

IN THE SUPREME COURT OF FLORIDA

CLAUDIA VERGARA CASTAÑO,
Petitioner,

v.

CASE NO.

STATE OF FLORIDA,
Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the Fifth District Court of Appeal
State of Florida
Appeal No. 5D10-2032

H. MANUEL HERNÁNDEZ, P.A.

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STATEMENT OF THE CASE AND FACTS

Original Proceedings in the Circuit Court

On December 12, 2010, the Appellant, Claudia Vergara-Castaño (hereinafter, Ms. Castaño), 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. The charges resulted from an incident that occurred on September 3, 2008, when a 2 ½ year old child, who according to the child's own parents, had a habit of opening house doors and going outside, wandered away unnoticed from a day care center Ms. Castaño was running out of her home. The child was found a short distance away by a neighbor who called the police, who then arrested Ms. Castaño. (*Id.*).

Based on the advice of her privately retained trial counsel, Ms. Castaño entered a guilty plea to the single charge in the information on March 4, 2009. She was sentenced to 1 day in the Orange County Jail with credit for one day served, three years of supervised probation, and court costs.

The Motion to Vacate judgment and Sentence

A Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850, and/or Petition for A Writ of Error *Coram Nobis* (hereinafter "Motion to Vacate") was filed by Ms. Castaño through new privately retained counsel on November 30, 2009. The Motion to Vacate raised nine grounds in support of Ms.

Castaño's request to set aside her plea and vacate her conviction and sentence. The two issues raised that are relevant to this petition were:

I. Ms. Castaño is not a United States citizen, was in the process of trying to obtain her permanent residency, and as a result of not understanding the nature of the charge and the consequences of the plea, she is now subject to mandatory denial of her present lawful status and mandatory deportation;

II. Ms. Castaño's trial counsel was ineffective for failing to inform her that entry of the plea to the charge of child neglect would cause her application for renewal of her present legal status to be denied, her request for an adjustment of status to a permanent United States resident to be denied, her planned petition to ultimately become a United States citizen to be denied, and that her plea would subject her to mandatory deportation, trial counsel instead, lead her to believe that all she would have to do after her plea was to pay her court costs and report to probation, and that nothing further would happen.

The trial court did not order the State to respond to Ms. Castaño's Motion to Vacate, and the State did not file a response on its own. A hearing was held on Ms. Vergara's Motion to Vacate on December 11, 2009. On May 10, 2010, the trial court entered its written order denying Ms. Castaño's Motion to Vacate, relying primarily on the statements made by Ms. Castaño during the plea colloquy.

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. In her appeal, Ms. Castaño 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*, ___ U.S. ____, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). On June 17, 2011, the Fifth District Court of Appeal rejected the Ms. Castaño's *Padilla* argument and affirmed the lower court's denial of Ms. Castaño's Motion to Vacate. See, Appendix - Copy of Opinion in *Castaño v. State*, No. 5D10-2032, ___ So. 3d ___, 2011 WL 2415796, 36 Fla. L. Weekly D1285 (Fla. 5th DCA June 17, 2011). In affirming, the Fifth District Court of Appeal concluded that first, the general advisement of potential immigration consequences required by *Fla. R. Crim. P. 3.172(c)(8)* and given to Ms. Castaño were enough to satisfy the requirements of *Padilla*, and second, that *Padilla* should not be applied retroactively. *Id.* However, in so holding, the Fifth District Court of Appeal recognized that its decision in *Castaño* was in direct conflict with the Third District Court of Appeal's recent decision on the same point 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, and the Fifth District Court of Appeal certified the conflict between *Castaño* and *Hernández* pursuant to *Fla. R. App. P. 9.030(a)(2)(iv)*. See, *Castaño* at *2. 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.*¹

On June 29, 2011, Ms. Castaño 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. Castaño "is" and "will" be subject to mandatory deportation, not "may" or "could" be subject to mandatory deportation as incorrectly set out in the opinion. *Castaño* at *1. 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 a critical part of the Third District Court of Appeal's holding in *Hernández*. 61 F.3d, at In spite of appellate

¹In accordance with *Fla. R. App. P. 9.120(d)*, which prohibits the filing of a jurisdictional brief "[i]f jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts . . .)", this Jurisdictional Brief addresses only the Fifth District Court of Appeal's certification of the conflict between *Castaño* and *Hernández* pursuant to *Fla. R. App. P. 9.030(a)(2)(iv)*.

counsel's concern that, given the holding in *Padilla*, Ms. Castaño consistent position and arguments that as a result of her plea and conviction in this case she *will be deported*, 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 July 19, 2011.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal's decision and opinion in *Castaño* directly conflicts with the Third District Court of Appeal's recent decision on the same point of law in *Hernández*. Specifically, *Castaño* held that 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 all cases, and as long as the general advisements of the potential immigration consequences of a conviction in Rule 3.172(c)(8) are given, there can be no claim of ineffective assistance of counsel no matter how "truly clear" the adverse immigration consequences of the defendant's plea are. In *Hernández*, the court held that Rule 3.172(c)(8) would not be enough to satisfy the requirements of *Padilla* in cases where the certain adverse immigration consequences of a defendant's guilty plea are "truly clear." In such cases, under *Hernández*, based on *Padilla*, defense

counsel has a duty to advise his or her client of the all but certain adverse consequences of a conviction to the immigration status of the client, and failure to do so would amount to ineffective assistance of counsel, notwithstanding any Rule 3.172(c)(8) advisement by the court. There is a clear conflict between the Florida District Courts of Appeal on an important issue confronted by appellate and trial courts in Florida daily that has impacted, and continues to impact, the lives of countless numbers of non-citizen defendants every day, and less the standard of effective assistance of counsel during plea negotiations and plea proceedings in Florida become as much a question of geography as binding uniform legal precedent, the Florida Supreme Court should, and must, resolve this conflict.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of appeal that expressly and directly conflicts with a decision of another District court of appeal on the same point of law. Art. V, §3(b)(3) Fla. Const. (1980); *Fla. R. App. P.* 9.030(a)(2)(A)(iv). Here, the Fifth District Court of Appeal has certified that its decision and opinion in *Castaño v. State*, No. 5D10-2032, ___ So. 3d ___, 2011 WL 2415796, 36 Fla. L. Weekly D1285 (Fla. 5th DCA June 17, 2011) directly conflicts with the Third District Court of Appeal's recent decision on the same point of law in *Hernández v. State*, 61

So.3d1144 (Fla. 3d DCA 2011). Therefore, this Court has discretionary jurisdiction to address this conflict.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL’S DECISION AND OPINION IN *CASTAÑO V. STATE* DIRECTLY CONFLICTS WITH THE THIRD DISTRICT COURT OF APPEAL’S RECENT DECISION ON THE SAME POINT OF LAW IN *HERNÁNDEZ V. STATE*, TO WIT, 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 ALL CASES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA PROCEEDINGS WHEN DEFENSE COUNSEL FAILS TO ADVISE A NON-CITIZEN DEFENDANT OF THE “TRULY CLEAR” ADVERSE IMMIGRATION CONSEQUENCES RESULTING FROM THE DEFENDANT’S PLEA.

In *Padilla*, the United States Supreme Court held that before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel and that in order to provide effective assistance, defense counsel must inform a defendant entering a plea to criminal charges whether the plea carries a risk of deportation, and that it is ineffective assistance of counsel when defense counsel fail to inform defendants that a plea will result in certain deportation where such a result is “truly clear.” *Padilla v. Kentucky*, 130 S.Ct. at 1486-87. Since the United states Supreme Court issued this critically important decision, four of Florida’s five District Court of Appeal have considered the impact

of *Padilla* on criminal defense counsel’s constitutional duties during criminal plea proceedings in Florida. *See, Flores v. State*, 57 So.3d 218 (Fla. 4th DCA 2010)(Holding that plea colloquy advisement pursuant to Rule 3.172(c)(8) that defendant's guilty plea could in fact result in his deportation cured any prejudice arising from counsel's alleged misadvice to the contrary, and thus, any ineffective assistance could not serve as grounds to permit defendant to withdraw his guilty plea and that the holding in *Padilla* was not retroactive)¹; *accord, Castaño v. State, supra* (Same; certifying question of application of *Padilla* and retroactivity); *Barrios-Cruz v. State*, 63 So.2d 868 (2d DCA 2011)(Finding only that *Padilla* not retroactive; certifying question of retroactivity); *Hernández v. State, supra*, 61 So.3d at 1148,49 (Holding that *Padilla* applicable to Florida plea proceedings and that constitutionally competent counsel must advise a non-citizen defendant that certain pleas and judgments “will” subject the defendant to deportation, but that *Padilla* not retroactive).

As a result of these various holdings, the state of the law in Florida regarding the application of *Padilla* to Florida criminal plea proceedings, and defense

²Although the Fourth District Court of Appeal did not certify either the question of the applicability of *Padilla* to Florida criminal plea proceedings nor the retroactivity of *Padilla*, Flores is seeking discretionary review of by this Court. *See, Flores v. State*, No. CR11-0989.

counsel's constitutional duties after *Padilla* with regards to plea proceedings is unsettled confusing, and it is respectfully submitted, simply wrong. This is the present state of the law regarding *Padilla* claims in previous cases that were not on direct appeal when *Padilla* was decided, cases presently on appeal, and cases presently in the trial courts. The constitutional duties of criminal defense counsel in plea proceedings where defendants are not United States citizens, and the corollary gate-keeping role of the Florida judiciary is at best, a morass of indecision.

There is a clear conflict between the Florida District Court's of Appeal on an important issue confronted by appellate and trial courts in Florida daily, that has impacted, is impacting, and absent action by this Court, will continue to impact, the lives of countless numbers of non-citizen defendants every day, and less the standard of effective assistance of counsel during plea negotiations and plea proceedings in Florida become as much a question of geography as binding uniform legal precedent, the Court's responsibility under the Constitution is clear, the Court should, and must, resolve this conflict.

CONCLUSION

THEREFORE, the petitioner CLAUDIA VERGARA CASTAÑO, respectfully requests that this Court accept jurisdiction of her case and decide the certified questions.

RESPECTFULLY SUBMITTED, this August 5, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this August 5, 2011, a copy of this Jurisdictional Brief Initial Brief of Appellant has been furnished by mail to, Assistant Attorney General Tony Golden, Department of Legal Affairs, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118.

H. MANUEL HERNÁNDEZ

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