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.

REPLY/CROSS-ANSWER BRIEF OF PETITIONER/DEFENDANT

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I. INTRODUCTION

The State's Answer Brief (hereinafter "Answer") demonstrates that the State is laboring under the misperception that Mr. Hernandez faces uncertain immigration consequences. As a matter of fact and law, the immigration consequences of Petitioner Hernandez' conviction are clear. He faces certain deportation without recourse to any discretionary waiver. Under the Sixth Amendment, these facts must be presented to a defendant prior to him entering a guilty plea.

While this discussion is more germane to the Cross-Reply section of the present brief, the State repeatedly invokes this misinformation in its opening section on the applicability of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in criminal proceedings in Florida. *See* Answer at 6. This fallacy must be confronted at the outset.

Padilla held that an immigrant's right to constitutionally effective criminal counsel includes the right to be properly advised of the logical immigration consequences or "risk of deportation" that flow from a plea of guilty:

> "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."

Padilla at 1483.

Mr. Padilla's conviction for drug distribution made him subject to automatic deportation. *Padilla* at 1478. Petitioner Mr. Hernandez' conviction for a small drug sale also makes him subject to automatic deportation. *See* Slip Op. at 5 ("His [Hernandez'] plea and conviction was and is classified as an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), mandating his deportation under 8 U.S.C. § 1227(a)(2)(A)(iii), and (B)(i).")

For all practical purposes, Mr. Hernandez presents the identical legal issue as Mr. Padilla. There can be no dispute that his consequences are clear. The U.S. Supreme Court said as much in *Padilla*. *Padilla* at 1478.

Thus, the State's repeated characterizations of the immigration consequences in this case are inaccurate and incomplete, including:

- "The warning given by the trial court accurately reflects the true consequences of the plea – the Defendant *could* be deported." Answer at 6.
- "He entered this … plea … having been directly informed of its possible effect on his immigration status." Answer at 6.
- "*Padilla* does not affect the validity of the Defendant's plea in light of the express warning he received." Answer at 6.

Mr. Hernandez' immigration consequence is indisputable. It is compulsory deportation. That the State would attempt to characterize it otherwise is perplexing. The State's claim is factually and legally erroneous.

At best, Mr. Hernandez' trial counsel may have conveyed that he "might" have an immigration problem. *See* Slip Op. at 4. The court warning pursuant to Florida Rule Crim P. 3.172(c)(8) conveyed that Mr. Hernandez "may" have an immigration problem. *Slip op* at 2. The trial court did not give an "express warning" of any detail.

The State may debate the impact of Florida's judicial warning for curing ineffective counsel. However, for the purposes of this appeal, it is a matter of fact that the consequence of Mr. Hernandez' plea is mandatory deportation, the same as discussed in *Padilla.* To state otherwise is contrary to established precedent and the federal immigration statute. *See Padilla*; 8 U.S.C. § 1101(a)(43)(B); 8 U.S.C. § 1227(a)(2)(A)(iii). It is also a matter of fact, for the purposes of this appeal, that this warning was not conveyed by trial counsel. To state otherwise is factually erroneous, contradicted by the record, and unnecessarily clouds the present controversy.

II. CROSS-ANSWER OF PETITIONER HERNANDEZ

F. Summary of Argument

The Court below erred in ruling that the Sixth Amendment protections discussed in *Padilla* do not apply retroactively. The Court erred in failing to discuss the federal retroactivity standards, never considering that *Padilla* was an "old rule," by concluding that the Florida retroactivity tests under *Witt v. State* are controlling, and that *Padilla* should not be applied retroactively under *Witt.* Petitioner sought review of the Third District Court's certified question of great public importance:

SHOULD THE RULING IN *PADILLA* BE APPLIED RETROACTIVELY?

As argued in the Initial Brief, this question should be answered in the positive and the lower court's ruling reversed.

G. The State Cannot And Does Not Directly Dispute That The Combination Of Federal Precedent Compels The Conclusion That *Padilla* Must Run Retroactively.

4. Federal "Old Rule" Analysis

As discussed in the Initial Brief (hereinafter "Initial"), Mr. Hernandez argues that *Padilla* used the familiar structure of *Strickland v. Washington,* 466 U.S. 668 (1984), to resolve a specific factual scenario (ineffective assistance regarding immigration consequences tainting the validity of a plea), making it an "old rule" within the federal retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989).

First, the Court found that "*Strickland* applies to *Padilla's* claim." *Padilla* at 1482. Thus the facts of *Padilla* could be resolved within long-standing precedent. The court discussed the impact of *Padilla* on existing convictions, and opined that the criminal courts, well versed in applying Strickland would be capable of re-visiting affected cases and screening out the meritless cases. *Id* at 1485.

The court rejected the notion that *Padilla* would invite a flood of meritless litigation in "those convictions already obtained as the result of plea bargains" because "there is no reason to doubt that 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.*

There would be no need for the *Padilla* court to discuss pleas "already obtained" if the case did not apply retroactively. *Id*; *United States v. Orocio*, 645 F.3d 630 (3rd Cir. 2011), 2011 WL 2557232, at *7 ("[I]t is not unlikely that the *Padilla* Court anticipated the retroactive application of its holding on collateral review when it considered the effect its decision would have on final convictions."); *United States v. Hubenig*, No. 6:03-mj-040, 2010 WL 2650625, at *8 (E.D. Cal. July 1, 2010) ("If the Court intended *Padilla* to be a new rule which would apply only prospectively, the entire 'floodgates' discussion would have been unnecessary.").

The U.S. Supreme Court has long "recognized that "preserving the possibility of" discretionary relief from deportation … "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Padilla* at 1483, citing *St. Cyr v. INS*, 533 U.S., at 323 (2001). We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief." *Padilla* at 1483.

In other words, the Supreme Court expected this professional conduct prior to *St. Cyr* (2001), at least since 1996. *Id.* Thus, the outcome of *Padilla* was actually "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. The court obviously found that the right existed in 2002, the time that Mr. Padilla entered his ill-advised plea in Kentucky. Also noteworthy is the court's use of the past-tense. *Padilla* did not create a new expectation of counsel or right of defendants. The court has long "expected" the bar to display professional responsibility and effective representation regarding immigration consequences of guilty pleas. *See id*; *Padilla* at 1483. The court notes that if the bar has actually met this long-held expectation, the "flood" of meritorious cases needing correction may be minimal.

The court even establishes the standard by which the pre-*Padilla* cases must be evaluated:

> "For 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. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.

Padilla at 1485. Applying their standard, and obviously (for reasons discussed in the subsequent section) finding that the Sixth Amendment right encompassing immigration consequences existed retroactively in 2002, the court remanded *Padilla* for further proceedings to assess "prejudice" under *Strickland.*

5. Federal New Rule Analysis

Alternately, even if a "new rule," *Padilla* must be deemed retroactive when examined under *Danforth v. Minnesota*, 552 U.S. 264 (2008). Under *Danforth*, a "new rule" can never be announced and applied in an appeal of a collateral case unless the matter meets an exception to the general prohibition of "new rules" being applied retroactively. *Danforth*, *supra*, at 267, n.1 (2008) ("'[u]nder *Teague*, new rules will not be **applied** or **announced** in cases on collateral review unless they fall into one of two exceptions,'" *citing Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (emphasis added). *Padilla* was a collateral attack and the concept was announced and applied to Mr. Padilla's benefit. Therefore, if a "new rule" *Padilla* must meet an exception.

6. Combination "Two-Part" Federal Analysis – The Only Options Under Controlling Precedent Are That *Padilla* Is Either An "Old Rule" Or A "New Rule Exception." *Padilla* Applies Retroactively Under Both Options.

The State did not attempt to counter this argument – essentially a "heads we win, tails they lose" proposition - because it cannot. *See generally* Answer.

Instead, the State, acknowledging that there is a significant split in the courts on the issue of *Padilla* retroactivity, sides with the cases favorable to it. The State did not challenge that Mr. Hernandez' two-part argument is in fact correct. The Court should not adopt the reasoning of the cases the State prefers because Mr. Hernandez can demonstrate that they were either 1) incorrectly decided or 2) decided on a different basis, without the benefit of the argument clearly stated above.

For example, the State relies on *United States v. Chang Hong*, 2011 U.S. App. LEXIS 18034 (10th Cir. Aug. 30, 2011). *See* Answer at 18. *Chang Hong* is, of course, significant because it was decided by a U.S. Court of Appeals and ruled against retroactive application of *Padilla*. *See id.* However, the Tenth Circuit was not presented with Mr. Hernandez' "two-part" argument. Unfortunately for him, "Chang Hong argued *Padilla* is a new rule of constitutional law that applies retroactively to cases on collateral review." *Chang Hong* at 1-2. The case also did not undergo complete briefing or oral argument. *Id*

at 1. As such, the Tenth Circuit did not consider the present argument and *Chang Hong* is not controlling over Hernandez' theory.

The State also cites to the Seventh Circuit decision in *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011). *See* Answer at 18, 21. As discussed in the Initial Brief, it is not surprising that *Chaidez* was decided as it was. *See* Initial at 26. Both parties in *Chaidez* stipulated that *Padilla* would not meet an exception to the prohibition on retroactive applications of "new rules." *See Chaidez* at 688. Consequently, the *Danforth/Penry* argument present in the instant case was absent from the Seventh Circuit litigation. Thus, the Seventh Circuit also did not confront the "two-part" theory presented by Mr. Hernandez, making its decision not squarely on point.

Thus, the federal landscape regarding retroactivity is not as bleak as the State argues. Two of the three federal courts of appeal with published decisions on retroactivity did so by relying on a different basis than presented in the instant case. A third court, the Third Circuit, ruled in favor of retroactivity under the "old rule" analysis. *See United States v. Orocio*, 645 F.3d 630 (3rd Cir. 2011).

H. Under The Supremacy Clause Of The Federal Constitution, The Florida Retroactivity Analysis Is Irrelevant If The Result Would Produce Lower Protections Than Mandated By The Sixth Amendment

The State may be correct that the Florida standard for retroactivity of "new rules" can be seen as less stringent than the federal standard. However, under the Supremacy Clause and through the applicability of the Fourteenth Amendment, the States cannot offer lower protections than those guaranteed by the Federal Constitution. *See Danforth, supra.* If Mr. Hernandez has Sixth Amendment rights running retroactively from *Padilla* as a matter of federal constitutional law, the state analysis is irrelevant, if this analysis would produce lower protection than the floor established in the U.S. Constitution. *See id.*

Therefore, the Court must rule on the tension of Mr. Hernandez' two-part argument for retroactivity – both of which come out in favor of retroactivity – before considering any Florida analysis under *Witt.*

I. Retroactivity Analysis Under Florida Law

Mr. Hernandez reiterates his arguments from his Initial Brief. To summarize, the state analysis of retroactivity under *Witt*[1] and *Chandler*[2] must consider Florida's flip-flopping on this very issue in *Edwards*[3] and *Ginebra*.[4] The Florida courts first accepted (*Edwards*), then completely rejected (*Ginebra*), the very Sixth Amendment right at issue in *Padilla*. It would be incongruous for the

[1] *Witt v. State* 387 So. 2d. 922 (Fla. 1980).
[2] *Chandler v. Crosby*, 916 F.2d 718 (Fla. 2005).
[3] *Edwards v. State of Florida*, 393 So. 2d 597 (Fla. 3d DCA 1981).
[4] *State v. Ginebra*, 511 So.2d 960 (Fla. 1987).

Florida courts to find that *Padilla* is both not "old" and not a "development of fundamental significance" under *Witt* and *Chandler*.

Curiously, part of the State's argument in favor of denying retroactivity under *Chandler* is the "effect on the administration of justice … which could swamp the court with thousands of plea withdrawals." Answer at 5. On one hand, the state would use a "floodgates" argument to its own benefit in its attempt to deny *Padilla* is a retroactive "new rule" under *Witt*. *Id.* On the other hand, the State denigrates the "floodgates" discussion in *Padilla*, as superfluous language that does not support that the Supreme Court contemplated that *Padilla* is an "old rule." Answer at 20. The "flood" cannot be both relevant and irrelevant, as the State sees convenient. Similarly, *Padilla* cannot be both "not old" and "not fundamentally significant."

Finally, as a factual matter, the State has no basis for its wildly speculative claims of "thousands of plea withdrawals" (Answer at 6) "overwhelming to the administration of justice" (Answer at 12) with "thousands of pleas" (Answer at 12). There may well be a significant number of cases, but the courts will be able to shoulder the load, just as they did after *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in state criminal proceedings), *U.S. v. Booker*, 543 U.S. 220 (2005) (unconstitutionality of federal sentencing guidelines), and *State v.*

Green, *supra*, all of which required re-examination or re-litigation of large, but smaller-than-expected, numbers of cases.

Padilla was decided on March 31, 2010. Almost two years later, the State acknowledges that there have been only "dozens" of district court cases involving *Padilla* claims. Two years is a significant sample size, because many defendants and their counsel feared that a two-year window, under Florida Rule Crim. P. 3.850, for filing *Padilla* motions tolled on March 31, 2010, so they rushed to file for post-conviction relief in the ensuing two-year period.

To give a precise example, in the Third District Court, a canvassing of the court on-line decision database reveals that there have been exactly 59 cases citing *Hernandez* (the controlling precedent and the only case permitted oral argument in the Third DCA) to date. *See* http://www.3dca.flcourts.org/Opinions/Opinions.shtml (last surveyed February 29, 2012). The Third District reviews the trial decisions of 55 judges sitting in Miami-Dade County (46)[5] and Monroe County (9).[6] Surely, many more cases will follow, but the onslaught alluded to by the State is hyperbolic speculation. Many cases will fail to establish *prima facie* eligibility for relief. *See* Initial at 40; *Padilla* at 1483. A large number of defendants also will

[5] http://www.jud11.flcourts.org/judgesdirectory.aspx?pid=108 (Miami-Dade Circuit and County Court judges).

[6] *See* http://www.keyscourts.net/judges/circuitjudges.html (Monroe County Circuit and County Court judges).

not want or need to seek relief. *See* Initial at 41; *Padilla* at 1485-86. Once the cases are distributed throughout the entire corps of judges, even large numbers of remaining cases are unlikely to produce the doomsday scenario that the State's argument is predicated upon.

J. Timeliness

The State argues, in the alternative, that if *Padilla* is an "old rule" with retroactive application, then Mr. Hernandez' motion is untimely. However, Florida precedent has barred this exact type of claim since at least 1992, so he could not have raised it sooner. *See Ginebra*, *supra*; *Bermudez*, *supra.* The present litigation demonstrates that it has been impossible to raise and favorably resolve older claims, even subsequent to the issuance of *Padilla* in March 2010.

Thus, the proper remedy would to be to follow this Court's reasoning in *Dixon v. State*, 730 So.2d 265 (Fla. 1999). In *Dixon*, the court realized that a system that produced disparate results in convictions, solely on the misfortune of the date the conviction was entered, "compel[led] a conclusion that it is appropriate to utilize the date of [a] decision announcing retroactivity, specifically the date of this Court's mandate, as the beginning date for calculating the additional two-year window" for bringing claims under Rule 3.850. *See Dixon* at 267.

This is consistent with and parallel to the Court's decision in *Green*, *supra*, in which the Court adjusted the two-year window for filing Rule 3.850 motions to

the date that the Court removed the legal obstacles presented by the Florida District Courts. It would be consistent with Rule 3.850(b)(2) to do the same here. Prior to *Green*, "the Third District ruled that circumstances falling short of initiation of deportation proceedings were insufficient to establish threatened deportation." *Green* at 210. Similarly, the Third District has found *Bermudez* inapplicable post-*Padilla* and *Ginebra* is inherently violative of the Sixth Amendments. These cases obstructed bringing action within the normal confines of Rule 3.850.

It is of important note that *Padilla,* of course, bypassed any Kentucky scheme of retroactivity in remanding the case directly for hearings on prejudice. A State procedural mechanism will be suspect if it causes violation of federal constitutional rights. *See Danforth, supra.*

III. CROSS-REPLY OF PETITIONER HERNANDEZ

A. Summary Of Argument

Florida Rule 3.172(c)(8) is insufficient to cure the ineffective assistance of counsel in Petitioner's case, where deportation was a certain, mandatory consequence and he was entitled to be advised of this information, pursuant to *Padilla v. Kentucky*. The State seeks review of the Third District Court's certified question of great public importance:

> DOES THE IMMIGRATION WARNING IN FLORIDA RULE OF CRIMINAL PROCEEDURE 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)?

This question must be answered in the negative and the lower court's decision upheld.

B. The State Wrongly Asserts That Petitioner's Immigration Consequences Are "Uncertain."

The State argues that there is doubt as to the certainty of the deportation consequences that Mr. Hernandez faces as a result of his conviction. *See* Answer, at 25-26, 29. This argument is without merit, as discussed in Section I, *supra*. The State does not present any legal authority to support its baseless claim. Mr. Hernandez' conviction is considered an "aggravated felony" under U.S. immigration law and mandates deportation without recourse to any discretionary

relief from deportation. *See* Initial at 4-5; *Padilla* at 1478 ("As a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation"). Ironically, to quote Justice Stevens, the State, just like "Padilla's counsel[,] could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute." *Padilla* at 1483.

The State also opines, without citation, that as a factual matter there is unpredictability as to when the U.S. government initiates removal proceedings against a given immigrant. *See* Answer at 29. However, the State provides no argument that, when immigration proceedings are commenced against Mr. Hernandez, removal will not be the sole possible outcome of these proceedings. Thus, the State casts no doubt on the immigration consequences of Mr. Hernandez' conviction.

In fact, this Court has soundly rejected the State's argument in *Green v. State.* 895 So. 2d 208, 210 (Something "less than the initiation of a deportation proceeding will constitute … a 'threat of deportation'"). *Green* acknowledged that sometimes there is considerable passage of time before deportation proceeding commence but the defendant may "have knowledge of the threat of deportation

based on the plea" prior to being "specifically threatened with deportation." *See id. Green* actually requires defendants to bring, and courts to hear, certain 3.850 motions regardless of whether deportation proceedings are commenced, since the immigration consequences are predictable, even if not presently executed. *Id.*

The same scenario was presented in *Padilla v. Kentucky*. Mr. Padilla was convicted of an "aggravated felony" in 2002 and his deportation became compulsory at that time. *See generally Padilla.* However, he remained physically in the United States through 2010 when the U.S. Supreme Court heard his case. His presence in the U.S. did not stop the U.S. Supreme Court from recognizing that Mr. Padilla had suffered constitutionally insufficient counsel and it remanded his case for a hearing on whether he could satisfy a showing of prejudice under *Strickland. Padilla* at 1486-87.

Petitioner was not afforded an evidentiary hearing; therefore, his factual allegations must be accepted as true for the purposes of his appeal. It is uncontroverted that Mr. Hernandez faces certain deportation. *See Padilla* at 1478. His conviction carries identical consequences as those discussed in *Padilla*. The central issues were settled by *Padilla.* Mr. Hernandez faces certain deportation, this fact was obvious at the time of his conviction. His counsel had an obligation to inform him of this certainty. *See id.*

C. The Court Only Warned That Mr. Hernandez "Could" Have Immigration Consequences. This General Warning Was Inadequate Under *Padilla.*

The State is correct in stating that in "the instant case … the Defendant was plainly informed [by the trial court] that he could in fact be subject to deportation for his crime." Answer at 26 (emphasis added). Unfortunately, constitutionally competent counsel was required to inform Hernandez that he would, in fact be deported. In cases involving mandatory deportation consequences that are "easily determined… simply from reading the text of the statute" counsel must advise as such. *See Padilla* at 1483.

A warning that a defendant "could" have consequences would only be appropriate in instances where these consequences were uncertain. 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.*

The State selectively mis-quotes *Padilla*, and would have this court believe that Padilla holds only that "counsel must inform her client whether his plea carries a *risk* of deportation." Answer at 26, citing *Padilla* at 1487 (emphasis added in Answer). *Padilla* makes quite clear that when this "risk" is certain deportation,

this certainty must be expressed by counsel. *Padilla* at 1478. Only when the "risk is lesser or uncertain may a general warning be sufficient. *Padilla* at 1483.

The State then cites "numerous" federal cases in which an accurate judicial warning did cure ineffectiveness. *See* Answer at 6. This is irrelevant to the present analysis (where the warning did not), and is rooted in the State's ignorance that Mr. Hernandez' immigration consequences are not "obvious." *See id.* The cases actually generally undercut the State's argument. *See* Answer at 31-32 (citing e.g. *United States v. Hernandez-Monreal*, 404 Fed.Appx at 715 (4th Cir. 2010) (in a conviction for alien smuggling – clearly an offense triggering automatic deportation under 8 U.S.C § 1101(a)(43)(N) – and court warned that plea would make it difficult or impossible to remain in U.S. legally); *Falcon v. DHS*, 2010 WL 5651187 (C.D. Cal. Nov. 29, 2010) (in case of theft offense with 16-month sentence – clearly an offense triggering automatic deportation under 8 U.S.C. 1101(a)(43)(G) – and court warning acknowledged "the offense charged will have the consequence of deportation"). An exception is the State's reliance on *Gonzalez v. United States*, a trial court opinion that is equally irrelevant to the present analysis as it involved a *pro se* appeal of an administrative immigration case. The case was dismissed for lack of subject matter jurisdiction (filed in wrong forum). *See* 2010 WL 3465603 (in *dicta* the court did not address the issue of "mandatory" versus "possible" consequences in that case, and did not confront that the crime

actually did trigger mandatory immigration deportation under 8 U.S.C. § 1101(a)(43)(D)).

Again, it is concerning that the State cites cases and creatively misstates their holdings. It complicates an already complex topic and is misleading.

D. The Florida Warning Is Inadequate To Warn A Defendant Of Clear, Mandatory Immigration Consequences. Consequently, The Warning Is Insufficient To Cure Constitutionally Deficient Counsel In Cases Triggering "Certain" Deportability

The State acknowledges that the Florida plea colloquy only includes a "warning that the defendant's criminal conviction may result in deportation." Answer at 27 (emphasis added). The State does not attempt to reconcile this general warning ("may result") with the requirement of clear warning ("will result") discussed in *Padilla* for cases with clear immigration consequences. There simply is no argument that the Florida warning is sufficient to cure ineffective advice in cases where the conviction will trigger clear immigration consequences. *See Padilla* at 1478.

The Florida warning, if spoken by counsel to Mr. Hernandez, would fall below constitutional standards. It is absurd to suggest that the same constitutionally deficient statement could be proper guidance, much less cure ineffective counsel, simply because the mis-advice was spoken by a judge.

The Third District properly held that Rule 3.172(c)(8) is too vague to cure ineffectiveness in cases that involve clear immigration consequences. In doing so it properly retreated from its decision in *Bermudez.* *See* Slip Op. at 6.

Every Florida case the State cites (to support its proposition that the general warning is sufficient to cure ineffectiveness) relies on *Bermudez* as its foundation. *See* Answer at 28 (citing *Flores v. State*, 57 So. 3d 218, 220-21 (Fla. 4th DCA 2010); *Santiago v. State*, 65 So. 3d 575, 576 (Fla. 5th DCA 2011), rev. dismissed, 71 So. 3d 117 (Fla. 2011). The State completely fails to mention that *Flores* was denied rehearing after *Hernandez* was decided below (and the Third DCA withdrew from *Bermudez*), so the legal basis of *Flores* and its progeny are highly specious.

Additionally, again the State mis-characterizes the text of a U.S. Supreme Court decision to support a conclusion in keeping with its position. This time it is *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). *See* Answer at 28. The State would have this court believe that:

> "*Blackledge* supports the notion that "solemn declarations in open court carry a strong presumption of verity" forming a "formidable barrier in any subsequent collateral proceedings."

While true, placed in context, what the Supreme Court actually concluded in *Blackledge* (two sentences later) was:

> "What *Machibroda* and *Fontaine* indisputably teach, however, is that the barrier of the plea or sentencing proceeding record, although imposing, in not invariably insurmountable."

Blackledge at 74. Ironically, the *Blackledge* court proceeded to recognize that "[Mr. Allison's] guilty plea was induced by an unkept promise" (of an agreed upon 10- year sentence, when Allison was actually sentenced to 17-21 years) and that the defendant was denied the benefit of his bargain. *Id* at 68. Analogizing to contract law, the court found that plea agreements "can be set aside by a court on the grounds of fraud, mistake, duress, "or on some ground that is sufficient for setting aside other contracts."" *Id* at 75. Thus, *Blackledge* actually supports Mr. Hernandez' claim, as he was also wrongly induced to accept a contract with a deceptive premise. Similar to the defendant in *Blackledge*, Mr. Hernandez deserves recourse for the unfairly procured bargain.

E. The State's Assertion That It Would Be Unreasonable For Petitioner To Have Gone To Trial Is Speculative And Not Supported By The Record. This Issue Is Properly The Subject Of An Evidentiary Hearing On Remand.

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*. The U.S. Supreme Court has recognized that improper guidance on immigration consequences actually is central to entering a valid plea. *Padilla* at 1486.

The State would have the court believe that Mr. Hernandez' criminal proceeding was a fair and deliberative process, and that he presently manipulates the proceedings "willy-nilly" to seek a preferable result. *See* Answer at 27, citing *Scheele v. State*, 953 So. 2d 782, 785 (Fla. 4th DCA 2007).

The comparison to *Scheele* is unconvincing for many reasons. First, *Scheele* involved a warning that involved accurate judicial advice (that Scheele faced a 28-year maximum prison sentence) contrary to that allegedly given by counsel (that Scheele faced only a ten-year sentence). *Scheele* at 785. Mr. Hernandez did not receive contradictory advice from a judge that would have alerted him to the certainty of his deportation. Second, the duty to advise of proper consequences attached to counsel, so it is counsel who should have properly been prompted to comply with Mr. Hernandez's constitutional rights. Finally, *Padilla* held that improper advice undermines the integrity and willingness of the plea itself. The State cannot choose to characterize such a claim, involving a fundamental right, as creating a "meaningless charade." *See id.* The proceeding was robbed of its integrity on account of the ineffectiveness of counsel, not an action by Mr. Hernandez.

Next, the State argues that Mr. Hernandez would not have reasonably rejected the plea, given that the charge carried a maximum sentence of fifteen years

and he was given a "slap on the wrist" of one year probation. *See* Answer at 33. This argument fails as well.

First, this issue is premature. "Reasonableness" is properly the subject of an evidentiary hearing before a fact-finding court on remand.

Second, at the evidentiary hearing, this argument will cut two ways, not just negatively toward Mr. Hernandez. If the State had a quality case that it could prove at trial, it may not have been reasonable for it to resolve the charges so lightly at the first sounding hearing. Nothing in the record suggests that the State was likely to both 1) prevail at trial and 2) secure the maximum 15-year sentence.

Third, and most significantly, Mr. Hernandez would have reasonably rejected the plea if he was properly informed that the "slap on the wrist" was illusory. He was never informed that the actual punishment was a term of probation, followed by certain deportation to Nicaragua, a country he left when he was one year old.

IV. 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 March, 2012.

Respectfully submitted,

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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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