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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 OPENING BRIEF

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KRISTINA M. NICHOLS  
Nichols Law Firm, PLLC  
Attorney for Appellant  
P.O. Box 19203  
Spokane, WA 99219  
(509) 280-1207  
Fax (509) 299-2701  
Wa.Appeals@gmail.com

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## **A. SUMMARY OF ARGUMENT**

Estela Lopez Rojas pleaded guilty in 1991 to delivery of cocaine. But she was uninformed of the automatic immigration consequences that would result from pleading guilty. In 2011, after *Padilla v. Kentucky*<sup>1</sup> was decided by the U.S. Supreme Court, Ms. Lopez Rojas moved to vacate her guilty plea based on ineffective assistance of counsel. The trial court denied Ms. Rojas' motion, deciding that the motion was time barred, Ms. Rojas had no equitable relief from the time bar and Ms. Rojas had failed to establish ineffective assistance.

The trial court erred. Since its decision, Washington case law has clarified that the defendant's motion, such as in this case to vacate a plea pursuant to *Padilla*, falls within the time-bar exception of RCW 10.73.100(6). Furthermore, counsel's failure to inform Ms. Rojas of the automatic deportation consequences indeed constitutes ineffective assistance, which prejudiced the defendant in this case. Accordingly, Ms. Rojas now requests that the trial court's decision be reversed so that her plea can be vacated.

## **B. ASSIGNMENTS OF ERROR**

1. The court erred by finding that Ms. Rojas offered no evidence to support her ineffective assistance of counsel claim.

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<sup>1</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

2. The court erred by finding that Ms. Rojas failed to meet her threshold burden of establishing ineffective assistance of counsel.
3. The court erred by failing to find that counsel's performance prejudiced the defendant.
4. The court erred by finding that Ms. Rojas' motion to vacate her guilty plea was time-barred.
5. The court erred by finding that Ms. Rojas waived her claim by not raising it within one year of judgment.
6. The court erred by denying Ms. Rojas' motion as untimely based on her earlier failure to report to DOC, her failure to "do equity" or her failure to "act diligently." These are not applicable factors in determining whether the time bar exception applies in RCW 10.73.100(6). Ms. Rojas' motion fell within the exception to the time bar in RCW 10.73.100(6).
7. The court erred by denying Ms. Rojas' motion to withdraw her guilty plea.

(CP 71-73)

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the defendant should be permitted to withdraw her 1991 plea where defense counsel failed to give adequate advice on the immigration consequences of pleading guilty, thereby prejudicing the defendant.

- A. The court erred by finding that Ms. Rojas' ineffective assistance of counsel claim based on *Padilla v. Kentucky*, *supra*, was time barred.
  - i. *Padilla* constituted a significant change in the law.
  - ii. *Padilla* was "material" to the defendant's conviction.
  - iii. *Padilla* should apply retroactively.

- B. The court erred by finding counsel's performance effective even though Ms. Rojas was not advised that her conviction would result in automatic deportation.
- C. The court erred by failing to find that Ms. Rojas was prejudiced by counsel's ineffective assistance where he failed to adequately advise her on the deportation consequences and, absent the faulty advice, she would have proceeded to trial on a duress defense rather than face automatic deportation.

#### **D. STATEMENT OF THE CASE**

Estela Lopez Rojas is a Spanish-speaking non-U.S. citizen from Mexico who does not understand English. (CP 6, 21) On May 6, 1991, Ms. Rojas pleaded guilty (with the aid of an interpreter) to delivery of a cocaine. (CP 5)

In pertinent part, Ms. Rojas' statement on plea of guilty read: "I understand that if I am not a citizen to the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation." (CP 5) The plea statement also indicated it had been reviewed by Ms. Rojas with the translator, and that Ms. Rojas supposedly understood its terms. (CP 6) And, yet, at the conclusion of Ms. Rojas' plea and sentencing hearing in 1991, the defendant questioned the court as follows:

"I would like to ask a question... After I've served my sentence, do you know if they're going to get me out to Mexico?"

(CP 89) The court answered:

"I do not know that. I am not in charge of that."

(CP 89)

The court then sentenced Ms. Rojas to serve 21 months, which would commence the following week so that Ms. Rojas could first make care arrangements for her son. (CP 87) But Ms. Rojas did not report for confinement the week after sentencing, so a warrant was issued. (CP 20) Instead, Ms. Rojas went to Mexico. (RP 20)

Ms. Rojas returned to the United States in 2005 after her daughter who lived in this country had apparently been victimized by rape and assault. (RP 20) In February 2011, Ms. Rojas was arrested on the outstanding warrant from her 1991 conviction. (RP 19-20) In May 2011, Ms. Rojas moved to vacate her guilty plea based on *Padilla v. Kentucky*, *supra*, which was decided in March of 2010. (CP 23) Ms. Rojas declared that she would have proceeded to trial on a duress defense had she known that pleading guilty would automatically result in deportation to Mexico. (CP 21) Ms. Rojas, through counsel, argued that she did not know pleading guilty would lead to automatic deportation because she had been told otherwise by her trial attorney in 1991, and she offered to testify to this fact. (RP 13) In sum, Ms. Rojas argued that she was denied effective assistance of counsel because she was not properly advised on and did not understand the automatic deportation consequences of pleading guilty. (CP 21, 23, 26; RP 12-13)

On April 23, 2012, the trial court denied Ms. Rojas' motion to vacate her guilty plea. (CP 72) The court found that Ms. Rojas failed to establish ineffective assistance of counsel and, regardless, that her motion was time-barred and that she was not entitled to "equitable tolling" of the time bar because she had not acted equitably herself by reporting to confinement 20 years earlier. (CP 72) This appeal timely followed. (CP 76)

#### **E. ARGUMENT**

**Issue 1: Whether the defendant should be permitted to withdraw her 1991 plea where defense counsel failed to give adequate advice on the immigration consequences of pleading guilty, thereby prejudicing the defendant.**

The court erred by denying Ms. Rojas' motion to vacate her guilty plea based on untenable grounds and reasoning. After the trial court's decision in this case, Washington has rejected several bases upon which the trial court erroneously relied in its decision below. **(A)** Indeed, a claim of ineffective assistance, like that set forth herein, is not time barred, even if brought more than one year of judgment, because it falls within the exception of RCW 10.73.100(6). **(B)** In addition, so long as the immigration consequences are clear, like in this case where the defendant's conviction was for delivery of cocaine, counsel does provide ineffective assistance of counsel where he fails to correctly advise his client prior to pleading guilty that she will be automatically subject to

deportation. **(C)** Finally, Ms. Rojas was prejudiced by counsel's ineffectiveness. She would not have pleaded guilty had she known of the deportation consequences, and she would have instead proceeded to trial on a duress defense. Automatic deportation and a ban on future lawful admittance to this country was a particularly severe penalty that prejudiced Ms. Rojas without the aid of effective counsel. Ms. Rojas respectfully requests that this Court reverse and vacate her guilty plea, or, at a minimum, remand for an evidentiary hearing and appropriate findings if the court did not sufficiently address the prejudice issue below.

**A. The court erred by finding that Ms. Rojas' ineffective assistance of counsel claim based on *Padilla v. Kentucky, supra*, was time barred.**

As a threshold matter, a defendant may move to vacate her guilty plea to correct a "manifest injustice" pursuant to CrR 4.2(f). Where the motion is brought after judgment, relief from judgment may be obtained pursuant to CrR 7.8(b)(5) for "any...reason justifying relief..." CrR 4.2(f), 7.8(b)(5). A court's denial of a motion to vacate under CrR 7.8, as in this case, is reviewed for an abuse of discretion. *State v. Cervantes*, 169 Wn. App. 428, 431, 282 P.3d 98 (2012) (internal citations omitted). "A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds." *Id.* "A decision is based on untenable grounds or made for untenable reasons

when it was reached by applying the wrong legal standard.” *Id.* “A court abuses its discretion if its ruling is based on an erroneous view of the law.” *Id.*

The trial court here determined that Ms. Rojas’ motion to vacate her guilty plea was time barred. But the court abused its discretion in so finding. Its decision was based on untenable grounds and untenable reasons, in application of the wrong legal standard, as Washington has held since the trial court’s decision in this case. The trial court’s erroneous view of the law has been rejected in our Courts and should now be reversed in this case.

The trial court was correct that, generally speaking, a motion to withdraw a guilty plea (i.e., a “collateral attack” on judgment and sentence) cannot be filed more than one year after the judgment is final. RCW 10.73.090. However, this one-year time bar does not apply where the motion is based on a significant, material change in the law that applies retroactively. *Cervantes*, 169 Wn. App. at 432-33; RCW 10.73.100(6). A claim of ineffective assistance based on inadequate advice pursuant to *Padilla v. Kentucky* constitutes just such an exception to the one-year time bar. *In re Jagana*, 170 Wn. App. 32, 282 P.3d 1153, 1156 (2012), *reconsideration pending per* 177 Wn.2d 1027 (2013).<sup>2</sup>

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<sup>2</sup> The Court in *In re Jagana* may change its stance on this retroactivity issue in light of *Chaidez v. United States*, \_\_ U.S. \_\_, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013). But until

i. *Padilla* constituted a significant change in the law.

In *In re Jagana, supra*, the defendant moved to vacate his guilty plea more than four years after his judgment, after the United States Supreme Court decided *Padilla v. Kentucky, supra*, in March 2010. 170 Wn. App. at 36. Our Washington Court of Appeal, Division I, held that the motion to vacate the guilty plea based on *Padilla v. Kentucky* was not time barred by the one-year rule, because, first of all, it was based on a “significant change in the law.” *Id.* at 38-39. Indeed, the Court in *Jagana* aptly followed the reasoning of *In re Greening*, noting that “where 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’ for purposes of exemption from procedural bars.” *Id.* at 40 (quoting *In re Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000)).

*Padilla v. Kentucky* did indeed constitute a change of law by overturning prior appellate decisions that would have otherwise been determinative in both *Jagana, supra*, and in this case. Prior to *Padilla, supra*, many, if not most, courts across the country, including those in Washington State, believed that the Sixth Amendment right to counsel did not include advice about immigration consequences of a criminal

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and unless that happens, your appellant continues to rely on the current state of the law in this State, as set forth in *Jagana* and its progeny.

conviction. *State v. Sandoval*, 171 Wn.2d 163, 169-70, 249 P.3d 1015 (2011) (citing *Padilla*, 130 S.Ct. at 1481 n.9). For example, our State Supreme Court was part of this prior legal landscape, holding that immigration consequences were merely collateral consequences to a plea and defense counsel only had a duty to warn clients of direct consequences of a criminal conviction. *Jagana*, 170 Wn. App. at 42 (citing *In re Personal Restraint of Yim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999)).

But *Padilla v. Kentucky* rejected the collateral verses direct consequences analysis, holding that it was ill-suited to reviewing a *Strickland*<sup>3</sup> claim for effective assistance concerning the specific risk of deportation. *Jagana*, 170 Wn. App. at 42 (citing *Padilla*, 130 S.Ct. at 1481-82). Instead, because of “deportation’s close connection to the criminal process, advice about deportation consequences falls within the ambit of the Sixth Amendment right to counsel.” *Id.* at 42-43 (citing *Sandoval*, 171 Wn.2d at 169-70); *Padilla*, 130 S.Ct. at 1478. In other words, prior to *Padilla*, anything short of affirmative misadvice by counsel was not sufficient to set aside the plea. *Jagana*, 170 Wn. App. at 41-44 (citing *Yim*, 139 Wn.2d at 588). But since *Padilla*, direct advice regarding clear deportation consequences<sup>4</sup> is required of competent counsel pursuant

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<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

<sup>4</sup> *C.f.*, RCW 10.40.200(2) (requires advice that potential immigration consequences may exist, compliance with which is not sufficient to meet the *Padilla* advice requirements

to *Strickland, supra. Jagana*, 170 Wn. App. at 40-43 (citing *Padilla*, 130 S.Ct. at 1482). Accordingly, “[t]here can be no question that *Padilla* was a significant change in the law’ as RCW 10.733.100(6) requires.” *Jagana*, 170 Wn. App. at 43-44. The first prong of the time bar exception in RCW 10.733.100(6) has been met.

ii. *Padilla* was “material” to the defendant’s conviction.

Next, as RCW 10.733.100(6) requires for its exception to the general one-year time bar, *Padilla* is “material” to the defendant’s conviction. *Jagana*, 170 Wn. App. at 43-44. “‘Material’ most closely means ‘[h]aving some logical connection with the consequential facts.’” *Id.* (quoting Black’s Law Dictionary 1066 (9<sup>th</sup> ed. 2009)). “Where pleading guilty to a crime could put the defendant’s immigration status at risk, *Padilla* is clearly material.” *Id.*

Here, Ms. Rojas’ plea to delivery of cocaine made her automatically deportable. 8 USCA §1251 (1991); 8 USCA §1227(a)(2)(B)(i); *Padilla*, 130 S.Ct. at 1477. This deportation consequence was clearly material, both pursuant to *Padilla* and in specific regard to this defendant, as was evident when Ms. Rojas expressed her concern about possible deportation consequences at the conclusion of her

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where there are clear deportation consequences facing the defendant, *see, Sandoval*, 171 Wn.2d at 173 (“the guilty plea warnings required by RCW 10.40.200(2) cannot save the advice” of counsel where deportation was for certain.)

sentencing. (CP 89) Finally, as set forth more fully in Issue 1(C) below and incorporated herein, Ms. Rojas was prejudiced by counsel’s failure to inform her of the deportation consequences, further demonstrating the materiality of the deportation consequences as applied in this case. Simply put, the immigration consequences and lack of advice thereon was material to Ms. Rojas’ conviction, such that the second prong for the timeliness exception in RCW 10.73.100(6) was met.

iii. *Padilla* should apply retroactively.

Finally, as RCW 10.73.100(6) requires for its last exception to the time bar, there are “sufficient reasons” to require “retroactive application” of *Padilla*. *Jagana*, 170 Wn. App. at 43-46 (applying *Padilla* retroactively even though collateral attack was made over four years after final judgment and sentencing); *Padilla*, 130 S.Ct. 1473 (applying its ruling retroactively to Mr. Padilla’s case even though his conviction was entered two years before he brought a motion to collaterally attack the same)<sup>5</sup>.

To determine whether *Padilla* applies retroactively, courts determine whether a “new” or “old” rule is involved. *Jagana*, 170 Wn. App. at 47 (citing *Teague v. Lane*, 489 U.S. 288, 299-301, 109 S.Ct.

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<sup>5</sup> The *Padilla* Court did not expressly decide whether its ruling was intended to apply retroactively, though the practical application in that case did apply retroactively to Mr. Padilla. As of this writing, Washington State has applied *Padilla* retroactively and not adopted the federal holding in *Chaidez*, *supra*. See *Jagana*, 170 Wn. App. at 48 n.68.

1060, 103 L.Ed.2d 334 (1989)). An “old” rule will apply to both direct review and collateral attacks on judgment, hence retroactively, while a “new” rule applies only to cases still on direct review. *Jagana*, 170 Wn. App. at 47. “New” cases are those that ‘break[ ] new ground or impose[ ] a new obligation on States or the Federal government [or]... [where] the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Id.* (emphasis in *Jagana* opinion) (quoting *State v. Evans*, 154 Wn.2d 438, 114 P.3d 627 (2005)).

The rule announced in *Padilla* is not new for purposes of determining retroactivity. *Padilla* was based on the long-standing precedent of *Strickland v. Washington*, *supra*, decided in 1984, and its requirement that counsel must provide effective advice, even and particularly on deportation consequences. *Padilla*, 130 S.Ct. 1473. Moreover, the immigration consequences of becoming immediately deportable based on most drug crimes were in place when Mr. Padilla was convicted (see 8 U.S.C.A. §1227(a)(2)(B)(i)), just as those same immigration consequences were in place when Ms. Rojas pleaded guilty in this case in 1991 (*see* 8 U.S.C.A. §1251 (1991)).

Each application of *Strickland v. Washington* to a new set of facts does not necessarily create a new rule, but rather a “new application of an ‘old rule’ in a manner dictated by precedent.” *Jagana*, 170 Wn. App. at

50-51 (quoting *United States v. Orocio*, 645 F.3d 630 (3<sup>rd</sup> Cir. 2011)). See also *Jagana*, 170 Wn. App. at 50 (citing *Commonwealth of Massachusetts v. Clarke*, 949 N.Ed. 892 (2011) (sub-internal citations omitted) (the mere existence of conflicting authority does not necessarily mean a rule is new). Irrespective of the ruling in *Padilla*, which greatly impacted existing precedent, the long-standing constitutional rule that the *Padilla* Court relied upon remains the same. *Jagana*, 170 Wn. App. at 52. As set forth in greater detail by Division I and hereby relied upon by Ms. Rojas for purposes of this appeal, *Strickland* was the controlling authority in *Padilla* and *Strickland* itself is clearly an “old rule.” Accordingly, since *Strickland* has a newly clarified application since *Padilla*, but still constitutes an “old rule,” “there are sufficient reasons to apply *Padilla* retroactively...” to those supported claims of ineffective assistance of counsel based on *Padilla*. *Id.*

Here, the court erred by deciding that Ms. Rojas’ collateral attack on her guilty plea was time barred because it was brought more than one year after the judgment became final. The court improperly decided that, since Ms. Rojas had not yet served her sentence, she was not entitled to relief. But this was not the proper legal inquiry in the wake of *Padilla* or pursuant to RCW 10.73.100(6). Whether Ms. Rojas may have been subject to additional charges for not reporting to DOC after her 1991

conviction is a wholly separate issue. For these purposes, the relevant legal inquiry on Ms. Rojas' motion to vacate her plea has been set forth above and was satisfied by Ms. Rojas.

In sum, Ms. Rojas' motion to vacate her guilty plea was not time-barred since a significant and material change of law had occurred that warranted retroactive application to this case. Ms. Rojas' case is significantly similar to *In re Jagana, supra*, which was decided after the trial court's decision in this case. The court erred here by either applying the wrong legal standard or basing its decision on untenable grounds or reasons. Ultimately, the trial court denied Ms. Rojas based on an erroneous view of the law that has since been clarified by *In re Jagana, supra*. Accordingly, Ms. Rojas' ineffective assistance of counsel claim pursuant to *Padilla* was not time-barred, and she was entitled to a decision on the merits of her argument.

**B. The court erred by finding counsel's performance effective even though Ms. Rojas was not advised that her conviction would result in automatic deportation.**

As a threshold matter, an ineffective assistance claim is a mixed question of fact and law that is reviewed de novo. *Cervantes*, 282 P.3d at 100 (citing *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009)). "Effective assistance includes the right to be informed of adverse immigration consequences." *Cervantes*, 282 P.3d at 100 (citing *Padilla*,

130 S.Ct. at 1483). To that end, the defendant must show “(1) defense counsel’s representation was deficient and fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant.” *Id.* Counsel is presumed effective. *Id.* (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

“The first step in determining whether counsel's immigration advice was below an objective standard of reasonableness is to determine whether, ‘the relevant immigration law is truly clear about the deportation consequences.’” *State v. Martinez*, 161 Wn. App. 436, 441, 253 P.3d 445 (Div. 3, 2011) (quoting *Sandoval*, 171 Wn.2d at 171). Defense counsel’s “failure to affirmatively advise a client of a clearly deportable offense amounts to ineffective assistance of counsel.” *Martinez*, 161 Wn. App. at 439 (citing *Sandoval*, 171 Wn.2d 163). In other words, counsel’s performance is guided by the clarity of the immigration law, such that:

“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. If ‘the law is not succinct and straightforward,’ counsel must provide only a general warning that ‘pending criminal charges may carry a risk of adverse immigration consequences.’”

*Martinez*, 161 Wn. App. at 441 (emphasis added) (quoting *Sandoval*, 171 Wn.2d at 170, (quoting *Padilla*, 130 S.Ct. at 1483).

In *Padilla*, *Jagana*, and *Martinez*, *supra*, like in the case at bar, all the defendants were convicted of drug crimes that made deportation certain pursuant to 8 U.S.C.A. §1227(a)(2)(B)(i)<sup>6</sup> (requiring deportation for any alien convicted of a drug crime other than for possession of a small amount of marijuana for personal use). *Padilla*, 130 S.Ct. at 1477 n.1; *Jagana*, 170 Wn. App. at 58; *Martinez*, 161 Wn. App. at 438; CP 3-4. Accordingly, counsel was obligated to advise that deportation was equally clear, certain, or presumptively mandatory, since this automatic consequence was clearly set forth in the United States Code. *Padilla*, 130 S.Ct. at 1483; *Jagana*, 170 Wn. App. at 58-60; *Sandoval*, 171 Wn.2d at 170; *Martinez*, 161 Wn. App. at 442.

Furthermore, not only must counsel affirmatively and clearly advise his client of clear deportation consequences, but, contrary to the court's concerns in this case (RP 14), advice pursuant to the immigration warnings set forth in RCW 10.40.200 does not satisfy counsel's duty.

RCW 10.40.200 provides:

“Prior to acceptance of a plea of guilty..., the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. A defendant signing a guilty plea statement

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<sup>6</sup> The identical language of the current statute is found at 8 U.S.C.A. §1251 in the 1991 version of the United States Code, which would have been in effect when Ms. Rojas pleaded guilty.

containing the advisement required by this subsection shall be presumed to have received the required advisement.”

RCW 10.40.200(2) (emphasis added).

Ms. Rojas’ statement on plea of guilty included this same boiler-plate language pertaining to potential immigration consequences. But only when the law is not succinct or straightforward may counsel’s presumed advice of potential as opposed to clear consequences be sufficient. *Padilla*, 130 S.Ct. at 1483. In *Martinez* and *Sandoval*, like here, the defendants signed plea statements that included the warnings from RCW 10.40.200. *Martinez*, 161 Wn. App. at 448; *Sandoval*, 171 Wn.2d at 173. But “the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave.” *Sandoval*, 171 Wn.2d at 173.

In other words, advice that there may be potential immigration consequences from pleading guilty is not the equivalent of advice that deportation is certain. *Sandoval*, 171 Wn.2d at 173 (emphasis added). Accordingly, the warnings in Ms. Rojas’ plea statement of potential immigration consequences do not save counsel’s lacking advice that deportation was presumptively mandatory or certain.

The determinative issue, then, is whether Ms. Rojas established that counsel’s performance was indeed inadequate. *Padilla* and its progeny offer guidance and support for Ms. Rojas’ position that counsel’s

advice was, in fact, ineffective, based on the record submitted before the trial court in this case.

In *Padilla*, the defendant pleaded guilty to a drug transportation offense involving a large quantity of marijuana. 130 S.Ct. at 1477-78. In a post-conviction proceeding two years later, Mr. Padilla claimed that his defense counsel was ineffective for failing to advise him of his immigration consequences (including that his deportation was virtually mandatory), and that counsel instead told him he did not need to worry about his immigration status since he had been in the country so long. *Id.* at 1478. The United States Supreme Court agreed with Mr. Padilla, holding that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” *Id.* at 1478, 1482. “[D]eportation was presumptively mandatory, and his counsel’s advice was incorrect.” *Id.* at 1483. The court remanded for an evidentiary hearing to determine prejudice to the defendant. *Id.*

Similarly, in *Martinez*, the defendant pleaded guilty to possession with intent to deliver cocaine. 161 Wn. App. at 439. Thereafter, Mr. Martinez argued that counsel was ineffective for failing to notify him of the certain deportation consequences of his plea. *Id.* To support his argument, Mr. Martinez filed a declaration, asserting that his defense

counselor failed to advise him of the appropriate immigration consequences of pleading guilty, or that counsel incorrectly advised that his conviction was only “mere grounds for deportation.” 161 Wn. App. at 447. Defense counsel too filed a declaration, indicating that he had “no independent recollection” of what he advised Mr. Martinez, admitting he knew “very little about immigration law.” *Id.* The court found defense counsel’s performance ineffective pursuant to *Padilla* for failing to properly advise of the clear immigration consequences. *Id.* at 448.

Likewise, the defendant in *Sandoval* was not fully and properly informed by his attorney of the clear immigration consequences of pleading guilty. Mr. Sandoval’s attorney recalled that the defendant was concerned about whether pleading guilty would result in deportation, but counsel told the defendant that he would not be immediately deported and he would have time to confer with an immigration attorney. *Sandoval*, 171 Wn.2d at 166-68. Counsel’s categorical assurances and failure to properly inform the defendant of the clear immigration consequences (i.e. being automatically deportable) constituted ineffective assistance. *Id.* at 174.

In *Jagana, supra*, the defendant pleaded guilty to possession of cocaine. 170 Wn. App. at 36-38. Four years after his judgment became final, after *Padilla* was decided, the defendant moved to vacate his guilty

plea. *Id.* To support his motion, Mr. Jagana filed a declaration, stating that his attorney did not advise him of any immigration consequences prior to his pleading guilty. *Id.* at n.6. The Court of Appeals agreed that counsel's inadequate advice amounted to ineffective assistance pursuant to *Padilla*. *Id.* The Court remanded for an evidentiary hearing to determine if Mr. Jagana could establish the prejudice prong of his ineffective assistance claim. *Id.*

Finally, in *State v. Cervantes, supra*, the defendant pleaded guilty to possession of cocaine in 1987; judgment was entered in 1994. 282 P.3d at 99. More than 15 years later, subsequent to the decision in *Padilla*, the defendant moved to vacate his guilty plea, claiming that his defense attorney was ineffective for failing to inform him of the immigration consequences of pleading guilty. *Id.* The Court acknowledged that counsel is indeed required to advise a defendant whether his plea carries a risk of deportation. *Id.* at 100. But the defendant had failed to offer any proof for his allegation that he had not been adequately advised by defense counsel, merely stating in his Appellant Brief that defense "counsel did not inform him of the immigration implications of his plea." *Id.* at 101. The *Cervantes* Court distinguished that case from *Sandoval* and *Martinez, supra*, where "corroborative evidence established ineffective assistance,"

holding the defendant's "bald, self-serving statement without corroboration is insufficient to show deficient performance." *Id.*

Here, Ms. Rojas did not simply support her ineffective assistance claim with a "bald, self-serving statement" in her Appellant Brief like did the defendant in *State v. Cervantes, supra*. Instead, she filed a motion with supporting declaration below, stating that she was unaware at the time she pleaded guilty that she would face automatic deportation, indicating at argument, through counsel, that she did not know she would be automatically deported because her attorney told her otherwise and that she was prepared to testify as such. (CP 21, 23, 26; RP 12-13) In the absence of proof of counsel's proper advice otherwise, similar declarations by the defendants in *Padilla* and *Jagana* were sufficient to prove that counsel's immigration advice was inadequate or incorrect. *Padilla*, 130 S.Ct at 1478 (counsel proved ineffective based on defendant's declaration); *Jagana*, 170 Wn. App. at 37 n.6 (same). In other words, in the absence of proof of counsel's proper advice otherwise, Ms. Rojas sufficiently established that counsel's performance was ineffective based on her declaration and the record that was before the trial court at the hearing to vacate the plea.

Furthermore, like the defendants in *Sandoval* and *Martinez, supra*, there is additional corroborative evidence to support Ms. Rojas' claim.

Whereas Mr. Sandoval and Mr. Martinez had corroborative evidence in declarations and statements made by their former attorneys (*Sandoval*, 171 Wn.2d at 166-68; *Martinez*, 161 Wn. App. at 439), Ms. Rojas' ineffectiveness claim found corroboration in the record of the 1991 plea and sentencing hearing itself.

In 1991, Ms. Rojas conversed with her defense attorney at the plea hearing and pleaded guilty with the aid of an interpreter/translator. (CP 80-81) Ms. Rojas agreed that she had discussed the matter with trial counsel and understood the statements in her plea of guilty, that she was submitting an *Alford* plea even though she did not believe she was guilty in order to avoid a potentially harsher penalty. (CP 81-83, 86) The court accepted Ms. Rojas' plea and immediately turned to sentencing. (CP 84-85, 87) After the court announced the sentence, Ms. Rojas asked, "After I've served my sentence, do you know if they're going to get me out to Mexico?" (CP 89) The court answered, "I don't know. I'm not in charge of that. But it is entirely possible." (*Id.*)

Ms. Rojas declared that she was unaware of the deportation consequences of her plea prior to pleading guilty. She argued, through counsel, that her attorney never informed her of the consequences of pleading guilty. At the hearing to vacate the plea, counsel offered for Ms. Rojas to testify that she did not know pleading guilty would automatically

result in deportation because she had been informed otherwise by counsel. (RP 13) Ms. Rojas' statements and offers of proof regarding counsel's performance are corroborated by her colloquy with the court at sentencing in 1991 that she was uninformed about the deportation consequences when she pleaded guilty. When prompted by Ms. Rojas' questions, the trial court could have questioned matters further and clarified whether defense counsel had informed Ms. Rojas of the immigration consequences. This record sufficiently established that Ms. Rojas was never informed of the immigration consequences by her attorney, else she would not have asked the court for clarification otherwise.

There is direct evidence in Ms. Rojas' declaration to support her ineffective assistance claim, and there is at least circumstantial corroborative evidence from the plea and sentencing hearing itself to support Ms. Rojas' ineffective assistance claim. Ms. Rojas established that defense counsel failed to advise her of the immigration consequences of pleading guilty. Even in 1991, counsel had an affirmative duty to advise Ms. Rojas of the clear immigration consequences of pleading guilty to delivery of cocaine – i.e., that she would be automatically deportable. Since he failed to do so, pursuant to *Padilla*, defense counsel's representation fell below an objective measure of reasonableness.

The court erred by finding that Ms. Rojas failed to establish ineffective assistance of counsel. As such, Ms. Rojas respectfully requests that this Court reverse and either find prejudice based on the record below and argument herein, or, at a minimum, remand for an evidentiary hearing on the prejudice issue.

**C. The court erred by failing to find that Ms. Rojas was prejudiced by counsel's ineffective assistance where he failed to adequately advise her on the deportation consequences and, absent the faulty advice, she would have proceeded to trial on a duress defense rather than face automatic deportation.**

Ms. Rojas was prejudiced by her attorney's ineffective representation. Deportation is an incredibly hefty penalty in itself, and had Ms. Rojas known that such a consequence was certain, she would have taken her chances at trial with a duress defense. Ms. Rojas respectfully requests that this Court reverse and remand to allow her to withdraw her guilty plea. In the event that this Court decides that the trial court did not sufficiently pass upon the prejudice issue below, Ms. Rojas requests that the matter be remanded for an evidentiary hearing and appropriate findings on the prejudice issue.

The final prong of an ineffective assistance of counsel claim requires the defendant or petitioner to show that counsel's deficient performance prejudiced the defendant. *Cervantes*, 282 P.3d at 100. "In satisfying the prejudice prong, a petitioner must show that there is a

reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial.” *Jagana*, 170 Wn. App. at 57 (citing *Sandoval*, 171 Wn.2d at 175). “A ‘reasonable probability’ exists if [the defendant or petitioner] ‘convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances.’” *Id.* at 1166-67 (quoting *Sandoval*, 171 Wn.2d at 175 (quoting *Padilla*, 130 S.Ct. at 1485)). “This standard of proof is ‘somewhat lower’ than the common ‘preponderance of the evidence’ standard.” *Sandoval*, 171 Wn.2d at 175 (quoting *Strickland*, 466 U.S. at 694). “[A] petitioner who shows prejudice under *Strickland* necessarily meets his burden to show actual and substantial prejudice on collateral attack.” *Jagana*, 170 Wn. App. at 36 (quoting *In re Personal Restraint of Crace*, 174 Wn.2d 835, 848, 280 P.3d 1102 (2012)).

Ms. Rojas’ case is on point with the prejudice established in *Sandoval* and *Martinez, supra*. In *Sandoval*, the defendant declared that he would not have pleaded guilty to third-degree rape if he knew the deportation consequence, and his counsel declared that the defendant was “very concerned” at the time of pleading about the risk of deportation. 171 Wn.2d at 168, 175. The Court acknowledged that the disparity in punishment if Mr. Sandoval had rejected the offer to plead guilty would have made it less likely that the defendant would have been rational in

refusing the plea. *Id.* (Mr. Sandoval faced 78-102 months on the second-degree rape charge and pleaded to third-degree rape, subjecting him to only 6-12 months). Nonetheless, the Court held that the deportation consequences of the guilty plea were a “particularly severe penalty...,” such that the defendant “would have been rational to take his chances at trial.” *Id.* at 175-76 (internal quotations omitted). The Supreme Court thus found that the defendant had been prejudiced by counsel’s ineffective assistance and vacated the defendant’s conviction. *Id.* at 176.

Similarly, in *Martinez* the defendant claimed in his appellate brief that he would not have pleaded guilty had he known of the deportation consequences, and his defense attorney declared that deportation was a “material factor” to the defendant. 161 Wn. App. at 443. Following the reasoning in *Sandoval, supra*, the *Martinez* Court held that “it may not seem rational that Mr. Martinez would refuse a very favorable plea offer...,” but the defendant’s claims otherwise along with counsel’s statement that deportation was a “material factor” was sufficient to establish prejudice. *Id.* Mr. Martinez was permitted to withdraw his plea, having satisfied both prongs for his ineffective assistance claim.

Here, Ms. Rojas established prejudice in support of her ineffective assistance of counsel claim. First, like in *Sandoval* and *Martinez, supra*, Ms. Rojas declared that she would not have pleaded guilty if she had

known of the immigration consequences, and that she would have instead proceeded to trial with a duress defense due to her boyfriend's involvement in the incidences below. (RP 8; CP 21) Ms. Rojas was adamant during the plea hearing that she believed she had done nothing wrong, that the allegations against her were incorrect. (CP 81-82, 85-86) And deportation was clearly a concern to Ms. Rojas, since she asked the court itself about the deportation consequences. (CP 89) "Deportation is an integral part –indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla*, 130 S.Ct. at 1480.

This case warrants the same result as *Sandoval* and *Martinez*, *supra* – vacation of the plea – so that Ms. Rojas can be properly advised before giving up her rights to a trial and facing deportation and permanent exile. So long as Ms. Rojas' conviction stands, she is not only deportable, but she is generally unable to ever lawfully enter the United States again. See 8 U.S.C. §1182(2)(A)(i)(II) ("any alien convicted of... a violation of...any law of regulation of a State...relating to a controlled substance ... is inadmissible.")

Ms. Rojas has or had at least one child in the United States, and she returned to the United States in 2005 to try to help when that girl was raped and assaulted. Clearly, Ms. Rojas has significant ties to this

country, and deportation combined with future inadmissibility to the United States carries a particularly weighty concern. Accordingly, given the significant immigration concerns, which Ms. Rojas declared she would have taken the chance to try to avoid through trial, prejudice has been established and Ms. Rojas' plea should now be vacated.

Alternatively, if this Court does not find prejudice at this time, Ms. Rojas respectfully requests that the matter be remanded for an additional evidentiary hearing on this issue, like in *Padilla* and *Jagana, supra*. In *Jagana* and *Padilla*, the Courts held that “constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to automatic deportation.” *Padilla*, 130 S.Ct. at 1478; *see also Jagana*, 170 Wn. App. at 58. In other words, the defendants satisfied the first prong of showing ineffective assistance of counsel. *Id.* But in *Padilla*, the Court held that the defendant's ultimate success would depend on whether he could establish prejudice from counsel's performance, a matter the United States Supreme Court refused to reach since it was not passed on by the Kentucky court below. *Padilla*, 130 S.Ct. at 1478, 1483-84, 1487. Similarly, the Court in *Jagana* remanded for an evidentiary hearing because the “record is inadequate to decide the question of prejudice” and the issue “should be decided by the trial court...” *Jagana*, 170 Wn. App. at 59.

Here, there is either sufficient record for this Court to decide the prejudice issue in Ms. Rojas' favor, as set forth above, or the matter should be remanded for an evidentiary hearing so that the prejudice issue can specifically be passed on by the trial court after opportunity to receive additional evidence pertaining to this prejudice issue.

F. **CONCLUSION**

Ms. Rojas' claim pursuant to *Padilla, supra*, was not time-barred. Furthermore, she established that counsel's representation was ineffective and that she was prejudiced as a result. Ms. Rojas respectfully requests that the trial court's decision be reversed and her plea vacated. Alternatively, Ms. Rojas requests that the matter be remanded for further evidentiary hearing.

Respectfully submitted this 12<sup>th</sup> day of November, 2013.

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918

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 November 12, 2013, 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  
c/o Nichols Law Firm, PLLC  
PO Box 19203  
Spokane, WA 99219

Having obtained prior permission from Yakima County Prosecutor's Office, I also served David Trefy at TrefryLaw@wegowireless.com by e-mail.

Dated this 12<sup>th</sup> day of November, 2013.

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
PO Box 19203  
Spokane, WA 99219  
Phone: (509) 280-1207  
Fax: (509) 299-2701  
Wa.Appeals@gmail.com