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

Immigrant Defendant Petitioner,	)	Case No. C010756CV
vs.	)	Memorandum Opinion Granting Petition for Post-Conviction Relief
STATE OF OREGON, Respondent.	)	

Petitioner has established by a preponderance of the evidence the allegations of his Petition, specifically that he was denied effective assistance of counsel as alleged in paragraphs 7(A)(1)(a), (b), (c) and (d), and 7(A)(2)(d). Furthermore, Petitioner has established that he had been prejudiced by the ineffective assistance of counsel in that he would have proceeded with the Motion to Suppress and trial and not pled guilty, in Washington Count Case Number C001713CR, if he had known that his conviction would result in mandatory removal (deportation) from the United States. The court is therefore granting petitioner's Second Amended Petition for Post-Conviction Relief and ordering that his conviction in C001713CR be vacated and that said case be set for trial.

MEMORANDA OPINION

On October 30, 2000, petitioner's then attorney, _____, was approached by

Deputy District Attorney Bracken McKey a few minutes prior to the time scheduled for a Motion to Suppress hearing in petitioner's criminal case (C001713CR), and Mr. McKey suggested a resolution to the case. The proposed resolution was that the petitioner plead guilty to one count each of Delivery of a Controlled Substance (substantial quantities) and Possession of a Controlled Substance (substantial quantities), with petitioner to receive "optional probation". Petitioner's counsel knew that petitioner was a non-citizen, that petitioner was concerned about any immigration consequences of a conviction, and petitioner's attorney gave petitioner reason to believe that by not being incarcerated petitioner had a reasonable possibility of avoiding removal (deportation); see Petitioner's Ex. 10, Deposition of _____ pages 9 and 10. Under the terms of the Illegal Immigration Reform and Immigrant Responsibilty Act of 1996 (IIRIRA), 8 U.S.C. 1229b(a)(3), there was virtually no chance that petitioner would not be subject to removal, at the latest in 2002 when he tried to renew his "green card", as he was pleading guilty to an "aggravated felony".

The court is convinced by a preponderance of the evidence that petitioner would not have pled guilty, and would have chosen to proceed with the Motion to Suppress and trial, if he had known the immigration consequences of his guilty plea. In addition to petitioner's testimony, there are several factors that convince the court of this. Petitioner is a long term permanent resident of the United States, and has strong family and business ties here. He has a child who is a United States citizen, and is the owner of a local retail business. Furthermore, from the testimony of Deputy District Bracken McKey, it is apparent that petitioner had a reasonable chance of prevailing on the Motion to Suppress and at trial, if the suppression motion had been successful; if he had known that his guilty plea to DCS would result in

mandatory removal from the United States, it is unlikely that he would have agreed to the plea agreement. It is apparent to the court that he was more concerned about the immigration consequences than he was about a potential jail or prison sentence.

The State has argued that petitioner was aware of the immigration consequences of his plea because of a June 7, 2002 letter he had received from his first attorney, Constance Crooker, Exhibit 3. However, this letter was sent to petitioner prior to any charges having been brought against him. The letter referred to "drug trafficking", and not specific charges, and went on to state that "[i]f immigration were to start deportation proceedings, you could ask for 'cancellation of approval'". Furthermore, Ms. Crooker's next letter, Exhibit 4, addressed to petitioner's new attorney _____ after the Grand Jury had indicted petitioner for two counts each of DCS and PCS, substantial quantities, stated: "I did some immigration research for this client, resulting in the advice in the enclosed June 7th letter [Exhibit 3]. Apparently there is some possibility, depending on his length of residency, that he might have defenses to a deportation based on the length of his residency." There was no mention in that later letter of petitioner not having any defenses to removal available to him if he were convicted of "drug trafficking."

This court is convinced that petitioner believed he had some possibility of not being "removed" if he served no incarceration time and if he did well on probation. It is clear that his attorney believed this, and did not understand, or convey to petitioner, the ramifications of IIRIRA that became effective in 1997 (prior to 1997, petitioner had an excellent chance, based on his longevity of legal residency in the United States and his minimal criminal record, of not being deported; for a discussion of the history of the various Immigration Acts, see

Immigration and Naturalization Services v. St. Cyr, 523 U.S.____(2001). The court is convinced that the petitioner, because of inadequate assistance of counsel did not understand the immigration ramifications of his plea, and that petitioner would not have pled guilty if the ramifications had been explained to him by his attorney. Therefore, his petition for post-conviction relief should be granted, and his guilty plea in Case Number C001713CR should be vacated. See Long v. State of Oregon, 130 Or. App. 198 (1994), and Saroian v. State of Oregon, 154 Or. App. 112 (1998).

DATED October 14, 2001.

Nancy W. Campbell, Circuit Court Judge