NO. 49048-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSE MANUEL RAMOS-CURIEL,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the September 12, 2017, unpublished opinion of the Court of Appeals in *State v. Ramos-Curiel*, COA No. 49048-0-II. This decision affirmed the trial court's denial of Ramos-Curiel's CrR 7.8 motion to withdraw his guilty plea to violation of a domestic violence no-contact order.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. While a defense attorney must inform his or her client when a plea carries a risk of deportation, if the immigration consequences of a plea are unclear or difficult to discern (such as in the case of a plea to a domestic violence no-contact order), the attorney must only inform the client that he or she could be deported.

2. Ramos-Curiel's plea was knowing and voluntary because he was advised of his rights and the consequences of a plea, and the trial court did not mislead him.

III. STATEMENT OF THE CASE

On April 24, 2008, Ramos-Curiel was charged with one count of possession of cocaine and one count of violation of a domestic violence

no-contact order. CP 1–2. He was represented by Thomas Ladouceur of the Office of Public Defense. CP 45. Both Mr. Ladouceur and Ramos-Curiel signed a statement of defendant on plea of guilty which stated:

> 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, of denial of naturalization pursuant to the law of the United States.

CP 6, CP 10.

Mr. Ladouceur went through the language of the statement of defendant on plea of guilty, including the language regarding immigration, with Ramos-Curiel. RP 15. He also advised Ramos-Curiel that the charges he was facing were deportable offenses. *Id.* Ramos-Curiel entered his guilty plea to the charges on October 14, 2008. CP 108. During that hearing, the judge asked Ramos-Curiel whether he understood that he may be deported; Ramos-Curiel stated that he understood. RP 4.

In 2016, Ramos-Curiel filed a CrR 7.8 motion, seeking to withdraw his guilty plea. The State called Mr. Ladouceur as a witness, and he testified as above. Ramos-Curiel's motion was denied. He then appealed to the Court of Appeals, who affirmed the trial court. Ramos-Curiel also successfully moved the trial court to vacate his felony drug conviction during this time. Ramos-Curiel now seeks review of the trial

court's denial of his CrR 7.8 motion as to the domestic violence no-contact order.

IV. ARGUMENT

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division II Court of Appeals holding in this case is not in conflict with any decisions either the Washington Supreme Court or another division of the Court Appeals. In fact, the decision in this case directly follows from *State v. Sandoval* and *Padilla v. Kentucky*. The holding also does not raise a significant question of law or involve an issue of substantial public interest.

A. The Court of Appeals properly held that the advice of Ramos-Curiel's trial counsel was constitutionally sufficient under the applicable case law.

In 2010, the United States Supreme Court held that a defense attorney must inform his or her client whether a plea carries a risk of deportation. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). The Court explained that, when the deportation consequences in a case are clear, the attorney must clearly explain the risk. *Id.* at 369. However, there will likely be many situations in which the immigration consequences of a plea are unclear or uncertain; in those situations, the attorney's duty is more limited. *Id.*

The Washington Supreme Court interpreted and applied *Padilla* in *In re Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015). In that case, the Court first had to determine whether the petitioner's PRPs were time-barred by RCW 10.73.090. The Court therefore conducted a *Teague* analysis to determine if *Padilla* announced a new rule under Washington law. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). Whether a rule applies to collateral attacks on a judgment depends on whether the rule is considered "new" or "old." Under *Teague*, new constitutional rules of criminal procedure typically only apply to matters on direct review, but old rules apply retroactively to matters on both direct and collateral review. Therefore, if the rule enunciated in *Padilla* is considered a new

rule under Washington law, it would not apply to this case. However, if it is considered an old rule, it applies retroactively.

The Court in *Tsai* held that *Padilla* did not announce a new rule under Washington law because it was merely an application of the *Strickland* factors to a particular set of facts. *Tsai*, 183 Wn.2d at 103; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The failure to give advice regarding immigration consequences of a plea was already determined to be deficient performance in Washington. *Tsai*, 183 Wn.2d at 99. Therefore, *Padilla* applies retroactively under *Teague*. The parties in this case agree that Ramos-Curiel's motion was timely made. However, this Court should nonetheless deny his petition for review because the Court of Appeals' decision does not conflict with any decisions of the Court of Appeals or Supreme Court.

The failure to do sufficient research and correctly advise the defendant falls below the standard of a reasonably prudent attorney. *Tsai*, 183 Wn.2d at 101. In this case, trial counsel conducted sufficient research and did correctly advise the defendant. First, the immigration consequences of a plea to a violation of a domestic violence no-contact order are not clear. Under 8 U.S.C. § 1227 (a)(2)(E),

> 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.

The fact that Ramos-Curiel was convicted of a statute prohibiting contact with another person would not necessarily subject him to deportation. Federal Circuit Courts have interpreted this language differently and applied different approaches. At the very least, an immigration court would need to determine if Ramos-Curiel engaged in conduct that violated a protection order by issuing credible threats of violence, repeatedly harassing the protected person, or injuring the protected person. Therefore, Ramos-Curiel's trial counsel would have needed to ascertain the proper method of analysis given the differing federal circuit court opinions and then apply that method of Ramos-Curiel's particular circumstances. Even then, though, the trial attorney could not be sure Ramos-Curiel would be deported because an immigration court would need to make a factual determination regarding Ramos-Curiel's conduct.

What *Padilla* and 8 U.S.C. § 1227 requires is simply that the attorney give the advice he is capable of giving. In this case, the trial

attorney gave that advice – he knew Ramos-Curiel was not a citizen and went over the plea form with him, focusing especially on the language about immigration consequences of a plea. Given the complexities in determining the consequences of a plea, and the fact that a conviction for a violating a domestic violence no-contact order would not necessarily result in deportation, Ramos-Curiel was given constitutionally sufficient advice. Ramos-Curiel's statement in his petition that the complexities inherent in ascertaining the immigration consequences in this case actually increase the duty of trial counsel to correctly advise the defendant. This is simply incorrect in light of the explicit language in *Padilla* and *Tsai*. The Court of Appeals' decision in this case follows directly from *Padilla* and *Tsai*. Therefore, the petition for review should be denied.

B. Ramos-Curiel's plea was knowing and voluntary because he was advised of his rights and the consequences of a plea, and the trial court did not mislead him.

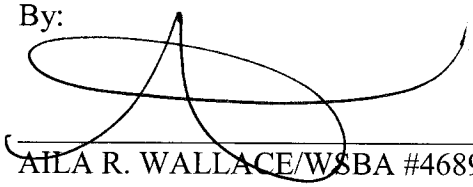
Ramos-Curiel was advised by his attorney, the statement of defendant on plea of guilty, and by the judge that his plea could result in deportation or other immigration consequences. As discussed above, the immigration consequences of this plea were not clear, so all that was required was that Ramos-Curiel may be deported. He was advised of this. Therefore, his plea was knowing and voluntary.

V. CONCLUSION

For the reasons stated above, Ramos-Curiel's petition for discretionary review should be denied.

Respectfully submitted this 31 day of May, 2018.

RYAN JURVAKAINEN
Prosecuting Attorney

By: 

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CERTIFICATE OF SERVICE

Hannah Bennett-Swanson, certifies that opposing counsel was served electronically via the Division II portal:

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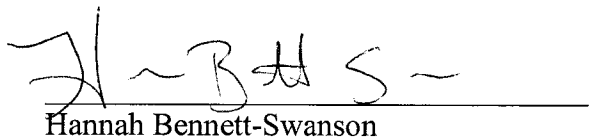
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 31st day of May, 2018.



Hannah Bennett-Swanson

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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Transmittal Information

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