NO. 90549-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

JUAN PEDRO RAMOS

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

State of Washington, Respondent, submits the following answer to the Petition for Review filed by Juan Pedro Ramos.

B. COURT OF APPEALS DECISION

Petitioner correctly identifies the Court of Appeals decision from which he seeks review.

C. ISSUES PRESENTED FOR REVIEW

The State respectfully submits the instant case raises no issues in need of review of the Washington Supreme Court.

D. COUNTERSTATEMENT OF THE CASE

The background of the case is well described in the Court of Appeals opinion, which the State adopts as its statement of the case.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

(1.) The instant case presents no substantial issue of a violation of Sixth Amendment right to counsel. The lawyer's performance was not deficient viewed as of the time it occurred in 1997. Moreover, there would have been no deficiency even if present-day standards applied. If the guilty plea had any possible immigration consequences at all, they were not clear and succinct and only a general warning was required.

Petitioner makes the following one-sentence argument regarding his claim that he was denied effective representation: "Mr. Ramos, under Padilla and Sandoval was entitled to his Sixth Amendment rights." Petition for Review, at 6. However, the instant case presents no substantial issue of ineffective assistance of counsel.

In Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the United States Supreme Court found a lawyer may render ineffective assistance by failing to advise a client of the deportation consequences of a guilty plea. The Court held that counsel is required to "inform her client whether his plea carries a risk of deportation." Padilla, 130 S. Ct. at 1486. However, the Court further noted that when immigration consequences are unclear or uncertain, "a criminal defense attorney need do no more that advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Padilla, 130 S. Ct. at 1483.

A defendant claiming ineffective assistance must show both deficient performance and resulting prejudice. State v. Rodriguez, 103 Wn. App. 693, 700-01, 14 P.3d 157 (2000); State v. Gomez Cervantes, 169 Wn. App. 428, 434, 282 P.3d 98 (2012). The appellate court will presume counsel was effective. Gomez Cervantes, 169 Wn. App. at 434; State v. McFarland, 127 Wn.2d at 322, 335, 899 P. 2d 1251 (1995). Bald assertions and conclusory allegation are insufficient to show deficient performance. Gomez Cervantes, 169 Wn. App. at 434. To meet the second prong of the test, the defendant must show but for the ineffectiveness, there is a reasonable probability that the outcome would have been different. Rodriguez, 103 Wn. App. at 701. A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. Rodriguez, 103 Wn. App. at 701; Gomez Cervantes, 169 Wn. App. at 424-35. Prejudice need not be addressed if there is an insufficient showing of deficient performance. Gomez Cervantes, 169 Wn. App. at 434-35. On the

other hand, if it is easier to dispose of an ineffectiveness claim on the basis of a lack of sufficient prejudice, that course should be followed. Rodriguez, 103 Wn. App. at 701.

A court deciding an actual ineffectiveness claim "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (emphasis added). At the time of petitioner's guilty plea in 1997, it was well established that a criminal defense attorney's responsibilities did not extend to advising a client on immigration matters.

The affidavit of petitioner's own expert witness, James E. Egan, shows that the performance of petitioner's trial counsel was not deficient by 1997 standards. Mr. Egan's affidavit dated August 17, 2010, is attached to the personal restraint petition and appears in appendix F of the brief of appellant; a copy of it is appended to this answer for the court's convenience. Mr. Egan stated he has been a member of the Washington State Bar since November 6, 1975, and his practice has been in the area of criminal law. Mr. Egan explained that petitioner's trial counsel, Mr. Rembert Ryals, was at the time of the affidavit retired from the practice of law and in failing health. Mr. Ryals has subsequently passed away. *Washington State Bar News,* Vol. 65 No. 11, Page 44 (November, 2011). However, Mr. Egan stated regarding Mr. Ryals that "[i]t was his (as well as my own) practice to simply read the 'immigration warnings' in the guilty plea statements to our clients." Mr. Egan elaborated:

> I am very well acquainted with the practices and procedures of the Franklin County Superior Court (during) that time period (circa. 1997) and I am qualified to make this affidavit.
>
> As defense counsel, our collective understanding of the law at that time was that we had met our ethical obligations so long as we didn't affirmatively misadvise our clients as to the potential immigration consequences of their guilty pleas.
>
> . . .
>
> As defense counsel, it was our studied view that we had no obligation to inquire into our clients' immigration status. Sometimes we knew about it if our clients would tell us. If they ever asked for any specific advice as to immigration consequences, we would tell them they should consult an immigration attorney.

This "studied view" was well founded in the guidance provided by Washington appellate courts. In State v. Malik, 37 Wn. App. 414, 680 P.2d 770 (1984), review denied, Wn.2d (1984), the court held:

> Deportation is a civil procedure. Its effects are collateral consequences of the criminal proceeding instituted against Malik. Malik's counsel was appointed by the State to represent him on the criminal charge, not in a civil proceeding. The possibility of deportation, being collateral, was not properly a concern of appointed counsel. Trial counsel's responsibility was to aid Malik in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea. By informing Malik that deportation was a possibility and urging him to seek the advice of an attorney skilled in that field, Malik's trial counsel discharged his responsibilities in a constitutionally sufficient manner.

Id. at 416-17 (emphasis original; citations omitted). Three years before petitioner's guilty plea, in State v. Holley, 75 Wn. App. 191, 876 P.2d 973 (1994), the court stated:

> In the context of plea bargains, effective assistance of counsel means that defense counsel actually and substantially assist his client in deciding whether to plead guilty. It is counsel's responsibility to aid the defendant in evaluating the evidence

against him and in discussing the possible direct consequences of a guilty plea.

As we stated above, deportation is a collateral consequence of a criminal conviction. Thus, the trial court is not required to grant a motion to withdraw a guilty plea when a defendant shows that his counsel failed to warn him of the immigration consequences of a conviction.

Holley argues, however, that RCW 10.40.200 imposes on attorneys a duty to apprise their clients of the immigration consequences of guilty pleas. He further argues that failure to satisfy this duty is ineffective assistance of counsel.

Even if we assume that RCW 10.40.200 imposes a duty on attorneys to discuss immigration consequences with their clients, we find no basis to conclude the statute also creates a constitutional right for a defendant to be so advised. Where there is no constitutional right to advisement, counsel's failure to give that advisement does not cause constitutional harm. Thus, Holley has failed to show that he was deprived of his right to effective assistance of counsel, a constitutionally protected right. U.S. Const. amend. 6.

Id. at 197-98 (emphasis original; citations, quotes, and footnote omitted). As late as three years after the instant guilty plea, in State v. Martinez-Lazo, 100 Wn. App. 869, 999 P.2d 1275 (2000), review denied, 142 Wn.2d 1003 (2000), the court held:

In the context of a guilty plea, the defendant must show that his counsel failed to actually and substantially assist him in deciding whether to plead guilty, and but for counsel's failure to adequately advise him, he would not have pleaded guilty.

. . .

In view of these considerations, trial counsel has the obligation to aid a defendant in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea. However, a defendant need not be advised of the possibility of deportation because a deportation proceeding that occurs subsequent to the entry of a guilty plea is merely a collateral consequence of that plea.

Id. at 876 (emphasis original; citations and quotes omitted). The defendant in Martinez-Lazo argued that immigration consequences were no longer collateral in light of changes in federal law making deportation mandatory for certain convictions. The court disagreed, stating that "[a] deportation proceeding is a collateral civil action because it is not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility." Id. at 877 (citation and quotes omitted). "The changes to the INA may make Mr. Martinez-Lazo's deportation certain, but they do not alter its collateral nature as a collateral civil proceeding over which the sentencing judge has no control." Id. at 877-78.

It is difficult to ascertain the exact point where the prevailing professional norms changed to require criminal defense attorneys to advise the client when deportation is a consequence of a guilty plea. However, both before and after the instant guilty plea, Washington courts held such advice was not required. Viewed as of the time it occurred in 1997, counsel's challenged conduct was not deficient.

Even applying modern-day standards, petitioner's case is not comparable to those where ineffective assistance was found based on failure to advise that deportation would result from a guilty plea. In State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), the defendant was "a noncitizen permanent resident of the United States." Id. at 167. He had "earned permanent residency and made this country his home." Id. at 175. He told his attorney "that he did not want to plead guilty if the plea would result in his deportation." Id. at 167. His attorney

corroborated that he was "very concerned" that he would be held in jail after pleading guilty and subjected to deportation proceedings. However, counsel assured him that he would not be immediately deported. Id. Contrary to counsel's assurances, the immigration authorities placed a "hold" on the defendant preventing his release from jail and commenced deportation proceedings. Id. at 168. The defendant swore after the fact the he would not have pleaded guilty if he had known that would happen to him. Id.

The Sandoval court acknowledged that in satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial. Id. at 174-75. It must be shown that a decision to reject the plea bargain would have been reasonable under the circumstances. Id.

The court in Sandoval found the defendant had met this burden. The court noted that not only had the defendant sworn after the fact that he would not have pleaded guilty if properly advised, his attorney corroborated that he was very concerned at the time about the risk of deportation. Id. Finally, the court emphasized that the defendant had "earned permanent residency and made this county his home" and that deportation was a particularly harsh consequence under the circumstances. Id. at 175-76.

Along the same lines, the defendant in State v. Martinez, 161 Wn. App. 436, 235 P.3d 445 (2011) was a "legal alien" and "lawful permanent resident". Id. at 438. He was not advised that he faced certain deportation as a result of his

guilty plea. Id. Mr. Martinez asserted after the fact that he would not have pleaded guilty had he been properly advised and his attorney verified that deportation was a "material factor" for him. Id. at 443. Under these circumstances, both prongs of the test for ineffective assistance of counsel were met. Id.

In contrast, the defendant in our case has not shown that his guilty plea actually generated any deportation proceedings or that any are contemplated. While it is argued that his trial counsel should have known that deportation was a certain result of a guilty plea, that is clearly not true as no such proceedings have instituted in the 17 years since the conviction was entered. As the Court of Appeals explained, petitioner's conviction is not an "aggravated felony" that would result in deportation. Slip opinion, at 10-13. Petitioner now acknowledges this fact: "The immigration consequences, while not an aggravated felony, were still sufficient to prevent Mr. Ramos from being able to adjust status." Petition for Review, at 4 (emphasis added).

At most, it can be said that the immigration consequences of the guilty plea were unclear or uncertain. As previously noted, the United States Supreme Court stated in Padilla that under such circumstances, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Padilla, 130 S. Ct. at 1483.

As noted above, the affidavit of attorney James E. Egan stated regarding petitioner's trial counsel that "[i]t was his (as well as my own) practice simply to

read the 'immigration warnings' in the guilty plea statements to our clients." Egan affidavit, page 2, paragraph 5. Here, the guilty plea statement includes an acknowledgment on page 4 signed by the defendant stating that his lawyer had discussed each paragraph of the form with him, as well as a certification by defense counsel that he read the statement to the defendant. (CP 27). The "immigration warning in the guilty plea statement" was as follows: "If I am not a citizen of the United States, a plea of guilty to an offense punishable by state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (CP 25). The warning read by Mr. Ryals to the defendant was exactly that required by Padilla where immigration consequences are not clear and succinct: "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Padilla, 130 S. Ct. at 1483. Even if something more was required of counsel, petitioner suffered no prejudice since there were no immigration consequences, or alternatively the warning he received informed him of the actual circumstances applicable to his own situation. Again, the case is vastly different from Sandoval and Martinez where the defendants faced certain deportation as a result of their guilty pleas.

Petitioner has not established that his counsel failed to comply with the standards later announced in Padilla. Nor has he presented any evidence that he was prejudiced by his counsel's actions. Accordingly, his claim of ineffective assistance of counsel clearly fails and there is no need for this court to grant review.

(2.) The instant case presents no substantial issue of counsel failing to advise of actual immigration consequences. Padilla does not extend to future adjustment of status. Even if it did, the general warning petitioner received was sufficient given the uncertain and variable nature of adjustment of status.

Petitioner makes another one-sentence argument regarding his claim that he should have been provided actual advice on the immigration consequences of his plea and conviction: "Mr. Ramos' trial counsel should have informed him specifically of the immigration consequences of his guilty plea and conviction" Petition for Review, at 6. As previously noted, petitioner now admits his conviction was not an aggravated felony that could result in deportation but claims he should have been advised of its effect on his ability to "adjust status." Petition for Review, at 4. However, Padilla does not extend to non-deportation immigration matters such as adjustment of status. Even if it did, the consequences of the plea were, at most, unclear and uncertain and nothing more than a general warning of potential adverse immigration consequences would have been required.

"Certain individuals who are physically present in the United States already are permitted to 'immigrate' without having to leave the United States to apply for an immigrant visa. This procedure, called 'adjustment of status,' is accorded because of the obvious convenience for persons already here to process their immigration papers without the need for an often costly and disruptive trip abroad to a U.S. consulate." AUSTIN T. FRAGOMEN, JR.,

CAREEN SHANNON AND DANIEL MONTALVO, IMMIGRATION PROCEDURE HANDBOOK § 20:3 (WestLaw 2014).

Immigrants seeking adjustment of status must meet the following standards: (1) the immigrant must have been "admitted" or "paroled" into the United States (although certain individuals who are admitted remain ineligible for adjustment); (2) an immigrant must not have engaged in unlawful employment in the United States; (3) an immigrant must have maintained status during all periods of stay in the United States and he or she must not have violated the terms of a nonimmigrant visa; (4) an immigrant who seeks adjustment of status based on an approved employment-based petition must be in a lawful nonimmigrant status at the time of the filing; (5) the immigrant must be "eligible" for immigration (i.e., he or she must be an immediate relative of a U.S. citizen, a person selected under the diversity program, or a preference immigrant qualifying in either a family-sponsored preference or an employment-based preference) and the immigrant must continue to be eligible for immigration throughout the adjustment process; (6) an immigrant visa must be "immediately available" to the immigrant at the time of filing, and a visa number must be available at time of adjustment; (7) the immigrant must be admissible and must merit a favorable exercise of discretion. Id. § 20:4. The authors note that "[t]he grounds of inadmissibility are discussed in detail in Ch[apter] 19" of the treatise. Id. § 20:11. It is explained in Chapter 19 that individuals who have been convicted of some crimes are likely to have problems with the grounds for inadmissibility relating to criminal, illegal, or immoral conduct, including crimes

involving "moral turpitude." Id. § 20:11. "Some exemptions from this ground from exclusion exist for youthful offenders, persons with one minor conviction (a sentence of six months or less for a crime with a maximum possible sentence of one year or less), immediate relatives of citizens and residents, and persons who committed an offense more than 15 years before the date of the immigrant's application for a visa or adjustment of status and have been rehabilitated. An immigrant with a conviction that seems to fall into this ground for inadmissibility should seek legal assistance to see whether an exemption or waiver applies." Id. § 19:9.

However, even assuming petitioner's conviction could be problematic for adjustment of status and he could not obtain an exemption or waiver, such matters are beyond the scope of legal advice required by Padilla. "A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that is a virtual certainty." United States v. Bonilla, 637 F.3d 980, 984 (9th Cir. 2011). On the other hand, a much different situation exists with a person such as petitioner who was not convicted of a deportable offense and has continued to reside in the United States for 17 years following conviction; his counsel could not have been expected to advise him of all paths to citizenship or adjustment of status. As recently explained in Garcia v. State, 425 S.W.3d 248 (Tenn. 2013):

> With respect to the consequences of a guilty plea for future attempts to legally immigrate to the United States, as the State points out, Padilla involved only defense counsel's obligation to advise of deportation consequences of a guilty plea. Padilla does not address counsel's obligation to advise a client regarding the effect a guilty plea will have upon the client's future eligibility to

> immigrate legally to the United States. Extending Padilla as petitioner suggests would impose a substantial burden upon defense counsel. Legal immigration depends upon many factors, which may change as a result of Congressional action, executive agency policy choices, or court decisions. Padilla neither mandates, nor even suggests, that defense counsel in a state criminal trial must be able to advise her client of the effect a guilty plea is likely to have upon the client's future eligibility to immigrate legally to the United States.

Id. at 260.

The court went on to state that even if Padilla required some advice regarding the effect of a guilty plea on future ability to immigrate to the United States (or to obtain adjustment of status, in the case of someone already living in the United States), "the most that Padilla can fairly be interpreted as requiring in a situation such as this, when the law is not 'succinct and straightforward,' is a general warning that the plea may have adverse future immigration consequences." Id. In Garcia, the defendant's future ability to immigrate depended on whether the Tennessee offense to which he pleaded guilty amounted to a "crime of moral turpitude" under the Immigration and Nationality Act (the Act). However, the court noted that "crime of moral turpitude" is not defined in either the Act or the Code of Federal Regulations. Id. Thus, even if Padilla applied, a general warning of immigration consequences was sufficient. Id. at 260-61.

There are simply too many variables affecting future adjustment of status to require criminal defense attorneys to advise on such matters at the time of a guilty plea. See 8 U.S.C.A. § 1182. Adjustment of status involves the exercise of discretion, and its availability is subject to future Congressional or Presidential

action or judicial decisions. Moreover, unlike deportation, the inability to adjust status does not result in removal from the country (as evidenced by petitioner, who has continued to live in the United States for 17 Years.) Deportation and inability to adjust status are thus not remotely comparable. Even if Padilla did apply to adjustment of status, defendant has not established that he would have qualified for adjustment of status but for his conviction. At most, the consequences of the guilty plea regarding future adjustment of status were unclear or uncertain. The general warning that defendant received was more than adequate under Padilla. There are no substantial issues requiring Supreme Court review.

F. CONCLUSION

As basis of the arguments set forth above, it is respectfully requested that the Petition for Review be denied.

Dated this 17th day of December, 2014.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: Frank W. Jenny
Frank W. Jenny,
WSBA #11591
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 17th day of December, 2014, a copy of the foregoing was delivered to Juan Pedro Ramos, Appellant, 1225 North Union Street, Kennewick WA 99336, and to opposing counsel Brent DeYoung, PO Box 1668, Moses Lake, WA 98837, by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Abigail Iracheta

Signed and sworn to before me this 17th day of December, 2014.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2018.

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON, Plaintiff, v. OCTAVIO VILLEGAS, Defendant.	CAUSE NO. 97-1-50135-0 **AFFIDAVIT OF ATTORNEY JAMES E. EGAN**

STATE OF WASHINGTON)
: ss
County of Benton)

COMES NOW, James E. Egan, sworn on oath, deposes and states:

1. I am an attorney in good standing in the State of Washington, WSBA #3393. I was sworn in on November 6, 1975. My practice at the time of Mr. Villegas' matter and until now has been in the area of criminal law.

2. I was practicing in Franklin County during the time period referenced in Mr. Villegas' criminal matter. I know his former attorney Rembert "Rem"Ryals very well. I know that Mr. Ryals is currently in declining health and no longer practices law.

3. I am very well acquainted with the practices and procedures of the Franklin County Superior Court that time period and I am qualified to make this affidavit.

4. As defense counsel, our collective understanding of the law at that time was that we had met our ethical obligations so long as we didn't affirmatively misadvise our

AMES E. EGAN, P.S.
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clients as to the potential immigration consequences of their guilty pleas.

5. I know that Rem Ryals never claimed any expertise in the area of immigration law. It was his (as well as my own) practice simply to read the "immigration warnings" in the guilty plea statements to our clients.

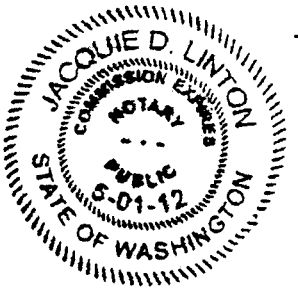
6. As defense counsel, it was our studied view that we had no obligation to inquire into our clients' immigration status. Sometimes we knew about it if our clients would tell us. If they ever asked for any specific advice as to the immigration consequences, we would tell them that they should consult an immigration attorney.

7. I have read the U.S. Supreme Court opinion in the matter of *Padilla v. Kentucky*. My understanding of the opinion is that defense attorneys always had the duty to specifically ascertain our clients' citizenship and deportation status. Also, we always had the duty to inform our clients of immigration consequences whenever they are unclear. This was obviously not what we were doing in 1997.

Signed under penalty of perjury under the laws of the State of Washington this 17th day of August, 2010 at Kennewick, Washington

James E. Egan

SUBSCRIBED AND SWORN to before me this 17th day of August, 2010.



Notary Public in and for the State of Washington
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To: Abigail Iracheta
Subject: RE: STATE V JAUN PEDRO RAMOS- SUPREME COURT NO 90549-5

Rec'd 12/17/2014

From: Abigail Iracheta [mailto:aIracheta@co.franklin.wa.us]
Sent: Wednesday, December 17, 2014 11:45 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: STATE V JAUN PEDRO RAMOS- SUPREME COURT NO 90549-5

Attached please find the Answer to the Petition for Review in the State v Juan Pedro Ramos case no. 90549-5.

Thank you

Abigail Iracheta
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