Supreme Court No.
Court of Appeals No. 31271-2-III
Chelan Superior No. 02-1-00593-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE: PERSONAL RESTRAINT OF JORGE MARTINEZ CHAVEZ

JOSE ANTONIO MANJARES, Petitioner

AMENDED MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

The Petitioner, JOSE ANTONIO MANJARES, by and through his attorney of record, Brent A. De Young, asks for the relief designated in Part B.

B. RELIEF REQUESTED

The Petitioner, Jose Antonio Manjares, by and through his counsel, Brent A. De Young, moves this Court for review of the Court of Appeals Order dated March 14, 2017 denying his Motion to Reconsider as well as the Court of Appeals decision of February 2, 2017 dismissing his ineffective assistance of counsel claims and thus upholding the trial court's conclusion not to Restraint Petition as frivolous (RAP 16.11 (b). A copy of the February 2, 2017 decision and the March 14, 2017 denial for reconsideration is attached hereto as Appendix A.

C. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Prevailing Norms at the Time of Mr. Manjares' Conviction Dictated that Defense Counsel Not Stipulate to the Police Reports to Serve as a Factual Basis For a Noncitizen's Plea.

2. Mr. Manjares was Entitled to Competent Counsel at all Stages of His Representation. Counsel's 6th Amendment Duties Were Not Limited to Simply Informing as to the Ascertainable Immigration Consequences Upon Conviction.

3. The Court of Appeals Erred In Not Applying The Federal Immigration Law Regarding Categorical Analysis and Stipulations Concerning The Scope of the Record of Conviction That Applied At The Time Of Mr. Manjares' Conviction.

4. The Court Of Appeals Erred In Employing A Bifurcated Analysis of Mr. Manjares' Counsel's Advice As To Whether Counsel's Advice Regarding Immigration Consequences Was "Affirmative Misadvice" or Whether The Advice Given Was Limited To The RCW 10.40.200 Warnings Contained In The Guilty Plea Statement.

5. The Court Of Appeals Erred In Not Remanding Mr. Manjares' Motion To The Trial Court For A Proper Fact Finding Hearing.

I. ARGUMENT

A. Padilla v. Kentucky and State v. Sandoval Require That Trial Counsel Advocate With Knowledge and Regard to the Immigration Status of a Client and The Client's Representation Priorities Throughout All States Of The Representation.

The legal basis for Mr. Manjares' 2002 deportation is not revealed in his Order of Removal. Thus, it is not completely clear how the immigration court removed Mr. Manjares for commission of an aggravated felony (CP at 123). The immigration judge's order provides only the following boilerplate: "upon the basis of the respondent's admissions I have determined that the respondent is subject to removal on the charge(s) in the notice to appear."

In its decision it appears that the Court has discounted the accuracy of the of the 2002 removal order which identifies the legal basis ad due to an "aggravated felony". As previously argued, it seems likely that the immigration court found that the facts presented in the expanded "record of conviction" supported a finding that the crime involved "sexual abuse of a minor" or an attempt to commit such crime. *8 U.S.C. § 1101(a)(43)(A).*

Assuming arguendo that the immigration court erred and the conviction was not an aggravated felony, the result is still the same for Mr. Manjares. Under immigration law then and currently applicable, he could not have qualified for Cancellation of Removal. The burden would have been on Mr. Manjares to show that qualified for such relief. No competent counsel would have entered an Alford plea enlarging the record of conviction for a noncitizen client. There simply is no strategic reason for such a decision.

The procedural substance of Mr. Manjares' conviction is remarkably similar to another Washington State criminal conviction that is often cited in the context of the allowable scope of the record of conviction in relation to removable proceedings. See, *Parrilla v. Gonzalez*, 414

F.3d 1038 (2005) (Ireneo Parilla, the defendant in that matter, pleaded guilty on March 15, 2002 in the King County Superior Court. By comparison, Mr. Manjares entered a guilty plea on December 11, 2002 in the Chelan County Superior Court. Both Defendants' lawyers had chosen to incorporate the police reports as a factual basis for the plea rather than making a sufficient statement to encompass the factual elements of the crime. The immigration consequences for both were swift, certain and resulted in permanent banishment. *Id*.

In *Parilla*, the 9th Circuit Court of Appeals stated:

> The BIA determined that Parrilla was ineligible for cancellation pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) because his conviction for communicating with a minor for immoral purposes under Washington Revised Code section 9.68A.090 was an aggravated felony that met the definition of "sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A). Although we hold that section 9.68A.090 did not categorically proscribe "sexual abuse of a minor," the government provided an information, a guilty plea and a Certification for Determination of Probable Cause that allow us to conclude, under the modified categorical approach, that Parrilla committed an offense rendering him ineligible for cancellation of removal.

It can be discerned from Mr. Manjares' immigration record that he had been present in the United States long enough to qualify for Cancellation of Removal for certain nonpermanent residents.

However, to prove eligibility for this type of relief, an applicant must satisfy the following criteria:

1. Ten years of continuous physical presence in the United States;
2. Good moral character during such period of time;
3. The alien has not been convicted of an offense under INA §212(a)(2), INA §237(a)(2) or INA §237(a)(3); and,
4. A showing of exceptional and extremely unusual hardship to a qualifying United States citizen (USC) or lawful permanent resident (LPR) spouse, parent or child.

However, once Mr. Manjares was found by the immigration court to have a disqualifying conviction under INA §212(a)(2), INA §237(a)(2) or INA §237(a)(3), Mr. Manjares was thereafter ineligible to apply for cancellation of removal. He was simply deportable. Trial counsel should have made efforts to mitigate the immigration harm to Mr. Manjares.

The February 2, 2017 decision downplays the significance of trial counsel's inattention to the details of his client's conviction. If Mr. Manjares' counsel had not unnecessarily expanded the scope of the immigration judge's review, it is doubtful that the immigration court could have removed Mr. Manjares in 2002.

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.

Based on the cited decisions, *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 representation consistent with the steps outlined in the *Sandoval* opinion.

Under the approach now approved by the Division III Court of Appeals in this published decision there is no legal fault at all if trail counsel decided not to ascertain his client's immigration status or to investigate the immigration consequences of the conviction. Trial counsel can now warn every Defendant that he will be deportable as a result of his conviction. Even if trial counsel happened to be incorrect and his client was only potentially deportable (ie. The alien defendant still could apply for cancellation of removal), such Defendant could not easily show any prejudice. This result does not comport with the 6th Amendment outcome envisioned in *the Padilla*, *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 Mr. Manjares was entitled to competent representation at all times in light of his immigration status and immigration goals This Court should reject the improper analytical tests employed by the Court of Appeals. If this Court finds that the factual issues have not been sufficiently developed, it is respectfully urged that this Court return the matter to Chelan County for a hearing on the issues as Mr. Manjares had originally moved.

Respectfully submitted this 13th day of April, 2017.

s/ Brent A. De Young

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STATE OF WASHINGTON, Plaintiff/Respondent, vs. JOSE ANTONIO MANAJARES, Defendant/Appellant.	Supreme Court No. Court of Appeals No. 31271-2-III Chelan Superior No. 02-1-00593-5 AMENDED PETITIONER/APPELLANT'S MOTION FOR DISCRETIONARY REVIEW AMENDED CERTIFICATE OF SERVICE

I certify that on this 21st day of April, 2017, that I caused to be sent electronically or as otherwise indicated, a copy of *Motion For Discretionary Review* to:

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