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State v. Icanovic Appellant's Reply Brief 3 Dckt. 38477

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IN THE SUPREME COURT OF THE STATE OF IDAHO

HASAN ICANOVIC,)	
)	NO. 38477
Petitioner-Appellant,)	
v.)	ADA COUNTY NO. CV 2010-20419
)	
STATE OF IDAHO,)	APPELLANT'S
)	REPLY BRIEF
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

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

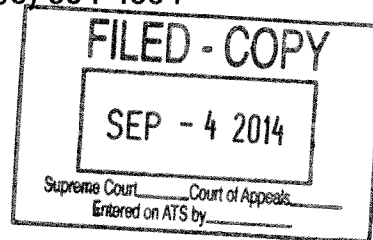
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STATEMENT OF THE CASE

Nature of the Case

Hasan Icanovic appeals from the district court's order denying his petition for post-conviction relief following a remand from this Court. He asserts that the district court erred in its determination that counsel did not provide deficient performance and in its decision that, even if performance were deficient, Mr. Icanovic suffered no prejudice.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Icanovic's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.¹

¹ In its Statement of Facts, the State asserts that the district court initially granted the State's motion for summary dismissal and that it conceded error because there remained material issues of fact. (Respondent's Brief, p.1 n.1.) The State then asserts that it is "highly inappropriate" for Mr. Icanovic attempt to turn this concession into factual or legal concessions on remand. What, exactly, is inappropriate about quoting the representations made in the State's own motion is not clear. Mr. Icanovic does not believe that any of the State's previous assertions have been misrepresented. This Court can decide what weight, if any, to give the assertions made by the State in support of its motion for remand.

ISSUE

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

ARGUMENT

The District Court Erred When It Denied Mr. Icanovic's Petition For Post-Conviction Relief

A. Introduction

The district court erred when it dismissed Mr. Icanovic's petition for post-conviction relief because Mr. Icanovic demonstrated, by a preponderance of the evidence, that he received ineffective assistance of counsel prior to the entry of his guilty plea to felony domestic violence. There is no dispute that Mr. Icanovic, a non-citizen, was not informed by his trial counsel prior to entering his plea that his plea would render him automatically and presumptively deportable under clear immigration law. Because the immigration consequences of his plea were clear under federal law, Mr. Icanovic was entitled to affirmative and correct advice as to the immigration consequences of this plea. Further, because the district court's prejudice analysis is based upon evidence that would be inadmissible at trial or that was not introduced at the evidentiary hearing, the district court erred by holding that Mr. Icanovic suffered no prejudice.

B. The District Court Erred When It Denied Mr. Icanovic's Petition For Post-Conviction Relief

The State first asserts that Mr. Icanovic failed to establish deficient performance. (Respondent's Brief, pp.5-8.) The State's primary assertion is that, "neither the deportation law nor the end of that process was 'succinct and straightforward,' and therefore counsel's advice that a guilty plea 'may carry a risk' or deportation was entirely

accurate.” (Respondent's Brief, p.6.) There are several problems with the State's argument.

First, this position is directly contrary to the position taken by the State in its Respondent's Brief during Mr. Icanovic's first appeal in this matter. In that brief, the State made the following statement:

The state concedes that had Icanovic's attorney researched the law, he would have discovered that a felony conviction for domestic violence results in mandatory deportation. See 8 U.S.C. § 1227(a)(2)(E)(i). Thus, although counsel's advise was constitutionally sufficient prior to Padilla, if Padilla applies, counsel's advice that Icanovic “might” or “might not” be deported was constitutionally deficient because the immigration consequences were clear.

(11/8/11 Respondent's Brief, p.21 n.3.) There was no new testimony from Icanovic's attorney after remand.

Second, the immigration consequences were succinct and straightforward, as set forth in the Appellant's Brief. In such a case, an attorney must give correct advice as to the specific immigration consequences. The question is whether the federal statutory law makes it clear that the particular offense will render a non-citizen client eligible for deportation or subject to automatic deportation – not whether, in the best guess of defense counsel, immigration and customs enforcement will ever get around to initiating removal proceedings. See *Padilla*, 559 U.S. at 360-61; 368-69. And this standard is measured by whether, under the pertinent immigration statutes, regulations, and case law, the consequence of the defendant's guilty plea on his or her immigration status is clearly defined. *Id.* at 369 (finding that, “[t]he consequences of Padilla's plea could be easily determined from reading the removal statute”).


Finally, the State asserts that a “laser-like focus on what made [Mr. Icanovic] eligible for deportation simply ignores most of the applicable deportation law and procedure.” (Respondent’s Brief, p.7.) The State then summarizes some of Officer Jones’s testimony concerning what occurs after an individual is found to be removable, such as an attempt to obtain travel documents, to facilitate deportation. However, as is set forth in the Appellant’s Brief, the focus is on whether federal law renders an individual deportable. The fact that the deportation procedure could possibly be disrupted or delayed due to unexpected problems getting travel documents not the relevant inquiry. If this were the inquiry, immigration consequences would never be known because there would always be the possibility of a bureaucratic mistake in the deportation process.

Mr. Icanovic pleaded guilty to an offense that constitutes an aggravated felony, and a non-citizen who commits an aggravated felony is presumptively deportable. See 8 U.S.C. § 1227(a)(2)(A)(iii). The State’s argument is based on ignoring the federal law that actually sets forth the immigration consequences. Indeed, the State does not cite any federal statutes at all. The fact that deportation proceedings can get disrupted or delayed does not render the immigration consequences Mr. Icanovic’s guilty plea unknown. Because the immigration consequences to Mr. Icanovic’s plea were clear, counsel rendered deficient performance by only advising that Mr. Icanovic might of might not be deported.

CONCLUSION

Mr. Icanovic respectfully requests that this Court vacate the district court's order denying his petition for post-conviction relief.

DATED this 4th day of September, 2014.


FOR JUSTIN M. CURTIS
Deputy State Appellate Public Defender