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SUPREME COURT NO. ~~89992-4~~
COA NO. 66682-7-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

MUHAMMADOU JAGANA,

Petitioner.

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FILED
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MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Muhammadou Jagana asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Jagana seeks review of Division One's order denying his personal restraint petition, filed January 27, 2014. A copy of the order is attached as appendix A.

C. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

1. This Court has issued arguably conflicting decisions on the question whether Washington, as a matter of independent state law, will follow the United States Supreme Court's decision in Teague v. Lane¹ 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. Kentucky² be applied retroactively to this case, to allow relief from the time bar in RCW 10.73.090?

¹ Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

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

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

D. STATEMENT OF THE CASE

1. Procedure

Jagana was charged on March 20, 2005, with unlawful possession of cocaine. He pled guilty on June 7, 2006, and was sentenced to a 90-day term.

By motion and affidavit filed in the superior court on November 4, 2010, Jagana sought to vacate the judgment and sentence and to withdraw his plea. His affidavit stated his appointed trial counsel did not advise him of the immigration consequences of a conviction, nor to contact an immigration attorney before entering a guilty plea. The motion sought to set aside the plea as not knowing, intelligent, and voluntary. Citing Padilla, Jagana further asserted he was denied effective assistance of counsel because counsel failed to advise him of the immigration consequences of the conviction. He argued the motion was timely under RCW 10.73.090 because Padilla was a significant change in the law that should be retroactively applied.

On December 6, 2010, the state moved to transfer the motion to the Court of Appeals for consideration as a personal restraint petition (PRP). The state asserted Jagana's motion was not timely

filed. On December 7, 2010, the trial court entered its order transferring the case to the Court of Appeals.

2. Published Division One Decision

After hearing oral argument, the Court of Appeals issued a published decision on August 13, 2012.³ The Court of Appeals agreed that Padilla was retroactive and that Jagana's petition was timely under RCW 10.73.100(6). Padilla constituted a significant change in the law, material to the conviction, and the Court of Appeals determined sufficient reasons exist to require retroactive application of Padilla to Jagana's case. Jagana, 170 Wn. App. at 38-56⁴; RCW 10.73.100(6). The court also recognized that the Supreme Court had itself retroactively applied the Padilla rule to Padilla's case, which was filed as a request for collateral relief from a final judgment. Jagana, 170 Wn. App. at 56. In addition, Washington courts previously "recognized that professional norms of at least the past 15 years have required an attorney to advise his client about deportation

³ In re Restraint of Jagana, 170 Wn. App. 32, 282 P.3d 1153 (2012), review granted and remanded, 177 Wn.2d 1027 (2013), opinion withdrawn by Order dated August 21, 2013, noted at 2013 WL 6564637 (December 9, 2013).

⁴ Jagana recognizes that the published opinion has been withdrawn. See appendix B. Nonetheless, this motion cites the opinion because it historically existed, it is part of this case's procedural background, and it is more efficient to cite the online version, rather than to attach a 29-page slip opinion as an otherwise unnecessary appendix.

consequences of a plea.” Jagana, 170 Wn. App. at 49 n. 71 (citing State v. Chetty, 167 Wn. App. 432, 433-34, 272 P.3d 918 (2012)).

The court further concluded the crime to which Jagana pled guilty was “clearly deportable” and Jagana’s counsel was obligated to advise him of the correct deportation consequences of the plea. Counsel’s failure to do so was deficient performance under Strickland. The court remanded for an evidentiary hearing to determine whether Jagana could demonstrate prejudice under Strickland and Padilla. Jagana, 170 Wn. App. at 59⁵; see also State v. Sandoval, 171 Wn.2d 163, 175-76, 249 P.3d 1015 (2011) (discussing Strickland’s prejudice prong in this context).

The state sought discretionary review. While review was pending, the United States Supreme Court issued its decision in Chaidez v. United States, ___ U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013). In that federal coram nobis case, the Chaidez majority held that Padilla would not be retroactively applied for purposes of federal review under the retroactivity standard set forth in Teague v.

⁵ Although Jagana initially filed his motion in the court where an evidentiary hearing would have been available, the state moved to transfer the case to the Court of Appeals for consideration as a PRP.

Lane.⁶ According to the Chaidez majority, Padilla announced a “new rule” and petitioners whose convictions were final before Padilla cannot benefit from its holding. Chaidez, 133 S.Ct. at 1113.

The Chaidez dissenters would have held that Padilla did not announce a “new rule,” but instead applied settled Strickland principles to the context of immigration advice. “Padilla did nothing more than apply the existing rule of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in a new setting, the same way the Court has done repeatedly in the past: by surveying the relevant professional norms and concluding that they unequivocally required attorneys to provide advice about the immigration consequences of a guilty plea.” Chaidez, 133 S.Ct. at 1115 (Sotomayor, dissenting).

This Court then granted the state’s motion for discretionary review and remanded for “reconsideration in light of Chaidez.” 177 Wn.2d 1027 (2013). The Court of Appeals then withdrew its opinion,

⁶ When the United States Supreme Court issues a new rule of criminal proceedings, its retrospective application to cases on federal habeas corpus review is governed by the test in Teague. A new rule is one that is not dictated by precedent. Beard v. Banks, 542 U.S. 406, 411, 124 S.Ct. 2504, 2510, 159 L.Ed.2d 494 (2004). In general, a new rule will not be applied retroactively unless it fits one of two enumerated exceptions. The exceptions are for rules that place “certain kinds of primary, private, individual conduct beyond the power of the criminal law making authority to proscribe” and for “watershed rules of criminal procedure.” Teague, 489 U.S. at 308-11. Neither exception is implicated here.

and later dismissed Jagana's PRP. Jagana seeks review of that dismissal.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

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

Jagana argues his plea and conviction are invalid because he was denied effective assistance when counsel failed to advise him of the immigration consequences of his plea to this offense. The overarching question is whether Jagana's motion should be considered under the legal standards discussed in Padilla. Citing Chaidez, the state asserts Padilla should not be retroactively applied to Jagana's case.

Washington statutes address the question whether a PRP is timely filed in Washington courts, and when a person is entitled to relief from unlawful restraint. Although Jagana'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).⁷

In addressing retroactivity questions under the statute, Washington courts have generally imported the federal retroactivity test from Teague. In re Restraint of Gentry, ___ Wn.2d ___, 316 P.3d 1020, 1026-27 (2014); In re 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

⁷ 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.

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 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, Jagana'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.

Jagana’s case 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); RAP 13.5.

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 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 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 Restraint of Dalluge, 152 Wn.2d 772, 787, 100 P.3d 279 (2004). In cases like Jagana's, 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, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (2012). The Martinez Court noted that:

Where, as here, the initial-review collateral proceedings 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 1320.⁸

⁸ 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

The present proceeding is, likewise, Jagana'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 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 our Court has applied the Teague test all involved claims that could have

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).

been, and in many cases were, raised previously on direct appeal. See e.g. In re Restraint of Jackson, 175 Wn.2d 155, 283 P.3d 1089 (2012); In re Restraint of Scott, 173 Wn.2d 911, 271 P.3d 218 (2012); In re 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 Restraint of Rhome, 172 Wn.2d 654, 260 P.3d 874 (2011) (involving waiver of right to counsel, which could have been 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, Jagana's ineffective assistance claim, which relies on evidence from outside of the trial record, could only have been raised in this PRP, 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 Jagana's PRP 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 State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011), 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.

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 Jagana'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 to his PRP.

Because the case involves significant constitutional questions and issues of substantial public interest, this Court should grant review. RAP 13.4(b)(3), (4); RAP 13.5.

G. CONCLUSION

For the reasons set forth above, this Court should grant review. RAP 13.4(b), 13.5, 13.6.

DATED this 26th day of February, 2014.

Respectfully submitted,

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(corrected signature page)

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/defendant~~ plaintiff containing a copy of the document to which this declaration is attached.

Ann Summers RCTT
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Ann Summers Done in Seattle, WA Date *2/27/14*
Name

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served 2/29; original filed and
served 2/26/14.*

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of
MUHAMMADOU JAGANA,
Petitioner.

No. 66682-7-1
ORDER DENYING
PERSONAL RESTRAINT
PETITION

Muhammadou Jagana seeks collateral review of his final judgment and sentence that was based on his guilty plea to possession of cocaine. In a decision filed on August 13, 2012, we decided that he had satisfied the first prong of his claim of ineffective assistance of counsel. But we remanded for an evidentiary hearing to determine if he could satisfy the second prong, prejudice.

The State sought discretionary review. On August 6, 2013, the supreme court granted review and remanded to this court for reconsideration in light of Chaidez v. United States, 133 S. Ct. 1103 (2013).

On August 21, 2013, we withdrew our opinion filed on August 13, 2012. Thereafter, we ordered additional briefing by the parties. Both parties have submitted either additional briefing or supplemental authority.

Having reviewed this material and the records and files, this court hereby denies this personal restraint petition.

Dated this 27th day of January 2014.

COX, J.

Leach, C. J.

Schirrell, J.

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APPENDIX B

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

In re the Personal Restraint Petition of)
MUHAMMADOU JAGANA.)
_____)

No. 66682-7-1

ORDER WITHDRAWING
OPINION

This case was remanded to this court by a special department of the
supreme court "for reconsideration in light of Chaidez v. United States, 133 S. Ct.
1103 (2013)." Having reconsidered the case, as ordered by the supreme court, it
is hereby

ORDERED that this court's opinion, filed on August 13, 2012, is
withdrawn.

DATED this 21st day of August 2013.

COX, J.

Leach, C. J.

Belustaden, J.

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