

No. 82175-5

Stephens, J. (concurring)—I concur in the result in this case but write separately to emphasize what I believe is the appropriate analysis under *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

In *Padilla*, the United States Supreme Court rejected the distinction that other courts had recognized between failing to advise a noncitizen defendant of potential immigration consequences and affirmatively misadvising the defendant. *Id.* at 1481-82; *see also id.* at 1484 (noting there is no relevant difference between an act of commission and an act of omission in this context). This now-rejected distinction resonates in *In re Personal Restraint of Yim*, 139 Wn.2d 581, 989 P.2d 512 (1999), upon which the Court of Appeals in this case relied in dismissing Sandoval’s personal restraint petition. Under *Yim*, defense counsel has no obligation to advise his client that a guilty plea might result in deportation because this is a mere collateral consequence of the plea. *Id.* at 588. However, “an affirmative misrepresentation to a defendant regarding the possibility of deportation might

constitute a ‘manifest injustice’ and, thus, provide a basis for setting aside a guilty plea . . . .” *Id.* The majority opinion appropriately recognizes *Yim* has been eclipsed by *Padilla*.

The focus after *Padilla* is on application of the ineffective assistance of counsel test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As to the first aspect of the *Strickland* test, *Padilla* distinguishes between two broad categories of cases in determining whether counsel’s advice was objectively unreasonable: those in which immigration consequences are “succinct and straightforward” and those in which the consequences are “unclear or uncertain.” *Padilla*, 130 S. Ct. at 1483. I tend to agree with Justice J.M. Johnson that this case falls into the latter category. The picture goes blurry, however, once the analysis moves beyond the threshold question. In order to avoid creating incentives for counsel to “remain silent on matters of great importance,” *id.* at 1484, it is important that the *Padilla* analysis remain focused on the reasonableness standard of *Strickland*.

Rather than asking whether Sandoval’s counsel affirmatively provided incorrect advice regarding immigration consequences, the *Strickland* test asks whether his advice, taken as a whole, was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 688. While I believe this is a close call, I agree that ineffective performance of counsel is established by the evidence submitted in support of the personal restraint petition. And, I agree that Sandoval

has demonstrated the necessary prejudice. I do not, however, agree with any suggestion that a claim of ineffective assistance of counsel is established whenever defense counsel offers affirmative advice concerning immigration consequences that are unclear and that advice turns out to be wrong. In the short term, this would open the door to unsupported claims. In the long term, it would create an unfortunate incentive for defense counsel to remain silent rather than assist a noncitizen defendant seeking to navigate the complexities of immigration law.

AUTHOR:

Justice Debra L. Stephens

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WE CONCUR:

Chief Justice Barbara A. Madsen

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Justice Tom Chambers

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