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Apr 27, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 71082-6-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION ONE

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In re Personal Restraint Petition of:

SANTOS W. ORANTES,

Petitioner.

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SUPPLEMENTAL RESPONSE TO  
PERSONAL RESTRAINT PETITION

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## I. INTRODUCTION

This personal restraint petition was dismissed as untimely, without calling for a response from the State. The Supreme Court granted the petitioner's motion for discretionary review and remanded the case for reconsideration in light of In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015). This court has directed the State to "submit a supplemental response addressing Tsai." This response is accordingly limited to the facts and arguments relevant to the application of Tsai.

## II. ISSUE

In Tsai, the Supreme Court recognized an exception to the statutory time limit for some claims of ineffective assistance of counsel. A petition falls within the exception if it claims that counsel failed to provide any advice about the immigration consequences of pleading guilty. In contrast, there is no exception for petitions claiming that counsel provided incorrect advice about those consequences. In the present case, the petitioner claims that his attorney incorrectly told him that pleading guilty would not affect his immigration status. Does this claim fall within the exception recognized in Tsai?

### **III. STATEMENT OF THE CASE**

A detailed summary of the history of this case was set out in the State's Motion to Transfer Motion for Relief From Judgment. App. 4 at 1-4.<sup>1</sup> For purposes of the present response, the following facts are relevant:

On August 23, 2006, the petitioner, Santos Orantes, pleaded guilty to the gross misdemeanor of attempted unlawful issuance of a bank check. In the plea agreement, the State agreed to recommend a deferred sentence of 364 days in jail. The plea form originally had 365 days typed in, but it was changed by hand to 364 days. Defense counsel later explained that this change was made to avoid immigration consequences. App. 4 at 2. That same day, the court imposed sentence in accordance with the State's recommendation. The judgment and sentence was filed the next day, August 24, 2006. App. 1.

On December 12, 2008, the court entered an order reducing the deferred sentence to 180 days. App. 2. The supporting motion, filed by a different attorney, said that this change was necessary to avoid immigration consequences. App. 4 at 3.

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<sup>1</sup> References to Appendices are those attached to this Response.

On January 20, 2011, the petitioner filed a motion to vacate the judgment. He claimed that the guilty plea was involuntary because he had not been advised of immigration consequences. In discussions with the prosecutor, defense counsel specifically stated that they were not claiming ineffective assistance of counsel. The trial court transferred the case to this court, for consideration as a personal restraint petition. App. 4 at 3. After a hearing before a panel, this court dismissed the petition as untimely. In re Orantes, no. 66891-9-I.

Less than a month after the mandate was issued, the petitioner filed the present motion. It raised the claim that the petitioner had previously renounced: that defense counsel's misadvice concerning immigration consequences constituted ineffective assistance. App. 3. The trial court again transferred the motion to this court. This court dismissed the petition. The Supreme Court granted discretionary review and remanded the case for reconsideration.

#### IV. ARGUMENT

**A. SINCE THE PETITIONER'S MIS-ADVICE CLAIM HAS ALWAYS BEEN AVAILABLE, THERE HAS BEEN NO "SIGNIFICANT CHANGE IN THE LAW" RELEVANT TO THAT CLAIM.**

The personal restraint petition in this case was filed long after expiration of the one-year time limit set out in RCW 10.73.090. The petitioner claims, however, that it falls within the exception to the time limit set out in RCW 10.73.100(6):

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:

...

(6) There has been a significant change in the law, which is material to the conviction [or] sentence, ... and ... a court ... determines that sufficient reasons exist to require retroactive application of the changed legal standard.

The petitioner claims that a "significant change in the law" resulted from Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

The Supreme Court applied RCW 10.73.100(6) to claims based on Padilla in In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015). Tsai distinguishes between two situations. In one, the defense attorney "failed to provide any advice about the immigration consequences of pleading guilty." Before Padilla, "Washington

appellate courts have routinely rejected the possibility that such a failure could ever be ineffective assistance of counsel." Consequently, Padilla was a significant change in the law with respect to this situation. Tsai, 183 Wn.2d at 105-07 ¶¶ 26-29.

In the other situation, the defense attorney provided incorrect advice about immigration consequences. "Washington courts have long recognized that where a defendant relies on his or her attorney's incorrect advice about the immigration consequences of pleading guilty, the defendant's plea may be rendered involuntary and withdrawn." Because such claims were available prior to Padilla, they do not fall within the exception for a "significant change in the law." Tsai, 183 Wn.2d at 107-08 ¶ 32.

The present case involves a claim of mis-advice, not non-advice. The petitioner's declaration claims: "My lawyer mistakenly advised me that pleading guilty would not affect my TPS [immigration status] as long as I was sentenced to less than 365 days of confinement." App. 16, Declaration of Santos Orantes ¶ 17. He claims that this advice was wrong: "[D]ue to the fact that I have two misdemeanor convictions, I remain ineligible for TPS." Id. ¶ 22.

Long before the conviction in the present case, this court had recognized mis-advice about immigration consequences as a

valid basis for relief. State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993); State v. Holley, 75 Wn. App. 191, 198-99, 876 P.2d 191 (1994). In Stowe, the defendant was a soldier in the U.S. Army. His attorney incorrectly told him that he could probably remain in the Army despite his guilty plea. This court held that counsel's erroneous advice about this collateral consequence constituted ineffective assistance justifying withdrawal of the guilty plea. Stowe, at 187-88. In reaching this conclusion, the court cited to an Illinois case holding that "counsel's erroneous representation that guilty plea would not affect defendant's immigrant status was ineffective assistance and rendered guilty plea involuntary." Id. at 187, citing People v. Correa, 108 Ill.2d 541, 485 N.E.2d 307 (1985).

This court followed the same reasoning in Holley. There, defense counsel crossed out the portion of the plea statement that discussed immigration consequences. The court rejected the claim that this constituted ineffective assistance:

In Stowe we stated that provision of erroneous advice about a matter collateral to the conviction can constitute constitutionally deficient performance. However, this case differs from Stowe. Heath Stowe was particularly concerned about the consequences of a guilty plea on his military career and so advised his counsel. Stowe's counsel responded by telling Stowe that the plea would not jeopardize his military career. This advice was incorrect. Stowe was

immediately and dishonorably discharged from the Army. Here, it appears that [the defendant] and his lawyer never discussed the critical issue — the deportation consequences of his pleas. The affidavits merely suggest that counsel may have told [the defendant] he could skip over [the portion of the plea agreement discussing immigration consequences]. This obviously was faulty advice. However, it differs from the type of affirmative misinformation at issue in Stowe. [The defendant] has failed to show that his counsel's comment rose to the level of ineffective assistance of counsel.

Holley, 75 Wn. App. at 198-99. The court thus classified the attorney's error as a failure to advise, rather than affirmative misinformation. The court re-affirmed that affirmative misinformation could constitute ineffective assistance, even if that misinformation concerned a collateral consequence such as immigration.

The petitioner's claims in the present case exactly fit the pattern recognized in Stowe and re-affirmed in Holley. As in Stowe, the petitioner claims that his lawyer knew that "my immigration status was very important to me." App. 3, Dec. of Santos Orantes at 2 ¶ 16. Also as in Stowe, the petitioner claims that his lawyer "mistakenly advised me that pleading guilty would not affect my [immigration status]." It did not matter that immigration consequences were considered "collateral." Both Stowe and Holley

expressly said that affirmative mis-information about collateral consequences could constitute ineffective assistance of counsel, thereby justifying withdrawal of a guilty plea. Stowe, 71 Wn. App. at 187; Holley, 75 Wn. App. at 198.

Because the basis for the petitioner's claims has existed since at least 1993, there has been "no significant change in the law" relevant to *this* case. A "significant change" exists when an argument was "essentially *unavailable* at the time." In re Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000) (court's emphasis). In the present case, the petitioner's arguments were available at all times since his plea was entered. As Tsai recognizes, Padilla is not a significant change in the law with regard to cases involving mis-advice. Tsai, 183 Wn.2d at 107 ¶ 32. Consequently, the present case does not fall within any exception to the time limit.

**B. EVEN IF THE PETITIONER'S CLAIMS ARE NOT TIME BARRED, THEY CONSTITUTE AN ABUSE OF THE WRIT.**

If this court concludes that the petitioner's claims fall within an exception to the time limit, that would still not justify considering the merits of those claims. This court would still have to decide whether these claims are an abuse of the writ, because they were deliberately omitted from his prior personal restraint petition.

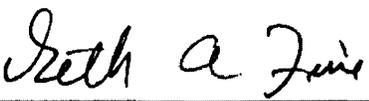
Arguments on this point are beyond the scope of this supplemental brief. Those arguments are set out in the State's Motion to Transfer. App. 4 at 7-9.

**V. CONCLUSION**

The personal restraint petition should be dismissed.

Respectfully submitted on April 27, 2016.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
\_\_\_\_\_  
SETH A. FINE, WSBA # 10937  
Deputy Prosecuting Attorney  
Attorney for Respondent

## **APPENDICES**

- Appendix 1 – Judgment and Sentence (8/24/06)
- Appendix 2 – Order Amending Judgment & Sentence  
Nunc Pro Tunc (12/12/08)
- Appendix 3 – Defendant's Motion to Withdraw  
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- Appendix 4 – State's Motion to Transfer Motion for  
Relief from Judgment (2/21/13)

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PAM L. DANIELS  
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SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,	
	Plaintiff,
v.	
ORANTES, SANTOS WILFREDO	
	Defendant.

No. 06-1-00278-9

JUDGMENT & SENTENCE  
(Gross Misdemeanor)

Aliases:

The above-named defendant was found guilty on August 18, 2006 by plea of:

Count No. 1

Crime: Attempted Unlawful Issuance of Bank Check  
RCW 9A.56.060

Date of Crime: 10/12/04

IT IS ADJUDGED that the defendant is guilty of the above crime(s) and that the defendant be sentenced to imprisonment in the Snohomish County Jail for a maximum term of 305 days on Count No. 1.

IT IS ORDERED that the execution of 364 days of this sentence is  deferred pursuant to RCW 9.95.210 ( ) suspended pursuant to RCW 9.92.060 upon the following conditions:

1. ( ) The defendant shall commence serving the portion of the sentence not suspended or deferred ( ) immediately ( ) no later than the \_\_\_\_\_ day of \_\_\_\_\_, 2006, at \_\_\_\_\_ .m.
- (a) ( ) The defendant shall receive credit for \_\_\_\_\_ days served.
- (b) ( ) If eligible, and subject to the rules and regulations of the program, the defendant may participate in the ( ) work release program ( ) home detention program.

*Handwritten initials and number:*  
AB  
32

2. ( ) The defendant shall report to the Department of Corrections and shall be under the charge of a community corrections officer designated by that department and follow implicitly the instructions of that department and rules and regulations promulgated by the department during the term of probation.

3.  The termination of probation shall be set at MA 12 months from the date of this order; however, the court shall have the authority at any time prior to the entry of an order terminating probation to revoke, modify, or change the terms and conditions of this sentence and to extend the period of probation. Probation is tolled during any time the defendant is in custody.

4.  The defendant shall not commit any law violations.

5. ( ) The defendant shall enter and successfully complete any ( ) inpatient ( ) outpatient treatment and therapy programs as directed by the defendant's community corrections officer.

6.  The defendant shall pay to the clerk of this court:  
(a) ( ) \$ WAIVED court costs, plus any costs determined after this date as established by separate order of this court;  
(b)  Victim assessment;  
    \$100.00 Prior to June 6, 1996.  
    \$500.00 on or after June 6, 1996.  
(c) ( ) \$ MA total amount restitution (with credit for amounts paid by co-defendants). The amount and recipient(s) of the restitution are as established by separate order of this court;  
( ) Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_

(d) ( ) \$667/727 recoupment for attorney's fees; WAIVED  
(e) ( ) \$ \_\_\_\_\_ fine;  
(f) ( ) \$ \_\_\_\_\_ Dept. Drug enforcement fund;  
(g) ( ) \$125.00 Washington State Toxicology Laboratory Fee. [ ] All or part suspended due to inability to pay. RCW 46.61.5054(1).  
(h) ( ) \$ \_\_\_\_\_ Domestic Violence Penalty (Post 6/4/04-\$100 maximum) RCW 10.99.080

7. The above payments shall be made in the manner established by Local Rule 7.2(f) and according to the following terms:  
(  ) not less than \$ 50.00 per month, 1st payment due in 30 Days  
( ) on a schedule established by the defendant's community corrections officer, to be paid within \_\_\_\_\_ months of ( ) this date ( ) release from confinement.

8. ( ) The defendant shall be prohibited from having any contact, directly or indirectly, with \_\_\_\_\_, (dob : \_\_\_\_\_) for a period of \_\_\_\_\_ years.

9. ( ) The defendant, having been convicted of a sexual offense, a drug offense associated with the use of hypodermic needles, or a prostitution related offense, shall cooperate with the Snohomish County Health District in conducting a test for the presence of human immuno- deficiency virus. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 2722 Colby, Suite 333, Everett, Washington, within one hour of this order to arrange for the test.

10.( ) If this is a crime enumerated in RCW 9.41.040 which makes you ineligible to possess a firearm, you must surrender any concealed pistol license at this time, if you have not already done so. (Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court).

11. ( ) \_\_\_\_\_  
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SONYA KRASKI  
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SNOHOMISH CO. WASH  
The Honorable Anita L. Farris

THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

No. 06-1-00278-9

Plaintiff,

DEFENDANT'S MOTION TO  
WITHDRAW GUILTY PLEA

vs.

SANTOS WILFREDO ORANTES,

(Clerk's Action Required)

Defendant.

MOTION

COMES NOW Defendant, SANTOS WILFREDO ORANTES, by and through undersigned counsel, Christopher Black, and moves this Court for relief from the judgment previously entered in the above-noted matter. Specifically, Defendant moves the Court to withdraw his plea of guilty and vacate the judgment and sentence in this matter. This motion is based on CrR 7.8(b)(4); RCW 10.73.100(6); Padilla v. Kentucky, \_\_ U.S. \_\_, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011); In re Personal Restraint of Jagana, 170 Wn. App. 32 (2012); the following Memorandum of Law; and the attached Declarations of Santos Orantes and Kathleen Kyle.

MOTION FOR RELIEF FROM

R BLACK, PLLC  
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APPENDIX 3

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MEMORANDUM

**I. Factual and Procedural Background**

Santos Orantes was born on September 1, 1980, in Zacatecoluca, El Salvador. See attached Declaration of Santos Orantes ("Orantes Dec."), ¶ 1. In 1999, he came to the United States. Id. at ¶ 2. He applied for Temporary Protected Status (TPS) in 2000 due to the ongoing dangerous conditions in El Salvador. Id. at ¶ 3. TPS establishes a temporary safe haven in the United States for nationals of designated countries (including El Salvador) where the country's nationals are unable to return safely, or, in certain circumstances, the country's government is unable to handle their return adequately. See 8 U.S.C. § 1254a. A person becomes ineligible for TPS if he is convicted of a felony or two or more misdemeanors. 8 U.S.C. § 1254a(c)(2)(B)(i). Mr. Orantes duly renewed his TPS twice after his initial application. Orantes Dec. at ¶ 3.

Mr. Orantes pleaded guilty to attempted unlawful issuance of a bank check on August 18, 2006, on advice of counsel. Orantes Dec. at ¶¶ 13, 15. He was given a deferred 364-day sentence with 12 months of probation and a \$500.00 fine. Id. at ¶ 13. It is this conviction that is the subject of this motion. This conviction carries grave collateral consequences for Mr. Orantes. The fact that he was convicted makes him ineligible for TPS and eligible for deportation.

At the time that Mr. Orantes entered his guilty plea, he had no idea that doing so would affect his immigration status. See Orantes Dec. at ¶¶ 17-19. He was not so advised by anyone prior to entry of his plea, and he was incorrectly assured by counsel that his conviction would have no impact on his TPS. Id. at ¶ 17; Declaration of Kathleen Kyle ("Kyle Dec."), ¶¶ 7-9. He did not realize that this conviction would impact his immigration status until his application to

1 renew TPS was denied due to his criminal convictions and he was placed in deportation  
2 proceedings. See Orantes Dec. at ¶ 18.

3 Since his conviction in 2006, Mr. Orantes has had no subsequent convictions. Id. at ¶ 9.  
4 He is a business owner who has worked hard to provide for his wife and two children, as well as  
5 his parents, his sister, and his sister's child. Id. at ¶ 5-7, 10.

6 Mr. Orantes has been deeply affected by the loss of his TPS. He is currently in  
7 deportation proceedings. Id. at 23. If Mr. Orantes is unsuccessful in obtaining relief in this  
8 case, he will be deported from the United where he has spent his entire adult life, separated from  
9 his family, and sent to a country where he has not lived since he was a youth. Id. at ¶¶ 24-27.  
10 Mr. Orantes's financial and emotional support is essential to the well-being of his family. Id. at  
11 ¶ 25. If he were to be deported to El Salvador, he fears that it would be a "disaster" for his  
12 family. Id. at ¶ 27.

13  
14 On January 13, 2011, Mr. Orantes filed a motion for relief from judgment in this Court.  
15 Ex. A at 11. In that motion, relying on Padilla v. Kentucky and Boykin v. Alabama,<sup>1</sup> Mr.  
16 Orantes argued that his guilty plea was not knowing and voluntary because the *trial court* did  
17 not inform him of the immigration consequences of his conviction, which as a result of the  
18 Supreme Court's holding in Padilla should be considered direct consequences. Ex. A at 4-6.  
19 Mr. Orantes did not raise a claim of ineffective assistance of counsel. Mr. Orantes's original  
20 motion was subsequently referred to the Court of Appeals as a personal restraint petition. In re  
21 Personal Restraint of Orantes, No. 66891-9-1, 2012 Wash. App. LEXIS 1922, at \*3-4 (August  
22 13, 2012).

23  
24  
25 <sup>1</sup> Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

1 After briefing and oral argument, the Court of Appeals held that Mr. Orantes's personal  
2 restraint petition was time-barred by RCW 10.73.090's one-year time limit on collateral attack.  
3 Id. at \*4. The court also held that Mr. Orantes's petition was not exempt from the time limit for  
4 collateral attack under RCW 10.73.100(6), which creates an exception for untimely personal  
5 restraint petitions based on new precedent, because Padilla v. Kentucky applies only to  
6 ineffective assistance of counsel claims, and not ordinary due process voluntariness claims  
7 under Boykin. Id. at \*17. Accordingly, because Mr. Orantes did not raise a claim of ineffective  
8 assistance of counsel in his personal restraint petition, the Court of Appeals refused to address  
9 the merits of his petition and dismissed it. Id. at \*17.

10 Mr. Orantes files the instant motion to withdraw his guilty plea on the ground that he did  
11 not receive effective assistance of counsel during the plea process in this case.

12 **II. Summary of Argument**

13  
14 When Mr. Orantes entered his plea of guilty, his attorney failed to inform him that doing  
15 so would cause him to lose his immigration status and render him deportable from the United  
16 States, and instead assured him that his immigration status would not be affected if he pleaded  
17 guilty. Orantes Dec. at ¶¶ 17-19. Had Mr. Orantes known that pleading guilty would subject  
18 him to deportation from the United States, he would have refused to plead guilty. Id. at ¶19.  
19 Prior to the United States Supreme Court's recent decision in Padilla v. Kentucky, the rule in  
20 Washington was that failure to inform a noncitizen defendant of the immigration consequences  
21 of a guilty plea did not constitute ineffective assistance of counsel. However, the Padilla Court  
22 significantly changed the law by imposing on defense counsel the duty to advise noncitizen  
23 defendants of the immigration consequences of a plea. 130 S. Ct. at 1482-83.  
24  
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1 Because Mr. Orantes was not correctly informed of the immigration consequences of his  
2 guilty plea by his attorney in this case and was instead given affirmative misadvice, he was  
3 denied effective assistance of counsel at the time his plea was entered, and his plea is therefore  
4 void. Accordingly, the Supreme Court's decision in Padilla dictates that Mr. Orantes should be  
5 relieved of the judgment in this case pursuant to CrR 7.8(b)(4). Mr. Orantes's claim is not time-  
6 barred because Padilla effected a significant change in the law governing Mr. Orantes's  
7 conviction, which should be applied retroactively, and which therefore creates an exception to  
8 the time limit on collateral attacks on judgments imposed by RCW 10.73.090. See In re  
9 Personal Restraint of Jagana, 170 Wn. App. 32, 59 (2012). Furthermore, Mr. Orantes's motion  
10 is not a successive petition for post-conviction relief under RCW 10.73.140 because the merits  
11 of his original personal restraint petition were never addressed by the Court of Appeals. In re  
12 Personal Restraint of VanDelft, 158 Wn.2d 731, 738 (2006).

13  
14 **III. Mr. Orantes's Plea in This Case Was Not Voluntary Because He Did Not**  
15 **Receive Effective Assistance of Counsel During the Plea Process.**

16 Both the Washington State Supreme Court and the United States Supreme Court have  
17 held that the "Sixth Amendment right to effective assistance of counsel encompasses the plea  
18 process." Sandoval, 171 Wn.2d at 168 (citing In re Personal Restraint of Riley, 122 Wn.2d 772,  
19 863 P.2d 554 (1993); McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d 763  
20 (1970)). In the context of the plea process, "[c]ounsel's advice can render the defendant's guilty  
21 plea involuntary or unintelligent." Sandoval, 171 Wn.2d at 168. In order to "establish the plea  
22 was involuntary or unintelligent because of counsel's inadequate advice, the defendant must  
23 satisfy the familiar two-part Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80  
24 L.Ed.2d 674 (1984), test. . . ." Id. First, the defendant must establish that counsel's  
25

1 performance was objectively unreasonable, and second, the defendant must establish that  
2 counsel's unreasonable performance prejudiced his case. Id.

3 In Padilla v. Kentucky, the United States Supreme Court applied these principles to  
4 advice regarding the immigration consequences of a guilty plea. The Supreme Court imposed  
5 upon counsel the duty to inform his client of the immigration consequences a of a guilty plea,  
6 holding that, where the immigration consequences of a guilty plea are clear, counsel has the  
7 duty to give a noncitizen client "correct advice" regarding those consequences, but where the  
8 immigration consequences of a plea are unclear, counsel "need do no more than advise a  
9 noncitizen client that pending criminal charges may carry a risk of adverse immigration  
10 consequences." Id. at 1482. The Washington State Supreme Court recognized Padilla's  
11 holding in State v. Sandoval, 171 Wn.2d at 171.

12 There is no question that the performance of Mr. Orantes's defense counsel was  
13 objectively unreasonable during the plea process in this case. At the time that Mr. Orantes  
14 pleaded guilty to attempted unlawful issuance of a bank check in 2006, the only reason that he  
15 was permitted to remain in the United State was because had been granted TPS. See Orantes  
16 Dec. at ¶¶ 3. In addition, Mr. Orantes had been convicted of a misdemeanor in North Carolina  
17 prior to pleading guilty in this case. Orantes Dec. at 7. The Immigration and Nationality Act  
18 provides that: "An alien shall not be eligible for temporary protected status under this section if  
19 the Attorney General finds that . . . the alien has been convicted of any felony or 2 or more  
20 misdemeanors committed in the United States. . . ." 8 U.S.C. § 1254(c)(2)(B)(i). Thus, it was  
21 plainly clear that by pleading guilty in this case Mr. Orantes would become ineligible for TPS  
22 status and be rendered deportable under the immigration laws.  
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1 Despite these facts, Mr. Orantes's attorney failed to correctly advise Mr. Orantes of the  
2 consequences of his guilty plea. See Orantes Dec. at ¶ 17; Kyle Dec. at ¶¶ 5-6. Instead of  
3 advising Mr. Orantes that pleading guilty would cause him to lose his immigration status, his  
4 attorney incorrectly assured him that pleading guilty would have no impact on his status.  
5 Orantes Dec. at ¶ 17. Indeed, the first time that Mr. Orantes learned that his conviction caused  
6 him to lose his immigration status was after the judgment and sentence in this case were  
7 entered, when his renewal application for TPS was denied and he was placed in deportation  
8 proceedings. Dec. Orantes at ¶ 18.

9 Because the immigration consequences of Mr. Orantes's conviction were clear at the  
10 time he pleaded guilty, counsel had the duty to give him correct advice regarding the  
11 immigration consequences of his conviction in this case. See Padilla, 130 S. Ct. at 1482. Mr.  
12 Orantes's counsel failed to correctly advise Mr. Orantes about the immigration consequences of  
13 his guilty plea and gave him incorrect advice. See Dec. Orantes at ¶ 17; Dec. Kyle, at ¶¶ 5-7.  
14 Since Mr. Orantes's attorney failed to provide him with correct advice about the immigration  
15 consequences of his guilty plea when the immigration consequences were clear, and gave him  
16 incorrect advice that induced him to plead guilty, her performance was constitutionally  
17 deficient. Sandoval, 171 Wn.2d at 171.

19 Furthermore, there is no question that Mr. Orantes was prejudiced by counsel's deficient  
20 performance. "In satisfying the prejudice prong, a defendant challenging a guilty plea must  
21 show that there is a reasonable probability that, but for counsel's errors, he would not have  
22 pleaded guilty and would have insisted on going to trial." Sandoval, 171 Wn.2d at 174-75  
23 (internal quotation marks and citations omitted). A reasonable probability exists if the  
24 defendant convinces the court that a decision to reject the plea bargain would have been rational  
25

1 under the circumstances. Id. at 175. This standard of proof is somewhat lower than the  
2 preponderance of the evidence standard. Id.

3 As a result of his guilty plea in this case, Mr. Orantes lost his immigration status and  
4 was automatically rendered eligible for deportation from the United States. Mr. Orantes asserts  
5 that he would not have pleaded guilty had he known the immigration consequences of his  
6 conviction, and would have instead taken his chances at trial. Dec. Orantes at ¶ 15. This claim  
7 is extraordinarily credible in view of the immigration consequences of pleading guilty, which  
8 include virtually certain deportation and return to a country plagued by poverty and violence  
9 where Mr. Orantes has not lived since his youth. It is especially so given the fact that, by  
10 withdrawing his plea, Mr. Orantes will do no more than return himself to the position he was  
11 previously in, facing the same charges he originally faced. The Washington State Supreme  
12 Court has recognized that for noncitizen defendants, the punishment of deportation is just as  
13 severe as imprisonment. Sandoval, 171 Wn.2d at 176. In Mr. Orantes's case it is much worse,  
14 as deportation to El Salvador would subject him to great hardships and permanently separate  
15 him from his family. See Orantes Dec. at ¶¶ 20-21. Mr. Orantes pleaded guilty based on his  
16 attorney's incorrect advice about immigration consequences of his plea. Had Mr. Orantes  
17 received correct advice about the immigration consequences of his conviction, he would not  
18 have pleaded guilty. Mr. Orantes was substantially prejudiced by his counsel's deficient  
19 performance.  
20

21 Accordingly, because Mr. Orantes was deprived of the effective assistance of counsel  
22 during the plea process in this case, the resulting plea was involuntary and he should be  
23 permitted to withdraw his guilty plea. See Sandoval, 171 Wn.2d at 168.  
24  
25

1                   **IV. An Involuntary Plea Results in a Void Judgment that Is Subject to**  
2                   **Collateral Attack Pursuant to CrR 7.8(b)(4).**

3                   CrR 7.8(b) allows a court to relieve a party from a final judgment for the following  
4 reasons:

- 5                   (1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a  
6                   judgment or order;  
7                   (2) Newly discovered evidence which by due diligence could not have been discovered  
8                   in time to move for a new trial under rule 7.5;  
9                   (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or  
10                   other misconduct of an adverse party;  
11                   (4) The judgment is void; or  
12                   (5) Any other reason justifying relief from the operation of the judgment.

13                   A plea that is involuntary violates due process. State v. Ross, 129 Wash.2d 279, 284,  
14 916 P.2d 405 (1996); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). Such a plea  
15 results in a void judgment that is subject to collateral attack pursuant to CrR 7.8(b)(4). State v.  
16 Olivera-Avila, 89 Wn.App. 313, 319 (1997).

17                   In this case, because Mr. Orantes's plea was involuntary, as outlined above, the resulting  
18 judgment and sentence is void and he may be relieved from that judgment pursuant to CrR  
19 7.8(b)(4). Olivera-Avila, 89 Wn.App. at 319.

20                   **V. Mr. Orantes is Excused from the Time Limit on Collateral Attacks on**  
21                   **Judgments because *Padilla v. Kentucky* Effected a Significant Change in the**  
22                   **Law that Applies Retroactively under RCW 10.73.100(6).**

23                   Mr. Orantes is entitled to withdraw his plea because Padilla effected a significant change  
24 in the law material to his case that applies retroactively. RCW 10.73.090 imposes a one-year  
25 time limit on collateral attacks on judgments. However, 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

1 or civil proceeding instituted by the state or local government, and either the  
2 legislature has expressly provided that the change in the law is to be applied  
3 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.

4 RCW 10.73.100(6). The Washington Court of Appeals recently held that the Supreme Court's  
5 decision in Padilla effected a significant change in law that applies retroactively to cases on  
6 collateral review under RCW 10.73.100(6) and that a defendant who raises a claim of  
7 ineffective assistance of counsel under Padilla is exempt from the one-year time limit on  
8 collateral attack imposed by RCW 10.73.090. In re Personal Restraint of Jagana, 170 Wn. App.  
9 at 59. Because Padilla effected a significant change in the law that applies retroactively to Mr.  
10 Orantes's case, his motion is exempt from RCW 10.73.090's one-year time limit.

11 **VI. Mr. Orantes's Motion is Not a Successive Petition for Post-Conviction**  
12 **Relief.**

13 Mr. Orantes's motion is not barred by RCW 10.73.140 as a successive petition for post-  
14 conviction relief. RCW 10.73.140 provides:

15 If a person has previously filed a petition for personal restraint, the court of  
16 appeals will not consider the petition unless the person certifies that he or she has  
17 not filed a previous petition on similar grounds, and shows good cause why  
petitioner did not raise the new grounds in the previous petition. . . .

18 RCW 10.73.140. RCW 10.73.140 applies to motions under CrR 7.8(b). State v. Brand, 120  
19 Wn.2d 365, 370, 842 P.2d 470 (1992). But, the Supreme Court has held that a second personal  
20 restraint petition is not barred by RCW 10.73.140 as a successive petition if the first petition was  
21 never decided on the merits. In re Personal Restraint of VanDelft, 158 Wn.2d at 738; In re  
22 Personal Restraint of Stoudmire, 145 Wn.2d 258, 263, 26 P.3d 1005 (2001).

23 In dismissing Mr. Orantes's original personal restraint petition, the Court of Appeals  
24 expressly stated that it did not address "the merits of his claim" because his petition was  
25

1 procedurally barred as untimely. In re Personal Restraint of Orantes, 2012 Wn. App. Lexis  
2 1922, at \*17. Accordingly, because Mr. Orantes's original personal restraint petition was  
3 dismissed on procedural grounds and the merits of his claim were not decided by the Court of  
4 Appeals, the instant motion is not precluded by RCW 10.73.140 as a successive petition. See In  
5 Personal Restraint of VanDelft, 158 Wn.2d at 738.

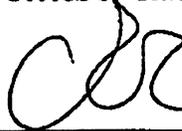
6 **VII. Conclusion**

7 Based on the foregoing, the Court should vacate the judgment and sentence in this case  
8 and permit Mr. Orantes to withdraw his guilty plea.  
9

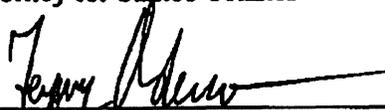
10 DATED this 15<sup>th</sup> day of January, 2013.

11 Respectfully submitted,

12 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

13 

14  
15 Christopher Black, WSBA No. 31744  
16 Attorney for Santos Orantes

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18 Teymur Askerov, WSBA No. 45391  
19 Attorney for Santos Orantes  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing, along with any attachments, was served on the below-noted date, via U.S. Mail, upon the parties required to be served in this action:

**Snohomish County Prosecuting Attorney's Office  
3000 Rockefeller Ave., M/S 504  
Everett, WA 98201**

**DATED this 15<sup>th</sup> day of January, 2013.**

**Respectfully submitted,**

**LAW OFFICE OF CHRISTOPHER BLACK, PLLC**



**Teymur Askerov, WSBA No. 45391  
Attorney for Santos Orantes**

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THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

Plaintiff,

vs.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

DECLARATION OF SANTOS ORANTES

I, SANTOS WILFREDO ORANTES, am defendant in this matter. I have personal knowledge of the facts herein, am over the age of 18, and am competent to testify. I hereby certify that the following is true and correct to the best of my ability under penalty of perjury.

Background

1. My name is Santos Wilfredo Orantes. I was born on September 1, 1980, in Zacatecoluca, El Salvador.
2. I left El Salvador in the summer of 1999 and came to the United States. I lived in California, North Carolina, and Florida before moving to Washington in 2004.
3. I applied for Temporary Protected Status (TPS) for the first time in approximately 2000. This is a temporary immigration status accorded by the United States government to people from certain countries to which it unsafe to return. I successfully renewed my TPS twice after that.
4. I met my wife, Nansy, in 2003. Nansy was born in El Salvador and has lived in the United States since she was fourteen years old. She is a naturalized U.S. citizen. We were married in 2005.

- 1 5. Nansy and I have two beautiful children. Our daughter Lesley is eight and our son Daniel is  
2 almost four. They were both born here in the United States and are both U.S. citizens.
- 3 6. My sister Dinora, who also has TPS, is a single mother to an eleven year old U.S. citizen.  
4 They lived with my family until recently, and I continue to support them.
- 5 7. I also support my parents, who still live in El Salvador. Both of my parents are ill and they  
6 would have no means to survive if I stopped supporting them.
- 7 8. When I first arrived in the United States, I did not speak English and I was unsophisticated in  
8 my behavior and business dealings. Regrettably, I was convicted of a misdemeanor while  
9 living in North Carolina.
- 9 9. Since 2006, I have not been convicted of any crimes. In 2010, I started my own construction  
10 company. I specialize in remodeling homes. My company is licensed in the State of  
11 Washington and I have stayed current on my taxes.
- 12 10. I have worked very hard, learned English, and done my best to be a good husband, father,  
13 son, and community member.
- 14 11. I know that I have been very lucky to be able to live in safety in the U.S., and I want to do  
15 everything in my power to take advantage of the opportunity, and to contribute to society as  
16 much as I am able.
- 17 12. In short, I have been working hard, caring for my family, and being as productive a member  
18 of society as I can.

18 Entry of Guilty Plea in this Case

- 19 13. On August 18, 2006, I entered a plea of guilty to the charge of attempted unlawful issuance  
20 of a bank check. I was given a deferred sentence of 364 days with 12 months of probation  
21 and a \$500.00 fine.
- 22 14. I complied with all of the terms of my deferred sentence.
- 23 15. My legal counsel advised me that my best option was to plead guilty, because doing so  
24 would likely lead to the best resolution of my criminal case. Thus, I decided to plead guilty.
- 25 16. My lawyer knew about my TPS and that my immigration status was very important to me.

- 1 17. My lawyer mistakenly advised me that pleading guilty would not affect my TPS as long as I  
2 was sentenced to less than 365 days of confinement. She never told me that pleading guilty  
3 would cause me to lose my immigration status.
- 4 18. The first time that I became aware that this plea would jeopardize my immigration status was  
5 when my application to renew TPS was denied.
- 6 19. At the time I pleaded guilty in this case I was completely unaware of the serious impact this  
7 conviction would have on my immigration status, and thus my life. I would not have pleaded  
8 guilty had I been aware of those consequences and would have gone to trial instead.
- 9 20. Avoiding deportation was much more important to me than avoiding jail time at the time I  
10 pleaded guilty. In 2006, when I pleaded guilty, I was recently married and had a new born  
11 daughter. I was prepared to do everything within my power to remain with them in the  
12 United States.
- 13 21. After I was convicted, I consulted with another attorney, who erroneously advised me that a  
14 reduction in my sentence from 364 to 180 days would resolve my immigration problems. I  
15 petitioned the court to reduce my sentence, which was then amended from 364 to 180 days.
- 16 22. However, due to the fact that I have two misdemeanor convictions, I remain ineligible for  
17 TPS.

18 Current Status

- 19 23. I am currently in deportation proceedings. If I am unsuccessful in my attempt to obtain post-  
20 conviction relief in this matter, it is almost certain that I will be deported to El Salvador.
- 21 24. If this happens it will have a disastrous impact on both me and my family. I have been in this  
22 country for over ten years. I have spent my entire adult life here. I have no prospects in El  
23 Salvador. My wife and children are all U.S. Citizens. My wife has been in this country since  
24 she was a child, and my children have never lived anywhere else. El Salvador is a dangerous  
25 place, and there is little economic opportunity there.
- 25 25. My wife would not be able to financially support our family without me. I am the main  
breadwinner in my household, and my wife does not earn enough to support herself and our  
children without my income. My wife and children rely on me for financial and emotional  
support, and we would all be devastated if we were separated from one another.

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26. If I am deported to El Salvador, I will also be unable to support my parents, my sister and my niece. I fear that my parents will be unable to survive without my support.

27. I truly do not know what will happen if I am deported. It would be a disaster for our family.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my ability.

SIGNED AND DATED this 17 day of September, 2012 at Kent, Washington.

  
Santos Wilfredo Orantes

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THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
SANTOS WILFREDO ORANTES,  
  
Defendant.

No. 06-1-00278-9

DECLARATION OF KATHLEEN KYLE

I, KATHLEEN KYLE, have personal knowledge of the facts herein, am over the age of 18, and am competent to testify. I hereby certify that the following is true and correct to the best of my ability under penalty of perjury.

1. I am an attorney licensed to practice law in the State of Washington.
2. I previously represented the defendant, Santos Wilfredo Orantes, in this matter.
3. On August 18, 2006, Mr. Orantes entered a plea of guilty to one count of Attempted Unlawful Issuance of a Bank Check.
4. I discussed some of the consequences of Mr. Orantes's plea with him prior to his entry of the plea in court.
5. At no point during my conversations with Mr. Orantes prior to the entry of the plea did I advise him that pleading guilty to this charge would likely result in the loss of his immigration status.

DECLARATION OF KATHLEEN KYLE - 1

LAW OFFICE OF CHRISTOPHER BLACK, PLLC  
119 First Avenue South, Suite 320  
Seattle, WA 98104  
206.623.1604 | Fax: 206.622.6636

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6. I did not advise him that his guilty plea would render him ineligible for Temporary Protected Status.

7. I have no reason to believe that Mr. Orantes was aware of the actual effect that his guilty plea would have on his immigration status at the time of entry of the plea.

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

SIGNED AND DATED this 1<sup>st</sup> day of January, 2011 at Everett, Washington.

  
\_\_\_\_\_  
Kathleen Kyle



FILED

2013 FEB 21 PM 3:25

SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH

**CERTIFIED  
COPY**

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

No. 06-1-00278-9

Plaintiff,

v.

STATE'S MOTION TO TRANSFER  
MOTION FOR RELIEF FROM JUDGMENT

ORANTES, Santos W.

Defendant.

**I. MOTION**

The State of Washington moves for an order transferring the defendant's motion for relief from judgment to the Court of Appeals, for consideration as a personal restraint petition. This motion is based on CrR 7.8(c)(2) and the following memorandum.

**II. FACTS**

On October 12, 2004, the defendant purchased two truck canopies. He paid for them with a check in the amount of \$598.95. At the time he wrote this check, his checking account was already overdrawn by \$196.08. Docket no. 2.

Based on these acts, the defendant was charged with the felony of unlawful issuance of a bank check. Docket no. 1. Ms. Kathleen Kyle of the Snohomish

State's Motion to Transfer  
Motion for Relief from Judgment

**APPENDIX 4**

County  
Criminal Division  
e., MS 504  
98201-4048  
(25) 388-7172

62

1 County Public Defender Association was appointed to represent him. On her  
2 advice, the defendant pled guilty to attempted unlawful issuance of a bank check, a  
3 gross misdemeanor. The plea statement contained the standard advisement  
4 concerning possible immigration consequences:

5 If I am not a citizen of the United States, a plea of guilty to an offense  
6 punishable as a crime under state law is grounds for deportation,  
7 exclusion from admission to the United States, or denial of  
naturalization pursuant to the laws of the United States.

8 Docket no. 29 at 2, ¶ 6(i). In accepting the plea, the court orally repeated this  
9 warning. Docket no. 54 at 5.

10 In the plea agreement, the State agreed to recommend 364 days in jail, all  
11 deferred on condition of one year's probation and payment of a \$500 penalty  
12 assessment. (The plea form originally had 365 days typed in. A handwritten change  
13 reduced this to 364.) Docket no. 29.

14 In connection with a subsequent motion to amend the sentence, Ms. Kyle  
15 explained the reason for this change. She had consulted an overview published by  
16 the Washington Defenders Immigration Project on consequences of criminal  
17 convictions. According to this, the defendant could face immigration consequences  
18 if he was sentenced to one year or more. He would not face such consequences if  
19 he was sentenced to less than one year. Based on this information, she sought a  
20 deferred sentence of 364 days. Declaration of Defense Counsel (attached to Motion  
21 and Declaration in Support of Amending Judgment and Sentence, docket no. 34).  
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1 On August 23, 2006, the court sentenced the defendant in accordance with  
2 the parties' recommendations. He received 364 days in jail, all deferred on condition  
3 of 12 months' probation and payment of a \$500 victim assessment. The judgment  
4 was filed the following day.

5 In December, 2008, the defendant, acting through new counsel, filed a  
6 motion to amend the judgment. This motion stated that the defendant faced  
7 immigration consequences as a result of any sentence exceeding 180 days.  
8 According to information provided by the defendant's immigration counsel,  
9 amendment of the sentence was "the paramount issue" in an upcoming immigration  
10 hearing. Docket no. 34 at 2. This court granted the motion. It entered an order  
11 reducing the sentence "nunc pro tunc" to 180 days. Docket no. 35.  
12

13 Despite this action by the court, on January 20, 2011 the defendant filed a  
14 motion to vacate the judgment. The motion claimed that the guilty plea was not  
15 voluntary because the defendant had not been advised of immigration  
16 consequences. Docket no. 38.  
17

18 Before responding to this motion, the prosecutor asked defense counsel  
19 whether he was claiming ineffective assistance of counsel. The prosecutor pointed  
20 out that such a claim waived the attorney-client privilege to the extent necessary to  
21 respond to those allegations. In response, defense counsel stated that "we have not  
22 claimed ineffective assistance of counsel." Based on this assurance, the prosecutor  
23 agreed not to seek to interview Ms. Kyle. Docket no. 57.  
24  
25

1 The court transferred the motion to the Court of Appeals for consideration as  
2 a personal restraint petition. Docket no. 48. The Court of Appeals dismissed the  
3 petition, holding that it was barred by RCW 10.73.090. The mandate was issued on  
4 December 21, 2012. Docket no. 50.

5 On January 16, 2013, the defendant filed a "Motion to Withdraw Guilty Plea,"  
6 again relying on CrR 7.8. This time, he raised the claim that he had renounced in  
7 the prior motion: that former defense counsel's mis-advice concerning immigration  
8 consequences constituted ineffective assistance of counsel. Docket no. 51. The  
9 defendant has, however, still refused to provide a waiver of attorney-client privilege,  
10 so as to allow the prosecutor to interview former defense counsel. As a result, the  
11 prosecutor has still been unable to obtain any information concerning this case from  
12 former counsel. Docket no. 57.

13  
14 **II. ISSUE**

15 Should this case be transferred to the Court of Appeals for consideration as a  
16 personal restraint petition?  
17

18 **IV. ARGUMENT**

19 Motions to vacate judgment can be either resolved by this court on the merits  
20 or transferred to the Court of Appeals. The standards governing this choice are set  
21 out in CrR 7.8(c)(2):

22 The court shall transfer a motion filed by a defendant to the Court of  
23 Appeals for consideration as a personal restraint petition unless the  
24 court determines that the motion is not barred by RCW 10.73.090 and  
25 either (i) the defendant has made a substantial showing that he or she

1 is entitled to relief or (ii) resolution of the motion will require a factual  
hearing.

2 **A. THE DEFENDANT'S MOTION IS TIME BARRED.**

3 RCW 10.73.090(1) sets a time limit on motions to vacate judgment and other  
4 forms of "collateral attack." Such a motion must be filed within one year after the  
5 judgment "becomes final." Since the judgment in the present case was not  
6 appealed, it became final on August 24, 2006, the day it was filed. RCW  
7 10.73.090(3)(a). The present motion was filed on January 16, 2013. That date is  
8 almost 5½ years beyond the time limit.  
9

10 The defendant claims that his motion falls within the exception to the time  
11 limit set out in RCW 10.73.100(6):

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

14 . . .

15 (6) There has been a significant change in the law, whether  
16 substantive or procedural, which is material to the conviction ..., and  
17 ... a court, in interpreting a change in the law that lacks express  
18 legislative intent regarding retroactive application, determines that  
sufficient reasons exist to require retroactive application of the  
changed legal standard.

19 The defendant claims that a "significant change in the law" resulted from  
20 Padilla v. Kentucky, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Prior  
21 to Padilla, Washington courts did not require lawyers in criminal cases to advise  
22 their clients of immigration consequences of guilty pleas. The courts reasoned that  
23 counsel's duty did not extend to "collateral consequences." State v. Holley, 75 Wn.  
24 App. 191, 197, 876 P.2d 973 (1994). Padilla holds that counsel must advise of  
25 State's Motion to Transfer

1 immigration consequences, whether or not they are considered "collateral."  
2 Because of this, the Court of Appeals has held that Padilla is a significant change in  
3 the law. In re Jagana, 170 Wn. App. 32, 43 ¶ 24, 282 P.3d 1153 (2012).

4 The Court of Appeals also held that Padilla is retroactively applicable.  
5 Jagana, 170 Wn. App. at 65 ¶ 66. The court noted that this issue was currently  
6 awaiting decision by the United States Supreme Court. Id. at 55 ¶ 54. That decision  
7 has just been handed down. The Supreme Court held that Padilla is not retroactive.  
8 Chaidez v. United States, no. 11-820 (decided 2/20/13). This being so, the  
9 exception set out in RCW 10.73.100(6) does not apply, and the defendant's motion  
10 is time barred.  
11

12 Even under the analysis in Jagana, the defendant's claim would not fall  
13 within the statutory exception. Prior to Padilla, courts recognized a distinction  
14 between non-advice concerning collateral consequences and affirmative mis-  
15 advice. Although non-advice did not constitute ineffective assistance, affirmative  
16 mis-advice could be ineffective assistance. Chaidez, slip op. at 13; Jagana, 170 Wn.  
17 App. at 43 ¶ 24. Two Washington cases specifically recognized that counsel's mis-  
18 advice about immigration consequences could support withdrawal of a guilty plea.  
19 State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993); Holley, 175 Wn. App.  
20 at 198-99; cf. In re Yim, 139 Wn.2d 581, 588, 989 P.2d 512 (1999) (affirmative mis-  
21 advice concerning immigration consequences could constitute "manifest injustice"  
22 supporting withdrawal of plea).  
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1 The present case involves mis-advice, not non-advice. According to the  
2 defendant's declaration, "My lawyer mistakenly advised me that pleading guilty  
3 would not affect my TPS [Temporary Protected Status] as long as I was sentenced  
4 to less than 365 days of confinement." Declaration of Santos Orantes at 3 ¶ 17.  
5 The defendant claims that this advice was erroneous: "[D]ue to the fact that I have  
6 two misdemeanor convictions, I remain ineligible for TPS." Id. ¶ 22.

7 Since the defendant's claim is based on mis-advice, it was available prior to  
8 Padilla. This means that Padilla is not a "significant change in the law" with respect  
9 to *this defendant's* claim. A "significant change in the law" occurs when "an  
10 intervening opinion has effectively overturned a prior appellate decision that was  
11 originally determinative of a material issue." In re Domingo, 155 Wn.2d 356, 366 ¶  
12 27, 119 P.3d 816 (2005). This reflects the principle that litigants have a duty to raise  
13 available arguments in a timely fashion, but "they should not be penalized for having  
14 omitted arguments that were essentially unavailable at the time." In re Greening,  
15 141 Wn.2d 687, 697, 9 P.3d 206 (2000). Since the defendant's claim was available  
16 prior to Padilla, he had a duty to raise it in a timely fashion. Since he failed to do so,  
17 the claim is barred by RCW 10.73.090.

18  
19  
20 **B. THE DEFENDANT HAS NOT MADE A SUBSTANTIAL SHOWING THAT HE IS**  
21 **ENTITLED TO RELIEF.**

22 **1. Because The Defendant Renounced An Ineffectiveness Claim In The Prior**  
23 **Proceeding, His Motion Is Barred As Abusive.**

24 Even if the defendant's motion could be considered timely, it is barred as  
25 abusive.

1 A prisoner's second or subsequent personal restraint petition that  
2 raises a new issue for the first time will not be considered if raising  
3 that issue constitutes an abuse of the writ. We have held that if the  
4 defendant was represented by counsel throughout postconviction  
5 proceedings, it is an abuse of the writ for him or her to raise a new  
6 issue that was available but not relied upon in a prior petition. No  
7 abuse of the writ will be found where a claim is based on newly  
8 discovered evidence or intervening changes in case law because they  
9 would not have been "available" when the earlier petition was filed.  
10 However, if counsel was fully aware of the facts supporting the "new"  
11 claim when the prior petition was filed, and there are no pertinent  
12 intervening developments, raising the "new" claim for the first time in a  
13 successive petition constitutes needless piecemeal litigation and,  
14 therefore, an abuse of the writ.

9 In re Turay, 153 Wash. 2d 44, 48-49, 101 P.3d 854 (2004) (citations and footnote  
10 omitted).

11 All of these requirements are satisfied here. The defendant was represented  
12 by counsel throughout the prior proceeding. At the time the prior motion was filed,  
13 Padilla had already been decided. All of the facts that allegedly establish ineffective  
14 assistance were known to counsel at the time. There has been no newly discovered  
15 evidence or significant change in the law. This being so, the defendant was required  
16 to raise all available grounds for relief. Having chosen to litigate the case on one  
17 legal theory, he is not entitled to a second try under a different theory.

18 The defendant's motion is also abusive for a second reason. In his prior  
19 motion, the defendant deliberately chose not to raise a claim of ineffective  
20 assistance. The deliberate abandonment of an issue constitutes an abuse of the  
21 writ, which prevents the issue from being raised in a subsequent proceeding.  
22 Sanders v. United States, 373 U.S. 1, 18, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963).  
23  
24

1 Because the defendant's attempt to raise a claim of ineffectiveness constitutes an  
2 abuse of the remedy, that claim cannot be considered.

3 **3. The Defendant Has Not Made An Adequate Showing That His Counsel's**  
4 **Performance Was Deficient.**

5 Even if the standards of Padilla are applied, the defendant has not made a  
6 sufficient factual showing to warrant relief. Ineffective assistance claims are  
7 governed by the standard set out in Strickland v. Washington, 466 U.S. 668, 104 S.  
8 Ct. 2052, 80 L. Ed. 2d 674 (1984). Under that standard, the defendant must  
9 establish that (1) his attorney's performance was deficient and (2) the deficient  
10 performance prejudiced the defense. Id. at 687.

11 To establish a constitutional violation, the defendant must show that  
12 counsel's performance was "objectively unreasonable." State v. Sandoval, 171  
13 Wn.2d 163, 169 ¶ 9, 249 P.3d 1015 (2011). When counsel's alleged error involves  
14 failure to advise of immigration consequences, the standard depends on the clarity  
15 of the immigration law:  
16

17 If the applicable immigration law is truly clear that an offense is  
18 deportable, the defense attorney must correctly advise the defendant  
19 that pleading guilty to a particular charge would lead to deportation. If  
20 the law is not succinct and straightforward, counsel must provide only  
a general warning that pending criminal charges may carry a risk of  
adverse immigration consequences.

21 Id. at 170 ¶ 11 (citations omitted).

22 In the present case, the defendant has not demonstrated that the immigration  
23 consequences of his plea were "truly clear." According to Ms. Kyle's declaration,  
24 she relied on a manual published by the Washington Defenders Immigration  
25

1 Project. Docket no. 34, Declaration of Defense Counsel ¶ 2. The defendant has not  
2 shown that this reliance was unreasonable. An immigration attorney later concluded  
3 that adverse consequences could be avoided by reducing the suspended sentence  
4 to 180 days. Id., Declaration of Counsel ¶ 7.

5 The adverse immigration consequences in this case stem from the  
6 defendant's prior North Carolina misdemeanor conviction. Motion for Relief from  
7 Judgment at 2. There is no showing that Ms. Kyle knew or should have known of  
8 that conviction. Even subsequent counsel claimed that "Mr. Orantes has no criminal  
9 history before ... this offense." Docket no. 34, Declaration of Counsel ¶ 5. So far as  
10 the defendant has shown, Ms. Kyle may have made reasonable inquiries, and the  
11 defendant may have failed to inform her of his prior conviction. The defendant  
12 cannot blame his former attorney for his own lack of candor.

14 With regard to the "prejudice" prong, the State concedes that the defendant  
15 has made an adequate prima facie showing. In this context, "prejudice" exists "if the  
16 defendant convinces the court that a decision to reject the plea bargain would have  
17 been rational under the circumstances." Sandoval, 171 Wn.2d at 174-75 ¶ 19.  
18 Here, the prosecutor stated at the plea hearing that there were "significant factual  
19 issues" with the case. Docket no. 54 at 2. Defense counsel asserted that the  
20 defendant had written the bad check "due to inexperience and the language  
21 barrier." Id. at 7. This is sufficient to create a factual issue whether the defendant  
22 would have acted rationally in rejecting the plea agreement.  
23  
24

1           Nevertheless, since the defendant has failed to establish deficient  
2 performance, he has not satisfied his burden of proof under  
3 Strickland. Consequently, he has not made a substantial showing that he is entitled  
4 to relief.

5 **C. THE DEFENDANT IS NOT ENTITLED TO A FACTUAL HEARING.**

6           Under CrR 7.8(c)(1), a motion for relief from judgment must be "supported by  
7 affidavits setting forth a concise statement of the facts ... upon which the motion is  
8 based." As discussed above, the defendant's motion fails to contain adequate facts  
9 to establish deficient performance. His motion is also barred as both untimely and  
10 abusive. Consequently, he is not entitled to a factual hearing.

11           Alternatively, if the court believes that the motion is not barred and that the  
12 defendant's factual showing is sufficient, the court should "enter an order fixing a  
13 time and place for hearing" per CrR 7.8(c)(3).  
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1 **V. CONCLUSION**

2 This motion is time barred. The defendant has not made a substantial  
3 showing of entitlement to relief. There is also no need for a factual hearing. Under  
4 CrR 7.8(c)(2), the motion should be transferred to the Court of Appeals for  
5 consideration as a personal restraint petition.  
6

7 Respectfully submitted on February 20, 2013.

8  
9 MARK K. ROE  
Snohomish County Prosecuting Attorney

10  
11 By: *Seth A. Fine*  
12 SETH A. FINE, WSBA # 10937  
13 Deputy Prosecuting Attorney  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

In re Personal Restraint Petition of

No. 71082-6-1

SANTOS W. ORANTES,

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

Petitioner.

AFFIDAVIT BY CERTIFICATION:

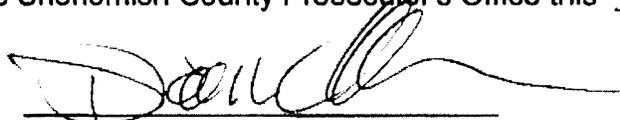
The undersigned certifies that on the 27<sup>th</sup> day of April, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL RESPONSE TO PERSONAL RESTRAINT PETITION

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Christopher R. Black and Teymur Gasanovich Askerov, Attorneys at Law, [crb@crblack.com](mailto:crb@crblack.com); [timaskerov@crblack.com](mailto:timaskerov@crblack.com)

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 27<sup>th</sup> day of April, 2016.



DIANE K. KREMENICH  
Legal Assistant/Appeals Unit

**SNOHOMISH COUNTY PROSECUTOR**

**April 27, 2016 - 3:40 PM**

**Transmittal Letter**

Document Uploaded: prp2-710826-orantes supp response.pdf

Case Name: In Re Personal Restraint of Santos W. Orantes

Court of Appeals Case Number: 71082-6

Party Represented: yes

**Is this a Personal Restraint Petition?**  Yes  No

Trial Court County: Snohomish - Superior Court #  
06-1-00278-9

**The document being Filed is:**

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: \_\_\_\_\_
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: Supplemental Response to Personal Restraint Petition

**Comments:**

No Comments were entered.

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