

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 23 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0101-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
OMAR MORENO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR1993093484

Honorable Daniel G. Martin, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Diane Meloche

Phoenix
Attorneys for Respondent

Rachelle S. Ferraro

Phoenix
Attorney for Petitioner

K E L L Y, Judge.

¶1 Petitioner Omar Moreno seeks review of the trial court’s order denying his petition for post-conviction relief and motion for rehearing, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-

conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Pursuant to a plea agreement, Moreno, a permanent resident alien, was convicted in 1998 of possession of marijuana for sale. The trial court suspended the imposition of sentence and placed Moreno on probation for a period of three years. According to the affidavit Moreno attached to his notice of post-conviction relief, he was advised by “the immigration office” in 2009 that he “would be detained” for deportation and removal. In 2011, more than twelve years after he was convicted and placed on probation, Moreno initiated a proceeding for post-conviction relief, arguing that his Sixth Amendment right to counsel had been violated because his defense attorney had not advised him about the immigration consequences of his guilty plea, as required by *Padilla v. Kentucky*, 559 U.S. 356 (2010). In his notice and petition, Moreno cited Rule 32.1(g), asserting *Padilla* constituted a significant change in the law that entitled him to relief. Ariz. R. Crim. P. 32.1(g) (“significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence” ground for relief).

¶3 Citing this court’s decision in *State v. Poblete*, 227 Ariz. 537, ¶¶ 10, 14, 16, 260 P.3d 1102, 1105-07 (App. 2011), the trial court found *Padilla* created a new rule of law which did not apply to defendants, like Moreno, whose conviction was final¹ when *Padilla* was decided. The court thus denied Moreno’s petition for post-conviction relief

¹See *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (“A defendant’s case becomes final when ‘a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.’”), quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Moreno does not appear to dispute that his 1998 conviction was final before *Padilla* was decided in 2010.

as untimely and precluded.² The court also denied Moreno’s motion to amend his Rule 32 petition pursuant to Rule 32.6(d), “to argue alternatively that *Padilla* . . . may not have created a new rule for purposes of . . . retroactivity,” noting it did not see “how any argument presented could change” what the court of appeals had decided regarding retroactivity in *Poblete*. The court also denied Moreno’s motion for rehearing.

¶4 On review, Moreno argues that, although *Padilla* is a significant change in the law, it “does not create a ‘new constitutional rule of law’ but [is] just another application of *Strickland*³ [and] therefore as an ‘old rule,’ it is retroactively applicable to cases on collateral review.” Thus, he maintains this court incorrectly concluded in *Poblete* that *Padilla* introduced a new rule of law, and asserts that *Padilla* should apply retroactively to him. Moreno also maintains the trial court improperly denied his motion to amend his petition to argue *Padilla* did not create a new rule of law. Finally, Moreno asserts “[u]nfortunately, to date, the United States Supreme Court has not yet answered this specific question [regarding the retroactive application of *Padilla*] although the justices in the *Padilla* opinion suggest they intended the decision to be retroactively applied to cases on collateral review.”

¶5 But, in February 2013, after Moreno submitted his petition for review, the Supreme Court concluded that *Padilla* does not apply retroactively to cases that were final before it was decided. *Chaidez v. United States*, ____ U.S. ____, 133 S. Ct. 1103, 1105 (2013). The Court concluded that its decision in *Padilla* “answered a question about the Sixth Amendment’s reach that [the Court] had left open, in a way that altered

²Although the trial court scheduled an evidentiary hearing in the Rule 32 matter, after the state notified the court of the *Poblete* decision, the court ruled without conducting an evidentiary hearing.

³*Strickland v. Washington*, 466 U.S. 668 (1984).

the law of most jurisdictions,” thereby “breaching the previously chink-free wall between direct and collateral consequences.” *Id.* at 1110. Reasoning “*Padilla*’s holding that the failure to advise about a non-criminal consequence [like deportation] could violate the Sixth Amendment would not have been—in fact, was not—‘apparent to all reasonable jurists’” before *Padilla*, the Court concluded *Padilla* announced a new rule of law. *Id.* at 1111, quoting *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). The Court thus held that *Padilla* did not apply retroactively to convictions that were final when it was decided. *Id.* at 1107, relying on *Teague v. Lane*, 489 U.S. 288 (1989).

¶6 Because the trial court correctly found that *Padilla* did not apply to Moreno’s case, we grant the petition for review but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge