

No. 98026-8

Supreme Court No. \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 79621-6-I

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In re the Personal Restraint of:

Alejandro Garcia Mendoza,

Petitioner.

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MOTION FOR DISCRETIONARY REVIEW

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## **I. IDENTITY OF PETITIONER**

Alejandro Garcia Mendoza (“Mr. Garcia”), petitioner below, asks this Court to accept discretionary review of the Court of Appeals decision terminating review designated in Part II of this petition.

## **II. COURT OF APPEALS DECISION**

Petitioner requests discretionary review of the decision of the Court of Appeals, Division I in In re Personal Restraint of Alejandro Garcia Mendoza, filed on December 2, 2019, No. 79621-6-I, denying his request to withdraw his guilty plea on the ground that his statutory rights under RCW 10.40.200 were violated because he was not advised of the specific immigration consequences of his conviction by his attorney as required by that statute. A copy of the decision is attached to this petition as Appendix (“App.”) A.

## **III. ISSUES PRESENTED FOR REVIEW**

Whether the Court of Appeals erred by holding that Mr. Garcia’s personal restraint petition does not fall within the exception to the statute of limitations on collateral attacks provided for in RCW 10.73.100(6) because this Court’s decisions in State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) and In re Personal Restraint of Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015) did not overturn appellate precedent on the statutory right to be advised of the immigration consequences of a criminal conviction under RCW 10.40.200?

#### **IV. STATEMENT OF THE CASE<sup>1</sup>**

Petitioner, Alejandro Garcia Mendoza, was born in Mexico City, Mexico. His parents brought him to the United States when he was only 13 years old. After coming to the United States, he attended Rose Hill Junior and Lake Washington High School in Kirkland, Washington. Mr. Garcia married a United States citizen and the two started a family together. The couple is happily married and are raising their twelve-year-old daughter together. Mr. Garcia has worked hard to provide for his family over the years. For the past seven years he has operated his own painting company. Mr. Garcia's wife and daughter rely on him heavily for financial and emotional support, and Mr. Garcia is actively involved in his daughter's life, frequently volunteering at her school. Altogether, Mr. Garcia has lived in this country more than 20 years, albeit in undocumented status.

Like many youths, Mr. Garcia had run-ins with the law as a teenager and young adult. Consequently, he was convicted of drug possession in the King County Superior Court in 2004 and 2005, respectively. On March 27, 2007, when Mr. Garcia was only 22 years old, he pleaded guilty to one count

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<sup>1</sup> Unless noted otherwise, the facts contained herein are derived from the declaration of Alejandro Garcia Mendoza, dated October 3, 2018, and attached hereto as App. G, Exhibit ("Ex.") A.

of possession of a controlled substance in this case for possessing small amounts of cocaine and methamphetamine for personal use. On July 18, 2007, Mr. Garcia was sentenced to 110 days in jail and ordered to pay fines and court costs. Before Mr. Garcia pleaded guilty, his attorney, Rachel Forde, failed to advise him that the crime that he was pleading guilty to was a ground for inadmissibility to the United States, which would permanently prevent him from adjusting to lawful permanent resident status and prevent him from applying for cancellation of removal for non-permanent residents in deportation proceedings, one of the most important forms of relief available to longtime undocumented residents of the United States. See App. G, Ex. B (“Declaration of Rachel Forde”); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (providing that a noncitizen who is convicted of a violation of any law relating to a controlled substance is inadmissible); 8 U.S.C. § 1255(a) (providing that a noncitizen who is inadmissible to the United States is ineligible to adjust to lawful permanent resident status). Mr. Garcia is currently in deportation proceedings and his conviction in this case, as well as his convictions from King County present a bar to relief from removal in the form of cancellation of removal in immigration court. 8 U.S.C. § 1229b(b)(1)(C) (providing that an individual who has been convicted of an offense listed in § 1182(a)(2), including a controlled substance offense is ineligible to apply for cancellation of removal). If

granted, this form of relief would permit Mr. Garcia to obtain lawful permanent resident status and remain in the United States with his family.

On October 18, 2018, Mr. Garcia moved, under CrR 7.8, to withdraw his guilty plea in the Snohomish County Superior Court on the ground that he was not advised of the immigration consequences of his conviction in violation of his Sixth Amendment right to effective assistance of counsel as construed by the United States Supreme Court in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d (2010), and on the alternative ground that he was eligible for relief under RCW 10.40.200 independent of his eligibility for relief under Padilla.<sup>2</sup> App. G. Mr. Garcia argued that under the plain language of RCW 10.40.200, he was entitled to relief based on his attorney's failure to advise him of the specific immigration consequences of his plea even without a showing of prejudice. App. E at 8 – 9.

The Superior Court transferred Mr. Garcia's motion to Division I of the Washington Court of Appeals as a personal restraint petition on February 22, 2019. App. C at 7. In its decision transferring Mr. Garcia's case, the Superior Court held that Mr. Garcia's ineffective assistance of

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<sup>2</sup> The State asserted in its briefing that Mr. Garcia added this argument to his original Sixth Amendment claim later in the litigation. However, the statutory claim was raised in Mr. Garcia's original motion. See App. G at 9, n.4.

counsel under Padilla failed because as a result of his two prior King County convictions, he could demonstrate neither deficient performance nor that he was prejudiced by counsel's failure to advise him of the immigration consequences of his conviction. See id. at 3 – 5. The trial court did not address Mr. Garcia's statutory claim.

On December 2, 2019, the Court of Appeals issued an unpublished decision denying Mr. Garcia's personal restraint petition addressing only Mr. Garcia's statutory claim without reaching his constitutional claim. App. A. The Court found Mr. Garcia's petition time-barred as a mixed petition, holding that while this Court's decision in Tsai established that ineffective assistance claims under Padilla were not subject to the one-year time-bar on collateral attacks imposed by RCW 10.73.090 because Padilla constituted a significant change in the law within the meaning of RCW 10.73.100(6), Mr. Garcia's alternative claim for relief under RCW 10.40.200 was time-barred because neither Padilla nor any subsequent Washington decision changed the law with respect to a defendant's statutory right to be advised of the immigration consequences of a criminal conviction under RCW 10.40.200. See id. at 5 – 7. Mr. Garcia now seeks review of the Court of Appeals decision.

## **V. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

In determining whether a motion for discretionary review of a Court of Appeals decision dismissing a personal restraint petition should be granted, this Court applies the standards set forth in Rule 13.4(b) of the Rules of Appellate Procedure (“RAP”). See RAP 13.5A(b). Thus, a motion for discretionary review may be granted for any of the reasons set forth in RAP 13.4(b) pertaining to petitions for review. Review should be granted in Mr. Garcia’s case because the decision of the Court of Appeals conflicts with the decisions of this Court and because this case presents a question of substantial public interest. See RAP 13.4(b)(1); RAP 13.4(b)(4).

**A. The Court of Appeals Decision Conflicts with this Court’s Decisions Interpreting RCW 10.40.200 and RCW 10.73.100(6).**

This Court may accept a petition for review where the decision of the Court of Appeals conflicts with a decision of this Court. See RAP 13.4(b)(1). This Court should accept review of Mr. Garcia’s petition because the Court of Appeals decision conflicts with this Court’s holdings in State v. Sandoval, 171 Wn.2d 163, 168 (2011) and In re Personal Restraint of Tsai, 183 Wn.2d 91 (2015), construing the statutory right to be advised of the immigration consequences of a criminal conviction under RCW 10.40.200, as well as this Court’s decisions defining the term “significant change in law” as used in RCW 10.73.100(6) which creates an

exception to the time limit on collateral attacks for claims based on significant material changes in the law. See RAP 13.4(b)(1).

Mr. Garcia asserts that his statutory right to receive specific advice about the immigration consequences of his guilty plea under RCW 10.40.200 was violated because while he received a general warning about the *potential* immigration consequences of a plea to a criminal offense, his defense attorney failed to apply RCW 10.40.200 to his case and provide him with *specific* advice about the impact of his conviction on his immigration status and ability to remain in the United States.

The Court of Appeals held that Mr. Garcia's claim under RCW 10.40.200 was time-barred under RCW 10.73.090 because while this Court's decision in In re Personal Restraint of Tsai exempts claims of ineffective assistance of counsel based on failure to advise of immigration consequences under Padilla from the time limit on collateral attacks, it does not exempt claims under RCW 10.40.200 from the time limit because there has been no significant change in law pertaining to the construction and application of RCW 10.40.200 that would bring such claims within the exception to the time limit set forth in RCW 10.73.100(6). Specifically, the Court of Appeals found that this Court's post-Padilla decisions did not constitute a significant change in law within the meaning of RCW 10.73.100(6) with respect to the interpretation of RCW 10.40.200. In so

holding, the Court of Appeals misconstrued this Court’s decisions in State v. Sandoval and In re Personal Restraint of Tsai, which overturned older interpretations of RCW 10.40.200, as well as the decisions of this Court defining what constitutes a “significant change in law” for purposes of the exception to the time limit on collateral attacks provided for in RCW 10.73.100(6).

RCW 10.73.100(6) provides that the time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on the fact that:

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 law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6). This Court has held time and time again, that a decision constitutes a “significant change in the law” for purposes of RCW 10.73.100(6) when it “has effectively overturned a prior appellate decision that was originally determinative of a material issue.” See In re Personal Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). “One test to determine whether an appellate decision represents a significant change

in law is whether the defendant could have argued this issue before publication of the decision.” In re Personal Restraint of Stoudmire, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001).

Under this standard, it is clear that the change in law effected by Padilla and subsequent Washington decisions construing that case also effected a change in the construction and application of RCW 10.40.200. Prior to Padilla courts in Washington uniformly rejected claims under RCW 10.40.200 where the boilerplate advisement was read to the defendant and no other immigration advice was given. An example of how Washington courts construed RCW 10.40.200, prior to the sea change effected by Padilla and its progeny is found in State v. Holley, 75 Wn. App. 191, 876 P.2d 973 (1985). The decision in that case makes clear that the only factor that courts considered in determining whether a violation of RCW 10.40.200 occurred is whether the boilerplate statutory warning found in a statement of defendant on plea of guilty was read to the defendant. After finding that the defendant in Holley submitted sufficient evidence to rebut the presumption resulting from the presence of the immigration warning in his plea statement, the court explained as follows:

Thus, he is entitled to a hearing to attempt to persuade the trial court by a preponderance of the evidence, that he did not receive the statutory warnings . . . Therefore, we remand this matter to the [trial court] to determine whether: (1) defense counsel advised Holley not to read paragraph 17 of the

statement of defendant on plea of guilty; (2) Holley, acting on the advice of counsel, in fact did not read paragraph 17; (3) Holley was advised of the possibility of deportation any other way; and (4) deportation is a collateral consequence of Holley's convictions . . . .

Id. at 201. The foregoing passage demonstrates that prior to Padilla Washington courts construed RCW 10.40.200 to be satisfied where a defendant was read the boilerplate advisement in a plea form. As a consequence, a defendant who had the statutory immigration advisement read to him from his plea form during his plea proceedings had no basis to raise a claim for relief under RCW 10.40.200.

As late as 2013, Division II of the Court of Appeals held in State v. Martinez-Leon, 174 Wn. App. 753, 300 P.3d 481 (2013), that a reading of the boilerplate immigration advisement was sufficient to satisfy the requirements of RCW 10.40.200 before Padilla was decided:

And, unlike Littlefair, Martinez-Leon signed a statement on the plea of guilty that provided, "If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." . . . Although Martinez-Leon's defense counsel did not specifically advise him that a 365-day sentence on his assault conviction would result in definite deportation under United States immigration laws, such an obligation was not required before Padilla.

Id. at 762; see also In re Personal Restraint of Yim, 139 Wn.2d 581, 590, 989 P.2d 512 (1999) (reading of standard plea statement warning was

sufficient to notify defendant “that there was a risk of deportation”); State v. Jamison, 105 Wn. App. 572, 594, 20 P.3d 1010 (2001) (finding that defendant was adequately warned under RCW 10.40.200 where the statement of defendant contained a standard advisement and prosecutor asked “Do you understand that if you are not a citizen . . . that this guilty plea will affect your ability to be in the United States?”).

Padilla and subsequent Washington decisions construing that case marked a departure from the line of cases holding that merely advising a defendant in general terms of possible immigration consequences is enough to satisfy RCW 10.40.200. In Sandoval, this Court held that the presence of a standard advisement in a plea statement is not enough to establish that counsel’s duties under Padilla were satisfied. Sandoval, 171 Wn.2d at 173. The Court explained in Sandoval that a reading of the standard advisement was not enough to save counsel’s deficient advice about immigration consequences. See id. Then, in In re Personal Restraint of Tsai, this Court held that the boilerplate advisement found in Washington’s form plea statements was not itself the advice required by RCW 10.40.200 and that the statute gives noncitizens the “unequivocal right to advice regarding immigration consequences” and requires defense counsel to research and apply RCW 10.40.200 to his or her client’s case. See Tsai, 183 Wn. 2d at 101. The Court reasoned:

Our legislature did [in 1983] what Padilla did in 2010—it rejected the direct-versus collateral distinction as applied to immigration consequences, declaring that a noncitizen defendant must be warned of immigration consequences before pleading guilty. To give effect to this statute, the standard plea form in CrR 4.2 was promptly amended to include a statement warning noncitizen defendants of possible immigration consequences. *That warning statement is not, itself, the required advice; it merely creates a rebuttable presumption that the defendant has been properly advised.*

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.* . . . While defense counsel’s duty to advise regarding immigration consequences is imposed by statute, reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *In many cases defense counsel’s failure to fulfill his or her statutory duty may be due to an unreasonable failure to research or apply RCW 10.40.200, and there is no conceivable tactical or strategic purpose for such a failure.*

Tsai, 183 Wn.2d at 101 – 102 (emphasis added); (internal citations and quotation marks omitted). In so holding, this Court expressly overruled prior cases holding that a general advisement about immigration consequences is sufficient to satisfy RCW 10.40.200 and clarified that the statute requires defense counsel to research the immigration consequences of each particular case and provide clients with case-specific immigration advice. See id. at 106 – 07. (“Padilla superseded the theory underlying these decisions—that ‘anything short of an affirmative misrepresentation

by counsel of the plea's deportation consequences could not support the plea's withdrawal. . . . This was a significant change in Washington law.”). The language of this Court's decision in Tsai makes clear that RCW 10.40.200 itself, separate and apart from the Sixth Amendment's requirements, imposes a duty on counsel to research and advise a defendant of the specific immigration consequences of his or her guilty plea and not just parrot the warning found in the statement of defendant on plea of guilty. This is a material departure from the way that RCW 10.40.200 was interpreted by Washington courts before Padilla.

Consequently, because the change in law effected by Padilla and Tsai also effected a change in law on the construction and application of RCW 10.40.200, litigants whose cases became final before Tsai was decided should be permitted to raise claims under RCW 10.40.200 after the expiration of the one year time limit on collateral attacks pursuant to the exemption set forth in RCW 10.73.100(6).

Prior to the issuance of the decisions in Padilla, Sandoval, and Tsai, Mr. Garcia was precluded from arguing that a violation of RCW 10.40.200 occurred in his case, because under the holdings of cases like Holley, Yim, and Jamison having the boilerplate warning in his statement of defendant on plea of guilty read to him by his attorney was sufficient to satisfy RCW 10.40.200. However, after the issuance of the decision in Tsai, it became

clear that such advice was not sufficient to satisfy the requirements of RCW 10.40.200, and that his attorney was required to research and apply RCW 10.40.200 to Mr. Garcia's specific case, which she failed to do. See Tsai, 183 Wn.2d at 102. Thus, by overturning precedent that would have precluded him from arguing that a violation of RCW 10.40.200 occurred in his case, Tsai constituted a material change in law that is retroactively applicable to Mr. Garcia's case for purposes of the exemption from the time-bar set forth in RCW 10.73.100(6).

The Court of Appeals in this case held that neither Padilla nor Sandoval and Tsai changed the interpretation of RCW 10.40.200, but that holding stands in direct conflict with this Court's decisions on what constitutes a significant change in the law within the meaning of RCW 10.73.100(6) and the plain language of Tsai. Never before Tsai had this Court held that RCW 10.40.200 requires criminal defense counsel to advise a client about the specific immigration consequences of a conviction instead of simply reading the general immigration warning. Indeed, decisions like Holley, Yim, and Jamison, expressly precluded Mr. Garcia from arguing that he had a statutory right to case-specific immigration advice under RCW 10.40.200. Thus, Tsai changed the interpretation of RCW 10.40.200 and overturned prior appellate precedent that prevented defendants who received a one-size-fits-all immigration warning in their

plea statements from raising claims under RCW 10.40.200. As such, under this Court's precedents, Tsai constituted a significant change in the law for purposes of RCW 10.73.100(6). See In re Personal Restraint of Light-Roth, 191 Wn.2d 328, 334, 422 P.3d 444 (2018) ("A "significant change in the law" is likely to have occurred if the defendant was unable to argue the issue in question before publication of the intervening decision."). Because the Court of Appeals decision in this case conflicts with the decisions of this Court, the Court should grant review in Mr. Garcia's case pursuant to RAP 13.4(b)(1).

**B. Mr. Garcia's Case Presents a Question of Substantial Public Interest.**

This Court should also grant review under RAP 13.4(b)(4) because Mr. Garcia's case presents a question of substantial public interest. In In re Personal Restraint of Tsai, this Court stated the following in support of its holding:

This case is not a faceless one that bears no consequences. Numerous noncitizen defendants have benefited from the *clear statutory requirement* that defense counsel has a duty to advise them about the immigration consequences of pleading guilty. However, numerous meritorious claims that defense counsel unreasonably failed to fulfill this duty have been rejected based on the mistaken belief that RCW 10.40.200 has no constitutional implications. Now that this mistaken belief has finally been corrected, holding such meritorious claims procedurally barred would deprive many others of the opportunity to have the merits of their constitutional claims reviewed.

Tsai, 183 Wn.2d at 108 (emphasis added). As this Court acknowledged in Tsai, immigration consequences flowing from criminal convictions concern numerous criminal defendants in Washington, so many, in fact, that in 1983 the state Legislature enacted RCW 10.40.200, which this Court construed in Tsai to require criminal defense attorneys to provide specific immigration advice to a client before advising the client to plead guilty. This Court clearly viewed the right to immigration advice under RCW 10.40.200 to be a statutory right, separate and apart from any constitutional right to effective assistance of counsel, calling the right “unequivocal.” Id. at 102. The statute that created the unequivocal right to immigration advice, also provides that relief is appropriate without a showing of prejudice where a defendant who has pleaded guilty later establishes that the guilty plea in fact carried immigration consequences. See In re Personal Restraint of Peters, 50 Wn. App. 702, 705 , 750 P.2d 463 (1998) (“After this date, if a defendant is not advised as required by RCW 10.40.200(2) and shows that conviction of the offense to which a guilty plea was entered may lead to deportation, the court “shall vacate the judgment” and permit the withdrawal of the plea.”).

However, before this Court’s decision in Tsai, RCW 10.40.200 was construed narrowly by Washington Courts to only permit vacatur and withdrawal of a guilty plea where the standard immigration warning was

not read to the defendant. See Holley, 75 Wn. App. at 201. This Court's holding in Tsai corrected that erroneous construction, and held that the advice contained in the standard plea warning is not itself the required advice, and that a statutory violation occurs where counsel fails to research and apply the statute to his or her client's particular case. See Tsai. Now that this Court has established that a violation of RCW 10.40.200 occurs whenever a defense attorney fails to research RCW 10.40.200 and provide his or her client with case-specific immigration advice, it would be fundamentally unfair to deny relief to an entire class of criminal defendants who did not have the benefit of this Court's construction of RCW 10.40.200 in Tsai before the time limit to collaterally attack their convictions had expired.

The availability of relief under 10.40.200 is particularly important to defendants like Mr. Garcia who pleaded guilty to more than one deportable offense, like simple drug possession, without being advised of the immigration consequences of their convictions and only later learned that their convictions resulted in devastating immigration consequences. Unfortunately, this is not an uncommon occurrence. See e.g., State v. Littlefair, 112 Wn. App. 749, 755, 59 P.3d 116 (2002) (defendant did not learn of immigration consequences for more than two years after conviction); Tsai, 183 Wn.2d at 97 (defendant did not learn of immigration

consequences until more than a year after his conviction). This is especially so where for many years, our State's laws made it so that even a misdemeanor offense, like theft in the third degree, could render a defendant an aggravated felon under the immigration laws, making the defendant deportable from the United States and ineligible for discretionary forms of relief from deportation in immigration court, and defendants pleaded guilty to multiple misdemeanors or other petty offenses, without being advised of the devastating immigration consequences they carried. See RCW 9A.20.021; Laws of 2011, Chapter 96, § 1. RCW 10.40.200, which creates an unequivocal right to relief without a showing of prejudice in these types of situations, is the only mechanism for such defendants to ameliorate the immigration consequences of their convictions and escape the harsh consequence of deportation. See Matter of Thomas and Thompson, 27 I&N Dec. 674 (A.G. 2019) (holding that state post-conviction relief will only be given full faith and credit for immigration purposes where the relief is based on a substantive or procedural defect underlying the criminal proceedings).

The need for relief from poorly counseled convictions resulting in adverse immigration consequences is greater now than it has ever been before, as multitudes of longtime Washington residents, like Mr. Garcia Mendoza, are being deported as a result of old petty convictions committed

in their youth. See Matt Driscoll, Fear Grips Cambodian Communities who fled here to Escape Genocide – They’re Trying to Deport Me. Tacoma News Tribune (May 16, 2019), <https://www.thenewstribune.com/news/local/news-columns-blogs/matt-driscoll/article230266884.html>; Nina Shapiro, “He’s Mexican. She’s American. Deportation Forced this Washington Family to Make a Choice. The Seattle Times (July 27, 2018), <https://www.seattletimes.com/seattle-news/hes-mexican-shes-american-a-deportation-order-left-this-washington-state-family-with-a-difficult-choice/>. This Court’s decision in Tsai, was a good first step toward correcting the flaws in Washington precedent that allowed convictions entered in violation of RCW 10.40.200 to stand. Mr. Garcia’s case presents the Court with an opportunity to ensure that relief under RCW 10.40.200 is available to those who need it most. Because Mr. Garcia’s case presents a question of substantial public interest, this Court should grant review in this case pursuant to RAP 13.4(b)(4).

## **VI. CONCLUSION**

For the foregoing reasons, the Court should accept Mr. Garcia’s petition for review.

DATED this 30<sup>th</sup> day of December 2019.

Respectfully submitted,

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