IN THE SUPREME COURT OF FLORIDA

GABRIEL A. HERNANDEZ,

Petitioner/Cross-Respondent,

v. CASE NO. SC11-941, SC11-1357
(CONSOLIDATED)

STATE OF FLORIDA,

Respondent/Cross-Petitioner.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS/ CROSS-PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE

These consolidated appeals stem from two questions certified by the Third District Court of Appeal. Hernandez v. State, 61 So. 3d 1144, 1145-46 (Fla. 3d DCA 2011). In the district court, the State prevailed on the retroactivity issue. Id. at 1149-51. The Defendant prevailed on the ineffectiveness issue. Id. at 1147-49.

This Court has set a briefing schedule in these consolidated appeals requiring an initial brief by the Defendant, answer brief/cross-appeal initial brief by the State, reply brief/cross-appeal answer brief by the Defendant, and cross-appeal reply brief by the State.

In his initial brief on the merits, the Defendant addresses as his first issue the ineffectiveness claim *on which he prevailed below* – the issue for which the *State* has sought review. To avoid confusion, the State will address this issue as its second point, in its cross-appeal, and it will address the Defendant's appeal on the retroactivity issue first, as the briefing schedule seems to contemplate.

STATEMENT OF FACTS

The State submits the following additions/corrections to the Defendant's Statement of Facts and adds facts relevant to the State's cross-appeal. Because no paginated record was filed in the lower court, and the record in this Court will not be completed before the instant brief is filed, factual matters will be referred to as included in the State's appendix, filed contemporaneously with this brief.

On May 3, 2001, the Defendant entered a guilty plea to a second degree felony – sale of a controlled substance (LSD). (App. B at p. 3). During the course of his plea colloquy, the Defendant stated under oath that he had enough time to discuss this matter with his lawyer and that he was satisfied with his lawyer's representation. (App. A at p. 8-9). He also stated under oath that he understood the various consequences of his plea – he was giving up his right to various constitutional protections, he could be sentenced to fifteen years imprisonment if he violated his probation, and he would have to report to probation for twelve months. (App. A at p. 8-10). Most relevant to this proceeding, the Defendant stated that he understood that if he was not an American citizen, "the U.S.

Government could use these charges against [him] in deportation proceedings." (App. A at p. 9).

Over ten years later, on July 1, 2010, the Defendant filed a motion to vacate his conviction under Rule 3.850 of the Florida Rules of Criminal Procedure, claiming that he was entitled to relief under recent Supreme Court precedent – Padilla v. Kentucky, 130 S.Ct. 1473 (2010). (App. B). In this motion, the Defendant alleged that he would not have entered a guilty plea had he been informed that the plea would result in any harm to his immigration status. (App. B at p. 5).

The motion further alleged that his trial counsel did not discuss the immigration consequences of the plea with an outside immigration specialist or refer the Defendant to an immigration specialist; instead, counsel either ignored this issue or, at most, informed the Defendant that a plea could or may affect his immigration status. (App. B at p. 4; App. C).

The trial court entered an order denying the Defendant's motion. (App. D). In this order, the court found that the warning during the plea colloquy was sufficient to inform the Defendant of the deportation consequences of his plea, especially in the absence of any affirmative misadvice by counsel.

On appeal, the Third District Court of Appeal affirmed the trial court's ruling based on a finding that Padilla did not apply retroactively to the Defendant's case. Hernandez, 61 So. 3d at 1149-51. The court certified this issue as a question of great public importance. Id. at 1146. The Defendant timely sought review of this issue.

The district court further noted that it disagreed with the trial court's finding that the plea colloquy cured any Padilla problem, certifying conflict with the Fourth District Court of Appeal on this matter and certifying another question of great public importance. Id. at 1145-49. The State timely sought review of this issue, and the two cases have been consolidated in this Court.

SUMMARY OF ARGUMENT

DEFENDANT'S APPEAL (RETROACTIVITY OF PADILLA):

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

The same result is reached under the more stringent retroactivity test used by federal courts, as Padilla announced a new rule of law that cannot be categorized as a watershed rule of criminal procedure central to an accurate determination of guilt or innocence.

The Supreme Court's decision in Padilla should not be applied retroactively, and the second certified question should be answered in the negative.

STATE'S APPEAL (APPLICATION OF PADILLA IN FLORIDA):

In Padilla, the Supreme Court held that reasonably competent attorneys must inform their clients whether their pleas carry a risk of deportation. This standard was satisfied here, where counsel stated that although he could not remember this specific case, he generally told his clients that their pleas could affect their immigration status, and where the Defendant specifically stated, under oath, that he understood that the government could use these charges against him in deportation proceedings.

While the Defendant contends that this admonition was insufficient, as it failed to inform him that deportation was "compulsory" under federal law, the warning given by the trial court accurately reflects the true consequences of the plea – the Defendant *could* be deported. Further, the Defendant cannot show that any deficiency in counsel's performance prejudiced him, where he entered this highly favorable plea anyway, having been directly informed of its possible effect on his immigration status.

The Supreme Court's decision in Padilla does not affect the validity of the Defendant's plea in light of the express warning he received, and the first certified question should be answered in the affirmative.

ARGUMENT

APPEAL BY DEFENDANT

(PETITIONER'S ISSUE II)

THE DISTRICT COURT PROPERLY CONCLUDED THAT PADILLA DOES NOT APPLY RETROACTIVELY, AND QUESTION 2 SHOULD BE ANSWERED IN THE NEGATIVE.

The Defendant seeks this Court's review of the following question of great public importance:

SHOULD THE RULING IN PADILLA BE APPLIED RETROACTIVELY?

Hernandez, 61 So. 3d at 1146.

This question should be answered in the negative, as the district court of appeal properly concluded that Padilla is not a development of fundamental significance warranting retroactive application.

Retroactivity Under Florida Law

A new rule of law announced by this Court or the United States Supreme Court applies to all non-final criminal cases – that is, all cases still pending on direct appeal – unless this Court says otherwise. Wuornos v. State, 644 So. 2d 1000, 1008 n. 4 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). Once a criminal conviction has been upheld on appeal, however, the application

of a new rule to that conviction is much more limited. At that point, the State of Florida and society as a whole have acquired a strong interest in the finality of the conviction. As this Court has explained:

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

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

Indeed, making new rules broadly applicable retroactively to all final cases would "destroy the stability of the law,

render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Id. at 929-30.

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

Retroactivity of Padilla – Witt Analysis

This Court has repeatedly addressed whether various decisions interpreting constitutional requirements in criminal cases require retroactive application to cases already final. As a general matter, this Court has "rarely f[ound] a change in decisional law to require retroactive application." Mitchell v. Moore, 786 So. 2d 521, 529 (Fla. 2001) (noting that the Court

had decided over sixty retroactivity cases at that time). The instant case is not one of those unusual situations warranting retroactive application of a new rule of law, and the lower court's decision on this matter should be affirmed.

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

Fundamental significance is determined by analyzing three factors: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Id. at 926. As the lower court recognized here, all of these factors weigh in favor of a finding that Padilla should not be applied retroactively. Hernandez, 61 So. 3d at 1149-52. See also Barrios-Cruz v. State, 63 So. 3d 868, 871-73 (Fla. 2d DCA 2011) (reaching the same conclusion).

First, where new rules of law constitute "evolutionary refinements" whose purpose is "affording new or different standards for procedural fairness and for other like matters," such rules do not require retroactive application. This stands

in contrast with "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding" – rules whose purposes do require retroactive application. Witt, 387 So. 2d at 929.

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

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

Further, there has been extensive reliance on the old rule regarding immigration consequences of a plea. Rule 3.172(c)(8),

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

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

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

Should this Court conclude that Padilla applies to final convictions, thousands of pleas would undoubtedly be subject to

challenge in the lower courts, requiring the processing of 3.850 motions and full evidentiary hearings in cases involving pleas that took place years ago. The State would be at a distinct disadvantage in these hearings, as it would be difficult to find defense attorneys who actually remember the conversations they had with clients on such matters – as this very case well-illustrates. Further, the State would often be unable to bring to trial those defendants who would be allowed to withdraw their pleas, given the age of these cases and the likely disappearance of evidence and fading memories of witnesses.

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

Retroactivity of Padilla – Teague Analysis

[1]The First District Court of Appeal has not yet issued an opinion actually addressing this issue, but implicitly reached the same conclusion by affirming the lower court's denial of relief while citing the Hernandez opinion.

In his initial brief, the Defendant asserts that this Court should not apply the long-standing Witt test, but should instead apply the retroactivity test set out by the United State Supreme Court in Teague v. Lane, 489 U.S. 288 (1989).

First, the State disagrees with the Defendant's premise that this Court is *required* to apply Teague under the United States Constitution. As this Court has expressly recognized, state courts are not bound by Teague in determining the retroactivity of decisions, but can provide greater protections to criminal defendants by expanding the retroactive application of new rules of law. Johnson v. State, 904 So. 2d 400, 408-409 (Fla. 2005).

The Defendant's position is based on the mistaken belief that Teague is an easier standard to meet and would mandate a favorable result for him here. To the contrary, Teague actually provides a greater level of protection to society's interest in finality. See Monlyn v. State, 894 So. 2d 832, 840-841 (Fla. 2004) (Cantero, J., concurring) (urging Court to adopt Teague analysis with respect to constitutional decisions of United State Supreme Court, rather than using outmoded test announced in Witt); Windom v. State, 886 So. 2d 915, 941-45 (Fla. 2004) (Cantero, J., concurring) (same).

At any rate, should this Court agree with the Defendant that the Witt analysis should be abandoned in favor of the federal standard for evaluating retroactivity, the same result is mandated – Padilla should not be applied retroactively to cases already final when the decision was issued.

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

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

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

As Justice Alito noted in his concurring opinion: "Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the direct consequences of a criminal conviction." 130 S.Ct. at 1487 (citing Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 699 (2002) (noting that "virtually all jurisdictions" — including "eleven federal circuits, more than thirty states, and the District of Columbia" — "hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation)).[2]

[2]The decision in Padilla was not unanimous, including a concurrence authored by Justice Alito and joined by Chief Justice Roberts as well as a dissenting opinion authored by

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

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

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

Justice Scalia and joined by Justice Thomas. That the members of the Court expressed such an "array of views" itself indicates that Padilla was not dictated by precedent and accordingly created a "new" rule. See O'Dell v. Netherland, 521 U.S. 151, 159-160 (1997).

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

Admittedly, courts addressing the retroactive application of Padilla under the Teague analysis have come to contrary conclusions. Notably, however, most federal district courts to have considered the issue – and all of those within Florida – have found that the Padilla rule should not apply retroactively. See, e.g., United States v. Fajardo, 2012 WL 252440, *5-7 (M.D. Fla. Jan. 26, 2012); Sarria v. United States, 2011 WL 4949724, *5-6 (S.D. Fla. Oct. 18, 2011); Rodriguez v. United States, 2011 WL 3419614, *6-8 (S.D. Fla. Aug. 4, 2011); Llanes v. United States, 2011 WL 2473233, *1-3 (M.D. Fla. June 22, 2011). See also Emojevwe v. United States, 2011 WL 5118800, *3 n.12 (M.D. Ala. Sept. 29, 2011), report adopted, 2011 WL 5118788 (M.D. Ala. Oct 28, 2011); United States v. Chapa, 800 F. Supp. 2d 1216, 1220-24 (N.D. Ga. 2011).

Two of the three circuit courts of appeal that have directly considered the issue have reached this conclusion as well. See United States v. Chang Hong, 2011 WL 3805763, *6-10 (10th Cir. Aug. 30, 2011); Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011). See also United States v. Hernandez-

Monreal, 404 Fed. Appx. 714, 715 n.* (4th Cir. 2010) (noting that "nothing in the Padilla decision indicates that it is retroactively applicable to cases on collateral review"). But see United States v. Orocia, 645 F.3d 630, 641 (3d Cir. 2011) (holding that Padilla is an "old rule" for Teague purposes and therefore retroactive).[3]

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

Finally, even if this Court concludes that Padilla is simply an "old rule," as the Defendant asserts, he is still entitled to no relief in this proceeding. While Padilla would be applied retroactively under that rationale, it would not serve as a newly established fundamental constitutional right under Rule 3.850(b)(2), and accordingly the Defendant's failure to bring his claim in a timely manner under Rule 3.850 precludes relief.

Padilla Itself

[3] State courts addressing this issue have likewise reached contrary decisions. See Chapa, 800 F. Supp. 2d at 1221 n. 2 (collecting cases).

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

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

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

Chang Hong, 2011 WL 3805763 at *10 (emphasis added). See also United States v. Agoro, 2011 WL 6029888, *7 (D. R.I. Nov. 16, 2011) (finding the above reasoning persuasive), report adopted, 2011 WL 6034478 (D. R.I. Dec 05, 2011). This well-reasoned

opinion should be followed by this Court here, and the Defendant's argument rejected.

The Defendant's additional argument that the procedural posture of Padilla itself indicates it must apply retroactively is likewise without merit. Specifically, the Defendant claims that because Padilla himself was before the Court on a motion for postconviction relief, and he was granted such relief, the Court must have intended for Padilla to apply retroactively to final convictions. See Santos-Sanchez v. United States, 2011 WL 3793691, *2-3 (S.D. Tex. Aug. 24, 2011) (finding Padilla's procedural posture controlling on the retroactivity issue and Teague's application to federal convictions on collateral review highly questionable).

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

> The district court relied on the fact that Padilla itself was before the Court on a motion for post-conviction relief for its conclusion that the Court intended for Padilla to apply retroactively to cases on collateral appeal. **In light of the fact that Kentucky did not raise Teague as a defense in Padilla, we do not assign the significance to Padilla's**

> **procedural posture that the district court did.** While "[r]etroactivity is properly treated as a threshold question," Teague "is not 'jurisdictional' in the sense that [the] Court ... must raise and decide the issue sua sponte." Therefore, if a State does not rely on Teague, the Court has no obligation to address it, and can consider the merits of the claim. **We believe it is more likely that the Court considered Teague to be waived, than that it silently engaged in a retroactivity analysis.**

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

CROSS-APPEAL BY STATE

(PETITIONER'S ISSUE I)

THE DISTRICT COURT ERRED IN FINDING THAT INEFFECTIVE ASSISTANCE OF COUNSEL CAN BE DEMONSTRATED WHERE THE TRIAL COURT HAS SPECIFICALLY INFORMED THE DEFENDANT THAT HIS PLEA COULD BE USED AGAINST HIM IN DEPORTATION PROCEEDINGS, AND QUESTION 1 SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The State seeks this Court's review of the following question of great public importance:

> DOES THE IMMIGRATION WARNING IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.172(C)(8) BAR IMMIGRATION-BASED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON THE U.S. SUPREME COURT'S DECISION IN PADILLA V. KENTUCKY, __ U.S. __, 130 S.CT. 1473, 176 L.ED.2D 284 (2010)?

Hernandez, 61 So. 3d at 1145-46.

This question should be answered in the affirmative, and the lower court's decision on this matter should be reversed.

Ineffective Assistance of Counsel

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

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

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

circumstances, applying a heavy measure of deference to counsel's judgments." Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991) (quotation omitted).

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

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

Applying that standard here, the district court of appeal erred in finding counsel was ineffective, where the Defendant was specifically informed that his conviction could subject him to deportation.

The Padilla decision

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

The Kentucky Supreme Court found that this advice did not render counsel ineffective, as the advice concerned a mere collateral consequence of the defendant's conviction. Id. The United States Supreme Court disagreed, finding that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." Id. In so holding, the Court noted that it had never applied a distinction between direct and collateral consequences in defining the scope of reasonable professional assistance, and this distinction was especially meaningless in light of the "uniquely difficult" classification of deportation as merely collateral. Id. at 1481-82.

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

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

Id. at 1483 (emphasis added).

At the same time, however, the Court acknowledged that immigration law can be complex, and criminal lawyers are not necessarily well-versed in this area. Id. Nonetheless, the Court rejected the Solicitor General's position that affirmative misadvice is required for a valid claim of ineffectiveness, finding that silence on this issue is "fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." Id. at 1484 (quotation omitted).

Accordingly, the Court reiterated its holding "that counsel must inform her client whether his plea carries *a risk* of deportation." Id. at 1487 (emphasis added). The Court did not

grant relief, however, but instead remanded the case back to state court to determine whether the defendant could demonstrate prejudice. Id. at 1478, 1487.

The State submits that Padilla is readily distinguishable from the instant case, where the Defendant was plainly informed that he could in fact be subject to deportation for his crime. Further, even if trial counsel should have done more, the Defendant cannot demonstrate prejudice.

Application of Padilla in Florida

Unlike Kentucky, the State of Florida has long required that any plea colloquy include a specific warning that the defendant's criminal conviction may result in deportation. See Fla. R. Crim. P. 3.172(c)(8) (requiring court to verify before accepting plea that defendant understands "that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service"). Such a warning was given here, and the Defendant stated, under oath, that he understood this possibility. (App. A at p. 9).

As the Fourth District Court of Appeal has held, such specific information provided by the court and acknowledged by

the defendant precludes a finding of ineffective assistance of counsel – even in the face of *contrary advice* given by counsel:

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

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

court carry a strong presumption of verity" forming a "formidable barrier in any subsequent collateral proceedings").

Here, of course, there was not even any misadvice to overcome. The Defendant's counsel in this case, unlike Mr. Padilla's counsel, did not assure him that there would be no immigration consequences, but instead was either silent on the issue (according to the Defendant) or, as counsel stated in his email, told the Defendant that he could/may be deported as a result of the plea. (App. C). Further, there is no doubt that the trial court informed the Defendant that deportation was a potential consequence of his plea, and the Defendant specifically acknowledged that he understood this. (App. A at p. 9).

In light of these facts, then, the Defendant assumed the risk that he *may* be deported because of his criminal conviction – *the very situation he faces now*. While he characterizes his status as being subject to "compulsory" deportation, his very presence in this country, presumably working and living openly, *ten years* after his plea was entered, evidences the fallacy of this characterization.

Indeed, it is common knowledge that deportation is far from a *mandatory* reality for anyone in the United States. Hundreds

of thousands of individuals are living in this country completely illegally; those individuals, like the Defendant himself, are subject to deportation – yet no one seriously believes they will *all* actually be deported.

Deportation is not the simple matter portrayed by the Defendant, but is instead a complicated process subject to change in enforcement and procedure depending on the political, legal, or fiscal impulses of Congress and the President. Surely 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. In fact, had the Defendant's attorney told the Defendant that he definitely *would* be deported as a result of his plea, the Defendant would have actually been given affirmatively inaccurate advice that may have led him to turn down a favorable plea offer.

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

was, however, revealed to the Defendant, probably by his attorney and certainly by the trial court.

Strickland, and Padilla, require the reasonable professional assistance of counsel. The Defendant received such reasonable assistance here, and his 3.850 motion claiming to the contrary was properly denied.

Further, even assuming counsel was completely silent on this matter when he should have discussed the issue with him, the Defendant cannot establish prejudice. The trial court told the Defendant the truth about his situation – the government could use these charges against him in deportation proceedings. The Defendant chose to enter his plea anyway, with full knowledge of its possible consequences.

In light of this explicit warning, the Defendant cannot show that he would not have entered the plea in the absence of counsel's allegedly deficient representation. See, e.g., Hernandez–Monreal, 404 Fed. Appx. at 715 (defendant could not show ineffective assistance of counsel under Padilla where he affirmatively acknowledged in plea hearing his understanding that his plea "could definitely make it difficult, if not impossible, for [him] to successfully stay legally in the United States); Smith v. United States, 2011 WL 837747, *11 (S.D. Fla.

Feb. 4, 2011) (defendant could not show prejudice under Padilla where, even assuming counsel misadvised him regarding deportation, defendant became aware of possibility he would be deported when trial court advised of this fact during the plea colloquy, curing any error due to counsel's alleged misadvice), report adopted, 2011 WL 836736 (S.D. Fla. Feb 28, 2011).[4]

The lack of prejudice here is further apparent when considering the totality of the circumstances. As this Court has recognized, the allegation that the defendant would have gone to trial in the absence of counsel's deficient performance must be assessed in light of the entire situation, including "whether a particular defense was likely to succeed at trial,

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

the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial." Grosvenor v. State, 874 So. 2d 1176, 1181-82 (Fla.), cert. denied, 543 U.S. 1000 (2004).

Here, not only does the plea colloquy itself refute the Defendant's claim, but the record further reflects that the Defendant was facing fifteen years imprisonment for a second degree felony but ended up with a veritable "slap on the wrist" - adjudication withheld and one year of probation, with the possibility of early termination after six months.

While the Defendant alleged in his motion that he "believes he would have successfully presented an alibi, forwarded a defense of entrapment, or successfully argued that the facts did not support a finding that he sold narcotic," (App. C at p. 5), this allegation is both vague and inherently contradictory. The Defendant basically claims that he would have turned down the negligible sanction offered so that he could have the privilege of going to trial, where upon conviction he could have received a fifteen year prison sentence and then ended up getting

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

In light of the explicit warning to the Defendant that his plea could be used against him in deportation proceedings, his situation is readily distinguishable from the situation in Padilla, and he cannot demonstrate that he was in any way prejudiced by counsel's allegedly deficient performance. The district court's decision finding that counsel was ineffective should be reversed by this Court, and the first certified question answered in the affirmative.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court affirm the district court's finding that Padilla does not apply retroactively, answer the second certified question in the negative, reverse the decision of the district court finding that counsel was ineffective, and answer the first certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief/Cross-Appeal Initial Brief on the Merits has been furnished by U.S. mail to Sui Chung, counsel for Petitioner, 2964 Aviation Avenue, Third Floor, Miami, Florida 33133 and Professor Michael Vastine, co-counsel for Petitioner, St. Thomas University School of Law, 16401 N.W. 37th Avenue, Miami Gardens, Florida 33054, this 22nd day of February, 2012.

CERTIFICATE OF COMPLIANCE

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

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