erroneous – or wrongful.

Either way, it demonstrates that the lawyer was in service to a different 'master' than the client's legal objectives. A lawyer is not supposed to serve two masters, only one – the client who hired the lawyer to represent him. This is a second, and similarly crucial point of argument in the appeal. The lawyer was centrally pursuing an interest that conflicted with the defendant's legal objectives. This is a very epitome of a violation of the Rules of Professional Conduct embodied in RPC 1.7 and RPC 1.8.

(ii) <u>In this appeal, Mr. Walker requests this Court of Appeals to reverse the court below when it wrongly denied his motion to withdraw his plea</u>. As noted, Mr. Walker filed a notice of appeal. Mr.

Walker is now respectfully asking this Court of Appeals that the trial court be reversed and that he be allowed to withdraw his plea to the determinate sentence, which the trial court imposed as a straight 138 months. CP 414-15. This will return Mr. Walker to the point in time where his judgment and sentence is 159 months to Life, but with a pending opportunity to seek vacation of that judgment under CrR 7.8 for a second chance at trial on the original charges. Mr. Walker contends that the CrR 7.8 motion, on its face, stated colorable claims for reversal of the jury's trial verdicts.

(c). <u>Alvin Walker's plea lawyer had an RPC conflict of interest, and Walker must be allowed to withdraw his guilty plea</u>. In its Brief of the Respondent, the State of Washington, for all practical purposes, urges this Court to decide Mr. Walker's appeal based on the contention that Mr. Walker received a generous plea offer leading to a favorable case outcome, and he should not 'complain.' <u>See</u> Brief of Respondent ("BOR"), at pp. 18, 19.

The State further goes on to announce that Mr. Walker's CrR 7.8 motion "was not likely to succeed," and contends, therefore, that he should be very satisfied with abandoning the 7.8 motion because he received a significant reduction in sentence by pleading guilty instead. BOR, at p. 15.

However, one need not delve very deeply below the subtext of this case to discover an important truth which the State refuses to acknowledge – if Mr. Walker's CrR 7.8 motion was so unlikely to succeed (as the State now says), *then why did the prosecutor offer such a significant reduction in sentence to persuade Mr. Walker to abandon that motion*?

There was a conflict of interest in this case. The Rules of Professional Conduct make it unethical for a lawyer to serve two conflicting interests. Here, lawyer Torres' effort at extracting statements that would undermine any claim of defective attorney performance is a conflict of interests.[2]

Remarkably, the State claims that Mr. Walker's factual statement in the plea exhibit/appendix A "that he was 'satisfied' with his attorneys' representation did not create an actual conflict of interest" because such a *factual* assertion is not a statement that would weigh against him being able to raise the legal issue of whether there was ineffective assistance. BOR, at p. 18.

[2] As Mr. Walker argued in his Opening Brief, RPC 1.7 proves that lawyer Torres had a conflict of interest because there was "a significant risk that [her] representation of [Mr. Walker was] materially limited by … a personal interest of the lawyer." RPC 1.7(a)(2). Likewise, "a lawyer shall not … make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement." RPC 1.8(h) (internal punctuation omitted); State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (word "shall" in a statute or court rule is presumptively mandatory).

Yet on the very same page, in a footnote, the State fully attempts to use other similar factual statements by Mr. Walker against him, arguing that Mr. Walker, after moving to withdraw his plea, "continue[s] to express his belief that his attorneys had done a 'great job' in negotiating[.]" BOR, at p. 18, and note 4.

As noted, just before he entered the guilty plea which he subsequently moved to withdraw under CrR 4.2, Alvin Walker had in hand a pending CrR 7.8 motion, in which he was seeking to reverse his May, 2010 jury trial convictions. The upcoming motion hearing was the result of a timely and properly brought post-conviction prayer for collateral relief, arguing not just one, but two independent grounds of ineffective assistance of trial counsel. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). It is well known that it is only in the rarest of instances in which the Court of Appeals will deem a criminal defendant's collateral attack on a *final judgment* so potentially meritorious under the applicable law that resolution of the party's pertinent factual contentions justifies further employment of the resources of the Superior Court in holding a reference hearing and determination on the merits. Yet the Court of Appeals in this case did just that.

As mentioned, Mr. Walker's motion and supporting memorandums sought outright reversal of the judgments entered on the jury verdicts and

sentences in 2010, based on *two bases*; both of these involving violations of his Sixth Amendment right to non-deficient trial counsel. This is in itself a high standard to meet. Ineffective assistance of counsel under Strickland demands that the movant must be able to show not tactical mistake, but lawyering errors that are so deficient that they would not have been committed by *any* competent trial counsel. Matter of Pirtle, 136 Wn.2d 467, 492, 965 P.2d 593 (1998) (further noting that a defendant, to prevail on claims of ineffective assistance, must indeed meet this "high burden" to show not only that his trial lawyer's mistakes were genuinely deficient, but also that these mistakes would probably have resulted in the jury issuing verdicts of not guilty if the lawyer had not made them).[3]

These two bases were (1) the failure of trial counsel to review medical records *already present in the client file* transferred to counsel by former counsel; and (2) the failure of trial counsel to obtain a material witness warrant for an individual, Phyllis Barquet, who was already identified as capable of testifying that she was the perpetrator and that Mr. Walker was innocent. The Court of Appeals, Division One, had so

[3] In general, a person seeking to collaterally attack his or her judgment such as via a PRP is required to make out a greater showing of prejudice than demanded in a routine direct appeal; thus the Supreme Court has said that actual and "substantial" prejudice must be made out where a constitutional violation is alleged. In re Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014) (citing In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992)).

emphatically endorsed the potential legal viability of Mr. Walker's post-conviction collateral attack on his judgment that it had remanded both of these matters to the King County Superior Court for the aforesaid reference hearing.

Thus, it was at that juncture, and time, that Mr. Walker forewent his opportunity to pursue his CrR 7.8 motion, and it is within this context, and for related and additional reasons, that Alvin Walker must be permitted to withdraw his plea of guilty and return to the stage of the case post-conviction. pp. 3-4; see also Brief of Respondent State of Washington, at pp. 20-21.

2. ALVIN WALKER'S GUILTY PLEA WAS INVOLUNTARY, WHEN ONE ANALYZES THE FACTS UNDER THE TOTALITY OF THE CIRCUMSTANCES.

Principles of due process require guilty pleas to be knowing, intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); In re Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3; CrR 4.2(d). Consistent with this constitutional mandate, according to court rule, a court must allow a plea to be withdrawn if (a) the plea was not valid when it was made, or (b) whenever it is necessary to correct a manifest injustice. CrR 4.2(f); see State v. McDermond, 112 Wn. App.

239, 243, 47 P.3d 600 (2002), overruled on other grounds, State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006). A manifest injustice is one "that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Washington courts recognize four nonexclusive indicia of per se manifest injustice: (1) ineffective assistance of counsel, (2) a defendant's failure to ratify the guilty plea, (3) an involuntary plea, or (4) the State's breach of the plea agreement.[4] Id. at 597. The defendant bears the burden of showing a manifest injustice. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

Here, Mr. Walker's plea was not voluntary because of the coercive effect of pressures surrounding the entry of the guilty plea and misrepresentations by counsel regarding the potential consequences of accepting versus rejecting the plea. Further, it was not knowing because there is insufficient evidence to support a finding that Ms. Torres explained Appendix A to the plea agreements to Mr. Walker. And indeed,

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[4] The Court in Taylor emphasized,

> If, however, facts presented to the court do not fall within one of the listed categories, ... we hold that there must at least be some showing that a manifest (i.e., obvious, directly observable, overt or not obscure) injustice will occur if the defendant is not permitted to withdraw his plea.

Taylor, 83 Wn.2d at 596.

with lawyer Torres claiming at the plea withdrawal hearing that the clause was meaningless, it is difficult, if not impossible, to hold that there was evidence to believe that it was properly explained. The State in its Brief of Respondent fails to provide an cogent argument as to how it can be said that lawyer Torres properly explained to Mr. Walker the meaning of a "meaningless" clause.

Finally, the timing of Mr. Walker's motion to withdraw a guilty plea—made within hours, if not minutes, of the plea hearing—although no longer a dispositive factor under CrR 4.2, lends weight to the conclusion that the plea must be set aside to correct a manifest injustice. Cf. State v. A.N.J., 168 Wn.2d 91, 107, 225 P.3d 956 (2010) (finding that defendant's claim that he did not understand the consequences of plea "may simply be more credible if made before sentencing than it would be if the defendant rolls the dice on a favorable sentence and is disappointed").

C. CONCLUSION

This Court should conclude that withdrawal of Alvin Walker's plea was necessary to correct a manifest injustice and reverse the trial court.

Respectfully submitted this 26 day of August, 2015.

s/ OLIVER R. DAVIS
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ALVIN WALKER, Appellant.	)	NO. 71748-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] AMY MECKLING, DPA [paoappellateunitmail@kingcounty.gov] [amy.meckling@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF AUGUST, 2015.

X_____

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