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

REPLY BRIEF OF PETITIONER LEDUAN DIAZ

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

The trial court's warning to Diaz was generic. It warned only of possibilities – "this plea *can*[1] be used in deportation proceedings." It failed to address Diaz's circumstances – his immigration status, and his residency and travel plans. The warning was insufficient to comply with Rule 3.172(c)(8). It indicated only that the plea could be used in deportation proceedings. It failed to explain to what end: removal from the United States. Accordingly, this warning could never substitute for, or satisfy the purpose of, advice from counsel that Diaz was pleading to a "removable offense" that would result in "automatic deportation." App. 5 at 1.

It is well settled that a defendant is entitled to an evidentiary hearing on his motion for postconviction relief pleading a legally sufficient claim if he alleges specific facts in support which are not *conclusively rebutted* by the motion, record, and files. *See* ***Floyd v. State***, 808 So.2d 175, 182 (Fla. 2002); Fla. R. Crim. P. 3.850(d). Absent an evidentiary hearing, the appellate court *must* accept the defendant's factual allegations as true unless conclusively rebutted by the record. ***Valle v. State***, 705 So.2d 1331, 1333 (Fla. 1997). Contrary to the state's discussion of the standard of review, AB at 5, an order *summarily* denying a motion for postconviction relief without an evidentiary hearing (as in our case), is reviewed *de novo*. ***Willacy v. State***, 967 So.2d 131, 138 (Fla. 2007).

[1] Diaz equates "can" and "could" with "may" in this context.

There exists no factual basis for the state's argument that the warning to Diaz placed him under adequate and sufficient notice of the deportation consequence of his plea. The state claims that the trial court "specifically revealed to [Diaz]" that his "conviction *could* subject him to deportation," AB at. 13, "told [Diaz] the truth about his situation," *id*., and gave an "explicit warning to [Diaz] that his plea could be used against him in deportation proceedings," *Id*. at 13, 17. The plea colloquy transcript belies these assertions. App. 3 at 5-6.

The trial court never stated Diaz's "conviction could subject him to deportation." It said only that "this plea could be used in deportation proceedings." App. 3 at 5-6. Nor did the court's warning tell Diaz "the truth about his situation." Indeed, as the court in ***Hernandez v. State***, 61 So.3d 1144 (Fla. 3rd DCA 2011), astutely observed, a trial court's "'may' warning is [not only] deficient, . . . [it] is actually misadvice in a case in which the plea 'will' subject the defendant to deportation." *Id*. at 1151. Finally, the court did not even convey that the plea could be used *against* Diaz in deportation proceedings. Based on the court's words, Diaz reasonably could have understood that *he* could use his plea and withhold of adjudication in *defense* should immigration proceedings ever occur.

Even small deviations from Rule 3.172(c)(8)'s "may" warning will render a plea colloquy inadequate to refute a defendant's claim of an involuntary plea. *See, e.g.,* ***Labady v. State***, 783 So.2d 275 (Fla. 3d DCA 2001). *A fortiori*, the trial

court's warning to Diaz, which not only failed to warn that the plea could result in deportation, but even failed to warn that the plea could be used *against* him, utterly failed to refute Diaz's claim that he was prejudiced as a result of his attorney's failure to accurately advise him deportation would result from his plea.

The state attempts to distinguish the instant case from ***Padilla*** because Padilla's counsel "affirmatively concealed from him" the fact that his conviction "*could* subject him to deportation." AB at 13. This distinction is without a difference. ***Padilla*** specifically held that in this context, there is no distinction between affirmative misadvice and lack of advice. *Id*., 130 S.Ct. at 1484. Whether trial counsel affirmatively concealed immigration consequences as in ***Padilla***, or failed to correctly advise of the immigration consequences (especially that of automatic deportation) as in the instant case, the result is the same.

Padilla requires that defense counsel provide accurate advice about clear and virtually inevitable immigration consequences of a plea. *Id*., 130 S.Ct. at 1487. It necessitates a consultation between counsel and client about whether avoiding deportation is a goal, whether preserving the eligibility for future legal immigration status is important, and about determining how those concerns relate to the traditional goals of avoiding a conviction and incarceration. The ***Padilla*** requirement can only be satisfied by the scrupulous work of counsel defending the interests of an accused noncitizen defendant, and not by the court, an entity

uninformed of the nuances of a defendant's particular immigration status, travel plans, or hopes to one day become a United States citizen.

The state claims that Diaz's plea colloquy and the totality of the circumstances of his case refute Diaz's allegation of ineffective counsel. AB 17. The state supports this assertion with the speculative presumption that because Diaz "was facing thirty years imprisonment for a first degree felony but ended up with a veritable 'slap on the wrist' – reduced charges, adjudication withheld, and three years of probation," his allegation that he would have contested the charges at trial is not credible. *Id*. However, since there was no evidentiary hearing, this court must accept Diaz's allegation that he would have contested the charges at trial, if he knew a guilty plea would result in deportation, as true. Additionally, there existed alternatives to trial, such as further plea bargaining in an effort to avoid or minimize the immigration deportation consequence.

The state's argument undermines its position. If the state wants this court to assume that because Diaz was offered probation he never would have gone to trial, then this court should also assume that the reason he ended up with a "slap on the wrist" when facing a first degree felony was because the state feared a trial might result in an acquittal. Accepting a plea to probation is certainly something an innocent person might easily do, to avoid the risk of incarceration following trial. However, when the choice to accept a plea is made in a vacuum, where the relative

importance of immigration consequences, immigration status goals, possible travel plans or future plans are *not* explored, then that choice is not the result of an informed, voluntary, or knowing decision, as required under ***Padilla***.

The state's attempt to minimize, nullify, or otherwise mischaracterize the removability consequence of Diaz's guilty plea is specious. AB 11-12. Under the Immigration and Nationality Act, the charges to which Diaz pled guilty, burglary, criminal mischief, and aggravated assault, were crimes involving moral turpitude. *See* INA §212(a)(2)(A)(i)(I) and 8 U.S.C. § 1182(a)(2)(A)(i)(I). Convictions[2] upon these charges rendered Diaz removable from the U.S. because Diaz was an alien.[3] *Id*. An alien applying for admission[4] to the U.S., whose criminal record contains any one of these crimes, is inadmissible to, and therefore deportable from, the U.S. *Id*. Thus, the clear consequence of Diaz's guilty plea was mandatory deportation.

Because Diaz's counsel failed to inform Diaz that his plea to serious criminal charges would result in inevitable deportation, notwithstanding the trial court's generic deportation warning (which in this case did not even meet the basic

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[2]Adjudication and withhold of adjudication are the same for purposes of immigration penalties. ***Matter of Ozkok***, 19 I&N Dec. 546 (BIA 1988); ***Chong v. INS***, 890 F.2d 284 (11th Cir. 1989).

[3]INA §1101(a)(3) defines an "alien" as "any person not a citizen or national of the United States." Under §240(a)(1),(2)&(3) and 8 U.S.C. §1229(a)(1),(2)&(3), any alien who is inadmissible under these sections is subject to removal proceedings.

[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."

elements of Rule 3.172(c)(8)), Diaz's claim should not have been summarily denied. Instead, the trial court should have conducted an evidentiary hearing and determined Diaz's claim of ineffective counsel on the merits.

II. *Padilla* Applies "Old Law" and Should be Held to be Retroactive; This Court Should Establish a Window Within Which Noncitizens Whose Convictions Were Final When *Padilla* Was Decided Can File Ineffective Counsel Claims Based on *Padilla*.

The state quotes ***Witt*** [***v. State***, 387 So.2d 922 (Fla. 1980)]'s recital of the criminal justice interests that underlie the goal of finality and support limiting the retroactivity of new criminal procedure rules - judicial economy, effective use of criminal justice resources, and eliminating the uncertainty of criminal judgments. AB 18-19. But ***Witt*** indicated that these interests must give way to "ensur[e] fairness and uniformity" when a "process no longer considered acceptable and no longer applied to indistinguishable cases" is used to "depriv[e] a person of his liberty or his life ... ." *Id*. at 925. This would be precisely the effect of holding a noncitizen to a plea entered several weeks (or years) before ***Padilla*** that was involuntary, because he was not advised or was misadvised of his plea's clear and virtually certain deportation consequences, while granting relief to someone similarly situated who entered a plea after ***Padilla,*** or whose case happened to be on appeal when ***Padilla*** was decided and, thus, was "in the pipeline."

The state urges that "making new rules broadly applicable retroactively" would "destroy the stability of the law, render punishments uncertain and therefore

ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." AB 19 (quoting ***Witt*** at 929-30). But Diaz makes no such proposal. He argues only that ***Padilla***'s procedural posture and clear expression of intent that its rule apply retroactively, and the fact that it merely applied the old rule of ***Strickland v. Washington***, 466 U.S. 668 (1984), satisfy narrow retroactivity requirements. IB 20-23. Additionally, for the many reasons articulated in ***Padilla*** - the difficulty in surmounting ***Strickland's*** high bar, the heavy burden on a defendant to show that a decision to reject a plea bargain would have been rational, the presumption that defense lawyers were following the professional norms extant throughout the past 17 years that obliged them to advise clients of deportation consequences, the limited number of collateral challenges to pleas as compared to convictions following trial, and the absence of a flood of collateral challenges following ***Hill v. Lockhart***, 474 U.S. 52 (1985), ***Padilla,*** 130 S.Ct. at 1485-86, - the impact of ***Padilla*** retroactivity should be especially limited.

The state urges that "this Court has rarely f[ound] a change in decisional law to require retroactive application." AB 20 (citation omitted). It asserts without support that "[t]he instant case is not one of those unusual situations warranting retroactive application . . .." *Id* To the contrary, ***Padilla*** is precisely such a case. As ***Blatch v. State***, 389 So.2d 669 (Fla. 3d DCA 1980), noted: "Every case affording the right to the assistance of counsel in trial and appellate proceedings

has been held to be retroactive." *Id.* at 671. Where the Supreme Court itself has so strongly indicated its intent that ***Padilla*** apply retroactively, the rule at issue is one that will materially improve the accuracy and reliability of "critical stage," change-of-plea proceedings, and the burden on the criminal justice system will likely be modest, ***Padilla***, 130 S.Ct. at 1484-85, retroactivity should be declared.

The state has failed to respond to Diaz's argument that ***Witt*** only applies to "new rules," and because ***Padilla*** applies "old law," ***Witt*** is inapplicable making ***Padilla*** a basis to redress Diaz's ineffective counsel claim. IB 20. In the state's words, ***Padilla*** is a mere "evolutionary refinement" of ***Strickland.*** AB 21. Or, as the court in ***Newland v. Hall,*** 527 F.3d 1162 (11th Cir. 2008), put it, ***Padilla*** is an instance of "case-by-case examination of the evidence" under ***Strickland***'s "paradigmatic . . . rule of general application." *Id.* at 1197. Accordingly, this court should hold that ***Padilla*** merely applies "old law" and Diaz (and other claimants whose convictions were final before ***Padilla***) is entitled to seek redress based on it.

Regarding the purpose of the ***Padilla*** rule, the state urges it is merely to "afford[] new or different standards for procedural fairness" and does not implicate the criminal justice system's "veracity or integrity" interests that would "require retroactive application." AB 21 (quoting ***Witt***). As Diaz argued in his initial brief, the application of ***Strickland*** that ***Padilla*** adopted, requiring defense counsel to provide accurate immigration consequence advice to noncitizen defendants

contemplating pleading guilty and waiving all of their criminal trial rights, could not be more crucial to the veracity and integrity of the change-of-plea process. IB 42-44. This conclusion flows inexorably from U.S. and Florida Supreme Court caselaw expounding upon the vital role of counsel in ensuring that guilty pleas are voluntarily and intelligently tendered. *See, e.g.,* ***Hill***. 474 U.S. at 56-57; ***Bolware v. State***, 995 So.2d 268, 272-73 & n.3 (Fla. 2008).

Regarding "reliance on the old rule," the state asserts, as did the court in ***Hernandez v. State***, 61 So.3d 1144 (Fla. 3d DCA 2011), that Fla. R. Crim. P. 3.172(c)(8) is the "old rule." AB 22. But this rule, which only obliges judges to provide generic warnings about possible deportation consequences, has nothing to do with the duty of counsel to accurately advise as confirmed by ***Padilla.*** IB 47-48. Instead, the "old rule" in Florida is ***Edwards v. State***, 393 So.2d 597 (Fla. 3d DCA 1981), which in terms nearly identical to ***Padilla***, held that an attorney's failure to provide immigration consequence advice constituted ineffective counsel and provided a basis for postconviction relief. IB 24-25 & n. 6. Although ***State v. Ginebra***, 511 So.2d 960 (Fla. 1987), (erroneously) overruled ***Edwards***, this unique flip-flop in Florida's caselaw undermines the significance of this factor in the ***Witt*** calculus. It weighs, at best, equivocally against retroactivity. IB 44.

Regarding the effect on the administration of justice, the state urges it would be "overwhelming" as "thousands of pleas would undoubtedly . . . requir[e] the

processing of 3.850 motions and full evidentiary hearings . . . ." AB 22-23. By this unsupported and speculative assertion, the state has relegated ***Padilla***'s thorough rejection of the "floodgates" argument to a tidbit unworthy of mention: "It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains." *Id.*, 130 S.Ct. at 1485. IB 45. The Court's myriad reasons supporting this conclusion are recited *supra.*

Regarding the state's fear that it would be disadvantaged by the passage of time in defending against these claims, AB 23, the loss of memory and evidence should only impact older cases. But the general difficulties in prevailing on a ***Strickland*** claim strongly favor the state, *i.e.*, demonstrating that "a decision to reject the plea bargain would have been rational under the circumstances." ***Padilla*** at 1485. Additionally, a defendant's demonstration of strong ties to the U.S. at the time of the plea, or the absence of any relationship with his country of origin, facts material to the prejudice determination, are not subject to the vagaries of memory that the state fears. And where applicable, the state can always argue laches. *See* ***Francis v. State***, 31 So.3d 285, 287 (Fla. 4th DCA 2010).

Counterbalanced against this modest negative impact upon the administration of justice, this court must consider the extent to which it would be enhanced. IB 45-46. The state has failed to acknowledge this. On balance, and particularly in light of these enhancements, the "effect on the administration of

justice" factor weighs resolutely in favor of retroactivity.

Although inapplicable in Florida, the state next assesses retroactivity under ***Teague v. Lane***, 489 U.S. 288 (1989). AB 23-28. It points to ***Teague***'s test that a rule is "new" if it was not "dictated by precedent existing at the time the defendant's conviction became final" and concludes that the "rule announced in ***Padilla*** is undoubtedly new . . . ." AB 25 (citation omitted). In support, it relies upon Justice Alito's concurring opinion in ***Padilla*** that "[u]ntil today, the longstanding 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*. (quoting ***Padilla***, 130 S. Ct. at 1487). Notwithstanding Justice Alito's minority opinion, the state's conclusion is wrong.

It cannot be denied that ***Padilla***'s foundation is the application of ***Strickland***'s standards regarding the duties of Sixth Amendment counsel. Likewise, it cannot be denied that to determine these duties, courts must look to "prevailing professional norms" as reflected in the various professional standards and ethical norms adopted and promulgated by leading U.S. bar organizations. *See, e.g.,* ***Wiggins v. Smith***, 539 U.S. 510, 522 (2003); ***Strickland***, 466 U.S. at 688.

Regarding "precedent," one need only look to ***INS v. St. Cyr***, 533 U.S. 289 (2001). The Court noted that "[p]reserving the [noncitizen] client's right to remain in the United States may be more important to the client than any potential jail

sentence." *Id*. at 322-23. "[P]reserving the possibility of such [discretionary] 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.* Accordingly, "competent defense counsel, following the advice of numerous practice guides, would have advised [his client whether his conviction would affect his removability from the United States]." *Id.* at 323 n. 50 (citation omitted). The Court specifically noted a 1982 ABA standard that "if a defendant will face deportation as a result of a conviction, defense counsel '*should fully advise the defendant of these consequences*.'" *Id*. at 323 n. 48.

Padilla cited a wide array of professional standards, criminal defense manuals, and learned articles, several from the early and mid 1990s, that imposed this same obligation. *Id*., 130 S. Ct. at 1482-83.[5] "Authorities of every stripe – including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications – universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . ." *Id*. at 1482 (citations omitted).

[5] *See also* ***United States v. Michel***, 507 F. 2d 461, 465 (2d Cir. 1976); ***People v. Soriano***, 194 Cal. App. 3d 1470, 1478-82, 240 Cal. Rptr. 328, 334-36 (1987); ***People v. Pozo***, 746 P. 2d 523, 526-29 (Colo. 1987); Fullerton and Kinigstein, "Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys," 23 Am. Crim. L. Rev. 425, 426 & n. 5, 437, 443-44 & n. 167 (1986).

The state attempts to diminish the import of ***Padilla***'s language expressing the majority's belief and intent that its application of ***Strickland*** in this context would be retroactive. AB at 31-32. As noted *supra,* the Court could not have been clearer; its reasoning could not have been more compelling. *Id*., 130 S. Ct. at 1484-85. Eschewing the significance of the Court's lengthy discussion, the state relies upon ***United States v. Chang Hong***, No. 10-3623, 2011 WL 3805763 (10th Cir. Sept. 1, 2011), where the court opined it would be "unwise to imply retroactivity based on dicta" or "from an isolated phrase . . . ." *Id*. at *10.

The state has ignored Justice Anstead's observation in ***Chandler v. Crosby***, 916 So. 2d 728 (Fla. 2005), that "many times retroactivity is decided by implication rather than explicitly," citing ***Gideon v. Wainwright***, 372 U.S. 335 (1963), as an example. *Id.* at 738. Even the court in ***Hernandez*** noted that these passages of ***Padilla*** "strongly suggest that the majority understood that ***Padilla*** would . . . [apply retroactively]." *Id.,* 61 So.3d at 1149-50.

Other courts also recognize that retroactivity can be decided by implication and have noted ***Padilla***'s strong implication that it should be applied retroactively. [6] ***United States v. Orocio***, 645 F. 3d 630 (3d Cir. 2011), relied upon ***Padilla***'s explicit

[6] *See, e.g.*, ***United States v. Hubenig,*** No. 6:03-MJ-040, 2010 WL 2650625 at *7 (E.D. Cal. July 1, 2010); ***Marroquin v. United States***, M-10-156, 2011 WL 488985 at *7 (S.D. Tex. 2011); ***Commonwealth v. Clarke***, 460 Mass. 30 949 N.E. 2d 892, 903 (2011); ***Campos v. State***, 798 N.W. 2d 565, 569 (Minn. Ct. App. 2011); ***cf. Chaidez v. United States***, 655 F. 3d 684, 698-99 (7th Cir. 2011) (Williams, J., dissenting).

rejection of the floodgates argument to support its holding of retroactivity. *Id.* at 641. Even ***Chaidez*** though it came to a contrary decision, acknowledged that this is a "reasonable reading" of ***Padilla*** and "the most compelling argument that ***Padilla*** is an old rule." *Id.,* 655 F. 3d at 694.

The state also attempts to minimize the significance of the fact that ***Padilla*** applied its rule retroactively to Mr. Padilla's postconviction case. AB at 32-33. To the contrary, the Court observed in ***Teague***: "…[O]nce a new rule is applied to the defendant in the case announcing the rule, even handed justice requires that it be applied retroactively to all who are similarly situated. . . ." *Id.*, 489 U.S. at 300. Other courts have cited ***Padilla***'s procedural posture to support their determination that ***Padilla*** applies retroactively.[7]

Assuming ***Padilla*** applies an "old rule," the state urges that Diaz is time barred under Rule 3.850. AB at 28. Diaz has urged this court to follow its tradition of providing a two year window to file such claims in the interest of fairness, to avoid the arbitrariness of having the date of one's conviction determine whether one's constitutional right to effective counsel and a voluntary plea will be protected. IB 35-38. The state acknowledges this custom but urges it is limited to "unique situations where this Court actually changed the requirements of a valid

[7] *See*, *e.g.,* ***Santos-Sanchez v. United States***, 2011 WL 3793691 at *10 (S.D. Tex. Aug. 24, 2011); ***McNeill v. United States***, No. A-11-CA-495 55, 2012 WL 369471, at *3 (W.D. Tex. Feb. 2, 2012); ***People v. Guteirrez***, 954 N.E. 2d 365, 376-77 (Ill. App. 1 Dist. 2011); ***Campos***, 798 N.W. 3d at 569.

claim for postconviction relief, creating a situation where some defendants would be caught in an unfair loophole of being unable to bring their claims under earlier requirements and then suddenly time-barred under the new requirements." AB 29.

The scenario presented by this case is highly analogous to the one described by the state. This court changed the "fundamental requirements for bringing a claim under Rule 3.850" when it precipitously overruled ***Edwards*** in ***Ginebra***. By doing so, it placed all noncitizens whose guilty pleas were involuntary, due to their lawyers' incompetent omission of accurate immigration consequence advice, into the "unfair loophole" of being unable to seek relief from their pleas under the old, correct law of ***Edwards***. Because of ***Ginebra***, Diaz "could [not] have brought his claim of misadvice long ago." AB 30. Indeed, it was only once ***Padilla*** was decided that ***Ginebra***'s barrier was removed and Diaz's right to seek relief was reinstated. Given ***Padilla***'s vindication of ***Edwards,*** it would be unfair to Diaz, in the same way it would have been to the litigants saved by the windows provided in ***Green***, ***Peart***, and ***Wood***,[8] to deny him an opportunity to litigate his well-pled claim of ineffective counsel. Thus, for the same reasons that supported establishing windows in ***Green***, ***Peart***, and ***Wood***, this court should establish one to allow Diaz (and other similarly situated noncitizen defendants whose convictions were final at the time ***Padilla*** was decided) the opportunity to litigate his ***Padilla***

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[8] ***State v. Green***, 944 So.2d 208, 219 (Fla. 2006); ***Peart v. State***, 756 So.2d 42, 46 (Fla. 2000); ***Wood v. State***, 750 So.2d 592, 595 (Fla. 1995).

claim.

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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 12th day of March 2012, to AAG Kristen L. Davenport Attorney General's Office, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118.

By:_________________________________
BENJAMIN S. WAXMAN