IN THE SUPREME COURT OF FLORIDA

CASE NO: SC11-941/SC11-1357
(Consolidated)

THIRD DCA NO. 3D10-2462
LOWER TRIBUNAL NO. 01-11703-A (Miami-Dade)

GABRIEL A. HERNANDEZ,
Petitioner/Defendant,

-vs-

STATE OF FLORIDA,
Respondent.

INITIAL BRIEF OF PETITIONER/DEFENDANT

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STATEMENT OF THE CASE AND FACTS

On May 3, 2001, Mr. Hernandez appeared before the Circuit Court of the Eleventh Judicial Circuit, in Miami, Florida to answer to the charge of unlawful sale of a controlled substance in violation of Fla Stat. § 893.13(1)(a)(1). *See* Slip Op. at 3, 4. Mr. Hernandez was nineteen (19) years old at the time. *Id* at 3. An attorney of the Dade County Office of the Public Defender represented him. *Id* at 4. Counsel did not advise Mr. Hernandez of the obvious and certain immigration consequences of a guilty plea to this charge, including that his deportation was presumptively mandatory and that the conviction would serve as a complete bar to all discretionary immigration relief. *Id* at 4-5.

The court accepted Defendant's plea of guilty, withheld adjudication and sentenced Defendant to one year of probation, with the possibility of early termination after six (6) months, upon completion of the T.A.S.C. program. *Id* at 4. Prior to accepting Mr. Hernandez's guilty plea, pursuant to Fla. R. Crim. P. 3.172(c)(8), the trial court read Mr. Hernandez the standard Florida warning that the U.S. government could use the charges against him in deportation proceedings. *Id.* Mr. Hernandez did not appeal the court's decision.

On July 8, 2010, Mr. Hernandez filed a sworn motion to vacate his plea, judgment and sentence, accompanied by evidence of his eligibility to vacate his conviction pursuant to *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). *Id* at 1, 2.

Included in the evidence was an emailed statement from Mr. Hernandez's trial counsel admitting that counsel neither conveyed an accurate assessment of any immigration consequences to Mr. Hernandez nor referred him to competent immigration counsel to make a proper determination and advisement of immigration consequences. *Id* at 4.

On August 18, 2010, the trial court issued an order denying Defendant's motion for post-conviction relief, "due to the status of prevailing law, and the facts upon which the claim for relief is made." Order Denying Defendant's Motion For Post Conviction Relief Under Rule 3.850 (Order) at 7. The "prevailing law" cited by the post-conviction trial court was *Bermudez v. State*, 603 So.2d 657 (Fla. 3rd DCA 1992), holding that the Florida generic judicial advisement pursuant to Rule 3.172(c)(8) cured any deficiency on the part of Mr. Hernandez's counsel. *Id.* The post-conviction trial court noted that *Bermudez* apparently remained valid precedent, even in the wake of the *Padilla* decision, as it had been recently (at the time) cited in *Flores v. State*, No. 4D08-3866 (Fla. 4th DCA, July 14, 2010). *Id.* The trial court did not conduct an evidentiary hearing. Mr. Hernandez appealed from the trial court's decision denying his motion for post conviction relief. Slip Op. at 1-2.

On April 6, 2011, the Third District Court of Appeal issued a decision affirming the denial of post-conviction relief. In the decision, the Third District

found that Florida's deportation warning read in the standard plea colloquy, pursuant to Florida Rule of Criminal Procedure 3.172(c)(8), was insufficient to cure ineffective assistance of counsel when applied to a case, such as Mr. Hernandez's case, where deportation consequences were certain. *Id* at 2. The court further found that reliance on its 1992 decision in *Bermudez v. State* (holding that the Florida plea colloquy cured ineffective assistance of counsel) was misplaced, as *Bermudez* did not survive as good law subsequent to the U.S. Supreme Court decision in *Padilla v. Kentucky.* *Id* at 6.

However, the Third District, after conducting an analysis under *Witt v. State*, 387 So. 2d. 922 (Fla. 1980), held that *Padilla* should not be applied retroactively, and held that Hernandez should not be afforded the Sixth Amendment protections discussed in *Padilla*, as Hernandez's case pre-dated the issuance of *Padilla.* *Id* at 14.

Mr. Hernandez is a native and citizen of Nicaragua who entered the United States in the custody of his mother in 1983, when he was less than two years old. Hernandez became a lawful permanent resident of the United States on January 29, 1999. *Id* at 3. After sustaining his conviction, Mr. Hernandez attained a number of achievements, including a Bachelor of Arts Degree in 2005 and gainful employment as a computer network administrator for a Miami bank group. *Id* at 5.

The conviction for sale of a controlled substance renders Mr. Hernandez removable (deportable) from the United States pursuant to 8 U.S.C. § 1227(a)(2)(B)(i) as "any alien who at any time after admission has been convicted of a violation of … any law or regulation of a State, the United States or a foreign country relating to a controlled substance … other than a single offense involving possession for one's own use of 30 grams or less of marijuana." *Id* at 5. Additionally, under 8 U.S.C. § 1227(a)(2)(A)(iii), Hernandez's conviction makes him deportable as an "aggravated felon" as defined at 8 U.S.C. 1101(a)(43)(B), including aliens convicted of an offense involving illicit trafficking in a controlled substance, including a drug trafficking crime. *Id.*

No waiver of deportability is available for Mr. Hernandez's conviction. Since major changes to the federal immigration laws in 1996 and 1997, drug sale offenses are classified as "aggravated felonies" and trigger certain deportation. *Id.* Mr. Hernandez's conviction for an "aggravated felony" bars his eligibility for Cancellation of Removal, the primary form of discretionary relief from deportation for permanent residents. *Id; See* 8 U.S.C. § 1229b(a)(3). The conviction also bars Cancellation of Removal because the conviction is for a deportable offense that took place within the first seven years of Mr. Hernandez's legal admission to the United States. *See id.*

Hernandez's conviction also bars eligibility for the sole alternate discretionary waiver of deportability under 8 U.S.C. § 1182(h), which is statutorily barred for resident aliens with either 1) an aggravated felony conviction or 2) a controlled substance conviction other than simple possession of marijuana. *Id.*

When the Department of Homeland Security initiates removal proceedings against Mr. Hernandez, his deportability will be presumptively mandatory. *Id.* He will not be eligible to apply for any form of discretionary relief from deportation and his removal is assured. *Id.* Pursuant to *Padilla v. Kentucky, supra*, the right to accurate advice regarding deportation consequences is part of the Sixth Amendment right to counsel. *Padilla* at 1482. The actual, mandatory consequences of the conviction were not conveyed to Mr. Hernandez by his counsel or by the trial court. *Slip Op.* at 4-9

The correct advice is a settled matter of fact and law. Mr. Hernandez is convicted of a "drug trafficking offense," defined as an "aggravated felony" at 8 U.S.C. § 1101(a)(43)(B). *Id* at 5. Any aggravated felony conviction is a ground of deportability, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). *Id.* Any aggravated felony conviction entered after April 24, 1996, cannot be waived in immigration proceedings, and therefore, his removal is compulsory. *See* 8 U.S.C. § 1229b(a)(3); 8 CFR § 1212.3; *Padilla*, at 1478.

Mr. Padilla also faced deportation for a drug trafficking offense. "Thus, [*Padilla*] [was] 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." *Padilla*, at 1477. Thus, under U.S. Supreme Court precedent, directly on point, the correct advice required to have been conveyed to Mr. Hernandez was that he faced certain deportation. *Padilla*, at 1478 ("We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation").

SUMMARY OF THE ARGUMENT

1. Florida Rule of Criminal Procedure 3.172(c)(8) is insufficient to cure the ineffective assistance of counsel suffered by Petitioner Hernandez. Pursuant to *Strickland v.Washington*, 466 U.S. 668 (1984), as applied in *Padilla v. Kentucky*, Petitioner's Sixth Amendment rights required that his counsel advise him that deportation was a mandatory consequence of his 2001 guilty plea for sale of a controlled substance. The general warning in Rule 3.172(c)(8) also failed to properly advise Petitioner of the clear and certain deportation consequence. A general warning from counsel can only satisfy the Sixth Amendment rights of a defendant in instances where the deportation consequence is vague or uncertain. A general warning can never satisfy the Sixth Amendment rights in a case where the consequences are clear.

2. *Padilla* must be applied retroactively. A state cannot offer lower protections than those afforded by the Sixth Amendment to the U.S. Constitution. *Padilla* is applied retroactively by the federal courts, including the U.S Supreme Court. Retroactivity is governed by *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague,* decisions applying "old rules" are applied retroactively. "New rules" are only applied prospectively, unless they meet one of two exceptions. *Padilla* was resolved within the framework of *Strickland v. Washington*, making it an "old rule." Alternately, under *Teague,* the U.S. Supreme Court can never pronounce or

apply a "new rule" in a case on collateral review unless the case meets one of the two exceptions that permits retroactive application. *Padilla* was on collateral review. The U.S. Supreme Court both pronounced its rule in *Padilla* applied its rule to Padilla, thereby remanding his case. Therefore, if a "new rule," *Padilla* necessarily met one of the exceptions. All available options within the federal retroactivity analysis require that *Padilla* be applied retroactively.

Finally, if the Florida retroactivity analysis pursuant to *Witt v. State* is a relevant inquiry, *Padilla* still must be construed retroactively. *Padilla* cannot be both not an "old rule" and not "a development of fundamental significance" under *Witt*, particularly in Florida where state precedent actively spurned the very claim of Sixth Amendment protection extolled in *Padilla*.

ARGUMENT

I. NEITHER TRIAL COUNSEL'S ADVICE NOR THE TRIAL COURT WARNING WAS A "PROPER WARNING" UNDER *PADILLA*

As pure questions of law, the proper standard of review of the two certified issues is *de novo*.

The Third District accurately found that Mr. Hernandez's Sixth Amendment right to effective counsel was violated because 1) at best, trial counsel may have provided a general warning that a conviction could/may affect Mr. Hernandez's immigration status (when deportation was actually assured), and 2) this ineffectiveness was not cured by the recitation of Florida's plea colloquy required by Florida Rule of Criminal Procedure 3.172(c)(8), which itself was insufficient to properly advise Mr. Hernandez of his certain immigration consequences. *See* Slip Op. at 4, 10. Both conclusions are derived from by the obligations of counsel imposed by *Strickland v. Washington*, 466 U.S. 668 (1984), as discussed at length in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

As the Third District accurately held, "We are obligated to follow and apply the majority's distinction and holding in *Padilla*. Applying this … Sixth Amendment analysis to the present case, neither the plea colloquy nor Hernandez's counsel's advice (accepting the sworn allegation of Hernandez's motion as true for this purpose) conveyed the warning that deportability was a non-discretionary and "truly clear" consequence of his plea. Slip Op. at 8.

A. THE UNITED STATES SUPREME COURT HAS SETTLED THE CENTRAL ISSUE OF LAW AND FACT - THE IMMIGRATION CONSEQUENCES FOR MR. HERNANDEZ WERE CLEAR AND COMPULSORY. CONSEQUENTLY, COUNSEL WAS OBLIGATED TO INFORM HIM ACCURATELY OF HIS CERTAIN DEPORTATION.

The immigration consequences of Mr. Hernandez's conviction are obvious. The consequence is severe and certain. Mr. Hernandez is deportable without recourse to any discretionary waiver to stop his removal. The U.S. Supreme Court has ruled precisely regarding counsel's duty in Mr. Hernandez's case. His conviction has the identical mandatory consequences as the defendant in *Padilla v. Kentucky*. The U.S. Supreme Court has held that the exact consequences Mr. Hernandez faces "could easily be determined from reading the removal statute." *Padilla*, at 1483.

Consequently, there can be no dispute that Mr. Hernandez's counsel was duty bound to give accurate advice to his client – that by accepting a plea bargain, Mr. Hernandez was assuring his own deportation. Trial counsel failed to make any such obvious and accurate advice and "failed to advise him at all." Answer Brief at 3, Order at 6. Counsel's failure to give accurate advice is uncontroverted in the record. As a matter of law and fact, counsel was ineffective in this case.[1]

[1] The State, taking the position of the post-conviction trial court, also argued below that there is a difference between affirmative misadvice and non-advice from counsel, and that somehow Mr. Hernandez was less harmed if he received non-advice. This distinction has been considered and rejected by the U.S. Supreme Court. *See Padilla*, at 1484.

B. AS APPLIED TO THE FACTS OF THIS CASE, THE TRIAL COURT'S GENERIC WARNING WAS INSUFFICIENT TO CURE THE PREJUDICE OF INEFFECTIVE TRIAL COUNSEL.

The Third District properly held that the Rule 3.172(c)(8) generic warning by the trial judge did not cure inaccurate or non-advice from trial counsel regarding obvious mandatory immigration consequences. *See* Slip Op. at 6, 7. The *Padilla* court contemplated that, because of the complexity of immigration law, in many cases the immigration consequences of a conviction would be uncertain. *See Padilla*, at 1483. In those instances, distinguishable from the obvious consequences presented in the instant case, counsel's burden is only to provide general advice. *Id.*

Appellee argued below that "Florida has provided, by rule of court, for the very protections mandated by *Padilla* in those "numerous situations" where the deportation consequence is less than "truly clear." Answer Brief at 11, quoting *Padilla*, at 1483 (emphasis added). Appellee observed that in these circumstances, the verbiage of the generic Florida warning appears to be constitutionally sufficient.[2] However, Appellee must necessarily agree that the warning was not effective to cure the prejudice to Mr. Hernandez, where an immigration

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[2] Mr. Hernandez disputes whether the judicial warning can ever be sufficient to protect a defendant's Sixth Amendment rights. However, the same phrase, if spoken by counsel, may be appropriate in some pleas triggering vague immigration consequences. *See* discussion of *Bermudez v. State*, *infra*, at 10-11, 32-25.

consequence is clear, so this incorrect warning, even if given by counsel, would not pass constitutional scrutiny. In Mr. Hernandez's case, where deportation is obvious and compulsory, he was entitled to accurate advice prior to entering a plea.[3]

C. WHERE DEPORTATION IS A CLEAR AND COMPULSORY CONSEQUENCE OF A GUILTY PLEA, THE FLORIDA PRECEDENT OF *GINEBRA*, *BERMUDEZ* AND THEIR PROGENY CANNOT BE BINDING. THEY ARE INCONSISTENT WITH THE U.S. SUPREME COURT'S RULING IN *STRICKLAND*, AS APPLIED IN *PADILLA*.

The Third District properly found Appellee's reliance on *State v. Bermudez*, 603 So.2d 657 (Fla. 1992), was misplaced, as the reasoning underpinning *Bermudez* is in direct conflict with U.S. Supreme Court precedent when applied to the instant case. *See* Slip Op. at 6; Answer Brief at 6.

Prior to *Padilla*, "the [Florida] supreme court held that a defendant's lack of knowledge that a plea of guilty may lead to deportation does nothing to undermine the plea itself." *Bermudez*, at 658, quoting *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987), citing *United States v. Sambro*, 454 F.2d 918, 921 (D.C.Cir. 1971). Additionally, "defense counsel's failure to inform defendant of possible deportation was not ineffective assistance of counsel because deportation [was

[3] While Mr. Hernandez argues that this Sixth Amendment obligation rests with counsel and never with a court, particularly when counsel is court-appointed to protect the rights and interests of the defendant, this court need not necessarily resolve this issue in order to reverse the court below. Instead, the court could find that in this instance, which is square with the facts of *Padilla*, the warning was insufficient.

considered] only a "collateral consequence" of the plea. *Id, citing State v. Fundora*, 513 So.2d 122 (Fla. 1987) (emphasis added).

Both premises were rejected in *Padilla*. First, "[the U.S. Supreme] Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required under *Strickland*." *Padilla*, at 1481. Second, *Strickland* was applicable to Padilla's claim, so before deciding whether to plead guilty, he was constitutionally entitled to "the effective assistance of competent counsel." *Padilla*, at 1480, citing *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970). An admission of facts made while receiving ineffective assistance of counsel is made in violation of a defendant's Sixth Amendment rights and undermines the validity and voluntariness of the plea. Thus, the premise underlying *Bermudez* is unconstitutional.

Padilla clarified that the right to accurate advice regarding immigration consequences is a component Sixth Amendment right to effective counsel, as elucidated in *Strickland*. *See Padilla*, at 1480. A generic warning by a court is insufficient to cure a violation of the right to effective counsel, particularly when the immigration consequences are obvious and certain and neither counsel nor the court give the accurate advice required by *Strickland* and *Padilla*.[4]

[4] *Padilla*, at 1484 ("Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti* v. *United States*, 516 U. S. 29,

II. RETROACTIVE APPLICATION OF *PADILLA v. KENTUCKY*

A. FACTS APPLICABLE TO RETROACTIVITY

Padilla was a U.S. Supreme Court consideration of a state (Kentucky) motion for post-conviction relief. Mr. Padilla was charged with multiple drug offenses on October 31, 2001, and was convicted by guilty plea on August 22, 2002. *Padilla v. Commonwealth*, 2006 Ky. App. LEXIS 98 (Ky. Ct. App. Mar. 31, 2006) at 2. Mr. Padilla's deportation was a compulsory consequence of his plea. In granting relief in March 2010, the U.S. Supreme Court necessarily found that Mr. Padilla's Sixth Amendment right to effective counsel regarding immigration consequences did exist in 2002 and that Mr. Padilla could benefit from the decision in *Padilla v. Kentucky*.

Hernandez presents a state (Florida) motion for post-conviction relief. Mr. Hernandez was charged on May 3, 2001, with sale of a small amount of LSD. He was convicted by guilty plea approximately ten minutes after counsel was appointed, also on May 3, 2001. *See* Slip Op. at 4. Mr. Hernandez' deportation was a compulsory consequence of his plea. In denying relief, the Third District

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50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. [Silence] would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis").

necessarily found that Mr. Hernandez' Sixth Amendment right to effective counsel regarding immigration consequences did not exist in 2001 and that Mr. Hernandez could not benefit from the decision in *Padilla v. Kentucky*.

B. FLORIDA MAY NOT OFFER LESS PROTECTION THAN THAT MANDATED BY THE FEDERAL CONSTITUTION.

The remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. However, federal law "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Danforth v. Minnesota*, 552 U.S. 264, at 288 (2008). Where there is such a federal rule of law, presumably the Supremacy Clause in Article V of the Federal Constitution, would require all state entities--not just state judges--to comply with it. *Id* at 289.

C. THE THIRD DISTRICT ERRED BY FAILING TO CONDUCT AN ANALYSIS OF *PADILLA* USING FEDERAL RETROACTIVITY PRINCIPLES

The Third District erroneously, and without explanation, found that *Padilla* was a "new Sixth Amendment analysis." *See* Slip Op. at 8. Rather than consider if it needed to defer to a federal standard, the Third District proceeded to only consider whether *Padilla* satisfied the Florida scheme for retroactivity under *Witt v. State*. *See* Slip Op. at 11-16. The Third District failed to consider controlling federal precedent, and the facts of *Padilla* itself, that demonstrate and mandate that *Padilla* be applied retroactively. *See* Slip Op. at 11 ("Passages [in *Padilla*]

strongly suggest that the majority fully understood that *Padilla* would be followed by motions to vacate preexisting pleas and convictions. "To determine whether a new rule applies retroactively to final cases in postconviction proceedings, however, courts in Florida conduct a retroactivity analysis under *Witt v. State*."").

The U.S. Supreme Court has made clear that States can only give greater substantive protection under their own laws than was available under federal law. *See Danforth, supra*. The federal interest in uniformity in the application of federal law does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as the state laws do not infringe on federal constitutional guarantees. *Johnson v. New Jersey*, 384 U.S. 719, at 733 (1966) ("[O]f course, States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision" (emphasis added)). Even in his *Danforth* dissent, Chief Justice Roberts agreed that the clear implication of *Johnson* was that States could apply their own retroactivity rules only to new substantive rights "under their own law," not to federal rules announced by the U.S. Supreme Court. *See Danforth* at 295 (Roberts, C.J. dissenting).

D. FEDERAL RETROACTIVITY IS GOVERNED BY *TEAGUE V. LANE*

"Old rules" are decisions that are governed by existing precedent, or are merely application of different facts to a legal structure. Decisions applying new facts to "old rules" are applied retroactively. *See Teague v. Lane*, 489 U.S. 288 (1989).

A "new rule" issued by the U.S. Supreme Court, as that term is defined in *Teague*, is one that "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, at 301 (plurality opinion). New constitutional rules of criminal procedure may not be applied retroactively to cases on federal habeas review unless 1) they place certain primary individual conduct beyond the States' power to proscribe or 2) are "watershed" rules of criminal procedure. *See Teague*, at 310 (plurality opinion).

E. THE SUPREME COURT CAN ONLY ANNOUNCE AND APPLY A NEW CONCEPT IN A CASE ON COLLATERAL REVIEW IF THE CONCEPT WILL BE APPLIED RETROACTIVELY. *PADILLA* WAS ON COLLATERAL REVIEW AND ITS ANNOUNCED CONCEPTS WERE APPLIED TO MR. PADILLA. THEREFORE, *PADILLA* MUST BE APPLIED RETROACTIVELY.

The Third District observed that the issue of retroactivity "begins with *Padilla* itself, which implies (but does not explicitly) hold that it is to be applied retroactively." Slip Op. at 11. It would have been helpful if the *Padilla* Court had overtly stated that its holding was to be applied retroactively. However, precedent dictates that *Padilla* be applied retroactively without any such declaration.

The posture of the *Padilla* decision, as applied to Mr. Padilla, leaves no alternative but for the Court to have intended for its decision in *Padilla* to be applied retroactively. If *Padilla* is an "old rule" (i.e. an application of *Strickland*, not a distinct Sixth Amendment development) then its holding is applied retroactively and Mr. Hernandez must also benefit from *Padilla's* protections.

The Supreme Court discussed in *Danforth* that "'[u]nder *Teague*, new rules will not be **applied** or **announced** in cases on collateral review unless they fall into one of two exceptions.'" *Danforth*, *supra*, at 267, n.1 (2008), *citing Penry* v. *Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) (emphasis added). *Graham v. Collins* demonstrates that when a case is on collateral review and the holding sought by the defendant would announce a new rule that does not fit a *Teague* exception, the Supreme Court will refuse to apply or announce the rule in that case. *See Graham v. Collins*, 506 U.S. 461,463 (1993). In other words, if it was both "new" and "non-retroactive," *Padilla* could not have been decided at all, as it would violate *Teague*.

Padilla was before the Supreme Court on collateral review and the Supreme Court's holding (rule) was applied to Padilla. *Santos-Sanchez v. United States, 2011 U.S. Dist. LEXIS 95442* (S. Dist. Tex, August 24, 2011), at 10 (emphasis in original). Therefore, when *Teague* is applied to *Padilla* there are three possible outcomes: (1) *Padilla* announced an old rule; (2) *Padilla* announced

a new rule and the first *Teague* exception applies, or (3) *Padilla* announced a new rule and the second *Teague* exception applies. *Id.* [I]t is critical to understand that each of the three available options results in the retroactive application of *Padilla* to cases on collateral review. *Id.* Therefore, the Court must reach the merits of Mr. Hernandez' *Padilla* claim. Even if it is not known with certainty which option the Supreme Court intended to justify retroactivity, it is incontrovertible that if *Padilla* is analyzed under *Teague*, it must be applied retroactively to cases on collateral review. *See* id at 9, 11.

F. THE *PADILLA* COURT INTENDED THAT THE DECISION WOULD RUN RETROACTIVELY AS AN ELEMENT OF THE OLD RULE OF S*TRICKLAND*

The Third District erroneously, and without explanation, found that *Padilla* was a "new Sixth Amendment analysis." *See* Slip Op. at 8. If a "new rule," the protections of *Padilla* are not automatically given retroactive application, pursuant to *Teague v. Lane*, unless it meets one of two exceptions. *See Teague*, *supra.* The court noted that the analysis of the retroactivity issue begins with "Padilla itself, which implies (but does not explicitly hold) that it is to be applied retroactively… passages strongly suggest that the majority fully understood that Padilla would be followed by motions to vacate preexisting pleas and convictions." Slip Op. at 11.

Appellee argued below that the Sixth Amendment protections discussed in *Padilla v. Kentucky* do not run retroactively, because "new constitutional rules of criminal procedure are not retroactively applicable to cases that became final

before the decision was announced." *See* Answer Brief at 13. *Padilla* is neither a new rule nor a procedural rule, but illustrates one way that counsel may violate a defendant's Sixth Amendment rights under *Strickland v. Washington.* *See Padilla*, at 1482 ("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").

To violate *Strickland*, counsel's representation must fall "below an objective standard of reasonableness." *Strickland, supra,* at 688, 694. Constitutional deficiency is necessarily linked to the legal community's practice and expectations. *Id.*, at 688. "For at least the last 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the immigration consequences of a client's plea." *Padilla* at 1485. The Court has long recognized the importance to the client of "[p]reserving the … right to remain in the United States" and "preserving the possibility of" discretionary relief from deportation, particularly after major amendments to the immigration law in 1996 severely limited discretionary relief from removal. *INS* v. *St. Cyr*, 533 U.S. 289, 323 (2001); *Padilla* at 1480. The Supreme Court "expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" available since the 1990's to learn the important details of discretionary relief. *Id* at 323, n. 50.

The Supreme Court anticipated that *Padilla* would apply retroactively. This is made clear by its lengthy discussion (and debate with the concurring Justice Alito) considering the importance of protecting the finality of convictions obtained through guilty pleas. *Id* at 1484, 85. The court analogized to "floodgates" concerns in other decisions with retroactive effects and concluded that the "lower courts -- now quite experienced with applying *Strickland* -- can effectively and efficiently use its framework to separate specious claims from those with substantial merit." *Id* at 1485. The court further reasoned that, since for the last 15 years professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea … (courts) should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty." *Id.*

The *Padilla* court made clear its intent that it was not passing a new rule, but was rather correcting a widely-held misperception among the states that was undermining proper application of *Strickland*. The court noted that "the Kentucky high court is far from alone in [its] view" that "failure to advise of deportation consequences is not cognizable as a claim for ineffective assistance of counsel." *Padilla*, at 1481. The court's next sentence reads "we, however, have <u>never</u> applied a distinction between direct and collateral consequences." *Id* (emphasis

added). In other words, *Padilla* was not a new rule, but a correction of many courts' improper limitations on *Strickland* claims.

Subsequent to issuing the *Padilla* decision, the U.S. Supreme Court has applied *Padilla's* protections to historical pleas pre-dating *Padilla*. As such, *Padilla* must not be a "new rule," as the Supreme Court would have likely explicitly stated its retroactive applicability in order to give it retroactive effect. Instead, the U.S. Supreme Court applies *Padilla* as an extension of the "old rule" established in *Strickland*. Thus, Mr. Hernandez's case must also benefit from the retroactive application of *Padilla.*

1. THE UNITED STATES SUPREME COURT RELIED ON *PADILLA* TO REMAND CASES WITH PLEAS THAT PRE-DATE THE *PADILLA* DECISION FOR HEARINGS TO DETERMINE "PREJUDICE," THUS INDICATING THAT *PADILLA* DOES RUN RETROACTIVELY.

Decisions by the U.S. Supreme Court, subsequent to *Padilla*, demonstrate that the court treated other historical cases with the intention that the protections discussed in *Padilla* run retroactively as an extension of the protections established by *Strickland* rather than as a "new rule."

The prime example of this is the case of Mr. Padilla himself. The U.S. Supreme Court could not remand his case for a determination of prejudice if it held that his Sixth Amendment right to effective advice regarding immigration consequences did not exist in 2002. Further, as discussed above, the Supreme

Court cannot and will not pronounce a "new rule" on collateral review if the benefits do not run retroactively.

The court granted *certiorari* and remanded a case where the defendant alleged that her guilty plea was involuntary since her counsel rendered ineffective assistance by failing to inform her that a conviction would almost certainly result in deportation. *Cantu Chapa v. U.S.*, 130 S. Ct. 3504 (2010) ("The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Padilla*"). The Fifth Circuit subsequently held that the case should be filed in the District Court for an evidentiary hearing regarding prejudice. *United States v. Cantu Chapa*, 2010 U.S. App. LEXIS 18227 (5th Cir. 2010) ("while the *Padilla* holding shows that Cantu Chapa's claim may satisfy the constitutional deficiency prong of a *Strickland v. Washington* ineffective assistance of counsel analysis, we cannot fully address the claim here, since the record is not sufficiently developed so as to consider the prejudice prong of the *Strickland* analysis").

The U.S. Supreme Court also granted *certiorari* and remanded proceedings in *Santos-Sanchez v. United States*, 130 S. Ct. 2340 (2010). Subsequently, the U.S. Court of Appeals for the Fifth Circuit remanded the case for an evidentiary hearing. *See Santos-Sanchez v. United States*, 2010 U.S. App. LEXIS 12205 (5th Cir. Tex., June 15, 2010) ("In *Padilla v. Kentucky*, the Supreme Court held that the

Sixth Amendment mandates that "counsel must inform her client whether his plea carries a risk of deportation. Subsequently, the Supreme Court vacated our judgment in *Santos-Sanchez* and remanded the case to us for further consideration. We find that *Padilla* has abrogated our holding in *Santos-Sanchez.* We therefore vacate the district court's denial of Santos-Sanchez's petition for a writ of *coram nobis* and remand to the district court for further proceedings consistent with *Padilla*).

It is significant that Santos-Sanchez, a permanent resident alien of the United States since 2001, was arrested on September 6, 2003, and charged with aiding and abetting the illegal entry of an alien. *See Santos-Sanchez v. United States*, 548 F.3d 327, 329 (5th Cir. 2008). Two days later, Santos-Sanchez appeared before a magistrate judge and pleaded guilty. *Id.* Thus, his plea pre-dated *Padilla* by approximately six and one half years and was on collateral attack, the same procedural posture as Hernandez, the Petitioner before this court.

Interestingly, on remand, the post-conviction trial court found that it did not matter which *Teague* test was applied, as each test would result in the retroactive application of *Padilla:*

> "Normally, the Court would be compelled to choose one of these unattractive options. However, that decision is unnecessary in this case because each of the available options requires retroactive application of *Padilla* to cases on collateral review. Since *Padilla* itself was on collateral review and it both announced and applied its

> own rule, this Court is compelled to reach the merits of Santos-Sanchez' *Padilla* claim."

Santos-Sanchez v. United States, 2011 U.S. Dist. LEXIS 95442 (S.Dist. Tex, August 24, 2011) at 32.

2. FEDERAL COURTS APPLYING *PADILLA* RETROACTIVELY

Padilla did not set forth a new rule of constitutional law. Instead, the Supreme Court applied Padilla's facts to the test in *Strickland* and held that Padilla's counsel's performance "fell below an objective standard of reasonableness" as measured by "prevailing professional norms" as they existed at the time of Padilla's conviction. *See Padilla*, at 1482. Because *Padilla* did not announce a new constitutional rule, there is no need to consider any issue of retroactive application under the exceptions set forth in *Teague*. *See id.*

a. LITIGATION WITHIN THE SEVENTH FEDERAL CIRCUIT

The Northern District of Illinois found that *Padilla* did not announce a new rule and presented a two-part practical explanation for its conclusion:

> First, Padilla concerned a collateral challenge to a conviction. Thus, if *Teague* barred petitioner's claim, *Padilla's* claim should have been barred as well. Second, application of *Padilla* promoted the finality of judgments, which was the purpose behind the rule in *Teague*, while balancing the need to provide meaningful review of constitutional errors resulting in uninformed guilty plea.

United States v. Chaidez, 730 F. Supp. 2d 896 (N.D. Ill. 2010). The Court failed to state a legal basis for its thought, perhaps overlooking (or perhaps neither party

argued) that this logical conclusion was actually dictated by U.S. Supreme Court precedent. *See Danforth,supra,* at 267 ("[u]nder *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions").

U.S. v. Chaidez was reversed by the Seventh Circuit in *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), finding *Padilla* a non-retroactive "new rule." The Seventh Circuit restricted its analysis to its finding that *Padilla* was not an "old rule." *Id* at 688 ("Whether *Padilla* announced a new constitutional rule of criminal procedure is the sole issue before us"). It never addressed that *Teague* actually mandated that *Padilla* was either an old rule or met an exception to non-retroactivity of a "new rule." *See Danforth, supra,* at 267.

However, *Chaidez* is not controlling of this issue. The Seventh Circuit was not confronted with the controlling language of *Danforth* because the parties waived this argument. *See Chaidez,* at 688 ("The parties agree that if *Padilla* announced a new rule neither exception to non-retroactivity applies"). Thus, that *Chaidez* was wrongly decided is attributable to a litigation error by Chaidez.

Other District Courts within the Seventh Circuit considered the issue and reached the conclusion that *Padilla* must be given retroactive effect. *See Martin v. United States,* No. 09-1387, 2010 U.S. Dist. LEXIS 87706 (C.D. Ill. Aug. 25, 2010) (holding that *Padilla* applies and ordering evidentiary hearing on § 2255

petition). It is likely that another case petitioning for review in the Seventh Circuit will present the winning theory, or at least not concede a point that undermines their appeal.

b. LITIGATION IN THE THIRD FEDERAL CIRCUIT

The Third Circuit held that *Padilla* applies retroactively as a type of *Strickland* claim, and that it did not yield a result "so novel that it forged a new rule." *United States v. Orocio*, 645 F.3d 630, at 639-640 (3rd Cir. 2011) The Third Circuit noted that only one year after *Strickland* that "the same two-part standard [of *Strickland*] . . . [is] applicable to ineffective assistance claims arising out of the plea process," and a court must therefore determine "whether counsel's advice [to accept a plea] was within the range of competence demanded of attorneys in criminal cases." *Id* at 638, citing *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985). The application of *Strickland* to the *Padilla* scenario is not so removed from the broader outlines of precedent as to constitute a "new rule," for the Court had long required effective assistance of counsel on all "important decisions," in plea bargaining that could "affect the outcome of the plea process." *Hill*, at 59. In that light, Padilla is best read as merely recognizing that a plea agreement's immigration consequences constitute the sort of information an alien defendant needs in making "important decisions" affecting "the outcome of the plea process," and thereby comes within the ambit of the "more particular duties to consult with

the defendant" required of effective counsel. *Orocio, supra, at 638*. Thus, far from extending the *Strickland* rule into new territory, *Padilla* merely reaffirmed defense counsel's obligations to the criminal defendant make important decisions during the plea process, a critical stage in the proceedings. *See id.*

When Mr. Orocio pled guilty, it was "hardly novel" for counsel to provide advice to defendants at the plea stage concerning the immigration consequences of a guilty plea, undoubtedly an "important decision" for a defendant. *See Padilla*, at 1485 ("For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the [removal] consequences of a client's plea."). *Padilla* "merely clarified the law as it applied to the particular facts of that case." *Id.*

c. Other federal litigation

Numerous other federal courts have held that *Padilla* presented a new application of *Strickland* to new facts, an occurrence that "generally will not produce a new rule. *See Williams v. Taylor*, 529 U.S. at 362, at 382 (2000), citing *Wright* v. *West*, 505 U.S. 277, 308-309 (1992) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule… Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a

myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent").

Federal cases approving retroactive application of *Padilla* include *United States v. Zhong Lin*, No. 3:07-CR-44-H, 2011 U.S. Dist. LEXIS 5563 (W.D. Ky. Jan. 20, 2011) (concluding that *Padilla* did not create a new rule and granting writ of *coram nobis* to withdraw guilty plea); *United States v. Hubenig*, No. 6:03-mj-040, 2010 U.S. Dist. LEXIS 80179 (E.D. Cal. July 1, 2010) (same); *United States v. Shafeek*, Crim. Case No. 05-81129, Civ. Case No. 10-12670, 2010 U.S. Dist. LEXIS 99969 (E.D. Mich. Sept. 22, 2010) ("the *Padilla* opinion may not be considered a 'new rule'").

3. State courts applying *Padilla* retroactively

New York courts have interpreted the intent and action of the U.S. Supreme Court to indicate that *Padilla's* protection runs retroactively. *See People v. Paredes*, 2010 NY Slip Op 51668U, 2010 N.Y. Misc. LEXIS 4639 (Sup. Ct. of N.Y., New York County, Sept. 21, 2010)("While the Supreme Court has not explicitly stated that *Padilla v. Kentucky, supra*, is applicable to guilty pleas entered into prior to the issuance of *Padilla*, it seems to have indicated that those guilty pleas are to be governed by the *Padilla* standard"). Citing *Cantu-Chapa, supra*, the court held that "[t]he Supreme Court's remand of a case involving a guilty plea entered into prior to the decision in *Padilla v. Kentucky, supra*, is a

clear indication that the Supreme Court is of the opinion that *Padilla* is to be applied to cases involving pleas entered into prior to *Padilla* and subsequent to the 1996 amendments to the 1952 Immigration and Nationality Act." *Id* at 4.

A Texas appeals court has also found *Padilla* to run retroactively. *See State v. Golding*, 2011 Tex. App. LEXIS 3616, 29-30 (Tex. App. Houston 1st Dist., May 12, 2011) ("Considering the language of the *Padilla* opinion, the *Strickland* analysis, and the prevailing professional norms occasioned by major changes in immigration law [in 1996], we hold that *Padilla* -as an extension of Strickland, and not a new constitutional rule - applies to this case (emphasis added)"). The court further noted that the "recent decisions by the Fifth Circuit Court of Appeals indicate that *Padilla* applies retroactively." *Id* (citing *Santos-Sanchez, supra,* and *Cantu-Chapa, supra*).

A Minnesota appeals court also agreed that *Padilla* did not create a new rule of constitutional criminal procedure, and therefore its holding applies retroactively to cases on collateral review. *See Campos v. State*, 2011 Minn. App. LEXIS 54, Slip Op. at 3-4 (May 16, 2011) ("In March 2010, the United States Supreme Court held that federal-constitutional law requires counsel to advise his or her client whether his or her plea carries a risk of deportation. *Padilla* at 1486. Failure to so advise renders counsel constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)").

The Maryland Supreme Court held that *Padilla* runs retroactively to the effective date of the last major immigration legislation, April 1, 1997. *See Denisyuk v. State of Maryland,* 422 Md. 462 (2011). In finding that *Padilla*'s rule was not "new," the court agreed with:

> "our sister courts in the Third Circuit, Massachusetts, Illinois, Minnesota, and Texas that *Strickland* set forth a general standard for application to a specific set of facts; that decisions applying the *Strickland* standard do not establish a rule of prospective application only; and that *Padilla* is an application of *Strickland* to a specific set of facts. *Padilla*, decided on March 31, 2010, instructs that, "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." 559 U.S. at __, 130 S. Ct. at 1485. That 15-year span approximately matches the time period following the 1996 amendments to federal immigration law that made deportation "practically inevitable" for noncitizens convicted of removable offenses. *Id*. at __, 130 S. Ct. at 1480 (citing 8. U.S.C. § 1229b). The *Padilla* Court explained that those changes to immigration law "dramatically raised the stakes of a noncitizen's criminal conviction[,]" and, as a result, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Id*. at , 130 S. Ct. at 1480. Likewise, all but one of the sources cited by the Court in determining the "weight of prevailing professional norms" were published in 1995 or later, i.e., within the 15 years preceding the Court's decision in *Padilla*.
>
> We therefore need look no further than *Padilla* itself to ascertain what has been expected of defense counsel under the Sixth Amendment, in connection with advice concerning the immigration consequences of a guilty plea, at least since the 1996 amendments to federal immigration law. Stated differently, the holding of *Padilla* did not "overrule prior law and declare a new principle of law." Rather, *Padilla* applied "settled precedent [i.e., *Strickland*] to [a] new and different factual situation," and, therefore, that decision "applies retroactively.""

Id, at 481-482.

G. ASSUMING, *ARGUENDO*, THAT FLORIDA RETROACTIVITY ANALYSIS IS APPLICABLE, *PADILLA* MERITS RETROACTIVE APPLICATION PURSUANT TO *WITT V. STATE* AND *CHANDLER V. CROSBY*.

2. APPLICABILITY OF *WITT V. STATE*.

a. PROPER ADVICE OF DEPORTATION CONSEQUENCES IS A "FUNDAMENTAL RIGHT" THAT REQUIRES RETROACTIVE APPLICATION TO PREVENT "MANIFEST INJUSTICE."

Petitioner Hernandez reiterates his arguments that *Padilla* does not represent a new rule. However, he further contests the accuracy of the Court's holding regarding retroactivity under *Witt* and its progeny. If a "new rule," the protections of *Padilla* run retroactively in Florida only if "a development of fundamental significance." *Witt v. State*, 387 So. 2d. 922, at 931 (Fla. 1980). The Third District found that *Padilla* was a "new rule" and was not of "fundamental significance."

It is difficult to imagine a more fundamental right than the right to effective assistance of counsel. *United States v. Diaz-Palmerin*, 2011 U.S. Dist. LEXIS 37151, 13-14 (N.D. Ill. Apr. 5, 2011). The Supreme Court "has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Id*, citing *Strickland*, 685-86; *Gideon v. Wainwright*, 372 U.S. 335 (1963)). The right to counsel is the right to effective assistance of counsel. *Id.*

It is a "development of fundamental significance" that the Supreme Court has held that, since at least 1996, defendants have held a Sixth Amendment right to

accurate advice regarding deportation consequences of a guilty plea. *See Padilla.* In Florida, this development is significant because the Florida Supreme Court explicitly barred this exact constitutional challenge from 1987 until 2010, when the U.S. Supreme Court issued *Padilla* and intervened in the ongoing violation of Florida immigrant defendants' Sixth Amendment rights. *See State v. Ginebra,* 511 So. 2d 960 (Fla. 1987).

Other courts have opined that although "a criminal defendant does not have an absolute right to withdraw a plea of guilty once it has been entered, [he] may withdraw a guilty plea … [if] necessary to correct a manifest injustice." *Campos, supra*, Slip Op. at 4. A "manifest injustice" occurs when a guilty plea is not accurate, voluntary, and intelligent. *See id; see also Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998), reversed by *Campos*. Pursuant to *Padilla*, because ineffective counsel caused the "manifest injustice" of interfering with the intelligent entry of a voluntary plea, the pre-*Padilla* pleas must be vacated. *See Campos* at 4.

The Minnesota example is similar to the situation in Florida, where *Padilla* abrogated the long-standing Florida precedent of *Ginebra* and *Bermudez*. *See Hernandez* Slip. Op. at 6, 8. The *Campos* court recognized that *Padilla* directly reversed controlling Minnesota precedent. *See Alanis*, at 577 (deportation possibilities were formerly considered merely a "collateral consequence" of the

guilty plea, therefore, the *Alanis* court had found (in 1998) that his attorney was under no obligation to advise him of such). Nonetheless, in 2011, the *Campos* court was obliged to permit *Padilla* to have its intended retroactive effect,[5] despite any inconvenience, because accepting uninformed pleas in violation of the Sixth Amendment had created a "manifest injustice."

b. RETROACTIVITY PURSUANT TO CHANDLER V. CROSBY

The Third District erroneously found that Petitioner Hernandez failed to satisfy any of the three prongs of *Chandler v. Crosby*, 916 F.2d 718 (Fla. 2005) for meriting retroactive application of a federal constitutional development of a procedural nature. Slip Op. at 12. Hernandez disputes these findings in turn.

i. PURPOSE TO BE SERVED BY THE "NEW" RULE

The Third District held that "*Padilla* does not affect the determination of guilt or innocence" of a defendant. Slip op. at 12, 13. This is a fallacy, as applied to the instant case. Petitioner Hernandez was determined to be guilty by the court

[5] *Campos*, at *10, *11. ("Campos argues that *Padilla* merely applied the long-standing principles regarding ineffective assistance of counsel enunciated in *Strickland* to specific facts and did not announce a new rule of constitutional criminal procedure. We agree. Given (1) the procedural posture of *Padilla* (a collateral attack on a guilty plea); (2) the clear references in the opinion to its application to collateral proceedings attacking guilty pleas; (3) the analysis under long-standing principles of the right to effective assistance of counsel; and (4) the absence of any mention of retroactivity, the conclusion that the opinion does not announce a new rule of criminal procedure seems self-evident to this court. *See Padilla*, at 1478.").

solely because he entered a plea of guilty without holding the State to its burden of proof. It is reasonable to believe that defendants regularly plead guilty to facts that are somewhat, if not totally, inaccurate, because doing so is in their self-interest and minimizes risk when they are threatened with significant jail time.[6] However, the calculus of "self-interest" is significantly altered by accurate information regarding all consequences of a plea, including certain deportation, as in this case.

Curiously, the Third District found that retroactive application of *Padilla* does not further the "critical purposes of protecting "the veracity or integrity" of the underlying criminal case and preventing the conviction of the innocent." Slip op. at 13. The opposite is true. The Florida criminal courts, as well as many other criminal courts nationwide, have been exposed by *Padilla*, which revealed that for years the courts have systematically permitted convictions to occur in violation of defendants' Sixth Amendment rights to effective counsel. The State has no valid purpose, other than convenience, in preserving the *status quo* in these unlawful

[6] *See generally* W. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L. Rev 505, 509 (2001) ("Suppose a given criminal episode can be charged as assault, robbery, kidnapping, auto theft, or any combination of the four. By threatening all four charges, prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty. The odds of conviction are therefore higher if the four charges can be brought together than if prosecutors must choose a single charge and stick with it - even though the odds that the defendant did any or all of the four crimes may be the same.")

convictions, as doing so implicates and undermines the "veracity and integrity" of the criminal justice system.

The cases the Third District erroneously cited in support of its proposition – that an unconstitutional plea under *Padilla* "does not affect a determination of guilt or innocence" - are each distinguishable from the instant case. *See* Slip Op. at 13. *Apprendi*,[7] *Blakely*,[8] and *Ring* [9] presented challenges to sentencing after a trial, not questions of actual guilt or innocence. *Crawford*[10] related to a post-trial appeal to an exception to the hearsay rule, involving use of recorded spousal statements as evidence without cross-examination, not a question of guilt or innocence. None of these cases related to plea bargains with ineffective counsel. Regardless, guilty pleas are typically less about guilt or innocence then they are a bargained-for exchange where each party protects their own interests rather than expose themselves to the ambiguity of trial.

The court cannot find that there was "procedural fairness" in the instant case where ineffective counsel triggered a Sixth Amendment violation. *See* Slip Op. at 13. When Petitioner Hernandez entered his plea, it was based on an illusory

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[7] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[8] *Blakely v. Washington*, 542 U.S. 296 (2004).

[9] *Ring v. Arizona*, 536 U.S. 584 (2002).

[10] *Crawford v. Washington*, 541 U.S. 36 (2004).

"bargain." He agreed not to hold the State to its burden of proof in exchange for a period of probation rather than risk of a jail sentence. He did not make this trade in exchange for certain deportation. In a fair proceeding, he would have been informed of this hidden deportation implication of his deal. He then could have conducted his defense differently, electing to develop his case, invest in other counsel, or attempt to negotiate a more favorable charge in exchange for the plea. The present course of *Hernandez* assures conviction of the innocent defendants who made illusory deals at the urging of constitutionally inadequate (and in his case, court appointed) defense counsel.

ii. EXTENT OF RELIANCE ON THE OLD RULE

The Third District was overly concerned that Florida courts have relied on the immigration consequences warning codified in Rule 3.172(c)(8) for many years. *See* Slip Op. at 14. Its reliance was cemented by *Bermudez*, *supra*, in 1992, which barred Sixth Amendment challenges to convictions if the standard warning (albeit proven constitutionally inadequate) was given to "cure" ineffective assistance.

As observed in *Padilla*, many immigration consequences are obvious, and have remained static, harsh and consistent, subsequent to major changes to the immigration laws in 1996. *See Padilla* at 1483. Thus, for at least 15 years, Florida precedent has been effectively obstructing legal remedies to the Florida *Strickland*

violations relating to immigration consequences. The fact that the policy was broad, long-running and dictated severe consequences to ill-advised immigrants does not cut in favor of perpetuating the constitutional violation. This prong of *Chandler* does not tilt in favor of the State.

Historically, Florida jurisprudence actually acknowledged the importance of immigration consequences and counsel's primary role in advising a defendant of the immigration consequences of a guilty plea. *See e.g. Edwards v. State of Florida*. 393 So. 2d 597, 598 (Fla. 3d DCA 1981) (Edwards made two claims for relief: first, that his plea of guilty was involuntary in that the trial court failed to advise him at the plea proceeding of the possible collateral consequence of deportation; and second, that the failure of his retained counsel to advise him of this consequence rendered his counsel ineffective). The *Edwards* court observed that labeling the deportation as collateral does not diminish its significance, as this penalty has long been accepted as often far more extreme than the direct consequences which may flow from a plea of guilty to an offense. *See id* at 599, citing *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1947). Most revealing, and hauntingly foreshadowing *Padilla*, the *Edwards* court remarked:

> "The dissent sees some inconsistency in our holding on the one hand that the trial court's failure to advise the defendant of possible deportation consequences does not render the plea involuntary, and on the other hand that counsel's failure may. We do not see that placing the burden of advising the defendant on that person in the system most

> familiar with the background and status of the defendant, and the possibility or not of deportation, makes for inconsistency."

Id at 599 (emphasis added).

Of course, *Edwards* was overruled by *Ginebra* in 1987. Rule 3.172(c)(8) took effect in 1989. Finally, in *Bermudez* (reaching the conclusion opposite of its *Edwards* holding) the Third District held that Florida's warning would always cure ineffective counsel who failed to advise a defendant of immigration consequences of a guilty plea. This system would remain in place for the next 18 years, until 2010 when *Padilla* demonstrated that Florida had gone astray by rejecting *Edwards.*

iii. EFFECT OF RETROACTIVE APPLICATION

The court's concern for efficiency belies its characterization of the affect of retroactive application as adverse to the "administration of justice" for "thousands" of noncitizens (whose Sixth Amendments rights have been violated). Slip Op. at 14. If justice is the stated goal of the Florida judicial system, permitting a half-generation of known illegal pleas to stand – and in cases such as Petitioner Hernandez, lead to eventual, certain deportation – is itself "adverse" to the judicial system's purpose.

Furthermore, the efficiency problem (an opening of "floodgates") the Third District foresees is not of the proportion that the court fears. As a factual matter,

the U.S. Supreme Court, has already considered and rejected that a "floodgates" argument as a viable excuse not to recognize defendants' Sixth Amendment right to be advised regarding immigration consequences of a guilty plea. *See Padilla* at 1484-85.

The *Padilla* court itself also eased the anticipated fears of "floodgates" opening, noting that many obstacles to proving either effectiveness or prejudice. One of the hallmarks of *Strickland* actions is that, in the two-part test, if a court can easily reject the case on one prong, they do not proceed to analyze the other. *See Strickland* at 687-88, 694; s*ee also Pilla v. United States*, No. 10-4178, (6th Cir., Feb. 6, 2012), at 6 ("The United States says [*Padilla*] cannot be imposed retroactively on [attorney] Bell; [defendant] Pilla says it can. But we need not decide that issue here, because in any event Pilla cannot show prejudice").

Among the many reasons that post-conviction cases will fail include the following:

- Case presents vague or uncertain consequences, thus counsel's duty would be more easily met;
- Prejudice could not be established for any number of reasons;
- Defendant is not credible;
- Defendant would not have "reasonably" gone to trial;
- The plea did not trigger any immigration consequences; or
- Counsel properly warned (as "professional norms," even in Florida, dictate that counsel may often have exceeded the low *Bermudez* standard).

Additionally, many immigrant defendants will have no incentive to pursue post-conviction relief because they may have:

- Already served a sentence and be unwilling to risk a harsher result;
- Been deported and are disinterested in pursuing a state remedy; or
- Completed removal proceedings and granted relief.

Finally, the Florida courts have satisfactorily confronted similar obstacles in the past including, famously, in the aftermath of *Gideon v. Wainwright*, 372 U.S. 335 (1963). The court has also satisfactorily resolved major changes in application of Rule 3.172(c)(8) and other immigration-related post-conviction cases, including *Peart v. State*, 756 So. 2d 42 (Fla. 2000) and *State of Florida v. Green*, 944 So. 2d 208 (Fla. 2006).[11] Nationally, fears of a flood of cases proved unfounded, even after the federal sentencing guidelines were ruled unconstitutional in *U.S. v. Booker*. 543 U.S. 220 (2005). In each scenario, the courts processed a finite number of relevant cases and concluded the backlog over time.

Finally, the Third District Court of Appeals posited a false dichotomy when intimating that a primary concern in (and reason for not) disturbing the unconstitutional convictions was putting the state at a great disadvantage in

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[11] *Green* is very distinguishable from the instant litigation. *Green* corrected a procedural violation related to proper delivery of the immigration warning within the Florida plea colloquy, while *Hernandez* addresses a recognized constitutional violation.

seeking to try to case to conviction. In doing so, the court ignores the countervailing concern that the convictions affected by *Padilla* were achieved in violation of each defendant's Sixth Amendment rights and in tolerance of attorney conduct that fell below accepted "professional norms."

The elected State Attorneys and Attorney General charged with executing justice should have no philosophical opposition to reopening convictions attained through unconstitutional means. Conviction is not the objective of the courts and the State. Due process is. To paraphrase *Gideon*, "the right of one charged with crime to [effective] counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon, supra,* at 344.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, Petitioner/Defendant Hernandez respectfully moves this Court to UPHOLD the Third District's decision that Florida Rule 3.172(c)(8) is insufficient to cure ineffective assistance of counsel, REVERSE the Third Circuit's holding that the U.S. Supreme Court's decision in *Padilla v. Kentucky* should not be applied retroactively, and REMAND Defendant's Motion for Post Conviction Relief Under Rule 3.850 for further proceedings.

Dated: _____ day of February, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Appellant's Reply Brief was mailed by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid and depositing the same with the United States Postal Service to the person at the address set forth below.

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Florida Bar Number 0016280