95787-8

NO. 49048-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSE MANUEL RAMOS-CURIEL,

Petitioner.

PETITION FOR REVIEW

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

Statutes and Court Rules

Other Authorities

A. *IDENTITY OF PETITIONER*

Jose Manuel Ramos-Curiel asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of each and every part of the unpublished decision of the Court of Appeals affirming the Cowlitz County Superior Court's order denying the defendant's motion to withdraw his guilty plea filed on September 12, 2017 . A copy of the Court of Appeals decision is attached. On April 27, 2018, the Court of Appeals denied the defendant's timely filed Motion to Publish. A copy of that decision is also attached.

C. *ISSUES PRESENTED FOR REVIEW*

I. Under United States Constitution, Sixth Amendment, Washington Constitution, Article 1, § 22, and RCW 10.40.200 does an attorney have the duty to research and accurately inform an alien defendant whether or not his guilty plea to violating a domestic violence protection order issued under RCW 10.99 or RCW 26.50 will result in deportation, exclusion from admission or denial of naturalization?

II. Does a trial court's failure to inform an alien defendant that his guilty plea to violating a domestic violence no contact order issued under RCW 10.99 or RCW 26.50 could or would result in his deportation, exclusion from admission or denial of naturalization render that plea unknowing and involuntary?

D. *STATEMENT OF THE CASE*

On April 24, 2008, the Cowlitz County Prosecutor charged the defendant Jose Manuel Ramos-Curiel with one count of possession of

cocaine under RCW 69.40.4013 (a class C felony) and one count of violation of a domestic violence no contact order that was issued under RCW 26.50.110 or RCW 10.99.020 (a gross misdemeanor). CP 1-2. Mr. Ramos-Curiel is a Mexican national who has lived for over 10 years in the United States. CP 44-45.

Following arraignment the defendant's court-appointed attorney received the following offer from the Cowlitz County Prosecutor:

> 25 days; First Time Offender; 24 months Community Custody; Costs; Drug Evaluation and Treatment; 365/365 on the misdemeanor; 24 months Probation; No Contact Order with Victim; Anger Management Therapy.

CP 12.

The defendant's attorney communicated this offer to the defendant, who eventually decided to accept it. CP 45. The defendant's attorney then prepared a written statement of defendant on plea of guilty and reviewed it with the defendant. CP 3-12. Both the defense attorney and the defendant signed the document. CP 10. Subsection(6)(i) of that guilty plea states:

> (i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

CP 6.

According to the affirmation the defendant filed in support of his

Motion for Relief from Judgment, his attorney did not tell him that his convictions would result in his deportation, exclusion from admission or denial of naturalization. CP 44-46. Rather, he simply told him that a conviction for any crime "could" result in his deportation. *Id.* According to the defendant, he would not have pled guilty had his attorney informed him that a conviction for either offense would require his deportation and would prevent him from ever legally returning to the United States. *Id.*

On October 14, 2008, the defendant appeared in court before the Honorable Judge James Warme and pled guilty pursuant to the plea offer. CP 108-119. During that hearing, the following colloquy took place between the court and the defendant concerning the immigration consequences of his plea:

> THE COURT: Do you understand – are you an American citizen?
>
> THE DEFENDANT: No.
>
> THE COURT: Do you understand if you enter a guilty plea to a ***felony***, you ***may be*** deported?
>
> THE DEFENDANT: Yes, I understand.

CP 112 (emphasis added).

Once again, Mr. Ramos-Curiel stated in his affirmation that had the court informed him that a conviction on either charge would require his deportation or prevent him from ever returning to this country he would

not have pled guilty. CP 44-46.

In fact, Mr. Ramos-Curiel is now the subject of federal deportation proceedings pursuant to the federal government's argument that under 8 U.S.C. § 1227(a)(2)(B) both of his Cowlitz County convictions require his deportation and permanently exclude him from ever returning to this country. CP 126-131. Mr. Ramos-Curiel is represented in that proceeding by attorney Amanda E. Gray, of the Portland law firm of Parker, Butte & Lane. *Id.* According to Ms. Gray's affirmation, under 8 U.S.C. § 1227(a)(2)(B), as it existed in 2008 and as it still exists today, the defendant's convictions for possession of cocaine and for violation of a domestic violence no contact order issued under RCW 26.50 or RCW 10.99 each require his deportation and exclusion from reentry into this country. *Id.* As she explained in her affirmation, the statement that a non-citizen's conviction for these offenses "could" result in deportation is erroneous and misleading. *Id.* As she explained, under federal law deportation and exclusion are required for either offense. *Id.*

Based upon these factual claims the defendant moved to withdraw his guilty plea upon the following four arguments: (1) that under RCW 10.73.100(6) as interpreted by the Washington Supreme Court in *State v. Tsai, infra*, the defendant's motion to withdraw his guilty plea is timely; (2) that under CrR 7.8(b)(5) as well as his state and federal constitutional rights

to due process, the defendant did not knowingly, voluntarily and intelligently enter his guilty plea because neither his attorney nor the trial court correctly informed him of the immigration consequences of his plea; (3) that the trial counsel's failure to determine and inform the defendant of the correct immigration consequences of his guilty plea denied the defendant his statutory rights under RCW 10.40.200 as well as his state and federal constitutional rights to effective assistance of counsel; and (4) that under CrR 7.8(c) the court should order a show cause hearing because the defendant's motion is not time barred under RCW 10.74.090, he had made a substantial showing that he is entitled to relief and resolution of the motion would require a factual hearing. CP 26, 27-43.

The state and the trial court initially agreed with the defendant's first and fourth arguments and set a fact-finding hearing on the defendant's motion for May 14, 2016. RP 10. At that hearing the state called the defendant's appointed attorney as its only witness. RP 13-28. During his testimony this attorney stated that he had no independent recollection of any conversations he had with the defendant. RP 23. However, he believed that he did read paragraph (6)(i) of the Statement of Defendant on Plea of Guilty to the defendant. This attorney also accepted the proposition that the transcript of the hearing indicated that during the guilty plea colloquy the court told the defendant that he "may be deported" based upon his

guilty plea to the felony charge. RP 24-26. In addition, the defendant's former attorney stated that he did not believe he spoke to the defendant about the effect his guilty pleas would have upon his ability to reenter the country. RP 27-29.

Following this testimony the parties presented argument, after which the court took the matter under advisement. RP 39-40. The court later denied the defendant's motion and entered supporting findings of fact and conclusions of law. CP 132-134. The defendant thereafter filed timely notice of appeal. CP 135. During the pendency of this appeal the defendant successfully moved the trial court to vacate his felony conviction and dismiss that charge with prejudice. *See* Attached Decision, page 4. On March 23, 2017, the Court of Appeals granted the defendant's subsequent motion under RAP 7.2(e) to give effect to the trial court's order and to withdraw that portion of his argument with regards to the now vacated felony conviction. *Id.*

On September 12, 2017, the Court of Appeals filed its decision in this case and affirmed the order of the trial court, holding in essence that since the defendant's attorney could not simply look at the state and federal statutes and automatically determine whether or not the defendant's conviction for violating a domestic violence no contact order issued under RCW 10.99 or RCW 26.50 would subject the defendant to deportation or

exclusion from admission, he had no duty to research the issue and then correctly inform the defendant of the immigration consequences of his plea. *See* Decision. The defendant now seeks review of that decision.

E. *ARGUMENT WHY REVIEW SHOULD BE ACCEPTED*

The case at bar presents this court with two separate bases for review: (1) under RAP 13.4(b)(1) the decision of the Court of Appeals conflicts with the decisions in *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015), and *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), and (2) under RAP 13.4(b)(3), this case presents a significant question of law under Washington Constitution, Article 1, §§ 3 & 22, and under United States Constitution, Sixth and Fourteenth Amendments. The following discusses these arguments.

(1) Under RCW 10.40.200, Washington Constitution, Article 1, §§ 3 & 22, and United States Constitution, Sixth and Fourteenth Amendments, an Attorney Representing an Alien in a Criminal Proceeding Has the Duty to Research and Correctly Inform the Defendant of the Immigration Consequences of a Proposed Guilty Plea Even If Those Consequences Are Not Readily Apparent after a Cursory Review of Federal Statutes.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty

pleas that are entered without a statement of the consequences of the sentence are not "knowingly" made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). In addition, under CrRLJ 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a "manifest injustice." A plea that is not knowingly, voluntarily and intelligently entered produces a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991).

As is set out in *Padilla v. Kentucky, supra* and *In re Yung-Cheng Tsai, supra*, a non-citizen defendant is entitled to correct advice concerning the immigration consequences of his or her guilty plea under the state and federal constitutional right to effective assistance of counsel. In addition, in *Tsai*, the court clarifies that a non-citizen defendant is also entitled to correct advice concerning the immigration consequences of his or her guilty plea under RCW 10.40.200.

In *Tsai, supra,* the Washington Supreme Court held that under RCW 10.40.200, a non-citizen defendant has a statutory right to be informed of the immigration consequences of a guilty plea. In this case the court noted that this statutory right includes the requirement that a defendant be correctly advised of the immigration consequences of his or her guilty plea following sufficient research by the attorney. The failure to do sufficient research and correctly advise the defendant, as is required under the

statute, falls below the standard of a reasonably prudent attorney.

In *Padilla v. Kentucky, supra*, the United States Supreme Court stated the following concerning this issue.

> These changes to our immigration law have dramatically raised the stakes of a non-citizen's criminal conviction. The importance of accurate legal advice for non-citizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on non-citizen defendants who plead guilty to specified crimes.

Padilla v. Kentucky, 559 U.S. at 356, 130 S. Ct. at 1476.

In this case at bar the Court of Appeals held that since the underlying facts to the defendant's conviction and not the conviction itself are what potentially make him deportable, a defense attorney has no duty to do any further research and may simply rely upon a warning that the defendant's conviction "may" have immigration consequences. The Court of Appeals held:

> As the differing analyses undertaken by the Seventh and Ninth Circuit Courts of Appeal illustrate, the immigration consequences of pleading guilty to violation of a domestic violence no contact order are complex and not easily determined by simply reading the text of 8 U.S.C. section 1227(a)(2)(E)(ii). Rather, determining the immigration consequences of Ramos–Curiel's guilty plea to violation of a domestic violence no contact order required defense counsel to look beyond the text of subsection (a)(2)(E)(ii), ascertain the proper mode of analysis in light of conflicting federal circuit court opinions, and apply the proper analysis to the circumstances of Ramos–Curiel's case. Even after making such a determination, counsel could not be certain that Ramos–Curiel would be deported as a result of his violation of a domestic violence no contact order, since an immigration court would

> be required to make certain factual determinations about the nature of the no contact order violation under either the modified categorical approach of the Ninth Circuit or the analysis employed by the Seventh Circuit.

State v. Ramos-Curiel, 200 Wn.App. 1040 (2017).

The error in this analysis is that under RCW 10.40.200, Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, the inability to simply look at the fact of conviction and instantly discern immigration consequences does not relieve defense counsel of the duty to provide accurate advice. Rather, it increases the duty to correctly ascertain those immigration consequences. Even minimal research in this case would have revealed that the defendant's misdemeanor conviction rendered him deportable and ineligible for cancellation of removal. Indeed, the defendant is now currently in federal court on this very claim by the federal government.

In this case the Court of Appeals analysis confuses convictions obtained under RCW 26.50.110 and RCW 10.99.220 for violation of an unspecified protection order as opposed to the defendant's conviction, which was obtained under RCW 26.50.110 and RCW 10.99.220 for violating a protection order that was itself issued "pursuant to Chapter 10.99 or 26.50." *See* Information at CP 2. The distinction is critical because if the underlying protection order is unspecified or was issued under RCW 7.40,

7.92, 7.90, 9A.46, 9.04A, 26.09, 26.10, 26.26 or 74.34, then a "DV" conviction under RCW 26.50.110(1)(a), for a violation of one of those orders does not trigger the DV-VNCO deportation ground. However, if the record establishes that the order violated was issued under RCW 10.99 or RCW 26.50, then a "DV" violation of the order does trigger the DV-VNCO deportation ground, as does proof of such a violation even without a conviction.

In the case at bar the record reveals that the defendant was convicted of a DV violation of a no contact order issued under either RCW 26.50 or RCW 10.99. Under these facts the defendant was subject to deportation and denial of reentry based upon his conviction and his attorney was negligent in failing to determine that fact and negligent in failing to so inform the defendant. Indeed, he would also have been subject to deportation simply upon proof of the facts underlying the conviction even had he not been prosecuted.

(2) During a Guilty Plea Colloquy, a Trial Court Errs and Renders an Alien Defendant's Guilty Plea Unknowingly, Involuntarily and Unintelligently Entered If it Fails to Inform That Alien Defendant That His Guilty Plea to a Misdemeanor May or Will Subject Him to Deportation, Exclusion and Denial of Naturalization under the Laws of the United States.

Under CrR 4.2(d), when accepting a guilty plea a trial court has a duty to enter a colloquy with a defendant to verify that the plea is being

knowingly, voluntarily and intelligently entered. CrR 4.2(d). This rule states:

> **(d) Voluntariness.** The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d).

Under RCW 10.40.200 the legislature has imposed specific requirements when a trial court accepts a guilty plea from an alien. This provision states that "it is the intent of the legislature . . . that acceptance of a guilty plea [by an alien defendant] be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea." RCW 10.40.200. Thus, the failure to adequately inform an alien defendant during a guilty plea colloquy of the immigration consequences of that plea violates CrR 4.2(d), RCW 10.40.200 and renders the plea unknowingly, involuntarily and unintelligently entered and thereby subject to withdrawal. It would then seem axiomatic that the failure to inform an alien defendant that there were any possible immigration consequences to a plea would also fall below the standards set for guilty plea colloquies. As the following notes this is precisely what happened in this case and it is precisely what the Court of Appeals erroneously sanctions in its decision.

In its decision the Court of Appeals noted that during the guilty plea colloquy in this case the trial court did not even mention the potential immigration consequences for the defendant's plea to the gross misdemeanor of violating a domestic violence protection order. In spite of recognizing that the trial court gave no warning at all to the defendant about the actual or potential immigration consequences to his plea to this offense, the Court of Appeals none the less found no error by the trial court. The Court of Appeals held:

> First, it appears that the trial court's statement at issue referred only to Ramos–Curiel's charge of unlawful possession of a controlled substance, which we do not address in this appeal by Ramos–Curiel's request. Ramos–Curiel's violation of a domestic violence no contact order was charged and pled as a gross misdemeanor, and the trial court's question in full reads, "Do you understand if you enter a guilty plea to a felony, you may be deported?" RP at 4 (emphasis added). Second, even if the trial court had referred to the violation of a domestic violence no contact order charge, its question was appropriate given the uncertainty that deportation would follow a conviction for that charge and the proper advisement given in the plea of guilty. The trial court did not mislead the defendant about the immigration consequences of his plea.

State v. Ramos-Curiel, 200 Wn. App. 1040 (2017).

In this ruling the Court of Appeals ignored the fact that the trial court did not give the defendant any warning at all about the immigration consequences of his plea to the misdemeanor. Thus, whether or not those consequences were easy to ascertain or not, the trial court's colloquy on the misdemeanor plea did not meet the requirements of CrR 4.2(d), RCW

10.40.200 and the constitutional requirements of due process. In fact, as the following explains, a careful review of the court's warning to the defendant as to the felony implicitly told the defendant that there were no potential immigration consequences to the misdemeanor plea.

In our law there is a rule of statutory construction stated in latin as *inclusio unius est exclusio alterius* or *expressio unius est exclusio alterius.* These two phrases are translated as "the inclusion of one is the exclusion of another," and "the expression of one thing is the exclusion of another." *Blacks Law Dictionary*, 5th Edition (1979), pages 687 and 521 respectively. This principle of statutory construction states that if the legislature uses a term to define a specific word or condition, it thereby excludes all other terms or conditions. *See e.g. State v. Swanson*, 116 Wn.App. 67, 65 343 (2003).

While used as a fundamental principle of statutory construction, these rules do not originate in the law. Rather, they are rules of language and logic. The legal scholar William T. Hughes from the last century discussed the origin and application of these rules as follows:

> This cannon of construction applies to constitutions, statutes, codes, pleadings, records, judgments, commercial paper, indeed to every gathering and collection of words. It is a rule of logic.

The Law Restated: The Roots of the Law, William T. Hughes, page 87 (1915).

The application of this rule of logic and language construction to the

court's statement to the defendant on the immigration consequences of his guilty pleas to felony possession of cocaine and misdemeanor violation of a domestic violence protection order are as follows. By asking the defendant "Do you understand if you enter a guilty plea to a felony, you may be deported," the court was implicitly telling the defendant that there were no possible immigration consequences to his guilty plea on the misdemeanor. Thus, not only did the trial court fail to explicitly give the defendant any immigration warnings at all about his misdemeanor plea, it implicitly gave him an erroneous assurance that there would be no immigration consequences as a result of the plea to the misdemeanor.

The Court of Appeals ruling runs contrary to CrR 4.2(d) and RCW 10.40.200 and the defendant's right to due process and effective assistance of counsel under Washington Constitution, Article 1, §§ 3 & 22, and United States Constitution, Sixth and Fourteenth Amendments. Consequently, this court should accept review and reverse the decision of the Court of Appeals because (1) that decision conflicts with the decisions in *In re Tsai, supra*, and *Padilla v. Kentucky, supra*, and (2) this case presents a significant question of law under Washington Constitution, Article 1, §§ 3 & 22, and under United States Constitution, Sixth and Fourteenth Amendments.

F. *CONCLUSION*

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 2nd day of May, 2018.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Petitioner

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, Respondent, vs. JOSE RAMOS-CURIEL, Appellant.	NO. 49048-0-II AFFIRMATION OF OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Ryan Jurvakainen
   Cowlitz County Prosecuting Attorney
   312 SW First Avenue
   Kelso, WA 98626
   sasserm@co.cowlitz.wa.us

2. Jose Manuel Ramos-Curiel
   2475 Corman Road
   Longview, WA 98632

Dated this 2nd day of May, 2018 at Longview, Washington.

Diane C. Hays

Diane C. Hays

200 Wash.App. 1040

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Jose RAMOS–CURIEL, Appellant.

No. 49048–0–II

September 12, 2017

Appeal from Cowlitz Superior Court, 08–1–00455–1, Honorable Marilyn K. Haan, J.

Attorneys and Law Firms

John A. Hays, Attorney at Law, 1402 Broadway St., Longview, WA, 98632–3714, for Appellant.

Aila Rose Wallace, Cowlitz County Prosecutor's Office, 312 Sw 1st Ave. Rm. 105, Kelso, WA, 98626–1799, for Respondent.

UNPUBLISHED OPINION

Bjorgen, C.J.

*1 Jose Ramos–Curiel appeals the denial of his motion to withdraw his guilty plea to violation of a domestic violence no contact order. He contends that he is entitled to withdraw his guilty plea because (1) his defense counsel was ineffective for failing to accurately advise him about the immigration consequences of pleading guilty to the crime and (2) the trial court misinformed him about the immigration consequences of pleading guilty. We affirm.

FACTS

On April 24, 2008, the State charged Ramos–Curiel with unlawful possession of a controlled substance and violation of a domestic violence no contact order. Ramos–Curiel pled guilty to the charges. Ramos–Curiel's signed statement on plea of guilty form provided that, in considering the consequences of his guilty plea, he understood that:

> If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Clerk's Papers (CP) at 6. In addition, the following exchange took place at Ramos–Curiel's October 14, 2008 plea hearing:

> [Trial court]: Do you understand—are you an American citizen?
>
> [Ramos–Curiel]: No.

[Trial court]: Do you understand if you enter a guilty plea to a felony, you may be deported?

[Ramos–Curiel]: Yes, I understand.

Report of Proceedings (RP) at 4. The trial court accepted Ramos–Curiel's guilty pleas and sentenced him to 20 days of incarceration.

On March 16, 2016 Ramos–Curiel filed a CrR 7.8(b) motion to withdraw his guilty pleas. On May 16, the trial court held an evidentiary hearing on Ramos–Curiel's withdrawal motion. At the hearing, Ramos–Curiel's former defense attorney, Thomas Ladouceur, testified that it was his standard practice to review every applicable provision contained in a guilty plea form with his clients. Although Ladouceur testified that he had no independent recollection of reviewing the guilty plea form's immigration provision with Ramos–Curiel, he stated his belief that he would have done so based on his standard practice.

On May 27, the trial court denied Ramos–Curiel's withdrawal motion and entered the following findings of fact and conclusions of law:

Based on the files and records herein, the testimony, argument of counsel, the Court finds the following:

1. The parties stipulate that this Motion to Withdraw Guilty Plea is timely and properly before this Court.

2. That on October 14, 2008, the Defendant did plead guilty to the charges of Count I Violation Uniform Controlled Substance Act (possession of cocaine) and Count II Violation of Domestic Violence No Contact Order.

3. At that time the Defendant was represented by the attorney Tom Ladouceur.

4. That paragraph 4(i) of the Statement of Defendant on Plea of Guilty signed and entered by the Defendant states: "If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

*2 5. At the time of the guilty plea, the Defendant was not a US Citizen. Under the immigration law at the time a plea of guilty by the Defendant was made to the offenses stated, the Defendant would be deported.

6. Mr. Ladouceur went through the language of paragraph 4(i) of the Statement of Defendant on Plea of Guilty with the Defendant. Mr. Ladouceur does not recall whether he made any contact with an immigration attorney to determine the applicable law specific to the defendant pleading guilty as herein and then subsequently advise the Defendant of the information.

7. Mr. Ladouceur did properly advise the Defendant that the crimes he was pleading guilty to were deportable offenses. Mr. Ladouceur did not give wrong advice to the Defendant regarding the offenses.

8. The judge taking the plea also reviewed the language of paragraph 4(i) of the Statement of Defendant on Plea of Guilty with the Defendant. The judge made the finding the "defendant's plea of guilty to be knowingly, intelligently and voluntarily made..."

9. That based on the law that applies to the time of the entry of the plea of guilty by the Defendant, Mr. Ladouceur gave appropriate legal advice and therefore did not provide ineffective legal assistance. Further, the language of the plea form and the colloquy of the judge were appropriate.

Thus, the Court concludes:

1.) The Motion to Withdraw Guilty Plea has been timely made; and

2.) Defendant did make a knowing, intelligent and voluntary plea to the charges of the above-entitled case.

Therefore, the Motion to Withdraw Guilty Plea made pursuant to CrR [ ] 7.8(b)(5) is denied.

Clerk's Papers (CP) at 132–34. Ramos–Curiel appeals from the trial court's ruling denying his withdrawal motion. [1]

ANALYSIS

Ramos–Curiel contends that the trial court erred in denying his CrR 7.8(b) motion to withdraw guilty plea because (1) his defense counsel provided ineffective assistance during plea negotiations by failing to advise him that his guilty plea to violation of a domestic violence no contact order would result in certain deportation, and (2) the trial court misled him during the plea colloquy by asking him whether he understood that he "may be deported" by pleading guilty, rendering his guilty plea involuntary. RP (Oct. 14, 2008) at 4. We disagree with each contention.

I. STANDARD OF REVIEW

A defendant is permitted to withdraw a guilty plea under CrR 4.2(f) "whenever it appears that the withdrawal is necessary to correct a manifest injustice." Additionally, CrR 7.8 governs postjudgment motions to withdraw a guilty plea and provides in relevant part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
>
> ....
>
> (5) Any other reason justifying relief from the operation of the judgment.

*3 A defendant seeking to withdraw a guilty plea in a postjudgment motion must meet the requirements for a plea withdrawal under both CrR 4.2(f) and CrR 7.8. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012). In other words, to succeed on his postjudgment motion to withdraw his guilty plea, Ramos–Curiel would have had to demonstrate *both* (1) that withdrawal of his plea was necessary to correct a manifest injustice *and* (2) that relief from the final judgment was justified by one of the reasons enumerated in CrR 7.8(b). Ramos–Curiel may demonstrate a manifest injustice warranting withdrawal of his guilty plea if he shows that he received ineffective assistance of counsel or that his plea was involuntary. *State v. Pugh*, 153 Wn. App. 569, 577, 222 P.3d 821 (2009) (citing *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974)). A showing that Ramos–Curiel received ineffective assistance of counsel or that his plea was entered involuntarily would also satisfy the criteria for withdrawal of his guilty plea under CrR 7.8(b)(5). *See, e.g.*, *State v. Martinez*, 161 Wn. App. 436, 441, 253 P.3d 445 (2011), *appeal after remand*, 189 Wn. App. 1050 (2015).

We generally review a trial court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *Martinez*, 161 Wn. App. at 440. However, when the trial court bases its otherwise discretionary decision solely on application of the law to particular facts, the issue is one of law, which we review de novo. *State v. Martinez–Leon*, 174 Wn. App. 753, 759, 300 P.3d 481 (2013). Additionally, where a trial court weighs evidence following a CrR 7.8 hearing, we review its findings of fact for substantial evidence and its conclusions of law de novo. *State v. Schwab*, 141 Wn. App. 85, 91, 167 P.3d 1225 (2007).

Ramos–Curiel assigns error to the trial court's findings of fact 7 and 9, but only to the extent that they contain the legal conclusion that his defense counsel had accurately advised him of the immigration consequences of pleading guilty to violation of a domestic violence no contact order. A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Accordingly, our review of this issue is de novo.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel can render a plea involuntary. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). To prevail on his claim that his counsel was constitutionally ineffective, Ramos–Curiel must demonstrate that (1) defense counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). If Ramos–Curiel fails to demonstrate either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

A constitutionally competent defense attorney must advise a defendant of the immigration consequences of entering into a guilty plea. *Padilla v. Kentucky*, 559 U.S.

356, 367, 130 S. Ct. 1473, 176 L.Ed. 2d 284 (2010). In *Sandoval*, our Supreme Court held that "[i]f the applicable immigration law 'is truly clear' that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation." 171 Wn.2d at 170 (quoting *Padilla*, 559 U.S. at 369). However, "[i]f 'the law is not succinct and straightforward,' counsel must provide only a general warning that 'pending criminal charges may carry a risk of adverse immigration consequences.' " *Sandoval*, 171 Wn.2d at 170 (quoting *Padilla*, 559 U.S. at 369).

We briefly discuss the facts underlying *Padilla* and *Sandoval*, as they illustrate the relation between the clarity of immigration law and a defense counsel's constitutionally required immigration advice during plea negotiations. In *Padilla*, the defendant pled guilty to transporting a significant amount of marijuana in his truck—an obviously deportable offense under 8 U.S.C. section 1227(a)(2)(B)(i):

> ***4** "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation ... relating to a controlled substance, ... other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

559 U.S. at 359, 368 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). The *Padilla* Court determined that this statutory provision was "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Padilla*, 559 U.S. at 368. By simply "reading the text of the statute," Padilla's defense counsel could have determined that a guilty plea would subject the defendant to deportation. *Padilla*, 559 U.S. at 368. Defense counsel was thus ineffective for misadvising Padilla that he would not have to worry about immigration status because he had been in the country so long. *Padilla*, 559 U.S. at 368–69.

Similarly, in *Sandoval* defense counsel advised the defendant to "accept the State's plea offer [to third degree rape] because 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." *Sandoval*, 171 Wn.2d at 167. Our Supreme Court concluded that defense counsel performed deficiently by incorrectly dismissing the defendant's risk of deportation and not informing the defendant that third degree rape equated to an "aggravated felony" under federal immigration law, which subjected him to deportation. *Sandoval*, 171 Wn.2d at 171.

Here, unlike *Padilla* and *Sandoval*, it was not "truly clear" that deportation would follow Ramos–Curiel's guilty plea to violation of a domestic violence no contact order. The deportation provision applicable to Ramos–Curiel's violation of a domestic violence no contact order conviction states:

Violators of protection orders

> Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

8 U.S.C. § 1227(a)(2)(E)(ii).

8 U.S.C. section 1227(a)(2) lists numerous categories of criminal offenses that would subject a person who is not a United States citizen to deportation. Subsection (a)(2)(E)(ii), quoted above, is one of only three provisions that is not framed in terms of a criminal conviction. *Garcia–Hernandez v. Boente*, 847 F.3d 869, 871 (7th Cir. 2017). In other words, the fact that Ramos–Curiel was convicted of a statute prohibiting contact with a protected party, alone, would not necessarily subject him to certain deportation under 8 U.S.C. section 1227(a)(2)(E)(ii).

Instead, under at least the Ninth Circuit's view, an immigration court would first need to determine under a "categorical approach" whether the statute Ramos–Curiel had pled guilty to violating, former RCW 26.50.110 (2007), included the full range of conduct covered by 8 U.S.C. section 1227(a)(2)(E)(ii). *Alanis–Alvarado v. Holder*, 558 F.3d 833, 836 (9th Cir. 2008) (quoting *Kawashima v. Mukasey*, 530 F.3d 111, 1116 (9th Cir. 2008), *withdrawn and superseded by Kawashima v Holder*, 615 F.3d 1043 (9th Cir. 2010)). If the immigration court determined that the range of protection orders that could be issued under former RCW 26.50.110 was broader than the scope of 8 U.S.C. section 1227(a)(2)(E)(ii), it would then employ the " 'modified categorical approach,' " requiring it to

> ***5** "conduct a limited examination of the documents in the record of conviction ... [to] determine whether there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive."

Alanis–Alvarado, 558 F.3d at 836 (quoting *Kawashima*, 530 F.3d at 1116).

In contrast to the Ninth Circuit in *Alanis–Alvarado*, the Seventh Circuit in *Garcia–Hernandez* held that neither the "categorical approach" nor the "modified categorical approach" controls whether a non-United States citizen's conduct subjected him or

her to deportation under 8 U.S.C. section 1227(a)(2)(E)(ii). The Court stated:

> The text of (E)(ii) does not depend on a criminal conviction but on what a court "determines" about the alien's conduct. Based on that significant textual difference between (E)(ii) and other provisions, we find that neither the categorical approach nor the modified categorical approach controls this case. What matters is simply what the state court "determined" about Garcia–Hernandez's violation of the protection order.
>
> The key language, "the court determines," does not require a conviction of a particular kind or the categorical approach at all. What matters is what the court "determines".... If a court "determines" that the alien has engaged in conduct that violates a portion of the order that "involves protection against credible threats of violence, repeated harassment, or bodily injury," that is enough for purposes of (E)(ii).

Garcia–Hernandez, 847 F.3d at 872.

As the differing analyses undertaken by the Seventh and Ninth Circuit Courts of Appeal illustrate, the immigration consequences of pleading guilty to violation of a domestic violence no contact order are complex and not easily determined by simply reading the text of 8 U.S.C. section 1227(a)(2)(E)(ii). Rather, determining the immigration consequences of Ramos–Curiel's guilty plea to violation of a domestic violence no contact order required defense counsel to look beyond the text of subsection (a)(2)(E)(ii), ascertain the proper mode of analysis in light of conflicting federal circuit court opinions, and apply the proper analysis to the circumstances of Ramos–Curiel's case. Even after making such a determination, counsel could not be certain that Ramos–Curiel would be deported as a result of his violation of a domestic violence no contact order, since an immigration court would be required to make certain factual determinations about the nature of the no contact order violation under either the modified categorical approach of the Ninth Circuit or the analysis employed by the Seventh Circuit.

We need not decide the extent to which defense counsel was required to examine the circumstances of Ramos–Curiel's charges to determine whether pleading guilty would satisfy a specific ground for deportation under 8 U.S.C. section 1227(a)(2)(E)(ii). Although Ramos–Curiel does argue that his trial attorney failed in his duty to research and correctly inform him of the immigration consequences of pleading guilty, he does not argue that any feature of the charges or likely evidence would satisfy the specific grounds in 8 U.S.C. section 1227(a)(2)(E)(ii).

Through his signed statement on plea of guilty, Ramos–Curiel was advised that his plea was "grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." CP at 6. In light of the complexities just discussed and the fact that conviction for a violation of a domestic violence no contact order

Filed
Washington State
Court of Appeals
Division Two

April 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSE RAMOS-CURIEL,

Appellant.

No. 49048-0-II

ORDER DENYING MOTION TO PUBLISH OPINION

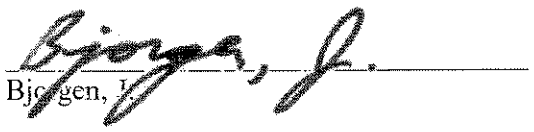
The opinion in this matter was filed on September 12, 2017. The appellant has filed a motion to publish the filed opinion. After review, it is hereby

ORDERED that the motion to publish is denied.

IT IS SO ORDERED.

Jjs.: Bjorgen, Worswick, Lee

FOR THE COURT:



Bjorgen, J.

JOHN A. HAYS, ATTORNEY AT LAW

May 02, 2018 - 2:13 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49048-0
Appellate Court Case Title:	State of Washington, Respondent v. Jose Manuel Ramos-Curiel, Appellant
Superior Court Case Number:	08-1-00455-1

The following documents have been uploaded:

- 490480_Petition_for_Review_20180502141035D2340180_8051.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Ramos Curiel Petition for Review.pdf

A copy of the uploaded files will be sent to:

- WallaceA@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us

Comments:

Sender Name: Diane Hays - Email: jahayslaw@comcast.net
Filing on Behalf of: John A. Hays - Email: jahayslaw@comcast.net (Alternate Email: jahayslaw@comcast.net)

Address:
1402 Broadway
Longview, WA, 98632
Phone: (360) 423-3084

Note: The Filing Id is 20180502141035D2340180