**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-2096**

Jose Rene Constanza, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 15, 2011**
**Reversed and remanded**
**Kalitowski, Judge**

Hennepin County District Court
File No. 27-CR-09-45135

Gregory S. Bachmeier, Maple Grove, Minnesota; and

Bruce Michael Rivers, Rivers & Associates, P.A., Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

**U N P U B L I S H E D  O P I N I O N**

**KALITOWSKI**, Judge

In this appeal from the denial of postconviction relief, appellant Jose Rene Constanza argues that he was deprived of effective assistance of counsel when he was not

advised that his guilty plea would make him deportable. Because we held in *Campos v. State*, 798 N.W.2d 565, 568-69 (Minn. App. 2011), *review granted* (Minn. July 19, 2011), that the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), applies retroactively to similarly situated postconviction petitioners, we reverse and remand.

**FACTS**

Appellant Jose Rene Constanza was charged with domestic assault by strangulation on September 9, 2009, and pleaded guilty to the charge one month later. He was sentenced to three years of probation on December 2, 2009, and did not file a direct appeal. Appellant is a citizen of El Salvador who was granted Temporary Protected Status, which allowed him to lawfully reside in the United States. He was ordered deported as a result of this conviction.

On June 10, 2010, appellant moved to withdraw his plea through a petition for postconviction relief. Appellant asserted various claims, including that he was deprived of his Sixth Amendment right to counsel when he pleaded guilty because he was not advised of the immigration consequences of the conviction and therefore was entitled to relief under *Padilla v. Kentucky*.

The postconviction court held an evidentiary hearing on the petition. Appellant's signed plea petition stated that "[m]y attorney has told me and I understand that if I am not a citizen of the United States, conviction of a crime may result in deportation," was admitted into evidence. Appellant testified that he did not understand the plea petition because it was in English and that the interpretation technology his defense attorney used

during their meeting was not working properly. Appellant's defense attorney testified that when appellant was first offered a plea, he was "concerned that [appellant] was jumping into a plea" because he was "focused on the fact [that] he was going to get out [of custody]." The defense attorney therefore requested a continuance to meet with appellant. The defense attorney testified that he reviewed the plea petition's statement on immigration consequences with appellant the day appellant pleaded guilty. The defense attorney also testified that he did not advise appellant that the crime to which he was pleading guilty would in fact render appellant deportable.

The postconviction court denied relief, concluding that the U.S. Supreme Court's decision in *Padilla* did not apply. Appellant challenges the denial of his ineffective-assistance-of-counsel claim.

**D E C I S I O N**

To withdraw a plea on the basis of ineffective assistance of counsel, appellant bears the burden of proving (1) that his counsel's representation fell below an objective standard of reasonableness and (2) that but for the deficient performance, appellant would not have pleaded guilty and would have insisted on a trial. *See State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). This court reviews a district court's decision to grant a plea withdrawal for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). But whether *Padilla* applies retroactively in Minnesota to convictions final at the time *Padilla* was decided is a purely legal issue that this court reviews de novo. *Campos*, 798 N.W.2d at 568.

On March 31, 2010, the U.S. Supreme Court held in *Padilla v. Kentucky* that defense counsel's representation is constitutionally ineffective if he or she fails to (1) provide accurate information regarding the deportation consequences of a guilty plea when those consequences are "clear," or (2) advise noncitizen defendants that a charge "may carry a risk of adverse immigration consequences" when the immigration statutes are not "succinct and straightforward." 130 S. Ct. at 1483.

Appellant's conviction became final on March 2, 2010. *See* Minn. R. Crim. P. 28.05, subd. 1(1) (stating that a party must file an appeal "within 90 days after judgment and sentencing"); *State v. Hughes*, 758 N.W.2d 577, 580 (Minn. 2008) ("[I]f a defendant does not file a direct appeal, his conviction is final for retroactivity purposes when the time to file a direct appeal has expired." (quotation omitted)). The postconviction court concluded that *Padilla* was not retroactively applicable to appellant, who was seeking collateral review of his conviction, and that appellant's defense counsel's performance did not fall below an objective standard of reasonableness based on the prevailing professional norms at the time of appellant's plea.

After the postconviction court's decision, this court determined that *Padilla* did not announce a new rule and that it therefore applied retroactively to other postconviction petitioners. *Campos*, 798 N.W.2d at 568-69. Our holding in *Campos* is consistent with conclusions of numerous other courts that have considered the issue. *See, e.g.*, *United States v. Orocio*, ___ F.3d ___, ___ No. 10-1231, 2011 WL 2557232, at *7 (3d. Cir. June 29, 2011); *Amer v. United States*, No. 1:06CR118-GHD, 2011 WL 2160553, at *3 (N.D. Miss. May 31, 2011); *United States v. Chavarria*, Nos. 2:10-CV-191 JVB, 2:08-

CR-192, 2011 WL 1336565, at *2-3 (N.D. Ind. Apr. 7, 2011); *Marroquin v. United States*, No. M-10-156, 2011 WL 488985, at *6 (S.D. Tex. Feb. 4, 2011); *United States v. Zhong Lin*, No. 3:07-CR-44-H, 2011 WL 197206, at *2-3 (W.D. Ky. Jan. 20, 2011); *Luna v. United States*, No. 10CV1659 JLS, 2010 WL 4868062, at *3-4 (S.D. Cal. Nov. 23, 2010); *Martin v. United States*, No. 09-1387, 2010 WL 3463949, at *3 (C.D. Ill. Aug. 25, 2010); *United States v. Chaidez*, 730 F. Supp. 2d 896, 904 (N.D. Ill. 2010); *Al Kokabani v. United States*, Nos. 5:06-CR-207-FL, 5:08-CV-177-FL, 2010 WL 3941836, at *6 (E.D.N.C. July 30, 2010); *United States v. Hubenig*, No. 6:03-mj-040, 2010 WL 2650625, at *8 (E.D. Cal. July 1, 2010); *Commonwealth v. Clarke*, 949 N.E.2d 892, 904, (Mass. 2011); *People v. Bennett*, 903 N.Y.S.2d 696, 700 (N.Y. Crim. Ct. 2010).

Applying *Padilla* to other similarly situated postconviction petitioners is also consistent with the U.S. Supreme Court's decision in *Santos-Sanchez v. United States*, 130 S. Ct. 2340 (2010), issued a week after *Padilla*. *Santos-Sanchez* involved a collateral attack through a writ of coram nobis in which the petitioner claimed that he received ineffective assistance by his counsel's failure to accurately advise him of the immigration consequences of his guilty plea. *Sanchos-Sanchez v. United States*, 548 F.3d 327, 331-32 (5th Cir. 2008). The Supreme Court vacated the judgment and remanded to the Fifth Circuit for further consideration under *Padilla*, making *Padilla* available to another petitioner on collateral review. *Santos-Sanchez*, 130 S. Ct. at 2340. On remand, the Fifth Circuit also applied *Padilla* retroactively, stated that *Padilla* abrogated its previous holding that defense counsel was not constitutionally obligated to advise Santos-Sanchez of the possible deportation consequences of his plea, and vacated the district court's

denial of the petition. *Santos-Sanchez v. United States*, 381 Fed. App'x 419, 2010 WL 2465080 (5th Cir. June 15, 2010).

In addition, applying *Padilla*'s ruling on the obligations of defense counsel to other postconviction petitioners recognizes the unique nature of ineffective-assistance claims arising out of guilty pleas and furthers the principles underlying the jurisprudence of retroactivity. Appellant was released from custody upon pleading guilty and may not have been aware of the immigration consequences of his conviction before the time to file an appeal ran. And ineffective-assistance claims, which can require development of a record, are often reviewed for the first time in collateral proceedings. *See Erickson v. State*, 725 N.W.2d 532, 535-36 (Minn. 2007) (stating that ineffective-assistance claims may be brought in postconviction proceedings even after direct appeal when "the claim cannot be determined from the district court record and requires additional evidence" (quotation omitted)). Consequently, the posture of a *Padilla* postconviction claim is more akin to direct review than collateral review, despite being brought in postconviction proceedings. *See Chaidez*, 730 F. Supp. 2d at 904 (stating that "the court hearing a *Strickland* claim . . . will serve a function similar to the appellate court, by being the first to reconsider the work done by the trial court"). And these claims, unlike most other claims, are not final when reviewed collaterally.

In developing the rules for retroactivity, the U.S. Supreme Court reasoned that the purpose of direct review and collateral review differ. Although cases in which a defendant's conviction is not yet final must be adjudicated "'in light of [the Court's] best understanding of governing constitutional principles,'" the same is not true for defendants

seeking collateral review. *Teague v. Lane*, 489 U.S. 288, 304, 109 S. Ct. 1060, 1072, 1075 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 679, 91 S. Ct. 1160, 1173 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)). But although new constitutional interpretations need not generally be applied retroactively, because *Padilla* claims are often first brought in collateral proceedings and are not final, the principles behind using current constitutional standards when adjudicating cases on direct review apply, rather than the principles of deterrence and finality that underlie collateral review. *See Saffle v. Parks*, 494 U.S. 484, 488, 110 S. Ct. 1257, 1260 (1990) (stating that the Court employs a "functional view" in determining retroactivity).

Following *Campos* and federal precedent, we reverse the postconviction court's denial of appellant's ineffective-assistance-of-counsel claim. And we remand the case for consideration under *Campos* and *Padilla* in such proceedings as the postconviction court deems appropriate.

On remand, appellant has the burden of establishing both prongs of *Strickland* as interpreted in *Padilla*. In deciding whether appellant was adequately advised, the district court will need to determine whether the immigration consequences of appellant's conviction were clear so that defense counsel had the affirmative obligation to advise his client that his plea would make him deportable rather than advising appellant only that there may be adverse consequences to the conviction. *See Padilla*, 130 S. Ct. at 1483. The immigration statute making appellant deportable states that "[a]ny alien who at any time after admission is convicted of a crime of domestic violence . . . is deportable." 8 U.S.C. § 1227(a)(2)(E)(i) (2006). If the postconviction court determines that the statute

rendering appellant deportable is as "succinct, clear, and explicit" as the statute that rendered Padilla deportable, defense counsel's reliance on the standard plea-petition provision advising appellant that his conviction *may* result in deportation—which satisfies the district court's obligations under Minn. R. Crim. P. 15.01, subd. 1(6)(1)—may not have been sufficient to provide appellant with constitutionally effective assistance of counsel under *Padilla*. *See Padilla*, 130 S. Ct. at 1483.

Finally, we note that the postconviction court cited the statutory exception to the two-year deadline for postconviction petitions that applies if "the petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a Minnesota appellate court and the petitioner establishes that this interpretation is retroactively applicable to the petitioner's case." Minn. Stat. § 590.01, subd. 4(b)(3) (2008). But appellant brought his petition within the two-year deadline and therefore, need not rely on one of the statutory exceptions.

**Reversed and remanded.**