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NO. 82175-5

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SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington

V.
~~In re Personal Restraint Petition of~~

VALENTIN SANDOVAL,

Petitioner.

AMICUS BRIEF OF WASHINGTON ASSOCIATION
OF PROSECUTING ATTORNEYS

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A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that may establish the contours of the constitutional obligations of defense counsel to advise clients, and the ability of clients to challenge final convictions based on allegedly deficient advice.

B. ISSUES

1. Does Washington law already comply with the requirement of Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, ___ L. Ed. 2d ___ (2010), that criminal defense lawyers advise non-citizen clients that conviction of a crime may carry immigration consequences?

2. Has this personal restraint petitioner failed to establish deficient performance and actual prejudice under Padilla v. Kentucky, or is a reference hearing required?

C. FACTS

The Court of Appeals set forth the salient facts, and the parties and amici have variously characterized the record. WAPA will not repeat those summaries here. But, for ease of reference, and because it is central to this case, the most pertinent portion of the declaration of trial counsel, Mr. Schiffner, is reproduced verbatim, with italics added.

4. I was aware that Mr. Sandoval was not a U.S. citizen and that his immigration status was that of a green card holder (U.S. Permanent Resident).

5. In late September of 2006, I counseled Mr. Sandoval regarding a plea offer by the State. Mr. Sandoval was very concerned whether or not he would be *released from jail* if he were to plead guilty. He did not want to plead guilty if the end result were that he should be *immediately* deported.

6. Previously, in similar cases, my non-citizen clients have succeeded in avoiding deportation, so long as they did not remain in custody for more than a few hours after they were sentenced. I believed that this would also occur with Mr. Sandoval's case. Based on this previous behavior of the immigration officials, I believed that Mr. Sandoval would be able to avoid being taken into *immediate* immigration custody and deported.

7. I told Mr. Sandoval that he should accept the State's plea offer because he would not be *immediately* deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea.

8. After Mr. Sandoval entered his guilty plea, the Border Patrol *immediately* put a hold on him from leaving the jail and I understand that he was *immediately* put into deportation proceedings. My advice to Mr. Sandoval was unfortunately incorrect.

See Respondent's Supp. Br., Appendix A (Decl. of Robert E. Schiffner).

D. ARGUMENT

This Court requested supplemental and amicus briefing regarding the effect of Padilla v. Kentucky on this case. WAPA provides this brief to address Padilla generally and to suggest how a Padilla claim should be analyzed under Washington law when brought in a personal restraint petition.

First, WAPA argues that Padilla does not require more immigration advice from defense counsel than is already required by Washington law. Defendants must be informed that their criminal

convictions may have immigration consequences. Given the complexity of immigration law and the unpredictability of the immigration process, defense counsel will be hard-pressed to predict the outcome in any given case. For these reasons, Padilla and Washington law simply require that defendants be warned that they might be deported, so that they can choose with open eyes whether to plead guilty.

Second, WAPA argues that counsel in this case met the Padilla standard because it seems Sandoval was told that he faced the risk of deportation by entering a guilty plea to rape in the third degree.¹ Whether counsel misadvised Sandoval in some other respect must be analyzed under the usual collateral attack standards. On this record, it is unclear whether Sandoval was misadvised, or whether reasonable advice simply turned out to be mistaken in this case. It is also unclear whether Sandoval has demonstrated actual prejudice, insofar as he has not established that he had any better option, and that he would have insisted upon a trial, but for the advice received.

¹ Sandoval asserted in his Statement of Additional Grounds that he was told he would not be deported. This assertion was apparently not considered by the Court of Appeals because it was not a part of the record on direct appeal. State v. Sandoval, 2008 WL 2460282, at *1. The evidence is, at best, conflicting on this important point.

1. PADILLA DOES NOT REQUIRE GREATER IMMIGRATION ADVICE TO NON-CITIZEN CRIMINAL DEFENDANTS THAN IS ALREADY REQUIRED UNDER WASHINGTON LAW.

Jose Padilla was a long-term United States resident but not a United States citizen. He was charged with transportation of a large amount of marijuana. His lawyer assured him that a guilty plea to that crime would not affect his status in the country because he had been a resident for so long. This advice was wrong; deportation is “virtually” automatic under immigration law following a conviction for distribution of drugs. Padilla filed a collateral attack on his judgment, alleging ineffective assistance of counsel. The Kentucky Supreme Court denied his petition because it deemed immigration to be a “collateral consequence” of conviction, such that counsel had no duty to correctly advise Padilla, or to advise him at all, about immigration consequences that might stem from his guilty plea. Padilla, 130 S. Ct. at 1477-78.

The United States Supreme Court reversed the Kentucky court. The Court said that “constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced...” Padilla, at 130 S. Ct. at 1478. The Court said, “we now hold that counsel must inform her client whether his

plea carries a risk of deportation.” Id. at 1486. The Court stated, however, that when the deportation consequences of a particular plea are unclear or uncertain, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” Id. at 1483.

Washington already requires that defendants be warned by the plea judge that a conviction might have immigration consequences. RCW 10.40.200. The superior court criminal rules implement the statute. See CrR 4.2(g) at (6)(i).² And, a defendant who is not advised pursuant to these provisions is entitled to withdraw his plea. State v. Littlefair, 112 Wn. App. 749, 767, 51 P.3d 116 (2002). Padilla simply makes it clear that this duty exists not just under the Washington state statute, but also under the Sixth Amendment.

To this extent, the Court of Appeals decision in this case was incorrect. State v. Sandoval, 2008 WL 2460282, at *2-3 (holding that counsel had no constitutional duty to advise a defendant of collateral immigration consequences). Counsel had a duty to advise Sandoval that

² The Statement of Defendant on Plea of Guilty says: "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."

he faced immigration consequences, even if those consequences could not be determined with precision.

It appears, however, that counsel did advise Sandoval that he could be deported if he pled guilty. Decl. of Schiffner at ¶ 6-7. Sandoval has not claimed that the trial court failed to advise him pursuant to RCW 10.40.200. Thus, the crux of the dispute in this case appears not to be a Padilla v. Kentucky dispute. Rather, the crux of the dispute seems to be whether counsel's more detailed advice -- that *immediate* deportation might be avoided by a guilty plea that results in release from jail on state charges -- was reasonable under the circumstances. Padilla does not require counsel to advise on the intricacies of immigration law as applied to a specific fact-pattern like this one.

It was for good reason that the Supreme Court imposed only a general duty to advise of the most obvious immigration consequences; there are no certainties in immigration law. In fact, immigration law is seldom clear either in the abstract or as applied to a particular defendant's circumstance. Even allegedly "easy" cases defy firm predictions.³ As the

³ The Supreme Court called Padilla's case "obvious" and "easy" but, interestingly, referred to deportation following conviction as "virtually" certain, rather than certain. Padilla, at 1478.

following quotations illustrate, even experts are confounded by this area of the law.⁴

- “The Immigration and Nationality Act is a bewildering and complex statute[.]”⁵
- “[A]n almost overwhelmingly complex legal regime ...”⁶
- “Congress ... has enacted a baffling skein of provisions for the INS and courts to disentangle.”⁷
- “Immigration and naturalization law has grown exceedingly complex in recent years as Congress tightens the law against aliens. ... Intricacy is bound to increase post-September 11, 2001.”⁸
- “Every immigration benefit has its own set of rules, regulations, and procedures. Many are complex and time-consuming to adjudicate. Some are so difficult to process that specialists must handle them.”⁹

⁴ These quotations were previously compiled by Seattle immigration attorney David W. Merrell.

⁵ Perez-Funez v. District Director, INS, 611 F.Supp. 990, 1002 (D. Ct. C.D. Calif. 1984).

⁶ Guyadin v. Gonzales, 449 F.3d 465, 470 (2nd Cir. 2006).

⁷ Lok v. INS, 548 F.2d 37, 38 (2nd Cir. 1977).

⁸ United States v. De Jesus Perez, 213 F.Supp.2d 229, 235 (D. Ct. E.D. N.Y. 2002).

⁹ Staff Report of the National Commission on Terrorist Attacks Upon the United States, at p. 98 (Aug. 21, 2004).

- “[I]nspectors at ports of entry, border patrol agents, immigration agents, immigration benefits adjudicators, and immigration attorneys and judges, were all stymied by rules that were fuzzy and time-consuming to implement.”¹⁰
- “We are saddled with administering what my legal friends tell me is the most complicated set of laws in the nation. I am told it beats the tax code. ... Six million to seven million applications have to be administered – adjudicated – against a body of law that is very complex and sometimes contradicting each other [sic].”¹¹
- “[W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.”¹²
- “Although the density and complexity of the Act has been subjected to literary and mythological analogy, ... (likening the immigration laws to King Minos’ labyrinth in ancient Crete), this is not a Lewis Carroll story and we are not in Wonderland.”¹³

¹⁰ Testimony of Janice L. Kephart, former counsel for the National Commission on Terrorist Attacks Upon the United States, before a House Judiciary Subcommittee. 109th Cong. (May 2005).

¹¹ Testimony of Eduardo Aguirre, director of U.S. Citizenship and Immigration Services, before the House Appropriations Subcommittee on Homeland Security. 109th Cong. (March 2005).

¹² Yuen Sang Low v. Attorney General, 479 F.2d 820, 821 (9th Cir. 1973).

¹³ Matter of Ruiz-Romero, 22 I&N Dec. 486, 502 (Board of Immigration Appeals 1999).

Similar concerns were acknowledged by the majority opinion and further described by the concurring justices in Padilla. Padilla, at 1483 n.10 (majority); 1487-94 (Alito, J., concurring). The concurring justices observed that interpretation of the immigration laws varies widely from federal circuit to federal circuit (and sometimes varies within a given circuit), that the Board of Immigration Appeals (BIA) also has jurisdiction and interprets federal immigration law in published opinions, that the law is in a constant state of flux, and that a myriad of agency rules (drafted by different agencies over time) are subject to interpretation by these various appellate courts. Id. at 1489-90.

The justices noted that the terms “aggravated felonies” and “crime involving moral turpitude” were opaque. The term “aggravated felonies” could include misdemeanors (not just felonies, as the plain language suggests), it might include simple possession of drugs (depending on a variety of factors), and it might include adjudications that were not even “convictions” under state law. Id. The term “crime involving moral turpitude” is no more transparent. It might include certain sex offenses (but not others), and it might include certain misdemeanor driving under the influence offenses (but not others). The typical criminal practitioner, balancing a caseload of scores and scores of clients, and inexperienced in immigration law, may not be able to easily determine which consequences

are “obvious,” and which are not.¹⁴ Id. The justices also noted that even the fundamental, threshold question of whether a person is an “alien” or a “citizen” can be problematic. Id. at 1489.

For all these reasons, the Court in Padilla wisely refrained from holding that criminal defense lawyers must delve deeply into this terribly confusing tangle of laws, regulations, and court cases, and attempt to give detailed advice in a criminal case. Giving advice involves making predictions, and making predictions on the outcome of immigration proceedings is extraordinarily difficult. An exceptionally wide range of advice might be acceptable given the uncertainties.

Moreover, requiring too specific advice could be harmful to clients and to the orderly administration of justice. If a defendant is warned that deportation is virtually certain following conviction of a charged crime, he may plead guilty to a lesser crime, and then later challenge his plea by claiming the threat of deportation was *overblown*. Similarly, if he is told

¹⁴ Washington's characterization of offenses rarely corresponds with federal immigration law. For instance, the “most serious offense” of vehicular homicide, RCW 46.61.520(1)(a), RCW 9.94A.030(29)(r), is not an “aggravated felony” for purposes of immigration law. See United States v. Mojica-Linos, 399 F.Supp.2d 1114, 1120 (E.D. Wash. 2005). The non-felony offense of communicating with a minor for immoral purposes, RCW 9.68A.090, while not categorically “sexually abuse of a minor,” is nonetheless, a “crime involving moral turpitude” that can result in deportation. See Morales v. Gonzales, 478 F.3d 972, 978 (9th Cir. 2007); Parrilla v. Gonzales, 414 F.3d 1038, 1043 (9th Cir. 2005).

he has a chance to avoid deportation, pleads guilty, and deportation proceedings are initiated, he will likely assert that the warning was *understated*. Given the complexity of the law, it may be difficult to assess whether the advice was *reasonable*, especially if the immigration system produces a result contrary to advice that seemed prudent at the time.

And, the threat of ineffective assistance complaints and potential disciplinary action might stifle lawyers who are attempting to tailor their advice to a particular client.¹⁵ Sometimes lawyers have to give creative advice in the face of poor options. This case might be an example. From the existing record, it appears that Sandoval might have pled guilty to, or been convicted of any number of crimes, including rape in the second degree, rape in the third degree, indecent liberties, assault in the second degree (intent to commit a felony), or assault in the fourth degree, with or

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (“No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.”).

without a sexual motivation allegation.¹⁶ Any of these offenses -- including the misdemeanor -- might be considered a crime involving moral turpitude, or an aggravated felony.¹⁷ Thus, Sandoval faced a risk of

¹⁶ See RCW 9A.44.050 (second degree rape); RCW 9A.44.060 (third degree rape); RCW 9A.44.100 (indecent liberties); RCW 9A.36.021(1)(e) (second degree assault, intend felony); RCW 9A.36.041 (fourth degree assault); RCW 9.94A.835(1) (sexual motivation allegations; can apply to misdemeanor assault).

¹⁷ “[T]he term [aggravated felony] — which sounds as if it is reserved for aggravated or fairly serious felony offenses — may reach relatively minor offenses, such as state-classified misdemeanors that result in little or no jail time.” See Immigrant Defense Project, at <http://immigrantdefenseproject.org/webPages/aggFelony.htm>. This resource is recommended by amicus curiae Washington Defender Association, et al. See Supplemental Brief Addressing *Padilla v. Kentucky*, at 5. Another resource recommended by the Immigrant Defense Project says:

Despite the aggravated felony label, many of these crimes have been interpreted by federal courts to include misdemeanors, even though misdemeanors are generally meant to encompass less serious or dangerous acts than crimes traditionally designated as felonies.

* * *

With the rapid expansion of crimes which can be considered "aggravated felonies," the list of applicable crimes now includes both various criminal categories as well as specific crimes. The designation of some crimes as aggravated felonies depends on the length of sentence imposed or amount of money involved. Examples of listed aggravated felonies include:

- a crime of violence for which the term of imprisonment is at least 1 year;
- a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year;
- illicit trafficking in drugs, firearms, destructive devices, or explosive materials;
- an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000;
- offenses related to alien smuggling (though some exceptions apply); and
- murder, rape, or sexual abuse of a minor.

It is also an aggravated felony to attempt or conspire to commit an aggravated felony.

While the above examples of aggravated felonies would seem to be severe offenses for which deportation is an appropriate punishment, in practice fairness is not always clear cut. A good example of this concerns Carlos Pacheco who entered the US with a green card as a 6-year old

deportation even if the prosecutor was willing to reduce the charge to a misdemeanor.¹⁸ Sandoval faced a high risk of deportation unless he was acquitted, or unless the prosecution dropped the case entirely.

Under such circumstances, it may have been appropriate to recommend a guilty plea that mitigated the damage to Sandoval, even if a guilty plea did not eliminate the threat of deportation. If this Court were to hold -- without a factual inquiry into the matter -- that Mr. Schiffner's advice was unreasonable, all defense counsel in Washington will be reluctant, if not prohibited, from recommending such a strategy, even if the strategy might benefit a particular client.

Thus, Counsel should be given great latitude to advise clients except in the most "obvious" cases, like Padilla's. This Court should hold that a criminal lawyer fulfills his duty to this client if he generally advises the client that there are immigration consequences to his guilty plea.

child. In 2000 a federal appeals court agreed that he was an aggravated felon based on his misdemeanor conviction in Rhode Island for stealing some Tylenol and cigarettes. In doing so, the court expressed its own "misgivings" that Congress, in its zeal to deter deportable non-citizens from re-entering this country", equated misdemeanors with felonies. In this case, the immigration consequences were much more severe than the criminal consequences.

See <http://trac.syr.edu/immigration/reports/155/>.

¹⁸ The record establishes only that the prosecutor was willing to offer a rape in the third degree. The record is silent as to whether the prosecutor would have offered, or whether Sandoval would have pled guilty to, one of the lesser offenses.

2. THE RECORD DOES NOT ESTABLISH DEFICIENT PERFORMANCE OR PREJUDICE; EITHER DISMISSAL OR A REFERENCE HEARING IS REQUIRED.

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error which constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). If a petition cannot be determined solely on the record, the petition will be transferred to a superior court for a determination on the merits or for a reference hearing. RAP 16.11(b).

Deficient performance and prejudice resulting from that performance are factual matters that must be established by the petitioner; trial counsel is presumed competent. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In plea negotiations, counsel's duty is to assist the defendant in evaluating the evidence against him and determining whether to plead guilty. State v. S.M., 100 Wn. App. 401, 410-11, 996 P.2d 1111 (2000). In order to establish the prejudice

prong, the defendant must establish a reasonable probability that, but for counsel's errors, he would not have pled guilty. In re Personal Restraint of Riley, 122 Wn.2d 772, 780-81, 803 P.2d 554 (1993). As the Supreme Court recognized in Padilla, whether a lawyer's performance was deficient is "necessarily linked to the practice and expectations of the legal community." Padilla, at 1482.

Mr. Schiffner's declaration says that he had successfully advised other clients that they could avoid or delay deportation by obtaining release from state custody. Decl. at ¶ 6. The record does not show whether the "practice and expectations of the legal community" in Grant County support Mr. Schiffner's belief. If the practice and expectations in the legal community were consistent with Mr. Schiffner's advice, then it may not have been unreasonable. Furthermore, Sandoval has not established that Schiffner failed to consider other options, or that Schiffner failed to advise him that deportation was possible under these circumstances. Nor has Sandoval established that he would have insisted upon a trial in the event the prosecutor was unwilling to reduce charges below the rape in the third degree level, knowing that he was going to be deported regardless of the crime of conviction.

It also appears that Sandoval may have prior Arizona convictions that qualify as "aggravated felonies." See Respondent's Brief in COA

at 2-3 (referring to convictions in 1990 and 1995 for kidnapping and a 2000 conviction for felony stalking). These convictions were never proved but, if they exist, their existence would have strongly motivated Sandoval's decision to plead guilty and obtain release from custody before the convictions were discovered.

These shortcomings in Sandoval's petition suggest that either the petition should be denied, or that a reference hearing is required to resolve the factual questions. In any event, WAPA respectfully suggests that it will be critical to the orderly administration of justice that appellate courts adhere to the standards for adjudicating collateral attacks that are based on allegedly improper immigration advice. The legal and factual issues are frequently more complicated than they appear at first blush, and such challenges are likely to appear with greater frequency than in the past.

E. CONCLUSION

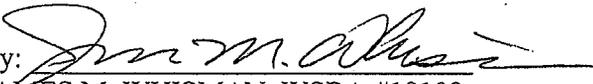
For these reasons, WAPA respectfully asks this Court to hold that Washington law already meets the standard set by the Padilla decision; counsel and the court must advise a defendant of the obvious immigration consequences of his guilty plea. WAPA also respectfully asks this Court to consider whether Sandoval has met his burden of proof in this personal

restraint petition, or whether a reference hearing is required to settle conflicting factual claims.

DATED this 10th day of May, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

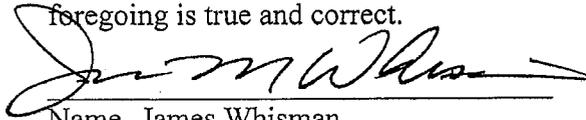
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Certificate of Service by Electronic Mail

Today I sent by electronic mail a copy of the AMICUS BRIEF OF WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS in Personal Restraint Petition of Valentin Sandoval, Cause No. 82175-5, in the Washington State Supreme Court, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name James Whisman
Done in Seattle, Washington

5/10/10
Date 5/10/10