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OF THE STATE OF WASHINGTON

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IN RE PERSONAL RESTRAINT PETITIONS OF
MUHAMMADOU JAGANA and YUNG-CHENG TSAI,
Petitioners.

AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonprofit, nonpartisan organization with over 20,000 members. It is dedicated to the preservation and defense of constitutional rights and civil liberties, and has particular interest and expertise in criminal justice and immigration matters. With leave from this Court, the ACLU has already participated as amicus curiae in this case by the filing of a memorandum in support of review. Further information regarding the ACLU’s interest is set forth in its concurrently filed Motion for Leave to File Amicus Curiae Brief, which is hereby incorporated by reference.

II. SUMMARY OF ARGUMENT

In the landmark decision of *Padilla v. Kentucky*, 599 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the United States Supreme Court held that the right to effective assistance of counsel guaranteed by the Sixth Amendment ensures the right to adequate advice regarding the immigration consequences of a guilty plea. Subsequently, in *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), the Supreme Court held that *Padilla* announced a “new rule” of criminal procedure. Under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and its progeny, principles of federalism and comity generally prohibit parties from asserting such “new rules” to challenge final state court convictions in federal postconviction proceedings.

However, these retroactivity rulings in federal court have no direct application to state court proceedings. *See Danforth v. Minnesota*, 552

U.S. 264, 282, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008). The issue now before this Court is whether *Padilla* should receive “retroactive” application *under Washington law* – in other words, whether defendants whose constitutionally erroneous convictions were final on appeal when *Padilla* was announced can vindicate their rights in state postconviction proceedings. This is a state law question. The United States Supreme Court’s decision in *Chaidez*, which declined to apply *Padilla* retroactively in federal postconviction proceedings, is not binding here and does not address issues of state law. Indeed, other states have persuasively concluded post-*Chaidez* that the rule set forth in *Padilla* will be retroactively applied in their state systems, consistent with state law values. *See Commonwealth v. Sylvain*, 466 Mass. 422, 435, 995 N.E.2d 760 (2013) (holding that *Padilla* is retroactive); *Ramirez v. State*, No. 33,604, ___ P.3d ___, 2014 WL 2773025, at *6-7 (N.M. June 19, 2014) (holding that state-law corollary of *Padilla* is retroactive). There are compelling and sufficient reasons for the same result here, including the severe and extraordinary consequences of these constitutional errors – not just incarceration but deportation – and the value Washington has long placed on adequate advice concerning immigration consequences.

In analyzing issues of state law retroactivity, this Court in recent years has generally followed the federal standard originating in *Teague*. However, it has done so while rightfully recognizing that *Teague* is not binding and does not actually define the full scope of retroactivity under Washington law, which in fact has never been defined.

This case presents reason to reconsider the nature of this Court's reliance on *Teague* and to refine its retroactivity analysis under Washington law. The *Teague* test was primarily designed to further principles of federalism that are inapposite here. To further those principles, the *Teague* test has also been interpreted by federal courts in an overly restrictive manner inappropriate for the interests at issue in state postconviction proceedings. The task facing this Court is to decide which participants in our state's system of justice will be precluded from benefiting from a constitutional right afforded others in the system. An overly restrictive application of *Teague* in this context results in outcomes that are unjustified by the interests limiting retroactivity and otherwise inconsistent with Washington law and values. This Court should adopt a more flexible retroactivity analysis better reflective of the importance to our state's justice system of correcting constitutional errors and according similar treatment to similarly situated individuals. Under such an analysis, the benefits of the constitutional rights announced in *Padilla* should be available on initial collateral review.

III. STATEMENT OF THE CASE

The ACLU relies on petitioners' statements of the case.

IV. ARGUMENT

A. Applying *Teague* Restrictively To Always Reject Retroactivity Is An Inappropriate Test For Washington.

At its core, the *Teague* test is intended to promote principles of federalism by restricting federal intervention in final state proceedings.

These same federalism principles enable and encourage states to make independent retroactivity decisions that are consistent with their specific state values. This independent analysis is necessary because the interests underlying the application of *Teague* in federal court proceedings are largely unrelated to those appropriate for a state law retroactivity analysis. For the reasons described below, a restrictive application of *Teague* is unjustified and inappropriate for Washington state law.

1. The Application Of Teague In Washington

Under *Teague*, a new rule of constitutional law is inapplicable to cases on federal collateral review unless it falls into one of two exceptions: (1) it is “substantive” rather than procedural in nature (an exception not applicable here); or (2) it is considered a “watershed” procedural rule implicating the fundamental fairness and accuracy of the criminal proceeding. *See Saffle v. Parks*, 494 U.S. 484, 494-95, 110 S. Ct. 1257, 108 L. E. 2d 415 (1990). In practice, the federal courts have interpreted this test such that basically all decisions are determined to be new rules to which neither exception applies; in other words, no pronouncements of constitutional procedure will be retroactive on federal collateral review. This severe limitation on retroactivity in the federal courts reflects the reality that the *Teague* test “was intended to limit the authority of federal courts to overturn state convictions.” *Danforth*, 552 U.S. at 280.

In *Danforth*, the United States Supreme Court considered whether the constitutional retroactivity analysis in *Teague* was binding on state courts and affirmed that it is not. The Court explained that *Teague* was

not designed to “limit a state court’s authority” or to bind state courts, but rather, was intended to allow states to fashion their own retroactivity rules that serve their own state values. *Id.* at 279-82.

In recent years, this Court has repeatedly cited *Teague* when analyzing state law retroactivity issues. However, the substantial shift in the analysis of retroactivity under Washington state law that has occurred since *Teague* was made “largely without comment.” *In re Pers. Restraint of Haghghi*, 178 Wn.2d 435, 470, 309 P.3d 459 (2013) (Gordon McCloud, J., concurring). The reason for this Court’s continued citation of *Teague* as “guidance” appears to be principally founded on a general interest in maintaining some amount of consistency with federal standards. *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 268, 111 P.3d 249 (2005).

Yet, this Court has never engaged in any analysis of whether the application of *Teague*, particularly in the restrictive manner it is applied in the federal courts, is consistent with or promotes Washington state values. *See Haghghi*, 178 Wn.2d at 458 (Gordon McCloud, J., concurring) (“This court has not had an opportunity since *Danforth* was decided to consider whether the values informing our retroactivity analysis are the same as the values animating *Teague*.”). Moreover, this Court has also acknowledged that *Teague* does not actually define the full scope of the retroactivity analysis in Washington. *State v. Evans*, 154 Wn.2d 438, 448-49, 114 P.3d 627 (2005); *see also Markel*, 154 Wn.2d at 268 n.1. Despite this acknowledgement, it has not identified any other test or otherwise defined the availability of new rule retroactivity in Washington, and has instead

continued to rely on the federal *Teague* standard. As described below, there are good reasons to reconsider that reliance.

2. *The Interests Underlying The Teague Test Are Inapplicable Or Reduced For A State Court Retroactivity Analysis*

Using a strict and restrictive application of *Teague* to define state law retroactivity is not justified because *Teague* was developed to protect interests that are implicated by *federal* collateral review of final state criminal proceedings. *Danforth*, 552 U.S. at 279. These same interests are not applicable here. As the United States Supreme Court explained in *Danforth*, the federalism and comity considerations animating *Teague* are unique to *federal* habeas review of state convictions. *Id.* at 279-280; *see also, e.g., State v. Preciose*, 129 N.J. 451, 475, 609 A.2d 1280 (1992) (explaining that comity and federalism concerns “simply do not apply when this Court reviews procedural rulings by our lower courts”); *Sylvain*, 466 Mass. at 433 n.16 (“The need to prevent excessive interference by Federal habeas courts has little application to collateral review by State courts themselves.”); *In re Rhoades*, 149 Idaho 130, 137, 233 P.3d 61 (2010) (explaining that “considerations of comity between federal and state courts . . . simply have no application” to state court retroactivity decisions).

Given that the federalism interests underlying *Teague* test are not applicable here, there is no clear rationale for why the test should be. As this Court has recognized: “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*, 154 Wn.2d at 449. If anything, “considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*.” *Danforth*, 552 U.S. at 280. Rather than ensuring that federal courts do not unduly interfere with state courts’ past efforts to reach the right result given the law in place, which was what *Teague* was intended to do, an overly restrictive state law retroactivity analysis would only prevent Washington’s own courts from correcting constitutional errors and reaching the right result in our own state. There is no justification for doing so. *See, e.g., State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1303 (La. 1992) (Dennis, J., dissenting) (explaining that a state court’s strict adoption of *Teague* is a “self-defeating circularity” as the state court “blindly replicates the very federal habeas rule by which the High Court attempts to accord comity to our state laws and decisions”).

The *only* interest served by *Teague* with any relevance here is *finality*. However, the finality interests at issue in a federal court’s application of *Teague* are of a far different character than those at issue here. Again, *Teague* is concerned with federal review of final state court proceedings, where the federal court does not want to interfere with the finality of the underlying proceedings due to notions of comity. State collateral review proceedings are much closer in nature to direct review than to federal collateral review, which takes place in an entirely separate judicial system later in time. Compared to federal collateral review, state collateral review is far more like an outgrowth of the original proceedings;

the proceedings remain in state court and often continue to involve the same actors (prosecutors, defense counsel, judges). Indeed, in some instances (like those present here, as discussed further below), the matter presented on state collateral review is an issue being raised for the *first time*. This is very different from the typical habeas matter, where a federal court is reviewing again a matter that has already been exhausted in the state courts. There is thus a fundamental difference in the finality interests applicable to federal habeas review and those applicable to state postconviction proceedings like this one.

Restrictions on retroactivity result from a balancing between the important value of error correction, which ensures that convictions do not result from constitutional violations and that individuals are allowed the full benefits of their constitutional rights, against any applicable countervailing interests. *See Haghghi*, 178 Wn.2d at 458. The countervailing interests supporting a narrow retroactivity test in the federal habeas context are comity (federalism) and finality. Here, there is no comity interest, and the finality interest is far less compelling. Thus, the balance weighs heavily in favor of error correction.¹

¹ It is worth noting that the entire personal restraint petition process is a constitutionally protected structure under which error correction is given priority over the finality of convictions. This reflects our state's core value of correcting errors in our justice system, particularly where those errors involve constitutional rights. Finality interests are not dispositive where constitutional rights are implicated. In a slightly different context, for example, this Court acknowledged that although a subsequent change in law typically does not "allow a litigant to reopen a case already decided, . . . conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 567 n.4, 933 P.2d 1019 (1997) (quotations omitted).

3. *A Restrictive Application of Teague Is Not Consistent With Washington Law*

An additional important reason this Court should not use a restrictive application of *Teague* to define retroactivity under state law is that doing so seems inconsistent with other Washington law. The Washington legislature has indicated its intent that there will be new legal rules applied retroactively where sufficient reasons exist for doing so. RCW 10.73.100(6) states that a collateral attack filed after one year is not time-barred if “there has been a significant change in the law, whether substantive or procedural” and a court “determines that sufficient reasons exist to require retroactive application of the changed legal standard.” *Cf.* RAP 16.4 (containing similar wording). Clearly, the legislature anticipated that some changes in the law would apply retroactively. Moreover, given that the statute was enacted *after Teague*, it is reasonable to presume that the legislature believed some deviation from strict application of the federal test would be necessary to safeguard Washington state interests. Other state legislatures have expressly approved of *Teague* in similar procedural contexts; ours did not.

Indeed, the mere fact that our legislature indicated there would be instances under Washington law where “sufficient reasons” would justify retroactive application of a substantial change in the law is inconsistent with the restrictive analysis of *Teague* in use in the federal courts, in which in effect *no* new rules are applied retroactively. In the federal courts, the “watershed” exception has been interpreted so narrowly as to

be essentially meaningless; there have never been any watershed rules since *Teague*, and the Supreme Court has indicated there will not ever be any. Based on the plain language of the statute, it is inconceivable that the legislature envisioned that the exception it enacted would *never* be available. Such a reading of the statute would be unreasonable. This is further indication that Washington law and values support a broader retroactively analysis than that currently available under federal law.

This Court has in fact confirmed as much by repeatedly acknowledging that *Teague* is *not* the final word on state retroactivity. In *Evans*, this Court expressly noted that there may be instances where Washington law “would authorize *or require* retroactive application of a new rule of law when *Teague* would not.” 154 Wn.2d at 448 (emphasis added). Likewise, in *Markel*, this Court confirmed that *Teague* “does not necessarily define the full scope” of RCW 10.73.100(6) and that there may be cases where defendants “would not be entitled to relief under the federal analysis . . . but where sufficient reason would exist to depart from that analysis.” 154 Wn.2d at 268 n.1. In other words, Washington law provides for broader retroactivity than a restrictive application of the *Teague* federal law standard would allow.

4. *Other States Have Recognized That A Restrictive Application Of Teague Is Not Appropriate For State Values*

Washington is not alone in acknowledging that a restrictive application of the *Teague* test, which is used by federal courts to provide deference to state courts, is not well suited to the consideration of

retroactivity issues within state court systems. In recognition of these issues, other states have adopted variants of *Teague* or have adopted its framework in a less restrictive form.²

For example, the Nevada Supreme Court has determined that while the “general framework” of *Teague* is “sound in principle,” its “strict[.]” application in practice does not adequately safeguard state constitutional principles. *Colwell v. State*, 118 Nev. 807, 818, 59 P.3d 463 (2002). While “strictly constraining retroactivity serves the Supreme Court’s purpose of circumscribing federal habeas review of state court decisions,” as a state court Nevada found no reason “to bind quite so severely our own discretion in deciding retroactivity.” *Id.* at 819. Accordingly, Nevada adopted a modified version of *Teague* in which the “general framework” was retained but the determination of whether a rule is “new” or whether the two exceptions apply would be based on a more flexible standard than that used in the federal courts, consistent with the different context and underlying interests involved in state court retroactivity decisions. *Id.*³

² Many other states have disregarded *Teague* entirely in favor of unique state standards. See, e.g., *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005) (explaining that Florida law, based on pre-*Teague* standards, will continue to be applied and “provides more expansive retroactivity standards than those adopted in *Teague*”). This Court is free to exercise its independent judgment as to the nature of retroactivity under Washington law.

³ In its Supplemental Brief, the state asserts that *Colwell* interprets new rules “more restrictively” than *Teague*. Supp. Brief of Resp. at 11. This assertion is misleading at best. The Nevada Supreme Court in *Colwell* clearly expressed its *disagreement* with the United States Supreme Court’s “expansive[.]” definition of new rules and crafted its modified version of *Teague* to provide *broader* retroactivity. 118 Nev. at 819. Moreover, as the Nevada Supreme Court noted in *Colwell*, state courts must give “new federal constitutional rules at least as much retroactive effect as *Teague* does.” *Id.* The state’s attempt to suggest that Nevada is using a retroactivity test that is unconstitutionally more restrictive than allowed under federal law is baseless.

Other states have adopted similarly flexible approaches to the application of *Teague* under state law. *See, e.g., Sylvain*, 466 Mass. at 435 (applying the basic *Teague* framework but rejecting federal limitations on what constitutes a “new rule”); *Rhoades*, 149 Idaho at 138-40 (adopting the *Teague* framework but holding that Idaho courts will “independently” determine “what constitutes a new rule or whether a new rule is a watershed rule” based on state specific concerns and values); *cf. Danforth v. State*, 761 N.W.2d 493, 500 (Minn. 2009) (retaining the *Teague* test but acknowledging that it is not bound by United States Supreme Court’s retroactivity determinations and will “independently review cases to determine whether they meet our understanding of fundamental fairness”).

As these other states have persuasively recognized, if the *Teague* framework is to be used for general consistency with federal law, a less strict application of its factors better reflects the very different concerns underlying federal habeas review versus state postconviction review. Adopting a similar, more flexible variant of the *Teague* framework here would likewise better promote Washington state interests.

B. A Restrictive Application Of *Teague* Is Particularly Inappropriate Under The Unique Circumstances Here

This appeal presents the issue of state law retroactivity standards in a very unique context. The claims at issue involve ineffective assistance of counsel for failure to advise of the immigration consequences of a guilty plea. These are serious claims raised for the *first time* on collateral review. The interests of finality are far less compelling when the matter

under review has never been previously reviewed. In addition, the consequences of the constitutional errors presented are unusually harsh – the severe risk of deportation. Under the unique circumstances here, a restrictive application of *Teague* would be particularly unjustified.

1. Finality Interests Are Substantially Reduced For Matters That Must Be First Raised On Collateral Review

Under ordinary circumstances, a postconviction personal restraint petition (PRP) is the first time a claim for ineffective assistance of counsel may be raised in Washington. *See, e.g., State v. Sandoval*, 171 Wn.2d 163, 168-69, 249 P.3d 1015 (2011) (noting the “unique procedural obstacle” that because “advice does not appear in the trial court record,” ineffective assistance of counsel claims must be brought on PRP). This fact significantly distinguishes state PRP proceedings on ineffective assistance of counsel claims from federal collateral review proceedings in which the merits of the claim under review have already been presented to and decided by another court. The basic finality interest that weighs against the litigation of matters previously resolved is simply not present. Indeed, the retroactivity rule in *Teague* relies on the critical assumption that the petitioner has already had a full and fair opportunity to raise their constitutional claims. *See Teague*, 489 U.S. at 308-09; *see also Mackey v. United States*, 401 U.S. 667, 684, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971) (Harlan, J., dissenting) (noting that restrictions on retroactivity presume that the defendant “had a fair opportunity to raise his arguments in the original criminal proceeding”). The *sole* interest that supports limiting

retroactivity in state court proceedings, finality, is far less substantial in the unique context present here.

2. *The Severity Of The Consequences And Washington's State Law Values In Immigration Matters Provide Further Reason To Decline A Restrictive Application of Teague.*

There are other powerful reasons for declining to apply an overly restrictive application of *Teague* to *Padilla* claims in Washington. First, *Teague* and its progeny are formulated to give deference to state values, and, as discussed in the *amicus* brief of the Washington Defender Association, Washington has long valued appropriate advice on the immigration consequences of guilty pleas. Washington's prior establishment of a noncitizen defendant's right to advice regarding the immigration consequences of a guilty plea is notably analogous to New Mexico's past adoption of similar rights, which the New Mexico Supreme Court held to be a basis for applying its state corollary to *Padilla* retroactively. *See Ramirez*, 2014 WL 2773025, at *4-5.

Second, the severe consequences of the constitutional errors at issue in *Padilla* matters provide further reason to avoid an overly restrictive, and thus unjust, retroactivity standard. As courts have regularly recognized, the immigration consequences of a criminal proceeding are often far more serious, and far more important to the defendant, than incarceration. *See, e.g., Padilla*, 559 U.S. at 364 (noting that "deportation is an integral part – indeed, sometimes the most important part" of the penalty for those who plead guilty to criminal

charges); *INS v. St. Cyr*, 533 U.S. 289, 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) (noting that “preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence”). Those consequences could include individuals facing exile from this country, separation from their families, and poverty and persecution in their home countries. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 164, 65 S. Ct. 1443, 98 L. Ed. 2103 (1945) (“A deported alien may lose his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution, and even death.”).⁴ A noncitizen defendant who pleads guilty to a deportable offense will be subject to potential deportation indefinitely because deportable offenses contain no statutory limitations. These severe consequences must be considered in analyzing whether finality interests overcome the interests of fundamental fairness and error correction supporting the retroactive application of *Padilla* in Washington.

C. An Appropriate Application Of Retroactivity Principles Promoting Washington Values Supports *Padilla* Retroactivity

Rather than a rote application of *Teague* mirroring the federal court analysis, which is based on inapposite principles of federalism, this Court should instead apply the basic *Teague* framework in a more flexible and

⁴ *See also, e.g.,* Jennifer Welch, Comment, Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively, 92 Cal. L. Rev. 541, 545 (2004) (“[I]n many misdemeanor and low-level felony cases, a noncitizen criminal defendant is usually much more concerned about immigration consequences than about the term of imprisonment.”).

less restrictive manner consistent with the foregoing Washington state law and values. Doing so would promote this Court's expressed desire to generally stay "in step" with federal retroactivity principles, while also appropriately reflecting the very substantial differences in context between federal and state collateral proceedings. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 324, 823 P.3d 492 (1992).

This Court could do this by finding that *Padilla* is retroactive as a "watershed" rule, under an appropriately flexible standard grounded in Washington law. The *Teague* framework cannot be applied so restrictively in Washington that the watershed exception is entirely meaningless. In the federal courts, from a practical perspective the "exception" has been rendered a nullity. *See In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 628, 316 P.3d 1020 (2014) (noting that courts have been "sparing to the point of unwillingness" to apply this exception). In the 25 years since *Teague*, the United States Supreme Court has *never* found that a decision satisfies this exception and has repeatedly indicated that none ever will. *See, e.g., Whorton v. Bockting*, 549 U.S. 406, 417, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) ("We have observed that it is unlikely that any such [watershed] rules have yet to emerge. And in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status.") (quotations and citations omitted). As discussed above, the severely restrictive nature of this "exception" in the federal courts is based on principles of federalism inapplicable here. There is no similar rationale for such a restrictive application of

retroactivity in state law proceedings, and the use of such an analysis would be inconsistent with Washington law. *See* RCW 10.73.100(6) (calling for retroactivity where “sufficient reasons” exist).

Rather than treating the watershed exception as the nullity it has become in the federal courts, Washington should instead treat as retroactive all significant changes in criminal procedure that implicate the fundamental fairness or accuracy of the underlying conviction or plea. *Cf. Mackey*, 401 U.S. at 693-94 (Harlan, J., dissenting) (explaining that a new rule should apply retroactively where it is a “bedrock procedural element” impacting “the fairness of the conviction”). Where a change in law is both “significant” and implicates the fundamental fairness or accuracy of the underlying proceeding, there are certainly “sufficient reasons” for its retroactive application, as contemplated by the Washington legislature. RCW 10.73.100(6). In such circumstances, the benefits of ensuring greater correction of constitutional errors within our state system strongly outweigh the largely inapplicable countervailing concerns calling for the restrictive application of new constitutional rules.

Additionally, the unique nature of *Padilla* claims provides a separate and independent ground for applying *Padilla* retroactively in Washington. Because the claims here have very serious consequences and must be brought for the first time by PRP, these proceedings, while technically collateral, are the functional equivalent of direct review. *See Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012). As a result, these claims should be treated as having been brought

on direct review for retroactivity purposes, and to therefore be entitled to the benefit of new rules. *See Teague*, 489 U.S. at 300 (stating that “once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated”); *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (holding that the “integrity of judicial review” requires applying new rules to “all similar cases pending on direct review,” and that failure to do so “violates basic norms of constitutional adjudication”). Interpreting the concept of “direct review” flexibly for retroactivity purposes under the unique circumstances here would have minimal finality implications – since, as discussed above, the claims are being raised for the first time – while strongly promoting fundamental fairness. *See Griffith*, 479 U.S. at 323 (stating that “selective application of new rules violates the principles of treating similarly situated defendants the same”). Related arguments are detailed in the *amicus* brief of law professors John Strait, Christopher Lasch, and others. The ACLU strongly supports these important arguments concerning claims that must be first brought on collateral review, but will not discuss them further to avoid undue repetition.

Applying these principles here, *Padilla* should be found to be retroactive in Washington. The rule announced in *Padilla* clearly implicates the fundamental fairness and accuracy of the plea; defendants asserting *Padilla* claims face unexpected, severe consequences to which they did not knowingly agree. Moreover, as described above, state law

values, which have long supported the importance of the type of advice at issue in *Padilla*, as well as the extraordinarily severe consequences resulting from a plea given as a result of constitutional error under these circumstances, strongly support this conclusion. Washington immigrants who pled guilty due to ineffective assistance of counsel, and who face severe and unexpected consequences as a result, should be allowed the fair opportunity to vindicate their constitutional rights in the same manner accorded to similarly situated individuals on direct appeal.

V. **CONCLUSION**

For the reasons set forth herein, the ACLU as amicus curiae respectfully requests that this Court hold that *Padilla* applies retroactively under Washington law, as described herein.

Respectfully submitted this 4th day of September, 2014.

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DECLARATION OF SERVICE

I certify that on the date below, I caused the foregoing to be served on the following parties in the manner indicated:

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