No. 71748-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALVIN WALKER,

Appellant.

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

The Honorable Regina Cahan

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Walker's guilty plea was involuntary, contrary to the due process clause of the Fourteenth Amendment.

2. The attorneys that counseled Mr. Walker to plead guilty had a conflict of interest and thereby rendered ineffective assistance, in violation of the Sixth Amendment right to the assistance of counsel.

3. The trial court erred in entering Finding of Fact 6 on Defendant's Motion to Withdraw Guilty Plea to the extent that the finding states:

> Torres reviewed exhibit A with Walker after the waiver language was stricken and explained to him that the stricken language did not change the rights he was waiving because he could not waive his right to claim ineffective assistance, nor could she advise him to do so.

CP 406.[1]

4. The trial court erred in entering conclusions of law on Defendant's Motion to Withdraw Guilty Plea 3, 4, and 5. CP 409-10.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The due process clause of the Fourteenth Amendment requires a guilty plea be knowing, intelligent, and voluntary. In Washington, a guilty plea must be set aside when necessary to correct a manifest injustice. An involuntary plea is one of the indicia of a manifest injustice, and plea

[1] The trial court's findings of fact and conclusions of law are attached as Appendix A.

pressures may render a guilty plea involuntary. In inducing Mr. Walker to plead guilty, his counsel equated his determinate-plus sentence to life imprisonment, misrepresented the consequences of not pleading guilty, and told him the judge hearing his case would not give him a "fair break." Did the combined effect of these pressures render Mr. Walker's guilty plea involuntary?

2. In order for a guilty plea to be knowing and voluntary, the accused must understand all direct consequences of the plea. Where the record did not show that Mr. Walker understood a part of the plea agreement that abridged his right to appeal, was the guilty plea involuntary? In the absence of substantial evidence in the record, must the trial court's finding to the contrary be stricken?

3. An attorney's conflict of interest will violate an accused person's Sixth Amendment right to the effective assistance of counsel where an actual conflict adversely affects his or her performance. In such a case, prejudice is presumed. The Rules of Professional Conduct prohibit a lawyer from representing a client if the representation will be materially limited by a personal interest of the lawyer. They also mandate that before a lawyer may limit his or her personal liability to a client, the client must be afforded independent counsel. Was Mr. Walker denied the effective assistance of counsel where, in conjunction with an appeal waiver in a

guilty plea, his lawyers obligated him to endorse language expressing his satisfaction with his lawyers' representation, and he did not have the benefit of independent counsel?

C. STATEMENT OF THE CASE

Alvin Walker appeals following the denial of a motion to withdraw his guilty plea to two criminal counts, assault in the first degree and rape in the third degree. CP 404-10, 425-47. The guilty plea succeeded an unusual and protracted procedural history. The State originally prosecuted Mr. Walker in connection with an incident that occurred in November 2008 involving his ex-girlfriend, Bridget Mitchell. CP 22-24, 32-33. Represented by counsel from the Defender Association (TDA), Mr. Walker proceeded to trial and was convicted as charged, and sentenced to an indeterminate term of 159 months to life.[2] CP 13, 37, 39-41. His contentions of ineffective assistance of counsel at sentencing were rejected on appeal. CP 24-28. The court of appeals mandate was issued on March 7, 2012. CP 20.

Mr. Walker subsequently contacted the Innocence Project Northwest (IPNW) for assistance in obtaining relief from his convictions. IPNW filed a CrR 7.8 motion for relief from judgment on March 5, 2013.

[2] Mr. Walker was convicted of assault in the second degree, rape in the second degree, and felony harassment, all with domestic violence designations. CP 9. The determinate sentences imposed on the assault and felony harassment counts were run concurrently with the sentence on the rape count. CP 13.

CP 31-240. The motion was premised on two grounds. First, Mr. Walker's trial counsel rendered ineffective assistance when he failed to review medical records that would have undermined the State's theory of the assault. CP 218, 226-28. These records were in the case file, as they had been obtained by Mr. Walker's previously-assigned counsel at TDA, and were even referenced in previous counsel's transfer memo. CP 154, 159, 218. Second, Mr. Walker's trial counsel failed to seek a material witness warrant for a key exculpatory witness, Phyllis Barquet, who claimed that Mr. Walker was innocent of the charged assault, and that she herself was the perpetrator. CP 216-17.

The CrR 7.8 motion was transferred to the Court of Appeals, but the Court remanded it back to King County Superior Court for a reference hearing and determination on the merits. CP 241-44.

On November 1, 2013, Mr. Walker entered a straight guilty plea to an amended information charging assault in the first degree and an Alford plea to rape in the third degree. CP 294-315, RP 4-21. At the plea hearing, his lawyer, Ms. Torres, explained to the court that the agreement with the State was reached "relatively late yesterday so hence the scrambling to try and get it done today." RP 4. Notwithstanding the professed need for haste, Ms. Torres took the time to draft an unusual and unorthodox "Exhibit A to Statement of Defendant on Plea of Guilty." CP

304, 314. The exhibit consisted of an appeal waiver, a crossed-out statement, and the declaration, "I am satisfied with the representation and counsel I have received from my attorneys, Fernanda Torres and David Allen." The appendix was affixed to the plea statements for the two offenses and signed by Mr. Walker.[3]

The very same day that Mr. Walker entered the plea, after he returned to the jail, he wrote a letter to the court begging for the plea to be withdrawn. CP 400, 401. He explained,

> I was under a great deal of mental and emotional stress about the demands put on me by the attorneys[.] I am under the bord [sic] they kept on stressing me out about doing life and not get[t]ing out ever[.] They used several tactics of strategems on me, the other stratagem used was that from you that I would not get a fair break with you at this trial your Honor Im [sic] 57 now and Im [sic] very sorry that I forgot whom you are after seeing you I no that what they said was very wroung [sic]. And afterwords [sic] I had a very nervous feeling of uncertainty and of making a very unwise decision, I now believe that you are a true and just and very honorable judge and I will take my chances with your decision at court I would like if you will asine [sic] new lawer [sic] ...

CP 400.

The court appointed Mr. Walker new counsel and permitted Ms. Torres to withdraw. Mr. Walker later submitted a declaration that supplied additional facts in support of his motion to withdraw the plea.

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[3] Identical versions of Appendix A were attached to Mr. Walker's plea form for rape in the third degree, a sex offense, and assault in the first degree. A sample copy is attached to this brief as Appendix B for this Court's convenience.

CP 401. He explained that the guilty plea was negotiated and entered very quickly. Id. He stated that after a year of work on the CrR 7.8 motion, "the day before my motion hearing, Ms. Torres came to me telling me to plead guilty to the State's offer, and that I needed to take the State's offer now." CP 402. He said that he did not have enough time to "really consider the plea in all its detail", and he did not receive a copy of the plea paperwork. Id. He stated that to induce him to enter the plea, "Ms. Torres kept referring to the Indeterminate Sentence Review Board. She kept on stressing that I would do life in prison and never get out ever if I went forward with my motions." Id. He stated that Ms. Torres brought Mr. Allen to talk to him "about life in prison and to convince me to plead guilty. Both of them emphasized that I had to take the offer right now." Id.

Mr. Walker also explained the circumstances behind Appendix A to the plea agreement. He said,

> On the day of my plea, Ms. Torres showed me an attachment to the plea paperwork that she said covered her and David Allen. She said it meant that I agreed that I wouldn't be able to claim that she and Mr. Allen had been ineffective counsel. I understood the agreement was a condition of the plea. I felt that Ms. Torres was being deceitful and acting in her own interests by asking me to sign and enter my guilty plea with a condition that I would not say that she or David Allen were ineffective counsel. I did not receive a copy of that attachment.

Id.

Mr. Walker further explained, "I was under a great deal of mental and emotional stress at the time of my guilty plea due to the demands put on me by my attorneys. I felt that Ms. Torres no longer wanted to represent me or to work on my case, and that she was more concerned about her own interests than mine." Id. He stated that although he did not voice these concerns at the plea hearing, he "did not feel right" about the plea as he was participating; he was confused, and he felt he could not say anything about it to the court. Id. He stated that immediately after the plea, he felt "very nervous" and like he had made an unwise decision. He was "devastated." This was why he wrote the letter requesting his plea be withdrawn as soon as he returned to the jail. CP 403.

Ms. Torres testified at the hearing on Mr. Walker's motion to withdraw his guilty plea. She stated that sometime during the week prior to November 1, 2013, she advised Mr. Walker that she would be striking the portion of the CrR 7.8 motion relating to trial counsel's failure to secure the presence of Ms. Barquet. RP 62-63. She testified to her opinion that without the aspect relating to Ms. Barquet, the CrR 7.8 motion was "less strong", and that she had told Mr. Walker it would be "very difficult to prevail on appeal" if they lost the CrR 7.8 motion. RP

65. She also believed that the State would be "100%" likely to appeal in the event that Mr. Walker prevailed on his CrR 7.8 motion. Id.

With regard to the timing of the offer in regard to the entry of the plea, Ms. Torres's testimony established that Mr. Walker had very little time to reflect on whether to enter the plea bargain. Ms. Torres received authorization from Mr. Walker to negotiate a plea on his behalf on October 29, 2013. RP 67. The details of the offer were not finalized until October 31, 2013. RP 75. Ms. Torres met with Mr. Walker on October 31, 2013, regarding the offer sometime after 3 p.m. RP 67-68, 75-76. At the time of her meeting, she herself had not seen a formal written State's sentencing recommendation, and she did not have plea paperwork to show him. RP 68, 76. Following her meeting, she felt she could communicate to the State that Mr. Walker would enter into the proposed plea. RP 69.

The morning of the plea itself, Ms. Torres stated that she met with Mr. Walker for about two hours to go over the plea paperwork, and then again after speaking with the prosecutor. RP 69. With regard to Exhibit A, which contained the appeal waiver and expression of "satisfaction" with the representation she and Mr. Allen had provided, she explained,

> The document that I initially reviewed with Mr. Walker had the explicit statement of the waiver, or that by pleading guilty he was not waiving his right to claim ineffective

> assistance of counsel – of me and anybody else that worked on his case at this stage, and that was stricken.[4]

RP 70.

She admitted that the portion indicating that Mr. Walker was satisfied with the representation that he had received from her and Mr. Allen was part of the original document that she reviewed with him. Id. Even though she had stricken the portion stating that Mr. Walker was not waiving his right to claim ineffective assistance of counsel, she opined, "I didn't think he could waive that on my advice because of the conflict." RP 71. When the prosecutor asked Ms. Torres whether she "would have advised him that he could waive that" she said "No." Id.

On cross-examination, Ms. Torres admitted that when she met with Mr. Walker on October 31, 2013, she had not even seen a formal written State's sentencing recommendation, and that the plea forms themselves were prepared the morning of the hearing. RP 77-78. Although she reviewed the forms with him, she did not give him his own copy. RP 78. When she reviewed the plea forms with him, the part that expressly stated Mr. Walker was not waiving his right to claim ineffective assistance of counsel had not been stricken out. RP 79. She stated that she discussed

[4] Specifically, that portion of the document read, "I understand this does not include a waiver to a claim of ineffective assistance of counsel." RP 81.

this change with Mr. Walker but did not remember for how long. RP 84. She did not testify to the specifics of this discussion.

The plea hearing itself did not shed any light on the nature of Ms. Torres's discussions with Mr. Walker about "Exhibit A", as the prosecutor only inquired, "All right, and you are in agreement with this Exhibit A to your [plea] statements?" RP 12.

Ms. Torres admitted Mr. Walker "was reluctant in having to go over any of this at all" and that he was unhappy about the decision to plead guilty. RP 85. She stated that Mr. Walker did not want to plead guilty, but that at some point he changed his mind. RP 91-92. Ms. Torres also admitted that the additional statement Mr. Walker was obligated to agree to—that he was satisfied with the representation he received from her and Mr. Allen—was "designed to make it harder" for him to claim ineffective assistance of counsel, but that she did not believe it would do so. RP 93. Nevertheless she acknowledged that "[i]n retrospect we should have taken all of it out ... but that statement, I think in theory that it would be designed to make it harder and it doesn't make a difference is what I would have explained to him." Id. She conceded, in response to a direct question from Mr. Walker's lawyer, that she did not remember "explicitly or specifically" whether she in *fact* explained this to Mr. Walker. RP 94.

The trial court subsequently entered formal findings of fact and conclusions of law denying Mr. Walker's motion to withdraw his guilty plea. CP 404-410. Mr. Walker was sentenced to concurrent terms of 138 months of confinement on the assault in the first degree count, and 43 months on the rape in the third degree count. CP 414-15.

D. ARGUMENT

Principles of due process require guilty pleas to be knowing, intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); In re Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3; CrR 4.2(d).[5] Consistent with this constitutional mandate, according to court rule, a court must allow a plea to be withdrawn if (a) the plea was not valid when it was made, or (b) whenever it is necessary to correct a manifest injustice. CrR 4.2(f);[6] see State v. McDermond, 112 Wn. App. 239, 243, 47 P.3d 600 (2002), overruled on other grounds, State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006). A manifest

[5] CrR 4.2(d) directs: "The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

[6] CrR 4.2(f) states in relevant part: "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice."

injustice is one "that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Washington courts recognize four nonexclusive indicia of per se manifest injustice: (1) ineffective assistance of counsel, (2) a defendant's failure to ratify the guilty plea, (3) an involuntary plea, or (4) the State's breach of the plea agreement.[7] Id. at 597. The defendant bears the burden of showing a manifest injustice. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

Here, Mr. Walker's plea was not voluntary because of the coercive effect of pressures surrounding the entry of the guilty plea and misrepresentations by counsel regarding the potential consequences of accepting versus rejecting the plea. It was not knowing because there is insufficient evidence to support a finding that Ms. Torres explained Appendix A to the plea agreements to Mr. Walker. Additionally, Ms. Torres had a conflict of interest based upon her desire to insulate herself

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[7] The Court in Taylor emphasized,

> The American Bar Association standards and the Criminal Rules Task Force proposed standards do not suggest that the list of indicia is exclusive and we do not so hold. If, however, facts presented to the court do not fall within one of the listed categories, ... we hold that there must at least be some showing that a manifest (i.e., obvious, directly observable, overt or not obscure) injustice will occur if the defendant is not permitted to withdraw his plea.

\Taylor, 83 Wn.2d at 596.

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

1. **Mr. Walker's guilty plea was not voluntary because of the improperly coercive pressures placed on him by his counsel and misrepresentations regarding the consequences of rejecting the plea.**

Plea bargaining pressures may render a plea involuntary. State v. Frederick, 100 Wn.2d 550, 556, 674 P.2d 136 (1983), overruled on other grounds, Thompson v. Department of Licensing, 138 Wn.2d 783, 794, 982 P.2d 601 (1999). Thus, a defendant may properly challenge the voluntariness of his plea based on coercion, even where he has denied coercive influences during the plea colloquy. Id. at 557.

At the plea hearing, Mr. Walker denied that anyone had made threats or promises to induce him to plead guilty. RP 14. However the

timing of his request to withdraw the guilty plea and his unequivocal expression of stress, anxiety, and "devastation" regarding the circumstances of the plea's entry undermine confidence in Mr. Walker's statements at the plea hearing.

The evidence established the following:

- The plea offer was not made until the afternoon October 31, 2013. RP 67, 75.

- When Ms. Torres met with Mr. Walker that same day regarding whether he would enter the plea, she did not have any paperwork to show him. RP 68, 76.

- Mr. Allen attended the meeting with Mr. Walker on November 1, 2013. A "large part of the discussion that Mr. Allen had with him" was the fact that if Mr. Walker did not accept the plea offer, he could be "subject to imprisonment for the rest of his life" under the indeterminate sentence that previously had been imposed by the court. RP 86.

- According to Mr. Walker's letter to the court, Ms. Torres and Mr. Allen "kept on stressing me about doing life and not getting out ever." CP 400. His subsequent sworn declaration confirms:

  In talking to me about the plea offer, Ms. Torres kept referring to the Indeterminate Sentence Review Board. She kept on stressing that I would do life in prison and never get out ever if I went forward with my motions. Ms. Torres brought Mr. Allen to talk to me about life in prison, and to convince me to plead guilty. Both of them emphasized that I had to take the offer right now. CP 402.

- Ms. Torres and Mr. Allen told Mr. Walker that he would "not get a fair break" from the court at the CrR 7.8 motion. CP 400.

These tactics were improper and unduly coercive in several respects. First, it was improper of Ms. Torres and Mr. Allen to equate Mr. Walker's indeterminate sentence on the rape in the second degree count with "life in prison." It is true that the sentence involved a minimum term of 159 months and a maximum term of life imprisonment. However the Indeterminate Sentence Review Board (ISRB) considers many factors when deciding a person's releasability. See WAC 381-90-050. The pivotal question is "whether it is more likely than not that the offender will engage in sex offenses if released to the community in spite of board-imposed conditions of community custody." WAC 381-90-050(3). Given Mr. Walker's lack of similar offense history and age at the time of release, the ISRB might well determine at the outset that release was appropriate. Thus, although life imprisonment was a theoretical possibility, it was not a certainty, and it was improper for Ms. Torres and Mr. Allen to overstate this risk.

Second, the claim that Mr. Walker would be "subject to imprisonment for the rest of his life" misrepresented the legal posture of his case. This claim would be true only if (a) he litigated his CrR 7.8 motion and lost, (b) he won his CrR 7.8 motion and the State appealed and prevailed; or (c) he won his CrR 7.8 motion and was reconvicted of the

originally-charged crimes.[8] The "life sentence" was thus highly contingent on a number of factors, and not guaranteed.

It was far from clear that Mr. Walker would lose his CrR 7.8 motion. Even though Ms. Torres had decided to withdraw the claim relating to Ms. Barquet, Mr. Walker still had a viable ineffective assistance of counsel claim based upon his trial attorney's failure to review Mr. Walker's medical records and secure appropriate expert testimony. CP 46. As noted in the CrR 7.8 motion, given that the records were physically in the file, trial counsel's failure to review them was "inexplicable." CP 44. See A.N.J., 168 Wn.2d at 110-11 (counsel has duty to conduct reasonable investigation and familiarize himself with the evidence). The records showed significant damage to Mr. Walker's rotator cuff, including "extensive tearing of multiple shoulder tendons, atrophy and retraction of the muscle, prominent degeneration in the shoulder socket, and moderate degenerative joint disease." CP 45, CP 226-28 (declaration of Dr. Albert Gee). The CrR 7.8 motion emphasized that, in opposition to the complainant's testimony that Mr. Walker had picked her up and thrown her around, Mr. Walker testified regarding his

[8] As noted, the threatened life sentence also would require an affirmative finding by the ISRB that Mr. Walker should not be released upon completion of his minimum term.

injury and resulting disability at trial. CP 46. "[T]hese medical records—objective, documentary evidence—corroborate[d] him." Id.

Ms. Torres opined that if Mr. Walker were to win his CrR 7.8 motion, the likelihood of a State appeal was "100%." RP 65. She could not persuasively claim, however, that the State would *prevail* on appeal. A ruling on a CrR 7.8 motion generally is reviewed for an abuse of discretion. State v. Martinez-Leon, 174 Wn. App. 753, 760, 300 P.3d 481, rev. denied, 179 Wn.2d 1004 (2013). Given trial counsel's indisputably deficient performance regarding the medical evidence, it is unlikely that an appellate court would determine granting a CrR 7.8 motion on this basis would be an abuse of discretion.

Third, Ms. Torres and Mr. Allen were wrong to tell Mr. Walker that he would not get a "fair break" from the court if he litigated his CrR 7.8 motion. See CP 400. This statement was tantamount to a threat that he would lose the motion *not* because it would fail on the merits, but because the judge would not discharge her constitutional and ethical duties to try the matter fairly and impartially. See Const. art. IV, § 28; Code of Judicial Conduct, Canon 2.2.

In sum, plea bargaining pressures may render a plea involuntary. Frederick, 100 Wn.2d at 556. Likewise, coercion by an accused person's lawyer may render a plea involuntary. See Iaea v. Sunn, 800 F.2d 861,

867 (9th Cir. 1986) (collecting cases). Here, the combined effect of counsel's overstatement regarding Mr. Walker's risk of life imprisonment, the misrepresentation regarding possible outcomes, and the threat that the judge would not give Mr. Walker a "fair break" deprived Mr. Walker of free will in changing his plea, and rendered the plea involuntary.

This conclusion is fortified by the fact that Mr. Walker had very little time between when the offer was conveyed and when he was obliged to enter the plea to reflect upon the decision, and by the fact that Mr. Walker voiced his unhappiness with the plea at his first available opportunity following the hearing. This Court should conclude that Mr. Walker's plea was involuntary.

2. **The plea was not knowing and intelligent because Ms. Torres failed to ensure that Mr. Walker understood "Appendix A" to the plea agreement.**

Mr. Walker's guilty plea to both counts included a typed Appendix which, by its express terms, was "incorporated as part of [Mr. Walker's] Statement of Defendant on Plea of Guilty to both Counts I and II." CP 304, 314. The language of the Appendix was confusing, and made more so when the parties struck the portion that expressly permitted Mr. Walker to challenge the effectiveness of his counsel on appeal. It was undisputed that when Ms. Torres went over the plea forms with Mr. Walker, this language had not been stricken. RP 79.

The trial court found, however, that

> Torres reviewed exhibit A with Walker after the waiver language was stricken and explained to him that the stricken language did not change the rights he was waiving because he could not waive his right to claim ineffective assistance, nor could she advise him to do so.

CP 406 (Finding of Fact 6).

In order for a guilty plea to be knowing and voluntary, an accused person must understand all the direct consequences of his plea. State v. Weyrich, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008); Isadore, 151 Wn.2d at 298. Contrary to the trial court's finding, the record does not establish that Ms. Torres ever explained the import of "Appendix A" to the plea forms to Mr. Walker. Ms. Torres testified that she "would have" explained its meaning, but when directly questioned on this subject, she said she did not remember "explicitly or specifically" that she did so. RP 93, 94.

Findings of fact may only be upheld on appeal if they are supported by substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Here, Ms. Torres was constrained to admit that she had no recollection of reviewing "Appendix A" with Mr. Walker after the

language preserving his right to challenge the effectiveness of his counsel was struck. That she believed she "would have" done so is not proof that she did do so, and the fact that she is an attorney does not make up for the want of proof. The trial court's finding of fact is not supported by substantial evidence, and must be stricken.

The plea colloquy does not dispel doubts regarding Mr. Walker's comprehension of "Appendix A." The prosecutor read the Appendix into the record and asked Mr. Walker if he had signed it. RP 11-12. She then asked him whether he was in agreement with the Appendix, and he assented. RP 12. But she did not note the change between the document that he signed and the one that was ratified in court. And she did not ask Mr. Walker whether he understood that the change had been made, or even if he was aware of the alteration.

As noted, "Appendix A" was expressly incorporated into the plea agreement. The terms of Appendix A bore upon Mr. Walker's rights in connection with challenging the plea on appeal, and thus upon direct consequences of the plea. Cf. Isadore, 151 Wn.2d at 298. In the absence of evidence showing that Mr. Walker understood "Appendix A" to the plea agreement, this Court must conclude that the plea was not knowing and intelligent, and therefore was involuntary.

3. Ms. Torres's conflict of interest prevented her from rendering the effective assistance of counsel to which Mr. Walker was entitled under the Sixth Amendment.

Defendants have a Sixth Amendment right to the effective assistance of counsel, a right that extends to the plea-bargaining process. Lafler v. Cooper, -- U.S. --, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012); U.S. Const. amend. VI. Where counsel has an actual conflict of interest and the conflict adversely affects her performance, then the accused need not demonstrate prejudice in order to obtain relief. Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Here, although the plea was negotiated with haste and had to be entered quickly, Ms. Torres took the time to draft language for inclusion in "Appendix A" that required Mr. Walker to affirmatively express his satisfaction in her performance. CP 304, 314. The inclusion of this language established a conflict of interest under Cuyler and requires a finding that Mr. Walker received ineffective assistance of counsel.

An accused person establishes that his lawyer rendered deficient performance where the lawyer's conduct fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). "The proper measure of attorney performance remains simply reasonableness under prevailing professional

norms." Id. Although rules governing professional conduct do not *de facto* embody the constitutional standard for effective performance, In re Personal Restraint of Gomez, 180 Wn.2d 337, 349, 325 P.3d 142 (2014), "these standards may be valuable measures of the prevailing professional norms of effective representation." Padilla v. Kentucky, 559 U.S. 356, 367, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010).

RPC 1.7, pertaining to conflicts of interest, provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer." RPC 1.7(a)(2). Likewise, "a lawyer shall not ... make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement." RPC 1.8(h) (internal punctuation omitted); State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (word "shall" in a statute or court rule is presumptively mandatory).

Although the statement was in no way relevant to the charges or the proceedings, Mr. Walker was obligated to affirmatively voice his satisfaction with his lawyers' representation as a condition of his plea bargain. Ms. Torres agreed that the purpose of this statement, at least from the State's point of view, was to make it "harder" for Mr. Walker to

allege ineffective assistance of counsel. RP 93. There is no showing that Mr. Walker was afforded an opportunity to consult with independent counsel before he endorsed this statement.

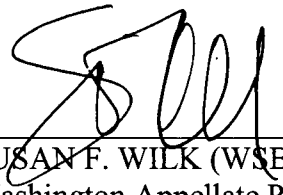
This prospective limitation of Ms. Torres and Mr. Allen's liability is particularly problematic given the haste within which the plea was entered and the acute pressures that Ms. Torres and Mr. Allen brought to bear on Mr. Walker in order to induce him to plead guilty. As noted, the advice that they gave him was inaccurate and misleading in material respects. Mr. Walker had very little time to think about his decision. And Mr. Walker immediately sought to undo the plea, suggesting that if he had had more time to think and accurate advice, he would have rejected the State's offer. This Court should conclude that Ms. Torres and Mr. Allen's interest in insulating themselves from liability adversely affected their performance. The plea should be withdrawn.

E. CONCLUSION

This Court should conclude that withdrawal of Alvin Walker's guilty plea is necessary to correct a manifest injustice. The trial court should be reversed, and the plea should be withdrawn.

DATED this 4th day of March, 2015.

Respectfully submitted:



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State v. Walker, No. 71748-1-I

Appendix A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ALVIN WALKER, Defendant.	No. 08-1-12516-1 SEA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

This matter came on for hearing on February 14, 2014. The Court, having presided over the jury trial and guilty plea, and having considered the following evidence offered at the hearing: the testimony of Fernanda Torres, the declaration of the defendant, and the recording of the plea hearing; and the briefing and argument of counsel, now makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

1. On May 14, 2010, Walker was convicted by a jury of Assault in the Second Degree (count I), Rape in the Second Degree (count II), and Felony Harassment (count III).
2. Having exhausted his rights on direct appeal, Walker contacted the Innocence Project Northwest (hereafter IPNW), who filed a CrR 7.8 motion on Walker's behalf, alleging

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ineffective assistance of trial counsel on four bases, including counsel's inability to secure the presence of witness Phyllis Barquet. That motion was set to be heard on November 1, 2013. Fernanda Torres of IPNW represented Walker and David Allen associated as counsel.

3. On October 29, 2013, Allen and Torres advised the State that they were striking the portion of the CrR 7.8 motion regarding Phyllis Barquet and inquired whether the State had any interest in settling the case. Torres met with Walker at the jail that evening for approximately 30 minutes to discuss whether Walker would authorize them to enter plea negotiations. During that discussion, Torres advised Walker that they were striking the part of the CrR 7.8 motion regarding Phyllis Barquet, which, in Torres's opinion would substantially reduce Walker's likelihood of prevailing on the CrR 7.8 motion. Torres also advised Walker that if he did not prevail on the CrR 7.8 motion, he would have no strong issues on appeal. After this discussion, Walker authorized Torres and Allen to enter into plea negotiations. Torres so advised the State that evening and proposed a resolution that resulted in the vacation of the rape conviction.

4. On October 30, 2013, the State rejected Walker's proposal and the parties exchanged counter offers. Torres did not meet with Walker on the 30th.

5. On October 31, 2013, Allen proposed a plea of assault in the first degree and rape in the third degree, which would eliminate the indeterminate sentence on the sex offense and result in a low-end determinate sentence of 138 months; the State agreed to that proposal. Torres met with Walker in a private face to face meeting for two hours, after which Allen and Torres met with Walker for approximately 30 minutes, to discuss the plea offer and the distinction between determinate and indeterminate sentencing. After those meetings, Torres notified the

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State that Walker would plead to assault in the first degree and rape in the third degree on November 1.

6. On the morning of November 1, 2013, Torres met privately with Walker for two hours to review the plea forms, including exhibit A to the statements of defendant on plea of guilty, which included language that Walker was not waiving his right to appeal based on ineffective assistance of counsel. Exhibit A also included the statement "I am satisfied with the representation and counsel I have received from my attorneys, Fernanda Torres and David Allen." The State disagreed with the explicit waiver of claims of ineffective assistance and the disputed language was stricken, but the language that Walker was satisfied with the representation and counsel remained. Torres reviewed exhibit A with Walker after the waiver language was stricken and explained to him that the stricken language did not change the rights he was waiving because he could not waive his right to claim ineffective assistance, nor could she advise him to do so.

7. Walker entered a straight plea to assault in the first degree and an Alford plea to rape in the third degree. During the plea colloquy, Walker stated that he understood the rights he was waiving, adopted the factual statements as his own, and stated that he had not been made any threats or promises to enter the plea. Walker also signed and said that he agreed to exhibit A of the statements of defendant on plea of guilty. When asked if he needed any more time to discuss the plea with his attorneys, Walker stated that he did not. The Court found that Walker had entered the plea knowingly, intelligently, and voluntarily and accepted his plea.

8. On November 5, 2013, the Court received a letter from Walker dated November 1, 2013 advising that he wanted to withdraw his plea.

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B. CONCLUSIONS OF LAW

1. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. CrR 4.2(f). The defendant bears the significant burden of demonstrating manifest injustice. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). A manifest injustice is "an injustice that is obvious, directly observable, overt, not obscure," and may include: 1) denial of effective counsel; 2) failure to ratify the plea by the defendant or one authorized by him to do so; 3) involuntariness of the plea; or 4) failure by the prosecution to keep the plea agreement. State v. Taylor, 83 Wn.2d 594, 596-97, 521 P.2d 699 (1974). At issue here is whether Walker received ineffective assistance of counsel and whether his plea was voluntary given the timeframe in which he had to consider the plea, and whether exhibit A to the statements of defendant on plea of guilty created a conflict of interest.
2. The test for ineffective assistance of counsel is whether (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The Strickland test applies to claims of ineffective assistance of counsel in the plea process; in that context, the defendant must show that his counsel failed to actually and substantially assist her client in deciding whether to plead guilty, and that but for counsel's failure to adequately advise him, he would not have pled guilty. State v. McCollum, 88 Wn. App. 977, 981-82, 947 P.2d 1235 (1997) (citing State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)). The fact that counsel does not review plea forms with the defendant until the day of the plea is not ineffective assistance so long as the defendant understands the rights that he gives up by pleading guilty and the consequences of his plea.

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Compare McCollum, 88 Wn. App. 977 (no ineffective assistance when public defender other than assigned counsel reviewed the plea form with defendant the day of the plea and appeared for the plea) with State v. A.N.J., 168 Wn.2d 91, 119, 225 P.3d 956 (2010) (counsel's failure to accurately advise of consequences of plea to sex offense during 55-minute review of plea forms on day of plea was ineffective assistance). Torres and Walker met at least three times before Walker entered his plea, during which counsel advised that they did not expect to prevail on the CrR 7.8 motion and advised him of the differences between determinate and indeterminate sentences. During the plea colloquy, Walker stated that he understood the consequences of his plea and the rights that he was giving up by pleading guilty and he denied needing additional time to speak with counsel. Walker has failed to show that counsel was ineffective in advising him on the plea or that his plea was involuntary based on the length of time he had to consider the plea.

3. To prove an ineffective assistance claim premised on an alleged conflict of interest, a defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). A conflict of interest exists if there is a significant risk that the representation of a client will be materially limited by a personal interest of the lawyer. RPC 1.7(a)(2). Further, a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. RPC 1.8(h)(1). Although the expression of satisfaction with counsel in exhibit A to the statements of defendant on plea of guilty would not support a claim of ineffective assistance, exhibit A does not waive Walker's right to claim ineffective assistance

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of counsel, nor did Torres advise Walker to waive that right. There is no evidence that an actual conflict of interest adversely affected Torres's representation.

4. A defendant's subsequent regret after an otherwise valid plea has been accepted does not constitute a manifest injustice. State v. Norval, 35 Wn. App. 775, 783-84, 669 P.2d 1264 (1983). The timing of a motion to withdraw a plea may be considered by the court together with all other evidence bearing on the issue, but should be given weight only when it is made promptly after discovery of previously unknown consequences or information, if the motion is made before any other benefit to the defendant or detriment to the State is known, and if the motion is grounded in the core concerns recognized in Taylor. A.N.J., 168 Wn.2d at 107. Although Walker manifested his regret shortly after the plea, his motion is not based on new information and he has not shown that his plea was involuntary or that he did not understand the nature of the charges and the consequences of his pleas.

5. Walker has not met his burden of demonstrating manifest injustice, pursuant to CrR 4.7(f) and Taylor, *supra*.

+ The inherent difficulty of defendant's choice to plead guilty does not render a plea involuntary. Defense counsel explicitly outlining the situation he was facing, explaining the difference between determinate and indeterminate sentence is not equivalent to any type of coercion. Although defendant was faced with a difficult choice, he was not coerced in any way. In fact counsel's defense counsel's effort to fully explain to Mr. Walker the situation he was facing was evidence of their effectiveness.

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C. **ORDER**

The court being fully advised in the premises; now, therefore, IT IS HEREBY ORDERED, ADJUDGED and DECREED that: Walker's motion to withdraw his plea is denied.

Dated this 28th day of February, 2014.

JUDGE

REGINA S. CAHAN

Presented by:

Deputy Prosecuting Attorney

Approved for entry:

Attorney for Defendant

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State v. Walker, No. 71748-1-I

Appendix B

Exhibit A to Statement of Defendant on Plea of Guilty

State v. Alvin George Walker, Cause No. 08-1-12516-1 SEA

Pursuant to this plea agreement, I agree to waive any appeal of my conviction or imposition of a standard range sentence on the amended charges, [redacted]. I am satisfied with the representation and counsel I have received from my attorneys, Fernanda Torres and David Allen. I also understand that by pleading guilty to these charges, I am agreeing to the dismissal of my CrR 7.8(b) motion.

Further, I understand the State agrees not to file any other charges in connection with King County Sheriff's case number 08-149110 and agrees not to file any perjury charges against me in connection with my statement on plea of guilty.

I have reviewed this document with my attorney and I understand it is being incorporated as part of my Statement of Defendant on Plea of Guilty to both Counts I and II.

Dated November 1, 2013

Alvin George Walker