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Court of Appeals Cause No. 30150-8-III  
consolidated with  
Court of Appeals Cause No. 30766-2-III

Franklin Superior Court No. 96-1-50466-1

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

JUAN PEDRO RAMOS, Appellant

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PETITIONER'S  
APPELLANT'S SUPPLEMENTAL BRIEF

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 ORIGINAL

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A. APPELLANT'S SUPPLEMENTAL BRIEFING RE:  
NEW CASE LAW -- STATE v. CHETTY

The Appellant, Juan Pedro Ramos, now files a supplemental brief to address the recent decision of *State v. Chetty* (Slip Opinion dated November 24, 2014 Division I Court of Appeals); and *State v. Chetty*, 167 Wn. App. 432, 444-45, 272 P.3d 918 (2012).

In *Chetty*, following his arrest in May 2003, Chetty retained an attorney to represent him. Upon later inquiry, this attorney could not recall specific details regarding his representation of Chetty but he did recall what his general representation practices were at the time of his representation of Chetty. This first attorney did not believe that he ever discussed immigration issues with Chetty as it was not his routine practice at the time to discuss appellate rights with clients in cases that were at the pretrial stage. His practice was to "file an appeal if a person has a valid reason to have their appeal filed." *Chetty*, 66729-7-1, Slip Op. at 3 (Div. I, Nov. 24, 2014).

A second attorney represented Chetty from November 2003 until March 2004. This attorney was aware of Chetty's immigration concerns and attempted to negotiate "an immigration safe resolution" with the State. The second attorney's practice at the time was to advise clients with potential immigration issues that he/she should contact an immigration attorney for assistance. The second lawyer did not provide Chetty with information about his appellate rights or any specific warnings as to how a conviction would affect his immigration status. *Id.*

A third attorney represented Chetty from March 2004 through his sentencing in November 2004. The third attorney also never provided Chetty any advice about the specific immigration consequences of conviction. He acknowledged that Chetty had expressed concern to him about the potential immigration consequences. The third attorney stated that although he did not in this instance refer Chetty to an immigration attorney, that his general practice at the time was to do so if he recognized any potential immigration issues. The third attorney also provided that this practice was common among local criminal defense attorneys at the time. The third attorney knew that Chetty would not plead guilty. Chetty had instead elected to stand trial on stipulated facts due to the potential immigration issues. *State v. Chetty*, 167 Wn. App. 432, 434, 272 P.3d 918 (2012). The third attorney's general practice regarding an appeal was to answer any questions posed after his clients were advised of their appeal rights during the plea and sentencing process. The third attorney recalled discussing several potential appeal issues with Chetty both before the trial court ruled on whether the cooperation agreement had been violated and also before sentencing. However, the third attorney never actually discussed the advantages and disadvantages of filing an appeal with Chetty. *Id* at 3-4.

On Chetty's behalf, an immigration lawyer with 24 years of experience testified at the trial court's evidentiary hearing. The immigration attorney testified that prevailing professional norms in 2003-2004 imposed a duty on criminal defense attorneys "to seek out, discover, and advise a client concerning immigration consequences flowing from a conviction." *Id* at 4. The immigration lawyer provided that in 2004, a conviction for possession of cocaine with intent to deliver would be an "aggravated felony" under the

immigration law. Deportation following conviction of an “aggravated felony” under the immigration law is virtually certain. *Padilla v. Kentucky*, 559 U.S. 356, 359, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). The immigration lawyer further testified that a criminal defense lawyer’s decision to refer a client facing such a charge to an immigration lawyer rather than seeking out this knowledge on his own, reflected deficient knowledge and understanding. *Chetty*, 66729-7-1, Slip Op. at 4 (Div. I, Nov. 24, 2014).

The Division I Court of Appeals found that although Chetty "knew there were immigration consequences of a conviction," he "was not informed specifically that his conviction would definitely result in deportation." *Id* at 5. In reaching this conclusion, the appellate court relied on the trial court's findings which stated in part:

Following sentencing, defendant was informed by the court that he had the right to appeal. Defendant understood that an appeal meant review by a higher court. Defendant did not understand the legal nuances of an appeal. Defendant understood that he had thirty days to file an appeal.

[His attorney] did not discuss with defendant, in any detail, the advantages and disadvantages of an appeal. Defendant did not file a notice of appeal within thirty days.

*Id.*

Chetty held that "[T]he effectiveness of counsel is a circumstance that bears on the validity of a defendant's waiver of the right to appeal and, in turn, on this court's ultimate determination whether to extend the time to file a notice of appeal under RAP 18.8(b)." *Chetty*, 167 Wn. App. at 444. The United States Supreme Court addressed claims of ineffective assistance of counsel based on the failure to consult with the defendant about filing an appeal. *Chetty*, 66729-7-1, Slip Op. at 5 (Div. I, Nov. 24, 2014) quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). *Roe* adopted the analytical framework of *Strickland v. Washington*, 466 U.S.

668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for determining ineffective assistance of counsel. *Roe*, 528 U.S. at 478. *Id.*

Unless the state meets the burden of showing that the defendant has knowingly, voluntarily and intelligently decided not to appeal, trial counsel's failure to consult is ineffective assistance of counsel. *State v. Sweet*, 90 Wn.2d 282, 287, 581 P.2d 579 (1978).

when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

*Roe*, 528 U.S. at 480; *Chetty*, 167 Wn. App. at 441.

Chetty stated that trial counsel's obligation cannot be satisfied by a rote reference to the rights to an appeal. Trial counsel must actually consult with his or her client to determine whether or not an appeal will be filed. Prior to such, trial counsel must also actually advise his or her client regarding the advantages and disadvantages of filing an appeal. *Roe*, 528 U.S. at 478.

#### APPLICATION OF THE CHETTY DECISION

The Appellant's first contention as argued in his petition to this Court was that he was entitled to advice regarding the specific immigration consequences that would befall him following conviction for theft in the first degree.

In this supplemental brief, Appellant now reasserts that his plea was not knowing, voluntary and intelligently made. *Chetty* provides this additional authority.

Both contentions share a common element -- whether the immigration consequences to the appellant were specific or ambiguous. Division III in deciding the appellant's arguments did not make any differentiation as to whether the immigration consequences were of any difference for legal permanent residents versus noncitizens present without any immigration status. The Appellant did not have any legal status at the time of this conviction. (CP 18 – 4, 19 – 5) Nonetheless, Mr. Ramos' theft in the first degree conviction was extremely likely to be considered by an immigration court as a ground of inadmissibility. This authority was sufficiently clear at the time of the appellant's conviction.<sup>1</sup>

For a noncitizen without immigration status, Mr. Ramos' application for legal permanent residence was his only possibility to remain in the United States. A conviction under RCW 9A.56.020(1)(a) and RCW 9A.56.030(1)(a) - theft in the first degree, a "B" felony cannot possibly be waived under the "petty offense exception" which is a possible waiver to grounds of inadmissibility. The maximum possible sentence for a "B" felony is ten years. Therefore, no waiver was available for Mr. Ramos. He was simply deportable at the time of his conviction. See *8 USC § 1182(a)(2)(A); INA § 212(a)(2)(A)*

Functionally, the immigration status result for a legal permanent resident with an aggravated felony conviction is the same as compared to a defendant without any legal status with a conviction that triggers a category of inadmissibility which cannot be waived. In both instances, the defendant's conviction virtually guarantees his or her deportation.

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<sup>1</sup> See authority provided in Appellant's May 26, 2014 Motion for Reconsideration, incorporated herein by reference

Attorney Roach's affidavit unfortunately did not provide enough information as to how Mr. Ramos' conviction could be considered an aggravated felony.<sup>2</sup> There is some possibility to discern the most likely circumstances in which this conviction could be considered an aggravated felony. At the time that Attorney Roach provided his affidavit, the immigration court was routinely allowing documentary proof that was not part of the accepted "record of conviction." *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989). This was allowed by immigration judges under the authority of *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008.)<sup>3</sup>

The circumstances surrounding Mr. Ramos' entry of a guilty plea share significant infirmities similarly as in *Chetty*.

In Mr. Ramos' matter, at the acceptance of his guilty plea, the trial court called another matter of a female defendant as, according to his counsel, Mr. Ramos' written guilty plea was not yet complete. It yet required his initials in seven separate places. The record indicates that Mr. Ramos and his counsel immediately set upon this task. Meanwhile, the trial court gave no prior indication to Mr. Ramos that it was accepting both guilty pleas simultaneously. The trial court provided a set of warnings as it accepted the other female defendant's plea. After this the court stated:

Miss Lane, have a seat please.  
Mr. Ramos, did you understand all that?

The warnings were not repeated. (*See* 1/27/1997 - Transcript of Guilty Plea Hearing RP 3 at 21-22)

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<sup>2</sup> The court of appeals refers to Attorney Roach as a premiere immigration attorney. *See* May 8, 2014 Court of Appeals decision denying Mr. Ramos' appeal and motion to vacate.

<sup>3</sup> Attorney Roach does not specify in his declaration whether his aggravated felony analysis pertained to the time of Appellant's conviction or the present interpretation of such conviction at the time of his affidavit.

THE COURT: I think I passed over number 40, Juan Ramos. Mr. Ramos, if you'll come up, please. Number 40, Juan Ramos.

MR. RYALS: I don't see Mr. Ramos. I don't know why he's not up.

CORRECTIONS OFFICER: I don't have him on my list, your Honor.

THE COURT: I'll hold on to this. We'll find him.

(Proceedings in this matter deferred and later resumed as follows:)

THE COURT: Is Juan Ramos here?

MR. CORKRUM: He's up, your Honor. Set this morning for sentencing. The state's ready to proceed.

MR. RYALS: We'll get Mr. Ramos' signature, your Honor.

THE COURT: Very well.

(See 1/28/1997 - Transcript of Sentencing Hearing - RP 2 at 1-17)

The transcript of proceedings for the sentencing supports Mr. Ramos' declaration that he did not have the opportunity to discuss his sentencing with his attorney. The record supports a finding that Mr. Ramos did not receive warnings pertaining to his collateral appeal rights. (See 1/28/1997 - Transcript of Sentencing Hearing - RP 2-3)

Mr. Ramos in his third declaration stated:

8. No one ever told me anything about my rights to an appeal or how long I would have to do anything if I wanted an appeal.  
(CP 71 at 8)

The state did not provide any evidence to rebut Mr. Ramos' declarations that his trial counsel did not effectively represent him.

Since Mr. Ryals was already in declining health at the time of Mr. Ramos' motions in the trial court, a colleague of Mr. Ryals, who was familiar with his general practice, provided a declaration. (PRP – Appendix F) (This declaration was limited to advice regarding immigration consequences.)

The State did not provide any evidence to rebut this declaration.

Mr. Ramos would have had a sound argument on appeal as to whether the evidence supported his guilty plea and conviction. By the time that Mr. Ramos had decided to participate in the plan to move cars at night from the car lot, the police had already infiltrated the plan and Mr. Ramos was at all times dealing with an undercover police officer. (CP 14) Mr. Ramos never even set foot in the car lot. *Id.*

It would not have been objectively unreasonable given his immigration status, for Mr. Ramos to risk an appeal for a potentially worse result on retrial. Mr. Ramos was already the beneficiary of an immigration petition filed by his mother (CP 18) and had been expecting to receive his legal permanent resident status (green card.)

#### CONCLUSION

Mr. Ramos' guilty plea to theft in the first degree was a ground of inadmissibility for which Mr. Ramos would not be able to avoid deportation. Based on the supplemental authority provided herein, the appellant asserts that *State v. Chetty* (Slip Opinion dated November 24, 2014 Division I Court of Appeals) further supports his motion to vacate his conviction.

Respectfully submitted this 6<sup>th</sup> day of February, 2015.

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
  
Plaintiff/Respondent,  
  
vs.  
  
JUAN PEDRO RAMOS,  
  
Defendant/Petitioner.

NO. 90549-5

COURT OF APPEALS NO. 30150-8-III  
COURT OF APPEALS NO. 30766-2-III

APPELLANT/PETITIONER'S  
PETITION FOR REVIEW

CERTIFICATE OF MAILING

I certify that on this 6<sup>th</sup> day of February, 2015, I caused to be sent by U.S. Mail,  
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please see attached supplemental brief of the Petitioner, Juan Pedro Ramos.

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