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NO. 87297-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIGFREDO BUENO,

Petitioner.

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

PETITIONER'S ANSWER TO THE WASHINGTON
ASSOCIATION OF PROSECUTING ATTORNEYS AMICUS BRIEF

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TABLE OF CONTENTS

A. ARGUMENT..... 1

WAPA misrepresents the prosecution’s ethical obligation to do justice as well as Bueno’s right to seek relief due to his reliance on incorrect advice..... 1

1. WAPA is wrong in claiming that Bueno was accurately advised that a pardon was a possible way to avoid deportation 1

2. WAPA is wrong that prosecutors have eliminated racial disparity in Washington..... 2

3. WAPA is wrong that the prosecution cannot take individual circumstances into account when fashioning a plea..... 3

4. WAPA misleads the Court about the framework for considering equitable tolling 6

5. The substantial change in the law following Padilla and Sandoval governs Bueno’s case. 9

B. CONCLUSION..... 12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Bonds, 165 Wn.2d 135, 196 P.3d 672 (2008) ... 7

State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) 10, 11

Washington Court of Appeals Decisions

In re Pers. Restraint of Jagana, _ Wn.App. _, 282 P.3d 1153 (2012)... 10

State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002) 6, 9

United States Supreme Court Decisions

Holland v. Florida, 60 U.S. ___, 130 S.Ct. 2549, 17 L.Ed.2d 130 (2010)6,
7

Padilla v. Kentucky, 559 U.S. ___, 130 S.Ct. 1473, 176 L.Ed 2d 284
(2010)..... 3, 4, 5, 9, 10, 11, 12

Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398
(2009)..... 5

Federal Court Decisions

Aguilera-Montero v. Mukasay, 548 F.3d 1248 (9th Cir. 2008) 2

Doe v. Busby, 661 F.3d 1001 (9th Cir. 2011) 6, 8

United States v. Chaidez, 655 F.3d 684 (7th Cir. 2011), cert. granted,
132 S.Ct. 2101 (2012)..... 11

United States v. Gonzalez, 58 F.3d 459 (9th Cir. 1995)..... 4

United States v. Orocio, 645 F.3d 630 (3d Cir. 2011)..... 11

Statutes

8 U.S.C. 1101 1
8 U.S.C. 1227 1
RCW 10.73.110 8

Court Rules

CrR 7.2..... 8

Other Authorities

ABA Standards for Criminal Justice (1993) 4
Altman, Heidi, Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants, 101 Geo. L.J. 29 (Nov. 2012)4, 5
Am. Prosecutors Research Inst., Prosecution in the 21st Century: Goals, Objectives, and Performance Measures (2004)..... 4
Nat’l Prosecution Standards (2009)..... 4
Preliminary Report on Race and Washington’s Criminal Justice System (2011)..... 3

A. ARGUMENT.

WAPA misrepresents the prosecution's ethical obligation to do justice as well as Bueno's right to seek relief due to his reliance on incorrect advice

1. WAPA is wrong in claiming that Bueno was accurately advised that a pardon was a possible way to avoid deportation.

WAPA insists that Bueno's trial attorney properly urged Bueno to hope for a pardon as a mechanism for relief from deportation, citing two newspaper articles showing that pardons could be bestowed on noncitizens by Washington governors. WAPA Amicus at 15. It is true that Bueno and his wife relied on defense counsel's claim that Bueno could seek a pardon or waiver to avoid deportation. 2RP 23, 26. But even if Bueno had received such highly speculative relief, a pardon would not have stopped Bueno's deportation due to the nature of his plea.

Bueno's plea to conspiracy to deliver rendered him deportable on two grounds: (1) as an aggravated felon under 8 U.S.C. 1101(a)(43)(B); and (2) as a person convicted of a controlled substances violation under 8 U.S.C. 1227(a)(2)(B). While a gubernatorial pardon could provide relief from the aggravated felony ground for deportation, it would not help him avoid deportation for an

offense that also qualifies as a controlled substances violation. 8 U.S.C. 1227(a)(2)(A)(vi) (authorizing pardons to eliminate certain deportation grounds, including aggravated felonies); Aguilera-Montero v. Mukasay, 548 F.3d 1248, 1253-54 (9th Cir. 2008) (under plain language of controlling statutes and precedent, deportable alien with controlled substance conviction is “ineligible for pardon-based waiver”).

Contrary to the advice Bueno received from his lawyer, a pardon would not have prevented him from being deported. Bueno did not understand this mandatory consequence when he pled guilty. 2RP 34; CP 43. WAPA misrepresents the accuracy of the advice rendered by defense counsel.

2. WAPA is wrong that prosecutors have eliminated racial disparity in Washington.

WAPA asserts that prosecutors have “all but eliminated disparities by race in prosecutorial decision making in Washington” due to rules that preclude them from considering “a defendant’s alienage,” in charging or plea decisions. WAPA Amicus at 19.

WAPA inexplicably ignores the recently issued task force report, Preliminary Report on Race and Washington’s Criminal Justice

System, 1, 11-12, 54 (2011),¹ which found indisputable evidence of persistent racial disparity in many phases of the criminal justice system, including prosecutorial decision-making and sentencing outcomes. Even facially neutral policies have disproportionately negative impacts on racial or ethnic minorities, resulting in longer sentences, fewer alternative sentences, and more charges being filed against defendants of color. Id. at 21, Appendix A-5 & A-6.

WAPA misrepresents the on-going problems with racial and ethnic disparity in the criminal justice system.

3. WAPA is wrong that the prosecution cannot take individual circumstances into account when fashioning a plea.

WAPA distorts the issues by arguing Bueno is seeking special leniency that would be unfair to bestow upon him. Taking immigration consequences into account when negotiating a guilty plea is an appropriate exercise of a prosecutor's ethical and legal duties; it is not a request for special leniency. See Padilla v. Kentucky, 559 U.S. ___, 130 S.Ct. 1473, 1486, 176 L.Ed 2d 284 (2010). An appropriate alternative plea would be similar in nature and severity. When no similar plea is

¹ Available at:

<http://www.law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/preliminary%20report%2020final%20release%20march%201%202011%20for%20printer%202.pdf> (last viewed Oct. 10, 2012).

available, noncitizen defendants may agree to a plea that results in longer jail sentences or bigger fines in exchange for a plea to an offense that does not mandate deportation. See Altman, Heidi, Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants, 101 Geo. L.J. *29 (Nov. 2012).²

Prosecutors have the fundamental duty to do justice in a given case. Am. Prosecutors Research Inst., Prosecution in the 21st Century: Goals, Objectives, and Performance Measures (2004)³; Nat'l Prosecution Standards §§ 1-1.1 to 1-1.2 (2009); ABA Standards for Criminal Justice § 3-1.2 (1993). It is “proper and appropriate” for prosecutors to negotiate a case resolution predicated on avoiding the trigger of mandatory deportation. United States v Gonzalez, 58 F.3d 459, 462 (9th Cir. 1995).

The Supreme Court held in Padilla that deportation was an “integral part” of the possible penalty facing non-citizen defendants. 130 S.Ct. at 1480-81. The Court recognized that it serves the interests

² This forthcoming article is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031151 (last viewed Oct. 9, 2012). Page citations herein refer to the SSRN version.

³ APRI is the research arm of the National District Attorney Association, study available at: http://www.ndaa.org/pdf/prosecution_21st_century.pdf (last viewed Oct. 9, 2012).

of the prosecution and defense by engaging in informed consideration of immigration penalties during plea bargaining. Id. at 1486.

Prosecutors may take into account a defendant's health, her status as a veteran, his eligibility for work release, and other circumstances that make a certain sentence more or less appropriate to the case. See Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 454, 175 L.Ed.2d 398 (2009) (defendant's background and character critical to sentencing). A noncitizen who is deported solely because of a criminal conviction has received a harsher punishment than a similarly situated citizen. Padilla, 130 S.Ct. at 1480 (deportation is "severe penalty"). It is both unjust and disproportionate for the prosecution to refuse to address or consider that penalty triggered by immigration laws when determining a fair plea bargain. It is in the prosecution's interest to take deportation consequences into account. See e.g., Altman, at 32 ("the most effective way for prosecutors to protect the finality of bargained-for dispositions in cases involving immigration penalties is to directly engage with those penalties during plea bargaining and to offer immigration-neutral dispositions when appropriate"). It is not favoritism or invidious bias to recognize that a legal permanent resident

will receive harsher punishment from certain convictions and to act proportionally.

4. WAPA misleads the Court about the framework for considering equitable tolling.

Equitable tolling allows a court, for good cause and in the interest of fairness, to modify the harsh application of a time limitation on equitable grounds where the claimant has been reasonably diligent and the respondent has not been unduly prejudiced. Holland v. Florida, ___ U.S. ___, 130 S.Ct. 2549, 2563, 17 L.Ed.2d 130 (2010). It is a flexible concept that it not governed by mechanical rules. Id. One area where courts have granted equitable relief is based on an attorney's deficient performance, such as "failing to fulfill a basic duty of client representation," Doe v. Busby, 661 F.3d 1001, 1012 (9th Cir. 2011); or unintentionally omitting immigration information from the guilty plea statement, State v. Littlefair, 112 Wn.App. 749, 762, 51 P.3d 116 (2002).

A petitioner's diligence for equitable tolling is "reasonable diligence," not extreme or exceptional diligence. Holland, 130 S.Ct. at 2565; Doe, 661 F.3d at 1014 ("Reasonable diligence does not require a petitioner to identify the legal errors in his attorney's advice and

thereupon fire the attorney because such errors would have been evident to a trained lawyer.”).

In In re Bonds, this Court issued a splintered ruling on the requirements of equitable tolling. Four justices defined “equitable tolling” as requiring bad faith, deception, or false assurances; two justices felt this standard was too strict; and three justices thought that a manifestly unfair result and diligence by the accused satisfied the equities required. 165 Wn.2d 135, 144, 196 P.3d 672 (2008) (plurality); Id. at 144-45 (Justices Alexander and Fairhurst, concurring); Id. at 146 (Justice Sanders, joined by Justices Chambers and Stephens, dissenting). This Court has acknowledged that equitable tolling is available on a broader basis than that suggested by the Bonds plurality. In re Carter, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011).

The Holland decision was issued after Bonds. 130 S.Ct. at 2549. In Holland, the United States Court pronounced the lower court’s standard “too rigid,” where it had used a test of “bad faith [and] dishonesty.” Id. at 2563. “‘The flexibility’ inherent in equitable procedure” requires a rule enabling “courts to meet new situations [that] demand equitable intervention, and to accord all the relief

necessary to correct ... particular injustices.” Id. (internal citation omitted).

Bueno could not have reasonably learned that he erroneously relied on his lawyer’s purported expertise and false assurance within one year of his guilty plea. He is not expected to hire a second lawyer to audit the first lawyer’s performance when he had no basis to suspect he had been misled. See Doe, 661 F.3d at 1014. Once the immigration authorities started deportation proceedings against him, Bueno went to a lawyer asking for help in seeking the pardon he thought would be available. 2RP 40. This lawyer informed Bueno that there was no availability of a pardon to obtain relief from deportation based on the nature of his guilty plea. Id. This lawyer then helped Bueno file a motion to vacate his guilty plea that started the instant case.

WAPA wrongly insists that Bueno was adequately informed that he needed to act immediately if he filed a collateral attack. WAPA Amicus at 11, 14. It has not been established that Bueno understood the one-year time limit, which was not discussed on the record at the sentencing hearing as required by RCW 10.73.110 and CrR 7.2(b). 1RP 8-10. WAPA may not rely on the assertion that Bueno was adequately

informed of the collateral attack deadlines when that issue has not been resolved.

Bueno diligently sought his lawyer's advice on how the case would affect his ability to legally remain in the United States. 2RP 21. Despite his diligence, he was impeded in accurately knowing his legal predicament earlier than he did due to his lawyer's inaccurate advice and because several years passed before immigration authorities instituted deportation proceedings. Bueno has committed no other criminal wrongdoing, supports a wife and children, and has legally resided in the United States for many years. When he discovered that he was not accurately informed of the true deportation consequences by his lawyer, he diligently sought help. Similarly to the circumstances meriting equitable tolling in Littlefair, Bueno faced extraordinary circumstances impeding him from requesting relief earlier and this Court should consider his claim to correct the injustice done.

5. The substantial change in the law following *Padilla* and *Sandoval* governs Bueno's case.

WAPA wrongly asserts that no statutory exception to the time limit for filing a collateral attack would apply to Bueno. Yet as Bueno explained in his supplemental brief, Padilla is both an application of long-standing ineffective assistance of counsel precedent as well as a

marked change in the law. In re Pers. Restraint of Jagana, __ Wn.App. __, 282 P.3d 1153 (2012). Under RCW 10.73.100(6), Padilla should be applied to petitioners who relied on inaccurate immigration advice. It operates as a significant, material legal change that exempts the statutory time limitations for collateral attack.

Padilla “superceded” prior case law explaining how counsel’s advice affects a plea. State v. Sandoval, 171 Wn.2d 163, 170 n.1, 249 P.3d 1015 (2011); Jagana, 282 P.3d at 1160. The trial court issued its ruling before Sandoval was decided and without understanding that “[o]rdinary due process analysis does not apply” when evaluating the superceding nature of detailed advice from counsel as to the consequences of a guilty plea. Sandoval, 171 Wn.2d at 169; see Bueno’s Supplemental Brief, at 14-15.

Padilla is material to Bueno’s conviction because it explains that the plea Bueno entered, based on inaccurate advice from his lawyer, was the product of deficient representation. Jagana, 282 P.3d at 1160. Padilla did not create a new rule, as lawyers have long been required to give accurate advice to their clients, but it explained counsel’s obligations to an accused person who is a non-citizen in a way that was not previously clear. see United States v. Orocio, 645 F.3d 630, 638 (3d

Cir. 2011). Just as this Court was guided by Padilla in Sandoval, the analysis presented in Padilla and its progeny dictate that Bueno received ineffective assistance of counsel and the law as expressed by Padilla be should applied to grant Bueno relief.⁴

Padilla requires counsel to provide *accurate* advice about the fundamental and severe consequences of a conviction. 130 S.Ct. at 1483. For a noncitizen client, inaccurate immigration advice minimizing the actual inevitability of deportation is devastating. Id. at 1482. Bueno only agreed to the plea after his attorney's false assurance that he would not only escape immediate deportation, but if he behaved himself, he could seek relief. Based on the severity of deportation and its critical role on Bueno's decision to plead guilty, it would be rational for him to reject this plea bargain had he understood its consequences. He should receive the opportunity to withdraw his guilty plea.

⁴ The United States Supreme Court is presently considering a case involving whether Padilla is a new rule and, if so, whether it should be retroactively applied under federal law. United States v. Chaidez, 655 F.3d 684 (7th Cir. 2011), cert. granted, 132 S.Ct. 2101 (2012). Oral argument is scheduled for October 30, 2012. Supreme Court Dkt. No. 11-820.

B. CONCLUSION.

Due to WAPA's misrepresentation of Padilla, the operation of immigration law, and the equities involved in the case, Sigifredo Bueno respectfully requests this Court to reject WAPA's analysis and permit him the opportunity to withdraw his guilty plea.

DATED this 11th day of October 2012.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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)
 SIGIFREDO BUENO,)
)
 Petitioner.)

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