IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1571

FIFTH DCA APPEAL NO. 5D10-2032
NINTH JUDICIAL CIRCUIT CASE NO. 2008-CF-18828-A-O

CLAUDIA VERGARA CASTANO,
Petitioner/Appellant/Defendant,

v.

STATE OF FLORIDA,
Respondent/Appellee.

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Certiorari Review from the Fifth District Court of Appeal

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PRELIMINARY STATEMENT

This is an appeal from the Fifth District Court of Appeal's decision affirming the Ninth Judicial Circuit Court's order denying the Petitioner's Motion to Vacate her plea and sentence pursuant to *Fla. R. Crim. P.* 3.850. At the heart of this appeal is the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S.____ , 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), how that decision applies to criminal plea proceedings in Florida, whether the general warnings about potential immigration consequences required by *Fla. R. Crim. P*. 3.172(c)(8) nullify the Supreme Court's holding in *Padilla*, and whether the plain language of the holding in *Padilla* requires that *Padilla* be applied retroactively to cases that were not on direct appeal when it was decided.

The decision of the Fifth District Court of Appeals is reported as *Castano v. State*, 65 So.3d 546 (Fla. 5th DCA 2011). In *Castano* the Fifth District held that the general advisement of potential immigration consequences required by *Fla. R. Crim. P*. 3.172(c)(8) were enough to satisfy the requirements of *Padilla*, and that *Padilla* should not be applied retroactively. In so holding, the Fifth District recognized that its decision was in direct conflict with the Third District Court of Appeal's then recent decision in *Hernández v. State*, 61 So.3d1144 (Fla. 3d DCA 2011), which held that when the immigration consequences of a defendant's plea are "truly clear," the general Rule 3.172(c)(8) warnings would not be sufficient

under *Padilla*. *Hernández*, 61So.3d at 1148. *See*, *Castano* at 548. The Fifth District Court of Appeal also noted its agreement with the Third District Court of Appeal's conclusion in *Hernández* that *Padilla* should not be applied retroactively, and that the question of whether *Padilla* should be applied retroactively to cases that were not on direct appeal when *Padilla* was decided was a question of great public importance. Id.

There are two companion cases discussing the same *Padilla* issues raised in this appeal that are being briefed and set for oral argument at the same time. Those two cases are *Hernández v. State*, Case No. SC11-941/SC11-1357 (consolidated) and *Díaz v. State*, Case No. SC11- 1281. The undersigned counsel has attempted, to the extent possible, to avoid simply repeating the same arguments and case references in these two companion cases in this brief *in toto*.

Finally, references to the record will be made as follows:

(R- #) - Pages to the Record in the Original Appeal at pages 1 to 113;

(Trans. Mtn. Hrg.- #) - Page numbers 1 to 88 in the Original Transcript of the Hearing held on December 11, 2009 on Motion to Vacate (pages 114 to 202 of Record);

(Supp. R. #) - Pages of Change of Plea and Sentencing Hearing Transcript Held on March 4, 2009.

STATEMENT OF THE CASE AND FACTS

Original Proceedings in the Circuit Court

On December 12, 2010, the Petitioner, Claudia Vergara-Castano (hereinafter, Ms. Castano), was charged in a one count information with neglect of a child, in violation of Fla. Stat. § 827.03(3)(c) and § 827.03(3)(a).9. (R-1). The charges resulted from an incident that occurred on September 3, 2008, when a 2 ½ year old child, wondered away unnoticed from a day care center Ms. Castano was running out of her home. (R-3,5-6, 7, 8-9). The child was found unharmed a short distance away by a neighbor who called the police, who then arrested Ms. Castano. (*Id*.).

In spite of a very weak case, and a total lack of any evidence of willfulness or culpable negligence, on March 4, 2009, Ms. Castano entered a guilty plea to the single charge in the information based on the advice of her privately retained trial counsel. (R-24-25, 26-29, 30-32; Supp. R.-1-9[1]). She was sentenced to 1 day in

[1] The transcript of the change of plea and sentencing hearing was included in the Record at pages 94 to 98. The pages were two-sided, and the clerk's office missed half the pages. A Supplemental Index to Record was subsequently filed including the complete transcript. However, although the Supplemental Index to Record cover indicates that the transcript of the plea and sentence is at pages 204-209, there is no pagination other than the original pagination in the transcript itself. Also, the 6 pages covered by numbers 204-209 indicate that the clerk's office once again ignored the two sided copies of the 10 page transcript. As such, and as indicated above, references will be made to the original transcript pages as follows: (Supp. R.- #).

the Orange County Jail with credit for one day served, three years of supervised probation, and court costs. (R-26-29, 30-32; Supp. R- 8).

The Motion to Vacate judgment and Sentence and/or Petition for A Writ of Error Coram Nobis

A Motion to Vacate Judgment and Sentence and/or Petition for A Writ of Error Coram Nobis (hereinafter "Motion to Vacate") was filed by Ms. Castano through new privately retained counsel on November 30, 2009. (R-67-78). The Motion to Vacate raised nine grounds in support of Ms. Castano's request to set aside her plea and vacate her conviction and sentence. (Id.). Ground Four and Ground Eight are relevant to this appeal and can be summarized as follows:

> Ms. Castano is not a United States citizen, was in the process of trying to obtain her permanent residency, and eventually become a naturalized United States citizen. Ms. Castano's trial counsel was ineffective for failing to inform her that entry of the plea to the charge of felony child neglect would subject her to mandatory deportation. Instead her original trial counsel lead her to believe that all she would have to do after her plea was to pay her court costs and report to probation for a period of time, and that nothing further would happen. As a result of he trial counsel's negligent advice, Ms. Castano entered an unknowing plea, and if Ms. Castano had known of the mandatory consequences her plea would have on her legal status in the United States and subject her to mandatory deportation, Ms. Castano would not have agreed to enter a plea.

(R-69-71, Paragraphs 13-19 [Fourth Ground]; R-74, paragraph 27 [Eighth Ground]).

The trial court did not order the State to respond to Ms. Castano's Motion to Vacate, and the State did not file a response on its own. However, a hearing was held on Ms. Castano's Motion to Vacate on December 11, 2009. (R-114-202; 1-89[2]). At the hearing, Ms. Castano testified that prior to entering her plea, she was unable to reach her trial counsel to discuss her case, that at her first meeting with him she tried to tell him about possible witnesses who would testify in her defense, including the parents of the alleged child victim who wondered away from her daycare, but "he didn't care."(Trans. Mtn. Hrg.-23-24, 32-33). Ms. Castano went on to testify that after her first meeting with her trial counsel she tried to call him "four or five times," and eventually just went to his office "two or three, four times" to try and meet with him, but was unable to ever see him and only spoke to his secretary (Trans. Mtn. Hrg.- 6-8, 14-15), and that her attorney never sent her or discussed the evidence against her, possible witnesses in her defense, taking depositions of the state's witnesses, possible motions to suppress evidence or other defense motions. (Trans. Mtn. Hrg.- 25-26, 28,30).

Eventually, Ms. Castano was told to be in court on March 4, 2009, without being told the purpose of the hearing. (Trans. Mtn. Hrg.- 9-10). Although she

[2] The "Index to Record" indicates that the transcript of the hearing on Ms. Castano's Motion to Vacate begins on page 114 and ends at page 202. However, in checking with the clerk's office, it appears that the transcript of this hearing in the Court's record actually begins on page 115. In order to avoid any confusion, references to this transcript will be made to the original page numbers in the transcript as follows: (Trans. Mtn. Hrg.- #).

arrived at the courtroom early, Ms. Castano testified that her attorney arrived late, that she was first told about the planned plea hearing and shown the plea agreement in court, "two or three minutes" before entering the courtroom (Trans. Mtn. Hrg.- 10-11), she was surprised when her attorney told her the reason for the hearing, and that she had no idea what she was pleading to, what the terms of her plea agreement were, or what the consequences of her plea were. (Trans. Mtn. Hrg.- 11-12). Ms. Castano went on to testify that when her trial counsel began discussing the terms of the written plea agreement with her, she told him that she had not done anything, and her attorney told her that "[i]t is all the same. . . [t]he child left the home." (Trans. Mtn. Hrg.- 13). According to Ms. Castano's testimony, she objected to pleading to a crime she did not believe she committed without looking at other possibilities, and her attorney told her that she "shouldn't worry," and that the only thing she would have to do was pay some money and "everything was going to be all right." (Trans. Mtn. Hrg.- 13-14, 15). Ms. Castano also testified that her trial counsel never explained the consequences of her plea agreement to her, either with regards to her immigration status or her daycare license with the Florida Department of Children and Families (DCF)(Trans. Mtn. Hrg.- 15-16, 17), and that although she was shown the written plea agreement and signed it, which was in Spanish (Trans. Mtn. Hrg.- 24-25), her trial counsel did not explain it to her, because he was late and they had to rush into court, she never had

an opportunity to read it (Trans. Mtn. Hrg.- 16-17, 44), and she did not understand either the terms of her plea or the collateral consequences her plea on her immigration status and her DCF license. (Trans. Mtn. Hrg.- 17-18).

As a result of her plea, Ms. Castano testified that she was now subject to deportation and that she lost her DCF license to run her daycare business, her main source of income. (Trans. Mtn. Hrg.- 17, 18,19-20). Ms. Castano testified further, and was adamant in her testimony, that she did not agree, and would never have agreed to enter any plea agreement that would have affected her ability to stay in the United States and her DCF license. (Trans. Mtn. Hrg.- 22-23). She testified that she signed the written plea agreement without knowing the consequences of her plea because of the last minute rush occasioned by her attorney arriving late to the court hearing and not fully explaining what the consequences of her plea were (Trans. Mtn. Hrg.- 22-23), and telling her that she shouldn't worry and would only have to pay some money. (Trans. Mtn. Hrg.- 13-14,15).

On cross-examination by the state, Ms. Castano again insisted that the only time she met with her trial counsel about her criminal case was the day she hired him and the day she saw him in court a few minutes before he urged her to enter her plea (Trans. Mtn. Hrg.- 34, 44), although she acknowledged that he had represented her in a separate unrelated civil injunction matter. (Trans. Mtn. Hrg.- 37-38). Ms. Castano also testified on cross-examination that her first meeting with

her trial counsel regarding her criminal case lasted about "twenty minutes." (Trans. Mtn. Hrg.- 38). She also testified again that although she had signed the written plea form, because of the pressure she felt from the last minute rush, as well as participating in an unfamiliar legal proceeding, and not wanting to contradict her own attorney in front of the judge, she informed the court that it had been reviewed with her, when in reality, her trial counsel had not fully explained it to her and she had never had an opportunity to read it. (Trans. Mtn. Hrg.- 39, 40-41, 44). Ms. Castano then acknowledged that at the time of her alleged offense she had not yet obtained her DCF license to run her day care business, but did obtain it afterward (Trans. Mtn. Hrg.- 43), and testified again that her trial counsel never discussed the consequences of her plea. (Trans. Mtn. Hrg.- 44, 45, 47-48, 49).

The state then called Ms. Castano's trial counsel, Mr. José Torroella. (Trans. Mtn. Hrg.- 52). Mr. Torroella testified that he is a licensed Florida attorney, that Ms. Castano hired him at the beginning of January of 2009 to represent her in a civil injunction hearing, and that Ms. Castano subsequently retained him for her criminal case. (Trans. Mtn. Hrg.- 53-54). According to Mr. Torroella's testimony, he purportedly spoke to Ms. Castano during the time they were supposedly waiting in court for the injunction hearing, although he could not explain exactly what they spoke about, the civil injunction hearing they were waiting for, or the criminal case, and according to Mr. Torroella, he met with Ms. Castano a total of three

times (as opposed to the two times Ms. Castano testified to) to discuss her criminal case, and he reviewed the police reports with her during one of those supposed meetings. (Trans. Mtn. Hrg.- 54-55). He also testified that he is fluent in the Spanish language, and that he discussed the immigration consequences of a plea with Ms. Castano. (Trans. Mtn. Hrg.- 55-56). Specifically, with regards to the purported discussion about the immigration consequences, Mr. Torroella testified as follows:

> [Prosecutor] Q. All right. Now as far as her status in the United States, did you discuss with her at some point her status in the U.S. and whether she was a citizen or resident of the United States?
>
> [Mr. Torroella] A. Yes. We discussed very clearly–we discussed the facts of the case, the discovery. We discussed the facts of immigration. ***I explained to her I was not an immigration attorney, but that I've been told in the past two or three years even with a withhold of adjudication to any pleas of felonies they're actively aggressively seeking to deport people.*** I also explained to her that the problem is that in a criminal case it's not part of the jury instructions before the jury reaches a verdict that if you're going to be deported–that if they're convicted they're going to be deported. I said, you know, we cannot present that in court. That is not a legal defense and it's separate than a criminal case. ***I said, you know, you need to consult with an immigration attorney that can aid you better***, but the criminal case and the immigration case, ***even though there's consequences or possible consequences*** they're different.
>
> Q All right. Now when you were in court, when you presented in court, did you present her with a plea form?
>
> A Yes. . . .

(Trans. Mtn. Hrg.- 56-57)(emphasis added).

Although Mr. Torroella testified that he reviewed the written plea agreement with Ms. Castano, he admitted that he did not read the form to her, and failed to testify about how much time he spent reviewing the plea agreement with Ms. Castano, whether he discussed the plea with her prior to the day of the plea hearing, and whether he allowed her to read the form on her own. (Trans. Mtn. Hrg.- 59, 77). Rather, he testified that he was confident, based on his 18 years of practicing law, that Ms. Castano, who had never been in a criminal case before, understood the lengthy plea form from his explanation, although he also admitted that other than discussing the maximum sentence she could receive if she went to trial, he never discussed the sentencing guidelines and her probable sentence under the guidelines with her. (Trans. 59, 77, 82-83).

On cross-examination Mr. Torroella admitted that although he testified that the civil injunction matter was related to the criminal case, the petitioner in the civil injunction matter was not a witness in the criminal case, was not a complainant, not the parent of the alleged victim child, and in fact had nothing to do with the criminal case at all. (Trans. Mtn. Hrg.- 64-65). And while he insisted that he had in fact reviewed the state's discovery with Ms. Castano, Mr. Torroella admitted that he did not recall if he ever provided her with a copy of the discovery, that he never took any depositions, contacted any witnesses, or even considered filing a motion to suppress Ms. Castano's statement to the police. (Trans. Mtn.

Hrg.- 66-68, 71, 72). Mr. Torroella also admitted that although "he could not recall," Ms. Castano "may have" told him that the mother of the purported victim child wanted to cooperate with the defense and did not want to have Ms. Castano prosecuted, but he never spoke to the alleged victim child's mother, nor did he try to get a declination affidavit from her to give to the state. (Trans. Mtn. Hrg.- 74). Mr. Torroella also testified that Ms. Castano's main interest was "to resolve the case" and to not go to jail. (Trans. Mtn. Hrg.- 70).

On May 10, 2010, the trial court entered its written order denying Ms. Castano's Motion to Vacate (R-89-93), relying primarily on the statements made by Ms. Castano during the plea colloquy. (R-92).

The Appeal

A timely notice of appeal seeking review of the trial court's denial of her Motion to Vacate by the Fifth District Court of Appeal was filed on May 28, 2010. (R-109). In her appeal, Ms. Castano argued, *inter alia*, that her trial counsel had provided her ineffective assistance of counsel by not informing her that her plea and conviction would result in certain deportation, relying on the United States Supreme Court's then recent decision in *Padilla v. Kentucky*, *supra*, 559 U.S. , 130 S.Ct. 1473. On June 17, 2011, the Fifth District Court of Appeal rejected the Ms. Castano's *Padilla* argument and affirmed the lower court's denial of Ms. Castano's Motion to Vacate. See, *Castano v. State*, 65 So. 3d 546 (Fla. 5th DCA

2011). The Fifth District Court of Appeal affirmed, relying on and adopting the Fourth District Court of Appeal's holding in *Flores v. State,* 57 So.3d 218 (Fla. 4th DCA 2010), concluding that first, the general advisement of potential immigration consequences required by *Fla. R. Crim. P.* 3.172(c)(8) and given to Ms. Castano were enough to satisfy the requirements of *Padilla*, and second, that *Padilla* should not be applied retroactively. *Castano*, at 547-48. However, in so holding, the Fifth District Court of Appeal recognized that its decision in Castano was in direct conflict with the Third District Court of Appeal's then recent decision on the same points of law in *Hernández v. State,* 61 So.3d1144 (Fla. 3d DCA 2011), which held that when the immigration consequences of a defendant's plea are "truly clear," the general Rule 3.172(c)(8) warnings would not be sufficient under *Padilla*. *Hernández,* 61So.3d at 1148. As such, the Fifth District Court of Appeal certified the conflict between *Castano* and *Hernández* pursuant to *Fla. R. App. P.* 9.030(a)(2)(iv). See, Castano at 548. The Fifth District Court of Appeal also noted its agreement with the Third District Court of Appeal's conclusion in *Hernández* that the question of whether *Padilla* should be applied retroactively to cases that were not on direct appeal when *Padilla* was decided was a question of great public importance, and certified that question pursuant to *Fla. R. App. P.* 9.030(a)(2)(A)(v). *Id*. Accord, *Barrios-Cruz v. State,* 63 So. 3d 868, 870 Fla. 2d DCA 2011)

On June 29, 2011, Ms. Castano filed a Motion for Clarification pursuant to *Fla. R. App. P.* 9.330(a), asking that the appellate panel to correct and amend the panel's written opinion to accurately reflect appellate counsel's consistent position in all pleadings filed with the Court, and during oral argument, that Ms. Castano "is" and "will" be subject to mandatory deportation, not "may" or "could" be subject to mandatory deportation as incorrectly set out in the opinion. *Castano* at 547. This distinction between the terms "is" and "will" and "may" and "could" is critical when applying the Supreme Court's holding in *Padilla* to claims of ineffective assistance of counsel and formed an important part of both the holding in *Padilla*, 130 S.Ct at 1483, and the Third District Court of Appeal's holding in *Hernández*. 61 F.3d, at 1148-49. In spite of appellate counsel's concern that, given the holding in *Padilla*, Ms. Castano's consistent position and arguments that as a result of her plea and conviction in this case she will be subject to mandatory deportation, the distinction between cases where a defendant "may" be deported and cases where a defendant "will" be deported under *Padilla*, and the imprecision of the panel's characterization of the appellate counsel's arguments during oral argument, the Motion for Clarification was denied on July19, 2011.

Ms. Castano then filed her timely Notice to Invoke the Discretionary Jurisdiction of this Court pursuant to *Fla. R. App. P.* 9.120(b) and (c) on July 29, 2011. On January 24, 2012, the Court accepted jurisdiction and set the briefing

schedule. *Castano v. State*, No. SC11-1571,____So.3d ____, 2012 WL 285665 (Fla. Jan 24, 2012).

SUMMARY OF THE ARGUMENT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense . . ." U.S. Const. Amend. VI. This Sixth Amendment right to counsel in criminal prosecutions applies to criminal defendants in Florida pursuant to the Due Process Clause of the Fourteenth Amendment, which provides that ". . . , nor shall any State deprive any person of life liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws") U.S. Const. Amend. XIV, §1 (Due Process and Equal Protection Clauses). It is through the right to effective assistance of counsel that all of a criminal defendant's other due process rights are protected and insured, and when a defendant is deprived of effective assistance of counsel, his or her right to due process is, of necessity, denied as well.

The plea bargaining process and plea proceedings themselves are considered an important and critical stage of the criminal process during which a defendant is entitled to effective assistance of counsel. In *Padilla*, the United States Supreme Court focused on the right of criminal defendants to be advised by their defense counsel of potential collateral immigration consequences before entering a plea, in

order to insure that the plea is knowing and intelligent. Here, by virtue of Ms. Castano's conviction for child neglect under Fla. Stat. §827.03(3)(c), there is no question but that she is subject to mandatory deportation. Pursuant to the Supreme Court's decision in *Padilla*, Ms. Castano, in order to enter a knowing and intelligent plea, had to be advised by her trial attorney that she "is" going to be deported rather than that she"may" be deported, or merely that there are "possible immigration consequences" as a result of her plea. As such, under *Padilla*, her original defense counsel was negligent and provided ineffective assistance of counsel when he failed to properly advise her of the adverse consequences of her plea regarding the certain immigration consequences of her plea on her ability to remain in the United States. And the record is clear, Ms. Castano's original trial counsel did not provide her with any real legal advice about the immigration consequences of her plea. In essence, all Ms. Castano's trial counsel told her was "I don't know" and that "she should talk to an immigration lawyer" because the gossip on the street is that the government "is aggressively seeking to deport" defendants convicted of felonies. This was not legal advice, it was lawyerly evasion and "punting" advocacy.

Also, after *Padilla*, the general admonishment that a defendant's plea "may have immigration consequences" required by *Fla. R. Crim. P.* 3.172(c)(8) is no longer sufficient where the adverse consequences of a plea and conviction are

"truly clear," as was the case with Ms. Castano's plea. This Court is bound to follow the Supreme Court's holding in *Padilla*, and as the Third District did in *Hernández,* hold that there is a difference between cases where the immigration consequences of a guilty plea are "truely clear" and when they are not clear, that defense counsel must advise their client's accordingly to provide effective legal representation, and that the generic warning contained in Rule 3.172(c)(8) will no longer inoculate negligent defense counsel nor be enough to bar ineffective assistance of counsel claims when criminal defense counsel fail to properly advice a pleading noncitizen defendant who is clearly facing mandatory deportation as a result of his or her plea. As such the Court should answer the first certified question regarding whether the general advisement of potential immigration consequences required by *Fla. R. Crim. P.* 3.172(c)(8) were enough to satisfy the requirements of *Padilla,* in the negative.

With regards to the retroactive application of *Padilla,* the *Padilla* decision itself included the retroactive application of the *Padilla* decision to a collateral appeal, and the decision itself makes clear that its holding should be applied retroactively either because it involved an old rule addressing the Court's long line of cases enforcing the mandate of the Sixth Amendment that criminal defendants are entitled to effective assistance of counsel, or, in the alternative, if the *Padilla* holding announced a new rule, it is a substantive or a "watershed rule" of criminal

procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Also, if the Court determines that *Padilla* announced a new rule, it is a "watershed rule" addressing "fundamental rights" that require retroactive application to prevent "manifest injustice" under Florida case law. As such, this Court must answer the second certified question as to whether *Padilla* should be applied retroactively in the affirmative.

The decision to dispose of a criminal case by the entry of a guilty plea is a serious decision inasmuch as it constitutes a waiver of the fundamental rights. In the case of noncitizen defendants, and their families, the consequences of a decision to plead guilty goes far beyond the mere waiver of rights, no matter how fundamentally important those rights may be. With the changes in federal immigration policy and laws, a noncitizens decision to plead guilty can have catastrophic implications for the accused, and for the innocent family members of the accused, which are all but automatic. Given this cruel reality, it is not too much to demand that a noncitizen entering a guilty plea be fully informed of the "truly clear" consequences of that plea before entering it.

The Court should then reverse the lower courts' decisions and previous orders, and remand with instructions to set aside Ms. Castano's plea of guilty and conviction, and that Ms. Castano be allowed to withdraw her guilty plea, and plead anew with new counsel.

ARGUMENT

THE SUPREME COURT'S HOLDING IN *PADILLA* V. KENTUCKY CONTROLS HERE, IS RETROACTIVE, AND UNDER THE HOLDING IN *PADILLA*, THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HER DEFENSE COUNSEL FAILED TO ADEQUATELY INFORM HER THAT SHE WOULD BE SUBJECT TO MANDATORY DEPORTATION AS A RESULT OF HER PLEA, AND THE TRIAL COURT'S WARNING UNDER FLA. R. CRIM. P. 3.172(C)(8) WAS INSUFFICIENT TO CURE TRIAL COUNSEL'S FAILURE TO ADEQUATELY INFORM MS. CASTANO OF THE CERTAIN IMMIGRATION CONSEQUENCES OF HER PLEA WHICH WERE "TRULY CLEAR"

A. Standard on Review - De Novo

The proper application of a decision of the United States Supreme Court to Florida law, the Florida Rules of Criminal Procedure, and to criminal proceedings in Florida is a pure legal question, and as such is subject to *de novo* review on appeal. *Jackson v. State*, 64 So.3d 90, 92 (Fla. 2011); *Sutton v. State*, 975 So.2d 1073, 1076 (Fla. 2008).

B. The Right to Effective Assistance of Counsel Generally

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense . . ." U.S. Const. Amend. VI. This right was designed to assure fairness in the adversary criminal process. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697-98, 100 L.Ed.2d 140 (1988). This Sixth Amendment right to counsel in criminal prosecutions applies to criminal defendants in Florida pursuant to the Due Process Clause of the Fourteenth Amendment, which provides that ". . . ,nor

shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws") U.S. Const. Amend. XIV, §1 (Due Process and Equal Protection Clauses); *see generally*, *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 796, 9 L.Ed. 2d 799 (1963); *see also*, Fla. Const., Art. 1, § 9 (Due Process- "No person shall be deprived of life, liberty or property without due process of law") and § 16(a) (Rights of Accused-"In all criminal prosecutions the accused . . . shall have the right to . . . be heard . . . by counsel . . ."). The constitutional right to effective assistance of counsel during a criminal prosecution and at trial applies to every criminal case, without regard to whether counsel is retained or appointed. *Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985). Also, the Supreme Court has made clear that the right to effective assistance of counsel applies to all defendants regardless of their innocence or guilt.

> While we have recognized that the premise of our adversary system of criminal justice that partisan advocacy will best promote the ultimate objective that the guilty be convicted and the innocent go free, underlies and gives meaning to the right to effective assistance, we have never intimated that the right to counsel is conditioned upon actual innocence. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.

Kimmelman v. Morrison, 477 U.S. 365, 379-80, 106 S.Ct. 2574, 2585, 91 L.Ed.2d 305 (1986) (citations and internal quotation marks omitted).

This right to counsel in a criminal case encompasses more than merely having an attorney appointed or present throughout a criminal proceeding. Instead, it entitles a defendant to effective representation of counsel at each important and critical stage of the criminal process. *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *United States v. Cronic*, 466 U.S. 648, 654-55, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984). The representation of a criminal defendant entails certain basic duties. Defense counsel's function in a criminal case is to assist the defendant, and "[f]rom counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause . . ." *Strickland v. Washington, supra*, 466 U.S. at 687, 104 S.Ct. at 2064 (emphasis added).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

United States v. Cronic, supra, 466 U.S. at 655-56, 104 S.Ct. at 2044-45 (1984) (internal quotation marks in original and citations omitted). Thus, it is through the right to effective assistance of counsel that all of a criminal defendant's other due process rights are protected and insured, and when a defendant is deprived of

effective assistance of counsel, his or her right to due process is, of necessity, denied as well. *Id; accord*, *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999), *citing*, *Strickland*, 466 U.S. at 685, 104 S.Ct. at 2063.

When a defendant who has been convicted alleges ineffective assistance of counsel, he or she generally has the burden of proof and must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. *Strickland v. Washington*, *supra*, 466 U.S. at 687, 104 S.Ct. at 2065; *United States v. Cronic*, *supra*, 466 U.S. at 658, 104 S.Ct. at 2046; *Johnston v. State*, 70 So.3d 472, 477 (Fla. 2011). In the context of a guilty plea, a defendant claiming ineffective assistance of counsel must establish that there is a reasonable probability that but for his or here defense counsels negligence, the defendant would not have pled guilty and would have proceeded to trial. *State v. Dickey*, 928 So.2d 1193, 1199 (Fla. 2006), *citing*, *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Claims of ineffective assistance of counsel present mixed questions of law and fact subject to plenary review, with the Court independently reviewing legal conclusions and deferring to the lower courts findings of fact. [3] *Hartley v. State*, 990 So.2d 1008, 1013 (Fla. 2008).

[3] Since the trial court denied Ms. Castano's Motion to Vacate relying almost exclusively on her statements during the plea colloquy (R-92), arguably, there is little in the way of factual findings for this Court to defer to on appeal. *Hartley*.

Generally, defendant's are bound by the statements they make at a change of plea hearing under oath. *Henry v. State*, 920 So.2d 1245, 1246 (Fla. 5th DCA 2006) ("Defendants are bound by the statements made by them under oath; they are not entitled to have their plea set aside by later claiming the plea was involuntary based on their allegedly perjured testimony."). However, a defendant who enters a plea based on an honest mistake or misunderstanding should be allowed to plead anew. *Bowen v. State*, 997 So.2d 508, 509 (Fla. 5th DCA 2008) ("A defendant who enters a plea based on an honest mistake, misunderstanding or misapprehension concerning the length of his sentence should be allowed to withdraw his plea"). As to what defendants say during a plea colloquy; depending on the facts and circumstances of each case, rote answers during a plea colloquy may not be dispositive of any subsequent claim by a defendant that the plea was not voluntary and knowing. *See*, *Robinson v. State*, 761 So.2d 269, 274 (Fla. 1999)("A defendant should be permitted to withdraw a plea [prior to sentencing and notwithstanding statements made during plea colloquy under oath] if he files a proper motion and proves that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights."), *cert. denied*, 529 U.S. 1057, 120 S.Ct. 1563, 146 L.Ed.2d 466 (2000); *State v. Leroux*, 689 So.2d 235, 238 (Fla. 1996)(Defendant's negative response to trial court's question during plea colloquy of whether anything was promised to

defendant to induce guilty plea did not conclusively refute post-conviction relief claim that his negotiated plea was product of trial counsel's alleged misrepresentations concerning sentence); *Jones v. State*, 846 So.2d 1224, 1226 (Fla. 2d DCA 2003)(Defendant's affirmative responses in plea colloquy when the trial court asked him if he was satisfied with his attorney, alone, did not refute subsequent ineffective assistance of counsel claim); *see also and compare*, *United States v. Gonzalez-Mercado*, 808 F.2d 796, 800 n.8 (11th Cir. 1987)("Clearly, in certain circumstances, the presumption of a knowing and voluntary plea created by proceedings . . . 'although imposing, is not insurmountable.'"), *citing*, *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977) (Notwithstanding presumption that statements made during plea proceedings are true, allegation of unkept promise of a lighter sentence, not patently false or frivolous, is sufficient to support petition for habeas corpus) and *Fontaine v. United States*, 411 U.S. 213, 214-15, 93 S.Ct. 1461, 1462-63, 36 L.Ed.2d 169 (1973) (Charge of coerced plea, supported by factual allegation, will support a motion to vacate plea and sentence, notwithstanding statements by defendant during plea colloquy that plea not coerced and that plea was voluntary).

C. The Right to Effective Assistance of Counsel in Plea Proceedings Padilla v. Kentucky - Collateral Immigration Consequences

With regards to a criminal defendant's right to effective assistance of counsel, it is beyond per adventure that the plea bargaining process and plea

proceedings themselves are considered an important and critical stage of the criminal process during which a defendant is entitled to effective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. ____ , 130 S.Ct. 1473, 1480-81, 1486, 176 L.Ed.2d 284 (2010) ("Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.")(internal quotation marks omitted), citing, *McMann v. Richardson*, 397 U.S. 759, 771[n.14], 90 S.Ct. 1441, 1449 [n.14], 25 L.Ed.2d 763 (1970) and *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052; *see also*, *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct.495, 498, 30 L.Ed.2d 427 (1971) (". . . it is now clear that an accused pleading guilty must be counseled, absent a waiver.").

In *Padilla*, the United States Supreme Court focused on the right of criminal defendants to be advised by their defense counsel of potential collateral immigration consequences before entering a plea, in order to insure that the plea is knowing and intelligent. Specifically, the Court held:

> Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court. In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." The Kentucky high court is far from alone in this view.

> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*,. . .
>
> **We have long recognized that deportation is a particularly severe "penalty** but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, ***And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult***.
>
> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. ***We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla's claim.***

Padilla v. Kentucky, 130 S.Ct., at 1481-82 (citations omitted)(emphasis added); *see also generally*, *Peart v. State*, 756 So.2d 42, 48 n.5 (Fla. 2000) ("This Court included advisement of the possible immigration consequences of the plea during the plea acceptance hearing because deportation of a person from the United States often is just as harsh as other consequences, if not more so.").

However, the Supreme Court also made clear in *Padilla* that the obligation of defense counsel is different when a defendant's plea results in mere possible

collateral immigration consequences and a defendant's plea where the immigration consequences are "truly clear," holding that:

> Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. ***There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited***. When the law is not succinct and straightforward. . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges ***may*** carry a risk of adverse immigration consequences. ***But when the deportation consequence is truly clear, as it was in this case [and was in Castano's case], the duty to give correct advice is equally clear***.

Padilla v. Kentucky, 130 S.Ct. at 1483(footnote omitted)(emphasis added). See also, *Hernández v. State*, *supra*, 61 So.3d at 1147-48 (Noting that the majority opinion in *Padilla* differentiated between those cases involving a mere "risk of adverse immigration consequences," and those with a "truly clear" deportation consequence.

Finally, the Supreme Court concluded in *Padilla* that:

> It is our responsibility under the Constitution to ensure that no criminal defendant-whether a citizen or not-is left to the "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Padilla, 130 S.Ct., at 1486. (Emphasis added).

D. Ms. Castano's Guilty Plea to Felony Child Neglect under Fla. Stat. §827.03(3)(C) Subjected Her to Mandatory Deportation under United States Immigration Law Applicable at the Time of Her Plea, and Given the Fact That the Immigration Consequences of Her Plea Were "Truely Clear," Ms. Castano's Trial Counsel's Failure to Inform Her That Her Plea Subjected Her to Mandatory Deportation Amounted to Ineffective Assistance of Counsel

The changes to U.S. immigration laws which the Supreme Court referred to in *Padilla*,, and the harsh and often cruel consequences they have often engendered, referred to by both the Supreme Court in *Padilla* and this Court in *Peart*, have bedeviled courts and immigrants alike.

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Padilla,, 130 S.Ct., at 1478. (citation omitted). The most significant changes to U.S. immigration laws and the availability of judicial review relevant here were enacted by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIA), codified at 8 U.S.C. 1252(a)(2)(C), and was succinctly summarized by the Eleventh Circuit as follows:

> On September 30, 1996, Congress passed the IIRIRA. This legislation contained at least three major changes in U.S. immigration law that ultimately affect [the defendant's] case. The first change was the adoption of the term "removal," which essentially eliminated a

> distinction that formerly existed between "deportation" proceedings and "exclusion" proceedings. See *Calcano-Martinez v. INS*, 533 U.S. 348, 121 S.Ct. 2268, [2270, n. 1], 150 L.Ed.2d 392 (2001) (noting "statute-wide change in terminology"). Thus, a determination whether an alien is "inadmissible" (i.e., cannot, or did not, enter the country lawfully), see 8 U.S.C. § 1101(a)(13), or "deportable" (i.e., entered the country lawfully but is no longer entitled to stay), see 8 U.S.C. § 1227(a), would be determined through "removal" proceedings, see 8 U.S.C. § 1229a(a) (defining removal proceeding as the "exclusive procedure" for determining the "inadmissibility or deportability of an alien").

A second change was an amendment to 8 U.S.C. § 1252, which defines our authority to review removal orders issued by the Board of Immigration Appeals (BIA). Although under the new version of the law [federal appellate courts] retain [the] ability "to consider petitions challenging 'final orders' commanding the 'removal' of aliens from the United States," ***the new law also eliminated [their] jurisdiction "to review any final order of removal against any alien who is removable by reason of a conviction for certain criminal offenses***," including any offense encompassed by 8 U.S.C. § 1182(a)(2). *Calcano-Martinez*, 533 U.S. at 350[, 121 S.Ct., at 2269-70]. . .

> The third, and perhaps most significant change, was the repeal of §244(a)(2), formerly codified at 8 U.S.C. § 1254(a)(2), providing for certain discretionary relief from deportation (or removal, under the terminology of the current law).

Balogun v. United States, 304 F.3d 1303, 1306-07 (11th Cir. 2002)(case citations in original)(footnotes in original omitted)(emphasis added).

Here, by virtue of Ms. Castano's conviction for child neglect under Fla. Stat. §827.03(3)(c) (R-24), there can be no question but that she is subject to mandatory deportation. *See specifically*, 8 U.S.C. § 1227(a)(2)(E)(i)("***Any alien*** who at any time after admission is ***convicted of a crime of . . . child neglect***, or child abandonment ***is deportable***.")(emphasis added); see also, *Martínez v. U.S. Attorney Genera*l, 413 Fed. Appx. 163, 164 (11th Cir. 2011)(Unpublished opinion[4] by the Eleventh Circuit United States Court of Appeals involving alien with an identical conviction under same Florida child neglect statute Ms. Castano pled guilty to on the advice of her trial counsel, finding that an alien convicted of felony child neglect under Fla. Stat. § 827.03(3)(c) is not eligible for cancellation of removal pursuant to 8 U.S.C. § 1227(a)(2)(E)(i), and thus subject to certain deportation); *Matter of Soram*, 25 I&N Dec. 503, 381-82 (BIA 2008)(Finding that "child neglect" is included in the list of child abuse offenses that subject aliens who have been convicted of committing to deportation under 8 U.S.C. §1227(a)(2)(E)(i) and finding alien appellant convicted of child abuse is subject to mandatory deportation). Pursuant to the Supreme Court's decision in *Padilla*, Ms. Castano, in

[4] While unreported federal decisions have no controlling precedential value for this Court, *Citizens Property Ins. Corp. v. Ash*, 50 So.3d 645. 653 n. 3 (Fla. 1st DCA 2010), they may be persuasive insofar as their legal analysis warrants. *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir), *cert. denied*, 552 U.S. 1077, 128 S.Ct. 813, 169 L.Ed.2d 607 (2007). In *Martínez*, a federal appellate court is interpreting federal immigration law as it applies to the same Florida criminal statute involved in this case, and as such, it is respectfully submitted, is persuasive here.

order to enter a knowing and intelligent plea, had to be advised by her trial attorney that she "is" going to be deported rather than that she"may" be deported, or there are "possible immigration consequences" as a result of her plea. *Padilla*, 130 S.Ct. at 1483; *accord*, *Hernández v. State*, 61 So.3d at 1147-48. As such, under *Padilla*, Ms. Castano's original defense counsel was negligent and provided ineffective assistance of counsel when he failed to properly advise her of the adverse consequences of her plea regarding the certain immigration consequences of her plea on her ability to remain in the United States. *Padilla*, 130 S.Ct., at 1486.

And the record is clear, Ms. Castano's original trial counsel did not provide her with any real legal advice about the immigration consequences of her plea. Instead, all Ms. Castano's trial counsel did was provide a self-serving, generic, and confusing, statement about legal gossip regarding the collateral consequences of a criminal conviction on a defendant's immigration status. Again, according to his own testimony at the hearing on the Motion to Vacate, Mr. Torroella told Ms. Castano that "I explained to her I was not an immigration attorney, but that I've been told in the past two or three years even with a withhold of adjudication to any pleas of felonies they're actively aggressively seeking to deport people. . . . ***I said, you know, you need to consult with an immigration attorney that can aid you better, but the criminal case and the immigration case, even though there's consequences or possible consequences*** they're different. (Trans. Mtn. Hrg. at pp.

56). In essence, all Ms. Castano's trial counsel told her was "I don't know" and that "she should talk to an immigration lawyer" because the gossip on the street is that the government "is aggressively seeking to deport" defendants convicted of felonies. This was not legal advice, it was lawyerly evasion and "punting" advocacy. While this type of generic statement and disclaimer may have survived a Strickland analysis prior to *Padilla*, given the "truly clear" consequences of Ms. Castano's plea on her immigration status, 8 U.S.C. § 1227(a)(2)(E)(i), *Martínez v. U.S. Attorney General, Matter of Soram*, it clearly no longer passes Sixth Amendment muster.

E. After Padilla, the General Admonishment That a Defendant's Plea "May Have Immigration Consequences" Required by Fla. R. Crim. P. 3.172(c)(8) Is No Longer Sufficient Where the Adverse Consequences of a Plea and Conviction Are "Truely Clear," as Was the Case with Ms. Castano's Plea - this Court must Uphold the Third District's Holding in Hernández on the Constitutional Viability of Rule 3.172(c)(8) after Padilla and Reverse the Fourth District's Holding in Flores, and the Fifth District's Holding in Castano on this Issue

In *Flores v. State*, 57 So.3d 218 (Fla. 4th DCA 2010), the Fourth District held that a trial court's scripted generic advisement pursuant to Fla. R. Crim. P. 3.172(c)(8) that defendant's guilty plea could result in his or her deportation, and requiring only a "yes" or "no" answer from the defendant, cured any prejudice arising from the defendant's counsel's alleged pre-plea misadvice to the contrary, thus precluding any claim of ineffective assistance of counsel. *Flores*, at 220-21. In so deciding the Fourth District addressed the Supreme Court's holding in

Padilla, and attempted to distinguish the holding in *Padilla*, concluding that it was distinguishable from *Flores* on the facts.[5] The holding in *Flores* misconstrued the United States Supreme Court's holding in *Padilla*.

Of course, like the Fifth and Fourth District Courts of Appeal, this Court is bound by the rulings and precedent of the United States Supreme Court regarding Sixth Amendment claims of ineffective assistance of counsel. *Stephens v. State, supra*, 748 So.2d at1033 (This Court noting that when an ineffective assistance of counsel claim is based on the Sixth Amendment, the Court is not at liberty to disregard the United States Supreme Court's decision); see also, U.S. Const. Amend. VI and Amend. XIV (Due Process and Equal Protection clauses). In *Flores*, the Court erroneously relied on the holding in *Bermudez v. State*, 603 So.2d 657 (Fla. 3d DCA 1992), where the Third District Court of Appeal, relying on this court's prior holding in *State v. Ginebra*, 511 So.2d 960, 960 (Fla. 1987), held that "there is no right to be informed of the collateral consequences of a guilty plea," and held that any prejudice flowing from counsel's misadvice regarding the immigration consequences of a guilty plea was "cured" by the trial court's warning under Rule 3.172(c)(8) that a guilty plea by a noncitizen may result in deportation.

[5] It bears noting here that, although the Fourth District did not address the retroactive application of the holding in *Padilla* directly, by implication, the Fourth District held that *Padilla* applied retroactively when it considered *Padilla* and distinguished it on its facts to the *Flores* case, *Flores*, 57 So.3d 220, which was itself an appeal from a denial of a Motion to Vacate Judgment and Sentence filed pursuant to *Fla. R. Crim. P.* 3.850. *Id.*

Bermudez, 603 So.2d at 658, *citing*, *Ginebra*, 511 So.2d, at 960. However, in *Padilla* the United States Supreme Court held that regardless of the lower courts' many previous holdings finding a distinction between "collateral" and "direct" consequences, counsel has an affirmative Sixth Amendment duty to correctly advise criminal defendants about the immigration consequences of a contemplated guilty plea. *Padilla*, 130 S.Ct., at 1484. Specifically, the Court ruled that *Padilla*'s counsel was ineffective for failing to advise him that his conviction for drug distribution subjected him to automatic deportation. *Id*. at 1478. Given the holding in *Padilla*, the *Flores* court's reliance on *Bermudez* for the proposition that the generic Rule 3.172(c)(8) warning always cures prejudice stemming from counsel's misadvice about immigration consequences of a guilty plea is plainly misplaced. Both *Bermudez* and *Ginebra* are no longer good law after *Padilla*. In *Hernández*, the same court that decided *Bermudez*, the Third District, specifically held as much, concluding that the holding in Bermudez was no longer good law after *Padilla*.[6] Hernández, 61 So.3d at 1147 ("Relying on this Court's decision in Bermudez . . . , *Flores* holds that the trial court's warning to *Flores* that he may be deported based on his plea 'cured any prejudice that might have flowed from counsel's alleged misadvice.' 57 So.3d at 220–21. While this may have been an

[6] Notably, while the Fourth District did not have the benefit of the Third District's decision in *Hernández* when it issued the *Flores* decision, the Fifth District did, and still chose to follow the then fatally flawed holding in *Flores.*

accurate statement of federal and Florida law before *Padilla*, we respectfully conclude that it is no longer accurate.")(emphasis and citations in original). In *Hernández,* the Third District, it is respectfully submitted, then correctly applied the Supreme Court's holding in *Padilla* to plea proceeding in Florida and Rule 3.172(c)(8), holding that when the fact that a guilty plea "will" result in deportation is "truly clear, constitutionally effective defense counsel must inform their client that their plea "will subject you," not "may subject you," to deportation. *Id*. at 1147-48.

Certainly, holding, as the *Flores* Court appears to have done, that a warning from a trial court, which would be unconstitutional if offered by a defendant's defense counsel, could cure constitutionally deficient advice by counsel, makes little or no sense, and is simply wrong. Also, the *Flores* court's holding that a generic Rule 3.172(c)(8) warning always cures prejudice, the particular facts of the case notwithstanding, conflicts with the United States Supreme Court's ruling in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires a determination of whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, *supra*, 466 U.S. at 694, 104 S.Ct. at 2068, and in making this determination, a trial court must make a case-by-case

record-based decision that takes account of all relevant facts. 466 U.S. at 695, 104 S.Ct. at 2069.

This Court is bound to follow the Supreme Court's holding in *Padilla*,, and as the Third District did in *Hernández,* hold that there is a difference between cases where the immigration consequences of a guilty plea are "truely clear" and when they are not clear, that defense counsel must advise their client's accordingly to provide effective legal representation, and that the generic warning contained in Rule 3.172(c)(8) will no longer inoculate negligent defense counsel nor be enough to bar ineffective assistance of counsel claims when criminal defense counsel fail to properly advice a pleading noncitizen defendant who is clearly facing mandatory deportation as a result of his or her plea. As such the Court should answer the first certified question in the negative.

F. The Supreme Court's Holding in Padilla is Retroactive and Applies to Cases Not Still On Direct Appeal When Padilla was Decided

Beginning with the Third District's holding in *Hernández*, the cases addressing the retroactivity of *Padilla* are numerous, ponderous, conflicting, and it is respectfully submitted, have created a legal thicket that even a judicial Marco Polo dare would find daunting to navigate. All for naught. While generally, the remedy a state court chooses to provide its own citizens for violations of the Federal Constitution is usually a question of state law, federal law sets certain minimum requirements that states must meet, and which the state may only exceed

if it so chooses. *Danfoth v. Minnesota*, 552 U.S. 264, 288, 128 S.Ct. 1029, 1045, 169 L.Ed.2d 859 (2008). As such, while "[a] State may provide relief beyond the demands of federal due process, . . . under no circumstances may it confine [a petitioner] to a lesser remedy." *Harper v. Virginia Dept. Of Taxation*, 509 U.S. 86, 102, 113 S.Ct. 2510 , 2520, 125 L.Ed.2d 74 (1993). And as already discussed above, this Court has acknowledged that it is bound by the rulings and precedent of the United States Supreme Court regarding Sixth Amendment claims of ineffective assistance of counsel. *Stephens v. State*, 748 So.2d at 1033 (The Florida Supreme Court is not at liberty to disregard the United States Supreme Court's decisions addressing Sixth Amendment claims of ineffective assistance of counsel); *see also*, U.S. Const. Amend. VI and Amend. XIV (Due Process and Equal Protection Clauses). [7] This being the law, and *Padilla* being the "law of the land," *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct. 1441, 1410, 3 L.Ed.2d 5 (1958) (Supreme Court interpretation of Federal Constitution "supreme law of the land"), *citing*, *Marbury*

[7] It is for this reason that the Third District's effort in *Hernández*, after acknowledging that the language in *Padilla* itself implies that it is to be applied retroactively, *Hernández*, 61 So.3d at 1149-50, to take refuge in this Court's decision in *Witt v. State*, 387 So.2d 922 (Fla. 1980) to avoid the holding in *Padilla*, must fail. However, even if the *Witt* analysis applies, given the importance of the holding in *Padilla*, and the importance of giving correct and complete counsel to defendants entering guilty pleas about the immigration consequences of their pleas, it is respectfully submitted that *Padilla* announced a "watershed rule" addressing "fundamental rights" that require retroactive application to prevent "manifest injustice." *Witt*, 387 So.2d, 931.

v. Madison, 1 Cranch 137, 177 2 L.Ed. 60 (1803), the holding in *Padilla* must be applied retroactively.

This result follows because, to begin with, *Padilla* was itself a post-conviction collateral proceeding appeal, and the Supreme Court applied its holding in *Padilla* retroactively to the petitioner's case. *Padilla*, at 478. Also, the very language of the holding in *Padilla* itself makes it clear that the Court is relying on its prior line of Sixth Amendment cases, including *Strickland v. Washington, supra*, 466 U.S. 668, 104 S.Ct. 2052, and as such, the holding in *Padilla* is retroactive. The analytical framework for determining if a rule announced in a Supreme Court holding is to be applied retroactively to criminal cases in collateral proceedings is set out in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Under *Teague*, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. *Teague*, 489 U.S. at 307-10, 109 S.Ct. 1073- 1075; see, *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007); *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). However, a new rule may be applied retroactively in a collateral proceeding only if the rule is substantive or the rule is a "watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting, supra, quoting, Saffle v. Parks*, 494 U.S. 484, 494-95, 110 S.Ct. 1257,

1263, 108 L.Ed.2d 415 (1990), quoting in turn, *Teague v. Lane*, 489 U.S. at 311, 109 S.Ct. at 1075-76.

Moreover, en route to its holding in *Padilla*, the Supreme Court addressed and ultimately rejected the government's argument in *Padilla*, through the Solicitor General as *amici*, "regarding the importance of protecting the finality of convictions obtained through guilty pleas[,]" *Padilla* at 1484-85, the very heart of the reasoning of the holding in Teague, 489 U.S. at 311, 109 S.Ct. at 1075-7. In its Amicus brief the Solicitor General's Office argued that:

> . . . imposing a duty on counsel to advise about any and all adverse effects of conviction would undermine the finality of plea-based convictions and could strain judicial and prosecutorial resources. Many defendants would likely not challenge their pleas until years later, when the collateral consequences of the conviction first become evident. *See, e.g., Santos-Sanchez v. United States*, 548 F.3d 327, 329 (5th Cir. 2008),[8] petition for cert. pending, No. 08-9888 (filed Apr. 15, 2009); *People v. Gutierrez*, No. B209591, 2009 WL 2025638 (Cal. App. July 14, 2009). The sheer multiplicity of adverse consequences that could form the basis of plea challenges- and defendants' incentive to attack otherwise valid pleas by raising these consequences-could lead to an influx of challenges to long-final pleas. These claims could be hard for the government to refute, because the existing record might not be sufficient to avoid the need for an evidentiary hearing and because memories of the trial participants would fade over time. And if pleas were set aside only because the passage of time rendered the government unable to muster its proof,

[8] It bears noting here that the Supreme Court vacated the decision in *Santos-Sanchez*, which like *Padilla* was also an appeal in a collateral proceeding, and remanded the case for further consideration in light of *Padilla*, *Santos-Sanchez v. United States*,____U.S. ____, 130 S.Ct. 2340, 176 L.Ed. 2d 284 (2010), adding further weight to the conclusion that the Supreme Court intended that *Padilla* be retroactive and is applying *Padilla* retroactively.

> significant costs would result-either the dismissal of charges to which the defendant once admitted her guilt, or the expense and burden of a new trial. Those costs should not be imposed based on expansion of counsel's duty to advise on a criminal defendant's collateral, non-criminal interests.

Brief of United States as *Amicus Curiae*, 2009 WL 2509223, at 19-20. In rejecting the Solicitor General's concerns and finality argument in *Padilla*,, the Supreme Court noted that:

> We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. ***We confronted a similar "floodgates" concern . . . [previously], but nevertheless applied Strickland to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty. A flood did not follow in that decision's wake***. Surmounting Strickland 's high bar is never an easy task. . . . There is no reason to doubt that lower courts-now quite experienced with applying Strickland-can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

Padilla, 130 S.Ct., at 1484-85 (emphasis added)(citations omitted).

Of course, the "floodgates" the Court makes reference to in *Padilla*, are the potential collateral attacks on convictions and guilty pleas engendered by applying the Court's holding in *Padilla* retroactively. It is safe to assume that prospective collateral attacks based on *Padilla* will be limited by trial courts simply applying the holding in future proceedings. As such, the Supreme Court, in *Padilla* itself, has made clear that the holding in *Padilla* should be applied retroactively, either because is not a new rule, but rather an extension of the Court's long line of cases

enforcing the mandate of the Sixth Amendment that criminal defendants are entitled to effective assistance of counsel, *Teague*, 489 U.S. at 307-10, 109 S.Ct. 1073- 1075, or, in the alternative, because the *Padilla* holding is a new rule that is substantive or a "watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding." [9] *Teague v. Lane*, 489 U.S. at 311, 109 S.Ct. at 1075-76; *Saffle v. Parks*, 494 U.S. at 495, 110 S.Ct. at 1263. Therefore, the holding in *Padilla* should be applied retroactively. *See e.g*., *Padilla*, 130 S.Ct at1485 n.1 (The Court discussing its reliance on "old rules" in prior ineffective assistance of counsel cases in responding to concern in concurring opinion and stating that "Justice Alito [in the concurring opinion] believes that the Court misreads *Hill*,. . . In *Hill*, the Court recognized-for the first time-that *Strickland* applies to advice respecting a guilty plea. . . . It is true that *Hill* does not control the question before us. But its import is nevertheless clear. ***Whether Strickland applies to Padilla's claim follows from Hill, regardless of the fact that the Hill Court did not resolve the particular question respecting misadvice that was before it***.")(emphasis added)(full citations omitted). *See also and compare*, *Bauder v. Department of Corrections of State of Florida*, 619 F.3d 1272,1274-75 (11th Cir. 2010)(Eleventh Circuit applying *Padilla* retroactively to claim of

[9] To the extent that this Court determines that *Padilla* announced a "new rule" it is respectfully submitted that it was a "watershed rule" still requiring retroactive application.

ineffective assistance of counsel and upholding District Court's granting of collateral relief based on ineffective assistance of counsel in a case involving defense counsel giving incorrect legal advice to a defendant who pled to stalking a minor in 2002, about potential collateral consequence of plea on future involuntary civil commitment proceedings under Florida sex offender statutes, citing *Padilla*, and stating that "the Supreme Court has noted that when the law is unclear a criminal defense attorney must advise his client that the "pending criminal charges may carry a risk of adverse [collateral] consequences.")(citations omitted). *See generally*, *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011)(holding that *Padilla* is "an 'old rule' for *Teague* purposes and is retroactively applicable on collateral review"); *Marroquin v. United States*, Case No. M-10-56, 2011 WL 488985 (S.D. Tex February 4, 2011)(Noting split between various courts on the retroactivity of *Padilla* [listing cases], and holding that "this Court joins the majority of other courts that have considered the issue and concludes that *Padilla* does not announce a new rule, that it is an extension of the rule in *Strickland v. Washington*, . . . -requiring effective assistance of counsel-, and that its holding should apply retroactively."); *Commonwealth v. Clarke*, 949 N.E.2d 892, 903 (Mass. 2011)(Finding *Padilla* retroactive); *Campos v. State*, 798 N.W.2d 565, 569 (Minn. Ct. App. 2011)(Finding that *Padilla* did not announce a new rule and should be retroactive, and even a new rule was announced in *Padilla*, it was a

watershed rule that should be applied retroactively); *Denisyuk v. State of Maryland*, 422 Md. 462 (2011)(Maryland Supreme Court holding that *Padilla* runs retroactively to the effective date of the last major immigration legislation, April 1, 1997); *but see and compare*, *Chaidez v. United States*, 655 F.3d 684, 694 (7th Cir.2011)(holding that *Padilla* announced a "new rule" inapplicable on collateral review), petition for cert. filed, 80 BNA USLW 3429 (December 23, 2011); *United States v. Chang Hong*,____F.3d ____, 2011 WL 3805763, at *1 (10th Cir. August 30, 2011)(holding that *Padilla* announced a "new rule" not entitled to retroactive application).

In *fine*, the *Padilla* decision itself makes clear that its holding should be applied retroactively either because it involved an old rule addressing the Court's long line of cases enforcing the mandate of the Sixth Amendment that criminal defendants are entitled to effective assistance of counsel, *Teague*, 489 U.S. at 307-10, 109 S.Ct. 1073- 1075, or, in the alternative, if the *Padilla* holding announced a new rule, it is a substantive or a "watershed rule" of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings. *Teague v. Lane*, 489 U.S. at 311, 109 S.Ct. at 1075-76; *Saffle v. Parks*, 494 U.S. at 495, 110 S.Ct. at 1263. Also, if the Court determines that *Padilla* announced a new rule, it is a "watershed rule" addressing "fundamental rights" that require retroactive application to prevent "manifest injustice" under Florida case law. *Witt*, 387 So.2d,

931. So under either *Teague* or *Witt,* the holding in *Padilla* requires retroactive application. As such, this Court must answer the second certified question in the positive.

G. The Impact Of Guilty Pleas On Noncitizen Defendants

The decision to dispose of a criminal case by the entry of a guilty plea ". . . is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent [or testify on one's own behalf if one chooses], and to be convicted by proof beyond all reasonable doubt [by the unanimous decision of a jury of ones peers]." *Santobello v. New York, supra*, 404 U.S. at 265, 92 S.Ct. 500 (Douglas, J., concurring)(internal citations omitted). In the case of noncitizen defendants, and their families, the consequences of a decision to plead guilty goes far beyond the mere waiver of rights, no matter how fundamentally important those rights may be. With the changes in federal immigration policy and laws, a noncitizen's decision to plead guilty can have catastrophic implications for the accused, and for the innocent family members of the accused, which are all but automatic. Defendants, many of whom were brought to the United States at a very young age,[10] often find themselves being sent to their native homeland, which is very often a country they have rarely visited, if they have been there at all, where

[10] In *Hernández,* the 19 year old defendant was brought to the United States when he was just two years old. *Hernández,* 61So.3d at 1146.

they know no one, and where the primary language is as unfamiliar to them as it would be to most Americans. Their children, many of whom were born in the United States, and are therefore American citizens,[11] must also bear the crushing and heart wrenching consequences of seeing their lives torn asunder as a result of their parent's plea and due to no fault of their own. In some cases, where the noncitizen defendant or his or her family member has a life threatening medical condition, deportation can literally result in possible death. All this without even the modest hope that the potentially cruel consequences of a noncitizen's guilty plea might be reviewed, and possibly tempered by a judge. *Padilla*, 130 S.Ct., at 1478; *Calcano-Martinez*, 533 U.S. at 350, 121 S.Ct., at 2269-70; *Balogun v. United States*, 304 F.3d at 1307.

Given this plain reality, it is not too much to demand that a noncitizen entering a guilty plea be fully informed of the "truly clear" consequences of that plea before entering it. That is all that the Supreme Court held in *Padilla*, and that is "law of the land," including the "law of the land" on the Florida peninsula. Those who argue otherwise willingly sacrifice fundamental fairness at the alter of finality, and attempt to circumvent the basic fundamental right of Due Process guaranteed in the both the United States and Florida Constitutions in the name of

[11] In *Flores,* the defendant was married to an American citizen with whom he had three children, Americans all. *Flores v. State*, 57 So.3d at 219 n.2. Here, Ms. Castano's youngest child is an American citizen.

mere bureaucratic expedience. This Court should not proceed down such a dubious path, and instead should follow the plain holding of *Padilla*.

CONCLUSION

The Court should answer the first certified question, whether the general advisement of potential immigration consequences required by *Fla. R. Crim. P.* 3.172(c)(8) is enough to satisfy the requirements of *Padilla*, in the negative, and the second certified question, whether *Padilla* should be applied retroactively, in the affirmative. The Court should then reverse the lower courts' decisions and previous orders, and remand with instructions to set aside Ms. Castano's plea of guilty, conviction and sentence, and that Ms. Castano be allowed to withdraw her guilty plea, and plead anew with new counsel.

Respectfully Submitted, this 16th day of February of 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this February 16, 2012, a copy of this Brief of Appellant has been furnished by mail and e-mailto, Assistant Attorney General Kristen Davenport, Department of Legal Affairs, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118.

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CERTIFICATE OF COMPLIANCE

This is to certify that the undersigned has complied with *Fla. R. App. P.* 9.210(a)(2), including the font and margin requirements. The size and style of the type used in this brief is proportionally spaced 14 point Times New Roman.

H. MANUEL HERNÁNDEZ