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NO. 82175-5

BY THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE: PERSONAL RESTRAINT OF: VALENTIN SANDOVAL

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN SANDOVAL,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUE FOR WHICH REVIEW WAS GRANTED

When a defense attorney gives a client patently incorrect advice about the immigration consequences of a conviction, and the attorney knows the client does not want to plead guilty if the plea will lead to deportation, does the attorney's performance constitute ineffective assistance of counsel if the client pleads guilty in reliance on this advice and the plea triggers mandatory deportation proceedings?

B. STATEMENT OF THE CASE

1. The defense attorney incorrectly advised Sandoval of the immigration consequences of the guilty plea. After he was charged with a crime, Valentin Sandoval told his court-appointed attorney that he was not a United States citizen, but a long term legal permanent resident, and he did not want to lose his ability to live lawfully in the United States. PRP Ex. 1(attorney declaration); Statement of Additional Grounds (SAG), at 1. Without investigating the immigration implications, his attorney negotiated a plea to a reduced charge, told Sandoval he would be immediately released from jail, and assured him that he could "ameliorate" any immigration issues raised by this plea upon his release from jail. PRP Ex. 1, p. 1-2. His attorney understood that Sandoval did not

want to plead guilty if it would cause his deportation. Court of Appeals decision (Slip op.) at 2. Sandoval relied on his lawyer's advice that he would neither be deported nor "put into Immigration Court" by pleading guilty. Slip op. at 2 (quoting SAG).

Although the plea form contained standard language that a non-citizen may face deportation upon a conviction, no one discussed immigration consequences during the court hearings. Oblivious to the immigration consequences of Sandoval's conviction as well as the impact of the immigration detainer already placed on his client, defense counsel told the sentencing judge Sandoval was in the country legally and requested an immediate copy of the Judgment and Sentence to ensure the jail released Sandoval that same day. 1/23/07RP 13, 16; PRP Ex. 1.

Predictably, Sandoval was not released from jail even though he had served the entirety of his sentence. He was transferred to the custody of Immigration and Customs Enforcement officials, subject to mandatory immigration detention, and charged with removal as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii) due to his conviction. Slip op. at 2; PRP Ex. 1, p. 2. Contrary to defense counsel's advice and assurances, Sandoval's guilty plea to a conviction defined as an aggravated

felony under 8 U.S.C. 1101(a)(43)(A) triggered mandatory deportation without the possibility of “amelioration” and without any recourse for avoiding “Immigration Court.” After learning of the ramifications of Sandoval’s plea, defense counsel conceded his advice had been “unfortunately incorrect.” PRP Ex. 1.

Sandoval appealed the validity of his guilty plea and simultaneously filed a personal restraint petition seeking to withdraw his plea based on his attorney’s affirmative misadvice about the immigration consequences of his conviction.

2. Sandoval could have proceeded to trial or negotiated a different resolution. Although the record does not contain details about the underlying charge, Sandoval was accused of having nonconsensual sexual intercourse with an acquaintance and charged with second degree rape. He was intoxicated at the time and believed the contact was consensual. 10/3/06RP 3. The complainant did not want to see Sandoval go to prison. Id.

The prosecution reduced the charge to third degree rape and recommended a standard range sentence of six months in jail, based on an offender score of “0.” At sentencing, the prosecution claimed Sandoval had an Arizona felony conviction but it could not obtain any documents to show its existence and comparability.

1/23/07RP 3-4. Defense counsel insisted that the alleged Arizona offense would not be comparable to a felony in Washington. *Id.* at 8. The court did not count this alleged conviction and imposed the requested six-month sentence, which Sandoval had already served. *Id.* at 11, 15. Sandoval's deportation has been stayed pending the outcome of his appeal. Slip op. at 5.

3. Changes in immigration law since 1990. Before 1990, judges in deportation proceedings had substantial discretion and deportation was not inevitably sought in cases where a long-term legal resident was convicted of a crime. Changes to the law in 1990 and 1996 abolished judicial discretion, significantly expanded the list of deportable offenses, and rendered deportation mandatory in many circumstances. Margaret H. Taylor & Ronald Wright, The Sentencing Judge as Immigration Judge, 51 Emory L.J. 1131, 1143 (2002).¹ A conviction for an offense constituting an "aggravated felony" will "generally mean[] certain and speedy deportation." American Bar Association Standards for Criminal

¹ Further explanation of current immigration law is contained in Brief for Asian American Justice Center, *et al*, as Amici Curiae Supporting Petitioner, at 6-11, Padilla v. Kentucky, No. 08-651 (filed May 2009); and Brief of Petitioner at 3-8, Padilla v. Kentucky, (No. 08-651) (filed May 2009). Both briefs are available at: <http://www.abanet.org/publiced/preview/briefs/unscheduled.html#padilla>.

Justice, Pleas of Guilty, (ABA) Standard 14-1.4 at 58 n.96 (3d ed. 1999).

C. ARGUMENT

1. PROFESSIONAL NORMS, ETHICAL RULES, AND PREVAILING LAW REQUIRE A DEFENSE ATTORNEY TO ACCURATELY ADVISE A CLIENT OF THE IMMIGRATION CONSEQUENCES OF A CONVICTION

a. An attorney's duties to a client include advising the client of advantages and disadvantages in pleading guilty.² The right to effective assistance of counsel is guaranteed by the Sixth Amendment and Washington Constitution, Article I, section 22. When an attorney's performance was deficient, and the deficient performance prejudiced the defense, the conviction may not stand. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The constitutional guarantee of the right to the assistance of counsel recognizes that "the average defendant does not have the professional legal skill to protect himself" when facing a criminal prosecution. Johnson v. Zerbst, 304 U.S. 458, 462-63, 58 S.Ct.

1019, 82 L.Ed. 1461 (1938). The right to counsel is not meaningfully provided and protected if an accused person is “left to the mercies of incompetent counsel.” McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 736 (1970).

“Prevailing professional norms” guide the court’s assessment of an attorney’s competence in a particular case. Strickland, 466 U.S. at 688. Because standards for professional competence may evolve, courts turn to guidelines issued by professional oversight organizations such as the ABA and National Legal Aid and Defender Association (NLADA), as well as rules of professional conduct and state bar publications. See Rompilla v. Beard, 545 U.S. 374, 381, 125 S.Ct. 2527, 162 L.Ed.2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). As articulated below, case law further defines the scope of a defense attorney’s general duties and specific obligations when representing a client in a criminal proceeding who is not a citizen of the United States.

² The United States Supreme Court is considering a case involving an attorney’s duty under the Sixth Amendment to accurately advise a client of the deportation consequences of a guilty plea. Padilla v. Kentucky, 253 S.W.3d 482 (2008), cert. granted, 129 S.Ct. 1317 (2009). According to the Court’s website, the case will be heard in the October 2009 term.

i. A defense attorney must know the pertinent law and advocate for the client's needs in all cases. A defense lawyer's obligation to provide meaningful assistance of counsel requires the lawyer to act as an "active advocate, rather than a mere friend of the court assisting in the detached evaluation" of a claim. Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1995). A competent defense attorney must reasonably investigate the case; evaluate pertinent legal criteria; weigh the advantages and disadvantages of various outcomes; and understand and convey all important sentencing consequences. In re: Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) ("counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client."); Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.Ed.2d 309 (1948) ("prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."); Boria v. Keane, 99 F.3d 492, 497 (2nd Cir. 1996), cert. denied, 521 U.S. 1118 (1997) ("A defense lawyer in a criminal case has the duty to advise his client fully on *whether*

a particular plea to a charge appears to be desirable." (emphasis added by court, internal citation omitted)).

Defense counsel must provide sufficient information so an accused person may make an informed decision as to whether to plead guilty. In re Pers. Restraint of McCready, 100 Wn.App. 259, 263, 996 P.2d 658 (2000). In McCready, the court found counsel's performance deficient when the attorney did not explain the consequences of rejecting a guilty plea and facing a far greater sentence if convicted after trial. The same analysis applies here, where counsel did not explain the severe consequences of accepting a plea and waiving trial.

ii. Standards of professional competence require an attorney to understand all aspects of the case that significantly impact the client's needs. According to ABA Standards, when a client considers pleading guilty, the defense attorney must advise him or her of "possible collateral consequences that might ensue from entry of the plea." ABA Standards on Plea of Guilty, 14.3-2(f). ABA Standards direct defense counsel advising a client about a guilty plea to "address considerations deemed important" by the client or the lawyer. Id. at 14.3-2(b).

Washington's Rules of Professional Conduct (RPC)

"establish standards of conduct by lawyers." RPC Preamble, § 20. These rules define "competent representation" as having "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1. Performing with the necessary knowledge and skill requires that, "a lawyer should keep abreast of changes in the law and its practice." RPC 1.1, cmt. 6. If an attorney lacks sufficient breadth of knowledge, he or she may limit the scope of an attorney-client relationship, but representation limits must be done affirmatively, expressly, and without unreasonable restrictions. RPC 1.2(b), cmt. 1, 7. Thus, an attorney must understand the legal issues necessary for competent representation; seek assistance from a knowledgeable source; or candidly admit the attorney's lack of expertise and explicitly limit the scope of the representation.

NLADA Standards provide guidelines for a defense attorney's counseling of a client in a criminal case regarding immigration consequences. NLADA Performance Guidelines for Criminal Defense Representation, Guideline 6.2(a)(3) (1994), available at <http://www.nlada.org> (counsel's duty to "be fully aware of, and make sure the client is fully aware of . . . consequences of

conviction such as deportation.”). Treatises and published guides for practice similarly direct defense counsel to provide accurate immigration advice to all clients or direct the client to an immigration lawyer.³ Sandoval's attorney did not take any of the mandatory measures required by the RPCs to render competent representation and instead gave incorrect immigration advice without researching the current state of the law.

iii. Numerous other courts have recognized defense counsel's obligation to give accurate immigration advice. The New Mexico Supreme Court ruled, “when a defendant's guilty plea almost certainly will result in deportation, an attorney's advice to the client that he or she ‘could’ or ‘might’ be deported would be misleading and thus deficient.” State v. Paredez, 101 P.3d 799, 804 (N.M. 2004). Paredez cited the commentary in the ABA Standards that notes “many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.” Id. at 805, citing ABA Standards on Guilty Pleas 14-

³ See e.g., Norton Tooby, Criminal Defense of Immigrants, § 1.3 (3rd ed. 2003); Thomason Reuters/West, 2 Crim. Prac. Manual §§ 45:3, 45:15 (2009); Gabriel Chin & Richard Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, n.193 (2002) (listing attorney performance guidelines regarding collateral consequences).

3.2 cmt., at 127. In Rubio v. State, 194 P.3d 1224, 1230-32 & n.47 (Nev. 2008), the court cited a litany of cases decided in the last 30 years that find an attorney's affirmative misadvice of immigration consequences may constitute ineffective assistance of counsel, and emphasized that it is "good practice" to advise a client of "all foreseeable consequences, including the possibility of deportation."

Indeed, many courts have found counsel's misrepresentation of immigration consequences to be objectively unreasonable. See In re Resendiz, 19 P.3d 1171, 1181 (Cal. 2001) (recognizing "tremendous personal stakes involved in deportation and exclusion," and because severe consequences in this arena, "we do well to eschew technicalities and fictions and to deal instead with realities."); see also United States v. Couto, 311 F.3d 179, 188 (2nd Cir. 2002) ("an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable" and "meets the first prong of the Strickland test."); United States v. Mora-Gomez, 875 F.Supp. 1208, 1212 (E.D. Va. 1995) ("the clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance").

iv. Immigration issues implicate significant aspects of a defense attorney's representation. Immigration issues affect numerous aspects of a criminal case. Immigration status affects pre-trial detention by a potential immigration detainer or a higher bail. See 8 C.F.R. § 287.7 (regulation permitting jails to extend detention of noncitizens upon release for up to 48 hours for immigration officials to assume custody); United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) ("That the defendant is an alien may be taken into account" when setting bail); CrR 3.2(e) (risk of flight factor in setting bail).

It plays a central role in plea bargaining and sentence negotiation. Preserving the ability to remain a United States resident may be the paramount consideration for a noncitizen defendant, as it was for Sandoval. PRP Ex. 1. This may mean pleading to a more onerous offense, accepting a harsher sentence in exchange for a plea that mitigates immigration consequences, or agreeing to immediate deportation. See State v. Rodriguez, 146 Wn.2d 260, 272, 45 P.3d 541 (2002) (plea in exchange for recommendation of immediate deportation).

Because the length of the sentence may trigger deportation, a prosecutor may agree to impose a less onerous sentence in the

interest of avoiding deportation. See United States v. Gonzalez, 58 F.3d 459, 462 (9th Cir. 1995) (prosecutor's duty to "do justice" prompts the "proper and appropriate" dismissal of deportable offense). A court could reduce a sentence to prevent deportation, an "amendment to the sentence that had minimal practical impact on the State but had critical consequences to the defendant." State v. Quintero Morelos, 133 Wn.App. 591, 596, 137 P.3d 114 (2006); see also State v. Tinoco-Perez, 179 P.3d 363, 365 (Idaho Ct. App. 2008) (deportation is "very significant consequence," and court may consider it when "fashioning a sentence").

Consequently, a reasonably competent attorney must either have some knowledge of the interplay of criminal convictions and immigration consequences or seek assistance from a knowledgeable resource. Only when armed with accurate information about immigration laws can an attorney advise the client as to the best way to resolve the case.

b. An attorney is not excused from reasonable performance when assisting a client who pleads guilty. In the context of guilty pleas, Washington has long dictated that a defense attorney's effective performance requires he or she "actually and substantially assist[s] the client in deciding whether to

plead guilty.” State v. Holley, 75 Wn.App. 191, 197, 876 P.2d 973 (1994). When counsel misrepresents the applicable law, including the collateral consequence of a plea, the defendant must be allowed to withdraw the plea. State v. Stowe, 71 Wn.App. 182, 187-89, 858 P.2d 267 (1993); see also Hill v. Lockhart, 474 U.S 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (counsel’s advice about the parole eligibility after a guilty plea must fall “within the range of competence demanded of attorneys in criminal cases.”).

In Stowe, an attorney misadvised his client that if he pled guilty he would be able to continue serving in the Army. 71 Wn.App. at 188. Despite the “collateral” nature of military service, the Stowe Court found that an issue of attorney misadvice must be analyzed under ineffective assistance of counsel principles. Id. at 187. The court asked whether counsel’s misadvice was unreasonable and so prejudicial to deny effective assistance of counsel. In Stowe, counsel admitted he did not research the issue before inaccurately advising his client he would be able to serve in the Army notwithstanding his conviction. Id. at 188. Because the defendant informed counsel of his interest in remaining in the Army and relied on the attorney’s advice, the court found he was prejudiced by the lawyer’s misadvice. Id. at 189.

Like Stowe, Sandoval relied on his attorney's claim that he understood the immigration consequences from the conviction and by that reliance, was induced to accept a plea that he would not have taken if he had understood the actual immigration consequences of this plea. Slip op. at 5. Counsel's advice that a plea would not adversely or permanently affect his immigration status was objectively unreasonable.

c. Caselaw and prevailing professional norms require criminal defendants to be competently advised about immigration consequences. Prevailing professional norms clearly reflect that competent counsel need to "fully advise" noncitizen clients of the immigration consequences of the conviction when the attorney. INS v. St. Cyr, 533 U.S. 289, 323 n.50, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

The Supreme Court noted in St.Cyr, "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." 533 U.S. at 322 (citing Magana-Pizano v. INS, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to

plead or proceed to trial is well-documented”) and 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02 [2] (1999) (“Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence”). “Calculations of the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty.” United States v. Briscoe, 432 F.2d 1351, 1354 (D.C. 1970). Certain considerations are so important that misinformation from counsel may render the guilty plea constitutionally uninformed. Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985).

The Ninth Circuit’s decision in United States v. Kwan, 407 F.3d 1005, 1015 (9th Cir. 2005), illustrates the analysis that should be used in the case at bar. Like Sandoval, Kwan was a longtime lawful permanent resident who told his attorney he was very concerned with the possibility that deportation could result from pleading guilty. Kwan relied on defense counsel’s misleading and erroneous information regarding the immigration consequences in agreeing to enter a negotiated plea. Id. at 1015.

The Kwan Court held that the conduct of Kwan’s defense counsel fell below an objective standard of reasonableness. The

court explained that the counsel's ignorance of the law is no excuse, because "it is a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice." 407 F.3d at 1016 (citing ABA Model Rules of Professional Conduct, Rule 1.1[6]). Because counsel "affirmatively" discussed immigration consequences with Kwan, "counsel had a professional responsibility to inform himself and his client of significant changes in the law that drastically affected the immigration consequences of his client's plea." Id.

When counsel lacks the requisite competence in immigration law, he or she should not give advice regarding the immigration consequences of his plea, but must refer the client to an immigration lawyer or consult himself with an immigration lawyer in the first place. Id. Likewise, defense counsel affirmatively misled Sandoval about the inexorable immigration consequences that would follow his guilty plea and therefore did not provide effective assistance of counsel.

During both the plea and sentencing proceedings, counsel demonstrated his mistaken understanding of Sandoval's legal position *vis a via* immigration law. He advised Sandoval that his best option for immigration purposes was to plead guilty first, which

would lead to his release from custody, and then talk to an immigration lawyer once released. PRP Ex.1, at 2. He told the court Sandoval would be immediately released from jail and would be moving to Wenatchee, without understanding that his guilty plea was an aggravated felony and triggered a detainer and immediate removal proceedings. 1/23/07RP 13, 16; SAG. No immigration attorney could ameliorate Sandoval's deportation and retain his lawful status in the United States after his guilty plea, because he pled guilty to an aggravated felony which triggers deportation without possible amelioration. Slip op. at 5 (citing 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable"); 8 U.S.C. 1101(a)(43)(A) (rape is an "aggravated felony")). The defense attorney's uneducated advice and speculation of the lax operation of immigration law was patently incorrect, out-of-date, and contrary to Sandoval's undisputed desire to work on a resolution to the case that did not lead to immediate deportation. PRP Ex. 1.

d. The appropriate rule in assessing immigration issues in a guilty plea is case-specific but guided by the severe and largely automatic deportation that follows many criminal convictions. The objective reasonableness of an attorney's

conduct is always case-specific and based on individual circumstance. Strickland, 466 U.S. at 688. Some common factors useful in measuring the reasonableness of attorney conduct in this area may be: the availability of information giving notice to the attorney of potential immigration consequences; the nature of the offense, such as whether it involves an aggravated felony as defined by immigration law;⁴ the nature of the investigation conducted in the case; the advice given about immigration issues, if any; the possibility of alternative plea bargains or other sentences; the importance of immigration consequences to the defendant. Washington courts have informally considered such factors in other cases, such as in Stowe, where the court weighed the importance of the information to the defendant and the automatic nature of the consequence.

Inquiring into the current state of immigration law is not unduly onerous for an attorney. The Washington Defender Association's Immigration Project (WDA) provides free case consultations to defenders throughout Washington State by

⁴ The Washington Defender Association (WDA) maintains a list of offenses under the RCW with their potential immigration consequences. This information is available on the WDA website or by telephoning WDA's Immigration Rights Project. See www.defensenet.org

experienced immigration practitioners. WDA also provides regular trainings and maintains an extensive list of immigration-related resources on its website, www.defensenet.org. Additionally, the amici briefs filed in the Supreme Court in Padilla document the breadth of immigration-related resources available to defense attorneys nationally.⁵

e. The prejudice that flows from incorrect immigration advice that prompts a guilty plea is substantial, largely automatic, and incapable of amelioration. To many non-citizens who have lived in the United States for a long time like Sandoval, immigration detention and deportation are the most serious consequences that could happen to them.

As recognized by the Supreme Court, immigration consequences are drastic. St. Cyr, 533 U.S. at 322; Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948) (“the equivalent of banishment”); Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 66 L.Ed. 938 (1922) (may result in the “loss of both property and life; or of all that makes life worth living”).

⁵ See e.g., Brief for National Association of Criminal Defense Attorneys, *et al*, as Amici Curiae Supporting Petitioner, at App. C & D, Padilla v. Kentucky, No. 08-651 (filed May 2009), found at: www.abanet.org/publiced/preview/briefs/unscheduled.htm#padilla.

In the Strickland prejudice analysis, the determinative question is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Brett, 142 Wn.2d at 874; see Kwan, 407 F.3d at 1017. In the context of the case at bar, the probability of a "different" result includes the likelihood that the defendant would have proceeded to trial or sought a different plea resolution. Lockhart, 474 U.S. at 59.

Here, the Court of Appeals acknowledged Sandoval "may not have pleaded guilty if he had been properly advised of the consequences of his plea." Slip op. at 5-6. But the court concluded that because "deportation is not a direct consequence of his plea," defense counsel's incorrect advice cannot be the basis to withdraw a guilty plea. Id. This analysis improperly conflated a defense attorney's obligations to provide effective assistance of counsel under the Sixth Amendment and Washington Constitution, Article I, section 22, with the court's obligations in ensuring a voluntary waiver of the right to proceed to trial, as discussed *infra*.

Sandoval's decision to plead guilty was premised on his incorrect understanding of its immigration consequences. Slip op. at 5. A plea to an aggravated felony subjected him to immediate

deportation. Id. (citing 8 U.S.C. 1227(a)(2)(A)(iii) and 8 U.S.C. 1101(a)(43)(A)). Sandoval told his attorney he did not want to plead guilty if it would cause his immediate deportation. PRP Ex. 1; SAG. His attorney admits his advice was “incorrect” and he mistakenly thought immigration authorities do not bother to deport people who are not already in custody. PRP Ex. 1, p. 2.

The prosecution asserts that Sandoval’s affidavit is simply “self-serving” and should be disregarded. But defense counsel’s affidavit and his actions during the proceedings support Sandoval’s claims. There is no basis to disregard Sandoval’s explanation of events when the attorney’s affidavit and conduct in court indicate the attorney assumed Sandoval would both be immediately released from jail and would remain a long-term resident of the area. Furthermore, whatever defense counsel’s general experience in criminal law, he purports to have no knowledge of immigration law, undertook no research on immigration consequences, and consulted with no experienced advisors to learn about the operation of immigration law.

Sandoval did not have to accept this plea. He could have proceeded to trial, and the prosecution would have had to prove that the complainant did not consent to the sexual encounter as

Sandoval believed she had. 10/3/06RP 3. Alternatively, he could have sought a resolution that did not require deportation but agree to more onerous punishment, including jail, community service, counseling, or other sentencing conditions that would satisfy the complainant and prosecution without mandating Sandoval's banishment from the United States. When even the complainant did not want to see Sandoval in prison, it is reasonably probable that a more favorable resolution could have been negotiated or trial sought. Whatever alternative outcome may occur, it is clear that Sandoval would not have accepted the plea bargain offered if he understood that he would be immediately detained and deported.

2. THE COLLATERAL CONSEQUENCE ANALYSIS IS NOT THE APPROPRIATE FRAMEWORK TO ANALYSE WHETHER COUNSEL'S MISADVICE REGARDING THE IMMIGRATION CONSEQUENCES OF A PLEA CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

The prosecution's argument here and the Court of Appeals decision below reflect an erroneous, entrenched insistence that the "collateral" nature of the immigration consequences flowing from a conviction is dispositive and renders such considerations beyond the scope of counsel's Sixth Amendment duties.

Minimizing immigration issues as a mere "collateral" consequences rests upon a false dichotomy distinguishing between direct and collateral consequences for noncitizen defendants. Deportation is largely automatic after a conviction to an expanding category of offenses. The severity of deportation, including permanent "banishment" from a country, and often from one's family and community, markedly separates immigration consequences from virtually all other "collateral" consequences such as temporary loss of driving privileges or ineligibility of student loans. Furthermore, whether a consequence is "collateral" must evolve and immigration consequences are no longer illusory, discretionary, or speculative.

More fundamentally, the court's role in assuring a plea is voluntarily and intelligently entered is premised on the competency of counsel, who has a far more expansive role in assisting the client's decision to plead guilty. See Libretti v. United States, 516 U.S. 29, 50, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995) ("it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."); Lockhart, 474 U.S. at 56 (distinguishing court and counsel's obligations in advising a client of plea consequences).

In Lockhart, the Supreme Court ruled that when a defendant claims his attorney misadvised him about any consequence of a guilty plea – direct or collateral – “the two part Strickland v. Washington test applies.” 474 U.S. at 58. The Court of Appeals misunderstood this basic rule and failed to analyze whether Sandoval’s attorney provided effective assistance of counsel.

The Sixth Amendment guarantee of effective assistance of counsel attaches to any critical stage of the proceedings “at which fundamental rights might be sacrificed or lost.” U.S. v. Wade, 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). A guilty plea is a critical stage of the proceedings at which the defendant relinquishes fundamental constitutional rights. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). It is “counsel and not the court [that] has the job of advising [the defendant] of collateral consequences that may be important to his decision.” Michel v. United States, 507 F.2d 461, 465 (2nd Cir. 1974). The one-sentence notation regarding immigration consequences in a guilty plea form ensures the court is in compliance with its statutory obligation under RCW 10.40.200. It cannot substitute for or trump counsel’s advice, where such advice is supposed to be predicated on long-term discussions with a client

about the desirability of a plea and its advantages and disadvantages in an individual's life.

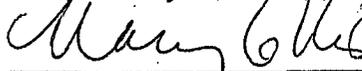
Here, the defense attorney has acknowledged he told Sandoval that the possibility of deportation was of such minimal concern that getting out of jail would be his best recourse. Yet because he pled guilty to an aggravated felony in order to get out of jail, counsel's advice was flatly wrong and decidedly counterproductive. Counsel's advice was unreasonable and unintelligent, rendered without research into current law. Because it prompted Sandoval to enter a guilty plea he would not have otherwise taken, it constitutes ineffective assistance of counsel requiring reversal.

D. CONCLUSION.

For the foregoing reasons, Valentin Sandoval respectfully requests this Court permit him the opportunity to withdraw his guilty plea.

DATED this 15th day of June 2009.

Respectfully submitted,



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