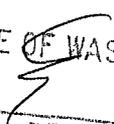


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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

Case No. 43118-1-II

PERSONAL RESTRAINT PETITION OF
YUNG-CHENG TSAI

PETITIONER'S REPLY TO STATE'S RESPONSE TO
PERSONAL RESTRAINT PETITION

YUNG-CHENG TSAI
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7 **IN THE COURT OF APPEALS**
8 **OF THE STATE OF WASHINGTON**
9 **DIVISION II**

10 IN RE THE PERSONAL RESTRAINT
11 PETITION OF:

12 YUNG-CHENG TSAI,

13 Petitioner.

No. 43118-1-II

PETITIONER'S REPLY
TO STATE'S RESPONSE TO
PERSONAL RESTRAINT PETITION

14 COMES NOW petitioner, Yung-Cheng Tsai (Mr. Tsai), pro se, files the following reply
15 to State's response dated November 28, 2012, received by petitioner on November 30, 2012.

16 **A. IDENTITY OF PETITIONER**

17 The petitioner Yung-Cheng Tsai is a lawful permanent resident currently detained by the
18 Immigration and Customs Enforcement (ICE), pending removal (deportation) from the United
19 States based on the challenged VUCSA conviction.

20 **B. JURISDICTION**

21 This court has jurisdiction in this matter pursuant to RAP 16 et seq.

22 **Facts relating to jurisdictional restraint.**

23 Mr. Tsai is neither in custody nor under supervision by the State of Washington based on
24 the VUCSA conviction. However, Mr. Tsai still owes over \$800 for legal financial obligations
25

1 associated with this challenged conviction. Furthermore, Mr. Tsai is currently serving a term of
2 community custody for an unrelated crime committed in 2008. This VUCSA conviction
3 contributed to the length of his current sentence.

4 Mr. Tsai is therefore under “restraint” for purposes of RAP 16.4(b) because “restraint”
5 includes any “disability resulting from a judgment or sentence in a criminal case.” RAP 16.4(b).
6 And thus, Mr. Tsai satisfies the threshold requirement for relief by means of a personal restraint
7 petition (PRP).

8 **C. ISSUES PRESENTED FOR REVIEW**

- 9 **1. Whether *Padilla v. Kentucky* and *State v. Sandoval* are significant changes in the**
10 **laws that are material with sufficient reasons to apply retroactively to Mr. Tsai’s**
11 **conviction?**
- 12 **2. Whether under the *Strickland* test, Mr. Tsai received ineffective assistance from**
13 **trial counsel’s deficient performance and suffered prejudice when counsel**
14 **affirmatively misadvised him of deportation consequences?**

15 **D. STATEMENT OF THE CASE**

16 On February 16, 2006, petitioner Yung-Cheng Tsai was charged in Pierce County
17 Superior Court with one count of Unlawful Possession of a Controlled Substance with Intent to
18 Deliver-Marijuana. *CP* at 1-2. Mr. Tsai retained Erik Bauer of Bauer and Balerud Law Firm, and
19 on February 21, 2006, a Notice of Appearance was filed on the criminal case. *CP* at 108.

20 On April 24, 2006, Mr. Tsai contacted immigration attorney Vicky Dobrin, who had
21 represented him in an earlier immigration proceeding. *Appendix A, Declaration of Vicky Dobrin.*
22 Ms. Dobrin advised Mr. Tsai that he if he was convicted as charged, he would be removed as an
23 aggravated felon. *Id.* Ms. Dobrin suggested alternate pleas that would avoid deportation or
24 preserve his eligibility for discretionary relief. *Id.* When Mr. Tsai told Ms. Dobrin he was
25 represented by Mr. Bauer, Ms. Dobrin told Mr. Tsai that “it would be important for his attorney
and me to speak regarding the immigration consequences of his pending charge before Mr. Tsai

1 made any decisions regarding what course he should take.” *Id.*

2 On April 28, 2006, Ms. Dobrin spoke to Mr. Bauer and advised him that a conviction as
3 charged would be “regarded as an ‘aggravated felony’ under immigration law” which would not
4 only render Mr. Tsai deportable but would also bar Mr. Tsai from any form of discretionary
5 relief from deportation. *Id.* Ms. Dobrin also discussed alternate pleas with Mr. Bauer, including a
6 plea to either possession of a controlled substance or solicitation. *Id.*

7 However, at no time did Ms. Dobrin inform Mr. Bauer that the length of the sentence
8 would be relevant to the “aggravated felony” analysis, should Mr. Tsai plead guilty to possession
9 with intent to deliver. *Id.* Nor did they ever discuss the sentence issue at all during the
10 conversation. *Id.* Ms. Dobrin offered Mr. Bauer to consult with her further regarding alternate
11 plea options for Mr. Tsai and requested Mr. Bauer to call her before moving forward with any
12 particular plea or before going to trial. *Id.* Mr. Bauer did not contact Ms. Dobrin after that
13 conversation. *Id.*

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

20 On July 27, 2006, Mr. Bauer sent an associate to handle the guilty plea. *CP* at 6. Prior to
21 entering the plea, Mr. Tsai spoke to the associate again about his concern that the plea may
22 impact his immigration status. *CP* at 36. The associate indicated that pleading guilty as charged
23 should not jeopardize Mr. Tsai’s immigration status. *Id.* Based on this additional assurance by
24 the associate of Mr. Bauer’s advice, Mr. Tsai pled guilty as charged. *Id.*, see also *CP* at 3-6.
25

1 During the plea proceeding, the court inquired whether anyone has made him any promises in
2 order to induce him to plead guilty “other than what the State may have agreed to do or
3 recommend,” Mr. Tsai answered “no.” *RP of Plea* at 7.¹

4 On August 29, 2006, Mr. Tsai appeared with Mr. Bauer for the sentencing hearing. *RP of*
5 *Sentencing* at 2, *CP* at 16. At the hearing, Mr. Bauer stated that the 11 months sentence was “an
6 agreed recommendation before the court.” *RP of Sentencing* at 2. Mr. Bauer further stated:

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

10 *Id.* at 2-3. (Emphasis added). The sentencing court followed the recommendation and sentenced
11 Mr. Tsai to 11 months confinement, *id.* at 3, see also *CP* at 13; 12 months of community
12 custody, *CP* at 14; and \$2050 in legal financial obligations, *CP* at 11.² Mr. Tsai still owes more
13 than \$800 in legal financial obligations in this case. *Appendix B.*

14 On October 30, 2007, a year after Mr. Tsai was released from custody, and over a year
15 after the judgment became final, the Department of Homeland Security issued a “Notice to
16 Appear” based on this controlled substance conviction charging Mr. Tsai with deportability
17 under 8 U.S.C. § 1227(a)(2)(B)(i) and an “aggravated felony” under 8 U.S.C. §
18 1227(a)(2)(A)(iii). *CP* at 51. On November 1, 2007, Mr. Tsai was detained by the Immigration
19 and Customs Enforcement and placed in removal proceedings. *Appendix B.* That was when Mr.
20 Tsai first learned that he received affirmative misrepresentation of the deportation consequences
21 by Mr. Bauer. *Id.* Up until then, Mr. Tsai “had no reason to question Mr. Bauer’s advice.” *Id.*

22
23 ¹ The petitioner did not receive an index to the Verbatim Report of Proceedings, and thus, the petitioner cites to the
24 July 27, 2006, Plea Proceedings as “RP of Plea” and the August 29, 2006, Sentencing Proceeding as “RP of
25 Sentencing” as provided by the Pierce County Court Reporters.

² Following the sentencing proceeding Mr. Tsai was taken into custody and began serving the term of commitment.
However, on October 29, 2006, Mr. Tsai was early released due to jail over-crowding and began serving the term of
community custody.

1 On November 3, 2007, Mr. Tsai hired immigration lawyer Kaaren Barr to challenge his
2 deportation. *CP* at 51. On November 30, 2007, Mr. Tsai hired Stirbis and Stirbis Law Firm to
3 research and file a motion to withdraw his guilty plea. *Id.*

4 On July 21, 2008, Maria Stirbis filed a "Motion to Withdraw Guilty Plea" under CrR
5 7.8(b)(4) reasoning that under *State v. Stowe*, 71 Wn.App. 182, 858 P.2d 267 (1993) and *U.S. v.*
6 *Kwan*, 407 F.3d 1005 (9th Cir. 2005), the plea was involuntary due to ineffective assistance by
7 counsel's affirmative misrepresentation regarding immigration consequences. *CP* at 25-27. And,
8 when Mr. Tsai was notified by the INS of the deportation consequence of the plea and learned
9 that he received affirmative misrepresentation from counsel, he acted diligently in seeking relief,
10 and thus, the doctrine of equitable tolling under *State v. Littlefair*, 112 Wn.App. 749, 51 P.3d 116
11 (2002) should apply to RCW 10.73.090. *CP* at 24-25.

12 On September 25, 2008, the trial court entered an order denying the motion to withdraw
13 guilty plea on grounds that it was time barred by RCW 10.73.090 and the doctrine of equitable
14 tolling did not apply to the facts. *CP* at 88-89. The trial court observed, assuming, arguendo, that
15 defendant's counsel provided incorrect information on July 27, 2006, it would also have denied
16 the ineffective assistance of counsel claim based on the facts that: a) Mr. Tsai was advised on
17 April 24, 2006 of the deportation consequences before he entered his plea on July 27, 2006; b)
18 Mr. Tsai was present at the sentencing hearing when Mr. Bauer made the statement regarding
19 possible immigration issues and the importance of the 11 months sentence to give him better
20 arguments later on; and c) Mr. Tsai's untimely application was not a product of a failed timely
21 application. *CP* at 88-89. In reaching this decision, the trial court did not apply the *Strickland* test
22 or any other analysis. *See CP* at 88-89. No appeals were filed on this order.

24 On March 18, 2011, Mr. Tsai engaged attorney Christopher Black to again challenge this
25 judgment. *CP* at 135. On May 18, 2011, Mr. Black filed "Motion For Relief From Judgment" in

1 the Superior Court under CrR 7.8(b)(4), reasoning that Mr. Tsai entered an involuntary plea
2 when Mr. Tsai received ineffective assistance from counsel's erroneous advice that his guilty
3 plea would not make him deportable from the United States, and that the exception under RCW
4 10.73.100(6) should apply to RCW 10.73.090(1) because the decision in *Padilla v. Kentucky*, ___
5 U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and *State v. Sandoval*, 171 Wn.2d 163, 249
6 P.2d 1015 (2011) were significant changes in the law material to Mr. Tsai's conviction. *CP* at
7 90-140.

8 On August 31, 2011, the trial court entered an order to retain consideration of the motion.
9 *CP* at 141-143. Upon reviewing further pleadings submitted by Mr. Tsai and the State, (see *CP*
10 at 144-177), the trial court ruled on the merits and entered an order on October 18, 2011, denying
11 the motion as time barred by RCW 10.73.090. *CP* at 178-181. The trial court held in its analysis
12 that "Mr. Tsai's counsel's obligation in 2006 when Mr. Tsai entered into his plea were the same
13 as they would be now, post-*Padilla*, i.e. to provide accurate legal advice about immigration
14 consequences of a plea." *CP* at 180. Therefore, there were no "significant change in the law that
15 is material to the conviction, sentence, or other order,' affecting Mr. Tsai." *CP* at 180. However,
16 the trial court explicitly acknowledged in a footnote that:

17
18 This case is not a typical pre-*Padilla* (or pre-*Littlefair*) failure of a lawyer to provide any
19 warning about immigration consequences because it was "only" a "collateral"
20 consequence of the plea. *The undisputed facts 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.

21 *CP* at 180 fn. 1 (emphasis added). The trial court further held in Part B its agreement with those
22 courts that have held the rule announced in *Padilla* is not retroactive under *Teague v. Lane*, 489
23 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and thus "will not repeat the analysis..." *CP*
24 at 180-181.

25 On November 8, 2011, Mr. Tsai submitted a timely notice of appeal. *CP* at 182-186. That

1 same day, Mr. Tsai also filed a “Motion For Vacate of Order” under CR 60(b) seeking to have
2 the trial court vacate its order denying the defendant’s motion for relief from judgment arguing
3 that pursuant to CrR 7.8(c)(2) the trial court did not have the authority to deny an untimely
4 collateral attack. See *State’s Response, Appendix K*. On January 6, 2012, this Court assigned case
5 number 42834-2-II to the direct appeal.

6 On January 23, 2012, the trial court ruled on the CR 60(b) motion, restated its analysis,
7 modified its conclusion by vacating its October 18, 2011, order and transferred Mr. Tsai’s May
8 18, 2011 “Motion For Relief From Judgment” to this Court for consideration as a PRP because it
9 appears to be time barred under RCW 10.73.090. See *State’s Response, Appendix M*. On March
10 22, 2012, this Court received the transferred motion and assigned the current case number
11 43118-1-II to the case. On June 20, 2012, Mr. Tsai submitted the “Supplemental Brief of
12 Appellant” for both cases. On August 20, 2012, this Court dismissed the direct appeal as moot
13 because the superior court’s January 23, 2012, order transferring the motion to this Court as a
14 PRP pursuant CrR 7.8(c)(2) resolved the issue of the appeal.

15 On September 6, 2012, this Court issued a perfection letter for this case and ordered
16 Pierce County to respond within 60 days. On November 30, 2012, a response by the respondent
17 was received. See *Appendix C*. Mr. Tsai now submits this Petitioner’s Reply to State’s Response
18 to Personal Restraint Petition for consideration by this Court.

19
20 **E. ARGUMENT**

- 21 **1. THE RULINGS IN *PADILLA* AND *SANDOVAL* ARE SIGNIFICANT CHANGES**
22 **IN THE LAW THAT ARE MATERIAL TO MR. TSAI’S CONVICTION,**
23 **THEREFORE, UNDER RCW 10.73.100(6) APPLIES RETROACTIVELY TO HIS**
24 **CASE.**

25 Mr. Tsai’s motion for relief from judgment, which was converted into this PRP, was filed
after the one-year time limit of RCW 10.73.090. He relies on the exception for “a significant

1 change in the law, whether substantive or procedural, which is material to the conviction ... and
2 ... a court determines that sufficient reasons exist to require retroactive application of the
3 changed legal standard.” RCW 10.73.100(6); RAP 16.4(c)(4). Where an intervening opinion has
4 effectively overturned a prior appellate decision that was originally determinative of a material
5 issue, the intervening opinion constitutes a “significant change in the law” under this statute. *In*
6 *re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258-59 (2005).

7 Mr. Tsai maintains that he may rely on *Padilla* because it did not announce a new federal
8 constitutional rule, and that the time-bar exception applies because *Padilla* nevertheless effected
9 a significant change in Washington law that is material to his conviction.

10 **(a) Significant Change In The Law**

11 The first part of RCW 10.73.100(6) requires a “significant change in the law.” In *In re*
12 *Personal Restraint of Greening*, 141 Wn.2d 687, 9 P.3d 206 (2000), the Washington State
13 Supreme Court discussed the “significant change in the law” requirement in considering whether
14 Mr. Greening’s personal restraint petition was time barred under RCW 10.73.090. *Id.* at 691. The
15 *Greening* court held that “where an intervening opinion has effectively overturned a prior
16 appellate decision that was originally determinative of a material issue, the intervening opinion
17 constitutes a ‘significant change in the law’ for purposes of exemption from procedural bars.” *Id.*
18 at 697.

19 The question here is whether the Supreme Court decision in *Padilla* is a “significant
20 change in the law” under RCW 10.73.100(6).

21 **(i) Padilla made no distinction between misadvice and lack of advice.**

22 In its response, the State argues that there is “a significant difference between lack of
23 advice about immigration consequences and misadvice concerning those consequences” *State’s*
24 *Response* at 8. The State submits that since Mr. Tsai’s claim was based on misadvice, he could

1 have raised a challenge to his guilty plea based on then existing law. *State's Response* at 9. In
2 support of its argument, the State cites to *Stowe* and *State v. Holley*, 75 Wn.App. 191 (1994), as
3 existing authorities, and therefore, *Padilla* and *Sandoval* did not significantly change any law.

4 First, Mr. Tsai did in fact raise a challenge to his guilty plea based on affirmative
5 misrepresentation under *Stowe*, *Holley* and *United States v. Kwan* in his 2008 "Motion to
6 Withdraw Guilty Plea." *CP* at 25-27. However, the trial court observed, assuming, arguendo, that
7 defendant's counsel provided incorrect information on July 27, 2006, it would also have denied
8 the ineffective assistance of counsel claim based on the facts. *CP* at 88-89. This fact was
9 explicitly acknowledged by the State in its response, see *State's Response* at 2, and supported by
10 attached appendix. *State's Response, Appendix D*.

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

18 Furthermore, both *Padilla* and *Sandoval* were cases challenging defense counsel's
19 misadvice, not counsel's lack of advice of deportation consequences. The State's argument,
20 therefore, failed to recognize the changes in law by *Padilla* and *Sandoval's* requirement to
21 correctly advise when the deportation consequence of a guilty plea is "truly clear."
22

23 **(ii) *Padilla* now permits post-conviction review of immigration related claim of**
24 **ineffective assistance of counsel.**

25 In Washington, no decision prior to *Padilla* permitted a post-conviction review based on

1 an immigration-related claim of ineffective assistance. See e.g., *State v. Malik*, 37 Wn.App. 414,
2 416, *review denied*, 102 Wn.2d 1023 (1984); *Holley*, 75 Wn.App. at 197; *State v. Martinez-Lazo*,
3 100 Wn.App. 869, 878 (2000); *State v. Jamison*, 105 Wn.App. 572, 593 (2001)

4 The Supreme Court made clear in *Padilla* that immigration consequences were squarely
5 within the ambit of defense counsel's Sixth Amendment duties in order to apply the test of
6 ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) to Mr.
7 *Padilla's* claim. *Padilla*, 130 S.Ct. at 1481.

8 In *Sandoval*, the Washington Supreme Court held that "[i]f the applicable immigration
9 law 'is truly clear' that an offense is deportable, *the defense attorney must correctly advise the*
10 *defendant that pleading guilty to a particular charge would lead to deportation*" to meet his
11 Sixth Amendment obligations under *Padilla* and *Strickland*. See *Sandoval*, 171 Wn.2d at 170
12 (quoting *Padilla*, 130 S.Ct. at 1483) (emphasis added).

13 *Padilla* and *Sandoval* now permits a post-conviction review based on an immigration-
14 related claim of ineffective assistance by recognizing that immigration consequences were within
15 the Sixth Amendment duties of counsel. And therefore, *Padilla* and *Sandoval*, effected a
16 "significant change" in Washington law under RCW 10.73.100(6).

17
18 **(b) The Changes In Law Is Material To Mr. Tsai's Conviction.**

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

25 Recently, the Division One Court of Appeals considered this exact question in *In re*

1 | *Personal Restraint Petition of Muhammadou Jagana*, ___ Wn.App. ___, 282 P.3d 1153,
2 | Division One Court of Appeals No. 66682-7-I (8/13/2012), and held:

3 | [T]he change in the law from *Padilla*, requiring defense counsel to inform a defendant of
4 | the immigration consequences of a plea bargain, must impact the outcome of the plea at
5 | issue. Where pleading guilty to a crime could put the defendant's immigration status at
6 | risk, *Padilla* is clearly material. Here Jagana's guilty plea did result in deportation
7 | proceedings being initiated against him. Therefore, we concluded that *Padilla* is material
8 | to his conviction.

9 | *Appendix D, Slip Opinion* at 11-12.

10 | When Mr. Tsai retained Mr. Bauer, he expressed to Mr. Bauer his concerns regarding the
11 | deportation consequences of the plea. *Appendix B, CP* at 167. Mr. Tsai's decision to plead guilty
12 | was strictly based on Mr. Bauer's advice that he would avoid deportation consequences by a less
13 | than one year sentence. *Appendix B*. But regardless of the length Mr. Tsai was sentenced to, it
14 | was "truly clear" Mr. Tsai's conviction was an offense that is deportable. Further, Mr. Tsai's
15 | guilty plea did result in deportation proceedings being initiated against him. *Id.* The erroneous
16 | advice received by Mr. Tsai from his defense counsel impacted the outcome of the plea at issue,
17 | and thus, *Padilla* and *Sandoval* is material to Mr. Tsai's conviction.³

18 | **(c) Sufficient Reasons Require Retroactive Application Of *Padilla* And *Sandoval*.**

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

22 | Here, the State argues that *Padilla* is a new rule that does not fall within either of the
23 | exception articulated by *Teague*. Mr. Tsai opposes the State's argument and maintains that

24 | ³ Furthermore, when Mr. Tsai challenged his conviction in 2008 based on the ineffective assistance of counsel
25 | claim, the trial court denied the motion based on the fact that Mr. Tsai was present during the sentencing hearing
when trial counsel reaffirmed his misadvice. The rulings in *Padilla* and *Sandoval* requiring counsel to correctly
advise the deportation consequences of a guilty plea when it is "truly clear" effectively overturned the prior
appellate decision, the trial court's 2008 order denying Mr. Tsai's claim of ineffective assistance of counsel based on
affirmative misrepresentation of deportation consequences, which was originally determinative of a material issue.

1 *Padilla* and *Sandoval* are not new rules, but rather an old rule applied to new facts.

2 Generally, courts in Washington have followed the United States Supreme Court's
3 standards, as set out in *Teague*. *Teague* generally prohibits a federal court from applying a "new
4 rule" of constitutional criminal procedure retroactively.⁴ Since state and federal courts have
5 disagreed on whether *Padilla* announced a new rule, it is most useful, therefore, to look directly
6 to the U.S. Supreme Court's standards regarding retroactivity, and the discussion in *Padilla* itself
7 regarding whether the Court believed it was breaking new ground.⁵

8 "[T]he standard for determining when a case establishes a new rule is 'objective,' and the
9 mere existence of conflicting authority does not necessarily mean a rule is new." *Williams v.*
10 *Taylor*, 529 U.S. 362, 410 (2000) (citation omitted). Further,

11 [i]f the rule in question is one which of necessity requires a case-by-case examination of
12 the evidence, then we can tolerate a number of specific applications without saying that
13 those applications themselves create a new rule... Where the beginning point is a rule of
14 this general application, a rule designed for the specific purpose of evaluating a myriad of
factual contexts, it will be the infrequent case that yields a result so novel that it forges a
new rule, one not dictated by precedent.

15 *Wright v. West*, 505 U.S. 277 (1992) (Kennedy, J. concurring).

16 *Strickland's* test for ineffective assistance of counsel is a general one that applies to a
17 broad range of factual scenarios. *Knowles v. Mirzayance*, 566 U.S. 111, *reh'g denied* by *In re*
18 *Word*, ___ U.S. ___, 129 S.Ct. 2422 (2009). The generality of the rule, however, "obviates neither
19 the clarity of the rule nor the extent to which the rule must be seen as 'established' by this

20 _____
21 ⁴ The Washington Supreme Court has noted, however, that it is not bound by the *Teague* standard when deciding,
22 under RCW 10.73.100(6), whether a ruling should apply retroactively. *State v. Evans*, 154 Wn.2d 438, 449, 114
23 P.3d 627, *cert. denied*, 546 U.S. 983 (2005) ("Limiting a state statute on the basis of the federal court's caution in
interfering with State's self-governance would be, at least, peculiar."); *In re Pers. Restraint of Markel*, 154 Wn.2d
262 (2005) (*Teague* doctrine does not "define the full scope of RCW 10.73.100(6).")
Also, in *Danforth v. Minnesota*, 128 S.Ct. 1029, 169 L. Ed. 2d 859 (2008), the Supreme Court held that the state
courts are not bound by the non-retroactivity principles set forth in *Teague*. *Id.* at 1042.

24 ⁵ Several state and federal courts have followed this approach in concluding that *Padilla* applies retroactively. *See*
25 *e.g.*, *Commonwealth v. Clarke*, 460 Mass. 30, 949 N.E.2d 892 (2011); *United States v. Orocio*, 645 F.3d 630, 637-
41 (3rd Cir. 2011); *People v. Gutierrez*, 945 N.E.2d 365, 377-78 (Ill. App. 2011); *Denisyuk v. State*, -- A.3d --, 2011
WL 5042332 at *8-9 (Md. 2011); *Campos v. State*, 798 N.W.2d 565, 568-71 (Minn. App. 2011).

1 Court.” *Williams*, 529 U.S. at 391. *See also, Tanner v. McDaniel*, 493 F.3d 1135 (9th Cir.), *cert.*
2 *denied*, 552 U.S. 1068 (2007) (“Each time that a court delineates what ‘reasonable effective
3 assistance’ requires of defense attorney with respect to a particular aspect of client representation
4 ... it can hardly be thought to have created a new principle of constitutional law”).

5 In applying the *Strickland* standard to Padilla’s claim, the language of the opinion itself
6 shows that the Justice did not believe they were creating a new rule. The Court noted that in *Hill*
7 *v. Lockhart*, 477 U.S. 52 (1985), it established that *Strickland*’s requirement of effective
8 assistance of counsel applied to advice regarding a plea offer. *Padilla*, at 1484. “Whether
9 *Strickland* applies to Padilla’s claim follows from *Hill*.” *Id.* at 1484, n.12. In holding that defense
10 counsel has an affirmative duty to advise noncitizen defendants regarding immigration
11 consequences, the Court rejected the notion that it was imposing some new burden on defense
12 counsel. “For at least the past 15 years, professional norms have generally imposed an obligation
13 on counsel to provide advice on the deportation consequences of a client’s plea.” *Id.* at 1485.

14 In *Jagana*, ___ Wn.App. ___, 282 P.3d 1153, No. 66682-7-I, the Division One of this
15 Court conducted a detailed analysis of *Padilla* and held that because of the heavy reliance on
16 *Strickland*, it is difficult to conclude why the Supreme Court “would conclude that *Padilla* is
17 anything other than an ‘old’ rule, retroactively applicable to cases on collateral review of final
18 judgments.”⁶ *Jagana*, No. 66682-7-I, slip op. at 25. The Court further held that:

19
20 Moreover, *Padilla*’s rejection of the distinction between direct and collateral
21 consequences of a plea when applying *Strickland* supports the conclusion that the case
22 should be applied retroactively under our state statute.

23 *Id.*

24 Further, *Padilla* itself involved a collateral attack on a guilty plea. *Id.* at 1478. If the

25 ⁶ So far, *Jagana* is the only holding in WA State that has ruled on the retroactivity issue. Until the United States Supreme Court decides the issue in *Chaidez v. United States*, ___ U.S. ___, 2012 WL 1468539, the petitioner maintains that this holding is persuasive authority on this issue.

1 Court believed it was creating a new rule, it would not have applied that rule to Mr. Padilla.
2 *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (“Under *Teague*, new rules will not be applied or
3 announced in cases on collateral review unless they fall into one of two exceptions.”). This fact
4 alone warrants concluding that *Padilla* did not announce a new rule. See *People v. Gutierrez*,
5 945 N.E.2d at 377.

6 One week after deciding *Padilla*, the Supreme Court granted certiorari in a collateral
7 challenge similar to *Padilla*'s. The Court vacated the judgment and remanded to the Fifth Circuit
8 for further consideration in view of *Padilla*. *Santos-Sanchez v. United States*, __ U.S. __, 130
9 S.Ct. 2340 (2010). The Court would not have issued such an order unless it thought that *Padilla*
10 applies retroactively since the Court will issue such an order only when it believes an intervening
11 decision would alter the lower court's ruling. *Lawrence v. Chater*, 516 U.S. 13, 163, 167 (1996).
12 The Fifth Circuit obviously understood the Supreme Court's order to mean that it must apply
13 *Padilla*, since it reversed its original decision in light of that case. *Santos-Sanchez v. United*
14 *States*, 381 Fed. Appx. 419, 2010 WL 2465080 (2010).

15
16 And thus, Mr. Tsai may rely on *Padilla* because it did not announce a new rule and
17 applies retroactively.

18 **2. MR. TSAI RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER**
STRICKLAND AND WAS PREJUDICED.

19 Having established that the rulings in *Padilla* and *Sandoval* constitutes a “significant
20 change in law” that is “material” to Mr. Tsai's conviction and that those rulings requires a
21 retroactive application, the *Strickland* test of ineffective assistance of counsel will now be
22 applied to the facts of the case.

23 A guilty plea must be knowing, intelligent, and voluntary to satisfy federal and state
24 constitutional due process requirements. *U.S. Const. amends. V, XIV; Wash. Const. Art. I, sec 3;*
25

1 | *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 297 (2004) (citing *Boykin v. Alabama*, 395
2 | U.S. 238, 242-43 (1969)). Mr. Tsai contends that his plea was not knowing, intelligent, and
3 | voluntary because trial counsel affirmatively misrepresented to him of the deportation
4 | consequences and thus received ineffective assistance of counsel. *CP* at 90-140

5 | The right to effective assistance of counsel under the Sixth Amendment includes the plea
6 | process. *Sandoval*, 171 Wn.2d at 169 (citing *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780,
7 | 863 P.2d 554 (1993); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d
8 | 769 (1970)). Counsel's faulty advice can render a guilty plea involuntary or unintelligent. *Id.*
9 | (citing *Hill*, 474 U.S. at 56; *McMann*, 397 U.S. at 770-71). In evaluating such a claim, an
10 | ordinary due process analysis does not apply. *Id.* (citing *Hill*, 474 U.S. at 56-58). Rather, "[t]o
11 | establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the
12 | defendant must satisfy the familiar two-part [*Strickland*] test of ineffective assistance claims—
13 | first, objectively unreasonable performance, and second, prejudice to the defendant." *Id.*

14 | In satisfying the prejudice prong, Mr. Tsai must show that there is a reasonable
15 | probability that, but for counsel's error, he would not have pled guilty and would have insisted
16 | on going to trial. *Id.* at 174-75 (citing *Riley*, 122 Wn.2d at 780-81 (citing *Hill*, 474 U.S. at 59)).
17 | A "reasonable probability" exists if Mr. Tsai "'convince[s] the court that a decision to reject the
18 | plea bargain would have been rational under the circumstance.'" *Id.* at 175 (alteration in original)
19 | (quoting *Padilla*, 130 S. Ct. at 1485).

20 | **(a) Deficient Performance**

21 | Here, the State argues that Mr. Tsai has not made a sufficient showing to warrant relief
22 | because the "record before this Court does not establish misadvice." *State's Response* at 14. In
23 | support of its argument, the State points out that a) Mr. Tsai was informed by the plea form of
24 | deportation consequences; b) Mr. Tsai was advised by immigration counsel of the consequences
25 |

1 by pleading guilty as charged; c) Mr. Bauer's affidavit stated that his advice was consistent with
2 that provided by immigration attorney, and thus, neither attorney "gave petitioner incorrect
3 advice, rather their declarations show that he was correctly advised." *Id.* Further, the State calls
4 into question the "accuracy" of Mr. Tsai's "representation about who gave him the incorrect
5 advice and when it occurred..." *Id.* at 14-15.

6 When counsel affirmatively misrepresents deportation consequences and the defendant
7 relies upon these misrepresentations in making his or her plea, counsel's performance is
8 "objectively unreasonable." *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) cert.
9 denied, 544 U.S. 1034 (2005). A plea based on misinformation is involuntary. *State v. Mendoza*,
10 157 Wn.2d 582, 591 (2006). A guilty plea operates as a waiver of important rights, and is valid
11 only if done voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant
12 circumstances and likely consequence." *Brady v. United States*, 397 U.S. 742, 748 (1970).

13 Under the rulings of *Padilla* and *Sandoval*, a foreign national's criminal defense counsel
14 is required to correctly inform a defendant of the deportation consequences that are "succinct,
15 clear, and explicit." *Padilla*, 130 S.Ct. at 1482, *Sandoval*, 171 Wn.2d at 170. The Supreme Court
16 held that that despite a lack of expertise in the specific area of law, criminal counsel still have a
17 clear duty to give correct advice where removal consequences are clear. *Padilla* at 1483,
18 *Sandoval* at 169-170. And thus, failing to notify or misinforming a noncitizen client about
19 removal consequences of pleading guilty when the consequences are "truly clear" may give rise
20 to a claim of ineffective assistance of counsel. *Padilla* at 1483, *Sandoval* at 170.

22 Due to Mr. Tsai's immigrant status, he expressed his concerns to Mr. Bauer, his retained
23 criminal counsel, of how a conviction would affect his permanent resident status, *CP* at 36. A
24 fact that is not disputed by Mr. Bauer. *CP* at 167. Mr. Tsai consulted Ms. Dobrin for advice
25 regarding immigration issues. *CP* at 110, see also *Appendix A*. Ms. Dobrin advised Mr. Tsai that

1 he could be removed as an aggravated felon by a conviction as charged. *Appendix A*. Ms. Dobrin
2 also suggested alternate pleas that would avoid deportation or preserve his eligibility for
3 discretionary relief. *Id.* Ms. Dobrin then offered to consult Mr. Bauer about the deportation
4 consequences against him and alternate pleas to avoid his deportation. *Id.*

5 On April 28, 2006, Ms. Dobrin explicitly advised Mr. Bauer that a conviction as charged
6 would be regarded as an aggravated felony under immigration laws which would not only render
7 Mr. Tsai deportable but would also bar Mr. Tsai from any form of discretionary relief from
8 deportation. *Id.* Ms. Dobrin also advised Mr. Bauer of alternate pleas that would allow Mr. Tsai
9 discretionary relief from deportation. *Id.* However, Ms. Dobrin did not advise Mr. Bauer that by
10 pleading guilty to possession with intent to deliver and receiving a sentence of less than one year
11 would allow Mr. Tsai any opportunities of relief from deportation. *Id.* In fact, Ms. Dobrin never
12 discussed the sentence issue with Mr. Bauer at all. *Id.*

13 Mr. Tsai averred that he was advised by Mr. Bauer sometime before his plea hearing that
14 a plea agreement was reached to avoid his deportation. *CP* at 114. At the plea hearing, Mr. Tsai
15 was reassured by the associate that the plea would not impact his immigration status. *CP* at 36.
16 Mr. Bauer's statement at sentencing emphasized the importance of the 11 month sentence to
17 allow Mr. Tsai "a slightly better argument in immigration later on." *RP of Sentencing* at 3.
18 Clearly, there has been no inconsistency in who gave Mr. Tsai incorrect advice or when it had
19 occurred. Rather, these sequence of facts clearly demonstrate that Mr. Bauer's misadvice: was
20 discussed with Mr. Tsai before the plea hearing; was passed on to the associate to reassure Mr.
21 Tsai; and was reaffirmed by Mr. Bauer at sentencing. There would be no reason for Mr. Tsai to
22 react with surprise, outrage, or complain as suggested by the State.

23 The fact that Mr. Bauer was advised on this matter from Ms. Dobrin does not mitigate his
24 ineffectiveness under *Padilla* and *Sandoval*. It is clear by the advice Mr. Bauer provided, he
25

1 disregarded the advice Ms. Dobrin provided. And when Mr. Tsai decided to plead guilty, it was
2 based on Mr. Bauer's advice that "by pleading guilty and receiving a sentence of less than one
3 year, [he] would avoid any danger of removal." *CP* at 114. Mr. Tsai confirmed with Mr. Bauer
4 that this was part of the alternate pleas that was discussed with Ms. Dobrin. *Id.* Although the
5 length of sentence is relevant for certain grounds of deportability and "aggravated felony"
6 crimes, it is not relevant when the conviction is for a controlled substance or for a drug
7 trafficking-related aggravated felony. *Appendix A.* The 11-months sentence would have provided
8 Mr. Tsai relief under immigration law had he been convicted of certain crimes defined under 8
9 U.S.C. § 1101(a)(43)⁷.

10 However, Mr. Tsai's conviction is clearly a deportable crime defined under 8 U.S.C. §
11 1227(a)(2)(B)(i) as:

12 Any alien who at any time after admission has been convicted of a violation of (or a
13 conspiracy or attempt to violate) any law or regulation of a State, the United States, or a
14 foreign country relating to a controlled substance (as defined in section 102 of the
15 Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving
16 possession for one's own use of thirty grams or less of marijuana, is deportable.

17 and classified as an aggravated felony defined under 8 U.S.C. § 1101(a)(43)(B) as:

18 illicit trafficking in a controlled substance (as defined in section 102 of the Controlled
19 Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in
20 section 924(c) of title 18, United States Code);

21 *Id.* Under these provisions, the length of sentence would not provide Mr. Tsai any relief
22 whatsoever. Contrary to Mr. Bauer's advice, the 11-month sentence did not provide Mr. Tsai any

23 ⁷ (G) a theft offense (including receipt of stolen property) or burglary offense *for which the term of imprisonment*
24 *[is] at least one year;*

25 (J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt
organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title
(relating to gambling offenses), *for which a sentence of one year imprisonment or more may be imposed;*

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification
numbers of which have been altered *for which the term of imprisonment is at least one year;*

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, *for which*
the term of imprisonment is at least one year. (Emphasis added)

1 relief in immigration whatsoever because by pleading guilty as charged Mr. Tsai is automatically
2 deportable.

3 Also, the fact that Mr. Tsai received the immigration advisement in his plea form
4 pursuant to RCW 10.40.200 does not negate Mr. Bauer's duty to correctly advise. Under *Padilla*
5 and *Sandoval*, such general advisements about possible immigration consequences are
6 insufficient. "RCW 10.40.200 and other such warnings do not excuse defense attorneys from
7 providing the requisite warnings." *Sandoval*, 171 Wn.2d at 174.

8 The deportation consequences in this case were "truly clear." Therefore, Mr. Bauer was
9 required to correctly advise Mr. Tsai. Mr. Bauer's failure to do so amounts to deficient
10 performance, meeting the first prong of the *Strickland* test.

11 **(b) Prejudice**

12 The State argues here that Mr. Tsai accepted the plea simply to avoid a lengthy sentence
13 and submitted a declaration from the prosecutor who handled the case. *State's Response*
14 *Appendix O*. The declaration states that the prosecutor "would seek amendment of the
15 information to add a firearm enhancement to the drug charges as guns were also recovered in the
16 search." *Id.* Further, the declaration states that "[t]here was also the possibility of filing a bail
17 jump charge due to his failure to appear." *Id.*

18 A self-serving statement from the defendant or trial counsel that the misrepresentation
19 was prejudicial is insufficient to establish prejudice. *State v. Conley*, 121 Wn.App. 280, 287
20 (2004). There must be objective evidence that corroborates the defendant's claim. *Id.*
21 "[P]reserving the possibility of [] relief" from deportation "would have been one of the principal
22 benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to
23 trial." *St. Cyr*, 533 U.S. at 322-23.

1 **(i) Plea did not minimize any incarceration time.**

2 Trial counsel is obliged to aid a defendant “in evaluating the evidence against him and in
3 discussing the possible direct consequences of a guilty plea.” Holley, 75 Wn.App. at 197
4 (quoting Malik, 37 Wn.App. at 417). First, Mr. Tsai entered a plea of guilty as **originally**
5 **charged**. *CP at 1-2, CP at 37 ¶(4)(b)*. Contrary to the State’s allegations, there were no
6 enhancements sought by the State. *CP at 1-2*. Besides returning the property taken from Mr. Tsai
7 during his arrest, *CP at 4 ¶(g)*, the State agrees that there were no other promises or threats made
8 of enhancements or additional charges to induce Mr. Tsai to plead guilty other than the 11
9 month sentence. *State’s Response* at 15. Firearm enhancements were not sought for the other
10 defendant’s choice to go to trial, there is no clear reason why Mr. Tsai would be treated any
11 differently if he had been tried with the other defendants. Further, Mr. Bauer never discussed the
12 possibility of firearm enhancement with Mr. Tsai, however, even if it is imminent, Mr. Tsai
13 would have taken his chances at trial and faced any sentence if Mr. Tsai had know that
14 deportation was certain by his plea. *Appendix B*.

15 Next, in the prosecutor’s declaration submitted by State alleges that “there was a
16 possibility of bail jump charges for Mr. Tsai’s failure to appear.” *State’s Response, Appendix O*.
17 This additional charge was unlikely as the alleged failure to appear incident occurred at the time
18 when Mr. Tsai was in custody at the Pierce County Jail for this VUCSA charge and the bench
19 warrant issued was quashed by the prosecutor’s on motion. *See Appendix E, Bench Warrant and*
20 *Motion to Quash Bench Warrant*.

21 And thus, if Mr. Tsai had taken his chances at trial and lost, based on his criminal history,
22 the lengthiest sentence he would have faced was 18-months. An 11-month sentence was only a
23 midrange sentence for Mr. Tsai. Clearly, there were no incentives for Mr. Tsai to plead guilty as
24 charged other than to avoid deportation consequences because no other charges were dismissed
25

1 or amended down, and there were no exceptional downward sentence. *CP* at 9 ¶2.1. There was,
2 however, a specific joint recommended sentence for 11-months by Mr. Tsai and the State. *RP of*
3 *Sentencing* at 2; *CP* at 4. At sentencing Mr. Bauer reiterated the importance of this 11-months
4 sentence and how it would provide Mr. Tsai some relief in his immigration case later on. *RP of*
5 *Sentencing* at 2-3. Mr. Tsai's decision to plead guilty was clearly based on this 11-months
6 sentence affirmatively misrepresented by Mr. Bauer that it would avoid his deportation.

7 *Appendix B.*

8 **(ii) Rejecting the plea would have been rational under the circumstances.**

9 Given the severity of the deportation consequences, and the fact that Mr. Tsai explicitly
10 expressed his concerns about this issue to Mr. Bauer, Mr. Tsai would have taken his chances at
11 trial and face any length of sentence had he been properly advised of the automatic deportation
12 consequences. *Appendix B.* "Preserving the client's right to remain in the United States may be
13 more important to the client than any potential jail sentence." *St. Cyr*, 533 U.S. at 323. Further,
14 had Mr. Tsai been correctly advised of the deportation consequences, the fact that there was only
15 a difference of 7-months would be rational for him to reject the plea and taken his chance at trial.

16
17 "If inaccurate advice about a consequence materially taints the defendant's decision, the
18 plea should be set aside." *State v. McDermond*, 112 Wn.App. 239, 247-48 (2002); *Stowe*, 71
19 Wn.App. at 187. Mr. Tsai relied on Mr. Bauer's advice regarding the law in making his decision
20 to plead guilty. Mr. Tsai is clearly prejudiced by Mr. Bauer's affirmative misrepresentation
21 regarding deportation consequences as he is subject to deportation from the United States based
22 on this conviction. And thus, for Mr. Tsai "to reject the plea bargain would have been rational
23 under the circumstances." *Padilla* at 1485; *Sandoval* at 175.

24 Therefore, Mr. Tsai was prejudiced by his counsel's unreasonable performance,
25 satisfying *Strickland's* second prong. See *Strickland* 466 U.S. at 695. Accordingly, Mr. Tsai's

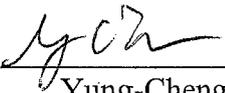
1 2006 conviction of possession with intent to deliver was the result of constitutionally deficient
2 representation, and must be vacated.

3 **F. CONCLUSION**

4 Because *Padilla* and *Sandoval* constitute a significant, material change in Washington
5 law, but do not announce a new constitutional rule, *Padilla's* holding must apply retroactively to
6 Mr. Tsai's 2006 conviction as his collateral challenges are not time-barred. Mr. Tsai has
7 demonstrated both that counsel's representation was objectively unreasonable, and that he was
8 prejudiced by counsel's performance. Accordingly, this Court should withdraw his guilty plea
9 and vacate his conviction or, alternatively, remand for an evidentiary hearing on his ineffective
10 assistance claim.

11 RESPECTFULLY SUBMITTED this 28 day of December, 2012.

12 Presented by:



13 Yung-Cheng Tsai
14 Petitioner

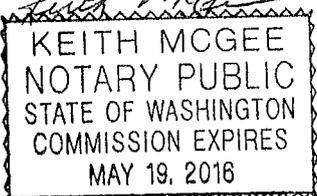
14 **G. OATH OF PETITIONER**

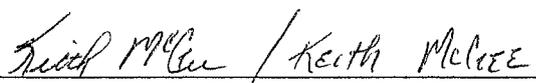
15 STATE OF WASHINGTON)
16) ss.
17 COUNTY OF GRAYS HARBOR)

18 After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I
19 have read the petition, know its contents and I affirm the contents of this petition are true and
20 correct under penalty of perjury of the laws of the State of Washington.

21 
22 Yung-Cheng Tsai
23 Petitioner

24 SUBSCRIBED AND SWORN to before me this 28 day of DEC., 2012.

25 
KEITH MCGEE
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
MAY 19, 2016


Notary Public in and for the State of Washington
My commission expires: 05/19/2016

1 Certificate of Service

2 I, Yung-Cheng Tsai, certify that on December 24, 2012, I deposited the foregoing
3 **Petitioner's Reply Brief** and attached exhibits, in the Northwest Detention Center Legal Mail
4 System by First Class Mail pre-paid postage, addressed to:

5 Division Two Court of Appeals
6 950 Broadway, Ste 300
7 Tacoma, WA 98402-4454

8 Kathleen Proctor, Pierce County Prosecuting Atty. Office
9 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402-2171

10 EXECUTED this 24 day of December, 2012, at Tacoma, Washington.

11 By: 
12 Yung-Cheng Tsai
13 Petitioner Pro Se

Appendix A

Declaration of Vicky Dobrin

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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PERSONAL RESTRAINT)
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PETITION OF:)
)
YUNG-CHENG TSAI)
_____)

No. 43118-1-II
DECLARATION OF VICKY
DOBRIN

Declaration of Vicky Dobrin

Dobrin & Han, PC
705 Second Avenue, Suite 610
Seattle, WA 98104

DECLARATION OF VICKY DOBRIN

I, Vicky Dobrin, declare under the penalty of perjury as follows:

1. I am an immigration attorney licensed to practice in the state of Washington. I have practiced exclusively in immigration law since 1998, and I am a partner at Dobrin & Han, PC. My state bar number is 28554.

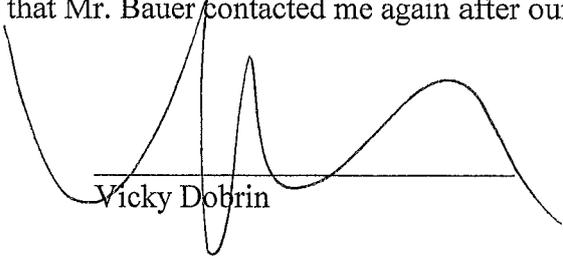
2. I previously represented Yung-Cheng Tsai ("Mr. Tsai") in his removal proceedings in 2005. At that time, he was charged with removability based on a previous conviction. I filed a motion to terminate his removal proceedings, based on my view that he was not removable as charged, and the immigration judge granted the motion and terminated his proceedings.

3. On April 24, 2006, after my representation of Mr. Tsai had ended, he contacted me and informed me that he had recently been arrested and charged with possession of marijuana with intent to deliver. I informed Mr. Tsai, *inter alia*, that I believed that if he were convicted of this charge, under the immigration laws, the conviction would be regarded as an "aggravated felony." I told Mr. Tsai that if he were convicted of an "aggravated felony," he would not only be deportable from the United States, but he would be ineligible for any discretionary forms of relief from removal. During our conversation, I also discussed alternate pleas that would either not render him deportable at all, or that would at the very least preserve his eligibility for discretionary relief from removal. Mr. Tsai informed me that he was represented by a private criminal attorney, and I told Mr. Tsai that it would be important for his attorney and me to speak regarding the immigration consequences of his pending charge before Mr. Tsai made any decisions regarding what course of action he should take.

4. On April 28, 2006, I spoke to Mr. Tsai's criminal attorney Erik Bauer regarding Mr. Tsai's criminal case and the immigration issues I believed existed. I told Mr. Bauer, as I had told Mr. Tsai, that I believed that if Mr. Tsai were convicted of possession of marijuana with intent to deliver, it would be regarded as an "aggravated felony" under the immigration laws. I explained that an "aggravated felony" conviction would not only render Mr. Tsai deportable from the United States, but it would also make him ineligible for any discretionary relief from removal. I discussed alternate pleas with Mr. Bauer, including a plea to either possession of a controlled substance or solicitation. I understood from Mr. Bauer that the case was still in the preliminary stages, and I told him that he should feel free to consult with me again about any potential pleas before Mr. Tsai made any decisions regarding the case. Mr. Bauer told me he would contact me before moving forward with any particular plea or before going to trial. At no point during our conversation did I inform Mr. Bauer that the length of the sentence would be relevant to the "aggravated felony" analysis, should Mr. Tsai plead guilty to possession with intent to deliver. Nor did we ever discuss the sentence issue at all during our conversation. Although the length of a sentence is relevant for certain grounds of deportability and for certain "aggravated felony" crimes, it is not relevant when the underlying conviction is for a controlled substance offense or for a drug trafficking-related "aggravated felony" conviction.

5. Based on my notes, it does not appear that Mr. Bauer contacted me again after our conversation on April 28, 2006.

Dated: May 29, 2012



Vicky Dobrin

Appendix B

Affidavit of Yung-Cheng Tsai

1 COURT OF APPEALS OF THE STATE OF WASHINGTON

2 DIVISION TWO

3 PERSONAL RESTRAINT

No. 43118-1-II

4 PETITION OF:

AFFIDAVIT OF

5 YUNG-CHENG TSAI

YUNG-CHENG TSAI

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

10 1. On February 15, 2006, while working at a Cingular kiosk at the South Hill Mall in
11 Puyallup, WA, I was detained by the Pierce County Sheriff's Department and transported to a
12 residence in Parkland where a search warrant was served.

13 2. I was charged with Unlawful Possession of a Controlled Substance-Marijuana with
14 Intent to Deliver based on the drugs found in a room of that residence alleged to be my bedroom.
15 I was booked into the Pierce County Jail where I had remained until I posted bail on March 7,
16 2006.

17 3. While I was in custody, I retained private counsel, Erik Bauer of Bauer and Balerud, to
18 represent me in this criminal case. Because of my immigration status, I explicitly expressed my
19 concerns to Mr. Bauer about deportation consequences by a conviction in this case.

20 4. On April 24, 2006, I met with Ms. Vicky Dobrin, an immigration attorney who had
21 represented me in a previous matter, to discuss the effect the pending criminal charges would
22 have on my immigration status. Ms. Dobrin informed me that she believed that if I were
23 convicted of this charge, the conviction would be regarded as an "aggravated felony" under
24 immigration laws which would make me deportable from the United States.

25 5. During that conversation, she also discussed alternate pleas that either would not
render me deportable at all, or that at the very least would preserve my eligibility for
discretionary relief from removal. I informed Ms. Dobrin that I was represented by a private
criminal attorney, Erik Bauer, and Ms. Dobrin told me that it would be important for her to
discuss with Mr. Bauer the immigration consequences of the pending charge.

6. A few days later, Mr. Bauer contacted me and told me that he had spoken to Mr.
Dobrin about the effect of a conviction on my immigration status, and alternate pleas that would
preserve my permanent resident status in the United States. Mr. Bauer indicated to me that he
and Ms. Dobrin had worked out ways I could plead guilty in order to prevent deportation from
the United States.

1 7. Prior to my plea hearing in July, Mr. Bauer advised me that he was able to negotiate a
2 plea with a sentence of less than one-year. Thus, by pleading guilty and receiving a sentence of
3 less than one-year, I would avoid any danger of removal. Mr. Bauer assured me that when he and
4 Ms. Dobrin spoke, this was part of the alternate pleas they had worked out that would avoid my
5 deportation from this country. I decided to plead guilty based on this advice and assurance from
6 Mr. Bauer.

7 8. At no time did Mr. Bauer ever discuss the possibility of any firearm enhancements
8 with me. Nor did he discuss any possibilities of bail jump charges. We did not have much
9 discussion regarding challenging the evidence or what equates to "possession" because the entire
10 focus of the case was to avoid my deportation.

11 9. At the plea hearing, Mr. Bauer sent one of his associates to handle the guilty plea. I
12 spoke to the associate again about my concern that the plea may impact my immigration status.
13 The associate assured me that the plea offer is the same as discussed with Mr. Bauer and
14 pleading guilty as charged should not jeopardize my immigration status. I signed the guilty plea
15 form on July 27, 2006 based on the additional assurance by the associate of Mr. Bauer's advice.

16 10. On August 29, 2006, I was sentenced to 11-months confinement in Pierce County
17 Cause No. 06-1-00782-6, following a joint recommended agreement. I was also sentenced to 12
18 months of community custody and \$2,500 in legal financial obligations. I currently still owe over
19 \$800 in legal financial obligations in this case.

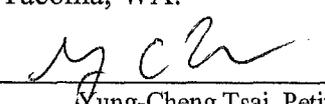
20 11. Other than avoiding deportation consequences, I had no other incentives by pleading
21 guilty as charged and sentenced to less than one-year sentence. The charge was not amended
22 down and no enhancements or other charges were dismissed in exchange for my plea. Besides
23 returning property taken from me at the time of my arrest, no other promises were made.

24 12. On November 1, 2007, I was arrested by the U.S. Immigration and Customs
25 Enforcement based on this conviction. It was at that time I discovered that, regardless of the
length of sentence, pleading guilty to this charge made me automatically deportable. Up until
then I had no reason to question Mr. Bauer's advice. In the end, Mr. Bauer's advice was wrong.

13 I would have taken my chances at trial and faced any length of sentence had I known
that, regardless of the length of sentence, by pleading guilty I would be automatically deportable
and no other pleas were available to avoid deportation

21 Conclusion

22 I declare under penalty of perjury of the laws of the State of Washington that all of the
23 above is true and correct. Done this 24 day of December, 2012, at Tacoma, WA.

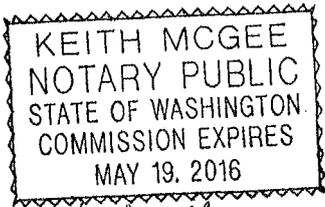
24 
25 Yung-Cheng Tsai, Petitioner
NWDC, A# 73 441 433
1623 East J St., Ste. 5
Tacoma, WA 98421

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THE STATE OF WASHINGTON)
) SS
COUNTY OF PIERCE)

I certify I know or have satisfactory evidence that the above named Petitioner, Yung-Cheng Tsai, is the person who appeared before me, and the said person acknowledged that he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in this instrument.

SUBSCRIBED AND SWORN before me on this 28 day of DEC, 2012.



Keith McGee

Keith McGee / Keith McGEE
Notary Public in and for the State of Washington
My commission expires: *05/19/2016*

Appendix C

Proof of Receiving State's Response

Hasler

11/29/2012

US POSTAGE

PRIORITY MAIL
ComBasPrice

\$05.24⁰⁰



ZIP 98409
011D12603035

126



Pierce County

Mark Lindquist
Prosecuting Attorney

930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

SPECIAL
DELIVERY

B-1

YUNG-CHENG TSAI
A#073-441-433
NORTHWEST DETENTION CENTER
1623 EAST J STREET
TACOMA, WA 98421

Detainee Request Form (Solicitud de Detenido)

Northwest Detention Center

Alien Number (Numero de Extranjero): A 73-441-433		Detainee Name (Nombre de Detenido): (Last Name - Apellido) (First Name - Nombre Primero) TSAI, Yung-Cheng	
Living Unit (Dormitorio): B-1	Bunk Number (Numero Litera): 219B	Date (Fecha): 12/6/12	Nationality (Nacionalidad): Taiwanese

Note: Incorrect or incomplete information will result in no response and the return of this form.
Informacion que esta incorrecta o incompleta no recibira una respuesta la vuelta de esta forma.

- Type of Request:** [] ICE (Inmigracion) [] Mail (Correo) [] Property (Propiedad)
 [] Emergency Phone Call (Emergencia Telefono) [] Recreation (Recreacion)
 [] Finance (Dinero) [] Work Request (Trabajo Solicitud) [] Barber (Barbero)
 [] Commissary (Commisara) [] Classification Appeal (Clasificacion)
 [] Food (Comida) [] Notary (Notario) [] Copies (Copias) [] Other (Otro)
 [] Religious Diet / Common Fare (Dieta Religiosa / Precio Comun) [] Chaplain (Capellán)

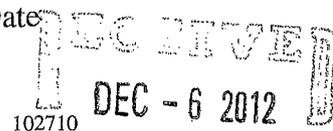
Request (Solicitud): Can you provide the dates that this facility
received legal mail, and the date it was forwarded to B-1 unit
for distribution from: Pierce County Prosecuting Attorney
930 Tacoma Ave S, Rm 946, Tacoma, WA 98402-2111.
(Note: Envelope was post-Marked 11/29/2012.)

Thank You

Y C En
 Detainee Signature (Firma Detenido)

Response: Our records show the Mail Room
processed a piece of incoming mail for
you on 11-30-12, sent by Pierce County
Prosecuting Attorney. It was forwarded to you
in pod B-1 on 11-30-12.

Nelson 12-6-12
 Staff Signature Date



Appendix D

Slip Opinion,

In re Personal Restraint Petition of Muhammadou Jagana,

___ Wn.App. ___, 282 P.3d 1153,

Division One Court of Appeals No. 66682-7-I (8/13/2012)

charge.⁶ Moreover, his attorney did not tell him to contact an immigration attorney before pleading guilty. His attorney told him to plead guilty, and he did. The felony judgment and sentence was entered on June 9, 2006. Jagana did not appeal.

In November 2010, Jagana moved, pursuant to Criminal Rule (CrR) 7.8, to withdraw his guilty plea and for the court to vacate the judgment and sentence. First, he argued that his defense counsel in the VUCSA prosecution did not inform him of the immigration consequences of his guilty plea, in violation of Padilla. Second, he argued that his plea was not intelligently and voluntarily made, based on the lack of proper advice of his attorney as to the immigration consequences of his plea.

The State moved to transfer Jagana's motion to this court for consideration as a personal restraint petition. The trial court granted the State's motion.

COLLATERAL REVIEW OF FINAL JUDGMENT

Jagana seeks to withdraw his guilty plea on two bases. First, he argues that he was denied effective assistance of counsel under Padilla. Second, he argues that his plea was not intelligently and voluntarily made. We address the first argument and need not reach the second.

A personal restraint petition is not a substitute for direct appeal and availability of collateral relief is limited.⁷ In order to obtain relief, Jagana must

⁶ Affidavit of Defendant in Support of Motion to Withdraw Guilty Plea at 2.

⁷ In re Pers. Restraint of Grasso, 151 Wn.2d 1, 10, 84 P.3d 859 (2004)

first overcome statutory and rule based procedural bars.⁸ Then, in order to successfully argue a claim not previously raised, Jagana must demonstrate by a preponderance of the evidence either a constitutional error that worked to his actual and substantial prejudice, or a non-constitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice.⁹

A motion to withdraw a plea may be transferred to the appellate court for treatment as a personal restraint petition.¹⁰ A personal restraint petition is a collateral attack on a judgment.¹¹ Generally, a defendant may not collaterally attack a judgment and sentence in a criminal case more than one year after it becomes final.¹² A judgment and sentence generally becomes final either on entry or on the day an appellate court issues its mandate disposing of a timely direct appeal from the conviction.¹³

There are exceptions to RCW 10.73.090(1)'s one-year time bar. Jagana relies on RCW 10.73.100, which states in pertinent part:

The time limit specified in RCW 10.73.090 does *not* apply to (citing In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992)).

⁸ Id. See RCW 10.73.090; RAP 16.4(d).

⁹ Grasso, 151 Wn.2d at 10-11 (citing St. Pierre, 118 Wn.2d at 328; In re Pers. Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)).

¹⁰ See CrR 7.8(c)(2).

¹¹ RCW 10.73.090(2).

¹² RCW 10.73.090(1).

¹³ RCW 10.73.090(3)(a), (b).

a petition or motion that is based solely on one or more of the following grounds:

.....

(6) There has been a **significant change in the law**, whether substantive or procedural, which is **material to the conviction, sentence, or other order entered** in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or **a court**, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, **determines that sufficient reasons exist to require retroactive application** of the changed legal standard.^[14]

Jagana has satisfied these requirements.

Significant Change in the Law

The first requirement of RCW 10.73.100(6) is that there must be a "significant change in the law."¹⁵ We hold that there is such a change here.

Our supreme court discussed the "significant change in the law" requirement in *In re Personal Restraint of Greening*.¹⁶ There, the court considered whether Greening's personal restraint petition was time barred under RCW 10.73.090.¹⁷ He claimed that RCW 10.73.100(6) exempted his claim from that one year time bar.¹⁸

In considering Greening's argument, the supreme court referred to its

¹⁴ (Emphasis added.)

¹⁵ *State v. Abrams*, 163 Wn.2d 277, 291, 178 P.3d 1021 (2008).

¹⁶ 141 Wn.2d 687, 9 P.3d 206 (2000).

¹⁷ *Id.* at 691.

¹⁸ *Id.* at 694-95.

emphasis of the "[b]road exceptions" provided in RCW 10.73.100 when it earlier upheld the constitutionality of this statute.¹⁶ More specifically, the court stated:

These exceptions are broader than is necessary to preserve the narrow constitutional scope of habeas relief. The Legislature, of course, is free to expand the scope of collateral relief beyond that which is constitutionally required, and here it has done so to include **situations which affect the continued validity and fairness of the petitioner's incarceration**.^[20]

The *Greening* court held that "where an intervening opinion has effectively

overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a 'significant change in the law' for purposes of exemption from procedural bars."²¹

The question here is whether the Supreme Court decision in *Padilla* is a "significant change in the law" for purposes of this statute.

The Court described *Padilla* as a native of Honduras who was a lawful permanent resident of the United States for over 40 years.²² Following his guilty plea to possessing marijuana in a state case, he faced federal deportation proceedings.²³ In response to this, *Padilla* sought relief in state court based on

¹⁶ *Id.* at 695 (quoting *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 440, 853 P.2d 424 (1993)).

²⁰ *Id.* at 695 (quoting *Runyan*, 121 Wn.2d at 445).

²¹ *Id.* at 697.

²² *Padilla*, 130 S. Ct. at 1477.

²³ *Id.*

the claimed ineffectiveness of his plea counsel.²⁴ Specifically, he claimed counsel did not advise him of the potential adverse immigration consequences of pleading guilty to the charged offenses.²⁵ The Kentucky Supreme Court denied his request for post-conviction relief.²⁶ The denial was based on the rationale that the Sixth Amendment right to effective assistance of counsel did not include the duty to advise a client about deportation because it is a collateral, not a direct, consequence of a conviction.²⁷

Reversing and remanding for further proceedings, the Supreme Court held that, under the Sixth Amendment and Strickland, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."²⁸ To the contrary, such advice falls within that domain.²⁹

The Court reasoned that deportation is "intimately related to the criminal process" and that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders."³⁰ The Court stated that it "ha[d] long recognized that the negotiation of a plea bargain

²⁴ Id. at 1478.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id. at 1482.

²⁹ Id.

³⁰ Id. at 1481.

is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.³¹ The Court also observed that the "weight of prevailing professional norms supports the view that counsel must advise" a client of the risk of deportation as part of the plea process.³²

Before Padilla, many other courts, including the Washington State Supreme Court, believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction.³³ This was based on the rationale that there was a distinction between "direct" and "collateral" consequences of a plea bargain.³⁴

For example, in In re Personal Restraint of Yim,³⁵ the Washington Supreme Court noted that immigration consequences to a plea are merely

³¹ Id. at 1486.

³² Id. at 1482 (citing Nat'l Legal Aid & Defender Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, at 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713-18 (2002); A. Campbell, Law of Sentencing § 13:23, at 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, at D10, H8-H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), at 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), at 116 (3d ed. 1999).

³³ State v. Sandoval, 171 Wn.2d 163, 169-70, 249 P.3d 1015 (2011) (citing Padilla, 130 S. Ct. at 1481 n.9).

³⁴ Padilla, 130 S. Ct. at 1481.

³⁵ 139 Wn.2d 581, 588, 989 P.2d 512 (1999).

collateral to the plea.³⁶ Thus, the court stated there was no duty for counsel to advise a client of the possibility of deportation.³⁷ Under this rationale, defense counsel only had a duty to warn clients of direct consequences of a criminal conviction, which did not include deportation—a civil consequence deemed collateral to the criminal proceeding.³⁸

The Padilla Court addressed this claimed distinction, stating:

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under Strickland. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

....

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla’s claim.³⁹

Thus, Padilla made clear that the Supreme Court had never recognized the validity of the direct versus collateral distinction that some lower federal

³⁶ Id. at 588.

³⁷ Id.

³⁸ See U.S. v. Amador-Leal, 276 F.3d 511, 514-15 (9th Cir. 2002) (holding that attorneys were not required to advise clients about immigration consequences of a plea because deportation was simply a “collateral consequence” of the plea).

³⁹ Padilla, 130 S. Ct. at 1481-82 (internal citations omitted).

courts, our state supreme court, and many other jurisdictions had recognized for purposes of applying the Strickland standard. The Court also stated that it was not deciding whether such a distinction was generally appropriate because, in the case of deportation, such a distinction was ill-suited to evaluate a Strickland claim.

In State v. Sandoval,⁴⁰ our supreme court recognized that Padilla changed the law:

Before Padilla, many courts believed that the Sixth Amendment right to effective assistance of counsel did not include advice about the immigration consequences of a criminal conviction. However, in Padilla, the United States Supreme Court rejected this limited conception of the right to counsel. The Court recognized that deportation is intimately related to the criminal process and that recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Because of deportation’s close connection to the criminal process, advice about deportation consequences falls within the ambit of the Sixth Amendment right to counsel.⁴¹

There can be no question that Padilla was a “significant change in the law,” as RCW 10.73.100(6) requires. Before that case was decided, Yim was the law in this state.⁴² As described above, that case held that deportation was a collateral consequence of a guilty plea.⁴³ Thus, anything short of affirmative misadvice by counsel was not sufficient to set aside a plea.⁴⁴

⁴⁰ 171 Wn.2d 163, 170, 249 P.3d 1015 (2011).

⁴¹ Id. at 169-70 (internal quotations and citations omitted).

⁴² Sandoval, 171 Wn.2d at 170 n.1.

⁴³ Yim, 139 Wn.2d at 588.

⁴⁴ Id.

The supreme court noted that "Padilla has superseded Yim's analysis of how counsel's advice about deportation" affects a plea.⁴⁵ Padilla rejects any distinction between direct and collateral consequences of a plea where immigration consequences are at issue. This effectively overturned Yim, a prior appellate decision that was originally determinative of this issue and its impact on the right to effective assistance of counsel. Accordingly, Padilla is a "significant change in the law" for the purposes of RCW 10.73.100(6).

Materiality

We turn to the next requirement to qualify for exemption from the one year bar: materiality of the change in law to the challenged conviction. We hold that Padilla is material to Jagana's conviction.

RCW 10.73.100(6) requires that a significant change in the law be "**material** to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government."⁴⁶ The term "material" is not defined in the statute. Therefore, we may turn to a definition found in a standard dictionary.⁴⁷ In the context of this statute, the word "material" most closely means "[h]aving some logical connection with the consequential facts <material evidence>."⁴⁸ Generally, the terms "material" and "consequential" in a

⁴⁵ Sandoval, 171 Wn.2d at 170 n.1.

⁴⁶ (Emphasis added.)

⁴⁷ State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003).

⁴⁸ Black's Law Dictionary 1066 (9th ed. 2009).

legal context mean outcome-determining.⁴⁹

Applying that meaning here, the change in the law from Padilla, requiring defense counsel to inform a defendant of the immigration consequences of a plea bargain, must impact the outcome of the plea at issue. Where pleading guilty to a crime could put the defendant's immigration status at risk, Padilla is clearly material. Here, Jagana's guilty plea did result in deportation proceedings being initiated against him. Therefore, we conclude that Padilla is material to his conviction.

Sufficient Reasons to Require Retroactive Application

The final requirement of RCW 10.73.100(6) is that there are "sufficient reasons" to require retroactive application of the "significant change in the law." We hold that there are sufficient reasons to apply Padilla retroactively here.

Jagana's request for collateral review comes over four years after his sentencing on June 9, 2006. Whether Padilla, which was decided in March 2010, may be applied retroactively is at issue.

Our retroactivity analysis under RCW 10.73.100(6) is controlled by the

⁴⁹ See State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006) ("Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial."); In re Davis, 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("A material fact is one upon which the outcome of the litigation depends." (quoting Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993))); In re Estate of Black, 153 Wn.2d 152, 160-61, 102 P.3d 796 (2004) ("A material fact is one upon which the outcome of the litigation depends." (quoting Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963))); Ohler v. Tacoma Gen. Hosp., 92 Wn.2d 507, 511, 598 P.2d 1358 (1979) ("A 'material fact' is one on which the litigation's outcome depends."), overruled on other grounds by Wood v. Gibbons, 38 Wn. App. 343, 685 P.2d 619 (1984).

decisions of our state supreme court. The court has made clear that “[i]t has attempted to maintain congruence in [its] retroactivity analysis with the standards articulated by the United States Supreme Court.”⁵⁰

More recently, the state supreme court reiterated that “RCW 10.73.100(6) allows collateral relief from judgment even after the normal time bar has lapsed based on a ‘material’ change in the law when the court or the legislature finds ‘sufficient reasons’ for retroactive application. *The statutory language has been interpreted along the lines of Teague.*”⁵¹

In *In re Markel*,⁵² the court applied the federal retroactivity analysis articulated in the plurality opinion of Justice O’Connor in *Teague*.⁵³ A majority of the Supreme Court adopted and refined the *Teague* analysis in *Schriro v. Summerlin*.⁵⁴

Teague and its progeny first require identifying whether a constitutional rule is “new” or “old.”⁵⁵ An “old” rule applies both to direct and collateral

⁵⁰ *In re Markel*, 154 Wn.2d 262, 268, 111 P.3d 249 (2005).

⁵¹ *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627 (2005) (emphasis added).

⁵² 154 Wn.2d 262, 111 P.3d 249 (2005).

⁵³ *Id.*, at 268-69.

⁵⁴ 542 U.S. 348, 352, 355, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

⁵⁵ *Teague*, 489 U.S. at 299-301; *Summerlin*, 542 U.S. at 351-52.

⁵⁶ *Com. v. Clarke*, 460 Mass. 30, 34-35, 949 N.E. 2d 892 (2011) (quoting *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)).

review.⁵⁶ But a “new” rule is generally applicable only to cases that are still on direct review.⁵⁷ There are two limited exceptions to applying a “new” rule to collateral review, as outlined by our supreme court in *Markel*. There, the court characterized the federal common law retroactivity analysis applicable to “new” rules as follows:

(1) A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.

(2) A new rule will not be given retroactive application to cases on collateral review except where either: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty.⁵⁸

Here, we must first decide whether the rule of *Padilla* is “old” or “new.” As the *Teague* Court stated, “[i]t is admittedly often difficult to determine when a case announces a new rule.”⁵⁹

In *State v. Evans*,⁶⁰ our supreme court quoted the test from *Teague* and later Supreme Court authority:

“New” cases are those that “break[] new ground or impose[]

⁵⁶ *Com. v. Clarke*, 460 Mass. 30, 34-35, 949 N.E. 2d 892 (2011) (quoting *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)).

⁵⁷ *Id.* (quoting *Whorton*, 549 U.S. at 416).

⁵⁸ *Markel*, 154 Wn.2d at 268-69.

⁵⁹ *Teague*, 489 U.S. at 301.

⁶⁰ 154 Wn.2d 438, 114 P.3d 627 (2005).

a new obligation on the States or the Federal government [or] . . . *if the result was not dictated by precedent existing at the time the defendant's conviction became final.*" If before the opinion is announced, reasonable jurists could disagree on the rule of law, the rule is new.⁶¹

As we previously discussed in this opinion, the Supreme Court held in Padilla that, under the Sixth Amendment and Strickland, "advice regarding deportation" falls within "the ambit of the Sixth Amendment right to counsel."⁶² Thus, the failure of defense counsel to advise his or her client of the immigration consequences of a plea agreement falls below the objective standard of reasonableness, as required by the first prong of Strickland.⁶³ The Court reasoned that removal is nearly automatic for many offenses, plea negotiations are a critical phase of litigation, and "prevailing professional norms" require counsel to advise a client of the risk of deportation during the plea process.⁶⁴

Because immigration law can be complex, the precise advice required under Padilla depends on the clarity of the law.⁶⁵ If it "is truly clear" that an offense is deportable based on the applicable immigration law, the defense attorney must correctly advise the defendant that pleading guilty to a particular

⁶¹ Id. at 444-45 (quoting Teague, 489 U.S. at 301; citing Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004)) (emphasis added).

⁶² Padilla, 130 S. Ct. at 1482.

⁶³ Id.

⁶⁴ Id. at 1481-82, 1486.

⁶⁵ Id. at 1483.

charge would lead to deportation.⁶⁶ If "the law is not succinct and straightforward[,] counsel must provide only a general warning that "pending criminal charges may carry a risk of adverse immigration consequences."⁶⁷

Significantly, Padilla did not expressly decide whether its rule should be applied retroactively. That question is currently the subject of debate among the federal circuit courts and the state appellate courts.⁶⁸

Among the conflicting authorities on the question whether Padilla is retroactive for purposes of collateral review of final judgments, we conclude that two are most persuasive. They are the Third Circuit decision in United States v. Orocio⁶⁹ and the Massachusetts decision in Commonwealth v. Clarke.⁷⁰ Accordingly, we join those two courts in concluding that Padilla applies an "old"

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ See U.S. v. Orocio, 645 F.3d 630 (3d Cir. 2011) (Padilla is not a "new" rule); Chaidez v. U.S., 655 F.3d 684 (7th Cir. 2011) (Padilla is a "new" rule), cert. granted, ___ U.S. ___, 2012 WL 1468539, 132 S. Ct. 2101 (Apr. 30, 2012); U.S. v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011) (Padilla is a "new" rule); U.S. v. Amer, 681 F.3d 211 (5th Cir. 2012) (Padilla is a "new" rule); U.S. v. Mathur, ___ F.3d ___, 2012 WL 2819603 (4th Cir. 2012) (Padilla is a "new" rule); Commonwealth v. Clarke, 460 Mass. 30, 949 N.E. 2d 892 (2011) (Padilla is not a "new" rule); Campos v. State, ___ N.W. 2d ___, 2012 WL 2327962 (Minn. 2012) (Padilla is a "new" rule); Denisvuk v. State, 422 Md. 462, 30 A.3d 914 (2011) (Padilla is not a "new" rule); State v. Gaitan, 209 N.J. 339, 37 A.3d 1089 (2012) (Padilla is a "new" rule). See also U.S. v. Hubenig, 2010 WL 2650625, at *6 (E.D. Cal. 2010) (Padilla is not a "new" rule); Luna v. U.S., 2010 WL 4868062, at *3 (S.D. Cal. 2010) (Padilla is not a "new" rule).

⁶⁹ 645 F.3d 630 (3d Cir. 2011).

⁷⁰ 460 Mass. 30, 949 N.E. 2d 892 (2011).

rule: the standard dictated by Strickland.⁷¹ We hold that Padilla is to be applied retroactively under the Teague analysis that controls our reading of RCW 10.73.100(6)'s last requirement.

Orocio noted the distinction in Teague between "old" rules, applicable to both direct and collateral review, and "new" rules, applicable in much more limited circumstances.⁷² The court rejected the government's argument that Padilla announced a new rule. In response to the argument that the case extended Strickland to a non-criminal setting, the court reasoned that was too narrow a view of the rule of Strickland.⁷³ In light of Strickland and Hill v. Lockhart,⁷⁴ a plea bargain case, the court held that immigration consequences represented an "important decision" at a critical phase and Padilla merely "reaffirmed defense counsel's obligations to the criminal defendant during the plea process"⁷⁵

The Orocio court was not persuaded that Padilla "broke new ground" in the sense stated in Teague. Rather, the court concluded that the Supreme Court "straightforwardly applied the Strickland rule[,] and the norms of the legal

⁷¹ See State v. Chetty, 167 Wn. App. 432, 443-44, 272 P.3d 918 (2012) (without deciding whether Padilla should be applied retroactively, this court recognized that professional norms of at least the past 15 years have required an attorney to advise his client about deportation consequences of a plea).

⁷² Orocio, 645 F.3d at 637.

⁷³ Id. at 637-39.

⁷⁴ 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

⁷⁵ Orocio, 645 F.3d at 638.

profession, to the facts of Padilla's case.⁷⁶ Furthermore, the court explained that an application of new facts to the Strickland standard "is not in each instance a 'new rule,' but rather a new application of an 'old rule' in a manner dictated by precedent."⁷⁷ Accordingly, the court concluded that the application of the facts of Padilla's case to Strickland was not a new rule under Teague.⁷⁸

In Clarke, the Supreme Judicial Court of Massachusetts reached the same conclusion. The court quoted the general test stated in Teague for a "new" rule: that the result was not *dictated* by existing precedent when the conviction was final.⁷⁹ The court then considered the government's argument that Padilla is a "new" rule because "it was not 'dictated' by precedent and 'abrogated both widespread federal and state[] precedent.'"⁸⁰ In rejecting that argument, the court quoted Justice O'Connor and Justice Kennedy in two other Supreme Court cases analyzing Teague. Justice O'Connor stated:

"Even though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new."⁸¹

⁷⁶ Id.

⁷⁷ Id. at 640-41.

⁷⁸ Id.

⁷⁹ Clarke, 460 Mass. at 34-35.

⁸⁰ Id. at 35.

⁸¹ Id. at 36 (quoting Williams v. Taylor, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (quoting Wright v. West, 505 U.S. 277, 304, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (O'Connor, J., concurring))).

This statement in the concurring opinion of Justice O'Connor states her view that the mere existence of conflicting authority does not mean that a rule is new for purposes of retroactivity. This view is telling, coming from the author of Teague.

The Clarke court went on, quoting Justice Kennedy:

... Of particular relevance to the claim of ineffective assistance of counsel raised in Padilla, Justice Kennedy has noted that it may be harder to find a "new rule" in a case where the existing precedent established a general standard that can only be applied after analysis of the facts of a given case:

"Whether the prisoner seeks the application of an old rule in a novel setting . . . depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."⁸²

The Clarke court reasoned that Strickland established a general rule that is to be applied in a variety of factual situations.⁸³ As Justice Kennedy stated in his concurring opinion in Wright, that view of Strickland undercuts any argument that a new rule exists in such a situation.⁸⁴

The Clarke court made additional observations of note on the question of

⁸² Id. (quoting Wright, 505 U.S. at 308-09 (Kennedy, J., concurring)).

⁸³ Id. at 38-39.

⁸⁴ Wright, 505 U.S. at 308-09 (Kennedy, J., concurring).

retroactivity. It cited the Supreme Court's decision in Roe v. Flores-Ortega.⁸⁵ That case settled a conflict among the federal circuit courts regarding counsel's duty under Strickland to inform a client about his or her appellate rights.⁸⁶ Notwithstanding the split, the Supreme Court rejected the bright line rule articulated by several of the circuits.⁸⁷ Rather, it held that "the performance inquiry [under the first prong of Strickland] must be whether counsel's assistance was reasonable considering all the circumstances."⁸⁸

Even though there was a conflict among the federal circuits on the scope of the duty under Strickland before Roe, Roe is generally viewed not to be a "new" rule.⁸⁹ This treatment of the case by most courts supports the conclusion that the constitutional rule of Strickland remains the same. Only the factual circumstances under which that rule is applied change.

Clarke also discusses Padilla itself as an additional source of support for

⁸⁵ 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

⁸⁶ Id. at 478.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ See Tanner v. McDaniel, 493 F.3d 1135, 1143-44 (9th Cir. 2007) ("Each time that a court delineates what 'reasonably effective assistance' requires of defense attorneys with respect to a particular aspect of client representation [under Strickland] it can hardly be thought to have created a new principle of constitutional law."); Frazer v. South Carolina, 430 F.3d 696, 704-05 (4th Cir. 2005) ("[Roe] simply crystalizes [stet] the application of Strickland to the specific context presented by [the defendant's] claim."); Lewis v. Johnson, 359 F.3d 646, 655 (3rd Cir. 2004) ("Strickland is a 'rule of general applicability,' and identification of 'particular duty' to consult regarding appeal options is not a basis for classifying a rule as 'new').

the retroactive application of its holding. Clarke notes the reference in Padilla to the Solicitor General's concern that the decision would "open the 'floodgates' and disturb the finality of convictions."⁹⁰ The Clarke court stated:

The Court pointed out that as a practical matter its ruling would not undermine the finality of large numbers of convictions that had already been obtained by plea bargains for several reasons. First, because for "at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." Second, because in the then twenty-five years since Strickland, claims of ineffective assistance of counsel at the plea stage are far "less frequently the subject of collateral challenges than convictions obtained after a trial," in large measure because the relief to be obtained, a new trial, "imposes its own significant limiting principle"—the loss of the benefit of the bargain obtained through the plea. Third, because to obtain relief under Strickland, the defendant must also meet the high bar of demonstrating prejudice resulting from counsel's below-standard performance, that is, "that a decision to reject the plea bargain would have been rational under the circumstances."⁹¹

As the above passage makes clear, the Clarke court viewed Padilla's reliance on Strickland's statement of the test for ineffective assistance of counsel claims as a broad rule of reasonableness. That rule depends on professional norms and is applied to factual situations that will vary according to individual cases. The growing importance of immigration consequences to pleas in criminal cases requires effective assistance of counsel at this critical stage of a case.

It is also noteworthy that the Padilla Court was well aware that its rule would have some impact on collateral review in future cases, although it

⁹⁰ Clarke, 460 Mass. at 43.

⁹¹ Id. at 43-44 (quoting Padilla, 130 S. Ct. at 1485).

concluded that impact would be minimal:

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied Strickland to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed. The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.⁹²

For all of these reasons, Orcoio and Clark are persuasive.

In contrast to those cases, in Chaidez v. United States⁹³ the Seventh Circuit concluded that Padilla announced a "new" rule of law and was not retroactive on collateral review.⁹⁴

First, it noted that the lack of unanimity in the Padilla opinion indicated that a "new" rule was announced.⁹⁵ Second, it pointed out that the lower courts were split on the issue, meaning that it was susceptible to reasonable debate

⁹² Padilla, 130 S. Ct. at 1485-86.

⁹³ 655 F.3d 684 (7th Cir. 2011).

⁹⁴ Id. at 694.

⁹⁵ Id. at 689 (citing Beard, 542 U.S. at 414-15; Sawyer v. Smith, 497 U.S. 227, 236-37, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990)).

before the Supreme Court's decision.⁹⁶ Third, it explained that Padilla should not be considered an "old" rule because it "was not *dictated* by precedent," but was simply informed, controlled, and governed by precedent that led "general support" to the rule established.⁹⁷ Finally, the court determined that Padilla was a "new" rule because it categorized an attorney's duty to advise a client on immigration consequences based upon whether those consequences were clear or uncertain.⁹⁸ The court stated that such a "nuanced, new analysis cannot, in our view, be characterized as having been dictated by precedent."⁹⁹

The Supreme Court recently granted review of Chaidez.¹⁰⁰ As of this writing, the Supreme Court has not resolved this conflict within the federal circuit courts on whether Padilla is a new rule or an old one.

Here, the State argues that Padilla sets forth a new rule that was not dictated by precedent and apparent to all reasonable jurists.¹⁰¹ For the reasons that we have already explained in our discussion of Oroco and Clarke, we disagree.

There are additional bases for our conclusion that Padilla should be

⁹⁶ Id. at 689-91.

⁹⁷ Id. at 689-90.

⁹⁸ Id. at 693.

⁹⁹ Id.

¹⁰⁰ ___ U.S. ___, 2012 WL 1468539 (Apr. 30, 2012).

¹⁰¹ State's Response to Personal Restraint Petition at 8.

applied retroactively to this collateral review of Jagana's final judgment and sentence.

In Padilla, the Supreme Court characterized the case as a "postconviction proceeding."¹⁰² An examination of the history of the case reveals more specifically what type of "postconviction proceeding" it was.

Padilla, who was represented by counsel, entered a guilty plea to three drug related charges in exchange for dismissal of a remaining charge and a total sentence of ten years on all charges.¹⁰³ Final judgment on the reduced charges was entered on October 4, 2002.¹⁰⁴

On August 18, 2004, Padilla moved for relief from the conviction. He claimed his counsel was ineffective for misadvising him about the potential for deportation as a consequence of his guilty plea.¹⁰⁵

Rule 12.04 of the Kentucky Rules of Criminal Procedure provides that a notice of appeal of a judgment must generally be filed within 30 days of entry. There is no evidence of any appeal by Padilla of the October 2002 judgment. Thus, that judgment was final as of that date. Accordingly, his August 2004 application for relief—characterized by the Supreme Court as a "postconviction proceeding"—was one for collateral review of a final judgment.

¹⁰² Padilla, 130 S. Ct. at 1478.

¹⁰³ Com. of Kentucky v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

¹⁰⁴ Id.

¹⁰⁵ Id.

We also note that the Padilla Court applied Strickland despite substantial conflicting authority in lower federal courts and many state courts. Nevertheless, the Court had no difficulty in applying Strickland, an old rule, to that case.

We acknowledge the obvious. The Supreme Court did not expressly decide in Padilla whether the rule of that case would be applied retroactively. Nevertheless, the Supreme Court did just that. Padilla's judgment was final in October 2002. His request for relief, almost two years later, was one for collateral relief of a final judgment.

It is difficult to see why the Supreme Court, particularly after the Court's heavy reliance on Strickland, would conclude that Padilla is anything other than an "old" rule, retroactively applicable to cases on collateral review of final judgments. Presumably, that question will be settled when the Court decides Chaldez.

Moreover, Padilla's rejection of the distinction between direct and collateral consequences of a plea when applying Strickland supports the conclusion that the case should be applied retroactively under our state statute.

For all of these reasons, we conclude that the Strickland rule applied in Padilla is an "old" rule, not a "new" one. The result in that case was dictated by Strickland. The existence of conflicting authority before Padilla was decided does not require a different conclusion.

Accordingly, there are sufficient reasons to apply Padilla retroactively, to Jagana's claim of ineffective assistance of counsel. This fulfills the final

requirement of RCW 10.73.100(6).

INEFFECTIVE ASSISTANCE OF COUNSEL

Because the one year bar does not apply to Jagana's claim that he received ineffective assistance of counsel, we reach the merits. We hold that he has demonstrated, under Padilla, that his counsel failed to properly advise him under the first prong of Strickland.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process.¹⁰⁶ Counsel's faulty advice can render a guilty plea involuntary or unintelligent.¹⁰⁷ In evaluating such a claim, an ordinary due process analysis does not apply.¹⁰⁸ Rather, "[t]o establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part [Strickland] test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant."¹⁰⁹

In satisfying the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial.¹¹⁰ A "reasonable probability" exists if

¹⁰⁶ Sandoval, 171 Wn.2d at 169 (citing In re Pers. Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); McMann v. Richardson, 397 U.S. 769, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

¹⁰⁷ Id. (citing Hill, 474 U.S. at 56; McMann, 397 U.S. at 770-71).

¹⁰⁸ Id. (citing Hill, 474 U.S. at 56-58).

¹⁰⁹ Id.

¹¹⁰ Id. at 174-75 (citing Riley, 122 Wn.2d at 780-81 (citing Hill, 474 U.S. at

he "convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances."¹¹¹ "[A] petitioner who shows prejudice under Strickland necessarily meets his burden to show actual and substantial prejudice on collateral attack."¹¹² In the absence of one prong of the Strickland test, it is unnecessary to consider the other.¹¹³

In Padilla, the Supreme Court held that a constitutionally competent defense attorney must give advice about immigration consequences during the plea process.¹¹⁴ As noted above, if the immigration law "is truly clear" that an offense is deportable, the attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation.¹¹⁵ But, if "the law is not succinct and straightforward," counsel must only generally warn that "pending criminal charges may carry a risk of adverse immigration consequences."¹¹⁶

In Padilla, the Court did not reach the prejudice prong of Strickland.¹¹⁷ It

¹¹¹ Id. at 175 (alteration in original) (quoting Padilla, 130 S. Ct. at 1485).

¹¹² Crace, No. 85131-0, slip op. at 15.

¹¹³ In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

¹¹⁴ Padilla, 130 S. Ct. at 1483.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id. at 1487.

remanded to the state court for a determination of that question at a proper hearing.¹¹⁸

In Sandoval, the defendant claimed that his defense counsel was ineffective for failing to advise him of the deportation consequences of his guilty plea.¹¹⁹ Applying Padilla, the supreme court held that the immigration law at issue was "straightforward enough for a constitutionally competent lawyer to conclude that a guilty plea . . . would have subjected Sandoval to deportation."¹²⁰

Here, Jagana pled guilty to one count of violation of the uniform controlled substances act: possession of cocaine. Under 8 U.S.C. § 1227(a)(2)(B)(i), this crime is clearly deportable:

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Therefore, under Padilla and Sandoval, Jagana's counsel was required to advise him of the correct deportation consequence of his guilty plea. Counsel's failure to do so was unreasonable and satisfies the first Strickland prong.

In Padilla, the Court stated the prejudice standard required that "a petitioner must convince the court that a decision to reject the plea bargain

¹¹⁸ Id.

¹¹⁹ Sandoval, 171 Wn.2d at 174, 176.

¹²⁰ Id. at 172.

would have been rational under the circumstances."¹²¹

Jagana presents several arguments that he suffered prejudice. First, he argues that boilerplate language in his guilty plea form regarding immigration consequences did not waive defense counsel's duty to inform him directly of those consequences. He also argues that emails exchanged between the prosecutor and defense counsel referencing the immigration consequences of his plea are not evidence that he was so informed. Finally, he opposes the State's argument that it would have been irrational for him to proceed to trial and risk conviction with a greater prison sentence.

Here, the record is inadequate to decide the question of prejudice. That question should be decided by the trial court on remand at an evidentiary hearing.

To summarize, we hold that this request for collateral relief of a final judgment falls within the exception to the one year bar, as codified in RCW 10.73.100(6). Jagana has also demonstrated that his plea counsel failed to fulfill his duty under the first prong of Strickland.

We remand for an evidentiary hearing to determine whether Jagana can demonstrate prejudice due to his counsel's failure to advise him of adverse immigration consequences arising from his guilty plea.

¹²¹ Padilla, 130 S. Ct. at 1485 (citing Roe, 528 U.S. at 480, 486).

Cox, J.

WE CONCUR:

Leach, C. J.

Salvatore, J.

Appendix E

Bench Warrant and Motion to Quash Bench Warrant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

Plaintiff,

NO. 06-1-067826

vs.

Yung-Chang Tsai

MOTION AND DECLARATION
AUTHORIZING ISSUANCE OF BENCH
WARRANT

Defendant.

I. MOTION

The undersigned (deputy) prosecuting attorney, moves the court for the issuance of an order authorizing the clerk of this court to issue a bench warrant for the arrest of the defendant above named for the reason that the defendant has

Defendant failed to appear for PK
on 7-28-06 @ BOPM CDZ/14550.

This motion is based upon the case record to date and upon the following declaration.

DATED: 7-28-06

[Signature]
DEPUTY PROSECUTING ATTORNEY

12902

II. DECLARATION

The undersigned states:

2.1 I am a (deputy) prosecuting attorney and am acquainted with the court file of this case.

2.2 A bench warrant should issue for the following reasons:

On 7-10-06 the court ordered the defendant to appear on today's date and defendant has failed to appear as ordered; or

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: 7-28-06

PLACE: TACOMA, WASHINGTON

[Signature]
DECLARANT

12402

MOTION AND DECLARATION AUTHORIZING
ISSUANCE OF BENCH WARRANT (4/01)

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

STATE OF WASHINGTON

Plaintiff,

v.

Yung - Cheng Tsai

Defendant.

NO. 06-1-00782-6

ORDER AUTHORIZING ISSUANCE OF
BENCH WARRANT

I. BASIS

A motion and declaration for the court to order the issuance of a bench warrant in this case was filed on:

2-28-09

II. FINDING

The court finds that the (deputy) prosecuting attorney has shown good cause for the issuance of a bench warrant for the defendant for the reason(s) that:

DEFENDANT FAILED TO APPEAR AS ORDERED BY THE COURT.

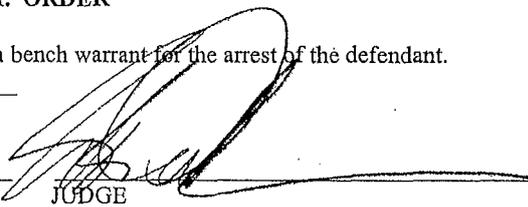
III. ORDER

IT IS ORDERED that the clerk of the court issue a bench warrant for the arrest of the defendant.

Bail on this warrant is set at \$ _____

No bail will be accepted.

DATED: 2-28-09


JUDGE

Pursuant to RCW 10.19.090, the prosecutor shall forward a copy of this order to the surety and this order shall serve as written notice to the surety.

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

CAUSE NO. 06-1-00782-6

Plaintiff,

vs.

ORDER REVOKING ORDER FOR BENCH WARRANT AND QUASHING ALL BENCH WARRANTS THEREUNDER

YUNG-CHENG TSAI,

Defendant.

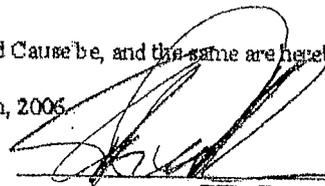
[X] ADMINISTRATIVE ONLY
INCIDENT #: 060460362

THIS MATTER having come on for hearing before this court upon the motion of the Prosecuting Attorney the defendant appearing in person herein, the defendant is currently in custody in the Pierce County Jail and good cause having been shown why the order authorizing issuance of bench warrant should be revoked, and the bench warrant issued 02/28/06 for the arrest of YUNG-CHENG TSAI should be quashed, NOW, THEREFORE, IT IS HEREBY

ORDERED that the order authorizing issuance of bench warrant issued herein, be and hereby is, revoked, and it is finally

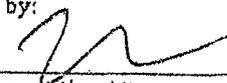
ORDERED that all bench warrants issued under said Cause be, and the same are hereby quashed.

DONE IN OPEN COURT this 3 day of March, 2006



JUDGE

Presented by:



Deputy Prosecuting Attorney
WSB # 24050

tmc

ORDER REVOKING ORDER FOR BENCH WARRANT AND QUASHING ALL BENCH WARRANTS.
bwquash.dot

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

