

**FILED**

SEP 02, 2015

Court of Appeals

Division III

State of Washington

No. 30814-6-III

IN THE COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

Estela Rojas Lopez

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Blaine Gibson

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APPELLANT'S SUPPLEMENTAL BRIEFING

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### **A. SUMMARY OF ARGUMENT**

The trial court erred by finding Ms. Lopez Rojas's motion to vacate her guilty plea was untimely where the motion was based on her attorney's failure to advise her of mandatory deportation consequences. The Supreme Court's decision in *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015), is dispositive in this appeal and supports this matter being reversed and remanded for an evidentiary hearing.

### **B. PROCEDURAL HISTORY**

In 1991, Estela Lopez Rojas, a non- U.S. citizen, pleaded guilty to delivery of cocaine. (CP 5-6, 21) In 2011, Ms. Lopez Rojas moved to vacate her plea based on *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), declaring that she did not know that her offense was subject to automatic deportation and arguing that counsel failed to warn her of this automatic deportation consequence. (CP 21, 23, 25-31, 89) The trial court held that Ms. Lopez Rojas's collateral attack was time-barred and that she was not entitled to equitable tolling. (CP 72) Ms. Lopez Rojas appealed to this Court. On November 12, 2013, the Appellant's Amended Opening Brief was filed, which the Appellant incorporates herein by reference.

On November 18, 2013, this Court granted the parties' agreed motion to stay this appeal pending the final decision in *In re Pers. Rest. of Jagana*, No. 66682-7-I.

By way of history, in *In re Jagana*,<sup>1</sup> Division One had held that a claim of ineffective assistance based on inadequate advice pursuant to *Padilla* constituted an exception under RCW 10.73.100(6) to the one-year time bar on collateral attacks found in RCW 10.73.090. *Jagana*, 170 Wn. App. at 36. In other words, *Padilla* would apply retroactively, and a petitioner was not time-barred in bringing his collateral attack more than one year after his judgment was final due to insufficient immigration advice. *Id.* Shortly thereafter, the United States Supreme Court held, *inner alia*, that *Padilla* did not apply retroactively. *See Chaidez v. United States*, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013). The Washington State Supreme Court then granted review in *In re Jagana* and remanded the matter back to Division One in light of *Chaidez, supra*. *In re Jagana*, 177 Wn.2d 1027. Division One subsequently withdrew its opinion and dismissed Mr. Jagana's personal restraint petition (see No. 66682-7-I, 2013 WL 6564637 (Wa. Ct. App. Dec. 9, 2013)), and Mr. Jagana sought review. The Supreme Court granted review and consolidated the matter

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<sup>1</sup> *In re Jagana*, 170 Wn. App. 32, 282 P.3d 1153 (2012), *remanded by* 177 Wn.2d 1027 (2013), *amended by* No. 66682-7-I, 2013 WL 6564637 (Wa. Ct. App. Dec. 9, 2013), *rev'd sub nom, In re Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015).

with *In re Pers. Restraint of Yung-Cheng Tsai*, 180 Wn.2d 1014, 327 P.3d 55 (2014).

In 2015, the Washington State Supreme Court reversed the Court of Appeals' order that had dismissed Mr. Jagana's personal restraint petition, holding that the petition was not time-barred. *Sub nom, In re Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015). That decision now being final, the stay was lifted in this case on August 25, 2015. This supplemental briefing timely follows.

**C. SUPPLEMENTAL ARGUMENT: The Supreme Court's decision in *In re Yung-Cheng Tsai* and *In re Jagana* warrants reversal of the trial court's decision in this case.**

The Washington State Supreme Court's decision in *In re Yung-Cheng Tsai* and *In re Jagana* is dispositive in this appeal. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 96-108, 351 P.3d 138 (2015). There, our State Supreme Court held that *Padilla* constituted a significant, material change in the law (i.e., it constituted a significant change in how courts interpret an old constitutional law) that would apply retroactively to matters on collateral review and be exempt from the general one-year time bar on collateral attacks. *In re Yung-Cheng Tsai*, 183 Wn.2d at 101-08. In other words, a petitioner making a collateral attack on her guilty plea, based on counsel's failure to inform her of mandatory deportation consequences, is not time-barred in doing so, contrary to the trial court's ruling in this case.

Prior to *Padilla*, it took an “affirmative misrepresentation by counsel of the plea’s deportation consequences” to support a plea’s withdrawal. *Yung-Cheng Tsai*, 183 Wn.2d at 107 (quoting *Sandoval*, 171 Wn.2d at 170n.1). Before *Padilla*, “Washington courts would have rejected [a claim that a plea should be withdrawn based on counsel’s failure to provide any guidance as to any possible immigration consequences of his guilty plea].” *Id.* But *Padilla* clarified that, where the deportation consequence is clear, such as here where a conviction makes a person subject to mandatory deportation, constitutionally competent counsel must affirmatively advise his or her client of this consequence. *Padilla*, 559 U.S. at 369; *Yung-Cheng Tsai*, 183 Wn.2d at 107. Failure to provide this guidance on immigration consequences, if proven along with prejudice at an evidentiary hearing, would establish a basis for ineffective assistance of counsel and withdrawal of the plea even if brought more than one year after judgment. *Id.*

It is now settled that, at least under Washington state law, a defendant is not necessarily time barred in making a collateral attack on her guilty plea by the general one-year limit found in RCW 10.73.090. *In re Yung-Cheng Tsai*, 183 Wn.2d at 101-08. To wit, as Appellant argued in her opening brief, *Padilla* constituted a significant, material change in the law and applies retroactively to collateral attacks like those made by Ms.

Lopez Rojas. *Id.* Specifically, where counsel failed to advise his clients of succinct and certain deportation consequences, as Ms. Lopez Rojas alleged here, relief from that plea is warranted provided the defendant proves these facts and prejudice at an evidentiary hearing. *Id.* at 107.

Ms. Lopez Rojas indicated she was unaware of the deportation consequences, she exhibited confusion regarding immigration consequences during her sentencing hearing, and counsel argued she was not informed of the mandatory consequences. (CP 21, 25-31, 89) Where Ms. Lopez Rojas was prejudiced by counsel's failure to inform her of mandatory deportation consequences, as would likely be established at an evidentiary hearing, Ms. Lopez Rojas would be entitled to withdraw her plea.

Finally, Ms. Lopez Rojas's case is akin to that of Mr. Jagana, as opposed to Mr. Yung-Cheng Tsai. *See In re Yung-Cheng Tsai*, 183 Wn.2d at 107-08. Unlike with Mr. Yung-Cheng Tsai, Ms. Lopez Rojas did not allege that her attorney provided affirmative *misinformation* regarding immigration consequences. In that scenario, Ms. Lopez Rojas may have been procedurally barred from bringing her collateral attack, because an attorney's misinformation has long-time provided the basis for withdrawing a plea and would not constitute a significant change of law; i.e., Ms. Lopez Rojas may have remained time-barred. Instead, like Mr.

Jagana, Ms. Lopez Rojas alleged that her attorney failed to advise her of the mandatory consequences. An attorney's silence or failure to advise during plea discussions that deportation is certain now establishes the basis for an ineffective assistance argument and basis for withdrawing the plea, and this is a significant, material change in the law that satisfies the time-bar exception in RCW 10.73.100(6). *In re Yung-Cheng Tsai*, 183 Wn.2d at 101-08.

In sum, our State Supreme Court acknowledged the U.S. Supreme Court's decision in *Chaidez*, 133 S.Ct. at 1107-08, but held that: “[a]s applied to Washington, *Padilla* did not announce a new rule, but it did effect a significant change in the law under RCW 10.73.100(6).” *Yung-Cheng Tsai*, 183 Wn.2d at 99. To wit,

The unreasonable failure to give any advice about the immigration consequences of a guilty plea was already deficient performance in Washington... However, language in certain Washington appellate cases made it appear that this well-established rule did not apply to RCW 10.40.200. In superseding those cases, *Padilla* significantly changed state law.

*Yung-Cheng Tsai*, 183 Wn.2d. at 96.

Accordingly, because there was a significant, material change involving an old law, Ms. Lopez Rojas is entitled to retroactive relief on collateral review and is exempt from RCW 10.73.090(1)'s one-year time bar for collateral attacks. *Id.* at 100, 103, 107. The trial court's decision to the contrary – that this matter was time-barred – warrants reversal.

**D. CONCLUSION**

Based on the foregoing, and the Appellant's arguments in her opening brief, Ms. Lopez Rojas requests that this Court reverse the trial court's denial of her motion to vacate and remand this matter for an evidentiary hearing pursuant to *In re Jagana, sub nom, In re Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015).

Respectfully submitted this 2<sup>nd</sup> day of September, 2015.

/s/ Kristina M. Nichols

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Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 30814-6-III  
vs. )  
ESTELA LOPEZ ROJAS ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on September 2, 2015, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Estela Lopez Rojas  
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Having obtained prior permission from Yakima County Prosecutor's Office, I also served the Respondent at [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us) by e-mail and [joseph.brusic@co.yakima.wa.us](mailto:joseph.brusic@co.yakima.wa.us).

Dated this 2<sup>nd</sup> day of September, 2015.

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