Supreme Court No. 90320-4
(Court of Appeals No. 69824-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

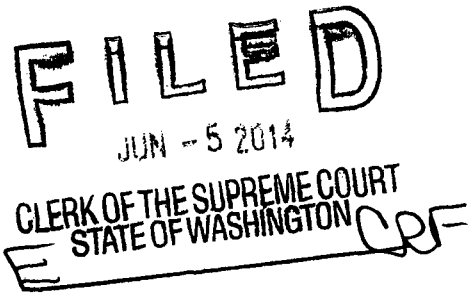
Respondent,

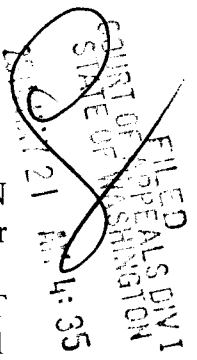
v.

CARLOS QUINTERO CISNEROS,

Petitioner.

PETITION FOR REVIEW





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A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Carlos Quintero Cisneros asks this Court to review the opinion of the Court of Appeals in State v. Quintero Cisneros, No. 69824-9-I. A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW[1]

1. This Court has issued arguably conflicting decisions on the question of whether Washington, as a matter of independent state law, will follow the United States Supreme Court's decision in Teague v. Lane[2] when determining whether a Supreme Court decision is retroactive. Should this Court grant review to conclusively determine the scope of Teague's retroactivity test when applied to state convictions?

2. Should the United States Supreme Court's decision in Padilla v. Kentucky[3] be applied retroactively to this case, to allow relief from the time bar in RCW 10.73.090?

3. Is the retroactivity of Padilla better suited to analysis under a different test than Teague?

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[1] The issues presented here are currently pending in this Court in State v. Jagana, No. 89992-4. Indeed, the arguments in this petition are taken directly from the motion for discretionary review in that case.

[2] Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

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

C. STATEMENT OF THE CASE

Carlos Quintero Cisneros is a lawful permanent resident who has lived in the United States since he was a two-month-old baby. CP 56, 69. In April of 2008, when Mr. Quintero Cisneros was 20 years old, he had sex with a person who was between 14 and 16 years old. CP 1-4, 15. The State charged Mr. Quintero Cisneros with third-degree rape of a child. CP 1. Mr. Quintero Cisneros eventually entered an Alford[4] plea to third-degree assault of a child with sexual motivation. CP 5-17. Both the original charge and the crime to which Mr. Quintero Cisneros pled guilty are categorical aggravated felonies which qualify non-citizen defendants for removal from the country. CP 69-73, 79.

In 2010, the federal government initiated removal proceedings against Mr. Quintero Cisneros. CP 69. After hiring a succession of immigration attorneys who were eventually disbarred, Mr. Quintero Cisneros was finally referred to competent immigration counsel and criminal defense lawyers. CP 44-45, 104-07.

Mr. Quintero Cisneros filed a motion to withdraw his Alford plea on the basis of ineffective assistance of counsel because he said he had not been told that his conviction would result in deportation. CP 41-119.

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[4] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

After an evidentiary hearing, the superior court denied the motion. CP 157-160. The court found that Mr. Quintero's attorney "advised Mr. Quintero Cisneros of the immigration consequences, that is, that he would be deported if he pled guilty to Assault of a Child in the Third Degree with Sexual Motivation." CP 159. Thus, the court concluded that the attorney's performance was not deficient. CP 159.

Mr. Quintero Cisneros appealed, and argued that the above factual finding was not supported by substantial evidence. Mr. Quintero Cisneros argued that the record showed he was not advised of the immigration consequences of his plea, and therefore he was entitled to withdraw the plea under Padilla and State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011). Although it had been more than a year since his conviction was final, he argued that his case fell within the "significant change in the law" exception to the time bar under RCW 10.73.100(6). For this proposition, he cited In re the Personal Restraint of Jagana, 170 Wn. App. 32, 36, 282 P.3d 1153 (2012).

The Court of Appeals rejected Mr. Quintero Cisneros's argument. It did not reach the question of whether substantial evidence supported the factual finding that trial counsel had advised Mr. Quintero Cisneros of the immigration consequences of his conviction. Instead, the Court of Appeals rejected Mr. Quintero Cisneros's argument on the basis that the

Jagana opinion had been withdrawn following this Court's remand in light of Chaidez v. United States, ___ U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013). The court ruled that because Chaidez held that Padilla is not retroactive, the exception to the time bar under RCW 10.73.100(6) did not apply.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED TO DECIDE A QUESTION THAT HAS DIVIDED THIS COURT.

Washington statutes address the question of whether a PRP is timely filed in Washington courts, and when a person is entitled to relief from unlawful restraint. Although Mr. Quintero Cisneros's motion was filed more than a year after his conviction was final:

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
> ....
>
> (6) There has been a **significant change in the law**, whether substantive or procedural, which is **material to the conviction, sentence, or other order** entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or **a court**, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, **determines that sufficient reasons exist to require retroactive application** of the changed legal standard.

Jagana, 170 Wn. App. at 39 (court's emphasis).[5]

In addressing retroactivity questions under the statute, Washington courts have generally imported the federal retroactivity test from Teague. In re the Personal Restraint of Gentry, __ Wn.2d __, 316 P.3d 1020, 1026-27 (2014); In re the Personal Restraint of Haghighi, 178 Wn.2d 435, 441-42, 309 P.3d 459 (2013). But this Court has also recognized that Teague was developed for different federal purposes – "to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings [and] . . . to limit the authority of federal courts to overturn state convictions – not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." Gentry, 316 P.3d at 1026-27 (2014) (quoting Danforth v. Minnesota, 552 U.S. 264, 280-81, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008)). It is not surprising, then, that this Court has recognized "[t]here may be a case where our state statute would authorize

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[5] See also, RAP 16.4(c)(4), defining in part the unlawful nature of restraint sufficient to justify collateral relief (emphasis added):

> (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard.

or require retroactive application of a new rule of law when Teague would not." State v. Evans, 154 Wn.2d 438, 448-49, 114 P.3d 627 (2005). "Limiting a state statute on the basis of the federal court's caution in interfering with State's self-governance would be, at least, peculiar." Evans, at 449.

The recent Haghighi concurrence, signed by three justices, recognized that the state law boundaries of Teague have not yet been clearly marked by this Court. The concurrence offers several persuasive reasons why state courts need not and should not blindly follow a retroactivity test intended to address different limitations faced by federal courts. Unlike federal courts, state courts must be concerned with error correction. But overarching federalism principles limit the error-correcting reach of federal courts and require deference to state court factual determinations. While a deferential federal test that places a higher value on finality than on error correction may make sense in that context, states are by no means required to adopt the same test. Haghighi, 178 Wn.2d at 458-61.

Other states have determined that Teague is not persuasively applied in this state law context. Those courts have retroactively applied Padilla. See Commonwealth v. Sylvain, 466 Mass. 422, 423-24, 995 N.E.2d 760 (2013) (citing Danforth and holding, as a matter of state law,

that Padilla is retroactive despite Chaidez; Denisyuk v. State, 422 Md. 462, 478-82, 30 A.3d 914 (2011) (Padilla is retroactive under Maryland retroactivity jurisprudence, as it merely applied professional norms in effect for 15 years as required by Strickland). As these cases show, Mr. Quintero Cisneros's claim is not only procedurally important, it also has substantive merit.

Chaidez is not the conclusive word on an independent state question. While the Chaidez majority declined to apply Padilla retroactively to coram nobis cases from lower federal courts, it expressly declined to rule on petitioner's claims that Teague's retroactivity bar does not apply to claims of ineffective assistance of counsel or to challenges of federal convictions. Chaidez, 133 S.Ct. at 1113, n. 16 (declining to rule on those issues because they were not included in the petition for certiorari or raised in the lower court). Because Teague's applicability was not properly raised, the Court was obligated to apply Teague. Given the strict limits of coram nobis review, the ultimate outcome is not surprising. Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987) (coram nobis relief requires that the petitioner demonstrate an error below that "is of the most fundamental nature.").

The Washington legislature's adoption of a personal restraint petition process, however, abolished the writ of coram nobis in

Washington and made clear that this mechanism for collateral review of convictions was meant to be far less onerous at the state level. Toliver v. Olsen, 109 Wn.2d 607, 610, 746 P.2d 809 (1987); RAP 16.4. Given these differences, neither Chaidez nor Teague dictate the result in Washington.

This case, along with Jagana, offers this Court the chance to decide whether Teague should be the rule that governs retroactivity questions in the context of RCW 10.73.100(6) and RAP 16.4(c)(4). Because the case involves significant constitutional questions and issues of substantial public interest, this Court should grant review. RAP 13.4(b)(3), (4).

2. PRINCIPLES OF REDRESSABILITY FURTHER SUPPORT REVIEW.

This Court's authority to retroactively apply Padilla's inclusion of advice regarding immigration consequences into the ambit of the Sixth Amendment right to counsel comes not from the U.S. Supreme Court, but from RCW 10.73.100(6). As stated in Evans, it would be "peculiar" to limit this court's retroactivity analysis under that statute based on the Teague test, which was designed in great part to avoid federal interference into state governance.

Additionally, the history of post-conviction procedures in Washington reveals that the personal restraint petition was meant to provide far broader relief than the federal habeas corpus or coram nobis

writs at stake in Teague and Chaidez. Shortly after the creation of the Court of Appeals, this Court adopted a series of rules, RAP 16.4-16.15, which "established a single procedure for post-conviction relief ... and provide[d] an expanded habeas remedy in [the appellate] courts." Toliver v. Olsen, 109 Wn.2d 607, 610, 746 P.2d 809 (1987). Discarding the ancient and sometimes obtuse procedural requirements (such as those related to "custody"), the PRP process affords a remedy to anyone under "restraint," defined as someone who "is under some other disability resulting from a judgment or sentence in a criminal case." RAP 16.4(b). See also In re the Personal Restraint of Powell, 92 Wn.2d 882, 887-88, 602 P.2d 711 (1979) ("we note that an unlawful conviction can serve as a restraint on liberty due to collateral consequences affecting one adjudged to be a habitual criminal"); In re the Personal Restraint of Davis, 142 Wn.2d 165, 170 n. 2, 12 P.3d 603 (2000) (PRP not moot because a conviction could still result in an increased sentence under a recidivist statute for a future offense).

Beyond not being controlling as to the retroactive application of new rules of criminal procedure to personal restraint petitions, the reasoning and context of the Teague test render it logically inapposite to the question of whether Padilla should be applied retroactively under RCW 10.73.100 (6).

The personal restraint petition remedy incorporates its own retroactivity analysis, which is inherently more forgiving than Teague's federal standard applied in Chaidez. Rather than focusing on the "fundamental" nature of the error (as required for coram nobis) a PRP court need only to find that "sufficient reasons exist to require retroactive application" of a significant change in the law. RAP 16.4(c)(4). When the legislature adopted the one-year time bar to personal restraint petitions at RCW10.73.090, it explicitly adopted an exception to that bar setting the same "sufficient reasons" test for retroactive application of significant legal changes. RCW 10.73.100(6)

The language of RAP 16.4(c)(4) and RCW 10.73.100(6) stand in stark contrast to the Teague preference against retroactive application of new rules. While the exception to the one-year time limit at RCW 10.73.100 (6) does not create a substantive right to post-conviction relief in the way that RAP 16.4 does, the language is evidence of a legislative intent to provide post-conviction relief in old cases if there is a change in the law where sufficient reasons exist. In this regard, the language of RCW 10.73.100 (6) is far more liberal than Teague. Accordingly, this court is not bound by the Chaidez court's determination that Padilla is not applicable retroactively to review of federal coram nobis claims and

should hold instead that Padilla is retroactively applicable to PRP and related claims.

A second compelling reason for not following Chaidez in this context is the principle of redressability. Because ineffective assistance claims based on failure to advise regarding immigration consequences can only be raised on initial-review collateral proceedings, principles of redressability require that Padilla based claims be afforded retroactive application.

A defendant's first opportunity to raise an ineffective assistance of counsel claim is often on collateral review. See e.g. In re the Personal Restraint of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004). In cases like this, requiring evidence from outside the record in the trial court, a personal restraint petition is the first time a claim of ineffective assistance can be raised. State v. McFarland, 127 Wn.2d 322, 332-39, 899 P.2d 1251 (1995).

The Supreme Court recently acknowledged the critical difference between collateral proceedings representing a defendant's first opportunity to raise a constitutional claim and those seeking review of issues already heard by a lower court, referring to the former as "initial-review collateral proceedings." Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (2012). The Martinez Court noted that:

> Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim... A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.

Id. at 1317. In the context of an initial-review collateral proceeding raising a claim of ineffective assistance of counsel, the Martinez Court held that procedural default would not bar federal habeas review of the claim if there was no counsel or counsel on initial collateral review at the state level was ineffective. Id. at 1320.[6]

The present proceeding is, likewise, Mr. Quintero Cisneros's first and only opportunity to raise his ineffective assistance claim. The issues of redressability acknowledged in Martinez require that his claim be heard.

Again, the Teague retroactivity test is inapposite. In Teague, the petitioner "repeated – as all state habeas petitioners must – a claim that he had already raised in state court." 489 U.S. at 293. In other words, the

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[6] See also Coleman v. Thompson, 501 U.S. 722, 753-754, 111 S.Ct. 2546, 115 L.Ed. 2d 640 (1991) (noting possible exception to the rule that appointed counsel is not required on collateral review for initial-review collateral cases raising ineffective assistance claims, which represent the defendant's "one and only appeal" as to the issue).

petitioner was attempting to use the collateral proceedings to obtain a second bite at the judicial apple: he wanted the federal court to entertain a constitutional claim that the state court had previously rejected. The Teague Court held that, in that context, respect for the finality of state-court judgments allows federal courts to apply only "old rules" on collateral review. Teague's non-retroactivity principle relies on the critical assumption that habeas petitioners have already had a full and fair opportunity to raise constitutional claims. Id. at 308.

Similarly, the personal restraint petition cases in which this Court has applied the Teague test all involved claims that could have been, and in many cases were, raised previously on direct appeal. See e.g. In re the Personal Restraint of Jackson, 175 Wn.2d 155, 283 P.3d 1089 (2012); In re the Personal Restraint of Scott, 173 Wn.2d 911, 271 P.3d 218 (2012); In re the Personal Restraint of Eastmond, 173 Wn.2d 632, 272 P.3d 188 (2012); Evans, 154 Wn.2d 438 (all involving sentencing irregularities, which could have been raised on direct appeal); In re the Personal Restraint of Rhome, 172 Wn.2d 654, 260 P.3d 874 (2011) (involving waiver of right to counsel, which can be raised on direct appeal); State v. Abrams, 163 Wn.2d 277, 178 P.3d 1021 (2008) (involving fact-finder regarding materiality of statement for perjury purposes, which could have been raised on direct appeal).

In contrast, Mr. Quintero Cisneros's ineffective assistance claim, which relies on evidence from outside of the trial record, could only have been raised in a PRP or motion to withdraw plea, which functions as an initial-review collateral proceeding. In this context, the critical assumption underlying the retroactivity analysis in Teague – that the defendant has already had a forum in which to raise a constitutional claim – does not apply. This issue of the applicability of Teague to ineffective assistance cases on initial-review collateral proceedings is a second critical claim that was not reached by the Chaidez court. 33 S.Ct. at 1113, fn 16.

Under Teague, even new rules of criminal procedure are applied retroactively to cases on direct review. St. Pierre, 118 Wn.2d at 326 (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). Because this motion represents an initial-review collateral proceeding – raising a claim that could not have been brought on direct review – principles of redressability require that Padilla be applied retroactively to this case as well. In Sandoval, this Court recognized this issue:

> Sandoval had to bring a PRP to meet his burden of proving ineffective assistance of counsel because his counsel's advice does not appear in the trial court record ... Because of this unique procedural obstacle to Sandoval's ineffective assistance of counsel claim, he has not already had an opportunity to appeal to a disinterested judge.

Sandoval, 171 Wn.2d at 168-69.

Because the Strickland test already fully protects the interest in the finality of convictions, resources were readily available to make the fulfillment of Mr. Quintero Cisneros's counsel's duty to inform him of the immigration consequences of his plea, and this case is on "initial-review collateral proceeding," sufficient reason exists to apply Padilla retroactively.

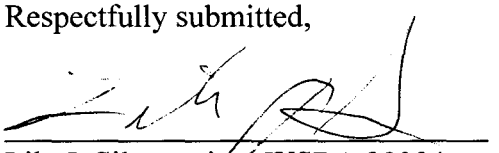
Because the case involves significant constitutional questions and issues of substantial public interest, this Court should grant review. RAP 13.4(b)(3), (4).

E. CONCLUSION

Carlos Quintero Cisneros respectfully requests that this Court grant review.

DATED this 21st day of May, 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	No. 69824-9-I
Respondent,	)	
	)	
v.	)	
	)	
CARLOS A. QUINTERO CISNEROS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 12, 2014
	)	

PER CURIAM — Carlos Cisneros appeals an order denying his motion to withdraw his guilty plea to third degree assault of a child with sexual motivation. Citing Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), he contends he was entitled to withdraw his plea because his attorney failed to inform him that he would be deported if he pleaded guilty. He concedes that his motion was filed beyond the one year time limit on collateral attacks in RCW 10.73.100. He argues, however, that Padilla constitutes a significant, retroactive change in the law, and therefore his motion falls within an exception to the one year time bar. RCW 10.73.100(6). In support of the latter proposition, Cisneros cites this court's decision in In re Personal Restraint of Jagana, 170 Wn. App. 32, 282 P.3d 1153 (2012).

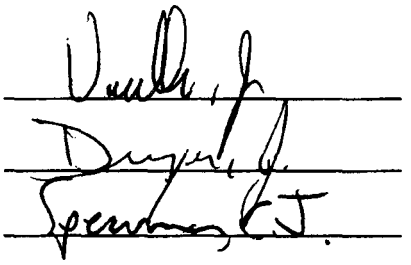
In Jagana, we held "there are sufficient reasons to apply Padilla retroactively." 170 Wn. App. at 56. But our State Supreme Court granted review of Jagana and

remanded "for reconsideration in light of Chaidez v. United States, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). Chaidez held that Padilla does not apply retroactively and that "a person whose conviction is already final may not benefit from the [Padilla] decision in a habeas or similar proceeding." Chaidez, 133 S. Ct. at 1107. In light of Chaidez, this court dismissed Jagana's petition. Similarly, Division Two of this court recently dismissed a personal restraint petition as untimely under Chaidez. State v. Martinez-Leon, 174 Wn. App. 753, 760-61, 300 P.3d 481, review denied, 179 Wn.2d 1004 (2013) (time bar exception in RCW 10.73.100(6) requires showing that Padilla is retroactive; because Chaidez holds that it is not retroactive, Martinez-Leon's petition was time barred); see also State v. Carney, __ Wn. App. __, 314 P.3d 736, 744 (2013) (rejecting argument that RCW 10.73.100(6) is distinct from federal retroactivity analysis, stating that in "In re Pers. Restraint of Haghighi, 178 Wn.2d 435, 309 P.3d 459 (2013), the Washington Supreme Court reiterated that it has 'interpreted RCW 10.73.100 as a procedural rule that is entirely consistent with the federal retroactivity analysis. . . . Since Teague . . ., this court has consistently and repeatedly followed and applied the federal retroactivity analysis as established in Teague. Haghighi, 178 Wn.2d at 464" (alterations in original)).

Accordingly, because Cisneros's collateral attack on his guilty plea was filed more than one year after his conviction became final and before the decision in Padilla, and because Padilla is not retroactive, his motion is time barred and the superior court properly denied it.

Affirmed.

FOR THE COURT:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69824-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erik Pedersen, DPA
Skagit County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 21, 2014