

Supreme Court No. **94630-2**
Court of Appeals No. 33432-5-III
Consolidated with No. 33052-4-III
Grant County Superior No. 03-1-00956-6

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IN THE SUPREME COURT
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MARIA MANZO, Petitioner

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

The Petitioner, MARIA MANZO, by and through her attorney of record, Brent A. De Young, asks for the relief designated in Part B.

B. RELIEF REQUESTED

The Petitioner, Maria Manzo, by and through his counsel, Brent A. De Young, moves this Court for review of the Court of Appeals Order dated May 9, 2017 denying her Motion to Reconsider as well as the Court of Appeals decision March 9, 2017 affirming Ms. Manzo's 2004 guilty plea, dismissing her personal restraint petition and denying her appeal. A copy of the March 9, 2017 decision and the May 9, 2017 denial for reconsideration is attached hereto.

C. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Ms. Manzo was Entitled to Competent Counsel at all Stages of Her Representation. Assuming Arguendo, That Ms. Manzo Was Correctly Informed, Counsel's 6th Amendment Duties Were Not Limited to Simply To Informing Ms. Manzo After She Had Already Entered a Guilty Plea And Prior to Sentencing as to the Ascertainable Immigration Consequences Upon Her Conviction.
2. The Court Of Appeals Erred In Additionally Applying A Manifest Injustice Test Beyond The Clear Rule Provided By Padilla v. Kentucky/State v. Sandoval.

I. ARGUMENT

Padilla V. Kentucky And State V. Sandoval Require That Trial Counsel Advocate With Knowledge And Regard To The Immigration Status Of His Client And His Client's Representation Priorities Throughout All Stages Of Representation.

State v. Sandoval supports the proposition that defendants are entitled to competent representation at all stages of their defense. The *Sandoval* decision provides:

Amici curiae Washington Defender Association, Washington Association of Criminal Defense Lawyers, Northwest Immigrant Rights Project, American Immigration Lawyers Association, and One America invite us to hold the Sixth Amendment requires a defense attorney to conduct a fourstep process when handling a noncitizen criminal defendant's case: (1) investigate the facts; (2) discuss the defendant's priorities; (3) research the immigration consequences of the charged crime and the plea alternatives, and advise the defendant accordingly; and (4) defend the case in light of the client's interests and the surrounding circumstances. We decline amici's invitation, as their argument goes beyond the scope of this case. *Sandoval*'s ineffective assistance claim is focused narrowly on the advice that he received about the deportation consequence of pleading guilty to rape in the third degree. Of course, *Padilla* recognizes that "bringing deportation consequences into this [plea] process" can give defense counsel the information necessary to "satisfy the interests" of the client, perhaps by "plea bargain[ing] creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." 130 S.Ct. at 1486. However, this case does not concern *Sandoval*'s counsel's negotiations with the prosecutor, his investigation of the facts, his analysis of a complicated immigration statute (we have concluded the statute was clear), or any other matter addressed by amici's arguments. We will consider these issues if and when they are squarely presented.

Padilla and *Sandoval* are not limited in application to only the final stage of representations – simply to provide a warning as to the ascertainable probability of deportation. Effective trial counsel must engage in the representation by first ascertaining his client's precise immigration status and then providing competent representation. There is no question that in the State of Washington, all defense

attorneys have unfettered access to the resources that can provide the answers to these immigration consequences questions. *Ibid.*

It is remarkable in itself that Ms. Manzo was even able to secure a declaration from her trial counsel. Most defendants are unable to succeed at this endeavor. Mr. Banda then provided a second declaration when it appeared that he would otherwise receive a subpoena to provide testimony in the Grant County Superior Court. This second declaration did provide much more substantive information as to Attorney Banda's actions and statements. CP at 54.

Mr. Banda's declarations are notably concise and do not stray at all from providing just enough information to answer Ms. Manzo's allegations. However, it cannot be ignored that Attorney Banda also showed great candor in explaining that that he mentioned deportation consequences only for the purpose of trying to secure a lighter sentence for his client. *Ibid.* Attorney Banda conceded that he didn't have any knowledge of what immigration consequences would befall his client.

It also bears note that whatever discussion was made of immigration consequences, it occurred only after Ms. Mano had entered her guilty plea. See *Transcript of Plea and Sentencing Hearing (RP 8 at 1-11)*

Whether or not Attorney Banda should have made such a statement to the court when he did not actually know what immigration consequences would result is irrelevant. The uncontested facts that emerge from Attorney Banda and Ms. Manzo's declarations is that Attorney Banda said one thing in court while simultaneously telling his client that he actually did not know and she might not necessarily be deported. *Ibid.*

The Sandoval decision stated quite clearly that trial counsel was not to couch his immigration advice with such uncertainty as to downplay such immigration consequences warnings. This seems to be perfectly on point with the instant matter. *Sandoval* at 173.

When asked to answer Ms. Manzo's allegations that she was not warned by Attorney Banda of the certain deportation consequences prior to her decision to plead guilty, Attorney Banda provided:

6. As previously stated, I was not certain that Ms. Manzo would actually be deported as a result of this conviction. It seemed likely to me that Ms. Manzo would be sent for deportation proceedings after the case had ended. It was my intention in bringing up the issue of deportation to the court to make the court mindful of the fact that if she was going to be deported that any additional conditions that the court might add as to drug treatment would be impossible for Ms. Manzo to fulfill. I had appeared in front of this particular trial court judge previously.

CP 54

Attorney Banda thus shows that he had mitigated the substance of his in-court statements. Attorney Banda avers that he wanted the judge to understand that, if he sentenced Ms. Manzo to treatment, that she would not be able to comply with the judge's order. Attorney Banda's declaration also averred that he reviewed Ms. Manzo's statements. (CP 54-55)

In light of the declarations which contradict the in court statements, the court of appeals erred in finding that Attorney Banda did not advise his client consistently with what he stated to the court.

If there is any perceived ambiguity in whether or not Ms. Manzo's statement that she [does] "not have anything more to add," Ms. Manzo should have been afforded an opportunity to clarify that issue to the satisfaction of the panel in a Reference Hearing (RAP 16.12). Attorney Banda could be called to testify to clear up any remaining ambiguities that might possibly exist.¹

The Manifest Injustice Test Employed By The Court of Appeals As An Additional Burden on the Defendant Is Not Applicable To Cases Concerning The Sixth Amendment Duties Of Counsel To Properly Inform His Client In Advance Of Her Decision To Plead Guilty That She Would Be Deported For Life.

The initial briefing in this matter was filed in 2011 in the Grant County Superior Court. With the benefit of a handful of additional precedential authorities now available, it does appear that

¹ The Court of Appeals suggests that Ms. Manzo was actually deported. However, no evidence of deportation was ever presented in this matter. See March 9, Decision p.10

analytically that *Littlefair* was ever an “affirmative misadvice” case. *State v. Littlefair*, 112 Wn.App. 749, 51 P.3d 116 (2002), review denied, 149 Wash.2d 1020, 72 P.3d 761 (2003). Arguably, there was no communication at all between Mr. Littlefair and his counsel. Mr. Littlefair’s counsel told him nothing at all about immigration consequences. Littlefair’s counsel simply crossed out language that he incorrectly thought was optional. The provision that Mr. Littlefair’s counsel crossed out contained the RCW 10.40.200 immigration warnings which are the warnings that counsel was to provide to his client.²

Ms. Manzo adequately identified the issues regarding the lack of specific advice from her trial counsel regarding the certain lifetime banishment that her conviction would carry. Neither *Sandoval*, nor *In re Personal Restraint of Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015) cited to affirmative misadvice as this is no longer the test when analyzing the Sixth Amendment performance of counsel when representing noncitizens. Accordingly, the proper tests for this panel to apply are those related to the Sixth Amendment duties of counsel in the *Sandoval* and *Tsai* decisions.

II. CONCLUSION

Based on the aforementioned authority provided, this Court should accept review of the decisions of the Court of Appeals and rule on the legal issues contained herein and find that Ms. Manzo was entitled to competent representation at all times in light of his immigration status and immigration goals. This Court should reject the additional manifest error test employed by the Court of Appeals. If this Court finds that the factual issues have not been sufficiently developed, it is respectfully urged that

² RCW 10.40.200 provides in part: “If, after September 1, 1983, the defendant has not been advised as required by this section . . . the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty. Absent a written acknowledgment by the defendant of the advisement required by this subsection, the defendant shall be presumed not to have received the required advisement.”

this Court return the matter to Grant County for a hearing on any remaining issues that this Court finds ambiguous.

Respectfully submitted this 8th day of June 2017.

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Plaintiff/Respondent,
vs.
MARIA MANZO,
Defendant/Appellant.

Supreme Court No.
Court of Appeals No. 33432-5-III
Consolidated with No. 33052-4-III
Grant County Superior No. 03-1-00956-6
PETITIONER/APPELLANT'S MOTION
FOR DISCRETIONARY REVIEW
CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2017, that I caused to be sent electronically or as otherwise indicated, a copy of *Motion For Discretionary Review* to:

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Ephrata, WA 98823

And by U.S. first-class mail, postage prepaid to:

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FILED

MARCH 9, 2017

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	No. 33432-5-III
Respondent,)	(consolidated with 33052-4-III)
)	
v.)	
)	
MARIA I. MANZO,)	
)	UNPUBLISHED OPINION
Appellant.)	
_____)	
In the Matter of the Personal Restraint of)	
)	
MARIA I. MANZO)	

FEARING, C.J. — In 2004, Maria Manzo pled guilty to conspiracy to possess cocaine with the intent to deliver. She now argues that she received ineffective assistance of counsel because her trial counsel failed to inform her of the full immigration consequences of her plea or he affirmatively misadvised her of the immigration consequences. We disagree.

FACTS

Maria Isabel Manzo came to the United States in 1996 at the age of twelve years old. On November 12, 2003, following a search of her home, the State of Washington

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charged Maria Manzo with possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, possession of stolen property in the first degree, and alien in possession of a firearm. Attorney Adolfo Banda represented Manzo.

On January 12, 2004, Maria Manzo pled guilty to the amended charge of conspiracy to possess cocaine with the intent to deliver. The State recommended time served and restitution. Defense counsel Adolfo Banda checked a box allowing the court to “review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” Clerk’s Papers (CP) at 12.

After accepting the plea, the trial court, on January 12, 2004, heard argument regarding sentencing. Adolfo Banda commented:

My client has—actually I know my client has an immigration hold and she’ll be deported. She’ll be joined by her infants in Mexico once she gets to Mexico. The deportation in itself is punishment. She won’t be able to come back to this country and she won’t be able to acquire legal status in this country as the law stands right now. Therefore, in the interests of justice, we ask the court to accept the State’s recommendation.

CP at 51. Victor Guzman interpreted the English words of Banda into Spanish for Maria Manzo. When the court asked if Manzo wished to comment, Manzo replied: “I just want to be reunited with my children.” CP at 51.

During the 2004 plea hearing, neither the trial court nor counsel informed Maria Manzo of her right to appeal the sentence. Neither the trial court nor counsel informed Manzo of the right to collateral attack of the judgment or a time limit for collateral attack.

PROCEDURE

On November 29, 2011, Maria Manzo filed, with the trial court, a motion to withdraw her guilty plea. In support of her motion, Manzo filed two declarations and two declarations from Adolfo Banda.

In Maria Manzo's first declaration, she averred:

Mr. Banda never told me anything specific about what would happen at immigration. The only things that were told to me were in the papers that I signed. It was my understanding from these papers that when I pleaded guilty that I would still have some chance to argue to stay here in the United States. I had been here for a long time and I had two children and one of them needed to see doctors.

...
... I also found out from my immigration lawyer that my lawyer for this case should have warned me that by signing these papers that I wouldn't have any chances at all to stay in the United States. If that had been explained to me clearly[,] I would have not just agreed to be deported. I didn't have anything to do with drugs and I would have testified in court about this.

CP at 41.

In her second declaration, Maria Manzo stated:

I remember now that Mr. Banda told me that it would give a better chance of the court going along with the agreement he made with the prosecutors if he also said that I would be deported. I was very concerned about this, but then he also told me that he wasn't an immigration lawyer so

he actually didn't know whether or not I would be deported. He said that it meant just that I was being sent for deportation. He said that this would be up to the immigration court. I remember now after having it read to me how he also talked about my children to the judge.

CP at 42.

In his first declaration, Adolfo Banda declared:

It was always my general practice to go over all the sections of a client's guilty plea with my client. This would include the general immigration warnings that are part of the State of Washington *Statement of Defendant on Plea of Guilty*.

CP at 36. He also averred that he recommended to Maria Manzo to employ an Alford plea for immigration reasons.

In Adolfo Banda's second declaration, he avowed:

As previously stated, I was not certain that Ms. Manzo would actually be deported as a result of this conviction. It seemed likely to me that Ms. Manzo would be sent for deportation proceedings after the case had ended. It was my intention in bringing up the issue of deportation to the court to make the court mindful of the fact that if she was going to be deported that any additional conditions that the court might add as to drug treatment would be impossible for Ms. Manzo to fulfill.

CP at 54.

Maria Manzo also filed an affidavit of immigration attorney, Drew White. White declared that he recently interviewed Manzo, who informed him that she lacked knowledge that her guilty plea precluded her from obtaining legal status in the United States. White further averred that Manzo's crime prevented her from legal status in this

country. White faults Adolfo Banda for failing to inform Manzo of the direct deportation consequences of her plea.

On January 9, 2015, the trial court transferred the motion to withdraw the guilty plea to this court to be considered as a personal restraint petition. When transferring the case, the trial court found that Adolfo Banda did not affirmatively misadvise Maria Manzo regarding the immigration consequences of her plea.

On May 27, 2015, Maria Manzo appealed the trial court's January 12, 2004 acceptance of her guilty plea and finding of guilt. Our court commissioner ruled the appeal to be timely given Manzo's lack of notice regarding a right to appeal. Commissioner's Ruling, *State v. Manzo*, No. 33432-5-III (Wash. Ct. App. July 8, 2015). We consolidated the direct appeal with the personal restraint petition.

LAW AND ANALYSIS

In both her personal restraint petition and her direct appeal, Maria Manzo argues that she received ineffective assistance of counsel because Adolfo Banda misadvised her of the full immigration consequences of her guilty plea. Therefore, according to Manzo, *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) compels vacation of her plea. The State responds, in part, that attorney Banda warned Manzo of the full legal consequences. We agree with the State.

Because we review Maria Manzo's personal restraint petition, we may consider affidavits filed by Manzo in support of her motion to vacate. *In re Personal Restraint of Ramos*, 181 Wn. App. 743, 749, 326 P.3d 826 (2014), *review granted*, 181 Wn.2d 1029 (2015). Because we also review this case on direct appeal, Manzo receives the benefit of the changes in law since her 2004 plea. *In re Ramos*, 181 Wn. App. at 749. Anyway, our state high court held that *Padilla v. Kentucky* did not announce a new rule as applied in Washington and therefore the benefits of *Padilla* apply retroactively to defendants in collateral review. *In re Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 103, 351 P.3d 138 (2015).

A strong public interest encourages the enforcement of a plea agreement when an accused voluntarily and intelligently enters the plea. *In re Detention of Scott*, 150 Wn. App. 414, 426, 208 P.3d 1211 (2009). Nevertheless, the court may allow a defendant to withdraw his guilty plea when the withdrawal is necessary to correct a manifest injustice. *In re Detention of Scott*, 150 Wn. App. at 426. The defendant bears the burden of proving manifest injustice, defined as “‘obvious, directly observable, overt, not obscure.’” *In re Detention of Scott*, 150 Wn. App. at 426-27 (internal quotation marks omitted) (quoting *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996)). For purposes of withdrawing a guilty plea, a manifest injustice exists under four per se nonexclusive instances: (1) the defendant did not ratify the plea, (2) the plea was not

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voluntary, (3) the defendant received ineffective assistance of counsel, or (4) the plea agreement was not kept. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); *State v. Wilson*, 162 Wn. App. 409, 414-15, 253 P.3d 1143 (2011). Maria Manzo relies only on ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must satisfy a two-part test (1) that his or her counsel's assistance was objectively unreasonable and (2) that as a result of counsel's deficient assistance, he or she suffered prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate the first prong, deficient performance, a reviewing court adjudges the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690. The appellate court presumes counsel's effectiveness. *State v. Gomez Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012).

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *State v. Sandoval*, 171 Wn.2d 163, 168-69, 249 P.3d 1015 (2011). Faulty advice of counsel may render the defendant's guilty plea involuntary or unintelligent. *Hill v. Lockhart*, 474 U.S. 52, 56-57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *State v. Sandoval*, 171 Wn.2d at 169. To establish that the plea was involuntary or unintelligent

due to counsel's inadequate advice, the defendant must show under the test in *Strickland* that his attorney's performance was objectively unreasonable and that he was prejudiced by the deficiency. *Sandoval*, 171 Wn.2d at 169.

Prior to *Padilla v. Kentucky*, 559 U.S. 356 (2010), Washington law considered deportation a collateral consequence of a conviction and anything short of an affirmative misrepresentation by counsel of the plea's deportation consequences could not support a plea withdrawal. *State v. Sandoval*, 171 Wn.2d at 170 n.1; *In re Personal Restraint of Yim*, 139 Wn.2d 581, 587-89, 989 P.2d 512 (1999). *Padilla* explicitly rejected the proposition that only affirmative erroneous advice about deportation consequences of the plea, and not failure to give such advice, could constitute ineffective assistance of counsel. *Padilla* also emphasized that, for at least the past fifteen years, professional norms imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea.

Dicta in *Padilla* suggests that its holding also applies to undocumented noncitizens who would become ineligible to apply for relief.

[W]e have recognized that "preserving the possibility of" discretionary relief from deportation . . . "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial."

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Padilla, 559 U.S. at 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)). This court applied a full *Padilla* analysis when an undocumented defendant argued that counsel failed to advise him that his offense constituted a commission of a crime involving moral turpitude, which automatically made him ineligible to remain in the United States. *In re Ramos*, 181 Wn. App. at 754.

Maria Manzo relies on *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002). In *Littlefair*, the defendant did not receive immigration warnings because his attorney struck them from the written plea of guilty. Counsel subjectively believed that his client was a United States citizen. The trial court vacated the guilty plea, and this court affirmed. This court noted that when Littlefair pled, he did not know the likelihood of deportation. His lack of knowledge was not due to any fault or omission on his part. Littlefair did not consider the stricken subsections applied to him, so he did not read them. The sentencing court failed to ascertain whether counsel properly advised Littlefair of possible deportation consequences.

State v. Littlefair lacks any relevance to this appeal. Contrary to the argument of Maria Manzo, her trial counsel specifically warned that she would be deported and not be eligible to return to the United States. During the January 12, 2004, hearing, Adolfo Banda declared: “[A]ctually I know my client has an immigration hold and she’ll be deported. She’ll be joined by her infants in Mexico once she gets to Mexico.” CP at 51.

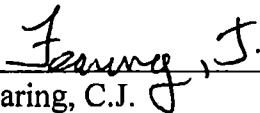
Banda added: "She won't be able to come back to this country and she won't be able to acquire legal status in this country as the law stands right now." CP at 51.

Maria Manzo protests that she did not understand she could not return to the United States. Nevertheless, her counsel specifically stated otherwise during the plea hearing. We recognize that Manzo probably does not understand English. Nevertheless, an interpreter repeated, in Spanish, her counsel's clarion warning. She does not allege any faulty translation. Manzo does not aver that Adolfo Banda advised her contrary to his court comments or that Banda later recanted his comments.

CONCLUSION

We affirm Maria Manzo 2004's guilty plea. We dismiss her personal restraint petition and deny her appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

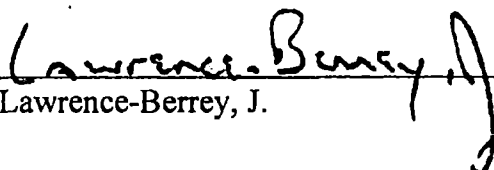


Fearing, C.J.

WE CONCUR:



Siddoway, J.



Lawrence-Berrey, J.

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From: Brent De Young [mailto:deyounglaw1@gmail.com]

Sent: Thursday, June 08, 2017 5:01 PM

To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Kaye Burns <kburns@grantcountywa.gov>

Subject: Motion for Discretionary Review

See attached

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