IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

No. 30150-8-III
Consolidated with No. 30766-2-III

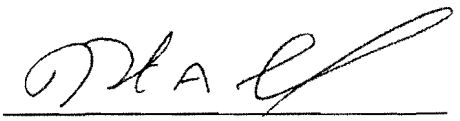
Franklin County Superior Court No. 96-1-50466-1

STATE OF WASHINGTON
Respondent,

vs.

JUAN PEDRO RAMOS
Appellant.

APPELLANT'S ANSWERS TO STATE'S REPLY BRIEF



Brent A. De Young, WSBA #27935

De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333

Attorney for Appellant

ANSWERS TO COUNTERSTATEMENT OF ISSUES

1. Whether or not *Padilla v. Kentucky* applies retroactively does not apply to the instant case.

2. It is not violative of the court rules or the rules of appeal if a defendant brings both a PRP and a direct appeal.

3. The superior court criminal rules applicable following sentencing include CrR 4.2(f) and CrR 7.8.

4. Post-judgment affidavits may be properly included in a PRP.

5. CrR 4.2(f) and CrR 7.8 provide a trial court with broad discretion to admit and to weigh affidavits provided by the Defendant.

6. Since its passage in 1983, RCW 10.40.200 has required that defendants entering a guilty plea be provided with nonspecific immigration warnings.

7. Whether immigration consequences are clear or unclear cannot be determined solely on the basis of whether a defendant has or has not been placed into immigration proceedings.

8. When immigration consequences are unclear or uncertain, criminal defense counsel need only give nonspecific warnings regarding potential immigration consequences. Trial counsel may though have additional Sixth Amendment duties to attempt to mitigate potential immigration consequences.

9. The question of legal prejudice in the context of *Sandoval* cannot be determined based solely on arbitrary removal actions by immigration enforcement officials.

A. RESPONSE TO ASSIGNMENT OF ERROR

The Appellant's motion to withdraw his guilty plea was filed in the Franklin County Superior Court on April 15, 2011. In his initial memorandum, Appellant's argument, based on the *Padilla* and *Sandoval* decisions, was that he received ineffective assistance of counsel. Appellant's argument was brought under CrR 7.8 and also claimed

that equitable tolling applied. On May 25, 2011, Appellant filed additional authority in the Franklin County Superior Court claiming that his plea was not entered knowingly, voluntarily and intelligently. This argument was based largely on the *Martinez* decision.

The Appellant's motion was denied and transferred as a PRP to this Court. The original briefing accompanying the original PRP was not transferred, nor was the verbal argument transcribed.

The State has noted "It is necessary to analyze the personal restraint petition and the appeal separately, as different rules apply to each." *Reply Brief of Respondent* at 3. To some extent this statement is correct. However, the appellate rules don't compel that the direct appeal and personal restraint petition be analyzed in complete isolation of each other.

Personal Restraint Petition

The Appellant appreciates the argument of the State pertaining to PRP. However there is no violation of the court rules or procedure caused by the filing of both a PRP and a direct appeal. The Washington Supreme Court in *Sandoval* noted: "Sandoval had to bring a PRP to meet his burden of proving ineffective assistance of counsel because his counsel's advice does not appear in the trial court record. *See State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (" If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.") *State v. Sandoval,* 171 Wn.2d 163, 169 249 P.3d 1015 (2011). The *Sandoval* decision did not utilize the constrained approach that the State now urges.

Regarding *Chaidez,* this decision decided in the federal context that the *Padilla* decision was not retroactive and that it only applied to convictions that were "final." *U.S. v. Chaidez*, 568 U. S. ____ (2013) (See Slip Opinion at 15); *Padilla v. Kentucky,* 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

On August 29, 2012, this Court found that Mr. Ramos' direct appeal was timely filed. The decision stated in part: "the trial court did not inform Mr. Ramos of his right to appeal nor the deadline for filing a notice of appeal as required by *State v. Sweet,* 90 Wn.2d 282, 286,581 P.2d 579 (1978)." (See *August 29, 2012 Commissioners Ruling)* Therefore, the decision was not "final" for purposes of *Padilla.*

The issue of whether *Sandoval* is retroactive does not appear to be dispositive to any of the unique facts and procedural issues of the instant case. Therefore, this court need not reach them.

The procedural stance of the Appellant's case seem to be analogous with *State v. Martinez*, 161 Wn.App. 436, 253 P.3d 445 (2011). In *Martinez*, the defendant was sentenced on November 7, 2009. *Martinez* at 440. On December 1, 2009, Mr. Martinez moved to withdraw his guilty plea, alleging that his counsel failed to inform him his plea could have immigration consequences or, alternatively, he was incorrectly advised there were only "mere grounds for deportation." *Ibid.* at 447. Trial counsel stated by affidavit that he "knew little about immigration law" and that he had no independent recollection of the case. *Ibid.* Applying *Sandoval,* this Court found that counsel's performance was deficient and also found that Mr. Martinez was prejudiced by the deficient performance. *Ibid.* at 448.

Appellant was unable to produce a declaration from his trial counsel. Mr. Ryals was in declining health and passed away on June 3, 2011. A declaration was submitted by attorney James E. Egan. Mr. Egan's declaration involved a 1997 conviction entered in the Franklin County Superior Court in another matter. Mr. Egan stated that he knew Mr. Ryals very well and that he was also well acquainted with the practices and procedures of the Franklin County Superior Court. Mr. Egan stated that Mr. Ryals never claimed any expertise in the area of immigration. Mr. Egan stated that both he and Mr. Ryals provided only the immigration warnings that were provided in the guilty plea statement to their clients. (See *Declaration of Attorney James Egan – Appellant's Brief – Appendix F)*

The Appellant also submitted a declaration from an experienced immigration attorney. This attorney reviewed the Appellant's criminal and immigration background. (See *Declaration of Immigration Attorney Thomas Roach – CP 17-21*)

The declaration provided in part:

> Mr. Ramos was the beneficiary of a petition filed for him under the Family Unity Act. (§301 of IMMACT90, PL 101-649, 104 Stat. 4978 (Nov. 29, 1990) (8 C.F.R §236.10 to .18 (formerly 8 C.F.R. §242.6), 57 FR 6457 (Feb. 25, 1992). In order to remain eligible to receive legal status under this provision, a beneficiary must not have been convicted of a felony or 3 or more misdemeanors. INA §241(b)(3)(B)

. . .

> The court documents underlying this particular conviction support a finding of an "aggravated felony" by ICE in the immigration courts. See INA 10l(a)(43)(M)(i); 8 USC 110l(a)(43)(M)(i). The value of the automobiles was declared to be over $690,000 in the probable cause statement. The value of the automobiles well exceeded the necessary value to support an aggravated felony. See, *Nijhavvan v. Holder,* 129

> S.Ct. 2294 (2009) (the immigration court considers sentencing admissions and other relevant court documents to determine the amount of loss in a conviction to determine an aggravated felony offense)

. . .

> The crime of Theft in the First Degree provides a basis for Mr. Ramos' virtually certain deportation at the time of his guilty plea. Under 8 USC § 1182(a)(2)(A)(i)(I), INA §212(a)(2)(A)(i)(I), the commission of a crime involving moral turpitude (CIMT) automatically made Mr. Ramos inadmissible to remain in the United States. The U.S. Supreme Court and other authorities have long held that all offenses involving fraud are crimes of moral turpitude. *Jordan v. DeGeorge*, 341 U.S. 223,227-332 (1951).

(CP 19)

This court has noted previously that an aggravated felony in the immigration context is deportable and thus the law was "clear."

> "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Illicit trafficking in a controlled substance is an "aggravated felony." 8 U.S.C. §1101(a)(43)(B). Thus, possessing a controlled substance with intent to deliver is an aggravated felony that, if committed by an alien, is a deportable offense. The law is clear.

State v. Martinez, 161 Wn.App. 436, 448 253 P.3d 445 (2011)

It is common knowledge within the legal community that the immigration authorities do not operate at a level of oversight and precision that would make any delay in commencing immigration proceedings noteworthy or remarkable.

Trial counsel for Mr. Sandoval stated in his own declaration:

> Previously, in similar cases, my non-citizen clients have succeeded in avoiding deportation, so long as they did not remain in custody for more than a few hours after they were sentenced. I believed that this would also occur with Mr. Sandoval's case. Based on this previous behavior of the

> immigration officials, I believed that Mr. Sandoval would be able to avoid being taken into immediate immigration custody and deported.
>
> I told Mr. Sandoval that he should accept the State's plea offer because he would not be immediately deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea.

Sandoval at 172 (quoting Def's PRP Exhibit 1).

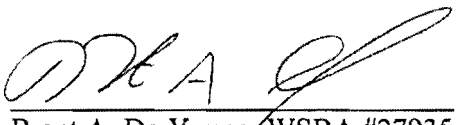
Delays by the immigration authorities are mentioned in many other cases. *State. v. Littlefair*, 112 Wn.App. 749, 762-63 51 P.3d 116 (2002) , review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003) (INS waited more than two years before notifying [Littlefair] that he was subject to deportation); *State v. Chetty*, 167 Wn. App. 432, 435 272 P.3d 918 (2012) (delay of almost six years before immigration proceedings began); *In re Jagana*, 170 Wn.App. 32, 44 282 P.3d 1153, (2012) (delay of over four years before immigration proceedings initiated.)

CONCLUSION

The Appellant's matter is procedurally analogous to *State v. Martinez* , 161 Wn.App. 436, 448 253 P.3d 445 (2011). The Appellant's collateral motion, on the basis of his now-timely appeal is not time-barred.

This court should reverse the decision of the trial court denying the defendant's motion to withdraw his guilty plea and remand the case for further proceedings.

Respectfully submitted this 23rd day of August, 2013.



Brent A. De Young, WSBA #27935
Attorney for Appellant

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent, vs. JUAN PEDRO RAMOS, Defendant/Appellant.	NO. 30150-8-III Consolidated with NO. 30766-2-III APPELLANT'S ANSWERS TO STATE'S REPLY BRIEF CERTIFICATE OF SERVICE

I certify that on this 23rd day of August, 2013, I caused to be sent by U.S. Mail, first-class postage prepaid, a copy of Appellant's Opening Brief to:

Frank William Jenny, II
Franklin County Deputy Prosecutor
1016 N. 4th Ave.
Pasco, WA 99301

Juan Pedro Ramos
1225 N. Union St.
Kennewick, WA 99366

Brent A. De Young, WSBA #27935