

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2011 MAR 14 AM 10:11

FILED

2011 MAR -9 PM 4:02

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



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

<p>The State of Washington,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>ORANTES, Santos W.,</p> <p style="text-align: center;">Defendant.</p>
--

00891-9

NO. 06-1-00278-9

ORDER TRANSFERRING MOTION
FOR RELIEF FROM JUDGMENT

(CLERK'S ACTION REQUIRED)

This matter came before the court pursuant to CrR 7.8(c)(2), for initial consideration of the defendant's Motion for Relief from Judgment. The court has considered the Motion, the State's Motion to Transfer, and the defendant's response to the State's motion. Neither party requested oral argument. Being fully advised, the court hereby concludes and orders as follows:

I. CONCLUSIONS OF LAW

1. The defendant's motion is barred by RCW 10.73.090.
2. The defendant has not made a substantial showing that the defendant is entitled to relief.
3. Resolution of the defendant's motion will not require a factual hearing.

ORIGINAL

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-7172

1
2 **II. ORDER**

3 1. Pursuant to CrR 7.8(c)(2), the defendant's Motion for Relief from Judgment is
4 transferred to the Court of Appeals for consideration as a personal restraint petition.

5 2. The clerk of this court shall transmit copies of the following to the Court of
6 Appeals:

7
8 a. This order;

9 b. The Motion for Relief from Judgment, together with the supporting
10 declarations.

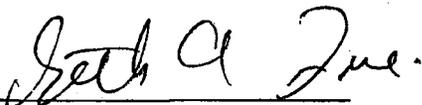
11 c. The State's Motion to Transfer Motion for Relief from Judgment.

12 d. The Defendant's Response to State's Motion to Transfer Motion for Relief
13 from Judgment.

14 Entered this 24 day of February, 2011.

15
16
17
18 
19
20
21
22
23
24
25
26
HON. ANITA L. FARRIS
JUDGE

Presented by:

21
22 
23 SETH A. FINE, WSBA #10937
24 Deputy Prosecuting Attorney

25 Order Transferring Motion
26 For Relief from Judgment Page 2



FILED

2011 MAR -8 PM 1:28

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

The State of Washington,

Plaintiff,

v.

ORANTES, Santos W.,

Defendant.

NO. 06-1-00278-9

ORDER TRANSFERRING MOTION
FOR RELIEF FROM JUDGMENT

(CLERK'S ACTION REQUIRED)

This matter came before the court pursuant to CrR 7.8(c)(2), for initial consideration of the defendant's Motion for Relief from Judgment. The court has considered the Motion, the State's Motion to Transfer, and the defendant's response to the State's motion. Neither party requested oral argument. Being fully advised, the court hereby concludes and orders as follows:

I. CONCLUSIONS OF LAW

1. The defendant's motion is barred by RCW 10.73.090.
2. The defendant has not made a substantial showing that the defendant is entitled to relief.
3. Resolution of the defendant's motion will not require a factual hearing.

ORIGINAL

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-7172

1
2 **II. ORDER**

3 1. Pursuant to CrR 7.8(c)(2), the defendant's Motion for Relief from Judgment is
4 transferred to the Court of Appeals for consideration as a personal restraint petition.

5 2. The clerk of this court shall transmit copies of the following to the Court of
6 Appeals:

7
8 a. This order;

9 b. The Motion for Relief from Judgment, together with the supporting
10 declarations.

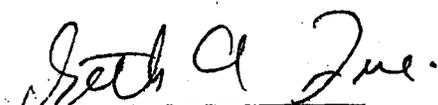
11 c. The State's Motion to Transfer Motion for Relief from Judgment.

12 d. The Defendant's Response to State's Motion to Transfer Motion for Relief
13 from Judgment.

14 Entered this 24 day of February, 2011.

15
16
17
18 
HON. ANITA L. FARRIS
JUDGE

19
20 Presented by:

21
22 
23 SETH A. FINE, WSBA #10937
Deputy Prosecuting Attorney

24
25 Order Transferring Motion
For Relief from Judgment Page 2

FILED

2011 JAN 20 PH 2:13

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

The Honorable Anita L. Farris



CL14547750

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

THE STATE OF WASHINGTON,

Plaintiff,

vs.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

MOTION FOR RELIEF FROM
JUDGMENT

CLERK'S ACTION REQUIRED

2011 MAR 14 AM 10:11

COURT OF SUPERIOR COURT
SNOHOMISH COUNTY

MOTION

COMES NOW Defendant, SANTOS WILFREDO ORANTES, by and through undersigned counsel, Christopher Black, and moves this Court for relief from the judgment previously entered in the above-noted matter. Specifically, Defendant moves the Court to withdraw his plea of guilty and vacate the judgment and sentence in this matter. This motion is based on CrR 7.8(b)(4); RCW 10.73.100(6); State v. Ross, 129 Wash.2d 279 (1996); State v. Olivera-Avila, 89 Wash.App. 313 (1997); Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010); the following Memorandum of Law; and the attached Declarations of Santos Orantes and Kathleen Kyle. A proposed order accompanies this motion.

38

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MEMORANDUM

I. Factual and Procedural Background

Santos Orantes was born on September 1, 1980, in Zacatecoluca, El Salvador. See attached Declaration of Santos Orantes (“Orantes Dec.”), ¶ 1. In 1999, he came to the United States. Id. at ¶ 2. He applied for Temporary Protected Status (TPS) in 2000 due to the ongoing dangerous conditions in El Salvador. Id. at ¶ 3. TPS establishes a temporary safe haven in the United States for nationals of designated countries (including El Salvador) where the country’s nationals are unable to return safely, or, in certain circumstances, the country’s government is unable to handle their return adequately. See 8 U.S.C. § 1254a. A person becomes ineligible for TPS if he is convicted of a felony or two or more misdemeanors. 8 C.F.R. § 244.4. Mr. Orantes’s TPS was duly renewed twice after that. Orantes Dec. at ¶ 3.

Mr. Orantes pleaded guilty to attempted unlawful issuance of a bank check on August 18, 2006, on advice of counsel. Orantes Dec. at ¶¶ 11, 13. He was given a deferred 364-day sentence with 12 months of probation and a \$500.00 fine. Id. at ¶ 11. It is this conviction that is the target of this motion. This conviction carries grave collateral consequences for Mr. Orantes. The fact that he was convicted makes him eligible to be deported and ineligible for TPS.

At the time that Mr. Orantes entered his guilty plea, he had no idea that doing so would affect his immigration status. See Orantes Dec. at ¶¶ 14-17. He was not so advised by anyone prior to entry of his plea. Id. at ¶ 14; Declaration of Kathleen Kyle, ¶¶ 5-6. He did not realize that this conviction would impact his immigration status until his application to renew TPS was denied due to his criminal convictions. See Orantes Dec. at ¶ 15.

1 Since his conviction in 2006, Mr. Orantes has had no subsequent convictions. Id. at ¶ 8.
2 He is a business owner who has worked hard to provide for his wife and two children, as well as
3 his parents, his sister, and his sister's child. Id. at ¶ 5-6, 10.

4 Mr. Orantes has been deeply affected by the loss of his TPS. He is currently in
5 immigration proceedings and will almost certainly be deported if he is not successful in his
6 endeavor to withdraw his guilty plea in this matter. Id. at ¶ 18. The possibility that he might be
7 removed from the United States, where he has spent his entire adult life, separated from his
8 family, and sent to a country where he has not lived since he was a child is a frightening
9 prospect. Id. at ¶¶ 19-21. Mr. Orantes's financial and emotional support is essential to the well-
10 being of his family. Id. at ¶ 20. If he were to be deported to El Salvador, he fears that it would
11 be a "disaster" for his family. Id. at ¶ 21.

12 **II. Argument**

13
14 When Mr. Orantes entered his plea of guilty, he had not been informed that doing so
15 would cause him to lose his immigration status and make him eligible for deportation. Prior to
16 the Supreme Court's recent decision in Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176
17 L.Ed.2d 284 (2010), the rule in Washington was that immigration consequences were collateral
18 to a guilty plea and therefore that a person could enter a voluntary guilty plea without being
19 advised of any such consequences. However, the Padilla Court significantly changed the law by
20 holding that immigration consequences are not collateral to a guilty plea. Because Mr. Orantes
21 was not informed of the immigration consequences of his guilty plea, his plea of guilty was not
22 knowing and voluntary and the resulting judgment and sentence is void. Mr. Orantes should be
23 relieved from that judgment pursuant to CrR 7.8(b)(4). This motion is timely made due to the
24
25

1 significant change in the law under Padilla, which should be applied retroactively for the reasons
2 discussed below.

3 **A. Mr. Orantes did not enter his plea of guilty knowingly and voluntarily.**

4 Due process requires an affirmative showing that a defendant entered a guilty plea
5 intelligently and voluntarily. State v. Ross, 129 Wash.2d 279, 284 (1996); State v. Barton, 93
6 Wash.2d 301, 304 (1980) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). Where a defendant
7 is not informed of the direct consequences of a guilty plea, the plea is not voluntary. Ross, 129
8 Wash.2d at 284. Because Mr. Orantes was not informed that his plea of guilty would cause him
9 to lose his immigration status and make him eligible for deportation from the United States, his
10 plea in this case was not voluntary.

11
12 The prosecutor bears the burden of proving the validity of a guilty plea. Ross, 129
13 Wash.2d at 287; Wood v. Morris, 87 Wash.2d 501, 507 (1976). Knowledge of the direct
14 consequences of a guilty plea may be satisfied from the record of the plea hearing or clear and
15 convincing extrinsic evidence. Ross, 129 Wash.2d at 287; Wood, 87 Wash.2d at 511. A
16 defendant need not be informed of all possible consequences of a plea but rather only direct
17 consequences. Ross, 129 Wash.2d at 284; Barton, 93 Wash.2d at 305. The court has
18 distinguished direct from collateral consequences by whether the result represents a definite,
19 immediate, and largely automatic effect on the range of the defendant's punishment. Id. (internal
20 quotation and citations omitted).

21
22 In Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), the United
23 States Supreme Court significantly changed the status of the law regarding the relationship of
24 immigration consequences to criminal convictions. In that case, the Kentucky Supreme Court
25 had denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment's

1 guarantee of effective assistance of counsel does not protect a criminal defendant from
2 erroneous advice about deportation because it is merely a “collateral” consequence of his
3 conviction. Padilla, 130 S. Ct. at 1476. The United States Supreme Court overturned the
4 Kentucky Court’s ruling and found that, because criminal conviction and deportation are so
5 uniquely enmeshed, deportation cannot be dismissed as merely a collateral consequence of
6 conviction. Padilla, 130 S. Ct. at 1481-82.

7
8 The Court in Padilla explained:

9 The landscape of federal immigration law has changed dramatically over the last 90
10 years. While once there was only a narrow class of deportable offenses and judges
11 wielded broad discretionary authority to prevent deportation, immigration reforms
12 over time have expanded the class of deportable offenses and limited the authority of
13 judges to alleviate the harsh consequences of deportation. The drastic measure of
14 deportation or removal, is now virtually inevitable for a vast number of noncitizens
15 convicted of crimes.

16 Padilla, 130 S. Ct. at 1478 (internal quotation and citation deleted). The Court further noted that
17 these changes in immigration law have dramatically raised the stakes of a noncitizen’s criminal
18 conviction, which confirmed their view that, “as a matter of federal law, deportation is an
19 integral part—indeed, sometimes the most important part of the penalty that may be imposed on
20 noncitizen defendants who plead guilty to specified crimes.” Id. at 1480. The Court recognized
21 that deportation is a particularly severe “penalty,” and noted that even though it is not strictly a
22 criminal sanction, it is intimately related to the criminal process. Id. at 1481 (internal citations
23 omitted). The Court also noted that, “importantly, recent changes in our immigration law have
24 made removal nearly an automatic result for a broad class of noncitizen offenders.” Id. The
25 Court found that it was “most difficult” to divorce the penalty from the conviction in the
deportation context. Id. The Court therefore held that immigration consequences cannot be
considered as collateral to a criminal proceeding and that noncitizen defendants are entitled to
advice from their counsel regarding those consequences. Id. at 1482.

1 Mr. Orantes is not a United States citizen. His conviction for attempted unlawful
2 issuance of a bank check in this case, in combination with his previous conviction, makes him
3 ineligible for TPS. See 8 C.F.R. § 244.4. This conviction has already caused him to lose his
4 immigration status, including his employment authorization and protection from deportation.
5 See 8 U.S.C. § 1254a(a)(1)(A). Mr. Orantes was not informed of this consequence prior to his
6 entry of a plea of guilty. This consequence of pleading guilty cannot be considered “collateral”
7 to the criminal conviction in this case. Padilla, 130 S. Ct. at 1482. Therefore, the fact that Mr.
8 Orantes was not advised of the immigration consequences prior to entry of his plea renders that
9 plea involuntary. Ross, 129 Wash.2d at 284.

11 **B. An involuntary plea results in a void judgment that is subject to collateral
12 attack pursuant to CrR 7.8(b)(4).**

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

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

23 A plea that is involuntary violates due process. Ross, 129 Wash.2d at 284; Barton, 93
24 Wash.2d at 304. Such a plea results in a void judgment that is subject to collateral attack
25 pursuant to CrR 7.8(b)(4). State v. Olivera-Avila, 89 Wash.App. 313, 319 (1997).

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

1 C. This motion is timely because there has been a significant change in the law since
2 the time of the conviction that is material to the conviction and because sufficient
3 reasons exist to require retroactive application of the changed legal standard.

4 RCW 10.73.090 establishes a time limit of one year from the date a judgment becomes
5 final to file a motion for relief from judgment under CrR 7.8(b)(4). See CrR 7.8(b); RCW
6 10.73.090(1). However, the one-year time limit is not applicable if, among other grounds,
7 "there has been a significant change in the law that is material to the conviction." State v. King,
8 130 Wash.2d 517, 531 (1996). The Washington Supreme Court has repeatedly found that
9 appellate decisions can effect such a change. See State v. Greening, 141 Wash.2d 687, 696
10 (2000). RCW 10.73.100 provides that the time limit specified in RCW 10.73.090 does not
11 apply to a petition or motion that is based solely on the fact that:

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

19 RCW 10.73.100(6). For the reasons discussed below, Padilla constitutes a significant change in
20 the law that is material to Mr. Orantes' conviction, and should be applied retroactively.
21 Therefore, Mr. Orantes' motion is exempt from the one-year time limit.

22 1. The rule from *Padilla* constitutes a significant, material change in the law
23 because Mr. Orantes could not have argued that his plea was entered
24 involuntarily prior to that decision.

25 Prior to the United States Supreme Court's decision in Padilla, the rule in Washington
was that immigration consequences were collateral to a guilty plea and therefore that a person
could enter a voluntary guilty plea without being advised of any such consequences. The
Padilla Court held that immigration consequences are not collateral to a guilty plea. This

1 holding constitutes a significant change in the law because it presents Mr. Orantes with a new
2 argument relevant to the voluntariness of his guilty plea that was not previously available to
3 him.

4 One of the tests for determining whether a new law represents a significant, material
5 change is applied by asking if the defendant could have argued the same issue before the new
6 law was decided. In re Personal Restraint of Holmes, 121 Wash.2d 327, 332 (1993). While
7 litigants have a duty to raise *available* arguments in a timely fashion and may later be
8 procedurally penalized for failing to do so, they should not be faulted for having omitted
9 arguments that were essentially *unavailable* at the time. Greening, 141 Wash.2d at 697 (2000)
10 (internal citations omitted). In Greening, the Washington Supreme Court held that where an
11 intervening opinion has effectively overturned a prior appellate decision that was originally
12 determinative of a material issue, the intervening opinion constitutes a “significant change in the
13 law” for purposes of exemption from procedural bars. Id.

14
15 The rule from Padilla, that immigration consequences cannot be considered as collateral
16 to a criminal proceeding, constitutes a significant, material change in the law. Although the law
17 is well-settled that a guilty plea cannot be accepted until the defendant had been informed of all
18 direct consequences of the plea, State v. Barton, 93 Wash.2d 301, 305 (1980), prior to Padilla,
19 immigration consequences were not recognized as direct consequences of a guilty plea. See
20 State v. Martinez-Lazo, 100 Wash.App. 869, 876 (2000) (noting acknowledgement that the
21 general rule in Washington was that deportation is a collateral consequence); In re Yim, 139
22 Wash.2d 581, 588 (1999) (“A deportation proceeding that occurs subsequent to the entry of a
23 guilty plea is merely a collateral consequence of that plea.”); State v. Holley, 75 Wash.App. 191,
24 197 (1994). Therefore, prior to Padilla, Mr. Orantes could not have argued that his lack of
25

1 knowledge of the immigration consequences of a guilty plea rendered the plea involuntary.
2 Padilla constituted a significant change in the law, and Mr. Orantes' motion should therefore be
3 exempt from the one-year time limit.

4 2. The rule from *Padilla* should be applied retroactively.

5 The Supreme Court signaled that it understood that its holding in Padilla would apply
6 retroactively by giving "serious consideration" to the argument that its ruling would open the
7 "floodgates" to new litigation challenging prior guilty pleas. Padilla, 130 S. Ct. at 1484-85.
8 Most courts to reach the issue have held that Padilla can be applied retroactively, and all have
9 acknowledged that this is a close question. The only courts to decide this issue in the Ninth
10 Circuit have been the Eastern and Southern Districts of California, which have applied Padilla
11 retroactively. See United States v. Chaidez, 2009 U.S. Dist. LEXIS 116229 (S.D. Cal. Dec. 10,
12 2009); United States v. Hubenig, 2010 U.S. Dist. LEXIS 80179 (E.D. Cal. July 1, 2010); Luna
13 v. United States, 2010 U.S. Dist. LEXIS 124113 (S.D. Cal. Nov. 23, 2010).

14 The holding of Padilla can be applied retroactively if it is not a new rule of criminal
15 procedure, or if it meets one of two exceptions. The Supreme Court has declared that, going
16 forward, the issue of retroactivity should be decided as a threshold question on collateral review,
17 before addressing any constitutional claim. See Teague v. Lane, 489 U.S. 288, 305, 109 S. Ct.
18 1060, 103 L.Ed.2d 334 (1989). Although Padilla did make significant changes to the law as it
19 existed in Washington State, it is not a "new rule" for the purpose of a retroactivity analysis
20 under Teague. The Teague Court acknowledged that it is "often difficult to determine when a
21 case announces a new rule." Id. at 301. "[A] case announces a new rule when it breaks new
22 ground or imposes a new obligation on the states or the Federal Government. To put it
23 differently, a case announces a new rule if the result is not *dictated* by precedent existing at the
24
25

1 time the defendant's conviction became final." Id. Moreover, "the mere existence of conflicting
2 authority does not necessarily mean a rule is new." Williams v. Taylor, 529 U.S. 362, 410, 120
3 S. Ct. 1495 (2000).

4 Generally, when a well-established rule of law is applied in a new way based on the
5 specific facts of a particular case, it does not establish a "new rule." See Stringer v. Black, 503
6 U.S. 222, 228-29, 112 S. Ct. 1130, 117 L.Ed.2d 367 (1992). In Hubenig, supra, the court held
7 that Padilla should be applied retroactively because it did not establish a "new rule." The
8 Hubenig Court noted that counsel is already urged by professional standards to advise on
9 immigration consequences due to the importance the defendant generally places on deportation.
10 Hubenig at *7. The requirement that defendants be informed of the direct consequences of a
11 guilty plea is well-established. By recognizing that immigration consequences are among the
12 direct consequences of a guilty plea, the Padilla Court did not break new ground or impose a
13 new obligation on the State. Thus, the rule is not "new" even though the Supreme Court's
14 recognition of removal as a sufficiently important consequence *is* a significant change in the
15 law.
16

17 Even if Padilla established a "new rule," it should still be given retroactive application.
18 The Washington Supreme Court, in the case of In re Personal Restraint of St. Pierre, 118
19 Wash.2d 321 (1992), set forth standards for deciding whether a new rule should be applied
20 retroactively. See Olivera-Avila, 89 Wash.App. at 321. A new rule will be given retroactive
21 application to cases on collateral review if "(a) the new rule places certain kinds of primary,
22 private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the
23 observance of procedures implicit in the concept of ordered liberty." St. Pierre, 118 Wash.2d at
24 326; Olivera-Avila, 89 Wash.App. at 321. The rule from Padilla, that immigration
25

1 consequences cannot be considered as collateral to a criminal proceeding, should be applied
2 retroactively because it requires the observance of procedures implicit in the concept of ordered
3 liberty. The rule that immigration consequences are not collateral to criminal proceedings
4 implicates, in the context of the voluntariness of pleas, due process rights. Like Padilla, the rule
5 in Ross, 129 Wash.2d at 284, requires the observance of a procedure – communication of all
6 direct consequences of a guilty plea – that is implicit in due process. Olivera-Avila, 89
7 Wash.App. at 321. A rule requiring observance of this procedure is to be applied retroactively
8 even on collateral review. Olivera-Avila, 89 Wash.App. at 321.

9
10 CONCLUSION

11 For the foregoing reasons, the Court should grant Mr. Orantes's motion for relief from
12 the judgment in this matter.

13
14 DATED this 13th day of January, 2011.

15 Respectfully submitted,

16 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

17
18 

19
20 Christopher Black, WSBA No. 31744
21 Attorney for Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, and attachments, was served on January 13, 2011, via U.S. Mail, upon the parties required to be served in this action:

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

DATED this 13th day of January, 2011.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744
Attorney for Defendant



FILED

2011 JAN 20 PM 2:13

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

THE STATE OF WASHINGTON,

Plaintiff,

v.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

DECLARATION OF KATHLEEN KYLE

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

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

DECLARATION OF KATHLEEN KYLE - 1

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

39

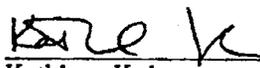
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

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

SIGNED AND DATED this 1st day of January, 2011 at Everett, Washington.



Kathleen Kyle

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED

2011 JAN 20 PM 2:13

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



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

THE STATE OF WASHINGTON,

Plaintiff,

vs.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

DECLARATION OF SANTOS ORANTES

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

Background

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

DECLARATION OF SANTOS ORANTES - 1

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

42

- 1
- 2 5. Nansy and I have two beautiful children. Our daughter Lesley is six years old, and our son
- 3 Daniel is almost two. They were both born here in the United States and are both U.S.
- 4 citizens.
- 5
- 6 6. My sister Dinora, who has TPS, is a single mother to a nine year old U.S. citizen. They lived
- 7 with my family until recently, and I continue to support them. I also help support my
- 8 parents, who are ill.
- 9
- 10 7. When I first arrived in the United States, I did not speak English and I was unsophisticated in
- 11 my behavior and business dealings. Regrettably, I was convicted of a misdemeanor while
- 12 living in North Carolina.
- 13
- 14 8. Since 2006, I have not been convicted of any crimes. In 2010, I started my own construction
- 15 company. I have worked very hard, learned English, and done my best to be a good husband,
- 16 father, and community member.
- 17
- 18 9. I know that I have been very lucky to be able to live in safety in the U.S., and I want to do
- 19 everything in my power to take advantage of the opportunity, and to contribute to society as
- 20 much as I am able.
- 21
- 22 10. In short, I have been working hard, caring for my family, and being as productive a member
- 23 of society as I can.

24 Entry of Guilty Plea in this Case

- 25 11. On August 18, 2006, I entered a plea of guilty to the charge of attempted unlawful issuance
- of a bank check. I was given a deferred sentence of 364 days with 12 months of probation
- and a \$500.00 fine.
12. I complied with all of the terms of my deferred sentence.
13. My legal counsel advised me that my best option was to plead guilty, because doing so
- would likely lead to the best resolution of my criminal case. Thus, I decided to plead guilty.
14. Prior to entry of this guilty plea, my lawyer did not advise me that pleading guilty to this
- charge would likely result in the loss of my immigration status.
15. The first time that I became aware that this plea would jeopardize my immigration status was
- when my application to renew TPS was denied.

1
2 16. I consulted with an attorney, who mistakenly advised me that a reduction in my sentence
3 from 364 to 180 days would resolve this issue. I petitioned the court to reduce my sentence,
which was then amended from 364 to 180 days.

4 17. However, due to the fact that I have two misdemeanor convictions, I remain ineligible for
5 TPS.

6 Current Status

7 18. I am currently in deportation proceedings. If I am unsuccessful in my attempt to obtain post-
8 conviction relief in this matter, it is almost certain that I will be ordered deported to El
9 Salvador.

10 19. If this happens it will have a disastrous impact on both me and my family. I have been in this
11 country for over ten years. I have spent my entire adult life here. I have no prospects in El
12 Salvador. My wife and children are all U.S. Citizens. My wife has been in this country since
13 she was a child, and my children have never lived anywhere else. El Salvador is a dangerous
14 place, and there is little economic opportunity there.

15 20. My wife would not be able to financially support our family without me. I am the main
16 breadwinner in my household, and my wife does not earn enough to support herself and our
17 children without my income. My wife and children rely on me for financial and emotional
18 support, and we would all be devastated if we were separated from one another.

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

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

23 SIGNED AND DATED this 13th day of January, 2011 at Seattle, Washington.

24 
25 Santos Wilfredo Orantes

FILED

2011 JAN 28 AM 11:27

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL14630327

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

The State of Washington,

No. 06-1-00278-9

Plaintiff,

v.

STATE'S MOTION TO TRANSFER
MOTION FOR RELIEF FROM JUDGMENT

ORANTES, Santos W.,

Defendant.

I. MOTION

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

II. FACTS

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

Based on these acts, the defendant was charged with the felony of unlawful issuance of a bank check. Docket no. 1. Ms. Kathleen Kyle of the Snohomish County Public Defender Association was appointed to represent him. On her

State's Motion to Transfer
Motion for Relief from Judgment - Page 1

ORIGINAL

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., MS 504
Everett, Washington 98201-4048
(425) 388-3333 Fax: (425) 388-7172

43

1 advice, the defendant pled guilty to attempted unlawful issuance of a bank check, a
2 gross misdemeanor. The plea statement contained the standard advisement
3 concerning possible immigration consequences:

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

8 Docket no. 29 at 2, ¶ 6(i).

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

13 In connection with a subsequent motion to amend the sentence, Ms. Kyle
14 explained the reason for this change. She had consulted an overview published by
15 the Washington Defenders Immigration Project on consequences of criminal
16 convictions. According to this, the defendant could face immigration consequences
17 if he was sentenced to one year or more. He would not face such consequences if
18 he was sentenced to less than one year. Based on this information, she sought a
19 deferred sentence of 364 days. Declaration of Defense Counsel (attached to
20 Motion and Declaration in Support of Amending Judgment and Sentence, docket
21 no. 34).

22 On August 23, 2006, the court sentenced the defendant in accordance with
23 the parties' recommendations. He received 364 days in jail, all deferred on
24

1 condition of 12 months' probation and payment of a \$500 victim assessment. The
2 judgment was filed the following day. He completed the payments within the
3 probationary period.

4 In December, 2008, the defendant, acting through new counsel, filed a
5 motion to amend the judgment. This motion stated that the defendant faced
6 immigration consequences as a result of any sentence exceeding 180 days.
7 According to information provided by the defendant's immigration counsel,
8 amendment of the sentence was "the paramount issue" in an upcoming immigration
9 hearing. Docket no. 34 at 2. This court granted the motion. It entered an order
10 reducing the sentence "nunc pro tunc" to 180 days.¹ Docket no. 35.

12 Despite this action by the court, and contrary to the representations that he
13 made at the time, the defendant now claims that this conviction still subjects him to
14 deportation. This results from his unusual immigration status ("temporary protected
15 status") and his prior misdemeanor conviction in North Carolina. See 8 C.F.R. §
16 244.4. He has therefore moved to withdraw his guilty plea and vacate the
17 judgment.
18
19
20
21
22

23 ¹ This order was improper. "A nunc pro tunc order may be used to make the
24 record speak the truth, but not to make it speak what it did not speak but ought to
25 have spoken." State v. Hendrickson, 165 Wn.2d 474, 478 ¶ 8, 198 P.3d 1029
(2009). Since the original judgment correctly set out the sentence intended by the
26 State's Motion to Transfer

1
2
3
4 **III. ISSUE**

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

5
6
7 **IV. ARGUMENT**

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

8 The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

9
10
11
12 Under this rule, this court should resolve three issues: (1) Is the motion
13 barred by RCW 10.73.090? (2) Has the defendant made a substantial showing that
14 he or she is entitled to relief? (3) Will resolution of the motion require a factual
15 hearing?

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

17
18 RCW 10.73.090(1) sets a time limit on motions to vacate judgments and
19 other forms of "collateral attack." Such a motion must be filed within one year after
20 the judgment becomes final. Since the judgment in the present case was not
21 appealed, it became final on August 24, 2006, the day it was filed. RCW
22 10.73.090(3)(a). The present motion was filed on January 20, 2011. It was not filed
23 within the time limit.

1 The defendant claims that his motion falls within the exception set out in
2 RCW 10.73.100(6):

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

5 ...

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

12 To come within this exception, the defendant must make two showings: (1)
13 there has been "a significant change in the law ... which is material to the
14 conviction"; (2) "sufficient reasons exist to require retroactive application of the
15 changed legal standard." He cannot satisfy either requirement.

16 **1. Since Padilla Did Not Alter The Due Process Requirements For Guilty Pleas,
17 It Is Not A "Significant Change In The Law Material To The Defendant's
18 Conviction."**

19 A "significant change in the law" occurs when "an intervening opinion has
20 effectively overturned a prior appellate decision that was originally determinative of
21 a material issue." In re Domingo, 155 Wn.2d 356, 366 ¶ 27, 119 P.3d 816 (2005).
22 This reflects the principle that litigants have a duty to raise available arguments in a
23 timely fashion, but "they should not be penalized for having omitted arguments that
24 were essentially unavailable at the time." In re Greening, 141 Wn.2d 687, 697, 9
25 P.3d 206 (2000). The defendant claims that a "significant change in the law"
26 resulted from Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284

1 (2010). To analyze this claim, it is first necessary to review the law that existed
2 prior to Padilla. The court can then compare that law with the holding of Padilla, to
3 determine whether that case overruled any determinate prior decisions.

4 Pre-existing law established clear requirements for guilty pleas. For the plea
5 to be valid, due process required the court to advise the defendant of all direct
6 consequences of his plea. The court was not, however, required to advise the
7 defendant of collateral consequences. State v. Barton, 93 Wn.2d 301, 305, 609
8 P.2d 1353 (1980); State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996).
9 Immigration consequences were considered "collateral," so the court was not
10 required to cover them at the plea hearing. State v. Holley, 75 Wn. App. 191, 196,
11 876 P.2d 973 (1994); State v. Malik, 37 Wn. App. 414, 416, 680 P.2d 770, review
12 denied, 102 Wn.2d 1023 (1984). A Washington statute, however, required courts to
13 advise defendants that a criminal conviction could result in deportation, exclusion
14 from admission, or denial of naturalization. RCW 10.40.200. This statute was
15 complied with in the present case. Docket no. 29 at 2, ¶ 6(i).

16
17
18 Padilla changed none of this. That case has nothing to do with due process
19 requirements for valid guilty pleas. Rather, it involved an allegation of ineffective
20 assistance of counsel. The court held that the Sixth Amendment requires counsel
21 to "inform her client whether his plea carries a risk of deportation." Padilla, 130 S.
22 Ct. at 1486. The court noted that when immigration consequences are unclear or
23 uncertain, "a criminal defense attorney need do no more than advise a noncitizen
24 client that pending criminal charges may carry a risk of adverse immigration
25

26 State's Motion to Transfer
Motion for Relief from Judgment - Page 6

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-7172

1 consequences." Id. at 1483. In the present case, the defendant received that
2 advice from the court. The defendant is not claiming that he received ineffective
3 assistance.

4 The defendant claims that Padilla characterized immigration consequences
5 as not "collateral to a criminal proceeding." This is an incorrect reading of Padilla.
6 Padilla does not turn on the distinction between "direct" and "collateral"
7 consequences. Rather, it holds that this distinction is irrelevant to ineffective
8 assistance claims:

9
10 Deportation as a consequence of a criminal conviction is, because of
11 its close connection to the criminal process, uniquely difficult to
12 classify as a direct or a collateral consequence. The collateral versus
13 direct distinction is thus ill-suited to evaluating an [ineffectiveness]
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.

14 Id. at 1482.

15 In short, Padilla deals solely with the Sixth Amendment right to counsel. It
16 sets out standards for determining whether counsel was constitutionally ineffective.
17 Since no such claim has been raised in the present case, Padilla is irrelevant.
18 Because Padilla says nothing at all about the Due Process requirements for a valid
19 guilty plea, it is not a "significant change in the law" with respect to those
20 requirements. Consequently, it does not provide any basis for excusing the
21 defendant's failure to comply with the statutory time limit.
22
23
24
25

1 **2. Padilla is not a “watershed rule” that would receive retroactive application.**

2 Even if Padilla is somehow considered a “significant change in the law ...
3 material to the conviction,” that would not be enough to excuse compliance with the
4 statutory time limit. The defendant would still have to show that “sufficient reasons
5 exist to require retroactive application of the changed legal standard.”

6 A new rule will not be given retroactive application to cases on
7 collateral review except where either: (a) the new rule places certain
8 kinds of primary, private individual conduct beyond the power of the
9 state to proscribe, or (b) the rule requires the observance of
procedures implicit in the concept of ordered liberty.

10 This standard has been adopted from federal case law. State v. Evans, 154 Wn.2d
11 438, 444, 114 P.3d 627 (2005) (footnote omitted)

12 The first exception is obviously inapplicable. Padilla has nothing to do with
13 the State’s ability to proscribe the crime of unlawful issuance of bank checks.

14 The second exception only applies to “watershed rules of criminal
15 procedure.” Evans, 145 Wn.2d at 446. To qualify under this exception, a rule must
16 “alter our understanding of the *bedrock procedural elements* essential to the
17 fairness of a proceeding.” Id. at 445 (court’s emphasis). It is not sufficient that the
18 rule reflects due process requirements. Tyler v. Cain, 523 U.S. 656, 666 n. 7, 121
19 S. Ct. 2478, 150 L. Ed. 2d 643 (2001). When courts have applied this standard to
20 Padilla, they have concluded that it did *not* establish a “watershed rule.” Doan v.
21 United States, ___ F. Supp. 2d ___, 2011 WL 116811 (E.D. Va. 2011); People v.
22 Kabre, 29 Misc. 3d 307, 905 N.Y.S. 2d 887, 899 (N.Y. Crim. Court 2010). There do
23 not appear to be any holdings to the contrary.
24
25

1 **3. If Padilla Is Not A "New Rule," It Is Also Not A "Significant Change In The Law."**

2 As Evans indicates, retroactivity analysis only applies to a "new rule." Any
3 case that does not establish a "new rule" is automatically retroactive. Some courts
4 have held that Padilla is not a "new rule" and therefore applies retroactively.²
5 People v. Nunez, ___ N.Y.S.2d ___, 2010 WL 5186602 (N.Y. Sup. App. Term
6 2010). Other courts have held to the contrary, that Padilla is a "new rule." Doan;
7 Kabre, 905 N.Y.S.2d at 895-98; Miller v. State, ___ A.3d ___, 2010 WL 5381453
8 (Md. App. 2010). This court need not, however, resolve this controversy. The
9 defendant's position is self-contradictory. If Padilla is indeed not "new," it is also not
10 a "significant change in the law" and therefore does not fall within any exception to
11 the time limit.
12

13 A "new rule" is one that was not "*dictated* by precedent existing at the time
14 the defendant's conviction became final." Evans, 154 Wn.2d at 444 (court's
15 emphasis). As discussed above, a significant change in the law exists when an
16 argument was "essentially unavailable at the time." Greening, 141 Wn.2d at 698.
17 Thus, "significant changes in the law" is a subcategory of "new rules." If a rule is
18 *dictated* by existing precedent, an argument for that rule is necessarily *available*
19 under that precedent. The converse is not true: an argument may be *available*, but
20 accepting that argument may not be *dictated* (if the relevant law is unclear). Every
21
22
23

24 ² The defendant has cited unpublished opinions on this point. He has not,
25 however, complied with the requirements for citing unpublished opinions set out in
26 GR 14.1(b).

1 "significant change in the law" is a "new rule," but not every "new rule" is a
2 "significant change in the law."

3 The relationship between "significant changes in the law" and "new rules" is
4 shown by the following table:

5

6 Rule established by new decision is:	Significant change in law?	New rule?
7 Contrary to prior law	Yes	Yes
8 Unclear under prior law	No	Yes
9 Dictated by prior law	No	No

10

11 For purposes of the present case, it does not matter whether or not Padilla
12 established a "new rule." If it is not a "new rule," it is also not a "significant change
13 in the law." It would be retroactively applicable if it could be raised – but it cannot
14 be raised because of the time bar.
15

16 Conversely, if Padilla does establish a "new rule," it is not retroactively
17 applicable (whether or not it is also a "significant change in the law"). "New rules"
18 are generally not retroactive, and neither of the exceptions to non-retroactivity
19 applies. The statutory exception to the time limit applies only when "sufficient
20 reasons exist to require retroactive application of the changed legal standard."
21 Since "sufficient reasons" do not exist here, the motion is again time barred..
22

23 In short, the defendant can meet neither of the requirements set out in RCW
24 10.73.100(6). Padilla does not constitute a "significant change in the law" that is
25

1 relevant to the present case. Even if it did, it would not be retroactively applicable.
2 If this court were to accept the defendant's argument that it is not a "new rule," that
3 would require rejecting his argument that it is a "significant change in the law."

4 **B. THE DEFENDANT HAS NOT MADE A SUBSTANTIAL SHOWING OF**
5 **ENTITLEMENT TO RELIEF.**

6 Even if the defendant could somehow avoid application of the time limit, he
7 still would not be entitled to relief. As discussed above, Washington law is clear:
8 due process does not require that defendants be advised of immigration
9 consequences before they plead guilty. Holley, 75 Wn. App. at 196; Malik, 37 Wn.
10 App. at 416. Padilla did not change this rule. By statute, defendants must be
11 advised of the possibility of adverse consequences – which was done here.

12 The rule that the defendant seeks is utterly impractical. If this court were
13 required to advise defendants of immigration consequences, it would first have to
14 require every defendant to disclose whether he is a U.S. citizen. It would then have
15 to determine each defendant's exact immigration status and criminal history.
16 Having determined this basic information, it would then have to research the
17 complex area of immigration law to determine what effect the particular conviction
18 would have on *this* defendant. Plea calendars would grind to a stop.

19 The facts of this case demonstrate the absurdity of this supposed
20 requirement. Three different attorneys – including an immigration attorney –
21 apparently failed to anticipate that the conviction could result in deportation. Yet the
22
23
24
25

1 defendant claims that the court was *constitutionally* required to provide this
2 information.

3 Padilla places the requirement of advising the defendant where it belongs –
4 on defense counsel. Only defense counsel can ascertain the necessary facts
5 without exposing the defendant to jeopardy. Defense counsel can do any
6 necessary legal research and consult immigration experts if appropriate. If
7 counsel's conduct falls below the standard of reasonable assistance, the defendant
8 can obtain relief if he raises the claim in a timely fashion. Here, the defendant is not
9 claiming that counsel was constitutionally ineffective. Rather, he is claiming that the
10 court was constitutionally required to do what counsel could not. This claim should
11 be rejected.
12

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

14 The defendant's claims are time barred. Even if his allegations can be
15 proved, he is not entitled to relief. Consequently, there is no need for a factual
16 hearing.
17
18
19
20
21
22
23
24
25

1 **V. CONCLUSION**

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

6 Respectfully submitted on January 27, 2011.

7
8 MARK K. ROE
Snohomish County Prosecuting Attorney

9
10 By: *Seth A. Fine*
11 SETH A. FINE, WSBA # 10937
12 Deputy Prosecuting Attorney
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED

2011 FEB 15 PM 12:52

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL14650206

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

THE STATE OF WASHINGTON,

Plaintiff,

vs.

SANTOS WILFREDO ORANTES,

Defendant.

No. 06-1-00278-9

DEFENDANT'S RESPONSE TO
STATE'S MOTION TO TRANSFER
MOTION FOR RELIEF FROM
JUDGMENT

SENT ON FEBRUARY 15, 2011 VIA FAX FOR FILING IN SNOHOMISH COUNTY
SUPERIOR COURT

RESPONSE

Mr. Orantes respectfully requests that the Court deny the State's Motion to Transfer Mr. Orantes's Motion for Relief from Judgment to the Court of Appeals. This response is based on the authorities outlined in the following memorandum and the authorities outlined in Defendant's Motion for Relief from Judgment.

MEMORANDUM

I. STATEMENT OF FACTS¹

Defendant, Santos Orantes, is a citizen of El Salvador who has lived in the United States for over ten years. See Declaration of Santos Orantes ("Orantes Dec."), ¶¶ 1-2. He was granted

¹ These facts are based on the declarations attached to Mr. Orantes's original motion for relief from judgment, which the defense has not re-submitted, but to which we refer the Court.

45

1 Temporary Protected Status ("TPS") in approximately 2000. Id. at ¶ 3. He is married to a United
2 States citizen, and they have two children, who are also U.S. citizens. Id. at ¶¶ 4-5. He also helps
3 to support his sister, who has TPS, and her U.S. citizen daughter. Id. at ¶ 6.

4 Mr. Orantes was convicted of a misdemeanor in North Carolina soon after he arrived in
5 the United States. Id. at ¶ 7. In 2006, he was accused of writing a bad check, which comprises
6 the basis of the charge in this case. He pleaded guilty to a gross misdemeanor, which rendered
7 him statutorily ineligible for TPS. No one advised Mr. Orantes, prior to entry of his guilty plea,
8 that the plea would certainly and automatically lead to the loss of his immigration status. Id. at ¶¶
9 13-15; see also Declaration of Kathleen Kyle ("Kyle Dec."), ¶¶ 5-7. He was subsequently
10 represented by different counsel, who also misadvised him about the immigration consequences
11 of his plea. Orantes Dec. at ¶ 16.

12 The loss of Mr. Orantes's TPS makes him deportable, and he is currently in deportation
13 proceedings. Orantes Dec. at ¶ 18. If he is unsuccessful in his motion for post-conviction relief,
14 he will almost certainly be deported to El Salvador. Id. Apart from his two misdemeanor
15 convictions, Mr. Orantes has no criminal history. Id. at ¶ 8. He is a business owner whose family
16 relies on him for financial and emotional support. Id. at ¶¶ 8, 20.

17 II. ARGUMENT

18 The State argues that Mr. Orantes's motion for relief from judgment should be transferred
19 to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR
20 7.8(c)(2), on the basis of 1) Mr. Orantes's motion being time barred to RCW 10.73.090; 2) Mr.
21 Orantes having failed to make a substantial showing that he is entitled to relief; and 3) no factual
22 hearing being required to resolve the motion. Because Mr. Orantes's motion is exempt from the
23 one-year limit established by RCW 10.73.090, and because Mr. Orantes has made a substantial
24
25

1 showing that he is entitled to relief, the Court should deny the State's motion to transfer and
2 grant Mr. Orantes's original motion for relief from judgment.

3 **A. Defendant's Motion is Timely.**

4 Defendant's Motion for Relief from Judgment is exempt from the one-year time limit
5 pursuant to RCW 10.73.100(6) because there has been "a significant change in the law...which
6 is material to the conviction," and "sufficient reasons exist to require retroactive application of
7 the changed legal standard."

8
9 1. Padilla constituted a significant change in the law.

10 In Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), the United
11 States Supreme Court significantly changed the status of the law regarding the relationship of
12 immigration consequences to criminal convictions. In that case, the Kentucky Supreme Court
13 had denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment's
14 guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous
15 advice about deportation because it is merely a "collateral" consequence of his conviction.
16 Padilla, 130 S. Ct. at 1476. The United States Supreme Court overturned the Kentucky Court's
17 ruling and found that, because criminal conviction and deportation are so uniquely enmeshed,
18 deportation cannot be dismissed as merely a collateral consequence of conviction. Padilla, 130 S.
19 Ct. at 1481-82.

20
21 The holding of Padilla constitutes a significant, material change in the law. The fact that
22 Padilla was based on a Sixth Amendment ineffective assistance of counsel claim, rather than a
23 due process argument, is irrelevant. Questions regarding ineffective assistance often depend on
24 underlying due process issues. In State v. Martinez-Lazo, 100 Wn. App. 869 (2000), the
25 defendant claimed that he had received ineffective assistance because his counsel did not warn

1 him of the deportation consequences of his guilty plea. Id., at 876. The court, after discussing
 2 the requirements for a voluntary guilty plea (advisement of the direct consequences of his or her
 3 plea but not of all possible collateral consequences of a plea), and noting that counsel therefore
 4 only needed to discuss the direct consequences of the plea, held that the claim failed because of
 5 the collateral nature of immigration proceedings. Id., at 876-78. The context in which a claim is
 6 brought does not determine the scope of the case's holding, the issues that the court decides that
 7 are crucial to resolution of the case do.

8
 9 The part of the holding of Padilla at issue here, that immigration consequences cannot be
 10 considered collateral to criminal convictions, was crucial to the determination of the case and
 11 was part of the case's holding. The Kentucky Supreme Court had denied relief based on its
 12 categorization of immigration consequences as collateral. Specifically, the Kentucky Supreme
 13 Court held "that the Sixth Amendment's guarantee of effective assistance of counsel does not
 14 protect a criminal defendant from erroneous advice about deportation because it is merely a
 15 'collateral' consequence of his conviction." Padilla, 130 S. Ct. at 1478. In overturning that
 16 court, the United States Supreme Court necessarily held that immigration consequences are not
 17 collateral to criminal convictions. If they were, the Court would not have found that Mr. Padilla
 18 received ineffective assistance of counsel in regard to his criminal case. The fact that the Court
 19 declined to explicitly use the framework of "direct" versus "collateral" consequences does not
 20 change the analysis.

21
 22 This holding from Padilla comprises a significant change in the law in the State of
 23 Washington relative to the voluntariness of guilty pleas. One of the tests for determining
 24 whether a new law represents a significant, material change is applied by asking if the defendant
 25 could have argued the same issue before the new law was decided. In re Personal Restraint of

1 Holmes, 121 Wn.2d 327, 332 (1993). While litigants have a duty to raise *available* arguments
 2 in a timely fashion and may later be procedurally penalized for failing to do so, they should not
 3 be faulted for having omitted arguments that were essentially *unavailable* at the time. State v.
 4 Greening, 141 Wn.2d 687, 697 (2000) (internal citations omitted). In Greening, the Washington
 5 Supreme Court held that where an intervening opinion has effectively overturned a prior
 6 appellate decision that was originally determinative of a material issue, the intervening opinion
 7 constitutes a "significant change in the law" for purposes of exemption from procedural bars. Id.

8 Padilla is an opinion that effectively overturned a prior appellate decision that was
 9 determinative of a material issue, namely whether immigration consequences are collateral to
 10 guilty pleas, in reference to the voluntariness of the plea. The law is well-settled that a guilty
 11 plea cannot be accepted until the defendant had been informed of all direct consequences of the
 12 plea. State v. Barton, 93 Wn.2d 301, 305 (1980). Further, prior to Padilla, the law in
 13 Washington was well-settled regarding the proposition that immigration consequences were
 14 collateral to a guilty plea and that a person did not therefore enter a plea involuntarily when he
 15 or she pleaded guilty without being informed of the immigration consequences of plea. See State
 16 v. Martinez-Lazo, 100 Wn. App. at 876-78. Therefore, prior to Padilla, Mr. Orantes could not
 17 have argued that his lack of knowledge of the immigration consequences of a guilty plea
 18 rendered his plea involuntary.
 19

20
 21 The fact that Mr. Orantes received the advisement contained in RCW 10.40.200,
 22 regarding general possible immigration consequences, does not affect the analysis relative to the
 23 instant motion. The State relies on the existence of this statute, and the fact that the Court
 24 complied with it in this case, to argue that Padilla did not change the state of the law regarding
 25 what possible immigration consequences a defendant is required to be advised of prior to

1 pleading guilty. This argument fails because the statute does not provide the level of protection
 2 that Padilla requires. The general declaration in Mr. Orantes's plea statement advising that
 3 some criminal convictions can result in deportation or the loss of immigration status is
 4 insufficient to comply with Padilla. In fact, the plea form used in Kentucky courts at the time of
 5 Mr. Padilla's conviction provided similar notice of possible immigration consequences. Padilla,
 6 130 S. Ct. at 1486, n. 15. The Padilla Court even cited RCW 10.40.200 in its list of state
 7 statutes requiring trial courts to advise defendants of possible immigration consequences. Id.
 8 According to the Padilla Court, this notification is insufficient to provide defendants with the
 9 necessary information which would allow them to make an informed decision regarding a plea
 10 of guilty. Id. at 1486.

12 2. Sufficient reasons exist to require retroactive application of the *Padilla* standard.

13 The State cites no authority for the proposition that a "significant change in the law" is
 14 by definition a "new rule." Although Padilla did make significant changes to the law as it
 15 existed in Washington State, it is not a "new rule" for the purpose of a retroactivity analysis
 16 under Teague v. Lane, 489 U.S. 288, 305, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989). The
 17 Teague Court acknowledged that it is "often difficult to determine when a case announces a new
 18 rule." Id. at 301. This difficulty is apparent in the contradictory analysis present in the few cases
 19 that have decided the issue.² "[A] case announces a new rule when it breaks new ground or
 20 imposes a new obligation on the states or the Federal Government. To put it differently, a case
 21 announces a new rule if the result is not *dictated* by precedent existing at the time the
 22

24 ² The State cites several decisions in which courts have held that Padilla establishes a new rule; however, the only
 25 courts to decide the issue in the Ninth Circuit have held that Padilla does not establish a new rule and should
 therefore be applied retroactively. See United States v. Chaldez, 2009 U.S. Dist. LEXIS 116229 (S.D. Cal. Dec. 10,
 2009); United States v. Hubenig, 2010 U.S. Dist. LEXIS 80179 (E.D. Cal. July 1, 2010); Luna v. United States,
 2010 U.S. Dist. LEXIS 124113 (S.D. Cal. Nov. 23, 2010).

1 defendant's conviction became final." Teague v. Lane, 489 U.S. at 301. Moreover, "the mere
2 existence of conflicting authority does not necessarily mean a rule is new." Williams v. Taylor,
3 529 U.S. 362, 410, 120 S. Ct. 1495 (2000).

4 Generally, when a well-established rule of law is applied in a new way based on the
5 specific facts of a particular case, it does not establish a "new rule." See Stringer v. Black, 503
6 U.S. 222, 228-29, 112 S. Ct. 1130, 117 L.Ed.2d 367 (1992). In Hubenig, *supra*, the court held
7 that Padilla should be applied retroactively because it did not establish a "new rule." The
8 Hubenig Court noted that counsel is already urged by professional standards to advise on
9 immigration consequences due to the importance the defendant generally places on deportation.
10 Hubenig at *7. The requirement that defendants be informed of the direct consequences of a
11 guilty plea is well-established. By recognizing that immigration consequences are among the
12 direct consequences of a guilty plea, the Padilla Court did not break new ground or impose a
13 new obligation on the State. Thus, the rule is not "new" even though the Supreme Court's
14 recognition of removal as a sufficiently important consequence to require notice is a significant
15 change in the law.
16

17 Even if Padilla created a "new rule," its holding should be applied retroactively because it
18 meets the second exception set forth in State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005)
19 ("the rule requires the observance of procedures implicit in the concept of ordered liberty").
20 Defendant brings his motion pursuant to State v. Ross, 129 Wn.2d 279 (1996). "The rule in
21 Ross, 129 Wn.2d at 284, requires the observance of a procedure – communication of all direct
22 consequences of a guilty plea – that is implicit in due process. Ross should, accordingly, be
23 applied retroactively even on collateral review." State v. Olivera-Avila, 89 Wn. App. 313, 949
24 P.2d 824, 828 (1997).
25

DEFENDANT'S RESPONSE TO STATE'S MOTION
TO TRANSFER MOTION FOR RELIEF FROM
JUDGMENT - 7

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

1 Olivera-Avila is directly on point regarding this issue. The case involved a motion to
 2 withdraw a plea based its involuntary nature due to the defendant not having been informed of
 3 the direct consequences of the plea. Id., at 315-17. Although the court ultimately found that Mr.
 4 Olivera-Avila was not entitled to relief, it did hold that the rule requiring that a defendant be
 5 informed of all the direct consequences of a guilty plea was a rule that was implicit in due
 6 process, which should therefore be applied retroactively. Id., at 321. Mr. Orantes brings almost
 7 the same claim, and this Court should make the same finding here. The State appears to simply
 8 ignore the holding of Olivera-Avila in its motion. For the Court to do so would lead to an
 9 incorrect result in this matter.
 10

11 **B. Defendant Has Made a Significant Showing of Entitlement to Relief.**

12 A plea that is involuntary violates due process. Ross, 129 Wn.2d at 284; Barton, 93
 13 Wn.2d at 304. Where a defendant is not informed of the direct consequences of a guilty plea, the
 14 plea is not voluntary. Ross, 129 Wash.2d at 284. Such a plea results in a void judgment that is
 15 subject to collateral attack pursuant to CrR 7.8(b)(4). Olivera-Avila, 89 Wn. App. at 319.

16 In this case, because Mr. Orantes was not informed of the immigration consequences of
 17 his guilty plea by either the court or his counsel, his plea was not knowing and voluntary. Mr.
 18 Orantes is not a United States citizen. His conviction for attempted unlawful issuance of a bank
 19 check in this case, in combination with his previous conviction, makes him ineligible for TPS.
 20 See 8 C.F.R. § 244.4. This conviction has already caused him to lose his immigration status,
 21 including his employment authorization and protection from deportation. See 8 U.S.C. §
 22 1254a(a)(1)(A). Mr. Orantes was not informed of this consequence prior to his entry of a plea of
 23 guilty. As discussed above, Padilla overruled prior Washington law which held that immigration
 24 consequences are merely collateral consequences of a criminal conviction. In this case, the loss
 25

1 of Mr. Orantes's immigration status was a direct consequence of his criminal conviction, as he
2 became statutorily ineligible for Temporary Protected Status upon his second misdemeanor
3 conviction. He should have been advised as such prior to the entry of his guilty plea. Because
4 Mr. Orantes's plea was involuntary, the resulting judgment and sentence is void and he may be
5 relieved from that judgment pursuant to CrR 7.8(b)(4). Olivera-Avila, 89 Wn. App. at 319.

6 The State argues that the statutory requirement that defendants be advised of the
7 possibility of immigration consequences to a criminal conviction was sufficient. However, in
8 Padilla, the defendant was also aware that a criminal conviction carries the possibility of
9 immigration consequences and informed of that possibility by the Court, but was misadvised as
10 to the specific consequences of his plea. "When the law is not succinct and straightforward..., a
11 criminal defense attorney need do no more than advise a noncitizen client that pending criminal
12 charges may carry a risk of adverse immigration consequences. But when the deportation
13 consequence is truly clear..., the duty to give correct advice is equally clear." Padilla, at 1483.
14 In this case, the immigration consequences of Mr. Orantes's plea were truly clear. An individual
15 with two misdemeanor convictions automatically becomes ineligible for TPS. Mr. Orantes's
16 second misdemeanor conviction led clearly and automatically to the loss of his immigration
17 status, and he should have been advised as such prior to the acceptance of his plea of guilty. Just
18 as in Padilla, the fact that he was not advised of this consequence was not rectified by the
19 statutory advisement of the possibility of immigration consequences.

20
21
22 **C. No Factual Hearing is Required Because the Facts are Undisputed.**

23 The State has not disputed Mr. Orantes's factual allegations. These can be summarized
24 in the following manner: Mr. Orantes entered a plea of guilty that had a direct and certain effect
25 on his immigration status- to eliminate it; No one advised Mr. Orantes of this consequence of

1 pleading guilty prior to his doing so; and Mr. Orantes is now subject to virtually certain
 2 deportation. Therefore, Mr. Orantes agrees that no factual hearing is required.

3 CONCLUSION

4 For the foregoing reasons, the Court should deny the State's motion to transfer and grant
 5 Mr. Orantes's original motion for relief from judgment.

6
 7 DATED this 15th day of February, 2011.

8
 9 Respectfully submitted,

10 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

11 

12
 13 _____
 14 Christopher Black, WSBA No. 31744
 15 Attorney for Defendant

16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on February 15, 2011, via email,
upon the parties required to be served in this action:

Seth Fine
Asst. Chief Criminal Deputy
Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Ave., M/S 504
Everett, WA 98201

sfine@co.snohomish.wa.us

DATED this 15th day of February, 2011.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744
Attorney for Defendant



Snohomish County Clerk

and Ex-Officio Clerk of Superior Court

March 10, 2011

Sonya Kraski
County Clerk
M/S #605
3000 Rockefeller Avenue
Everett, WA 98201
(425) 388-3466
FAX (425) 388-3806

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals - Division One
One Union Square
600 University St.
Seattle, WA 98101-4170

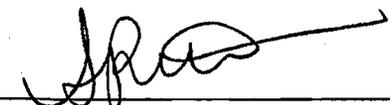
RE: State of Washington vs. Santos Orantes
Snohomish County No. 06-1-00278-9

Dear Mr. Johnson:

Enclosed please find copies of sub numbers 38, 39, 42, 43, 45 and the Order Transferring Motion for Relief From Judgment in the above-referenced case on consideration as a personal restraint petition.

Sincerely,

SONYA KRASKI, Snohomish County Clerk

By: 

Sarah Patrenets, Deputy Clerk

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2011 MAR 14 AM 10:11