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STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

88770-5

Case No. 42834-2-II

STATE OF WASHINGTON, Respondent

v.

YUNG-CHENG TSAI, Appellant

Case No. 43118-1-II

PERSONAL RESTRAINT PETITION OF

YUNG-CHENG TSAI

SUPPLEMENTAL BRIEF OF APPELLANT

YUNG-CHENG TSAI

Pro Se Appellant

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I. STATEMENT OF THE CASE

This brief supplements the “Brief of Appellant” Mr. Tsai submitted to this Court on May 3, 2012 in connection with Case No. 42834-2-II, a direct appeal of the Pierce County Superior Court’s denial of his CrR 7.8(b) collateral challenge to his 2006 conviction. Mr. Tsai subsequently filed a motion to consolidate that case with Case No. 43118-1-II, a personal restraint petition based on the same conviction. Appendix 1, “Motion to Consolidate.” The legal argument presented here applies to both Mr. Tsai’s appeal of his 7.8(b) motion and his personal restraint petition.

I. ARGUMENT

A. Mr. Tsai’s Collateral Attack Is Not Time Barred Because *Padilla* and *Sandoval* Constitute a Significant, Material Change In Washington Law.

Mr. Tsai’s 2006 plea to possession of a controlled substance with intent to deliver must be withdrawn and his conviction vacated because his defense attorney’s erroneous advice that the plea would not make Mr. Tsai deportable constitutes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Tsai’s CrR 7.8(b) motion and personal restraint petition are not subject to the one-year time bar at R.C.W. 10.73.090 because they are based solely on *Padilla v. Kentucky*, __U.S.__, 130 S.Ct. 1473, 176 L.Ed.2d 284

(2010) and *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011), cases which constitute a significant change in Washington law that is material to Mr. Tsai's conviction. See R.C.W. 10.73.100(6); RAP 16.4(c)(4).

- i. Prior To *Padilla* and *Sandoval*, Immigration-Related *Strickland* Claims Were Plainly Unavailable Under Washington Law.

Intervening legal authority is a significant change in the law under R.C.W. 10.73.100(6) if the defendant could not have argued the issue prior to publication of the decision. *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001) (citing *In re Pers. Restraint of Holmes*, 121 Wn.2d 327, 332, 849 P.2d 1221 (1993)). Defendants “should not be faulted for having omitted arguments that were essentially unavailable at the time.” *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). While *Strickland*'s two-part ineffective assistance of counsel test, and its applicability to claims arising out of the plea process, has been established for over 25 years, see *Strickland*, 466 U.S. at 687; *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366 (1985), prior to *Padilla* and *Sandoval*, neither Mr. Tsai, nor any noncitizen defendant in Washington whose defense counsel failed to adequately warn of the risk of deportation, could invoke *Strickland*'s test. Since 1984, Washington courts had consistently deemed immigration consequences “collateral” to

the criminal conviction and thus, outside the scope of counsel's Sixth Amendment duties. *See State v. Jamison*, 105 Wn.App. 572, 593 (2001) (Defense counsel's performance regarding immigration consequences was "immaterial because deportation and exclusion from reentry are collateral consequences of Jamison's guilty plea, not part of his punishment."); *State v. Martinez-Lazo*, 100 Wn.App. 869, 878 (2000) ("Deportation remains a collateral consequence. Thus, the trial court was not required to grant Mr. Martinez-Lazo's motion to withdraw his plea."); *State v. Holley*, 75 Wn.App. 191, 197 (1994) ("[D]eportation is a collateral consequence of a criminal conviction. Thus, the trial court is not required to grant a motion to withdraw a guilty plea when a defendant shows that his counsel failed to warn him of the immigration consequences of a conviction."); *State v. Malik*, 37 Wn.App. 414, 416, *review denied* 102 Wn.2d 1023 (1984) (Denying petitioner's ineffective assistance claim on the grounds that "the possibility of deportation, being collateral, was not properly a concern of appointed counsel."). Thus, Prior to *Padilla* and *Sandoval*, no decision in Washington permitted a post-conviction motion premised on an immigration-related claim of ineffective assistance.¹ *Strickland's*

¹ In *In Re Yim*, the Washington Supreme Court, in dicta, left open the limited possibility that affirmative misadvice regarding immigration consequences "might constitute a 'manifest injustice'". *In Re Yim*, 139 Wn.2d 581, 588 (1999) (emphasis added). No Washington court had published a decision so holding.

established test was plainly unavailable to defendants like Mr. Tsai under Washington law.

ii. *Padilla* and *Sandoval* Overruled Washington Precedent That Had Foreclosed Mr. Tsai's Claim.

A decision also constitutes a significant change in the law if it “has effectively overturned a prior appellate decision that was originally determinative of a material issue....” *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 366 (2005) (quoting *Greening*, 141 Wn.2d at 697) (internal quotation marks omitted). *Padilla* and *Sandoval* clearly overruled Washington precedent that had foreclosed Mr. Tsai's ineffective assistance of counsel claim. In *Padilla*, the Supreme Court recognized that applying the established *Strickland* test to Mr. Padilla's claim would affect a significant change in jurisdictions like Washington where defense counsel's failure to warn of possible deportation was “not a cognizable claim for ineffective assistance of counsel” because deportation was characterized as a collateral consequence of the plea. *See Padilla*, 130 S.Ct. at 1481. After noting that it had never applied the collateral consequences doctrine to define defense counsel's Sixth Amendment duties, and reiterating its long recognition of deportation as a “particularly severe ‘penalty’” that is “intimately related to the criminal process,” the Court held:

“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.”

Id. (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed. 905 (1893)). Subsequently, in *Sandoval*, the Washington Supreme Court expressly acknowledged that *Padilla* had overruled Washington law on this issue. *Sandoval*, 171 Wash.2d at 170 n.1 (“*Padilla* has superseded *Yim*’s analysis of how counsel’s advice about deportation consequences (or lack thereof) affects the validity of a guilty plea.”).

iii. The Superior Court Misconstrued The Change in Law Affected By *Padilla* and *Sandoval*.

In erroneously concluding that *Padilla* did not render a significant change in Washington law, the Pierce County Superior Court conflated the issues. *Padilla* eliminated the classification of immigration consequences as “collateral” to a noncitizen’s conviction – a classification upon which Washington courts had relied for over 25 years to foreclose *Strickland* claims challenging the efficacy of counsel on these matters. Once the collateral consequences barrier was disposed of, the *Padilla* Court went forward with an application of the long-established *Strickland* test.

As such, the Superior Court was correct in stating, “Mr. Tsai’s counsel’s obligations in 2006 when Mr. Tsai entered his plea were the same as they would be now, post-*Padilla*, *i.e.* to provide accurate legal advice about the immigration consequences of a plea.” *State of Washington v. Yung-Chen Tsai*, No. 06-1-00782-6, slip op. at 3. (Pierce Cnty. Super. Ct. Oct. 18, 2011). The *Padilla* Court recognized that since at least 1995, counsel’s Sixth Amendment duty under prevailing professional norms has included affirmative, correct immigration advice. *Padilla*, 130 S.Ct. at 1485. However, the Superior Court erred in misconstruing the application of *Strickland* as the change *Padilla* affected, when it was *Padilla*’s de-classification of immigration consequences as collateral that overturned 25 years of Washington precedent.

The Superior Court’s reliance on *State v. Littlefair*, 112 Wn.App. 749, 769 (2002), is misplaced and only serves to further confuse the issues since it is irrelevant to the instant case. The *Littlefair* Court expressly decline to rule on the defendant’s Sixth Amendment claim of ineffective assistance of counsel and limited its decision to addressing Washington’s advisal statute, R.C.W. 10.40.200, which placed a statutory obligation on *courts* to put all defendants on notice that a conviction may trigger immigration consequences. *Id* at 763-65. As the *Sandoval* Court recognized, the statutory obligations addressed in *Littlefair* have no

bearing on the question of whether defense counsel competently discharged his or her duty to provide affirmative, accurate advice regarding the immigration consequences of a plea. *See Sandoval*, 171 Wn.2d. at 173-4. Statutory advisals such as R.C.W. 10.40.200 are wholly distinct from and do not satisfy counsel's constitutional duty. *See Padilla*, 130 S.Ct. 1486; *Sandoval*, 171 Wn.2d. at 173-4.

It is both apparent and unfortunate that the Superior Court conflated a noncitizen defendant's *right* to effective assistance of counsel with the *remedy* for ineffective assistance. *Padilla* held that the right to effective assistance regarding immigration consequences was squarely within the scope of counsel's Sixth Amendment duties and has been an established professional norm since at least 1995. However, the remedy for violations of this preexisting right – a post-conviction *Strickland* challenge – was unavailable to Mr. Tsai prior to *Padilla's* elimination of the collateral designation. By making the remedy Mr. Tsai now seeks newly available to Washington defendants, *Padilla* and *Sandoval* affected a significant change in law. *See Stoudmire*, 145 Wn.2d at 264 (citing *Holmes*, 121 Wn.2d at 332).

iv. The Significant Change In Law Affected By *Padilla* and *Sandoval* Is Material to Mr. Tsai's Conviction.

A significant change in law is material to a challenged conviction if the result would have been different after the intervening decision. *See e.g., In re Pers. Restraint of Roland*, 149 Wn.App. 496, 500-1, 204 P.3d 953 (2009); *cf. In re Pers. Restraint of Crabtree*, 141 Wn.2d 577, 589, 9 P.2d 814 (2000). The outcome of Mr. Tsai's request for post-conviction relief is certain to be different after *Padilla* and *Sandoval* because the collateral consequences doctrine no longer forecloses immigration-related ineffective assistance of counsel claims in Washington. Because this remedy was previously unavailable to Washington defendants like Mr. Tsai, *Padilla* and *Sandoval* are a significant, material change in law under R.C.W. 10.73.100(6), and Mr. Tsai's collateral challenges are not time-barred.

C. *Padilla* Did Not Announce a New Federal Constitutional Rule and Thus, Applies Retroactively to Mr. Tsai's 2006 Conviction.

While *Padilla* clearly constitutes a significant, material change in Washington law under R.C.W. 10.73.100(6), it is also clear that the case did not announce a "new rule" under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989), and thus, must apply retroactively to Mr.

Tsai's 2006 plea.² In short, the significant change in law wrought by *Padilla* was to make clear that the collateral consequences doctrine to which lower courts had ascribed did not define the scope of counsel's Sixth Amendment duties with regard to the immigration consequences facing noncitizen defendants. In so doing, the Court recognized that immigration consequences are squarely within the ambit of counsel's constitutional obligations that are subject to the long-established *Strickland* standard, so that Mr. Padilla's claim could be resolved within longstanding precedent.

- i. Given That The Supreme Court Applied *Padilla*'s Holding To Mr. Padilla's Claim, There Is No Alternative To Retroactivity.

A decision applies retroactively to convictions that became final before its publication unless it announces a new constitutional rule of criminal procedure. *See Teague*, 489 U.S. at 310. Moreover, “[u]nder *Teague*, new rules will not be applied or announced in cases on collateral

² Federal and state courts are divided as to *Padilla*'s retroactivity. *Compare U.S. v. Amer*, 2012 WL 1621005 (5th Cir. 2012) (*Padilla* announced a new rule and does not apply retroactively); *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 2012 WL 1468539, (Apr. 30, 2012) (No. 11–820) (same); *U.S. v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011) (same); *State v. Frensel Gaitan* (A-109) (067613), slip op. at 42, (N.J. Feb. 28, 2012) (same); *with United States v. Orocio*, 645 F.3d 630 (3rd Cir. 2011) (*Padilla* did not announce a new rule and applies retroactively); *Commonwealth v. Clarke*, 949 N.E.2d 892 (Mass. Jul 17, 2011) (same); *Denisyuk v. State*, 2011 WL 5042332, 422 Md. 462 (M.D. Oct. 25, 2011) (same).

review unless they fall into one of two exceptions.”³ *Danforth v. Minnesota*, 552 U.S. 264, 267, n.1 (2008) (citing *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)). Thus, when a case is on collateral review and the holding sought by the defendant would announce a new rule that is not within an exception to non-retroactivity, the Supreme Court will refuse to apply or announce the rule in that case. See, e.g., *Graham v. Collins*, 506 U.S. 461, 463 (1993). *Padilla* was before the Supreme Court on collateral review, and the Court applied its holding to Mr. Padilla. *Padilla*, 130 S.Ct. at 1478. If *Padilla*’s rule were new, and presumably not within one of *Teague*’s two exceptions, its application to Mr. Padilla would violate *Teague*’s prohibition on applying such a rule in a case on collateral review. See *Danforth*, 552 U.S. at 267 n.1. Thus, *Padilla*’s collateral posture alone indicates that the case announced an old rule that applies retroactively.

Alternately, even if *Padilla* announced a new rule, it must apply retroactively. If *Padilla*’s rule were new, the Court would not have applied it to Mr. Padilla unless it was within one of *Teague*’s exceptions to

³ The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. See *Teague*, 489 U.S. at 311. The second exception allows retroactive application of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. See *id.* It is not clear that *Padilla*’s holding falls within either exception.

non-retroactivity. *See id.* It is not obvious that *Padilla*'s holding falls within either exception, but if it announces a new rule that the Court then applied to Mr. Padilla, it must. *See id.* While there is ample evidence that *Padilla*'s rule is old, it is "critical to understand" that the only available alternative also "results in the retroactive application of *Padilla* to cases on collateral review." *See Santos-Sanchez v. U.S.*, 2011 WL 3793691 (S. Dist. Tex, August 24, 2011), at 3. No Circuit court to deem *Padilla* non-retroactive reached the argument that *Teague*, as explained in *Danforth*, mandates retroactivity whether *Padilla*'s rule is old or new. *See Chaidez v. United States*, 655 F.3d 684, 688 (7th Cir. 2011), *cert. granted*, 2012 WL 1468539, (Apr. 30, 2012) (No. 11-820) ("The parties agree that if *Padilla* announced a new rule neither exception to non-retroactivity applies."); *United States v. Chang Hong*, 671 F.3d 1147, 1150-60 (10th Cir. 2011); *U.S. v. Amer*, 2012 WL 1621005 (5th Cir. 2012) at 1-2.

- ii. *Padilla* Did Not Impose A New Obligation, But Rather Assured Availability of *Strickland*'s Established Remedy Where Counsel Failed to Fulfill Constitutional Duties Existing At The Time Of Representation.

A case announces a new rule if it "breaks new ground or imposes a new obligation." *Teague*, 489 U.S. at 301. But the *Padilla* Court specifically rejected the idea that it was imposing a new burden on defense counsel since "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." *Padilla*, 130 S.Ct. at 1485. Thus, *Padilla* merely confirmed a Sixth Amendment duty to provide affirmative, accurate immigration advice that had been firmly in place for some time. "Our law has enmeshed criminal sanctions and the penalty of deportation for nearly a century," and 1996 amendments "made removal nearly an automatic result for a broad class of noncitizen offenders." *Padilla*, 130 S.Ct. at 1480-81. In 2001, the Supreme Court explained that because "preserving the client's right to remain in the United States" and "the possibility of discretionary relief from deportation" are "principal benefits sought by defendants deciding whether to accept a plea offer," the Court "expected that counsel who were unaware of the discretionary relief measures would 'follo[w] the advice of numerous practice guides' to advise themselves" of its importance. *Padilla* at 1483, (citing *St. Cyr v. INS*, 533 U.S. 289, 323 (2001)). This expectation aligned with ABA Standards published in 1982 providing that "if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" *INS v. St. Cyr*, 533 U.S. at 323 n. 48 (quoting 3 ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed.1982)). After surveying additional professional

guidelines from as early as 1993,⁴ the *Padilla* Court obviously concluded that “the weight of prevailing professional norms” required affirmative, accurate immigration advice in 2002 when Mr. Padilla entered his ill-advised plea. *See Padilla*, 130 S.Ct. at 1482. Thus, *Padilla* did not create a new expectation of counsel or right of defendants, but rather assured defendants access to a remedy under *Strickland* where counsel failed to fulfill Sixth Amendment duties existing at the time of representation.

While the collateral consequences doctrine had foreclosed immigration-related *Strickland* claims in Washington and elsewhere prior to *Padilla*, “the mere existence of conflicting authority does not necessarily mean a rule is new.” *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (quoting *Wright v. West*, 505 U.S. 277, 304, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (O'Connor, J., concurring)). Thus, contrary lower court decisions and lack of unanimity in a decision itself may be relevant to the analysis, but are not sufficient to establish that a case announces a new rule. *See, e.g., Tanner v. McDaniel*, 493 F.3d 1135, 1143-1144 (9th Cir. 2007) *cert. denied*, 552 U.S. 1068 (2007) (*Roe v. Flores-Ortega*, 528

⁴ *See Padilla*, 130 S.Ct. at 1482 (citing National Legal Aid and Defendant Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 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, pp. 555, 560 (3d ed.2004); Dept. of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8–H9, J8 (2000); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–5.1(a), p. 197 (3d ed.1993); ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116 (3d ed.1999)).

U.S. 470, 484 (2000), holding that counsel has an obligation to inform clients about appellate rights, did not announce a new rule despite contrary circuit court authority prior to the decision); *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004) (noting that the Supreme Court has not “suggest[ed] that the mere existence of a dissent suffices to show that the rule is new.”). “The Kentucky high court [was] far from alone in [its] view” that “failure to advise of deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” *Padilla*, 130 S.Ct at 1481. But the Supreme Court itself had “never applied a distinction between direct and collateral consequences.” *See id.* *Padilla*’s rejection of the collateral consequences doctrine broke no new ground; it merely corrected lower courts’ improper limitation on the availability of *Strickland*’s established remedy.

iii. *Padilla*’s Application Of *Strickland*’s Established Standard Does Not Constitute A New Rule

A case does not announce a new rule if it merely applies a general rule or standard to a specific set of facts. *Williams*, 529 U.S. at 381 (citing *Wright*, 505 U.S. at 308-309 (Kennedy, J. concurring)). As Justice Kennedy explained:

“[i]f 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.”

Wright, 505 U.S. at 308-309 (Kennedy, J., concurring) (citations omitted).

Strickland, published 25 years prior to *Padilla*, articulates just such a rule of general application, implicated in a wide range of factual circumstances. *See id.* By refusing to define counsel’s Sixth Amendment duty more specifically than “reasonableness under the prevailing professional norms,” the *Strickland* Court created a necessarily evolving standard. *See Strickland*, 466 U.S. at 688. A court reviewing an ineffective assistance claim “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. “[T]hat the *Strickland* test ‘of necessity requires a case-by-case examination of the evidence,’ obviates neither the clarity of the rule nor the extent to which the rule must be seen as ‘established’....” *Williams*, 529 U.S. at 391, quoting *Wright*, 505 U.S. at 308 (Kennedy, J., concurring).

Merely applying *Strickland* in a new factual setting does not create a new rule under *Teague*. In *Williams v. Taylor*, the Supreme Court found that prevailing professional norms require counsel to bring in mitigating evidence during the sentencing phase of a capital trial. *See Williams*, 529 U.S. at 410-12; *Strickland*, 466 U.S. at 688. This application of *Strickland*

did not create a new rule because “it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the State” and *Strickland*’s test “provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims.” *Williams*, 529 U.S at 391.

Similarly, in *Roe v. Flores-Ortega*, the Court found that counsel has a Sixth Amendment duty under prevailing norms to inform defendants of their appeal rights. *See Flores-Ortega*, 528 U.S. at 484; *Strickland*, 466 U.S. at 688. Each circuit court to address the question has found that *Flores-Ortega* merely applied *Strickland*, and did not announce a new rule. *See Tanner v. McDaniel*, 493 F.3d at 1143-1144 (“Each time that a court delineates what ‘reasonably effective assistance’ requires of defense attorneys with respect to a particular aspect of client representation, it can hardly be thought to have created a new principle of constitutional law.”); *Frazer v. South Carolina*, 430 F.3d 696, 704-705 (4th Cir.2005) (“*Flores-Ortega* simply crystalizes the application of *Strickland* to the specific context presented by [the defendant’s] claim.”); *Lewis v. Johnson*, 359 F.3d 646, 655 (3d Cir.2004) (*Flores-Ortega*’s identification of a duty to consult regarding appeal options is not basis for classifying *Strickland*’s standard as “new” for *Teague* purposes.).

Like *Williams* and *Flores-Ortega*, *Padilla* merely applied *Strickland*'s established standard to incorporate evolving professional norms, as the standard itself requires. After clarifying that immigration consequences are not collateral to the plea, so that *Strickland* is applicable to counsel's performance in this respect, the *Padilla* Court proceeded to apply *Strickland* straightforwardly, "judg[ing] the reasonableness of counsel's challenged conduct" under professional norms as they existed in 2002 when Mr. Padilla's conviction became final. *See Strickland*, 466 U.S. at 690. Because 2002 norms required affirmative, accurate immigration advice, counsel's performance was objectively unreasonable and thus, constitutionally deficient under *Strickland*'s first prong. *See Padilla*, 130 S.Ct. at 1483.

iv. *Padilla*'s Language Indicates That The Court Assumed That Its Decision Would Apply Retroactively

The *Padilla* Court clearly assumed that the case did not announce a new rule and would apply retroactively to convictions that became final before its publication. For instance, the Court rejected the notion that *Padilla* would invite a flood of meritless litigation in "those convictions already obtained as the result of plea bargains" because "there is no reason to doubt that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate

specious claims from those with substantial merit.” *Padilla*, 130 S.Ct. at 1485. If *Padilla* did not apply retroactively, this discussion of pleas “already obtained” would have been superfluous. *Id.*; *United States v. Orocio*, 645 F.3d 630, 641 (3rd Cir. 2011) (“[I]t is not unlikely that the *Padilla* Court anticipated the retroactive application of its holding on collateral review when it considered the effect its decision would have on final convictions.”); *United States v. Hubenig*, 2010 WL 2650625 (E.D. Cal. July 1, 2010) at 7 (“If the Court intended *Padilla* to be a new rule which would apply only prospectively, the entire ‘floodgates’ discussion would have been unnecessary.”).

Moreover, *Teague* emphasized that a new rule’s retroactivity should be decided as a threshold question before addressing a petitioner’s constitutional claim so as to avoid inequitable results among similarly situated parties. *Teague*, 489 U.S. at 315-316. But the *Padilla* Court adjudicated Mr. Padilla’s claim without any mention of retroactivity or *Teague* – a strong indication that it assumed that the case did not announce a new rule and would apply retroactively to others in Mr. Padilla’s position.

- v. The Supreme Court Has Remanded Cases Involving Pre-*Padilla* Convictions For Hearings To Determine Prejudice, Indicating That *Padilla* Does Apply Retroactively

The most obvious evidence that the Court expected *Padilla* to apply retroactively to convictions that became final before its publication is the case of Mr. Padilla himself. The Supreme Court could not have remanded his case for a determination of prejudice unless it found that counsel's Sixth Amendment duty to advise as to immigration consequences existed at the time of his 2002 plea, so that *Strickland* must apply to his claim. *See Padilla*, 130 S.Ct. at 1487.

In the months after *Padilla*, the court vacated and remanded two cases challenging pre-*Padilla* pleas, *Santos-Sanchez v. United States*, 130 S.Ct. 2340 (2010) and *Cantu Chapa v. U.S.*, 130 S. Ct. 3504 (2010), for further consideration in light of *Padilla*. The Supreme Court vacates and remands when there is a reasonable probability that an intervening development will alter the lower court's ruling. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). As a New York Superior Court noted, "[t]he Supreme Court's remand of a case involving a guilty plea entered into prior to the decision in *Padilla v. Kentucky*, is a clear indication that the Supreme Court is of the opinion that *Padilla* is to be applied to cases involving pleas entered into prior to *Padilla* and subsequent to the 1996 amendments." *People v. Paredes*, 2010 NY Slip Op 51668(U), 29 Misc 3d 1202(A) (N.Y. Cnty. Super. Ct. Sept. 21, 2010) at 4. Thus, "[w]hile the Supreme Court has not explicitly stated that *Padilla v. Kentucky*...is

applicable to guilty pleas entered into prior to the issuance of *Padilla*, it seems to have indicated that those guilty pleas are to be governed by the *Padilla* standard.” *Id.*

On remand, a Texas District Court determined that “[s]ince *Padilla* itself was on collateral review and it both announced and applied its own rule,” it must apply retroactively to Santos-Sanchez’ claim. *Santos-Sanchez*, 130 S.Ct. 2340, *remanded to*, 2011 WL 3793691 (D. Tex. 2011) at 9. The Fifth Circuit, clearly assuming that *Padilla* would apply retroactively, remanded Cantu Chapas’ case to the District Court for an evidentiary hearing regarding prejudice. *Cantu Chapa*, 130 S.Ct. 3504, *remanded to*, 394 Fed.Appx. 53 (5th Cir. 2010) (“While the *Padilla* holding shows that Cantu Chapa’s claim may satisfy the constitutional deficiency prong of a *Strickland v. Washington* ineffective assistance of counsel analysis, we cannot fully address the claim here, since the record is not sufficiently developed so as to consider the prejudice prong of the *Strickland* analysis”).

For this Court to refuse to apply *Padilla* to Mr. Tsai’s challenge to his 2006 conviction would contravene the clear intent of the U.S. Supreme Court that the decision apply retroactively to pleas entered before its publication. *Padilla* clarified that immigration-related advice is not collateral to a plea but rather, since at least 1995 and certainly in 2006

when Mr. Tsai was misadvised, squarely within the ambit of counsel's Sixth Amendment duties. As such, Mr. Tsai must have an opportunity to present the merits of his ineffective assistance of counsel claim under *Strickland*.

D. Mr. Tsai's 2006 Guilty Plea Must Be Withdrawn Because It Was The Result Of Constitutionally Deficient Counsel Under *Strickland*.

- i. Counsel's Performance Was Objectively Unreasonable Because The Applicable Immigration Law Is Truly Clear That Mr. Tsai's Conviction Is Deportable.

"If the applicable immigration law 'is truly clear' that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation" to meet his Sixth Amendment obligations under *Padilla* and *Strickland*. See *Sandoval*, 171 Wn.2d at 170 (quoting *Padilla*, 130 S.Ct. at 1483).

Just like Mr. Padilla, Mr. Tsai was a longtime lawful permanent resident facing a charge for trafficking marijuana. A conviction for possession of a controlled substance with intent to deliver is an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B),⁵ that makes a lawful permanent resident deportable under 8 U.S.C. §1227(a)(2)(A)(iii) and ineligible for discretionary relief from deportation such as

⁵ "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B).

“cancellation of removal” under 8 U.S.C. § 1229b(a). Alternately, it is a deportable controlled substance offense under 8 U.S.C. §1227(a)(2)(B)(i).⁶

Both statutory sections are “succinct, clear and explicit in defining the removal consequences” of a drug trafficking-related conviction. *See Padilla*, 130 S.Ct at 1483.

Nevertheless, Mr. Tsai’s defense counsel erroneously assured him that pleading guilty would not make him deportable *as long as the sentence imposed was less than one year*. “Brief of Appellant” at 2. This advice was patently inaccurate. Had Mr. Tsai’s counsel so much as consulted the grounds of deportation he would have readily been apprised of the fact that the sentence imposed on a conviction involving trafficking in a controlled substance is wholly irrelevant to the immigration consequences it triggers – under immigration law, Mr. Tsai could have been sentenced to twelve days or twelve years and it would not have mattered. Although the applicable immigration law was truly clear, defense counsel affirmatively misled Mr. Tsai as to the risk of deportation. Thus, Mr. Tsai’s counsel’s performance was objectively unreasonable

⁶ “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..., other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.” 8 U.S.C. §1227(a)(2)(B)(i).

under *Sandoval*, satisfying *Strickland*'s first prong. See *Strickland*, 466 U.S. at 687; *Sandoval*, 171 Wn.2d at 170.

ii. Counsel's Performance Prejudiced Mr. Tsai Because There Is A Reasonable Probability That, But For Counsel's Errors, Mr. Tsai Would Not Have Pled Guilty

“In satisfying [*Strickland*'s] prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Sandoval*, 171 Wn.2d at 174-5 (quoting *In re. Pers. Restraint of Riley*, 122 Wn.2d 772, 780–81 (1993)). “A ‘reasonable probability’ exists if the defendant ‘convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances.’ *Id.* at 175 (quoting *Padilla*, 130 S.Ct. at 1485).

Mr. Tsai was clearly prejudiced by counsel's unreasonable performance. Like Mr. Sandoval, Mr. Tsai was “very concerned” about the risk of deportation, even to the point of hiring an immigration attorney specifically to advise his defender regarding immigration consequences. See *Sandoval*, 171 Wn.2d at 175; “Brief of Appellant” at 1. Despite Mr. Tsai's diligence, defense counsel incorrectly informed him that the plea carried no risk of deportation, advice upon which Mr. Tsai “relied heavily.” See *Sandoval*, 171 Wn.2d at 175. In fact, counsel's erroneous

assurance that an 11-month sentence would prevent deportation was the sole reason Mr. Tsai accepted the plea. “Brief of Appellant” at 7. Given Mr. Tsai’s evident concern over the risk of deportation, the avoidance of which was apparently more important to him than any potential jail sentence, it would have been rational to risk a longer sentence at trial. *See Padilla*, 130 S.Ct. at 1483 (quoting *St. Cyr*, 533 U.S. at 323); *Sandoval* 171 Wn.2d at 175. Thus, Mr. Tsai was prejudiced by his counsel’s unreasonable performance, satisfying *Strickland*’s second prong. *See Strickland* 466 U.S. at 695. Accordingly, Mr. Tsai’s 2006 conviction of possession with intent to deliver was the result of constitutionally deficient representation, and must be vacated.

IV. CONCLUSION

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

DATED this 20th day of June, 2012.

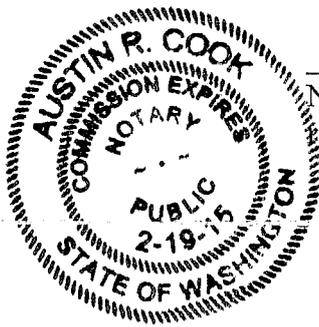
Respectfully submitted,
[Signature]
Yung-Cheng Tsai
Petitioner Pro Se

Oath

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

[Signature]
Yung-Cheng Tsai
Petitioner Pro Se

Subscribed and sworn to before me this 20th day of June, 2012.



[Signature]
Notary Public in and for the State of Washington
residing at Pierce County

Certificate of Service

I, Yung-Cheng Tsai, certify that on June 20th, 2012, I deposited the foregoing **Pro Se Supplemental Brief** and attached exhibits, in the Northwest Detention Center Legal Mail System by First Class Mail pre-paid postage, addressed to:

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

EXECUTED this 20th day of June, 2012, at Tacoma, Washington.

By: [Signature]
Yung-Cheng Tsai
Petitioner Pro Se

APPENDIX 1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,)	No. 42834-2-II
Respondent,)	No. 43118-1-II
)	
v.)	MOTION TO
)	CONSOLIDATE
YUNG-CHENG TSAI,)	CASES
Appellant.)	

I. IDENTITY OF MOVING PARTY AND RELIEF REQUESTED

Appellant, Yung-Cheng TSAI, asks this Court to consolidate the two cases he has pending before this Court, No. 42834-2-II and No. 43118-1-II, into a single case.

II. FACTS RELEVANT TO THE MOTION

On May 18, 2011, Appellant filed in Pierce County Superior Court a "Motion for Relief from Judgment" pursuant to CrR 7.8(b)(4), challenging his 2006 conviction for Unlawful Possession of a Controlled Substance with Intent to Deliver. On October 18, 2011, The Superior Court found that the motion was time-barred under RCW 10.73.090, and denied. Case No. 42834-2-II is Appellant's appeal of this denial.

In addition to appealing, Appellant argued that under CrR 7.8(c)(2), the Superior Court should have transferred his motion to

the Court of Appeals upon determining that it was time-barred. On January 23, 2012, the Superior Court agreed, vacating the October 18, 2011 denial and transferring Appellant's motion to the Court of Appeals, Division II, to be considered as a personal restraint petition. Case No. 43118-1-II is Appellant's personal restraint petition.

III. LEGAL STANDARD

"A party should move to consolidate two or more cases if consolidation would save time and expense and provide for a fair review of the cases." RAP 3.3. Both of Appellant's cases concern: (a) Whether Appellant's CrR 7.8(b)(4) challenge is exempt from the one-year time bar at RCW 10.73.090 because *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), and *State v. Sandoval*, 171 Wn.2s 163, 170 (2011), constitute a significant, material change in Washington law, see RCW 10.73.100(6); and (b) Whether *Padilla* should be applied retroactively because it did not announce a "new rule" of constitutional criminal procedure. Because Appellant's two cases before this Court concern identical legal issues, consolidation will conserve resources while permitting thorough review.

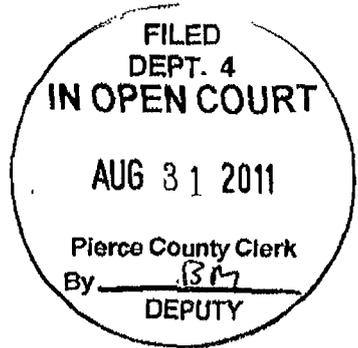
IV. CONCLUSION

For the reasons stated, Appellant asks this Court to consolidate his appeal, Case No. 42834-2-II, and his personal restraint petition, Case No. 43118-1-II, into a single case.

DATED this 30 day of May, 2012.



Yung-Cheng Tsai



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

STATE OF WASHINGTON,

Plaintiff,

vs.

YUNG CHENG TSAI,

Defendant.

CAUSE NO. 06-1-00782-6

ORDER:

- ON MOTION FOR RELIEF FROM JUDGMENT
- ✓ Clerk's Action Required

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THIS MATTER came on before the undersigned judge of the Pierce County Superior Court based upon the written motion denominated a "Motion for Relief from Judgment" pursuant to CrR 7.8(b)(4) to the court dated May 18, 2011 (and efiled May 18, 2011) and brought to this court's attention in late August 2011. The court reviewed the pleadings/materials submitted by the defendant and reviewed the file. Therefore, being duly advised in all matters, the court hereby enters the following order (check all that apply):

27 () **A. IT IS HEREBY ORDERED** that this petition/motion is transferred to the Court of
 28 Appeals, Division II, to be considered as a personal restraint petition. The petition is being transferred
 29 because:

30 () it appears to be time-barred under RCW 10.73.090; or

31 () it is not time-barred under RCW 10.73.090 but it is untimely under CrR 7.8(a) and therefore
 32 would be denied as an untimely motion in the trial court; or

33 () is not time-barred but does not meet the criteria under CrR 7.8(c)(2) to allow the court to
 34 retain jurisdiction on the merits.
 35

36 If box "A" above is checked the Pierce County Superior Court Clerk shall forward a copy
 37 of this order as well as the defendant's pleadings identified above, to the Court of Appeals,
 38 Division II.
 39

40 (x) **B. IT IS HEREBY ORDERED** that this court will retain consideration of the motion
 41 because the following conditions have been met: 1) the petition ~~is not~~ may or may not be barred by the
 42 one year time bar in RCW 10.73.090 and either:

43 (x) The defendant has made a substantial showing that he or she is entitled to relief; or

44 (x) the resolution of the motion will require a factual hearing.
 45

46 **IT IS FURTHER ORDERED** that the defendant's motion shall be heard on its merits. The
 47 State is directed to:

48 (x) file a response by **September 30, 2011**. After reviewing the response, the Court will
 49 determine whether this case will be transferred to the Court of Appeals, or if a hearing shall be
 50 scheduled.

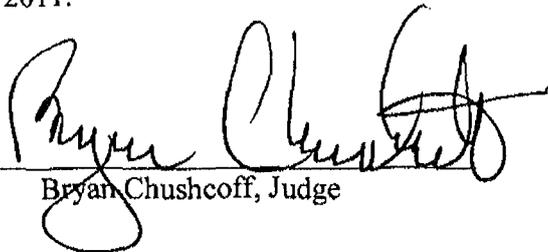
51 () appear and show cause why the defendant's motion should not be granted. That hearing shall
 52 be held on _____ at _____ a.m./p.m.

53 () As the defendant is in custody at the Department of Corrections, the State is further directed
 54 to arrange for defendant's transport at that hearing.

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If box "B" above is checked the Pierce County Superior Court Clerk shall forward a copy of this order to the Appellate Division of the Pierce County Prosecutor's Office.

ORDER signed this 31ST day of August, 2011.


Bryan Chushcoff, Judge

cc: April McComb, Department #4 sentencing deputy
Pierce County Prosecutor

Christopher Black
Attorney at Law
119 First Avenue So. #320
Seattle, WA 98104

