Washington Defender Association's
Immigration Project
www.defensenet.org/immigration-project

Ann Benson, Directing Attorney
abenson@defensenet.org (360) 385-2538
Enoka Herat, Staff Attorney
enoka@defensenet.org (206) 623-4321 x 105
Jonathan Moore, Immigration Specialist
jonathan@defensenet.org (206) 623-4321 x 104

Overview of Selected Case Law for PCR Claims

Fong Yue Ting v. United States, 149 U.S. 698, 149 S.Ct. 698, 37 L.Ed. 905 (1893)

For more than a century, the United States Supreme Court has "recognized that deportation is a particularly severe 'penalty,'" equivalent to "banishment or exile." 149 U.S. 698 at 740. This was reiterated by the Court in *Delgadillo v. Carmichael* (1947) and most recently in *Padilla v Kentucky* (2010).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)

In order to establish that a plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the two-part test defined by the Court in *Strickland*. The first prong of the *Strickland* test requires a court to determine whether counsel's performance was deficient and "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687. Second, the defendant must demonstrate that counsel's unreasonable performance prejudiced his case. *Id*. To satisfy this requirement, defendant must show that there is a reasonable probability that, but for attorney's unprofessional errors, the result of the trial would have been different. See *id*. at 694. The probability is "reasonable" if it is sufficient to undermine confidence in the outcome of the trial. See *id*.

Sate v. Littlefair, 112 Wash.App. 749, 51 P.3d 116 (2002)

In *Littlefair*, the Court of Appeals held that RCW 10.73.090's time limit on collateral attack was equitably tolled in the case of a Canadian citizen who, as a result of mistakes on the part of defense counsel and the trial court, did not learn of the immigration consequences of his guilty plea until some two years after his conviction when he was placed in deportation proceedings. *Littlefair*, 51 P.3d at 122-123. Thus, where a defendant is not accurately advised by his attorney about the immigration consequences of his conviction and does not learn about those consequences until well after the statutory time limit, the one year time limit on collateral attack under RCW 10.73.090 may be equitably tolled. *See* 122-123. Where equitable tolling is applied, the statute of limitations does not begin to run until the date that the defendant first discovered that deportation was a consequence of his plea. *See id*.

Benyaminov v. City of Bellevue, 144 Wash.App. 755, 183 P.3d 1127 (2008)

In a similar case to *Littlefair*, the court held that equitable tolling did not apply in an instance where a non-citizen who pleaded guilty to a crime that had serious immigration consequences moved for relief from the judgment more than a year after it was entered. Here, the court file, which would have contained the plea acknowledgement of deportation consequences, had been destroyed prior to the initiation of deportation proceedings. *Benyaminov*, 183 P.3d at 1133. The Court distinguished the case from *Littlefair* by noting that Mr.

Littlefair had demonstrated the existence of mistakes which caused his lack of knowledge of the deportation consequences of his plea (his attorney never informed him of the consequences and immigration waited more than two years before notifying him that he was subject to deportation for his conviction), whereas Mr. Benyaminov simply asserted that no record existed of his acknowledgement of the deportation consequences of his plea.

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

In *Padilla v. Kentucky*, the United States Supreme Court held that the Sixth Amendment duty to provide effective assistance requires defense counsel to affirmatively and accurately advise their non-citizen clients about the immigration consequences of entering a guilty plea. *Padilla*, 130 S.Ct. at 1482-83. The Court rejected the idea that immigration consequences of a guilty plea are collateral to a conviction and thus fall outside the Sixth Amendment obligation of effective assistance of counsel. Rather, they emphasized that the risk of deportation is an "integral part" of the possible penalty that may be imposed on non-citizen defendants. *Id*. at 1478–1480. *Padilla* makes clear that due to the "close connection" of the risk of deportation "to the criminal process," defense attorneys have an affirmative obligation to advise their clients with respect to the immigration consequences of a plea. *Id*. at 1482.

The Court recognized that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." 130 S.Ct. at 1482. Further, the Court held that "[i]t is quintessentially the duty of counsel to provide her client with *available advice* about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis." *Id.* at 1484 (internal citations omitted; emphasis added). The *Padilla* decision elucidated numerous steps an attorney must take to satisfy his duties under its holding. To identify whether a particular plea carries risks of deportation, an attorney should "read [] the text of the statute," and "follow the advice of numerous practice guides," and most importantly, should access even "rudimentary advice on deportation . . . when it is readily available." *Id.* at 1483-84. The Court noted, "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 1483.

***State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011)**

In *Sandoval*, the Washington Supreme Court established the bounds of *Strickland* prejudice where a non-citizen defendant faces immigration consequences as the result of a plea by holding that, in the context of the plea process, "[c]ounsel's advice can render the defendant's guilty plea involuntary or unintelligent." 171 Wn.2d at 168. Specifically, the Court found that, given the severity of the deportation consequence at stake, a non-citizen defendant meets his burden to establish prejudice where counsel's ineffective assistance *forecloses consideration of options* that would avoid deportation. See *Sandoval*, 171 Wn.2d at 176. The *Sandoval* Court found prejudice where there was a reasonable probability that a non-citizen would not have pled guilty to third degree rape with a six month sentence, and instead would have risked a prison term of 78-102 months at trial, since the guilty plea triggered certain deportation.

The Court held that "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." *Id*. at 174-75. A reasonable probability exists if the defendant convinces the court that a decision to reject the plea bargain would have been rational under the circumstances. *Id*. at 175. This standard of proof is somewhat lower than the preponderance of the evidence standard. *Id*.

It should be noted that the Washington Supreme Court has not yet addressed the scope of *Padilla* duties as they relate to "counsel's negotiations with the prosecutor, [or] his investigation of the facts…" 171 Wn.2d at 174, n. 3.

***Lafler v. Cooper*, 132 S.Ct. 1376, 182 L. Ed. 2d 398 (2012)**

Much like the Washington Supreme Court's holding in *Sandoval*, the *Lafler* Court held that the Sixth Amendment guarantees a criminal defendant the right to counsel and that "right extends to the plea-bargaining process." 132 S.Ct. 1376 at 1384. During the plea negotiation process, "defendants are 'entitled to the effective assistance of competent counsel.'" *Id*. (quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

***State v. Chetty*, 167 Wash.App. 432, 272 P.3d 918 (2012)**

In *Chetty* the defendant, a citizen of Fiji and lawful permanent resident in the U.S., filed a motion under RAP 18.8(b) to extend the time to file a direct appeal of his 2004 conviction of possession of cocaine with the intent to deliver in violation of former RCW 69.50.401(a)(1)(i) (1998). Chetty contended that he was entitled to an extension of time on the grounds that his attorney provided ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668. The Court of Appeals held that counsel's failure to inform the defendant of immigration consequences of guilty plea was a factor in determining whether defendant's waiver of right to direct appeal was knowing, voluntary, and intelligent. *See* 272 P.3d at 925 ("the effectiveness of counsel is a circumstance that bears on the validity of a defendant's waiver of the right to appeal and, in turn, on this court's ultimate determination whether to extend the time to file a notice of appeal under RAP 18.8(b).) *See also Evitts,* 469 U.S. at 400, 105 S.Ct. 830 (a state may not extinguish a defendant's right to an appeal "because another right of the appellant—the right to effective assistance of counsel—has been violated").

***In re Personal Restraint of Ramos*, 181 Wash.App. 743, 326 P.3d 826 (2014)**

The Court in *Ramos* held that defense counsel's reading of the standard immigration warning language contained in the defendant's guilty plea statement which provides acknowledgement that the plea may be grounds for deportation, exclusion from admission to the United States, or denial of naturalization is sufficient to satisfy counsel's *Padilla* obligation to communicate to the client the immigration consequences of a plea. 181 Wash.App. at 755, 326 P.3d at 832. ("[W]e do not consider Ryals' [defendant's defense lawyer] reading of the warning from the form to be less of a caution than if Ryals independently uttered the warning. No case requires that the warning of immigration consequences come directly from the thoughts of the attorney rather than the attorney reading the warning to the client."). *Id.*

***In re Personal Restraint of Tsai*, 183 Wash.2d 91, 351 P.3d 138 (2015)**

The Washington State Supreme Court recently held in *In re Personal Restraint of Tsai*, that the Supreme Court's holding in *Padilla* effected a significant change law that applies retroactively to cases on collateral review and therefore exempts litigants making claims under *Padilla* from RCW 10.73.090's one year time bar on collateral attacks. *In re Personal Restraint of Tsai*, Slip Op. at 16.