Court of Appeals No. 32870-8
Consolidated with No. 32990-9
Yakima Superior No. 11-1-01110-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

vs.

APOLINAR PEREZ GOMEZ,
Appellant.

APPELLANT'S OPENING BRIEF

Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

Federal Cases

I. ASSIGNMENTS OF ERROR

A. Mr. Perez Gomez's Trial Counsel's Performance Was Deficient Under The Sixth Amendment on the Basis of His Failure to Provide Specific Immigration Consequences Warnings Prior to Mr. Perez Gomez's Plea

B. Based on an Actual Determination of Mr. Perez Gomez's Immigration Status Cross-Referenced with the Specific Crime, the Immigration Consequences to Mr. Perez Gomez Upon Conviction Could Be Easily Determined – Thus, Trial Counsel Was Obligated to Provide Specific Immigration Consequence Warnings and Erred by Failing to Do So.

C. Trial Counsel Was Ineffective During Plea Negotiations By Failing to Offer Plea Alternatives to Mitigate Immigration Consequences In Spite of the State's Refusal to Negotiate Plea Alternatives Which Recognized Mr. Perez Gomez's Immigration Status.

D. Trial Counsel Erred By Not Discussing Appeal Issues With His Client.

E. Mr. Perez Gomez Was Prejudiced As A Result Of His Trial Counsel's Deficient Performance

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Is Trial Counsel's Performance Deficient If He Fails to Ascertain His Client's Precise Immigration Status in Order to Effectively Research the Immigration Consequences of Conviction? (Assignments of Error No. 1 and No. 2)

B. Is Trial Counsel Automatically Relieved of His Sixth Amendment Duties Under *Padilla* and *Sandoval* if The Defendant Has Already Chosen Immigration Counsel To Assist Him Following the Resolution of His Criminal Case? (Assignments of Error No. 1 and No. 2)

C. Is Trial Counsel Relieved from Offering Plea Alternatives During Negotiations if He is Informed By the State That It Will Refuse to Consider any Plea Alternatives Offered on the Basis of Avoiding Immigration Consequences? (Assignment of Error No. 3)

D. May Trial Counsel Omit Discussing the Pros and Cons of Filing an Appeal When His Client is Accepting a Negotiated Plea Deal?

E. Is Prejudice Established Under the *Strickland* Standard When A Defendant Enters a Plea As the Result Of His Trial Counsel's Deficient Performance When It Would Have Been a Logical Choice to Proceed to Trial?

III. ANSWERS TO ISSUES ON ASSIGNMENTS OF ERROR

A. Yes. Trial counsel is ineffective if he or she fails to make a detailed inquiry into the client's immigration status and then follow up by undertaking research to locate the specific immigration consequences applicable to the client's immigration status upon conviction of a certain crime.

B. No. Sixth Amendment duties apply only between an attorney and his or her client. Trial counsel cannot provide competent representation if he or she ignores the *Padilla* and *Sandoval* requirements, or if he or she attempts to foist this responsibility back onto the client by requiring the client to consult an immigration attorney for the information that the trial attorney was constitutionally obligated to provide.

C. No. It may well be an appealable error if the State improperly interferes with trial counsel's Sixth Amendment duties. However, it remains trial counsel's duty to competently represent his client through all stages of the criminal process.

D. No. Competent counsel discusses the pros and cons of filing an appeal with his or her client even if the conviction results from a plea deal rather than trial.

E. Yes. Prejudice under the *Strickland* standard may be established when it can be shown that, but for the ineffective assistance of counsel, the defendant would not have pleaded guilty and would have insisted on going to trial.

IV. STATEMENT OF THE CASE

The Appellant is currently not in custody and he resides in Yakima, Washington.

On August 10, 2011, an Information was filed in the Yakima County Superior Court arising from an incident occurring on October 6, 2011 in Yakima County, Washington. Mr. Perez Gomez was charged with one count of Attempting To Elude A Pursuing Police Vehicle (RCW 46.61.024) and one count of Driving While Under The Influence Of Intoxicating Liquor (RCW 46.61.502(5)). (CP 1-2, CP 4)

On August 12, 2011, attorney Scott Bruns was appointed to represent Mr. Perez Gomez in this matter. (CP 5)

Mr. Perez Gomez was formally arraigned on August 22, 2011. The matter was scheduled for omnibus hearing on September 22, 2011. (CP 6)

On September 22, 2011, the matter was continued to September 29, 2011 for omnibus hearing. (CP 7) The matter was again continued on September 29, 2011 to October 3, 2011. (CP 8) On October 3, 2011, the matter was scheduled for entry of a guilty plea on October 5, 2011. (CP 9)

On October 6, 2011, Mr. Perez Gomez entered a plea of guilty to the crime of Attempting To Elude A Pursuing Police Vehicle (RCW 46.61.024). Count 2 - Driving While Under The Influence Of Intoxicating Liquor (RCW 46.61.502(5)) was dismissed by the State. (CP 10-19) Also on October 6, 2011, Mr. Perez Gomez was sentenced to serve 63 days in the Yakima County Jail and to pay fines and fees totaling $1,400.00. (CP 20-26) A transcript of proceedings of the October 6, 2011 plea and sentencing hearing was prepared and filed with the Yakima County Superior on October 6, 2014. (CP 54-60)

On January 31, 2014, attorney De Young filed a Notice of Appearance in the matter. Also filed on that date was a Note for Motion Docket for a hearing to be held on February 11, 2014 for the purpose of obtaining an Order Waiving Attorney/Client Privilege. A proposed Order was also filed with the court.

The motion hearing was held on February 11, 2014. Judge Bartheld signed an Order Waiving Attorney/Client Privilege and Confidentiality in the matter.

On March 3, 2014, trial counsel Bruns was sent by certified mail copies of the Order Waiving Attorney/Client Privilege and Confidentiality entered in the Yakima Superior Court on February 11, 2014, a copy of Mr. Perez Gomez's declaration dated February 11, 2014, and a list of questions regarding attorney Bruns' representation of Mr. Perez Gomez. (*See* PRP Attachment E – *March 3, 2014 Letter to Trial Counsel with Filed Waiver of Attorney Client Privilege, Declaration of the Defendant and Questions Regarding Representation of Apolinar Perez Gomez*)

On March 20, 2014, trial counsel responded to the mailing and sent a letter of his recollections regarding the case. (*See* PRP Attachment F – *March 20, 2014 Letter from Attorney Scott Bruns RE: Perez Gomez Representation*)

On April 23, 2014, a follow up letter seeking clarification of trial counsel's responses was sought. The clarification sought concerned whether the immigration consequences advice stated in the letter was inclusive or whether any other advice concerning specific immigration consequences was provided to Mr. Perez Gomez. This letter was sent by certified mail to trial counsel to the address that the first letter was sent. This letter was returned by the U.S. Post Office as undeliverable. (*See* PRP Attachment G – *April 23, 2014 Letter to Trial Counsel Bruns with Proof of Certified Mailing and Undeliverable Return*).

On May 2, 2014, the same letter seeking clarification was sent certified to the address that was listed on Attorney Bruns letterhead from his initial response. This letter was also returned as undeliverable. (*See* PRP Attachment H - *May 2, 2014 Letter to Trial Counsel Bruns with Proof of Certified Mailing and Undeliverable Return*)

Phone messages were left for Mr. Bruns seeking his correct mailing address as it appeared that neither the address listed on the WSBA website nor the second address that Mr. Bruns had provided on his letterhead was correct. Mr. Bruns failed to respond to any messages left for him by telephone.

On October 6, 2014, Mr. Perez Gomez filed a Notice of Appeal to the Washington State Court of Appeals – Division III. (CP 37-47) Also filed with the Yakima County Clerk on that date was another Notice of Appearance by Attorney

De Young, a Memorandum of Authorities, and a Transcript of the October 6, 2011Guilty Plea and Sentencing Hearing. (CP 54-60)

On December 15, 2014, Mr. Perez Gomez filed a Personal Restraint Petition (COA3 No. 32990-9).

Included as an attachment to the PRP was an interview under oath of Mr. Perez Gomez's immigration counsel who was questioned regarding her interactions with Mr. Perez Gomez and his trial counsel Attorney Scott Bruns. (*See* PRP Attachment I - *Transcript of October 24, 2014 Interview with Immigration Counsel Tamerton Granados*) A copy of Mr. Perez Gomez's Notice to Appear to the immigration court was also included with GR 15(b)(6) redactions in Mr. Perez Gomez's Personal Restraint Petition filing. (*See* PRP Attachment J – *Immigration Documents*)

Mr. Perez Gomez's Direct Appeal No. 32870-8 and his Personal Restraint Petition No. 32990-9 were consolidated by the Court of Appeals – Division III on March 12, 2015 under Case No. 32870-8.

V. IMMIGRATON LAW PERTINENT TO THE CASE

On June 30, 2001, the Board of Immigration Appeals (BIA) issued its decision in *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011). In this matter, the BIA found that a conviction under RCW 46.61.024 was a crime involving moral turpitude (CIMT). The BIA held that such conviction made Ruiz-Lopez statutorily ineligible for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2006).

As to the instant matter, Mr. Perez Gomez did not have the requisite ten years of presence in the U.S. to qualify for cancellation of removal at the time of his Yakima County conviction. The only potential relief that would have been available to him at the time of his conviction would have been the exercise of prosecutorial discretion. This form of relief is not offered to noncitizens with criminal convictions which also implicate a crime of moral turpitude. Mr. Perez Gomez would have maintained a chance to qualify for prosecutorial discretion if he had a conviction for a crime that did not have specific immigration consequences.

VI. ARGUMENT

A. Mr. Perez Gomez's Trial Counsel's Performance Was Deficient Under The Sixth Amendment on the Basis of His Failure to Provide Specific Immigration Consequences Warnings Prior to Plea.

In the instant case, trial counsel for Mr. Perez Gomez provided a letter concerning advice that he gave to Mr. Perez Gomez regarding the specific immigration consequences of his plea and conviction. (*See* PRP Attachment F - *March 20, 2014 Letter from Attorney Scott Bruns RE: Perez Gomez Representation)*

The letter speaks for itself and won't be quoted here in its entirety. The letter does not state that trial counsel provided any specific immigration advice. Trial counsel claims to have ascertained his client's immigration status, however, he does not provide that he ever inquired or knew how long his client had been in the United States. Such knowledge is a prerequisite to determining the specific

immigration consequences which could result from conviction. The letter does not provide that trial counsel ever informed his client about the certainty of deportation. It appears that he likely relied on what Attorney Granados had told him rather than engaging in his own independent inquiry as required by his Sixth Amendment duties.

One portion of trial counsel's letter demonstrates clearly that the necessary specific advice was not provided: Trial counsel, in his March 20, 2014 letter under Number 8 Part (h), provides:

> h. After explaining the difficulties of settling the case and the obstacles with taking the case to trial, Apolinar chose to plead guilty in the hopes that the immigration authorities would be merciful towards him. He did not want to wait any longer for a trial and wanted to get out of the jail as soon as possible.

(PRP Attachment F - *March 20, 2014 Letter from Attorney Scott Bruns RE: Perez Gomez Representation*)

Counsel's statement that his client chose to plead guilty "in hopes that the immigration authorities would be merciful towards him" simply cannot be harmonized with the requirement that trial counsel provide specific and accurate advice of the immigration consequences of conviction. If Mr. Perez Gomez harbored any belief that there was a realistic chance of "the immigration authorities being merciful towards him," it was trial counsel's Sixth Amendment duty to correct this mistaken belief by providing accurate immigration advice.

This is consistent with Mr. Perez Gomez' declaration in which he states that his trial counsel never informed him of the specific immigration

consequences of this conviction. (*See* PRP Attachment E – *February 11, 2014 Declaration of Defendant (included therein))*

Both *Padilla* and *Sandoval* require that trial counsel provide specific advice of regarding the immigration consequences of their noncitizen clients' guilty pleas. (*Padilla v. Kentucky,* 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *State v. Sandoval,* 171 Wn.2d 163, 249 P.3d 1015 (2011))

The Washington Supreme Court in *Sandoval* stated:

> The second reason that Sandoval's counsel's advice was unreasonable, contrary to the State and WAPA's argument, is that the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave. In *Padilla,* the Commonwealth of Kentucky used a plea form that notifies defendants of a risk of immigration consequences, and the Court even cited RCW 10.40.200, noting the Washington statute provides a warning similar to Kentucky's. *See* 130 S.Ct. at 1486 n. 15. However, the Court found RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings. Rather, for the Court, these plea-form warnings underscored (internal citation omitted) "how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation." *Id.* at 1486.

State v. Sandoval, 171 Wn.2d 163, 173 249 P.3d 1015 (2011).

B. <u>The Immigration Consequences to Mr. Perez Gomez Were Sufficiently Clear That Trial Counsel Was Obligated to Provide Specific Warnings.</u>

As provided above, at the time of Mr. Perez Gomez's conviction, it was clear that a plea to felony eluding would be considered a CIMT (crime involving a moral turpitude) under the immigration laws. See *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011).

Trial counsel knew that his client was a noncitizen. (See *PRP Attachment F - March 20, 2014 Letter from Attorney Scott Bruns RE: Perez Gomez Representation – p.1, items #1 and #2)* What trial counsel did not know was whether or not Mr. Perez Gomez could qualify for any relief in the immigration court. Trial counsel could only have figured this out if he had known the length of time that Mr. Perez Gomez had resided in the United States. If Mr. Perez Gomez had been present for at least ten years, then he could apply for the relief of cancellation of removal.

C. The State's Refusal to Conduct Plea Negotiations Which Recognized Mr. Perez-Gomez' immigration Status Was Improper. However, This Did Not Relieve Trial Counsel From Offering Plea Alternatives Which Would Have Protected His Client's Immigration Status.

1. Plea Negotiations Must Consider a Defendant's Immigration Status

To a noncitizen, immigration consequences are almost always the most serious of all the automatic consequences following from a conviction. For example, if a noncitizen, whether she is a lawful permanent resident, or if she is simply present without lawful authority in the United States for any period of time, pleads to an aggravated felony, she has virtually guaranteed her deportation. This obvious disparity in punishment has always been apparent. This has resulted in corrective efforts by both the legislature and by the appellate courts. The passage of RCW 10.40.200 by the Washington State legislature is one example of this recognition. Another is the passage of SHB 5168 which lowered the

maximum number of days possible sentence for a gross misdemeanor from 365 days to 364.

The Legislature's intent is stated in Sec. 1.

> The legislature finds that a maximum sentence by a court in the State of Washington for a gross misdemeanor can, under federal law, result in the automatic deportation of a person who has lawfully immigrated to the United States, is a victim of domestic violence or a political refugee, even when all or part of the sentence to total confinement is suspended. The legislature further finds that this is a disproportionate outcome, when compared to a person who has been convicted of certain felonies which, under the State's determinate sentencing law, must be sentenced to less than one year and hence, either have no impact on that person's residency status or will provide that person an opportunity to be heard in immigration proceedings where the court will determine whether deportation is appropriate. Therefore, *it is the intent of the legislature to cure this inequity by reducing the maximum sentence for a gross misdemeanor by one day.*

SHB 5168, Sec. 1 (2011)

It seems not a far-fetched notion that the legislature and appellate courts are communicating a clear message to the criminal justice system: immigration consequences matter. See also, *Padilla v. Kentucky,* 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *State v. Sandoval,* 171 Wn.2d 163, 249 P.3d 1015 (2011); *In re Personal Restraint of Tsai*, 88770-5, (May 7, 2015) (consolidated with *In re Personal Restraint of Jagana,* 89992-4).

The instance of plea bargaining is increasing in frequency, from 84% of federal cases in 1984 to 94% by 2001. Fisher, George, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, Stanford University Press (2003). *See* also Chin, Gabriel J. & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 Cornell L. Rev. 697, 698

(2002). The State will likely reply that it has no duty to offer any plea bargain at all. Facially, such a statement has some appeal. For practitioners in the criminal law, it is simple, authoritative and it relieves the parties so inclined from the extra work involved. Under such a bright-line policy, the State need not weigh proffered alternative pleas which might involve the amending of the Information to include additional counts to which conviction would yield the same amount of incarceration without the dire immigration consequences. Such an alternative plea would also raise the defendant's criminal history score. Under this policy offered by the State, defense counsel would, in theory, be relieved of his Sixth Amendment duties to spend additional time with his client determining whether or not her conviction would result in certain deportation. He would be spared the additional drudgery of inquiring into his client's immigration status to determine whether or not she has the requisite number of years present in the United States so that she might have a possibility of applying for cancellation of removal for nonpermanent residents in the immigration court following conviction.

Another of the State's well-worn counter-arguments is that noncitizens shouldn't be given "better" deals than citizens. However, this statement cries out for a definition of the term "better." Some prosecutors believe this means that any recognition of immigration status in plea negotiations puts a defendant on a higher footing than a noncitizen. This argument is without merit. Much of the time, it requires only a diligent reading of the police reports to identify several plea alternatives which would 1) result in the same or greater amount of incarceration and fines, and; 2) hold the defendant accountable by punishing him

for his criminal actions. For example, for an individual charged with possession of a controlled substance, a detailed reading of the police reports might reveal that the defendant used a family member's or a company's vehicle at the time of arrest. Taking a motor vehicle outside of the scope of permission by the owner (RCW 9A.56.075), is also a class C felony. Such defendant could also additionally plead to solicitation to possess the controlled substance identified in the police report without any immigration consequences. *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984) also provides defense counsel with a wide possibility of resolving criminal matters while protecting immigration status.

2. Trial counsel's duty of competence extends to plea negotiations.

For the State to suggest that plea negotiations involving the defendant's immigration status are not somehow "off limits" draws an arbitrary distinction and confounds the clear intentions of legislature and the applicable precedential decisions.

Trial counsel's duties to Mr. Perez Gomez extended through all parts of his representation. In *Missouri v. Frye*, 132 S.Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), the Supreme Court held that the Sixth Amendment right to effective assistance of counsel applies at the plea bargaining stage.

In the instant case, trial counsel had a duty to pursue plea negotiations as required by his Sixth Amendment duties. Trial counsel was ineffective by

allowing the State, in effect, to waive trial counsel's constitutional requirement of competence.

D. Trial Counsel's Failure to Discuss Appeals Issues With His Client Was Deficient.

The United States Supreme Court addressed claims of ineffective assistance of counsel based on the failure to consult with the defendant about filing an appeal. See *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

In *Roe*, the U.S. Supreme Court rejected a bright-line rule requiring counsel to always consult with his or her client regarding the filing of an appeal. *Roe*, 528 U.S. at 478. Instead, the court applied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as the measure for analyzing when defense counsel's failure to file a notice of appeal constitutes ineffective assistance. *Roe*, 528 U.S. at 478.

But where a defendant "has not clearly conveyed his wishes one way or the other" to counsel regarding an appeal, "the circumstance-specific reasonableness inquiry required by *Strickland*" applies. *Id*. at 477–78. The question bearing upon deficient performance under the latter scenario is whether or not counsel had a duty to consult with the defendant about an appeal. The Court held:

> [C]ounsel 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 non-frivolous grounds for appeal), or (2) that this particular defendant reasonably

> demonstrated to counsel that he was interested in appealing.

Id. at 480.

See also, *State v. Chetty*, 338 P.3d 298, 184 Wn.App. 607 (2014).

As applied to the instant case, this Court has already allowed Mr. Perez Gomez's appeal, so it would seem that as to that issue the point is moot. Yet it must still be included for the purpose of cataloging trial counsel's pattern of deficient performance in Mr. Perez Gomez's case.

E. Mr. Perez Gomez Was Prejudiced Under *Strickland* As A Result Of His Trial Counsel's Deficient Performance.

Mr. Perez Gomez does not have to show actual and substantial prejudice but must show that he is entitled to relief for one of the reasons listed in RAP 16.4(c). (*Sandoval* at 166, quoting *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010)); (*State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.")

RAP 16.4(c) states:

> (c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:
>
> (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(RAP 16.4(c)).

In *Sandoval*, the appellant/defendant claimed a constitutional violation. Therefore he still was required to meet the two-part test of *Strickland*. *Strickland v. Washington*, 466 U.S. 668 (1984). "In satisfying the (second) prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Sandoval* at 175 (citing *In re Pers. Restraint of Riley*, 122 Wn.2d at 780-8, 863 P.2d 554 (1993)(citing *Hill v.*

Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)); accord *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 254, 172 P.3d 335 (2007); *State v. Oseguera Acevedo*, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999) (internal citations omitted). A "reasonable probability" exists if the defendant "convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. *Strickland*, 466 U.S. at 694.

In the *Padilla* matter, the U.S. Supreme Court justices only determined that Mr. Padilla had satisfied the first prong of *Strickland*. The matter was remanded back to Kentucky for determination as to whether or not the second prong of *Strickland* was met.

The *Sandoval* case completed a full *Strickland* analysis. It accepted the State's argument that the disparity in punishment made it less likely that Sandoval would have been rational in refusing the plea offer. A conviction for second degree rape, RCW 9A.44.050, would have risked a standard sentencing range of 78-102 months imprisonment to a maximum of a life sentence while third degree rape had a standard sentencing range of only 6-12 months.

Since Sandoval had earned permanent residency, the court found that the deportation consequence of his guilty plea was "a particularly severe 'penalty.'" *Padilla*, 130 S. Ct. at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893)). For criminal defendants, deportation no less than prison can mean "banishment or exile," *Delgadillo v.*

Carmichael, 332 U.S. 388, 390-91, 68 S. Ct. 10, 92 L. Ed. 17 (1947), and "separation from their families," *Padilla*, 130 S. Ct. at 1484. Given the severity of the deportation consequence, the court was persuaded that Mr. Sandoval would have been rational to take his chances at trial. *Sandoval* at 176 (citing *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 322, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

Similarly, Mr. Perez Gomez had but one chance to remain in the United States by avoiding a removal order from the Immigration Court. His conviction took away that chance and left him with no viable possibilities for relief (*See* PRP Attachment I – *Transcript of October 24, 2014 Interview with Immigration Counsel Tamerton Granados.*)

Trial counsel's failure to provide specific advice required by *Padilla* and *Sandoval* rendered his performance ineffective and proximately caused prejudice to his client.

VIII. CONCLUSION

Trial counsel was ineffective in not independently ascertaining his client's precise immigration status and then determining the specific immigration consequences of his guilty plea. By not providing Mr. Perez Gomez advice concerning the specific immigration consequences that would result from his plea and conviction, trial counsel's performance was deficient under the Sixth Amendment. The State's refusal to allow plea negotiations on the basis of *Padilla* and *Sandoval* is likely appealable error. Trial counsel was ineffective in not

pursuing plea alternatives, notwithstanding. Finally, trial counsel was ineffective in not discussing appeals issues with his client.

Mr. Perez Gomez was prejudiced under both prongs of *Strickland* as a result of trial counsel's deficient performance.

In view of the above, this court should grant Mr. Perez Gomez's request to vacate his conviction on the grounds stated and remand this case to the Yakima County Superior Court for a new trial.

Respectfully submitted this 26th day of June, 2015.

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

Court of Appeals No. 32870-8
Consolidated with No. 32990-9
Yakima Superior No. 11-1-01110-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent, vs. APOLINAR PEREZ GOMEZ, Defendant/Appellant.	APPELLANT'S OPENING BRIEF CERTIFICATE OF SERVICE

I certify that on this 26th day of June, 2015, I caused a copy of APPELLANT'S OPENING BRIEF to be sent by electronic mail to:

Yakima County Prosecuting Attorney
Appeals@co.yakima.wa.us
128 N. Second St., Room 329
Yakima, WA 98901

David B. Trefry
david.trefry@co.yakima.wa.us
Yakima County Prosecutor's Office
P.O. Box 4846
Spokane, WA 99220-0846

and by U.S. Mail, first-class postage prepaid, to:

Apolinar Perez Gomez
1114 Rock Ave.
Yakima, WA 98902

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant