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Supreme Court No. _____
(COA No. 25935-8-~~III~~ consol. with 26039-9-~~III~~)

III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN SANDOVAL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Valentin Sandoval, petitioner here and below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Sandoval seeks review of the Court of Appeals decision denying his request to withdraw his guilty plea based on his trial attorney's unreasonable and affirmative misadvisement of the virtually certain deportation that would follow his guilty plea, a copy of which is attached hereto as Appendix A. The Court of Appeals denied a motion for reconsideration on August 12, 2008, a copy of which is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. The right to effective assistance of counsel as guaranteed by the state and federal constitutions includes the right to meaningful advice about the material consequences of a guilty plea. Here, defense counsel affirmatively misadvised Mr. Sandoval of the immigration consequences of his guilty plea, by telling him there was "potential" for deportation but he would be able to work to "ameliorate" that danger, and Mr. Sandoval understood to advice

to mean he would not be deported upon his plea. In fact, Mr. Sandoval pled guilty to an offense for which immediate detention and mandatory deportation were non-negotiable and certain. Did defense counsel's misadvice constitute ineffective assistance of counsel?

2. The possibility of deportation following a criminal conviction is considered a "collateral consequence" for which the court is not constitutionally obligated to discuss with a defendant who pleads guilty. Where defense counsel has a far greater obligation to assess a criminal defendant's material risks if entering a guilty plea and to provide competent advice, did the Court of Appeals incorrectly excuse defense counsel's misadvice by equating a court's obligations when accepting a plea with the duties of a defense attorney in providing accurate advice about the certain likelihood of deportation stemming from a guilty plea?

3. In light of recent changes in the letter and enforcement of immigration law, does defense counsel have heightened obligations to accurately explain the immigration consequences that will necessarily follow a criminal conviction?

4. Is there substantial public interest in addressing a defense attorney's obligations when offering immigration advice,

where immigration laws are increasingly narrow and strictly enforced, and deportation is a mandatory, non-waivable consequence of numerous criminal convictions?

D. STATEMENT OF THE CASE.

On August 14, 2006, the Grant County prosecutor charged Valentin Sandoval with one count of rape in the second degree, pursuant to RCW 9A.44.050(1)(a). Counsel was appointed on August 21, 2006, and on October 3, 2006, upon the advice of counsel, Mr. Sandoval pleaded guilty to a reduced charge of rape in the third degree.

Prior to pleading guilty, Mr. Sandoval told defense counsel he was not a United States citizen and avoiding deportation was a paramount concern for him in resolving the criminal charges against him. Slip op. at 2. His attorney knew Mr. Sandoval was a lawful permanent resident and held a greencard. (attorney declaration, attached as Ex. 1 to personal restraint petition ("PRP")). Despite this knowledge, his attorney did not consult with immigration counsel. Rather, Mr. Sandoval's attorney affirmatively misadvised him that under the negotiated plea bargain he would not face immediate deportation, would be released from custody, and would have time to get an attorney "to ameliorate any potential

immigration consequences of his guilty plea.” PRP Ex. 1. Mr. Sandoval recalled his attorney’s advice as an assurance that he would not be deported as a result of his plea. Slip op. at 2.

The court imposed the recommended standard range sentence. Mr. Sandoval was immediately taken into immigration custody and the government initiated removal, or deportation, proceedings as an “aggravated felon.” Slip op. at 2.

Mr. Sandoval filed a direct appeal, consolidated with a PRP, arguing his attorney provided ineffective assistance of counsel by affirmatively misadvising him of the immigration consequences of his guilty plea when his plea subjects him to mandatory detention and certain deportation. Mr. Sandoval asserted in his PRP that he would not have pleaded guilty had his attorney accurately advised him of the mandatory immigration consequences of his plea, and that failure to adequately address the immigration consequences in the context of his representation of Mr. Sandoval fell below prevailing professional norms.

Citing this Court’s decision in In re Pers. Restrain of Yim, 139 Wn.2d 581, 588, 989 P.2d 512 (1999), the Court of Appeals ruled that deportation is merely a collateral consequence of the criminal proceeding and thus beyond the scope of defense

counsel's Sixth Amendment obligations and, despite the affirmatively erroneous nature of defense counsel's advice and Mr. Sandoval's reliance upon it, counsel's incorrect advice was sufficient. Slip op. at 5-6.

The facts are further set forth in the Court of Appeals opinion, pages 1-2; Petitioner's Personal Restraint Petition, page 1-2 and attached Exhibit; and Appellant's Opening Brief, pages 1-3. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT.

1. THE COURT OF APPEALS ERRED IN HOLDING THAT DEFENSE COUNSEL'S LACK OF INVESTIGATION AND AFFIRMATIVE MISADVICE REGARDING THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL

a. Counsel's failure to investigate and provide an accused person with accurate advice concerning the immigration consequences of his plea constitutes deficient performance. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129

Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6¹ Wash. Const. art. 1, section 22.

To prevail in a claim of ineffective assistance of counsel, a defendant must show, “First, [that] counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998).

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.” In re: Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (citing Strickland, 466 U.S. at 689-90).

¹ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

When a client pleads guilty, a defense attorney does not perform effectively unless he or she “actually and substantially assist[s] the client in deciding whether to plead guilty.” State v. Holley, 75 Wn.App. 191, 197, 876 P.2d 973 (1994). When counsel misrepresents the applicable law, including the collateral consequence of a plea, the defendant must be allowed to withdraw the plea. State v. Stowe, 71 Wn.App. 182, 187-89, 858 P.2d 267 (1993).

As the Supreme Court has clearly articulated, the “reasonableness” of attorney conduct is determined by prevailing professional norms. Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 2466, 162 L.Ed.2d 360 (2005) (relying on American Bar Association (“ABA”) standards to assess reasonableness of attorney’s investigation). And, as the Supreme Court has further recognized, prevailing professional norms clearly reflect that current norms require competent counsel to “fully advise” noncitizen defendants of the immigration consequences of the

conviction.² INS v. St. Cyr, 533 U.S. 289, 323 n.50, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

The Ninth Circuit's recent decision in United States v. Kwan, 407 F.3d 1005, 1015 (9th Cir. 2005), illustrates the erroneous and out-dated analysis of the Court of Appeals decision in the instant case. Kwan, like Mr. Sandoval, was a longtime lawful permanent resident. Like Mr. Sandoval, Kwan made clear to his defense counsel that he was very concerned with the possibility that deportation could result from pleading guilty. As with the instant case, Kwan relied on defense counsel's misleading and erroneous information regarding the immigration consequences in agreeing to enter the negotiated plea. Kwan, 407 F.3d at 1015.

In finding that the conduct of Kwan's defense counsel fell below an objective standard of reasonableness, the court stated:

² Both the American Bar Association and the National Legal Aid and Defender Association (NLADA) maintain professional standards of practice that require counsel to investigate the immigration consequences of sentencing upon a defendant and to advocate for a sentence that would avoid them. See Standard 4-8.1 Sentencing, ABA Standards for Criminal Justice: Prosecution Function and Defense Function, 3rd, 1993; NLADA Performance Guidelines for Criminal Defense Representation 8.1, 8.2 (2001) available at: <http://www.nlada.org/Defender/DefenderStandards/PerformanceGuidelines>. These performance guidelines were relied on as the standards for what constitutes effective attorney performance in Grant County felony cases pursuant to the recent settlement in Best, Et. Al. v. Grant County, No. 04-2-00189-0. See Best Settlement Agreement at II.C.2, available at <http://www.defensenet.org/issues.htm>.

That counsel may have misled Kwan out of ignorance is no excuse. It is a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice. See, e.g., ABA Model Rules of Professional Conduct, Rule 1.1[6]. Although counsel was a criminal defense attorney and not an immigration attorney, counsel made an affirmative representation to Kwan regarding... immigration consequences; as a result, counsel had a professional responsibility to inform himself and his client of significant changes in the law that drastically affected the immigration consequences of his client's plea. See generally ABA Model Rules of Professional Conduct, Rule 1.1. ...If counsel did not have the requisite competence in immigration law...he should not have advised Kwan regarding the immigration consequences of his plea without referring Kwan to an immigration lawyer or consulting himself with an immigration lawyer in the first place. See id.

Counsel's performance also fell below the American Bar Association's ethical standard for criminal defense attorneys with respect to immigration consequences. The Supreme Court noted this standard in INS v. St. Cyr, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001).

407 F.3d at 1016.

Likewise, in United States v. Couto, 311 F.3d 179, 188 (2nd

Cir. 2002), the court ruled,

an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable. We therefore hold that such a misrepresentation meets the first prong of the Strickland test.

Because defense counsel affirmatively misled Mr. Sandoval about the inexorable immigration consequences that would follow his guilty plea, his attorney did not provide effective assistance of counsel.

b. The Court of Appeals' determination that defense counsel's performance was reasonable is conflicts with prior decisions by Washington Courts as well as numerous other jurisdictions. Comparing prevailing professional norms articulated *infra*, to the circumstances of this case outlined, *supra*, it is clear that the appellate court's decision is erroneous and egregious. In short, it is simply not possible to credibly conclude that counsel's performance was reasonable under the circumstances:

- Counsel knew not only that his client was not a U.S. citizen, but, even more importantly, that he was a lawful permanent resident (a.k.a greencard holder). See Slip op. at 2; PRP, Ex. 1.³
- Mr. Sandoval made it clear to counsel that he was afraid of the immigration consequences of the criminal proceedings and did not want to plead guilty to an offense that would result in his deportation. Id.
- Counsel affirmatively misadvised Mr. Sandoval that he would not be "immediately" taken into immigration custody. In fact, not only was defendant immediately taken into immigration custody upon release, he was charged with

³ As a lawful permanent resident, Mr. Sandoval could avoid deportation even if convicted of a crime, but only if his conviction was not for an aggravated felony. 8 U.S.C. 1229(a)(A).

removal (a.k.a. deportation) as an aggravated felon under 8 U.S.C. 1101(a)(43)(A), precluded from seeking discretionary relief pursuant to 8 U.S.C. 1229(a)(A), and subject to mandatory detention pursuant to 8 U.S.C. 1226(c). Slip op. at 5.

- Counsel affirmatively misadvised Mr. Sandoval that he would be able to retain immigration counsel to “ameliorate any potential immigration consequences.” In fact, as this case clearly demonstrates, immigration counsel in the context of removal, or deportation, proceedings is not the appropriate avenue or forum to ameliorate the immigration consequences of his criminal conviction. Should his conviction become final, immigration counsel will be unable to do anything to ameliorate the immigration consequences of certain deportation and permanent banishment from a country he has called home.
- The extent of defense counsel’s conduct regarding immigration consequences was to rely on dubious anecdotal evidence from the circumstances of other clients as a basis for advising Mr. Sandoval about the issue that was of paramount concern to him. See PRP, Ex. 1,
- Defense counsel’s failure to investigate the accurate immigration consequences is even more egregious in light of the fact that he did not need to incur additional expenses in consulting with an immigration lawyer or exhaustively research a complex and foreign body of law to get the information he needed to accurately and effectively represent Mr. Sandoval. Rather, a free 20 minute phone call or one email with the Washington Defender Association’s Immigration Project⁴ would have alerted defense counsel that his advice was wholly inaccurate and would have provided him with alternative options for negotiating a plea that would not have triggered these drastic consequences. Even had he been unsuccessful in doing so, defendant would have then been able to make a more informed

⁴ See Appellant’s Opening Brief, page 4 for more details about the Washington Defender Association’s Immigration Project.

decision about whether to accept a plea or take his case to trial.

c. Counsel's deficient performance prejudiced the defendant. In the Strickland prejudice analysis, the determinative question is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Brett, 142 Wn.2d at 874; Kwan, 407 F.3d at 1017 (citing Glover v. United States, 531 U.S. 198, 202-03, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001)). To demonstrate this, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Kwan, 407 F.3d at 1017 (citing Strickland, 466 U.S. at 693).

Here, the Court of Appeals acknowledged that Mr. Sandoval's conviction qualifies as an aggravated felony for which deportation is mandated under federal law. 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")). The court further asserted that defense counsel understood this consequence, but counsel most certainly did not and counsel's declaration demonstrates that he had no idea that a rape conviction

made deportation anything more than a “potential” that could be “ameliorated.” Slip op. at 5. Had counsel taken the time to even minimally investigate the immigration consequences of a conviction for third degree rape he would have easily determined that it is classified as an “aggravated felony” under immigration law and would trigger the harshest possible immigration consequences for Mr. Sandoval, including certain deportation. Slip op. at 5.

Deportation, or the banishment of a person from a country in which he has been a lawful permanent resident, is undoubtedly a severe punishment. As the Supreme Court recognized in St. Cyr, the importance of immigration consequences to a non-citizen “in deciding whether to plead or proceed to trial is well-documented,” and for some people, preserving the right to remain in the United States “may be more important than any potential jail sentence.” 533 U.S. at 322 (quoting Magana-Pizano v. INS, 200 F.3d 603, 612 (9th Cir. 1999); and 3 Bender, Criminal Defense Techniques, sections 60A.01, 60A.02(2) (1999)). The prejudice to Mr. Sandoval in his certain deportation following a plea to an aggravated felony requires that his guilty plea be vacated and the matter be remanded for further proceedings.

2. THE COURT OF APPEALS ERRED IN HOLDING THAT THE COLLATERAL CONSEQUENCES DOCTRINE DEFINES THE SCOPE OF DEFENSE COUNSEL'S SIXTH AMENDMENT OBLIGATIONS AND, THUS, IMMIGRATION CONSEQUENCES HAVE NO BEARING ON DETERMINING WHETHER DEFENDANT'S PLEA WAS SUFFICIENTLY KNOWING, INTELLIGENT AND VOLUNTARY.

a. Due process mandates that a guilty plea be voluntarily entered. Due process requires that a guilty plea be knowing, intelligent, and voluntary. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 982 (1987). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." In re the Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

"Where a plea agreement is based on misinformation . . . generally the defendant may choose . . . withdrawal of the guilty plea." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). The premise of this holding is that a guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. Walsh, 143 Wn.2d at 8; State v. Mendoza, 157 Wn.2d 582, 592, 141 P.3d 49 (2006).

A criminal defendant's failure to understand the immigration consequences of his plea of guilty may render the plea involuntary. In Re Resendiz, 25 Cal. 4th 230; 19 P.3d 1171, 1177 (Cal. 2001); People v. Soriano, 240 Cal Rptr. 328, 334-46 (Cal. Ct. App. 1987); People v. Pozo, 746 P.2d 523, 529 (Colo. 1987); Lyons v. Pearce, 676 P.2d 905, 909 (Or. 1984).

Here, Mr. Sandoval did not understand the immigration consequences of his plea and he informed his attorney his interest in pleading guilty was predicated on his ability or desire to avoid deportation. His attorney did not inform him that deportation was a certain result from his guilty plea, not subject to waiver or other lesser penalty. Consequently, his plea was not knowingly, intelligently, and voluntarily entered.

b. The collateral consequences doctrine does not define the scope of defense counsel's obligations. The status of deportation as a "collateral consequence" of a criminal conviction does not determine what constitutes reasonable performance of counsel under prevailing professional norms. The collateral consequences doctrine relates to the scope of the *trial court's* duty when accepting a guilty plea, insofar as the court is required to advise a defendant of the direct – as opposed to the collateral –

consequences of the conviction in order to ensure that the defendant is making a voluntary, knowing and intelligent plea. See Resendiz, 19 P.3d at 1182-83; State v. Paredez, 101 P.3d 799 (N.M. 2004).

Under the Sixth Amendment, defense counsel has far greater duties toward the defendant at all phases of representation than does the court when taking a guilty plea. In Resendiz, the California Supreme Court discussed at length the expanded duty of defense counsel as opposed to the trial court's obligation to insure the defendant understood the advice given by his or her counsel. 19 P.3d at 1179-80. It is "counsel's function to assist the defendant," and "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions." Id. at 1181. On the other hand, "the court's functions and duties quintessentially exclude such assistance, advocacy, and consultation." Id. It is not the role of the court to advise the defendant as to whether there are meritorious motions, or the possibility of prevailing at trial, and similarly, it is not for the court to conduct investigation and consultation with the accused of his immigration status. Id.

In Resendiz, the defendant plead guilty having been advised of the general possibility of deportation, but he relied on his attorney's advice that he would have no problem with immigration officials. His lawyer's advice was wrong, because the defendant pled guilty to an aggravated felony for which deportation was not only likely but certain to result. His attorney had not consulted an immigration lawyer before giving this advice. The California Supreme Court ruled such "affirmative misadvice" is ineffective. Id. at 1177. Because of the changes in federal immigration law making the exceptions to deportation extremely narrow, the statutory scheme governing deportation for criminal convictions now requires "an enhanced, not a diminished, role for counsel" representing people accused of crimes. Id. at 1178.

No Washington appellate courts have addressed the obligations of a defense attorney when advising a client whom counsel knows to not be a United States citizen in light of these more recent decisions or with a view to the ABA standards of prevailing norms. This Court last addressed the court's role in imparting advice on immigration consequences in In Re Yim, 139 Wn.2d 581; 989 P.2d 512 (1999). In Yim, the court found that the defendant Samphao had not established he was affirmatively

misadvised by the court or prosecution at sentencing regarding the immigration consequences of his conviction. 139 Wn.2d. at 589. However, the Court found that affirmative misadvice on immigration issues can constitute ineffective assistance of counsel and, thus, rise to the level of a manifest injustice warranting withdrawal of defendant's plea. See also Stowe, 71 Wn.App. at 187 (affirmative misadvice regarding collateral consequence of the impact of plea on defendant's military career constituted deficient performance);

Similarly, the court in Holley, ruled that affirmative misadvice regarding collateral consequences can constitute ineffective assistance of counsel, but counsel's "faulty" advice in telling client to disregard the immigration advice in the plea form was different from the misadvice as occurred in Stowe, *supra*, and thus was not a Sixth Amendment violation. *Id.* at 198-99. Notably the court did not articulate how the misadvice in Holley is different than in Stowe, to the extent such the advice in both cases was deemed "collateral."

Neither Yim, Holley, nor other Washington cases accurately address defense counsel's independent role in ensuring a plea in knowingly, intelligently, and voluntarily entered. The attorney must provide effective assistance of counsel throughout the plea and

sentencing proceedings. The attorney does not provide effective assistance by misleading the defendant of the immigration consequences stemming from the plea. See St. Cyr, supra; see also Resendiz, 19 P.3d at 1182-83; Paredes, 101 P.3d at 804 (“We agree with those jurisdictions that have held that ‘an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.’”). These cases, combined with the ABA standards,⁵ point to the emergence of a professional norm that now includes effective, accurate advice regarding immigration consequences. St. Cyr, 533 U.S.at 323 n.50 (noting changes in immigration law affect competency of counsel’s advice in negotiating guilty plea).

It is illogical and counterproductive to tie defense counsel’s Sixth Amendment obligations to the constitutional minima the due process clause requires when the court accepts a guilty plea. As recognized by Resendiz, Couto, St. Cyr, and other courts, immigration consequences are increasingly severe and strict. A competent defense attorney must either seek the advice of a

⁵ The United States Supreme Court has stated, “On claim of ineffective assistance of counsel, proper measure of counsel’s performance is simply reasonableness under *prevailing professional norms*.” Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis added).

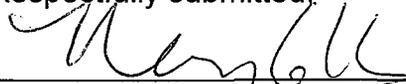
qualified immigration attorney or explain to the client that he or she does not know the immigration risks of pleading guilty to a certain offense. Because changes in immigration law alter the calculus involved in pleading guilty for non-citizens, prior case law does not adequately discuss a competent defense attorney's role in providing accurate immigration advice. Therefore, this Court should accept review as a matter of substantial public interest.

F. CONCLUSION.

Based on the foregoing, Petitioner Valentin Sandoval respectfully requests review be granted because the ruling below conflicts with other court decisions and raises an issue of substantial public importance. RAP 13.4(b).

DATED this 11th day of September 2008.

Respectfully submitted,



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APPENDIX A

FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 25935-8-III
	)	(consolidated with
Respondent,	)	No. 26039-9-III)
)	
v.	)	Division Three
)	
VALENTIN SANDOVAL,)	
)	
Appellant.)	
)	
<hr/> In re Personal Restraint petition of:	)	UNPUBLISHED OPINION
)	
VALENTIN SANDOVAL,)	
)	
Petitioner.)	

BROWN, J. — Valentin Sandoval in his consolidated appeal and personal restraint petition (PRP) seeks to vacate his third degree rape conviction by challenging his trial counsel's effectiveness when misadvising him of the deportation consequences of changing his plea. We affirm Mr. Sandoval's conviction and guilty plea because the record lends insufficient support, and deny his PRP.

FACTS

The State charged Mr. Sandoval with second degree rape - forcible compulsion and/or lack of consent. The State agreed to reduce the charge to third degree rape -

lack of consent and to recommend a six-month sentence in exchange for a guilty plea. According to Mr. Sandoval's trial counsel, Robert E. Schiffner, he was "very concerned" about being deported. Exhibit 1 to PRP at 2. Mr. Sandoval swore counsel "assured [him] that [he] would not be deported or put into Immigration Court by pleading guilty." Statement of Additional Grounds Affidavit.

Mr. Schiffner, swore Mr. Sandoval "did not want to plead guilty if the end result were that he should be immediately deported." Exhibit 1 to PRP at 2. Mr. Schiffner swore he encouraged Mr. Sandoval to accept the plea offer because he believed Mr. Sandoval would have sufficient time "to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea." *Id.* Considering Mr. Sandoval "was immediately put into deportation proceedings[,]," Mr. Schiffner concluded: "My advice to Mr. Sandoval was unfortunately incorrect." *Id.*

Mr. Sandoval, on advice of counsel, pleaded guilty to third degree rape. The court sentenced him to six months. Border Patrol immediately put a hold on him and started deportation proceedings. Immigration proceedings are stayed pending this appeal.¹ Mr. Sandoval appealed and filed a PRP.

ANALYSIS

The issue is whether Mr. Sandoval's third degree rape conviction and supporting

¹ Mr. Sandoval attaches the immigration court record as an appendix to his reply brief. These documents are not included in this court's record, and, therefore, are not properly before this court on direct appeal. RAP 9.1.

guilty plea should be vacated because the plea was not knowing, intelligent and voluntary due to ineffective assistance from his trial counsel.

The faults relating to defense counsel's advice to Mr. Sandoval and the later deportation proceedings are not included in the direct appeal record. As they are not part of the designated appellate record, we cannot consider them on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Thus, no direct appeal record supports Mr. Sandoval's improper plea arguments. Therefore, no relief can be afforded to Mr. Sandoval in his direct appeal or in his pro se statement of additional grounds for review, which raises the same concerns.

A PRP petitioner must show actual and substantial prejudice by a violation of either constitutional rights or a fundamental error of law. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). Three options exist for a petitioner raising a constitutional issue: (1) if the petitioner fails to meet the threshold burden of showing actual prejudice stemming from the constitutional error, the petition must be dismissed; (2) if the petitioner makes a prima facie showing of actual prejudice, but the court cannot determine the merits of the contention solely on the record, the court must remand for a hearing on the merits or a reference hearing is required; or (3) if the petitioner has proven the error actually prejudiced him, the petition must be granted. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992).

Due process requires a defendant's guilty plea be knowing, voluntary and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A

plea is involuntary if the defendant did not understand the consequences of pleading guilty. *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). However, "[a] defendant need not be informed of all possible consequences of a plea but rather only direct consequences." *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Direct consequences are distinguished from collateral consequences by "whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* (citing *Barton*, 93 Wn.2d at 305).

Mr. Sandoval contends his plea was not knowing, intelligent, and voluntary because defense counsel incorrectly informed him of the deportation consequences. In reviewing his claim of ineffective assistance of counsel, our focus is whether "(1) defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant." *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). "The first prong of the *Strickland* test is satisfied if counsel's performance falls below an objective standard of reasonableness in light of all surrounding circumstances." *Stowe*, 71 Wn. App. at 186. Even if counsel's performance is deemed deficient, the defendant must also show prejudice: a reasonable probability that, but for counsel's unprofessional errors, defendant would not have pleaded guilty and would have insisted on going to trial. *Id.*

Trial counsel is obliged to aid a defendant "in evaluating the evidence against him and in discussing the possible *direct* consequences of a guilty plea." *State v.*

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State v. Sandoval; In re Pers. Restraint of Sandoval

Holley, 75 Wn. App. 191, 197, 876 P.2d 973 (1994) (quoting *State v. Malik*, 37 Wn. App. 414, 417, 680 P.2d 770 (1984)) (emphasis in original). Regarding a deportation consequence, Washington courts have held that a defendant need not be advised of the possibility of deportation because "a deportation proceeding that occurs subsequent to the entry of a guilty plea is merely a collateral consequence of that plea." *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999). When counsel affirmatively misrepresents deportation consequences and the defendant relies upon these misrepresentations in making his or her plea, counsel's performance is "objectively unreasonable." *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002), *cert. denied*, 544 U.S. 1034 (2005). A plea based on misinformation is involuntary. *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

While trial counsel advised Mr. Sandoval that deportation proceedings would not immediately commence following conviction, possible deportation was a known consequence of the plea. Counsel provided this advice knowing rape is a crime with deportation consequences. See 8 USC § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable"); 8 USC § 1101(a)(43)(A) (rape is an "aggravated felony").

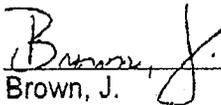
The State argues defense counsel correctly advised Mr. Sandoval because in fact he is still not deported. Deportation proceedings were merely stayed due to our review. Although Mr. Sandoval may not have pleaded guilty if he had been properly

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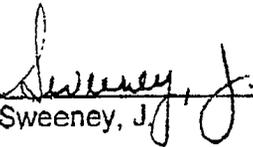
advised of the consequences of his plea, deportation is not a direct consequence of his plea. *Ross*, 129 Wn.2d at 284. Mr. Sandoval's conviction and guilty plea are affirmed.

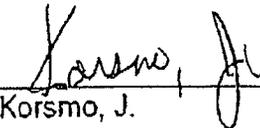
Affirmed; personal restraint petition is denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Brown, J.

WE CONCUR:


Sweeney, J.


Korsmo, J.

APPENDIX B

FILED

AUG 12 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	No. 25935-8-III
	)	(consolidated with
Respondent,	)	No. 26039-9-III)
.v.)	
VALENTIN SANDOVAL,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION;
Appellant.	)	MOTION TO SUPPLEMENT
	)	THE RECORD; AND MOTION
	)	FOR LEAVE TO FILE
	)	AMICUS CURIAE BRIEF
<hr/>)	
In re Personal Restraint of:)	
VALENTIN SANDOVAL,)	
)	
Petitioner.)	

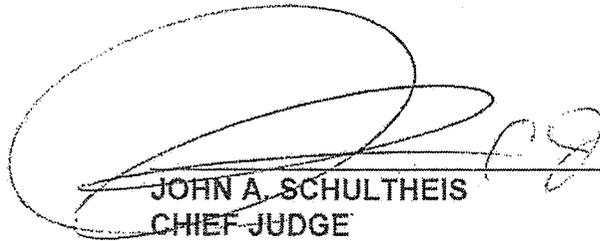
THE COURT has considered appellant's motion for reconsideration of this Court's opinion under date of June 19, 2008, appellant's motion to supplement, and motion for leave to file amicus curiae brief, and State's objection to motion to supplement and is of the opinion the motions should be denied. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

IT IS FURTHER ORDERED appellant's motion to supplement the record and motion for leave to file amicus curiae brief is further denied.

DATED: August 12, 2008

FOR THE COURT:



JOHN A. SCHULTHEIS
CHIEF JUDGE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.)
)
VALENTIN SANDOVAL,)
)
PETITIONER.)

SEP 15 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. _____
COA NO. 26039-9-III

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 11TH DAY OF SEPTEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TERESA CHEN, DPA
GRANT COUNTY PROSECUTOR'S OFFICE
PO BOX 37
EPHRATA, WA 98823-0037

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF SEPTEMBER, 2008.

X _____ *grc*

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STATE OF WASHINGTON
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