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Court of Appeals
Division III
State of Washington

NO. 345335

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

STATE OF WASHINGTON

PLAINTIFF/APPELLANT,

V.

TARA J. AMMONS

DEFENDANT/RESPONDENT

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Statement of Facts and Procedural History.

On November 5, 2007, Respondent, Tara Ammons, was charged by Information with RCW 9A.56.040(1)(c)/RCW 9A.56.020(1)(a)- Theft in the Second Degree, RCW 9A.56.050- Theft in the Third Degree, and two counts of RCW 69.50.401(1)- Possession of a Controlled Substance with Intent to Deliver. [CP 193-196] On December 3, 2007, Respondent filed a motion for Drug Court, requesting entrance into the Drug Court program on a diversionary basis. [CP 191-192] On January 11, 2008, Respondent signed the Drug Court Agreement and formally entered Drug Court. [CP 185-187, 188-190]

When Respondent entered the Drug Court Agreement, she believed she was a U.S. citizen. [CP 9:7] The State, the Court, and the Drug Court team also believed Respondent was a U.S. citizen when she entered Drug Court. [CP 9:8-9]

After her entry into Drug Court, Respondent found out that she was not a U.S. citizen. [CP 9:10] The State, the Court, and the Drug Court team also learned Respondent was not a U.S. citizen after she entered Drug Court. [CP 9:11-12] Respondent learned she was not a U.S. citizen no later than March 28, 2008 as the Drug Court minutes from pertaining to that date indicate Respondent was “working on her citizenship.” [CP 9:15-17] Under

Drug Court policy, participants must be U.S. citizens. [CP 9:18] The State and the Drug Court team opposed Respondent remaining in Drug Court due to the policy, however the Drug Court judge allowed Respondent to remain in Drug Court despite the policy. [CP 9:20-23] Respondent's immigration status was not deemed as a violation of Drug Court terms or deemed non-compliance with the terms. [CP 10:4-5]

Approximately nine months later, on January 2, 2009, the State filed a motion to terminate Respondent from Drug Court based on continued violations including alcohol use, missed treatment meetings, and a new charge of Assault in the Fourth Degree, Domestic Violence. [CP 182-184] On April 3, 2009, Respondent was terminated from Drug Court and the Court held a stipulated facts trial and found Respondent guilty of all her charges. [CP 181] She was sentenced the same day and a Judgment and Sentence was filed. [CP 169-180]

Respondent was then subject to immigration proceedings in a separate immigration court based on these and other charges. [CP 81-90] Respondent was found incompetent in the immigration proceedings; however Respondent was competent when she entered the Drug Court Agreement. [CP 10:21-23] In 2011, counsel, Manuel Rios, was retained by the Mexican Consulate to represent Respondent in immigration proceedings. [CP 82] Respondent's immigration case was closed and she was released

from immigration custody. [CP 82] In July 2015, Respondent's immigration removal proceedings were reopened and Mr. Rios was re-appointed on her new removal proceedings. [CP 82] Around July or September of 2015, attorney Phil Safar, was hired to represent Respondent on her motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence. [RP 56:5-6]

Respondent filed a motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence on March 16, 2016, seven years after entry of the judgment. [CP 166-168, 97-165] Respondent requested withdrawal of her Drug Court Agreement under *Padilla v. Kentucky*, 559 U.S. 356 (2010), RCW 10.73.100(1), CrR 4.2, CrR 7.8, RCW 10.40.020, and equitable tolling. [CP 97-165] A hearing on the motion was held on May 13, 2016 in front of Honorable Judge Henry Rawson in the Okanogan County Superior Court. [CP 8] The trial court denied Respondent's motion under *Padilla v. Kentucky*, RCW 10.73.100, and RCW 10.40.020. [CP 11-12] The trial court granted Respondent's motion under CrR 4.2 and CrR 7.8(b)(1) and (b)(5) and applied equitable tolling, tolling the entire period up until Respondent hired Mr. Safar for the motion to withdrawal and vacate around July or September of 2015. [CP 11-12, RP 56:5-6, RP 63:17-64:16]

The trial court held that Respondent did not knowingly enter into the Drug Court Agreement because she entered under the mistaken belief that she was a U.S. citizen. [CP 10:24-26] The trial court also held that the record was unclear as to whether Respondent was given an option to voluntarily leave Drug Court and return to a normal case status upon learning of her immigration status. [CP 10:6-7] However, the trial court also held that she was not given an opportunity to “opt-out” of the Drug Court program once she learned of her immigration status. [CP 11:1-2] The trial court ruled that “there is an element of equity in this case in the form of fairness, full disclosure and full understanding and knowledge of the consequences. Because Ms. Ammons was not alerted to the consequences of her being a non-citizen the Court believes equity requires the Drug Court Agreement be set aside.” [CP 11:21-24]

Findings of Fact and Conclusions of Law, along with the Order granting Respondent’s withdrawal of her Drug Court Agreement and vacating her Judgment and Sentence was filed on June 30, 2016. [CP 8-12]

ASSIGNMENTS OF ERROR

I. Assignments of Error.

1. The trial court erred when it issued a factual finding that was not supported by substantial evidence and further erred when it shifted the burden of proof to the State as the non-moving party.

2. The trial court erred when it allowed Ms. Ammons to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 4.2.
3. The trial court erred when it allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 7.8(b)(1) and (b)(5).
4. The trial court violated separation of powers when it allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence based on her resulting immigration consequences and the trial court's view of what is equitable to Respondent.
5. The trial court erred when it improperly applied equitable tolling to Respondent's motion and held that the motion was not time-barred under RCW 10.73.090.

II. Issues Pertaining to Assignment of Error.

1. Whether there is substantial evidence presented at the trial court motion hearing that Respondent was not given the option to "opt-out" of Drug Court as a basis for the trial court's ruling to grant Respondent's motion; and whether the trial court impermissibly shifted the burden of proof to the State as the responding party.

2. Whether the trial court erred when it allowed Respondent to withdraw her Drug Court Agreement under CrR 4.2 given CrR 4.2's express application only to pleas of guilty.
3. Whether the trial court erred when it allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 7.8 given Respondent's implied waiver of asserting mistake and her invited error based on her continued participation in Drug Court for at least nine months.
4. Whether the trial court violated the separation of powers when the trial court allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence based on her resulting immigration consequences and the court's desire to give the Respondent an "equitable" resolution.
5. Whether the trial court erred when it applied equitable tolling to Respondent's motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence and whether the trial court erred in its application of equitable tolling.

ARGUMENT

A review of a ruling under CrR 7.8(b) is reviewed for abuse of discretion. *State v. Smith*, 159 Wn.App. 694, 699 (Div.3 2011). A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner, or when the exercise of discretion is based on untenable grounds or reasons. *Id.* The application of court rules to a particular set of facts is a question of law subject to de novo review. *State v. Chenoweth*, 115 Wn.App. 726, 732 (Div.3 2003). Findings of fact are reviewed for substantial evidence and conclusions of law are reviewed de novo. *State v. Levy*, 156 Wn.2d 709, 733 (2006).

When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature. *State v. Greenwood*, 120 Wn.2d 585, 592 (1993). Principles of statutory construction are applied to court rules. *Id.* The Court's primary duty in interpreting any statute is to discern and implement the intent of the Legislature. *State v. J.P.*, 149 Wn.2d 444, 450 (2003). The starting point must always be the statute's plain language and ordinary meaning. *Id.* When the plain language is unambiguous- that is, when the statutory language admits of only one meaning- the legislative intent is apparent, and the court will not construe the statute otherwise. *Id.* The court may not add words or clauses to an

unambiguous statute when the Legislature has chosen not to include that language. *Id.*

When the court interprets a criminal statute, it gives it a literal and strict interpretation. *State v. Delgado*, 148 Wn.2d 723, 727 (2002). “[The court] cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *Id.* “[The court] assumes the legislature means exactly what it says.” *Id.* The court will not add or subtract from the clear language of a statute even if it believes the legislature intended something else but did not adequately express it. *State v. Castillo*, 144 Wn. App. 584, 591 (Div. 3, 2008).

I. The trial court’s factual findings are not supported by substantial evidence in the trial court record.

Appellant first assigns error to the trial court’s findings of fact and conclusions of law to the extent that the court held Respondent was not given an opportunity to “opt-out” of Drug Court once she learned of her immigration status and the trial court’s reliance on those findings in making its ruling. Appellant asserts that such a finding is not supported by the factual record and that the trial court impermissibly shifted the burden to the State, rather than requiring the Respondent to prove the facts in support of her motion.

A. The trial court's finding that Respondent was not given the option to "opt-out" of Drug Court is not supported by the factual record.

Factual findings are erroneous where not supported by substantial evidence in the record. *In re Davis*, 152 Wn.2d 647, 679 (2004).

Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id.* Unchallenged factual findings are verities on appeal. *Id.* The court will review challenged factual findings to determine whether those findings are supported by substantial evidence." *Id.*

The factual finding challenged by Appellant is that Respondent was not given the option to "opt-out" of Drug Court. At the hearing on the motion, the State strongly argued that Respondent was given the option to "opt-out" and that Respondent had not provided evidence that she was not given the option to "opt-out." The trial court's Findings of Fact are self-contradictory because one finding says the record is unclear whether she was given the option [CP 10:6-7, Finding of Fact Number 15], while another finding says that Respondent was not given the option to "opt-out" [CP 11:1-2, Finding of Fact Number 23]. The inconsistency in these factual findings should further permit Appellant to challenge this factual finding on appeal.

The trial court's ruling on the motion to withdraw and vacate was based on the court's view of what the court felt "compelled" to rule based on what was "equitable" to Respondent given her current situation. [CP 11:21-22, 12:1-2] The court's decision was based in large part on the court's finding that Respondent was not given the option to "opt-out" of Drug Court once everyone learned of her immigration status. [RP 60:2-63:3] However, the trial court's Findings of Fact are self-contradictory on this issue. Finding of Fact, Number 15 indicates that "the record is unclear as to whether Ms. Ammons was given an option to voluntarily leave Drug Court and return to a normal case status upon learning of her citizenship." [CP 10:6-7] However, Finding of Fact, Number 23 indicates that "Ms. Ammons...was not...given an opportunity to opt out of the program." [CP 11:1-2]

The finding that Respondent was not given the opportunity to "opt-out" of Drug Court is not supported by substantial evidence in the factual record and this was an issue heavily argued by the State at the trial court motion hearing. Rather, the trial court relied upon the lack of clarity in the record and the *State's* apparent inability to prove that Respondent *had* been given the option to "opt-out" of Drug Court as its basis for its factual finding that Respondent had not been given such an opportunity. This was error as lack of clarity in the record and the State's inability to prove that

Respondent *was* given the option to “opt-out” is not substantial evidence, or even evidence at all, that she, in fact, *was not* given the opportunity to “opt-out.” There was no clear evidence affirmatively put forward by Respondent to prove that she was not given such an opportunity.

The Declaration of Prosecutor Karl Sloan indicates:

That over the objection of law enforcement members of the drug court team, Ms. Ammons was given the opportunity to remain in drug court and the ability to have her charges dismissed if she completed the program. Ms. Ammons also had the opportunity to leave the drug court track and contest her charges through the normal criminal track. Ms. Ammons elected to remain in drug court. [CP 57]

The Supplemental Declaration of Prosecutor Karl Sloan indicates:

The discovery of her immigration status was an eligibility issue, not a knowing or willful violation of conditions that would subject her to sanctions, revocation, and stipulated facts trial. As a result, the defendant’s case would have been returned to the criminal track if she had been deemed ineligible to continue her participation by the drug court team. That over the objection of law enforcement members of the drug court team, the defendant was given the opportunity to continue in drug court and the continued ability to have her charges dismissed if she completed the program. Ms. Ammons was not compelled, or without a choice, to remain in drug court after her immigration status was revealed; rather she voluntarily continued in the program. [CP 17:5-17]

The Declaration of Steve Brown states:

The decision was made by Judge Burchard to ignore the policy of Drug Court. Ms. Ammons was brought in to discuss her situation with the Drug Court team. I personally gave Ms. Ammons the contact information in

Spokane so that she could deal with her situation and find a remedy. [CP 53]

None of the initial Declarations provided by Respondent in association with her motion to withdrawal and vacate address the issue or claim that she was not given the option to “opt-out” of Drug Court. [CP 94-96, 81-90, 91-93, 73-74, 77-80, 75-76] The only Declaration touching this issue provided by Respondent was the Supplemental Declaration of Mike Lynch which indicates:

Contrary to the statements in the Declaration of Karl Sloan dated 5/6/2016, Ms. Ammons did not have the opportunity to leave the drug court track and contest her charges through the normal criminal track. Based upon entry of the Drug Court Agreement, if an individual failed to follow the terms of the agreement, there were a number of sanctions which could be imposed, including being terminated and convicted... [CP 14]

This statement by Mr. Lynch is the only evidence put forward by Respondent that Respondent was not given an option to “opt-out” of Drug Court. Furthermore, as the State argued during the hearing on the motion, the Declarations of Mr. Lynch are inaccurate as compared to the Drug Court minutes. [RP 25:11-26:24] Mr. Lynch’s Supplemental Declaration states that Respondent was never given the option to “opt-out” and that is evidenced by the December 19, 2008 Drug Court minutes that “LE feels... she should be terminated from Drug Court” based on her new December

14, 2008 Assault charges and that the termination occurred at the next meeting per the January 9, 2009 minutes. [CP 14]

However, as the State argued at the trial court hearing, Mr. Lynch was merging two different discussions together in a way that, while likely unintentionally, misled the trial court. The termination discussion referenced by Mr. Lynch pertains to the discussion to terminate Respondent *after her new assault charge* in December of 2008. [CP 14] The discussion that was at issue at the trial court hearing was the discussion that took place around March of 2008, when Respondent and the team learned she was not a U.S. citizen. [CP 16] The record is clear that Respondent learned she was not a US citizen no later than March 28, 2008 and the discussion about whether she could “opt-out” took place at that time. [CP 15-23] Therefore, Mr. Lynch’s Declaration, the only evidence put forward by Respondent to show that was not given the option to “opt-out” is not reliable in its timeline or clarity.

Furthermore, the Declaration of Mr. Lynch is inaccurate because it references Respondent’s immigration status as a violation of the terms of Drug Court. [CP14] However, as pointed out by Mr. Sloan’s Declarations and as recognized in the trial court’s Findings of Fact, Number 14, Respondent’s legal status was not a violation or any form of non-compliance; it was an eligibility issue; therefore she would not have

and could not have been “terminated” from Drug Court on that basis. [CP 9:4-5, 17:3-11; 57:1-11]

Finally, the Supplemental Declaration of Mr. Lynch is not reliable as it is directly in conflict with independent evidence. The Declaration states that Respondent did not learn she was a U.S. citizen until after she had been in Drug Court for seven months. [CP 13] However, the review of the Drug Court minutes shows that her immigration status was discussed as early as March 28, 2008 [CP 9:15, 27-30] a mere two months after her January 11, 2008 entry date. [CP 185-187; 57, 54, 17]

During the motion hearing, the trial court mentioned facts that would support that Respondent was given the option to “opt-out.”

It appears to the Court that at some point she learned that she was not a U.S. citizen, and that the Drug Court team was debating amongst themselves whether she should opt out or not, Detective Brown said she should go out, Mr. Sloan, in his declaration, says that law enforcement wanted her out, but in this case the Judge let her in, kept her in or allowed her to stay in over the objection possibly of some other team members, I’ll say that, but if she had the option to opt out, wouldn’t the consequences of that action be important... [RP 42:13-24]

The court further recognized that there was evidence that Respondent was given the option to “opt-out” of Drug Court. [RP 52:1-15] However, the court then stated

Although Mr. Sloan states in his declarations, supplemental declaration, I have it, of sections 7 and 8, because she was

already involved in Drug Court, the discovery of her immigration was not a violation, a noncompliance and, therefore, she is not sanctioned because of that.... Yes, it was an eligibility issue... I'm not clear from the record presented to this Court that at that point that she was given an option to go back to basically prior to entry of Drug Court... And Mr. Sloan makes a statement, as a result the Defendant's case would have been returned to the criminal track if she had been deemed ineligible, and that's from the beginning—at the beginning. He's the only one that states that. That's not reflected anywhere. This is the first time it's reflected anywhere, this statement, he's the only one that makes that statement. Defense Counsel doesn't state it, Judge Burchard doesn't state it, it's not in the minutes of Ms. Barnes' that there was a discussion that she could go back and be put back on the criminal or trial track. Your [State's] argument here also indicates that once that was discovered, she voluntarily continued on Drug Court. Again, there's nothing that makes clear on the record here that indicates that, that if she, with being ineligible, if she would be put back on the trial track and have all of her rights reinstated....That's not clear. [RP 60:2-61:11]

The State argued that since this was Respondent's motion, the burden was on her, and there was no evidence presented by Respondent that she asked to "opt-out" and was denied that opportunity. [RP 61:15-19] The Court responded

I guess what I'm saying is there's no showing that there—that she was offered to opt out period. There's no discussion. Mr. Sloan for the first time in his declaration states that she could've been given an opportunity, there's nowhere in the minutes or anything that she was given that opportunity, so I'm not deeming that there was a choice and that there was an opportunity to elect by her. [RP 61:20-61:4]

The trial court later stated in its ruling

I'm not finding either that, that Ms. Ammons was given the option to opt out after discovery. I'm not making that finding that she was given that opportunity. Yes, she was already committed, yes, she was already in the program, I'm just not finding from the minutes anything that's been presented, other than Mr. Sloan's brief comment in his supplemental declaration that she could've been put back on the trial track, that wasn't done, that wasn't offered, there's no clear evidence of that. [RP 69:4-13]

It appears from the record and the trial court's finding, that the trial court simply disregarded the Declarations of Karl Sloan and Steve Brown, and with no reliable evidence from Respondent, concluded that she *was not* given the opportunity to "opt-out." The court explicitly stated that the Declarations of Karl Sloan indicate that she was given the option to "opt-out," but then held that since it is not contained in any of Respondent's Declarations or in the Drug Court minutes, that it is not clear if that option was given. However, it is common knowledge that Drug Court team meetings are typically closed-door discussions, so the discussion to "opt-out" or not, would not appear in the record.

A defendant collaterally attacking a judgment and sentence in a criminal case bears the overall burden of demonstrating an entitlement to relief. *In re Quinn*, 154 Wn.App. 816, 831 (Div.1, 2010) citing *In re PRP of Gentry*, 137 Wn.2d 378, 409 (1999) and *In re PRP of Runyan*, 121 Wn.2d 432, 452 n. 16 (1993). Therefore, Respondent had the burden of

proof to show that she was not given the option to “opt-out” of Drug Court in support of her motion. The trial court phrased the issue as the record was unclear and that there is not a sufficient showing that Respondent was given the option to “opt-out.” However, the burden is on the Respondent to prove the facts in support of her motion; therefore, Respondent needed to prove that she was not given the option to “opt-out.” No such facts were provided to the court.

The only evidence presented by Respondent was a sole Declaration of Mr. Lynch that was inconsistent with the timeframe laid out in the entirety of the record and confused the Respondent’s final Drug Court termination discussion with her initial Drug Court eligibility discussion. The court simply looked at the lack of clarity in the record, stated that the State had not proven that she was given the option to “opt-out” and therefore made a factual finding that she was not given such an opportunity. This finding is not supported by substantial evidence as there is essentially no affirmative evidence to support that finding. The court’s determination that the record is not clear, and that there was not sufficient evidence that she was given the option, is not evidence that she was not given the option.

B. The trial court impermissibly shifted the burden to the State to prove Respondent was given the option to “opt-out” of Drug Court rather than placing the burden on Respondent to prove that she was not given the option to “opt-out” of Drug Court.

Respondent filed the motion to withdraw and vacate and; therefore, bears the burden of proving the evidence in support of that motion.

Quinn, 154 Wn.App. at 831 citing *Gentry*, 137 Wn.2d at 409 and *Runyan*, 121 Wn.2d at 452 n. 16. The trial court appears to have placed a burden on the State to prove that Respondent was given the option to “opt-out” of Drug Court, when that issue was not even raised by Respondent’s motion. If the trial court’s decision was to revolve around whether or not Respondent was given the option to “opt-out” of Drug Court, the court should have placed the burden on the Respondent to provide evidence that she was not given the option to “opt-out.” Instead the trial court placed the burden on the State to prove that she was given the option and in the end, the trial court made its ruling because the “record is not clear” whether she was given the option to “opt-out.” Thus, the trial court impermissibly shifted the burden to the State. If the record was not clear, the trial court should have held that against the *moving party* not the *responding party*.

The trial court sought to give the Respondent the benefit of the doubt and require the State to uncover information from more than seven

years ago about what occurred behind closed-doors in a Drug Court team meeting; and if the State could not prove that Respondent was given the option to “opt-out,” Respondent would be entitled to withdraw her Drug Court Agreement. This is a daunting and unfair burden to place on the State, especially as the non-moving party. As pointed out by the State in its argument at the hearing, and recognized by the trial court, the Drug Court prosecutor at the time is now deceased so the State was unable to get a Declaration from the prosecutor who would have been in the closed-door Drug Court team meeting at the time. [RP 8:13-9:20] The Drug Court minutes are very brief recordings of the status of each participant and do not go into detail about discussion that occurred in the team meeting. [CP 27-39] The issue of a participant’s immigration status is also a private matter that would not have been discussed on the record, so the State could not go back and review the recorded record of the actual Drug Court session. It is unclear where the trial court expected the State to uncover evidence of seven year old discussions, other than in Declarations of the few people who knew about the situation. The State provided those to the court; however, the court seemed to just disregard those Declarations because there was nothing mentioned in the Drug Court minutes or on the record.

The court's comments make clear that the trial court put the burden on the State to prove Respondent was not given the "opt-out" option, rather than requiring the Respondent to prove that she was given the option:

I'm not clear from the record presented to this Court that at that point that she was given an option to go back to basically prior to entry of Drug Court... Mr. Sloan makes a statement, as a result the Defendant's case would have been returned to the criminal track if she had been deemed ineligible, and that's from the beginning... He's the only one that states that. That's not reflected anywhere. This is the first time it's reflected anywhere, this statement, he's the only one that makes that statement. Defense Counsel doesn't state it, Judge Burchard doesn't state it, it's not in the minutes of Ms. Barnes' that there was a discussion that she could go back and be put back on the criminal or trial track. Your [State's] argument here also indicates that once that was discovered, she voluntarily continued on Drug Court. Again, there's nothing that makes clear on the record here that indicates that, that if she, with being ineligible, if she would be put back on the trial track and have all of her rights reinstated....That's not clear. [RP 60:2-61:11]

I guess what I'm saying is there's no showing that there—that she was offered to opt out period. There's no discussion. Mr. Sloan for the first time in his declaration states that she could've been given an opportunity, there's nowhere in the minutes or anything that she was given that opportunity, so I'm not deeming that there was a choice and that there was an opportunity to elect by her. [RP 61:20-61:4]

I'm not finding either that, that Ms. Ammons was given the option to opt out after discovery. I'm not making that finding that she was given that opportunity...I'm just not finding from the minutes anything that's been presented,

other than Mr. Sloan's brief comment in his supplemental declaration that she could've been put back on the trial track, that wasn't done, that wasn't offered, there's no clear evidence of that. [RP 69:4-13]

The court's comments make clear that the burden was incorrectly put on the State, the responding party to disprove a fact beneficial to Respondent, rather than properly put on Respondent to prove the fact beneficial to her.

Even despite the trial court's impermissible burden shifting, there was ample evidence provided by the State that Respondent was given the option to "opt-out" of Drug Court, but that she elected to remain. The only evidence provided by Respondent is a single Declaration that has inaccurate timing and confuses the initial eligibility discussion with the later termination discussion. The Respondent did not meet her burden to provide evidence that she was not given the option to "opt-out" of Drug Court. Rather, the court viewed a slight ambiguity and in an effort to provide "equity and fairness [CP 11:21, RP 63:4-8]," shifted the burden to the State, disregarded the evidence provided by the State and concluded without a factual basis that Respondent must not have been given the option to "opt-out."

It appears from the trial court's comments that "Whether you characterize it as a mutual mistake from the contract point of view, this Court just, just feels compelled, as the Court said before, I can't treat her

as a faceless individual... [RP 63:4-8]” that the court’s ruling was based not on the evidence actually presented, but that the court was attempting to seek a resolution it felt was equitable based on Respondent’s resulting immigration consequences, and the trial court therefore, shifted the burden to the State and disregarded the evidence that did not support its decision.

There is not a sufficient factual basis for the court to affirmatively find that Respondent was not given the option to “opt-out” of Drug Court. Even in the light most favorable to Respondent, the record remains unclear as to whether she was given that option. However, an affirmative finding that Respondent was not given that option is far different than the State not being able to prove that she was given the option. If the record remained unclear, it was error for the trial court to find that Respondent was not given the option to “opt-out” and the trial court should have left its findings as that. It was error to find that that Respondent was not given the option and to then make a ruling based in large part on that finding.

Appellant asks this Court to hold that the trial court’s finding of fact that Respondent was not given the option to “opt-out” of Drug Court is not supported by substantial evidence in the factual record and that the trial court impermissible shifted the burden of proof to the State rather than requiring Respondent to prove that she had not been given the opportunity to “opt-out” of Drug Court. Appellant further requests this

court hold that the trial court should not have relied upon that factual finding in making its rulings in this case since it was not supported by the evidence in record.

II. The trial court erred when it allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 4.2 as she did not enter a guilty plea and CrR 4.2 only applies to pleas of guilty.

Appellant first assigns error to the trial court's ruling allowing Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 4.2. CrR 4.2(f) states as follows:

Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.401-.411, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

By its express terms, CrR 4.2, and specifically CrR 4.2(f), applies only to a defendant's "plea of guilty." However, Respondent's entry into the Drug Court Agreement was not tantamount to a guilty plea.

It is well established through Washington law that Drug Court programs are comparable to deferred prosecutions. See *State v. Melick*, 131 Wn.App. 835, 844-845 (2006) (The court "may apply the principles of

chapter 10.05 RCW to drug court prosecutions.”); *State v. Cassill-Skilton*, 122 Wn.App. 652, 658 (2004) (“Although drug court statute contains no provisions for operating the program, the court can use chapter 10.05 RCW for guidance.”).

Washington law is further clear that entry into a diversionary program such as a deferred prosecution or Drug Court is not the equivalent of a guilty plea. This position was succinctly summed up in *State v.*

Higley:

[The defendant] argues that when he obtained an order granting deferred prosecution, he was, in effect, entering a guilty plea. Based on that premise, he reasons that he is entitled to the same due process rights as a person who pled guilty.

To accept deferred prosecution is not the same as to plead guilty.

To accept deferred prosecution is, by definition, to leave adjudication by plea or trial to a later time. *State v. Wright*, 54 Wash.App. 638, 640 n. 1 (1989) (“Deferred prosecution occurs, as its name implies, prior to any adjudication of guilt or innocence.”); *State v. Vinge*, 59 Wash.App. 134, 138, (1990) (“A deferred prosecution treatment program, unlike a deferred sentence or probation, occurs prior to an adjudication of guilt.”); *State v. Friend*, 59 Wash.App. 365, 367, (1990) (“By definition, deferred prosecution defendants have not even been prosecuted, much less convicted”). To plead guilty is to submit to adjudication by plea, provided of course that the court accepts the plea. (citations omitted) Here, [the defendant] did not plead guilty, and he did not acquire the due process rights of one who does.

State v. Higley, 78 Wn.App. 172, 187-188 (Div.2, 1995) review denied 128 Wn.2d 1003 (1995). See also *Abad v. Cozza*, 128 Wn.2d 575, 579 (1996) (deferred prosecution is sentencing alternative to the traditional criminal justice system and is not tantamount to a guilty plea.); *State v. Colquitt*, 133 Wn.App. 789 (Div.2, 2006) (drug court can be compared to cases involving deferred prosecution and is not tantamount to a guilty plea). A defendant who enters a deferred prosecution or Drug Court stipulates to admission of the police reports as evidence; however, the defendant does not stipulate to the sufficiency of the evidence for conviction. *Colquitt*, 133 Wn.App. at 795.

In *State v. Drum*, 142 Wn.App. 608 (Div. 2, 2008), the defendant entered into Drug Court, was later terminated from Drug Court, and was found guilty by the judge at a stipulated facts trial. The defendant asserted on appeal that a Drug Court contract is tantamount to a guilty plea, requiring the same due process protections that apply to a guilty plea. *Id.* at 617. Due process requires the trial court to determine that the defendant is entering his or her guilty plea intelligently and voluntarily and CrR 4.2 requires the court to determine that the defendant understands the consequences of his or her plea. *Id.* at 618. However, the Division Two court explained that agreeing to a deferred prosecution, such as Drug Court, is not the same as pleading guilty because the deferred prosecution “leaves adjudication by plea or trial

to a later time, whereas to plead guilty is to submit to adjudication by plea.” *Id.* at 618. citing *Higley*, 78 Wn.App. at 187-188. Because a person who enters a deferred prosecution does not plead guilty, they do not acquire the due process rights of one who does. *Id.* This holding was affirmed by the Supreme Court in *State v. Drum*, 168 Wn.2d 23, 39 (2010). The Supreme Court held very clearly that “a stipulated facts trial, where the trial court independently reviews the evidence and makes its own findings, is not the equivalent of a guilty plea” and the associated due process requirements do not attach. *Id.* The Supreme Court has therefore upheld the distinction between a guilty plea and a Drug Court agreement.

Furthermore, in the trial court’s Conclusions of Law, Number 3, the trial court itself held that “Ms. Ammons did not plead guilty.” [CP 11:13-14] This ruling was made in association with the trial court’s denial to apply RCW 10.40.020 to Respondent’s case, holding that “RCW 10.40.020 applies to guilty pleas and does not apply to the facts of this case since Ms. Ammons did not plead guilty.” [CP 11:13-14]

Therefore, the trial court erred when it allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 4.2 because CrR 4.2 expressly applies only to guilty pleas and both the case law and the trial court’s own ruling hold that Respondent did

not plead guilty. The trial court's decision is self-contradictory and violates its own rulings.

Further, CrR 4.2(f) states that "If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8." Since Respondent's Judgment and Sentence was entered on April 3, 2009, CrR 4.2 is inapplicable even if the Court had ruled that the Drug Court Agreement was the equivalent of a guilty plea. Since judgment has been entered, any motions for withdrawal or vacation are governed by CrR 7.8 and cannot be brought under CrR 4.2.

Appellant asks this Court to hold that Respondent was not permitted to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 4.2 and to reverse the trial court's ruling.

III. The trial court erred when it allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 7.8(b) as she remained in Drug Court after being made aware of the "mistake" and it is therefore invited error.

Appellant next assigns error to the trial court's ruling allowing Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 7.8(b)(1) and (b)(5). A defendant collaterally attacking a judgment and sentence in a criminal case bears the overall burden of demonstrating an entitlement to relief. *Quinn*, 154

Wn.App. at 831 citing *Gentry*, 137 Wn.2d at 409 and *Runyan*, 121 Wn.2d at 452 n. 16. Under CrR 7.8(b),

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (5) Any other reason justifying relief from the operation of the judgment.

Relief under CrR(b)(5) is limited to extraordinary circumstances not covered by any other section of the rule. *Smith*, 159 Wn.App. at 700. Extraordinary circumstances include fundamental and substantial irregularities in the court's proceedings or irregularities extraneous to the court's action. *Id.* CrR 7.8(b)(5) will not apply when the circumstances used to justify the relief existed at the time the judgment was entered. *Id.*

The trial court's application of CrR 7.8(b) was improper as the court seemed to ignore a significant factor in this case- Respondent's continued participation in the Drug Court program after she learned of her citizenship status. The trial court ruled that Respondent's mistake as to the nature of her citizenship was a reason justifying withdrawal of the Drug Court Agreement. However, the trial court merely recognized the "mistake" that Respondent did not know she was a U.S. citizen when she entered into the Drug Court Agreement and ended its analysis there. The trial court failed to consider Respondent's actions after learning of her

citizenship status. The trial court's ruling presumes that Respondent would have actually wanted to withdraw her agreement when she learned she was not a U.S. citizen and therefore that mistake justifies the court's vacation of her conviction. Put another way, the trial court presumed that the "mistake" was a substantive mistake that weighed on Respondent's decision to enter or remain in Drug Court.

A court's allowance of a defendant to withdraw their plea or agreement based on mistake presumes that the defendant would not have entered the plea or the agreement but for that mistake. To allow a defendant to withdraw a guilty plea or agreement based on a mistake that would not have actually affected their decision anyway makes no logical sense. Therefore, the question with regard to a mistake under CrR 7.8(b) should be as follows -- would the defendant still have entered the plea or agreement even if they had known the mistaken fact at the time they entered the plea or agreement? If the answer is yes, the defendant should not be permitted to withdraw their plea or agreement under CrR 7.8(b).

The record in this case is quite clear that Respondent's citizenship status was not a determining factor for her decisions in this case until she actually faced those consequences after failing to succeed in Drug Court. Respondent learned that she was not a U.S. citizen no later than March 28, 2008. [CP 9:15-17, 27-30] After learning of her citizenship, the Drug

Court team and the State opposed Respondent remaining in Drug Court because policy required all participants to be U.S. citizens. The Drug Court judge allowed Respondent to remain in the program despite the policy violation. This means that even after she learned she was not a U.S. citizen, Respondent *wanted* to remain in Drug Court. The Drug Court minutes reflect that Respondent was continuing to work on her immigration status while she was in Drug Court. [CP 27-35]

Respondent never requested to withdraw from Drug Court or even raised the issue of wanting to withdraw from the Drug Court program. Rather, she remained in Drug Court and participated in the program for at least nine months, until the State eventually filed a motion to terminate her from the program on January 2, 2009 due to non-compliance. [CP 182-184]

It is only now, after she was unable to complete the program and was terminated for non-compliance, that she claims she should be allowed to undo the agreement due to that mistake. This failure to raise the issue of mistake when she first learned of it and her continued participation in the program are an implied waiver of her right to assert that mistake after she was terminated from the program for non-compliance and is invited error. The State is entitled to fair and just proceedings to the same extent that a defendant is and RCW 10.73.090 is intended to promote finality of

judgments. CrR 7.8 was not intended to allow a defendant to try one course of action in the hopes that it will work out in their benefit, but then vacate their conviction and try another course when that one fails.

Appellant asks this court to reverse the trial court's ruling allowing Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 7.8(b)(1) and (5) and to hold that her failure to raise the issue when it was first learned and her continued participation in the Drug Court program are an implied waiver and amount to invited error by Respondent.

IV. The trial court violated separation of powers when it relied on “equity” and Respondent’s immigration status in granting Respondent’s motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence.

Appellant asserts that the trial court violated separation of powers when it allowed Respondent to withdraw her Drug Court Agreement and vacate her Judgment and Sentence based on her current immigration status and the court's attempt to give her an “equitable” resolution.

A trial court should not use CrR 7.8 in an attempt to help the defendant reach a more “equitable” result. Article 3, section 9 of the Washington State Constitution states that “The pardoning power shall be vested in the Governor under such regulations and restrictions as may be prescribed by law.” In *State v. Aguirre*, 73 Wn.App. 682 (Div.1 1994), the

defendant pled guilty to controlled substance charges and was later subject to deportation proceedings. *Id.* at 686. He later applied for asylum and filed a motion to withdraw his guilty plea under CrR 7.8(b)(5). *Id.* The trial court granted the motion saying the court felt the defendant could not receive a fair asylum hearing if the convictions stood. *Id.*

The Court of Appeals reversed the decision holding that the decision was a violation of the separation of powers under the State Constitution. *Id.* at 688. The Washington Constitution vests the pardoning power in the Governor. *Id.* at 689. However broad a trial judge's discretion may be under CrR 7.8(b)(5), it is not so broad as to intrude on the power to pardon vested solely in the Governor. *Id.* at 688. The court determined that the trial judge used CrR 7.8(b)(5) to forgive the defendant his crimes for the sole purpose of affecting his deportability status. *Id.* The court stated that, despite the trial court's humanitarian and well-meaning intentions, the trial court did not have the authority to vacate the conviction based on collateral immigration consequences. *Id.*

Such is the same situation in Respondent's case. Respondent did not seek to withdraw her Drug Court Agreement and vacate her Judgment and Sentence until after her second deportation proceedings had begun in 2015. [CP 82, 166-168] Her motion is merely a back-channel attempt to influence the deportation proceedings by trying to attack her conviction in

this case. While Respondent may present an empathizing set of circumstances, empathy alone, without proper legal justification, is not legal basis to vacate a conviction.

The trial court's ruling in this case is similar to that in *Aguirre*. Respondent's counsel's argument in favor of the motion revolves heavily around her current deportation proceedings. [RP 21:5-9, CP 97-165]. The Declarations provided by Respondent support that Respondent's motion to vacate her conviction was merely an attempt to influence her immigration proceedings.

The Declaration of Mike Lynch states

I believe it is in the client's best interest and the interests of justice for Tara to be able to vacate her judgment and sentence and withdraw her drug court agreement and plead guilty to an immigration safe offense. [CP 93]

The Declaration of Manuel Rios discusses how her convictions in this case renders Respondent deportable and discusses alternative charges that would allow Respondent to petition to remain in the United States. [CP 81-83]

The trial court's findings of fact and oral comments during the hearing revolve around the Respondent's immigration status and her now resulting immigration proceedings. The trial court ruled in an attempt to do what it thought was "equitable" given that Respondent is now facing

deportation proceedings and her unusual circumstances. [CP 11:21, RP 62:14-18]. The trial court stated

[T]here is an aspect, and I'm going to use the word equity here, there's an aspect of – when we tend to talk about equity here, this Court is of a mind that equity talks about fairness, full disclosure, full understanding in aspects of this. That's from the Court's perspective, is a form of equity. A person that has basically her entire life resided in the United States, married, had children, yes...[RP 62:14-23]

Whether you characterize it as a mutual mistake from the contract point of view, this Court just, just feels compelled, as the Court said before, I can't treat her as a faceless individual... [RP 63:4-8]

The trial court's decision to vacate Respondent's conviction was *because of* her current pending immigration proceedings and the trial courts desire to give her an "equitable" resolution under the circumstance. The trial court, therefore, violated separation of powers when it granted Respondent's motion under CrR 7.8(b)(1) and (b)(5) as it was done so without a legal justification and was done in an attempt to help her in the immigration proceedings. Appellant requests this court hold that the trial court violated the separation of powers and reverse the trial court's ruling.

V. Respondent's motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence under CrR 7.8 was time barred by RCW 10.73.090 and the trial court improperly applied equitable tolling.

Appellant finally assigns error to the trial court's improper application of equitable tolling and asks this court to hold that Respondent's motion to withdraw under CrR 7.8 was time-barred under RCW 10.73.090. The burden is on the defendant to prove that an exception to the RCW 10.73.090 one year limitation applies. *State v. Schwab*, 141 Wn.App. 85, 90 (Div.2 2007). The trial court held that

I accept the argument, Mr. Safar, that, that there is an aspect of (inaudible) that the consequences are, there is a delay in exercising her remedies, what contributions and what effects that she was under. It's clear there's now [*sic*] showing here, and I'll state that there was no showing that she was incompetent at the time she entered the, the Drug Court agreements. However, there is findings here and, and reports indicating that she does suffer from PTSD and mental health issues that all relate to her comprehension and a determination by the immigration Court that she's incompetent and, therefore, she had assigned Counsel from the Mexican consulate, and then subsequently employed Mr. Safar to deal with this. At some point that all can have an effective delay for presenting in a timely manner, which basically again goes to the Court's finding that there's an equitable tolling there that's occurred. We don't have a clear pinpoint at what point in her life when she can make those decisions. [RP 63:17-64:16]

The court therefore, tolled RCW 10.73.090 up until the time Respondent hired counsel for the motion, Mr. Safar, approximately seven years later in July or September of 2015.

Under RCW 10.73.090(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.” “Collateral attack” means any form of postconviction relief other than a direct appeal.” RCW 10.73.090(2). This includes a motion to withdraw a guilty plea and a motion to vacate a judgment. RCW 10.73.090(2). A judgment becomes final “the date it is filed with the clerk of the trial court.” RCW 10.73.090(3)(a). Respondent’s Judgment and Sentence was filed on April 3, 2009. Respondent’s motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence was filed with the trial court on March 16, 2016, seven years after her judgment became final. [CP 169-180, 182-184]

In *State v. Littlefair*, 112 Wn.App. 749, 759 (Div.2, 2002), the court held that RCW 10.73.090 can be equitably tolled in a proper case. However appropriate circumstances for equitable tolling generally include “bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff.” *Id.* citing *State v. Duvall*, 86 Wn.App. 871, 875 (1997) review denied 134 Wn.2d 1012 (1998); *In re Bonds*, 165 Wn.2d 135, 141 (2008). Courts permit equitable tolling to occur only sparingly, and should not extend it to a “garden variety claim of excusable neglect.” *Id.* Equitable

tolling is only used sparingly when “the plaintiff exercises diligence and there is evidence of bad faith, deception or false assurances. *In re Carlstad* 150 Wn.2d 583, 593 (2003). The court is reluctant to apply exceptions to legislative time limits. *Bonds*, 165 Wn.2d at 143.

Equitable tolling of a statute is appropriate when consistent with the policies and purposes underlying the statute. *Bonds*, 165 Wn.2d at 141. The purpose underlying the time limit in RCW 10.73.090 is to manage the flow of post-conviction collateral relief petitions by requiring collateral attacks to be brought promptly. *Id.* Limiting attacks to a one-year period also promotes finality of judgments. *Id.*

The defendant in *Littlefair* was entitled to equitable tolling to allow him to withdraw his guilty plea because he did not know he was likely to be deported based on his conviction. *Littlefair*, 112 Wn.App. at 762. However, in that case, his lack of knowledge was not due to any fault of his own, but due to a series of mistakes by his attorney, the court, and the INS. *Id.* The INS delayed more than two years before notifying the defendant that he was subject to deportation. *Id.* Most importantly, the court noted how equitable tolling actually works- “we conclude that the one-year time period in RCW 10.73.090 should be equitably tolled from the date of his plea [] to the date on which he first discovered that deportation was a consequence of his plea.” *Id.* at 763. Furthermore, the application of equitable tolling in *Littlefair* was

actually called into question in *Bonds*, suggesting the Court of Appeals applied the remedy too loosely. *Bonds*, 165 Wn.2d at 142.

In *In re Carlstad* 150 Wn.2d 583 (2003), the defendant gave a PRP to prison officials for mailing days before the one year time limit was to expire. Due to a delay in mailing, the PRP was not filed until after the expiration of the time limit. *Id.* at 587. The court declined to apply equitable tolling because there was no showing that the prison officials acted in bad faith, deception, or false assurances. *Id.* at 593.

In *Bonds*, the defendant timely filed a PRP and a few days after the judge referred the PRP for a decision on the merits and counsel was appointed, the one year limit for collateral attack under RCW 10.73.090 passed. 165 Wn.2d at 138. Subsequently, counsel filed an amended PRP asserting additional grounds for relief. *Id.* *Bonds* asserted that the delay in filing the amended PRP was due to the Court of Appeals' delay in appointing counsel. *Id.* at 143. The Court of Appeals held that equitable tolling allowed the court to consider the additional grounds of relief. *Id.* at 139. The Supreme Court reversed the Court of Appeals and held that *Bonds* had not met the burden demonstrating that the amended PRP was untimely due to bad faith, deception, or false assurances. *Id.* at 144.

In Respondent's case, the trial court should not have applied equitable tolling as none of the required predicates laid out in *Littlefair* and

Bonds are present in this case and Respondent has not acted with diligence in presenting her motion to withdraw and vacate to the trial court. There was no showing of bad faith, deception, or false assurances by the State or the trial court. Without such a showing by Respondent, equitable tolling cannot be implicated. The justifications laid out by the trial court- Respondent's incompetence in the resulting immigration proceedings, appointment of counsel in the immigration court, Respondent's mental health issues and PTSD are not legally sufficient reasons to apply equitable tolling. The trial court simply made a blanket determination that "We don't have a clear pinpoint at what point in her life when she can make those decisions." [RP 64:13-15]

Respondent argued at the hearing that equitable tolling should apply because Respondent could not address the complex issues of immigration until counsel was appointed in immigration court. [RP 55:10-56:9] However, counsel was appointed in immigration court in 2011 and Respondent did not file her motion until five years later. [CP 82] Furthermore, Respondent's argument that she should be entitled to equitable tolling because immigration law is so complex that she could not make any decisions about her case until counsel was appointed just further shows that her sole purpose in seeking to vacate her judgment is to influence her

deportation proceeding which is an inappropriate and insufficient legal basis to vacate her conviction and violates separate of powers as addressed above.

The delay in Respondent's filing of her motion to withdrawal and vacate her judgment was based on her own lack of action for seven years. It has nothing to do with her resulting immigration proceedings or any claimed mental health issues that were not present at the time the Drug Court Agreement was entered or Judgment was entered.

Furthermore, the court assumed that Respondent has been entangled in immigration proceedings since her Judgment and Sentence was entered in 2009 and the complexity of that situation is what caused the delay in her presenting her motion. This is not the case. According to Respondent's own immigration attorney, Respondent's initial immigration case was closed around 2011 and Respondent was released from immigration custody. [CP 82] Respondent's removal proceedings were then re-opened in 2015. [CP 82] Respondent made no motion to withdraw her agreement or vacate her conviction during her initial removal proceedings in 2011, likely because she was able to get those proceedings dismissed. She then made no motion to withdraw her agreement or vacate her conviction in the four years after her initial immigration case closed in 2011 and before her subsequent case opened in 2015, likely because she was not facing any major consequences of her convictions during that time period. It is only now that her

immigration case has been re-opened in 2015 and she again faces deportation proceedings that she seeks to withdraw her agreement and vacate her conviction. This is not diligence.

Even if equitable tolling were applicable in this case, it was applied incorrectly by the trial court. Equitable tolling does not allow the trial court to indefinitely toll the statutory time limit, or disregard it completely. Following the procedure to apply equitable tolling as laid out in *Littlefair*, if the trial court ruled that equitable tolling applied, the one year time limit in RCW 10.73.090 could only be tolled from the time Respondent entered her Drug Court Agreement to the time she first learned that she was not a U.S. citizen. Since she learned of her status while still in Drug Court, any tolling period has long passed. Even going from the date of finality of judgment, Respondent was aware of her citizenship status at that time so the one year time limit would have begun to run no later than April 3, 2009. Finally, even in the light most favorable to the Respondent, she was appointed counsel in the immigration proceedings in 2011 which is still approximately five years before her motion was filed.

Equitable tolling does not allow Respondent to find out about a mistaken fact, try to proceed with the course that is in her best interest at the time, then wait to see if she can succeed on that course, then once she has failed on that course, and only when deportation proceedings begin, come

back seven years later and claim that based on that mistake the one-year time limit does not apply to her. Such an argument is in direct conflict with the purpose of RCW 10.73.090 and the finality of judgments and is frankly absurd.

Appellant asks this court to hold that Respondent's motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence was time-barred by RCW 10.73.090 and to reverse the trial court's ruling.

CONCLUSION

Appellant requests this Court hold that there was not substantial evidence in the record for the trial court to find that Respondent was not given the option to "opt-out" of Drug Court and the trial court should not have relied on that fact in making its ruling. Appellant further requests this court hold that Respondent's motion to withdraw her Drug Court Agreement and vacate her Judgment and Sentence were improperly granted under CrR 4.2 and CrR 7.8. Appellant requests this court hold that the trial court violated the separation of powers when it granted Respondent's motion based on the desire to seek "equity" considering her pending immigration consequences. Finally, Appellant request this court hold that Respondent's motion was time-barred by RCW 10.73.090 and

equitable tolling did not apply, or in the alternative was not applied properly.

Appellant requests this Court reverse the trial court's order vacating the Drug Court Agreement and vacating the Judgment and Sentence and reinstate the Judgment and Sentence entered April 3, 2009.

Dated this 7th day of December, 2016

Respectfully Submitted:



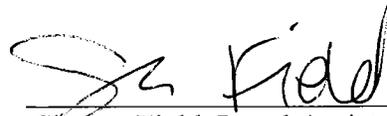
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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 2nd day of December, 2016, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Opening Brief of Appellant:

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A handwritten signature in cursive script, appearing to read "Shauna Field", is written over a horizontal line.

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