

Court of Appeals No. 57975-8-II  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 2

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**State of Washington, Respondent**  
**v.**  
**Jonathan Ricardo, Appellant**

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Grays Harbor County Superior Court

Cause No. 20-1-00326-14

The Honorable Judge David L. Edwards

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS..... i**

**TABLE OF AUTHORITIES.....iii**

**ISSUES AND ASSIGNMENTS OF ERROR ..... 1**

**INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS . 2**

**ARGUMENT ..... 5**

**I. THE TRIAL COURT SHOULD HAVE ALLOWED MR. RICARDO TO WITHDRAW HIS GUILTY PLEA, AND SHOULD HAVE GRANTED HIS RECONSIDERATION MOTION..... 5**

A. Defense Counsel provided deficient performance during plea negotiations. .... 6

B. Mr. Ricardo has shown a reasonable probability that he would have insisted on a trial, but for counsel’s deficient performance. .... 7

C. In his original decision, the trial judge applied the wrong legal standard to Mr. Ricardo’s motion to vacate. .... 9

D. The trial court should have granted Mr. Ricardo’s reconsideration motion..... 11

**II. THE TRIAL COURT’S ERRONEOUS FINDINGS ARE  
ACTUALLY CONCLUSIONS OF LAW, SUBJECT TO DE  
NOVO REVIEW..... 12**

**CONCLUSION..... 17**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)..... 7, 8, 9, 10

**WASHINGTON STATE CASES**

*Guardado v. Guardado*, 200 Wn.App. 237, 402 P.3d 357 (2017)..... 12

*Matter of Welfare of A.L.C.*, 8 Wn.App.2d 864, 439 P.3d 694 (2019)..... 12, 13

*Petition of Riley*, 122 Wn.2d 772, 863 P.2d 554 (1993)..... 8, 10

*State v. Stowe*, 71 Wn. App. 182, 858 P.2d 267 (1993)..... 7, 9

**WASHINGTON STATE STATUTES**

RCW 71.09.020 ..... 11

RCW 71.09.030..... 11

**OTHER AUTHORITIES**

CtR 7.8 ..... 6

## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Ricardo's motion to withdraw his guilty plea.
2. The trial court erred by denying Mr. Ricardo's reconsideration motion.
3. The trial court erred by mischaracterizing numerous legal conclusions as findings of fact.
4. The trial court erred by adopting Finding of Fact No. 6.
5. The trial court erred by adopting Finding of Fact No. 9.
6. The trial court erred by adopting Finding of Fact No. 10.
7. The trial court erred by adopting Finding of Fact No. 11.
8. The trial court erred by adopting Finding of Fact No. 12.
9. The trial court erred by adopting Finding of Fact No. 13.
10. The trial court erred by adopting Finding of Fact No. 14.
11. The trial court erred by adopting Conclusion of Law No. 2.
12. The trial court erred by adopting Conclusion of Law No. 3.

**ISSUE 1:** A guilty plea may be withdrawn if there is a reasonable probability that the defendant would not have pled guilty but for defense counsel's deficient performance. Was Mr. Ricardo entitled to withdraw his guilty plea because his attorney gave him faulty advice during plea negotiations?

**ISSUE 2:** Judge Edwards found a lack of prejudice because the State could seek civil commitment even absent a guilty plea. Did the court err by denying Mr. Ricardo's reconsideration motion once the State amended its civil commitment petition to rely solely on the charge to which he pled guilty?

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

When Jonathan Ricardo pled guilty to multiple felonies, his “overriding goal” was to avoid the consequences of a sex offense conviction, including civil commitment. His attorney wrongly told him that conviction for second-degree assault with intent to commit rape could not lead to civil commitment.

Counsel’s deficient performance prejudiced Mr. Ricardo. Given his “overriding goal”—avoiding the consequences of a sex-offense conviction—there is a reasonable probability that, but for counsel’s error, he would have insisted on going to trial rather than pleading guilty.

Mr. Ricardo was denied the effective assistance of counsel. He must be permitted to withdraw his guilty pleas.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

When he entered plea negotiations, Jonathan Ricardo’s “overriding goal” was to avoid the consequences of a sex offense conviction. Appendix I to Motion to Vacate filed 5/16/22, Supp. CP. He’d been charged with three counts of third-degree child rape. Information, filed 8/3/2020, Supp. CP.

Because of his “overriding goal,” he rejected an offer to plead guilty to a single count of third-degree child rape (a Class C felony). Statement of Prosecuting Attorney filed 5/17/21, p. 6, Supp. CP; Appendix I to Motion to Vacate filed 5/16/22, Supp. CP. Instead, he offered to plead guilty to second-degree assault (a Class B felony) and four other felonies.<sup>1</sup> Statement of Prosecuting Attorney filed 5/17/21, pp. 6-7, Supp. CP. In the end, he pled guilty to those four felonies and one count of second-degree assault with intent to commit third-degree rape of a child. CP 192, 201-202, 204.

Before pleading guilty, he asked his attorney if this offense could lead to civil commitment. Appendices H and I to Motion to Vacate filed 5/16/22. His attorney told him that it could not. Appendix I to Motion to Vacate filed 5/16/22.

Several months later, the State filed a petition for civil commitment, alleging that the assault conviction was a sexually violent offense. CP 240-241. Mr. Ricardo moved to withdraw his plea, arguing that his attorney provided ineffective

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<sup>1</sup> These were two counts of felony harassment and two counts of second-degree malicious mischief. CP 1, 201-202, 204.

assistance by providing faulty advice. Motion to Vacate filed 5/16/22.

The court denied Mr. Ricardo's motion. CP 216-221. The judge concluded that civil commitment proceedings are "clearly a collateral consequence," and that defense attorneys do "not have an obligation to advise a Defendant of collateral consequences." CP 217.

The court also found "[t]here is not a clear showing of... prejudice." CP 218. According to the judge, Mr. Ricardo suffered no prejudice because he'd be facing civil commitment even if he hadn't pled guilty. CP 218. This was so because the civil commitment petition included an alternative allegation which would allow commitment even without the assault conviction. CP 218; *see also* RP 34.

The court entered an order denying the motion. CP 216-221. Mr. Ricardo's appeal of that decision is pending. *See* Court of Appeals No. 57431-4-II.

At some point after the trial court's decision, the State amended its civil commitment petition. CP 261. In its Amended Petition, the State removed the alternative allegation, instead



the petition now relied exclusively on Mr. Ricardo's second-degree assault conviction as a predicate offense. CP 261-262.

Based on this change, Mr. Ricardo filed a motion asking the court to reconsider its earlier decision.<sup>2</sup> CP 299. He argued that the court should reconsider its determination that Mr. Ricardo suffered no prejudice, given the amendment of the civil commitment petition. CP 230-232.

The trial judge denied the reconsideration motion on its merits. 266. Mr. Ricardo now seeks review of that decision.

### **ARGUMENT**

#### **I. THE TRIAL COURT SHOULD HAVE ALLOWED MR. RICARDO TO WITHDRAW HIS GUILTY PLEA AND SHOULD HAVE GRANTED HIS RECONSIDERATION MOTION.**

Jonathan Ricardo's attorney gave him faulty advice during plea negotiations. As a result, he entered a guilty plea that contravened his overriding goal. Because he was denied the

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<sup>2</sup> Although the motion was captioned "Defendant's Motion to Reconsider," Mr. Ricardo cited, *inter alia*, CrR 7.8. CP 231. The trial court characterized his motion as untimely, but nonetheless reached the merits. CP 266.

effective assistance of counsel, the trial court should have allowed Mr. Ricardo to withdraw his plea.

Furthermore, the trial judge should have reconsidered his determination that Mr. Ricardo suffered no prejudice. The basis for the court's "no prejudice" finding vanished once the State amended its civil commitment petition.

A. Defense Counsel provided deficient performance during plea negotiations.

Mr. Ricardo's attorney provided faulty advice regarding the consequences of his guilty plea. Appendix I to Motion to Vacate filed 5/16/22, Supp. CP. The trial judge erroneously concluded that an attorney need not advise a client regarding collateral consequences that attend a conviction. CP 217. This is false.

Affirmative misinformation regarding a collateral consequence establishes deficient performance during plea negotiations. *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). Furthermore, even a mere failure to advise regarding a collateral consequence may constitute deficient

performance. *Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Here, counsel’s performance fell below an objective standard of reasonableness. Mr. Ricardo was falsely advised that he would not suffer the consequences of a sex offense conviction—including the possibility of civil commitment—if he pled guilty to second-degree assault with intent to commit child rape.

Counsel either misrepresented a collateral consequence or failed to advise Mr. Ricardo about that collateral consequence. Appendices H and I to Motion to Vacate filed 5/16/22, Supp. CP. Both amount to deficient performance. *Id.*; *Stowe*, 71 Wn. App. at 187.

B. Mr. Ricardo has shown a reasonable probability that he would have insisted on a trial, but for counsel’s deficient performance.

A person challenging a guilty plea establishes prejudice by showing “that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Petition of Riley*, 122 Wn.2d

772, 780–81, 863 P.2d 554 (1993). To obtain relief, the person “must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla*, 559 U.S. at 372.

That standard is met here.

Mr. Ricardo’s “overriding goal” was to avoid the consequences of a sex offense conviction. Appendix I to Motion to Vacate filed 5/16/22, Supp. CP. During plea negotiations, he rejected a plea to a single Class C sex offense. Instead, he pled guilty to five felonies (including a Class B offense) because he mistakenly thought that he would avoid the consequences of a sex offense conviction. Statement of Prosecuting Attorney filed 5/17/21, pp. 6-7, Supp. CP; Appendix I to Motion to Vacate filed 5/16/22, Supp. CP; CP 192, 201-202.

Had he understood the consequences of conviction, Mr. Ricardo would have rejected the plea offer, just as he did with the otherwise more favorable offer to plead guilty to a single Class C sex offense. Statement of Prosecuting Attorney filed

5/17/21, pp. 6-7, Supp. CP; Appendix I to Motion to Vacate filed 5/16/22, Supp. CP; CP 192, 201-202.

Whether defense counsel affirmatively misrepresented the collateral consequences of the plea or simply failed to provide advice, Mr. Ricardo has shown a reasonable probability that he would have gone to trial rather than voluntarily sign up for the consequences that attend a sex offense conviction. *Id.* This establishes prejudice. *Id.*

C. In his original decision, the trial judge applied the wrong legal standard to Mr. Ricardo's motion to vacate.

The trial court did not understand that providing affirmative misinformation regarding a collateral consequence amounts to deficient performance. CP 217; *Stowe*, 71 Wn. App. at 187. Nor did the court understand counsel's mandatory duty to advise a defendant regarding collateral consequences. CP 217; *Padilla*, 559 U.S. at 374.

Furthermore, the court misunderstood the prejudice inquiry. The court did not examine the effect of counsel's error on Mr. Ricardo's decision to plead guilty. CP 218; *Riley*, 122

Wn.2d at 780–81. Instead, the court erroneously focused on the basis for the State’s civil commitment petition. CP 218.

According to the court, Mr. Ricardo was not prejudiced because the State could seek civil commitment even absent a guilty plea. CP 218. The court noted that Mr. Ricardo “could have been subjected to the SVP statute whether pleading to either charge.” CP 18.

The basis for a civil commitment petition does not factor into the question of prejudice. *See Riley*, 122 Wn.2d at 780–81; *Padilla*, 559 U.S. at 372. Mr. Ricardo showed prejudice by establishing that it would have been rational for him to reject the plea offer, given his “overriding goal” of avoiding the consequences of a sex offense conviction. Appendix I to Motion to Vacate filed 5/16/22, Supp. CP; *Padilla*, 559 U.S. at 372.

The trial court’s error requires reversal. Mr. Ricardo must be permitted to withdraw his plea. *Id.*

D. The trial court should have granted Mr. Ricardo's reconsideration motion.

After the court's ruling, the State amended its civil commitment petition. CP 261. If the trial court's prejudice analysis is correct, then Mr. Ricardo *was* prejudiced by counsel's error once the petition was amended.

As the court found, prior to the amendment, Mr. Ricardo would have faced civil commitment even if he had not pled guilty to the assault charge. CP 218. The State originally alleged that (a) the assault conviction was a qualifying prior conviction *and* (b) that the underlying conduct amounted to Recent Overt Act,<sup>3</sup> allowing commitment based on his out-of-state prior convictions even absent a conviction for assault. CP 240-241.

The amended petition was based solely on the assault conviction. CP 261-262. The absence of any alternative grounds for commitment meant that the petition rested on Mr.

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<sup>3</sup> See RCW 71.09.020(13); RCW 71.09.030(1)(e).

Ricardo's guilty plea. In other words, counsel's error prejudiced Mr. Ricardo under the court's theory because the guilty plea paved the way for a civil commitment petition. This is the very consequence he sought to avoid as his "overriding goal."

Appendix I to Motion to Vacate, Supp. CP.

Because of this, Mr. Ricardo established prejudice even under Judge Edwards' reasoning. Judge Edwards should have changed his ruling. Instead, he "determined that the motion for reconsideration should be denied." CP 266.

This error requires reversal.

**II. THE TRIAL COURT'S ERRONEOUS FINDINGS ARE ACTUALLY CONCLUSIONS OF LAW, SUBJECT TO DE NOVO REVIEW.**

A legal conclusion that is incorrectly designated as a finding must be treated as a conclusion of law and reviewed *de novo*. *Matter of Welfare of A.L.C.*, 8 Wn.App.2d 864, 871, 439 P.3d 694 (2019); *Guardado v. Guardado*, 200 Wn.App. 237, 245, 402 P.3d 357 (2017). In this case, the court incorrectly designated several legal conclusions as findings.



A finding of fact involves a determination of “whether something occurred based on the evidence before the court.” *A.L.C.*, 8 Wn.App.2d at 872. By contrast, when the court “determine[s] the legal significance of those underlying facts,” that determination is a conclusion of law. *Id.*

Finding No 6 indicates that “the question at issue was whether the Defendant entered his plea voluntarily.” CP 217. In fact, the question was whether Mr. Ricardo was prejudiced by his attorney’s deficient performance, as outlined above. He did not argue that his plea was involuntary. Finding No. 6 should be reviewed *de novo* and vacated.<sup>4</sup>

The court found that attorneys have no duty to advise their clients regarding collateral consequences. CP 217. This is false. Attorneys have a duty to advise their clients regarding collateral consequences as the Supreme Court found in *Padilla*.

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<sup>4</sup> Likewise, Conclusion No. 2 mischaracterizes “the claimed error [as] ‘a misstatement of sentencing consequences.’” CP 218. This is incorrect. The issue is ineffective assistance. Conclusion No. 2 must be vacated.

Furthermore, it is deficient performance to provide misinformation regarding a collateral consequence, as outlined above. *See Stowe*, 71 Wn. App. at 187. Finding of Fact No. 9 is a legal conclusion. It should be reviewed *de novo*, and it must be vacated.<sup>5</sup>

Likewise, Findings Nos. 13 and 14 include incorrect statements of law as well as legal conclusions. Both “findings” suggest that Mr. Ricardo was required to make a “clear showing” of ineffective assistance and prejudice. CP 218. This is incorrect: there is no requirement of a “clear showing.”<sup>6</sup> Instead, he was required to show deficient performance and a reasonable probability of prejudice. He has done so, as outlined

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<sup>5</sup> Findings of Fact Nos. 7 and 8 are also legal conclusions.

<sup>6</sup> Similarly, Conclusion No. 3 indicates that Mr. Ricardo was required to show “that the outcome of the guilty plea proceeding would more likely than not have been different had the error not occurred.” CP 219. This is incorrect. Mr. Ricardo was required to show a reasonable probability of prejudice, as outlined above. Conclusion of Law No. 3 is incorrect and must be vacated.

above. Findings Nos. 13 and 14 are subject to *de novo* review.

They are incorrect and must be vacated.

In Finding No. 10, the court found immaterial the question of whether Mr. Ricardo received faulty advice regarding the consequences of his guilty plea. CP 218. This is a legal conclusion. It is also incorrect; Mr. Ricardo's argument is that he received faulty advice, and that this was deficient performance, as outlined above. Finding No. 10 is a legal conclusion. It should be reviewed *de novo* and vacated.

Finding No. 11 reflects a misapprehension of Mr. Ricardo's argument. In his initial motion, he argued that he would have gone to trial rather than pleading guilty to an offense that could lead to commitment. He did not argue that there was no other basis for filing a civil commitment petition, as the finding suggests. CP 218. Furthermore, Finding No. 11 appears to suggest that Mr. Ricardo failed to establish prejudice. CP 218. Finding No. 11 is a legal conclusion, not a

factual finding. It should be reviewed *de novo* and vacated for the reasons outlined above.

Finding No. 12 suggests that Mr. Ricardo might have faced civil commitment after pleading guilty to “either charge.” CP 218. This is a legal conclusion that must be reviewed *de novo*. It is apparently a reference to the State’s offer that he plead guilty to third-degree rape of a child. Statement of Prosecuting Attorney filed 5/17/21, p. 6, Supp. CP; Appendix I to Motion to Vacate filed 5/16/22, Supp. CP. But Mr. Ricardo made clear that he would never have pled guilty to any sex offense. Statement of Prosecuting Attorney filed 5/17/21, p. 6, Supp. CP; Appendix I to Motion to Vacate filed 5/16/22, Supp. CP.

In addition, as noted, he did not argue that the prejudice stemmed from the applicability of the civil commitment statute. Instead, his argument was that he was denied the effective assistance of counsel – he pled guilty based on incorrect advice from his attorney. There is a reasonable probability that he

would have insisted on a trial had he been properly advised. Finding No. 12 is unsupported (and irrelevant) and must be vacated.

The trial court's order denying Mr. Ricardo's motion to vacate and the order denying reconsideration must be reversed. Mr. Ricardo must be permitted to withdraw his guilty plea.

### **CONCLUSION**

The trial court should have granted Mr. Ricardo's reconsideration motion. Mr. Ricardo's overriding goal was to avoid the consequences of a sex offense conviction. His attorney either (a) provided misinformation, or (b) failed to advise him as to the collateral consequences of his guilty plea.

The trial court's prejudice analysis erroneously focused on the grounds for the State's civil commitment petition. However, if the trial judge were correct, the court should have reconsidered its original decision following amendment of the civil commitment petition.

The trial court's order must be vacated, and the case must be remanded so Mr. Ricardo can withdraw his guilty plea.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 2713 words, as calculated by our word processing software. The font size is 14pt.

Respectfully submitted on May 26, 2023,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

**CERTIFICATE**

I certify that on today's date, I mailed a copy of this document to:

Jonathan Ricardo  
McNeil Island Special Commitment Center  
P.O. Box 88600  
Steilacoom, WA 98388

I CERTIFY UNDER PENALTY OF PERJURY  
UNDER THE LAWS OF THE STATE OF  
WASHINGTON THAT THE FOREGOING IS TRUE  
AND CORRECT.

Signed at Olympia Washington on May 26, 2023.



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Jodi R. Backlund, No. 22917  
Attorney for the Appellant