IN THE SUPREME COURT OF FLORIDA

CASE NOS. **SC11-941** & **SC11-1357**
Lower Tribunal Case No. 3D10-2462

GABRIEL A. HERNANDEZ,

Petitioner & Cross-Respondent,

-vs-

THE STATE OF FLORIDA,

Respondent & Cross-Petitioner.

ON PETITIONS FOR DISCRETIONARY REVIEW FROM
THE FLORIDA THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT & CROSS-PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The State substantially accepts and adopts the factual assertions made in Mr. Hernandez' initial brief on jurisdiction, but makes the following alterations, additions and observations that may become important as the argument develops.

First, it is important to note that the trial court engaged in a plea colloquy with Mr. Hernandez, not merely a "warning," and that this two-sided conversation "included Hernandez' affirmative response (in the presence of his appointed counsel) to the trial court's question: 'Do you understand that if you are not an American citizen, the U.S. Government could use these charges against you in deportation proceedings?" *Hernandez v. State*, 61 So. 3d 1144, 1146 (Fla. 3d DCA 2011). The charges stemmed from "the sale of lysergic acid diethylamide (LSD) to a confidential informant," a second-degree felony under *section 893.13(1)(a)1, Florida Statutes (2001)*, punishable by up to fifteen years in state prison, a consequence which "was described to Hernandez by his attorney before he agreed to the plea." *Id.* The district court opinion describes the plea as "for one year of probation (with a possibility of termination after six months), completion of a substance abuse assessment and any recommended treatment, and the payment of $451 in costs." *Id*.

The district court recognized that the "trial court's careful and detailed four-page order denying Hernandez' claim was correct on the basis of binding Florida decisional law as it stood five months after *Padilla* [*v. Kentucky*, 559 U.S. ___ , 130 S. Ct. 1473 (2010)] was announced." 61 So. 3d at 1147. The district court then examined that decisional law cited by the trial court, which the district court noted was not binding upon it. *Id*. The district court noted that its sister court, in *Flores v. State*, 57 So. 3d 218 (Fla. 4th DCA 2011), "accurately observes that '[a] defendant's sworn answers during a plea colloquy must mean something,' and 'a defendant has an affirmative duty to speak up if the attorney has promised something different.'" *Id*. But the court below disagreed with that portion of the *Flores* decision that relied on the holding in *Bermudez v. State*, 603 So. 2d 657 (Fla. 3d DCA 1992), to conclude that "the trial court's warning to Flores that he *may* be deported based on his plea 'cured any prejudice that might have flowed from counsel's alleged misadvice.'" *Id*. (*quoting*, *Flores*, 57 So. 3d at 220-21)(*emphasis supplied in Hernandez*). The court below concluded that its prior decision in *Bermudez* was "no longer accurate" after *Padilla*. *Id*.

The opinion below noted that the "majority opinion in *Padilla* focuses on counsel's duty, not on the 'fair notice' warning that such a plea might (and therefore, inferentially, might not) result in deportation." 61 So. 3d at 1147. Indeed, the court noted that "the record in *Padilla* did not even include a 'may

subject you' warning as part of the plea colloquy." *Id*. The court quoted what it recognized as central to the holding of the *Padilla* majority:

> When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may carry a risk* of adverse immigration consequences. *But when the deportation consequence is truly clear*, as it was in this case, *the duty to give correct advice is equally clear*.

Id. at 1147-48 (*quoting*, *Padilla*, 130 S. Ct. at 1483)(*emphasis provided in Hernandez*). Applying *Padilla* to the similar facts of *Flores* and the case before it, the court concluded that "constitutionally effective defense counsel is required under either scenario to furnish a 'will subject you,' not a 'may subject you' warning to his or her client." *Id*. at 1148. The court further concluded that, here, "neither the plea colloquy nor Hernandez's counsel's advice . . . conveyed the warning that deportability was a non-discretionary and 'truly clear' consequence of his plea." *Id*.

In so holding, the court explicitly disagreed with the decision in *Flores*, "because in our view the ruling in *Padilla* does not turn on the fact that the Kentucky trial court and plea colloquy failed to include a 'may subject you to deportation' type of warning . . . [but rather] on the fact that a 'may' warning is deficient (and actually misadvice) in a case in which the plea 'will' subject the defendant to deportation." 61 So. 3d at 1151. The court also stated: "We anticipate that [*Florida Rule of Criminal Procedure*] *3.172(c)(8)* will require

amendment to comport with the holding in *Padilla*." *Id*. As such, the court certified conflict with *Flores*, and certified as a question of great public importance:

> 1. 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)?

Id. at 1145-46.

The district court then noted that *Padilla* itself did not explicitly hold that the new rule announced therein was to be applied retroactively. 61 So. 3d at 1149. The court recognized that, in Florida, retroactivity analysis would, in this instance, boil down to whether the new rule "constitutes a development of fundamental significance." *Id*. at 1150 (*quoting*, *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980)). Assessing three factors identified by this Court in *Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005), the district court determined, respectively: (1) that the purpose of the new rule was to assure that non-citizen defendants receive effective assistance of counsel regarding the immigration consequences of their plea, which does not affect the determination of guilt or innocence or the veracity or integrity of the underlying criminal case, 61 So. 3d at 1150; (2) that trial and appellate courts in Florida have relied for over twenty-two years on the trial court warning, a

"considerable period of reliance that militates against retroactive application," *Id*. at 1150-51 (*quotation omitted*); and (3) that retroactive application would "pave the way" for motions to vacate "thousands" of past pleas and convictions in which "the passage of time . . . puts the State at a great disadvantage in seeking to try the case to conviction.," *Id*. at 1151 (*quoting*, *State v. Green*, 944 So. 2d 208, 216 (Fla. 2006)). The court concluded that these factors cut against retroactive application, and so held. *Id*. This holding led to the court's second certified question of great public importance:

> 2. IF THE PRECEEDING QUESTION IS ANSWERED IN THE NEGATIVE, SHOULD THE RULING IN *PADILLA* BE APPLIED RETROACTIVELY?

Id. at 1146.

SUMMARY OF THE ARGUMENT

The Court should accept conflict jurisdiction in this matter in order to resolve a question of recurring importance across the state: that of how a defendant who has entered a counselled plea of guilty can show the required prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), after he has given answers to the trial court during the plea colloquy acknowledging and accepting the risk of deportation as a consequence of the plea. This issue will survive any decision by the Court on the question of retroactivity.

ARGUMENT

I. CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE.

The State recognizes that under *Florida Rule of Appellate Procedure 9.120(d)*, no brief on jurisdiction would normally be filed when jurisdiction is invoked under *rule 9.030(a)(2)(A)(v)*, seeking review of a district court decision that passes upon a question certified to be of great public importance. The State's argument on this basis for jurisdiction is therefore merely responsive to argument made by Mr. Hernandez under this heading, in order to avoid any implied concessions.

Contrary to Mr. Hernandez' assertion, the first question certified by the court below does not present "the question of whether Florida procedural mechanisms are sufficient to protect an immigrant defendant's *Sixth Amendment* right to counsel." (Init. Br. on Juris. at 5). And most certainly, the State contests that Mr. Hernandez' trial counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires findings of both unreasonable performance under prevailing professional norms and prejudice to the result of the proceeding. *Id*. at 688. Properly construed, the first certified question can only impact the latter, as the court's colloquy and counsel's performance are entirely distinct. It is only the consequence of each that is interrelated. Importantly, neither the court below, nor the Supreme Court in *Padilla*, found a violation of

Sixth Amendment rights, or even reached that ultimate issue, and a decision here can only determine whether Mr. Hernandez is foreclosed from relief. If not, further proceedings will be necessary in the courts below to determine whether Mr. Hernandez can make the required showing of prejudice under *Strickland*.

As Mr. Hernandez correctly notes, the Fifth District has aligned itself with *Hernandez* on the issue of retroactivity, but certified the issue as one of great public importance, as has the Second District. *Castano v. State*, 65 So. 3d 546 (Fla. 5th DCA 2011); *Barrios-Cruz v. State*, 63 So. 3d 868 (Fla. 2d DCA 2011). Notably, the Second and Fifth Districts do not certify the issue of prejudice under *Strickland* as one of great public importance, *Id*., nor has the Fourth District. *See, e.g.*, *Brown v. State*, Nos. 4D10-3965, 3966 (Fla. 4th DCA, June 22, 2011)(certifying conflict only).

II. CERTIFICATION OF DIRECT CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT IN *FLORES V. STATE*.

"The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that are certified to be in direct conflict with decisions of other district courts of appeal." Fla. R. App. P. 9.030(a)(2)(A)(vi); *see also*, Art. V, § 3(b)(4), Fla. Const. The certification of conflict by the district court provides this Court with jurisdiction *per se*, without the need for analysis of

whether the decision actually "expressly and directly" conflicts with the decision of another court. *State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007).

Here, the importance of the certified conflict with *Flores v. State*, 57 So. 3d 218 (Fla. 4th DCA 2011), lies in the recurring nature of the legal issues surrounding proof of the requisite prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), once deficient performance has been established for failure to advise of the deportation consequences of a plea, under *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010). These issues will necessarily survive any determination by this Court regarding the retroactive application of *Padilla* on collateral attack in Florida for any defendant whose conviction did not become final until after *Padilla* was decided.

More importantly, these issues are better addressed under the conflict jurisdiction of this Court, rather than as the certified question posed below. This is because the certified question presents the issue as one which merits a particular result, *per se*: does giving the required warning under *Florida Rule of Criminal Procedure 3.172(c)(8)* necessarily "bar" relief. *Hernandez*, 61 So. 3d at 1145, 1148 (plea colloquy did not convey warning that deportation was a "non-discretionary and 'truly clear' consequence of plea). But *Flores*, and *Bermudez v. State*, 603 So. 2d 657 (Fla. 3d DCA 1992), upon which it relied, analyzed the issue as the application of a rule of law, the *Strickland* prejudice prong, to the facts

presented, the "defendant's sworn answers during a plea colloquy." *See, e.g.*, *Flores*, 57 So. 3d at 220 (defendant "admitted that he understood what the judge said but did not believe this warning applied to him personally"). Other district courts have recognized the significance of this distinction. *See, e.g.*, *Barrios-Cruz v. State*, 63 So. 3d 868, 872 (Fla. 2d DCA 2011)(*Rule 3.172(c)(8)* "has been in effect since 1989, and it will continue to have significance, even in light of the *Padilla* decision"). This Court should now accept conflict jurisdiction over these issues to provide consistent guidance to the trial courts across the state confronted with non-citizens who wish to enter guilty pleas upon which the State can rely.

CONCLUSION

Based upon the arguments and authorities cited herein, this Court should accept the instant case for review under its certified conflict jurisdiction as being of recurring importance throughout the state. Under the rules, the State makes no argument on the certified questions, deferring to the discretion of the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 29th day of August, 2011 to: Sui Chung, Esq., Immigration Law & Litigation Group, 2964 Aviation Ave., Third Floor, Miami, FL 33133; Prof. Michael Vastine, Esq., St. Thomas Univ. School of Law, 16401 N.W. 37th Avenue, Miami Gardens, FL 33054.

I FURTHER CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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