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No. 98026-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-MENDOZA,

Petitioner.

**BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON, WASHINGTON DEFENDER
ASSOCIATION AND NORTHWEST IMMIGRANT RIGHTS
PROJECT AS AMICI CURIAE**

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RIGHTS PROJECT

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The statement of identity and interest of amici are set forth in the Motion for Leave to File that accompanies this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Effective assistance of counsel is guaranteed by both federal and Washington state constitutions.¹ In *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the United States Supreme Court found that this Sixth Amendment right requires criminal defendants to be advised of the immigration consequences of a guilty plea. The Court looked to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to establish the test for whether the right to assistance of counsel was violated. Washington State has also adopted a statute, RCW 10.40.200,² which requires that criminal defendants be advised of

¹ U.S. Const. amend. VI; Wn. Const. art. 1, § 22; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Mierz*, 127 Wn. 2d 460, 471 (1995).

² RCW 10.40.200. Deportation of aliens upon conviction-Advisement-Legislative intent.

(1) The legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court.

(2) Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the

the immigration consequences of a guilty plea. Though Washington's statutory right and the federal constitutional right intersect on the fundamental issue of requiring notice to criminal defendants of the immigration consequences of a guilty plea, the two are distinct bases for protection.

After *Padilla*, this Court, in *In re Personal Restraint of Tsai*, 183 Wn. 2d 91, 351 P.2d 3d 138 (2015), held that the *Padilla* duty for counsel to affirmatively and accurately advise a defendant on immigration consequences has been part of RCW 10.40.200 from its inception, and that *Padilla* had effected a significant change in Washington law because prior Washington cases interpreting RCW 10.40.200 had never held that a violation of that statute could be the basis for a Sixth Amendment claim of ineffective assistance of counsel. Because *Padilla* represented a significant change in state law, it qualified for an exception to the one-year time bar for collateral attack on a guilty plea under RCW 10.73.100(6).

laws of the United States. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement. If, after September 1, 1983, the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty. Absent a written acknowledgment by the defendant of the advisement required by this subsection, the defendant shall be presumed not to have received the required advisement.

(3) With respect to pleas accepted prior to September 1, 1983, it is not the intent of the legislature that a defendant's failure to receive the advisement required by subsection (2) of this section should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid.

In this petition,³ Petitioner, Mr. Garcia-Mendoza, asserted separate claims: a constitutional claim of ineffective assistance of counsel under the Sixth Amendment, and a statutory claim for failure to give the notice required under RCW 10.40.200. The Court of Appeals found that under *Tsai*, Petitioner’s constitutional claim was not time-barred, but that his statutory claim was, as *Tsai* had not affected a “significant change” in Washington law interpreting RCW 10.40.200 that qualified his petition for the exception under RCW 10.73.100(6).

This brief shows that Mr. Garcia-Mendoza’s statutory claim under RCW 10.40.200 is not time-barred because *Tsai*, applying *Padilla*, did effect a significant change in Washington law interpreting the statute. Further, it explains that under the plain language of RCW 10.40.200, Mr. Garcia-Mendoza is not required to show that he was prejudiced under the *Strickland* constitutional test and is entitled to the statutory remedies of vacatur and withdrawal of his guilty plea, because he was given only boilerplate warnings and his conviction may have the immigration consequences set out in the statute.

³ No. 79621-6, 2019 WL 6492486 (Wn. App. Dec. 2, 2019) (unpublished opinion).

ARGUMENT

- I. In *Tsai*, this Court recognized that *Padilla* significantly changed Washington courts' interpretation of RCW 10.40.200's duty to advise defendants of the immigration consequences of their guilty pleas for constitutional and statutory claims.**
- A. In RCW 10.40.200, the Washington legislature identified the problem created by noncitizen defendants pleading guilty to crimes without advice regarding the immigration consequences of their pleas, and set forth statutory remedies to address the problem.**

In 1983—before the Supreme Court's opinion in *Strickland v. Washington*, and when Washington courts rejected the notion that a defendant needed to be advised of the “collateral consequences” of a guilty plea⁴—the Washington legislature sought to ensure that criminal defendants were aware of the immigration consequences of entering a guilty plea. The legislature declared that noncitizen defendants were pleading guilty to crimes “without ... knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”⁵ The legislature enacted RCW 10.40.200 in order to “promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea,”⁶ and the statute mandates that warning⁷. Where defendants rebut the

⁴ See, e.g., *State v. Cameron*, 30 Wn. App. 229, 233 (1981) (“[A] defendant need not be advised of the collateral consequences of his plea . . .”).

⁵ RCW 10.40.200(1).

⁶ *Id.*

⁷ RCW 10.40.200(2).

presumption of receiving requisite immigration consequences advice and establish that a conviction “may have” an enumerated consequence, the court is required to “vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty.”⁸

In enacting RCW 10.40.200, our legislature recognized what the United States Supreme Court articulated 27 years later: “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”⁹ Commentators have since concurred that for noncitizen defendants, deportation resulting from a guilty plea “may constitute a harsher sanction than criminal punishment,”¹⁰ and it has “a social ripple effect” to immigrant families and communities.¹¹ And, because there are often no grounds later for noncitizens to contest the basis for their removal or overcome bars to obtaining lawful status or citizenship based on certain crimes, “accepting a guilty plea on the basis of deficient immigration counsel can frequently cause an undocumented defendant to suffer irreversible legal prejudice with respect to his or her immigration status.”¹²

⁸ *Id.*

⁹ *Padilla*, 559 U.S. at 364.

¹⁰ *States’ Commandeered Convictions: Why States Should Get a Veto Over Crime-Based Deportation*, 132 Harv. L. Rev. 2322, 2333 (2019).

¹¹ Evelyn Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 Harv. Lat. L. Rev. 47, 48 (2010).

¹² Daniel A. Horwitz, *Actually, Padilla Does Apply to Undocumented Defendants*, 19 Harv. Lat. L. Rev. 1, 8 (2016).

Washington’s statute was enacted a year before the United States Supreme Court set the general constitutional standard for effective assistance of counsel in *Strickland*, and decades before the standards set forth in *Strickland* were recognized in the context of immigration consequences in *Padilla*. “[W]hen the legislature enacted RCW 10.40.200, it intended to grant a *statutory* right to be advised of deportation consequences that would supplement whatever *constitutional* right a defendant might (or might not) have.”¹³ This Court should hold that the statute means what it says: a defendant “shall” be permitted to withdraw his plea on a showing that the failure to provide accurate immigration advice “may have” an enumerated immigration consequence such as deportation.

B. In *Sandoval* and *Tsai*, this Court found that RCW 10.40.200’s statutory duty to advise of immigration consequences went beyond form notice language in plea agreements and encompassed counsel’s constitutional duty to advise of such consequences outlined in *Padilla*.

Strickland sets out the requirements for invalidating a conviction based on violation of the constitutional right to effective assistance of counsel. It requires a bifurcated analysis: first, the performance of counsel must have been objectively unreasonable, and second, the defective performance must have resulted in prejudice to the defendant. *Padilla* held that defense counsel’s duty to provide effective assistance to defendants

¹³ *State v. Littlefair*, 112 Wn. App. 749, 767, 51 P.3d 116 (2002) (emphasis in original).

extended to advice regarding the immigration consequences of a guilty plea and was, therefore, subject to the *Strickland* test.¹⁴

In *State v. Sandoval*, 171 Wn. 2d 163, 249 P.3d 1015 (2011), this Court found, and reiterated in *Tsai*, the boilerplate statutory warning codified in the standard plea form “is not, itself, the required advice; it merely creates a rebuttable presumption the defendant has been properly advised.”¹⁵ It “cannot save” deficient performance.¹⁶ In *Tsai*, this Court concluded that, with RCW 10.40.200, the “legislature did what *Padilla* ultimately did in 2010 ... declaring that a noncitizen defendant must be warned about immigration consequences before pleading guilty.”¹⁷ The Court reasoned that “RCW 10.40.200’s plain language gives noncitizen defendants the unequivocal right to advice regarding immigration consequences and necessarily imposes a correlative duty on defense counsel to ensure that advice is provided;” therefore, counsel’s failure to research or apply the statute could amount to constitutionally deficient performance, subject to *Strickland*.¹⁸

The Court recognized that such duty had existed since RCW 10.40.200 was enacted in 1983, prior to *Strickland*. This Court concluded that *Padilla* had affected a “significant change” in Washington law within

¹⁴ See generally *Padilla*, 559 U.S. 356; see also *State v. Sandoval*, 171 Wn. 2d at 170 (“*Padilla* describes the advice that a constitutionally competent defense attorney is required to give about immigration consequences during the plea process.”).

¹⁵ See *Tsai*, 183 Wn. 2d at 101 (citing *Sandoval*, 171 Wn.2d at 173).

¹⁶ *Sandoval*, 171 Wn. 2d at 173.

¹⁷ *Tsai*, 183 Wn. 2d at 101.

¹⁸ *Id.* (citations omitted).

the meaning of RCW 10.73.100(6) because for decades, Washington appellate cases had misinterpreted RCW 10.40.200. Before *Tsai*, Washington courts routinely denied Sixth Amendment claims for relief from a conviction where defendants received no more than plea agreements containing the boilerplate warnings drafted after enactment of RCW 10.40.200.¹⁹

In *Tsai*, this Court wove counsel’s constitutional duty to provide advice regarding immigration consequences into the statutory duty under RCW 10.40.200. After *Tsai*, Washington courts evaluating whether an attorney complied with RCW 10.40.200 must ask whether the attorney provided accurate, case-specific advice regarding the immigration consequences of a guilty plea.²⁰ Thus, *Tsai* was a departure from prior cases interpreting the statute.

C. *Tsai* was also a significant change from prior Washington cases involving statutory claims under RCW 10.40.200.

In rejecting Mr. Garcia-Mendoza’s petition, the Washington Court of Appeals stated: “Nothing in *Tsai* involved a change to our courts’ interpretation of RCW 10.40.200.”²¹ The Court of Appeals reasoned that, as *Tsai* involved only a *constitutional* claim of ineffective assistance of counsel, its interpretation of RCW 10.40.200 only changed the law with

¹⁹ See, e.g., *State v. Martinez-Leon*, 174 Wn. App. 753, 300 P.3d 481 (2013); *In re Personal Restraint of Yim*, 139 Wn. 2d 581, 989 P.2d 512 (1999); *State v. Jamison*, 105 Wn. App. 572, 20 P.3d 1010 (2001).

²⁰ *Tsai*, 183 Wn. 2d at 106.

²¹ *In re Personal Restraint of Alejandro Garcia-Mendoza*, No. 79621-6, 2019 WL 6492486 at *4 (Ct. App. Dec. 2, 2019).

respect to such constitutional claims.²² Yet, as explained below, it is clear from *Tsai* that this Court intended only one interpretation of the statute for both constitutional and statutory claims.

Before *Tsai*, Washington cases based on failure to comply with RCW 10.40.200 turned on the plea agreement language required by the statute and whether it was negated, either by being crossed out or by counsel misinforming defendant that it did not apply. Courts interpreted RCW 10.40.200(2)'s requirement that a defendant be "advised as required by this section" to mean receive the boilerplate advisement. The cases expressly did not turn on whether counsel met the constitutional performance standard outlined in *Strickland* and *Padilla*.

In *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), the defendant signed a plea agreement in which the form language regarding immigration consequences had been crossed out as inapplicable. The court considered the defendant's statutory and constitutional claims to be separate and independent and, since the statute had clearly been violated by the effective deletion of the relevant language, held that he was entitled to relief without further examining the performance of his counsel. Similarly, in *State v. Holley*, 75 Wn. App. 191, 876 P.2d 973 (1994), the court found that there was insufficient evidence whether defendant's counsel had indicated that the statutory notice language was inapplicable to him and remanded for a hearing on the matter, opining in (what this

²² *Id.*

Court later identified as) dicta that the case did not present constitutional issues.²³

Tsai held that these readings of the statute’s plain terms were wrong and that the statute mandates a more robust duty to investigate and advise. The Court held that “as required by this section” means—and has always meant—case-specific immigration advice: the test set out in *Padilla* defined whether counsel had effectively met its statutory obligation.²⁴ In *In re Personal Restraint of Colbert*, 186 Wn. 2d 614, 380 P.3d 504 (2016), this Court reiterated that the *Tsai* holding was based on RCW 10.40.200’s statutory right to effective advice of counsel on immigration consequences of a guilty plea, which *Padilla* ultimately recognized with respect to Sixth Amendment claims.²⁵ There is nothing in *Tsai* or *Colbert* to suggest that this Court intended RCW 10.40.200 to be interpreted differently in statutory rather than constitutional cases.

Pursuant to pre-*Tsai* case law, criminal defendants can still claim a violation of RCW 10.40.200 if they can establish that they did not receive the statutorily required notice of immigration consequences as in *Littlefair* and *Holley*. But after *Tsai*, a defendant can also show that RCW 10.40.200 was violated if he can establish that his counsel did not research or provide case-specific advice regarding the immigration consequences of his plea.

²³ See *Tsai* 183 Wn. 2d at 106.

²⁴ *Id.* at 107.

²⁵ *Colbert*, 186 Wn. 2d at 622.

As in *Tsai*, this is a significant change in the interpretation of RCW 10.40.200 for such statutory claims.

II. *Strickland's* prejudice standard does not govern claims for redress for violations of RCW 10.40.200(2). The statutory language makes clear defendants need only show their conviction may have an enumerated consequence.

RCW 10.40.200(2) sets out both the duty to advise a defendant of the immigration consequences of a guilty plea and the remedy if that advice is not given. “If . . . the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty *may have* the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant’s motion *shall* vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty.”²⁶ *Tsai* held that “as required by this section” means case-specific immigration advice. But *Tsai* did not change any other parts of RCW 10.40.200.

As the plain language of the statute makes clear, if a defendant did not receive the requisite advice and can show that their conviction may result in any of the listed consequences, the defendant is entitled to the statutory relief, without more. No further burden is placed on the defendant.

²⁶ RCW 10.40.200(2) (emphasis added).

A. The legislative intent to mandate a remedy for violation of RCW 10.40.200 is plain from its use of the verb “shall”.

In 1983, deportation had already been recognized for decades as something that “may result in the loss of all that makes life worth living.”²⁷ Thus, given the severity and disproportionate nature of immigration consequences in 1983 no less than today, it is telling that the legislature saw fit to ensure a low threshold for relief. Deficient performance triggers relief where any of the enumerated consequences is implicated. It is also telling that they included mandatory remedies. Breach of RCW 10.40.200, with use of the verb “shall,” the plain meaning of which is that the action is mandatory, triggers the remedies of vacatur and withdrawal of a guilty plea without further requirements.

RCW 9.96.060 is another criminal statute that uses “shall” when requiring specific results. That statute, which governs vacating the conviction of misdemeanor or gross misdemeanor offenses, states “once the court vacates a record of conviction under this section, the person *shall* be released from all penalties and disabilities resulting from the offense and the fact that the person has been convicted of the offense *shall* not be included in the person’s criminal history for purposes of determining a sentence in any subsequent conviction.”²⁸

²⁷ *Bridges v. Wixon*, 326 U.S. 135, 147, 65 S.Ct. 1443, 89 L. Ed. 2103 (1945) (internal quotations omitted) (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S. Ct. 492, 495, 66 L. Ed. 938 (1922)).

²⁸ RCW 9.96.060(6)(a) (emphasis added).

As this Court recently reiterated: “If the meaning of a statute is plain on its face, we ‘give effect to that plain meaning as an expression of legislative intent’.”²⁹

B. Requiring defendants who received critically insufficient advice to meet *Strickland*’s higher prejudice threshold contravenes the plain language of RCW 10.40.200 and would be contrary to legislative intent.

The requirement that a defendant establish prejudice arising from ineffective assistance of counsel applies to constitutional claims under the Sixth Amendment, as set out in the second half of the two-part *Strickland* test.³⁰ *Padilla* primarily addressed the performance aspect of the *Strickland* test.³¹ The Court explained, however, that “whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof.”³² That would require him to “convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”³³

The Washington legislature enacted RCW 10.40.200 prior to *Strickland*; therefore, the legislature could not have intended to incorporate the *Strickland* prejudice standard into the statute. Rather, they created their own statutory remedy of vacatur of the judgment and

²⁹ Interpreting other aspects of RCW 9.96.060 in *State v. Haggard*, 195 Wn. 2d 544, 548, 461 P.3d 1159 (2020) (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn. 2d 1, 9-10 (2002)).

³⁰ 466 U. S. at 691-96. This Court applied the prejudice prong of the *Strickland* test in *Sandoval*, 171 Wn. 2d at 174-75.

³¹ 559 U.S. at 374.

³² *Id.*

³³ *Id.* at 372.

permission to withdraw the guilty plea, triggered only by a showing that the statutory advice was not given and the resulting conviction “may have” the “special consequences” listed in the statute. The legislature was undoubtedly aware of cases decided by the Washington State Supreme Court and other Washington courts, requiring that ineffective assistance of counsel had to be prejudicial to provide grounds for relief under the Sixth Amendment,³⁴ yet they declined to include an express prejudice test in RCW 10.40.200. Instead, a showing that the conviction may have the special immigration consequences listed in the statute is sufficient prejudice under the statute.

C. *Littlefair* correctly held that the statutory remedies of vacatur and permission to change a guilty plea apply automatically once a defendant shows that he did not receive the statutorily required advice, without any inquiry into whether he was prejudiced by that failure.

In *Littlefair*, the defendant asserted claims under both RCW 10.40.200 and the Sixth Amendment. The court of appeals closely analyzed the language of RCW 10.40.200 and the history of the statute.³⁵ The court concluded that the defendant had not been advised of the immigration consequences of his guilty plea as required by the statute, and

³⁴ See e.g., *State v. Myers*, 86 Wn. 2d 419, 424, 545 P.2d 538 (1976) (“it is well established, however, that there must be some prejudice to a defendant before a denial of the effective assistance of counsel based on joint representation will be found,” (Citations omitted.); *State v. Kennedy*, 8 Wn. App. 633, 638, 508 P.2d 1386 (1973) (“We do not find even a possibility that the defendant may have been actually prejudiced.”)

³⁵ The court identified the statute as a legislative response to *State v. Malik*, 37 Wn. App. 414, 680 P.2d 770, review denied, 102 Wn.2d 1023 (1984), where a Pakistani defendant sought to withdraw his guilty plea because he had not known it would subject him to deportation. 112 Wn. App. At 766, 51 P.2d at 124, 125.

held that he was entitled to the statutory relief.³⁶ The court stated: “Our conclusion is not affected by whether Littlefair had or lacked a constitutional right to be advised of the deportation consequences of his plea. The legislature can create statutory rights not found in the constitution and it did that when it enacted RCW 10.40.200.”³⁷

According to the court, the Washington statutory right “would supplement whatever constitutional right a defendant might (or might not) have.”³⁸ In keeping with its focus on the express language of RCW 10.40.200, the court did not address the concept of prejudice, much less require that the defendant demonstrate prejudice in order to be entitled to the statutory relief. Instead it vacated his plea and sentence and remanded the case for further action.³⁹

D. Recognizing that RCW 10.40.200 does not require a showing of prejudice and may, therefore, be more protective of defendants than the Sixth Amendment right to effective assistance of counsel is not inconsistent with either *Tsai* or *Padilla*.

In *Tsai*, neither defendant claimed that their failure to receive advice regarding the immigration consequences of their guilty plea was a violation of RCW 10.40.200. They argued, rather, that counsel’s failure constituted ineffective assistance of counsel under the Sixth Amendment. This Court found that the right to advice about immigration consequences

³⁶ Because the statutory claim was dispositive, the court did not address Littlefair’s constitutional claims. 112 Wn. App. at 763, 51 P.3d at 123.

³⁷ *Id.* at 766 (citations omitted).

³⁸ *Id.* at 767.

³⁹ *Id.* at 769.

under RCW 10.40.200 was co-extensive with the constitutional right to receive such advice set out in *Padilla*.⁴⁰

In so doing, this Court, like *Padilla*, addressed the performance aspect of the two-part *Strickland* test, linking it to the performance language in RCW 10.40.200. However, there is no similar language in RCW 10.40.200 that suggests or links to a prejudice requirement other than that the defendant show that conviction of the crime to which she pleaded guilty would subject her to the immigration consequences set out in the statute. Although this Court does make reference to the prejudice leg of the *Strickland* test in *Tsai*,⁴¹ such a reference is appropriate to the constitutional claim for relief that the Court had before it.

But there is no reason to refer to the prejudice prong of the *Strickland* test in the case of a statutory claim under RCW 10.40.200. Indeed, doing so would contravene the legislature's intent to create its own mandatory remedy that does not require a showing of *Strickland* prejudice and may, in limited cases, be more protective of defendants who were not advised of immigration consequences. As the Court of Appeals recognized in *Littlefair*, holding that RCW 10.40.200 does not require a showing of prejudice is entirely consistent with Sixth Amendment case law, as the

⁴⁰ 183 Wn. 2d at 101-02.

⁴¹ *Id.* at 99 (“Where that deficiency deprives the defendant of fair proceedings, the defendant has suffered *prejudice* Unreliable results caused by defense counsel’s *prejudicially* deficient performance are constitutionally intolerable.”) (emphasis added); *Id.* at 102, n.2 (“And of course, even if deficient, counsel’s performance is not constitutionally ineffective unless it is also *prejudicial*.”) (emphasis added; citations omitted).

statutory right supplements “whatever constitutional rights a defendant might (or might not) have’ .⁴²

E. Application of *Strickland*’s prejudice standard guarantees unwarranted, unjust immigration consequences for a limited cohort of noncitizens and their families.

Padilla’s recognition of a noncitizen defendant’s right to advice regarding immigration consequences, along with this Court’s *Sandoval* and *Tsai* decisions, unquestionably resulted in more just outcomes for noncitizen defendants whose lawyers failed to provide the requisite affirmative, accurate, individualized immigration advice. Unfortunately, there remain noncitizens, like Mr. Garcia-Mendoza, who continue to face deportation due to convictions obtained without having received more than a generic warning. *Strickland*’s prejudice standard bars post-conviction relief to those like Mr. Garcia-Mendoza who have multiple convictions obtained after receiving mere boilerplate warnings. It is also a barrier for undocumented people who became eligible for lawful immigration status after their conviction.⁴³

Conviction-related consequences often attach many years later, when paths to status have become available and the person has accrued equities such as a spouse and children, employment, a home. For example, the existing post-conviction framework excludes undocumented people

⁴² 112 Wn. App. at 767.

⁴³ See *In re Personal Restraint of Portillo*, Cause No. 04-1-00298-1 (Grant Cty. Sup. Ct. July 5, 2018) (denying defendant’s personal restraint petition because he was deportable at the time of the plea).

who would be eligible for Deferred Action for Childhood Arrivals (DACA),⁴⁴ or a waiver of deportation requiring ten years of presence in the United States,⁴⁵ or lawful status through marriage to a United States citizen,⁴⁶ if not for their pre-*Padilla* pleas that were entered based on a generic warning.⁴⁷ Mr. Garcia-Mendoza and other noncitizens who were given boilerplate warnings before *Padilla* faced an inherent prejudice in not being able to make an informed decision about their case, and yet have no recourse under the constitutional right. RCW 10.40.200 permits relief without being forced to meet *Strickland*'s demanding prejudice standard and is the most just outcome for noncitizens.

Padilla, *Sandoval* and *Tsai* did not open post-conviction floodgates and neither will allowing noncitizens who received mere boilerplate warnings to withdraw their guilty pleas under the statute. First, long before *Padilla*, the Washington defense bar took proactive steps to provide every noncitizen with accurate advice warning of immigration consequences. These practices are evidenced by the creation of the Washington Defender Association's Immigration Project in 1999.⁴⁸ Through the Immigration

⁴⁴ DACA was created in 2012 by executive order. U.S. Department of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁴⁵ See 8.U.S.C. § 1229(b).(Cancellation of removal and adjustment of status for certain nonpermanent residents).

⁴⁶ See 8 U.S.C § 1255(a) (adjustment of status); 8 U.S.C. § 1151(b)(2)(A)(i) (including spouses).

⁴⁷ See *In re Portillo*, Cause No. 04-1-00298-1.

⁴⁸ See Washington Defender Association website <https://defensenet.org/case-support/immigration-project/>.

Project, thousands of defenders provided noncitizen defendants the necessary immigration consequences advice to make informed decisions. Individuals who received accurate immigration advice will be unable to raise claims under RCW 10.40.200.

Second, many non-citizens who have been convicted of crimes have already been deported and have no avenues for returning to or obtaining status in the United States. These individuals will have nothing to gain from collaterally attacking their convictions under RCW 10.40.200 regardless of what advice they received and likely lack the ability to do so.

Third, some defendants who might be eligible for some form of relief under RCW 10.40.200 will not apply for it because they do not wish to go to trial and risk incarceration or other consequences. The State can re prosecute a defendant whose conviction is vacated under *Padilla* or RCW 10.40.200, and the risk of re prosecution is a strong disincentive for defendants who risk additional time in custody and potentially more severe immigration consequences if convicted after trial.

In short, holding that RCW 10.40.200 does not require the defendant to meet a prejudice standard absent from the statute will not open the floodgates of litigation, but instead provide a just outcome for a small number of deserving noncitizens. Many are connected to spouses, children, employers and communities who will undoubtedly be not only harmed, but devastated, if the petitioner is deported. Clarifying that a petitioner seeking relief under RCW 10.40.200 need only show that his conviction “may have” specific immigration consequences will effect the

intent of the legislature to provide noncitizen defendants with appropriate protections against the life-altering consequences of deportation.

CONCLUSION

For the foregoing reasons, justice requires this Court to hold that under the RCW 10.73.100(6) exception, Mr. Garcia-Mendoza's petition is not time-barred and that RCW 10.40.200 sets forth its own threshold requirement to establish requisite consequences of counsel's deficient performance, obviating reliance on *Strickland*'s prejudice test. The Court should then reverse the judgment of the Court of Appeals in this case, vacate the judgment against Mr. Garcia-Mendoza, and permit him to withdraw his guilty plea.

RESPECTFULLY SUBMITTED this 11th day of September,
2020.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on September 11, 2020, the forgoing document was electronically filed with the Washington State Supreme Court Portal, which will effect service of such filing on all attorneys of record.

Signed in Seattle, Washington, on September 11, 2020.

/s Carolyn S. Gilbert
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