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

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STATE OF WASHINGTON,  
Respondent,

v.

FEN SHOU CHEN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE DAVID EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

**I. RESPONSE TO ASSIGNMENTS OF ERROR ..... 1**

The Court did not abuse its discretion when it properly denied the Appellant's motion to withdraw his plea of guilty because the record showed the Appellant understood, to a passable degree, the interpretation services provided. .... 1

The Court did not abuse its discretion when it properly denied the Appellant's motion to withdraw his plea of guilty because his counsel meet the standard required of *Padilla* and *Sandoval* by correctly advising him of the immigration consequences of his plea, even though she could not advise him of other immigration-related issues. .... 1

**II. FACTS AND PROCEDURAL POSTURE..... 1**

**III. ARGUMENT..... 2**

1. STANDARD OF REVIEW ..... 2

The Appellant could not meet a high standard of review before the trial court, and this court reviews that decision for abuse of discretion..... 2

2. ADEQUACY OF INTERPRETING ..... 4

The objective facts in the record show effective interpretation ..... 6

The record shows the Appellant understood his Mandarin interpretation so as to proceed competently in court ..... 8

3. ADEQUACY OF COUNSEL..... 10

Counsel must advise regarding deportability of a conviction, as well as those related questions that are within the counsel's ability to determine..... 10

Counsel provided accurate advice within her knowledge and answered all of Appellant's questions she could. The issues raised by Appellant were not within the scope of counsel's ability to answer 13

**IV. CONCLUSION ..... 16**

**TABLE OF AUTHORITIES**

**U.S. Supreme Court**

*Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010) ..... 11, 12  
*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) ..... 10, 11

**U.S. Circuit Court of Appeals**

*Amadou v. Immigration & Naturalization Service*, 226 F.3d 724 (6th Cir. 2000) ..... 7, 8  
*Perez-Lastor v. Immigration & Naturalization Service*, 208 F.3d 773 (9th Cir. 2000) ..... 7, 8

**Washington Supreme Court**

*In Re: Petition of Riley*, 122 Wn.2d 772, 863 P.2d 554 (1993) ..... 11  
*State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997) ..... 3  
*State v. Gonzales-Morales*, 138 Wn.2d 374, 979 P.2d 826 (1999)..... 4  
*State v. Lord*, 161 Wn.2d 276, 165 P.3d 1251 (2007) ..... 3  
*State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000)..... 3  
*State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011). ..... 12, 13  
*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) ..... 10

**Washington Court of Appeals**

*State v. McCollum*, 88 Wn. App. 977, 947 P.2d 1235 (1997) ..... 11  
*State v. Olivera-Avila*, 89 Wn. App. 313, 949 P.2d 824 (1997) ..... 3  
*State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 319 P.3d 53 (2013) ..... 3  
*State v. Ramirez-Dominguez*, 140 Wn. App. 233, 165 P.3d 391 (2007)4, 6  
*State v. Teshome*, 122 Wn. App. 705, 94 P.3d 1004 (2004)..... 3, 4, 5, 6, 7

**Statutes**

RCW 2.43.010 ..... 4

## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

The Court did not abuse its discretion when it properly denied the Appellant's motion to withdraw his plea of guilty because the record showed the Appellant understood, to a passable degree, the interpretation services provided.

The Court did not abuse its discretion when it properly denied the Appellant's motion to withdraw his plea of guilty because his counsel meet the standard required of *Padilla* and *Sandoval* by correctly advising him of the immigration consequences of his plea, even though she could not advise him of other immigration-related issues.

## **II. FACTS AND PROCEDURAL POSTURE**

The State charged the Appellant on December 1, 2017, with one count of Manufacture of a Marijuana (RCW 69.50.401), and one count of Unlawful Use of a Building for Drug Purposes (RCW 69.53.010). CP 1–2. The trial court found the Appellant indigent and appointed Ms. Karrie Young as counsel. Starting with arraignment, the Defendant made eight appearances before entering a plea of guilty to Count 1 on his ninth appearance on March 23, 2018. The Defendant was sentenced the following Monday, March 26. CP30–40. At all ten court appearances Mandarin translation services were provided by either Ping Lau, Ginger Wang, a certified telephonic interpreter, or Alan Lai, who interpreted the change of plea and sentencing hearing. CP 39. The court sentenced Mr.

Chen to credit for time served on March 26 and released him from the Grays Harbor County Jail.

Federal immigration authorities, apparently, picked up the Appellant outside the jail when he was released. CP 47.

On June 4, 2018, the Appellant filed a motion to withdraw his plea, citing the lack of effective interpreter services provided by the court, and ineffective assistance of counsel specific to the advice he received on the immigration consequences of his plea. CP 41–45.

On July 6, the Hon. Judge David Edwards, who had heard most of the previous appearances, took up the motion and questioned Ms. Young and the Appellant. Judge Edwards orally ruled on the interpreter issue, but took under advisement the question of Ms. Young’s performance. A delay occurred, for reasons not relevant to this appeal, before Judge Edwards denied the motion via a written letter on September 9, 2018. CP 77–78. This appeal of that decision timely follows.

### **III. ARGUMENT**

#### **1. STANDARD OF REVIEW**

The Appellant could not meet a high standard of review before the trial court, and this court reviews that decision for abuse of discretion

A criminal defendant has no absolute right to withdraw his guilty plea. *State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 282, 319 P.3d 53 (2013). In deciding the Appellant's motion to withdraw his guilty plea under CrR 7.8, the trial court looked to whether a reason justified relief, or whether there existed "extraordinary measures" as defined by *State v. Olivera-Avila*, 89 Wn. App. 313, 949 P.2d 824 (1997). In this case, the Appellant did not meet that burden at the trial court level.

An appellate court reviews a trial court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *State v. Teshome*, 122 Wn. App. 705, 709, 94 P.3d 1004, 1006 (2004). Abuse of discretion occurs "only when no reasonable person would take the view adopted by the trial court." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court abuses its discretion if it makes a manifestly unreasonable ruling, or one based on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). The appellate court may not simply substitute its judgment for the trial court's. *State v. Roberts*, 142 Wn.2d 471, 538, 14 P.3d 713, 749 (2000).

Given the record before the trial court, primarily the testimony elicited on July 6, this court should find that the Grays Harbor Superior Court did not abuse its discretion in denying the Appellant's motion. The

court grounded its decision in the statements by the trial counsel and the record. Because the court's ruling had a factual basis, it was reasonable and therefore one that another reasonable court could make.

## 2. ADEQUACY OF INTERPRETING

A non-English speaking defendant has a Sixth Amendment right to a competent interpreter. *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999); *State v. Teshome*, 122 Wn. App. at 711. This right flows from the Sixth Amendment constitutional right to confront witnesses and the right inherent in a fair trial to be present at one's own trial. *Teshome*, 122 Wn. App. at 709-10. Appellate counsel correctly cites the statutory policy of Washington to provide qualified interpreters to non-English speakers. See RCW 2.43.010. The policy is one of equal protection—a non-English speaker should not be treated differently in our courts. Thus, where a defendant questions an interpreter's adequacy, the inquiry becomes whether the rights of the non-English speaking defendant have been protected. *Teshome*, 122 Wn. App. at 712; *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 165 P.3d 391 (2007).

In support of his motion to withdraw his plea, Mr. Chen stated that he needed an interpreter who speaks the dialect of Fuzhou. CP 48. However, nowhere in the record does the Appellant make such a request

prior to his motion to withdraw his plea. Notably, the Appellant's own declaration states that he "understand[s] about 75-80 [percent] of conversational Mandarin." CP 48. His declaration states he did not understand all the "legal terminology." Id. But, that is neither the test that the trial court properly applied, nor is it the question before this court. The test, actually, is whether the Defendant understood enough so that his rights were protected, not whether the interpreting was egregiously poor. *Teshome*, 122 Wn. App. at 705. In this sense, the equal protection afforded to Mr. Chen is comparable to that provided a poorly-educated English speaker who can understand only about 75 to 80 percent of conversational English and may not understand much legal terminology. Providing counsel or proceeding in court with such a person, which often occurs in Grays Harbor County, requires repeatedly explaining, rephrasing, and answering questions from the Defendant. But, so long as one has patience and uses language that can be generally understood, proceedings can proceed. So long as a defendant understand adequately, his rights are protected. Nowhere in the record does tis Appellant state that he did not understand the proceedings.

The objective facts in the record show effective interpretation

In Washington, two key cases hold that, even where interpreting is not ideal, a Defendant's plea will not be withdrawn if there is an indication that the proceedings were nonetheless sufficiently understood. In *Ramirez-Dominguez*, the court provided a Spanish interpreter but the defendant requested an interpreter in his native Mixteco language. *Ramirez-Dominguez*, 140 Wn. App. at 236. In all, three interpreters assisted in the case and all three expressed their concern regarding Ramirez-Dominguez's broken Spanish. However, none of the interpreters indicated an inability to communicate in Spanish with Ramirez-Dominguez. The Court upheld the conviction following a bench trial, pointing to the absence of any difficulty by Ramirez-Dominguez understanding the questions asked, and that he never asked for clarification due to interpretation problems. The Court held that "the Spanish interpreter Ramirez-Dominguez requested adequately protected his rights to a fair trial." *Id.*, at 247.

The Court of Appeals reached a similar holding in *Teshome*, the primary case on point in Washington. The Defendant, with her attorney and an interpreter, entered a plea of guilty to assault in the third degree. *Teshome*, 122 Wn. App. at 708. Later, when the Defendant sought to withdraw the plea, she alleged that the interpreter did not competently

interpret and that she could not understand the nature of crimes to which she pled guilty or the rights she waived. *Id.*, at 717. Although Teshome testified that she did not understand what was happening at the plea hearing, she also "could function in English in daily life." *Id.* at 709. The trial court found her testimony not credible and did not consider it, finding that Teshome had not proved that she suffered a manifest injustice. *Id.* The *Teshome* Court held that "the standard for competence should relate to whether the rights of non-English speakers are protected, rather than whether the interpreting is or is not egregiously poor." *Id.*, at 712.

In *Teshome* and *Ramirez-Dominguez*, the Washington Court of Appeals looked to two key federal cases—*Perez-Lastor v. Immigration & Naturalization Service*, 208 F.3d 773 (9th Cir. 2000), and *Amadou v. Immigration & Naturalization Service*, 226 F.3d 724 (6th Cir. 2000). In *Perez-Lastor*, the Ninth Circuit found the problems with the interpreting because Perez-Lastor repeatedly stated he could barely understand the Spanish interpreter. Perez-Lastor is a citizen of Guatemala and Quiche Indian and he speaks his native Quiche language. *Perez-Lastor*, 208 F.3d at 775. He did not give logical answers to questions on numerous occasions during his deportation hearing. Despite repeated restatement of questions, he clearly did not understand several of the inquiries. *Id.* at 779,

780-81. Likewise, in *Amadou*, decided in the Sixth Circuit, the interpreter spoke a different dialect than Amadou. The interpreter repeatedly stated that he did not understand Amadou. *Amadou*, 226 F.3d at 725. In each of these cases, the courts found objective evidence that the interpreting services did not allow the alien to present personally their arguments against removal in violation of due process.

Washington courts have taken from these decisions the guidance that there are at least three types of evidence of different weights that can indicate that an interpreter was insufficient to safeguard a defendant's rights—direct evidence of incorrectly translated words is persuasive evidence of an incompetent translation; unresponsive answers by a witness or defendant is circumstantial evidence of translation problems; and, a witness or defendant actually expressing difficulty understanding the proceedings. *Perez-Lastor*, 208 F.3d at 778 (citations omitted). These are just indicators of deficient interpretation, not a decisive checklist.

The record shows the Appellant understood his Mandarin interpretation so as to proceed competently in court

In the Appellant's case, the trial court found that the record did not contain any indicators that the Appellant was confused by the court-provided interpreters. VRP 36. The Court further found the Appellant effectively communicated with his attorney, as evidenced by Ms. Young's

testimony that on March 12, 2018, she and the Appellant had communicated about his green card status. VRP 37. The court pointed to the lengthy colloquy that accompanied the change of plea, which involved the Appellant understanding and answering several of Judge Edward's questions appropriately (akin to *Perez-Lastor*). Id. The interpreter also stated during the hearing that she had talked with Mr. Chen that morning and he seemed to understand the translation and communicate well. Id. Finally, Ms. Young testified that between the date she was appointed in November and some time in February of 2018, she communicated with the Appellant using a Mandarin interpreter, with the only indication of problems being that "There were times when he would ask to rephrase the question, but did respond appropriately." VRP 18-20. She testified that she felt she could effectively communicate with the Appellant. VRP 20. The court questioned Ms. Young about her perception of whether the Appellant understood the court-provided interpreters, and she testified that her client understood Mr. Lai better, even though he spoke Mandarin. "Mr. Lai said that Mr. Chen had told him that he understood his accent more." VRP 23-25.

The trial court did not abuse its discretion in denying the Appellant's motion because the facts of this case, when held against the

facts and guidance in the prevailing case law, did not indicate the Appellant could not understand, to at least a passable degree, the interpreting provided by the court. These findings comport with the case law in *Teshome* and *Ramirez-Dominguez*. Given the record before it, the trial court cannot be found to have abused its discretion.

### 3. ADEQUACY OF COUNSEL

Counsel must advise regarding deportability of a conviction, as well as those related questions that are within the counsel's ability to determine

The test for ineffective assistance of counsel is whether 1) the defense counsel's performance fell below an objective standard of reasonableness, and 2) whether this deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). The trial court determined that the counsel provided by Ms. Young did not fall below this standard as she did indeed advise the Appellant there would be deportation consequences following his plea. The Court found that the specific issue complained of by the Appellant—the failure to provide adequate advise regarding the *timing* of any immigration consequences—fell outside counsel's obligation under *Sandoval* (discussed below), and that Ms. Young therefore was not ineffective.

When examining the effectiveness of legal counsel, the court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." *Strickland*, 466 U.S. at 690. The *Strickland* test, along with its strong presumption that a defendant's attorney provided reasonable assistance, applies to claims of ineffective assistance of counsel in the process of pleading guilty. *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997). When the Appellant sought to withdraw his guilty plea based on ineffective assistance of counsel, he needed to show "there [was] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *In Re: Petition of Riley*, 122 Wn.2d 772, 780–81, 863 P.2d 554 (1993).

In 2010, the U.S. Supreme Court put immigration consequences at the forefront of a defense attorney's duty to his or her client when the client may not be a U.S. citizen. The *Padilla v. Kentucky* decision held that deportation from the United States is not a collateral consequence of a criminal conviction, but a factor of such magnitude that proper advice is a constitutional matter. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010). Although acknowledging that immigration law can be

complicated, the *Padilla* Court put the onus on defense attorneys to be educated so as to advise their clients how and what immigration issues may follow a criminal matter, rather than just provide notice of possible immigration issues.

In *Padilla*, similar to the case at hand, the conviction at issue involved controlled substances. Padilla's "counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute ... Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country ... his counsel's advice was incorrect." *Padilla*, 559 U.S. at 368-69. The defense attorney in *Padilla* failed by hedging the advice, saying there *might* be consequences, rather than providing the definite answer that the charge to which Padilla pled was deportable.

One of the first cases in Washington following *Padilla* was *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011). In that case, Sandoval pled guilty to a lesser sex offense than that which he was charged. Sandoval was very concerned with deportation and his attorney advised that there could be immigration consequences, but failed, apparently, to advise that the guilty plea would make him presumptively deportable. "That Sandoval was subjected to deportation proceedings several months

later, and not 'immediately' as his counsel promised, makes no difference. Sandoval's counsel's advice impermissibly left Sandoval the impression that deportation was a remote possibility." *Sandoval*, 171 Wn.2d at 173.

Counsel provided accurate advice within her knowledge and answered all of Appellant's questions she could. The issues raised by Appellant were not within the scope of counsel's ability to answer

The kind of failing in *Padilla* and *Sandoval* is not at issue in this case. The Appellant does not argue Ms. Young failed to advise about deportability, but rather about the timing of deportation proceedings. As the trial court found, that was an unknowable issue and Ms. Young was not required under *Padilla* or *Sandoval* to have sussed out the answer and provide it. CP 81.

Specifically, the Appellant's only claim regarding ineffective assistance involved the claim that Ms. Young "did not properly and thoroughly explain the high probability that I may be detained by ICE right after my release from Grays Harbor Jail and subject to deportation/removal proceedings." CP 49. Part and parcel with that claim, he alleged that Ms. Young said "there was 'little to no' chance of me facing any immigration consequences from my guilty plea." *Id.* That final complaint did not hold up; Ms. Young told the court she did advise the Appellant his charge was deportable. "I can tell someone if an offense is a

deportable offense. I can't tell a person what defenses they might have to that, or when, or if immigration is going to actually pick them up, or enforce that rule. I mean, the extent of my knowledge is whether or not a person can be deported for an offense." VRP 27.

The deportation consequences of the Appellant's plea to manufacturing marijuana were well known and easy to determine, found in 8 U.S.C. § 1227, as the court noted. CP 81. The Appellant was so advised, as the record shows. CP 56; VRP 23 ("He was concerned about getting out of custody, and whether he would be deported. And so there was no ICE hol[d] on him, *and we knew the offense was deportable...*"), 26–29.

The trial court noted further that the warning about immigration consequences appeared in Paragraph 6 of the Appellant's plea form. CP 13. The Appellant, notably, did not state that he believed he would not face immigration consequences. He declared, "I basically wanted it to be over and was happy to just plead guilty to the felony so I could be released from jail." CP 48. There was no indication that he was not advised that the plea of guilt would make him deportable, he was simply unhappy that the immigration consequences came so quick.

The details about how quickly any deportation proceedings would occur, however, is not within the scope of effective assistance of counsel as envisioned by *Padilla* and *Sandoval*. In making the ruling, the trial court heard testimony that most of the Appellant's questions about immigration were about logistics or process, which Ms. Young could answer. The questions about timing were questions she could not answer. Ms. Young told the court she answered everything she could. "I was able to answer the questions that he had." VRP 28.

It makes sense that some of the Appellant's questions of counsel were just not knowable, specifically the timing of any deportation, which was the crux of the Appellant's motion to withdraw his plea. It is possible, even, that the question was not in the Appellant's interest to discover. If the Appellant had not yet caught the interest of federal authorities—he did not have an immigration hold at the jail—then calling federal immigration authorities to inquire about the timing of deportation could have led to such attention or immigration hold. VRP 41.

The court found that Ms. Young's counsel was adequate; she "informed Mr. Chen that the offense with which he was charged was deportable, which is a correct statement of the law. But when Mr. Chen inquired further about the potential consequences, I think Ms. Young

provided him with her best estimate, or speculation about what might happen." VRP 38. The court found Ms. Young's advice was correct and within her ability to discern, but the Appellant's complained-of issues were beyond the scope of what she could competently advise or discern. Thus, her counsel met the requirements of *Padilla* and *Sandoval*, and was therefore effective. The court's finding was reasoned and based on the record; it therefore should not be disturbed on appeal.

#### IV. CONCLUSION

In ruling on the Appellant's motion to withdraw his plea of guilty, the trial court considered the record of the case and examined his counsel, Ms. Young. The record indicates that the Appellant generally understood his Mandarin interpreters and they understood him. The record does not contain any objective evidence that the Appellant could not understand the court proceedings. It was proper and within the trial court's discretion to find that the Appellant's right to due process was protected by the interpreter services provided; it should not be disturbed.

Similarly, the record shows that Ms. Young properly and correctly advised the Appellant that his plea of guilty to manufacturing of marijuana would lead to deportation. She answered all his questions that she could, but the question of timing at issue by the Appellant went beyond her

knowledge or ability to learn. The lower court, therefore, properly found that Ms. Young satisfied her *Padilla* and *Sandoval* obligations by providing accurate counsel.

Given the record before the court and the argument above, the State respectfully requests the Court find the trial court did not abuse its discretion in denying the Appellant's motion to withdraw his plea of guilty.

DATED this second day of July, 2019.

Respectfully Submitted,

BY: 

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# GRAYS HARBOR PROSECUTING ATTORNEY

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