IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

[redacted],

Defendant.

NO. [redacted]

DECLARATION OF ENOKA HERAT

1. I, ENOKA HERAT, swear under penalty of perjury that the following facts are true and accurate:

2. I am a licensed attorney in the State of Washington. I am over the age of 18 and I am competent to testify to the matters set forth herein. I have practiced immigration law exclusively since 2010 and have developed a particular expertise in the immigration consequences of crimes. Since 2012, I have served as the Resource Attorney of the Washington Defender Association's Immigration Project (WDA's Immigration Project).

3. Founded in 1999, and funded by the legislature, WDA's Immigration Project serves as the primary immigration-related resource for public defenders representing noncitizen clients in Washington. We provide individual case assistance, practice advisories, online resources, and regular trainings to criminal defenders throughout Washington State. Through these efforts, we assist criminal defenders to: 1. identify the immigration consequences associated with their client's criminal charges and plea offers; 2. Develop strategies to avoid or mitigate these consequences in the course of their representation; and, 3. Assist their noncitizen clients in making informed choices for resolving their criminal charges.

4. Any criminal defense attorney in Washington may contact the WDA office or email Immigration Project staff directly and seek counsel as to the possible immigration consequences associated with a particular criminal charge and/or plea offer. Additionally these consultations provide defense

counsel with best practices and strategies to mitigate or avoid adverse immigration consequences where possible. Case consultations take, on average, 20 minutes of defense counsel's time and are provided at no charge to the defendant or defense counsel.

5. Since the inception of WDA's Immigration Project, I, along with the other immigration law experts on staff, have conducted over 20,000 individual case consultations and have worked with defenders in every Washington county. In 2014 alone, we consulted on over 3,092 cases, of which 1,656 were in King County. Additionally, we have conducted over 150 trainings throughout Washington.

6. I have reviewed the relevant criminal and immigration documents in relation to Mr. [redacted]'s criminal case as provided to me by his attorney, [redacted].

7. Mr. [redacted] is a native and citizen of Senegal who lawfully entered the United States, most recently in 2008 when he was 18 years old, and has lived continuously in the U.S. ever since. He is a Lawful Permanent Resident (LPR aka green card holder).

8. On January 29, 2014, Mr. [redacted] was charged in King County with Delivery of a Controlled Substance, to wit: cocaine, in violation of RCW 69.50.401(1)(2)(a). He has no other criminal history.

9. On July 10, 2014, Mr. [redacted] agreed to participate in Drug Court. Drug Court is a diversion program that provides an opportunity for drug rehabilitation and treatment, and if successfully completed, results in the original charges being dismissed. WDA's Immigration Project worked closely with the King County Drug Court and stakeholders to draft a Drug Court agreement that insulates noncitizen defendants from immigration consequences. The agreement includes language that ensures that participation in Drug Court does not constitute a conviction under immigration law for a deportable drug offense.

10. Mr. [redacted] participated in the Drug Court program for over a year and half with much success. However, in December 2015, he decided to terminate. The reasons he made this decision are unclear.

11. On December 15, 2015, Mr. [redacted]'s participation in the King County Drug Court was terminated and he was found guilty of Delivery of a Controlled Substance under RCW § 69.50.401(1)(2)(a).

12. A conviction for delivery of a controlled substance triggers the drug trafficking aggravated felony ground of deportation. *See* 8 U.S.C. § 1101(a)(43)(B). Aggravated felonies have the most severe immigration consequences including virtually automatic deportation and a permanent bar on returning to the U.S. As the U.S. Supreme Court recognized in *Padilla v. Kentucky*, " [i]f a noncitizen has committed a removable offense . . . his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the [Immigration Judge] to cancel removal for noncitizens convicted of particular classes of offenses. *See* 8 U.S.C. § 1229b. Subject to limited exception,[1] this discretionary relief is not available for an offense related to trafficking in a controlled substance. *See* § 1101(a)(43)(B); 1228." 130 S.Ct. 1473, 1480 (2010).

[1] The "exception" that the Supreme Court referred to is the Convention Against Torture relief (CAT). CAT provides that no person may be removed to a country where it is "more likely than not" that such person will be subject to torture at the hands of the government. If granted CAT, one still loses their LPR status and is ordered deported. However their actual physical deportation is deferred until such time that the likelihood of torture

13. Thus, with a drug trafficking conviction under RCW 69.50.401(1)(2)(a), an immigration judge cannot even consider the circumstances of Mr. [redacted]'s life and is precluded from exercising discretion to cancel Mr. [redacted]'s deportation. Therefore, he will be ordered deported to Senegal.

14. Under *Padilla*, the Supreme Court held that to provide effective assistance of counsel to a noncitizen defendant pursuant to the Sixth Amendment, defense counsel has a duty to consult available resources to inform themselves of the immigration consequences of the charge and plea offers at stake. *Id.* at 1484. Moreover, defenders must provide the defendant with affirmative, accurate advice regarding these consequences. *Id.* The Supreme Court has also made clear in *Padilla* that defense counsel's duty includes ensuring that negotiations are informed by counsel's understanding of the immigration consequences at stake for the defendant. *Id*. at 1486*; see also*, *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). The Padilla Court held that defense counsel's Constitutional duties to identify, advise on, and seek to mitigate, immigration consequences have been recognized since at least 1995. *See*, *Padilla* at 1483.

15. We do not have a record of Mr. [redacted]'s court appointed counsel, [redacted], consulting with WDA's Immigration Project regarding this particular case. While Ms. [redacted] has consulted us on other cases, we do not have a record of her consulting us on Mr. [redacted]'s case.

16. There are two points at which Ms. [redacted] could have consulted with WDA's Immigration Project staff during her representation of Mr. [redacted]: at the time he was charged, and upon terminating his Drug Court participation. At both points, we would have provided her with the support and analysis to competently navigate the immigration issues. Additionally, we would have assisted her in her communications with her client and the prosecutor to obtain the resolution that Mr. [redacted] needed to remain lawfully in the country. This advice could have ensured that Mr. [redacted] made an informed decision at both the point of entering the Drug Court program and upon termination.

17. Specifically, WDA's Immigration Project staff would have informed Ms. [redacted] that it is clear under the immigration statute and caselaw that a conviction for a drug trafficking offense triggers the drug trafficking aggravated felony ground of deportation, resulting in virtually automatic deportation. *See* 8 U.S.C. § 1101(a)(43)(B). We say "virtually" because, after a conviction for a drug trafficking aggravated felony, the only possible way of remaining in the country is if Mr. [redacted] were granted relief under the Convention Against Torture (CAT). *See*, *supra* § 12 fn 1. As mentioned, CAT is extremely difficult to obtain, and it still results in an order of deportation.

18. Had Ms. [redacted] consulted us at the initial negotiations stage, we would have advised that Drug Court was a good resolution for immigration purposes. Agreeing to Drug Court does not constitute a conviction for immigration purposes since there is no finding of guilt or facts sufficient to find guilt. *See*, 8 U.S.C. § 1101(a)(48)(A). Thus, if successfully completed, it would not result in a conviction for immigration purposes and thus would not trigger any grounds of deportation. We would also have advised her and her client, that the risk of termination in Drug Court was significant since a resulting conviction would be classified as an aggravated felony, resulting in the loss of her client's lawful permanent resident status and virtually automatic deportation.

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subsides. Establishing the likelihood that one will be tortured is extremely challenging. *See*, Immigration Judge Benchbook, § 241b. Available here: https://www.justice.gov/eoir/immigration-judge-benchbook-section-241b.

19. It appears that the difficulties with this case arose when Mr. [redacted] decided to terminate his Drug Court participation. Had Ms. [redacted] consulted with us at the point of termination, we would have informed her that it was imperative to strongly and clearly advise her client that termination of the drug court agreement would result in a conviction that would trigger his deportation to Senegal. We would have also advised her that it was critical to negotiate to an alternative to Delivery of a Controlled Substance. We would have advised her that negotiating to an alternative would be the only way to avoid Mr. [redacted]'s deportation.

20. We would also have informed Ms. [redacted] that such an outcome could be avoided by negotiating with the prosecutor at the time of termination to resolve the delivery charge by a plea to Solicitation to Deliver pursuant to RCW 9A.28.030. The Ninth Circuit Court of Appeals has long held that solicitation to commit drug offenses do not trigger the drug trafficking aggravated felony ground, or the controlled substance grounds of deportation. *See*, *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997). A conviction under this statute regardless of the sentence would not trigger the aggravated felony ground or the controlled substance deportation ground and thus, would not have rendered Mr. [redacted] deportable.

21. We would have counseled Ms. [redacted] that her client's ability to remain in the U.S. hinged on obtaining a plea to Solicitation to Deliver. We would have provided her with the support to vigorously advocate and negotiate for such a resolution with the prosecutor. In our experience, we have seen that a plea to Solicitation to Deliver from delivery is not uncommon, particularly for a first time offender such as Mr. [redacted]. Had he still not been successful, we would have explained to her to clearly advise her client that a conviction for delivery of a controlled substance would result in virtually automatic deportation to Senegal.

22. In the course of our case consultations, we regularly provide this type of advice and support to defense counsel. And we regularly see prosecutors, informed with this additional information (including that the defendant agrees to more jail time, greater fines, and additional probation conditions if necessary), consent to permit the defendant to plead to an immigration-safe resolution. Additionally, we also see defendants routinely agree to such additional punishments, in an effort to do everything possible to avoid deportation.

Signed this __th day of ____, 2016 at Seattle, Washington.

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Enoka Herat, WSBA #43347