Supreme Court No. 96895-1
(COA No. 77021-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARVIN CASTRO-OSEGUERA

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Marvin Castro-Oseguera asks this Court to review the opinion of the Court of Appeals in *State v. Castro-Oseguera*, No. 77021-7-I. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Does a defense attorney have a duty to advise a non-citizen client regarding the impact of a criminal conviction on the client's ability to later seek discretionary relief from deportation?

C. STATEMENT OF THE CASE

Mr. Castro-Oseguera entered a guilty plea to one count of delivery of cocaine on January 28, 2010. RP 13. He had no prior criminal history. CP 7. On June 9, 2017, he moved to withdraw his plea based on ineffective assistance of counsel, citing his counsel's failure to properly advise him of the immigration consequences following conviction. RP 20; CP 40, 48.

At the hearing on the motion, trial counsel testified he was aware Mr. Castro-Oseguera was from Honduras and undocumented. RP 42. Counsel knew Mr. Castro-Oseguera's biggest concern was "whether or not he was going to be kicked out of the country." RP 55. However, he

did not recall asking, or include in his notes, how Mr. Castro-Oseguera entered the country or why he left Honduras. RP 42-43; Ex. 1. Counsel neglected to conduct any research on the immigration consequences of a delivery of cocaine charge for his client, and his notes did not reflect any discussion of such consequences. RP 58; CP Ex. 1. Nor did counsel inform Mr. Castro-Oseguera his conviction constituted an "aggravated felony" under immigration law. RP 58.

Counsel admitted he did not consulted an immigration attorney to discuss Mr. Castro-Oseguera's case. RP 59. Counsel also failed to discuss discretionary deportation relief options, including asylum, with his client. RP 61-62. Nevertheless, counsel advised Mr. Castro-Oseguera he would be deported without further clarification. RP 63. Specifically, when asked whether he told Mr. Castro-Oseguera "he would be deportable," counsel clarified, "I told him my legal opinion would be that he would be deported. I also told him that this is an offense that makes you deportable, and in my opinion you will be deported." RP 66. Counsel believed Mr. Castro-Oseguera "was clear on that," referring to counsel's opinion that deportation was certain. RP 80-81.

Following the hearing on Mr. Castro-Oseguera's motion to withdraw his plea, the court found defense counsel was not required to advise defendants of "the entire panoply of immigration law including the prospects of asylum if you are eligible for deportation." RP 103. The court further found counsel was not required to conduct additional research because "he clearly knew that a plea to this offense would result in deportation." RP 104. The court denied Mr. Castro-Oseguera's motion to withdraw his plea based on the ineffective assistance of counsel. CP 48.

On review, the Court of Appeals declined to reach issue of whether the duty to advise a client about immigration consequences of a conviction extends to advice regarding discretionary deportation relief measures such as asylum. Slip Op. at 16. Despite acknowledging this issue is one of first impression in Washington, and that other jurisdictions have reached different results, the Court of appeals resolved the issue solely on lack of prejudice. Slip Op. at 15-16.

D. ARGUMENT

This Court should accept review to determine whether a defense attorney's duty to advise a non-citizen client of the clear deportation consequences of a guilty plea or conviction extends to advice regarding discretionary relief from deportation measures.

1. An accused person has a constitutional right to effective assistance of counsel, including during plea negotiations and process.

Criminal defendants are entitled to the effective assistance of counsel under the Sixth Amendment and article I, section 22. *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 99, 351 P.3d 138 (2015). The right to effective assistance of counsel includes the plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (citing *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993)); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). Counsel's incompetent advice may render a defendant's guilty plea involuntary and unintelligent. *McMann*, 397 U.S. at 1449; *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (holding defendant must be informed of direct plea consequences and may not be positively misinformed of collateral consequences).

2. *Criminal defense attorneys must advise non-citizen clients of the clear immigration consequences of a conviction, including the impact of the conviction on a client's ability to seek discretionary deportation relief measures.*

Immigration consequences fall within "the ambit of the Sixth Amendment right to counsel." *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *Sandoval*, 171 Wn.2d at 170. This is because preserving a defendant's "right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla*, 559 U.S. at 368 (citing *INS v. St. Cyr*, 533 U.S. 289, 322-23, 121 S. Ct. 227, 1150 L. Ed. 2d 347 (2001)). Effective assistance as applied to immigration consequences requires counsel to advise clients regarding the risk of deportation. *Padilla*, 559 U.S. at 366. Counsel is required to correctly advise, or seek consultation to correctly advise, a client of immigration consequences flowing from his guilty pleas. *Sandoval*, 171 Wn.2d at 172. Moreover, reasonable conduct for an attorney includes researching the relevant law. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The scope of counsel's duty to advise a defendant of immigration consequences depends on the clarity of the applicable immigration law. *Padilla*, 559 U.S. at 369; *Sandoval*, 171 Wn.2d at 170. Thus, if the applicable immigration law is "truly clear" that an

offense is deportable, counsel must so advise a defendant. *Padilla*, 559 U.S. at 369; *Sandoval*, 171 Wn.2d at 170. At the very least, even where the immigration law is unclear, "competent counsel informs the defendant that deportation is at least possible, along with exclusion, ineligibility for citizenship, and any other adverse immigration consequences." *Sandoval*, 171 Wn.2d at 170 (emphasis added). Notably, a warning statement of immigration consequences contained in a plea form is not sufficient. *Yung-Cheng Tsai*, 183 Wn.2d at 101.

This duty further includes advising defendants of discretionary deportation relief measures, such as asylum, because preserving the possibility of discretionary relief would be "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Padilla*, 559 U.S. at 368 (citing *St. Cyr*, 533 U.S. at 322-23 (discussing discretionary relief under §212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996)). Counsel who are unaware of discretionary deportation relief measures must inform themselves by following the advice of practice guides to advise themselves of the importance of such measures. *St. Cyr*, 533 U.S. at 323 n.50; *Padilla*, 559 U.S. at 368.

Other jurisdictions are in accord. For example, in *United States v. Nuwintore*, 696 F. App'x 178 (9th Cir. 2017) (unpublished)[1], trial counsel failed to advise Nuwintore he would be charged with removability and suffer the loss of his asylum status." *Id*. at 179. The Court found "the immigration consequences . . . were 'succinct, clear, and explicit.'" *Id*. (quoting *Padilla*, 559 U.S. at 368). The Court further held counsel had a duty to explain "that [Nuwintore] would lose his asylum status if he pleaded guilty." *Id*. at 180.

Similarly, in *Diaz v. State*, 896 N.W.2d 723 (Iowa 2017), the Iowa Supreme Court found "counsel has an obligation to inform his or her client of all the adverse immigration consequences that competent counsel would uncover. We do not believe clients expect their counsel to only advise them that the chances of deportation are certain or possible." *Id*. at 732. Likewise, in *Daramola v. State*, 294 Or. App. 455, 430 P.3d 201 (2018), the court found *Padilla* may require advice beyond removability alone but resolved the issue on other grounds. *Id*. at 467-68.

Relevant standards for defense attorneys also support proposition that defense attorneys must advise clients on immigration consequences

[1] Citied in accordance with GR 14.1 and FRAP 32.1.

beyond whether an offense renders a client deportable. The American Bar Association standards provide:

> (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.

Am. Bar Ass'n, Standards for Criminal Justice for the Defense Function, std. 4-5.5 (4th ed. 2015).[2] This Court's Standards for Indigent Defense also mandate that criminal defense attorneys must "[b]e familiar with the consequences of a conviction or adjudication, including possible immigration consequences," and does not restrict that advice to removability alone. Standard 14.1(E).[3] These standards

[2] Available at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (last visited Feb. 21, 2019).

[3] Available at: http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc (last visited Feb. 21, 2019).

support the proposition that competent immigration advice in a criminal setting is not limited to whether a particular offense renders a defendant deportable. Rather, an effective defense attorney must also address a non-citizen's ability to seek other forms of removal relief after suffering a conviction.

In contrast, other jurisdictions have found *Padilla* does not extend to advice regarding discretionary relief measures. *See*, *e.g.*, *United States v. Carillo-Estrada*, 564 F. App'x 385, 388 (10th Cir. 2014)) (*Padilla* says nothing about asylum); *Rosario v. State*, 165 So. 3d 672, 673 (Fla. 2015) (*Padilla* does not require advice about whether a plea will negatively impact discretionary removal relief or reentry).

In this case, the Court of Appeals acknowledged this issue was one of first impression in Washington and that other jurisdictions have reached different results. Slip Op. at 15. Nevertheless, the Court declined to address the issue.

This issue involves a significant question of law under the United States Constitution, and this Court should accept review to determine whether the Sixth Amendment right to effective counsel includes the right to be advised of the consequences of a conviction on a non-citizen's ability to seek discretionary relief from removal proceedings.

E. CONCLUSION

Based on the foregoing, petitioner M.F. respectfully requests that this review be granted. RAP 13.4(b).

DATED this 21st day of February 2019.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MARVIN RAMON CASTRO-OSEGUERA, Appellant.	No. 77021-7-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

ANDRUS, J. — In January 2010, Marvin Castro-Oseguera, an undocumented Honduran immigrant, entered a guilty plea to one count of delivery of cocaine. In 2017, he moved to withdraw that plea, claiming he received ineffective assistance of counsel because his attorney did not advise Castro-Oseguera that a guilty plea would render him ineligible for asylum, a form of discretionary relief from deportation.[1] After conducting an evidentiary hearing, the trial court denied his motion. We affirm but on grounds different than those of the trial court.

FACTS

Castro-Oseguera arrived in the United States from Honduras in 2000.[2] In December 2009, the State of Washington charged Castro-Oseguera with one

[1] Deportation is sometimes referred to as removal.

[2] The facts are taken from the testimony of Castro-Oseguera and his 2010 criminal defense attorney, Carey Huffman, at a June 9, 2017, evidentiary hearing conducted by the trial court, the

count of delivery of cocaine and one count of possession with intent to manufacture or deliver cocaine in violation of Washington's Uniform Controlled Substances Act, RCW 69.50.401. According to the Certification for Determination of Probable Cause, law enforcement found 251.9 grams of powder cocaine and 23 grams of crack hidden in the console of the car Castro-Oseguera was driving when he was arrested for selling .9 grams of crack to a confidential witness.

Castro-Oseguera pleaded guilty to one count of delivery of cocaine, an aggravated felony,[3] on January 28, 2010. At the plea and sentencing hearing, Castro-Oseguera's counsel, Carey Huffman, explained to the court the parties had agreed to a low-end sentence on the delivery charge. He added that the State had agreed to dismiss the possession charge relating to the drugs found in the car because the evidence indicated that Castro-Oseguera was unaware there were drugs secreted in the car and that he was "simply a runner" who was asked to complete a single drug transaction for another dealer.

Castro-Oseguera acknowledged that Huffman and an interpreter had helped him review the plea documents. Castro-Oseguera also stated on the record that he understood his plea of guilty "may be grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Although Castro-Oseguera was eligible for a drug offender sentence alternative (DOSA) for this offense, the State informed the

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declaration Castro-Oseguera provided with the motion to withdraw his plea, the underlying Information, Certification for Determination of Probable Cause, Statement of Defendant on Plea of Guilty, and Judgment and Sentence, and the transcript of Castro-Oseguera's plea hearing.

[3] See 8 U.S.C. § 1101(a)(43)(B).

court it could not recommend a DOSA because Castro-Oseguera was on an "immigration hold." The court accepted Castro-Oseguera's plea and sentenced him to the agreed low-end sentence—a term of 12 months plus one day in custody and 12 months of community custody.

According to the record, Castro-Oseguera was subsequently deported for this conviction but reentered the United States sometime thereafter. By March 2017, Castro-Oseguera was detained by Immigration and Customs Enforcement (ICE) in the Northwest Detention Center in Tacoma, and a previous deportation order was reinstated. While he was in ICE custody at the Northwest Detention Center, Castro-Oseguera filed a motion to withdraw his guilty plea in King County Superior Court. In that motion, Castro-Oseguera alleged he filed an asylum application, claiming that he feared going back to Honduras. He further alleged he had passed his "reasonable fear" interview and had his case transferred to an immigration judge for "withholding only" proceedings. But Castro-Oseguera alleged, as a result of his aggravated felony conviction, he was not eligible for asylum, a status under which he would have been able to apply for a green card after a year. Castro-Oseguera contended a grant of "withholding of removal," unlike asylum, would prevent his deportation to Honduras only as long as the United States deemed it dangerous for him to return.

We understand Castro-Oseguera's reference to a "withholding only" proceeding relates to the provision of the Immigration and Naturalization Act that prohibits the Attorney General from deporting an alien to a country where his life or freedom would be threatened on the basis of one of several protected grounds.

8 U.S.C. § 1231(b)(3)(A); see also Al-Harbi v. I.N.S., 242 F.3d 882, 888 (9th Cir. 2001). A person fearing such persecution may seek "asylum" or a "withholding of removal." See Al-Harbi, 242 F.3d at 888. Asylum is a discretionary decision made by the Attorney General, whereas withholding of removal is not discretionary. Id.; see also Navas v. I.N.S., 217 F.3d 646, 655 (9th Cir. 2000). If an applicant receives asylum status, he may apply for permanent resident status after one year. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 429 n.6, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987). If a person establishes a basis for withholding of deportation, but is not granted asylum, he is only given the right not to be removed to the country of persecution. I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 419-20, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999). Withholding does not confer protection from removal to any other country. El Himri v. Ashcroft, 378 F.3d 932, 937-38 (9th Cir. 2004).

It is unclear from this record whether the factual basis for Castro-Oseguera's petition for asylum or withholding of deportation arose before he initially emigrated to the United States in 2000 or when he returned to Honduras after his 2010 conviction.

Castro-Oseguera claimed in his motion to withdraw his guilty plea that he received ineffective assistance of counsel during plea negotiations in January 2010 because his attorney did not properly advise Castro-Oseguera that pleading guilty would not only make him deportable but it would also make him ineligible for asylum, a form of discretionary relief from deportation. He relied on the United States Supreme Court's ruling in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), which was issued two months after Castro-

Oseguera pleaded guilty, and State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011). The purpose of seeking to withdraw the plea, we assume, is to revive Castro-Oseguera's eligibility to obtain asylum and to maximize his chances to avoid being returned to Honduras.

At an evidentiary hearing on his motion, Castro-Oseguera advanced two separate arguments. First, he appears to argue that his grasp of English was so poor that he did not understand what occurred during his criminal plea hearing. Second, he argued that he was never advised that pleading guilty would make him legally ineligible for asylum, a form of discretionary relief from deportation.

Castro-Oseguera testified that he did not understand anything Huffman told him at the time of the plea negotiations. He testified he told Huffman he "only understood a little [English] but that [he] couldn't follow a conversation in English." He further testified that an interpreter was only present when he pleaded guilty, and he did not remember discussing his immigration status with Huffman. According to Castro-Oseguera, trial counsel said the plea was in his best interest because, if he were found guilty of the two charges, he would "be facing a lot of time." He had no recollection of discussing his immigration status with Huffman. Castro-Oseguera denied recalling being informed by his attorney or the court at any point that a guilty plea would be grounds for deportation, exclusion from the United States, or denial of naturalization.

Huffman's testimony conflicted with Castro-Oseguera's version of events. Huffman testified that despite having worked on the case in December 2009 and January 2010, he remembered this case due to the large amount of drugs involved.

He first met his client on December 17, 2009, without an interpreter present. Castro-Oseguera told him at the time that he understood English and wanted an interpreter only for court hearings. During this first meeting, Huffman reviewed the allegations against his client as set out in the certification for determination of probable cause. Huffman had the impression Castro-Oseguera understood him during this initial conversation.

Although Huffman did not remember asking Castro-Oseguera if he had a visa, how he came to the United States, or why he left Honduras, he did remember that Castro-Oseguera's biggest concern during their meetings was whether he was going to be able to stay in the United States. His notes from the December 17 meeting indicated "Defendant from Honduras illegal." According to Huffman, whenever he first meets with a client, he asks about the client's immigration status. When Castro-Oseguera informed him he was undocumented, Huffman stated that would have prompted a conversation with Castro-Oseguera about adverse immigration consequences of any conviction. Huffman remembered advising Castro-Oseguera that a felony drug conviction could send him back to Honduras. Huffman recalled that he would have discussed the risk of deportation every time he met with Castro-Oseguera.

Huffman also recalled reviewing the certification for probable cause, the information, and the discovery with Castro-Oseguera on three different occasions. His records indicated he met with his client, with the assistance of an interpreter, on January 21, 2010, during a case-setting hearing to discuss a plea deal offered by the State. Huffman's notes indicated that "Defendant wants misdemeanor, but

if can't have will take this offer." Huffman testified these notes meant that Castro-Oseguera wanted a deal that allowed him to plead guilty to a misdemeanor as a way to avoid deportation.

Huffman met with the prosecutor again on January 28, 2010, to ask him to consider allowing Castro-Oseguera to plead to a misdemeanor for one of the counts and a reduced felony for the second count—anything to allow his client to avoid a prison sentence. Specifically, he testified he would have asked the prosecutor for "all options [for a] reduction away from a felony that includes prison time." The prosecutor, instead, offered to dismiss the possession charge if Castro-Oseguera would plead guilty to the delivery charge.

That same day, Huffman met with his client in the jail, again with the help of an interpreter, to discuss the plea offer. Huffman, who had been a felony criminal defense attorney for several years, did not do any specific immigration research on this case, nor did he consult an immigration attorney regarding the immigration-related consequences of a plea. He also did not recall specifically advising Castro-Oseguera that pleading guilty to a felony drug offense would constitute an "aggravated felony" under federal immigration law. But based on his prior training and experience, he knew that pleading guilty to the delivery charge would be grounds for Castro-Oseguera's deportation because delivery of cocaine was a deportable offense. He advised his client that delivery was a deportable offense, and that "in [his] opinion [Castro-Oseguera would] be deported" because of the large quantity of drugs involved in the case. He did not advise Castro-Oseguera that the felony was a crime of automatic deportation, nor did he use the phrase

"automatically deportable." Huffman testified that the language he uses to discuss immigration law with clients has changed over time because case law has changed, but "automatic deportation" was not a phrase that he would have used at the time based on the law at the time. Huffman explained to Castro-Oseguera that by entering the plea, he would "likely" be deported, and the only way to avoid being deported was "to go to trial and try to win or to get a better offer."

Huffman also testified that Castro-Oseguera did not mention to him that he was seeking asylum and he, therefore, did not discuss with Castro-Oseguera the plea's impacts on any future asylum request.

Huffman specifically remembered he had an interpreter present to review the plea paperwork with Castro-Oseguera before the plea hearing because he did not want the court to have any reason not to accept the proposed plea. The Statement of Defendant on Plea of Guilty corroborates this testimony. At the end of the pleading, a certified Spanish interpreter signed a sworn statement indicating she translated the entire document for Castro-Oseguera from English into Spanish. A different Spanish interpreter participated in the plea hearing and translated the contents of the hearing.

Huffman's testimony is further supported by the events of the 2010 plea hearing. During that hearing, Castro-Oseguera informed the court that he had reviewed the Statement of Defendant on Plea of Guilty with his counsel and with the assistance of an interpreter. He also stated that, with the help of his attorney and the interpreter, he was able to understand the document in its entirety. Castro-Oseguera acknowledged that he also understood that a plea of guilty may

be grounds for deportation, exclusion from admission to the United States, or a denial of naturalization.

At the conclusion of the 2017 evidentiary hearing, the court denied Castro-Oseguera's motion to withdraw his guilty plea. It found that Castro-Oseguera was able to converse with Huffman in English at their initial meeting and had the assistance of interpreters for the subsequent meetings with counsel and for all court proceedings. It further found Huffman had tried to negotiate a deal for something less than an aggravated felony so that Castro-Oseguera would not be deportable. It found that Castro-Oseguera's request to plead to a misdemeanor was evidence that the client was aware of the deportation consequences of pleading guilty to a felony drug offense. The court further found that everyone was aware Castro-Oseguera was at risk of deportation because the plea forms specifically indicated he had an "INS hold." It stated:

> The only thing that [counsel] didn't do is discuss the prospects of asylum with his client as a mechanism for getting around deportation in the long run, but he clearly indicated to his client that he would be deported. . . . And the bottom line is my understanding of the case law is you're supposed to advise your client of the deportation consequences, not the entire panoply of immigration law including the prospects of asylum if you are eligible for deportation. I think that goes way beyond the bounds of what defense counsel are required to do.
>
> . . . .
>
> And to the extent that there's the allegation that Mr. Huffman was supposed to do more research, if he already knew the effect of the plea on this gentleman's immigration status, there was no need to do any more research, and he clearly knew that a plea to this offense would result in deportation and told his client so. And it's obvious that deportation was a big issue for the client at the time and hence that repeated request for a misdemeanor.

Castro-Oseguera appeals.

ANALYSIS

A. The State waived any argument that Castro-Oseguera's motion is time-barred.

For the first time on appeal, the State contends that Castro-Oseguera's motion to withdraw his guilty plea is time-barred under RCW 10.73.090 and that the trial court should have transferred the motion to this court to review as a personal restraint petition. We find the State affirmatively waived this argument below.

RCW 10.73.090(1) provides that no collateral attack on a criminal conviction may be filed more than one year after the judgment becomes final.[4] A motion to withdraw a guilty plea is a "collateral attack" on a judgment. RCW 10.73.090(2). In addition, CrR 7.8(c)(2) provides that a motion to withdraw a guilty plea shall be transferred to the court of appeals "for consideration as a personal restraint petition unless the [superior] court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing."

RCW 10.73.100(6) creates an exception to the one-year rule: if a defendant establishes a significant change in the law material to his conviction and the change applies retroactively. The Washington Supreme Court held in In re the Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 105, 351 P.3d 138 (2015),

[4] Castro-Oseguera's felony judgment and sentence was entered on January 29, 2010. Because Castro-Oseguera did not appeal, the judgment and sentence became final one year later. See RCW 10.73.090(3)(a).

that Padilla represented a significant, material, and retroactive change in the law, creating an exception to the one-year time bar in RCW 10.73.090(1).

Castro-Oseguera cited Yung-Cheng Tsai in his motion to withdraw his guilty plea. The State did not argue below that his motion was time-barred or ask the trial court to transfer Castro-Oseguera's motion to this court under CrR 7.8(c)(2). In fact, at the conclusion of the evidentiary hearing, the State discussed the Yung-Cheng Tsai case and explicitly represented to the trial court that it was not arguing that the case should be transferred to the court of appeals. Thus, we conclude the State affirmatively waived any argument that Castro-Oseguera's motion was statutorily time-barred and should have been transferred here as a personal restraint petition.

In any event, the State did not appeal the trial court's decision to conduct an evidentiary hearing and to address the merits of Castro-Oseguera's motion. Under RAP 2.4(a), this court will grant affirmative relief to a respondent only if it files a notice of appeal or "if demanded by the necessities of the case." The State has provided no briefing as to why the necessities of the case demand review despite its failure to file a timely notice of cross-appeal. We will, therefore, address Castro-Oseguera's appeal on its merits.

B. Even if Castro-Oseguera did not receive effective assistance of counsel, he failed to demonstrate prejudice.

Castro-Oseguera argues the trial court erred in denying his motion to withdraw his guilty plea because his attorney failed to advise him that pleading guilty to a felony drug charge would render him ineligible for asylum. The Sixth

Amendment right to effective assistance of counsel extends to the plea process. Sandoval, 171 Wn.2d at 169. If counsel gives incorrect advice, or if he fails to give any advice, about the possible immigration consequences of a guilty plea, it can render the defendant's guilty plea involuntary or unintelligent. Id.; see also Yung-Cheng Tsai, 183 Wn.2d at 107. To establish that his plea was involuntary or unintelligent because of trial counsel's inadequate or incorrect advice, Castro-Oseguera must prove (1) he received objectively unreasonable legal advice, and (2) this advice prejudiced him. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element is not satisfied, the inquiry ends. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). We presume that trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690.

1. Standard of Review

The trial court's denial of a motion to vacate under CrR 7.8 is reviewed for an abuse of discretion. State v. Kassner, 5 Wn. App. 2d 536, 539, 427 P.3d 659 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State v. McCormick, 166 Wn.2d 689, 706, 213 P.3d 32 (2009). A trial court's decision is based on untenable grounds when the decision is contrary to law. Kassner, 5 Wn. App. 2d at 539.

When the basis for the motion to vacate is ineffective assistance of counsel, we review a trial court's factual findings for substantial evidence. State v. Lopez, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). The ultimate conclusion of whether

counsel's performance was ineffective constitutes an application of law to established facts, making it a mixed question of fact and law, which we review de novo. Id. at 117.

2. Advice as to Loss of Eligibility for Asylum

Castro-Oseguera argues that the trial court erred in concluding that under Padilla and Sandoval, his criminal attorney did not have a duty to advise him that a guilty plea would render him ineligible for asylum, a discretionary form of relief from deportation. But neither the United States Supreme Court nor the Washington Supreme Court has held that such a duty exists.

Under the Immigration and Naturalization Act, Castro-Oseguera's drug conviction constitutes an "aggravated felony," 8 U.S.C. § 1101(a)(43)(B), and aliens convicted of aggravated felonies are "deportable," 8 U.S.C. § 1227(a)(2)(A)(iii); see also 8 U.S.C. § 1227(a)(2)(B)(i) (alien deportable if convicted of a controlled substance offense). A conviction for an aggravated felony also makes an alien statutorily ineligible for asylum. 8 U.S.C. § 1158(b)(2)(B)(i); see also 8 U.S.C. § 1158(b)(2)(A)(ii).[5]

In Padilla, a defendant convicted on a drug-related charge filed a motion for post-conviction relief, alleging his attorney was ineffective in misadvising him about

[5] An aggravated felony conviction is not an automatic bar to relief in the form of withholding of removal; an alien becomes ineligible for withholding only if the crime of conviction constitutes a "particularly serious crime." Lopez-Cardona v. Holder, 662 F.3d 1110, 1111-12 (9th Cir. 2011); see also 8 C.F.R. § 1208.16(d)(2). While not all aggravated felonies are "particularly serious crimes" under immigration law, there is some support for the proposition that an aggravated felony containing a drug trafficking element is presumed to be a particularly serious crime. Rendon v. Mukasey, 520 F.3d 967, 976 (9th Cir. 2008) (selling or possessing with intent to sell constitutes "trafficking").

whether deportation was a risk of pleading guilty. 559 U.S. at 359. The Supreme Court held that under the Sixth Amendment, a competent criminal defense attorney must advise a client whether his plea carries a risk of deportation. Id. at 374. The Padilla court recognized that "[i]mmigration law can be complex, and it is a legal specialty of its own." Id. at 369. It laid out the following test—if the deportation consequence of a guilty plea is clear, the criminal attorney must advise his client of that clear risk; if, however, the law is not succinct and straightforward, a criminal defense attorney need only advise a noncitizen client that pending criminal charges "may carry a risk of adverse immigration consequences." Id.

As in Padilla, the deportation risk to Castro-Oseguera was clear under federal law. Castro-Oseguera pleaded guilty to a drug offense that constitutes an aggravated felony under immigration law. A conviction of an aggravated felony rendered Castro-Oseguera deportable. Huffman was aware of these adverse immigration consequences, and the trial court found he correctly advised his client of this risk before the plea. We conclude there is substantial evidence in the record to support the trial court's finding.

Castro-Oseguera, however, argues that Padilla similarly requires a criminal attorney to advise his client about the clear impacts a plea will have on his right to asylum.[6] He relies on a passage in Padilla, in which the Supreme Court quoted from one of its immigration decisions, to suggest that the Sixth Amendment right

[6] Castro-Oseguera also argues that his trial attorney was ineffective for failing to research immigration law to determine how the plea would impact his right to seek asylum, but this argument is simply a variant of the argument that he was not advised about the loss of eligibility to seek asylum.

to effective assistance of counsel extends to advice beyond the deportation context:

> [W]e have recognized that "preserving the possibility" of discretionary relief from deportation . . . "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." 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.

559 U.S. at 368 (second alteration in original) (citations omitted) (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)). The trial court rejected this argument, holding that Padilla imposes only a duty to advise clients on the risk of deportation.

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).

Castro-Oseguera submitted a declaration in support of his motion to withdraw the guilty plea and testified at the evidentiary hearing before the trial court. But unlike the defendant in Sandoval, Castro-Oseguera never testified that had his attorney advised him about his ineligibility for asylum, he would have declined the plea offer and insisted on taking his case to trial. See id. at 175-76.

Moreover, there is no evidence that the events supporting his current asylum petition even existed before he was deported after the 2010 conviction. Castro-Oseguera testified that he had lived continuously in the United States between 2000 and his arrest in 2009. And Huffman testified that after advising Castro-Oseguera that there was a high likelihood he would be deported, Castro-Oseguera still indicated a desire to accept the plea offered by the State. At the evidentiary hearing below, Castro-Oseguera conceded that even if he had been acquitted of the drug charges, it is highly likely he would have been deported anyway because he was undocumented and on an immigration hold. It is, thus, far from clear based on this record that had Castro-Oseguera learned his guilty plea would render him ineligible for asylum, his decision to plead guilty would have been any different.

In addition, there is nothing in this record to suggest that had Castro-Oseguera rejected the State's plea offer, he would have obtained a better plea deal. Indeed, Huffman testified that he broached the subject of allowing his client

to plead guilty to lesser charges to avoid deportation, and the prosecutor refused not once, but twice.

Finally, while Castro-Oseguera may have had an "unwitting possession" defense to the possession charge for the drugs hidden in his vehicle console, he has demonstrated no defense to the delivery charge. The Certification for Determination of Probable Cause indicates that a detective from the Seattle Police Department set up a drug transaction with a cooperating witness and observed the witness get into the vehicle driven by Castro-Oseguera, exchange pre-marked cash for crack cocaine, and return with the drugs. When Castro-Oseguera was searched incident to his arrest, they recovered the marked hundred dollar bill in his front pants pocket. And the police confirmed that the cell phone in Castro-Oseguera's possession was the number the witness had called to arrange the transaction. Given this evidence, the likelihood of an acquittal on the delivery charge appears close to nil. By accepting the State's offer, Castro-Oseguera obtained a recommendation for a low-end prison sentence, something he may not have achieved had he gone to trial. Castro-Oseguera cannot demonstrate that a decision to reject the plea bargain would have been rational under the circumstances.

3. Risk of Deportation

Lastly, Castro-Oseguera maintains trial counsel provided incorrect advice when he told Castro-Oseguera that he would be deported following resolution of his criminal matter. He argues that while immigration law rendered him deportable,

removal was not a certainty. Neither the law nor the factual record supports this argument.

As previously discussed, the statutes are clear that an undocumented immigrant convicted of an aggravated felony or for a controlled substance offense is subject to deportation. Castro-Oseguera was already on an immigration hold by the time of his plea, meaning it was inevitable he would be in deportation proceedings after completing his sentence. And Castro-Oseguera was, in fact, deported as a result of his conviction.

In addition, counsel may have been ineffective had he not advised Castro-Oseguera that it was highly likely he would be deported. The Ninth Circuit has held that equivocal deportation warnings, in light of Padilla, fall below the standards for adequate assistance of counsel. See United States v. Rodriguez-Vega, 797 F.3d 781, 785-87 (9th Cir. 2015) (concluding language like "potentially" and "probably" did not adequately advise defendant of likelihood of removal); United States v. Bonilla, 637 F.3d 980, 984 (9th Cir. 2011) (holding that a "criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty"). Huffman testified he did not inform Castro-Oseguera that he would "automatically" be deported, but he advised him that, in his opinion, deportation was a very high probability. Under these circumstances, we conclude that trial counsel's advice to Castro-Oseguera regarding the likelihood of deportation did not constitute ineffective assistance of counsel.

Furthermore, as with advice regarding the possibility of seeking asylum, Castro-Oseguera has not demonstrated how he was prejudiced by being informed that he would face likely deportation if he pleaded guilty. Based on this record, we conclude Castro-Oseguera failed to demonstrate prejudice.

We affirm the trial court's denial of Castro-Oseguera's motion to withdraw his guilty plea.

Andrus, J.

WE CONCUR:

Mann, ACJ

Chun, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77021-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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