NO. 32870-8-III

Consolidated with No. 329909

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

APOLINAR PEREZ GOMEZ,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raised numerous issues in both his direct appeal and the consolidated Personal Restraint Petition (PRP). Many of these issues overlap and will be addressed together. They can be summarized as follows;

Issues listed in PRP:

A. Mr. Perez Gomez's Trial Counsel's Performance Was Deficient Under The Sixth Amendment on the Basis of His Failure to Provide Specific Immigration Consequences Warnings Prior to Plea.

B. Mr. Perez Gomez Was Not Informed Of His Rights To Pursue A Direct Appeal By The Trial Court As Required Under The Court Rules And Case Law.

C. Mr. Perez Gomez Was Prejudiced Under Strickland As A Result Of His Trial Counsel's Deficient Performance.

Issues listed in Appeal:

A. Is Trial Counsel's Performance Deficient If He Fails to Ascertain His Client's Precise Immigration Status in Order to Effectively Research the Immigration Consequences of Conviction? (Assignments of Error No. 1 and No. 2)

B. Is Trial Counsel Automatically Relieved of His Sixth Amendment Duties Under Padilla and Sandoval if The Defendant Has Already Chosen Immigration Counsel To Assist Him Following the Resolution of His Criminal Case? (Assignments of Error No. 1 and No. 2)

C. Is Trial Counsel Relieved from Offering Plea Alternatives During Negotiations if He is Informed By the State That It Will Refuse to Consider any Plea Alternatives

Offered on the Basis of Avoiding Immigration Consequences? (Assignment of Error No. 3)

D. May Trial Counsel Omit Discussing the Pros and Cons of Filing an Appeal When His Client is Accepting a Negotiated Plea Deal?

E. Is Prejudice Established Under the Strickland Standard When A Defendant Enters a Plea As the Result Of His Trial Counsel's Deficient Performance When It Would Have Been a Logical Choice to Proceed to Trial?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

A. Trial counsels representation of Appellant was not deficient he did ascertain immigration consequences of a guilty plea.
B. Trial counsel did advise his client of the immigration consequences. Further, so did Appellants immigration attorney whom trial counsel and appellant consulted with throughout the proceeding?
C. Trial counsel did proffer alternative plea agreement alternatives to the State. The State indicated no offer that would avoid immigration consequences will be offered.
D. There is no requirement that counsel discuss filing an appeal when a plea agreement by its very nature negates the ability to appeal.
E. Trial counsels performance was not deficient.

THE FOLLOWING ARE ANSWERS TO THE THREE ISSUES SET OUT IN THE CONSOLIDATED PERSONAL RESTRAINT PETITION.

F. Trial counsel was not deficient. He clearly did inform Petitioner of the immigration consequences of the plea.
G. Appellant was not verbal informed of his right to appeal by the trial court, he was informed that he was waiving that right by his plea. He has now been allowed to appeal, therefore there is no harm and/or this was invited error.
H. Trial counsel's performance was not deficient.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed. Certain sections of the record shall also be set forth in the appendices to this document.

Petitioner was arrested on August 2, 2011 after attempting to eluding police in a high speed chase that ended when he hit a barrier after he exited the freeway, he was intoxicated at the time of his arrest. (CP 1-2) He charged with one count of Attempting to Elude a Pursing Police Vehicle and one count of Driving Under the Influence of Intoxicating Liquor and was arraigned on August 11, 2011. On August 12, 2011 his trial attorney Mr. Scott Bruns was appointed. (CP 4-6) On September 29 and again on October 3, 2011 the case was set for "plea & sent." (CP 8-9)

On October 3, Dora Ornelas a certified court interpreter for Yakima County signed the Statement of Defendant on Plea of Guilty indicating;

The defendant signed the foregoing statement in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

X (a) The defendant had previously read the entire statement above and that the defendant understood it in full;

X (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or

X (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The Interpreter's Declaration is included below.

Interpreter's Declaration: I am a certified or registered interpreter, or have been found otherwise qualified by the court to interpret in the SPANISH language, which the defendant understands. I have interpreted this document for the defendant from English into that language. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. (CP 18)

In that statement it indicates;

5. I Understand I Have the Following Important Rights, and I Give Them Up by Pleading Guilty
(a) The right to a speedy and public trial by an impartial jury in the county here the crime was allegedly committed;
(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
(c) The right at trial to hear and question the witnesses who testify against me;
(d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
(e) The right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or I enter a plea of guilty;
(f) The right to appeal a finding of guilt after a trial. (CP 11)(Emphasis mine.)

And later;

(i) **If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States**. (CP 14) (Emphasis mine.)

This statement was apparently read to the defendant on two occasions. The first has not been supplied by Appellant the second

reading is not in the record due to an "Audio skip(s)" in that specific and important portion of the hearing.

> THE COURT: Sir, ***we're going to kind of go through this again like we did just a few minutes ago.*** I now have a Statement of Defendant on Plea of Guilty to the charge of eluding.

Finally the following colloquy between the trial attorney, Mr. Bruns and the court states:

> THE COURT: All right. I am going to find there is a factual basis to support the plea to this being knowingly, intelligently, and voluntarily made, and I will accept the plea.
>
> **MR. BRUNS: Also, for the record, I need to point out that in accord with current case law, I have fully gone over the potential effects on my client with regard to his potential deportation as a consequence of this plea. And he was fully advised and understands those consequences.**
> **And despite the potential consequences, his plea is voluntary in this case.**
>
> THE COURT: **And you agree with that, sir?**
>
> THE DEFENDANT: **Yes**.
>
> THE COURT: All right. Thank you. (CP 58)

At some point Petitioner was apparently taken into custody by a federal agency. An attachment to the consolidated PRP indicates that Gomez stated to an agent of the United States Department of Homeland Security that he, Gomez, was not a citizen of the United States, his parents

were not citizens, nor had he served in the U.S. military. He stated that he was a citizen of Mexico. He claimed that he did not have any applications or petitions pending that would allow him to remain lawfully in the United States. He further stated that he last entered the United States at or near an unknown place, on or after 2004. (Petitioner has been in this country unlawfully for at least eleven years) In doing so, he is in violation of section 212(a)(6)(i) of the immigration and Nationality Act, as amended. (PRP attachment J) Gomez listed his address for service as 1114 Rock Ave. Yakima, WA 98902.

The offense was committed on August 6, 2011, Gomez was sentence on October 6, 2011. Petitioner was sentenced to "63" days with credit for time served. It would appear that he was released on the date of sentencing. During that time he spoke to and was advised by another attorney whose practice is immigration law. There is no indication that at any time between his release and now Gomez has been placed into custody. Clearly Petitioner's address is not a jail or holding facility therefore Petitioner is not under restraint. Gomez admits he is one in custody on the first page of his PRP. Nothing in Gomez's Declaration states that that the immigration "consequences" he now claims are based on this criminal conviction. (PRP Attachments E and I)

Further, Petitioner has presented this court with nothing that would

definitively indicate that the reason that he is subject to removal or deportation has anything to do with the conviction addressed in these consolidated matters. It would appear from the documentation that Gomez supplied that he is subject to removal or deportation not from this criminal conviction but based on the fact that he unlawfully entered this country. (Attachment J PRP.)

III. ARGUMENT

Appellant has filed both an appeal and a personal restraint petition and those two matters have been consolidated by this court for review.

Initially there were motions filed regarding Appellant's right to file the appeal Appellant alleged that there was no advisement of the right to appeal and therefore in the interests of justice he must be allowed to file an appeal. The State purposefully chose to not dispute the right to file the appeal, however by that choice the State did not waive any right to object to any other reason why the issues in that appeal should be denied by this court. The PRP filed by Petitioner was filed exactly one year after his Judgment and Sentence was entered.

1. Standards of Review PRP

Rule 16.4. PERSONAL RESTRAINT PETITION--GROUNDS FOR REMEDY

> (a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is

> under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).
> (b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.
> (c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

In re Personal Restraint of Dalluge, 162 Wn.2d 814, 177 P.3d 675 (2008) "Dalluge can prevail if he can show he is under "unlawful" (as meant by RAP 16.4(c)) "restraint" (as meant in RAP 16.4(b)). Petitioners are restrained if, among other things, they are confined or are "under some other disability resulting from a judgment or sentence in a criminal case." RAP 16.4(b); *see also* In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 149, 866 P.2d 8 (1994). (Citations omitted.)

Gomez is under no restraint that he can or has identified as arising from the conviction upon which this PRP is based. In re Martinez, 171 Wn.2d 354, 256 P.3d 277 (2011);

> Next, we must determine whether Mr. Martinez is entitled to relief. To obtain collateral relief by means of a personal restraint petition, a petitioner must demonstrate unlawful restraint. RAP 16.4(a). In addition, where an alleged error is constitutional in nature, a petitioner must establish not only constitutional error but also "actual and substantial prejudice." *Haverty,* 101 Wash.2d at 504, 681 P.2d 835.
> "**A petitioner is under 'restraint' if the petitioner has limited freedom because of a court decision in a civil**

> **or criminal proceeding, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case."** RAP 16.4(b). While Mr. Martinez appears to have completed his sentence for first degree burglary, he meets the restraint requirements nevertheless, due to the stigma and collateral consequences associated with his conviction. *See In re Pers. Restraint of Powell,* 92 Wash.2d 882, 887, 602 P.2d 711 (1979) (" [A]n unlawful conviction can serve as a restraint on liberty."); *In re Pers. Restraint of Richardson,* 100 Wash.2d 669, 670, 675 P.2d 209 (1983) (allowing petitioner who had completed sentence to bring personal restraint petition to "remove a serious blot from his record"). (Footnote omitted, Emphasis mine.)

The "restraint" that Petitioner finds himself subject to is not "unlawful" nor is it a "blot" on his record and most specifically it has not been proven to this court that the alleged "restraint" is a result of the judgment or sentence in this or any other criminal case.

Gomez can meet none of the requirements of RAP 16.4, this court can and should deny this petition based solely on this factor. In addition Gomez was allowed file a direct appeal wherein he raises these issues negating the possibility of this PRP falling within any section of RAP 16.4(c). Gomez alleges that the transcript of an interview of attorney Granados suffices to support the claim that this conviction is the basis for Gomez's possible removal. A removal that has not been demonstrated to this court in any form other than the one document from Homeland Security that would indicate his removal is based on his unlawful entry not

on this conviction. Attorney Gomez replies "No" when asked "..apart from this criminal case, does Mr. Perez-Gomez have any bars to immigration relief other than this case." This is clearly incorrect as seen in the document from Homeland Security that indicates that the fact of Gomez's unlawful entry was the basis for Homeland Security issuing the order regarding removal.

It is the State's belief that this court need look no farther at this case in order to deny review, however the State will however address the issues raised.

RESPONSE TO ALLEGATION - APPEAL "A", "B" "C", "E" AND PRP "A", "C" . INEFFECTIVE ASSISTANCE.

As indicated in the caption to this section of the State's brief many of the issues raised by Appellant fall under the theory of ineffective assistance of counsel. The issues are stated different ways but they all allege that trial counsel's performance was ineffective or "deficient" in regard to advisement of the immigration consequences of Appellant's plea.

It is very clear from the record above that these allegations are baseless. This is a defendant whose attorney not only discussed the consequences but insured that proof of that was placed in the record. Trial counsel also spoke directly to an attorney who specialized in

immigration law. Therefore there is no doubt that Appellant was afforded his rights pursuant to Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Gomez has not met his burden for either the appeal to go forward or his PRP. To obtain relief in a personal restraint petition, the defendant must show he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law. In re Personal Restraint of Benn, 134 Wn.2d 868, 884, 952 P.2d 116 (1998) (citations omitted); In re Personal Restraint of Krier, 108 Wn. App. 31, 37-38, 29 P.3d 720 (2001); In re Personal Restraint of Cook, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990).

A personal restraint petitioner must state "with particularity facts which, if proven, would entitle him to relief." Bald assertions and conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i). Further, a "petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, cert denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992).

There is nothing in this PRP that would allow any relief to be granted. Gomez was allowed to file his appeal, albeit late and raise whatever issues he desired. The State specifically did not file any

objection to this action so that there could be no claim that Gomez was denied this right. The problem for Gomez arises with the simple fact that now that he has filed his appeal the issues raised are baseless. Therefore this allege denial is harmless and moot.

The Washington State Supreme Court recently issued its decision in In re Pers. Restraint of Tsai, 183 Wn.2d 91, ___ P.3d ____ (2015). Tsai deals with the application of the time bar of RCW 10.73.090(1) and RCW 10.73.100(6). Tsai did not overrule prior reliance by the court on Teague. Instead, the court expanded collateral relief for claims of ineffective assistance regarding immigration consequences based upon the statutory requirements of RCW 10.40.200.

Tsai, involved the consolidated case of two individuals, Tsai and Jagana. Tsai plead guilty, but later pursued a motion to withdraw his guilty plea in the trial court which was denied. He did not appeal or otherwise pursue the motion further. Three years later, he filed a second motion to withdraw his guilty plea, contending that his petition was exempt from the one-year time bar in RCW 10.73.090(1) under RCW 10.73.100(6). The Court of Appeals dismissed Tsai's PRP as time barred.

Jagana had also pled guilty and did not pursue a direct appeal. Four years after his plea, he moved to withdraw his guilty plea. The matter

was transferred to the Court of Appeals for consideration as a personal restraint petition. The Court of Appeals initially found the petition timely, but the Washington State Supreme Court remanded the case for consideration in light of Chaidez v. United States, 568 U.S. ___, 133 S. Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013). The Court of Appeals reconsidered and found the petition untimely.

In Tsai, the Washington State Supreme Court determined that "[a]s applied to Washington, Padilla did not announce a new rule, but did effect a significant change in the law under RCW 10.73.100(6)." Tsia, at 99.[1] The court went on to hold that RCW 10.40.200, adopted in 1983, required a defendant to be advised by counsel of immigration consequences, which Padilla ultimately required in 2010. *Tsai*, at 101. "Because Padilla did not announce a new rule under Washington law, it applies retroactively to matters on collateral review under Teague." Tsai, at 103.

The court held that Padilla, effected a significant change in the law under RCW 10.73.100(6), because the Washington appellate cases before Padilla held that improper or deficient advice which was required by RCW 10.40.200 could not be ineffective assistance. Tsai, at 105, 107.

> Padilla superseded the theory underlying these decisions—that "anything short of an affirmative misrepresentation by counsel of the plea's deportation consequences could not

[1] Majority did not abandon Teague v. Lane, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

> support the plea's withdrawal." Sandoval, 171 Wn.2d at 170 n.1.

In re Pers. Restraint of Tsai, 183 Wn.2d 91, 107, ___ P.3d ____ (2015).

The statements contained in the transcript of Ms. Granados, filed with the PRP, support the State's position that Mr. Bruns acted in accordance with the law when he advised Gomez regarding the plea to this charge. See specifically pages 8-11, 14, of the Granados transcript where this attorney whose area of emphasis is immigration states what she communicated to trial counsel. Appellant himself confirmed that there was a discussion between he and his trial counsel regarding the ramification of his plea. There is no error here.

> **MR. BRUNS: Also, for the record, I need to point out that in accord with current case law, I have fully gone over the potential effects on my client with regard to his potential deportation as a consequence of this plea. And he was fully advised and understands those consequences.**
> **And despite the potential consequences, his plea is voluntary in this case.**
>
> THE COURT: **And you agree with that, sir?**
>
> THE DEFENDANT: **Yes**. (CP 58)

The court in Tsai addressed Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as follows:

> When determining whether a defense attorney provided effective assistance, the underlying test is always one of "reasonableness under prevailing professional

> norms." *Id.* at 688. While simple to state in theory, this test can be complicated to apply in practice. The court must engage in a fact-specific inquiry into the reasonableness of an attorney's actions, measured against the applicable prevailing professional norms in place at the time. *Id.* at 690. It is thus impossible to "exhaustively define the obligations of counsel [ ]or form a checklist for judicial evaluation of attorney performance." *Id.* at 688. Nevertheless, effective representation "entails certain basic duties, " such as a duty of loyalty, a duty to avoid conflicts of interest[,] ... the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Id.*

Appellant makes an unsupported statement/allegation that trial counsel somehow violated the standards set forth in Strickland, supra, when he discussed the case with his client and after that discussion followed the choice of his client who "chose to plead guilty in the hopes that the immigration authorities would be merciful towards him. He did not want to wait any longer for a trial and wanted to get out of the jail as soon as possible." (Appendix A at sub 8h.)

When this court engages in a fact-specific inquiry into the reasonableness of Mr. Bruns actions it will find that he acted with "reasonableness under the prevailing professional norms." The edicts of Strickland, Padilla and Tsai have been met. There is no basis for this court

to grant this appeal or review the allegations set out in the PRP regarding the allegations of ineffectiveness of Mr. Bruns' counseling of his client.

Trial counsel's actions met all applicable norms.

APPEAL ISSUE "C" and "D" PLEA NEGOTIATIONS.

Gomez claims that the State is somehow required to negotiate a plea agreement that takes into account the fact his immigration status. The State has no obligation to enter into ***any*** negotiations and Gomez does not and cannot cite to one single case that requires the State to enter into a plea bargain with any defendant let alone one that is tailored to the fact that a defendant is in this country illegally.

Gomez would have this court require the State to work out a plea agreement that would "take into account" the immigration status of an individual. Taken to the "logical" conclusion this would require the State to offer some charge that would not implicate federal exclusion or removal while not requiring a similar consideration for a citizen of the United States who had committed the exact crime. There is absolutely no basis for this in statute or case law. And once again Gomez has cited to nothing to support this claim. "Where no authority is cited in support of a proposition, the court is not required to search for authority and will not give consideration to such errors unless it is apparent on the face of the assignments that they have merit." State v. Alden, 73 Wn.2d 360, 363, 438

P.2d 620 (1968). State v. Cunningham, 23 Wn. App. 826, 857, 598 P.2d 756 (1979) "We note at the outset that issues raised on appeal that are not supported by citation of authority will not ordinarily be considered unless well taken on their face. Griffin v. Department of Social & Health Servs., 91 Wn.2d 616, 590 P.2d 816 (1979).

Citation to In re Pers. Restraint of Tsai, 183 Wn.2d 91, ___ P.3d ____ (2015), Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) does not satisfy the requirement that a petition must be supported by the law. These cases address the consequences of immigration in a plea setting they are not "the legislature and appellate courts communicating a clear message to the criminal justice system" that the State must offer a plea bargain ***ever*** or tailor one if offered that would theoretically comport with federal immigration laws. (Appellant's Brief at 11) This argument presupposes that the State must apparently now be completely knowledgeable of federal immigration law, the immigration status of each person who appears before the court and then blend this into a plea offer that takes into account the fact that that the defendant may be deported at some future time.

Even if Gomez could cite to any law from any jurisdiction requiring the State to offer a plea bargain, the record contained in the PRP,

Gomez's appeal and, the record set forth above as well as the letter from Gomez's trial counsel contained in Appendix A make it clear that that there was an active negotiation between the State and Mr. Bruns, Gomez's trial attorney. The letter from Mr. Bruns indicates that he took into consideration the immigration consequences of the charged offense and discussed with the State other options. This issue has no basis for review, the claim is refuted by the facts presented in the letter from Mr. Bruns which is corroborated by the taped statement of Ms. Granados that is attached to the PRP of Gomez.

From the letter in Appendix A:

> 7. Yes, I discussed this with the prosecutor on the case and argued for leniency. I suggested pleading to the DUI charge and either dropping the felony eluding or doing Diversion on the eluding charge. I was advised by the deputy prosecutor that he had no authority to even contemplate such a resolution as the policy of his office (as set by the elected prosecutor) was that they would give no consideration to a defendant's immigration status in fashioning their offers. Their position was that they shouldn't give an undocumented defendant a better deal than they would to a citizen-defendant. He also wasn't inclined to give an (sic) leniency (other than a credit for time served sentence) because the length of the chase, the high speed, the running of the red light and the crash at the end all were indicative of a degree of recklessness that did not warrant leniency.
> …
> d. I did ask Apolinar about his immigration status, which is why I tried so hard to negotiate a resolution with the prosecutor for either a dismissal of the felony, or placing the case into the prosecutor's Diversion program. The

prosecutor would not agree to either solution.
…
h. After explaining the difficulties of settling the case and the obstacles with taking the case to trial, Apolinar chose to plead guilty in the hopes that the immigration authorities would be merciful towards him. He did not want to wait any longer for a trial and wanted to get out of the jail as soon as possible.
(Appendix A)

State v. Holm, 91 Wn. App. 429, 434-5, 957 P.2d 1278 (1998) sets forth the obligation of a defense attorney. The record herein meets or exceeds the standard set forth in Holm:

> Defense counsel has an ethical obligation to discuss plea negotiations with a client. James, 48 Wn. App. at 362. This duty includes not only communicating actual offers, but also keeping the defendant apprised of developments in plea discussions and providing sufficient information to enable the client to make an informed judgment whether or not to plead guilty. Id.; see American Bar Ass'n Standards for Criminal Justice, Standards 4-6.1 and 4-6.2 [hereinafter "ABA Standards"].
>
> ...
>
> We have found two published decisions from other jurisdictions analyzing the specific issue raised here: People v. Brown, 177 Cal. App. 3d 537, 223 Cal. Rptr. 66 (1986), review denied (May 29, 1986); and Harris v. State, 437 N.E.2d 44 (Ind. 1982). In Brown, the California Court of Appeals concluded:
>
> [T]he duty [of defense counsel] includes the obligation to initiate plea negotiations where the facts and circumstances of the offense and its proof, as well as an assessment of available factual and legal defenses, would lead a reasonably competent counsel to believe that there is a reasonable possibility of a result favorable to the accused through the process of plea negotiations. Where counsel has initiated plea negotiations, the duty requires that the negotiations be pursued to conclusion, whether or not a

bargain is ultimately struck.

RESPONSE TO ALLEGATION "B" FROM CONSOLIDATED PRP PETITIONER'S WAS NOT INFORMED OF RIGHT TO APPEAL.

For the first time on appeal and in the PRP Gomez alleges that he was not advised of his right to appeal. The remedy for this allegation is the ability of the complaining party to file an appeal. That has occurred in this case. The State purposefully did not object to the late filing so that this issue would be moot. An issue is moot "when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief." Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). "[a court] may decide a moot issue if it involves matters of continuing and substantial public interest. To determine whether a case involves the requisite public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination to provide future guidance to public officers, and (3) the likelihood that the question will recur." Thomas v. Lehman, 138 Wn.App. 618, 622, 158 P.3d 86 (2007) (citation omitted).

There is nothing here for the court to review, the Appellant asks for the right to appeal that was granted by this court.

Once again, Gomez has not met his burden for either the appeal to

go forward or his PRP. To obtain relief in a personal restraint petition, the Petitioner must show he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law. In re Personal Restraint of Benn, 134 Wn.2d 868, 884, 952 P.2d 116 (1998) (citations omitted) A personal restraint petitioner must state "with particularity facts which, if proven, **would entitle him to relief**." (Emphasis mine.) In re Rice, 118 Wn.2d at 886. Bald assertions and conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); In re Rice, 118 Wn.2d at 886. Further, a "petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." In re Rice, 118 Wn.2d at 886.

There is nothing in this PRP that would allow any relief to be granted. Gomez was allowed to file his appeal, albeit late, and raise whatever issues he desired. The State specifically did not file any objection to this action so that there could be no claim that Gomez was denied this right. The problem for Gomez arises with the simple fact that now that he has filed his appeal the issues raised are baseless. Therefore this alleged denial is harmless and moot. There is no other relief that could be granted regarding this allegation. Gomez has had occasion to raise and all issues he believed were relevant, he has been granted the remedy to this alleged error.

As is all too often ignored a plea negates the "right" to appeal. State v. Wiley, 26 Wn. App. 422, 425, 613 P.2d 549 (1980), "A guilty plea generally waives the right to appeal. State v. Saylors, 70 Wn.2d 7, 422 P.2d 477 (1966). A guilty plea has been said to be "itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969).

While the court rule mandates that the defendant be advised of the right to appeal there is no such rule regarding his attorney doing the same with a plea. In this case it is obvious that it the waiver of this right had been spoken of because the Statement of Defendant on Plea of Guilty contained the acknowledgment of the waiver. Mr. Bruns indicated in the letter he submitted to appellate counsel that he spoke directly to Appellant, obviously there was no problem with a language barrier. It would appear that at the end of the plea hearing the **trial court** did advise Gomez of his right to appeal, that right is one which by case law is generally inapplicable to a plea hearing. If there had been an issue that was agreed to and the plea was for the purpose of preserving the record for appeal the record would have so noted, it did not. Gomez took a bargained for plea, a contractual arraignment and was benefited by that arrangement he now has what is often called "buyer's remorse." There is no reason nor basis for this court to overturn the actions of the trial court. State v. Cater, 186

Wn.App. 384, 345 P.3d 843 (2015) "A defendant who pleads guilty retains a limited right to appeal collateral questions such as the validity of the statute, sufficiency of the information, and an understanding of the nature of the offense. See State v. Cross, 156 Wn.2d 580, 621, 132 P.3d 80 (2006); State v. Osborne, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984)."

See also, State v. Smith, 134 Wn.2d 849, 852-3, 953 P.2d 810 (1998)

> A voluntary guilty plea acts as a waiver of the right to appeal. State v. Johnson, 104 Wash.2d 338, 342-43, 705 P.2d 773 (1985). The State bears the burden to show valid waiver of the right to appeal. Perkins, 108 Wash.2d at 217, 737 P.2d 250.
>
> When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Perez, 33 Wash.App. 258, 261, 654 P.2d 708 (1982).

Further, while not set forth in facts of this case to the degree described in State v. Perkins, 108 Wn.2d 212, 737 P.2d 250 (1987) there was a written acknowledgment that the defendant was waiving "The right to appeal a finding of guilty after a trial." (CP 11)

State v. Moon, 108 Wn. App. 59, 62, 29 P.3d 734 (2001):

> "However, a trial court must allow withdrawal of a guilty plea 'to correct a manifest injustice.' "Walsh, 143 Wn.2d at 6 (quoting CrR 4.2(f)). A manifest injustice is described as "'an injustice that is obvious, directly observable, overt, not obscure.' "State v. Paul, 103 Wn. App. 487, 494, 12 P.3d 1036 (2000) (quoting State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996)). Such an injustice occurs when (1) the defendant has been denied effective assistance of counsel; (2) the defendant or one authorized by the

> defendant did not ratify the plea; (3) the plea was involuntary; or (4) the prosecution breached the plea agreement. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (citing State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)).

IV. CONCLUSION

The interview of Appellant/Petitioner's other attorney, Ms. Granados in conjunction with the letter from trial attorney Scott Bruns make it perfectly clear that Gomez was properly advised of the immigration consequences of his plea. He took advantage of the State's offer and plea to one count receiving the benefit of the other charge being dropped and according to his immigration attorney that was also an enhancement that was not charged. The interview of Petitioner's immigration attorney also indicate that Mr. Bruns had attempted to gain an offer that would not impact Gomez's immigration status, yet another indication that Mr. Bruns acted as effectively as possible in obtaining a favorable offer from the State.

The State does not have any obligation to plea bargain this or any other case. The offer made by the State was fair, equitable and just given the facts. Facts and an offer that were equally applied to Mr. Gomez, to otherwise would be discriminatory on the part of the State.

For the reasons set forth above this court should deny allegations set forth in both the appeal and the personal restraint petition.

Respectfully submitted this 15th day of October 2015,

By: s/ David B. Trefry
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APPENDIX A

SCOTT A. BRUNS
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3/20/14

To:
Brent De Young
Attorney at Law
P.O. Box 1668
Moses Lake, WA 98837

Re: Apolinar Perez Gomez

Dear: Mr. De Young

I am responding to your letter of March 3, 2014, inquiring into my handling of the defense of Mr. Apolinar Perez Gomez in the criminal case brought against him in Yakima County Superior Court under cause number 11-1-01110-6. I am responding to the questions in your letter as follows:

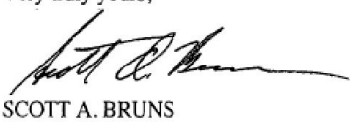
1. Although I have no notes on it, to the best of my recollection I ascertained Apolinar's immigration status when I first met with him at the arraignment. I believe there was already an immigration hold on him at the Yakima County Jail.
2. As far as I could detemine, ICE had a hold on Apolinar for being in the United States as an undocumented alien.
3. Apolinar's family had hired an immigration attorney, Tamerton Granados. I kept her up to date on the status of my negotiations with the prosecution.
4. I advised Apolinar of the evidence against him and the risks of going to trial. I told him there was a high liklihood of conviction as he was chased for several miles by a state trooper, who tried to pull him over for weaving over the center line of the roadway. In the course of the chase he accelerated to speeds of over 100 miles per hour, and then drove through a red light at one of the most dangerouse intersections in Yakima County. He then got onto the freeway and when he exited he crashed his car into a jersey barrier. His blood alchol level then came back at .104/.106. The chase was many miles in length and the witnesses against him were virtually all law enforcement officers who were in on the chase.
5. I did not advise Apolinar to not go to trial, but I did advise him that under the state of the evidence it would probably be fruitless. I also advised him that if the case were to go to trial then the sentence afterwards would perhaps be harsher than anything negotiated with the prosecutor. This would be due to the prosecution arguments that the high speed, running the red light, the length of the chase, the alcohol, and the crash were all factors that warranted an exceptional sentence beyond the standard range.
6. I consulted with Apolinar's immigration attorney, Tammerton Granados.
7. Yes, I discussed this with the prosecutor on the case and argued for leniency. I suggested pleading to the DUI charge and either dropping the felony eluding or doing Diversion on the eluding charge. I was advised by the deputy prosecutor that he had no authority to even contemplate such a resolution as the policy of his office (as set by the elected

prosecutor) was that they would give no consideration to a defendant's immigration status in fashioning their offers. Their position was that they shouldn't give an undocumented defendant a better deal than they would to a citizen-defendant. He also wasn't inclined to give an leniency (other than a credit for time served sentence) because the length of the chase, the high speed, the running of the red light and the crash at the end all were indicative of a degree of recklessness that did not warrant leniency.

8. Comments on the Declaration of Apolinar Perez Gomez:
    a. The immigration authorities met with Apolinar before I was assigned to his case
    b. I don't recall how many times I discussed the case with Apolinar but when I did speak with him he was comfortable speaking to me privately without an interpreter.
    c. I did not tell Apolinar that his best option was to plead guilty but neither did I give him an overly optimistic assessment of his chances at trial. I explained the evidence and asked him about any potential counters he may have had to that evidence.
    d. I did ask Apolinar about his immigration status, which is why I tried so hard to negotiate a resolution with the prosecutor for either a dismissal of the felony, or placing the case into the prosecutor's Diversion program. The prosecutor would not agree to either solution.
    e. I was present with the interpreter when the plea/judgment and sentence documents were read to Apolinar. She was very thorough and Apolinar had no questions. In addition, I seperately highlighted the more important parts of the documents for him.
    f. We never discussed an appeal, as Apolinar gave up his right to appeal by pleading guilty. We did discuss the right to make a collateral attack within one year of the date of sentence.
    g. I have no idea what discussions took place between Apolinar and Ms. Granados, however, I did discuss the case with Ms. Granados. In light of the prosecution's refusal to deal on the felony charge, she advised it severely limited Apolinar's options.
    h. After explaining the difficulties of settling the case and the obstacles with taking the case to trial, Apolinar chose to plead guilty in the hopes that the immigration authorities would be merciful towards him. He did not want to wait any longer for a trial and wanted to get out of the jail as soon as possible.

If you have any questions please give me a call.

Very truly yours,



SCOTT A. BRUNS

DECLARATION OF SERVICE

I, David B. Trefry state that on October 15, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Mr. Brent De Young at deyounglaw1@gmail.com

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

DATED this 15th day of October, 2015 at Spokane, Washington.

By: s/David B. Trefry

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