IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1281

LEDUAN DIAZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON REVIEW OF CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS OF PETITIONER LEDUAN DIAZ

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STATEMENT OF THE ISSUES

(Verbatim Questions Certified to be of Great Public Importance in ***Hernandez v. State***, 61 So. 3d 1144 (Fla. 3d DCA 2011)

I. Does the immigration warning in Florida Rule of Criminal Procedure 3.172(c)(8) bar immigration-based ineffective assistance of counsel based on ***Padilla v. Kentucky***, 599 U.S. ___, 130 S.Ct. 1473 (2010)?

II. If the preceding question is answered in the negative, should the ruling in ***Padilla*** be applied retroactively?

STATEMENT OF THE CASE

This is an appeal from the Third District Court of Appeal's affirmance of the Miami-Dade Circuit Court's summary denial of Mr. Diaz's motion for postconviction relief.

On August 24, 2010, Mr. Diaz filed his Motion for Postconviction Relief Pursuant to ***Padilla v. Kentucky***, 599 U.S. ____, 130 S.Ct. 1473 (2010). App. 1.[1] He alleged that his May 21, 2001, plea of guilty to the charges of burglary of a conveyance, criminal mischief, and aggravated assault with a deadly weapon, were the result of constitutionally ineffective counsel. *Id*. at ¶5. More specifically, Mr.

[1]Counsel never received the Third District's paginated record and could not determine the internal pagination of documents from the index. Accordingly, Diaz has filed a separate appendix containing the essential documents.

Diaz, a noncitizen, alleged that neither his attorney nor the trial court advised him that the offenses to which he pled guilty would result in virtually inevitable deportation. *Id.* at ¶3. Diaz further alleged that the offenses to which he pled guilty constituted crimes of moral turpitude and rendered him automatically deportable. *Id*. at ¶s 5, 6. At the time, as a result of these convictions, Diaz was in deportation proceedings. *See id*. at ¶7.

The motion was supported by Diaz's affidavit. App. 1 at 2; App. 2. There, Diaz specifically asserted his "attorney did not advise that I would be deported or that I could even possibly be deported if I were convicted . . ." and the trial court "did not advise me that I would be deported for the offenses or that the offenses would subject me to deportation if I pled guilty . . . ." App. 2 at ¶s 2, 3. He noted he was then in removal proceedings. *Id*. at ¶4. Diaz stated that had he known his plea would result in automatic deportation, he would not have accepted it and, instead, "would have challenged the case at trial." *Id.* at ¶ at 6. The motion also was supported by Diaz's plea colloquy during which the court inquired, "Do you understand that if you are not a U.S. citizen, that this plea can be used in deportation proceedings," and Diaz responded, "Yes," App. 3 at 5-6, and the arrest affidavit describing the underlying offenses. App. 4.

In its Order Denying Defendant's Motion for Postconviction Relief pursuant to ***Padilla v. Kentucky***, the trial court acknowledged Diaz's claim that his attorney failed to inform him that charges to which he pled guilty were "removable offense[s]" and would result in "automatic deportation." App. 5 at 1. It acknowledged Diaz's claim that had he known, he would not have entered into the plea. *Id*. But, the court ruled that because Diaz was advised during the plea colloquy that the plea "could be used against him in a deportation proceeding" and this warning "cured" any deficiency in defense counsel's lack of advice or misadvice. *Id*. at 2.

On appeal, the Third District Court of Appeal affirmed. ***Diaz v. State***, No. 3D10-2563 (Fla. 3d DCA Oct. 20, 2010). App. 6. It cited ***Flores v. State***, 57 So.3d 218 (Fla. 4th DCA 2011), and ***Bermudez v. State***, 603 So. 2d 657 (Fla. 3d DCA 1992), for the proposition that a court's warning that the defendant may be deported based on his plea cures any prejudice from counsel's alleged misadvice.

Subsequently, the Third District decided ***Hernandez***. The court now rejected the holding in ***Flores***. Instead, it held that, where the deportation consequence is "truly clear," a trial court's warning that a plea "may" subject the defendant to deportation is inadequate to cure counsel's failure to provide accurate

advice as required by ***Padilla***. *Id.*, 61 So.3d at 1147-9. But, presuming ***Padilla*** established a "new rule," the court held under ***Witt v. State***, 387 So. 2d 922 (Fla. 1980), that the requirements of constitutionally effective counsel explained in ***Padilla*** do not apply "retroactively." *Id*. at 1149-50. Thus, the court held that ***Padilla*** did not provide a basis to vacate Hernandez's guilty plea and conviction. *Id*. at 1150. The court certified the questions (1) whether the immigration warning required by Florida Rule of Criminal Procedure 3.172(c)(8) bars ineffective counsel claims under ***Padilla*** and (2) whether ***Padilla*** applies retroactively, as ones of great public importance. *Id*. at 1145-6. ***Hernandez*** is pending review in this court. ***Hernandez v. State***, Nos. SC11-941, SC11-1357 (Fla. Jan. 24, 2012).

Subsequently, the Third District granted Diaz's motion for rehearing, withdrew its prior opinion, and substituted a new opinion. ***Diaz v. State***, 65 So. 3d 1079 (Fla. 3d DCA 2011). App. 7. The court now affirmed citing only ***Hernandez***.

Mr. Diaz applied to this court for review. After initially staying proceedings pending the disposition of ***Hernandez,*** this court accepted jurisdiction. App 8.

SUMMARY OF THE ARGUMENT

I. Rule 3.172(c)(8)'s deportation warning does not bar claims of ineffective counsel based on ***Padilla***. ***Padilla*** clarified that under the standards of ***Strickland v. Washington,*** 466 U.S. 668 (1984), where the deportation

consequence is unclear or uncertain, counsel's obligation is limited and merely requires advising that a plea *may* carry a risk of deportation. But, where a deportation consequence is "truly clear" and practically inevitable, defense counsel is obliged to provide *correct* advice.

Diaz's lawyer was required to provide accurate advice about the clear, virtually automatic deportation consequence Diaz would suffer by pleading guilty. The uncontroverted record establishes that counsel failed to comply with this fundamental responsibility. It further establishes that had Diaz known this consequence, he would not have pled guilty but, instead, would have gone to trial or further plea bargained.

A trial court's Rule 3.172(c)(8) warning that a plea "may" result in deportation, fails to satisfy counsel's obligation to provide accurate advice under ***Padilla***. This warning fails to convey the certainty of deportation when this is clear. Where such a warning does not satisfy Sixth Amendment standards under ***Padilla*** to ensure the voluntariness of a guilty plea, it cannot satisfy the due process standards intended to ensure the same voluntariness.

Hernandez correctly resolved this issue. It highlighted the distinction between the accurate deportation advice demanded by ***Padilla*** and the generic warning of *possible* deportation provided under Rule 3.172(c)(8). The Fourth District's contrary decision in ***Flores*** is incorrect because it failed to respect the

distinction between the specific, accurate advice demanded by ***Padilla*** and the generic warning of Rule 3.172(c)(8).

Even if a trial court's Rule 3.172(c)(8) warning is generally an adequate substitute for counsel's advice, the trial court's warning to Diaz was not. It only warned that Diaz's plea "can be used in deportation proceedings." This failed to satisfy Rule 3.172(c)(8)'s requirement that a defendant be advised he "may" be deported as a result of his plea. Accordingly, Diaz's warning fails to conclusively refute his assertion that he did not know he would be deported based on his plea, and had he known, he would have sought a different result.

II. ***Padilla*** constitutes a basis to redress claims of constitutionally ineffective counsel based on the failure to advise defendants of clear and virtually automatic deportation consequences for defendants whose convictions became final before ***Padilla***. ***Padilla*** did not establish a "new rule" of constitutionally effective counsel. Instead, it clarified the application of ***Strickland*** in the context of deportation consequence advice owed noncitizen defendants. Florida caselaw endorsed this very application from 1981 through 1987. Accordingly, ***Padilla*** is "old law" and should apply in Florida to postconviction litigants.

Although Diaz filed his claim after his 2001 conviction became final, in the interest of fairness, this court should establish a two year window within which defendants like Diaz can file ***Padilla*** claims. This court has routinely provided

such windows in the past. Given that defendants like Diaz would have been able to make their immigration-based ineffective counsel claims under Florida's 1981-1987 caselaw, but were thereafter barred by this court's (now overruled) ***State v. Ginebra***, 511 So.2d 960 (Fla. 1987), fairness demands establishing such a window.

Alternatively, Diaz's motion should be deemed timely under Rule 3.850(b)(2). As required, the Sixth Amendment right to effective counsel clarified in ***Padilla*** is fundamental. Moreover, ***Padilla*** itself implicitly recognized that its refinement of ***Strickland*** should apply retroactively. Because Diaz's claim was filed within two years of the retroactive decision in ***Padilla***, it is timely.

If this court assesses retroactivity under ***Witt***, it also should hold that ***Padilla*** applies retroactively. As required, ***Padilla*** clarified a rule of federal constitutional dimension. The rule's purpose is vital, to assure the voluntariness of guilty pleas. Applying ***Padilla*** retroactively would *enhance* the administration of justice by correcting the injustice of holding defendants to involuntary pleas. Accordingly, ***Padilla*** should be deemed retroactive.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. Rule 3.172(c)(8)'s Deportation Warning Does Not Bar Claims of Ineffective Counsel Based on *Padilla.*

In ***Padilla***, the Court held that the Sixth Amendment duty of defense counsel to their noncitizen clients includes providing accurate advice about the immigration consequences to a plea agreement. The Court's decision reinforced

professional conduct rules requiring defense attorneys to integrate immigration counseling into their everyday practice to effectively represent their noncitizen clients. Specifically, ***Padilla*** confirmed that defense counsel has a Sixth Amendment duty to "inform her client whether her plea carries a risk of deportation." *Id*. at 1486. Where the deportation consequence is "unclear or uncertain," counsel's duty is limited to advising that "pending criminal charges may carry a risk of adverse immigration consequences." *Id*. at 1483. But where virtually inevitable deportation consequences are "truly clear," i.e., where immigration law is "succinct and straightforward ," counsel must correctly advise a criminal defendant. *Id*.

Jose Padilla, who had been lawfully in the United States as a permanent resident for over 40 years, faced virtually automatic deportation after pleading guilty to transporting marijuana. *Id*. at 1477. His attorney had assured him that he did not need to worry about deportation because he had been a lawful permanent resident for so long. *Id*. at 1478. Padilla's attorney was wrong in that Padilla's offense triggered virtually automatic deportation.

The U.S. Supreme Court rejected the Kentucky Supreme court's denial of relief as well as its characterization of deportation as a *collateral* consequence. The Court observed that the way in which "[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century" is "unique." *Id*. at

1481. Given the significance of this nexus, and the difficulty in classifying deportation as a direct or collateral consequence, the Court concluded that there was no viable distinction. *Id*.

In addition to clarifying a Sixth Amendment requirement that defense counsel provide correct immigration consequence advice to noncitizen defendants, ***Padilla*** held in this context there was no distinction between affirmative misadvice and no advice. *Id.*, 130 S.Ct. at 1484. That is, ***Padilla*** provides that a defense lawyer's lack of advice is no different than his affirmative misadvice. Logically, the fact that "…Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country," *id*. at 1483, was no different than if his counsel had failed to render any immigration advice. Thus, ***Padilla*** established that a noncitizen defendant is entitled to vacate a criminal court plea upon proving (1) counsel failed to accurately advise of a "truly clear," virtually inevitable deportation consequence, and (2) that but for counsel's failure to provide this advice, a defendant would have exercised his/her right to trial or to further negotiate a plea which would either minimize or avoid the immigration consequence.

A. Rule 3.172(c)(8)'s generic deportation warning fails to satisfy the demands for effective counsel clarified in *Padilla.*

In Florida, pursuant to Criminal Rule of Procedure 3.172(c)(8), a trial judge must warn every defendant that a guilty plea "may" subject him or her to

deportation. This warning is generic, completely unrelated to the immigration status of the defendant and the unique risks of deportation, removal, or inadmissibility that the defendant faces under federal immigration laws. Given that ***Padilla*** held "[i]t is quintessentially the duty of *counsel* to provide her client with available advice about an issue like deportation . . . .," *id*. at 1484, (citation omitted), concluding that a court's compliance with Rule 3.172(c)(8) satisfies counsel's duty, is faulty and problematic.

Had Diaz's attorney advised him in the same fashion as required by Rule 3.172(c)(8), Diaz's attorney's advice would not have satisfied ***Padilla****'s* requirements. Under ***Padilla***, defense counsel must advise a defendant when his guilty plea will make him *automatically* deportable, as opposed to *possibly* subject to deportation. ***Padilla***, 130 S.Ct. at 1483. If defense counsel was required under ***Padilla*** to advise Diaz, based on his immigration status and future plans, that deportation was "presumptively mandatory," it defies logic to conclude that a plea court's generic warning, that a plea "may" result in deportation, could ever adequately warn of the consequence of mandatory deportation and cure constitutionally deficient advice by counsel.

Padilla requires advice which can evidently only be satisfied by the scrupulous work of *counsel defending* the interests of an accused noncitizen defendant, and not by a judicial figure who is uninformed as to the nuances of a

defendant's particular immigration status, travel plans, or his hopes to one day become a United States citizen. Further emphasizing the unique role of defense counsel in providing this advice, the Court stated that:

> ...[I]nformed consideration of possible deportation can only benefit ...during the plea-bargaining process. By bringing deportation consequences into this process, **the defense** and prosecution **may well be able to reach agreements that better satisfy the interests of both parties**….**Counsel** who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense **may be able to plea bargain creatively with the prosecutor** in order to craft a [] sentence that reduce[s] the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers removal consequence…In sum, we have long recognized the negotiation of a plea bargain is a critical phase of litigation for purposes of the 6th Amendment right to effective assistance of counsel.

Id. at 1486.

The ***Padilla*** decision, therefore, makes it the responsibility under the Constitution that *counsel* "ensure that no criminal defendant–whether a citizen or not–is left to the 'mercies of incompeten[ce].'" *Id*. (quoting ***McMann v. Richardson***, 397 U.S. 759, 771 (1970)). "To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation." ***Padilla***, 130 S.Ct. at 1486.

In ***Hernandez v. State***, 61 So.3d 1144 (Fla. 3d DCA 2011), the court astutely concluded that a trial court's generic "may" warning fails to cure defense counsel's

deficiency in failing to advise a noncitizen when "automatic deportation" is a "truly clear" consequence. ***Hernandez*** correctly states that the "majority opinion in ***Padilla*** focuses on *counsel's duty, not on the 'fair notice' warning* that such a plea might (and therefore, inferentially, might not) result in deportation . . . ." *Id*. at 1147 (emphasis added).

The ***Hernandez*** decision relied upon other opinions that likewise held that a "may" warning in the plea colloquy regarding deportation fails to satisfy ***Padilla***'s requirements. In ***People v. Garcia***, 29 Misc.3d 756, 907 N.Y.S.2d 398 (N.Y.Sup.Ct.2010), Garcia was allowed to withdraw his plea despite the trial court's specific warning that a "controlled substance offense can certainly lead to deportation." *Id*. N.Y.S.2d at 400. In ***State v. Limarco***, 235 P.3d 1267 (Kan.Ct.App.2010), the court considered the effect of ***Padilla*** on Limarco's motion to vacate and remanded the case for an evidentiary hearing regarding the alleged prejudice, notwithstanding the plea court's confirmation that Limarco understood the warning in a plea form he signed that conviction "may result in deportation." ***Hernandez***, 61 So.3d at 1149. In ***Boakye v. United States***, No. 09 Civ. 8217, 2010 WL 1645055 (S.D.N.Y. Apr. 22, 2010), the third case ***Hernandez*** relied upon, the court considered a motion to vacate based on a 2005 plea and conviction which constituted a "presumptively mandatory" basis for deportation. Despite being

warned that "another possible consequence of your plea here is that you might be deported," *Id*. at 1149, the court concluded that if Boakye's allegation as to his counsel's failure to advise was taken as true, that advice "would amount to unreasonable advice under ***Padilla***." *Id*.

Relying on these other decisions, ***Hernandez*** determined that under ***Padilla***, "a 'may' warning in a plea colloquy with a noncitizen when automatic deportability is a 'truly clear,' non-discretionary consequence," amounts to constitutionally deficient advice. *Id*. at 1149. ***Hernandez*** recognized that "a 'may' warning [not only] is deficient (. . .[but] is actually misadvice) in a case in which the plea 'will' subject the defendant to deportation." *Id*. at 1151. Recognizing the constitutional inadequacy of a "may" warning, it further anticipated "that Rule 3.172(c)(8) will require an amendment to comport with the holding in ***Padilla***." *Id*.

Other federal and non-Florida cases also recognize that a trial court's generic deportation warning does not cure *counsel's* failure give accurate, tailored immigration consequence advice to a noncitizen defendant so as to bar a defendant's postconviction claim. *See, e.g.,* ***State v. Sandoval***, 171 Wash. 2.d 163, 170-1, 249 P.3d 1015, 1020-1 (Wash. 2011); ***United States v. Bonilla***, 637 F.3d 980, 984-5 (9th Cir. 2011); ***United States v. Kwan***, 407 F.3d 1005 (9th Cir. 2005);

United States v. Choi, 581 F.Supp.2d 1162 (N.D. Fla. 2008); ***In re Resendiz***, 19 P.3d 1171, 1177-79 (Cal. 2001); ***State v. Creary***, No. 82767, 2004 WL 351878 (Ohio Ct. App. 2004).

In ***Flores v. State***, 57 So.3d 218 (Fla. 4th DCA 2010), the court held that a trial court's generic "may" warning under 3.172(c)(8) cures any deficient immigration advice by counsel and bars a postconviction claim by the defendant. ***Flores***, which conflicts with ***Hernandez***, is wrong.

It was established at a hearing that Flores received Rule 3.172(c)(8)'s "may" warning at a plea colloquy. *Id*. at 220. The court held that the trial court's "may" warning precluded Flores from showing "the prejudice necessary to obtain relief for ineffective assistance of counsel under ***Strickland*** ...." *Id.* at 220. Relying on ***Bermudez v. State***, 603 So.2d 657, 658 (Fla. 3d DCA 1992), ***Flores*** held that the trial court's warning to Flores that his plea *may* subject him to deportation "cured any prejudice that might have flowed from counsel's alleged misadvice." *Id*. at 220-21.

The ***Flores*** decision does not comport with the basic tenet of ***Padilla*** that the obligation to accurately inform a noncitizen as to immigration consequences lies with *counsel*. ***Flores***' reliance on ***Bermudez*** is invalid because the entire analytical framework upon which ***Bermudez*** rests, that deportation is a "collateral consequence," has been completely abrogated by ***Padilla***. *Id*., 130 S.Ct. at 1481-2.

B. **The trial court's vague, deficient deportation warning failed to conclusively refute Diaz's claim of prejudice that he would not have pled guilty had he known that deportation was virtually inevitable.**

Even if this court holds that a trial court's generic warning under 3.172(c)(8) bars an ineffective counsel claim under ***Padilla***, the court should conclude that, because the warning Diaz received failed to meet the minimum requirements of 3.172(c)(8), it could not bar Diaz's ineffective counsel claim. Florida courts recognize that if a defendant's plea colloquy does not comply with the requirements set forth in 3.172, the defendant's claim of an involuntary plea cannot be summarily denied. *See, e.g.*, ***Labady v. State***, 783 So.2d 275, 277 (Fla. 3d DCA 2001); ***Fernandez v. State***, 780 So.2d 336, 337 (Fla. 3d DCA 2001); ***Morales v. State***, 988 So.2d 705, 706 (Fla. 3d DCA 2008). If a trial court's warning is vague or otherwise fails to comply with 3.172, it cannot be deemed to "conclusively refute" a defendant's claim that he was prejudiced by counsel's omitted or incorrect advice.

Contrary to the lower court's order denying Diaz relief and the 3d DCA panel's opinion affirming it, the plea court's deportation warning did not *conclusively* refute Diaz's declaration of prejudice resulting from his counsel's failure to advise. Diaz specifically declared: "Had I known that my plea would result in my *automatic deportation* I would not have accepted the plea and I would have challenged the case at trial." App. 3 at para. 6.

First, the court's deportation warning was insufficient. As in ***Labady***, ***Fernandez***, and ***Morales***, the plea court's vague warning that Diaz's plea "can be used in deportation proceedings" fell short of Rule 3.172(c)(8)'s basic requirements *and* failed to adequately advise that his plea *virtually inevitably* would cause his deportation.

In his motion, Diaz alleged that his charges were for "removable offenses" and would result in his "automatic deportation." App. 2 at 2-3. More specifically, he alleged that the offenses to which he pled guilty, burglary of a conveyance, criminal mischief, and aggravated assault with a deadly weapon, were crimes of "moral turpitude" rendering him "automatically deportable." *Id*. at 3. Under the Immigration and Nationality Act provisions, these charges were classified as crimes involving moral turpitude. *See* INA §212(a)(2)(A)(i)(I) and 8 U.S.C. § 1182(a)(2)(A)(i)(I). These provisions read as follows:

> (i) "[]any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . .is inadmissible."

Any alien who is inadmissible under these sections is subject to removal proceedings under INA §240(a)(1),(2)&(3) and 8 U.S.C. § 1229(a)(1),(2)&(3). INA Section 240 (a)(3) governs the "exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted,

removed from the United States." Thus, convictions[2] to charges as pled to by Diaz render one removable from the United States if one is an alien.[3] *Id*. Naturally, an alien applying for admission[4] to the U.S., who has a criminal record containing any one of the crimes to which Diaz pled, is inadmissible to, and therefore deportable from, the United States. *Id*.

Because Diaz's counsel failed to inform Diaz that his plea to serious criminal charges would result in inevitable deportability from the United States, notwithstanding the trial court's generic deportation warning (which in this case did not even meet the basic elements of Florida law under 3.172(c)(8)), Diaz's claim should not have been summarily denied. Instead, Diaz's motion should have survived the pleadings, the court should have proceeded to an evidentiary hearing, and a determination should have been made as to the merits of the case based on both testimony and the applicable law under ***Padilla***.

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[2]Conviction and Withhold are the same for purposes of immigration penalties. ***Matter of Ozkok***, 19 I&N Dec. 546 (BIA1988); ***Chong v. INS***, 890 F.2d 284 (11th Cir. 1989)(withhold of adjudication under Florida law is [a] conviction for immigration purposes under ***Ozkok***).

[3]INA §1101(a)(3) defines an "alien" as "any person not a citizen or national of the United States."

[4]INA §1101(a)(13)(A) defines the terms "admission" and "admitted" to mean, with respect to an alien, "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

Arguably, the court's warning may constitute "some evidence" contrary to Diaz's claim that he would not have pled guilty and would have gone to trial. **But it did not conclusively refute his claim of prejudice**. In ***State v. Leroux***, 689 So.2d 235 (Fla. 1996), this court considered whether a claim to withdraw a plea based on defense counsel's incorrect advice about how much time the defendant would serve could be summarily denied based on the defendant's plea colloquy statement that no one had promised him anything to induce his plea. *Id*. at 235. The court noted Florida law was clear that a defendant may be entitled to withdraw his plea entered in reliance upon his attorney's mistaken sentencing advice: "[W]e think this issue would be best determined by the trial court after testimony from, but not limited to, defendant and his trial attorney." *Id*. at 237.

The court highlighted the "proposition that a defendant invariably relies upon the expert advice of counsel concerning sentencing in agreeing to plead guilty." *Id*. Explaining the importance of a correct plea colloquy, it emphasized the distinction between the questions asked by the trial court during a plea and the nuances of plea sentencing consequences and plea discussions between trial counsel and his client. In light of this distinction, the court held that, while a "plea colloquy may . . . be some evidence contrary to a defendant's claim [of ineffective counsel, if] it is not so clear or inconsistent with the claim," it is insufficient to

"conclusively" rebut it. *Id*. *Accord* ***Chandler v. State***, 843 So.2d 1046 (Fla. 2d DCA 2003); ***Johnson v. State***, 757 So.2d 586 (Fla. 2d DCA 2000).

As in ***Leroux, Chandler,*** and ***Johnson***, Diaz was entitled to an evidentiary hearing on his motion for postconviction relief; it should not have been summarily denied. It is clear that his plea colloquy did not serve as *conclusive* evidence that Diaz knew he was virtually inevitably deportable. Diaz asserted he had no such knowledge. He additionally declared that his attorney failed to provide him this information. Indeed, as the Third District pointed out in ***Hernandez***, the trial court's deficient warning was "actually misadvice" in a case where Diaz was clearly deportable. ***Hernandez***, 61 So.3d at 1151. If anything, the plea court's colloquy only served to further confuse Diaz's understanding of the true consequences of his plea to serious crimes.

II. *Padilla* Establishes the Redressability and Timeliness of Diaz's Claim That He Was Denied Effective Counsel Because of Counsel's Failure to Advise Him His Pleas Rendered Him Virtually Mandatorily Deportable.

A. *Padilla* applied "old law"; the interest of justice requires establishing a two-year window within which noncitizens whose convictions were final before *Padilla* was decided can file their claims.

Padilla clarified the application of ***Strickland*** and ***Hill v. Lockhart***, 474 U.S. 52 (1985), in a different context: the immigration consequence advice owed guilty

pleading noncitizens. It merely applied an "old rule." It did not establish a "new rule." Accordingly, this refinement of ***Strickland's*** and ***Hill's*** applicability is available to redress the ineffective counsel claims of Florida postconviction litigants.

In ***Hernandez***, the court held that ***Padilla*** does not apply retroactively by analyzing it under ***Witt v. State***, 387 So. 2d 922 (Fla. 1980). *Id*., 61 So. 3d at 1150-52. Quoting ***State v. Fleming***, 61 So. 2d 399 (Fla. 2011), the court stated: "To determine whether a new rule applies retroactively to final cases in postconviction proceedings, . . . courts in Florida conduct a retroactivity analysis under ***Witt*** . . . ." *Id*. at 1150. *Accord* ***Chandler v. Crosby***, 916 So. 2d 728, 729 (Fla. 2005). The court presumed ***Padilla*** established a "new rule." *Id*. Diaz maintains that, based on the ***Padilla*** majority's clear language and analysis, earlier Florida caselaw, and the greater weight of authority that has analyzed ***Padilla's*** retroactivity, ***Padilla*** constitutes the mere refinement of "old law." Thus, it is applicable in Florida to postconviction litigants. *See* ***Whorton v. Bockting***, 549 U.S. 406, 416 (2007).

1. *Padilla's* language and analysis establishes it is "old law," a mere clarification of *Strickland*.

After tracing recent evolution of federal deportation law culminating in 1996's near elimination of discretionary relief from deportation for broad classes of noncitizen felons, the Court observed that "[b]efore deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'"

Id., 130 S.Ct. at 1481 (quoting ***McMann v. Richardson***, 397 U.S. 759, 771 (1970), and ***Strickland***, 466 U.S. at 686)). The Court eschewed the Kentucky Supreme Court's rejection of Padilla's ineffective counsel claim on the ground that the in deportation advice he sought was collateral. It noted: "We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under ***Strickland*** . . ." *Id*. at 1481. The Court set out ***Strickland***'s two-part test noting it had long recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." *Id*. at 1482 (quoting ***Strickland***). It also relied on ***Hill*** where the Court "applied ***Strickland*** to a claim that counsel failed to advise the client regarding his parole eligibility before he pleaded guilty." *Id*. at 1484-5 n.12.[5]

Citing a variety of professional responsibility codes dating back to the early and mid-1990s, the Court observed: "[A]uthorities of every stripe - including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications - universally required defense attorneys to advise as to the risk of deportation consequences for non-

[5]In ***Hill***, the Court explained that where a defendant enters a guilty plea based on the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'" and a defendant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in ***McMann***." *Id*., 474 U.S. at 56-57.

citizen clients . . . ." *Id*. (citations omitted). Based on this, the Court held that where the deportation consequences of a particular plea are "unclear or uncertain," defense counsel need only advise a noncitizen client "that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 1483.

Rejecting the Solicitor General's argument that ***Strickland*** applies only to an attorney's affirmative misadvice about deportation consequences, the Court observed that "[a] holding limited to affirmative advice . . . would give counsel an incentive to remain silent on matters of great importance . . . . Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Id*. at 1484 (citing ***Libretti v. United States***, 516 U.S. 29, 50-51 (1995)). The Court further reasoned that such a rule would deny all noncitizens, "a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." *Id.* Citing Justice White's concurrence in ***Hill***, 474 U.S. at 62, the Court concluded: "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so '*clearly* satisfies the first prong of the ***Strickland*** analysis.'" *Id*. (emphasis added).

Also telling, because the standards ***Padilla*** applied that demanded accurate deportation advice had been in existence for some 15 years, after "serious consideration," the Court rejected any concern that its decision would spawn a flood of challenges thereby undermining "the finality of convictions obtained through guilty pleas." *Id*. "It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. . . . We . . . presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty." *Id*. at 1485 (citation omitted).

Summing up its ruling, the Court further illuminated its belief that the immigration advice it clarified was required by the constitutional right to counsel created no new rule and did not stray from its settled, Sixth Amendment jurisprudence:

> [W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. The severity of deportation - "the equivalent of banishment or exile" - only underscores how critical it is for counsel to inform her noncitizen client that he faces of risk of deportation.
>
> . . . Our long standing Sixth Amendment precedents . . . demand no less.

Id. at 1486 (citations and footnote omitted).

2. Florida's caselaw establishes that *Padilla* applied "old law."

Florida law, too, has long recognized the constitutional right to effective legal advice preceding a criminal defendant's guilty plea. *See, e.g.*, ***Grosvenor v. State***, 874 So. 2d 1176, 1179 (Fla. 2004); ***Stano v. State***, 520 So. 2d 278, 280 n. 2 (Fla. 1988); ***Ginwright v. State***, 466 So. 2d 409 (Fla. 2d DCA 1985)*;* ***Castro v. State***, 419 So. 2d 796 (Fla. 3d DCA 1982). Indeed, in ***Edwards v. State***, 393 So. 2d 597 (Fla. 3d DCA), *rev. denied*, 402 So. 2d 613 (Fla. 1981), some 29 years before ***Padilla***, the court applied the same rule as ***Padilla*** and reversed the trial court's order denying the defendant's claim that his guilty plea was the result of ineffective counsel's failure to correctly advise him of the deportation consequence of his plea. Consistent with the as-of-yet decided case in ***Hill***, the court stated:

> It is a lawyer's duty to ascertain that his client's plea of guilty is entered voluntarily and knowingly, that is, upon advice which enables the accused to make an informed, intelligent, and conscious choice to plead guilty or not. A waiver of constitutional rights to be acceptable must be made with sufficient awareness of the relevant circumstances and likely results. Ignorance of the potential consequences of deportation cannot in our view, make for an intelligent waiver.

Id. at 599 (citations omitted). The court observed that "[w]hile we may not impose upon the trial court the obligation to advise the accused of this consequence because 'collateral,' its 'collateralness' is immaterial in measuring the effective assistance of counsel." *Id.* Thus, the court held that the defendant's motion to vacate his plea based on his attorney's ineffectiveness in failing to advise of the

deportation consequences stated a legal ground for relief upon which the defendant was entitled to an evidentiary hearing. *Id.* at 600.

The Third and Fourth District Courts of Appeal adhered to this application of the Sixth Amendment until 1987.[6] This is when the Florida Supreme Court decided ***State v. Ginebra***, 511 So. 2d 960 (Fla. 1987), vacating the Third District's opinion in ***Ginebra*** and overruling ***Edwards*** and other Florida caselaw that applied this interpretation of the constitutional right to effective counsel. But for the now-abrogated decision in ***Ginebra***, there is no question that the application of the constitutional right to counsel recognized in ***Edwards*** and now in ***Padilla*** would have been considered "old law," available to redress ineffective counsel claims of Florida postconviction litigants including Diaz.

3. The greater weight of authority establishes that *Padilla* merely clarified old law.

In ***Teague v. Lane***, 489 U.S. 288 (1989), the Court held that in determining the retroactivity of constitutional principles to state cases on habeas review, a

[6]*See, e.g.*, ***State v. Sallato***, 508 So. 2d 1256 (Fla. 3d DCA 1987), *quashed*, 519 So. 2d 605 (Fla. 1988); ***Fundora v. State***, 508 So. 2d 1250 (Fla. 3d DCA), *quashed*, 513 So. 2d 122 (Fla. 1987); ***Garcia v. State***, 508 So. 2d 42 (Fla. 4th DCA 1987); ***State v. Castilla***, 507 So. 2d 727 (Fla. 3d DCA 1987); ***Ginebra v. State***, 498 So. 2d 467 (Fla. 3d DCA 1986), *quashed*, 511 So. 2d 960 (Fla. 1987); ***Rodriguez v. State***, 487 So. 2d 1224 (Fla. 4th DCA 1986); *cf.* ***Hahn v. State***, 421 So. 2d 710 (Fla. 1st DCA 1982) (though announcing conflict with ***Edwards***, also distinguishing ***Edwards*** because no record evidence that Hahn was a noncitizen and lawyer in north Florida "would not reasonably expect his client to be an alien").

federal court must first determine whether the principle sought to be applied constitutes an "old rule" or a "new rule." *Id*. at 301. "Old rules" apply on both direct and collateral review. *See* ***Whorton***, 549 U.S. at 416. "New rules," by contrast, subject to two narrow exceptions (new constitutional rules that place primary individual conduct beyond states' powers to proscribe and "watershed" rules of criminal procedure), only apply to cases on direct review. *Id*.

Teague held that a rule was new "if it br[oke] new ground" or "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id*., 489 U.S. at 301. Also, "the mere existence of conflicting authority . . . [does not] necessarily mean a rule is new." ***Williams v. Taylor***, 529 U.S. 362, 410 (2000) (O'Connor J., concurring) (quoting ***Wright v. West***, 505 U.S. 277, 304 (1992).

Justice Kennedy observed in his concurring opinion in ***Wright***:

> 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 contents, it will be the infrequent case that yields a result so novel that it forges a new rule, not one dictated by precedent.

Id. at 308-09.

Applying Justice Kennedy's analysis in a context similar to the one presented this court, the court in ***Newland v. Hall***, 527 F. 3d 1162 (11th Cir. 2008),

cert. denied, 555 U.S. 1183 (2009), held that three other recent U.S. Supreme Court cases applying ***Strickland*** in the "new context" of counsel's duty to conduct reasonable capital penalty phase investigation, ***Rompilla v. Beard***, 545 U.S. 374 (2005); ***Wiggins v. Smith***, 539 U.S. 510, 522 (2003); ***Williams v. Taylor***, 529 U.S. 362 (2000), are not "new law" under ***Teague***. *Id*. at 1196-7. *See also* ***Williams v. Allen***, 542 F. 3d 1326, 1337 n. 7 (11th Cir. 2008). The court relied on Justice Kennedy's "[w]here the beginning point is a rule of general application" observation in ***Wright*** and noted: "***Strickland*** set forth the paradigmatic example of a rule of general application; it establishes a broad and flexible standard for the review of any attorney's performance in a variety of factual circumstances." *Id*. at 1197. As the Court itself emphasized in ***Strickland***, "the performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances*." *Id*., 466 U.S. at 688.

Courts across the country, federal and state, are split on whether ***Padilla*** applies retroactively. Diaz submits that the better reasoned opinions conclude that ***Padilla*** merely clarified the scope of effective counsel under the Sixth Amendment and constituted the application of "old law" that must be applied to cases pending in postconviction proceedings.[7] These cases persuasively support a conclusion that

[7]*See, e.g.*, ***United States v. Orocio,*** 645 F.3d 630, 637-41 (3d Cir. 2011); ***Chaidez v. United***, 655 F. 3d 684, 694-99 (7th Cir. 2011) (Williams, J., dissenting); ***Al Kokabani v. United States,*** No. 5:06-CR-207, 2010 WL 3941836 at *4-6

Padilla merely clarified "old law" and, thus, applies to convictions that were "final" before it was decided. Tracing the analysis of a few is instructive.

In ***Orocio,*** the defendant, like many postconviction litigants in other cases making these claims, sought relief under ***Strickland*** *before* ***Padilla*** was even decided. *Id.* at 633. After analyzing ***Padilla*** and noting that it "clarified the ***Strickland*** standard for ineffective . . . counsel in the context of the immigration

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(E.D.N.C. July 30, 2010); ***Amer v. United States,*** No. 1:06 CR 118-GHD, 2011 WL 2160553 at *3 (N.D. Miss. May 31, 2011); ***Marroquin v. United States,*** No. M-10-156, 2011 WL 488985 at *2-*7 (S.D. Tx. Feb. 4, 2011), *appeal dcktd.*, No. 11-40256 (5th Cir. Mar. 9, 2011); ***Song v. United States***, Nos. CV09-5184 DOC, CR98-0806DOC, 2011 WL 2940316 (C.D. Cal. July 15, 2011); ***United States v. Dass***, No. 05-140(3) (JRT/FLN 2011 WL 2746181 (D. Minn. July 14, 2011); ***United States v. Hubenig***, No. 6:03-mj-040, 2010 WL 2650625 at *5-8 (E.D. Cal. July 1, 2010); ***United States v. Reid***, No. 1:97-CR-94, 2011 WL 3417235 at *3-*4 (S.D. Ohio Aug. 4, 2011); ***United States v. Zhong Ling***, No. 3:07-CR-44-H, 2011 WL 197206 (W.D. Ky. Jan. 20, 2011); ***Zapata-Banda v. United States***, Nos. B:10-256, B:09-PO-2487, 2011 WL 1113586 at *4-*7 (S.D. Tx. March 7, 2011); ***Campos v. State***, 798 N.W.2d 565, 569-71 (Minn. App. 2011); ***Commonwealth v. Clarke***, 460 Mass. 30, 34-45, 949 NE 2d 892, 896-904 (2011); ***Costanza v. State,*** No. A10-2096, 2011 WL 3557824 (Minn. App. Aug. 15, 2011); ***Denisyuk v. State***, 422 Md. 462, 472-84, 30 A. 3d 914, 919-27 (2011); ***Ex Parte De Los Reyes***, 350 S.W. 3d 723 (Tex. App.-El Paso 2011), *rev. grt'd*. (Tex. Crim. App. Jan. 11, 2012); ***Ex Parte Tanklevskaya,*** No. 01-10-00627-CR, 2011 WL 2132722 at *4-*7 (Tx. App.-Houston May 26, 2011); ***People v. Bennett***, 28 Misc. 3d 575, 903 N.Y.S.2d 696, 698-700 (Crim. Ct., Bx. Cty. 2010); ***People v. De Jesus***, 30 Misc.3d 1203(A), 2010 WL 5300535 at *4-*9 (N.Y. Cty. Dec. 24, 2010); ***People v. Garcia***, 29 Misc. 3d 756, 907 N.Y.S.2d 398, 403-05 (Sup. Ct. Kings Cty. 2010); ***People v. Ortega***, No. 2008NY012378, 2010 WL 3786254 at *2 (N.Y. Crim.Ct. Sept. 28, 2010); ***People v. Ramirez***, No. 2004 NY012357, 29 Misc. 3d 1201(A), 2010 WL 3769208 at *5 (N.Y. Crim.Ct. Sept. 17, 2010); ***State v. Gaitan***, 419 N.J. Super. 365, 17 A.3d 227 (App. Div), *cert. grtd*., 206 N.J. 330 (2011).

consequences of plea agreements," *id*. at 636, the court went on to analyze the retroactivity issue.

The court noted that in ***Teague***, the Supreme Court "divided the world into two categories, 'old rules' and 'new rules.'" *Id*. at 637. Under ***Teague***, a rule is new "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id*. (citation omitted). Such rules apply retroactively to cases on collateral review under narrow circumstances. "By contrast, an 'old rule,' applies on both direct and collateral review." *Id*. (citing ***Whorton***, 549 U.S. at 416).

The court rejected the government's argument that ***Padilla*** is a "new rule" "because it has extended ***Strickland's*** Sixth Amendment analysis to a non-criminal setting - namely, the failure of criminal defense counsel to advise a client of the mandatory civil removal consequences of pleading guilty to drug trafficking charges." *Id*. at 637. The court observed that the import of ***Padilla*** was the application of the ***Strickland*** standards for effective counsel, which the Supreme Court held in ***Hill*** applied to advice preceding a guilty plea, following the "recent [1996] changes in our immigration law [that] have made removal nearly an automatic result for a broad class of noncitizen offenders." *Id.* (quoting ***Padilla***, 130 S. Ct. at 1481). Thus,

> [t]he application of ***Strickland*** to the ***Padilla*** scenario is not so removed from the broader outlines of precedent as to constitute a

> "new rule," for the Court had long required effective assistance of counsel on all "important decisions," . . . in plea bargaining that could "affect[] the outcome of the plea process . . ." In that light, ***Padilla*** is best read as merely recognizing that a plea agreement's immigration consequences constitute the sort of information an alien defendant needs in making "important decisions" affecting "the outcome of the plea process," and thereby come within the ambit of the "more particular duties to consult with the defendant" required of effective counsel. . . .Far from extending the ***Strickland*** rule into unchartered territory, ***Padilla*** reaffirmed defense counsel's obligations to the criminal defendant during the plea process, a critical stage in the proceedings. *Id*. 645 F.3d at 638.

The court next rejected the government's argument that ***Padilla*** "broke new ground regarding counsel's duty to advise her client about [removal], and was not 'dictated' by prior Supreme Court precedent." *Id*. (quotations and footnote omitted). The court noted that, notwithstanding some contrary decisions by the lower courts, "the [***Padilla***] Court straightforwardly applied the ***Strickland*** rule - and the norms of the legal profession that insist upon adequate warning to criminal defendants of immigration consequences - to the facts of Jose Padilla's case." *Id.*[8]

[8]Rejecting any notion that the rule of ***Padilla*** was a "novel concept," the court in ***United States v. Hubenig***, 2010 WL 2650625 (E.D. Cal. 2010), pointed out that in ***INS v. St. Cyr***, 533 U.S. 289, 121 S. Ct. 2271 (2001), the Court stated that "competent defense counsel following the advice of numerous practice guides, would have advised" her client whether a conviction would result in removal. *Id*. at *6 (quoting ***St. Cyr*** at 323 n. 50). The Supreme Court further noted that preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence "and that preserving relief from deportation" would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id*. at 322-23. Thus, ***St. Cyr*** plainly foreshadowed the application of ***Strickland*** that the Court

Assessing the "intersection of ***Strickland*** and ***Teague***," the court repeated three previous observations that guide the "new rule" inquiry:

> (1) 'caselaw need not exist on all fours to allow for a finding under ***Teague*** that the rule at issue was dictated by . . . precedent'; (2) '***Strickland*** is a rule of general applicability which asks whether counsel's conduct was objectively reasonable and conformed to professional norms based 'on the *facts of the particular case*, viewed as of the time of counsel's conduct'; and (3) 'it will be the infrequent case that yields the results so novel that it forges a new rule, one not dictated by precedent.' *Id*. at 639 (citations omitted).

Conducting this inquiry, the court found that "***Padilla*** followed from the clearly established principals of the guaranty of effective assistance of counsel [set forth in] ***Strickland*** and ***Hill*** . . . ." *Id*. at 639. "***Padilla*** is set within the confines of ***Strickland*** and ***Hill***, as it concerns what advice an attorney must give to a criminal defendant at the plea stage." *Id*. Thus, the court concluded that ***Padilla*** "broke no new ground" and "did not 'yield [] a result so novel that it forge[d] a new rule.'" *Id*. at 639-40.

The court also rejected the government's reliance on Justice Alito's observation in his ***Padilla*** concurrence that "[u]ntil today, the long standing and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the direct consequences of a criminal conviction." *Id*. at 640. The court noted that ***Strickland*** "did not freeze into place

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announced in ***Padilla***. *See also* ***Zapata-Banda v. United States***, 2011 WL 1113586 at *6.

the objective standards of attorney performance prevailing in 1984, never to change again." *Id*. The court noted that many of the lower court decisions that were not in harmony with ***Padilla*** were decided before the advent of the professional norms cited in ***Padilla*** that now demand competent counsel to provide accurate immigration consequence advice.[9]

As other courts, ***Orocio***, observed:

> Every ***Strickland*** claim requires a fact specific inquiry, but it is not the case that every ***Strickland*** ruling on new facts requires the announcement of a "new rule." . . . Accordingly, a court's disposition of each individual factual scenario arising under the long-established ***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. ***Padilla*** is no different. *Id.* at 640-41.

In concluding its analysis, the court pointed to the language of ***Padilla***, indicating the Court contemplated its application to final convictions on collateral review:

> We have given serious consideration to the . . . importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar 'floodgates' concern in ***Hill***, but nevertheless applied ***Strickland*** to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty . . . . A flood did not follow in that decision's wake. *Id*. at 641 (quoting ***Padilla***, 130 S. Ct. at 1484-85).

[9]"[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***, 529 U.S. at 410 (quoting ***Wright***, 505 U.S. at 304 (O'Connor, J., concurring)).

For all these reasons, the court held ***Padilla*** merely applied "old law" and Orocio (and other postconviction litigants) were entitled to its benefit. *Id.*

In ***Campos v. State***, 798 N.W. 2d 565 (Minn. App. 2011), the court determined ***Padilla*** applies retroactively under circumstances highly analogous to those faced by this court. In 1998, the Minnesota Supreme Court decided in ***Alanis v. State***, 583 N.W. 2d 573, 578-9 (Minn. 1998), that a defendant could not challenge the voluntariness of a guilty plea based on counsel's ineffectiveness in failing to warn of possible immigration consequences because these were collateral, not direct, consequences. Several years later, Minnesota adopted a rule requiring trial judges to warn of the possibility of deportation. *Id.* at 569-70.

Conducting its retroactivity analysis under ***Teague***, the court held that ***Padilla*** was not a new rule but, instead, "a predictable extension of a pre-existing doctrine, . . . [and] merely applied the long-standing principles regarding effective assistance of counsel enunciated in ***Strickland*** to specific facts . . . ." *Id.* at 569. It reasoned:

> Given (1) the procedural posture of ***Padilla*** (a collateral attack on a guilty plea); (2) the clear references in the opinion to its application to collateral proceedings attacking guilty pleas; (3) the analysis under longstanding principles of the right to effective assistance of counsel; and (4) the absence of any mention of retroactivity, the conclusion that the opinion does not announce a new rule of criminal procedure seems self-evident to this court. *Id.*

The court noted "temptation" to conclude ***Padilla*** announced a new rule because it effectively overruled the "collateral consequences" distinction that it and other courts had given to the risk of deportation. *Id.* But besides the fact that ***Padilla*** announced its rule in a case collaterally attacking a final conviction, the court found the reasoning of ***Marroquin v. United States***, 2011 WL 488985 (S.D.Tx. Feb. 4, 2011), persuasive. That court (like others) rejected the argument that "***Strickland***'s application in ***Padilla*** yields a result so novel that it forges a new rule, one not dictated by precedent," where "prior Supreme Court cases have applied ***Strickland*** to new sets of facts and the resulting holdings, relying on professional standards and expectations, did not establish new rules." *Id.* (citations omitted).

In conclusion, ***Campos*** noted under ***Teague*** that "a rule is generally considered 'new' if it is not 'dictated' by precedent existing at the time a conviction became final," and that the test is whether "reasonable jurists hearing petitioner's claim at the time of his conviction became final would have felt compelled by existing precedent to rule in his favor." *Id.* at 570 (citations omitted). But where the constitutional right to effective representation is concerned,

> [w]hat constitutes effective assistance of counsel is examined under ***Strickland***, and . . . a defense attorney's duty to properly advise his client before a guilty plea is hardly new. Given developments in immigration policy and the post-***Alanis*** changes to the Minnesota Rules of Criminal Procedure, we conclude that reasonable jurists, at

the time Campos was sentenced, could have concluded that Campos' counsel was ineffective. *Id.* at 570-71.[10]

These cases demonstrate ***Padilla*** constitutes "old law," the application of ***Strickland's*** well-settled and broad, general rule defining virtually all instances of ineffective counsel. ***Padilla*** is a mere refinement of ***Strickland***, its application to one of myriad circumstances that cannot be deemed the creation of a "new rule." Thus, it should apply to, and govern, Diaz's ineffective counsel claim as well as those of all other Florida defendants whose convictions were final at the time ***Padilla*** was decided. While this court can choose to provide broader, retroactive application of ***Padilla***, it can provide no less than this. *See* ***Danforth v. Minnesota***, 552 U.S. 264 (2008).

4. The Interest of Fairness Requires This Court to Establish a Two Year Window Within Which Noncitizens Whose Convictions Were Final When *Padilla* Was Decided Can File Their Claims.

Pursuant to Rule 3.850(b), Florida defendants must file any motion for postconviction relief within two years of his judgment and sentence becoming

[10]Interestingly, Florida followed the same chronology of events as Minnesota. As with ***Alanis***, the court in ***Ginebra*** prohibited noncitizen defendants from challenging their convictions based on their attorneys' failure to provide "collateral," immigration consequence advice. Then, just as in Minnesota, the Florida Supreme Court amended its plea colloquy rule to include a generic deportation warning. *See* ***In re Amendments to Florida Rules of Criminal Procedure***, 536 So.2d 992 (Fla. 1988). Thus, Florida too, had an evolving recognition of the importance of immigration consequences to noncitizen defendants and the necessity of this information to ensure the voluntariness of their pleas.

final. Mr. Diaz's conviction and sentence became final shortly after his 2001 guilty plea. But, under this court's then governing, but now overruled, decision in ***Ginebra***, he has been barred from seeking relief. The soonest he possibly could have filed his motion was *after* ***Padilla*** was decided. He filed his motion shortly thereafter. To ameliorate the injustice of Diaz and others having been prevented from litigating their IAC claims since 1987, this court should establish a two year window within which they can file their claims.

In ***State v. Green***, 944 So. 2d 208 (Fla. 2006), this court altered the requirements for noncitizens to raise postconviction claims that their pleas were involuntary because the trial court failed to provide Rule 3.172(c)(8)'s immigration consequence warning. Although since ***Peart v. State***, 756 So. 2d 42 (Fla. 2000), a litigant had to be able to demonstrate that deportation was imminent to satisfy the prejudice requirement of such a claim, this court now held that the prejudice requirement could be satisfied by merely showing a defendant was "subject to deportation," *i.e.,* whether or not the defendant was in deportation proceedings, immigration laws rendered the defendant deportable. Because noncitizens whose convictions had become final more than two years before ***Green*** would have been untimely in now filing their claims, and forever barred from seeking relief from involuntary pleas on this basis, the court established a "window" within which such noncitizens could file claims under ***Green's*** new paradigm:

> Our holding in this case reduces the time in which a defendant must bring a claim based on an alleged violation of Rule 3.172(c)(8). Therefore, in the interest of fairness, defendants whose cases are already final will have two years from the date of this opinion in which to file a motion comporting with the standards adopted today.

Id. at 218.

Green's establishment of this window follows this court's long tradition of doing so in similar circumstances. For instance, in ***Peart***, in determining the starting point of the two year limitations period for non-custodial defendants to seek relief from their pleas based on Rule 3.172(c)(8) violations, the court held that the period shall run from when the defendant has or should have knowledge of the threat of deportation, *i.e.*, when deportation proceedings are initiated. Because this rule would have barred claimants from seeking relief who learned of the threat of deportation more than two years before ***Peart*** , this court allowed such potential claimants two years from the date of the ***Peart*** decision within which to file their claims. *Id.* at 46. *See also* ***Wood v. State***, 750 So. 2d 592 (Fla. 1999) (directing amendment of Rule 3.850 to encompass non-custodial claimants and providing any whose convictions were final before ***Wood*** two years within which to file proper motion for postconviction relief); *cf*. ***State v. Boyd***, 846 So. 2d 458, 459-60 (Fla. 2003) (pursuant to Fla. R. Crim. P. 3.050, a trial court may extend time for filing motion for postconviction relief under Rule 3.850, even after expiration of two

year period of limitations, for "good cause" shown and based upon "excusable neglect").

To ensure fairness to all litigants filing these claims, this court should establish a reasonable uniform window. A two year window would avoid the arbitrary results that would follow if the date of one's conviction would determine whether one's constitutional right to effective counsel and a voluntary plea will be protected. For the same reasons this court established a two year window in ***Green***, it should now do so regarding the applicability of ***Padilla*** to noncitizens whose convictions became final before ***Padilla*** was decided.

B. *Padilla* Applies to Diaz, And His Postconviction Claim Was Timely, Under the Plain Language of Rule 3.850(b)(2).

Rule 3.850(b), which establishes a two-year statute of limitations for collaterally challenging Florida criminal convictions, makes an exception for motions that allege that "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively . . . ." *Id*. at subsection (2).

Unquestionably, the right to effective counsel asserted by Diaz, as clarified in ***Padilla***, is a "fundamental constitutional right" that was not established within two years of his judgment and sentence becoming final. The fundamental nature of the Sixth Amendment right to counsel cannot be denied. *See, e.g.*, ***Jackson v. State***, 983 So.2d 562, 575 (Fla. 2009); ***Traylor v. State***, 596 So.2d 957, 968 (Fla.

1992). As the court noted in ***Blatch v. State***, 389 So.2d 669 (Fla. 3d DCA 1980), "Every case affording the right to the assistance of counsel in trial and appellate proceedings has been held to be retroactive." *Id.* at 671.

Padilla appears to have implicitly decided that the rule it announced extending the constitutional right to effective counsel to advice about critical immigration consequences, applies retroactively. *See* ***Chandler v. Crosby***, 916 So.2d 728, 738 (Fla. 2005) (Anstead, J., concurring specially) ("many times retroactivity is decided by implication rather than explicitly, as was the case in ***Gideon*** [***v. Wainwright,*** 372 U.S. 335, 83 S.Ct. 792 (1963)], where relief was granted in a postconviction habeas proceeding, obviously indicating its application to others similarly situated"); ***Hernandez***, 61 So. 3d at 1149-50 (***Padilla*** itself "strongly suggest[s]" that the majority contemplated it would be applied retroactively to postconviction litigants).

Significantly, ***Padilla*** announced its application of ***Strickland*** to deportation advice by applying it retroactively to a petitioner whose conviction had become final long before ***Padilla*** was decided. "Under ***Teague***, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." ***Danforth v. Minnesota***, 552 U.S. 264, 266 n. 1 (2008) (quoting ***Penry v. Lynaugh***, 492 U.S. 302, 313 (1989)). Neither of these exceptions applies. To provide Padilla relief but then deny relief to other postconviction litigants

would be arbitrary and capricious and violate equal protection. If ***Padilla*** applied its rule retroactively to Mr. Padilla, it also must be applied retroactively to other similarly situated defendants. Reinforcing this view, the Court subsequently summarily vacated and remanded other federal decisions affirming the denial of postconviction claims challenging final convictions based on counsel's failure to advise defendants of deportation consequences. *See, e.g.*, ***Cantu Chapa v. United States***, 130 S.Ct. 3504 (2010); ***Santos-Sanchez v. United States***, 130 S.Ct. 2340 (2010).

More importantly, the Court in ***Padilla*** noted "[i]t seem[ed] unlikely that our decision today will have a significant effect on those convictions *already obtained* as the result of plea bargains" because (1) it presumed defense attorneys had fully complied with the professional norms demanding advice about immigration consequences in criminal cases that have been in effect "[f]or at least the past 15 years" and (2) convictions by "[p]leas account for only approximately 30% of the habeas petitions filed." *Id.*, 130 S.Ct. at 1485 (emphasis added). The Court also rejected arguments regarding "the importance of protecting the finality of convictions obtained through guilty pleas" and concerns that its decision would open the "floodgates" to postconviction litigation. *Id.* at 1484-85. If the Court intended ***Padilla*** to apply only prospectively, this entire discussion would have been unnecessary. *See* ***United States v. Hubenig***, No. 6:03-MJ-040, 2010 WL

2650625 at *7 (E.D. Cal. July 1, 2010); ***People v. Bennett***, 28 Misc. 3d 575, 580, 903 N.Y.S. 2d 696, 700 (Crim. Ct., Bx. Cty. 2010). Thus, because ***Padilla*** strongly indicated its intent that its decision be applied retroactively, and for the other reasons explained *supra*, this court should hold that ***Padilla*** "has been held to apply retroactively" and Diaz's Sixth Amendment claim is timely under Rule 3.850(b)(2).

C. *Padilla* Should Be Applied Retroactively Under *Witt*.

If this court disagrees with arguments A and B *supra*, it should hold that ***Padilla*** applies retroactively under ***Witt*** . There the court held that a new rule of law will apply retroactively if it "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.*, 387 So.2d at 931.

Plainly, ***Padilla's*** application of ***Strickland's*** IAC standard to advice about immigration consequences satisfies ***Witt's*** first two factors. Regarding the third, a decision is of "fundamental significance" when, *inter alia*, it is "of sufficient magnitude to necessitate retroactive application" as ascertained by the three-fold test of ***Stovall v. Denno***, 388 U.S. 293 (1967), and ***Linkletter v. Walker***, 318 U.S. 618 (1965). *Id.*, 387 So.2d at 929. This test requires consideration of "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and

(c) the effect on the administration of justice of a retroactive application of the new rule." *Id.* at 926.

The first factor weighs strongly in favor of retroactivity. ***Padilla*** extends defense counsel's Sixth Amendment obligations to providing accurate immigration consequence advice to noncitizens. This is not merely to satisfy "the intentions of the framers of the Sixth Amendment" that the right of counsel be afforded "in a particular manner," *see* ***Chandler***, 916 So.2d at 730, or to formally "conform criminal procedure to the Sixth Amendment's . . . [effective counsel] guarantee . . . ." ***Johnson v. State***, 904 So.2d 400 (Fla. 2005). Instead, the purpose of this rule is to improve the "accuracy" and "reliability" of change-of-plea proceedings, *see* ***Chandler*** at 730, and their "fairness or efficiency . . . ." *See* ***Johnson*** at 410.

In the context of a guilty (or no contest) plea, the purpose of the Sixth Amendment right to effective counsel is to ensure the voluntariness of the plea and that the attendant waiver of criminal procedural rights is made knowingly and intelligently. *See* ***Hill***, 474 U.S. at 56-57; ***Bolware v. State***, 995 So.2d 268, 272 n.3 (Fla. 2008). Nothing, in this context, could be more important. Ensuring, through the accurate advice and effective representation of counsel, that a plea is voluntarily and intelligently made lies at the core of the federal and Florida constitutional Due Process Clauses. As ***Bolware*** reiterated:

> A defendant who enters such a plea simultaneously waives several constitutional rights . . . .For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." . . . Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

Id. at 272-73 (quotation omitted).

For a noncitizen, "[p]reserving the client's right to remain in the United States may be more important . . . than any potential jail sentence." ***Padilla***, 130 S.Ct. at 1483 (quotation omitted); *accord* ***Ginebra***, 511 So.2d at 960. Deportation is "the equivalent of banishment or exile . . . ." ***Padilla,*** *Id*. at 1486. Thus, lack of advice regarding immigration consequences, no different than misadvice, wholly undermines the voluntariness, and hence the reliability, of any guilty plea. *See, e.g.*, ***Hernandez v. State***, 828 So.2d 1084, 1085 (Fla. 2d DCA 2002); ***Ghanavati v. State***, 820 So. 2d 989, 991 (Fla. 4th DCA 2002); *cf.* ***Padilla***, 130 S.Ct. at 1484 (rejecting any distinction between affirmative misadvice and lack of advice regarding immigration consequences). And to be actionable, any lack of advice leading to an involuntary plea must be *prejudicial*, i.e., a defendant must prove that if she had been provided the advice ***Padilla*** demands, she never would have pled guilty. Thus, because the rule of ***Padilla*** is ultimately intended to significantly

improve fairness and reliability of guilty pleas, and ensure compliance with the federal and Florida constitutional guarantees of due process, this factor strongly supports finding the rule of ***Padilla*** to be retroactive.

The second ***Stovall/Linkletter*** factor weighs equivocally against retroactivity. Since ***Ginebra***, Florida has declined to recognize a defendant's claim of ineffective counsel based on her attorney's failure to advise of the immigration consequences of a guilty plea. But ***Ginebra*** (erroneously) overruled ***Edwards***, which, like ***Padilla***, held that the constitutional right to effective counsel requires counsel to advise guilty-pleading noncitizens of the deportation consequences. That ***Ginebra*** *erroneously* overruled ***Edwards*** should not be deemed to cancel a defendant's right to obtain relief from an involuntary plea for which legal advice mandated by the Sixth Amendment was not rendered. Nonetheless, until the U.S. Supreme Court's 2010 ***Padilla*** decision***, Ginebra*** has been the prevailing law in Florida.

The third ***Stovall/Linkletter*** factor, the effect on the administration of justice, weighs in favor of retroactivity. Clearly, any time a rule of criminal procedure changes and gives rise to the right of defendants with "final" convictions to seek relief from those convictions, judicial work associated with processing those claims will ensue. But the judicial work associated with litigating ***Padilla*** postconviction claims should be modest. ***Padilla*** will only affect noncitizen

defendants, a relatively small proportion of all defendants who resolve their Florida criminal cases through guilty or no contest pleas.

As ***Padilla*** itself recognized, the rule it applied should *not* result in a flood of litigation. To succeed upon a ***Padilla*** claim, a defendant must clear the difficult hurdle of demonstrating prejudice, at the very least by showing that "a decision to reject the plea bargain would have been rational under the circumstances." *Id.*, 130 S.Ct. at 1485; *see* ***Hubenig*** at *7. Defendants who took plea bargains resulting in sentences substantially below maximum statutory exposure would be hard-pressed to make this showing. The impact of retroactivity could be further limited by this court employing its typical practice of providing defendants a two-year window in which to file these newly recognized claims. *See, e.g.*, ***Green***, 944 So.2d at 219; ***State v. Calloway***, 658 So.2d 983, 987 (Fla. 1995).

To fully assess the effect of retroactivity on the administration of justice in Florida, this court must also consider the extent to which it would be enhanced. *See* ***Padilla***, 130 S. Ct. at 1486 ("informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process"); ***Johnson***, 904 So.2d at 426 (Anstead, J., concurring in part, dissenting in part). As noted *supra*, applying ***Padilla*** retroactively will increase fairness by providing an avenue to relief for defendants whose pleas were entered

involuntarily because they were unaware of, or misled about, a factor (the consequence of deportation) critical to their decision of which their attorneys were obliged, but failed, to advise them. It will increase uniformity and equality in that identically situated defendants, i.e., ones who were not advised by their attorneys that their guilty pleas could result in deportation, would have an equal opportunity to seek redress for their involuntary pleas. Finally, applying ***Padilla*** retroactively would enhance the public's perception of the integrity of the criminal justice system by demonstrating its steadfast commitment to the constitutional principle of a voluntary plea and knowing and intelligent waivers of constitutional rights. Thus, this factor weighs in favor of retroactivity.

Hernandez held that under ***Witt***, ***Padilla*** is not retroactive. *Id.*, 61 So.3d at 1149-52. Subsequently, ***Castano v. State***, 65 So. 3d 546 (Fla. 5th DCA 2011); ***Barrios-Cruz v. State***, 63 So. 3d 868 (Fla. 2d DCA 2011); and ***State v. Shaikh***, 65 So. 3d 539 (Fla. 5th DCA 2011), have held the same. ***Hernandez, Castano,*** and ***Barrios-Cruz*** have all certified the question of ***Padilla's*** retroactivity to be one of great public importance. Diaz maintains that ***Hernandez*** and these other cases incorrectly decided this issue.

Regarding the "purpose to be served," ***Hernandez*** defined it narrowly as assuring that noncitizen defendants are aware of a plea's immigration

consequences, not as assuring the voluntariness of a plea. Accordingly, the court held that ***Padilla*** did nothing to protect "the veracity or integrity of the underlying criminal case and preventing the conviction of the innocent." ***Barrios-Cruz*** likewise opined that ***Padilla*** implicates only "procedural fairness," a consideration not worthy of retroactivity. *See id.*, 63 So.2d at 872. To the contrary, Diaz maintains that ***Padilla***'s purpose is broader, to ensure the voluntariness of a guilty plea. This implicates weightier "veracity" and "integrity" concerns that the court in ***Hernandez*** found significant. Indeed, in the words of ***Barrios-Cruz***, an involuntary plea can give rise to a "miscarriage of justice." *Cf.* ***Allen v. State***, 876 So.2d 737, 740-41 (Fla. 1st DCA 2004) (miscarriage of justice where trial court failed to ensure factual basis supporting guilty plea). Consideration of these more important factors shifts the balance decisively in favor of retroactivity.

Regarding the "extent of reliance on the old rule," ***Hernandez*** identified Rule 3.172(c)(8) as the old rule, instead of ***Edwards v. State***, 393 So.2d 597 (Fla. 3d DCA 1981), which recognized, like ***Padilla***, that an attorney's failure to advise a defendant of immigration consequences constituted ineffective assistance of counsel. *Cf.* ***Barrios-Cruz*** at 872 ("[P]rior to the decision in ***Padilla***, no formal duty existed for counsel to advise clients of the immigration consequences of a

plea"). Although ***Ginebra*** overruled ***Edwards***, this was the Florida Supreme Court's error and should not diminish the fact that beginning at least as early as 1981, Florida law recognized the claim Diaz presses now.

Regarding the effect of retroactive application on the administration of justice, ***Hernandez*** wholly ignored ***Padilla's*** rationale that most lawyers, in observance of existing professional standards, probably had been advising noncitizens of the immigration consequences of their pleas since at least the mid-1990s, and thus ***Padilla*** would spawn only a modest amount of litigation. *Id.* at 1149-50. To the contrary, it speculated that a retroactivity ruling would pave the way for thousands of postconviction hearings. *Id.* at 1151. It failed to recognize the enhancement of the criminal justice system by correcting the injustice of holding defendants to involuntary pleas. *Cf.* ***Barrios-Cruz*** at 873 ("[A]pplying ***Padilla*** retroactively . . . would present a logistical nightmare . . .[and] consume immense judicial resources without any corresponding benefit to the accuracy or reliability of [the plea] proceedings").

The test in ***Witt*** is generally intended to identify those constitutional rules for which a sufficiently compelling objective would justify abridging the weighty doctrine of finality:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* at 925 (footnote omitted).

See also ***State v. Calloway***, 658 So.2d at 987 ("The concern for fairness and uniformity in individual cases outweighs any adverse impact that retroactive application of the rule might have on decisional finality").

Besides weighing decisively in favor of retroactivity under ***Witt***, the rule of ***Padilla***, intended to ensure the voluntariness of guilty pleas for all noncitizens, presents a "more compelling objective" than the doctrine of finality. It would be unfair, and antithetical to the fundamental principles underlying due process, to hold a defendant to the uncontemplated, life-altering consequence of deportation which, if known, the defendant would have chosen to avoid by rejecting the plea offer and proceeding to trial or further plea bargaining. The crucial interests of uniformity and equality make it necessary for a person whose conviction became final before ***Padilla*** to have the same opportunity for redress as a person whose conviction may not yet be final. Because retroactive application of ***Padilla*** ensures fairness and uniformity in individual adjudications, two foundational hallmarks of our criminal justice system, this court should hold that ***Padilla*** be applied retroactively.

CONCLUSION

Padilla clarified that under the Sixth Amendment right to effective counsel, noncitizens are entitled to accurate immigration consequence advice regarding their contemplated guilty pleas. A trial court's generic warning to this same effect under Rule 3.172(c)(8) cannot supplant the accurate advice a defendant must receive from his counsel. Rule 3.172(c)(8)'s warning cannot be deemed to bar a claim of ineffective counsel under ***Padilla***.

Padilla merely refined ***Strickland*** in the context of immigration consequence advice. This court should establish a two year window within which claimants can seek relief or conclude ***Padilla*** governs Diaz's postconviction motion because (1) it explains a fundamental constitutional right that has been held to apply retroactively or (2) it applies retroactively under ***Witt***.

For the reasons and on the basis of the applicable law and arguments set forth herein, Diaz requests that this court quash the decision below, answer ***Hernandez***'s first question certified in the negative and second question in the affirmative, and remand this case with directions to provide Diaz an evidentiary hearing on his motion for postconviction relief, or for such other and further relief as this court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States mail this 21st day of February 2012, to AAG Kristen L. Davenport Attorney General's Office, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118.

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