

No. 290182

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent/Plaintiff,

v.

JOSE MARTINEZ-RUIZ,

Appellant/Defendant.

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

The Honorable Donald Schacht, Judge

BRIEF OF APPELLANT

Brian Patrick Conry
WSBA No. 32392
Attorney for Appellant
534 SW Third Ave. Suite 711
Portland, Oregon 97204
(503) 274-4430

FILED

AUG 27 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B3

No. 290182

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent/Plaintiff,

v.

JOSE MARTINEZ-RUIZ,

Appellant/Defendant.

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

The Honorable Donald Schacht, Judge

BRIEF OF APPELLANT

Brian Patrick Conry
WSBA No. 32392
Attorney for Appellant
534 SW Third Ave. Suite 711
Portland, Oregon 97204
(503) 274-4430

TABLE OF CONTENTS

	Page
I. TABLE OF AUTHORITIES.....	ii
II. Introduction.....	1
III. ASSIGNMENTS OF ERROR.....	3
a. Assignment of Error I.....	3
b. Assignment of Error II.....	4
c. Issues Pertaining to Assignment of Error I.....	4
d. Issues Pertaining to Assignment of Error II.....	5
IV. STATEMENT OF THE CASE.....	6
Immigration Consequence Issue.....	6
Failure to Investigate Issue.....	19
V. ARGUMENT.....	24
I. (a). Immigration Consequences	29
II. (a) Ineffective Investigation.....	38
VI. CONCLUSION.....	50

TABLE OF AUTHORITIES

	PAGE NO.
<u>FEDERAL CASES</u>	
<u>Brady v. United States</u> 397 U.S. 742, 748 (1969).....	32
<u>Coronado-Durazo v. INS</u> , 123 F.3d 1322 (9 th Cir. 1997).....	11
<u>Evans v. Lewis</u> , 855 F.2d 631, 637 (9 th Cir. 1988).....	44
<u>Hart v. Gomez</u> 174 F.3d 1067 (9 th Cir. 1999).....	45
<u>Hendricks v. Calderon</u> , 70 F.3d 1023, 1036 (9 th Cir. 1995).....	45
<u>Hendricks v. Vasquez</u> , 974 F.2d 1099, 1109 (9 th Cir. 1992).....	44
<u>Hills v. Lockhart</u> , 474 U.S. 54, 57 (1985).....	44
<u>INS v. St. Cyr</u> , 533, U.S. 289 (2001).....	32, 37
<u>Jordan v. De George</u> , 341 U.S. 223, 232 (1951).....	33
<u>McCarthy v. United States</u> 394 U.S. 459, 464-67, (1969).....	32
<u>Padilla v. Kentucky</u> 599 U.S. ____ , 130 S. Ct. 1473 (2010).....	18, 24, 25, 28,29, 32-33, 38,50
<u>Rompilla v. Beard</u> , 545 U.S. 374 (2005).....	45
<u>Strickland v. Washington</u> 466, U.S. 668 (1984).....	28, 29, 39, 42, 43, 44

<u>United States v. Burrows</u> , 872 F.2d 915, 918 (9 th Cir. 1989).....	44
<u>United States v. Kwan</u> , 407 F3d 1005, 1017 (9 th Cir. 2005).....	43

STATE CASES

<u>In Re Personal Restraint of Brett</u> , 142 Wn.2d 868, 873, 16 P.3d 601 (2001).....	30, 39, 41-43
<u>In Re Personal Restraint of Fleming</u> , 142 Wn. 2d 853, 865 16 P.3D 610 (2001).....	30, 39
<u>In Re Personal Restraint of Cook</u> , 114 Wn.2d 802, 814, 732, P.2d 506 (1990).....	42
<u>Rollins v. Georgia</u> , 591 S.E.2d 796, 799 (Ga. 2004).....	46
<u>State v. Barton</u> , 93 Wn.2d 301, 304, 609 P.2d 1353 (1980).....	8
<u>State v. Brand</u> , 120 Wn.2d 365, 369, 842 P.2d 470 (1992).....	40
<u>State v. Cortez</u> , 73 Wn. App. 838, 841-42, 871 P.2d 660 (1994).....	40
<u>State v. Fairbanks</u> , 25 Wn. 2d. 686 (1946).....	21
<u>State v. Gibson</u> , 2009 Wash. App. 2774 (2009).....	1, 21
<u>State v. Goforth</u> , 33 Wn. App. 405 (1982).....	1-2, 21
<u>State v. Holley</u> , 75 Wn. App. 191 (1994).....	12

<u>State v. Jamison</u> , 105 Wn. App. 572, 590, 20 P.3d 1010, 1019.....	41
<u>State v. Littlefair</u> , 112 Wash. App. 749, 51 P.3d 116 (2002).....	7, 28, 36
<u>State v. McFarland</u> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).....	33, 43
<u>State v. Olivera-Avila</u> , 89 Wn. App. 313, 319, 949 P.2d 824 (1997).....	40
<u>State v. Powell</u> , 126 Wn. 2d 244, 258, 893 P.2d 615 (1995).....	29, 38
<u>State v. S.M.</u> , 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).....	29, 38
<u>State v. Shove</u> , 113 Wn.2d 83, 88, 776 P.2d 132 (1989).....	40
<u>State v. Taylor</u> , 83 Wn. 2d 594, 596, 521 P.2d 699 (1974).....	41
<u>State v. Thomas</u> , 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).....	29, 39, 42

STATUTES

RCW 69.50.401(1)(2)(a).....	1
RCW 10.40.200.....	6
RCW 10.73.090.....	8, 11

OTHER AUTHORITY

<i>INA</i> §101(a)(43)(B).....	30
--------------------------------	----

<i>INA § 240(A)(a)(3)</i>	31
<i>INA § 236(C)</i>	31
Wash. Rev. Code§10.40.200(2).....	12
Washington Constitution Article 1, Section 22.....	24
U.S.C. § 1227 (a)(2)(B)(i).....	33
U.S. Constitution Fourteenth Amendment.....	4, 10, 24, 42

INTRODUCTION

On December 3, 2008, Petitioner was convicted by guilty plea of VUCSA – Delivery of Cocaine in violation of RCW 69.50.401 (1)(2)(a). Criminal defense counsel, hereafter counsel, who had represented Mr. Martinez-Ruiz at the time of his plea, filed a motion to vacate judgment on the basis of “newly discovered evidence” that clearly should have been obtained and was available prior to trial. Some documents regarding this initial 7.8 motion, are found at CP 110-113, 114-119, and 124-126. The claim that the evidence could not have been discovered earlier was clearly a weak claim especially in light of the approximate 8 months that Mr. Martinez-Ruiz had been in custody pre-plea and because of criminal defense counsel’s obvious duty to investigate the facts of the case prior to plea entry. The State of Washington’s response is found at CP 85-108. This was an easily defeated claim because newly discovered evidence, which is merely impeaching or discrediting evidence, was, as a matter of law, insufficient grounds for the Superior Court to potentially grant a motion to vacate judgment, as the Superior Court Judge decided on November 9, 2009, CP 126. Clear precedent provides that newly discovered evidence affecting the credibility of a witness is insufficient to withdraw a plea as a matter of law. See State v. Gibson, 2009 Wash. App. 2774 (2009) and State v. Goforth, 33 Wn. App. 405 (1982). Counsel offered no theory or contrary precedent to trump this obvious result.

On approximately December 1, 2009, Mr. Martinez-Ruiz timely filed a motion to vacate judgment relying on CrR 7.8(5), (See Infra. Page 41) based upon the ineffective assistance of counsel representing him at the time of the plea, as well as at the time of the first motion to vacate judgment. CP 128-144. Mr. Martinez-Ruiz proved counsel was ineffective and that he suffered prejudice as a result of the ineffective representation of counsel. Former counsel candidly admitted to not advising Mr. Martinez-Ruiz of the immigration consequences of his plea to VUCSA and a failure to conduct a competent, factual investigation. See Declaration of William D. McCool, signed December 2, 2009. CP 279-282. Counsel opined there was a strong motion to suppress that he would have litigated on behalf of Mr. Martinez-Ruiz if Mr. Martinez-Ruiz and he had known that Martinez-Ruiz would be required to be deported forever if he pled to VUCSA. Counsel said he would have recommended to Mr. Martinez-Ruiz that his client proceed to litigate the Motion to Suppress, if counsel had conducted a competent investigation. He was sure Mr. Martinez-Ruiz would have proceeded to trial if counsel had conducted an effective investigation and/or if counsel advised Mr. Martinez-Ruiz that he would be required to be deported forever if he entered a plea to VUCSA.

Mr. Martinez-Ruiz stated that if he would have been advised of the required deportation immigration consequence of his conviction he would

have insisted that the motion to suppress be litigated and that he would have proceeded to jury trial, if needed. CP 290-292. The motion to suppress filed by counsel prior to plea is found at CP 30-48. This is a strong motion to suppress.

Expert immigration counsel on behalf of Mr. Martinez-Ruiz prepared affidavits which were submitted in support of the Court of Motion to Vacate Judgment, due to the ineffective assistance of counsel, establishing that at the time that Mr. Martinez-Ruiz entered the plea, that it was clear black letter immigration law that Mr. Martinez-Ruiz would be required to be deported forever from the United States following his plea to VUCSA. See Affidavit of Siovhan Sheridan-Ayala. CP 283-285. See Affidavit of Brent DeYoung. CP 286-289.

ASSIGNMENT OF ERROR

Assignment of Error (I)

Did the Superior Court err by finding Martinez-Ruiz merely needed to be advised of the potential consequences of deportation from the United States at the time of his plea entry and rejecting Mr. Martinez-Ruiz's position that the statutory warning in the plea petition was affirmative misadvice of the immigration consequences of his conviction?

Assignment of Error (II)

Did the Court abuse its discretion in its March 10, 2010 letter opinion and in its March 30, 2010 Order Denying Motion to Vacate Guilty Plea by ruling against the Motion based on grounds not raised by Mr. Martinez-Ruiz and by failing to address the ineffective assistance of counsel grounds upon which Mr. Martinez-Ruiz relied to vacate the judgment against him?¹

Issues Pertaining to Assignment of Error (I)

- I. (A.) Was Mr. Martinez-Ruiz's right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the U.S. Constitution and under Article 1, Section 22 of the Washington Constitution² violated by counsel failing to advise

¹ The Court in its letter decision and in the Order Denying Motion to Vacate Guilty Plea, at CP 337-338, and CP 392, respectively, mistakenly states, in pertinent part:

“As the State argues, the Defendant is again arguing there is newly discovered evidence that challenges the facts in this case and supports the Defendant's claim of innocence. The Court agrees there are not sufficient new facts under CrR 7.8 to support vacation of the guilty plea.” CP 337-338.

In its Order Denying Motion to Vacate Guilty Plea, the Court writes:

“3. This Court finds that the Defendant's renewed claims of ‘newly discovered evidence’ challenging the facts in this case and purportedly supporting his claim of innocence are not sufficient new facts under CrR 7.8 to support vacation of the guilty plea or of the judgment and sentence.” CP 392.

²Art. I Section 22 RIGHTS OF ACCUSED PERSONS In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . .

Mr. Martinez-Ruiz accurately of the immigration consequences of his VUCSA conviction?

- I. (B) Did the Superior Court commit legal error by finding the statutory advisal sufficient by stating, in pertinent part, in his March 10, 2010 letter as follows:

“The Court finds most persuasive the State’s argument that Defendant understood all of the consequences of his guilty plea, both from the Court’s oral colloquy with the Defendant and the written plea statement that the Defendant signed. Now, after the fact of the guilty plea, the Defendant argues that he didn’t understand all of the consequences of the plea. His bold statement should not be sufficient to set aside the plea.” CP 337.

- I. (C) Was the statutory advisal itself affirmative misadvice of immigration consequences?

Issues Pertaining to Assignment of Error (II)

- II. (A) Did the Superior Court abuse its discretion by not ruling on Mr. Martinez-Ruiz’s claim that counsel violated his right to effective assistance by failure to advise him accurately of the immigration consequences to Mr. Martinez-Ruiz of his plea of guilty to VUCSA (Delivery of a Controlled Substance: Cocaine)?
- II. (B) Did the Superior Court abuse its discretion and err by not ruling on Mr. Martinez-Ruiz’s allegation that the failure to investigate the facts of the underlying criminal charge resulted in prejudice to Mr. Martinez-Ruiz because he would have

chosen to proceed with a Motion to Suppress and jury trial had counsel conducted an adequate and competent investigation?

STATEMENT OF THE CASE: Immigration Consequence Issue

In his motion to vacate judgment, CP 128-144, filed on December 1, 2009, Jose Martinez-Ruiz alleged as follows:

- (I) Petitioner was not informed in colloquy by the Court accepting his plea to Delivery of Cocaine (hereafter DCS) that his plea was grounds for deportation, exclusion from admission to the United States, or denial or naturalization as required by RCW 10.40.200. Petitioner does not read English very well. Petitioner has only a 6th grade education; some of this education is in Mexico. The plea petition in this case was provided to the Petitioner only in the English language. The petitioner swears by declaration to follow that he was not given the statutorily required warning that his plea was grounds for deportation from the United States. Further, he swears that he did not receive this information from his criminal defense counsel and he did not read and/or did not understand the information in the plea petition that his plea was grounds for deportation. Criminal defense counsel agrees by affidavit (to follow)

that he does not have an independent recollection of providing this information to Petitioner, and may not have done so. A transcript of the colloquy on this matter, which will be attached to the memorandum in support thereof, shows that at the time of the plea the Judge accepting the plea did not orally advise the Petitioner of the immigration consequences of the conviction prior to his plea entry. Please See CR 7.8(b)(1) (relief from final judgment due to mistake, inadvertence, surprise). Also See State v. Littlefair, 112 Wash. App 749, 51 P.3d 116 (2002) (provides that a guilty plea may be vacated when an attorney affirmatively misinforms a client as to the immigration consequences of his guilty plea.)

- (II) Criminal defense counsel (hereafter counsel) and the court accepting the plea had an independent constitutional duty to inform Mr. Martinez Ruiz of the direct immigration consequences of his plea, which includes banishment because banishment is an automatic consequence of a plea to Delivery of Cocaine by a Legal Permanent Resident (hereafter LPR). Criminal defense counsel is aware of the LPR status of Petitioner. This is especially so when an LPR is sentenced to prison and will obviously be turned over to

immigration authorities (ICE and/or DRO³) at the conclusion of the sentence. Also See CR 7.8(b)(5) (any other reason justifying relief from the operation of the judgment, e.g. such as ineffective assistance of counsel). Also see RCW 10.73.090 (collateral attack, authorizing Post-Conviction Relief petition through a Motion to Vacate Judgment). Also see CrR 4.1 and 4.2. “It is a violation of due process to accept a guilty plea without an affirmative showing that the plea was made intelligently and voluntarily.” State v. Barton, 93Wn.2d 301, 304, 609 P.2d 1353 (1980).

(III) In the alternative, if this court finds that Petitioner was advised of the statutory advisal when counsel, Mr. McCool, advised Petitioner that his plea was grounds for deportation, exclusion from admission to the United States or denial of naturalization; then the conviction should be set aside because this is affirmative misadvice of the consequences of Mr. Martinez Ruiz’s conviction. In fact, Mr. Martinez Ruiz must be deported from the United States as a matter of law having entered into a plea to DCS. This is not a discretionary choice of an Immigration Judge or the

³ ICE refers to Immigration and Customs Enforcement, and DRO refers to Department of Removal Operations.

law enforcement arm of the immigration authorities, but rather is required by law. In other words, telling an individual that there are mere grounds for deportation when, in fact, these grounds require the deportation of an immigrant is to affirmatively misadvise that immigrant because “grounds” suggests that there would be defenses to any attempt to deport the immigrant, when in fact there are no grounds to defend Mr. Martinez Ruiz from deportation from the United States but for this Motion to Vacate Judgment.

- (IV) Counsel failed to adequately investigate the facts of the charges against the Petitioner, but if counsel had done so the Petitioner wouldn't have entered the plea of guilty to the charges of DCS as follows:

“On or about April 17, 2008, in Walla Walla County, Washington, I unlawfully delivered cocaine, a scheduled II narcotic.”

Also See CR 7.8(b)(5) (any other reason).

Prejudice accrues under claim (I) as a matter of law and requires the judgment against the Petitioner be vacated. Claim (II), (III), and (IV) under the U.S. Constitution right to effective assistance of counsel, establish the ineffective assistance under the U.S. Constitution and under Article 1,

Section 22⁴ of the Washington State Constitution and prejudiced the Petitioner because he would not have entered into the plea agreement had he been aware that by entering into the plea agreement he was also stipulating to his own banishment from the United States forever. Claim (II) above also makes out the allegation that Petitioner entered into a plea unknowingly and therefore involuntarily. This is violation of due process on the Fifth and Fourteenth Amendment of the United States Constitution. Petitioner represents that the court erred by not advising Petitioner of the direct consequence of deportation of his plea. His conviction has as a direct consequence his banishment from the U.S. because as an automatic matter Mr. Martinez Ruiz is referred from the prison authorities in the State of Washington to the immigration authorities who have no administrative discretion to do anything but deport Mr. Martinez Ruiz from the United States. Insofar as Mr. Martinez Ruiz is stipulating to his banishment by signing the plea petition; his banishment is a direct consequence of that plea. The Judge taking the plea was required to inform Mr. Martinez

⁴ "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..."

Ruiz of this fact as a well established matter of “direct consequence” law. Banishment of an LPR pleading to an aggravated felony is no longer a collateral consequence but is a direct consequence of the criminal conviction. Enforcement of the immigration laws and criminal law enforcement thereof is now co-joined. The State of Washington prison authorities cooperate with the immigration authorities in identifying LPRs subject to deportation. An LPR is virtually certain to be apprehended and deported from the United States forever; this result is a “direct consequence” of a criminal plea to an aggravated felony.

This motion is supported by the Memorandum in Support thereof, which will follow, and is incorporated herein by reference.

RCW 10.73.090 (collateral attack on judgment may be filed up to one (1) year after final judgment) further provides:

- (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
- (2) For the purposes of this section, "collateral attack" means any form of post conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

- (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
- (a) The date it is filed with the clerk of the trial court;
 - (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
 - (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

This motion to vacate judgment is being filed on or about December 1, 2009 within one year of final judgment which occurred at the time of Mr. Martinez-Ruiz's sentencing on January 7, 2009.

Also See State v. Holley, 75 Wn. App. 191 (1994). The court held that defendant's affidavit evidence, when viewed in light most favorable to defendant, disproved the presumption that he was advised of the consequences associated with the guilty pleas. The court noted that he was entitled to a hearing to attempt to persuade the trial court that he did not receive the statutory warning required under Wash. Rev. Code § 10.40.200(2), and that he was not properly informed about the risk of deportation.

Petitioner further alleges that he has not filed a motion to vacate judgment on the grounds outlined above nor could he have at an earlier time. Petitioner acknowledges that former attorney Mr. McCool filed a motion and proposed order to set aside judgment due to newly discovered evidence that has been denied by this court. CP 120-122.

Mr. Martinez-Ruiz stated in his declaration, in support of Motion to Vacate Judgment, signed November 15, 2009, as follows:

“I have been an LPR since October 4, 1984. I came to the United States when I was 23 years old; my date of birth is December 19, 1961. I have strong family ties and I am close to my four (4) U.S. citizen children and my many U.S. citizen grandchildren. My wife of many years recently passed away in February 2009 while I was incarcerated.

I was convicted by plea on December 3, 2008 of Delivery of Cocaine. After I served my time at Washington State prison I was sent to Tacoma, Washington, where I have been held in mandatory detention...

My criminal defense counsel, Mr. McCool, never advised me that I would be required to be deported from the United States if I entered a plea to Delivery of Cocaine. I would not have entered a plea to Delivery of Cocaine had I know this was the required immigration consequence of the plea. I certainly would have gone to jury trial because upon factual investigation that was not undertaken by my criminal defense counsel, prior to plea entry, we have been able to prove that I was likely to any objective viewer not the individual delivering drugs as alleged in the charges against me. In other words, I would have insisted on a jury trial of my case had it been properly investigated by criminal defense counsel pre-trial.

At the time I entered the guilty plea in this case, I had not become completely familiar with the facts leading to my allegedly having delivered cocaine on April 10, 2008, and April 17, 2008.

I now have possession of physical evidence which proves to me beyond all doubt that I was not even around on April 10, 2008, when one of the charges lodged against me allegedly occurred. My time slips from Clifstar Corporation clearly demonstrate that I was at work when I allegedly delivered cocaine.

With regard to the second alleged delivery, the one to which I pled guilty, on April 17, 2008, I was only at work for less than half-hour on that date. I became so ill from drinking activities the night before that I had to leave work, and I ended up going down to the home of Petra Sandoval in Milton-Freewater, Oregon, to “sleep it off”. I did not return home until late afternoon, and, even then, I was no[t] (*sic*) going around in and out of my house. I still was sleeping.

I can state, without hesitation, that I did not deliver cocaine to Angel Gonzales or anyone else on the afternoon of April 17, 2008.

The lack of this investigation being conducted prior to my pleading to the merits of the charges against me contributed to my pleading to a charge that I clearly would have insisted on a jury trial on had this investigation been conducted in a timely fashion I would have agreed to a jail sentence of up to 364 days on a “generic” solicitation offense in order to resolve the case and not be deported.

I have been advised by Immigration counsel, also my post-conviction relief counsel, that solicitation is a non-deportable offense under the Ninth Circuit case *Coronado-Durazo v. INS*, 123 F3d 1322 (9th Cir. 1997). I would have been willing to serve 364 days in jail following a plea to this charge in order to avoid banishment.

Had my criminal defense lawyer advised me of the possibility of a solicitation plea negotiation, I would have wholeheartedly embraced that. My attorney did not advise me of this possible plea bargain.” CP 212, 213, 290-292⁵.

Mr. McCool admitted in his declaration in support of the Motion to Vacate Judgment that:

“I know very little about immigration law [. . .] I was unaware that if a legal permanent resident is convicted of a deportable offense that as long as the conviction is on a direct appeal from that conviction to a court of appeals of the state in which the conviction occurred that he is not deportable by Immigration and Customs Enforcement, (ICE) due to the lack of finality of the conviction. My experience is that if we would have fought and lost the motion to suppress and then appealed from the denial of the motion to suppress following a jury trial and guilty verdict that the appeal would have taken many months, or even a year or two, just at the Court of Appeals level.

I was unaware that violation of the uniform controlled substance act by delivery of a controlled substance was an “aggravated felony” conviction that requires an “alien”, legal permanent resident to be held in custody while immigration proceedings are being fought. I was unaware that if Mr. Martinez Ruiz was placed into deportation proceedings that he could not defend any potential deportation grounds through his general good conduct in the United States but rather he is required to be deported under the immigration laws as an aggravated felon. Had I

⁵ This reference is to both the declaration submitted by the witness as well as the memorandum in support of the Motion to Vacate Judgment. The pertinent portions of the sworn statements were clearly brought to the attention of the Superior Court Judge.

been aware of these circumstances, I would have informed Mr. Martinez Ruiz of them and it is my strong opinion that he would have elected a jury trial.

Further, in hindsight, I believe that because the immigration consequences of a conviction is a material factor for a Legal Permanent Resident (hereafter LPR) in deciding whether or not to enter into a plea, I should have advised Mr. Martinez Ruiz not only that DCS is grounds for deportation but further that he would be required to be banished from the United States forever if he entered into the plea bargain.

I also would have recommended to Mr. Martinez Ruiz that he bail out on the criminal charge because if he was convicted he would continue to remain out of immigration custody until his direct appeal in the state of Washington was completed on his behalf. Of course, an appeal might not have been necessary if we obtained a jury acquittal or the state might have been appealing if we had won the motion to suppress.

It now occurs to me that if Mr. Martinez Ruiz were out of custody, the chances immigration would execute the deportation laws and arrest him as an aggravated felon must be less than if he is sitting in prison in the state of Washington where immigration routinely picks up immigrants for deportation.

I was aware that Mr. Martinez Ruiz was a legal permanent resident. I was aware that he had been in the United States for over twenty years at the time of his plea. I really hoped that if immigration proceedings were instituted against him that he would be able to remain in the United States. I did no independent legal research on the immigration consequences regarding a delivery of controlled substance conviction on a legal permanent resident at the time I represented Mr. Martinez Ruiz.” CP 214-216, CP 279-282.

Immigration experts also provided information to the Court on behalf of Mr. Martinez-Ruiz. Siovhana Sheridan-Ayala⁶ stated in pertinent part as follows:

⁶ Ms. Siovhana Sheridan-Ayala also provides in her affidavit information about her background as follows: “I have been a Washington State Bar member since December 8, 2003. I have also been an Oregon State Bar member since April 27, 2007. I have the majority (about 95%) of my practice in immigration law. I am a member of the American Immigration Lawyers Association (hereafter AILA), Oregon and Washington chapter, as well as national chapter. I am also a member of the National Immigration Project, and I

“From my experience, if an “alien” is placed into the Washington Department of Corrections on a 20-month prison sentence it is virtually certain that this “alien” will be picked up by ICE/DRO⁷ and placed into removal proceedings, if appropriate. By “removal proceedings,” I mean deportation proceedings; they are now called removal proceedings by the immigration laws. By if appropriate, I mean if the “alien” is deportable. The case will certainly be screened by Immigration and Customs Enforcement (hereafter ICE) for potential deportation proceedings.

If an LPR with any number of years in that status in the United States is convicted of Delivery of Controlled Substance (hereafter DCS) by plea, it is virtually certain and legally required that this immigrant be deported from the United States forever. This LPR can be further expected to be held into (*sic*) mandatory detention until such time as he is ordered deported or the “aggravated felony” conviction is set aside. DCS is an aggravated felony under immigration law. An LPR convicted of an aggravated felony must be deported from the United States. There is no basis for this LPR to seek Cancellation of Removal. Cancellation of Removal is prohibited under the immigration laws for an aggravated felon LPR, even one with 25 years of LPR status in the United States.

An “alien” convicted of an aggravated felony, such as DCS cannot be released as a matter of law under INA 236(c). There is nothing surprising about an immigrant being placed into Washington State Corrections Division one day and soon thereafter a detainer being placed on that immigrant. Based on my experience and the law, I would expect that to happen. I would not expect that a LPR would be sentenced to prison on a DCS conviction and then not be picked up by ICE/DRO and not be placed into immigration proceedings. I doubt that that ever happens. The execution of the immigration laws is at an all-time high in the states of Washington and Oregon throughout the United States.” CP 215-216, CP 283-285.

am admitted to the Ninth Circuit Court of Appeals and the District Court of Oregon and the Western District of Washington. I actively represent immigrants who have been convicted of crimes. I am familiar with the detainer procedures throughout the state of Washington at this time.” (page 1 of Ms. Siovhana Sheridan-Ayala’s affidavit)

⁷ ICE refers to Immigration and Customs Enforcement, and DRO refers to Department of Removal Operations.

An additional immigration expert, Brent De Young, testified on behalf of Mr. Martinez-Ruiz through the affidavit stated in pertinent part as follows:

“In my opinion, it is very clear that an LPR like the Petitioner in this case, who is from Mexico and does not have any available claim for relief from deportation available, who enters a plea to an aggravated felony like DCS is stipulating to his own lifetime banishment from the United States.

However, if an LPR litigates his case and is convicted at a jury-trial and the case is subsequently appealed, this is not considered a final conviction for immigration purposes. That is, an LPR is not deportable based upon a jury-trial conviction if the matter is placed on direct appeal to the State of Washington Court of Appeals. The LPR remains in LPR status as far as the immigration authorities are concerned and is not even susceptible to deportation proceedings until the direct appeal has been fully resolved or all further avenues of appeal have been exhausted and a mandate has issued.

An LPR charged with an aggravated felony has no compelling reason to plead guilty as charged when the immediate consequence will be lifetime banishment. In my opinion, the only logical legal course is to proceed to trial in such cases involving aliens charged with offenses with such severe immigration consequences.” CP 215-217, CP 286-288.

Mr. De Young further makes clear that banishment of an LPR convicted of a drug trafficking aggravated felony such as DCS is a direct consequence of that plea by the LPR as follows:

“From my experiences, if an alien was placed into the Washington Department of Corrections on a 20-month prison sentence it is virtually certain that this alien would be transported at the end of his or her sentence by ICE/DRO. The alien would then be placed into removal proceedings if the alien has either pleaded guilty or been found guilty of certain offenses. Removal proceedings are essentially deportation proceedings; they are so called now by under current immigration law. Jailed aliens are identified and routinely screened by ICE for potential deportation proceedings...”

“Administrative detention (that is, being held in immigration jail) by DRO, is mandatory for aliens convicted of a DCS following the completion of their state court sentences See INA 236(c).

In my experience, it is not uncommon for an alien defendant to be in the custody of Washington State Department of Corrections and not have an immigration detainer placed on him until shortly before his DOC release date. Based upon various Washington Records Act (WRA) and Freedom of Information (FOIA) requests that I have made, I have learned that DOC provides lists of inmates that are close to their anticipated release dates to ICE authorities. ICE then “runs” each name in its computer database to check for alienage and deportability.

Since the time that I began practicing law, the complexity of the relationships between immigration authorities and state custody authorities has grown from almost nothing to what I would best describe as a thoroughly enmeshed system. It would be foolish to expect that any individual could somehow now slip through scrutiny of immigration authorities while they are being held in state custody. The execution of the immigration laws is at an all-time high in the state of Washington and throughout the United States.” CP 215-217, CP 286-288.

The U.S. Supreme Court in Padilla v. Kentucky, 599 U.S. ___ (2010), agreed, and confirmed Mr. DeYoung’s opinion that, as a matter of law, banishment is a “penalty” of the DCS conviction virtually certain to be suffered by a LPR as a matter of law. Padilla eliminated the direct versus collateral consequence language previously used by many courts. The Supreme Court never used this distinction and has now rejected the use of this terminology to describe immigration consequences which are inextricably linked to the criminal proceedings.

STATEMENT OF THE CASE: Failure to Investigate Issue

Additional facts relevant to the failure to investigate claim, which this Court may choose not to reach if it rules for Mr. Martinez-Ruiz on his counsel's clear failure to advise of immigration consequences conviction violation are found in Mr. Martinez-Ruiz's declaration at CP 291, which states, in pertinent part as follows:

“I certainly would have gone to jury trial because upon factual investigation that was not undertaken by my criminal defense counsel, prior to plea entry, we have been able to prove that I was likely to any objective viewer not the individual delivering drugs as alleged in the charges against me. In other words, I would have insisted on a jury trial of my case had it been properly investigated by criminal defense counsel pre-trial.

At the time I entered the guilty plea in this case, I had not become completely familiar with the facts leading to my allegedly having delivered cocaine on April 10, 2008, and April 17, 2008.

I now have possession of physical evidence which proves to me beyond all doubt that I was not even around on April 10, 2008, when one of the charges lodged against me allegedly occurred. My time slips from Clifstar Corporation clearly demonstrate that I was at work when I allegedly delivered cocaine.

With regard to the second alleged delivery, the one to which I pled guilty, on April 17, 2008, I was only at work for less than half-hour on that date. I became so ill from drinking activities the night before that I had to leave work, and I ended up going down to the home of Petra Sandoval in Milton-Freewater, Oregon, to “sleep it off”. I did not return home until late afternoon, and, even then, I was no going around in and out of my house. I still was sleeping.

The lack of this investigation being conducted prior to my pleading to the merits of the charges against me contributed to my pleading to a charge that I clearly would have insisted on a

jury trial on had this investigation been conducted in a timely fashion.” CP 291.

Mr. McCool states at CP 279-280, in pertinent part as follows:

“In hindsight, one mistake I made in my representation of petitioner on the multiple charges of Delivery of a Controlled Substance (hereafter DCS) is that I trusted an officer’s claim that I should not have just trusted. I am convinced from going to the scene where Sergeant Alessio indicated he was when he claimed he made an observation of Mr. Jose Martinez Ruiz that the claimed identification of petitioner could not have been made from that distance. Sergeant Alessio said he watched Mr. Martinez Ruiz engage in a hand to hand exchange with a third party (Angel Gonzalez) who later allegedly then handed drugs to an informant. I went to the scene where Petitioner had allegedly been identified by the officer from 250-300 feet away, which is the about the length of a football field. It would have been extremely difficult for the police officer to have seen this to the extent where he could later make an identification of petitioner as the individual who had handed something to Angel Gonzalez. I was not able to recognize the facial features of somebody I have worked with for 8 years from that distance. I should have gone out there prior to the plea rather than after the plea. Had I done so, I would not have recommended to the client that he entered into the plea bargain.

I also should have deposed or otherwise formally interviewed Sergeant Alessio prior to the plea on this matter to get complete specifics as to his claimed observations. I further now know that the petitioner had an alibi defense at the time of the alleged drug transactions on April 10, 2008 and April 17, 2008. I should have come to realize such an alibi defense was available through pre plea-investigation and pre plea-consultation with petitioner. If I had done so, I also would have recommended to the petitioner that he not enter into the plea. I am confident that the petitioner would not have entered into the plea if I had recommended against it.”

Regarding the motion to vacate judgment, filed by former criminal counsel, the State of Washington replied as follows:

“I don’t believe this newly discovered evidence, if, in fact, it is newly discovered – I’m convinced that the analysis that Mr. McCool has made of this evidence, maybe even some supplemental information from Sergeant Alessio and/or the State has resulted in a new analysis of a potential defense here, but I don’t think in the true sense of the word as the case laws sets forth it is newly discovered evidence.” RP 202.

Clear precedent provides that newly discovered evidence affecting the credibility of a witness is insufficient to withdraw a plea as a matter of law. *See State v. Gibson*, 2009 Wash. App. 2774 (2009), *State v. Goforth*, 33 Wn. App. 405 (1982), and *State v. Fairbanks*, 25 Wn. 2d. 686 (1946).

The investigator for Mr. Martinez-Ruiz, on his motion to vacate judgment due to the ineffective assistance of counsel claim, and in particular on the failure to investigate the facts of the case allegation, Winthrop Taylor, a private investigator with 33 years of police experience, states at CP 303-309, in pertinent as follows:

“In December 22, 2009, I went to the vicinity of 737 North 8th Avenue in the City of Walla Walla, Washington and viewed the location where the Petitioner was accused of making a ‘hand to hand exchange’ with Mr. Angel Gonzalez. (Walla Walla Superior Court, Case No. 08-1-001654-5) on April 17, 2008.

Prior to my visit I had read the Declaration of Sgt. Alessio in this matter dated September 30, 2009 (Exhibit 1), and Defendant’s Reply Memorandum filed October 22, 2009 (Exhibit 2). In summary, Sgt. Alessio avowed that at about 4:15 PM on April 17, 2008, he had seen a Hispanic male, later identified as the Petitioner, exit the rear of 737 N. 8th Avenue, and, ‘reached out with his right hand and made an exchange of something with the target (Angel Gonzalez), who then left.’

Mr. McCool, arguing on behalf of the Petitioner in his Reply Memorandum (Exhibit 2), stated that he had a telephone conversation with the prosecutor, Mr. Gabriel Acosta, on October 21, 2009, in which he learned the exact location from where Sgt. Alessio’s observations were made. That location was determined

to be, “on the west side of 9th (Avenue) just south of the intersection of Paine (Street) and 9th (Avenue)’.

At about 10:20 AM, I located the Petitioner’s then residence clearly numbered as 737 North 8th Avenue, Walla Walla. It is a blue-gray painted, single story, wood framed house, with a unique pyramid shaped roof the upper tip of which is flat with a concrete block chimney. I then proceeded to the location from which Sgt. Alessio viewed the rear yard, as described above.

Once on 9th Avenue, just south of Paine Street, parked at the west curb, I was able to look through the north side yard of a yellow house bearing the address numbers 738 North 9th Avenue and see a limited part of the rear yard and rear of the Petitioner’s house. I took a photograph using the unmagnified lens from this position (Exhibit 3). I next took a close-up photo from the same position using the magnified lens (Exhibit 4).

The view into the rear yard is obstructed by trees, shrubs, a chain link fence, mechanical equipment, automobiles, and several uprights of what appears to be a trampoline. The rear of the house was at a distance of 85 yards (255 feet) from my location as measured with a Leica Rangemaster 1200, digital optical range finder, accurate to ±1 yard.

On January 4, 2010, I spoke with Mr. Lyle Roofff, Mr. McCool’s legal assistant. He confirmed that he was with Mr. McCool and took the photographs referred to in Exhibit 2. Mr. Roofff confirmed that he was in the same location as I was when I made my observations [. . .]

During my police and investigative experience, I have conducted numerous surveillances. It is my opinion based on my personal experience that a police officer in the position described could not have distinguished features sufficient to make an accurate identification or to have seen anything exchanged between two individuals.

[. . .]

Mr. Gonzalez told me he was charged with the delivery of cocaine to a confidential informant working for the police on 04-10-08 and again on 04-17-08. Gonzalez said that on May 23, 2008, he entered a negotiated plea of guilty to one count of delivery of cocaine on April 10, 2008; Walla Walla Superior Court Case No. 08-1-001654-5. He said the count was dismissed. I subsequently verified that statement with the court file.

I showed the two photographs I had obtained from Ms. Sandoval to Mr. Gonzalez. He said they were of a man known to him as Jose Martinez-Ruiz the Petitioner in this case. Mr.

Gonzalez said he had done irrigation work for Jose Martinez-Ruiz at his home.

Mr. Gonzalez told me that while he was confined at Airway Heights, a DOC Corrections Officer told him he was to be transported to the State Penitentiary as he was needed in court in Walla Walla. While at the Penitentiary, the prosecutor, Mr. Acosta came and spoke with Mr. Gonzalez. Mr. Gonzalez said that Mr. Acosta wanted him to testify against the Petitioner. Mr. Acosta asked Mr. Gonzalez if he had any legitimate reason to be in the Petitioner's back yard on April 17, 2008. Mr. Gonzalez said he told Mr. Acosta that he was doing irrigation work at that time and could have gone into the backyard for tools. Mr. Gonzalez told he was not called to testify and in about 3 weeks he was sent back to Airway Heights. Mr. Gonzalez told me that he believed the confidential informant who had set him up was a man he knew as 'Chad'.

I subsequently verified with court documents that on 10-24-08, Mr. Acosta petitioned the court to have Mr. Gonzalez transported for the Petitioner's trial scheduled for 12-11-08

[. . .]

After reading the report, Mr. Gonzalez told me, 'I did not obtain the cocaine that I sold to the confidential informant on April 10, 2008, from Mr. Jose Martinez-Ruiz,' the Petitioner in this case.

Concerning the buy on 04-17-08, Gonzalez read the police report in my presence. The report that the SOI (source of information), was followed to Cayuse and Cherry and after about 15 minutes Angel Gonzalez came out and then they went around town to a couple of locations. They stopped at Harvest Foods on South 2nd, where Angel Gonzalez got money from another individual who wanted cocaine. Angel was dropped off at 8th and Elm Street and went down an alley between 8th and 9th returning with drugs.

Mr. Gonzalez told me this did not sound remotely familiar to anything he recalled [. . .]

Mr. Gonzalez told me he did not think that Jose Martinez-Ruiz was the supplier of the drugs on 04-17-08, but was not positive. Mr. Gonzalez stated that he didn't even think that he (Gonzalez) had been involved in the buy on 04-17-08. [. . .]"

The photographs from the scene are at CP 319-320. Mr. Martinez-Ruiz's timecard for work on April 10, 2008 and April 17, 2008 is at CP

323-326. There is a complete, unimpeachable alibi for April 10, 2008.

The declaration of Sergeant Alessio is found at 312-313.

SUMMARY OF ARGUMENT

I. The Immigration Consequences for a Legal Permanent Resident of a plea to an aggravated felony conviction charge clearly requires the LPR's deportation, and the LPR client must be advised of this clear immigration consequence prior to plea or counsel's plea advice is ineffective assistance as a matter of law.

Advice “in the words of the plea petition” of potential immigration consequences is inadequate, ineffective assistance of counsel under the Sixth Amendment of the United States Constitution (the effective assistance clause), applicable to the States through the Fourteenth Amendment and resulted in prejudice to Mr. Martinez-Ruiz. Mr. Martinez-Ruiz would not have pled guilty to VUCSA, but would have insisted on a jury trial, had he been accurately advised by counsel that deportation was a required, virtually certain consequence of his plea to VUCSA. Mr. Martinez-Ruiz further submits that failure to advise accurately of the immigration consequences of the VUCSA conviction is ineffective assistance under the Washington Constitution Article 1, Section 22.

An order of deportation from the United States is a penalty that Mr. Martinez-Ruiz suffers as a direct consequence of his plea entry. The United States Supreme Court, in Padilla, stated that immigration consequences are not collateral consequences of convictions. Immigration

consequences are a penalty inextricably woven with the criminal sanction. Criminal defense counsel has an affirmative obligation to advise an “alien” defendant of the immigration consequences of a conviction prior to plea. Mr. McCool was ineffective as a matter of law, by his own admission, for failing to do so. Counsel did not advise Mr. Martinez-Ruiz that he would be required to be deported from the United States if he entered the plea. The plea petition’s statutory warning to Mr. Martinez-Ruiz did not advise him that he would be required to be deported following his plea to an aggravated felony.

Mr. Martinez-Ruiz had pointed out to the Superior Court at the hearing on the matter in his Memorandum in Support of Motion to Vacate Judgment that the US Supreme Court heard oral argument in Padilla v. Kentucky, 08-1651, on October 13, 2009, an affirmative misadvice of immigration consequences case that appeared to reverse a Kentucky conviction caused by the affirmative misadvice of criminal defense counsel to an immigrant that he would not be deported when the conviction he pled to DCS (Delivery of a Controlled Substance) required his deportation under the immigration laws. RP 50-51. Mr. Martinez-Ruiz pointed out that decision in Padilla would likely affect any decision the Superior Court made and urged the Superior Court to await the Padilla decision if it was unable to grant the Motion to Vacate based on the clear claim that counsel had failed to properly investigate the case.

Mr. Martinez-Ruiz and counsel had agreed that, had Mr. Martinez-Ruiz received accurate immigration advice, he would have litigated a Motion to Suppress and insisted on a jury trial, if needed. Ineffectiveness and prejudice is established as a matter of law under the U.S. and Washington Constitutions.

II. Ineffective investigation of the factual basis of the charges against Mr. Martinez-Ruiz prejudiced him and required the motion to vacate be granted.

The Superior Court Judge abused his discretion by deciding this Motion to Vacate Judgment on a ground not argued by counsel for Mr. Martinez-Ruiz and by overlooking or ignoring grounds for vacation of judgment argued by Mr. Martinez-Ruiz. Grounds for vacation of the judgment urged by Martinez-Ruiz but ignored or overlooked by the Superior Court Judge are as follows:

1. Ineffective assistance of counsel due to failure to accurately advise of immigration consequences and resulting prejudice to Mr. Martinez-Ruiz.
2. Failure to investigate and said failure resulted in prejudice to Mr. Martinez-Ruiz because he would have chosen to proceed with a Motion to Suppress and jury trial had counsel conducted an adequate, competent investigation.

The Superior Court Judge mistakenly viewed Mr. Martinez-Ruiz's submission as a Request to Vacate the Judgment based upon "newly

discovered evidence.” Mr. Martinez-Ruiz made no such claim. The prosecutor made that claim on behalf of Mr. Martinez-Ruiz, apparently hoping the Judge would conflate his analysis or due to the prosecutor’s own confusion? The Superior Court Judge letter decision overlooked the grounds argued by Mr. Martinez-Ruiz, and conflated his decision with the mistaken argument by the prosecutor that Mr. Martinez-Ruiz was seeking to vacate the judgment based upon “newly discovered evidence.” Mr. Martinez-Ruiz did no such thing. The Superior Court Judge abused his discretion in deciding the case against Mr. Martinez-Ruiz on a basis that Martinez-Ruiz did not submit to the Court. Section (1) addresses the failure to give immigration consequence accurate advice to Mr. Martinez-Ruiz. Counsel again summarizes the error made by the Superior Court Judge for the purpose of clarity regarding how the Superior Court abused its discretion.

1. Failure to Advise of Immigration Consequences

Mr. Martinez-Ruiz’s conviction should be set aside due to the failure of counsel to accurately advise him of immigration consequences of his conviction pre-plea. The statutory warning that the Superior Court Judge found that Mr. Martinez-Ruiz received pre-plea affirmatively misadvised Mr. Martinez-Ruiz of the immigration consequences of his conviction because the plea petition merely advised that a plea of VUCSA was grounds for deportation proceedings and not that the plea would

require his deportation from the United States forever as a matter of well-established immigration law. The plea petition warning, if given, was certainly watered down by the colloquy between the Court and Mr. Martinez-Ruiz and counsel at the time of the plea. The plea petition advice of immigration consequences is as follows:

“If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under 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 52.

Moreover, Mr. Martinez-Ruiz’s position that counsel had an affirmative obligation to advise his client of his required deportation prior to his plea entry has been clearly embraced by the Padilla v. Kentucky holding, construing the obligations of counsel under Strickland v. Washington.

2. Failure to Investigate

The Superior Court also ignored and overlooked Mr. Martinez-Ruiz’s claim that counsel was ineffective due to a failure to investigate the criminal case against his client. Counsel admitted he failed to investigate the prosecution case against his client. Mr. Martinez-Ruiz states he would have chosen to go to jury trial if the case had been adequately investigated. His claim is corroborated by his lengthy permanent resident status in the United States and also by his continuing litigation of this matter, despite his long incarceration at the Northwest Detention Center. His claim is further corroborated by the strength of the claims made herein. Clearly,

counsel's investigation failed to take place in a timely fashion, and counsel has admitted as much in his declaration in support of the Motion to Vacate Judgment. Therefore, it is clear that the conviction against Mr. Martinez-Ruiz must be vacated.

**I(a) ARGUMENT: STANDARD OF APPELLATE REVIEW:
IMMIGRATION CONSEQUENCES**

This court reviews a trial court's CrR 7.8 ruling for an abuse of discretion. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn. 2d 244, 258, 893 P.2d 615 (1995). Under CrR 7.8(b) (4) and (5) a party can be relieved of a final judgment if the judgment is void or for ' {a}ny other reason justifying relief from the operation of the judgment.'

To prevail on a claim of ineffective assistance of counsel a defendant must prove that his counsel's performance fell below an objective standard of reasonableness and that this deficiency in his counsel's performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). Accord State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

The Superior Court Judge's ruling denying Mr. Martinez-Ruiz's ineffective assistance of counsel ("IAC") claim is reviewable on appeal under a *de novo* standard of review. Ineffective assistance of counsel is a mixed question of law and fact, Strickland, 466 U.S. at 698, and therefore

such claims are reviewed on appeal under a de novo review standard. In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).
Accord In re Personal Restraint of Fleming, 142 Wn.2D 853, 865 16 P.3D 610 (2001).

I(b). The Admitted Failure to Warn of Required Immigration Consequences Require This Court to Vacate the Judgment

Mr. Martinez-Ruiz, a native and citizen of Mexico, first entered the United States on October 4, 1984, at the age of 23, and was admitted as a Legal Permanent Resident (hereafter LPR) of the United States on October 4, 1984. He has extremely significant family and social ties to the United States, including four (4) U.S. citizen children and many U.S. citizen grandchildren, -- Declaration of Mr. Martinez-Ruiz in support of Motion to Vacate Judgment. CP 76-78. Prior to this plea entry, found at CP 49-57, he was not advised by criminal defense counsel that he would be required to be deported from the United States forever as consequence of his plea. VUCSA, Delivery of Cocaine is an aggravated felony crime under *Immigration and Nationality Act (INA) § 101(a)(43)(B)*, which provides in pertinent part as follows:

“The term ‘aggravated felony’ means – (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);”

Mr. Martinez-Ruiz has no relief from deportation following a conviction for an aggravated felony. All that former criminal defense

counsel (hereafter referred to as counsel) had to do to know this was to read *INA* § 240(A)(a)(3) which provides in pertinent part:

“Cancellation of removal for certain permanent residents—
The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—(3) has not been convicted of any aggravated felony.”

After Mr. Martinez-Ruiz served his sentence in the Washington prison system, Martinez-Ruiz was transferred to the Northwest Detention Center in Tacoma, Washington. He was held in mandatory detention under *INA* § 236(C), which provides:

“(c)Detention of criminal aliens—

(1)*Custody.*—The Attorney General shall take into custody any alien who—

- (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),
- (B) is deportable by reason of having committed any offense covered in section 237(a)(A)(ii), (A)(iii), (B), (C), or (D),
- (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
- (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) *Release.*—The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides

pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.”

Mr. Martinez-Ruiz subsequently was ordered deported.

It is fundamental that a plea that is involuntary, unintelligent, or uninformed is an invalid plea. Brady v. United States, 397 U.S. 742, 748 (1969); see also, McCarthy v. United States, 394 U.S. 459, 464-67 (1969).

The US Supreme Court in INS v. St. Cyr, 533 U.S. 289 (2001) stated that the Attorney General has no discretion to not banish a legal permanent resident convicted of an aggravated felony after the effective date of AEDPA⁸ and IRRIRA⁹. (pg 40)

The Supreme Court in the recent case of Padilla v. Kentucky, 599 U.S. ___ (2010), held that deportation is a “penalty,” not a “collateral consequence,” of the criminal proceeding. The Supreme Court held that in light of the unique severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, the Sixth Amendment requires defense

⁸ AEDPA refers to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 (hereafter AEDPA).

⁹ IIRIRA refers to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (effective April 1, 1997) (hereafter IIRIRA).

counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen suffers ineffective assistance of counsel. In so holding, the Court described deportation as a “particularly severe penalty.” Cf. *Jordan v. De George*, 341 U.S. 223, 232 (1951) (Jackson, J.) (Deportation is a “life sentence of banishment in addition to the punishment which a citizen would suffer from the identical acts.”)

The holding of *Padilla v. Kentucky*, found at page 11 of the U.S. Supreme Court website majority opinion, which Justice Stevens wrote, and that four other Justices joined, provides in pertinent part as follows:

“In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. See 8 U. S. C. §1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.”

The rule is that, at the very least, where the immigration consequences of a plea can be easily determined by reading the immigration statute that makes the deportation mandatory and the consequence truly clear, counsel has a duty to give correct immigration advice. This is the exact situation in Mr. Martinez-Ruiz's case.

I.(c) Counsel's Duty To Not Make Material Omissions

The United States Supreme Court in the Padilla decision made clear that errors of omission are material to an evaluation of whether or not counsel was ineffective. The Solicitor General had argued in Padilla that the court should find Padilla received defective advice because of clear affirmative misadvice. The Solicitor General wanted to limit Defense Counsel's obligations to not providing affirmative misadvice; and not impose on counsel the duty to provide accurate immigration advice. The court rejected the Solicitor General's argument stating, in pertinent part (pg. 12-13) of the majority opinion:

“In the United States' view, “counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ,” though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor General's proposed rule unpersuasive, although it has support among the lower courts. See, e.g., *United States v. Couto*, 311 F. 3d 179, 188 (CA2 2002); *United States v. Kwan*, 407 F. 3d 1005 (CA9 2005); *Sparks v. Sowders*, 852 F. 2d 882 (CA6 1988); *United States v. Russell*, 686 F. 2d 35 (CAD9 1982); *State v. Rojas-Martinez*, 2005 UT 86, 125 P. 3d 930, 935; *In re Resendiz*, 25 Cal. 4th 230, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as “result-driven, incestuous . . . [,and]

completely lacking in legal or rational bases.” Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference “between an act of commission and an act of omission” in this context. *Id.*, at 30; *Strickland*, 466 U. S., at 690 (“The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance”); see also *State v. Paredes*, 2004–NMSC–036, 136 N. M. 533, 538–539.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” *Libretti v. United States*, 516 U. S. 29, 50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the *Strickland* analysis.” *Hill v. Lockhart*, 474 U. S. 52, 62 (1985) (White, J., concurring in judgment).”

I.(d) Immigration Consequences of Convictions are Not Collateral Consequences

Padilla also completely dispatched with the concept that immigration consequences are collateral to a criminal conviction stating (pg. 8-9 of the majority opinion):

“[D]eportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F. 2d 35, 38 (CADDC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of

deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U. S., at 322 (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions”).

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla’s claim.”

I.(e) Affirmative Misadvise

State v. Littlefair, 112 Wash. App 749 51 P.3d 116 (2002) provides that a guilty plea may be vacated when an attorney affirmatively misinforms a client as to the immigration consequences of his guilty plea. Deportation was a virtual certainty of Mr. Martinez-Ruiz’s guilty plea.

Even if Mr. Martinez-Ruiz was advised of the statutorily required warning in the plea form by Mr. McCool, or even if he is found by the court to have read the statutory warning, that DCS is “grounds” for deportation, the wording of this warning is itself a form of affirmative misadvise because it states that DCS is mere “grounds” for deportation but fails to advise Mr. Martinez-Ruiz of the truth that his plea to DCS requires his banishment from the United States forever.

The word “grounds” would suggest that petitioner could be charged with deportability, not that he would be mandatorily deported. Mr. McCool states in his affidavit that he believed that if the Petitioner

was placed into immigration proceedings he would have an ability to challenge his deportation through his many years in the United States. The definition of grounds” in Merriam-Webster Online Dictionary¹⁰ is a “basis for belief, action, or argument <ground for complaint>—often used in plural [. . .] *b (1)*: a fundamental logical condition.”

“Grounds” means a mere charge, not an automatic banishment or deportation result. The significance is material. Cf. the rationale of INS v. St. Cyr, a U.S. Supreme Court opinion discussed *infra* at page 14 that there is a world of difference between a possibility of deportation and the requirement of deportation when assessing the immigration consequences of a plea to a criminal charge. This was the basis for the court finding that changes in the immigration laws, which occurred through 1996 and 1997 legislation making immigration consequences of criminal convictions more severe by expanding the list of aggravated felonies and by decreasing the sentences that render a conviction an aggravated felony and that further limited the potential for relief from deportation of any LPR convicted of an aggravated felony; did not apply retroactively to LPR-alien who had pled prior to these changes in the list of convictions that are aggravated felonies.

Mr. Martinez-Ruiz submits that when an LPR who is required to be deported from the U.S. forever by a plea to an aggravated felony is told

¹⁰ The Merriam-Webster Online Dictionary is based on the print version of *Merriam-Webster's Collegiate © Dictionary, Eleventh Edition*.

that this is mere “grounds” for deportation by criminal defense counsel through review of the statutory warning on the plea petition that this “warning” is unfortunately affirmative misadvice by that attorney of the direct/collateral immigration consequences of his conviction. It clearly does not matter in the ineffective assistance of counsel area that McCool’s misadvice may be considered to be collateral, because affirmative misadvice of significant “collateral” consequences is presently found to constitute ineffective assistance.

This affirmative misadvice argument was made to the Superior Court, in the pages 12, 19-21 of the Memorandum in support of motion to vacate judgment. The Solicitor General conceded as much in its position before the United States Supreme Court in Padilla. That is, that affirmative misadvice of immigration consequences is ineffective assistance of counsel. Clearly, the Superior Court abused its discretion in overlooking this meritorious ground to vacate the judgment.

II.(a) ARGUMENT: STANDARD OF APPELLATE REVIEW:

FAILURE TO INVESTIGATE

This court reviews a trial court’s CrR 7.8 ruling for an abuse of discretion. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn. 2d 244, 258, 893 P.2d 615

(1995). Under CrR 7.8(b) (4) and (5) a party can be relieved of a final judgment if the judgment is void or for ‘{a}ny other reason justifying relief from the operation of the judgment.’

To prevail on a claim of ineffective assistance of counsel a defendant must prove that his counsel’s performance fell below an objective standard of reasonableness and that this deficiency in his counsel’s performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). Accord State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

The Superior Court Judge’s ruling denying Mr. Martinez-Ruiz’s ineffective assistance of counsel (“IAC”) claim is reviewable on appeal under a *de novo* standard of review. Ineffective assistance of counsel is a mixed question of law and fact, Strickland, 466 U.S. at 698, and therefore such claims are reviewed on appeal under a *de novo* review standard. In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Accord In re Personal Restraint of Fleming, 142 Wn.2D 853, 865 16 P.3D 610 (2001).

II. (b) Statement of Washington Law: Failure to Investigate

Pursuant to CrR 7.8, a court may relieve a party from a final judgment because of (1) mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining the judgment, (2) newly discovered

evidence, (3) fraud, (4) if the judgment is void, or (5) for any other reason justifying relief from the judgment. CrR 7.8(b)(1)-(5). The court may vacate a judgment under CrR 7.8(b)(5) under “extraordinary circumstances not covered by any other section of the rule.” State v. Olivera-Avila, 89 Wn. App. 313, 319, 949 P.2d 824 (1997) (citing State v. Brand, 120 Wn.2d 365, 369, 842 P.2d 470 (1992)). These circumstances “must relate to fundamental, substantial irregularities in the court’s proceedings or to irregularities extraneous to the court’s action.” Olivera-Avila, 89 Wn. App. at 319 (citations omitted).

CrR 7.8(b) (5) permits a judgment to be vacated for ‘(a)ny other reason justifying relief.’ ‘A vacation under section (5) is limited to extraordinary circumstances not covered by any other section of the rule.’ State v. Cortez, 73 Wn. App. 838, 841-42, 871 P.2D 660 (1994) (citing State v. Brand, 120 Wn.2d 365, 369, 842 P.2d 470 (1992)). Final judgments “may be vacated or altered only in those limited circumstances where the interests of justice most urgently require.” Cortez, 73 Wn. App. At 842 (quoting State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989)). CrR 7.8(b) (5) does not apply when the circumstances alleged to justify the relief existed at the time the judgment was entered. Cortez, 73 Wn. App. At 842.

At the hearing on the motion to vacate judgment, counsel for Mr. Martinez-Ruiz argued:

“This is the 7.8(5) argument: All together, your Honor, I’m asking that the Court grant the motion to vacate judgment because all together this is really an extraordinary case. I don’t think the Court is going to see another one like it. I doubt that I will.

Now, Mr. --- criminal defense counsel made a mistake to come to this Court and ask this Court to vacate the conviction himself. I think that was a mistake. That was his error, but he is trying to cover up – wrong word. He was trying to make up for an error he had committed. And I admire that. And I actually admire the way he has done in this case to be candid with the Court about his errors, which I submit are extreme.” RT 52.

The prosecutor’s mistaken claim imagined that Mr. Martinez-Ruiz’s argument relied upon “allegedly new evidence.” In rebuttal to this mistaken claim, counsel for Mr. Martinez-Ruiz clearly stated,

“I have got to say the newly evidence case, newly discovered evidence, has nothing to do with ineffective assistance of counsel. It just doesn’t.” (RT 54)

Relief will be granted if the Petitioner establishes actual and substantial prejudice resulting from a violation of his or her constitutional rights or a fundamental error of law.

In the Matter of the Personal Restraint of Brett, 142 Wn.2d 868; 16 P.3d 601; 2001 Wash. LEXIS 74 (citations omitted). Ineffective assistance of counsel constitutes a violation of defendants constitutional Sixth Amendment right and results in a a manifest injustice warranting plea withdrawal. *Id.* at 674; see also State v. Jamison, 105 Wn. App. 572, 590, 20 P.3d 1010, 1019, review denied, 144 Wn.2d 1018 (2001); State v. Taylor, 83 Wn. 2d 594, 596, 521 P.2d 699 (1974). The burden of proof is

a preponderance of the evidence. Brett at 674; In re Personal Restraint of Cook, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

An accused person is constitutionally guaranteed reasonably effective representation by counsel. U.S. Const. Amend. 6; In Re Brett, supra; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The purpose of the requirement for effective assistance of counsel is to ensure a fair and impartial trial.” State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Denial of the constitutional right to effective assistance of counsel constitutes a fundamental, substantial irregularity in the proceedings that warrants redress pursuant to CrR 7.8.

Ineffective assistance of counsel is a mixed question of law and fact. Strickland, 466 U.S. at 698; Brett at 142 Wn 2d at 873. To establish ineffective assistance of counsel, a defendant must show that his attorney’s performance was deficient and that he was prejudiced by the deficiency. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d at 226. The Sixth Amendment of the U.S. Constitution applies to the states under the Fourteenth Amendment¹¹.

The Sixth Amendment effective assistance clause test is set forth in

¹¹ No State “shall...deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” 14th Amendment, U.S Constitution.

Strickland v. Washington, 466 U.S. 668, 698 (1984) and has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

The first prong is met by showing that defense counsel's performance was not reasonably effective under prevailing professional norms. The second prong is met by showing that, but for counsel's errors, the result would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "To demonstrate [prejudice], 'a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.' Strickland, 466 U.S. at 693, 104 S.Ct. 2052." United States v. Kwan (9th Cir. 2005) 407 F.3d 1005, 1017.

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. Brett at 142 Wn. App. 873 (citing Strickland, 466 U.S. at 689-90). To provide constitutionally adequate assistance, "counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client." *Id.* (citing Strickland, 466 U.S. at 689-90).

See also Hendricks v. Vasquez (9th Cir. 1992) 974 F.2d 1099, 1109 [vacating conviction]; United States v. Burrows (9th Cir. 1989) 872 F.2d 915, 918 [reversing conviction for failure to investigate a mental defense]; Evans v. Lewis (9th Cir. 1988) 855 F.2d 631, 637). And, the lack of factual investigation into the underlying circumstances of the criminal case that, Mr. McCool as a matter of integrity admits, makes the lack of investigation defect in this case beyond any reasonable dispute.

II.(c) Prejudice

Mr. Martinez-Ruiz established he would not have pled guilty if he had been accurately informed of the immigration consequences of conviction or if his case had been properly investigated he would have insisted on jury trial. He proved prejudice due to the ineffective assistance of counsel.

Strickland Id. at 694, defendant ordinarily must demonstrate a “reasonable probability that, but for counsel’s unprofessional errors, the result of proceedings would have been different” to obtain relief. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In the plea context, prejudice is established if the defendant can show that he would not have plead but for the ineffective assistance. Hills v. Lockhart 474 US 54, 57 (1985) (prejudice is established where there is a reasonable probability that, but for counsel’s

errors, the defendant would not have pleaded guilty, and would have insisted on going to trial.) Petitioner states this is the case through an affidavit filed in this Motion to Vacate Judgment proceedings. The facts and circumstances surrounding his prosecution strongly support Petitioner's assertion. An ineffectiveness claim may be based on an attorney's action as well as inaction. The Ninth Circuit, Washington, and U.S Supreme Court have found ineffective assistance of counsel in the following circumstances:

1. Failure to investigate (including a failure to investigate mitigating circumstances), Rompilla v. Beard, 545 U.S. 374 (2005); Hendricks v. Calderon, 70 F.3d 1023, 1036 (9th Cir. 1995) (counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client). Counsel failed to uncover the obvious fact that a VUCSA (Delivery of cocaine conviction) would require his client's banishment. The severity of this punishment might have led any reasonable defendant to elect jury trial.

2. Failure to seek the assistance of experts, Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999). Where an expert is necessary to defend a client, it is the attorney's role to secure the expert without regard to whether or not the client specifically demands that expert. Immigration consequence expertise was readily available to counsel who completely failed to seek

out that expertise so he could properly advise his client of the immigration consequences of a VUCSA conviction.

See Rollins v. Georgia, 591 S.E.2d 796, 799 (Ga. 2004)

(deportable based on drug law violation is “a fact that would have been easily discovered through simple research”).

Counsel in these proceedings plainly believed that the motion to suppress was meritorious. He would not have recommended to the Petitioner that he enter a plea of guilty to the charge but for his failure to investigate the allegations that Petitioner had delivered cocaine on April 10, 2008 and on April 17, 2008.

On April 10, 2008, Mr. Martinez-Ruiz has a complete alibi defense as he was at work and he can easily prove this through times slips. Counsel admits he did not obtain this evidence until after his client pled. The client/petitioner did not enter the plea until he had been in custody for approximately 11 months. Counsel failed to investigate the case properly prior to plea entry.

On April 17, 2009, the Defendant has a partial alibi defense. Counsel investigated and established facts corroborating this defense only after the plea entry. Only post-plea was an investigation launched to challenge the credibility of the lead witness for the State, Sgt. Alessio. Sgt. Alessio claimed to have seen a hand to hand delivery by Mr. Martinez-Ruiz of something, presumably drugs, to Angel Gonzalez who

subsequently allegedly delivered the drugs to a CI under police control and custody. Evidence introduced proving the impossibility of Sgt. Alessio's claimed observation upon which the prosecution relied. There is, at the very least, a strong argument that Sgt. Alessio misidentified Mr. Martinez Ruiz. The claimed identification is based upon an observation that could not reasonably be made, according to three witnesses. Mr. McCool, his investigator, Mr. Roff, and Mr. Winthrop Taylor could not make out facial features that Sgt. Alessio claimed that he could make out from almost the length of a football field. In short, Sgt. Alessio's claim that he could identify Mr. Martinez-Ruiz's facial features is a suspect claim. Mr. Martinez-Ruiz's property was searched the following day, at which time Sgt. Alessio identifies him as the individual who was in the backyard with Angel Gonzalez. Sgt. Alessio could only make this identification accurately if he had been able to identify Mr. Martinez-Ruiz's facial features. This claimed identification is inconsistent with the Sergeant not being able to state what was exchanged between Mr. Angel Gonzalez and the third party he observed. Angel Gonzalez stated to Winthrop Taylor, who in turn advised the Superior Court that Angel Gonzalez would be on Mr. Martinez-Ruiz's property because he was involved in an irrigation project on that property and accordingly there was an innocent reason for him to be on the property conducting the irrigation project work. Another important potential defense arguments

arise from the lack of corroboration by Angel Gonzalez of Mr. Martinez-Ruiz's alleged role in this transaction.

Obviously, criminal defense counsel cannot simply recommend that his client plea based upon trust of a police officer in light of the adversary nature of our criminal justice system, which counsel candidly admitted he mistakenly did when he "defended" Mr. Martinez-Ruiz against this prosecution.

It is clearly the case that without this eyewitness identification claim¹² by Sgt. Alessio, counsel would have proceeded with a likely meritorious motion to suppress and would have advised the Petitioner of the inability of the Sergeant to make this identification prior to plea entry and recommended against such plea entry. Counsel believed, and believes today, that following a motion to suppress being granted the Petitioner could potentially prevail at a jury trial and be found not guilty of all the charges against him by challenging Sgt. Alessio's claimed identification, if the State could somehow proceed after a grant of the motion to suppress. Mr. McCool learned post-plea this likely misidentification could surely be challenged at trial. In turn, the Mr. Martinez-Ruiz obviously would have elected a jury trial based upon the recommendations of his counsel.

¹² Mistaken identification, of course, is the most common error in false conviction cases. See Barry Scheck's webpage, the Innocence Project, at <http://www.innocenceproject.org/>; which states that decades of solid scientific evidence prove eyewitness misidentifications contributed to over 75% of the more than 220 wrongful convictions in the United States that were later overturned by post-conviction DNA evidence

Moreover, if Petitioner had known he was stipulating to his own banishment through entry of plea, he never would have entered the plea. Counsel now admits he should have provided that information to petitioner as banishment is clearly and reasonably a material factor in petitioner's consideration of whether or not he should enter into a plea especially because of his long-term ties to the United States where he has lived for approximately 25 years.

Having been convinced that the search in this matter was faulty due to the flawed searched warrant affidavit, the only reasonable manner to proceed in this case was to:

- A) Litigate the motion to suppress.
- B) Depose Officer Alessio concerning his claimed observations of April 17, 2008, and investigate the claimed observation pre-plea rather than post-plea.
- C) Go to jury trial if unable to negotiate the case to a non-deportable offense such as solicitation following or prior to litigation of the motion to suppress.
- D) Preserve all this for an appeal if appeal becomes necessary for Mr. Martinez-Ruiz.
- E) Bail the client out of pretrial and allow Mr. Martinez-Ruiz to proceed with his defense in an out of custody setting in light of the

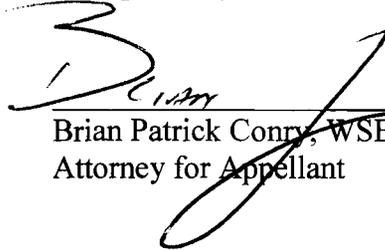
fact that the final resolution of the matter might take years as the case proceeds through anticipated appeals.

CONCLUSION

The motion to vacate judgment should be granted because the Superior Court denied it on grounds not raised by Mr. Martinez-Ruiz but raised only through a mischaracterization by the prosecution of Mr. Martinez-Ruiz's motion to vacate judgment allegations. Mr. Martinez-Ruiz was denied effective assistance of counsel. His former counsel candidly admits the same. His motion to vacate judgment anticipated the Padilla ruling. Padilla requires the conviction be set aside. The failure to investigate the underlying facts of the case, also candidly admitted by counsel, further requires the motion to vacate judgment be granted.

Dated this 25 day of August, 2010.

Respectfully Submitted,



Brian Patrick Conry, WSBA No: 32392
Attorney for Appellant