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 REPLY BRIEF ON THE MERITS

On Certiorari Review from the Fifth District Court of Appeal

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I. UNDER THE SUPREME COURT'S HOLDING IN *PADILLA V. KENTUCKY*, 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 FLORIDA TRIAL COURT'S WARNING UNDER *FLA. R. CRIM. P.* 3.172(c)(8), WAS INSUFFICIENT TO CURE TRIAL COUNSEL'S FAILURE

In its Response Brief, the State attempts to circumnavigate and circumvent the clear import of the holding in *Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) by purportedly distinguishing petitioner's case here from the petitioner in *Padilla* on the facts. *See*, Respondent's Answer Brief on the Merits (hereinafter the "State's Answer Brief") at p.10-13. In so doing, the State misconstrues the facts here, misstates the facts in *Padilla*, and proceeds at times as if *Padilla* had never been decided at all.

The State begins its assault on the applicability of the United States Supreme Court's holding in *Padilla* to Florida state criminal cases by incorrectly arguing that "[u]nlike 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)." State's Answer Brief, at 10. In fact, Kentucky and Florida had strikingly similar, if not identical, procedures regarding advising defendants of possible immigration consequences of pleas. The Supreme

Court noted in the *Padilla* decision itself, that defendants entering pleas in Kentucky have long been provided notice of possible immigration consequences. *Padilla,* 130 S.Ct. 1486 n. 15 (citing Kentucky Plea form AOC-491(Rev. 2/2003[1]) and listing other states with similar immigration warnings including, *inter alia,* Florida, and citing *Fla. R. Crim. P*. 3.172(c)(8). Thus, notwithstanding the State's arguments to the contrary, the language used in the Kentucky plea form, which was found to be insufficient by the Supreme Court in *Padilla*, *Id.,* is almost identical to the language used in Florida plea proceedings and forms generally, and more specifically, the language in the plea forms and warnings used here. *See and compare,* Addendum-1-Kentucky Plea Form AOC-491 at p.2, paragraph 10 (Rev. 2/2002)("I understand that if I am not a United States citizen, I may be subject to deportation pursuant to the laws and regulations of the United States."); Orange County Circuit Court Spanish Plea Form (R-24)[English Translation attached as Addendum 3]("I understand that if I am not a citizen of the United States, I may be deported."); and Trial Court's perfunctory discussion of immigration consequences during plea colloquy (Supp. R. 5)("Do you know if you are not a U.S. citizen you can be deported as a result of this plea?").

[1]In footnote 15 the Supreme Court refers to the Kentucky plea form used in change of plea proceedings, which was apparently revised in 2003. *Padilla,* 130 S.Ct. 1486 n. 15. In fact, the defendant in *Padilla* pled guilty on October 4, 2002. *Commonwealth v. Padilla,* 252 S.W.3d 483 (Ky. 2008). However, the plea form language regarding immigration consequences was identical in the predecessor form AOC-491(Rev.

The State then notes that "***such a warning*** was given here, and the defendant stated under oath that she understood this ***possibility***," State's Answer Brief at 11 (emphasis added), and proceeds to cite cases regarding the solemnity of defendant's answers to rote questioning in plea colloquy proceedings. *Id.* The State's arguments in this regard miss the mark, and are beside the point. In *Padilla*, the Supreme Court has already clearly held that "such a warning" is not enough when, as here, the immigration consequences, to wit, certain deportation, "are truely clear." *Padilla,* 130 S.Ct. 1483 (". . . 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."). *See also, Hernández v. State,* 61 So.3d 1144, 1147-48 (Fla. 3d DCA 2011) (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).

Here, by virtue of Ms. Castano's conviction for child neglect under Fla. Stat. § 827.03(3)(c) (R-24), there is 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)(Eleventh Circuit United States Court of Appeals

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2/2002). Both versions of the Kentucky Plea Form are included as Addendum-1 (2002) and Addendum-2 (2003) at the end of this brief for the Court's convenience.

decision involving alien with an identical conviction under same Florida child neglect statute Ms. Castano pled guilty to 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)(Same).[2] Thus, 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 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

[2]*See, Green v. State*, 895 So.2d 441, 443-44 (Fla. 2005)("Threaten," does not mean deportation proceedings initiated, but rather that defendant is subject to deportation).

conviction on a defendant's immigration status. According to his own testimony at the hearing on the Motion to Vacate, Ms. Castano's original trial counsel admitted 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, and her resulting exposure to certain deportation, 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.[3] Also, the State's argument that Petitioner's criticism of her

[3]Notably, in its Answer Brief, the State proceeds as if advising a noncitizen defendant that he or she "could" be deported is the equivalent of properly advising a noncitizen defendant that he or she "will be" deported, as a result of their guilty plea. *See e.g.*, State's Answer Brief at pp. 12 and13. Again, this is not the law. *Padilla*, 130 S.Ct.

original trial counsel amounts to little more than "blatant second-guessing by collateral counsel" and that the Petitioner's original trial counsel "warned the defendant that she could very well be deported," State's Answer Brief at 12, ignores the unrebutted testimony of Ms. Castano that when she objected to pleading to a crime she did not believe she committed without looking at other possibilities, 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).

In its Answer Brief, the State then proceeds to argue not law, nor facts supported by anything in the record or readily ascertainable, but rather talk radio hyperbole, to wit, that "it is common knowledge that deportation is far from a *mandatory* reality for anyone living int the United States[,]" that "[h]undreds of thousands of individuals are living in this country completely illegally" and that "those individuals, like the Defendant herself, are subject to deportation - yet no one seriously believes they will *all* actually be deported." State's Answer Brief at 13. The State concludes its rhetorical tantrum by arguing that "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" and that because of the federal immigration "quagmire" no defense

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1483.

counsel can ***ever*** accurately advise a noncitizen criminal defendant that their plea will subject them to mandatory deportation. State's Answer Brief at 13-14.

First, it is respectfully submitted that such a tirade has no place in a pleading filed before this Court, or any court for that matter. Second, the changes to U.S. immigration laws, which have resulted in a dramatic rise in deportations, have already been acknowledged by the Supreme Court, *Padilla*, 130 S.Ct., at 1478 (The landscape of federal immigration law has changed dramatically over the last 90 years. . . ***The "drastic measure" of deportation or removal, is now virtually inevitable for a vast number of noncitizens convicted of crimes.***")(citation omitted)(emphasis added), as has the importance of properly advising noncitizen defendants or deportation consequences by this Court. *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."). Third, the State's appellate counsel are woefully misinformed. Deportations of illegal immigrants are at historically high levels. *See e.g,* Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics, Department of Homeland Security Press Release, Dated October 6, 2010, http://.dhs.gov/ynews/releases/pr_1286389936778.shtm (last visited on March 7, 2012). Finally, if one accepts the State's argument, the Supreme Court's holding in *Padilla* is a nullity, and must be ignored as mere foolishness by the highest court in the land.

The State then cites the many cases where courts have ignored the holding in *Padilla*. State's Answer Brief at 14-15, 15 n.2. There have, of course, also been many courts that have followed the holding in *Padilla*, many of which were cited in the Petitioner's Initial Brief on the Merits, *see*, Ms. Castano's Initial Brief at pp. 40-42 (citing cases), and as such, will not be repeated again here. The next arrow in the State's quiver relates to the Petitioner's unrebutted claim that if she had known that her plea to felony child neglect would result in her mandatory deportation, she would not have entered her original plea (Trans. Mtn. Hrg.- 22-23), which the State gratuitously disposes of by incorrectly arguing that Ms. Castano "was facing a 15 years imprisonment for a third degree felony but ended up with a veritable 'slap on the wrist'- adjudication withheld and three years probation, and therefore would never have risked going to trial. State's Answer Brief at 18. Of course the maximum sentence for a third degree felony is 5 years imprisonment not 15 years. Fla. Stat. § 775.082(3)(d). However, under the Florida Criminal Punishment Code, Fla. Stat. § 921.002, the offense Ms. Castano pled guilty to, felony child neglect, Fla. Stat. § 827.03(3)(c), is scored as an F3/level 6 (R- 1), Fla. Stat. § 921.002(3)(f), which would have resulted in a score of 36 points, Fla. Stat. § 921.0024(1)(a) and (b), and as such, a certain non-state prison sanction, Fla. Stat. § 921.0024(2), almost certainly probation given the facts of this case. More importantly, Ms. Castano's sworn assertion that she would have gone to trial rather than expose herself to certain deportation as a result of

her plea (Trans. Mtn. Hrg.- 22-23), remains unrebutted, and is bolstered by the fact that she hired counsel to seasonably seek collateral relief, and then she retained the undersigned appellate counsel to prosecute her claims through the appellate courts, including all the way to this Court. This persistence belies the State's inaccurate and specious claims about the sincerity of Petitioner's claims here.

In *fine,* and the arguments in the State's Answer Brief notwithstanding, it is once again respectfully submitted that after *Padilla*, the general admonishment that a defendant's plea "may have immigration consequences" required by *Fla. R. Crim. P.* 3.172(c)(8), or could have adverse immigration consequences as the State has argued, is no longer sufficient where the adverse consequences of a plea and conviction are "truely clear." *Padilla,* 130 S.Ct. 1483. Ms. Castano's was not properly advised of the certain deportation consequences of her plea, and as such, and the trial court's Rule 3.172(c)(8) warning not withstanding, her plea was not knowingly and intelligently entered. *Id.* Since 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,* 748 So.2d 1028, 1033(Fla. 1999) (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), this Court must uphold the Third District's holding in *Hernández* on the

constitutional viability of rule 3.172(c)(8) after *Padilla,* reverse the Fifth District's holding here, and hold that there is a difference between cases where the immigration consequences of a guilty plea are "truely clear" and when they are "truly 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.

II. THE COURT'S HOLDING IN *PADILLA* IS APPLICABLE RETROACTIVELY

While the remedy a state court chooses to provide its own citizens for violations of the Federal Constitution is generally 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). With regards to claims of ineffective assistance of counsel, this Court is bound by the rulings and precedent of the United States Supreme

Court. *Stephens v. State, supra,* 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 Clause). In its answer brief, the State ignored this controlling case law, the Sixth and Fourteen Amendments, and the Supremacy Clause, U.S. Const. Amend. VI, Clause II, of the U.S. Constitution.

This being the law, it is the position of the Petitioner that the holding in *Padilla* must be applied retroactively. The *Padilla* decision itself makes clear that its holding should be applied retroactively 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. *See, Teague v. Lane,* 489 U.S. 288, 307-10, 109 S.Ct. 1060, 1073-75, 103 L.Ed.2d 334 (1989). Specifically, the Court relied on its prior line of Sixth Amendment cases, including *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to reach its decision. *Padilla*, 130 S.Ct, at1485n.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 prior precedent that recognized that *Strickland* applies to advice respecting a guilty plea, concluding that the Court's prior precedent although not controlling, made clear that ***Strickland applies to Padilla's claim***")(emphasis

added)(full citations omitted). Of Course, *Padilla* itself was an appeal in a collateral proceeding involving a vintage plea and conviction. *Padilla* at 1478, and the Court addressed and rejected the identical "floodgate" arguments of the U.S. Solicitor General and raised again by the State before this Court. *Id*. at 1485-86.

In the alternative, if the Court determines that the *Padilla* holding announced a new rule, first, 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, requiring retroactive application to prevent "manifest injustice" under either *Teague* or Florida case law. *Witt v. State*, 387 So.2d 922, 931(Fla.), *cert. denied sub nom., Witt v. Florida* 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed2d 612 (1980). As such, this Court must answer the second certified question in the affirmative.

In its Answer Brief the State admits that "court's addressing the retroactive application of *Padilla* under the *Teague* analysis have come to contrary conclusions." State's Answer Brief at 29. The State then cites to a number of Florida Federal District Court decisions that have found that *Padilla* should not be applied retroactively. *Id.* However, the State does not address, nor even mention the Eleventh Circuit's decision in *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 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). *Bauder* was cited in the petitioner's Initial Brief, Petitioner's Initial Brief at pp. 40-41, and is binding on all federal courts in Florida, *See also 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, . . .*, and that its holding should apply retroactively."). It is respectfully submitted that the well reasoned decisions in these cases should advise and be followed by this Court here.

CONCLUSION

This 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 allow Ms. Castano to plead anew with new defense counsel.

RESPECTFULLY SUBMITTED, this 9th day of March of 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this March 9, 2012, a copy of this Petitioner's Reply Brief has been furnished by regular mail, and e-mail to, Assistant Attorney General Kristen Davenport, 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

ADDENDUM