

No. 11-9831

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSE MANUEL DIAZ,

Petitioner,

V.

STATE OF WYOMING,

Respondent.

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On Petition For A Writ Of Certiorari to the Wyoming Supreme Court

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RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Mr. Diaz came to the United States from Guatemala with his family at the age of seven in 1995. (Pet.'s App. p. 4, ¶ 1). They entered the country on six month tourist visas, but remained here unlawfully after their visas expired. (Resp't's App. pp. 29-30.). Mr. Diaz was still in the country illegally in 2009, when he was arrested on the charges giving rise to this case. (*Id.*).

Before his arrest in Wyoming, Mr. Diaz had been arrested in Idaho. (Resp't's App. p. 92). He was charged with two felonies in that case, but the prosecution allowed him to plead guilty to a single misdemeanor. (*Id.*). As a result of that arrest, United States Immigration and Customs Enforcement placed a "hold" on Mr. Diaz. (*Id.* p. 30).

The present case arose out of Mr. Diaz's arrest in Wyoming in 2009 after he arranged a drug deal between a supplier and a confidential informant who was cooperating with law enforcement. (Pet.'s App. pp. 195-96). The State charged Mr. Diaz with one felony count of Delivery of a Controlled Substance, and one felony count of Conspiracy to Deliver a Controlled Substance. (*Id.*, p. 219). Pursuant to a plea agreement, Mr. Diaz pled guilty to the delivery charge, and the State dismissed the conspiracy charge. (*Id.*, p. 5, ¶ 2). On February 24, 2010, the trial court sentenced Mr. Diaz to incarceration for a period of 18 to 36 months, but suspended that sentence in favor of three years of supervised probation. (*Id.*). The following month, this Court issued its opinion in *Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S.Ct. 1473 (2010). Mr. Diaz did not appeal his conviction to the Wyoming Supreme Court, and he has since been deported. (Cert. Pet., p. 5).

Before his deportation, Mr. Diaz filed a *Motion to Withdraw Plea or in the Alternative, Petition for Post-Conviction Relief* in the trial court. (Pet.'s App. pp. 262-78). Citing *Padilla*, Mr. Diaz contended that his trial counsel was ineffective for failing to warn him that a conviction for delivery of a controlled substance would result in automatic deportation. (*Id.*). The Teton County and Prosecuting Attorney's Office moved for denial of the plea withdrawal motion, and the Wyoming Attorney General's office moved for dismissal of the post-conviction relief petition. (*Id.*, p. 199). In its *Order Granting State's Motion to Dismiss Petition for Post-Conviction Relief and Denying Motion to Withdraw Plea* the trial court granted both respondents' motions, without reaching the merits of Mr. Diaz's claim. (*Id.*, pp. 198-210).

Mr. Diaz next sought discretionary review in the Wyoming Supreme Court, identifying four questions for that court's review:

1. Has Petitioner been denied his right to appeal his conviction provided by Wyoming Statute § 7-12-101, and his right to effective assistance of counsel as defined in *Roe v. Flores-Ortega*, because the trial court failed to advise him of his right to appeal, and because his counsel's incorrect legal advice led him to misunderstand the immigration consequences of the conviction or an appeal?
2. Is a defendant, who is given a suspended sentence for a felony conviction, entitled to seek state post-conviction relief while the defendant remains on probation?
3. Was Mr. Diaz denied effective assistance of counsel when Mr. Kent Brown failed to obtain accurate information regarding immigration consequences for an individual who commits an aggravated felony, and then proceeded to inform Mr. Diaz of the incorrect information after Mr. Diaz made his concerns known?
4. Do the interests of justice require this Court to provide Mr. Diaz with some mechanism—whether a belated direct appeal, appellate review

of the district court's post-conviction decision, or other extraordinary relief—to ensure that he is guaranteed an appeal and the protections by counsel made available by the Supreme Court's decision in *Padilla v. Kentucky*?

(Pet.'s App. pp. 21-197). The Wyoming Supreme Court declined to issue Mr. Diaz a writ of review, but it partially granted a writ of certiorari and remanded the case to the trial court for an evidentiary hearing on Mr. Diaz's claims that his trial counsel provided ineffective assistance. (*Id.*, pp. 18-20). The trial court held an evidentiary hearing at which Mr. Diaz and his trial attorney, Kent Brown, were the only witnesses called. (Resp't's App. pp. 1-89). Because the testimony from that hearing is important in determining whether Mr. Diaz was prejudiced, and also because Mr. Diaz's petition does not discuss the testimony in depth, Respondent will present a substantial description of that testimony here.

Mr. Brown testified that when he was appointed to represent Mr. Diaz, he became concerned about the immigration consequences Mr. Diaz might face. (*Id.*, p. 10). He contacted an immigration attorney who confirmed that a felony conviction for delivery of a controlled substance would subject Mr. Diaz to deportation. (*Id.*) While Mr. Brown and Mr. Diaz were discussing the pros and cons of accepting a plea or going to trial, Mr. Brown told Mr. Diaz that "there was a good chance he would be deported either way." (*Id.* p. 11). Mr. Brown spoke multiple times with Diaz's father, Byron Diaz, who told Mr. Brown that he believed Mr. Diaz would not be deported if the trial court imposed a sentence of less than one year. (*Id.*, p. 12). Mr. Brown told Byron Diaz that he did not believe that was accurate. (*Id.*). Although Mr. Brown never told Mr. Diaz that a guilty

plea would result in automatic deportation, he did tell Mr. Diaz that the plea would “make him subject to deportation.” (*Id.* p. 16).

Mr. Diaz’s testimony was inconsistent. Three times, he testified that before he pled guilty he already knew that a felony conviction would *automatically* result in his deportation. (*Id.*, pp. 40, 46, 61). Another time, he testified that he knew a felony conviction “could” result in deportation. (*Id.*, p. 59). Yet another time Mr. Diaz testified that Mr. Brown told him he “would be eligible for deportation but he didn’t know what the deportation judge would do[.]” (*Id.*, p. 64). But Mr. Diaz also testified that an immigration lawyer (not Mr. Brown) and an “immigration agent” told his father that Mr. Diaz would fare better in his immigration matters if the trial court imposed a sentence of less than one year. (*Id.*, pp. 43-44, 50).

The trial court subsequently found that Mr. Diaz’s trial counsel did not provide ineffective assistance. (Pet.’s App. pp. 3-17). Relying on the Tenth Circuit’s decision in *United States v. Hong*, 671 F.3d 1147 (10th Cir. 2011), the trial court determined that this Court’s holding in *Padilla* does not have retroactive effect in collateral review proceedings. (*Id.*). It also found that even if *Padilla* were given retroactive effect, Mr. Diaz was not entitled to relief because he received the advisement required by *Padilla* and also because he could not show prejudice from the alleged *Padilla* violation. (*Id.*). The Wyoming Supreme Court subsequently issued its *Order Denying Petition for Writ of Certiorari*. (*Id.*, pp. 1-2). Mr. Diaz has not petitioned the United States District Court for a writ of habeas corpus.

## SUMMARY OF THE ARGUMENT

Analysis under *Padilla* still requires application of the two-part *Strickland* test under which a petitioner claiming ineffective assistance of counsel must demonstrate both deficient performance and prejudice. Even if this Court grants certiorari and decides both that *Padilla* applies retroactively in collateral review and that Mr. Diaz's attorney was ineffective for failing to tell him explicitly that a guilty plea would result in automatic deportation, the state courts' decision will still stand because Mr. Diaz has not challenged the state court's determination that he failed to satisfy the prejudice prong of the *Strickland* test. Moreover, the determination that Mr. Diaz suffered no prejudice is correct because he knew that a felony conviction would result in his deportation, and because he was already subject to deportation because the federal immigration authorities were aware that he was in the United States illegally. Finally, this Court has already granted certiorari on the question of *Padilla's* retroactivity, and the case in which it did so provides a better vehicle for this Court's review.

## ARGUMENT

This case is not the right vehicle for this Court to determine whether *Padilla* is retroactive on collateral review.

***Mr. Diaz cannot satisfy the prejudice prong of the Strickland test because he knew his guilty plea would make him subject to deportation.***

In determining whether trial counsel was ineffective for failure to warn a defendant about the immigration consequences of a plea, a court must apply the two-part test this Court articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Padilla*, 130 S.Ct. at 1482. That test requires Mr. Diaz to show both that his trial counsel performed deficiently, and that he was prejudiced by counsel's deficient performance. *Id.* In order to satisfy the prejudice prong of the test, Mr. Diaz must show a reasonable probability that the outcome would have been different – in other words, that he would have elected to go to trial – if not for his counsel's deficient performance. *Id.* The trial court found that Mr. Diaz failed to satisfy either prong of the *Strickland* test. (Pet.'s App. p. 16). In his petition to this Court, Mr. Diaz does not challenge the finding that he failed to establish prejudice. Even if he had done so, the evidence not only failed to show prejudice, it clearly showed that Mr. Diaz was not prejudiced because he was well aware that his guilty plea could lead to deportation.

The testimony at the November 29, 2011, evidentiary hearing shows that Mr. Diaz knew a delivery conviction could result in his deportation. As detailed above, trial counsel Kent Brown testified that both Mr. Diaz and his father recognized that a

conviction could have serious immigration consequences. (Resp't's App. pp. 11-12). Mr. Brown also testified that he told Mr. Diaz that he was likely to be deported whether he pled guilty or went to trial and was convicted. (*Id.*, p. 11). Further, Mr. Brown testified that he told Mr. Diaz the plea would "make him subject to deportation." (*Id.* p. 16).

Mr. Diaz's own testimony also shows that he suffered no prejudice from Mr. Brown's allegedly deficient performance. Mr. Diaz testified that Mr. Brown told him he "would be eligible for deportation but he didn't know what the deportation judge would do[.]" (*Id.*, p. 64). Another time he testified that he knew a felony conviction "could" result in deportation. (*Id.*, p. 59). Mr. Diaz also repeatedly testified that before he pled guilty he already knew that a felony conviction would result in his deportation. (*Id.*, pp. 40, 46, 61).

Finally, the trial court twice advised Mr. Diaz that a conviction could result in deportation. At his arraignment, the trial court told Mr. Diaz that conviction on the charged offenses could result in deportation. (*Id.* pp. 101-02). Again at the change of plea hearing, before accepting Mr. Diaz's guilty plea, the trial court warned him:

If you plead guilty to a felony, Mr. Diaz, and this is a felony, you lose certain civil rights. If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(Pet.'s App. pp. 287-88).

Based on the evidence presented to the trial court considering Mr. Diaz's ineffective assistance claim on remand, that court correctly determined that Mr. Diaz could not satisfy the prejudice prong of the *Strickland* test. As the trial court noted, Mr. Diaz testified that he knew a guilty plea would make him subject to deportation, yet he pled guilty anyway. (*Id.*, p. 11). Thus, he cannot show that he would have done anything differently absent trial counsel's allegedly deficient performance. In other words, Mr. Diaz cannot show that he would have chosen to go to trial if he were properly informed, because he was properly informed and nonetheless chose to plead guilty.

***Mr. Diaz was already subject to deportation as an illegal alien.***

Mr. Diaz testified that he, his parents, and his sisters entered the United States lawfully on tourist visas when he was seven years old. (Resp't's App. P. 29). The visas were valid for six months, but the family remained in the country for several years. (*Id.*, p. 30). Mr. Diaz never received permission from federal immigration authorities to stay in the United States. (*Id.*, p. 35).

In 2007, Mr. Diaz was arrested in Teton County, Idaho, on a misdemeanor charge of careless driving. (*Id.*, p. 91). He was convicted and placed on probation. (*Id.*, p. 58). In 2008, Mr. Diaz was again arrested in Teton County, Idaho, this time on felony charges of aggravated assault and attempted robbery. (*Id.*, p. 92). Mr. Diaz reached a plea agreement with the prosecutor by which he pled guilty to a single count of misdemeanor assault and was again placed on probation. (*Id.*). Mr. Diaz testified that deportation was a concern in both of those cases, and that his father consulted an immigration attorney on

his behalf. (*Id.*, pp. 57-58). He also testified that when he was arrested on the Wyoming charges that gave rise to this case, he knew that the federal immigration authorities had placed a “hold” on him. (*Id.*, p. 59).

Because he was in this country illegally, Mr. Diaz was already subject to deportation before he pled guilty. 8 U.S.C. § 1227(a)(1)(B). Thus, he faced deportation regardless of what happened in his Wyoming criminal proceedings. Accordingly, Mr. Diaz did not suffer actual prejudice from trial counsel’s alleged failure to inform him of the immigration consequences of his guilty plea because that alleged failure did not change his situation.

*This Court has already granted certiorari in a case that is a better vehicle for review.*

On April 30, 2012, (after Mr. Diaz submitted his certiorari petition) this Court granted certiorari to review the Seventh Circuit’s decision in *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011) *cert. granted*, 80 U.S.L.W. 3429, 3608, 3612 (U.S. Apr. 30, 2012) (No. 11-820). The question this Court agreed to address is whether *Padilla* applies to persons whose convictions became final before its announcement.

*Chaidez* presents a better vehicle for clarifying *Padilla* than does Mr. Diaz’s case because *Chaidez* is not fact-bound like Mr. Diaz’s case. Ms. Chaidez claimed that her trial attorney entirely failed to warn her that her guilty plea could have adverse immigration consequences. *Chaidez*, 655 F.3d at 686. The question presented to the Seventh Circuit, and to this Court, is not encumbered by factual disputes. By contrast,

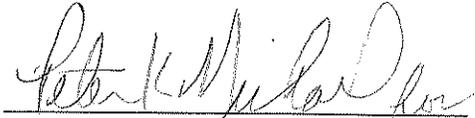
important facts in Mr. Diaz's case remain in dispute. Crucially, Mr. Diaz testified inconsistently regarding what his attorney told him and what he knew from other sources, including the immigration attorney his father consulted when Mr. Diaz was charged with aggravated assault and attempted robbery in Idaho.

Mr. Diaz's pre-existing status as a deportable alien also makes this case an unsuitable vehicle. Ms. Chaidez was in the United States lawfully, so a holding in her favor could result in her being allowed to remain here. *Chaidez*, at 686. Mr. Diaz's situation is very different. Even if this Court were to grant certiorari not only on the questions Mr. Diaz presents, but also on the *Strickland* prejudice prong question he did not present, and even if the Court were then to decide the case in Mr. Diaz's favor and hold that his trial counsel was ineffective, the Court's decision would have no real effect in terms of Mr. Diaz's immigration status. He is deportable under federal statute, and no resolution of the questions he has presented to this Court will change that.

## CONCLUSION

For the reasons discussed above, this Court should deny Mr. Diaz's petition for a writ of certiorari.

Submitted this 7th day of June, 2012.

  
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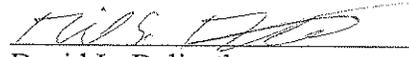
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CERTIFICATE OF SERVICE

I, David L. Delicath, a member of the Bar of this Court, hereby certify in accordance with United States Supreme Court Rule 29.5(b) that on the 7th day of June, 2012, I served a true and correct copy of Respondent's Brief in Opposition and Respondent's Appendix by placing the same in the United States mail, first-class postage prepaid, and addressed to the attorney of record for Petitioner:

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I further certify that all parties required to be served have been served.

  
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