No. 13-5860

In The
Supreme Court of the United States

ISABEL RODRIGUEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Court of Appeals of Texas erred in holding that an attorney is not required, under *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), to advise a non-citizen defendant of the immigration consequences of a criminal plea of guilty, where the resulting conviction renders the defendant deportable, but subject to the discretionary authority by an immigration judge to grant relief from deportation, because, under such circumstances, the defendant's immigration consequences are not "truly clear" under *Padilla*'s holding?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

PRAYER

The Petitioner, ISABEL RODRIGUEZ (Petitioner), respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Fourth Court of Appeals of Texas, against the Petitioner, reverse the judgment of the Fourth Court of Appeals, and remand this case for reconsideration of the merits, under this Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

OPINIONS BELOW

On April 25, 2012, the Fourth Court of Appeals of Texas issued an order affirming the denial of Petitioner's application for a writ of habeas corpus, in *Ex parte Isabel Rodriguez*, 378 S.W.3d 486 (Ct. App. – San Antonio 2012).[1]

On April 17, 2013, the Texas Court of Criminal Appeals refused Ms. Rodriguez's petition for discretionary review of the Fourth Court of Appeals's decision. *See* Cause No. PD-0081-13.

[1] http://www.cca.courts.state.tx.us/opinions/Case.asp?FilingID=292680.

JURISDICTION

On April 25, 2012, the Texas Fourth Court of Appeals of Texas, entered its judgment and opinion affirming the order of the Bexar County Court at Law # 8, Bexar County, Texas, denying Petitioner's petition for a writ of habeas corpus, in *Ex parte Isabel Rodriguez*, 378 S.W.3d 486 (Ct. App. – San Antonio 2012).

On April 17, 2013, the Texas Court of Criminal Appeals refused Ms. Rodriguez's petition for discretionary review of the Fourth Court of Appeals's decision. *See* Cause No. PD-0081-13.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner's questions implicate the Sixth Amendment's right to effective assistance of counsel, which provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Procedural History of the Case

On January 29, 1997, Petitioner Isabel Rodriguez (Ms. Rodriguez) was arrested for the offenses of theft, involving a value of $50.00-$500.00, and for prostitution, in Cause Nos. 2452 and 2453, both classified as Class B misdemeanors. CR 2.[2] That same day, Ms. Rodriguez pled guilty to both offenses, and received a probated sentence that was later revoked to a term of 60 days in the Bexar County Jail, with each term to run concurrent. CR 11-18.

On November 10, 2010, Ms. Rodriguez filed an "Application for a Writ of Habeas Corpus, and Motion to Withdraw" in County Court at Law #8, in connection with the theft and prostitution convictions. On December 13, 2010, the Court held a hearing. On December 16, 2010, the Court issued its "Order" denying both applications.

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[2] The Clerk's Record on appeal, titled "APPEAL VOL 913" is referred to as CR [page number] and the Reporters Record, which is a transcription of the hearing on Ms. Rodriguez's application for a writ of habeas corpus held on December 13, 2010, is referred to as RR [page number]. The Clerk's Record on appeal titled "APPEAL VOL 913" and "APPEAL VOL 914" are identical in all respects, except that APPEAL VOL 914 is missing pages 6 and 7 of the original "Application for a Writ of Habeas Corpus, and Motion to Withdraw Plea." Consequently, Ms. Rodriguez will be citing APPEAL VOL 913 when referencing materials in the Clerk's Record. The Supplemental and 2nd Supplemental Records on Appeal will not be referenced in this petition.

On April 25, 2012, the Fourth Court of Appeals, in a published opinion, affirmed the trial court's denial of Ms. Rodriguez's writ of habeas corpus. *See Ex parte Isabel Rodriguez*, 378 S.W.3d 486, 489 n. 1 (Ct. App. – San Antonio 2012). On December 17, 2012, the Fourth Court denied rehearing.

On April 17, 2013, the Texas Court of Criminal Appeals denied Ms. Rodriguez's petition for discretionary review of the Fourth Court of Appeals's opinion.

Ms. Rodriguez's petition for a writ of certiorari was due to be filed no later than July 16, 2013, and has been timely filed.

B. Facts

On January 29, 1997, Petitioner, Isabel Rodriguez (Ms. Rodriguez) was arrested for the offenses of theft, involving a value of $50.00-$500.00, and for prostitution, both classified as Class B misdemeanors. CR 2. She remained in custody until February 4, 1997, when she was transported to court, where she first met her court-appointed counsel, Mr. James K. Hunt (plea counsel), to represent her in both cases. CR 3, 19. That same day, Ms. Rodriguez pled guilty to both offenses, and received a probated sentence that was later revoked to a term of 60 days in the Bexar County Jail, with each term to run concurrent. CR 11-18.

Years later, Ms. Rodriguez consulted with a person with expertise in immigration law, who advised her that as a result of her two convictions, her continued legal residency is at great risk. CR 3. This prompted her to retain legal counsel for the purpose of vacating her convictions, via application for a writ of habeas corpus.

C. Writ of Habeas Corpus

On November 10, 2010, citing *Padilla v. Kentucky*[3] as the predominant authority, Ms. Rodriguez filed an "Application for a Writ of Habeas Corpus, and Motion to Withdraw," based on Tex. Crim. Pro. § 11.072, with the County Court at Law # 8, before the Hon. Karen Crouch,[4] which alleged, in relevant part, that "the failure of Ms. Rodriguez's trial counsel to properly inform her on the certain and automatic immigration consequences of her guilty pleas led Ms. Rodriguez to enter an unknowing and involuntary plea." CR 3. Specifically, she alleged that plea counsel rendered ineffective assistance when he failed to advise her that a plea to the misdemeanor offenses of theft and prostitution would subject her to "a certain finding of deportation/removal and immigration detention," because "[u]nder 8 U.S.C. § 1227(a)(2)(B), an alien is deportable for having been convicted of

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[3] *See Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010).

[4] On January 1, 2011, Judge Crouch left the bench, which is now presided over by the Hon. Lisa Rodriguez.

two or more crimes of moral turpitude not arising out of a single scheme of criminal conduct." CR 5. It adds that "Ms. Rodriguez's offenses are quintessential crimes of moral turpitude" and that "[i]f the guilty pleas stand, and if arrested by the U.S. Department of Homeland Security and placed in removal/ deportation proceedings, Ms. Rodriguez will be found deportable and ordered removed. CR 5-6 (citing 8 U.S.C. Section 1227(a)(2)(B)). The writ further advises that "if her application of relief from removal/ deportation is denied, Ms. Rodriguez will be exiled from this country she knows as her home and her banishment will be based on her unknowing and involuntary pleas," adding that based on *Padilla*'s holding, counsel is now required "to inquire as to the immigration status of a client and provide competent and accurate advice of the possible consequences, particularly where the deportation consequence is plain." CR 6 (citing *Padilla* at 1484-1485). The writ was supported by the affidavit of Mr. Alfonso Otero, an Attorney who concentrates in the practice of immigration law. CR 23-25. Mr. Otero submitted that Section INA 237(a)(2)(I) provides that an alien who is convicted of two crimes involving moral turpitude is deportable. CR 24. *See also* CR 5. The writ also contained the affidavit of John Hunt, Ms. Rodriguez's plea lawyer. Plea counsel fully admitted that he did not at the time of Ms. Rodriguez's plea, or for that matter had ever, done any immigration work; that, because each charge was a misdemeanor, he had no reason to believe that Ms. Rodriguez would be subject to deportation; that he has no independent recollection

of having made inquiries about Ms. Rodriguez's immigration status; and that he did not advise Ms. Rodriguez that her convictions would subject her to certain (or any chance of) deportation. CR 21.

Finally, the writ is supported by Ms. Rodriguez's own affidavit, in which she avers that she is married to Jose M. Campos, and that she has four children, ages 20, 16, 14, and 12. She is currently employed, and has worked for the past 12 years. CR 19. Ms. Rodriguez expresses that at the time of her arrest for the theft and prostitution charges, she had no money to hire an attorney, and that she met her court-appointed lawyer, Mr. James Hunt, six days later, on February 4, 1997. CR 19. That same day, her lawyer told her to plead no contest, and that she would receive probation and community service hours. CR 19. Her lawyer gave her papers to sign, and she recalls that she was not aware that pleading guilty to the two misdemeanor charges would affect her residency in the United States. CR 19. She explains that at the time of her plea, she had been a [legal] resident alien for 18 years, that she obtained her legal status when her mother, a United States citizen, petitioned for her when she was 12 years old. She adds that she has been living in the United States since she was 6 years old. CR 19.

She added that at the time of her plea she did not realize the consequences of her pleas. Specifically, she explains that she was never advised that entering pleas of no contest to the theft and prostitution charges would result in severe consequences to her

immigration status, and that she now knows that the charges can result in her deportation and complete banishment from the United States. CR 20.

She elaborates that had she known what the consequences of her plea were, she would have never entered her pleas to the charges. She recalls that prior to her pleas, her lawyer did not discuss anything about her case, but only that he instructed her to sign the plea papers, that she would receive probation and that she would be released the same day. CR 20.

She adds that had she known of the negative effect of the pleas on her immigration status, she would have elected to fight her case before a jury. In retrospect, she states that she should have fought her case. CR 20.

She continues that today she knows that her residency in the United States is at great risk, and reiterates that had she been informed of the effects of her pleas to her immigration status, she would have taken her case to a jury. She did not know that she could take her case to a jury, and that she had the rights to force the state to present evidence against her, that she could confront her accusers, and that she could remain silent. She was told only to sign the papers, and to plead no contest. CR 20.

D. Trial Court's Order Denying Relief

After a hearing, the trial court considered the argument that plea counsel did not adequately inform her of the consequences of a plea of no contest on her immigration status, and that had she been properly warned of such consequences, she would have contested the charges against her, but issued an order denying the application for a writ of habeas corpus on both cases. CR 27-28.

E. Decision by the Texas Fourth Court of Appeals

Affirming the trial court's denial of the writ, the Fourth Court of Appeals (Fourth Court) wrote:

> In our view, [] a deportation consequence analysis that includes the client's eligibility for cancellation of removal is consistent with *Padilla*. When an LPR defendant is charged with an offense where the statute succinctly, clearly, and explicitly makes her removable, and the defendant is not eligible for cancellation of removal, her deportation [] consequence – like *Padilla*'s – is truly clear. *See Padilla*, 130 S. Ct. at 1483. Thus, counsel has a duty to inform the defendant that she will be deported. But if she is eligible for cancellation of removal and counsel only advises her that she is subject to deportation and fails to also advise her that she may ultimately avoid deportation because she is eligible for discretionary relief, the attorney's advice is at a minimum incomplete legal

> advice. *See id*. at 1491 (Alito, J., concurring) ("Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.").

See Ex parte Isabel Rodriguez, at pp. 14-15 (Opinion at *14-*15). Despite acknowledging that counsel had rendered incomplete legal advice under *Padilla*, the Fourth Court reasoned as follows:

> Because plea counsel cannot advise the defendant with any degree of certainty whether her removal will be cancelled, counsel's duty to advise the defendant of her immigration consequences is much more circumspect. Section 1229b(a)'s terms that define the defendant's eligibility [ ] for cancellation of removal are explicit, but the defendant's ability to obtain the relief is not so straightforward. *See id.* at 1483 (majority opinion) (recognizing "the law is not succinct and straightforward" in many situations). Therefore, the final result – whether the LPR defendant will actually be deported – will depend on whether the defendant is granted discretionary relief from removal. *See id*. at 1490 (Alito, J., concurring) (noting that "the immigration consequences of a criminal conviction" include the question of whether the noncitizen defendant is "eligible for relief from removal" (internal quotation marks omitted)). Cancellation of removal in turn depends on numerous factors and the decision to grant relief rests in the immigration judge's discretion. *See In re C-V-T-*, 22 I. & N.

Dec. 7, 11 (BIA 1998); *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978). Because the final result of the defendant's plea depends on relief that may or may not be granted, the defendant's eligibility for cancellation of removal makes the deportation consequence unclear or uncertain. *See Padilla*, 130 S. Ct. at 1483.

[ ] Considering the discretionary nature of cancellation of removal and its effect on the LPR defendant's plea, we believe that an LPR defendant's eligibility for cancellation of removal makes the defendant's deportation consequence not truly clear. We hold that the analysis to determine whether a deportation consequence is truly clear must include the question of the LPR defendant's eligibility for cancellation of removal. *Cf. Ex parte Carpio-Cruz*, No. 08-10-00240-CR, 2011 WL 5460848, at *7 (Tex. App. – El Paso Nov. 9, 2011, no pet. h.) (not designated for publication) (expressly considering the defendant's ineligibility for cancellation of removal in determining whether his deportation consequence was truly clear); *Hernandez v. State*, 61 So. 3d 1144, 1147-48 (Fla. Dist. Ct. App. 2011) (considering discretionary relief as a factor in determining when the deportation consequence is truly clear), review granted, 81 So. 3d 414 (Fla. Jan. 24, 2012). If an LPR defendant's deportation consequence is not truly clear, the plea attorney's duty to advise the client on the immigration effects of the plea is limited. *See Padilla*, 130 S. Ct. at 1483. The LPR defendant's attorney "need do no more

> than advise [the] noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*; *Ex parte Isabel Rodriguez*, 350 S.W.3d 209, 211 (Tex. App. – San Antonio 2011, no pet.).

Opinion, at *16-*18.[5]

The Fourth Court of Appeals denied rehearing, and Petitioner filed a petition for discretionary review to the Texas Court of Criminal Appeals, which was refused on April 17, 2013.

Ms. Rodriguez's petition for a writ of certiorari is due to be filed no later than July 16, 2013, and has been timely filed.

REASON FOR GRANTING THE WRIT

The Court should grant Certiorari and clarify that in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court requires that counsel advise a non-citizen defendant of the immigration consequences

[5] Because the State did not challenge Rodriguez's assertion that *Padilla* applies retroactively to her case (citing *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L. Ed. 2d 284 (2010)), the Fourth Court of Appeals determined that "for purposes of this case," it would apply *Padilla*'s test for constitutionally deficient counsel. *See Ex parte Isabel Rodriguez*, 378 S.W.3d 486, 489 n. 1 (Ct. App. – San Antonio 2012). Thus, because the State of Texas waived the subject of *Padilla*'s retroactivity in Ms. Rodriguez's case, this Court is not barred from considering the merits of her petition before this Court.

of a plea, where the resulting conviction renders the defendant deportable, even if the conviction permits the defendant to receive discretionary relief from removal, because such consequence is "truly clear," under *Padilla*'s holding.

A. The Meaning of "Truly Clear"

This Court has yet to speak on the parameters that establish whether a "deportation consequence" of a plea is sufficiently "truly clear," so as to create a duty by a lawyer to advise a non-citizen defendant about the immigration consequences of a plea of guilty. The question presented by Ms. Rodriguez thus appears to be one of first impression.

Ms. Rodriguez submits that a review of Justice Alito's concurring opinion – which disagreed with *Padilla*'s majority's holding that counsel have the affirmative duty to give proper immigration advice – clearly recognizes that defense counsel must not only, *at a minimum* "warn the client of a general risk of removal; it would also require counsel, in at least some cases, to specify what the removal consequences of a conviction would be." *Padilla* at 1488 (citation omitted). Therefore, both the majority and the concurring opinion in *Padilla* require that plea counsel at least warn a non-citizen defendant that they are "deportable."

Ms. Rodriguez agrees with the Fourth Court's recognition that if a non-citizen defendant is eligible for cancellation of removal, counsel must advise that

client that 1. she is automatically subject to deportation proceedings and that 2. she may ultimately avoid deportation because she is eligible for discretionary relief, and its foundational premise that incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source. *Id.* at 493 (citing *Padilla* at 1491) (Alito, J., concurring). This position is also emphasized by the majority in *Padilla*, which states:

> . . . changes to our immigration law radically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part – **indeed, sometimes the most important part** (citation omitted) – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

See Padilla v. Kentucky, 130 S.Ct. 1473, 1480 (2010) (emphasis by Ms. Rodriguez). However, from this point forward, the Fourth Court strayed beyond the limits of *Padilla*'s holding.

Specifically, after discussing the many factors that play into the decision by an immigration judge to grant or deny cancellation from removal, the Fourth Court concluded that "[b]ecause the final result of the defendant's plea depends on relief that may or may not be granted, the defendant's eligibility for cancellation

of removal makes the deportation consequence unclear or uncertain." *See* Opinion, at *id. infra*. This statement is wrong. The Court has misread *Padilla*'s use of the phrase "deportation consequences," and has misapplied it to Ms. Rodriguez's case, and for that matter, to all other cases where a non-citizen, although deportable, is nevertheless theoretically eligible for discretionary relief from deportation. The Fourth Court's decision, which has been published and therefore has precedential value in Texas has so far been followed by at least one other appellate court in the state (also via published opinion),[6] and thus threatens to deny *Padilla*'s mandate from protecting an entire category of non-citizen defendants whose conviction-based deportation is subject to an immigration judge's authority to grant discretionary relief.

Perhaps because it is impossible to predict how removal proceedings will conclude, nothing in *Padilla* mandates, or even suggests, that proper immigration advice requires a lawyer to ideate the *end result* of the immigration proceedings, that is, whether a client

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[6] *See Ex parte Alfaro*, 378 S.W.3d 677, 680 (Ct. App. – San Antonio 2012) ("Alfaro must show that the deportation consequences of his plea were 'truly clear[ ]' because his plea caused him to be automatically removable under federal immigration law."). *See also Ex parte Cisneros*, 2013 Tex. App. LEXIS 4055 *21-22, n. 10 (Ct. App. – El Paso 2013) (unpublished) (citing *Ex parte Isabel Rodriguez* for the proposition that "[b]ecause the final result of the defendant's plea depends on relief that may or may not be granted, the defendant's eligibility for cancellation of removal makes the deportation consequence unclear or uncertain" under *Padilla*).

will ultimately receive any relief from deportation from an immigration judge. This is not, and cannot be a part of the "deportation consequence" inquiry. To illustrate this point, Ms. Rodriguez submits Jose Padilla's (the appellant in *Padilla v. Kentucky*) own immigration consequences following his guilty plea. Albeit via affirmative misadvice from his plea lawyer, although Mr. Padilla was convicted of a felony drug trafficking offense that precluded him from discretionary relief from deportation, *Padilla* did not focus on whether Padilla's removal was guaranteed to occur in determining the propriety of the advice, but on the fact that Jose Padilla's conviction made him deportable, and precluded him from discretionary relief from deportation under the immigration laws. *See Padilla*, *generally.* The Fourth Court's logic fails when one considers that, as in Jose Padilla's own case, despite the non-existence of discretionary relief by a judge to grant him relief, those in his situation – categorized as "Aggravated Felons" – are still eligible to obtain relief from deportation from provisions such as the Convention Against Torture Treaty (*see* 8 C.F.R. § 208.17). Plainly put, a non-citizen's deportability, even under the worst of circumstances, is never an absolute certainty.

Thus, despite the probabilities of an immigration judge's grant of relief in her case, the fact remains that after her plea, Ms. Rodriguez is, and will remain deportable. The fact that we cannot adequately predict what the immigration judge will do in her case did not excuse her lawyer's obligation to warn

her that she was *both* deportable, *and* that her removal is subject only to the discretionary relief of an immigration judge, who may elect to not grant her relief. As the facts in our case clearly demonstrate, and as the Court acknowledges in its opinion, neither her lawyer nor the Court met the necessary advice parameters. Specifically, neither advised Ms. Rodriguez that her pleas would bring about deportation proceedings, *and* that she would also be eligible for discretionary relief from deportation. *See* Opinion at 494-495. Had he conducted the proper immigration research, it was then plea counsel's obligation, under *Padilla* to admonish Ms. Rodriguez that upon pleading, she would be rendered deportable, and that her removal would rest ultimately on an immigration judge's discretionary authority. By contrast, a *de minimis* statement that a non-citizen client may "carry a risk of adverse immigration consequences" (Opinion at 495) following a plea of guilty is something that *Padilla*'s holding reserves for those cases where deportability itself is not discernible – that is, whether a person is even subject to being removed at all – which is clearly not Ms. Rodriguez's case.

Professor Cesar Cuauhtemoc Garcia Hernandez has theorized a framework that should be followed in deciphering the specific obligations imposed by *Padilla* under the Sixth Amendment's duty that criminal defense attorneys owe to non-citizen defendants. *See* "Criminal Defense after *Padilla v. Kentucky*," 26 Geo. Immigr. L.J. 475, 488 (2012). He writes:

> *Padilla* requires criminal defense attorneys to engage in two lines of inquiry: (1) they must investigate a client's citizenship status and (2) determine whether a client will be removable if convicted. The first inquiry, determining a client's citizenship status, turns on an attorney's duty to conduct a reasonable investigation of the law and facts of a defendant's legal predicament. The second inquiry, determining removability and advising accordingly, depends on the clarity of the relevant statutory language – specifically, the clarity of the language describing the consequence (deportation) and the clarity of the language describing which crimes result in deportation. A close reading of the decision suggests that neither is a simple endeavor. Both, however, are manageable burdens for criminal defense attorneys.

Id. Garcia Hernandez concludes that "the threshold requirement for defense attorneys is to conduct a reasonable investigation of the client's citizenship status," adding that "[i]gnorance of immigration concerns will not satisfy *Padilla*." *Id*. at 494. Counsel in our case did neither, and yet, the Fourth Court concluded that the trial court's warning that Ms. Rodriguez might suffer adverse immigration consequences satisfied *Padilla*'s mandate, simply because Ms. Rodriguez possessed the ability to receive discretionary relief from an immigration judge, despite the fact that ultimately, the immigration judge may well deny discretionary relief, and rule that Ms. Rodriguez should be removed. Ms. Rodriguez submits that

Padilla required that her counsel inform her of the discretionary nature of the removability, so that she could then have made a fully informed decision as to whether she would take a chance at trying to convince an immigration judge that she should be spared deportation, or be risk averse and elect another resolution of her case. Either way, the choice was for her to make, and counsel deprived her of the ability to do so.

B. Incorrect and Incomplete Prejudice Analysis

In determining, *arguendo*, that plea counsel rendered ineffective assistance in failing to properly admonish Ms. Rodriguez about the deportation consequences of her plea (*see* Opinion at 495), the Fourth Court concluded that Ms. Rodriguez was not prejudiced, because the court's admonishment, that she would suffer "adverse immigration" consequences was sufficient "immigration advice," as it were, to satisfy *Padilla*'s mandate. As noted, telling someone that they might suffer adverse immigration consequences, is not the equivalent of telling them that a plea automatically renders them subject to deportation proceedings, and that relief may only come in the form of an immigration judge's discretionary relief, something that *Padilla* identifies as often times the most important concern for a non-citizen faced with a criminal charge. Thus, the trial court's (or even counsel's, in the give case) claim that it warned Ms. Rodriguez of, without more, possible adverse

immigration consequences did not discharge plea counsel's full obligation under *Padilla.* Without the necessary admonishment about her certain deportability status and how her removal could be ultimately decided by an immigration judge, Ms. Rodriguez was in no position to make a knowing and voluntary decision whether to continue with the plea, or opt to try her case, hence rendering her plea involuntary. Counsel's failure to properly warn her deprived her of the ability to make that choice. Ms. Rodriguez averred in her affidavit that had she known of her deportability, she would have opted to try her case. This is all of what she had to prove under *Strickland*'s ineffective assistance claim for pleas, under *Hill v. Lockhart*, and clearly, she did so. *See generally Strickland v. Washington*, 466 U.S. 668 (1984); *see also Hill v. Lockhart*, 474 U.S. 52 (1985). Ms. Rodriguez has suffered prejudice.

In a recent opinion by the Fifth Circuit, Justice Dennis wrote a concurring opinion that sagely analyzes, and puts front and center, Ms. Rodriguez's complaint before this Court, in *United States v. Tanguma-Marroquin*, No. 11-40256 (5th Cir. 2012) (unpublished).

Justice Dennis' opinion fully supports arguments presented by the Appellant, specifically, a lawyer's duty, *independent* of the one to give advice about the immigration consequences of a plea, to also attempt to craft a plea agreement that reduces the chances of his/her non-citizen client's removal, which, as Appellant has argued, Justice Dennis concludes has been

reaffirmed after the Supreme Court's rulings in *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012). Additionally, Justice Dennis concludes that any warning about possible – or even certain – removal consequences of a guilty plea, that is given by a judge during a defendant's plea colloquy, cannot supplant a lawyer's independent obligation to give full and competent immigration advice at a time previous to the plea. More specifically, Justice Dennis flatly rejects the position that any such warning by a judge during the plea colloquy eliminates the prejudice under that prong of the *Strickland* test. Petitioner respectfully urges this Court to examine Justice Dennis' entire concurring opinion, in order to best capture the full message of a very well-written treatment of the issue before this Court.

In sum, the Fourth Court of Appeals decision is not specific to Ms. Rodriguez's case, but rather, to a whole subset of non-citizens, whose deportability rests with the discretionary power of an immigration judge. It is therefore of critical importance that this Court clarify that counsel in Ms. Rodriguez's case is also mandated under *Padilla* to investigate the immigration consequences of a plea, and then discuss the discretionary nature of her deportability, so that a non-citizen defendant can make an informed, and voluntary decision to plead guilty, or choose an alternate way to resolve the criminal case.

CONCLUSION

For the foregoing reasons, the Petitioner, Isabel Rodriguez, respectfully prays that this Court grant certiorari, and that it reverse the judgment of the Texas Fourth Court of Appeals.

Respectfully submitted,

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EX PARTE Isabel RODRIGUEZ

Nos. 04-11-00038-CR, 04-11-00039-CR

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

2012 Tex. App. LEXIS 3207

April 25, 2012, Delivered
April 25, 2012, Filed

OPINION BY: Rebecca Simmons

OPINION

AFFIRMED

Appellant Isabel Rodriguez Campos pleaded *nolo contendere* to two misdemeanors in 1997. In late 2010, she applied for writs of habeas corpus to withdraw her pleas. She asserted that she received ineffective assistance of counsel in light of *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Specifically, Rodriguez complained that her plea counsel "failed to properly inform her on the certain and automatic immigration consequences of her guilty pleas." In her sole issue on appeal, Rodriguez argues the trial court erred when it denied her applications. We affirm the trial court's order.

BACKGROUND

In 1997, Rodriguez was a lawful permanent resident of the United States when she was arrested for two separate misdemeanors: theft by check and

prostitution. The theft by check occurred in 1995 and the prostitution occurred in early 1997. Rodriguez was represented in both pleas by the same court-appointed counsel. Before Rodriguez pleaded, she signed written admonitions and the trial court orally admonished her that her pleas could adversely affect her immigration status. She pleaded *nolo contendere* to both charges and the court accepted her pleas.

On November 10, 2010, Rodriguez filed applications for writs of habeas corpus, supported by affidavits, and motions to withdraw her pleas. She asserted that (1) her plea counsel failed to warn her that she would be deported if she pleaded guilty to two misdemeanors, (2) his advice was constitutionally deficient, (3) she was prejudiced, and thus (4) her pleas were not knowing and voluntary. At the hearing on the applications for writs of habeas corpus no testimony or additional evidence was presented. In its December 16, 2010 order, the trial court found, *inter alia*, that (1) Rodriguez signed written admonitions and voluntarily waived her right to trial and (2) she understood her pleas could result in her deportation. It denied her applications; Rodriguez appeals the trial court's order.

STANDARD OF REVIEW

We review the trial court's denial of a habeas corpus application for an abuse of discretion. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). An applicant who asserts that her plea was not knowing

and voluntary must prove her claim by a preponderance of the evidence. *Id*. We review "the record evidence in the light most favorable to the trial court's ruling and [we] must uphold that ruling absent an abuse of discretion." *Id*. We give almost total deference to the trial court's findings that are " 'based upon credibility and demeanor.' " *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006) (quoting *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004)). We also defer to the trial court's findings of historical facts it determines from conflicting affidavits. *Manzi v. State*, 88 S.W.3d 240, 243-44 (Tex. Crim. App. 2002) (citing *Anderson v. City of Bessemer City, N.C*., 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)).

RELEVANT IMMIGRATION LAWS

Padilla v. Kentucky addressed the requirements for effective assistance of counsel for a noncitizen defendant who enters a plea to a criminal charge if her deportation consequence is "truly clear." *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284 (2010). In *Padilla*, the defendant was a lawful permanent resident (LPR) of the United States for over forty years when he pleaded guilty to transporting a large amount of marijuana. *Id*. at 1477. Before he pleaded guilty, his plea counsel told Padilla "he did not have to worry about immigration status since he had been in the country so long." *Id*. at 1478 (internal quotation marks omitted). Padilla relied on his plea counsel's affirmative misadvice and pleaded guilty.

Id. at 1478, 1483. But the immigration statute's terms applicable to Padilla's offense were succinct, clear, and explicit: Padilla was deportable. *Id*. at 1483. Further, he was not eligible for discretionary relief. *See id*. at 1480. Thus, the outcome of his removal proceeding was not in question: he was deportable, he was not eligible for discretionary relief, and the immigration judge would order him deported. Because Padilla's deportation consequence was truly clear, his plea counsel's duty was to warn him that he would be deported. *Id*. at 1483. A mere warning of a risk of adverse immigration consequences would be constitutionally deficient. *Id*.

To determine whether Rodriguez received ineffective assistance of counsel, we must first decide whether the immigration consequences for her pleas were truly clear.[1] *See id*. Like Padilla, Rodriguez was deportable; but unlike Padilla, Rodriguez was eligible for cancellation of removal. As discussed below, Rodriguez's immigration consequences turn on her removability and eligibility for cancellation of removal.

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[1] The State did not challenge Rodriguez's assertion that *Padilla* applies retroactively to her case. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Therefore, for purposes of this case, we apply *Padilla*'s test for constitutionally deficient counsel.

A. Removability

1. Removable Persons

The Immigration and Nationality Act (INA) authorizes the Attorney General to order deported any alien who "is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii) (2006); *see Amouzadeh v. Winfrey*, 467 F.3d 451, 454 (5th Cir. 2006). The INA does not define "moral turpitude," but federal courts give substantial deference to the Board of Immigration Appeals' (BIA's) definition of the term. *Fuentes-Cruz v. Gonzales*, 489 F.3d 724, 725 (5th Cir. 2007) (per curiam); *Amouzadeh*, 467 F.3d at 454. For the BIA's deportation determination purposes, theft and prostitution convictions in Texas are crimes involving moral turpitude. *See generally Fuentes-Cruz*, 489 F.3d at 726; *Holgin v. State*, 480 S.W.2d 405, 408 (Tex. Crim. App. 1972) (prostitution involves moral turpitude); *Brown v. Tex. Dep't of Ins.*, 34 S.W.3d 683, 690 (Tex. App. – Austin 2000, no pet.) (theft by check involves moral turpitude).

2. Rodriguez's Removability

Rodriguez pleaded *nolo contendere* to two separate misdemeanors: theft by check and prostitution. She asserts that both offenses are crimes involving moral turpitude; we agree. *See Holgin*, 480 S.W.2d at 408; *Brown*, 34 S.W.3d at 690. Therefore, Rodriguez was deportable. *See* 8 U.S.C. § 1227(a)(2)(A)(ii); *Amouzadeh*,

467 F.3d at 454. However, some deportable aliens, like Rodriguez, are eligible for discretionary relief such as cancellation of removal.

B. Eligibility for Discretionary Relief

1. Cancellation of Removal

Under the INA, the Attorney General has discretionary authority to cancel removal in some instances. 8 U.S.C. § 1229b(a) (2006); *see Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2583, 177 L. Ed. 2d 68 (2010); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 214-15 (5th Cir. 2003). An LPR who has been admitted for at least five years, who has continuously resided in the United States for seven years, and who has not been convicted of an aggravated felony – under the federal immigration law definition – may apply for cancellation of removal. 8 U.S.C. § 1229b(a) (2006); *Carachuri-Rosendo*, 130 S. Ct. at 2580-81. The LPR "bears the burden of demonstrating that his or her application for relief merits favorable consideration." *In re C-V-T-*, 22 I. & N. Dec. 7, 12 (BIA 1998); *see* 8 C.F.R. § 1240.64(a) (2012). She may offer evidence, including "affidavits from family, friends, and responsible community representatives," that show her good character and support her application. *Matter of Marin*, 16 I. & N. Dec. 581, 585 (BIA 1978). Factors that support cancellation of removal include the following:

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence

> occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, . . . a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character.

In re C-V-T-, 22 I. & N. Dec. at 11. Adverse factors include:

> the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.

Id. The immigration judge "'must balance the adverse factors evidencing the [LPR]'s undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of . . . relief appears in the best interest of this country.'" *Id*. (quoting *Marin*, 16 I. & N. Dec. at 584-85) (omission in original). The immigration judge must "clearly enunciate the basis for granting or denying a request for cancellation of removal," and the judge's decision is subject to administrative review by the Board of Immigration Appeals. *See id*. at 12, 15 (reversing the immigration

judge's decision and granting cancellation of removal). However, there is no judicial review of "any judgment regarding the granting of [discretionary] relief under section . . . 1229b." 8 U.S.C. § 1252(a)(2)(B)(i); *Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008); *see Delgado-Reynua v. Gonzales*, 450 F.3d 596, 600 (5th Cir. 2006).

2. Rodriguez's Eligibility for Cancellation of Removal

In its brief, the State asserted Rodriguez was eligible for cancellation of removal when she pleaded to the offenses, and Rodriguez did not rebut that assertion. According to the record, Rodriguez was eligible for cancellation of removal at the time of her plea because she was an LPR and had been admitted for at least five years, had continuously resided in the United States for seven years, and had not been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a) (2006); *Carachuri-Rosendo*, 130 S. Ct. at 2580-81. Having established that Rodriguez was subject to deportation but also eligible for cancellation of removal, we must determine whether Rodriguez's deportation consequence was truly clear. If it was truly clear then according to *Padilla*, plea counsel must have advised Rodriguez that she would be deported. We turn then to *Padilla* and its progeny for guidance on the meaning of truly clear deportation consequence.

C. Defining Deportation Consequence

1. Deportation Consequence Analysis

If "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction," the defendant's plea counsel must "give correct advice [that] is equally clear." *Padilla*, 130 S. Ct. at 1483. Plea counsel must tell the defendant that she will be deported; a general warning of some adverse immigration consequence is not sufficient. *See id*.; *Ex parte Rodriguez*, 350 S.W.3d 209, 211 (Tex. App. – San Antonio 2011, no pet.). However, if the deportation consequence for a defendant's plea is not truly clear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 130 S. Ct. at 1483; *Rodriguez*, 350 S.W.3d at 211. The specificity of the warning that *Padilla* requires turns on whether "the deportation consequence is truly clear," but *Padilla* does not state what "deportation consequence" comprises. *See Padilla*, 130 S. Ct. at 1483. Specifically, *Padilla* does not state whether deportation consequence analysis is limited to determining whether the statutory terms making the noncitizen defendant deportable are succinct, clear, and explicit, or if the analysis also includes the defendant's eligibility for cancellation of removal. *See id*. at 1482-83.

2. Examining Padilla

In *Padilla*, the defendant was clearly deportable and he was not eligible for cancellation of removal. *See id*. at 1480, 1483. The outcome of his removal proceeding was certain: he would be deported. The Court stated that Padilla's deportation consequence was truly clear, but it did not expressly address whether deportation consequence includes the defendant's eligibility for discretionary relief. Nevertheless *Padilla* helps define consequence in its discussion on when the statutory terms are succinct, clear, and explicit. *Id*. at 1482-83.

The majority uses "consequence" in describing "the removal consequence for Padilla's conviction," the "consequences of Padilla's plea," and "when the deportation consequence is truly clear." *Id*. at 1483. These uses comport with the view that the deportation consequence is the outcome of the removal proceeding. *See id*.

The concurring opinion also shapes the definition of deportation consequence. The concurrence primarily addresses the difficulties in determining whether a crime makes a noncitizen defendant removable. *E.g., id*. at 1488 (Alito, J., concurring) ("[D]etermining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude [(CIMT)]' is not an easy task." (second alteration in original)). But the concurrence expressly includes eligibility for discretionary relief as one of the factors to consider in determining "the immigration consequences of a

criminal conviction." *Id*. at 1489-90 ("The task of offering advice about the immigration consequences of a criminal conviction . . . [includes determining whether the alien is] eligible for relief from removal. . . .").[2] These uses of consequence by the majority and the concurrence are consistent with a definition of deportation consequence as the final result of the removal proceeding – whether the removal order will be granted or cancelled.

3. Other Courts

We have not found any Texas authority that directly addresses the question of whether deportation consequence includes discretionary relief. However, at least two other courts have considered, in light of *Padilla*, defense counsel's advice regarding discretionary relief to a noncitizen defendant.

In *Hernandez v. State*, the LPR defendant was arrested for selling lysergic acid diethylamide (LSD). *Hernandez v. State*, 61 So. 3d 1144, 1146 (Fla. Dist. Ct. App. 2011), *review granted*, 81 So. 3d 414, (Fla. Jan. 24, 2012). His conviction was an aggravated felony for immigration purposes and made him ineligible for discretionary relief. *Id*. at 1146-47. The

[2] Justice Alito's concurrence also points out the complicated task of offering advice about immigration consequences based on the alien's status; whether the alien is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen. *Id*. at 1490.

appellate court considered the defendant's eligibility for discretionary relief as a factor in determining when the deportation consequence is truly clear. *Id*. at 1147-49. It decided that the defendant's deportation consequence was truly clear because his plea made him deportable and he was not eligible for discretionary relief. *Id*.

In *Diunov*, a noncitizen defendant pleaded guilty to mail fraud, wire fraud, and conspiracy. *Diunov v. United States*, No. 08 Civ. 3184 (KMW), 2010 U.S. Dist. LEXIS 59723, 2010 WL 2483985, at *1 (S.D.N.Y. June 16, 2010). Before she entered her plea, defense counsel advised her that her plea would make her subject to deportation and that she would be eligible for a hardship waiver. 2010 U.S. Dist. LEXIS 59723, [WL] at *11. The court noted with approval that her defense counsel "did not assure her that any factor as it related to such a waiver would actually or necessarily prevent her deportation." *Id*. Notably, the court did not terminate its analysis of her deportation consequence with the offenses to which she pleaded guilty; she "face[d] presumptively mandatory deportation." 2010 U.S. Dist. LEXIS 59723, [WL] at *1. Instead, the court considered whether she was eligible for discretionary relief – a hardship waiver – and whether her counsel properly advised her regarding that discretionary relief when it determined that plea counsel gave her appropriate advice. 2010 U.S. Dist. LEXIS 59723, [WL] at *9-11.

D. Deportation Consequence Analysis Consistent With *Padilla*

In our view, a deportation consequence analysis that includes the client's eligibility for cancellation of removal is consistent with *Padilla*. When an LPR defendant is charged with an offense where the statute succinctly, clearly, and explicitly makes her removable, and the defendant is not eligible for cancellation of removal, her deportation consequence – like Padilla's – is truly clear. *See Padilla*, 130 S. Ct. at 1483. Thus, counsel has a duty to inform the defendant that she will be deported. But if she is eligible for cancellation of removal and counsel only advises her that she is subject to deportation and fails to also advise her that she may ultimately avoid deportation because she is eligible for discretionary relief, the attorney's advice is at a minimum incomplete legal advice. *See id*. at 1491 (Alito, J., concurring) ("Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.").[3]

Because plea counsel cannot advise the defendant with any degree of certainty whether her removal will be cancelled, counsel's duty to advise the

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[3] Following *Padilla*, we reject a view that would increase the likelihood of affirmative misadvice or misleading advice. *See Padilla*, 130 S. Ct. at 1483 (rejecting affirmative misadvice); *id*. at 1491 (Alito, J., concurring) (warning of misleading or incomplete advice).

defendant of her immigration consequences is much more circumspect. Section 1229b(a)'s terms that define the defendant's *eligibility* for cancellation of removal are explicit, but the defendant's ability to *obtain* the relief is not so straightforward. *See id*. at 1483 (majority opinion) (recognizing "the law is not succinct and straightforward" in many situations). Therefore, the final result – whether the LPR defendant will actually be deported – will depend on whether the defendant is granted discretionary relief from removal. *See id*. at 1490 (Alito, J., concurring) (noting that "the immigration consequences of a criminal conviction" include the question of whether the noncitizen defendant is "eligible for relief from removal" (internal quotation marks omitted)). Cancellation of removal in turn depends on numerous factors and the decision to grant relief rests in the immigration judge's discretion. *See In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998); *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978). Because the final result of the defendant's plea depends on relief that may or may not be granted, the defendant's eligibility for cancellation of removal makes the deportation consequence unclear or uncertain. *See Padilla*, 130 S. Ct. at 1483.

Considering the discretionary nature of cancellation of removal and its effect on the LPR defendant's plea, we believe that an LPR defendant's eligibility for cancellation of removal makes the defendant's deportation consequence not truly clear. We hold that the analysis to determine whether a deportation

consequence is truly clear must include the question of the LPR defendant's eligibility for cancellation of removal. *Cf. Ex parte Carpio-Cruz*, No. 08-10-00240-CR, 2011 WL 5460848, at *7 (Tex. App. – El Paso Nov. 9, 2011, no pet. h.) (not designated for publication) (expressly considering the defendant's ineligibility for cancellation of removal in determining whether his deportation consequence was truly clear); *Hernandez v. State*, 61 So. 3d 1144, 1147-48 (Fla. Dist. Ct. App. 2011) (considering discretionary relief as a factor in determining when the deportation consequence is truly clear), *review granted*, 81 So. 3d 414 (Fla. Jan. 24, 2012). If an LPR defendant's deportation consequence is not truly clear, the plea attorney's duty to advise the client on the immigration effects of the plea is limited. *See Padilla*, 130 S. Ct. at 1483. The LPR defendant's attorney "need do no more than advise [the] noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*; *Ex parte Rodriguez*, 350 S.W.3d 209, 211 (Tex. App. – San Antonio 2011, no pet.).

INEFFECTIVE ASSISTANCE OF COUNSEL

We now examine whether plea counsel's failure to advise Rodriguez that she was deportable rendered her counsel's performance ineffective.

A. *Strickland*'s Prongs

In deciding whether to plead guilty to a criminal charge, a defendant is entitled to effective assistance

of counsel. *Padilla*, 130 S. Ct. at 1480-81; *see Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). *See generally Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant asserts she received ineffective assistance of counsel, she must satisfy both of *Strickland*'s prongs: she must prove her plea counsel's performance was deficient, and as a result, she suffered prejudice. *See Padilla*, 130 S. Ct. at 1482; *Strickland*, 466 U.S. at 687.

B. Habeas Hearing

To be entitled to habeas relief, Rodriguez had to show that her plea counsel's assistance was ineffective. *See Padilla*, 130 S. Ct. at 1482; *Strickland*, 466 U.S. at 687. James Hunt was Rodriguez's plea counsel. Rodriguez asserts she proves both of *Strickland*'s prongs: (1) that Hunt's assistance was constitutionally deficient because he failed to tell her she would be deported, and (2) had she known she would be deported, she would instead have gone to trial.

At the hearing on her applications for writs of habeas corpus, Rodriguez's habeas counsel asserted Hunt's advice was constitutionally deficient under *Padilla*, but the appellate record provides very little insight into what Hunt advised Rodriguez before the court accepted her pleas. At the habeas hearing, neither Rodriguez nor the State put on a single witness. The reporter's record captures the entire proceeding in only four pages. Rodriguez's habeas counsel argued

that *Padilla* applies retroactively, that Hunt's performance was deficient, Rodriguez was prejudiced, and the court should grant her applications. Rodriguez's habeas counsel also noted that Rodriguez had submitted affidavits from herself and from Hunt. Rodriguez's affidavit avers that Hunt asked her if she was a citizen, she told him she was a resident alien, but Hunt did not explain that her pleas "would affect my residency in the United States." Hunt's affidavit avers that he has never done "immigration work," he did not advise Rodriguez that "her convictions subjected her to certain deportation/removal," and that he does not recall if he advised "her to consult with an immigration attorney." His affidavit states that the admonitions Rodriguez signed are attached to his affidavit, but none are attached and the appellate record contains no admonitions. The State argued that Rodriguez signed separate admonitions for each of the misdemeanor offenses and therefore must have been aware of the deportation consequence of her pleas. During the hearing, the trial court disputed Rodriguez's habeas counsel's assertion that Rodriguez was not advised of the deportation consequence of her pleas.

> Sir, I'm going to tell you that in Cause Number 639382, I took that plea and I inform everyone that "should you plead guilty or no contest and not be a citizen of the United States of America, a plea of guilt or of no contest could adversely affect your citizenship status now or at a later time." And I do that routinely. I took the plea in

that cause. Actually, I took the plea in both causes.

C. Trial Court's Order

In its order denying Rodriguez's applications for writs of habeas corpus, the trial court included findings of fact and conclusions of law. The trial court found that Rodriguez signed the court's admonitions that warned her "that if she was not a citizen of the United States, a plea of guilty or *nolo contendere* for the offenses charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." The trial court concluded that Rodriguez failed to meet either of *Strickland*'s prongs: she had not shown deficient performance or prejudice. *See generally Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

D. Plea Counsel's Advice

Because Rodriguez's deportation consequence was not truly clear, Hunt's duty to advise Rodriguez about the effects of her plea was limited: he only had to warn her that her pleas could "carry a risk of adverse immigration consequences." *See Padilla*, 130 S. Ct. at 1483; *Rodriguez*, 350 S.W.3d at 211. Assuming *arguendo* that Hunt's advice was deficient, Rodriguez's ineffective assistance assertion still fails: Rodriguez cannot show she was prejudiced.

E. No Prejudice

After the court advised Rodriguez's habeas counsel that it always admonishes defendants entering pleas about the deportation consequence of their pleas, counsel responded: "[W]e are not here in any way challenging what the Court may have advised her. At issue here is what her [plea] attorney advised her." Thus Rodriguez does not dispute that, before the court accepted her pleas, the court admonished her that her pleas could have adverse immigration consequences.

1. Incurable prejudice authorities

Nevertheless, Rodriguez argues that the trial court's admonitions could not cure the prejudice caused by Hunt's alleged deficient performance. She cites four authorities for support, but each is distinguishable. In three of Rodriguez's four cited authorities, the noncitizen defendant was not eligible for discretionary relief. *See Salazar v. State*, No. 11-11-00029-CR, 2011 Tex. App. LEXIS 7229, 2011 WL 4056283, at *2 (Tex. App. – Eastland Aug. 31, 2011, no pet.) (recognizing that the noncitizen defendant was not eligible for discretionary relief "because . . . he had not been a legal resident of the United States for at least five years"); *Ex parte Romero*, 351 S.W.3d 127, 130-31 (Tex. App. – San Antonio 2011, no pet.) (noting that the LPR defendant's "deportation consequence was truly clear" because he pleaded guilty to an aggravated felony, and impliedly recognizing that

the defendant was not eligible for cancellation of removal under § 1229b(a)); *Ex parte Tanklevskaya*, No. 01-10-00627-CR, 2011 Tex. App. LEXIS 4034, 2011 WL 2132722, at *7, *8 (Tex. App. – Houston [1st Dist.] May 26, 2011, pet. filed) (noting that the noncitizen defendant did not qualify for the discretionary relief of waiver of inadmissibility). These defendants' immigration consequences were truly clear, and plea counsels' duty was to give specific advice. *See Padilla*, 130 S. Ct. at 1483; *Rodriguez*, 350 S.W.3d at 211. We agree that in such circumstances, a trial court's admonition of possible immigration consequences will not cure plea counsel's failure to give specific advice. *E.g., Tanklevskaya*, 2011 Tex. App. LEXIS 4034, 2011 WL 2132722, at *11. However, Rodriguez was eligible for cancellation of removal and, as we explain above, her deportation consequence was not truly clear, and the trial court's admonition did not have to tell her that she would be deported. *See Padilla*, 130 S. Ct. at 1483; *Rodriguez*, 350 S.W.3d at 211.

Rodriguez also cites *Ex parte De Los Reyes*, a case where the noncitizen defendant may have been eligible for discretionary relief. *See Ex parte De Los Reyes*, 350 S.W.3d 723, 726 (Tex. App. – El Paso Aug 31, 2011, pet. granted). But De Los Reyes's plea counsel admitted that he failed to advise De Los Reyes that his guilty plea might have adverse immigration consequences. *See id*. at 730. In this case, Rodriguez admits that she and Hunt discussed her immigration status, and Hunt does not admit that he

gave her no immigration advice. He merely states he did not advise her she was certain to be deported.

2. Rodriguez not prejudiced

Rodriguez's deportation consequence was not truly clear and plea counsel's duty was limited; he only needed to advise Rodriguez of possible deportation consequences. *See Padilla*, 130 S. Ct. at 1483; *Rodriguez*, 350 S.W.3d at 211. Even assuming *arguendo* that Hunt failed to properly advise Rodriguez, the trial court did not fail to do so. The habeas court found that before the trial court accepted Rodriguez's pleas, Rodriguez signed admonitions stating she understood her pleas could have adverse immigration consequences. The habeas court stated that the trial court orally warned Rodriguez of possible adverse immigration consequences before it accepted her pleas, and Rodriguez did not challenge the court's statement. There is no evidence that the trial court would have refused Rodriguez's request to withdraw her pleas if, after hearing the trial court's oral admonition, she chose not to plead *nolo contendere*. Giving deference to the trial court's findings of fact, we must conclude that Rodriguez chose to proceed with her pleas knowing that she would risk adverse immigration consequences. *See Manzi v. State*, 88 S.W.3d 240, 243-44 (Tex. Crim. App. 2002). Therefore, Rodriguez cannot show prejudice. *See Marroquin v. United States*, No. M-10-156, 2011 U.S. Dist. LEXIS 11406, 2011 WL 488985, at *8 (S.D. Tex. Feb. 4, 2011) (deciding that the trial court's specific admonition that the

defendant would be deported disproved prejudice); *Amreya v. United States*, Nos. 4:10-CV-503-A, 4:08-CR-033-A, 2010 U.S. Dist. LEXIS 118824, 2010 WL 4629996, at *5 (N.D. Tex. Nov. 8, 2010) (deciding that the court's admonition that the defendant's plea "could result in deportation" precluded prejudice); *Momah v. United States*, Nos. 4:10-CV-369-A, 4:07-CR-189-A, 2010 U.S. Dist. LEXIS 90217, 2010 WL 3431657, at *3 (N.D. Tex. Aug. 30, 2010) (same); *cf. Ex parte Tanklevskaya*, No. 01-10-00627-CR, 2011 Tex. App. LEXIS 4034, 2011 WL 2132722, at *11 (Tex. App. – Houston [1st Dist.] May 26, 2011, pet. filed) (rejecting an admonition warning of possible adverse immigration consequences as curing prejudice when *Padilla* required a specific warning).

CONCLUSION

We hold that when a lawful permanent resident defendant is deportable but is also eligible for cancellation of removal, the defendant's deportation consequence is not truly clear. We further hold that when the deportation consequence is unclear or uncertain, and the trial court warns the defendant before it accepts the defendant's plea, the trial court's warning "that the pending criminal charges may carry a risk of adverse immigration consequences" precludes constitutional prejudice from plea counsel's failure to give the required warning. *See Padilla*, 130 S. Ct. at 1483; *see also* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West Supp. 2011); *Ex parte Rodriguez*,

350 S.W.3d 209, 210 (Tex. App. – San Antonio 2011, no pet.).

In this case, Rodriguez failed to prove prejudice, and the trial court did not abuse its discretion in denying her applications. Therefore, we affirm the trial court's order.

Rebecca Simmons, Justice

PUBLISH

WRIT #2452, 2453

EX PARTE	§	IN THE COUNTY COURT
	§	
	§	AT LAW NO. 8
ISABEL G. RODRIGUEZ	§	BEXAR COUNTY, TEXAS

ORDER

(Filed Dec. 16, 2010)

Applicant, ISABEL G. RODRIGUEZ, through her attorney, Javier N. Maldonado, has filled [sic] an application for post-conviction application for writ of habeas corpus pursuant to Article 11.072, Code of Criminal Procedure, collaterally attacking her conviction in cause numbers CC639382 and CC653617. The Court has determined that relief should not be granted.

HISTORY OF THE CASE

On February 4th, 1997, Applicant pled no contest to the Court for the offenses of Theft $50-$500 under cause number 639382 and Prostitution under cause number 653617. Under both causes the Court found sufficient evidence to substantiate Applicant's guilt, and Applicant was sentenced to 60 days in the Bexar County Jail and the sentence was probated for a period of one year. Additionally, the Applicant was fined an amount of $250.00 and the punishment under both causes was to be run concurrently. On June 25th, 1997, a Motion to Revoke Applicant's probation was filed with the Court. The applicant remained at

large until her arrest on February 5th, 2001. On February 13th, 2001, the Applicant pled true to violation of probation #5 (failing to report) and the Court accepted her plea of true and finding it was true revoked Applicant's probation under both cause numbers. The Applicant was sentenced to thirty days in jail and a fine of $250.00 under both cases. Applicant did not file a motion for new trial nor did she appeal her original case.

ALLEGATION OF APPLICANT

Applicant alleges that she received ineffective assistance of counsel in that her defense counsel did not adequately inform her of the consequences a plea of nolo contendere would have on her immigration status. Applicant contends that had her defense counsel properly informed her of the consequences of her plea of nolo contendere she would not have accepted the plea bargain and as such her plea was not made knowingly, voluntarily, nor intelligently. Applicant asserts that defense counsel informed her only that her plea would result in probation and community service hours, but did not "realize the consequences of such a plea." Applicant asserts that had she been properly informed she would have contested the charges against her.

FINDINGS OF FACT

1. That on February 4th, 1997 the Applicant signed a Defendant's Waiver of Constitutional Rights

and Court's Admonitions. As part of those admonitions the defendant indicated:

a. She understood she had a right to a jury trial and she freely and voluntarily gave up that right;

b. Before entering into a plea of Nolo Contendere, she had considered all aspects of her legal situation and discussed them with her attorney and had determined that the entry of such plea was in her own best interest;

c. That if she understood "that if she was not a citizen of the United States of American, a plea of guilty or nolo contendere for the offenses charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law;"

CONCLUSIONS OF LAW

1. The burden of proof in a habeas application is on the Applicant to prove his factual allegation by a preponderance of the evidence. See. *Ex parte Thomas,* 906 S.W.2d 22, 24 (Tex. Crim. App. 1995); *Ex parte Cruz* 739 S.W.2d 53, 59 (Tex. Crim. App. 1987).

2. This Court finds that Applicant has not met his burden to show that the representation provided to him fell below an objective standard of reasonableness and that there is a reasonable probability the result would have been different. *Strickland v. Washington,* 466 U.S. 668 (1984); *Hernandez v. State,* 726 S.W.2d 53 (Tex. Crim.

App. 1986). Applicant therefore does not establish facts which if true entitle him to relief. Se [sic] *Ex Parte Maldonado,* 688 S.W. 2d 114 (Tex. Crim. App. 1985) and See. *Rodriguez v. State,* 899 S.W. 2d 658 (Tex. Crim. App. 1995).

3. The relief prayed for is DENIED.

ORDERS OF THE COURT

The clerk of the Court is directed to immediately send copies of this Order, by certified mail, return receipt requested, to the Applicant, ISABEL G. RODRIGUEZ, by and through her attorney of record, Javier N. Maldonado, and to the Criminal District Attorney of Bexar County. Applicant is herby [sic] notified of her right to appeal under Article 44.02 of the code of Criminal procedure and Rule 31, Texas rules of Appellate Procedure.

SIGNED AND ENTERED on 12-16-2010.

/s/ Karen Crouch
JUDGE KAREN CROUCH
COUNTY COURT AT LAW
NO. 8
BEXAR COUNTY, TEXAS

[SEAL]

Fourth Court of Appeals
San Antonio, Texas

December 17, 2012

Nos. 04-11-00038-CR & 04-11-00039-CR

EX PARTE Isabel **RODRIGUEZ**,

From the County Court at Law No 8,
Bexar County, Texas
Trial Court Nos. 2453 & 2452
Honorable Karen Crouch, Judge Presiding

ORDER

Sitting: Catherine Stone, Chief Justice
Karen Angelini, Justice
Rebecca Simmons, Justice

The Panel has considered the Appellant's Motion for Rehearing, and the motion is DENIED.

/s/ Rebecca Simmons
Rebecca Simmons, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 17th day of December, 2012.

[SEAL]

/s/ Keith E. Hottle
Keith E. Hottle, Clerk