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Guide to Filing for Immigration-Related Post-Conviction Relief in Washington State

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I. Legal Framework Governing *Padilla*-Related Ineffective Assistance of Counsel Claims

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. 130 S.Ct. 1473, 1482-83 (2010). 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 following year, the Washington Supreme Court decided *State v. Sandoval*, affirming *Padilla* and applying it to Washington state convictions. 171 Wash.2d 163 (2011). The Court in *Sandoval* went further than *Padilla*, determining that a defendant could establish prejudice where counsel's ineffective assistance foreclosed consideration of options that would avoid deportation. *Id.* at 176. In that case, the Court found prejudice where there was a reasonable probability that a non-citizen would have gone to trial for the chance at acquittal and risked a prison term of 78-102 months for second degree rape, instead of pleading guilty to third degree rape with six months, resulting in automatic deportation, as his attorney advised him to do.

A. Establishing Ineffective Assistance of Counsel Under *Strickland v. Washington*

Padilla-related post-conviction relief claims in Washington State are governed by the ineffective assistance of counsel framework established by the U.S. Supreme Court in *Strickland v. Washington*. 104 S.Ct. 2052 (1984). In *Strickland*, the Supreme Court recognized that the Sixth Amendment requires attorneys to provide effective assistance of counsel, holding that the defendant is entitled to relief where counsel's performance was deficient. In order to establish ineffective assistance, the petitioner must satisfy a two-part test. The first prong requires a court to determine whether counsel's performance "fell below an objective standard of reasonableness." 104 S.Ct. at 2064. Second, the petitioner must demonstrate that counsel's unreasonable performance prejudiced his case. *Id*.

1. Demonstrating Trial Counsel's Deficient Performance

To satisfy the unreasonable performance requirement of *Strickland*, the petitioner must clearly identify concrete ways in which trial counsel acted deficiently. Whether counsel's performance was deficient is determined by looking to the prevailing professional norms in place at the time to assess how counsel should have acted under the circumstances. This requires the court to "engage in a fact-specific inquiry into the reasonableness of an attorney's actions, measured against the applicable prevailing professional norms." *In re Personal Restraint of Tsai*, 183 Wash.2d 91, 99 (2015) (citing *Strickland*, 104 S.Ct. at 2066*).* The *Padilla* Court stated that "[p]revailing norms of practice as reflected in American Bar Association standards and the like…are guides to determining what is reasonable…" 130 S.Ct. at 1482 (citing *Strickland*, 104 S.Ct. at 2065). While acknowledging that these are "only guides," the Court affirmed that "these standards may be valuable measures of the prevailing professional norms of effective representation, especially as…[they]…have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Id*. (internal citations omitted).

The *Padilla* Court emphasized that in discharging her Sixth Amendment duty to provide effective assistance, counsel must provide non-citizen clients with affirmative and accurate advice about immigration consequences. *See Padilla*, 130 S.Ct. at 1482 (recognizing that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation"). The Court recognized that defenders satisfy this duty by consulting available resources. *See id.* at 1484 ("[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") (internal citations omitted; emphasis added).

A foundational issue is thus to assess what resources were available for a defender to be able to determine immigration consequences. Did defense counsel consult these resources? Was the legal advice provided accurate and consistent with the immigration consequences reflected in these resources? In *Tsai*, the Supreme Court found that "defense counsel's failure to fulfill his or her statutory duty [to advise their clients of immigration consequences] may be

due to an unreasonable failure to research … and there is no conceivable tactical or strategic purpose for such a failure." *In re Tsai*, 183 Wash.2d at 102. The *Padilla* Court noted an expectation that attorneys who are unaware of the immigration consequences "would follow the advice of numerous practice guides to advise themselves" of different paths to lawful status and consequences at stake. *Id.* at 1483 (internal citations omitted). Moreover, the Court also expected that Mr. Padilla's lawyer "could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute." *Id.* Additionally, the Washington Court of Appeals, to determine the immigration consequences of a theft offense, referenced the immigration statute as well as circuit court case law to complete its analysis. *See, In re Ramos*, 181 Wash.App. 1005 (2014). Thus, defense attorneys are obligated to consult readily available resources. Moreover, there is a temporal component with regard to the available resources that inform the prevailing norms *at the time of conviction*, and make clear whether a defense lawyer in a given case effectively discharged his/her duty to provide accurate advice.

PRACTICE TIP: Establishing Immigration Consequences

- A critical first step in considering any *Padilla*-related PCR motion is to clearly identify what the immigration consequences are based upon the law at the time that the plea was entered (or trial occurred).
- Did the resulting conviction trigger grounds of deportation? Grounds of inadmissibility? Render client ineligible for lawful status or citizenship?

In Washington State, the legislature, courts and defense bar have long recognized the importance of ensuring that the state's criminal justice system consider the impact of deportation consequences at stake for non-citizen defendants and their families. The *Padilla* Court observed that professional norms have imposed an obligation on counsel to provide clients advice on the deportation consequences of a plea since at least 1995. *See* 130 S.Ct. at 1485. The *Tsai* Court extended this obligation to 1983. *See In re Tsai*, 183 Wash.2d. at 101. That year, the legislature enacted a statute requiring that courts determine whether a noncitizen defendant had been warned of potential immigration consequences of a plea. *See* RCW § 10.40.200. This implies that defense counsel should have been giving immigration advisals as early as 1983. "To give effect to this statute, the standard plea form … was promptly amended to include a statement warning noncitizen defendants of possible immigration consequences. That warning statement is not, itself, the required advice; it merely creates a rebuttable presumption the defendant has been properly advised." *In re Tsai*, 183 Wash.2d. at 101.

In the scope of their representation, defense attorneys in Washington have been providing defendants with advice regarding immigration consequences since at least 1991. At that time, the Northwest Immigrant Rights Project (NWIRP) began offering regular trainings and publications emphasizing defense strategies to negotiate resolutions that avoided or mitigated immigration consequences and provided tools to assist clients in making informed choices. NWIRP attorneys also began offering defenders free case consultations. As changes wrought by Congress increased the severity and frequency of immigration penalties for criminal offenses, Washington's legislature responded in 1999 by allocating resources to the Washington Defender Association (WDA) to make immigration law experts directly available to defenders. In addition to NWIRP's ongoing efforts, WDA's Immigration Project began providing individualized, case-specific immigration consequences analysis, including offering alternatives to avoid or mitigate harm. WDA's Immigration Project was one of the first state-wide projects of its kind and remains a model for other states.

The established norm of affirmatively incorporating the client's immigration priorities into defense representation was included in updates to both WDA and Washington State Bar Association (WSBA) practice standards. *See* WDA's Standards for Public Defense Services, 17 (2006) ("[l]awyers must be aware of their clients' immigration status, research the implications of it for their cases, and advise their clients of the consequences of a conviction"); *see also* WSBA's Performance Guidelines for Criminal Defense Representation, §2.2(b)(2)(b) (2011) ("when the client is not a citizen the lawyer should obtain information that will permit counsel to determine the immigration consequences of the conviction and sentence").

PRACTICE TIP: Establishing Deficient Performance

Although there is no specific formula for classifying conduct which falls below the standard of reasonableness, the following action items will assist in identifying and demonstrating deficient performance:

- A defense lawyer's foundational duty is first to identify that the client is a non-citizen and to ascertain his/her immigration status.
  - Did trial counsel identify the client as a non-citizen?
- Highlight the available resources that trial counsel should have consulted to inform his advice to the client.
  - Make the case that it was deficient performance not to consult WDA's Immigration Project after its inception in 1999.
  - It is not sufficient to advise your client to consult with an immigration attorney; the *Padilla* duty falls on the defender.
  - Create a record outlining which sources were consulted, if any.
- Trial counsel is required to advise her client of the potential consequences of accepting a plea, including the risk of deportation.
  - Was the client given *affirmative* and *accurate* advice regarding the potential immigration consequences in their case?
  - If no advice was given, counsel clearly failed to meet her duty.
- Trial counsel is obligated to negotiate the case according to her client's goals (factoring in any immigration consequences the client seeks to avoid and mitigating where possible).
  - Did counsel factor immigration consequences into the plea negotiation and sentencing advocacy?

a. Clear v. Unclear Test

Perhaps the most problematic aspect of *Padilla* is the "clear" versus "unclear" test that the Court put forth. In *Padilla*, the Supreme Court stated that 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." 559 U.S. at 366. However, because "[i]mmigration law can be complex," the precise advice a constitutionally effective attorney provides depends on the clarity of the law. *Id*. at 369. If the applicable immigration law makes it "truly clear" that an offense is deportable, defense counsel must correctly advise the defendant that pleading guilty to that particular charge would lead to deportation. *Id*. If "the law is not succinct and straightforward," counsel must provide only a general warning that "pending criminal charges may carry a risk of adverse immigration consequences." *Id*.

This "clear v. unclear test" has thus become a threshold issue. It is problematic since courts have been considering whether the law was clear prior to any other considerations about the adequacy of the advice provided. For the most part, immigration consequences are rarely unclear; a conviction either triggers deportation or it doesn't. For a post-conviction relief client that is in deportation proceedings, a conviction likely either triggered deportation (for clients with lawful status), or triggered a bar to a waiver of deportation (for undocumented clients). In those cases, the consequences of that conviction are clear. Consulting with WDA's Immigration Project or an immigration attorney can help clarify this.

A post-conviction relief client may not be in deportation proceedings. For example, a lawful permanent resident (LPR), may wish to apply for citizenship but are concerned that a prior conviction may trigger a bar to applying for citizenship. In these cases, it is critical to consult with the WDA's Immigration Project or a private immigration attorney to determine whether the conviction bars citizenship or triggering deportation. If it does, then pursuing post-conviction relief, or not applying for citizenship are the best options. If the consequences of the conviction are truly unclear, then the best option could be to apply for citizenship and to pursue post-conviction relief only if the government requests more information about the conviction.

A court's finding that the immigration consequences are unclear creates an insurmountable hurdle for post-conviction relief cases. The Court in *Ramos* determined that the immigration consequences of theft in the first degree with a sentence of 45 days were unclear where the post-conviction relief attorney, aided by an immigration attorney, claimed that it triggered the fraud aggravated felony deportation ground. 181 Wash.App. 743, 752 (2014). The Court conducted

research to determine whether a theft offense could form the basis of a fraud aggravated felony and did not find any case law supporting the assertion and thus found that the consequences of the offense were unclear. *Id.* at 754. As a result, the Court found Mr. Ramos's trial attorney's general warning about immigration consequences was sufficient. Thus, Mr. Ramos could not establish the deficient performance prong of *Strickland* and the case was dismissed. *Id.* at 755.[1]

Therefore, when seeking to demonstrate trial counsel's objectively unreasonable performance, it is the post-conviction relief attorney's responsibility to establish that the immigration consequences were in fact clear at the time of the plea and that trial counsel would have ascertained this had he consulted readily available resources.

PRACTICE TIP: Talking to Trial Counsel

When pursuing PCR based upon ineffective assistance of counsel, where possible, obtain an affidavit from the trial attorney clearly outlining the steps she took (or failed to take) and articulating any immigration advice she provided to the client. If the trial attorney refuses to provide an affidavit, highlight the defendant's story. Include an affidavit from competent immigration counsel detailing the immigration consequences by clearly stating the relevant statutes and case law. State what the best available alternatives would have been. Include in the defendant's affidavit what happened, the importance of immigration consequences and avoiding deportation, and how s/he would have rejected the plea offer if s/he had been properly advised.

b. *Padilla* Duties During Plea Negotiations

In *Lafler v. Kentucky*, the Supreme Court clarified that the Sixth Amendment right to effective assistance of competent counsel extends to the plea-bargaining process. 132 S.Ct. 1376, 1385 (2012) ("The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial…[but also] applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice"). *See also Missouri v. Frye*, 132 S.Ct. 1399, 1406 (2012) (reaffirming that defense counsel's duty to provide effective assistance includes "the negotiation of a plea bargain").

Even before the U.S. Supreme Court's decisions, the Washington State Supreme Court recognized that the right to effective assistance of counsel extends to the plea process. *State v. Sandoval*, 171 Wash.2d 163 (2011) ("The Sixth Amendment right to effective assistance of counsel encompasses the plea process) (citing *In re Pers. Restraint of Riley*, 122 Wash.2d 772, 780 (1993)). For post-conviction purposes, this means that trial counsel's failure to effectively engage in pre-trial plea negotiations with the State (i.e. not taking into account the client's immigration-related goals) falls below the reasonable standard of performance required by *Padilla and Lafler*, and thus constitutes deficient performance under *Strickland*. In other words, if *Strickland* and *Lafler*, extends effective representation to all critical stages of representation – and plea negotiations are clearly a critical stage – then the *Padilla* duty extends to incorporating immigration advice into plea negotiations.

In *Mellouli v. Lynch*, the Supreme Court built upon its ruling in *Padilla* by again acknowledging the enormous influence that immigration consequences carry in a non-citizen defendant's calculus to plead guilty. 135 S.Ct. 1980 (2015). The *Mellouli* Court's recognition of the magnitude of defense counsel's role in negotiating and mitigating potential adverse immigration consequences for non-citizens provides additional support for arguing that *Lafler*'s holding extends *Padilla* beyond client advice to plea negotiations. It indicates that defense counsel is also required to effectively negotiate a plea to avoid or mitigate immigration consequences, where possible. Thus, *Mellouli* supports asserting a claim that defense counsel has not complied with his duty to provide effective assistance of counsel where he did not negotiate effectively to minimize adverse immigration consequences.

[1] We agree with the Court's finding that there is no immigration case law determining that theft offenses trigger the fraud aggravated felony ground. Had WDA's Immigration Project been consulted, we would have advised this client to not pursue post-conviction relief.

PRACTICE TIP: Stating Alternatives

When working with WDA's Immigration Project or a private immigration attorney, be sure that they state what the reasonable plea alternatives would have been to avoid or mitigate immigration consequences.

c. Insufficiency of the Immigration Advisal Statute Warning

Since 1983, the Washington State Legislature has required state courts to provide an immigration advisement to non-citizen defendants prior to accepting a plea pursuant to RCW 10.40.200(2). To give effect to this statute, advisory language warning non-citizen defendants of possible immigration consequences was added to the standard plea agreement form. *See* CrR 4.2. Though often read to the client by their attorney, the warning is a statutory right conferred by the legislature and it is the obligation of the court to discharge this duty.

For years, a proforma reading of the advisal statute was interpreted by courts (as well as prosecutors and defenders) to satisfy RCW 10.40.200. In *Sandoval*, the State argued that evidence that the advisal statute's notification had been included in the plea form was sufficient to meet a defender's *Padilla* obligations. 171 Wash.2d 163 (2011). The *Sandoval* Court rejected this position. Specifically, the Court asserted that where counsel misadvises his client regarding immigration consequences, as Sandoval's attorney did, reading "the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave." *Id*. at 173. To support this conclusion, the Court noted that in *Padilla* the Supreme Court compared Kentucky's plea form notification to Washington's statutory warning (*see* 130 S.Ct. at 1486 n. 15), before ultimately holding that "RCW 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite warnings." *Sandoval,* 171 Wash.2d at 173 (referencing *Padilla*, 130 S.Ct. at 1486).

In *In re Tsai*, the Washington Supreme Court further clarified the purpose and reach of the advisal statute, making clear that reading the advisal to one's client does not meet counsel's Sixth Amendment *Padilla* obligation. The "warning statement is not, itself, the required advice; it merely creates a rebuttable presumption the defendant has been properly advised," but is insufficient to discharge counsel's Sixth Amendment duty. *In re Tsai*, 183 Wash.2d at 102. Indeed, the *Tsai* Court found that "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." *Id.*

Not only must lawyers review the required RCW 10.40.200(2) advisal with their client, there is also an obligation to consult readily available resources. Merely reading the warning statement to a defendant is not the prevailing professional norm and does not substitute for affirmatively providing accurate advice as to immigration consequences.

d. Affirmative Misadvice Versus No Advice

Prior to *Sandoval*, failure to advise a client on what were traditionally viewed as "collateral consequences" to the criminal penalty could not be the basis for ineffective assistance of counsel in Washington. *See In re Personal Restraint of Yim*, 139 Wash.2d 581 (1999) (holding that the defendant is not entitled to withdraw a guilty plea because of the immigration consequences where the defendant was not affirmatively misled). The *Yim* Court held open the possibility that affirmative misadvice may constitute a manifest injustice that would permit vacation under *Strickland*. However, between 1999 and the 2010 *Padilla* decision, no Washington Court issued a precedent decision so finding. *See Id.; see also Yim*, 139 Wash.2d at 588.

However, *Padilla* held that attorneys are obligated to provide affirmative advice on the immigration consequences of a conviction as they are "intimately related to the criminal process" and an "integral part of the penalty." 130 S.Ct. at 1480–81. The Court made clear that both affirmative misadvice and no advice constitute negligent conduct sufficient to establish that counsel's representation fell "below an objective standard of reasonableness," thereby satisfying the first prong of the *Strickland* test. 130 S.Ct. at 1484. A year later, the Washington Supreme Court held in *Sandoval* that when a plea involves obvious immigration consequences, failure to affirmatively advise a non-citizen client of those consequences falls below the objective standard of reasonableness. *See Sandoval*, 171 Wash.2d at 170.

2. Showing Prejudice

In announcing the test for ineffective assistance, the *Strickland* Court maintained that to satisfy the prejudice requirement "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. The probability is "reasonable" if it is "sufficient to undermine confidence in the outcome." *Id.* Washington courts have articulated a similar standard for demonstrating prejudice. *See*, e.g., *Sandoval*, 171 Wash.2d at 174-75 ("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"). In such instances, 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.'" *Id.* (quoting *Padilla,* 130 S.Ct. at 1485). *See also In re Brett*, 142 Wash.2d 868, 873 (2001) ("Prejudice is established when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different").

In *Padilla*, the Court only addressed the first prong of *Strickland*: whether counsel's performance was objectively unreasonable. After finding that counsel's performance was constitutionally deficient, the Court remanded the case to the lower court to determine whether Mr. Padilla was prejudiced as a result. A year later, the Washington Supreme Court established in *Sandoval* the bounds of *Strickland* prejudice where a non-citizen defendant faces immigration consequences as the result of a plea. The Court held that prejudice was established where counsel's misadvice resulted in deportation and foreclosed Mr. Sandoval's consideration of going to trial to avoid deportation. 171 Wash.2d at 175 ("Although Sandoval would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea is also 'a particularly severe penalty.' Given the severity of the deportation consequence, we think Sandoval would have been rational to take his chances at trial") (internal citations omitted) (quoting *Padilla,* 130 S.Ct. at 1481).

When filing a motion for relief based upon ineffective assistance of counsel, it is imperative to clearly link trial counsel's deficient conduct (affirmative misadvice or failure to give advice regarding the immigration consequences of the client's plea) to the actual immigration consequences suffered by the client as a result of taking the plea. Defense counsel should consult WDA's Immigration Project or a competent immigration lawyer to help accurately identify the immigration consequences at issue and clarify how a successful post-conviction relief petition will resolve the problem.

PRACTICE TIP: Establishing Prejudice

Obtain a signed affidavit from WDA's Immigration Project or an immigration lawyer to support the assertion that, because of their plea, the client suffered one or more of the following immigration consequences:

- Removability (Deportability) and/or Loss of Legal Status
- Ineligibility for Relief
  - Barring cancellation of removal (relief from deportation in immigration court)
  - Inability to obtain Deferred Action for Childhood Arrivals (DACA)
    - DACA is an administrative relief program granting temporary "deferred action status" for undocumented immigrants who entered the U.S. as children.
- Inability to Obtain Lawful Status
  - Inability to become a lawful permanent resident (green card holder)
  - Inability to become a United States citizen

B. Issues of Timing – One Year Time Bar

RCW 10.73.090 imposes a one year time limit on motions for collateral attack on a judgment and sentence in a criminal case. "Collateral attack" includes any form of post-conviction relief other than a direct appeal, including motions based on ineffective assistance of counsel under CrR 7.8(b) and personal restraint petitions. In other words, collateral attacks must be filed and received within one year of the date the judgment became final. *See, e.g., State v. Robinson*, 104 Wash.App. 657 (2001) (Court held defendant's motion to withdraw her plea was time-barred when it was received by the trial court clerk three days after the one year limit.). This is a harsh time bar – one of the strictest in the nation. If your

post-conviction relief client contacts you within 1 year of her conviction, it is critical to ensure timely filing. If your client learns of the immigration consequences after a year has passed, defense lawyers must act within a reasonable time period to assess whether ineffective assistance of counsel occurred and, when appropriate, timely submit a petition for relief.

Often, clients do not become aware of the serious immigration consequences of their guilty plea until they are placed in deportation proceedings. In addition to discussing the one year time bar, attorneys should clearly inform their client that initiating a post-conviction relief petition does not automatically stay the immigration process. Immigration judges have the discretion to grant a continuance until a post-conviction decision is rendered, but there is certainly no guarantee they will and it is likely that immigration proceeding will move forward while the ineffective assistance of counsel case is pending.

PRACTICE TIP: Time Bar

When analyzing a case for PCR options, the first consideration should be to identify the time bar date and ensure it is not crossed. If the one year mark has already passed, it is critical to develop a strategy and argument for overcoming it, otherwise PCR efforts will be dismissed on this ground.

1. Immigration-Related Exceptions to the One Year Limit

The following two exceptions to the one year time bar on collateral attacks deal specifically with counsel's failure to accurately provide advice regarding the immigration consequences of entering a guilty plea.

a. Pre-*Padilla* Convictions – RCW 10.73.100(6) (Significant Change in the Law)

If the conviction at issue became final prior to *Padilla* (March 31, 2010), RCW 10.73.100(6) provides an exception to the one year time bar. RCW 10.73.100(6) provides that where there has been 1) a significant change in the law 2) that is material to the conviction and 3) which warrants retroactive application, the time limit specified in RCW 10.73.090 does not apply.

The Washington State Supreme Court recently held in *In re Tsai*, that the Supreme Court's holding in *Padilla* met these three requirements and therefore litigants raising claims under *Padilla*, for ineffective assistance of counsel which occurred prior to 2010, are exempt from RCW 10.73.090's one year time bar on collateral attacks. *In re Tsai*, 183 Wash.2d at 107. *Tsai* established that, in Washington, defense counsel should have been advising clients of their immigration consequences since 1983. *Id.* at 101. Therefore, for cases where the conviction occurred prior to when *Padilla* was decided (March 31, 2010), post-conviction relief counsel should argue that, under *Tsai*, the 1 year time bar does not apply.

PRACTICE TIP: Pre-2010 Convictions

All cases with convictions rendered prior to March 31, 2010 (the date *Padilla* was decided) should rely on *In re Tsai* and RCW 10.73.100(6) to argue that the 1 year time bar does not apply.

b. Post-*Padilla* Convictions

For cases with convictions that occurred since *Padilla* was decided in 2010, there are two scenarios relating to timing. Either the conviction occurred within the past year and a timely motion can and must be filed, or the immigration consequences were discovered after a year since the date of conviction. For the latter, post-conviction relief counsel must argue that the 1 year time bar should be equitably tolled. Unfortunately, these are some of the most challenging post-conviction relief cases.

i. Equitable Tolling

The case law on equitable tolling is not favorable, and it is unlikely that equitable tolling will be granted. Even so, for convictions rendered after *Padilla*, 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 after the statutory time limit, post-conviction relief attorneys should argue that the one year time limit on collateral attack under RCW 10.73.090 may be equitably tolled. *See, Sate v. Littlefair*, 51 P.3d 116, 763 (2002). Where equitable tolling is applied, the statute of limitations does not begin to run until the date that the defendant learned all of the facts relevant to his claim. *See id*. at 759 n.23. Thus, equitable tolling exempts defendants from the one year filing deadline running from the date of the plea. However, petitions for relief must still be brought within one year of the time that the prejudice to the client was discovered. *See id*. at 763 (the one-year time period in RCW 10.73.090 is tolled from the date of the plea to the date on which defendant first discovered that deportation was a consequence of his plea).

Littlefair involved a Canadian citizen who pleaded guilty to a violation of the Uniform Controlled Substances Act. *Id*. at 752. The plea statement in his case contained the standard immigration advisement as required under RCW 10.40.200(2), but it was crossed off by the attorney who represented the defendant at the plea proceeding. *Id*. The Court found that this evidence was sufficient to establish a violation of RCW 10.40.200(2), despite the fact that the defendant "had the opportunity" to read the advisement because it had not been "completely obliterated." *See id.* at 756 n.44. In *Littlefair*, the Court of Appeals held that RCW 10.73.090's time limit on collateral attack was equitably tolled because, as a result of mistakes on the part of defense counsel and the trial court, the defendant did not know the immigration consequences of his guilty plea until some two years after his conviction. *See id*. at 763.

In a similar case decided subsequent 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. *Benyaminov v. City of Bellevue*, 144 Wash.App. 755, 760 (2008). Here, the court file, which would have contained the plea acknowledgement of deportation consequences, had been destroyed prior to the initiation of deportation proceedings. *See id*. at 767. The court in *Benyaminov* 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.

As a general strategy, defense lawyers should argue that *Benyaminov* does not change the equitable tolling analysis in cases where the petitioner client recalls the trial proceedings and asserts that he was not in fact informed by counsel of the immigration consequences of his conviction. Attorneys must do more than simply declare that the client does not recall being informed about the immigration consequences and point to a lack of evidence in the record. Instead, the client must supply affirmative evidence supporting the assertion that he was not properly advised of the immigration consequences of his conviction prior to entering a plea of guilty as required by *Padilla*. When possible, defense attorneys should obtain a supporting affidavit from trial counsel corroborating the petitioner's declaration that they were not accurately advised.

ii. Other Exceptions

In order to get around the one year time bar, attorneys should also consider non-immigration related arguments such as the exceptions listed in RCW 10.73.100(1)-(5) or, where applicable, filing a motion to reinstate the time to file an appeal.

1. RCW 10.73.100(1)-(5)

The one year time limit imposed by 10.73.090 applies only to judgments that are valid on their face and rendered by a court of competent jurisdiction. To circumvent the one year bar, defense lawyers should diligently review the criminal record to discern other possible options to re-open the window for filing a collateral attack including those listed in RCW 10.73.100(1)-(5) e.g. the discovery of new evidence or where there was insufficient evidence to support a conviction.

2. Reinstatement of Appeal Rights

The one year time clock on motions for collateral review begins on the date the judgment becomes final. A case on appeal is not considered final for post-conviction relief filing purposes. Thus, in order to re-open the window for filing a claim of ineffective assistance, defense lawyers should exhaust all options, including filing a motion to re-instate the time to file an appeal in cases where the defendant was not informed of their right to appeal or in which waiver of appeal was not knowing, voluntary, and intelligent. If reinstatement of appeal rights is granted, the time clock for filing a claim of ineffective assistance of counsel is reset, thus circumventing RCW 10.73.090's one year time bar. However, counsel must be prepared to proceed on grounds for criminal appeal which will differ from the ineffective assistance case.

According to RAP 5.2(a), except where otherwise provided, a notice of appeal must be filed in the trial court within 30 days after the entry of the trial court's decision. However, RAP 18.8(b) enables the appellate court to extend the time within which a party may file a notice of appeal. In *In re Ramos*, defendant Ramos filed a motion to vacate his guilty plea based on ineffective assistance on the ground that defense counsel failed to advise him of the fact that his plea subjected him to mandatory deportation. 181 Wash.App. 1005 (2014). The superior court found the motion to vacate the plea time-barred and transferred it to the Court of Appeals for consideration as a personal restraint petition under CrR 7.8(c)(2). *Id*. at 2. While the personal restraint petition was pending, Mr. Ramos filed a notice of appeal from the 1997 judgment and sentence, with an accompanying motion and affidavit for late filing of direct appeal under RAP 18.8(b). *Id.* The Court of Appeals commissioner found Ramos's appeal timely because the sentencing court did not inform him of his appeal rights at the time of his plea. Mr. Ramos's direct appeal was thus consolidated with his personal restraint petition which was no longer considered time-barred. *Id*.

In *State v. Sweet*, 90 Wash.2d (1978), the Court held that the strict application of filing deadlines pursuant to RAP 18.8(b) must be balanced against a defendant's state constitutional right to appeal. Moreover, because "there is no presumption in favor of the waiver of the right to appeal," the State carries the burden of showing that the defendant "made a voluntary, knowing, and intelligent waiver of the right to appeal." *Id*. at 286. In *State* v. *Chetty*, the Court found that defense counsel had a duty to inform the defendant of the immigration consequences of his guilty plea, and failure to do so was a factor in determining whether defendant's waiver of right to direct appeal was in fact knowing, voluntary, and intelligent. 167 Wash.App. 432, 445 (2012) ("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 to appeal.").

II. Choosing the Right Vehicle

There are various avenues for challenging criminal convictions and sentences. This guide addresses the two primary vehicles of collateral attack in cases alleging ineffective assistance of counsel: petitions under CrR/CrRLJ 7.8(b) (filed in the court of original jurisdiction) and the personal restraint petition (PRP) (filed in appellate court). Most post-conviction cases should be brought under 7.8(b), if possible. The 7.8(b) petition takes the form of a defendant's motion to withdraw a plea of guilty. If the motion is granted, the plea is withdrawn and the judgment and sentence are vacated in their entirety. A PRP, on the other hand, asks the court to grant appropriate relief (typically vacation of judgment or request for re-sentencing) to release the petitioner from unlawful restraint.

Post-conviction relief pursuant to either vehicle carries a risk that the case may be re-prosecuted after the judgment is vacated. If successful in his petition, the client is merely returned to the position he was previously in, facing the same charges he originally faced. The benefit conferred to the client is that he may attempt to negotiate a different, immigration safe, plea or choose to proceed to trial to defend against the charges against him. In some instances, a request for a sentence reduction may suffice to avoid the unwanted immigration consequences. If granted a re-sentencing hearing there is likewise no guarantee that the client will receive a sentence reduction.

PRACTICE TIP: Post-PCR

Even if successful in their motion for PCR, clients must be advised that they risk re-prosecution on the original charges after the plea is withdrawn if the Prosecutor's Office is unwilling to agree to an alternative plea. The degree of risk will depend upon the circumstances of the case (e.g, how long ago the original charges were brought, the type of charges at issue, etc.).

The procedural requirements for obtaining relief vary with the method of attack and are discussed in detail in the relevant section below. A basic decision is whether to seek initial relief in the trial or appellate court. A timely-filed petition for post-conviction relief may be filed under 7.8(b) or as a PRP at the discretion of client and counsel. There is no requirement that a direct appeal be pending to file a PRP in appellate court. The grounds for relief are substantially similar in both petitions, and the choice of vehicle hinges largely on the client's present circumstances. For example, if time is a major consideration, a trial court motion to vacate judgment under CrR/CrRLJ 7.8(b) would be the appropriate choice since a motion can be brought to hearing in a relatively short period of time. In contrast, prior to setting a PRP for hearing, the motion is first screened by the Acting Chief Judge to decide whether the case warrants consideration by a panel of judges for determination on the merits. It can be years before the case is set for oral argument and, subsequently, may take up to another year before a decision is rendered.

PRACTICE TIP: PCR in Immigration Proceedings

Immigration judges have discretion to stay immigration proceedings while a PCR petition is pending; however, deportation proceedings often continue to move forward. If time is of the essence, it would be wise to file under CrR/CrRLJ 7.8(b) for a swifter decision.

In addition to expediency, a 7.8(b) motion is often the preferred method for raising immigration-related ineffective assistance of counsel claims because it lends to simplified settlement negotiations with the trial prosecutor thereby creating a stronger likelihood of resolution in the client's favor. Conversely, in PRP proceedings, appellate prosecutors are unlikely to respond to counsel until the Acting Chief Judge requires a response and proceedings generally tend to take longer. Another practical benefit to filing under 7.8(b) is that there is no filing fee, whereas there is a $200 filing fee for PRPs. Additionally, at the trial court level there is a right to assigned counsel for filing of the motion and on subsequent appeal. In comparison, there is no right to a court-appointed lawyer for a PRP on initial review. Counsel is only assigned if the PRP is deemed to have merit.

Lastly, one of the greatest advantages of filing a motion under CrR/CrRLJ 7.8(b) is that it allows the petitioner two bites at the proverbial apple. If the petition is denied by the trial court, the petitioner has a right to seek review of the decision pursuant to RAP 2.2. If the motion was filed in a court of limited jurisdiction, an appeal is heard in superior court rather than appellate court. In contrast, if the motion is initially filed as a PRP and the petition is dismissed for lack of merit, or argued and lost, the only recourse is to file a motion for discretionary review to the Supreme Court; there is no appeal of right.

Regardless of the type of petition selected, counsel does not have complete control over the forum since the rules may require transfer between superior and appellate court. *See State v. Smith*, 144 Wash.App. 860 (2008). CrR 7.8(c)(2) authorizes the superior court to rule on the merits of a motion where the record establishes substantial showing in favor of relief or where a motion cannot be resolved without a factual hearing. However, if the petition is time-barred or lacks merit, and an evidentiary hearing is not necessary, the rule requires the petition be transferred to the Court of Appeals for consideration as a PRP. In 2015, the Washington Supreme Court decided *In Re Ruiz-Sanabria*, requiring that the trial court conduct a more rigorous and thorough analysis of the merits of a 7.8 motion prior to transferring it to the Court of Appeals for review. 184 Wash.2d 632 (2015). CrRLJ 7.8(c) does not have a similar transfer provision; courts of limited jurisdiction may deny a motion without a hearing if it is time-barred or the facts alleged do not establish grounds for relief. For PRPs, RAP 16.11 allows the appellate court to grant or deny a motion on the merits. The Washington Supreme Court recently determined that a petition is frivolous, and thus can be denied if it "fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle." *In re Khan*, 184 Wash.2d 679, 686-87 (2015). If the petition cannot be determined solely on the record, the Chief Judge will transfer a PRP back to the trial court for an evidentiary hearing or determination on the merits.

A. CrR/CrRLJ 7.8(b) – Motion to Vacate Judgment

A collateral attack can be made in the trial court by bringing a motion to vacate judgment under either CrR 7.8 or CrRLJ 7.8. This is a rule-based form of the writ of *coram nobis*, which is no longer available in this state. It was added to the Superior Court Rules in 1986 (1987 as to courts of limited jurisdiction) as a criminal version of CR 60, which had been held to apply to criminal convictions in *State v. Scott*, 92 Wash.2d 209 (1979). A motion pursuant to CrR/CrRLJ

7.8(b) must be filed in the court of original jurisdiction. The motion should state the grounds for relief, utilizing one of the enumerated grounds, and be supported by affidavits setting forth in detail the facts or errors upon which the motion is based.

1. Grounds for Relief

CrR/CrRLJ 7.8(b) allows a court to relieve a party from a final judgment for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order;
(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
(3) Fraud…, misrepresentation, or other misconduct of an adverse party;
(4) The judgment is void; or
(5) Any other reason justifying relief from the operation of the judgment.

Ineffective assistance of counsel claims for failure to discharge *Padilla* obligations constitute a Sixth Amendment violation and should be brought under CrR 7.8(b)(5).

The CrR 7.8(b) motion can also, in the alternative, assert that the judgement is void pursuant to (b)(4). While neither the holdings in *Padilla* nor *Sandoval* were based on due process violations asserting that the pleas were involuntary, the *Sandoval* Court did note that "[c]ounsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent." *Sandoval*, 249 P.3d at 1018.

B. Personal Restraint Petitions

With the adoption of the current Rules of Appellate Procedure in 1976, the personal restraint petition has become the only method of applying for post-conviction relief in the appellate courts based on ineffective assistance of counsel at the trial level. The PRP replaced the previous methods: statutory habeas corpus (RCW 7.36) and post-conviction relief formerly provided by CrR 7.7 (now repealed). Because the advice of counsel does not appear in the trial court record, ineffective assistance of counsel claims must be brought on PRP and not direct appeal. Though technically collateral, PRP claims are the functional equivalent of direct review as it is the first opportunity for the court to hear the claim. *See Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). RAP 16.3-14 lay out in detail the process for filing a personal restraint petition, though several important components are highlighted in the subsequent sections.

1. Unlawful Restraint and Burden of Proof

To be eligible for relief the petitioner must be under "restraint" and that restraint must be "unlawful" pursuant to RAP 16.4. A petitioner is under restraint if the petitioner "has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case." RAP 16.4(b).

The definition of restraint is broad and covers non-citizens who are either currently being detained or who are at risk of being detained and then made the subject of removal proceedings because of a criminal conviction. Even collateral consequences of a conviction, such as the impact the conviction may have on future prosecutions, or on the probation or parole process, or difficulties returning to society upon release have been recognized as restraints. *In re Powell*, 92 Wash.2d 656 (1979).

The types of defects or errors that can lead to a finding of unlawful restraint include:

- Ineffective assistance of trial counsel;
- Ineffective assistance of appellate counsel;
- Incompetency during trial proceedings;
- Invalidity of guilty plea;

- Broken plea bargain;
- Invalid waiver of appeal;
- Denial of good-time credit or credit for time served;
- Erroneous disciplinary hearing;
- Change in law;
- Newly discovered evidence;
- Sentencing errors, such as miscalculation of offender score;
- Unlawful insanity or civil commitment; or
- Denial of parole.[2]

The petitioner has the burden of proof of unlawful restraint by a preponderance of the evidence. *In re Cook,* 114 Wash.2d 802 (1990). For alleged constitutional errors, the petitioner must show "actual prejudice;" in other words, that the error was not harmless. *In re Hagler*, 97 Wash.2d 818 (1982). Sixth Amendment ineffective assistance of counsel claims, for example, would be subject to this standard. For non-constitutional error to be considered, the petitioner must show that the error constitutes a "fundamental defect which inherently results in a complete miscarriage of justice." *In re Cook,* 114 Wash.2d at 813.

2. Availability of Other Remedies

A PRP will only be granted if other remedies available to the petitioner are inadequate under the circumstances. RAP 16.4(d). A personal restraint petition is not a substitute for an appeal; however, a PRP can be filed along with an appeal to raise matters which are outside of the record and not properly subject to appeal (e.g., ineffective assistance of counsel). *State v. Byrd*, 30 Wash.App. 794 (1981). The fact that an issue could have been raised on appeal but was not once time-barred consideration by PRP, but that is no longer the case. *In re Cook*, supra.

3. Subsequent Petitions

No more than one petition for similar relief will be considered except for where "good cause" is shown. RAP 16.4(d). The request for relief will be considered similar if the ground for relief was previously heard and determined adversely to the petitioner on the merits and the ends of justice would not be served by reaching the merits on a subsequent application. *In re Haverty*, 101 Wash.2d 498 (1984).

[2] Royce A. Ferguson, Jr., *Criminal Practice and Procedure*, Washington Practice Series, West Publishing (3rd edition 2004), at §5005.