No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2011

STATE OF WYOMING, Respondent,

v.

JOSE MANUEL DIAZ,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WYOMING SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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Dated April 9, 2012

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG BOTH FEDERAL CIRCUIT COURTS AND STATE COURTS OVER THE RETROACTIVITY OF THIS COURT'S DECISION IN *PADILLA V. KENTUCKY*, 130 S. CT. 1473 (2010) AND THEREBY RESOLVE THE CONFUSION AMONG LOWER COURTS?

II. WHETHER THIS COURT'S DECISION IN *PADILLA V. KENTUCKY*, 130 S. CT. 1473 (2010) REQUIRES DEFENSE COUNSEL TO EXPLICITLY WARN DEFENDANTS OF THE THEIR AUTOMATIC DEPORTATION STATUS?

PARTIES TO THE PROCEEDING

As per U.S. Supreme Court Rule 14.1(b), all the parties to the proceeding are identified in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

As per U.S. Supreme Court Rule 29.6, no party is a nongovernmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Defendant respectfully requests that this Court grant the petition for writ of certiorari, seeking review of the decision of the Wyoming Supreme Court, entered on January 10, 2012, denying Mr. Diaz's petition for writ of certiorari.

OPINION BELOW

The opinion of the Wyoming Supreme Court, denying petitioner's petition for a writ of certiorari, filed January 10, 2012, cited as *State v. Diaz*, No. S-11-0226 (Wyo. 2012) (unpublished), is appended as Appendix, page 1.[1]

JURISDICTION

On March 15, 2011 the Ninth Judicial District Court for the State of Wyoming granted the State's motion to dismiss Mr. Diaz's petition for post-conviction relief and denied Mr. Diaz's motion to withdraw his plea. *State v. Diaz,* Criminal Action No. 2247 (Wyo. 9th Jud. Dist. September 9, 2011) *(unpublished).* (A5). A petition for writ of review or in the alternative a petition for a writ of certiorari was timely filed in the Wyoming Supreme Court pursuant to Wyoming Rules of Appellate Procedure 13.01 and 13.03(a).

On review, the Wyoming Supreme Court exercised jurisdiction pursuant to Wyoming Rule of Appellate Procedure 13.01 and 13.03(a) and initially partly granted Mr. Diaz's petition for writ of certiorari and remanded to the state district court for an evidentiary hearing. After the state district court issued its findings, the Wyoming Supreme Court, in an order filed on January 10, 2012, denied a writ of certiorari and dismissed petitioner's appeal of his motion to withdraw his plea. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(a).

[1] The Appellant's appendix will be referenced herein as "A[page #]".

FEDERAL STATUTORY PROVISIONS INVOLVED, Appendix, page

STATEMENT OF THE CASE

This petition for writ of certiorari seeks review of the decision of the Wyoming Supreme Court, denying Mr. Diaz a writ of certiorari, after initially remanding the case to the Ninth Judicial District of Wyoming for an evidentiary hearing regarding the ineffectiveness of defense counsel. Shortly after the Ninth Judicial District of Wyoming found trial counsel was neither ineffective in his advice regarding immigration consequences nor in his advice regarding appealing the conviction, the Wyoming Supreme Court denied Mr. Diaz review of the lower court's dismissal of the defendant's motion to withdraw plea and denied review of his conviction.

On May 5, 2012, Mr. Diaz filed a motion to withdraw his plea or in the alternative a petition for post-conviction relief, pursuant to W.S. § 7-14–101, challenging his conviction pursuant to the judgment of the Wyoming state court in Docket No. 2247, Ninth Judicial District Court, Teton County. (A262-78). The challenge was based on trial counsel's failure to give Mr. Diaz correct, complete information about the immigration consequences of pleading guilty to a drug- related felony. (*Id.*). The Ninth District Court of Wyoming granted the State's motion to dismiss the defendant's motion to withdraw plea and his petition for post-conviction relief. (A198).

On September 26, 2011 Mr. Diaz filed in the Wyoming Supreme Court a petition for writ of review, seeking review of the lower state court's decision, or alternatively a writ of certiorari seeking a belated direct appeal of his conviction to the Wyoming Supreme Court in which he could raise the ineffectiveness claim. (A21). On October 18, 2011, the Wyoming Supreme Court denied Mr. Diaz's petition for writ of review but granted, in part, the petition for writ of certiorari. (A18). In that order, the Wyoming Supreme Court remanded the case to the state trial

court for an evidentiary hearing on Petitioner's claim that his trial counsel was ineffective with regard to advising Mr. Diaz of his right to appeal. (*Id*).

After an evidentiary hearing, the state trial court issued an order finding trial counsel was neither ineffective in his advice regarding the immigration consequences if Mr. Diaz pled guilty nor in his advice whether to pursue a direct appeal. (A3-17). In particular, the state trial court concluded (1) that Mr. Diaz's claims depended on this Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which did not apply retroactively to Mr. Diaz's case, and (2) in any event, trial counsel had provided effective assistance because, though he did not advise Mr. Diaz that a conviction meant he would be automatically and inevitably deported without an opportunity for hearing, he advised Mr. Diaz that he could be "subject to" deportation. (*Id.*). After receiving the state trial court's order, the Wyoming Supreme Court on January 10, 2012 denied Mr. Diaz a writ of certiorari and dismissed his petition for a writ of certiorari. (A1).

STATEMENT OF FACTS

Mr. Jose Diaz was born in Guatemala in 1988, and came to America with his family when he was seven years old. (A103). Until his recent deportation, Mr. Diaz had been in the United States for over fifteen years, and his friends and family are all located in the United States. (*Id.*). He remembers very little about Guatemala, and has become accustomed to American culture in almost every way. Mr. Diaz's mother was just granted a U-Visa. (*Id.*). However, instead of being eligible for lawful status under his mother's U-visa, Mr. Diaz recently was deported because of the felony conviction at issue in this case. (*Id.*).

On October 22, 2009 Mr. Jose Diaz was charged with one count of Conspiracy to Deliver a Controlled Substance, a felony, in violation of W.S. § 35-7-1031(a)(ii) and W.S. § 35-7-1042

and one count of Delivery of a Controlled Substance, a felony, in violation of Wyo. Stat. § 35-7-1031(a)(ii). According to the State's allegations, these charges stemmed from an incident where Mr. Diaz's friend – who happened to also be serving as a confidential informant – asked Mr. Diaz if he could locate and sell some Ecstasy to the informant. (A295; A194-A197). Again, according to the State's allegations, Mr. Diaz contacted another friend, Miron Aleksander Ikaev, about procuring the Ecstasy, and arranged a meeting where the Ecstasy would be sold by Mr. Ikaev to the informant. (*Id.*). The State's own allegations claim that Mr. Diaz merely served as the middle-man between Mr. Ikaev and the confidential informant, and he had no knowledge of where the Ecstasy came from beyond the fact that Mr. Ikaev was able to procure it. (*Id.*). When the transaction took place Mr. Diaz was arrested and charged with conspiracy to deliver a controlled substance and delivery of a controlled substance in violation of Wyo. Stat. § 35-7-1042 and Wyo. Stat. § 35-7-1031(a)(ii). (A194-A197; A211-A217).

Mr. Diaz was represented by Mr. Kent Brown, a Teton County Public Defender. (A103). Mr. Brown was well aware of Mr. Diaz's immigration status, and knew that Mr. Diaz was concerned with possibly being deported if convicted of a felony. (*Id.*). Mr. Brown attempted to find out what immigration consequences delivery of a controlled substance could have for Mr. Diaz, and told him that he could be subject to deportation upon conviction, but a sentence of "less than a year" might help Mr. Diaz avoid deportation. (A303). Mr. Diaz understood that Mr. Brown was saying that only if the sentence was a year or longer would he face a strong possibility of being deported, so a guilty plea gave him at least a chance to avoid deportation. This advice was incorrect. (A192-A193). At no point in time did Mr. Brown explicitly inform Mr. Diaz that pleading guilty to Count II would make him an aggravated felon who would be automatically deported regardless of the sentence assigned.

Though the possibility of adverse immigration consequences made Mr. Diaz reluctant to plead guilty, he did so because of Mr. Brown's advice that the plea deal was the "best he could do" for Mr. Diaz. (A104). Additionally, Mr. Brown told Mr. Diaz that he had to accept the plea agreement in order to prevent more serious consequences, such as a lengthy prison sentence. (*Id.*). Believing Mr. Brown, and feeling helpless, Mr. Diaz went ahead and accepted the plea agreement. (*Id.*). At the Sentencing Hearing on February 9, 2010, in accordance with the agreement, Mr. Diaz changed his plea from not guilty to guilty on Count II of the Information. (A283). The State agreed to dismiss Count I in exchange for the guilty plea. (*Id.*). After finding that Mr. Diaz was fit to enter the guilty plea, the court sentenced Mr. Diaz to not less than eighteen (18) months nor more than thirty-six (36) months in the Wyoming State Penitentiary. (A308). This sentence was suspended for a term of three years probation. *Id.* Before the court imposed sentence, Mr. Brown informed the district court, and Mr. Diaz, that it was his impression that a sentence of one year or more was needed for deportation. He stated,

> Mr. Diaz, Jose's father, Byron has consulted the immigration officials and I guess it's our understanding that less than a year is the operative number. If we can keep things under a year, you know, 364 days them it significantly effects what's going to happen.
>
> I have talked with an immigration attorney also and that's my understanding. With any kind of drug case there's no guarantee, but it has to be less than a year is kind of the operative number and six months actually in jail is kind of an operative number.

(A303). This understanding that Mr. Brown communicated to both Mr. Diaz and the state trial court is incorrect. See *infra* Argument I (discussing *Padilla*'s retroactivity).

Shortly after being sentenced, Mr. Diaz was taken into Immigration and Customs Enforcement (ICE) custody where he was held until his recent deportation.

SUMMARY OF THE ARGUMENT

There is tremendous disagreement among the state and lower federal courts about whether the rule announced in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), applies retroactively to cases decided before March 2010, when *Padilla* was announced. Several courts have concluded that *Padilla* did not announce a new rule of law but rather, given this Court's reliance on *Strickland v. Washington*, 466 U.S. 668 (1984), *Padilla* applied a new set of facts to the established *Strickland* standard. Thus, even though Mr. Diaz pled guilty before this Court's decision in *Padilla*, Mr. Diaz's defense counsel was obliged to inform Mr. Diaz of the immigration consequences associated with his guilty plea.

Similarly, *Padilla* fails to clarify the extent of advice defense counsel is obliged to give a defendant. In other words, it fails to tell criminal defense lawyers how much of an expert in immigration law they must become. While *Padilla* provides some guidance, it is still unclear when counsel can fulfill his obligations by simply giving notice that adverse immigration consequences are possible and when counsel must provide an explicit warning regarding automatic deportation. Thus, this Court should resolve whether, contrary to the state court decision in Mr. Diaz's case, the unambiguity of the immigration statues related to aggravated felonies requires an explicit warning regarding a defendant's inevitable deportation.

At no time before, during or after his sentencing did Mr. Diaz's trial counsel explicitly inform him that entering the plea agreement would lead to Mr. Diaz's automatic deportation, despite the specific language of 8 U.S.C. §1101. Defense counsel's failure to inform Mr. Diaz ultimately led to Mr. Diaz making a decision that guaranteed his deportation from the only home he had known for the last fifteen years. Had Mr. Diaz been informed of the inevitable consequence of deportation which arose from his guilty plea by his trial counsel, Mr. Diaz would

have elected to go to trial given this was the only way to escape deportation. This Court should grant certiorari to clarify the obligations of counsel in such a case.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG BOTH THE FEDERAL CIRCUIT COURTS AND THE STATE COURTS OVER THE RETROACTIVITY OF THIS COURT'S DECISION IN *PADILLA V. KENTUCKY* AND THEREBY RESOLVE THE CONFUSION AMONG LOWER COURTS.

Padilla v. Kentucky requires defense attorneys to advise criminal defendants about the possible adverse immigration consequences associated with a particular plea agreement. *Padilla*, 130 S.Ct. at 1486. The failure of defense to counsel to adequately advise defendants constitutes ineffective assistance of counsel under *Strickland. Id.*

On February 9, 2010, while this Court's decision in *Padilla* was pending, Mr. Diaz pled guilty to conspiracy to delivery of a controlled substance in violation of Wyo. Stat. § 35-7-1031(a)(ii), an aggravated felony under 8 U.S.C. § 1101(a)(43).[2] During Mr. Diaz's plea negotiation, defense counsel did not properly inform Mr. Diaz of the immigration consequences related to pleading guilty and specifically failed to affirmatively inform Mr. Diaz that by pleading guilty to an aggravated felony he would be automatically deported. (See infra Argument II). When Mr. Diaz later sought to withdraw his plea and vacate the conviction based on a claim that counsel was ineffective, the state court rejected his claim, in part, based on its conclusion that this Court's ruling in *Padilla v. Kentucky* is not retroactive. *State v. Diaz,* Criminal Action No. 2247 (Wyo. 9th Jud. Dist. December 29, 2011) at pp. 8-10. (A11-A13). This Court has yet to determine whether its decision in *Padilla v. Kentucky* applies retroactivity

2 Defense counsel failed to inform Mr. Diaz of his right to appeal his conviction. But for defense counsel's ineffectiveness it is quite likely that this Court's decision in *Padilla* would have been announced before Mr. Diaz's appeal was heard and would have been binding in that proceeding.

to the cases, such as Mr. Diaz's, adjudicated before this Court's announcement of its decision. Mr. Diaz's case presents an opportunity for this Court to address this important unresolved issue.

Federal courts have struggled with determining the retroactivity of *Padilla*. In fact, several Circuit Courts of Appeal are divided regarding whether *Padilla*'s requirement that defense counsel must properly advise defendants regarding the immigration consequences of conviction applies retroactively. *Compare Chaidez v. United States,* 655 F.3d 684, 694 (7th Cir. 2011) (holding that *Padilla* announced a "new rule" inapplicable on collateral review), *and United States v. Hernandez-Monreal*, 404 Fed. App'x 714, 715 (4th Cir. 2010) (noting that "nothing in the *Padilla* decision indicates that it is retroactively applicable to cases on collateral review"), *and United States v. Chang Hong*, No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011) (holding that *Padilla* announced a "new rule" not entitled to retroactive application) *with United States v. Orocio*, 645 F.3d 630, 641 (3rd Cir. 2011) (holding that *Padilla* is "an 'old rule' for *Teague* purposes and is retroactively applicable on collateral review"). States too have struggled determining whether *Padilla*'s requirement on defense counsel should apply retroactively as well. *Compare State v. Gaitan*, 37 A.3d 1089 (N.J. 2012) (holding "*Padilla* represents a new constitutional rule of law that, for Sixth Amendment purposes, is not entitled to retroactive application on collateral review under *Teague*"), *and State v. Alshaif,* No. COA11-817, 2012 WL 540740 (N.C. App. Feb. 21, 2012) (holding "*Padilla* announces a new rule of constitutional law and is not retroactively applicable on collateral review") *with Costanza v. State*, No. A10-2096, 2011 WL 3557824 (Minn. App. Aug. 15, 2011) (not reported) (holding *Padilla* is retroactive); *Campos v. State*, 798 N.W.2d 565, 568-69 (Minn. App. 2011) (holding *Padill*a os retroactive); *People v. Garcia*, 29 Misc. 3d 756 (N.Y. Sup. Ct. 2010) (finding *Padilla* applied retroactively). It is clear ,based on the disagreement among Circuit courts and state

courts, that the retroactivity of *Padilla* is an important and unsettled issue that requires this Court determination.

Whether a holding by this Court applies retroactively to cases on collateral review depends upon whether it articulates a "new rule." Under *Teague v. Lane,* this Court announces a new rule when the holding of a case "breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). As one Circuit Court has found, *Padilla* does not qualify as a new rule given the Supreme Court's strong reliance in *Padilla* on *Strickland*'s standard of ineffectiveness claims and prevailing professional norms. *Orocio*, 645 F.3d at 641 (citing *Padilla,* 130 S. Ct. at 1482-86). "*Strickland* is a rule of general applicability which asks whether counsel's conduct was objectively reasonable and conformed to professional norms based 'on the *facts of the particular case,* viewed as of the time of counsel's conduct.'" *Orocio*, 645 F.3d at 639, quoting *Strickland*, 466 U.S. at 690 (emphasis in quotation).

While "[i]t is true that the precise question of whether the civil removal consequences of a plea are within the scope of *Strickland* had never been addressed by the Supreme Court before *Padilla,*" the language in *Padilla* suggests that the Court was reiterating prior precedents governing the ineffectiveness of trial counsel, specifically *Strickland*, under a new factual scenario. *Orocio*, 645 F.3d at 641 (citing *Padilla,* 130 S. Ct. at 1482-86). For example, this Court explained in *Padilla*, "we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. The severity of deportation—'the equivalent of banishment or exile,' —only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Padilla*, 130 S. Ct. at 1485 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390-

391 (1947)).

Because *Padilla* frames the issue of immigration advice for criminal defendants in the structure of *Strickland*, it appears that this Court did not intend to announce a new rule but rather intended to apply already established professional norms related to immigration advice to the clearly established ineffectiveness analysis under *Strickland*. In fact this Court in *Padilla* recognized it was unlikely that its decision would alter the state of plea bargaining or criminal defense representation given the already prevailing professional norms regarding immigration advice. *Padilla*, 130 S.Ct at 1485. This Court found "for at least the past 15 years [before this Court's decision in *Padilla*], professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Id.*

Based on these already prevailing professional norms of defense counsel at the time *Padilla* was announced, the obligation for defense counsel to inform all defendants of immigration status was not a new rule and thus applied to all criminal defense attorneys before *Padilla* was announced by this Court. Thus, Mr. Diaz's trial counsel had an obligation to properly and effectively inform him of all the consequences stemming from his guilty plea on February 9, 2010.

The issue of *Padilla*'s retroactivity has yet to be resolved by this Court and continues to cause disagreement and confusion among the state and lower federal courts. Mr. Diaz's case provides this Court an opportunity to resolve the conflict among the Circuit Courts of Appeal and among the state courts, and to clarify whether defense counsel had an obligation to inform defendants of adverse immigration consequences before March 2010.

II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE EXTENT DEFENSE COUNSEL IS REQUIRED TO DISCUSS IMMIGRATION CONSEQUENCES AND WHETHER ITS DECISION IN *PADILLA V. KENTUCKY* REQUIRES AN EXPLICIT WARNING REGARDING AUTOMATIC DEPORTATION WHEN AN OFFENSE CLASSIFIES AS AN AGGRAVATED FELONY UNDER 8 U.S.C. § 1101.

Padilla stands for the proposition that the failure of defense counsel to correctly inform a criminal defendant of the possible adverse immigration consequences associated with a guilty plea constitutes ineffective assistance of counsel. *Id.* at 1486. As this Court explained in *Padilla*,

> It is our responsibility under the Constitution to ensure that no criminal defendant-whether a citizen or not-is left to the "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Id. at 1486 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

However *Padilla* fails to clarify the degree of specificity with which defense counsel is obliged to discuss the adverse immigration consequences of a particular charge with a defendant, and whether that obligation requires defense counsel to explicitly state that taking a plea agreement makes a defendant an aggravated felon and will lead to automatic deportation. This Court in *Padilla* recognized that, "[t]here will . . . undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Padilla,* 130 S. Ct. at 1483. Given the complexity of immigration statutes, the Court found that "[w]hen the law is not succinct and straightforward ... a criminal defense attorney need not do 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." *Padilla,* 130 S. Ct. at 1483.

Padilla is not instructive, however, on which immigration laws are clear, and thus require correct and explicit advice from counsel, and which immigration laws are "not succinct and straightforward" and thus simply require notice to the defendant that adverse immigration consequences are possible. Lower federal courts and state courts have struggled determining the extent of immigration advice a defense attorney is obliged to give a defendant due to complexity of many of the immigration statutes. *See, e.g., Orocio*, 645 F.3d at 641-642 (finding defense counsel's failure to advise defendant about his almost certain deportation constituted ineffective assistance of counsel); *People v. Garcia*, 29 Misc. 3d 756 (N.Y Sup. Ct. 2010) (holding defense counsel's suggestion to seek advice from an immigration specialist regarding the adverse immigration consequences constituted ineffective assistance of counsel under *Padilla*), and *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (finding defense counsel's incorrect advice regarding automatic deportation did not prejudice defendant given she knew adverse immigration consequences were possible and there was overwhelming evidence of guilt).

Mr. Diaz's case exemplifies the need for clarification from this Court on this issue. While Mr. Brown, Mr. Diaz's trial counsel, advised Mr. Diaz that there may be some adverse immigration consequences associated with the plea agreement and mentioned the possibility of deportation, Mr. Brown never explicitly informed his client that by accepting the plea he would become an aggravated felon and would be automatically deported. When Mr. Diaz asked about how pleading to the charge of delivery of a controlled substance would affect his immigration status, Mr. Brown told him adverse immigration consequences were possible, but he did not know for sure what would happen to Mr. Diaz. (A103).

If the immigration statutes involved in Mr. Diaz's case were "not succinct and straightforward," it is likely Mr. Brown met his obligation under *Padilla* by simply advising Mr.

Diaz that some adverse consequences were possible. However if the immigration consequences were clear, *Padilla* suggests that Mr. Brown had an obligation to explicitly inform Mr. Diaz that he would be automatically deported.

Under the controlling immigration law, an "aggravated felony" includes "illicit trafficking of a controlled substance." 8 U.S.C. §1101(a)(43)(B). Those convicted of drug trafficking felonies are considered aggravated felons regardless of the length of the sentence imposed. Aggravated felons are conclusively presumed deportable, and thus are subject to an expedited process of administrative removal. 8 U.S.C. §1227(a)(2)(A)(iii). In such expedited proceedings, an order of removal is entered without formal proceedings and the immigrant is not given an opportunity to apply for discretionary relief. *See* 8 U.S.C. §§1228(a), 1228(b)(1), 1228(c). Based on this language it is clear a conviction of an aggravated felony fulfills this Court's pronouncement in *Padilla* that "[t]he 'drastic measure' of deportation or removal, is now virtually inevitable for a vast number of noncitizens convicted of crimes." *Padilla*, 130 S. Ct. at 1478 (internal citation omitted). What is less clear is whether the law articulating the immigration consequences for an aggravated felon, in the context of the complex, interrelated immigration statutes, is "succinct and straightforward." *Id.* at 1483.

The controlling immigration law regarding aggravated felons appears to be straightforward and unambiguous, and thus pursuant to *Padilla* arguably requires defense counsel to correctly and explicitly warn of an individual's automatic deportation upon a conviction of one of the included felonies. The failure of trial counsel to affirmatively and explicitly inform a defendant that a particular crime constitutes an aggravated felony when the statute is so clear and straightforward "den[ies] a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." *Id.* at

1484. *Padilla* highlights the important purposes counsel can serve in a case involving possible deportation:

> [I]nformed consideration of possible deportation can only benefit both the State and noncitizen during the plea bargaining process. By bringing deportation consequences into this process, the defense and the prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for dismissal of a charge that does.

Id. at 1486.

In Mr. Diaz's case, despite the specific language of the immigration statutes, Mr. Brown did not understand the adverse immigration consequences Mr. Diaz faced, and consequently failed to warn Mr. Diaz that he would qualify as an aggravated felon for immigration purposes. Mr. Brown indicated it was his understanding that, for immigration purposes, it was helpful if the sentence imposed was less than one year. That understanding is wrong based on the language of the statute. A controlled substance offense – regardless of the length of the sentence – is an aggravated felony under 8 U.S.C. § 1101. Nonetheless, the state trial court found that counsel's advice was adequate because he told Mr. Diaz that deportation was possible. This Court should clarify whether counsel fulfills his obligation to provide effective assistance of counsel, by advising a client that deportation is *possible* when, in fact, it is *inevitable*. Based on the limited warning of counsel, Mr. Diaz was convinced that his best chance to avoid adverse immigration consequences was to plead guilty to Count II, delivery of a controlled substance, and argue for a lenient sentence. (*See* A193). The failure of defense counsel to affirmatively and explicitly warn Mr. Diaz that he would be automatically deported if he accepted this plea bargain, left Mr. Diaz

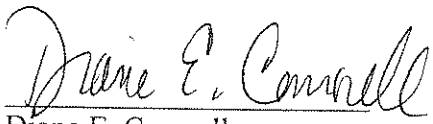
without the complete, accurate picture of the consequences necessary for him to make an informed decision whether to enter a guilty plea. In fact, because defense counsel failed to explicitly inform Mr. Diaz that he would become automatically deported if he pled guilty, Mr. Diaz believed the plea agreement defense counsel had made with the State could prevent any adverse immigration consequences—especially if he received a sentence of less than a year imprisonment. Due to defense counsel's failure to provide correct advice, Mr. Diaz pleaded guilty without fully understanding the consequences of that plea agreement. Ultimately Mr. Diaz was deported without being given the opportunity to fully evaluate the risk of inevitable deportation with the risk of going to trial.

Mr. Diaz's case provides this Court with an opportunity to clarify the extent of advice defense counsel must give a defendant under *Padilla*, and whether 8 U.S.C § 1101 is clear enough to require an explicit warning regarding automatic deportation. This Court should clarify that *Padilla* requires defense counsel not only to advise defendants of *possible* immigration consequences, but also requires defense counsel to explicitly warn defendants if they will be automatically deported due to their status as aggravated felons.

CONCLUSION

This Court should issue the writ of certiorari to clarify and resolve the disagreement among both the Circuit Courts of Appeal and among the state courts on the retroactivity of *Padilla v. Kentucky*. *See* U.S. S. Ct. Rule 10(a). Additionally, because the decision of the Wyoming state district court and the Wyoming Supreme Court decided important issues which this Court has yet to, but should resolve, *see* U.S. S. Ct. Rule 10(c), this Court should issue the writ of certiorari.

Respectfully submitted this 9th day of April, 2012.



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