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TETON COUNTY, WYOMING

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IN THE DISTRICT COURT OF TETON COUNTY, WYOMING
NINTH JUDICIAL DISTRICT

THE STATE OF WYOMING

Plaintiff,

vs.

JOSE MANUEL DIAZ,

Defendant.

Criminal Action No. 2247

**ORDER UPON EVIDENTIARY HEARING REGARDING INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIMS**

THIS MATTER comes before the Court on remand from the Wyoming Supreme Court in Case Number S-11-0226, captioned *Jose Manuel Diaz, Petitioner v. The State of Wyoming, Respondent*, to "make findings of fact and conclusions of law on Petitioner's claim that his trial counsel was ineffective with regard to the decision of whether to take a direct appeal" and, related to that, whether "trial counsel was ineffective in advising (or failing to advise) Petitioner with regard to immigration consequences of a guilty plea." The Court held an evidentiary hearing on November 29, 2011. Petitioner, Mr. Diaz, appeared by telephone and was represented by counsel Diane E. Courselle and law student Gary Veron, from the Defender Aid Program. The State was represented Deputy Prosecuting Attorney Clark C. Allan from the Teton County and Prosecuting Attorney's Office. After reviewing the parties pre-hearing memoranda and considering the evidence and argument presented at the hearing, the Court finds and concludes that Petitioner was not denied effective assistance of counsel. The Court specifically finds and concludes as follows:

Failure to Advise Regarding Immigration Consequences of a Guilty Plea

Findings of Fact

1. Petitioner moved to Wyoming from Guatemala at the age of seven in July 1995. Petitioner testified that his family entered the United States on tourist visas which were valid for six months; however, Petitioner and his family overstayed on their tourist visas. Petitioner did not secure legal residency in the United States prior to his arrest on the charges at issue in this case.

2. Charges were filed against Defendant on October 22, 2009 on two felony counts: Conspiracy to Deliver a Controlled Substance, in violation of W.S. § 35-7-1042(a)(ii), and Delivery of a Controlled Substance, in violation of W.S. § 35-7-1031(a)(i), both arising out of events in April 2009. Petitioner entered a plea of guilty to the charge of Delivery of a Controlled Substance, in violation of W.S. § 35-7-1031(a)(i), a felony, on February 9, 2010. The Conspiracy charge was dismissed as part of the plea agreement. Defendant's plea agreement with the State was subject to open sentencing by the Court not to exceed eighteen to thirty-six months in the Wyoming State Penitentiary. At the February 9, 2010 hearing in which Defendant entered his guilty plea, the Court sentenced Defendant to not less than eighteen months and not more than thirty-six months in prison. The Court suspended the sentence and placed Petitioner on three years of supervised probation. The Court entered its Judgment and Sentence on February 24, 2010.
3. Prior to Petitioner's arrest on the charges in this case, Petitioner had been arrested in Idaho. Petitioner testified that at the time of his arrest in Wyoming, United States Immigration and Customs Enforcement ("ICE") already had a hold on Petitioner related to the Idaho charges. Following Petitioner's guilty plea in this case, he was taken into ICE custody and transported to the ICE detention center in Aurora, Colorado, where he remains to-date.
4. Petitioner alleges that his attorney, Kent Brown, failed to inform him of the consequences that his guilty plea would have on Petitioner's immigration status; specifically, that Petitioner's conviction of a drug-related felony (other than possession) is considered an aggravated felony under federal law, and accordingly, Petitioner is considered automatically deportable and subject to an expedited process of removal without formal proceedings or the opportunity to apply for discretionary relief. Petitioner now asserts in these proceedings that if he had been aware of the fact that the crime to which he was pleading guilty was an aggravated felony subject to automatic deportation, then he would not have plead guilty and would have, instead, gone to trial.
5. Both Petitioner and Mr. Brown testified, and thus the Court can conclude, that Mr. Brown never specifically informed Petitioner that Delivery of a Controlled Substance constitutes an aggravated felony for the purposes of immigration and that it would render Petitioner

automatically deportable. *As set forth below, however, the evidence shows that Mr. Brown told Petitioner that his plea would make him deportable.*

6. Petitioner's testimony at the evidentiary regarding what, exactly, Mr. Brown advised him regarding the potential immigration consequences of Petitioner's guilty plea was inconsistent. Petitioner admitted that Mr. Brown informed him that pleading guilty to a felony would affect Petitioner's immigration status. Petitioner testified, though, that Mr. Brown never told Petitioner that pleading guilty would make Petitioner deportable. Later, however, Petitioner testified that Mr. Brown advised Petitioner that the guilty plea would make Petitioner eligible for deportation.
7. Petitioner also stated that Mr. Brown told Petitioner that if Petitioner received any sentence less than a year, then it would not result in adverse immigration consequences. Petitioner stated he believed Mr. Brown. Given Petitioner's repeated other testimony, however, that Petitioner knew that he would be deported if he plead guilty to a felony, the Court does not find it credible that Petitioner relied on alleged statements by Mr. Brown that a sentence of less than a year would not have adverse immigration consequences. Instead, it appears to the Court based on the testimony from Petitioner and Mr. Brown, that any information Petitioner had regarding a sentence less than a year being an operative sentence to avoid adverse immigration consequences was derived 1) from Petitioner's prior experiences with the Idaho criminal justice system, and 2) from statements made by Petitioner's father after the father consulted an immigration attorney in Idaho.
8. Petitioner consistently testified that he knew that pleading guilty to a felony would make him automatically deportable. Petitioner indicated that he shared those concerns with Mr. Brown and that Mr. Brown responded that the plea deal that had been negotiated was the best deal that Mr. Brown could negotiate and that otherwise, Petitioner would have to go to trial. Petitioner repeatedly indicated that he wanted to avoid trial because of the likelihood that he would be unsuccessful and face a prison sentence. At one point, on the day of the change of plea hearing, Petitioner testified that he himself told Mr. Brown that pleading guilty to a felony would result in Petitioner's deportation. Mr. Brown responded to Petitioner that it was the best plea deal that he could negotiate. At that point, in Court

just before the change of plea proceedings, Mr. Brown had a conversation with Petitioner's father, and Petitioner's father gave Petitioner a thumbs up. Petitioner testified that, based on his father's thumbs up, he believed that everything would "be okay," and thereafter Petitioner entered his guilty plea at the change of plea proceedings.

9. Mr. Brown testified that, while it is true that he never informed Petitioner that pleading guilty to Delivery of a Controlled Substance was considered an aggravated felony that would result in Petitioner's automatic deportation, Mr. Brown informed Petitioner that the guilty plea would make Petitioner deportable. Mr. Brown indicated that he spoke with an immigration attorney who informed him that Petitioner would be deported if he was convicted of Delivery of a Controlled Substance. Mr. Brown then testified that he relayed that information to both Petitioner and Petitioner's father. In response, Petitioner's father indicated that he believed that if his son received a sentence of less than a year, it would not have a negative impact on his immigration status. Mr. Brown also stated that the immigration lawyer advised him it would not hurt to argue for the lowest sentence possible to the Court. Mr. Brown indicated that he believed a lower sentence may better reflect in the eyes of the ICE judge and perhaps create a "lower profile" for Petitioner.
10. Indeed, at Petitioner's change of plea hearing, Mr. Brown argued to the Court that Petitioner's father "consulted the immigration officials and I guess it's our understanding that less than a year is the operative number. If we can keep things under a year, you know, 364 days then it significantly effects what's going to happen. I've talked to an immigration attorney also and that's kind of my understanding." At the evidentiary hearing, Mr. Brown stated that, while his statement to the Court at the change of plea hearing was inarticulate, he had made it clear to his client previously that the one-year mark was irrelevant. Mr. Brown indicated that he made that argument to the Court in part because of what the immigration attorney told him about arguing for a lesser sentence, in part to satisfy Petitioner and Petitioner's father, and in part to get the lowest sentence possible for his client.
11. At the change of plea hearing, the Court also addressed potential immigration consequences with Petitioner. Specifically, the Court instructed Petitioner that:

[i]f you plead guilty to a felony, Mr. Diaz, and this is a felony, you lose certain civil rights. If you are not a citizen of the United States you are

hereby advised that conviction of the offense to which you are pleading guilty **may have the consequences of deportation**, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Transcript of Change of Plea and Sentencing Hearing, 8:23-9:5 (emphasis added).

Petitioner indicated that he understood what the Court informed him, and at that time, Petitioner entered a guilty plea. *Id.* at 9:19-10:22.

12. Under the plea agreement with the State, Petitioner could have received a sentence of up to thirty-six months in prison. Petitioner testified at the evidentiary hearing that he understood that there was no guarantee that he would receive a sentence of less than a year, and that he knew that he could be sentenced to prison time. Furthermore, Petitioner testified that he knew that by pleading guilty to a felony offense, he would be subject to deportation proceedings.
13. Thus, from the evidence before the Court, it is clear that Mr. Brown advised Petitioner that, by pleading guilty to a felony offense, he would be subject to deportation. Mr. Brown also advised Petitioner that he was unlikely to prevail at trial, and that the plea deal from the State was the best that Mr. Brown could negotiate. It is also clear from the evidence that Petitioner was aware that he would be subject to deportation because he was pleading guilty to a drug-related felony, that he knew he may receive a sentence of more than one year, and that he still entered a guilty plea in order to avoid a trial and, hopefully, prison. While Petitioner now indicates that he was unaware that he would be subject to automatic deportation and that he relied upon Mr. Brown's in-court statement that a sentence of less than a year may ameliorate immigration concerns, that testimony is inconsistent with the weight of the evidence before the Court and Petitioner's own statements made throughout the evidentiary hearing. Accordingly, the Court concludes that Mr. Brown properly advised Petitioner that a guilty plea to the charge of Delivery of a Controlled Substance would make Petitioner deportable; however, Mr. Brown did not inform Petitioner that the offense was an aggravated felony that would render Petitioner subject to automatic deportation.

Conclusions of Law

14. The United States Supreme Court articulated the standard for attorneys informing criminal defendants of the potential consequences of a guilty plea on the defendant's

immigration status in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). In *Padilla*, the defendant, who had been a lawful permanent resident of the United States for over forty years, was convicted (through a guilty plea) of drug-related charges that would render him subject to automatic deportation. Mr. Padilla's trial attorney erroneously informed Mr. Padilla that, given the amount of time Mr. Padilla had lived in the United States, he would not be subject to deportation based on the criminal conviction. Following Mr. Padilla's conviction, ICE instituted deportation proceedings, and Mr. Padilla challenged his conviction on the basis of the ineffective assistance of his lawyer in the rendering of the erroneous immigration advice.

15. In *Padilla*, the Court analyzed the defendant's claim under the framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which provides the analysis for ineffective assistance of counsel claims. Under *Strickland*, a court must first determine whether a counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. Then the court must consider whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.
16. In analyzing whether Mr. Padilla's lawyer was ineffective under the *Strickland* framework, the *Padilla* Court analyzed the same federal statute under which Petitioner is facing deportation proceedings in his case. That statute provides that "[a]ny alien who at any time after admission has been convicted of a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance...is deportable." 8 U.S.C. § 1227(a)(2)(B)(i). Furthermore, 8 U.S.C. § 1101 (a)(43)(B) defines an "aggravated felony" as including "illicit trafficking in a controlled substance." Finally, 8 U.S.C. § 1228 provides that aggravated felons are conclusively presumed deportable and are subject to an expedited process of administrative removal without formal proceeding or the opportunity to apply for discretionary relief. 8 U.S.C. §§ 1228(a), (b)(1), and (c).
17. In analyzing those statutes, the *Padilla* Court provided that:

[t]here will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such a case is more limited. When the law is not succinct and straightforward..., a criminal defense attorney

need do no more than advise a noncitizen client that the pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla, 130 S.Ct. at 1483. The Court further stated that “[t]he consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” *Id.* Finally, the Court wrote that “Padilla’s counsel could have easily determined that his plea would make him eligible for deportation...,” but “[i]nstead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country.” *Id.* Ultimately, the Court concluded that Padilla “sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*” and remanded the case to the trial court to consider whether the defendant could satisfy the second *Strickland* prong. *Id.* at 1483-84.

18. In the case at hand, Mr. Brown did exactly what the *Padilla* Court mandated him to do. Mr. Brown consulted with an immigration attorney and determined that if Petitioner entered a guilty plea to the crime of Delivery of a Controlled Substance, that would render Petitioner deportable under the United States Code. The evidence before the Court further indicates that Mr. Brown communicated that information to Petitioner and that Petitioner understood it. Petitioner testified that he knew if he was convicted of a felony, he would be deportable. Petitioner now, however, argues that Mr. Brown had a heightened duty to inform Petitioner that he was being convicted of an aggravated felony and subject to mandatory deportation. Petitioner provides no independent authority for this proposition, instead relying on *Padilla*. In *Padilla*, however, under the same deportation statutes at issue in this case, the Court provided that “Padilla’s counsel could have easily determined that his plea would make him eligible for deportation.” *Id.* at 1483 (emphasis added). Under the facts before the Court, Mr. Brown complied with that requirement and did not provide inadequate representation to Petitioner.
19. Petitioner’s claim fails under the first prong of *Strickland* because Petitioner is unable to show that Mr. Brown’s representation fell below an objective standard of reasonableness, therefore rendering it unnecessary for the Court to consider whether Petitioner’s claim would succeed under the second *Strickland* requirement that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S.

at 694. The Court notes, however, that Petitioner would also be unable to succeed under the second *Strickland* prong. Petitioner testified that he knew that if he was convicted of a felony, then he would be automatically deportable. Petitioner further testified that, even if receiving a sentence of less than one-year would mean that Petitioner did not suffer adverse immigration consequences, Petitioner *knew* that under his plea deal, he was not guaranteed a less-than-one-year sentence and that he could be sentenced up to thirty-six months. Despite this, Petitioner chose to enter a guilty plea so that he could avoid trial and hopefully avoid a prison sentence. Thus, Petitioner cannot demonstrate that he would have chosen to go to trial if he had been advised that his crime constituted an aggravated felony because Petitioner testified that he *knew* that he was subject to automatic deportation and that he was pleading guilty to a felony that rendered him automatically deportable.

20. Finally, Petitioner's claim also fails under the Tenth Circuit Court of Appeal's recent holding in *United States v. Hong*, -- F.3d --, Case No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011). In *Hong*, the Tenth Circuit considered whether the Supreme Court's holding in *Padilla* applied retroactively to sentences that were entered prior to the Supreme Court's March 31, 2010 opinion. The Tenth Circuit concluded that the *Padilla* ruling could not be applied retroactively. The court wrote:

Although *Padilla* establishes a new rule of constitutional law, under the Supreme Court's rubric for determining retroactivity established in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *Padilla* does not apply retroactively to cases on collateral review. ***

In *Teague*, and subsequent cases interpreting its analysis, the Supreme Court constructed and refined a three-step process to determine retroactivity. We apply it here to decide whether *Padilla* announced a new rule of constitutional law and whether it applies retroactively to Hong's conviction. We first must determine whether Hong's Conviction was final before the Supreme Court's decision in *Padilla*.

Second, we assess whether the rule in *Padilla* is actually "new," based on whether a "court considering [Hong]'s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [announced in *Padilla*] was required by the Constitution."

Third, if we determine if the rule in *Padilla* is new, we will apply it to Hong's conviction only if that new rule "falls within either of the two narrow exceptions to nonretroactivity."

Id. at *2-*3 (citations omitted; modifications original). First, the *Hong* court concluded that Hong's conviction was final before the Supreme Court's decision in *Padilla* because

his conviction became final when his time period in which he could file a direct appeal following the entry of judgment against him lapsed in 2008, well before the *Padilla* Court's March 31, 2010 opinion. *Id.* at *3. Next, the *Hong* court found that *Padilla* announced a new rule of constitutional law "because it was not compelled by existing precedent at the time Hong's conviction became final." *Id.* Finally, however, the court found that *Padilla* cannot be applied retroactively because 1) the rule announced in *Padilla* was procedural, not substantive, and 2) the rule did not constitute "a watershed rule of criminal procedure." *Id.* at *8-*9.

21. Based on the Tenth Circuit's holding in *Hong*, Petitioner's claim is time-barred because the rule announced in *Padilla* cannot be applied retroactively to Mr. Brown's actions. In Wyoming, post-conviction relief proceedings considering the inadequacy of trial counsel are considered cases on "collateral review," thus falling under the scope of *Hong*. See *Laing v. State*, 746 P.2d 1247, 1251 (Wyo. 1987) ("For almost 40 years it has been established that inadequacy of counsel undercuts the very competence and jurisdiction of the trial court and is always open to collateral review."). Petitioner's Judgment and Sentence was entered on February 24, 2010. Under the reasoning in *Hong*, a judgment becomes final for the purposes of determining whether applying the rule in *Padilla* would constitute a retroactive application of that rule when the right of the defendant to bring a direct appeal expires. Thus, the Court must look to the Wyoming Rules of Appellate Procedure to determine when Petitioner's conviction became final. Under the Wyoming Rules of Appellate Procedure, "[a]n appeal from a trial court to an appellate court shall be taken by filing the notice of appeal with the clerk of the trial court within 30 days from entry of the appealable order," in this case, the Judgment and Sentence. Wyo. R. App. P. 2.01. Thus, under the standard set forth in *Hong*, Petitioner's sentence became final on March 26, 2010, thirty days after the entry of the Judgment and Sentence. The United States Supreme Court did not announce its holding in *Padilla* until five days later on March 31, 2010. Therefore, under the Tenth Circuit's holding in *Hong* that *Padilla* cannot be applied retroactively, Petitioner's sentence falls five days outside the protections of *Padilla*. Accordingly, Petitioner's claim necessarily fails because, in this case, Petitioner was not entitled to the protections announced by *Padilla* because, at the

time Petitioner's conviction became final, those protections did not yet exist.

22. In conclusion, under the first *Strickland* prong, Mr. Brown provided Petitioner with adequate advice regarding the potential consequences Petitioner's guilty plea would have on Petitioner's immigration status. Mr. Brown informed Petitioner that the plea would render Petitioner deportable. Furthermore, Petitioner has failed to demonstrate that, even if Petitioner knew that he would be automatically deportable as an aggravated felon, that he would have chosen to go to trial instead of entering a guilty plea, as required by the second prong of *Strickland*. Finally, under the Tenth Circuit's ruling in *Hong*, Petitioner's claim under *Padilla* is time-barred because *Padilla* cannot be applied retroactively to Petitioner's sentence that was final before the announcement of the *Padilla* decision.

Ineffective Assistance of Counsel Regarding the Decision Whether to Take a Direct Appeal

Findings of Fact

1. To the extent that the above-recited facts are applicable to the Court's analysis related to Petitioner's claim regarding inadequate assistance of counsel related to the availability of an appeal, those facts are incorporated herein.
2. The recollections of both Petitioner and Mr. Brown with regard to advice relating to the availability of appeal are less clear than their memories related to the immigration issues in the case.
3. Petitioner testified that he does not believe that Mr. Brown informed him that he could appeal his conviction *after* he entered his guilty plea and was sentenced on February 9, 2010. Petitioner indicated, however, that he cannot recall whether he was advised of his appeal rights by Mr. Brown at any time *prior to* the February 9 hearing.
4. Mr. Brown, on the other hand, stated that approximately one week prior to the February 9, 2010 change of plea hearing, Mr. Brown met with Petitioner and explained the pre-sentence investigation report and the terms of the plea agreement. Mr. Brown also testified that, in his experience as a criminal defense attorney, as a matter of routine, he discusses the availability of appeals with his clients every time he speaks with a client regarding a plea deal. Specifically, Mr. Brown stated that he tells his clients that entering a guilty plea will limit the client's rights on appeal and he discusses the likelihood of success on appeal, including that an appeal based on the length of a sentence, alone, is

unlikely to succeed. Mr. Brown testified that he believed he discussed Petitioner's appeal rights at this meeting, although at one point Mr. Brown testified he did not have a specific recollection of the advisement.

5. Thus, from the facts before the Court, it appears that Mr. Brown informed Petitioner of his rights to appeal *prior to* the February 9 change of plea hearing, when they met to discuss Petitioner's plea agreement. There is no evidence before the Court to suggest that Mr. Brown informed Petitioner of his appeal rights *after* Petitioner's entry of the guilty plea and subsequent conviction and sentence.
6. Finally, Petitioner testified that, following his arrival in ICE custody in Colorado, Petitioner consulted with his attorneys from University from Wyoming who advised him of his appeal rights and rights to bring post-conviction relief actions; however, Petitioner declined to seek either type of relief, instead wanting to finalize his immigration case before he attacked his state-court conviction. Specifically, Petitioner indicated that he did not want to reopen his criminal case out of fear that it would result in him going to trial and receiving a prison sentence.¹

Conclusions of Law

7. Claims of ineffective assistance of counsel related to the failure of counsel to advise regarding the availability of an appeal and the failure to file a notice of appeal are analyzed under the *Strickland* framework set forth above. The United States Supreme Court further articulated the analysis for ineffective assistance of counsel claims related to appeal rights in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Flores-Ortega*, the Supreme Court indicated that there is no *per se* rule that an attorney must file a notice of appeal on behalf of his or her client. *Id.* at 478. The Court further provided that “[w]e cannot say, as a *constitutional* matter, that in every case counsel’s failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient.” *Id.* at 479 (emphasis original).
8. Given those two basic tenants, the Court established a framework to determine “whether counsel has performed deficiently by not filing a notice of appeal.” *Id.* at 478. First, the

¹ After Petitioner testified that he failed to file for post-conviction relief or bring an appeal because he did not want to face a prison sentence, Petitioner equivocated in his testimony and stated that he did not understand the difference between post-conviction relief and the direct appeal process.

Court must ask "whether counsel in fact consulted with the defendant about an appeal." *Id.* "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* On the other hand, "[i]f counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance." *Id.*

9. Furthermore, under *Flores-Ortega*,

counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights.

Id. at 480. Finally, if, based on those factors, a defendant can demonstrate that he was deprived the effective assistance of counsel, thus satisfying the first *Strickland* prong, the defendant must show prejudice. In order to do so, the defendant must demonstrate that the attorney's deficient performance was the actual cause of the defendant failing to appeal. *Id.* at 484. "If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." *Id.* Thus, to show prejudice, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.*

10. Based on the testimony from Petitioner and Mr. Brown at the evidentiary hearing, it appears to the Court that Mr. Brown did advise Petitioner of his right to appeal and the likelihood of the success of that appeal prior to the February 9th hearing when Mr. Brown and Petitioner went over the plea agreement together. Although Mr. Brown does not have a specific recollection of discussing appeal rights with Petitioner, Mr. Brown testified that

when he discusses plea deals with his clients, he routinely goes through appeal rights with his clients, and that he specifically discusses the consequences that entering a guilty plea has on those rights. Petitioner did not provide any evidence to contradict that. Instead, Petitioner merely testified that he could not remember if Mr. Brown advised him. When considering whether the advice given by counsel to a criminal defendant is sufficient, courts have relied up on the routine and practice of the attorney in question. *See Banda v. Estelle*, 519 F.2d 1057, 1058 (5th Cir. 1975) (“Witnesses in a hearing on a petition for habeas corpus need not testify from their personal recollection of the particular trial under attack. Rather, evidence as to standard practice or customary procedures can be used to demonstrate compliance with constitutional standards.”); *See also Jackson v. Hopper*, 243 Ga. 41, 252 S.E.2d 467 (Ga. 1979). Thus, based on Mr. Brown’s uncontested testimony that he routinely advises his clients about their appeal rights, the Court concludes that Petitioner was also advised of his appeal rights prior to the February 9th hearing.

11. Even if it were found that Mr. Brown failed to advise Petitioner of his right to appeal, however, the Court finds that Petitioner’s claim still fails under the framework set forth in *Flores-Ortega*. If the Court assumes, *arguendo*, that Mr. Brown never discussed the possibility of appeal with Petitioner, the Court must consider whether 1) a rational defendant in Petitioner’s position would want to appeal or 2) whether Petitioner demonstrated that he was interested in an appeal. There is no evidence before the Court that Petitioner demonstrated that he wanted to appeal, so the Court’s inquiry must focus on the first factor. In considering the first factor, the Court must consider all of the information Mr. Brown knew or should have known, including factors such as whether Petitioner’s conviction followed trial or a guilty plea, whether Petitioner received a bargained for sentence, and whether Petitioner’s plea expressly reserved or waived appeal rights. *Flores-Ortega*, 528 U.S. at 480.
12. In Petitioner’s case, Petitioner voluntarily entered a guilty plea, which, in turn, severely limited Petitioner’s rights to appeal and reduced the issues upon which Petitioner could have appealed. Furthermore, in entering into the plea deal, the State dropped one felony charge against Petitioner, thus greatly reducing the potential sentence Petitioner would

have received had he gone to trial and been found guilty on both felony charges against him. Finally, while it is true that Petitioner's plea deal did not expressly waive the right to appeal, the plea also did not reserve any appeal rights. Thus, based on the evidence before the Court, it is unlikely that a reasonable defendant in Petitioner's shoes would have filed an appeal. Petitioner presumably had few, if any, nonfrivolous appealable issues, and Petitioner received a significant benefit from entering into the plea deal, as opposed to going to trial. Indeed, Petitioner limited his exposure to prison time and, in fact, received a probationary sentence.

13. Finally, while it is again unnecessary for the Court to consider whether Petitioner suffered prejudice because Petitioner failed to meet his burden under the first *Strickland* prong, the Court notes that Petitioner's claim would also fail under the second *Strickland* prejudice prong. Specifically, Petitioner would have to demonstrate that if he had been properly advised of his appeal rights (which, again, the Court believes that he was), then Petitioner would have filed a timely appeal. Petitioner's own testimony conflicts with the notion that Petitioner had any interest in appealing his guilty plea. Petitioner repeatedly testified that he wanted to avoid trial because he was concerned that if he went to trial, he would end up serving a prison sentence. While Petitioner now testifies in these proceedings that he would have appealed, that testimony is contrary to the weight of the evidence before the Court. Specifically, Petitioner testified that when he arrived at the ICE detention facility in Colorado, he was advised both of his appeal rights and post-conviction relief rights. Despite that, Petitioner testified that he did not want to re-open his State criminal case until he finalized his immigration case. Petitioner indicated that he was concerned that if he sought relief in his State case prior to finalizing his immigration case, it would result in his plea being overturned, a trial, a guilty conviction following trial, and a prison sentence. Thus, even at this late stage in the proceedings, Petitioner is still indicating that he wanted to avoid trial to avoid going to prison. Given that testimony, it is impossible for the Court to conclude that Petitioner would have filed a timely appeal had he been given different information from Mr. Brown. Instead, it is evident to the Court that Petitioner's primary concern throughout these proceedings has been avoiding trial and prison, and that he entered into the guilty plea to achieve that

goal.

14. In conclusion, it appears to the Court based on Mr. Brown's testimony about his standard practice and routine, that Mr. Brown properly consulted with Petitioner regarding Petitioner's appeal rights and the low likelihood of success of an appeal. Even if Mr. Brown failed to consult with Petitioner with regards to an appeal, however, it is evident that Petitioner's ineffective assistance of counsel claim still fails under the frameworks set forth in *Strickland* and *Flores-Ortega*. Petitioner failed to demonstrate that either he expressed interest in an appeal or that a reasonable defendant in his position would want to appeal. To the contrary, the evidence shows that Petitioner received exactly what he bargained for in the plea deal, achieved Petitioner's goal of avoiding trial, and that Petitioner did not have nonfrivolous appealable issues based on Petitioner's plea. Petitioner also failed to show that he suffered prejudice because he would have appealed had been properly advised, and instead testified that he did not want to seek relief in his State criminal case because he did not want it to interfere with his immigration case. Accordingly,

IT IS, THEREFORE, HEREBY ORDERED that these Findings of Fact and Conclusions of Law be filed and immediately forwarded to the Wyoming Supreme Court for further proceedings on Petitioner's Writ of Certiorari in Case Number S-11-0226, captioned *Jose Manuel Diaz, Petitioner v. The State of Wyoming, Respondent*.

DATED this 29th day of December, 2011.

BY THE COURT.

Honorable Timothy C. Day

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 29 day of Dec 11

E. J. Munn
D. J. Counsell
W. J. Belicath
W. J. Supreme Ct
P. J. P.
By D. H. Deputy Clerk

State v. Diaz

Criminal Action No. 2247

Order Upon Evidentiary Hearing Regarding Ineffective Assistance of Counsel Claims

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