Supreme Court No. 88770-5
Court of Appeals No. 43118-1-II

IN THE WASHINGTON SUPREME COURT

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In re the Personal Restraint Petition of:

YUNG-CHENG TSAI,

Petitioner.

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MOTION FOR DISCRETIONARY REVIEW

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By:
YUNG-CHENG TSAI,
Petitioner *pro se*
A# 73 441 433
1623 East J St., Ste 5
Tacoma, WA 98421

## I. IDENTITY OF MOVING PARTY

Petitioner **Yung-Cheng Tsai**, moves for discretionary review of the decision designated in part II of this motion.

## II. DECISION FOR WHICH REVIEW IS SOUGHT

Mr. Tsai seeks review of the Division Two Court of Appeals order dismissing his personal restraint petition. *Exhibit* A, *Order Dismissing Petition, In re the Personal Restraint Petition of Yung-Cheng Tsai,* No. 43118-1, Division II, March 27, 2013.

## III. ISSUES PRESENTED FOR REVIEW

**1.** Whether the Court of Appeals properly dismissed the personal restraint petition when the United States Supreme Court held in *Danforth v. Minnesota*, 128 S.Ct. 1029, 169 L. Ed. 2d 859 (2008), that State courts are not bound by the non-retroactivity principles set forth in *Teague?*

**2.** The Court of Appeals dismissed Mr. Tsai's petition based on the United States Supreme Court decision in *Chaidez v. United States,* __ U.S.__, 133 S. Ct. 1103 (2013), in which holds that the decision in *Padilla v. Kentucky,* 559 U.S. 356 (2010), declared a "new rule" that did not apply retroactively to cases that were final before the *Padilla* decision was issued, and thus, Mr. Tsai cannot demonstrate that his petition falls within the time bar exception set forth in RCW 10.73.100(6). Did the Court of Appeals properly relied on *Chaidez* in dismissing the personal restraint

petition when this Court has noted that it is not bound by the standard of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) when deciding, under RCW 10.73.100(6), whether a ruling should apply retroactively? *State v. Evans*, 154 Wn.2d 438, 449, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005); *In re Pers. Restraint of Markel*, 154 Wn.2d 262 (2005).

## IV. STATEMENT OF THE CASE

### A. Statement of Facts

On February 16, 2006, Yung-Cheng Tsai was charged in Pierce County Superior Court with one count of Unlawful Possession of a Controlled Substance with Intent to Deliver-Marijuana. *CP* at 1-2. Mr. Tsai retained Erik Bauer of Bauer and Balerud Law Firm. *CP* at 108. On April 24, 2006, Mr. Tsai contacted immigration attorney Vicky Dobrin, who had represented him in an earlier immigration proceeding. *Petitioner's Reply, Appendix A, Declaration of Vicky Dobrin.* Ms. Dobrin advised Mr. Tsai that if he were convicted as charged, he would be removed as an aggravated felon. *Id.* Ms. Dobrin suggested alternate pleas that would avoid deportation or preserve his eligibility for discretionary relief. *Id.*

On April 28, 2006, Ms. Dobrin spoke to Mr. Bauer and advised him that a conviction as charged would be "regarded as an 'aggravated

felony' under immigration law" which would not only render Mr. Tsai deportable but would also bar Mr. Tsai from any form of discretionary relief from deportation. *Id.* Ms. Dobrin also discussed alternate pleas with Mr. Bauer, including a plea to either solicitation or possession of a controlled substance. *Id.*

In July of 2006 prior to Mr. Tsai's plea, Mr. Bauer contacted Mr. Tsai and informed him that a plea was negotiated which would avoid his deportation. *Petitioner's Reply, Appendix B, Declaration of Yung-Cheng Tsai.* Mr. Bauer advised Mr. Tsai that "by pleading guilty and receiving a sentence of less than one year, [he] would avoid any danger of removal." *Id.* Mr. Tsai agreed to plead guilty based on Mr. Bauer's assurance that this was one of the alternate pleas he discussed with Ms. Dobrin, which would avoid his removal from this country. *Id.*

On July 27, 2006, Mr. Tsai pled guilty as charged. *CP* at 3-6. On August 29, 2006, Mr. Tsai appeared with Mr. Bauer for the sentencing hearing. *RP of Sentencing* at 2, *CP* at 16. At the hearing, Mr. Bauer stated that the 11 months sentence was "an agreed recommendation before the court." *RP of Sentencing* at 2. Mr. Bauer further stated:

> Mr. Tsai is actually a native of Taiwan and so there's probably going to be some immigration issues later on, anyway. *The 11 months is pretty important*, and immigration law gives absolutely no guarantees. That was why we hit on that number. *That gives him a slight better argument in immigration issues later on.*

*Id.* at 2-3. (Emphasis added).

On October 30, 2007, a year after Mr. Tsai was released from custody, and over a year after the judgment became final, the Department of Homeland Security ("DHS") issued a "Notice to Appear" based on this controlled substance conviction charging Mr. Tsai with deportability under 8 U.S.C. § 1227(a)(2)(B)(i) and an "aggravated felony" under 8 U.S.C. § 1227(a)(2)(A)(iii). On November 1, 2007, Mr. Tsai was detained by the Immigration and Customs Enforcement ("ICE") and placed in removal proceedings. *CP at 51.* That was when Mr. Tsai first learned that he received affirmative misrepresentation of the deportation consequences by Mr. Bauer. *Petitioner's Reply, Appendix B.*

**B. Procedural History**

Petitioner Tsai was convicted by a plea of guilty on July 27, 2006, *CP* at 3-6, and sentenced to 11 months confinement on August 29, 2006. *CP* at 13. On November 1, 2007, Mr. Tsai was detained by ICE and placed in removal proceedings. *CP* at 51. Mr. Tsai immediately retained counsel in November of 2007, to withdraw his guilty plea. *Id.* In July of 2008, Mr. Tsai filed, through counsel, a motion to withdraw guilty plea with the trial court under CrR 7.8(b)(4) based on affirmative misrepresentation and doctrine of equitable tolling. *CP* at 25-27. In September of 2008, that motion was denied by the court. *CP* at 88-89. No appeals were filed on

that decision.

In May of 2011, Mr. Tsai filed again, through counsel, a motion for relief from judgment under CrR 7.8(b)(4). *CP* at 90-140. Petitioner argued that he should be allowed to withdraw his guilty plea because his defense counsel failed to properly advise him of the deportation consequences when it was "truly clear," and thus, his plea was not knowingly, intelligently or voluntarily made. *Id.* Petitioner contends that his petition falls within RCW 10.73.100(6)'s exception to the one year time bar of RCW 10.73.090(1) because the United States Supreme Court's decision in *Padilla v. Kentucky,* 559 U.S. 356 (2010) and this Court's decision in *State v. Sandoval*, 171 Wn.2d 163 (2011), relying on *Padilla*, represented a significant change in the law that is material to his conviction and that sufficient reasons exists to require retroactive application of the changed legal standard. *CP* at 90-140.

In October of 2011, the trial court denied the motion as timed barred. *CP* at 178-181. Mr. Tsai appealed the trial court's decision and in January of 2012, the trial court modified its decision and transferred the motion to the Court of Appeals for review as a personal restraint petition pursuant CrR 7.8(c)(2). *State's Response, Appendix M.* On February 27, 2013, the Court of Appeals dismissed the petition based on the the United States Supreme Court decision in *Chaidez,* holding that *Padilla* declared a

"new rule" that did not apply retroactively to cases that were final before the *Padilla* decision was issued.

## V. ARGUMENT

Discretionary review of decisions that terminate appellate review is governed by RAP 13.4. Under this rule, this Court will accept review if the Court of Appeals' decision conflicts with another decision of this Court or of the Court of Appeals, if the petition presents a significant constitutional question, or if the petition involves an issue of substantial public interest. RAP 13.4(b)(1-4); *In re Coats*, No. 83544-6, 2011 WL 5593063 (Wash. Nov. 27, 2011).

In this case, the Court of Appeals ruled that Mr. Tsai cannot demonstrate that his petition falls within the time bar exception set forth in RCW 10.73.100(6) because the Supreme Court clarified in *Chaidez* that the *Padilla* decision, which requires a constitutional effective counsel to correctly advise him of the deportation consequences when those consequences were "truly clear," announced a new rule that did not apply retroactively. As discussed below, this ruling presents a significant constitutional question, which also conflicts with the Division One Court of Appeals decision of *In re Personal Restraint Petition of Muhammadou Jagana*, ___ Wn.App. ___, 282 P.3d 1153, No. 66682-7-I (8/13/2012). RAP 13.4(b)(1) and (2).

This case also presents an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Whether *Padilla* and *Sandoval* apply retroactively to cases on collateral review in Washington is an issue of substantial public interest that requires this Court's determination.

This Court should accept review to provide guidance to litigants and the lower courts regarding the effect of *Chaidez* on the retroactivity of *Padilla* and *Sandoval* in Washington.

**1. The Court of Appeals improperly relied upon *Chaidez* in dismissing Mr. Tsai's petition because under *Danforth,* State courts are not bound by the non-retroactivity principles set forth in *Teague* and this Court has not issued any rulings regarding the effect of *Chaidez* on whether *Sandoval* constitutes a significant change in law in Washington.**

In *Danforth v. Minnesota*, 128 S. Ct. 1029, 552 U.S. 264, 169 L. Ed. 2d 859 (2008), the petitioner filed a state post-conviction petition in which he argued that he was entitled to a new trial because the admission of the taped interview violated the rule announced in *Crawford v. Washington,* 541 U.S. 36, 68-69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), for evaluating the reliability of testimonial statements in criminal cases. *Danforth,* 128 S.Ct. 1033. The Minnesota trial court and Court of Appeals held that *Crawford* did not apply to petitioner's case. *Id.* The Minnesota Supreme Court granted review to consider: (1) whether under *Teague,* the lower courts erred in holding that *Crawford* did not apply retroactively;

and (2) whether the state court was "free to apply a broader retroactivity standard than that of *Teague*," and should apply the *Crawford* rule to petitioner's case even if federal law did not require it to do so. 718 N.W.2d. 451, 455 (2006).

The court rejected both arguments and held that the Supreme Court decisions in *Michigan v. Payne,* 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), and *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990), and *Teague* prohibited state courts from giving a Supreme Court decision, announcing a new constitutional rule of criminal procedure, broader retroactive application than that given by the Court. *Danforth*, 128 S.Ct. at 1033. The United States Supreme Court granted certiorari, 550 U.S. __, 127 S.Ct. 2427, 167 L.Ed.2d 1129 (2007), to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so.

The Court clarified that it has never suggested that it does and held that it does not. *Id.* at 1033. In its analysis, the Court stated, "[i]t is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings." *Id.* at 1041. (citing *Teague,* 489 U.S. at 310-313 (plurality opinion)). The Court further determined that:

The absence of any precedent for the claim that *Teague* limits state

> collateral review courts' authority to provide remedies for federal constitutional violations is a sufficient reason for concluding that there is no such rule of law.

*Id.* at 1046. After fully considering the question, the Court concluded:

> A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in *federal habeas* courts.

*Danforth*, 128 S.Ct. at 1047. The Court reversed and remanded the case.

Recently, the Supreme Court has determined in *Chaidez v. United States,* 133 S. Ct. 1103 (relying on *Teague*), that *Padilla* is a "new" rule that is not retroactive to cases in *federal* habeas proceedings that became final before it was decided. Mr. Tsai's state court judgment became final in July of 2006, 4 years before *Padilla* was announced, and thus, relief is *Teague*-barred in *federal habeas* proceeding. Nevertheless, Mr. Tsai argues that this Court should exercise its discretion in reviewing the Court of Appeals' ruling because he is currently pursuing post-conviction relief in State Court, in which, the Supreme Court has held that is not bound by *Teague. Danforth,* 128 S.Ct. 1029.

At issue in Mr. Tsai's petition, then, is whether the constitutional rule from *Padilla* and *Sandoval* should be applied retroactively, as a matter of State law. As presented below, Mr. Tsai submits that *Padilla* and *Sandoval* should apply retroactively in Washington.

**2. The Division Two Court of Appeals erred by dismissing Mr. Tsai's petition as time barred under RCW 10.73.090(1) when this Court has not explicitly ruled whether *Sandoval* is significant change change in law that is retroactive under RCW 10.73.100(6).**

Mr. Tsai's petition was filed after the one-year time limit of RCW 10.73.090. He relied on the exception for "a significant change in the law, whether substantive or procedural, which is material to the conviction ... and ... a court ... determines that sufficient reasons exist to require retroactive application of the changed legal standard." RCW 10.73.100(6). Where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a "significant change in the law" under this statute. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258-59, 111 P.3d 837 (2005).

In its decision to dismiss Mr. Tsai's personal restraint petition, the Court of Appeals relied on the decision of *Chaidez* in which the United States Supreme Court held that the decision in *Padilla*, declared a "new rule" under the *Teague* analysis, which did not apply retroactively to cases that were final before the *Padilla* decision was issued. *Ex.* A at 2-3. Thus, the Court found that Mr. Tsai's PRP did not meet the "significant change in law" exception under RCW 10.73.100(6). *Id* at 3.

The petitioner contends that the Court of Appeals erred in relying

on *Chaidez* in finding his petition was time barred because this Court has held under *State v. Evans*, 154 Wn.2d 438, 449, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005); and *In re Pers. Restraint of Markel*, 154 Wn.2d 262 (2005), that it is not bound by the standard of *Teague* when deciding, under RCW 10.73.100(6), whether a ruling should apply retroactively.

*Teague* has define "new" cases are those that "break[] a new obligation on the States or the Federal government [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. A new procedural rule is retroactive if it is "implicit in the concept of ordered liberty," implicating the fundamental fairness of the trial. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing *Mackey v. United States,* 401 U.S. 667, 692-93, 91 S. Ct. 1160, 28 L.Ed.2d 404 (1971). "A rule that qualifies under this exception must only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer v. Smith,* 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L.Ed.2d 193. However, Chaidez did not argue nor did the Supreme Court consider whether *Padilla*'s new rule meets those exceptions. *Chaidez,* 133 S. Ct. 1103, No. 11-820, slip op. at 4, n.3.

This Court has held that the law favors finality of judgments, and courts will not apply "new" decisions of law to cases that are already finally. *St. Pierre*, 118 Wn.2d at 329; *cf. State v. Hanson*, 151 Wn.2d 783, 790, 91 P.3d 888 (2004). Generally, this court has followed the lead of the United States Supreme Court when deciding whether to apply retroactively new principles of law. *See In re Markel*, 154 Wn.2d at 268. (citing *In re Pers. Restraint of Sauve,* 103 Wn.2d 322, 328, 692 P.2d 818 (1985)).

"It is not enough for the right to be important; it must also play a vital instrumental role in securing a fair trial." *Evans*, 154 Wn.2d at 445. The specific advice given by counsel regarding deportation consequences clearly plays a vital instrumental role in whether an alien defendant would want to proceed to trial or accept a plea offer to avoid deportation. "Counsel must 'actually and substantially [assist] his client in deciding whether to plead guilty.'" *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981). *Sandoval* relied on *Padilla* and substantially changed counsel's duties in requiring advice regarding deportation consequences, thus, it may qualify under the *Teague* exceptions as it alter the understanding of "the *bedrock procedural elements*" essential to the fairness of a proceeding.

RCW 10.73.100(6) allows collateral relief from judgment even after the normal time bar has lapsed based on a "material" change in the law when the court finds "sufficient reasons" for retroactive application. Although the statutory language of RCW 10.73.100(6) has been interpreted along the lines of *Teague,* this Court has held that "[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. *Evans*, 154 Wn.2d 448. (citing *Cf. In re Pers. Restraint of Vandervlugt,* 120 Wn.2d 427, 432-33, 842 P.2d 950 (1992) (vacating exceptional sentence based on invalid sentencing factor); *In re Pers. Restraint of Smith*, 117 Wn.App. 846, 860-70, 73 P.3d 386 (2003). Here, Mr. Tsai argues for retroactive application of *Padilla* and *Sandoval* based on state law.

**(a) Significant Change in the Law**

The first part of RCW 10.73.100(6) requires a "significant change in the law." In *In re Personal Restraint of Greening,* 141 Wn.2d 687, 9 P.3d 206 (2000), this Court held that "where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a 'significant change in the law' for purposes of exemption from procedural bars." *Id.* at 697.

In Washington, no decision prior to *Padilla* permitted a post-conviction review based on an immigration-related claim of ineffective assistance. See e.g., *State v. Malik*, 37 Wn.App. 414, 416, *review denied*, 102 Wn.2d 1023 (1984); *Holley*, 75 Wn.App. at 197; *State v. Martinez-Lazo*, 100 Wn.App. 869, 878 (2000); *State v. Jamison*, 105 Wn.App. 572, 593 (2001). In *Sandoval*, the Washington Supreme Court held that "[i]f the applicable immigration law 'is truly clear' that an offense is deportable, *the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation"* to meet his Sixth Amendment obligations under *Padilla* and *Strickland. See Sandoval*, 171 Wn.2d at 170 (quoting *Padilla*, 130 S.Ct. at 1483) (emphasis added).

Furthermore, the decisions in *Padilla* and *Sandoval* did away with the distinction between affirmative misrepresentation and the failure to provide advice on the immigration consequences of a guilty plea. *Padilla,* 130 S.Ct. at 1484 ("[W]e agree that there is no relevant difference between an act of commission and act of omission in this context." (internal citations and quotations marks omitted)); *Sandoval,* 171 Wn.2d at 170, n.1 ("*Padilla* has supersede *Yim*'s analysis of *how counsel's advice* about deportation consequences (or lack thereof) affects the validity of a guilty plea.") (Emphasis added).

*Padilla* and *Sandoval* now permits a post-conviction review based on an immigration-related claim of ineffective assistance by recognizing that immigration consequences were within the Sixth Amendment duties of counsel. *Padilla* and *Sandoval*'s requirement to **correctly advice** when the deportation consequence of a guilty plea is "truly clear," is significant in Washington. Therefore, *Sandoval*, which relied on *Padilla,* effected a "significant change" in Washington law under RCW 10.73.100(6).

**(b) <u>The Changes in Law Is Material to Mr. Tsai's Conviction.</u>**

Next, to qualify for exemption from the one-year time bar, RCW 10.73.100(6) also requires a materiality of the change in law to the challenged conviction. In its response, the State argued that Mr. Tsai's claim is consistent with law that existed at the time of his conviction, and thus, "there has been no significant change in the law that is material" to his claim. *State's Response* at 10. Mr. Tsai maintains that the change in law by *Padilla* and *Sandoval* are material to his conviction.

Recently, the Division One Court of Appeals considered this exact question in *In re Personal Restraint Petition of Muhammadou Jagana*, ___ Wn.App. ___, 282 P.3d 1153, No. 66682-7-I (8/13/2012), and held:

> [T]he change in the law from *Padilla*, requiring defense counsel to inform a defendant of the immigration consequences of a plea bargain, must impact the outcome of the plea at issue. Where pleading guilty to a crime could put the defendant's immigration status at risk, *Padilla* is clearly material. Here Jagana's guilty plea

> did result in deportation proceedings being initiated against him. Therefore, we concluded that *Padilla* is material to his conviction.

*In re Jagana,* COA No. 66682-7-I, slip op. at 11-12.

When Mr. Tsai retained Mr. Bauer, he expressed to Mr. Bauer his concerns regarding the deportation consequences of the plea. *Petitioner's Reply, Appendix B; CP* at 167. Mr. Tsai's decision to plead guilty was strictly based on Mr. Bauer's advice that he would avoid deportation consequences by a less than one-year sentence. *Petitioner's Reply, Appendix B.* However, regardless of the length Mr. Tsai's sentence, it was "truly clear" Mr. Tsai's conviction was a deportable offense. Further, Mr. Tsai's guilty plea did result in deportation proceedings being initiated against him. *Id.* Like *Sandoval,* the erroneous advice received by Mr. Tsai from his defense counsel, assuring that he would not be deported, affected the outcome of the plea at issue. *Sandoval* at 172. Thus, *Sandoval* is material to Mr. Tsai's conviction.

**(c) <u>Sufficient Reasons Require Retroactive Application Of *Sandoval.*</u>**

Finally, in order for the "significant changes in law" by *Padilla* and *Sandoval* to apply to Mr. Tsai's case under RCW 10.73.100(6) there must be "sufficient reasons" to require retroactive application.

In *St. Pierre*, 118 Wn.2d 321, this Court set forth standards for deciding whether a new rule should apply retroactively. *See State v.*

*Olivera-Avila*, 89 Wn.App. 313, 321 (1997). A new rule will be given retroactive application to cases on collateral review if "(a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty." *St. Pierre*, 118 Wn.2d at 326; *Olivera-Avila*, 89 Wn.App. at 321. *Olivera-Avila* involved a motion to withdraw a plea based its involuntary nature due to the defendant not having been informed of the direct consequences of the plea. *Olivera-Avila* at 315-17. Although the court ultimately found that Olivera-Avila was not entitled to relief, it did hold that the rule requiring that a defendant be informed of all the direct consequences of a guilty plea was a rule that was implicit in due process, which should therefore be applied retroactively. *Id.* at 321.

The rule from *Padilla*, that immigration consequences cannot be considered as collateral to a criminal proceeding, should also be applied retroactively because it requires the observance of procedures implicit in the concept of ordered liberty. The rule that immigration consequences are not collateral to criminal proceeding implicates, in the context of the voluntariness of pleas, due process rights. Like *Padilla*, the rule in *State v. Ross,* 129 Wn.2d 279, 284 (1996), requires the observance of a procedure – communication of all direct consequences of a guilty plea – that is

implicit in due process. *Olivera-Avila*, 89 Wn.App. at 321. A rule requiring observance of this procedure is to be applied retroactively even on collateral review. *Id.* at 321.

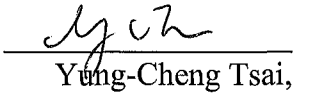
Based on the above, Mr. Tsai submits that he may rely on *Sandoval* because compelling reasons and applies retroactively.

## VI. CONCLUSION

Based on the foregoing, this motion for discretionary review should be accepted to determine whether the constitutional rule announced in *Padilla* and *Sandoval* are significant changes in law that applies retroactively under RCW 10.73.100(6).

DATED this 24 day of April, 2013.

Respectfully submitted,



Yung-Cheng Tsai,
Petitioner *Pro Se*
A# 73 441 433
1623 East J St., Ste 5
Tacoma, WA 98421

## Certificate of Service

I, Yung-Cheng Tsai, certify that on April 24, 2013, I deposited the foregoing **Notice and Motion for Discretionary Review** and attached exhibits, in the Northwest Detention Center Legal Mail System by First Class Mail pre-paid postage, addressed to:

Division Two Court of Appeals
950 Broadway, Ste 300, Tacoma, WA 98402-4454

Kathleen Proctor, Pierce County Prosecuting Atty. Office
930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402-2171

EXECUTED this 24 day of April, 2013, at Tacoma, Washington.

By: _____
Yung-Cheng Tsai

# Exhibit A

*Order Dismissing Petition*

*Division II Court of Appeals*

*No. 43118-1-II*

*3/27/2013*

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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STATE OF WASHINGTON
BY _____
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|---|---|
| In re the<br>Personal Restraint Petition of<br><br>YUNG-CHENG TSAI,<br><br>Petitioner. | No. 43118-1-II<br><br>ORDER DISMISSING PETITION[1] |

Yung-Cheng Tsai seeks relief from personal restraint imposed following 2006 guilty plea to unlawful possession of a controlled substance (marijuana) with intent to deliver. Tsai argues that he should be allowed to withdraw his guilty plea because his defense counsel failed to advise him of the immigration consequences of pleading guilty and, thus, he claims that his plea was not made voluntarily, knowingly and intelligently.

RCW 10.73.090(1) provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

A personal restraint petition is a collateral attack on a judgment. RCW 10.73.090(2). Tsai filed this petition on February 29, 2012, more than a year after his judgment and sentence became final on August 29, 2006. RCW 10.73.090(3)(a). Thus, this petition must be dismissed as untimely unless Tsai can establish that (1) his judgment

[1] Tsai has filed a motion with this court seeking the appointment of counsel at public expense. That motion is denied.

and sentence is facially invalid or not rendered by a court of competent jurisdiction, in which case RCW 10.73.090 does not apply; or (2) one of the six time bar exceptions stated in RCW 10.73.100 applies. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 168-69 (2011).

Tsai contends that his petition falls within RCW 10.73.100(6)'s exception to the one year time bar because the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), and our Supreme Court's decision in *State v. Sandoval*, 171 Wn.2d 163 (2011), relying on *Padilla*, represent a significant change in the law that is material to his conviction and that sufficient reasons exist to require retroactive application of the changed legal standard. RCW 10.73.100 provides in relevant part:

> 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.

Accordingly, to meet RCW 10.73.100(6)'s exception to the time bar, Tsai must show a (1) "a significant change in the law," (2) "material to [his] conviction [or] sentence," (3) that applies retroactively.

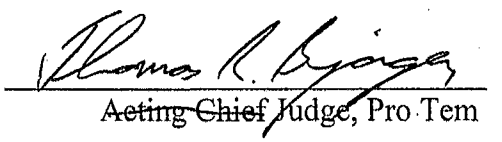
In *Chaidez v. United States*, --- U.S. ---, 133 S. Ct. 1103, 1107 (2013), the United States Supreme Court settled a split among the lower federal and state courts on the issue of whether *Padilla* applied retroactively, holding that the *Padilla* decision declared a "new rule" that did not retroactively apply to cases that were final before the *Padilla*

decision was issued. Here, Tsai's conviction became final on August 29, 2006, before the Supreme Court issued its decision in *Padilla* on March 31, 2010. Because the rule announced in *Padilla* does not apply retroactively, Tsai cannot demonstrate that his petition falls within the time bar exception set forth in RCW 10.73.100(6) and, thus, his petition is dismissed as time barred.

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 26 day of March, 2013.



~~Acting Chief~~ Judge, Pro Tem

cc: Yung-Cheng Tsai
Pierce County Clerk
County Cause No(s). 06-1-00782-6
Mark Lindquist, Pierce County Prosecuting Attorney
Kathleen Proctor, Pierce County Deputy Prosecuting Attorney