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THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

SIGIFREDO GARCIA BUENO,

Petitioner.

BY RONALD R. CARPENTER  
CLERK

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR YAKIMA COUNTY

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PETITIONER'S SUPPLEMENTAL BRIEF

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**ORIGINAL**

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

Sigifredo Bueno's attorney encouraged Bueno to plead guilty to a crime for which mandatory deportation was a "truly clear" consequence by telling Bueno he could avoid deportation if he stayed out of trouble and erased the record later. There is no legal avenue for erasing this conviction to escape deportation. Did Bueno rely on unreasonable advice from his lawyer to enter a plea that he would not have otherwise entered?

Is Bueno excused from the time limit for filing a collateral attack when \_\_\_\_\_, the delay was caused by his attorney's misadvice, and equities favor granting him relief?

B. STATEMENT OF THE CASE.

Bueno is a legal permanent resident of the United States whose wife of 13 years and two children are United States citizens. 2RP 5.<sup>1</sup> He supports his family as a farmworker; his wife is unable to work due to a disability. 2RP 5, 25. He attended school in rural Mexico to the sixth grade. 2RP 8. He does not speak, read, or write English. 2RP 9. There are many words he does not understand in Spanish. 2RP 27-28.

On August 4, 2004, Bueno's brother-in-law gave him a ride to an auto repair shop. 2RP 5-6; CP 28; CP 55. Two men Bueno did not know

were also in the car. 2RP 6. One man asked Bueno to hold his money. CP 29. Police officers stopped the car and Bueno had the buy-money from a drug purchase. CP 29, 43.

Bueno was charged with delivery of a controlled substance and conspiracy to deliver. CP 1. His lawyer Jerry Talbott specialized in immigration law. 2RP 30-31. Talbott, Bueno, and Bueno's wife discussed Bueno's desire to remain a legal permanent United States resident. 2RP 21. He told Talbott his legal status was "very important to him." Id.

The prosecution offered a plea to conspiracy to deliver a controlled substance with a "time served" sentence. 2RP 34. Talbott told Bueno a jury would believe that a Mexican person with marked drug-buy money was part of the drug deal. 2RP 33. If convicted, he would be deported. 2RP 34. If he pled guilty, he would not be immediately deported. 2RP 12. As long as he stayed out of trouble, he could try to erase the conviction before renewing his permanent residency card. 2RP 34.

Bueno followed Talbott's advice and entered a guilty plea in 2005. 2RP 13; CP 2-8. He stayed out of trouble, but his conviction alone resulted in immigration authorities seeking his deportation. CP 45.

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<sup>1</sup> The verbatim report of proceedings is referred to as: 1RP (Feb. 24, 2005); 2RP (Aug. 20, 2010).

Bueno contacted a different lawyer who told him no waiver was possible. 2RP 40. Bueno filed a motion to vacate his plea due to the ineffective assistance of counsel. CP 17-58. Talbott admitted he told Bueno they could “erase the record” if he stayed out of trouble. CP 43. However, the court ruled Bueno was “not ignorant of the immigration consequences” of his plea and denied his motion. CP 78-79.

In his direct appeal, the lawyer appointed to represent Bueno withdrew from the case before a panel of three Court of Appeals judges reviewed his appeal *de novo*, contrary to the right to counsel on appeal as explained in State v. Rolax, 104 Wn.2d 129, 133, 702 P.2d 1185 (1985). Bueno’s *pro se* request for further review was granted.

C. ARGUMENT.

**1. It constitutes unreasonable performance for an attorney to mislead the defendant about the clear immigration consequences of his guilty plea**

a. The right to counsel guarantees effective representation when deciding whether to enter a guilty plea.

The right to counsel is “a bedrock principal in our justice system” and “the foundation for our adversary system.” Martinez v. Ryan, \_\_ U.S. \_\_, 132 S.Ct. 1307, 1317, 182 L.Ed.2d 272 (2012); U.S. Const. amend. VI; Const. art. I, § 22. The right is satisfied only when counsel provides “effective assistance.” Missouri v. Frye, \_\_ U.S. \_\_, 132 S.Ct. 1399, 1404,

182 L.Ed.2d 379 (2012) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Ineffective assistance of counsel occurs when “counsel's representation fell below an objective standard of reasonableness,” and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Lafler v. Cooper, U.S. , 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012) (quoting Strickland, 466 U.S. at 688). The right to effective assistance of counsel is “a right that extends to the plea-bargaining process.” Id. at 1384. At the plea bargaining stage, “defendants cannot be presumed to make critical decisions without counsel’s advice.” Id. at 1385. A client’s intent to plead guilty does not excuse a lawyer from accurately explaining the important consequences of conviction and trying to minimize them. State v. A.N.J., 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010).

Because plea bargains are “central to the administration of the criminal justice system,” defense counsel has “responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” Frye, 132 S. Ct. at 1407. “Anything less” than effective representation during plea bargaining

“might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.” Id. at 1407-08.

b. A lawyer performs deficiently if he gives inaccurate immigration advice.

Immigration laws have imposed inexorably more stringent consequences upon non-citizens with felony convictions. Padilla v. Kentucky, — U.S. —, 130 S.Ct. 1473, 1478-80, 176 L.Ed.2d 284 (2010).

Congress expanded the deportable offenses, eliminated discretionary waivers, instituted rigorous enforcement, and made deportation “practically inevitable” upon conviction of a deportable crime. Id.<sup>2</sup>

Padilla set forth three basic rules of reasonable attorney performance predicated on prevailing professional norms and the legal realities of deportation as a penalty resulting from a criminal conviction: (1) if the immigration consequences are clear, the attorney must clearly and accurately explain those consequences; (2) unclear immigration consequences require general advice on the possibility of immigration consequences; and (3) the attorney must try to reduce known immigration consequences in the plea process. 130 S.Ct. at 1481, 1483, 1486.

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<sup>2</sup> Starting in the 1990s, Congress has “tightened the connections between the formerly separate criminal and immigration enforcement infrastructures,” thus ensuring swift transitions from conviction to deportation. M. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 Yale J. on Reg. 47, 72 (2010).

Bueno's conviction for conspiracy to deliver a controlled substance involves the same immigration statute that Padilla held was "easy," "succinct, clear and explicit" in its consequences for a non-citizen. Id. at 1483; see State v. Sandoval, 171 Wn.2d 163, 171, 249 P.3d 1015 (2011) ("Padilla itself is an example of when the deportation consequence is 'truly clear.'"). The governing immigration statute "specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." 130 S.Ct.at 1483.<sup>3</sup>

Just as significantly, Bueno's conviction also constitutes an aggravated felony. Aggravated felonies disqualify even longtime permanent residents from seeking discretionary waivers from deportation. Sandoval, 171 Wn.2d at 171 (citing 8 U.S.C. §1227(a)(2)(A)(iii)).<sup>4</sup> Conspiracy to deliver a controlled substance is an aggravated felony. See United States v. Fresnares-Torres, 235 F.3d 481, 482 (9th Cir. 2000); Matter of Davis, 20 I &N Dec. 536, 545 (BIA 1992). Talbott agreed this offense was an aggravated felony. 2RP 34.

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<sup>3</sup> Citing 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable").

<sup>4</sup> Any conviction for "illicit trafficking in a controlled substance . . . including a drug trafficking crime" is an aggravated felony. 8 U.S.C. § 1101(a)(43)(B). "[A]ny person convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii).

When the deportation consequences of a criminal conviction are clear and succinct, it constitutes deficient performance for counsel to provide his client “false assurance that his conviction would not result in his removal from this country.” Padilla, 130 S.Ct. at 1483. Padilla pled guilty to possessing a large quantity of marijuana. Under the pertinent immigration statute deportation was presumptively mandatory and automatic. Id. The trial court found that Padilla “was aware of the possibility of deportation.”<sup>5</sup> But his lawyer falsely, and unreasonably, told him that as a long-term legal resident he did not need to worry about being deported. 130 S.Ct. at 1483. There is a clear difference “between facing possible deportation and facing certain deportation,” like Padilla. I.N.S. v. St. Cyr, 33 U.S. 289, 325, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

A similar false assurance occurred in Sandoval, where the defendant pled guilty to a crime that was deportable as an aggravated felony. 171 Wn.2d at 171. Sandoval’s attorney told him that he “would not be immediately deported” because the plea would enable him to get out of jail. Id. at 167. Once out of jail, he could “retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty

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<sup>5</sup> Merits Brief of Petitioner at 12, available at: [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_07\\_08\\_08\\_651\\_Petitioner.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_651_Petitioner.authcheckdam.pdf) (last viewed Sept. 12, 2012).

plea.” Id. This advice was wrong, as there was no avenue to “ameliorate” deportation for an aggravated felony. Bueno relied on similarly incorrect and unreasonable advice.

c. Bueno received and relied on deficient immigration advice from his trial attorney.

As Padilla and Sandoval demonstrate, “[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty.” United States v. Bonilla, 637 F.3d 980, 984 (9th Cir. 2011) (emphasis in original); see also Ex Parte Tanklevskaya, 361 S.W.3d 86, 97 (Tex. App. 2011) (where defendant’s inadmissibility was “virtually mandatory,” it was deficient for counsel to tell client of mere possibility). Padilla “mandates that counsel’s performance be deemed deficient” where counsel told the accused deportation was possible “despite the presumptively mandatory nature of the applicable immigration provision.” Aguilar v. State, \_\_S.W.3d \_\_, 2012 WL 2783170, \*5 (Tex. App. 2012); see also State v. Martinez, 161 Wn.App. 436, 442, 253 P.3d 445, rev. denied, 172 Wn.2d 1011 (2011) (counsel’s discussion of possibility of deportation coupled with warnings in the guilty plea form were deficient because “deportation was certain”).

Cases decided before Padilla used similar reasoning. It “constitutes unreasonable attorney performance” when an attorney “misled Defendant into believing there were things that could be done to avoid deportation (when in fact there were none).” United States v. Couto, 311 F.3d 179, 187 (2d Cir. 2002). Likewise, “when a defendant’s guilty plea almost certainly will result in deportation, an attorney’s advice to the client that he or she ‘could’ or ‘might’ be deported would be misleading and thus deficient.” State v. Paredez, 136 N.M. 533, 538, 101 P.3d 799, 804 (2004).

Bueno’s attorney knew his legal permanent residency was “very important.” 2RP 21. His lawyer advised him he could stay in the country if he pled guilty and behaved. 2RP 17. “[W]e would then be asking for a pardon.” 2RP 17. “He told me that no, that I wouldn’t be deported” and “we would just wait and . . . we would then go and ask for a pardon.” 2RP 18; Id. at 21 (attorney advised Bueno, “if I pled guilty, that I would stay here, that they weren’t going to deport me”).

Bueno’s wife recalled the same advice. She said the attorney told them that after Bueno pled guilty, “all he had to do was be a good citizen, be responsible and not do anything wrong” and then “[i]mmigration cannot ever find that he had this conviction.” 2RP 26. The lawyer told

them that when his green card was almost expired, “we’re gonna ask for a pardon” to “waive the charges.” Id.

The trial attorney’s testimony was not materially different. Talbott said he told Bueno that pleading guilty was his best chance at avoiding deportation. 2RP 34. He admitted telling Bueno “to stay out of trouble until he might have a chance to erase the record.” CP 43.

Talbott said he told Bueno, “If you behave yourself, keep your nose clean, don’t get put in jail for anything, you could go on for years and years and years without a problem.” 2RP 34. At the 2010 hearing, Talbott still believed “staying clean” would avoid deportation: he assumed the reason Bueno was facing removal was because he had not stayed out of trouble, even though this assumption was wrong. 2RP 36; CP 43.

The immigration authorities’ aggressive efforts to remove deportable non-citizens were in full effect when Bueno pled guilty. In 2003, the government had formally issued a plan to “remove all removable aliens” by 2012.<sup>6</sup> Anyone whose criminal conviction rendered them subject to mandatory deportation could expect deportation proceedings to occur. 8 U.S.C. § 1226(c)(1)(B) (imposing mandatory detention if convicted of a controlled substance offense or aggravated felony). It was

unreasonable to advise Bueno that he could live in the United States for “years and years and years” if he simply “kept his nose clean” when virtually mandatory deportation was “truly clear.”

Padilla commands that “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” 130 S.Ct. at 1483. Rather than give clear, correct advice to Bueno, the trial attorney falsely assured Bueno that the avenue of relief was to behave. By failing to inform Bueno that his subsequent removal was virtually certain and presumptively mandatory, trial counsel’s performance was deficient.

d. Bueno’s attorney also did not perform competently by failing to seek available plea alternatives.

Counsel’s core function under the Sixth Amendment includes the “overarching duty to advocate the defendant’s cause.” Strickland, 466 U.S. at 688. The right to effective assistance of counsel includes “the negotiation of a plea bargain.” Padilla, 130 S.Ct. at 1486.

In Padilla, the Court explained that competent attorneys must possess enough knowledge to not only understand the possibility of “avoiding a conviction for an offense that automatically triggers the

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<sup>6</sup> Department of Homeland Security, “Endgame: Office of Detention and Removal Strategic Plan,” <http://www.fas.org/irp/agency/dhs/endgame.pdf>.

removal consequence,” but also to “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.” Padilla, 130 S.Ct. at 1486.

Padilla explained that the Sixth Amendment has long required attorneys to take available steps to mitigate immigration consequences stemming from a conviction. Id. at 1480 (citing Janvier v. United States, 793 F.2d 449, 455 (2nd Cir. 1986)). Professional standards mandate that a lawyer in a criminal case “has an obligation to pursue with the prosecutor and the court ‘immigration-safe’ dispositions.” Washington Defender Association (WDA) Standards for Indigent Defense, at 17.<sup>7</sup>

Bueno’s deportation was not inevitable. While conspiracy to commit a drug delivery falls into the mandatory deportation category, solicitation to deliver a controlled substance under RCW 9A.28.030 does not qualify as an aggravated felony or even a deportable offense. See Coronado-Durazo v. INS, 123 F.3d 1322, 1325-26 (9th Cir. 1997) (conviction under general solicitation statute is not categorized by underlying crime solicited); see also Leyva-Licea v. INS, 187 F.3d 1147,

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<sup>7</sup> Available at: <http://www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense> (last visited Sept. 12, 2012). See A.N.J., 168 Wn.2d at 110 (citing WDA Standards as “useful” in determining professional norms).

1150 (9th Cir. 1999) (solicitation involving controlled substance is not controlled substance offense). Washington does not treat solicitation to commit a controlled substance offense as a “drug offense” because it is not part of the Controlled Substances Act. In re Hopkins, 137 Wn.2d 897, 903, 976 P.2d 616 (1999).

Alternatively, simple possession of a controlled substance is not treated as an aggravated felony. Lopez v Gonzales, 549 U.S 47, 53, 60, 127 S. Ct. 625, 166 L.Ed.2d 462 (2006). If he pled guilty to possession, he could have sought a discretionary waiver. 8 U.S.C. § 1229(a)(1).

A person may plead guilty to a crime that is a legal fiction for purpose of a negotiated settlement. In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984). The parties may craft a plea to a substituted offense as long as there is a factual basis for the crime originally charged and the defendant enters the plea in a knowing and intelligent manner. Id. at 270.

Bueno’s trial attorney told him his only choice was between a trial or to plead guilty to a crime mandating deportation. 2RP 33-34. But “informed consideration” of a plea bargain includes more than whether to accept a deportability-triggering plea, “particularly where it may be

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See also American Bar Association (ABA) Standards on Plea of Guilty, 14.3-2(f) (3d ed. 1999) (responsibility of defense counsel to “advise the defendant of the alternatives available” to aid the defendant “in reaching a decision” to enter a plea).

possible for a client to plead to alternative charges resulting in a range of lesser adverse immigration consequences.” L. Nash, Considering the Scope of Advisal Duties Under Padilla, 33 Cardozo L. Rev. 549, 574 (2011). It was unreasonable for Bueno’s trial attorney, who said he specialized in immigration law, to pursue only a plea to a categorically removable offense. Padilla, 130 S.Ct. at 1479.

- e. The trial court improperly focused on the plea agreement without considering the actual misadvice Bueno received.

In the context of ineffective assistance of counsel, this Court reviews the judge’s findings *de novo*. A.N.J., 168 Wn.2d at 109. Bueno asked to withdraw his plea based on ineffective assistance of counsel, but the judge’s findings do not even mention, much less evaluate, the standards of attorney performance. CP 78-80. Instead, the court focused on the due process notion of whether Bueno understood the “parameters of the plea agreement.” CP 78. The court disbelieved that Bueno “did not understand the plea statement [and] was ignorant of the immigration consequences of the plea.” CP 78-79.

“[O]rdinary due process analysis does not apply” to the question of ineffective assistance of counsel. Sandoval, 171 Wn.2d at 169. Padilla, Frye, and Lafler demonstrate that the attorney-client relationship dictates the knowing, intelligent and voluntary nature of a plea. Bueno was told

that his plea “could” have “immigration consequences,” but not that he would be certainly deportable without an opportunity for relief. 1RP 4. This Court ruled that “the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave.” Sandoval, 171 Wn.2d at 173; see United States v. Akinsade, 686 F.3d 248, 253 (4th Cir. 2012) (court’s general warning “that a guilty plea could lead to deportation” is insufficient to correct counsel’s misadvice when deportation was a legally mandated consequence of the conviction).

Bueno, Bueno’s wife, and Talbott agreed that Talbott told Bueno that his best hope in avoiding deportation was by behaving himself, waiting until his legal resident permit needed renewal, and asking to erase or pardon the conviction. The court acknowledged this testimony, CP 76-78, but did not use it to guide its legal conclusion that Bueno was “cognizant” of the plea and its consequences. CP 78-80.

The court’s erroneous and incomplete findings misrepresent the testimony. It implied that Talbott “told” Bueno he needed to wait so “the law changed in some way to allow for a waiver of his conviction.” CP 78 (Finding of Fact 12). But Talbott said only, “I thought” maybe “something would come up” such as a change in the law. 2RP 38. Talbott never clearly told Bueno he needed an extraordinary change in the law. The prevailing

legal norm was increasingly rigorous immigration enforcement, with mandatory detention and swift deportation for non-citizens convicted of aggravated felonies or controlled substance offenses. Bueno's attorney unreasonably advised Bueno, contrary to prevailing professional norms, and the trial court analyzed these errors under the wrong legal framework.

**2. Bueno would not have entered his guilty plea if he understood its inevitable consequence was mandatory deportation**

A defendant sufficiently proves he was prejudiced by his attorney's unreasonable advice if it would have been rational for him to reject he plea bargain under the circumstances. Sandoval, 171 Wn.2d at 174-75. "This standard of proof is 'somewhat lower' than the common 'preponderance of the evidence' standard." Id. at 175 (citing Strickland, 466 U.S. at 694).

In Sandoval, the defendant's plea bargain saved him years of prison if convicted at trial, but it required his deportation. Id. This Court held that it would not have been unreasonable for Sandoval to go to trial, and risk a long prison sentence, when viewed against the seriousness of being permanently banned from the United States due to his plea. Id.; see also United States v. Orocio, 645 F.3d 630, 645 (3d Cir. 2011) (when the guilty plea has "presumptively mandatory" removal consequences "it is not at all unreasonable" to "risk a ten-year sentence and guaranteed

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removal, but with the chance of acquittal and the right to remain in the United States”).

Bueno’s attorney knew he was most concerned about his ability to remain lawfully in the United States. 2RP 13, 21. His guilty plea essentially guaranteed he would be barred from this country. If Bueno lost at trial, his standard range sentence would be 12+ to 20 months in prison.<sup>8</sup> He had no criminal history, the crime was not extraordinary, and he faced little more than one year in prison. He had a colorable defense. 2RP 35-36. The risk of forcing the State to prove his purposeful involvement in the drug sale would not have been unreasonable when mandatory deportation followed his plea. Sandoval, 171 Wn.2d at 175. He was prejudiced by the his lawyer’s misadvice.

Furthermore, an attorney's failure to properly advise a client of immigration consequences may be a basis for equitable tolling. See State v. Littlefair, 112 Wn.App. 749, 757-58, 51 P.3d 116 (2002). However, Littlefair refers to a disfavored standard equitable tolling, which is "too rigid," if it requires "bad faith [and] dishonesty." Holland v. Florida, 60 U.S. \_\_\_, 130 S.Ct. 2549, 2563, 17 L.Ed.2d 130 (2010). "The flexibility inherent in equitable procedure" requires "courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices." Id. (internal citation omitted).

Bueno is does not speak or read English. He relied on his lawyer's advice that if he behaved, officials would not try to deport him. This advice was wrong and unreasonable.

Once he learned he would be deported based on his conviction, he filed a motion to withdraw his plea. Bueno acted diligently upon receiving notice that his conviction alone would result in deportation. These extraordinary and unfair circumstances merit relief in the interest of justice.

- b. The substantial change in the law from *Padilla* should govern Bueno's right to relief.

In In re Pers. Restraint of Jagana, \_ Wn.App. \_, 282 P.3d 1153, 1160-66 (2012), the Court of Appeals persuasively reasoned that Padilla brought a change in the law that should be applied to petitioners who relied on inadequate immigration advice under RCW 10.73.100(6) (text attached as App. C). Padilla “superceded” prior case law explaining how counsel’s advice affects a plea. Sandoval, 171 Wn.2d at 170 n.1. Padilla did not create a new rule, as lawyers have long been required to give competent advice to their clients, but it explained counsel’s obligations to an accused person who is a non-citizen. Orocio, 645 F.3d at 638. Padilla demonstrates that Bueno received ineffective assistance of counsel and should be permitted to withdraw his plea.

D. CONCLUSION.

Mr. Bueno respectfully requests this Court permit him to withdraw his guilty plea.

DATED this 14th day of September 2012.

Respectfully submitted,

/s/ Nancy P. Collins

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**APPENDIX A**  
(Scoring Worksheet, Adult Sentencing Manual)

**DELIVER OR POSSESS WITH INTENT TO DELIVER METHAMPHETAMINE**

(RCW 69.50.401(2)(b))

**CLASS B DRUG - FIRST CONVICTION OR NOT IN A PROTECTED ZONE**

*For offenses occurring after June 30, 2003 (RCW 9.94A.517)*

*(If sexual motivation finding/verdict, use form on page III-15)*

**I. OFFENDER SCORING (RCW 9.94A.525(12))**

**ADULT HISTORY:**

Enter number of felony drug convictions (as defined by RCW 9.94A.030)\* ..... \_\_\_\_\_ x 1 = \_\_\_\_\_  
 Enter number of other felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of felony drug dispositions (as defined by RCW 9.94A.030)\* ..... \_\_\_\_\_ x ½ = \_\_\_\_\_  
 Enter number of serious violent and violent felony dispositions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_  
 Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x ½ = \_\_\_\_\_

**OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)**

Enter number of other felony drug convictions (as defined by RCW 9.94A.030)\* ..... \_\_\_\_\_ x 1 = \_\_\_\_\_  
 Enter number of other felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the Offender Score  
 (Round down to the nearest whole number)

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**II. DRUG GRID SENTENCE RANGESS**

Offender Score	0 to 2	3 to 5	6 to 9+
Standard Range Level II	12+ to 20 months	20+ to 60 months	60+ to 120 months

- A. For current offenses occurring after June 30, 2002 but before July 1, 2003, please reference the 2002 sentencing manual for applicable scoring rules. For current offenses occurring prior to July 1, 2002, please reference the 2001 sentencing manual.
- B. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-6 or III-7 to calculate the enhanced sentence.
- C. Add 18 months to the entire standard sentence range with a finding that the offense was committed in a county jail or state correctional facility (RCW 9.94A.510).
- D. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 9 to 12 months, or to the period of earned release, whichever is longer (RCW 9.94A.715)\*\*.
- E. For sentence ranges for anticipatory drug offenses, see page III-269.
- F. Statutory maximum sentence for first conviction under RCW 69.50 is 120 months (ten years) (RCW 69.50.401).

\*The Washington State Court of Appeals ruled that although solicitations to commit violations of 69.50 are not considered drug offenses as defined in 9.94A.030, they do score as a drug offense. See *State v. Howell*, 102 Wn. App. 288, 6 P.3d 1201 (2000).

\*\*The Supreme Court clarified that solicitations to commit violations of the Uniform Controlled Substances Act (RCW 69.50) are not "drug offenses" and are not subject to the community custody requirement for drug offenses, under RCW 9.94A.715. See *In re Hopkins*, 137 Wn.2d 897 (1999).

**III. SENTENCING OPTIONS - See page III-268**

- *The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules.*

**APPENDIX B**  
(RCW 10.73.110)

RCW 10.73.110

10.73.110. Collateral attack--One year time limit--Duty of court to advise defendant

At the time judgment and sentence is pronounced in a criminal case, the court shall advise the defendant of the time limit specified in RCW 10.73.090 and 10.73.100.

**APPENDIX C**  
(RCW 10.73.100)

West's Revised Code of Washington Annotated  
Title 10. Criminal Procedure (Refs & Annos)  
Chapter 10.73. Criminal Appeals (Refs & Annos)

West's RCWA 10.73.100

10.73.100. Collateral attack--When one year limit not applicable

Currentness

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

**Credits**

[1989 c 395 § 2.]

Notes of Decisions (82)

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 87297-0
	)	
SIGIFREDO GARCIA BUENO,	)	
	)	
PETITIONER.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/>	JAMES HAGARTY, DPA	<input checked="" type="checkbox"/>	U.S. MAIL
	YAKIMA CO PROSECUTOR'S OFFICE	<input type="checkbox"/>	HAND DELIVERY
	128 N 2 <sup>ND</sup> STREET, ROOM 211	<input type="checkbox"/>	_____
	YAKIMA, WA 98901-2639		
<input checked="" type="checkbox"/>	DAVID BRIAN TREFRY	<input checked="" type="checkbox"/>	U.S. MAIL
	ATTORNEY AT LAW	<input type="checkbox"/>	HAND DELIVERY
	PO BOX 4846	<input type="checkbox"/>	_____
	SPOKANE, WA 99220-0846		

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2012.

X \_\_\_\_\_ 

## OFFICE RECEPTIONIST, CLERK

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**To:** Maria Riley  
**Subject:** RE: 872970-BUENO-SUPPLEMENTAL BRIEF

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** Maria Riley [<mailto:maria@washapp.org>]  
**Sent:** Monday, September 24, 2012 11:28 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** 'James.Hagarty@co.yakima.wa.us'; 'David B. Trefry'  
**Subject:** 872970-BUENO-SUPPLEMENTAL BRIEF

**State v. Sigifredo Bueno**  
**No. 87297-0**

Please accept the attached documents for filing in the above-subject case:

**PETITIONER'S SUPPLEMENTAL BRIEF**

Nancy P. Collins - WSBA 28806  
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By

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