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SUPREME COURT
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Oct 11, 2012, 11:20 am
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SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIGIFREDO G. BUENO,

Appellant.

RESPONSE TO AMICUS CURIAE

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ASSIGNMENTS OF ERROR.

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- A. Counsel was effective; he properly investigated and discussed immigration options with Bueno.
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STATEMENT OF THE CASE.

The State shall respond to both Amicus Curiae briefs, WDA, et al, and Korematsu Center in this one reply.

The following is the narrative of the actual crime for which Mr. Bueno was arrested. This is taken from CP 62-64;

On August 4, 2004, members of the Yakima City/County Narcotics Unit (CCNU) conducted a buy/bust operation at the Albertson's parking lot, at 1610 W. Lincoln Ave., Yakima, Washington. The CCNU detectives had a confidential and reliable informant (CI) place a phone call to a drug dealer known only as Juan) and arranged the purchase of methamphetamine which Juan agreed to sell to him or her in front of Albertsons. The CI was searched prior to contacting anyone at the above location and no contraband was found. The CI was given \$100.00 or CCNU buy money to purchase

the methamphetamine [PC Narrative of Detective Mark Andrews].

The CI was waiting for "Juan" in front of the Albertson's pay phones when he/she was approached by two Hispanic males. The CI recognized one of the malt. subjects (identified as Gerardo Covarruvias Landin) as being with "Juan" the other day. The other male subject with Gerardo was identified as Ramon Vasquez Rodriguez. The CI advised that Gerardo asked him "what's up fool" and the CI told Gerardo he/she only had \$100.00 so Gerardo bent down down (sic) and ripped off a piece of plastic that was wrapped around some Albertson's plant potting soil bags and pored an amount of suspected methamphetamine which he had pulled out. Once Gerardo handed the CI the baggie of suspected methamphetamine he gave it to the CI and the CI gave Gerardo the \$100.00 of CCNU buy money. The CI advised that the male subject (Ramon) who was with Gerardo was beside them during the drug deal and observed the transaction. The CI also advised that Ramon was looking around during the deal and was acting as the lookout during the drug transaction. [PC Narrative of Detective Mark Andrews.]

After Gerardo sold the CI the suspected methamphetamine he then walked away with Ramon and got into a green Chrysler (WA# 190-NOG) and got into the backseat of the vehicle. The suspect vehicle was followed while the CI was picked up and gave CCNU detectives the baggie of suspected methamphetamine that he/she stated was purchased from Gerardo for \$100.00. The CI also advised that the two males subjects (Gerardo and Ramon) got into the green Chrysler and drove away. Once the suspected methamphetamine was recovered from the CI the CI was searched again and no contraband was found. Officers were then advised it was a good deal and they stopped the vehicle in the 1100 block W. Lincoln Ave. The driver of the suspect vehicle was identified by WADL as Baldemar Abundiz. The front passenger was identified by WADL as Sigifredo Bueno-Garcia, the defendant. The right rear passenger was identified as Gerardo Covarruvias Landin. The left rear passenger was identified by WADL as Ramon Vasquez-Rodriguez. [PC Narrative of Detective Mark Andrews.]

The CI informed Detective Andrews that the person who had sold him the meth was with "Juan" the day before when he was helping him with his vehicle. As Detective Andrews and the CI passed the suspect vehicle with the occupants outside of it, the CI identified the defendant, Sigifredo Bueno-Garcia, as the person whom he knew was "Juan" from the day prior. [Factual Summary-States Response to Defendant's Motion to Suppress Evidence, pg 2 –filed December 30, 2004)

Upon searching the subjects, the \$100.00 of CCNU buy money was found in the front pants pocket of Sigifredo Bueno-Garcia, the defendant herein. The suspected methamphetamine that was purchased by the CI field tested positive for the presence of amphetamine, and weighted 2.0 grams. [PC Narrative of Detective Mark Andrews.]
(CP 62-64)

LAW AND ARGUMENT - SUMMARY OF ARGUMENT

A. Counsel represented Bueno in an effective manner.

The facts set forth below clearly and convincingly demonstrate that the conduct of Mr. Talbot met all of the standards set forth in this amicus brief. There have been two amicus curiae briefs filed. The State is responding both briefs, Washington Defender Assoc., et al. hereinafter this shall be referred to as WDA and Korematsu Center shall be referred to as Korematsu. WDA spends most of their brief lecturing this court for what WDA perceives as actions Mr. Talbott should have taken regarding Mr. Bueno's case. It, at times, would appear that WDA has not read the transcript or the ruling by the trial court.

Initially the State must remind the court of the facts that were presented to Mr. Talbott as set forth above. The Petitioner was found

minutes after the sale of narcotics to an undercover agent of the State to be in possession of the money used to by those narcotics.

It is from this that Mr. Talbott had to work. WDA says that Talbott should have investigated reasonable alternatives or other possible plea's which would not have resulted in deportation. WDA goes on at great length regarding other possible crimes Bueno could have pleaded guilty to. The problem with this entire argument is that it is theory. The reality of this is as follows:

Q Okay. So did you go through the police reports or what the allegations were, the evidence that the State had against Mr. --

A In great detail, yes.

Q And in these types of cases, a drug case, one of the goals would be to get a simple possession charge --

A (Inaudible).

Q -- if possible?

THE COURT: You have to answer audibly.

MR. TALBOTT: Uh, yes.

THE COURT: Okay.

Q And was that the goal that you were reaching for possibly in this case?

A Well, our initial goal actually was to try to convince the prosecutor, Kelly Falwell (phonetic), that he was totally innocent. His story was that he (inaudible) the car and parked it. He didn't see the transaction. That he didn't know the guy who was involved in the transaction. And that he -- the guy who had made the drug sale just handed him the money. While the police were chasing the car (inaudible) put it in his pocket.

...

A I went over that with Kelly several times. She said she didn't buy it basically, and said that I'm -- that the only deal that she would make would be leave it at conspiracy, but give it credit for time served, and/or go to trial.

Obviously Mr. Talbott did explore “other alternatives.” When there are only two alternatives which are possible, not theoretical, one must choose from those options. I am sure that Mr. Talbot would have been ecstatic to have one of the choices proffered by WDA, the reality is there were not possible. The State had made it clear, plead to the conspiracy or go to trial.

WDA questions the background and experience of Mr. Talbott and suggests that if he would have called the resources they list that they could have steered him to a reasonable alternative. Once again the alternatives were; conspiracy or trial. They were seven days of jail and walk out the door a free man or try to explain to a jury in Yakima County how a “Mexican” had ended up with the buy money from a methamphetamine sale just minutes after the sale. And the additional fact that the same CI had apparently purchase drugs from Bueno the day before, evidence which the State would have attempted to elicit at trial.

This is the background and legal practice emphasis testimony from Mr. Talbott, this clearly shows, contrary to what WDA indicates, that this attorney had the background to advise Bueno with regard to the immigration consequences of his plea:

Q And what does your practice consist of?

A At the present time I've been about 98 percent immigration law. Over the years I've done various things. I gradually

specialized in virtually doing all immigration law.

Q And in fact 2004, 2005, what was the mix of your practice?

A Probably at that time 80, 85 percent immigration law, 15, 20 percent various things, including some criminal law.

Q And so you got from doing a lot of criminal law to narrowing the focus of your practice?

A Gradually. I used to be on the federal panel of public defenders, and I've done a little contract work here and there, but gradually I've taken the criminal law part of it out.

Q And so, one of your specialties would be immigration law?

A It is by far (inaudible).

Q And you hold yourself out as an expert in immigration law or in the specialization, I guess, would be (inaudible).

A I specialize in (inaudible).

Q Okay. It's a complex area of the law; correct?

A It's very complicated, yes.

Q You took on the representation of Mr. Bueno --

A I did.

Q -- correct. And who initially -- what was your first appearance for Mr. Bueno -- or Garcia, I guess.

A Uhm, I believe they initially appointed a public defender, and then we substituted in fairly early on in the case. I don't remember exactly at what point.

...

A I'm fairly fluent in Spanish, but it was not an issue in Mr. Bueno's case because Misty, his wife, was virtually at every conference we had and she is totally bilingual. Also, (inaudible), she was participating in all the discussions about what he should do or shouldn't do, and so it was all going through her and with her, so there was no problem with the communications. RP 2010 pgs 30-2)

Mr. Talbott's testimony makes it extremely clear that he did "reasonably investigate" the immigration consequences of this plea. He testified that he informed Bueno that either choice, plea or trial, a trial that Mr. Talbott did not believe was winnable, would result in automatic deportation due to the fact that this crime was in fact an aggravated felony.

In Amicus WDA's brief they state;

Had Mr. Bueno's defense counsel consulted with WDAIP, attended a training or consulted the available resource materials he would have obtained the accurate assessment of his client's circumstances, namely that there was no subsequent pardon, waiver, or other alternative (then or now) that would cure inevitable removal from a conviction for either delivery or conspiracy to deliver a controlled substance. (At 10)

The footnote then discusses the effect of the conspiracy charge. Not once in this section of this document does WDA reference the actual record in this appeal. If they did they would have to note that Mr. Talbott, a member of the Washington State Bar since 1969, testified under oath, not just as a member of the bar whose statements carry the weight of that membership, but sworn testimony that this immigration attorney told Mr. Bueno in no uncertain terms that both consequences would result in deportation. The difference was that this plea allowed Mr. Bueno to literally walk out the door of the courtroom and the courthouse and thereby avoid Homeland Security for the time being. This was the sworn testimony regarding the discussion between Mr. Talbott and Mr. & Mrs. Bueno

Well, yeah, the risk of going to trial, number one, I thought, in my opinion, I've done many criminal cases over the years, it was a really a hard case to win. In the meantime, if I can speak bluntly about it, if you're Mexican, you're in Yakima County, you're at the location where the drug sale's taking place, you're in a car that's leaving the scene and you've got some marked money in your pocket, it's going to be very hard to convince a Yakima County jury that you weren't part of a conspiracy, even maybe to the point of simply trying to hide the money.

So I -- you know, realistic. I don't lie to my clients at all. This is going to be a really hard case. If you win it, everything's great, you go on with your green card and your life is good. If you lose, though, there are a couple counts, I (inaudible) in prison, and you're going to be deported directly from prison. That's just what would happen. And it would be for life.

If the offer was -- and (inaudible) credit for time served-- you don't have to go back to jail, even though the guilty plea is a drug offense. It's going to be deportable. If you plead and go do something stupid, get put back in jail for something else and Immigration finds you, you're outta here, on the basis -- on this plea. This is an aggravated felony. You're out of here.

The difference is that, as (inaudible) alluded to. If you don't go back to jail, Immigration isn't going to get you this time. If you behave yourself, stay out of trouble, keep your nose clean, don't get put in jail for anything, you could go on for years and years and years without a problem.

So then, truthfully I left the option up to the two of them, and they talked about it a great deal. I'm sure for days they discussed it. And with me he said -- we talked numerous times that's absolutely true. I don't know how many times we were in the -- my office or on the phone, every detail. And I'm straight up him, it's (inaudible) felony, when Immigration finds him, they're gonna be thrown (inaudible).

By the time you're going to renew your green card, come in and see me and maybe at that point there's something we can do for you. I'm making no promises whatsoever. But the options are, plead as (inaudible) ultimately (inaudible) at least get your (inaudible) immediately, or I go to trial and it's going to be really tough to win. And if you lose, then it could be much worse than (inaudible).

I left the option to them. They finally came and said, he wants to do the plea.

...

Q Okay. You didn't indicate that, uh -- to him-- I think you got -- in terms of what you'd just discussed, that's -- that's the advice with regard to the immigration consequences that you gave to him?

A (Inaudible) pleading to an aggravated felony. I said, if you ever get picked up by Immigration, you're out of here. He said, okay, I've learned my lesson. I'm never going to get in trouble again. I'm going to behave myself and take care of my wife and children because they mean all the world to me. I'm sure they (inaudible) matter very much.

Apparently now he's back in trouble with some kind of – I don't know what. (RP 33-36)

This was effective representation as required by State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). The advise was not only effective in allowing Mr. Bueno to remain in the country literally for years even though he had plead guilty to a crime which usually resulted in automatic deportation but was amazingly accurate as to the final outcome.

B. Defense counsel did give accurate advice.

WDA's assertion that the Buenos belief regarding future actions regarding deportation "... defies reason to believe that they would have constructed such an alternative out of whole cloth" completely ignores the sworn statement made by Mr. Talbott under oath. Regarding this claim that Talbott assured the Buenos that this would be taken care of at a later date he testified when queried about a letter he had written Bueno's new attorney:

Q So in here you do make a statement that says, I – uhm, I warned him of the Immigration consequences and that he would have to stay out of trouble until he might have a chance to erase the record. Under current law do you know of any way that he could erase the record?

A No. Nor did I promise him. (Inaudible) take a look at it. (Inaudible) feature Immigration law is changing. We (inaudible) . I thought maybe by the time he got the renew something would come up. And no, (inaudible) nor did I promise him.

Q Do you believe it's possible that he might have understood that to be a possibility, a real possibility?

A Uhm, I believe that he probably understood, that because things are constantly changing, maybe some day down the road would be a (inaudible), maybe. And I think that's certainly not out of the realm of possibility, there's (inaudible) exist today, nor did I say --

MR. JAKEMAN: No further

A (inaudible) wrong.

REDIRECT BY MR. RAMM:

Q Did you have any discussion with regard to pardons?

A Not that I recall. And I'm not saying that (inaudible). I might have said, maybe someday there will be some proof of pardon. I don't know. I did not promise that. Because there is none now still, (inaudible) six years later. We talked about -- we talked a lot. I mean, this was session after session. And Misty was very concerned and she'd call me and then come in to see me.

Q Are you familiar with the portion of the Sentencing Reform Act where a person, if they spend like either five years for a Class C or ten years for a Class B out of -- out of trouble and pay all their costs that they can go back in and get their record vacated?

A They can with that type of vacation, (inaudible) just passage of time is not effective for Immigration purposes. They've made note of that (inaudible).

(RP 2010 pg 38-39)

Apparently the Honorable Michael McCarthy, the jurist who heard the testimony of the Buenos and Mr. Talbott, believed that in fact the Buenos were making this up out of "whole cloth" when he stated the following in both his letter opinion and the Finding of Fact and Conclusion of Law;

The Court specifically disbelieves Mr. Bueno-Garcia's testimony and his sworn statement in which he asserts that he did not understand the plea statement, was ignorant of the immigration consequences of the plea, wanted to go to trial, and only pleaded guilty because his attorney told him to. The Court further finds his assertions that he did not understand the Statement of Defendant on Plea of Guilty or the guilty plea process to be incredible. The transcript of the plea clearly contains his statement that he understood the form, and he was fully aware that if he was not a citizen, the plea could have immigration consequences, including deportation. Mr. Buena-Garcia's plea was entered, knowingly, voluntarily, and with a full

understanding of the benefits and risks attendant thereto. (CP 73-4, 78-9)

The credibility of the witness is a determination to be made by the court. "Determinations of credibility are for the fact finder and are not reviewable on appeal." State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

Mr. Talbott's representation exceeded that required by either Padilla or Sandoval. The actions and advice of Mr. Talbott were effective. There was nothing else that could have been done in this case other than that which was done. The representation of Mr. Talbot met the standards and therefore there is no error and no prejudice. The actions of Judge McCarthy meet the standard of review. "We review a trial court's decision denying a motion to withdraw for an abuse of discretion." State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006)

C. Mitigation of consequences.

This court in State v. Sandoval, 171 Wn.2d 163, 174 footnote 3, 249 P.3d 1015 (2011) declined this very same amicus' "invitation" with regard to setting forth a standard. In the present case, as in Sandoval, the question need not be broadened and this Court should once again decline the invitation of Amicus;

^[3] Amici curiae Washington Defender Association, Washington Association of Criminal Defense Lawyers, Northwest Immigrant

Rights Project, American Immigration Lawyers Association, and One America invite us to hold the Sixth Amendment requires a defense attorney to conduct a four-step process when handling a noncitizen criminal defendant's case: (1) investigate the facts; (2) discuss the defendant's priorities; (3) research the immigration consequences of the charged crime and the plea alternatives, and advise the defendant accordingly; and (4) defend the case in light of the client's interests and the surrounding circumstances. We decline amici's invitation, as their argument goes beyond the scope of this case. Sandoval's ineffective assistance claim is focused narrowly on the advice that he received about the deportation consequence of pleading guilty to rape in the third degree. Of course, Padilla recognizes that "bringing deportation consequences into this [plea] process" can give defense counsel the information necessary to "satisfy the interests" of the client, perhaps by "plea bargain[ing] creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." 130 S.Ct. at 1486. However, this case does not concern Sandoval's counsel's negotiations with the prosecutor, his investigation of the facts, his analysis of a complicated immigration statute (we have concluded the statute was clear), or any other matter addressed by amici's arguments. We will consider these issues if and when they are squarely presented.

Amicus WDA attempts to use this case as a platform to request the court institute a set of requirements upon all parties in this state who conduct pleas. There is no record before this court upon which to make such a determination, this issue is not before this court and should not and need not be addressed by this court.

The two choices for Bueno were go to trial and probably lose or take a plea and with credit for time served walk out the courtroom door a freeman. There are few more overt manifestations of "mitigating the

immigration consequences” than working out an agreement whereby your client leaves the courtroom and the courthouse, a freeman.

This allegation is baseless. The standard of practice demonstrated by Mr. Talbott meets any test.

D. One year time bar.

First and foremost this case is factually distinguishable from Padilla and from In re Personal Restraint Petition of Jagana, 66682-7-I (WACA). In both of those cases there was improper advice given by trial counsel. That did not occur here. Mr. Talbott unequivocally told Bueno that neither option would allow him to avoid deportation. The avoidance of deportation occurred because he was allowed, on the day of the plea and sentencing, to be given credit for the time he had served. It is very noteworthy that Mr. Talbott had successfully argued to the court that Mr. Bueno should be released on his personal recognizance thereby putting into place the necessary step in the plea process which would eventually allow Bueno to walk away from more time in jail and the consequences of this plea, deportation.

The issue certified by this court was not whether Padilla is in fact retroactive under the “new” rule “old” rule analysis. The State would disagree with the court in Jagana, application of the mandate of Padilla is not a “significant change in the law” in the State of Washington.

The State would disagree that Padilla is an "old" rule. As set forth in Jagana the Supreme Court did not determine whether it was old or new. There is a split in the courts in the United States regarding this issue. However the analysis set forth in Jagana from the Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) which more accurately reflects the effect of Padilla especially in this State:

First, it noted that the lack of unanimity in the *Padilla* opinion indicated that a "new" rule was announced. Second, it pointed out that the lower courts were split on the issue, meaning that it was susceptible to reasonable debate before the Supreme Court's decision. Third, it explained that *Padilla* should not be considered an "old" rule because it "was not *dictated* by precedent, "but was simply informed, controlled, and governed by precedent that led "general support" to the rule established. Finally, the court determined that *Padilla* was a "new" rule because it categorized an attorney's duty to advise a client on immigration consequences based upon whether those consequences were clear or uncertain. The court stated that such a "nuanced, new analysis cannot, in our view, be characterized as having been dictated by precedent." (Footnotes omitted.)

The court in Jagana found that trial counsel improperly advised Jagana regarding the consequences of the plea on his immigration status; that did not occur in Bueno's case. To date none of the five jurists who have reviewed this case have found the actions of Mr. Talbott did not meet the test set forth in Padilla v. Kentucky, 130 S.Ct. 1473, 1483, ___ U.S. ___, 176 L.Ed.2d 284 (2010) which simply states;

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear. (Footnote omitted.)

Mr. Talbott did exactly what Padilla requires. He told his client that there were only two options left on the table. Go to trial, an option he told his client which would be very difficult and conviction would result in years in prison then automatic deportation or plead guilty to an offense which also was an aggravated felony and was a deportable offense but walk away from the courtroom free. Not to be redundant but Mr. Talbott practices immigration law in the Yakima area and area with an extensive immigrant community. Mr. Talbott has been practicing law since 1969 and stated in sworn testimony that he specializes in immigration law and has done criminal law over the years. His practice at the time of Bueno's plea was 80-85 percent immigration law (RP 30) He informed his client that there was no other option but deportation and there were no other options available from the State. Mr. Bueno chose to plead and now after the predictions of Mr. Talbott have come to fruition, contact with law

enforcement resulted in deportation proceedings, he wants a second chance.

Padilla was a major change in the law in some portions of the United States but the Court approved Washington's statute which requires that a defendant be notified of the immigration consequences of a plea, noted in Padilla at 1486;

"In sum, we have 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. Hill, 474 U.S., at 57, 106 S.Ct. 366; see also Richardson, 397 U.S., at 770-771, 90 S.Ct. 1441. The severity of deportation—"the equivalent of banishment or exile," Delgado v. Carmichael, 332 U.S. 388, 390-391, 68 S.Ct. 10, 92 L.Ed. 17 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.^[15]

[15] ... Further, many States require trial courts to advise defendants of possible immigration consequences.; Wash. Rev. Code §10.40.200 (2008); (Emphasis mine.)

Nothing in the record would indicate to this court or the lower courts that Mr. Bueno was precluded or thwarted from filing an appeal or a personal restraint petition within the proscribed periods by something other than the alleged reliance on this claimed future motion to vacate or a later attempt to seek a pardon, the existence of which were emphatically refuted by Mr. Talbott.

This State has allowed appeal for a claim of ineffective assistance with regard to an allegation such as the one raised by Bueno for decades.

State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993) addressed the allegation as one of ineffective assistance of counsel;

The State argues that defense counsel does not have an obligation to inform his client of all possible collateral consequences of a guilty plea. State v. Malik, 37 Wn. App. 414, 680 P.2d 770, review denied, 102 Wn.2d 1023 (1984) Although this is a correct statement of the law, the question here is not whether counsel failed to inform defendant of collateral consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea. As noted by the court in In re Peters, 50 Wn. App. 702, 707 n.3, 750 P.2d 643 (1988), "[d]ifferent considerations may arise" when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea (citing United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); People v. Correa, 108 Ill. 2d 541, 485 N.E.2d 307 (1985) (counsel's erroneous misrepresentation that guilty plea would not affect defendant's immigrant status was ineffective assistance and rendered guilty plea involuntary)

State v. Holley, 75 Wn.App. 191, 876 P.2d 973 (1994) discusses the process where an appellant has demonstrated by a preponderance, that he was not properly advised with regard to immigration consequences. The court in Holley remanded to the trial court for a hearing to allow Holley to address this allegation and for the court to make findings. That was exactly what was done in Bueno's case. The outcome was not satisfactory to Bueno; however the formal process did allow a second review of the actions of trial counsel, Mr. Talbott. This review allowed the sworn testimony of the parties and the establishment of a record upon which a court, in this instance Judge McCarthy, could and did rule. This

ruling was based on the facts, evidence and briefing presented to the court. The process to date has fully and completely allowed Mr. Bueno to challenge his plea. It must also be noted that Mr. Bueno took no actions to address this alleged error until that truth and accuracy of Mr. Talbott's advice came to fruition. As can be seen by Stowe and Holley the edicts of Padilla are not new to this state.

RESPONSE TO KOREMATSU AMICUS.

Amicus Korematsu Center's brief consistently cites to matters which are outside the record of this appeal. The information from page three - six, pages eight - nine and portions of page twelve and thirteen have absolutely nothing to do with this appeal and should be stricken and/or not be considered by this court. These sections are clearly extra-record information. The filing of amicus briefs is now an accepted norm; however the insertion of new or outside issues which must be addressed by an opposing party at the last moment is burdensome. See, e.g., Wells v. Whatcom County Water Dist., 105 Wn. App. 143, 154, 19 P.3d 453 (2001) (a party on appeal may not cite to evidence not in the appellate record and may be sanctioned for doing so). State v. Argo, 81 Wn. App. 552, 576, 915 P.2d 1103 (1996) "Where, as here, the claim of ineffective assistance is made on direct appeal, the appellate court will not consider matters outside the record. McFarland, 127 Wn.2d 322, 335 899 P.2d

1251 (1995) (citing State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991))

Korematsu Center argues that the trial court emphasized the plea colloquy when coming to its decision. The State would respectfully disagree. These rulings, the oral, the letter opinion and the formal Findings and Conclusions all take into account the totality of the information provided. Amicus Korematsu makes the same unfounded assumption that WDA amicus put forward, that the actions of Mr. Talbott somehow fell below the required standard set forth in Padilla and in Sandoval, that assumption is not based on the facts of this case nor the sworn testimony of a member of the bar of this State. The testimony of Mr. Talbott clearly demonstrates a careful considerate lengthy discussion between not just he and his client but he, his client and the clients bilingual wife, the wife who authored the Petition for review which was accepted by this court even though she is not an attorney and did not ask leave of this court to file the brief for her husband.

CONCLUSION.

Amicus attempts to argue that Petitioner should be allowed to withdraw his plea. The argument is in many instances based on areas outside the scope of the record and the issue before this court on appeal. The record is clear that Mr. Talbott told Mr. Bueno in no uncertain terms,

that he would be deported for either conviction. He was clear that there were no other choices available. There were no options that were not explored. The plain simple fact is the State made an offer and was not willing to change that offer. Mr. Bueno was given a choice and he made a decision a decision that allowed Mr. Bueno to leave the courtroom a free man and to remain a free for years.

This court should once again decline to adopt the process WDA proposed herein and in Sandoval. The issues raised by both amicus should be denied. The State respectfully requests this Court uphold the decision of the trial court and the Court of Appeals and dismiss this petition.

DATED: October 11, 2012

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Yakima County Prosecuting Attorney

s/ David B. Trefry
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Certificate of Service

The undersigned certifies that on this day, October 11, 2012, he delivered, by email by agreement of the parties, delivery to the attorney of record for the appellant and Amicus Curiae, true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Spokane, Washington, on the date below.

October 11, 2012,

s/ David B. Trefry
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Subject: State v. Bueno 87297-0 Response to Amicus

Please find attached the State's Response to the two amicus briefs. The State has responded to those to separate briefs in this one combined response.

David B. Trefry
Special Deputy Prosecuting Attorney
Yakima County