

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**10-1231**

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**UNITED STATES OF AMERICA,**

**Appellee,**

**v.**

**GERALD OROCIO,**

**Appellant.**

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**Appeal from the U.S. District Court for New Jersey**

**No. 2-04-cr-00725-001**

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**REPLY BRIEF FOR APPELLANT**

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## INTRODCUTION

This Court should reverse the decision of the District Court of New Jersey and grant Mr. Gerald Orocio's petition for writ of error coram nobis. Mr. Orocio's plea counsel, Mr. Portelli, failed to notify Mr. Orocio regarding anything about the possibility (much less the certainty) of deportation, which constitutes ineffective assistance of counsel pursuant to the Supreme Court's recent decision in *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 2010 U.S. LEXIS 2928, No. 08-651 (Mar. 31, 2010); *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Orocio suffered prejudice because Mr. Portelli did not attempt to negotiate a plea that could give Mr. Orocio even a possibility of avoiding mandatory deportation, such as one pursuant to the Federal First Offender Act, and Mr. Orocio waived his right to a jury trial. Mr. Orocio's pending deportation trial is a continuing consequence of his irregular and invalid criminal proceedings, and his conviction should be vacated.

## ARGUMENT

Mr. Orocio incorporates by reference all arguments in his opening brief.

Mr. Orocio filed his petition for a writ of coram nobis in the New Jersey District Court on November 25, 2009, prior to the Supreme Court's decision in *Padilla*. (Appellant App. at vol. 2, 32-40). Therefore, Mr. Orocio does not seek

retroactive application of *Padilla*. He only recently learned of the deportation consequences of his plea and he could not have been expected to raise these issues on direct appeal or in a habeas case. (Decl., Appellant App. vol. 2, 38-89). He merely asks this Court to apply the *Strickland* rule to his case to find that his attorney provided ineffective assistance by failing to inform him of the possibility of deportation, just like the petitioner in *Padilla*. See *United States v. Chaidez*, 2010 U.S. Dist. LEXIS 69561, \*7-8 (N.D. Ill. 2010) (citing 130 S. Ct. at 1486); *Santos-Sanchez v. United States*, 2010 U.S. App. LEXIS 12205, 2010 WL 2465080 (granting coram nobis relief following the decision in *Padilla*)).

*Padilla* is not a new rule, so even if the *Teague* analysis is applied to the instant matter, *Padilla* can be applied to this matter retroactively. *United States v. Millan*, 2010 U.S. Dist. LEXIS 62351 (May 24, 2010) (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Guzman Garcia*, 2010 U.S. Dist. LEXIS 42930, 2010 WL 1791247 \*2 (E.D. Cal. 2010)). *Padilla* merely applies the *Strickland* test for ineffective assistance of counsel to a new situation. *Strickland*, 466 U.S. 668; see *People v. Bennett*, 2010 NY Slip Op 20194 (N.Y. City Crim. Ct. 2010) (citing *Williams v. Taylor*, 529 U.S. 362, 391 (2000)).

The Supreme Court stated, “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.” *Padilla*, 130 S. Ct. at 1485. *Padilla*

did not recognize a new right in criminal procedure. *See United States v. Guzman Garcia*, 2010 U.S. Dist. LEXIS 42930, 2010 WL 1791247 \*2 (E.D. Cal. 2010)); *see also United States v. Obonaga*, U.S. Dist. LEXIS 63872 (E.D.N.Y. 2010). *Padilla*'s holding "that *Strickland* should be applied in the context of advice concerning deportation" is a fact-specific analysis, and therefore merely extends an existing rule. *Bennett*, 2010 NY Slip Op 20194.

The Supreme Court intended for *Padilla* to apply retroactively. "[I]f the Supreme Court did not intend for *Padilla* to be retroactively applied, that would render meaningless the majority's lengthy discussion about concerns that *Padilla* would open the 'floodgates' of challenges to guilty pleas." *Bennett*, 2010 NY Slip Op 20194.

Mr. Portelli's failure to notify Mr. Orocio regarding the possibility of removal was ineffective assistance, even at the time it occurred. Mr. Orocio is an alien, and Mr. Portelli knew or should have known this fact. The criminal charge that Mr. Orocio faced was an aggravated felony under the Immigration and Nationality Act and a conviction for it would have subjected Mr. Orocio to mandatory deportation. 8 U.S.C. § 1101(a)(43)(B). The plea that Mr. Portelli negotiated also leads to mandatory deportation, because Mr. Orocio is ineligible for relief from deportation based on the Immigration and Nationality Act. 8 U.S.C. §§ 1227(a)(2)(B)(i); 1229b (a); 1229b (d)(1)(B). The Federal First Offender Act

existed at that time of Mr. Orocio's proceedings and was an avenue for relief that would not have subjected Mr. Orocio to deportation. 18 U.S.C. § 3607. Mr. Portelli failed to advise Mr. Orocio of any of these possibilities. Mr. Portelli failed to mention to Mr. Orocio even the possibility that he might be subject to deportation. (Decl., Appellant App. vol. 2, 38-39).

The district court judge's sentencing warning was insufficient to notify Mr. Orocio regarding the deportation consequence of his plea. First, this warning came at sentencing, after Mr. Orocio had already pleaded guilty. Second, the warning was very vague, informing Mr. Orocio merely that he had to cooperate with the ICE and that *if* he were deported he would need permission to return. (Tr., Appellant App. at vol. 2, 52). Third, it took Immigration and Customs Enforcement years to file a notice for Mr. Orocio to appear in immigration court for a deportation trial. Had ICE filed this document sooner, Mr. Orocio could have determined that he was deportable sooner and could have appealed his conviction or filed a petition for a writ of habeas corpus. Mr. Orocio was not aware that he faced mandatory deportation until he received the immigration court Notice to Appear and consulted with a specialist in immigration and nationality law last year. (Decl., Appellant App. vol. 2, 38-39).

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## CONCLUSION

This Court should issue a writ of error coram nobis and vacate Mr. Orocio's conviction.

Respectfully submitted August 3, 2010,

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## CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE

### 32(a)

#### **Certificate of Compliance With Page Limitation, Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. This reply brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(A) because it does not exceed 15 pages.
2. This reply brief also complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 974 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
3. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in size 14 Times New Roman font.

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## CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(b) that I electronically filed the REPLY BRIEF FOR APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 3, 2010 and sent 10 hard copies of the brief to the Clerk's Office on the same day. I certify that the following participant is a registered CM/ECF user who has consented to electronic service [Fed. R. App. P. 25(c)(1)(D)]; that service will be accomplished by the appellate CM/ECF system; and that I have served one copy of the paper REPLY BRIEF FOR APPELLANT on this participant by U.S. certified mail:

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*See* Fed. R. App. P. 25(d)(1)(B); 3d Cir. L.A.R. 31.0 (d).

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**CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS**

I certify that the text of the electronic brief is identical to the text in the paper copies. 3d Cir. L.A.R. 31.0 (c).

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## **CERTIFICATE OF VIRUS CHECK**

I certify that Sophos Anti-Virus, Version 7.1.6 (virus definition last updated August 2, 2010), a virus detection program, has been run on the electronic file of this brief and no virus was detected. 3d Cir. L.A.R. 31.0 (c).

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