NO. 72854-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SANGTACHAN FONG,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

---

# BRIEF OF RESPONDENT

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## A. ISSUES PRESENTED

1. A year after he was sentenced on a charge of first-degree rape, appellant Fong moved to withdraw his guilty plea, claiming that his plea was involuntarily entered because he did not understand English and had not been provided with the services of an interpreter.

At an evidentiary hearing, Fong's prior counsel testified that he never experienced any difficulty communicating with Fong in English and that he did not believe Fong needed the assistance of an interpreter. The community corrections officer who interviewed Fong as part of the presentence investigation testified that he had no trouble communicating with Fong in English and did not think Fong needed an interpreter.

Fong testified that he knew only "a couple" of English words, that he had not understood anything his previous attorney had said to him before the plea, that he had asked his previous attorney for an interpreter but one was not provided, and that he had no idea he had even entered a guilty plea until he found himself in prison. The court found Fong's testimony not credible and found that he did not need the services of an interpreter. Did the trial court properly exercise its discretion when it denied Fong's motion to withdraw his plea?

2. Fong did not move to withdraw his plea on the claimed basis of ineffective assistance of counsel regarding immigration

consequences. At the plea-withdrawal hearing, Fong did not testify about immigration issues. Rather, he claimed that due to a language barrier, he had not understood anything at all that his attorney said to him.

Nevertheless, in response to questioning by Fong's attorney, Fong's previous counsel testified that he had made it clear to Fong that he was pleading guilty to an aggravated felony, that there was no way to make the plea "immigration-safe," and that the consequences "could be very adverse" and "could affect his ability to stay [in the country]." There was no testimony from anyone at the hearing that this advice was incorrect. Prior counsel testified that he was confident that Fong understood the possible immigration consequences to the plea. He testified that he advised Fong to speak to an immigration attorney if he had further questions.

Fong's prior counsel also testified that Fong had decided to plead guilty because of the strength of the evidence and because he wanted to avoid imposition of a firearm enhancement. There was no testimony from Fong (or anyone else) that he would not have pled guilty with a proper understanding of the plea's effect on his immigration status. Did Fong receive effective representation with respect to the immigration consequences of the plea?

## B. STATEMENT OF THE CASE

### 1. SUBSTANTIVE FACTS.

One afternoon in November of 2012, seventeen-year-old D.S.Z. returned home from school and went to her room. CP 25. Her stepfather, appellant Sangtachan Fong, came into her room with a revolver in a holster on his hip. Id. Fong told D.S.Z. that "there was an easy way and a hard way." Id. He told her that the easy way involved them "doing things," and the hard way was that he could kill them both right then. CP 25.

Fong told D.S.Z. that he loved her (but not like a daughter) and told her "not to tell" or her mother "would be ruined." CP 25. Fong then forced sexual intercourse onto D.S.Z. while the gun lay on the pillow next to her head. CP 26. After he was done, Fong removed his shirt, wiped D.S.Z. with it, and told her that if she got pregnant he would take her to have an abortion. Id. Fong left the home. Id. After he left, D.S.Z. got dressed and ran down the street to her grandmother's house, where they called 911. Id.

D.S.Z. also told the police about a prior instance of sexual abuse by Fong that had occurred when she was 14 years old. CP 26. D.S.Z.'s sister also reported being sexually assaulted by Fong. Id.

## 2. PROCEDURAL FACTS.

Charges were filed within 48 hours of the crime. CP 1-5. However, Fong fled and was arrested in Texas, where he waived extradition and was returned to King County. CP 91; 12/5/14 RP 21-22.

On March 27, 2013, Fong pled guilty to Rape in the First Degree – Domestic Violence. CP 8-36; 3/27/13 RP 4-21. As a result of the plea, the State agreed to dismiss a second charge of Attempted Rape of a Child in the Third Degree – Domestic Violence. CP 23-24, 29, 38. On August 2, 2013, Fong was sentenced to a standard-range indeterminate sentence of 123 months to life imprisonment. CP 37-47.

One year after he was sentenced, on August 1, 2014, Fong filed a CrR 7.8 motion to withdraw his guilty plea on the grounds that it was involuntarily entered. Supp. CP __ (Sub. No. 41, Note for Motion Docket, filed August 1, 2014). He claimed that he did not understand English and had not been provided with the services of an interpreter to either review the plea documents or to assist during the plea hearing. Id. The court held an evidentiary hearing and heard testimony from Fong, Fong's brother, Fong's previous counsel David Gehrke, and Community Corrections Officer ("CCO") John Pioli, who had interviewed Fong prior to drafting a presentence investigation report to the court. 12/5/14 RP; 12/9/14 RP.

After the hearing, the trial court determined that Fong had failed to meet his burden to prove the plea was involuntary and found his claim that he did not understand English "not credible." 12/9/14 RP 30-33. Fong appealed the trial court's denial of his motion to withdraw the plea. CP 128-29.

## 3. FACTS ALLEGED BY FONG THAT ARE NOT SUPPORTED BY THE RECORD.

Several key statements of alleged fact as stated in the Appellant's Brief are not supported by any citation to the record as required by RAP 10.3(a)(5), (6), or are unsupported by the citations presented.

### a. Assertion That Fong Does Not Read Or Write English.

Fong asserts that he cannot read or write in English. Brief of Appellant at 3. As support, he cites to his brother's testimony at 12/5/14 RP 12-13, and to CCO John Pioli's testimony at 12/9/14 RP 22-23. But the portion of his brother's testimony that he refers to indicates only that his brother was asked whether he *knew* if Fong had learned to read or write English while in school, to which his brother replied, "I don't remember that. It's been a long time." 12/5/14 RP 12-13. Moreover, Fong fails to cite to the following page of the transcript, where his brother was asked, "Do you know whether [Fong] was able to read and write in

English?" to which Fong's brother answered, "I think he reads a little bit." 12/5/14 RP 14. As for CCO Pioli, he was questioned about whether he asked Fong during his interview if he was able to read or write in English, and Pioli answered, "I don't remember asking him that, no." 12/9/14 RP 22-23.

Furthermore, Fong ignores the record where his previous attorney, David Gehrke, testified that Fong had told him that he could read English. 12/5/14 RP 25. Additionally, during his own testimony, Fong admitted that he could read and write in English to some degree: "Maybe minimal." 12/5/14 RP 67.

b. Assertion That Fong Advised The Trial Court At The Plea Hearing That He Was Not Able To Read English.

Fong claims that during the plea hearing, he "told the court that he was *not able* to read the Statement of Defendant on Plea of Guilty, but that his trial attorney had read it to him." Brief of Appellant at 7 (emphasis added). Fong cites to 3/27/13 RP 5 as support for his claim that he told the plea court he was unable to read the document:

| | |
|---|---|
| MS. BOHN: | Is it also accurate that you have an eleventh grade education? |
| DEFENDANT FONG: | Yes. |

| | |
|---|---|
| MS. BOHN: | I have in front of me, and you're welcome to share with me, a document that is called "Statement of Defendant on Plea of Guilty." Have you had the opportunity to go over this document in depth with your attorney, Mr. Gehrke? |
| DEFENDANT FONG: | Yes. He did last week. |
| MS. BOHN: | Okay. And did you read the document yourself, or did he read it to you, or a combination of the two? |
| DEFENDANT FONG: | He read it to me. |
| MS. BOHN: | Did you have any problems understanding him when he read this document to you? |
| DEFENDANT FONG: | No, no. |
| MS. BOHN: | Do you have any problems understanding the English language at all? |
| DEFENDANT FONG: | No, no. |

3/27/13 RP 5. Quite different than telling the court that he was *unable* to read the document, Fong merely advised that his attorney had read the guilty plea statement to him instead of having read it to himself.

c. Assertion That Fong "Stated That His Trial Counsel Failed To Advise Him Of The Immigration Consequences Of His Guilty Plea."

On appeal, Fong contends that:

> *At some point after his conviction, Mr. Fong learned of the immigration consequences of his plea.* Mr. Fong then moved to withdraw his guilty plea, and new counsel was appointed. Mr. Fong explained that he had not understood the terms of his plea, largely because he had not been provided with a Mien interpreter. *He also stated that his trial counsel had failed to advise him of the immigration consequences of his guilty plea.*

Brief of Appellant at 4 (emphasis added). However, Fong never filed his own declaration in support of the motion to withdraw the plea, and his attorney's declaration does not mention immigration issues at all. Supp. CP __ (Sub. No. 41, Note for Motion Docket, filed August 1, 2014). Moreover, Fong did not testify that his attorney had failed to advise him of the immigration consequences of his plea; he testified only that he did not understand *anything* his lawyer told him because he does not speak English. 12/5/14 RP 62-76. Indeed, Fong never mentioned immigration issues at all during his testimony at the evidentiary hearing. 12/5/14 RP 62-76.

As support for his assertion that he "stated that his trial counsel had failed to advise him of the immigration consequences of his guilty plea," Fong cites only to his previous counsel's testimony that he *did* advise

Fong regarding immigration, 12/5/14 RP 39-41, and to his attorney's oral argument to the court in support of his motion to withdraw the plea, 12/9/14 RP 30. Neither of those citations support the claim that Fong "stated" his attorney failed to properly advise him of the immigration consequences of his plea.

d. Assertion That Fong Would Not Have Pled Guilty Had He "Understood" The Immigration Risks.

With no citation to the record, Fong alleges on appeal that he "would not have taken a guilty plea and risked deportation, had he understood the risks to his refugee immigration status." Brief of Appellant at 13-14. No support for this statement exists in the record. As noted above, Fong did not testify regarding immigration issues, and he did not file a declaration in support of his motion to withdraw his plea. Supp. CP __ (Sub. No. 41, Note for Motion Docket, filed August 1, 2014); 12/5/14 RP 61-76. Counsel's declaration did not mention immigration issues. Id. In fact, Fong's prior counsel testified that Fong wanted to plead guilty because the evidence was strong, because Fong knew he would not "win," and because he wanted to avoid imposition of a firearm enhancement. 12/5/14 RP 43, 57. There is no support in the record for Fong's assertion that he would not have pled guilty had he "understood" the immigration risks of the plea.

## C. ARGUMENT

### 1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED FONG'S MOTION TO WITHDRAW HIS PLEA.

Fong alleges that at the time of his plea he did not understand English, did not understand that he was pleading guilty, and should have been provided with an interpreter. However, the trial court held an evidentiary hearing on the issue and considered the transcript of the plea colloquy, the testimony of Fong's prior attorney, the testimony of the CCO who interviewed Fong prior to sentencing, and the testimony of Fong and his brother. Finding Fong's claims not credible, the trial court properly exercised its discretion to deny Fong's motion to withdraw his plea.

A post-judgment motion to withdraw a guilty plea is governed by CrR 7.8. See CrR 4.2(f). Pursuant to CrR 4.2(f), if a motion to withdraw the plea is made *before* judgment, the court must allow a defendant to withdraw his plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." However, when the motion to withdraw the plea is made *after* judgment, it must meet the requirements of both CrR 4.2(f) and CrR 7.8(b). State v. Lamb, 175 Wn.2d 121, 127-29, 285 P.3d 27, 30-31 (2012).

A defendant may establish a manifest injustice under CrR 4.2(f) by showing that his plea was involuntary or that his trial counsel was ineffective in the plea process. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). A defendant has the burden of establishing a manifest injustice "in light of all the surrounding facts of his case." State v. Dixon, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984); see also State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (describing the burden defendant must satisfy in order to establish a manifest injustice). Proving a manifest injustice is a demanding standard, made so because of the many safeguards taken when a defendant enters a guilty plea. State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

Fong moved below to withdraw his plea pursuant to the "catchall" provision of CrR 7.8(b)(5). Supp. CP __ (Sub. No. 41, Note for Motion Docket, filed August 1, 2014). To obtain relief under CrR 7.8(b)(5), a defendant must show extraordinary circumstances relating to "irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." State v. Aguirre, 73 Wn. App. 682, 686, 871 P.2d 616 (1994) (quoting Shum v. Dep't of Labor & Indus., 63 Wn. App. 405, 408, 819 P.2d 399 (1991)). Such relief should be granted only in the limited circumstances "where the interests of justice

most urgently require." State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989).

A trial court's denial of a motion to withdraw a plea will be overturned only in the case of an abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons, or when its decision is manifestly unreasonable. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). A decision is based on untenable reasons if it rests on an incorrect standard, or if the court's factual findings are unsupported by the record. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable if it falls "outside the range of acceptable choices, given the facts and the applicable legal standard." Id. This court defers to the trial court on credibility issues. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

An involuntary plea creates a manifest injustice supporting its withdrawal. Taylor, 83 Wn.2d at 597. "Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances." State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). When a defendant admits to reading, understanding, and signing a

guilty plea statement, the plea is presumed voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Indeed, when the court engages the defendant in a colloquy on the record and satisfies itself that the plea is voluntary, the presumption of voluntariness is "well nigh irrefutable." State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citations omitted). See also In re Pers. Restraint of Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980) (court justified in relying on defendant's acknowledgement that he had read plea statement prepared by his attorney and that it was true).

The transcript of the plea colloquy itself contradicts Fong's claim that his English was poor and that an interpreter was required. On several occasions, Fong answered the prosecutor with a full sentence, responsive to the question asked:

| | |
|---|---|
| MS. BOHN: | . . . Have you had the opportunity to go over this document in depth with your attorney, Mr. Gehrke? |
| DEFENDANT FONG: | Yes. He did last week. |
| | . . . |
| MS. BOHN: | And are those your initials, "SF," after those crossed-out paragraphs? |
| DEFENDANT FONG: | That's an "ST." |
| MS. BOHN: | That's an "ST"? Okay, sorry. Are those your initials? |

DEFENDANT FONG: Yes.

. . .

MS. BOHN: Has anyone made any promises to you other than what is set forth in documents that you've gone over with your attorney?

DEFENDANT FONG: Can you repeat, please?

3/27/13 RP 5, 11-12.

Moreover, Fong's previous attorney, David Gehrke, testified that he had spent ten to twelve hours with Fong prior to the plea and that he never once thought that Fong needed an interpreter. 12/5/14 RP 23, 50. Gehrke testified that no one – not Fong or any member of his family – ever indicated that Fong needed the assistance of an interpreter. 12/5/14 RP 50, 52. Gehrke testified that Fong spoke in full sentences, asked context-appropriate questions during their discussions, and gave appropriate details relating to the case. 12/5/14 RP 30, 51, 56. Gehrke testified that he "didn't feel the need to have an interpreter at any time," and that if he had thought that Fong needed an interpreter, he would have done what was necessary to secure one. 12/5/14 RP 57-58.

Additionally, CCO John Pioli interviewed Fong for approximately two hours as part of the presentence investigation ordered by the court. 12/9/14 RP 8. The purpose of the interview was to gather as much detail

as possible about Fong's background. 12/9/14 RP 7. Pioli testified that at no time during the lengthy interview did Fong ever ask for an interpreter, and Pioli never thought that Fong needed one. 12/9/14 RP 9. Pioli testified that Fong spoke in complete sentences, gave appropriate answers to every question he was asked, provided significant detail regarding his life, and talked about his past relationships, his children, his work history, and his education. Id. Pioli testified that if he had thought Fong needed an interpreter, he would have stopped the interview and requested one. 12/9/14 RP 12. At the conclusion of the interview, Pioli drafted a written report, CP 82-92. Pioli testified that, "Everything that's in this report that I attribute to Mr. Fong was told to me by him in English." 12/9/14 RP 17. The report belies Fong's assertion that he did not speak English and did not understand the plea.[1] CP 82-92.

Indeed, Fong's claim that he required the assistance of an interpreter was based *entirely* on his own self-serving and implausible

[1] The report contains significant background information about Fong that Pioli would not have known had he been unable to communicate with Fong. Moreover, Fong himself demonstrated awareness that he had pled and was pending sentencing at the time he spoke to Pioli. See CP 89 (Fong talking about where he would live once released from prison); CP 91 (Fong indicating that he would follow the conditions the court placed on him at sentencing).

testimony.[2] Fong claimed that he had only met with Gehrke approximately three times, for 20 minutes each time, or at most for about three hours (12/5/14 RP 68, 72), that he did really not understand anything that Gehrke said (12/5/14 RP 63, 73), that he asked Gehrke twice for an interpreter but one was never provided (12/5/14 RP 68, 76), that he did not understand anything written on the Statement of Defendant on Plea of Guilty (12/5/14 RP 64) nor did he understand any questions asked of him at the plea hearing (12/5/14 RP 74), that he did not even realize he had pled guilty until he ended up in prison after sentencing (12/5/14 RP 69-70), and that he only spoke "a couple" of words of English, such as "eat," "water," and "shower" (12/5/14 RP 65, 70-71).[3]

At the close of the evidentiary hearing, the court stated, "[T]he bottom line is that I don't find Mr. Fong credible in his statement that he doesn't understand English." 12/9/14 RP 30-31. In so finding, the court

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[2] Although Fong's brother testified generally about Fong's education and employment background, his testimony did not support Fong's claim that his plea was involuntary. Indeed, he testified that he believed that if Fong had trouble understanding the proceedings, he would have asked for assistance. 12/5/14 RP 17.

[3] Fong also testified that he remembered "starting" the Automotive Technician Program at South Seattle Community College, but that he did not remember taking classes and had dropped out because he could not understand the language. 12/5/14 RP 75. However, Fong told CCO Pioli that he completed the program and earned a certificate in 2006. CP 86. Pioli called the program and confirmed that Fong was enrolled in the program for over two years – from January of 2004 to March of 2006. CP 86; 12/9/14 RP 14-15. Additionally, Fong testified that he dropped out of high school because "it was too difficult for him to understand." 12/5/14 RP 65. However, he told Pioli that he had quit high school to start working after he impregnated his girlfriend. CP 86; 12/9/14 RP 15-16.

referenced the plethora of evidence that Fong spoke English – the plea colloquy itself, the testimony of Gehrke and Pioli, and Pioli's presentence investigation report. Credibility determinations are strictly within the province of the trial court and are not reviewable on appeal. State v. Teshome, 122 Wn. App. 706, 715, 94 P.3d 1004 (2004) (citing Camarillo, 115 Wn.2d at 71).

Fong produced nothing to support his motion other than his own self-serving and unbelievable statements that the trial court found to be not credible. He failed to establish a basis for relief under CrR 7.8(b)(5) and the trial court properly exercised its discretion to deny his motion to withdraw the plea.[4]

## 2. FONG HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Fong also contends that he received ineffective assistance of counsel regarding the immigration consequences of his plea. He has failed to make such a showing.

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[4] On appeal, Fong frames the issue as the denial of his right to due process. However, the factual basis for this claim (that he entered the plea without the assistance of a needed interpreter) was litigated and rejected by the trial court in the motion to withdraw the plea. Because the trial court determined that Fong failed to establish the factual basis for the claim he makes on appeal, abuse of discretion is the proper standard of review. As noted above, the trial court found Fong's claim that he did not understand the plea proceedings to be not credible. Because the court's credibility determination is unassailable and because the court properly exercised its discretion to deny his motion, the State will not address Fong's due process claim further.

A criminal defendant has the right to effective assistance of counsel in the plea process. U.S. Const. amend. VI; In re Pers. Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993). Claims of ineffective assistance of counsel in the plea bargaining context are governed by Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of establishing ineffective assistance of counsel falls on the defendant. Id. at 687. To prevail, a defendant must show that (1) his attorney's conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice. Id. at 687-88; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). In this context, prejudice exists only if the defendant can demonstrate 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. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Riley, 122 Wn.2d at 780-81.

If the defendant fails to establish either prong of the Strickland test, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689.

a. Fong Fails To Establish Deficient Performance.

In Padilla v. Kentucky, the Supreme Court held that in order to provide effective assistance of counsel, defense counsel must advise a noncitizen client regarding the risk of deportation. 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Recognizing that immigration law is complex, the Court acknowledged that in most situations the deportation consequences are uncertain. Id. at 369. The Court concluded that, "When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Id. When the "deportation consequence is truly clear," the duty is to give correct advice. Id.

Thus, deficient performance can be established by showing that: 1) the deportation consequences are truly clear and counsel gave the defendant incorrect advice; *or* 2) the deportation consequences are uncertain and counsel failed to advise the client that the conviction could carry a risk of adverse immigration consequences. Padilla, 559 U.S. at 368-69; see also State v. Sandoval, 171 Wn.2d 163, 172, 249 P.3d 1015 (2011).

Here, Gehrke testified that he told Fong the offense was an "aggravated felony," that he did not see any way to make the plea "immigration-safe," that the plea "could have very adverse consequences

in terms of citizenship and could affect his ability to stay here." 12/5/14 RP 37-38. When asked whether Fong understood that he "would" be deported, Gehrke answered, "I made it clear to him, and I'm confident he understood, that a plea to this would have negative consequences. I'm not sure I told him he would definitely be deported. I told him that he had serious issues there, and I also told him that if he had further questions, he could talk to an immigration attorney." 12/5/14 RP 40-41.

The record does not establish whether there are "truly clear" immigration consequences to Fong's plea, or if so, what they are. There is no indication that the advice Gehrke gave was incorrect, or that he failed in his responsibility to properly advise Fong regarding immigration.

b. Fong Fails To Establish Prejudice.

As noted above, in order to establish the prejudice prong under Strickland, a defendant must demonstrate a reasonable probability that had he been given appropriate advice, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. at 59; Riley, 122 Wn.2d at 780-81. A defendant must "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372. Although Fong asserts on appeal that he "would not have taken a guilty plea and risked deportation, had he

understood the risks to his refugee status," Brief of Appellant at 13-14, this claim is unsupported by the record. Indeed, the record is devoid of any evidence to support Strickland's prejudice prong.

Rather, the record supports the conclusion that Fong pled guilty because of the strength of the evidence and his desire to avoid imposition of a firearm enhancement. 12/5/14 RP 43, 57. Fong has failed to establish that a decision to reject the plea bargain would have been rational under the circumstances. He has failed to establish either deficient performance of counsel or prejudice therefrom. His ineffective assistance of counsel claim must be rejected.

## D. CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the denial of Fong's motion to withdraw his guilty plea.

DATED this 28th day of October, 2015.

Respectfully submitted,

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By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jan Trasen, at jan@washapp.org, containing a copy of the Brief of Respondent, in STATE v. SANGTACHAN FONG, Cause No. 72854-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

10-28-15
Date

Done in Seattle, Washington

CERTIFICATE OF SERVICE
BY ELECTRONIC MAIL