

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.

PETITIONER'S BRIEF ON JURISDICTION

SUI CHUNG
Florida Bar No. 0034601

Sui Chung P.A.
Immigration Law & Litigation Group
Grove Place, 2964 Aviation Avenue
Third Floor
Miami, Florida 33133
(305) 444-4027, phone
(305) 444-5232, facsimile
schung@lawgroupusa.com

MICHAEL VASTINE
Florida Bar No. 0016280

Assistant Professor of Law
Director, Immigration Clinic
St. Thomas University School of Law
16401 NW 37th Avenue
Miami Gardens, Florida 33054
(305) 623-2340, phone
(305) 474-2412, facsimile
mvastine@stu.edu

TABLE OF CONTENTS

Table Of Contents.....	i
Table Of Authorities.....	ii
I. Grounds for Invoking Discretionary Jurisdiction	1
II. Statement of the Case and Facts	2
III. Certified Questions of Great Public Importance	4
IV. Certified Direct Conflict With Decisions of Other District Courts of Appeal	6
a. The Conflict: Does a Rule 3.172(c)(8) warning necessarily cure ineffective assistance of counsel post- <i>Padilla</i> ?	6
b. The certified conflict with the Fourth District decision in <i>Flores v. ...</i> <i>State</i> is valid despite <i>Flores</i> becoming a final decision subsequent to the issuance of the opinion in the instant case	8
c. The Fifth District has certified conflict with the instant case	8
V. Other Factors Compelling the Court to Accept Jurisdiction	9
VI. Conclusion	10
Certificate of Service	11
Certificate of Compliance	12
Appendix	
• <i>Hernandez v. State</i> , No. 3D10-2462; 61 So. 3d 1144; 36 Fla. L. Weekly D713 (April 6, 2011)	

TABLE OF AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
<i>Barrios-Cruz v. State</i> , 2011 Fla. App. LEXIS 8466, Fla. L. Weekly D 1229 (Fla. Dist. Ct. App. 2d Dist, June 10, 2011)	6
<i>Bermudez v. State</i> , 603 So. 2d 657 (Fla. 3d DCA 1992)	3, 7
<i>Flores v. State</i> , 35 Fla. L. Weekly D1562	1, 2, 4, 6, 7, 8, 9 (Fla. 4th DCA July 14, 2010)
<i>Flores v. State</i> , 2011 Fla. App. LEXIS 6100	4 (Fla. Dist. Ct. App. 4 th Dist. Apr. 13, 2011)
<i>Hernandez v. State</i> , 61 So. 3d 1144, 2011 Fla. App. LEXIS 10254, Fla. L. Weekly D713 (Fla. Dist. Ct. App. 3d Dist. June 3, 2011)	2, 3, 4, 6, 7
<i>Padilla v. Kentucky</i> , 130 S. Ct. 1473 (2010)	1, 2, 3, 4, 5, 6, 7, 9
<i>State v. Ginebra</i> , 511 So. 2d 960 (Fla. 1987)	7
<i>State v. Green</i> , 944 So. 2d 208; 2006 Fla. LEXIS 2534; 31 Fla. L. Weekly S 693	10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	2
<i>Vergara-Castano v. State</i> , Fla. App. LEXIS 8968, 36 Fla. L. Weekly D 1285 (June 17, 2011)	1, 4, 6, 7, 8, 9

OTHER AUTHORITY

8 U.S.C. 1101(a)(43)(b)	2
Florida Rule of Appellate Procedure 9.030(a)(2)(A)	1
Florida Rule of Appellate Procedure 9.030(2)(A)(iv)	1
Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v)	1

Florida Rule of Criminal Procedure 3.172(c)(8) 1, 2, 3, 4, 5, 6, 7, 8
Immigration and Nationality Act § 101(a)(43)(B) 2
Sixth Amendment to United States Constitution 5, 9

I. GROUNDS FOR INVOKING DISCRETIONARY JURISDICTION

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A), Petitioner Gabriel Hernandez seeks the Supreme Court to exercise its discretionary jurisdiction to review the decision of the district court below. Review is necessary pursuant to Rule 9.030(a)(2)(A)(v), as the Third District certified the following questions as matters 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*, 130 S. Ct. 1473 (2010)?
2. If the preceding question is answered in the negative, should the ruling in *Padilla* be applied retroactively?

Additionally, pursuant to Florida Rule of Appellate Procedure 9.030(2)(A)(iv), the Third District certified a conflict to the Florida Supreme Court. The Third District found that its decision in the instant case on the first of the two certified issues expressly and directly conflicts with the decision of the Fourth District in *Flores v. State*, 35 Fla. L. Weekly D1562 (Fla. 4th DCA July 14, 2010, petition for rehearing denied April 13, 2011), on the same questions of law.

Finally, the Fifth District has certified that its holding in *Vergara-Castano v. State*, Fla. App. LEXIS 8968, 36 Fla. L. Weekly D 1285 (June 17, 2011)(rehearing denied July 19, 2011), on the first certified question is also in conflict with the instant case.

II. STATEMENT OF THE CASE AND FACTS

On May 3, 2001 Petitioner, then 19 years old and a permanent resident of the United States, entered a plea of guilty to the charge of sale of LSD and was sentenced to one year of probation. *See Hernandez v. State*, 61 So. 3d 1144, 2011 Fla. App. LEXIS 10254, Fla. L. Weekly D713 (Fla. Dist. Ct. App. 3d Dist. June 3, 2011), at 3. Prior to accepting Petitioner's plea, the trial judge warned Petitioner, pursuant to Florida Rule of Criminal Procedure 3.172(c)(8), that "the U.S. Government could use these charges against you in deportation proceedings." *See id* at 4.

Petitioner's offense involved "commercial dealing" so it was considered an "aggravated felony" under Immigration and Nationality Act § 101(a)(43)(B), 8 U.S.C. 1101(a)(43)(b), triggering compulsory deportation without recourse to any discretionary relief from removal. *See id*. Petitioner's attorney did not inform him of this certain consequence of his plea. *See Hernandez v. State, supra*, at 5. The Rule 3.172(c)(8) warning also did not advise him of this certainty. *See id* at 9-10.

In July 2010, Petitioner filed a motion to vacate his plea, judgment and sentence, filed pursuant to *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). *Padilla* held that under *Strickland v. Washington*, 466 U.S. 668 (1984), defendants are entitled to effective assistance of counsel, and for immigrant defendants, this includes accurate advice regarding the certain immigration consequences of a

guilty plea. Petitioner's immigration situation is identical to that faced by Padilla. *See Hernandez v. State, supra; Padilla v. Kentucky, supra.* Both were lawful permanent residents at the time of their guilty pleas (Padilla entered his plea in 2002, Petitioner entered his plea in 2001). *See id.* Both pled guilty to narcotics offenses labeled "aggravated felonies." *See id.*

The post-conviction court denied Petitioner's motion without an evidentiary hearing, applying *Bermudez v. State*, 603 So. 2d 657 (Fla. 3d DCA 1992) and holding, as a matter of law, that the standard Florida plea colloquy given under Florida Rule of Criminal Procedure 3.172(c)(8) cured any ineffective assistance Petitioner received from his trial counsel. The post-conviction judge cited *Flores v. State, supra*, for the proposition that *Bermudez* was still valid law in Florida, post-*Padilla*.

Petitioner appealed to the Third District Court of Appeals. On April 6, 2011, the Third District held that under *Padilla*, the Rule 3.172(c)(8) warning was insufficient to cure the prejudice from Petitioner's counsel. *Hernandez v. State, supra.* The court further held, that as applied to Petitioner's case, its own decision in *Bermudez* is no longer accurate after *Padilla*, since "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," and there is a constitutional dimension to the seemingly simple distinction between a "will

subject you” warning versus a “may subject you” warning. *See id* at 10. “A “may” warning is deficient (and is actually misadvice) in a case in which the plea “will” subject the defendant to deportation.” *Id* at 19, 20.

However, the court held that *Padilla* did not have retroactive effect and therefore did not cure the constitutional violation Petitioner suffered in 2001. *Id* at 6. The court certified two questions of great public importance and certified the conflict with *Flores v. State, supra*. *See Hernandez v. State, supra*, at 2.

On April 13, 2011, the Fourth DCA denied rehearing in *Flores*. *See Flores v. State*, 2011 Fla. App. LEXIS 6100 (Fla. Dist. Ct. App. 4th Dist. Apr. 13, 2011).

On June 3, 2011, the Third DCA denied Petitioner’s motion for rehearing. *Hernandez v. State, supra*.

On June 17, 2011, the Fifth DCA aligned itself with the Fourth DCA in *Flores*, certified a conflict with *Hernandez* and certified similar questions of great public importance. *See Vergara-Castano v. State*, Fla. App. LEXIS 8968, 36 Fla. L. Weekly D 1285 (Fla. 3d DCA, June 17, 2011) (rehearing denied July 19, 2011).

III. CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE

Third District certified the following questions as matters 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*, 130 S. Ct. 1473 (2010)?

2. If the preceding question is answered in the negative, should the ruling in *Padilla* be applied retroactively?

Petitioner's case presents the question of whether Florida procedural mechanisms are sufficient to protect an immigrant defendant's Sixth Amendment right to effective counsel. It is uncontested for the purpose of this appeal that Petitioner's trial counsel's conduct fell below constitutional standards. As in *Padilla*, "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Padilla* at 1281. At issue is whether the general warning Rule 3.172(c)(8) necessarily serves as a cure to the Sixth Amendment violation, when as in Petitioner's case, the deportation consequence of "automatic deportation" is certain. If not, the Court will have to determine if it must permit retroactive application of *Padilla*, for otherwise, Petitioner will have no cure for the violation of his Sixth Amendment rights.

There is no dispute as to the great public importance of this issue. The U.S. Supreme Court held in *Padilla* held that deportation is an integral part - indeed, sometimes the most important part - of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. *Id* at 1483.

The importance of these issues is underscored by the fact that, in addition to decisions emanating from federal and state courts around the country, within Florida, the Second, Third, Fourth, and Fifth Districts have all issued opinions regarding the certified questions. *See Hernandez, supra; Flores, supra, Vergara-Castano, supra; Barrios-Cruz v. State*, 2011 Fla. App. LEXIS 8466, Fla. L. Weekly D 1229 (Fla. Fla. Dist. Ct. App. 2d Dist, June 10, 2011). The Third and Fifth Districts have held oral argument on the issues. The Second, Third and Fifth Districts have all certified question(s) and/or conflict(s) to the Court for further review.

IV. CERTIFIED DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

a. The Conflict: Does a Rule 3.172(c)(8) warning necessarily cure ineffective assistance of counsel post-*Padilla*?

In 2010, the U.S. Supreme Court held in *Padilla* that it is a violation of an immigrant defendant's Sixth Amendment due process rights for their counsel 1) to fail to advise a defendant of the actual immigration consequences of a guilty plea, including mandatory deportation, if the consequences are certain, or alternately, 2) to fail to provide general advice or refer a defendant to an immigration specialist if the immigration consequences are uncertain.

Prior to *Padilla*, courts in Florida followed the Florida Third District's 1992 decision in *Bermudez v. State, supra*, which held that the Rule 3.172(c)(8) warning

cured any misadvice by ineffective counsel regarding the immigration consequences of a guilty plea, because “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” and “defense counsel’s failure to inform defendant of possible deportation was not ineffective assistance of counsel because deportation [was considered] only a “collateral consequence” of the plea.” *Bermudez, supra*, at 658, quoting *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987).

In the instant case, the Third District ruled that its own precedent, *Bermudez v State, supra*, while “an accurate statement of federal and Florida law before *Padilla*, [is] no longer accurate.” *Hernandez v. State, supra*, at 7. However, the following week, the Fourth District denied rehearing in *Flores* and continued to apply *Bermudez* post- *Padilla*. Subsequently, the Fifth Circuit relied on *Flores v. State, supra*, in holding that “any prejudice ... is cured when the trial court gives the deportation warning.” *Vergara-Castano, supra*, at 2.

Pursuant to Rule 3.172(c)(8), the trial court read Petitioner the standard Florida warning that “the U.S. government could use the charges against you in deportation proceedings (emphasis added).” Petitioner, like *Padilla*, is subject to compulsory deportation without recourse because of his conviction.

The conflict is whether or not the general advice in the Rule 3.172(c)(8) warning, which itself did not inform that Petitioner faced certain deportation, is

sufficient to cure his counsel's failure to advise Petitioner of his mandatory immigration fate when counseling him to enter a plea of guilty.

b. The certified conflict with the Fourth District in *Flores* is valid despite *Flores* becoming a final decision subsequent to the issuance of the opinion in the instant case.

The Third District certified that its decision - holding that the Rule 3.172(c)(8) warning does not necessarily cure ineffective counsel - expressly and directly conflicts with the decision of the Fourth District in *Flores v. State, supra*, dated July 14, 2010. The Third District issued its decision on April 6, 2011. On April 6, 2011, a motion for rehearing remained pending in *Flores* and that motion was ultimately denied on April 13, 2011. The Third District then denied rehearing in the instant case on June 3, 2011. Consequently, at the time of final disposition of Petitioner's case, there existed an actual, final conflict with the Fourth District's decision in *Flores*.

c. The Fifth District has certified conflict with the instant case.

The Fifth District certified a conflict with *Hernandez*, regarding the first certified issue, in *Vergara-Castano, supra*. The Fifth District "aligned itself with the Fourth District Court of Appeal in *Flores v. State, supra*, which held that any prejudice arising from counsel's misadvice regarding the immigration consequences of a plea is cured when the court gives its deportation warning." *Vergara-Castano, supra*, at 2 (internal citation omitted). *Vergara-Castano* was

denied rehearing on July 19, 2011. Consequently, there is now another certified actual, final conflict with the instant case.

V. OTHER FACTORS COMPELLING THE COURT TO ACCEPT JURISDICTION

Petitioner's case is first in time at the Florida Supreme Court. It is the sole Florida case to benefit from both oral argument and amicus curiae briefing prior to a hearing before a District Court of Appeal. It is the only case to be certified on multiple legal questions. It is also the only case certified for conflict between multiple District Courts of Appeal.

Petitioner presents the ideal set of facts for clear review of the issue presented. Both his immigration status and the immigration consequences of his conviction are identical to that in *Padilla v. Kentucky, supra*. Other cases will present "certain" immigration consequences of convictions, but Petitioner presents a scenario where the central issues of fact and law are dictated by the U.S. Supreme Court, which has ruled that in Petitioner's situation, deportation is a clear consequence of a conviction, and counsel's failure to specifically warn as such is a Sixth Amendment violation.

The case presents a single legal theory and cannot be resolved in any way other than the Court ruling on the important issues presented. Petitioner has no alternate legal recourse such as vacating under *Green v. State*, 944 So. 2d 208 (Fla. 2006), to complicate the record. He holds lawful permanent residency and has

been convicted of only one deportable offense, allowing him to clearly demonstrate prejudice. Finally, the case does not present any conflict over evidence or credibility because post-conviction relief was denied as a matter of law without an evidentiary hearing. Petitioner's case is therefore a convenient vehicle for addressing the certified questions and conflicts between the District Courts of appeal.

VI. CONCLUSION

WHEREFORE, for the above and foregoing reasons, Petitioner respectfully seeks this Court to exercise its jurisdiction for discretionary review of his post-conviction proceedings and the two certified questions of great public importance and the conflict between District Courts contained therein.

Dated: _____ day of August, 2011.

Respectfully submitted,

SUI CHUNG
Florida Bar No. 0034601

Sui Chung P.A.
Immigration Law & Litigation Group
Grove Place, 2964 Aviation Avenue
Third Floor
Miami, Florida 33133
(305) 444-4027, phone
(305) 444-5232, facsimile

MICHAEL VASTINE
Florida Bar No. 0016280

Assistant Professor of Law
Director, Immigration Clinic
St. Thomas University School of Law
16401 NW 37th Avenue
Miami Gardens, Florida 33054
(305) 623-2340, phone
(305) 474-2412, facsimile

Sui Chung

Michael Vastine

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on Jurisdiction 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.

Timothy R.M. Thomas
Office of the Attorney General
Rivergate Plaza, Suite 650
444 Brickell Avenue
Miami, Florida 33131

Michael Ufferman (Amicus Curiae)
Chair, Amicus Curiae Committee
Florida Association of Criminal Defense Lawyers
Michael Ufferman Law Firm
2022-1 Raymond Diehl Road
Tallahassee, Fl 32308

Tania Galoni (Amicus Curiae)
Amicus Committee
American Immigration Lawyers Association, South Florida Chapter
Florida Immigrant Advocacy Center
3000 Biscayne Blvd, Suite 400
Miami, Florida 33137

Michael Vastine
Florida Bar Number 0016280

CERTIFICATE OF FONT COMPLIANCE

Undersigned counsel certifies that the typeface used in this brief is 14 point proportionately spaced Times New Roman.

Michael Vastine
Florida Bar Number 0016280

Date