

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-31

**SECOND DCA NO. 2D11-34
LOWER TRIBUNAL NO. 2000-CF-424
(12th JUDICIAL CIRCUIT-MANATEE)**

**JUAN M. GOMEZ
Petitioner/Defendant**

vs.

**STATE OF FLORIDA,
Respondent**

INITIAL BRIEF OF PETITIONER/DEFENDANT

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PRELIMINARY STATEMENT

The letter "R," followed by a number, is used to designate the Record of Appeal and Document number.

STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE AND FACTS

This case involves a pure issue of law which has been resolved adversely to the Appellant after this appeal was initiated. Accordingly, a detailed summary of the facts of the case is unnecessary.

In short, on May 12 or 22, 2000 in Manatee County, Florida, the Appellant, Mr. Gomez, tendered a plea of Nolo Contendere to the offenses of possession of cocaine and paraphernalia. R-2. Adjudication of Guilt was withheld and he was sentenced to serve 18 months of probation.

Ten years later, the United States Supreme Court decided Padilla v. Kentucky, 130 S.Ct. 1473 (2010), holding that the Sixth Amendment's promise of effective assistance of counsel includes an obligation on trial counsel to give full and accurate advice about deportation where the consequences are clear. *Id.* 1483.

Based on the holding in Padilla, Mr. Gomez filed a Motion for Post-Conviction

Relief pursuant to Fla.R.Cr.P. 3.850. R-4. This Motion alleged that his attorney, by failing to accurately advise him that the offense to which he pled carries mandatory deportation, did not provide effective assistance of counsel.

On November 30, 2010, the Honorable Gilbert A. Smith, Jr. denied Mr. Gomez's Motion without a hearing, primarily on the grounds that the Motion was untimely and that Padilla does not apply retroactively. R-5.

Mr. Gomez appealed the denial of his motion for Post-Conviction Relief to the Second District Court of Appeal. On December 9, 2011 the Second District Court of Appeal affirmed the decision of the lower court, but certified to the court the following question: Should the ruling in Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), be applied retroactively in postconviction Proceedings?

STANDARD OF REVIEW

This case presents a pure question of law. As such the standard of review is *de novo*.

SUMMARY OF ARGUMENT

Padilla v. Kentucky, 130 S.Ct. 1473, 1483 (2010) established that trial counsel has an affirmative duty under the Sixth Amendment of the Constitution to correctly advise his client that a plea to qualifying offenses will result in deportation where that is the case. Mr. Gomez would be entitled to relief if, but only if, Padilla applies

retroactively.

In Hernandez v. State, 37 Fla. L. Weekly S730 (Fla. Nov. 21, 2012) this Court found that Padilla should not be applied retroactively.

In Chaidez v. United States, the United States Supreme Court held that Padilla should not be applied retroactively.

Mr. Gomez's argument that Padilla should be applied retroactively is no longer supported by viable case law.

ISSUES AND ARGUMENT

ISSUE ONE

WHETHER THE HOLDING IN PADILLA v. KENTUCKY, 130 S.Ct. 1473 (2010) SHOULD BE APPLIED RETROACTIVELY.

In Hernandez v. State, 37 Fla. L. Weekly S730 (Fla. Nov. 21, 2012) this Court found that Padilla should not be applied retroactively.

In Chaidez v. United States, (No. 11-820, February 20, 2013), the United States Supreme Court held that Padilla should not be applied retroactively.

Whatever case law and arguments that once existed to support the premise that Padilla should be applied retroactively are obviated by the aforementioned cases.

CONCLUSION

Based on Hernandez v. State, 37 Fla. L. Weekly S730 (Fla. Nov. 21, 2012) and Chaidez v. United States, (No. 11-820, February 20, 2013), Padilla v. Kentucky does not apply retroactively. Accordingly, and regretfully, counsel for the Appellant recognizes that Mr. Gomez is barred from relief.

Respectfully submitted this 27th day of February, 2013.



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Fla.

R.App.P. 9.210.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing to the Office of the Attorney General, c/o Tricia Pate, crimappth@myfloridalegal.com this 27th day of February, 2013.



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