

1-28-2014

Popoca-Garcia v. State Appellant's Reply Brief Dckt. 40777

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IN THE SUPREME COURT OF THE STATE OF IDAHO

German POPOCA-)
GARCIA)

NO. 40777

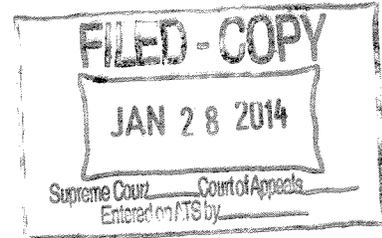
Petitioner - Appellant,)

BINGHAM COUNTY NO. CV-2012-200

v.)

STATE OF IDAHO,)

Respondent.)



REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM

HONORABLE DAVID C. NYE
District Judge

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RESPONDENT

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LEGAL ARGUMENT

Petitioner-Appellant German Popoca-Garcia (hereinafter “Mr. Popoca” or “Petitioner”), having received Respondent’s brief on appeal, herein files this Reply.

Given its jurisdiction to freely review the application of the relevant law to the facts found by the district court, *see Young v. State*, 151 Idaho 52, 764 P.2d 129 (Ct. App. 1988), this Court should find that the district court’s determination that Mr. Popoca failed to demonstrate ineffective assistance of his trial counsel be deemed clearly erroneous because (i) the incoherent manner in which Mr. Popoca’s prior attorney, Manuel Murdoch, communicated his advice to Mr. Popoca was objectively deficient as a matter of law, and (ii) Mr. Murdoch’s confused communication of that advice prejudiced Mr. Popoca.

- I. Mr. Murdoch’s inconsistent explanations about the immigration consequences of the plea agreement fell below an objective level of reasonableness, rendering his representation deficient as a matter of law.**

Mr. Murdoch’s performance was objectively deficient as a matter of law because the cumulative effect of his various inconsistent explanations to Mr. Popoca about the immigration consequences of the plea offer

amounted to confusing, inconsistent advice when the consequence of pleading guilty to the offense was crystal clear. The conviction for a sexual abuse of a minor offense is an aggravated felony under the Immigration and Nationality Act, appearing third on the list of aggravated felonies in the statute. 8 U.S.C. § 1101(a)(43)(A). Neither the district court nor the parties to this appeal take the position that the consequence was unclear. (Respondent's brief, p. 6; R., pp. 53-54, 92.) As a result of the inconsistent and confusing manner in which he communicated his advice to Mr. Popoca, Mr. Murdoch failed to carry out his constitutional duty to provide clear advice under *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010). In this case, Mr. Murdoch was required to tell Mr. Popoca that it was virtually certain that he would be deported as a result of his conviction. By failing to clearly convey this advice, Mr. Murdoch violated his fundamental duty to clearly communicate to his client information necessary to meet his client's objective of avoiding deportation, thereby failing to provide constitutionally competent representation under the Sixth Amendment.

The Supreme Court reached its decision in *Padilla* by applying the test for ineffective assistance of counsel announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *Padilla*, 130 S.Ct. at 1482.

Strickland, of course, requires an assessment of whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 104 S.Ct. at 2052. Following the standard laid down in *Strickland*, the Supreme Court concluded that constitutionally effective assistance requires a defense attorney to affirmatively advise a non-citizen defendant about the immigration consequences of admitting guilt to an offense, and where, as here, the consequences of pleading guilty are clear, the attorney's affirmative advice must also be clear. *Padilla*, 130 S.Ct. at 1483.

The Supreme Court's conclusion in *Padilla* is consistent with, if not grounded upon, the attorney's fundamental duty to communicate with clients and keep them informed of decisions with respect to representation. Communication is essential to the very nature of the attorney-client relationship because the client trusts the attorney to work with the client to achieve a desired result. The Idaho Rules of Professional Conduct expressly provide that a lawyer "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." IDAHO RULES OF

PROFESSIONAL CONDUCT R. 1.4(a)(2), (b) (2004).¹ *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000). Similarly, the American Bar Association's Criminal Justice Standards provide that defense counsel has a duty to keep the client informed about developments arising in a case or plea discussion. *See* ABA Criminal Justice Standards, Defense Function (3d ed. 1993) Standard 4-3.8(b); ABA Criminal Justice Standards, Pleas of Guilty (3d ed. 1999) Standard 14-3.2(a), (f). Prevailing professional norms also provide that the duty to clearly and accurately communicate legal advice extends to an explanation of the consequences of a plea bargain. *See* Nat'l Legal Aid and Defender Assoc., Performance Guidelines for Criminal Representation, Guideline 6.3(a) (1995) ("Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.").

¹ The commentary further clarifies: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." IDAHO RULES OF PROFESSIONAL CONDUCT R. 1.4 cmt. 5.

In the course of plea negotiations, Mr. Popoca's central objective was to avoid a conviction that would trigger mandatory deportation. (R., pp. 6-8.) An attorney's duty to clearly communicate with a client is intimately intertwined with the concurrent duty to generally abide by a client's decisions concerning the objectives of representation and the means for achieving those objectives. See IDAHO RULES OF PROFESSIONAL CONDUCT R. 1.2(a), 1.4(a)(2). The Supreme Court recently recognized the duty to communicate clearly in the specific context of plea-bargaining in *Missouri v. Frye*, 566 U.S. ___, 132 S.Ct. 1399, 1408 (2012). Justice Kennedy, writing for the majority, addressed defense counsel's duty of clarity in the context of conveying the terms of a plea offer, stating that the general rule is that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.*

Although there is no dispute that Mr. Popoca wanted to avoid deportation, Mr. Murdoch's statements to the trial court and his assertions as to what he told Mr. Popoca about the immigration consequences of pleading guilty to the charged offense were anything but clear. Mr. Murdoch told the trial court in Mr. Popoca's presence that Mr. Popoca

could be deported, and *likely* would be deported, but also that it was *unclear* whether he would be deported. (Tr., p. 11, Ls. 7-10; p. 24, L. 25 – p. 25, Ls. 1-6; p. 37, Ls. 18-21.) The only correct advice to give a Lawful Permanent Resident who is poised to plead guilty to an aggravated felony under the Immigration and Nationality Act is that the conviction *will cause* deportation. *Padilla*, 130 S.Ct. at 1483. In *Padilla*, the Supreme Court emphasized that this is not a matter of semantics: where the consequence is clear – as it was for both the petitioner in *Padilla* and Mr. Popoca – precision matters, and an attorney must communicate to the client that a guilty plea will result in virtually certain deportation. *Id.*

The district court decision neither addresses the mandate that the attorney clearly communicate to the client the immigration consequences of a decision to plead guilty, nor discusses whether Mr. Murdoch discharged this duty in light of his various inconsistent statements on this very point. Rather, the district court's decision, and the Respondent's appellate argument, hang upon only one of the many and various statements that Mr. Murdoch made about the immigration consequences: specifically, that *at some point* before entering the guilty plea, Mr. Murdoch managed to accurately characterize the immigration consequences of the plea offer.

(Respondent's brief, pp. 5-6; R., pp. 93-95.) In order to arrive at this conclusion, the district court and the Respondent rely upon Mr. Murdoch's statement at the post-conviction evidentiary hearing that, before appearing at the change of plea hearing, he explained to Mr. Popoca that a guilty plea to the charged offense *would* result in the loss of his permanent resident status and deportation. (Tr., p. 36, Ls. 16-25 – p. 37, Ls. 4-6; R., pp. 93-94; Respondent's brief, p. 6.) However, Mr. Murdoch said other things, too.

Mr. Murdoch admits that he equivocated in the advice he provided to Mr. Popoca – specifically, that he told Mr. Popoca that the immigration authorities “*could* deport him for [the offense] and *most likely* would.” (Tr., p. 37, Ls. 18-21.) (emphasis added). Although both the district court and Respondent suggest that Mr. Murdoch was appropriately disclosing the immigration authorities' opinion about the immigration consequences of Mr. Popoca's potential conviction, the relevant inquiry is whether Mr. Murdoch explained the consequence of the guilty plea under the law. (Tr., p. 37, Ls. 11-15; R., p. 94; Respondent's brief, p. 6.) *Booth v. State*, 151 Idaho 612, 619, 262 P.3d 255, 262 (2011) (citing *Padilla*, 130 S.Ct. at 1483).

Neither the district court nor the Respondent directly engage with what Mr. Murdoch actually said on the record to the trial court (and in the

presence of Mr. Popoca) at the change of plea hearing: “My client will *most likely* have some immigration consequences to this. And I’ve informed him of this, that this *could* put his permanent resident status in jeopardy.” (Tr., p. 11, Ls. 7-10.) (emphasis added). Mr. Murdoch also admitted at the evidentiary hearing that this was an incorrect statement of law. (Tr., p. 49, Ls. 16-22.) While the district court acknowledged that this statement alone was not sufficient to inform Mr. Popoca that his deportation was virtually certain, the court did not consider the effect that this admittedly inconsistent and incorrect statement of law made in open court might have had on Mr. Popoca as he heard it. (R., p. 93.)

The district court decision does not explain how Mr. Murdoch discharged his duty to tell Mr. Popoca that his conviction was virtually certain to cause his deportation in light of his admitted inconsistent statements to his client and the district court. (R., pp. 88-95.) Compliance with defense counsel’s obligations under *Padilla* requires the provision of clear advice about clear consequences: that a guilty plea *would* result in deportation. *Padilla*, 130 S.Ct. at 1483. Both the district court and the Respondents acknowledge this. (R., p. 94; Respondent’s brief, pp. 5-6.) In light of the various other statements that Mr. Murdoch made about the

immigration consequences of Mr. Popoca's guilty plea, the district court's reliance upon only one of those statements to conclude that Mr. Murdoch discharged his constitutional duty to clearly explain to Mr. Popoca that his deportation was a virtual certainty was legal error.

Since the Respondent did not address this undisputed erroneous statement by Mr. Murdoch, Petitioner herein restates his position: that Mr. Murdoch's hedging about the deportation consequences before the trial court at the crucial moment when Mr. Popoca changed his plea to guilty reflected Mr. Murdoch's own uncertainty about the consequences, and amounts to conflicting and confusing legal advice. Further, the cumulative effect of that conflicting and confusing advice deprived Mr. Popoca of meaningful representation by failing to inform him of the virtual certainty of deportation following conviction for the charged offense. Even if Mr. Murdoch did, as the district court found, provide correct advice at some time, that advice was nullified by the other statements made to Mr. Popoca and to the trial court that directly conflict with what Mr. Murdoch testified he explained to Mr. Popoca in private. *See, e.g., State v. Sandoval*, 171 Wn.2d 163, 173, 249 P.3d 1015, 1020 (Wash. 2011) ("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.”).

Although the district court correctly found that a violation of *Padilla* occurs, if at all, before the plea is entered, Mr. Murdoch’s statements at the sentencing hearing are nonetheless relevant to determine his certainty about the advice he professed to have given Mr. Popoca about the consequences of a guilty plea. At the sentencing hearing, Mr. Murdoch repeated his hedging about the deportation consequences before the court:

[The prosecutor] said [Mr. Popoca] is going to be deported. *It’s premature to say that. We don’t know. That’s going to have to run through whatever proceedings immigration courts do. I do a lot of immigration law. And I can say that it’s unclear at this point whether this would actually result in a removal or not.*

(Tr., p. 24, L. 25 – p. 25, Ls. 1-6.) (emphasis added). Either Mr. Murdoch was uncertain about the legal consequences of the conviction, or he was certain but neglected to express his certainty to the trial court. This post-hoc statement is relevant because the plain meaning of Mr. Murdoch’s explanation to the court continues to reflect his uncertainty regarding deportation consequences.

- II. Mr. Murdoch's inconsistent explanations prejudiced Mr. Popoca because it is reasonably probable that, but for Mr. Murdoch's lack of clarity about the immigration consequences of pleading guilty to the charged offense, Mr. Popoca would have understood that the plea virtually guaranteed deportation, and would have instead insisted on going to trial.

The Respondent argues that even if Mr. Murdoch's representations may be considered deficient, there is no actual prejudice to Mr. Popoca on account of that deficiency because, during the plea colloquy, he answered in the affirmative when the trial court asked if he was aware that he *could* be deported as a consequence of his plea. Given Mr. Popoca's affirmative response to the trial court's inquiry, the Respondent maintains that Mr. Popoca's subsequent sworn statement in his post-conviction petition that he would have taken his case to trial to avoid deportation amounts to nothing more than mere retrospective dissatisfaction. (Respondent's brief, p. 7.)

Idaho Criminal Rule 11(d)(1) requires the trial court to inform all defendants entering a guilty plea or making factual admissions during the colloquy that the entry of the plea or the admission of certain facts *could* have the consequence of deportation if the defendant is not a citizen. I.C.R.

11(d)(1). While warnings from the trial court about possible immigration consequences may play a useful role in stimulating a conversation between defense counsel and the defendant about those consequences, court advisals during the plea colloquy can neither substitute for competent advice from defense counsel, nor cure the prejudice flowing from counsel's failure to advise about those consequences, because the Sixth Amendment obligation of competence is a duty owed by defense counsel. *Padilla*, 130 S.Ct. at 1482, 1486. *See, e.g., State v. Favela*, No. 32,044, 2013 WL 6038868 (N.M. Ct. App. Aug. 8, 2013), *cert. granted*, (N.M. Oct. 18, 2013) (No. 34,311) (trial court's advice to defendant about immigration consequences at plea proceeding does not cure failure of defense counsel to provide detailed advice about such consequences). *Cf. United States v. Delgado-Ramos*, 635 F.3d 1237, 1240-41 (9th Cir. 2011) (failure of trial court to accurately inform defendant of immigration consequences of guilty plea during colloquy was not prejudicial error).

The central focus in a claim of ineffective assistance of counsel must be on the prejudice arising from counsel's deficient performance, *see United States v. Akinsade*, 686 F.3d 248, 255 (4th Cir. 2012), and the legal standard for evaluating prejudice requires that Mr. Popoca show a reasonable

possibility that, but for Mr. Murdoch's deficiency, he would have withdrawn his plea and insisted on going to trial, and that such a decision would have been rational under the circumstances. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985); *Gilpin-Grub v. State*, 138 Idaho 76, 82, 57 P.3d 787, 793 (2002); *McKeeth v. State*, 140 Idaho 847, 851, 103 P.3d 460, 464 (2004); *Padilla*, 130 S.Ct. at 1485. This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. *Strickland*, 104 S.Ct. 2052.

Petitioner herein submits that his dissatisfaction with Mr. Murdoch's representations in his criminal proceedings is not merely retrospective because Mr. Murdoch's failure to accurately and consistently communicate the consequences that would inexorably flow from the entry of a guilty plea frustrated the central objective sought by the Petitioner in the course of representation—avoiding mandatory deportation. Not only does Mr. Popoca swear that he would have rejected the plea offer had he known about the guaranteed deportation consequence (R., p. 8.), but Mr. Murdoch also stated that Mr. Popoca's immigration status "was a big part of our discussions" when they discussed the plea agreement. (Tr., p. 35, Ls. 21-25.) *See also Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289,

322, 121 S.Ct. 2271 (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.”).

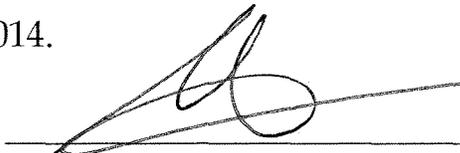
If Mr. Popoca were convicted after trial for the charged offense of Lewd Conduct with a Minor under Sixteen, he would have faced a maximum sentence of life imprisonment. I.C. § 18-1508. However, Mr. Popoca had earned permanent residency and made the United States his home; although he would have risked 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. 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 (1947), and “separation from their families,” *Padilla*, 130 S.Ct. at 1484. Given the severity of the deportation consequence, Mr. Popoca would have been rational to take his chances at trial. *See, e.g., Sandoval*, 171 Wn.2d at 175-176 (defendant’s after-the-fact statement that he would have rejected plea and gone to trial despite facing a maximum life sentence deemed rational under the

circumstances). Therefore, Mr. Popoca has proved that his counsel's unreasonable advice prejudiced him.

CONCLUSION

The Petitioner respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief and remand this case for further proceedings.

DATED this 28th day of January, 2014.



Maria E. Andrade
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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