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NO. 87297-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIGIFREDO GARCIA BUENO,

Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for responding to collateral attacks upon criminal convictions that are filed in state courts. *See* RAP 16.6(b).

WAPA is interested in cases, such as this, which have wide-ranging impact on the prosecution system. Recognition of the limited nature of the jurisdiction that has been conferred upon the courts by the legislature with regard to collateral attacks upon criminal convictions will foster respect for the courts by ensuring the finality of judgments.

II. ISSUES PRESENTED

1. Whether equitable tolling allows a defendant to raise an ineffective assistance of counsel challenge with respect to advice regarding the immigration consequences of a guilty plea, after the expiration of the time limit in RCW 10.73.090, when no extraordinary circumstances prevented the defendant from filing the claim in a timely manner?

2. Whether equitable tolling allows a defendant to raise an ineffective assistance of counsel challenge with respect to advice regarding

the immigration consequences of a guilty plea, after the expiration of the time limit in RCW 10.73.090, when there was no bad faith, deception, or false assurances by the State with respect to the immigration consequences of the conviction?

3. Whether the instant collateral attack must be denied on the merits as trial counsel provided accurate information and the trial court found the defendant's claim that he would not have pled guilty if he knew he would ultimately be deported to be incredible?

III. STATEMENT OF FACTS

Sigifredo Garcia Bueno was charged with one count of delivery of methamphetamine and one count of conspiracy to deliver methamphetamine on August 9, 2004. CP 1. Bueno hired Jerry Talbott to represent him on these charges. 2RP 10.¹ Mr. Talbott, a former prosecutor, was well versed in both criminal law and immigration law. 2RP 30.

Mr. Talbott tried to convince the deputy prosecuting attorney ("DPA"), who was handling Bueno's case, to dismiss the case on the grounds that Bueno was "totally innocent." 2RP 32. This effort failed. Mr. Talbott tried to negotiate a lesser charge of simple possession. 2RP 32. This effort also failed, with the only options being offered to take both charges to trial

¹The verbatim report of proceedings consist of two volumes. The transcript of the February 24, 2005, plea hearing will be cited as "1RP". The transcript of the August 20, 2010, hearing will be cited as "2RP".

or to plead guilty to the conspiracy, with credit for time served. 2RP 33.

Mr. Talbott took both options to Bueno. He explained to Bueno that the State would likely prevail in a trial due to the strength of their evidence and the biases of the local jury pool. 2RP 33. A loss at trial would result in a prison term and immediate deportation. 2RP 21, 25-26, 33-34.

Accepting the plea offer would prevent immediate deportation as Bueno would not be returned to jail. 2RP 34. While the offense is an aggravated felony, deportable crime, it may be years before Immigration finds him. 2RP 34. Mr. Talbott explained that if Bueno kept his nose clean in the interim, the laws may change in Bueno's favor by the time Immigration begins deportation proceedings. 2RP 34-35. One possibility for remaining in the country is to seek a pardon. 2RP 17, 18, 26. Bueno ultimately decided to accept the plea offer. 2RP 35.

Bueno, with the assistance of an interpreter, completed a statement of defendant on plea of guilty that informed him that a plea of guilty to a crime "is grounds for deportation." CP 5; 1RP 3. During the change of plea hearing, the judge informed Bueno that "[t]here could be immigration consequences if you are not a citizen of the United States." 1RP 4. Bueno told the judge that he understood the consequences of pleading guilty, that he was doing so freely and voluntarily, and that no one had made any promises to get him to plead guilty. 1RP 6.

The State's evidence was summarized by the DPA. 1RP 6-7. Bueno personally stated that he "agreed" with the DPA's summary. 1RP 7. These facts supported the charge, and the judge found Bueno guilty. 1RP 8.

The State explained its sentencing recommendation to the judge as follows: "Your Honor, our recommendation is based upon his lack of criminal history and the fact he will very likely be deported." 1RP 8. Although given an opportunity to personally address the court, Bueno did not ask any questions about the likelihood of deportation and he did not ask the court to stop the proceedings so he could preserve his ability to remain in the United States. *Id.* Bueno ultimately left the courtroom and returned to the community, at the end of the hearing. 1RP 10; CP 11 (7 days of confinement imposed with credit for 7 days served).

Although the judgment and sentence informed Bueno that he was required to file any collateral attack on the conviction within one year of the February 24, 2005, conviction, CP 12 ¶ 4.6, Bueno first filed a motion to withdraw his guilty plea on August 24, 2009. CP 17. The impetus for the motion was the initiation of removal proceedings by the Department of Homeland Security on August 25, 2008. CP 20.

An evidentiary hearing was held on Bueno's motion on August 20, 2010. Bueno testified during the hearing that Mr. Talbott told him his chances of prevailing at trial were slim, that a conviction at trial would result

in a prison sentence followed by an immediate deportation, that a guilty plea would allow him to avoid Immigration in the short term if he kept his nose clean, and that a pardon could be sought when Immigration did contact him. 2RP 10-11, 13-15, 17-18. Bueno's memory of other events regarding the guilty plea was poor, as he claimed no recollection of reading or having read to him the information regarding the immigration consequences of a guilty plea that appeared in the statement of defendant on plea of guilty or of the judge's statement on the same topic. 2RP 16-17. Bueno ultimately claimed that he would have risked a trial as he was "clean", rather than pled guilty because his papers were important to him. 2RP 21.

Bueno's testimony was corroborated on many key points by his wife. She acknowledged that Mr. Talbott laid out the options, and that he explained a guilty plea may give him "a lot of years" before Immigration found him. 2RP 25-26. Mr. Talbott also explained that once Immigration did contact Bueno, Mr. Talbott would assist him in seeking a pardon. 2RP 27. Bueno's wife intimated that Bueno would not have pled guilty if he knew that the plea would result, some day, in his deportation. *Id.*

Mr. Talbott testified as to the information he provided to Bueno prior to the guilty plea, and the efforts he made to achieve a resolution to the case that would allow Bueno to avoid deportation. 2RP 31-36. The advice included a warning to Bueno that if he was ever picked up by Immigration he

would be “out of here” because the offense was an “aggravated felony.” 2RP 36. Mr. Talbott made no promises to Bueno that he could avoid deportation in the future. All Mr. Talbott told Bueno was that Immigration law is changing and that something may enable him to avoid deportation in the future. 2RP 38.

The judge, who presided over the hearing, found that Bueno knew that a guilty plea would buy him a few more years in the United States. 2RP 50. The judge further found that he was properly advised by Mr. Talbott, CP 76, COL 1 and 9, and that Bueno got exactly what he was seeking at the time he entered the guilty plea. 2RP 51; CP 73. Judge McCarthy

specifically disbelieve[d] Mr. Bueno-Gracia’s testimony and his sworn statement in which he asserts that he did not understand the plea statement, was ignorant of the immigration consequences of the plea, wanted to go to trial, and only pleaded guilty because his attorney told him to. The Court further finds his assertion that he did not understand the Statement of Defendant on Plea of Guilty or the guilty plea process to be incredible.

CP 73-74. *Accord* CP 78-79, COL 1-3. Bueno’s motion to withdraw guilty plea was, therefore, denied. CP 76.

Bueno appealed the denial of his motion to vacate judgment. CP 75. After the Court of Appeals affirmed the superior court’s decision, this Court granted a petition for review that Bueno’s non-attorney wife prepared.

IV. ARGUMENT

A. The Requirements for Equitable Tolling Have Not Been Meet in this Case.

A court's authority to reopen a judgment in a criminal case arises from either a statute or the constitution. The constitutional authority, which is contained in article 1, § 13, is very narrow and does not permit challenges that go beyond the face of a final judgment of a court of competent jurisdiction. *In re Runyan*, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993). Any inquiry beyond the face of a final judgment results from legislative authorization. There is none that applies to Bueno's untimely ineffective assistance of counsel claim.

Legislative authorization for review beyond the face of a final judgment may be found in the habeas corpus statute, RCW 7.36.130. RCW 7.36.130 is derived from a statute passed by the first legislature of Washington Territory. As first enacted, the territorial habeas corpus statute was an *absolute* prohibition against collateral review of a facially-valid judgment by a court of competent jurisdiction. Laws of 1854, p. 213, § 445. That restriction was repeatedly upheld by this Court. *In re Lybarger*, 2 Wash. 131, 25 P. 1075 (1891); *In re Grieve*, 22 Wn.2d 902, 158 P.2d 73 (1945).

In 1947, the habeas corpus statute was amended to allow such challenges when the challenge is based upon a constitutional violation. Laws of 1947, chapter 256, § 3. "[T]hese statutory changes have never affected,

nor could they affect, the core constitutional inquiry protected by our state suspension clause.” *Runyan*, 121 Wn.2d at 443.

In the 1970’s, the Supreme Court created personal restraint petitions as the procedural mechanism for carrying out the Legislature’s grant of jurisdiction at the appellate court level. *See generally* RAP 16.1(c); *Toliver v. Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1987). These procedural rules, however, did not override or alter the restrictions placed upon the courts’ review of collateral attacks by the Legislature. *See In re Rafferty*, 1 Wash. 382, 25 P. 465 (1890).²

In 1989, the Legislature acted to restore some finality to criminal judgments by limiting the authority it had previously granted to courts to look behind the face of a judgment and sentence. Specifically, the Legislature restricted the length of time a prisoner could wait before bringing a petition. *See* RCW 10.73.090; RCW 10.73.100. This time-bar prevents the filing of a collateral attack based upon ineffective assistance of counsel (“IAC”) more than one year after the conviction becomes final. *See, e.g., In re Pers. Restraint of Weber*, No. 85992-2, ___ Wn.2d ___, ___ P.3d ___ (Sep. 6, 2012)

²Once the legislature acted to expand jurisdiction beyond that preserved by Const. art. I, § 13, Const. article 4, § 4 permits the court to adopt procedural rules for dealing with the *legislatively* expanded scope of jurisdiction. *Holt v. Morris*, 84 Wn.2d 841, 529 P.2d 1081 (1974), *overruled on other grounds, Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975). To the extent any procedural rules regarding collateral attacks conflict with the legislature’s substantive grant of authority, the statute controls. *See, e.g., In re Personal Restraint of Johnson*, 131 Wn.2d 558, 563-65, 933 P.2d 1019 (1997).

(dismissing collateral attack that asserted an IAC claim as time-barred); *Shumway v. Payne*, 136 Wn.2d 383, 400, 964 P.2d 349 (1998) (prohibiting the filing of an IAC claim beyond the 1-year period authorized by RCW 10.73.090); *Runyan*, 121 Wn.2d at 436 (dismissing as time-barred petitioner Runyan's collateral attack that asserted a claim of ineffective assistance of counsel).

There are a number of statutory exceptions to the time limit in RCW 10.73.090. *See* RCW 10.73.100. Bueno, however, asserted none of these exceptions in the trial court, the Court of Appeals, or in his petition for review. *See generally* CP 17-46; 2RP 40-45, 48-52; Appellant's Brief; Petition for Review. Bueno relied solely upon the non-statutory doctrine of "equitable tolling." *Id.*

Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed. *In re Personal Restraint of Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). Equitable tolling is used sparingly in collateral attacks so as to not undercut the finality of judgments. *Id.*, at 67. *Accord Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("Any invocation of equity to relieve the strict application of a statute of limitation must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.").

A petitioner seeking the equitable tolling of the RCW 10.73.090 time limit has a high hurdle to overcome. The petitioner must establish, at a minimum, ““(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.”” *Bonds*, 165 Wn.2d at 146 (Sanders, J., dissenting) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). A petitioner, in Washington, may also be required to demonstrate bad faith, deception, or false assurances by the defendant. *Bonds*, 165 Wn.2d at 141. To date, no petitioner has satisfied the test for equitable tolling contained in *Bonds*.³ Equitable tolling does not eliminate the statute of limitations, it merely extends the period for a length of time equal to the disability. *See, e.g., Hazel v. Van Beek*, 135 Wn.2d 45, 954 P.2d 1301 (1998) (equitable tolling improperly applied where petitioner did not explain how the 1984 bankruptcy action prevented her from enforcing her judgment between August 1984 and November 2, 1993)

The federal courts have determined that the time limitation for filing a federal habeas corpus action set forth at 28 U.S.C. § 2244(d) is subject to equitable tolling. *Holland v. Florida*, ___ U.S. ___, 130 S. Ct.. 2549, 2560,

³Prior to *Bonds*, the Court of Appeals applied a less stringent test for equitable tolling. *See Bonds*, 165 Wn.2d at 142 (citing *In re Personal Restraint of Hoisington*, 99 Wn. App. 423, 431, 993 P.2d 296 (2000), and *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), *review denied*, 149 Wn.2d 1020 (2003)). It is doubtful that these Court of Appeals’ decisions survive *Bonds*.

177 L. Ed. 2d 130 (2010). Although the federal courts do not require proof of governmental misconduct, the federal courts do recognize that “[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if ‘extraordinary circumstances’ beyond a prisoner’s control make it impossible to file a petition on time.” *Calderon v. U.S. Dist. Court (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997), *cert. denied*, 523 U.S. 1061 (1998), *overruled in part on other grounds, Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999) (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996)). Equitable tolling does not eliminate the statute of limitations, it merely extends the period for a brief length of time. *See, e.g., Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999) (no equitable tolling where petitioner waited additional six months to act, after elimination of alleged extraordinary circumstances); *Marchuk v. Lowe*, 2012 U.S. Dist. LEXIS 48335, at *12-13 (E.D. PA Mar. 15, 2012) (petitioner who waited one year after the United States Supreme Court issued its opinion to file habeas was not entitled to equitable tolling).⁴

Equitable tolling is not available for “what is best a garden variety claim of excusable neglect”. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). Application of this

⁴GR 14.1(b) permits the citation of these unpublished opinions.

principle has led the federal courts to reject equitable tolling predicated upon deficiencies related to petitioner's pro se status, lack of knowledge and expertise,⁵ delay in receiving the state disposition,⁶ delay in receiving transcripts,⁷ deficiencies in the prison law library,⁸ erroneous advice from a lawyer,⁹ hospitalization,¹⁰ prison lockdowns,¹¹ the merits of the collateral attack,¹² illiteracy,¹³ lack of knowledge of English if a petitioner has access to a translator or other assistance,¹⁴ and prior unsuccessful efforts to be heard.¹⁵ Equitable tolling was available when a petitioner's reliance upon

⁵See, e.g., *Johnson v. United States*, 544 U.S. 295, 311, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194 (2001).

⁶See, e.g., *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237 (2003); *Geraci v. Senkowski*, 23 F. Supp.2d 246, 252-53 (E.D. N.Y. 1998), *aff'd*, 211 F.3d 6 (2nd Cir.), *cert. denied*, 531 U.S. 1018 (2000).

⁷See, e.g., *Gassler v. Bruton*, 255 F.3d 492, 495 (8th Cir. 2001).

⁸See, e.g., *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000)(en banc).

⁹See, e.g., *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.), *cert. denied*, 534 U.S. 944 (2001) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling").

¹⁰See, e.g., *Rhodes v. Senkowski*, 82 F. Supp.2d 160 (S.D.N.Y. 2000).

¹¹See, e.g., *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir.1998), *cert denied*, 526 U.S. 1040 (1999).

¹²See, e.g., *Helton v. Sec'y for the Department of Corrections*, 259 F.3d 1310, 1314-15 (11th Cir. 2001), *cert. denied*, 535 U.S. 1080 (2002).

¹³See, e.g., *Schneider v. McDaniel*, 674 F.3d 1144 (9th Cir. 2012).

¹⁴See, e.g., *Pabon v. Mahanoy*, 654 F.3d 385, 400-02 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 2430 (2012).

¹⁵See, e.g., *Jones v. Morton*, 195 F.3d 153, 160 (3rd Cir. 1999).

prison officials to comply with his instructions regarding timely submitted petition was ignored,¹⁶ when the court lost a timely filed petition,¹⁷ and when a petitioner was mentally incompetent to assist his counsel.¹⁸

Since the United States Supreme Court issued its opinion in *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the federal courts have considered numerous requests to equitably toll the time limit for filing a habeas corpus petition raising an IAC claim related to immigration consequences. The requests for equitable tolling have been uniformly rejected. *See, e.g., Francisco v. Yelich*, 2012 U.S. Dist. LEXIS 86484 (E.D. N.Y. June 21, 2012); *Henriquez v. United States*, 2012 U.S. Dist. LEXIS 62218 (E.D. N.C. May 2, 2012). These courts recognize that

the alleged disparity between [the petitioner's] crime and the consequences of deportation is not an extraordinary circumstance. The term "extraordinary circumstance" refers not to the uniqueness of the petitioner's circumstances," but rather to the severity of the obstacle that prevented the petitioner from filing on time.

Vasquez v. Ryan, 2012 U.S. Dist. LEXIS 38955, at *12 (E.D. Penn. Mar. 21, 2012).

Here, Bueno identified no external impediment to his raising the IAC

¹⁶*See, e.g., Miles v. Prunty*, 187 F.3d 1104 (9th Cir. 1999).

¹⁷*See, e.g., Corjasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002).

¹⁸*See, e.g., Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), *abrogated by Woodford v. Garceau*, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003).

claim within the statutory one-year period. Bueno was not in custody and could access the county law library in order to draft his own collateral attack. Although Bueno speaks no English and is functionally illiterate, his wife is "totally bilingual", 2RP 32, and is fully capable of preparing legal pleadings.¹⁹ No government actor prevented Bueno from hiring an attorney,²⁰ obtaining assistance from legal aid, or obtaining assistance from an Immigration Rights organization. Bueno knew the factual predicate for his claim at the time he entered his guilty plea.²¹ Washington case law, in existence on the day he entered his guilty plea, allowed for relief from judgment based upon erroneous advice regarding a collateral consequence of a guilty plea. *See, e.g., State v. Stowe*, 71 Wn. App. 182, 187-88, 858 P.2d 267 (1993). Bueno's request that the time limit in RCW 10.73.090 be "tolled" for five years must be denied.

¹⁹Bueno's wife prepared the petition for review in this case. Presumably in recognition of the Bueno's language and literacy limitations, this Court accepted the pleading despite the absence of a familial exception to RCW 2.48.180. *See City of Seattle v. Shaver*, 23 Wn. App. 601, 597 P.2d 935 (1979) (layman husband could not represent wife).

²⁰There is no constitutional right to counsel at public expense for the filing of a collateral attack. *See generally Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539 (1987); RCW 10.73.150(4).

²¹This fact distinguishes Bueno's case from that of the petition in *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), *review denied*, 149 Wn.2d 1020 (2003). Bueno, unlike Littlefair, was advised that his conviction carried immigration consequences.

B. Bueno has Established Neither Prejudice nor Deficient Performance

A successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *In re Personal Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Prejudice requires a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Bueno cannot satisfy either prong.

First, Judge McCarthy found that Mr. Talbott provided correct information to Bueno regarding the immigration consequences of a guilty plea. Mr. Talbott told Bueno the offense was an "aggravated felony" and that if found by Immigration, Bueno would be deported for the offense. Mr. Talbott's statement that a request for a pardon could be filed in the future if Bueno did not incur any other criminal convictions, merely recognized that Washington's governors have issued pardons in the past to individuals facing deportation. *See, e.g.*, Jonathan Martin, "Gregoire, other governors reluctant to grant clemency", *Seattle Times*, June 20, 2010, available at http://seattletimes.com/html/localnews/2012168458_clemency21m.html (last accessed Sept. 21, 2012); Susan Gilmore, "Locke offers key for some offenders", *Seattle Times*, June 22, 2004, available at <http://www.seattlepi.com/news/article/Locke-offers-key-for-some-offender>

s-1147780.php (last accessed Sept. 21, 2012). Mr. Talbott's statement that Immigration law may change for the better, merely recognizes that different administrations set different priorities. *See, e.g.*, Peter Wallsten, "U.S. will stop deporting some illegal immigrants who came here as children", *Washington Post*, June 15, 2012, available at http://www.washingtonpost.com/politics/us-will-stop-deporting-some-illegal-immigrants-who-came-here-as-children/2012/06/15/gJQANBbseV_story.html (last accessed Sep. 21, 2012).

Second, Bueno's claim that he would not have pled guilty if he knew deportation was a certainty was not believed by Judge McCarthy. Judge McCarthy's credibility determination is binding upon an appellate court. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) ("Credibility determinations are for the trier of fact and cannot be reviewed on appeal."). Bueno entered a guilty plea to secure the possibility of remaining in the United States for a few more years.

Bueno claims, in his supplemental brief, that prejudice is established because "[d]eportation should not have been inevitable for Bueno." Petition for Review, at 16. Bueno contends that his attorney should have obtained an "immigration-safe' disposition." *Id.*, quoting Washington Defender Association Standards for Indigent Defense, at 17.

Bueno's argument ignores the fact that Mr. Talbott met with the prosecutor numerous times in an attempt to secure either a dismissal of charges or an amendment to the "immigration-safe" offense of possession of a controlled substance. Bueno's argument also ignores the fact that a defendant has no means to compel a prosecutor to offer an "immigration-safe" charge or disposition. Prejudice cannot and should not be based upon the remote possibility that a defendant might obtain an "immigration-safe" disposition if s/he is just given another chance with another prosecutor.

Deficient performance is also not shown by the fact that defense attorney failed to obtain an immigration-safe resolution. Prosecutors take an oath to obey and uphold the constitutions of the United States and the State of Washington. The Constitution grants Congress the power to "establish a uniform Rule of Naturalization." Art. I., § 8, cl. 4. Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and expulsion from our borders. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589, 72 S. Ct. 512, 96 L. Ed. 586 (1952). The States enjoy no power with respect to the classification of aliens, and the states are generally preempted from acting with respect to immigration by the Supremacy Clause. See, e.g., *Arizona v. United States*, ___ U.S. ___, 132 S. Ct. 2492, 183 L.

Ed. 2d 351 (2012); *Plyler v. Doe*, 457 U.S. 202, 225, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) . Neither judges nor prosecutors may adopt procedures that merely displace congressional choices of policy. *See, e.g., United States v. Maung*, 320 F.3d 1305, 1308-10 (11th Cir. 2003) (it is improper for courts to adjust sentences solely to avoid deportation consequences); *State v. Cortez*, 73 Wn. App. 838, 842, 871 P.2d 660 (1994) (it is improper for courts to vacate convictions solely to avoid harsh deportation consequences; quoting *Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982). *Accord Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S. Ct. 399, 402, 85 L.Ed. 581 (1941) (“Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”).

The federal constitution’s equal protection clause requires that an alien born resident be treated the same as a citizen in most respects. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). Sympathy for the unique hardship that an alien born citizen will face upon conviction of a crime does not create a sufficient basis for adopting an “immigration-friendly” charging or plea disposition scheme. The effect of adopting such a scheme “would be to favor aliens with more lenient sentences than citizens of this country who commit the same crime and have

the same criminal history.” *United States v. Aleskerova*, 300 F.3d 286, 299-301 (2d Cir. 2002).

Washington prosecutors, moreover, are subject to statutes which preclude consideration of a defendant’s alienage in determining what charges to file or what concessions to offer in exchange for a guilty plea. *See, e.g.*, RCW 9.94A.340 (“prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.”); RCW 9.94A.411 (evidentiary sufficiency should determine what charges will be filed). Adherence to the principles contained in these statutes have all but eliminated disparities by race in prosecutorial decision making in Washington. *See, e.g.*, R. Engen, R. Gainey, and S. Steen, *The Impact of Race and Ethnicity on Charging and Sentencing Processes for Drug Offenders in Three Counties of Washington State*, at 2, 67 (Dec. 1999) (the data provided no evidence that race and ethnicity are important factors affecting charging decisions for drug offenders; once legal factors are controlled, the only extra-legal factors affecting prosecutor's recommended sentence length is whether the case was convicted at trial); R. Crutchfield, J. Weis, T. Engen, and R. Gainey, *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County*, at 58 (Nov. 1995) (the few observed disparities did not reflect racially-based decisions by prosecutors, but were likely related to legal, economic, and

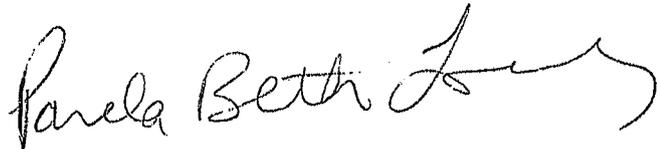
social factors).

Finally, prosecutors are subject to professional standards that prohibit consideration of a defendant's national origin in considering what plea agreement to offer the defendant. *See, e.g.*, National District Attorneys Association, National Prosecution Standards, Std 5-1.4 (3rd ed. 2009) ("Uniform Plea Opportunities."); RPC 8.4(g) and (h) (attorneys may not commit a discriminatory act based upon national origin).

V. CONCLUSION

WAPA respectfully requests that this Court deny Bueno's untimely collateral attack.

Respectfully submitted this 21st day of September, 2012.

A handwritten signature in cursive script that reads "Pamela Beth Loginsky". The signature is written in black ink and is positioned above the typed name and title.

Pamela B. Loginsky, WSBA 18096
Staff Attorney



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Positive
As of: Sep 21, 2012

**WALTER RUIZ HENRIQUEZ, Petitioner, v. UNITED STATES OF AMERICA,
Respondent.**

NO. 5:06-CR-232-FL, NO. 5:11-CV-142-FL

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
NORTH CAROLINA, WESTERN DIVISION**

2012 U.S. Dist. LEXIS 62218

**April 30, 2012, Decided
May 2, 2012, Filed**

SUBSEQUENT HISTORY: Appeal dismissed by, Certificate of appealability denied *United States v. Ruiz Henriquez*, 2012 U.S. App. LEXIS 18238 (4th Cir. N.C., Aug. 27, 2012)

PRIOR HISTORY: *Henriquez v. United States*, 2011 U.S. Dist. LEXIS 154955 (E.D.N.C., July 26, 2011)

COUNSEL: [*1] For Walter Ruiz Henriquez, also known as Walter Alexander Ruiz also known as Carlos (5:06-cr-00232-FL All Defendants), Defendant: Joshua W. Willey, LEAD ATTORNEY, Mills & Willey, New Bern, NC.

For USA (5:06-cr-00232-FL All Defendants), Plaintiff: Imelda J. Pate, LEAD ATTORNEY, District Attorney's Office, Kinston, NC; Seth Morgan Wood, LEAD ATTORNEY, U. S. Attorney's Office, Raleigh, NC.

Walter Ruiz Henriquez (5:11-cv-00142-FL), Petitioner, Pro se, Petersburg, VA.

JUDGES: LOUISE W. FLANAGAN, United States District Judge.

OPINION BY: LOUISE W. FLANAGAN

OPINION

ORDER

This matter comes before the court on the memorandum and recommendation ("M&R") of United States Magistrate Judge William A. Webb (DE # 36) regarding petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (DE # 28) and respondent's motion to dismiss (DE # 32). The magistrate judge recommends the court grant respondent's motion to dismiss and deny petitioner's motion to vacate. Petitioner objected to the M&R, and respondent filed a response to petitioner's objection. In this posture, the issues raised are ripe for ruling. For the reasons that follow, the court overrules petitioner's

objections and grants respondent's [*2] motion to dismiss.

STATEMENT OF THE CASE

On September 14, 2006, petitioner was charged with conspiracy to distribute and possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Petitioner also was charged with possession with the intent to distribute more than five hundred (500) grams of cocaine, in violation of 21 U.S.C. § 841(a). On November 21, 2006, petitioner entered a plea of guilty, pursuant to a plea agreement, to the conspiracy charge. On February 21, 2007, this court sentenced petitioner, *inter alia*, to a term of one hundred eighty-eight (188) months imprisonment. Petitioner did not file a direct appeal.

Petitioner filed his § 2255 petition on March 28, 2011. In his petition, petitioner asserts that he received ineffective assistance of counsel because his counsel failed to inform him, before he pled guilty, that he was subject to deportation in violation of the requirements of *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L. Ed. 2d 284 (2010). On June 16, 2011, respondent filed a motion to dismiss petitioner's petition. On July 5, 2011, petitioner filed a response to respondent's motion to dismiss.

On July 15, 2011, the court referred [*3] the matter to the magistrate judge. On July 26, 2011, the magistrate judge issued an M&R, finding that petitioner's § 2255 petition should be dismissed because it is time-barred. On August 17, 2011, petitioner filed an objection to the M&R, arguing that his § 2255 petition is timely because the Supreme Court's decision in *Padilla* is retroactively applicable and may be applied to cases on collateral review. Petitioner also argues that he is entitled to equitable tolling. Respondent responded to petitioner's objection to the M&R.

DISCUSSION

A. Motion to Dismiss

1. Standard of Review

The district court conducts a *de novo* review of those portions of a the magistrate judge's M&R to which specific objections are filed. See 28 U.S.C. § 636(b). The court does not perform a *de novo* review where a party makes only "general and conclusory objections that do

not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). Absent a specific and timely filed objection, the court reviews only for "clear error," and need not give any explanation for adopting the M&R. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005); [*4] *Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983). Upon careful review of the record, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Because a proceeding to vacate a judgment of conviction is a civil collateral attack, the burden of proof rests upon petitioner to establish a denial of constitutional rights by a preponderance of the evidence. *Johnson v. Zerbst*, 304 U.S. 458, 468-69, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Vanater v. Boles*, 377 F.2d 898, 900 (4th Cir. 1967); *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

2. Analysis

Petitioner objects to the magistrate judge's recommendation that his § 2255 petition be dismissed as time-barred. Petitioner asserts that his motion is timely pursuant to 28 U.S.C. § 2255(f)(3), because he filed it within one year of the United States Supreme Court's decision in *Padilla*. Section 2255(f)(3) provides that the one year period of limitation runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. ..."

The [*5] Fourth Circuit has not determined whether *Padilla* is retroactively applicable to cases on collateral review. However, the Fourth Circuit has stated, in an unpublished opinion, that "nothing in the *Padilla* decision indicates that it is retroactively applicable to cases on collateral review." *United States v. Hernandez-Monreal*, 404 F. App'x 714, 715 n* (4th Cir. 2010); see also, *Mendoza v. United States*, 774 F. Supp. 2d 791, 797-798 (E.D. Va. Mar. 24, 2011); *Mathur v. United States*, No. 7:07-CR-92-BO, 7:11CV-67-BO, 2011 U.S. Dist. LEXIS 56801, 2011 WL 2036701, *3 (E.D.N.C. May 24, 2011). Accordingly, the court finds that the rule announced in *Padilla* does not apply retroactively to cases on collateral review.

Petitioner next argues that the statute of limitations period should be tolled pursuant to the doctrine of

equitable tolling. The Fourth Circuit has held that "the AEDPA statute of limitation is subject to equitable tolling." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (en banc) (citations and quotations omitted). Nonetheless, the Fourth Circuit has noted the rarity in which equitable tolling applies. "Any invocation of equity to relieve the strict application of a statute of limitation must be guarded [*6] and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." Id. (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). "Principles of equitable tolling do not extend to garden variety claims of excusable neglect." *Rouse*, 339 F.3d at 246 (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)). Equitable tolling only is "appropriate when...extraordinary circumstances beyond [petitioner's] control prevented him from complying with the statutory time limit." *Rouse*, 339 F.3d at 246 (citation and quotations omitted). Generally, a petitioner seeking equitable tolling must demonstrate that he has been diligently pursuing his rights and that some extraordinary circumstances stood in his way to prevent him from filing a timely petition. See *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005); *Rouse*, 339 F.3d 238, 246.

Petitioner states that he is entitled to equitable tolling because the United States Marshals Service confiscated his legal materials, including his pre-sentence investigation report and plea agreement. Prison conditions such as lock-downs, misplacement of legal papers, and lack of access to legal materials typically [*7] are not grounds for equitable tolling. See *Akins v. United States*, 204 F.3d 1086, 1089 (11th Cir. 2000); *Murphy v. United States*, No. 5:04-CR-241-FI-1, 5:08-CV-534-FL, 2009 U.S. Dist. LEXIS 72742, 2009 WL 2579648, *2 (E.D.N.C. Aug. 17, 2009); *Fuller v. Kelly*, No. 7:09-CV-117, 2009 U.S. Dist. LEXIS 49726, 2009 WL 1675710, *2 (W.D. Va. June 15, 2009). Further, petitioner has not demonstrated how his lack of access to these materials prevented him from timely filing his § 2255 petition, despite having knowledge of the issue in this case. Accordingly, petitioner has not demonstrated that he diligently pursued his rights. Because petitioner has not demonstrated extraordinary circumstances to justify equitable tolling or that he pursued his rights diligently, he is not entitled to equitable tolling. Thus, petitioner's action is time-barred, and respondent's motion to dismiss is GRANTED.

B. Certificate of Appealability

The court now must determine whether petitioner is entitled to a certificate of appealability. *Rule 22(b)(1) of the Federal Rules of Appellate Procedure* provides in pertinent part that a § 2255 applicant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." [*8] *Fed. R. App. P. 22(b)(1)*. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). An applicant satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court likewise is debatable. See *Miller-El v. Cockrell*, 537 U.S. 322, 336-38, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001).

Petitioner has failed to meet the requirements for a certificate of appealability. The court properly dismissed petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and petitioner failed to make a "substantial showing" of the denial of a constitutional right. Petitioner has not shown that reasonable jurists would find that decision debatable. Therefore, petitioner is not entitled to a certificate of appealability.

CONCLUSION

For the reasons stated, petitioner's objection is without merit. Accordingly, following the recommendation of the [*9] magistrate judge, respondent's motion to dismiss (DE # 32) is GRANTED, and petitioner's § 2255 petition (DE # 28) is DISMISSED. The certificate of appealability is DENIED. The Clerk of Court is DIRECTED to close the case file.

SO ORDERED, this the 30th day of April, 2012.

/s/ Louise W. Flanagan

LOUISE W. FLANAGAN

United States District Judge



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Positive
As of: Sep 21, 2012

**ROBERT FRANCISCO, Petitioner, -against- BRUCE YELICH, SUPT. BARE
HILL CORRECTIONAL FACILITY, Respondent.**

12-CV-2243 (SLT)

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW
YORK**

2012 U.S. Dist. LEXIS 86484

**June 18, 2012, Decided
June 21, 2012, Filed**

COUNSEL: [*1] Robert Francisco, Petitioner, Pro se,
Malone, NY.

JUDGES: SANDRA L. TOWNES, United States
District Judge.

OPINION BY: SANDRA L. TOWNES

OPINION

MEMORANDUM AND ORDER

TOWNES, United States District Judge:

On May 3, 2012, petitioner filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. By order dated May 9, 2012, petitioner was granted thirty (30) days to either: (1) file an affirmation which states that he wishes to have this Court treat the § 2241 petition as a one brought pursuant to 28 U.S.C. § 2254; or (2) withdraw the § 2241 petition rather than having it

converted to a petition brought under § 2254.

On June 4, 2012, petitioner filed an affirmation in which he argued for the application of equitable tolling to the applicable statute of limitations. Upon review of petitioner's affirmation, it is clear that the instant 28 U.S.C. § 2254 petition is not timely, and that the arguments presented in petitioner's affirmation are insufficient to warrant equitable or statutory tolling. Therefore, for the reasons discussed below, the instant petition for a writ of habeas corpus is dismissed as time-barred.

Discussion

AEDPA

Section 2244(d)(1) of the Antiterrorism and Effective Death Penalty Act of [*2] 1996 ("AEDPA" or "Act"), which was signed into law on April 24, 1996, provides that "a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court" 28 U.S.C. § 2244(d)(1); see also *Lindh v. Murphy*, 521 U.S. 320, 327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997) (§ 2244 applies "to the general run of habeas cases . . . when those cases had been filed after the date of the Act."),

The one-year period generally runs from the date on which the state criminal judgment becomes final. See 28 U.S.C. § 2244(d)(1). Petitioner alleges that he pled guilty on March 13, 2009. See Affirmation at p. 1. Under New York law, petitioner had thirty (30) days from the date of his conviction to file a notice of appeal to the appropriate appellate court. See *NY. Crim. Proc. Law* § 460.10 (1)(a). Therefore, the judgment of conviction became final on or about April 13, 2009, when the time for filing a notice of appeal to the Appellate Division expired, see *Bethea v. Girdich*, 293 F.3d 577, 578 (2d Cir. 2002), and the statute of limitations for filing a petition for a writ of habeas corpus expired on April 13, 2010, one year after the conviction became final. Because [*3] the petition was filed on May 3, 2012, over two years after the limitations period expired, it is barred by 28 U.S.C. § 2244(d) unless tolling is applicable.

Tolling

Statutory tolling under § 2244(d)(2) does not impact the timeliness of the petition in this case. Petitioner states that he filed his motion to vacate judgment pursuant to *N. Y. Crim. Proc. Law* § 440.10 on November 24, 2010. See Affirmation at p. 1. The § 440.10 motion appears to have been denied on November 9, 2011. See Letter from the Appellate Division-Second Department dated March 27, 2012, annexed to Affirmation. Here, the § 440.10 motion, filed on November 24, 2010, has no effect for tolling purposes under § 2244(d)(2) because it was filed after the one-year statute of limitations expired on April 13, 2010. See *Doe v. Menefee*, 391 F.3d 147, 154 (2d Cir. 2004) (a stale collateral proceeding commenced after (he statute of limitations has run does not reset the limitations period); *Smith v. McGinnis*, 208 F.3d 13, 16-17 & n.2 (2d Cir. 2000).

Petitioner, relying on the Supreme Court's decision in *Padilla v. Kentucky*, U.S. , 130 S.Ct. 1473, 176 L. Ed. 2d 284 (2010), argues that the one-year limitations period provided under 28 U.S.C. § 2244(d)(1) [*4] should be equitably tolled because his trial counsel's failure to warn him of the immigration consequences of his guilty plea deprived him of effective assistance of counsel. The Second Circuit has not yet decided whether

Padilla applies retroactively. However, the Court finds that to the extent *Padilla* sets forth a newly recognized constitutional rule of criminal procedure, it should not be deemed retroactive to cases on collateral review. See *Rosales v. Artus*, No. 10 CV 2742, 2011 U.S. Dist. LEXIS 96868, 2011 WL 3845906, at *8 (E.D.N.Y. Aug. 30, 2011) (holding that *Padilla* does not apply retroactively) (citing *Hamad v. United States*, No. 10 CV 5829, 11 CV 550, 2011 U.S. Dist. LEXIS 45851, 2011 WL 1626530 (E.D.N.Y. Apr. 28, 2011)); *Ellis v. U.S.*, 806 F.Supp.2d 538 (E.D.N.Y. June 3, 2011) (same); *Hamad v. United States*, No. 10 CV 5829, 11 CV 550, 2011 U.S. Dist. LEXIS 45851, 2011 WL 1626530, at *2 (E.D.N.Y. Apr. 28, 2011) (same); but see *United States v. Obonaga* No. 10 CV 2951, 2010 U.S. Dist. LEXIS 64954, 2010 WL 2710413, at *1 (E.D.N.Y. Jun. 30, 2010) (noting that it is "unclear if *Padilla* applies retroactively," and that "reasonable jurists have disagreed about whether *Padilla* has retroactive effect").

Moreover, the Court finds that the requirements for application of equitable tolling have not [*5] been met in this instance. Equitable tolling is available only if the petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing." *Holland v. Florida*, U.S. , 130 S.Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)); see also *Harper v. Ercole*, 648 F.3d 132, 136 (2d Cir. 2011); *Dillon v. Conway*, 642 F.3d 358, 362 (2d Cir. 2011). The determination of whether equitable tolling is appropriate must be made on a case-by-case basis. *Holland*, 130 S.Ct. at 2563; see also *Jenkins v. Greene*, 630 F.3d 298, 305 (2d Cir. 2010) (recognizing that "equitable procedure demands flexibility in the approach of equitable intervention").

A petitioner seeking equitable tolling must "demonstrate a causal relationship between the extraordinary circumstances ... and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances." *Jenkins*, 630 F.3d at 303 (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)); *Harper*, 648 F.3d at 137 (holding [*6] that in order to secure equitable tolling, the petitioner must demonstrate that extraordinary circumstances caused him to miss the original filing deadline). Here, on the present record there

is no basis for justifying equitable tolling of the one-year limitations period.

Conclusion

Accordingly, the petition for a writ of habeas corpus is dismissed as time-barred under 28 U.S.C. § 2244(d)(1). A certificate of appealability shall not issue, as petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253 (c)(2); *Lucidore v. New York State Div. of Parole*, 209 F.3d 107 (2d Cir. 2000); *Lozada v. United States*, 107 F.3d 1011 (2d Cir. 1997), abrogated on other grounds by *United*

States v. Perez, 129 F.3d 255, 259-60 (2d Cir. 1997). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. See *Coppedge v. United States*, 369 U.S. 438, 444-45, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

SANDRA L. TOWNES

United States District Judge

Dated: Brooklyn, New York

June 18, 2012



4 of 34 DOCUMENTS



Cited
As of: Sep 21, 2012

JERONIMO VASQUEZ v. WILLIAM H. RYAN, JR., et al.

CIVIL ACTION NO. 11-2300

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

2012 U.S. Dist. LEXIS 38955

March 20, 2012, Decided

March 21, 2012, Filed

COUNSEL: [*1] For JERONIMO VASQUEZ, Petitioner: HEATHER M. SIAS, LEAD ATTORNEY, PHILADELPHIA, PA; CHERYLLE C. CORPUZ, CHERYLLE C. CORPUZ, ESQUIRE, P.C., PHILADELPHIA, PA.

JUDGES: TIMOTHY J. SAVAGE, J.

OPINION BY: TIMOTHY J. SAVAGE

OPINION

MEMORANDUM OPINION

Savage, J.

Jeronimo Vasquez moves for reconsideration of our dismissal of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Vasquez, a noncitizen immigrant, seeks relief from a state court conviction, arguing that his lawyer's failure to inform him of the immigration consequences of his guilty plea constituted

ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because Vasquez was not "in custody," we dismissed his petition for lack of subject matter jurisdiction. Vasquez then timely moved for reconsideration, arguing that we took an overly narrow view of the custody requirement. After a thorough review of the law and facts of this case, we conclude that our previous decision was correct. At the same time, we note that Vasquez's habeas petition was untimely. Therefore, we shall deny the motion for reconsideration.

Background

On June 11, 2002, Vasquez pleaded guilty to three drug-related offenses in the Court of Common [*2] Pleas of Bucks County. According to Vasquez, his public defender did not inform him before he pleaded guilty that, as a noncitizen immigrant, he might be deported as a result of his guilty plea. There is no question that his drug conviction renders him subject to deportation. See 8 U.S.C. § 1227(a)(2)(B)(i) (2006); *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483, 176 L. Ed. 2d 284 (2010). The

government has taken no action to deport him.

On the same day he pleaded guilty, Vasquez was sentenced to two years probation. Two months later, he filed a petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 et seq. (1997), claiming ineffective assistance of counsel. His petition was denied on January 17, 2003.

On March 31, 2010, the Supreme Court in *Padilla v. Kentucky* held that a defense attorney's failure to inform her client of the immigration consequences of his guilty plea may constitute ineffective assistance of counsel entitling the defendant to post-conviction relief. 130 S.Ct. at 1483-84. Exactly one year later, Vasquez filed his petition for writ of habeas corpus, arguing that *Padilla* established a right "newly recognized by the Supreme Court and made retroactively [*3] applicable to cases on collateral review" under 28 U.S.C. § 2244(d)(1)(C). By the time he filed his petition, Vasquez had served his probationary sentence.

Standard of Review

Pursuant to *Federal Rule of Civil Procedure 59(e)*, Vasquez moves for reconsideration of our dismissal of his petition for lack of subject matter jurisdiction. A *Rule 59(e)* motion is subject to the "sound discretion of the district court." *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001). A party may move the court to alter or amend a judgment under *Rule 59(e)* on one of three grounds: "(1) an intervening change in the law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Cottrell v. Good Wheels*, No. 11-3409, 458 Fed. Appx. 98, 2012 U.S. App. LEXIS 1319, 2012 WL 171941, at *3 (3d Cir. Jan. 23, 2012) (per curiam) (citing *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)). Without saying so, Vasquez relies on the third ground, arguing that we erroneously held that he was not in custody when he filed his habeas petition. He contends that he is in custody because he is excludable as a result of his criminal conviction. Consequently, he cannot [*4] travel outside the United States because he could not legally reenter. He contends that these consequences are sufficient to satisfy the "in custody" requirement for habeas relief.

Discussion

A petition under 28 U.S.C. § 2241 is a vehicle for

challenging the "execution" of the defendant's state court sentence, such as a denial of parole. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 241 (3d Cir. 2005) (quoting *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2001)). However, Vasquez does not attack the execution of his sentence. Rather, he challenges the validity of his underlying conviction. A petition for relief from an unlawful state court conviction is properly brought under 28 U.S.C. § 2254. *Coady*, 251 F.3d at 485-86.¹ Therefore, we shall analyze Vasquez's petition as one under § 2254.

1 The Third Circuit recognized in *Woodall* that the applicability of § 2241 is, in some respects, "far from clear." 432 F.3d at 241. Even if Vasquez could proceed under § 2241, however, his petition would suffer the same fate as it does under § 2254. Vasquez's petition is untimely under § 2244(d)(1), which applies to petitions challenging "custody pursuant to the judgment of a State court" under both § 2241 [*5] and § 2254. Additionally, § 2241(c)(1) contains the same "in custody" requirement as § 2254(a), which Vasquez fails to meet. *Amenuvor v. Mazurkiewicz*, No. 11-4086, 457 Fed. Appx. 92, 2012 U.S. App. LEXIS 668, 2012 WL 75960, at * 2 (3d Cir. Jan. 11, 2012) (per curiam) (citing *Kolkevich v. Att'y Gen.*, 501 F.3d 323, 334, n.6 (3d Cir. 2007)).

Timeliness

Because we determined that Vasquez was not in custody, we did not address other issues raised by his petition in our original order, including whether the petition was timely filed. We now determine that Vasquez's petition was untimely.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") establishes a one-year statute of limitations for filing a § 2254 habeas corpus petition. 28 U.S.C. § 2244(d)(1); *Pace v. DiGuglielmo*, 544 U.S. 408, 410, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). The statute provides that the one-year period begins with the latest of one of four "triggering events:"

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment

to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented [*6] from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1); *Fielder v. Varner*, 379 F.3d 113, 116 (3d Cir. 2004). The statutory period is tolled while a "properly filed application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244(d)(2); *Pace*, 544 U.S. at 410; *Heleva v. Brooks*, 581 F.3d 187, 191 (3d Cir. 2009).

Vasquez's conviction became final nearly ten years ago, and his PCRA petition was denied more than nine years ago. Despite this passage of time, Vasquez argues that his petition was timely under § 2244(d)(1)(C) because the Supreme Court in *Padilla* recognized a new constitutional right when it held that a noncitizen defendant may be denied effective assistance of counsel if his attorney fails to advise him that a guilty plea might result in deportation. If his argument is correct, Vasquez's [*7] petition is timely because he filed it on the last day of the statute of limitations.

To determine whether *Padilla* provides a triggering event for the statute of limitations under § 2244(d)(1)(C), we look to the retroactivity rules from the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). See *Reinhold v. Rozum*, 604 F.3d 149, 153-54 (3d Cir. 2010). *Teague* "set forth two regimes governing the retroactive application of constitutional principles to criminal cases" by "divid[ing] the world into two categories, 'old rules' and 'new rules.'" *United States v. Orocio*, 645 F.3d 630, 637 (3d Cir. 2011). If a rule of criminal law announced in a case "was not dictated by precedent existing at the time the defendant's conviction became final," that rule is a "new rule" under *Teague*. *Id.* (quoting *Teague*, 489 U.S. at 301

). A new rule does not apply retroactively on collateral review except under two narrow exceptions: "(1) the new rule places certain kinds of criminal conduct beyond the power of the criminal law-making authority to proscribe; or (2) the new rule is a watershed rule of criminal procedure that alters our understanding of the *bedrock procedural elements* that must be found [*8] to vitiate the fairness of a particular conviction." *Id.* (quoting *Teague*, 489 U.S. at 311). (internal quotations and alterations omitted); see also *Schrivo v. Summerlin*, 542 U.S. 348, 351, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (stating that the *Teague* exceptions apply only in "limited circumstances"). Conversely, an "old rule"--one that is dictated by existing precedent--is always retroactively applicable on both direct and collateral review. *Orocio*, 645 F.3d at 637 (citing *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)).

Although *Teague* informs our interpretation of § 2244(d)(1)(C), the *Teague* retroactivity rules and § 2244(d)(1)(C) are different in an important respect. The statute only codifies *Teague's* "new rule" regime. It does not codify *Teague's* "old rule" regime. Section 2244(d)(1)(C) explicitly requires that the Supreme Court case at issue "newly recognize" a right, which refers to announcing a "new rule" under *Teague*. See *Reinhold*, 604 F.3d at 152-54 (looking to *Teague* to determine whether a right was newly recognized under § 2244(d)(1)(C)). Therefore, the Court's pronouncement of an old rule cannot trigger the statute of limitations under § 2244(d)(1)(C). See *Peterson v. Cain*, 302 F.3d 508, 511-15 (5th Cir. 2002) [*9] (holding that because the Supreme Court did not announce a new rule in *Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998), that decision was not a triggering event for the statute of limitations under § 2244(d)(1)(C)).

The Third Circuit has held that *Padilla* announced an old rule because its holding "followed directly from *Strickland* and long-established professional norms" regarding effective assistance of counsel. *Orocio*, 645 F.3d at 641. ² Therefore, under circuit precedent, *Padilla* cannot be a triggering event for the statute of limitations under § 2244(d)(1)(C). ³

2 The Third Circuit went on to hold that *Orocio* could avail himself of the *Padilla* decision on collateral review. However, *Orocio* did not consider whether the petition was timely; rather, it considered only whether *Padilla* was retroactive

under *Teague*. Although there is considerable overlap between *Teague* and various provisions of AEDPA, including § 2244(d)(1)(C), the Supreme Court and Third Circuit have held that *Teague* and those AEDPA provisions present distinct inquiries, and that a petitioner must satisfy both independently. See *Horn v. Banks*, 536 U.S. 266, 272, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002) ("[I]f our post-AEDPA cases suggest anything about AEDPA's [*10] relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct. . . . Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." (internal citations omitted)); *Greene v. Palakovich*, 606 F.3d 85, 100-01 (3d Cir. 2010) (citing *Horn*, 536 U.S. at 272).

3 The Seventh and Tenth Circuits have disagreed with *Orocio* and have held that *Padilla* announced a new rule under *Teague*. See *United States v. Chang Hong*, No. 10-6294, 671 F.3d 1147, 2011 U.S. App. LEXIS 18034, 2011 WL 3805763, at *7-8 (10th Cir. Aug. 30, 2011); *Chaidez v. United States*, 655 F.3d 684, 694 (7th Cir. 2011). The Tenth Circuit went on to determine that *Padilla* was not retroactively applicable on collateral review because neither of the two *Teague* exceptions applied. *Chang Hong*, 2011 U.S. App. LEXIS 18034, 2011 WL 3805763, at *9-10. The Tenth Circuit therefore held that *Padilla* did not provide a triggering event for the statute of limitations under § 2255(f)(3)—a nearly identical provision to § 2244(d)(1)(C) that applies to challenges to federal detention brought under § 2255. The Seventh Circuit did not consider the retroactivity [*11] issue.

In the alternative, Vasquez argues that he is entitled to equitable tolling of the statute of limitations for two reasons. First, he argues that *Padilla* provided his earliest meaningful opportunity to challenge his guilty plea because Pennsylvania law does not recognize his constitutional claim. Second, he contends that strict application of the statute of limitations would be unfair because the consequences of his guilty plea far outweigh the gravity of the offense.

A petitioner seeking equitable tolling bears the burden of establishing: "(1) that he has been pursuing his

rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented him from filing on time. *Pace*, 544 U.S. at 418. Equitable tolling should be used sparingly. *LaCava v. Kyler*, 398 F.3d 271, 275 (3d Cir. 2005) (citing *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239 (3d Cir. 1999)).

The existence of unfavorable state law is not an "extraordinary circumstance" that prevents the petitioner from filing on time. See *Corrigan v. Barbary*, 371 F. Supp. 2d 325, 331 (W.D.N.Y. 2005). The purpose of filing a § 2254 petition is to challenge a conviction imposed and upheld under state [*12] law in violation of the Constitution or federal law. The existence of unfavorable state law is the reason a petitioner seeks habeas corpus. It does not prevent the petitioner from doing so.⁴

4 Similarly, a favorable decision is not a "factual predicate" that triggers the statute of limitations under § 2244(d)(1)(D). *Mitchell v. Beard*, No. 06-4746, 2010 U.S. Dist. LEXIS 27753, 2010 WL 1135998, at *1 n.3 (E.D. Pa. Mar. 24, 2010) (Gardner, J.) (citing circuit court cases). As Judge Gardner recognized, allowing a petitioner to wait until any favorable case is decided would eviscerate § 2244(d)(1)(C). *Id.* The petitioner could wait indefinitely to file his habeas petition until any favorable decision, even one that did not meet the high standard of § 2244(d)(1)(C), was handed down.

Additionally, the alleged disparity between Vasquez's crime and the consequences of deportation is not an extraordinary circumstance. The term "extraordinary circumstance" refers not to "the uniqueness of the petitioner's circumstances," but rather to the severity of the obstacle that prevented the petitioner from filing on time. *Bolarinwa v. Williams*, 593 F.3d 226, 231-32 (2d Cir. 2010) (quoting *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008)).

Vasquez [*13] must have filed his petition within one year of the date his conviction became final, plus the tolling period while his PCRA petition was pending. 28 U.S.C. § 2244(d)(1)(A), (d)(2). Consequently, he was required to file his petition in or around November 2003. Because he failed to file until 2011, his petition was untimely.

Subject Matter Jurisdiction

Even if Vasquez's petition had been timely filed, we reaffirm our ruling that we lack subject matter jurisdiction. To establish subject matter jurisdiction over his § 2254 petition, Vasquez must show that, at the time he filed his petition, he was "in custody" pursuant to the conviction he is attacking. *Obado v. New Jersey*, 328 F.3d 716, 717 (3d Cir. 2003) (per curiam) (citing *Maleng v. Cook*, 490 U.S. 488, 490-92, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989)).⁵

⁵ We determine subject matter jurisdiction by looking at the petitioner's condition only at the time he filed his petition. *Obado*, 328 F.3d at 717 (citing *Maleng*, 490 U.S. at 490-92). Thus, the court maintains jurisdiction when the petitioner is released from custody while the action is pending, so long as he met the jurisdictional requirements when he filed. See *Carafas v. LaVallee*, 391 U.S. 234, 238-39, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968); see also [*14] *Chong v. Dist. Dir., INS*, 264 F.3d 378, 382-83 (3d Cir. 2001).

We agree with Vasquez that the custody requirement is read liberally and is not limited to physical restraint. *Id.* Rather, "custody" refers to "significant restraints on liberty which [are] not shared by the public generally, along with some type of continuing governmental supervision." *Id.* (quoting *Barry v. Bergen Cnty. Prob. Dep't*, 128 F.3d 152, 160 (3d Cir. 1997)) (internal quotations and alterations omitted). For example, a petitioner is considered to be in custody while he is on parole because the terms of parole include many restrictions on his liberty. *Jones v. Cunningham*, 371 U.S. 236, 241-43, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963); see also *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 300-01, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984) (holding that the petitioner was in custody after he had been released on personal recognizance pending retrial).

Vasquez argues that the threat of future deportation proceedings render him in custody. He reasons that, like a parolee, he suffers from significant restrictions on his liberty because of his conviction. In particular, he claims that he cannot travel abroad because he "would almost certainly be denied reentry" [*15] into the United States.

A petitioner is no longer in custody after his sentence has fully expired. See *Maleng*, 490 U.S. at 492 ("While we have very liberally construed the 'in custody' requirement for purposes of federal habeas, we have never extended it to the situation where a habeas

petitioner suffers no present restraint from a conviction."). This is true even where the petitioner suffers collateral restrictions on his liberty because he has been convicted of a crime, such as loss of the right to vote or inability to hold public office. *Id.* at 491-92.⁶

⁶ In a case such as this where the petitioner has been released from custody but continues to suffer collateral harm because of his conviction, the questions of subject matter jurisdiction and mootness might easily be confused. These questions are importantly distinct. See *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (distinguishing the jurisdictional "in custody" requirement from mootness). Whereas jurisdiction is determined by a one-time snapshot of the petitioner's condition at the time of filing, see *supra* note 5, the doctrine of mootness requires that the case present a live controversy at all stages of the proceedings. *Id.*; *Burkey v. Marberry*, 556 F.3d 142, 147 (3d Cir. 2009) [*16] (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)).

Although the petitioner's release from custody while the case is pending does not affect jurisdiction, it may render the case moot. *Spencer*, 523 U.S. at 7. This is because release from custody often eliminates the only source of the petitioner's harm and leaves the court unable to provide any meaningful relief. *Id.*; *Burkey*, 556 F.3d at 147. However, the case is not moot post-release where the petitioner continues to suffer collateral consequences of the conviction. Such consequences give the petitioner a continuing interest in the case and may be redressed by a favorable ruling. *Spencer*, 523 U.S. at 7. Vasquez's petition is not moot because the threat of deportation creates a continuing controversy. See *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) ("Following *Carafas*, we conclude that Romero-Vilca's petition is not moot in light of the potential for deportation that flows from his conviction.").

Conversely, if the petitioner was not in custody at the time of filing, the later existence of collateral consequences does not give the court jurisdiction. *Maleng*, 490 U.S. at 492. The

petitioner either meets the [*17] "in custody" requirement at the time of filing or not at all.

In *Maleng*, the Supreme Court held that a petitioner who was currently serving a sentence from a 1976 conviction could not challenge the validity of a 1958 conviction, even though the existence of the earlier conviction enhanced his sentence for the later one. *Id. at 492-93*. The Court determined that because the petitioner had completed his original sentence, he was no longer in custody pursuant to that conviction. *Id. at 492*. The Court found it immaterial that he was still suffering a collateral consequence of the original conviction. *Id.* Courts of appeals have uniformly held that a petitioner facing deportation as a result of his conviction is not in custody once he has completed his sentence prior to filing a habeas petition. See *Ogunwomoju v. United States*, 512 F.3d 69, 75 (2d Cir. 2008); *Resendiz v. Kovensky*, 416 F.3d 952, 956-58 (9th Cir. 2005); *Broomes v. Ashcroft*, 358 F.3d 1251, 1254 (10th Cir. 2004); *Kandiel v. United States*, 964 F.2d 794, 796 (8th Cir. 1992).

Vasquez argues that the Supreme Court's recent holding in *Padilla* altered the rule in *Maleng* and its progeny. In *Padilla*, the Supreme Court of Kentucky had distinguished [*18] between "collateral" matters in a defendant's decision to plead guilty--for example, certain rights that a defendant may lose in the future because he is a convicted felon--and those matters that directly relate to the sentence the court may impose, such as the nature and duration of the sentence. 130 S.Ct. at 1481. The state court had determined that immigration consequences were a collateral matter, and that a lawyer's failure to advise a defendant on those consequences did not violate the *Sixth Amendment* under *Strickland*. *Id.* Rejecting the state court's approach, the Supreme Court concluded that "[t]he collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Id. at 1482*. The Court, upon examining the nature of deportation itself, noted that deportation is a "particularly severe 'penalty'" that is "intimately related to the criminal process," and is "nearly an automatic result for a broad class of noncitizen offenders." *Id. at 1481*. The Court therefore held that an attorney's failure to advise a client about the immigration consequences of a guilty plea may constitute ineffective assistance of counsel. *Id. at 1482*. [*19] Thus, courts must perform a standard *Strickland* analysis in such a case. *Id. at 1482-83*.

Vasquez argues that *Padilla*, by holding that deportation is not merely a collateral consequence of a conviction, implicitly expanded the definition of "in custody" under § 2254 to include petitioners facing deportation proceedings. He points out that *Maleng* and its progeny drew a bright line for the "in custody" requirement between petitioners who are still serving their sentences when they file and those who are merely facing "collateral consequences" of their convictions. He claims that *Padilla* rejected that bright line as it pertains to deportation, and held that courts should treat the threat of deportation like part of a defendant's sentence because of its severity and closeness to the criminal process. Therefore, according to Vasquez, he is in custody just as he would be if he were still serving his sentence from his guilty plea. At least one district court has agreed with this argument. See *Rodriguez v. United States*, No. 10-23718, 2011 U.S. Dist. LEXIS 85852, 2011 WL 3419614, at *5-6 (S.D. Fla. Aug. 4, 2011) (holding that, after *Padilla*, a petitioner who had fully served her sentence was in custody because she faced [*20] deportation).

Vasquez's argument conflates two distinct inquiries. The *Padilla* Court was not faced with the jurisdictional question of whether the defendant was in custody for the purposes of obtaining federal post-conviction relief.⁷ Rather, it considered whether the *Sixth Amendment* entitles a criminal defendant to be advised on the possible immigration consequences of his guilty plea before he pleads guilty. That question goes to the merits of Vasquez's constitutional claim. The simple fact that courts use the term "collateral consequences" in reference to both § 2254 and the *Sixth Amendment* does not mean that they are referring to identical concepts. We determine the meaning of a particular term not in a vacuum but in light of the legal context surrounding it. See *Johnson v. United States*, 130 S.Ct. 1265, 1270, 176 L. Ed. 2d 1 (2010) ("[W]e do not force term-of-art definitions into contexts where they plainly do not fit . . ." (quoting *Gonzales v. Oregon*, 546 U.S. 243, 282, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) (Scalia, J., dissenting) (internal quotations omitted))). The definition of "collateral consequences" in one context is not necessarily the same as that in another context.

⁷ *Padilla* did not file a federal habeas petition. [*21] Rather, he appealed from the Supreme Court of Kentucky's denial of his state law petition for post-conviction relief. *Padilla*, 130 S.Ct. at 1478. Additionally, *Padilla* was in state

custody when he filed his petition. See *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).

Padilla did not address the "in custody" requirement, and no decision has purported to alter *Maleng's* bright-line rule that a petitioner is not in custody after he has fully served his sentence. See *Fenton v. Ryan*, No. 11-2303, 2011 U.S. Dist. LEXIS 89276, 2011 WL 3515376, at *2 (E.D. Pa. Aug. 11, 2011) (holding that *Padilla* did not alter the custody requirement and that a petitioner is not in custody after completing his sentence merely because he faces deportation); see also *United States v. Krboyan*, No. 10-2016, 2010 U.S. Dist. LEXIS 137666, 2010 WL 5477692, at *6-7 (E.D. Cal. Dec. 30, 2010) (same); *Walker v. Holder*, No. 10-10802, 2010 U.S. Dist. LEXIS 50960, 2010 WL 2105884, at *1 (D. Mass. May 24, 2010) (same). *Padilla* may recognize that Vasquez had a constitutional right to be counseled about possible deportation, but it does not give the court jurisdiction over his habeas petition.

Even if Vasquez's argument had merit, accepting it would require us to decide that the Supreme Court's holding [*22] on one matter implicitly overturned its holding on a separate matter. It is not for the district court to hold that the Supreme Court has implicitly overturned itself. When the Supreme Court speaks directly to an issue, lower courts must follow that decision even if a later Supreme Court decision on a different issue appears to undermine its reasoning. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); *United States v. Weaver*, 267 F.3d 231, 250-51 (3d Cir. 2001). It is for the Supreme Court to overturn its own rulings. *Rodriguez de Quijas*, 490 U.S. at 484; *Weaver*, 267 F.3d at 251. We are bound by *Maleng*. Therefore, because we lack subject matter jurisdiction, we shall deny the motion for reconsideration.

Certificate of Appealability

As an alternative to reconsideration, Vasquez seeks a certificate of appealability ("COA") under 28 U.S.C. § 2253. A petitioner "has no absolute entitlement to appeal a district court's denial of his petition." *Miller-El v. Cockrell*, 537 U.S. 322, 335, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Rather, a petitioner must obtain a COA from the district court or court of appeals to appeal the district court's denial of the petition. 28 U.S.C. § 2253(c)(1); see also *Gonzalez v. Thaler*, 132 S.Ct. 641,

649 n.5, 181 L. Ed. 2d 619 (2012) [*23] (noting that district courts have the power to issue COAs); *Walker v. Gov't of the V.I.*, 230 F.3d 82, 89-90, 43 V.I. 265 (3d Cir. 2000) (discussing the COA requirement). If no COA has been issued, the court of appeals does not have jurisdiction to consider the appeal. *Miller-El*, 537 U.S. at 336.

We dismiss Vasquez's petition on two procedural grounds--untimeliness and lack of subject matter jurisdiction. Thus, Vasquez must demonstrate that: (1) reasonable jurists would find it debatable whether he has stated a valid underlying constitutional claim and: (2) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); see also *Satizabal v. Folino*, 318 F. App'x 78, 80-81 (3d Cir. 2009); *Fenton*, 2011 U.S. Dist. LEXIS 89276, 2011 WL 3515376, at *1.⁸

8 If we dismissed the petition on the merits of his constitutional claim, Vasquez would only have to show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Because we dismiss the petition on procedural grounds, he must also show that our procedural rulings are debatable among reasonable jurists. *Id.*

Our [*24] ruling that Vasquez's petition is untimely is not debatable by jurists of reason. It cannot plausibly be argued that *Padilla* recognized a new right that is retroactively applicable on collateral review. Reasonable jurists could debate whether the Third Circuit in *Orocio* correctly held that *Padilla* announced an "old rule" under *Teague*. However, even if *Padilla* announced a "new rule," it is clear that *Padilla's* rule does not fall under either of the two exceptions to *Teague's* maxim of non-retroactivity for new rules. *Padilla* did not "place[] certain kinds of criminal conduct beyond the power of the criminal law-making authority to proscribe," nor was it "a watershed rule of criminal procedure that alters our understanding of *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Orocio*, 645 F.3d 630 (quoting *Teague*, 489 U.S. at 311) (internal quotations and alterations omitted). The Supreme Court has held that only a decision of the magnitude of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), which recognized an

indigent criminal defendant's right to a court-appointed attorney, is sufficient to satisfy *Teague's* "watershed" exception. *Beard v. Banks*, 542 U.S. 406, 417-18, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). [*25] Although *Padilla* may be a significant opinion for noncitizen defendants deciding whether to plead guilty, it clearly does not alter our system of criminal procedure in any extent comparable to *Gideon*. See *United States v. Chang Hong*, No. 10-6294, F.2d , 671 F.3d 1147, 2011 U.S. App. LEXIS 18034, 2011 WL 3805763, at *9 (10th Cir. Aug. 30, 2011) ("Simply put, *Padilla* is not *Gideon*"). Thus, it is clear beyond reasonable debate that *Padilla* does not provide a triggering event for the statute of limitations under § 2244(d)(1)(C).

Whether our ruling on subject matter jurisdiction is debatable among reasonable jurists presents a more difficult question. Another court in this district recently denied a petitioner's request for a COA in a case with virtually identical facts. See *Fenton*, 2011 U.S. Dist. LEXIS 89276, 2011 WL 3515376, at *2 (*Schiller, J.*).⁹ *Fenton* pleaded guilty to a drug offense in state court. After he completed his sentence, he filed for habeas relief in federal court, arguing that he was in custody because he faced possible deportation. Like Vasquez, *Fenton* argued that *Padilla* changed the definition of "in custody" such that it now includes individuals who might be deported because they have been convicted of a crime. Judge Schiller, rejecting [*26] that argument, held that *Fenton* was not in custody when he filed his petition. *Id.* Judge Schiller also denied *Fenton's* request for a COA, stating that "courts across the country have concluded that removal proceedings and removal itself--much less the possibility of removal proceedings--do not constitute custody for habeas purposes," and that "[r]easonable jurists thus could not find the Court's denial of habeas relief debatable." *Id.*

⁹ *Fenton* was represented by the same attorney as Vasquez. The two cases were filed on the same day.

The Third Circuit upheld Judge Schiller's ruling, including his denial of a COA. *Fenton v. Attorney Gen. of PA*, No. 11-3297 (3d Cir. Nov. 9, 2011). In its order, the court stated that "[f]or substantially the same reasons given by the District Court, Appellant has not shown that reasonable jurists would debate the District Court's denial of his motion for reconsideration of its dismissal of his petition" We shall follow the Third Circuit's guidance in *Fenton* and deny Vasquez a COA.

Conclusion

Vasquez did not file his petition until nearly ten years after he was convicted and more than nine years after his PCRA petition was denied. The Supreme Court's decision [*27] in *Padilla* announcing an "old rule" under *Teague* does not provide Vasquez a triggering event for the statute of limitations under § 2244(d)(1)(C). Therefore, his petition is untimely.

We lack subject matter jurisdiction because Vasquez had completed his sentence when he filed his habeas petition and therefore was not in custody. Thus, we deny Vasquez's motion for reconsideration.

Vasquez has failed to show that reasonable jurists could debate our timeliness and subject matter jurisdiction rulings. We therefore shall deny his request for a COA.

ORDER

AND NOW, this 20th day of March, 2012, upon consideration of the Motion for Reconsideration Under Rule 59 (Document No. 3), it is **ORDERED** that the motion is **DENIED**.

/s/ Timothy J. Savage

TIMOTHY J. SAVAGE, J.



5 of 34 DOCUMENTS



Positive
As of: Sep 21, 2012

VLADIMIR MARCHUK, Petitioner, v. CRAIG A. LOWE, et al, Respondents.

CIVIL ACTION NO. 11-2304

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

2012 U.S. Dist. LEXIS 48335

March 15, 2012, Filed

SUBSEQUENT HISTORY: Approved by, Adopted by, Writ of habeas corpus dismissed, Certificate of appealability denied *Marchuk v. Lowe, 2012 U.S. Dist. LEXIS 48704 (E.D. Pa., Apr. 4, 2012)*

COUNSEL: [*1] For VLADIMIR MARCHUK, Petitioner: HEATHER M. SIAS, LEAD ATTORNEY, PHILADELPHIA, PA.

For CRAIG A. LOWE, WARDEN, PIKE COUNTY PRISON, Respondent: JOHN E.D. LARKIN, MONTGOMERY CTY DA'S OFFICE SWEDE & AIRY STS, NORRISTOWN, PA; ROBERT M. FALIN, MONTGOMERY COUNTY DISTRICT ATTORNEY'S OFFICE, NORRISTOWN, PA.

JUDGES: ARNOLD C. RAPOPORT, United States Magistrate Judge.

OPINION BY: ARNOLD C. RAPOPORT

OPINION

ARNOLD C. RAPOPORT

UNITED STATES MAGISTRATE JUDGE

REPORT AND RECOMMENDATION

Presently before the Court is a counseled Petition for Writ of Habeas Corpus filed by Petitioner, Vladimir Marchuk ("Marchuk"), pursuant to 28 U.S.C. section 2241. Marchuk is not currently incarcerated or under a term of probation. For the reasons that follow, it is recommended that the Petition should be dismissed without an evidentiary hearing.

I. PROCEDURAL HISTORY.¹

1 The facts I recite are taken from the Petition for Writ of Habeas Corpus, Respondents' Response, and the exhibits attached to those pleadings. Because the public docket information from the Montgomery Court of Common Pleas fully sets forth the history of Marchuk's state court proceedings, as well as the fact that he is no longer in custody, which leads to the inexorable conclusion that [*2] this court lacks jurisdiction over the petition, or, in the alternative, that the

federal petition is time barred, I have not ordered the state court record.

On July 22, 2008, Marchuk pled guilty to one count of misdemeanor Possession of Marijuana before the Honorable Richard J. Hodgson in the Court of Common Pleas of Montgomery County. On that same date, Marchuk was sentenced to thirty days probation.

Marchuk did not appeal and his conviction became final on direct review when the time in which he could seek review to the Pennsylvania Superior Court expired on August 22, 2008. Marchuk also did not file a petition under the Pennsylvania Post-Conviction Relief Act ("PCRA"), see *42 Pa. C.S.A. § 9541*.

Marchuk filed his counseled Petition for Writ of Habeas Corpus on March 31, 2011. The matter was assigned to the Honorable Anita Brody. On July 26, 2011, Respondents filed a Response, contending that the Petition should be dismissed. Judge Brody then referred this matter to the undersigned for preparation of a Report and Recommendation.

II. DISCUSSION

A. Petitioner is Not "In Custody"

A habeas petitioner is only entitled to habeas review if he is in custody and seeks to challenge the legality of [*3] that custody under the Constitution, laws or treaties of the United States. *28 U.S.C. § 2241(c)(3)*. Marchuk admits in his petition that he "is not currently serving the state sentence in question," but that he is "currently imprisoned under the supervision of the United States Immigration and Customs Enforcement and is currently subject to deportation due to [the instant] conviction and sentence." (Pet., unnumbered p. 4.) Marchuk argues that he could be deported at any time and that his conviction prevents him from becoming a U.S. citizen and may subject him to removal from the country; therefore, he is "subject to restraints not shared by the public generally." (Pet., unnumbered p. 4.)

I recommend that Marchuk is not in custody so as to provide this Court with jurisdiction over his habeas petition. *28 U.S.C. §§ 2241 and 2254* confer jurisdiction on the District Courts to entertain petitions for habeas corpus relief only from petitioners who are "in custody in violation of the Constitution or laws or treaties of the United States." See *28 U.S.C. § 2241(c)(3)*; see also

Maleng v. Cook, *490 U.S. 488, 490, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989)* (quoting *28 U.S.C. § 2241(c)(3)*); *Obado v. New Jersey*, *328 F.3d 716, 717 (3d Cir. 2003)*. [*4] The question of whether a petitioner such as Marchuk who is undergoing removal proceedings is considered to be "in custody" has been addressed by courts numerous times. In deciding this issue, "[c]ourts in this circuit have rejected habeas petitions for failure to satisfy the custody requirement where the non-citizen petitioner is undergoing removal proceedings." *Fenton v. Ryan*, No. 11-2303, *2011 U.S. Dist. LEXIS 89276, 2011 WL 3515376, at *2 (E.D.Pa. Aug. 11, 2011)* (Schiller, J.) (citing *Maphorisa v. Dist. Dir., ICE*, No. 09-298, *2010 U.S. Dist. LEXIS 13711, 2010 WL 598451, at *2 (M.D. Pa., Feb. 17, 2010)*).

In the instant matter, Marchuk pled guilty on July 22, 2008, and his thirty-day probationary sentence expired on August 22, 2008. Accordingly, Marchuk is no longer in custody for the state court conviction that he challenges in this matter. Further, the fact that he is involved in immigration proceedings and may be removed from the country is insufficient for him to be considered to be "in custody" so as to entitle him to habeas relief. Marchuk's alleged detention pending removal proceedings is insufficient to provide a court with jurisdiction over his habeas petition.² Accordingly, his habeas petition must be dismissed.

2 A search of Immigration, [*5] Customs and Enforcement's Online Detainee Locator System shows that no one named Vladimir Marchuk with a country of birth of Ukraine is presently being detained by Immigration, Customs and Enforcement.

B. The Federal Habeas Corpus Petition at Issue is Statutorily Time-barred

Even if Marchuk could be considered to be "in custody" so as to provide this court with jurisdiction over his habeas petition, his petition still must be denied due to its untimeliness. Marchuk's case must be decided pursuant to the terms of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which contains a strict one-year period of limitations that applies to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court.³ In this case, the applicable starting point to examine the limitation period is the latest date on which the judgment of sentence became final, either by the conclusion of

direct review or the expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1).

3 28 U.S.C. section 2244 requires that:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to [*6] the judgment of a State court. The limitation period shall run from the latest of

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;

or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Marchuk's conviction became final on direct review on August 22, 2008, thirty days after he was sentenced, after he failed to seek direct review in the Pennsylvania Superior Court and his time to seek such relief expired. See 28 U.S.C. § 2244(d)(1)(A); 42 Pa. C.S.A. § 9545(b)(3); Pa. R.App. P. 903(a) (stating that appellants have thirty days in which to file notice [*7] of appeal in the Superior Court). Accordingly, the one-year time limit for Marchuk to timely file a federal Petition for Writ of Habeas Corpus began on August 22, 2008, and Marchuk had until August 22, 2009, to timely file a federal Petition.

There is an exception in the habeas statute that states that the time during which a properly filed PCRA is pending in the state court shall not be counted under the limitations period. 28 U.S.C. § 2244(d)(2). However, as Marchuk did not file a PCRA petition, the statute of limitations is not tolled under this exception.

Therefore, Marchuk had until August 22, 2009, in which to file his federal habeas Petition. Marchuk filed the instant Petition on March 31, 2011, over a year and a half after the expiration of the AEDPA filing deadline. Thus, the Petition appears to be time-barred.

The habeas statute allows a later start date for the limitations period if: 1) state action in violation of the federal constitution prevented a petitioner's timely filing of a habeas petition; 2) a new rule of retroactively applicable constitutional law applies to the petition; or 3) if the facts underlying the claim could not have been discovered through the exercise [*8] of due diligence until a later time. 28 U.S.C. § 2244(d)(1)(B)-(D). In his petition, Marchuk argues that he is entitled to a later start

date of the AEDPA limitations period under 28 U.S.C. §2244(d)(1)(C) because of a new retroactively applicable law. (Pet., unnumbered pp. 2-3).

Marchuk claims that *Padilla v. Kentucky*, 559 U.S. , 176 L.Ed.2d 284, 130 S.Ct. 1473 (Mar. 31, 2010), establishes a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." He argues that, due to *Padilla*, the statute of limitations began to run on March 31, 2010, when the U.S. Supreme Court decided the case. Marchuk argues that since his petition falls under section 2244(d)(1)(C), he is entitled to a start date for the statute of limitations of March 31, 2010, the date of the decision, and that his petition is therefore timely (although just barely, even under Marchuk's view of the limitations period).

First, I note that Marchuk "bears the burden of proving all facts entitling him to a discharge from custody as well as demonstrating that he has met all procedural requisites entitling him to relief." *Rodriguez v. Thomas*, No. 07-1097, 2007 U.S. Dist. LEXIS 97872, 2007 WL 5041872, *5 (E.D. Pa., Dec. 10, 2007) [*9] (Restrepo, J.) Thus, Marchuk must demonstrate "why the date for the start of AEDPA's limitations period is other than the date the conviction became final or some other reason why the statute of limitations ha[s] not run." *Id.*, citing *U.S. ex rel Lipchey v. Corbett*, 2007 U.S. Dist. LEXIS 61758, 2007 WL 2428662, at *5 (W.D. Pa. Aug. 22, 2007). This Marchuk cannot do, as he has not identified a new right that the Supreme Court recognized and made retroactively applicable to cases on collateral review, as required by 28 U.S.C. § 2244(d)(1)(C).

Recently, in *United States v. Orocio*, 645 F.3d 630, 2011 WL 2557232, at *6 (3d Cir. June 29, 2011), the Third Circuit found that *Padilla* "broke no new ground in holding the duty to consult also extended to counsel's obligation to advise the defendant of the immigration consequences of a guilty plea and 'did not yield[] a result so novel that it forge[d] a new rule'" (citation omitted).

As the Third Circuit specifically found that *Padilla* did not forge a new rule, and that counsel's duty to inform a client about the immigration consequences of a guilty plea was in existence for years before the U.S. Supreme Court's decision in *Padilla*, Marchuk clearly does not satisfy the exception [*10] set forth in 28 U.S.C. § 2244(d)(1)(C) for a later start date. Marchuk has not established that the statute of limitations period should be

computed from any date other than the date on which his judgment of sentence became final. Thus, his limitations period began running on August 22, 2008.

C. The Federal Habeas Corpus Petition at Issue is Not Eligible for Equitable Tolling

A "petitioner is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S.Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010) (quoting *Pace*, 544 U.S. at 418; see also *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001) (holding that equitable tolling is permitted: (1) if the Respondent has actively misled the petitioner; (2) if the petitioner has in some extraordinary way been prevented from asserting his rights, or (3) if the petitioner has timely asserted his rights mistakenly in the wrong forum.))

The habeas petitioner bears the burden of demonstrating both his entitlement to equitable tolling and his due diligence. *Pace*, 544 U.S. at 418; *Cooper v. Price*, 82 Fed.Appx. 258, 260 (3d Cir. 2003); [*11] *Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982); *United States v. Soto*, 159 F.Supp.2d 39, 45 (E.D. Pa. 2001) (Van Antwerpen, J.).

Marchuk argues that he is entitled to equitable tolling to excuse the late filing of his habeas petition because his "claim for ineffective assistance of counsel based on failure to warn about 'collateral' consequences of a plea was clearly unavailable under Pennsylvania state law prior to *Padilla*, and therefore [he] has had no real opportunity to challenge this conviction." (Pet., unnumbered p. 3.) I recommend that this argument is insufficient to entitle Marchuk to equitable tolling.

First, Marchuk can provide no reason as to why he waited over sixteen years after his guilty plea in state court to seek relief in the federal courts. Further, the mere fact that prior to *Padilla*, state court authority existed that was contrary to Marchuk's position did not in any way prevent him from challenging his conviction in the state courts. In fact, the majority of habeas cases which award relief to the prisoner have arisen from cases in which the state courts determined that the prisoner did not have a valid claim. *Padilla*, upon which Marchuk bases his claim for habeas [*12] relief, resulted from a petitioner whose claim of ineffective assistance of counsel was denied by the Kentucky state courts. Despite this denial, *Padilla*

pursued federal habeas relief, and the Supreme Court found in his favor. There was nothing preventing Marchuk from doing the same.

In addition, Marchuk has not demonstrated that he exercised "reasonable diligence" in investigating and pursuing his federal claim. By Marchuk's version of events, the decision in *Padilla v. Kentucky* cleared the way for his federal habeas petition. However, *Padilla* was decided on March 31, 2010, and Marchuk did not file his federal habeas petition until March 31, 2011, exactly one year after the Supreme Court decided *Padilla*. Even if Marchuk's situation would be considered the "extraordinary circumstances" necessary to meet the first half of the equitable tolling test, a petitioner must also file suit within a reasonable period of time after realizing that such suit has become necessary. *Walker v. Frank*, 56 Fed. Appx. 577, 582 (3d Cir. 2003). Marchuk should have become aware that his habeas petition was necessary on March 31, 2010, but failed to file his petition for an entire year. I recommend that waiting [*13] twelve months after the alleged "extraordinary circumstance" which justifies equitable tolling occurs is not reasonable. See *Walker*, 56 Fed. Appx. at 582, n. 5 (petitioner who waited eleven months after termination of allegedly "extraordinary circumstances" to file habeas was not entitled to equitable tolling); see also *Garrick v. DiGuglielmo*, 162 Fed. Appx. 122 (3d Cir. 2005)(petitioner who waited eight months to file habeas did not show requisite diligence for equitable tolling); *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999)(no equitable tolling where petitioner waited additional six months to act, after elimination of alleged extraordinary circumstances). Therefore, I recommend that even if the Supreme Court's decision in *Padilla* was an

"extraordinary circumstance" sufficient to qualify Marchuk for equitable tolling, Marchuk was not diligent by failing to file his habeas petition until exactly one year after the *Padilla* decision.

The record is devoid of factual justification for equitable tolling and Marchuk has adduced no evidence to convince me that "rigid application of the statute would be unfair." *Fahy*, 240 F.3d at 245. Accordingly, I recommend that equitable tolling cannot [*14] apply and Marchuk's habeas petition, filed on March 31, 2011, should be dismissed as time-barred.

For these reasons, I make the following:

RECOMMENDATION

AND NOW, this 15th day of March, 2012, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. section 2241 should be DISMISSED without an evidentiary hearing. There is no probable cause to issue a certificate of appealability.

Petitioner may file objections to this Report and Recommendation. See *Local Civ. Rule 72.1*. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Arnold C. Rapoport

ARNOLD C. RAPOPORT

United States Magistrate Judge

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 87297-0

Respondent,

v.

PROOF OF SERVICE

SIGIFREDO GARCIA BUENO,

Petitioner.

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On September 21, 2012, I deposited in the mails of the United States of America, postage prepaid, an envelop containing a copy of the Brief of Amicus Curiae Washington Association of Prosecuting Attorneys, a copy of a motion for leave to file brief of amicus curiae, and a copy of this proof of service addressed to:

David B. Trefrey
Special Deputy Pros. Atty.
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

Nancy P. Collins
Washington Appellate Project
1511 Third Ave. Suite 701
Seattle, WA 98101-3635

On the 21st day of September, 2012, I also e-mailed a copy of the document to which this proof of service is attached to

Nancy P. Collins at nancy@washapp.org

David Trefry at TrefryLaw@WeGoWireless.com

Signed under the penalty of perjury under the laws of the state of Washington this 21st day of September, 2012, at Olympia, Washington.



Pamela B. Loginsky, WSBA #18096
Staff Attorney
206 10th Ave. SE
Olympia, WA 98501
Phone: (360) 753-2175
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OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; nancy@washapp.org; TrefryLaw@WeGoWireless.com
Subject: RE: State v. Bueno, No. 87297-0

Rec. 9-21-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pam Loginsky [<mailto:Pamloginsky@waprosecutors.org>]
Sent: Friday, September 21, 2012 4:32 PM
To: OFFICE RECEPTIONIST, CLERK; nancy@washapp.org; TrefryLaw@WeGoWireless.com
Subject: State v. Bueno, No. 87297-0

Dear Clerk and Counsel-

Attached for filing is WAPA's motion to file amicus brief, the actual amicus brief, and a proof of service.

Please let me know if you should encounter any difficulty in opening these documents.

Sincerely,

Pam Loginsky
Staff Attorney
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206 10th Ave. SE
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