NO. 46933-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEVIN ESTES,

Appellant.

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

The Honorable Phillip Sorensen, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel when his attorney failed to familiarize himself with relevant law regarding appellant's deadly weapon charges and the applicable penalty under the Persistent Offender Accountability Act (POAA).

2. Appellant was denied a fair trial when a police officer improperly commented on his guilt as to the deadly weapon charges.

3. The trial court erred when it failed to consider appellant's ability to pay before imposing discretionary legal financial obligations (LFOs).

Issues Pertaining to Assignments of Error

1. Appellant was charged with two counts of second degree assault and one count of felony harassment, each with a deadly weapon enhancement. He had previously been convicted of two strike offenses under the POAA. A jury acquitted appellant of both of the second degree assault charges, but found him guilty of one count of the third degree assault (a lesser included offense) and the felony harassment charge, each with a deadly weapon enhancement. Under RCW 9.9A.030(32)(t), these offenses constituted third strikes because of the enhancements.

Unfortunately, defense counsel was not aware of this until after the verdicts were rendered. The record shows appellant's defense was prejudiced by counsel's failure to familiarize himself with relevant law. Was appellant denied effective assistance of counsel?

2. The State's theory of the case was that appellant was armed with one of two possible knives during the incident. When deciding by special verdict whether appellant was armed with a deadly weapon, the jury was not asked to distinguish between the knives. One of the knives was never offered as physical evidence, but an officer who saw the knife told the jury it was a "deadly weapon." Was this an improper comment on guilt that encroached upon the jury's duty to render an independent and impartial verdict?

3. The trial court ordered appellant to pay $1,500.00 for discretionary LFOs. There was no on-the-record inquiry into his ability to pay. Hence, the trial court failed to comply with RCW 10.01.160(3). Is remand required for the trial court to comply with that statute?

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 2, 2014, the Pierce County prosecutor charged appellant Kevin Estes with two counts of second degree assault

and one count of felony harassment, each with a deadly weapon enhancement. CP 1-2.

On February 27, 2014, the State issued a Persistent Offender Notice indicating that Estes was facing a third strike offense, but the notice failed to specify under what statutory authority the State would be seeking to qualify the offenses as a third strike. CP 381.

On July 23, 2014, the prosecutor amended the information, adding one more count of second degree assault. CP 117-119. On July 31, 2014, the information was amended again, with the prosecutor dropping one of the assault charges. RP 206-08.

After a jury trial, Estes was acquitted of both second degree assault charges. However, he was found guilty of one count of third degree assault (a lesser included offense), the felony harassment charge, and deadly weapon enhancements for both offenses. CP 331-35. Due to the deadly weapon enhancements, Estes was convicted of a third strike and sentenced to life in prison without parole. CP 363. Estes timely appeals. RP 377.

2. Substantive Facts

On February 19, 2014, Estes was drinking with his friend James Randle all day and into the evening at Randle's apartment.

RP 278-79. Randle's roommate, Anthony Prusek, was also in the apartment that evening, as was Prusek's girlfriend, Ashley Stoltenberg. RP 72, 74, 277. Stoltenberg remained in Prusek's bedroom while the men sat in the living room playing video games. RP 280. Prusek was sitting on the couch and Estes was sitting on the floor next to him, leaning his back against the couch. RP 139. Both were facing the television set. RP 139.

Estes had previously talked openly about Stoltenberg's breasts and made her feel uncomfortable, so Prusek took the opportunity to say something to Estes. RP 78, 83, 130. Estes continued to talk about Stoltenberg breasts. RP 83. At this point, Stoltenberg stormed out of the bedroom and yelled, "If you don't stop talking about me like that, I will slap you." RP 84, 280.

There were several different versions of what happened next. Randle testified that Stoltenberg had "lost her mind" when she came out of the bedroom screaming. RP 280. Randle saw Estes was mad and started to get up, but he did not recall Estes threatening Stoltenberg. RP 287, 297. Randle never saw Estes lunge at Stoltenberg or take a swing toward Prusek. RP 287, 312. Randle saw Prusek restrain Estes, however. RP 281. Then, he saw them wrestling on the floor and, at some point, there was a

knife on the floor. RP 281-82. Randle did not see Estes draw a knife, and he never saw Estes stab at anyone. RP 284, 287.

After Prusek had subdued Estes, Randle grabbed the knife. RP 282-83. He told Estes to leave. RP 282-83. Randle put the knife on top of the refrigerator. RP 284

In contrast, Stoltenberg testified that after she shouted at Estes, he stood up, pulled out a knife, and growled, "Time to die, bitch." RP 86. She said Estes stood and turned to face her. RP 101. She claimed he lunged and waived the knife around, making stabbing motions toward Prusek – who had stepped in between them. RP 101. Stoltenberg said Prusek then grabbed Estes and eventually had him in a headlock. RP 88, 90. At this point, Stoltenberg ran out and called 911. Stoltenberg testified that she later saw the knife that was used on the refrigerator. RP 106.

Prusek gave several conflicting statements about what happened. RP 136-37; RP 169. At trial, he testified that after Stoltenberg came out of bedroom and said something to Estes, Estes said "bitch" and turned his body quickly as if to stand up and go after Stoltenberg. RP 131-32. Prusek said he grabbed Estes around the waist, so that Estes never actually stood up. RP 131, 141-42. Prusek testified that when he grabbed Estes, he was trying

to make sure both that Estes did not hurt Stoltenberg and that Stoltenberg did not hurt Estes.[1] RP 377.

Prusek claimed that he and Estes wrestled on the floor and then Estes pulled out a knife.[2] RP 132. Prusek said he adjusted his grip to a chokehold as Estes was flailing with the knife, which cut Prusek on the pinky and a toe. RP 134, 143-44, 151, 153, 156. According to Prusek, Estes began having trouble breathing because of the chokehold and submitted. RP 157, 366. At this point, Randle took knife and Prusek released Estes. RP 134, 157, 164. Seeing he had been cut, Prusek went to get band-aides. RP 164. Meanwhile, Estes went out to his car without any further problems. RP 194.

When an officer arrived in response to the 911 call, he found Estes inside his car in the driveway. RP 194, 210. The officer inquired whether Estes knew anything about the incident that had been reported. RP 195. Estes admitted that he was in the

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[1] In one of his statements, Prusek said Stoltenberg has a bad temper, can become violent, and has been involved in domestic violence. RP 350-52. He said he grabbed Estes to keep him from being hurt by Stoltenberg. RP 386.

[2] In his statement to police, Prusek indicated the knife just accidently appeared on the ground while they were struggling. RP 169.

apartment, he knew about incident with the knife, and he was angry at the couple who lived there. RP 195-97. The officer detained Estes, searched him, and discovered a knife in his pocket. RP 197. Estes stated, "it was not the knife that was used." RP 207. The officer confiscated that knife and kept it outside the apartment until it was taken into to evidence. RP 208.

Meanwhile, Officer Steve Pigman went into the apartment and interviewed Stoltenberg in the kitchen. RP 254, 256. While there, he noticed the knife on the refrigerator. RP 256. Stotlenberg claimed that was the knife that Estes had used. RP 106, 256.

C. ARGUMENT

I. ESTES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO FAMILIARIZE HIMSELF WITH RELEVENT LAW PRIOR TO FORMULATING AND EXECUTING A DEFENSE.

Defense counsel was unaware that under the POAA, even if Estes was not convicted of second degree assault, Estes still faced a third-strike if he was convicted of any felony coupled with a deadly weapon enhancement. Consequently, defense counsel failed to thoroughly investigate and vigorously defend against the deadly weapon enhancements until after the verdicts were handed down and he was finally alerted to the fact that the enhancements

elevated the offenses to strikes. By that time, however, it was too late to reformulate the course of the defense. As such, defense counsel's representation of Estes was objectively unreasonable and it prejudiced the outcome of the case. Hence, appellant was denied his right to effective assistance of counsel.

(i) Relevant facts

At trial, the jury was presented evidence regarding two possible deadly weapons. RP 197, 162. First, there was knife found on Estes after the officers arrived. RP 197. The State was able to introduce that as physical evidence (Ex. 6). RP 197. It also introduced a photograph (Ex. 2) in which the knife blade was ostensibly measured as being longer than three inches. RP 217-218. Testimony established that Estes had this knife in his pocket when the officer found him in the car, the officer removed the knife from him, and that knife was never taken into the apartment afterward. RP 197, 208.

As to the second knife (the knife that was on the top of the refrigerator), the State did not offer the knife as physical evidence and was unable to have the blade measured. RP 162. Instead, it relied only on testimonial evidence. Prusek testified that when Randle took the knife away from Estes, he took the knife into the

kitchen. RP 162. Randle said he placed the knife on the refrigerator after the wrestling had subsided. RP 284. Officer Pigman testified that he saw the knife on the refrigerator when interviewing Stoltenberg, and Stoltenberg informed him that was the knife Estes used. RP 256.

At trial, neither Stoltenberg, Pigman, nor Randle could estimate the length of the knife's blade. RP 87, 270, 303. Prusek testified that, while he and Estes were wrestling, he saw the knife blade and determined the length was between 3.5 and 4 inches long. RP 134. However, he later admitted he did not get a good look at the knife. RP 186. In fact, his view of the knife was so fleeting, Prusek could not say whether the knife the State had offered as physical evidence (Ex. 6) was in fact the knife that was used in the incident. RP 186, 190.

The State's theory was that Estes was armed with either the knife that was found on Estes at the time of arrest or the knife that was seen on the refrigerator. It argued that both knives were deadly weapons as defined by law, either because of the blade length or their capacity to cause death. RP 444-46; 453-54. As for the knife placed on the refrigerator, the State emphasized Prusek's testimony that the knife blade was 3.5 to 4 inches long. RP 445.

The jury was instructed that if it found Estes was armed with either knife during the incident and if it found the knife constituted a deadly weapon, it could return a guilty verdict for the enchantment charges. CP 329-330. In other words, the jury, as instructed, did not have to unanimously agree on: (1) which knife Estes was armed with; or (2) whether the knife was a per se deadly weapon or a deadly weapon via its capacity to inflict death. Id.

The defense's theory of the case was that the State could not meet its burden of proving Estes assaulted anyone with a knife due to the conflicting statements of Stoltenberg, Prusek, and Randle. RP 456-66. Defense counsel also contended that the knife found on Estes upon arrest could not have been the knife used in the incident because the witnesses said the knife that was used had been placed in the kitchen. RP 466-67. Defense counsel argued that, since no one could remember any specifics about the knife, the jury could only speculate about the knife. RP 468-69.

After the jury returned its verdicts, the parties and the court discussed scheduling a sentencing hearing. RP 504. The following exchange took place:

> [Prosecutor]: Yes. In fact, I am available whenever the Court can accommodate it. As the

> Court is aware, this is a third strike case. There's no issue as to – as to—
>
> [Defense Counsel]: He wasn't convicted of a strike offense.
>
> [Prosecutor]: Apparently, the Defendant is a third strike case because of the deadly weapon enhancements, so there's no issue as to the sentencing ..."

RP 504.

After realizing that the deadly weapon enhancements elevated the third degree assault and felony harassment convictions to third strikes, defense counsel moved to dismiss the deadly weapons enhancements on the grounds that there was insufficient evidence, conflicting verdicts, and a disproportionate sentence. RP 339-49.

Defense counsel contended that the evidence was insufficient to show the knife found on Estes was a per se deadly weapon. CP 342-43. He explained that the dictionary defines "blade" as "the flat sharp part of a weapon or tool that is used for cutting." CP 343. Defense counsel stated that when he measured the actual "blade" with a ruler using the dictionary definition it did not measure more than three inches and, therefore, did not meet the definition of a per se deadly weapon. CP 343; RP 510, 520.

He explained that the State had measured more of the knife than just the "blade." CP 343.

Defense counsel argued there was a jury unanimity problem because of the insufficiency regarding that knife. He explained that some of the jurors could have concluded the State had proved only that Estes was armed with the knife found on him upon arrest, and then found – based on the State's improper photo measurement – that the knife was a per se deadly weapon. Because that knife was in fact not a per se deadly weapon, however, there was insufficient evidence to support such a conclusion. As such, an alternative means of committing the offense was unsupported by the evidence. RP 519-23.

The State responded by first noting defense counsel had failed to move to dismiss the charges at trial for insufficient evidence and had not sought instructions defining the term "blade" for the jury. RP 516. It also argued there was sufficient evidence for the jury to conclude that Estes was armed with a per se deadly weapon during the incident based solely on Prusek's testimony that the blade of the knife being used was over three inches long. RP 516.

At this point, defense counsel objected, stating: "I don't believe that was the testimony at all." RP 516. However, the prosecutor was correct. RP 134.

The trial court denied the motion to dismiss, ruling there was sufficient evidence from which the jury could find "that the knife was used in a way to make [Estes] armed, and given the testimony that came out, that it was of sufficient length to make it a deadly weapon." RP 524. In reaching its decision, the trial court specifically pointed to an officer's testimony that the knife was capable of causing death[3] and Prusek's testimony the blade was longer than three inches. RP 521-22.

(ii) Legal Argument

The federal and Washington constitutions guarantee a defendant the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. A defendant is denied this right and is entitled to reversal of his convictions when his attorney's conduct: (1) falls below a minimum objective standard of reasonable attorney conduct; and (2) the defense was prejudiced by the deficient

[3] As discussed below, Officer Pigman actually testified that the knife on the refrigerator was a "deadly weapon." RP 270. Defense counsel failed to object to this comment on guilt. RP 270.

performance. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). As shown below, both prongs are met here.

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). "Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981).

"[T]he duty to provide effective assistance of counsel includes the duty to research and apply relevant statutes." In re Personal Restraint Petition of Tsai, __ Wn. 2d __, __ P.3d __ (2015).[4] Prevailing norms of practice as reflected in American Bar Association standards ... are guides to determining what is reasonable." Strickland, 466 U.S. at 688. A.B.A. Defense Function Standard 4- 4.1(a) provides the following:

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[4] The slip opinion is attached as Appendix A. This a quote from page one of that opinion.

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction....[5]

This Standard implies that defense counsel must be apprised of the relevant law pertaining to the specific charges and penalties before he explores "all avenues leading to facts" in support of a viable defense. In fact, the A.B.A. standard addressing consultation nearly states as much, requiring:

> **After informing himself or herself fully on the facts and the law**, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

A.B.A. Defense Function Standard 4-5.1(a) (emphasis added).[6]

These professional standards establish that counsel's familiarity with relevant law is a threshold requirement for making informed decisions regarding defense strategy and for rendering effective representation. See, e.g., Appendix A at 5-10 (explaining counsel's duty to research relevant law and reversing where that did not happen); State v. Kyllo, 166 Wn.2d 856, 865-69, 215 P.3d 177

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[5] Retrieved on April 28, 2015 from: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#1.2

[6] Id.

(2009) (holding counsel was ineffective where he failed to conduct proper legal research when formulating and executing the defense); In re Ontiberos, 295 Kan. 10, 36, 287 P.3d 855, 871 (2012) (reversing for ineffective assistance where the record showed counsel failed to familiarize himself with relevant law).

While Strickland protects "strategic choices made after thorough investigation of law and facts," 466 U.S. at 690, it does not protect choices made where counsel does not have a full understanding of the law prior to formulating a defense. State v. Felton, 110 Wis.2d 485, 500-07, 329 N.W.2d 161(1983). As the Washington Supreme Court recently stated, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Appendix A at 10 (citing Hinton v. Alabama, 571 U.S. __, 134 S. Ct. 1081, 188 L.Ed.2d 1 (2014)).

While not binding, Felton, 110 Wis.2d at 500-07, is persuasive authority that is particularly germane to this case. In Felton, the defendant Rita Felton was charged with first degree murder for shooting her husband while he was sleeping. Id. at 487. Defense counsel presented only a battered-spouse defense. Id. at 488.

Counsel was unfamiliar with the law as it pertained to a heat-of-passion defense and, thus, he did not consider such a defense when formulating trial strategies. Id. at 496. A jury found Felton guilty of second degree murder. Id. at 488.

Felton appealed, contending she was provided ineffective assistance of counsel. Id. The Wisconsin Supreme Court agreed, holding defense counsel was ineffective because he had failed to familiarize himself with relevant law when formulating Felton's defense. Id. at 505.

Looking first at the question of whether defense counsel's performance was objectively unreasonable, the Felton Court noted, "he was never in a position even to consider whether, in light of the facts, heat of passion was an appropriate defense; and he never explored the circumstances to determine what evidence existed that would support [such a defense]." Id. The Court concluded defense counsel's failure to familiarize himself with the law was "a glaring deficiency" that made it "impossible for him to weigh alternatives and to make a reasoned decision." Id. at 506.

Next, the Felton Court rejected the notion that defense counsel's inadequate performance could be justified merely as trial strategy. Although generally concerned with interfering with defense

counsel's professional judgment via "hindsight evaluation," it nevertheless concluded that "requiring lawyers to inform themselves of relevant law prior to formulating a defense or determining a strategy or tactic will promote exercise of rational, informed, and considered judgment." Id. at 507.

Turning to the Strickland's prejudice prong, the Court concluded counsel's deficient performance had prejudiced Felton's defense. Id. at 507-08. While the Court acknowledged there might be some cases in which the lawyer's failure to inform himself of the law could in no way be prejudicial (i.e. where the facts don't support a particular line of defense at all), it explained that prejudice exists if the facts in any way support a possible line of defense that was foreclosed due to counsel's ignorance of the law. Id. at 507.

The Felton Court determined that the facts in that case would have supported a heat-of-passion defense. Id. at 513. Hence, it held that both Strickland prongs were satisfied, and it reversed Felton's conviction. Id.

As in Felton, the record here establishes that Estes was denied effective assistance of counsel due to defense counsel's ignorance of relevant law. As shown below, defense counsel's failure to familiarize himself with the law as it pertained to the charges

against Estes and the potential for a third-strike was objectively unreasonable and prejudiced Estes' defense.

A sentencing court must impose a sentence of total confinement for life without the possibility of release on a "persistent offender." RCW 9.94A.570. A persistent offender is one who stands convicted of a felony defined as a "most serious offense" and has previously "been convicted as an offender on at least two separate occasions... of felonies that under the laws of this state would be considered most serious offenses." RCW 9.94A.030(37)(a)(ii). Second degree assault – as was the original charge in two counts here – is a strike offense. RCW 9.94A.030(32)(b). In addition, "[a]ny other felony with a deadly weapon verdict under RCW 9.94A.825" constitutes a strike offense. RCW 9.94A.030(32)(t).

Counsel was aware of Estes' criminal history and the fact that he already had been convicted of two strike offenses under the POAA. CP 381. He presumably was also aware that the second degree assault charges Estes faced were strike offenses. However, the record clearly demonstrates defense counsel was not aware that

if Estes was convicted of any felony with an added deadly weapon enhancement, it would also constitute a strike.[7] RP 504.

Counsel's failure to fully familiarize himself with the law as it pertained to the charged strike offenses was objectively unreasonable. There is no question counsel's performance fell below the A.B.A. Defense Standards set forth above. Defense counsel's failure to familiarize himself with relevant law was "a glaring deficiency, " making it impossible for him to weigh alternatives and to make reasoned decisions as to how to properly defend the charges. Without a basic knowledge of the law, counsel's execution of Estes' defense of the strike offenses was not the product of rational, informed, and considered judgment. He was unable to weigh alternatives and make informed decisions about tactics.

This record also establishes that counsel's failure to familiarize himself with the law was prejudicial. Under Strickland, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. Instead, prejudice is established if there is a

[7] The State's "Persistent Offender Case Notice" was admittedly ambiguous. CP 381. However, prudent counsel would have read through the list of possible third strike offenses and determined which applied.

reasonable probability that the outcome would be different but for the attorney's conduct. Id. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694.

When counsel has failed to familiarize himself with relevant law, the question becomes whether this has caused a "breakdown in the adversary process that renders the result unreliable." Prejudice is established by determining whether the record shows a certain line of defense was foreclosed due to counsel's ignorance of the law. Felton, 110 Wis. at 507. Here, defense counsel's Motion to Dismiss the Deadly Weapon Enhancements and his performance at trial establish just that.

After counsel was finally made aware that a deadly weapon enhancement elevated the other felony convictions (third degree assault and felony harassment) into strike offenses, he adjusted his defense tactics. When arguing the motion to dismiss, defense counsel explained that after consulting the dictionary to determine the definition of a "blade" and then applying the legal definition of a deadly weapon to measure the knife in evidence, he concluded the knife found on Estes was in fact not a per se deadly weapon.

Unfortunately, defense counsel did nothing to present this line of defense to the jury. He did not ask the trial court for an instruction defining "blade."[8] He did not offer an alternative measurement or even cross examine the forensic evidence technician about her measurements by confronting her with dictionary definition of "blade." RP 219-20. He failed to make any targeted argument during his closing regarding the blade length. RP 460-72. As such, the trial court properly found this was an argument that should have been made at trial.

The record also shows, due to his ignorance of the law, defense counsel simply was not tracking the importance of deadly weapon enhancement charges throughout trial. First, he failed to object to an officer's improper opinion that one of the knives in question was a "deadly weapon."[9] RP 270.

Second, defense counsel failed to even register the fact that Prusek had testified that Estes' knife had a blade that was 3.5 to 4 inches long. RP 516. This was crucial testimony, as the trial court's ruling on the post-trial motion indicates. RP 524. By not tracking this,

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[8] Case law establishes that the trial court may instruct the jury using ordinary dictionary definitions. State v. Saraceno, 23 Wn. App. 473, 475, 596 P.2d 297, 299 (1979).

[9] This issue is discussed in detail below.

defense counsel did nothing to mitigate the impact of this testimony in closing argument. RP 460-72. Prudent counsel would have hammered the fact that Prusek was not in a good position to see the knife or make any reasonable estimation about the blade length. But instead, defense counsel simply made a tepid argument that "nobody" could recall any details about that knife so the jury was left to speculate. RP 468.

Finally, defense counsel failed to emphasize that there was no evidence establishing that the knife found on Estes at the time of arrest was in fact in his pocket during the incident. RP 460-472. Prudent counsel would have suggested that, while it was possible the knife was in Estes' pocket at the time of the offense, there was just as much of a possibility that Estes armed himself with that knife after he got in his car. However, because counsel was unaware of the law and the penalty Estes faced if convicted of the deadly weapon charges, he failed to vigorously defend against these charges as part of his trial strategy.

In sum, defense counsel's failure to inform himself of relevant law as it pertained to the deadly weapons charges was objectively unreasonable. Moreover, this record shows counsel's deficient performance prejudiced Estes' defense. Consequently, this Court

should find Estes was denied effective assistance of counsel and reverse.

II. ESTES WAS DENIED A FAIR TRIAL WHEN THE JURY HEARD IMPROPER OPINION TESTIMONY ESTABLISHING THAT THE KNIFE WAS A DEADLY WEAPON.

Estes' right to a fair trial was violated when the State presented Officer Pigman's opinion that the knife found inside the apartment was a deadly weapon. This was an impermissible comment on guilt that prejudiced appellant's right to have the jury independently decide whether the knife was in fact a deadly weapon.

(i) Relevant Facts

Officer Pigman testified he saw the knife on the refrigerator and Stoltenberg indicated it was used during the incident. RP 268-69. He stated that the entire knife was about six inches long, but he had no idea how long the blade was. RP 269-70. Then, the following exchanged occurred:

> [Prosecutor]: And if a suspect were coming at you with a knife like that, what action would you take?
>
> [Pigman]: He would probably be shot.
>
> [Prosecutor]: Why would he get shot?

[Pigman]: Because he's displaying a deadly weapon, coming at me with a deadly weapon.

RP 270. Defense counsel failed to object. RP 270.

When the trial court denied the post-trial motion to dismiss the deadly weapon enhancements, it recalled Pigman's testimony as significant. RP 521.

(ii) Legal Argument

A defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); State v. Johnson, 152 Wn. App. 924, 931-35, 219 P.3d 958 (2009).

Although defense counsel failed to object to Officer Pigman's comment on guilt,[10] Washington courts have found the admission of an explicit or nearly explicit comment on guilt constitutes a manifest constitutional error that may be raised for the first time on appeal under RAP 2.5(a)(3). State v. King, 167 Wn.2d 324, 329, 332 219 P.3d 642 (2009). As shown below, Officer Pigman's opinion as to

[10] Counsel's failure to contemporaneously object to the comment on guilt has been raised among one of the many factors showing ineffective assistance of counsel.

whether the knife was a deadly weapon was an explicit comment on guilt.

As the Washington Supreme Court has held, it is "clearly inappropriate" for the State to offer opinion testimony in a criminal trial that amounts to an expression of personal belief as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citation omitted). Such an opinion is not helpful to the jury and is highly prejudicial; thus it offends both constitutional principles and the rules of evidence. Id. at 591, n. 5; State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

"Opinions on guilt are improper whether made directly or by inference." State v. Quaale, 182 Wn. 2d 191, 199, 340 P.3d 213, 217 (2014). The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the defendant's guilt or innocence is having that witness tell the jury what result to reach rather than allowing the jury to make an independent evaluation of the facts. 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989).

To determine whether a statement constitutes improper opinion testimony, courts consider the following five factors: (1) the nature of the charges, (2) the type of defense, (3) the type of witness, (4) the specific nature of the testimony, (5) and the other

evidence before the trier of fact. Montgomery, 163 Wn.2d at 591. Applying these factors here, Officer Pigman's opinion that the knife he saw was a deadly weapon constituted an improper comment on guilt.

As to the first factor, Estes was charged with deadly weapon enhancements under RCW 9.94A.825. That statute provides:

> ... the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: ... any knife having a blade longer than three inches... .

RCW 9.94A.825.

As stated above, the jury instruction given at trial permitted the jury to return a special verdict if it found Estes was armed with either of the knives during the incident, and if it found that either knife constituted a deadly weapon. CP 329-330. Thus, a core element was whether the knife was indeed a deadly weapon as defined by statute. This was for the jury to decide. However, because the officer's comment went directly to this core element,

the jury was never given the opportunity to independently assess it when reaching its verdict. See, Quaale, 182 Wn.2d at 200 (emphasizing that the officer's improper comment went to the core issue); State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (focusing on the "core element" of the charges when concluding a witness offered an impermissible opinion); State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (reversing where officer's improper opinion on defendant's guilt was shown to invade jury's province regarding the "core element" of the charge).

The second factor – the nature of the defense – also weighs in favor of finding Pigman's testimony was an improper comment on guilt. Although defense counsel offered a compromised defense as to whether the knives met the legal definition of deadly (see argument above), when focusing on the assault charges, defense counsel argued that the only knife involved in the incident was the knife Pigman saw on the refrigerator. RP 467-68.

Hence, the nature of the defense that was presented unfortunately amplified the impact of Officer Pigman's improper opinion. The jury was told by Officer Pigman that the knife that was involved in the incident was a deadly weapon and the defense argued that that was the only possible knife used. Hence, the jury

could have accepted the defense's theory and then relied exclusively on Officer Pigman's opinion that the knife on the refrigerator was in fact a "deadly weapon" without actually deciding that fact independently.

Both the third and fourth factors – the type of witness and the nature of the opinion testimony – weigh in favor of a determination that Officer Pigman's testimony was an improper opinion on guilt. First, Officer Pigman's comment was particularly troublesome because it carried with it an aura of reliability. The Washington Supreme Court has stated that an officer's live opinion testimony -- such as that given by Pigman – carries with it "an aura of special reliability and trustworthiness." State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001) (citations omitted). Thus, Officer Pigman's testimony carried more weight because of the type of witness he was.

Second, the Officer was asked to draw on his training and experience as to weapons when he testified that the knife involved her was a "deadly weapon." RP 270. This type of testimony carried the added importance of an expert opinion. Importantly, however, the trial court failed to mitigate the danger of this type of testimony by giving the standard expert opinion instruction explicitly

informing the jury that it was not bound by the expert's opinion.[11] See, Kirkland, 159 Wn.2d at 937 (explaining the expert opinion instruction is an important factor to be considered when determining the constitutional impact of improper opinions).

When applying the fifth factor, a reviewing court should consider other evidence that was before the trier of fact to determine whether the improper opinion testimony could have been avoided and whether it was particularly prejudicial. Montgomery, 163 Wn.2d at 591. The Washington Supreme Court has explained opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions. Id. at 592 (explaining "It is unnecessary for a witness to express belief that certain facts or findings lead to a conclusion of guilt.").

Given the evidence here, the jury did not need to hear Officer Pigman's personal belief that the knife on the refrigerator

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[11] WPIC 6.51 provides: "A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness."

was in fact a "deadly weapon." The jury had heard testimony (including Pigman's) describing the knife, its capabilities, and the manner in which it was used. Hence, the jury had the evidence before it from which it could have independently evaluated whether the knife qualified as a deadly weapon. Consequently, the prosecutor never should have offered Pigman's opinion that the knife was a deadly weapon.

As shown above, all five factors weigh in favor of the fact that Pigman's testimony constituted an explicit and improper comment on guilt.

Finally, the comment on guilt cannot be considered harmless error.[12] The State's case as to whether the knife that was used was indeed a deadly weapon was not particularly strong, making the effect of this comment more prejudicial. As for the knife that was in the kitchen, the State had to rely solely on witnesses' recollection of the knife. Although officer Pigman saw the knife, he could not testify to the length of the blade or how it was used. Stoltenberg and Randle saw the knife after the incident but neither could testify

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[12] Because this type of error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving the error was harmless beyond a reasonable doubt. Olmedo, 112 Wn. App. at 533.

as to the blade length and they offered starkly different recollections of the knife's use. Prusek testified as to a blade length over three inches; however, he allegedly saw this while wrestling with Estes. He later clarified that he did not get a good look at the knife.

As for the knife that was found on Estes, the State's evidence was not overwhelming. The State did not establish through any testimony that Estes in fact had the knife on him while he was in the apartment. Whether the jury could have inferred this from the fact the knife was in Estes' pocket when the police arrived, it was also possible that Estes armed himself with that knife after he returned to his car.

As for the manner in which the knife was used, the State had to deal with vastly different witness accounts. The jury's acquittal on the second degree assault charges is a strong indication that it did not find this evidence at all persuasive.

In sum, Officer Pigman's testimony that the knife in the kitchen was a deadly weapon constituted an impermissible opinion on guilt that encroached on the jury's ability to independently decide a core element for establishing guilt. Given the weaknesses in the State's case, this cannot be dismissed as harmless. As such, this Court should find appellant's due process rights were

violated and reverse.

III. THE TRIAL COURT FAILED TO CONSIDER ESTES' ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS AND THUS THE CASE SHOULD BE REMANDED FOR PROPER CONSIDERATION.

RCW 9.94A.760 permits the trial court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability or likely future ability to pay. The record here does not show the trial court in fact considered Estes' ability or future ability to pay before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous and the validity of the order may be challenged for the first time on appeal.

The trial court ordered Estes to pay $1,500.00 for "Court-Appointed Attorney Fees and Defense Costs." CP 365. This is a discretionary LFO. However, when imposing this fee, the trial court failed to make an individualized inquiry into Estes' current and future ability to pay them. This was a sentencing error. State v. Blazina, __ Wn.2d __, 344 P.3d 680, 681 (2015).

The trial court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

A trial court thus has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. Blazina, 344 P.3d at 681. The record reflects no such consideration here. RP 528-534.

In the judgment and sentence, the following pre-printed, generic language appears:

> **2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS**. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 364. Despite this, the trial court did not in fact consider Estes individual financial resources and the burden of imposing such

obligations on him. This boilerplate language is inadequate to meet the requirements under RCW 10.01.160(3).

"[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Blazina, 344 P.3d at 685. The trial court failed to do anything more than enter the boilerplate language. Thus, it failed to follow statutory mandate in imposing the legal financial obligations and the remedy is a new sentencing hearing. Id.

In response, the State may argue that this issue has been waived and should not be considered for the first time on appeal. Even though defense counsel did not object to the imposition of these LFOs below, this Court has the discretion to reach this error consistent with RAP 2.5. Id. at 681. As shown below, given the trial court's failure to conduct any semblance of an inquiry into Estes' ability to pay and given his indigent status,[13] this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

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[13] Appellant was appointed publically funded counsel both at trial and on appeal, based on his indigent status. CP 382.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant's ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal.

The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence. Blazina, 344 P.3d at 683-85. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in reducing recidivism. Id.

Hence, as a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider on direct appeal whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in Blazina, the fact is "the state cannot collect money from defendants who cannot pay." Id. at 684. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge who is already familiar with the case so he may actually make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response. Unquestionably, the trial court erred in imposing discretionary LFOs without making any inquiry into Estes' ability to pay. The Supreme Court has held that "RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability

to pay" before a court may impose legal financial obligations. Id. at 685. This did not happen.

As explained above, the pre-formatted language used here, and in the majority of courts around the state, is simply inadequate to meet the requirements of RCW 10.01.160(3). The systemic misuse of this boilerplate finding requires a systemic response. Part of this response must come from appellate courts through the immediate rejection of such boilerplate and remand for the trial court to follow the law.

For these reasons, this Court should exercise its discretion, accept review, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Estes' ability to pay LFOs.

D. CONCLUSION

This Court should reverse because Estes was denied effective assistance of counsel and his due process rights were violated due to Officer Pigman's impermissible comment on guilt. Alternatively, Estes requests remand so the trial court may properly address LFOs.

DATED this 11TH day of May, 2015.

Respectfully Submitted,

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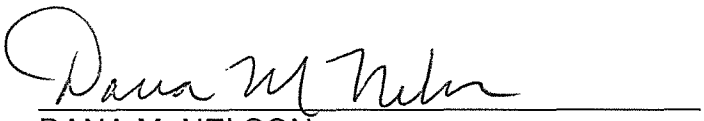

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of YUNG-CHENG TSAI, Petitioner.	No. 88770-5 (consolidated with No. 89992-4) EN BANC
In the Matter of the Personal Restraint of MUHAMMADOU JAGANA, Petitioner.	Filed: MAY 07 2015

YU, J.—As applied to Washington, the holding in *Padilla v. Kentucky,* 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) is an affirmation of an old rule of state constitutional law— the duty to provide effective assistance of counsel includes the duty to reasonably research and apply relevant statutes. However, language in certain Washington appellate cases made it appear that this well-

established rule did not apply to RCW 10.40.200. In superseding those cases, *Padilla* significantly changed state law.

Muhammadou Jagana raises a claim that would have been rejected before *Padilla* based on those superseded appellate cases. We therefore reverse the Court of Appeals' order dismissing Jagana's personal restraint petition (PRP) and remand to the trial court for an evidentiary hearing. However, Yung-Cheng Tsai's claim was available before *Padilla*, and Tsai did in fact raise his claim with the assistance of an attorney in 2008. That motion was denied based on an issue of law not affected by *Padilla*, and Tsai did not appeal. We therefore affirm the Court of Appeals' order dismissing Tsai's PRP.

FACTUAL AND PROCEDURAL HISTORY

A. Yung-Cheng Tsai

On July 27, 2006, Tsai pleaded guilty to one count of unlawful possession of a controlled substance with intent to deliver (marijuana). On August 29, 2006, the trial court sentenced him to 11 months in jail and 12 months of community custody. Tsai did not appeal. On or about October 30, 2007, Tsai received a notice to appear from the United States Immigration and Naturalization Services, which informed him that he was subject to removal (also known as deportation) based on his conviction.

On July 21, 2008, Tsai filed a motion to withdraw his guilty plea under CrR 7.8, alleging that his attorney wrongfully advised him he would not be deportable if he accepted the State's plea offer and that this erroneous advice was prejudicial. The trial court denied Tsai's motion as time barred. The motion was filed over one year after Tsai pleaded guilty, and the trial court held that equitable tolling did not apply. The trial court did not transfer Tsai's motion to the Court of Appeals for consideration as a PRP. Tsai did not appeal or otherwise pursue his 2008 motion.

On May 18, 2011, Tsai again moved to withdraw his guilty plea under CrR 7.8 based on his attorney's alleged erroneous advice. Tsai argued his motion was exempt from the one-year time bar in RCW 10.73.090(1) under RCW 10.73.100(6) because *Padilla* and *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) (applying *Padilla*) effected a significant, material change in the law that applies retroactively.

The trial court initially denied Tsai's 2011 motion, holding it was time barred. On Tsai's motion, the trial court vacated its holding and transferred the motion to the Court of Appeals to be considered as a PRP. The Court of Appeals denied Tsai's PRP as time barred, holding that *Padilla* and *Sandoval* do not apply retroactively. We granted Tsai's motion for discretionary review and consolidated his case with Jagana's. *In re Pers. Restraint of Yung-Cheng Tsai*, 180 Wn.2d 1014, 327 P.3d 55 (2014).

B. Muhammadou Jagana

On June 7, 2006, Jagana pleaded guilty to one count of possession of a controlled substance (cocaine). He was sentenced to three months of electronic home monitoring. Jagana did not appeal.

On November 4, 2010, Jagana moved to withdraw his guilty plea under CrR 7.8. Relying on *Padilla*, Jagana asserted that his attorney failed to investigate Jagana's immigration status, did not advise him that his guilty plea could have immigration consequences, and did not advise him to speak with an immigration attorney. The trial court transferred Jagana's motion to the Court of Appeals to be considered as a PRP.

The Court of Appeals initially filed a published opinion holding Jagana's PRP was timely under RCW 10.73.100(6) and remanding the case to the trial court for a reference hearing. *In re Pers. Restraint of Jagana*, 170 Wn. App. 32, 282 P.3d 1153 (2012). The Court of Appeals reasoned that *Padilla* was a significant, material change in the law and that *Padilla* should apply retroactively because it was not a new rule; it merely applied the standard analysis for ineffective assistance of counsel to a new set of facts.

The State sought discretionary review, and we remanded to the Court of Appeals for reconsideration in light of *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013), which held *Padilla* did announce a

new rule that does not apply retroactively to matters on collateral review. *In re Pers. Restraint of Jagana*, 177 Wn.2d 1027, 309 P.3d 1186 (2013). On reconsideration, the Court of Appeals withdrew its opinion and dismissed Jagana's PRP as time barred. We granted Jagana's motion for discretionary review and consolidated his case with Tsai's. *In re Pers. Restraint of Jagana*, 180 Wn.2d 1014, 327 P.3d 55 (2014).

ISSUES

A. Are the PRPs exempt from the one-year time bar in RCW 10.73.090(1) under RCW 10.73.100(6)?

B. If the PRPs are not time barred, are the petitioners entitled to relief or evidentiary hearings on the merits of their claims?

ANALYSIS

A. As applied to Washington, *Padilla* did not announce a new rule, but it did effect a significant change in the law under RCW 10.73.100(6)

1. The unreasonable failure to give any advice about the immigration consequences of a guilty plea was already deficient performance in Washington under the ordinary *Strickland* test

A criminal defendant's right to the assistance of counsel derives from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. Under these provisions, a criminal defense attorney has the constitutional duty to provide assistance that is effective. *Strickland v.*

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Where a defense attorney makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," the attorney's performance is constitutionally deficient. *Id.* at 687. Where that deficiency deprives the defendant of fair proceedings, the defendant has suffered prejudice because there is "a breakdown in the adversary process that renders the result unreliable." *Id.* Unreliable results caused by defense counsel's prejudicially deficient performance are constitutionally intolerable.

When determining whether a defense attorney provided effective assistance, the underlying test is always one of "reasonableness under prevailing professional norms." *Id.* at 688. While simple to state in theory, this test can be complicated to apply in practice. The court must engage in a fact-specific inquiry into the reasonableness of an attorney's actions, measured against the applicable prevailing professional norms in place at the time. *Id.* at 690. It is thus impossible to "exhaustively define the obligations of counsel [ ]or form a checklist for judicial evaluation of attorney performance." *Id.* at 688. Nevertheless, effective representation "entails certain basic duties," such as

> a duty of loyalty, a duty to avoid conflicts of interest[,] . . . the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear

> such skill and knowledge as will render the trial a reliable adversarial testing process.

Id.

It is against this backdrop that we consider whether *Padilla* applies retroactively under RCW 10.73.100(6) and *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Under *Teague*, new constitutional rules of criminal procedure usually apply only to matters on direct review, but old rules apply to matters on both direct and collateral review. *Whorton v. Bockting,* 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). Because it is impossible to exhaustively define a defense attorney's obligations under *Strickland*, cases that merely apply the ordinary test for ineffective assistance of counsel to new facts do not announce new rules for *Teague* purposes. *Chaidez*, 133 S. Ct. at 1107 (citing *Strickland*, 466 U.S. 668). As applied to Washington law, *Padilla* is just such a case.

In *Chaidez*, the Supreme Court held that *Padilla* did not merely apply the ordinary test for ineffective assistance of counsel; it first considered the threshold question of whether defense counsel has any constitutional duty to advise noncitizen defendants about the immigration consequences of pleading guilty. *Id.* at 1108. The notion that defense counsel has no such duty arose from a distinction many courts have drawn between direct and collateral consequences. *Padilla*, 559

U.S. at 365 & n.9. Immigration consequences were usually considered collateral and thus outside the scope of defense counsel's constitutional duty to advise. *Id.* at 364-65. *Padilla* did not fully reject the direct-versus-collateral distinction but held it was not appropriate as applied to immigration consequences. *Id.* at 366.

This court first explicitly adopted the distinction between direct and collateral consequences in a 1980 case holding that habitual criminal proceedings were collateral consequences. *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Within three years of *Barton*, our legislature did what *Padilla* ultimately did in 2010—it rejected the direct-versus-collateral distinction as applied to immigration consequences, declaring that a noncitizen defendant must be warned about immigration consequences before pleading guilty.[1] LAWS OF 1983, ch. 199 § 1(1), *codified at* RCW 10.40.200(1). 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

[1]Contrary to the dissent's suggestion, we are not holding that the legislature has the authority to define the scope of constitutionally effective counsel. Rather, we are giving effect to our own precedent, which holds that a defense attorney has a basic duty to know and apply relevant statutes and professional norms, and the unreasonable failure to fulfill that duty is constitutionally deficient. *E.g.*, *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *see also Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (deficient performance where counsel failed to file a timely suppression motion because he did not engage in any pretrial discovery and therefore was not aware of the evidence to be presented).

presumption the defendant has been properly advised. RCW 10.40.200(2); *Sandoval*, 171 Wn.2d at 173.

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. *State v. Butler*, 17 Wn. App. 666, 675, 564 P.2d 828 (1977) ("Beyond the defendant's power of knowledge and intelligence, the duty to protect the defendant lies first and foremost with his attorney."). While defense counsel's duty to advise regarding immigration consequences is imposed by statute, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland*, 466 U.S. at 690-91). In many cases[2] 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.

Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. *See, e.g., id.* at 865-69 (deficient performance where reasonably

[2]There may be situations where defense counsel's failure to provide the advice required by RCW 10.40.200 is objectively reasonable and thus not deficient. *See People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987). And of course, even if deficient, counsel's performance is not constitutionally ineffective unless it is also prejudicial. *Kyllo*, 166 Wn.2d at 862.

adequate research would have shown that a former pattern jury instruction misstated the law on self-defense); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (deficient performance where reasonably adequate research would have prevented the possibility of conviction based on acts predating the relevant statute's effective date). *Cf. State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799, 805 (holding that the failure to advise a noncitizen defendant about immigration consequences as required by N.M. CODE R. 5-303(E)(5) could be ineffective assistance); RPC 1.1 cmt. 2 ("Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."). Indeed, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. ___, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014). The unreasonable failure to research and apply RCW 10.40.200 is as constitutionally deficient as the unreasonable failure to research and apply any relevant statute.

This resolves *Padilla*'s threshold question as applied to Washington law. *Padilla* thus becomes a "garden-variety application[ ] of the test in *Strickland*" that simply refines the scope of defense counsel's constitutional duties as applied to a specific fact pattern. *Chaidez*, 133 S. Ct. at 1107. Because *Padilla* did not

announce a new rule under Washington law, it applies retroactively to matters on collateral review under *Teague*.

2. *Padilla* effected a significant change in Washington law

Whether a changed legal standard applies retroactively is a distinct inquiry from whether there has been a significant change in the law. An old rule whose new application significantly changes the law is unusual, but not impossible, as this case demonstrates. *Padilla*'s application of the old *Strickland* test significantly changed state law by superseding Washington appellate cases that apparently foreclosed the possibility that defense counsel's unreasonable and prejudicial failure to fulfill his or her duties under RCW 10.40.200 could ever be constitutionally ineffective.

(a) A "new" rule under *Teague* is not always the same as a "significant change" in the law under RCW 10.73.100(6)

There is unquestionably a substantial overlap between "new" *Teague* rules and "significant changes" in state law, but they are two separate inquiries: "RCW 10.73.100(6) sets forth three conditions that must be met before a petitioner can overcome the one-year time bar: (1) a [significant] change in the law (2) that is material and (3) that applies retroactively." *In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 625, 316 P.3d 1020 (2014). While we have used the *Teague* analysis and its definition of a "new" rule to determine whether a constitutional rule applies

retroactively, *id.* at 626, we have never imported *Teague*'s definition of a new rule into our analysis of whether there has been a significant change in the law.

In fact, we have always defined the two phrases differently. A significant change in state law occurs "where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue." *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). By comparison, new rules for *Teague* purposes "are those that 'break[ ] new ground or impose[ ] a new obligation on the States or the Federal government [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (alterations in original) (quoting *Teague*, 489 U.S. at 301). "If before the opinion is announced, reasonable jurists could disagree on the rule of law, the opinion is new." *Id.* (citing *Beard v. Banks*, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004)).

Using different definitions for a "significant change" in state law and a "new" rule under *Teague* is not only fully supported by the plain language of RCW 10.73.100(6) and our own precedent, it also makes good sense in light of the different purposes these phrases serve in our analysis. The "significant change" language is intended to *reduce* procedural barriers to collateral relief in the interests of fairness and justice. *Greening*, 141 Wn.2d at 697 ("While litigants

have a duty to raise *available* arguments in a timely fashion and may later be procedurally penalized for failing to do so . . . they should not be faulted for having omitted arguments that were essentially *unavailable* at the time."). Meanwhile, *Teague*'s broad definition of "new" rules that usually do not apply retroactively is intended to *strengthen* procedural barriers to collateral relief in the interests of finality and comity. *Danforth v. Minnesota*, 552 U.S. 264, 279-81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008).

A "significant change" in state law and a "new" constitutional rule of criminal procedure are different phrases with different meanings that serve different purposes. We will not conflate them. *Gentry*, 179 Wn.2d at 625; *cf. Commonwealth v. Sylvain*, 466 Mass. 422, 433-34, 995 N.E.2d 760 (2013) (retaining the general *Teague* framework but declining to adopt the expanded definition of a "new" rule that was articulated after *Teague*).

(b) *Padilla* significantly changed Washington law

It is true that in most cases simply applying the ordinary *Strickland* test to new facts will announce neither new rules nor significant changes in the law. *See In re Pers. Restraint of Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003) (Where an opinion "simply applies settled law to new facts, it does not constitute a significant change in the law."). However, Washington appellate cases issued before *Padilla* apparently foreclosed any possibility that the unreasonable, prejudicial failure to

provide the advice required by RCW 10.40.200 could ever be ineffective assistance of counsel. *Padilla* superseded these decisions, significantly changing state law.

The first appellate case to explicitly consider whether RCW 10.40.200 has any implications on the constitutional effectiveness of defense counsel is *State v. Holley*, 75 Wn. App. 191, 876 P.2d 973 (1994). In that case, the Court of Appeals held that a reference hearing was required to determine whether the defendant's guilty plea was entered in violation of RCW 10.40.200. *Id.* at 200-01. Even though it decided the case on statutory grounds, *Holley* chose to address the constitutional implications of RCW 10.40.200 and summarily stated in dictum that there were none. *Id.* at 196-98. To support this proposition, *Holley* relied on *State v. Malik*, 37 Wn. App. 414, 680 P.2d 770 (1984). *Malik* was based on facts occurring before RCW 10.40.200's effective date and so did not consider the impact of that statute on the duties of defense counsel. *State v. Littlefair*, 112 Wn. App. 749, 767, 51 P.3d 116 (2002). As discussed above, with the enactment of RCW 10.40.200, the unreasonable failure to research and apply that statute became constitutionally deficient performance. *Holley*'s dictum was thus erroneous.

The only decision of this court that touches on the issue presented here is *In re Personal Restraint of Yim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999). However, *Yim* dealt with a claim that the defendant received incorrect advice, rather than no advice, regarding immigration consequences. *Id.* *Padilla* is not

limited to incorrect advice; it explicitly holds that providing no advice regarding immigration consequences is also deficient. *Padilla*, 559 U.S. at 370. Further, *Yim* discussed only the voluntariness of the defendant's plea without reference to the standard for determining ineffective assistance of counsel, and *Yim* did not consider RCW 10.40.200. *Yim*, 139 Wn.2d at 588-90 (citing *State v. Ward*, 123 Wn.2d 488, 512-13, 869 P.2d 1062 (1994); *Malik*, 37 Wn. App. at 416). *Yim*'s analysis does not address the issues presented where a noncitizen asserts his or her attorney unreasonably failed to provide any advice about the immigration consequences of pleading guilty as required by RCW 10.40.200.

Nevertheless, Washington appellate courts have routinely rejected the possibility that such a failure could ever be ineffective assistance of counsel. Each of those decisions relies on cases analyzing guilty pleas entered before the effective date of RCW 10.40.200, *Holley*'s erroneous dictum, or *Yim*'s distinguishable analysis. *See State v. Jamison*, 105 Wn. App. 572, 591-92, 595, 20 P.3d 1010 (2001) (citing *Yim*, 139 Wn.2d at 588; *Holley*, 75 Wn. App. at 198); *State v. Martinez-Lazo*, 100 Wn. App. 869, 876-77, 999 P.2d 1275 (2000) (citing *Yim*, 139 Wn.2d at 588; *Holley*, 75 Wn. App. at 197; *In re Pers. Restraint of Peters*, 50 Wn. App. 702, 704, 750 P.2d 643 (1988)), *abrogation recognized by Chaidez*, 133 S. Ct. at 1109 n.8; *Holley*, 75 Wn. App. at 197-98 (citing *Malik*, 37 Wn. App. at 416-17); *Peters*, 50 Wn. App. at 705 (noting the guilty plea was

entered before RCW 10.40.200's effective date); *see generally Littlefair*, 112 Wn. App. at 766-69 (discussing the history of RCW 10.40.200, *Malik*, and its progeny). *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." *Sandoval*, 171 Wn.2d at 170 n.1. This was a significant change in Washington law.

B. Jagana is entitled to an evidentiary hearing on the merits

A significant, material, retroactive change in the law exempts a PRP from RCW 10.73.090(1)'s one-year time bar for collateral attacks. RCW 10.73.100(6). However, in light of the arguments currently presented for our review, only Jagana is entitled to an evidentiary hearing on the merits of his PRP.

Jagana alleges that his trial attorney unreasonably failed to ascertain Jagana's immigration status and did not provide him with any guidance as to any possible immigration consequences of his guilty plea, and further alleges that these failures rendered Jagana's plea involuntary. These allegations, if true, would establish that Jagana did not receive effective assistance of counsel in deciding whether to plead guilty. As discussed above, Washington courts would have rejected Jagana's claim before *Padilla* was issued. Jagana's failure to raise this apparently unavailable argument cannot render his PRP procedurally barred. *Greening*, 141 Wn.2d at 697. He is entitled to an evidentiary hearing.

However, 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. *Yim*, 139 Wn.2d at 588. With the assistance of an attorney, Tsai filed a motion to withdraw his guilty plea in 2008, alleging his guilty plea was involuntary because his attorney incorrectly advised him about the immigration consequences. The trial court denied this motion, not because it was legally unavailable on the merits, but because the trial court decided it was untimely and not subject to equitable tolling. Perhaps the trial court erred in 2008, but Tsai did not appeal that decision and neither *Padilla* nor *Sandoval* addresses equitable tolling. Based on the arguments currently presented for our review, Tsai has not shown he is entitled to an evidentiary hearing on the merits of his PRP. *See* RAP 16.4(d); *Greening*, 141 Wn.2d at 697.

CONCLUSION

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 are procedurally barred would deprive many others of the opportunity to have the merits of their constitutional claims reviewed. In light of the legislature's long-standing commitment to ensuring noncitizen defendants understand the immigration consequences of conviction and this court's long-standing commitment to ensuring criminal defendants receive effective assistance of counsel, such an outcome would be unjust and fall short of the values underpinning our state statutory framework.

WE CONCUR:

In re Pers. Restraint of Tsai
In re Pers. Restraint of Jagana

No. 88770-5 (consolidated with No. 89992-4)

OWENS, J. (dissenting) — In 1992, we adopted the United States Supreme Court's method for determining when a constitutional rule that arises out of new case law may apply retroactively. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326-27, 823 P.2d 492 (1992). The Court's method comes from *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and under that method only settled constitutional rules apply retroactively. New constitutional rules of criminal procedure do not apply retroactively. *Id.* In this case, both Tsai and Jagana ask that we apply a constitutional rule that arose out of new case law—*Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)—retroactively to them.

In *Padilla*, the United States Supreme Court held that if a defendant's attorney fails to advise the defendant of the immigration consequences of pleading guilty, it violates the defendant's right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Id.* at 374. Thus, the question under our retroactivity framework is whether that holding constituted a new constitutional

rule in Washington. To determine that, we must assess whether our courts interpreted the Sixth Amendment to require attorneys to advise their clients of the immigration consequences of pleading guilty prior to *Padilla*.

As I explain below, our case law shows that prior to *Padilla*, Washington courts had held that if an attorney failed to advise his or her client of the immigration consequences of pleading guilty, it was *not* a violation of the defendant's Sixth Amendment right to the effective assistance of counsel. Although some may disagree with those holdings, that was the law in Washington prior to *Padilla*. Thus, *Padilla* represented a new constitutional rule of criminal procedure in Washington. The United States Supreme Court came to this same conclusion when it resolved this exact question in the federal context. *See Chaidez v. United States*, __ U.S. __, 133 S. Ct. 1103, 1113, 185 L. Ed. 2d 149 (2013). Because *Padilla* is a new constitutional rule of criminal procedure, it cannot be applied retroactively to the petitioners.

The majority avoids this result by distorting the historical scope of Washington constitutional law regarding ineffective assistance of counsel. The majority relies on a Washington statute—RCW 10.40.200—to hold that *Padilla* represented a settled constitutional rule in Washington, and that *Padilla* may therefore be applied retroactively. That is mystifying, as *Teague* requires us to determine whether a *constitutional rule* of criminal procedure is retroactive, not a *statutory rule*. RCW 10.40.200 tells us nothing about how the Sixth Amendment was interpreted in

Washington prior to *Padilla*. Although the majority may believe that Washington courts *should* have interpreted the Sixth Amendment to require attorneys to advise their clients of the immigration consequences of pleading guilty because of RCW 10.40.200, that was not the reality of Washington constitutional law prior to *Padilla*.

It is understandable why the majority wants to avoid this difficult result, but it is compelled by our precedent adopting the *Teague* analysis. Unless and until we overturn our adoption of the *Teague* analysis, we are bound by it. *Padilla* represented a new constitutional rule of criminal procedure in Washington. Thus, it cannot be applied retroactively to the petitioners under *Teague*. I respectfully dissent.

1. Under Teague, *New Constitutional Rules of Criminal Procedure Do Not Apply Retroactively*

Under *Teague*, "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. "Only when we apply a settled rule may a person avail herself of the decision on collateral review." *Chaidez*, 133 S. Ct. at 1107. A rule is new "'when it breaks new ground or imposes a new obligation' on the government." *Id.* (quoting *Teague*, 489 U.S. at 301). Put differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301.

2. *As the United States Supreme Court Has Held,* Padilla *Was a New Rule in Jurisdictions (Like Washington) That Previously Held That Advice about Immigration Consequences Was Categorically Removed from the Scope of the Sixth Amendment*

Prior to *Padilla*, both federal courts and our courts had concluded that an attorney's advice about the immigration consequences of pleading guilty was categorically removed from the scope of the Sixth Amendment. As the United States Supreme Court said, state and lower federal courts had "almost unanimously concluded that the Sixth Amendment [did] not require attorneys to inform their clients of a conviction's collateral consequences, including deportation." *Chaidez*, 133 S. Ct. at 1109. Washington was one of those states. *See State v. Martinez-Lazo*, 100 Wn. App. 869, 876-78, 999 P.2d 1275 (2000) (holding that Martinez-Lazo did not receive ineffective assistance of counsel because "a defendant need not be advised of the possibility of deportation," which is merely a collateral consequence). The United States Supreme Court recently analyzed whether *Padilla* created a "'new rule'" under *Teague* in *Chaidez*. 133 S. Ct. at 1107. Because our courts' interpretation of the Sixth Amendment was the same as the federal courts, our *Teague* analysis should mirror the United States Supreme Court's *Teague* analysis in *Chaidez*.

In *Chaidez*, Chaidez pleaded guilty to deportable offenses, but her attorney failed to advise her of the immigration consequences of pleading guilty. *Id.* at 1106. Her conviction became final in 2004. *Id.* In 2009, after immigration proceedings

commenced against her, she filed a writ of coram nobis[1] in federal district court, arguing ineffective assistance of counsel under the Sixth Amendment. *Id.* The Court decided *Padilla* while Chaidez's petition was still pending, and the Court granted her petition for certiorari to determine whether *Padilla* applied retroactively to her. *Id.* at 1106-07.

In finding that *Padilla* created a new rule (and thus that it could not be applied retroactively), the Court's analysis hinged on the distinction between defense counsel's duty to inform clients about deportation consequences as a matter of professional competence and defense counsel's requirements under the Sixth Amendment. *See id.* at 1108. The Court noted that "had *Padilla* merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent," then *Padilla* would not have created a new rule. *Id.* Indeed, in *Padilla*, the Court noted that the plea form used by Kentucky trial courts already "provides notice of possible immigration consequences" and that many other states (including Washington) "require trial courts to advise defendants of possible immigration consequences." 559 U.S. at 374 n.15. However, in *Chaidez*, the Court

[1] Chaidez filed a writ of coram nobis instead of habeas relief because she was no longer "'in custody'" and therefore could not seek habeas relief. *Chaidez*, 133 S. Ct. at 1106 n.1 (citing 28 U.S.C. §§ 2255, 2241). The Court assumed without deciding that nothing in the case turned "on the difference between a *coram nobis* petition and a habeas petition." *Id.*

noted that "*Padilla* did something more." 133 S. Ct. at 1108. *Padilla* considered whether "advice about deportation" was "'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction, rather than a component of the criminal sentence." *Id.* (quoting *Padilla*, 559 U.S. at 366). In other words, *Padilla* broke new ground by determining that attorneys are required to inform their clients about the immigration consequences of pleading guilty *under the Sixth Amendment.*

As discussed above, Washington courts, like the federal courts and many other state courts prior to *Padilla*, "concluded that the Sixth Amendment [did] not require attorneys to inform their clients of a conviction's collateral consequences, including deportation." *Id.* at 1109; *Martinez-Lazo*, 100 Wn. App. at 876-78. Only Colorado and New Mexico held that the Sixth Amendment required attorneys to inform their clients of a conviction's collateral consequences. *Chaidez*, 133 S. Ct. at 1109 & n.9 (citing *People v. Pozo*, 746 P.2d 523, 527-29 (Colo. 1987); *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 539, 101 P.3d 799). Since our courts' interpretation of the Sixth Amendment was the same as the federal courts, our *Teague* analysis here should mirror the United States Supreme Court's *Teague* analysis in *Chaidez*. Thus, like the Supreme Court, I would hold that *Padilla* created a new rule in Washington and cannot be applied retroactively under *Teague*. The majority's conclusion to the contrary is erroneously based on statutory authority, as explained below.

3. The Majority Fundamentally Errs by Conflating Statutory and Constitutional Authority

As discussed above, Washington has long required trial courts and attorneys to inform defendants of the immigration consequences of pleading guilty as a matter of practice and professional competence pursuant to a statute. However, we never required that practice *under the Sixth Amendment* until we decided *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011), in light of *Padilla*. The majority fundamentally errs by giving a *statutory* attorney practice standard the same legal authority as a *constitutional* attorney practice standard for *Teague* retroactivity purposes. That is simply not correct under *Teague*. To determine retroactivity under *Teague*, we must assess whether a *constitutional rule* of criminal procedure is settled or new, not whether a *statutory rule* is settled or new.

In 1983, our legislature passed a bill requiring that defendants be advised of immigration consequences before pleading guilty. LAWS OF 1983, ch. 199, § 1(2) (currently codified as RCW 10.40.200(2)). That being said, our courts have consistently held "that a deportation proceeding that occurs subsequent to the entry of a guilty plea is merely a collateral consequence of that plea." *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999). Accordingly, before *Padilla* and *Sandoval*, our courts had concluded that the Sixth Amendment did not require attorneys to inform their clients of a conviction's collateral consequences, including

deportation. *See Martinez-Lazo*, 100 Wn. App. at 876-78 (holding that Martinez-Lazo did not receive ineffective assistance of counsel because "a defendant need not be advised of the possibility of deportation," which is merely a collateral consequence). As discussed above, we did not recognize that the Sixth Amendment required attorneys to give competent advice about deportation consequences until *Sandoval*, in light of *Padilla*. *See Sandoval*, 171 Wn.2d at 169-71.

The majority fundamentally errs by asserting that in 1983, "our legislature did what *Padilla* ultimately did in 2010—it rejected the direct-versus-collateral distinction as applied to immigration consequences, declaring that a noncitizen defendant must be warned about immigration consequences before pleading guilty." Majority at 8. The legislature did not reject the "direct-versus-collateral distinction" in enacting what is now RCW 10.40.200 because it did not (and does not) have the constitutional authority to declare what the Sixth Amendment means for determining what constitutes ineffective assistance of counsel—that is our job. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."). Although the legislature can set practice standards for attorneys, only Washington courts can determine whether an attorney's violation of a legislative standard constitutes ineffective assistance *under the Sixth Amendment*. And in Washington, as discussed above, our courts had decided that an attorney failing to give advice about immigration consequences (as required by

RCW 10.40.200) was categorically removed from the scope of the Sixth Amendment. *Martinez-Lazo*, 100 Wn. App. at 876-78.

Despite the existence of RCW 10.40.200(2), the Court of Appeals' decision in *Martinez-Lazo* accurately reflected the scope of Washington constitutional law prior to *Padilla*. Even Martinez-Lazo "acknowledge[d] the general rule in Washington that deportation is a collateral consequence"; instead, he argued that because "his deportation [was] certain, [it was] therefore no longer a collateral consequence." *Id.* at 876-77. Martinez-Lazo's argument eschewing the distinction between direct and collateral consequences in the deportation context was not recognized until *Padilla* and *Sandoval*. Thus, although Washington *statutory* law provided that attorneys were required to inform their clients of immigration consequences, it was not a *constitutional* requirement under our state courts' interpretation of the Sixth Amendment. That distinction should be dispositive of our *Teague* analysis—we are determining whether a *constitutional rule* of criminal procedure is retroactive, not a *statutory rule*.

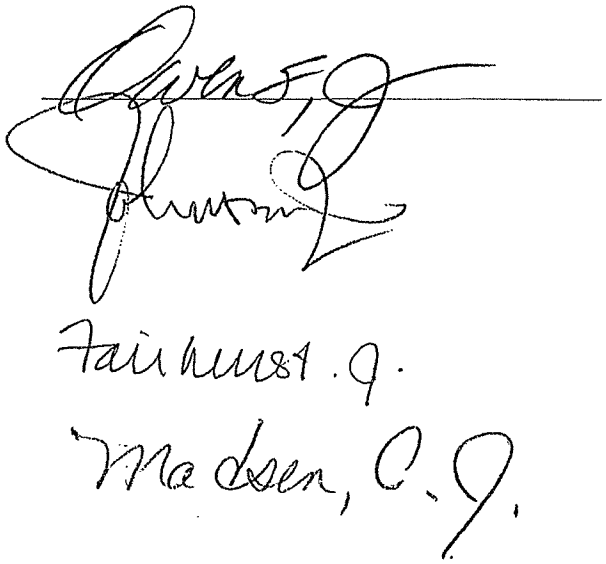
It should be evident from the majority's own citations that it has no authority to support its holding. The only pre-*Padilla* case the majority cites that actually held that it was ineffective assistance of counsel for an attorney to fail to advise his or her client of the immigration consequences of pleading guilty is from New Mexico. *Paredez*, 136 N.M. 533. As noted above, that is one of the two states the United

States Supreme Court discussed in *Chaidez* that did not consider deportation to be a collateral consequence. 133 S. Ct. at 1109 & n.9.

Thus, I would conclude that *Padilla* created a new rule in Washington, and I would therefore hold that the rule imposed by *Padilla* is not retroactive under *Teague*. Accordingly, I would find the petitioners' personal restraint petitions time barred.

CONCLUSION

I recognize that "[t]his case is not a faceless one that bears no consequences." Majority at 17. But we are a court of law, and we are required to faithfully apply our precedent. Our cases have consistently applied the *Teague* analysis to decide whether constitutional rules apply retroactively. Under a proper *Teague* analysis here, we do not look to whether our courts *should have been* interpreting the Sixth Amendment to require attorneys to inform their clients of the deportation consequences of pleading guilty. Rather, we must assess how our courts *actually* interpreted the Sixth Amendment and then decide whether *Padilla* broke new ground from our courts' prior approach. Prior to *Padilla*, our courts had concluded that the Sixth Amendment did not apply to an attorney's advice about the immigration consequences of pleading guilty. Thus, *Padilla* created a new rule in Washington. I would therefore hold that *Padilla* may not be applied retroactively under *Teague*. Accordingly, I would find Tsai's and Jagana's personal restraint petitions time barred and affirm the Court of Appeals.



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 46933-2-II
	)	
KEVIN ESTES,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF MAY 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVIN ESTES
DOC NO. 915117
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MAY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

May 11, 2015 - 3:10 PM

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