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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

YUNG-CHENG TSAI, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 06-1-00782-6

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO GRANT OF REVIEW.

1. Did the Court of Appeals correctly dismiss an untimely collateral attack when petitioner cannot meet the requirements of the exception to the time bar found in RCW10.73.100(6) as he cannot show *Padilla* is a significant change in the law material to his claim?
2. Has petitioner failed to show that this Court's adoption of the retroactivity analysis in *Teague v. Lane* is incorrect and harmful so as to warrant the abandonment of a long line of decisions applying the *Teague* standard?

B. STATEMENT OF THE CASE.

On July 27, 2006, the petitioner, Yung-Chen Tsai, pleaded guilty to an original information charging him with unlawful possession of a controlled substance (marijuana) with intent to deliver in Pierce County Cause No. 06- 1-00782-6; SR Appendices A and B.¹

Petitioner's plea form included a warning as to immigration consequences of a guilty plea by non-citizens as required by RCW 10.40.200, stating that "a plea of guilty to an offense punishable as a crime under the state law is grounds for deportation, exclusion from admission to the United States, or denial of a naturalization pursuant to the laws of the United States." SR Appendix B at p. 5(i). In his colloquy with the court at the time of the plea, petitioner represented that: 1) he read and wrote in the English language; 2) he had gone over the plea form with his attorney;

¹ "SR Appendix" or " SR Appendices" reference those that were attached to the State's response filed with the Court of Appeals

3) he understood the contents of the form; and 4) he had no questions. SR Appendix E, at Exhibit C.² After receiving assurances that no one had made any promises other than those set forth in the plea form, the court accepted the plea. *Id.* at 7-8. Erik Bauer represented petitioner on his drug charges, but he was not present the day of the plea; the entry of the plea was handled by an associate. *See* SR Appendix E, Exhibit C at p.4.

Petitioner's sentencing occurred on August 29, 2006. SR Appendix A. At the sentencing hearing, petitioner's counsel, Mr. Bauer, noted that petitioner was not a citizen and that he was likely to face some immigration consequences:

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.

SR Appendix E, Exhibit D at p. 2-3. The transcript does not reflect any reaction from petitioner to this being contrary or different from what he had been told previously by his attorney. When asked by the court whether there was anything he wanted to say - petitioner stated that he knew what he did was wrong and was sorry for it. *Id.* Petitioner was sentenced to 11 months in the county jail to be followed by 12 months of community supervision. SR Appendix A. Petitioner did not appeal from

² SR Appendix E is the responsive briefing to the 7/21/08 motion to withdraw filed in the superior court. It has several documents appended to it as Exhibits A through D.

entry of his judgment. On November 1, 2007, the Department of Corrections indicated that petitioner did not meet the statutory criteria for supervision and terminated supervision. SR Appendix C.

On July 21, 2008, petitioner, with the assistance of new counsel, filed a motion to withdraw his guilty plea alleging that he had received ineffective assistance of counsel because he was misadvised as to the immigration consequences if he pleaded guilty to the charges in the original information; petitioner asked for equitable tolling of the time bar in RCW 10.73.090 so that his collateral attack would not be untimely. SR Appendix D.³ Petitioner's motion to withdraw asserted that the misinformation came from the associate who handled the plea hearing. See SR Appendix D, Attachment D ("The associate indicated that to plead as charged should not jeopardize my immigration status."). Also attached to the motion was a declaration from an immigration attorney with whom petitioner had consulted after being charged, but prior to his plea that also provided evidence that petitioner *had* been informed prior to his plea that pleading guilty to the original information would result in immigration consequences. In her declaration she states that "Mr. Tsai ...told me that he was charged with possession of marijuana with intent to deliver. I told him that if he plead guilty or were found guilty of this charge, I believed it

³ SR Appendix D was the motion to withdraw guilty plea filed on July 21, 2008; it, in turn, has several documents appended to it as Attachments A through G.

would constitute an aggravated felony under the immigration law. I further told Mr. Tsai that if he were convicted of an aggravated felony, he would be deportable and ineligible to apply for discretionary relief from deportation.” SR Appendix D, Attachment C – Declaration of Vicky Dobrin. She also indicates that on “April 28, 2006, I spoke to Mr. Tsai’s attorney Eric Bauer. I told Mr. Bauer essentially the same thing I had told Mr. Tsai ... a conviction for possession of marijuana with the intent to deliver is an aggravated felony that would bar Mr. Tsai from any form of discretionary relief from deportation.” *Id.*

In its ruling on the motion to withdraw guilty plea, the trial court found that the motion was time barred as the motion was untimely filed under RCW 10.73.090 and petitioner had not established that equitable tolling applied. SR Appendix F. Petitioner did not appeal this ruling.

On May 18, 2011, petitioner, again with the assistance of another new attorney, filed a second collateral attack in the Pierce County Superior Court seeking to withdraw his plea. SR Appendix G.⁴ Again, petitioner alleged that he had been given incorrect information about the effect of his conviction on his immigration status and claimed he was facing deportation. This time petitioner alleged in his declaration that the faulty

⁴ SR Appendix G is the motion for relief from judgment filed on May 18, 2011, in Pierce County Superior Court. It has several documents appended to it labeled as Exhibits A through I.

information came from his attorney, Mr. Bauer, rather than the associate who handled the plea.

Prior to my plea hearing, I was advised by Atty. Bauer that he was able to negotiate a plea with a sentence of less than one-year. Thus, by pleading guilty and receiving a sentence of less than one-year, I would avoid any danger of removal. I relied on Atty. Bauer's assurance that when he and Atty Dobrin spoke, this was the alternative they had both agreed would avoid my removal from this country.

SR Appendix G, Exhibit D – Affidavit of Yung-Cheng Tsai. Petitioner submitted the same sworn statement from the immigration attorney that had been submitted three years earlier stating she advised Mr. Tsai that a plea to possession of marijuana with intent to deliver would render him deportable. *Compare* SR Appendix D, Attachment C *with* SR Appendix G, Exhibit C.

Petitioner argued that *Padillia v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), represented a significant change in the law that provided an exception to the one year time bar for bringing collateral attacks, such that his motion could be brought under RCW 10.73.100(6).

The trial court directed a response from the State. SR Appendix L. With its response, the State again provided the court with transcripts of the plea hearing and the sentencing, but this time also presented an

affidavit from petitioner's trial attorney, Erik Bauer. *See*, SR Appendix

H.⁵ In his declaration, Mr. Bauer stated:

I spoke with Ms. Dobrin at Mr. Tsai's request and explained Mr. Tsai's criminal case to her. Ms. Dobrin indicated she would advise Mr. Tsai as to the immigration consequences of his plea.

Any advice I gave Mr. Tsai regarding immigration was consistent with that provided by his immigration attorney, Ms. Dobrin. Essentially I deferred to the immigration attorney with respect to her field of expertise.

SR Appendix H, Exhibit C. In response to the petitioner's argument about an exception to the time bar the State argued that *Padilla* did not represent a material change in the law in Washington with regards to advice about immigration consequences as there was already a statutory duty to advise a defendant about possible immigration consequences, citing to RCW 10.40.200(a) and *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002). SR Appendix N.

The trial court issued a written ruling denying the motion for relief of judgment as time barred. It noted that petitioner's motion was based upon a claim of *erroneous* advice about immigration consequences of a plea and not a claim of a *failure to provide* advice. The court found that the petitioner's attorney had the same obligation in 2006 in Washington

⁵ There are three attachments to the response to the motion for relief from judgment, Exhibits A through C, filed in the trial court. Exhibit A is the transcript of the plea hearing; Exhibit B is a transcript of the sentencing hearing; Exhibit C is the Declaration of Erik Bauer.

that he did post-*Padilla* – to give accurate legal advice about the immigration consequences of a plea. As such, *Padilla* did not represent a “significant change in the law that is material” to petitioner’s conviction. SR Appendix I at p. 3. The court also found that *Padilla* would not be applied retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L. Ed. 2d 334 (1989). SR Appendix I.

Petitioner initially filed a notice of appeal from this ruling, but then moved to vacate the order on the grounds that the superior court should have transferred an untimely motion for relief of judgment to the Court of Appeals under the terms of CrR7.8; the court vacated that portion of the order that denied the motion for relief of judgment but let the remainder of its order stand and transferred the motion to the Court of Appeals to be handled as a personal restraint petition. *See* SR Appendices J and M.

The Court of Appeals noted that to meet the exception to the time bar in RCW 10.73.100(6) a petitioner “must show a (1) ‘a significant change in the law,’ (2) ‘material to [his] conviction [or] sentence,’ (3) that applies retroactively.” Order Dismissing Petition at p. 2. Citing to the Supreme Court decision in *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1102, 1107 (2013) holding that the *Padilla* decision declared new rule that would not be applied retroactively to cases that were final before the *Padilla* decision issued, the Court of Appeals found that petitioner could

not meet the requirements of RCW 10.73.100(6) and dismissed the petition as time barred.⁶

Petitioner then sought discretionary review in this Court arguing for the first time that the any lower court's reliance upon the *Teague v. Lane* standard for retroactivity analysis was erroneous.

Because the courts below have ruled that petitioner is procedurally barred from bringing his collateral attack, the factual disputes about whether petitioner received any erroneous advice remain unresolved.

C. ARGUMENT.

1. THE PETITION WAS PROPERLY DISMISSED AS UNTIMELY AS *PADILLA* IS NOT A SIGNIFICANT CHANGE IN THE LAW MATERIAL TO PETITIONER'S CLAIM OF ERRONEOUS ADVICE.

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. RCW 10.73.090. Petitioner did not appeal his judgment, so it was "final" for the purposes of the time bar when it was entered on August 29, 2006, almost five years

⁶ The Court of Appeals did err in referring to August 29, 2006 as being the relevant finality date to consider in respect to the retroactivity analysis. August 29, 2006 is the date that his judgment entered and is the date his judgment became final for the purposes of RCW 10.73.090. The relevant date for retroactivity analysis is the date that the availability of direct appeal ended, which would have been thirty days after the entry of judgment, September 28, 2006, when petitioner's time for filing a notice of appeal expired.

before he filed his current collateral attack. *See* RCW 10.73.090(3). The petitioner has the burden to demonstrate that his personal restraint petition (“PRP”) is timely under the statute. *See In re Personal Restraint of Quinn*, 154 Wn. App. 816, 226 P.3d 208 (2010).

The petitioner argues that there has been a significant change in the law due to *Padilla v. Kentucky*, 559 U.S. 356 (2010), which falls into the exception to the time bar in RCW 10.73.100(6), which states:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction ..., and ... 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.

A “significant change in the law” occurs when “an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.” *In re Domingo*, 155 Wn.2d 356, 366, 27, 119 P.3d 816 (2005). This reflects the principle that litigants have a duty to raise available arguments in a timely fashion, but “they should not be penalized for having omitted arguments that were essentially unavailable at the time.” *In re Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). The exception in RCW 10.73.100(6) “sets forth three conditions that must be met before a petitioner can overcome the one-year time bar: (1) a substantial change in the law (2) that is material and (3) that applies

retroactively.” *In re Gentry*, 179 Wn.2d 614,625, 316 P.3d 1020 (2014).

Prior to *Padilla*, lawyers in criminal cases were not constitutionally required to advise their clients of immigration consequences of guilty pleas as this was considered a “collateral” consequence. The courts reasoned that counsel’s duty did not extend to “collateral consequences.” *State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (1994). *Padilla* holds that counsel must advise of immigration consequences, whether or not they are considered “collateral.”

But in 1983, long before *Padilla* issued, the Washington Legislature enacted a statutory duty to warn defendants of the potential immigration consequences flowing from guilty pleas. *See* Laws of Washington 1983, c 199 §1. That provision states, in the relevant part:

Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement.

RCW 10.40.200(2). The express legislative intent behind this provision was “to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate

warning of the special consequences for such a defendant which may result from the plea.” RCW 10.40.200(1). Any defendant pleading guilty after September 1, 1983, who did not get the required advisement and then faced immigration consequences was entitled to withdraw his guilty plea. RCW 10.40.200(2). The Legislature specifically indicated that this remedy was not meant to apply to pleas accepted prior to September 1, 1983. RCW 10.40.200(3).

Additionally, prior to *Padilla*, there was a significant difference in Washington law between how the court looked at a *lack* of advice about collateral consequences and how it looked at erroneous advice concerning those consequences. Prior to *Padilla*, Washington courts did not entertain ineffective assistance of counsel claims relating to non-advice about collateral consequences. *In re Personal Restraints of Yim & Deng Samphao*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999). The courts did, however, entertain claims relating to erroneous advice concerning immigration and other collateral consequences. *See Yim*, 139 Wn.2d at 588 (noting the distinction between the failure to advise and “an affirmative misrepresentation to a defendant regarding the possibility of deportation” as the latter “might constitute a ‘manifest injustice,’ and, thus, provide a basis for setting aside a guilty plea[.]”); *see also State v. Sandoval*, 171 Wn.2d 163, 170 n.1, 249 P.3d 1015 (2011) (acknowledging

that under *Yim* affirmative misrepresentation by counsel of the plea's deportation consequences could support the plea's withdrawal).

This distinction was explained in *State v. Stowe*, 71 Wn. App. 182, 858 P.2d 267 (1993). Stowe was a soldier in the United States Army whose lawyer advised him that a guilty plea would not prevent him from continuing his military career. The Army discharged Stowe immediately after he entered his plea. The court held that this supported a claim of ineffective assistance, even though the discharge was a collateral consequence:

[T]he question here is not whether counsel failed to inform defendant of collateral consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea. . . . Different considerations may arise when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea.

Id. at 187 (citations omitted). The court in *Stowe* cited to a case in which “counsel’s erroneous misrepresentation that guilty plea would not affect defendant’s immigrant status was ineffective assistance and rendered guilty plea involuntary.” *Id.*, citing *People v. Correa*, 108 Ill.2d 541, 485 N.E.2d 307 (1985). See also *State v. Holley*, 75 Wn. App. 191, 198-99, 876 P.2d 973 (1994).

Looking at Washington’s legal landscape in 2006, when petitioner

entered his plea, an attorney was required to go over the statutory warning pursuant to RCW 10.40.200 in the plea form regarding the potential immigration consequences that could flow from a guilty plea and ensure that his client understood that provision. While the attorney was not required to give additional advice about the possible immigration consequences, any advice he did give had to be accurate. Erroneous advice could provide a basis for a withdrawal of a plea even though it was regarding a collateral consequence.

Petitioner raises a claim that he received erroneous advice. As the superior court noted in its ruling, he has failed to show that *Padilla* changed the law on whether advice that was given to a client on collateral consequences had to be *accurate*. See SR Appendix I. Any advice that petitioner's attorney gave back in 2006 about collateral consequences had to be accurate or it would provide a basis for withdrawal of a plea. Nor has petitioner shown that *Padilla* is "an intervening opinion" that has "effectively overturned a prior appellate decision that was originally determinative of a material issue." Petitioner was not prevented by 2006 law from raising a challenge to his plea based on inaccurate legal advice. While *Padilla* held that there was no reason to make a distinction between commission (erroneous advice) and omission (failure to give advice) with respect to advice on immigration consequences, it acknowledged that

many jurisdictions did previously draw such distinction with regard to ineffective assistance of counsel claims. *Padilla*, 559 U.S. at 369-71. Petitioner does not identify a single Washington case overruled by *Padilla* regarding erroneous advice. *Padilla* did not change the law with respect to his situation so it is not material to his conviction.

Because Petition cannot show a significant change in the law, he does not meet the requirements of RCW 10.73.100(6) and his petition was properly dismissed as untimely.

2. PETITIONER HAS NOT SHOWN THAT WASHINGTON'S LONGSTANDING PRACTICE OF STAYING IN STEP WITH FEDERAL RETROACTIVITY ANALYSIS IS EITHER INCORRECT OR HARMFUL.

Before an established rule is abandoned, the doctrine of stare decisis requires a clear showing that it is incorrect and harmful. *State v. Abdulle*, 174 Wn.2d 411, 415, 275 P.3d 1113 (2012). This court has long followed decisions of the United States Supreme Court with regard to retroactivity of new decisions. Retroactivity analysis was first discussed in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed. 2d 601 (1965) as prior to that constitutional decisions had been applied retroactively as a matter of course. This Court used the *Linkletter* analysis to determine the retroactivity at least as early as *Brumley v. Charles R. Denney Juvenile Center*, 77 Wn.2d 702, 466 P.2d 481 (1970). Keeping

Washington on track with federal retroactivity analysis continued through various modifications under *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L. Ed. 2d 1199 (1967) and *United States v. Johnson*, 457 U.S. 537, 549, 102 S. Ct. 2579, 2586, 73 L. Ed. 2d 202 (1982), through 1980s and into the 1990s. See *In re Personal Restraint of Suave*, 103 Wn.2d 322, 692 P.2d 818 (1985), *In re Taylor*, 105 Wn.2d 683, 691, 717 P.2d 755 (1986), and *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 324, 823 P.2d 492 (1992).

In *St. Pierre*, this Court noted that “retroactivity analysis has been marked by erratic development since the United States Supreme Court announced the doctrine in 1965” and explained how this led to the gradual adoption of the retroactivity standards set forth in *Teague v. Lane*, 489 U.S. 288, 302–04, 109 S. Ct. 1060, 1070–71, 103 L. Ed. 2d 334 (1989). This Court stated that it was going “to stay in step with the federal retroactivity analysis” and adopted the *Teague* standard⁷. *St. Pierre*, 118 Wn.2d at 324-25. A decision to “stay in step” with federal retroactivity analysis articulates the Court’s recognition that it was not compelled to adopt of the *Teague* standard, but was deciding to do so.

⁷ That standard is as follows: 1. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past. 2. A new rule will not be given retroactive application to cases on collateral review except where either: (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.

As was noted in a recent decision, “[s]ince *Teague v. Lane* [citation omitted], this court has consistently and repeatedly followed and applied the federal retroactivity analysis as established in *Teague*.” *In re Haghghi*, 178 Wn.2d 435, 441, 309 P.3d 459, 462 (2013) (listing fourteen of its decisions using the *Teague* standard). There has been virtually no discussion or question that *Teague* is the appropriate standard for retroactivity analysis in Washington. There has been no discussion that use of the *Teague* standard is harmful or that the *Teague* decision is incorrect.

This Court has stated, when faced with an argument for retroactive application of *Blakely*⁸ based on state law - such as the provision in RCW 10.73.100(6) - 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.” *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627 (2005). But the Court refused to consider the issue any further in *Evans* as the parties arguing for such a rule did not “make a compelling case that there are reasons for retroactive application that are sufficient under state law.” *Id.* at 449.

In *In re Gentry*, 179 Wn.2d 614, 316 P.3d 1020 (2014), Gentry suggested that the court was not bound by *Teague* citing to language in

⁸ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2538, 159 L. Ed. 2d 403 (2004).

Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008), and that *Danforth* provided a reason to reassess use of the *Teague* standard. A similar claim was made the prior year in *Haghighi*, but the majority rejected it. The majority was critical of the concurrence/dissent for pointing to the language in *Danforth* as “an attempt justify abandonment of our long-settled precedent” noting that the language relied upon in *Danforth* was nothing new and that the Court was well aware that it was not required to follow the *Teague* standard. *Haghighi*, 178 Wn.2d at 442-43. The majority noted that “The *Teague* framework is supported by roughly 25 years of precedent, and neither Haghighi nor the concurrence/dissent provide adequate basis for jettisoning such a firmly established principle of law.”

Thus, there can be no credible dispute that this Court has firmly established the *Teague* standard as the one to use in determining retroactivity. To argue for use of a different standard, petitioner must show that the use of the *Teague* standard is incorrect and harmful. This he has wholly failed to do. Rather, petitioner has tried to disingenuously frame the question as being one of first impression. It is not an issue of first impression, but one of well settled law. If the court were to abandon this firmly established principle of law now, it is inviting litigation as to which “standard” of retroactivity should be used each time a new rule of law is announced as well as relitigation of every past “new rule” where the

court has previously applied the *Teague* standard. This would be a devastating blow to finality of judgment in Washington. Further, it would not promote stability or clarity in the law but mark a return to the erratic development that existed in retroactivity analysis prior to *Teague*.

Petitioner has not clearly articulated what his standard is for retroactive application other than to argue that *Padilla* and *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) should be applied retroactively to his case. He seems to argue that these cases involve a rule implicit in the concept of ordered liberty – a concept consistent with the *Teague* standard. But under *Teague* retroactive application of any such new procedural rule is limited to “those new procedures without which the likelihood of an accurate conviction is seriously diminished.” *Gentry*, 179 Wn.2d at 628, citing *Teague*, 489 U.S. at 313 (“*Teague* presents a very high hurdle to overcome. In announcing watershed rules, courts have been sparing to the point of unwillingness”). Here the rule that a criminal defendant must be advised as to immigration consequences has no impact on the accuracy of the conviction as immigration consequences have nothing to do with whether the defendant is guilty or innocent. Defendant admitted that he was guilty of this offense and nothing about whether he was advised properly of his immigration consequences cast any doubt on his guilt.

Petitioner reliance on *State v. Olivera –Avila*, 89 Wn. App. 313, 321 (1997) is misplaced. In that case the Court of Appeals reversed the grant of a motion to withdraw a guilty plea because the collateral attack was untimely under RCW 10.73.090 despite the fact that it was clear the defendant had not been properly advised of mandatory community placement term-a direct consequence of his plea. Olivera-Aavila argued that a certain decision constituted a significant material change in the law, but the court found Olivera-Avila could have made his argument on the law that existed prior to the issuance of the decision. This case is supportive of the argument that the State made in the first part of this brief. Regardless of the standard used to determine retroactivity, petitioner cannot show a significant material change in the law with regards to his claim so he cannot meet the criteria of RCW 10.73.100(6).

Nor has petitioner made any argument as to why the statutory provision in RCW 10.73.100(6) would authorize or require retroactive application of a new rule of law when *Teague* would not. It is important to note that when the Washington Legislature enacted RCW 10.40.200 and provided a statutory remedy for any defendant who pleaded guilty whose plea form did not contain the statutory warnings as to immigration consequences, it specifically limited that remedy to prospective application. RCW 10.40.200(2), (3). Thus, state statutory provisions on advisement of immigration consequences at time of guilty plea do not

application. RCW 10.40.200(2), (3). Thus, state statutory provisions on advisement of immigration consequences at time of guilty plea do not support a retroactive application and petitioner makes no other argument in his motion for discretionary review regarding state constitutional provisions or other state law to show a compelling reason to apply a standard other than *Teague* in this instance.

As this issue regarding use of the *Teague* standard was not raised until the motion for discretionary review, the State is concerned that new arguments will be raised in the supplemental brief that were not articulated in the motion for discretionary review, when there is no opportunity to respond. The State objects to any argument raised for the first time in the supplemental brief and asks the court to disregard any such argument. *Cummins v. Lewis County*, 156 Wn.2d 844, 851, 133 P.3d 458 (2006).

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the dismissal of the petition as time barred.

DATED: AUGUST 11, 2014.

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Certificate of Service:

email

The undersigned certifies that on this day she delivered by ~~US~~ *email* or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Attached is the State's Supplemental Brief of Respondent