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

In re the Personal Restraint Petition of	)	No. 66682-7-I
MUHAMMADOU JAGANA.	)	ORDER WITHDRAWING OPINION

This case was remanded to this court by a special department of the supreme court "for reconsideration in light of Chaidez v. United States, 133 S. Ct. 1103 (2013)." Having reconsidered the case, as ordered by the supreme court, it is hereby

ORDERED that this court's opinion, filed on August 13, 2012, is withdrawn.

DATED this 21st day of August 2013.

COX, J.

Leach, C.J.

Schindler, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of	)	No. 66682-7-I
MUHAMMADOU JAGANA.	)	DIVISION ONE
	)	PUBLISHED
	)	FILED: August 13, 2012

Cox, J. — Muhammadou Jagana seeks collateral review of his final judgment and sentence that was based on his guilty plea to possession of cocaine. His request is more than four years after the entry of his June 2006 final judgment and sentence. Based on Padilla v. Kentucky,[1] which was decided in March 2010, Jagana argues that he was denied effective assistance of counsel because his attorney did not inform him of the immigration consequences of his guilty plea. He also claims that his plea was not knowing and voluntary for the same reason.

Jagana has borne the burden of showing that his ineffective of counsel claim falls within RCW 10.73.100(6). Thus, this claim is an exception to the one

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[1] ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

year bar against collateral review of final judgments. Accordingly, we reach the merits of his claim.

On the merits, we hold that the ineffective assistance of counsel rule applied in Padilla is not a "new" rule, as defined in Teague v. Lane[2] and subsequent cases.[3] Based on Padilla, Jagana has demonstrated that his plea counsel's representation fell below the objective standard of reasonableness that Strickland v. Washington[4] requires. We remand to the superior court for a determination whether he can also establish prejudice under the second prong of Strickland.[5]

In 2006, the State charged Jagana with one count of violation of the uniform controlled substances act (VUSCA): possession of cocaine. He met with his appointed attorney several times. Jagana states that his attorney did not advise him of any immigration consequences of pleading guilty to the felony charge.[6] Moreover, his attorney did not tell him to contact an immigration

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[2] 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (O'Connor, J., plurality opinion).

[3] See Schriro v. Summerlin, 542 U.S. 348, 352, 355, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (adopting and refining the analysis of Teague).

[4] 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[5] Roe v. Flores-Ortega, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (defendant must show that counsel's unreasonable advice actually prejudiced him and that he is rational in challenging such advice on appeal); In re Pers. Restraint of Crace, No. 85131-0, slip op. at 15 (Wash. July 19, 2012) ("a petitioner who shows prejudice under Strickland necessarily meets his burden to show actual and substantial prejudice on collateral attack").

[6] Affidavit of Defendant in Support of Motion to Withdraw Guilty Plea at 2.

attorney before pleading guilty. His attorney told him to plead guilty, and he did. The felony judgment and sentence was entered on June 9, 2006. Jagana did not appeal.

In November 2010, Jagana moved, pursuant to Criminal Rule (CrR) 7.8, to withdraw his guilty plea and for the court to vacate the judgment and sentence. First, he argued that his defense counsel in the VUCSA prosecution did not inform him of the immigration consequences of his guilty plea, in violation of Padilla. Second, he argued that his plea was not intelligently and voluntarily made, based on the lack of proper advice of his attorney as to the immigration consequences of his plea.

The State moved to transfer Jagana's motion to this court for consideration as a personal restraint petition. The trial court granted the State's motion.

COLLATERAL REVIEW OF FINAL JUDGMENT

Jagana seeks to withdraw his guilty plea on two bases. First, he argues that he was denied effective assistance of counsel under Padilla. Second, he argues that his plea was not intelligently and voluntarily made. We address the first argument and need not reach the second.

A personal restraint petition is not a substitute for direct appeal and availability of collateral relief is limited.[7] In order to obtain relief, Jagana must first

[7] In re Pers. Restraint of Grasso, 151 Wn.2d 1, 10, 84 P.3d 859 (2004) (citing In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992)).

overcome statutory and rule based procedural bars.[8] Then, in order to successfully argue a claim not previously raised, Jagana must demonstrate by a preponderance of the evidence either a constitutional error that worked to his actual and substantial prejudice, or a non-constitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice.[9]

A motion to withdraw a plea may be transferred to the appellate court for treatment as a personal restraint petition.[10] A personal restraint petition is a collateral attack on a judgment.[11] Generally, a defendant may not collaterally attack a judgment and sentence in a criminal case more than one year after it becomes final.[12] A judgment and sentence generally becomes final either on entry or on the day an appellate court issues its mandate disposing of a timely direct appeal from the conviction.[13]

There are exceptions to RCW 10.73.090(1)'s one-year time bar. Jagana relies on RCW 10.73.100, which states in pertinent part:

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

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[8] Id. See RCW 10.73.090; RAP 16.4(d).

[9] Grasso, 151 Wn.2d at 10-11 (citing St. Pierre, 118 Wn.2d at 328; In re Pers. Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)).

[10] See CrR 7.8(c)(2).

[11] RCW 10.73.090(2).

[12] RCW 10.73.090(1).

[13] RCW 10.73.090(3)(a), (b).

> (6) There has been a ***significant change in the law***, whether substantive or procedural, which is ***material to the conviction, sentence, or other order entered*** in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or ***a court***, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, ***determines that sufficient reasons exist to require retroactive application*** of the changed legal standard.[14]

Jagana has satisfied these requirements.

Significant Change in the Law

The first requirement of RCW 10.73.100(6) is that there must be a "significant change in the law."[15] We hold that there is such a change here.

Our supreme court discussed the "significant change in the law" requirement in In re Personal Restraint of Greening.[16] There, the court considered whether Greening's personal restraint petition was time barred under RCW 10.73.090.[17] He claimed that RCW 10.73.100(6) exempted his claim from that one year time bar.[18]

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[14] (Emphasis added.)

[15] State v. Abrams, 163 Wn.2d 277, 291, 178 P.3d 1021 (2008).

[16] 141 Wn.2d 687, 9 P.3d 206 (2000).

[17] Id. at 691.

[18] Id. at 694-95.

In considering Greening's argument, the supreme court referred to its emphasis of the "'[b]road exceptions'" provided in RCW 10.73.100 when it earlier upheld the constitutionality of this statute.[19] More specifically, the court stated:

> These exceptions are broader than is necessary to preserve the narrow constitutional scope of habeas relief. The Legislature, of course, is free to expand the scope of collateral relief beyond that which is constitutionally required, and here it has done so to include ***situations which affect the continued validity and fairness of the petitioner's incarceration***.[20]

The Greening court held that "where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a 'significant change in the law' for purposes of exemption from procedural bars."[21]

The question here is whether the Supreme Court decision in Padilla is a "significant change in the law" for purposes of this statute.

The Court described Padilla as a native of Honduras who was a lawful permanent resident of the United States for over 40 years.[22] Following his guilty plea to possessing marijuana in a state case, he faced federal deportation proceedings.[23] In response to this, Padilla sought relief in state court based on

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[19] Id. at 695 (quoting In re Pers. Restraint of Runyan, 121 Wn.2d 432, 440, 853 P.2d 424 (1993)).

[20] Id. at 695 (quoting Runyan, 121 Wn.2d at 445).

[21] Id. at 697.

[22] Padilla, 130 S. Ct. at 1477.

[23] Id.

the claimed ineffectiveness of his plea counsel.[24] Specifically, he claimed counsel did not advise him of the potential adverse immigration consequences of pleading guilty to the charged offenses.[25] The Kentucky Supreme Court denied his request for post-conviction relief.[26] The denial was based on the rationale that the Sixth Amendment right to effective assistance of counsel did not include the duty to advise a client about deportation because it is a collateral, not a direct, consequence of a conviction.[27]

Reversing and remanding for further proceedings, the Supreme Court held that, under the Sixth Amendment and Strickland, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[28] To the contrary, such advice falls within that domain.[29]

The Court reasoned that deportation is "intimately related to the criminal process" and that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders."[30] The Court stated that it "ha[d] long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective

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[24] Id. at 1478.

[25] Id.

[26] Id.

[27] Id.

[28] Id. at 1482.

[29] Id.

[30] Id. at 1481.

assistance of counsel."[31] The Court also observed that the "weight of prevailing professional norms supports the view that counsel must advise" a client of the risk of deportation as part of the plea process.[32]

Before Padilla, many other courts, including the Washington State Supreme Court, believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction.[33] This was based on the rationale that there was a distinction between "direct" and "collateral" consequences of a plea bargain.[34]

For example, in In re Personal Restraint of Yim,[35] the Washington Supreme Court noted that immigration consequences to a plea are merely collateral to the plea.[36] Thus, the court stated there was no duty for counsel to

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[31] Id. at 1486.

[32] Id. at 1482 (citing NAT'L LEGAL AID & DEFENDER ASSN., PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2 (1995); G. HERMAN, PLEA BARGAINING § 3.03, at 20–21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713-18 (2002); A. CAMPBELL, LAW OF SENTENCING § 13:23, at 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, at D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), at 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), at 116 (3d ed. 1999).

[33] State v. Sandoval, 171 Wn.2d 163, 169-70, 249 P.3d 1015 (2011) (citing Padilla, 130 S. Ct. at 1481 n.9).

[34] Padilla, 130 S. Ct. at 1481.

[35] 139 Wn.2d 581, 588, 989 P.2d 512 (1999).

[36] Id. at 588.

advise a client of the possibility of deportation.[37] Under this rationale, defense counsel only had a duty to warn clients of direct consequences of a criminal conviction, which did not include deportation—a civil consequence deemed collateral to the criminal proceeding.[38]

The Padilla Court addressed this claimed distinction, stating:

> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under Strickland. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.
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> . . . .
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> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla's claim.[39]

Thus, Padilla made clear that the Supreme Court had never recognized the validity of the direct versus collateral distinction that some lower federal courts, our state supreme court, and many other jurisdictions had recognized for purposes of applying the Strickland standard. The Court also stated that it was not deciding whether such a distinction was generally appropriate because, in the

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[37] Id.

[38] See U.S. v. Amador–Leal, 276 F.3d 511, 514-15 (9th Cir. 2002) (holding that attorneys were not required to advise clients about immigration consequences of a plea because deportation was simply a "collateral consequence" of the plea).

[39] Padilla, 130 S. Ct. at 1481-82 (internal citations omitted).

case of deportation, such a distinction was ill-suited to evaluate a Strickland claim.

In State v. Sandoval,[40] our supreme court recognized that Padilla changed the law:

> Before Padilla, many courts believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction. However, in Padilla, the United States Supreme Court rejected this limited conception of the right to counsel. The Court recognized that deportation is intimately related to the criminal process and that recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Because of deportation's close connection to the criminal process, advice about deportation consequences falls within the ambit of the Sixth Amendment right to counsel.[41]

There can be no question that Padilla was a "significant change in the law," as RCW 10.73.100(6) requires. Before that case was decided, Yim was the law in this state.[42] As described above, that case held that deportation was a collateral consequence of a guilty plea.[43] Thus, anything short of affirmative misadvice by counsel was not sufficient to set aside a plea.[44]

The supreme court noted that "Padilla has superseded Yim's analysis of how counsel's advice about deportation" affects a plea.[45] Padilla rejects any

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[40] 171 Wn.2d 163, 170, 249 P.3d 1015 (2011).

[41] Id. at 169-70 (internal quotations and citations omitted).

[42] Sandoval, 171 Wn.2d at 170 n.1.

[43] Yim, 139 Wn.2d at 588.

[44] Id.

[45] Sandoval, 171 Wn.2d at 170 n.1.

distinction between direct and collateral consequences of a plea where immigration consequences are at issue. This effectively overturned Yim, a prior appellate decision that was originally determinative of this issue and its impact on the right to effective assistance of counsel. Accordingly, Padilla is a "significant change in the law" for the purposes of RCW 10.73.100(6).

Materiality

We turn to the next requirement to qualify for exemption from the one year bar: materiality of the change in law to the challenged conviction. We hold that Padilla is material to Jagana's conviction.

RCW 10.73.100(6) requires that a significant change in the law be "***material*** to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government."[46] The term "material" is not defined in the statute. Therefore, we may turn to a definition found in a standard dictionary.[47] In the context of this statute, the word "material" most closely means "[h]aving some logical connection with the consequential facts <material evidence>."[48] Generally, the terms "material" and "consequential" in a legal context mean outcome-determining.[49]

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[46] (Emphasis added.)

[47] State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003).

[48] BLACK'S LAW DICTIONARY 1066 (9th ed. 2009).

[49] See State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006) ("Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial."); In re Davis, 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("'A material fact is one upon which the outcome of the litigation depends.'" (quoting Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298

Applying that meaning here, the change in the law from Padilla, requiring defense counsel to inform a defendant of the immigration consequences of a plea bargain, must impact the outcome of the plea at issue. Where pleading guilty to a crime could put the defendant's immigration status at risk, Padilla is clearly material. Here, Jagana's guilty plea did result in deportation proceedings being initiated against him. Therefore, we conclude that Padilla is material to his conviction

Sufficient Reasons to Require Retroactive Application

The final requirement of RCW 10.73.100(6) is that there are "sufficient reasons" to require retroactive application of the "significant change in the law." We hold that there are sufficient reasons to apply Padilla retroactively here.

Jagana's request for collateral review comes over four years after his sentencing on June 9, 2006. Whether Padilla, which was decided in March 2010, may be applied retroactively is at issue.

Our retroactivity analysis under RCW 10.73.100(6) is controlled by the decisions of our state supreme court. The court has made clear that "[It has] attempted to maintain congruence in [its] retroactivity analysis with the standards articulated by the United States Supreme Court."[50]

(1993))); In re Estate of Black, 153 Wn.2d 152, 160-61, 102 P.3d 796 (2004) ("'A material fact is one upon which the outcome of the litigation depends.'" (quoting Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963))); Ohler v. Tacoma Gen. Hosp., 92 Wn.2d 507, 511, 598 P.2d 1358 (1979) ("A 'material fact' is one on which the litigation's outcome depends."), overruled on other grounds by Wood v. Gibbons, 38 Wn. App. 343, 685 P.2d 619 (1984).

[50] In re Markel, 154 Wn.2d 262, 268, 111 P.3d 249 (2005).

More recently, the state supreme court reiterated that "RCW 10.73.100(6) allows collateral relief from judgment even after the normal time bar has lapsed based on a 'material' change in the law when the court or the legislature finds 'sufficient reasons' for retroactive application. ***The statutory language has been interpreted along the lines of Teague***."[51]

In In re Markel,[52] the court applied the federal retroactivity analysis articulated in the plurality opinion of Justice O'Connor in Teague.[53] A majority of the Supreme Court adopted and refined the Teague analysis in Schriro v. Summerlin.[54]

Teague and its progeny first require identifying whether a constitutional rule is "new" or "old."[55] An "old" rule applies both to direct and collateral review.[56] But a "new" rule is generally applicable only to cases that are still on direct review.[57] There are two limited exceptions to applying a "new" rule to collateral review, as outlined by our supreme court in Markel. There, the court

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[51] State v. Evans, 154 Wn.2d 438, 448, 114 P.3d 627 (2005) (emphasis added).

[52] 154 Wn.2d 262, 111 P.3d 249 (2005).

[53] Id. at 268-69.

[54] 542 U.S. 348, 352, 355, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[55] Teague, 489 U.S. at 299-301; Summerlin, 542 U.S. at 351-52.

[56] Com. v. Clarke, 460 Mass. 30, 34-35, 949 N.E. 2d 892 (2011) (quoting Whorton v. Bockting, 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)).

[57] Id. (quoting Whorton, 549 U.S. at 416).

characterized the federal common law retroactivity analysis applicable to "new" rules as follows:

> (1) A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.
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> (2) A new rule will not be given retroactive application to cases on collateral review except where either: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty.[58]

Here, we must first decide whether the rule of Padilla is "old" or "new." As the Teague Court stated, "[i]t is admittedly often difficult to determine when a case announces a new rule."[59]

In State v. Evans,[60] our supreme court quoted the test from Teague and later Supreme Court authority:

> "New" cases 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***." If before the opinion is announced, reasonable jurists could disagree on the rule of law, the rule is new.[61]

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[58] Markel, 154 Wn.2d at 268-69.

[59] Teague, 489 U.S. at 301.

[60] 154 Wn.2d 438, 114 P.3d 627 (2005).

[61] Id. at 444-45 (quoting Teague, 489 U.S. at 301; citing Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004)) (emphasis added).

As we previously discussed in this opinion, the Supreme Court held in Padilla that, under the Sixth Amendment and Strickland, "advice regarding deportation" falls within "the ambit of the Sixth Amendment right to counsel."[62] Thus, the failure of defense counsel to advise his or her client of the immigration consequences of a plea agreement falls below the objective standard of reasonableness, as required by the first prong of Strickland.[63] The Court reasoned that removal is nearly automatic for many offenses, plea negotiations are a critical phase of litigation, and "prevailing professional norms" require counsel to advise a client of the risk of deportation during the plea process.[64]

Because immigration law can be complex, the precise advice required under Padilla depends on the clarity of the law.[65] If it "is truly clear" that an offense is deportable based on the applicable immigration law, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation.[66] If "the law is not succinct and straightforward[,]" counsel must provide only a general warning that "pending criminal charges may carry a risk of adverse immigration consequences."[67]

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[62] Padilla, 130 S. Ct. at 1482.

[63] Id.

[64] Id. at 1481-82, 1486.

[65] Id. at 1483.

[66] Id.

[67] Id.

Significantly, Padilla did not expressly decide whether its rule should be applied retroactively. That question is currently the subject of debate among the federal circuit courts and the state appellate courts.[68]

Among the conflicting authorities on the question whether Padilla is retroactive for purposes of collateral review of final judgments, we conclude that two are most persuasive. They are the Third Circuit decision in United States v. Orocio[69] and the Massachusetts decision in Commonwealth v. Clarke.[70] Accordingly, we join those two courts in concluding that Padilla applies an "old" rule: the standard dictated by Strickland.[71] We hold that Padilla is to be applied retroactively under the Teague analysis that controls our reading of RCW 10.73.100(6)'s last requirement.

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[68] See U.S. v. Orocio, 645 F.3d 630 (3d Cir. 2011) (Padilla is not a "new" rule); Chaidez v. U.S., 655 F.3d 684 (7th Cir. 2011) (Padilla is a "new" rule), cert. granted, __ U.S. __, 2012 WL 1468539, 132 S. Ct. 2101 (Apr. 30, 2012); U.S. v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011) (Padilla is a "new" rule); U.S. v. Amer, 681 F.3d 211 (5th Cir. 2012) (Padilla is a "new" rule); U.S. v. Mathur, __ F.3d __, 2012 WL 2819603 (4th Cir. 2012) (Padilla is a "new" rule); Commonwealth v. Clarke, 460 Mass. 30, 949 N.E. 2d 892 (2011) (Padilla is not a "new" rule); Campos v. State, __ N.W. 2d __, 2012 WL 2327962 (Minn. 2012) (Padilla is a "new" rule); Denisyuk v. State, 422 Md. 462, 30 A.3d 914 (2011) (Padilla is not a "new" rule); State v. Gaitan, 209 N.J. 339, 37 A.3d 1089 (2012) (Padilla is a "new" rule). See also U.S. v. Hubenig, 2010 WL 2650625, at *6 (E.D. Cal. 2010) (Padilla is not a "new" rule); Luna v. U.S., 2010 WL 4868062, at *3 (S.D. Cal. 2010) (Padilla is not a "new" rule).

[69] 645 F.3d 630 (3d Cir. 2011).

[70] 460 Mass. 30, 949 N.E. 2d 892 (2011).

[71] See State v. Chetty, 167 Wn. App. 432, 443-44, 272 P.3d 918 (2012) (without deciding whether Padilla should be applied retroactively, this court recognized that professional norms of at least the past 15 years have required an attorney to advise his client about deportation consequences of a plea).

Orocio noted the distinction in Teague between "old" rules, applicable to both direct and collateral review, and "new" rules, applicable in much more limited circumstances.[72] The court rejected the government's argument that Padilla announced a new rule. In response to the argument that the case extended Strickland to a non-criminal setting, the court reasoned that was too narrow a view of the rule of Strickland.[73] In light of Strickland and Hill v. Lockhart,[74] a plea bargain case, the court held that immigration consequences represented an "important decision" at a critical phase and Padilla merely "reaffirmed defense counsel's obligations to the criminal defendant during the plea process . . . ."[75]

The Orocio court was not persuaded that Padilla "broke new ground" in the sense stated in Teague. Rather, the court concluded that the Supreme Court "straightforwardly applied the Strickland rule[,]" and the norms of the legal profession, to the facts of Padilla's case.[76] Furthermore, the court explained that an application of new facts to the Strickland standard "is not in each instance a 'new rule,' but rather a new application of an 'old rule' in a manner dictated by

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[72] Orocio, 645 F.3d at 637.

[73] Id. at 637-39.

[74] 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[75] Orocio, 645 F.3d at 638.

[76] Id.

precedent."[77] Accordingly, the court concluded that the application of the facts of Padilla's case to Strickland was not a new rule under Teague.[78]

In Clarke, the Supreme Judicial Court of Massachusetts reached the same conclusion. The court quoted the general test stated in Teague for a "new" rule: that the result was not ***dictated*** by existing precedent when the conviction was final.[79] The court then considered the government's argument that Padilla is a "new" rule because "it was not 'dictated' by precedent and 'abrogated both widespread federal and state[] precedent.'"[80] In rejecting that argument, the court quoted Justice O'Connor and Justice Kennedy in two other Supreme Court cases analyzing Teague. Justice O'Connor stated:

> "Even though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new."[81]

This statement in the concurring opinion of Justice O'Connor states her view that the mere existence of conflicting authority does not mean that a rule is new for purposes of retroactivity. This view is telling, coming from the author of Teague.

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[77] Id. at 640-41.

[78] Id.

[79] Clarke, 460 Mass. at 34-35.

[80] Id. at 35.

[81] Id. at 36 (quoting Williams v. Taylor, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (quoting Wright v. West, 505 U.S. 277, 304, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (O'Connor, J., concurring))).

The Clarke court went on, quoting Justice Kennedy:

> . . . Of particular relevance to the claim of ineffective assistance of counsel raised in Padilla, Justice Kennedy has noted that it may be harder to find a "new rule" in a case where the existing precedent established a general standard that can only be applied after analysis of the facts of a given case:
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> "Whether the prisoner seeks the application of an old rule in a novel setting . . . depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."[82]

The Clarke court reasoned that Strickland established a general rule that is to be applied in a variety of factual situations.[83] As Justice Kennedy stated in his concurring opinion in Wright, that view of Strickland undercuts any argument that a new rule exists in such a situation.[84]

The Clarke court made additional observations of note on the question of retroactivity. It cited the Supreme Court's decision in Roe v. Flores-Ortega.[85] That case settled a conflict among the federal circuit courts regarding counsel's duty under Strickland to inform a client about his or her appellate rights.[86]

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[82] Id. (quoting Wright, 505 U.S. at 308-09 (Kennedy, J., concurring)).

[83] Id. at 38-39.

[84] Wright, 505 U.S. at 308-09 (Kennedy, J., concurring).

[85] 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

[86] Id. at 478.

Notwithstanding the split, the Supreme Court rejected the bright line rule articulated by several of the circuits.[87] Rather, it held that "the performance inquiry [under the first prong of Strickland] must be whether counsel's assistance was reasonable considering all the circumstances."[88]

Even though there was a conflict among the federal circuits on the scope of the duty under Strickland before Roe, Roe is generally viewed not to be a "new" rule.[89] This treatment of the case by most courts supports the conclusion that the constitutional rule of Strickland remains the same. Only the factual circumstances under which that rule is applied change.

Clarke also discusses Padilla itself as an additional source of support for the retroactive application of its holding. Clarke notes the reference in Padilla to the Solicitor General's concern that the decision would "open the 'floodgates' and disturb the finality of convictions."[90] The Clarke court stated:

> The Court pointed out that as a practical matter its ruling would not undermine the finality of large numbers of convictions that had

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[87] Id.

[88] Id.

[89] See Tanner v. McDaniel, 493 F.3d 1135, 1143-44 (9th Cir. 2007) ("Each time that a court delineates what 'reasonably effective assistance' requires of defense attorneys with respect to a particular aspect of client representation [under Strickland] it can hardly be thought to have created a new principle of constitutional law."); Frazer v. South Carolina, 430 F.3d 696, 704-05 (4th Cir. 2005) ("[Roe] simply crystalizes [stet] the application of Strickland to the specific context presented by [the defendant's] claim."); Lewis v. Johnson, 359 F.3d 646, 655 (3rd Cir. 2004) (Strickland is a "rule of general applicability," and identification of "particular duty" to consult regarding appeal options is not a basis for classifying a rule as "new").

[90] Clarke, 460 Mass. at 43.

> already been obtained by plea bargains for several reasons. First, because for "at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." Second, because in the then twenty-five years since Strickland, claims of ineffective assistance of counsel at the plea stage are far "less frequently the subject of collateral challenges than convictions obtained after a trial," in large measure because the relief to be obtained, a new trial, "imposes its own significant limiting principle"—the loss of the benefit of the bargain obtained through the plea. Third, because to obtain relief under Strickland, the defendant must also meet the high bar of demonstrating prejudice resulting from counsel's below-standard performance, that is, "that a decision to reject the plea bargain would have been rational under the circumstances."[91]

As the above passage makes clear, the Clarke court viewed Padilla's reliance on Strickland's statement of the test for ineffective assistance of counsel claims as a broad rule of reasonableness. That rule depends on professional norms and is applied to factual situations that will vary according to individual cases. The growing importance of immigration consequences to pleas in criminal cases requires effective assistance of counsel at this critical stage of a case.

It is also noteworthy that the Padilla Court was well aware that its rule would have some impact on collateral review in future cases, although it concluded that impact would be minimal:

> Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied Strickland to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed. The nature of relief secured by a successful

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[91] Id. at 43-44 (quoting Padilla, 130 S. Ct. at 1485).

> collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a ***less favorable*** outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.[92]

For all of these reasons, Orocio and Clark are persuasive.

In contrast to those cases, in Chaidez v. United States[93] the Seventh Circuit concluded that Padilla announced a "new" rule of law and was not retroactive on collateral review.[94]

First, it noted that the lack of unanimity in the Padilla opinion indicated that a "new" rule was announced.[95] Second, it pointed out that the lower courts were split on the issue, meaning that it was susceptible to reasonable debate before the Supreme Court's decision.[96] Third, it explained that Padilla should not be considered an "old" rule because it "was not ***dictated*** by precedent," but was simply informed, controlled, and governed by precedent that led "general support" to the rule established.[97] Finally, the court determined that Padilla was

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[92] Padilla, 130 S. Ct. at 1485-86.

[93] 655 F.3d 684 (7th Cir. 2011).

[94] Id. at 694.

[95] Id. at 689 (citing Beard, 542 U.S. at 414-15; Sawyer v. Smith, 497 U.S. 227, 236-37, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990)).

[96] Id. at 689-91.

[97] Id. at 689-90.

a "new" rule because it categorized an attorney's duty to advise a client on immigration consequences based upon whether those consequences were clear or uncertain.[98] The court stated that such a "nuanced, new analysis cannot, in our view, be characterized as having been dictated by precedent."[99]

The Supreme Court recently granted review of Chaidez.[100] As of this writing, the Supreme Court has not resolved this conflict within the federal circuit courts on whether Padilla is a new rule or an old one.

Here, the State argues that Padilla sets forth a new rule that was not dictated by precedent and apparent to all reasonable jurists.[101] For the reasons that we have already explained in our discussion of Orocio and Clarke, we disagree.

There are additional bases for our conclusion that Padilla should be applied retroactively to this collateral review of Jagana's final judgment and sentence.

In Padilla, the Supreme Court characterized the case as a "postconviction proceeding."[102] An examination of the history of the case reveals more specifically what type of "postconviction proceeding" it was.

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[98] Id. at 693.

[99] Id.

[100] __ U.S. __, 2012 WL 1468539 (Apr. 30, 2012).

[101] State's Response to Personal Restraint Petition at 8.

[102] Padilla, 130 S. Ct. at 1478.

Padilla, who was represented by counsel, entered a guilty plea to three drug related charges in exchange for dismissal of a remaining charge and a total sentence of ten years on all charges.[103] Final judgment on the reduced charges was entered on October 4, 2002.[104]

On August 18, 2004, Padilla moved for relief from the conviction. He claimed his counsel was ineffective for misadvising him about the potential for deportation as a consequence of his guilty plea.[105]

Rule 12.04 of the Kentucky Rules of Criminal Procedure provides that a notice of appeal of a judgment must generally be filed within 30 days of entry. There is no evidence of any appeal by Padilla of the October 2002 judgment. Thus, that judgment was final as of that date. Accordingly, his August 2004 application for relief—characterized by the Supreme Court as a "postconviction proceeding"—was one for collateral review of a final judgment.

We also note that the Padilla Court applied Strickland despite substantial conflicting authority in lower federal courts and many state courts. Nevertheless, the Court had no difficulty in applying Strickland, an old rule, to that case.

We acknowledge the obvious. The Supreme Court did not expressly decide in Padilla whether the rule of that case would be applied retroactively. Nevertheless, the Supreme Court did just that. Padilla's judgment was final in

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[103] Com. of Kentucky v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

[104] Id.

[105] Id.

October 2002. His request for relief, almost two years later, was one for collateral relief of a final judgment.

It is difficult to see why the Supreme Court, particularly after the Court's heavy reliance on Strickland, would conclude that Padilla is anything other than an "old" rule, retroactively applicable to cases on collateral review of final judgments. Presumably, that question will be settled when the Court decides Chaidez.

Moreover, Padilla's rejection of the distinction between direct and collateral consequences of a plea when applying Strickland supports the conclusion that the case should be applied retroactively under our state statute.

For all of these reasons, we conclude that the Strickland rule applied in Padilla is an "old" rule, not a "new" one. The result in that case was dictated by Strickland. The existence of conflicting authority before Padilla was decided does not require a different conclusion.

Accordingly, there are sufficient reasons to apply Padilla retroactively, to Jagana's claim of ineffective assistance of counsel. This fulfills the final requirement of RCW 10.73.100(6).

INEFFECTIVE ASSISTANCE OF COUNSEL

Because the one year bar does not apply to Jagana's claim that he received ineffective assistance of counsel, we reach the merits. We hold that he has demonstrated, under Padilla, that his counsel failed to properly advise him under the first prong of Strickland.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process.[106] Counsel's faulty advice can render a guilty plea involuntary or unintelligent.[107] In evaluating such a claim, an ordinary due process analysis does not apply.[108] Rather, "[t]o establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part [Strickland] test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant."[109]

In satisfying the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial.[110] A "reasonable probability" exists if he "'convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances.'"[111] "[A] petitioner who shows prejudice under Strickland necessarily meets his burden to show actual and substantial

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[106] Sandoval, 171 Wn.2d at 169 (citing In re Pers. Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

[107] Id. (citing Hill, 474 U.S. at 56; McMann, 397 U.S. at 770-71).

[108] Id. (citing Hill, 474 U.S. at 56-58).

[109] Id.

[110] Id. at 174-75 (citing Riley, 122 Wn.2d at 780-81 (citing Hill, 474 U.S. at 59)).

[111] Id. at 175 (alteration in original) (quoting Padilla, 130 S. Ct. at 1485).

prejudice on collateral attack."[112] In the absence of one prong of the Strickland test, it is unnecessary to consider the other.[113]

In Padilla, the Supreme Court held that a constitutionally competent defense attorney must give advice about immigration consequences during the plea process.[114] As noted above, if the immigration law "is truly clear" that an offense is deportable, the attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation.[115] But, if "the law is not succinct and straightforward," counsel must only generally warn that "pending criminal charges may carry a risk of adverse immigration consequences."[116]

In Padilla, the Court did not reach the prejudice prong of Strickland.[117] It remanded to the state court for a determination of that question at a proper hearing.[118]

In Sandoval, the defendant claimed that his defense counsel was ineffective for failing to advise him of the deportation consequences of his guilty

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[112] Crace, No. 85131-0, slip op. at 15.

[113] In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

[114] Padilla, 130 S. Ct. at 1483.

[115] Id.

[116] Id.

[117] Id. at 1487.

[118] Id.

plea.[119] Applying Padilla, the supreme court held that the immigration law at issue was "straightforward enough for a constitutionally competent lawyer to conclude that a guilty plea . . . would have subjected Sandoval to deportation."[120]

Here, Jagana pled guilty to one count of violation of the uniform controlled substances act: possession of cocaine. Under 8 U.S.C. § 1227(a)(2)(B)(i), this crime is clearly deportable:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Therefore, under Padilla and Sandoval, Jagana's counsel was required to advise him of the correct deportation consequence of his guilty plea. Counsel's failure to do so was unreasonable and satisfies the first Strickland prong.

In Padilla, the Court stated the prejudice standard required that "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[121]

Jagana presents several arguments that he suffered prejudice. First, he argues that boilerplate language in his guilty plea form regarding immigration consequences did not waive defense counsel's duty to inform him directly of those consequences. He also argues that emails exchanged between the

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[119] Sandoval, 171 Wn.2d at 174, 176.

[120] Id. at 172.

[121] Padilla, 130 S. Ct. at 1485 (citing Roe, 528 U.S. at 480, 486).

prosecutor and defense counsel referencing the immigration consequences of his plea are not evidence that he was so informed. Finally, he opposes the State's argument that it would have been irrational for him to proceed to trial and risk conviction with a greater prison sentence.

Here, the record is inadequate to decide the question of prejudice. That question should be decided by the trial court on remand at an evidentiary hearing.

To summarize, we hold that this request for collateral relief of a final judgment falls within the exception to the one year bar, as codified in RCW 10.73.100(6). Jagana has also demonstrated that his plea counsel failed to fulfill his duty under the first prong of Strickland.

We remand for an evidentiary hearing to determine whether Jagana can demonstrate prejudice due to his counsel's failure to advise him of adverse immigration consequences arising from his guilty plea.

Cox, J.

WE CONCUR:

Leach, C.J.

Schindler, J.