

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

CROSS-PETITIONER'S REPLY BRIEF ON THE MERITS

PAMELA JO BONDI
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Florida Bar #909130

kristen.davenport@myfloridalegal.com

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar #773026
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990

COUNSEL FOR RESPONDENT/
CROSS-PETITIONER

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SUMMARY OF ARGUMENT

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

The Defendant's plea made him deportable under federal law. As a practical matter, then, these charges could be used against him in deportation proceedings.

This is exactly what the Defendant was told at his plea hearing, and he chose to enter that plea with full knowledge of the consequences. While he now contends that he will in fact be deported, such a contention is purely speculative.

The Defendant's situation is distinguishable from that of the defendant in the United States Supreme Court, who was told by his counsel that there were no immigration consequences and who received no contrary warning when he entered his plea.

The trial court properly concluded that the Defendant's allegation of ineffective assistance of counsel is conclusively refuted by the record, and the certified question should be answered in the affirmative.

ARGUMENT

CROSS-APPEAL BY STATE

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

The Defendant contends that the State has wrongly deemed his deportation consequences to be uncertain, reiterating his argument that deportation is a mandatory consequence of his plea. This argument fails to consider the practical reality of his situation - a reality that any reasonable defense attorney must consider in advising his client of the consequences of his plea and a reality that was actually disclosed to the Defendant during the plea hearing.

The State acknowledges that the Defendant appears to be legally *deportable* under federal law. That he is deportable, however, does not mean he inevitably *will* be deported.

The State does not contend that the Defendant would have no claim if he faced the same situation as Mr. Padilla - that is, if he was told by his attorney that his plea would have no immigration consequences, and the trial court did nothing to contradict this advice. Padilla v. Kentucky, 130 S.Ct. 1473,

1478 (2010). Indeed, such a claim would have long been valid under Florida law. See State v. Green, 944 So. 2d 208, 212-18 (Fla. 2006).

Here, however, *unlike Mr. Padilla*, the Defendant was specifically told by the trial court that the U.S. government could use the charges against him in deportation proceedings. (App. A at p. 9). The State submits that this was an accurate warning of the consequences of the Defendant's plea and an accurate description of the situation the Defendant now faces. Despite this clear warning, the Defendant chose to enter a plea. He cannot rescind this decision now, nearly ten years later.

The Defendant contends that a more specific warning should have been given - he should have been told that he would in fact be deported. (Answer Brief at p. 18). This warning would be completely inaccurate - no one knows if the Defendant *will in fact* be deported, and the State has absolutely no control over this matter.

The Defendant has been in this country, without removal proceedings having commenced, for nearly ten years since his plea. He could be deported tomorrow. He could also be here the rest of his life. No one knows, and the trial court's warning

that he *could* be deported was the most accurate assessment possible.

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

CONCLUSION

Based on the arguments and authorities presented herein and in its Cross-Appeal Initial Brief on the Merits, the State respectfully requests this honorable Court reverse the decision of the district court finding that the Defendant's claim of ineffective assistance of counsel was improperly denied, and answer the first certified question in the affirmative.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #773026
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990

COUNSEL FOR RESPONDENT/
CROSS-PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Cross-Appeal Reply 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 6th day of March, 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.

Kristen L. Davenport
Assistant Attorney General