IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC11-1281**
Lower Tribunal Case No. 3D10-2563

LEDUAN DIAZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FLORIDA THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Leduan Diaz, as Defendant in the trial court, moved for post-conviction relief under *Florida Rule of Criminal Procedure 3.850*, claiming ineffective assistance of counsel for failure to properly advise him of the deportation consequences of his plea, pursuant to *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010). *Diaz v. State*, 65 So. 3d 1079, 1080 (Fla. 3d DCA 2011). The trial court summarily denied his claim, and the district court affirmed on October 20, 2010, citing *Flores v. State*, 57 So. 3d 218 (Fla. 4th DCA 2010)(trial court's warning cured any prejudice from counsel's misadvice under *Padilla*), and *Bermudez v. State*, 603 So. 2d 657 (Fla. 3d DCA 1992)(trial court's warning cured any prejudice flowing from counsel's misadvice regarding deportation consequences of his plea).[1] *Diaz v. State*, 35 Fla. L. Weekly D2328 (Fla. 3d DCA, Oct. 20, 2010). On November 4, 2010, Defendant moved for rehearing, rehearing *en banc*, or to certify questions of great public importance.

On May 25, 2011, the district court withdrew its prior opinion and substituted the opinion for which Defendant now seeks discretionary review. The

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[1] The district court's docket reflects the fact that a response to the appeal was neither ordered by the court nor filed by the State, consistent with *Florida Rule of Appellate Procedure 9.141(b)(2)(C)*.

revised opinion granted rehearing by the original panel, and now affirmed on the basis of the opinion in *Hernandez v. State*, 61 So. 3d 1144 (Fla. 3d DCA 2011), *reh'g and reh'g en banc denied* (June 17, 2011), which had just been released by a different panel of the same court the month before.[2]

Defendant filed his notice to invoke the discretionary jurisdiction of this Court on June 28, 2011, and this Court, *sua sponte*, issued its order on July 15, 2011, staying further proceedings pending disposition of *Hernandez v. State*, Case No. SC11-941. On Defendant's motion to lift that stay and permit briefing on the merits, this court granted the motion in part and ordered the State to file its answer brief on jurisdiction, which now follows.

SUMMARY OF THE ARGUMENT

The Court has discretion to grant jurisdiction in this case, but should exercise that discretion to stay or limit the issues briefed and reviewed to avoid duplication of efforts and a waste of judicial resources.

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[2] Notice to invoke the discretionary jurisdiction of this Court on the basis of a certified question of great public importance was filed in the district court by the defendant in *Hernandez* on May 5, 2011, and a subsequent motion to stay remained pending until this Court's order of July 19, 2011, consolidating the separate cases of the defendant and the State.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO STAY OR LIMIT REVIEW IN THIS CASE.

The State agrees that because the opinion below cites as controlling authority a decision that is pending review in this Court, there exists *prima facie* express conflict which would allow this Court to exercise its jurisdiction. *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). Of course, dozens of cases out of the Third District, and no doubt many more across the state, stand in the same procedural posture, and can make the same claim to jurisdiction. To allow multiple litigants to separately brief and argue the merits of issues common to each would be a colossal waste of judicial resources, and selfishly, a tremendous drain on the resources of the State, as respondent in each case.

The decision in *Hernandez* addressed two questions, each certified to this Court on different bases. The second of these questions asked, as a question of great public importance, "should the ruling in *Padilla* be applied retroactively?" *Hernandez*, 61 So. 3d at 1146 (*citing*, *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010)). This is a pure question of law, and there is no profit to consideration of the same question simultaneously in multiple cases. What's more, if the decision in *Hernandez* is affirmed on this basis, it is dispositive in this case, without need for consideration of the other certified question.

However, the other question certified by the court below in *Hernandez* is not a pure question of law. That question was presented and analyzed first in the opinion below, and framed as: "Does the immigration warning in *Florida Rule of Criminal Procedure 3.172(c)(8)* bar immigration-based ineffective assistance of counsel claims based on the U.S. Supreme Court's decision in *Padilla* . . . ?" *Hernandez*, 61 So. 3d at 1145-46. This question is fact specific, because it addresses whether the particular defendant is able to show "the prejudice necessary to obtain relief for ineffective assistance of counsel" under *Strickland v. Washington*, 466 U.S. 668 (1984). *Hernandez*, 61 So. 3d at 1147. The basis stated by the court below for certifying this question was that it "expressly and directly conflicts with the decision of the Fourth District in *Flores v. State*, 57 So. 3d 218 (Fla. 4th DCA 2010)." *Id*. at 1146.

The opinion in *Flores* rested upon a finding that the defendant could not show the prejudice necessary to obtain relief because when he was advised by the trial court that "the plea may result in deportation," that gave rise to "an affirmative duty to speak up if the attorney has promised something different." 57 So. 3d at 220. In *Flores*, the defendant asserted that he entered his plea to a lesser offense upon advice from his attorney that by reducing the charge from a felony to a misdemeanor, "the conviction would not cause him to be deported." *Id*. at 218. In contrast, the defendant's counsel in *Hernandez* "reported that he confined his

immigration-related advice to his clients to the fact 'that a plea could/may affect their immigration status.'" 61 So. 3d at 1146. Here, although not reported in either of the opinions below, Defendant's affidavit asserted: "My attorney advised me that with a 'withhold of adjudication' that I would not likely face any risk of deportation."[3] Other cases currently before this Court involve pleas where no advice whatsoever was given by the defendant's counsel regarding the deportation consequences of a plea. *See, e.g.*, *Centeno v. State*, 64 So. 3d 699 (Fla. 3d DCA 2011), *reh'g denied* (July 27, 2011), *review pending*, Case No. SC11-1555 (stayed pending disposition of *Hernandez*).

Each of these cases presents a fact pattern that could be materially different in a prejudice analysis under *Strickland*, though each also presents a question that would be mooted by a decision from this Court that *Padilla* does not apply retroactively. Therefore, the State suggests that this Court stay briefing and argument on the merits in this case until and unless *Hernandez* is decided in such a way that the prejudice question is not mooted. In the alternative, the State requests that jurisdiction, or briefing and argument, be accepted in this case on the limited

[3] This affidavit was attached to Defendant's Brief in Support of Leduan Diaz's Motion for Post-Conviction Relief filed in the district court.

question of prejudice, to avoid needless duplication of effort on the question of retroactivity.

CONCLUSION

Based upon the arguments and authorities cited herein, this Court should stay further proceedings, or in the alternative limit the issues considered.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 14th day of October, 2011 to: Benjamin S. Waxman, Esq., Robbins, Tunkey, Ross, Amsel, Raben & Waxman, P.A., 2250 S.W. Third Ave., 4th Floor, Miami, FL 33129; and to Maggie Arias, Esq., Pozo, Goldstein & Gomez, LLP, 2121 S.W. Third Ave., 5th Floor, Miami FL 33129.

I FURTHER CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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