

No. 88770-5  
(consolidated with No. 89992-4)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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In re Personal Restraint Petition of

MUHAMMADOU JAGANA,

Petitioner.

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**RESPONSE TO *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES  
UNION OF WASHINGTON, LAW PROFESSORS,  
WASHINGTON DEFENDER ASSOCIATION AND  
NORTHWEST IMMIGRANT RIGHTS PROJECT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANN SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650



**ORIGINAL**

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A. INTRODUCTION.

*Amicus Curiae* American Civil Liberties Union of Washington, Washington Defender Association, Northwest Immigrant Rights Project and law professors ask this Court to modify or abandon the Teague retroactivity standard so that non-citizens can bring untimely claims of ineffective assistance of counsel based on the United States Supreme Court decision in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). However, the Teague retroactivity standard has been utilized by this Court for 22 years and has proven predictable and workable. It protects the finality of criminal convictions, which is of substantial importance in state court, and not just in federal review of state convictions. The Teague standard is not incorrect or harmful, as evidenced by its continued widespread use in other states. There is no basis to modify or abandon the standard.

B. ISSUE PRESENTED.

Whether this Court should continue to adhere to the Teague standard, which it adopted in 1992 and has continued to apply since, for determining the retroactivity of new rules of criminal procedure, where that standard protects the justice system's

interest in the finality of criminal convictions, is widely used in other states, and has not been shown to be incorrect and harmful?

C. ARGUMENT.

1. THE FINALITY OF CRIMINAL CONVICTIONS IS OF PARAMOUNT CONCERN TO STATE AND FEDERAL COURTS ALIKE.

*Amici* argue that the interest in finality of criminal convictions is not compelling when a state conviction is challenged in state court. The State respectfully disagrees. The interest in the finality of criminal convictions is strong. The right to the writ of habeas corpus under the Washington State Constitution is limited to challenges to the jurisdiction of the sentencing court. In re PRP of Runyan, 121 Wn.2d 432, 853 P.3d 4244 (1993). Even a judgment erroneous on its face could not be attacked unless the judgment was void for lack of jurisdiction. Id. In light of this very narrow constitutional right, Washington courts have recognized the legislature's authority to define and limit the scope of additional collateral review:

The Legislature has long played a role in deciding the scope of collateral relief, and this court has accepted this involvement, so long as the scope of the relief afforded is not constricted beyond the narrow boundaries of our constitution.

Id. at 443. This Court therefore affirmed the time bar imposed by RCW 10.73.090 and the exceptions provided by RCW 10.73.100. Id. at 443. In doing so, it looked to other states that had “responded to the copious flow of postconviction collateral relief petitions by enacting a time limit for such petitions.” Id. at 446.

In arguing that Washington courts should not be concerned with finality, and should be primarily concerned with error correction, *amici* ignore the history of collateral relief in Washington. The state constitution, legislative enactments and this Court’s own decisions affirming those legislative enactments evidence that the finality of criminal convictions has always been of great concern to Washington courts. “[P]ostconviction collateral review was never intended to be a ‘superconstitutional procedure enabling [the petitioner] to institute appeal upon appeal and review upon review in forum after forum ad infinitum.’” Id. at 453-54.

2. THERE IS NO REASON TO “MODIFY” THE *TEAGUE* STANDARD IN THIS CASE.

The ACLU cites to other states to argue that this Court should modify the Teague standard. However, any modification would be of no avail to the petitioners in this case. By any standards, Padilla is a “new” rule of criminal procedure because it

overruled precedent, and even under modified Teague standards rules that overrule precedent are not given retroactive effect.

The ACLU cites to in Commonwealth v. Sylvain, 466 Mass. 422, 433, 995 N.Ed.2d 760 (2013), where the Massachusetts Supreme Court concluded that Padilla was not a new rule in Massachusetts. Likewise, the New Mexico Supreme Court has applied the Teague standard but concluded that its own precursor to Padilla did not announce a new rule. Ramirez v. State, \_\_\_ P.3d \_\_\_, 2014 WL 2773025 (2014).

Jagana cannot dispute that Padilla announced a new rule in Washington that constituted a “significant change in the law” to the extent it imposed a duty under the Sixth Amendment upon defense counsel to advise all non-citizen criminal defendants of the risk of adverse immigration consequences. Unless Padilla is a significant change in the law, Jagana's claim does not fall within the exception to the time bar provided in RCW 10.73.100(6). A decision constitutes a significant change in the law if it effectively overturns a prior holding that was originally determinative of a material issue. In re PRP of Domingo, 155 Wn.2d 356, 366, 119 P.3d 816 (2005). Thus, modifying the standard of what is a new rule will be of no avail because a “significant change in the law” that overrules

precedent will be “new” under any standard. The ACLU also argues that this Court should deem Padilla to be a “watershed” rule. But they offer no principled standard to apply that would not result in most new rules of constitutional criminal procedure also being “watershed.” This Court should decline the invitation to modify or weaken the Teague standard in this case.

3. ABANDONING THE *TEAGUE* STANDARD WILL NOT HAVE THE EFFECT DESIRED BY *AMICI*.

The law professors argue that this Court should abandon the Teague standard altogether so that ineffective assistance of counsel claims based on Padilla can be “redressed.” However, Padilla claims can currently be redressed in either a direct appeal or in a timely PRP. Moreover, abandoning Teague would not, in fact, give all petitioners with Padilla claims an avenue for redress. For the reasons explained below, even this drastic step would be of no avail for many of these petitioners.

Padilla claims can and have been successfully litigated on direct appeal. See State v. Chetty, 167 Wn. App. 432, 272 P.3d 918 (2012); State v. Martinez, 161 Wn. App. 436, 253 P.3d 445 (2011). And there is no question that a claim of ineffective assistance of counsel may be raised for the first time in a timely

PRP. See In re PRP of Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012); State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011).

Abandoning the Teague standard would not provide petitioners who claim they were affirmatively misadvised about immigration consequences an avenue for redress, because such claims would still be time barred if not brought within the one year prescribed in RCW 10.73.090. In State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993), the Court of Appeals held that counsel provides ineffective assistance by affirmatively misadvising the defendant of a collateral consequence. Thus, when the ineffective assistance of counsel claim is based on affirmative misadvice, as opposed to no advice at all, Padilla is *not* a significant change in the law, because a claim of ineffective assistance of counsel based on affirmative misadvice about immigration consequences would have been successful under Stowe. See State v. A.N.J., 168 Wn.2d 91, 116, 225 P.3d 956 (2010) (citing Stowe with approval). A petitioner's claim of ineffective assistance of counsel based on affirmative misadvice (like petitioner Tsai) would not fall within the exception to the time bar provided by RCW 10.73.100(6), which requires a "significant change in the law." Therefore, abandoning the Teague standard would be of no avail to these petitioners.

Similarly, abandoning the Teague standard would not provide petitioners who will claim they received no notice of adverse immigration consequences after March 31, 2010, an avenue of redress unless their petition is filed within the one-year time bar. For these petitioners, Padilla will not be a “significant change in the law” because the rule announced in Padilla was in place before their convictions were obtained. Their claims will not fall within the exception to the time bar provided by RCW 10.73.100(6). Therefore, abandoning Teague will be of no avail to these petitioners.<sup>1</sup>

4. *AMICI HAVE FAILED TO SHOW THAT THE  
TEAGUE STANDARD IS INCORRECT AND  
HARMFUL.*

This Court does not overturn an established rule absent a clear showing that the rule is incorrect and harmful. State v. Nionge, \_\_ Wn.2d \_\_, 2014 WL 4792046 (September 25, 2014). The Teague standard is not incorrect and harmful, as evidenced by its widespread use in other states. See Garcia v. Commission of Correction, 147 Conn. App. 669, 676, 84 A.3d 1 (2014) (utilizing Teague standard); Rhoades v. State, 149 Idaho 130, 136, 233 P.3d

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<sup>1</sup>Moreover, as long as CrR 4.2 and RCW 10.40.200 are followed, all criminal defendants pleading guilty will be advised of the risk of adverse immigration consequences.

61 (2010) (adopting the Teague standard); People v. Davis, 379 Ill.Dec. 381, 392-93, 6 N.E.3d 709 ( 2014) (applying the Teague standard); Danforth v. State, 761 N.W.2d 493, 499 (Minn. 2009) (adopting the Teague standard); State v. Mantich, 287 Neb. 320, 331, 842 N.W.2d 716 ( 2014) (finding "no reason to depart" from Teague standard); State v. Bishop, 7 N.E.3d 605 (Ohio App. 2014) (applying Teague to conclude that Padilla does not apply retroactively); Siers v. Weber, 851 N.W.2d 731 (S.D. 2014) (abandoning Linkletter standard and adopting Teague standard); Bush v. State, 428 S.W.3d 1, 20 (Tenn. 2014) (utilizing Teague standard pursuant to state statute); Ex Parte Maxwell, 424 S.W.3d 66, 70-71 (Tex.Crim.App. 2014) (adhering to Teague standard).

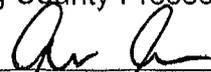
D. CONCLUSION.

This Court should adhere to the Teague standard and hold that Jagana's petition is untimely and must be dismissed.

DATED this 6th day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

## CERTIFICATION OF SERVICE

Today I directed electronic mail addressed to Eric Broman, Nielsen, Broman & Koch, attorney for the petitioners Muhammadou Jagana and Yung-Cheng Tsai, containing a copy of the King County's Response to Amicus Curiae in In re Personal Restraint of Jagana, No. 88770-5, in the Supreme Court of the State of Washington.

Today I directed electronic mail addressed to Kathleen Proctor, Pierce County Prosecuting Attorney's Office, attorney for the respondent, containing a copy of the King County's Response to Amicus Curiae in In re Personal Restraint of Jagana, No. 88770-5, in the Supreme Court of the State of Washington.

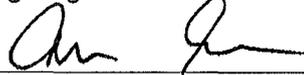
Today I directed electronic mail addressed to Shawn Larsen-Bright, Sarah Dunne and Nancy Talner, attorneys for amicus curiae ACLU, containing a copy of the King County's Response to Amicus Curiae in In re Personal Restraint of Jagana, No. 88770-5, in the Supreme Court of the State of Washington.

Today I directed electronic mail addressed to Ann Benson and Travis Stearns, attorneys for amicus curiae Washington Defenders Association and Northwest Immigrant Rights Project, containing a copy of the King County's Response to Amicus Curiae in In re Personal Restraint of Jagana, No. 88770-5, in the Supreme Court of the State of Washington.

Today I directed electronic mail addressed to Pam Loginsky, attorney for amicus curiae Washington Association of Prosecuting Attorneys, containing a copy of the King County's Response to Amicus Curiae in In re Personal Restraint of Jagana, No. 88770-5, in the Supreme Court of the State of Washington.

Today I directed electronic mail addressed to Christopher Lasch and John Strait, attorneys for amicus curiae Law Professors, containing a copy of the King County's Response to Amicus Curiae in In re Personal Restraint of Jagana, No. 88770-5, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

10/16/2014  
Date

## OFFICE RECEPTIONIST, CLERK

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**To:** Summers, Ann; 'Eric Broman'; 'kprocto@co.pierce.wa.us'; Nancy Talner; Ann Benson; 'Pam Loginsky'; 'straitj@seattleu.edu'; 'Jacqueline McMurtrie'; defensesnet.org, stearns (stearns@defensesnet.org) (stearns@defensesnet.org); dorsey.com, larsen.bright.shawn; dunne@aclu-wa.org; Lasch, Christopher (clasch@law.du.edu)  
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**Cc:** PAO Appellate Unit Mail  
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Dear Supreme Court Clerk,

Attached please find for filing King County's response to Amicus Curiae in In re PRP of Jagana, No. 88770-5 (consolidated with 89992-4). I believe all parties and amici have accepted service by email.

Thank you,

*Ann Summers*  
*Senior Deputy Prosecuting Attorney*  
*King County Prosecuting Attorney's Office*  
**Please note my new phone number: (206) 477-1909**