

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC 11-1281  
LOWER TRIBUNAL CASE NO. 3D10-2563

LEDUAN DIAZ,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL THIRD DISTRICT

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JURISDICTIONAL BRIEF OF PETITIONER

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**TABLE OF CONTENTS**

	<b><u>PAGE(S)</u></b>
TABLE OF CITATIONS .....	iii
GROUNDS FOR INVOKING DISCRETIONARY JURISDICTION.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE ISSUES.....	2
SUMMARY OF THE ARGUMENT .....	3
REASONS FOR EXERCISING DISCRETIONARY JURISDICTION .....	3
CONCLUSION.....	5
CERTIFICATE OF SERVICE .....	6
CERTIFICATE OF COMPLIANCE.....	6
APPENDIX	

*Diaz v. State*, 3D10-2563 (Fla. 3d DCA May 25, 2011)

**TABLE OF CITATIONS**

<b><u>CASE</u></b>	<b><u>PAGE(S)</u></b>
<i>Berrios-Cruz v. State</i> , 2D10-4774 (Fla. 2d DCA June 10, 2011) .....	4
<i>Castano v. State</i> , No. 5D10-2032 (Fla. 5 <sup>th</sup> DCA June 17, 2011) .....	4
<i>Coyne v. State</i> , 755 So.2d 108 (Fla. 2000) .....	3
<i>Diaz v. State</i> , 3D10-2563 (Fla. 3d DCA May 25, 2011) .....	1
<i>Flores v. State</i> , 57 So.2d 218 (Fla. 4 <sup>th</sup> DCA 2010).....	4
<i>Hernandez v. State</i> , No. 3D10-2462 (Fla. 3d DCA April 6, 2011) .....	1, 2, 3, 4
<i>Jollie v. State</i> , 405 So.2d 418 (Fla. 1981) .....	1, 3
<i>Maddox v. State</i> , 760 So.2d 89 (Fla. 2000) .....	3
<i>Padilla v. Kentucky</i> , 599 U.S. ___, 130 S.Ct. 1473 (2010) .....	1, 2, 3, 4

**FLORIDA CONSTITUTION**

Fla. Const. Art. V, § 3(b)(4).....	1
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**OTHER AUTHORITIES**

Florida Rule of Criminal Procedure 3.172(c)(8) .....2, 3, 4  
Fla. R. App. P. 9.030(a)(2)(A)(v) ..... 1

## **GROUND FOR INVOKING DISCRETIONARY JURISDICTION**

Jurisdiction vests in this court because the decision below, *Diaz v. State*, 3D10-2563 (Fla. 3d DCA May 25, 2011), (Appendix), raises questions certified to be of great public importance. See Fla. Const. Art. V, § 3(b)(4); Fla. R. App. P. 9.030(a)(2)(A)(v). The court below cited as its sole basis for affirmance *Hernandez v. State*, No. 3D10-2462 (Fla. 3d DCA April 6, 2011). *Hernandez* certified as questions of great public importance:

1. 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 v. KENTUCKY*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)?
2. IF THE PRECEDING QUESTION IS ANSWERED IN THE NEGATIVE, SHOULD THE RULING IN *PADILLA* BE APPLIED RETROACTIVELY?

Because the case below raises the identical issues that were certified and resolved in *Hernandez* and cited *Hernandez* as the sole basis for its decision, jurisdiction lies in this court to review the decision below as well. See *Jollie v. State*, 405 So.2d 418 (Fla. 1981).

## **STATEMENT OF THE CASE**

Mr. Diaz moved for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, claiming ineffective assistance of counsel due to trial counsel's failure to advise him that accepting a plea would subject him to deportation. The trial court summarily denied the motion. On appeal, after granting rehearing and withdrawing its prior per curiam affirmance without opinion, the Third District Court of Appeal affirmed. It did so based on *Hernandez v. State*, 3D10-2263 (Fla. 3d DCA April 6, 2011). *Hernandez* certified as questions of great public importance (1) whether the immigration warning in Florida Rule of Criminal Procedure 3.172(c)(8) bars immigration-based ineffective assistance of counsel claims brought pursuant to *Padilla v. Kentucky*, 599 U.S. \_\_\_, 130 S.Ct. 1473 (2010), and (2) whether the United States Supreme Court's decision in *Padilla* should be applied retroactively.

## **STATEMENT OF THE ISSUES**

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. Whether the United States Supreme Court's decision in *Padilla v. Kentucky*, 599 U.S. \_\_\_, 130 S.Ct. 1473 (2010), obliging defense counsel to advise non-citizen

defendants of the deportation consequences of their guilty pleas, should apply retroactively in postconviction proceedings?

### **SUMMARY OF THE ARGUMENT**

The decision below was affirmed solely based on the Third District Court of Appeal's decision in *Hernandez v. State*, 3D10-2462 (Fla. 3d DCA April 6, 2011). *Hernandez* certified as issues of great public importance (1) does the immigration warning in Florida Rule of Criminal Procedure 3.172(c)(8) bar immigration-based ineffective assistance of counsel claims brought pursuant to *Padilla v. Kentucky*, 599 U.S. \_\_\_, 130 S.Ct. 1473 (2010), and (2) whether *Padilla v. Kentucky*, 599 U.S. \_\_\_, 130 S.Ct. 1473 (2010), applies retroactively. The decision below was resolved based on these identical issues. Because the decision below was paired with *Hernandez*, this court has jurisdiction to review it. *Jollie v. State*, 405 So.2d 418 (Fla. 1981).

### **REASONS FOR EXERCISING DISCRETIONARY JURISDICTION**

This court should exercise jurisdiction and review the decision below because, as reflected by its singular citation to *Hernandez*, it raises both certified questions of great public importance recited above. The pairing of *Diaz* with *Hernandez* provides a basis for jurisdiction in this court. See *Jollie v. State*, 405 So.2d 418 (Fla. 1981). Cf. *Maddox v. State*, 760 So.2d 89, 94 & n. 2 (Fla. 2000)

(consolidating some 50 cases for review that raised same issue though on different jurisdictional bases, some based on PCA's that cited another decision certifying question of great public importance); *Coyne v. State*, 755 So.2d 108 (Fla. 2000) (accepting jurisdiction and ruling upon case solely because the lower court's PCA cited a case which was pending at time in Florida Supreme Court on a question of great public importance);

Since the Third District Court of Appeal's decision in *Hernandez*, the Second and Fifth District Courts of Appeal have also certified the question of *Padilla's* retroactivity as one of great public importance. *Berrios-Cruz v. State*, 2D10-4774 (Fla. 2d DCA June 10, 2011); *Castano v. State*, No. 5D10-2032 (Fla. 5<sup>th</sup> DCA June 17, 2011). *Berrios-Cruz* noted that its decision "carries with it significant implications for the treatment of pleas entered prior to *Padilla*." *Id.* at \*1. It would be most efficient for this court to consider these cases together to resolve the common question of *Padilla's* retroactivity.

Regarding the second issue certified in *Hernandez* to be one of great public importance and raised in the case below, whether Rule 3.172(c)(8)'s warning bars the related IAC claim under *Padilla*, also certified conflict on this issue with *Flores v. State*, 57 So.2d 218 (Fla. 4<sup>th</sup> DCA 2010). *Hernandez* (as did the court below) held that a judge's deportation warning did NOT bar a defendant's related claim of



ineffective counsel. *Flores* held that the judge's warning does bar such a claim. *Castano*, which aligned itself with *Flores* on this issue, certified conflict with *Hernandez*. The fact that the decision below raises this issue too is further reason to review it.

### **CONCLUSION**

The petitioner respectfully requests this court to review the decision below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States mail this \_\_\_ day of June, 2011 to: AAG Timothy Thomas, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, FL 33131.

By: \_\_\_\_\_  
MAGGIE ARIAS

**CERTIFICATE OF SERVICE**

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

By: \_\_\_\_\_  
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