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NO. 36557-3-III

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

STATE OF WASHINGTON, RESPONDENT

v.

JUAN CARLOS MENDOZA, APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRANT COUNTY

Superior Court Cause No. 94-1-00328-6

The Honorable Evan E. Sperline, Judge

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. Mendoza's argument relies entirely on facts outside the record in violation of RAP 10.3(a)(5) and (6). Facts needed to establish a Sixth Amendment violation appear only in declarations attached to a memorandum filed for this Court's preliminary consideration of timeliness. They do not appear in Mendoza's statement of the case but are alluded to in his argument as though competently established. Should this Court deny Mendoza's appeal? (Assignments of Error A and B)
- B. Regardless of whether trial counsel delivers deficient performance, does Mendoza fail to establish, as required by *Strickland*, that but for counsel's deficient performance, the outcome of his proceeding would have been different? (Assignments of Error A and B).

II. STATEMENT OF THE CASE^{1 2}

Juan Carlos Mendoza, born in Mexico, moved to the United States with his family when he was fifteen years old. Attach. D (Mendoza) at 1. Born October 25, 1975, Mendoza was 18 years old when police officers

¹ The record of facts in this case is found in the Clerk's Papers, cited as CP at ____ . Mendoza also refers this Court to two declarations submitted as Attachment D to Appellant's Memorandum re: Timeliness, filed February 26, 2019, and refers to facts contained in Attachments E and F. Attachment D is not part of the trial court record. As argued in subsection A of Respondent's argument, this Court should refuse to consider any of Mendoza's claims which rely on facts appearing nowhere in the record and only in Attachment D. However, in an abundance of caution, the State addresses Mendoza's arguments in subsection B, presenting the facts from Attachment D as though they were part of the record below. The State does not intend this inclusion to be a waiver of its objection to consideration of facts asserted in attachments to the timeliness memorandum.

² Attachment D is not sequentially paginated. The State cites to the two declarations as Attach. D (declarant name) at ____ (declaration page number).

arrested him on July 10, 1994. CP 074. He had not yet obtained a “green card.” Attach. D (Mendoza) at 1.

Mendoza was arrested after two Mattawa police officers responding to a fireworks complaint were invited into a home by a female resident. CP at 002–03. Mendoza was inside the house. CP at 003. Mendoza had white powder in his nostrils. CP at 003. One of the officers noticed Mendoza was holding a plastic baggie and asked what he had in his hands. CP at 002. When Mendoza attempted to hide the baggie, the officer opened Mendoza’s hand and observed the baggie contained white powder. CP at 002. Mendoza wrestled with the officer and was arrested. CP at 002–03. The white powder field-tested positive for cocaine. CP at 003.

Another man, Chavez-Hernandez, came “out of a utility room sniffing and had white powder in his nostrils.” CP at 003. After being advised of her rights, the female occupant gave verbal and written consent to search the residence. CP at 003. A search of the utility room yielded approximately four grams of white powder that also field-tested positive for cocaine. CP at 003. Chavez-Hernandez and a third man, Morales, told the officers they rented a bedroom from the female resident. CP at 003. In that bedroom, officers found five grams of white powder packaged in a manner consistent with sale that also field-tested positive as cocaine. CP at

003. Morales' driver's license, taken from his person, had white powder stuck to the bottom it and between the layers of laminate. CP 003.

The approximate total value of the recovered cocaine was between \$240 and \$250. CP at 003.

The State charged Mendoza with possession of cocaine with intent to deliver, RCW 69.50.401(A)(1)(i). CP at 01. Mendoza moved under CrR 3.6 to suppress the drug evidence as fruit of an illegal search. CP at 022. The court held the suppression hearing on November 14, 1994. CP at 111–14. The court heard testimony from Mendoza and Officer Lazarro Sanchez, CP at 112, reviewed diagrams of the residence and the plastic baggie, and heard counsel's arguments CP at 112–14, before ruling that law enforcement had no legal right to be in the bedroom shared by Chavez-Hernandez and Morales, and had no right to seize the baggie from Mendoza's hand, but denied Mendoza's blanket suppression motion. CP at 113–14. Mendoza understood Knox thought the trial court's ruling was strange because Knox thought they had a good argument. Attach. D (Mendoza) at 2. Trial was scheduled to begin November 22. CP at 040.

Later, Knox told Mendoza he could plead to possession of cocaine and receive a much lower sentence than what he would get if he were found guilty of possession with intent to deliver. Attach. D (Mendoza) at 2. Mendoza accepted the deal and on November 17, 1994 entered a guilty

plea to the amended charge of possession of cocaine, RCW 69.50.401(d).

CP at 45. Paragraph 1.17 of Mendoza's plea statement contained the mandatory advice concerning adverse immigration consequences:

I understand 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.

CP at 048. Mendoza averred he had read, or had read to him all of the preceding paragraphs, understood them, had received a copy of his Statement of Defendant on Plea of Guilty to a Felony, and had no further questions. CP at 048. Defense counsel and the prosecuting attorney signed the Judge's Findings on the guilty plea statement. CP at 049.

Defense counsel, Ken Knox, does not remember this case. Attach. D (Knox) at 1. When he represented Mendoza in 1994, he did not have any immigration law training and was unaware of the immigration consequences of criminal convictions. Attach. D (Knox) at 1. Knox did not ask any of his clients whether they were citizens of the United States, nor did he ask about their immigration status. Attach. D (Knox) at 1. Regardless of whether he knew about Mendoza's status, Knox would neither have known, nor been able to ascertain, how a conviction might affect his client's immigration status. Attach. D (Knox) at 1.

Mendoza recalls he told Knox at the beginning of his case he did not have a green card. Attach. D (Mendoza) at 3. They never again discussed his immigration status. Attach. D (Mendoza) at 3. Mendoza remembers that during the plea change hearing an interpreter told him what the judge and his lawyer were saying. Attach. D (Mendoza) at 3. He recalls Knox did not discuss whether he would or would not be deported. Attach. D (Mendoza) at 3. Mendoza states that, had he known he “would be just deported without any chance to stay in the U.S., [he] would not have just pleaded guilty to just be done with [his] case. Attach. D (Mendoza) at 4. Mendoza declares he would have asked his lawyer to do whatever was possible to keep fighting the case *if the lawyer still believed his suppression argument was correct.* Attach. D (Mendoza) at 4 (emphasis added).

III. ARGUMENT

A. MENDOZA’S ARGUMENT RELIES ENTIRELY ON FACTS OUTSIDE THE RECORD IN VIOLATION OF RAP 10.3(A)(5) AND (6). FACTS NEEDED TO ESTABLISH A SIXTH AMENDMENT VIOLATION APPEAR ONLY IN DECLARATIONS ATTACHED TO A MEMORANDUM FILED FOR THIS COURT’S PRELIMINARY CONSIDERATION OF TIMELINESS. THEY DO NOT APPEAR IN MENDOZA’S STATEMENT OF THE CASE BUT ARE ALLUDED TO IN HIS ARGUMENT AS THOUGH COMPETENTLY ESTABLISHED. THIS COURT SHOULD DENY MENDOZA’S APPEAL.

Mendoza filed a direct appeal. He did not file a contemporaneous personal restraint petition which would have allowed introduction of facts

outside the trial record. *In re Ramos*, 181 Wn. App. 743, 749, 326 P.3d 82 (2014) (citing *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011)). RAP 10.3(a)(5)³ requires a “fair statement of the facts” with reference to the record for each factual statement.” Reviewing courts “decline to consider facts recited in briefs but not supported by the record.” *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 615 n. 1, 160 P.3d 31 (2007).

RAP 10.3(a)(6) demands an argument that refers to relevant sections of the record.⁴ Mendoza’s sole claim, ineffective assistance of counsel, relies entirely on facts appearing only in declarations attached as Appendices D, E, and F to Appellant’s Memorandum re: Timeliness filed in this Court February 26, 2019. Mendoza’s argument states conclusions entirely predicated on acceptance of these facts, although they do not appear in his Statement of the Case, Br. of Appellant at 1–4, nor are they expressly recited anywhere in his argument. *Id.* at 5–15.

Instead, Mendoza opens his argument by referring this Court to his February 26, 2019 Memorandum re: Timeliness, Attachment D

³ RAP 10.3(a)(5) provides “*Statement of the Case*: A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

⁴ RAP 10.3(a)(6) provides: “*Argument*. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.”

(“Attachment D”). Br. of Appellant at 5. He does not state what facts may be found in that attachment.⁵ *Id.* The relevant facts found only in Attachment D are: (1) Knox does not remember anything about Mendoza’s case; (2) Knox failed to inform Mendoza of immigration consequences of his plea and conviction; (3) Knox does not contest any assertions in Mendoza’s declaration; and (3) Mendoza’s current recollection of what he understood and what he was thinking 25 years ago. Br. of Appellant at 5. To establish the fact of his deportation and his immigration status at the time of his guilty plea, Mendoza refers to other attachments to the timeliness memo but, again, fails to include any of those facts in his brief and only alludes to their existence in his argument. Br. of Appellant at 8.

In the heading to Section C of his argument, Mendoza asserts trial counsel should have offered plea alternatives that would have protected Mendoza’s immigration status. Br. of Appellant at 8. In the ensuing argument, Mendoza does not provide any facts—in or outside the record—establishing what counsel did or did not do during plea

⁵ Attachment D is trial counsel’s declaration with Mendoza’s declaration, initialed by trial counsel, appended as an attachment. Br. of Appellant at 5. Mendoza filed a duplicate of this declaration, without trial counsel’s initials, as Attachment E to the timeliness memorandum. Mendoza’s second declaration is included as Attachment F.

negotiations or what options, if any, may have been available. Br. of Appellant at 8–11.

Similarly, Mendoza provides no facts establishing he “had but one chance to remain in the United States by avoiding a removal order from the Immigration Court.”⁶ Br. of Appellant at 14. Finally, the brief fails to offer any facts supporting Mendoza’s argument that trial counsel failed to provide specific advice required by *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) and *State v. Sandoval*, 171 Wn.2d at 169. Br. of Appellant at 14.

Mendoza asserts in his Conclusion that trial counsel was ineffective because he did not ascertain his client’s precise immigration status and determine the specific immigration consequences of the conviction. Br. of Appellant at 15. Factual support for this argument is absent from the trial court record and remains unstated in his brief.

Mendoza recognizes he 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.” Br. of Appellant at 13, citing *Sandoval*, 171 Wn.2d at 175 (remaining citations omitted). Yet nowhere in the brief or the record are there facts asserting what Mendoza would have

⁶ As will be argued later in this brief, Mendoza’s removal was not an absolute certainty in 1994.

done had he known he could be deported for a cocaine possession conviction, detailing his frame of mind when he agreed to change his plea, or recounting what discussions, if any, he had with trial counsel concerning his goals and priorities for resolving the case.

Reviewing courts do not consider arguments unsupported by reference to the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citing RAP 10.3(a)(5); *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989)).

This Court should conclude the record is insufficient to support Mendoza's ineffective assistance of counsel claim and deny his appeal.

B. REGARDLESS OF WHETHER TRIAL COUNSEL DELIVERS DEFICIENT PERFORMANCE, MENDOZA FAILS TO MEET *STRICKLAND*'S DEMANDING REQUIREMENT THAT A DEFENDANT CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL ESTABLISH THAT, BUT FOR COUNSEL'S DEFICIENT PERFORMANCE, THE OUTCOME OF HIS PROCEEDING WOULD HAVE BEEN DIFFERENT.

1. *Standard of review*

Mendoza, asserting ineffective assistance of counsel must satisfy a two-part test: (1) that his counsel's assistance was objectively unreasonable and (2) that he suffered prejudice as a result of counsel's deficient assistance. *Strickland v. Washington*, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). "To show prejudice, the appellant

need not prove that the outcome would have been different but must show only a “reasonable probability”—by less than a more likely than not standard—that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (citing *Strickland*, 466 U.S. at 694; *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996)).

Appellate courts presume counsel was effective. *State v. Gomez Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012).

2. *Deficient performance is assessed according to the reasonableness of counsel's conduct at the time and under the facts of each case. The standards for immigration advice in criminal cases accepted by the Washington legal community were different in 1994 than they are now.*

Whether counsel rendered deficient assistance depends on the reasonableness of his or her conduct at the time and under the facts of the particular case. *Strickland*, 466 U.S. at 690. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” 466 U.S. at 689.

When Mendoza pleaded guilty to possession of cocaine in 1994, the Attorney General of the United States still had authority to grant discretionary relief from deportation and did so over 10,000 times between

1991 and 1995. *Padilla v. Kentucky*, *supra*, 559 U.S. at 363 (citing *INS v. St. Cyr*, 533 U.S. 289, 296, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)). The Attorney General's discretion to grant relief was not eliminated until 1996. *Id.* Thus, possession of cocaine in 1994 may have been a deportable offense, but deportation following a guilty plea to that charge was not a certainty.

In 1994, deportation was considered a collateral consequence of pleading guilty. *State v. Ward*, 123 Wn.2d 488, 513, 869 P.2d 1062 (1994). The general rule was that “[a] defendant need not be informed of all possible consequences of a plea but rather only direct consequences.” *See, e.g. State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). The United States Supreme Court resoundingly rejected this distinction for deportation cases in 2010, holding “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.” *Padilla*, 559 U.S. at 357. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 101, 351 P.3d 138 (2015), the prevailing norm in 1994, expressed in *Ward*, *Ross*, and *Barton*, *supra*, was that defense counsel need not specifically discuss immigration consequences when advising their clients during plea negotiations.

Mendoza's assertion that his attorney should have "offered" plea alternatives which would have protected his immigration status does not take into account the general views held by the legal community in 1994. More to the point, nothing in the record suggests the State would have accepted such an offer, nor does Mendoza offer any example of what such a resolution might have looked like. The trial court had denied Mendoza's CrR 3.6 suppression motion and found evidence sufficient to proceed to trial on possession of cocaine with intent to deliver. CP at 113-14 .

Mendoza was holding a baggie of cocaine when law enforcement entered his friend's residence and had white powder in his nostrils. CP at 002-03. Officers obtained custody of the baggie following a scuffle with Mendoza. CP at 002. Although it appears from the scant record that evidence of Mendoza's intent to deliver cocaine may have been thin, being supported primarily by the cocaine found in the laundry room, the State would have had little incentive to let him plead to a charge unrelated to drugs with irrefutable evidence that he had the drug in his possession. Further, the record is insufficient to establish what counsel may have attempted during plea negotiations, including what he understood to be his client's priorities at the time.

3. *Mendoza had no realistic hope of avoiding a guilty verdict on the cocaine possession charge and cannot establish a reasonable probability that, had he understood the risk of*

deportation, his attorney would have advised him to refuse the plea offer on the strength of a failed suppression argument.

The State does not agree RAP 16.4(c) is relevant to Mendoza's argument.

Regardless of whether Knox delivered deficient performance, Mendoza cannot establish the second *Strickland* prong, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

"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*, 130 S. Ct. at 1485. Evidence of the 1994 circumstances is sparse and Mendoza's statement of what he would have done had he been aware he could be deported is somewhat ambiguous, given the facts here. He states that, had he known he "would be just deported without any chance to stay in the U.S., [he] would not have just pleaded guilty to just be done with [his] case. Attach. D (Mendoza) at 4. He declares he would have asked his lawyer to do *whatever was possible to keep fighting the case if the lawyer still believed his suppression argument was correct.* Attach. D (Mendoza) at 4 (emphasis added). Mendoza recites that his

attorney thought they had a good suppression argument. Attach. D (Mendoza) at 2. It appears the court agreed with some of counsel's arguments, but not sufficiently to suppress evidence. CP at 113–14. A review of the facts reveals no realistic suppression argument regarding the possession charge. It is reasonable to conclude Knox did not think Mendoza's chances of outright acquittal were worth the risk of trial.

Mendoza does not say he would have refused the plea deal and gone to trial, nor does he say his lawyer thought anything further could have been done regarding the suppression ruling. Attach. D (Mendoza) at 1–4. His statement may be simply unartful, but Mendoza appears to say he would have instructed his attorney to take the case to trial, or pursue some other course of action, only if Knox thought they had a chance with the suppression argument. He and his lawyer had lost the suppression motion. It is probable his lawyer did not believe there was anything else he could do to avoid a drug charge conviction and had negotiated a plea deal to eliminate the chance of conviction on a more serious charge. Although Knox now confesses he knew absolutely nothing about immigration law, it is fair to assume he knew about appellate reversal of a trial court's erroneous suppression rulings. Had he truly believed the trial court erred, it is likely he would have counseled Mendoza he could proceed to trial, then bring the issue before this Court if found guilty. There is simply not

enough evidence, within the record or outside it, to ascertain what Knox thought or advised in this regard.

None of the assertions in the Attachment D declarations identify Mendoza's contemporaneous priorities for resolving his case, nor do they state anything about what he was thinking when he changed his plea. However, in addition to the equivocal nature of his current assertion, a number of other factors combine to demonstrate rejecting the plea bargain would not have been rational when facing certain conviction.

First, Mendoza might have been acquitted at trial on a charge of possession of cocaine with intent to deliver but, absent intervention by the infamous "lawless decisionmaker,"⁷ there was no possibility he would have avoided conviction on the possession charge following the trial court's denial of his motion to suppress. Mendoza's standard sentencing range for possession was zero to 90 days, CP at 066, with a presumptive mid-range sentence of 45 days. Under the plea agreement, Mendoza was sentenced to 11 days confinement, with credit for 11 days served prior to

⁷ "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984)

sentencing. CP at 069. Although the 34-day reduction from a presumptive mid-range sentence is not remarkable, it would have been attractive, especially in light of the fact Mendoza had already served the time. CP at 069.

“As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea.” *Lee v. United States*, 137 S. Ct. 1958, 1966, 198 L. Ed. 2d 476 (2017). In *Lee*, the United States Supreme Court recognized a defendant facing “long odds” at trial “will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial.” *Id.* This is “because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.” *Id.*

Lee is instructive here because of the dissimilarities between Mendoza’s case and circumstances the Supreme Court found “unusual” enough to adequately demonstrate “a reasonable probability [Lee] would have rejected the plea had he known that it would lead to mandatory deportation.” *Lee*, 137 S. Ct. at 1967. Throughout his federal case, Lee focused on possible deportation risks and further demonstrated that it was

his paramount concern—that he would have chosen trial—when, during his plea colloquy he responded “Yes, Your Honor” to the judge’s question of whether the chance of deportation affected his decision to plead guilty. *Id.* at 1968. Immediately after that response, Lee turned to his attorney for advice. *Id.* He agreed to plead guilty only after “counsel assured him that the judge’s statement was a ‘standard warning.’” *Id.*

The Supreme Court concluded deportation was “the determinative issue” in Lee’s decision to change his plea and that he pleaded guilty only because his attorney continued to advise him he had nothing to worry about. *Id.* at 1963. Unlike the situation here, “Lee’s claim that he would not have accepted a plea had he known it would lead to deportation [was] backed by substantial and uncontroverted evidence.” *Id.* at 1969.

Counsel for the defendant in *Sandoval* likewise confirmed his client was “‘very concerned’ at the time about his risk of deportation.” 171 Wn.2d at 175. It is notable that Mendoza does not say his immigration status was a priority in 1994 or what his priorities were at the time he pleaded guilty. Br. of Appellant at 1–4. His signed Statement of Defendant on Plea of Guilty confirms he had been read the statement and fully understood all of its numbered sections, including the statutory deportation warning in paragraph 1.17. CP at 048.

Mendoza also fails to disclose what he thought when he heard the judge read the statutory deportation warning aloud before accepting Mendoza's guilty plea, or what he thought when his lawyer went over it with him beforehand, although he does recall he had an interpreter. Attach. D (Mendoza) at 3. Mendoza does not assert he had any questions or concerns about immigration consequences at the time he changed his plea, despite having twice heard deportation was a possibility, presumably within a relatively short period of time. Attach. D (Mendoza) at 1–4. He does not assert Knox misadvised him or gave him false reassurances. Attach. D (Mendoza) at 1–4; Attach. F. Unlike Lee, who repeatedly brought up the relative risks of deportation throughout his case, Mendoza and his lawyer talked about his immigration status only once, and only briefly, when, in response to his attorney's inquiry, Mendoza said he did not yet have a green card. Attach. D (Mendoza) at 3. They never again discussed his immigration status. *Id.* Attach F. Mendoza does not, even now, claim that avoiding deportation was a critical concern in 1994. Attach. D (Mendoza) at 1–4; Attach. F.

Mendoza cannot establish that he would have proceeded to trial, risking the possibility of a longer sentence—a substantially longer sentence were he to be convicted of possession with intent to deliver—

when his attorney had apparently concluded there was nothing they could do to reverse the trial court's suppression ruling.

A circumstance the defendants in both *Lee* and *Padilla* had in common is that these men had lived in the United States for decades before their arrests. Padilla had been a lawful, permanent resident for over 40 years and served in the U.S. armed forces during the Viet Nam war. *Padilla*, 559 U.S. at 359. Lee moved to the United States from South Korea when he was 13 years old and had spent 35 years in this country as a lawful, permanent resident and business owner. *Lee*, 137 S. Ct. at 1962–63. Lee had never returned to South Korea. In Washington, Sandoval, too, “had earned his permanent residence and made this country his home.” *Sandoval*, 171 Wn.2d at 175. The Washington Supreme Court, citing *Padilla*, among other cases, noted in *Sandoval* that “deportation no less than prison can mean ‘banishment or exile’ and separation from [defendants’] families’.” *Sandoval*, 171 Wn.2d at 176.

In contrast, Mendoza moved to the United States from Mexico at age 15 and was 18 at the time of his arrest. CP at 074. He had just turned 19 when he was sentenced. CP at 045. He still needed an interpreter for his court appearances. Although his immediate family lived in Washington, Mendoza, unlike the fully-Americanized Lee and Padilla, presumably still had strong ties and acquaintances, even family, in Mexico. While

deportation, if carried out, meant banishment, it was banishment to a familiar location populated by familiar people. It was not exile from his adopted homeland of decades, as it was for Lee and Padilla. *Lee* recognizes that

“[s]urmounting *Strickland*’s high bar is never an easy task,” and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.

Lee, 137 S. Ct. at 1967 (quoting *Padilla*, 559 U.S. at 371; *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979)).

Mendoza’s case is entirely devoid of contemporaneous evidence demonstrating he shares any of the circumstances that distinguished Lee’s and Padilla’s circumstances from the usual situation in which “a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea.” *Lee*, 137 S. Ct. at 1966.

Mendoza’s ties to the United States were no different from those of many other new immigrants. He was an adult child who lived with, or near, his immediate family and had not yet been in the United States five years. Even had he known deportation was a possibility, nothing in his

ascertainable circumstances in 1994 demonstrates concern over, or even curiosity about, possible deportation as a consequence of his guilty plea. Mendoza has told this court he would have gone to trial if his lawyer thought they had a good argument. Had he known deportation was a consequence, and if his lawyer truly thought they had a chance in the appellate courts, he may have chosen to take his chances with trial. The fact that a seasoned criminal defense lawyer recommended a guilty plea tends to cast doubt on the idea he thought the suppression battle winnable. There are simply not enough facts from which any conclusion can be made without speculation and Mendoza's *post hoc* assertions are insufficient to meet *Strickland*'s rigorous demands.

IV. CONCLUSION

This Court should find Mendoza fails to present competent evidence establishing a Sixth Amendment violation through ineffective assistance of counsel.

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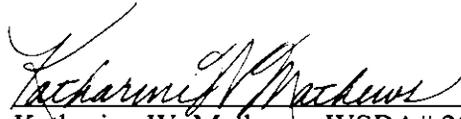
In the alternative, this Court should find Mendoza fails to present facts sufficient to establish a reasonable probability he would have gone to trial had he known of the deportation possibility created by his guilty plea.

This Court should deny Mendoza's appeal.

DATED this 18th day of September 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Brent A. DeYoung
deyounglaw1@gmail.com

Dated: September 18, 2019.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

September 18, 2019 - 3:59 PM

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