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36109-8-III
36425-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,
v.
MARIA FRANCISCA CONTRERAS, Appellant.
and
IN RE THE PERSONAL RESTRAINT OF MARIA
FRANCISCA CONTRERAS, Petitioner

APPEAL CONSOLIDATED WITH
PERSONAL RESTRAINT PETITION

RESPONDENT'S BRIEF

Respectfully submitted:



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TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	2
V. <u>ARGUMENT</u>	15
A. <u>The Defendant's Disbelief that the Superior Court Meant What it Said is Not a Justiciable Claim</u>	15
B. <u>The Defendant's Failure to Appeal the 2014 Ruling Forecloses Re-Litigation of the <i>Padilla</i> Claim</u>	16
C. <u>The Defendant Received Effective Assistance of Counsel in Pleading Guilty</u>	17
VI. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

State Cases

Page No.

<i>In re Brown</i> , 143 Wn.2d 431, 21 P.3d 687 (2001)	17
<i>In re Taylor</i> , 105 Wn.2d 683, 717 P.2d 755 (1986)	17
<i>In re Yung-Cheng Tsai</i> , 183 Wn.2d 91, 351 P.3d 138 (2015)	10
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 829 P.2d 746 (1992)	17
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	17, 18
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007)	17, 18
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	17
<i>State v. Sandoval</i> , 171 Wn.2d 163, 249 P.2d 1015 (2011)	passim

United States Supreme Court Cases

Page No.

<i>Christianson v. Colt Indus. Operating Corp.,</i> 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).....	17
<i>Padilla v. Kentucky,</i> 559 U.S. 356, 103 S.Ct. , 176 L.Ed.2d 284 (2010).....	passim
<i>Strickland v. Washington,</i> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	17

Statutes and Rules

Page No.

CrR 7.8.....	1, 16
ER 602	13
RCW 9.94A.640	9, 10
WAC 388-271-0010	2
WAC 388-271-0030	2, 3
WAC 388-406-0010	3
8 U.S.C. § 1101(a)(43).....	20
8 U.S.C. § 1227 (a)(2).....	19, 20

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction of the Appellant/Petitioner.

III. ISSUES

1. Does the appeal present a justiciable claim where it asserts without any factual basis that the superior court held the 2018 CrR 7.8 motion to be time barred?
2. Is the *Padilla* claim foreclosed where the same issue was raised and decided in a 2014 CrR 7.8 motion and where the Defendant did not seek review of that decision?
3. Has the Defendant demonstrated that her attorney provided deficient advice on immigration consequences of the guilty plea
 - where the transcript provides uncontradicted evidence that, counsel referred the Defendant to an immigration attorney prior to the change of plea,

- where the Defendant does not demonstrate that the conviction renders her deportable,
- where the Defendant has not been deported in the ensuing 15+ years,
- where the Defendant does not claim or demonstrate that there is any action to deport her, and
- where she cannot demonstrate that she would have proceeded to trial on the state's "ironclad" case and obtained a better outcome?

IV. STATEMENT OF THE CASE

In 2003, the Defendant/Appellant/Petitioner Maria Francisca Contreras was charged with theft in the first degree (welfare fraud), identity theft in the first degree, and tampering with a witness. CP 3-5. It is easy for the State to prove welfare fraud using DSHS records. Appendix A at 3 ("ironclad cases" with defendant answering DSHS questions "all in writing").

The Department (DSHS) works with clients who speak a variety of languages and provides full interpretation and translation services to them. WAC 388-271-0010 – WAC 388-271--0030. The

Department provides “fully translated communication” in the client’s primary language, including pamphlets, brochures, forms, and letters. WAC 388-271-0030. A person who applies for cash assistance does so by filling out a form¹ in the appropriate language and signing it. WAC 388-406-0010(6). The applicant may also be required to interview² and provide proof of information. WAC 388-406-0010(7). Therefore, a welfare fraud case is made by showing the applicant’s signatures on forms which give conflicting or false statements.

In this case, the Defendant was confronted with her and her husband’s signed statements, demonstrating that she had used false social security numbers to misrepresent her household income in order to qualify for public assistance to which she was not entitled. CP 1-2. The Economic Services Administrations (ESA), a division of DSHS, would have the employer records of the husband’s income as reported under his true SSN. The Defendant admitted that she had obtained her husband’s signature by misrepresenting the content of

¹ <https://www.dshs.wa.gov/sites/default/files/FSA/forms/pdf/14-001.pdf> (includes specific warnings that false statements may result in prosecution and loss of other rights and benefits);

<https://www.dshs.wa.gov/sites/default/files/FSA/forms/pdf/14-001sp.pdf> (in Spanish)

² <https://www.dshs.wa.gov/sites/default/files/FSA/forms/pdf/14-078.pdf> (eligibility review form); <https://www.dshs.wa.gov/sites/default/files/FSA/forms/pdf/14-467.pdf> (mid-certification review form).

the forms. CP 2. So confronted, she asked the investigator not to tell her husband, who she expected would be angry to learn how she had implicated him in her criminal activity. CP 2.

When Ms. Contreras came to court, she was advised of her rights in both English and Spanish. CP 9-12. Gail Siemers was appointed to represent her. CP 13. Approximately three months later, the Defendant pled guilty to a single count of welfare fraud. CP 22-31. She admitted that she fraudulently obtained \$4299.00 in assistance to which she was not entitled. CP 28, 65-66. The standard range for this single offense was 0-60 days. CP 23. The prosecutor agreed to dismiss the other two counts and to recommend 15 days of work crew or community service. CP 25.

The Defendant completed her GED and CNA in the United States and reads and writes in English. CP 59-60, 69. Nevertheless she was provided the services of OAC Certified Court Interpreter Jeff Adams for her change of plea and sentencing. CP 58, 68.

She acknowledged that:

- she was not a U.S. citizen (CP 63);
- she was not present in the country legally (CP 63);
- her change of plea could affect her ability to stay in the U.S. (CP 63); and

- the conviction could affect her ability to obtain public assistance for at least six months (CP 64-65).

The Honorable Judge Schacht found that the Defendant's plea was knowing, intelligent, and voluntary. CP 29, 66-67.

The Statement on Plea of Guilty acknowledges that a plea of guilty may be grounds for deportation, exclusion from admission, or denial of naturalization. CP 25. The Defendant Contreras signed that her lawyer had explained the Statement to her; that they had "fully discussed" all of the paragraphs and attachments; and that she understood the entire Statement and had no further questions. CP 29. Ms. Siemers signed that she had "read and discussed this statement with the defendant and believe[s] that the defendant is competent and fully understands the statement." CP 29. The interpreter signed a declaration swearing that he had reviewed the Statement with the attorney and client; that Ms. Contreras indicated her understanding of its contents and consequences including possible deportation; and that he believed Ms. Contreras understood the document and its consequences. CP 31.

Judge Schacht signed that the Defendant asserted that:

- she had read the entire statement;

- Ms. Siemers read the entire statement to Ms. Contreras; and
- the Defendant understood it in full.

CP 28.

At the change of plea hearing, the Defendant was supposed to have already paid restitution in full. CP 62. She had not. *Id.* She asked to plead guilty anyway, promising that she would cash a check and make the payment the next day. *Id.* The prosecutor explained, that if the Defendant failed to do as she promised, the State would ask to withdraw the plea agreement. *Id.*

At her sentencing hearing two weeks later, the Defendant admitted that yet again she had failed to fulfill her promise. CP 71. She had only paid \$2100; she asked to be permitted to pay the rest in installments. CP 71-72 (\$100 paid in cash on the day of sentencing). Ms. Siemers informed the court that the Defendant had no husband and was in need of child support enforcement services. CP 73. Neither party asked to withdraw the guilty plea.

The prosecutor Michelle Mulhern indicated that she would agree to the payment plan, although she recognized that the Defendant may be deported before full restitution could be made.

I have cut Ms. Contreras a break here. Usually my

request is for full restitution or we go forward on all the charges. In this case, I realize that \$4,000 is quite a lot of money for this lady to come up with.

As far as the deportation issue goes, I don't know what INS or the Department of Homeland Security will do. Usually for theft cases they are not extraditable by deportation, but given the current climate, I don't know what their position is right now. Certainly that's not my call or anybody else's call. That is the federal court's [call] in the hearing over there.

CP 72. The court interpreter translated the Defendant's written allocution. CP 11. The Defendant explained that she took the public assistance to pay for childcare so she could go to school where she obtained her GED and CNA. CP 69. She said she wanted to repay the State, "because they helped me a lot." CP 69.

... But I don't want to have a criminal record because maybe I'll never be able to get my papers fixed to be able to stay in this country. And all the time that I was in school will not count and that was through a lot of work and a lot of effort.

Also, judge, sir, I want to tell you that it's very difficult to maintain my family, my five children. And because of that, I committed this mistake because it's because of that to be able to. I'm asking for your pardon and that of the State's, your Honor.

CP 69-70.

MS. SIEMERS: Your Honor, Maria has been very concerned about how this is going to make her future turn out. ***She does understand that she could very well be deported. And I have referred her to the immigration lawyers to address that problem even***

before we entered the plea.

She was enthusiastic about taking the plea, thought it was what she needed to do to take care of it. Then she stepped back a little bit, so I don't know if she was aware of how serious this is, but I believe her heart is in the right place. And I think that she cares a lot about her children. They are certainly a beautiful group of children.

However, there are other places she can get money and assistance and not have to steal. And that is what indeed she did and did for some time. So she is sorry. She can't be sorrier

CP 70-71 (emphasis added). Judgment was entered. CP 34-46.

Eleven years later, in 2014, the Defendant made a motion for relief from judgment, arguing that Ms. Siemers had provided ineffective assistance of counsel under *Padilla v. Kentucky*, 559 U.S. 356, 103 S.Ct. 1473, 176 L.Ed.2d 284 (2010) such that Ms. Contreras should be permitted to withdraw her guilty plea. CP 200-05 ("counsel must advise correctly that a conviction will lead to deportation, or warn generally that it might do so, depending on the clarity of the immigration rules."). The motion argued that the client was advised that she *could* be deported, rather than that she *would* be deported. CP 203.

The State argued that *Padilla* did not have retroactive effect such that the motion was time barred. CP 81-86. The Defendant

replied that the Washington Supreme Court was then considering the question of retroactivity in the consolidated cases of *Tsai* and *Jagana*. CP 90.

The superior court denied the *Padilla* motion under the time bar. CP 111. It also denied the motion on the merits, holding: "The defendant has failed to show any deficiency in either the Guilty Plea statement or the Judgment and Sentence that would justify setting the Judgment aside pursuant to CrR 7.8." CP 112. The Defendant filed a letter requesting reconsideration or clarification. CP 121. It was denied. CP 129. The Defendant filed a more formal motion for reconsideration, which was also denied. CP 130-35, 137. The Defendant did not appeal following the denial of reconsideration.

That same year, the Defendant filed a second motion to vacate and seal the conviction, arguing that the Defendant had committed no new crimes and had satisfied all terms of her sentence. CP 101-05. An offender may vacate a conviction for a class B felony if she remains crime free for ten years after the issuance of the certificate of discharge. RCW 9.94A.640. Ms. Contreras failed to pay her LFO's for ten years, therefore the Certificate of Discharge did not issue until August 12, 2013. CP 107. The prosecutor explained that the earliest

the Defendant may apply for relief under RCW 9.94A.640(2)(d) is August 12, 2023. *Id.* After receiving the State's response, the Defendant abandoned the motion. CP 143-44 (pro se motion to strike).

Four more years passed. In 2018, the Defendant filed a Motion to Vacate Sentence and Withdraw Guilty Plea – arguing that, under new case law, *Padilla* claims are an exception to the one-year time bar. CP 141-58 (citing *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015)). The motion concluded, but did not argue, that “the uncontroverted facts show that Ms. Contreras did not receive specific warnings from her counsel regarding the certainty of deportation following the plea and conviction.” CP 144.

The State responded that Ms. Siemers had provided the client effective assistance consistent with *Padilla*. CP 161-63.

Here, immigration consequences were at the forefront of Defendant's mind throughout the criminal proceedings. At her change of plea, she acknowledged that a conviction could affect her ability to stay in the country. At sentencing, she and her attorney both made a record that they had spent significant time investigating the potential consequences of pleading guilty, and Defendant knew a conviction would affect her ability to stay in the country. Her attorney even confirmed that Defendant consulted with an immigration attorney prior to pleading guilty.

CP 143.

The Defendant provided a declaration claiming that:

- Luciano Santana was involved in the welfare fraud;
- She met with Ms. Siemers in her office once before the change of plea and once after, as well as in court;
- There was no interpreter during the office meeting and that she “probably understood about 80% of everything [Ms. Siemers] said”;
- Ms. Siemers did not see a legal defense in the client’s excuses and explained that the Defendant was facing years of incarceration unless they could negotiate a plea deal;
- The only discussion about immigration consequences was the review of the Statement of Defendant on Plea of Guilty with the interpreter; and
- She would not have pled guilty if she had known that she would get deported.

CP 187-90.

The motion was denied again on the merits. CP 193-95; RP 2.

This time the court made no mention of the time bar.

- 1) The defendant affirmed at her change of plea that she understood she faced immigration consequences due to her citizenship status. At sentencing, the defendant additionally reflected she was concerned about immigration consequences, but she agreed to proceed. The defendant’s attorney made a record that the defendant had been referred to an immigration attorney prior to change of plea and was aware of the potential immigration consequences she faced. Therefore, the defendant was properly advised of the immigration consequences of the plea,

consistent with *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010) and *State v. Sandoval*, 171 Wn.2d 163, 249 P.2d 1015 (2011).

- 2) The defense has failed to show any deficiency in either the Guilty Plea statement or the Judgment and Sentence that would justify setting the Judgment aside pursuant to CrR 7.8.

CP 193-94. The Defendant filed a notice of appeal, and this appeal followed.

The Appellant's Brief (AB) only argues that the judge's decision is something other than it appears, i.e. "the judge considered the matter simply time-barred." AB at 4.

The Defendant also filed a personal restraint petition (PRP) and a motion to consolidate, explaining that the PRP is necessary in order to supplement the record with new declarations. The PRP argues that Ms. Siemers' assistance was ineffective under *Padilla*. It attaches declarations from attorney William McCool and from paralegal Shirley Diamond.

Prior to *Padilla*, Mr. McCool states he was "probably rarely, if ever, following the dictates of *Padilla* and *Sandoval*." PRP at 58. DPA Mulhern casts doubt on this assertion. Appendix B at 2 (indicating that Mr. McCool had a criminal case which should have

given him reason to consider immigration advice for guilty pleas “well before either *Padilla* and *Sandoval* had been decided”). The declarations of the actual attorneys involved in the case, attached to this response, explain that Walla Walla County judges in the 1990’s were ahead of the curve and highly sensitive to immigration consequences. App. A at 2-3; App. B.

Mr. McCool offers his opinion that he is a superior attorney to Ms. Siemers who was a public defender and who he believes once failed to request a proper jury instruction on self-defense. PRP at 58, 60-61. He “find[s] it rather difficult to accept” that Ms. Siemers would have provided superior assistance to his by referring her client to an immigration attorney prior to making a change of plea. *Id.* But, in fact, the 2003 transcript demonstrates that Ms. Siemers had referred Ms. Contreras to an immigration attorney. CP 70-71. Mr. McCool also provides gratuitous and conclusory hearsay statements of anonymous clients – without any apparent awareness of their possible motives. PRP at 59. He has no personal knowledge of Ms. Siemers’ practice, which would be required under ER 602 before a statement may be included in a declaration. App. A at 5-6.

Ms. Diamond explains that she assisted Mr. De Young in

reaching out to Ms. Siemers in the summer of 2018. PRP at 63. Ms. Diamond sent a copy of the case file to Ms. Siemers together with a proposed declaration and a bank draft of \$200, which Ms. Siemers cashed. PRP at 63-64. Ms. Diamond professes shock that an attorney would accept payment for legal work performed. PRP at 64.

Ms. Siemers reviewed the materials, but was unable to assist, because the client's allegations are false. PRP at 64 (“[i]t appears Ms. Contreras is not telling the whole truth”), 66. For example, contrary to the client's declaration, there was in fact an interpreter during any meetings at Ms. Siemer's office. *Id.*; App. A at 2-3; App. B at 3 (Walla Walla judges “routinely” authorized public defenders to hire an interpreter for use outside of the courtroom); CP 13 (authorizing interpreter services in this case). As a public defender Ms. Siemers was highly sensitive to immigration consequences very early in her career. PRP at 64; App. A at 1-2.

On July 31, 2018, Ms. Siemers advised that she could not sign the declaration Mr. De Young had proposed, “as it is untrue and incomplete.” PRP at 64, 66. Ms. Diamond provides a portion of Ms. Siemers' emailed response. PRP at 64, 66. The entirety is attached here as Appendix C.

When Mr. De Young replied that he expected a declaration in exchange for the \$200, Ms. Siemers explained that she had accepted the money for the cost of her time already spent reviewing and replying. PRP at 66; App. A at 4 (payment accepted for “chasing up the details of the case, contacting the Court and corresponding with his office”). She perceived that he was attempting “to shame me into signing a [falsified] affidavit.” App. A at 4. “Never had I been asked to write an affidavit in exchange for money.” *Id.* On August 31, 2018, Ms. Siemers explained that she had lost trust in Mr. De Young who was trying “to alter my testimony.” PRP at 67. “If I sign a declaration, I will want to file it directly with the court.” *Id.*

Despite Ms. Siemers’ clear refusal to provide a declaration (App. A at 5; App. C), Mr. De Young filed motions for extension of time on September 24 and October 4 professing to be waiting for Ms. Siemers’ declaration.

V. ARGUMENT

A. THE DEFENDANT'S DISBELIEF THAT THE SUPERIOR COURT MEANT WHAT IT SAID IS NOT A JUSTICIABLE CLAIM.

As the State has expressed in the Motion to Dismiss Appeal and Reply on Motion to Dismiss Appeal, the Appellant's Brief appears only to be a kind of placeholder for the PRP. The State proposed that the Defendant may want to seek voluntary dismissal of the appeal where it does not meet the purposes of RAP 3.3. Reply on Motion at 2-3 ("The maintenance of the fiction of an appeal is confusing and the opposite of economical.")

The Appellant's Brief raises no justiciable claim. It argues that superior court dismissed the CrR 7.8 motion as "simply time-barred." AB at 3-4. In fact, the court's order makes no mention of any time bar. On the contrary, it addresses the merits of the claim. There is no factual basis for the claim. The appeal must be dismissed.

B. THE DEFENDANT'S FAILURE TO APPEAL THE 2014 RULING FORECLOSES RE-LITIGATION OF THE *PADILLA* CLAIM.

The PRP challenges the conviction under Padilla. The Defendant first made this claim in 2014. The motion was denied, and the Defendant did not appeal the denial of the motion. That

unchallenged denial from 2014 is the law of the case. *Cf. In re Brown*, 143 Wn.2d 431, 445, 21 P.3d 687 (2001)); *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992); *In re Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). The law of the case doctrine promotes the finality and efficiency of the judicial process. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN PLEADING GUILTY.

The Defendant claims that Ms. Siemers' performance in 2003 does not meet the standard required in *Padilla v. Kentucky*, 559 U.S. 356, 103 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls "below an objective

standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d at 334-35. Prejudice exists if the defendant can show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d at 8. *See also State v. Sandoval*, 171 Wn.2d at 169 (“Sandoval still has the burden of establishing the prejudice required for a claim of ineffective assistance of counsel based on an attorney’s advice during the plea bargaining process.”)

Under *Padilla*, faulty advice about the immigration consequences of a criminal conviction is deficient performance. *State v. Sandoval*, 171 Wn.2d at 169.

... “Immigration law can be complex,” as *Padilla* recognizes, and so the precise advice required depends on the clarity of the law. *Id.* at 1483. If the applicable immigration law “is truly clear” that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation. *Id.* If “the law is not succinct and straightforward,” counsel must provide only a general warning that “pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* In other words, even if immigration law does not reveal clearly whether the offense is deportable, competent counsel informs the defendant that deportation is at least possible, along with exclusion, ineligibility for citizenship, and any other

adverse immigration consequences. *Padilla* rejected the proposition that only affirmative misadvice about the deportation consequences of a guilty plea, but not the failure to give such advice, could constitute ineffective assistance of counsel. *Id.* at 1484.

Padilla itself is an example of when the deportation consequence is “truly clear.” *Id.* at 1483. Jose Padilla pleaded guilty to transporting a significant amount of marijuana in his truck, an offense that was obviously deportable under 8 U.S.C. § 1227(a)(2)(B)(i)

...

State v. Sandoval, 171 Wash. 2d at 170–71.

Ms. Contreras claims that her attorney Ms. Siemers lacked knowledge about the consequences of the conviction. PRP at 5. This is not the record. Ms. Siemers did not recommend the State’s offer to her client under a mistaken belief that there would be no immigration consequences. She did so, because there was no legal defense to the criminal charges. The State’s case was “ironclad” based on the client’s own sworn, written falsehoods. The plea deal reduced three counts to one and meant there would be no jail time, only 15 days of community service.

It is apparent that both attorneys (defense and prosecution) expected that Ms. Contreras could very well be deported, which is why the plea deal required her to pay restitution up front. If she were deported after the sentencing hearing, the State would never be

repaid. Ms. Siemers informed the court that she had referred her client to an immigration attorney prior to the change of plea hearing. CP 70-71. There can be no more solid advice than early referral to a specialist.

The PRP relies on *State v. Sandoval*, 171 Wn.2d 163, 249 P.2d 1015 (2011). PRP at 5. Ms. Contreras' case is distinguishable from Sandoval's case. First, the charges were different. Mr. Sandoval was convicted of rape. Rape is an aggravated felony. 8 U.S.C. § 1101(a)(43)(A). An aggravated felony is "deportable." 8 U.S.C. § 1227 (a)(2)(A)(iii).

Ms. Contreras, on the other hand, was convicted of welfare fraud, which is a kind of theft. With a sentence less than a year and the loss under \$10,000, this is not an aggravated felony. 8 U.S.C. § 1101(a)(43)(G) or (M)(i). Theft is a crime of moral turpitude. A crime of moral turpitude is only deportable if it was committed within a certain period of time after the date of admission and ***if a sentence of one year or longer may be imposed.*** 8 U.S.C. § 1227 (a)(2)(A)(i). The record does not tell us when Ms. Contreras was admitted. However, we do know that, according to the Statement of Defendant on Plea of Guilty and the Judgment and Sentence, ***her possible***

sentence was only 0-60 days. PRP, Attachments B and C. Unlike Mr. Sandoval, Ms. Contreras is not rendered deportable by her conviction.

Second, the strength of the prosecution is different in each case. Ms. Contreras' case was ironclad, based on her translated, written, sworn statements to DSHS and subsequent confession. She could not win at trial. Sandoval, on the other hand, had a chance at trial. A rape charge is a matter which generally turns on witness credibility. They are winnable cases for defendants. The Supreme Court was persuaded that Mr. Sandoval "would have been rational to take his chances at trial." *State v. Sandoval*, 171 Wn.2d at 176.

Ms. Contreras argues that her "one chance to remain in the United States" was by obtaining a "Cancellation of Removal" which she could not obtain with this conviction. PRP at 5. She argues that her guilty plea and sentence in 2003 "virtually ensured her deportation" or "would ensure her removal." PRP at 5. This is not proven in the record. In fact, more than 15 years later, Ms. Contreras continues to live in the United States. "[S]peculating whether a party might be deported in the future is not productive, especially in light of the complexity of federal immigration law and the lack of expertise of

trial court judges in that area of the law.” GR 9 Cover Sheet for Proposal to Adopt New Rule of Evidence 413, Columbia Legal Services, Northwest Immigrant Rights Project, Legal Voice, and the Washington Association of Prosecuting Attorneys.³

Because of the complexities of immigration law, the very best advice a criminal attorney can give is a referral to an immigration attorney. That happened here. While the Defendant did not like her situation, she understood it. She received effective assistance in deciding whether to plead guilty.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction.

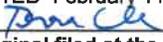
DATED: February 11, 2019.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

³ http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=605

<p>Brent De Young Deyounglaw1@gmail.com</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 11, 2019, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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**In re the Personal Restraint of Maria Francisca Contreras
Court of Appeals No. 36425-9-III
(consolidated with No. 36109-8-III)**

Index to Appendices in Respondent's Brief

- A. Declaration of Gail L. Siemers, February 4, 2019
- B. Declaration of Michelle M. Mulhern, February 7, 2019
- C. Email from Gail Siemers to Brent De Young, July 31, 2018

APPENDIX A

Declaration of Gail L. Siemers

February 4, 2019

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF)	Court of Appeals No. 364259
)	(consolidated with No. 361098)
)	
MARIA FRANCISCA CONTRERAS,)	
)	DECLARATION OF GAIL L. SIEMERS
)	
Petitioner.)	
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I, Gail L. Siemers, am an attorney licensed to practice law in the State of Washington. I worked in Ferry and Walla Walla counties as a public defender for over 23 years. Most recently, I worked as a public defender as an on-call attorney in Island County for two and a half years. While my license remains active, I am not currently practicing due to illness.

Beginning my practice in Ferry County, I had clients who regularly crossed into the United States from Canada. One of the first cases I ever had was a young man with driving infractions. As a young attorney, I was surprised to find that his first felony was likely going to cause deportation. It was a formative experience for me as a new lawyer. I learned not to take anything about a client for granted. A blue eyed blond who spoke with no discernible accent could be from another country and in the United States illegally. I became very motivated to follow through with my immigration education and to verify

answers to questions about what a client may tell me regarding their country of origin or immigration status. I considered going into immigration law after this experience..

When I moved to Walla Walla in the late 90's, I found myself serving a large Spanish speaking population who were more often than not undocumented. Not too long after I moved to Walla Walla, I attended a CLE on immigration to keep informed on the issues. The prosecutor on this case, Michelle Mulhern, attended this same conference. The law was developing so quickly that I immediately made sure that a client was apprised of their rights on immigration on every occasion presented. I educated myself on the issues long before the law changed, i.e. before Padilla v. Kentucky and State v. Sandoval. I was glad the law changed and that the judges inquired into the client's' understanding of immigration consequences during the plea colloquy. The Honorable Judge Donald W. Schacht was very thorough in addressing immigration consequences during changes of plea. We had the best certified simultaneous interpreters available. Judge Schacht always made sure defendants understood the ramifications of their guilty pleas. Judge Schacht's habit was to go through every paragraph of the Change of Plea and inquire from counsel and the interpreter if these ramifications had been discussed and any questions of the defendant answered. We swore to the fact that we had reviewed those sanctions on the Plea of Guilty form.

In 2003, I represented Maria Francisca Contreras in Walla Walla Superior Court No. 03-1-00345-7. Ms. Contreras spoke Spanish. The Acknowledgment of Advice of Rights was provided to her in Spanish translation. When Judge Schacht appointed me as her counsel, he authorized me to hire an interpreter for use in this case. As was my practice, I used an interpreter for every visit with my clients, especially when I met with a client like Ms. Contreras in my office. I would not interview any Spanish speaking client without an interpreter. Jeff Adams was always easily available and would spend the time necessary going over every single signature and statement made by the client to DSHS regarding their many visits for benefits. Jeff Adams, the interpreter, was extremely thorough interpreting my questions for the client and the client's questions to me. We worked closely together with Ms. Contreras and every Spanish-speaking client to make sure they were aware of their rights and the possible consequences of a

conviction. I would address the issue of possible removal from the United States due to conviction in every case. I would not risk my clients' family situation or security on such an omission. I took all the time I needed to be sure they understood. Other court participants such as Judge Schacht, the prosecutors, the court reporter Tina Driver, and the clerks were aware of this practice. We knew that if there were many defendants who were changing their pleas with Jeff Adams interpreting that the docket would be much longer than usual as the judges would not skip any part of the plea of guilty. Our practices did not alter over the years except to become more detailed in the reference to new case law.

In Ms. Contreras' case, there had been a DSHS investigation of welfare fraud. Almost all of those investigations produced ironclad cases. DSHS' questions and the clients' answers were all in writing. For this type of case, contrary to Ms. Contreras' representations, I would not have met with her until I had received the paperwork; there would have been more than one appointment; and the appointments would have taken a lot more time than she claims. First degree fraud is not a little crime. It would have taken time to review all the issues, every form and every signature. Ms. Contreras would have attended with other relatives and her children, which would have further extended our conversations. It would not have been short meetings. I allowed at least an hour to two hours for these interviews. If more was required, we would schedule more time. In Ms. Contreras' case, we arranged prepayment of restitution in hopes for mitigation of the possible sentence. That would have been an unusual offer, which indicates to me that I worked this case thoroughly and completely. Ms. Contreras would have had to tell me through the interpreter, repeatedly, that she understood the possible ramification of deportation in the event of a guilty plea or a finding of guilt at trial. I also made a list for clients of immigration attorneys in case the client wanted further information on immigration in general.

I am positive that I would have been thorough and very straightforward on what we discussed. I fought hard for all of my clients, however, deportation due to their crime was worse to them than incarceration and I respected their need for information on the possible outcome of their future.. I was able to secure very good offers due to the fact that the County showed what compassion they could with mothers who were usually just trying to feed their families. DSHS finally quit filing on these cases in

Walla Walla, because the County did not take a hardline against the families who were in untenable circumstances.

In the summer of 2018, I received a letter of inquiry from Brent De Young an attorney defending Ms. Contreras' case regarding deportation. I spent a good deal of time finding my old notes and reviewing the Court file contents on the case. I told Mr. De Young that he should contact Tina Driver, the court reporter, if he wanted to see how things were run in Judge Schacht's courtroom. For over twenty years, it was the same procedure each week. The judge did an amazing job and made a good record. I wrote a letter to Mr. De Young indicating that I would not write anything that was not true in an affidavit or declaration. I also stated I would not write anything vague or deceptive for money or just to assist Ms. Contreras in her deception to the Court..

In July, Mr. De Young provided me with a copy of the superior court file, a declaration that he had drafted in my name which was false and inaccurate in describing my statements I made to him. At one point I received and cashed a check sent to me for \$200. I assumed the check was for all the work I had already done in review of the file and my recollections. I replied to him that I would not sign the declaration as it was false and he knew I would not help him out just because Ms. Contreras was now claiming I did not fully inform her of the consequences of her plea of guilty. Mr. De Young knew from the beginning I would not falsify my statement. His claim to be waiting for my statement was false.

I was aware that Mr. De Young would attempt to alter my position again with every contact, however, I did not watch my in box or my post office box every day for his communications. I was doing my own work and did not feel that repeated statements to Mr. De Young that I would not alter my decision or lie on his or Ms. Contreras' behalf were final. He tried to shame me into signing an affidavit because I cashed the \$200 check. Never had I been asked to write an affidavit in exchange for money. I told him that I had certainly done more than \$200 worth of work already just chasing up the details of the case, contacting the Court and corresponding with his office. They made a pest of themselves knowing that I was not going to change my mind. There was no time that I told him there was an affidavit coming from

me in support of his position. Further, he attempted to intimidate me by having Bill McCool write an affidavit based on no information about me, the case, the client, my meetings or my habits.

In November, special deputy prosecutor Teresa Chen contacted me to advise me that Mr. De Young had been making motions for extension of time based on representations that he was waiting for my declaration. She was aware that I had told Mr. De Young on July 31, 2018 that I would not be signing his proposed declaration. She asked whether Mr. De Young was being candid with the court in his motions for extension. I did not see her email immediately so I was tardy in my reply. Once I received her message, I spent an afternoon leaving messages for Ms. Chen though I knew she was out of the office, telling her where Mr. De Young was misleading this Honorable Court and misstating the facts as I repeatedly told him. I contacted the court reporter, Tina Driver, who stated she would make Judge Schacht aware of the situation. I left messages and attempted to send information to James Nagle. Ms. Chen contacted me again in November to share the personal restraint petition with the declarations from Mr. De Young's paralegal and from William McCool.

I was shocked at Mr. McCool's attempt to assume he knew one single thing about my practice with Ms. Contreras or any other client. Mr. McCool would do many things considered unethical, even having been charged by the State with fraud at one time. Mr. McCool would provide information on cases that he knew nothing about and make statements that were not based on any facts in a case. He has no information about me, my practice or this case whatsoever. He depends on gossip and innuendo for his version of facts. He goes out of his way to cause drama and intimidation and attempt to make money on his myopic opinions. He is a spreader of gossip and innuendo. Nor was Mr. McCool popular or respected in the Walla Walla courtroom by judges or staff. He would know nothing about how Jeff Adams and I worked together or the amount of time I spent with clients. He certainly would not know what level of education I had at any time regarding immigration law. His attempts to characterize me as someone who was not respected and capable of handling my work load and how much I cared about my clients. He has no insight or information about anything I have done for the last several decades in my practice. He would not have been a party to my attorney-client conversations and would have no first-hand knowledge.

Nor does he appear to claim any first-hand knowledge such as would be necessary to be admissible in a declaration under ER 602 and ER 802. Mr. McCool looks for opportunities to earn money by besmirching other attorneys' work with no knowledge of that actual work. We were not friendly and thus he cannot know any of the workings of my office.

I am sorry that Ms. Contreras is suffering, however, there was nothing but concern and honesty from the moment I received her case. I would never have neglected to inform her of everything there was to know about the law and immigration during my representation. I would have been happy to go to trial for her, however, an honest review of the amazing amount of work done by those who prepared discovery and witness lists and everything necessary to consider that would be offered at trial showed clearly that there was no defense for Ms. Contreras' actions. She was given every possible benefit from our justice system. Unfortunately, she had made bad decisions in her attempt to increase her income for use by her family.

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

Sworn to this 4th day of February, 2019 at Oak Harbor, Washington.

Gail Siemers

Gail L. Siemers, WSBA #20585

APPENDIX B

Declaration of Michelle M. Mulhern

February 7, 2019

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF) Court of Appeals No. 364259
) (consolidated with No. 361098)
)
MARIA FRANCISCA CONTRERAS,)
) DECLARATION OF MICHELLE M. MULHERN
)
Petitioner.)
)
)
)
)

I, Michelle M. Mulhern am an attorney licensed to practice law in the State of Washington. I have worked in Walla Walla County as a deputy prosecuting attorney for nearly 23 years.

I am familiar with the standards and practices in Walla Walla County Superior Court, especially as it pertains to allocutions and rights advisal on guilty pleas, and the judge's personal views on the sufficiency of the allocution and rights advisal around the time Ms. Contreras changed her plea and was sentenced.

In the late 1990's and early 2000's, both superior court judges, Judge Robert L. Zagelow (retired) and Judge Donald W. Schacht (retired) were concerned about the collateral immigration consequences that might befall those who were not permanent legal residents of the United States, when a defendant decided to change their plea to guilty.

To that end, both judges endeavored to ensure a defendant at least was aware that immigration consequences might come from a plea of guilty to a felony, or to a gross misdemeanor where the sentence was 365 days (in fact, public defenders routinely asked for a sentence of 364 days, specifically

1 to avoid immigration consequences for their clients. Now that the law has changed regarding the
2 maximum penalty for gross misdemeanors, those requests are not necessary).

3 Both judges routinely advised a defendant, during the allocution and rights advisal, that there
4 could be immigration impacts as a result of their guilty plea.

5 It was my understanding that both judges had been directed to do so by their judges association,
6 or at least were advised it might be best practice.

7 In addition, I recall at least one felony sex offense case (I can't recall either the defendant's name
8 or the particulars of the case, except that he was represented by William D. McCool) where a plea
9 agreement went badly sideways, after the change of plea but before sentencing, because the defendant
10 was not aware, nor apparently advised by his attorney, that he could and most likely would be deported
11 post-sentencing. As a result, Judge Schacht in particular, made a point to either ask counsel, the
12 defendant, or both, whether or not they were aware there might be negative immigration consequences
13 as a result of their guilty plea.

14 This was well before either *Padilla* or *Sandoval* had been decided; I am fairly certain of this,
15 because I do remember when those two cases set new, more detailed inquiry standards from judges for
16 changes of plea. My reaction was one of "well, we're already doing something very similar; nice to be out
17 in front of an issue for a change."

18 As far as I'm aware, as a result of the court's inquiries as standard practice in our courtroom,
19 defense attorneys were diligent about advising their clients of all collateral consequences. No attorney
20 wanted their clients *not* to be fully advised regarding collateral consequences; to do so would obviously
21 impact their rights and their ability to stay in the US with their families. Nor did an attorney want to be on
22 the receiving end of an irate lecture, on the record, by the court regarding their thoroughness in fully
23 informing their clients.

24 As a result, it was my impression the public defender bar in Walla Walla was ahead of the curve
25 on collateral immigration consequences. That includes Ms. Siemers, who was practicing law here during
26 that time. As privately retained counsel wasn't in court as much as the public defenders were/are, they
27 might not have been aware of the practice in our county courts.

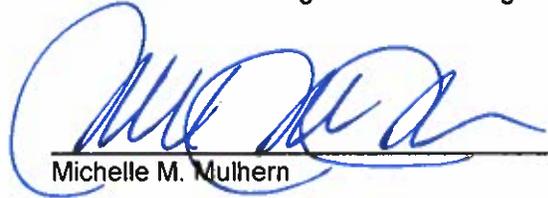
1 I don't recall attending any immigration CLE classes; as far as I can recall, the only CLE's I've
2 taken since the start of my career here have been through WAPA, WAPA-SEP, NDAA, or the State
3 Attorney General's Office (through my work in dependencies).

4 I should also note that both Judges Schacht and Zagelow routinely wrote in, on orders appointing
5 public defenders, a line giving the attorney permission to hire/use an interpreter at public expense in order
6 to effectively communicate with their non-English speaking clients.

7 The inquiry during the plea allocution became standard practice in both judge's courtrooms during
8 that time, and as far as I was aware, all public defenders were diligent in making their clients aware of
9 potential immigration consequences.

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

12 2/7/19 Walla Walla, WA
13 Date and Place



Michelle M. Mulhern

APPENDIX C

Email from Gail Siemers to Brent De Young

July 31, 2018

Teresa Chen

From: Jim Nagle <jnagle@co.walla-walla.wa.us>
Sent: Wednesday, August 1, 2018 2:45 PM
To: Teresa Chen
Subject: State v. Contreras, Maria F. COA 361098

FYI

James L. Nagle
Prosecuting Attorney
240 W. Alder, Ste. 201
Walla Walla, WA 99362-2807
(509)524-5445 - Fax (509)524-5485

From: Michelle Mulhern
Sent: Wednesday, August 01, 2018 2:36 PM
To: Jim Nagle <jnagle@co.walla-walla.wa.us>; Gabe Acosta <gacosta@co.walla-walla.wa.us>
Subject: FW: State v. Contreras

I'm not sure what to make of this.

mmm

From: Gail Siemers <gail.l.siemers@gmail.com>
Sent: Tuesday, July 31, 2018 1:16 PM
To: deyounglaw1@gmail.com
Cc: Michelle Mulhern <mmulhern@co.walla-walla.wa.us>
Subject: : State v. Contreras

Brian, I received your letter of inquiry on the Contreras matter.

My recollection of the events is not the same as the client's.

I practiced in Ferry County before I went to Walla Walla. There I had clients who regularly crossed into the United States from Canada. One of the first cases I ever had was a young man with driving issues. By the time I got him as a client, he had felony level crimes on his record. As a young attorney I was surprised at the fact that this young man was facing deportation over his criminal record. A Canadian citizen who appeared to be a good kid being banned from the US. I even considered going into Immigration law it disturbed me so much.

I moved to Walla Walla in the late 90s and found myself serving a large Mexican population who were undocumented. I attended a CLE on immigration not too long after I moved to Walla Walla to keep informed on the issues. I could see from the way the law was developing that we would have issues dealing with deportation immediately. I educated myself on the issues long before the cases came down. (Sandoval) I was glad the changes of plea eventually required an inquiry from the judge on the immigration paragraph in a plea instrument.

Judge Schacht was very thorough with changes of plea. I was expected from the first to make sure my clients understood the ramifications of their change of plea. Since Contreras was Spanish speaking I would have had an interpreter in my office at the time I met with her. If I didn't have one in the office with me when we met, it was because she assured my secretary that she understood English. She had a GED from our country and went to the 7th grade in Mexico.

In court we would always have an interpreter. Jeff Adams was extremely thorough and we worked closely together to be sure that my clients were fully advised of their rights and possible losses due to the criminal behavior they were accused of if they pled guilty.

DSHS does an investigation on welfare fraud that makes almost all of their cases ironclad. I had every single paper reflecting Ms. Contreras' contacts and answers to the questions she was asked about by DSHS. I would not have seen Contreras without the paperwork and it would have taken much longer and more than one appointment to review the issues. Contreras would have come with other relatives and her children so it would not have been a short meeting. I am positive I would have been thorough and very straight forward on what we discussed. First degree fraud is not a little crime. I fought hard for my clients who would be considered for deportation due to their crimes. I was able to secure very good offers due to the fact that the county wasn't that interested in putting mothers in jail for trying to feed themselves and their families. The state finally quit filing on these cases in Walla Walla because the prosecutors were not that interested.

To arrange prepayment of restitution would have been an unusual offer, so I am certain I worked this case thoroughly and completely.

With all the assurances you try to give in your letter, you are still accusing me of not doing a good job on this case. That is not the true and it is a very crummy way to approach me for help. I was not beyond making deals with the jail to get a client out before they contacted ICE so the client would not be deported. I tried to help these clients, but I won't lie about the handling of the case.

It appears Ms. Contreras is not telling the whole truth. I would be the first to defend her right to be here in America, but she had to acknowledge to me that she knew what she was doing in lying to DSHS or I would not have let her plead out. I am broken hearted over what Trump has done. It isn't fair and it is as close to Nazi German behavior as you can get, but I can't lie for Ms. Contreras.

She knew what she did was wrong. Otherwise, I would not have pled her out.

I'm sure Michelle Mulhern, the prosecutor, would agree. She went to the same CLE I did on immigration.

Let me know if you need more information. I will not sign your declaration as it is untrue and incomplete.

Do you still want an affidavit from me?

Gail Siemers

February 11, 2019 - 12:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36109-8
Appellate Court Case Title: State of Washington v. Maria Francisca Contreras
Superior Court Case Number: 03-1-00345-7

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Please note that this is the identical brief filed today in consolidated PRP 364259.

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