PETITION FOR A WRIT OF CERTIORARI

Opinions Below

In an unpublished opinion under docket number 2004QN043051, dated March 3, 2010, the Criminal Court of the City of New York, County of Queens, denied Petitioner's motion to vacate his conviction. The Appellate Term of the Supreme Court of the State of New York for the 2nd, 11th, and 13th Judicial Districts then denied Petitioner's application for a certificate granting leave to appeal on June 7, 2010. On August 12, 2010, in an unpublished decision, the Court of Appeals of New York denied Petitioner's leave to appeal and dismissed the petition. 2010 N.Y. Lexis 2709.

Jurisdiction

This Court has jurisdiction to review a state court's denial of post-conviction relief on grounds of ineffective assistance of trial counsel, where the state court resolved a federal issue on exclusively federal-law grounds or where the state court decision raises a Sixth Amendment question. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 1257; Sears v. Upton, 130 S.Ct. 3259 (2010); Padilla v. Kentucky, 559 U.S. ----, 130 S.Ct. 1473 (2010).

Constitutional and Statutory Provisions Involved

Article VI of the United States Constitution states in pertinent part that:

> This constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The United States Constitution, Amendment VI, provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The United States Constitution, Amendment XIV, § 1, provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

At issue before the Court is first, whether this court's mandate that by virtue of the constitution, counsel must advise their client's of immigration consequences of a criminal plea, is applicable retroactively.

Petitioner faces deportation as a consequence of a 2005 misdemeanor conviction for insurance fraud in the third degree for which he received a one-year conditional discharge. Petitioner's counsel advised him to enter said plea without advising him affirmatively that the conviction would be considered a conviction of "moral turpitude" under the Immigration & Nationality Act ("INA").

If the Court does not clearly state that Padilla v Kentucky, 130 S. Ct. 1473 (2010) and the rule set forth therein applies retroactively then the Petitioner will be deported leaving his wife, his daughter and his yet to be born second child along with his parents and siblings here in the United states, while he is returned to the country of Georgia. In essence he will be exiled.

Immigration Regulatory Framework

Under 8 U.S.C.A. § 1227(2)(A)(i)(I), an alien who is convicted of a crime involving moral turpitude committed within five years

after the date of admission is deportable. The list of cases which fall under this umbrella is very broad and not delineated by INA as asserted in the concurrent opinion of Justice Alito in Padilla. *See also* People v Rampersaud, 31 Misc.3d 1229(A), Slip Copy, 2011 WL 1901869.

Under *Padilla*, "our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal guilty plea and the concomitant impact of deportation on families living in this country demand no less." Padilla, 130 s. Ct. at 1486.

Petitioner's Background and Conviction

Khaka Shalva Khaburzania (hereinafter "Petitioner") is a native and citizen of the country of Georgia. He was born on September 29, 1974, and is 36 years old. On or about April 1, 1997, when he was 25 years old, Petitioner was admitted to the United States as a non-immigrant B1 Visitor for Business pursuant to section 101(a)(15) of the Immigration and Nationality Act ("Act"), with authorization to remain in the United States for a temporary period not to exceed the time necessary to complete his business in the United States and for up to one year. Petitioner remained in the United States beyond one year without authorization from the Immigration and Naturalization Service or the United States Citizenship and Immigration Services. Both the Defendant's

mother and father, Natela and Shalva Khaburzania, are lawful permanent residents. His sister, Sophia Nozadze, is a United States citizen.

On June 26, 2002, Defendant married Carmen Archilla, a United States citizen. The marriage lasted until June 6, 2006, when the parties' divorce became final.
On July 26, 2002, Carmen filed an I-130 Petition for an Alien Relative on Defendant's behalf. On June 6, 2006, Defendant and his wife divorced, and consequently neither one of them appeared for or rescheduled their July 13, 2006 appointment at the Department of Homeland Security. As a result, on March 22, 2007, the I-130 Petition filed by Defendant's former wife in 2002, which may have allowed him to adjust his status, was denied.

On May 4, 2007, the United States Department of Homeland Security, United States Citizenship and Immigration Services, served Defendant with a Notice to Appear before an immigration judge of the United States Department of Justice in New York on August 16, 2007 in connection with removal proceedings under section 240 of the Act. Defendant was further given notice that he was being charged with violating section 237(a)(1)(B) of the Act, as amended, in that after his admission, he remained in the United States for a time longer than permitted.

On May 7, 2007, Natela Khaburzania, Defendant's mother, filed another I-130

Petition on Defendant's behalf. On June 14, 2007, however, Defendant was informed that he was not eligible for an adjustment of status.

On August 23, 2007, Defendant filed an I-485 Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents pursuant to section 240A(b) of the Act based on the extreme and unusual hardship that would result to his mother if Defendant were to be removed. Because of his conviction, however, which is considered an offense involving moral turpitude, Defendant is not eligible for the exception and he remains unable to adjust his status.

On December 8, 2008, Petitioner married his present wife Nina Georgian, a permanent legal resident of the United States. In addition, both of Petitioner's parents hold Green Cards. On October 23, 2009, Petitioner's wife gave birth to the couple's daughter, Nina. Petitioner and his wife are presently expecting their second child in February of 2012. For the past 10 years, Petitioner has worked as a Livery Car Driver.

On September 17, 2003, members of the New York City Police Department executed a search warrant at chiropractic and acupuncture clinics located in Queens County, seizing what the government alleged to be falsified records.

On September 23, 2003, Petitioner was arrested and charged with insurance fraud in the third degree, a class A misdemeanor under New York Penal Law, and falsifying business records in the first degree, a class E felony. The Queens County District Attorney's Office alleged that on five separate dates between June 17, 2003 and August 11, 2003, Petitioner signed attendance and therapy records at a chiropractic/ acupuncture clinic, both located at the same address in Queens County, falsely indicating that he had received treatment, which he did not in fact receive, in order for the doctor to obtain reimbursement payments from his insurance company.[1] In a related accusatory instrument, the government charged that a doctor at the clinic, David Davidov, had engaged in the practice of billing insurance companies for administering medical treatment to patients, such as Petitioner, which he never in fact administered.

Petitioner initially entered a plea of not guilty to the charges filed against him, and retained Paul Goldberger, of the firm Goldberger & Dubin, to represent him. Unbeknownst to Petitioner, Goldberger & Dubin also represented defendant Dr. Davidov.

On February 15, 2005, Petitioner, on the advice of counsel, entered a plea of guilty

[1] It clear that Petitioner would not and had not received any benefit from the scheme alleged.

to insurance fraud in the third degree (New York Penal Law (hereinafter "P.L.") § 176.20)), a class A misdemeanor, with the understanding that he would be sentenced to a one-year conditional discharge. Mr. Goldberger, the attorney retained by Petitioner, and the attorney with whom he had previously consulted, was not present with Petitioner when he entered his plea. Instead, an attorney by the name of Robert Horne, Esq. appeared with Petitioner. Counsel advised Petitioner that the prosecution was making Petitioner a misdemeanor plea offer but that if Petitioner did not accept the offer that day, February 15, 2005, the prosecution would present the case against him to a grand jury in order to secure an indictment on felony charges. Petitioner requested that counsel adjourn the case to allow Petitioner time to consult with Mr. Goldberger, the attorney of record, but counsel indicated that an adjournment would forfeit the plea offer, which was in Petitioner's best interest to accept.

Before entering his plea, Petitioner advised counsel that he was not a United States citizen, and inquired of counsel whether pleading guilty to a misdemeanor would cause any immigration consequences. Counsel indicated to Petitioner that because Petitioner would be pleading guilty to a misdemeanor only as opposed to a felony, Petitioner's conviction was of no import for immigration purposes. In reliance on this erroneous advice, Petitioner entered a plea of guilty to a class A

misdemeanor, in full satisfaction of the criminal complaint filed against him.[2] Petitioner never perfected a direct appeal.

Before February of 2005 when Petitioner pleaded guilty, on April 8, 2004, Petitioner had filed an I-485 application for an adjustment of his immigration status. At that time, Petitioner's wife had filed an I-130 petition for an alien relative on Petitioner's behalf, which would enable Petitioner to then adjust his own status. However, because of his misdemeanor conviction, Petitioner was no longer entitled to such an adjustment, and in March of 2007, Petitioner's application for an adjustment of status was denied.

Two months later, on May 4, 2007, the United States Department of Homeland Security, United States Citizenship and

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[2] A reading of the plea minutes further reveals that the court accepting Petitioner's plea completely failed to advise him of the rights he was waiving by entering a plea of guilty, such as his right to a trial by jury, his right to have the government prove his guilt beyond a reasonable doubt, his right to cross-examine the government's witnesses and to present witnesses in his own defense, his right not to incriminate himself, and his right to appeal his conviction. The minutes also show that the court made no inquiry of Petitioner into the facts underlying and supporting the plea, or into whether any promises—other than the promise that the court would sentence Petitioner to a conditional discharge—were made to Petitioner to induce him to plead guilty. There was no mention of the immigration consequences either.

Immigration Services served Petitioner with a Notice to Appear before an immigration judge of the United States Department of Justice in New York on August 16, 2007 in connection with removal proceedings under section 240 of the Act. Petitioner was further given notice that he was being charged with violating section 237(a)(1)(B) of the Act, as amended, in that after his admission, he remained in the United States for a time longer than permitted.

Petitioner first sought to cancel his impending removal based on the fact that he is married to a United States citizen. Next he sought a hardship exception, but because of his conviction, which is considered an offense involving moral turpitude, Petitioner is not eligible for the exception and he remains unable to adjust his status.

Postconviction Proceedings

On December 9, 2009, Petitioner motioned the criminal court pursuant to section 440.10(1)(h) of the New York Criminal Procedure Law ("C.P.L.") to vacate his conviction. Petitioner raised three claims in support of his motion. First, Petitioner claimed that he received ineffective assistance of counsel in that his attorney was operating under a conflict of interest by simultaneously representing the Petitioner/ patient and the treating doctor, which prejudiced his defense. Second, Petitioner maintained that his counsel at the time of the entry of his guilty plea

affirmatively misadvised him as to how the conviction would affect his immigration status, thereby undermining the knowing and intelligent nature of his plea. Third, Petitioner claimed that the court conducted an insufficient allocution, thereby causing the waiver of his trial rights and his right to appeal to also be unknowingly and unintelligently entered.

The Government filed its response on February 3, 2010. Submitted together with the Government's response was an affidavit by Robert Horne, Esq., Petitioner's attorney at the time the guilty plea was entered. In this affidavit, counsel stated that although he had no specific recollection of any conversation with Petitioner as to what if any immigration consequences could result as a result of a misdemeanor fraud plea, counsel was sure that he would never have told Petitioner that there were no immigration consequences to pleading guilty.

As to Petitioner's first claim, the Government maintained that the issue with respect to the conflict of interest had been placed on the record on February 9, 2005, when the Prosecutor requested that the court adjourn the case so that the District Attorney's Office could look into the potential conflict. According to the government, Petitioner's claim could have therefore been reviewed on direct appeal, and—since Petitioner took no appeal—the trial court was procedurally barred from reviewing it. C.P.L. § 440.10(2)(c).

Alternatively, the Government maintained that even if Petitioner's first claim was not procedurally barred, the Petitioner failed to allege that any existing conflict operated on his representation or prejudiced his defense.

As to Petitioner's second claim, the Government first argued that the affidavit submitted by Petitioner together with his motion to vacate was self-serving and—when considered together with the affidavit of Robert Horne, insufficient to establish any reasonable possibility that the allegation his attorney gave him incorrect advice about the immigration consequences of a misdemeanor fraud conviction was true. C.P.L. § 440.30(4)(d).

Second, the Government asserted Petitioner's affidavit contained a patently false statement, namely, Petitioner's misdemeanor conviction was the cause of his removal proceedings when in actuality, Petitioner was being subject to removal due to the fact he overstayed his Visa. Third, the Government argued that even if Petitioner could establish the first prong of the Strickland test, Petitioner failed to show that his counsel's misadvice prejudiced his defense because he did not show his conviction was the cause of his removal.

In response to Petitioner's third claim, the Government maintained that any challenge to the sufficiency of a plea allocution is a claim which can adequately be resolved by

a review of the transcript of the plea proceedings. Therefore, because the claim is "on the record," it was improper for Petitioner to advance the argument in a collateral attack on the judgment as opposed to by way of direct appeal. C.P.L. § 440.10(2)(c).

In a written Decision and Order dated March 3, 2010, the criminal court denied Petitioner's motion in its entirety. As to Petitioner's conflict-based ineffective assistance claim as well as his claim that the plea allocution was insufficient, the court ruled that facts necessary to review each of these claims appeared on the record and that the court was therefore barred from reviewing them collaterally. In any event, the court found that Petitioner had knowingly, intelligently, and voluntarily pleaded guilty while represented by competent counsel and that, having received a favorable non-jail disposition, Petitioner failed to establish his attorney's alleged conflict of interest impacted his defense.

As to Petitioner's claim that counsel was ineffective for misadvising him about the immigration consequences of his guilty plea, the court found this claim to also be meritless. Under New York law, the court stated, neither the court nor defense counsel are obligated to warn a defendant that there might be immigration consequences attendant to a guilty plea. Deportation, the court stated, citing People v. Ford, 633 N.Y.S.2d 270 (1995) is merely a collateral consequence of a guilty

plea. The court also credited the affidavit submitted by Mr. Horne, Petitioner's counsel at the time of his plea, wherein then-counsel noted his routine advice regarding immigration issues attendant to convictions. Finally, the court stated that Petitioner failed to establish that the challenged conviction is the cause of his impending deportation.

On March 31, 2010, the same day this Court rendered its decision in Padilla v. Kentucky, Petitioner filed a motion seeking leave to appeal to the Supreme Court of New York, Second Judicial Department, Appellate Term for the 2nd, 11th, and 13th Judicial Districts from the criminal court's order denying his motion to vacate his guilty plea.[3] Petitioner argued the facts on the record were insufficient to have allowed for adequate direct appellate review of either Petitioner's conflict-based or his competence-based ineffective assistance of counsel claims, and that the criminal court therefore erred in concluding otherwise. Petitioner also urged the Appellate Term to identify and correct the trial court's failure to acknowledge the distinction between situations where an attorney remains silent with respect to potential immigration consequences and where he or she makes affirmative misrepresentations. See United

[3] Under New York Criminal Procedure Law, an order denying plea vacatur is reviewable by permission only granted through the Appellate Term's issuance of a certificate. C.P.L. § 450.15. Had Petitioner pleaded guilty to a felony in Queens County Supreme Court, Petitioner would have sought leave to appeal to the Appellate Division, Second Department.

States v. Couto, 311 F.3d 179, 187 (2d Cir. 2002) (holding that an attorney's misrepresentation to a defendant as to the deportation consequences of a guilty plea is objectively unreasonable and therefore satisfies the first prong of the Strickland test) cert den'd …….. ; People v. McDonald, 769 N.Y.S.2d (2003)

On April 7, 2010, in light of the holding in Padilla, Petitioner filed a supplemental memorandum in support of his motion seeking leave to appeal the denial of his motion for vacatur. The Petitioner here is in a strikingly similar position as that in which Mr. Padilla found himself. The Supreme Court of Kentucky denied Padilla relief without a hearing and held that the Sixth Amendment neither entitles a defendant to advice regarding the risk of deportation nor protects a defendant from erroneous advice about deportation. Deportation, according to the State of Kentucky was merely a collateral consequence of the conviction. Likewise in this case, the Queens County Criminal Court denied Petitioner's motion—without even a hearing—and held that neither the courts nor defense counsel have an obligation to advise defendants about matters collateral to their convictions, such as immigration consequences.

The Appellate Term was not persuaded that the trial court's order merited review, and denied Petitioner's application for leave to appeal without explanation.

In a letter dated July 2, 2010, Petitioner then sought permission to appeal to the Court of Appeals for the State of New York, advancing the argument that Padilla did not create a "new constitutional rule," but rather applied the well-settled rule of Strickland v. Washington to a new set of particular facts. See Williams v. Taylor, 529 U.S. 362 (2000). Petitioner further cited to two New York decisions which held that Padilla did not announce a new constitutional rule and applied the holding retroactively to final judgments on collateral review. See People v. Bennett, 2010 WL 2089266; People v. Henlin, 2010 2305497 (Sullivan Co. Ct. 2010).

On August 12, 2010, the Court of Appeals denied Petitioner's application. January 14, 2011, Petitioner filed an additional motion to reargue with the Criminal Court of the City of New York to vacate the conviction pursuant to CPL§440.10(1)(h) based on the issuance of the decision in Kentucky v Padilla and the application retroactively. In a Decision and Order entered March 21, 2011, the relief requested was denied.

Again the Appellate Term was not persuaded that the trial court's order merited review, and denied Petitioner's application for leave to appeal.

REASONS FOR GRANTING THE WRIT

Failure to advise of immigration consequences of criminal pleas rises to the level of ineffective counsel as held in Padilla. Conflicting decisions continue to arise throughout the Courts in this country and ambiguity exists.

The issue then is whether the Padilla decision applies retroactively to cases under collateral review. 28 U.S.C. § 2255(3). Nothing in the Supreme Court's decision expressly directs that the decision apply retroactively, and given the recency of the opinion, the courts in the federal circuit have yet to address the issue. In fact this Court has most recently granted the writ in Morris v. Virginia ,No. 11-101498, it would appear at the realization of the ambiguity that has been left regarding just this, the retroactivity of Padilla. It is evident by the numerous conflicting decisions that have arisen since the Court's ruling that it is necessary once more for the Court to guide and clarify.

Federal and State Courts are Split

Since this court rendered its decision on March 31, 2011, numerous cases have been brought in the lower courts thus magnifying the confusion that has been left by the court's intent. The split is close to 50:50 as to whether or not the Padilla decision is meant to

be applied retroactively and hence we ask the Court to nullify the confusion and set forth clarity. Some courts have in fact preferred not to even address the matter.

A district court in the Eastern District of Michigan has held that "it is unlikely that Padilla will be made retroactive to convictions under collateral attack." Haddad v. U.S., 2010 WL 2884645 *6 (E.D.Mich. Jul.20, 2010) (unpublished). A district court in the Eastern District of New York, on the other hand, noted that it is "unclear" whether Padilla applies retroactively. United States v. Obonaga, 2010 WL 2710413 *1, Case No. 10-CV-2951 (E.D.N.Y. Jun. 30, 2010) (unpublished), and electing to assume arguendo that it does, without extensive analysis).

In Teague, the Court announced a three-step analysis to determine whether a new rule of criminal procedure applies to a case on collateral review. First, the reviewing court must determine whether a defendant's conviction became final. Humphress, 398 F.3d at 860. Next, the court must determine whether the rule in question is actually "new." Id. Third, if the rule is new, the court must then determine whether the new rule falls into either of two exceptions to non-retroactivity. Id. The first exception to non-retroactivity "does not apply to rules forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " Id. at 862 (citation

omitted). The second exception to non-retroactivity is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (quotation omitted).

The Sixth Circuit has "repeatedly emphasized the limited scope of the second Teague exception, explaining that it is clearly meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. The Sixth Circuit has further opined that any qualifying rule would be so central to an accurate determination of innocence or guilt that it is quite unlikely that many such components of due process have not yet emerged. The Sixth Circuit yet to find a new rule that falls under the second Teague exception. The Sixth Circuit is likely to find that the Padilla decision should not be applied retroactively. See Humphress v. United States, 398 F.3d 855 (6th Cir. 2005); Beard v. Banks, 542 U.S. 406 (2004).

This Court stated that it "seem[ed] unlikely that [its] decision [would] have a significant effect on those convictions already obtained as a result of plea bargains[,]"as professional norms for at least the past 15 years have imposed a general obligation on counsel to provide advice on the deportation consequences of a client's plea. Padilla, 130 S.Ct. at 1483-84. The Court stated that it should therefore "presume that counsel satisfied their obligation to render competent

advice at the time their clients considered pleading guilty." Padilla, 130 S.Ct. at 1485. The Court's opinion cited several guidelines and handbooks showing that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." Id. at 1482. The Court further noted that "[p]reserving 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 (quotation omitted). "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, ..., the duty to give correct advice is equally clear." Id. (footnote omitted).

Only a few courts have yet weighed in on the question of Padilla's retroactive application.[4] Some courts have found that the Padilla decision may be applied to convictions which became final before March 31, 2010, the date the Padilla decision was announced, and so is applicable retroactively. See United

[4] The Writ of Morris v Virginia which is before the Court outlines on pages 12 through and including page 16 all of the Federal and State cases that have been heard on the issue of ineffective counsel in light of Padilla. To reintroduce them herein would in essence be repetitive and we would ask the Court take note of those cases and the division set forth therein. This simply continues to reinforce the need for the Court to eliminate the confusion as to retroactive application and further makes valid the request that the instant matter be consolidated with Morris.

States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *8 (E.D.Cal. July 1, 2010); People v. Bennett, 906 N.Y.S.2d 696, 700 (N.Y.Crim.Ct.2010). Other courts have reached the opposite conclusion. Gacko v. United States, No. 09-CV-4938 (ARR), 2010 WL 2076020, at *3 (E.D.N.Y. May 20, 2010); People v. Kabre, No.2002NY029321, 2010 WL 2872930, at *10 (N.Y.Crim.Ct. July 22, 2010).

Padilla is Not a New Rule and should be Retroactive

It is acknowledged that the Petitioner herein made two separate requests for postconviction relief. However, the second request was based on the understanding that Padilla is not new law but rather rests upon the already existing constitutional rule as set forth above. It is simply applying an existing Constitutional rule to a new set of facts and as such it should apply both on appeal and in review. Williams v. Taylor, 529 US 362, 380-81 (2000).

Strickland, provides the default rule for ineffective counsel and Padilla simply reinforced it. Padilla strengthens with conviction the role of counsel and the obligation that counsel has on behalf of an individual such as the Petitioner herein. The Court's own opinion acknowledges that in issuing their decision it was likely to see more than one application to the Court's for the relief as the one requested herein. 130 S. Ct. at 1484-85. Yet the Court felt confident that Strickland created enough of a "high bar" so as

to diminish any frivolous or innate applications. However distinctively this is not one of those petitions of frivolity. Albeit this is a conviction from a plea as the Court stated it would "unlikely . . .have a significant effect on" but it is one with the distinction of being truly a plea entered without knowledge of the true ramifications that this would have on Petitioner's life. *Id* at 1484-5.

To not grant certiorari would continue to allow for the division among the courts both at the Federal and the State level. The Court has already granted the Writ in Morris v Virginia therefore we would simply ask the court consolidate the case and allow Petitioner to join in seeking the relief set forth herein and by Morris. This is an opportunity for the Court to address the second of the two types of criminal convictions to which they directed attention, and stated that the INA has allowed it to remain vague (i.e. aggravated felony and crimes involving moral turpitude).

This case is an appropriate vehicle for resolving the ambiguity

The continuing conflicting decisions being rendered with regard to post conviction regulations may only be remedied through the intervention of this court. The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions. U.S. Const. 6th Amend; NY Const. art. I § 6. Under the Federal Constitution, the "longstanding test for determining the validity of a guilty

plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotation marks and citations omitted); People v. McDonald, 769 N.Y.S.2d 781, 783 (N.Y. 2003). This Court is the only means by which a nationwide change may occur. By doing so then those individuals such as the petitioner would not feel that their fate is determined not so much by the constitutional rule but rather by the geographic region's application of the Padilla holding.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Supreme Court's landmark decision in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), limited the ability of courts to hear constitutional challenges to convictions on collateral review. Teague clarified that a criminal defendant seeking to collaterally attack a conviction may not rely on a new constitutional rule of criminal procedure identified only after the date that the conviction became final. Id. at 310. A conviction becomes final after the judgment of conviction is rendered, the availability of direct appeal is exhausted, and the time for filing a petition for certiorari has elapsed. Id. at 295.

When precedent is overturned it is clear that a new rule has been established. Saffle v. Parks, 494 U.S. 484, 488, 110 S.Ct. 1257, 108

L.Ed.2d 415 (1990). "[I]t is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases." Id.; accord Teague, 489 U.S. at 301. Analysis under Teague rests upon whether or not a new rule has been established or rather precedent overturned. This Court elaborated in Teague:

> Generally ... a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.
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> Id. (emphasis in original).

Under Teague a broad interpretation as to what constitutes a new rule should be applied. If however it is unclear whether the holding of this court applies to a new set of facts or context then under Teague it would be said that the holding does not "dictate" the particular application. But the Supreme Court has stated that this is a blanket rule but rather it is not so in every case. See, e.g., Stringer v. Black, 503 U.S. 222, 237, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (holding that cases invalidating use of vague aggravating factors in capital sentencing applied to Mississippi's capital sentencing law despite the fact that Mississippi used a different method of weighing aggravating and mitigating factors); Penry, 492 U.S. at 318-19

(holding that as-applied challenge to Texas death penalty statute did not seek application of new rule, despite earlier Supreme Court opinion rejecting facial challenge to the same statute). Under Penry and Stringer, results were "dictated" by law that existed at the time of the petitioner's conviction but this was not through a unanimous decision. Disagreements as to logical reach occurred in both among the Justices.

It can be said that Padilla establishes a per se rule that counsel must inform a client of immigration consequences prior to entering a guilty plea so that the may enter truly informed. On the other hand it could be argued that it is a strict application of Strickland: the petitioner's attorney "fell below an objective standard of reasonableness," because, as a factual matter, the professional standards at the time of the client's plea required counsel to inform of potential immigration consequences. If instead it is established clearly that Padilla is not establishing a new rule but instead is simply the presentment of the old rule under new circumstances or facts then the Court is within its discretion to allow for retroactive application. *See* Yates v Aiken, 484 US 211, 216-17(1988).

"[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation."); id. Padilla, 130 S.Ct. at 1488 (Alito, J., concurring) ("[T]his Court has never held that a criminal defense attorney's

Sixth Amendment duties extend to providing advice about [collateral consequences of a conviction].") There is strong support for the argument in favor of Padilla being the establishment of a new rule, with one court declaring that Padilla would not apply retroactively, having the ripple effect of changing the law in nine circuits and the majority of states. Kabre, 2010 WL 2872930, at *4-5. Id. at *4 (citing United States v. Gonzalez, 202 F.3d 20 (1st Cir.2000); United States v. Santelises, 476 F.2d 787 (2d Cir.1973); United States v. Del Rosario, 902 F.2d 55 (D.C.Cir.1990); United States v. Yearwood, 863 F.2d 6 (4th Cir.1988); United States v. Banda, 1 F.3d 354 (5th Cir.1993); United States v. George, 869 F.2d 333 (7th Cir.1989); United States v. Fry, 322 F.3d 1198 (9th Cir.2000); Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir.2004); United States v. Campbell, 778 F.2d 764 (11th Cir.1985)). These further argue that deportation is simply a collateral effect and one that is understood.

Yet the Supreme Court stated in Williams, "[e]ven though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." 529 U.S. at 410 (quoting Wright, 505 U.S. at 304). Therefore it must be understood and established with clarity that Padilla did not

overturn any prior decision of the Supreme Court. Padilla, 130 S.Ct. at 1481 ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland."). Justice Stevens's majority opinion in Padilla relied primarily on citations to Strickland itself as well as secondary sources discussing prevailing professional norms at the time of Padilla's plea. Id. at 1482-83. The Court also noted that the extent of the advice counsel is required to give will be entirely fact-dependent. Id. at 1483. The law in Padilla's case is straightforward but this is not always the case and it is not every attorney who will know all the minutiae of immigration law.

In Martin v. U.S., 2010 WL 3463949 (C.D.Ill. 2010) the district court—without holding that Padilla applies retroactively, characterized the case as a "he said, she said" and granted an evidentiary hearing on the issue of whether defense counsel informed Martin that his 2008 conviction carried a risk of deportation. However in direct contrast the district court in U.S. v. Chaidez, --- F.Supp.2d ----, 2010 WL 3184150 (N.D.Ill. 2010), court held that the this Court's holding in Padilla v. Kentucky, does apply retroactively and an evidentiary hearing needed.

The simple act of the Supreme Court applying an established rule of law in a new way based on the specific facts of a particular

case does not generally establish a new rule. See Stringer v. Black, 503 U.S. 222, 228-29, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (where application of a prior rule of law did not "break new ground," it was not a new rule); Turner v. Williams, 35 F.3d 872, 885 (4th Cir.1994) ("[W]hen we apply an extant normative rule to a new set of facts (leaving intact the extant rule) generally we do not announce a new constitutional rule of criminal procedure for purposes of Teague."). The issue before the Supreme Court in Padilla was whether the first prong of the Strickland test was met. Padilla, 130 S.Ct. at 1482 (quoting Strickland, 466 U.S. at 6881. The Strickland test for what constitutes ineffective assistance of counsel is an old, well-established rule of law. See Williams v. Taylor, 529 U .S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("It is past question that the rule set forth in Strickland qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.' ").

This is not to say that Strickland can be applied like a blanket on all cases but instead it must be looked at on a case by case or fact by fact analysis.[5] Williams, 529 U.S. at 391;

[5] The Supreme Court has issued a number of relatively recent opinions applying the Strickland test in a variety of different factual contexts; none of these cases has been afforded new rule status under Teague, See, e.g., Rompilla v. Beard, 545 U.S. 374. 125 S.Ct. 2456. 162 L.Ed.2d 360 (20051; Wiggins v. Smith, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); Williams, 529 U.S. at 391.

see also Tanner, 493 F.3d at 1143 ("the general nature of Strickland requires courts to elaborate upon what an 'objective standard of reasonableness' means for attorney performance in innumerable factual contexts"); Newland v. Hall, 527 F.3d 1162, 1197 (11th Cir.2008) (" Strickland set forth the paradigmatic example of a rule of general application; it establishes a broad and flexible standard for the review of an attorney's performance in a variety of factual circumstances."). "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." Wright v. West, 505 U.S. 277, 308-09, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (Kennedy, J., concurring). Similarly, in Padilla, the Supreme Court merely applied Strickland to defense counsel's failure to advise her client regarding the possible immigration consequences of his guilty plea.

Although generally the application of an established rule of law such as Strickland does not constitute a new rule, a new rule may be announced if "the prior decision is applied in a novel setting, thereby extending the precedent." Stringer, 503 U.S. at 228.

In Al Kokabani v. U.S., 2010 WL 3941836 (E.D.N.C. 2010) the district court conclude that Padilla, did not produce a novel result and, therefore, did not announce a new

rule for purposes of Teague. Wright, 505 U.S. at 309 (Kennedy, J., concurring); see also Tanner, 493 F.3d at 1144 (case applying Strickland "did not produce 'a result so novel' as to have forged a new rule.").

The idea that reasonably prudent counsel would advise their client with respect to the immigration impact of a guilty plea is not a novel concept. See Kwan, 407 F.3d at 1017 (counsel had a responsibility not to mislead his client with respect whether a guilty plea would make him deportable). This idea is not a novel one but one that has been around for at least 10 years if not more. In INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), this Court stated that "competent defense counsel, following the advise of numerous practice guides, would have advised" her client regarding whether his conviction would affect his removability from the United States. Id. at 323 n. 50. The Court noted that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" and 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." Id. at 322-23.

Further it is not only the Supreme Court that has recognized the duty of counsel but even the body of counsel themselves known as the ABA. In St. Cyr, the Supreme

Court directed their attention to the ABA guidelines and stated, "if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.' " Id. at 323 n. 48 (quoting 3 ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed.1982)). The Supreme Court again cited a number of professional standards in Padilla and further emphasized that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." Padilla, 130 S.Ct. at 1482 (citing National Legal Aid and Defendant Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L.Rev. 697, 713-18 (2002); A. Campbell, Law of Sentencing § 13:23, pp. 555, 560 (3d ed.2004); Dept. of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed.1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed.1999)). Can it not therefore be clearly stated that this is not a new idea set forth in Padilla but rather the norm?

The mention of floodgates in Padilla indicated even more clearly the acknowledgment of this Court that this was

not a new rule but and old one that is being applied to new facts therefore opening the opportunity for others who may have been similarly situated as Padilla or the Petitioner herein. Id. at 1484-85. The Court minimized the "floodgates" concern by stating that a petitioner would have to show not only that his counsel's performance fell below professional standards, but also that he was prejudiced by the deficient performance. Id. at 1485. Why would this Court even address the possibility of "floodgates" if it meant to create a new rule through Padilla thus negating retroactivity. It would appear that the mention of same and the attempt to minimize the concerns just bolsters the fact that this was meant to be a retroactively applicable rule. The use of the statement "*now* holds[s] that counsel must inform her client whether his plea carries a risk of deportation" may be argued as indicating that the Court was intending to create a new rule of law. Padilla, 130 S.Ct. at 1486 (emphasis added). However the Third Circuit was not convinced. Instead they stated that "[t]his language is hardly dispositive or even persuasive," as the phrase "now holds" "merely states the obvious (that the case announced a rule on a particular day)." Lewis v. Johnson, 359 F.3d 646, 655 (3d Cir.2004).

Recently in People v. Paredes, 1104/04 N.Y.L.J Oct. 18, 2010, p. 17, the defendant, who plead guilty to possession of a controlled substance and was sentenced in 2004 to five years probation. Arguing ineffective

assistance of counsel and contending he was never informed of the immigration consequences of his plea, the defendant sought vacatur of his conviction. At the time of the defendant's plea, the failure of an attorney to advise a defendant of the immigration consequences of pleading guilty did not deprive defendant of effective assistance of counsel under People v. Ford. The court found, therefore that resolution of the defendant's motion turned on the question of whether Ford remained applicable to convictions that were finalized prior to the Court's decision in Padilla. The Paredes court held that Padilla mandated a finding of ineffective assistance of counsel and therefore a hearing was required to decide if the defendant was prejudiced by his attorney's failure to provide him with effective assistance. The court stated that while Padilla may not be retroactive "in the classical sense," the decision governed pleas entered into at the time of the defendant's guilty plea.

Padilla changed how the Court's view the issue of advisement of counsel as to immigration ramifications and their duty towards same. The question however becomes whether this change is only going forward or a duty that has always existed but may have been neglected by some. Deportation was a collateral consequence in New York prior to Padilla. A consequence which is "peculiar to the individual's personal circumstances and not one within control of the court system". Prior to Padilla there did

not exist an affirmative duty as this was not grounds to claim ineffective assistance of counsel or rather one existed but the ramifications of not adhering to same were not guarded and adjudicated. People v. Ford, 86 N.Y.2d 397, 403, 633 N.Y.S.2d 270, 657 N.E.2d 265 (1995); see also People v. Gravino, 14 N.Y.3d 546, 902 N.Y.S.2d 851, 928 N.E.2d 1048 (2010); People v. Argueta, 46 A.D.3d 46, 844 N.Y.S.2d 63 (2d Dept.2007), appeal dismissed 10 N.Y.3d 761, 854 N.Y.S.2d 323, 883 N.E.2d 1258 (2008); People v. Cavatus, 26 Misc.3d 1220(A), 2010 WL 432342 (Sup. Ct., Kings County 2010); People v. Felipe, 15 Misc.3d 1124(A), 2007 WL 1185671 (Sup. Ct., Kings County 2007). Actual misadvice by counsel concerning immigration consequences of a plea, however, could constitute ineffective assistance of counsel. See People v. McDonald, 1 N.Y.3d 109, 769 N.Y.S.2d 781, 802 N.E.2d 131 (2003); People v. McKenzie, 4 A.D.3d 437, 771 N.Y.S.2d 551 (2d Dept.2004); see also United States v. Couto, 311 F.3d 179 (2d Cir.2002), cert. denied 544 U.S. 1034, 125 S.Ct. 2283, 161 L.Ed.2d 1062 (2005), abrogated by Padilla. This landscape was altered on March 31, 2010 when the United States Supreme Court decided Padilla.

Criminal convictions obtained by a plea of guilty should never be taken lightly and should always be entered into knowingly and with full consideration of the rights the person is waiving as well as the long term ramifications. For a natural born citizen we may not consider that these ramifications

could be so far reaching as to expel us from our homes, which essentially is what foreign nationals often are faced with. When entering a plea of guilty an individual relies on the counsel as much if not more than a natural born citizen to explain all of the possible results they may face as a consequence of the plea. Mr. Khaburzania placed his faith in the hands of his attorney and relied upon his representations. Petitioner upheld his obligation to the attorney client relationship by disclosing his immigration status to counsel and asked what if any effect this would have on his immigration status. Unfortunately the advice he received by counsel fell below the standard as set forth in Strickland and without this court's intervention Petitioner will be ripped from his family and removed from this country.

If Padilla is not retroactively applied then Petitioner along with many others will be harmed detrimentally and irreparably. The divisiveness of the Courts below highlights the need for this Court to guide those below with regard to the retroactiveness of the Padilla decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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