

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,)	Supreme Court No. CR-11-0326-PR
)	
Plaintiff / Respondent,)	Court of Appeals No.
)	2 CA-CR 2011-0136-PR
v.)	DEPARTMENT A
)	
GERARDO POBLETE,)	Pinal County Superior Court
)	Cause No. S100 CR200500234
Defendant / Petitioner.)	
_____)	

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, IMMIGRATION LEGAL RESOURCE CENTER, IMMIGRANT DEFENSE PROJECT, AND NATIONAL IMMIGRATION PROJECT IN SUPPORT OF PETITION FOR REVIEW

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INTERESTS OF *AMICI CURIAE*

¶1 Arizona Attorneys for Criminal Justice (AACJ) is a not-for-profit membership organization representing over 400 criminal defense lawyers licensed to practice in the State of Arizona, law students, and other associated professionals, which is dedicated to protecting the rights of the criminally accused in the courts and the legislature. AACJ offers this brief in support of Gerardo Poblete’s petition for review because the issues presented touch the core of AACJ’s mission to protect the right to effective assistance of counsel.

¶2 Florence Immigrant & Refugee Rights Project (FIRRP) is a nonprofit organization providing free legal services to men, women, and unaccompanied children detained by Immigration and Customs Enforcement in Arizona. In 2007, the Florence Project initiated the Arizona Defending Immigrants Partnership (AZ-DIP) to provide training, consultation and support to Arizona defense counsel, prosecutors, judges and other criminal justice system stakeholders about immigration law to minimize instances of misadvice, the need for post-conviction relief, ineffective assistance of counsel claims and wrongful detention and deportation.

¶3 Immigrant Legal Resource Center (ILRC) is a national backup center committed to fair and humane administration of immigration laws and respect for civil and constitutional rights of all persons. ILRC has special expertise in

immigration consequences of crimes and, since 1990, has consulted on thousands of cases in criminal and immigration proceedings, and has provided training to criminal defense attorneys, prosecutors, and judges. Immigrant Defense Project (IDP) is a nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. A leading national expert on issues arising from interplay of immigration and criminal law, IDP has provided defense and immigration lawyers, criminal and immigration judges, and noncitizens with expert legal advice, training and publications on such issues since 1999. IDP's publications include *Representing Immigrant Defendants in New York* in 1998. As partner organizations in the Defending Immigrants Partnership, *amici* ILRC and IDP have a keen interest in this case and the fair and just administration of the nation's criminal and immigration laws. The National Immigration Project of the National Lawyers Guild (NIP) is a nonprofit membership organization of immigration attorneys and others working to defend immigrants' rights and to secure fair administration of immigration and nationality laws. NIP provides legal training to the bench and bar on immigration consequences of criminal conduct and is author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. Federal courts, including the Supreme Court, have accepted and relied on briefs submitted by *amici* in several important cases involving the application of criminal and immigration law.

INTRODUCTION

¶4 *State v. Poblete*, __ P.3d __, 2011 WL 3207780 (App. 2011), is at the forefront in Arizona in addressing whether defendants whose convictions are already final are entitled to revisit their convictions in the wake of *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). Whereas other jurisdictions have addressed this issue upon a petition for a writ of error *coram nobis*, this Court, through Rule 32, Ariz. R. Crim. P., places greater limitations on the scope of defendants' ability to seek post-conviction review of final convictions. Though this Court's interpretation of Rule 32.1(g) is generally in line with the United States Supreme Court's cases governing retroactive application of newly-decided cases, the language of the rule that speaks of "significant change in the law" creates confusion, and that confusion resulted in a decision here by the Court of Appeals that contradicts the clear language of *Padilla*. The result here was an opinion that is wholly inconsistent with the retroactive application of the rule in *Padilla* itself. Furthermore, in defending the decision in *State v. Rosas*, 183 Ariz. 421 (App. 1995), *Poblete* altogether failed to take into account the standards of practice in criminal defense that were fully discussed in *Padilla*. For these reasons, *amici* request this Court grant Mr. Poblete's petition for review.

REASONS THE COURT SHOULD GRANT THE PETITION

I. For fifteen years, standards of practice for criminal defense attorneys required advising clients of potential immigration consequences of convictions

¶5 The right to effective assistance of counsel at all critical stages of the proceedings includes assistance with respect to plea bargaining. *Hill v. Lockhart*, 47 U.S. 52, 56 (1985); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994). “To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea.” *State v. Donald*, 198 Ariz. 406, ¶ 16 (App. 2000) (citing *Hill*).

¶6 Since *State v. Rosas* was decided in 1995, professional norms have dramatically evolved regarding a defense attorney’s duty to advise a client on the immigration consequences of criminal convictions. This sea change in performance standards is reflected in opinions of the U.S. Supreme Court and federal circuit courts, the treatment of immigration issues by states, and a variety of professional guidelines and treatises.

A. The U.S. Supreme Court and Federal Circuit Courts Recognized the Evolution of Prevailing Professional Norms Requiring Defense Attorneys to Advise on Immigration Consequences Prior to *Padilla*

¶7 Although the Supreme Court decided *Padilla* in 2010, federal law

suggests that standards for defense attorneys had already evolved to encompass a duty to advise noncitizens on immigration consequences prior to the decision. To find evidence of this, one need look no further than *Padilla* itself, which noted that “[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea.” *Padilla*, 130 S. Ct. at 1485; *see also id.* at 1483-84. Nearly ten years prior to *Padilla*, the Court relied on a similar principle in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), which overturned legislation limiting relief from deportation under Section 212(c) of the Immigration and Nationality Act. There, the Court concluded that “[e]ven if the defendant were not initially aware of § 212(c), **competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.**” *Id.* at 323 n.50 (emphasis added).

¶8 Federal circuit courts, most notably the Ninth Circuit, have also found that defense attorneys were under a duty to advise their clients on the immigration consequences of a particular plea prior to *Padilla*. In *United States v. Bonilla*, 637 F.3d 980, 981-82 (9th Cir. 2011), the defense attorney failed to provide any information about immigration consequences to the mentally ill defendant prior to his entry of a plea despite numerous inquiries by the defendant’s wife. Relying on *Padilla*, the Ninth Circuit found that the defendant received “inadequate legal

advice” about the immigration consequences such that he should be permitted to withdraw his plea. *Id.* at 984. Although *Bonilla* was decided one year after *Padilla*, an examination of the procedural history of *Bonilla* reveals that the attorney’s deficient conduct actually occurred *prior to* Mr. Bonilla’s entry of plea on November 5, 2007 – at least two and a half years prior to *Padilla*. See *United States v. Bonilla*, 5:07-cr-00251-RMW-1, Doc.22 (Minute entry showing open guilty plea on November 5, 2007). Therefore, in *Bonilla*, the Ninth Circuit implicitly held that *Padilla* applies retroactively since the professional standards that were in place prior to *Padilla* required defense attorneys to advise a noncitizen client on the immigration consequences of a plea. The Ninth Circuit reached a similar conclusion in 2005, finding that an attorney who wrongly advises a client about immigration consequences violates the “basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice.” *United States v. Kwan*, 407 F.3d 1005, 1016 (9th Cir. 2005).

¶9 Other circuit courts have held that professional norms required defense counsel to accurately advise on the immigration consequences prior to the issuance of *Padilla*. In 2002, the Second Circuit found that misrepresentation by counsel as to the deportation consequences of a guilty plea “is today objectively unreasonable” and met the first prong of the *Strickland*¹ test. *United States v.*

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

Couto, 311 F.3d 179, 188 (2d Cir. 2002). The Seventh Circuit noted in *Jideonwo v. I.N.S.* that “many states have found that it is a breach of professional responsibility for a defense attorney to fail to discuss the immigration consequences of a plea agreement with a criminal defendant.” 224 F.3d 692, 700 (7th Cir. 2000) (citations omitted). More recently, the Third Circuit held that *Padilla* applies retroactively since it merely “reaffirmed” the “norms of the legal profession that insist upon adequate warning to criminal defendants of immigration consequences.” *United States v. Orocio*, 645 F.3d 630, 638-39 (3d Cir. 2011).

¶10 Indeed, since the Court in *Padilla* relied on the last fifteen years of professional norms to find Mr. Padilla’s counsel deficient, a failure to do so in this case would not only be inconsistent but also a violation of equal protection. If *Poblete* is permitted to stand, an Arizona defendant who pleaded to an identical offense on the same day as Mr. Padilla did would nevertheless be denied post-conviction relief simply by virtue of the fact that it was Mr. Padilla’s case, rather than the Arizona defendant’s, that was granted review by the Supreme Court. There is no logical reason why one defendant should be granted relief based on a shift in prevailing professional norms while another defendant should be told that these same norms did not apply to his counsel’s performance until a later date. For these reasons, Mr. Poblete maintains that the Supreme Court and numerous federal circuit courts have held that, prior to *Padilla*, prevailing professional norms had

already evolved to require defense attorneys to advise noncitizens on the immigration consequences of criminal convictions, and that this standard should be applied to his counsel's performance.

B. In the Past Fifteen Years, States Have Increasingly Recognized a Defense Attorney's Duty to Advise on Immigration Consequences

¶11 A defense attorney's evolving responsibility to advise defendants on immigration consequences is also reflected in the changing laws and procedural rules of many states. Six years prior to *Padilla*, the New Mexico Supreme Court held in *State v. Paredes*, 101 P.3d 799, 805 (N.M. 2004), that "the attorney must advise ... [a noncitizen] client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain." Indiana has relied on its state constitution to find that "it constitutes ineffective assistance for an attorney to fail to advise a noncitizen defendant of the deportation consequences of a guilty plea." *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994) (applying *Strickland* analysis); *see also Segura v. State*, 749 N.E.2d 496, 500 (Ind. 2001) ("the failure to advise of the consequences of deportation can, under some circumstances, constitute deficient performance").

¶12 The critical nature of immigration consequences is also reflected in the fact that since 1995, at least twenty-two jurisdictions have implemented rules requiring trial courts to advise defendants on the potential immigration

consequences of entering into a plea. *Padilla*, 130 S. Ct. at 1486 n.15. That the defendant receives notice of potential immigration consequences before entering a plea suggests that legislatures and rules drafters contemplated that defense counsel would respond to any questions that the notice may trigger for a defendant. Indeed, several of these provisions specifically require that the court ascertain whether the defendant has had a chance to discuss the matter with counsel. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-1j (“If the defendant has not discussed these possible consequences with the defendant’s attorney, the court shall permit the defendant to do so prior to accepting the defendant’s plea.”); Md. Rule 4-242(e) (court must advise “that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequence of the plea”); 21 N.M. Dist. Ct. R. Cr. P. 5-303(F)(5) (“if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequence of a plea”).

¶13 Since *Rosas* was decided in 1995, the evolution of a defense attorney’s obligation to advise defendants on the immigration consequences of a plea in Arizona has become ever more obvious. On December 1, 2004, an amendment to Rule 17.2, Ariz. R. Crim. P., went into effect, stating that before accepting a plea of guilty or no contest, the court shall advise the defendant “[t]hat if he or she is not a citizen of the United States, the plea may have immigration

consequences.” Furthermore, in 2007, the State Bar of Arizona Foundation for Legal Services and Education provided start-up funding to *amici* FIRR to provide training and individual consultations to Arizona criminal defense attorneys, judges, and prosecutors on the immigration consequences of criminal convictions. Therefore, to the extent that *Rosas* was ever an accurate reflection of the Sixth Amendment requirement of effective assistance of counsel, shortly thereafter *Rosas* no longer reflected the prevailing professional norms on a defense attorney’s obligation to advise noncitizen defendants on the immigration consequences of criminal convictions.

C. Professional Guidelines Have Consistently Required Defense Attorneys to Advise on Immigration Consequences During the Last Fifteen Years

¶14 In determining whether an attorney’s performance fell below objective standards of reasonableness, the Supreme Court states, “We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable.’” *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688). In *Padilla*, the Court went on to note that “authorities of every stripe – including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications – universally require defense attorneys to advise as to the risk of deportation consequences for non-

citizens.” *Id.* at 1482 (internal quotation marks and citation omitted).

¶15 As early as 1999, the American Bar Association (“ABA”) required defense counsel to “determine and advise” a client about the immigration consequences of pleading guilty. ABA Standards for Criminal Justice, Pleas of Guilty 14-3.20 cmt. (3d ed. 1999). Similarly, in 1994, the National Legal Aid & Defender Association (“NLADA”) published guidelines directing counsel to “make sure the client is fully aware of ... other consequences of conviction such as deportation” during guilty plea negotiations. NLADA, Performance Guidelines for Criminal Defense Representation, § 6.2(a)(3) (1994). Another leading treatise instructs that “[an] attorney who suspects that his client is an alien has a duty to inquire and to protect his client’s immigration status.” 3 *Criminal Defense Techniques* § 60A.01 (Scott Daniels & Ellen Smolinsky Pall eds., 2002). A review of the relevant guidelines indicates that the reasoning in *Rosas*, *i.e.*, that failure to advise on immigration consequences does not constitute ineffective assistance of counsel, did not represent prevailing professional norms for criminal defense lawyers around the time it was decided, and it certainly no longer represented those norms shortly thereafter. Therefore, *Rosas* should not inhibit retroactive application of *Padilla* to defendants such as Mr. Poblete.

II. The Rule 32.1(g) requirement that a “significant change in the law” must be a “clear break from the past” must be harmonized with *Teague v. Lane*

¶16 This Court adopted Rule 32 in 1975 as a replacement for writs of *habeas corpus*, *coram nobis*, etc. At that time, Rule 32.1(g) provided a ground for relief where “there has been a significant change in the law applied in the process which led to the petitioner’s conviction or sentence, and there are sufficient reasons to allow retroactive application of the changed legal standard.” The 1992 amendment to Rule 32.1(g), however, not only removed the entire second clause concerning retroactive application, but it also changed the first clause such that the focus was changed from “the process” by which a conviction was obtained to the probability that the conviction itself would have been overturned. Regardless of the removal of that language from Rule 32.1(g), this Court has since continued to interpret the rule as permitting retroactive application of newly-decided cases in appropriate circumstances. Rather than leave categorization of those circumstances as vague as “sufficient reasons,” this Court has applied the United States Supreme Court’s *Teague* rule for retroactive application in cases already final when the newly-decided case was handed down. *State v. Slemmer*, 170 Ariz. 174, 180 (1991) (citing *Teague v. Lane*, 489 U.S. 288 (1989)); *State v. Towerly*, 204 Ariz. 386 (2003) (same).

¶17 The three-part analysis for determining whether a newly-decided case

applies retroactively under *Teague* is: 1) has the petitioner’s case already become final? 2) “is the rule that the petitioner asserts a new rule, and is the new rule substantive or procedural?” and 3) if it is a new rule, is it a watershed rule or does it “place[] certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe”? *Towery*, 204 Ariz. 386, ¶¶ 7, 14 (quoting *Teague*, 489 U.S. at 307). If the answer to either of the first two prongs is negative, then the rule is applied retroactively.

¶18 Whether *Padilla* applies retroactively to Mr. Poblete’s case is largely determined by the second part of the *Teague* analysis. If the rule that petitioner asserts is an “old rule,” then there is no need to move to the third part of the analysis. The problem with the Court of Appeals’ *Teague* analysis in this case is that it conflates the “clear break with the past” that is required in order to find a significant change in the law under Rule 32.1(g) with “new rule” as contemplated by *Teague*. *Poblete* ¶ 8, quoting *State v. Shrum*, 220 Ariz. 115, ¶ 15 (2009) (quoting in turn *Slemmer*, 170 Ariz. at 182). Under the court’s analysis, it would be impossible for a “significant change in the law” to ever be anything but a “new rule,” because “[t]he ‘new rule’ principle is meant to ‘validate [] reasonable, good-faith interpretations of existing precedents ... even though they are shown to be contrary to later decisions,’” *Poblete* ¶ 13 (citations omitted), and, presumably, courts never act unreasonably or in bad faith.

¶19 The court found that its previous holding in *State v. Rosas* was a correct statement of the law as it existed at the time. But *Padilla* shows, consistently with the previous argument in this brief, that the standard of practice for criminal defense lawyers has included an expectation that the lawyer will inquire with the client about citizenship and residency status and advise the client about immigration consequences of any conviction (whether by jury trial or plea). The lack of any previous case from this Court or the United States Supreme Court explicitly holding that immigration consequences are collateral to the conviction and not cognizable in a Rule 32 claim for ineffective assistance of counsel does not render *Rosas* a correct statement of the law. But *Hill v. Lockhart*, which applied ineffective counsel standards to challenges of guilty pleas, noted the lower court’s characterization of parole eligibility as a “collateral consequence.” 474 U.S. at 55. Yet the Court found this had no relevance in assessing the validity of the claim, rather it relied exclusively on the *Strickland* two-part test and held that the finding of ineffectiveness in advising a client to accept a plea relies upon whether the information given to the client was so deficient that it affected the voluntariness of the plea. *Id.* at 56-57.

¶20 For these reasons, reliance on *Rosas* represents a clear misapplication of clearly established United States Supreme Court cases. *Poblete* altogether failed to cite any cases contrary to *Rosas*, though, as demonstrated in the previous

argument, those cases clearly existed for many years before *Padilla* was decided. The fact that other courts elsewhere made a similar error is irrelevant when the right to effective counsel in this context was already established by *Hill* and *St. Cyr*. Because the holding in *Padilla* was “dictated by precedent” and was not a “clear break from the past,” *Teague* would require that *Padilla* be applied retroactively in cases such as this.

¶21 But the greatest evidence providing that *Padilla* should be applied retroactively is in *Padilla* itself. The Court confronted head-on the arguments of *Padilla*’s opponents that permitting this kind of collateral attack on final convictions would open the floodgates, and it implied that, as in *Hill*, retroactive application was appropriate. 130 S.Ct. at 1484-85. The Court explained:

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.

Id. at 1485 (internal cites omitted).

CERTIFICATE OF SERVICE

The undersigned has electronically filed and served Brief of *Amici Curiae* Arizona Attorneys for Criminal Justice, Florence Immigrant & Refugee Rights Project, Immigration Resource Legal Center, Immigrant Defense Project, and National Immigration Project in Support of Petition for Review this 17th day of October, 2011, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31.25(b)(1) and 31.19(c), I certify that the foregoing Brief of *Amici Curiae* Arizona Attorneys for Criminal Justice, Florence Immigrant & Refugee Rights Project, Immigration Resource Legal Center, Immigrant Defense Project, and National Immigration Project in Support of Petition for Review uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 3,500 words.

Dated this 17th day of October, 2011.

/s/
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