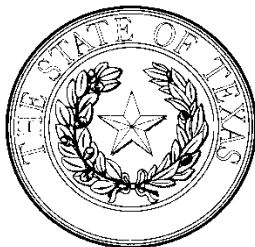


Opinion issued May 12, 2011.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-10-00685-CR

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**THE STATE OF TEXAS, Appellant**

**V.**

**TERRY GOLDING, Appellee**

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**On Appeal from the County Criminal Court at Law No. 6  
Harris County, Texas  
Trial Court Case No. 1694035**

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**OPINION**

In 1994, Terry Golding, a lawful permanent resident of the United States since 1989, pled guilty to the misdemeanor offenses of driving while intoxicated and unlawful possession of a firearm. Shortly after the United States Supreme Court decided *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), Golding applied for a

writ of habeas corpus, claiming that his 1994 guilty plea was involuntary because his counsel had failed to advise him of the immigration consequences of entering a guilty plea. The trial court granted Golding habeas relief and vacated his conviction for unlawful possession of a firearm. The State presents three issues on appeal, contending that the trial court erred in granting relief because: (1) the doctrine of laches barred Golding's request for relief; (2) the trial court did not have jurisdiction to grant habeas relief; and (3) Golding failed to show that he received ineffective counsel at the time of his guilty plea. We affirm the order of the trial court.

### **Background**

In October 1994, the State charged Golding with driving while intoxicated and the unlawful possession of a firearm. On the advice of counsel, Golding pled guilty to both misdemeanor offenses. The trial court assessed punishment at three days' confinement served and a \$400 fine for the firearm offense, and three days' confinement and a \$500 fine for the DWI offense. Golding did not appeal either conviction, and he successfully completed the terms of his punishment.

In March 2010, the United States Supreme Court decided *Padilla v. Kentucky*, which addressed whether defense counsel's failure to provide information regarding the immigration consequences of a guilty plea constitutes ineffective assistance of counsel under *Strickland v. Washington* and therefore

renders a guilty plea involuntary. *See Padilla*, 130 S. Ct. at 1482–84; *Strickland*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984). The *Padilla* Court held that defense counsel “must inform her client whether his plea carries a risk of deportation” to satisfy the requirements of the Sixth Amendment. *Padilla*, 130 S. Ct. at 1486.

On June 15, 2010, Golding filed an application for writ of habeas corpus, alleging that his conviction should be vacated because his plea counsel failed to advise him of the immigration consequences resulting from his guilty plea, mainly that an unlawful possession of firearm conviction, though a misdemeanor offense, would lead to potential deportation and negatively affect his ability to become a naturalized citizen. *See* 8 U.S.C. § 1227(a)(2)(C) (“Any alien who at any time after admission is convicted under any law of . . . possessing . . . or carrying . . . a firearm . . . in violation of any law is deportable.”). In his habeas petition, Golding stated that he recently had consulted with an immigration attorney regarding his application for United States citizenship. That attorney had advised him that his misdemeanor conviction for unlawful possession of a firearm rendered him deportable and made him ineligible for naturalization. Golding included with his petition several letters of recommendation that supported his citizenship and habeas application.

The State contested the trial court's habeas jurisdiction, claiming that the possibility of deportation and potential bar to naturalization do not qualify as restraint or confinement for the purposes of a request for habeas relief. *See* TEX. CODE CRIM. PROC. ANN. art. 11.09 (West 2005). The State also claimed that laches should bar Golding's request for habeas relief and that the trial court should not grant relief because Golding had not proven ineffective assistance of counsel. As to its latter contention, the State argued that *Padilla* did not apply retroactively and that, as a result, Golding did not receive ineffective assistance because Golding's counsel was not required to advise him of the immigration consequences of his guilty plea at the time he entered it.

At the habeas hearing, the trial court heard testimony from Golding, his plea counsel, and his immigration attorney. The trial court also heard the State's habeas jurisdiction and laches challenges. Pertinent to Golding's claims and the State's defenses, the trial court made the following findings of fact:

- Golding's plea counsel advised him to plead guilty to the misdemeanor charge of unlawful possession of a firearm and pay a fine;
- Golding's plea counsel did not research or advise Golding about the immigration consequences for a resident alien convicted of the offense of unlawfully possessing a firearm; Golding's plea counsel knew, at the time he advised Golding to enter a plea of guilty to the misdemeanor charge of unlawfully carrying a weapon, that Golding was only a resident alien, and not a citizen, of the United States.
- 8 U.S.C. § 1227(2)(C) provides that any alien convicted of unlawfully carrying a weapon is deportable.

- Federal law does not provide for any waiver or exception to deportation for an alien convicted of unlawfully possessing a weapon which is a firearm.
- Golding's plea counsel could have easily determined that Golding's plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all offenses involving the purchasing, selling, offering for sale, exchanging, using, possessing any weapon, part or accessory which is a firearm.
- Based on the advice of his attorney, Golding entered a plea of guilty to the charge of unlawfully carrying a firearm.
- At the time of Golding's plea, the county criminal court at law that accepted his plea used plea papers that contained a general admonishment that:

If I am not a citizen of the United States my plea of guilty or nolo contendere may result in my deportation, exclusion from admission to this country or denial of naturalization under federal law.

- Prior to his plea, Golding and his plea counsel executed a document similar to the plea papers containing that admonition.
- Had Golding been advised that a plea of guilty to the offense of unlawfully carrying a firearm would result in making him subject to deportation with no waiver available under immigration law, Golding would not have entered a guilty plea.
- The general admonishments contained in the plea papers used by the Court at the time of the plea were insufficient to advise Golding of the immigration consequences of his plea under *Padilla*.

The trial court granted habeas relief and vacated Golding's conviction for unlawful possession of a firearm.

## Habeas Corpus

### *I. Standard of Review for Habeas Corpus Decision*

The applicant for a writ of habeas corpus based on an involuntary guilty plea has the burden of proving his allegations by a preponderance of the evidence. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). In reviewing the trial court's ruling on a habeas corpus application, we must 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 decide whether a trial court abused its discretion by determining whether the court acted without reference to any guiding rules or principles, or in other words, whether the court acted arbitrarily or unreasonably. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993). A trial court abuses its discretion when its decision lies outside of the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990).

### *II. Jurisdiction*

We first examine whether the trial court had jurisdiction to consider Golding's application for a writ of habeas corpus. The State contends that the court did not have jurisdiction to hear the case because appellee failed to present evidence that, as a result of his misdemeanor charges, he was either (1) confined or

restrained or (2) suffered collateral legal consequences from his conviction. *See* TEX. CODE CRIM. PROC. ANN. art. 11.09 (West 2005).

### ***III. Proof of Eligibility for Habeas Relief***

To be entitled to habeas corpus relief, an applicant must establish that he was either “confined” or “restrained” unlawfully at the time he applied for relief. *State v. Collazo*, 264 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.], pet. ref’d). The terms “confinement” and “restraint” encompass incarceration, release on bail or bond, release on community supervision or parole, or any other restraint on personal liberty. *Ex parte Davis*, 748 S.W.2d 555, 557 (Tex. App.—Houston [1st Dist.] 1988, pet. ref’d). Lack of physical confinement does not preclude an applicant from seeking relief or deprive a trial court of jurisdiction from hearing his plea. *Ex parte Schmidt*, 109 S.W.3d 480, 482–83 (Tex. Crim. App. 2003). A showing of collateral legal consequences is sufficient to show that an applicant is “confined.” *See Collazo*, 264 S.W.3d at 126–27. Collateral legal consequences resulting from a prior misdemeanor conviction have been defined broadly to include denial of entry into the military, denial of a Texas peace officer’s license, detainment for deportation proceedings, and termination from employment. *See Ex parte Davis*, 748 S.W.2d at 557; *Collazo*, 264 S.W.3d at 126–27; *Le v. State*, 300 S.W.3d 324, 326–27 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Ex parte Wolf*, 296 S.W.3d 160, 166–167 (Tex. App.—Houston [14th Dist.] 2009, pet.

ref'd). If the applicant may suffer collateral legal consequences from his misdemeanor conviction, a trial court has jurisdiction to consider his application for habeas relief. *Schmidt*, 109 S.W.3d at 483.

**A. *Collateral legal consequences***

The State acknowledges that a person may be entitled to habeas relief if his misdemeanor charge results in collateral legal consequences. However, the State contends that Golding did not suffer any collateral legal consequences from his misdemeanor conviction of unlawful possession of a firearm because he has not yet been deported or been denied citizenship. The State would confine the availability of habeas relief in immigration-related cases to those in which the applicant demonstrates that he has already suffered negative consequences, such as an immigration-related detention, an outstanding order of deportation, or denial of citizenship. This proposed rule excludes potential immigration consequences that an otherwise lawful alien may suffer as a result of an earlier guilty plea.

The Supreme Court in *Padilla* held that defense counsel has an obligation to inform a client of *potential* immigration consequences before entering a guilty plea. 130 S. Ct. at 1483. A requirement that habeas relief is unavailable until the applicant actually suffers the negative immigration consequences would be particularly burdensome, especially for individuals, like Golding, who wish to

apply for naturalization.<sup>1</sup>

The State's proposed rule also runs counter to the due process concerns expressed by the Supreme Court in *Padilla*:

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to *Padilla*'s claim.

*Padilla*, 130 S. Ct. at 1482.

The State relies on *Ex parte Davis* and *State v. Collazo* to contend that this Court has limited collateral legal consequences to cases where the applicant already suffered an injury as a result of his plea to a misdemeanor charge. *See Davis*, 748 S.W.2d at 557; *Collazo*, 264 S.W.3d at 126–27. This reliance is misplaced. Neither *Davis* nor *Collazo* holds that potential adverse immigration consequences are not collateral legal consequences. In both *Davis* and *Collazo*, the habeas applicants did not become aware of the negative legal consequences of their pleas until they had already suffered injury. *Davis*, 748 S.W.2d at 557 (applicant did not become aware of negative legal consequences of prior plea until he was

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<sup>1</sup> The Supreme Court has treated *potential* immigration consequences as collateral consequences in granting habeas relief. *See Fiswick v. United States*, 329 U.S. 211, 221–23, 67 S. Ct. 224, 229–30 (1946). Federal courts consistently give great latitude in considering their jurisdiction over habeas petitions. *See Sibron v. New York*, 392 U.S. 40, 55, S. Ct. 1889, 1899 (1968) (“It is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.”).

denied entry into military); *Collazo*, 264 S.W.3d at 125 (applicant did not become aware of negative legal consequences of prior plea agreement until he was denied opportunity to apply for peace officer's license). Thus, *Collazo* and *Davis* did not apply for habeas relief before they suffered injury because they were unaware that their prior plea could have negative legal consequences, not because habeas relief was unavailable. Unlike those applicants, *Golding* learned of the negative legal consequences of his plea before suffering an injury. The habeas record shows that *Golding* sought legal counsel to assist in preparing his application for citizenship. His attorney informed him that he was subject to deportation and would likely be denied citizenship as a result of his prior plea.

The State also relies on *Ex parte Wongjaroen*, in which the Fourteenth Court of Appeals expressed doubt as to whether potential deportation could qualify as a collateral legal consequence. No. 14-07-00593-CR, 2008 WL 4809494, at \*3 n.2 (Tex. App.—Houston [14th Dist.] Nov. 6, 2008, pet. ref'd) (substitute mem. op., not designated for publication). In *Wongjaroen*, the applicant claimed that her prior guilty plea to a misdemeanor prostitution charge was involuntary because her counsel rendered ineffective assistance by failing to advise her about the immigration consequences that could result from a guilty plea. *Id.* at \*1. Decided pre-*Padilla*, the court upheld the trial court's decision to deny relief but observed that it was unconvinced that the applicant's claim showed a collateral legal

consequence.<sup>2</sup> *Id.* at \*3 n.2.

The State misreads *Wongjaroen*. Our sister court did not hold that potential immigration consequences were barred from being considered collateral legal consequences for the purposes of habeas relief. Its jurisdictional concerns related to the insufficiencies of the record, not the definition of collateral legal consequences. *See id.* at \*3 n.2 (observing that applicant “provided no evidence that her misdemeanor conviction . . . affected her immigration status” and observing that record nowhere indicated that applicant would be “denied residency or face removal from the country”).

Golding’s writ application is distinct from that in *Wongjaroen*. The record provides more than a “mere assertion” that his pleading guilty to the offense of unlawful possession of a firearm resulted in negative immigration consequences. The application states that Golding had consulted with an immigration attorney regarding naturalization and that the attorney had advised him that his prior guilty plea would affect his naturalization status. With his application, Golding included

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<sup>2</sup> The Supreme Court likewise has expressed doubt about presuming collateral legal consequences from bare assertions in habeas applications. *See Spencer v. Kemna*, 523 U.S. 1, 10–11, 118 S. Ct. 978, 984–85 (1998) (“[I]t must be acknowledged that the practice of presuming collateral consequences (or of accepting the remote possibility of collateral consequences as adequate to satisfy Article III) sits uncomfortably beside the long-standing principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record, and that it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.” (internal citations and quotations omitted)).

letters of recommendation that were supporting his application for citizenship. From the letters and the assertion in the writ application that an immigration attorney had advised Golding of the negative impact his prior plea would have on his naturalization, a reasonable person could conclude that Golding's prior guilty plea resulted in a restraint on his ability to obtain citizenship.

Texas courts have not excluded potential immigration consequences from being considered as sufficient collateral legal consequences for the purposes of habeas relief. A careful reading of article 11.09 writ decisions reveals an intention to include potential injuries as collateral legal consequences for the purposes of habeas jurisdiction. TEX. CODE CRIM. PROC. ANN. art 11.09; *See Tatum v. State*, 846 S.W.2d 324, 327 (Tex. Crim. App. 1993) (“if a misdemeanor is void, and its existence *may* have detrimental collateral consequences in some *future* proceeding, it may be collaterally attacked”) (emphasis added); *Collazo*, 264 S.W.3d at 126–27 (holding that an appellant suffers collateral legal consequences if “he is denied the *opportunity* to obtain a Texas peace officer license”) (emphasis added); *Wolf*, 296 S.W.3d at 167 (holding that the “*inability* to obtain employment in the banking and securities industry constitutes collateral consequences”) (emphasis added).

Consequently, we hold that the denial of Golding's opportunity to apply for naturalization and the fact that Golding's plea renders him deportable if

apprehended are sufficient collateral legal consequences to invoke the trial court's habeas jurisdiction.

***B. Laches***

The State also contends that the doctrine of laches prevents Golding from obtaining relief because Golding waited sixteen years to apply for the writ. Also in the interim, the judge who took the plea died, and the clerk's office destroyed the original file. To bar relief based on laches, the State had the burden to (1) make a particularized showing of prejudice to its ability to respond to the allegations in Golding's application, (2) show that the prejudice was caused by Golding having filed a late petition, and (3) show that Golding did not act with reasonable diligence as a matter of law. *See Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999). Mere delay in petitioning for habeas corpus relief is not sufficient. *See id.* The trial court has discretion to evaluate the equities of a case and determine whether habeas relief is barred by laches. *See id.*

The record supports the trial court's finding that the State failed to prove that it suffered any prejudice from the lapse of time between Golding's conviction and application for habeas corpus relief. The State points to the death of Golding's plea judge and to the destruction of Golding's original plea paperwork as evidence of prejudice. These facts alone, however, do not demonstrate prejudice, when, here, the State provided the habeas court with the plea papers that the trial court

used at the time of Golding's plea, and Golding did not dispute that he signed similar papers. *See, e.g., Ex parte Elliff*, No. WR-64223-01, 2006 WL 1545499, at \*1 (Tex. Crim. App. 2006) (order not designated for publication). The State provided no evidence at the writ hearing that, had the plea agreement not been destroyed and Golding's plea judge survived to testify, it would have received a more favorable trial. *Id.* (holding that death of potential witness was not sufficient to show prejudice because State failed to show that had applicant filed twenty years earlier, witness would have been available to testify in State's favor). The State also points to Golding's plea counsel's testimony that he does not remember the specifics of the plea hearing. Plea counsel testified, however, that he had never advised Golding about the immigration consequences of pleading guilty. The trial court had discretion to either believe or disbelieve that testimony. *See Kniatt*, 206 S.W.3d at 664.

The record likewise supports the trial court's finding that Golding used diligence in applying for the writ. The time lapse was not an unexplained delay; Golding applied for habeas relief soon after the Supreme Court handed down its decision in *Padilla*. We hold that the trial court did not abuse its discretion in declining to rule that Golding's requested relief was barred by laches.

### *C. Ineffective Assistance of Counsel*

The State also challenges the trial court's decision to grant the writ on its merits. The State contends that Golding was not entitled to have his conviction set aside because he failed to show that his plea counsel was ineffective.

#### *1. Standard of review*

To show ineffective assistance of counsel, a defendant must demonstrate both (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Padilla*, 130 S. Ct. at 1482 (citing *Strickland*, 466 U.S. at 687–88, 694, 104 S. Ct. at 2064, 2068); *Ex parte Chandler*, 182 S.W.3d 350, 353 (Tex. Crim. App. 2005). A defendant has the burden to establish both of these prongs by a preponderance of the evidence, and a failure to make either showing defeats his ineffectiveness claim. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). We presume that counsel's conduct falls within the wide range of reasonable professional assistance, and we will find counsel's performance deficient only if the conduct is so outrageous that no competent attorney would have engaged in it. *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). We cannot speculate beyond the record provided, so any allegation of ineffectiveness must be firmly founded in the record, and the record affirmatively must demonstrate the alleged

ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

2. *Applicability of Padilla to Strickland claim*

a. *Padilla's holding*

The Sixth Amendment right to effective assistance of counsel does not extend to the “collateral consequences” of the criminal prosecution, which are consequences that are not “definite, practical consequences of a defendant’s guilty plea.” *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). A defendant must be advised of the direct consequences of his guilty plea; however, his “ignorance of a collateral consequence does not render the plea involuntary.” *Id.* (citing *United States v. Long*, 852 F.2d 975, 979–80 (7th Cir. 1988)).

Traditionally, courts have considered potential deportation to be a “collateral consequence” of a guilty plea; however, in *Padilla*, the Supreme Court recognized that deportation is “uniquely difficult to classify as either a direct or a collateral consequence,” given its “close connection” to criminal proceedings, and concluded that “advice regarding deportation is not categorically removed from the ambit of Sixth Amendment right to counsel.” 130 S. Ct. at 1482. The Court held that when the applicable immigration law is “not succinct and straightforward,” defense counsel “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at 1483. When the “deportation consequence is truly clear,” however, defense counsel owes

an “equally clear” duty to give correct advice. *Id.* The Court also held that silence regarding the negative immigration consequences of a guilty plea constitutes constitutionally deficient representation under *Strickland*. *Id.* at 1484 (stating that “there is no relevant difference between an act of commission and an act of omission in this context”). The Court noted that professional norms already imposed a general obligation on defense counsel to provide advice regarding deportation consequences of guilty pleas. *Id.* at 1485. The Court held that Padilla had shown constitutionally deficient representation, but remanded for a determination of prejudice. *Id.* at 1486–87.

*b. Retroactivity of Padilla rule*

The Supreme Court decided *Padilla* after Golding’s conviction became final. The State recognizes that *Padilla* requires defense counsel to advise clients of the potential immigration consequences resulting from a guilty plea, but contends that *Padilla* should not be applied retroactively. To determine whether the trial court erred in granting Golding relief, we must decide whether *Padilla* applies retroactively.

The State contends that Golding cannot take advantage of *Padilla* on collateral review because it represents a new rule of criminal procedure. *See Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989). *Teague* explains that new constitutional rules are not retroactive unless they are substantive rules or

created pursuant to a watershed decision. *Id.* at 301, 109 S. Ct. at 1075. A substantive rule is one that holds that a statute improperly makes conduct criminal. *Id.* In determining retroactivity, we consider whether “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 US 151, 156–57, 117 S. Ct. 1969, 1973 (1997) (quoting *Lambrix v. Singletary*, 520 U. S. 518, 527, 117 S. Ct. 1517, 1524 (1997)). A novel statement of law will be considered a new rule, but a new application of an existing rule will not. *See Butler v. McKellar*, 494 U.S. 407, 412–15, 110 S. Ct. 1212, 1217 (1990).

According to the State’s position, *Padilla* establishes a per se rule that counsel must inform a client of immigration consequences before an informed guilty plea may be entered. The contrary view, accepted by the trial court, reads *Padilla* as a straightforward application of *Strickland*: the petitioner’s attorney “fell below an objective standard of reasonableness,” because, as a factual matter, the professional standards at the time of the client’s plea required counsel to inform of potential immigration consequences. State and federal courts have split on whether *Padilla* establishes a “new constitutional rule of criminal procedure” or merely extends *Strickland*, and consequently, on whether *Padilla* should be applied retroactively. *Compare United States v. Hernandez-Monreal*, Fed. Appx. 714, 714

n.1 (4th Cir. 2010) (noting that “nothing in the *Padilla* decision indicates that it is retroactively applicable to cases on collateral review”) and *United States v. Gilbert*, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286, at \*3 (D.N.J. Oct. 19, 2010) (holding that *Padilla* is not retroactive for cases on collateral review) with *United States v. Hubenig*, No. 6:03-mj-040, 2010 WL 2650625, at \*5–8 (E.D. Cal. July 1, 2010) (holding *Padilla* did not establish new constitutional rule and therefore petitioner’s claim did not pose retroactivity problem) and *United States v. Chaidez*, No. 03 CR 636-6, 2010 WL 3184150, at \*6 (N.D. Ill. Aug. 11, 2010) (slip op.) (same).<sup>3</sup>

We first look to *Padilla* itself for guidance. Although the Court did not specifically address whether its holding applies retroactively, it nevertheless observed that:

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

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<sup>3</sup> The Court of Criminal Appeals has not yet addressed this issue; however, it has ordered that an application for a writ of habeas corpus be filed and set for submission to determine, among other issues, whether “*Padilla* is an application of the established rule in *Strickland v. Washington*” and whether “*Padilla* announced a new rule that is retroactive on collateral review.” See *Ex parte Moussazadeh*, No. AP-76439, 2010 WL 4345740, at \*1 (Tex. Crim. App. Nov. 3, 2010) (order not designated for publication).

This observation implies that the Court anticipates the decision to cause some post-conviction motions based on counsel's misadvice or lack of advice on the immigration consequences of pleas entered before the decision. Further, *Padilla* relies primarily on *Strickland* as well as secondary sources discussing prevailing professional norms at the time of Padilla's plea. 130 S. Ct. at 1482–83. The Court also observed that the extent of the advice counsel is required to provide depends wholly on the facts: Padilla's case was straightforward, but counsel is not required to know every intricacy of immigration law when the potential consequences are not so clear. *Id.* at 1483. This language also suggests that *Padilla* does not announce a new rule, but merely extends *Strickland*.

Recent changes in substantive immigration law, which have had an enormous impact on the fate of noncitizens faced with criminal charges, also support the conclusion that *Padilla* applies retroactively. Evaluation of whether counsel's representation was constitutionally deficient "is necessarily linked to the practice and reasonable expectations of the legal community . . . under prevailing professional norms. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2052, *quoted in Padilla*, 130 S. Ct. at 1482.

Before 1990, under section 212(c) of the Immigration and Nationality Act of 1952, immigration judges had broad discretion to admit aliens who were otherwise ineligible to return to or remain in the United States because of prior criminal

convictions. *See* 8 U.S.C. § 1182(c); *see generally* *INS v. St. Cyr*, 533 U.S. 289, 295–96, 110 S. Ct. 3371, 2276–77 (2001) (citing *Matter of Silva*, 16 I. & N. DEC. 26, 30 (1976) (adopting position of *Francis v. INS*, 532 F. 2d 268 (2d Cir. 1976))). During that period, section 212(c) created a safety valve for aliens with prior convictions:

[T]he class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted. Consequently, in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens.

*St. Cyr*, 533 U.S. at 294–95, 121 S. Ct. at 2277. The Anti-Drug Abuse Act of 1988 introduced the term “aggravated felony” into immigration law. PUB. L. NO. 100-690, 102 Stat. 4181 (codified at 8 U.S.C. 1101(a)(43) (1988)). At the time, it created a separate ground of deportation for crimes such as murder, drug trafficking or illegal trafficking of firearms or destructive devices, but Congress quickly expanded it to include other, less serious crimes. The Court in *St. Cyr* recognized that federal immigration law underwent a sea change during the 1990’s:

In 1990, Congress amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years. In [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)], Congress identified a broad set of offenses for which convictions would preclude such relief. And finally, that same year, Congress passed [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] IIRIRA. That statute . . . repealed § 212(c) and replaced it with a new section that gives the Attorney General the authority to cancel

removal for a narrow class of inadmissible or deportable aliens. So narrowed, that class does not include anyone previously “convicted of any aggravated felony.”

*St. Cyr*, 533 U.S. at 297, 110 S. Ct. at 2277 (internal citations omitted). The statute enumerating “aggravated felonies,” was amended to include crimes for which the minimum sentence is as short as one year, regardless of whether the noncitizen receives a suspended sentence or probation. 8 U.S.C. § 1101(a)(43), (48). Some misdemeanor offenses can also be aggravated felonies. *See, e.g., United States v. Christopher*, 239 F.3d 1191, 1194 (11th Cir. 2001) (“Although Congress apparently did not notice that it might be breaking the time-honored line between felonies and misdemeanors, Congress had the power to define the punishment for the crime of re-entering the United States after deportation.”); *United States v. Graham*, 169 F.3d 787, 791–93 (3d Cir. 1999) (holding that appellant’s prior conviction for petit larceny, a Class A misdemeanor under New York law, for which he served the maximum one-year sentence, constituted an aggravated felony). These changes in law have drastically reduced the size of the class of aliens eligible for discretionary relief, to the point where, under prevailing professional norms, criminal practitioners are reasonably expected to understand and communicate the dire immigration consequences that could follow a noncitizen’s plea of guilty or nolo contendere to one of the crimes identified as an aggravated felony under federal law.

In his concurring opinion in *Wright v. West*, Justice Kennedy described the retroactivity analysis this way:

If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

505 U.S. 277, 307 (1992) (Kennedy, J, concurring). New consequences for noncitizens facing criminal charges, stemming from major changes in substantive immigration law, were severe enough to precipitate a change to prevailing professional norms for the practice of criminal law. *Padilla* recognized an application of the existing *Strickland* rule to a factual context that the Court had not yet addressed.

Recent decisions by the Fifth Circuit Court of Appeals indicate that *Padilla* applies retroactively. See *Santos-Sanchez v. United States*, 381 Fed. App. 419 (5th Cir. 2010) (vacating denial of coram nobis relief and remanding to trial court for further proceedings consistent with *Padilla*); see also *United States v. Chapa*, No. 394 Fed. Appx. 53 (5th Cir. 2010) (recognizing that appellant showed ineffective assistance under *Padilla*). The Fifth Circuit originally decided *Santos-Sanchez* and *Chapa* before the Supreme Court decided *Padilla*. In the original decisions, the Fifth Circuit considered immigration consequences as collateral. See *Santos-*

*Sanchez v. United States*, 548 F.3d 327, 336–37 (5th Cir. 2008); *United States v. Chapa*, 354 Fed. Appx. 203, 204 (5th Cir. 2009). As a result, the Court held that counsels’ failure to warn of these consequences did not show the deficient representation required to satisfy the first prong of *Strickland*. See *Santos-Sanchez*, 548 F.3d at 336–37; *Chapa*, 354 Fed. Appx. at 204. Both applicants petitioned the Supreme Court to review these decisions. The Supreme Court vacated the Fifth Circuit’s rulings and remanded for renewed consideration in light of its holding in *Padilla*. See *Santos-Sanchez v. United States*, 130 S. Ct. 2340 (2010); *Chapa*, 130 S. Ct. 3504 (2010). On remand, the Fifth Circuit recognized that *Padilla* had abrogated its prior decisions. *Chapa*, 354 Fed. Appx. 203; *Santos-Sanchez*, 381 Fed. Appx. 419. In *Santos-Sanchez*, it vacated the district court’s denial of the petitioner’s claim for a writ of coram nobis and remanded the petition for reconsideration according to *Padilla*. *Santos-Sanchez*, 381 Fed. Appx. at 419. In *Chapa*, the Fifth Circuit observed that “the *Padilla* holding shows that . . . Chapa’s claim may satisfy the constitutional deficiency prong” of *Strickland*, the ineffective assistance claim was not properly before the court on direct appeal because it had not been addressed by the district court, and the record had not been fully developed. *Chapa*, 394 Fed. Appx. at 54. Considering the language of the *Padilla* opinion, the *Strickland* analysis, and the prevailing professional norms occasioned

by major changes in immigration law, we hold that *Padilla*—as an extension of *Strickland*, and not a new constitutional rule—applies to this case.

3. *Analysis of Golding's Strickland claim*

The State argues that even if *Padilla* applies retroactively, the trial court erred in granting relief because Golding failed to demonstrate that (1) his plea counsel's failure to advise him of the immigration consequences of pleading guilty to unlawful possession of a firearm fell below an objective standard of reasonableness; and (2) a reasonable probability existed that, but for his plea counsel's failure to advise him of the immigration consequences of pleading guilty, the result of the proceeding would have been different. *See Padilla*, 130 S. Ct. at 1482; *Ex parte Chandler*, 182 S.W.3d at 354 & n.8.

a. *Deficient counsel*

At the writ hearing, Golding testified that he had not been advised of the immigration consequences of his plea. His plea counsel acknowledged that he was aware that Golding was not a citizen, that, as counsel, he had a duty to investigate immigration consequences, and that he had failed both to advise Golding of the immigration consequences of his plea or recommend that he consult with an immigration attorney. The trial court concluded that the federal immigration law in effect at the time of Golding's plea made a conviction for illegal possession of a weapon a deportable offense, and that a guilty plea would make Golding eligible

for deportation and prevent him from being eligible for naturalization. We hold that the trial court did not abuse his discretion in finding that Golding established the first prong of the *Strickland* framework. *See Kniatt*, 206 S.W.3d at 664.

*b. Prejudice*

The State contends that Golding failed to establish prejudice under *Strickland* because Golding testified that he recalled initialing paperwork before the judge at his plea hearing. Since Golding's original plea was destroyed by the Harris County Clerk's Office, the State presented a copy of the plea paperwork used in 1994. The plea paperwork contains the following admonitions:

I understand that upon a plea of guilty or nolo contendere . . . that if I am not a citizen of the United States my plea of guilty or nolo contendere may result in my deportation, exclusion from admission to this country, or denial of naturalization under federal law.

Article 26.13 of the Code of Criminal Procedure governs the requirements of the court prior to accepting a defendant's guilty plea. When Golding entered his plea in 1994, there was no requirement in Texas law for a trial court to admonish a person entering a plea of guilty to a misdemeanor offense. *See TEX. CODE CRIM. PROC. ANN. art. 26.13(a)* (West Supp. 2010). The State points to the language in the plea papers cautioning that a guilty plea may result in deportation or ineligibility for naturalization and contends that this language put Golding on notice of the possibility of adverse consequences, rendering his plea voluntary. In reaching the contrary conclusion, the habeas trial court considered other facts,

finding that (1) Golding’s plea counsel could have easily determined from the language of the statute, “which specifically commands removal for all offenses involving the purchasing, selling, offering for sale, exchanging, possessing [or] using any weapon, part or accessory which is a firearm” and (2) plea counsel’s failure to conduct a sufficient pretrial investigation of the immigration law applicable to the charges against Golding left him unable to adequately advise Golding of the specific and certain consequences of his plea. In other words, Golding’s conviction was not one that *might* make him deportable and ineligible for citizenship—given the nature of the offense, it certainly *would*. Where adequate representation reasonably would have led criminal defense counsel to advise against entering a guilty plea, the general admonition about the risk of adverse immigration consequences in the court’s plea papers did not put Golding on notice that his plea of guilty to the misdemeanor charged would absolutely render him deportable and ineligible for naturalization. “A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty.” *United States v. Bonilla*, No. 09-10307, 2011 WL 833293, at \*4 (9th Cir. Mar. 11, 2011); *see Padilla*, 130 S. Ct. at 1483 (“When the law is not succinct and straightforward . . ., 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 . . . [b]ut when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear.”).

The trial court’s findings of fact and conclusions of law are supported by the record and the law. *See Bonilla*, 2011 WL 833293 at \*6 (holding that trial court abused its discretion in denying request to withdraw plea where counsel failed to inform defendant that plea of guilty to crime charged would render defendant deportable without possibility of waiver or exception). Golding showed that he received deficient counsel at the time of his plea and that he was prejudiced by his counsel’s errors. The trial court thus did not abuse its discretion by concluding that Golding was entitled to habeas relief.

### **Conclusion**

We hold that the trial court had jurisdiction over Golding’s application for habeas relief and that it acted within its discretion in concluding that Golding’s application was not barred by the doctrine of laches. We further hold that the trial court acted within its discretion in granting the requested relief. We therefore affirm the order of the trial court.

Jane Bland  
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

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