IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VALENTIN SANDOVAL Petitioner. _____ In the Matter of the Personal Restraint of VALENTIN SANDOVAL, Petitioner. _____	)	No. 82175-5 EN BANC Filed March 17, 2011

FAIRHURST, J. — The question presented is whether, in light of the United States Supreme Court's decision in *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), a noncitizen criminal defendant can be denied the right to effective assistance of counsel when the defense attorney erroneously

assures the defendant that the deportation consequence of a guilty plea can be mitigated.

I. FACTUAL AND PROCEDURAL HISTORY

Valentin Sandoval, a noncitizen permanent resident of the United States, was charged with rape in the second degree. The prosecutor offered, in exchange for a guilty plea, to reduce the charge to rape in the third degree. Sandoval conferred with his attorney and said that he did not want to plead guilty if the plea would result in his deportation. Sandoval's attorney recalls Sandoval as being "very concerned" that he would be held in jail after pleading guilty and subjected to deportation proceedings. Pers. Restraint Pet. (PRP), Ex. 1, at 2. Sandoval's counsel advised him to plead guilty: "I told Mr. Sandoval that he should accept the State's plea offer because he would not be immediately deported and that he would then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea." *Id*. Sandoval explains, "I trusted my attorney to know that what he was telling me was the truth." Statement of Additional Grounds for Review at 1.

Sandoval followed his counsel's advice and pleaded guilty on October 3, 2006. The statement on plea of guilty, that Sandoval signed, contained a warning about immigration consequences: "If I am not a citizen of the United States, a plea

of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Clerk's Papers at 10. During a colloquy with the court, Sandoval affirmed that his counsel, with an interpreter's help, had reviewed the entire plea statement with Sandoval. After the original sentencing hearing was continued, Sandoval was sentenced on January 23, 2007 to the standard range of 6 to 12 months in jail, with credit for time served.

Before Sandoval was released from jail, the United States Customs and Border Protection put a "hold" on Sandoval that prevented him from being released from jail. Deportation proceedings against Sandoval then began. Sandoval now claims, "I would not have pleaded guilty to Rape in the Third Degree if I had known that this would happen to me." Statement of Additional Grounds for Review at 1.

Sandoval appealed, claiming his plea was not knowing, voluntary, or intelligent due to ineffective assistance of counsel, and he filed a concurrent PRP. The deportation proceedings were stayed. The Court of Appeals consolidated the appeal and the PRP, and in an unpublished opinion, affirmed the conviction and denied the PRP. *State v. Sandoval*, noted at 145 Wn. App. 1017, 2008 WL 2460282, at *1.

We granted Sandoval's petition for review. *State v. Sandoval*, 165 Wn.2d

1031, 203 P.3d 381 (2009). Subsequently, the United States Supreme Court decided *Padilla*. We requested and received additional briefing.

II. STANDARD OF REVIEW

Ordinarily, a personal restraint petitioner alleging constitutional error must show actual and substantial prejudice. *See In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). This actual and substantial prejudice standard does not apply when the petitioner has not had a prior opportunity to appeal the issue to a disinterested judge. *See In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010). However, if some other showing of prejudice is required by the law underlying the petitioner's claim of constitutional error, the petitioner must make the requisite showing of prejudice. *Id.* at 214-15.

Sandoval had to bring a PRP to meet his burden of proving ineffective assistance of counsel because his counsel's advice does not appear in the trial court record. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal."). Because of this unique procedural obstacle to Sandoval's ineffective assistance claim, he has not "already had an opportunity to appeal to a disinterested judge." *Grantham,* 168

Wn.2d at 214. Thus, Sandoval does not have to show actual and substantial prejudice; his burden is only to show that he is entitled to relief for one of the reasons listed in RAP 16.4(c). *See Grantham,* 168 Wn.2d at 214. Sandoval still has the burden of establishing the prejudice required for a claim of ineffective assistance of counsel based on an attorney's advice during the plea bargaining process. *See Padilla*, 130 S. Ct. at 1485; *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

III. ANALYSIS

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent. *Hill*, 474 U.S. at 56; *McMann*, 397 U.S. at 770-71. To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test for ineffective assistance claims--first, objectively unreasonable performance, and second, prejudice to the defendant. Ordinary due process analysis does not apply. *Hill*, 474 U.S. at 56-58.

A. Did the advice of Sandoval's attorney meet the constitutional standard of competence for advice about immigration consequences?

Before *Padilla*, many courts believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction. *See Padilla*, 130 S. Ct. at 1481 n.9. However, in *Padilla*, the United States Supreme Court rejected this limited conception of the right to counsel. *Id.* at 1481-82. The Court recognized that deportation is "intimately related to the criminal process" and that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Id.* at 1481. Because of deportation's "close connection to the criminal process," advice about deportation consequences falls within "the ambit of the Sixth Amendment right to counsel." *Id.* at 1482.

Padilla describes the advice that a constitutionally competent defense attorney is required to give about immigration consequences during the plea process. "Immigration law can be complex," as *Padilla* recognizes, and so the precise advice required depends on the clarity of the law. *Id.* at 1483. If the applicable immigration law "is truly clear" that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation. *Id.* If "the law is not succinct and straightforward," counsel must

provide only a general warning that "pending criminal charges may carry a risk of adverse immigration consequences." *Id.* In other words, even if immigration law does not reveal clearly whether the offense is deportable, competent counsel informs the defendant that deportation is at least possible, along with exclusion, ineligibility for citizenship, and any other adverse immigration consequences. *Padilla* rejected the proposition that only affirmative misadvice about the deportation consequences of a guilty plea, but not the failure to give such advice, could constitute ineffective assistance of counsel. *Id.* at 1484.[1]

Padilla itself is an example of when the deportation consequence is "truly clear." *Id.* Jose Padilla pleaded guilty to transporting a significant amount of marijuana in his truck, an offense that was obviously deportable under 8 U.S.C. § 1227(a)(2)(B)(i):

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is *deportable*.

(Emphasis added.) This statute is "succinct, clear, and explicit in defining the

[1]In analyzing Sandoval's case, the Court of Appeals relied on *In re Personal Restraint of Yim*, 139 Wn.2d 581, 587-89, 989 P.2d 512 (1999), which held that because deportation was merely a collateral consequence of a guilty plea, anything short of an affirmative misrepresentation by counsel of the plea's deportation consequences could not support the plea's withdrawal. *Sandoval*, 2008 WL 2460282, at *2. *Padilla* has superseded *Yim*'s analysis of how counsel's advice about deportation consequences (or lack thereof) affects the validity of a guilty plea.

removal consequence for Padilla's conviction." *Padilla*, 130 S. Ct. at 1483. By simply "reading the text of the statute," Padilla's lawyer could determine that a plea of guilty would make Padilla eligible for removal. *Id.*

To assess whether Sandoval's counsel's advice to Sandoval meets the *Padilla* standard, we must first determine whether the relevant immigration law is truly clear about the deportation consequences. Under 8 U.S.C. § 1227(a)(2)(A)(iii), "[a]ny felon who is convicted of an aggravated felony at any time after admission is deportable." "Aggravated felony" is defined in 8 U.S.C. § 1101(a)(43)(A) to include "murder, rape, or sexual assault of a minor." The charges here, rape in the second degree and rape in the third degree, appear to be deportable offenses because they fit the definition of "aggravated felony." Sandoval's counsel had to take the extra step of reviewing the definition of "aggravated felony," whereas Padilla's counsel had to look only at the face of 8 U.S.C. § 1227(a)(2)(B)(i). Further, although determining whether a state crime is a "rape" under federal immigration law is not always a simple matter, the Ninth Circuit Court of Appeals interprets the term "rape" in 8 U.S.C. § 1101(a)(43)(A) "by 'employing the ordinary, contemporary, and common meaning' of that word and then determin[ing] whether or not the conduct prohibited by [state law] falls within that common, everyday definition." *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000) (citation omitted)

(quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)). In this case, we think the law was straightforward enough for a constitutionally competent lawyer to conclude that a guilty plea to RCW 9A.44.060(1)(a) (rape in the third degree, lack of consent) would have subjected Sandoval to deportation. Therefore, Sandoval's counsel was required to correctly advise, or seek consultation to correctly advise, Sandoval of the deportation consequence.

The State and amicus Washington Association of Prosecuting Attorneys (WAPA) argue that Sandoval's counsel's advice was proper. From their perspective, counsel discussed the risk of deportation with Sandoval, and counsel appropriately relied on his prior experience to assess Sandoval's chances and recommend a mitigation strategy. Further, WAPA notes, counsel's assurance was limited to telling Sandoval that he would not be "immediately deported," PRP, exhibit 1, at 2, not that he would never be deported. The State and WAPA also argue that the guilty plea statement contained a warning about the immigration consequences of pleading guilty, as required by RCW 10.40.200,[2] and the judge

[2]This statute provides, in relevant part:
Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement. If, after September 1, 1983,

confirmed in a colloquy that Sandoval reviewed the statement with his counsel. These arguments are unavailing for two principal reasons.

First, defense counsel's mitigation advice may not be couched with so much certainty that it negates the effect of the warnings required under *Padilla*. The required advice about immigration consequences would be a useless formality if, in the next breath, counsel could give the noncitizen defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences. Under *Padilla*, counsel can provide mitigation advice. However, counsel may not, as Sandoval's counsel did, assure the defendant that he or she certainly "would not" be deported when the offense is in fact deportable. That Sandoval was subjected to deportation proceedings several months later, and not "immediately" as his counsel promised, makes no difference. Sandoval's counsel's advice impermissibly left Sandoval the impression that deportation was a remote possibility.

> the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty. Absent a written acknowledgement by the defendant of the advisement required by this subsection, the defendant shall be presumed not to have received the required advisement.

RCW 10.40.200(2).

The second reason that Sandoval's counsel's advice was unreasonable, contrary to the State and WAPA's argument, is that the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave.

In *Padilla*, the Commonwealth of Kentucky used a plea form that notifies defendants of a risk of immigration consequences, and the Court even cited RCW 10.40.200, noting the Washington statute provides a warning similar to Kentucky's. *See* 130 S. Ct. at 1486 n.15. However, the Court found RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings. Rather, for the Court, these plea-form warnings underscored "how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation." *Id.* at 1486 (emphasis added). Despite the warning about immigration consequences on Kentucky's plea forms, the Court concluded that the advice of Padilla's lawyer was incompetent under the Sixth Amendment. The defendant was misadvised that he "'did not have to worry about immigration status since he had been in the country so long.'" *Id.* at 1478 (internal quotation marks omitted) (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)).

The result is the same here. Just as Padilla's lawyer incorrectly dismissed the risks of deportation, Sandoval's counsel's categorical assurances nullified the constitutionally required advice about the deportation consequence of pleading

guilty. We conclude, therefore, that Sandoval has proved the performance prong of *Strickland*.

We hold the performance of Sandoval's counsel during the plea process "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and thus was constitutionally incompetent because his advice regarding the immigration consequences of Sandoval's plea impermissibly downplayed the risks.[3]

B. Did the advice of Sandoval's attorney prejudice Sandoval?

"In satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Riley*, 122 Wn.2d

[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.

at 780-81 (citing *Hill*, 474 U.S. at 59); *accord In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 254, 172 P.3d 335 (2007); *State v. Oseguera Acevedo*, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999). A "reasonable probability" exists if the defendant "convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S. Ct. at 1485. This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. *Strickland*, 466 U.S. at 694.

We conclude Sandoval meets this burden. Not only does Sandoval swear after-the-fact that he would have rejected the plea offer had he known the deportation consequence, but also Sandoval's counsel says that Sandoval was "very concerned" at the time about the risk of deportation. PRP, Ex. 1, at 2. Sandoval relied heavily on his lawyer's counsel, explaining that "I trusted my attorney to know that he was telling the truth." Statement of Additional Grounds for Review at 1.

We accept the State's argument that the disparity in punishment makes it less likely that Sandoval would have been rational in refusing the plea offer. According to the State, if Sandoval were convicted of second degree rape, RCW 9A.44.050, a class A felony, he faced a standard sentencing range of 78-102 month's imprisonment and a maximum of a life sentence. Third degree rape, however,

subjected Sandoval to a standard sentencing range of 6-12 months.

However, Sandoval had earned permanent residency and made this country his home. Although Sandoval would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea is also "a particularly severe 'penalty.'" *Padilla*, 130 S. Ct. at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893)). For criminal defendants, deportation no less than prison can mean "banishment or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91, 68 S. Ct. 10, 92 L. Ed. 17 (1947), and "separation from their families," *Padilla*, 130 S. Ct. at 1484. Given the severity of the deportation consequence, we think Sandoval would have been rational to take his chances at trial. *See Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). Therefore, Sandoval has proved that his counsel's unreasonable advice prejudiced him.

IV. CONCLUSION

We reverse the Court of Appeals, vacate Sandoval's conviction, and remand to the trial court for proceedings consistent with this opinion.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Justice Charles W. Johnson	Richard B. Sanders, Justice Pro Tem.
Justice Gerry L. Alexander	
Justice Susan Owens	