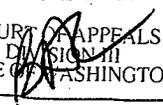


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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By 

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26039-9-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,  
v.  
VALENTIN SANDOVAL  
Appellant.

/

IN RE THE PERSONAL RESTRAINT OF  
VALENTIN SANDOVAL,  
Petitioner.

---

APPEAL FROM GUILTY PLEA  
CONSOLIDATED WITH  
PERSONAL RESTRAINT PETITION

---

RESPONDENT'S BRIEF

---

Respectfully submitted:  
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by: Teresa J. Chen, WSBA 31762  
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## **I. IDENTITY OF RESPONDENT**

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

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the Petitioner's conviction.

## **III. ISSUES**

1. Regarding his plea, did the Defendant's attorney misadvise the Defendant that he would not be deported immediately and would have time to find immigration counsel, when ten months after the plea the Defendant has not been deported, is not in custody, and has had time to find immigration counsel?
2. Assuming without evidence that counsel advised that the removal proceedings would not commence immediately, was trial counsel's conduct reasonable (within the range of competence of a criminal defense attorney) in predicting this based on previous experience? Does the petition prove that, but for such an advisement (regarding how much time he would have to hire new counsel), the Defendant would not have pled guilty to significantly reduced charges?

3. Assuming without evidence that counsel advised that the plea could not lead to the Defendant's deportation, does the petition prove that, but for such advisement, the Defendant would not have pled guilty to credit for time served but would instead have risked a potential life sentence after trial?

#### **IV. STATEMENT OF THE CASE**

The Defendant/Petitioner Valentin Sandoval was originally charged with rape in the second degree (forcible compulsion). CP 1-2. The charge was amended for plea, down to rape in the third degree. CP 3-4. The Defendant pled guilty on October 3, 2006. CP 5-15. The Defendant signed his name directly below the following language:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of this "Statement of the Defendant on Plea of Guilty." I have no further questions to ask of the judge.

CP 12. The plea statement explains that the plea is grounds for deportation of non-citizens. CP 10 at para. (i). Defendant and counsel orally assured the court of the Defendant's understanding. RP October 3, 2006 at 5-6.

At the sentencing hearing, the prosecutor informed the court that she

had learned that the Defendant had criminal history out of Arizona, namely a 1990 kidnapping, a 1995 kidnapping, and a 2000 felony stalking. RP January 23, 2007 at 4, 9. However, it would take a few weeks for the Arizona authorities to provide the documentation for these convictions. RP January 23, 2007 at 5-6. Defense counsel Robert Schiffner explained that if the court imposed the anticipated six month sentence, then “as of yesterday, my client is on dead time.” RP January 23, 2007 at 7. The court noted that the Defendant had a right to speedy sentencing and that as of this hearing the State was unable to prove the prior convictions by a preponderance. RP January 23, 2007 at 10. Accordingly, the court used a zero offender score. RP January 23, 2007 at 11.

With a zero offender score, the reduction in charge resulted in a sentencing range of 6-12 months. CP 18. A conviction on the original charge (with a zero offender score) would have resulted in a minimum sentence 13 times greater, with a sentencing range of 78-102 months<sup>1</sup> and a maximum sentence of life. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.712.

Mr. Sandoval has filed both a personal restraint petition and Brief of

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<sup>1</sup> A conviction on the original charge with an offender of three would have resulted in a minimum range of 102-136 months. RCW 9.94A.510; RCW 9.94A.515.

Appellant essentially making the same claim – that the Defendant’s plea was not voluntary because his counsel misinformed him regarding immigration consequences. Both the petition and appeal rely on Mr. Schiffner’s affidavit, which states that:

1. Mr. Sandoval did not want to plead guilty if it would mean that he would be “immediately” deported. (Para. 5)
2. Mr. Schiffner informed Mr. Sandoval that the length of time he spent in custody after sentencing affected the likelihood of his “being taken into immediate immigration custody and deported.” (Para. 6)
3. Mr. Schiffner informed Mr. Sandoval that if he pled guilty, he “would not be immediately deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea.” (Para. 7)
4. Mr. Sandoval has not been immediately deported, but deportation proceedings were initiated. (Para. 8)

Several months after Mr. Schiffner’s affidavit was signed, there are no longer any removal (deportation) proceedings against the Defendant. Brief of Appellant at 7. The Defendant is out of custody and residing in Moses Lake. State of Additional Grounds for Relief.

## V. ARGUMENT

### A. STANDARD OF REVIEW

1. Because the Defendant relies upon an affidavit that is not part of the record on review, this Court must apply the standards of review for a Personal Restraint Petition.

On appeal, an appellant is limited to the record. RAP 9.1(a). Mr. Sandoval's claim necessarily requires going off the record for consideration of a supplemental affidavit providing a record of counsel's conversation with his client. On appeal, the court is prohibited from considering the affidavit. Therefore, the appeal must be dismissed because there is no support for the claim on the direct appeal record. This claim is properly filed as a personal restraint petition only.

This Court should not be confused by the consolidation into applying the wrong standards. The Court should apply the standards for a personal restraint petition.

2. The Petitioner bears the burden of demonstrating that counsel's advice was not within the range of competence demanded of attorneys in criminal cases and that, but for counsel's advice, the result of the plea proceedings would have been different.

In a personal restraint petition the burden shifts to the petitioner. In re Cook, 114 Wn.2d 802, 814, 792 P.2d 506 (1990) (ultimate burden of proof

requires petitioner establish error by a preponderance of the evidence); Hews v. Evans, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). The voluntariness of a guilty plea is a matter of due process. In re Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). The petitioner must demonstrate actual and substantial prejudice; the mere possibility of prejudice is insufficient. In re Mercer, 108 Wn.2d 714, 718, 741 P.2d 559 (1987). See also In re Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991) (actual prejudice must be established by a preponderance of the evidence). Although a constitutional error is never considered harmless on direct appeal, such an alleged error is *not* presumed prejudicial for purposes of a personal restraint petition. In re St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). If the petitioner fails to make a prima facie showing of prejudice, the petition will be dismissed. In re Grigsby, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

Defense counsel has no obligation to inform the client of all possible collateral consequences of a guilty plea. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980); State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993); State v. Johnston, 17 Wn. App. 486, 493, 564 P.2d 1159 (1977); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4<sup>th</sup> Cir. 1973). It is well settled that deportation consequences are collateral to a guilty plea.

State v. Jamison, 105 Wn. App. 572, 591-92, 20 P.3d 1010, review denied, 144 Wn.2d 1018 (2001); In re Yim, 139 Wn.2d 581, 588, 989 P.2d 512 (1999); State v. Holley, 75 Wn. App. 191, 196, 876 P.2d 973 (1994); State v. Ward, 123 Wn.2d 488, 513, 869 P.2d 1062 (1994); In re Peters, 50 Wn. App. 702, 704, 750 P.2d 643 (1988).

However, counsel's affirmative misrepresentations regarding a collateral consequence *may* affect the voluntariness of a plea.<sup>2</sup> United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); People v. Correa, 485 N.E.2d 307 (Ill. 1985) (counsel's erroneous misrepresentation that guilty plea would not affect defendant's immigrant status was ineffective assistance and rendered guilty plea involuntary).

Not every misadvisement relied upon renders a plea involuntary. People v. Correa, 485 N.E.2d at 548-49. A "mere inaccurate prediction, standing alone, [does] not constitute ineffective assistance." Iaea v. Sunn,

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<sup>2</sup> The Defendant misrepresents that this is the holding in State v. Littlefair, 112 Wn. App. 749, 51 P.3d 116 (2002). Petition at 2-3; Brief of Appellant at 10. In that case, counsel did not "misinform" his client. "[T]he trial court made specific findings that were not challenged, that Littlefair's attorneys did not affirmatively misrepresent to him deportation consequences." State v. Littlefair, 112 Wn. App. at 769. Rather, the court permitted Littlefair to withdraw his plea, because his statutory right under RCW 10.40.200 to be *advised* of the deportation consequences of pleading guilty had been violated. State v. Littlefair, 112 Wn. App. at 763 (finding that the first claim regarding the statute is dispositive, so the court does not reach claims regarding the voluntariness of the plea or the effective assistance of counsel.)

800 F.2d 861, 865 (9th Cir. 1986).

The United States Supreme Court has held:

[A] decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

....

Whether a plea of guilty is unintelligent and therefore vulnerable [] depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but whether that advice was within the range of competence demanded of attorneys in criminal cases.

McMann v. Richardson, 397 U.S. 759, 770-71, 90 S. Ct. 1441, 25 L. Ed. 2d

763 (1970). In other words, the question is whether the Defendant received *effective assistance of counsel* in deciding to plead guilty.

Counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial, and in the former case counsel need only provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice.

Wofford v. Wainwright, 748 F.2d 1505, 1508 (11<sup>th</sup> Cir. 1984).

In order to prevail on the ineffective assistance of counsel claim, [a defendant] must demonstrate (1) that [] trial counsel's conduct was unreasonable, and (2) that but for [] trial counsel's failure to apprise [the defendant] of the deportation consequences of the guilty plea, the result of the plea proceedings would have been different.

United States v. Campbell, 778 F.2d 764, 768 (11<sup>th</sup> Cir. 1985), citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A bare allegation that a petitioner would not have pleaded guilty had defense counsel advised of the consequences of deportation is insufficient to establish prejudice under the second prong of Strickland. United States v. Campbell, 778 F.2d at 768.

B. DEFENDANT'S COUNSEL CORRECTLY ADVISED HIS CLIENT THAT HIS PLEA COULD HAVE DEPORTATION CONSEQUENCES AND THAT HE WOULD HAVE TIME TO RETAIN COUNSEL ON THE IMMIGRATION MATTER AND NOT BE IMMEDIATELY DEPORTED.

The Defendant's claims are replete with factual errors. They misrepresent Mr. Schiffner's statement. They misrepresent the "immediacy" and "certainty" of the Defendant's deportation. And they even misstate his crime of conviction.

1. The Defendant misstates his crime of conviction.

The Defendant misstates that he pled guilty to rape by "forcible compulsion." Brief of Appellant at 4. The assertion is unsupported by the record. Rape in the second degree may be by forcible compulsion. RCW 9A.44.050(1)(a). But the Defendant pled guilty to rape in the *third* degree.

CP 5. Rape in the third degree is sex where the victim did not *consent*. CP 5; RCW 9A.44.060. The difference between the punishments for the two crimes is enormous, and it is also a significant factor (unexplored by the Defendant) in the analysis of prejudice.

2. The Defendant's claim relies upon a misrepresentation of the evidence.

The Defendant claims that his trial counsel informed him that "he would not be taken into custody and put into deportation proceedings by the immigration authorities as a result of his guilty plea." Brief at Appellant at 3 citing the PRP. See also Brief at Appellant at 10, citing the PRP, Exhibit 1 ("Mr. Sandoval's attorney told him, specifically, that he would not be taken into custody and put into deportation proceedings by the immigration authorities, as a result of entering a guilty plea").

In fact, this is *not* what his counsel represents. This claim is a material misrepresentation of the evidence. The PRP includes an affidavit, exhibit 1, the only evidence in the brief and PRP for the claim, which states something quite different. His counsel told him that "he would not be *immediately* deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea." Affidavit of Attorney Robert E. Schiffner

at 2, para. 7 (emphasis added).

The Defendant interprets “not be immediately deported” to mean “not be deported.” This is both ungrammatical and inconsistent with the entirety of the sentence. “Not immediately” means something will happen, *but* not immediately. As Mr. Schiffner himself explains, he was advising his client to get an attorney because there could be “potential immigration consequences.”

Mr. Schiffner feels that his advice was “unfortunately incorrect,” because the Defendant “was immediately put into deportation proceedings.” Affidavit of Attorney Robert E. Schiffner at 2, para. 8. But Mr. Schiffner’s self-criticism is unwarranted. He does not claim to have told his client that “proceedings” would not commence immediately, but only that his client would not be “deported” immediately. And, indeed, the Defendant was not immediately deported. In fact, he has not been deported even now, ten months after the plea. He has had plenty of time to retain immigration counsel, exactly as Mr. Schiffner advised.

3. The Defendant misstates the consequences of his plea.

The Defendant misstates that he faces “certain deportation” and that his plea makes him “immediately and permanently deportable.” Brief of

Appellant at 4. The assertion is unsupported by any evidence in the Statement of Facts.

A petitioner must provide evidence to support any factual allegations. RAP 16.7(a)(2)(i). The content of the briefs in a personal restraint petition are governed by RAP 10.3. RAP 16.10(d). The opening brief should provide a statement of the case including *references to the record* and should provide argument together with citations to authority and *references to relevant parts of the record*. RAP 10.3(a)(5) and (6). There is no evidence for the Defendant's statement that his deportation was certain and immediate. His bare allegation is not evidence. The evidence is that the Defendant was *not* immediately deported, but is living in Moses Lake. (The Defendant's Statement of Additional Grounds for Review was signed on August 21, 2007 in Moses Lake where there is neither a state nor federal detention facility.)

By the Defendant's own admission, the claim of "certain" deportation is error. The Defendant admits that federal prosecutors may exercise discretion and elect not to file removal proceedings, that courts may find that they lack jurisdiction over removal proceedings, and that defendants may contest whether their conviction meets the federal standards. Brief of Appellant at 9. The Defendant's true claim is that deportation is highly

probable. By the Defendant's own briefing, it is plain that his deportation has not been "immediate" and is not "certain."

The Defendant claims that this is how the law is supposed to work. Brief of Appellant at 7. He does not demonstrate with any evidence that this is how it worked in his particular case. In fact, he concedes that the removal proceedings have been "terminated," albeit without prejudice. Brief of Appellant at 7. Ten months after his plea, the Defendant has not been deported and is not even detained.

On April 12, 2007, half a year after the guilty plea, the Defendant was "in custody at the Northwest Detention Center in Tacoma." Petition at 1. Four months later, on August 21, 2007, the Defendant was signing a document (the Statement of Additional Grounds for Review) in Moses Lake.<sup>3</sup> In other words, ten months after his plea the Defendant is home in Moses Lake, *not deported and not even in custody*. He has had ten months to retain counsel on the immigration matter. **Mr. Schiffner's advice was correct.**

C. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE.

For a claim of ineffective assistance of counsel, the Defendant must

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<sup>3</sup> There is no detention center in Moses Lake. The Grant County Jail is located in Ephrata, Washington.

show that his counsel's advice was unreasonable and that but for this advice he would not have pled guilty. United States v. Campbell, 778 F.2d 764, 768 (11<sup>th</sup> Cir. 1985), citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Defendant claims that his counsel misadvised that he would not be taken into custody and put into deportation proceedings. Petition at 2; Brief of Appellant at 3. But there is *no evidence* for this claim. Because there is no evidence in the Petition or Appellant's Brief that Mr. Schiffner misinformed his client, the claim must be dismissed without further review.

Mr. Schiffner states that when his other similarly situated clients were in custody for only a few hours after sentencing, they managed to escape the attention of immigration officials. Affidavit of Attorney Robert E. Schiffner at 2, para. 6. Therefore, although the affidavit does not so state, let us assume *arguendo* that counsel misinformed his client that he would *not come to the immediate attention* of immigration authorities, such that he would have time to retain counsel and ameliorate the potential immigration consequences. If these were the facts, the Defendant fails to show that this advice was unreasonable and fails to show that but for this advice he would not have pled guilty.

If Mr. Schiffner informed his client that he would not come to the immediate attention of immigration authorities, this statement was based on his previous experience (Affidavit of Robert E. Schiffner, para. 6). In other words, he made an inaccurate prediction based on real experience. The Ninth Circuit has held that a “mere inaccurate prediction, standing alone, [does] not constitute ineffective assistance.” Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986). It is reasonable to inform a client of practical consequences based on real experience. This Court should find that such an advisement is “within the range of competence demanded of attorneys in criminal cases.” McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). In fact, Mr. Schiffner’s experience and attention to the patterns of immigration authorities demonstrates more than what is required for a competent criminal defense counsel.

It appears that the reason Mr. Schiffner preferred a delay between plea and initiation of removal proceedings was to provide his client with enough time to hire immigration counsel. Affidavit of Robert E. Schiffner, para. 6. Whether he was immediately put into deportation proceedings or whether proceedings were initiated at a later date, the Defendant now has had ten months to retain immigration counsel. Therefore, the immediacy of the

immigration hold is immaterial to the decision to plead guilty.

Assuming *arguendo* that Mr. Schiffner advised his client that he would not be deported, the Defendant cannot show that but for deportation consequences he would not have pled guilty to a deal that reduced his confinement time by at least a factor of thirteen. Because the State amended the charge to third degree rape in exchange for a guilty plea, the Defendant was sentenced to only six months confinement. CP 21. With time off for good behavior, by the time sentencing came around, the Defendant had served all his time. RP January 23, 2007 at 7 (“as of yesterday, my client is on dead time”). If he had not pled guilty, he would have been risking conviction on the original charge and a minimum sentence of 78 months (6.5 years). RCW 9.94A.510; RCW 9.94A.515. The minimum term could have been even higher with a confirmation of the Defendant’s out of state criminal history.

Consider, too, that, unlike third degree rape, second degree rape is sentenced under RCW 9.94A.712. In other words, the Defendant could have received an indeterminate sentence with the minimum term within the standard range and the maximum term being life. If convicted on the original charge, the Defendant could have spent the rest of his life in prison. In

deciding his maximum term, the DOC would have considered his previous criminal history (two kidnappings and a felony stalking following an incident of domestic violence).

And finally, consider how willing the Defendant would be to risk a prolonged prison stay given his long term, possibly irremediable injury and pending lawsuit. RP January 23, 2007 at 13-14 (Defendant on L&I for six years and pursuing personal injury lawsuit while searching for treatment).

Although he has the burden of proof, the Defendant offers no evidence that deportation was a worse fate than life imprisonment such that he would not have pled guilty. A bare allegation that a petitioner would not have pleaded guilty had defense counsel advised of the consequences of deportation is insufficient to establish prejudice under the second prong of Strickland. United States v. Campbell, 778 F.2d at 768.

Moreover, we have been assuming *arguendo* facts for which there is no evidence. There is neither evidence nor reason to believe that Mr. Schiffner advised his client that he could not be deported following a conviction of felony rape. The affidavit does not support this. Mr. Schiffner advised that there were "potential immigration consequences" and that his client would need to "retain proper immigration counsel." Affidavit of

Attorney Robert E. Schiffner at 2, para. 7. And the record demonstrates that Mr. Schiffner was well aware of his client's non-citizen status. RP January 23, 2007 at 13.

Mr. Schiffner informed his client that there were potential immigration consequences to the plea. Affidavit of Robert E. Schiffner, para.7; CP 10, para. (i). In other words, he explained "the law in relation to the facts, so that the accused may make an informed and conscious choice." Wofford v. Wainwright, 748 F.2d 1505, 1508 (11<sup>th</sup> Cir. 1984). This is competent counsel.

Based on Mr. Schiffner's affidavit, the Defendant does not have sufficient evidence even to request a reference hearing. Hews v. Evans, 99 Wn.2d 80, 88, 660 P.2d 263 (1983) ("If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12"). The petition must be dismissed.

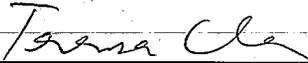
**VI. CONCLUSION**

Based upon the forgoing, the State respectfully requests this Court  
dismiss the petition and affirm the conviction.

DATED: Aug. 29, 2007.

Respectfully submitted:

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\_\_\_\_\_  
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