

COA#43118-1-II
CrR 7.8 transf. PRP Yung-Chen Tsai



06-1-00782-6 37874795 ORDY 01-24 12

FILED
DEPT. 4
IN OPEN COURT
JAN 23 2012
Pierce County Clerk
By *[Signature]*
DEPUTY

88770-5

transf. order determ. proper on
3/21/12

PRP Transfer Order
Accept Transfer

Personal Restraint Petition
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

YUNG-CHEN TSAI,

Defendant.

CAUSE NO. 06-1-00782-6

ORDER ON MOTION TO VACATE and
ON RELIEF FROM JUDGMENT

 Clerk's Action Required

1
8
9
10
11
12
13
14
15
16
17
18
19

20
21
22
23
24
25
26
27
28
29

THIS MATTER came on before the undersigned judge of the Pierce County Superior Court based upon the written motion denominated a "Motion for Vacate" pursuant to CR 60(b) to the court dated November 8, 2011 (and filed November 23, 2011) seeking to have the court vacate its orders of: 1) August 31, 2011 (directing the state to file a response on or before September 30, 2011); and, 2) October 18, 2011 denying the defendant's motion for relief from judgment pursuant to CrR 7.8.

Defendant's argument is that pursuant CrR 7.8(c)(2) if the superior court finds defendant's motion to be untimely by RCW 10.73.090 (as this court did), it should transfer the matter to the Court of Appeals rather than deny the motion. This does not affect the validity of the order of August 31, 2011 and the motion to vacate that order should be denied. Whether the superior court should consider

1 the matter on its merits or transfer the matter to the Court of Appeals, depends upon whether the motion
2 is timely. In this Order the court restates its analysis and modifies its conclusion.

3

4 **1. Analysis.**

5

A.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

RCW 10.73.090 imposes a one-year time limit on petitions or motions for collateral attack, including motions to vacate judgment and motions to withdraw guilty pleas. RCW 10.73.090(1) states: "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." This time limitation "is a mandatory rule that acts as a bar to appellate court consideration" of collateral attacks, unless the petitioner shows that an exception under RCW 10.73.100 applies. *Shumway v Payne*, 136 Wash.2d 383, 397-98 (1998).

RCW 10.73.100 enumerates exceptions to the one-year time limit if the motion alleges (1) newly discovered evidence; (2) a statute that is unconstitutional on its face or as applied to the defendant; (3) double jeopardy; (4) insufficiency of the evidence; (5) a sentence in excess of the court's jurisdiction; or (6) a significant change in the law that is material to the conviction, sentence, or other order. In light of these explicit statutory exceptions, our Supreme Court has cautioned that a reviewing court should not look behind the judgment of a court of competent jurisdiction unless expressly permitted to do so by the Legislature. See *In re Personal Restraint of Runyan*, 121 Wash.2d 432, 442-44, 853 P.2d 424 (1993).

State v. Robinson, 104 Wash App. 657, 662 (2001).

Understanding this and that his motion would otherwise be untimely, defendant Tsai proceeds in his CrR 7.8 motion under subparagraph 6, the exception for a significant change in the law. In this case it is the law relating to the need to provide a defendant with accurate information about the immigration consequences of pleading guilty and, specifically, the case of *Padilla v Kentucky*, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). The defendant argues further that the change, while significant, should not be considered a "new rule" of criminal procedure and that it therefore meets the test to be applied retroactively set forth by the U.S. Supreme Court in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

1 The state maintains that at the time of his plea in 2006, defendant Tsai already had a right to be
2 so informed by reason of state law, to-wit: RCW 10.40.200(a) and *State v Littlefair*, 112 Wn. App. 749,
3 769 (2002). It therefore asserts that the *Padilla* ruling is not a significant change in the law of
4 Washington State (or as the state puts it, it is not "new law") and, therefore, the exception to the one-
5 year time limit codified in RCW 10.73.100(6) does not apply.

6 The defendant correctly points out that the warnings of RCW 10.40.200 do not excuse a defense
7 attorney's responsibility to provide appropriate warnings and accurate legal advice about the legal
8 consequences of a plea. *State v Sandoval*, 171 Wn.2d 163 (2011). Defendant's Motion for Relief from
9 Judgment, pp. 7-8. One notes that the timeliness of Sandoval's application was not an issue in his case.

10 Assuming *arguendo* that the advice given Mr. Tsai was erroneous, it nonetheless affects this
11 court's consideration of the *timeliness* of defendant's present application that the change in law in
12 Washington state is not substantial and material for purposes of RCW 10.73.100(6). Mr. Tsai's
13 counsel's obligations in 2006 when Mr. Tsai entered into his plea were the same as they would be now,
14 post-*Padilla*, *i e* to provide accurate legal advice about the immigration consequences of a plea.¹ See,
15 *State v Littlefair*, 112 Wn. App. 749, 769 (2002)(dissenting opinion). Thus, it cannot be said that there
16 has been a "significant change in the law that is material to the conviction, sentence, or other order"
17 affecting Mr. Tsai. *No other exception to RCW 10 73.090 being available to defendant under RCW*
18 *10.73 100, it appears defendant's motion is time barred by RCW 10.73.090.*

19
20 **B.**

21 The defense motion at p. 12 states "[m]ost courts to reach this issue have held that *Padilla* can be
22 applied retroactively . ." Defendant's Motion for Relief from Judgment, p. 12. Contrast this with the
23 view of Federal District Court Judge Laurie Smith Camp (who decided the rule was not retroactive):
24

¹ This case is not a typical pre-*Padilla* (or pre-*Littlefair*) failure of a lawyer to provide any warning about immigration consequences because it was "only" a "collateral" consequence of the plea. The undisputed fact in this case is that the immigration consequences of the plea *were specifically discussed* but that erroneous information allegedly was provided defendant by his lawyer

1 Courts that have addressed the issue have reached different conclusions. *The*
 2 *weight of authority appears to favor nonretroactivity*. See, e.g., *United States v.*
 3 *Chang Hong*, — F.3d —, 2011 WL 3805763, at * *2–9 (10th Cir. Aug. 30,
 4 2011); *Chaidez v. United States*, — F.3d —, 2011 WL 3705173, at * *4–8
 5 (7th Cir. Aug. 23, 2011); *United States v. Hernandez–Monreal*, 404 Fed. App'x
 6 714, 715 n* (4th Cir. 2010). A few courts, however, have decided that Padilla is
 7 retroactive in a collateral review context. *United States v Orocio*, 645 F.3d 630,
 8 633 (3d Cir. 2011); *United States v Dass*, 2011 WL 2746181, at *4 (D.Minn. July
 9 14, 2011).

10
 11 (Emphasis added.) *U.S v Abraham*, 2011 WL 3882290, at 2 (D.Neb., September 1, 2011). Also finding
 12 the rule not to be retroactive is *U.S. v Cervantes-Martinez*, 2011 WL 4434861, at 3 (S.D.Cal.,
 13 September 23, 2011). I will not repeat the analysis, suffice to say I agree with those courts that have so
 14 held. The rule announced in *Padilla* is *not* retroactive under *Teague*.

15 16 2. Order.

17 The court has reviewed the pleadings/materials submitted by the defendant and by the plaintiff as
 18 well as having reviewed the court's file. Because the court has determined that defendant's motion
 19 APPEARS TO BE BARRED by RCW 10.73.090, the court should, therefore, transfer the matter to the
 20 Court of Appeals. Denying the motion rather than transferring the matter to the Court of Appeals is an
 21 irregularity justifying relief to the Defendant under CR 60(b)(1). Therefore, being duly advised in all
 22 matters, the court hereby enters the following order:

23 **IT IS HEREBY ORDERED** that the defendant's motion is GRANTED in part and the order
 24 denying defendant's motion for relief from judgment entered October 18, 2011 be and it is hereby
 25 vacated and amended by this order. It is further,

26 **ORDERED, ADJUDGED and DECREED** that defendant's motion to vacate the order the
 27 entered August 31, 2011 is DENIED.

28 **ORDERED, ADJUDGED and DECREED** that defendant's petition/motion is transferred to
 29 the Court of Appeals, Division II, to be considered as a personal restraint petition. The petition is being
 30 transferred because it appears to be time-barred under RCW 10.73.090. It is further,

1 **ORDERED, ADJUDGED and DECREED** that the Pierce County Superior Court Clerk shall
2 forward a copy of this order as well as the defendant's pleadings identified above, to the Court of
3 Appeals, Division II.

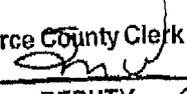
4
5
6 **ORDER** signed this 23rd day of January, 2012.

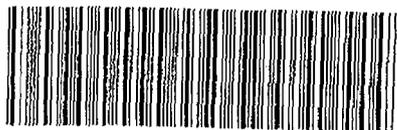
7
8 
9 _____
10 Bryan Chushcoff, Judge

11
12 cc: John Macejunas
13 Deputy Prosecuting Attorney
14
15 Yung-Cheng Tsai
16 DOC #821442
17 Clallam Bay Corrections Center
18 1830 Eagle Crest Way
19 Clallam Bay, WA 98326-9723

FILED
DEPT. 4
IN OPEN COURT

JAN 23 2012

Pierce County Clerk
By 
DEPUTY



06-1-00782-6 37546821 MTV 11-23-11

FILED
IN COUNTY CLERK'S OFFICE

NOV 23 2011
A.M. PM.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

The Honorable Bryan E. Chushcoff

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

YUNG-CHENG TSAI,

Defendant.

No. 06-1-00782-6

MOTION FOR VACATE
OF ORDER (CR 60(b)(1), (11))

CLERK'S ACTION REQUIRED

MOTION

COMES NOW Defendant, YUNG-CHENG TSAI, appearing pro se, hereby submits this motion for vacate of order entered by this court on Motion For Relief From Judgment in the above-noted matter. Specifically, Defendant moves this Court to vacate the orders entered on August 31, 2011 and October 18, 2011 in this matter. This motion is based on CR 60(b)(1), (11); CR 7.8(c)(2); ~~and~~ State v. Smith, 144 Wn. App. 860, 184 P.3d 566 (2008) and the following Memorandum of Law.

//

//

//

//

MOTION FOR VACATE OF ORDER -1

MEMORANDUM

I. Factual and Procedural Background

On May 18th, 2011, Defendant represented by attorney Christopher Black moved this Court for relief from judgment pursuant to CrR 7.8(b)(4).

Upon reviewing the pleadings/materials submitted by the Defendant and reviewing the Court file, this Court entered an order on August 31, 2011, (August Order), to retain consideration of the motion. The Court entered its order based on:

D the petition may or may not be barred by the one year time bar in

RCW 10.73.090 and either:

- (X) The defendant has made a substantial showing that he or she is entitled to relief; or
- (X) the resolution of the motion will require a factual hearing.

August Order, pg 2

The Court further ordered the State to file a response by September 30, 2011 and "After reviewing the response the court will determine whether this case will be transferred to the Court of Appeals, or if a hearing shall be scheduled." Id.

Upon review of pleadings/materials submitted by the defendant and by the plaintiff; as well as review of the Court file, the Court entered an order on October 18, 2011, (October Order), denying the Defendant's motion for relief from judgment. In its analysis, the Court found "No other exception to RCW 10.73.090 being available to defendant under RCW 10.73.100, defendant's motion is time barred by RCW 10.73.090." see October Order at pg 3.

//

//

//

//

MOTION FOR VACATE OF ORDER -2

II. Argument.

This Court does not have authority to deny a CrR 7.8 motion if it is untimely under RCW 10.73.090.

CrR 7.8 sets forth the criteria for seeking relief from judgment and the procedure this Court must follow in addressing such motions. These procedures limits this Court's discretion. On September 1, 2007, the rule was amended and the pertinent following provides:

(2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8 (c) (2). See State v. Smith, 144 Wn.App. 860, 862-63, 184 P.3d 666 (2008)

The amended rule provides mandatory procedures and criteria for determining when to transfer the motion to the Court of Appeals and when to retain the motion; and, if retained, what further procedures the trial court must employ. Restated, the rule directs this Court to transfer the motion to the Court of Appeals unless this Court first determines that (1) the motion is timely (i.e. not barred by RCW 10.73.090) and (2) either the motion is meritorious or it raises a question the resolution of which require a factual hearing. Under the current rule, this Court can only retain a CrR 7.8 (b) motion if it first makes the enumerated determinations. CrR 7.8 (c) (2).

Here, in response to Defendant's CrR 7.8 (b) motion, this Court retained consideration of the motion in its August order and ordered the State to respond. See August Order at 2. This Court further ordered: "After reviewing the response, the Court will determine whether this case will be transferred to the

MOTION FOR VACATE OF ORDER -3

Court of Appeals, or if a hearing shall be scheduled." *Id.* However, upon review of the pleadings from the State and the Defendant, this Court held in its analysis that: "No other exception to RCW 10.73.090 being available to defendant under RCW 10.73.100, defendant's motion is time barred by RCW 10.73.090." See October Order at 3. This Court then denied the Defendant's CrR 7.8(b) motion as untimely in the October Order. *Id.* at 4.

Under the amended CrR 7.8(c), this Court does not have authority to dismiss the Defendant's CrR 7.8(b) motion if it is untimely under RCW 10.73.090, *Smith* at 863. Instead, this Court must transfer the Defendant's CrR 7.8(b) motion to the Court of Appeals for consideration as a personal restraint petition.

Based on the error by this Court in its August Order retaining the CrR 7.8(b) motion for consideration and its October order denying the CrR 7.8(b) motion as untimely, pursuant CR 60(b)(1), (2) and in the interest of justice and judicial economy, the Defendant hereby respectfully moves this Court to vacate both orders and transfer the CrR 7.8(b) motion filed by attorney Christopher Black on May 18, 2011, to the Court of Appeals as a personal restraint petition for consideration on its merits. CrR 7.8(c)(2). *Smith* at 864.

III. Conclusion.

For the foregoing reasons, this Court should grant Mr. Tsai's motion for vacate of order in this matter.

DATED this 8th day of November, 2011

Respectfully Submitted,



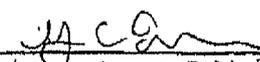
YUNG-CHENG TSAI
Pro Se Litigant
DO# 821442 FSB22
SCCC 191 Constantine Way
Aberdeen, WA 98520

MOTION FOR VACATE OF ORDER -4

DECLARATION

I, YUNG-CHENG TSAI, declare that I have examined this motion and to the best of knowledge and belief it is true and correct.

DATED this 8th day of November, 2011.

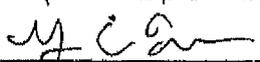
Signed by: 
YUNG-CHENG TSAI DOC# 821442

CERTIFICATE OF SERVICE

I certify that on the 8th day of November, 2011, I deposited a true and correct copy of the foregoing in the Stafford Creek Corrections Center Legal Mail system by First Class mail pre-paid postage, upon the parties required to be served in this action!

Pierce County Prosecuting Attorney
County-City Building
930 Tacoma Ave S., Room 946
Tacoma, WA 98402-2171

DATED this 8th day of November, 2011.

Respectfully submitted,

YUNG-CHENG TSAI
DOC# 821442 FSB22
SCCC 191 Constantine Way
Aberdeen, WA 98520

//
//
//
//

MOTION FOR VACATE OF ORDER -5



06-1-00782-6 37546837 AFS 11-23-11

FILED IN COUNTY CLERK'S OFFICE

IN SUPERIOR COURT OF WASHINGTON

AM. NOV 23 2011 PM

IN AND FOR THE COUNTY OF PIERCE

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

STATE OF WASHINGTON,

No. 06-1-00782-6

Plaintiff,

v.

AFFIDAVIT TO SUPPORT MOTION
FOR VACATE OF ORDER
(CR 60(b)(1), (1)).

YUNG-CHENG TSAI,

Defendant.

My name is YUNG-CHENG TSAI. I am defendant pro se in this action. I affirm under penalty of perjury that I am over the age of 18 and competent to testify. I make this affidavit to support my motion for vacate of orders on motion for relief from judgment in this case. The orders were entered on August 31, 2011 and October 18, 2011, before Judge Chushcoff.

Upon review of the CrR 7.8(b) motion filed by attorney Christopher Black, the Court ordered in August based on the possibility that the defendant's motion "may or may not" be time barred by RCW 10.73.090 and either the defendant has made a substantial showing he is entitled to relief or the resolution of the motion will require a factual hearing. The Court further ordered the state to file a response by September 30, 2011, and upon reviewing the response will determine whether to trans for this case to the Court of Appeals, or schedule a show cause hearing.

On October 18, 2011, after reviewing the pleadings/materials from the defendant and the state, the Court found in its analysis that the defendant's CrR 7.8(b) motion was time barred because the exception under RCW 10.73.100(c) did not

AFFIDAVIT TO SUPPORT MOTION FOR VACATE OF ORDER -1

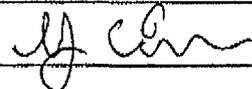
apply and that no other exception to RCW 10.73.090 was available under RCW 10.73.100, and therefore denied the CrR 7.8(b) motion.

On November 1, 2011, my attorney Christopher Black, filed a notice of withdraw as counsel of record. I am now pro se in this case.

The specific claims I make are that pursuant CR 60(b) (1) the Court's order denying the CrR 7.8(b) motion was a "mistake, inadvertence, surprise, excusable neglect..." because under CrR 7.8(c) (2) and State v. Smith, 144 Wn.App. 860, 184 P.3d 666 (2008), the Court must transfer a untimely CrR 7.8(b) motion to the Court of Appeals for consideration as a Personal Restraint Petition. The Court does not have authority to dismiss an untimely CrR 7.8(b) motion.

In the interest of justice and judicial economy, I am moving the Court to vacate its order under CR 60(b) (1), (11) and transfer the CrR 7.8(b) motion filed on May 18, 2011 to the Court of Appeals for consideration as a personal restraint petition. By such action, the Court of Appeals would not have to vacate the Court's order and remain this case just to transfer the case to the Court of Appeals for consideration as a personal restraint petition.

DATED this 8th day of November, 2011. Affirmed to be true and correct under the penalty of perjury of the laws of the State of Washington.



YUNG-CHEUNG TSAI
 DOC# 821442 75822
 SCCC, 191 Constantine Way
 Aberdeen, WA 98520

AFFIDAVIT TO SUPPORT MOTION FOR VACATE OF ORDER - 2

DECLARATION

I, YUNG-CHENG TSAI, declare that, on November 8th, 2011, I deposited the foregoing "Notice of Appeal" and "Order On Motion For Relief From Judgment," or a copy thereof, in the Stafford Creek Corrections Center Legal Mail System by First Class mail pre-paid postage, addressed to:

Pierce County Prosecuting Attorney
County City Building
930 Tacoma Ave S., Room 946
Tacoma, WA 98402-2171

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Aberdeen, WA on November 8th, 2011.

Yung-Cheng Tsai
Yung-Cheng TSAI

DOCH 821442 FSB22
SCCC, 191 Constanline Way
Aberdeen, WA 98520

The Honorable Bryan E. Chushoff

IN THE SUPERIOR COURT FOR PIERCE COUNTY WASHINGTON

State of Washington,)
 Plaintiff,) NO. 06-1-00782-6
 vs)
SCHEDULING ORDER
YUNG-CHEUNG TSAI)
 Defendant.)

IT IS HEREBY ORDERED that:

1 The following court dates are set for the defendant.

Approval No	Hearing Type	Date	Time	Courtroom
	<input type="checkbox"/> Pretrial Conference	, 20	AM/PM	
	<input type="checkbox"/> Return w/ Attorney	, 20	AM/PM	
	<input type="checkbox"/> Omnibus Hearing	, 20	AM/PM	CDPJ
	<input type="checkbox"/> Status Conference	, 20	AM/PM	CDPJ
	<input checked="" type="checkbox"/> Motion (Describe): <u>MOTION FOR VACATE OF ORDER</u>	11/17, 2011	9:00 AM/PM	CDPJ
	<input type="checkbox"/> TRIAL	, 20	8:30 AM	CDPJ
		, 20	AM/PM	

2 Moving papers due: _____ Responsive brief due: _____

3. The defendant shall be present at these hearings and report to the courtroom indicated at
 930 Tacoma Avenue South, County-City Building, Tacoma, Washington 98402
FAILURE TO APPEAR WILL RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST

4 DAC; Defendant will represented by Department of Assigned Counsel
 Retained Attorney; Defendant will hire their own attorney or, if indigent, be Screened
 (interviewed) for Department of Assigned Counsel Appointment.

Dated November 8, 2011
 Copy Received

[Signature]
 Defendant

 JUDGE

Pro Se
 Attorney for Defendant/Bar #

 Prosecuting Attorney/Bar #

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language I certify under penalty of perjury that the foregoing is true and correct _____
 Pierce County, Washington.

 Interpreter/Certified/Qualified

 Court Reporter

November 8, 2011

Pierce County Clerk's Office

Attention: Superior Court Clerk

930 Tacoma Ave S

Tacoma, WA 98402

Re: State v. Tsai, 06-1-00782-6 Cover Letter

Dear Superior Court Clerk:

I was previously represented by attorney Christopher Black in the matter of State v. Tsai, cause # 06-1-00782-6, for a CrR 7.8(b) motion. However, on Nov. 1, 2011, Mr. Black had unexpectedly withdrew from this case. I am now a pro se litigant in this matter.

Please find enclosed a "motion for vacate of order" pursuant CR 60 (b) (1), (11).

The intent in filing this motion is to serve judicial economy by vacating the order denying the CrR 7.8(b) motion for untimeliness and have the Court of Appeals

consider the CrR 7.8(b) motion's merits as a P.R.P. pursuant to CrR 7.8 (c) (2) and State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008). The reason I believe this is

necessary is so that the Court of Appeals will not have to vacate the order

denying the 7.8(b) motion and remand the case just to have it forwarded

to the Court of Appeals for consideration on the merits. And thus, serve judicial economy.

I am also enclosing a "notice of appeal" pursuant RAP 5.3 for the "order denying motion for relief from judgment." I am enclosing this notice so that it is submitted within

a timely manner in case the "motion for vacate of order" is denied by the

Court. Please hold this "notice of appeal" until the outcome of the "motion for vacate of order" is decided but take notice that it is timely submitted.

I apologize in advance for any error and inconvenience this may have caused as I am prose. Thank you for your time and consideration in this matter.

Sincerely,
Y. C.

Yung-Cheng Tsai
DOC # 821442 FS B22
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

CC: Division 2 Court of Appeals



06-1-00782-6 37548745 AFS 11-23-11

FILED IN COUNTY CLERK'S OFFICE

NOV 23 2011 A.M. P.M.

IN THE SUPERIOR COURT FOR WASHINGTON IN AND FOR PIERCE COUNTY

PIERCE COUNTY, WASHINGTON County Clerk DEPUTY BY KEVIN STOCK

STATE OF WASHINGTON Plaintiff No. 06-1-00782-6 V. Yung-Cheng TSAI Defendant DECLARATION OF SERVICE BY MAILING

I Yung-Cheng TSAI, the Defendant, in the above entitled cause, do hereby declare that I have served the following documents; Motion, declaration and proposed order to proceed in forma pauperis on appeal; declaration Certificate of indigency; order finding indigency and order to transmit findings of indigency; motion for appointment of counsel; motion, declaration and order to proceed in forma pauperis; order granting appointment of counsel; and Statement of Additional Grounds for Review (RAP W.10).

PARTIES SERVED:

CLERK OF THE COURT PLAINTIFF / PROSECUTOR Pierce County Prosecuting Attorney County City Building Rm 946 930 Tacoma Ave S Tacoma, WA 98402

That I deposited in with the Unit Officer's Station, by processing as Legal Mail, with First Class Postage at: Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520

Dated this 15 day of November, 20 11

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

[Signature] (Signature)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

State of Washington

Plaintiff

vs.

YUNG CHENG TSAI

Defendant

February 29, 2012

No.: 06-1-00782-6

Court of Appeals No.: 42834-2

CLERK'S PAPERS PER
REQUEST OF APPELLANT
TO THE
COURT OF APPEALS,
DIVISION II

	Index	Pages
AFFIDAVIT/DECLARATION IN SUPPORT, FILED November 23, 2011.....	7	- 12
AFFIDAVIT/DECLARATION IN SUPPORT, FILED November 23, 2011.....		- 1
MOTION TO VACATE, FILED November 23, 2011.....	2	- 6
ORDER ON MOTION TO TRANSFER TO COA, FILED January 24, 2012.....	13	- 17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

State of Washington

Plaintiff

vs.

YUNG CHENG TSAI

Defendant

February 29, 2012

No.: 06-1-00782-6
Court of Appeals No.: 42834-2

CLERK'S PAPERS PER
REQUEST OF APPELLANT
TO THE
COURT OF APPEALS,
DIVISION II

HONORABLE SERGIO ARMIJO
Trial Judge

KATHLEEN PROCTOR
946 COUNTY CITY BLDG
FELONY DIVISION
TACOMA, WA 98402

ATTORNEY FOR RESPONDENT

PIERCE COUNTY SUPERIOR COURT

February 29, 2012 - 1:13 PM

Transmittal Letter

Document Uploaded: prp-CHENGPRP.pdf

Case Name: STATE OF WASHINGTON VS. YUNG CHENG TSAI

County Cause Number: 06-1-00782-6

Court of Appeals Case Number:

Personal Restraint Petition (PRP) Transfer Order

Notice of Appeal/Notice of Discretionary Review

(Check All Included Documents)

Judgment & Sentence/Order/Judgment
Signing Judge: _____

Motion To Seek Review at Public Expense

Order of Indigency

Filing Fee Paid - Invoice No: _____

Affidavit of Service

Clerk's Papers - Confidential Sealed

Supplemental Clerk's Papers

Exhibits - Confidential Sealed

Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Administrative Record - Pages: ____ Volumes: ____

Other: _____

Co-Defendant Information:

No Co-Defendant information was entered.

Sender Name: Emma J Gaddis

May 18 2011 4:03 PM

KEVIN STOCK
COUNTY CLERK
NO: 06-1-00782-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

The Honorable Bryan E. Chushcoff

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

THE STATE OF WASHINGTON,

Plaintiff,

vs.

YUNG-CHENG TSAI,

Defendant.

No. 06-1-00782-6

MOTION FOR RELIEF FROM
JUDGMENT

CLERK'S ACTION REQUIRED

MOTION

COMES NOW Defendant, YUNG-CHENG TSAI, by and through undersigned counsel, Christopher Black, and moves this Court for relief from the judgment previously entered in the above-noted matter. Specifically, Defendant moves the Court to withdraw his plea of guilty and vacate the judgment and sentence in this matter. This motion is based on CrR 7.8(b)(4); RCW 10.73.100(6); State v. Ross, 129 Wn.2d 279 (1996); State v. Olivera-Avila, 89 Wn.App. 313 (1997); Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 2011 Wash. LEXIS 247 (Wash. Mar. 17, 2011); the following Memorandum of Law; and the attached Declarations of Yung-Cheng Tsai and Vicky Dobrin. A proposed order accompanies this motion.

1
2 MEMORANDUM

3 **I. Factual and Procedural Background**

4 On February 16, 2006, Yung-Cheng Tsai was charged in Pierce County Superior Court
5 with one count of Unlawful Possession of a Controlled Substance with Intent to Deliver –
6 Marijuana. See attachment A. On February 21, 2006, Erik Bauer of Bauer and Balerud Law
7 Firm filed a Notice of Appearance on the criminal case. See attachment B. On April 24, 2006,
8 Mr. Tsai contacted immigration attorney Vicky Dobrin, who had represented him in an earlier
9 immigration proceeding. See attachment C. Mr. Tsai hired Ms. Dobrin to consult with Mr.
10 Bauer about possible immigration consequences of the charge against him. On April 28, 2006,
11 Ms. Dobrin advised Mr. Bauer that a conviction for Unlawful Possession of a Controlled
12 Substance with Intent to Deliver would be an aggravated felony that would bar Mr. Tsai from
13 any form of discretionary relief from deportation. See attachment C.

14
15 On the July 27, 2006 plea date, Mr. Bauer sent an associate from his firm to handle the
16 guilty plea. See attachment E. In the Statement of Defendant on Plea of Guilty, the court
17 checked the sentence indicating that the attorney had read the statement to Mr. Tsai. Paragraph i
18 of page 2 of the guilty plea form indicated that Mr. Tsai is not a United States citizen. See
19 attachment E. That paragraph also contained the language regarding deportation, exclusion
20 from admission to the United States, or denial of naturalization, pursuant to the laws of the
21 United States. Prior to the plea, Mr. Tsai had spoken to Mr. Bauer regarding his concerns about
22 his immigration status. See attachment D. Mr. Bauer had informed Mr. Tsai that “by pleading
23 guilty and receiving a sentence of less than one-year, [he] would avoid any danger of removal.”
24 See attachment D. Mr. Tsai relied on this assurance when he pleaded guilty as originally
25

1 charged to Unlawful Possession of a Controlled Substance with Intent to Deliver – Marijuana.
2 See attachment E. On August 29, 2006, Mr. Tsai was sentenced to 11 months in custody. See
3 attachment F. Mr. Bauer represented Mr. Tsai at the sentencing hearing.

4 On October 30, 2007, a Notice to Appear advising Mr. Tsai of the charges against him
5 was issued by the Department of Homeland Security. See attachment G. Between October 30,
6 2007 and November 3, 2007, the Notice to Appear was served on Mr. Tsai. See attachment G.
7 Mr. Tsai remains in deportation proceedings based on the conviction in this case. See
8 attachment H. On July 21, 2008, Maria Stirbis filed a motion to withdraw his plea of guilty to
9 Possession of Marijuana with Intent to Deliver, reasoning that the plea was involuntary due to
10 ineffective assistance of counsel. On September 25, 2008, the Court denied this motion on
11 grounds that it was time barred by RCW 10.73.090 and that equitable tolling did not apply to the
12 facts at that time. See attachment I. The Court observed that it would also have denied the
13 ineffective assistance of counsel claim based on the facts presented. See attachment I.

14
15 On March 18, 2011, Mr. Tsai engaged attorney Christopher Black to again challenge this
16 judgment based on significant changes in the law since 2008 regarding ineffective assistance of
17 counsel and immigration consequences of criminal convictions. See attachment H.

18 **II. Argument**

19 When Mr. Tsai entered his plea of guilty, he was not informed that doing so would cause
20 him to lose his immigration status and make him eligible for deportation. Prior to the United
21 States Supreme Court's recent decision in Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176
22 L.Ed.2d 284 (2010), and the Washington State Supreme Court's according decision in State v.
23 Sandoval, 2011 Wash. LEXIS 247 (Wash. Mar. 17, 2011), the rule in Washington was that
24 immigration consequences were collateral to a guilty plea. Therefore a person could enter a
25

1 voluntary guilty plea without being advised of immigration consequences. However, the Padilla
2 Court significantly changed the law by holding that immigration consequences are not collateral
3 to a guilty plea. Because Mr. Tsai was not informed of the immigration consequences of
4 pleading guilty plea prior to entering his plea, the plea was not knowing and voluntary and the
5 resulting judgment and sentence is void. Mr. Tsai should be relieved from that judgment
6 pursuant to CrR 7.8(b)(4). This motion is timely made due to the significant change in the law
7 under Padilla and Sandoval, which should be applied retroactively for the reasons discussed
8 below.

9 **A. Mr. Tsai did not enter his plea of guilty knowingly and voluntarily.**

10 Due process requires an affirmative showing that a defendant entered a guilty plea
11 intelligently and voluntarily. State v. Ross, 129 Wn.2d 279, 284 (1996); State v. Barton, 93
12 Wn.2d 301, 304 (1980) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). Where a defendant is
13 not informed of the direct consequences of a guilty plea, the plea is not voluntary. Ross, 129
14 Wn.2d at 284. Mr. Tsai was wrongly advised that his plea of guilty would not make him
15 eligible for deportation from the United States. Because of this erroneous advice, his plea in this
16 case was not voluntary.

17
18 The state bears the burden of proving the validity of a guilty plea. Ross, 129 Wn.2d at
19 287; Wood v. Morris, 87 Wn.2d 501, 507 (1976). Knowledge of the direct consequences of a
20 guilty plea may be satisfied from the record of the plea hearing or clear and convincing extrinsic
21 evidence. Ross, 129 Wn.2d at 287; Wood, 87 Wn.2d at 511. A defendant need not be informed
22 of all possible consequences of a plea but rather only direct consequences. Ross, 129 Wn.2d at
23 284; Barton, 93 Wn.2d at 305. The court has distinguished direct from collateral consequences
24
25

1 by whether the result represents a definite, immediate, and largely automatic effect on the range
2 of the defendant's punishment. Id. (internal quotation and citations omitted).

3 In Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), the United
4 States Supreme Court significantly changed the status of the law regarding the relationship of
5 immigration consequences to criminal convictions. In that case, the Kentucky Supreme Court
6 denied Mr. Padilla post-conviction relief holding that the Sixth Amendment's guarantee of
7 effective assistance of counsel does not protect a criminal defendant from erroneous advice
8 about deportation, reasoning that it is merely a "collateral" consequence of his conviction. Id. at
9 1476. The United States Supreme Court overturned the Kentucky court's ruling and found that,
10 because criminal conviction and deportation are so uniquely enmeshed, deportation cannot be
11 dismissed as merely a collateral consequence of conviction. Id. at 1481-82.

12
13 The Court in Padilla explained:

14 The landscape of federal immigration law has changed dramatically over the last 90
15 years. While once there was only a narrow class of deportable offenses and judges
16 wielded broad discretionary authority to prevent deportation, immigration reforms
17 over time have expanded the class of deportable offenses and limited the authority of
judges to alleviate the harsh consequences of deportation. The drastic measure of
deportation or removal, is now virtually inevitable for a vast number of noncitizens
convicted of crimes.

18 Id. at 1478 (internal quotation and citation deleted). The Court further noted that these changes
19 in immigration law have dramatically raised the stakes of a noncitizen's criminal conviction,
20 which confirmed their view that, "as a matter of federal law, deportation is an integral part—
21 indeed, sometimes the most important part of the penalty that may be imposed on noncitizen
22 defendants who plead guilty to specified crimes." Id. at 1480. The Court recognized that
23 deportation is a particularly severe "penalty," and noted that even though it is not strictly a
24 criminal sanction, it is intimately related to the criminal process. Id. at 1481 (internal citations
25

1 omitted). The Court also noted that, “importantly, recent changes in our immigration law have
2 made removal nearly an automatic result for a broad class of noncitizen offenders.” Id. The
3 Court found that it was “most difficult” to divorce the penalty from the conviction in the
4 deportation context. Id. The Court therefore held that immigration consequences cannot be
5 considered as collateral to a criminal proceeding and that noncitizen defendants are entitled to
6 advice from their counsel regarding those consequences. Id. at 1482.

7 In Sandoval, the Washington State Supreme Court affirmed Padilla and clarified the type
8 of legal advice that an attorney must give to an immigrant criminal defendant. “If the applicable
9 immigration law is truly clear that an offense is deportable, the defense attorney must correctly
10 advise the defendant that pleading guilty to a particular charge would lead to deportation. If the
11 law is not succinct and straightforward, counsel must provide only a general warning that
12 pending criminal charges may carry a risk of adverse immigration consequences.” Sandoval at
13 *7 (internal quotation and citation deleted).

14
15 In Padilla, pleading guilty to transporting a significant amount of marijuana was an
16 offense whose immigration consequences were “truly clear.” Simply by reading the applicable
17 statute, Padilla’s attorney could have discovered and advised him that pleading guilty to this
18 offense would make him deportable. Instead, the attorney erroneously advised Padilla that he
19 would not be subject to deportation. Because the law in this area is straightforward, a
20 constitutionally competent attorney is required to correctly advise, or seek consultation to
21 correctly advise, a criminal defendant of the deportation consequences of a plea. Padilla, 130 S.
22 Ct. 1473; Sandoval, 2011 Wash. LEXIS 247.

23 Mr. Tsai is not a United States citizen. His conviction for unlawful possession of
24 marijuana with intent to deliver makes him deportable. See 8 U.S.C. § 1101(a)(43); 8 U.S.C. §
25

1 1227(a)(2). As in Padilla, Mr. Tsai was erroneously informed that his plea would not affect his
2 immigration status. In fact, it was “truly clear” that Mr. Tsai would be deportable under 8
3 U.S.C. § 1227(a)(2)(B)(i), which states, “[a]ny alien who at any time after admission has been
4 convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of ...
5 relating to a controlled substance ... , other than a single offense involving possession for one's
6 own use of 30 grams or less of marijuana, is deportable.” 8 U.S.C. § 1227(a)(2)(B)(i); Padilla,
7 130 S. Ct. at 1483. In addition, Mr. Tsai is not eligible for discretionary relief in immigration
8 court because he is classified as an aggravated felon. He is classified as an aggravated felon
9 because he pleaded guilty to having the intent to deliver a controlled substance. 8 U.S.C. §
10 1101(a)(43); 8 U.S.C. § 1227(a)(2).

11 The immigration consequences of Mr. Tsai’s plea were “truly clear.” Therefore, Mr.
12 Tsai’s attorney had a duty to correctly inform him that pleading guilty to possession of
13 marijuana with intent to deliver rendered him deportable. Instead, Mr. Tsai’s attorney
14 misinformed him that he was not in danger of deportation because he would be sentenced to less
15 than one year of imprisonment. The fact that Mr. Tsai’s attorney had previously sought advice
16 on this matter from an immigration expert does not mitigate his ineffectiveness under Padilla
17 and Sandoval. Mr. Tsai’s defense attorney disregarded the advice of Mr. Tsai’s immigration
18 attorney that Mr. Tsai would be deported if he pleaded guilty to possession of marijuana with
19 intent to distribute.
20

21 The fact that Mr. Tsai received the immigration advisement in his plea agreement
22 pursuant to RCW 10.40.200 does not affect this analysis. Such a general advisement about
23 possible immigration consequences is insufficient under Padilla and Sandoval. “RCW
24 10.40.200 and other such warnings do not excuse defense attorneys from providing the requisite
25

1 warnings.” Sandoval at *13. The warning contained within Mr. Tsai’s plea agreement does not
2 diminish his attorney’s responsibility to provide accurate legal advice about the immigration
3 consequences of the plea agreement. Mr. Tsai’s attorney failed to provide accurate advice
4 about a direct consequence of a criminal conviction, so Mr. Tsai’s guilty plea was not voluntary.

5 The immigration consequences of pleading guilty cannot be considered “collateral” to
6 the criminal conviction in this case. Padilla, 130 S. Ct. at 1482; Sandoval, 2011 Wash. LEXIS
7 247. Therefore, the fact that Mr. Tsai was misadvised of the immigration consequences prior to
8 entry of his plea renders that plea involuntary. Sandoval, 2011 Wash. LEXIS 247; Ross, 129
9 Wn.2d at 284.

10 **B. An involuntary plea results in a void judgment that is subject to collateral attack**
11 **pursuant to CrR 7.8(b)(4).**

12 CrR 7.8(b) allows a court to relieve a party from a final judgment for the following
13 reasons:

- 14 (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a
15 judgment or order;
- 16 (2) Newly discovered evidence which by due diligence could not have been
17 discovered in time to move for a new trial under rule 7.5;
- 18 (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation,
19 or other misconduct of an adverse party;
- 20 (4) The judgment is void; or
- 21 (5) Any other reason justifying relief from the operation of the judgment.

22 A plea that is involuntary violates due process. Ross, 129 Wn.2d at 284; Barton, 93
23 Wn.2d at 304. Such a plea results in a void judgment that is subject to collateral attack pursuant
24 to CrR 7.8(b)(4). State v. Olivera-Avila, 89 Wn.App. 313, 319 (1997). In this case, because
25 Mr. Tsai’s plea was involuntary, as outlined above, the resulting judgment and sentence is void
and he may be relieved from that judgment pursuant to CrR 7.8(b)(4). Id. at 319.

1 C. This motion is timely because there has been a significant change in the law since
2 the time of the conviction that is material to the conviction and because sufficient
3 reasons exist to require retroactive application of the changed legal standard.

4 RCW 10.73.090 establishes a time limit of one year from the date a judgment becomes
5 final to file a motion for relief from judgment under CrR 7.8(b)(4). See CrR 7.8(b); RCW
6 10.73.090(1). However, the one-year time limit is not applicable if, among other grounds,
7 “there has been a significant change in the law that is material to the conviction.” State v. King,
8 130 Wn.2d 517, 531 (1996). The Washington Supreme Court has repeatedly found that
9 appellate decisions can effect such a change. See In re Pers. Restraint of David Greening, 141
10 Wn.2d 687, 696 (2000). Where an intervening opinion has effectively overturned a prior
11 appellate decision that was determinative of a material issue, the intervening opinion constitutes
12 a “significant change in the law” for purposes of exemption from procedural bars. Id. RCW
13 10.73.100 provides that the time limit specified in RCW 10.73.090 does not apply to a petition
14 or motion that is based solely on the fact that:

15 There has been a significant change in the law, whether substantive or procedural,
16 which is material to the conviction, sentence, or other order entered in a criminal or
17 civil proceeding instituted by the state or local government, and either the legislature
18 has expressly provided that the change in the law is to be applied retroactively, or a
19 court, in interpreting a change in the law that lacks express legislative intent regarding
20 retroactive application, determines that sufficient reasons exist to require retroactive
21 application of the changed legal standard.

22 RCW 10.73.100(6). For the reasons discussed below, Padilla constitutes a significant change in
23 the law that is material to Mr. Tsai’s conviction, and should be applied retroactively. Therefore,
24 Mr. Tsai’s motion is exempt from the one-year time limit.

25 1. The rule from *Padilla* constitutes a significant, material change in the law.

Prior to Padilla and Sandoval, the rule in Washington was that immigration
consequences were collateral to a guilty plea. A person could enter a voluntary guilty plea

1 without being advised of any such consequences. The Padilla Court held that immigration
2 consequences are not collateral to a guilty plea. This holding constitutes a significant change in
3 the law. Where an intervening opinion has effectively overturned a prior appellate decision that
4 was originally determinative of a material issue, the intervening opinion constitutes a
5 "significant change in the law" for purposes of exemption from procedural bars. In re Pers.
6 Restraint of David Greening, 141 Wn.2d at 697.

7 The rule from Padilla, that immigration consequences cannot be considered as collateral
8 to a criminal proceeding, constitutes a significant, material change in the law. Although the law
9 is well-settled that a guilty plea cannot be accepted until the defendant had been informed of all
10 direct consequences of the plea, State v. Barton, 93 Wn.2d 301, 305 (1980), prior to Padilla,
11 immigration consequences were not recognized as direct consequences of a guilty plea. See
12 State v. Martinez-Lazo, 100 Wn.App. 869, 876 (2000) (noting acknowledgement that the
13 general rule in Washington was that deportation is a collateral consequence); In re Yim, 139
14 Wn.2d 581, 588 (1999) ("A deportation proceeding that occurs subsequent to the entry of a
15 guilty plea is merely a collateral consequence of that plea."); State v. Holley, 75 Wn.App. 191,
16 197 (1994). In Washington, Padilla and Sandoval constituted a significant change in the law.
17 "Padilla has superseded Yim's analysis of how counsel's advice about deportation consequences
18 (or lack thereof) affects the validity of a guilty plea." Sandoval at *7-8. Prior to that ruling, not
19 knowing the immigration consequences of plea did not render it involuntary. Under Padilla and
20 Sandoval, a plea is involuntary if an attorney does not advise an defendant of the clear
21 immigration consequences of the plea. This is a significant, material change in the law.
22

23 Even though Padilla and Sandoval did not couch their holdings in terms of "direct" or
24 "collateral" consequences, both necessarily held that immigration consequences are not
25

1 collateral to criminal convictions. The Padilla court overturned the Kentucky Supreme Court's
2 holding that immigration consequences of guilty pleas are collateral. Therefore, the Supreme
3 Court necessarily held that immigration consequences are not collateral to criminal convictions.
4 The fact that the Court declined to explicitly use the framework of "direct" versus "collateral"
5 consequences does not change the analysis.

6 The fact that Padilla was based on a Sixth Amendment ineffective assistance of counsel
7 claim, rather than a due process argument, is irrelevant. It still represents a significant and
8 material change in the law. Questions regarding ineffective assistance often depend on
9 underlying due process issues. In State v. Martinez-Lazo, the defendant claimed that he had
10 received ineffective assistance because his counsel did not warn him of the deportation
11 consequences of his guilty plea. Martinez-Lazo, 100 Wn.App. at 876. The court, after
12 discussing the requirements for a voluntary guilty plea, held that the claim failed because
13 immigration proceedings were then considered collateral. Id. at 876-78. Padilla and Sandoval
14 resolved the issue of whether a "constitutionally competent" attorney must advise a client on
15 immigration consequences of a criminal conviction in the context of the Sixth Amendment. See
16 Sandoval. The issue is identical in the context of due process. It follows that due process
17 requirements for a voluntary plea are consistent with Sixth Amendment requirements.
18

19 Padilla and Sandoval effectively overturned a prior appellate decision that determined
20 the material issue of whether immigration consequences are collateral to guilty pleas. Id. 876-
21 78. The law is well-settled that a guilty plea cannot be accepted as voluntary until the defendant
22 had been informed of all direct consequences of the plea. State v. Barton, 93 Wn.2d 301, 305
23 (1980). Because Padilla and Sandoval are a significant and material change in the law, Mr.
24 Tsai's motion should be exempt from the one-year time limit.
25

1 2. The rule from *Padilla* should be applied retroactively.

2 The Supreme Court signaled that it understood that its holding in *Padilla* would apply
3 retroactively by giving “serious consideration” to the argument that its ruling would open the
4 “floodgates” to new litigation challenging prior guilty pleas. *Padilla*, 130 S. Ct. at 1484-85.
5 Most courts to reach the issue have held that *Padilla* can be applied retroactively, and all have
6 acknowledged that this is a close question. The only courts to decide this issue in the Ninth
7 Circuit have been the Eastern and Southern Districts of California, which have applied *Padilla*
8 retroactively. See *United States v. Chaidez*, 2009 U.S. Dist. LEXIS 116229 (S.D. Cal. Dec. 10,
9 2009); *United States v. Hubenig*, 2010 U.S. Dist. LEXIS 80179 (E.D. Cal. July 1, 2010); *Luna*
10 *v. United States*, 2010 U.S. Dist. LEXIS 124113 (S.D. Cal. Nov. 23, 2010).

11 The holding of *Padilla* can be applied retroactively if it is not a new rule of criminal
12 procedure, or if it meets one of two exceptions. The Supreme Court has declared that, going
13 forward, the issue of retroactivity should be decided as a threshold question on collateral review,
14 before addressing any constitutional claim. See *Teague v. Lane*, 489 U.S. 288, 305, 109 S. Ct.
15 1060, 103 L.Ed.2d 334 (1989). Although *Padilla* did make significant changes to the law as it
16 existed in Washington State, it is not a “new rule” for the purpose of a retroactivity analysis
17 under *Teague*. The *Teague* Court acknowledged that it is “often difficult to determine when a
18 case announces a new rule.” *Id.* at 301. “[A] case announces a new rule when it breaks new
19 ground or imposes a new obligation on the states or the Federal Government. To put it
20 differently, a case announces a new rule if the result is not *dictated* by precedent existing at the
21 time the defendant’s conviction became final.” *Id.* Moreover, “the mere existence of conflicting
22 authority does not necessarily mean a rule is new.” *Williams v. Taylor*, 529 U.S. 362, 410, 120
23 S. Ct. 1495 (2000).
24
25

1 Generally, when a well-established rule of law is applied in a new way based on the
2 specific facts of a particular case, it does not establish a “new rule.” See Stringer v. Black, 503
3 U.S. 222, 228-29, 112 S. Ct. 1130, 117 L.Ed.2d 367 (1992). In Hubenig, supra, the court held
4 that Padilla should be applied retroactively because it did not establish a “new rule.” The
5 Hubenig Court noted that counsel is already urged by professional standards to advise on
6 immigration consequences due to the importance a defendant might place on deportation.
7 Hubenig at *7. The requirement that defendants be informed of the direct consequences of a
8 guilty plea is well-established, and Padilla simply reclassifies deportation as a direct
9 consequence. By recognizing that immigration consequences are among the direct
10 consequences of a guilty plea, the Padilla court did not impose a new obligation on the State.
11 Thus, the rule is not “new” even though the Supreme Court’s recognition of removal as a
12 sufficiently important consequence *is* a significant change in the law.

13
14 Even if Padilla established a “new rule,” it should still be given retroactive application.
15 The Washington Supreme Court, in the case of In re Personal Restraint of St. Pierre, 118 Wn.2d
16 321 (1992), set forth standards for deciding whether a new rule should be applied retroactively.
17 See Olivera-Avila, 89 Wn.App. at 321. A new rule will be given retroactive application to cases
18 on collateral review if “(a) the new rule places certain kinds of primary, private individual
19 conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of
20 procedures implicit in the concept of ordered liberty.” St. Pierre, 118 Wn.2d at 326; Olivera-
21 Avila, 89 Wn.App. at 321. Olivera-Avila involved a motion to withdraw a plea based its
22 involuntary nature due to the defendant not having been informed of the direct consequences of
23 the plea. Olivera-Avila at 315-17. Although the court ultimately found that Mr. Olivera-Avila
24 was not entitled to relief, it did hold that the rule requiring that a defendant be informed of all
25

1 the direct consequences of a guilty plea was a rule that was implicit in due process, which
2 should therefore be applied retroactively. Id. at 321.

3 The rule from Padilla, that immigration consequences cannot be considered as collateral
4 to a criminal proceeding, should also be applied retroactively because it requires the observance
5 of procedures implicit in the concept of ordered liberty. The rule that immigration consequences
6 are not collateral to criminal proceedings implicates, in the context of the voluntariness of pleas,
7 due process rights. Like Padilla, the rule in Ross, 129 Wn.2d at 284, requires the observance of
8 a procedure – communication of all direct consequences of a guilty plea – that is implicit in due
9 process. Olivera-Avila, 89 Wn.App. at 321. A rule requiring observance of this procedure is to
10 be applied retroactively even on collateral review. Id. at 321.

11 CONCLUSION

12 For the foregoing reasons, the Court should grant Mr. Tsai’s motion for relief from the
13 judgment in this matter.

14
15
16 DATED this 18th day of May, 2011.

17 Respectfully submitted,

18 LAW OFFICE OF CHRISTOPHER BLACK, PLLC

19
20 *s/ Christopher Black*

21 Christopher Black, WSBA No. 31744

22 Attorney for Defendant

23 Law Office of Christopher Black, PLLC

24 119 First Avenue South, Suite 320

25 Seattle, WA 98104

Phone: 206.623.1604

Fax: 206.622.6636

Email: crb@crblack.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, and attachments, was served on May 18, 2011, via U.S. Mail, upon the parties required to be served in this action:

Pierce County Prosecuting Attorney
County-City Building
930 Tacoma Avenue South, Room 946
Tacoma WA 98402-2171

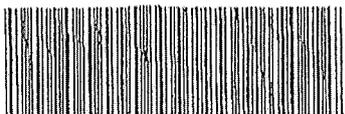
DATED this 18th day of May, 2011.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC

s/ Christopher Black
Christopher Black, WSBA No. 31744
Attorney for Defendant
Law Office of Christopher Black, PLLC
119 First Avenue South, Suite 320
Seattle, WA 98104
Phone: 206.623.1604
Fax: 206.622.6636
Email: crb@crblack.com

Exhibit A



06-1-00782-6 24975737 INFO 02-16-06

FILED
IN COUNTY CLERK'S OFFICE
A.M. FEB 16 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-00782-6

vs.

YUNG-CHENG TSAI,

INFORMATION

Defendant.

496 48961

DOB: 12/16/1980
PCN#: 538678139

SEX: MALE
SID#: 20513465

RACE: ASIAN/PACIFIC ISLAND
DOL#: WA TSAI*Y*202RW

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse YUNG-CHENG TSAI of the crime of UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, committed as follows:

That YUNG-CHENG TSAI, in the State of Washington, on or about the 15th day of February, 2006, did unlawfully, feloniously, and knowingly possess, with intent to deliver to another, a controlled substance, to-wit: Marijuana, classified under Schedule I of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(c), and against the peace and dignity of the State of Washington.

DATED this 16th day of February, 2006.

TACOMA POLICE DEPARTMENT
WA02703

GERALD A. HORNE
Pierce County Prosecuting Attorney

cto

By:

CORT T. O'CONNOR
Deputy Prosecuting Attorney
WSB#: 23439

INFORMATION- 1

ORIGINAL

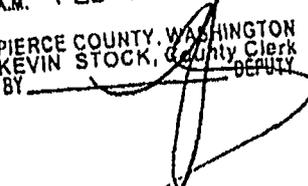
Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

Exhibit B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED
IN COUNTY CLERK'S OFFICE

A.M. FEB 21 2006 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY  DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
Plaintiff,)
v.)
YUNG-CHENG TSAI,)
Defendant.)

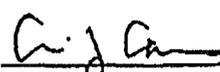
NO. 06-1-00782-6

NOTICE OF APPEARANCE;
REQUEST FOR DISCOVERY

TO: PROSECUTING ATTORNEY'S OFFICE;
AND TO: CLERK OF THE COURT:

PLEASE TAKE NOTICE that ERIK BAUER of the Law Offices of Bauer & Balerud, Attorneys at Law, hereby appears as Counsel for the defendant, YUNG-CHENG TSAI, hereby requests discovery pursuant to CrR 4.7.

DATED this 21st day of February, 2006.

 #36844 for Bauer
ERIK BAUER
WSB #14937
Attorney for Defendant

ORIGINAL

THE LAW OFFICES OF
BAUER & BALERUD
215 Tacoma Avenue South
Tacoma, Washington 98402
(253) 383-2000 or (360) 895-1500
FAX (253) 383-0154

Exhibit C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

YUNG-CHENG TSAI,

Defendant.

CASE NO.: 06-1-00782-6

DECLARATION OF VICKY
DOBRIN

I, Vicky Dobrin, am over the age of eighteen and competent to testify in this matter.

1. I am an immigration attorney in private practice at Dobrin & Han, PC in Seattle, Washington. I am admitted to practice by the Washington State Bar, and my state bar number is 28554. My business address is 705 Second Avenue, Suite 610, Seattle, Washington 98104.

2. Mr. Tsai was placed in removal proceedings in 2005, as a result of a prior criminal conviction. I represented him in those removal proceedings. On April 22, 2005, those proceedings were terminated by an immigration judge, who determined that Mr. Tsai was not subject to deportation. Because I represented Mr. Tsai in his prior removal proceedings, I am familiar with his immigration history.

3. I spoke to Mr. Tsai on April 24, 2006, after my representation of him had ceased. He told me that he was charged with possession of marijuana with the intent to deliver. I told Mr. Tsai that if he pled guilty or were found guilty of this charge, I believed it 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. During that meeting, we also discussed possible alternate pleas that would allow him to either avoid deportation or at least be eligible for discretionary relief from deportation.

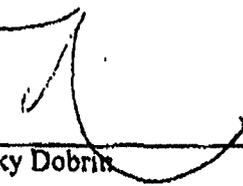
Declaration of Vicky Dobrin

STIRBIS & STIRBIS
4119 Sixth Avenue
Tacoma, WA 98406
253-573-9111
253-272-8318 Facsimile

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. 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. In particular, I told him that 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. I also spoke to Mr. Bauer about alternate pleas that would give Mr. Tsai the chance to avoid certain deportation.

Dated: March 6, 2008



Vicky Dobrin

Declaration of Vicky Dobrin

STIRBIS & STIRBIS
4119 Sixth Avenue
Tacoma, WA 98406
253-573-9111
253-272-8318 Facsimile

Exhibit D

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
Plaintiff,)	Case No.: 06-1-00782-6
)	
vs.)	AFFIDAVIT OF
)	YUNG-CHENG TSAI
YUNG-CHENG TSAI,)	
Defendant.)	
<hr/>		

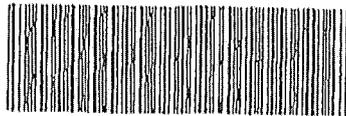
I, Yung-Cheng Tsai, Defendant in this action, am over the age of 18, am of sound mind and discretion, and am competent to testify. I declare on oath and affirm under penalty of perjury of the laws of the State of Washington that all of the following is true and correct, and is based on my first-hand knowledge:

1) In February of 2006, I was arrested and charged with possession with intent to deliver marijuana in Pierce County.

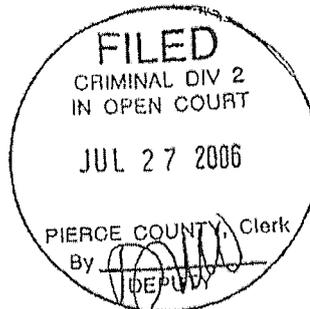
2) In April of 2006, I met with Ms. Vicky Dobrin, an attorney whose practice focuses on immigration law, to discuss the effect the pending criminal charges would have on my permanent resident immigration status. Atty. Dobrin told me at that time she "believed" intent to deliver was an aggravated felony, and a conviction for it would thus make me removable from the United States. She advised me of alternative pleas to possibly avoid deportation. Then, I asked Atty. Dobrin to discuss these alternative pleas with my criminal defense counsel Atty. Erik Bauer.

3) A few days later, Atty. Bauer contacted me and told me that he had spoken to Atty. Dobrin about the effect of a conviction on my immigration status, and possible alternative pleas to preserve my residence in the United States. Mr. Bauer indicated to me that he and Atty. Dobrin had worked out ways I could plead guilty in order to prevent criminal charges that would result in removal.

Exhibit E



06-1-00782-8 25072420 STTDFG 07-27-06



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
 Plaintiff,
 vs.
Yung Chung Tsai Defendant.

Cause No. 06-1-00782-6
 STATEMENT OF DEFENDANT ON
 PLEA OF GUILTY
 USE FOR NON-VIOLENT CRIMES
 COMMITTED AFTER 7-1-00

1. My true name is: Yung Chung Tsai
2. My age is: 25, DOB: 12/15/80.
3. I went through the 12th grade.
4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
 (a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is: Erik Bayer WSBA#: 14937

(b) I have received a copy of and I am charged in original Information with the crime(s) of:
 Count I: Unlawful possession of a controlled substance, with intent to deliver
 Elements: In the State of WA, unlawfully, feloniously, and knowingly possess, with intent to deliver to another, a controlled substance, classified under schedule I of the uniform controlled substance Act, including to RCW 69.50.401(1)(2)(c)
 Count II:
 Elements: In the State of WA,

(c) Additional counts are addressed in Attachment 4(d).

5. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:
 (a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	COMMUNITY CUSTODY RANGE	MAXIMUM TERM AND FINE
1	3	6+ - 18	—	6+ - 18	0 - 12	\$4 / 10k
2						

* (V) VUCSA in protected zone, (JP) Juvenile present

(b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes other current offenses, prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere. The parties stipulate the standard range is correct and may be relied upon.

(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions prior to being sentenced.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding upon me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase, even if the result is a mandatory sentence of life imprisonment without the possibility of parole.

(e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees, the costs of incarceration, and other legal financial obligations.

(f) In addition to sentencing me to confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the community custody range established for that offense type unless the judge finds substantial and compelling reasons not to do so. If the period of earned release awarded per RCW 9.94A.728 (formerly RCW 9.94A.150) is longer, that will be the term of my community custody. If I have been convicted of a crime that is not listed in the chart and my sentence is more than 12 months, I will be placed on community custody for the period of earned release.

OFFENSE TYPE	COMMUNITY CUSTODY RANGE
Crimes Against Persons as defined by RCW 9.94A.411 (formerly 4A0(21))	9 to 18 months or up to the period of earned release, whichever is longer
Offenses under Chapter 09.50 or 09.52 RCW (Not sentenced under RCW 9.94A.505 (formerly 120(6)))	9 to 12 months or up to the period of earned release, whichever is longer

During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me. My failure to comply with these conditions will render me ineligible for general assistance, RCW 74.04.005(6)(h), and may result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions.

(g) The prosecuting attorney will make the following recommendation to the judge; The State and the defendant will jointly make this recommendation. 11 months in custody, \$2100.00 costs,

\$500.00 C.V.P.A., \$250.00 Agency drug fund, \$100.00 DNA fee,
\$1000.00 fine, Drug treatment per RCW, 12 months community custody,
no visit or possession of unlicensed substance, no association with drug users or sellers.
Forfeit any items in property except \$ earnings, keys and cell phone.

(h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range of actual confinement and community custody unless the judge finds substantial and compelling reasons not to do so. If the judge goes outside the standard range of actual confinement and community custody, either the State or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

(i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. I am am not a United States citizen.

(j) I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040.

(k) Public assistance will be suspended during any period of imprisonment.

(l) I understand that I will be required to have a biological sample collected for purposes of DNA identification analysis. For offenses committed on or after July 1, 2002, I will be assessed a \$100 DNA collection fee.

NOTIFICATION RELATING TO SPECIFIC CRIMES: IF ANY OF THE FOLLOWING PARAGRAPHS

DO NOT APPLY, THEY SHOULD BE STRICKEN.

(m) The judge may sentence me as a first-time offender instead of giving me a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days confinement, and up to two years of community custody, plus all of the conditions described in paragraph 5(f). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training.

(n) If this is a crime of domestic violence and I, or the victim of the offense has a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(o) If this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus.

(p) The judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660, formerly RCW 9.94A.120(6). This sentence could include a period of total confinement in a state facility for one-half of the midpoint of the standard range plus all of the conditions described in paragraph 5(f). During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose community custody of at least one-half of the midpoint of the standard range that must include appropriate substance abuse treatment, a condition not to use illegal controlled substances, and a requirement to submit to urinalysis or other testing to monitor that status. Additionally, the judge could prohibit me from using alcohol or controlled substances, require me to devote time to a specific employment or training, stay out of certain areas, pay thirty dollars per month to offset the cost of monitoring and require other conditions, including affirmative conditions. For offenses committed on or after June 8, 2000, if an offender receives a DOSA sentence and then fails to complete the drug offender sentencing alternative program or is administratively reclassified by the department of corrections, the offender shall be reclassified to serve the unexpired term of the sentence as ordered by the sentencing judge and shall then be subject to a range of community custody and early release as specified in section 5(f) of the plea form.

(q) If the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.

(r) If this crime involves the manufacture, delivery, or unlawful possession with the intent to deliver methamphetamine or amphetamine or unlawful possession of pseudoephedrine or anhydrous ammonia with intent to manufacture methamphetamine, a mandatory methamphetamine clean-up fine of \$3,000.00 will be assessed. RCW 69.50.401(a)(1)(ii) or RCW 69.50.440.

(s) If this crime involves a motor vehicle, my driver's license or privilege to drive will be suspended or revoked. If I have a driver's license, I must now surrender it to the judge.

(t) I understand that the offense(s) I am pleading guilty to include a deadly weapon or firearm enhancement. Deadly weapon or firearm enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon or firearm enhancements.

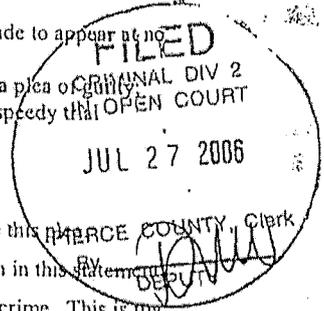
(u) I understand that the offenses I am pleading guilty to include both a conviction under RCW 9A.10.040 for unlawful possession of a firearm in the first or second degree and one or more convictions for the felony crimes of theft of a firearm or possession of a stolen firearm. The sentences imposed for these crimes shall be served consecutively to each other. A consecutive sentence will also be imposed for each firearm unlawfully possessed.

(v) I understand that if I am pleading guilty to the crime of unlawful practices in obtaining assistance as defined in RCW 74.08.331, no assistance payment shall be made for at least 6 months if this is my first conviction and for at least 12 months if this is my second or subsequent conviction. This suspension of benefits will apply even if I am not incarcerated. RCW 74.08.290.

(w) If this crime involves a violation of the state drug laws, my eligibility for state and federal food stamps, welfare, and education benefits will be affected. 20 U.S.C. §1091(r) and 21 U.S.C. § 826a.

6. I UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

- (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;
- (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
- (c) The right at trial to hear and question the witnesses who testify against me;
- (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
- (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial as well as other pretrial motions such as speedy trial challenges and suppression issues.



7. I make this plea freely and voluntarily.

8. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On February 15, 2006 in Pierce County, I knowingly possessed a sealed substance, marijuana, with the intent to deliver that marijuana to another person. I understand this was wrong and I am sorry.

If my statement is a Newton or Alfred Plea, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

12. I was given a copy and I read this plea statement. My lawyer read this plea statement to me. Also, my lawyer has explained to me, and we have fully discussed, all of the above paragraphs. If I have any more questions about it, I understand I can and need to ask the judge when I enter my plea of guilty.

Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

Defendant's Lawyer, WSBA# 29661

Approved for entry:

Prosecuting Attorney, WSBA# 35536

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The court finds:

- (a) The defendant had previously read the entire statement above and the defendant understood it in full; or
- (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

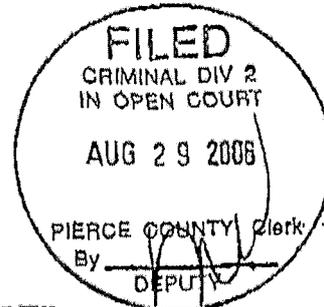
Dated this 27 day of July, 2006.

Bryan E. Chushcoff
Judge

BRYAN E. CHUSHCOFF

Exhibit F

06-1-00782-6



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-00782-6

vs.

JUDGMENT AND SENTENCE (JS)

YUNG-CHEUNG TSAI

Defendant.

- Prison
- Jail One Year or Less
- First-Time Offender
- SSOSA
- DOSA
- Breaking The Cycle (BTC)

AUG 29 2006

SID: 20513465
DOB: 12/16/80

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 9/20/06 7-27-06 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO
I	UPCS W/ID (75) Marijuana - Schedule I	69.50.401(1)(2)(e)	NONE	02/15/06	060460362.TPD

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present.

as charged in the Original Information

The court finds that the offender has a chemical dependency that has contributed to the offense(s).
RCW 9.94A.

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589);

06-9-10034-5

06-1-00782-6

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A.S.J. ADULT JUV	TYPE OF CRIME
1	VEHIC HOMICIDE	05/29/02	Pierce County, WA	06/24/01	A	FEL
2	VEHIC ASLT	05/29/02	Pierce County, WA	06/24/01	A	FEL
3	VEHIC ASLT	05/29/02	Pierce County, WA	06/24/01	A	FEL

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancement)	MAXIMUM TERM
I	3	I	6+ - 18 MOS	NONE	6+ - 18 MOS	3 YRS

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 LEGAL FINANCIAL OBLIGATIONS. The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows: N/A

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 The court DISMISSES Counts _____ The defendant is found NOT GUILTY of Counts _____

06-1-00782-6

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN	\$ _____	Restitution to: _____
	\$ _____	Restitution to: _____
	(Name and Address - address may be withheld and provided confidentially to Clerk's Office).	
PCV	\$ <u>500.00</u>	Crime Victims Assessment
DNA	\$ <u>100.00</u>	DNA Database Fee
PUB	\$ _____	Court-Appointed Attorney Fees and Defense Costs
FRC	\$ <u>200.00</u>	Criminal Filing Fee
FCM	\$ <u>1000.⁰⁰</u>	Fine
CLF	\$ _____	Crime Lab Fee [] deferred due to indigency
CDF/DFA-DFZ	\$ <u>250.⁰⁰</u>	Drug Investigation Fund for <u>Tacoma PD</u> (agency)
WFR	\$ _____	Witness Costs

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 2050.⁰⁰ TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ per CCO per month commencing per CCO RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

[] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[] shall be set by the prosecutor.

[] is scheduled for _____

[] defendant waives any right to be present at any restitution hearing (defendant's initials): _____

[] RESTITUTION. Order Attached

4.3 COSTS OF INCARCERATION

[] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate RCW 10.01.160.

4.4 COLLECTION COSTS

JUDGMENT AND SENTENCE (JS)
(Felony) (6/19/2003) Page 3 of 12

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

06-1-00782-6

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.7 [] HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 [X] DNA TESTING

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 NO CONTACT

The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

[] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.10 OTHER:

See Appendix E
forfeit contained in property room

4.11 BOND IS HEREBY EXONERATED

06-1-00782-6

4.12 JAIL ONE YEAR OR LESS. The defendant is sentenced as follows:

(a) CONFINEMENT, RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the county jail:

11 days/months on Court I days/months on Court
_____ days/months on Court _____ days/months on Court

Actual number of months of total confinement ordered is: 11 months

CONSECUTIVE/CONCURRENT SENTENCES; RCW 9.94A.589

All counts shall be served concurrently, except for the following which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here. the sentence herein shall run consecutively to the felony sentence in cause number(s) _____

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: _____

Confinement shall commence immediately unless otherwise set forth here: _____

PARTIAL CONFINEMENT. Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions: _____

- Work Crew RCW 9.94A.135
- Home Detention RCW 9.94A.180, 190
- Work Release RCW 9.94A.180

CONVERSION OF JAIL CONFINEMENT (Nonviolent and Nonsex Offenses). RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

BTC Facility

ALTERNATIVE CONVERSION, RCW 9.94A.680. _____ days of total confinement ordered above are hereby converted to _____ hours of community service (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections (DOC) to be completed on a schedule established by the defendant's community corrections officer but not less than _____ hours per month.

Alternatives to total confinement were not used because of: _____

- criminal history
- failure to appear (finding required for nonviolent offenders only) RCW 9.94A.680.

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

21 days

06-1-00782-6

4.13 **COMMUNITY SUPERVISION CUSTODY.** RCW 9.94A.505. Defendant shall serve 12 months (up to 12 months) in community supervision (Offense Pre 7/1/00) or community custody (Offense Post 6/30/00). Defendant shall report to DOC, 755 Tacoma Ave South, Tacoma, not later than 72 hours after release from custody, and the defendant shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC and shall comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community supervision or community custody and any other conditions of community supervision or community custody stated in this Judgment and Sentence or other conditions imposed by the court or DOC during community custody. The defendant shall:

- Remain in prescribed geographic boundaries specified by the community corrections officer
- Notify the community corrections officer of any change in defendant's address or employment
- Cooperate with and successfully complete the program known as Breaking The Cycle (BTC)

Other conditions: _____

The community supervision or community custody imposed by this order shall be served consecutively to any term of community supervision or community custody in any sentence imposed for any other offense, unless otherwise stated. The maximum length of community supervision or community custody pending at any given time shall not exceed 24 months, unless an exceptional sentence is imposed. RCW 9.94A.569. The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here:

4.14 **OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020.** The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

06-1-00782-6

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. N/A

5.7 **RESTITUTION AMENDMENTS.** The portion of the sentence regarding restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.

5.8 **OTHER:** _____

06-1-00782-6

DONE in Open Court and in the presence of the defendant this date: 8-29-06

JUDGE

Print name

SERGIO ARMILIO

Jennifer Sievers

Deputy Prosecuting Attorney

Print name: Jennifer Sievers

WSB # 35536

Attorney for Defendant

Print name: Earl Fawcett

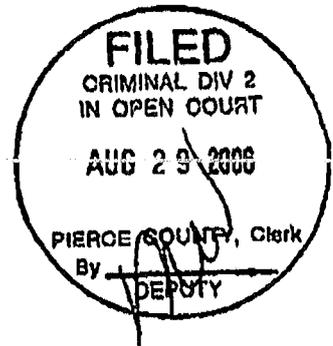
WSB # 17937

Defendant

Print name: Yung-Cheng Tsai

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. IF I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050, or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored in a class C felony, RCW 92A.84.660.

Defendant's signature: [Signature]



06-1-00782-6

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 06-1-00782-6

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

CARLA HIGGINS

Court Reporter

06-1-00782-6

APPENDIX "E" - ADDITIONAL CONDITIONS OF RELEASE

It is further ordered that the defendant, as a condition of his/her community supervision, as a first-time offender, shall:

- FTO 1) Refrain from committing new offenses;
- FTO 2) Devote time to a specific employment or occupation;
- FTO 3) Enter and successfully complete Breaking the Cycle (BTC) or other available outpatient treatment for up to two years, or inpatient treatment as designated by Community Corrections Officer;
- FTO 4) Pursue a prescribed, secular course of study or vocational training;

It is further ordered that the defendant, as a condition of his/her community supervision, shall:

- 1) Remain within prescribed geographical boundaries. Notify the court or the community corrections officer prior to any change in the defendant's address or employment;
- 2) Report as directed to the court and a community corrections officer;
- 3) (NARC order) Refrain from entering certain geographical boundaries (designated by attachment);
- 4) Not purchase, possess, or use any controlled substances without a prescription from a licensed physician. Provide a written prescription for controlled substances to the Community Corrections Officer within 24 hours of receipt. Submit to urinalysis as directed by the Community Corrections Officer;
- 5) Refrain from associating with drug users or drug sellers;
- 6) Comply with Breaking the Cycle (BTC) Program requirements, including participation in BTC recommended chemical dependency treatment;
- OTHER: Drug treatment as set by CCO.

Exhibit G

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

YUNG-CHENG TSAI

Defendants.

CASE NO.:06-1-00782-6

DECLARATION OF
MARIA STIRBIS

I, Maria Stirbis, am over the age of eighteen and competent to testify in this matter.

1. On November 30, 2007, Mike Tsai retained my firm's services to research and file a motion to withdraw a guilty plea in the above-referenced matter.

2. On June 12, 2008, I spoke with Kaaren Barr, immigration attorney whom Mr. Tsai hired to help him fight INS deportation proceedings.

3. Ms. Barr advised me that on October 30, 2007, the INS issued Mr. Tsai a Notice to Appear, which stated that he was subject to deportation because he had been convicted of an aggravated felony.

4. Ms. Barr also related that on November 3, 2007, Mr. Tsai contacted her about challenging his deportation.

STIRBIS & STIRBIS
4119 Sixth Avenue
Tacoma, WA 98406
253-573-9111
253-272-8318 Facsimile

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge.

DATED this 20th day of June, at Tacoma

2008.


Maria Stirbis

STIRBIS & STIRBIS
4119 Sixth Avenue
Tacoma, WA 98406
253-573-9111
253-272-8318 Facsimile

Exhibit H

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

THE STATE OF WASHINGTON,

Plaintiff,

vs.

YUNG-CHENG TSAI,

Defendant.

No. 06-1-00782-6

DECLARATION OF CHRISTOPHER
BLACK

I, Christopher Black, am over the age of 18 and competent to testify in this matter.

1. On February 16, 2011, I spoke with Matt Adams, an immigration attorney representing Mr. Tsai in immigration proceedings.

2. Mr. Adams informed me that Mr. Tsai was currently in deportation proceedings on the basis of his conviction in this case being an aggravated felony.

3. On March 18, 2011, Yung-Cheng Tsai engaged my firm's services to research and file a motion to withdraw a guilty plea in the above-referenced matter.

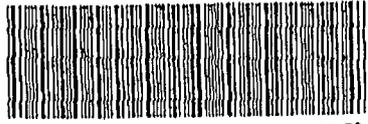
I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge.

DATED this 17th day of May at Seattle, Washington.

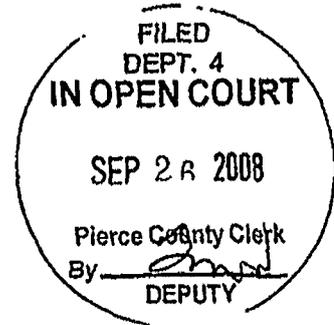


Christopher Black

Exhibit I



06-1-00782-6 30804924 ORDY 09-26-08



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

YUNG-CHEN TSAI,

Defendant.

CAUSE NO. 06-1-00782-6

ORDER ON MOTION FOR RELIEF
FROM JUDGMENT (CrR 7.8)

Clerk's Action Required

THIS MATTER came on before the undersigned judge of the Pierce County Superior Court based upon the written motion for relief from judgment filed by the defendant. The motion is in the form of a "Defendant's Motion To Withdraw Guilty Plea" to the court dated July 19, 2008 (filed July 21, 2008) and brought to this court's attention September 2008. The court reviewed the pleadings submitted by the defendant and reviewed the file. Therefore, being duly advised in all matters, the court hereby enters the following order:

IT IS HEREBY ORDERED that the defendant's motion for relief from judgment is denied based upon the written material submitted. Defendant's motion is time barred by RCW 10.73.090. Defendant has failed to show any exception to the time bar applicable to defendant's motion.

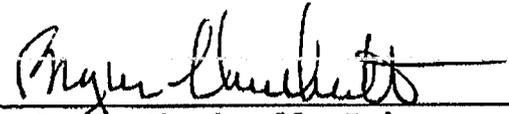
[a]n examination of the cases in which we have applied the equitable tolling doctrine as between private litigants affords petitioner little help. Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196 (1984). Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 457 - 458 (1990) cited favorably in *State v. Duvall*, 86 Wn. App. 871, 875 (1997).

So Defendant's invocation of the doctrine of equitable tolling does not apply to the facts of this matter. Assuming, *arguendo*, that defendant's counsel provided incorrect information on July 27, 2006, nonetheless: a) the defendant was informed by immigration counsel on April 24, 2006 - prior to entering into the plea on July 27, 2006 -

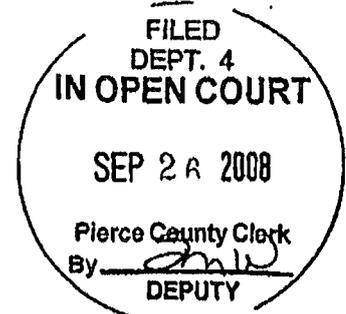
that if he were found guilty of the crime of Unlawful Possession of Marihuana With Intent to Deliver that he would be deportable and ineligible to apply for discretionary relief from deportation; b) that at the sentencing hearing of August 29, 2006, he was present when his counsel stated that defendant "is actually a native of Taiwan and so there's probably going to be some deportation 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 slightly better argument in immigration issues later on;" and, c) that defendant's untimely application was not a product of a failed timely application. In such circumstances defendant fails to establish the doctrine of equitable tolling.

ORDER signed this 25th day of September, 2008.


 Bryan Chushcoff, Judge

cc: Scott Peters
 Deputy Prosecuting Attorney

Maria Stirbis WSBA #26048
 Stirbis & Stirbis
 Attorney for Defendant
 4119 Sixth Avenue
 Tacoma, WA 98406



1
2
3
4
5
6 THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

7
8 THE STATE OF WASHINGTON,

9 Plaintiff,

10 v.

11 YUNG-CHENG TSAI,

12 Defendant.

No. 06-1-00782-6

ORDER GRANTING MOTION FOR
RELIEF FROM JUDGMENT

[PROPOSED]

13 Good cause having been shown, Defendant's motion for relief from the judgment
14 previously entered in the above-noted matter is GRANTED.

15 The Court hereby orders the following specific relief:

16 Defendant's plea of guilty is withdrawn and the judgment and sentence are hereby
17 voided.

18 DATED this ____ day of _____, 2011.

21 _____
The Honorable Bryan E. Chushcoff
22 Pierce County Superior Court Judge

23 Presented by:

24 _____
25 Christopher Black, WSBA #31744
Attorney for Yung-Cheng Tsai

ORDER GRANTING MOTION FOR RELIEF FROM
JUDGMENT - 1

LAW OFFICE OF CHRISTOPHER BLACK, PLLC
119 First Avenue South, Suite 320
Seattle, WA 98104
206.623.1604 | Fax: 206.622.6636