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I. ISSUES RAISED BY RESPONDENT’S BRIEF

A. Do *Padilla v. Kentucky* and *State v. Sandoval* represent a “significant change in the law” regarding the ability of defendants to raise ineffective of assistance claims grounded in the failure of counsel to accurately advise them as to the immigration consequences of a guilty plea?

B. Did the trial court err in not applying the doctrine of equitable tolling of the time limitations of RCW 10. 73.090 because Mr. Martinez-Leon’s lawyer had told him that deportation was a “possible” consequence of his plea, but also told him that if the court followed the plea recommendation, he would only have to do 60 days in jail?

II. ARGUMENT IN REPLY

A. The claim for relief is not time barred due to RCW 10.73.100 (6).

As both parties recognize, the time limitations of RCW 10.73.090 do not apply to collateral attacks if “there has been a significant change in the law, whether substantive or procedural, which is material to the conviction...and...a court...determines that sufficient reasons exist to require retroactive application of the changed legal standard.” RCW 10.93.100 (6). The key question in this case is thus whether the United States Supreme Court’s decision in *Padilla v. Kentucky*, 509 US____, 130 S. Ct.1473, 176 L. Ed. 2d 284 (2010) and subsequent Washington decisions following it such as *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) and *State v. Martinez*, 161 Wn. App. 436, 259 P.3d 1109 (2011) represent such a “significant change in the law.”

1. *Padilla v. Kentucky* represents a “significant change in the law.”

The *Padilla* court held squarely for the first time that counsel’s duties under the Sixth Amendment required accurate and complete advice

regarding the immigration consequences of a guilty plea, at least when the consequences are reasonably discernable. The *Padilla* Court disavowed any distinction between “direct” and “collateral” consequences of a plea with regard to the constitutional obligation to give accurate advice. 130 S. Ct at 1481-82. This was the basis upon which the Kentucky Supreme Court had declined to grant relief: that defense counsel had no constitutional obligation to give accurate advice on the “collateral” consequences that might befall an immigrant as a result of a guilty plea. As the Supreme Court noted, the Kentucky court was “far from alone” in this view of the law.¹

The *Padilla* court rejected the suggestion that only affirmative misadvice of the consequences would support a claim of ineffective assistance of counsel. *Padilla*, 130 S. Ct. at 1484.

The first Washington decision which followed in *Padilla*'s wake, *State v. Sandoval, supra*, noted that *Padilla* had “superceded” Washington's previously controlling decision on whether incorrect or inadequate advice regarding immigration consequences could be raised in a collateral attack, *In re Yim*, 139 Wn. 2d 581, 989 P.2d 512 (1999). The *Yim* case had held that because immigration consequences were “collateral”, there was no duty to advise about them, and thus *Yim* could not raise this issue in his collateral attack on his plea. The *Yim* holding

¹ Although the United States Supreme Court did not list any Washington decisions in its sampling, it is clear that there were at least two: *In Re Yim, infra*, and *State v. Martinez-Lazo, infra*.

was echoed in *State v. Martinez–Lazo*, 100 Wn. App. 869, 877, 999 P.2d 1275 (2000), *Review denied* at 142 Wn.2d 1003 (2000). The Supreme Court denied review in *Martinez-Lazo*, suggesting at least that it remained precedential law.² The *Sandoval* court also rejected the argument that the advisement on the plea form constituted sufficient advice to defeat the ineffective assistance of counsel claim. 171 Wn. 2d at 173. See also *State v. Martinez, supra*, 161 Wn. App. at 442.

Mr. Martinez-Leon submits that *Padilla* and *Sandoval* represent a “significant change in the law” in two respects. The Sixth Amendment (and presumably Art. I §22 of the Washington Constitution) now require accurate advice about immigration consequences which flow from a guilty plea. Secondly, they change Washington’s former rule, exemplified by *Yim*, that such a claim of ineffective assistance could not be successfully raised in the context of a collateral attack.

In *In re Greening*, 141 Wn. 2d 687, 9 P.3d 206 (2000), our Supreme Court discussed the exception to the one year time limit for collateral attacks authorized by subsection (6) of RCW 10.73.100. The court held that “where an intervening opinion has effectively overturned a

² Other Washington cases also had similar holdings: *See State v. Malik*, 37 Wn.App. 414, 416, 680 P.2d 770 (1984) *review denied* 102 Wn.2d 1023 (1984) (Denying petitioners ineffective assistance claim on the grounds that “the possibility of deportation, being collateral, was not properly a concern of appointed counsel.”); *State v. Holley*, 75 Wn.App. 191, 197, 876 P.2d 973 (1994) (1994) (“[D]eportation is a collateral consequence of a criminal conviction. Thus the trial court is not required to grant a motion to withdraw a guilty plea when a defendant shows that his counsel failed to warn him of the immigration consequences of a conviction.”)

prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a ‘significant change in the law’ for purposes of exemption from procedural bars.” 141 Wn. 2d at 697. This is what the *Sandoval* court said was true of *Padilla* and *Yim*.

The *Greening* court specifically distinguished *State v. Olivera-Avila*, 89 Wn. App. 313, 949 P.2d 824 (1997), relied on here by the prosecutor. Resp. Brief at 11-13. Olivera–Avila had argued that his plea was invalid because he had not been advised that community placement was mandatory in his case. The *Greening* court noted that it was already well–settled law that a defendant had to be advised of all of the direct consequences of the plea, that community placement had been one of these since 1988, and hence *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), on which Olivera–Avila was relying, did not constitute “a significant change in the law” which would justify application of the exception to the time limitations of RCW 10.73.090.

However, this is definitively *not* the case with *Padilla* and *Sandoval*. The *Sandoval* court stated that *Padilla* “superceded” the previous rule of *In re Yim*, which previously was determinative of the issue of whether an ineffective assistance of counsel claim could be premised on incorrect advise as to immigration consequences. In other words, before *Padilla* and *Sandoval*, had Mr. Martinez–Leon attempted to litigate whether his lawyer’s advice was defective back in 2006, he would have run straight into the *Yim* and *Martinez–Lazo* holdings, and his motion

would have been denied. Clearly, *Padilla* and *Sandoval* represent a “significant change in the law” which justifies the application of the exception to the time limitations on collateral attack.

The prosecutor cites *State v. Gomez-Cervantes*, _____ Wn. App. _____, _____ P. 3d _____ (Division III, filed March 29) for the proposition that *Padilla* does *not* represent a significant and material change in the law. Notably, counsel for *Gomez-Cervantes* did not even discuss the time limitations of RCW 10.73.090 in his briefing for the court.³ (Slip opinion at 6). While the decision references *Olivera-Avila*, it does not mention either the *Greening* standard for evaluating a “significant change in the law”, or the fact that the *Sandoval* court considered *Padilla* had effectively overruled (“superceded”) the *Yim* rule. The *Gomez-Cervantes* court does observe that in determining whether a new decision represents a “significant change in the law,” a court should consider whether a defendant could have made the same argument with regard to ineffective assistance before the new case was decided. Slip opinion at 6. Under that phrasing of the test, it is clear that *Sandoval* and *Padilla* do represent a significant change, because *Yim* and *Martinez-Lazo* would have precluded such an argument being successfully made if it were made before *Padilla* was decided. Thus *Gomez-Cervantes* should not be followed, as it is clearly wrongly decided on this point.

³ A motion for reconsideration is pending, which supplies briefing on this issue as well as briefing supplied by *amici curiae*.

2. The *Padilla* decision should be applied retroactively.

In order for the exception in RCW 10.73.100(6) to apply to the time bar of RCW 10.73.090, a court must determine that the change in the law should apply retroactively. *Padilla* represents a significant change in the law, but not a “new rule”, and thus does apply retroactively. These are not incompatible positions.

Washington courts have generally followed the United State Supreme court standards, set out in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1-060, 103 L.Ed.2d 334 (1989). *Teague* generally prohibits a federal court from applying a “new rule” of constitutional criminal procedure retroactively. However, our Supreme Court has noted that it is not bound by *Teague* standards when deciding to grant relief under RCW 10.73.100 (6). See *State v. Evans*, 154 Wn. 2d 438, 449, 114 P.2d 627, (“Limiting a state statute on the basis of the federal court’s caution in interfering with State’s self-governance would be, at least, peculiar.”); *In re Personal Restraint of Markel*, 154 Wn.2d 262 (2005) (*Teague* doctrine does not “define the full scope of RCW 10.73.100(6).”)

State and Federal courts which have considered whether *Padilla* applies retroactively have split on the issue of whether the decision announced a “new rule”. It is instructive to examine the decision itself on this point.⁴

⁴ Several courts have followed this approach in concluding that *Padilla* applies retroactively. See e.g., *Commonwealth v. Clarke*, 460 Mass. 30, 949 N.E.2d 892 (2011); *United States v. Orocio*, 645 F.3d 630 (3rd Cir.

In applying the *Strickland* standard to Padilla’s claim, the language of the opinion itself shows that the Justices did not believe they were creating a new rule. The Court noted that in *Hill v. Lockhart*, 474 U.S. 52 (1985), it established that *Strickland*’s requirement of effective assistance of counsel applied to advice regarding a plea offer. *Padilla*, at 1484. “Whether *Strickland* applies to Padilla’s claim follows from *Hill*.” *Id.* at 1485, n.12.

In holding that defense counsel has an affirmative duty to advise non-citizen defendants regarding immigration consequences, the Court rejected the notion that it was imposing some new burden on defense counsel. “For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.” *Padilla*. at 1485.

Further, *Padilla* itself involved a collateral attack on a guilty plea. *Id.* at 1478. If the Court believed it was creating a new rule, it would not have applied that rule to Mr. Padilla. *Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 106 L.Ed.2d 256(1989) (“Under *Teague* new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions.”). This fact alone warrants concluding that *Padilla* did not announce a new rule. *See People v. Gutierrez*, 954 N.E.2d 365, 377 (Ill. App. 2011).

2011); *People v. Gutierrez*, 954 N.E.2d 365, 377-78 (Ill. App. 2011); *Denisyuk v. State*, -- A.3d --, 2011 WL 5042332 at *8-9 (Md. 2011); *Campos v. State*, 798 N.W.2d 565, 568-71 (Minn. App. 2011), *State v. Ramirez*, __ P.3d __ (N.M. Ct. App. April 16, 2012); *But see Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), *petition for cert. filed*, No. 11-820 (Dec. 23, 2011).

Moreover, one week after deciding *Padilla*, the Supreme Court granted certiorari in a collateral challenge similar to *Padilla*'s. The Court, vacated the judgment and remanded to the Fifth Circuit for further consideration in view of *Padilla*. *Santos-Sanchez v. United States*, -- U.S. - - , 130 S.Ct. 2340 (2010). The Court would not have issued such an order unless it thought that *Padilla* applies retroactively since the Court will issue such an order only when it believes an intervening decision would alter the lower court's ruling.⁵ *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. CT 604, 133 L.Ed.2d 545 (1996).

Mr. Martinez–Leon thus submits that *Padilla* represents a “significant change in the law”, and that it should be applied retroactively to his case, thus satisfying both prongs of RCW 10.73.100 (6). The trial court erred in ruling that his claim was time barred.

B. Even if the time limit of RCW 10.73.090 applied, the court erred in not applying the doctrine of equitable tolling.

The state concedes, at least implicitly, that equitable tolling can be applied to the time limits of RCW 10.73.090, as it was in *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), but argues that the doctrine should not be applied here because the deportation consequences were not clear, and also because that Mr. Martinez had been told that deportation *might* be a consequence of his plea. The prosecutor also points out that while Littlefair brought his motion to withdraw within three years

⁵ The Fifth Circuit reversed its original decision in light of *Padilla*. *Santos-Sanchez v. United States*, 381 Fed. Appx. 419, 2010 WL 2465080 (2010).

of the entry of his plea⁶, Mr. Martinez-Leon's motion was not filed until five years after his plea and sentencing.

While noting that prior cases had said that the doctrine would not be applied to "garden variety cases of excusable neglect", the *Littlefair* court granted relief when Littlefair's lawyer had neglected to determine his citizenship status, consequently neglected to inform him of potential immigration consequences, the court had neglected to notice that the portion of the plea form which covered this issue had been marked as being inapplicable, and the INS apparently neglected to take action for a two year period. Although some Washington cases⁷ have discussed the need for a showing of bad faith, deception, or false assurances by the opposition and the exercise of diligence by the party seeking relief, there was no indication in *Littlefair* that bad faith, deception or false assurances were involved at all. The issue of diligence was only discussed in the context of when Littlefair first became aware that INS planned to take action against him, which was several years after he entered his plea.

In the case at bar, Mr. Martinez did not become aware of the fact that his plea made him subject to deportation without any basis for relief only when he was arrested in the Houston airport when returning to the

⁶ The decision says that Littlefair filed for relief about six months after being notified by INS that he would be deported, which happened more than two years after his plea. The court held that the time limitation of RCW 10.73.090 was tolled from the time of the plea until Littlefair was told by INS that he would be deported.

⁷ *State v. Duvall*, 86 Wn. App. 871, 874, 875 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012 (1998); quoting *Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995).

United States in January of 2011. It was only then he learned for the first time that Homeland Security planned to deport him. His motion for relief was filed in the Superior Court in June of that year. Consequently, like Mr. Littlefair, he was diligent in pressing for relief once he knew he needed to do so.

The State appears to argue that equitable tolling should not be applied to this case because it claims that the deportation consequences of an “aggravated felony” plea were not sufficiently clear for trial counsel to have warned Mr. Martinez–Leon about them and that counsel’s advice that deportation *could* be a consequence was sufficient. However, *Padilla* holds to the contrary. If the immigration consequences are readily discernable, there is a duty to notify the client about them.⁸

Here the prosecutor notes that the factual basis set out in the plea form, and the amended complaint made it clear that the fourth degree assault in the present case would qualify as an “aggravated felony” which would make removal “presumptively mandatory.” Resp. Br. at 26. Mr. Martinez–Leon was not advised of this consequence, and his lawyer admitted this. The prosecutor’s own analysis of the consequences of the plea shows that trial counsel did not render effective assistance pursuant to *Padilla*.

While Mr. Martinez–Leon does not claim bad faith or deception on the part of his lawyer, he was assured that if he entered the plea, he would

⁸ “When the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” *Padilla* at _____.

only serve 60 days in jail. Moreover, the court never discussed any immigration consequences at all, which resulted in the implicit assurance, as in *Littlefair*, that there would not be any.

The state also argues that Mr. Martinez-Leon cannot meet the second part of the *Strickland* test and show that he was prejudiced by the improper advice of his lawyer. This argument should be rejected. Mr. Martinez-Leon's declaration says that he would have gone to trial had he known he would be deported as a result of his guilty plea. A similar showing was sufficient to show prejudice in *Sandoval* and *State v. Martinez*, 161 Wn. App. 436, 259 P.3d 1109 (2011).

The circumstances of this case are quite similar to those of *Littlefair*, and warrant the application of the doctrine of equitable tolling. Trial counsel here, like trial counsel in *Littlefair*, did not adequately investigate the immigration consequences of the plea, and did not advise her client of those consequences. Nor did she advocate for a sentence which might have avoided some of those consequences.⁹ Like *Littlefair*, the trial court did not discuss any immigration consequences during the plea colloquy. Like *Littlefair*, Mr. Martinez-Leon did not find out that he would be deported until several years after his plea, and then moved for relief within a six month period thereafter. This court should hold that the

⁹ "I did not ask the judge at the time of sentencing for a sentence of less than 365 days, since I was not aware at the time that if the sentence were only 364 days, the assault charge would not be considered an "aggravated felony" for immigration purposes." Lisa Tabbut Declaration, CP 70.

doctrine of equitable tolling should be applied to this case, and as in *Littlefair*, toll the time between the entry of the plea (May of 2006) and Mr. Martinez-Leon's discovery that Homeland Security planned to initiate removal proceedings against him (January of 2011).

III. CONCLUSION

This court should hold that *Padilla* and *Sandoval* represent a significant change in the law which should be retroactively applied to Mr. Martinez-Leon's case, thus invoking the exception to the one year time limitation of RCW 10.73.090 for bringing a motion for relief from judgment. Alternatively, the court should apply the doctrine of equitable tolling, and allow Mr. Martinez-Leon to present his claim for relief from the judgment which subjects him to deportation and exile from the United States. The court should reverse the Superior Court, and remand with directions to grant the relief requested in the trial court.

Dated this 26 day of APRIL, 2012

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