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# State v. Icanovic Respondent's Brief 2 Dckt. 38477

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

HASAN ICANOVIC,  
Petitioner-Appellant,  
vs.  
STATE OF IDAHO,  
Respondent.

No. 38477  
Ada Co. Case No.  
CV-2010-20419

**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

**HONORABLE MICHAEL E. WETHERELL  
District Judge**

**LAWRENCE G. WASDEN  
Attorney General  
State of Idaho**  
  
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**JUN 19 2014**  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

**ATTORNEYS FOR  
RESPONDENT**

**ATTORNEY FOR  
PETITIONER-APPELLANT**

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## STATEMENT OF THE CASE

### Nature Of The Case

Hasan Icanovic appeals from the denial of his petition for post-conviction relief after an evidentiary hearing.

### Statement Of The Facts And Course Of The Proceedings

In the underlying criminal case Icanovic pled guilty to felony domestic violence pursuant to a plea agreement with the state. (Order Re: Evidentiary Hearing Held June 21, 2013, p. 2 (hereinafter "Order").) Icanovic initiated the instant case by filing a petition for post-conviction relief. (R., pp. 3-5.) Icanovic alleged that defense counsel had assured him that his guilty plea would not result in his deportation to Bosnia nor result in loss of the ability to apply for United States citizenship. (R., pp. 4, 7-8.) Icanovic was a legal permanent resident of the United States at the time. (Supp. Tr., p. 80, Ls. 16-19.)

After an evidentiary hearing<sup>1</sup> the district court found that Icanovic's counsel told Icanovic "that if he chose to plead guilty, it was possible he could be deported and that there could be adverse impacts on his ability to obtain United

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<sup>1</sup> The district court initially granted the state's motion for summary dismissal, which the state on appeal conceded was error because there remained material issues of fact. (Uncontested Motion for Remand and Statement in Support Thereof.) Icanovic's attempt to turn this concession of material issues of fact, made in the context of summary dismissal proceedings, into factual or legal concessions on remand (Petitioner's Memorandum *in re: Padilla v. Kentucky* and *Laffler v. Cooper*, p. 4 (augmentation) (claiming motion constituted a stipulation to deficient performance); Appellant's brief, p. 17 (state "acknowledged" that only issue regarding deficient performance was statutory comparison)), is highly inappropriate. The state conceded neither deficient performance nor the irrelevance of law guiding the actual deportation proceeding.

States citizenship.” (Order, p. 27.) Furthermore, “during the course of the taking of the guilty plea, [the district court] advised Mr. Icanovic that a felony or even a misdemeanor conviction could result in his deportation, inability to obtain legal status or denial of an application for United States citizenship. Mr. Icanovic stated under oath that he understood these potential consequences of pleading guilty.” (Id. (footnote omitted).) These representations were “legally correct” and “factually accurate in light of the relevant statutes, rules, and ICE practices and procedures.” (Id. at pp. 27-29.) The court therefore found there was neither deficient performance of counsel (Order, pp. 26-30) nor prejudice (Order, pp. 31-33).

ISSUE

Icanovic states the issues on appeal as:

Did the district court err when it denied Mr. Icanovic's petition for post-conviction relief?

(Appellant's brief, p. 10.)

The state rephrases the issue as:

Has Icanovic failed to demonstrate either legal or factual error in the district court's order denying his petition for post-conviction relief?

## ARGUMENT

### Icanovic Has Failed To Demonstrate Error In The District Court's Order Denying His Petition For Post-Conviction Relief

#### A. Introduction

Icanovic alleged that his counsel informed him that his guilty plea to felony domestic violence would not result in his deportation or losing his ability to apply for citizenship, and that but for this advice he would not have pled guilty. (R., pp. 4, 8.) The district court found Icanovic's evidence not credible, the testimony of counsel credible, and that Icanovic had in fact been advised both by counsel and by the district court that his guilty plea might have immigration consequences. (Order, pp. 12, 27.) Icanovic argues that even though he failed to prove his allegations he was still entitled to relief, because informing him that he might be deported was still ineffective assistance of counsel. (Appellant's brief, pp. 13-25.) Icanovic's argument that the district court should have granted him relief on the unpled theory that counsel had informed him that his guilty plea might result in his deportation is without merit because counsel's statements were neither incorrect nor prejudicial.<sup>2</sup>

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<sup>2</sup> The state initially argued that Padilla v. Kentucky, 559 U.S. 356 (2010), should not be given retroactive effect. (Brief of respondent, pp. 9-21.) Indeed, the Supreme Court of the United States has held that a petitioner whose conviction was final prior to the decision in Padilla may not invoke the holding of that case to collaterally attack a criminal judgment. Chaidez v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1103 (2013). In its motion to remand, the state conceded that Padilla was decided the day before the judgment in this case became final. (Uncontested Motion for Remand and Statement in Support Thereof, p. 3.)



B. Standard Of Review

Post-conviction proceedings are civil in nature and therefore the applicant's allegations must be proven by a preponderance of the evidence. When appellate review of a district court's denial of post-conviction relief follows an evidentiary hearing, rather than a summary dismissal, the evidence must be viewed most favorably to the trial court's findings. On review, this Court will not disturb the district court's factual findings unless they are clearly erroneous. However, this Court exercises free review of the district court's application of the relevant law to the facts. If a district court reaches the correct result by an erroneous theory, this Court will affirm the order upon the correct theory. Additionally, constitutional issues are pure questions of law over which this Court exercises free review.

Murray v. State, 156 Idaho 159, \_\_\_, 321 P.3d 709, 713 -714 (2014) (internal quotes and citations omitted).

C. Icanovic Failed To Prove Either Deficient Performance Or Prejudice

To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Murray, 156 Idaho at \_\_\_, 321 P.3d at 714. To establish a deficiency, the petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. Murray, 156 Idaho at \_\_\_, 321 P.3d at 714; Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); Knutsen v. State, 144 Idaho 433, 442, 163 P.3d 222, 231 (Ct. App. 2007). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. Murray, 156 Idaho at \_\_\_, 321 P.3d at 714; Knutsen, 144 Idaho at 442, 163 P.3d at 231. Where the defendant was convicted upon a guilty plea, to

satisfy the prejudice element the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Booth v. State, 151 Idaho 612, 621, 262 P.3d 255, 264 (2011).

In Padilla v. Kentucky, 559 U.S. 356, 374 (2010), the Supreme Court of the United States held “that counsel must inform her client whether his plea carries a risk of deportation.” “[W]hen the deportation consequence is truly clear ... the duty to give correct advice is equally clear,” but “[w]hen the 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.” Id. at 369. In Icanovic’s case neither the deportation law nor the end result of that process was “succinct and straightforward,” and therefore counsel’s advice that a guilty plea “may carry a risk” of deportation was entirely accurate. (Order, pp. 26-29.) Because counsel “inform[ed] [his] client” that “his plea carries a risk of deportation,” the district court correctly found he fulfilled his obligation of reasonableness.

Icanovic, citing Padilla, claims that counsel has a “duty to give concrete, accurate, affirmative advice as to specific immigration consequences,” which is measured against “whether the federal statutory law makes it clear that the particular offense will render the non-citizen client eligible for deportation or subject to automatic deportation.” (Appellant’s brief, p. 16 (emphasis omitted).) First, the Supreme Court required no such duty of “concrete, accurate, affirmative advice,” but only that “his plea carries a risk of deportation.” Padilla, 559 U.S. at

374. Moreover, reading Padilla as holding that a defendant is more interested in testing counsel's statutory knowledge than in knowing whether he will actually be deported is both unwarranted and strains common sense. Finally, Icanovic's laser-like focus on what made him eligible for deportation simply ignores most of the applicable deportation law and procedure.

ICE Officer Brandon Jones testified that after "the individual is found removable" by an immigration judge, his "legal permanent residence [sic] status is revoked and [he is] kept in ICE custody and we begin trying to obtain travel documents for that individual" from the country of origin. (Supp. Tr., p. 73, Ls. 20-25.) ICE custody can last only up to 180 days. (Supp. Tr., p. 74, Ls. 1-15.) If the travel documents are not issued by the country of origin ICE is legally "required to release that individual on [his] own recognizance." (Supp. Tr., p. 74, Ls. 4-22; see also Supp. Tr., p. 76, Ls. 1-16 (can hold beyond 180 days only if immediate removal "highly likely").) If the individual is from a country from which ICE cannot obtain travel documents he "would never in effect be removed from the United States." (Supp. Tr., p. 84, Ls. 16 – p. 85, L. 14.) Bosnia, Icanovic's country of origin, is "tricky" because "verifying citizenship in Bosnia is quite a lengthy process." (Supp. Tr., p. 85, L. 15 – p. 86, L. 5.)

Icanovic's argument assumes that the only relevant step in this process is the immigration judge's determination that the individual is removable, and that the legal ability to actually remove the individual is irrelevant. This reads Padilla too narrowly, and would lead to the absurd result that where the defendant is deemed removable by the judge but never actually removed, the attorney who

inaccurately advised a client he would be deported would be deemed effective while the attorney who accurately predicted the person would not be deported is deemed ineffective. Icanovic has not demonstrated that the district court erred by concluding Icanovic failed to prove that his trial counsel was ineffective for advising him that deportation was a possibility (as opposed to a sure thing) if he pled guilty.

Even if his attorney could theoretically have given better legal advice, his advice was, as a matter of fact, spot on, and therefore there can be no prejudice. Icanovic had the burden of showing “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.” Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted). To obtain relief he has to “convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” Padilla, 559 U.S. at 372 (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

Icanovic’s only evidence of prejudice was his assertion that “[b]ut for [defense counsel’s] advisement, I would not have pled guilty.” (R., p. 8.) Counsel’s alleged “advisement” was that pleading guilty “would not” “result in me being deported to Bosnia.” (Id.) Thus, the prejudice claim was based on underlying facts (an affirmative representation that he would not be deported) that the district court specifically rejected. Icanovic presented no evidence that the actual advice given by counsel, that pleading guilty might result in deportation, played any role whatsoever in Icanovic’s decision to accept the plea agreement. Because Icanovic presented no evidence suggesting that but for the

allegedly erroneous advice that he might be deported he would not have pled guilty and would have gone to trial, the district court correctly found no prejudice.

Moreover, Icanovic has presented no theory by which he would have been better off rejecting the state's plea offer and going to trial. He was no less subject to deportation after a guilty verdict than after a guilty plea. The district court found that the state's charge was backed not only by the victim's testimony, but also by physical evidence and the testimony of "an uninvolved third-party witness." (Order, pp. 31-32.) The district court concluded that if Icanovic had elected to go to trial it is "overwhelmingly likely that he would be in the same, or likely a worse, position." (Order, p. 32.)

Icanovic asserts that no evidence was presented in post-conviction regarding what evidence would have been presented at trial had he rejected the plea offer. (Appellant's brief, pp., 23-24.) Even assuming the truth of this assertion, Icanovic's claim that there is a lack of evidence ultimately cuts against him. It was his burden of proof, and there is no evidence that Icanovic had a better chance of avoiding deportation had he gone to trial, and therefore no evidence that it would have been reasonable to reject the state's plea offer.

It was Icanovic's burden to prove that he would not have pled guilty and would have insisted on going to trial but for counsel's deficient performance. On appeal he only claims that he proved he "was very concerned about the potential immigration consequences of his guilty plea." (Appellant's brief, p. 25.) He can cite to no evidence, however, that going to trial would have better addressed this concern than pleading guilty. He points out that in his affidavit he claimed he

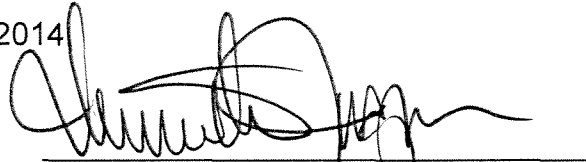
would not have entered the plea. (Id.) His statement that he would not have entered the plea but for counsel's advice there would be no deportation is of marginal relevance where the facts show the claimed advice was never given. Icanovic failed to prove the theory he pled (that he was told there would be no immigration consequences) and has failed on appeal to even articulate how he was prejudiced by the facts ultimately proved (that he was informed there may be immigration consequences). Icanovic has failed to demonstrate that he proved any prejudice from the advice in fact given by counsel (and reiterated by the trial court).

The district court found, based on a credibility determination, that counsel in fact advised Icanovic that there was the possibility of deportation upon his conviction. The district court also informed him of this possibility during the plea colloquy. Icanovic does not assert on appeal that the district court erred by rejecting his allegations of being told there would be no immigration consequences and making these factual findings. These factual findings, in turn, show that there was neither deficient performance nor prejudice. Icanovic has failed to show error in the district court's order denying his petition for post-conviction relief.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order and judgment denying the petition for post-conviction relief.

DATED this 19th day of June, 2014



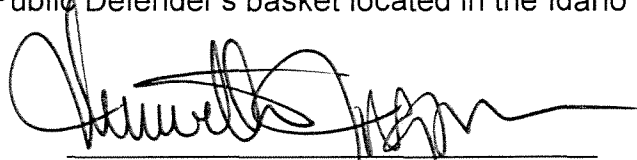
\_\_\_\_\_  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of June, 2014, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

JUSTIN M. CURTIS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



\_\_\_\_\_  
KENNETH K. JORGENSEN  
Deputy Attorney General

KKJ/pm