

FILED

NOV 05 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

NO. 30154-1-III
Consolidated with No. 30775-1-III

STATE OF WASHINGTON
Respondent,

vs.

PETRONILO S. BARAJAS
Appellant.

APPELLANT'S OPENING BRIEF


Brent A. De Young, WSBA #27935

De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333
Attorney for Appellant

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II. STATEMENT OF THE CASE

On September 21, 2005, the Defendant Petronilo S. Barajas, represented by counsel, pleaded guilty in the Adams County Superior Court to one count of Manufacture of Marijuana (RCW 9A.50.401(1) and also to one count of Animal Fighting RCW 16.52.117(1)(a). (CP 1, CP 22) Mr. Barajas was then sentenced to 4 months confinement on each count to run consecutively. (CP 23)

Trial counsel for Mr. Barajas completed two declarations regarding his actions and advice in the case. (CP 40, Exhibit A) (CP 62) These declarations concerned actions and advice given prior to entry of the guilty plea and also during the judgment and sentence portion of the case. Trial counsel has also been copied on all other affidavits filed in this matter including all of the Defendant's affidavits.

On February 16, 2011, the Defendant filed a *Motion to Vacate Guilty Plea* in the Adams County Superior Court. Mr. Barajas, in his first

affidavit, states that at the time of his guilty plea, his trial attorney had not provided him with any specific advice regarding the immigration consequences of his guilty plea. Also, the Defendant stated that his trial counsel did not take any requisite steps to ascertain Mr. Barajas' citizenship status in order to be in a position to provide any accurate immigration consequences advice. (CP 41, Attachment B)

On February 28, 2011, an immigration attorney provided an affidavit on behalf of Mr. Barajas. Immigration attorney, Carlos Villarreal, stated that the immigration consequences of Mr. Barajas guilty plea were quite certain and also easy to ascertain at the time of Mr. Barajas' guilty plea. The crime of Manufacture of Marijuana is an aggravated felony under immigration law. Upon pleading guilty, Mr. Barajas' deportation was virtually guaranteed. (CP 37, Attachment D)

After oral argument and additional briefing, the Adams County Superior Court judge made an oral ruling on June 9, 2011 ordering that the Petitioner's motion be transferred to the Court of Appeals as a personal restraint petition. (CP 55) Petitioner filed a Motion for Reconsideration of this decision. The Motion to Reconsider was denied on July 18, 2011. (CP 52) The matter was then forwarded by the Adams County Superior Court clerk on August 10, 2011 to the Court of Appeals. The Adams County Superior Court Clerk at that time forwarded the following

documents to the Court of Appeals as part of the defendant's record of proceedings for the Personal Restraint Petition:

- Defendant's Motion to Vacate Guilty Plea
- Findings of Fact, Conclusions of Law, and Order Transferring Motion to the Court of Appeals
- Felony Judgment and Sentence
- Statement of Defendant on Plea of Guilty

On August 15, 2011, this matter was accepted and filed as a Personal Restraint Petition under case number 30154-1-III.

The Defendant provided a 2nd Affidavit with his PRP. This Affidavit was received by the Court of Appeals on December 7, 2011.

On March 15, 2012, it was discovered that the Adams County transferred record of proceedings was incomplete in that it did not include affidavits from trial counsel, the defendant and the immigration attorney. These declarations were considered by the Adams County Superior Court judge but inadvertently omitted when the clerk transferred the motion as a PRP. A motion to supplement the record with these missing declarations was granted by the Court of Appeals on April 9, 2012.

On April 13, 2012, and shortly after the Division I decision in *State v. Chetty*, No. 66729-7-I (Division I, March 26, 2012), Mr. Barajas filed a Direct Appeal with the Court of Appeals under case number 30775-1-III. (CP 61-63) Mr. Barajas provided by affidavit that he was not informed that he did have the right to appeal his conviction. (CP 70)

On June 11, 2012, Mr. Barajas filed a Motion to Consolidate his Direct Appeal matter (30775-1-III) with his PRP matter (30154-1-III).

On August 2, 2012, the Court of Appeals granted the Motion to Consolidate the Appellant's personal restraint petition and his direct appeal. Mr. Barajas was directed to file his appeal brief by September 4, 2012.

On August 30, 2012, Mr. Barajas' counsel moved for a continuance to allow trial counsel the opportunity to provide a further declaration concerning his advice and actions during the sentencing of his client. The continuance was necessary as trial counsel had just left for a vacation to Chicago. Upon his return, trial counsel then provided a second affidavit. (Provided to the Court of Appeals on October 3, 2012 by courier). Trial counsel stated in his affidavit that his normal procedure was to go over the judgment and sentence document with his clients. There is a section in the judgment and sentence pertaining to appeal rights. However, during the court's sentencing colloquy, the pro-tem judge specifically informed Mr. Barajas instead that he did not have the right to file any appeal. (RP 4: 12-14)

III. ARGUMENT

PRECEDENTIAL BACKGROUND

Up until the March 17, 2011 Washington Supreme Court decision of *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011), it was settled law in the State of Washington that immigration consequences were only collateral consequences of a guilty plea. Under the collateral consequence doctrine, a defendant need not be informed of those consequences which were not considered “direct” consequences of the guilty plea. *In re Yim*, 139 Wn. 2d 581, 989 P. 2d 512 (1999); *State v. Holley*, 75 Wn. App. 191 (1994); *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980); *State v. Malik*, 37 Wn. App. 414, 680 P.2d 770, review denied, 102 Wn.2d 1023 (1984).

On March 31, 2010, the U.S. Supreme Court decided the case of *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010);

In *Padilla* the petitioner was a lawful permanent resident of the United States for over 40 years, faced deportation after pleading guilty to drug distribution charges in Kentucky. In collateral proceedings, Mr. Padilla claimed that his counsel failed to advise him of this consequence before he entered his plea.

The U.S. Supreme Court in *Padilla*, in granting the motion to vacate the guilty plea under 6th Amendment grounds, held that changes to immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and trial court judges previously wielded broad discretionary authority to prevent deportation, immigration reforms have since expanded the class of deportable offenses while eliminating trial court judges' authority to avoid deportation's harsh consequences through mechanisms such as the JRAD. *Id.* Because the drastic measure of deportation (also now known as "removal") is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral, and not collateral, part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. See, *Padilla, Supra.*

The Washington Supreme Court in, *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) was one of the first State applications of *Padilla v. Kentucky*. In *Sandoval* the defendant had been informed by his trial attorney: "I told Mr. Sandoval that he should accept the State's plea offer because he would not be immediately deported and that he would

then have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his guilty plea.”

The state argued that this advice was not technically incorrect and that it demonstrated that Mr. Sandoval had been adequately warned that deportation could be a foreseeable consequence.

Mr. Sandoval’s request for relief was denied by this Court, for the most part, under the collateral consequences doctrine. *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *In re Pers. Restraint of Kim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999).

The Washington Supreme Court in *Sandoval* stated: “If the applicable immigration law “is truly clear” that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation.” *Id.* (quoting *Padilla* at 1483). *Sandoval* further held that for Mr. Sandoval’s conviction, the immigration law was, in fact, truly clear regarding Mr. Sandoval’s deportability. Thus, his trial counsel should have informed him specifically.

Very recently, the Washington State Court of Appeals, Division I, issued its decision in *State v. Jagana*, No. 66682-7-I, (August 13, 2012) which found that *Padilla* applies retroactively to matters filed beyond the

one-year time period following sentencing. The court had looked to *In re: PRP of Greening*, 141 Wn.2d 687, 9 P.3d 206 (2000) and found that the law concerning trial counsel's 6th amendment duties regarding immigration advice had significantly changed as it had effectively overturned *State v. Yim*. *Yim* at 588.

As to whether the change should be given retroactive application, the court looked to the Third Circuit federal court of appeals decision in *U.S. v. Orocio*, 645 F.3d 630 (3d Cir. 2011) (Padilla is not a "new" rule) and the Massachusetts decision in *Commonwealth v. Clarke*. 460 Mass. 30, 949 N.E. 2d 892 (2011).

Accordingly, we join those two courts in concluding that Padilla applies an "old" rule.

Id.

1. The Defendant's Guilty Plea Was Not Knowing, Voluntary and Intelligently Made

APPLICATION OF CrR 4.2(f)

The Defendant's guilty plea was not "knowing, voluntary and intelligent" as required under CrR 4.2(f).

CrR 4.2(f) states:

Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the

withdrawal is necessary to correct a *manifest injustice*. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.401-.411, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. *If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.* (Emphasis Added)

A recent Washington State Supreme Court matter, *State v. Lamb*, No. 86603-1 (Decided August 16, 2012) has interpreted the interplay between CrR 4.2(f) and CrR 7.8.

The Washington Supreme Court stated:

We recognize that in *Robinson* and *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), we indicated that the manifest injustice standard of CrR 4.2(f) applies both before and after entry of judgment. *Robinson*, 172 Wn.2d at 791; *A.N.J.*, 168 Wn.2d at 106. In reaching this conclusion, we relied on *State v. Taylor*, 83 Wn.2d 594, 595, 521 P.2d 699 (1974). *Robinson*, 172 Wn.2d at 791-92; *A.N.J.*, 168 Wn.2d at 106-07. After *Taylor* was decided, however, CrR 4.2(f) was amended to state that motions for withdrawal made after entry of judgment are governed by CrR 7.8. Amendment to CrR 4.2(f), 116 Wn.2d 1106 (effective Sept. 1, 1991). We did not discuss this amendment in either *Robinson* or *A.N.J.* We need not, in this case, revisit the discussion of the standard in *Robinson* and *A.N.J.*

postjudgment motion to withdraw a guilty plea must either meet the requirements of both CrR 4.2(f) and CrR 7.8, *cf. Robinson*, 172 Wn.2d at 791 n.4, or *only* CrR 7.8, *see* CrR 4.2(f).

Lamb, pp. 7-8 Slip Opinion.

In re Fonseca, 132 Wn.App. 464, 468 132 P.3d 154 (Wn.App. Div. 3 2006), interpreted the meaning of the term “manifest injustice as applied to an involuntary guilty plea.

In *Fonseca*, the defendant was convicted upon plea of guilty to delivery of methamphetamine. Fonseca did not enter a knowing, voluntary and intelligent plea because as he was not apprised of a direct consequence that he was ineligible for a sentence under the Drug Offender Sentencing Alternative (DOSA). Fonseca was ineligible for a DOSA sentence due to his two prior convictions for first degree burglary -- a class A felony and violent offense. *RCW 9A.52.020(2)*; *RCW 9.94A.030(44)(a)(i)* (now *RCW 9.94A.030(45)(a)(i)*) *In re Fonseca* at 466.

The court in *Fonseca* stated:

“An involuntary plea produces a manifest injustice.” *In re Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004), Citing *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996); *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (mutual mistake regarding sentencing consequences renders guilty plea invalid)).

A "direct" consequence includes one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Ross*, at 284 (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)) (Emphasis Added)

In re Fonseca at 468.

Under *Lamb*, a post-judgment motion to withdraw a guilty plea must either meet the requirements of *both* CrR 4.2(f) and CrR 7.8 or *only* CrR 7.8. *Ibid*.

2. The Defendant's Motion to Withdraw His Guilty Plea Was Not Untimely Under CrR 7.8

APPLICATION OF CrR 7.8

CrR 7.8 states:

RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence;

Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

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

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation. (Emphasis Added)

(c) Procedure on Vacation of Judgment.

- (1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. 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.

(3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

[Adopted effective September 1, 1986; amended effective September 1, 1991; June 24, 2003; September 1, 2007.]

As a prerequisite matter, it is first necessary to initially categorize the Defendant's motions under the applicable subsections of *CrR 7.8(b)*.

The Defendant's motion may be brought under both *CrR 7.8(b)(4)* (An invalid guilty plea producing a judgment that is void) and/or *CrR 7.8(b)(5)* (Any other reason justifying relief from the operation of the judgment). These two bases will be discussed in turn.

In further studying *CrR 7.8(b)* a one-year time bar is made applicable to subparts (b)(1) (Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order); and (b)(2) (Newly discovered evidence which by due diligence could not have been

discovered in time to move for a new trial under rule 7.5). Neither of these bars applies to the Defendant's motions. Since the Defendant's motions do not allege any fraud, CrR 7.8(b)(3) also does not apply.

The next portion of CrR 7.8 rule states: "and is further subject to RCW 10.73.090, .100, .130, and .140." RCW 10.73.130 merely states that the section applies to petitions and motions filed after July 23, 1990. RCW 10.73.140 applies to subsequent collateral relief petitions. The two remaining subsections are considered in turn.

RCW 10.73.090 states:

RCW 10.73.090
Collateral attack -- One year time
limit.

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

There is developed Washington case law on the meaning of "valid on its face." It is anticipated that the State might potentially argue that a trial court is confined to the four-corners of the guilty in determining whether either of these documents is "valid on its face." Washington appellate courts have rejected such a limited scope of review and have consistently applied a much more flexible standard. *In re Coats*, 173

Wn.2d 123 (Wash. 2011) in addition to providing an informative historical analysis of habeas jurisdiction in Washington State, also demonstrates that Washington courts have regularly looked beyond the document in question itself to other proffered evidence in determining whether or not the instant document was “valid on its face.” See Subsection “*Facial Invalidity*” quoting *State v. Goodwin*, 146 Wn.2d at 866 n.2, 872, 50 P.3d 618 (2002).

The record of conviction which includes the transcript of the August 7, 2006 Guilty Plea and Sentencing Hearing, and the affidavits of trial counsel demonstrate that the Defendant was not informed of the certain and automatic immigration consequences of his guilty plea. As such, the Defendant could not have entered a valid guilty plea.

RCW 10.73.100 provides:

RCW 10.73.100
Collateral attack -- When one year limit not applicable.

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

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was

convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

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

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

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

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

[1989 c 395 § 2.]

The first section of RCW 10.73.100(1) adds a further requirement to CrR 7.8(b)(1) that a defendant act with “reasonable diligence” in uncovering new evidence.

RCW 10.73.100(2) applies to unconstitutional statutes.

RCW 10.73.100(3) applies to double jeopardy.

RCW 10.73.100(4) applies to insufficiency of the evidence supporting a conviction.

RCW 10.73.100(5) applies to the potential retroactivity of “significant changes in the law.” As applied to the Defendant, this subsection breaks down to the following requirements:

- a. There has been a significant change in the law.
- b. That is material to the conviction.
- c. A court has determined that the significant change is retroactive.

The first requirement has been met. Prior to *Padilla* and *Sandoval*, a defendant could not bring such a motion since immigration consequences were considered merely “collateral consequences” of a guilty plea. *In re the Pers. Restraint of Yim*, 139 Wn.2d 581, 587-89, 989 P.2d 512 (1999).

The Defendant, in his affidavits, states that he was never questioned about his citizenship status and that he was never warned that his deportation would be a virtual certainty following his conviction. (CP 41) His trial counsel provided by affidavit that he was unaware of his client’s citizenship status. (CP 40)

The third requirement under *RCW 10.73.100(5)* has also been met. The U.S. Supreme Court has already applied *Padilla* retroactively as is cited herein.

APPLICATION OF CrR 7.8(b)(4)

As the counterpart to *CrR 4.2(f)*, *CrR 7.8(b)(4)* provides that a void judgment is not subject to the one-year time bar. A guilty plea that is not knowing, voluntarily and intelligently made is an invalid plea. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

As previously provided, failure to inform the defendant of a direct consequence renders a guilty plea invalid. *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980), See also, *In re Pers. Restraint of Isadore*, 151 Wn.2d at 297, 88 P.3d 390 (2004). An involuntary guilty plea would also produce a void judgment.

The caselaw in this particular area in attempting to construe this part of *CrR 7.8(b)(4)* instead of relying on *CrR 4.2(f)* has instead focused on a “facial invalidity”. The determination of facial invalidity is not nearly so straight forward as it might seem. The appellate courts in determining facial invalidity, regularly go beyond the four corners of the document to consider additional evidence that is relevant to the issue of

whether the plea was voluntary. *In re Coats*, 173 Wn.2d 123 (Wash. 2011)

APPLICATION OF CrR 7.8(B)(5)

Previous to *Padilla* and *Sandoval*, immigration-related IAC claims in Washington focused only on “affirmative misadvice” and were thus analyzed under CrR 7.8(b)(5). Both the Division II *Littlefair* and the Division III *Martinez* decisions were decided under this particular statutory subsection. *State v. Littlefair*, 112 Wn.App. 749, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003), *State v. Martinez*, – 29018-2 – Div. III – Washington State Court of Appeals – (April 21, 2011)

To date, the only case that construed an immigration-based IAC claim under *CrR 7.8(b)(5)* as a purely collateral matter was *Littlefair*. The appeals court in *Littlefair* did not apply CrR 7.8(b)(1) as the trial court had to find Mr. Littlefair’s motion to be time-barred; nor did it apply *RCW 10.73.100*. Instead the court applied CrR 7.8(b)(5) and invoked the doctrine of equitable tolling to find Mr. Littlefair’s motion timely. The dissenting opinion correctly noted that “*CrR 7.8(b)(5)*, [] did not have the one-year limitation.” *Id* at 773. The dissent further stated that the doctrine of equitable tolling should apply only in bad faith,

deception, or false assurances. Since none of these were present in Mr. Littlefair's factual situation, Justice Bridgewater, the lone dissenter, would not have applied equitable tolling. *Id.*

In re Pers. Restraint of Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008) was a matter in which all of the justices agreed that equitable tolling was available to some degree. *Id.* at 141, 144-46. The four justice plurality held that whether equitable tolling is justified depends on whether the circumstances are consistent with the purposes of the time bar. *Id.* at 141. The two-justice concurrence agreed with the plurality that equitable tolling was not justified in *Bonds*, but would not have limited the application of equitable tolling to only those circumstances where one of the predicates of bad faith, deception, and false assurances was shown. *Id.* at 144-45. The three justice dissent would have applied equitable tolling to Mr. Bonds and would have held that equitable tolling was available "when justice requires it." *Id.* at 146 (Sanders, J., dissenting).

Thus, a majority of the justices in *Bonds* supported equitable tolling well beyond applications limited only to "bad faith, deception, or false assurances."

In a more recent case, *In the Matter of the Personal Restraint of Carter*, 172 Wn.2d 917, 263 P.3d 1241 (Wash. 2011), the supreme court

affirmed that equitable tolling of the time bar is available in contexts much broader than those recognized by the *Bonds* plurality (bad faith, deception, and false assurances).

In the instant case, Mr. Barajas' lack of knowledge regarding his lack of notice of the dire immigration consequences is not assignable to any negligence or dilatory fault of his own. In fact, his trial counsel provided by declaration that he was not aware of his client's immigration status. He made no such inquiries during the course of his representation.

The recent final decision in *Gomez Cervantes*, No. 29595-8-III on July 12, 2012 also cited to *CrR 7.8(5)*. This decision was decided on the narrow basis that appellate counsel for *Gomez Cervantes* apparently did not submit an affidavit from the defendant. Thus, without even an affidavit from the Defendant in support, his counsel's argument in his opening brief could only be bald uncorroborated assertions.

In the instant case, corroboration of the lack of proper warnings is has been met. The Defendant has provided affidavits. His trial counsel has provided affidavits. An immigration attorney has provided an affidavit pointing out the section of law applicable to the Defendant's guilty plea. Finally, the plea record itself shows that the Defendant was not correctly informed of his rights regarding the filing of an appeal.

ADDITIONAL AUTHORITY RE RETROACTIVITY:
TEAGUE V. LANE

Washington State has generally followed *Teague v. Lane*, 489 U.S. 288 (1989). However, the Washington Supreme Court found that it is not always strictly bound by the *Teague* standard. For example, when deciding, under *RCW 10.73.100(6)*, whether a ruling should apply retroactively, the Washington State Supreme Court did not follow *Teague*. *State v. Evans*, 154 Wn.2d 438, 449, 114 P.3d 627, *cert. denied*, 546 U.S. 983, 126 S.Ct. 560, 163 L.Ed.2d 472 (2005) (“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 Pers. Restraint of Markel*, 154 Wn.2d 262, 268 n. 1, 111 P.3d 249 (2005) (*Teague* doctrine does not “define the full scope of RCW 10.73.100(6).”)

At least as to the *federal* application of *Padilla*, the *Padilla* opinion itself shows that the Justices did not believe they were creating a new rule. The Court noted that in *Hill v. Lockhart*, *supra*, it established that *Strickland*’s requirement of effective assistance of counsel applied to advice regarding a plea offer. *Padilla*, 130 S. Ct. at 1484. “Whether *Strickland* applies to *Padilla*’s claim follows from *Hill*.” *Id.* at 1485 n.12. The *Padilla* court then noted: “We have long recognized that deportation is a particularly severe penalty.” *Id.* It relied on the earlier decision in

I.N.S. v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), for the propositions that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence,” and that counsel must “advise themselves” of options for minimizing immigration consequences. *Padilla* at 1483, citing *St. Cyr*, 533 U.S. at 323 and n.50.

The *Padilla* court then rejected the argument that counsel’s duty was merely to refrain from giving misadvice regarding deportation, rather than to affirmatively give correct advice. It noted that *Strickland* expressly applied to both “acts or omissions” of defense counsel. *Padilla*, 130 S.Ct. at 1484, citing *Strickland*, 466 U.S. at 690. “It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis.” *Padilla*, 130 S.Ct. at 1484 (internal quotation marks and citation omitted).

The Court likewise 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.” *Id.* 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 at 377.

The U.S. Supreme Court retroactively applied *Padilla* to another matter, *Santos-Sanchez v. United States*, 130 S. Ct. 2340 (2010), one week after *Padilla*. *Santos-Sanchez* involved a collateral attack through a writ of *coram nobis* in which the petitioner claimed that he received ineffective assistance by his counsel’s failure to accurately advise him of the immigration consequences of his guilty plea. *Santos-Sanchez v. United States*, 548 F.3d 327, 331-32 (5th Cir. 2008). The Supreme Court vacated the judgment and remanded to the Fifth Circuit for further consideration under *Padilla*, making *Padilla* available to another petitioner on collateral review. *Santos-Sanchez*, 130 S. Ct. at 2340. On remand, the Fifth Circuit also applied *Padilla* retroactively, stating that *Padilla* abrogated its previous holding that defense counsel was not constitutionally obligated to advise Santos-Sanchez of the possible deportation consequences of his

plea, and vacated the district court's denial of the petition. *Santos-Sanchez v. United States*, 381 Fed. App'x 419, 2010 WL 2465080 (5th Cir. June 15, 2010).

Thus, if the Supreme Court believed that its decision in *Padilla* did not apply retroactively, there would have been no reason to remand. The Fifth Circuit obviously understood the Supreme Court's order to mean that it must apply *Padilla*, since it reversed its original decision in light of that case. *Ibid.*

Thus, it appears that the U.S. Supreme Court itself has already applied *Padilla* retroactively to at least two cases on collateral review. This Court should likewise find that *Padilla* applies retroactively.

Division I of the Washington Court of Appeals has recently found that *Padilla* is retroactive as applied to collateral challenges beyond the one-year time limitation following sentencing. *State v. Jagana*, No. 66682-7-I, (Division I, August 13, 2012)

3. The Defendant's Motion to Vacate His Guilty Plea Is Not Untimely Under RCW 10.73.100(6) as a "Significant Change In The Law"

**PADILLA IS A SIGNIFICANT CHANGE
IN WASHINGTON LAW**

Under the statute, petitions are exempt from the one-year time limit for seeking collateral relief if they are based on a “significant change in the law” and this Court determines there are “sufficient reasons” to apply the change in law retroactively to the petitioner. RCW 10.73.100(6).

[W]here an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a “significant change in the law. . .”

In re Pers. Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). “One test to determine whether an [intervening case] represents a significant change in the law is whether the defendant could have argued this issue before publication of the decision.” *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 264, 36 P.3d 1005 (2002).

In Re Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005) (alterations in original).

Like the Kentucky Supreme Court, which was overruled in *Padilla*, Washington State had long maintained that deportation was a “collateral consequence” of a plea and therefore an attorney had no duty to advise his client about deportation. *See, e.g., In re the Pers. Restraint of Yim*, 139 Wn.2d 581, 587-89, 989 P.2d 512 (1999).

Clearly, the “collateral consequences” doctrine foreclosed the defendant’s motion until *Sandoval* was decided. *State v. Sandoval*, 171 Wn.2d 163, 170 n.1, 249 P.3d 1015 (2011) (“*Padilla* has superseded *Yim*’s analysis of how counsel’s advice about deportation consequences (or lack thereof) affects the validity of a guilty plea.”). *Padilla*, therefore, effected a “significant change” in Washington law under RCW 10.73.100(6). The motion to vacate the guilty plea should be granted.

Very recently, the Washington State Court of Appeals, Division I, decided the matter of *State v. Jagana*, No. 66682-7-I, (August 13, 2012) which found that *Padilla* applies retroactively to matters filed beyond the one-year time period following sentencing.

4. Trial Counsel’s Performance Was Deficient And The Defendant Was Prejudiced as a Result.

APPLICATION OF THE PREJUDICE REQUIREMENT

As well as showing that he was not informed of the direct consequences of his guilty plea, case law also requires a defendant to show that he was prejudiced as a result of his conviction. The type and level of prejudice that needs to be shown by a Defendant in a post-conviction relief motion depends on several factors:

1. Whether the defendant’s motion is timely;

2. Whether his motion is based on a constitutional or nonconstitutional claim;
3. If based on an IAC claim regarding attorney's advice during the plea bargaining process, whether the defendant can establish the requisite level of prejudice under *Strickland*.

If this court determines under the authority provided that the defendant's motion is not time barred, then a different standard of prejudice applies. The matter of *State v. Sandoval*, 249 P.3d 1015 (2011) highlights this difference. In *Sandoval*, the error of trial counsel came to light during the time period in which a direct review could properly be, and was filed. Mr. Sandoval still was required to file a PRP in order to make a full record of the IAC, since his counsel's advice was not part of the trial court record. See *Sandoval* *infra*. See also, *In re Delgado*, 160 Wn.App. 898, 251 P.3d 899 (2011), citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (" If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.")

Since Mr. Sandoval's motion wasn't time-barred he did not need to show actual and substantial prejudice but instead had to meet the requirements of RAP 16.4(c).

RAP 16.4(c) states:

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of

the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

Otherwise, if his motion was time-barred, a defendant must prove either a constitutional error that caused actual prejudice or a non-constitutional error that caused a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Even if a defendant were to prove a constitutional error but then failed to make a prima facie showing of actual prejudice, an appellate court would dismiss such a petition. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

The law stating that a defendant must be informed of the direct consequences of his guilty plea is well established. *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). In *Weyrich*, the defendant was misinformed that the statutory maximum for the charged crimes was 5 years, rather than 10 years. *Weyrich*, 163 Wn.2d at 556, 182 P.3d 965.

In re Pers. Restraint of Isadore, 151 Wn.2d 294, 299, 88 P.3d 390 (2004) held that a defendant who is misinformed of a direct consequence of his guilty plea need not make a special showing of materiality in order to be afforded a remedy for an involuntary plea.

In *Isadore*, the defendant was misinformed that community placement did not apply to his sentence. The trial court accepted the plea and sentenced Isadore to 54 months, a standard range sentence. After the time for a direct appeal had passed, DOC notified the court that the defendant's sentence should have included mandatory one-year community placement. The trial court amended Isadore's sentence to add a one-year community placement to the sentence. Isadore then filed a PRP.

The Washington Supreme Court, in construing Isadore's argument, analyzed whether a defendant seeking to withdraw a guilty plea due to misinformation about direct consequences must show that the misinformation was material to his decision to plead guilty. *Isadore*, 151 Wn.2d at 300-02, 88 P.3d 390. The court's analysis was based on direct appeal cases—*State v. Acevedo*, 137 Wn.2d 179, 970 P.2d 299 (1999), *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), and *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001). The court found that his prejudice met the heightened PRP standards for prejudice. *Isadore*, 151 Wn.2d at 300-02, 88 P.3d 390.

The Defendant in the instant case has met even the heightened requirement of prejudice. His conviction has been analyzed by an immigration attorney and found to be an aggravated felony. The

immigration attorney's analysis is set out in his sworn affidavit and corroborates the lack of specific and accurate immigration warnings, and the certainty of deportation under the immigration laws applicable to drug manufacturing crimes. (CP 37, Attachment D)

Thus, the harm suffered by the defendant is easily shown to be not merely speculative. He has established the first prong of *Strickland*, in showing that his trial counsel was ineffective. He has also established the second prong of *Strickland* in showing that but for his trial counsel's errors that the result of this matter would have been different.

5. The Defendant Was Incorrectly Advised of His Rights To File An Appeal. State v. Chetty Further Requires Correct Advice Regarding the Direct Consequences of a Guilty Plea Before Waiver of the Defendant's Rights to File an Appeal Can Be Found.

LACK OF NOTICE TO THE DEFENDANT OF HIS APPEAL RIGHTS

Waiver of a constitutional right, such as due process, is a question of law that a reviewing court considers de novo. *State v. Robinson*, 171 Wn.2d 292, 301, 253 P.3d 84 (2011). A waiver is an intentional relinquishment or abandonment of a known right or privilege and must be knowing, intelligent, and voluntary. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Also, the State bears the burden of showing the

defendant's waiver of a constitutional right. See *State v. Campos-Cerna*, 154 Wn. App. 702, 709, 226 P.3d 185 (waiver of *Miranda* rights), *review denied*, 169 Wn.2d 1021 (2010); *State v. Hos*, 154 Wn. App. 238, 249-50, 225 P.3d 389 (waiver of right to jury trial), *review denied*, 169 Wn.2d 1008 (2010).

A signed waiver of a constitutional right is “usually strong proof” of the waiver's validity. *State v. Woods*, 34 Wn. App. 750, 759, 665 P.2d 895 (1983) (*Miranda* rights) (quoting *N. Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)).

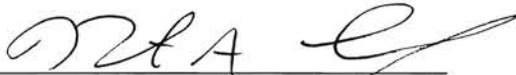
The Defendant has successfully made a prima facie showing that he was not apprised of his appeal rights. The trial court judge during sentencing informed Mr. Barajas that he had no right to file any appeal. (RP 4: 12-14)

IV. CONCLUSION

In applying CrR 4.2(f), CrR 7.8(b), CrR 7.8(b)(4) and CrR 7.8(b)(5), and the lack of correct information and warnings regarding appeal, the defendant's motions are not time-barred. Based on the affidavits offered by the defendant, an immigration lawyer and the transcripts of the proceedings, the defendant was never properly informed as to the readily ascertainable consequences of his guilty plea. Neither

was he given proper notice of his rights to an appeal. Accordingly, his guilty plea should be vacated.

Respectfully submitted this 2nd day of November, 2012

A handwritten signature in black ink, appearing to read "Brent A. De Young", written over a horizontal line.

Brent A. De Young, WSBA #27935
Attorney for Appellant

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WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

RESPONDENT,

PETRONILO S. BARAJAS,

APPELLANT.

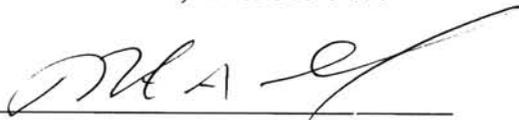
No. 30154-1-III
Consolidated with No. 30755-1-III

APPELLANT'S OPENING BRIEF
CERTIFICATE OF SERVICE

I certify that, on this 2nd day of November, 2012, I caused to be sent by U.S. Mail, first-class postage prepaid, a copy of the Appellant's above-noted document to:

Adams County Prosecuting Attorney
210 W. Broadway Ave.
Ritzville, WA 99169

Paul Szott
Kootenai County Public Defender
P.O. Box 9000
Coeur d'Alene, ID 83816-9000



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