

COA Nos.
25935-8-III & 26039-9-III
(consolidated)

No. 82175-5

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

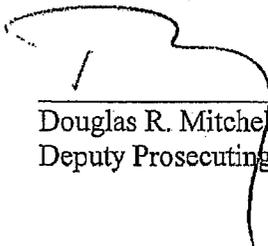
VALENTIN SANDOVAL,

Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
2010 JUN -1 P 12:36
J. G. W.

CORRECTED
RESPONDENT'S SUPPLEMENTAL BRIEF

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A. Identity of Moving Party

The State of Washington was the Plaintiff in the Superior Court, Respondent in the Court of Appeals, and Respondent herein. The State hereby responds to the Court's Request for Supplemental Briefing dated April 5, 2010, addressing the possible impact of *Padilla v. Kentucky*, 559 U.S. ____ (2010) on this appeal. The State is represented by the Grant County Prosecutor's Office.

B. Relief Sought

The State is still asking this Court to affirm the Court of Appeals. In support thereof, the State files this Supplemental Brief as requested by the Court.

C. Supplemental Briefing Re: *Padilla v. Kentucky*

Jose Padilla is a native of Honduras. He has been a lawful permanent resident alien for over 40 years, and was a veteran of the United States military, having served during the Vietnam War. He was convicted by plea in the courts of Kentucky of a criminal offense based on his transportation of a large quantity of marijuana. As a result, he faced removal (commonly known as "deportation") from the United States pursuant to Federal Law. *Padilla v. Kentucky*, 559 U.S. ____ (2010) (slip op. at 1).

Padilla sought post-conviction relief, claiming ineffective assistance of counsel. Specifically, he claimed not only that his counsel failed to warn him of this consequence, but that his counsel told him he would not have to worry about immigration consequences due to the length of time Padilla had been in this country. *Padilla v. Kentucky*, 559 U.S. ____ (2010) (slip op. at 1) (citation omitted). The Court concluded that Mr. Padilla's counsel was deficient, and remanded for further proceedings to determine whether he been prejudiced by that deficiency. *Id.*, at 12.

The facts here are readily distinguished. In the case before this Court, the defendant entered a plea of guilty to an Amended Information alleging Rape in the Third Degree on October 3, 2006. CP, at 3-4; RP, October 3, 2006, at 3. There was a thorough colloquy, during which the Judge displayed the Statement on Plea of Guilty to the Petitioner, and discussed with him whether the Statement had been read to him with the assistance of counsel and the interpreter (yes); whether he had understood it (yes); whether he had any questions about the case or the plea of guilty (no); whether any promises or threats had been made to get him to enter the guilty plea (no); and the sentencing range applicable to the case. RP, October 3, 2006, at 4-6.

In addition, counsel represented to the Court that he had spoken to the interpreter about whether Petitioner "got it", as counsel is not bilingual and

wanted to clarify the answer to the Court's inquiry about counsel's belief that the Petitioner understood. RP, October 3, 2006, at 5. After further inquiry, the Court found there to be a factual basis for the plea and that the Petitioner understood the consequences of his plea. RP, October 3, 2006, at 11.

Among the many warnings required and provided on the Statement on Plea of Guilty form pursuant to CrR 4.2(g) is an explicit warning on page 6 of the document, item 6(i), about the potential immigration consequences of a plea of guilty to a felony. CP, at 10. This warning is present to implement the requirements of RCW 10.40.200. The Statement on Plea in this case, the subject of the detailed discussion between the Court, counsel, and Petitioner during his guilty plea hearing, and signed by the (deputy) prosecutor, defense counsel, defendant (Petitioner) and trial court judge, reflects that Petitioner was clearly notified by the plea document of the potential consequences. *Womack v. McDaniel*, 497 F.3d 998, 1003, (2007) *cert. den.* 128 S. Ct. 928 (2008). The written Statement on Plea of Guilty filed in the trial court can and should be credited over the later contradictory assertions made by both Petitioner and his trial counsel. *Id.*, at 1004.

Such an admonition is favorably noted by the Supreme Court in *Padilla*. The Court stated that the harsh consequence of deportation "... only underscores how critical it is for counsel to inform her noncitizen client that

he faces the risk of deportation.” *Padilla v. Kentucky*, 559 U.S. ____ (2010) (slip op. at 16). In the adjacent footnote, the Court finds it “significant” that the current form used in Kentucky provides such notice, and also lists twenty-two other states, one of which is Washington, which mandate the same information be provided to criminal defendants. *Id.*, n. 15. In other words, unlike Kentucky, Washington already meets the standard announced in *Padilla*. No change to Washington law is required.

Nor does *Padilla* change the outcome of this case. In order to prevail, Petitioner must prove ineffective assistance of counsel. To establish ineffective assistance, Petitioner must prove both that that the representation provided was deficient, “ ... i.e., it fell below an objective standard of reasonableness based on consideration of *all* the circumstances ...” and that prejudice resulted, “ ... i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Thomas*, 109 Wn.2d 222, 225-226 (1987) (emphasis added)(citing *Strickland v. Washington*, 466 U.S. 668 (1984)). “The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Padilla v. Kentucky*, 559 U.S. ____ (2010) (slip op. at 9) (citations omitted). There is no question, based on the record, that Petitioner was given all the advice possible under the

circumstances. Not only does the Statement on Plea of Guilty, a form approved by this Court, provide explicit warning, but the trial court's colloquy ensured that the defendant had complete knowledge of its terms. In addition, trial counsel's subsequent affidavit describes his awareness of the issue, and the prediction he made based on his experience. Affidavit of Attorney Robert E. Schiffner, at 2. Petitioner has not, and cannot, establish the first prong of the *Strickland* test. Counsel predicted -- based on his experience with local conditions -- that if the defendant pleaded guilty he would have a greater chance of avoiding deportation. Counsel did not guarantee that his client would not be deported. The fact that the defendant was deported does not establish that counsel's advice was deficient, it simply shows that the defendant was not fortunate enough to avoid deportation. *Id.*

Even assuming without conceding that Petitioner can or has established that counsel's assistance was ineffective, he was not prejudiced; that is, that "... there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn.2d 222, 225-226 (1987) (emphasis added) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). As the Court of Appeals was informed by the State's brief, Petitioner was facing a lengthy sentence, a minimum prison term 13 times longer if convicted of the original

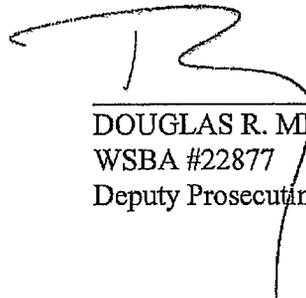
charge, and 17 times longer if the State had been able to prove the out of state criminal history, followed by almost certain deportation. While deportation is a clear concern to anyone in Petitioner's setting, that was not the only risk to consider. The original Information in this case alleged Rape in the Second Degree, a class "A" felony. CP, at 1. Rape in the Second Degree, like any other class "A" felony, is a "most serious" offense, commonly known as a "strike". RCW 9.94A.030(29). The risk of a "strike" conviction and a long period of incarceration are substantial.

It is not possible to predict now what Petitioner would have done knowing what he knows now. Petitioner has not shown that he would have made a choice to go to trial instead of plead guilty, and given that the most likely outcome after a conviction at trial would be deportation after a long period of incarceration, rejecting the plea bargain would not have been rational under the circumstances. *Padilla v. Kentucky*, 559 U.S. ____ (2010) (slip op. at 14) (citations omitted).

This Court should not consider the assertions of Petitioner with regard to the immigration consequences of this case in isolation, but in the light of all of the circumstances. *State v. Thomas*, 109 Wn.2d 222, 225-226 (1987). After having done so, it will be readily apparent that Petitioner did in fact

make an intelligent choice among the options available, and that the decision of the Court of Appeals should be affirmed.

DATED this 29th day of April, 2010



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