No. 82175-5

J.M. JOHNSON, J. (concurring)—The United States Supreme Court has noted that where immigration "law is not succinct and straightforward . . . 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." *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284 (2010) (emphasis added). If attorney Robert E. Schiffner would have advised Valentin Sandoval of the *risk* of deportation without adding his prediction that the federal government would not enforce immediate deportation, Schiffner's performance would have been objectively reasonable. Additionally, had the trial court specifically addressed the deportation provision in Sandoval's plea agreement, the record would not establish prejudice. However, because attorney Schiffner assured Sandoval of federal nonenforcement and the trial court did not specifically address the

risk of immigration consequences, I must respectfully concur in this decision.

Prior to the United States Supreme Court's decision in *Padilla*, "'virtually all jurisdictions' – including 'eleven federal circuits, more than thirty states, and the District of Columbia' – '[held] that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation." *Id*. at 1487 (Alito, J., concurring in the judgment) (quoting Gabriel A. Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 699 (2002)). The United States Supreme Court departed from this consensus when the *Padilla* majority held "that counsel must inform her client whether his plea carries a risk of deportation." *Id*. at 1486. Importing the test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court determined that Padilla's counsel failed to properly advise his client that he risked deportation by pleading guilty. *Padilla*, 130 S. Ct. at 1483. It concluded that such advice was objectively unreasonable in violation of the first prong of the *Strickland* analysis. *Id*. The *Padilla* majority distinguished between two types of immigration cases: (1) cases where the immigration consequences are "succinct and straightforward" and (2) cases

where the consequences are "unclear or uncertain." *Id*. In "succinct and straightforward" cases like Padilla's, the attorney has an obligation to accurately advise his client of the known immigration consequences of a criminal conviction. *Id*. However, where the "deportation consequences of a particular plea are unclear or uncertain[,] [t]he duty of the private practitioner . . . is more limited." *Id*. The United States Supreme Court then remanded the case for a determination whether Padilla could demonstrate prejudice sufficient to satisfy *Strickland*'s second prong. *Id*. at 1483-84.

Along with the majority, I concede that, in light of *Padilla*, the *Strickland* analysis now applies to the advice a criminal defense attorney gives to his client regarding the deportation consequences of a guilty plea. Where I disagree is with the Court's flawed application of the *Strickland* analysis.

1. *Objectively reasonable representation*

While Schiffner's performance was objectively unreasonable, I disagree with the majority's analysis. The law concerning the deportation consequences of Sandoval's guilty plea is not clear, succinct, or straightforward. Where the law is not "succinct or straightforward," a

criminal defense attorney only needs to advise his noncitizen client that his criminal charges may carry immigration consequences. *Id*. at 1483. Justice Alito's concurrence criticized the majority's distinction between "succinct or straightforward" law and "other situations." *Id*. at 1487 (Alito, J., concurring). He noted that, in the immigration context, the term "aggravated felony" raises several legal issues, setting potential traps for the unwary. *See id*. at 1488 (Alito, J., concurring) ("As has been widely acknowledged, determining whether a particular crime is an 'aggravated felony' . . . is not an easy task."). In response to Justice Alito's criticisms, the *Padilla* majority indicated that Justice Alito's complex scenarios were not the "succinct and straightforward" cases that the Court envisioned its new rule would apply to. *See id.* at 1483 ("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." (emphasis added)). Both the majority and concurring opinions in *Padilla* agreed that whether a crime constitutes an "aggravated felony" for purposes of immigration law is not an easy question.

While the United States Supreme Court considers it a difficult question whether a crime constitutes an "aggravated felony" under federal immigration law, the majority of this court disagrees. The majority concludes that the immigration consequences concerning Sandoval's conviction were "straightforward enough" to require precise advice from a competent criminal lawyer. Majority at 8-9. The majority performs this "straightforward" analysis in three steps: (1) look up the relevant statute governing deportation consequences for an "aggravated felony" – 8 U.S.C. § 1227(a)(2)(A)(iii); (2) cross-reference this statute with a federal statute defining "aggravated felony" – 8 U.S.C. § 1101(a)(43)(A); and (3) consult Ninth Circuit case law as to whether Sandoval's conviction actually satisfies the statutory definition. Majority at 7-8. This is hardly "straightforward." Additionally, this analysis fails to consider further complications that an attorney should consider before advising a noncitizen client. For example, when did the conviction occur? If the conviction occurred within the wrong time frame, it may not count. *See Ledezma-Galicia v. Holder*, ___ F.3d ___, 2010 WL 5174979 at *6 (9th Cir. 2010) (holding that the deportation consequences under 8 U.S.C. § 1227(a)(2)(A)(iii) do not apply to "aggravated felony" convictions prior to

1988). Which state did the conviction occur in? The same crime that constitutes an "aggravated felony" under one state's statute might not under another's. *Compare Rivera-Cuartas v. Holder*, 605 F.3d 699, 701 (9th Cir. 2010) (holding that a conviction for engaging in sexual conduct with a minor under Arizona Revised Statutes § 13-1405 does *not* constitute an "aggravated felony" under the Immigration and Nationality Act (INA)), *with Yasay v. Holder*, No. 08-74610, 368 Fed. Appx. 727, 729 (9th Cir. Feb. 23, 2010) (unpublished) (holding that a conviction for engaging in sexual conduct with a minor under Hawaii Revised Statutes § 707-732(1)(b) constitutes an "aggravated felony" under the INA). The federal circuits do not even agree on which crimes satisfy the federal definitions. *Compare Silva v. Gonzalez*, 455 F.3d 26, 29 (1st Cir. 2006) (holding that statutory rape is an "aggravated felony" under the INA), *with Soto-Armenta v. Gonzales*, No. 03-72404, 174 Fed. Appx. 386, 388 (9th Cir. Mar. 31, 2006) (unpublished) (holding that statutory rape is *not* an "aggravated felony" under the INA). In short, Schiffner would have to resolve complicated immigration law issues before directly advising Sandoval – issues that were far from "straightforward" as the majority suggests.

It is not even clear that the majority gives the right answer to this question of immigration law. The majority relies on the Ninth Circuit's holding that a conviction for "rape" under California Penal Code § 261(a)(3) constitutes an "aggravated felony" for purposes of the INA, 8 U.S.C. § 1227(a)(2)(A) (iii). Majority at 7-8 (citing *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000)). When considering whether a state conviction satisfies the INA's federal definitions, the Ninth Circuit takes a categorical approach. An offense qualifies as "an aggravated felony if and only if the 'full range of conduct' covered by it falls within the meaning of that term." *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999) (quoting Cal. Penal Code § 288(a)). The Ninth Circuit looks "solely to the statutory definition of the crime, not to the name given to the offense or to the underlying circumstances of the predicate conviction." *Id*. The Ninth Circuit determined that all of the conduct proscribed in California Penal Code § 261(a)(3) constituted "rape" and thereby an "aggravated felony" under the INA. *Castro-Baez*, 217 F.3d at 1059. Of course, the Ninth Circuit's determination regarding a conviction for rape under Washington law might be entirely different. Unlike the California statute at issue in *Castro-Baez*,

Washington's statute, RCW 9A.44.060(1)(a), does not enumerate circumstances that constitute lack of consent by the victim and requires that the victim clearly express nonconsent. Though the California and Washington statutes cover a great deal of similar criminal conduct, they are not coextensive. Quite simply, it is an open question in the Ninth Circuit whether a conviction under RCW 9A.44.060(1)(a) constitutes an "aggravated felony" under the INA.[1]

All of this stands in stark contrast to the "succinct, clear, and explicit" definition in the statute interpreted by the *Padilla* majority that "addresses *not some broad classification of crimes* but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Padilla*, 130 S. Ct. at 1483 (emphasis added). A requirement that all criminal defense attorneys master the intricacies of immigration law prior to providing legal aid to noncitizen defendants is clearly *not* required by *Padilla* or *Strickland*. Whether Sandoval's attorney possessed such mastery should not be dispositive regarding the effectiveness

[1] Though an open question, it seems likely that a conviction under RCW 9A.44.060(1)(a) constitutes an "aggravated felony" under the INA, given the Ninth Circuit's determination that a conviction under the same Washington statute constitutes an "aggravated felony" under the federal sentencing guidelines. *See United States v. Yanez Saucedo*, 295 F.3d 991, 996 (9th Cir. 2002).

of his representation.

The majority also fails to properly emphasize the major defect in Schiffner's advice – his assurance of nonenforcement. Due to the complexities of immigration law, an attorney unsure of the deportation consequences of a criminal conviction should "say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice." *Id.* at 1483 n.10. Had Schiffner simply advised Sandoval that his conviction carried a risk of deportation and urged him to seek out immigration counsel, his performance would not fail *Strickland*'s first prong.

However, Schiffner admits he assured Sandoval that federal authorities would not enforce the immigration consequences of his conviction. He assured Sandoval that he could accept the State's plea offer and still have sufficient time to serve his sentence before seeking immigration counsel. Resp't's Suppl. Br., App. A., Aff. of Att'y. For this reason, Schiffner's advice fails *Strickland*'s first prong.

2. *Prejudice to Sandoval*

I also do not agree with the majority's analysis of prejudice under *Strickland*. RCW 10.40.200 requires each written plea agreement to contain

a warning about immigration consequences. Had the trial judge in this case specifically addressed the immigration warnings during the guilty plea colloquy, the record would not establish prejudice. In this case, the trial judge simply asked Sandoval if he had discussed the plea agreement with his attorney. Hr'g Tr. at 5-6. This particular colloquy was insufficient to cure any prejudice of the defense counsel's deficient performance. However, specifically discussing the statutory warnings in RCW 10.40.200 with a noncitizen criminal defendant would suffice.

The majority mistakenly analyzes the *effect* of statutory warnings when evaluating whether Schiffner gave objectively reasonable advice under the first prong of *Strickland*. Majority at 10-11. Though the majority correctly notes that statutory warnings and the judge's guilty plea colloquy do not remove counsel's duties owed to the client, it incorrectly concludes that such warnings are irrelevant to a claim for ineffective assistance of counsel. These warnings are highly relevant to determining whether the client faced prejudice.

The majority compounds this error by erroneously citing *Padilla*'s reference to RCW 10.40.200 as justification for its position. Majority at 10-

11. *Padilla* provides no support for the majority's dismissal of the statutory and judicial warnings' significance. The United States Supreme Court referenced RCW 10.40.200, along with numerous other state statutes, to help underscore "how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Padilla*, 130 S. Ct. at 1486. *Padilla* did not reach a conclusion as to whether these warnings mitigate the prejudice a noncitizen defendant faces. *Padilla* expressly left the prejudice prong of the *Strickland* analysis to the state courts. *Id*. at 1483-84. Had Sandoval signed a plea agreement containing immigration warnings and expressly told a judge that he understood the warning regarding the immigration consequences of his conviction, I would find no prejudice under *Strickland*.

Conclusion

Schiffner properly warned Sandoval that there was a risk of deportation following his conviction and recommended that he seek immigration counsel. That is all that *Padilla* and *Strickland* require. Schiffner's performance became objectively unreasonable when he assured his client that federal immigration authorities would not enforce the law. Despite his deficient performance, the trial court could have cured the error by specifically

addressing the immigration warnings mandated in RCW 10.40.200. Though the majority arrives at the correct conclusion in this case, I cannot join its flawed analysis. For these reasons, I respectfully concur.

AUTHOR:

Justice James M. Johnson

WE CONCUR: