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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint)	No. 66682-7-I
Petition of)	
)	Petitioner's Reply
)	to State's Response
MUHAMMADOU JAGANA,)	
)	
Petitioner.)	
)	

COMES now the Petitioner, MUHAMMADOU JAGANA, and submits the following Reply to the State's Response to Personal Restraint Petition.

DATED this 21st say of July 2011:

Respectfully Submitted,

s/ Nicholas Marchi
Nicholas Marchi
Attorney for Petitioner

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I. ARGUMENT

A. Mr. Jagana's claim is not time-barred because *State v. Littlefair* provides a statutory right to be advised of the potential immigration consequences of a plea in addition to the Constitutional right created by *Padilla v. Kentucky*.

In its Response to Personal Restraint Petition, the State argues that Mr. Jagana's petition is time-barred because *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), is a new rule of criminal procedure that does not warrant retroactive application under the federal framework laid out in *Teague v. Lane*, 109 S. Ct. 1060 (1989). State's Response to Personal Restraint Petition, p. 5. The Washington Supreme Court has held, however, that RCW 10.73.100(6) may require retroactive application of a rule of law in certain cases even when *Teague* would not. *State v. Evans*, 154 Wn.2d 438, 448 (2005) (citing *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427 (1992)).

Under RCW 10.73.100(6), the court can determine that a new rule requires retroactive application regardless of whether the rule is procedural or substantive. RCW 10.73.100(6).

Even if the Court determines that *Padilla* does not warrant retroactive application, however, state law existing at the time that Mr. Jagana entered his guilty plea independently requires his conviction to be vacated.

In *State v. Littlefair*, 112 Wn.App. 749, 51 P.3d 116 (2002), the state Court of Appeals, Div. II, held that RCW 10.40.200 gives defendants a statutory right, apart from any Constitutional right, to be advised of the potential deportation consequences of a plea. This makes sense considering the plain language of the statute:

Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. RCW 10.40.200(2).

In addition, the court in *Littlefair* affirmed that RCW 10.73.090 (the statute imposing a time limit on collateral attacks) is subject to equitable tolling. *Littlefair*, 112 Wn.App. at 758. In

the instant case, Mr. Jagana maintains that the failure of his defense counsel to inform him of the immigration consequences of his plea is sufficient justification for equitable tolling of the statute.

Petitioner moves this Court to vacate on statutory grounds under *Littlefair* (in addition to the Constitutional grounds of *Padilla*) because he was not informed of the potential immigration consequences of his plea.

B. Mr. Jagana has established ineffective assistance of counsel.

In its brief, the State asserts that Mr. Jagana has failed to establish ineffective assistance of counsel because he has not shown that the immigration consequences of his conviction are “truly clear.” State’s Response to Personal Restraint Petition, p. 13.

In *Washington v. Sandoval*, the Washington Supreme Court held, “If the applicable immigration law ‘is truly clear’ that an offense is deportable, the defense attorney must

correctly advise the defendant that pleading guilty to a particular charge would lead to deportation.” 171 Wn.2d 163, 170 (2011).

Under immigration law, the consequences of a drug conviction are quite clear. Section 212(a)(2)(A)(i)(II) of the INA (8 U.S.C. § 1182) renders a person removable for committing a “a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).”

In a recent case, the Washington Court of Appeals, Division 3 recognized the clarity of immigration law with respect to drug convictions. *State v. Martinez*, 29018-2-III (Wa. Ct. App. Div. III, Apr. 21, 2011). The Court held in that case that defense counsel’s performance was deficient because he did not inform his client that a guilty plea would certainly render the client deportable. *Id.* The Court stated, “[P]ossessing a controlled substance with intent to deliver is an

aggravated felony that, if committed by an alien, is a deportable offense. The law is clear.” *Id.*

Given the clarity in immigration law with respect to the consequences of any drug conviction, *Padilla* imposed upon Mr. Jagana’s counsel a duty to inform him of these potential consequences.

In addition, the State argues that the immigration warnings in Mr. Jagana’s plea paperwork, as well as emails exchanged between Mr. Jagana’s defense counsel and the prosecuting attorney, show that Mr. Jagana has failed to satisfy his burden under *Padilla*. State’s Response to Personal Restraint Petition, p. 13-14.

In *Sandoval*, however, the Washington State Supreme Court determined that boilerplate advisal language in a guilty plea form does not satisfy defense counsel’s Sixth Amendment duty to inform his client of potential immigration consequences. *Sandoval*, 171 Wn.2d at 173 (2011). Similarly, emails exchanged between the prosecutor and defense counsel do not

serve to undermine Mr. Jagana's assertion that he was not informed of the potential immigration consequences of his conviction.

Finally, the State asserts that Mr. Jagana has failed to establish prejudice because "it would not have been rational for Jagana to proceed to trial, risking conviction for a higher crime with a certain prison sentence and more adverse immigration consequences." State's Response to Personal Restraint Petition, p. 15. The State has underestimated the importance of avoiding immigration consequences to persons who are in the country illegally or as Legal Permanent Residents.

Considering the severe consequences of removal, a well-informed defendant may choose to proceed to trial even if there is a very small chance that he will be found not guilty. He will often do this in order to try to avoid having a conviction on his record for immigration purposes. The Court of Appeals, Division III, shed light on this subject in its discussion of Sandoval:

In *Sandoval*, the court found prejudice where Mr. Sandoval stated in his brief that he would not have accepted the plea and counsel admitted Mr. Sandoval "was very concerned" about the risk of deportation. The *Sandoval* court found this to be sufficient, even though it was not "rational" that Mr. Sandoval would proceed to trial instead of accepting a plea deal given the disparity in punishment. *State v. Martinez*, 29018-2-III (Wa. Ct. App. Div. III, Apr. 21, 2011) (internal citations omitted).

Considering the negative immigration consequences of a plea to a drug charge, Mr. Jagana maintains that he would not have pled guilty had he been informed of these potential ramifications.

II. CONCLUSION

For the above reasons, the Petitioner respectfully requests that his conviction be vacated.

DATED this 21st day of July 2011.

Respectfully Submitted,


s/ Nicholas Marchi
Nicholas Marchi
Attorney for Petitioner

CERTIFICATE OF MAILING

I, Nicholas Marchi, declare:

That my business address is 108 So. Washington Street, Suite 406, Seattle, WA 98104. That I served a true copy of the attached by placing said copy in an envelope, which was then sealed, and delivered to:

Attorney for the State:

Ms. Ann Summers
SDPA, King County
W554 King County Courthouse
Seattle, WA 98104

Dated July 21st, 2011.



s/Nicholas Marchi

CARNEY & MARCHI, P.S.

Attorneys for Petitioner