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SUPREME COURT
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IN RE PERSONAL RESTRAINT PETITIONS OF _____

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YUNG-CHEN TSAI & MUHAMMADOU JAGANA,

Petitioners.

AMICUS CURIAE BRIEF OF

THE WASHINGTON DEFENDER ASSOCIATION, AND
THE NORTHWEST IMMIGRANT RIGHTS PROJECT

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ORIGINAL

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I. INTEREST OF AMICI CURIAE

The interests of amici are detailed in the accompanying motion.

II. STATEMENT OF ISSUES/SUMMARY OF ARGUMENT

In *Chaidez v. United States*, __ U.S. __, 133 S.Ct. 1103, 185 L.Ed. 2d 149 (2013), the Supreme Court decided that its previous opinion in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), broke new legal ground by applying the Sixth Amendment’s effective counsel protections to advice concerning immigration consequences. These protections had previously been considered by many courts, including this Court, as mere “collateral consequences”. See *State v. Sandoval*, 171 Wash.2d 163, 249 P.3d 1015, 1019 (2011). The *Chaidez* Court then held that federal courts may not apply *Padilla* retroactively to federal coram nobis petitions challenging convictions that became final before March 31, 2010. *Chaidez* at 1113.

Chaidez, however, does not require this Court to foreclose a remedy to Washington noncitizens whose constitutionally deficient convictions were obtained prior to *Padilla*. Rather, this Court can and should hold that there are sufficient reasons under RCW § 10.73.100(6) to apply *Padilla* to convictions that became final before it was decided.

Amici write to describe the professional standards by which Washington defense attorneys have long practiced, providing non-citizen

clients the type of competent advice that *Padilla* only recently confirmed is constitutionally required. These standards never existed in a vacuum. Rather, they are a reflection of Washington values. These values have long been tangibly manifested in an infrastructure built over more than two decades to ensure that defenders were able to guard the rights and wellbeing of noncitizens and their families in the Washington community whose lives would be destroyed if their attorneys failed to take immigration consequences into account. Amici thus also highlight representative human stories of Washington residents that have animated the critical need of defense counsel to competently advise their non-citizen clients of the immigration consequences of their criminal convictions.

Countless noncitizen have been significantly affected (for the better) by the strong standard the Washington defense bar has long applied, and the legislature has long supported. Others who have found themselves denied a level of assistance that did not meet the prevailing standard of practice will be profoundly affected by the Court's resolution of this case. For them, the stakes could not be higher: their very ability to remain with their families in the United States hinges on *Padilla's* retroactive effect under Washington law. For many of these people, the United States, and Washington in particular, is the only home they have.

Guilty pleas usually result in immediate consequences in the Washington criminal justice system while federal immigration consequences often silently attach only to become known years later. This is because the federal government can (and frequently does) initiate deportation proceedings years or decades after a conviction. Many non-citizens, having already paid their debt to Washington society, have not yet discovered (due to counsel's original inadequate advice) that old, often low-level convictions have rendered them deportable.

The discovery is typically only made after they are abruptly ripped from their families and communities and held by the U.S. government pending deportation, or placed in labyrinthine removal proceedings and forced to live with the impending threat of often inevitable deportation. Without *Padilla* retroactivity, those denied effective assistance of counsel prior to 2010, face inevitable of deportation. This includes parents, spouses and children of U.S. citizens, refugees, and business owners.

Amici request this Court to find that *Padilla* applies retroactively under state law to ensure that individuals whose convictions violated the Constitution, ran afoul of Washington values, and were contrary to established practice norms are entitled to a day in court.

III. ARGUMENT

A. IMMIGRATION ADVICE HAS LONG BEEN A TENET OF REASONABLY EFFECTIVE CRIMINAL DEFENSE REPRESENTATION IN WASHINGTON BECAUSE THE CONSEQUENCES OF A CRIMINAL CONVICTION CAN BE SO DEVASTATING AND DISPROPORTIONATE.

For more than a century, the United States Supreme Court has “recognized that deportation is a particularly severe ‘penalty,’” equivalent to “banishment or exile.” *Padilla* at 1486 (internal citations omitted). In recognition of its devastating and disproportionate effect on non-citizen defendants, the Supreme Court has unequivocally pronounced that “deportation is an integral part -- indeed, sometimes the most important part -- of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Padilla*, at 1480; *see also INS v. St. Cyr*, 533 U.S. 289, 322; 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (“[P]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence”).

Over the past decades, changes in immigration law have transformed the likelihood of deportation for a criminal conviction from uncommon and often avoidable, to a “nearly an automatic result for a broad class of noncitizen offenders.” *Padilla* at 1481; *St. Cyr* at 296 n.6 (The 1996 law “expanded the definition of ‘aggravated felony’ substantially and retroactively”). Beginning in 1988, Congress embarked

on an accelerated process of expanding the immigration consequences of criminal convictions by amending the immigration statute to require virtually automatic deportation for crimes classified as “aggravated felonies”. Only three crimes were then so classified: murder, drug trafficking and firearms trafficking. Anti-Drug Abuse Act of 1988, P.L. 100-690, effective Nov. 18, 1988. This process culminated in 1996, by which time the aggravated felony classification had been expanded seven times to include 21 different categories encompassing hundreds of offenses. See 8 USC § 1101(a)(43); *see also* K. Brady, *Defending Immigrants in the Ninth Circuit*, 10th Ed., Vol. 2, § 9.1 (2008). With these changes, Congress also expanded the list of other crime-related deportation grounds while simultaneously sharply curtailing the Attorney General’s authority to grant discretionary relief from deportation for rehabilitated offenders. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L. 104-132, 110 Stat. 1214 (April 24, 1996).¹

Pursuant to these amendments, even low-level crimes now trigger deportation as aggravated felonies. *See United States v. Gonzalez-*

¹ These changes also required mandatory immigration detention for broad categories of convicted noncitizen while administrative authorities and courts determine whether they are deportable or have available relief. 8 U.S.C. § 1226(c). In 2011, the Department of Homeland Security detained a record 429,247 non-citizens. DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2011* 4 (Sep. 2012).

Tamariz, 310 F.3d 1168 (9th Cir. 2003) (holding Nevada misdemeanor battery is now an “aggravated felony” under 8 USC § 1101(a)(43)(F)).²

Longtime Washington resident **Nora Soto’s** case illustrates the drastic nature of these changes.³ Brought to the US when she was four, she has spent nearly all her life in Toppenish. Ms. Soto is the primary caretaker of her three US citizen children. Her US citizen husband, in addition to subjecting her to severe domestic violence, also refused to petition for her to obtain lawful status. In 2008, Ms. Soto was convicted of misdemeanor attempted forgery in connection with using false documents to work and support her children. The trial court judge imposed a 365 day sentence (360 days suspended). Holding that *Chaidez* precluded *Padilla* retroactivity, the judge deemed her post-conviction petition for a 1-day sentence modification time barred, despite the fact that her defense counsel took no steps to avoid the clear, drastic and avoidable immigration consequences that would attach. Consequently, now in removal proceedings, Ms. Soto’s conviction is classified as an aggravated felony.⁴

² Other minor offenses triggering severe immigration consequences have included possession of a single pill of an anxiety drug, shoplifting \$14.99 worth of baby clothes, urinating at a construction site, and jumping subway turnstiles. See Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* 54 (2007).

³ Names and locations of the cases highlighted herein have been changed to protect confidentiality. All case information is on file with Amici.

⁴ See 8 USC § 1101(a)(43)(R) classifying forgery offenses with a sentence of at least one year as aggravated felonies.

Thus, the Immigration Judge is precluded from granting her lawful status under special provisions for immigrant survivors of domestic abuse and can only order her deported to Mexico.⁵

B. DEFENSE COUNSEL’S PADILLA OBLIGATIONS ARE PREMISED ON THE FUNDAMENTAL REQUIREMENT TO ACCESS AVAILABLE RESOURCES.

The *Padilla* Court recognized that defense counsel’s Sixth Amendment duty requires affirmative, accurate assistance regarding the immigration consequences of accepting a plea. In light of the complexities of immigration law, the Court acknowledged that the extent of a defenders advice may be contingent on the clarity of the immigration consequence. *Padilla* at 1477. However, the Court articulated that the sufficiency of defense counsel’s determinations as to the clarity of the immigration consequences - and subsequent advice regarding them -- rested upon the *availability of accurate advice*. The Court emphasized that, regardless of the clarity of the immigration consequences, counsel’s fundamental duty is to access available resources to inform herself and her advice to the client:

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are *readily available*. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the

⁵ A one-day modification in Ms. Soto’s sentence would declassify her conviction as an aggravated felony and make her eligible to have the immigration judge grant her lawful status. See 8 USC § 1229b(b)(2).

advantages and disadvantages of a plea agreement.” When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is *readily available*. It 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.”

Padilla at 1485 (emphasis added)(internal citations omitted.); *see also Id.* at 1486 (“Counsel who possess the most rudimentary understanding of the deportation consequences of a particular crime may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.”).

Thus, the Court held that a defender in Kentucky, a state that in 2006 still had no infrastructure or dedicated expert immigration resources to support its defenders in compliance with these duties, was obligated to consult “readily available resources” to affirmatively and accurately advise her client regarding the immigration consequences of his plea.

Padilla at 1482-83.

C. WASHINGTON HAS A LONG TRADITION OF PROVIDING DEFENDERS READILY AVAILABLE EXPERT IMMIGRATION RESOURCES.

In contrast to Kentucky, and long before *Padilla*, Washington had recognized that the justice meted out by our state’s criminal justice system

required giving informed consideration to the impact of deportation consequences on noncitizen defendants, their families and our communities. This recognition is reflected in the decades-long efforts by the legislature, the courts and the defense bar to ensure that noncitizen defendants be accorded not just “rudimentary advice” but a meaningful opportunity to have their choice of whether to accept a plea (or exercise their right to trial) informed by the immigration consequences at stake.

The legislature first recognized that principles of fairness necessitated that noncitizen defendants be advised of immigration consequences more than 30 years ago when it promulgated RCW § 10.40.200. This statute requires trial courts, prior to accepting a plea, to provide notice to the defendant that his plea could result in deportation or have other significant immigration consequences.⁶ Failure to do so warrants vacation of a noncitizen’s conviction. *State v. Littlefair*, 112 Wash.App 749, 51 P.3d 116 (2002). Importantly, as this Court recognized in *Sandoval*, this notice is only effective when it works in tandem with defense counsel’s duty to accurately advise clients regarding the immigration consequences and assist them in making meaningful choices in light of the facts of their case. *Sandoval* at 1020-21.

⁶ The standard court compliance with RCW 10.40.200 was (and is) to include boilerplate notice language in plea forms that are, as a matter of routine, read to defendants when reviewing their plea forms with counsel. See Guilty Plea Statement forms at <https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=21>.

By 1990, noncitizen defendants and their families began to feel the initial impact of Congress' expansion of the deportation dragnet. Efforts got underway in earnest in 1991 to begin providing Washington's defense bar with available resources to mitigate these increasingly harsh consequences when Amici Northwest Immigrant Rights Project (NWIRP) began offering regular trainings and publications. These trainings emphasized defense strategies to negotiate resolutions that avoided or mitigated immigration consequences and tools to assist clients to make informed choices. NWIRP attorneys also began offering defenders free case consultations.⁷

By 1997, the sweeping changes wrought by Congress (*see* § III.A, *supra*, and *Padilla* at 1478-80), began to outstrip NWIRP's capacity to provide defenders the needed resources. The defense bar became increasingly alarmed as it watched the severe penalty of deportation befall increasing numbers of clients, rendering their competent defense on criminal matters often meaningless to individuals whose lives and families were being devastated by deportation and permanent separation. Consequently, Amici Washington Defender Association (WDA), in collaboration with NWIRP, sought ways to more tangibly recognize that effective assistance to noncitizen defendants required affirmatively

⁷ NWIRP's defender-related efforts were spearheaded and overseen by its supervising attorneys, including Jay Stansell, himself a former King County assistant public defender. Documentation of NWIRP's trainings and publications on file with Amici.

incorporating accurate, case-specific immigration consequences information into their representation.

In 1999, the legislature responded to these efforts by allocating resources that allowed WDA to make immigration law experts directly available to defenders. In addition to NWIRP's ongoing efforts, WDA's Immigration Project now began providing individualized, case-specific immigration consequences analysis, including alternatives to avoid or mitigate them. WDA's Immigration Project was one of the first state-wide projects of its kind and remains a model for other states. Until recently, no other state has afforded the defense bar such ready access to the necessary immigration law expertise to effectively and efficiently represent noncitizen clients.

Since its inception, WDA's Immigration Project has been maintained through funds allocated by the legislature. In addition to its primary focus on assisting defenders, these resources ensured that prosecutors and courts could also give informed consideration to the decisions they made.⁸ The legislature increased Immigration Project funding in 2005 and again in 2013 to support

⁸ See *Padilla* at 1486 (recognizing the importance of the state giving informed consideration of immigration consequences in plea negotiations and sentencing decisions); see also, e.g., *Immigration Resource Guide for Judges* (2012), published by the Minority and Justice Commission in collaboration with WDA's Immigration Project. Available at: <http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/Immigration/index>.

three full-time immigration experts. By the time of the *Padilla* decision, this investment amounted to well over a million dollars.⁹

With these legislative resources, WDA's Immigration Project staff have assisted defenders to negotiate resolutions and provide accurate advice in over 20,000 cases. On average, individual case assistance consultations take less than 20 minutes of defender time and are responded to within 48 hours. Any attorney may also access current practice advisories from the WDA website, which focus on specific Washington crimes and include strategies to avoid or mitigate them.¹⁰ WDA's Immigration Project has also offered nearly 200 trainings on the immigration consequences of crimes, reaching more than 6,000 participants—including prosecutors, defenders and judges.¹¹

These established norms of affirmatively incorporating the client's immigration priorities into defense representation were included in the updates to both WDA and WSBA practice standards. *See*, WDA's Standards for Public Defense Services, at 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

⁹ Present annual legislative funding to WDA's Immigration Project totals nearly \$250,000. All documentation of legislative funding on file with Amici WDA.

¹⁰ *See* the WDA website at www.defensenet.org/immigrationproject. Website immigration resources have been available to defenders since 2001.

¹¹ Statistics and specific trainings on file with Amici WDA.

conviction.”); *see also*, WSBA’s Performance Guidelines for Criminal Defense Representation, §2.2(b)(2)(b) (2008) (“when the client is not a citizen the lawyer should obtain information that will permit counsel to determine the immigration consequences of the conviction & sentence”).¹²

In 2011, with the passage of SSB 5168, the legislature again demonstrated that Washington places a higher priority on ameliorating the immigration consequences of convictions than the federal government. The first of its kind in the country, this law reduced the maximum penalty for Washington misdemeanors by one day for the express purpose of ensuring that future noncitizen misdemeanants would no longer face the disproportionate consequence of deportation as an “aggravated felon”.¹³

D. COMPETENT WASHINGTON DEFENDERS HAVE GENERALLY ACCESSED AVAILABLE RESOURCES TO EFFECTIVELY REPRESENT NONCITIZEN CLIENTS AND, WHERE POSSIBLE, AVOIDED ADVERSE IMMIGRATION CONSEQUENCES.

There is no question that effectively addressing immigration consequences has been a cornerstone of criminal defense representation in Washington since well before *Padilla*. Indeed, Washington’s professional

¹² WDA defense standards were first created and endorsed by WSBA in 1985. Previous to the 2006 updates, they had not been updated since 1990. WSBA Performance Guidelines were created from the WDA standards and endorsed in 2008.

¹³ *See*, § III.A and Kristi Pihl, *Measure Reduces Misdemeanor Sentence by 1 Day*, Yakima Herald, (April 24, 2011). SSB 5168 does not alter the deportation consequence for misdemeanor convictions where 365 day sentences were imposed prior to 7/22/11.

norms stand upon the scaffolding of a sustained infrastructure considerably more substantial than the “readily available resources” that animated the *Padilla* decision. This infrastructure was and is designed to give defenders ready access to the necessary resources to prioritize meaningfully fulfilling their *Padilla* obligations.

Competent defenders have accessed these resources and effectively incorporated their client’s immigration issues into their representation. In so doing, they could, as the following stories highlight, secure plea agreements that did not trigger deportation and ensured that their clients remained eligible for immigration benefits such as permanent resident status and US citizenship.

Eddy Lopez, a 54-year-old Mexican citizen paralyzed from the waist down, has been living in Pasco for over two decades. Eddy became a lawful permanent resident in 1998. In 2004, Eddy was charged with a controlled substance violation. A conviction would have triggered automatic deportation.¹⁴ Defense counsel identified that preserving his ability to remain in the US with his family was Eddie’s highest priority. Defense counsel consulted with Eddie’s immigration attorney at NWIRP and, based upon the information provided, was able to negotiate a plea

¹⁴ See 8 USC § 1227(a)(2)(A)(iii); 8 USC § 1101(a)(43)(B) and 8 USC §1227(a)(2)(B)(i).

agreement to solicitation of a controlled substance under 9A.28.030, a resolution that avoided triggering deportation.¹⁵ He subsequently completed all terms of probation, has had no further violations and is now applying to become a US citizen.

Pedro Chixoc, an indigenous Guatemalan was granted asylum in 2002. In 2003 at 20 years old, he was charged with 3rd degree child molestation in Whatcom County for having consensual sex with his then-15 year old girlfriend, also an indigenous Guatemalan, despite the fact that they had subsequently married and had a child. After consulting with WDA's Immigration Project staff, defense counsel was able to vigorously negotiate with the prosecutor to secure a plea to assault 3rd degree under RCW § 9A.36.031(f)(negligence), a conviction that, unlike the charged offense, did not trigger deportation.¹⁶

Contrast the case of **Muhammed Haji**, who, like Mr. Lopez, faced a drug charge that jeopardized his ability to remain in the U.S. with his family. Unlike Mr. Lopez and Mr. Chixoc, Mr. Haji's defense counsel failed to access available immigration resources, resulting in a

¹⁵ See *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (solicitation to commit a drug crime is not a controlled substance violation under immigration law); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (same conviction also not an aggravated felony).

¹⁶ See 8 USC § 1101(a)(43)(A) (classifying "sexual abuse of a minor" crimes as aggravated felonies. See also, *Matter of Perez-Contreras*, 20 I&N Dec. 615 (1992) (offenses with negligent mens rea cannot be classified as crimes involving moral turpitude under immigration law); *Leocal v. Ashcroft*, 535 U.S. 234, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (negligence crimes cannot be classified as aggravated felonies).

dramatically different outcome. In 2001 when he was 13, Mr. Haji and his family were granted lawful status after fleeing ethnic violence in Ethiopia. Just 11 days after turning 18, he was arrested and later convicted in King County for delivery of a small amount of drugs, a crime classified as an aggravated felony.¹⁷ His defense counsel took no steps to avoid, mitigate, or even inform Mr. Haji of this outcome. Since release after serving his sentence, Mr. Haji has worked two jobs to help support his large immediate family. He is currently married, has two US citizen children, volunteers with a youth group and hopes to become a physician's assistant. Without an avenue to challenge the effectiveness of his counsel's representation, Mr. Haji faces imminent, inevitable deportation.

E. SANDOVAL ALIGNED WASHINGTON'S OUTDATED JURISPRUDENCE WITH ESTABLISHED PROFESSIONAL NORMS, A DISCREPANCY DESERVING NONCITIZENS SHOULD NOT BE FORCED TO BARE.

Sandoval brought Washington's jurisprudence in line with its established professional norms. That decision overturned *In Re Yim*, 139 Wn.2d 581; 989 P.2d 512 (1999)¹⁸ and the lower court decisions that had

¹⁷ See n. 13, *supra*.

¹⁸ In *Yim* this Court cursorily concluded that immigration consequences are "merely collateral" and, did not require counsel to affirmatively advise. *Yim* at 516. The Court nonetheless left open the possibility that affirmative misadvice could constitute a "manifest injustice" requiring the plea be set aside. *Id.* However, the Court's determination that the defendant was not affirmatively misadvised was arguably erroneous. While it is unclear what, if any additional advice the attorney provided her client, the record of her statements at sentencing make clear that she was willfully

for years rested on the collateral consequences doctrine, a tradition long at odds with the defense bar's own practices. *Sandoval* at 1019, n.1; *see also*, *See State v. Malik*, 37 Wn.App. 414, 416, *review denied* 102 Wn.2d 1023 (1984); *State v. Holley*, 75 Wn.App. 191, 197 (1994); *State v. Martinez-Lazo*, 100 Wn. App. 869, 878 (2000); *State v. Jamison*, 105 Wn.App. 572, 593 (2001); *but see State v. Chetty*, 167 Wn. App. 432, 443-44, 272 P.3d 918 (2012) (relying on *Padilla's* acknowledgement that immigration advice professional norms had been in place since at least 1995 to find that trial counsel in 2004 had a duty to advise about deportation consequences).

The weight of both state and federal pre-*Padilla* decisional authority may offer a legal rationale for the gap between Washington jurisprudence and defense practice norms. *Padilla* at 1482-83. However, requiring Washington's noncitizens and their families to bear the harsh, irreparable consequences of this discrepancy is unwarranted given the availability of a workable remedy for correcting pre-*Padilla* constitutional errors. *See* amicus briefs of Washington Law Professors and the ACLU of

misinformed about the immigration consequences of her client's plea to RCW 70.74.022, which the immigration statute clearly classified as an aggravated felony under 8 USC § 1101(a)(43)(E)(offenses relating to explosive materials) *regardless of the sentence imposed*. No 60 month sentence was required to trigger this consequence as defense counsel and the Court erroneously believed and communicated to the defendant, a permanent resident facing deportation to Laos due to the conviction at issue. *Id.*

Washington (providing in-depth legal analysis to support that sufficient reasons exist to grant an exception pursuant to RCW § 10.73.100(6)).

F. FINDING SUFFICIENT REASONS TO APPLY *PADILLA* RETROACTIVELY IS IN KEEPING WITH WASHINGTON VALUES AND WILL SERVE THE INTERESTS OF JUSTICE WITHOUT OPENING THE FLOODGATES OF LITIGATION.

Permitting a circumscribed class of noncitizens the opportunity to challenge the constitutional sufficiency of convictions that will serve as a legal basis to forever deprive them of their home and family will not open the courts to a flood of litigation.

First, in light of our established infrastructure outlined at § III.C, *supra*, this Court has even greater cause to presume that the majority of Washington defenders have long-complied with these immigration advice obligations than the *Padilla* Court did when it dismissed such “floodgates” concerns. *Padilla* at 1485.

Second, the remedy requested is the opportunity for aggrieved noncitizens to prove they can meet the rigorous two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d (1984); *see also*, *Chaidez* at 1116-21 (Sotomayor dissenting). Relief from judgment will only be granted to petitioners who, like Mr. Sandoval, can prove that counsel was deficient in their *Padilla* obligations and that this

deficiency prejudiced the outcome of the proceedings. *Sandoval* at 1018; accord *In Re Ramos*, ___ Wash. App. ___, 326 P.3d 826 (2014) (*Padilla*-related ineffective assistance claim denied where petitioner did not establish clear immigration consequences or how he was prejudiced by counsel's allegedly deficient performance.)

Third, the limitations on appointment of counsel and the complexities of the post-conviction relief process, practically speaking, weigh heavily against this class of petitioners. The majority of them are low-income with limited English proficiency; a vehicle for redress is the first step in a long journey many will not be able to complete. *See, e.g.*, RCW § 10.73.150 (limitations on appointment of counsel).

And finally, the flood of petitioners seeking to vacate convictions or modify sentences is more akin to a trickling stream given the realities of aggressive and expanded federal immigration enforcement practices. Simply put, many petitioners have already been deported. *See Office of Immigration Statistics, U.S. Dep't of Homeland Sec., 2009 Yearbook of Immigration Statistics* 95 tbl.36 (2010) (documenting that between 1986 and 2009, the year before *Padilla* was decided, annual deportations increased from just under 25,000 to nearly 400,000).¹⁹

IV. CONCLUSION

¹⁹ Available at: http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

To deny petitioners a day in court to prevent irreparable harm stemming from Constitutional errors would be to accept the *Padilla* Court's invitation to absurdity. *Padilla* at 1485. It would sanction counsels' failure to access readily available resources that could have prevented their clients' exile from this country. And, it would deny a class of clients least able to represent themselves the ability to make informed decisions about the consequence that often matters most. A more just alternative is readily available. Amici respectfully request this Court to find sufficient reasons exist to permit retroactive application of *Padilla*.

Respectfully Submitted,

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Supreme Court No. 88770-5
(CONSOL. WITH NO. 89992-4)

SUPREME COURT
OF THE STATE OF WASHINGTON

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IN RE PERSONAL RESTRAINT PETITIONS OF
YUNG-CHEN TSAI & MUHAMMADOU JAGANA,
Petitioners.

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CERTIFICATE OF SERVICE
REGARDING THE AMICUS BRIEF OF
THE WASHINGTON DEFENDER ASSOCIATION. AND
THE NORTHWEST IMMIGRANT RIGHTS PROJECT

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DECLARATION OF SERVICE

I certify that on the date below, I served the **amicus brief** filed by the **Washington Defender Association and the Northwest Immigrant Rights Project** in connection with this case on the following parties in the manner indicated:

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DATED this 5th day of September, 2014.

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