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IN THE SUPREME COURT OF THE STATE OF IDAHO

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| HASAN ICANOVIC<br><br>Petitioner-Appellant,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent. | ) | NO. 38477 |

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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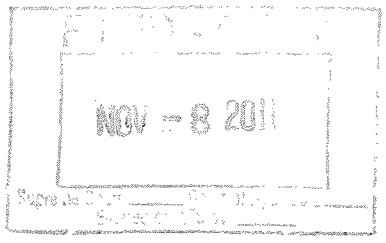

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## STATEMENT OF THE CASE

### Nature Of The Case

Hassan Icanovic appeals from the district court's order dismissing his petition for post-conviction relief after an evidentiary hearing.

### Statement Of Facts And Course Of Proceedings

The district court set forth the underlying facts and course of proceedings of the case in its Notice Of Intent To Summarily Dismiss Petition For Post Conviction Relief:

> Petitioner was charged with Attempted Strangulation, Felony, and Domestic Battery, Misdemeanor, by an Information filed on May 28, 2009. On June 25, 2009, pursuant to a negotiated plea agreement, the Petitioner entered a plea of "guilty" to the charge of Domestic Violence, Felony, and the State filed an Amended Information in open court. The Court accepted the guilty plea following an examination of the Petitioner under oath and waiver of applicable rights. On September 2, 2009, Petitioner came before the Court for sentencing. At that time, the Court heard statements from both counsel. The Court sentenced Petitioner to a period of incarceration of eight years, with the first three years fixed, however the Court retained jurisdiction. On September 14, 2009, the United States Bureau of Homeland Security Department of Immigration and Customs provided the Petitioner and the Court a notice of detainer. On February 18, 2010, the Court suspended the sentence and placed the Defendant on probation for a period of ten years. The Petitioner is currently housed at the Utah County Jail pursuant to the Immigration and Customs Enforcement (ICE) detainer. The Petitioner did not appeal his conviction or sentence.

(R., pp. 15-16.)

Icanovic filed a petition for post-conviction relief and supporting affidavit. (R., pp. 3-9.) In his petition, Icanovic claimed:

> 1) Attorney Jared Martens' representation fell below the minimum level of competent assistance and provided ineffective

assistance of counsel to the Petitioner during the course of the aforesaid criminal proceeding in the following ways:

a) When questioned specifically by the Petitioner if his guilty plea and/or conviction would result in him being deported to Bosnia, Mr. Martens advised the Petitioner that it would not.

b) When questioned specifically by the Petitioner if his guilty plea and/or conviction would result in him losing his ability to apply for United States citizenship, Mr. Martens advised the Petitioner that it would not.

2) The petitioner's guilty plea was not made knowingly, intelligently, and voluntarily.

(R., p. 4.) In his supporting affidavit, Icanovic stated:

6) Prior to entering my plea of guilty, I specifically asked Mr. Martens if my guilty plea and/or conviction would result in me being deported to Bosnia. Mr. Martens advised me that it would not.

7) Prior to entering my guilty plea, I specifically asked Mr. Martens if my guilty plea and/or conviction would result in me losing my ability to apply for United States citizenship. Mr. Martens advised me that it would not.

...

12) But for Mr. Martens' advisement, I would not have pled guilty.

(R., p. 8.) The court thereafter filed a notice of intent to summarily dismiss Icanovic's petition. (R., pp. 15-22.) In its notice, the court discussed Strickland v. Washington, 466 U.S. 668 (1984), and noted that to prevail Icanovic must prove both that his attorney's performance was deficient and that the deficient performance prejudiced him. (R., p. 18.) The court also discussed the recent United States Supreme Court case, Padilla v. Kentucky, -- US --, 130 S.Ct. 1473 (2010), in which the Court determined that advice regarding deportation

consequences falls under the ambit of the Sixth Amendment right to effective assistance of counsel. (R., p. 18.)

The district court then held, "[a]ccepting the Petitioner's allegations as true, a direct representation that his pending criminal charges would have no risk of adverse immigration consequences would constitute representation below an objective standard of reasonableness under *Padilla.*" (R., pp. 18-19.) The court, however, failed to find any resulting prejudice from Icanovic's attorney's performance. (R., pp. 19-20.) It explained that at Icanovic's change of plea hearing it advised Icanovic that his plea of guilty "may result in deportation, inability to obtain legal status or denial of an application for United States citizenship." (R., p. 19.) It concluded, "even accepting the Petitioner's allegations as true, the Court finds that the trial counsel's deficient performance was remedied by the Court." (R., pp. 19-20.)

Icanovic filed a response in which he discussed Padilla in detail and asserted that the district court's advisement did not remedy Icanovic's attorney's wrong advice and that he was therefore prejudiced by his attorney's performance. (R., pp. 27-34.)

A hearing was held on the matter. (See generally Tr.) Icanovic was not present at the hearing and his attorney based his arguments on Icanovic's previously-filed affidavit. (Tr., p. 2, L. 17 – p. 3, L. 23.) Icanovic's former attorney testified:

> Q. Do you recall if you had conversations with Mr. Icanovic regarding the possibility of deportation as a result of a guilty plea and conviction in this case?

A. I remember it being an issue that he was concerned about, yes.

Q. What makes you – what do you remember about that? What stands out in your mind?

A. Well, the other client that I was representing he had an ICE hold and they were friends. And so he was concerned that perhaps he would end up being deported as well. And I think that he had asked me about it. Was concerned that his guilty plea and the sentencing that he was going to ultimately end up getting deported like some others that he knew had.

Q. And what was your response to him when he expressed those concerns to you?

A. My response to that would have been you know, I don't know. They might. They might not.

Q. So you weren't aware if he would affirmatively be deported?

A. I would never tell somebody you affirmatively are not going to be deported because one, I'm not an immigration attorney. I know enough about the federal system and immigration to know that you can't definitively say you are or you are not going to be deported. Even if they say you are going to be deported, you may not be deported. If they say – you just can't make that kind of statement. I know I didn't make that statement because there is no way that I could know that.

(Tr., p. 12, L. 9 – p. 13, L. 17.)

Q. So there is the affidavit from Mr. Icanovic that states he specifically asked you if his plea or conviction would result in him being deported and he states that you advised him that he would not; is that true?

A. I know that there is no way that it is true because I know that I wouldn't make that kind of a definitive statement.

Q. Okay. He also –

A. Because there is no way that I could know for sure.

Q. All right. Now, he also states that he specifically asked you if his guilty plea or conviction would result in him losing his ability to

apply for United States citizenship and that you advised him that it would not?

A. As for that I don't remember that discussion. I don't even remember that discussion going on. But again, where I'm not an immigration attorney, don't know that area of the law well enough, I don't think I would have given him that kind of advice on that. Probably would have referred him to an immigration attorney on that, especially on that issue.

Q. Do you recall his response to you once you gave him that advice that there was the possibility that it could result in deportation, his conviction?

A. I don't specifically remember his response, no.

Q. Do you recall –

A. I think he was hopeful that he wouldn't be deported.

Q. Okay. That's – he had indicated to you that he was hoping that it wouldn't result in that?

A. Yeah.

Q. Do you recall how many conversations that you had with him about this issue? The possibility of being deported?

A. I don't remember specifically how many. At least a couple of discussions we talked about it. But I can't give you a number beyond that, I don't know.

(Tr., p. 14, L. 12 – p. 16, L. 5.) No other witnesses testified. At the conclusion of the evidence, the district court denied Icanovic's petition for post-conviction relief and held:

> The Court finds Mr. Martens' testimony credible that he would not have told his client there would be no immigration consequences.
>
> However, an attorney's inaccurate advice may be cured by accurate advice from the court. Navarez, N-A-V-A-R-E-Z, v. State, 145 Idaho 878, 187 Pacific Third 1253, Idaho Court of Appeals decided in 2008.

> Where the Court clearly and accurately explains the consequences of a plea, the effect of counsel's inaccurate advice is cured.
>
> Here, I don't find that there was inaccurate advice. But even were there inaccurate advice, the Court believes that that inaccurate advice is cured by this Court's questioning of the defendant.
>
> If the deficient performance of counsel is cured by the Court's statement post-conviction relief should be denied.
>
> ...
>
> Since any potentially inadequate advice by counsel was cured by the Court's admonition to the defendant the Court should deny relief.

(Tr., p. 35, L. 16 – p. 37, L. 15.) The district court later entered an order formally dismissing Icanovic's petition. (R., p. 48.) Icanovic timely appealed. (R., pp. 44-46.)

## ISSUE

Icanovic states the issue on appeal as:

> Did the district court err when it dismissed Mr. Icanovic's Petition For Post Conviction Relief?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Icanovic failed to show error in the district court's dismissal of his Petition for Post-Conviction Relief?

## ARGUMENT

### Icanovic Has Failed To Show Error In The Dismissal Of His Petition For Post-Conviction Relief

#### A. Introduction

Icanovic asserts that the district court erred in dismissing his petition for post-conviction relief, arguing, as he did below, that under the Supreme Court's decision in Padilla, his attorney was deficient for failing to advise him of the immigration consequences of his guilty plea and he would not have pled guilty had he been correctly advised. (Appellant's brief, pp. 8-21.) The district court did not err, however, because Padilla does not meet the applicable test for retroactive application. Therefore Icanovic is not entitled to relief based on its holding. As such, Icanovic has failed to establish that the district court erred in dismissing his petition for post-conviction relief.

#### B. Standard Of Review

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations upon which his claim is based. Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); I.C.R. 57(c). When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their

testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

C. The Holding Of *Padilla* Does Not Meet The Applicable Test For Retroactive Application

"Applications for post-conviction relief under the UPCPA initiate civil proceedings in which, like a civil plaintiff, the applicant must prove his or her allegations by a preponderance of the evidence." McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing Hauschulz v. State, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007); I.C.R. 57(c)). Where the petitioner alleges entitlement to relief based upon ineffective assistance of counsel, in order to prevail, the petitioner "must establish that his counsel was deficient in his performance and that this deficiency resulted in prejudice to the claimant." Murray v. State, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)). "There is a strong presumption that counsel's performance falls within the wide range of professional assistance and the defendant bears the burden of proving that counsel's representation fell below an objective standard of reasonableness." Id. (citing State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989)). In addition, it is well-established that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to

evaluate the conduct from counsel's perspective at the time." Maxfield v. State, 108 Idaho 493, 501, 700 P.2d 115, 123 (Ct. App. 1985) (citing Strickland v. Washington, 466 U.S. 668, 688 (1984) (ellipses original)).

To demonstrate prejudice, the petitioner must "show a reasonable probability that the outcome of trial would be different but for counsel's deficient performance." McKay, 148 Idaho at 570, 225 P.3d at 703 (citing State v. Row, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694)). When the alleged deficiency involves counsel's advice in relation to a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla at 1485 (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

Icanovic's entire claim for relief is premised on retroactive application of the Supreme Court's opinion in Padilla. Because the holding of Padilla does not meet the applicable test for retroactive application, Icanovic is not entitled to relief as a matter of law.

1. Overview of *Padilla v. Kentucky*

In Padilla, the Court considered whether defense counsel has an obligation to advise his client that a guilty plea would make him subject to automatic deportation. Padilla pled guilty to drug trafficking in Kentucky state court and, although a lawful permanent resident of the United States, he was subject to removal because of his drug conviction. Padilla, 130 S.Ct. at 1478. Padilla sought post-conviction relief, alleging ineffective assistance of counsel. Id. Padilla argued he entered his guilty plea in reliance on his counsel's erroneous advice that the plea would not affect his immigration status. Id. The Kentucky Supreme Court denied Padilla post-conviction relief and held that the Sixth Amendment's guarantee of effective assistance of counsel did not protect him from erroneous advice regarding the collateral consequences of a conviction such as deportation or removal. Id.

The Supreme Court reversed and remanded the case. It found "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation." Padilla, 130 S.Ct. at 1478. The Court noted that many state and federal courts had concluded that a defendant's Sixth Amendment right to effective assistance of counsel was limited to advice about the direct consequences of a guilty plea, and did not extend to information regarding collateral consequences. Id. at 1481. However, it nonetheless concluded that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." Id. at 1482. The Court explained that it had "never applied a distinction between

direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." Id. at 1481. It declined to consider the appropriateness of the direct/collateral distinction generally and found such a distinction to be "ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation." Id. at 1481-82.

The Court based its conclusion on the "unique nature" of deportation, and specifically focused on its severity as a penalty and its close relationship to the criminal process. Id. at 1481. The Court discussed recent changes in federal immigration law and explained that these changes further "enmeshed criminal convictions and the penalty of deportation" by making "removal nearly an automatic result for a broad class of noncitizen offenders." Id. at 1478-81. The Court held that "deportation is an integral part ... of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes" and cannot be "divorce[d] ... from the conviction." Id. at 1480-81. The Court concluded that Strickland thus applied to Padilla's ineffective assistance of counsel claim.

The Court next considered whether Padilla established the first Strickland prong – whether his counsel's representation fell below an objective standard of reasonableness. In determining the reasonableness of Padilla's attorney's representation, the Court looked to the prevailing professional norms set forth by the American Bar Association and numerous other authorities. Id. at 1482, 1485. The Court found that, dating back to the mid-1990s, those authorities have been in agreement that counsel must advise his client regarding the risks of

deportation. Id. It explained that if Padilla's counsel consulted the removal statutes he would have easily determined that Padilla's guilty plea would make his removal virtually mandatory and that his attorney was ineffective for failing to do so. Id at 1483. The Court held, "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." Id.

The Court also noted that, although in Padilla's case the immigration consequences were clear, in some situations the immigration consequences are unclear. Id. In those situations, defense counsel still has a duty to advise a noncitizen client that pending criminal charges may have negative immigration consequences. Id. Thus, the Court held that the seriousness and severity of deportation as a consequence of a guilty plea make it critical that defense counsel "inform her client whether his plea carries a risk of deportation." Id. at 1486.

2. *Padilla* Created A New Rule[1]

In collateral proceedings such as post-conviction "Idaho courts must independently review requests for retroactive application of newly-announced principles of law under the *Teague* [*v. Lane*, 489 U.S. 288 (1989)] standard." Rhoades v. State, 149 Idaho 130, 136, 233 P.3d 61, 67 (2010).

> Under *Teague*, decisions by the U.S. Supreme Court announcing a new rule apply to all criminal cases still pending on direct review. The new rule, however, only applies to final convictions in limited circumstances. New substantive rules generally apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces punishment that the law cannot impose upon him. New procedural rules generally do not apply retroactively because they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. This is a more speculative connection to innocence and, therefore, retroactivity is only given to

[1] Courts are split as to whether Padilla announced a new rule and whether the rule should be given retroactive effect. To date, three federal circuit courts have addressed the issue, and the Seventh and Tenth Circuits have concluded that Padilla is a new rule not entitled to retroactive effect. See Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011); United States v. Chang Hong, -- F.3d --, 2011 WL 3805763 (10th Cir. 2011). The Third Circuit has found that Padilla simply applied the old Strickland rule, such that it was retroactively applicable on collateral review. United States v. Orocio, 645 F.3d 630, 640-42 (3rd Cir. 2011). Federal district courts are likewise split. Compare Doan v. United States, -- F.Supp.2d --, 2011 WL 116811 at *3 (E.D.Va. 2011) (Padilla states a new rule); United States v. Hough, 2010 WL 5250996 at *3–4 (D.N.J. 2010) (same); United States v. Perez, 2010 WL 4643033 at *2 (D.Neb. 2010) (same) with Marroquin v. United States, 2011 WL 488985 at *2 (S.D.Tex. 2011) (Padilla does not state a new rule); Luna v. United States, 2010 WL 4868062 at *3–4 (S.D.Cal. 2010) (same); United States v. Shafeek, 2010 WL 3789747 at *3 (E.D.Mich. 2010) (same); Martin v. United States, 2010 WL 3463949 at *3 (C.D.Ill. 2010) (same); Al Kokabani v. United States, 2010 WL 3941836 at *4–6 (E.D.N.C. 2010) (same); United States v. Millan, 2010 WL 2557699 at *1 (N.D.Fla. 2010) (same). The state submits the reasoning of the courts that have concluded Padilla created a new rule is more persuasive, particularly in light of the applicable legal test for determining whether a new rule has been created as discussed *infra*.

> a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

Id. at 139, 233 P.3d at 70 (quotations, brackets, and citations omitted). See also Kriebel v. State, 148 Idaho 188, 191, 219 P.3d 1204, 1207 (Ct. App. 2009) ("If a case is deemed to have announced a new rule, it will apply retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings." (internal quotations omitted)).

Padilla created a new rule. A rule is new when it was not "*dictated* by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis in original). A rule is old if a "court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (quotation and brackets omitted). The inquiry is whether Padilla's outcome was "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990). In determining whether the outcome of a case was susceptible to reasonable debate, the Supreme Court has looked to both the views expressed in the opinion itself and lower court decisions. "If the lower courts were split on the issue, the Court has concluded that the outcome of the case was susceptible to reasonable debate." Chaidez v. United States, 655 F.3d 384, 2011 WL 3705173 at *4 (7th Cir. 2011). See also Butler, 494 U.S. at 415. In addition, "[l]ack of unanimity on the Court in deciding a particular case supports

the conclusion that the case announced a new rule." Chaidez at *4 (citing Beard v. Banks, 542 U.S. 406, 414-15, 124 S.Ct. 2504 (2004)).

a. Lower Court Split

Prior to Padilla, lower courts were split as to whether an attorney must advise his clients of deportation consequences. In Chaidez, the Seventh Circuit explained:

> Prior to *Padilla*, the lower federal courts, including at least nine Courts of Appeals, had uniformly held that the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea. Courts in at least thirty states and the District of Columbia had reached this same conclusion. Such rare unanimity among the lower courts is compelling evidence that reasonable jurists reading the Supreme Court's precedents in April 2004 could have disagreed about the outcome of *Padilla*.

Chaidez at *5 (internal citations and quotes omitted). It continued:

> We acknowledge that the mere existence of conflicting authority does not necessarily mean a rule is new. But, in our view, an objective reading of the relevant cases demonstrates that *Padilla* was not dictated by precedent. It is true that, unlike so many lower courts, the Supreme Court has never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance as required under *Strickland*. As such, prior to *Padilla*, the Court had not foreclosed the possibility that advice regarding collateral consequences of a guilty plea could be constitutionally required. But neither had the Court required defense counsel to provide advice regarding consequences collateral to the criminal prosecution at issue.

Id. at *6 (internal citations and quotes omitted).

In Idaho, like in the majority of jurisdictions, the Sixth Amendment right to effective assistance of counsel did not require counsel to provide advice concerning collateral consequences of a guilty plea. See Jakoski v. State, 136

Idaho 280, 285, 32 P.3d 672, 677 (Ct. App. 2001). The risk of deportation or other impacts on immigration status was generally considered a collateral consequence, albeit a "very significant consequence" for a defendant. State v. Tinoco-Perez, 145 Idaho 400, 402, 179 P.3d 363, 365 (Ct. App. 2008); Retamoza v. State, 125 Idaho 792, 796-97, 874 P.2d 603, 607-608 (Ct. App. 1994). Because the risk of deportation was considered a collateral consequence, and an attorney had no duty to advise his clients of collateral consequences, prior to Padilla an Idaho attorney had no obligation to advise his clients of possible deportation consequences stemming from their guilty pleas. That Idaho followed the majority rule in holding that an attorney did not generally need to advise defendants of deportation consequences lends support to the argument that the outcome of Padilla was "susceptible to debate among reasonable minds."

b. Lack Of Supreme Court Unanimity

Also weighing in favor of a conclusion that Padilla created a new rule is the lack of unanimity on the Court in the Padilla case. See Chaidez at *4. Justice Stevens delivered the majority opinion in Padilla, joined by Justices Kennedy, Ginsburg, Breyer and Sotomayor. Justice Alito filed an opinion concurring in the judgment, in which Justice Roberts joined. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined. As explained by the Seventh Circuit, this lack of unanimity supports the conclusion that Padilla announced a new rule:

> Statements in the concurrence leave no doubt that Justice Alito and Chief Justice Roberts considered *Padilla* to be groundbreaking. *See* 130 S.Ct. at 1488, 1491, 1492 (referring to the majority's holding as a "dramatic departure from precedent," "a major upheaval in Sixth Amendment law," and a "dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment"). And the two dissenting Justices, who expressed the view that the majority's extension of the Court's Sixth Amendment jurisprudence lacked "basis in text or principle," certainly did not see *Padilla* as dictated by precedent. 130 S.Ct. at 1495 (Scalie, J., dissenting). *See also Sawyer*, 497 U.S. at 236-37, 110 S.Ct. 2822. Even the majority suggested that the rule it announced was not *dictated* by precedent, stating that while *Padilla*'s claim "follow[ed] from" its decision applying *Strickland* to advice regarding guilty pleas in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d. 203 (1985), *Hill* "does not control the question before us." *Id.* at 1485 n. 12.

Chaidez at *4 (emphasis original). The Chaidez Court continued:

> It seems evident from Supreme Court precedent that *Padilla* cannot be an old rule simply because existing case law "inform[ed], or even control[led] or govern[ed]," the analysis. Saffle, 494 U.S. at 488, 110 S.Ct. 1257. Nor will the rule of *Padilla* be deemed old because precedent lent "general support" to the rule it established, *Sawyer*, 497 U.S. at 236, 110 S.Ct. 2822, or because it represents "the most reasonable ... interpretation of general law," *Lambrix v. Singletary*, 520 U.S. 518, 538, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997). *Padilla* can only be considered an old rule if Supreme Court precedent *"compel[led]* the result. *Saffle*, 494 U.S. at 490, 110 S.Ct. 1257. The majority's characterization of *Hill* suggests that it did not understand the rule set forth in *Padilla* to be dictated by precedent.

Id. (emphasis original). Thus, both the lack of unanimity between members of the Supreme Court and the split among lower courts prior to Padilla support the conclusion that Padilla created a new rule.

3. *Padilla* Does Not Meet Either Of The Exceptions To The Retroactivity Bar

A new rule will apply retroactively to a final conviction only under limited circumstances. Schiro v. Summerlin, 542 U.S. 348, 351 (2004). "A new rule applies retroactively in collateral proceedings only if (1) the rule is substantive, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings." Whorton v. Bockting, 549 U.S. 406, 416 (2007) (quotation and alteration omitted). New substantive rules generally apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Rhoades, 149 Idaho at 139, 233 P.3d at 70 (citing Schiro, 542 U.S. at 352). New procedural rules generally do not apply retroactively because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Id. (alteration in original). The Rhoades Court explained:

> This is a more speculative connection to innocence and, therefore, retroactivity is only given to a small set of watershed rules of criminal procedure implicated the fundamental fairness and accuracy of the criminal proceedings. The procedural rule must be one without which the likelihood of an accurate conviction is seriously diminished.

Id. (internal quotes and citations omitted).

A substantive rule is one that "alters the range of conduct or the class of persons that the law punishes." Rhoades, 149 Idaho at 139, 233 P.3d at 70

(citing Schiro, 542 U.S. at 353). A procedural rule "regulate[s] only the *manner of determining* the defendant's culpability." Id. (emphasis in original). The rule in Padilla "regulates the manner in which a defendant arrives at the decision to plead guilty." United States v. Chang Hong, -- F.3d --, 2011 WL 3805763 at *8 (10th Cir. 2011). An individual who knows the full immigration consequences of a guilty plea may choose instead to plead not guilty. As such, Padilla created a procedural rule and the retroactivity exception for substantive rules does not apply. Id.

A procedural rule is only given retroactive effect if the new rule is a watershed rule.

> In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.

Bockting, 549 U.S. at 418 (quotation marks and citations omitted).

Application of this standard shows that Padilla's rule is not "watershed." The Tenth Circuit explained:

> *Padilla* does not concern the fairness and accuracy of a criminal proceeding, but instead relates to the deportation consequences of a defendant's guilty plea. The rule does not affect the determination of a defendant's guilt and only governs what advice defense counsel must render when his noncitizen client contemplates a plea bargain. *Padilla* would only be at issue in cases where the defendant admits guilt and pleads guilty. In such situations, because the defendant's guilt is established through his own admission – with all the strictures of a Rule 11 plea colloquy – *Padilla* is simply not germane to concerns about the risks of inaccurate convictions or fundamental procedural fairness.

Chang Hong at *9.

Icanovic cannot establish that there was "large risk of an inaccurate conviction" under the rubric of law prior to Padilla. Likewise, having counsel's advice on immigration consequences does not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Indeed, having that advice merely allows a defendant to make a tactical decision whether to plead guilty or not. For these reasons, the new rule created in Padilla does not fit either of the retroactivity exceptions, and Padilla should not be applied retroactively in collateral proceedings.[2] Because Icanovic is not entitled to relief as a matter of law, this Court should affirm the district court's dismissal of Icanovic's petition for post-conviction relief.[3]

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[2] The state concedes that Icanovic was not given notice pursuant to I.C. § 19-4906 that his petition would be dismissed on the grounds that Padilla was not retroactive. However, this Court exercises free review over questions of law, State v. Rhoades, 149 Idaho 130, 233 P.3d 61 (2010), and retroactivity is a question of law. After a determination that Padilla is not retroactive, no further purpose would be served by remanding the case to the district court. Icanovic is not entitled to relief as a matter of law. "Where the lower court reaches the correct result, albeit by reliance on an erroneous theory, this Court will affirm the order on the correct theory." Ridgely v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010) (Although district court gave notice to dismiss on different theory, dismissal was upheld where the lower court reached the correct result, albeit by reliance on an erroneous theory; appellate court will affirm the order on the correct theory.). Because the district court reached the correct result, this Court should affirm the dismissal of Icanovic's petition for post-conviction relief.

[3] The state concedes that had Icanovic's attorney researched the law, he would have discovered that a felony conviction for domestic violence results in mandatory deportation. See 8 U.S.C. §1227(a)(2)(E)(i). Thus, although counsel's advise was constitutionally sufficient prior to Padilla, if Padilla applies, counsel's advice that Icanovic "might" or "might not" be deported was constitutionally deficient because the immigration consequences were clear. The state further concedes that the district court erred in holding that Icanovic's attorney's inaccurate advice concerning immigration consequences was "cured" by "advice" from the district court that he "may" be deported because that "advice" was essentially the same as counsel's.

## CONCLUSION

The state respectfully requests this Court to affirm the district court's dismissal of Icanovic's petition for post-conviction relief.

DATED this 8th day of November, 2011.

ELIZABETH A. KOECKERITZ
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of November, 2011 served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

ELIZABETH A. KOECKERITZ
Deputy Attorney General

EAK/pm