No. _____

In The
Supreme Court of the United States

LEONEL CERVANTES-MERAZ, *Petitioner,*

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

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PETITION FOR A WRIT OF CERTIORARI

Brian Patrick Conry
Counsel for Petitioner
Law Office of Brian Patrick Conry
534 SW 3rd AVE Suite 711
Portland, Oregon 97204
503-274-4430
bpconry@gmail.com

QUESTIONS PRESENTED GOES HERE WHEN FINAL

(I) Did the State of Oregon violate the Petitioner's right to effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendment of the U.S. Constitution and the Padilla precedent by ruling that Counsels, Ms. Mitchell and Mr. Geiger, were effective counsel and had complied with Padilla? Counsels advised Mr. Cervantes-Meraz he would be deportable both prior to and after a plea bargain where the Petitioner subsequently waived jury trial and entered into a stipulated facts trial and was convicted of Attempted Compelling Prostitution of a Minor and Sexual Harassment. Both Geiger and Mitchell admitted in their testimony that they did not advise Cervantes-Meraz that he was eligible for INA 245(i) adjustment of status and virtually certain to become a legal permanent resident of the U.S. if, but only if, he went to jury trial and was acquitted of all charges.

(II) Mitchell tells her client that she is an "expert", Padilla, counsel but does not tell Cervantes-Meraz, as she later testified at the PCR hearing, that inadmissibility concerns are not any part of her Padilla analysis. Mitchell admits she does not know how an undocumented alien can become a LPR through a family Visa. Mitchell is aware that Cervantes-Meraz is married to a U.S. citizen. Did Mitchell and Geiger affirmatively misadvised their client by telling Cervantes-Meraz the best possible outcome for him with Immigration is to stipulate to the facts of Attempted Compelling Prostitution of a Minor and Sexual Harassment, which destroyed his pre-plea ability to become an LPR through a family Visa? Was Petitioner affirmatively misadvised by his self-proclaimed Padilla expert of the immigration consequences of his convictions because of Mitchell's ignorance of family visas, of I-130s, of 245(i) adjustment, and due to her failure to inform her client thereof and thereby protect Cervantes-Meraz's pre-plea ability to change his status from undocumented to legal permanent resident of the U.S. if, but only if, he was acquitted at trial of all charges?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

Oregon Supreme Court:

Cervantes-Meraz v. Oregon, 481 P.3d 917 (Or. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Leonel Cervantes-Meraz petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court.

OPINIONS BELOW

The decision of the Oregon Supreme Court denying review is reported at 481 P.3d 917 (Or. 2021) and reproduced in the Appendix at App. 1. The decision of the Oregon Court of Appeals affirming without opinion is reported at 476 P.3d 1282 (Or.App. Ct. 2020) and reproduced in the Appendix at App. 2.

The decision of the Oregon Circuit Court is not reported, but is reproduced in the Appendix at App. 12. The only "written" decision is the transcribed oral decision of a Post-conviction relief Judge. This is reproduced in the Appendix at App. 5. There is also a form denial of the post-conviction relief allegations with "hand-written notes" added by post-conviction relief Judge Penn, APP-3.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The judgment of the Oregon Supreme Court denying a petition for review was entered on March 4, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment VI, provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The United States Constitution, Amendment XIV, provides, in

relevant part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Under 8 U.S.C. § 1101(a)(43), an "aggravated felony" includes "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), and "an attempt…to commit" such abuse, 8 U.S.C. § 1101(a)(43)(U).

8 U.S.C. § 1182(a)(2)(A)(i)(I) provides:

> "(a) Classes of aliens ineligible for visas or admission—Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States…
>
> (2)Criminal and related grounds
>
> (A)Conviction of certain crimes
>
> (i) in general
>
> Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> (I)a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.
>
> is inadmissible."

8 U.S.C. § 1158 provides:

> "(a) Authority to apply for asylum.—
>
> (1) In general.—Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival, and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b)…
>
> (b)(1)(B) Burden of proof.—

(i) In general.—The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(2) Exceptions

(A) In general.—Paragraph (1) shall not apply to an alien if the Attorney General determines that—…

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"

8 U.S.C. § 1227(a)(2)(A)(i)(I) provides:

"(a) Classes of deportable aliens.—Any alien (including an alien crewman) in and admitted to the United States shall, upon the order or the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:…

(2) Criminal Offenses

(A) General Crimes

(i) Crimes of moral turpitude

Any alien who-

(I) is convicted of a crime involving moral turpitude committed within fiver years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) of this title) after the date of admission."

8 U.S.C. § 1255(a) provides:

"(a) Status as a person admitted for permanent residence on application and eligibility for immigrant visa.—The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,

(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed."

8 U.S.C. § 1255(i) provides:

"(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States-

(A) who-

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of-

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application...

Footnote 159—The original § 245(i) took effect on 10/1/94 and was scheduled to sunset on 9/30/97. The provision was extended until 11/26/97 by a series of continuing resolutions. P.L. 105-119. The revised § 245(i) provides that an individual who is ineligible to adjust under § 245(a) may still adjust under § 245(i), but in order to be eligible, he or she must either be the beneficiary of a visa petition filed by the attorney general on or before 1/14/98, or a labor certification field with a state labor office on or before 1/14/98. The LIFE Act Amendments, 2000, P.L. 106-554, changed the date in (i)(1)(B) to 4/30/01, and also added (i)(1)(C)."

INTRODUCTION

Since this Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), a significant conflict has emerged among both federal circuit courts and state courts concerning whether the Padilla rule applies to both the deportation consequences of a conviction listed under 8 U.S.C. § 1227 as well to the inadmissibility consequences of conviction listed under 8 U.S.C. § 1182. This uncertainty impacts whether a noncitizen undocumented defendant is entitled to immigration consequence of conviction advice about the adverse effects on potential relief from removal provided by Adjustment of Status (8 U.S.C. § 1255(a), 1255(i)) Cancellation of Removal for Certain Non-Permanent Residents (8 U.S.C. § 1229(B)), or Deferred Action for Childhood Arrivals (Executive Action), or Asylum (8 U.S.C. § 1158), or Withholding of Removal (8 U.S.C. § 1208).

As Padilla pointed out at page footnote 6 of its majority decision, in 1996, the immigration statutes were amended and both inadmissibility (exclusion) proceedings and deportation proceedings became known as "removal" proceedings.

Padilla states at 1484 that:

> "It 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.""

As an "issue like deportation" certainly includes an issue like inadmissibility, it is clear that Mitchell and Geiger admit a failure to provide their client with available advice about inadmissibility to which he was

entitled pre-plea under Padilla.

As this Court recognized in *Padilla*, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."559 U.S. at 364. Furthermore, "[t]he 'drastic measure'of deportation or removal, is now virtually inevitable.

Padilla cites to INS v. St. Cyr, 533 US 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), which stated that "competent defense counsel, following the advice of numerous practice guides" would advise a defendant as to the risks a plea posed for removal, and eligibility for discretionary relief from removal, *Id.* at 323 n. 50, 121 S.Ct. 2271. Through his plea bargain, Cervantes-Meraz unknowingly and involuntarily lost his virtually certain ability to become an LPR as clearly set forth in 8 U.S.C. § 1255(i).

St. Cyr protected an immigrant from losing eligibility for discretionary relief from removal under former 8 U.S.C. § 1182(c). Adjustment of status under 8 U.S.C. § 1255(i) is relief from removal. Mitchell when testifying took the position that adjusting status to permanent residence from undocumented status is not "relief" from deportation stating, "I don't think adjustment of status is one of these avenues," for obtaining relief from deportation. See Petition for Review to Oregon Supreme Court, page 14.

Admissibility issues impacting noncitizen defendants' decision making process when weighing the "advantages versus the disadvantages of a plea bargain"

(Libretti v. U.S., 516 U.S. 29 (1995)) necessarily include potential relief from removal in the form of asylum, adjustment status from undocumented status to legal permanent residence under 8 U.S.C. § 1255(i), or under 8 U.S.C. § 1255(a) cancellation of removal for certain non-permanent residents, and DACA relief.

There is a lack of agreement throughout these State and federal Courts about whether the scope of Padilla applies to inadmissibility consequences and whether or not affirmative misadvice about the inadmissibility consequences of a conviction are ineffective assistance of counsel. Many States and federal circuits have ruled that the scope of Padilla does not apply to the inadmissibility consequences of convictions. This case provides the opportunity for this Court to address this issue of nationwide importance.

Further, the US Supreme Court has never ruled whether or not affirmative misadvice about the inadmissibility consequences of a conviction are ineffective assistance of counsel. This is despite the fact that in Padilla the government was arguing that Padilla had been affirmatively misadvised and as a consequence should be able to obtain relief from ineffective counsel. This country lacks and needs a US Supreme Court opinion that affirmative misadvice about the immigration consequences of a conviction including any errors of omission about inadmissibility consequences of a conviction made by a self-proclaimed Padilla "expert" is ineffective assistance and requires a conviction be vacated if the defendant

was prejudiced by that affirmative misadvice.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Cervantes-Meraz-Petitioner

Cervantes-Meraz, in his declaration in support, APP 61, filed January 5, 2018 states that he has been in the U.S. since the age of 15. He has a good job as a supervisory employee with a wildland firefighting outfit. He is married to a U.S. citizen. He has no family in Mexico; his family is in the U.S. He had DACA status pre-conviction. Additionally, he stated in pertinent part:

> "I would not have waived jury trial and entered into the Stipulated Facts Agreement, which I knew would result in my conviction of Sexual Harassment, if I was aware of the permanent adverse immigration consequences of that conviction." APP 62

Cervantes-Meraz, at APP 63-64, admits:

> "Mr. Geiger told me that there was a risk of deportation following the proposed plea bargain, stipulated facts trial and admission, and that things "didn't look very good"."

As regards a showing of prejudice, Cervantes-Meraz states at APP 65, 62:

> "I was not advised by criminal defense counsel that the immigration consequences of my conviction of Sexual Harassment following the waiver of jury trial, stipulated facts trial and my admission to Attempted Compelling Prostitution would make my adjustment of status through my US citizenship wife virtually certain to fail, if I ever attempted to adjust status…
> I would not have waived a jury trial and would have gone to jury trial if I'd been told by counsel that my ability to adjust status through family visa processing would be forever destroyed and that I would be virtually certain to be deported as a consequence of this plea "bargain"."

Finally, Cervantes-Meraz states at APP 69:

> "I would have insisted on a jury trial if I'd been fully and correctly advised of

the immigration consequences of my conviction. My jury trial waiver was made unknowingly and involuntarily."

In his Supplemental Declaration filed March 18, 2019, APP 71, Cervantes-Meraz admits he had some confusion at the time of the plea as he has ADHD and is not legally trained. He reiterates he would not have filed for PCR had he known his plea bargain destroyed a path to legal permanent residence that was otherwise open to him at the time of his plea bargain and stipulated facts trial.

Mitchell and Geiger—Criminal Defense Counsels

Ms. Mitchell is a criminal defense counsel who is also a self-proclaimed Padilla expert. She along with co-counsel, Mr. Geiger, represented Cervantes-Meraz on charges of: Counts 1-2—Sexual Abuse in the First Degree; Counts 3-4—Sodomy in the First Degree; Count 5—Using a Child in a Display of Sexually Explicit Conduct; Count 6—Attempted Compelling Prostitution; and, Count 7—Harassment. Both criminal defense counsels mistakenly believed that Mr. Cervantes-Meraz had a retained Immigration lawyer to also assist during the course of the criminal representation in advising him of the immigration consequences of any plea bargain. Both Geiger and Mitchell were well aware that the immigration consequences of conviction were extremely important to Cervantes-Meraz. Mitchell and Geiger were certain they had done all they could to minimize the impact of immigration consequences of conviction on their client. Geiger and Mitchell were certain that the plea bargain that they had recommended to Cervantes-Meraz was an extraordinary outcome for any person charged with child sex offenses. See Declaration of Geiger and Mitchell at APP 89. Geiger and

Mitchell were concerned that if there was a trial and if Cervantes-Meraz was convicted, he would spend decades in prison. Judge Penn shared Mitchell and Geiger's concerns and was also certain they had done all they could and had properly advised Cervantes-Meraz by simply telling this undocumented defendant that he was deportable. Judge Penn failed to discuss or rule in any way on Cervantes-Meraz's PCR allegation that counsels were ineffective due to their admitted complete failure to advise Cervantes-Meraz that his plea bargain rendered him inadmissible and eviscerated Cervantes-Meraz's only pre-plea opportunity to become a legal permanent resident. Rather, Judge Penn misstated the scope of Cervantes-Meraz's PCR allegations claiming:

> "This started out, as I said earlier, the petition was affirmative misrepresentations I guess was really what this case was about, but then it's been amended and the testimony now is, well, I just didn't understand it, and that's the way the petition goes forward, well, their error was that they didn't explain things to him in terms or in a way that he could understand." APP 6-7

Judge Penn also mistakenly states:

> "[I]mmigration law changes all the time, priorities change all the time, enforcement policies change all the time, the law might be the same, but how it's interpreted, how it rolls out, and what ICE decides they're going to do on a particular day, that's really all outside of our purview…
> I do not see error by trial counsel, I think they made an effort to provide information that is easily ascertainable, they gave him a referral to an immigration lawyer." APP 7

Judge Penn mistakenly held Mitchell and Geiger were effective counsel because they told defendant he was deportable and that was all the immigration advice to which the Petitioner was entitled.

Judge Penn failed to render a decision about Cervantes-Meraz's post-

conviction relief allegations that criminal defense counsels failed to advise an undocumented noncitizen with a US citizenship wife that he could become an LPR if, but only if, he proceeded to jury trial and was acquitted on all pending charges. The trial court bypassed this claim in its decision by mistakenly stating what ICE decided to do on a particular day is "outside of our purview" and by misconstruing the scope of Cervantes-Meraz's Amended Post-Conviction Relief Petition. In Pereida-Alba v Coursey, 536 Or. 654, 342 P.3d 70, 79 (2015), the Oregon Supreme Court stated:

> "[T]he Court of Appeals reasoned that the post-conviction court made an implicit factual finding that petitioner's counsel failed to consider asking for an instruction on third-degree robbery, an omission that, in the Court of Appeals' view, automatically established inadequate assistance. Petitioner urges us to adopt that reasoning…First, the post-conviction court did not make the factual finding that the Court of Appeals attributed to it…
> We begin with petitioner's argument that the post-conviction court found that his trial counsel failed to consider asking for an instruction on third-degree robbery. Because the post-conviction court did not find that fact explicitly, the issue is whether it did so implicitly. On that issue, we presume that a trial court implicitly resolves factual disputes consistently with its ultimate conclusion. *Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968). That presumption has its limits, however. If an implicit factual finding is not necessary to a trial court's ultimate conclusion or is not supported by the record, then the presumption does not apply. *See State v. Jackson*, 296 Or. 430, 440, 677 P.2d 21 (1984) (declining to attribute an implicit factual finding to a trial court when that court "never made any conclusions" regarding that factual issue) (emphasis in original); *State v. Lunacolorado*, 238 Or.App. 691, 243 P.3d 125 (2010) (explaining that appellate courts may presume that a trial court made implicit factual findings when "there is conflicting evidence about a fact that is a necessary predicate to the court's conclusion")."

Mitchell and Geiger agreed with Cervantes-Meraz that they did not advise him that he could become an LPR if, but only if, he proceeded to jury trial and was acquitted on all the pending charges.

Although Judge Penn found Cervantes-Meraz lacked credibility when Cervantes-Meraz testified that Geiger and Mitchell had not told him he would be deported, this finding was made in the context of Judge Penn's ruling that criminal defense counsel was effective because they had told Cervantes-Meraz he was deportable. Here, Cervantes-Meraz relies on the admissions of Geiger and Mitchell that they failed to advise their client on what they mistakenly considered irrelevant inadmissibility consequences of his plea bargain.

There is no credibility finding by the PCR Judge related to whether Cervantes-Meraz would have insisted on proceeding to jury trial following a finding that counsels were ineffective. Judge Penn found, essentially, that ineffectiveness was out of the question as counsels had saved their client from potentially residing at the Oregon State Prison for decades following a jury trial that went bad for him.

Cervantes-Meraz was advised essentially that he would be deported if he did not plea because he is undocumented and he was told he would also be deported if he was convicted. Cervantes-Meraz was not advised about the well-worn path to legal permanent residence for undocumented noncitizens in the U.S. who have a U.S. citizen spouse, known as a 245(i) (8 U.S.C. § 1255(i)) adjustment. Larsson testified approximately a million or more undocumented individuals have become legal permanent residents through 245(i). But, Cervantes-Meraz was not told that this path was open to him by either criminal defense counsel if, but only if, he went to jury trial and was acquitted.

Dan Larsson, an immigration practitioner, in his declaration to the PCR Court, APP 82, stated in pertinent part at APP page 83 as follows:

> "[B]ecause Leonel Cervantes-Meraz is married to a United States citizen and is the derivative beneficiary of the approved I-130 Petition for Alien Relative, filed for his mother on April 8, 1997, No. WAC-97-128-52154, he would be eligible under INA Sec. 245(i) for adjustment of status to legal permanent resident without even leaving the United States but for his criminal convictions in this matter."

In his declaration, Geiger represented that there was a good opportunity to go to trial on this matter due to:

> "[T]he extreme parental alienation engaged in by our client's ex…We were ready for trial. The petitioner had a good case." APP 91

However, Cervantes-Meraz, in fact, did not retain an immigration attorney. Cervantes-Meraz had an intake session with an immigration lawyer only at the outset of the criminal proceedings and once again after the prosecution had ended. The immigration lawyers corroborated their very limited role in meeting with Cervantes-Meraz. There was one meeting after Cervantes-Meraz was criminally charged and then a second meeting after the criminal proceedings had been completed, APP 181. There is an obvious lack of communication between criminal defense counsels and immigration counsel(s).

Mr. Geiger testified the plan was for Ms. Mitchell to speak with immigration counsel, Ms. Ghio, to ascertain what could be done, if anything, to minimize the chances of Mr. Cervantes-Meraz being deported. Geiger's declaration provided by the State of Oregon stated his client had retained Ms. Ghio as his immigration lawyer through the criminal proceedings. When Geiger was asked whether he was

aware that Ms. Ghio had not been retained, his response was, "of course I did not know that." Mitchell and Ms. Ghio never have the needed conversation that Mr. Cervantes-Meraz can avoid being deported and have his desired relief from virtually certain deportation by adjusting status through INA 245(i) if but only if he is acquitted of the criminal charges he is facing.

One deportation "defense device" Geiger employed was bargaining to keep Cervantes-Meraz out of jail hoping that following entry into the stipulated facts trial that Cervantes-Meraz might not be apprehended by ICE.

Dan Larsson, who has practiced as an immigration lawyer for over 20 years, testified via telephone during the post-conviction relief proceeding and submitted a declaration in support thereof. Larsson testified that the obvious circumstance was that Mr. Cervantes-Meraz needed to go to jury trial and if he did so and was acquitted he would be virtually certain to be able to become a legal permanent resident. Mr. Larsson opined that the Attempted Compelling Prostitution of a Minor was an "aggravated felony" (equivalent to an attempted sexual abuse of a minor) and/or a child abuse conviction which would render Mr. Cervantes-Meraz deportable. Larsson testified that by estimation approximately a million undocumented individuals have been able to become legal permanent residents through INA 245(i), that Mr. Cervantes-Meraz was eligible for INA 245(i), and that INA 245(i) would be virtually certain to be granted if, but only if, Mr. Cervantes-Meraz was not convicted of the charges on which he had entered into the plea bargain.

II. THE PROCEEDINGS BELOW

Marion County Criminal Case No. 15CR53353

The Marion County Circuit Court found Mr. Cervantes-Meraz guilty of Attempting Compelling Prostitution of a Minor and Sexual Harassment after a Stipulated Facts trial and plea bargain on or about December 16, 2016, with an Amended Judgment entered on or about January 9, 2017.

Marion County PCR Case No. 18CV00755

The Marion County Circuit Court denied Mr. Cervantes-Meraz's Petition for Post-conviction relief on or about April 18, 2019, issuing an oral decision.

Oregon Court of Appeals Case No. A170858

The Oregon Court of Appeals affirmed without opinion Mr. Cervantes-Meraz's appeal on or about December 2, 2020

Oregon Supreme Court Case No. S068215

The Oregon Supreme Court denied Mr. Cervantes-Meraz's Petition for Review on or about March 4, 2021

REASONS FOR GRANTING THE WRIT

I. AFFIRMATIVE MISADVICE IS *PADILLA* INEFFECTIVENESS

Counsel has a duty to "inform a defendant of the advantages and disadvantages of the plea agreement," Libretti 516 U.S. at 50. A decision to enter into a plea bargain is a personal decision made alone by a defendant who has that "ultimate authority" to decide whether or not to enter into a plea bargain. Florida v.

Nixon, 543 U.S. 175, 187 (2004); Jones v. Barnes, 463 U.S. 745, 751 (1983); Brady v. US, 397 U.S. at 748 (decision must be an "expression of [the defendant's] own choice").

There must be "upmost solicitude" to a defendant's decision whether or not to enter into a plea bargain, Nixon, 543 U.S. at 187 (quoting Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

Also, it's well established that counsel may not interfere in a client's decision making process by providing the client with inaccurate information, Nixon, 543 U.S. at 187; Brookhart v. Janis, 384 U.S. 1, 7-8 (1966).

Here, it's clear Mitchell and Geiger provided Cervantes-Meraz with inaccurate information about his opportunity for obtaining relief from removal. Mitchell in her declaration, APP 93, stated:

"It is my practice to advise all clients who are not documented (which would include DACA holders)—that the mere fact they are in the United States without a lawful status means they are deportable on that basis alone. I advised Petitioner of this."

Information provided by Mitchell is clearly inaccurate because it fails to advise him of his opportunity to adjust status through his U.S. citizen wife and become a lawful permanent resident. It is incomplete advice and, accordingly, affirmative misadvice. Mitchell is purporting to advise Cervantes-Meraz of the immigration consequences required by Padilla but fails to advise him of his clear eligibility for permanent residence which he unknowingly gave up through the plea bargain she recommended to him. This is especially egregious misadvice in light of both Mitchell and Geiger's touting of Mitchell's expertise as an expert Padilla

counsel to Cervantes-Meraz.

Expert Padilla counsel did not tell Cervantes-Meraz, as she later testified at the PCR hearing that inadmissibility concerns are not any part of her Padilla analysis and further that she does not know how an undocumented alien becomes an LPR through a family visa. Counsel affirmatively misadvised Cervantes-Meraz by telling him the best possible outcome for him with Immigration is to stipulate to the facts of Attempted Compelling Prostitution of a Minor and Sexual Harassment, which destroyed his ability to become an LPR through an immediately available family visa.

This unfortunately induced him to enter into a plea bargain entirely due to her misadvice. Cervantes Meraz would have insisted on going to jury trial if he had been accurately advised of the immigration consequences of his conviction. It's clear that counsel unwittingly undermined the integrity of Cervantes-Meraz's decision making process in violation of counsel's duty to safeguard Cervantes-Meraz's ability to make his own decision about whether or not to enter into the plea bargain.

II. FEDERAL AND STATE COURTS OF LAST RESORT ARE MIXED IN THEIR DECISIONS ABOUT WHETHER PADILLA APPLIES TO THE INADMISSIBILITY CONSEQUENCES OF A CONVICTION; THIS COURT IS ASKED TO CLARIFY THAT PADILLA DOES INDEED APPLY TO INADMISSIBILITY CONSEQUENCES

A conflict among federal circuit courts and State courts of last resort

squarely addressing the questions presented in this case is unlikely to be resolved without this Court's intervention. Given how frequently undocumented noncitizens appear and resolve cases in the criminal courts, the confusion andunpredictability surrounding immigration consequences of conviction advice undocumented immigrants are entitled to under the Sixth Amendment of the U.S. Constitution, immigration consequences unquestioned importance for the immigrant in weighing the advantages and disadvantages of a plea offer, this Court is respectfully requested to grant the writ of certiorari and resolve the conflict by holding the Padilla rule applies to the inadmissibility consequences of a conviction.

When a guilty plea, waiver of jury trial, or plea bargain followed by a stipulated facts trial is virtually certain to require a finding of inadmissibility or completely extinguish potential relief from removal for an undocumented noncitizen who otherwise would potentially qualify for DACA, adjustment of status, asylum, withholding, or some other form of relief from removal, all too many federal and state courts of last resort mistakenly find that Padilla does not apply. These courts mistakenly limit the scope of Padilla to immigration consequences advice given to undocumented noncitizens about deportability.

In a Spring 2016 law review article, "Actually Padilla Does Apply to Undocumented Defendants", the author points out that as of September 2015 courts throughout the U.S. were concluding that "Padilla applies only to those who were present in the country lawfully at the time of the plea," Joseph v. Florida, 107 So.3d

at 492 (2013).

At page 4-5 of the article, it states:

> "Authorities embracing this view include the U.S. Court of Appeals for the Fourth and Eleventh Circuits, U.S. District Courts in Georgia, Hawaii, Illinois, Kansas, Minnesota, Nebraska, and Texas, Texas's highest criminal court, Tennessee's Supreme Court and its Court of Criminal Appeals, nearly half a dozen Florida courts, one New York state trial court, Attorneys General representing the States of Massachusetts, Washington, Wisconsin and Texas." (footnotes/citations omitted)

Rosario v. State of Florida, 165 So.3d 672 (Fla Dist. Court of Appeals 2015) held that where an undocumented alien who was seeking adjustment of status, and had a U.S. citizenship spouse, claimed ineffective assistance based on Padilla, that such a claim is beyond the scope of Padilla. Rosario did not allege affirmative misadvice. Rosario cited the following non-Florida cases agreeing with its position:

> "*Garcia v. State*, 425 S.W.3d 248, 261 n. 8 (Tenn.2013) ("[C]ourts have consistently held that an illegal alien who pleads guilty cannot establish prejudice, even if defense counsel failed to provide advice about the deportation consequences of the plea as *Padilla* requires, because a guilty plea does not increase the risk of deportation for such a person."); *United States v. Sinclair*, 409 Fed.Appx. 674, 675 (4th Cir.2011); *Gutierrez v. United States*, 560 Fed.Appx. 924, 927 (11th Cir.2014), *cert. denied*, ___ U.S. ___, 135 S.Ct. 302, 190 L.Ed.2d 219 673*673 (2014); *State v. Guerrero*, 400 S.W.3d 576, 589 (Tex.Crim.App.2013)."

Rosario held that under Padilla, counsel had no affirmative duty to discuss other possible immigration ramifications of the plea, such as adjustment of status, a waiver of inadmissibility, or cancellation of removal.

The article then argues that these authorities are mistaken and based on a flawed premise that undocumented defendants will always be deported whether or not they plead guilty. This is the same flawed positioning taken by Judge Penn,

Geiger and Mitchell.

In Com. V. Marinho, 981 N.E.2d 648, 662 (Mass. 2013) the court stated that undocumented persons ineffective assistance claims depended on whether the defendant can address the issue of their particular status and how different performance by counsel would have resulted in a better outcome. This is similar to the Iowa Diaz decision.

In People of Colorado v. Rivas-Landa, no. 12CA0378, Colorado Court of Appeals (2013) (unpublished) the Court allowed post-conviction relief following a conviction of misdemeanor Theft because the theft conviction made the undocumented noncitizen defendant ineligible for Cancellation of Removal for certain non-permanent residents under 8 U.S.C. 1229(b)(1). Landa allowed this post-conviction relief claim even though to be granted cancellation of removal, Landa would have to prove "exceptional and extremely unusual hardship" to qualifying relatives. An adjustment of status grant would have been virtually certain for Cervantes-Meraz if he had elected jury trial and been acquitted. By comparison, Landa's claim is a steep uphill battle in light of the burden of proof required to obtain a grant of cancellation.

Landa also cited to People v. Burgos, 950 N.Y.S.2d 428, 441-42 (N.Y. Sup. Ct. 2012), where a noncitizen defendant was found to have been deprived of effective assistance because he wasn't advised that conviction for a controlled substance offense would render him subject to deportation. Landa concluded at page 10-11 of its unpublished slip opinion:

> "Simply put, after defendant pled guilty to theft, she was no longer eligible for cancellation of removal. Therefore, her deportation consequence was clear."

In State of Washington v. Castro-Oseguera, No. 77021-7-1, filed January 22, 2019 (unpublished opinion), the Washington Court of Appeals rejected a claim by Castro that he was entitled to learn from his attorney that he would be unable to file for asylum if he entered a plea to Delivery of Cocaine. But, had Castro failed to allege that he would have insisted on a jury trial if he had been advised that his plea would bar an asylum application because it is an aggravated felony conviction, 8 U.S.C. § 1101(a)(43). The opinion discusses an issue of first impression in the State of Washington. It notes that courts across the country have reached mixed results on this issue. A case supporting Cervantes-Meraz's request for PCR is discussed in Castro-Oseguera as follows:

> "This question is a matter of first impression in Washington. Other courts considering this issue have reached different results. See United States v. Nuwintore, 696 F. App'x 178, 179-80 (9th Cir. 2017) (defense counsel's performance fell below objective standard of reasonableness by failing to advise client that guilty plea would result in loss of his existing asylum status); United States v. Carrillo-Estrada, 564 F. App'x 385, 388 (10th Cir. 2014) (defendant had no right to be advised by defense counsel of possibility of seeking asylum; Padilla says nothing about asylum); United States v. Cordoba, Nos. 3:15-cr-67 3:16-cv-334, 2017 WL 318859, at *3 n.3 (S.D. Ohio Jan. 23, 2017) (defendant failed to establish defense counsel was ineffective for failing to preserve defenses to removability because no such defenses were shown to exist); Rosario v. State, 165 So. 3d 672, 673 (Fla. 2015) (Padilla does not require criminal defense attorney to advise undocumented immigrant whether plea will negatively impact possibility of avoiding removal or being able to reenter because these matters are within exclusive discretion of federal officials and too speculative to support claim of prejudice); Diaz v. State, 896 N.W.2d 723, 732 (Iowa 2017) (Padilla requires competent counsel to advise client of all adverse immigration consequences of plea, including whether alien will be immediately removable, subject to mandatory detention, foreclosed from seeking cancellation of deportation, barred from

legal reentry, and at risk of criminal prosecution for reentering country); Daramola v. State, 294 Or. App. 455, 467-68, 430 P.3d 201 (2018) (Padilla may require legal advice beyond removability to cover broader immigration consequences but defense counsel's advice was not ineffective assistance of counsel because it was not clear whether crime constituted particularly serious crime rendering him ineligible for asylum); Garcia v. State, 425 S.W.3d 248, 260 (Tenn. 2013) (Padilla does not require criminal defense counsel to advise client on future eligibility to immigrate legally to the United States but even if it did, defense counsel did legal research and concluded correctly that law was unclear).

We need not decide the legal issue here because we conclude that Castro-Oseguera failed to establish that Huffman's failure to advise him about his ineligibility for asylum prejudiced him. Our Supreme Court wrote in Sandoval that to satisfy the prejudice prong in an ineffective assistance of counsel claim,

"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." 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." This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard.

171 Wn.2d at 174-75 (alteration in original) (citations omitted)."

Diaz recited the ABA standards on this matter at 731 of its opinion.

"In *Padilla,* the U.S. Supreme Court looked to "norms of practice as reflected in American Bar Association standards and the like" to measure counsel's performance. *Padilla*, 559 U.S. at 366, 130 S.Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065). Consulting the current version of the American Bar Association guidelines now, we find they recommend the following:

> (a) Defense counsel should determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege. Counsel should avoid any actions that might alert the government to information that could adversely affect the client.
>
> (b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances. Public and appointed defenders should develop, or seek funding for,

> such immigration expertise within their offices.
> (c) After determining the client's immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client's interests and how to pursue it.
> (d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.
>
> ABA Standards for Criminal Justice: Prosecution Function and Def. Function 4-5.5 (4th ed. 2015) [hereinafter ABA Standards]."

In Diaz, his plea of guilty foreclosed potential relief from deportation that was otherwise available to him if he had been acquitted of the criminal charges. Diaz entered into a plea to the crime of aggravated misdemeanor forgery. This foreclosed his ability to apply for cancellation of removal for certain non-permanent residents. Diaz had not been advised of this outcome pre-plea. The Iowa court determined this was constitutional error requiring his conviction be vacated as obtained in violation of Diaz's right to effective assistance of counsel.

III. THIS COURT IS ALSO ASKED TO SPECIFICALLY HOLD THAT AFFIRMATIVE MISADVICE OF THE IMMIGRATION CONSEQUENCES OF A CONVICTION IS INEFFECTIVE ASSISTANCE

Cervantes-Meraz was affirmatively misadvised that he has no avenue of relief from deportation and was subject to deportation both pre-stipulated facts trial and post-stipulated facts trial. This was clear ineffective assistance by Mitchell and Geiger under Padilla, the Sixth and Fourteenth Amendment of the US Constitution,

and specifically was affirmative misadvice (US Constitutional right to effective/adequate counsel violated) as well, US v. Chan, 792 F.3d 1151 (9th Cir. 2015); US v. Kwan, 407 F.3d 1005 (9th Cir. 2005). An attorney commits affirmative misadvice under the Sixth and Fourteenth Amendment of the U.S. Constitution when the attorney begins to advise on matters that he need not otherwise discuss with counsel. Significantly, the Solicitor General's view stated in the Padilla cases is that Padilla's attorney had affirmatively misadvised his client. Summarizing the Solicitor General's view, Padilla at 1484 states:

> "'[C]ounsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case ...," though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10."

The Padilla decision continues to discuss affirmative misadvice as follows:

> Respondent and Padilla both find the Solicitor General's proposed rule unpersuasive, although it has support among the lower courts. See, *e.g., United States v. Couto,* 311 F.3d 179, 188 (C.A.2 2002); *United States v. Kwan,* 407 F.3d 1005 (C.A.9 2005); *Sparks v. Sowders,* 852 F.2d 882 (C.A.6 1988); *United States v. Russell,* 686 F.2d 35 (C.A.D.C.1982); *State v. Rojas-Martinez,* 2005 UT 86, 125 P.3d 930, 935; *In re Resendiz,* 25 Cal.4th 230, 105 Cal.Rptr.2d 431, 19 P.3d 1171 (2001)…
> We do not share that view, but we agree that there is no relevant difference "between an act of commission and an act of omission" in this context. *Id.,* at 30; *Strickland,* 466 U.S., at 690, 104 S.Ct. 2052 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"); see also *State v. Paredez,* 136 N.M. 533, 538-539, 101 P.3d 799, 2004-NMSC-036.
> A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti v. United States,* 516 U.S. 29, 50-51, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995). When attorneys know that their clients face possible

> exile from this country and separation from their families, they should not be encouraged to say nothing at all.[11] Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It 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." *Hill v. Lockhart,* 474 U.S. 52, 62, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (White, J., concurring in judgment)."

Whether or not *Padilla* applies to undocumented noncitizens is an extremely significant question that Cervantes-Meraz submits the majority of Courts in this country are answering in a manner that contradicts the Padilla rationale and ruling. The Padilla rationale was that undocumented noncitizen not to be made to fend for him or herself where counsel can protect his client from egregious immigration consequences of deportability. An undocumented immigrant is a subcategory of what Padilla refers to as a noncitizen offender. Padilla, at page 1483:

> "'`[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *St. Cyr,* 533 U.S., at 322, 121 S.Ct. 2271 (quoting 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr,* 533 U.S., at 323, 121 S.Ct. 2271. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.,* n. 50."

Adjustment of Status is as important, if not more important, form of discretionary relief from deportation than former 8 U.S.C. § 1182(c).

The flawed decisions by the State and Federal Courts of the Padilla rule

have severe deleterious impact on how Padilla experts advise undocumented noncitizens. Cervantes-Meraz's circumstance demonstrates that so-called expert Padilla advice fails to protect undocumented noncitizen clients from inadmissibility consequences of a conviction. These "experts" mistakenly believe the scope of Padilla does not extend to admissibility consequences. This unfairness is exactly what Padilla intended to prevent. An undocumented noncitizen who enters into a plea bargain without being full informed of the inadmissibility consequences thereof because an expert Padilla lawyer believes it is constitutionally sound to say nothing about a legal matter of such great importance to the client has a saltless lawyer. This information is readily available to counsel. A client left in ignorance about the loss of an opportunity to become a permanent resident because of Padilla advice narrowly limited to deportability consequences is unnecessarily and severely harmed by his self-serving lawyer(s).

As articulated by this Court in *Padilla* and demonstrated by this case, the immigration consequences of a criminal charge are often the predominate concern for noncitizen-defendants including undocumented defendants when assessing the advantages versus the disadvantages of whether to accept a plea bargain. When the unambiguous inadmissibility consequences of a plea offer are not clearly communicated, the result is devastating. Defense counsel, along with thousands of individuals like Cervantes-Meraz, respectfully ask this Court to resolve the questions presented herein to ensure the fair and

uniform application of the Sixth Amendment.

This established conflict of the scope of an attorney's duty to advise an undocumented noncitizen about the immigration consequences of a conviction lead to deeply disparate and unfair results. For example, noncitizen undocumented defendants in Iowa, Massachusetts, and California are apparently likely to have received better, more accurate and complete immigration consequences of a plea bargain than noncitizen undocumented defendant in Oregon and many other States throughout the U.S.

In Iowa, where the Iowa Supreme Court's decision in *Diaz* controls, undocumented noncitizen-defendants must be advised about the inadmissibility consequences of a conviction consistent with the ABA guidelines on counsel's duty when advising a client about the immigration consequences. Counsel must discuss with client all potential avenues of relief from removal.

Noncitizen defendants in Oregon lack a precedent that requires counsel to advice an undocumented noncitizen about the inadmissibility consequences of their conviction. A case suggesting counsel has no such duty is Aguilar v. Oregon, 292 Or.App. 309, 423 P.3d 1061 (2018) (plea to Third Degree Assault and Riot rendered defendant ineligible for temporary relief from deportation through an application for Deferred Action for Childhood Arrival; failure of CDC to advise his client thereon is not ineffective assistance).

Only this Court can correct the inequities caused by the mixed

interpretations of *Padilla* across the federal circuits and state courts of last resort. Given the significance of this crucial information to an undocumented noncitizen weighing the advantages versus the disadvantages of a potential plea bargain, this Court is respectfully 6requested to resolve this extremely important issue. Life and death may hang in the balance for these undocumented noncitizens. Banishment from the United States may equate to the immigrant losing "all that makes life worth living," *Ng Fun Ho v. White*, 259 U.S. 276, 284 (1922). Moreover, immigrants fully advised of the immigration consequences of convictions may "rationally" decide to "roll the dice" and go to jury trial, even under circumstances where the chances of prevailing at trial are slim at best, Lee v. U.S., 137 S.Ct. 1958, 582 US __, 198 L.Ed.2d 476 (2019).

IV. THE DECISION BELOW IS INCORRECT AND OFFERS AN IDEAL VEHICLE TO RE-SOLVE THE QUESTION PRESENTED.

a. The decision below is incorrect.

b. This case offers an ideal vehicle to address the questions presented which likely impact millions of undocumented noncitizens throughout the United States

The Court should issue the writ of certiorari. This case offers an opportunity to clarify the scope of Padilla and also to explicitly rule that

affirmative misadvice provided to a noncitizen in the context of providing that noncitizen with deportability only consequences of a conviction is ineffective assistance of counsel under the Sixth Amendment of the US Constitution.

These federal issues about the violation of Cervantes-Meraz's right to effective counsel under the Sixth and 1 Amendment of the U.S. Constitution have been preserved throughout Cervantes-Meraz's post-conviction proceedings from the initial PCR filing through his Petition for Review to the Oregon Supreme Court and is squarely presented to this court here.

CONCLUSION

The petition for a writ of certiorari should be granted. Geiger and Mitchell should be found ineffective under Padilla for failing to advise Cervantes-Meraz of the inadmissibility consequences of his convictions. The Court should further find that Mitchell and Geiger affirmatively misadvised Cervantes-Meraz, and, that this also is ineffectiveness. Finally, the case should be remanded on the prejudice issue for a new PCR hearing.

Respectfully Submitted,

/s/Brian Patrick Conry
Brian Patrick Conry
Counsel of Record
Law Office of Brian Patrick Conry
534 SW 3rd AVE Suite 711
Portland, Oregon 97204
503-274-4430
bpconry@gmail.com

July 30, 2021

IN THE SUPREME COURT OF THE STATE OF OREGON

LEONEL CERVANTES-MERAZ,
Petitioner-Appellant,
Petitioner on Review,

v.

STATE OF OREGON,
Defendant-Respondent,
Respondent on Review.

Court of Appeals
A170858

S068215

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
3/4/2021 11:25 AM

c: Brian Conry
Ryan P Kahn

jr

FILED: December 02, 2020

IN THE COURT OF APPEALS OF THE STATE OF OREGON

LEONEL CERVANTES-MERAZ,
Petitioner-Appellant,

v.

STATE OF OREGON,
Defendant-Respondent.

Marion County Circuit Court
18CV00755

A170858

Dale Penn, Senior Judge.

Argued and submitted on November 10, 2020.

Before DeVore, Presiding Judge, and DeHoog, Judge, and Hadlock, Judge pro tempore.

Attorney for Appellant: Brian Conry.

Attorney for Respondent: Ryan P. Kahn.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[X] Costs allowed, payable by Appellant.

PET. APP 3

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

LEONEL CERVANTES-MERAZ, SID # 21461003, Petitioner, vs. STATE OF OREGON Defendant.	Case No. 18CV00755 GENERAL JUDGMENT (After Trial)

The above-entitled matter came before the Court on April 18, 2019 for a Trial on Petition for Post-Conviction Relief. Petitioner withdrew the following claims: _____

_____.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. The Petition for Post-Conviction Relief is:

☐ Allowed and the following relief is granted: _____

_____

_____

_____.

☐ The Petition is dismissed pursuant to ORS 138.525, as meritless, and this judgment is therefore not appealable.

☒ Denied.

2. The parties stipulated to Petitioner's Exhibits 1-310 pages and Respondent's Exhibits _____. After considering objections ☐ Exhibits _____ were admitted and ☐Exhibits _____ were not admitted.

3. Pursuant to the burden of proof of ORS 138.620(2), the Court has considered the record evidence submitted by the parties, made determinations as to its relevancy and materiality, assessed the credibility of witnesses and testimony whether written or oral and ascertained for its purposes the probative significance of the evidence presented.

4. The Court makes the following findings and conclusions:

A. The Court makes findings on the record and incorporates those findings herein.

B. Trial Counsel did not commit error based upon the evidence presented. The Court found both Trial Counsel credible and Pet. not credible as witnesses.

C. There was no due process error. Pet knowingly, voluntarily and intelligently agreed to waive jury and proceed with stipulated facts for a trial.

D. No error. No prejudice.

E. With regard to any issues not specifically addressed above, the Court relies upon and adopts the facts and law in ☐Petitioner's Trial Memorandum or ☒Defendant's Trial Memorandum as the Court's findings of facts and conclusions of law. Petitioner has ☐met his burden of proof ☒failed to meet his burden of proof. Except as specifically provided herein, this judgment determines all issues presented.

5. This matter involves ☒Federal and/or ☒State Constitutional Issues.

DATED this 18th day of April, 2019.

Dale W. Penn, Senior Judge

were originally alleging false statements, okay? Now it's amended, so I need to have a clear picture, what did they do that was an error?

MR. CONRY: What I'm trying to say, Your Honor, and I'm sorry if I'm not being clear, is that they didn't advise about INA 212, which covers the inadmissibility grounds of removal, they advised about 237, the deportability grounds, they missed the correct advice and to try to give the correct advice to somebody who falls on the inadmissible side of the immigration statute, 11 million people, as opposed to the legal permanent residents who are here, who if they were told you're deportable, it's an aggravated felony, you have no defense, and that -- and they're being deported virtually certain because let's say they pled to delivery of controlled substance commercial offense, that's great advice and that can be given very easily. This isn't harder, Your Honor, I understand it, it's the INA, it's the statute, you've seen me, I'm no genius, I -- this is easy, and to say that criminal defense lawyers can't read a statute, which I guess is what we're saying if they can't read 245(i), is it's not reasonable.

THE COURT: Okay. Well, I did make a few notes as testimony was coming today, as the petitioner started, you were asking or counsel, Petitioner's counsel was asking

him about tell us about what you were told. And he prefaced things with "What I remember" and he told us what he remembered. Now, he doesn't remember what both attorneys said that they told him.

And so it puts me into a position where one attorney, Mr. Geiger, was saying it was very direct, if ICE finds you, you are gone, and the petitioner and he -- they had spent quite a bit of time talking about deportation because they knew if he got convicted that was going to be an issue and they also knew he faced all of this prison time with serious charges, and I'm not going to put words or into Mr. Geiger's mouth, he explained this that it was very difficult, and he came down to, in Ms. Mitchell's terms, deals aren't perfect, but we were trying to get, they were trying to get the best deal that they could and to try to protect against any immigration negative consequences, but the charges that you're dealing with were not going to be something they could get away from just because of the charges.

I do not find error by trial counsel in this case. This started out, as I said earlier, the petition was affirmative misrepresentations I guess was really what this case was about, but then it's been amended and the testimony now is, well, I just didn't understand it, and that's the way the petition goes forward, well, their error

was that they didn't explain things to him in terms or in a way that he could understand, and yet both attorneys today said the whole focus here was with these kind of charges, with huge amounts of prison facing him, and I'll just -- Mr. Geiger's statement about occasionally, yeah, somebody gets off of that, but not very often, here's that situation presented and you will be deported, we're not trying to tell you that you can get away from this, but the harsh reality as I look at this system, even the petitioner's expert today kept saying "I believe" and he kept modifying everything that he said, and clearly immigration law, I think one of the defense lawyers said this, immigration law changes all the time, priorities change all the time, enforcement policies change all the time, the law might be the same, but how it's interpreted, how it rolls out, and what ICE decides they're going to do on a particular day, that's really all outside of our purview, and as I looked at this, I, particularly with Petitioner's memo after the amendment, I was unclear what under *Padilla* you were pushing, but after the testimony, I heard that and it was more of an error-of-omission, I guess, kind of argument, but I do not see error by trial counsel, I think they made an effort to provide information that is easily ascertainable, they gave him a referral to an immigration lawyer, although I guess this wasn't the names they usually

give, but when Petitioner testifies today that when he went to Attorney Muntz and he said that he could be deported immediately at anytime and his testimony was "That's the first time I'd heard that," and yet both defense lawyers in the criminal case said that's what we were telling him over and over again.

So there is a credibility issue, and I find that both Mr. Geiger and Ms. Mitchell were credible, appeared to be supported by the record and the circumstances of the case, and I find Petitioner's testimony on this matter not credible.

So with -- the investigation is the first allegation and then because he mistakenly believed he didn't have witnesses, but that was a mistake and in fact he did have expert witnesses, so I don't see that Petitioner has proved the lack-of-preparation allegation, and then didn't use words or language in which he could understand, and again the testimony of the lawyers was opposed to this on these issues and, I believe, credible.

I do not see error, I do not see prejudice. The issue of due process analysis here as I look at the evidence and what I have heard, it appears to the Court that this was a knowing, voluntary, and intelligent process here, admission and the use of a stipulated trial as opposed to an admission of guilt for the one charge. But I

do not find a violation of due process, I do not find a basis to reverse the *Gonzales* case, and believe that is still good law in Oregon.

So as I view all of this, I will deny the petition because I believe Petitioner has not proved his allegations, and the important thing to remember about this is I will sign that order today, so you will have 30 days from today to give notice to the Court of Appeals if you wish to appeal this ruling, and the only thing, the only reason I bring that up is these deadlines are very important, so I am going to ask that your counsel just assist you in making contact with the public defense corporation and appellate attorneys just so, if you wish to appeal, you get that notice in in the next 30 days. Okay? So that's very important.

Mr. Conry, can you help him at least contact the appellate public defense corporation?

MR. CONRY: Of course.

THE COURT: Okay. Have I neglected to cover any issues from Petitioner's perspective?

MR. CONRY: I was just noting, Your Honor, I'm actually not sure if I should tell you this or not, I don't think the Court talked about affirmative mis-advice.

THE COURT: I beg pardon?

MR. CONRY: I don't think the Court talked about

affirmative mis-advice, did it?

THE COURT: Affirming -- I'm just not hearing the term. Affirming?

MR. CONRY: I don't believe the Court talked about affirmative mis-advice --

THE COURT: Oh, oh --

MR. CONRY: -- once you begin to talk about immigration consequences --

THE COURT: Okay.

MR. CONRY: -- you got to get it all the way through and you got to get it right.

THE COURT: Okay. And I would say that the record is clear about what was done and said and presented and there is a dispute among the three individuals about what was told, and I understand you have a little bit different argument on that and I think that's established, it was not credible to the Court that there were errors of omission or bad advice, and so I'll clarify it in that manner.

MR. CONRY: Okay. Thank you.

THE COURT: All right. Have I neglected to cover anything from Petitioner's perspective --

MR. KALLERY: Nothing from the State, Your Honor.

THE COURT: Okay. Thank you, all, very much, we'll be adjourned, we've got a 4:00 o'clock case and they

need to make sure that they have this courtroom open, so, all right, thank you, all, very much, I appreciate it.

(Whereupon, the proceeding in the above-entitled matter was concluded at 3:54 p.m.)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

State of Oregon, Plaintiff	)	
	)	Case No.: 15CR53353
vs.	)	
	)	**AMENDED JUDGMENT ***
Leonel Cervantes-Merez, Defendant	)	Case File Date: 11/23/2015 District Attorney File #: 15-8790

DEFENDANT

True Name: Leonel Cervantes-Merez
Sex: Male
Date Of Birth: 11/30/1983
Fingerprint Control No (FPN): JMAR115108273

HEARING

Proceeding Date: 12/19/2016
Judge: Tracy A Prall
Court Reporter: Recording, JAVS

Defendant appeared in person and was not in custody. The defendant was represented by Attorney(s) MARK J GEIGER, OSB Number 840473. Plaintiff appeared by and through Attorney(s) KURT W MILLER, OSB Number 084210. Defendant was assisted by interpreter, Danna E. Garcia. Defendant knowingly waived two day waiting period before sentencing.

COUNT(S)

It is adjudged that the defendant has been convicted on the following count(s):

Count 7 : Harassment

Count number 7, Harassment, 166.065(4), Misdemeanor Class A, committed on or between 01/01/2015 and 06/30/2015. Conviction is based upon a Guilty Plea on 12/16/2016.

Suspended Imposition of Sentence

Imposition of sentence is suspended.

** Amendment Reason: Modifying probation conditions on count 7.*

Probation

Defendant is placed on Supervised Probation for a period of 36 month(s) and shall be subject to the following conditions of Probation:

Defendant is subject to the following general conditions of probation (ORS 137.540):

- Pay supervision fees, fines, restitution or other fees ordered by the court.
- Not use or possess controlled substances except pursuant to a medical prescription.
- Submit to testing for controlled substance or alcohol use if the probationer has a history of substance abuse or if there is a reasonable suspicion that the probationer has illegally used controlled substances.
- Participate in a substance abuse evaluation as directed by the supervising officer and follow the recommendations of the evaluator if there are reasonable grounds to believe there is a history of substance abuse.
- Remain in the State of Oregon until written permission to leave is granted by the Department of Corrections or a county community corrections agency.
- If physically able, find and maintain gainful full-time employment, approved schooling, or a full-time combination of both. Any waiver of this requirement must be based on a finding by the court stating the reasons for the waiver.
- Change neither employment nor residence without prior permission from the Department of Corrections or a county community corrections agency.
- Permit the parole and probation officer to visit the probationer or the probationer's work site or residenee and to conduct a walk-through of the common areas and of the rooms in the residence occupied by or under the control of the probationer.
- Consent to the search of person, vehicle or premises upon the request of a representative of the supervising officer if the supervising officer has reasonable grounds to believe that evidence of a violation will be found, and submit to fingerprinting or photographing, or both, when requested by the Department of Corrections or a county community corrections agency for supervision purposes.
- Obey all laws, municipal, county, state and federal.
- Promptly and truthfully answer all reasonable inquiries by the Department of Corrections or a county community corrections agency.
- Not possess weapons, firearms or dangerous animals.
- If recommended by the supervising officer (SO), successfully complete a sex offender treatment program approved by the SO and submit to polygraph examinations at the direction of the SO if the probationer: (A) Is under supervision for a sex offense under ORS 163.305 to 163.467; (B) Was previously convicted of a sex offense under ORS 163.305 to 163.467; or (C) Was previously convicted in another jurisdiction of an offense that would constitute a sex offense under ORS 163.305 to 163.467 if committed in this state.
- Participate in a mental health evaluation as directed by the supervising officer and follow the recommendation of the evaluator.
- Report as required and abide by the direction of the supervising officer.
- If required to report as a sex offender under ORS 163A.010 or 163A.015, report with the Department of State Police, a city police department, a county sheriff's office or the supervising agency: (A) When supervision begins; (B) Within 10 days of a change in residence; (C) Once each year within 10 days of the probationer's date of birth; (D) Within 10 days of the first day the person works at, carries

on a vocation at or attends an institution of higher education; and (E) Within 10 days of a change in work, vocation or attendance status at an institution of higher education.

- Submit to a risk and needs assessment as directed by the supervising officer

Furthermore, Defendant is subject to the following Special Conditions of Probation (ORS 137.540(2)): Defendant shall:

- Report immediately to Marion County Sheriff's Office, Parole & Probation Division at 4040 Aumsville Hwy. SE, Salem, Oregon.
- Do not have contact with the victim without waiver, compliance with treatment and Court or Probation Officer permission. Neiferths Cervantes
- Enter into and successfully complete an approved treatment program for sex offenders as directed by your Probation Officer or Therapist. Comply with all treatment program requirements, including submission to plethysmographic and/or Abel screen assessment. Once the defendant has started treatment, there will be no therapist shopping. Any transfer must be approved ahead of time by both the defendant's current Therapist, his/her Probation Officer, and the intended Therapist, and compelling reasons must be submitted in writing to all parties by the offender.
- Make a full and complete disclosure of all prior victims. This disclosure will be made and confirmed 6 months into treatment. Confirmation of the list will be made a polygraph assessment. Any refusal to submit a complete list of victims is a violation of probation. During the course of treatment, the defendant's is to pass not only his/her full disclosure tests about the victims but also periodic maintenance tests.
- Submit to random blood/breath/urine testing at direction of Court or Probation Officer.
- Do not have contact with anyone who use or possess controlled substances illegally, or from going to places where such substances are kept or sold.
- Do not have direct or indirect contact with minors unless approved in writing by Probation Officer and Therapist. Any supervised visits must be approved in advance in writing by the defendant's treatment provider, and either the supervising Probation Officer or the Court.
- Do not go to places where minors congregate, such as playground, skating parks, parks, amusement parks, fairs, or schools (including athletic events). No involvement with any organizations which would place the defendant in contact with minors, i.e. Boy or Girl Scouts, the Boys and Girls Club, Sunday school teaching, Big Brother or Big Sister Programs, without specific written permission in advance from either the defendant's Probation Officer, Therapist or the Court.
- Inform all persons with whom defendant has had a significant relationship or close affiliation of his/her sexual offending history. Such relationships must be approved by his/her Probation Officer or Therapist.
- Consent to the search of person, vehicle or premises upon the request of a representative of the supervising officer if the supervising officer has reasonable grounds to believe that evidence of a violation will be found, and submit to fingerprinting or photographing, or both, when requested by the Department of Corrections or a county community corrections agency for supervision purposes.
- Do not access the internet without prior written permission of Probation Officer or Therapist, unless for work purposes.
- Abide by curfew, day reporting, geographic restrictions, and electronic monitoring at Probation Officer's/Court's direction.
- Do not reside within three miles of the victim as required by law.
- Do not reside in any dwelling with another sex offender without prior permission of his/her Probation Officer or the director of Marion County Parole and Probation, as required by law. Based upon the courts finding that the defendant is a sex offender as defined in ORS 181.594.
- Upon successful completion of all substantive terms of probation in count 7 and passage of 24 months from date of this judgment, the defendant may petition this court for early termination of probation.

- On count 6, the defendant is a 8/F. Sentencing in count 6 is set-over and defendant waived any rights associated with an earlier sentencing date. Upon successful completion of probation in count 7, this count will be dismissed. Upon revocation of probation in count 7, defendant stipulates this count will be sentenced as an 8/F and the sentence will be 24 months DOC.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Fine - Misdemeanor	$100.00			$100.00
Total	$100.00			$100.00

State has 60 days to submit restitution.

COUNTS DISPOSED WITH NO CONVICTION

Count # 1, Sexual Abuse in the First Degree is Dismissed.

Count # 2, Sexual Abuse in the First Degree is Dismissed.

Count # 3, Sodomy in the First Degree is Dismissed.

Count # 4, Sodomy in the First Degree is Dismissed.

Count # 5, Using a Child in a Display of Sexually Explicit Conduct is Dismissed.

Count # 6, Attempt to Commit a Class B Felony is Deferred.

If convicted of a felony or a crime involving domestic violence, you may lose the right to buy, sell, transport, receive, or possess a firearm, ammunition, or other weapons in both personal and professional endeavors pursuant to ORS 166.250, ORS 166.291, ORS 166.300, and/or 18 USC 922(g).

MONEY AWARD

Judgment Creditor: State of Oregon
Judgment Debtor: Leonel Cervantes-Merez

Payees are to be paid as ordered under Monetary Terms.

Defendant is ordered to pay the following monetary totals, including restitution or compensatory fine amounts stated above, which are listed in the Money Award portion of this document:

Type	Amount Owed
Fine - Misdemeanor	$100.00
Total	$100.00

The court may increase the total amount owed by adding collection fees and other assessments. These fees and assessments may be added without further notice to the defendant and without further court order.

Subject to amendment of a judgment under ORS 137.107, money required to be paid as a condition of probation remains payable after revocation of probation only if the amount is included in the money award portion of the judgment document, even if the amount is referred to in other parts of the judgment document.

Any financial obligation(s) for conviction(s) of a violation, which is included in the Money Award, creates a judgment lien.

Payment Schedule

Payment of the fines, fees, assessments, and/or attorney's fees noted in this and any subsequent Money Award shall be scheduled by the clerk of the court pursuant to ORS 161.675.

Payable to:

Marion County Circuit Court
100 High St. NE
Salem, Oregon 97301
P: 503.588.5105
F: http://courts.oregon.gov/Marion

Dated the _____ day of _____, 20_____

Signed: 1/9/2017 11:13 AM

Signed: _____

Tracy A Prall **Circuit Court Judge Tracy A. Prall**

IN THE SUPREME COURT OF THE STATE OF OREGON

LEONEL CERVANTES-MERAZ	)	
	)	Supreme Court Case No. TBD
	)	
Petitioner-Appellant,	)	Appellate Case No. A170858
Petitioner on Review	)	
v.	)	Marion County Circuit Court
	)	Case No. 18CV00755
STATE OF OREGON	)	
	)	
Defendant-Respondent,	)	
Respondent on Review	)	

PETITION FOR REVIEW OF PETITIONER-APPELLANT

Notice of Intent to File Brief on the Merits

Petition to Review the Decision of the Court of Appeals
on the Petitioner's Appeal from the Judgment of the Circuit Court
for Marion County
The Honorable Dale Penn, Judge

Decision of Court of Appeals filed: December 2, 2020. Devore, Presiding Judge, DeHoog, Judge, and Hadlock, Judge pro tempore. Affirmed.

BRIAN PATRICK CONRY #822245
Attorney at Law
534 SW Third Ave., Suite 711
Portland, OR 97204
TEL (503) 274-4430
FAX (503)274-0414
EMAIL bpconry@gmail.com

Attorney for Petitioner-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
PATRICK EBBETT #970513
1162 Court St. NE
Salem, OR 97301-4096
TEL (503) 378-4402
EMAIL- patrick.m.ebbett@doj.state.or.us
Attorneys for Defendant-Respondent

January, 2021

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APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES, AMENDMENTS AND PROVISIONS

(I) PRAYER FOR REVIEW

Leonel Cervantes-Merez, Petitioner below, requests this court to review and reverse the decision by the Court of Appeals dated December 2, 2020 (Decision attached as APP[1] 1), affirming the conviction without an opinion.

(II) STATEMENT OF THE CASE: Procedural and Historical Facts

Petitioner relies on the Statement of Facts presented in the Opening Brief to the Oregon Court of Appeals incorporated herein by this reference. There are no obstacles to review of the two important issues raised by this Petition for Review:

(1) Whether affirmative misadvice (through error of omission) from a self-proclaimed Padilla v. Kentucky, 130 S.Ct. 1473 (2010), expert about the damaging admissibility consequences of a plea bargain for an undocumented alien with a US citizenship spouse results in a violation of that undocumented alien's right to effective assistance of counsel; and,

(2) Whether under the Padilla rule an undocumented alien needs to be advised about inadmissibility consequences of a conviction arising out of a plea bargain.

The Court of Appeals appears to have denied Petitioner's PCR petition because there is no published case in Oregon that requires criminal defense counsel (hereafter CDC) to advise an undocumented alien about the inadmissibility

[1] APP refers to the Appendix attached herein

repercussions of a plea bargain. Moreover, there is a published Appellate decision to the contrary that the State argued to the Court was controlling precedent, Aguilar v. Oregon, 292 Or.App. 309, 423 P.3d 1061 (2018) (plea to Third Degree Assault and Riot rendered defendant ineligible for temporary relief from deportation through an application for Deferred Action for Childhood Arrival; failure of CDC to advise his client thereon is not ineffective assistance). Indeed, one member of the Appellate Court panel in this case was a presiding Judge on the Aguilar case.

The State of Oregon may argue that the Court of Appeals affirmance of the trial court means that the "credibility finding" by the trial court[2] extends to Petitioner's affirmative misadvice (error of omission) claim, which the trial court bypassed by mistakenly stating what the immigration authorities will do is beyond the court's purview.

The allegations in the Amended PCR petition upon which Petitioner's claim of error stands were attached to the Court of Appeals Opening Brief at: Excerpt page 16, lines 1-16; Excerpt page 17, lines 7-19; and, Excerpt page 18, lines 4-21. The trial court failed to discuss these allegations in its decision other than by stating:

[2] The PCR Court will be referred to as the trial court herein.

> "This started out, as I said earlier, the petition was affirmative misrepresentations I guess was really what this case was about, but then it's been amended and the testimony now is, well, I just didn't understand it, and that's the way the petition goes forward, well, their error was that they didn't explain things to him in terms or in a way that he could understand." RT 100-101

The trial court goes on to deny the PCR allegations related to CDCs' failure to explain to Petitioner in terms that he could understand the immigration consequences of his conviction. As to this aspect of the PCR petition, the Court found Petitioner's statement that his CDCs did not tell him he would be deported lacked credibility.

Pereida-Alba v Coursey, 536 Or. 654, 342 P.3d 70, 79 (2015) stated in pertinent part:

> "[T]he Court of Appeals reasoned that the post-conviction court made an implicit factual finding that petitioner's counsel failed to consider asking for an instruction on third-degree robbery, an omission that, in the Court of Appeals' view, automatically established inadequate assistance. Petitioner urges us to adopt that reasoning...First, the post-conviction court did not make the factual finding that the Court of Appeals attributed to it...
> We begin with petitioner's argument that the post-conviction court found that his trial counsel failed to consider asking for an instruction on third-degree robbery. Because the post-conviction court did not find that fact explicitly, the issue is whether it did so implicitly. On that issue, we presume that a trial court implicitly resolves factual disputes consistently with its ultimate conclusion. *Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968). That presumption has its limits, however. If an implicit factual finding is not necessary to a trial court's ultimate conclusion or is not supported by the record, then the presumption does not apply. *See State v. Jackson*, 296 Or. 430, 440, 677 P.2d 21 (1984) (declining to attribute an implicit factual finding to a trial court when that court "never made any conclusions" regarding that factual issue) (emphasis in original); *State v. Lunacolorado*, 238 Or.App. 691, 243 P.3d 125 (2010) (explaining that

> appellate courts may presume that a trial court made implicit factual findings when "there is conflicting evidence about a fact that is a necessary predicate to the court's conclusion").
> In this case, the implicit factual finding that the Court of Appeals and petitioner attribute to the post-conviction court was not necessary to its ruling. Rather, the post-conviction court ruled in its letter opinion that "no reasonably qualified defense attorney would have made the choice complained about in the post-conviction proceeding." That ruling did not require the post-conviction court to decide whether petitioner's counsel in fact made a strategic choice to forego asking for an instruction on third-degree robbery. Instead, the ruling assumes that petitioner's counsel "made the choice complained about in the post-conviction proceeding" and concludes that that choice constituted inadequate assistance because "no reasonably qualified defense counsel" would have made it. We cannot assume that the post-conviction court made the implicit factual finding that petitioner attributes to it.

As to Petitioner's ineffectiveness of assistance claim that CDCs were ineffective for failure to advise Petitioner that he was eligible for and virtually certain to obtain LPR status if he proceeded to trial and was acquitted of the pending charges, the trial court stated:

> "[I]mmigration law changes all the time, priorities change all the time, enforcement policies change all the time, the law might be the same, but how it's interpreted, how it rolls out, and what ICE decides they're going to do on a particular day, that's really all outside of our purview...
> I do not see error by trial counsel, I think they made an effort to provide information that is easily ascertainable, they gave him a referral to an immigration lawyer...
> [W]hen Petitioner testifies today that when he went to Attorney Muntz and he said that he could be deported immediately at anytime and his testimony was "That's the first time I'd heard that," and yet both defense lawyers in the criminal case said that's what we were telling him over and over again.
> So there is a credibility issue, and I find that both Mr. Geiger and Ms. Mitchell were credible, appeared to be supported by the record and the circumstances of the case, and I find Petitioner's testimony on this matter not credible...

I will deny the petition because I believe Petitioner has not proved his allegations." RT[3] 101-103

The trial court badly erred by claiming that the immigration consequences of conviction are outside its purview. "Purview" is defined in the Merriam Webster dictionary as meaning the range or limit of authority, competence, responsibility, concern, or intention.

CDCs' responsibility under the Sixth Amendment right to effective counsel is to be concerned and competent when advising clients about the immigration consequences of a conviction. Padilla establishes these concerns are not outside the purview of CDCs but are constitutionally required knowledge that counsel must acquire and impart to his client if this information is readily ascertainable.

Here, the State of Oregon argued to the Court of Appeals that the trial court's decision necessarily means that because the trial court had found CDCs effective it also would have necessarily found Petitioner lacked credibility if the trial Court had found counsel ineffective on his affirmative misadvice claim. Petitioner testified that he would have insisted on a jury trial had CDCs told him that he could become an LPR if, but only if, he proceeded to jury trial in this matter and was acquitted of the pending charges. It is this statement that the State of Oregon argued the trial court found lacked credibility.

[3] RT refers to the Transcript of Proceedings from the April 18, 2019 PCR hearing.

But, such an implicit factual finding was not necessary to the trial Court's decision that CDCs' immigration consequence of conviction advice amounted to effective representation. The trial Court held CDC was effective counsel because counsel told defendant he was deportable and that was the end of that matter. This was all the immigration advice to which the Petitioner was entitled. In so holding, the PCR Court rejected the Petitioner's testimony that CDCs had not told him he was deportable and that this statement by Petitioner lacked credibility.

The trial Court never had the occasion to review the issue of whether Petitioner was credible when he stated he would have insisted on a jury trial. This issue was not before the trial court after it concluded CDCs were effective because they always advised their client he was deportable and proceeded to obtain for him an excellent plea "bargain". The trial court did not grapple with Petitioner's allegations that CDCs had the responsibility to advise an undocumented alien with a US citizenship wife that he could become an LPR if, but only if, he proceeded to jury trial and was acquitted on all pending charges. The trial court bypassed this claim in its decision by stating really what ICE decided to do on a particular day is "outside of our purview". It's worth noting in that regard, CDCs agreed with Petitioner that they did not advise the Petitioner that he could become an LPR if, but only if, he proceeded to jury trial and was acquitted on all the pending charges.

CDCs testified that they had not advised Petitioner that following an acquittal on the pending charges, he was virtually certain to be able to become an LPR through adjustment of status. CDCs were aware that their client was an undocumented alien and was married to a US citizen. As such, a visa was immediately available to him; and, through INA 245(i) he would be eligible and virtually certain to become an LPR if he did not have a criminal record. In fact, this change in status to legal permanent resident was virtually certain to occur without a hitch but for the Attempted Compelling Prostitution and Sexual Harassment convictions. *Cf. page* B-270-271 of Ninth Circuit immigration outline, which explains the requirement for a 245(i) adjustment of status filing.

Petitioner was clearly not advised of easily ascertainable Padilla required advice. He was also affirmatively misadvised by CDCs because they failed to point out this area of potential relief for Petitioner from his undocumented status. CDCs did not tell Petitioner that legal permanent residence was available to Petitioner pre-plea but eviscerated through his entry into a stipulated facts trial to Attempted Compelling Prostitution and Sexual Harassment. Petitioner detrimentally relied upon CDCs' admonition that the plea bargain that was struck was the "best" result humanly possible. CDCs' admonition was based upon their mistaken misunderstanding of the immigration laws that Petitioner would be deported no matter the resolution on his pending criminal charges.

Petitioner filed a notice of appeal with the Oregon Court of Appeals on or about April 29, 2019. The appeal was affirmed without opinion on December 2, 2020.

(III) LEGAL ISSUES PRESENTED

(A): Whether under Strickland v. Washington, 466 US 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as applied by Padilla, as well as under Long v. State of Oregon, 130 Or. App. 198, 880 P. 2d 509 (1994), the constitutional obligation of CDC was violated because CDCs affirmatively misadvised their client pre-stipulated facts trial that he was deportable and had no opportunity to escape virtually certain deportation except to hope the Immigration authorities (Department of Homeland Security—hereafter DHS) would not arrest him and that the plea "bargain" to Sexual Harassment and Attempted Compelling Prostitution was the best possible result for him. This misplaced advice was caused by CDCs being ill equipped to represent the immigrant defendant. CDCs were unaware, due to lack of basic research, that their client could escape deportation and adjust status under 245(i) pre-plea bargain and stipulated facts trial. after the criminal proceeding was completed if, but only if, he was acquitted at trial of all the pending criminal charges?

Padilla

(B): Does the Padilla rule that CDC must advise his client of the immigration consequences of a proposed plea bargain extend to immigration consequence advice about admissibility issues? Did CDCs have the obligation under the Sixth and Fourteenth Amendment of the US Constitution to advise their client prior to his stipulated facts trial, of his opportunity to become an LPR through a family visa? Where the Petitioner has a US citizenship wife, a visa is immediately available to him and he is virtually certain to become an LPR of the United States if, but only if, he is acquitted on the pending criminal charges, does CDC violate Petitioner's right to effective assistance of counsel by failing to advise his client of this immigration consequences pre-plea bargain/stipulated facts trial?

(IV) PROPOSED RULES OF LAW

(I) The self-proclaimed Padilla "expert", CDC's affirmative misadvice about the immigration consequences of a conviction that the best "defense" Petitioner has against deportation is to plea bargain to a stipulated facts trial that does not require jail time and hope that DHS does not pick him up and deport him as this undocumented alien is mistakenly believed by CDC to be deportable both pre-plea bargain and post-plea bargain, is ineffective assistance of counsel where the undocumented alien was clearly eligible and virtually certain to become

a LPR through a family visa under 245(i), if he was acquitted of the pending criminal charges.

(II) The scope of the Padilla ruling that an immigration has a right to advice from CDC about the immigration consequences of a proposed plea bargain extends to CDC advising an undocumented alien with a US citizenship wife who is eligible to adjust status through INA 245(i) and is virtually certain to secure such status if, but only if, he proceeds to trial on the pending criminal charges and is acquitted thereon, pre-plea bargain.

(V) REASONS FOR REVIEW

Reasons for review include under ORAP 9.07, a significant issue of law. Immigration consequence of conviction issues for undocumented immigrant defendants arise often. At this point in time, the execution of the laws by the United States' government subjecting hundreds of thousands of immigrants per year to deportation proceedings is near or at an all-time high. Many immigrant criminal defendants would be affected by a decision in this case that would recognize CDC's obligation under Padilla to advise his/her undocumented alien client of admissibility issues related to a potential plea bargain including but not limited to an immigrant defendant's ability to become an LPR through 245(i) if, but only if, he does not enter into a plea bargain of pending criminal charges

against him but proceeds to trial and is acquitted. Affirmative misadvice, through error of omission, in the area of the immigration consequences of a conviction pre-plea bargain has not been addressed by this Court.

This decision is important to the public as well as to the integrity of the courts. The legal issue(s) presented are of state, as well as federal, law.

The consideration of each proposed legal issue are issue(s) of first impression for this Court. The legal issues are properly preserved.

(VI) ARGUMENT

(A) Failure to advise an undocumented alien that he could become an LPR if, but only if, he was acquitted at trial is affirmative misadvice

Long held that once CDC begins to opine on a certain area of the law, even if CDC's not required to do so, he is required to be accurate in his advice. CDCs were clearly inaccurate in his/her affirmative misadvice to Petitioner that he was deportable both pre-stipulated facts trial and post-stipulated facts trial because CDCs were admittedly unaware that their undocumented client with a US citizenship wife was virtually certain to become an LPR of the United States if, but only if, he was acquitted of his pending criminal charges. Because CDCs were ill-equipped to advise their client about the immigration consequences (due to CDCs' lack of research about the issue) having confessed on cross-examination during the PCR hearing to a lack of any knowledge about family visas being immediately available to an undocumented

immigrant with a US citizenship wife who qualifies to adjust status under INA 245(i), CDC misrepresented his/her expertise to their client and caused Petitioner to accept a plea "bargain" that Petitioner never would have accepted had he been appropriately advised by adequate CDC.

(B) Padilla requires accurate immigration consequence advice about admissibility issues

Second, as the Daramola v. Oregon, 294 Or App at 462, 430 P.3d 201 (2018), decision points out, INS v. St. Cyr, 533 U.S. 289 (2001), "expressly called for competent defense counsel" to preserve eligibility for relief from removal. Daramola noted that the US Supreme Court recognizes that avoiding removal proceedings and preserving the possibility of avenues for relief from removal is "one of the principal benefits sought by defendant's deciding whether to accept the plea offer or instead to proceed to trial".

The theory of ineffectiveness alleged by Petitioner was two-pronged but straightforward: (1) that CDCs identified one of the co-counsels as an expert in the immigration consequences of convictions, (2) that CDCs affirmatively misadvised their client through an egregious error of omission by never advising Petitioner of his opportunity to become an LPR of the United States. His virtually certain avenue to LPR was destroyed through the plea "bargain". CDCs, even after admitting their lack of any knowledge about any admissibility issues, still

propound their "expertise" and by ipse dixit declare their lack of negligence based upon their mistaken claim about the narrow-limited scope of Padilla relief to only deportability issues. The "expert" CDC's rationale for her limited knowledge about admissibility was a mistaken claim that an immigrant's admissibility issues are beyond the scope of what CDC is required to advise client about pre-plea according to the Padilla decision. The mistaken claim is that it is far too difficult for CDCs to read 245(i) or the 9th Circuit outline that for many years had provided an appropriate immigration discussion for counsel at https://www.ca9.uscourts.gov/guides/immigration_outline.php and discusses 245(i) in easily understandable terms. Our sophisticated CDCs would have absolutely no difficulty discerning the meaning of 245(i) or the discussion thereof on the 9th circuit website. Any claim otherwise is disingenuous.

In addition to providing mistaken Padilla advice about the effect of Petitioner's plea bargain, CDCs eschewed their responsibility to advise completely of the immigration consequences of conviction and candidly admitted their lack of knowledge of any aspect of family visas or the statutory language and practical application of INA § 245(i), which could have enabled Petitioner to become an LPR if, but only if, he was acquitted at trial. CDCs mistakenly shrug off their responsibility to know anything about INA § 245(i), in part, by claiming that Petitioner had retained immigration counsel in their pre-hearing declarations they

provided to the State. The truth as reflected by the records obtained from Immigration counsel is Petitioner never retained immigration counsel.

CDCs also mistakenly stated that they had completely discussed the immigration consequences of conviction(s) with immigration counsel in their declarations to the PCR Court, PCR—Defendant's Exhibits 101 and 102. However, when CDCs testified, they admitted never having had any discussion with immigration counsels about the uncontradicted and clear eligibility of Petitioner, pre-plea, for INA § 245(i) adjustment of status relief from deportation. "Expert" Padilla counsel even inexplicably contested that adjustment of status to legal permanent residence from undocumented status is "relief" from deportation. "I don't think adjustment of status is one of those avenues", RT 81.

Ultimately, CDCs are candid about their lack of knowledge and of their failure to advise Petitioner of his lost opportunity to become an LPR due to his plea entry.

CDCs' testimony corresponds and corroborates Petitioner's testimony to the extent that Petitioner also testifies he was never advised by CDCs that he was virtually certain to become an LPR if, but only if, he persisted in a jury trial resolution of his pending criminal charges and was acquitted thereon. This is an egregious error which should warrant a finding of ineffectiveness of counsel based upon CDCs' affirmative misadvice to Petitioner that he had no means to escape his

deportation and, thus, the best thing for him to do was to eliminate his potential exposure to potential draconic prison time by entering into the plea "bargain".

Padilla error

Petitioner is only arguing that generally CDCs cannot be blind to the clear opportunity for their undocumented immigrant clients to be virtually certain to become LPRs if, but only if, there is no plea to the criminal charges that CDCs represent him on. Petitioner respectfully submits this argument about the scope of Padilla is within the intended scope of Padilla as clearly reflected by that decision. Padilla cites to INS v. St. Cyr, 533 US 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), which stated that "competent defense counsel, following the advice of numerous practice guides" would advise a defendant as to the risks a plea posed for removal, and eligibility for relief from removal, *Id.* at 323 n. 50, 121 S.Ct. 2271.

Petitioner's lost opportunity to become an LPR is clearly reflected in the language of INA § 245(i) which provides as follows:

> "(i) Adjustment in status of certain aliens physically present in United States
> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States-
> (A) who-
> (i) entered the United States without inspection; or
> (ii) is within one of the classes enumerated in subsection (c) of this section;
> (B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of-

> (i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or
> (ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and
> (C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;
> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application...
>
> Footnote 159—The original § 245(i) took effect on 10/1/94 and was scheduled to sunset on 9/30/97. The provision was extended until 11/26/97 by a series of continuing resolutions. P.L. 105-119. The revised § 245(i) provides that an individual who is ineligible to adjust under § 245(a) may still adjust under § 245(i), but in order to be eligible, he or she must either be the beneficiary of a visa petition filed by the attorney general on or before 1/14/98, or a labor certification field with a state labor office on or before 1/14/98. The LIFE Act Amendments, 2000, P.L. 106-554, changed the date in (i)(1)(B) to 4/30/01, and also added (i)(1)(C)."

The clear language of the statute was corroborated as to the daily immigration practice side by Dan Larsson, who testified at the PCR hearing unequivocally as to this point. In fact, expert Larsson testified 245(i) is a common vehicle through which approximately a million undocumented aliens have become LPRs, RT 32.

The case was more than triable as two expert witnesses were on call to assist at trial and prove that the one complainant lacked credibility. CDC Geiger declared at Defense Exhibit 101, page 3 in pertinent part:

> "The issue at trial was the extreme parental alienation engaged in by our client's ex...We were ready for trial. The petitioner had a good case."

CDCs agree they were well aware of the importance of the immigration consequences of the conviction to their client and the Padilla expert was aware that Petitioner has a US citizenship wife.

In State of Washington v. Castro-Oseguera, No. 77021-7-1, filed January 22, 2019, the Washington Court of Appeals rejected a claim by Castro that he was entitled to learn from his attorney that he would be unable to file for asylum if he entered a plea to Delivery of Cocaine as Castro failed to allege that he would have insisted on a jury trial if he had been advised that his plea would bar an asylum application because it is an aggravated felony conviction. The opinion notes at page 15 that courts have reached mixed results on this issue. The positive results from Petitioner's standpoint that the court recites are at page 15-16.

> "See United States v. Nuwintore, 696 F.App'x 178, 179-80 (9th Cir. 2017) (defense counsel's performance fell below objective standard of reasonableness by failing to advise client that guilty plea would result in loss of his existing asylum status)...Diaz v. State, 896 N.W.2d 723, 732 (Iowa 2017) (Padilla requires competent counsel to advise client of all adverse immigration consequences of plea, including whether alien will be immediately removable, subject to mandatory detention, foreclosed from seeking cancellation of deportation, barred from legal reentry, and at risk of criminal prosecution for reentering country)".

Diaz recited the ABA standards on this matter at 731 of its opinion. These standards are submitted here as they are a succinct review of contemporary thinking about the obligations of defense counsel to advise on the immigration consequences of a conviction as follows:

> "In *Padilla,* the U.S. Supreme Court looked to "norms of practice as reflected in American Bar Association standards and the like" to measure counsel's performance. *Padilla,* 559 U.S. at 366, 130 S.Ct. at 1482 (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065). Consulting the current version of the American Bar Association guidelines now, we find they recommend the following:
>
> > (a) Defense counsel should determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege. Counsel should avoid any actions that might alert the government to information that could adversely affect the client.
> >
> > (b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances. Public and appointed defenders should develop, or seek funding for, such immigration expertise within their offices.
> >
> > (c) After determining the client's immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client's interests and how to pursue it.
> >
> > (d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.
>
> ABA Standards for Criminal Justice: Prosecution Function and Def. Function 4-5.5 (4th ed. 2015) [hereinafter ABA Standards]."

The Diaz court continued:

> "We recognize these recommendations are demanding, but we do not find them too onerous a burden to place on the professional advisers employed to represent their clients' best interests."

In Diaz, his plea of guilty foreclosed potential relief from deportation that was otherwise available to him if he had been acquitted of the criminal charges. Diaz entered into a plea to the crime of aggravated misdemeanor forgery. This foreclosed his ability to apply for cancellation of removal for certain non-permanent residents. Diaz had not been advised of this outcome pre-plea. The Iowa court determined this was constitutional error requiring his conviction be vacated as obtained in violation of Diaz's right to effective assistance of counsel.

Petitioner was affirmatively misadvised that he has no avenue of relief from deportation and was subject to deportation both pre-stipulated facts trial and post-stipulated facts trial. This was clear ineffective assistance by CDC under Padilla, Sixth and Fourteenth Amendment of the US Constitution, and affirmative misadvice (Oregon right to effective assistance of counsel violated, ineffective assistance and federal right to effective/adequate counsel violated) under Long. This was also affirmative misadvice under federal law, US v. Chan, 792 F.3d 1151 (9th Cir. 2015); US v. Kwan, 407 F.3d 1005 (9th Cir. 2005).

(VII) DECISION OF THE COURT OF APPEALS

Affirmed on December 2, 2020.

(VIII) CONCLUSION

This court should grant review of the decision of the Court of Appeals in this case, and after full briefing, reverse that decision, and remand the case for trial on all of the original charges

DATED: This 6th Day of January, 2021

Respectfully Submitted,

/s/Brian Patrick Conry
Brian Patrick Conry
Attorney at Law, OSB #822245

FILED: December 02, 2020

IN THE COURT OF APPEALS OF THE STATE OF OREGON

LEONEL CERVANTES-MERAZ,
Petitioner-Appellant,

v.

STATE OF OREGON,
Defendant-Respondent.

Marion County Circuit Court
18CV00755

A170858

Dale Penn, Senior Judge.

Argued and submitted on November 10, 2020.

Before DeVore, Presiding Judge, and DeHoog, Judge, and Hadlock, Judge pro tempore.

Attorney for Appellant: Brian Conry.

Attorney for Respondent: Ryan P. Kahn.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[X] Costs allowed, payable by Appellant.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05 and 9.05(3)(a)

Brief Length

I certify that:

(1) this brief complies with the word-count limitation placed on briefs in ORAP 9.05(3)(a); and

(2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,876 words

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 6th Day of January, 2021.

/s/Brian Patrick Conry
Brian Patrick Conry
Attorney at Law, OSB #822245

CERTIFICATE OF SERVICE

I, Brad Gourley-Paterson, certify that on January 6, 2021, I directed the original PETITION FOR REVIEW OF DEFENDANT-APPELLANT to be electronically field with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, by using the Court's electronic filing system.

I further certify that on January 6, 2021, I directed the foregoing PETITION FOR REVIEW OF DEFENDANT-APPELLANT to be served upon the following attorney by mailing two copies, with postage prepaid, in an envelope addressed as follows:

Ryan Kahn #002919
Attorney-in-Charge
1162 Court St. NE
Salem, OR 97301-4096

TEL (503) 378-4402
EMAIL- ryan.kahn@state.or.us

/s/Brad Gourley-Paterson
Brad Gourley-Paterson
Paralegal
Petitioner-Appellant, Petitioner on Review

BRIAN PATRICK CONRY, P.C.
OSB #822245
534 SW Third Ave., Suite 711
Portland, Oregon 97204
Tel (503) 274-4430
Fax (503) 274-0414
bpconry@gmail.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

CERVANTES-MERAZ, Leonel Petitioner, v. STATE OF OREGON, Respondent.	) Post-Conviction Case No. 18CV00755)) Marion County Case No. 15CR53353))) **AMENDED PETITION FOR POST-**) **CONVICTION RELIEF**)

COMES NOW the Petitioner, Leonel Cervantes-Meraz, by and through his attorney, Brian Patrick Conry, and alleges:

1.

Respondent, State of Oregon, caused Petitioner to suffer an illegal, unconstitutional conviction for Harassment (sexual, offensive physical touching), in violation of ORS 166.065, based on an involuntary, unknowing waiver of jury trial and resulting stipulated facts admissions, as well as a deferred prosecution on a charge or Attempted Compelling Prostitution, of his child, in violation of ORS

161.405 following that unintelligent and misinformed, waiver and stipulation. The amended judgment was entered on or about January 9, 2017.

2.

Petitioner was restrained of liberty by the above-named Respondent pursuant to an unknowing, unintelligent, misinformed and involuntary waiver of jury trial and subsequent unlawful conviction and admission and is still suffering restraint and the "virtually certain" immigration consequence of deportation caused by said conviction and admission.

At this time, Petitioner is clearly inadmissible into the United States and deportable therefrom as legally required by the Immigration and Nationality Act (hereafter INA) § 212(a)(2)(A)(i)(I) and INA § 237 (a)(2)(A)(i)(I), having been convicted of Harassment (sexual, offensive physical touching) and admitted Attempted Compelling Prostitution of his child of under the age of 12.

Petitioner's unknowing and involuntary waiver of jury trial and stipulation/admission to the Attempted Compelling Prostitution charge with a deferred sentencing thereon makes it virtually certain that if he was to apply for adjustment of status, through his United States citizenship wife (family visa processing), for which he is eligible to apply through INA 245(i), his application for adjustment of status from DACA or undocumented status to legal permanent residence status would be denied.

Prior to Petitioner's waiver of jury trial and admission to Attempted Compelling Prostitution and his conviction for Sexual Harassment, Petitioner was clearly eligible to adjust status through his United States citizenship wife under 245(i) and was virtually certain to acquire legal permanent residence upon filing. Subsequent to his involuntary, unintelligent, misinformed, and unknowing waiver of jury trial and stipulated facts admission to Attempted Compelling Prostitution and his conviction of Sexual Harassment, Petitioner is virtually certain to be deported from the United States forever if and when he comes to the attention of the Immigration Authorities. Trial counsel erred by misinforming and/or not fully informing his client prior to Petitioner's waiver of jury trial and stipulated admissions of the dire immigration consequences that Petitioner faces as a virtually certain result of his unknowing, unintelligent, misinformed and involuntary waiver of jury trial and subsequent stipulated conviction and admissions.

The unintelligent, misinformed and involuntary waiver of jury trial and subsequent conviction and admission with deferred prosecution Petitioner is attacking is by virtue of a judgment, sentence and deferred sentence by the Marion County Circuit Court in the criminal case of State of Oregon v. Leonel Cervantes-Meraz, Case No. 15CR53353.

Petitioner was facing seven counts: (1-2) Sexual Abuse in the First Degree; (3-4) Sodomy in the First Degree; (5) Using a Child in a Display of Sexually

Explicit Conduct; (6) Attempted Compelling Prostitution; and (7) Sexual Harassment following a second amended indictment on December 15, 2016 (filed December 16, 2016). Counsel's stipulation/admission to the Attempted Compelling Prostitution of Neifferth Cervantes, his child, by intentionally and unlawfully attempting to induce his son to engage in prostitution.

Petitioner was known or should have been known by criminal defense counsel (hereafter counsel)[1] to not be a citizen of the United States and to have been eligible for adjustment of status from undocumented to legal permanent residence through a family visa petition that could readily be filed by his United States citizenship wife on his behalf. Counsel should have known and told Petitioner prior to his waiver of jury trial and stipulated facts trial, that the stipulated facts trial and expected conviction of Sexual Harassment and admission to Attempted Compelling Prostitution would make Petitioner's desire to become a legal-permanent resident of the United States virtually certain to fail and cause his deportation from the United States. Counsel failed to so advise his client. Petitioner's jury trial waiver was misinformed and unintelligent. Counsel failed to

[1] Petitioner was represented by Mark Geiger and Dana Mitchell on his criminal charges in case number 15CR53353. They are referred to as counsel therefore throughout this petition.

adequately assist his client in making an informed choice about whether or not to enter into the waiver of jury trial and stipulated facts trial to the trial judge.

Petitioner's date of birth is 11/30/1983. Petitioner entered the United States from Mexico in approximately October, 1999. Petitioner has been deprived of his ability to successfully adjust status and have his permanent residence granted through family visa processing, INA 245(i). Counsel should have known and informed his client's that Petitioner's waiver of jury trial and agreement to proceed by a stipulated facts trial resulting in his conviction of the Sexual Harassment charge and admission to the Attempted Compelling Prostitution charge of his child with a deferred prosecution would eliminate Petitioner's ability to become a legal permanent resident. Counsel failed in his obligation to advise his client of these consequences of Petitioner's unintelligent and misinformed "choice" to proceed with the stipulated facts trial, as well as of his virtually certain deportation, prior to Petitioner's waiver of jury trial and subsequent stipulated admissions/conviction.

Affirmative Misadvice

Petitioner was mistakenly advised by counsel **{because counsel's advice to his client was incomplete and unclear. Petitioner believed}** that if he entered into the waiver of jury trial, stipulated facts trial and admission, and was able to successfully complete probation, expunge his Sexual Harassment conviction, and the Attempted Compelling Prostitution charges were eventually dismissed without

imposition of any sentence thereon, **{he might be able to adjust status to legal permanent resident despite}** [*that there would be no immigration consequences as a result of*] his conviction of Sexual Harassment and admission to Attempted Compelling Prostitution. This affirmative misadvice by counsel resulted in Petitioner's waiver of jury trial and uninformed agreement to proceed through a stipulated facts trial and resulted in his conviction of Sexual Harassment and admission to and deferred sentencing on the Attempted Compelling Prostitution. This result must be vacated as it was unconstitutionally obtained.

Petitioner **{'s advice to his client was unclear. Petitioner mistakenly believed}** [*was further affirmatively misadvised by counsel*] that once he completed probation he would be able to expunge his Sexual Harassment conviction and this would result in his being free from any immigration consequence(s) as a result of that conviction. However, the immigration court, as a well-established matter of law, continues to treat expunged criminal convictions as convictions for immigration purposes. **{Counsel was further unclear because counsel failed to tell his client that}** [*Further*], in immigration court, the admission to Attempted Compelling Prostitution would **{be considered a conviction by the immigration authorities}** [*still persist*], even following the dismissal of the criminal charges on that count. These **{clear immigration}** consequences make it virtually certain Petitioner will be deported and never able to

able to adjust status through INA 245(*i*) {**although he mistakenly continued to hope he would be able to adjust status either following his plea and/or following his probation/dismissal of the compelling charge and expungement of the Sexual Harassment conviction**}.

Petitioner was "prejudiced" by his waiver of jury trial, stipulated facts agreement to a Sexual Harassment conviction and by his admission to Attempted Compelling Prostitution and deferred sentence thereon. Petitioner would not have entered into the waiver of jury trial and proceeded with the stipulated facts trial had he known that his Sexual Harassment conviction and stipulated admissions, as a well-established matter of immigration law, would be virtually certain to lead to his deportation from the United States. Petitioner was misinformed by counsel because he was unaware of this virtually certain legal consequence at the time he waived his right to jury trial and entered into a stipulated facts trial and admitted Attempted Compelling Prostitution. Moreover, this waiver of jury trial and admissions will reasonably result in Petitioner being placed into Immigration proceedings at any time by the immigration authorities. If and when this occurs, Petitioner would have no relief available from being deported and will be virtually certain to be refused bond by the immigration authorities.

Petitioner was further misinformed by counsel and his waiver of jury trial and stipulated admissions was unintelligent because, at the time, he was unaware

that if he was arrested by the immigration authorities, he would be virtually certain to be denied bond. Rather, the immigration judge hearing any request for bond on his behalf will be virtually certain to find Petitioner is both a danger and a flight risk. If arrested by the immigration authorities prior to a grant of this post-conviction relief petition, it is virtually certain Petitioner would be held in Tacoma until such time as he is deported from the United States. Petitioner would not have waived jury trial and entered into the stipulated facts trial and stipulated facts admissions if he had been so informed by counsel. Counsel violated his obligation to advise his client of this disadvantage of his plea bargain before Petitioner agreed to the jury waiver stipulated facts trial, and plea "bargain".

Petitioner was further not advised by counsel that if he was arrested by the immigration authorities prior to his completion of probation that his inability to complete probation would result in his inability to gain the apparent "benefit" of his deferred sentencing, i.e., anticipated dismissal of the attempted compelling prostitution charges. He would then likely be convicted of Attempted Compelling Prostitution due to his violation of probation and required to serve 23-24 months in prison with the Oregon Department of Corrections as a consequence of his failure to complete probation prior to his virtually certain deportation. Counsel erred by not advising his client of this "disadvantage" of the plea bargain prior to

Petitioner's waiver of jury trial and agreement to proceed with a stipulated facts trial.

If Petitioner had been accurately advised by counsel that his waiver of jury trial, stipulated facts trial and conviction of Sexual Harassment and admission to Attempted Compelling Prostitution that he entered into would result in his {**never**} being [*un*]able to become a legal permanent resident and/or would be virtually certain to lead to his being placed into deportation proceedings without having any relief available; Petitioner would not have entered into the waiver of jury trial and stipulated facts trial or made the admission to Attempted Compelling Prostitution. Rather, Petitioner would have insisted on a jury trial. Petitioner has no other criminal record.

Counsel's Failure to Properly Prepare for Trial Facilitated the Involuntary and Unknowing Waiver of Jury Trial and Petitioner's Uninformed "Choice" to Proceed with the Stipulated Facts Trial

Petitioner's counsel was ineffective because {**it appeared to his client that counsel**} [*he*] was not prepared to go trial on the trial date that had been set as a firm date. The trial was set for more than a year after the time of his client's arrest. Two prior motions for continuance had been denied. It was clearly foreseeable that the third continuance request, which followed an admonition by the trial judge hearing continuation motions that clearly stated no more continuances would be

permitted, would result in a denial of this third request for continuance by counsel. {**Petitioner mistakenly believed**} Petitioner's counsel had failed to subpoena or otherwise have available for the scheduled trial date of December 19,2016, two key defense witnesses, Dr. Wendy Bourg and Jamie Chavez. This {**perceived**} lack of preparedness was a factor that increased the pressure[*s*] on Petitioner to enter into an unintelligent, misinformed waiver of jury trial and unintelligent agreement to proceed with the stipulated facts trial resulting in his conviction of Sexual Harassment and admission to Attempted Compelling Prostitution and deferred sentencing thereon. For this reason, there was a substantial denial in the proceedings. Petitioner's conviction and admission must be set aside as unconstitutionally obtained due to these {**confusing apparently**} coercive circumstances existing at the time Petitioner unintelligently and involuntarily entered into a stipulated facts trial.

4.

Prior to the waiver of jury trial and stipulated facts trial, counsel(s) did not {**clearly convey to Petitioner in words that he could understand**} [*know and/or did not clearly advise petitioner*] that petitioner would be virtually certain to be eternally disabled from potentially become a legal permanent resident of the United States through his admission to Attempted Compelling Prostitution and/or his conviction of Sexual Harassment even if he completed his probation on the

Sexual Harassment charge, the Attempted Compelling charge was dismissed and he obtained an expungement of the conviction of Sexual Harassment.

Petitioner was sentenced by the Circuit Court following his waiver of jury trial, stipulated facts admission/trial and conviction on one count of Sexual Harassment to 36 months supervised probation, undergo sex offender treatment, and obey all laws and other probation conditions. The sentencing on the Attempted Compelling Prostitution was deferred with a further provision that if Petitioner did not successfully complete probation on the sexual harassment charge, he would be sentenced to 23-24 months to the Oregon Department of Corrections. The judgment was entered on or about January 9, 2017.

5.

Petitioner has taken no prior post-conviction proceedings with respect to the above-referenced case. The conviction and/or admission has not been the subject of appellate proceedings nor does petitioner intend to file an appeal.

Violation of Right to Counsel Under the 6th and 14th Amendment

Criminal defense counsel has a duty under the 6th Amendment right to counsel to advise his client accurately of the clear, legally required immigration consequence of a conviction, prior to Petitioner's waiver of jury trial and agreement to proceed with a stipulated facts trial. Padilla holds that affirmative misadvice and/or mere silence and/or "errors of omission" are cognizable "ineffective assistance" claims.

Here, Petitioner {**mistakenly believed at the time of the plea**} [*was mistakenly informed by counsel*] that there {**might**} [*would*] be no immigration consequences {**and he still might be able to adjust his status and become a legal permanent resident**} if he successfully completed the probation on his Sexual Harassment conviction and then his deferred prosecution on the Attempted Compelling Prostitution charges resulted in a dismissal thereof.

Petitioner's waiver of jury trial and agreement to proceed with a stipulated facts trial, his admission, conviction, and deferred sentencing must be set aside due to the ineffective assistance of counsel under the Sixth Amendment right to counsel, which is applicable in the State of Oregon through application of the Fourteenth Amendment of the U.S. Constitution due process clause.

An immigrant defendant's right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the U.S. Constitution is violated when counsel fails to accurately {**and in a manner his client could understand**} advise {**his**} [*the*] immigrant {**client**} of the {**clear and complete**} "advantages and disadvantages" of the immigrant's waiver of jury trial and agreement to proceed with a stipulated facts trial [*that will result in the immigrant defendant being virtually certain to be deported from the United States, although the defendant was unaware that this was the consequence of his plea "bargain" when he unintelligently waived jury trial and agreed to proceed to a stipulated facts trial*].

It is unambiguously clear and/or readily ascertainable by reasonably competent counsel that, as a matter of the plain language of the applicable immigration statutes, Petitioner is virtually certain to be deported if he {**at any time for the rest of his lifetime**} comes to the attention of the immigration authorities due to his conviction of Sexual Harassment and admission to Attempted Compelling Prostitution of his child. Counsel failed to accurately advise his client of the clear immigration consequences of his conviction and admission. The failure to provide this advice prior to Petitioner's waiver of jury trial and agreement to proceed to a stipulated facts trial, his resulting conviction and admission is a clear violation of Petitioner's right to counsel as guaranteed by the Sixth and Fourteenth Amendments of the US Constitution. Counsel was clearly ineffective for failure to accurately advise this Petitioner, prior to his waiver of jury trial and agreement to proceed with a stipulated facts trial, that the immigration consequence of this waiver and agreement was that Petitioner is now virtually certain to be deported from the United States should he come to the attention of the immigration authorities.

The Violation of the Oregon Constitutional Right to be Free from Affirmative Misadvice by Criminal Defense Counsel

"Affirmative misadvice" is ineffective assistance requiring Petitioner's convictions be set aside. Long v. State of Oregon, 130 Or. App. 198, 880 P.2d 509

(1994) (Once counsel begins to advise on an area of law, such as the immigration consequences of a conviction, counsel must do so accurately). In Long, counsel had no obligation to offer advice about whether a conviction for Sexual Abuse would become expungable, but because counsel did give such advice, and in the course thereof misadvise his client about when expungement would be available, counsel was ineffective as a matter of law. Here, counsel began to advise on the immigration consequences, but gave flawed advice thereon {**because counsel allowed**} [. *Counsel advised merely that there was a risk of deportation prior to the unknowing and involuntary waiver of jury trial, stipulated facts trial and admission to Attempted Compelling Prostitution allowing*] his client to continue to hope that he would be able to adjust status from [*DACA and/or*] undocumented status to permanent residence either immediately after the conviction and/or following successful completion of probation, expungement of his conviction, and dismissal of all the charges. This is clearly ineffective, affirmative misadvise under the Oregon Constitution, Article I Section 11.

This affirmative misadvise also clearly violates the Sixth and Fourteenth Amendment of the US Constitution right to counsel. INS v. St. Cyr, 533 U.S. 289, at 325 (2001), held "[t]here is a clear difference … between facing possible deportation and facing certain deportation."

The Ineffective Assistance of Petitioner's Counsel Caused Prejudice and Requires that the Conviction be Vacated

If Petitioner had been accurately advised by counsel concerning the immigration consequence of his waiver of jury trial {**and decision to**} [*nor*] proceed[*ed*] with a stipulated facts trial and his subsequent conviction of Sexual Harassment and his admission to Attempted Compelling Prostitution, he would not have waived jury trial, or agreed to a stipulated facts trial and as a consequence been convicted of Sexual Harassment and admitted to Attempted Compelling Prostitution. Rather, Petitioner would have insisted on a jury trial on all counts.

Unknowing and Involuntary Agreement to a Stipulated Facts Trial and Waiver of Jury Trial is a Violation of Due Process

Petitioner's unknowing, unintelligent, misinformed and involuntary stipulated facts agreement and waiver of a jury trial has led to his conviction of Sexual Harassment and admission to and deferred sentencing on Attempted Compelling Prostitution was clearly caused by the ineffective assistance of counsel. This is a violation of the due process clause of the Fifth and Fourteenth Amendment of the US Constitution.

Petitioner's stipulated facts agreement and waiver of jury trial was made unknowingly and involuntarily because he did not make an informed decision after being fully advised of the advantages and disadvantages his waiver of jury trial and

his agreement to proceed with the stipulated facts trial in exchange for accepting the "benefits" of the proposed plea "bargain".

Violation of Right to Counsel under Article 1, Section 11 of the Oregon Constitution

It's clear that Oregon's "right to counsel", Article 1, Section 11, decision Gonzalez v. State of Oregon, 340 Or 452, 134 P.3d 955 (2006), which finds that immigration consequences are "collateral consequences" of a criminal conviction, reasonably must be reversed. Accordingly, Petitioner, at this time, requests this court reverse Gonzalez v. State of Oregon based upon the logic and rationale of the Padilla decision that immigration consequences of a conviction are not "collateral" to the criminal court proceedings but are inextricably entangled therein. The last Oregon Court of Appeals decision to address this issue, Saldana-Ramirez, decided March 13, 2013, stated that Gonzalez has not been impliedly reversed by the US Supreme Court decision in Padilla, and that Gonzalez remained the law of the land and accurately recites the duties of counsel under the Oregon Constitution "right to counsel" clause.

Conclusion

Petitioner's conviction for Sexual Harassment and his admission to Attempted Compelling Prostitution and deferred sentence thereon must be vacated on constitutional grounds because Petitioner's "choice" to waive jury trial and proceed

with the stipulated facts trial was unintelligent and misinformed. Counsel erred by failing to adequately assist Petitioner in making an informed choice to enter into a stipulated facts trial. Rather, counsel misinformed Petitioner by failing to advise him of the {**disadvantages**} [*virtually certain deportation consequence*] of his client's uninformed "choice" to proceed with a waiver of jury trial and stipulated facts trial. Petitioner was clearly misinformed by counsel about the disadvantages of proceeding in this matter.

Further, there was a substantial denial in the proceedings because Petitioner unknowingly and involuntarily waived jury trial and entered into a stipulated facts trial without {**fully understanding**} [*knowing*] the disadvantages of his stipulated facts trial, including {**that he would never be able to adjust status and become a legal permanent resident of the**} [*his virtually certain deportation from the*] United States. Accordingly, Petitioner's conviction, admission and deferred sentence must be vacated due to violations of his right to counsel under the Oregon Constitution, right to counsel under the US Constitution, and violation of his right to due process under the Fifth and Fourteenth Amendment of the US Constitution as outlined above.

DATED this 24th day of March, 2019.

Respectfully Submitted,

Brian Patrick Conry, OSB 822245
Attorney for Petitioner

BRIAN PATRICK CONRY, P.C.
OSB #822245
534 SW Third Ave., Suite 711
Portland, Oregon 97204
Tel (503) 274-4430
Fax (503) 274-0414
bpconry@gmail.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

CERVANTES-MERAZ, Leonel Petitioner, v. STATE OF OREGON, Respondent.	) Post-Conviction Case No. TBA)) Marion County Case No. 15CR53353)) **DECLARATION OF LEONEL CERVANTES-MERAZ IN SUPPORT OF PETITION FOR POST-CONVICTION RELIEF**)

I, Leonel Cervantes-Meraz swear and affirm the following is true to the best of my knowledge:

1. I was represented by Mark Geiger and Dana Mitchell on my criminal charges in case number 15CR53353. I have a 12th grade education in the schools in the United States but did not graduate. I got a GED just prior to getting Deferred Action for Childhood Arrivals (DACA) in 2013. I had DACA for four years; it expired in June 2017. I did not attempt to renew my DACA status at that time.

I arrived in the United States at the age of 15. I am gainfully employed as a wildland firefighter. This is a very good position and I am a supervisory employee

for Grizzly Firefighters Inc. I manage a crew of 20 firefighters at times including myself. I have a good income that I could not expect I would be able to duplicate in Mexico. All of my immediate family is here in the United States. Two of my brothers have legal permanent residence. One of my sisters is a citizen and one of my sisters has DACA status. My mother and father are undocumented. I also have uncles, aunts and cousins living in Salem.

2. I would not have waived jury trial and entered into the Stipulated Facts Agreement, which I knew would result in my conviction of Sexual Harassment, if I was aware of the permanent adverse immigration consequences of that conviction. I mistakenly believed since Sexual Harassment is a misdemeanor conviction, it would not be considered that serious by the immigration authorities. Criminal defense counsel Dana Mitchell had advised me misdemeanors are not too bad for immigration but felonies are. I would have insisted on a jury trial if I had known my deportation would be virtually certain, if I came to the attention of the immigration authorities, based on my conviction of Sexual Harassment. I also would have elected to proceed to a jury trial if counsel would have advised me, prior to my waiver of jury trial, that at times probation officers would report deportable probationers to the immigration authorities for their deportation from the United States.

I was advised by criminal defense counsel, Dana Mitchell, that the Sexual Harassment conviction would be expungable. It was my understanding that once this

conviction was expunged, there would be no possibility of adverse immigration consequences arising from this conviction.

I was aware that my counsel had sought a set over of the December 19, 2016 trial date that was denied by the court on December 5, 2016. I was aware that defense counsel had sought a continuance because of the unavailability of Dr. Wendy Bourg and Jamie Chavez on the scheduled trial date. I understood each of these witnesses were important witnesses that needed to be called on my behalf to the witness stand at trial. When I learned that they would be unable to attend the scheduled trial date and that the court had denied the request for continuance, I found it very difficult to proceed to jury trial in light of my counsel's inability to put forth the best possible defense at trial. This inability of witnesses to be present at trial was a factor in my waiving jury trial and proceeding with the stipulated facts trial. I believe I would have proceeded to trial if Dr. Wendy Bourg and Jamie Chavez were available for the scheduled December 19, 2016 trial date.

One time that Mr. Geiger advised me on immigration consequences, without Ms. Mitchell being present, was just prior to my waiver of jury trial and stipulated facts trial on December 16, 2016. I met with Mr. Geiger at his office about an hour prior to the time set for our court appearance on Friday, December 16, 2016, where we would attempt to resolve the case, if appropriate, with the option being we would go to trial on Monday, if needed. Mr. Geiger told me that there was a risk of

deportation following the proposed plea bargain, stipulated facts trial and admission, and that things "didn't look very good". I felt like I was being pushed to accept the waiver of jury trial and stipulated facts trial resolution of the matter because of Mr. Geiger's recommendation that I not proceed to trial. I also realized that you can be innocent of charges and still be convicted at trial. I understood from counsel that my sentence could be approximately 480 months in prison, essentially for the rest of my life, if convicted. I was scared of spending my life in prison.

However, Mr. Geiger believed it was better that I waive jury trial and enter into the proposed agreement rather than go to trial on the case and potentially spend the rest of my life in prison.

3. I would not have waived jury trial and stipulated to my admission to Attempted Compelling Prostitution and a deferred prosecution thereon, if I was aware that the adverse permanent immigration consequences of this admission would continue to exist even if the deferred case is dismissed by the criminal court following my successful completion of probation. I was unaware at the time of my admission to Attempted Compelling Prostitution, that even once the entire charge was subsequently dismissed in criminal court, the admission still has a draconic adverse immigration consequence of making my deportation virtually certain from the United States. If I'd been aware that the immigration consequences would continue, even after the Attempted Compelling Prostitution charge was dismissed

(following a successful completion of probation on the Sexual Harassment charges), I would not have entered into the admission/stipulation. I would have elected to go to jury trial if I had known my deportation would be virtually certain after my admission to Attempting to Compel Prostitution.

4. I was not advised by criminal defense counsel that the immigration consequences of my conviction of Sexual Harassment following the waiver of jury trial, stipulated facts trial and my admission to Attempted Compelling Prostitution would make my adjustment of status through my US citizenship wife virtually certain to fail, if I ever attempted to adjust status.

I had consulted with Ms. Ghio, an immigration attorney, months after I bonded out on the Sex Abuse and related charges. I met with her on or about July 22, 2016. Ms. Ghio had represented my brother, Israel Cervantes-Meraz. My brother was able to adjust status to permanent residence because our grandfather had filed an I-130 (Petition for alien relative) for our mother years ago. Thus, my brother was able, through family visa processing, to become a legal permanent resident without needing to return to Mexico for consular processing.

I asked Ms. Ghio if I could proceed to adjust like my brother had, while the criminal charges in case number 15CR53353 were pending. She advised me to return to file for permanent residence, only if that was possible to do, after the criminal cases were resolved in a manner that would permit my adjustment of status.

I understand Ms. Ghio's husband, Mr. Muntz, advised my criminal defense counsel, Mr. Geiger, on the immigration consequences of my plea "bargain" prior to the resolution of my criminal case.

I spoke with Mr. Muntz on 1/3/2017 following the resolution of criminal charges. At that point, I learned for the first time that probation officers would from time to time refer deportable probationers to the immigration authorities for deportation, if appropriate. Mr. Muntz told me I was "pretty much screwed" or words to that effect in my hopes to become a legal permanent resident of the United States. I had not considered my admission to Attempted Compelling Prostitution as an important fact. Mr. Muntz advised me this admission was very important, as any immigration judge would be very concerned that I would have admitted I had attempted to compel my child to be involved in prostitution. I thought the admission itself wouldn't amount to much because I expected the charges to be dismissed after I succeeded on probation. Mr. Muntz told me we could try to Petition for adjustment through my spouse but this really wouldn't be a good idea as it would really just set me up for deportation. I did not understand until this time that my potential for legal permanent residence in the United States was so completely jeopardized by my waiver of jury trial and stipulated admissions. I went into the conversation with Mr. Muntz understanding that because my only conviction, Sexual Harassment, was a

misdemeanor that it really wasn't that bad and I still had hope I could adjust status with this conviction.

I understood from my conversations with Ms. Mitchell that I would be able to expunge the sexual harassment conviction after the probation was done, either two or three years after sentencing depending on if the term of probation was reduced by a year or not. After the expungement, I had mistakenly understood there would be no adverse immigration consequences possible due to this conviction. At the time of my waiver of jury trial, I was unaware that after an expungement occurs that the immigration authorities continue to treat an expunged criminal conviction as still a conviction for immigration purposes.

I mistakenly believed once I was able to have the Attempted Compelling Prostitution charges dismissed following my successful completion of probation that I would be free of any immigration consequences due to my admission to Attempted Compelling Prostitution. I understood between the time of the stipulated facts trial and the time of the Attempted Compelling Prostitution being dismissed that there was a risk of deportation but I did not understand that I would be virtually certain to be deported during that time if the immigration authorities placed me into proceedings.

5. I would not have waived a jury trial and would have gone to jury trial if I'd been told by counsel that my ability to adjust status through family visa processing

would be forever destroyed and that I would be virtually certain to be deported as a consequence of this plea "bargain". I did not know that once I entered into the stipulated facts trial resulting in my conviction for Sexual Harassment and an admission to Attempted Compelling Prostitution, even after I completed probation successfully, expunged the Harassment charge and the Attempted Compelling charges were dismissed by the criminal court, that I would still be virtually certain to be deported from the United States.

6. I did not anticipate I could potentially be arrested by the immigration authorities prior to the probation term expiring and was not warned by counsel that this foreseeably could occur as soon as I had waived jury trial and entered my admissions on December 16, 2016 and/or was sentenced by the judge on December 19, 2016.

I was not advised that DACA did not continue to protect me from deportation following this waiver of jury trial and sentence. I mistakenly believed I was at least protected by DACA until June of 2017. I did not have in mind at the time of my waiver of jury trial, that if I was arrested and housed in Tacoma at the Northwest Detention Center after my stipulated facts trial, I would almost inevitably be held there in custody without bond. Criminal defense counsel did not so advise me. I would not have entered into the waiver of jury trial and plea "bargain" if I had been so advised.

I now know it's virtually certain that my immigration judge would find that I'm both a flight risk and a danger to the community if I requested bond after being arrested and transported to Tacoma. I did not know at the time of my waiver of jury trial the Immigration Judge would be virtually certain to find that I'm a danger to the community because of my conviction of Sexual Harassment and admission to Attempted Compelling Prostitution. I was further not told by criminal defense counsel that if the immigration authorities arrested me and I was unable to finish my probation that there is a risk I was stipulating to a 23-24 month prison sentence on the Attempted Compelling Prostitution because the deferral of the prosecution would be unlikely to stand. I thought of the Attempted Compelling as a "hammer" to make sure that I did my probation; I didn't think about it as a sentence that would be potentially imposed if immigration picked me up and I was unable to complete my probation. I also did not consider it a basis for my virtually certain deportation because it was not a conviction. I was not told by counsel that this admission, even if it never became a conviction, would be virtually certain to result in my deportation from the United States.

7. I respectfully request this court to grant my request for post-conviction relief. I want to exercise my opportunity to go to jury trial. I would have insisted on a jury trial if I'd been fully and correctly advised of the immigration consequences of my conviction. My jury trial waiver was made unknowingly and involuntarily. I'd

like to have the opportunity to live in the United States as a legal permanent resident without fear of being deported from the United States, at any moment in the future, when the immigration authorities might choose to initiate deportation proceedings against me.

DATED this 4th day of January, 2017.

Sworn to be true to the best of my knowledge,

Leonel Cervantes-Meraz

BRIAN PATRICK CONRY, P.C.
OSB #822245
534 SW Third Ave., Suite 711
Portland, Oregon 97204
Tel (503) 274-4430
Fax (503) 274-0414
bpconry@gmail.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

CERVANTES-MERAZ, Leonel Petitioner, v. STATE OF OREGON, Respondent.	) Post-Conviction Case No. 18CV00755)) Marion County Case No. 15CR53353)) **SUPPLEMENTAL DECLARATION**) **OF LEONEL CERVANTES-MERAZ**) **IN SUPPORT OF PETITION FOR**) **POST-CONVICTION RELIEF**

I, Leonel Cervantes-Meraz swear and affirm the following is true to the best of my knowledge:

There was a lot of confusion at the time of the plea in this matter. I was a nervous wreck at the time; I was confused and scared. I am not legally trained. I have ADHD (Attention deficit/hyperactivity disorder). I believe I have had ADHD my entire life. I started medication last summer (2018) for ADHD. I acknowledge there may have been some misunderstandings between my criminal defense counsel and I about the immigration consequences of my plea "bargain". I was unable to speak with Dana Mitchell about the immigration consequences of the conviction on the day

of the stipulated facts trial/plea "bargain" entry and that bothered me because I had been relying on her to tell me the immigration consequences of my conviction.

To the best of my recollection, Mr. Geiger never told me that witnesses Wendy Bourg and Jaime Chavez were available as witnesses at trial. I had been at a continuance motion hearing with Mr. Geiger where he became very upset that a continuance request was not granted despite the unavailability of these two witnesses. Today, I now know and believe that Mr. Chavez was, in fact, available to testify at the time of my plea "bargain". However, I did not know that at the time of my plea "bargain" and stipulated facts trial.

I know I was advised that a plea to a (Sexual) Harassment case can make it through scrutiny by the immigration authorities depending upon the manner in which the plea is entered. Ms. Mitchell, in a December email correspondence forwarded to me stated in pertinent part as follows:

> "At that point, when the DA diversion agreement is complete, Mr. Cervantes-Meraz can also plea to the sexual harassment charge (subject the point below***)-and then be on probation another 18 months. Note: ORS § 135.886(2) provides a list of factors to consider when determining if a DA diversion agreement is appropriate. Nearly all fall in our client's favor… ***Also we believe that if the harassment charge reads like the garden variety harassment, but lists the "sexual" subsection of the statute as the basis for the harassment being treated as an "A" misdemeanor, the immigration impact on him will be much less than if the body of the charge has the sexual component plead."

I recall Dana Mitchell discussing this with me at an earlier time. However, I do not believe I reviewed or understood the attached entire email correspondence, forwarded to me on December 14, 2016 from Dana Mitchell, prior to my plea. I was working the day of the plea. At one setting, the Judge was not available. I went back to work. Then I was told by Mr. Geiger to come back to enter the plea "bargain".

I would not be here filing for post-conviction relief but for the fact that I was unaware that after I entered into this plea and completed my probation that I would be virtually certain to be deported from the United States and my ability to become a legal permanent resident through adjustment of status would be destroyed.

I know Ms. Mitchell and I talked about expungement of a harassment conviction leading to my potentially being able to get DACA or a green card through my wife.

I do not recall if Ms. Mitchell ever told me that a (Sexual) Harassment conviction could not be expunged.

Although I was mistaken in part of what I said in my prior declaration, I have not lied in my declaration to this court either earlier or in my supplemental declaration today.

DATED this 18th day of March, 2019.

Sworn to be true to the best of my knowledge,

Leonel Cervantes-Meraz

Gmail Brian Conry <bpconry@gmail.com>

Fwd: Cervantes-Meraz: proposed resolution

Leonel Cervantes Meraz <leocervantes@icloud.com> Thu, May 25, 2017 at 4:05 PM
To: bpconry@gmail.com

Sent from my iPhone

Begin forwarded message:

From: Dana Mitchell <danamitchellpc@gmail.com>
Date: December 14, 2016 at 09:37:36 PST
To: Cervantes Leo <leocervantes@icloud.com>, Ortiz Teresa <palsol@aol.com>
Subject: Fwd: Cervantes-Meraz: proposed resolution

Dana M. Mitchell
Attorney at Law
317 Court St. N.E.
Salem, Oregon 97301
Ph: (503) 508-6078 | Fax: (503) 581-2260

Begin forwarded message:

From: "Kurt Miller"
Date: December 14, 2016 at 8:03:10 AM PST
To: <mark@markgelger.com>
Cc: "Dana Mitchell" <danamitchellpc@gmail.com>
Subject: Re: Cervantes-Meraz: proposed resolution

Preferably by Thu, but at least by Fri.
-K
>>> Mark Geiger <mark@markgeiger.com> 12/13/2016 5:26 PM >>>
That's not the best but it's better than risking all that prison time. We will have to get a hold of Leo, but when do you propose we do this?

On Dec 13, 2016, at 3:23 PM, Kurt Miller wrote:

Sorry, I had interpreted Dana's proposal as a bottom-line given the immigration consequences.

I can still see us working it out with a no contest to att. compelling with a stip to an 8F (23-24), s/o sent. Plead no-contest to sex harassment w/stip to 36 M sup prob and the SO package. Upon successful completion of prob, dismissal of the att. compelling. I would consider a def. request for early termination of prob upon successful completion of treatment and minimum of 24 months on probation without a violation.

I would have to plead the sex harass as:
did unlawfully and intentionally harass and annoy the victim by subjecting him to offensive physical contact by touching his

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penis, a sexual or intimate part of the victim.
-K
>>> <mark@markgeiger.com> 12/13/2016 2:57 PM >>>
Hold on their Kurt. There is no reason to jump to the conclusion that we can't reach an agreement. We can still do this with an agreement that works for you, even if it may not be perfect for us. I didn't think you actually made an offer, but if I can read between the lines, if he pleads no contest to attempted compelling, stips to an 8-I, pleads to harassment, agrees to probation (we didn't talk about length), and if we can do that as a diversion it would help him. If you cannot, then so be it....if the best we can do is a deferred sentence on the attempt, that's fine. Let's not throw out the possibility of a resolution so quickly.
Mark

From: Kurt Miller
Sent: Tuesday, December 13, 2016 2:42 PM
To: Dana Mitchell
Cc: mark@markgeiger.com
Subject: Re: Cervantes-Meraz: proposed resolution

I appreciate the well-thought counter-offer and understand why your client would want this best-case scenario for his DACA. However, I can not accept this offer. I will be prepared to go to trial on all counts on 12/19. I would like to sit down with you one more time to see if we can come to terms on what is and is not admissible. Hopefully we can agree without an omnibus hearing.
-K
>>> Dana Mitchell <danamitchellpc@gmail.com> 12/13/2016 1:37 PM >>>
Hi Kurt,
We met with Mr. Cervantes this morning, and while he is interested in accepting some sort of offer, the potential immigration consequences he faces plays a primary role in what he is and is not able to agree to. He currently has a work permit through the DACA program. His DACA expires this upcoming August, but he can request to renew it as early as 150 days prior to its expiration, which would be March 2017. DACAs last for two years.

Mr. Cervantes Meraz will be unable to renew his DACA if he has a conviction for sexual harassment and/or any sort of pending charge like an attempted compelling prostitution, even if it is on a deferred sentence, or on a DA diversion agreement. We've been trying to figure out a solution and may have something. Here is the proposal we would like to present for your consideration:

- The State dismisses, without prejudice, all charges against Mr. Cervantes Meraz

- Between dismissal and re-filing, Mr. Cervantes Meraz applies to renew his DACA permit. This should take only a few months.

- During this time, he will also start an agreed upon sexual-offender treatment evaluation and any recommended treatment. He is also willing to abide by whatever other requirements the State requests.

- When the State re-files, he enters into a DA diversion agreement (I've attached an example from one of my previous cases, it is not redacted but this is not public record, please keep confidential) - on the attempted compelling prostitution. If the agreement is kept off the record (so remains in DA file, but isn't filed with the court, which is not that unusual) - we could even add another charge to it, attempted sex abuse I, possibly. I'm trying to sweeten the deal for this option...

- Such an agreement can last for up to 18 months, during which the criminal proceedings are stayed. At the end of the DA diversion agreement, if he has complied with everything, the charges under the agreement are dismissed with prejudice.

-At that point, when the DA diversion agreement is complete, Mr. Cervantes -Meraz can also plea to the sexual harassment charge (subject to the point below***) - and then be on probation another 18 months. Note: ORS §135.886(2) provides a list of factors to consider when determining if a DA diversion agreement is appropriate. nearly all fall in our client's favor.

- One note about a suspended prison term: regarding jail/prison sentences: any sentence over 6 months - executed or suspended - is devastating immigration wise, and subject him to immediate removal. The immigration court doesn't look at if he *actually* spends over 6 months in custody, it only looks at if he is the *possibility* of spending over 6 months in custody.

In sum: I know you don't love the idea of a DA diversion agreement, but the above proposal results in our client having a much longer time period of prision possible, and means if he does NOT comply, then he is facing convictions on very serious charges, in addition to the harassment, it allows him the time to renew his work permit, and then makes him accountable to the State for another year and a half, and keeps his bail tied up as well. He has been on a release agreement for over a year and a half, and we can modify that agreement as need be throughout the DA diversion agreement.

I think this gives both the State and the defense the flexibility they need to reach a resolution that addresses both the interests of the state/victim/court and defense.

***Also, we believe that if the harassment charge reads like the garden variety harassment, but lists the "sexual" subsection of the statute as the basis for the harassment being treated as an "A" misdemeanor, the immigration impact on him will be much less than if the body of the charge has the sexual component plead.

Last but not least: One thing we forgot to discuss yesterday: In the family law case, Leonel will be awarded custody of Neifferth in January...his mother has lost custody due to not responding to any of the family law pleadings. This may complicate things.

--

Dana M. Mitchell, P.C.
Attorney at Law
317 Court Street NE
Salem, Oregon 97301
Ph: (503) 508-6078

Fax: (503) 581-2260

****

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Viruses are often contained in attachments - Email with specific attachment types are automatically deleted.

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****

Gmail

Brian Conry <bpconry@gmail.com>

Fwd: cervantes

Leonel Cervantes Meraz <leocervantes@icloud.com>
To: bpconry@gmail.com

Thu, Dec 28, 2017 at 4:59 PM

Begin forwarded message:

From: Dana Mitchell <danamitchellpc@gmail.com>
Date: December 14, 2016 at 06:39:43 PST
To: Mark Geiger <mark@markgeiger.com>, Cervantes Leo <leocervantes@icloud.com>
Subject: Re: cervantes

I sent you his phone #last night, and here is his email:
leocervantes@icloud.com

Dana M. Mitchell
Attorney at Law
317 Court St. N.E.
Salem, Oregon 97301
Ph: (503) 508-6078 | Fax: (503) 581-2260

> On Dec 14, 2016, at 5:28 AM, Mark Geiger <mark@markgeiger.com> wrote:
>
> I can see him anytime in the AM...
>
> > On Dec 13, 2016, at 10:17 PM, Dana Mitchell <danamitchellpc@gmail.com> wrote:
> >
> > I'm in early tomorrow, but have a 9:30-11:30 dental appointment.
> >
> > But, I have a very big hearing in Multnomah county Friday morning, which I need to devote most of my free time to tomorrow and Thursday. (Prep had taken a backseat to Leo's case)
> >
> > ---
> >
> > Dana M. Mitchell
> >
> > Attorney at Law
> >
> > 317 Court St. N.E.
> >
> > Salem, Oregon 97301
> >
> > Ph: (503) 508-6078 | Fax: (503) 581-2260

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On Dec 13, 2016, at 7:37 PM, Mark Geiger <mark@markgeiger.com> wrote:

I just remembered that you are busy tomorrow... I can see Leo in the AM to get the paperwork done. Then I would imagine we have to get him on the docket at the annex, probably Thursday. Can you get a hold of him? I don't have his contact info. Thanks!

mark

23:48 Mon Mar 4 91%

Edit **Messages**

Luna pahua Mario A 4/1/17
Okay ta bien no problem

Hernandez Fernando 3/16/17
Ok. bro.

(971) 273-3763 3/14/17
You're welcome.

Wife & Bombon ... 2/26/17
She's beautiful. Her eyes are gonna pop out!!

(971) 283-2123 2/24/17
OK

Mono Jesus 2/4/17
Ya estas

Dana Mitchell Lawyer 1/9/17
Good afternoon Dana,
Can you please email Sarah Ba...

Mark J Geiger & D... 12/23/16
They gave me a packet that I...

Mark J Geiger 12/22/16
Hey Mark this is Leo; I haven't...

Zavala Juan 7/28/16
Orale nomas keria saber pa no irme muy lejos

Luis Enrique 6/21/16
Okay tan bien

Grizzly Firefighters... 6/17/16
No problem!

Dana Mitchell Lawyer >

Dec 12, 2016, 15:07

Are you an LPR or an DACA? Please let me know!

DACA

Thank you!

You're welcome.

Can you meet us tomorrow morning? Around 10?

[redacted]

Dec 15, 2016, 08:37

[redacted]

Dec 23, 2016, 17:58

BRIAN PATRICK CONRY, P.C.
OSB #822245
534 SW Third Ave., Suite 711
Portland, Oregon 97204
TEL (503) 274-4430
FAX (503) 274-0414
bpconry@gmail.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

CERVANTES-MERAZ, Leonel Petitioner, vs. STATE OF OREGON Defendant,	) Post-Conviction Relief Case No. _____))) Marion County Case No. 15CR53353)) **DECLARATION OF DAN**) **LARSSON IN SUPPORT OF**) **PETITIONER'S PETITION FOR**) **POST-CONVICTION RELIEF**

I, Dan Larsson, being first duly sworn, depose and state as follows:

1.

I have practiced immigration law for 24 years, including removal defense, family- and employment-based petitions and adjustment of status, citizenship applications, VAWA applications, U visas, asylum, and appeals before the Board of Immigration Appeals, the Administrative Appeals Office, and the Ninth Circuit Court of Appeals.

2.

As a basis for this declaration, I have reviewed the following documents pertaining to Mr. Cervantes-Meraz' post-conviction relief case:

1. Petition for Post-Conviction Relief, with supporting documents, Marion County Case No. 15CR53353
2. Immigration Documents from FOIA Request, NRC2017178028

3. Immigration Documents for 245(i) Application/I-130 Receipt No. WAC-97-128-52154, filed on behalf of Mr. Cervantes-Meraz' mother Maria A. Meraz on April 8, 1997, making Mr. Cervantez-Meraz a derivative beneficiary and grandfathering him to adjust status in the United States under INA Sec. 245(i) under any other category, such as the spouse of a U.S. citizen.

These records establish that Leonel Cervantes-Meraz had approved Deferred Action for Childhood Arrival status from August 7, 2013 to August 6, 2015. These records further establish that because Leonel Cervantes-Meraz is married to a United States citizen and is the derivative beneficiary of the approved I-130 Petition for Alien Relative, filed for his mother on April 8, 1997, No. WAC-97-128-52154, he would be eligible under INA Sec. 245(i) for adjustment of status to legal permanent resident without even leaving the United States but for his criminal convictions in this matter.

3.

Petitioner could not have made an informed decision when he agreed to a plea of guilty to Harassment (sexual, offensive physical touching), in violation of ORS § 166.065(4), a Class A Misdemeanor, which carries a potential term of imprisonment of up to one year, as well as deferred prosecution on a charge of Attempted Compelling Prostitution, of his child, in violation of ORS 161.405, which amended judgment was entered on or about January 9, 2017. This was based on an involuntary, unknowing waiver of jury trial and resulting stipulated facts admissions.

Because he was not advised by criminal defense counsel, pre-plea, that, as a practical matter, his stipulation/admission to the Attempted Compelling Prostitution (of his child) charge with the deferred sentencing thereon, would make it virtually certain that if he was to apply for adjustment of status, through his United States citizen wife (family

visa processing), for which he is eligible to apply through INA 245(i), his application for adjustment of status from DACA or undocumented status to legal permanent resident status would be denied.

Petitioner also pled to Sexual Harassment. The Immigration consequences for Petitioner, solely as a result of his plea to Sexual Harassment are: if Petitioner is not taken into custody by ICE and completes his probation on Sexual Harassment and the Attempted Compelling Prostitution deferred sentencing does not take place but the Attempted Compelling Prostitution charge is dismissed, Mr. Leonel Cervantes-Meraz is still "virtually certain" to be deported from the United States because he would be deemed an aggravated felon under US immigration law as having committed attempted sexual abuse of a minor, and also having been convicted of a crime involving moral turpitude, which would be virtually certain to bar him from obtaining legal immigration status on discretionary grounds.

It is counsel's opinion that the crime of Attempted Compelling Prostitution (of his child) under ORS § 161.405 would be deemed a "Crime Involving Moral Turpitude" (CIMT) under U.S. immigration law. CIMT is a term used in the immigration context that has no statutory definition. Extensive case law, however, has provided sufficient guidance on whether an offense rises to the level of a CIMT. Moral turpitude refers generally to conduct that is "inherently base, vile, or depraved, and contrary to accepted rules of morality." *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1169 (9th Cir. 2006) (quoting *Tseung Chu v. Cornell*, 247 F.2d 929, 934 (9th Cir. 1957)); *see also Knapik v.*

Ashcroft, 384 F.3d 84, 89 (3rd Cir. 2004) (defining moral turpitude as "conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general"). For example, the court in *Morales v. Gonzales*, 472 F.3d 689 (9th Cir. 2007), stated that:

> "Sexual communication with a minor is inherently wrong and contrary to the accepted rules of morality and the duties owed between persons. The full range of conduct prohibited by section 9.68A.090 of the Revised Code of Washington categorically constitutes a crime involving moral turpitude. Therefore, without proceeding to the modified categorical approach, we conclude that Morales has been convicted of a crime involving moral turpitude, and this court lacks jurisdiction to review the IJ's final order of removal. *See* 8 U.S.C. §§ 1182(a)(2), 1252(a)(2)(C)-(D) (West 2005)."
>
> *Morales v. Gonzales*, 472 F.3d at 695..

A noncitizen is deportable based upon conviction of a single crime involving moral turpitude that carries a potential sentence of a year or more, if the person committed the offense within five years "after the date of admission." INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

Further, under the INA, an "aggravated felony" includes "sexual abuse of a minor," *id.* § 101(a)(43)(A), and "an attempt . . . to commit" such abuse, *id.* § 101(a)(43)(U). Given the nature of the charges, it is very likely that the immigration service would deem the underlying conviction and facts in this case as constituting attempted sexual abuse of a minor under immigration law. Because procedures such as adjustment of status are discretionary in nature, it is virtually certain that an attempt to adjust his status would be denied because the underlying charges involve both conduct

that would be considered a crime involving moral turpitude, as well as an attempted "aggravated felony" for sexual abuse of a minor under immigration law.

Here, upon information and belief, Mr. Cervantes-Meraz entered the United States without inspection on or about October 1999. While it is counsel's understanding that he was granted DACA protection before his criminal conviction, it is virtually certain (unless already denied) that he would not be given renewal of his DACA status because of his criminal conviction as DACA applications are discretionary in nature.

Here, Mr. Cervantes-Meraz, following his waiver of jury trial, stipulated facts admission/trial and conviction on one count of Sexual Harassment, was sentenced to 36 months supervised probation, undergo sex offender treatment, and obey all laws and other probation conditions. The sentencing on the Attempted Compelling Prostitution was deferred with a further provision that if Mr. Cervantes-Meraz did not successfully complete probation on the sexual harassment charge, he would be sentenced to 23 to 24 months to the Oregon Department of Corrections. The judgment was entered on or about January 9, 2017. Leonel Cervantes-Meraz is both inadmissible and removable with his current criminal record. Although not subject to mandatory detention, Petitioner would be likely to be detained in Tacoma as a "danger to society" due to his criminal record. This is regardless of whether or not he's placed into immigration proceedings following a completed probation on the Sexual Harassment charge and a dismissal of the Attempted Compelling Prostitution charge because he would be removable since he no longer has any legal immigration status in the United States. Any foreign national who is found in the United States without legal authorization, is subject to apprehension, detention and

removal by U.S. Immigration and Customs Enforcement (ICE), even without a criminal record.

In addition, because of his criminal record, Mr. Cervantes-Meraz should be considered an "enforcement priority" by ICE for apprehension and detention. As ICE stated in a year-end report dated December 13, 2017, ICE no longer exempts groups of removable [noncitizens] from enforcement. In other words, all undocumented immigrants have become targets—even if they have lived in the United States for many years, have U.S.-born children, and have never had a run-in with law enforcement.

The Trump administration laid out its enforcement priorities in the executive order, "Enhancing Public Safety in the Interior of the United States," signed on January 25, 2017 (see e.g. Executive Order 13768 of Jan 25, 2017, Document Citation 82 FR 8799, Page 8799-8803 (5 pages), Document Number 2017-02102).

. The order defines as a priority any non-U.S. citizen who:

- has been convicted of any criminal offense;
- has been charged with any criminal offense, where the charge has not been resolved;
- has committed acts that constitute a chargeable criminal offense;
- has engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency;
- has abused any program related to the receipt of public benefits;

- is subject to a final order of removal, but has not departed; or
- otherwise poses, in the judgment of an immigration officer, a risk to public safety or national security.

The subsequent Department of Homeland Security (DHS) memorandum implementing this executive order severely curtailed the ability of immigration-enforcement personnel to assess an individual's equities when making case decisions. In the words of the memo: "prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of [noncitizens] from enforcement of the immigration laws." Put differently, all DHS personnel "shall faithfully execute the immigration laws of the United States against all removable [individuals]."

It is my opinion that if Mr. Cervantes-Meraz is not granted PCR in this matter, that it is virtually certain he will be removed/deported from the United States. Mr. Cervantes-Meraz has no other vehicle through which he can reasonably obtain relief from removal other than through his attempt to vacate these convictions.

***

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED: October 9, 2018

Dan Larsson, OSBAR # 041992

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

LEONEL CERVANTES-MERAZ, Petitioner, vs. THE STATE OF OREGON, Defendant.	Case No.: 18CV00755 DECLARATION OF MARK J. GEIGER

I, along with Dana Mitchell, represented the petitioner in his Marion County Case 15CR53353. In this post conviction case, the petitioner makes various claims that I will respond to in detail.

It is true, as stated in the petition, that the petitioner was convicted of Harassment (sexual harassment) after a stipulated facts trial, and that his conviction was deferred on a charge of attempted compelling prostitution. This later charge could have been dismissed upon the completion of certain probation requirements, as part of the negotiations. The original charges were two counts of sexual abuse I, two counts of sodomy I, and a count of using a child in display of sexually explicit conduct, attempted compelling position and sexual harassment. The resolution of this case was the result of incredible work by me, Ms. Mitchell, and the prosecutor, Kurt Miller. Given the severity of the charges and the time the petitioner was facing (if convicted), the outcome was extraordinary.

Ms. Mitchell and I were aware of the fact that the petitioner was not a citizen and was subject to deportation. In fact, that was a key issue in the many discussions we had with him about whether he should take the offer. We both told him that the harassment was a deportable offense, as well as the deferred sentence to the compelling case, because immigration authorities

Mark J. Geiger, Attorney at Law
317 Court Street NE # 211 | Salem, OR 97301
Phn 503-588-1723 | Fax 503-581-2260
mark@markgeiger.com

do not distinguish between a "deferred sentence" and a "conviction." The petitioner was informed that if the immigration authorities "caught up with him," he was almost certain to be deported.

This was such an important issue that we told him to hire an expert in the field—an immigration lawyer—and he hired Barbara Ghio. Ms. Mitchell communicated with Ms. Ghio, but I was aware of the fact that petitioner was speaking with her to see if there was anything we could do to minimize the chances of him being deported.

I did not, and I am sure that Ms. Mitchell did not, tell the petitioner that if he successfully completed probation and could expunge the conviction and then get the compelling prostitution charges dismissed, that there would be no immigration consequences.

We are both well aware of the requirements required by *Padilla*. In fact, Ms. Mitchell has won several *Padilla* PCR cases and is considered by me to be somewhat of an expert in what is required of trial counsel in order to effectively discharge his/her obligations to his/her non-citizen clients.

I do not know what Ms. Ghio told the petitioner. Ultimately, the decision to accept the offer was the petitioner's.

There is an additional allegation that we were not prepared to go to trial on the trial date that was set by the court and with my input. The trial had been set in late summer of 2016, but because of issues with my experts, the trial had to be moved. I told the judge that we shouldn't move the trial date without getting the experts on the phone to make sure that new date would work, but the judge declined my invitation, instead telling me to get back to him as soon as I knew if they were available. I informed my experts—Jamie Chavez and Dr. Wendy Bourg—that the trial had been moved to December 19, 2016, within days of the pretrial conference with the judge. Neither one of my experts got back to me for 4-6 weeks. When they did get back to me,

Mark J. Geiger, Attorney at Law
317 Court Street NE # 211 | Salem, OR 97301
Phn 503-588-1723 | Fax 503-581-2260
mark@markgeiger.com

Chavez told me that on the trial date, he was out of state for a family event, and Bourg was in another state at a conference. I filed a motion with the court as soon as I was aware of this.

The issue at trial was the extreme parental alienation engaged in by our client's ex, and my client could not receive due process without Bourg testifying about alienation. The motion was not heard by the assigned judge (Bennett) but by a referee (Caso). The DDA, Kurt Miller, agreed that our witnesses were critical and that the trial should be moved. The court refused.

I sent subpoenas to both witnesses and told them they would have to be at the trial. The petitioner was fully aware that these witnesses, although very unhappy, would be present. We were ready for trial. The petitioner had a good case, but after we worked out the deal with Mr. Miller, the petitioner's exposure was reduced from possibly spending 20 some years in prison to probation.

The petition filed in this case is replete with inaccuracies and lies, frankly. Ms. Mitchell spent HOURS talking to the petitioner about the immigration consequences, that if ICE went after him, he would almost certainly be deported. I know that he had the assistance of an immigration lawyer, Ms. Ghio, as well.

There is some innuendo that I had said something different about deportation issues at the trial. I NEVER VARRIED FROM MY ADVICE THAT THESE "CONVICIONS" WERE CERTAIN TO LEAD TO DEPORTATION, ASSUMING ICE FOUND OUT ABOUT THEM.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Date: January 29, 2019.

/s/ Mark J. Geiger
Mark J. Geiger, OSB #840473

Mark J. Geiger, Attorney at Law
317 Court Street NE # 211 | Salem, OR 97301
Phn 503-588-1723 | Fax 503-581-2260
mark@markgeiger.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

In the Matter of: LEONEL CERVANTES MERAZ, Petitioner, and THE STATE OF OREGON Respondent.	Case No.: 18CV00755 **DECLARATION OF DANA M. MITCHELL**

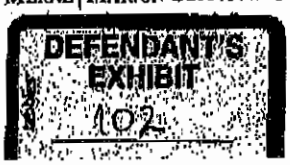
My name is Dana M. Mitchell, and I make this declaration in response to the allegations made in the petition for post-conviction relief and its supporting documentation.

1. I represented Leonel Cervantes Meraz in Marion County Case No. 15CR53353, as second chair to Mark J. Geiger.

2. Throughout the past eight years I have practiced primarily in the area of criminal defense, and am very familiar with the obligations imposed on defense counsel under *Padilla*. I have successfully litigated several post-conviction cases that were based on an ineffective assistance of counsel claim under *Padilla*. In one such matter the trial court denied granting post-conviction relief, which my client appealed. I represented that client in his appeal as well, and the Court of Appeals subsequently reversed the denial and found my client was denied effective assistance of counsel due to his defense counsel's failure to advise him of the easily ascertainable immigration consequences of his guilty plea.

3. I am very aware of my non-citizen client's concerns regarding immigration

Dana M. Mitchell, P.C.
Attorney at Law
317 Court Street N.E.
Salem, Oregon 97301
Ph: (503) 508-6078 | Fax: (503) 581-2260



consequences. It is often one of the most important factors that they are considering. I always advise any non-citizen criminal defense clients of the easily ascertainable immigration consequences of their guilty plea, and have since I started practicing.

4. I take my obligations to advise my non-citizen clients of the easily ascertainable immigration consequences of any guilty plea in their case very seriously. I will try to negotiate with the prosecutor for a resolution that will either obviate or mitigate potential immigration consequences to my client. In the event that there will be immigration consequences to my client (that are easily ascertainable) - I am sure to ensure they are aware of and understand those consequences and are nevertheless deciding to move forward with their guilty plea.

5. In the present case, I spoke with Petitioner multiple times about the potential immigration consequences of a guilty plea, the first time was when he was still in custody at the Marion County jail. Petitioner had a DACA, which was a 2 year work permit given to qualifying individuals. DACA refers to "Deferred Action for Childhood Arrivals", and meant that immigration court would defer taking any action against the person for a period of two years and grant them a permit to work "legally" in the US.

6. One of the qualifiers to receive a DACA is that the individual was in the country without documentation, ie, unlawfully. It is my practice to advise all clients who are not documented (which would include DACA holders) – that the mere fact they are in the United States without a lawful status means they are deportable on that basis alone. I advised Petitioner of this.

7. As immigration consequences are such an important factor for my non-citizen clients, it is an integral part of my practice to always consider such and try to negotiate with the prosecutor to mitigate those consequences. If my client has an immigration attorney, I will also confer with

Dana M. Mitchell, P.C.
Attorney at Law
317 Court Street N.E.
Salem, Oregon 97301
Ph: (503) 508-6078 | Fax: (503) 581-2260

them to ensure I am doing everything I can to minimize immigration consequences.

8. In this case, Petitioner was represented by Muntz and Ghio LLC, an immigration law firm in Salem. I spoke several times with Kurt Muntz regarding possible outcomes as well as concerns he had regarding the changing face of immigration law. These concerns and possible ways around them were reflected in my communications with the assigned deputy district attorney on the case, Kurt Miller. Unfortunately, the State was not willing to agree to the proposals offered.

9. There are two specific pieces of advice attributed to me set forth in Petitioner's affidavit. I want to address these directly, though by not addressing other allegations made does not mean I am agreeing other allegations are true. I am addressing these two specifically because Petitioner directly attributes them to me.

10. The first statement is "Criminal defense counsel Dana Mitchell had advised me misdemeanors are not too bad for immigration but felonies are."[1] With the exception of DACA holders, a state's classification of a crime as a misdemeanor or a felony has little to no bearing on the way an immigration court will treat a conviction for such a crime during immigration proceedings. However, the classification of a crime does matter in terms of either obtaining, or renewing, a DACA work permit. One of the eligibility requirements for applicants seeking a DACA or trying to renew their DACA is that the applicant cannot have any "significant misdemeanor" or felony convictions on their record. A "felony" is defined as a criminal offense punishable by imprisonment for a term exceeding one year. I may have addressed this point with Petitioner in any conversation regarding renewing his DACA, but would have made sure to explain that for immigration consequences outside of any DACA situation, the classification of a

[1] Declaration of Lionel Cervantes-Meraz, pg. 2, lines 13-16.

Dana M. Mitchell, P.C.
Attorney at Law
317 Court Street N.E.
Salem, Oregon 97301
Ph: (503) 508-6078 | Fax: (503) 581-2260

crime as a misdemeanor would not necessarily put the person convicted in a better position or be considered "less serious" by the immigration court.

11. The second statement was that I advised Petitioner "[T]hat the Sexual Harassment conviction would be expugnable."[2] I did not advise Petitioner of that, nor would I, as it is patently wrong. First, even if a record of conviction has been set aside, immigration law still requires the conviction to be disclosed and it would still count as a criminal conviction to the immigration court. Second, I have handled motions to set aside records of arrest and/or convictions on a regular basis my entire career. A conviction for any sex crime conviction is not "expugnable". Sexual harassment is a sex crime, and therefore, not "expugnable".

12. I advised Petitioner of the easily ascertainable immigration consequences of his guilty plea. This was an important topic throughout the litigation, and so was a constant presence in any negotiations or considerations for resolution. The decision to plead guilty was one made after careful consideration. The defense was prepared for trial but did not elect to try the case based on Petitioner's decision to accept the plea offer and plead guilty.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in court and are subject to penalty for perjury.

Dated this 29th day of January, 2019.

/s/ Dana M. Mitchell
Dana M. Mitchell, OSB No. 114637

[2] Declaration of Leonel Cervantes-Meraz, pg. 2, lines 24-25.

Dana M. Mitchell, P.C.
Attorney at Law
317 Court Street N.E.
Salem, Oregon 97301
Ph: (503) 508-6078 | Fax: (503) 581-2260

AFFIDAVIT OF **KURT MUNTZ**
IN RELATION TO LEONEL CERVANTES

State of Oregon)
) ss:
County of Marion)

I, **Kurt Muntz,** 3000 Market St #252, Salem, OR 97301, (DOB 8-2-75) being first duly sworn, depose and say, to the best of my memory after reviewing the applicable documentation that:

1. Leonel Cervantes-Meraz had several consultations at my law office Muntz & Ghio, LLC.

2. The first consultation Mr. Cervantes had was on/about 7-22-16 with Attorney Barbara Ghio, such consultation addressing then pending criminal charges against him (under Marion County Case number 15CR53353).

3. On/about 12-14-16 Attorney Kurt Muntz discussed by phone with Mr. Cervantes's then criminal defense attorney the possible immigration consequences of the case as it stood procedurally at the time.

4. On/about 12-22-16 Attorney Kurt Muntz discussed by phone with another one of Mr. Cervantes's then criminal defense attorneys particulars of the case.

5. On/about 1-3-17 Mr. Cervantes again had an office consultation at Muntz & Ghio, LLC, this time with Attorney Kurt Muntz, the subject matter being the status of his immigration options in relation to disposition of his criminal charges.

6. On/about 11-14-17 Attorney Brian Conroy requested with proper release all file documents related to Mr. Cervantes, and was accordingly provided those in the possession of Muntz & Ghio, LLC.

Kurt Muntz

SUBSCRIBED AND SWORN TO before me this 21st day of March, 2019.

OFFICIAL STAMP
ELISABET RAMOS PEREZ
NOTARY PUBLIC - OREGON
COMMISSION NO. 979844
COMMISSION EXPIRES SEPTEMBER 27, 2022

Notary Public of Oregon
My Commission Expires: 09/27/2022

AFFIDAVIT OF **BARBARA GHIO**
IN RELATION TO LEONEL CERVANTES

State of Oregon)
) ss:
County of Marion)

I, **Barbara G. Ghio**, 3000 Market St #252, Salem, OR 97301, (DOB 11-29-79) being first duly sworn, depose and say, to the best of my memory after reviewing the applicable documentation that:

1. Leonel Cervantes-Meraz had several consultations at my law office Muntz & Ghio, LLC.

2. The first consultation Mr. Cervantes had was on/about 7-22-16 with me. This consultation addressed then pending criminal charges against him (under Marion County Case number 15CR53353), and was advised that he would not be able to file for any immigration status until after final resolution of his pending criminal charges. The other consultation was with Attorney Kurt Muntz, my law partner.

3. On/about 11-14-17 Attorney Brian Conroy provided to our office a proper release requesting all file documents related to Mr. Cervantes, and was accordingly provided those in the possession of Muntz & Ghio, LLC.

Barbara G. Ghio

SUBSCRIBED AND SWORN TO before me this 20 day of March, 2019 by Barbara G. Ghio.

Notary Public of Oregon
My Commission Expires: 09/27/2022

OFFICIAL STAMP
ELISABET RAMOS PEREZ
NOTARY PUBLIC - OREGON
COMMISSION NO. 979844
MY COMMISSION EXPIRES SEPTEMBER 27, 2022

Muntz & Ghio, LLC
Attorneys - Abogados.

CLIENT INTAKE/
INFORMACION DEL CLIENTE

NAME *(NOMBRE)* Cervantes Merac Leonel
Last (Apellido) First (Primer)

ADDRESS *(DIRECCIÓN)* 4789 Jade St NE

CITY *(CIUDAD)* Salem STATE *(ESTADO)* OR ZIP *(CÓDIGO POSTAL)* 97305

PHONE *(TELÉFONO)* 971-600-5541 ______ (503)363-2489
Cell (Celular) Home (Casa) Work (Trabajo)

DATE OF BIRTH *(FECHA DE NACIMIENTO)* 11 30 1982
Month (Mes) Day (Día) Year (Año)

U.S. CITIZEN *(¿ES USTED CIUDADANO/A DE LOS EE.UU.?)* ☐ Yes *(Sí)* ☒ No *(No)*
If not, do you have a Green Card? *(Si Usted no es Ciudadano, ¿Tiene la tarjeta verde (MICA)?)* ☐ Yes *(Sí)* ☐ No *(No)*

EMPLOYER *(¿PARA QUIEN TRABAJA?)* Grizzly Firefighters, INC
Name (Nombre de la persona o del Comercio)

EMERGENCY CONTACT *(CONTACTO DE EMERGENCIA)*
Maria Cervantes 503-719-4080 Wife
Name *(Nombre)* Phone *(Teléfono)* Relationship *(Relación)*

REASON FOR APPOINTMENT *(¿CUAL ES EL MOTIVO DE LA VISITA DE HOY?)*
GreenCard

HOW DID YOU HEAR ABOUT US? *(¿CÓMO SE ENTERO DE NOSOTROS?)* Referred By Brother

The undersigned acknowledges that the initial consultation with the Attorney does not establish a lasting attorney-client relationship, and one will not be established unless a separate 'Retainer Agreement' is signed. The undersigned acknowledges that a 'Statute of Limitations' applies to all causes of action, and that if the Attorney is not retained then the undersigned is responsible for keeping track of when their cause of action may expire. Additionally, if applicable, the undersigned consents to a third party paying the consultation fee.

El que firma debajo *reconoce que esta consulta inicial, no establece una relación de abogado-cliente hasta que otro for-mulario por separado, llamado Acuerdo de Representación ("Retainer Agreement") sea firmado por usted. El que firma debajo reconoce que cada caso legal tiene una fecha de caducidad-expiración y que si los Abogados no fueran contratados por usted, usted será responsable de tener en cuenta esa fecha. Adicionalmente, y en su caso, el que suscribe consiente que una tercera persona pague por la consulta profesional.*

Refiled 1/3/17

Signature (Firma) [signature] Date (Fecha) 7-22-2016

FOR OFFICE USE ONLY [illegible]
Consultation Fee [illegible]
CONFLICTS CONTACT [illegible]
[illegible]
Name
Name
Name
[illegible]
[illegible] 155

IMMIGRATION LAW CLIENT INTAKE CHECKLIST [redacted]

BIOGRAPHICAL INFORMATION: A# 204-804-609

Client Name: Lionel Cervantes-Reyes Age: 32 Any Children? Y ✓ N___ If "Yes" how many?: 3 usc

Legally Married? Y ✓ N___ If "Yes", > 2 yrs? Y___ N ✓ since 4/2016 (known since 2012) (11) (13, 13) step

Country of Birth: Mex. Fear of Persecution if Return?: Y___ N___ Victim of a Crime?: Y___ N ✓

Does the Client have a current legal status?: Y___ N___

-If "Yes", specify status; how acquired; and when: DACA since 2013, renewal exp. 6/18/17

U.S. Citizen; LPR; or Military Veteran Relatives?: Y ✓ N___

-If "Yes", specify relationship & status: usc wife, 1 usc child, 2 step kids, 2 LPR sibs.

Has a petition [or other documentation] ever been filed for the Client?: Y ✓ N___

-If "Yes", specify document; when filed & if current: grandpa filed in '97 for mother & LPR C Israel Cervantes file

IMMIGRATION HISTORY: Client's entry (&/or attempted entry) into the U.S.:

Date of Entry/Attempt	Entry with Inspection?	"Ordered" Removed?	Date Left U.S.
'99	Y___ N ✓	Y___ N ✓	hasn't left
	Y___ N___	Y___ N___	
	Y___ N___	Y___ N___	
	Y___ N___	Y___ N___	

INADMISSIBILITY / REMOVABILITY FACTORS:

Currently in removal proceedings? Y___ N ✓

Ever been "ordered" removed/deported/excluded? Y___ N ✓

Ever failed to attend a removal proceeding? Y___ N___

Prior removal/deportation/exclusion order & return w/o inspection after 3/31/97? Y___ N ✓

Unlawful presence acquired [while 18+ yrs old] after 3/31/97? Y ✓ N___ If "Yes", specify amount of time: > 1

Unlawful presence acquired in aggregate of >1yr [at any age] after 3/31/97; leave; & return w/o inspection? Y___ N ✓

Ever misrepresented 'material fact' to a 'government official' to gain entry and/or any immigration benefit? Y___ N ✓

Ever claimed U.S. Citizenship [on or after 9/30/96] to gain 'any' benefit under state or federal law? Y___ N ✓

Ever assisted another alien to enter the United States illegally? Y___ N ✓ If "Yes" specify who & when?:

Any criminal convictions? Y ✓ N___ If "Yes" specify: pending ∆ sex abuse 15CR53353 V: Neiffer-th Cervantes ∆ Monda Garza

ASSESSMENT & QUOTE:

Told him cut ... AOS until Trial in 10/5/16 ... sex abuse case is final. ... to talk to ∆ if he calls.

#. 12/14/16 Drawned up Garza's Att re: Imm consq.

12/22/16 P/c w/ Att who said ...

Muntz & Ghio, LLC
Attorneys - Abogados

CLIENT INTAKE/ INFORMACION DEL CLIENTE

NAME *(NOMBRE)* Cervantes Leonel
Last (Apellido) First (Primer)

ADDRESS *(DIRECCIÓN)* 4789 Jade St NE

CITY *(CIUDAD)* Salem STATE *(ESTADO)* OR ZIP *(CÓDIGO POSTAL)* 97305

PHONE *(TELÉFONO)* 971-600-5341 (503)363-2489
Cell (Celular) Home (Casa) Work (Trabajo)

DATE OF BIRTH *(FECHA DE NACIMIENTO)* 11-30-83
Month *(Mes)* Day *(Día)* Year *(Año)*

U.S. CITIZEN *(¿ES USTED CIUDADANO/A DE LOS EE.UU.?)* □ Yes *(Sí)* ☒ No *(No)*
If not, do you have a Green Card? *(Si Usted no es Ciudadano, ¿Tiene la tarjeta verde (MICA)?)* □ Yes *(Sí)* ☒ No *(No)*

EMERGENCY CONTACT *(CONTACTO DE EMERGENCIA)*
Maria Cervantes (503)718-4080 Esposa
Name *(Nombre)* Phone *(Teléfono)* Relationship *(Relación)*

REASON FOR APPOINTMENT *(¿CUAL ES EL MOTIVO DE LA VISITA DE HOY?)*
Questions About Possibilities to Apply for Greencard

HOW DID YOU HEAR ABOUT US? *(¿CÓMO SE ENTERO DE NOSOTROS?)* My Brother was a Former Client

The undersigned acknowledges that the initial consultation with the Attorney does not establish a lasting attorney-client relationship, and one will not be established unless a separate 'Retainer Agreement' is signed. The undersigned acknowledges that a 'Statute of Limitations' applies to all causes of action, and that if the Attorney is not retained then the undersigned is responsible for keeping track of when their cause of action may expire. Additionally, if applicable, the undersigned consents to a third party paying the consultation fee.

El que firma debajo reconoce que esta consulta inicial, no establece una relación de abogado-cliente hasta que otro for-mulario por separado, llamado Acuerdo de Representación ("Retainer Agreement") sea firmado por usted. El que firma debajo reconoce que cada caso legal tiene una fecha de caducidad-expiración y que si los Abogados no fueran contratados por usted, usted será responsable de tener en cuenta esa fecha. Adicionalmente, y en su caso, el que suscribe consiente que una tercera persona pague por la consulta profesional.

Signature (Firma) [signature] Date (Fecha) 01-03-~~16~~17

FOR OFFICE USE ONLY *(PARA USO INTERNO)*

Consultation Fee $ 100

Deadlines:

CONFLICTS CONTROL:
Name:
Name:
Name:

ENTERED INTO CONFLICTS SYSTEM
BARBARA G. GHIO ☒ KURT MUNTZ ☒ OFFICE ☒

137

Advised need to demonstrate ... to ... I-130 ... Prior consult 7/16/16 (Refiled under ...)

NO. 0648 ... NOV. 17. 2017 1:23PM

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

LEONEL CERVANTES-MERAZ, Petitioner-Appellant, v. STATE OF OREGON, Defendant-Respondent.	Case No.: 18CV00755 Appeal No.: A170858 **POST-CONVICTION TRIAL**

TRANSCRIPT OF PROCEEDINGS

VOLUME I OF I (Pages 1 through 105)

APPEARANCES: For the Petitioner: Brian Conry

For the Defendant: Sean Kallery

BE IT REMEMBERED THAT the above-entitled matter came on regularly for hearing before the Honorable Dale W. Penn, Judge of the Circuit Court of the County of Marion, State of Oregon, commencing on the 18th day of April 2019.

INDEX

EXHIBITS

NUMBER:	DESCRIPTION:	MARKED:	RECEIVED:
PETITIONER'S:			
None in this volume.			
DEFENDANT'S:			
None in this volume.			

TRANSCRIPT OF PROCEEDINGS

[Time noted: 1:30 p.m.]

THE COURT: Always have to have everything recorded, so my name is Dale Penn, I'm a senior judge in Oregon, and I've been assigned this case today. And so this is Case Number 18CV00755. And so I'm going to need to meet everyone here, so, Mr. Conry, okay --

MR. CONRY: Good afternoon, Your Honor, and this is Mr. Cervantes.

THE COURT: Thank you.

And Mr. Kallery?

MR. KALLERY: Yes, Your Honor, Sean Kallery for State, Bar Number 172133 in case we need it.

THE COURT: Okay. Now this is the time set for trial today, and I did have an opportunity to view the memorandum. Help me with exhibits at this point. Does Petitioner have exhibits or is there any understanding between the parties about your exhibits?

MR. CONRY: We have not discussed it.

THE COURT: Ah. Okay --

MR. CONRY: I know there's 303 pages of exhibits that have been submitted, and in addition to that --

THE COURT: Now, that was one thing I was going to ask, because I did see -- it appeared to me that this is, when it says 303, that that's every page has a number.

MR. CONRY: Right --

THE COURT: So we aren't talking about 303 exhibits; we're talking about 303 pages.

MR. CONRY: I agree, Your Honor --

THE COURT: Right, okay, all right --

MR. CONRY: -- yeah, now, one other thing is after we filed in the last week or so, this was not intentional, somehow I noticed, and I don't know if the government had gotten a copy of this declaration already or not, we noticed that the -- my expert's declaration had not been included within the 303 pages and that was submitted to the clerk as well as to the District Attorney's Office and it's also in ex -- I also intend for that to be an exhibit in this case.

THE COURT: Now, is that the expert who's testifying?

MR. CONRY: Yes, Your Honor.

THE COURT: Okay, I see.

So your position about that?

MR. KALLERY: Sure, Your Honor, just very briefly, I'm going to stipulate to any of the declarations of the parties in this case, including prior defense counsel and the expert in this case, there should be no argument about any of that stuff coming in and I believe will help the record, so --

THE COURT: Okay. So it doesn't sound like that report is going to be a problem, so let me ask, so 1 through 303, do you have any objection?

MR. KALLERY: None, Your Honor.

THE COURT: All right. I will admit pages 1 through 303 filed by Petitioner.

And then Defendant's exhibits.

MR. KALLERY: So, Your Honor, given that the declarations are already in for my defendant's -- or for my defense attorneys, I should say, I apologize, this is one of my early PCRs --

THE COURT: Sure, sure.

MR. KALLERY: -- and so I'm going to trip up a little bit, I have no exhibits to be submitted at this time, I will only be calling --

THE COURT: Okay.

MR. KALLERY: -- witnesses we need.

THE COURT: All right. That sounds good. Now, let me just verify who all is testifying today. I have Mr. Larsson for Petitioner?

MR. CONRY: Yes, Your Honor, can I go backwards a little bit?

THE COURT: Oh, sure.

MR. CONRY: The declaration by Mr. Larsson, has that been admitted as well? It was submitted after the 303

pages --

THE COURT: Okay.

MR. CONRY: -- I believe there's no objection thereto --

THE COURT: I'm going to, just for the part of the record, then I need to know what are the pages? So it would start at 304?

MR. CONRY: 4, yeah.

THE COURT: To what --

MR. CONRY: That's a good question. Here's one. Your Honor, it's seven pages.

THE COURT: Okay. So basically 304 to 310, approximately, I'm going to say that. And do you feel comfortable that you have access to that and you have no objection --

MR. KALLERY: I do, Your Honor.

THE COURT: All right, great. So I will admit additionally this report of Doc -- of Mr. Larsson and so that should be like 304 to 310 or maybe 311.

MR. CONRY: It's 310 --

THE COURT: Okay?

MR. CONRY: Yeah, thank you.

THE COURT: All right. And so then we have Mr. Larsson testifying by phone.

MR. CONRY: Right.

THE COURT: And at this point do you know if Petitioner will testify or?

MR. CONRY: I think it's a good idea we call Petitioner first, Your Honor.

THE COURT: Okay.

MR. CONRY: Yeah, I probably for the record need to state -- should I stand?

THE COURT: Sure.

MR. CONRY: I probably for the record should state that we have a standby interpreter that we -- that my client requested, he's --

THE COURT: Oh.

MR. CONRY: -- concerned that he'll be not understanding some words that might be used --

THE COURT: Okay.

MR. CONRY: -- we may never ask for help.

THE COURT: Okay.

MR. CONRY: Okay.

THE COURT: I understand, so the gentleman -- or the lady is the --

THE INTERPRETER: We have two interpreters, Your Honor, because this was supposed to go on for three hours, so it's my colleague and myself.

THE COURT: Okay. Could I have you come up and just state that into this microphone so that you're --

yeah.

THE WITNESS: Yeah. Good afternoon, Your Honor, first name is AnaMaria, last name is Meneses-Henry, M-e-n-e-s-e-s-hyphen-H-e-n-r-y, and I'm a court-certified Spanish interpreter. And there is another colleague here and we re -- they requested two interpreters to switch because this --

THE COURT: Sure.

THE WITNESS: -- hearing was supposed to go on for three hours.

THE COURT: Sure. And let me ask of the other interpreter, if you would just state your name and are you court-certified?

THE INTERPRETER: Good afternoon, Your Honor, yes, I am, Christopher Fallas, that's F-a-l-l-a-s, certified court interpreter for the Spanish language for the State --

THE COURT: Great.

THE INTERPRETER: -- of Oregon, thank you.

THE COURT: All right. Thank you, both, very much and --

THE INTERPRETER: You're welcome, Your Honor.

THE COURT: And I guess as we're proceeding, if your -- you've instructed your client to advise you he doesn't understand something, so let me know and then let's

get set up to deal with it.

MR. CONRY: Okay, Your Honor, and then the only other thought I have is my understanding is there's a court behind us at 4:00 o'clock --

THE COURT: Yeah.

MR. CONRY: -- and so we need to do as much as we can to be done by 4:00?

THE COURT: Yes, yes --

MR. CONRY: Okay.

THE COURT: -- that's -- I appreciate you bringing that up, that was the direction I was given at least, that involves a different case obviously, but a different judge, and so --

MR. CONRY: Oh.

THE COURT: -- we need to be finished at that time.

MR. CONRY: My intent is not to make an opening, but I think I would need up to a half hour for --

THE COURT: Closing?

MR. CONRY: -- close because there's so much stuff and --

THE COURT: Sure, okay.

MR. CONRY: I'm hoping to have that.

THE COURT: Okay. Well, we'll just, we need to get started and see what we can get done, so let me just

ask, so we have admitted the declarations of trial counsel. Are you going to call them or are we going on a declaration?

MR. KALLERY: So, Your Honor, right now I'm comfortable proceeding on their declarations, but --

THE COURT: Sure.

MR. KALLERY: -- depending on what the testimony comes in, I may call them.

THE COURT: Okay. That sounds fine. So it seems like we are at the point where, since I have some overview of the case already from the written material, we're ready to proceed with witnesses, so it's my understanding you wish to call the petitioner.

MR. CONRY: Yes, Your Honor, is should he be here or here?

THE COURT: Sure, yeah, if he'll need, if you'll walk up here, and when you get up here, if you'd just stop and raise your right hand, take an oath.

Whereupon,

LEONEL CERVANTES-MERAZ,

a witness called on his own behalf, having been first duly sworn by the Court, was examined and testified on his oath as follows:

THE COURT: Okay. Please be seated and state your name, and if you would spell your last name.

THE WITNESS: My name is Leonel Cervantes-Meraz, do you need all the?

THE COURT: It's okay, this witness obviously is the petitioner and so I don't have a need to spell out the name, so you may inquire, go ahead.

MR. CONRY: Thank you, Your Honor.

Good afternoon, Mr. Cervantes.

DIRECT EXAMINATION

BY MR. CONRY:

Q. How are you here today, how are you doing?

A. I'm a little nervous, but I'm okay overall.

Q. Have you testified before like in a court hearing?

A. I have before --

Q. Okay. Probably in that custody battle you had going with your -- the mother of your child?

A. I did, I did --

Q. Okay.

A. -- testify a couple times on --

Q. So we've actually written two declarations in this case, sir, you've written two declarations in this case and I asked you to review them in advance of this hearing, right?

A. Yes, you did.

Q. Okay. So you are able to read English, right?

A. I, I am.

Q. And a lot of times we do speak in English, correct?

A. I do, most of the time I do speak in English.

Q. Okay. So looking at the first declaration, it was written sometime ago.

MR. CONRY: It begins, Your Honor, page 77 and it was signed on -- in January 4th of 2017.

BY MR. CONRY: (Continuing)

Q. Would you make any revisions to this declaration or amendments to this declaration at this time?

A. I, I am going to make some changes, I do not work for Chris Lee (Phonetic) firefighters anymore, I work for, for my wife and I started a company and that's who I work for now.

Q. Are you still in the firefighting business?

A. I am planning on going to fight fires this summer, planning on taking out a crew out with a different company.

Q. Okay. With that revision to this declaration, are there any other changes or revisions you'd like to make to either declaration, including the second declaration which is called titled supplemental? It begins at page a hundred and it was signed on or about March 18, 2019.

A. There is some changes I would make on the second

declaration and it was more, more based on the fact that my understanding at the time of, of the declarations, but I believe both of them are to the best of my recollection and to the best of what I remember that happened at the time of my admission.

Q. Okay. Do you remember when you were first indicted?

A. I believe it was in November 23rd of 2015.

Q. Okay. So did you have -- let me lead a little bit, if it's okay, it's just preliminary. Am I -- is it correct that Mr. Geiger and Ms. Andrews are your criminal defense counsel?

A. It's Mr. Geiger and Dana Mitchell.

Q. I don't know why I want to call her Andrews all the time. And then you also consulted with immigration law firm and that was Ghio and Muntz, right?

A. Yeah, first time I went to see Ms. Ghio was in July 22nd, I believe, of 2016, I went to see her because I went to get some advice on, on immigration, on adjusting my immigration status from DACA to LPR --

Q. All right. And so what did you learn from Ms. Ghio at that time?

A. I learned that while the charges were pending against me, I could not do anything, I could not adjust my status at the time, but she did advise me to, to give her a

call before I took any type of plea or to have Mr. Geiger and/or the attorneys that were representing me on the case to give her a call before going into any plea agreement or any type of deal.

Q. Okay. Did you hire her for ongoing advise?

A. They did not offer me to, to represent me in any way, so it was just an initial consultation with, with Ms. Ghio, she did not offer to represent me in ongoing basis.

Q. Okay. And so when did you see the immigration law firm again?

A. I went to their office again on, I believe it was, January 3rd of 2017, after my conviction or my plea deal that I had, I went to see Mr. Muntz --

Q. Okay. And --

A. -- to --

Q. And then to lead a little bit again, your stip facts trial, was it on or about December 15, 2016?

A. The stipulated facts trial was, I believe it was on December 16 of, of 2016.

Q. All right. So why did you go to see Mr. Muntz after?

A. I went to see him because at the time of the plea agreement, I thought that my immigration situation would not be affected or I was still hoping that, that I could

adjust my status from DACA to, to LPR because that, that's what I was told at the time of the, of the plea agreement or, or the agreement that we had, deal that we had, that even though it wasn't perfect for me, I could still be able to adjust my immigration status, so that's the reason I went to see Mr. Muntz to, to see what opinion he had or what steps I needed to take to be able to, to start filing for 245(i), which I believe at the time I qualified for due to the, the fact that I was, that I am married, because I'm still married to a US citizen.

Q. Okay. So when did you first get the impression you could adjust status from undocumented to documented? To legal permanent residence?

A. I learned of that I could adjust my status prior to, I believe it was in the spring of, of 2016 because my brother, both of my brothers had adjusted their status from undocumented to LPR, they got their green cards through, through their US citizen wives, so I knew at the time that I could qualify also for the, for the same form, which is allows you to stay here in the United States and not having to leave the US to go to Mexico and reentry again due to the fact that my grandfather had applied for, for my mom in the mid-'90s.

Q. You describing the 245(i) process to the court, huh?

A. Correct.

Q. Okay. Did you ever talk about the 245(i) process with criminal defense counsel?

A. Not to the, not to my recollection.

Q. Okay. Did they ever talk -- strike that. How important is it to you to become a legal permanent resident?

A. It is very important for me to become an LPR because most of my life I lived here in, in, in America and in Oregon, so it's, it's, it's where most of my dreams are going to happen or I'm planning for them to happen, I have my whole family lives here, I have friends, my best friend lives here in, in, in, in Oregon in Salem, so I'm not, it's not in my plans to ever return to, to Mexico to where I hear of all the violence that is going on down there with a lot of family members that have been killed down there, so it was, it was never in my plans to ever return back to, to Mexico.

Q. I might have missed this; did you say what age you were when you first got to the US?

A. I came here at the age of 15.

Q. Okay. So you just made DACA, right? Because you have to be in the US by 16 if you're going to get DACA --

A. Yes, I barely made DACA --

Q. Okay. Did Ms. Ghio advise you when she saw you

back on July 22nd in 2016 what you could potentially plead to and come back and adjust status?

A. She didn't go into full extent of what I could plead to, she did say that there's some things that, that you could be convicted of and, and not be affected, to be able to adjust your, your immigration status, but she didn't go into full detail what, what, exactly what I could plead to on the day that I went to see her.

Q. Okay. So let's go to stipulated facts trial date. Okay? You entered into a stipulated facts trial where you're going to get convicted of attempted compelling prostitution as well as sexual harassment. Did your criminal defense counsel discuss with you whether or not you'd be able to adjust status following that stipulated facts trial?

A. From what I remember, they didn't go into full extent of what the consequences would be, all the consequences, they pretty much gave me or I believe they gave me part of what the consequences would be, but I, I wish at that time they had an immigration lawyer to be present and explain to me all the, the consequences that could result, the immigration consequences of, of such plea that I, that I, that I took based on, on advice from, from my legal counsel at the time, which I now know that it was erroneous or it wasn't complete, I only got, like I said, I

only got some, some consequences from, from that, but not, not all the consequences --

Q. Okay.

A. -- all the --

Q. Hold on, let me interrupt. Are you trying to say that you think it might have been helpful to have the immigration counsel to talk to before you entered into the stipulated facts trial?

A. I believe it would have, it would have been helpful if I had an immigration attorney present at the, at the time and give me all the, all the consequences to be able to take, to make a complete educated decision, so I went -- like -- like I said, I went into, into a plea not fully what the, what my immigration consequences were going to be at the time.

Q. Okay. So it's just a couple weeks later you go see Mr. Muntz, right?

A. A couple weeks later on, on, I, I believe it was on January 3rd I went to see Mr. Muntz because that was who I believe at the time had spoken to Ms. Mitchell to give her advice on, on, on the immigration consequences, so me thinking that, that it was I was going to be fine to be able to start the, the immigration proceedings, meaning the 245(i) to be able to adjust my status through my wife, I went to see Mr. Muntz to be able to start that, that

proceeding or that application going to be able to adjust my status, my immigration status.

Q. Okay. So did Mr. Muntz say anything that surprised you when you talked with him on January 3rd?

A. Yeah, when I went to see him, it was, it was like a bucket of cold ice water, I, I learned a lot of things that I wasn't aware of, I was told that because of what I pleaded to, I could be deported right and there right after I pleaded to, to sexual harassment and, and compelling prostitution of my son, so he pretty much told me I was, I was screwed, not, probably not on those exact words, but the way he, he presented it to me, it was that I want -- I took a plea that, that I shouldn't have taken, I -- based on what, on what I pleaded to, I was pretty much screwed to ever be able to apply for any type of, of immigration adjustment through my, through my wife, so I was --

Q. Did he talk with you about probation officers?

A. Yeah, he did tell me or explain it to me because I think he saw that I was upset, he tried to explain it to me that a lot of, a lot of times a lot of the probation officers because of their workload, they sometimes refer some of their probationers to, to, to ICE, to immigration because for a lot of reasons, a lot of times they just want to be able to have a lighter workload, so I could potentially be, be, you know, referred to ICE right off the

bat the first time I went to see my probation officer --

Q. Okay. So what you're saying is you didn't know that at the time of the stip facts trial; you only learned about it later, right?

A. Yes, I did not know that at the, at the stipulated facts trial, if I had known that at the time, I would have, I would have insisted not to, not to go into a plea and instead go and, and, and, and try to, to go to a jury trial or a normal jury trial which was scheduled to be on the, on the 19th of December 19th of 2016.

Q. Your stip facts trial, is it on a Friday?

A. Yes, it was, it was on a Friday --

Q. Okay. How many times did you meet with criminal defense counsel on that Friday?

A. I, I met with, with Mark once in the morning, which were I was led to believe that we're going to go see, I believe it was, Judge Bennett to, to do the, the regular plea trial. However, Mr. Bennett was not available, I believe he was at the annex at the time or at -- I think they said the annex --

Q. All right, all right, so is this in the morning?

A. This in the morning, it was --

Q. Are you seeing Mr. Geiger about 8:00 in the morning, something like that?

A. Yes, sir, I think I believe, I believe I saw him

maybe an hour or a half an hour before the, the, the hearing was scheduled --

Q. All right. Are you also working that day?

A. Yeah, however, after, after we would leave the or I was, after I was let known that Mist -- Judge Bennett was not available, I, I went to work, I returned to work, and then I was told later on to come back to, to see Mr. Geiger and go see a different judge for a stipulated facts trial.

Q. Do you know why things changed from a plea to a stipulated facts trial?

A. I believe it was, it was changed to a stipulated facts trial because Judge Bennett was not available and they wanted to have a result, meaning they, that is my, my counsel at the time, my trial counsel and the, and the State, to be able to have a resolution that same day because, because the, the hearing that the trial was on the following Monday, which was on the 19th of December.

Q. Okay. That week, the week of December 16, 2016, going back to that Monday, had you met with criminal defense counsels earlier in the week?

A. Can you repeat that same question again?

Q. I'll try. That week, December 16, 2016, it's a Friday, had you met with criminal defense counsels earlier in the week?

A. Yes, I did, they tried to contact me about my

what I, what I was in, in regards to immigration, I remember a text that Dana sent me asking if I was a DACA or an LPR, so I told her I was a DACA, and then they asked me to meet --

Q. Let me --

A. -- with them the following day, which was --

Q. Let me stop you, do you remember what day you got that message?

A. I believe it was on the, on December 12th of 2016.

Q. Okay. So I think you're saying that on the 13th you met with Ms. Mitchell and Mr. Geiger?

A. Yes, I met with them on the, on the 13th to be able to discuss what the, what the outcomes of the, of a deal would be and then discuss some of the immigration consequences --

Q. Okay --

A. -- or some of the immigration outcomes --

Q. All right. Had a plea bargain already been struck with the prosecutor's office at that time?

A. I believe at that time there was not one agreed to yet; however, I spoke with, with Ms. Mitchell, who was the one that I was dealing when, dealing with most of the time, that she had clients in the past that had gone into a plea to where if they take some wording out of the, out of

the plea, if does not affect them on the immigration court whenever they try to adjust their status and that's what we spoke about to, to some extent that, that day that we met.

Q. All right. You tried to talk about the harassment issue?

A. Yes, sir, the she -- from what I remember, she told me that a lot of times if you take the sexual out of the, out of the plea for sexual harassment, it doesn't af--- it doesn't have as much of, of bad consequences for immigration purposes when someone tries to file for, for a green card or immigration status.

Q. Did you see Ms. Mitchell again prior to the stipulated facts trial?

A. I did not, I tried to contact her that morning because it was my belief that she had spoken to, to an immigration attorney the prior night, so I tried to, I think I tried to call her a couple times and she didn't respond, so I sent her a text message asking her what the immigration had, lawyer had said about, about what the immigration consequences would be if I, if I took a plea.

Q. As between Ms. Mitchell and Mr. Geiger, who were you looking to for immigration advice in this case?

A. Dana Mitchell, that's who I was dealing with most of the time, so that's who I expected to, to explain to me what the, what the immigration consequences would be.

Q. Well, we got to go back to December 16th, all right? On that day, did criminal defense counsel advise you a plea set?

A. Mr. Geiger on that day when I showed up to the morn, in the morning, he did advise me of, of taking a plea, he said that it was, it was better if I, if I take that plea and, and be able to deal with some immigration consequences instead of being possibly able to spend a whole lot of time in, in, in, in prison if I was found guilty of, of the, of the nasty things that I was being accused of at the time --

Q. Okay, well, hold on a second, how much time were you facing?

A. I believe I was facing 408 months or some of that nature, I don't remember exactly how many months, but it was --

Q. A lot of time --

A. But it was a lot of time, it was pretty much a death sentence for me, for me I would have spent most of my life in prison, and so that was very, very nerve-wracking for me, I was, I was afraid, I was, I was scared, I was a nerve, nerve-wreck, I wasn't functioning very good that around that time, it was very traumatic for, for me.

Q. All right. Is it fair to say you were happy not to go to prison?

A. I was very happy to know that I had an option that, that would avoid me from me to doing so much time in prison and, and be able to, to adjust my status after my, my probation was, was done.

Q. All right. So if we win this post-conviction matter, if that happened, you'd go back to trial, right?

A. Yes, sir, if, if, if, if PCR is, is given to me, I'm willing to go to a, to trial and, and be able to prove that, that I'm, that I'm innocent of all the, the nasty things that I, that, that was said that I did at, at the time --

Q. So if the same plea offer was made to you following a grant, you would decline it is what you're stating right now, right --

A. I would decline every offer the State made to me --

Q. And then so why did you take it the last time?

A. I took it because that was the advice that I got from my attorneys and because I was, I was afraid that I could be incarcerated for a very long time and, and I will pretty much lose everything that I, that I fought so hard to that point, not being able to see my family, not be able to, to be with my wife, my, my kids, my step-kids, and, and so I was very afraid at the time --

Q. Okay, well, didn't Mr. Geiger tell you you're

going to be deported or something like that?

A. He said there was a -- when I asked him what the immigration lawyer had said, he said things don't look very good or something of that nature, things don't look very good, but I'd rather you be deported than, than you be able to spend the rest of your life in, in prison --

Q. Okay.

A. -- but he didn't go into extent of what all the immigration consequences would be.

Q. So if he just told you things don't look very good on December 16th, how is it that on January 3rd you go to see Mr. Muntz, he tells you you got no action, you can't get adjustment, and you're surprised?

A. Because even though he told me that things were not very, were not looking very good, I thought it was just temporary, I thought maybe somehow down the line I'll be able to adjust my status, me thinking that, that after my probation was over, I could, I easily adjust my status because my brothers had done that in the past where they qualified for 245(i), so I thought I, I had the same chances --

Q. Did you think you might have a chance because one of the convictions was a misdemeanor?

A. I did, I remember speaking to, to Dana about that, that, you know, a lot of the times that a misdemeanor

is not as bad as, as a felony, you can be, you will be able to adjust your status with, with a misdemeanor, but not a felony, so knowing that I had pleaded to, to a, to a misdemeanor and then the word sexual was taken out of the, of the, of the plea that I did of the sexual harassment, I believe the word sexual was taken out of it, so I thought based on that that I could easily be able to, to adjust my, my status once my probation was over, so that's what I believed at the time and that's the reason I went to see Mr. Muntz --

Q. Mr. Mun --

A. -- otherwise I wouldn't have paid him --

Q. Let me stop you. You reviewed the stip facts trial, right? The transcript of the stip facts trial? You reviewed it, you looked at it, you read it over, right?

A. I read it over after, yes.

Q. Okay. You understand that at that stip facts trial, you actually are pleading or agreeing to facts that convict you of sexual harassment, right?

A. Yes, I, I, I believe so, yeah.

Q. What happened, how do you not understand that?

A. I, I, I did not anticipate what was said, be said on record in, in court, like I said, I was, I was confused that day, I was overwhelmed, I do not function very well when I, when I'm overwhelmed, I didn't have a lot of time

to think about it, I, I, I, I felt like I was, you know, pressured into taking this, this plea that I was not, that I didn't necessarily agree with, if -- like I said, if I, if I was given another chance to with, with an immigration attorney where I (unintelligible) in the time at that, that day to be able to discuss that with an immigration attorney and all the consequences that will come with, with that plea that I agreed to, I would not have taken that plea, I will insist and to going to, to a jury trial instead --

Q. I think you told us you didn't fully understand what was going on at the time of the stip facts trial?

A. You are correct, I, I believe I didn't fully understand what, what I was pleading to or the gravity of what I was pleading to at the time.

Q. Sir, do you ever feel overwhelmed by circumstances?

A. I do, I, I, often I, I find myself being overwhelmed with life situations, work, work stress, and I don't, I find myself not functioning ver -- very well, this a lot of times --

Q. Is it easy to understand what everybody's saying when you're feeling overwhelmed?

A. It's not very easy --

Q. Okay.

A. I, I --

Q. You indicated to me yesterday that you had something good you wanted to say about Mr. Geiger. What was that? Or the day before when we spoke about this case. Do you remember?

A. Well, at the time I, I, I, I, I trusted Mr. Geiger with, with my life, I, I feel like, like he was fighting for me, I was very thankful that, that he had gotten that, that deal for me because that was avoiding for me to go, to go to prison for a very long time, so I felt grateful at the time, but I know now that I got that offer from the State because more than likely they were going to lose if it ever went to, to, to trial.

MR. CONRY: Your Honor, I think I'm covering most of it, I can stop in the interest of doing this in two and a half hours.

THE COURT: Okay. Thank you.

Cross-examination.

MR. KALLERY: Thank you.

CROSS-EXAMINATION

BY MR. KALLERY:

Q. Mr. Cervantes-Meraz, you said your brothers adjusted their status in 2016 thanks to marriage, is that correct?

A. One of my brothers did --

Q. All right. And was he facing criminal charges at

the time?

A. He was not, to the best of my knowledge.

MR. KALLERY: I have no further questions, thank you.

THE COURT: All right. Any redirect at all?

REDIRECT EXAMINATION

BY MR. CONRY:

Q. I don't know if I'll get away with this question, but I'm going to try it. Mr. Cervantes, is there anything else you'd like to tell the Court?

MR. KALLERY: Objection, Your Honor.

THE COURT: Yeah, I think we've already covered that, so I am -- that's a real brief cross-examination, I don't think it allows for a bunch of redirect, so you may step down now and return to counsel table.

Now, what's the situation with Mr. Larsson?

MR. CONRY: So a phone call, Your Honor?

THE COURT: Okay. Do we have that number?

MR. CONRY: I hope so. Is it 541-610-5921?

COURT CLERK: Yep.

THE COURT: Okay.

MR. CONRY: Okay, thank you, I know he's standing by.

THE COURT: Yeah, let me take just a two-minute break here so you can get him on the phone, and then as

soon as you get him on the phone, let me know.

COURT CLERK: Okay.

THE COURT: Thank you.

COURT CLERK: We're off the record.

(A recess is taken.)

THE COURT: All right. We're back on the record. Mr. Larsson, can you hear me?

MR. LARSSON: Yes, I can.

THE COURT: Great. My name is Dale Penn, I'm a senior judge here in Oregon, and you've been called as a witness by Petitioner in his post-conviction trial, which is what we're doing right now. I would like you to raise your right hand and take an oath to tell the truth. Okay?

MR. LARSSON: Yes.

Whereupon,

DAN ROLAND LARSSON,

a witness called on behalf of the Petitioner, having been first duly sworn by the Court, was examined and testified on his oath as follows:

THE COURT: All right. I'd like you to state your name and spell your last name.

THE WITNESS: My full name is Dan Roland Larsson, L-a-r-s-s-o-n.

THE COURT: All right. Mr. Conry, you may inquire.

MR. CONRY: Good afternoon, Mr. Larsson. Could you tell --

THE WITNESS: Good afternoon.

DIRECT EXAMINATION

BY MR. CONRY:

Q. Could you tell the Court a little bit about your educational background? Not too much, but just a brief overview?

A. Yes, I, I graduated from Seattle University law school in 1994.

Q. Okay. What's your experience in immigration law?

A. I have been practicing immigration law since 1994, I have practiced both before the US Immigration Service, an Executive Office for Immigration Review, as well as federal district courts in Washington and Oregon, and also before the Ninth Circuit Court of Appeals.

Q. Okay. And I'm shuffling papers a little bit too much, Dan. How long have you been doing that?

A. Since 1994.

Q. Okay, thank you. Have you reviewed the records in this matter?

A. Yes, I have.

Q. Okay. Could you talk with the Court about what 245(i) is?

A. Well, 245(i) is a statute that allows foreign

nationals to go through what is called adjustment of status, and it was originally enacted, I believe, in 1994, it expired in -- on January 14th of 1998, and then it was revived again between December 20th of 2000 until April 30th of 2001. And what 245(i) does is to permit persons who have entered the country without inspection or if they have worked without authorization in certain other cases and various grounds that will allow them to still go through the process of getting their green cards and adjust their status in the United States by paying an additional 1,000 -- $1,000 penalty fee.

Q. Is --

A. And -- uh-huh.

Q. I was just going to ask if there's anything about 245(i) that's esoteric?

A. Could you define esoteric?

Q. Is there anything about 245(i), sir, that's unusual? Is it uncommon?

A. No, it's, it's very common, and there aren't too many people anymore that -- well, I should, I should take that back. 245(i), that -- that statute permitted many people to, to apply for adjustment of status based on an application that had been filed on or before April 30th of 2001, and there are certain, there are many visa categories that may have actually even longer than a 20-year wait, but

if somebody is what is called grandfathered under 245(i), it's -- it allows people once the visa becomes available to then adjust their status, so it's a very valuable thing to have, and I don't have the, the full amount of, of people that file or qualified under 245(i), but I believe it's over a million people that were able to take advantage of 245(i) and, and there are still people today that can take advantage of that 245(i).

THE COURT: May I ask one question?

THE WITNESS: Yes.

THE COURT: So you told me this was in effect '94 to '98 and then I think it was a short time in 2001. Is it in --

THE WITNESS: Correct.

THE COURT: Is it in effect now?

THE WITNESS: Yes, it is.

THE COURT: Okay.

THE WITNESS: Once, once you are grandfathered, you're always grandfathered under 245(i).

THE COURT: I see, okay, good, thank you --

BY MR. CONRY: (Continuing)

Q. That grandfathered word's a good word. Can you explain what grandfathered means, please?

A. Well, so and it's -- under 245(i), it's, it's one of the provisions that, that, that people can qualify for,

and basically how it works is that let's say that, let's say that you have a spouse who, who is a US citizen that files that application for you, it's done on a form called I-130, and there are all these various categories that somebody can qualify under, so you can have spouse is a US citizen, parent of a US citizen, child under 21 of a US citizen, those are considered immediate relatives and there's no limit to how many applications can be filed for those, so a visa is immediately available in that category. Now, after that, you go into preference categories, and that can be the spouse of a permanent resident or --

Q. No need for that, sir, okay --

A. I'm sorry?

Q. -- no need for preference doc -- let's --

A. Well --

Q. -- limit it to Mr. Cervantes' situation. Okay --

A. Okay.

Q. Now, if you look at the Immigration and Nationality Act, is 245(i) like the statute INA 245(i)?

A. Yes, it is.

Q. Okay. And if you practice immigration law, do you know about 245(i)?

A. Yes, you should know about 245(i).

Q. All right. Did Mr. Cervantes qualify for 245(i) at the time his criminal charges were pending?

A. Yes, he did.

Q. Okay. Why?

A. Because he was a so-called derivative beneficiary of the application that had been filed for his mother on April 8th of 1997 and, as such, he would be, he's grandfathered under 245(i).

Q. Okay. And, sir, am I correct that you actually reviewed that document?

A. Yes, I did.

Q. Okay. How about now? Post-stipulated facts trial, post-plead to sexual harassment, post admitting to attempted compelling prostitution, what would happen to Mr. Cervantes if you filed a 245(i) for him today?

A. Well, he would still be eligible to file based on the fact that he is grandfathered under 245(i) and he is married to a US citizen, which gives him an immediately available visa, but with that type of conviction, the -- it would be very difficult if not impossible to -- for him to actually obtain his permanent resident status based on his criminal record.

Q. That's -- let me go through that language with you a little bit. What is your opinion as to whether or not Mr. Cervantes-Meraz would be deported if he was to file for I-130? I'm sorry, for 245(i).

A. Yes, it is my belief that he would be deported,

that he would be, he would be placed in removal proceedings based on his conviction.

Q. Okay. And let's do this a step at a time then. If he was placed into removal proceedings, what do you think would happen then?

A. Well, could you be a little bit more specific about --

Q. Sure, sure, the -- would he go to Tacoma?

A. Yes, I be -- yes, I believe that he would taken to Tacoma or to some other detention facility in the United States.

Q. Would the immigration authorities be likely to let him out on bond?

A. No, I don't believe that they would be likely to do that because his conviction could be construed as an aggravated felony under immigration law and also under the prostitution ground.

Q. Okay. By aggravated felony, actually what we're talking about is the attempted compelling prostitution, is that right?

A. That, that is correct.

Q. Okay. And you know that wasn't a conviction; it was just an admission. Does that make any difference?

A. Well, these -- these criminal convictions, in particular involving sex-related crimes and also in

particular given that this involved a minor, are very broadly construed as a crime involving moral turpitude, so, so like sexual abuse of a minor is one of the aggravated felony categories.

Q. Okay, so let me try this on you. Please assume criminal defense counsel today files for Mr. Cervantes-Meraz to have the criminal charge, the attempted compelling prostitution dismissed forever. Would he then be okay with immigration court?

A. Yes, I believe so. Yes, I believe so, I -- the, the -- there -- the reality is that they could still look at his arrest, but if he does not have any convictions, he would -- he, he's prima facie eligible for, for status.

Q. Okay, I'm sorry, I must have misspoke or you didn't hear me. He entered an admission to attempted compelling prostitution.

A. Okay.

Q. Would that admission still hurt him in criminal court -- I'm sorry, strike that. I'll rephrase. He entered an admission to attempted compelling prostitution, Dan, so if he was to now have the charges dismissed, could that admission still be used against him in immigration court?

A. Yes, it could. And it -- yes.

Q. Would it still stand as an aggravated felony in

immigration court?

A. I believe that it would, yes, based on my experience.

Q. Okay. What if he just had the sex harassment conviction? Would he be able to adjust status?

A. I, I, I believe that it would have a similar effect because it's the record of conviction would, would show that it involved a minor.

Q. Okay. So do you advise criminal defendants or lawyers representing criminal defendants about the immigration consequences of convictions?

A. Yes, I do.

Q. Okay, so what would your advice have been to Mr. Cervantes about whether or not he should enter into a stip facts trial where he would be convicted of sexual harassment and admit attempted compelling prostitution?

A. I would not have, have advised him to, to agree to that, to enter into such a plea.

MR. CONRY: And if he did, what would be the immig -- well, you described the immigration consequences. I don't think I have anything further, thank you, Mr. Larsson.

THE WITNESS: Thank you.

THE COURT: All right. Cross-examination?

MR. KALLERY: Right.

CROSS-EXAMINATION

BY MR. KALLERY:

Q. Mr. Larsson, I'd like to talk a little bit more about 245(i). You mentioned there are a number of categories and possible ways to be grandfathered in and other things like that, is that correct?

A. Well, there, there aren't different categories, the, the, the overall adjustment of status statute is Section 245 and it has (a), (b), (c), (d), various different categories, and one of those categories is, is, is (i), Section 245(i).

Q. Right, so I'm looking at Section 245(i) right now, which is the statute we're discussing today, is that correct?

A. Yes.

Q. And based on this particular statute, what kind of process do you go through to determine whether or not someone is eligible?

A. Well, if somebody comes -- basically what you're going to have to do is for somebody to have a filing fee for an approval notice of the application called I-130, or also an I-140, which is done in an employment-based situation because it also covers people in employment-based situations, and so somebody comes in with proof that they -- they filed an approved or approvable application on

or before April 30th of 2001, then that would grandfather them under 245(i).

Q. And you know that based on your training and experience as an immigration attorney, is that correct?

A. Yes.

MR. KALLERY: No further questions, thank you, Your Honor.

THE COURT: All right. Any redirect on that?

MR. CONRY: Nothing further.

THE COURT: Okay. Thank you. All right. May this witness be excused now?

MR. CONRY: Fine with me.

MR. KALLERY: From the Defense's perspective, Your Honor, yes.

THE COURT: All right. Mr. Larsson, you may hang up the phone, thank you for your participation.

THE WITNESS: Thank you.

THE COURT: All right. Are there any additional witnesses for Petitioner?

MR. CONRY: None for Petitioner, Your Honor.

THE COURT: Okay. Have you made a decision about what you want to do at this point?

MR. KALLERY: Well, Your Honor, at what appears to be the resting point for the plaintiff, I have a motion for the Court for a directed verdict in this particular

case --

THE COURT: Oh.

MR. KALLERY: We have a --

THE COURT: Okay, well, let me stop just a minute because I am kind of jumping around, so you don't have any more witnesses, so is the petitioner resting at this point --

MR. CONRY: Yes, Your Honor.

THE COURT: Okay. Go ahead.

MR. CONRY: So, Your Honor, the issue that we're kind of facing in this case is whether under *Padilla* the criminal defense counsel in the underlying case met their burden, their burden is to identify any reasonably ascertainable immigration consequences, provide them to the defendant.

And in this particular case, Your Honor, the evidence provided by the defense in both their exhibits, but also in testimonial form, is that this defendant was talked to about the reasonably ascertainable criminal -- or the reasonably ascertainable consequences of a criminal conviction in this particular case, and with that, Your Honor, I note the defendant's testimony today when he said he talked to Mark Geiger and the morning of the stip facts trial and Mark Geiger said, if I remember correctly and I am not paraphrasing too much, that the defendant needs to

balance the immigration consequences versus life imprisonment. Further, he says I'd rather see you deported than in prison for life.

And Your Honor, quite frankly, the reasonably ascertainable consequence of this is the deportation. Mr. Geiger in his declaration, Ms. Mitchell in her declaration, both of them state they told the defendant that this is a deportable conviction that's going to be a deportable offense. On top of that, this defendant during his testimony stated that he was told that that he is balancing deportation against lifetime spent in prison, he is somebody who has been told those particular things, so he has been advised of those consequences.

With that, we get to the next part, which is the reasonably ascertainable part, and cited by defense in their trial motion or their trial memo is *Daramoro* (Phonetic) v. State, and in that, Your Honor, they do some analysis of kind of what is reasonably ascertainable?

And with that, Your Honor, I'd like to point to a section, it looks like this is on page -- I apologize, I flipped to the wrong one. So this would be, it looks like, page 467 or 17, depending on which cite you're looking at for the citation, it gets in to a discussion about the at that point, at in that case, the immigration attorney's expert opinion as to what constituted a conviction with

basically deportable consequences that was an aggravated felony for the purposes of the statute, and basically what it talks about here is if it says in the statute itself that it is what you expect it to be, then it's something that you can determine very easily, it's going to be easily ascertainable, but the fact that this particular expert actually needed to do substantial legal research to decide one way or another whether this was going to be easily ascertainable meant that it wasn't, and that's identical to the situation that we're in particularly here with the not only ascertaining of whether these crimes are in fact the kind of crime of moral turpitude or the aggravated felony that would lead to deportation, but also with whether this defendant falls under 245(i), because under 245(i) the immigration attorney was able to say, yep, under my training and experience this is somebody who would be qualified, but then he gives not only statute, but also 24 years of experience that leads him to bel -- to understand that particular statute, so he also has a declaration that is seven pages long, Your Honor, when it comes down it, if this is something that an expert can't explain very quickly, it's not going to be reasonably ascertainable or readily ascertainable to the common defense attorney, so what you have here is you have a defendant who is told this is a deportable offense, that's

the readily ascertainable effect of the convictions of the crime, but he's also told beyond that, hey, there could be other consequences here, mentioned that a couple of times, he said he wasn't certain what they were, but I will note also that he was told when he met Barbara Ghio very early on in his prosecution, she told him give me a call back before you plead to anything and then he didn't.

Your Honor, defense counsel in this case met their *Padilla* requirements even with the evidence presented just by defense. With that, I would ask for a directed verdict. Thank you.

THE COURT: All right. Mr. Conry.

MR. CONRY: Your Honor, I toyed with the idea of simply arguing about affirmative mis-advice to this Court, maybe somehow not putting anything on the record other than the files, the filings. And we have a case here where I'm not going to accept *Padilla* doesn't apply. 245(i), black-and-white, Your Honor, it's hard to miss, a big part of this INA, it's been granted millions of -- a million times per the witness. The State talks about deportability, there's something else called inadmissibility; that wasn't even talked about. That's half of the immigration statute, that's half of the way you can defend these cases if somebody doesn't have papers.

Now, this man didn't have papers, except he had

DACA, so criminal defense counsel was aware he was in that side of the immigration world with no status part of the world, and there's no mention in their paperwork he's eligible for adjustment of status but for the conviction. It's because they didn't know that. They didn't know that. He had a heck of a lot to fight for and a trial to stay in the US, that's what the trial would have been about if it actually proceeded to trial.

Long v. State of Oregon, affirmative mis-advice, it's the federal part of it is *Quan* (Phonetic), the *Quan* case I cite, the *Kyoto* case I cite, it talks about affirmative mis-advice being a broader area of relief than is available in the *Padilla* and it says that once immigration -- I'm sorry, once criminal defense counsel starts to go down the road of advising on immigration consequences, they got to get it right, they got to go all the way through it, so, heck, you get a guy who's DACA, oh, my gosh, he's undocumented, can he adjust? Adjust? You got to find out, his brothers adjusted? Oh, maybe he can adjust. It's not a big whoop-te-doo to get there; it's easy. And he needed to be told, this is what I would have told him, you sign here, you're gone. You're going to get picked up, you're going to go. If you want to fight, let's fight. If we lose, it's prison 40 years, probably, but maybe we would win on appeal, but if you want to have this

over with, go home and be picked up by ICE tomorrow, potentially, and be put into Tacoma or not let out of jail and then be deported, that's your choice. He says he wouldn't have done that, he didn't even know about it. Apparently criminal defense counsel didn't even know about it because they don't talk about it. They say funny things in their declarations like I don't admit anything that I don't talk about. They wouldn't talk to me, I know that.

THE COURT: What about Petitioner's testimony today, I did write this down because it did seem significant to me, but that he was told by Mr. Geiger and his attorneys basically you got two choices, life in prison or deportation.

MR. CONRY: *Rodriguez-Vega*, Your Honor, if I may. *Rodriguez-Vega* says you have to be told that you're virtually certain to be deported --

THE COURT: What does the plea petition say?

MR. CONRY: There was no plea petition, it's a stip facts trial.

THE COURT: Oh, okay, that's right, that's right --

MR. CONRY: And I think that's part of the confusion is they --

THE COURT: That's right.

MR. CONRY: -- jumped straight into a stip facts

trial.

THE COURT: That's right.

MR. CONRY: And --

THE COURT: Okay, tell me your --

MR. CONRY: Oh --

THE COURT: -- response to my question again, you cited a, I think, Supreme Court case. If they say anything, then it must be accurate.

MR. CONRY: Yes, it's still *Long*, Your Honor.

THE COURT: All right, all right --

MR. CONRY: And the fact, and --

THE COURT: -- and that's basically what your argument is here.

MR. CONRY: It's a lot of it, but let me give it a little bit more, Your Honor.

THE COURT: Well, no, I think I'm ready to rule on this because this is more of a specific challenge that you have not brought forward sufficient evidence, but I am going to deny the motion at this point, simply because I can't make any kind of credibility finding at this stage of a case, and what I have is a statement that I didn't understand, they didn't explain it to me, okay?

MR. CONRY: Okay.

THE COURT: That, and I believe that is sufficient to get by this particular motion, so I'll deny

the motion, and now we're at the point where the defendant, do you wish to call witnesses --

MR. KALLERY: We do, Your Honor, first I will call Mr. Mark Geiger.

THE COURT: Okay. Thank you very much, if you just come up here and take the oath to tell the truth. Whereupon,

MARK JOSEPH GEIGER,

a witness called on behalf of the Defendant, having been first duly sworn by the clerk of the Court, was examined and testified on his oath as follows:

COURT CLERK: Have a seat. When you're ready, Mr. Geiger, if you'd state your full name and spell your last name for the record, please.

THE WITNESS: Yes, it's Mark Joseph Geiger, G-e-i-g-e-r.

THE COURT: All right. Thank you, you've been called by the defendant in this case, you may inquire.

DIRECT EXAMINATION

BY MR. KALLERY:

Q. Mr. Geiger, what do you do?

A. I'm an attorney.

Q. And what kind of attorney, specifically?

A. I specialize in criminal law, I also do quite a bit of post-conviction law, a little bit of PI work as

well.

Q. So I'd like to talk about the plaintiff in this particular case. Do you recognize the gentleman sitting at the end of this table in the red shirt?

A. I do.

Q. Who is that?

A. That's Mr. Cervantes.

Q. And how do you know him?

A. I represented him along with Dana Mitchell probably about three years ago or so in a very complex sex abuse case.

Q. And was that in so 2016?

A. That sounds about right, yeah --

Q. And did it start kind of early 2016?

A. Yes.

Q. Was there a resolution of that case at the end of 2016 in a stip facts trial?

A. Yes.

Q. All right. Now I'd like to talk a little bit about how your representation started. When did you first meet the defendant, ballpark?

A. You know, I don't remember that, I actually think this might have been one of those cases wherein I was out of town and Ms. Mitchell assisted me when I got back, she had already talked to him, but I'm not positive.

Q. And how did you meet him?

A. We had an appointment, we talked about his case, I then at some point asked Ms. Mitchell to assist me.

Q. And when you say you talked about his case, did that include talking about the charges that he was facing?

A. We talked about the charges, you know, once I got the discovery, of course we went over the discovery at length, we talked about witnesses, ways to rebut the evidence, what kind of tack, you know, we're going to take to defend him, that kind of thing.

Q. All right, and when you were discussing the case with him, did that also include discussions of any possible collateral consequences to a criminal conviction?

A. Eventually that was the prime component of our discussions towards the end of the case, yes.

Q. Well, when you say eventually, what happened to make that a big component?

A. Well, so the case was set for trial, there were some kind of bizarre witness issues that we worked around, I believe that Mr. Miller, the DA working on the case, thought that the case was very triable because we had strong evidence of parental alienation and he decided, we decided to talk more about it and we persuaded him to make an offer that was incredibly favorable.

We also talked to him about a sort of an off-the-

books, which I've never heard of it being done, but an off-the-books diversion because we were very concerned about the immigration consequences, as we told Mr. Cervantes, even a deferred sentence was considered a conviction under immigration law and, you know, we both told him that, we thought that the chances of him being deported were quite high, and we, we were worried about that and we wanted to figure out a way to avoid it, and Mr. Miller was open to talking about it, but the best we could do was a deferred sentence and then the conviction.

Q. So let me talk about it, let me focus the conversation a little bit more; why were you worried about immigration consequences with this defendant?

A. Well, because he was a nat -- you know, he wasn't a citizen, and so he was here on DACA, which he could potentially get renewed, but, I mean, anybody that's here illegally, whether they commit a crime or not, could be deported, so any kind of a conviction just makes it that much worse. The other thing is, is the prostitution charge could be a crime of moral turpitude, although as I now understand it, that's -- that standard is fluctuating, but I always tell clients, as I told Mr. Cervantes, that any convictions that arguably involve moral turpitude would result in deportation.

Q. So let's talk a little bit about the deportation

side of it. Given what you were facing in this particular case, how certain were you that deportation would be a problem?

A. Well, let me answer it this way. One of the, one of the things that we talked about was whether ICE would even pick up on this, ICE is particularly adept at picking up on people who are convicted and go to jail, I've noticed in my practice that they don't, I'm not sure how they, they track people who don't go to jail, but they don't seem to pick up on the people that don't go to jail as much, so what I basically told him was if ICE finds you, you're gone and, you know, that was a recurring theme that, that I stressed, and of course I want to mention this, one of the reasons I asked Ms. Mitchell to help with this is that she, I think, is an expert in *Padilla* issues and I think she knows more about it than I do, so it's --

Q. All right, well, let's, let me refocus back to --

A. Yeah --

Q. -- the deportation part of it --

A. Yeah.

Q. -- All right. When you said you told him that if ICE finds you, you're gone --

A. Yup.

Q. -- how certain was that conversation? Was it that simple?

A. It was that simple.

Q. And how long had you spent over the time of your representation from initially meeting to actually going to the trial with this defendant? Like how many hours had you met with him?

A. Oh, my gosh. We spent a lot of time talking, I would guess in excess of ten hours.

Q. And during all of that conversation, did you ever have some inkling that he didn't understand what you were saying?

A. No, I remember him being very concerned about being deported.

Q. And did you ever think, though, or did he ever have to ask you to repeat something or did he ever seem confused about what you were telling him?

A. Not confused, I think he was unhappy because he didn't want to, you know, plead guilty or get convicted of anything that might result in deportation.

Q. Right, did he ever ask you for clarification on something?

A. Oh, yeah, we talked about that extensively about if there were any other alternatives, this is the best we could do, the resolution was, I think in my 30-plus years it's, it's the best resolution I've ever seen, so that was certainly a component of the discussion, the risk factors

of going to trial and so forth.

Q. So this is going to be a little leading, I apologize. Is it fair to say then that if he had a question about what you were saying, he would ask you what it was?

A. He was very good about asking questions, yes, yes, if he had, if he had a question, there was no doubt in my mind that he would have asked us.

Q. All right. And now let's talk a little bit more about kind of the other piece of this, which is outside of the certain deportation that he was facing if he was convicted and found by ICE, were there any other immigration concerns that you were aware of that are easily ascertainable as required by *Padilla*?

A. No.

Q. Okay. And when I say are there any things, any other things that you're aware of, would there have been any adjustment of status that was available to him that you were aware of?

A. That never came up, that's not my expertise, it's not easily ascertainable under *Padilla* anyway, and one of the reasons we also had him talk to Ms. Ghio is because she's an immigration lawyer and I wanted him to talk to her to make sure that if there are any other issues that we were missing, I had an expert in the field to discuss this

with so that she could inform us of anything that we might be missing.

Q. And speaking of things that were missing, when did you find out that he had married a citizen US?

A. I never knew that.

Q. So I'd like to ask one final question, which is outside the deportation advice, did you ever make a definite statement of consequences for immigration other than deportation, meaning let me give you an example. Did you ever tell him you for sure cannot adjust your status?

A. I wouldn't have known to tell him that, because my, my belief was that he was going to get deported, my belief was that if ICE finds out about this, this is a deportable offense, there's not much we can do about it, I then deferred to Ms. Mitchell to give him more specific details about anything else, other questions that he had, and/or Ms. Ghio because Ms. Ghio's an expert.

MR. KALLERY: I have no further questions for this witness, Your Honor.

THE COURT: All right. Cross-examination.

MR. CONRY: Good afternoon.

THE WITNESS: Afternoon.

CROSS-EXAMINATION

BY MR. CONRY:

Q. Hey, does Ms. Ghio practice immigration law?

A. Sorry?

Q. Does Miss -- strike that. Did you talk with Ms. Ghio about what her advice to Mr. Cervantes was?

A. I did not; Ms. Mitchell did.

Q. Okay. Do you know what was said?

A. I do not remember what was said.

Q. All right. Did Ghio represent Cervantes?

A. I don't know that, I know she talked to him because Ms. Mitchell told me that she talked to Ms. Ghio and that Ms. Ghio had been consulting with Mr. Cervantes, but that's all I know.

Q. Okay, have you reviewed the pleadings in this matter?

A. I read them at some point, yes.

Q. All right. Would you disagree with Cervantes sees Ghio for an intake on July 22nd of 2016 and Ghio is not retained?

A. I did not have that information, my in -- understanding was that he talked to Ms. Ghio, that she was representing him; if he didn't hire her, I didn't know about it.

Q. Okay. And it's fair to say then that you also didn't know, I know you'll correct me if I'm mistaken --

A. Yeah.

Q. -- that he didn't hire Mr. Muntz either and that

it was own -- the next time he talked to immigration lawyer was on January 3, 2017.

A. Well, of course I wouldn't know that.

Q. All right. Can we go back to the week that was the December 16th week, is it fair to say at the beginning of the week you did not know what would happen with this case?

A. I don't know what week you're talking about, you're going to have to be more specific, what happened that week --

Q. I can definitely be more specific, sir, the stipulated facts trial was entered into on December 16, 2016, it was a Friday --

A. Okay.

Q. -- earlier in the week did you meet with Mr. Cervantes?

A. Be -- during that week?

Q. Yes, sir, if you remember --

A. I don't remember, I don't remember.

Q. All right. Do you remember when the deal came down that you accepted? Was it the day before? Approximately?

A. I don't remember that either, I know that we talked about it extensively, it was heavily negotiated, it -- frankly it would surprise me if it was that close to

the date that we did it because we'd been talking about it for weeks with Mr. Miller, Ms. Mitchell and I did, so I think the deal was, was hammered out well before the 16th, that that was the day that we actually entered the plea.

Q. Do you think it was hammered out before the 14th?

A. I, I can't say exactly, I'm just giving you my general memory of it, which is it's a long time ago, I have a lot of cases.

Q. I think we all do. Hey, do you recall, if you remember --

A. Uh-huh.

Q. -- that Miss -- it's Andrews -- no, it isn't, it's Mitchell, that Ms. Mitchell --

A. Mitchell.

Q. -- was not around the last three days of that week?

A. I do, I do remember that.

Q. Okay, she had to do something in Portland?

A. I don't know where she was, she wasn't there.

Q. Do you remember she wasn't able to talk about the plea offer with Mr. Cervantes after it was received?

A. I don't remember that.

Q. All right. Did you know that his brothers became permanent residents through adjustment in status?

A. Did not know that.

Q. Okay. Did you know that if he would have been picked up by ICE the next day after the plea went down, he would have been taken to Tacoma, there would have been no bond, the 23 months that was negotiated on the deferred attempted compelling, that because he never would have completed the probation, he's likely to have received that sentence? Did you know that?

A. Not that specifically, I do know that if, if ICE had picked him up, he'd be going to Tacoma, that much I know, yes.

Q. Okay. Did you know he wouldn't get out?

A. No. That's not easily ascertainable, Mr. Conry.

Q. Oh, it is.

A. No, I don't think it is.

Q. Oh, it is.

A. I don't think so.

Q. Have you ever read INA 245(i)?

A. No.

Q. Statute book --

A. Yeah.

Q. -- immigration law.

A. Yeah, I read *Padilla*.

Q. Right --

A. And I relied on Ms. Mitchell for the expertise in immigration law.

THE COURT: Okay, we're getting a little sidewise here --

MR. CONRY: Ms. Mit -- I know, he --

THE COURT: -- let's have a question --

MR. CONRY: He enjoys that.

THE COURT: Okay.

BY MR. CONRY: (Continuing)

Q. Is it Ms. Mitchell or Ms. Ghio you relied on?

A. Actually both, I, I believed he was seeing Ms. Ghio was an immigration expert, and as I said, Ms. Mitchell knows more about this than I do, that's one of the reasons I, I asked her to help me, but I consistently told him the same thing, this is a deportable offense.

Q. Okay. And you never told him this is an admissible offense, did you?

A. It's a what?

Q. Inadmissible offense, did you?

A. I don't recall ever saying that.

Q. Okay, because you're not familiar with that terminology.

A. Prob -- no.

MR. CONRY: Okay. Can I have a moment, Your Honor, so I don't just talk about whatever comes to -- if I could have a moment, I'd appreciate it.

THE COURT: Sure.

MR. CONRY: Oh.

BY MR. CONRY: (Continuing)

Q. This case, you could have tried it and won it, right?

A. I have no idea.

Q. Wouldn't have surprised you to win that case, right?

A. It wouldn't have surprised me, no, sex abuse cases, I've tried cases that I thought I should have won easily that we don't win and I, I don't understand why, they're very difficult to win or --

Q. And you've had others probably that you thought you would not win and that you won, right?

A. Yeah, that's happened on occasion.

Q. Okay.

A. Not usually, though.

MR. CONRY: I think I'll follow up with Ms. Mitchell, thank you.

THE WITNESS: Okay.

THE COURT: Any redirect?

MR. KALLERY: Not for this witness, Your Honor --

THE COURT: All right. May this witness be excused?

MR. KALLERY: He may, and at this time --

THE COURT: All right. Thank you very much,

you're excused --

THE WITNESS: Thanks, Your Honor, nice seeing you.

THE COURT: You may call your next witness --

MR. KALLERY: Thank you, Your Honor, at this time Defense would call Ms. Dana Mitchell.

THE WITNESS: I'll go get her. I'll get her.

THE COURT: I'll ask you to come up here and, when you get up here, raise your right hand.

Whereupon,

DANA MARGARET MITCHELL,

a witness called on behalf of the Defendant, having been first duly sworn by the clerk of the Court, was examined and testified on her oath as follows:

COURT CLERK: Be seated. And when you're ready, can you state your full name, spell your last name for the record?

THE WITNESS: Yes, it's Dana Margaret Mitchell, and the last name's spelled M-i-t-c-h-e-l-l.

THE COURT: All right. You may inquire.

MR. CONRY: Thank you, Your Honor. All right.

DIRECT EXAMINATION

BY MR. KALLERY:

Q. Ms. Mitchell, what do you do?

A. I am an attorney.

Q. And what kind of attorney specifically?

A. I practice in criminal defense and family law.

Q. And do you recognize the gentleman sitting at the end of the table in the red shirt?

A. I do.

Q. How do you know him?

A. He was a previous client of mine.

Q. And was he a client in about 2016?

A. Correct.

Q. How did you become involved in his case?

A. I was asked to participate in the case by Mark Geiger, who was his attorney initially --

Q. And what was the focus in your participation in that case?

A. Just to assist in the general criminal defense process.

Q. Did that include kind of concerns about what might happen if there was a conviction, those kinds of things?

A. Sure, well, yeah, and to handle any sort of immigration aspect of it.

Q. Let's get to the immigration aspect of it. Why did immigration become a concern of yours in this particular case?

A. Because he is not a documented citizen of the

United States, he is an undocumented individual who was on a DACA at that time --

Q. Right, and so just to ask upfront, being an undocumented individual, are you deportable --

A. Right.

Q. -- no matter what?

A. Yes.

Q. And is there a --

A. Well, let me clarify. If you're here unlawfully, then that would be grounds to be removed from the country, yes.

Q. And is that true outside even a criminal conviction or anything like that --

A. Correct.

Q. Does a criminal conviction perhaps exacerbate that?

A. Yeah.

Q. All right. And let's talk a little bit about that particular part of it. How long have you practiced as a criminal defense attorney?

A. Since 2011.

Q. And how long have you kind of focused on the immigration consequences to your clients?

A. Since 2011.

Q. So is it fair then that you have taken as much

time, is it fair to say you've taken as much time as you can to make sure you know what you can reasonably ascertainable from the immigration statute?

A. Correct, well, *Padilla* came out in 2010 when I was still a law clerk at a criminal defense firm, which is what made me aware of it, so it's just part of being a defense attorney, it's part of the job --

Q. Since you've become aware of it, have you kind of focused on *Padilla* in any way?

A. Well, only in that it directs me as a criminal defense attorney to advise any non-citizen clients of easily ascertainable immigration consequences --

Q. Do you also do any PCR work?

A. Oh, yes, yeah, if --

Q. And does much of that PCR work surround *Padilla*?

A. The only post-conviction relief work I do is based on *Padilla*.

Q. All right. And so I'd like to talk a little bit about the reasonably ascertainable consequences of this particular plaintiff's criminal case. Knowing what you knew at the very beginning of the case, were you able to ascertain any direct immigration consequences to him?

A. Well, yes, he --

Q. What were they?

A. He's not documented, so by that nature alone he

could be subject to removal, which is deportation.

Q. And did you know that there could be other consequences?

A. There could be, yeah, immig -- you mean immigration consequences --

Q. Yes, absolutely.

A. Sure, he wouldn't be admissible to the country, potentially, if he was picked up by immigration, his bond could be high or stuff like that, but the primary one --

Q. So when you're speaking about the other consequences, you keep saying potentially. Why is it that you have kind of this uncertainty about what might happen?

A. Because the immigration law changes constantly and it's impossible to know exactly what's going to happen at the end of a case, don't know if somebody's going to be convicted of, for instance, so you just know potential outcomes --

Q. All right.

A. -- but when somebody's not documented, the reality is if they are picked up by immigration, they're subject to removal because they're here unlawfully.

Q. So let's get back to kind of the *Padilla* aspect of this particular case where you talked about things being easily ascertainable, is it fair to say that his deportation would be easily ascertainable as a consequence

to a conviction in this case?

A. Yes.

Q. And when I say conviction, does that include any kind of admission or deferred sentence entry --

A. Yeah, he --

Q. -- or anything like that?

A. Yeah, you need to understand what conviction means to immigration court and so a conviction could be a what we would think of conviction pled guilty, it's any admission of guilt, though, so a deferred sentence still requires an admission of guilt, a diversion agreement requires an admission of guilt, all those things would be considered convictions under immigration law as I understood.

Q. And is that consistent with how you understood it in 2016 when you're talking to this plaintiff?

A. Yes.

Q. So would you have told him that?

A. Yeah.

Q. And how long did you spend talking to him between when you came onto the case and when the case was resolved in December of that year?

A. Just --

Q. Ballpark number of hours.

A. In total?

Q. Uh-huh.

A. For every --

Q. Everything.

A. -- oh, that's going to be hard for me to estimate. A lot --

Q. How much is a lot?

A. -- five, ten, maybe, I would -- that's hard to say, it was, it was a multi-month case, it was --

Q. So five to ten hours at least. Is that fair?

A. Fair.

Q. All right. During that time, during all of your talking with him, were you at all concerned about your ability to communicate with him and have him understand what you were saying?

A. No, unh-unh --

Q. All right, and when I say that, did you have any concerns that he didn't understand what you were telling him?

A. No, and if I ever have those sorts of concerns, I ensure that I've got an interpreter with me --

Q. And did he ever during that time ask you to rephrase something or restate something if he didn't understand it? You recall?

A. I can't recall specifically, but no, there was, I'm not sure if this is what you're asking, but there was

nothing about my communications with Leo that made me believe he wasn't understanding due to a language barrier, English not being his first language.

Q. So let me rephrase it a little bit. Actually what I'm asking is due to any kind of barrier, do you think that what you were telling him was not getting across?

A. Not at all --

Q. And with that, when you asked him or told him things, did he respond in an appropriate manner that led you to believe he not only understood the information that you had given him, but assimilated it and then was formulating a response?

A. Oh, yeah, yes, he was comprehending what I was saying for sure --

Q. Right, and so as part of the easily ascertainable issues, you were able to tell him that he was going to be subject to deportation if there was a conviction in this case. Is that correct?

A. Right.

Q. And then outside of that, were you actually able to talk to him about other immigration consequences?

A. We talked about his DACA because he was a DACA holder, which is Deferred Action for Childhood Arrivals, meaning the deferred action is removal from this country because in order to qualify for DACA you have to be not

documented to begin with and we tried to negotiate with the State to, to mitigate that, so we talked about the difficulty he may have renewing, well, we didn't, he wouldn't have been able to renew his DACA with the outstanding charges as they were.

Q. And were you able to explain that to him?

A. Uh-huh.

Q. Were you able to, are you aware of that there could be other consequences out there for immigration?

A. Yes.

Q. And would you have been able to say with any certainty what those consequences might be?

A. No.

Q. So how do you handle that in a case like this?

A. I either consult with immigration attorney or, if the individual already has an immigration attorney, I talk to their immigration attorney --

Q. All right, and were you able to talk to an immigration attorney in this particular case?

A. Yes.

Q. In fact did you refer this plaintiff to an immigration attorney?

A. I've got a, I can't recall, I've -- my recollection is that he already had retained immigration counsel or had spoken at one point with immigration counsel

and that's who we followed up with --

Q. And that, was that Barbara Ghio?

A. Correct, and Kurt Muntz.

Q. And Kurt Muntz. And as part of your talk with them, do you just kind of let your client know that there could be consequences and they need to talk to an immigration attorney to make sure they can sort those things out?

A. If they are not easily ascertainable immigration consequences, then we need to bring on an immigration attorney, yes.

Q. And now I'd like to talk about some of those other possible consequences that have been brought up in this case.

A. Okay.

Q. Have you heard of a statute called INA 245, Section (i)?

A. Yes.

Q. And have you looked at that statute?

A. Very recently, yes.

Q. Would you be able to tell whether, would you have been able to tell in 2016 whether this defendant qualified in that statute?

A. No.

Q. Why not?

A. It, I, it just says that some, that I think that subsection refers to somebody being, if eligible, can apply for naturalization or adjustment of status, but I'm not an immigration attorney, so --

Q. So would that in your best advice and the advice you gave be to go talk to an immigration attorney?

A. Yes, absolutely.

Q. So in the end, bottom line, what immigration advice did you give this defendant or, sorry, this plaintiff in this case?

A. I advised him that if he pleas guilty to any of the conviction or the charges as pled, he would be subject to removal, that's just mandatory, but the fact that he is not documented meant that he's subject to removal whether or not he has a criminal record, and so that was sort of where, I think I said that in my very first conversation with him, and so subsequently we were just trying to mitigate the immigration consequences, how do we avoid, could we potentially get the DACA renewed or could we have charges dismissed and then renew the DACA and then have them reinstate it and we were doing our best, but the immigration consequences that were easily ascertainable, I advised him of those and those were that you are subject to removal, you are not, you're not here lawfully, and if you are convicted, that just increases the likelihood of being

noticed by immigration --

Q. And for any of the other possible consequences, what did you do?

A. Well, discussed those with Ghio and Muntz and would have discussed that then with, with Mr. Cervantes.

Q. And when you say you would have discussed that with him, did you have any discussions about those other things with him?

A. Throughout the litigation, yeah, that's just sort of part of how I practice --

Q. Okay, well, I mean, when you say you had discussions with him throughout, what kind of discussions did you have about those other possible consequences during your representation of this client?

A. Just sort of confirming that a deferred sentence is still going to be considered a conviction and -- but mainly the State wasn't going for, and what I mean going for, the State wasn't going to move on some of these issues, and so we are left with, all right, now we've got that really difficult choice, do we -- trial's a huge risk, and so the alternative is if this is the plea negotiation that we can get to, that isn't ideal, I mean, you can't always get an ideal situation, but we want to try to minimize, you know, potential exposure, but he, he was in a very difficult spot immigration-wise no matter what.

Q. Okay. So is it fair to say then that you just gave him the solid advice of this is going to be a deportable thing, given your status you're deportable anyway, but we're going to try to mitigate that as much as possible --

A. Uh-huh.

Q. -- and then there was a discussion about DACA and trying to maybe find a way for him to renew, which you knew he wouldn't be able to --

A. Uh-huh.

Q. -- and you told him and then for any other consequences you referred him to Ms. Ghio, but most of those conversations then focused around mitigating those two previous concerns.

A. Correct --

Q. All right, and then did INA 245(i) ever come up in any of your conversations?

A. No.

Q. All right. Did you find out at any point during your representation of him that he'd gotten married to a US citizen?

A. Yes, I, I, yeah.

Q. And based on your training and experience, would you have known that that clearly was an indic -- immigration issue that would be exacerbated or changed at

all by his criminal setting?

A. No --

Q. Why not?

A. I'm not an immigration attorney.

Q. All right, and actually I'd like to talk a little bit about the final week of this case before it went to a stipulated facts trial --

A. Okay.

Q. -- you were, do you recall the week of December, I believe it was December 16, 2016?

A. Uh-huh.

Q. So when the trial was?

A. Yes.

Q. Were you around that entire week?

A. No, I had a trial in Multnomah County.

Q. And were you --

A. It was a trial or hearing, I wasn't around, though --

Q. Were you able to communicate with the defendant up until that point?

A. Yes.

Q. And then were you able to communicate with him in the couple of days before the trial?

A. I would have been available, yes, I can't recall any specific conversations, though --

Q. Can't recall whether you did communicate with him?

A. I can't recall.

MR. KALLERY: All right. I have no further questions for this witness, Your Honor, thank you very much.

THE COURT: All right. Cross-examination?

MR. CONRY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CONRY:

Q. Ms. Mitchell, if I just can start at the end, the last week. These 300 pages there in the pleadings, some of those are emails you wrote that somehow I acquired, I think it was from Mr. Cervantes, it possibly could have been from your file, I don't know, but you don't recall that you had to go to Portland that week and that you were unavailable Wednesday, Thursday, and Friday?

A. No, I, I think I did recall that, I don't know specifically which days of the week, I know I was largely unavailable that week, though, due to my obligations in Portland.

Q. All right, and do you remember that you met with Mr. Cervantes before you split for Portland, Mr. Geiger was present, and you guys sent the plea offer to the government by email, and it was responded to but it was only responded

to after you were gone, you were headed to Portland.

A. I don't know what you, what document you're talking about.

Q. Okay. I'll return to that, I guess.

A. I just don't recall what, which specific email you're talking about.

Q. All right, I should be able to show it to you here. Now, early on in this case when I first got the case, isn't it correct I asked to meet with you and we were going to meet, but then somehow we never met and this is actually the first time I'm ever talking with you?

A. Correct.

Q. Okay. I asked you guys if you could possibly provide me with a declaration, maybe nobody'd have to testify and we could work things out, maybe, maybe not?

A. Right, so I guess if you want to clarify, you mean talking verbally in person, not via email, because we, yes, did --

Q. Right, right --

A. Okay, correct, then, yes, yes --

Q. It's fair to say our emails were very limited, I sent you a series of questions that you never answered?

A. Correct.

Q. Okay. So, for instance, you never advised me that you never spoke with Mr. Cervantes about adjustment of

status, right, until today --

A. Those, can you rephrase that without?

Q. Without what?

A. Without double-negatives, I'm sorry, I'm not trying to be difficult, I just don't understand what you said --

Q. Oh, no, lawyers are never difficult. Is it fair to say that the first that I'm learning from you that you never discussed with Mr. Cervantes adjustment of status, the first I would learn of that is today?

A. Yes.

Q. Okay, so that's kind of hidden on us, huh?

A. Excuse me?

Q. Strike that. You -- at the time you represented Mr. Cervantes, you did not know what adjustment of status was.

A. I think I had some vague idea, but it certainly wasn't something I knew anything about --

Q. You certainly knew what a family visa is.

A. No, I don't.

Q. Do you know what an I-130 is?

A. I don't.

Q. Okay. For that reason, when you have those kinds of issues, your law firm refers to Muntz and Ghio, is that right?

A. In this particular case, I don't remember if they were existing immigration attorney or the one we referred Mr. Cervantes to; they are not who I normally refer clients to, however.

Q. All right, fair enough. And then would it surprise you that Ms. Ghio actually did not represent Mr. Cervantes but only met with him on a single occasion, I believe it was on July 22, 2016, she did an intake on the case and then waved goodbye to him? Goodbye and good luck?

A. Well, wasn't -- was that before he was charged on this?

Q. It was after he's charged, I'm sorry --

A. Okay.

Q. -- I'll give you a few dates --

A. Thank you.

Q. Secret indictment's November 23, 2015, July 22, 2016 see Ghio, at -- it's just an intake.

A. Okay.

Q. And so would it surprise you that she did not represent Mr. Cervantes as of July 23, 2016?

A. I -- not really, I mean, a lot of times clients don't actually go and retain the immigration attorney; they -- I simply confer with the immigration attorney, which is pretty much what we did in this case.

Q. Okay, so the responsibility of *Padilla*, is that

the criminal defense lawyer's responsibility --

A. Uh-huh.

Q. -- or is that the immigration lawyer's responsibility?

A. It's the criminal defense attorney's.

Q. Okay. So you said you learned about 245(i) just recently?

A. Uh-huh.

Q. When?

A. Within the last week or so.

Q. Okay. And you find the statute complicated? The 245(i) statute? You find it complicated?

A. Yes.

Q. Okay, is it something where you could easily ask perhaps Ms. Ghio about it and say "What does this mean?" and she could tell you?

A. I suppose.

Q. Okay. You guys didn't do that, right?

A. Ask --

Q. Ms. Ghio about the 245(i) statute --

A. Unh-unh.

Q. -- and what it means to Mr. Cervantes. You're nodding your head no?

A. I'm sorry, I am -- no, I did not ask her that.

Q. Okay. Are you aware, it sounds like you're not,

but just to be sure, are you aware that as of November 22, 2015 Mr. Cervantes could become a legal permanent resident through adjustment of status under 245(i)?

A. I was not aware, I'm not an immigration attorney.

Q. Okay. I feel like I'm beating a dead horse, so forgive me.

A. That's all right.

Q. Are -- were you unaware that Mr. Cervantes did not see an immigration counsel per se again until January 3, 2017 after the stip facts trial?

A. I was not, I, I think I was not aware of that based on what he --

Q. You won't debate that, would you?

A. Can you ask me again, please?

Q. Okay, I'll ask you another way. Would you debate or would you disagree at all with the notion that Mr. Cervantes was without the help of immigration counsel from July 23, 2016 until January 3rd of 2017?

A. Well, I don't know I disagree with that, I'd have to say.

Q. Excuse me?

A. I disagree with that.

Q. On what basis?

A. That, well, I guess what context do you mean, I mean, did he have an immigration attorney representing him

another context? The scope of what when I am conferring with immigration attorney in the criminal defense situation is a limited scope, we're not talking about other avenues of immigration law, I'm talking specifically to or speaking to how would these potential guilty pleas impact, what are the consequences? If I can't easily ascertain it from the statute, then I talk to the immigration attorney and they can say, well, this is a potential possibility, this is a possibility, because that's --

Q. You would --

A. -- about the scope --

Q. -- you would agree that *St. Cyr* indicated, and *St. Cyr* was cited in *Padilla*, that if relief is available from potential deportation, the immigrant should hear about it, right?

A. The potential avenues for relief?

Q. Yeah.

A. Well, yes, but I don't think adjustment of status is one of those avenues.

Q. Well, adjustment of status is potential relief from deportation, right? You become documented.

A. That assumes the person doesn't have a reason to be deported, I believe, because I, I think the way we're -- you're analyzing it is maybe incorrect that if somebody, relief from deportation would mean something like are they

able to bond out or do they have --

Q. I'm sorry, I can't hear you.

A. I guess I'm maybe understanding relief from deportation differently than you are and so maybe you can tell me what you mean by relief from deportation.

Q. Hm, I could ask you questions.

A. Right, I'm sorry, I'm not trying to be --

Q. Are you familiar with 212(c)?

A. No.

MR. CONRY: Okay. I'm sorry, too, I just -- it's a difficult case, I think, for all of us.

Your Honor, I'm going to the -- may I have a minute, I've got a bunch of questions, I probably maybe have a couple of, I appreciate it.

THE COURT: Sure.

MR. CONRY: I -- you may have already answered this, plea -- I'll just read it to you.

BY MR. CONRY: (Continuing)

Q. Did you tell Mr. Cervantes that after he completed probation successfully and the attempted compelling prostitution charge was dismissed, he would still be virtually certain to be deported from the United States?

A. I believe I would have said something similar. They're still convictions, deferred sentence is still a

conviction immigration-wise --

Q. And you're positive you talked to him about deferred -- not deferred sentences, but admissions, even if they're later dismissed, remaining deportable?

A. Absolutely, that's really important for, for --

Q. Of course it is.

A. -- criminal defense attorneys, their clients to know. There's considered convictions.

Q. Did you talk with him what might happen if he was picked up by immigration the day after he entered his plea?

A. I would, part of my general practice is to talk about what would happen, and so if you are pleading guilty to anything it would protect -- you know, raise your, raise immigration's potential awareness of you, you want to try and keep those clients off the radar as much as possible, but if you were to be picked up, you'd be subject to mandatory removal, yeah, so I would have discussed that, I just don't remember an exact conversation going over that.

Q. Do you think you might have told him if he would have done 22 to 23 months in prison on the attempted compelling prostitution because he'd been unable to complete his probation?

A. Can you repeat that?

Q. Yeah, remember the attempted compelling prostitution?

A. Uh-huh.

Q. If he didn't complete probation, do you remember it would turn into a 23- to 24-month prison sentence?

A. Right.

Q. So how's he going to complete probation if immigration has him? Isn't that kind of a problem with the deal?

A. That's one of the risks that you have to take, it's deals aren't perfect; trust me, I wish they were.

Q. Okay. Do you think you told Mr. Cervantes that if they picked him up, they being immigration authorities, that he could wind up doing a 23 to 24 months?

A. Well, yeah, if we had discussed that, but the fact is the Marion County prosecutors office are reasonable and usually they're not going to try to terminate somebody pro -- on probation if they are in immigration custody, they've been really good about working, I know in other cases I've had, with me where they're not seeking failures-to-appear or terminations of probation because --

Q. Well, that's good to hear.

A. It's appreciated, yes.

MR. CONRY: I appreciate your honesty, I -- Your Honor, I don't think I have more questions, I think we --

THE COURT: All right.

MR. CONRY: -- have the issues.

THE COURT: Any redirect?

MR. KALLERY: Not from the Defense --

THE COURT: All right.

MR. KALLERY: -- Your Honor, sorry.

THE COURT: Okay. May this witness be excused?

MR. CONRY: Sure.

MR. KALLERY: Yes, Your Honor.

THE COURT: All right.

THE WITNESS: Okay --

THE COURT: Thank you very much --

THE WITNESS: Thank you.

THE COURT: All right. Do you have any additional witnesses?

MR. KALLERY: Your Honor, I do not at this time, I'd rest.

THE COURT: Okay. And you don't have any witnesses at this point to rebut, okay --

MR. CONRY: No, I don't want to call Dan back, no, I don't want to call Dan up, he's fine, but --

THE COURT: Oh, okay.

MR. CONRY: -- I would like five minutes if I can get it.

THE COURT: Okay. And then that's going to give us about 35 minutes, so we're just going to need to focus in on the clear things, okay --

MR. CONRY: All right, I'll try to go 20 or less if I can.

THE COURT: Okay.

MR. CONRY: Thank you --

THE COURT: And we'll come back at 3:25.

COURT CLERK: We're off the record.

(A recess is taken.)

THE COURT: All right. So now we'll move to closings statements. Mr. Conry.

MR. CONRY: Okay, Your Honor.

PETITIONER'S CLOSING ARGUMENT

MR. CONRY: I'm looking at the amended petition. I think what we have is admissions from criminal defense counsel, and I take it that their admissions are they didn't know what they were doing. They didn't know what they were doing in terms of this gentleman having ability to adjust status prior to the case going forward. And once the case goes forward, he enters a plea, he's not only deportable, which is the word they like to focus on, but he's inadmissible. They admit their lack of knowledge, and I'm speaking of both criminal defense counsel.

First, Mr. Geiger defers to his associate and she admits not knowing anything about an I-130. Your Honor, an I-130's the most basic of instruments, it's a petition for alien relative that you use to adjust status to become a

permanent resident through US citizenship wife, for instance. They obviously sought to advise the defendant on the immigration consequences of his conviction, they told him he's deportable, they told him what he was before the criminal charge even started, he was deportable, and the structure of the deal that they made is to hide things if they can on the immigration service, they're hoping that the immigration service doesn't pick him up. He's not satisfied with that, he entered an unknowing plea because he didn't know that's what he was doing, he didn't know that he's jeopardizing his ability to adjust status, they admit it, I don't know how I can go on for 25 minutes on this, I mean, they admit the flaw in the advice they gave. Miss --

THE COURT: Well, help me then with that argument. If -- so tell me how they admitted that when their testimony was we took the position that this is going to be deportable, you're -- ICE is going to arrest you, so in that context, help me with why they've admitted --

MR. CONRY: Because --

THE COURT: -- they gave bad advice.

MR. CONRY: If you're playing a game of poker, Your Honor, you don't ignore an ace. There's an ace in his hand, it's called 245(i) --

THE COURT: Okay, but you are focusing --

MR. CONRY: -- that they can --

THE COURT: -- you are focusing on immigration. These people are forkus -- focusing on 2605 State Street the rest of your life --

MR. CONRY: Your Honor, I'm foke --

THE COURT: -- that's what they put forward --

MR. CONRY: -- I'm focusing on everything --

THE COURT: Okay.

MR. CONRY: -- the requirement for counsel is to focus on everything, not only 2605 State Street, not only forever in prison, if that happened. You know, the other thing that might have happened is an acquittal, that's why I loaded you up with the paper on the underlying case, Your Honor, there's an affidavit from or declaration from a lawyer who was involved in this case a great deal on the custody side of it and she said she's certain this man never would have entered into a plea had he known the immigration consequence, she's also certain that he's innocent, she's also believed she would have went to trial on it if she was the criminal defense counsel because it's imminently triable. Oh --

THE COURT: So you're going to use an attorney who is family law to then give advice to the Court about what a criminal attorney should do. Is -- why -- I mean, those are all things she's -- or I guess that is being said

there, so how does that help me? You're telling me --

MR. CONRY: Well, Your --

THE COURT: -- his custody lawyer was saying, oh, yeah, you --

MR. CONRY: Your Honor.

THE COURT: Okay, go ahead --

MR. CONRY: If I can. What I'm talking about is this -- we -- I have to show prejudice, right, I have to show a rational person would have insisted on going to a jury trial, that's what I'm attempting to show the Court through that --

THE COURT: Okay, okay, I --

MR. CONRY: -- declaration, I'm not trying to say whatever a family lawyer says --

THE COURT: Sure.

MR. CONRY: -- should go in this courtroom.

THE COURT: Okay, I'm just, I was just asking you to focus in on I heard both lawyers say we pointblank said this isn't a great deal, but it's either prison for the rest of your life or be deported if ICE ever finds you --

MR. CONRY: And the heart --

THE COURT: -- so that's what they said --

MR. CONRY: Okay.

THE COURT: -- okay, that's what they're telling me; now why, so I just wanted you to say why is that

inappropriate?

MR. CONRY: Because he was never told the ace card, they --

THE COURT: Beg pardon?

MR. CONRY: -- he was never told the ace card, the ace card he has relief available, they have a case they can go to trial on and win, he was never told that.

THE COURT: Okay, and I heard Mr. Geiger testify today, so I understand what their opinions were, but that's all I was wanting you to do is tell me the focus of that, so go ahead, I'm not going to interrupt you anymore.

MR. CONRY: Sometimes it's good when you interrupt, Your Honor. But I was asking the immigration counsel who was not an immigration counsel, Ms. Andrews or Ms. Mitchell, about relief available under *St. Cyr*, it's a 212(c) case and it's cited in *Padilla* and it says where relief is available, that's part of the information the immigrant needs when they're going to say whether or not, when they say whether or not they want to enter into the plea because they have to know the advantages and the disadvantages of the plea, so he's not told the disadvantages of the plea, it's flat, it's straight on with the PCR petition, and it's also affirmative mis-advice because they're giving advice on deportation, but they're not talking about how he can avoid it. But I'd like to

answer a question if the Court has one.

THE COURT: No, I just, the testimony I heard was this case was very likely to result in going to prison for the rest of your life, and I just know that was an important factor to those lawyers, I just wanted to allow you to address that any way you wanted to.

MR. CONRY: Your Honor, this is a classic defense case as far as trial goes, we have a classic custody battle going on for years where we know these cases where the person involved in the custody battle proceeds to have the child lie about sex charges, and I think the thing I liked about that declaration I mentioned from the family law lawyer is the claim of sex abuse came out when that -- well, the mother of the child was losing, she was losing everything in family court, so then she came up with sex abuse allegations, and also it's so interesting that the doctor involved in the case out of Woodburn, out of the Woodburn Pediatric, he talks about the child and he talks about the child at 183 to 185, and if you need to refer all this pattern of behavior would likely be diagnosed as a personality disorder, running to his father when he's not happy with his mother, complaining about his father when he's not -- to the mother about whatever she wants to hear when she's not happy with the father and, I mean, Wendy Bourg is a great witness, she's a great witness, and she's

gone into trials and helped win those trials in these kinds of circumstances, so that's where criminal defense counsel, to the extent they're talking purely about criminal defense, I think they're pushing it if what they're saying this guy would have been convicted, he had a good chance of winning the case, and I think they're pushing it to defend themselves, I think that's why they were defensive with me when I first asked them what was going on, I think that's the first, I think that's the reason that we first heard from these people that they didn't know anything about adjustment of status, the first we heard about that was today.

You can't advise on immigration consequences without knowing about adjustment of status, it's impossible. And it'ms certainly affirmatively mis-advice because it's left out of the equation, Your Honor, I don't think there's a better analogy than cards. If you don't have -- it's like not being able to call a witness; you have a witness, you know you can call a witness as exculpatory, you put it up, you can win, if the witness doesn't exist, it's that good, this adjustment of status evidence is that good. They don't even know this piece, they have to know this piece, to advise you have to know this piece --

THE COURT: Let me ask you what significance in

the criminal case does a change of immigration status have in the criminal case?

MR. CONRY: If he's a citizen of course he can't be deported, if he's a legal permanent resident --

THE COURT: No, I'm talking about what's admissible in the criminal trial, what -- does that give him an immediate get-out-of-jail card --

MR. CONRY: No, of course not, Your Honor--

THE COURT: -- to my understanding --

MR. CONRY: -- of course not --

THE COURT: -- okay, from my understanding, it's totally different than any issue that's going to come into the criminal case, because he's going to have to deal with the charges that he has, all Ballot Measure -- or most Ballot Measure 11 --

MR. CONRY: Your Honor, Your Honor, I agree, but the point is that the Sixth Amendment right to counsel --

THE COURT: Okay.

MR. CONRY: -- this isn't a collateral issue when it comes to advised on immigration consequences of conviction, it's the lawyer's duty, and --

THE COURT: Okay.

MR. CONRY: -- I understand where criminal defense counsel may not be aware of it, but they have to be, they have to be to be able to advise, they're trying to

advise on their own, they like to think, well, maybe he's represented, but he's not, they don't talk with immigration counsel about does he have other relief available, the question is not even asked.

THE COURT: Uh-huh. And they have a client that's out of custody and, if I believe one of the lawyers, he tells me he to this day didn't even know until today or something --

MR. CONRY: Right.

THE COURT: -- recently --

MR. CONRY: Right.

THE COURT: -- that his client was married to a citizen, so --

MR. CONRY: Maybe I should stop there --

THE COURT: -- this is a complex issue, but I've got you sidetracked, you tell me what you want me to hear.

MR. CONRY: I don't feel sidetracked, Your Honor --

THE COURT: Okay.

MR. CONRY: -- I would want to add what? You know, does this matter? Sarah Baldwin indicates Lydia Cruz is untruthful, manipulative. The emails show, and I didn't bring the emails out, but the emails show it was the same week of the plea that they're trying to negotiate the plea and it didn't get anywhere, and then their immigration

lawyer within the firm, if I may, Ms. Mitchell, was able to talk with Cervantes about what was going on, what this all meant, it never happened, they never had that conversation. Criminal defense lawyer says to undocumented immigrant "You're being deported," it's only part of the puzzle, that part of what he needs to know in order to be able to make knowing, voluntary plea, he's supposed to know the legal consequences of the plea, he doesn't, he's hoping he's going to be able to stay in the country, maybe he's hoping against hope, Your Honor, but --

THE COURT: Sure.

MR. CONRY: -- still he had a right to be advised before he entered the plea that you're done. And I guess Mr. Geiger said you're out of here, but it was without knowing the inadmissible piece of the how to become a permanent resident, so a good guess out of ignorance isn't fair advice, Your Honor. I'll stop, unless the Court has questions.

THE COURT: No, I do allow a brief rebuttal argument, so --

MR. CONRY: Okay.

THE COURT: So, Defendant's closing.

DEFENDANT'S CLOSING ARGUMENT

MR. KALLERY: So, Your Honor, given that I've already argued a fair amount on this case when it came to

the directed verdict part of it, my response is going to be very short, and when it comes down it, it's going to be about, first of all, the defendant's asserted confusion. He said in his declaration he was confused, he told you today he was confused. In spite of that, during his testimony, he revealed several things that I already addressed in that directed verdict, but then you also had two defense counsel who got on the stand today, told you they talked to this defendant for between five and ten hours each, that they'd had substantial conversations on this piece of it, that they had no concerns during any part of that time that he understood what they said, that he wasn't tracking the conversation, that he wasn't clear about the information that they were giving him, no concerns whatsoever, they said he responded accurately to questions, that he responded appropriately, that he knew what was happening, and that both of them told him straight-up flat-out this is a deportable offense. That, Your Honor, is the easily ascertainable piece of this.

And when it comes to the *Demorolla* (Phonetic) case that I cited earlier where they talk about *St. Cyr*, where they talk about *Padilla*, they finally recognize that, as the court noted, the Supreme Court, there will be numerous situations in which deportation consequences of a particular area are unclear or uncertain. In those

situations, obligations of criminal defense counsel are no different than when the criminal law is unclear or uncertain. They go on to quote, when the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences, but when that deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear, so, Your Honor, they gave correct advice on what was truly clear, he's deportable, period, we're done, but then they didn't just stop there. Instead what they said is there may be other consequences here because, quite frankly, they recognized that they don't know what they don't know. Neither of the lawyers that took the stand today is an immigration attorney. Ms. Mitchell, to be perfectly clear, said that she deals with *Padilla* and she deals with immigration as part of her criminal practice, she isn't somebody who should know what all of the tools of the immigration trade are, that's not her job. Her job is to know what *Padilla* requires, which is how does a criminal conviction, a criminal case affect immigration consequences? But not just immigration consequences; really only the reasonably ascertainable consequences. That's really what we're talking about today.

So with that, Your Honor, they gave that advice, this client was not confused about it, and beyond that, Your Honor, unless you have any questions, I will rest on my brief. Thank you.

THE COURT: All right.

MR. CONRY: Your Honor?

THE COURT: So I do allow, yeah, a rebuttal argument. Go ahead.

PETITIONER'S REBUTTAL ARGUMENT

MR. CONRY: Ms. Mitchell can advise legal permanent residents about deportability, the problem is there's 11 million undocumented people here who have, you have to address inadmissibility with them, not deportability; that wasn't done. To miss 11 million people, people's circumstances when you purport to be giving immigration advice to people, is ineffective assistance of counsel. I-130 --

THE COURT: And so it comes right down then your argument is because they did not assist him in trying to change his status immediately while the cases were pending, that that is their error.

MR. CONRY: No, Your Honor.

THE COURT: Okay, well, then tell me precisely what it is, because I'll tell you just because you amended the petition and so that changed a focus here because you

were originally alleging false statements, okay? Now it's amended, so I need to have a clear picture, what did they do that was an error?

MR. CONRY: What I'm trying to say, Your Honor, and I'm sorry if I'm not being clear, is that they didn't advise about INA 212, which covers the inadmissibility grounds of removal, they advised about 237, the deportability grounds, they missed the correct advice and to try to give the correct advice to somebody who falls on the inadmissible side of the immigration statute, 11 million people, as opposed to the legal permanent residents who are here, who if they were told you're deportable, it's an aggravated felony, you have no defense, and that -- and they're being deported virtually certain because let's say they pled to delivery of controlled substance commercial offense, that's great advice and that can be given very easily. This isn't harder, Your Honor, I understand it, it's the INA, it's the statute, you've seen me, I'm no genius, I -- this is easy, and to say that criminal defense lawyers can't read a statute, which I guess is what we're saying if they can't read 245(i), is it's not reasonable.

THE COURT: Okay. Well, I did make a few notes as testimony was coming today, as the petitioner started, you were asking or counsel, Petitioner's counsel was asking

him about tell us about what you were told. And he prefaced things with "What I remember" and he told us what he remembered. Now, he doesn't remember what both attorneys said that they told him.

And so it puts me into a position where one attorney, Mr. Geiger, was saying it was very direct, if ICE finds you, you are gone, and the petitioner and he -- they had spent quite a bit of time talking about deportation because they knew if he got convicted that was going to be an issue and they also knew he faced all of this prison time with serious charges, and I'm not going to put words or into Mr. Geiger's mouth, he explained this that it was very difficult, and he came down to, in Ms. Mitchell's terms, deals aren't perfect, but we were trying to get, they were trying to get the best deal that they could and to try to protect against any immigration negative consequences, but the charges that you're dealing with were not going to be something they could get away from just because of the charges.

I do not find error by trial counsel in this case. This started out, as I said earlier, the petition was affirmative misrepresentations I guess was really what this case was about, but then it's been amended and the testimony now is, well, I just didn't understand it, and that's the way the petition goes forward, well, their error

was that they didn't explain things to him in terms or in a way that he could understand, and yet both attorneys today said the whole focus here was with these kind of charges, with huge amounts of prison facing him, and I'll just -- Mr. Geiger's statement about occasionally, yeah, somebody gets off of that, but not very often, here's that situation presented and you will be deported, we're not trying to tell you that you can get away from this, but the harsh reality as I look at this system, even the petitioner's expert today kept saying "I believe" and he kept modifying everything that he said, and clearly immigration law, I think one of the defense lawyers said this, immigration law changes all the time, priorities change all the time, enforcement policies change all the time, the law might be the same, but how it's interpreted, how it rolls out, and what ICE decides they're going to do on a particular day, that's really all outside of our purview, and as I looked at this, I, particularly with Petitioner's memo after the amendment, I was unclear what under *Padilla* you were pushing, but after the testimony, I heard that and it was more of an error-of-omission, I guess, kind of argument, but I do not see error by trial counsel, I think they made an effort to provide information that is easily ascertainable, they gave him a referral to an immigration lawyer, although I guess this wasn't the names they usually

give, but when Petitioner testifies today that when he went to Attorney Muntz and he said that he could be deported immediately at anytime and his testimony was "That's the first time I'd heard that," and yet both defense lawyers in the criminal case said that's what we were telling him over and over again.

So there is a credibility issue, and I find that both Mr. Geiger and Ms. Mitchell were credible, appeared to be supported by the record and the circumstances of the case, and I find Petitioner's testimony on this matter not credible.

So with -- the investigation is the first allegation and then because he mistakenly believed he didn't have witnesses, but that was a mistake and in fact he did have expert witnesses, so I don't see that Petitioner has proved the lack-of-preparation allegation, and then didn't use words or language in which he could understand, and again the testimony of the lawyers was opposed to this on these issues and, I believe, credible.

I do not see error, I do not see prejudice. The issue of due process analysis here as I look at the evidence and what I have heard, it appears to the Court that this was a knowing, voluntary, and intelligent process here, admission and the use of a stipulated trial as opposed to an admission of guilt for the one charge. But I

do not find a violation of due process, I do not find a basis to reverse the *Gonzales* case, and believe that is still good law in Oregon.

So as I view all of this, I will deny the petition because I believe Petitioner has not proved his allegations, and the important thing to remember about this is I will sign that order today, so you will have 30 days from today to give notice to the Court of Appeals if you wish to appeal this ruling, and the only thing, the only reason I bring that up is these deadlines are very important, so I am going to ask that your counsel just assist you in making contact with the public defense corporation and appellate attorneys just so, if you wish to appeal, you get that notice in in the next 30 days. Okay? So that's very important.

Mr. Conry, can you help him at least contact the appellate public defense corporation?

MR. CONRY: Of course.

THE COURT: Okay. Have I neglected to cover any issues from Petitioner's perspective?

MR. CONRY: I was just noting, Your Honor, I'm actually not sure if I should tell you this or not, I don't think the Court talked about affirmative mis-advice.

THE COURT: I beg pardon?

MR. CONRY: I don't think the Court talked about

affirmative mis-advice, did it?

THE COURT: Affirming -- I'm just not hearing the term. Affirming?

MR. CONRY: I don't believe the Court talked about affirmative mis-advice --

THE COURT: Oh, oh --

MR. CONRY: -- once you begin to talk about immigration consequences --

THE COURT: Okay.

MR. CONRY: -- you got to get it all the way through and you got to get it right.

THE COURT: Okay. And I would say that the record is clear about what was done and said and presented and there is a dispute among the three individuals about what was told, and I understand you have a little bit different argument on that and I think that's established, it was not credible to the Court that there were errors of omission or bad advice, and so I'll clarify it in that manner.

MR. CONRY: Okay. Thank you.

THE COURT: All right. Have I neglected to cover anything from Petitioner's perspective --

MR. KALLERY: Nothing from the State, Your Honor.

THE COURT: Okay. Thank you, all, very much, we'll be adjourned, we've got a 4:00 o'clock case and they

need to make sure that they have this courtroom open, so, all right, thank you, all, very much, I appreciate it.

(Whereupon, the proceeding in the above-entitled matter was concluded at 3:54 p.m.)