IN THE SUPREME COURT OF FLORIDA

CLAUDIA VERGARA CASTANO,

Petitioner,

v. CASE NO. SC11-1571

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State disagrees with the various characterizations contained in the Defendant's Statement of Facts, such as her statement that the case against her was "very weak" and her representations of trial counsel's testimony concerning "purported" events. The State submits the following additions/corrections to the Defendant's Statement of Facts[1]:

On December 12, 2008, the Defendant was charged by information with one count of neglect of a child, a third degree felony. (R. 1). The charges were based on a two-year-old child walking away from the Defendant's unlicensed daycare. (R. 3-9). The child was found wandering in the roadway 45 minutes after being dropped off at the daycare; the Defendant was unaware that the child was missing. (Supp. Rec. 5-6).

[1]"R." refers to the original record on appeal. "Supp. Rec." refers to the supplemental record on appeal, containing the transcript from the original plea and sentencing; references to the supplemental record use the page number of the transcript as originally numbered by the court reporter.

On March 4, 2009, the Defendant entered into a plea agreement with the State and pled guilty as charged to neglect of a child. (Supp. Rec. 1-9). During the plea and sentencing hearing, an interpreter was used, the Defendant was sworn, and the trial judge went over the rights the Defendant was waiving by entering her plea. (Id.). Most relevant to this proceeding, the Defendant stated that she understood if she was not a U.S. citizen, she "can be deported as a result of this plea." (Supp. Rec. 5).

The trial judge withheld adjudication of guilt and placed the Defendant on probation for three years. (Supp. Rec. 8). The Defendant did not appeal from her judgment and sentence.

On November 30, 2009, the Defendant filed a motion for postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure, raising numerous claims of ineffective assistance of trial counsel. (R. 67-78).

On December 11, 2009, an evidentiary hearing was held. (R. 114-202). During the hearing, the Defendant testified that her trial counsel, Jose Torroella, did not inform her that she could be subject to deportation if she entered her plea, and that she would not have entered the plea if she had known she would be subject to deportation. (R. 130).

Mr. Torroella's testimony conflicted with that of the Defendant. Specifically, Torroella testified that he discussed deportation with the Defendant and told her that even with a withhold of adjudication the government was actively seeking to deport people. (R. 169). He told her that he was not an immigration attorney and she needed to consult with an immigration attorney who could "aid her better" regarding this matter. (R. 169).

The Defendant had informed Torroella that she had attained residency because she married either a U.S. citizen or a U.S. permanent resident. (R. 170). Her main concern was avoiding jail. (R. 183).

Torroella testified that he went over the plea form with the Defendant, including the deportation warning. (R. 172). The Defendant appeared to be very intelligent and understood what was going on. (R. 172).

The trial court entered an order denying the Defendant's 3.850 motion, finding that the Defendant was bound by her statements at the plea colloquy, which conflicted with her claims, and that nothing in the evidentiary hearing changed its conclusion. (R. 91-92).

On appeal, the Fifth District Court of Appeal held that any inadequate advice by trial counsel was cured by the trial court's specific warning during the plea colloquy and that the Supreme Court's decision in Padilla v. Kentucky, 130 S.Ct. 1473 (2010) should not be applied retroactively. Castano v. State, 65 So. 3d 546, 548 (Fla. 5th DCA 2011).

SUMMARY OF ARGUMENT

ISSUE I: In Padilla, the Supreme Court held that reasonably competent attorneys must inform their clients whether their pleas carry a risk of deportation. Here, the Defendant's attorney gave reasonable advice on this matter, telling the Defendant that the government would likely deport her even with a withhold of adjudication and that if she wanted better advice on her specific situation she should consult an immigration attorney.

Even if the Defendant's attorney should have done more, she is entitled to no relief where she specifically stated, under oath, that she understood that she could be deported as a result of her plea. The Defendant cannot show that any deficiency in counsel's performance prejudiced her, where she entered this highly favorable plea anyway, having been directly informed of its possible effect on her immigration status.

While the Defendant contends that the trial court's admonition was insufficient, as it failed to inform her that deportation was a mandatory consequence of her plea under federal law, the warning given by the trial court accurately

reflects the true consequences of the plea – the Defendant *could* be deported.

The Supreme Court's decision in Padilla does not affect the validity of the Defendant's plea in light of the express warning she received and the reasonable advice of her attorney, and the lower court's decision on this matter should be affirmed.

ISSUE II: Under this Court's precedent, a new rule of law is applied retroactively to final convictions only where that new rule constitutes a development of fundamental significance. Considering (1) the purpose to be served by the new rule of Padilla – ensuring that defendants who enter pleas are more fully informed of all the consequences; (2) the extent of reliance on the old rule – which has been followed in this state and throughout the country for decades; and (3) the effect on the administration of justice of a retroactive application of the new rule – which could swamp the court system with thousands of plea withdrawals in long final cases, retroactive application of Padilla is not required by Florida law.

The same result is reached under the more stringent retroactivity test used by federal courts, as Padilla announced a new rule of law that cannot be categorized as a watershed rule

of criminal procedure central to an accurate determination of guilt or innocence.

Padilla should not apply retroactively, and the lower court's decision on this matter should be affirmed.

ARGUMENT

ISSUE I

(PETITIONER'S POINTS A-E)

THE DISTRICT COURT PROPERLY CONCLUDED THAT INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT BE DEMONSTRATED WHERE THE TRIAL COURT HAS SPECIFICALLY INFORMED THE DEFENDANT THAT SHE COULD BE DEPORTED AS A RESULT OF HER PLEA.

The Defendant asks this Court to reverse the district court's finding that she failed to show ineffective assistance of counsel. Castano, 65 So. 3d at 548. The decision in Padilla does not mandate such a result, and the lower court's decision on this matter should be affirmed.

Ineffective Assistance of Counsel

A claim that trial counsel was ineffective presents a mixed question of law and fact, requiring an independent review of the lower court's legal conclusions while giving deference to the lower court's factual findings. Davis v. State, 875 So. 2d 359, 365 (Fla. 2003). Relief is warranted on such a claim only where a defendant can satisfy the two prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

> functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Id. at 689. In evaluating counsel's performance, "courts are required to make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time." White v. State, 729 So. 2d 909, 912 (Fla. 1999). The appropriate legal standard in evaluating ineffective assistance of counsel claims "is not error-free representation, but reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991) (quotation omitted).

The prejudice prong of the Strickland test does not focus solely on mere outcome determination. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). Rather, to establish prejudice a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable. Id.

In the context of a plea, the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process" – that is, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Finally, this Court has recognized that ""[w]hen the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory." Steinhorst v. State, 695 So. 2d 1245, 1248 (Fla.), cert. denied, 522 U.S. 1022 (1997).

Applying that standard here, the district court of appeal properly affirmed the trial court's order denying the Defendant's motion for postconviction relief, where the

Defendant was specifically informed by both her counsel and the trial court that she could be deported as a result of her plea.

The Padilla decision

Jose Padilla, a native of Honduras, had been a lawful permanent resident of the United States for more than 40 years when he entered a guilty plea to transporting a large amount of marijuana in Kentucky. Padilla, 130 S.Ct. at 1477. Before entering the plea, Mr. Padilla had been assured by his counsel that he did not have to worry about his immigration status being affected because he had been in the country for so long. Id. at 1478. This advice was incorrect, as Mr. Padilla's conviction actually "made his deportation virtually mandatory." Id.

The Kentucky Supreme Court found that this advice did not render counsel ineffective, as the advice concerned a mere collateral consequence of the defendant's conviction. Id. The United States Supreme Court disagreed, finding that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." Id. In so holding, the Court noted that it had never applied a distinction between direct and collateral consequences in defining the scope of reasonable professional assistance, and this distinction was especially

meaningless in light of the "uniquely difficult" classification of deportation as merely collateral. Id. at 1481-82.

The Court found that counsel's performance was unreasonable under the circumstances of the case:

> **Padilla's counsel could have easily determined that his plea would make him eligible for deportation** simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. **Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country**. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Id. at 1483 (emphasis added).

At the same time, however, the Court acknowledged that immigration law can be complex, and criminal lawyers are not necessarily well-versed in this area. Id. Nonetheless, the Court rejected the Solicitor General's position that affirmative misadvice is required for a valid claim of ineffectiveness, finding that silence on this issue is "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 (quotation omitted).

Accordingly, the Court reiterated its holding "that counsel must inform her client whether his plea carries *a risk* of deportation." Id. at 1487 (emphasis added). The Court did not grant relief, however, but instead remanded the case back to state court to determine whether the defendant could demonstrate prejudice. Id. at 1478, 1487.

The State submits that Padilla is readily distinguishable from the instant case, where the Defendant was plainly informed that her plea carried a risk of deportation. Further, even if trial counsel should have done more, the Defendant cannot demonstrate prejudice.

Application of Padilla in Florida

Unlike Kentucky, the State of Florida has long required that any plea colloquy include a specific warning that the defendant's criminal conviction may result in deportation. See Fla. R. Crim. P. 3.172(c)(8) (requiring court to verify before accepting plea that defendant understands "that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service"). Such a warning was

given here, and the Defendant stated, under oath, that she understood this possibility. (Supp. Rec. 5).

As the Fourth District Court of Appeal has held, such specific information provided by the court and acknowledged by the defendant precludes a finding of ineffective assistance of counsel – even in the face of *contrary advice* given by counsel:

> A defendant's sworn answers during a plea colloquy must mean something. A criminal defendant is bound by his sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. See Scheele v. State, 953 So. 2d 782, 785 (Fla. 4th DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences.")
>
> When the Court advises that the plea may result in deportation, a defendant has an affirmative duty to speak up if the attorney has promised something different. See Iacono v. State, 930 So. 2d 829 (Fla. 4th DCA 2006) (holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie).
>
> The court's warning that Flores may be deported based on his plea cured any prejudice that might have flowed from counsel's alleged misadvice. Bermudez, 603 So.2d at 658. When Flores entered his plea, he assumed the risk that he "may" be deported.

Flores v. State, 57 So. 3d 218, 220-21 (Fla. 4th DCA 2010). See also Santiago v. State, 65 So. 3d 575, 576 (Fla. 5th DCA 2011) (same), rev. dismissed, 71 So. 3d 117 (Fla. 2011). Cf. Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (noting that, in context of plea colloquy, "[s]olemn declarations in open court carry a strong presumption of verity" constituting a "formidable barrier in any subsequent collateral proceedings").

Here, of course, there was not even any misadvice to overcome. The Defendant's counsel in this case, unlike Mr. Padilla's counsel, did not assure her that there would be no immigration consequences. Instead, counsel told the Defendant that he was not an immigration lawyer, but it was his understanding that the government was actively seeking to deport people even with a withhold of adjudication. (R. 169).

The Defendant's situation was complicated by the fact that she had informed her attorney that she had attained residency in the United States because she had married either a U.S. citizen or a U.S. permanent resident. (R. 170). Trial counsel told the Defendant that she needed to consult with an immigration attorney who could "aid her better" regarding this matter. (R. 169).

While the Defendant criticizes this advice as self-serving, generic, and confusing, the State submits that this characterization is no more than blatant second-guessing by collateral counsel. Trial counsel warned the Defendant that she could very well be deported and recommended a visit to an immigration attorney if she wanted more specific information. This was completely reasonable advice under the circumstances.

Further, there is no doubt that the trial court informed the Defendant that she could be deported as a result of her plea, and the Defendant specifically acknowledged that she understood this. (Supp. Rec. 5).

In light of these facts, then, the Defendant assumed the risk that her plea could be used in deportation proceedings – *the very situation she faces now*. While she characterizes her status as being "subject to" mandatory deportation, she has yet to actually be deported and could very well live freely in this country indefinitely.

Indeed, it is common knowledge that deportation is far from a *mandatory* reality for anyone in the United States. Hundreds of thousands of individuals are living in this country completely illegally; those individuals, like the Defendant

herself, are subject to deportation – yet no one seriously believes they will *all* actually be deported.

Deportation is not the simple matter portrayed by the Defendant, but is instead a complicated process subject to change in enforcement and procedure depending on the political, legal, or fiscal impulses of Congress and the President. Contrary to the Defendant's position, no criminal defense attorney should be required as part of "reasonable professional assistance" to accurately predict the future of any one client, in light of the quagmire that is our country's immigration situation and the federal control over this issue.

Trial counsel performed reasonably here, clearly informing the Defendant of the risk she faced. In fact, had the Defendant's attorney more definitively told the Defendant that she definitely *would* be deported as a result of her plea, the Defendant would have actually been given affirmatively inaccurate advice that may have led her to turn down a favorable plea offer.

In short, no one can predict whether the Defendant will actually be deported as a result of her conviction. What is certain is that the Defendant's conviction *could* subject her to deportation. This fact was never revealed to Mr. Padilla – and

was instead affirmatively concealed from him. This fact was, however, specifically revealed to the Defendant by defense counsel and by the trial court in the instant case.

In light of this warning, then, the Defendant cannot establish prejudice. The trial court and counsel told the Defendant the truth about her situation – she could be deported as a result of her plea. The Defendant chose to enter her plea anyway, with full knowledge of its possible consequences.

In light of this explicit warning by the trial court and the testimony of defense counsel, the Defendant cannot show that she would not have entered the plea in the absence of counsel's allegedly deficient representation. See, e.g., United States v. Hernandez-Monreal, 404 Fed. Appx. 714, 715 (4th Cir. 2010) (defendant could not show ineffective assistance of counsel under Padilla where he affirmatively acknowledged in plea hearing his understanding that his plea "could definitely make it difficult, if not impossible, for [him] to successfully stay legally in the United States"); Smith v. United States, 2011 WL 837747, *11 (S.D. Fla. Feb. 4, 2011) (defendant could not show prejudice under Padilla where, even assuming counsel misadvised him regarding deportation, defendant became aware of possibility he would be deported when trial court advised of this fact

during the plea colloquy, curing any error due to counsel's alleged misadvice), report adopted, 2011 WL 836736 (S.D. Fla. Feb 28, 2011).[2]

The Defendant contends that she should not be bound by her statements of understanding at the plea colloquy, citing in support this Court's decision in State v. Leroux, 689 So. 2d 235 (Fla. 1996). There, this Court concluded that a defendant's allegation that counsel affirmatively misled him regarding the sentence he would receive was not conclusively refuted by his generic assurance, during the plea colloquy, that no "promises" had been made:

[2]Indeed, numerous courts around the country have come to this same conclusion. See, e.g., Zoa v. United States, 2011 WL 3417116 (D. Md. Aug. 1, 2011), appeal dismissed, 2012 WL 313688 (4th Cir. 2012); Zavala v. Yates, 2011 WL 1327135 (E.D. Cal. Apr. 5, 2011); Mendoza v. United States, 774 F. Supp. 2d 791 (E.D. Va. 2011); Marroquin v. United States, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011); Falcon v. D.H.S., 2010 WL 5651187 (C.D. Cal. Nov. 29, 2010), report adopted, 2011 WL 238624 (C.D. Cal. Jan 18, 2011); Gonzalez v. United States, 2010 WL 3465603 (S.D. N.Y. Sept. 3, 2010); United States v. Sanchez-Carmona, 2010 WL 3894133 (D. Nev. Sept. 2, 2010), aff'd, 2010 WL 3892255 (D. Nev. Sep 28, 2010); Al Kokabani v. United States, 2010 WL 3941836 (E.D. N.C. July 30, 2010), report adopted, 2010 WL 3941834 (E.D. N.C. Oct 07, 2010); United States v. Obonaga, 2010 WL 2710413 (E.D. N.Y. June 30, 2010); State v. Davis, 2011 WL 2085900 (Del. Super. Ct. May 20, 2011); Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. July 8, 2010); Chang Ming Lin v. State, 797 N.W.2d 131 (Iowa Ct. App. 2010); People v. Crawford, 2011 WL 1464133 (N.Y. Sup. Ct. Feb. 14, 2011); Ex parte Diaz, 2011 WL 455273 (Tex. Ct. App. Feb. 9, 2011).

> [A] defendant invariably relies upon the expert advice of counsel concerning sentencing in agreeing to plead guilty. In addition, 'there may be a difference between asking a defendant whether anything was promised to get the defendant to agree to a plea, and asking whether any additional promises were made to the defendant concerning the terms of the plea apart from those discussed during the taking of the plea.' Leroux v. State, 656 So. 2d 558, 559-60 (Fla. 4th DCA 1995) (Stone, J., dissenting). We agree, and acknowledge that there may also be a difference between a "promise" as commonly understood, and an attorney's expert advice to his client based upon the attorney's computation and estimate of the actual amount of time a defendant may serve on a sentence. Supplying such advice is not necessarily a promise of an outcome. Rather, providing such advice is a legitimate and essential part of the lawyer's professional responsibility to his client in most plea negotiations, where often the bottom line for the defendant is the amount of time he will serve.

Id. at 237.

Here, in contrast to Leroux, the Defendant's allegation is not refuted based on a generic reference to "promises," but on the *specific information* provided by the trial court regarding deportation as well as trial counsel's specific testimony at the evidentiary hearing. Cf. Iacono v. State, 930 So. 2d 829, 831 (Fla. 4th DCA 2006) (distinguishing Leroux where court's inquiry and defendant's response during plea colloquy were specific to claim being raised in postconviction motion, not simply general questions regarding promises); Hill v. State, 895 So. 2d 1122, 1124 (Fla. 4th DCA) (distinguishing Leroux where subject of

alleged misadvice was "patently the subject under inquiry" and directly addressed by trial court during plea colloquy), rev. denied, 911 So. 2d 98 (Fla. 2005).

Indeed, reading Leroux as broadly as the Defendant espouses would effectively render the plea colloquy meaningless, as defendants could routinely disclaim *any* of their representations at the plea hearing by asserting that counsel told them something different from what they acknowledged understanding, under oath, at the hearing. Nothing in Padilla mandates such a departure from long-standing law recognizing the definitiveness of representations made at a plea hearing.

As this Court has expressly recognized, post-Leroux, deportation consequences can be brought to the defendant's attention by either the court or counsel, and either is sufficient. State v. Luders, 768 So. 2d 440, 441 (Fla. 2000) (*trial court's* failure to warn of deportation consequences could not have prejudiced defendant where his *counsel* advised him of the consequences and he decided to accept the risk and enter the plea anyway). Nothing in Padilla changes this analysis, and here, of course, the Defendant was the recipient of such information from *both* the court and counsel.

Further, as this Court has recognized post-Leroux, the allegation that the defendant would have gone to trial in the absence of counsel's deficient performance must be assessed in light of the entire situation, including "whether a particular defense was likely to succeed at trial, *the colloquy between the defendant and the trial court at the time of the plea*, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial." Grosvenor v. State, 874 So. 2d 1176, 1181-82 (Fla.) (emphasis added), cert. denied, 543 U.S. 1000 (2004).

Here, not only does the plea colloquy itself refute the Defendant's claim, but the totality of the circumstances does as well. The record reflects that the Defendant was facing fifteen years imprisonment for a third degree felony but ended up with a veritable "slap on the wrist" - adjudication withheld and three years of probation. Most importantly, the plea addressed her main concern at the time – avoiding jail.

The Defendant basically claims that she would have turned down the negligible sanction offered so that she could have the privilege of going to trial, where upon conviction she could have received a fifteen year prison sentence and then ended up

getting deported anyway (or, more accurately, facing the possibility of deportation).

In light of the explicit warning to the Defendant, by both trial counsel and the trial court, that she could be deported as a result of her plea, her situation is readily distinguishable from the situation in Padilla, and she cannot demonstrate that she was in any way prejudiced by counsel's allegedly deficient performance. The district court's decision affirming the denial of the Defendant's postconviction motion should be affirmed by this Court.

ISSUE II

(PETITIONER'S POINTS F-G)

THE DISTRICT COURT PROPERLY CONCLUDED THAT PADILLA DOES NOT APPLY RETROACTIVELY.

Even if Padilla has some application in Florida notwithstanding the warning mandated by the Rules of Criminal Procedure, the district court properly concluded that no relief was warranted here, as the Defendant's conviction was already final, and Padilla is not a development of fundamental significance warranting retroactive application. Castano, 65 So. 3d at 548.

Retroactivity Under Florida Law

A new rule of law announced by this Court or the United States Supreme Court applies to all non-final criminal cases – that is, all cases still pending on direct appeal – unless this Court says otherwise. Wuornos v. State, 644 So. 2d 1000, 1008 n. 4 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). Once a criminal conviction has been upheld on appeal, however, the application of a new rule to that conviction is much more limited. At that point, the State of Florida and society as a whole have acquired a strong interest in the finality of the conviction. As this Court has explained:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefitting neither the person convicted nor society as a whole.

Witt v. State, 387 So. 2d 922, 925 (Fla.), cert. denied, 449 U.S. 1067 (1980).

Indeed, making new rules broadly applicable retroactively to all final cases 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." Id. at 929-30.

Accordingly, this Court has held that a new rule of law does not apply retroactively to final convictions unless the change "(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. at 931. The Witt test for retroactivity has been repeatedly, and recently, applied by this Court. See, e.g., State v. Fleming, 61 So. 3d 399, 403 (Fla. 2011); Chandler v. Crosby, 916 So. 2d 728, 729-31 (Fla. 2005), cert. denied, 549 U.S. 956 (2006); Hughes v. State, 901 So. 2d 837, 839-848 (Fla. 2005). Applying that test here, the lower court properly concluded that Padilla does not apply retroactively.

Retroactivity of Padilla – Witt Analysis

This Court has repeatedly addressed whether various decisions interpreting constitutional requirements in criminal cases require retroactive application to cases already final. As a general matter, this Court has "rarely f[ound] a change in decisional law to require retroactive application." Mitchell v. Moore, 786 So. 2d 521, 529 (Fla. 2001) (noting that the Court had decided over sixty retroactivity cases at that time). The instant case is not one of those unusual situations warranting

retroactive application of a new rule of law, and the lower court's decision on this matter should be affirmed.

Retroactive application of a new rule is required only when that rule meets all three elements of the Witt test. 387 So. 2d at 931. Here, the first two elements have been satisfied and are not contested by the State. The third element, "fundamental significance," cannot be met here.

Fundamental significance is determined by analyzing three factors: "(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. All of these factors weigh in favor of a finding that Padilla should not be applied retroactively. See Barrios-Cruz v. State, 63 So. 3d 868, 871-73 (Fla. 2d DCA 2011); Hernandez v. State, 61 So. 3d 1144, 1149-52 (Fla. 3d DCA 2011).

First, where new rules of law constitute "evolutionary refinements" whose purpose is "affording new or different standards for procedural fairness and for other like matters," such rules do not require retroactive application. This stands in contrast with "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the

original trial proceeding" – rules whose purposes do require retroactive application. Witt, 387 So. 2d at 929.

Here, the Court's decision in Padilla was designed to ensure that "defendants considering a plea receive effective assistance of counsel regarding the immigration consequences of the plea." Hernandez, 61 So. 3d at 1150. Padilla does not fundamentally affect the determination of guilt or innocence, nor does it prevent the conviction of innocent citizens. Rather, Padilla addresses procedural fairness in certain plea cases, in light of the "dramatically raised" stakes of a criminal conviction for non-citizens as immigration law has changed over the years. Padilla, 130 S.Ct. at 1480.

Padilla presents a classic example of an evolutionary refinement in the procedural law, and the lower court properly concluded that its purpose does not require retroactive application. See generally State v. Green, 944 So. 2d 208, 212-18 (Fla. 2006) (discussing evolving Florida law on deportation consequences of a plea).

Further, there has been extensive reliance on the old rule regarding immigration consequences of a plea. Rule 3.172(c)(8), requiring that defendants be warned that they may be subject to deportation, was enacted over twenty years ago. In re

Amendments to Fla. Rules of Criminal Procedure, 536 So. 2d 992, 994 (Fla. 1988). Before then, deportation was viewed as a collateral consequence that need not be explained to a defendant at all. See State v. Ginebra, 511 So. 2d 960, 961-62 (Fla. 1987) (lack of knowledge that plea may lead to deportation does nothing to undermine the plea itself).

This "considerable period of reliance" supports the lower court's conclusion that Padilla should not be retroactively applied. See Hughes v. State, 901 So. 2d 837, 845 (Fla. 2005); Williams v. State, 421 So. 2d 512, 515 (Fla. 1982).

Finally, the retroactive application of Padilla would be overwhelming to the administration of justice. The effect of Padilla has been certified as a question of great public importance in dozens of district court cases. See, e.g., Borrego v. State, 2012 WL 414004 (Fla. 2d DCA Feb. 10, 2012); Lezama v. State, 2012 WL 290046 (Fla. 2d DCA Feb. 1, 2012); Perez v. State, 2012 WL 246643 (Fla. 2d DCA Jan. 27, 2012); Jean v. State, 2012 WL 104494 (Fla. 2d DCA Jan. 13, 2012).

Should this Court conclude that Padilla applies to final convictions, thousands of pleas would undoubtedly be subject to challenge in the lower courts, requiring the processing of 3.850 motions and full evidentiary hearings in cases involving pleas

that took place years ago. The State would be at a distinct disadvantage in these hearings, as it would be difficult to find defense attorneys who actually remembered the conversations they had with clients on such matters. Further, the State would often be unable to bring to trial those defendants who would be allowed to withdraw their pleas, given the age of these cases and the likely disappearance of evidence and fading memories of witnesses.

All of the Witt factors weigh against the retroactive application of Padilla, and all five district courts of appeal have concluded that Padilla should not be applied retroactively. See Rodriguez v. State, 75 So. 3d 391 (Fla. 4th DCA 2011); Haddad v. State, 69 So. 3d 411 (Fla. 1st DCA 2011)[3]; State v. Shaikh, 65 So. 3d 539, 540 (Fla. 5th DCA 2011); Barrios-Cruz, 63 So. 3d at 871-73 (Fla. 2d DCA 2011); Hernandez, 61 So. 3d at 1149-52 (3d DCA 2011). This Court should reach the same conclusion here.

Retroactivity of Padilla – Teague Analysis

The Defendant asserts that this Court should follow case law from other courts finding that Padilla applies retroactively under the test set out by the United States Supreme Court in

[3]The First District Court of Appeal has not yet issued an opinion actually addressing this issue, but implicitly reached

Teague v. Lane, 489 U.S. 288 (1989).[4] Under this test, as under the Witt analysis discussed above, Padilla should not be applied retroactively to cases already final when the decision was issued.

In Teague v. Lane, a plurality of the United State Supreme Court concluded that new rules of constitutional law should apply to every case pending on direct appeal when the new rule is issued, but new rules should not apply retroactively to postconviction cases unless (1) they place conduct beyond the power of the government to proscribe, or (2) they announce a rule of criminal procedure that "implicate[s] the fundamental fairness of the trial" and is "implicit in the concept of ordered liberty." 489 U.S. at 311-12.

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the same conclusion by affirming the lower court's denial of relief while citing the Hernandez opinion.

[4]As this Court has expressly recognized, state courts are not bound by Teague in determining the retroactivity of decisions, but can provide greater protections to criminal defendants by expanding the retroactive application of new rules of law. Johnson v. State, 904 So. 2d 400, 408-409 (Fla. 2005). Teague actually provides a greater level of protection to society's interest in finality that the Witt analysis discussed above. See Monlyn v. State, 894 So. 2d 832, 840-841 (Fla. 2004) (Cantero, J., concurring) (urging Court to adopt Teague analysis with respect to constitutional decisions of United State Supreme Court, rather than using outmoded test announced in Witt); Windom v. State, 886 So. 2d 915, 941-45 (Fla. 2004) (Cantero, J., concurring) (same).

For the second prong to be satisfied, the new rule would need to be one "without which the likelihood of an accurate conviction is seriously diminished" or one that involves "watershed" rules of procedure "central to an accurate determination of innocence or guilt." Id. at 311, 313. See also Penry v. Lynaugh, 492 U.S. 302 (1989) (adopting Teague's retroactivity analysis as its majority view).

A rule is "new" for Teague purposes if it was not "dictated by precedent existing at the time the defendant's conviction became final." Graham v. Collins, 506 U.S. 461, 467 (1993). The rule announced in Padilla is undoubtedly new, finding deficient performance of counsel in an area never before applied – especially to the extent Padilla is held to apply in Florida, where the plea colloquy itself has long addressed this issue. (See Issue I).

As Justice Alito noted in his concurring opinion: "Until 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." 130 S.Ct. at 1487 (citing Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 699 (2002) (noting that "virtually all

jurisdictions" — including "eleven federal circuits, more than thirty states, and the District of Columbia" — "hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation)).[5]

Further, the new Padilla rule does not fall within either of the Teague exceptions allowing retroactive application. One cannot seriously argue that Padilla somehow decriminalizes any conduct, and the first exception clearly does not apply.

The second exception does not apply either. The Supreme Court has "repeatedly emphasized the limited scope of the second Teague exception." Beard v. Banks, 542 U.S. 406, 417 (2004). Indeed, the Court "[has] yet to find a new rule that falls under the second Teague exception." Id. at 417-18 (noting that the broad recognition of a right to counsel in state criminal proceedings, established in Gideon v. Wainwright, 372 U.S. 335 (1963), is the quintessential example of a watershed rule of procedure).

[5]The decision in Padilla was not unanimous, including a concurrence authored by Justice Alito and joined by Chief Justice Roberts as well as a dissenting opinion authored by Justice Scalia and joined by Justice Thomas. That the members of the Court expressed such an "array of views" itself indicates that Padilla was not dictated by precedent and accordingly

Padilla does not set forth such a rule. Finding that counsel can be ineffective for failing to advise a client of the immigration consequences of his plea is not a watershed rule implicating the fundamental fairness of trial, and failing to apply the rule announced in Padilla in no way diminishes the likelihood of an accurate conviction.

Indeed, Padilla addresses the advice of counsel for a defendant who chooses to *enter a plea,* a situation where the actual guilt of the defendant is in no way implicated.

Admittedly, courts addressing the retroactive application of Padilla under the Teague analysis have come to contrary conclusions. Notably, however, most federal district courts to have considered the issue – and all of those within Florida – have found that the Padilla rule should not apply retroactively. See, e.g., United States v. Fajardo, 2012 WL 252440, *5-7 (M.D. Fla. Jan. 26, 2012); Sarria v. United States, 2011 WL 4949724, *5-6 (S.D. Fla. Oct. 18, 2011); Rodriguez v. United States, 2011 WL 3419614, *6-8 (S.D. Fla. Aug. 4, 2011); Llanes v. United States, 2011 WL 2473233, *1-3 (M.D. Fla. June 22, 2011). See also Emojevwe v. United States, 2011 WL 5118800, *3 n.12 (M.D. Ala. Sept. 29, 2011), report adopted, 2011 WL 5118788 (M.D. Ala.

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created a "new" rule. See O'Dell v. Netherland, 521 U.S. 151,

Oct 28, 2011); United States v. Chapa, 800 F. Supp. 2d 1216, 1220-24 (N.D. Ga. 2011).

Two of the three circuit courts of appeal that have directly considered the issue have reached this conclusion as well. See United States v. Chang Hong, 2011 WL 3805763, *6-10 (10th Cir. Aug. 30, 2011); Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011). See also Hernandez-Monreal, 404 Fed. Appx. at 715 n.* (noting that "nothing in the Padilla decision indicates that it is retroactively applicable to cases on collateral review"). But see United States v. Orocia, 645 F.3d 630, 641 (3d Cir. 2011) (holding that Padilla is an "old rule" for Teague purposes and therefore retroactive). State courts addressing this issue have likewise reached conflicting conclusions. See Chapa, 800 F. Supp. 2d at 1221 n. 2 (collecting cases).

The State submits that the decisions finding that Padilla is a new rule of law that should not be applied retroactively are better reasoned and more faithful to the Teague analysis, and those decisions should be followed here.

Fairness

159-160 (1997).

The Defendant complains about the unfairness of her situation, noting the tragic consequences that often accompany deportation and arguing that Padilla should accordingly apply to all defendants, whether their convictions are already final or not. While the State is certainly sympathetic to these individual situations, the Witt analysis already takes into account the fairness of applying new decisions to final cases, *balanced against the compelling societal interest in finality*; even in capital cases, at some point courts must stop revisiting the conviction every time the law changes:

> We know that the outcome of a capital case may depend upon the speed with which the trial and the appellate process progress. A variety of reasons may account for the time disparities involved in concluding judicial labors with regard to individuals found guilty of capital crimes and sentenced to death. Trials are delayed for one reason or another. Appeals are not prosecuted with equal diligence. Our ability to review any case varies with the complexity of the issues, the amount of disagreement among the members of the court, the arrival of cases presenting comparable or relevant legal issues, the volume of our other work, and numerous other obvious reasons. It has been suggested that delay could result from a factor as minor as a common cold.
>
> Because the mere passage of time brings inevitable, attendant refinements of the law, disparities of result on direct review are unavoidable. We know, then, that if there were to be absolute uniformity and fairness in the application of our capital punishment law, all relevant changes of law would have to be recognized in post-conviction relief proceedings.

> In considering the ideal of individual fairness in capital cases, however, two countervailing considerations must be weighed. First, if punishment is ever to be imposed for society's most egregious crimes, the disposition of a particular case must at some point be considered final notwithstanding a comparison with other individual cases. Second, we cannot ignore the purpose for our post-conviction relief procedure in cases where a death penalty has been imposed. . . .
>
> Quite clearly, the main purpose for Rule 3.850 was to provide a method of reviewing a conviction based on a major change of law, where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside.

Witt, 387 So. 2d at 926-927.

As discussed above, the relevant considerations do not support the retroactive application of Padilla, and it should not be applied to final cases.

Padilla Itself

The Defendant also claims that, regardless of Teague or Witt, this Court must apply Padilla retroactively based on language in Padilla itself. Specifically, the Defendant cites the Court's discussion regarding opening the potential "floodgates" to challenges of convictions obtained through guilty pleas and the potential for collateral attack of pleas already obtained. Padilla, 130 S.Ct. at 1484-86.

The Tenth Circuit Court of Appeals expressly considered this same language and rejected the argument that it controlled the retroactivity analysis, reasoning as follows:

> We interpret the Court's statement to simply recognize that past decisions enumerating the contours of Strickland have not led to a surfeit of collateral attacks on guilty pleas. The force of the Court's argument is that Padilla would have a similar (lack of) effect on guilty pleas. In addition, **we think it unwise to imply retroactivity based on dicta — and abandon the Teague analysis entirely**. **The Teague framework exists to promote the finality of convictions** by shielding them from collateral attacks mounted on new procedural rules of constitutional law. **To imply retroactivity from an isolated phrase in a Supreme Court opinion would completely ignore this goal**.

Chang Hong, 2011 WL 3805763 at *10 (emphasis added). See also United States v. Agoro, 2011 WL 6029888, *7 (D. R.I. Nov. 16, 2011) (finding the above reasoning persuasive), report adopted, 2011 WL 6034478 (D. R.I. Dec 05, 2011). This well-reasoned opinion should be followed by this Court here, and the Defendant's argument rejected.

The Defendant's additional argument that the procedural posture of Padilla itself indicates it must apply retroactively is likewise without merit. Specifically, the Defendant claims that because Padilla himself was before the Court on a motion for postconviction relief, and he was granted such relief, the Court must have intended for Padilla to apply retroactively to

final convictions. See Santos-Sanchez v. United States, 2011 WL 3793691, *2-3 (S.D. Tex. Aug. 24, 2011) (finding Padilla's procedural posture controlling on the retroactivity issue and Teague's application to federal convictions on collateral review highly questionable).

The Seventh Circuit Court of Appeals expressly considered this same argument and rejected it, reasoning as follows:

> The district court relied on the fact that Padilla itself was before the Court on a motion for post-conviction relief for its conclusion that the Court intended for Padilla to apply retroactively to cases on collateral appeal. **In light of the fact that Kentucky did not raise Teague as a defense in Padilla, we do not assign the significance to Padilla's procedural posture that the district court did.** While "[r]etroactivity is properly treated as a threshold question," Teague "is not 'jurisdictional' in the sense that [the] Court ... must raise and decide the issue sua sponte." Therefore, if a State does not rely on Teague, the Court has no obligation to address it, and can consider the merits of the claim. **We believe it is more likely that the Court considered**

> **Teague to be waived, than that it silently engaged in a retroactivity analysis.**

Chaidez, 655 F.3d at 693-694 (emphasis added) (citations omitted). Again, this well-reasoned opinion should be followed by this Court, and the Defendant's argument rejected. ..... The retroactive application of Padilla has yet to be addressed by the United States Supreme Court. Applying either Witt or Teague, the result is the same – Padilla does not apply retroactively to cases already final. The Defendant here is entitled to no relief.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court affirm the district court's finding that the Defendant failed to establish ineffective assistance of trial counsel and that Padilla does not apply retroactively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief On the Merits has been furnished by U.S. mail to H. Manuel Hernandez, counsel for Petitioner, P.O. Box 916692, Longwood, Florida 32791, this 5th day of March, 2012.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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