NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

EDILBERTO BARRIOS-CRUZ, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D10-4774

Opinion filed June 10, 2011.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Polk County; Mark H. Hofstad, Judge.

Arturo R. Rios of Law Office of Arturo R. Rios, P.A., St. Petersburg, for Appellant.

WHATLEY, Judge

Edilberto Barrios-Cruz appeals the summary denial of two motions for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. The postconviction court denied Barrios-Cruz's motions as untimely. For the reasons expressed below, we affirm.

I. Background

On January 27, 2004, Barrios-Cruz pleaded guilty to discharging a firearm

in public, an offense for which he received one year of probation. On May 2, 2006, Barrios-Cruz pleaded guilty to possession of drug paraphernalia and to maintaining a structure for using, keeping, or selling drugs, offenses for which he again received one year of probation. On August 9, 2010, Barrios-Cruz, through counsel, filed his two motions for postconviction relief—one for each case—in which he alleged that his counsel was ineffective for failing to advise him of the deportation consequences of his pleas. In addition, he claimed that in his 2006 case, the trial court failed to advise him of the possibility of deportation during the plea colloquy. He asserts that his motions are timely under rule 3.850(b)(2) based on the retroactive application of the Supreme Court's decision in Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010), which creates a duty on behalf of counsel to advise their noncitizen clients that their criminal charges may subject them to adverse immigration consequences.

While some jurisdictions have begun to address the issue, this court has yet to resolve the question of whether Padilla applies retroactively. We now hold that Padilla should not be applied retroactively in postconviction proceedings and agree with the Third District's opinion in Hernandez v. State, 36 Fla. L. Weekly D713 (Fla. 3d DCA Apr. 6, 2011). However, we recognize that courts are split on this issue,[1] and our

[1]Courts that have concluded that Padilla should be applied retroactively include: People v. Bennett, 903 N.Y.S.2d 696 (N.Y. Crim. Ct. 2010); Marroquin v. United States, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011); United States v. Hubenig, 2010 WL 2650625 (E.D. Cal. Jul. 1, 2010); United States v. Chaidez, 730 F. Supp. 2d 896 (N.D. Ill. 2010); Martin v. U.S., 2010 WL 3463949 (C.D. Ill. Aug. 25, 2010); and Al Kokabani v. United States, 2010 WL 3941836 (E.D.N.C. Jul. 30, 2010). Courts that have reached the opposite conclusion include: People v. Kabre, 905 N.Y.S.2d 887 (N.Y. Crim. Ct. 2010); United States v. Macedo, 2010 WL 5174342 (N.D. Fla. Dec. 15, 2010) (holding simply that Padilla "was not made retroactive to cases on collateral review" without further analysis); United States v. Hough, 2010 WL 5250996 (D.N.J. Dec. 17, 2010); Miller v. State, 11 A.3d 340 (Md. Ct. Spec. App. 2010); United

decision carries with it significant implications for the treatment of pleas entered prior to Padilla. Therefore, we certify to the Florida Supreme Court the following question of great public importance pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v):

> SHOULD THE RULING IN PADILLA V. KENTUCKY, 130 S. CT. 1473 (2010), BE APPLIED RETROACTIVELY IN POSTCONVICTION PROCEEDINGS?

II. Retroactivity Analysis

We conclude that Padilla should not be applied retroactively based on the following analysis. First, it is important to consider the content of Padilla itself. The Supreme Court observes that "[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains" and rejects the notion that its decision would open the "floodgates," possibly referring to the retroactive effect of its decision. 130 S. Ct. at 1484-85. However, at no point does the Court explicitly state a holding one way or the other. Id. Therefore, it is necessary to turn to a separate retroactivity analysis.

According to State v. Fleming, 36 Fla. L. Weekly S50, S51-S52 (Fla. Feb. 3, 2011), "[t]o determine whether a new rule applies retroactively to final cases in postconviction proceedings, . . . courts in Florida conduct a retroactivity analysis under Witt v. State, 387 So. 2d 922 (Fla. 1980)." While federal courts and many state courts prefer to use the newer retroactivity standard articulated in Teague v. Lane, 489 U.S. 288 (1989), the Florida Supreme Court continues to stand by Witt because it "provides

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States v. Perez, 2010 WL 4643033 (D. Neb. Nov. 9, 2010); United States v. Gilbert, 2010 WL 4134286 (D.N.J. Oct. 19, 2010); Haddad v. United States, 2010 WL 2884645 (E.D. Mich. Jul. 20, 2010); and Gacko v. United States, 2010 WL 2076020 (E.D.N.Y. May 20, 2010).

more expansive retroactivity standards than those adopted in Teague." Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005).

Under Witt, a change of law will not be applied retroactively "unless the change: (a) emanates from [the Supreme Court of Florida] or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." 387 So. 2d at 931. Because Padilla is a United States Supreme Court decision that is constitutional in nature, the first two elements of this analysis have been satisfied. Accordingly, the question becomes whether Padilla represents a development of fundamental significance. Witt divides such developments into two categories: "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," and "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall [v. Denno, 388 U.S. 293 (1967)] and Linkletter [v. Walker, 381 U.S. 618 (1965)]." Id. at 929. Because the holding in Padilla does not fall within the first category, the analysis turns upon the three factors presented in Stovall and Linkletter. These factors include: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of the retroactive application of the new rule." Id. at 926.

A. The Purpose to be Served by the New Rule

The purpose of the Padilla decision is to extend the Strickland[2] ineffective assistance of counsel standard to ensure that noncitizen defendants receive an appropriate warning from counsel when their pleas are likely to result in deportation. In

[2]Strickland v. Washington, 466 U.S. 668 (1984).

Hughes v. State, 901 So. 2d 837 (Fla. 2005), the Supreme Court of Florida used the Witt standard to assess whether Apprendi v. New Jersey, 530 U.S. 466 (2000), should be applied retroactively. The purpose of Apprendi was to determine whether, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In holding that Apprendi should not be applied retroactively, the Florida Supreme Court noted that the purpose of Apprendi "does not affect the determination of guilt or innocence." Hughes, 901 So. 2d at 841. The court went on to state that "[Apprendi] does not address a miscarriage of justice or effect a judicial upheaval to the degree necessary to require its retroactive application." Id. at 842.

Because the Padilla decision concerns only a specific set of plea agreements, it represents a more minor change than that of Apprendi, one with implications that are significantly more unique and narrow. As such, it is less suited for retroactive application. What it does share in common with Apprendi—that it is a change that does not affect guilt or innocence or represent a judicial upheaval—only bolsters this assertion. To illustrate, Witt holds that new rules generally should not be applied retroactively unless they involve "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." 387 So. 2d at 929. In so holding, Witt examines the opposite end of the spectrum: "In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards . . . for procedural fairness . . . and for other like matters. Emergent rights in these categories . . . do not compel an abridgement of

the finality of judgments." Id. The intent of Padilla—to extend the scope of Strickland in the interest of procedural fairness—falls under the latter category rather than the former.

Finally, we note that Padilla was decided in the evolving landscape of "changes to our immigration law [that] have dramatically raised the stakes of a noncitizen's criminal conviction." 130 S. Ct. at 1480. Thus, the Padilla decision constitutes an evolutionary refinement designed to correspond to new developments in an ever-changing area of law. As such, the purpose of the Padilla decision does not compel retroactive application.

B. The Extent of Reliance on the Old Rule

Strickland, decided in 1984, provided the well-established standard for ineffective assistance of counsel, and it did not include any discussion of a defendant's residency status. 466 U.S. 668. Accordingly, prior to the decision in Padilla, no formal duty existed for counsel to advise clients of the immigration consequences of a plea. However, pursuant to Florida Rule of Criminal Procedure 3.172(c)(8), Florida courts are required to notify defendants during the plea colloquy that their pleas may subject them to deportation. See In re Amendments to Florida Rules of Criminal Procedure, 536 So. 2d 992, 992 (Fla. 1988). This rule has been in effect since 1989, and it will continue to have significance, even in light of the Padilla decision. See, e.g., Flores v. State, 57 So. 3d 218 (Fla. 4th DCA 2010) (noting that even if counsel performed deficiently under Padilla, the defendant was unable to establish prejudice because during the plea colloquy, the trial court advised the defendant that his plea might result in his deportation and the defendant admitted that he understood). The longstanding, reasonable reliance upon this rule weighs heavily against the retroactive application of

Padilla. See Williams v. State, 421 So. 2d 512, 515 (Fla. 1982) (holding that reasonable reliance upon the old rule "is an important factor supporting prospective application of the new rule"). Finally, as noted above, the Padilla decision represents a response to recent changes in immigration law, changes which have implications that could not have been accounted for in the past.

C. Effect of Retroactive Application on the Administration of Justice

In discussing Apprendi, the First District theorized that the impact of retroactive application on the administration of justice "would be monumental." Hughes v. State, 826 So. 2d 1070, 1074 (Fla. 1st DCA 2002). As stated above, Padilla likely has fewer far-reaching implications than Apprendi. However, Padilla does carry with it the potential for the same sort of complications. Of paramount concern is the likelihood that courts would be faced with a great number of postconviction motions stemming from past convictions, some of which would be decades old. Addressing motions challenging convictions that have long since been final would present a logistical nightmare for the courts, with the proceedings themselves potentially raising more questions than they would be able to answer. Furthermore, "the passage of time between the guilty plea and the postconviction motion puts the State at a great disadvantage in seeking to try the case to conviction." State v. Green, 944 So. 2d 208, 216 (Fla. 2006). As such, it appears evident that applying Padilla retroactively to expand the two-year timeframe for filing a rule 3.850 motion "would undermine the perceived and actual finality of criminal judgments and would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of [the plea] proceedings." Johnson, 904 So. 2d at 412.

III. Conclusion

We conclude that the three Witt factors weigh against the retroactive application of Padilla. While we recognize that Padilla represents an important development enumerating both a new right for defendants and a new duty for counsel, we do not find that it rises to the level of those rare "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." Witt, 387 So. 2d at 929. We therefore hold that Padilla does not apply retroactively. Because Barrios-Cruz's most recent conviction was final almost four years prior to the Padilla decision, the postconviction court correctly denied his motions as untimely. Furthermore, even when considered under the timeframe announced in State v. Green, 944 So. 2d 208 (Fla. 2006),[3] Barrios-Cruz's motions are still untimely.[4]

Affirmed.

KHOUZAM and MORRIS, JJ., Concur.

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[3]In Green, 944 So. 2d at 219, the Florida Supreme Court provided a defendant whose case was already final at the time of the opinion with two years from the date of Green to bring a claim that the trial court failed to advise him of the possible immigration consequences of his plea. Because Barrios-Cruz's case was final at the time of the Green decision, he had until October 26, 2008, to file a timely postconviction motion raising such a claim. Id.; Ventura v. State, 977 So. 2d 794, 796 (Fla. 2d DCA 2008). Any motions filed beyond this date would need to fall under one of the exceptions in rule 3.850(b) to be considered timely. Green, 944 So. 2d at 218. A defendant cannot satisfy this requirement by simply claiming that he learned of the possibility of deportation only upon the commencement of deportation proceedings; he must allege and prove that affirmative steps were taken in an attempt to discover the effect of the plea on his residency status. Id.

[4] Barrios-Cruz's motions, both filed in 2010, are beyond the October 26, 2008, extension offered by Green. In addition, they do not allege any affirmative steps to discover the effect of the plea on his residency status. As such, they are barred as untimely under Green.