LOWER COURT	Electronically Filed	CASE NO.
		Lower Court 08-9489-01
Wayne County Circuit Court	BRIEF COVER PAGE	Court of Appeals 308153

(Short title of case)

Case Name: **People v. Nargiz Ibragimova**

1. Brief Type (select one):
☐ APPELLANT(S) ☒ APPELLEE(S) ☐ REPLY
☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS
☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Nargiz Ibragimova**

3. x This brief is in response to a brief filed on January 27, 2012 by Plaintiff-Appellant.

4. ORAL ARGUMENT: ☒ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- ☒ Table of Contents [MCR 7.212(C)(2)]
- ☒ Index of Authorities [MCR 7.212(C)(3)]
- ☒ Jurisdictional Statement [MCR 7.212(C)(4)]
- ☒ Statement of Questions [MCR 7.212(C)(5)]
- ☒ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
- ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- ☒ Relief Requested [MCR 7.212(C)(9)]
- ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Desiree M. Ferguson**
Signing Attorney's Bar No. [if any]: **(P34904)**

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Court of Appeals No. 308153

Lower Court No. 08-9489-01

-vs-

NARGIZ IBRAGIMOVA

Defendant-Appellant.
_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

DESIREE M. FERGUSON (P34904)
Attorney for Defendant-Appellant
_____

DEFENDANT-APPELLANT'S RESPONSE TO PROSECUTION'S DELAYED APPLICATION FOR LEAVE TO APPEAL (ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF JURISDICTION

Defendant-Appellant concurs with the Plaintiff-Appellant's Statement of Jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

I. BECAUSE SHE PLED GUILTY BASED ON HER ATTORNEY'S AFFIRMATIVE MISADVICE THAT HER CONVICTION COULD NOT RESULT IN DEPORTATION FROM THE UNITED STATES, WAS MS. IBRAGIMOVA'S PLEA INVOLUNTARY OR UNINTELLIGENT, AND IS SHE ENTITLED TO PLEA WITHDRAWAL BASED ON *PADILLA V KENTUCKY*?

Trial Court answers, "Yes".

II. IS THE *PADILLA* CASE RETROACTIVELY APPLICABLE TO THIS CASE ON COLLATERAL REVIEW?

Trial Court answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellee Nargiz Ibragimova was convicted of attempted possession with intent to deliver between 5 and 44 kilograms of marijuana, after pleading guilty on September 26, 2008, before the Honorable David J. Allen in the Wayne County Circuit Court. On November 5, 2008, she was sentenced to 18 months probation.

At the plea proceeding, Ms. Ibragimova admitted that, on October 27, 2007, she was driving in Detroit, Michigan with marijuana in the trunk of the car, which she and co-defendant Doralee Witherspoon were transporting to Lansing, Michigan. [Plea 9/26/08, 8]

While serving her probation, Ms. Ibragimova was apprehended by the Department of Immigration and Customs Enforcement (ICE), and an Order was entered mandating her deportation.

On March 31, 2010, the Supreme Court of the United States decided in *Padilla v Kentucky*, ___ US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010) that attorneys owe a duty to non citizen clients to inform them of potential immigration consequences resulting from a conviction before they plead guilty.

Based on the *Padilla* decision, Ms. Ibragimova filed a Motion for Relief from Judgment seeking to withdraw her guilty plea. At that time, Ms. Ibragimova made the following factual averments under oath:

- Ms. Ibragimova is a non citizen legal resident of the United States, who immigrated with her family from a region of the former Soviet Union which is now the nation of Azerbaijan, when she was 12 years old. Along with other members of her family, she was granted political asylum. She has lived continually in the United States

since that time, has no friends or relatives in Azerbaijan, and indeed no longer even speaks the language that is spoken there.

- When she agreed to plead guilty, Ms. Ibragimova did not know that her conviction could or would cause her to be deported. In fact, her attorney specifically advised her that, because she possessed a "green card," she could not be deported as a result of the conviction. Had she known that she could or would be deported, she would not have taken the plea, and instead, would have exercised her right to a trial.

The respective parties filed briefs and trial court heard extensive argument on the Motion on October 8, 2010. In an Opinion and Order entered February 7, 2011[1], the court granted the Motion. The court held that the decision in *Padilla* is retroactive to cases, such as the instant one, in which the judgment was final before it was issued, because "*Padilla* did not announce a new rule, but merely applied the well-settled rule of *Strickland* [*v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)] to a particular set of facts. [Opinion, p 5] The court further held that trial counsel's failure to properly advise Ms. Ibragimova of the immigration consequences of her guilty plea violated *Strickland,* and entitled her to relief from judgment. [Opinion, p 8]

The prosecution filed a Delayed Application for Leave to Appeal the trial court's decision.

[1] Appendix A

I. BECAUSE SHE PLED GUILTY BASED ON HER ATTORNEY'S AFFIRMATIVE MISADVICE THAT HER CONVICTION COULD NOT RESULT IN DEPORTATION FROM THE UNITED STATES, MS. IBRAGIMOVA'S PLEA WAS NOT VOLUNTARY OR INTELLIGENT, AND SHE IS ENTITLED TO PLEA WITHDRAWAL BASED ON *PADILLA V KENTUCKY*.

Ms. Ibragimova is a non citizen legal resident of the United States, who immigrated with her family from a region of the former Soviet Union which is now the nation of Azerbaijan, when she was 12 years old. Along with other members of her family, she was granted political asylum. She has lived continually in the United States since that time, has no friends or relatives in Azerbaijan, and indeed no longer even speaks the language that is spoken there.

When she agreed to plead guilty to attempting to deliver drugs, Ms. Ibragimova did not know that her conviction could or would cause her to be deported. Because of her plea-based conviction, however, Ms. Ibragimova now faces imminent forcible removal from the United States, the only home she has known, virtually banished and exiled from family and abode.

Ms. Ibragimova's attorney never mentioned this eventuality to her. In fact, her attorney specifically advised her that, because she possessed a "green card," she could not be deported as a result of the conviction. Had she known that she could or would be deported, she would not have taken the plea, and instead, would have exercised her right to a trial.

Owing only to her attorney's serious dereliction in failing to properly advise her of the immigration consequences of pleading guilty, Ms. Ibragimova was denied the constitutional right to the effective assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, § 20; *Strickland v Washington, supra; People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994). The deprivation of this important right undermines the very foundation of the guilty plea, rendering it involuntary and unintelligent, and it must be withdrawn as a result.

The Court held in *Strickland* that a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *supra* at 687. First, the defendant must show that counsel's representation fell below an objective standard of reasonableness, and counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* at 687-688. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* This requires showing that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. In the guilty plea context, the second prong, or prejudice prong, is met by showing that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v Lockhart,* 474 US 52, 58; 106 S Ct 366; 88 L Ed 2d 203 (1985).

The long-standing test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v Ashford,* 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970). Before deciding to plead guilty, a defendant is entitled to the effective assistance of competent counsel. *McMann v Richardson,* 397 US 759, 771; 90 S Ct 1441; 25 L Ed 2d 763 (1970). Where a defendant is represented by counsel during the plea process and enters her plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann, id.* at 771. In *McMann* the Court held that a guilty plea must be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 766.

Ms. Ibragimova's situation closely resembles one which the Supreme Court of the United States recently addressed in *Padilla v Kentucky, supra,* where the Court ruled that the counsel was

ineffective for misadvising his client about the immigration consequences of his plea.[2] The defendant in *Padilla* was an immigrant from Honduras, who had lived in the United States as a lawful permanent resident of the United States for 40 years. He pled guilty to transporting a large quantity of marijuana, and faced deportation as a result. In post-conviction proceedings, it was established that his trial attorney had erroneously advised him that he "did not have to worry about immigration status since he had been in the country so long." The Court held that the defendant was deprived of the effective assistance of counsel under *Strickland, supra*, when counsel failed to inform him whether his plea carried a risk of deportation. *Padilla*, 130 S Ct at 1486. It is quintessentially the duty of counsel to provide his client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis." *Id.* at 1484.

Ms. Ibragimova's circumstance is no different, where she pled guilty based upon the erroneous misadvice by counsel that she would not be deported.

The lower court in *Padilla* had held that counsel was not obliged to advise on the immigration consequences of the plea, because such consequences were "collateral." The Supreme Court rejected this construct, holding that the distinction between collateral versus direct consequences is "ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Padilla, id* at 1482. The Court further noted that it had never applied that distinction in defining the scope of constitutionally "reasonable professional assistance" required under *Strickland. Padilla, supra* at 1481.

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[2] The *Padilla* decision implicitly overrules *People v Davidovich*,463 Mich 446, 618 NW2d 579 (2000), which previously held in Michigan that a failure of defense counsel to give immigration advice does not render counsel's representation ineffective in connection with a guilty plea.

Rather, the Court in *Padilla* recognized that "deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 1480. The Court elaborated that deportation is a devastating result, which is "intimately related to the criminal process." *Id.* at 1476. "The severity of deportation – 'the equivalent of banishment or exile,' – only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Id.* at 1486 (internal citations omitted). Counsel in *Padilla* affirmatively misadvised his client that there could be no immigration consequences to his conviction, but the Court clearly held that "there is no relevant difference 'between an act of commission and an act of omission' in this context." *Id.* at 1484 (internal citations omitted). Therefore, whether counsel gives no advice about deportation or wrong advice in that same regard, the right to effective counsel still breached.

The Court noted in *Padilla* that changes to the immigration law which were enacted in 1996 made removal (i.e. deportation) nearly an automatic result for a broad class of noncitizen offenders. *Id.* at 1477, 1481. As in the *Padilla* case, the consequences of Ms. Ibragimova's plea were easily ascertainable from simple reading of the removal statute, which mandates her deportation based on conviction for an "aggravated felony" or a "crime of violence." *See* 8 USC § 1227 (a)(2)(A)(iii) and 8 USC § 1101 (a)(43)(F). The Court held in *Padilla* that, even 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. *Id.* at 1483.

That did not occur in this case. Ms. Ibragimova's attorney gave her incorrect advice concerning the immigration consequences of her plea.

In her Affidavit[3], Ms. Ibragimova verifies that, had she known that she would face deportation on the basis of her conviction, she would not have pled guilty. Instead, she would have gone to trial, and held the prosecution to its burden of proving her guilt beyond a reasonable doubt. The Third Circuit held in *United States v Orocio,* 645 F3d 630 (CA 3, 2011) that, in order to prove harm under *Strickland,* the defendant must demonstrate that the decision to reject the plea bargain would have been rational under the circumstances. *Id.* at 644. The *Orocio* Court assumed the truth of the defendant's affidavit, indicating that he would have chosen to go to trial rather than enter a plea if he had known about the immigration consequences. *Id.* at 643.

Clearly, Ms. Ibragimova's choice to go to trial would have been rational under the circumstances, where there was a viable challenge the constitutionality of the stop and search of her vehicle, which gave rise to her conviction. And that choice remains rationale at this time, where she has fully served the sentence imposed for the offense and has now been discharged from probation, and moreover, where information she might provide about the drug trafficker for whom she was allegedly operating would still be very valuable information to the law enforcement, thus warranting a grant of consideration in her favor.

The Court in *Orocio* stated that the inquiry "does not focus solely on whether the defendant would have been found guilty at trial – *Padilla* reiterated that an alien defendant might rationally be more concerned with removal than with a term of imprisonment …" *Id.* The Court in *Padilla* recognized that "[p]reserving a client's right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla, supra* at 1483.

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[3] Affidavit, Appendix B. The original Affidavit tendered to the trial court has been mislaid. The attached Affidavit is identical, except that it bears a more recent date of execution. The attached version is unexecuted; however, an executed version will be forwarded to the court forthwith.

This is indeed Ms. Ibragimova's situation. Having lived in the United States for virtually all of her life, the threat of being forcibly removed from all of her family and friends, to a completely unfamiliar place and a regime whose persecution justified the grant of asylum in the first instance, is far more dangerous and fearful to her than whatever consequences might ensue from having a jury decide her fate for allegedly transporting marijuana.

Because she pled guilty solely on the basis of her attorney's incorrect to advice that she could not be deported, Ms. Ibragimova's plea is not voluntary or intelligent, and it must be withdraw as a result. MCR 6.302 (A); MCR 6.508(D)(3)(b)(ii); *Guilty Plea Cases*, 395 Mich 96, 129; 235 NW2d 132 (1975).

II. THE *PADILLA* CASE IS RETROACTIVELY APPLICABLE TO THIS CASE ON COLLATERAL REVIEW.

Ms. Ibragimova did not appeal her conviction on direct appeal. Because she never exercised an appeal of any kind, neither a showing of "good cause" nor "prejudice" under MCR 6.508 (D) is required. See *People v Harrington (On Remand),* No 188839 (Mich Ct App 1995), *lv den'd* 450 Mich 1024; 548 NW2d 645 (1996).[4]

Moreover, Ms. Ibragimova could not have raised the instant challenge on direct appeal, because the time allowed for filing a motion to withdraw her plea or for filing a delayed application for leave to appeal was expired when *Padilla* was decided on March 31, 2010. Michigan jurisprudence at the time of her plea provided that counsel was not ineffective for failing to advise of the risk of deportation. *People v Davidovich,* 463 Mich 446; 618 NW2d 579 (2000). It was not until the Supreme Court clarified in *Padilla* that the right to immigration advice arises under *Strickland* that Ms. Ibragimova was able to seek plea withdrawal based on the absence of that advice. Since the *Padilla* argument could not have been raised on direct appeal, Ms. Ibragimova is excused from failing to raise it in that context, under MCR 6.508 D)(3).

However, it is clear that the ruling in *Padilla* applies retroactively to cases such as the instant one, where the Judgment was final before the issuance of the *Padilla* ruling.

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[4] Appendix C.

The Padilla opinion itself contemplates retroactive application

It is obvious from the content of the *Padilla* opinion that the Court intended for its holding to be applied retroactively to convictions, such as that in the instant case, which had become final before that decision was issued. For that reason, the Court elaborately responded to criticism that its decision would "open the floodgates" to post-conviction litigation. *Padilla, supra* at 1485. In so doing, the Court noted that no such floodgate had ensued from prior decisions it had made identifying specific the protections afforded by the *Strickland* case. *Id.* The Court emphasized that, "[f]or at least 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea," and that, therefore, it could be presumed that attorneys were dutifully satisfying their obligation to render such advice. *Id.* To further assuage the fear that a deluge of challenges to plea-based convictions would proceed from its decision, the Court cited the infrequency with which guilty pleas are challenged in collateral proceedings, particularly noting that successful guilty plea challenges result in the loss of benefits obtained as a result of the plea bargain. *Id.* at 1485-1486.

Thus, it is clear that the Court regarded its decision in *Padilla* as the application of a long-existing rule concerning the obligations that the Sixth Amendment places on attorneys representing defendants in guilty plea proceedings, and therefore, a decision which would not be upsetting to the administration of justice.

Federal jurisprudence favors retroactive application of Padilla because it does not create a new rule

In *Teague v Lane,* 489 US 288, 311; 109 S Ct 1060; 103 L Ed 2d 334 (1989), a plurality of the Supreme Court espoused Justice Harlan's view of retroactivity that a federal constitutional rule of criminal procedure is applicable to those cases which have become final before it was

announced (here, March 31, 2010), unless it creates a new rule of law. The decision in *Padilla* thus applies to Ms. Ibragimova's case, because it does not create a new rule; rather, it simply implements the *Strickland* standard by applying it to the specific scenario presented by an attorney's failure to provide competent immigration advice to a non citizen defendant before she pleads guilty to a deportable offense.

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the states or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague, supra* at 301 (internal citations omitted)(emphasis in original). *Padilla*, by the Supreme Court's own assessment, was dictated by *Strickland* and its progeny, *Hill v Lockhart.*

Justice Harlan noted long before Teague that a decision does not announce a new rule where "it simply applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in prior case law." *Mackey v United States*, 401 US 667, 695; 91 S Ct 1160; 28 L Ed 2d 404 (1971)(Opinion of Harlan, J., concurring in part and dissenting in part); *see also Penry v Lynaugh*, 492 US 302, 314; 109 S Ct 2934; 106 L Ed 2d 256 (1989)(citing with approval Justice Harlan's approach to retroactivity, and holding that no new rule was created by the decision in *Jurek v Texas*, 428 US 262; 96 S Ct 2950; 49 L Ed 2d 929 (1976) which held that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires that the trial court instruct juries how to consider specific mitigating evidence in a particular case).

In *Williams v Taylor*, 529 US 362, 390-391; 120 S Ct 1495; 146 L Ed 2d 389 (2000), the Court held that applying *Strickland* to a particular set of facts does not constitute a new rule, because *Strickland* is the general test governing ineffective assistance claims, which implicitly

requires a case-specific analysis. "[I]t can hardly be said that recognizing the right to the effective assistance of counsel 'breaks new ground or imposes a new obligation on the States.'" *Williams v Taylor,* 529 US 362, 391; 120 S Ct 1495; 146 L Ed 2d 389 (2000)(holding in a death penalty case that the Virginia Supreme Court unreasonably applied *Strickland* in holding that the defendant was not denied the effective assistance of counsel when his attorney failed to present mitigating evidence at the penalty stage of his trial)(internal citations omitted).

Likewise, the following remarks by Justice Kennedy in *Wright v West,* 505 US 277, 308-309; 112 SCt 2482; 120 L Ed 2d 224 (1992) corroborate that a new rule does not emerge every time a case-specific assessment of counsel's performance is made under *Strickland,* because rules such as *Strickland* by definition require a case-specific analysis:

> 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. (Opinion of Kennedy, J, concurring).

Indeed, the Fifth Circuit held in *Burdine v Johnson,* 262 F3d 336 (CA 5, 2001) that no new rule was created even by the pronouncement of the *Strickland* case itself, because the *Strickland* decision was compelled by the Sixth Amendment. The Court granted habeas in *Burdine,* holding, under *Strickland,* and its companion case *United States v Cronic,* 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), that the defendant was deprived of the effective assistance of counsel when his attorney slept and doze through significant portions of his trial, and that prejudice was presumed pursuant to *Cronic*. *Id.* at 341. The Court held that a state court in 1987, when the defendant's conviction became final, "would have felt compelled by Supreme

Court precedent to conclude that the Sixth Amendment required a presumption of prejudice when a defendant's counsel slept repeatedly during the defendant's capital murder trial as evidence was being presented by the State," and that no new rule was created by the issuance of the *Strickland* and *Cronic* decisions. *Id.*

Since it decided *Padilla,* the Supreme Court has not squarely addressed the question of that case's retroactivity. Nor has any appellate Court in Michigan decided whether *Padilla* has retroactive application. However, this Court analogized to *Padilla* in deciding in *People v Fonville,* 291 Mich App363; 804 NW2d 878 (2011) that counsel owed a duty to advise his client that his plea-based conviction required him to register as a sex offender. This Court also recently invoked *Padilla* in an unpublished decision in *People v Abbas,* No 298862, 2011 WL 2347622 (June 14, 2011), where it remanded for an evidentiary hearing on the claim that trial counsel had failed that counsel misadvised him concerning his eligibility for Holmes Youthful Trainee status.

In one of the first cases to address the matter of *Padilla's* retroactivity, the federal district court in California rejected a prayer for reconsideration based on the intervening issuance of *Padilla,* stating that "*Padilla* did not newly recognize a right upon which defendant may rely …" and "[n]o clear error or intervening change in controlling law is present." *United States v Guzman-Garcia,* 2010 WL 1791247 (ED CA, 2010).

Since then, several federal Circuit Courts of Appeals, federal District Courts and state courts have found that *Padilla* did not create a new rule, and that it is therefore retroactively applicable on collateral appeal. *See, e.g., United States v Orocio, supra; United States v Shafeek,* 2010 WL 3789747 (ED MI, 2010); *Zapata-Banda v United States,* 2011 WL 1113586, (SD TX, 2011); *United States v Reid,* 2011 WL 3417235 (SD OH, 2011); *United States v Dass,* 2011 WL 2746181 (D MN, 2011); *Amer v United States,* 2011 WL 2160553 (ND MS, 2011); *United*

States v Diaz-Palmerin, 2011 WL 1337326 (ND IL, 2011); *Marroquin v United States*, 2011 WL 488985 (SD TX, 2011); *Commonwealth v Clarke*, 949 NE2d 892 (Mass Supreme Court, 2011); *Ex Parte Tanklevskaya*, ___ SW3d ___; 2011 WL 2132722 (Texas Court of Appeals, 2011); *Campos v State*, 798 NW2d 565 (2011)(Minn Court of Appeals).[5]

In concluding that *Padilla* is retroactive, the Third Circuit in *Oracio, supra* observed that "*Strickland* did not freeze into place the objective standards of attorney performance prevailing in 1984, never to change again." *Id.* at 639. The Court emphasized that there was nothing novel or unprecedented about the duty to provide sound legal advice concerning the immigration consequences of a guilty plea:

> *Strickland* and *Hill* [v *Lockhard, supra*] require[] counsel to advise criminal defendant at the plea stage in accordance with precedent and prevailing professional norms to ensure that the defendant makes an informed, knowing, and voluntary decision whether to plead guilty. *Padilla* is set within the confines of *Strickland* and *Hill*, as it concerns what advice an attorney must give to a criminal defendant at the plea stage. When Mr. Oracio pled guilty, it was "hardly novel" for counsel to provide advice to defendants at the plea stage concerning the immigration consequences of a guilty plea, undoubtedly an important decision for a defendant …We therefore hold that *Padilla* broke no new ground in holding the duty to consult also extended to counsel's obligation to advise the defendant of the immigration consequences of a guilty plea and did not yield [] a result so novel that it forge[d] a new rule. *Oracio, supra* at 639 (internal citations omitted)

In accordance with this reasoning, this Court should agree that *Padilla* applies retroactively to Ms. Ibragimova's circumstance.

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[5] Other jurisdictions have reached a contrary result. *See, e.g., Santiago v State*, 65 S.3d 575 (Fla Court of Appeal, 2011) *United States v Gilbert*, 2010 WL 4134286 (D NJ, 2010); *United States v Abraham*, 2011 WL 3882290 (D NB, 2011); *United States v Chang Hong*, ___ F3d ___, 2011 WL 3805763 (CA 10, 2011); *Chaidez v United States*, 655 F3d 684, (CA 7, 2011).

Even if Padilla does pronounce a new rule, it should still be applied retroactively

Under *Teague,* if a case does pronounce a new rule, it can only be applied to retroactively to cases proceeding on collateral review if the rule either decriminalizes a class of conduct or is a "watershed" rule that implicates the fundamental fairness and accuracy of a criminal proceeding. *Saffle v Parks,* 494 US 484, 494-495; 110 S Ct 1257; 108 L Ed 2d 415 (1990) (citing *Teague,* 489 US at 311). The second exception covers what *Teague* termed "watershed rules of criminal procedure," which the Court described as "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague,* at 313. It is this exception which obtains in the instant case.

Significantly, in defining these exceptions to the general rule against retroactivity, the *Teague* Court quoted Justice Harlan's earlier commentary, pointing to the right to counsel at trial as a primary example of a "watershed rule" that seriously impacts the accuracy of a conviction. *Teague,* at 311. The Supreme Court has continued to emphasize that decisions involving the right to counsel are paradigmatic examples of watershed rules. *Beard v Banks,* 542 US 406, 417; 124 SCt 2504; 159 L Ed 2d 494 (2004) ("[i]n providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963)(right to counsel).")

The Sixth Amendment right to counsel is the right to the effective assistance of counsel. *Strickland, supra.* Ms. Ibragimova was deprived of this essential right when her attorney rendered inept and legally deficient advice ignoring the grave consequences of her plea. Because it pertains to the important right of counsel, *Padilla* should apply retroactively to this case.

Even if Padilla does create a new rule, Michigan jurisprudence favors its retroactive application

The Court in *People v Maxson,* 482 Mich 485; 759 NW2d 817 (2008) employed the *Teague* analysis in concluding that the decision in *Halbert v Michigan,* 545 US 605; 125 S Ct 2585; 162 L Ed 2d 552 (2005) was a new rule which should not be applied retroactively to cases in which a defendant's conviction had become final. However, the *Maxson* Court also held that analysis under the *Teague* framework was not dispositive, since "[a] state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords." *Maxson, supra* at 392 (citing *Danforth v Minnesota,* 552 US 264; 128 S Ct 1029; 169 L Ed 2d 859 (2008).

The Court stated in *Danforth* that "[a] close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion." *Danforth, id* at 128 S Ct 1039. That Court went on to say that "[i]t is a matter that States should be fee to evaluate, and weight the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal right in their lower courts. *Id.* at 1041. As was stated by Judge Higginbotham in *Burdine,* "*Teague* is a rich and powerful discipline for the wielding of federal power." *Burdine, supra* at 351 (Opinion of Higginbotham, J., joined by King, C.J., Davis and Weiner, JJ., concurring). Thus, *Teague* does not restrain this Court from providing a remedy that Michigan courts previously wrongfully denied.

Michigan has employed the three factors set forth in *People v Sexton,* 458 Mich 43, 60-61; 580 NW2d 404 (1998) for whether a new rule of criminal procedure should be applied retroactively:

> (1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice.

Application of the "purpose" prong may not favor retroactivity of *Padilla*[6], but application of the second and third prongs does counsel its retroactive application.

When considering "general reliance on the old rule," a court examines whether individuals have been adversely positioned in reliance" on the old rule. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 221; 731 NW2d 41 (2007). To be considered to have detrimentally relied on the old rule, a defendant must have relied on the rule in not pursuing an appeal and have suffered harm as a result of that reliance. *Maxson, supra* at 395.

Ms. Ibragimova satisfies this requirement, as existing precedent in Michigan when she pled guilty held that counsel was not obligated to provide immigration advice to be effective under *Strickland. People v Davidovich, supra.*

The effect of the rule on the administration of justice also favors retroactive application. The numbers of persons who will be affected by such application is necessarily small. The rule only applies to non citizen defendants who are legal residents of the United States, and who plead guilty to deportable offenses. Citizens cannot be deported, and unlawful residents are deportable by virtue of their unlawful status alone. Presumably, many of those who were deportable have since been deported, and thus are not available to file post-conviction pleadings. And the rule would only apply to those who are willing to lose the benefits obtained under their guilty pleas and incur the risks of withdrawing those pleas, which frequently will include

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[6] Under the "purpose" prong, a law may be applied retroactively when it "concerns the ascertainment of guilt or innocence;'" however, "'a new rule of procedure which does not affect the integrity of the fact-finding process should be given prospective effect.'" *Maxson, supra* at 393(internal citations omitted).

additional convictions and higher sentences. Therefore, the numbers who will seek relief under the rule are few.

For all of these reasons, this Court should find that the *Padilla* decision applies to Ms. Ibragimova's situation and entitles her to withdraw her guilty plea. Accordingly, Ms. Ibragimova asks that this Honorable Court deny the prosecution's application for leave to appeal, and leave intact the lower court's grant of relief from judgment.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, this Court should uphold the trial court's ruling that *Padilla* does apply retroactively to Ms. Ibragimova's situation, which mandates a finding that counsel was ineffective in her case, thus entitling her to withdraw her guilty plea.

Respectfully submitted,

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