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NO. 98026-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Personal Restraint
Petition of

ALEJANDRO GARCIA-MENDOZA,

Petitioner.

RESPONDENT'S ANSWER TO
BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

I. ISSUE 1

II. STATEMENT OF THE CASE 1

III. ADDITIONAL ARGUMENT 1

 A. RCW 10.40.200 WAS INTENDED TO IMPOSE OBLIGATIONS
 ON COURTS, NOT DEFENSE COUNSEL..... 1

 B. JUSTICE DOES NOT REQUIRE SETTING ASIDE GUILTY
 PLEAS BASED ON ERRORS BY COUNSEL THAT MADE NO
 DIFFERENCE..... 5

IV. CONCLUSION 9

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Custody of A.F.J.</u> , 179 Wn.2d 179, 314 P.3d 373 (2013)	3
<u>In re Tsai</u> , 183 Wn.2d 91, 351 P.3d 138 (2015)	1
<u>State v. Jamison</u> , 105 Wn. App. 572, 20 P.3d 1010 (2001)	6
<u>State v. Jury</u> , 19 Wn. App. 256, 576 P.2d 1302 (1978)	3
<u>State v. Sandoval</u> , 171 Wn.2d 163, 249 P.3d 1015 (2011). 1, 3, 8, 9	
<u>State v. Tuttle</u> , 26 Wn. App. 382, 612 P.2d 823 (1980)	3

FEDERAL CASES

<u>Lee v. United States</u> , ___ U.S. ___, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017)	8
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	1, 2

WASHINGTON STATUTES

Laws of 1983, ch. 199, § 2	4
RCW 10.40.200	1, 4, 9
RCW 10.40.200(1)	4
RCW 10.73.090	9

I. ISSUE

As set out in the Supplemental Brief of Respondent, the issue in this case is substantially the following:

Did this court's decision in Sandoval and Tsai significantly change the interpretation of RCW 10.40.200?¹

II. STATEMENT OF THE CASE

The facts are set out in the Supplemental Brief of Respondent.

III. ADDITIONAL ARGUMENT

A. RCW 10.40.200 WAS INTENDED TO IMPOSE OBLIGATIONS ON COURTS, NOT DEFENSE COUNSEL.

The standards governing claims of ineffective assistance reflect a careful balance. On the one hand, "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On the other hand, both defendants and the public are harmed by excessive second-guessing of counsel:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's

¹ State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011); In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015).

unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id. at 690.

The primary purpose of ineffectiveness analysis is "to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings." Id. at 691-92. Moreover, reversals based on claims of ineffectiveness may harm the public, by setting aside convictions based on problems that neither the prosecution nor the court were able to prevent. Because of these problems, the analysis includes a "prejudice" component:

[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice.

Id. at 693.

Amici now wants this court to hold that the 1983 Legislature ran roughshod over this careful balance, by eliminating any "prejudice" requirement. As they point out, Strickland had not yet

been decided. Washington courts had, however, anticipated that decision. They had promulgated a test that “place[d] a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation; and second, that he was prejudiced thereby.” State v. Tuttle, 26 Wn. App. 382, 384, 612 P.2d 823 (1980), quoting State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). The Court of Appeals had expressly refused an invitation to abolish the “prejudice” requirement. Tuttle, 26 Wn. App. at 385.

Amici would like this court to believe that the Legislature promulgated a new standard for ineffective assistance claims, in a statute that never mentioned defense counsel or ineffective assistance. This “significant change in the law” was so subtle that no one noticed it until Sandoval was decided in 2011. During that interval of almost 28 years, the Legislature did nothing to correct this supposed misinterpretation of the statute. “If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval.” In re Custody of A.F.J., 179 Wn.2d 179, 186 ¶ 8, 314 P.3d 373 (2013).

According to amici, the Legislature chose to make the validity of every guilty plea entered by a non-citizen dependent on

the correctness of the advice provided by defense counsel. The Legislature supposedly did this without providing any way for the prosecution or the court to verify the accuracy of that advice. To the contrary, the Legislature *precluded* the court from requiring defendants to disclose their legal status. RCW 10.40.200(1). Without such disclosure, it is impossible for a court to know what immigration consequences, if any, might result from the conviction.

This version of the Legislature's action is absurd. As explained in more detail in the Supplemental Brief of Respondent, RCW 10.40.200 was intended to do exactly what it says: require the *court* to determine that the defendant has been advised of potential immigration consequences. This advisement was to be set out in a standard form, which would be incorporated in rules to be adopted by this court. Laws of 1983, ch. 199, § 2. Such a form would necessarily provide only general advice, not case-specific advice. Nothing in the language or history of RCW 10.40.200 indicates that the Legislature intended to adopt a new standard for ineffective assistance of counsel.

B. JUSTICE DOES NOT REQUIRE SETTING ASIDE GUILTY PLEAS BASED ON ERRORS BY COUNSEL THAT MADE NO DIFFERENCE.

Amici claim that allowing the petitioner to withdraw his guilty plea after 13 years will “provide a just outcome.” Brief of Amici at 19. The outcome is likely to be highly advantageous for him — but that is not synonymous with justice. Justice should involve exoneration of the innocent and conviction of the guilty after fair and reliable proceedings, with penalties imposed in accordance with law. In the context of the present case, such a result is produced by the standard test for ineffective assistance of counsel.

To understand this, the court should consider the situation that faced the petitioner at the time he decided to plead guilty. He had been arrested while carrying two different drugs —cocaine and methamphetamine. App. F, Affidavit of Probable Cause.² He was charged with a single count of possessing a controlled substance. App. F, Information. There is no indication that he had any defense to that charge.

² “App.” refers to the appendices to the Motion for Discretionary Review.

If the petitioner had not accepted the State's plea offer, the State would have added charges. App. F, Plea Agreement. The result of the trial would have been almost certain conviction of possessing a controlled substance. The petitioner would probably have been convicted of bail jumping as well. The consequences of conviction after trial would have been no better than those of conviction by guilty plea, and probably worse.

Amici emphasize the adverse immigration consequences of a drug conviction. Under the circumstances of this case, however, there were *no* meaningful consequences. This is because the petitioner already had two drug convictions. App. A, Prosecutor's Understanding of Criminal History; see Plea Agreement ¶ 5 (petitioner's agreement that Prosecutor's Understanding was accurate). At the time of the plea, there was no reason to believe that those convictions could be successfully challenged on either constitutional or statutory grounds. See, e.g., State v. Jamison, 105 Wn. App. 572, 591-96, 20 P.3d 1010 (2001) (rejecting challenges to guilty plea based on inadequate advice of immigration consequences).

Under these circumstances, complete and accurate advice from defense counsel would have been something like this:

"The prosecutor has offered to let you plead guilty to one count of possessing a controlled substance. If you reject the offer, you will go to trial. It's almost certain that you will be convicted. The prosecutor will also add charges of bail jumping. You will probably be convicted of those as well.

"If the government seeks to deport you in the future, a drug conviction will block some of the possible ways to avoid that. In particular, a person with a drug conviction isn't eligible for 'cancellation of removal.' But you've already lost your eligibility because of your prior drug convictions. There's no reason to think that those prior convictions can be set aside. So a new drug conviction won't change anything. With or without another conviction, you won't be eligible for 'cancellation of removal.'

"Unless you can avoid conviction on the drug possession charge, you gain nothing by rejecting the plea offer. I don't see any valid defense to that charge.

"What do you want to do?"

This question would have only one rational answer. A conviction would have no significant immigration consequences. The petitioner had no realistic prospects of acquittal. If he refused the plea offer, the probable outcome would have been conviction of

even more charges. The only rational decision would have been to accept the offer. Furthermore, if the petitioner had irrationally refused the offer, the outcome would almost certainly have been as bad or worse.

Under constitutional analysis, the near-certainty of conviction does not necessarily preclude relief. A defendant may still show that he would not have pleaded guilty if he had been aware of the consequences. The likelihood of conviction is a factor in this analysis, but it is not always determinative. Lee v. United States, ___ U.S. ___, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017).

The petitioner in the present case can thus still obtain relief if he succeeds in showing that (1) his attorney performed deficiently in failing to advise him of potential immigration consequences and (2) “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Sandoval, 171 Wn.2d at 174–75 ¶ 19. This standard provides proper protection for the petitioner’s constitutional right to decide whether to plead guilty based on accurate advice. It is a just result.

Amici instead argue that a defendant should be allowed to withdraw his guilty plea if he received inaccurate or incomplete

advice — even if accurate advice would have made no difference. Such a rule would deprive the State of a fair opportunity to prosecute defendants for their crimes. This would not be justice, but a windfall.

This court should not stretch RCW 10.40.200 to provide requirements that the Legislature never intended. The statute means what it says. It requires the court to provide certain general advice. If the court fails in this duty, the defendant has certain specified remedies, subject to the later-enacted time limits set out in RCW 10.73.090. If, on the other hand, the court provides this advice, the defendant still has the constitutional remedies explained in Sandoval. Since the meaning of RCW 10.40.200 has not changed, the petition in this case was properly dismissed as a time-barred “mixed petition.”

IV. CONCLUSION

The order dismissing the personal restraint petition should be affirmed.

Respectfully submitted on October 8, 2020.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

ALEJANDRO GARCIA-MENDOZA,
Petitioner.

No. 98026-8

DECLARATION OF DOCUMENT
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The undersigned certifies that on the 8th day of October, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

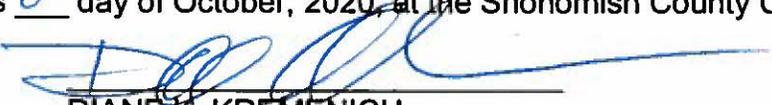
RESPONDENT'S ANSWER TO BRIEF OF AMICI CURIAE

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to:

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

Dated this 8th day of October, 2020, at the Snohomish County Office.


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Legal Assistant/Appeals Unit

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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