No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSUE IBARRA,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent,

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.- Whether the Texas Court of Criminal Appeals erred in applying *Teague v. Lane*, 489 U.S. 288 (1989) without engaging in a proper analysis as to whether the constitutional right recognized in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) was a watershed rule of criminal procedure, and by not recognizing that *Padilla* applies to affirmative misadvice as well as no advice, while the no retroactive application of *Chaidez v. United States*, 133 S.Ct. 1103 (2013) only applies to the "no advice" part of *Padilla*.

II.- Whether pursuant to the clearly established precedent of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911(2013) the Texas Court of Criminal Appeals erred in applying the "new rule v. old rule" threshold question of *Teague* to an Ineffective Assistance of Counsel (IAC) claim that is the functional equivalent of a direct appeal.

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OPINIONS BELOW

The Official Notice From Court of Criminal Appeals of Texas (App. A, infra, II). The Opinion of the First Court of Appeals of Texas, (App. B, infra, III).

JURISDICTION

The Order of the Court of Criminal Appeals was entered on November 20, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as well as 28 U.S.C. § 2101 (c)(d), and Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provision of the U.S. CONST. art. I § 9 cl. 2, is reproduced at App. C, infra, XI.

The relevant provision of the U.S. CONST. art. III §§ 1 and 2, is reproduced at App. C, infra, XI .

The relevant provisions of the U.S. CONST. amends. V, VI, XIV, are reproduced at App. C, infra, XI-XII.

The relevant provision of 8 U.S.C. § 1227 (a)(2)(A)(iii), is reproduced at App. C, infra, XII.

The relevant provision of 8 U.S.C. § 1227 (a)(2) (E)(i), is reproduced at App. C, infra, XII.

The relevant provision of 28 U.S.C. §2101 (c)(d), is reproduced at App. C, infra, XIII.

The relevant provision of 28 U.S.C. §1257, is reproduced at App. C, infra, XIII.

The relevant provision of Supreme Court Rule 13 is reproduced at App. C, infra, XIV.

The relevant provisions of Tex. Code Crim. Proc. Ann. art. 11.072, are reproduced at App. C, infra, XIV.

The relevant provisions of Tex. Code Crim. Proc. Ann. art. 26.13(a), (b), (c), (d), are reproduced at App. C, infra, XIV-XV.

STATEMENT OF THE CASE

Petitioner, Josue Ibarra, was convicted of the offense of assault on March 16, 1998 in Cause No. 757742 in the 174th District Court, Harris County, Texas. His sentence was one

year Harris County jail probated for 2 years. He complied with all the conditions of his sentence.

Petitioner was a Legal Permanent Resident (LPR) from Mexico. The Department of Homeland Security, and Immigration and Customs Enforcement (ICE), initiated Removal Proceedings against him pursuant to 8 U.S.C. § 1227 (a)(2)(A)(iii), INA § 237(a)(2)(A)(iii) and 8 U.S.C. § 1227 (a)(2) (E)(i), INA § 237(a)(2)(E)(i) as a result of his conviction. On July 22, 1999 Petitioner was ordered removed from the country as an aggravated felon without the possibility of legally returning to this country because of the conviction from Harris County.

In order for the Petitioner to have an opportunity to recover his LPR status he needs to successfully challenge the underlying aggravated felony for which he was deported.[1] Petitioner was deported as a consequence of this offense for two reasons; that it was an

[1] On June 7, 2012 Petitioner filed a Motion to Reopen with the Board of Immigration Appeals (BIA). While at the time Josue Ibarra was removed his offense was clearly an aggravated felony, in 2006 it became one which is not an aggravated felony. *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006). The BIA denied the Motion to Reopen and the case was timely appealed to the Fifth Circuit were a Motion for Rehearing of the Fifth Circuit decision is currently pending. *Josue Ibarra-Gonzalez v. Eric Holder* Case No. 12-60665.

aggravated felony and that it was a crime of domestic violence. Both of these reasons are premised on the condition that the offense be considered a crime of violence. While at the time that Petitioner plead guilty to the misdemeanor offense of assault such a crime was clearly within the definition of the INA pertaining to aggravated felonies, it is now equally clear that since *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) such offense is no longer within the definition of an aggravated felony.

On January 6, 2012 petitioner filed a writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.072, based on ineffective assistance of counsel according to *Padilla v. Kentucky,* 130 S.Ct. 1473 (2010). The claim included the allegation that petitioner's trial attorney had given him affirmative misadvice by basically telling him that his guilty plea would be the equivalent of a traffic citation for immigration purposes. The record was properly developed and all of the facts necessary for a determination were presented before the 174th District Court, Harris County, Texas.

On March 15, 2012, the court denied the Petition. On May 9, 2012, the State filed its "State's Proposed Findings of Fact, Conclusions of Law and Order." This instrument was never

actually served on Applicant's attorney as required by the Texas Code of Criminal Procedure or as stated by the district attorney in his certificate of service. Petitioner filed the required Notice of Appeal. The First Court of Appeals of Texas issued its Opinion on March 20, 2012 in the published decision of *Ibarra v. State of Texas*, NO. 01-12-00292-CR, 2013 Tex. App. LEXIS 2990 (Tex. App. –Houston [1st Dist.] 2011, pet. ref'd). On April, 5, 2013 petitioner filed a Motion for En Banc Reconsideration with the First Court of Appeal of Texas, and on June 21, 2013 a Motion for Leave was also filed with the First Court of Appeal of Texas. On August 9, 2013 the Motion for en banc reconsideration was denied. On September 9, 2013 petitioner filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which on November 20, 2013 the Court refused. The opinion of the First Court of Appeals of Texas stands as the one from which a Writ of Certiorari is being sought before the U.S. Supreme Court.

On February 20, 2013, this Court decided in *Chaidez v. United States,* 133 S.Ct. 1103 (2013), that *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) was not retroactive. The First Court of Appeals of Texas applied *Chaidez* to affirm the lower Court. The first Court of Appeals reasoned

in harmony with *Exparte De Los Reyes*, 392 S.W. 3d 675 (Tex. Crim. App. 2013). Petitioner argued before the First Court of Appeals of Texas that the Court should consider whether *Chaidez* decision might not apply because unlike *Chaidez* this was a writ of *habea*s and not *coram nobis*. Furthermore, this case presented the Court with an issue of affirmative misadvice and *Chaidez* was speaking to the part of *Padilla* that addressed ineffective assistance of counsel due to no-advice. This case involves affirmative misadvice.

REASONS FOR GRANTING THE PETITION

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "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." These provisions are universal in their application, to all persons within the territorial jurisdiction, with-out regard to any differences of race, of color, or of nationality; and the equal

> protection of the laws is a pledge of the protection of equal laws… The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."[2]

In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) the court expressed "[u]nder our law, the alien in several respects stands on an equal footing with citizens" and it further writes, in footnote 9, that:

> "[t]his Court has held that the Constitution assures him a large measure of equal economic opportunity, *Yick Wo v. Hopkins*, 118 U.S. 356…;*Truax v. Raich*, 239 U.S. 33…;he may invoke the writ of habeas corpus to protect his personal liberty, *Nishimura Ekiu v. United States*, 142 U.S. 651; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments, *Wong Wing*

[2] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

> *v. United States*, 163 U.S. 228…; and, unless he is an enemy alien, his property cannot be taken without just compensation. *Russian Volunteer Fleet v. United States*, 282 U.S. 481…"

The Supreme Court in *Galvan v. Press*, 347 U.S. 522 (1954) again affirms an alien's status as a person and his equal protection for life, liberty and property under the due process clause as is afforded to a citizen.

The writ of *Habeas Corpus* is a constitutionally protected privilege which shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.[3] In this sense *Habeas Corpus* is different from the writ of *Coram Nobis*. There is no constitutionally protected privilege or right to *Coram Nobis*. In *Chaidez v. United States,* 133 S.Ct. 1103 (2013), the U.S. Supreme Court did not decide whether the difference between a *Coram Nobis* and a *habeas* petition has significance in cases such as the one before them.[4] The difference between a writ of *Habeas Corpus* and the writ of *Coram Nobis* affects the outcome of this case. In considering whether the

[3] U.S. CONST. art. I § 9 cl. 2.
[4] See *Chaidez v. United States,* at 1106, footnote 1.

application of *Teague v. Lane*, 489 U.S. 288 (1989) to a "new rule" of criminal procedure can be given retroactive effect the fact that the writ of *Habeas Corpus* is constitutionally protected carries a heavier weight than when comparing it to the writ of *Coram Nobis*. The *Teague* rule that a "new rule" does not apply to a person whose conviction is already final has two exceptions. One of the exceptions is for rules that place the conduct beyond the power of the government to proscribe. The other exception for "watershed rules of criminal procedure" applies here. *Chaidez v. United States* is not an excuse for States to ignore this argument. The reason why *Chaidez v. United States* did not address the question of whether the new rule announced in *Padilla v. Kentucky,* 559 U.S. 356 (2010) was a "watershed rule of criminal procedure" is that the issue of the exceptions was not argued.[5] Petitioner presented this argument to the First Court of Appeals of Texas and to the Court of Criminal Appeals, and now brings it to the U.S. Supreme Court.

The new rule announced in *Padilla* that the *Chaidez* Court said was not to be given retroactive effect was that " the Sixth Amendment requires an attorney for a criminal

[5] *Id.* at 1107, footnote 3.

defendant to provide advice about the risk of deportation arising from a guilty plea."[6] The reason is, the *Chaidez* Court explained, that before deciding if failing to provide immigration consequences of a plea "fell below an objective standard of reasonableness…" *Padilla* considered the threshold question of "[w]as advice about deportation 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction, rather than a component of the criminal sentence…"[7] However, such a question was not needed to decide that affirmative misadvice about collateral consequences was covered under the ambit of the Sixth Amendment. The *Padilla* Court considered both affirmative misadvice as well as no advice but saw no reason to limit the holding to affirmative misadvice.[8] The *Padilla* Court did not have to consider the issue of "collateral v. direct" for the part of affirmative misadvice. The logic is that if the Sixth Amendment is going to apply to no advice regarding immigration consequences of a guilty plea because immigration consequences will not

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[6] *Id.* at 1105.
[7] *Id.* at 1108.
[8] *Padilla v. Kentucky,* 559 U.S. 356, 359-360, 369-372 (2010).

be categorized as "direct or collateral" it also applies to misadvice of even collateral consequences.

The issue of "new v. old rule" and when new rules apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), is not a concern for two types of case: 1) those that are not final convictions, 2) and those on direct appeal. Clearly established law, under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) would consider cases making an ineffective assistance of counsel claim for the first time on collateral review, such as the present one, the equivalent of a direct appeal. The logic of *Griffith v. Kentucky*, 479 U.S. 314 (1987), supports the proposition that the new rule should apply to this case, which in essence is the functional equivalent of a direct appeal.

In Texas, *Habeas Corpus* is much more than a mere privilege. The Texas Constitution defines *Habeas Corpus* as a writ of right that shall never be suspended. Furthermore, it guarantees that "…[t]he Legislature shall enact laws to render the remedy speedy and effectual." [9] While under the Federal

[9] Tex. Const. art. I, § 12.

Constitution *habeas corpus* is a privilege that may be suspended, the State of Texas provides a stronger protection. The State of Texas would not be complying with the Fourteenth Amendment if it merely gave State *habeas* seekers the same level of protection as that which was guaranteed under the Federal Rules of *Habeas*. The United States Constitution does not provide a specific mandate to Congress that it enact laws to render the remedy speedy and effectual. For the founding fathers the writ was such a strong protection against tyranny that it was superfluous to say anything else. [10] Whatever the meaning of the writ under the Federal Constitution, the State of Texas went much further in calling it a right that shall never be suspended and for which the legislature

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[10] Hamilton's argument against the inclusion of the Bill Rights in the Constitution is based on the principle that the Constitution, among other rights, provided for the privilege of habeas corpus. Hamilton cites with approval from Blackstone which considered that "confinement of the person, by secretly hurrying him into jail, where his sufferings are unknown or forgotten, is less public, a less striking, and therefore a more dangerous engine of arbitrary government." The writ of habeas as described by Hamilton was the best guarantee against arbitrary government and thereby a major tool in protecting liberty. *See* "Alexander Hamilton (Federalist Papers No. 48), *The Constitution of the United States of America, and Selected Writings of the Founding Fathers*, Barnes & Noble, (2012) at pages 639-648.

was to enact laws to render the remedy speedy and effectual. The State of Texas does not have the luxury of being able to suspend the writ. The writ of *coram nobis* that was contemplated under *Chaidez v. United States,* 133 S.Ct. 1103 (2013) is not a constitutionally protected writ. At the very least the Texas Court of Criminal Appeals had an obligation under the Fourteenth Amendment to consider the argument of whether the *Chaidez* no retroactivity principle also applied to the Texas Constitutionally protected right of *Habeas*. *Goeke v. Branch*, 514 U.S. 115 (1995), quoting from *Allen v. Georgia*, 166 U.S. 138 (1897), seems to suggest that if a State does not follow its own laws, at least with regards to a constitutionally protected right, it will be violating substantive due process. *Goeke* is a case in the context of a right to appeal after a defendant escapes justice under Missouri law. The Court in that case explained that "because due process does not require a State to provide appellate process at all…a former fugitive's right to appeal cannot be said to 'be so central to an accurate determination of innocence or guilt,' as to fall within this exception to the *Teague* bar." But the *Padilla* rule is a much more fundamental and basic human right than the one involved in the fugitive case of *Goeke*. The *Padilla* rule involves the right to effective

counsel under the Sixth Amendment. The present case involves two more constitutional protections; 1) the right of habeas which shall never be suspended, 2) the due process and equal protection of the Fourteenth Amendment.

This case is also one which involves affirmative misadvice. The *Padilla* no-retroactivity rule of *Chaidez* applies only to that part of *Padilla* which announced a new rule. The *Chaidez* Court specifically stated that the *Padilla* holding to the effect that "the sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea… does not have retroactive effect."[11] In the Court's view the *Padilla* decision first answered the question of whether advice about deportation was categorically removed from the scope of the Sixth Amendment right to counsel because it involved only a collateral consequence of a conviction, rather than a component of the criminal sentence.[12] This Court, however, recognizes both in *Padilla* and *Chaidez* that affirmative misadvice is in a different category. The Texas Court of Criminal Appeals did not follow the law as established by the precedent of the Fifth

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[11] *Chaidez v. United States,* 133 S.Ct. 1103, 1105 (2013).
[12] *Id.* at 1108.

circuit and the U.S. Supreme Court. While the new rule that immigration consequences are not to be considered collateral might not be retroactive according to *Chaidez*, such is not the case regarding the requirement that counsel's advice, once voluntary given, must be reasonable and accurate, or at the very least correct. The reason for this is that counsel's wrongful advice regarding immigration consequences of a guilty plea is subject to the Sixth Amendment pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) despite being considered a collateral consequence. Such wrongful advice might even be covered under *United States v. Cronic*, 466 U.S. 648 (1984) which supports the idea that in some cases the inadequacy of the advocacy in favor of the defendant merits the presumption of prejudice. *Cronic* should apply when a defendant, such as Josue Ibarra, chooses not to go to trial on the basis of either erroneous advice or no advice regarding the presumptively certain and mandatory removability from this Country.[13]

[13] The admonishments given by the Court do not serve to cure ineffective assistance of counsel. See, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), *Marroquin v. United States*, 2012 U.S. App. LEXIS 13011 (5th Cir. Tex. 2012). The Sixth

I.- There is a conflict among the Federal Circuits as well as between the Fifth Circuit and the Texas Court of Criminal Appeals on the matter of affirmative misadvice concerning a material issue not being considered acceptable representation before or after *Padilla.*

On the issue of whether affirmative misadvice regarding collateral issues, such as parole eligibility and immigration matters,[14] is protected under the Sixth Amendment most Federal Courts have decided that it is. The following federal circuits take that position, specifically with regards to the collateral consequence of parole eligibility: *Hill v. Lockhart*, 894 F.2d. 1009 (8th Cir. 1990), *Sparks v. Sowders*, 852 F. 2d. 882 (6th Cir. 1988), *Strader v. Garrison*, 611 F.2d. 61 (4th Cir. 1979), *Holmes v. United States*, 876 F.2d. 1545 (11th Cir. 1989), *James v. Cain*, 56 F. 3d. 662 (5th Cir. 1995), *Meyers v. Gillis*, 142 F.3d. 664 (3rd Cir. 1998). The following federal circuits take that position specifically regarding immigration consequences: *United States v. Kwan*, 407 F. 3d. 1005 (9th Cir. 2005), *United States of America v.*

Amendment does not guarantee the right to effective assistance of Court.

[14] After *Padilla* the Collateral v. Direct consequences analysis is irrelevant for purposes of Immigration.

Couto, 311 F. 3d. 179 (2nd Cir. 2002), and *Santos-Sanchez v. United States*, 548 F. 3d. 327 (5th Cir. 2008). With regard to the misadvice of immigration consequences the Eleventh circuit also held that misadvice was protected under the Sixth Amendment but limited the holding to case specific circumstance such as the one they confronted in *Downs-Morgan v. United states of America*, 765 F. 2d. 1534 (11th Cir. 1985). The Seventh Circuit on the other hand, recently held in *Chavarria v. United States of America*, 739 F. 3d. 360 (7th Cir. 2013) that:

> "[t]he *Chaidez* majority jointly referred to both misadvice and non-advice throughout its opinion. There is no question that the majority understood that *Padilla* announced a new rule for all advice, or lack thereof, with respect to the consequences of a criminal conviction for immigration status."

The position of the Seventh Circuit seems questionable in this regard because it would essentially mean that in some respects non-citizens would now be worse off than they were before. The position of the Seventh circuit would mean that a rule that prior to *Padilla* provided a form of relief for non-citizens has now been

foreclosed. Such position is not tenable. As it has been shown above the majority of the Federal Circuits held that misadvice regarding collateral consequences fell under the umbrella of the Sixth Amendment. Even the First Circuit admitted in *Cepulonis v. Ponte*, 669 F. 2d 573 (1st Cir. 1983) that:

> "[a]lthough *mis*information may be more vulnerable to constitutional challenge than mere lack of information, *see, e.g., Strader v. Garrison, 611 F.2d 61, 63-64 (4th Cir. 1979)*, a defendant seeking to set aside a guilty plea must at the very least show that correct information would have made a difference in his decision to plead guilty."

The *Chaidez* Court explained that: "[t]rue enough, three federal circuits (and a handful of state courts) held before *Padilla* that misstatements about deportation could support an ineffective assistance claim. But those decisions reasoned only that a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead his client on any important matter, however related to a criminal prosecution... They co-existed happily with

precedent, from the same jurisdictions (and almost all others), holding that deportation is not 'so unique as to warrant an exception to the general rule that a defendant need not be advised of the [collateral] consequences of a guilty plea…' So at most, Chaidez has shown that a minority of courts recognized a separate rule for material misrepresentations, regardless whether they concerned deportation or another collateral matter. That limited rule does not apply to Chaidez's case. And because it lived in harmony with the exclusion of claims like hers from the *Sixth Amendment*, it does not establish what she needs to--that all reasonable judges, prior to *Padilla*, thought they were living in a *Padilla*-like world."

However, affirmative misadvice was covered under certain Federal Jurisdictions including the Fifth Circuit as mention above. In the State of Texas affirmative misadvice was also protected under State precedent as well as the Texas Code of Criminal Procedure. See *Ex Parte Arjona*, 402 S.W. 3d. 312, 314 (Tex. App.-Beaumont 2013, no pet.) explaining that :

> "[i]n *Padilla*, the Supreme Court noted there is no relevant difference between an act of omission and an act of commission in this context,

and refused to limit the new duty it imposed on counsel to simply that of avoiding affirmative misadvice. *Padilla, 130 S.Ct. at 1484*. But that does not mean affirmative misadvice concerning a material issue was considered acceptable representation before or after *Padilla. See Ex parte Griffin, 679 S.W.2d at 17-18*; *United States v. Kwan, 407 F.3d 1005, 1008-09, 1014-1018 (9th Cir. 2005)* (distinction abrogated by *Padilla*); *United States v. Couto, 311 F.3d 179, 187-88 (2d Cir. 2002)* (distinction abrogated by *Padilla*); *Downs-Morgan v. United States, 765 F.2d 1534, 1540-41 (11th Cir. 1985)*; *see also* 43 George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 40:43 (3d ed. 2011 & Supp. 2012); 43 George E. Dix & Robert O. Dawson, *Texas Practice Series: Criminal Practice and Procedure* § 34.111 (2d ed. 2001) (Counsel's material misadvice may render guilty plea involuntary.)"

Also see Tex. Crim. Proc. Code Ann. art. 26.13 (2013). The First Court of Appeals, however, did not address the affirmative misadvice argument even after in their Opinion *Jose Ibarra v. The State of Texas*, No. 01-12-00292-CR 2013 Tex. App. Lexis 2990 (March 21, 2013) the Court acknowledged that:

> "[a]t a hearing on March 15, 2012, appellant testified that his trial counsel did not tell him about the immigration consequences associated with his guilty plea. Specifically, appellant alleged that his counsel, M. Barerra, told him that 'it was only a misdemeanor . . . as though I had been in a traffic citation.'…"

Petitioner than filed a Motion for En Banc Reconsideration specifically arguing that this case involved affirmative misadvice. It was again reargued in a Motion for Leave to file Amended Motion for En Banc Reconsideration. And then it was again argued to the Texas Court of Criminal Appeals in the Petition for Discretionary Review. The First Court of Appeals did not apply clearly established law under the pretext that *Padilla* was not retroactive. The First Court of Appeals, and the

Texas Court of Criminal Appeals by refusing the timely filed Petition for Discretionary Review, have created a conflict between the Fifth Circuit and State law on the issue of the application of *Padilla* to what was the clearly established law in Texas prior to *Padilla*. The conflict is also with the U.S. Supreme Court precedent because neither *Padilla* nor *Chaidez* stand for the proposition that affirmative misadvice about collateral consequences such as immigration is a new rule for which there is a retroactivity problem. Unlike the Ninth Court of Appeals of Texas in *Ex Parte Arjona* the First Court of Appeals in *Ibarra v. Texas*, No. 01-12-00292-CR 2013 Tex. App. Lexis 2990 (March 21, 2013) concluded that although:

> "[t]his Court has previously held that the ruling in *Padilla* applies retroactively. *See Enyong v. State, 369 S.W.3d 593, 600 (Tex. App.--Houston [1st. Dist.] 2012, no pet.)*; *Ex parte Tanklevskaya, 361 S.W.3d 86, 95 (Tex. App.--Houston [1st Dist.] 2011, pet. filed)*. However, since *Enyong* and *Tanklevskaya* were decided, the United States Supreme Court has addressed the issue and held that *Padilla* does not

> apply retroactively. *See Chaidez v. United States, No. 11-820, 568 U.S. , 133 S. Ct. 1103, 185 L. Ed. 2d 149, 153 (2013)*."

The First Court of Appeals of Texas and the Texas Court of Criminal Appeals failed to see that the clearly established law in Texas and in the Fifth Circuit as well as many other jurisdictions lead to the conclusion that affirmative misadvice concerning a material issue is not considered acceptable representation before or after *Padilla.*

In this case the advice given was affirmative misadvise. Petitioner was told that his conviction would be the equivalent of traffic ticket. *Padilla* applies to no advice as well as affirmative misadvise, but in the State of Texas we are almost always dealing with affirmative misadvise and in that sense the protections afforded by the State constitution are greater.

Courts have long recognized that a defense attorney's misadvice to a client constitutes ineffective assistance of counsel under the Sixth Amendment, regarding both "collateral" or "direct" consequences. Texas has long held that non-citizen defendants must be warned of immigration consequences before accepting a

guilty plea. *See* Tex. Code Crim. Proc. Ann. art. 26.13(a), (b), (c), (d). Furthermore, section 26.13(b) of the Texas Code of Criminal Procedure requires that the court not accept a guilty plea or *nolo contendere* unless it appears that the defendant is mentally competent, and the plea is free and voluntary. The Texas Court of Criminal Appeals has long held that when a defendant opts to plead guilty to an offense based on the misadvice of his attorney, the plea is not valid or constitutional. *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991) (holding that the defendant's guilty plea was invalid because his trial counsel informed him at the time of the plea agreement that probation was possible when in fact it was not.) This ruling has since been followed and confirmed by lower courts in Texas. *See Abu-Ein v. State*, 921 S.W.2d 807, 808 (Tex.App.-Houston [14th Dist.] 1996, pet. denied) (holding that a defendant's election to plead guilty when based upon erroneous advice of counsel is not made voluntarily and knowingly.) In this case trial counsel's advice that this conviction was the equivalent of a traffic citation is misadvice because it was clear it would result in deportation and traffic citations do not trigger removal from this country for legal permanent residents such as Petitioner.

Courts have held that affirmative misadvice concerning non-immigration consequences of a conviction violates the Sixth Amendment even if those consequences might be deemed "collateral." The Fifth Circuit Court of Appeals in *Santos-Sanchez* recognized that when there is affirmative misadvice by defense attorneys regarding immigration consequences of criminal convictions, this could fall under the Sixth Amendment right to effective counsel. See *Santos-Sanchez v. United States,* 548 F.3d 327, 333-334 (5th Cir. 2008) (concluding that counsel's advice was not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

Further, *Chaidez v. United States* says that *Padilla* is a new rule of law because of the differences between collateral and non-collateral consequences. But the principal that a defendant must be advised of the consequences of his crime as well as his plea has always been the standard of professional responsibility in the legal

profession. In a state with such a vast amount of immigrants, it cannot be argued that immigration consequences cannot be foreseen by any reasonable attorney in the State of Texas. Under the Fifth Amendment's due process protection, in Texas a fundamentally fair proceeding according to the State's legislature includes admonishments regarding immigration consequences. And the U.S. Fifth circuit Court of Appeals has apparently decided that in this Circuit the Six Amendment protects defendants from affirmative misadvice regarding collateral consequences long before *Padilla*. In *James v. Cain*, 56 F. 3d. 662, 667 (5th Cir. 1995), the Fifth Circuit explained that:

> "[t]his Court has never decided whether erroneous advice by counsel regarding parole eligibility amounts to ineffective assistance of counsel. *See Czere, 833 F.2d at 63 n.6*. However, this Court and others have recognized that affirmatively erroneous advice of counsel as to parole procedure is much more objectively unreasonable than would be a failure to inform of parole consequences…*See id.*; *see also Strader v. Garrison, 611 F.2d 61 (4th*

> *Cir. 1979)* (finding misinformation of parole consequences does constitute ineffective assistance of counsel); *Cepulonis v. Ponte, 699 F.2d 573, 577 (1st Cir. 1983)* (commenting that counsel's *mis*information regarding parole eligibility may be more vulnerable to constitutional challenge than mere lack of information)."

And then the Court proceeded to hold that:

> "Under the record as it presently stands, this Court has no choice but to hold that the district court should reconsider this habeas corpus petition to evaluate whether James has met the prejudice requirement in order to avoid dismissal of his petition as abuse of the writ. On remand, the district court should determine if James has shown that he was prejudiced by ineffective assistance of counsel. Specifically, the district court should evaluate whether the attorney affirmatively misinformed or failed to inform James about the parole process and, if so, whether such misinformation

> or failure rendered the attorney's actions objectively unreasonable. If the district court does find that James' attorney provided him with objectively unreasonable counsel, then the district court must inquire as to whether James was prejudiced by this ineffective assistance of counsel."[15]

The Texas Court of Criminal Appeals and the First Court of Appeals of Texas were constitutionally wrong in denying Petitioner his Writ of Habeas on the basis that *Chaidez* said *Padilla* was not retroactive. Just because Petitioner argued that his trial counsel did not provide him with the required effective assistance of counsel according to *Padilla* does not mean that he argued *Padilla* was limited to no-advice. On the contrary, Josue Ibarra, the Petitioner, argued and stated that his counsel gave him affirmative misadvice concerning the consequences of his guilty plea.

The State of Texas, the Texas Court of Criminal Appeals, and the First Court of Appeals of Texas are all entities which under the Fourteenth Amendment are required to not

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[15] *James v. Cain*, 56 F. 3d. 662, 668-669 (5th Cir. 1995).

"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."[16] The law is the law and Texas must apply it to all equally and fairly, such is the essence of due process and equal protection. For the reasons here explained this Honorable Court should grant the Petition for Writ of Certiorari.

II.- *Teague v. Lane*, 489 U.S. 288 (1989) requires that the Courts engage in a proper analysis as to whether the part of *Padilla v. Kentucky*, 559 U.S. 356 (2010) that established a new constitutional right was a watershed rule of criminal procedure, particularly when, as here, petitioner had argued that it was.

Danforth v. Minnesota, 552 U.S. 264 (2008) explained that the *Teague* rule as applied to Federal *Habeas* requires a test of whether the new rule is a "watershed rule of criminal procedure". The question of whether even if *Padilla* was a new rule it would nonetheless apply to *Habeas* Petitions on a retroactive basis must be addressed when the petitioner argues that the new rule is a "watershed rule of

[16] U.S. CONST. amend. XIV § 1.

criminal procedure". The Texas State Constitution under article I section 12 states that *Habeas* is a writ of right and shall never be suspended. The State's Constitutional guarantee of the Great writ of *Habeas* is much greater than the one of the U.S. Constitution which does allow for suspension. Under this analysis it logically flows that in Texas, even if we were to assume that *Padilla* was a new rule, which as previously explained is not for all advice, it would nonetheless apply retroactively since the *Habeas* right shall never be suspended and the State legislature is Constitutionally required to enact laws to make the remedy speedy and effectual.[17] Furthermore, in this case, being a *habeas* petition, the Teague framework requires that the Courts look at whether the new rule of criminal procedure is one considered to be a "watershed rule of criminal procedure". The *Chaidez* Court did not entertain such argument because it was not raised by the petitioner in that case.[18] The Texas Court of Criminal Appeals in *Ex parte De Los Reyes*, 392 S.W. 3d 675 (Tex. Crim. App., 2013) states that they follow *Chaidez* but in doing so fails to consider the exceptions of *Teague* and whether or not the new rule of *Padilla* is actually a "watershed rule

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[17] Texas Const. art. I sec. 12.

[18] *Chaidez v. United States,* at 1105.

of criminal procedure". Considering how important the matter is to the Texas legislature as reflected in Tex. Code Crim. Proc. Ann. art. 26.13(a), (b), (c), (d), the likelihood that for Texas and maybe for the rest of the United States, the exception of *Teague* and whether or not the new rule of *Padilla* is actually a "watershed rule of criminal procedure" is high and should have not been summarily refused in this case. The issue should have been properly analyzed because the United States Constitution so values the privilege of *Habeas Corpus* that it elevated such a privilege to one of constitutional dimensions. Furthermore, *Teague* at the very least requires that the exceptions it mentions, among them that the new rule is a "watershed rule of criminal procedure", be entertained as an argument when raised by the petitioner. The U.S. Supreme Court has delineated a minimum amount of protection that is required under the Sixth Amendment and the Fourteenth Amendment as well as under article I § 9 clause 2 of the U.S. Constitution. The State of Texas decided to expand its *Habeas* protection by raising it to a writ of right that shall never be suspended and for which the legislature shall enact laws to make the remedy speedy and effectual. The *Chaidez* Court did not decide whether a writ of *Habeas* or a writ of *Coram*

Nobis would have made a difference in their analysis under *Chaidez*. But it is clear that if Texas is following *Teague* it should have considered whether the new rule announced in *Padilla* was one involving a "watershed rule of criminal procedure". The First Court of Appeals of Texas and the Texas Court of Criminal Appeals are in direct conflict with this Court's established precedent in *Teague*. The First Court of Appeals of Texas and the Texas Court of Criminal Appeals did not even follow the requirement of their own constitution.

Chaidez v. United States in footnote number one (1) explains that Chaidez and the Government agreed that the case did not turn on the difference between a *Coram Nobis* and a *Habeas* and the Court assumed without deciding that the parties were correct. *Chaidez*, 133 S.Ct. 1103, n.1 (2013). The *De Los Reyes* Court did not consider the differences between *Coram Nobis* and *Habeas*. *Ex parte De Los Reyes*, 392 S.W. 3d 675 (Tex. Crim. App., 2013.) Unlike the petitioner in *Chaidez*, in this case petitioner argues that there is a difference and that the differences are critical to the outcome of this case. In *Padilla*, the Supreme Court seemed to infer that its decision here would be retroactive. *See Padilla*, 130 S. Ct. at 1482. The Supreme

Court has decided that *Padilla* is not retroactive. It is imperative to note that *Chaidez* did not address a *Habeas* Petition but rather a *Coram Nobis* which is a judicially created remedy when *Habeas* is no longer available. The distinction between a *Writ of Habeas* and one of *Coram Nobis* is paramount in this context because the *Writ of Habeas* is constitutionally protected while *Coram Nobis* is not. *See* U.S. CONST. art. I § 9 cl. 2 "[t]he privilege of the *Writ of Habeas Corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Texas Appellate Courts had held that *Padilla* applied retroactively. *See Aguilar v. State,* 375 S.W.3d 518 (Tex. App. --Houston [14th Dist.] 2012, vacated); *Enyong v. State*, 369 S.W.3d 593, 600 (Tex. App.—Houston [1st Dist.] 2012, op. issued); *Ex parte De Los Reyes*, 350 S.W.3d 723, 728-29 (Tex. App.—El Paso 2011, pet. granted); *Ex Parte Tanklevskaya v. State of Texas,* 361 S.W. 3d 86 (Tex. App. – Houston [1st Dist.] 2011) *judgment vacated by Ex parte Tankleskaya,* 393 S.W.3d 787 (Tex. Crim. App. 2013). As mentioned above, the Texas Courts of Appeals for the 1st and 14th Districts had *both* held that *Padilla* applies retroactively. However, on March 20, 2013, the Court of Criminal

Appeals decided in *Ex parte De Los Reyes* that they will follow the U.S. Supreme Court in *Chaidez v. United States* and decided that *Padilla* is not retroactive. *Ex parte De Los Reyes*, 392 S.W.3d 675 (Tex. Crim. App., 2013.) The Court of Criminal Appeals in *Ex parte De Los Reyes* acknowledges that they could give *Padilla* retroactive effect but the case before them did not give them a reason to do so. *Id.* at 679. The present case did give the Court a reason to do so because of the precedent as established by the U.S. Supreme Court, the U.S. Constitution, the State's Constitutional protections under article I section 12, and the Fourteenth amendment of the U.S. Constitution. [19] Specifically, the Texas State

[19] Technically, if the Court of Criminal Appeals had decided that article I section 12 of the State Constitution does not allow *Chaidez* to be controlling in this case it would not have been expanding any rights but merely applying the State Constitution. When the U.S. Supreme Court announces a rule regarding constitutional rights it is in a very narrow sense only recognizing a constitutional right that was always there, because article III of the U.S. Constitution does not empower the U.S. Supreme Court to act as a legislature much less as a Constitutional Convention. In my view, I respectfully disagree with the concept that the United States Supreme Court can make Constitutional decisions such as the one involving the Sixth amendment in *Padilla* and classify it as a "new or old rule". Once a constitutional decision has been made by the U.S. Supreme Court the

Constitution states that the *Writ of Habeas* is a Writ of Right and shall never be suspended. The *De Los Reyes* Court did not address these issues and it did not explain how the decision in *Chaidez* which applies to the judicially created remedy of *Coram Nobis* affects the declaration in the Texas Constitution that the *Writ of Habeas* is a *Writ* of Right and shall never be suspended.

Chaidez applied in the context of the non-constitutionally protected *Writ of Coram Nobis*. In *De Los Reyes* this Court did not address how *Chaidez,* that did not involve the *Writ of Habeas Corpus*, applied to State *Habeas* law. Under the federal standard, if *habeas* had been involved, the *Chaidez* Court would have had to analyze whether *Padilla* involved a watershed rule of Criminal Procedure. See *Teague v. Lane* , 489 U.S. 288 (1989), and *Danforth v. Minnesota*, 552 U.S. 264 (2008).[20] The *De Los Reyes* Court did

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classification of new or old should have no impact. Rather the fact that it is a constitutional decision should mean that only in the rarest of circumstances the decision will not be applied retroactively.

[20] The retroactivity standard of *Teague v. Lane*, may need to be revised by the U.S. Supreme Court, because a Constitutional right is not one created out of thin air but rather always within the confines of the Constitution albeit recently discovered. This is an additional reason why the Court of Criminal Appeals should reconsider the *Chaidez* decision.

not do this. The First Court of Appeals and the Texas Court of Criminal Appeals did not follow the federal standard required to give minimum federal constitutional protection to all persons in this case. It is just logical reasoning that if under State Constitutional law the *Writ of Habeas Corpus* is a *Writ* of Right and shall never be suspended it is even more powerful than the federal constitutionally protected privilege of the *Writ of Habeas Corpus*. The Supreme Court, as defined under U.S. CONST. art. III § 2, has judicial power "extended to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;..." The U.S. Supreme Court is a branch of government with limited entrustment under the Constitution. The power of the U.S. Supreme Court is exclusively judicial and it does not extend to creating powers not given by the constitution to itself or any other branch of government. *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803) confirmed the limited power of the Supreme Court by taking the additional step of declaring that it was not permissible for Congress to add or change the original or appellate jurisdiction of the Supreme Court. In *Marbury v. Madison* the U.S. Supreme Court further stated that:

> "[i]t is emphatically the province and duty of the judicial department to say what the law is.... So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case.... If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."

In essence *Marbury v. Madison* stands for the proposition that the U.S. Constitution is the paramount law of the Nation and that if a Court is confronted with a case in which both the U.S. Constitution and an Ordinary Act of congress applies it must decide the case on the basis of the constitution. The same logic applies if the conflict is between State law and the Constitution.

The State of Texas, the Texas Court of Criminal Appeals, and the First Court of Appeals of Texas are all entities which under the Fourteenth Amendment are required to not "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."[21] The law is the law and Texas must apply it to all equally and fairly, such is the essence of due process and equal protection. For the reasons here explained this Honorable Court should grant the Petition for Writ of Certiorari.

III.- The Texas Court of Criminal Appeals and the First Court of Appeals of Texas erred in applying the "new rule v. old rule" threshold question of *Teague* to an Ineffective Assistance of Counsel (IAC) claim that is the functional equivalent of a direct appeal pursuant to the clearly established precedent of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911(2013).

The Texas Court of Criminal Appeals and the First Court of Appeals of Texas are in conflict with the clearly established precedent by

[21] U.S. CONST. amend. XIV § 1.

this Court in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). In *Martinez v. Ryan*, this Court concludes that:

> "[w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."[22]

In *Trevino v. Thaler*, this Court applied the *Martinez* exception to the Texas case despite the fact that in theory the ineffective assistance of counsel claim could have been brought on direct appeal but the opportunity was not meaningful.[23] In *Trevino v. Thaler*, this Court notes that:

> "[t]he structure and design of the Texas system in actual operation, however, make it 'virtually

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[22] *Martinez v. Ryan*, 132 S.Ct. 1309,1317 (2012).

[23] See, Rebecca Sharpless & Andrew Stanton, *Teague New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of Padilla, Chaidez and Martinez*, 67 University of Miami L. Rev. 795 (2013).

> impossible' for an ineffective assistance claim to be presented on direct review. See *Robinson v. State, 16 S.W.3d 808, 810-811 (Tex. Crim. App. 2000)*."[24]

After this notation the court concludes that the *Martinez* exception applies. Considering that in Texas the collateral proceeding as to Ineffective Assistance of Counsel Claim is equivalent of a direct appeal this case does not present a "new rule v. old rule" problem under *Teague*. The logic of *Griffith v. Kentucky*, 479 U.S. 314 (1987) that new rules apply to all cases not yet final on direct appeal applies here. The Texas Court of Criminal Appeals and the First Court of Appeals did not follow this Court's precedent.

At the time of the hearing in the lower Court neither *Chaidez* nor *De Los Reyes* had been decided and Petitioner relied on the existing laws of Texas and the United States when making his arguments. Petitioner should not be penalized for focusing on *Padilla* as the controlling case, *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 256 (5th Cir. 2013) (holding litigant does not waive an argument based on a decision of law unavailable during trial court

[24] *Trevino v. Thaler*, 133 S. Ct. 1911, 1915 (2013).

proceedings if the litigant has properly raised a sufficiently similar issue) (citing *McGinnis v. Ingram Equipment Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990), *Williams v. Nexplore Corp.*, 2010 WL 4945364 (Tex. App.-Dallas Dec. 7, 2010, pet. denied) (holding that a party's complaint need not be raised at all in the trial court, it can hardly be considered waived for being untimely made.)

When petitioner filed his writ it was clear that *Padilla* applied retroactively in Texas.[25] Petitioner relied on the law at the time and focused on the most relevant case when he filed his Writ: *Padilla v. Kentucky*. It would have been unnecessary and inefficient for appellant to raise multiple issues for the court when the court could have made a decision based on *Padilla*. The specific argument regarding the

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[25] *See* Tex.Code Crim.Proc.Ann. art. 26.13; *Ex parte Tanklevskaya*, 361 S.W.3d 86 (Tex.App.-Houston [1st Dist.] 2011, vacated) (citing the US Southern District. *Marroquin v. United States*, No. M–10–156, 2011 WL 488985, at *2 (S.D.Tex. Feb. 4, 2011) (slip op.)); *Aguilar v. State*, 375 S.W.3d 518, 520 (Tex. App. --Houston [14th Dist.] 2012, vacated); *Ex parte Murillo*, 389 S.W.3d 922 (Tex. App. -Houston [14th Dist.]Jan. 8, 2013, no pet.); *Ex parte De Los Reyes*, 350 S.W.3d 723, 729 (Tex. App. El Paso 2011, rev'd); *Ex parte Olvera*, 394 S.W.3d 572 (Tex. App. -Dallas June 20, 2012, vacated); *Ex parte Fassi,* 388 S.W.3d 881 (Tex. App. --Houston [14th Dist.] 2012, no pet.).

Martinez exception was not presented to the Texas Court of Criminal Appeals or the First Court of Appeals. But it was nonetheless argued that *Padilla* should be applied and that the *Chaidez* determination about *Padilla's* non-retroactivity was inapplicable. Such argument fairly encompasses the *Martinez* issue.

While Petitioner did not rely on precedent that solely discussed misadvice, *Padilla* recognized and discussed that it was not overruling "misadvice" as a violation of effective assistance of counsel, it was only expanding that understanding by including omission as an act of submission, or recognizing omission as misadvice. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010). Thus, *Padilla* not only discussed and rule on "failure to advice", it included affirmative misadvice. And the argument was that *Padilla* should have applied to this case.

The Fourteenth Amendment requires a State to not "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."[26] Texas must apply the law to all equally and fairly. For these reasons

[26] U.S. CONST. amend. XIV § 1.

the Petition for Writ of Certiorari should be granted.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted.

_____

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February 13, 2014

APPENDICES

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Appendix A

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

Wednesday, November 20, 2013

Re: Case No. PD-1263-13

COA #: 01-12-00292-CR

STYLE: IBARRA, EX PARTE JOSUE

On this day, the Appellant's petition for discretionary review has been refused.

Abel Acosta, Clerk

Appendix B

Opinion issued March 21, 2013.

In The

Court of Appeals

For The

First District of Texas

NO. 01-12-00292-CR

JOSUE IBARRA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court

Harris County, Texas

Trial Court Case No. 1332441

O P I N I O N

Appellant, Josue Ibarra, appeals from the trial court's order denying him Habeas Corpus relief pursuant to Article 11.072 of the Texas

Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 8 (Vernon 2005) (providing for appeal in felony or misdemeanor case in which applicant seeks relief from order or judgment of conviction ordering community supervision). Appellant contends that the habeas court erred in finding that trial counsel had provided him with effective assistance of counsel, despite counsel's alleged failure to discuss clear immigration consequences of appellant's guilty plea, in violation of *Padilla v. Kentucky*, 559 U.S. 356, ___, 130 S. Ct. 1473 (2010). We affirm.

BACKGROUND

In 1998, appellant, a legal permanent resident at the time, was charged with sexual assault. On March 16, 1998, he pleaded guilty to a lesser charge of misdemeanor assault, and the trial court assessed punishment at one year confinement in jail, but suspended the sentence and placed appellant on community supervision for two years. Appellant was deported in 1998,[1]

[1] "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony" is defined as "murder, rape, or sexual abuse of a minor" or "a crime of violence (as defined in [18 U.S.C. § 16] . . .) for which the

but almost immediately returned to the United States illegally.

In September 2011, appellant was arrested again and is currently being detained by federal immigration authorities. On January 6, 2012, appellant filed a petition for writ of Habeas Corpus in the trial court, alleging that he received ineffective assistance of counsel in the trial court because trial counsel did not warn him of the immigration consequences of his plea. At a hearing on March 15, 2012, appellant testified that his trial counsel did not tell him about the immigration consequences associated with his guilty plea. Specifically, appellant alleged that his counsel, M. Barrera, told him that "it was only a misdemeanor . . . as though I had been in a traffic citation." Appellant further testified that, had he known the immigration consequences of his plea, he would have insisted on going to trial. Barrera filed an affidavit in which he stated, "I do not recall if I advised or did not advise Mr. Ibarra of the consequences

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term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(A), (F). Section 16 defines "crime of violence" in pertinent part as an offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

regarding his immigration status if he plead guilty." After the hearing, the trial court denied appellant habeas relief. This appeal followed.

RETROACTIVITY OF *PADILLA V. KENTUCKY*

In *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea. 559 U.S. ___, 130 S. Ct. at 1473. In his petition for writ of Habeas Corpus, appellant argued that he received ineffective assistance because his trial counsel did not comply with *Padilla*. On appeal, appellant contends that the trial court erred in overruling his ineffective assistance claim, which was based on trial counsel's failure to comply with *Padilla*. The State responds that appellant was convicted almost 15 years ago, and *Padilla* should not be applied retroactively.

This Court has previously held that the ruling in *Padilla* applies retroactively. *See Enyong v. State*, 369 S.W.3d 593, 600 (Tex. App.—Houston [1st. Dist.] 2012, no pet.); *Ex parte Tanklevskaya*, 361 S.W.3d 86, 95 (Tex. App.—Houston [1st Dist.] 2011, pet. filed). However, since *Enyong* and *Tanklevskaya* were

decided, the United States Supreme Court has addressed the issue and held that *Padilla* does not apply retroactively. *See Chaidez v. United States*, No. 11-820, 568 U.S. ___, slip op. at * 1 (February 20, 2013).

In *Chaidez*, the petitioner, a lawful permanent resident, pleaded guilty to two counts of mail fraud, and her conviction became final in 2004. *Id.* She subsequently filed a writ of Coram Nobis,[2] arguing that her trial counsel's failure to advise her of the immigration consequences of pleading guilty constituted ineffective assistance of counsel. *Id.* at *2. The Supreme Court, confronted with the issue of whether *Padilla* could be applied retroactively, had to decide whether *Padilla* announced a "new rule" because "only when the Supreme Court applies a settled rule may a person avail herself of the decision on collateral review." *Id.* at *4.

The Court rejected the argument that *Padilla* merely applied the settled law of ineffective assistance of counsel as set forth in *Strickland v. Washington*, 46 U.S. 668 (1984). *Id.*

[2]A writ of Coram Nobis provides a way to collaterally attack a criminal conviction for a person who is no longer "in custody" and thus unable to seek relief by a writ of Habeas Corpus. *Id.* at *2.

at * 5-6. In so holding, the Court stated as follows:

> But *Padilla* did something more [than apply settled law]. Before deciding if failing to provide such advice "fell below an objective standard of reasonableness," *Padilla* considered a threshold question: Was advice about deportation "categorically removed" from the scope of the Sixth Amendment right to counsel because it involved only a "collateral consequence" of a conviction, rather than a component of the criminal sentence?

Id. By first rejecting a categorical distinction between direct and collateral consequences in relation to the right to counsel, the court "resolved the threshold question before[it] by breaching the previously chink-free wall between direct and collateral consequences" before then applying the well-settled law of *Strickland v. Virginia*. *Id.* at 9. "If that does not count as 'breaking new ground' or imposing a new obligation, we are hard pressed to know what would." *Id.* at *9–10. Because "*Padilla*'s holding that the failure to advise about a non-criminal consequence could violate the Sixth

Amendment would not have been—in fact, was not—'apparent to all reasonable jurists'" prior to *Padilla*, the Court concluded that *Padilla* announced a "new rule." *Id.* at * 10–11. As such, "defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." *Id.* at *15.6

Here, appellant was convicted in 1998—twelve years before *Padilla* was decided. Because *Padilla* announced a "new rule," it is not retroactive and appellant may not now avail himself of the decision on collateral review.

CONCLUSION

In light of our holding that appellant may not raise a *Padilla* issue by way of a collateral attack on the judgment, we need not address his issue regarding the propriety of the trial court's findings of fact and conclusions of law, and decline to do so. We affirm the trial court's judgment.

Sherry Radack

Chief Justice

Panel consists of Chief Justice Radack and Justices Higley and Brown.

Publish. TEX. R. APP. P. 47.2(b).

ENTERED FOR THE COURT:

/S/
UNITED STATES CIRCUIT JUDGE

Appendix C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I § 9 cl. 2 : "The privilege of the *Writ of Habeas Corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

U.S. CONST. art. III § 1: "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...."

U.S. CONST. art. III § 2: "The judicial Power shall extended to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;..."

U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,…nor be deprived of life, liberty, or property, without due process of law…"

U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to

a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, …to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

U.S. CONST. amend. XIV: "All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside...; 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."

8 U.S.C. § 1227 (a)(2)(A)(iii): "Any alien who is convicted of an aggravated felony at any time after admission is deportable."

8 U.S.C. § 1227 (a)(2) (E)(i): "Any alien who at any time after admission is convicted of a crime of domestic violence…is deportable. For purposes of this clause, the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a

current or former spouse of the person, by an individual with whom the person shares a child in common…"

28 U.S.C. §2101 (c): "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U.S.C. §2101 (d): "The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court."

28 U.S.C. §1257 (a): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United

States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Supreme Court Rule 13.1: "Unless otherwise provided by law, a petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort …is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the clerk within 90 days after entry of the order denying discretionary review."

Tex. Code Crim. Proc. Ann. art. 11.072: Sec. 1 "This article establishes the procedures for an application for a writ of habeas corpus in a felony or misdemeanor case in which the applicant seeks relief from an order or a judgment of conviction ordering community supervision."

Tex. Code Crim. Proc. Ann. art. 26.13(a): "Prior to accepting a plea of guilty…, the court shall

admonish the defendant of: (1) the range of punishment attached to the offense;… (4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty… for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law…"

Tex. Code Crim. Proc. Ann. art. 26.13(b): "No plea of guilty… shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary."

Tex. Code Crim. Proc. Ann. art. 26.13(c): "In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court."

Tex. Code Crim. Proc. Ann. art. 26.13(d): "The court may make the admonishments required by this article either orally or in writing. If the court makes the admonishments in writing, it must receive a statement signed by the defendant and the defendant's attorney that he understands the admonishments and is aware of the consequences of his plea…"