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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 96895-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MARVIN CASTRO-OSEGUERA,

Petitioner.

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**STATE'S ANSWER TO PETITION FOR REVIEW**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANN M. SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

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A. INTRODUCTION

This Court should deny the petition for review because the Court of Appeals' conclusion that Castro-Oseguera failed to establish the prejudice prong of ineffective assistance of counsel is beyond dispute. However, if this Court accepts review, the State requests that the following issue also be reviewed:

Whether the State waived the claim that this collateral attack was time-barred pursuant to RCW 10.73.100(6) by consenting to an evidentiary hearing so that the facts necessary to determine the time bar could be established.

B. STANDARD FOR ACCEPTANCE OF REVIEW

“A petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

C. STATEMENT OF THE CASE

The facts of the case are fully set forth in the Court of Appeals opinion affirming the trial court and the State's Brief of Respondent filed in the Court of Appeals.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

1. THE COURT OF APPEALS CORRECTLY FOUND THAT CASTRO-OSEGUERA FAILED TO ESTABLISH PREJUDICE, AND THUS THIS CASE DOES NOT PRESENT A SIGNIFICANT ISSUE OF LAW OR SUBSTANTIAL PUBLIC INTEREST.

Castro-Oseguera asks this Court to review the unpublished opinion of the Court of Appeals, which affirmed the trial court's denial of his untimely motion to withdraw his 2010 guilty plea based on ineffective assistance of counsel. The Court of Appeals correctly concluded that Castro-Oseguera failed to establish prejudice, regardless of whether counsel's performance was deficient, and thereby failed to establish ineffective assistance of counsel.

Whether or not deficient performance was shown, there can be little doubt that Castro-Oseguera failed to establish prejudice. To establish his claim of ineffective assistance of counsel in plea

negotiations, the defendant must establish that he would have rejected the offer to plead guilty if he had been advised differently regarding the risk of deportation. Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Castro-Oseguera failed to carry this burden. Critically, at the motion to withdraw the plea, defense counsel admitted that Castro-Oseguera was likely to be deported even if he was acquitted at trial, because he was undocumented and was already in an INS hold at the time. RP 90. Thus, there would have been no rational reason for Castro-Oseguera not to accept the plea offer and a favorable sentencing recommendation from the State,<sup>1</sup> when even acquittal would not have prevented deportation. As the Court of Appeals concluded, “It is, thus, far from clear based on this record that had Castro-Oseguera learned his guilty plea would render him ineligible for asylum, his decision to plead guilty would have been different.” Opinion, at 17. The failure to establish prejudice is fatal to the ineffective assistance of counsel claim. If the court decides that either prong of ineffective assistance of counsel has not been met, it need not address the other prong. In re Pers. Restraint of Cross,

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<sup>1</sup> The State dismissed one of the two charges and agreed to recommend a low-end sentence in exchange for the plea of guilty to delivery. CP 6-7, 18.

180 Wn.2d 664, 693, 327 P.3d 660 (2014), abrogated by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018).

2. IF THIS COURT ACCEPTS REVIEW, IT SHOULD REVIEW WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE STATE WAIVED THE TIME BAR.

RCW 10.73.090 provides that no motion collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1). A judgment becomes final on the date that it is filed with the clerk of the trial court, or the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction, whichever is later. RCW 10.73.090(3). In the present case, the defendant's conviction became final in 2010, when the judgment and sentence was filed.

RCW 10.73.090 applies to motions filed in the trial court. State v. Smith, 144 Wn. App. 860, 862, 184 P.3d 666 (2008). In fact, CrR 7.8(b) states that motions for relief from judgment are "subject to RCW 10.73.090, .100, .130 and .140." Also, RCW



10.73.090(2) explicitly defines “collateral attack” as including a motion to withdraw a guilty plea.

Claims of ineffective assistance of counsel are not within the exceptions to the time bar. In re Pers. Restraint of Adams, 178 Wn.2d 417, 426, 309 P.3d 451 (2013). However, RCW 10.73.100(6) provides an exception to the one-year time limit if there has been a “significant change in the law” that is material to the conviction or sentence being challenged. Padilla *could* be a significant change in the law, depending on what immigration advice a defendant received.<sup>2</sup> As this Court determined in In re Pers. Restraint of Tsai, 183 Wn.2d 91, 107-08, 351 P.3d 138 (2015), Padilla only changed Washington law if the defendant establishes through an evidentiary hearing that he received *no* advice regarding immigration consequences. If a defendant instead received *some* advice about immigration consequences, albeit incorrect or incomplete, Padilla is not a significant change, because Washington courts have long recognized that incorrect advice about immigration consequences could constitute ineffective assistance of counsel that would render a plea involuntary. Id.

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<sup>2</sup> Padilla was issued on March 31, 2010, two months after Castro-Oseguera entered his plea in January of 2010.

Castro-Oseguera alleged that he had received no advice about immigration consequences. CP 41, 46-47; RP 22. Thus, a hearing was necessary. The trial court did not find his testimony credible. RP 102-03. The trial court found that Castro-Oseguera received advice about the deportation consequence of his plea. RP 102-03. Thus, Padilla is not a significant change in the law material to Castro-Oseguera's conviction pursuant to Tsai. But, this could not be determined without an evidentiary hearing. It makes no sense to hold, as the Court of Appeals did, that the State waives the time bar by not asking the court to transfer the motion to the Court of Appeals pursuant to CrR 7.8(c)(2). Transfer was not appropriate under the rule unless the motion was untimely, which could not be determined without an evidentiary hearing as to whether Castro-Oseguera received no advice (in which case his collateral attack would not be time-barred) or incorrect/ incomplete advice (in which case his collateral attack would be time-barred).

Once the trial court heard Huffman's testimony, found him credible, and rejected Castro-Oseguera's claim that he received *no* advice about immigration consequences of his plea, it was established that his collateral attack was time-barred pursuant to In re Tsai. The Court of Appeals' conclusion that the State waived

the time bar by consenting to an evidentiary hearing conflicts with this Court's decision in In re Tsai, and ignores the provisions of CrR 7.8 and RCW 10.73.090 and .100. If review is accepted, this issue should be reviewed as well.

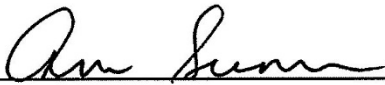
E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 22nd day of March, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:  \_\_\_\_\_  
ANN M. SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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