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No. 37056-9-III
Benton County Superior No. 14-1-00736-5

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

vs.

DAVID MERAZ GUTIERREZ,
Appellant.

APPELLANT'S REPLY TO RESPONDENT'S BRIEF

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I. REPLY TO RESPONDENT’S BRIEF

1. The trial court erred in finding that the defendant’s trial attorney’s performance did not fall below objective reasonable standards.
2. The trial court erred in finding that the defendant’s attorney spoke with him about the specific immigration consequences of his conviction.

II. ARGUMENT

Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) and *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) significantly changed the legal community’s understanding of criminal defense counsel’s Sixth Amendment duties regarding trial counsel’s duties to inform her or his client of the ascertainable immigration consequences of a criminal conviction. Prior to *Padilla* and *Sandoval*, the immigration consequences were considered to be merely collateral consequences of a criminal conviction. *In re Personal Restraint of Yim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999)

However, by now, almost a decade later, neither *Padilla* nor *Sandoval* have been significantly reinterpreted to relieve defense counsel of this Sixth Amendment duty. The requirement is a fairly bright line rule. Competent defense counsel must first assess his or her client’s citizenship status. Then counsel must determine whether the relevant immigration law is truly clear about the deportation consequences. In those circumstances where the deportation consequence is clear, the client must be informed of that consequence prior to the entry of his or her guilty plea.¹ The 2015 decision by this Court in *In re Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91 (2015) (deciding that *Sandoval* would apply retroactively to cases that were

¹ Footnote three of the *Sandoval* decision included a 4-part test offered by Amicus. This Court did not adopt that test as the precise issue was not yet before the court. That test is: “(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.” *State v. Sandoval*, 171 Wn.2d 163, 185, 249 P.3d 1015 (2011)

considered “final” for purposes of collateral appellate litigation) only underscored the fact that the rule enunciated in *Sandoval* was not a “one-off” decision of this Court that would be subject to a plethora of exceptions that would render the Sixth Amendment duty meaningless.

Trial counsel in this matter has had ample time since *Padilla* and *Sandoval* to learn the issues regarding his Sixth Amendment duties to inform his clients of the ascertainable immigration consequences.²

The State justifies trial counsel’s ineffective performance by stating that *Sandoval* never “required a defense attorney to get into the weeds of immigration law.” Such justification is meager and not compelling.

After almost a decade of consistent precedent, and more than four and a half years from date of Mr. Meraz’s plea and conviction, trial counsel was still unable to recognize the importance of the common forms of relief available to his noncitizens clients during deportation proceedings. See *April 16, 2019 Testimony of Trial Counsel pp. 10-19*. Trial counsel still did not understand how cancellation of removal for lawful permanent residents operated and how that might have affected his client. *Id.* at 17. Trial counsel was unable to explain how ascertaining the amount of time that a Legal Permanent Resident had accrued in the United States from his green card might easily prove his client’s deportation a virtual certainty. *Id.* Trial counsel testified that he was aware that the Washington Defender Association (WDA) has offered annual CLE courses on the importance of these and other important distinctions for all of the years that trial counsel has practiced as an attorney. *Ibid.*

Trial counsel’s own testimony reveals the crux of the problem in this motion:

² Mr. Meraz’s conviction occurred on October 9, 2014. Trial counsel’s subpoenaed testimony was taken on April 16, 2019 in the Benton County Superior Court at Mr. Meraz’s CrR 7.8 hearing.

Well, the three questions I highlighted would be examples of what I would ask. It wasn't just, it wouldn't have been those in order. And so I wouldn't say that had they been contacted by Immigration be the gateway question and I would just shut down the questioning if they said no. If they said no to that, if they said no to all the questions, if they said, "No, I haven't been contacted. Yes, I'm a citizen," and/or, "No, I don't have any immigration concerns," there's only so much prying I feel is necessary as defense counsel at that point.

April 16, 2019 Testimony of Trial Counsel at p. 8

The State puts great reliance in the fact that there is a discrepancy between Mr. Meraz's statement that he was never specifically asked by his trial counsel if he was a United States citizen. However, trial counsel's testimony proves that if Mr. Meraz had replied that he didn't have any "immigration concerns" that his trial counsel would have aborted any further questioning on this issue.

Whether or not Mr. Meraz had any immigration concerns is not the type of question for a legal expert to ask of his client, whom counsel already knows is unskilled in the law. It is for trial counsel to go forth into the weed to reach an actual legal conclusion whether or not his client has any immigration concerns.

The cases cited by the State are distinguishable. In *Manajeres*, that defendant had been deported by the immigration court as a result of his conviction. As part of the trial court record, documents from the defendant's immigration court deportation proceeding were entered. *State v. Manajeres*, 197 Wn.App. 798 (2017) 391 P.3d 530 - See 11/15/2012 Affidavit of Attorney Michael Grim and Attached Exhibits (CP 27). The warrant of removal submitted listed only INA 212(a)(6)(A)(i) as the basis of the removal. This section states as follows: "an alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as

designated by the Attorney General, is inadmissible.” *Id.* Also submitted by the government at this deportation hearing were the conviction documents from Mr. Manajares’ Chelan County felony conviction matter.³

This Court, in hindsight, was understandably unpersuaded by the lack of a clear deportation court record that Mr. Manajares was actually deported as a result of his unlawful imprisonment conviction.

The *Manajares* Court stated:

Neither Mr. Manajares's immigration expert nor his lawyer on appeal identify authority predating the December 2002 guilty plea that would have made it truly clear that Mr. Manajares's plea admitted committing acts that, for immigration purposes, constituted the essential elements of a crime involving moral turpitude.

State v. Manajares, 197 Wn.App. 798 (2017) 391 P.3d 530, 814

Our research also reveals that as of 2002, "moral turpitude" had been characterized as a "vague and nebulous standard ... whose definition has never been fully settled." *Marmolejo-Campos v. Gonzales*, 503 F.3d 922, 927 (9th Cir. 2007) (D.W. Nelson, J., dissenting) (citing pre-2002 case law), adhered to on reh'g en banc, 558 F.3d 903 (9th Cir. 2009). It reveals that by that time, the crimes of fraud, murder, rape, robbery, kidnapping, voluntary manslaughter, some involuntary manslaughter offenses, aggravated assaults, mayhem, theft offenses, spousal abuse, child abuse, and incest had been found to be turpitudinous. . .

State v. Manajares, 197 Wn.App. 798 (2017) 391 P.3d 530, 815

In *In Re Ramos*, 181 Wn.App. 743, 326 P.3d 826 (2014), Mr. Ramos had never been apprehended by the immigration authorities at the time of his filing. *Ramos* at 747. One of the issues argued by Mr. Ramos was that the restitution amount ordered (an amount exceeding \$10,000.00) would be considered an “aggravated felony” by the immigration court. *Nijhawan v.*

³ A transcript from the deportation court’s audio record was unavailable and could not be submitted.

Holder, 129 S. Ct. 2294 (2009) (applying the “fraud and deceit” aggravated felony ground of removability of 8 U.S.C. § 1101(a)(43)(M)(i))

The U.S. Supreme Court in *Nijhawan* stated: “at the time the \$10,000 threshold was added, only eight States had fraud and deceit statutes in respect to which that threshold, as categorically interpreted, would have full effect. Congress is unlikely to have intended subparagraph (M)(i) to apply only in such a limited and haphazard manner.” *Nijhawan* at 2302.

Between April 15, 2011, when Ramos filed his CrR 7.8 motion in the Franklin County Superior Court and prior to the appellate court’s decision issued on May 8, 2014, the U.S. Supreme Court issued decisions in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), and *Descamps v. United States*, 133 S.Ct. 2276 (2013). *Moncrieffe* and *Descamps* re-established strict limitations governing the “categorical approach” utilized by immigration judges to determine whether a state conviction triggers a conviction-related ground of removability, inadmissibility, or bars relief from removal. In doing so, *Moncrieffe* and *Descamps* overruled a swath of 9th Circuit decisions (including *Nijhawan*) which had improperly relied on extrinsic evidence that was not at all relevant to the categorical approach.

The *Ramos* decision neither relied on either *Moncrieffe* and *Descamps*, nor did it distinguish *Nijhawan*. However, *Moncrieffe* and *Descamps* made it far less certain that Mr. Ramos would ever be deported. Mr. Ramos subsequently voluntarily withdrew his petition for further review. (See 03/06/2015 Motion for Voluntary Withdrawal of Appeal, Washington Supreme Court 90549-5)

III. CONCLUSION

Based on the facts and the legal authority cited herein, the sentence in this matter should be vacated, the guilty plea withdrawn and Mr. Meraz's matter should be remanded to the Benton County Superior Court for further consideration.

Respectfully submitted this 25th day of August, 2020.

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APPELLANT'S REPLY TO STATE'S
ANSWER BRIEF

CERTIFICATE OF SERVICE

I certify that on this 25th day of August, 2020, I caused a copy of Appellant's REPLY TO STATE'S ANSWER BRIEF to be sent by electronic mail to:

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