NO. 91111-8

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Petitioner.

AMICUS CURIAE MEMORANDUM OF THE WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Due to his counsel's deficient conduct during plea negotiations, Vinay Bharadwaj rejected the State's only immigration-safe plea offer to assault in the third degree with sexual motivation, went to trial, and was convicted of offenses that will result in his automatic deportation.[1] Nevertheless, the Court of Appeals rejected his ineffective assistance of counsel claim holding there is no remedy for deficient conduct during plea negotiations unless or until the State presents a "formal offer."

As this Court recognized in *Sandoval*, it has not yet addressed the scope of *Padilla* duties as they relate to "counsel's negotiations with the prosecutor, [or] his investigation of the facts…" *State v. Sandoval*, 171 Wn.2d 163, 174, n. 3, 249 P.3d 1015 (2011). But the *Sandoval* Court made clear that it would "consider these issues if and when they are squarely presented." *Id*. They are squarely presented here and this court should grant review to provide important guidance as to how the Sixth Amendment applies to defense counsel's duties regarding immigration consequences of potential pleas during plea negotiations.

II. ARGUMENT

[1] Bharadwaj was convicted of three counts of Child Molestation 2nd degree. These convictions constitute aggravated felonies under 8 USC § 1101(a)(43)(B) (sexual abuse of minor offenses) and subject him to removal under 8 USC § 1227(a)(2)(A)(iii) (aggravated felony ground of deportation).

A. This Court Should Accept Review Under RAP 13.4(b)(3) To Address How The Sixth Amendment Applies To The Plea Bargaining Process With Respect To The Immigration Consequences Of Possible Pleas.

The Sixth Amendment guarantees a criminal defendant the right to counsel and that "right extends to the plea-bargaining process." *Lafler v. Cooper*, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012). During the plea negotiation process, "defendants are 'entitled to the effective assistance of competent counsel.'" *Id*. (quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). A plea agreement benefits both parties, through the "potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing." *Missouri v. Frye*, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012). But "in order [for] these benefits [to] be realized,… criminal defendants require effective counsel." *Id*.

Both the United States and Washington Supreme Court have held that this right includes defense counsel's duty to advise non-citizen defendants of the immigration consequences of their charges. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); *State v. Sandoval*, *supra*. In *Padilla*, the Supreme Court established the minimum

duties for counsel to be competent for *Strickland*[2] purposes: "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis." 559 U.S. at 371. (internal citations omitted). Under *Padilla*, in order to identify whether a particular plea carries risks of deportation, an attorney should "read[] the text of the statute," and "follow the advice of numerous practice guides," and should access "advice on deportation . . . when it is readily available." *Id.* at 1483-84.

In *Sandoval,* this court established the bounds of *Strickland* prejudice where a non-citizen defendant faces immigration consequences as the result of a plea. The court held that, given the severity of the deportation consequence at stake, a non-citizen defendant meets his burden to establish prejudice where counsel's ineffective assistance *forecloses consideration of options* that would avoid deportation. *Sandoval*, 171 Wn.2d at 176. Indeed, the *Sandoval* Court found prejudice as there was a reasonable probability that a non-citizen would not have pled guilty to third degree rape with a six month sentence, and instead would have risked a prison term of 78-102 months at trial, since the guilty

[2] A criminal appellant asserting ineffective assistance of counsel must satisfy the familiar *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) test by showing deficient conduct and prejudice.

plea triggered certain deportation.[3] *Id*; *see also, State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). (defense counsel failure to advise on consequences of plea constitutes ineffective assistance and violates RPC 1.1. and 1.2(a)).

B. The Court Of Appeals' Holding Would So Restrict *Padilla* And *Sandoval* As To Render Their Protections Meaningless Thus Warranting Review Under RAP 13.4(b)(2) & (3).

Review of the Court of Appeals' ruling is justified under RAP 13.4(b)(2) and (3) because it established a new rule that would gut *Padilla* and so restrict counsel's duties to advise a non-citizen defendant as to deny him his Sixth Amendment right to counsel. Relying on principles of contract law and citing to the Restatement of Contracts, the Court of Appeals held that in order to establish ineffective assistance of counsel, and for *Padilla* duties to attach, a non-citizen defendant must show that the State made a formal offer, including "all material terms necessary for a plea agreement." *State v. Bharadwaj*, No. 69453-7-I, 2014 WL 5465089, at *3 (Wash. Ct. App. Oct. 27, 2014). Because the Court found that the State's plea offer for assault in the third degree with sexual motivation lacked a sentencing recommendation and "contemplated future

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[3] Here, there is a similarly reasonable probability of prejudice, since Bharadwaj's desire to avoid deportation was just as great as Sandoval's, yet counsel's deficient conduct foreclosed Bharadwaj's consideration of options that would have avoided deportation. *See State v. Bharadwaj*, No. 91111-8, Petition for Review.

negotiations", it held that Bharadwaj could not demonstrate prejudice and his ineffective assistance of counsel claim therefore failed.[4] *Id*.

The Court of Appeals' rule would render *Padilla* toothless. Under this new standard, the *Padilla* duty to provide adequate advice regarding immigration consequences is eliminated unless or until the State makes a formal offer. This rule ignores the reality of the plea bargaining process. Plea negotiations may be "'the only stage when legal aid and advice would help [a defendant]'" —and the bulk of that process occurs before a formal offer is made. *Frye*, 132 S. Ct. at 1408 (quoting *Massiah v. United States*, 377 U.S. 201, 204, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)). Plea bargaining is not analogous to contract negotiations between corporate entities where each party presents formal offers and counter-offers in writing. Rather, the process is an interactive give-and-take with both the State and defense presenting numerous potential deals in various degrees of finality.

As the Supreme Court has recognized, "[t]o a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. *That* is what plea bargaining is." *Frye*, 132 S. Ct. at 1407 (emphasis added) (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)). But under the rule

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[4] The *Bharadwaj* court did not address whether he had established deficient conduct.

announced in *Bharadwaj*, non-citizen defendants would have no right to effective assistance during what the Supreme Court has termed "not some adjunct to the criminal justice system [but]… *the* criminal justice system." *Id*. (emphasis added). The Court of Appeals' vision of plea bargaining is divorced from reality, necessitating review.

The Court of Appeals' holding would place non-citizen defendants in a constitutionally impermissible catch-22. No remedy, and thus no *Padilla* duty, would attach unless the State makes an immigration-safe formal offer. It defies logic, and runs counter to *Padilla*, *Lafler* and *Frye*, to make the triggering event for defense counsel's *Padilla* duties the State's discretionary decision to offer an immigration-safe plea. In cases involving charges that trigger immigration consequences the only possibility of avoiding such an outcome, short of acquittal at trial, is for informed defense counsel to negotiate an immigration-safe plea.

In most cases, the State will rely on effective defense counsel to identify when an immigration-safe plea is necessary and what such options are. The State may be unaware of or misinformed about the immigration consequences of a plea. Or the State may have no idea that a defendant's priority is to avoid immigration consequences. Without effective representation at the pre-offer stage, many potential deals will simply fizzle out. This case illustrates the impossible position this new rule would

place defendants in. The *Bharadwaj* court found there was no formal offer and thus no prejudice because the offer did not contain a sentencing recommendation. *Bharadwaj*, 2014 WL 5465089, at *3. But there was no sentencing recommendation precisely because of defense counsel's deficient conduct—failing to investigate the immigration consequences of assault in the third degree with sexual motivation, failing to follow up with the State about those consequences, and failing to negotiate a final plea bargain with a sentencing recommendation. *Padilla* and a Defendant's Sixth Amendment rights cannot turn solely on the whim of the State to make a full and formal immigration-safe offer. *See State v. Bharadwaj*, No. 91111-8, Petition for Review at 17-19 (citing cases).

C. The *Bharadwaj* Rule Would Undermine The Goals Of The Plea Bargaining Process.

The rule announced in *Bharadwaj* would undermine the ability of the plea bargaining process to reach judicious and efficient results based on "informed consideration of possible deportation [that] can only benefit both the State and noncitizen defendants during the plea-bargaining process." *Padilla*, 559 U.S. at 373. Indeed, the *Padilla* court recognized:

> [A] criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation,

> as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

Id. The Court of Appeals rule would remove any affirmative responsibility for defense counsel to investigate possible pleas, actively advocate on immigration consequences during negotiations with the State, and develop those negotiations to the point where an immigration-safe plea is acceptable to both parties. At the same time, as this case aptly illustrates, where defense counsel does not effectively advise her client about the immigration consequences of a possible plea, the State loses a powerful motivator for defendants to plead guilty, resulting in unnecessary trials with often disastrous consequences for defendants.

D. The Court Of Appeals' Decision Will Have Drastic Results For Washington's Immigrant Communities Implicating A Significant Public Interest Under RAP 13.4(b)(4).

This rule would have devastating effects for Washington's non-citizen defendants—many of whom have been lawful permanent residents and members of our communities for decades. For more than a century, the United States Supreme Court has "recognized that deportation is a particularly severe 'penalty,'" equivalent to "banishment or exile." *Id*. at 373 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 149 S.Ct. 698, 37 L.Ed. 905 (1893); *Delgadillo v. Carmichael*, 332 U.S. 388, 390,

68 S.Ct. 10, 92 L.Ed. 17 (1947)). In 2013, over 5,000 people were in immigration removal proceedings in Washington; just over half of those in ICE detention facing removal proceedings had at least one conviction.[5] Deportation is a real and devastating prospect for many non-citizens and their families in Washington.[6]

E. The Washington Legislature And Courts Have Established Heightened Protections For Non-Citizen Defendants.

In Washington State, our legislature, our courts, and our voters have long made clear that immigrants are valued members of our communities who deserve heightened protections. Since 1999, the Washington Defender Association's Immigration Project (WDAIP) has provided defenders with individual, case-specific analysis of the immigration consequences of possible pleas. Since its inception, the Washington legislature has provided dedicated resources to ensure and expand the availability of WDAIP resources, expanding funding in 2005 and 2013. Washington voters, through their elected officials, have spoken clearly—in our state there is a heightened duty and expectation of

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[5] U.S. Deportation Proceedings in Immigration Courts. TRAC Immigration, FY 2012 and FY 2013. Available at http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php. (Accessed on 1/18/2015); http://trac.syr.edu/immigration/reports/343/. (Accessed on 1/18/2015).

[6] In 2011, the Immigration Custom's Enforcement (ICE) apprehended and detained an all-time high of nearly 430,000 non-citizens in the United States. DHS Office of Immigration Statistics, Immigration Enforcement Actions: 2011 4 (Sep. 2012), http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

competent representation for defendants. And our courts have long recognized that duty. *See State v. Stowe*, 71 Wn. App. 182, 185, 858 P.2d 267 (1993) (ineffective assistance of counsel where defense counsel failed to investigate and advise on military consequences of plea); *Sandoval*, 171 Wn. 2d 163; *State v. A.N.J.*, 168 Wn.2d at 111. Review should be granted to enforce that authority.

III. CONCLUSION

Both Federal and Washington precedent establish that the Sixth Amendment right to effective assistance of counsel applies to the entire plea negotiation process and requires counsel to adequately advise on the immigration consequences of plea offers. The Court of Appeals' new standard would eviscerate that right for non-citizen defendants by providing no remedy where defense counsel misadvises or fails to advise her client as to the immigration consequences of a plea offer if it is anything less than a formal and complete offer. For the foregoing reasons, this court should grant review pursuant to RAP 13.4(b)(2); (3); & (4).

DATED this 23rd day of January 2015.

Respectfully Submitted,

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