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Amicus Curiae Brief of the Washington Defender Association, the Washington Association of Criminal Defense Lawyers, the Northwest Immigrant Rights Project, OneAmerica, Fred T. Korematsu Center for Law and Equality, and the Washington Chapter of the American Immigration Lawyers Association, in Support of Appellant's Motion for Reconsideration

Fred T. Korematsu Center for Law and Equality

NO. 29595-8-III

WASHINGTON STATE COURT OF APPEALS

Division Three

MIGUEL GOMEZ CERVANTES,
a/k/a/ MIGUEL CERTANTES VALDOVINES

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

AMICUS CURIAE BRIEF OF THE WASHINGTON DEFENDER ASSOCIATION, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NORTHWEST IMMIGRANT RIGHTS PROJECT, ONEAMERICA, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND THE WASHINGTON CHAPTER OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

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INTEREST OF AMICUS CURIAE

The interests of the amici are contained within the motion to file amicus curiae brief.

ISSUES TO BE ADDRESSED BY AMICUS

I. Whether *Padilla v. Kentucky* substantially changed law in Washington State.

II. As *Padilla v. Kentucky* did not announce a new rule, whether it should apply retroactively.

STATEMENT OF THE CASE

This brief relies upon the appellant's statement of the case.

INTRODUCTION

Much is at stake when noncitizen defendants accept guilty pleas in Washington courts. Given that deportation has become a virtually automatic consequence for a broad range of convictions, failure to provide effective assistance of counsel can, and often does, result in a devastating blow that tears noncitizens away from "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Deportation inflicts grave emotional and financial harm on families, especially dependent U.S. citizen children. *See* Jonathan Baum et. al, *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation*, 4-5 (2010).[1] In 2009, Washington State children residing with at least one

[1] Immigration authorities removed 46,486 parents of U.S. citizen children from the U.S. in the six month period between January and June 2011 alone.

noncitizen parent accounted for 25.2% of the population under 18.[2] In addition, our society as a whole bears the costs for these family separations because dependent spouses and children of deportees must rely on public assistance and other forms of governmental support to survive. Baum, *supra*, at 5-6.

Given what is at stake for so many, and in light of the arguments herein, Amici request this court to reconsider its decision in the instant case or, in the alternative, withdraw its precedential designation. Had this Court had the requisite briefing from Mr. Gomez' appellate counsel warranted by the complex issues presented, Amici believes the Court could and would have reached a different conclusion.[3]

ARGUMENT

I. *PADILLA* SUBSTANTIALLY CHANGED THE LAW IN WASHINGTON STATE

[2] This and other significant demographic data regarding Washington State's immigrant population are available at the Migration Policy Institute's Data Hub: www.migrationinformation.org/datahub/state.cfm?ID=WA#1.

[3] In this case, the superior court ruled that it could not consider Gomez's motion to vacate his conviction based on ineffective assistance because it had previously vacated the conviction under RCW 9.94A.640, based on the passage of time and good behavior. Gomez's appellate briefing focused solely on that issue, and this Court correctly held that the trial court erred in that regard. The State, however, brought up additional issues on appeal regarding timeliness and retroactivity, which Gomez failed to address at all. (Gomez did address those issues in his superior court briefing but the superior court did not reach them). As discussed in this brief, those issues are hardly as one-sided as the State's briefing would suggest, and in fact Amici maintain that they should be resolved in Gomez's favor. However, the Court may find it more prudent to simply remove that portion of its decision and remand to the superior court to consider timeliness and retroactivity in the first instance. If the superior court's ruling is appealed again, this Court can then address the issues based on a complete record, and more thorough briefing.

In reaching its decision in the instant case this Court relied upon the State's incorrect analysis to find that the U.S. Supreme Court's decision in *Padilla v. Kentucky*, --- U.S. ---, 130 S.Ct. 1473 (2010) does not qualify Mr. Gomez for an exception to the 1 year filing requirement for post-conviction relief motions because the decision does not constitute a substantial change in the law under RCW 10.73.100(6). While the State got the test right for what constitutes a substantial change in law, it clearly missed the mark in applying it to this case and this Court's reliance on that misguided analysis was misplaced.[4] *Gomez* at 6, *citing* Br. Of Resp't at 9-10. In light of the consequences to the many noncitizens and their families who now unjustly face the severe penalty of deportation, Amici request the Court to correct its error.

As the State articulated, the test for whether a new legal decision constitutes a substantial change in law under RCW 10.73.100(6), is to determine whether the defendant could have argued this issue before publication of the new decision. *State v. Olivera-Avila*, 89 Wn.App. 313, 321 (1997). A brief review of Washington case law makes clear that, prior to the *Padilla* decision, neither Mr. Gomez nor any noncitizen defendant whose defense counsel failed to address the risk of deportation in the course of representation could have availed themselves of the established ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668 (1984).

[4] Again, Amici recognizes the failure of Mr. Gomez' appellate counsel to provide the Court with briefing on the relevant issues.

There is no dispute that the *Stickland* test is well established. *Gomez* at 6 ("*Padilla*…applied existing settled law to the case facts"). However, prior to *Padilla*, it was equally well-established in Washington law for over 26 years that *Strickland's* test did not apply to immigration-related ineffective assistance claims. Since 1984 immigration-related ineffective assistance claims were deemed "collateral" to the criminal conviction and thus, outside the scope of counsel's Sixth Amendment duties. *See State v. Malik*, 37 Wn.App. 414, 416, *review denied* 102 Wn.2d 1023 (1984) (Denying petitioners ineffective assistance claim on the grounds that "the possibility of deportation, being collateral, was not properly a concern of appointed counsel."); *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. 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. 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.")

Thus, prior to *Padilla*, no decision in Washington permitted a post-conviction motion premised on an immigration-related claim of ineffective assistance.[5]

In order to apply *Strickland* to Mr. Padilla's claim the High Court first had to make clear that immigration consequences were squarely within the ambit of defense counsel's Sixth Amendment duties. *Padilla*, 130 S.Ct. at 1481. The *Padilla* Court itself recognized that by applying *Strickland* to Mr. Padilla's case it was creating a substantial change in states like Washington that had relied upon the collateral consequences doctrine to foreclose immigration-related ineffective assistance claims. *Id*. After first noting that it had never applied the collateral consequences doctrine to define defense counsel's Sixth Amendment duties, and noting its long recognition of deportation as a "particularly severe 'penalty'", 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.*

In its subsequent decision in *State v. Sandoval*, the Washington Supreme Court expressly acknowledged that *Padilla* had overruled Washington law on this issue. *State v. Sandoval*, 171 Wn.2d 163, 170, n.1 (2011) ("*Padilla* has superseded *Yim's* analysis of how counsel's advice

[5] 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, 589 (1999) No Washington court had ever published a decision so holding.

about deportation consequences (or lack thereof) affects the validity of a guilty plea.").

II. *PADILLA* DID NOT ANNOUNCE A NEW RULE AND, THUS, APPLIES RETROACTIVELY

While it is clear that *Padilla* effected a significant change in Washington law, it is equally clear that *Padilla's* application of the *Strickland* test to immigration-related ineffective assistance claims did not forge a new federal constitutional rule and, thus, applies retroactively. Although these positions may at first blush seem incompatible, a review of the case law reveals that they are, in fact, aligned. Acknowledging both is necessary to ensure justice for noncitizen defendants and their families.

Washington courts have generally followed the U.S. Supreme Court's standards, as set out in *Teague v. Lane*, 489 U.S. 288, 299-300 *reh'g denied*, 490 U.S. 1031 (1989). *Teague* generally prohibits a federal court from applying a "new rule" of constitutional criminal procedure retroactively.[6]

Since state and federal courts have disagreed on whether *Padilla* announced a new rule it is most useful to look directly to the U.S. Supreme Court's standards regarding retroactivity, and the discussion in *Padilla* itself regarding whether the Court believed it was breaking new

[6] The Washington Supreme Court has noted, however, that it is not bound by the *Teague* standard when deciding, under RCW 10.73.100 (6), whether a ruling should apply retroactively. *State v. Evans*, 154 Wn.2d 438, 449, *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).").

ground.[7]

"[T]he 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." *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (citation omitted). Further,

> [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 v. West, 505 U.S. 277 (1992) (Kennedy, J. concurring).

Strickland's test for ineffective assistance of counsel is a general one that applies to a broad range of factual scenarios. *Knowles v. Mirzayance*, 566 U.S. 111, *reh'g denied by In re Word*, -- U.S. -- , 129 S.Ct. 2422 (2009). The generality of the rule, however, "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams*, 529 U.S. at 391. *See also, Tanner v. McDaniel*, 493 F.3d 1135 (9th Cir.), *cert. denied*, 552 U.S. 1068 (2007) ("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").

[7] Several courts have followed this approach in concluding that *Padilla* applies retroactively. *See e.g., Commonwealth v. Clarke*, 460 Mass. 30, 949 N.E.2d 892 (2011); *United States v. Orocio*, 645 F.3d 630 (3rd Cir. 2011); *People v. Gutierrez*, 954 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), *State v. Ramirez*, __ P.3d __(N.M. Ct. App. April 16, 2012); *But see Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), *petition for cert. filed*, No. 11-820 (Dec. 23, 2011).

In applying the *Strickland* standard to Padilla's claim, the language of the opinion itself shows that the Justices did not believe they were creating a new rule. The Court noted that in *Hill v. Lockhart*, 474 U.S. 52 (1985), it established that *Strickland*'s requirement of effective assistance of counsel applied to advice regarding a plea offer. *Padilla*, at 1484. "Whether *Strickland* applies to Padilla's claim follows from *Hill*." *Id.* at 1485, n.12.

In holding that defense counsel has an affirmative duty to advise noncitizen defendants regarding immigration consequences, the Court rejected the notion that it was imposing some new burden on defense counsel. "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." *Id.* at 1485.[8]

Further, *Padilla* itself involved a collateral attack on a guilty plea. *Id.* at 1478. If the Court believed it was creating a new rule, it would not have applied that rule to Mr. Padilla. *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) ("Under *Teague* new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions."). This fact alone warrants concluding that *Padilla* did not announce a new rule. *See People v. Gutierrez*, 954 N.E.2d 365, 377 (Ill. App. 2011).

[8] In light of the procedural posture of the instant case, the issue of what were prevailing professional norms at the time of Mr. Gomez' plea and sentence are not presently before the Court. However, Amici note that evidence supports that the prevailing norms referenced and relied upon in *Padilla* existed prior to 1995. *See*, e.g., Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425, 445 (1986); ABA Standard for Criminal Justice, Pleas of Guilty, 14-3.2 (2d ed. 1980 & Supp. 1986) (instructing defense counsel to advise clients about collateral consequences of guilty plea, including deportation.)

One week after deciding *Padilla*, the Supreme Court granted certiorari in a collateral challenge similar to *Padilla's*. The Court, vacated the judgment and remanded to the Fifth Circuit for further consideration in view of *Padilla*. *Santos-Sanchez v. United States*, -- U.S. -- , 130 S.Ct. 2340 (2010). The Court would not have issued such an order unless it thought that *Padilla* applies retroactively since the Court will issue such an order only when it believes an intervening decision would alter the lower court's ruling.[9] *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The core premise of *Padilla* reiterates what *Strickland* held more than 25 years ago: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla* at 1482 (quoting *Strickland*, 466 U.S. at 688 (internal quotation marks omitted)). In the recent decision in *State v. Chetty*, --- P.3d ----, 2012 WL 987779 (2012) the State opposed defendant's motion for additional time to file an appeal of his 2004 conviction which he asserted was premised on immigration-related ineffective assistance, on the grounds that *Padilla* was not retroactive. In remanding the case for an evidentiary hearing the Division One Court stated:

> However, here, the question is not whether *Padilla* is retroactive but, rather, whether the professional norms in 2004 required defense counsel to advise Chetty about the deportation consequences of the conviction and the advantages and disadvantages of filing an appeal.

[9] The Fifth Circuit reversed its original decision in light of *Padilla*. *Santos-Sanchez v. United States*, 381 Fed. Appx. 419, 2010 WL 2465080 (2010).

Chetty, at 14. Given what is a stake, Mr. Gomez, and others like him, deserve their day in court to determine whether their representation met existing professional norms.

CONCLUSION

Subjecting noncitizens across the state who entered pleas prior to March 31, 2010, and their families, to the devastating consequences of deportation that will result from this decision is unwarranted and unjust. Amici request this court to reconsider.

Respectfully submitted this 20th day of April 2012,

for

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION THREE

MIGUEL GOMEZ CERVANTES,	)	
a/k/a/ MIGUEL CERTANTES VALDOVINES,	)	
APPELLANT,	)	
	)	
v.	)	NO. 29595-8-III
	)	
STATE OF WASHINGTON	)	
RESPONDENT	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, TRAVIS STEARNS, STATE THAT ON THE 20th DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **MOTION TO FILE AMICUS MOTION AND THE AMICUS CURIAE BRIEF OF THE WASHINGTON DEFENDER ASSOCIATION, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NORTHWEST IMMIGRANT RIGHTS PROJECT, ONEAMERICA, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND THE WASHINGTON CHAPTER OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION** TO BE FILED IN THE **WASHINGTON STATE COURT OF APPEALS, DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SHAWN P. SANT	( )	HAND DELIVERY
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