

Court of Appeals No. 71082-6-I  
Superior Court No. 06-1-00278-9

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

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In re the Personal Restraint of:

Santos W. Orantes,

Petitioner.

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REPLY TO STATE'S SUPPLEMENTAL RESPONSE TO PERSONAL  
RESTRAINT PETITION

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. THE SUPREME COURT'S DECISION IN  TSAI  APPLIES TO MR. ORANTES'S CASE AND HIS CASE SHOULD THEREFORE BE REMANDED FOR A HEARING ON THE MERITS .....1

III. CONCLUSION.....9

## TABLE OF AUTHORITIES

### Cases

<u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).....	3
<u>In re Personal Restraint of Becker</u> , 143 Wn.2d 491 (2001).....	3
<u>In re Personal Restraint of Haverty</u> , 101 Wn.2d 498 (1984).....	3, 4
<u>In re Personal Restraint of Jeffries</u> , 114 Wn.2d 485 (1990) .....	4, 5
<u>In re Personal Restraint of Jagana</u> , 170 Wn. App. 32 (2012) .....	4
<u>In re Personal Restraint of Tsai</u> , 183 Wn.2d 91 (2015).....	<i>passim</i>
<u>In re Personal Restraint of Turay</u> , 153 Wn.2d 44 (2004).....	5
<u>In re Personal Restraint of Yim</u> , 139 Wn.2d 581 (1999).....	6
<u>Padilla v. Kentucky</u> , 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010).....	<i>passim</i>
<u>State v. Holley</u> , 75 Wn. App. 191 (1994).....	7
<u>State v. Malik</u> , 37 Wn. App. 414 (1984).....	8
<u>State v. Sandoval</u> , 171 Wn.2d 163 (2011).....	7
<b>Statutes</b>	
RCW 10.73.090.....	2
<b>Court Rules</b>	
CrR 7.8.....	3
RAP 16.4.....	2

I. **INTRODUCTION**

Comes now Petitioner, Santos Orantes, by and through undersigned counsel, and submits to this Court the following reply to the State's supplemental response to his personal restraint petition. The facts and procedural history of this matter are outlined in Mr. Orantes's transferred CrR 7.8 motion, filed on January 15, 2013. The Supreme Court remanded this case to the Court of Appeals for reconsideration in light of In re Personal Restraint of Tsai, 183 Wn.2d 91 (2015), after this Court dismissed Mr. Orantes's transferred personal restraint petition as untimely on June 4, 2014.

II. **THE SUPREME COURT'S DECISION IN *TSAI* APPLIES TO MR. ORANTES'S CASE AND HIS CASE SHOULD THEREFORE BE REMANDED FOR A HEARING ON THE MERITS.**

Mr. Orantes is entitled to have his case remanded to the trial court for a hearing on the merits because the claim he makes in his personal restraint petition was unavailable under Washington law before Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), was decided.

In In re Personal Restraint of Tsai, the Washington Supreme Court reviewed two cases, the case of petitioner Yung-Cheng Tsai, and the case of petitioner Muhammadou Jagana. See id. 183 Wn.2d at 96 - 97. The Supreme Court affirmed the Court of Appeals' order dismissing Mr.

Tsai's personal restraint petition, but reversed the Court of Appeals' order dismissing Mr. Jagana's personal restraint petition. See id. The dismissal of Mr. Tsai's personal restraint petition was affirmed because he had previously filed a motion for post-conviction relief based on his criminal defense attorney's misadvice about the immigration consequences arising from his guilty plea in 2008, with the assistance of an attorney, and failed to appeal the trial court's decision denying his motion on the ground that his claim was untimely under RCW 10.73.090. See id. at 107 - 08.<sup>3</sup> Due to Mr. Tsai's failure to appeal the denial of his initial motion for post-conviction relief in 2008, the Supreme Court found that it was barred by RAP 16.4(d) from entertaining his second motion for post-conviction relief on the same grounds, filed in 2011.<sup>4</sup> See id. However, the Court reversed the order of the Court of Appeals dismissing Mr. Jagana's personal restraint petition and remanded Mr. Jagana's case for an evidentiary hearing because unlike Mr. Tsai's petition, Mr. Jagana's petition was not a successive petition, and Mr. Jagana's claim, i.e., that

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<sup>3</sup> Mr. Orantes's claim is distinguishable from Mr. Tsai's because his first petition for relief was transferred to the Court of Appeals and rejected by that court as untimely.

<sup>4</sup> RAP 16.4(d) prohibits successive petitions for post-conviction relief on the same grounds. That rule provides, in pertinent part: "No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." RAP 16.4(d).

his defense attorney failed to properly investigate and advise him of the immigration consequences of his plea, was not available before Padilla was decided. See id.

Mr. Orantes's claim in this case is more similar to Mr. Jagana's claim, and therefore, like Mr. Jagana's case, Mr. Orantes's case should be remanded for an evidentiary hearing. First, Mr. Orantes's personal restraint petition is not a successive petition. Where a litigant raises a new claim "that had not been raised and adjudicated" his request for relief does not constitute a successive petition. See In re Personal Restraint of Becker, 143 Wn.2d 491, 499 (2001); In re Personal Restraint of Haverty, 101 Wn.2d 498, 503 - 04 (1984) (holding that RAP 16.4(d) does not bar a second collateral attack where the petition includes new issues). It is true that Mr. Orantes filed two separate motions for relief from his conviction in this case. However, Mr. Orantes's first CrR 7.8 motion, originally filed on January 13, 2011, was not based on a claim of ineffective assistance of counsel, but on due process.<sup>5</sup> Mr. Orantes's second petition for relief from the conviction in this case, filed on January 15, 2013, and currently

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<sup>5</sup> Specifically, Mr. Orantes argued that his plea was involuntary under Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) because the *trial court* failed to advise him of the immigration consequences of his conviction. Indeed, the State concedes that Mr. Orantes disclaimed reliance on ineffective assistance of counsel when his first petition was pending. See Supplemental Response at 3.

before this Court, is based on a claim of ineffective assistance of counsel. It was in this second petition that Mr. Orantes first raised a claim of ineffective assistance of counsel in this case. Consequently, because the instant petition for relief from the conviction in this case is based on a new claim, not previously heard and adjudicated, it is not a successive petition. See Haverty, 101 Wn.2d at 503 - 04.

Second, Mr. Orantes's petition does not constitute an abuse of the writ, as the State contends. A second petition for relief from a criminal conviction does not constitute an abuse of the writ where there have been "intervening changes in case law." See In re Personal Restraint of Jeffries, 114 Wn.2d 485, 492 (1990). After Mr. Orantes filed his initial petition for post-conviction relief in 2011, the Court of Appeals held for the first time in In re Personal Restraint of Jagana, 170 Wn. App. 32, 59 (2012), which was later vacated and withdrawn, that claims based on the Supreme Court's decision in Padilla apply retroactively to cases on collateral review. Before Jagana was decided, it appeared that a claim of ineffective assistance of counsel based on Padilla would be time-barred under Washington law, as more than one year had passed since Mr. Orantes's conviction became final. Mr. Orantes's second petition is based on the change in law effected by the Court of Appeals' holding in Jagana, and does not, therefore, amount to an abuse of the writ. And,

while the Court of Appeals' decision in Jagana was vacated and withdrawn after Mr. Orantes filed the instant petition, the Supreme Court reached the same conclusion in In re Personal Restraint of Tsai the Court of Appeals did in Jagana. Because Mr. Orantes's claim of ineffective assistance of counsel claim is based on an intervening change in law, it does not constitute an abuse of the writ. See Jeffries, 114 Wn.2d at 492; see also In re Turay, 153 Wn.2d 44, 48 - 49 (2004) (same).

Finally, Mr. Orantes's ineffective assistance of counsel claim was not available to him before Padilla was decided, as the State contends. The State argues that even if Padilla applies retroactively, Mr. Orantes is not entitled to relief from his conviction in this case because he is claiming that his criminal defense attorney affirmatively misadvised him about the immigration consequences of his conviction, and Washington courts recognized claims of ineffective assistance of counsel based on affirmative misadvice regarding immigration consequences long before Padilla was decided. The Court should reject this argument because Mr. Orantes's claim of ineffective assistance of counsel was not available to him before the Supreme Court's decision in Padilla was issued.

Prior to Padilla it was not the law in Washington that any degree of misadvice about the immigration consequences of a criminal conviction amounted to ineffective assistance of counsel. Rather, what the Supreme

Court had suggested was that a defendant *may* be entitled to withdraw a guilty plea based upon an affirmative misrepresentation by counsel about *deportation*. See In re Personal Restraint of Yim, 139 Wn.2d 581, 588 (1999). In order to obtain relief under this stringent standard, a defendant would have had to show that “he was affirmatively misled to believe that he would not be deported” by counsel’s advice. Id.; see Tsai, 183 Wn.2d 91 (reaffirming that prior to Padilla, “anything short of an affirmative misrepresentation by counsel of the plea’s *deportation* consequences” could not support an ineffective assistance of counsel claim) (emphasis added; internal citation and quotation marks omitted).

In the instant case, unlike Mr. Tsai, Mr. Orantes has not asserted that his attorney advised him that he would not be deported as a result of his conviction in this case. Rather, Mr. Orantes has asserted that his attorney did not correctly advise him about the effect of his conviction on his ability to maintain TPS. See Appendix (“App.”) A (Declaration of Santos Orantes) at 2 - 3. Because Mr. Orantes’s claim does not relate to an affirmative misrepresentation about *deportation*, Mr. Orantes’s claim was not cognizable before Padilla was decided.

Indeed, it is clear from Washington cases predating Padilla that the advice that Mr. Orantes received from his attorney about the immigration consequences of his guilty plea would not have been considered the sort of

misadvice that could support an ineffective assistance of counsel claim before Padilla was decided. In State v. Sandoval, 171 Wn.2d 163 (2010), citing pre-Padilla Washington case law, the Court of Appeals rejected a claim of ineffective assistance of counsel where counsel mistakenly assured his client that he would not be deported because any adverse immigration consequences could be ameliorated by immigration counsel after he served his sentence. Id. at 167. The Supreme Court reversed the defendant's conviction, holding that under Padilla the defense attorney's misadvice amounted to ineffective assistance of counsel. See id. at 174.

In State v. Holley, 75 Wn. App. 191, 195 (1994), the defendant was advised by criminal defense counsel prior to pleading guilty that the immigration advisement in his plea statement did not apply to him and that he could simply skip over the advisement. While recognizing that counsel's advice to Mr. Holley was "obviously faulty advice," the court held that because the immigration consequences of a guilty plea were collateral to a criminal conviction, counsel's advice to Mr. Holley did not constitute the sort of "affirmative misadvice" or "misinformation" that would support a claim of ineffective assistance of counsel. See id. at 199.<sup>7</sup>

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<sup>7</sup> The State attempts to characterize Holley as a non-advice case rather than a misadvice case because counsel never discussed the issue of immigration with the defendant. However, telling a client to skip a warning that applies to him is obviously misadvice.

Similarly, in State v. Malik, 37 Wn. App. 414, 415 (1984), the defendant was convicted of delivery of a large quantity of heroin, an offense that made him deportable under the immigration laws. Although Mr. Malik's attorney advised him that his conviction *may* result in his deportation from the United States, counsel failed to advise Mr. Malik of the actual immigration consequences of his plea, i.e., that his conviction made his deportation mandatory. Id. at 417. The court held that because immigration consequences were collateral to a guilty plea, counsel's generic warning to Mr. Malik "discharged [counsel's] responsibilities in a constitutionally sufficient manner." Id.

It is clear from the foregoing that Mr. Orantes could not have raised a claim of ineffective assistance of counsel under Washington case law before the Supreme Court of the United States issued its opinion in Padilla, and because Padilla effected a significant, material change in the law that is retroactively applicable for purposes of RCW 10.73.100(6), Mr. Orantes is entitled to an evidentiary hearing on the merits of his ineffective assistance of counsel claim. See Tsai, 183 Wn.2d at 107.

Even if one accepts the State's dichotomy between misadvice and non-advice, additional testimony is necessary to determine whether Mr. Orantes's claim should be classified as a misadvice claim or a non-advice claim under Tsai. Specifically, Mr. Orantes's former defense lawyer, Ms.

Kathleen Kyle, asserts in her declaration that she simply did not advise Mr. Orantes that he could lose his immigration status as a result of his conviction. See App. B (Declaration of Kathleen Kyle) at 1 - 2. Moreover, Mr. Orantes's declaration can also be read to state a claim of non-advice. Mr. Orantes explains in his declaration that defense counsel "never told me that pleading guilty would cause me to lose my immigration status." See App. A at 3. Thus, even if this Court adopts the State's reading of Tsai, Mr. Orantes's case should be remanded to the trial court for determination of whether counsel's representations to Mr. Orantes amounted to non-advice or misadvice.

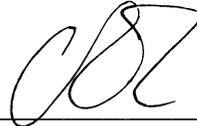
### **III. CONCLUSION**

Based on the foregoing reasons and the reasons previously submitted in this matter, the Court should remand Mr. Orantes's case to the trial court for an evidentiary hearing.

DATED this 27<sup>th</sup> day of May, 2016.

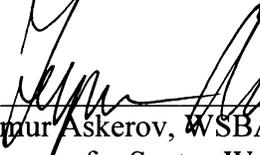
Respectfully submitted,

BLACK LAW, PLLC



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Christopher Black, WSBA No. 31744



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Teymur Askerov, WSBA No. 45391  
Attorneys for Santos W. Orantes  
705 Second Avenue, Suite 1111  
Seattle, WA 98104

CERTIFICATE OF SERVICE

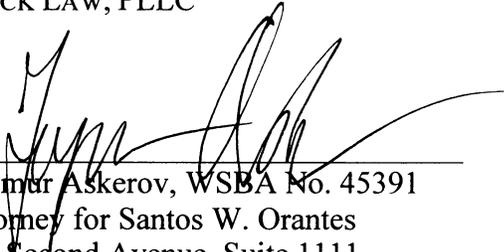
I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing and all appendices on the following:

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

DATED this 27<sup>th</sup> day of May, 2016.

Respectfully submitted,

BLACK LAW, PLLC



Teymur Askerov, WSBA No. 45391  
Attorney for Santos W. Orantes  
705 Second Avenue, Suite 1111  
Seattle, WA 98104

# Appendix A

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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  
1111 Hoge Building, 705 Second Avenue  
Seattle, WA 98104  
206.623.1604 | Fax: 206.658.2401

- 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.
- 10 9. Since 2006, I have not been convicted of any crimes. In 2010, I started my own construction  
11 company. I specialize in remodeling homes. My company is licensed in the State of  
12 Washington and I have stayed current on my taxes.
- 13 10. I have worked very hard, learned English, and done my best to be a good husband, father,  
14 son, and community member.
- 15 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  
16 everything in my power to take advantage of the opportunity, and to contribute to society as  
17 much as I am able.
- 18 12. In short, I have been working hard, caring for my family, and being as productive a member  
19 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 Current Status

19 23. I am currently in deportation proceedings. If I am unsuccessful in my attempt to obtain post-  
20 conviction relief in this matter, it is almost certain that I will be deported to El Salvador.

21 24. If this happens it will have a disastrous impact on both me and my family. I have been in this  
22 country for over ten years. I have spent my entire adult life here. I have no prospects in El  
23 Salvador. My wife and children are all U.S. Citizens. My wife has been in this country since  
24 she was a child, and my children have never lived anywhere else. El Salvador is a dangerous  
25 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.

1 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.

2 27. I truly do not know what will happen if I am deported. It would be a disaster for our family.  
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4  
5 I certify and declare under penalty of perjury under the laws of the State of Washington  
6 that the foregoing is true and correct to the best of my ability.

7  
8 SIGNED AND DATED this 17 day of September, 2012 at Kent, Washington.

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10   
11 Santos Wilfredo Orantes

# Appendix B

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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.

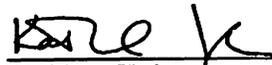
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6. I did not advise him that his guilty plea would render him ineligible for Temporary Protected Status.

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 1<sup>st</sup> day of January, 2011 at Everett, Washington.

  
\_\_\_\_\_  
Kathleen Kyle