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WASHINGTON STATE  
SUPREME COURT

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No.74309-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON

Respondent,

v.

JORGE MADRIGAL,

Appellant.

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MOTION FOR DISCRETIONARY REVIEW

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CARNEY & MARCHI, P.S.

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**MOTION FOR DISCRETIONARY REVIEW -1**

A. IDENTITY OF PETITIONER

Petitioner Jorge Madrigal, asks the Supreme Court of the State of Washington to grant his Motion for Discretionary Review of the Court of Appeals decision in Court of Appeals No. 74309-1-I, State of Washington v. Jorge Madrigal, King County Superior Court Cause No. 85-1-01481-9SEA. A copy of the Court of Appeals decision is attached hereto.

B. CITATION TO COURT OF APPEALS DECISION

The petitioner, Mr. Madrigal, seeks review of the Court of Appeals, Division I, decision in Court of Appeals No. 74309-1-I, which decision was filed on April 24, 2017. The Court of Appeals affirmed the denial of the Petitioner's Motion to Vacate Judgment and Sentence.

C. ISSUES PRESENTED FOR REVIEW

1. The Petitioner was not provided effective assistance of counsel before entering a guilty plea when Petitioner was not properly advised of the immigration consequences of pleading guilty to the charge.

D. STATEMENT OF THE CASE

1. Statement of Proceedings

Mr. Madrigal was charged with Unlawful Possession of a Controlled Substance, Heroin. (CP 1) On September 16, 1985, Mr. Madrigal, plead guilty to the charge and was sentenced to 35 days. (CP 70) On July 10, 2015, Mr. Madrigal filed a Motion to Vacate Judgment and Sentence. (CP 73) On October

25, 2015, the trial court denied the request. (CP 123) Notice of Appeal was timely filed.

Mr. Madrigal has no legal status in the United States. (RP 13) Mr. Madrigal testified via his declaration to the court in support of his Motion to Vacate his Judgment and Sentence. He testified that he was uneducated. (CP 123) At the time that he entered his plea, he did not read or write English. (CP 123) He testified that he was not informed that he would be deported by anyone. (CP 123) He further testified that he would not have plead guilty had he known of the consequence that he would be deported from the United States. (CP 123) Had he been informed that he would be deported from the United States, he stated that he would have fought the criminal charge. (CP 123)

Mr. Sidney Glass was the attorney appointed in 1985 to represent Mr. Madrigal. (RP 8) Mr. Glass testified that his standard procedure was to negotiate the least amount of jail time. (RP 8) He would inquire about his client's immigration status. (RP 9) He never researched any relevant immigration law before he proceeded with a guilty plea. (RP 9) Other than reviewing the language of the plea with his clients, he would take no other actions regarding the consequences of the plea on immigration status. (RP 9) A client who plead guilty would not receive any additional information regarding immigration consequences from him. (RP 10)

After hearing testimony, the trial court denied the Motion to Vacate Judgment and Sentence. The court found that Mr. Glass had advised the defendant he would be deported. (CP 123) The court found that the defendant received effective assistance of counsel in this matter prior to the entry of the guilty plea. (CP 123) Mr. Madrigal challenges that trial court's finding that Mr. Glass provided effective assistance of counsel and that Mr. Madrigal was properly advised of the immigration consequences.

The Court of Appeals ruled that Mr. Madrigal's request was not time barred. The Court of Appeals also concluded that Mr. Madrigal failed to show ineffective assistance of counsel. (OD 7)Mr. Madrigal maintains that the court of Appeals erred as there were insufficient facts to support the Court's conclusion that he was provided effective assistance of counsel.

#### E. ARGUMENT

Due process mandates that a guilty plea be voluntarily entered. Due process requires that a guilty plea be knowing, intelligent, and voluntary. *Henderson v. Morgan*, 426 U.S. 637,644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); *In re Hews*, 108 Wn.2d 579, 590, 741 P.2d 982 (1987). To be valid, a plea must represent a voluntary and intelligent choice among the alternatives available to the defendant. *In re Personal Restraint of Peters*, 50 Wn.App. 702, 704, 750 P.2d 643 (1988). The remedy for an invalid plea is the opportunity to withdraw the plea. *State v. Miller*, 110 Wn.2d 528,535,756 P.2d 122 (1988).

The state and federal constitutions guarantee a criminal defendant the right to effective assistance of counsel. U. S. Amend 14; Wash const, Art. 1, section 22. In the plea bargaining context, effective assistance of counsel requires counsel to " actually and substantially" assist the client in deciding whether to plead guilty, *State v. Osborne*, 102 Wn. 2d 87, 99, 684 P. 2d 683 ( 1984).

When a challenge to a guilty plea is based on a claim of ineffective assistance of counsel, the prejudice prong is analyzed in terms of whether counsel's performance affected the outcome of the plea process. *State v. Garcia*, 57 Wn. App. 927, 932 -33, 791 P. 2d 244 (1990), citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). One of the key factors in deciding that issue is whether the defendant would have pled guilty as charged in the absence of deficient performance. *Garcia*, 57 Wn. App. at 933.

It is Mr. Madrigal's position that counsel was ineffective when he did not properly advise him of the immigration consequences of pleading guilty. The trial court found that Mr. Glass was aware of the immigration consequences. The Court of Appeals maintains that as there was specific reference to deportation in the State's plea recommendation, this was sufficient to be advised of the immigration consequences. (CP 39) However, there are no facts that support that Mr. Glass informed Mr. Madrigal of the facts of the immigration consequences of the plea. There are no facts that Mr. Glass even advised Mr. Madrigal what "Deportation" meant in the plea recommendation. In fact there is nothing in the

record, which defines or clarifies what “Deportation” meant in the State’s recommendation. (CP 29)

The United States Supreme Court held in *Padilla v. Kentucky*, 130 S. Ct.1473 (2010), that defense counsel’s failure to inform a defendant of the immigration consequences of a criminal conviction is ineffective assistance of counsel. In *Padilla* for the first time the Supreme Court held that trial counsel had the duty to give accurate advice about the immigration consequences of a conviction.

This Court followed *Padilla* in its decision in *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011). In a proceeding strikingly similar to the present case, the defense lawyer told Sandoval he would not be immediately deported if he plead guilty to the charge of rape in the third degree, and would have time to consult with immigration counsel to "ameliorate" any potential consequences of the plea. The plea statement contained the same warning as the one in this case, i. e. that for a non—citizen, the plea of guilty might have immigration consequences. Sandoval filed an appeal from the denial of his motion to withdraw his plea and also filed a personal restraint petition, alleging that he received ineffective assistance of counsel in connection with the decision to plead guilty.

*Sandoval* noted that before *Padilla*, "many courts believed that the Sixth

Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction.” 171 Wn.2d at 169.

After *Padilla*, however, defense counsel has an obligation to give accurate advise about immigration consequences of a plea, so long as those consequences are clear. The court went on to hold that the consequences of a conviction for third degree rape, which would be classified as an " aggravated felony" for immigration purposes, were sufficiently clear that the obligation to give accurate advice arose. Both *Padilla* and *Sandoval* rejected the idea that the advisement of potential consequences in the plea form satisfied the constitutional obligation to give accurate advice. *Sandoval* at 173, citing *Padilla* at 1486.

In the case at bar, the Court of Appeals held that there were sufficient facts that supported that Mr. Madrigal had been informed of the immigration consequences of the plea. However, there were not, the record is clear that Mr. Glass did not advise Mr. Madrigal of the immigration consequences. Additionally, the fact that “Deportation” was stated in the State’s plea recommendation, is not a sufficient fact that Mr. Madrigal was informed of the immigration consequences. This is no different than the boiler plate language of the plea that this Court as well as The United States Supreme Court has held as being insufficient basis for informing a defendant of the immigration consequences of a plea.

F. CONCLUSION

For the reasons set forth herein, and on the record of appeal, it is respectfully requested that the Supreme Court of the State of Washington grant the Motion for Discretionary Review such that the important issues presented by this case can be reviewed and acted on by this court.

Dated this 24<sup>th</sup> day of May 2017.

Respectfully Submitted:

S/Nicholas W. Marchi

Nicholas Marchi, WSBA#19982  
CARNEY & MARCHI, P.S.



**CERTIFICATE OF SERVICE BY MAIL**

I, Nicholas Marchi, Attorney for the Appellant, hereby certify that I have emailed, e-filed and or mailed, on May 24, 2017, via postage prepaid, a true copy of the Motion for Discretionary Review attached hereto to the following individuals:

Appeals Unit  
Ann Summers, DPA  
King County Prosecuting Attorneys Office  
516 Third Ave., Ste. W554  
Seattle, WA 98104

Jorge Madrigal  
P.O. Box 247  
Parker, WA 98939

**DATED** this 24<sup>th</sup> day of May 2017.

S/ Nicholas W. Marchi  
Nicholas Marchi, WSBA 19982

**CARNEY & MARCHI PS**

**May 23, 2017 - 4:14 PM**

**Transmittal Information**

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**Appellate Court Case Title:** State of Washington, Respondent v. Jorge Madrigal, Appellant  
**Superior Court Case Number:** 85-1-01481-9

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,  
Respondent,  
v.  
JORGE MADRIGAL, aka JOSE  
MARTINEZ;  
Appellant  
GONSALO M. MEDIES,  
Defendant.

No. 74309-1-I  
DIVISION ONE  
UNPUBLISHED OPINION

FILED: April 24, 2017

APPELWICK, J. — The trial court denied Madrigal's motion to vacate his 1985 judgment and sentence. The State contends that this motion was time barred. Madrigal argues that counsel provided ineffective assistance by not informing him of the immigration consequences of his guilty plea. We affirm.

**FACTS**

In 1985, Jorge Madrigal was charged with unlawful possession of a controlled substance, heroin. He pleaded guilty to the charge. Madrigal did not have legal status in the United States at the time. Madrigal was sentenced to 35 days.

In 2013, the Department of Homeland Security notified Madrigal that he was subject to removal. It initiated removal proceedings. The listed reason for removal was that Madrigal was an alien present in the United States who had not been admitted or paroled. There was no mention of Madrigal's 1985 conviction.

In 2015, Madrigal sought to vacate his 1985 judgment and sentence. He alleged that were it not for this prior conviction, he would be eligible for cancellation of removal. He argued that his guilty plea was not voluntarily and intelligently made. And, he contended that he was denied effective assistance of counsel, because his attorney never advised him of the immigration consequences of a guilty plea.

The court held a hearing on the motion. Madrigal's counsel from the 1985 case, Sydney Glass, testified. The trial court concluded that Madrigal did not receive ineffective assistance of counsel. It denied Madrigal's motion. Madrigal appeals.

#### DISCUSSION

Madrigal argues that the trial court erred in denying his motion to vacate the judgment and sentence. He asserts that counsel had a duty to inform him of the immigration consequences of the plea, yet failed to do so. The State contends that Madrigal's collateral attack is time barred.

Madrigal moved to vacate the judgment and sentence pursuant to CrR 7.8. CrR 7.8(b)(5) permits a trial court to relieve a party from a final judgment for any reason justifying relief. We review a trial court's denial of a CrR 7.8 motion for an abuse of discretion. State v. Martinez, 161 Wn. App. 436, 440, 253 P.3d 445

(2011). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. Id.

I. Time Bar

A CrR 7.8 motion must be made within a reasonable time. CrR 7.8(b). RCW 10.73.090(1) provides that no motion for collateral attack on a judgment and sentence may be filed more than one year after the judgment was filed, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. But, this time limit does not apply to a motion where

[t]here has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6).

The State contends that Madrigal's collateral attack on the judgment and sentence is time barred. It asserts that the exception in RCW 10.73.100(6) does not apply here, because Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) is not a significant change in the law material to Madrigal's conviction.

In Padilla, the United States Supreme Court recognized that the constitutional guarantee of effective assistance of counsel requires counsel to inform a criminal defendant of potential immigration consequences of a guilty plea. Id. at 374. Since Padilla, Washington courts have addressed whether that rule

constitutes a significant change in the law for purposes of RCW 10.73.100(6). See, e.g., In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 103, 351 P.3d 138 (2015); In re the Pers. Restraint of Orantes, 197 Wn. App. 737, \_\_\_\_ P.3d \_\_\_\_ (2017). In Yung-Cheng Tsai, the Washington Supreme Court held that Padilla was a significant change in state law. 183 Wn.2d at 103.

In Orantes, we concluded that this significant change in the law was material to Orantes's conviction. 197 Wn. App. at 743. There, like here, the State contended that Padilla was not material to Orantes's conviction, because Washington courts previously accepted similar claims before Padilla. Id. The State asserted that Padilla changed the law with respect to nonadvice claims, but did not change the law for incorrect advice claims. Id. We disagreed, noting that Washington courts would have rejected Orantes's claim before Padilla. Id. at 743-44, 746. Therefore, the RCW 10.73.100(6) exception applied. Id. at 749.

Here, Madrigal alleges that he was not informed of the immigration consequences of his guilty plea. This type of claim would have been barred pre-Padilla. We conclude that Madrigal's claim is not time barred.

## II. Ineffective Assistance

Madrigal contends that the trial court erred in concluding that counsel's performance was not deficient. He asserts that counsel had an obligation to advise him of the immigration consequences of pleading guilty, and failed to do so. A claim of ineffective assistance of counsel presents a mixed question of law and fact reviewed de novo. Martinez, 161 Wn. App. at 441.

The Sixth Amendment right to effective assistance of counsel extends to the plea process. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Where counsel gives faulty advice, the defendant's guilty plea may be involuntary or unintelligent. Id. To establish ineffective assistance of counsel, the defendant must show both that counsel's performance was objectively unreasonable and that the defendant was prejudiced. Id. We presume counsel was effective. Martinez, 161 Wn. App. at 441.

Under Padilla, counsel's duty to provide effective assistance extends to advice about immigration consequences of a guilty plea. 559 U.S. at 364, 366. Where immigration consequences of a guilty plea are truly clear, counsel must correctly advise the defendant that pleading guilty would result in deportation. Id. at 368-69. But, where the law is not straightforward, counsel must provide only a general warning that the charges may carry a risk of adverse immigration consequences. Id. at 369. Both incorrect advice and the failure to give any advice can constitute ineffective assistance of counsel. Id. at 370-71.

Washington courts have followed Padilla to hold that counsel provided ineffective assistance by failing to correctly inform clients of the potential immigration consequences of a guilty plea. See, e.g., Sandoval, 171 Wn.2d at 174; Martinez, 161 Wn. App. at 442. Sandoval told his attorney that he did not want to plead guilty if it would result in deportation, and his attorney noted that Sandoval was very concerned about the possibility of deportation. Sandoval, 171 Wn.2d at 167. Yet, counsel advised Sandoval to plead guilty and assured him that he would have time to retain immigration counsel to ameliorate any immigration

consequences of the plea. Id. The Washington Supreme Court held that this advice constituted deficient performance. Id. at 174. Counsel's advice led Sandoval to believe that deportation was only a remote possibility. Id. at 173. Martinez claimed that counsel failed to inform him that his plea could have immigration consequences, and counsel admitted that he knew very little about immigration law. Martinez, 161 Wn. App. at 440. The Court of Appeals held that these facts showed that counsel did not warn Martinez of his certain eligibility for deportation. Id. at 442. Therefore, counsel's performance was deficient. Id.

Madrigal's declaration in support of his motion to vacate the judgment and sentence set out his alleged facts concerning the guilty plea. He alleged that he never really talked to his attorney except for the day that he pleaded guilty. Madrigal stated, "[Counsel] never told me that I could get deported for taking the guilty plea. Had I known the consequences I would not have ple[a]d[ed] guilty to that charge." He further declared, "My attorney did not advise me of any relief from immigration deportation. He did not tell me to contact an immigration attorney before I ple[a]d[ed] guilty."

Madrigal's plea counsel, Glass, testified at the hearing on the motion. He testified that he used to work as a public defender in King County. He did not remember representing Madrigal specifically, but he did represent individuals who were undocumented. He recalled that his common practice was to inquire into a client's immigration status. But, he did not research any relevant immigration law, refer clients to an immigration attorney, or give a special warning regarding immigration consequences before proceeding with a client's guilty plea. The only



warning he would give clients was the information contained on the plea form. However, Glass confirmed that his common practice was to discuss the plea and consequences with the client, including the State's recommendation.

The plea form in this case contained a boilerplate warning: "I understand that if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." And, the plea agreement contained a section acknowledging that Madrigal had been informed and understood the State's recommendations. This section listed the State's particular recommendations, which included deportation. The State's sentencing recommendations document also showed that the State was seeking deportation as part of Madrigal's sentence.

Here, counsel did not need to research immigration law to ascertain the likely immigration consequences of Madrigal's guilty plea. Deportation was an explicit recommendation from the State. This was conveyed to Madrigal in the plea agreement—not just in the boilerplate warning, but in a handwritten list of the State's recommendations. And, counsel confirmed that his common practice was to discuss the State's recommendation with a client. He further noted that an interpreter would have read the entire plea agreement to the client.

We conclude that Madrigal has not shown ineffective assistance of counsel. This case is unlike Sandoval or Martinez, where attorneys failed to correctly inform their clients of the immigration consequences of pleading guilty. Deportation was not merely a likely consequence of Madrigal's plea, but one explicitly sought by the

State. Counsel's standard practice was to review the State's recommendations with the client, which would have necessarily included discussing the potential for deportation in this case. Thus, counsel provided constitutionally competent assistance under Padilla. The trial court did not abuse its discretion in denying Madrigal's motion to vacate the judgment and sentence.

We affirm.

WE CONCUR:

Leach, J.

Appelwick, J.

Spencer, J.

**CARNEY & MARCHI PS**

**May 23, 2017 - 4:15 PM**

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