

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 APR 30 PM 3:24

BY RONALD R. CARPENTER *RC*

NO. 82175-5

~~THE SUPREME COURT OF THE STATE OF WASHINGTON~~
CLERK

IN RE: PERSONAL RESTRAINT OF: VALENTIN SANDOVAL

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN SANDOVAL,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF
ADDRESSING PADILLA V. KENTUCKY

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. ARGUMENT 1

 1. DEFENSE COUNSEL IS REQUIRED TO ACCURATELY
 ADVISE A CLIENT OF THE IMMIGRATION
 CONSEQUENCES OF A CONVICTION..... 1

 a. An attorney's duties to a client include informing the
 client whether his or her plea carries a risk of
 deportation 1

 b. A defense attorney has a duty to give correct advice .. 4

 2. THE COLLATERAL VERSUS DIRECT DISTINCTION IS
 ILL-SUITED TO EVALUATING AN INEFFECTIVE
 ASSISTANCE OF COUNSEL CLAIM..... 7

 3. SANDOVAL WOULD NOT HAVE ACCEPTED THE PLEA
 BARGAIN HAD HE KNOWN THAT HE WOULD BE
 IMMEDIATELY DETAINED AND DEPORTED 10

 4. INFORMED CONSIDERATION OF POSSIBLE
 DEPORTATION DURING THE PLEA-BARGAINING
 PROCESS CAN BENEFIT BOTH THE STATE AND
 NONCITIZEN DEFENDANTS..... 12

B. CONCLUSION..... 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Yim, 139 Wn.2d 581, 989 P.2d 512 (1999) 9
State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 9, 10, 14

Washington Court of Appeals Decisions

State v. Stowe, 71 Wn.App. 182, 858 P.2d 267 (1993)..... 9

United States Supreme Court Decisions

Delgadillo v. Carmichael, 332 U.S. 388, 68 S. Ct. 10, 92 L. Ed. 17
(1947) 13
Fong Yue Ting v. United States, 149 U.S. 698, 37 L. Ed. 905 (1893)
..... 8
Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203
(1985) 13
McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d
763 (1970) 13
Padilla v. Kentucky, 559 U.S. ___, 2010 WL 1222274 (Mar. 31,
2010) 1, 2, 4, 7, 8, 9, 10, 12, 13, 14
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.
2d 674 (1984) 4, 8

Federal Decisions

United States v. Yanez-Saucedo, 295 F.3d 991 (9th Cir. 2002)..... 6

United States Constitution

Sixth Amendment.....	3, 8, 12, 13
----------------------	--------------

Statutes

8 U.S.C. 1101.....	6
8 U.S.C. 1227.....	2, 5
RCW 9.94A.835	11
RCW 9A.36.021	11
RCW 9A.36.031	11

Other Authorities

Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as <i>Amici Curiae</i> , <i>Padilla v. Kentucky</i>	3
National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation (1995).....	3
Washington Defender Association's Standards for Public Defense Services.....	10

A. ARGUMENT

1. DEFENSE COUNSEL IS REQUIRED TO ACCURATELY ADVISE A CLIENT OF THE IMMIGRATION CONSEQUENCES OF A CONVICTION.

- a. An attorney's duties to a client include informing the client whether his or her plea carries a risk of deportation. The United States Supreme Court's decision in Padilla v. Kentucky, 559 U.S. ___, 2010 WL 1222274 (Mar. 31, 2010), articulates a defense attorney's affirmative obligation to accurately advise a noncitizen client of the immigration consequences of a criminal conviction. In Padilla, the Court held that counsel must inform a noncitizen client whether a guilty plea carries a risk of deportation in order for the plea to be knowing, intelligent, and voluntary. Id. at *11.

The facts in Padilla are similar to the facts here. Like Valentin Sandoval, Jose Padilla was a longtime lawful permanent resident of the United States who was concerned that if he pled guilty to the charged crime, he would be deported. Id. at *3. In accepting a plea agreement, Padilla relied upon his attorney's erroneous advice that he "did not have to worry about immigration status since he had been in the country so long." Id. Contrary to

his attorney's misadvice, Padilla's conviction made his deportation virtually mandatory. Id.

Similarly, after Sandoval was charged with a crime, he told his court-appointed attorney that he was a longtime lawful permanent resident, and he did not want to lose his ability to live lawfully in the United States. PRP Ex. 1 (attorney declaration); Statement of Additional Grounds (SAG), at 1. His lawyer told him he would neither be deported nor "put into Immigration Court" by pleading guilty. Slip op. at 2 (quoting SAG). Sandoval relied upon his attorney's false assurances that if he accepted a plea bargain, he would be immediately released from jail, and that he could "ameliorate" any immigration issues raised by the plea based on his immediate release from jail. Id.; PRP Ex. 1, p. 1-2. However, instead of being released from jail after accepting the plea, Sandoval was transferred to the custody of Immigration and Customs Enforcement officials, subject to mandatory immigration detention, and charged with removal as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii) because of his conviction. Slip op. at 2; PRP Ex. 1, p. 2.

Neither Sandoval nor Padilla were accurately advised of the immigration consequences of their convictions by their attorneys.

The Supreme Court held that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” Padilla, 2010 WL 1222274 at *7 (citing *inter alia* National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2 (1995)). Whether an attorney’s representation is constitutionally deficient “is necessarily linked to the practice and expectations of the legal community.” Id. Standards of professional behavior are “valuable measures” of reasonable performance. Id.

[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients

Id. (citing Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14 (internal citations omitted)).

In rejecting the Solicitor General’s argument that the Sixth Amendment protects an accused person only to the extent that his attorney gave him affirmative misadvice, the Court held, “[i]t 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’”

(internal citation omitted). Id. at *9; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). It would be “absurd” to direct attorneys only that they should not give misadvice, because that creates “an incentive to remain silent on matters of great importance, even when answers are readily available.” Id. In addition, it would deny those clients least able to represent themselves advice on deportation when it is readily available. Id.

Like Padilla, “[t]his is not a hard case.” Id. at *8. According to the prevailing professional norms of practice as reflected in the American Bar Association standards and “authorities of every stripe,” it is clear that Sandoval’s attorney had a duty to accurately advise his client regarding the risk of deportation. Id. at *7. The conduct of Sandoval’s attorney fell below Strickland’s objective standard of reasonable professional conduct and amounted to constitutionally deficient assistance.

b. A defense attorney has a duty to give correct advice. The Padilla Court concluded that giving no information at all regarding immigration consequences, or giving the wrong information regarding such consequences, could amount to constitutionally deficient assistance. Padilla, 2010 WL 1222274 at

*11. In Padilla's case, the Court concluded that deficient assistance was readily established because the consequences of his plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. Id. at *8. The Court explained that Padilla's counsel could have easily determined that his plea to possession of a large amount of marijuana would require his deportation simply from reading the text of the statute, which specifically commands removal for all controlled substances convictions except the most trivial of marijuana possession offenses. Id. Padilla's counsel provided him false information that his conviction would not result in his removal from this country even though the removal statute dictated the immigration consequence in plain language. Id.

Similarly, the consequences of Sandoval's plea could easily be determined. Had Sandoval's attorney read the removal statute, he would have known that it specifically commands removal for rape offenses, as the Court of Appeals recognized. Slip op. at 5 (citing 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an

aggravated felony at any time after admission is deportable”); 8

U.S.C. 1101(a)(43)(A) (rape is an “aggravated felony”)).¹

Sandoval's lawyer had a readily available resource to assist him with investigating the immigration consequences of a guilty plea. Any criminal defense attorney practicing in Washington may receive free advice over the telephone or through e-mail about the potential immigration consequences of particular criminal convictions by contacting the Washington Defender Association's Immigration Project (WDA).² *Amicus Curiae* Brief of the Washington Defender Association *et al*, (WDA Amicus) p. 3-5. WDA's immigration project provides case-specific advice about the immigration consequences of convictions based on client's residence status and criminal history. *Id.* An immigration specialist will assist counsel with crafting a guilty plea that meets the prosecution's concerns with punishment for a charged crime while best avoiding or minimizing the risk of deportation, by explaining

¹ As noted in the Washington Defender Association's Amicus Brief, case law also establishes that the offense for which Sandoval pled guilty is an aggravated felony. United States v. Yanez-Saucedo, 295 F.3d 991, 994 (9th Cir. 2002); see WDA Amicus, p. 9.

² The Washington Defender Association is a member-based organization open to any attorney representing indigent clients in criminal cases. Its Immigration Project offers consultation to any member of the defense bar, including privately retained counsel. It charges a small fee to privately retained counsel only if the advice requires substantial time and is otherwise available for free.

pertinent statutes and their likely effect on a client depending upon her immigration status. Id.

Sandoval's counsel did not consult an immigration specialist. He falsely assured Sandoval that his conviction would not result in his removal from this country. The attorney relied on his intuitive sense that if Sandoval were immediately released from jail, it would be unlikely that immigration officials would bother him. PRP Ex. 1, p. 2. He admitted this advice was "incorrect." Id. This uninformed and uneducated approach left Sandoval without effective assistance of counsel and resulted in his unintelligent and unknowing decision to plead guilty.

2. THE COLLATERAL VERSUS DIRECT DISTINCTION IS ILL-SUITED TO EVALUATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The Court's decision in Padilla makes clear that the collateral consequence analysis urged by the prosecution here and applied by the Court of Appeals below is not the appropriate framework for analyzing whether counsel's misadvice regarding the immigration consequences of a plea constitutes ineffective assistance of counsel. The prosecution's argument and the Court of Appeals decision reflect an erroneous insistence that the

“collateral” nature of the immigration consequences flowing from a conviction is dispositive and renders such considerations beyond the scope of counsel’s Sixth Amendment duties. Contrary to that proposition, the Padilla Court concluded that advice regarding deportation is *not* categorically removed from the ambit of the Sixth Amendment right to counsel. Padilla, 2010 WL 1222274 at *6.

Although Kentucky’s Supreme Court was not alone in its view that “collateral consequences are outside the scope of representation required by the Sixth Amendment,” the Padilla Court refused to apply a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under Strickland in the context of deportation. Padilla, 2010 WL 1222274 at *6 (citing Strickland, 466 U.S. at 689). The distinction between collateral and direct consequences is “ill-suited” to evaluating the risk of deportation. Id.

Even though deportation is not, strictly speaking, a criminal sanction, the Court has “long recognized that deportation is a particularly severe ‘penalty,’” and due to changes in immigration law, removal is “nearly an automatic result for a broad class of noncitizen offenders.” Id. (citing Fong Yue Ting v. United States, 149 U.S. 698, 740, 37 L. Ed. 905 (1893)).

Accordingly, the Court's decision in Padilla supersedes In re Pers. Restraint of Yim, 139 Wn.2d 581, 588, 989 P.2d 512 (1999), upon which the Court of Appeals relied for the proposition that defense counsel is not required to inform his client of the risk of deportation. In Yim, the Court held that defense counsel was not required to advise his client of the possibility of deportation because "a deportation proceeding that occurs subsequent to the entry of a guilty plea is merely a collateral consequence of that plea." 139 Wn.2d at 588. The distinction made in Yim regarding an attorney's failure to give advice as opposed to giving incorrect advice is not the appropriate framework for evaluating a claim of deficient performance. Padilla, 2010 WL 1222274 at *6-7.

An attorney must investigate sentencing consequences that are immediate and severe, or are important to a client's ability to "make a meaningful decision as to whether or not to plead guilty." State v. A.N.J., 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010); State v. Stowe, 71 Wn.App. 182, 187-89, 858 P.2d 267 (1993) (finding ineffective assistance of counsel due to attorney's misadvice about consequences of plea upon military service when attorney knew such consequences were important to client). Along with "authorities of every stripe," the Washington Defender Association's

Standards for Public Defense Services direct criminal defense attorneys that they “must be aware of their clients’ immigration status, research the implications of it for their cases, and advise their clients of the consequences of a conviction.”³ Padilla, 2010 WL 1222274 at *7. There is no question that Sandoval’s lawyer did not provide competent advice about the immigration consequences of Sandoval’s guilty plea.

3. SANDOVAL WOULD NOT HAVE ACCEPTED THE PLEA BARGAIN HAD HE KNOWN THAT HE WOULD BE IMMEDIATELY DETAINED AND DEPORTED.

In addition to proving that counsel’s performance fell below an objective standard of reasonableness, a defendant must also show prejudice. “To obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” Padilla, 2010 WL 1222274 at *10.

Sandoval told his attorney he did not want to plead guilty if it would cause his immediate deportation. PRP Ex. 1; SAG. The Court of Appeals acknowledged Sandoval “may not have pleaded

³ WDA Standards are available at <http://www.defense.net.org/resources/publications> (last visited April 27, 2010) and were cited as pertinent evidence concerning the effective assistance of counsel in A.N.J., 168 Wn.2d at 110.

guilty if he had been properly advised of the consequences of his plea.” Slip op. at 5-6. Only after his attorney incorrectly advised him that he would not be deported as a result of accepting the plea, did Sandoval agree to take the plea. Sandoval had expressed his grave concern about the immigrations consequences of a conviction. Had Sandoval known the actual consequences of accepting the plea, he would not have pled guilty.

The WDA Amicus Brief explains that “competent immigration counsel could have easily and quickly provided trial counsel with viable alternatives to pursue in the course of plea negotiations.” WDA Amicus, p. 9. Offenses with similar penalties but without automatic deportation include second or third degree assault, with or without sexual motivation. *Id.* at 9-10 (citing RCW 9A.36.021; RCW 9A.36.031(f); RCW 9.94A.835)).

Alternatively, Sandoval could have contested the charges at trial. At trial, the prosecution would have had to prove that the complainant did not consent to the sexual encounter as Sandoval believed she had. 10/3/06RP 3. He was accused of having nonconsensual sexual intercourse with an acquaintance while intoxicated. *Id.* The complainant did not want Sandoval to go to

prison, and most likely did not wish him to be removed and banished from the United States. 10/3/06RP 3.

In Padilla, the Supreme Court remanded the case for the state court to determine whether it would have been rational for Padilla to have rejected the plea bargain. 2010 WL 1222274 at *11 This Court does not need to remand the case because the record shows that Sandoval would not have pled guilty to third degree rape if he accurately understood the immigration consequences. Because Sandoval's primary concern was to avoid deportation, and in light of the reasonably available alternatives, his decision to reject the plea bargain certainly would have been rational under the circumstances.

4. INFORMED CONSIDERATION OF POSSIBLE DEPORTATION DURING THE PLEA-BARGAINING PROCESS CAN BENEFIT BOTH THE STATE AND NONCITIZEN DEFENDANTS.

Beyond the Sixth Amendment rationale for requiring defense attorneys to accurately advise their clients regarding the risk of deportation, the Padilla Court concluded that informed consideration of possible deportation could benefit both the State and noncitizen defendants during the plea-bargaining process. Id. at *16. The Court reasoned that bringing deportation

consequences into this process could better enable the defense and prosecution to reach agreements that satisfy the interests of both parties. Id. The Court suggested that defense counsel might be able to plea bargain creatively with the prosecutor in order to tailor a conviction and sentence that reduce the likelihood of deportation. Id. The Court posited that the threat of deportation may provide the defendant with a strong incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does. Id.

Importantly, the Court noted that it has “long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” Id. (citing Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); McMann v. Richardson, 397 U.S. 759, 770-71, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). The Court thus concluded that the severity of deportation underscored “how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” Padilla, 2010 WL 1222274 at *16 (citing Delgado v. Carmichael, 332 U.S. 388, 390-91, 68 S. Ct. 10, 92 L. Ed. 17 (1947) (equating deportation with “banishment or exile”). An attorney renders ineffective assistance under the Sixth Amendment

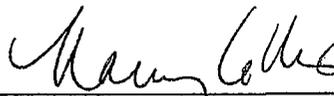
by failing to accurately advise a client of the consequences of a conviction. See A.N.J., 168 Wn.2d at 117 (holding that defendant was misinformed as to the consequences of his guilty plea and therefore was entitled to withdraw it). Sandoval should be permitted to withdraw his guilty plea because he was not accurately informed of the consequences of his conviction and he would have rejected the plea if he understood its consequences.

B. CONCLUSION.

In light of the Supreme Court's decision in Padilla, Valentin Sandoval respectfully requests this Court permit him the opportunity to withdraw his guilty plea.

DATED this 29th day of April 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 APR 30 PM 3:21
IN THE SUPREME COURT OF THE STATE OF WASHINGTON
BY RONALD R. CARPENTER

~~CLERK~~
IN RE THE PERSONAL RESTRAINT PETITION OF)
)
)
VALENTIN SANDOVAL,)
)
)
)
Petitioner.)

NO. 82175-5

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DOUGLAS MITCHELL, DPA GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] ANN BENSON 810 THIRD AVE, STE 800 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] TRAVIS STEARNS 110 PREFONTAINE PL STE 610 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] MICHELLE JENSEN K & L GATES LLP 925 4 TH AVE. STE 2900 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] NANCY TALNER SARAH DUNNE ACLU 705 2 ND AVE. STE 300 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] VALENTIN SANDOVAL PO BOX 4749 WENATCHEE, WA 98807	(X) () ()	U.S. MAIL HAND DELIVERY _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: dunne@aclu-wa.org; ntalner@aol.com; michelle.jensen@kigates.com; stearns@defensenet.org; dmitchell@co.grant.wa.us
Subject: RE: Sandoval 82175-5

Rec. 4-30-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Friday, April 30, 2010 3:26 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: dunne@aclu-wa.org; ntalner@aol.com; michelle.jensen@kigates.com; stearns@defensenet.org; dmitchell@co.grant.wa.us
Subject: Sandoval 82175-5

In Re the PRP of Valentin Sandoval
No. 82175-5

Please accept the attached documents for filing in the above-subject case:

SUPPLEMENTAL BRIEF OF PETITIONER ADDRESSING PADILLA V. KENTUCKY

<<SANDOVAL(SUPBRIEF2)82175-5.pdf>>

Nancy P. Collins - WSBA 28806
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: nancy@washapp.org

By

Maria Arranza Riley

Staff Paralegal

Washington Appellate Project

Phone: (206) 587-2711

Fax: (206) 587-2710

www.washapp.org

Please consider the environment before printing this e-mail.