

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 & Cross-Respondent,

-vs-

STATE OF FLORIDA,
Respondent & Cross-Petitioner.

PETITIONER'S CROSS ANSWER BRIEF ON JURISDICTION

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SUMMARY OF THE ARGUMENT

Petitioner Gabriel A. Hernandez and the State agree that the Court should accept jurisdiction of this matter, despite the parties possessing opposing views on the proper resolution of each issue presented in the case. The parties agree that the Court must entertain the issues presented in this case in order to determine the impact of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), upon Florida criminal procedure and to assure uniformity in the criminal justice system throughout the state of Florida. Petitioner summarizes the jurisdictional basis below and urges the court to accept jurisdiction over this matter and direct briefing on the merits of the issues contained therein.

Petitioner's immigration status and the immigration consequences of his conviction are identical to that presented in *Padilla v. Kentucky, supra*. *Padilla* held that deportation is a clear and certain consequence of Petitioner's conviction, meaning trial counsel's failure to specifically warn him as such violated the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, the Court must decide whether the immigration warning in the Florida Rule 3.172(c)(8) plea colloquy constitutes a *per se* cure to the prejudice Petitioner suffered because of his ineffective counsel. If not, and if *Padilla* is given retroactive effect pursuant to either *Teague v. Lane*, 489 U.S. 288 (1989) or *Witt v. State*, 387 So.2d 922 (Fla.

1980), Petitioner and other similarly situated defendants are entitled to an evidentiary hearing to determine whether he suffered prejudice, pursuant to the second prong of *Strickland*.

In the State's brief on jurisdiction, it "substantially accept[ed] the factual assertions made in [Petitioner]'s initial brief on jurisdiction." Resp. Br. on Juris. at

1. The State further agreed with Petitioner regarding the subjects at issue in the present Petition. These subjects include the certified conflict between decisions issued by district courts of appeal regarding the following two certified questions, designated of great public importance by the Third District:

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?

The Third District found, and the State agrees, 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. Additionally, the State agrees that the Fifth District subsequently certified that its holding in *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 in conflict with the instant case, as has the Second District in *Barrios-Cruz v. State*, 2011 Fla. App. LEXIS 8466, 6 Fla. L. Weekly D 1229 (Fla. Dist. Ct. App. 2d Dist, June 10, 2011).

I. CONCLUSION

WHEREFORE, for the above and foregoing reasons, in addition to the arguments raised in his initial Brief on Jurisdiction, Petitioner respectfully requests the Court to exercise its jurisdiction for discretionary review of his post-conviction proceedings and the two certified questions of great public importance and the certified conflict between District Courts contained therein.

Dated: _____ day of September, 2011.

Respectfully submitted,

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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.

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CERTIFICATE OF FONT COMPLIANCE

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

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