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Court of Appeals
Division II
State of Washington
8/21/2019 8:00 AM**

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NO. 53384-7-II

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

STATE OF WASHINGTON, Respondent

v.

OLEG VLADIMIROVIC FABYANCHUK, Appellant/Petitioner

OPENING BRIEF OF APPELLANT/PETITIONER

Attorney For Appellant/Petitioner

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A. ASSIGNMENT OF ERROR

Did the trial court err by failing to grant an unopposed continuance of the trial date to a date within the current speedy trial period when the failure to grant the continuance precluded defense counsel from advising Petitioner of the immigration consequences of a guilty plea or conviction and, thus, deprived Petitioner of effective assistance of counsel, a fair trial and due process of law?

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

The trial court erred by failing to grant a continuance of the trial date under the circumstances of this case. Specifically, when (1) the date for the continuance is within the current speedy trial period, (2) the state did not oppose the continuance, (3) Petitioner retained an immigration attorney to advise him and his defense counsel on the possible immigration consequences associated with his pending criminal matter, (4) the immigration attorney stated in a Declaration that he must obtain and review Petitioner's immigration file in order to complete his analysis under *Padilla v. Kentucky*, (5) the immigration attorney requested the Petitioner's immigration file in November 2018 but, although the parties had been able to confirm that the request for the file had been "processed", the parties had not yet received the file as of the date of the filing of the

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2 motion to continue. As a result of the failure of the United States
3 Government to provide that file in a timely fashion, the immigration
4 attorney was unable to advise Petitioner and defense counsel concerning
5 the immigration consequences associated with Petitioner's pending
6 criminal matter.

7
8 C. STATEMENT OF THE CASE

9 Mr. Fabyanchuk is charged with felonies in violation of RCW
10 9.68A.050 and RCW 9.68A.070. His trial date was set for April 22, 2019,
11 with a Readiness Hearing scheduled for April 18, 2019, until these
12 proceedings were stayed by order of this court.

13 In November 2018, defense counsel and Petitioner retained an
14 immigration attorney, Mr. N. David Shamloo (hereinafter "immigration
15 attorney"), to provide legal advice regarding the specific and potential
16 immigration consequences that could befall Petitioner regarding his
17 pending criminal matter. *See* CP 70 at page 1 (Declaration of David T.
18 McDonald dated April 2, 2019); CP 69 at page 1 (Declaration of N. David
19 Shamloo dated April 2, 2019).

20
21 The immigration attorney requested a copy of Petitioner's
22 immigration file held by U.S. Citizenship and Immigration Services
23 ("USCIS") and advised defense counsel and Petitioner that once he
24 obtained Petitioner's immigration file from USCIS then he could conduct
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2 his *Padilla* analysis regarding specific and potential immigration
3 consequences that may befall Petitioner should he enter into plea
4 negotiations and/or determine that he should proceed to trial. *See* CP 59
5 (Letter dated November 20, 2018 from N. David Shamloo to David T.
6 McDonald); CP 70 at page 1; CP 69 at page 2.

7
8 Subsequently, defense counsel filed a motion to continue the trial
9 date in the trial court. *See* CP 68 (Motion to Continue dated November
10 21, 2018). The State did not oppose that motion. *Id.* The Petitioner
11 agreed to the continuance so that defense counsel could obtain the
12 necessary advice from the immigration attorney and provide effective
13 assistance of counsel to Petitioner regarding the interplay of potential
14 immigration consequences with the pending criminal case. On November
15 30, 2018, the trial court granted the motion and continued the matter to
16 April 22, 2019. At that hearing, Petitioner agreed to a new speedy trial
17 commencement date of April 1, 2019. *See* CP 66 (Order dated December
18 6, 2018).

19
20 At the time of the November 30, 2018 hearing, the immigration
21 attorney estimated that the United States government would provide the
22 file to immigration attorney within 100 days (which would have been
23 approximately the end of February 2019). *See* CP 59. However the
24 United States federal government shut down from December 22, 2018
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2 to January 25, 2019, a period of 35 days, and the immigration attorney had
3 not yet received Petitioner's immigration file as of April 2, 2019, the date
4 the motion to continue at issue was filed with the court. *See* CP 69 at page
5 2 and CP 70 at page 2.

6 On April 1, 2019, defense counsel requested that Mr. Shamloo
7 attempt to track the file and see if it had been processed. *See* CP 69 at
8 page 2 and CP 70 at page 2. Mr. Shamloo reported that his investigation
9 and tracking revealed that the file had been "processed" as of March 14,
10 2019. *See id.* The time period from the end of the approximately 100-day
11 period and the March 14, 2019 date is approximately equal to the duration
12 of the federal government shutdown.

13
14 Defense counsel filed a Motion to Continue on April 2, 2019,
15 along with Declarations of defense counsel and immigration counsel. *See*
16 CP 68 at pages 1-2; CP 69; CP 70. Once again, the state did not oppose
17 the motion. *Id.* The motion sought a continuance of the current trial date
18 for a period of 45-60 days, which would make the requested new date well
19 within the current speedy trial period based upon the commencement date
20 of April 1, 2019. *Id.* On April 10, 2019, defense counsel filed an
21 additional Memorandum of Law in support of the Motion to Continue.
22 *See* CP 73. The trial court held a hearing on the motion to continue on
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2 April 12, 2019 and denied the motion to continue. See CP 75
3 (Memorandum of Disposition).

4 Oleg Fabyanchuk seeks review of the Clark County Superior
5 Court's Memorandum of Disposition filed on April 12, 2019 denying his
6 motion to continue the trial date to another date within the current speedy
7 trial period that commenced on April 1, 2019. The Petitioner renews his
8 arguments in his motion to continue that the continuance was necessary so
9 defense counsel could adequately and effectively provide Petitioner with
10 constitutionally valid legal advice as required by *Padilla v. Kentucky*, 559
11 U.S. 356 (2010) regarding the potential immigration consequences of a
12 negotiated plea resolution, and/or the consequences of proceeding to trial.
13
14 See CP 73.

15 D. ARGUMENT

16 I. The Trial Court's Failure To Grant The Petitioner's Unopposed
17 Motion To Continue Trial Date To A Date Within The Existing
18 Speedy Trial Period Was An Abuse of Discretion Because The
19 Denial Of the Motion Denied The Defendant The Benefit Of
20 Adequate And Effective Assistance Of Counsel Regarding The
21 Advisement Of Possible Immigration Consequences Regarding His
22 Charges And, Thus, Denied Him His Right To Due Process Of
23 Law And A Fair Trial.

22 Defense counsel is bound by constitutional and statutory
23 requirements to research and advise their clients on the immigration
24 consequences of a criminal conviction. *In re Yung-Cheng Tsai*, 183 Wash.
25
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2 2d at 99, 101-103 (citing requirements, constitutional provisions and
3 statute). Petitioner's immigration attorney stated he was unable to give
4 defense counsel adequate legal advice without reviewing the "A file"
5 which had been processed by USCIS but had been delayed. Defense
6 counsel timely moved to continue the trial date in order to secure the
7 client's "A file" from USCIS. The continuance request was for a period of
8 time within the current speedy trial period and that there was no claim of
9 prejudice to the state. Under these circumstances, the court's denial of the
10 motion to continue was an abuse of discretion.¹

11
12 Failure to grant a continuance is an abuse of discretion if it
13 deprives the defendant of a fair trial and due process of law, within the

14 //

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16
17 ¹ CrR 3.3(f) provides in pertinent part:

18 **(f) Continuances.** Continuances or other delays
may be granted as follows:

19 (2) *Motion by the Court or a Party.* On
20 motion of the court or a party, the court may
21 continue the trial date to a specified date
22 ***when such continuance is required in the***
23 ***administration of justice and the defendant***
24 ***will not be prejudiced in the presentation of***
25 ***his or her defense.*** The motion must be
26 made before the time for trial has expired.
The court must state on the record or in
writing the reasons for the continuance. The
bringing of such motion by or on behalf of
any party waives that party's objection to the
requested delay. (Emphasis supplied)

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2 circumstances of a particular case. *State v. Purdom*, 106 Wash. 2d 745,
3 748-49, 725 P.2d 622, 624 (1986):

4 The decision on a motion for a continuance
5 rests within the sound discretion of the trial
6 court. *State v. Williams*, 84 Wash.2d 853,
7 529 P.2d 1088 (1975); *State v. Kelly*, 32
8 Wash.App. 112, 114, 645 P.2d 1146 (1982).
9 Failure to grant a continuance, however,
10 may deprive the defendant of a fair trial and
11 due process of the law, within the
12 circumstances of a particular
13 case. *Williams*, 84 Wash.2d at 855, 529 P.2d
14 1088; *State v. Cadena*, 74 Wash.2d 185, 443
15 P.2d 826 (1968).

16 *Id.*

17 Therefore, a request for a continuance must be timely made, should
18 not prejudice the accused and the failure to grant the continuance cannot
19 deprive an accused of a fair trial and due process of law. *Id.*

20 Providing ineffective assistance of counsel can deprive an accused
21 of a fair trial and due process of law. See *In re Yung-Cheng Tsai*, 183
22 Wash. 2d at 99. The *Yung-Cheng Tsai* Court made it clear that defense
23 counsel is under an affirmative constitutional obligation to provide
24 effective assistance of counsel:

25 A criminal defendant's right to the assistance
26 of counsel derives from the Sixth
Amendment to the United States
Constitution and article I, section 22 of the
Washington Constitution. Under these
provisions, a criminal defense attorney has
the constitutional duty to provide assistance

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2 that is effective. *Strickland v.*
3 *Washington*, 466 U.S. 668, 686, 104 S.Ct.
4 2052, 80 L.Ed.2d 674 (1984). Where a
5 defense attorney makes “errors so serious
6 that counsel was not functioning as the
7 ‘counsel’ guaranteed the defendant by the
8 Sixth Amendment,” the attorney's
9 performance is constitutionally
10 deficient. *Id.* at 687, 104 S.Ct. 2052. *Where*
11 *that deficiency deprives the defendant of*
12 *fair proceedings, the defendant has*
13 *suffered prejudice because there is “a*
14 *breakdown in the adversary process that*
15 *renders the result*
16 *unreliable.”* *Id.* Unreliable results caused
17 by defense counsel's prejudicially deficient
18 performance are constitutionally intolerable.

19 *Id.* (emphasis supplied).

20 In conjunction with the above statement of law, the *Yung-Chang*

21 *Tsai* Court held that:

22 RCW 10.40.200's plain language gives
23 noncitizen defendants the unequivocal right
24 to advice regarding immigration
25 consequences and necessarily imposes a
26 correlative duty on defense counsel to
ensure that advice is provided. *State v.*
Butler, 17 Wash.App. 666, 675, 564 P.2d
828 (1977) (“Beyond the defendant's power
of knowledge and intelligence, the duty to
protect the defendant lies first and foremost
with his attorney.”). While defense counsel's
duty to advise regarding immigration
consequences is imposed by statute,
“[r]easonable conduct for an attorney
includes carrying out the duty to research
the relevant law.” *State v. Kylo*, 166
Wash.2d 856, 862, 215 P.3d 177
(2009)(citing *Strickland*, 466 U.S. at 690–

1
2 91, 104 S.Ct. 2052). In many cases defense
3 counsel's failure to fulfill his or her statutory
4 duty may be due to an unreasonable failure
5 to research or apply RCW 10.40.200, and
6 there is no conceivable tactical or strategic
7 purpose for such a failure.

8 *Id.* at 101-102.

9 The *Yung-Chang Tsai* Court concluded that:

10 “Where an attorney unreasonably fails to
11 research or apply relevant statutes without
12 any tactical purpose, that attorney's
13 performance is constitutionally
14 deficient. See, e.g., *id.* at 865–69, 215 P.3d
15 177 (Citations omitted). The unreasonable
16 failure to research and apply RCW
17 10.40.200 is as constitutionally deficient as
18 the unreasonable failure to research and
19 apply any relevant statute.”

20 *Id.* at 102–03 (emphasis
21 supplied); See *Matter of Orantes*, 197 Wash.
22 App. 737, 743, 391 P.3d 539, 542, review
23 denied *sub nom. In re Orantes*, 189 Wash.
24 2d 1009, 404 P.3d 479 (2017) (emphasis
25 supplied).

26 Since a defense counsel's failure to obtain constitutionally and
27 statutorily mandated legal information regarding the possible immigration
28 consequences is “constitutionally deficient” and “constitutionally
29 deficient” performance “deprives the defendant of fair proceedings”, the
30 failure to obtain and provide that information is prejudicial to the
31 defendant because it would deprive the defendant of a fair trial and due

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2 process of the law, within the circumstances of a particular case.
3 Therefore, the failure of the defense counsel in this case to provide
4 constitutionally and statutorily mandated legal information regarding
5 possible immigration consequences to Petitioner would rise to the level of
6 “constitutionally deficient” and be prejudicial to the defendant’s rights to
7 due process of law and a fair trial.

8
9 In this case, the defense took reasonable and diligent steps to
10 research and apply the law by hiring an attorney who specializes in
11 immigration law, and who is able to research the applicable laws and
12 provide his opinions so defense counsel can provide effective assistance to
13 Petitioner. Once defense counsel retained the services of an immigration
14 attorney, the immigration attorney informed defense counsel he would
15 need to review the “A file” before rendering a decision. The immigration
16 attorney immediately ordered the “A file”, but posited that it could take as
17 long as 100 days to obtain the file from the USDHS.

18
19 Based upon all of those facts, defense counsel filed a motion to
20 continue in November 2018, the state did not oppose the continuance and
21 the Court granted the continuance until April 22, 2018. The length of the
22 continuance was commensurate with the 100 days that the immigration
23 attorney posited would be necessary to obtain the “A file” and timely
24 provide information to defense counsel who could then, in turn, provide
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2 comprehensive and legally adequate information regarding the panoply of
3 possible immigration consequences that could attach to Petitioner given
4 the criminal charges.

5 Unfortunately, in the interim, the United States Government
6 experienced its longest government shutdown to date of 35 days from
7 December 22, 2018 to January 24, 2019² and, as of April 2, 2018, the
8 filing of the date of the Motion to Continue, the immigration attorney had
9 still not received the “A file”. At the request of defense counsel, the
10 immigration attorney attempted to track down the status of the request and
11 learned that his request for the file had been “processed” on March 24,
12 2018. The delay in obtaining the file in excess of the originally posited
13 100 days is approximately the same length of time as the 35-day
14 government shutdown.³ The defense then timely moved to continue the
15 trial date, 20 days prior to the scheduled trial date.
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19 ² https://www.washingtonpost.com/politics/federal-employees-return-to-backlog-of-work-after-35-day-shutdown/2019/01/28/10030766-231c-11e9-81fd-b7b05d5bed90_story.html?utm_term=.2475260908bd

20 ³ The delay in obtaining the A file since its initial request is due solely to the failure of
21 the United States Government to provide the file. It is clear from the daily barrage of
22 press reports that the shutdown of the government by the President of the United States,
23 along with the internal and external pressures on DHS to attend to other matters unrelated
24 to administrative requirements, lacks sufficient leadership to timely and adequately
25 process such requests. See <https://www.politico.com/story/2019/04/07/stephen-miller-trump-immigration-1260431>; https://www.washingtonpost.com/immigration/trump-removes-secret-service-director-as-purge-of-dhs-leadership-widens/2019/04/08/8bde9912-5a36-11e9-842d-7d3ed7eb3957_story.html?utm_term=.3211dd8bb566;
26 <https://www.washingtonpost.com/politics/grassley-warns-white-house-not-to-oust-any->

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2 Based upon all of the above, the court's failure to grant the
3 continuance deprived the Petitioner "of a fair trial and due process of the
4 law" because without the continuance, counsel is unable to comply with
5 the current legal and constitutional requirements. The constitution
6 guarantees the right to be adequately and correctly informed of the
7 immigration consequences that could affect an accused's and/or her or his
8 decisions. If an attorney fails to provide the correct and constitutionally
9 adequate legal advice to a client, the Courts have held that the client has
10 been deprived of effective assistance of counsel.
11

12 In this case, the accused has a right to effective assistance
13 of counsel which, it is clear, requires the legal immigration attorney to
14 provide an opinion which requires the obtaining, and review, of the A file.
15 As the immigration attorney had not yet received the "A file", he could not
16 render a legally effective opinion to defense counsel who, in turn, could
17 not provide legal, effective and adequate legal counsel to Petitioner in
18 comport with the requirements of the Sixth Amendment.
19

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25 [more-top-immigration-officials/2019/04/08/0b896e26-5a55-11e9-b8e3-
b03311fbbbfe_story.html?utm_term=.38802f77c5ba](https://www.more-top-immigration-officials.com/2019/04/08/0b896e26-5a55-11e9-b8e3-b03311fbbbfe_story.html?utm_term=.38802f77c5ba)
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E. CONCLUSION

This Court should find that the trial court erred and remand for the court to set a new trial date for the Petitioner.

Dated this 20th day of August, 2019.

Respectfully submitted,



David T. McDonald, WSB 18446
Attorney for Petitioner, Oleg Fabyanchuk

DAVID T. MCDONALD PC

August 20, 2019 - 5:12 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Oleg Vladimirovic Fabyanchuk, Petitioner
Superior Court Case Number: 17-1-02285-3

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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

Court of Appeals No. 53384-7

Clark County No. 17-1-02285-3

v.

DECLARATION OF
TRANSMISSION BY MAILING
AND EMAIL

OLEG VLADIMIROVIC FABYANCHUK,

Appellant.

STATE OF OREGON)

: ss

COUNTY OF MULTNOMAH)

On August 20, 2019, I deposited in the mails of the United States of America a properly addressed envelope directed to the below-named individuals, containing a copy of these documents: Appellant's Opening Brief and Declaration of Transmission by Mailing and Email.

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Oleg V. Fabyanchuk
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Battle Ground, WA 98604

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

Signed at Portland, Oregon this August 20, 2019.


David T. McDonald, WSBA #18446
Of Attorneys for Darin R. Vance

DAVID T. MCDONALD PC

August 20, 2019 - 5:12 PM

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