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FILED
KING COUNTY, WASHINGTON

DEC 07 2010

SUPERIOR COURT CLERK
THERESA GRAHAM
DEPUTY

COPY TO COURT OF APPEALS DEC 08 2010

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

Muhammadou Jabana

Defendant,

No. ⁶⁶⁶⁸²⁻⁷ 05-1-09670-1 SEA

ORDER TRANSFERRING
DEFENDANT'S MOTION FOR
RELIEF FROM JUDGMENT TO THE
COURT OF APPEALS FOR
CONSIDERATION AS A PERSONAL
RESTRAINT PETITION PURSUANT
TO CrR 7.8

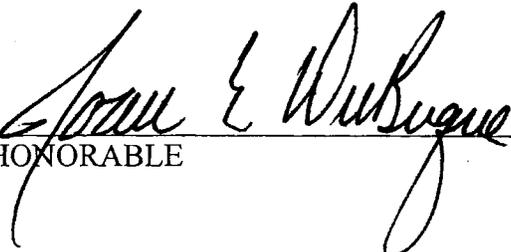
[clerk's action required]

THIS MATTER having come before the undersigned judge of this court upon the motion of the State of Washington, plaintiff, for an order transferring the defendant's Motion for Relief from Judgment to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2), and the court being fully advised in the premises; now, therefore,

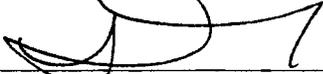
IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's Motion shall be transferred to the Court of Appeals, pursuant to CrR 7.8(c)(2), for consideration as a personal restraint petition.

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2010 DEC 13 AM 10:20

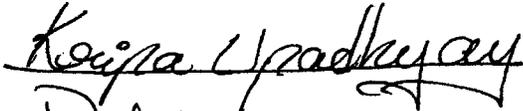
1 SIGNED this 7th day of December, 2010.

2
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4 
HONORABLE

5 Presented by:

6 

7 Laura Petregal WSBA #26016
8 Deputy Prosecuting Attorney

9
10 

11 Defense
12 KRIPA UPADHYAY WSBA#40063

FILED

10 DEC 06 AM 8:30

FILED
COURT OF APPEALS
2010 DEC 13 AM 10:20

2010 DEC 13 AM 10:20

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 05-1-09670-1 SEA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MUHAMMADOU JAGANA,

Defendant,

)
) No. 05-1-09670-1 SEA
)
) MOTION TO TRANSFER
) DEFENDANT'S MOTION TO COURT
) OF APPEALS FOR CONSIDERATION
) AS A PERSONAL RESTRAINT
) PETITION

1. IDENTITY OF MOVING PARTY

The State of Washington, plaintiff, requests the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

The State asks this court to transfer defendant's Motion to Vacate the Judgment and Sentence to the Court of Appeals for consideration as a personal restraint petition.

3. FACTS RELEVANT TO THE MOTION

Defendant was convicted one count of VUCSA, Possession of Cocaine. This court sentenced defendant on June 7, 2006. Defendant has now filed his motion. Because defendant's motion is time barred the State moves to transfer defendant's motion to the Court of Appeals to be considered as a personal restraint petition.

MOTION TO TRANSFER DEFENDANT'S MOTION
TO COURT OF APPEALS FOR CONSIDERATION
AS A PERSONAL RESTRAINT PETITION - 1

Daniel T. Satterberg, Prosecuting
Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

1 4. GROUNDS FOR RELIEF AND ARGUMENT

2 CrR 7.8(c)(2) gives this court the authority to transfer a motion to the Court of Appeals
3 for consideration as a personal restraint petition if such transfer would serve the ends of justice.
4 CrR 7.8 (c)(2) provides that the Superior Court *shall* transfer a motion filed by a defendant to the
5 Court of Appeals for consideration as a personal restraint petition *unless* the Superior Court
6 determines that the motion is not time-barred by the provisions of RCW 10.73.090 *and* either (1)
7 the defendant has made a substantial showing that he is entitled to relief, or (2) resolution of the
8 motion requires a factual hearing.

9 The defendant's motion raises a preliminary issue concerning the application of the one-
10 year time bar normally applied to such motions. CrR 7.8 explicitly makes the motion subject to
11 RCW 10.73.090. RCW 10.73.090 provides that no motion collaterally attacking a judgment and
12 sentence may be filed more than one year after the judgment becomes final, if the judgment and
13 sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW
14 10.73.090(1). Defendant's judgment was final on the date it was entered. RCW 10.73.090(3)(a).
15 This collateral attack is thus presumptively untimely, and the motion should be denied on that
16 basis.

17 Although the defendant also raises an ineffective assistance of counsel claim in his
18 motion, it is the State position that the matter is untimely and should be transferred to the Court
19 of Appeals. Moreover, under CrR 7.8 (c)(2) the defendant has not made a "substantial showing"
20 of ineffective assistance. He has not asserted particular errors and made a showing that these
21 errors were prejudicial.

22 Dated this 3rd day of December 2010.

23 Respectfully submitted,

MOTION TO TRANSFER DEFENDANT'S MOTION
TO COURT OF APPEALS FOR CONSIDERATION
AS A PERSONAL RESTRAINT PETITION - 2

Daniel T. Satterberg, Prosecuting
Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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DANIEL T. SATTERBERG
King County Prosecuting Attorney


By _____
Laura Petregal WSBA #26016
Deputy Prosecuting Attorney

MOTION TO TRANSFER DEFENDANT'S MOTION
TO COURT OF APPEALS FOR CONSIDERATION
AS A PERSONAL RESTRAINT PETITION - 3

Daniel T. Satterberg, Prosecuting
Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

FILED
COURT OF APPEALS
DIVISION ONE
JAN 07 2011

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: Joan E. DuBuque
Bailiff: Alice Gilliam
Court Clerk: Theresa Graham
Reporter: Steve Broscheid

Dept. 27
Date: 12/7/2010

KING COUNTY CAUSE NO.: 05-1-09670-1 SEA

State of Washington vs. Muhammadou Jagana

Appearances:

State is represented by DPA Laura Petregal.

Defendant is present, and represented by counsel Karpi Upadhyay, standing in for Nicholas Marchi.

MINUTE ENTRY

This cause comes before the Court on Defendant's motion to withdraw guilty plea and vacate Judgment and Sentence.

The State asks that this matter be transferred to the Court of Appeals.

The Court denies Defendant's motion, and transfers this matter to the Court of Appeals for consideration as a personal restraint petition.

The Court signs Order Transferring to Court of Appeals.

FILED

10 DEC 06 AM 8:30

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 05-1-09670-1 SEA

FILED
COURT OF APPEALS
DIVISION ONE

JAN 07 2011

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MUHAMMADOU JAGANA,

Defendant,

)
) No. 05-1-09670-1 SEA

)
) MOTION TO TRANSFER
) DEFENDANT'S MOTION TO COURT
) OF APPEALS FOR CONSIDERATION
) AS A PERSONAL RESTRAINT
) PETITION

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Defendant was convicted one count of VUCSA, Possession of Cocaine. This court sentenced defendant on June 7, 2006. Defendant has now filed his motion. Because defendant's motion is time barred the State moves to transfer defendant's motion to the Court of Appeals to be considered as a personal restraint petition.

MOTION TO TRANSFER DEFENDANT'S MOTION
TO COURT OF APPEALS FOR CONSIDERATION
AS A PERSONAL RESTRAINT PETITION - 1

Daniel T. Satterberg, Prosecuting
Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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14 10.73.090(1). Defendant's judgment was final on the date it was entered. RCW 10.73.090(3)(a).
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18 motion, it is the State position that the matter is untimely and should be transferred to the Court
19 of Appeals. Moreover, under CrR 7.8 (c)(2) the defendant has not made a "substantial showing"
20 of ineffective assistance. He has not asserted particular errors and made a showing that these
21 errors were prejudicial.

22 Dated this 3rd day of December 2010.

23 Respectfully submitted,

MOTION TO TRANSFER DEFENDANT'S MOTION
TO COURT OF APPEALS FOR CONSIDERATION
AS A PERSONAL RESTRAINT PETITION - 2

Daniel T. Satterberg, Prosecuting
Attorney
W554 King County Courthouse
516 Third Avenue
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DANIEL T. SATTERBERG
King County Prosecuting Attorney


By _____
Laura Petregal WSBA #26016
Deputy Prosecuting Attorney

MOTION TO TRANSFER DEFENDANT'S MOTION
TO COURT OF APPEALS FOR CONSIDERATION
AS A PERSONAL RESTRAINT PETITION - 3

Daniel T. Satterberg, Prosecuting
Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

FILED

10 NOV 04 AM 11:15

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 05-1-09670-1 SEA

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

STATE OF WASHINGTON,

Plaintiff,

v.

MUHAMMADOU JAGANA,

Defendant.

)
) NO.05-1-09670-1SEA
)
)
) CONFIRMATION OF NOTICE
) OF ISSUE

FILED
COURT OF APPEALS
DIVISION ONE

JAN 07 2011

TO: KING COUNTY PROSECUTING ATTORNEY,

AND: THE CLERK OF THE COURT

COMES NOW THE defendant and confirms her Motion to Withdraw Plea
and Vacate Judgment and Sentence which will be heard on December 7, 2010 at 8:45
a.m. before Judge Dubuque in W854 of the King County Courthouse.

DATED this 4 day of November 2010.



Nicholas Marchi, WSBA 19982
CARNEY & MARCHI, P.S.
Attorneys for Defendant

FILED

10 NOV 04 AM 11:15

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 05-1-09670-1 SEA

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

STATE OF WASHINGTON,

Plaintiff,

vs.

MUHAMMADOU JAGANA

Defendant

Case No. 05-1-09670-1SEA

AFFIDAVIT OF DEFENDANT
IN SUPPORT OF MOTION TO
WITHDRAW GUILTY PLEA

I, MUHAMMADOU JAGANA, being first duly sworn on oath, deposes and says:

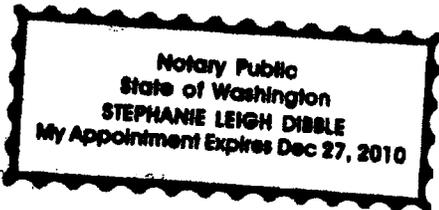
1. I am the defendant in this action. I make this affidavit in support of my request to withdraw my guilty plea and vacate my Judgment and Sentence.
2. On March 20, 2005, I was charged with Unlawful Possession of a Controlled Substance, Cocaine. I was represented by an appointed attorney
3. On June 7, 2006, I plead guilty as charged. I was sentenced to 90 days.
4. I met with my attorney on several different occasions but he did not inform me of the status of the investigation of my case. He further did not advise me of any of the immigration consequences of the conviction to my immigration status.

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5. My attorney did not advise me of any relief from immigration deportation. He did not tell me to contact an immigration attorney before I plead guilty. He did not tell me that I would be deported or that I could face federal charges if I returned to the United States. My attorney never told me of any relief from deportation or what I could do to defend myself if I were placed into Removal Proceedings.
6. I am requesting that I be allowed to withdraw my guilty plea. I did not enter the plea knowingly or voluntarily. I also maintain that my attorneys did not investigate the case or my immigration status. Nor did the attorney inform me of my immigration rights or right to relief. He merely told me to plead guilty.
7. Everything herein is true and correct.

JAGANA
MUHAMMADOU JAGANA

SUBSCRIBED AND SWORN to this 27 day of September, 2010.



[Signature]
NOTARY PUBLIC in and for the
State of Washington, residing
in Tukwila My commission
expires: 12/27/10.

FILED

10 NOV 04 AM 11:15

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 05-1-09670- SEA

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

STATE OF WASHINGTON,

Plaintiff,

vs.

MUHAMMADOU JAGANA,

Defendant

) Case No: 05-1-09670-1SEA

) MOTION AND MEMORANDUM IN
) SUPPORT OF MOTION TO VACATE
) JUDGEMENT AND SENTENCE

FILED
COURT OF APPEALS
DIVISION ONE
JAN 07 2011

I. MOTION

COMES now the Defendant MUHAMMADOU JAGANA by and through his attorneys and moves this Court for an order vacating the Judgment and Sentence in this matter. This motion is brought pursuant to CrR 7.8 and RCW. 10

II. BACKGROUND

On June 7, 2006, Mr. Jagana plead guilty to VUSCA, Possession Cocaine. At the time that he plead guilty he was not a United States citizen. Mr. Jagana maintains that he was not advised of the immigration consequences of the plea. In addition, he maintains that he was not informed of the consequences of the plea.

Mr. Jagana now moves to withdraw his guilty plea and vacate the Judgment and Sentence. It is Mr. Jagana's position that his plea was not intelligently and voluntarily made.

Memorandum in Support of
Motion to Vacate Judgment and Sentence 1

Carney & Marchi, P.S.
108 So. Washington St. #406
Seattle, WA 98104
206-224-0909

1 Clearly, the circumstances and facts surrounding the plea indicate that it was not voluntary and
2 intelligently made and was contrary to the requirements of CrR 4.2(d).

3 **II. ARGUMENT**

4 A motion to withdraw a plea of guilty after judgment and sentence has been entered is
5 addressed to the sound discretion of the court, and will be treated as an application to vacate the
6 judgment pursuant to RCW 4.72.010. State v. Mempa, 78 Wn. 2d 530, 477 P.2d 178 (1970) In
7 addition to establishing one of the statutory grounds as a basis for vacating the judgment, it is
8 necessary to show a prima facie defense to the charge. State v. Loux, 69 Wn.2d 855, 420 P.2d
9 693 (1966).

10 CrR 4.2(f) states:

11
12 The court shall allow a defendant to withdraw the defendant's plea of guilty
13 whenever it appears that the withdrawal is necessary to correct a manifest
14 injustice. If the defendant pleads guilty pursuant to a plea agreement and the
15 court determines under RCW 9.94A.090 that the agreement is not consistent with
16 (1) the interests of justice or (2) the prosecuting standards set forth in RCW
17 9.94A.430-.460, the court shall inform the defendant the guilty plea may be
18 withdrawn and a plea of not guilty entered. If the motion for withdrawal is made
19 after judgment, it shall be governed by CrR 7.8

20
21 "Manifest injustice" is an injustice that is obvious, directly observable, overt and not
22 obscure. State v. Smith, 74 Wn. App. 844, ___ P.2d___ (1994); State v. Saas, 118 Wn.2d 37, 820
23 P.2d 505 (1991); State v. Tylor, 83 Wn. 2d 594, 596 521 P.2d 699 (1974) Situations that can
24 result in instances of "manifest injustice" include but are not limited to: (1) denial of effective
25

1 counsel; (2) plea not ratified by the defendant or authorized by the defendant; (3) plea was
2 involuntary; (4) plea agreement was not kept by the prosecutor. *Supra*, at 42.

3 For the reasons stated herein, it will be clear that the plea must be withdrawn to correct a
4 manifest injustice.

5 **A. The Plea Was Not Voluntary.**

6 CrR 4.2(d) addresses the voluntaries of pleas. CrR 4.2(d) states:

7 The court shall not accept a plea of guilty, without first determining that it is
8 made voluntarily, competently and with an understanding of the nature of the
9 charge and the consequence of the plea. The court shall not enter a plea of guilty
10 unless it is satisfied that there is a factual basis for the plea.

11
12 It is Mr. Jagana's position that the plea that he entered did not comply with the
13 requirements of CrR 4.2(d), in that the defendant did not fully comprehend what he was pleading
14 guilty to nor did he understand the consequences of the plea. A defendant must be fully
15 informed of all the direct consequences of pleading guilty before the court accepts his plea of
16 guilty. Personal Restraint of Ness, 70 Wn. App. 817, ___ P.2d ___, (1993); State v. Barton, 93
17 Wn.2d 301, 609 P.2d 1353 (1980) In addition a defendant must understand the sentencing
18 consequences for a guilty plea to be valid. Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032
19 (1976).
20

21 In State v. Miller, 110 Wn. 2d 528, 756 P.2d 122 (1988) the Washington Supreme Court
22 held that the defendant, Miller, could withdraw his guilty plea where he did not understand the
23 mandatory minimum sentence and the state could not show that prejudicial reliance on the plea.
24 The plea must be withdrawn.
25

1 When a defendant pleads guilty pursuant to misrepresentations or false promise, then a
2 conviction will not stand. Mabry v. Johnson, 467 U.S. 504, 81 L. Ed. 2d 437. 104 S.Ct. 2543,
3 2547 (1984). Unfulfilled or unfulfillable promises can be misrepresentations in the context of a
4 plea agreement. Mabry 104 S.Ct. at 2547.

5 Mr. Jagana clearly shows that he did not understand the consequences of entering a plea.
6 Additionally, as he did not understand the consequences or the surroundings of the plea thus he
7 did not enter the plea voluntarily and it therefore did not comply with the requirements of CrR
8 4.2 (d) Throughout the course of his representation, his attorneys never advised him of his
9 immigration status or what relief he had should he be convicted.

10 Secondly, Mr. Jagana contends that he was pressured into entering the plea by his
11 attorney. He also alleges that he was informed that he would receive a more lenient sentence if
12 he entered the plea, contrary to the requirements of Mabry v. Johnson. Clearly based on the
13 totality of the facts presented it would be a manifest injustice should Mr. Jagana not be allowed
14 to withdraw his guilty plea.

15
16 **B. Mr. Jagana Was Denied Effective Assistance of Counsel.**

17 On March 31, 2010, the United States Supreme Court held in Padilla v. Kentucky that
18 failure to inform a defendant of the immigration consequences of a criminal conviction by
19 defense counsel is ineffective assistance of counsel.

20 The Court stated:

21 We have long recognized that the prevailing norms of practice as reflected in the
22 American Bar Association standards and the like.. are guidelines to determine
23 what is reasonable ...these standard may b valuable measures of the prevailing
24 professional norms of effective representations, especially as these standards have
25 been adapted to deal with the intersections of modern criminal prosecutions and
immigration law... Authorities of every stripe including the American Barr
Association, criminal defense and public defender organization authoritative
treatises and state and city publications universally require defense attorneys to

1 advise as to the risk of deportation consequences for non citizens.

2 Padilla at 9-10

3 The Court went on to state:

4 A holding limited to affirmative misadvice ...would give counsel the incentive to
5 remain silent on matters of great importance, even when answers are readily
6 available. Silence under these circumstances would be fundamentally at odds
7 with the critical obligation of counsel to advise the client of the advantages and
8 disadvantages of a plea agreement. When attorneys know their clients face exile
9 from this country and separation from their families, they should not be
10 encouraged to say nothing at all.

11 Id at 13-15

12 In the case at bar, Mr. Jagana maintains that he was never informed of the consequences
13 of a conviction to his immigration status. He further maintains that he was never informed of
14 relief from removal and what his options were should he be placed into Removal Proceedings.
15 Given the of the Supreme Court's holding in Padilla v. Kentucky, the 1991 conviction cannot
16 stand.

17 M. Jagana maintains that he was pressured to plead guilty. At the time that the plea was
18 entered he was rushed through the process. In addition, he was not fully informed of the
19 consequences of the plea on his immigration status nor what relief was available to him in
20 Removal Proceedings. These actions clearly prejudiced the defendant. Based on this
21 independent argument, Mr. Jagana's plea should be withdrawn.

22 It is anticipated that the State will oppose this request. It is further anticipated that the
23 State will contend that this motion is untimely. However, it is the Mr. Jagana's position that this
24 Court can hear this matter and should grant this motion.
25

1 It is Mr. Jagana's position that the matter is not time barred. It is his position that at the
2 time limitations stated in CrR 7.8 is not applicable.

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

5 (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining
6 a judgment or order;

7
8 (2) Newly discovered evidence which by due diligence could not have been
9 discovered in time to move for a new trial under rule 7.6;

10
11 (3) Fraud (whether heretofore denominated intrinsic or extrinsic),
12 misrepresentation, or other misconduct of an adverse party;

13
14 (4) The judgment is void; or

15
16 (5) Any other reason justifying relief from the operation of the judgment. "The
17 motion shall be made within a reasonable time and for reasons (1) and (2) not
18 more than 1 year after the judgment, order, or proceeding was entered or taken,
19 and is further subject to RCW 10.73.090, .100, .130, and .140"

20 RCW 10.73.090 states:

21
22 (1) No petition or motion for collateral attack on a judgment and sentence in a
23 criminal case may be filed more than one year after the judgment becomes final if
24 the judgment and sentence is valid on its face and was rendered by a court of
25 competent jurisdiction.

1
2 (2) For the purposes of this section, "collateral attack" means any form of post-
3 conviction relief other than a direct appeal. "Collateral attack" includes, but is not
4 limited to, a personal restraint petition, a habeas corpus petition, a motion to
5 vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a
6 motion to arrest judgment.

7
8 (3) For the purposes of this section, a judgment becomes final on the last of the
9 following dates:

10
11 (a) The date it is filed with the clerk of the trial court;

12 (b) The date that an appellate court issues its mandate disposing of a timely
13 direct appeal from the conviction; or

14 (c) The date that the United States Supreme Court denies a timely petition for
15 certiorari to review a decision affirming the conviction on direct appeal. The
16 filing of a motion to reconsider denial of certiorari does not prevent a judgment
17 from becoming final.

18
19 It is Mr. Jagana's position that the motion is not time barred as his is not attacking the
20 Judgment and Sentence as this is a new decision from the United States Supreme Court changes
21 the current state of the law.

22 Additionally, Mr. Jagana's position that if the Court determines that this is a collateral
23 attack, then RCW 10.73.090 is applicable. RCW 10.73.100 states:

24
25 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:

1 (1) Newly discovered evidence, if the defendant acted with reasonable diligence
in discovering the evidence and filing the petition or motion;

2 (2) The statute that the defendant was convicted of violating was unconstitutional
3 on its face or as applied to the defendant's conduct;

4 (3) The conviction was barred by double jeopardy under Amendment V of the
5 United States Constitution or Article I, section 9 of the state Constitution;

6 (4) The defendant pled not guilty and the evidence introduced at trial was
insufficient to support the conviction;

7 (5) The sentence imposed was in excess of the court's jurisdiction; or

8 (6) There has been a significant change in the law, whether substantive or
9 procedural, which is material to the conviction, sentence, or other order entered in
10 a criminal or civil proceeding instituted by the state or local government, and
11 either the legislature has expressly provided that the change in the law is to be
12 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.

13 Mr. Jagana would maintain that section (6) is applicable. As the recent immigration laws
14 have changed and these changes are material to the conviction and thus the one year statute of
15 limitation is not applicable.

16 **III. CONCLUSION**

17 Based on the authorities cited herein and the evidence that will be presented at a hearing,
18 it is clear that the defendant's plea was not voluntary and the defendant's Motion to Withdraw
19 Plea and Vacate Judgment and Sentence must be granted.

20 DATED this 4 day of ^{November}~~September~~ 2010.

21 Respectfully Submitted,

22 

23 Nicholas Marchi, WSBA 19982
24 CARNEY & MARCHI
25 Attorneys for Defendant