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NO. 98026-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re Personal Restraint  
Petition of

ALEJANDRO GARCIA-MENDOZA,  
  
Petitioner.

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SUPPLEMENTAL  
BRIEF OF RESPONDENT

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## I. INTRODUCTION

The petitioner has raised a claim of ineffective assistance of counsel. That claim has not been adjudicated. If the petitioner can establish deficient performance and prejudice, he will be entitled to relief under that claim. The State has conceded that the ineffectiveness claim is not time barred, because it falls under the “significant change in law” exception to the statutory time limit.

The petitioner has also claimed that he is entitled to withdraw his plea under RCW 10.40.200. That statute has been in effect since 1993. It requires courts to ensure that defendants receive general advice concerning possible immigration consequences of their guilty pleas. It does not require case-specific advice. It does not even *permit* courts to give such advice, since it precludes them from requiring defendants to disclose their legal status. Without knowing a defendant’s immigration status, it is impossible to advise the defendant of specific immigration consequences.

The petitioner claims that this court has re-interpreted RCW 10.40.200 as requiring *specific* advice by *defense counsel*. That is not correct. This court has only looked to RCW 10.40.200 in defining counsel’s constitutional duties. The performance of those

duties are governed by the Strickland standard, which requires a showing of deficient performance and prejudice.

Because there has been no significant change in the interpretation of RCW 10.40.200, there has been no “significant change in the law” with regard to the petitioner’s statutory claim. As a result, the Court of Appeals properly dismissed the personal restraint petition as “mixed.” This leaves the petitioner free to re-file a petition based on his claim of ineffective assistance.

## **II. ISSUE**

The Motion for Discretionary Review sets out substantially the following issue:

Did this court’s decisions in Sandoval and Tsai significantly change the interpretation of RCW 10.40.200?

## **III. STATEMENT OF THE CASE**

The facts underlying the challenged conviction are set out in the Affidavit of Probable Cause. In his plea statement, the petitioner agreed that the court could consider this Affidavit in deciding whether there was a factual basis for the plea. App. F,<sup>1</sup> Statement of Defendant on Plea of Guilty at 7 ¶ 12 (hereinafter “Plea

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<sup>1</sup> The documents referred to in this brief are attached to the Motion for Discretionary Review. They will be referred to by the Appendix designation.

Statement"). The petitioner has not disputed any of the facts set out in the Affidavit.

According to the Affidavit, on June 19, 2006, a Marysville Police officer arrested the petitioner, Alejandro Garcia Mendoza, on an outstanding DOC escape warrant. In a search incident to arrest, the officer found a plastic container containing two baggies. Later tests showed that one baggie contained 1.9 grams of cocaine, while the other contained .3 grams of methamphetamine. The petitioner had two prior convictions for possession of a controlled substance. App. F, Affidavit of Probable Cause at 1-2.

On September 19, an information was filed charging the petitioner with one count of possession of cocaine. App. F, Information. After being released on his own recognizance, he twice failed to appear for an omnibus hearing. On March 27, 2007, he pleaded guilty to the original charge. In return for the plea, the prosecutor agreed not to file two bail jumping counts. Plea Statement, Plea Agreement at 2 ¶ 8. He was sentenced on July 18, 2007. App. F, Judgment and Sentence.

The plea statement included the following warning:

If I am not a citizen of the United States, a plea of guilty punishable as a crime under state law is grounds for deportation, exclusion from admission to

the United States, or denial of naturalization pursuant to the laws of the United States.

Plea Statement at 4 ¶ 6(r). The petitioner has not denied that he received this warning. See App. G, ex. A at 3 ¶ 19.

Over 11 years later, on October 18, 2018, the petitioner filed a Motion to Withdraw Guilty Plea. He claimed that his trial counsel was ineffective for failing to advise him that the conviction rendered him ineligible for cancellation of removal. App G. The State moved to transfer that motion to the Court of Appeals, for consideration as a personal restraint petition. App. F. The State conceded that the ineffectiveness claim was not time barred. Id. at 4-5. The State argued, however, that the petitioner had failed to show either deficient performance or prejudice. Id. at 5-11.

In response, the petitioner raised a statutory argument.<sup>2</sup> He claimed that the court that accepted his plea had failed to provide the advice required by RCW 10.40.200. He argued that this statutory violation gave him the right to withdraw his plea *without* a showing of prejudice. App. E. In reply, the State argued that this statutory claim did not fall within any exception to the time limit.

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<sup>2</sup> This statutory claim had been mentioned in a footnote to the Motion to Withdraw Guilty Plea. App. G at 9 n. 4. The Motion did not, however set out any argument in support of the claim.

Because the motion now included a ground that was time-barred, the entire petition was subject to dismissal. App. D.

The Superior Court granted the State's motion to transfer. The court pointed out that in light of the petitioner's two prior drug convictions, the conviction in this case did not result in any additional immigration consequences. App. C at 4.

In light of this transfer, the Court of Appeals considered the Motion to Withdraw Guilty Plea as a personal restraint petition. See CrR 7.8(c)(2). The court requested supplemental briefing on whether the petition was time barred. After considering that briefing, the court dismissed the petition as a time-barred "mixed petition." Because of this conclusion, the court did not consider the merits of the petitioner's ineffectiveness claim. App. A. This court granted the petitioner's motion for discretionary review of that decision.<sup>3</sup>

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<sup>3</sup> Both the Motion for Discretionary Review and the Motion to Modify Commissioner's Ruling set out purported facts concerning the petitioner's life history following the conviction. M.D.R. at 2; Motion to Modify at 2-3. These facts have no relevance to the legal issues before this court. The outcome of this case would be the same for an inveterate criminal as for an outstanding member of the community. The only apparent reason for including these facts in the petitioner's motion is an effort to gain this court's sympathy.

#### IV. ARGUMENT

##### A. THIS CASE DOES NOT INVOLVE ANY ISSUE CONCERNING A DEFENDANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The sole issue in this case involves interpretation of the statutory mandate set out in RCW 10.40.200. This court has been asked to decide whether it significantly changed the interpretation of that statute in State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), and In re Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015).

In deciding this issue, it is important to recognize what this case does *not* involve. At this point in the proceedings, it does not involve any claim of ineffective assistance of counsel. In dismissing the petition as “mixed,” the Court of Appeals specifically stated that it was not considering the merits of the ineffectiveness claim. App. A at 8. As the opinion notes, the State has conceded that such a claim is not time-barred. Id. at 4; App. F at 4-5.

To establish ineffective assistance based on inadequate advice about immigration consequences, “the defendant must satisfy the familiar two-part Strickland ... test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant.” Sandoval, 171 Wn.2d at 169 ¶ 9, citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984). In its Answer to Motion for Discretionary Review, the State conceded that the petitioner is free to seek relief if he can satisfy the Strickland requirements. Ans. to M.D.R. at 4.

The issue in the present case is therefore significant only if the petitioner *cannot* satisfy the Strickland standard. In particular, the petitioner claims that he is entitled to relief without any showing of prejudice. M.D.R. at 16. In this context, a defendant satisfies the prejudice requirement by showing "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Sandoval, 171 Wn.2d at 174-75 ¶ 19. If he cannot show this, he is not entitled to relief on the basis of ineffective assistance. But according to the petitioner, he is nonetheless entitled to relief under RCW 10.40.200.

So the issue in the present case is this: Suppose that a defendant received incomplete advice concerning immigration consequences, but that advice had *no* impact on his decision to plead guilty. For example, suppose that the evidence was so overwhelming that the defendant had no chance of acquittal. Suppose that he was offered a plea bargain that was far more beneficial to him than the alternative of conviction after trial.

Moreover, suppose that the new conviction had *no* significant immigration consequences, since the defendant was already subject to the same consequences as a result of *prior* convictions. Has the Washington Legislature nonetheless decreed that the defendant is entitled to withdraw his guilty plea, with no time limit on that request? The answer to that question should be no.

**B. RCW 10.40.200 REQUIRES GENERAL WARNINGS BY THE COURT, NOT CASE-SPECIFIC WARNINGS BY DEFENSE COUNSEL.**

Before deciding whether there has been a significant change in the interpretation of RCW 10.40.200, the court may need to answer a subsidiary question: what does the statute mean? On its face, that statute require *courts* to ensure that defendants receive *general* warnings concerning potential immigration consequences. The petitioner, however, claims that the statute requires *defense counsel* to give *particularized* warnings. That claim should be rejected.

The purpose of statutory interpretation is to determine and give effect to the intent of the legislature. When possible, we find the legislature's intent solely from the plain language of the statute, considering the text of the provision, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.

State v. Stevens Cty. Dist. Court Judge, 194 Wn.2d 898, 906 ¶ 17,

453 P.3d 984 (2019) (citations omitted).

Here, the relevant statutory language is as follows:

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. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement. If, after September 1, 1983, the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty. Absent a written acknowledgment by the defendant of the advisement required by this subsection, the defendant shall be presumed not to have received the required advisement.

RCW 10.40.200(2), enacted by Laws of 1983, ch. 199, § 1.

This statute clearly places the duty on the court: "the court shall determine that the defendant has been advised..." There is no obligation placed on anyone else. There is nothing unusual about

this. Numerous statutes require courts to advise people concerning their legal rights or obligations. See, e.g., RCW 9.41.047(1)(a) (notifying defendants of loss of right to possess firearms), 10.01.200 (notifying defendants of sex offender registration requirements), 10.73.100 (advising defendants of time limits on collateral attacks), 13.32A.198(1) (advising parents of rights in at-risk youth proceeding), 13.34.092 (advising parties of rights in shelter care hearings). There does not, however, appear to be a single statute that requires advice to be given by counsel. It would be extremely surprising for the legislature to require convictions to be set aside based on failure to provide warnings, without giving the court or the prosecutor any opportunity to learn what warnings were given or to determine if they were correct.

Since the statutory warnings must come from the court, it necessarily follows that they can only be general in nature. This is clear from three statutory provisions. First, RCW 10.40.200(1) expressly states that “no defendant [should] be required to disclose his or her legal status to the court.” But without knowing the defendant’s legal status, it is impossible to provide specific advice concerning immigration consequences. For example, the consequences for a permanent resident may be far different than

those for an immigrant who lacks legal status. The statute thus precludes courts from acquiring the information necessary for anything more than general warnings.

Second, the statute that enacted RCW 10.40.200 specified how the new requirements would be carried into effect:

The office of the administrator for the courts shall notify all courts of the requirements contained in section 1 of this act [codified as RCW 10.40.200]. The judicial council shall recommend to the supreme court appropriate court rules to ensure compliance with the requirements of section 1 of this act. Until court rules are promulgated, the office of the administrator for the courts shall develop and distribute forms necessary for the courts to comply with section 1 of this act.

Laws of 1983, ch. 199, § 2.

Obviously, no form could cover all of the numerous ways in which a conviction might affect the immigration status of a particular defendant. A form can only contain a general warning — like the one set out in CrR 4.2. When the Legislature enacted a requirement for form warnings, it clearly contemplated that those warnings would be general in nature.

Third, RCW 10.94.400(2) establishes a presumption that is rational *only* if the statute contemplates general warnings. If a defendant signs a plea statement “containing the advisement required by this subsection,” it is presumed that he has “received

the required advisement.” The advisement in the plea statement is, however, only a general warning of potential consequences. The plea statement does not and cannot contain case-specific warnings.

If a defendant signs a plea statement containing general warnings, it is entirely reasonable to presume that he has received general warnings. If, on the other hand, “the required advisement” consists of case-specific warnings, the presumption is irrational. If a defendant signs a plea statement containing *general* warnings, there is no basis for inferring that he thereby received *case-specific* warnings. The existence of this statutory presumption thus strongly suggests that only general warnings are required by the statute.

The courts of this state have complied with the mandate of ch. 199. By the effective date of the statute, this court adopted a Superior Court rule that incorporated the statutory warnings. Amendment to CrR 4.2, 99 Wn.2d 1119-22 (eff. September 1, 1983). The petitioner in this case signed a plea form containing those warnings. Plea Statement at 4 ¶ 6(r). The statute did not require any other action by the court. If defense counsel failed to carry out his additional constitutional duties, that failure is analyzed under the two-part Strickland test.

**C. SANDOVAL AND TSAI DID NOT SIGNIFICANTLY CHANGE THE INTERPRETATION OF RCW 10.40.200, SINCE THEY APPLIED EXISTING STATUTORY STANDARDS IN CONSTRUING CONSTITUTIONAL REQUIREMENTS.**

Once this court has clarified the interpretation of RCW 10.40.200, it can resolve the question in this case: was that interpretation changed by Sandoval and Tsai? Under RCW 10.73.100(6), the time limit does not apply if there has been “a significant change in the law ... which is material to the conviction,” provided that the court “determines that sufficient reasons exist to require retroactive application of the changed legal standard.” A significant change in state law occurs “where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.” Tsai, 183 Wn.2d at 104 ¶ 23.

To begin with, Sandoval and Tsai clearly did not adopt the standard urged by the petitioner. As already mentioned, the petitioner claims that he is entitled to relief without any showing of prejudice. M.D.R. at 16. In both cases, this court specifically held to the contrary:

Sandoval still has the burden of establishing the prejudice required for a claim of ineffective assistance of counsel based on an attorney’s advice during the plea bargaining process.

Sandoval, 171 Wn.2d at 169 ¶ 8.

Where a defense attorney makes “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” the attorney’s performance is constitutionally deficient. Where that deficiency deprives the defendant of fair proceedings, the defendant has suffered prejudice because there is “a breakdown in the adversary process that renders the result unreliable.”

Tsai, 183 Wn.2d at 99 ¶ 14, quoting Strickland, 466 U.S at 688, 690.

In Sandoval, the State argued that the guilty plea statement provided an adequate warning about immigration consequences.

Sandoval, 171 Wn.2d at 172-73 ¶ 14. The court rejected this argument:

[T]he guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave. In Padilla, the Commonwealth of Kentucky used a plea form that notifies defendants of a risk of immigration consequences, and the Court even cited RCW 10.40.200, noting the Washington statute provides a warning similar to Kentucky’s. However, the Court found RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings. Rather, for the Court, these plea-form warnings underscored “how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”

Sandoval, 171 Wn.2d at 173 ¶ 16, quoting Padilla v. Kentucky, 559 U.S. 356, 373-74, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). This court thus accepted that the standard language in the plea form

satisfies the requirements of RCW 10.40.200. It held, however, that this language is insufficient to satisfy defense counsel's constitutional requirements.

In Tsai, the issue was whether the holding of Padilla was retroactive. That issue turned on whether that holding constituted a "new rule." "[C]ases that merely apply the ordinary test for ineffective assistance of counsel to new facts do not announce new rules." This court determined that Padilla was "just such a case." Tsai, 183 Wn.2d at 100 ¶ 15.

In reaching this conclusion, the court considered the impact of RCW 10.40.200:

RCW 10.40.200's plain language gives noncitizen defendants the unequivocal right to advice regarding immigration consequences and necessarily imposes a correlative duty on defense counsel to ensure that advice is provided. While defense counsel's duty to advise regarding immigration consequences is imposed by statute, reasonable conduct for an attorney includes carrying out the duty to research the relevant law. In many cases defense counsel's failure to fulfill his or her statutory duty may be due to an unreasonable failure to research or apply RCW 10.40.200, and there is no conceivable tactical or strategic purpose for such a failure.

Tsai, 183 Wn.2d at 101–02 ¶ 18 (footnote and citations omitted).

This analysis necessarily assumes that there had been *no* significant change in the court's interpretation of RCW 10.40.200.

Counsel's duty to "research the relevant law" only extends to the law that exists. "[C]ounsel's failure to anticipate changes in the law does not amount to deficient representation." State v. Brown, 159 Wn. App. 366, 372 ¶ 9, 245 P.3d 776 (2011). If Tsai changed the interpretation of RCW 10.40.200, prior counsel could not have been ineffective in failing to advise their clients about that change. No amount of legal research can identify a statutory interpretation that does not yet exist.

Tsai notes that the statement set out in the plea form "is not, itself, the required advice; it merely creates a rebuttable presumption the defendant has been properly advised." Tsai, 183 Wn.2d at 101 ¶ 17, citing RCW 10.40.200(2). This was likewise not a change in the law. Over 20 years before Tsai, the Court of Appeals recognized that the statutory presumption can be rebutted. State v. Holley, 75 Wn. App. 191, 876 P.2d 973 (1994). In Holley, the defendant signed a form containing the required warning. He later claimed that his attorney had told him that the paragraph did not apply to him. Id. at 195. The Court of Appeals held that if he did not read the paragraph on advice of counsel, that would rebut the statutory presumption and allow the defendant to withdraw his guilty plea. Id. at 201. Years before the plea in the present case, it

was thus clear that notwithstanding the existence of a form containing the proper advice, a defendant could rebut the presumption that he had received that advice.

Tsai does, however, contain some conflicting language concerning the source of counsel's duty. At one point, the court says that RCW 10.40.200 "imposes a correlative duty on defense counsel to ensure that advice is provided." Citing Strickland, the court then said that "reasonable conduct for an attorney includes carrying out the duty to research the relevant law." Tsai, 183 Wn.2d at 101-02 ¶ 18. In other words, the court used the statute as a way to define counsel's constitutional duties.

Elsewhere, however, the court referred to a "clear statutory requirement that defense counsel has a duty to advise [defendants] about the immigration consequences of pleading guilty." Id. at 1089 ¶ 33. Taken literally, this statement is incorrect. Nothing in the clear language of the statute places any duty on counsel. Rather, that statute — like every other criminal statute — gives rise to a constitutional duty for counsel to advise their clients concerning their statutory rights and potential consequences. This does not mean that every failure by counsel to advise of such consequences is a statutory violation.

This court should now acknowledge that its reference to a “clear statutory requirement” was imprecise. The statements made elsewhere in the opinion are more accurate. RCW 10.40.200 “imposes a correlative duty on defense counsel.” Tsai, 183 Wn.2d at 101 ¶ 18. As a result, the statute has “constitutional implications.” Id. at 108 ¶ 33. As stated in both Tsai and Sandoval, a violation of those constitutional requirements is judged under the two-part Strickland standard. Absent a showing of deficient performance and prejudice, the defendant is not entitled to relief.

Since the interpretation of RCW 10.40.200 has not changed, there is no “significant change in the law” that excuses the statutory claim from the time bar. As a result, the court properly dismissed the petition as a “mixed petition.” See In re Hankerson, 149 Wn.2d 695, 72 P.3d 703 (2003). This leaves the petitioner free to file a new petition alleging only ineffective assistance. Id. at 703-04.

**V. CONCLUSION**

The order dismissing the personal restraint petition should be affirmed.

Respectfully submitted on August 7, 2020.

ADAM CORNELL  
Snohomish County Prosecuting Attorney

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Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of:

ALEJANDRO GARCIA-MENDOZA,

No. 98026-8

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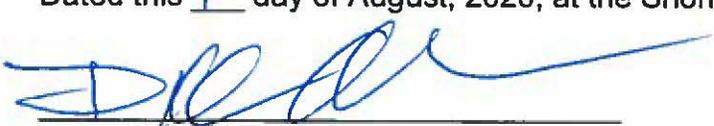
The undersigned certifies that on the 7<sup>th</sup> day of August, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Teymur Gasanovich Askerov, Black and Black, PLLC; [tim@blacklawseattle.com](mailto:tim@blacklawseattle.com)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7<sup>th</sup> day of August, 2020, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office

**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

**August 07, 2020 - 11:25 AM**

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