

NO. 42824-5-II
Cowlitz Co. Cause NO. 05-1-01156-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

RICARDO MARTINEZ-LEON,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S REPOSE TO ASSIGNMENT OF ERROR

1. The trial court properly denied the Defendant's CrR 7.8 Motion to withdraw his guilty plea as the motion was a collateral attack time barred under RCW 10.73.090 and equitable tolling was inappropriate.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

1. Whether the trial court correctly found the Defendant's CrR 7.8 Motion was a collateral attack that was time barred because the motion was made more than five years after the guilty plea.
2. Whether the rulings of *State v. Sandoval* and *Padilla v. Kentucky* represent a "significant change in the law" under RCW 10.73.100(6), when the law has always required the defendant be aware of the deportations consequences of his guilty plea.
3. Whether the trial court properly found the defendant was aware he could be deported as a consequence of his plea and thus properly denied the motion for equitable tolling

III. STATEMENT OF THE CASE

Procedural History Overview

The State concurs with the defendant's rendition of the case's procedural history.

Factual History

The Defendant was originally charged with Kidnapping in the First Degree (domestic violence), Felony harassment (domestic violence), assault in the fourth degree (domestic violence), and Interfering with

reporting domestic violence (domestic violence). CP 88. He accepted the State's offer and pled guilty to an amended information of Unlawful Imprisonment (domestic violence) and Assault in the fourth degree (domestic violence) on May 11, 2006. CP 88.

At the time of the plea, the Defendant was previously convicted of Assault in the fourth degree (domestic violence) out of Cowlitz County in cause C85903 from 8/6/1995 and Forgery in the first degree in Clackamas County, Oregon, cause number OR 0003075J from 3/12/1998. CP 13, 89. Additionally, the Defendant had a voluntary departure deportation proceeding on 12/05/1996 wherein he agreed to return to Mexico. CP 89, 94-95, 99.

The defendant admitted his guilt to the charge of Assault in the fourth degree and entered an *Alford* plea to the Unlawful Imprisonment. CP 31. At first the Defendant expressed some confusion about what rights he gave up by pleading guilty. CP 31-34. The court told the Defendant that he needed to understand all the rights he was giving up. CP 32-33. Defense counsel then took a break to again speak to Martinez-Leon and make sure he understood and wanted to plead guilty. CP 35. The court started over with the guilty plea, going slowly and using simple language. CP 35-44. The court reviewed the right to a jury trial, the right to have the State prove the case against him, the right to present evidence, the

elements of the crimes charged, the maximum sentence and the standard sentencing range, and the loss of his right to own firearms. CP 35-44. The court also determined the guilty plea form was read to the Defendant by the interpreter, that he understood it, didn't have any questions, and signed the document. CP 43-44. At the time of the plea, the Defendant's signed plea form contained the language "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 88. The court found the Defendant entered the plea "knowingly, intelligently and voluntarily, with a full understanding of its meaning and effect and with a factual basis." CP 44.

Sentencing was held on May 25, 2006. CP 47. There was an agreed recommendation of 2 months. CP 47. The court sentenced the Defendant to two months on count one and 365 days all suspended on count two. CP 18, 48. Defense counsel did not object to the sentence as to count two, or ask the court for a sentence of 364 days suspended. CP 70.

The Defendant filed his Motion for Relief from Judgment or to withdraw his guilty plea on June 27, 2011. CP 26. In the subsequent Memorandum, the Defendant filed a declaration from himself and from

Lisa Tabbut, defense counsel for the plea. CP 69-74. The Defendant indicated Ms. Tabbut did not tell him a guilty plea to Assault in the fourth degree would lead directly to his deportation and he did not recall if she said a guilty plea to Unlawful Imprisonment would lead to his deportation. CP 71. Ms. Tabbut confirmed she did not warn the Defendant of deportation consequences of the Assault, but she did recall discussing the paragraph in the plea form regarding immigration consequences and telling the Defendant that deportation was possible consequence of the felony conviction. CP 69. The Defendant also filed an affidavit from David Shamloo, the Defendant's current defense counsel in his deportation proceedings. CP 111. Mr. Shamloo opines Ms. Tabbut was ineffective and that the consequences were clear that a conviction of 365 days for the Assault, a domestic violence (DV) conviction, the defendant's prior criminal history combined with the DV conviction would constitute an aggravated felony. CP 112. Mr. Shamloo does not opine as to the consequences of the Unlawful Imprisonment conviction, nor state what the law was at the time of the Defendant's guilty plea. CP 111-113.

The State presented information to the trial court that Jeffery Chan, the Defendant's deportation officer, informed the State that ICE was unaware of the Defendant's prior criminal history when they filed for the current deportation proceedings. CP 89. However, Mr. Chan indicated

the Defendant's prior 1996 assault might be a basis for adding a new charge and the Forgery was a basis for adding a new charge and it was most certainly considered a Crime of Moral Turpitude, constituting grounds for deportation. CP 89. Mr. Chan also indicated that at the time the defendant was allowed permanent residence he informed the agency he had no criminal history. CP 89. When this was found to be untrue, the defendant filed a waiver indicating his forgery conviction was a crime involving moral turpitude. CP 89.

The parties argued the motion to Judge Stonier on September 9, 2011.¹ Judge Stonier asked for additional information of "what [were] the clear succinct consequences of the plea of guilty in the year 2006 when Mr. Martinez Leon entered his guilty plea?" RP 26. In response to this question, the Defendant filed the affidavit of Mr. Shamloo. CP 111-113

Had the Defendant been found guilty at trial his range on the charge of the Class A felony - Kidnapping in the first degree was 57-75 months in prison and carried mandatory registration. CP 89. The State's offer was a plea to a class C felony of Unlawful Imprisonment and Assault in the forth degree with a recommendation of 2 months. CP 89.

¹ The verbatim report of the September 9, 2011 oral argument will be referred to herein as "RP _____."

The trial court filed its decision on October 31, 2011 concluding the motion was time-barred pursuant to CrR 7.8 and RCW 10.73.090. CP 114. The trial court found the “requirement that defendant’s [sic] be advised of the implications of a plea of guilty under the immigration laws is not a significant change in the law. RCW 10.73.090, RCW 10.40.200.” CP 114. The trial court also found defense counsel informed the Defendant and he was aware he could be deported when he entered his guilty plea. CP 115. Moreover, the court found the Defendant failed to prove ineffective assistance of counsel under both prongs. First, the Defendant failed to provide sufficient evidence of the state of the immigration consequences in 2006 and whether effective counsel would know deportation absolutely would occur. CP 115. Second, the court found the Defendant failed to prove that even if his counsel had made the motion for a 364 day sentence, that the outcome would have been different. CP 115. The court thus denied the argument to apply equitable tolling and found the motion time barred. CP 115. The court then referred the matter to the Court of Appeals for a Personal Restraint Petition under CrR 7.8(c)(2). CP 115-16.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Defendant appeals from the Superior Court's denial of his motion to withdraw his guilty plea under Criminal Rule 7.8(b)(5) and RCW 10.73.090. The court of appeals reviews the denial of a 7.8 motion for an abuse of discretion. *State v. Forrest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (Div 2, 2005). "A trial court abuses its discretion when it exercise[s] its discretion in a manifestly unreasonable manner, or when the exercise of discretion is based on untenable grounds or reasons." *State v. Smith*, 159 Wn. App. 694, 699-700, 247 P.3d 775 (Div 3, 2011). A decision is based on untenable grounds or made for untenable reasons when it was reached by applying the wrong legal standard. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

B. THE DEFENDANT'S CRR 7.8 MOTION IS TIME BARRED AS THE RULINGS OF *STATE V. SANDOVAL* AND *PADILLA V. KENTUCKY* DO NOT REPRESENT A "SIGNIFICANT CHANGE IN THE LAW" UNDER RCW 10.73.100(6).

Washington Criminal Rule 4.2(f) (2011) states a court shall allow the withdrawal of a guilty plea when it is necessary to correct a manifest injustice. The motion is governed under Rule 7.8 because it is made after

the judgment. Criminal Rule 7.8 (b)(5) (2011) allows for relief for “any other reason justifying relief from the operation of the judgment.” However, Rule 7.8 also states the motion shall be made within a reasonable time and for reasons under subsection (b)(1) not more than one year after the judgment was entered, and all sections are subject to RCW sections 10.73.090, and 10.73.100.

RCW 10.73.090 states:

(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 post conviction 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.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;...

RCW 10.73.090 (2010). RCW 10.73.100 sets out the six exceptions to the time limit. It states:

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:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(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.

RCW 10.73.100 (2010).

The Defendant pled guilty in May 2006. He did not file his motion to withdraw his plea until June 27, 2011. This is clearly beyond the one year time limit under Criminal Rule 7.8(b)(1) and RCW 10.73.090.

Criminal Rule 7.8(b)(5) (2011) permits a judgment to be vacated for “[a]ny other reason justifying relief.” “A vacation under section (5) is limited to extraordinary circumstances not covered by any other section of the rule.” *State v. Cortez*, 73 Wn.App. 838, 841-42, 871 P.2d 660 (1994) (citing *State v. Brand*, 120 Wa.2d 365, 369, 842 P.2d 470 (1992)). Final judgments “ ‘may be vacated or altered only in those limited circumstances where the interests of justice most urgently require.’ ” *Cortez*, 73 Wn.App. at 842, 871 P.2d 660 (quoting *State v. Shove*, 113 Wa.2d 83, 88, 776 P.2d 132 (1989)). CrR 7.8(b)(5) does not apply when the circumstances alleged to justify the relief existed at the time the judgment was entered. *State v. Zavala-Reynoso*, 127 Wn.App. 119, 122-23, 110 P.3d 827 (Div. 3, 2005) (citing *Cortez*, 73 Wn.App. at 842, 871 P.2d 660). Additionally, ineffective assistance of counsel claims are barred after one year. *State v. Gomez Cervantes*, No. 29595-8-III slip op. at 4 (Wn App Div 3. filed March 29, 2012) citing *State v. Wade*, 133 Wn.

App. 855, 870, 138 P.3d 168 (2006). Moreover a “claim that a defendant was not properly advised of the consequences of his guilty plea cannot be brought more than one year after finality.” *State v. Gomez Cervantes*, No. 29595-8-III slip op. at 4, citing *State v. King*, 130 Wn.2d 517, 530-31, 925 P.2d 606 (1996),

The circumstances of the Defendant’s situation existed at the time of his plea, in that he was subject to deportation the minute he was convicted. As such, Rule 7.8 does not apply. Moreover, Criminal Rule 7.8(b)(5) is limited to extraordinary circumstances not covered by any other section of the rule. *State v. Brand*, 120, Wa.2d. 365, 369, 842 P.2d 470 (1992), *State v. Olivera-Avila*, 89 Wn.App. 313, 319, 949 P.2d 824 (Div 3, 1997). “These extraordinary circumstances must relate to fundamental, substantial irregularities in the court’s proceedings or to irregularities extraneous to the court’s action.” *Olivera-Avila*, at 319.

In *State v. Olivera-Avila*, a defendant moved to withdraw his guilty plea on the basis he was not advised of the direct consequence of mandatory community placement.² The defendant pled guilty in 1993 to two charges of unlawful delivery of cocaine and one charge of unlawful

²Mr. Olivera-Avila was deported based upon his convictions. When he re-entered the U.S. and committed crimes resulting in federal convictions, he moved to withdraw his pleas. It is interesting to think what Division Three would have done with a motion to withdraw based upon deportation considerations if Olivera-Avila filed a motion similar to the defendant’s.

possession of cocaine. *Id.* at 316. At the time of his plea, and since 1988, there was a mandatory community placement requirement. *Id.* 316, 322. There was no question the court and defense counsel failed to advise Olivera-Avila of the community placement. *Id.* at 316. However, at the time of the plea there was no case determining community placement was a direct consequence of a plea. *Id.* Three years later, *State v. Ross*, 129 Wa.2d. 279, 184-86, 916 P.2d 405 (1996), decreed community placement was a direct consequence. Olivera-Avila filed his motion to withdraw his plea based upon the new case. *Id.* The court of appeals considered whether collateral attack of a guilty plea on the basis of the new case was subject to the one-year limitation of Criminal Rule 7.8(b)(1) and RCW 10.73.090. *Id.* at 317.

The Court of Appeals found the failure to advise the defendant of the community placement was a matter causing the judgment to be void under CrR 7.8(4) and therefore was subject to the reasonable time limit under Rule 7.8 and to the one-year restrictions under RCW 10.73.090. *Id.* at 319. The court specifically held it did not fall under Rule 7.8(b)(5) as the failure to warn the defendant of the mandatory community placement was not a substantial or fundamental irregularity justifying vacation. *Id.*

The *Olivera-Avila* Court went on to consider the timeliness issue under RCW 10.73.100(6). “Generally, a new rule will not be given

retroactive application to cases on collateral review unless, ‘(a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) whether the rule requires the observance of procedures implicit in the concept of ordered liberty.’” *Id.* at 321 (citing *In re St. Pierre*, 118 Wa.2d 321, 823 P.2d 492 (1992)). The Court stated it is a well settled law that a guilty plea would not be accepted until the defendant had been informed of all the direct consequences of the plea. *Id.* (citing *State v. Barton*, 93 Wa.2d 301, 305, 609 P.2d 1353 (1980)). Thus, because the law dictating community custody was in effect at the time the defendant pled, he could have argued the plea was involuntary at the time of the plea, and thus the issues did not pose a significant material change in the law. *Id.* What Division Three indicates is if the law is in effect at the time of the plea and the defendant failed to raise the issue, it cannot be a significant material change in the law and thus does not fall under the exceptions in 10.73.100(6). Division Three reiterated this stance in *State v. Smith*, 159 Wn. App. 694, 247 P.3d 775 (Div 3, 2011), when it indicated that deportation consequences are knowable at the time of sentence. *See also, State v. Cortez*, 73 Wn. App. 838, 841-42, 871 P.2d. 660 (Div 3 1994).

The Washington Supreme Court has since clarified when an opinion effectively overturns a prior appellate decision that was originally

determinative of a material issue, the subsequent opinion constitutes a significant change in the law. *In re Greening*, 141 Wa. 2d 687, 697, 9 P.3d 206 (2000). However, the Supreme Court specifically adopted the decision of *Olivera-Avila*, stating the omitted arguments had to be essentially unavailable to the defendant prior to the new decision. *State v. Stoudmire*, 145 Wa.2d 258, 264-65, 36 P.3d 1005 (2002). Moreover, the Supreme Court agreed that *State v. Ross*, 129 Wa.2d. 279, 184-86, 916 P.2d 405 (1996), did not pose a significant change in the law because it did not overturn another decision. *Id.* at 265.

The Defendant argues there has been a significant change in the law wrought by *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and *State v. Sandoval*, 171 Wa. 2d 163, 249 P.3d 1015 (2011).

There is some debate over whether *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), created a significant change in the law. In *Padilla*, the United State's Supreme Court indicated it had never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Id.* at 1481. Rather it declined to consider the distinction between direct and collateral consequences, instead relying on the ambit of the Sixth Amendment right to counsel. *Id.* at 1481-82. Under the definitions in Washington law, *Padilla* could not be a significant change in

the law, because the Supreme Court indicates it arises from the 6th Amendment without distinction as to direct versus collateral consequences.

However, in *State v. Sandoval*, 171 Wa. 2d 163, 170 fn 1, 249 P.3d 1015 (2011), the Washington Supreme court in dicta indicates *Padilla* supersedes *In re Yim*, 139 Wa.2d 581, 587-89, 989 P.2d 512 (1999), a case determining deportation consequences were a collateral consequence only requiring defense counsel not to affirmatively misrepresent the deportation consequences. Yet, *Yim* was distinguished by *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (Div 2, 2002), wherein the court determined even if they were collateral consequences, a defendant had a statutory right to be informed of deportation consequences under RCW 10.40.200. The Defendant cites to *State v. Martinez-Lazo*, 100 Wn. App. 869, 877, 999 P.2d 1275 (Div 3, 2000), for the position that the failure to advise of these consequences did not constitute ineffective assistance. App. Brf. at 11. However, *Martinez-Lazo* relied on *Yim*, which was distinguished by *Littlefair*. Thus, this court should determine the argument as to ineffective assistance of counsel was available to Mr. Martinez-Leon under prior case law and the Defendant is barred from raising the issue.

Up until March 29, 2012, this issue was a matter of first impression in Washington State. In *State v. Gomez Cervantes*, No. 29595-8-III slip

op. (Wn App Div 3. filed March 29, 2012), Division Three determined *Padilla* did not create a significant change in the law. In *Gomez Cervantes*, Mr. Gomez pled guilty to unlawful possession of cocaine in 1987. *Id.* at 1. In 2005 he successfully moved to vacate the conviction under RCW 9.94.640, however this did not alleviate the immigration consequences. *Id.* In November 2010, Gomez moved to withdraw his plea saying it was involuntary because his trial counsel was ineffective under *Padilla*. *Id.* The trial court denied the motion under CrR7.8. *Id.*

Division Three considered the very question at issue in case before this court and held *Padilla* merely applied the existing settled law of *Strickland* to a new set of facts. *Id.* at 5. It stated *Padilla* “recognized state guilty pleas carry direct immigration risks, not merely collateral consequences beyond the scope of effective assistance of counsel.” *Id.* Because issue was available to Gomez at the time of plea, his motion was untimely and barred under RCW 10.73.090. *Id.*

The Federal courts have also weighed in on the issue. There is split in the divisions over whether *Padilla* created a new rule and the retroactive application if any. This two prong analysis has created the split. Division Three found the rule was an old rule requiring retroactive application to defendants. Divisions Seven and Ten found the rule was a new rule, but determined the rule did not fall under the retroactive

exception. Interestingly, under either prong Mr. Martinez-Leon's appeal fails as even under the split, *Padilla* would not amount to a change in the law to accommodate an exception to the time bar under Washington law.

In the federal circuits each court begins using the analysis created in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed2d 334 (1989). In *Teague*, the United States Supreme Court put forth the analysis to determine when a rule should apply retroactively for cases on collateral review. They started from the position of whether the rule was a "new rule" or an "old rule." A "new rule" occurs when a "case breaks new ground or imposes a new obligation on the States or Federal Government." *Id.* at 301. Or to say it differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* With this standard in mind, the Supreme Court determined when new rules apply retroactively for cases on collateral review. The Court determined that generally new rules would not be retroactive, unless the new rule places "certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe, ... or the rule requires the observance of those procedures that ... are implicit in the concept of ordered liberty." *Id.* at 307, 310 (citation omitted).

In *U.S. v. Orocio*, 645 F.3d 630, 634 (3rd Cir, 2011), the Defendant pled guilty to possession of a controlled substance in federal court in October 2004. After completing his sentence in 2007, removal proceedings began. *Id.* Orocio consulted with immigration counsel and in 2009 petitioned to overturn the conviction on the basis his plea counsel was ineffective in failing to notify him of the deportation consequences. *Id.* 634-35. The District court denied the petition finding Orocio failed to prove ineffective assistance. *Id.* On appeal, the United States argued *Padilla* could not be retroactively applied since it was a new rule and that Orocio could not invoke its protection.

The Third Circuit used the definition created in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed2d 334 (1989), for new rules and old rules. *Orocio*, at 637. In looking at the facts of *Padilla*, the Third Circuit held that the application of reasonable professional assistance under *Strickland* existed prior to *Padilla* and the old rule was merely applied to new facts. *Id.* at 637-39. Looking to the intersection of *Strickland* and *Teague* to determine whether the rule was old or new, the court made three observations: “(1) case law need not exist on all fours to allow for a finding under *Teague* that the rule at issue was dictated by...precedent, (2) *Strickland* is a rule of general applicability which asks whether counsel’s conduct was objectively reasonable and conformed to

professional norms based on the facts of the particular case, viewed as of the time of counsel's conduct, and (3) it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.* at 639 (citation's omitted).

With these three observations in mind, the Third Circuit determined *Padilla* did not "break new ground." *Id.* 638. In fact, the duty to provide advice to defendants at the plea stage concerning the immigration consequences of a guilty plea had been around at least 15 years prior to *Padilla*. *Id.* at 639 (citing *Padilla*, 130 S.Ct. at 1485). Moreover, "*Strickland* did not freeze into place the objective standards of attorney performance prevailing in 1984, never to change again." *Id.* at 640. Rather, performance has always been judged using the reasonableness under prevailing professional norms. *Id.* The court acknowledged that these reasonableness standards may change, but that is why the rule of *Strickland* is so broad. *Id.* at 638-39. The court insightfully stated, "[e]very *Strickland* claim requires a fact-specific inquiry, but it not the case that every *Strickland* ruling on new facts requires the announcement of a 'new rule'." *Id.* at 640.

Applying the Third Circuit's reasoning to Washington Criminal Rule 7.8(b)(5), RCW 10.73.100(6), *State v. Stodmire*, 145 Wa.2d 258, 264-65, 36 P.3d 1005 (2002) and *State v. Olivera-Avila*, 89 Wn.App. 313,

949 P.2d 824 (Div 3, 1997), the *Padilla* decision did not amount to a significant change in the law because the situation existed at the time of the plea.

Interestingly, both the 7th Circuit and 10th Circuit have determined *Padilla* announced a new rule of criminal procedure, but agree the new rule does not allow for retroactive application under *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060 (1989). *Chaidez v. U.S.*, 655 F.3d 684 (7th Cir, 2011), *U.S. v. Chang Hong*, No. 10-6294, 2012 WL 3805763 (D. Okla. Sept 1, 2011); *see also U.S. v. Hyun Ju Lee*, No. CR-01-221-FVS, 2012 WL 642338 (E.D. Wash, Fed. 28, 2012). Both *Chaidez* and *Chang Hong* expanded the definition of a “new rule” to consider whether a reasonable jurist could differ as to whether a rule was compelled or dictated by existing precedent. *Chaidez*, at 687, *Chang Hong* at *6. Both agreed that while *Padilla* was grounded in the earlier decision of *Strickland*, that reasonable minds differed whether it was a new rule. Ultimately they concluded that *Padilla* was a “new rule not because of *what* it applies – *Strickland* – but because of *where* it applies – collateral immigration consequences of a plea bargain.” *Chang Hong* at *8, *Chaidez*, at 688.

The State urges the court not to stop at the “new rule” versus “old rule” analysis of the 7th and 10th Circuits, because the Defendant’s claim

fails in the second prong of *Teague*. As stated above, in *Teague v. Lane* the Supreme Court decided that unless the new rule was an exception to the general rule “new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” The court laid out two exceptions to this general rule. The exceptions are the same exceptions developed under Washington law to determine significant changes in the law: (1) that either the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (2) the rule requires the observance of procedures implicit in the concept of ordered liberty. *Chaidez v. U.S.*, 655 F.3d at 688, *Teague v. Lane*, 489 U.S. 288, 311-12, *State v. Olivera-Avila*, 89 Wn.App. 313, 321, 949 P.2d 824 (Div 3, 1997), (citing *In re St. Pierre*, 118 Wa.2d 321, 823 P.2d 492 (1992)).

Both the 7th Circuit and 10th Circuit declined to retroactively apply *Padilla*. *Chaidez v. U.S.*, 655 F.3d at 688, *U.S. v. Chang Hong*, 2012 WL 3805763, at *9-10. They found it was a new rule that did not fall under the exceptions. In *Chang Hong*, the 10th Circuit looked to see if the new rule was (1) substantive or (2) a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Chang Hong*, at *8. To meet this burden in federal court, a defendant must show the new rule is necessary to prevent an

impermissibly large risk of an inaccurate conviction, and must alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Id.* The 10th Circuit indicated this is nearly a gargantuan task, and the new rule of *Padillia* did not suffice. *Id.* at *8-9.

Applying the Seventh and Tenth Circuit's analysis and recognizing the nearly identical basis of language under *State v. Stodmire*, 145 Wa.2d 258, 264-65, 36 P.3d 1005 (2002) and *State v. Olivera-Avila*, 89 Wn.App. 313, 949 P.2d 824 (Div 3, 1997), the *Padilla* decision did not amount to a significant change in the law because the omitted arguments were available to the defendant at the time of the plea, and the matter did not overturn a prior decision.

For the reasons outlined above, the Superior court did not abuse its discretion and the Defendant's motion is time barred under Rule 7.8 (b)(5), as well as under RCW 10.73.090 and does not constitute an exception under RCW 10.73.100(6).

C. THE TRIAL COURT PROPERLY FOUND THE DEFENDANT WAS AWARE HE COULD BE DEPORTED AS A CONSEQUENCE OF HIS PLEA AND THUS PROPERLY DENIED THE MOTION FOR EQUITABLE TOLLING.

The Defendant argues the trial court erred when it denied the application of equitable tolling, because his counsel was ineffective.

The Superior court determined equitable tolling was inappropriate as the Defendant failed to prove ineffective assistance of counsel. CP 115. The court concluded based up on the affidavit before it the Defendant was aware a possible consequence of the plea was deportation and counsel's advice was not ineffective. CP 115-16.

In *State v. Littlefair*, 112 Wn.App. 749, 51 P.3d 116 (Div 2, 2002), Littlefair pled guilty to manufacturing marijuana. Littlefair's attorney never asked him about his status as an alien, never warned him of any potential deportation consequences and struck the deportation warnings from the plea form and told him they did not apply. *Id.* at 754-55. Additionally, the court did not give Littlefair any warnings. *Id.* Two years later Littlefair became subject to deportation and filed a motion to withdraw his guilty plea. *Id.* at 755. The Superior court denied the motion as time barred under RCW 10.73.090. *Id.* at 755-56.

Division Two determined the time limit in RCW 10.73.090 can be equitably tolled in the proper case. *Id.* at 759. Division Two followed Division One in staying, "[e]quitable tolling 'permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.'" *Id.* citing *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), *rev. denied* 134 Wn.2d 1012, 954 P.2d 276 (1998) (emphasis added). Division Two emphasized that tolling is only to

be used sparingly and should not extend to a garden variety claim of excusable neglect. *Id.* The court allowed for equitable tolling in Littlefair's case because of the Unique and bizarre serious of events. *Id.* at 763.

The present case is distinguishable from *Littlefair* in that his defense counsel was not ineffective as the consequences were unclear and the Defendant was aware deportation was a consequence. Moreover, the Defendant's motion to withdraw his guilty plea comes five years after the plea. This is not a nominal elapse under *Littlefair*.

It is the defendant's burden to show ineffective assistance of counsel. *State v. Martinez*, 161 Wn.App. 436, 441, 53 P.3d 445 (Div 3, 2010). Counsel is presumed effective. *Id.* A claim of ineffective assistance of counsel is a mixed question of law and fact and reviewed de novo. *Id.* The test to determine ineffective assistance of counsel concerning deportation consequence is first to determine whether counsel's immigration advice was below an objective standard of reasonableness by determining whether the relevant immigration law is truly clear about the deportation consequences. *Id.* (citing *State v. Sandoval*, 171 Wa.2d 163, 249 P.3d 1015 (2011)).

Defense counsel stated in her affidavit that she was aware Martinez-Leon was not a U.S. citizen. CP 69. She specifically discussed

that a plea was grounds for deportation and that deportation was a potential consequence. CP 69. The Defendant also signed the plea form and indicated he understood it. CP 44. Even though the Defendant cannot “recall” this conversation, the plea paperwork and his defense attorney indicate the Defendant was aware the conviction was grounds for deportation.

For the Assault in the Fourth Degree (Domestic Violence) charge, there is a risk of removal based on three different grounds, a crime of violence, a crime of domestic violence, and/or a Crime of Moral Turpitude.

A crime of violence, also called an aggravated felony is an offense containing the element of the use, attempted use, or threatened use of physical force against the person or property of another, for which the term of imprisonment is at least one year. 18 U.S.C. § 16 (2010); 8 U.S.C. § 1101(a)(43)(F) (2010); *see also State v. Keend*, 140 Wn. App. 858, 166 P.3d 1268 (2007). The Ninth Circuit previously determined that fourth degree assault (domestic violence) in violation of RCW 9A.36.041 and RCW 10.99.020(3)(d) does not qualify as a crime of violence for purposes of 8 U.S.C. § 1101(a)(43)(F) under the categorical approach laid out in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143 (1990). Therefore, the risk of removal was not clear and counsel needed only to advise the

defendant (as she did here) “that pending criminal charges may carry a risk of adverse immigration consequences.” *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010).

However, although not categorically a crime of violence, the Court will apply a modified categorical approach, where it can look at the charging paper and judgment of conviction to determine if the actual offense the defendant was convicted of qualifies as a crime of violence. The amended complaint in this case specifically articulates the actual offense, “did intentionally assault Crystal Garcia, a family or household member, a human being, by putting her head in a headlock, pulling her hair, shoving and/or grabbing.” CP 1-2. Because these details are included in the charging document, it makes defendant’s risk of removal resulting from the guilty plea considerably clearer; thus, defense counsel’s advice may have fallen short of what *Padilla* requires.

A crime of violence/aggravated felony conviction would make the defendant’s removal “presumptively mandatory” - which can be interpreted to mean the alien is deportable and ineligible for any relief from removal apart from protection from torture or persecution. Additionally, under 8 U.S.C. 1227(a)(2)(E)(i) (2010) a person convicted of a crime of domestic violence is deportable. Again, under the categorical approach, one could argue the “crime of violence” aspect of

the charge is not clear, but there is still the same argument under the modified categorical approach and the defendant still runs a risk of removal.

Lastly, the defendant is still deportable under the definition of a Crime Involving Moral Turpitude (CIMT). Under 8 U.S.C. 1182(a)(2)(A)(i)(I) (2010) an alien who commits a CIMT is *inadmissible*. This ground of inadmissibility does not require a conviction, and thus may be established in immigration proceedings by conduct alone. Under 8 U.S.C. 1227(a)(2)(A)(i) (2010), an alien who commits a CIMT is *deportable* when the potential term of imprisonment is one year or longer, and the offense was committed within five years of the alien's admission to the United States. The Defendant's most recent assault conviction, however, is unlikely to constitute a CIMT as simple assault-type charges, are usually not considered CIMTs. *See Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626-27 (9th Cir. 2010) (misdemeanor simple assault is not a CIMT where the relevant statute criminalizes willful, intentional, and reckless acts) (citing *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-66 (9th Cir. 2006)).

Under the above analysis, defense counsel's warning and the plea form were accurate. The defendant was subject to deportation, the conviction was grounds for deportation, and it was a potential

consequence. The outcomes were unclear under federal law at the time, and the Defendant failed to show counsel's performance was deficient.

Even if defense counsel's advice was deemed insufficient, the defendant must still demonstrate prejudice under the second prong of *Strickland*. The second prong requires the defendant to prove that the advice prejudiced him. This means the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *State v. Sandoval*, 171 Wa.2d 163, 174-75, 249 P.3d 1015 (2011).

The defendant's prior record considerably eliminates his prejudice argument. Because the defendant's had a previous 1995 conviction for Assault in the Fourth Degree (domestic violence) it is an aggravated felony that is deportable, as well as having the possibility of being a CIMT. Moreover, his 1998 forgery conviction is a CIMT that is deportable. The question is whether knowing he had deportable prior criminal history, would he have pled guilty taking the recommendation of 2 months in prison, or risk a conviction for Kidnapping in the first degree, Harassment, and the misdemeanor offenses with a range of 57-75 months in prison.

Under *State v. Littlefair*, the Defendant's case is distinguishable and he is not entitled to equitable tolling.

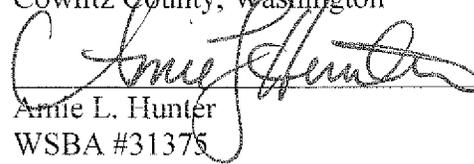
V. CONCLUSION

The Court should deny the defendant's motion on the above referenced grounds.

Respectfully submitted this 30th day of March, 2012.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By:

A handwritten signature in cursive script, appearing to read "Amie L. Hunter", written over a horizontal line.

Amie L. Hunter
WSBA #31375
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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 30th, 2012.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 30, 2012 - 2:20 PM

Transmittal Letter

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