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STATE OF WASHINGTON  
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NO. 98026-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-MENDOZA

Petitioner.

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ANSWER TO MOTION  
FOR DISCRETIONARY REVIEW

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## **I. IDENTITY OF RESPONDENT**

The State of Washington, respondent, asks that review be denied.

## **II. STATEMENT OF THE CASE**

On June 19, 2006, a Marysville Police officer arrested the petitioner, Alejandro Garcia-Mendoza, on an outstanding DOC escape warrant. In a search incident to arrest, the officer found a plastic container containing two baggies. Later tests showed that one baggie contained 1.9 grams of cocaine, while the other contained .3 grams of methamphetamine. The petitioner had two prior convictions for possession of a controlled substance. Affidavit of Probable Cause at 1-2.<sup>1</sup>

On September 19, 2006, an information was filed charging the petitioner with a single count of possession of cocaine. After being released on his own recognizance, he twice failed to appear for an omnibus hearing. On March 27, 2007, he pleaded guilty to the original charge. The plea statement included the standard warning that a guilty plea could be grounds for deportation, exclusion from admission, or denial of naturalization. Statement of

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<sup>1</sup> The documents referred to in this Answer are attached to the State's Motion to Transfer Motion for Relief from Judgment, which is Appendix F to the Motion for Discretionary Review.

Defendant on Plea of Guilty at 4 ¶ 6(r). In return for the plea, the prosecutor agreed not to file two bail jumping counts. Statement of Defendant on Plea of Guilty, Plea Agreement at 2 ¶ 8. The petitioner was sentenced on July 18, 2007.

Over 11 years later, on October 18, 2018, the petitioner filed a Motion to Withdraw Guilty Plea. He claimed that his trial counsel was ineffective for failing to advise him that the conviction rendered him ineligible for cancellation of removal. The State moved to transfer that motion to the Court of Appeals, for consideration as a personal restraint petition. The motion conceded that the ineffectiveness claim was not time barred. Motion to Transfer at 4-5. It claimed, however, that the petitioner had failed to show either deficient performance or prejudice.

In response, the petitioner raised a statutory argument. He claimed that the court that accepted his plea failed to provide the advice required by RCW 10.40.200. He argued that this statutory violation gave him the right to withdraw his plea *without* a showing of prejudice. In reply, the State argued that this statutory claim did not fall within any exception to the statutory time limit. Because the motion now included a ground that was time-barred, the entire

petition was subject to dismissal. See State v. Hankerson, 149 Wn.2d 695, 702, 72 P.3d 703 (2003).

The Superior Court granted the State's motion to transfer. The court pointed out that in light of the petitioner's two prior drug convictions, the conviction in this case did not result in any additional immigration consequences. M.D.R. App. C at 4.

Considering the motion as a personal restraint petition, the Court of Appeals requested supplemental briefing on whether the petition was time barred. After considering that briefing, the court dismissed the petition as a time-barred "mixed petition." Because of this conclusion, the court did not consider the merits of the petitioner's constitutional argument.

The petitioner now seeks discretionary review of that decision.

### **III. ARGUMENT**

**THE COURT OF APPEALS CORRECTLY HELD THAT THERE HAS BEEN NO SIGNIFICANT CHANGE IN THE LAW WITH REGARD TO THE COURT'S DUTY TO WARN OF POSSIBLE IMMIGRATION CONSEQUENCES.**

The Court of Appeals decision rejects a statutory claim for relief, but allows the petitioner to raise a constitutional claim. It is clear that the duties of defense counsel include providing reasonable advice concerning potential immigration consequences

of a guilty plea. Failure to provide such advice can constitute ineffective assistance. Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011). It is likewise clear that if a conviction became final prior to Padilla, a petition seeking relief for this type of ineffectiveness is not time barred. In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015). In the present case, the petitioner is free to seek relief under Padilla, if he can demonstrate deficient performance by counsel and resulting prejudice. See Sandoval, 171 Wn.2d at 169 ¶ 9, citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The petitioner, however, seeks to establish a much broader rule. According to him, he is entitled to relief under RCW 10.40.200. That statute (enacted in 1983) requires that prior to acceptance of a guilty plea, “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 laws of the United States.” This statutory language is incorporated into the plea statement set out in CrR 4.2. In the present case, the plea form included a warning of

these consequences. Statement of Defendant on Plea of Guilty at 4 ¶ 6(r).

The petitioner claims, however, that this standard warning is insufficient to satisfy the statute. According to him, the statute gives him the right to an explanation of the *specific* immigration consequences in *his particular case*. Moreover, he claims that the lack of such advice gives him the right to withdraw his plea without a showing of prejudice. Petitioner's Supplemental Brief at 8-9. Such a rule is contrary to the holding of both Sandoval and Tsai.

In Sandoval, this court specifically said that prejudice is a necessary requirement:

To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part *Strickland* ... test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant.

Sandoval, 171 Wn.2d at 169 ¶ 9. The court went on to consider whether the defendant had made the necessary showing of prejudice. Id. at 174-76 ¶¶ 19-22. If prejudice were not a requirement, this portion of the opinion would be meaningless.

In Tsai, the court again said that unreasonable failure to give advice about immigration consequences is governed by “the

ordinary *Strickland* test.” Tsai, 183 Wn.2d at 99 ¶ 12. The court then said that the “unreasonable failure to research and apply RCW 10.40.200 is as constitutionally deficient as the unreasonable failure to research and apply any relevant statute.” Id. at 102-03 ¶ 19. Of course, this is true only if the meaning of that statute had *not* changed. If the court had just announced a new interpretation of RCW 10.40.200, counsel in prior cases could not be considered deficient for having failed to anticipate that change. See In re Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998).

The petitioner’s argument would impose impossible obligations on courts that accept guilty pleas. As this case illustrates, the specific immigration consequences of a conviction for a particular defendant may depend on multiple factors. These could include not only his citizenship and immigration status, but the manner in which he entered the United States, his commission of uncharged crimes, and his existing or anticipated future family relationships. See 8 U.S.C. § 1229b(b)(1) (setting out requirements for cancellation of deportation); Sumbundu v. Holder, 602 F.3d 47 (2<sup>nd</sup> Cir. 2010) (discussing statutory requirement of “good moral character”); Montanez-Gonzalez v. Holder, 780 F.3d 720, 722-23 (6<sup>th</sup> Cir. 2015) (discussing statutory requirement of “exceptional

and extremely unusual hardship” to applicant’s relative). It is not only impractical, but potentially harmful, for a judge to inquire about such matters in open court.

The petitioner appears to acknowledge that courts cannot be expected to become “involved in the nuances of every defendant’s immigration status.” Petitioner’s Supplemental Brief at 10. He nonetheless claims that courts must guarantee that *counsel* provided accurate advice — even though the courts have no idea what advice was given or what facts that advice was based on.

This is absurd. Courts cannot be expected to give advice without knowing the necessary facts. Nor can they be expected to guarantee the accuracy of advice given by others without knowing what that advice was. The court’s duty can only involve general advice of potential consequences — such as the advice set out in CrR 4.2. This puts defendants on notice that they should seek more specific advice if necessary. If they receive inadequate advice from counsel, they have a remedy — but only on a showing of deficient performance and prejudice. There has been no alteration in these rules.

Because there has been no significant change in the law with regard to statutory requirements, the Court of Appeals

correctly dismissed the petition as time barred. That decision does not warrant review by this court.

**IV. CONCLUSION**

The motion for discretionary review should be denied.

Respectfully submitted on January 22, 2020.

ADAM CORNELL  
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By:   
\_\_\_\_\_  
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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

ALEJANDRO GARCIA-MENDOZA,

Petitioner.

No. 98026-8

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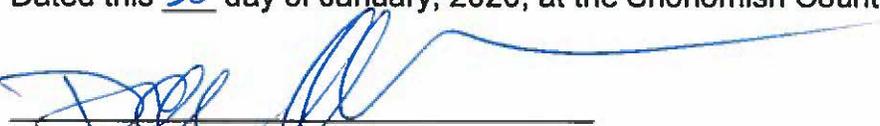
The undersigned certifies that on the 22<sup>nd</sup> day of January, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Teymur G. Askerov; [tim@blacklawseattle.com](mailto:tim@blacklawseattle.com)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22<sup>nd</sup> day of January, 2020, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office

**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

**January 22, 2020 - 10:01 AM**

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