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STATE OF WASHINGTON
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NO. 87297-0

SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIGIFREDO G. BUENO,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Ineffective assistance of counsel.

This Petition lists three “Issues Presented For Review.” No section of the document thereafter addresses the first issue “That the Motion to Withdraw was Untimely.” Petitioner does address effective assistance of counsel. Therefore the State will address whether trial counsel was effective as the first issue.

2. There is no basis for equitable tolling in this case.

3. The immigration consequences of Petitioner’s guilty plea were completely and fully addressed by his attorney in the trial court. Petitioner lists this as the third issue but does not denote a separate section within his petition to address this.

B. STATEMENT OF THE CASE.

On August 9, 2004, Mr. Bueno was charged with; Count One Delivery of a Controlled Substance – Methamphetamine and Count Two Conspiracy to Delivery of a Controlled Substance – Methamphetamine. On February 25, 2005 he plead guilty to the lesser charge, Conspiracy to Deliver Methamphetamine and was given credit for time served. Mr. Bueno was out on personal recognizance at the time of the plea. This allowed him to literally, physically, leave the courtroom at the end of his plea. On August 22, 2009 a motion to vacate Bueno’s plea was filed by and attorney who was not his trial attorney at the time of the original plea. The motion to vacate was heard and the court denied that motion. Subsequent to this denial the court filed a letter opinion and later entered

detailed Findings and Conclusions supporting the decision to deny the motion to vacate. This ruling was appealed, that appeal was denied by a Commissioners Ruling. On March 21, 2011 the ruling was upheld on review by a panel of the Court of Appeals Division III. On April 24, 2012 the Motion for Review was filed in this court by Petitioner and his wife. (There are two transcripts. The transcript for the plea hearing is designated 87297-0-2-24-2005, for the motion to vacate 87297-0-9-20-2010. They shall be referred to as RP 2005 and RP 2010.)

C. LAW AND ARGUMENT - SUMMARY OF ARGUMENT

The first question which must be asked in this case is do the facts support review by this court? The answer obviously from the position of the State is no. The three issues, ineffective assistance, equitable tolling and immigration consequences are all topics of great importance. However, the facts set forth below clearly and convincingly demonstrate that the conduct of Mr. Talbot met all of the standards of set forth in this supplemental brief.

1) Mr. Talbot – Mr. Bueno’s retained trial counsel, testified he specialized in immigration law – that he gave unequivocal advice to Mr. Bueno; If you plead guilty and walk out the door today as this deal allows AND keep your nose clean you may stay in the country. BUT, if you get caught you Will get thrown out. The plea bargain obtained for Mr. Bueno

by this attorney allowed Mr. Bueno to leave court a free man, he literally walked out the door, and to remain in this country for over five years. Just as stated by his attorney the first contact with law enforcement resulted in deportation proceedings. This was effective representation as required by State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). The advise was not only effective in allowing Mr. Bueno to remain in the country literally for years even though he had plead guilty to a crime which usually resulted in automatic deportation but was amazingly accurate as to the final outcome.

2) The actions of trial counsel were beyond reproach. There is no factual basis for this Court to invoke the Equitable Tolling Doctrine in this case. This doctrine is, for lack of a better phrase, a legal strategy of last resort. This doctrine should only be considered in cases where the facts and circumstances are outside the norm; a case where the acts and actions, facts and circumstances, have aligned themselves in such a way that we as a society say that equity must be done, that we will toll the very rules we have established in order to insure that what is done is not only legal but right.

The facts of this case do not merit the use of this extraordinary remedy. The test forth in State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002) has not been met. Not to demean the issues now confronting

Mr. Bueno but, these facts are not extraordinary, he was afforded an extraordinary level of representation.

3) The consequences of the plea by Mr. Bueno were fully and completely explained to both he and his wife in a manner that allowed Mr. Bueno to knowingly, intelligently and voluntarily enter into the plea agreement. The Bueno's hired an attorney who "specialized" in the area of immigration. Mr. Talbott testified he specifically told Mr. Bueno he would face certain expulsion for a conviction for either of the offenses he was charged with. Mr. Talbott had successfully argued for bail, Mr. Bueno was free, this with the plea agreement for credit for the time served, meant Bueno walked out the door at the end of the hearing. Talbott told Bueno if he kept his nose clean he could remain a free man in the United States. BUT, if he was contacted by immigration he was "out of here."

ARGUMENT

A main argument by Bueno is the standard for representation set by Padilla v. Kentucky, --- U.S. ----, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). There are few records which more clearly meet the tests set forth in Padilla than the record before this court. The Court recognized that deportation is "intimately related to the criminal process" and that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Id.* at 1481. Because of

deportation's "close connection to the criminal process," advice about deportation consequences falls within "the ambit of the Sixth Amendment right to counsel." *Id.* at 1482. The representation by Mr. Talbott clearly met the standards of Padilla. In State v. Sandoval, 171 Wn.2d 163, 171, 249 P.3d 1015 (2011) this court addressed these issues;

The required advice about immigration consequences would be a useless formality if, in the next breath, counsel could give the noncitizen defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences. Under Padilla, counsel can provide mitigation advice. However, counsel may not, as Sandoval's counsel did, assure the defendant that he or she certainly "would not" be deported when the offense is in fact deportable. That Sandoval was subjected to deportation proceedings several months later, and not "immediately" as his counsel promised, makes no difference. Sandoval's counsel's advice impermissibly left Sandoval the impression that deportation was a remote possibility. Sandoval, 171 Wn.2d at 173.

Mr. Talbott's representation exceeded that required by either Padilla or Sandoval. There was no error therefore there was no prejudice but even if this court found there was prejudice it was not sufficient. "In satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Petition of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (citing Hill, 474 U.S. at 59); A "reasonable probability" exists if the defendant "convince[s] the court that a decision to reject the plea bargain would have

been rational under the circumstances." Padilla, 130 S.Ct. at 1485. This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. Strickland, 466 U.S. at 694. Bueno did not convince Judge McCarthy or the Court of Appeals that "but for the actions of his attorney he would not have plead guilty. There were no errors by Mr. Talbott.

It is impossible to separate out the issues of the effectiveness of counsel, equitable tolling and Bueno's understanding of the consequences of his plea into separate section in this brief. The combined argument below will cover all areas of the Petition for Review.

The decision of the Court of Appeals should stand. The issues raised by Mr. Bueno have now been addressed in whole or in part by five judges and one Commissioner. "We review a trial court's decision denying a motion to withdraw for an abuse of discretion." State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (citing State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)). As noted above State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982);

The test in Washington is whether "[a]fter considering the *entire record*, can it be said that the accused was afforded an *effective representation* and a *fair and impartial trial*". State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); see also State v. Mode,

57 Wn.2d 829, 360 P.2d 159 (1961). While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.

At the hearing to vacate the original plea Mr. Bueno, his wife and Mr. Jerry Talbott, Bueno's original, retained, attorney were all called to testify. Judge McCarthy heard testimony from the people present at all of the meetings where the plea was discussed. Mr. Bueno alleges that he has a limited education and a limited understanding of Spanish, written and verbal. This has been raised at each stage of this case and yet Mr. Bueno, pro se, has now had his Petition accepted for review by the highest court in this state. Obviously that lack of education has not hampered his legal skills. One of the issues was the claim that the interpreter used was ineffective which hampered Mr. Bueno's ability to understand the proceedings as well as understand the plea agreement. The ability of this interpreter could not have been too detrimental because Bueno's new attorney at the hearing to vacate his conviction used the very same interpreter. (RP 2010 pgs 3-4) Mr. Talbott's testimony further rebuts the allegation that Bueno did not understand the proceeding. Mr. Talbott testified that he is "fairly fluent in Spanish" and that Bueno's wife was "virtually at every conference we had and she is totally bilingual." This is the same wife who co-authored and signed the Petition for Review in this

case. Additionally on the date of his plea the Deputy Prosecuting

Attorney states after the lengthy colloquy between the court and Bueno;

MS. OLWELL: Your Honor, our recommendation is based upon his lack of criminal history **and the fact he will very likely be deported.** I'd ask the court follow the recommendation of the credit for time served and the financial order set forth in Appendix B. (RP 2005 pg 8)(Emphasis mine.)

Bueno was present and did not deny this statement. All of these statements and information was before Judge McCarthy when he denied Bueno's motion to vacate his plea. The law is clear that when a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. In re Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); In re Teems, 28 Wn. App. 631, 626 P.2d 13 (1981)]; State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981). When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable. State v. Perez, 33 Wn.App. 258, 261-2, 654 P.2d 708 (1982) The findings and conclusion as well as the letter opinion of Judge McCarthy note that he found the assertion that Bueno did not understand the proceedings and the Plea form "incredible." (CP 73-4, 76-81)

Nothing in the record would indicate to this court or the lower courts that Mr. Bueno was precluded or thwarted from filing an appeal or a personal restraint petition within the proscribed periods by something other than the alleged reliance on this claimed future motion to vacate or a later attempt to seek a pardon, the existence of which were emphatically refuted by Mr. Talbott.

Judge McCarthy in both his letter opinion and in the Findings of Fact and Conclusions of law states that he “specifically disbelieves Mr. Bueno’s testimony and sworn statement...” (CP 73-4, 76-81.) The court found there was no factual basis before to use equitable tolling in this case and ruled the motion was time barred under RCW 10.73.090 distinguishing this case from State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002) based on the facts. In Littlefair the testimony was that Littlefair had not received the proper advice from his attorney with regard to the consequences of deportation. Here the testimony of Mr. Talbott completely refutes that claim in this case therefore there was no basis to equitably toll any time limits.

Judge McCarthy ruled, and Court of Appeals agreed, the motion failed on the merits. CrR 4.2(f) imposes a demanding standard for withdrawal of a guilty plea based on the facts before Judge McCarthy the new testimony and the prior transcript of the plea hearing, support a

finding that Bueno entered this plea knowingly, intelligently and voluntarily, that even if the time limits were tolled Bueno had not meet the requirements of CrR 4.2(f) such that the court would have allowed him to withdraw his plea.

“The statute of limitation set forth in RCW 10.73.090(1) is a mandatory rule that acts as a *bar* to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more . . .” of the grounds listed in RCW 10.73.100. Shumway v. Payne, 136 Wn.2d 383, 398, 964 P.2d 349 (1998) (emphasis added). These timelines are not subject to waiver, nor is there a “good cause” exception to the time provisions. Shumway, 136 Wn.2d at 399 (citing In re Personal Restraint of Benn, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998). “RCW 10.73.090 imposes a constitutionally valid ‘time limit’ as a means of controlling the flow of postconviction collateral relief petitions.” *Id.*

Petitioner never filed a timely appeal or personal restraint petition. It was not until after the prediction of Mr. Talbott came to fruition, immigration proceedings were initiated five years after the plea, that Bueno suddenly came to the realization that he had, been ineffectively represented and he had been woefully ignorant and misinformed of the

actual consequences of his actions to such an extent that the very rules of jurisprudence should be waived. In the trial court, the Court of Appeals and now before this court petitioner has sought or is seeking to avoid the one year time bar. Mr. Bueno can not avoid edicts of Benn or Shumway, he has now turned to the rarely and sparingly invoked doctrine of equitable tolling. “Appellate jurisdiction . . . often depends upon compliance with procedural rules that the legislature creates [and] this court has long considered filing an appeal within the statutory time limit as prerequisite for an appellate court to acquire jurisdiction.” Doughtery v. Department of L & I, 150 Wn.2d 310, 322, 76 P.3d 1183 (2003)

A recent United States Supreme Court decision holds that equitable tolling may not be used to circumvent jurisdictional statutes. See Bowles v. Russell, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96 (2007). In Bowles, the habeas petitioner failed to file a timely notice of appeal. The United States Supreme Court affirmed the Sixth Circuit, holding that a “timely filing of a notice of appeal in a civil case is a jurisdictional requirement[,]” and “[the courts] ha[ve] no authority to create equitable exceptions to jurisdictional requirements.” 127 S. Ct. 2366. The court noted the rigidity of the rule and that some may find it inequitable but it was for Congress to authorize courts to promulgate rules that excuse compliance with statutory time limits and that while these rules would

“give rise to litigation testing their reach and would no doubt detract from the clarity of the rule . . . [such rulemaking] would likely lead to less litigation than court-created exceptions.” 127 S.Ct. at 2367.

Equitable tolling is a sparingly used remedy. The equitable tolling doctrine “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.” In re Carlstad, 150 Wn.2d at 593, *infra*. “Appropriate circumstances generally include ‘bad faith, deception, or false assurances by the [party opposing application of the doctrine], and the exercise of diligence by the [party seeking its use.]’” State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012, 954 P.2d 276 (1998) The remedy is “generally used . . . when the plaintiff exercises diligence and there is evidence of bad faith, deception, or false assurances by the defendant.” In re Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003).

The U.S. Supreme Court recently reviewed whether a habeas petitioner was entitled to use of the doctrine Lawrence v. Florida, 127 S. Ct. 1079, 108 166 L. Ed. 2d 924 (2007). In Lawrence the question was had the petitioner met the one year deadline under AEDPA for the filing habeas relief. The Court considered whether equitable tolling should be applied. Lawrence argued the legal confusion surrounding time periods for filing petitions under AEDPA, his attorney’s mistake in miscalculating

the limitations period, and that his case presented special circumstances that entitled him to equitable tolling. The Court held:

Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel. . . .

But State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay. Lawrence has not alleged that the State prevented him from hiring his own attorney or from representing himself. It would be perverse indeed if providing prisoners with postconviction counsel deprived States of the benefit of the AEDPA statute of limitations. See, e.g., Duncan, 533 U.S., at 179, 121 S. Ct. 2120, 150 L. Ed. 2d 251 ("The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments"). Lawrence v. Florida, 127 S. Ct. 1079, 1085-86

The State has found no cases where equitable tolling was addressed that have a record such as this one. Rarely is there occasion for the trial court or a reviewing court to have sworn testimony from the attorney who represented the petitioner. Let alone testimony in a case with immigration consequences such as this:

Q And what does your practice consist of?

A At the present time I've been about 98 percent immigration law. Over the years I've done various things. I gradually specialized in virtually doing all immigration law.

Q And in fact 2004, 2005, what was the mix of your practice?

A Probably at that time 80, 85 percent immigration law, 15, 20 percent various things, including some criminal law.

Q And so you got from doing a lot of criminal law to narrowing the focus of your practice?

A Gradually. I used to be on the federal panel of public defenders, and I've done a little contract work here and there, but gradually I've taken the criminal law part of it out.

Q And so, one of your specialties would be immigration law?
A It is by far (inaudible).
Q And you hold yourself out as an expert in immigration law or in the specialization, I guess, would be (inaudible).
A I specialize in (inaudible).
Q Okay. It's a complex area of the law; correct?
A It's very complicated, yes.
Q You took on the representation of Mr. Bueno --
A I did.
Q -- correct. And who initially -- what was your first appearance for Mr. Bueno -- or Garcia, I guess.
A Uhm, I believe they initially appointed a public defender, and then we substituted in fairly early on in the case. I don't remember exactly at what point.
...
A I'm fairly fluent in Spanish, but it was not an issue in Mr. Bueno's case because Misty, his wife, was virtually at every conference we had and she is totally bilingual. Also, (inaudible), she was participating in all the discussions about what he should do or shouldn't do, and so it was all going through her and with her, so there was no problem with the communications. RP 2010 pgs 30-2)

Mr. Talbott then testified as follows:

Well, yeah, the risk of going to trial, number one, I thought, in my opinion, I've done many criminal cases over the years, it was a really a hard case to win. In the meantime, if I can speak bluntly about it, if you're Mexican, you're in Yakima County, you're at the location where the drug sale's taking place, you're in a car that's leaving the scene and you've got some marked money in your pocket, it's going to be very hard to convince a Yakima County jury that you weren't part of a conspiracy, even maybe to the point of simply trying to hide the money.

So I -- you know, realistic. I don't lie to my clients at all. This is going to be a really hard case. If you win it, everything's great, you go on with your green card and your life is good. If you lose, though, there are a couple counts, I (inaudible) in prison, and you're going to be deported directly from prison. That's just what would happen. And it would be for life.

If the offer was -- and (inaudible) credit for time served-- you don't have to go back to jail, even though the guilty plea is a drug offense.

It's going to be deportable. If you plead and go do something stupid, get put back in jail for something else and Immigration finds you, you're outta here, on the basis -- on this plea. This is an aggravated felony. You're out of here.

The difference is that, as (inaudible) alluded to. If you don't go back to jail, Immigration isn't going to get you this time. If you behave yourself, stay out of trouble, keep your nose clean, don't get put in jail for anything, you could go on for years and years and years without a problem.

So then, truthfully I left the option up to the two of them, and they talked about it a great deal. I'm sure for days they discussed it. And with me he said -- we talked numerous times that's absolutely true. I don't know how many times we were in the -- my office or on the phone, every detail. And I'm straight up him, it's (inaudible) felony, when Immigration finds him, they're gonna be thrown (inaudible).

By the time you're going to renew your green card, come in and see me and maybe at that point there's something we can do for you. I'm making no promises whatsoever. But the options are, plead as (inaudible) ultimately (inaudible) at least get your (inaudible) immediately, or I go to trial and it's going to be really tough to win. And if you lose, then it could be much worse than (inaudible).

I left the option to them. They finally came and said, he wants to do the plea.

...

Q Okay. You didn't indicate that, uh -- to him-- I think you got -- in terms of what you'd just discussed, that's -- that's the advice with regard to the immigration consequences that you gave to him?

A (Inaudible) pleading to an aggravated felony. I said, if you ever get picked up by Immigration, you're out of here. He said, okay, I've learned my lesson. I'm never going to get in trouble again. I'm going to behave myself and take care of my wife and children because they mean all the world to me. I'm sure they (inaudible) matter very much. Apparently now he's back in trouble with some kind of -- I don't know what. (RP 33-36)

This was followed by an attempt to get Mr. Talbott to admit that he had told Bueno that he would basically take care of the immigration issue later;

Q So in here you do make a statement that says, I – uhm, I warned him of the Immigration consequences and that he would have to stay out of trouble until he might have a chance to erase the record. Under current law do you know of any way that he could erase the record?

A No. Nor did I promise him. (Inaudible) take a look at it. (Inaudible) feature Immigration law is changing. We (inaudible) . I thought maybe by the time he got the renew something would come up. And no, (inaudible) nor did I promise him.

Q Do you believe it's possible that he might have understood that to be a possibility, a real possibility?

A Uhm, I believe that he probably understood, that because things are constantly changing, maybe some day down the road would be a (inaudible), maybe. And I think that's certainly not out of the realm of possibility, there's (inaudible) exist today, nor did I say --

MR. JAKEMAN: No further

A (inaudible) wrong. (RP 2010 pg 38)

Nothing in this case falls under the extraordinary circumstances necessary to establish equitable tolling. As in Lawrence, nothing prevented the defendant from representing himself if he felt he had been given bad advice. There is absolutely NOTHING in this record that would allow equitable tolling. This is a stunningly clear record, grounded on testimony from a member in good standing of the Bar of this state, an individual who “specialized” in immigration law who flat out told Bueno that if he was found by law enforcement in this country after the plea “**I said, if you ever get picked up by Immigration, you're out of here.**” (RP 2010 pg 36)(Emphasis mine.)

Mr. Bueno could have raised these issues in a timely fashion. He chose not to take action regarding his deportation. He avoided the

immigration authorities for five years before he determined that he must challenge criminal conviction and the alleged ineffectiveness of his trial counsel.

When Mr. Talbott was asked on redirect about the statements by Petitioner and his wife regarding a pardon or vacation of this plea, Mr. Talbott the following record was made;

Q Did you have any discussion with regard to pardons?

A Not that I recall. And I'm not saying that (inaudible). I might have said, maybe someday there will be some proof of pardon. I don't know. I did not promise that. Because there is none now still, (inaudible) six years later. We talked about -- we talked a lot. I mean, this was session after session. And Misty was very concerned and she'd call me and then come in to see me.

Q Are you familiar with the portion of the Sentencing Reform Act where a person, if they spend like either five years for a Class C or ten years for a Class B out of -- out of trouble and pay all their costs that they can go back in and get their record vacated?

A They can with that type of vacation, (inaudible) just passage of time is not effective for Immigration purposes.

They've made note of that (inaudible). (RP 2010 pgs 38-9)

The court of appeals did not address the issue of equitable tolling. The matter was decided by a Commissioner's ruling which states, "Since the superior court was correct on the merits, this Court does not reach the argument that the time for filing the motion to vacate was equitably tolled." (Commissioners ruling at 5.)

This court should uphold that decision. There is nothing in the record before this court which would support the use of the extraordinary remedy to overcome Bueno's failure to take action. Equitable tolling has

been discussed at length in the federal courts. There the courts have indicated that, even if a petition was untimely under the strict operation of the statute of limitations in some instances that limitation ought to be equitably tolled.

The U.S. Court of Appeals recently addressed equitable tolling. Rivas v. Fischer, 687 F.3d 514; 2012 U.S. App. LEXIS 13974 (July 9, 2012, amended August 12, 2012) at Lexis 66-73 ;

Equitable tolling is often addressed in connection with the “AEDPA” statute. In Rivas the court stated; the AEDPA’s statute of limitations is not jurisdictional and "does not set forth 'an inflexible rule requiring dismissal whenever' its 'clock has run.'" Holland v. Florida, 130 S.Ct. 2549, 2560 (2010) (quoting Day v. McDonough, 547 U.S. 198, 205 (2006)). Rather the limitations period "is subject to equitable tolling in appropriate cases"—specifically, where 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." *Id.* at 2560, 2562; *see also* Doe v. Menefee, 391 F.3d 147, 175 (2d Cir. 2004) ("To qualify for [equitable tolling], the petitioner must establish that extraordinary circumstances prevented him from filing his petition on time, and that he acted with reasonable diligence throughout the period he seeks to toll." (internal quotation marks omitted)). Whether a circumstance is extraordinary depends not on "how unusual the circumstance alleged to warrant tolling is among the universe of prisoners, but rather how severe an obstacle it is for the petitioner endeavoring to comply with AEDPA's limitations period." Diaz v. Kelly, 515 F.3d 149, 154 (2d Cir. 2008). "On an appeal from a district court's denial of equitable tolling, we review findings of fact for clear error and the application of legal standards *de novo*." Harper v. Ercole, 648 F.3d 132, 136 (2d Cir. 2011).

There is nothing in Bueno’s case that warrants the use of equitable tolling. Rivas at *69 states “[b]ecause a lawyer is the agent of his client,

the client generally "must `bear the risk of attorney error.'" Holland, 130 S. Ct. at 2563." Using this analysis Bueno would have to demonstrate Mr. Talbott's actions were ineffective thereby allowing tolling. Further this negligence must be so egregious as to amount to an effective abandonment of the attorney-client relationship. See also, Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) Equitable tolling is not available for "what is best a garden variety claim of excusable neglect". See also United States v. Dass, 2011 U.S. Dist. LEXIS 76506 (D. Minn. 2011, 8th Cir.) at *19, Case law generally holds that "extraordinary circumstances" in the equitable tolling doctrine specifically refer to events or conduct which inhibits a petitioner's ability to file a timely habeas petition; it does not refer to consequences of attorney misconduct from the criminal proceeding. (Cited pursuant to FRAP 32.1 and GR 14.1(b))

D. CONCLUSION.

Petitioner has not met his burden. He has not and can not provide this court with a record that supports the claim that his attorney was ineffective. Nor can he demonstrate that Padilla is applicable to his case. To the contrary the record is replete with testimony indicating Mr. Talbott was effective and that the test set forth in Padilla were met. Talbott

worked out a plea that allowed Mr. Bueno to leave the courtroom a free man and to remain a free for years.

Because Mr. Bueno can not demonstrate his counsel was ineffective and there is no other bases in the record which would support the use of equitable tolling, this court should not allow Mr. Bueno to use this extraordinary remedy. Bueno can not demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."

Finally, Bueno can not demonstrate based on the record before this court that he did not know or understand the consequences of his guilty plea on his immigration status. The record is clear, the trial court as well as the court of appeals ruled that Mr. Bueno's issue was without merit. The State respectfully requests this Court uphold the decision of the trial court and the Court of Appeals and dismiss this petition.

DATED: September 13, 2012

JAMES P. HAGARTY
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Certificate of Service

The undersigned certifies that on this day, September 14, 2012, he delivered by U.S. mail or by email, by agreement of the parties, I delivery to the attorney of record for the appellant and appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Spokane, Washington, on the date below.

September 14, 2012,

s/ David B. Trefry
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Please find attached a copy of the Respondent's supplemental brief in the above caption matter.

David B. Trefry
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