IN THE SUPREME COURT OF FLORIDA

Case No. SC11-_____
5th DCA Case No. 5D11-1670

SAINTALET EXANTUS,

Appellant/Petitioner

v.

STATE OF FLORIDA,

Appellee/Respondent.

On Review from the District Court of Appeal,
Fifth District
State of Florida

JURISDICTIONAL BRIEF OF PETITIONER, SAINTALET EXANTUS

Law Office of Michelle P. Smith, P.A.
Michelle P. Smith
Florida Bar Number 389382
827 Menendez Court
P.O. Box 1788
Orlando, Florida 32802-1788
Telephone 407-601-6700
Facsimile 1-888-614-3231
E-Mail michellepsmith_law@yahoo.com
Counsel for Appellant Exantus

Case No. SC11-_____
5th DCA Case No. 5D11-1670

Saintalet Exantus v. State of Florida

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellant, Saintalet Exantus, certifies that the following persons have or may have an interest in the outcome of this case:

The Honorable Marlene M. Alva, Circuit Court Judge, entered order appealed in case no. 1986-CF-2435-B

Mary-Ann K. Arlt, Former Public Defender

Pam Bondi, Attorney General, Office of the Attorney General

The Honorable Leon B. Cheek III, Former Attorney for Defendant/Appellant

The Honorable J. Emory Cross, Circuit Court Judge, Retired

The Honorable S. Joseph Davis Jr., Circuit Court Judge

The Honorable O.H. Eaton, Jr., Circuit Court Judge, Retired

The Honorable Ralph E. Eriksson, Former Circuit Court Judge and Former Assistant State Attorney

Saintalet Exantus, Defendant/Appellant

Robert Fisher, Former Assistant State Attorney

Thomas W. Hastings, Assistant State Attorney

The Honorable Mark E. Herr, County Court Judge, has pending motion in case no. 1987-1361-MMA

Steven W. Igou, Former Assistant State Attorney

Robert F. Kilfeather, Former Assistant State Attorney, Retired

The Honorable Humes T. Lasher, Circuit Court Judge, Deceased

The Honorable Donna L. McIntosh, Circuit Court Judge, entered order appealed in case no. 1987-CF-1686-A

The Honorable C. Vernon Mize, Jr., Circuit Court Judge, Deceased

John Christopher Ray, Former Attorney for Defendant/Appellant

Michelle P. Smith, Counsel for Defendant/Appellant

Norman R. Wolfinger, State Attorney, Office of the State Attorney

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STATEMENT OF THE CASE AND FACTS

Mr. Exantus is now almost 72 years old and has been residing in the United States since 1981. On November 15, 1986, Mr. Saintalet Exantus was arrested and charged with possession of less than 20 grams of cannabis (count 1) and possession of a controlled substance (count 2). On May 26, 1989, Mr. Exantus pled to possession of less than 20 grams of cannabis (count 1) and the State nolle prossed count 2. At the time Mr. Exantus entered his plea, the Court and his attorney were aware that Mr. Exantus was a citizen of Haiti and he spoke only limited English. At the time of his plea, Mr. Exantus was not warned by his attorney that he was subject to mandatory deportation as a result of his plea. On August 3, 1989, Mr. Exantus was sentenced to 60 days in jail to be suspended upon payment of a $200.00 fine. Mr. Exantus did not appeal, but rather served his sentence and since 1990 has had no other convictions.

Over twenty years later, on August 10, 2010, Immigration and Customs Enforcement served Mr. Exantus with a notice to appear at a removal/deportation hearing. In the Notice to Appear, Mr. Exantus was informed that he is subject to removal because he is a citizen of Haiti, and he was convicted of the above-mentioned offense and the offense discussed in Fifth District Court of Appeal, case no. 5D11-1645.

On April 11, 2011, Mr. Exantus filed a Verified Motion to Vacate Sentence, pursuant to Florida Rule of Criminal Procedure 3.850, averring that his attorney never informed him that he was subject to mandatory deportation as a result of his plea, that had he known he would not have entered a plea, and counsel's failure to properly advise him rendered his plea involuntary and violated his right to effective assistance of counsel as required in *Padilla v. Kentucky*, 599 U.S. ___, 130 S.Ct. 1473 (2010). On April 15, 2011, the Circuit Court denied the motion without an evidentiary hearing, citing *Hernandez v. State*, 61 So. 3d 1144 (Fla. 3d DCA 2011).

Mr. Exantus appealed the denial of his motion to vacate his judgment and sentence to the Fifth District Court of Appeal. In his appeal, Mr. Exantus recognized the Fifth District's rulings in *Santiago v. State*, 65 So. 3d 575 (Fla. 5th DCA 2011) and *State v. Shaikh*, 65 So. 3d 539 (Fla. 5th DCA 2011), which relied upon *Hernandez* in ruling that *Padilla* should not be applied retroactively. However, Mr. Exantus requested the Fifth District to consider his case *en banc*, reconsider its opinion in *Santiago* and *Shaikh en banc*, and/or certify the issues he raised to the Florida Supreme Court. The District Court affirmed the denial of his motion to vacate, citing its opinion in *Shaikh*. Both *Hernandez* and *Shaikh* are pending review in this Court.

SUMMARY OF THE ARGUMENT

Pursuant to article V, section 3(b)(4) of the Florida Constitution and *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this Court should accept jurisdiction if it accepts jurisdiction in *State v. Shaikh*, 65 So. 3d 539 (Fla. 5th DCA 2011) (citing *Hernandez v. State,* 61 So. 3d 1144 (Fla. 3d DCA 2011)) on the certified question of the retroactive application of *Padilla*.

In *Padilla*, the Supreme Court held that the Sixth Amendment right to counsel encompasses an affirmative duty of defense counsel to provide accurate advice regarding the immigration consequences of a contemplated plea. In particular, the Court ruled that defense counsel must advise a client when the immigration statute "specifically commands removal."

As the Supreme Court observed in *Padilla*, changes in immigration law over the past several decades have "dramatically raised the stakes of a noncitizen's criminal conviction" by exponentially expanding the number of deportable offenses and radically reducing the avenues for discretionary relief. 599 U.S. at ___, 130 S.Ct. at 1480. As a matter of federal law, deportation–that is, total banishment from the United States–has now become "sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes," 130 S.Ct. at 1480, and "'[p]reserving the client's right to remain in the United States

may be more important to the client than any potential jail sentence.'" *See id.* at 1483 (citations omitted).

Like Mr. Padilla, Mr. Exantus is subject to mandatory removal as a result of his criminal conviction. Like Mr. Padilla, Mr. Exantus was not warned of the immigration consequences of his plea by his counsel. And, like Mr. Padilla, Mr. Exantus' counsel did not provide effective assistance of counsel as required by the Sixth Amendment.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal expressly construing a provision of the federal or state constitution, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Fla. Const., Art. V, § 3(b)(4) (2011); Fla. R. App. P. 9.030(a)(2)(A); *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981).

ARGUMENT AND LEGAL AUTHORITY

I. The Decision in this Case Cites *State v. Shaikh*, 65 So. 3d 539 (Fla. 5th DCA 2011), which Is Pending Review Before this Court, as Controlling Authority.

In *Jollie*, this Court held that similarly situated litigants should have similar avenues of review in the Florida court system. 405 So. 2d at 420. The Fifth District Court of Appeal affirmed the circuit court's order denying post-conviction relief,

citing *Shaikh* as authority. In *Shaikh*, the Fifth District expressly agreed with that part of the decision by the Third District Court of Appeal in *Hernandez v. State*, 61 So. 3d 1144 (Fla. 3d DCA 2011) that held *Padilla* should not be applied retroactively. *See Shaikh*, 65 So. 3d at 540. The court in *Hernandez* certified as a question of great public importance whether or not *Padilla* should be applied retroactively.[1] *Hernandez*, 61 So. 3d at 1145-46. Petitions for review in *Hernandez* are currently pending before this Court. *See Hernandez v. State*, SC11-941 and *State v. Hernandez,* SC11-1357. A petition for review is currently pending in *Shaikh* and that case has been stayed pending the outcome in *Hernandez*. *See Shaikh v. State*, SC11-1517.

Pursuant to *Jollie*, this Court should accept jurisdiction in Mr. Exantus' case if it accepts jurisdiction in *Hernandez* on the certified question of the retroactive application of *Padilla*. When the Fifth District's decision was rendered on September 27, 2011 and became final on October 19, 2011, *Shaikh* and *Hernandez* were already pending jurisdictional review in this Court. *See Celeste v. State*, 32 So. 3d 611 (Fla. 2009)(jurisdiction existed under *Jollie* when, at time case became final, case relied upon was already pending in this Court); *Perkins v. State*, 7 So. 3d 529 (Fla.

[1] The court in *Hernandez* also certified as a question as of great public importance whether the immigration warning in Florida Rule of Criminal Procedure 3.172(c)(8) bars immigration-based ineffective assistance of counsel claims based on *Padilla* and certified conflict on this question with *Flores v. State*, 57 So. 3d 218 (Fla. 4th DCA 2010). Review is also being sought in this Court in *Flores. See Flores v. State,* SC11-989.

2009)(same); *Brown v. State*, 7 So. 3d 528 (Fla. 2009)(same); *City of Miami v. Juarez*, 944 So. 2d 249 (Fla. 2006)(same); *see also Denlinger v. State*, 7 So. 3d 522 (Fla. 2009)(jurisdiction existed under *Jollie* when, at time petitioner sought to invoke this Court's discretionary jurisdiction, case relied upon was already pending in this Court); *Allen v. State*, 7 So. 3d 519 (Fla. 2009)(same).

In *Kesler, etc., et al v. Chatfield Dean & Co.,* 794 So. 2d 577 (Fla. 2001), the petition for jurisdiction was filed prior to the date the Court granted review in *Barron Chase Securities*, *Inc*. *v. Moser*, 745 So. 2d 965 (Fla. 2d DCA 1999). *See Kesler*, 794 So. 2d at 578; *Moser v. Barron Chase Securities*, *Inc*, 761 So. 2d 330 (Fla. 2000). The Court granted review of *Kesler* under the authority of *Jollie,* noting that it was at the time in the process of determining the identical issue in its review of *Barron*. *See Kesler, etc., et al v. Chatfield Dean & Co.,* 794 So. 2d at 578. In the instant case, Mr. Exantus has sought jurisdiction in this Court while jurisdictional review in *Shaikh* is pending in this Court. As in *Kesler* should this Court grant review in *Shaikh*, then, under *Jollie*, review should be granted in Mr. Exantus' case. The District Court's decision to affirm the circuit court's order denying relief is grounded on the District Court's decision in *Shaikh* which expressly agreed with *Hernandez*'s conclusion that *Padilla* should not be applied retroactively. This is one of the certified questions presented in *Hernandez*.

Several district courts of appeal have already certified that the question of whether or not *Padilla* warrants retroactive application is of great public importance. *See Castano v. State*, 65 So. 3d 546 (Fla. 5th DCA 2011); *Barrios-Cruz v. State*, 63 So. 3d 868 (Fla. 2d DCA 2011)("[O]ur decision [concluding that *Padilla* is not retroactive] carries with it significant implications for the treatment of pleas entered prior to *Padilla.*"); *Hernandez,* 61 So. 3d at 1145 ("We acknowledge that our rulings on these issues have significant implications . . . for pleas taken in the past and to be taken in the future by persons whose right to remain in the United States is subject to summary divestment solely because of such a plea."[footnote omitted]).

This case presents an important issue that potentially will effect numerous criminal cases in Florida as Florida has a very large immigrant population. The answer to the question of whether or not *Padilla* should be applied retroactively will have a significant impact on many Florida defendants like Mr. Exantus who are now facing deportation as a result of pre-*Padilla* guilty or no contest pleas.

At the time Mr. Exantus entered his plea, deportation for a drug crime was certain. Indeed, on October 27, 1986, President Reagan signed into law the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. This act amended the immigration laws to render any alien deportable who

> is, or at any time after entry has been, a narcotic drug addict, or at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country

> relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)).

See Section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11)(Supp. IV 1986), *amending* 8 U.S.C. § 1251(a)(11)(1982). Mr. Exantus is still deportable under current law, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), which states: "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." *See also* 8 U.S.C. § 1229b(a)(3) (precluding cancellation of removal for those convicted of an aggravated felony); 8 U.S.C. § 1228(c) (creating a presumption of deportability for those convicted of aggravated felonies). An "aggravated felony" for purposes of determining immigration status includes an offense of "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B).

The removal statute cited in *Padilla* is precisely the same statute that subjects Mr. Exantus to removal, 8 U.S.C. § 1227(a)(2)(B), which the U.S. Supreme Court characterized as "specifically command[ing] removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Padilla*, 599 U.S. at ___, 130 S. Ct. at 1473, 1478. As with *Padilla*, the risk of removal is "clear" in Mr. Exantus' case and his counsel was therefore obligated specifically to advise him that "deportation was presumptively mandatory." *Id.* at 1483. As in *Padilla*, Mr. Exantus' "is not a hard case in which to find deficiency," because the consequences of the plea "could easily be determined from reading the removal

statute," which is "succinct, clear, and explicit in defining the removal consequence." *Id.* (citing 8 U.S.C. § 1227(a)(2)(B) which makes deportable any noncitizen convicted of any law "relating to a controlled substance" with the exception of a "single offense of possession of 30 grams or less of marijuana"). Under the reasoning of *Padilla*, Mr. Exantus' counsel was ineffective for not telling Mr. Exantus prior to entry of the plea that a conviction to a controlled substance offense would result in mandatory deportation. *Id.* at 1478 (concluding that Padilla's counsel should have advised him that the statute "commands [his] removal.").

Here, Mr. Exantus pled guilty to a statute that made his deportation automatic and mandatory. *See* 8 U.S.C. § 1251(a)(2)(B)(i)(1987); *see also* 8 U.S.C. § 1227(a)(2)(A)(iii). He will be deported because of his plea in this case to a country that he has not lived in since 1981 and to a place he has little or no family, leaving behind his wife and children that he raised. Counsel had an obligation to inform him that his deportation was mandatory. *See Padilla*, 599 U.S. ___, 130 S.Ct. at 1478, 1483; *Boakye v. United States*, 2010 U.S. Dist. LEXIS 39720 (2d Cir. 2010)(unpubl. op.). Mr. Exantus would not have entered a plea and would have insisted on taking his case to trial had he been advised that he faced deportation as a result of his guilty plea. Previous counsel was constitutionally ineffective for failing to ascertain the law as it applied to Mr. Exantus regarding immigration and failing to inform Mr. Exantus that deportation was certain and mandatory with the entry of his plea.

CONCLUSION

Based on the foregoing arguments, reasoning, and citations of authority, Mr. Exantus respectfully requests this Court accept review of the instant case and order briefs on the merits.

Respectfully submitted,

____

Michelle P. Smith
Florida Bar Number 389382
Law Office of Michelle P. Smith, P.A.
827 Menendez Court
P.O. Box 1788
Orlando, Florida 32802-1788
Telephone 407-601-6700
Facsimile 1-888-614-3231
Email michellepsmith_law@yahoo.com
Counsel for Appellant Exantus

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdiction Brief together with the attached Appendix were furnished by U.S. Mail and email to the Florida Supreme Court; Ms. Allison Morris, Office of the Attorney General, Criminal Appeals Division, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118; and Mr. Saintalet Exantus on this 3rd day of November 2011.

CERTIFICATE OF COMPLIANCE

Counsel for Mr. Exantus certifies that this brief complies with the type-font and volume limitations set forth in Rules 9.200 and 9.210 of the Florida Rules of Appellate Procedure.

____

Attorney

IN THE SUPREME COURT OF FLORIDA

Case No. SC11-_____
5th DCA Case No. 5D11-1670

SAINTALET EXANTUS,

Appellant/Petitioner

v.

STATE OF FLORIDA,

Appellee/Respondent.

On Review from the District Court of Appeal,
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APPENDIX TO JURISDICTIONAL BRIEF OF PETITIONER, SAINTALET EXANTUS

Law Office of Michelle P. Smith, P.A.
Michelle P. Smith
Florida Bar Number 389382
827 Menendez Court
P.O. Box 1788
Orlando, Florida 32802-1788
Telephone 407-601-6700
Facsimile 1-888-614-3231
E-Mail michellepsmith_law@yahoo.com
Counsel for Appellant Exantus

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5th DCA Case No. 5D11-1670

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Opinion of the Fifth District Court of Appeal, affirming the denial of Mr. Exantus' motion to vacate his judgment and sentence, entered September 27, 2011, mandate issued October 19, 2011 ....A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2011

SAINTALET EXANTUS, NOT FINAL UNTIL THE TIME EXPIRES

TO FILE REHEARING MOTION, AND,
Appellant, IF FILED, DISPOSED OF

v. CASE NO. 5D11-1670

STATE OF FLORIDA,

Appellee.

____/

Opinion filed September 27, 2011

3.850 Appeal from the Circuit Court
for Seminole County,
Marlene M. Alva, Judge.

Michelle Smith, of the Law Office of
Michelle P. Smith, P.A., Orlando,
for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee,
and Wesley Heidt, Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. *See State v. Shaikh*, 65 so. 3d 539 (Fla. 5th DCA 2011).

GRIFFIN, LAWSON, AND JACOBUS, JJ., concur.