Supreme Court, Appellate Division, First Department, New York.
The PEOPLE of the State of New York, Respondent,
v.
Roman BARET, Defendant–Appellant.

Oct. 2, 2012.

Labe M. Richman, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

MAZZARELLI, J.P., SAXE, DEGRASSE, RICHTER, ABDUS–SALAAM, JJ.

***1** Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about March 3, 2011, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court (John E.H. Stackhouse, J. at plea and motion to withdraw plea; Albert Lorenzo, J. at sentencing), rendered December 20, 2004, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 2 to 6 years, unanimously reversed, on the law, and the matter remitted to Supreme Court for a hearing.

To establish ineffective assistance of counsel under federal constitutional standards, a defendant must demonstrate both that counsel's performance was deficient and that the deficient performance resulted in prejudice (*Strickland v. Washington,* 466 U.S. 668 [1984]). In ***Padilla v. Kentucky*** (**559 U.S**. ––, **130 S Ct 1473** [**2010**]), the Supreme Court held that a constitutionally competent attorney must advise his or her client of the immigration consequences of a guilty plea. Defendant moved to vacate judgment, alleging that counsel did not advise him that his conviction would result in his being deported, prohibited from re-entering the United States and forever barred from citizenship, and that had he known of these consequences, there was a reasonable probability that he would have gone to trial.

We conclude that ***Padilla,*** decided after defendant's conviction was affirmed on direct appeal (43 AD3d 648 [2007], *affd* 11 NY3d 31 [2008]), should be applied retroactively. To determine whether a rule is to be applied retroactively, the court must determine whether the rule is "new" or "old" (*Teague v. Lane,* 489 U.S. 288, 301 [1989]; *People v. Eastman,* 85 N.Y.2d 265, 275 [1995]). When a Supreme Court decision applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an "old" rule, and is always retroactive (*Eastman,* 85 N.Y.2d at 275).

Prior to ***Padilla,*** the Court of Appeals held that deportation was a collateral consequence, so that the failure of counsel to warn a defendant of the possibility of deportation as a result of a guilty plea did not constitute ineffective assistance of counsel (*see People v. Ford,* 86 N.Y.2d 397, 405 [1995]). Actual misadvice by counsel concerning immigration consequences of a plea, however, could constitute ineffective assistance of counsel (*see People v. McDonald,* 1 NY3d 109 [2003]).

We conclude that ***Padilla*** did not establish a "new" rule under *Teague;* rather, it followed from the clearly established principles of the guarantee of effective assistance of counsel under *Strickland,* and "merely clarified the law as it applied to the particular facts" (*United States v. Orocio,* 645 F3d 630, 639 [3d Cir2011] [internal quotation marks omitted]; *but see Chaidez v. United States,* 655 F3d 684 [7th Cir2011], *cert granted* –– U.S. ––––, 132 S Ct 2101 [2012]). Rather than overrule a clear past precedent, ***Padilla*** held that *Strickland* applies to advice concerning deportation, whether it be incorrect advice or no advice at all (*see People v. Nunez,* 30 Misc.3d 55 [Appellant Term, 2d Dept 2010], *lv denied* 17 NY3d 820 [2011]; *but see People v. Kabre,* 29 Misc.3d 307 [Crim Ct, N.Y. County 2010]).

2** We note that defendant's plea was taken on December 23, 1996. We express no opinion on the applicability of ***Padilla to pleas taken before 1996, a year in which there were significant changes in immigration law.

Applying ***Padilla*** retroactively, we conclude from the submissions on the motion to vacate judgment that a hearing is required on the issues of what advice, if any, counsel gave defendant regarding the immigration consequences of his plea, and, assuming the advice was constitutionally deficient, whether there is a reasonable probability that but for this deficiency, defendant would have gone to trial (*see Hill v. Lockhart,* 474 U.S. 52, 59 [1985]).

N.Y.A.D. 1 Dept.,2012.
People v. Baret
--- N.Y.S.2d ----, 2012 WL 4490828 (N.Y.A.D. 1 Dept.), 2012 N.Y. Slip Op. 0655