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FILED
Oct 29, 2013
Court of Appeals
Division I
State of Washington

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

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

The State of Washington,

Plaintiff,

v.

ORANTES, SANTOS W.,

Defendant.

71082-6

NO. 06-1-00278-9

ORDER TRANSFERRING MOTION
FOR RELIEF FROM JUDGMENT

(CLERK'S ACTION REQUIRED)

This matter came before the court pursuant to CrR 7.8(c)(2), for initial consideration of the defendant's Motion for Relief from Judgment. The court has considered the documents listed below. Being fully advised, the court hereby concludes and orders as follows:

I. CONCLUSIONS OF LAW

1. The defendant's motion is time barred by RCW 10.73.090.
2. The defendant has not made a substantial showing that the defendant is entitled to relief.
3. Resolution of the defendant's motion will not require a factual hearing.

II. ORDER

1. Pursuant to CrR 7.8(c)(2), the defendant's Motion for Relief from Judgment is transferred to the Court of Appeals for consideration as a personal restraint petition.

 ORIGINAL

1 2. The clerk of this court shall transmit copies of the following to the Court of
2 Appeals:

- 3 a. This order;
- 4 b. The State's Motion to Transfer Motion for Relief From Judgment (sub No. 62).
- 5 c. Defendant's Response to State's Motion to Transfer (sub No. 63).
- 6 d. State's Supplemental Memorandum in Support of Motion to Transfer (sub No.
7 68).
- 8 e. Defendant's Response to State's Supplemental Memorandum in Support of
9 Motion to Transfer (sub No. 69).
- 10 f. Defendant's Supplemental Memorandum of Law (sub No. 70).
- 11 g. State's Response to Defendant's Supplemental Memorandum (sub No. 71).
- 12 h. Defendant's Reply to State's Response to Supplemental Memorandum of Law
13 (sub No. 73).
- 14 i. State's Submission of Supplemental Authority (sub No. 74).
- 15 j. The Court's Memorandum Decision (sub No. 75).

16 Entered this 28 day of October, 2013.

17 
18 _____
19 JUDGE ANITA L. FARRIS

20 Presented by:

21 
22 _____
23 SETH A. FINE, #10937
24 Deputy Prosecuting Attorney
25 Attorney for Plaintiff

20 Approved as to form:

21 
22 _____
23 CHRISTOPHER BLACK, #31744
24 Attorney for Defendant

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH
The Honorable Anita L. Farris

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

FILED
Oct 29, 2013
Court of Appeals
Division I
State of Washington

THE STATE OF WASHINGTON,

No. 06-1-00278-9

Plaintiff,

DEFENDANT'S MOTION TO
WITHDRAW GUILTY PLEA

vs.

(Clerk's Action Required)

SANTOS WILFREDO ORANTES,

Defendant.

MOTION

COMES NOW Defendant, SANTOS WILFREDO ORANTES, by and through undersigned counsel, Christopher Black, and moves this Court for relief from the judgment previously entered in the above-noted matter. Specifically, Defendant moves the Court to withdraw his plea of guilty and vacate the judgment and sentence in this matter. This motion is based on CrR 7.8(b)(4); RCW 10.73.100(6); Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011); In re Personal Restraint of Jagana, 170 Wn. App. 32 (2012); the following Memorandum of Law; and the attached Declarations of Santos Orantes and Kathleen Kyle.

MOTION FOR RELIEF FROM JUDGMENT - 1

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MEMORANDUM

I. Factual and Procedural Background

Santos Orantes was born on September 1, 1980, in Zacatecoluca, El Salvador. See attached Declaration of Santos Orantes (“Orantes Dec.”), ¶ 1. In 1999, he came to the United States. Id. at ¶ 2. He applied for Temporary Protected Status (TPS) in 2000 due to the ongoing dangerous conditions in El Salvador. Id. at ¶ 3. TPS establishes a temporary safe haven in the United States for nationals of designated countries (including El Salvador) where the country’s nationals are unable to return safely, or, in certain circumstances, the country’s government is unable to handle their return adequately. See 8 U.S.C. § 1254a. A person becomes ineligible for TPS if he is convicted of a felony or two or more misdemeanors. 8 U.S.C. § 1254a(c)(2)(B)(i). Mr. Orantes duly renewed his TPS twice after his initial application. Orantes Dec. at ¶ 3.

Mr. Orantes pleaded guilty to attempted unlawful issuance of a bank check on August 18, 2006, on advice of counsel. Orantes Dec. at ¶¶ 13, 15. He was given a deferred 364-day sentence with 12 months of probation and a \$500.00 fine. Id. at ¶ 13. It is this conviction that is the subject of this motion. This conviction carries grave collateral consequences for Mr. Orantes. The fact that he was convicted makes him ineligible for TPS and eligible for deportation.

At the time that Mr. Orantes entered his guilty plea, he had no idea that doing so would affect his immigration status. See Orantes Dec. at ¶¶ 17-19. He was not so advised by anyone prior to entry of his plea, and he was incorrectly assured by counsel that his conviction would have no impact on his TPS. Id. at ¶ 17; Declaration of Kathleen Kyle (“Kyle Dec.”), ¶¶ 7-9. He did not realize that this conviction would impact his immigration status until his application to

1 renew TPS was denied due to his criminal convictions and he was placed in deportation
2 proceedings. See Orantes Dec. at ¶ 18.

3 Since his conviction in 2006, Mr. Orantes has had no subsequent convictions. Id. at ¶ 9.
4 He is a business owner who has worked hard to provide for his wife and two children, as well as
5 his parents, his sister, and his sister's child. Id. at ¶ 5-7, 10.

6 Mr. Orantes has been deeply affected by the loss of his TPS. He is currently in
7 deportation proceedings. Id. at 23. If Mr. Orantes is unsuccessful in obtaining relief in this
8 case, he will be deported from the United where he has spent his entire adult life, separated from
9 his family, and sent to a country where he has not lived since he was a youth. Id. at ¶¶ 24-27.
10 Mr. Orantes's financial and emotional support is essential to the well-being of his family. Id. at
11 ¶ 25. If he were to be deported to El Salvador, he fears that it would be a "disaster" for his
12 family. Id. at ¶ 27.

13
14 On January 13, 2011, Mr. Orantes filed a motion for relief from judgment in this Court.
15 Ex. A at 11. In that motion, relying on Padilla v. Kentucky and Boykin v. Alabama,¹ Mr.
16 Orantes argued that his guilty plea was not knowing and voluntary because the *trial court* did
17 not inform him of the immigration consequences of his conviction, which as a result of the
18 Supreme Court's holding in Padilla should be considered direct consequences. Ex. A at 4-6.
19 Mr. Orantes did not raise a claim of ineffective assistance of counsel. Mr. Orantes's original
20 motion was subsequently referred to the Court of Appeals as a personal restraint petition. In re
21 Personal Restraint of Orantes, No. 66891-9-1, 2012 Wash. App. LEXIS 1922, at *3-4 (August
22 13, 2012).

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25 ¹ Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

1 After briefing and oral argument, the Court of Appeals held that Mr. Orantes's personal
2 restraint petition was time-barred by RCW 10.73.090's one-year time limit on collateral attack.
3 Id. at *4. The court also held that Mr. Orantes's petition was not exempt from the time limit for
4 collateral attack under RCW 10.73.100(6), which creates an exception for untimely personal
5 restraint petitions based on new precedent, because Padilla v. Kentucky applies only to
6 ineffective assistance of counsel claims, and not ordinary due process voluntariness claims
7 under Boykin. Id. at *17. Accordingly, because Mr. Orantes did not raise a claim of ineffective
8 assistance of counsel in his personal restraint petition, the Court of Appeals refused to address
9 the merits of his petition and dismissed it. Id. at *17.

10 Mr. Orantes files the instant motion to withdraw his guilty plea on the ground that he did
11 not receive effective assistance of counsel during the plea process in this case.

12 **II. Summary of Argument**

13
14 When Mr. Orantes entered his plea of guilty, his attorney failed to inform him that doing
15 so would cause him to lose his immigration status and render him deportable from the United
16 States, and instead assured him that his immigration status would not be affected if he pleaded
17 guilty. Orantes Dec. at ¶¶ 17-19. Had Mr. Orantes known that pleading guilty would subject
18 him to deportation from the United States, he would have refused to plead guilty. Id. at ¶19.
19 Prior to the United States Supreme Court's recent decision in Padilla v. Kentucky, the rule in
20 Washington was that failure to inform a noncitizen defendant of the immigration consequences
21 of a guilty plea did not constitute ineffective assistance of counsel. However, the Padilla Court
22 significantly changed the law by imposing on defense counsel the duty to advise noncitizen
23 defendants of the immigration consequences of a plea. 130 S. Ct. at 1482-83.
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1 Because Mr. Orantes was not correctly informed of the immigration consequences of his
2 guilty plea by his attorney in this case and was instead given affirmative misadvice, he was
3 denied effective assistance of counsel at the time his plea was entered, and his plea is therefore
4 void. Accordingly, the Supreme Court's decision in Padilla dictates that Mr. Orantes should be
5 relieved of the judgment in this case pursuant to CrR 7.8(b)(4). Mr. Orantes's claim is not time-
6 barred because Padilla effected a significant change in the law governing Mr. Orantes's
7 conviction, which should be applied retroactively, and which therefore creates an exception to
8 the time limit on collateral attacks on judgments imposed by RCW 10.73.090. See In re
9 Personal Restraint of Jagana, 170 Wn. App. 32, 59 (2012). Furthermore, Mr. Orantes's motion
10 is not a successive petition for post-conviction relief under RCW 10.73.140 because the merits
11 of his original personal restraint petition were never addressed by the Court of Appeals. In re
12 Personal Restraint of VanDelft, 158 Wn.2d 731, 738 (2006).

13
14 **III. Mr. Orantes's Plea in This Case Was Not Voluntary Because He Did Not**
Receive Effective Assistance of Counsel During the Plea Process.

15 Both the Washington State Supreme Court and the United States Supreme Court have
16 held that the "Sixth Amendment right to effective assistance of counsel encompasses the plea
17 process." Sandoval, 171 Wn.2d at 168 (citing In re Personal Restraint of Riley, 122 Wn.2d 772,
18 863 P.2d 554 (1993); McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d 763
19 (1970)). In the context of the plea process, "[c]ounsel's advice can render the defendant's guilty
20 plea involuntary or unintelligent." Sandoval, 171 Wn.2d at 168. In order to "establish the plea
21 was involuntary or unintelligent because of counsel's inadequate advice, the defendant must
22 satisfy the familiar two-part Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80
23 L.Ed.2d 674 (1984), test. . . ." Id. First, the defendant must establish that counsel's
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1 performance was objectively unreasonable, and second, the defendant must establish that
2 counsel's unreasonable performance prejudiced his case. Id.

3 In Padilla v. Kentucky, the United States Supreme Court applied these principles to
4 advice regarding the immigration consequences of a guilty plea. The Supreme Court imposed
5 upon counsel the duty to inform his client of the immigration consequences a of a guilty plea,
6 holding that, where the immigration consequences of a guilty plea are clear, counsel has the
7 duty to give a noncitizen client "correct advice" regarding those consequences, but where the
8 immigration consequences of a plea are unclear, counsel "need do no more than advise a
9 noncitizen client that pending criminal charges may carry a risk of adverse immigration
10 consequences." Id. at 1482. The Washington State Supreme Court recognized Padilla's
11 holding in State v. Sandoval, 171 Wn.2d at 171.

12 There is no question that the performance of Mr. Orantes's defense counsel was
13 objectively unreasonable during the plea process in this case. At the time that Mr. Orantes
14 pleaded guilty to attempted unlawful issuance of a bank check in 2006, the only reason that he
15 was permitted to remain in the United State was because had been granted TPS. See Orantes
16 Dec. at ¶¶ 3. In addition, Mr. Orantes had been convicted of a misdemeanor in North Carolina
17 prior to pleading guilty in this case. Orantes Dec. at 7. The Immigration and Nationality Act
18 provides that: "An alien shall not be eligible for temporary protected status under this section if
19 the Attorney General finds that . . . the alien has been convicted of any felony or 2 or more
20 misdemeanors committed in the United States. . . ." 8 U.S.C. § 1254(c)(2)(B)(i). Thus, it was
21 plainly clear that by pleading guilty in this case Mr. Orantes would become ineligible for TPS
22 status and be rendered deportable under the immigration laws.
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1 Despite these facts, Mr. Orantes's attorney failed to correctly advise Mr. Orantes of the
2 consequences of his guilty plea. See Orantes Dec. at ¶ 17; Kyle Dec. at ¶¶ 5-6. Instead of
3 advising Mr. Orantes that pleading guilty would cause him to lose his immigration status, his
4 attorney incorrectly assured him that pleading guilty would have no impact on his status.
5 Orantes Dec. at ¶ 17. Indeed, the first time that Mr. Orantes learned that his conviction caused
6 him to lose his immigration status was after the judgment and sentence in this case were
7 entered, when his renewal application for TPS was denied and he was placed in deportation
8 proceedings. Dec. Orantes at ¶ 18.

9 Because the immigration consequences of Mr. Orantes's conviction were clear at the
10 time he pleaded guilty, counsel had the duty to give him correct advice regarding the
11 immigration consequences of his conviction in this case. See Padilla, 130 S. Ct. at 1482. Mr.
12 Orantes's counsel failed to correctly advise Mr. Orantes about the immigration consequences of
13 his guilty plea and gave him incorrect advice. See Dec. Orantes at ¶ 17; Dec. Kyle, at ¶¶ 5-7.
14 Since Mr. Orantes's attorney failed to provide him with correct advice about the immigration
15 consequences of his guilty plea when the immigration consequences were clear, and gave him
16 incorrect advice that induced him to plead guilty, her performance was constitutionally
17 deficient. Sandoval, 171 Wn.2d at 171.

19 Furthermore, there is no question that Mr. Orantes was prejudiced by counsel's deficient
20 performance. "In satisfying the prejudice prong, a defendant challenging a guilty plea must
21 show that there is a reasonable probability that, but for counsel's errors, he would not have
22 pleaded guilty and would have insisted on going to trial." Sandoval, 171 Wn.2d at 174-75
23 (internal quotation marks and citations omitted). A reasonable probability exists if the
24 defendant convinces the court that a decision to reject the plea bargain would have been rational
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1 under the circumstances. Id. at 175. This standard of proof is somewhat lower than the
2 preponderance of the evidence standard. Id.

3 As a result of his guilty plea in this case, Mr. Orantes lost his immigration status and
4 was automatically rendered eligible for deportation from the United States. Mr. Orantes asserts
5 that he would not have pleaded guilty had he known the immigration consequences of his
6 conviction, and would have instead taken his chances at trial. Dec. Orantes at ¶ 15. This claim
7 is extraordinarily credible in view of the immigration consequences of pleading guilty, which
8 include virtually certain deportation and return to a country plagued by poverty and violence
9 where Mr. Orantes has not lived since his youth. It is especially so given the fact that, by
10 withdrawing his plea, Mr. Orantes will do no more than return himself to the position he was
11 previously in, facing the same charges he originally faced. The Washington State Supreme
12 Court has recognized that for noncitizen defendants, the punishment of deportation is just as
13 severe as imprisonment. Sandoval, 171 Wn.2d at 176. In Mr. Orantes's case it is much worse,
14 as deportation to El Salvador would subject him to great hardships and permanently separate
15 him from his family. See Orantes Dec. at ¶¶ 20-21. Mr. Orantes pleaded guilty based on his
16 attorney's incorrect advice about immigration consequences of his plea. Had Mr. Orantes
17 received correct advice about the immigration consequences of his conviction, he would not
18 have pleaded guilty. Mr. Orantes was substantially prejudiced by his counsel's deficient
19 performance.
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21 Accordingly, because Mr. Orantes was deprived of the effective assistance of counsel
22 during the plea process in this case, the resulting plea was involuntary and he should be
23 permitted to withdraw his guilty plea. See Sandoval, 171 Wn.2d at 168.
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1 **IV. An Involuntary Plea Results in a Void Judgment that Is Subject to**
2 **Collateral Attack Pursuant to CrR 7.8(b)(4).**

3 CrR 7.8(b) allows a court to relieve a party from a final judgment for the following
4 reasons:

- 5 (1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a
6 judgment or order;
7 (2) Newly discovered evidence which by due diligence could not have been discovered
8 in time to move for a new trial under rule 7.5;
9 (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or
10 other misconduct of an adverse party;
11 (4) The judgment is void; or
12 (5) Any other reason justifying relief from the operation of the judgment.

13 A plea that is involuntary violates due process. State v. Ross, 129 Wash.2d 279, 284,
14 916 P.2d 405 (1996); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). Such a plea
15 results in a void judgment that is subject to collateral attack pursuant to CrR 7.8(b)(4). State v.
16 Olivera-Avila, 89 Wn.App. 313, 319 (1997).

17 In this case, because Mr. Orantes's plea was involuntary, as outlined above, the resulting
18 judgment and sentence is void and he may be relieved from that judgment pursuant to CrR
19 7.8(b)(4). Olivera-Avila, 89 Wn.App. at 319.

20 **V. Mr. Orantes is Excused from the Time Limit on Collateral Attacks on**
21 **Judgments because *Padilla v. Kentucky* Effected a Significant Change in the**
22 **Law that Applies Retroactively under RCW 10.73.100(6).**

23 Mr. Orantes is entitled to withdraw his plea because Padilla effected a significant change
24 in the law material to his case that applies retroactively. RCW 10.73.090 imposes a one-year
25 time limit on collateral attacks on judgments. However, RCW 10.73.100(6) provides that the
time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely
on the fact that:

There 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

1 or civil proceeding instituted by the state or local government, and either the
2 legislature has expressly provided that the change in the law is to be applied
3 retroactively, or a court, in interpreting a change in law that lacks express
legislative intent regarding retroactive application, determines that sufficient
reasons exist to require retroactive application of the changed legal standard.

4 RCW 10.73.100(6). The Washington Court of Appeals recently held that the Supreme Court's
5 decision in Padilla effected a significant change in law that applies retroactively to cases on
6 collateral review under RCW 10.73.100(6) and that a defendant who raises a claim of
7 ineffective assistance of counsel under Padilla is exempt from the one-year time limit on
8 collateral attack imposed by RCW 10.73.090. In re Personal Restraint of Jagana, 170 Wn. App.
9 at 59. Because Padilla effected a significant change in the law that applies retroactively to Mr.
10 Orantes's case, his motion is exempt from RCW 10.73.090's one-year time limit.

11 VI. Mr. Orantes's Motion is Not a Successive Petition for Post-Conviction
12 Relief.

13 Mr. Orantes's motion is not barred by RCW 10.73.140 as a successive petition for post-
14 conviction relief. RCW 10.73.140 provides:

15 If a person has previously filed a petition for personal restraint, the court of
16 appeals will not consider the petition unless the person certifies that he or she has
17 not filed a previous petition on similar grounds, and shows good cause why
petitioner did not raise the new grounds in the previous petition. . . .

18 RCW 10.73.140. RCW 10.73.140 applies to motions under CrR 7.8(b). State v. Brand, 120
19 Wn.2d 365, 370, 842 P.2d 470 (1992). But, the Supreme Court has held that a second personal
20 restraint petition is not barred by RCW 10.73.140 as a successive petition if the first petition was
21 never decided on the merits. In re Personal Restraint of VanDelft, 158 Wn.2d at 738; In re
22 Personal Restraint of Stoudmire, 145 Wn.2d 258, 263, 26 P.3d 1005 (2001).

23 In dismissing Mr. Orantes's original personal restraint petition, the Court of Appeals
24 expressly stated that it did not address "the merits of his claim" because his petition was
25

1 procedurally barred as untimely. In re Personal Restraint of Orantes, 2012 Wn. App. Lexis
2 1922, at *17. Accordingly, because Mr. Orantes's original personal restraint petition was
3 dismissed on procedural grounds and the merits of his claim were not decided by the Court of
4 Appeals, the instant motion is not precluded by RCW 10.73.140 as a successive petition. See In
5 Personal Restraint of VanDelft, 158 Wn.2d at 738.

6 **VII. Conclusion**

7 Based on the foregoing, the Court should vacate the judgment and sentence in this case
8 and permit Mr. Orantes to withdraw his guilty plea.
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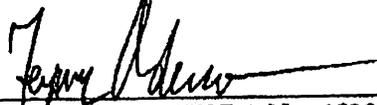
10 DATED this 15th day of January, 2013.

11 Respectfully submitted,

12 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

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14
15 Christopher Black, WSBA No. 31744
16 Attorney for Santos Orantes

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18 Teymur Askerov, WSBA No. 45391
19 Attorney for Santos Orantes
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, along with any attachments, was served on the below-noted date, via U.S. Mail, upon the parties required to be served in this action:

Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Ave., M/S 504
Everett, WA 98201

DATED this 15th day of January, 2013.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Teymur Askerov, WSBA No. 45391
Attorney for Santos Orantes

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THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

Plaintiff,

vs.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

DECLARATION OF SANTOS ORANTES

I, SANTOS WILFREDO ORANTES, am defendant in this matter. I have personal knowledge of the facts herein, am over the age of 18, and am competent to testify. I hereby certify that the following is true and correct to the best of my ability under penalty of perjury.

Background

1. My name is Santos Wilfredo Orantes. I was born on September 1, 1980, in Zacatecoluca, El Salvador.
2. I left El Salvador in the summer of 1999 and came to the United States. I lived in California, North Carolina, and Florida before moving to Washington in 2004.
3. I applied for Temporary Protected Status (TPS) for the first time in approximately 2000. This is a temporary immigration status accorded by the United States government to people from certain countries to which it unsafe to return. I successfully renewed my TPS twice after that.
4. I met my wife, Nansy, in 2003. Nansy was born in El Salvador and has lived in the United States since she was fourteen years old. She is a naturalized U.S. citizen. We were married in 2005.

DECLARATION OF SANTOS ORANTES - 1

LAW OFFICE OF CHRISTOPHER BLACK, PLLC
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Seattle, WA 98104
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1 5. Nansy and I have two beautiful children. Our daughter Lesley is eight and our son Daniel is
2 almost four. They were both born here in the United States and are both U.S. citizens.

3 6. My sister Dinora, who also has TPS, is a single mother to an eleven year old U.S. citizen.
4 They lived with my family until recently, and I continue to support them.

5 7. I also support my parents, who still live in El Salvador. Both of my parents are ill and they
6 would have no means to survive if I stopped supporting them.

7 8. When I first arrived in the United States, I did not speak English and I was unsophisticated in
8 my behavior and business dealings. Regrettably, I was convicted of a misdemeanor while
9 living in North Carolina.

9 9. Since 2006, I have not been convicted of any crimes. In 2010, I started my own construction
10 company. I specialize in remodeling homes. My company is licensed in the State of
11 Washington and I have stayed current on my taxes.

12 10. I have worked very hard, learned English, and done my best to be a good husband, father,
13 son, and community member.

14 11. I know that I have been very lucky to be able to live in safety in the U.S., and I want to do
15 everything in my power to take advantage of the opportunity, and to contribute to society as
16 much as I am able.

16 12. In short, I have been working hard, caring for my family, and being as productive a member
17 of society as I can.

18 Entry of Guilty Plea in this Case

19 13. On August 18, 2006, I entered a plea of guilty to the charge of attempted unlawful issuance
20 of a bank check. I was given a deferred sentence of 364 days with 12 months of probation
21 and a \$500.00 fine.

22 14. I complied with all of the terms of my deferred sentence.

23 15. My legal counsel advised me that my best option was to plead guilty, because doing so
24 would likely lead to the best resolution of my criminal case. Thus, I decided to plead guilty.

25 16. My lawyer knew about my TPS and that my immigration status was very important to me.

- 1 17. My lawyer mistakenly advised me that pleading guilty would not affect my TPS as long as I
2 was sentenced to less than 365 days of confinement. She never told me that pleading guilty
3 would cause me to lose my immigration status.
- 4 18. The first time that I became aware that this plea would jeopardize my immigration status was
5 when my application to renew TPS was denied.
- 6 19. At the time I pleaded guilty in this case I was completely unaware of the serious impact this
7 conviction would have on my immigration status, and thus my life. I would not have pleaded
8 guilty had I been aware of those consequences and would have gone to trial instead.
- 9 20. Avoiding deportation was much more important to me than avoiding jail time at the time I
10 pleaded guilty. In 2006, when I pleaded guilty, I was recently married and had a new born
11 daughter. I was prepared to do everything within my power to remain with them in the
12 United States.
- 13 21. After I was convicted, I consulted with another attorney, who erroneously advised me that a
14 reduction in my sentence from 364 to 180 days would resolve my immigration problems. I
15 petitioned the court to reduce my sentence, which was then amended from 364 to 180 days.
- 16 22. However, due to the fact that I have two misdemeanor convictions, I remain ineligible for
17 TPS.

18
19 Current Status

- 20 23. I am currently in deportation proceedings. If I am unsuccessful in my attempt to obtain post-
21 conviction relief in this matter, it is almost certain that I will be deported to El Salvador.
- 22 24. If this happens it will have a disastrous impact on both me and my family. I have been in this
23 country for over ten years. I have spent my entire adult life here. I have no prospects in El
24 Salvador. My wife and children are all U.S. Citizens. My wife has been in this country since
25 she was a child, and my children have never lived anywhere else. El Salvador is a dangerous
place, and there is little economic opportunity there.
- 26 25. My wife would not be able to financially support our family without me. I am the main
breadwinner in my household, and my wife does not earn enough to support herself and our
children without my income. My wife and children rely on me for financial and emotional
support, and we would all be devastated if we were separated from one another.

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~~26. If I am deported to El Salvador, I will also be unable to support my parents, my sister and my niece. I fear that my parents will be unable to survive without my support.~~

27. I truly do not know what will happen if I am deported. It would be a disaster for our family.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my ability.

SIGNED AND DATED this 17 day of September, 2012 at Kent, Washington.


Santos Wilfredo Orantes

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THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

Plaintiff,

v.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

DECLARATION OF KATHLEEN KYLE

I, KATHLEEN KYLE, have personal knowledge of the facts herein, am over the age of 18, and am competent to testify. I hereby certify that the following is true and correct to the best of my ability under penalty of perjury.

1. I am an attorney licensed to practice law in the State of Washington.
2. I previously represented the defendant, Santos Wilfredo Orantes, in this matter.
3. On August 18, 2006, Mr. Orantes entered a plea of guilty to one count of Attempted Unlawful Issuance of a Bank Check.
4. I discussed some of the consequences of Mr. Orantes's plea with him prior to his entry of the plea in court.
5. At no point during my conversations with Mr. Orantes prior to the entry of the plea did I advise him that pleading guilty to this charge would likely result in the loss of his immigration status.

DECLARATION OF KATHLEEN KYLE - 1

LAW OFFICE OF CHRISTOPHER BLACK, PLLC
119 First Avenue South, Suite 320
Seattle, WA 98104
206.623.1604 | Fax: 206.622.6636

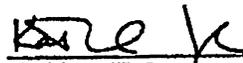
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6. I did not advise him that his guilty plea would render him ineligible for Temporary Protected Status.

7. I have no reason to believe that Mr. Orantes was aware of the actual effect that his guilty plea would have on his immigration status at the time of entry of the plea.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED AND DATED this 1st day of January, 2011 at Frederick, Washington.



Kathleen Kyle

SNOHOMISH SUPERIOR COURT

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Transmittal Letter

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Case Name: STATE OF WASHINGTON VS SANTOS WILFREDO
ORANTES

County Cause Number: 06-1-00278-9

Court of Appeals Case Number: 71082-6

FILED
Oct 29, 2013
Court of Appeals
Division I
State of Washington

Personal Restraint Petition (PRP) Transfer Order

Notice of Appeal/Notice of Discretionary Review

(Check All Included Documents)

Judgment & Sentence/Order/Judgment
Signing Judge: _____

Motion To Seek Review at Public Expense

Order of Indigency

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SUPERIOR COURT

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MEMORANDUM

TO: Judge FARRIS
RE: Santos Wantes
Superior Court No. 06-1 - 00278-9
DATE: 10/24/13

Agreed Order
Motion to Transfer

Seth File / DK

Diane K. Kremenich
Snohomish County Prosecuting Attorney - Criminal Division
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IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

No. 06-1-00278-9

Plaintiff,

v.

STATE'S MOTION TO TRANSFER
MOTION FOR RELIEF FROM JUDGMENT

ORANTES, Santos W.

Defendant.

I. MOTION

The State of Washington moves for an order transferring the defendant's motion for relief from judgment to the Court of Appeals, for consideration as a personal restraint petition. This motion is based on CrR 7.8(c)(2) and the following memorandum.

II. FACTS

On October 12, 2004, the defendant purchased two truck canopies. He paid for them with a check in the amount of \$598.95. At the time he wrote this check, his checking account was already overdrawn by \$196.08. Docket no. 2.

Based on these acts, the defendant was charged with the felony of unlawful issuance of a bank check. Docket no. 1. Ms. Kathleen Kyle of the Snohomish

ORIGINAL

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1 County Public Defender Association was appointed to represent him. On her
2 advice, the defendant pled guilty to attempted unlawful issuance of a bank check, a
3 gross misdemeanor. The plea statement contained the standard advisement
4 concerning possible immigration consequences:

5 If I am not a citizen of the United States, a plea of guilty to an offense
6 punishable as a crime under state law is grounds for deportation,
7 exclusion from admission to the United States, or denial of
naturalization pursuant to the laws of the United States.

8 Docket no. 29 at 2, ¶ 6(i). In accepting the plea, the court orally repeated this
9 warning. Docket no. 54 at 5.

10 In the plea agreement, the State agreed to recommend 364 days in jail, all
11 deferred on condition of one year's probation and payment of a \$500 penalty
12 assessment. (The plea form originally had 365 days typed in. A handwritten change
13 reduced this to 364.) Docket no. 29.

14 In connection with a subsequent motion to amend the sentence, Ms. Kyle
15 explained the reason for this change. She had consulted an overview published by
16 the Washington Defenders Immigration Project on consequences of criminal
17 convictions. According to this, the defendant could face immigration consequences
18 if he was sentenced to one year or more. He would not face such consequences if
19 he was sentenced to less than one year. Based on this information, she sought a
20 deferred sentence of 364 days. Declaration of Defense Counsel (attached to Motion
21 and Declaration in Support of Amending Judgment and Sentence, docket no. 34).
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1 On August 23, 2006, the court sentenced the defendant in accordance with
2 the parties' recommendations. He received 364 days in jail, all deferred on condition
3 of 12 months' probation and payment of a \$500 victim assessment. The judgment
4 was filed the following day.

5 In December, 2008, the defendant, acting through new counsel, filed a
6 motion to amend the judgment. This motion stated that the defendant faced
7 immigration consequences as a result of any sentence exceeding 180 days.
8 According to information provided by the defendant's Immigration counsel,
9 amendment of the sentence was "the paramount issue" in an upcoming immigration
10 hearing. Docket no. 34 at 2. This court granted the motion. It entered an order
11 reducing the sentence "nunc pro tunc" to 180 days. Docket no. 35.
12

13 Despite this action by the court, on January 20, 2011 the defendant filed a
14 motion to vacate the judgment. The motion claimed that the guilty plea was not
15 voluntary because the defendant had not been advised of immigration
16 consequences. Docket no. 38.
17

18 Before responding to this motion, the prosecutor asked defense counsel
19 whether he was claiming ineffective assistance of counsel. The prosecutor pointed
20 out that such a claim waived the attorney-client privilege to the extent necessary to
21 respond to those allegations. In response, defense counsel stated that "we have not
22 claimed ineffective assistance of counsel." Based on this assurance, the prosecutor
23 agreed not to seek to interview Ms. Kyle. Docket no. 57.
24

1 The court transferred the motion to the Court of Appeals for consideration as
2 a personal restraint petition. Docket no. 48. The Court of Appeals dismissed the
3 petition, holding that it was barred by RCW 10.73.090. The mandate was issued on
4 December 21, 2012. Docket no. 50.

5 On January 16, 2013, the defendant filed a "Motion to Withdraw Guilty Plea,"
6 again relying on CrR 7.8. This time, he raised the claim that he had renounced in
7 the prior motion: that former defense counsel's mis-advice concerning immigration
8 consequences constituted ineffective assistance of counsel. Docket no. 51. The
9 defendant has, however, still refused to provide a waiver of attorney-client privilege,
10 so as to allow the prosecutor to interview former defense counsel. As a result, the
11 prosecutor has still been unable to obtain any information concerning this case from
12 former counsel. Docket no. 57.

14 **II. ISSUE**

15 Should this case be transferred to the Court of Appeals for consideration as a
16 personal restraint petition?
17

18 **IV. ARGUMENT**

19 Motions to vacate judgment can be either resolved by this court on the merits
20 or transferred to the Court of Appeals. The standards governing this choice are set
21 out in CrR 7.8(c)(2):

22 The court shall transfer a motion filed by a defendant to the Court of
23 Appeals for consideration as a personal restraint petition unless the
24 court determines that the motion is not barred by RCW 10.73.090 and
25 either (i) the defendant has made a substantial showing that he or she

1 is entitled to relief or (ii) resolution of the motion will require a factual
2 hearing.

3 **A. THE DEFENDANT'S MOTION IS TIME BARRED.**

4 RCW 10.73.090(1) sets a time limit on motions to vacate judgment and other
5 forms of "collateral attack." Such a motion must be filed within one year after the
6 judgment "becomes final." Since the judgment in the present case was not
7 appealed, it became final on August 24, 2006, the day it was filed. RCW
8 10.73.090(3)(a). The present motion was filed on January 16, 2013. That date is
9 almost 5½ years beyond the time limit.

10 The defendant claims that his motion falls within the exception to the time
11 limit set out in RCW 10.73.100(6):

12 The time limit specified in RCW 10.73.090 does not apply to a petition
13 or motion that is based solely on one or more of the following grounds:

14 ...

15 (6) There has been a significant change in the law, whether
16 substantive or procedural, which is material to the conviction ..., and
17 ... a court, in interpreting a change in the law that lacks express
18 legislative intent regarding retroactive application, determines that
19 sufficient reasons exist to require retroactive application of the
20 changed legal standard.

21 The defendant claims that a "significant change in the law" resulted from
22 Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Prior
23 to Padilla, Washington courts did not require lawyers in criminal cases to advise
24 their clients of immigration consequences of guilty pleas. The courts reasoned that
25 counsel's duty did not extend to "collateral consequences." State v. Holley, 75 Wn.
26 App. 191, 197, 876 P.2d 973 (1994). Padilla holds that counsel must advise of

1 immigration consequences, whether or not they are considered "collateral."
2 Because of this, the Court of Appeals has held that Padilla is a significant change in
3 the law. In re Jagana, 170 Wn. App. 32, 43 ¶ 24, 282 P.3d 1153 (2012).

4 The Court of Appeals also held that Padilla is retroactively applicable.
5 Jagana, 170 Wn. App. at 65 ¶ 66. The court noted that this issue was currently
6 awaiting decision by the United States Supreme Court. Id. at 55 ¶ 54. That decision
7 has just been handed down. The Supreme Court held that Padilla is not retroactive.
8 Chaidez v. United States, no. 11-820 (decided 2/20/13). This being so, the
9 exception set out in RCW 10.73.100(6) does not apply, and the defendant's motion
10 is time barred.
11

12 Even under the analysis in Jagana, the defendant's claim would not fall
13 within the statutory exception. Prior to Padilla, courts recognized a distinction
14 between non-advice concerning collateral consequences and affirmative mis-
15 advice. Although non-advice did not constitute ineffective assistance, affirmative
16 mis-advice could be ineffective assistance. Chaidez, slip op. at 13; Jagana, 170 Wn.
17 App. at 43 ¶ 24. Two Washington cases specifically recognized that counsel's mis-
18 advice about immigration consequences could support withdrawal of a guilty plea.
19 State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993); Holley, 175 Wn. App.
20 at 198-99; cf. In re Yim, 139 Wn.2d 581, 588, 989 P.2d 512 (1999) (affirmative mis-
21 advice concerning immigration consequences could constitute "manifest injustice"
22 supporting withdrawal of plea).
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1 The present case involves mis-advice, not non-advice. According to the
2 defendant's declaration, "My lawyer mistakenly advised me that pleading guilty
3 would not affect my TPS [Temporary Protected Status] as long as I was sentenced
4 to less than 365 days of confinement." Declaration of Santos Orantes at 3 ¶ 17.
5 The defendant claims that this advice was erroneous: "[D]ue to the fact that I have
6 two misdemeanor convictions, I remain ineligible for TPS." Id. ¶ 22.

7
8 Since the defendant's claim is based on mis-advice, it was available prior to
9 Padilla. This means that Padilla is not a "significant change in the law" with respect
10 to *this defendant's* claim. A "significant change in the law" occurs when "an
11 intervening opinion has effectively overturned a prior appellate decision that was
12 originally determinative of a material issue." In re Domingo, 155 Wn.2d 356, 366 ¶
13 27, 119 P.3d 816 (2005). This reflects the principle that litigants have a duty to raise
14 available arguments in a timely fashion, but "they should not be penalized for having
15 omitted arguments that were essentially unavailable at the time." In re Greening,
16 141 Wn.2d 687, 697, 9 P.3d 206 (2000). Since the defendant's claim was available
17 prior to Padilla, he had a duty to raise it in a timely fashion. Since he failed to do so,
18 the claim is barred by RCW 10.73.090.

19
20 **B. THE DEFENDANT HAS NOT MADE A SUBSTANTIAL SHOWING THAT HE IS**
21 **ENTITLED TO RELIEF.**

22 **1. Because The Defendant Renounced An Ineffectiveness Claim In The Prior**
23 **Proceeding, His Motion Is Barred As Abusive.**

24 Even if the defendant's motion could be considered timely, it is barred as
25 abusive.

26 State's Motion to Transfer
Motion for Relief from Judgment - Page 7

1 A prisoner's second or subsequent personal restraint petition that
2 raises a new issue for the first time will not be considered if raising
3 that issue constitutes an abuse of the writ. We have held that if the
4 defendant was represented by counsel throughout postconviction
5 proceedings, it is an abuse of the writ for him or her to raise a new
6 issue that was available but not relied upon in a prior petition. No
7 abuse of the writ will be found where a claim is based on newly
8 discovered evidence or intervening changes in case law because they
9 would not have been "available" when the earlier petition was filed.
10 However, if counsel was fully aware of the facts supporting the "new"
11 claim when the prior petition was filed, and there are no pertinent
12 intervening developments, raising the "new" claim for the first time in a
13 successive petition constitutes needless piecemeal litigation and,
14 therefore, an abuse of the writ.

15 In re Turay, 153 Wash. 2d 44, 48-49, 101 P.3d 854 (2004) (citations and footnote
16 omitted).

17 All of these requirements are satisfied here. The defendant was represented
18 by counsel throughout the prior proceeding. At the time the prior motion was filed,
19 Padilla had already been decided. All of the facts that allegedly establish ineffective
20 assistance were known to counsel at the time. There has been no newly discovered
21 evidence or significant change in the law. This being so, the defendant was required
22 to raise all available grounds for relief. Having chosen to litigate the case on one
23 legal theory, he is not entitled to a second try under a different theory.

24 The defendant's motion is also abusive for a second reason. In his prior
25 motion, the defendant deliberately chose not to raise a claim of ineffective
26 assistance. The deliberate abandonment of an issue constitutes an abuse of the
27 writ, which prevents the issue from being raised in a subsequent proceeding.
28 Sanders v. United States, 373 U.S. 1, 18, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963).

1 Because the defendant's attempt to raise a claim of ineffectiveness constitutes an
2 abuse of the remedy, that claim cannot be considered.

3 **3. The Defendant Has Not Made An Adequate Showing That His Counsel's**
4 **Performance Was Deficient.**

5 Even if the standards of Padilla are applied, the defendant has not made a
6 sufficient factual showing to warrant relief. Ineffective assistance claims are
7 governed by the standard set out in Strickland v. Washington, 466 U.S. 668, 104 S.
8 Ct. 2052, 80 L. Ed. 2d 674 (1984). Under that standard, the defendant must
9 establish that (1) his attorney's performance was deficient and (2) the deficient
10 performance prejudiced the defense. Id. at 687.

11 To establish a constitutional violation, the defendant must show that
12 counsel's performance was "objectively unreasonable." State v. Sandoval, 171
13 Wn.2d 163, 169 ¶ 9, 249 P.3d 1015 (2011). When counsel's alleged error involves
14 failure to advise of immigration consequences, the standard depends on the clarity
15 of the immigration law:
16

17 If the applicable immigration law is truly clear that an offense is
18 deportable, the defense attorney must correctly advise the defendant
19 that pleading guilty to a particular charge would lead to deportation. If
20 the law is not succinct and straightforward, counsel must provide only
a general warning that pending criminal charges may carry a risk of
adverse immigration consequences.

21 Id. at 170 ¶ 11 (citations omitted).

22 In the present case, the defendant has not demonstrated that the immigration
23 consequences of his plea were "truly clear." According to Ms. Kyle's declaration,
24 she relied on a manual published by the Washington Defenders Immigration
25

1 Project. Docket no. 34, Declaration of Defense Counsel ¶ 2. The defendant has not
2 shown that this reliance was unreasonable. An immigration attorney later concluded
3 that adverse consequences could be avoided by reducing the suspended sentence
4 to 180 days. Id., Declaration of Counsel ¶ 7.

5 The adverse immigration consequences in this case stem from the
6 defendant's prior North Carolina misdemeanor conviction. Motion for Relief from
7 Judgment at 2. There is no showing that Ms. Kyle knew or should have known of
8 that conviction. Even subsequent counsel claimed that "Mr. Orantes has no criminal
9 history before ... this offense." Docket no. 34, Declaration of Counsel ¶ 5. So far as
10 the defendant has shown, Ms. Kyle may have made reasonable inquiries, and the
11 defendant may have failed to inform her of his prior conviction. The defendant
12 cannot blame his former attorney for his own lack of candor.

14 With regard to the "prejudice" prong, the State concedes that the defendant
15 has made an adequate prima facie showing. In this context, "prejudice" exists "if the
16 defendant convinces the court that a decision to reject the plea bargain would have
17 been rational under the circumstances." Sandoval, 171 Wn.2d at 174-75 ¶ 19.
18 Here, the prosecutor stated at the plea hearing that there were "significant factual
19 issues" with the case. Docket no. 54 at 2. Defense counsel asserted that the
20 defendant had written the bad check "due to inexperience and the language
21 barrier." Id. at 7. This is sufficient to create a factual issue whether the defendant
22 would have acted rationally in rejecting the plea agreement.
23
24
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1 Nevertheless, since the defendant has failed to establish deficient
2 performance, he has not satisfied his burden of proof under
3 Strickland. Consequently, he has not made a substantial showing that he is entitled
4 to relief.

5 **C. THE DEFENDANT IS NOT ENTITLED TO A FACTUAL HEARING.**

6 Under CrR 7.8(c)(1), a motion for relief from judgment must be "supported by
7 affidavits setting forth a concise statement of the facts ... upon which the motion is
8 based." As discussed above, the defendant's motion fails to contain adequate facts
9 to establish deficient performance. His motion is also barred as both untimely and
10 abusive. Consequently, he is not entitled to a factual hearing.
11

12 Alternatively, if the court believes that the motion is not barred and that the
13 defendant's factual showing is sufficient, the court should "enter an order fixing a
14 time and place for hearing" per CrR 7.8(c)(3).
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1 **V. CONCLUSION**

2 This motion is time barred. The defendant has not made a substantial
3 showing of entitlement to relief. There is also no need for a factual hearing. Under
4 CrR 7.8(c)(2), the motion should be transferred to the Court of Appeals for
5 consideration as a personal restraint petition.
6

7 Respectfully submitted on February 20, 2013.

8
9 MARK K. ROE
Snohomish County Prosecuting Attorney

10
11 By: *Seth A. Fine*
12 SETH A. FINE, WSBA # 10937
13 Deputy Prosecuting Attorney
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THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

Plaintiff,

vs.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

DEFENDANT'S RESPONSE TO
STATE'S MOTION TO TRANSFER

(Clerk's Action Required)

RESPONSE

COMES NOW Defendant, SANTOS WILFREDO ORANTES, by and through undersigned counsel, and files the following response to the State's motion to transfer his motion to withdraw guilty plea. The relevant facts are set forth in Mr. Orantes's motion to withdraw guilty plea filed on January 15, 2013, and the declarations of Santos Orantes and Kathleen Kyle filed in support thereof.

ARGUMENT

I. Mr. Orantes's Motion is Not Time-Barred by RCW 10.73.090.

The State argues in its motion to transfer that CrR 7.8(c)(2)¹ requires this Court to transfer Mr. Orantes's motion to withdraw his guilty plea to the Court of Appeals as a personal

¹ CrR 7.8(c)(2) provides that:

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1 restraint petition because his motion is barred by RCW 10.73.090, which imposes a one-year
2 time limit on collateral attacks on judgments. State's Motion to Transfer ("Transfer Motion") at
3 4 - 7. Because Mr. Orantes's motion falls within the scope of RCW 10.73.100(6),² which
4 creates an exception to the one-year time limit on collateral attacks for motions based on new
5 precedent, his motion is not untimely.

6 A. Mr. Orantes's Motion is Timely under *In re Personal Restraint of Jagana*.

7 The State first contends that *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473, 176
8 L.Ed.2d 284 (2010), should not be applied retroactively to cases on collateral review for
9 purposes of RCW 10.73.100(6), and that Mr. Orantes may therefore not take advantage of the
10 exception to the one-year bar on collateral attacks provided for in that statute. However, the
11 issue of *Padilla*'s retroactivity has already been resolved by the Washington Court of Appeals,
12 and resolved in a manner contrary to the State's position. That court unequivocally held in *In re*
13 *Personal Restraint of Jagana* that *Padilla* applies retroactively to cases on collateral review and
14 that motions for post-conviction relief based on *Padilla* are therefore exempt from RCW
15

16
17
18 The court shall transfer a motion filed by a defendant to the Court of Appeals for
19 consideration as a personal restraint petition unless the court determines that the
20 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.

21 ² RCW 10.73.100(6) provides that RCW 10.73.090 does not apply to a petition or motion based
on the fact that:

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

10.73.090's one-year time limit under the exception provided for in RCW 10.73.100(6). In re Personal Restraint of Jagana, 170 Wn. App. 32, 59 (2012).

Mr. Orantes's motion raises claims based on Padilla v. Kentucky, and is therefore exempt under RCW 10.73.100(6) from the one-year time limit on collateral attacks on judgments. Id. Because Jagana clearly establishes that Mr. Orantes's motion is not barred by RCW 10.73.090 and Mr. Orantes has established that he is entitled to relief, as discussed below, this Court should retain jurisdiction over Mr. Orantes's motion and resolve it on the merits. See CrR 7.8(c)(2)(i).

B. The Supreme Court's Recent Decision in *United States v. Chaidez* has No Impact on *Jagana*'s Holding.

The State accurately points out in its motion that the United States Supreme Court recently held in United States v. Chaidez, No. 11-820, slip op. at 1, that its holding in Padilla does not apply retroactively to cases that became final before Padilla was decided. Transfer Motion at 6. But, the State overlooks the fact that the Supreme Court's decision in Chaidez has no effect upon the holding of Jagana and does not of its own force impact Padilla's retroactivity for purposes of RCW 10.73.100(6). It is axiomatic that the United States Supreme Court has no authority to construe state statutes. Washington State courts have time and time again held that because RCW 10.73.100(6) is a Washington State statute, they are not bound by the Supreme Court's retroactivity analysis:

We have applied [RCW 10.73.100(6)] consistent with the United States Supreme Court's retroactivity analysis, although that analysis does not limit the scope of relief we may provide under the statute.

In re Personal Restraint of Hachenev, 169 Wn. App. 1, 17 n.11 (2012) (citing State v. Markel, 154 Wn.2d 262, 268 n.1 (2005)). As the Washington Supreme Court has noted, in the context of RCW 10.73.100(6), our courts are free to depart from "federal analysis as it exists today, or

1 as it may develop where sufficient reason would exist to depart from that analysis.” Markel
2 154 Wn.2d at 268 n.1. Washington courts have on at least two occasions departed from federal
3 retroactivity analysis. In re Personal Restraint of Vandervlugt, 120 Wn.2d 427, 432-33 (1992)
4 (rejecting federal retroactivity analysis in favor of state common law of statutory construction
5 principles); In re Personal Restraint of Smith, 117 Wn. App. 846, 856 (2003) (same).

6 In Jagana the Washington State Court of Appeals made clear that the question before it
7 was whether “Padilla should be applied retroactively under our state statute” and its resolution
8 of that question cannot therefore be impacted by changes in federal law. Jagana, 170 Wn. App.
9 at 56. In its opinion, the Jagana court acknowledged that the Supreme Court of the United
10 States had granted certiorari in Chaidez, but noted that the Supreme Court’s decision in Chaidez
11 would only resolve the conflict over Padilla’s retroactivity in the federal circuit courts. See id. at
12 55 (“The Supreme Court recently granted review of Chaidez. As of this writing the Supreme
13 Court *has not resolved this conflict within the federal circuit courts* on whether Padilla is a
14 ‘new’ rule or an ‘old’ one.”) (emphasis added). The Jagana court, expressly rejected the
15 conclusion ultimately reached by the Supreme Court in Chaidez on Padilla’s retroactivity, and
16 held that despite federal authority to the contrary, “sufficient reason exists to apply Padilla
17 retroactively” under RCW 10.73.100(6). Id. at 56.

18
19 Indeed, strong reasons exist to depart from the Supreme Court’s reasoning in Chaidez in
20 analyzing Padilla’s retroactivity under RCW 10.73.100(6). First, the Supreme Court’s decision
21 in Chaidez is inconsistent with its own precedent, including its decision in Padilla. As the
22 Jagana court noted, Mr. Padilla’s conviction had been final for over two years before the
23 initiation of the post-conviction proceeding that brought his case before the Supreme Court. See
24 id. at 56. Thus, the Supreme Court has itself applied Padilla retroactively. Under the Supreme
25

1 Court's own precedent, if the case announcing a rule applies that rule retroactively, "evenhanded
2 justice requires that it be applied retroactively to all who are similarly situated." Teague v. Lane,
3 489 U.S. 288, 300 (1989). Accordingly, failure to apply Padilla to cases on collateral review
4 would be fundamentally unfair to litigants who filed motions after Padilla was decided.

5 More importantly, the Supreme Court's analysis in Chaidez is unpersuasive. In Chaidez,
6 the Supreme Court based its decision on Padilla's retroactivity on the retroactivity framework
7 announced by the Court in Teague. See Chaidez, slip op. at 3. Under Teague, a "new rule" of
8 constitutional law generally does not apply retroactively to cases on collateral review. Teague,
9 489 U.S. at 307. However, a "new rule" will be given retroactive application to cases on
10 collateral review if: "(a) the new rule places certain kinds of primary, private individual conduct
11 beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures
12 implicit in the concept of ordered liberty." Id. A rule is new "when it breaks new ground or
13 imposes a new obligation on the government." Teague, 489 U.S. at 301. In other words, a rule
14 is new if "it was not dictated by precedent at the time the defendant's conviction became final."
15

16 On the other hand, a rule is not new when a well-established rule of law is applied to the
17 specific facts of a particular case. See Stringer v. Black, 503 U.S. 222, 228-29, 112 S. Ct. 1130,
18 117 L.Ed.2d 367 (1992). As the Supreme Court explained in Chaidez:

19 Where the beginning point of our analysis is a rule of general application, a rule
20 designed for the specific purpose of evaluating a myriad of factual contexts, it will
21 be the infrequent case that yields a result so novel that it forges a new rule, one
22 not dictated by precedent.

22 Chaidez, slip op. at 4 (internal citation and quotation marks omitted).

23 The Supreme Court acknowledged in Chaidez that an application of the two-prong test
24 for ineffective assistance of counsel first announced in Strickland v. Washington, 466 U.S. 688
25 (1984), to a novel set of facts would not create a new rule. Id. Nonetheless, the Court went on

1 to hold that Padilla created a new rule despite the fact that it relied upon an application of
2 Strickland because the Court had never decided whether the test for ineffective assistance of
3 counsel applies to counsel's advice on consequences collateral to a criminal conviction.
4 Chaidez, slip op. at 6 – 7.

5 In support of this proposition, the Court relied upon its decision in Hill v. Lockhart, 474
6 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), where it dismissed a claim of ineffective
7 assistance of counsel based on the fact that counsel gave the defendant erroneous advice about
8 his parole eligibility. Chaidez, slip op. at 6. The Court explained in Chaidez that because it
9 dismissed Hill on the ground that the defendant had failed to establish prejudice, it was
10 unnecessary for it to reach the preliminary question of whether the Strickland test even applies
11 to cases where a defendant claims ineffective assistance of counsel based on a criminal defense
12 lawyer's failure to advise him of consequences collateral to a criminal conviction. Id. Thus,
13 according to the Court, because Padilla was the first case to announce that Strickland applies in
14 the context of collateral consequences, it created a new rule. Id.

15
16 But contrary to the Court's opinion in Chaidez, Padilla did not announce that Strickland
17 applies to ineffective assistance of counsel claims based on collateral consequences. As Justice
18 Sotomayor pointed out in her dissent:

19 Padilla declined to embrace the very distinction between collateral and direct
20 consequences of a criminal conviction that the majority says it did. In fact, the
21 Court stated very clearly [in Padilla] that it found the distinction irrelevant for the
22 purpose of determining a defense lawyer's obligation to provide advice about the
23 immigration consequences of a plea . . . and asserted that [it] had never applied a
24 distinction between direct and collateral consequences to define the scope of
25 constitutionally "reasonable professional assistance" required under Strickland.

Chaidez, opinion of Sotomayor J. at 6.

1 Furthermore, the Court has applied the Strickland test to a variety of factual
2 circumstances without ever announcing a new rule. Id. at 2 n.1 (collecting cases). Indeed,
3 Padilla was not the first case to apply the Strickland test in the context of counsel's advice about
4 consequences collateral to a criminal conviction, Hill was. By analyzing a claim based on
5 failure to advise about parole eligibility, a collateral consequence, under the Strickland test, Hill
6 made clear almost thirty years ago that all claims of ineffective assistance of counsel, including
7 those based upon counsel's failure to provide advice collateral about consequences collateral to
8 a criminal conviction, required application of Strickland:

9 Two terms ago, in Strickland v. Washington . . . , we adopted a two-part standard
10 for evaluating ineffective assistance of counsel claims. There . . . we reiterated
11 that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's
12 assistance, the defendant must show that counsel's representation fell below an
objective standard of reasonableness. We also held that but for counsel's
unprofessional errors, the result of the proceeding would have been different.

13 Hill, 474 U.S. at 57. The fact that Hill Court had disposed of the claim before it after
14 considering only the prejudice prong of Strickland is irrelevant. Strickland, 466 U.S. at 697
15 ("[T]here is no reason for a court deciding an ineffective assistance of counsel claim to approach
16 the inquiry in the same order or even address both components of the inquiry if the defendant
17 makes an insufficient showing of one."). The fact remains that Hill applied Strickland in the
18 context of a claim of ineffective assistance of counsel based upon counsel's failure to warn
19 about the collateral consequences of a guilty plea, and therefore nothing about Padilla's
20 application of the Strickland test was novel. See Chaidez, opinion of Sotomayor J. at 12 ("In
21 Padilla, we did nothing more than apply Strickland, by holding to the contrary, today's decision
22 deprives defendants of the fundamental protection of Strickland, which requires that lawyers
23 comply with professional norms with respect to any advice they provide clients."). As the
24 Washington Court of Appeals stated in Jagana: "It is difficult to see why the Supreme Court,
25

1 particularly after the Court's heavy reliance on Strickland, would conclude that Padilla is
2 anything other than an "old" rule, retroactively applicable to cases on collateral review of final
3 judgments."

4 Finally, to the extent that the Chaidez Court relied upon disagreement between lower
5 courts to reach the conclusion that Padilla is a new rule because it was not dictated by precedent
6 at the time that it was decided, Chaidez, slip op. at 10 – 11, the Court's reasoning was expressly
7 rejected by the Washington Court of Appeals in Jagana. The Jagana court explained that "the
8 standard for determining when a case establishes a new rule is 'objective', and the mere
9 existence of conflicting authority does not necessarily mean a rule is new." Jagana, 170 Wn.
10 App. at 50 (quoting Commonwealth v. Clarke, 460 Mass. 30, 46, 949 N.E.2d 892 (2011)
11 (quoting Williams v. Taylor, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000))).

12 Because the Washington Court of Appeals's construction of RCW 10.73.100(6) in
13 Jagana is binding upon this Court, and because the conclusion reached by the Supreme Court in
14 Chaidez regarding Padilla's retroactivity was rejected in Jagana, Chaidez does not determine
15 Padilla's retroactivity under Washington law. Accordingly, absent a ruling to the contrary from
16 the Washington Supreme Court, Padilla remains retroactively applicable to cases on collateral
17 review under RCW 10.73.100(6). Jagana, 170 Wn. App. 59.

18
19 C. Padilla Changed the Law on Both Misadvice and Non-Advice Claims of
20 Ineffective Assistance of Counsel in the Immigration Context.

21 The State further argues that because Washington courts previously recognized
22 ineffective assistance of counsel claims based on affirmative misadvice about immigration
23 consequences, Padilla only changed the law on cases involving non-advice about immigration
24 consequences, i.e., cases where the defendant was not at all informed of the immigration
25 consequences of his guilty plea. The State asserts that because Mr. Orantes's claim involves

1 affirmative misadvice, it could have been raised under Washington precedent pre-dating Padilla.

2 Thus, the State concludes that Mr. Orantes may not avail himself of RCW 10.73.100(6)'s
3 exception to the time limit on collateral attacks on judgments. See Transfer Motion at 7.
4 However, the State misconstrues Washington law and the Supreme Court's opinion in Padilla in
5 reaching its conclusion.

6 The State asserts that prior to Padilla, the law in Washington was that a defendant could
7 make out an ineffective assistance of counsel claim by establishing that he was "misadvised" by
8 criminal defense counsel about the immigration consequences of his guilty plea. The State
9 relies on State v. Holley, 75 Wn. App. 191 (1994), in support of this proposition. Id. at 7.

10 However, this was not the law in Washington prior to Padilla. Instead, what the
11 Washington Supreme Court had suggested in dicta was that a defendant *may* be entitled to
12 withdraw a guilty plea based upon an affirmative misrepresentation by counsel about
13 deportation. See In re Yim, 139 Wn.2d 581, 588 (1999). In order to obtain relief under this
14 stringent standard, a defendant would have had to show that "he was affirmatively misled to
15 believe that he would not be deported" by counsel's advice. Id.

16
17 As a practical matter, there is not a single published Washington State decision prior to
18 Padilla that granted relief in an ineffective assistance of counsel case based on incorrect advice
19 about the immigration consequences of a guilty plea. Washington courts routinely dismissed
20 ineffective assistance of counsel claims based on erroneous immigration advice because
21 immigration consequences were viewed as being "collateral" to a criminal conviction. See
22 Yim at 558. Notably, in Holley, which is heavily relied upon by the State, the court refused to
23 grant relief despite the fact that the defendant's attorney erroneously advised him to skip over
24

1 the immigration advisement contained in his plea statement because it did not apply to him.

2 Holley, 75 Wn. App. at 195.

3 By holding that the collateral/direct distinction is inappropriate for analyzing ineffective
4 assistance of counsel claims, the United States Supreme Court completely altered Washington's
5 "analysis of how counsel's advice about deportation consequences (or lack thereof) affects the
6 validity of a guilty plea." State v. Sandoval, 171 Wn.2d 163, 170 n.1 (2011). Padilla's
7 framework for analyzing ineffective assistance of counsel claims in the context of immigration
8 advice in criminal plea proceedings effected a significant change in Washington law on both
9 misadvice and non-advice claims.

10 With regard to misadvice claims, after Padilla, a defendant claiming ineffective
11 assistance of counsel no longer has to establish that "he was affirmatively misled to believe that
12 he would not be deported" by counsel's erroneous advice, but simply that counsel failed to
13 "correctly advise, or seek consultation to correctly advise," him of the actual immigration
14 consequences arising from his plea of guilty. See Sandoval, 171 Wn.2d at 172. Consequently,
15 because Padilla established a less stringent standard for ineffective assistance of counsel claims
16 alleging misadvice about the immigration consequences of a guilty plea, Padilla effected a
17 significant change in Washington law on misadvice claims.

18
19 The State's argument that Padilla effected a significant change in Washington law only
20 with regard ineffective assistance of counsel claims based on non-advice about immigration
21 consequences is also belied by the fact that Padilla was itself a misadvice case, as was Sandoval,
22 the Washington State Supreme Court case recognizing the change in law effected by Padilla. In
23 Padilla, criminal defense counsel advised the defendant that he would not be deported because
24 he had "been in the country for so long." Padilla, 130 S. Ct. at 1478. Based on this advice, the
25

1 defendant pleaded guilty. Id. The Supreme Court held on these facts that the advice provided
2 by counsel was constitutionally deficient. There can be no question that Padilla is a case
3 involving misadvice about immigration consequences, not non-advice. Accordingly, any
4 language in Padilla concerning non-advice is merely dicta. In view of the fact that Padilla
5 involved misadvice about immigration consequences, it is difficult to comprehend how Padilla
6 can be construed as having changed only the law on ineffective assistance of counsel claims
7 alleging non-advice about immigration consequences. The facts of that case simply did not give
8 rise to a non-advice claim and Padilla could not, therefore, have effected a significant change in
9 the law on non-advice cases, but not on misadvice cases.

10 The conclusion that Padilla changed Washington law on cases involving misadvice
11 about the immigration consequences of a guilty plea is further strengthened by the Washington
12 State Supreme Court's decision in Sandoval. In that case, the defendant was convicted of rape,
13 a deportable offense. 171 Wn.2d at 167. His criminal defense lawyer advised him that he
14 should not worry about immigration consequences because any adverse immigration
15 consequences could be ameliorated by an immigration attorney. Id. Division III of the Court of
16 Appeals held, citing pre-Padilla Washington precedent, that because immigration consequences
17 were collateral to a guilty plea, counsel's misadvice about the immigration consequences of Mr.
18 Sandoval's plea could not support a claim of ineffective assistance. Id. However, recognizing
19 that Padilla changed the law on misadvice about immigration consequences, the State Supreme
20 Court reversed, holding that counsel's advice was insufficient to satisfy the duty imposed on
21 counsel by the Supreme Court's decision in Padilla. Id. at 176.

22
23 The Washington State Supreme Court decision in Sandoval demonstrates unequivocally
24 that Padilla changed Washington law on misadvice about immigration consequences in the
25

1 guilty plea context. Sandoval was a misadvice case. Counsel erroneously advised the
2 defendant in that case that he would not be deported from the United States because any
3 immigration consequences could be mitigated by an immigration attorney despite the fact that
4 the defendant's conviction rendered him immediately deportable from the United States and left
5 him with almost no avenues for relief in immigration court. Id. at 173. Yet, even this patently
6 erroneous advice was insufficient to establish an ineffective assistance of counsel claim under
7 pre-Padilla Washington precedent. Id. at 169 n.1. Indeed, the only reason that the petitioner in
8 Sandoval was granted relief was because of the change in the law effected by Padilla. Id. The
9 advice received by the defendant in Sandoval was essentially the same as the advice received by
10 Mr. Orantes, and it is difficult to comprehend how Mr. Orantes could have prevailed on his
11 claim prior to Padilla when Mr. Sandoval could not.

12 Because Mr. Orantes could not have raised a claim of ineffective assistance of counsel
13 under Washington State case law before the Supreme Court of the United States issued its
14 opinion in Padilla, his personal restraint petition is exempt from the one-year time limit on
15 collateral attack under RCW 10.73.100(6).

16
17 **II. Mr. Orantes's Petition is Not an Abuse of the Writ.**

18 The State also attempts to characterize Mr. Orantes's motion as an abuse of the writ.
19 Transfer Motion at 8. However, it is well-established that where there have been "intervening
20 changes in case law" the abuse of the writ doctrine does not apply. In re Personal Restraint of
21 Turay, 153 Wn.2d 44, 48-49 (2004) (citing In re Personal Restraint of Jeffries, 114 Wn.2d 485,
22 492 (1990)). At the time that Mr. Orantes filed his original motion for relief from judgment in
23 this case, Jagana, which held that Padilla applies retroactively in Washington State, had not yet
24 been decided. Accordingly, any ineffective assistance of counsel claim based on Padilla
25

1 appeared to be time-barred by RCW 10.73.090. Thus, undersigned counsel fashioned Mr.
2 Orantes's claim for relief as a Due Process claim, in hope of avoiding RCW 10.73.090's one-
3 year bar on collateral attacks based on state precedent. See In re Personal Restraint of Orantes,
4 2012 Wn. App. Lexis 1922, at *17. However, the Court of Appeals rejected Mr. Orantes's due
5 process argument. On the day that Mr. Orantes's initial petition was dismissed, the Court of
6 Appeals also issued its opinion in Jagana, asserting that ineffective assistance of counsel claims
7 under Padilla were not time-barred because they fell within the scope of RCW 10.73.100(6), for
8 the first time making an ineffective assistance of counsel claim available to Mr. Orantes.
9 Because Jagana constituted an intervening change in law relevant to Mr. Orantes's claim for
10 relief, the instant motion for relief from judgment on the basis of ineffective assistance of
11 counsel does not constitute an abuse of the writ. Turay, 153 Wn.2d at 48-49.

12
13 The State also asserts that Mr. Orantes's motion is an abuse of the writ because he
14 previously abandoned his ineffective assistance of counsel claim. Transfer Motion at 8 – 9. But
15 this is simply not the case. The Supreme Court explained the principle of abandonment in
16 Sanders v. United States, 373 U.S. 1, 18, 83 S. Ct. 1068, 10 L. Ed. 2d. 148 (1963). The Court
17 cited Wong Doo v. United States, 265 U.S. 239, 240-41, 44 S. Ct. 524, L. Ed. 999 (1924), as an
18 example of abandonment. In Wong Doo, the petitioner raised two grounds for relief in his first
19 habeas corpus petition, but at the hearing on the petition failed to provide any proof in support
20 of the second ground. Id. Petitioner later filed a second habeas corpus petition once again
21 raising the second ground for relief asserted in his initial habeas corpus petition. Id. The Court
22 dismissed the second petition, finding that the petitioner's claim was abandoned when he failed
23 to provide any proof in support of it at the hearing on his initial petition. Id.

1 There was no abandonment in Mr. Orantes's case. Unlike the petitioner in Wong Doo,
2 Mr. Orantes did not raise the ground for relief he now asserts, i.e., ineffective assistance of
3 counsel, in his first petition because it appeared procedurally barred at the time that his first
4 petition was filed. There has never been a hearing on Mr. Orantes's ineffective assistance of
5 counsel claim. Consequently, because Mr. Orantes has not previously raised ineffective
6 assistance of counsel as a ground for relief, he could not have abandoned the claim. See
7 Sanders, 373 U.S. at 18.

8 **III. Mr. Orantes has Established Entitlement to Relief.**

9 The State concedes that Mr. Orantes has satisfied the second prong of the Strickland test
10 for ineffective assistance of counsel by making a showing of prejudice. See Transfer motion at
11 10. However, the State argues that Mr. Orantes has failed to establish that his defense
12 attorney's performance was constitutionally deficient, and has therefore failed to satisfy the first
13 prong of the Strickland test. Id. The State misapplies Padilla in reaching its conclusion.
14

15 In Padilla, the Supreme Court held that criminal defense counsel has a duty to advise a
16 noncitizen defendant of the immigration consequences of a guilty plea and that failure to give a
17 noncitizen defendant accurate advice about the immigration consequences of a plea constitutes
18 constitutionally deficient performance under Strickland. 130 S. Ct. at 1482. The Court
19 explained that when "the deportation consequence is truly clear . . . the duty to give correct
20 advice is equally clear." Id. at 1483. However, where the immigration consequences of a plea
21 are "unclear or uncertain," counsel need only advise the noncitizen defendant that "pending
22 criminal charges may carry a risk of adverse immigration consequences." Id.

23 The State alleges that the consequences of Mr. Orantes's conviction were unclear
24 because criminal defense counsel had no knowledge that Mr. Orantes had previously been
25

1 convicted of a misdemeanor, and that a second misdemeanor conviction would therefore render
2 him ineligible for TPS. Transfer Motion at 10. The State concludes that because of counsel's
3 lack of knowledge about Mr. Orantes's first conviction counsel's advice to Mr. Orantes was not
4 constitutionally deficient. Id.

5 However, counsel had a duty to determine whether Mr. Orantes had previously been
6 convicted of any crimes before advising him to plead guilty in this case. See Rompilla v. Beard,
7 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (holding that failure to request and
8 review case file from prior conviction constituted ineffective assistance of counsel).
9 Furthermore, it is beyond cavil that the actual consequences of Mr. Orantes's conviction in this
10 case were crystal clear. The TPS statute clearly provides that: "An alien shall not be eligible for
11 temporary protected status under this section if the Attorney General finds that . . . the alien has
12 been convicted of any felony or 2 or more misdemeanors committed in the United States." 8
13 U.S.C. § 1254a(c)(3)(B). All counsel had to do to satisfy her obligation under Padilla and put
14 Mr. Orantes on notice about the consequences of his conviction in this case was advise Mr.
15 Orantes of the contents of the previously cited TPS provision. Because counsel failed to do this,
16 her performance was constitutionally deficient. See Padilla 130 S. Ct. 1483. Moreover, to the
17 extent that the State's motion intimates that Mr. Orantes misrepresented his criminal history to
18 former defense counsel, the State has provided no evidence in support of this contention.
19

20 Finally, even if the Court finds that the immigration consequences of Mr. Orantes's
21 conviction were unclear, Mr. Orantes is still entitled to relief. Under Padilla counsel had a duty
22 to advise Mr. Orantes that the conviction in this case "may carry a risk of adverse immigration
23 consequences." Padilla 130 S. Ct. at 1483. Because counsel failed to give Mr. Orantes even
24 this basic warning, and instead assured him that no immigration consequences would flow from
25

1 his conviction, her performance was constitutionally deficient. Even if counsel believed that
2 Mr. Orantes's conviction in this case would not have deprived him of his TPS status, Mr.
3 Orantes was still entitled to know that a conviction in this case could create immigration
4 problems in the future. See 8 U.S.C. § 1182(a)(2)(A)(i)(I) (“[A]ny alien convicted of . . . a
5 crime involving moral turpitude . . . is inadmissible”); Burr v. INS, 350 F.2d 87, 91 (9th Cir.
6 1965) (holding that fraudulently issuing check without sufficient funds is an act involving moral
7 turpitude).

8 **III. Conclusion**

9 Based on the foregoing reasons, and the reasons set forth in Mr. Orantes's motion to
10 withdraw his guilty plea, the Court should vacate the judgment and sentence in this plea and
11 permit Mr. Orantes to withdraw his guilty plea. In the alternative, should the Court find that
12 additional evidence is required, the Court should set an evidentiary hearing.³

13
14 DATED this 25th day of February, 2013.

15 Respectfully submitted,

16 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

17 

18 Christopher Black, WSBA No. 31744
19 Attorney for Santos Orantes

20 

21 Teymur Askerov, WSBA No. 45391
22 Attorney for Santos Orantes

23
24 ³ There has been some dispute between the parties over the nature of the hearing set for
25 February 26, 2013. The defense has been unclear on this issue because CrR 7.8 only requires a
hearing on a motion for relief from judgment if the court finds that the movant is entitled to
relief or that a factual hearing is required. CrR 7.8 (c)(2) – (3).

CERTIFICATE OF SERVICE

1
2 I hereby certify that a copy of the foregoing, along with any attachments, was served on
3 the below-noted date, via email and U.S. Mail, upon the parties required to be served in this
4 action:

5 Snohomish County Prosecuting Attorney's Office
6 3000 Rockefeller Ave., M/S 504
7 Everett, WA 98201

8 DATED this 25th day of February, 2013.

9 Respectfully submitted,

10 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

11 

12 Teymur Askerov, WSBA No. 45391
13 Attorney for Santos Orantes
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IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

No. 06-1-00278-9

Plaintiff,

STATE'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF MOTION TO TRANSFER

v.

ORANTES, Santos W.

Defendant.

The purpose of this memo is to advise the court of a new Court of Appeals decision: State v. Martinez-Leon, no. 42824-5-II. There, the court considered how Chaidez affects application of the time limit on collateral attacks. Based on Chaidez the Court of Appeals held that there are not "sufficient reasons ... to require retroactive application of the changed legal standard" set out in Padilla. Consequently, a CrR 7.8 motion based on Padilla did not fall within the exception to the time limit set out in RCW 10.73.100(6). The motion was therefore denied as time barred.

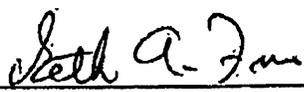
This decision controls the present case. The defendant's motion is untimely under RCW 10.73.090. It does not fall within the exception set out in RCW

ORIGINAL

1 1073.100(6). Per CrR. 7.8(c)(2), the motion should be transferred to the Court of
2 Appeals.

3 Respectfully submitted on May 1, 2013.

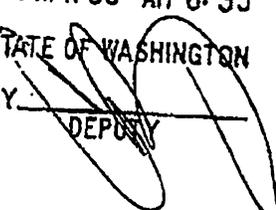
4
5 MARK K. ROE
6 Snohomish County Prosecuting Attorney

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8 By: 
9 SETH A. FINE, WSBA # 10937
10 Deputy Prosecuting Attorney

FILED
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DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

No. 42824-5-II

STATE OF WASHINGTON,
Respondent,

v.

RICARDO MARTINEZ-LEON,
Appellant.

PUBLISHED OPINION

VANDEREN, J. — Ricardo Martinez-Leon appeals the trial court's denial of his CrR 7.8 motion for relief from judgment or to withdraw his guilty plea. He asserts that the trial court erred by finding that his CrR 7.8 motion was time barred because the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) represented a significant change in the law under RCW 10.73.100(6), permitting him to collaterally attack his conviction beyond the one-year time limit set forth under RCW 10.73.090. Alternatively, Martinez-Leon asserts that the trial court erred by finding that his motion was not timely under the equitable tolling doctrine. We stayed this appeal pending a decision by the United States Supreme Court in *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). Because the *Chaidez* Court recently held that *Padilla* does not apply retroactively to cases that were final before the *Padilla* decision was issued, we lift the stay and hold that Martinez-Leon cannot satisfy the requirements of RCW 10.73.100(6)'s time bar

exception. And because Martinez-Leon cannot demonstrate that justice requires application of the equitable tolling doctrine to toll the one-year time limit set forth in RCW 10.73.090, we affirm the trial court's determination that his CrR 7.8 motion to withdraw his guilty plea was untimely.

FACTS

On May 11, 2006, Martinez-Leon pleaded guilty to unlawful imprisonment—domestic violence and fourth degree assault—domestic violence. The State originally charged Martinez-Leon with first degree kidnapping—domestic violence, felony harassment—domestic violence, fourth degree assault—domestic violence, and interfering with reporting domestic violence—domestic violence. Martinez-Leon's signed statement on plea of guilty form provided the following provision, "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." Clerk's Papers (CP) at 6.

At Martínez-León's May 11, 2006, plea hearing, defense counsel indicated that Martinez-Leon wanted to plead guilty to fourth degree assault and wanted to enter an *Alford*¹ plea to the unlawful imprisonment charge. The trial court explained the consequences of pleading guilty. Martinez-Leon, through an interpreter, stated that he did not fully understand the consequences of his guilty plea but that he still wanted to plead guilty. The trial court told Martinez-Leon that he needed to fully understand the consequences of pleading guilty and continued to explain to him what rights he was giving up by entering a guilty plea. The trial court allowed defense

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

counsel to take a short recess to speak with Martinez-Leon to ensure that he understood the consequences of his plea.

When the plea hearing recommenced, the trial court again explained to Martinez-Leon the consequences of pleading guilty. The trial court reviewed the right to a jury trial, the right to have the State prove its charges against him, the right to present evidence, the elements of the crimes charged, the maximum sentence and the sentencing range, and the loss of the right to possess firearms. The trial court did not, however, discuss any potential immigration consequences resulting from Martinez-Leon's decision to plead guilty. The trial court determined that an interpreter read the guilty plea form in its entirety to Martinez-Leon, he understood the form, he did not have any questions, and that he had signed the form. The trial court accepted Martinez-Leon's guilty plea, finding that he entered the plea, "knowingly, intelligently and voluntarily, with a full understanding of its meaning and effect with a factual basis." CP at 44.

The trial court held a sentencing hearing on May 25, 2006. The trial court accepted the State's and defense counsel's agreed recommendation to sentence Martinez-Leon to two months of incarceration for his unlawful imprisonment conviction and to a suspended sentence of 365 days on his fourth degree assault conviction.

On June 27, 2011, Martinez-Leon filed a CrR 7.8 motion for relief from judgment or to withdraw his guilty pleas. In support of his motion, Martinez-Leon filed a sworn declaration from his trial attorney, in which his trial attorney stated that she had "a general discussion about immigration consequences" with Martinez-Leon and that she told him "that deportation was a possible consequence of a guilty plea particularly because the plea offer required a plea to a felony." CP at 69. Martinez-Leon's trial attorney also stated the following in her sworn declaration:

... I know we did not have any discussion about the fact that if [Martinez-Leon] received a sentence of 365 days on the assault charge that it would be considered an "aggravated felony" for immigration purposes and that he would definitely be deported.

... I did not ask the judge at the time of sentencing for a sentence of less than 365 days, since I was not aware at the time that if the sentence were only for 364 days, the assault charge would not be considered an "aggravated felony" for immigration purposes.

CP at 69-70.

The Cowlitz County prosecuting attorney also provided the trial court with a sworn declaration, which stated in part:

At the time of the plea, [Martinez-Leon] was previously convicted of Assault in the fourth degree (domestic violence) out of Cowlitz County in cause C85093 from 8/6/1995 and Forgery in the first degree in Clackamas County, Oregon, cause number OR 0003075J from 3/12/1998. Additionally, [Martinez-Leon] had a voluntary departure deportation proceeding on 12/05/1996 wherein he agreed to return to Mexico.

I am informed by Jeffery Chan, [Martinez-Leon's] deportation officer that [Immigration and Customs Enforcement (ICE)] was unaware of [Martinez-Leon's] prior criminal history when they filed for the current deportation proceedings. However, Mr. Chan indicates [Martinez-Leon's] prior 1996 assault might be a basis for adding a new charge and the Forgery is a basis for adding a new charge and i[s] most certainly considered a Crime of Moral Turpitude, constituting a grounds for deportation. Mr. Chan also indicates that at the time [Martinez-Leon] was allowed permanent residence he informed the agency he had no criminal history. When this was found to be untrue, [Martinez-Leon] filed a waiver indicating his forgery conviction was a crime involving moral turpitude.

CP at 89.

The trial court held a hearing on Martinez-Leon's CrR 7.8 motion and entered a written order denying the motion. The trial court's written order concluded that Martinez-Leon's motion was time-barred under CrR 7.8 and RCW 10.73.090. The trial court further concluded that the requirement that an immigrant defendant be informed about the potential immigration consequences of a guilty plea was not a significant change in law and that equitable tolling did

not apply. The trial court's written order also indicated that it may or may not have imposed a 364 day suspended sentence on the fourth degree assault conviction had defense counsel requested it at Martinez-Leon's sentencing hearing. Martinez-Leon appeals the trial court's order denying his CrR 7.8 motion for relief from judgment or to withdraw his guilty plea.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's ruling on a CrR 7.8 motion for abuse of discretion. *State v. Martinez*, 161 Wn. App. 436, 440, 253 P.3d 445, review denied, 172 Wn.2d 1011 (2011). But when a trial court bases its otherwise discretionary decision solely on application of a court rule or statute, the issue is one of law that we review de novo. *State v. Dearbone*, 125 Wn.2d 173, 179, 883 P.2d 303 (1994).

CrR 4.2(f) provides that a trial court "shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." Where, as here, a criminal defendant moves to withdraw his guilty plea after judgment has been entered, CrR 7.8 governs. CrR 4.2(f). CrR 7.8(b)(5) provides that the trial court may relieve a party from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment." CrR 7.8 motions are subject to the provisions of RCW 10.73.090 and RCW 10.73.100. CrR 7.8(b).

RCW 10.73.090 states in part:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to

vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

Martinez-Leon concedes that he filed his CrR 7.8 motion beyond the one-year time period set forth in RCW 10.73.090 but asserts that his motion was timely under RCW

10.73.100(6). RCW 10.73.100 provides in relevant part:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(6) There 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.

Thus, to meet the exception set forth in RCW 10.73.100(6), Martinez-Leon must show a (1) "a significant change in the law," (2) "material to [his] conviction [or] sentence," (3) that applies retroactively. Because it is dispositive of the issue presented, we address only the retroactivity element of RCW 10.73.100(6).

II. RETROACTIVITY

To meet RCW 10.73.100(6)'s requirements, Martinez-Leon must demonstrate that "sufficient reasons exist to require retroactive application" of *Padilla*. He cannot meet this burden. In *Chaidez*, the United State Supreme Court held that its decision in *Padilla* announced a "new rule" that did not apply retroactively to cases that were final before the *Padilla* decision was issued. 133 S. Ct. at 1107. "[A] person whose conviction is already final may not benefit from the [*Padilla*] decision in a habeas or similar proceeding." *Chaidez*, 133 S. Ct. at 1107. Martinez-Leon's conviction was final on May 25, 2006, well before the *Padilla* decision was

issued on March 31, 2010. RCW 10.73.090(3)(a). Accordingly, Martinez-Leon cannot avail himself of the *Padilla* decision and he fails to meet the requirements of RCW 10.73.100(6)'s exception to the one-year time bar to collaterally attack his conviction.

III. EQUITABLE TOLLING

Next, Martinez-Leon asserts that even if *Padilla* does not apply retroactively to allow a collateral challenge to his conviction under RCW 10.73.100(6), the trial court erred by failing to toll the one-year time bar of RCW 10.73.090 under the equitable tolling doctrine. We disagree.

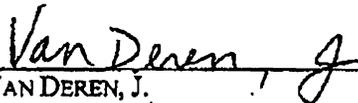
The equitable tolling doctrine "permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." *In re Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003) (quoting *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)). However, "application of equitable tolling . . . must only be done in the narrowest of circumstances and where justice requires." *In re Pers. Restraint of Carter*, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011). RCW 10.73.090 can be subject to equitable tolling in a proper case. *State v. Littlefair*, 112 Wn. App. 749, 759, 51 P.3d 116 (2002).

In *Littlefair*, the defendant, a resident alien, entered a guilty plea. 112 Wn. App. at 752. Littlefair's defense counsel did not inquire about Littlefair's immigration status and did not advise Littlefair about the potential immigration consequences of a guilty plea. *Littlefair*, 112 Wn. App. at 755. Littlefair's defense counsel also struck language on the guilty plea form stating that deportation was a possible consequence of entering a guilty plea. *Littlefair*, 112 Wn. App. at 752-54. Two years later, the INS notified Littlefair that it would seek to deport him because of his conviction. *Littlefair*, 112 Wn. App. at 755. Littlefair moved to withdraw his guilty plea on the basis that he would not have pled guilty had he known he would be subject to deportation. *Littlefair*, 112 Wn. App. at 755. This court concluded that it was appropriate to

apply equitable tolling to the unique circumstances of Littlefair's case, noting that Littlefair did not know about the deportation consequences of his guilty plea due to mistakes by his attorney, the trial court, and the INS. *Littlefair*, 112 Wn. App. at 762-63.

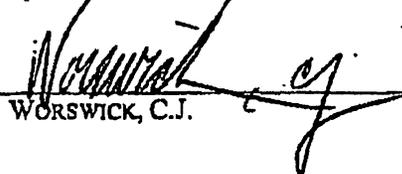
In contrast to the unique circumstances justifying equitable tolling in *Littlefair*, here Martinez-Leon's defense attorney was aware that Martinez-Leon was not a United States citizen and discussed the potential deportation consequences of entering a guilty plea with Martinez-Leon. And, unlike in *Littlefair*, Martinez-Leon signed a statement on plea of guilty that provided, "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." CP at 6.

We hold that these circumstances do not warrant application of the equitable tolling doctrine to the time limit in RCW 10.73.090. Although Martinez-Leon's defense counsel did not specifically advise him that a 365-day sentence on his assault conviction would result in definite deportation under United States immigration laws, such an obligation was not required before *Padilla*, which does not apply retroactively to Martinez-Leon's conviction. Accordingly, we affirm the trial court's denial of Martinez-Leon's CrR 7.8 motion to withdraw his guilty plea.


VANDEREN, J.

We concur:


QUINN-BRINTNALL, J.


WORSWICK, C.J.

FILED



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13 MAY -8 PM 1:07

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

No. 06-1-00278-9

Plaintiff,

DEFENDANT'S RESPONSE TO
STATE'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION TO TRANSFER

vs.

SANTOS WILFREDO ORANTES,

(Clerk's Action Required)

Defendant.

RESPONSE

COMES NOW Defendant, SANTOS WILFREDO ORANTES, by and through undersigned counsel, and files the following response to the State's supplemental memorandum in support of its motion to transfer.

ARGUMENT

I. Division I's Decision in Jagana is Controlling Upon this Court and Division II's Decision in State v. Martinez-Leon is Therefore Inapposite.

The State argues in its supplemental memorandum that the recent opinion issued by Division II of the Washington Court of Appeals in State v. Martinez-Leon, No. 42824-5-II, holding that Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), does not apply retroactively under RCW 10.73.100(6), is dispositive of Mr. Orantes's motion to withdraw his guilty plea. The State's argument is yet another attempt to circumvent binding

RESPONSE TO STATE'S SUPPLEMENTAL
MOTION - 1

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precedent and escape adjudicating Mr. Orantes's claim of ineffective assistance of counsel on its merits.

In In re Personal Restraint of Jagana, 170 Wn. App. 32, 59 (2012), Division I of the Washington Court of Appeals unequivocally held that Padilla applies retroactively under RCW 10.73.100(6), and that motions for post-conviction relief raising claims based on Padilla are therefore exempt from the one-year time limit on collateral attacks under RCW 10.73.100(6). Because this Court falls within the jurisdiction of the Division I, that court's decision in Jagana is binding upon this Court until Jagana is overruled by the Washington State Supreme Court. See RAP 4.1(b)(1); State v. Brooks, 157 Wn. App. 258, 265 (2010) (holding that decisions issued by one division of the Court of Appeals are not binding in another division); State v. Johnston, 143 Wn. App. 1, 14 (2007) (same). Division II's contrary opinion in Martinez-Leon is therefore inapposite.

Consequently, because Mr. Orantes's motion falls within the exception to the one-year time limit on collateral attacks provided for in RCW 10.73.100(6), as explained in Mr. Orantes's previous pleadings, his motion is timely.

III. Conclusion

Based on the foregoing reasons, and the reasons set forth in Mr. Orantes's motion to withdraw his guilty plea, the Court should vacate the judgment and sentence in this plea and permit Mr. Orantes to withdraw his guilty plea.

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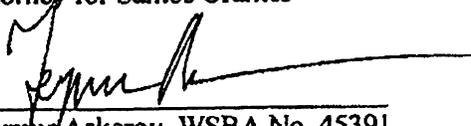
DATED this 7th day of May, 2013.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744
Attorney for Santos Orantes



Teymur Askerov, WSBA No. 45391
Attorney for Santos Orantes

CERTIFICATE OF SERVICE

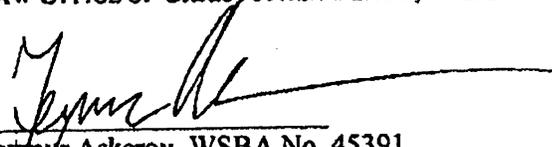
1 I hereby certify that a copy of the foregoing, along with any attachments, was served on
2 the below-noted date, via email and U.S. Mail, upon the parties required to be served in this
3 action:
4

5 Snohomish County Prosecuting Attorney's Office
6 3000 Rockefeller Ave., M/S 504
7 Everett, WA 98201

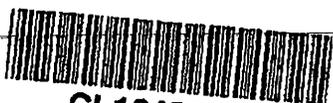
8 DATED this 7th day of May, 2013.

9 Respectfully submitted,

10 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

11 
12 Teymur Askerov, WSBA No. 45391
13 Attorney for Santos Orantes

FILED



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13 JUN 14 AM 11:24

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

No. 06-1-00278-9

Plaintiff,

DEFENDANT'S SUPPLEMENTAL
MEMORANDUM OF LAW

vs.

SANTOS WILFREDO ORANTES,

Defendant.

INTRODUCTION

COMES NOW Defendant, SANTOS WILFREDO ORANTES, by and through undersigned counsel, and files the following supplemental memorandum in support of his motion to withdraw his guilty plea in this case. The Court heard arguments on defendant's motion to withdraw his guilty plea on May 13, 2013. At that time the Court ordered the parties to submit additional briefing on the applicability of State v. Littlefair, 112 Wn. App. 749 (2002), to Mr. Orantes's case. The relevant facts are set forth in Defendant's initial motion.

ARGUMENT

I. MR. ORANTES IS ENTITLED TO RELIEF UNDER RCW 10.40.200

Even aside from his entitlement to relief under Padilla v. Kentucky, Mr. Orantes is entitled to relief based upon RCW 10.40.200. Precedent construing RCW 10.40.200 makes clear that Mr. Orantes's statutory right to be advised of the immigration consequences of his

RESPONSE TO STATE'S SUPPLEMENTAL
MOTION - 1

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conviction was violated during the plea proceeding in this case. Furthermore, because Mr. Orantes was unaware of the immigration consequences of his guilty plea until shortly before he filed his motion for relief, as a result of incorrect advice from his attorney, the statute of limitations on collateral attacks should be tolled in his case.

A. Mr. Orantes's Conviction was Obtained in Violation of RCW 10.40.200.

Mr. Orantes has established that he was not properly advised of the immigration consequences of his conviction as required by RCW 10.40.200(2). That statute provides:

Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement. *If, after September 1, 1983, the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty.* Absent a written acknowledgment by the defendant of the advisement required by this subsection, the defendant shall be presumed not have received the required advisement.

RCW 10.40.200(2) (emphasis added). The statute requires that "the plea and judgment be set aside if the defendant was not properly advised and he or she shows that the conviction may have deportation consequences." State v. Littlefair, 112 Wn. App. at 764-65. A plea statement signed by the defendant containing an immigration advisement as required under RCW 10.40.200(2) raises a presumption that the defendant received an immigration advisement. See RCW 10.40.200(2); Littlefair, 112 Wn. App. at 766. However, this presumption can be rebutted by evidence establishing that the defendant was not properly advised of the immigration consequences of his guilty plea. State v. Holley, 75 Wn. App. 191, 199 (1994). In

1 Holley, the Washington Court of Appeals explained that: “the court is not *required* to infer that
2 the defendant was advised of the relevant plea consequences upon a showing that he signed a
3 plea agreement containing such an advisement, regardless of contrary evidence.” Id. Rather, a
4 defendant can rebut the statutory presumption if he proves by a preponderance of the evidence
5 that he was not properly advised of the immigration consequences of his conviction. Id.

6 In State v. Littlefair, the defendant, a Canadian citizen, pleaded guilty to violation of the
7 Uniform Controlled Substances Act. Littlefair, 112 Wn. App. at 752. The plea statement
8 contained the standard immigration advisement as required under RCW 10.40.200(2), but the
9 advisement was crossed off by the attorney who represented the defendant at the plea
10 proceeding. Id. The court found that this evidence was sufficient to establish a violation of
11 RCW 10.40.200(2), despite the fact that the defendant “had the opportunity” to read the
12 advisement because it had not been “completely obliterated.” See id. at 765 n.44.

13 In State v. Sandoval, 171 Wn.2d 163, 173 (2010), the Washington State Supreme Court
14 made clear that defense counsel’s erroneous advice about the immigration consequences of a
15 guilty plea can negate the effect of an immigration advisement. In that case, defense counsel
16 advised the defendant that pleading guilty to rape in the third degree would make him
17 deportable under the immigration laws. Id. at 166. But, immediately thereafter, defense
18 counsel told the defendant that an immigration attorney could alleviate any negative
19 immigration consequences flowing from such a conviction. Id. The State argued that because
20 defense counsel advised the defendant that pleading guilty would render him deportable, his
21 advice was adequate. Id. at 172-73. The Supreme Court disagreed, holding that the
22 immigration advisement given by counsel was ineffective because counsel’s “mitigation advice
23 may not be couched with so much certainty that it negates the effect of the warnings.” As the
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1 Court explained: "The required advice about immigration consequences would be a useless
2 formality if, in the next breath, counsel could give the noncitizen defendant the impression that
3 he or she should disregard what counsel just said about the risk of immigration consequences."
4 Id. at 173.

5 It is clear from the Supreme Court's holding in Sandoval that erroneous advice about the
6 immigration consequences of a guilty plea will negate the effect of an immigration advisement
7 and is tantamount to striking the statutorily required immigration advisement from the plea
8 statement. In other words, a defense lawyer who incorrectly advises his client that the risk of
9 deportation is remote or mischaracterizes the risk of deportation flowing from a conviction
10 commits the same error as does a defense lawyer who strikes the statutory immigration warning
11 from a plea form. In both cases, the client is "impermissibly left [with] the impression that
12 deportation [is] a remote possibility." Id. It follows, necessarily, that the presumption arising
13 from a signed plea agreement containing an immigration advisement can be rebutted if a
14 defendant shows by a preponderance of the evidence that he was incorrectly advised of the
15 immigration consequences of his guilty plea by defense counsel.
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17 Based upon the foregoing, it is plainly apparent that Mr. Orantes has established that his
18 statutory right to be advised of the immigration consequences of his conviction was violated
19 during the plea proceeding in this case. There is no dispute about the fact that Mr. Orantes's
20 plea statement contains the immigration advisement required by RCW 10.40.200(2). But, there
21 can also be no dispute about the fact that the effect of the advisement was negated by the advice
22 given to Mr. Orantes by his defense attorney.

23 Mr. Orantes states in his declaration that his attorney incorrectly advised him about the
24 immigration consequences of his conviction. Specifically, Mr. Orantes states that his defense
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1 counsel advised him that so long as the sentence imposed for his conviction was less than 365
2 days imprisonment he would not lose his immigration status. See Declaration ("Decl.") of
3 Santos Orantes, dated September 17, 2013 at ¶ 17. Of course, this advice was wrong due to the
4 fact that because of Mr. Orantes's unique immigration status, Temporary Protection Status
5 ("TPS"), a second misdemeanor conviction would lead to deportation, no matter the length of
6 the sentence. See 8 U.S.C. 1254a(c)(2)(B)(i).

7 Mr. Orantes's assertions about the incorrect immigration advice he received prior to
8 pleading guilty in this case are supported by counsel's declaration and evidence in the court file.

9 Mr. Orantes's defense counsel, Kathleen Kyle, states in her sworn declaration:

10 At no point during my conversation with Mr. Orantes prior to the entry of the plea
11 did I advise him that pleading guilty to this charge would likely result in the loss
12 of his immigration status. I did not advise him that his guilty plea would render
13 him ineligible for Temporary Protected Status. I have no reason to believe that
14 Mr. Orantes was aware of the actual effect that his guilty plea would have on his
15 immigration status at the time of entry of the plea.

16 Decl. of Kathleen Kyle, dated January 11, 2011 at ¶¶ 5-7. In no uncertain terms, Mr. Orantes's
17 defense counsel states that she did not advise him that pleading guilty would lead to his
18 deportation. Moreover, documents in the court file provide strong circumstantial evidence that
19 Mr. Orantes was not correctly advised of the immigration consequences of pleading guilty. It is
20 evident from the judgment and sentence in this case that counsel was proceeding under the
21 erroneous assumption that a sentence of less than 365 days imprisonment would alleviate the
22 immigration consequences of Mr. Orantes's conviction. The judgment and sentence reflects that
23 in a departure from regular practice, the Court imposed a suspended sentence of 364 days
24 imprisonment instead of a suspended sentence of 365 days imprisonment. See Judgment and
25 Sentence. The inference that Mr. Orantes received inaccurate immigration advice is also

1 supported by the transcript from the sentencing hearing in this case. During sentencing, the
2 prosecutor stated on the record:

3 The State's recommendation's a little bit unusual in this case. Some of that was
4 based on proof issues, as well as the equities of this particular case So we
5 have agreed, and although we don't ordinarily do this, recommend 364 days in
6 jail with 364 suspended, and that's going to be - actually, not suspended but
7 deferred.

8 Transcript of Sentencing Hearing ("TR") at 6. While the prosecutor does not expressly so state,
9 it is obvious from the foregoing excerpt that the main reason behind the State's unusual
10 recommendation of 364 days imprisonment and the chief benefit of the plea bargain to Mr.
11 Orantes was the alleviation of the adverse immigration consequences of the conviction. This
12 Court recognized during oral argument on May 13, 2013, that at the time of Mr. Orantes's
13 sentencing, there was a widely held misconception among the defense bar that a sentence of 364
14 days imprisonment would resolve most immigration problems for noncitizens. It is clear from
15 the record in this case, that the erroneous immigration advice given to Mr. Orantes by defense
16 counsel was based upon this widely held misconception.

17 Because counsel wrongly advised Mr. Orantes about the immigration consequences of
18 his conviction, counsel's erroneous advice negated the boilerplate immigration advisement
19 contained in Mr. Orantes's plea statement. Mr. Orantes has shown by a preponderance of the
20 evidence that he was not properly advised of the immigration consequences of his conviction in
21 this case as required under RCW 10.40.200(2) and Mr. Orantes is therefore entitled to withdraw
22 his guilty plea. See Littlefair, 112 Wn. App. at 765.

23 **B. The Statute of Limitations on Collateral Attacks Should be Tolloed in
24 Mr. Orantes's Case.**

25 Generally, a collateral attack upon a judgment must be brought within one year of the
date on which the judgment was entered. RCW 10.73.090. In this case, the Court should find

1 that the statutory time limit on collateral attack is equitably tolled based upon the fact that Mr.
2 Orantes did not know the immigration consequences of his plea until well past the statutory
3 limit.

4 In cases where a defendant pleads guilty without knowing that a likely consequence of
5 his plea will be deportation, which lack of knowledge was not due to any fault or omission on
6 his part, the one-year time period in RCW 10.73.090 should be equitably tolled. Littlefair, 112
7 Wn.App. at 762-63. Where equitable tolling is applied, the statute of limitations does not begin
8 to run until the date that the defendant learned all of the facts relevant to his claim. See id. at
9 759 n.23. Littlefair was a case similar in many respects to this one. The facts of Littlefair are
10 set forth above. In Littlefair, the Court of Appeals held that RCW 10.73.090's time limit on
11 collateral attack was equitably tolled because as a result of mistakes on the part of defense
12 counsel, the trial court and the federal government, the defendant did not know the immigration
13 consequences of his guilty plea until some two years after his conviction. See id. at 762-63. The
14 Court in that case explained that:
15

16 When Littlefair pleaded, he did not know that he was likely to be deported. His
17 lack of knowledge was not due to any fault or omission on his part; rather, it was
18 due to a series of mistakes by his attorney, the court, and arguably the INS. The
19 attorney failed to inquire about citizenship. He had also stricken subsection (n),
20 contrary to the instruction on the written plea form The court failed to note
21 that subsection (n) had been stricken contrary to the form's instructions, and it did
22 not ascertain whether Littlefair had been properly advised of possible deportation
23 consequences. . . . Inexplicably, the INS delayed more than two years before
24 notifying Littlefair that he was subject to deportation.

21 Id.

22 The facts of Mr. Orantes's case are practically indistinguishable from the facts of
23 Littlefair. Due to false assurances and incorrect advice from defense counsel, Mr. Orantes was
24 not aware of the immigration consequences of his conviction at the time he pleaded guilty. The
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1 actions of the Court and the State compounded the error committed by counsel, as the Court and
2 the prosecutor accepted, without stopping to question, counsel's mistaken assumption that a 364
3 day sentence would ensure that the adverse consequences of Mr. Orantes's sentence would be
4 mitigated. Finally, United States Citizenship and Immigration Services did not initiate removal
5 proceedings against Mr. Orantes until almost two years after Mr. Orantes pleaded guilty.

6 Mr. Orantes's application to renew TPS was denied by the immigration court on June 2,
7 2010. See Decl. of Santos Orantes at ¶ 18. Accordingly, RCW 10.73.90's one-year time limit
8 should be tolled until that date. See id. at 759. Mr. Orantes retained undersigned counsel and
9 filed a motion for relief from the judgment and sentence in this case on January 13, 2011, well
10 within one year of learning all the facts relevant to his claim.¹

11 City of Bellevue v. Benyaminov, 144 Wn. App. 755 (2008), a case decided subsequent
12 to Littlefair is inapposite. Benyaminov also involved a non-citizen who pleaded guilty to a
13 crime that had serious immigration consequences, and then moved for relief from the judgment
14 more than one year after it was entered. See Benyaminov, 144 Wn. App. at 759. The court file,
15 which would have contained the acknowledgement of deportation consequences, had been
16 destroyed prior to the initiation of deportation proceedings. See id. at 767. The defendant
17 supplied no evidence to support the conclusion that he was not advised to of the immigration
18 consequences of his guilty plea. See id. Moreover, the defendant simply stated in his
19 declaration that he did not *recall* being advised of the immigration consequences of his guilty
20 plea. Id.

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24 ¹ While Mr. Orantes did not rely on Littlefair in his initial motion for relief from the judgment in
25 this case, the motion was based on the ground that he was not properly advised of the
immigration consequences of his guilty plea under Padilla. Accordingly, Mr. Orantes raised the
issues underlying his claim before this Court well within the limitations period.

The court in Benyaminov held that equitable tolling did not apply. Id. The Benyaminov

1
2 court distinguished the case from Littlefair by noting that the defendant in that case had
3 demonstrated the existence of mistakes relating to the cause of his lack of knowledge of the
4 deportation consequences of his plea (his attorney never informed him of the consequences, and
5 INS inexplicably waited more than two years before notifying him that he was subject to
6 deportation for his conviction), whereas Mr. Benyaminov had simply asserted that no record
7 existed of his acknowledgement of the deportation consequences of his plea. See id.

8 As outlined in detail above, unlike the defendant in Benyaminov, Mr. Orantes has
9 provided evidence establishing that he was incorrectly advised of the consequences of his guilty
10 plea by defense counsel and that he did not learn all the facts necessary to his claim until June 2,
11 2010. This evidence includes a declaration from the attorney who represented him during the
12 plea proceeding, a copy of the judgment and sentence, and a copy of the transcript of the
13 sentencing hearing.
14

15 **III. Conclusion**

16 Based on the foregoing reasons, and the reasons set forth in Mr. Orantes's motion to
17 withdraw his guilty plea, the Court should vacate the judgment and sentence in this plea and
18 permit Mr. Orantes to withdraw his guilty plea.
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DATED this 11th day of June, 2013.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744
Attorney for Santos Orantes



Teymur Askerov, WSBA No. 45391
Attorney for Santos Orantes

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CERTIFICATE OF SERVICE

1
2 I hereby certify that a copy of the foregoing, along with any attachments, was served on
3 the below-noted date, via email and U.S. Mail, upon the parties required to be served in this
4 action:

5 Snohomish County Prosecuting Attorney's Office
6 3000 Rockefeller Ave., M/S 504
7 Everett, WA 98201

8 DATED this 11th day of June, 2013.

9 Respectfully submitted,

10 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

11 
12 Teymur Askerov, WSBA No. 45391
13 Attorney for Santos Orantes

FILED

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SONYA KRASKI
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IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

Plaintiff,

v.

ORANTES, Santos W.,

Defendant.

No. 06-1-00278-9

STATE'S RESPONSE TO
DEFENDANT'S SUPPLEMENTAL
MEMORANDUM

I. BACKGROUND

At the last hearing on this case, the defendant orally raised an argument that the time limit on collateral attacks was equitably tolled. The court authorized the parties to file supplemental memoranda addressing this issue. The defendant has filed such a memorandum. This memorandum is the State's response.

II. ARGUMENT

A. THE DOCTRINE OF EQUITABLE TOLLING DOES NOT RENDER THE DEFENDANT'S MOTION TIMELY.

1. The Defendant's Alleged Ignorance Is Not Sufficient To Support Application Of The Narrow Doctrine Of Equitable Tolling.

The defendant argues that the time limit on collateral attacks should be "equitably tolled." The Supreme Court has recognized equitable tolling as an exception to the time limit, even though no such exception is set out in the statute.

ORIGINAL

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Prosecuting Attorney - Criminal Division
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1 The doctrine has been held applicable in two circumstances. It applies when there
2 has been "bad faith, deception, or false assurances by the [State] and the exercise
3 of diligence by the [defendant]." In re Bonds, 165 Wn.2d 135, 141 ¶ 10, 196 P.3d
4 672 (2008) (plurality opinion). It also applies when a defendant can establish "actual
5 innocence." In re Carter, 172 Wn.2d 917, 932 ¶ 27, 263 P.3d 1241 (2011). This
6 requires factual innocence, not merely legal error in the procedures that led to the
7 conviction. Id. at 933-34 ¶¶ 30-31. In the present case, there is no showing of either
8 bad faith by the State or actual innocence of the defendant.
9

10 Although the Supreme Court has recognized only these two circumstances
11 as justifying equitable tolling, it has left open the possibility that the doctrine could
12 be applied in other circumstances. "However, any application of equitable tolling ...
13 must only be done in the narrowest of circumstances and where justice requires."
14 Id. at 929 ¶ 21. Under less compelling circumstances, the court has rejected
15 application of the doctrine. Bonds, 165 Wn.2d at 143 ¶ 14, 144-45 ¶ 18 (Court of
16 Appeals delay in appointing counsel did not justify equitable tolling); In re Carlstad,
17 150 Wn.2d 583, 80 P.3d 586 (2003) (filing of petition one day late due to mailing
18 delays did not justify equitable tolling).
19

20 The defendant attempts to rely on State v. Littlefair, 112 Wn. App. 749, 51
21 P.3d 116 (2002), review denied, 149 Wn.2d 1020 (2003). There, the Court of
22 Appeals did apply equitable tolling to an ineffective assistance claim. That case,
23 however, involved much more than mere mis-advice by counsel concerning
24 potential immigration consequences. Rather, the defense attorney crossed out the
25

1 paragraph of the plea agreement that warned the defendant of possible immigration
2 consequences. The trial court then accepted the plea. By doing so, the court
3 violated a statutory directive that defendants receive this notification. RCW
4 10.40.200. Under this "unique and bizarre series of events," the Court of Appeals
5 held that equitable tolling was justified. Littelfair, 112 Wn. App. at 763.

6 A defendant's ignorance of his legal rights does not, by itself, justify equitable
7 tolling. This is clear from In re Hoisington, 99 Wn. App. 423, 993 P.2d 296 (2000).
8 There, the defendant pleaded guilty in the belief that he would receive a maximum
9 term of ten years. Prior to sentencing, he learned that he was actually subject to a
10 maximum term of life. His attorney failed to advise him that he had a right to specific
11 performance of the plea agreement.¹ On appeal, the defendant raised a specific
12 performance issue in a pro se brief, but the court failed to consider it. Under these
13 circumstances, the court applied equitable tolling: "Mr. Hoisington exercised due
14 diligence. The fault is with the court for not addressing his claim when he first raised
15 it in his direct appeal." Id. at 431-32. Thus, the defendant's ignorance of his rights
16 was *not* by itself sufficient to justify equitable tolling. Rather, equitable tolling was
17 only justified by the *court's* failure to give proper consideration to the defendant's
18 claims. Cf. Benyaminov v. City of Bellevue, 144 Wn. App. 755, 183 P.3d 1127
19 (2008), review denied, 165 Wn.2d 1020 (2009) (under "bad faith" standard of Bonds
20
21
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23 ¹ Such a right existed under then-existing case law. State v. Miller, 110
24 Wn.2d 528, 756 P.2d 122 (1988). The Supreme Court later held that there is no
25 right to specific performance of an illegal plea agreement. State v. Barber, 170
26 Wn.2d 854, 248 P.3d 494 (2011) (overruling Miller). This holding does not, however,
affect the analysis of equitable tolling in Hoisington.

1 plurality, counsel's alleged failure to advise defendant of immigration consequences
2 did not justify equitable tolling).

3 The defendant essentially claims that equitable tolling is warranted whenever
4 a defendant is unaware that counsel has given him incorrect advice. There is
5 nothing unusual about this situation: most defendants are ignorant of the law until
6 advised by counsel. To allow equitable tolling under these circumstances would
7 establish a very broad exception. This would be contrary to the Supreme Court's
8 requirement that equitable tolling be allowed only in "the narrowest of
9 circumstances." Carter, 172 Wn.2d at 929 ¶ 21. The defendant's ignorance of
10 counsel's error is not sufficient to establish equitable tolling.
11

12 **2. Since The Defendant's Current Motion Was Filed More Than One Year After**
13 **Any Tolling Period Ended, It Is Not Timely Even If Equitable Tolling Applied.**

14 If equitable tolling applied in this case, it would be insufficient to render this
15 motion timely. Under Littlefair, equitable tolling ends on "the date on which [the
16 defendant] first discovered that deportation was a consequence of his plea."
17 Littlefair, 12 Wn. App. at 763. The defendant has not established when this was. His
18 declaration says: "The first time that I became aware that this plea would jeopardize
19 my immigration status was when my application to renew TPS was denied."
20 Declaration of Santo Orantes at 3 ¶ 18 (attached to docket no. 51). He does not,
21 however, specify the date that this occurred. The defendant's memorandum claims
22 that the date was June 2, 2010, but it provides no evidentiary support for this
23 assertion. It simply cites to ¶ 18 of the defendant's declaration – which does not
24 specify any date. Defendant's Supp. Memo. at 8.
25

26 State's Resp. to Def. Supp. Memo - Page 4

1 If this court accepts the defendant's argument that equitable tolling ended on
2 June 10, 2010, that would still not render his current motion timely. That motion was
3 filed on January 16, 2013, over 2½ years after the latest date that equitable tolling
4 could have ended. This is well beyond the one year time limit set out in RCW
5 10.73.090

6 The defendant essentially argues that his current motion should relate back
7 to his prior motions, which was filed on January 20, 2011. He cites no authority that
8 the "relation back" doctrine applies to criminal cases. The Supreme Court has held
9 that an untimely personal restraint petition cannot be "related back" to an earlier
10 timely filing. In re Benn, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998).

12 The defendant cannot have it both ways. If his current motion is considered
13 to raise *the same* issue as his previous motion, the Court of Appeals has already
14 held that the motion is time barred. This court cannot overrule the Court of Appeals.
15 On the other hand, if the current motion is viewed as raising a *different* issue, its
16 timeliness must rest on its own filing date. Even if equitable tolling is applied, that
17 filing date is untimely.

19 **B. ANY STATUTORY VIOLATION THAT MAY HAVE OCCURRED IN THIS CASE
20 WOULD NOT ESTABLISH AN EXCEPTION TO THE TIME LIMIT ON
21 COLLATERAL ATTACKS.**

22 The defendant's supplemental memorandum also raises a new basis for
23 relief – an alleged violation of RCW 10.40.200. The court should not allow the
24 defendant, at this late date, to amend his motion to raise a new claim. The court
25 authorized supplemental briefing on the doctrine of "equitable tolling," not on a new

1 basis for relief. For the reasons discussed in the State's previous memo, this claim
2 is also an abusive. It was available at the time of the defendant's prior motion and
3 should have been raised then. See State's Motion to Transfer at 8.

4 In any event, RCW 10.40.200 does not significantly change the analysis of
5 this case. That statute does *not* provide any exception to the time limit on collateral
6 attacks. This is clear from Littlefair. There, the court set aside the defendant's guilty
7 plea because RCW 10.40.200 had been violated. Littlefair, 112 Wn. App. at 763-69.
8 The court reached this result only after determining that equitable tolling applied. Id.
9 at 759-63. If RCW 10.40.200 established an exception to the time limit, the entire
10 discussion of equitable tolling in Littlefair would be irrelevant.
11

12 The defendant's statutory claim does not fall within any exception to the time
13 limit. Obviously RCW 10.40.200 is not a "significant change in the law." It was
14 enacted in 1983, over 20 years before the defendant's guilty plea. With respect to
15 equitable tolling, the same analysis applies as set out above. If the defendant is
16 allowed to raise a claim under RCW 10.40.200, the claim as well is time barred.
17

18 **V. CONCLUSION**

19 The defendant's motion is time-barred. Equitable tolling does not apply. The
20 motion should therefore be transferred to the Court of Appeals, for consideration as
21 a personal restraint petition.
22
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Respectfully submitted on July 15, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: *Seth A. Fine*
SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney

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SNOHOMISH CO. WASH



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THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

No. 06-1-00278-9

Plaintiff,

DEFENDANT'S REPLY TO STATE'S
RESPONSE TO SUPPLEMENTAL
MEMORANDUM OF LAW

vs.

SANTOS WILFREDO ORANTES,

Defendant.

ARGUMENT

I. Equitable Tolling Applies to Mr. Orantes's Case

Contrary to the State's assertions, equitable tolling applies to Mr. Orantes's case because he was inaccurately advised of the immigration consequences of his conviction by his attorney, and the Court as well as the State acquiesced in the constitutional error committed by Mr. Orantes's counsel.

The State cites the plurality opinion in In re Personal Restraint of Bonds, 165 Wn.2d 135 (2008), for the proposition that equitable tolling may be applied only where there has been "bad faith, deception, or false assurances" by the court or the State. But that opinion did not command a majority of the Washington Supreme Court. Indeed, a majority of the Court in Bonds would have applied a less stringent standard to equitable tolling claims in the criminal context. Subsequent to Bonds, the Supreme Court expressly recognized, consistent with the

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1 majority of justices in Bonds, “that equitable tolling of [RCW 10.73.090] may be available in
2 contexts broader than those recognized by the Bonds plurality.” In re Personal Restraint of
3 Carter, 172 Wn.2d 917, 929 (2011). Notably, both the concurrence and the dissent in Bonds,
4 i.e., a majority of the Court, cited the Court of Appeals’ decision in State v. Littlefair, 112 Wn.
5 App. 749 (2002), with approval, explaining that the circumstances present in that case would
6 warrant equitable tolling of RCW 10.73.090’s one-year time limit on collateral attacks. Bonds,
7 165 Wn.2d at 145 (Alexander, C.J., concurring), 146 (Sanders, J., dissenting).

8 As explained in Mr. Orantes’s supplemental brief, Mr. Orantes’s case is similar to
9 Littlefair. Despite the fact that Mr. Orantes’s plea agreement contained the immigration
10 advisement required under RCW 10.40.200(2), his attorney erroneously advised him that if a
11 sentence of less than 364 days was imposed in his case, there would be no adverse
12 consequences to his immigration status. The Court and the prosecutor both accepted, without
13 questioning, counsel’s incorrect assumptions about the immigration laws as they applied to Mr.
14 Orantes’s case. Indeed, Mr. Orantes’s entire plea bargain and the sentence imposed by the
15 Court were based upon counsel’s mistaken assumption that a 364 day sentence would mitigate
16 the immigration consequences of Mr. Orantes’s conviction in this case. In addition, the federal
17 government did not initiate removal proceedings against Mr. Orantes until almost two years had
18 passed after his conviction. It is clear that Mr. Orantes’s case is not a mere case of “ignorance
19 of the law” as the State characterizes it, but rather a “unique and bizarre series of events” which
20 resulted in a serious violation of Mr. Orantes’s constitutional rights. Accordingly, just as in
21 Littlefair, the time limit on collateral attacks prescribed in RCW 10.73.090 did not begin to run
22 until Mr. Orantes first learned about the actual immigration consequences of his conviction.
23 Littlefair, 112 Wn. App. at 759. 130 S. Ct. 1481.
24
25

1 **II. Because Mr. Orantes Claim is Based on Equitable Tolling, His Claim Relates**
2 **Back to the Original Filing in this Case.**

3 The State asserts that Mr. Orantes's Littlefair claim cannot relate back to the date of the
4 original filing because the "relation back doctrine" does not apply to criminal cases. The State's
5 argument that Mr. Orantes's claim cannot relate back to the date of the filing of his original
6 motion for relief from the judgment and sentence in this Court entirely misses the obvious fact
7 that Mr. Orantes's claim is based on equitable tolling. Of course, the State correctly notes that,
8 ordinarily, the relation back doctrine does not apply in criminal cases. See In re Personal
9 Restraint of Benn, 134 Wn.2d 868, 938-39 (1998). But there is an exception to this general rule.
10 Specifically, the Washington Supreme Court has established that a pleading filed in a criminal
11 case may relate back where equitable tolling applies. See Bonds, 165 Wn.2d at 142. In Bonds,
12 the Washington Supreme Court rejected an argument identical to the one raised by the State in
13 this case:

14 The State argues that the Court of Appeals, by accepting Bonds's Amended PRP
15 after the filing deadline, undermined principles of finality and acted contrary to
16 Benn. . . . In Benn, the petitioner filed a timely PRP, then moved to supplement
17 his petition with new issues nearly three years later. Noting that the appellate
18 rules had no analog to CR 15(c) allowing an amendment to relate back to the date
19 of the original pleading, and further noting that RAP 18.8(a) (authorizing waiver
or alternation of court rules) does not apply to a statute of limitation like RCW
10.73.090, we held newly raised theories were time barred. *Though Benn is
factually analogous and supports our conclusion here, in Benn, the petitioner did
not assert application of equitable tolling.*

20 Id. After explaining that relation back is possible where equitable tolling applies, the Supreme
21 Court then went on to explain the reasons that equitable tolling did not apply to the case before
22 it. It is evident from the Supreme Court's analysis in Bonds that an otherwise time-barred claim
23 that relies on equitable tolling can relate back to the date of an original filing, if justice so
24 requires. Mr. Orantes attempted to obtain relief from the immigration consequences imposed
25 upon him by the conviction in this case as early as 2008, but was unable to do so because he was

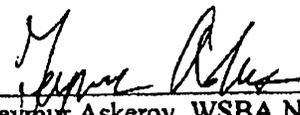
1 incorrectly advised of the immigration consequences of his conviction a second time when he
2 filed his first petition for relief from the judgment in this case.¹ Both justice and equity require
3 tolling of the statute of limitations in Mr. Orantes's case, and relation back of his claim for relief
4 under Littlefair.

5
6 DATED this 2nd day of August, 2013.

7 Respectfully submitted,

8 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

9  on behalf of
10 Christopher Black, WSBA No. 31744
11 Attorney for Santos Orantes

12 
13 Teymur Askerov, WSBA No. 45391
14 Attorney for Santos Orantes

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25 ¹ This Court granted a motion amending the sentence in this case to 180 days on December 12, 2008.

CERTIFICATE OF SERVICE

1 I hereby certify that a copy of the foregoing, along with any attachments, was served on
2
3 the below-noted date, via email and U.S. Mail, upon the parties required to be served in this
4 action:

5 Snohomish County Prosecuting Attorney's Office
6 3000 Rockefeller Ave., M/S 504
7 Everett, WA 98201

8 DATED this 2nd day of August, 2013.

9 Respectfully submitted,

10 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

11 

12 Teymur Askerov, WSBA No. 45391
13 Attorney for Santos Orantes
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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO WASH



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

The State of Washington,

No. 06-1-00278-9

Plaintiff,

STATE'S SUBMISSION OF
SUPPLEMENTAL AUTHORITY

v.

ORANTES, Santos W.

Defendant.

The purpose of this memo is to advise the court of a new Washington Supreme Court decision: In re Haghighi, no. 87529-4 (decided 9/12/13). That case limits the doctrine of "equitable tolling":

Consistent with the narrowness of the doctrine's applicability, principles of finality, and the multiple avenues available for postconviction relief, we apply the civil standard and require the predicates of bad faith deception, or false assurance. . .

Haghighi ¶ 28. Consistent with prior law, the court also recognized an "actual innocence" exception. Id.

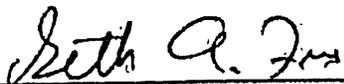
In the present case, there is no showing of bad faith, deception, or false assurances. Nor is there any showing of actual innocence. Consequently, the "equitable tolling" doctrine is inapplicable.

ORIGINAL

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Respectfully submitted on October 10, 2013.

FOR MARK ROE
Snohomish County Prosecutor



SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney

State's Supp. Authority - 2.

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Prosecuting Attorney - Criminal Division
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Superior Court of the State of Washington
for Snohomish County

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BRUCE I. WEISS
GEORGE F.B. APPEL
JOSEPH P. WILSON
RICHARD T. OKRENT
JANICE E. ELLIS
MARYBETH DINGLEY
MILLIE M. JUDGE

SNOHOMISH COUNTY COURTHOUSE
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PRESIDING JUDGE
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COURT ADMINISTRATOR
SUPERIOR AND JUVENILE COURT
BOB TERWILLIGER



CL16296990

October 14, 2013

Seth A. Fine
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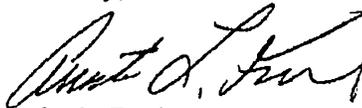
Re: *State v. Santos Wilfredo Orantes*, Snohomish County Cause No. 06-1-00278-9

Dear Counsel:

Please consider this letter as my memorandum decision on the State's motion to transfer the above case to the Court of Appeals as a Personal Restraint Petition. I hereby grant the motion pursuant to CrR 7.8 because I conclude the matter is time-barred. The defendant did not file this second motion within the time limits after actually becoming aware of his correct immigration consequences. The issue of whether RCW 10.73.090 time-barred this claim was also previously litigated on the first Personal Restraint Petition. There may be other grounds for not applying the time bar that could have been raised then, but they cannot be raised now.

Please prepare an order for my signature consistent with my ruling. If you cannot agree on form, please telephone my law clerk, Amanda Uphaus, at (425) 388-3449 or email her at amanda.uphaus@snoco.org.

Sincerely,


Anita L. Farris
Superior Court Judge

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

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cc: Court File

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