Journal of Law and Policy

Volume 20
Issue 2
SYMPOSIUM: Meaningful Reciprocity - In Honor of Clare Dalton

Article 16

2012

Padilla V. Kentucky: Bending Over Backward for Fairness in Noncitizen Criminal Proceedings

Alison Syre

PADILLA V. KENTUCKY: BENDING OVER BACKWARD FOR FAIRNESS IN NONCITIZEN CRIMINAL PROCEEDINGS

Alison Syré∗

INTRODUCTION

Zhong Lin was born in China, but has lived in the United States for most of his adult life.[1] Until 2007, Mr. Lin lived with his wife and two children, ages eleven and nine, all three of whom are United States citizens.[2] He had strong business interests in the United States, as well as family and community ties, but never became a U.S. citizen.[3] Mr. Lin considers himself to be entirely American, and sees China merely his place of birth.[4] In 2007, Mr. Lin was charged with one count of conspiracy to commit tax fraud.[5] Upon the advice of his attorney, he entered into a plea agreement, under which he agreed to plead guilty in exchange for a sentence of one year of probation, restitution payments to the IRS, and a fine.[6] Mr. Lin fulfilled each element of his sentence, but his attorney failed to

---

∗ J.D. Candidate, Brooklyn Law School, 2013; B.A. University of Wisconsin–Madison, 2008. The author would like to thank her family and friends for their support during the writing process. She also wholeheartedly thanks the members of the *Journal of Law & Policy* for their stellar efforts in preparing this Note for publication, and James Fox, Esq. for sparking her interest in this topic.

[1] United States v. Zhong Lin, No. 3:07-CR-44-H, 2011 WL 197206, at *3 (W.D. Ky. Jan. 20, 2011).

[2] *Id.* at *1, *3.

[3] *Id.* at *3.

[4] *See id.*

[5] *Id.* at *1.

[6] *Id.* at *1, *3.

tell him one very important thing: his guilty plea would render him deportable.[7]

Roselva Chaidez's story has many similarities. Ms. Chaidez is a lawful permanent resident from Mexico, who entered the United States in 1971.[8] She is a fifty-four-year-old grandmother of three, all United States citizens.[9] In 2003, she had been living in northern Illinois for more than twenty-five years.[10] That year, Ms. Chaidez was charged with multiple counts of mail fraud.[11] With the advice of counsel, she pled guilty to two of the counts, and was sentenced to four years probation and ordered to pay restitution and a fine.[12] In 2009, Ms. Chaidez's citizenship petition was denied, and the Department of Homeland Security placed her in removal proceedings based on her mail fraud conviction.[13] For her plea, Ms. Chaidez "forfeited her right to a trial and ultimately her privilege of remaining a free and lawful permanent resident, living in the only society she knows."[14] Like Mr. Lin, Ms. Chaidez's attorney did not inform her that her plea would render her deportable.[15]

Mr. Lin and Ms. Chaidez both challenged their guilty pleas following the Supreme Court's 2010 decision in *Padilla v. Kentucky*,[16] which held that the failure to inform a defendant of the potential immigration consequences of pleading guilty

---

[7] *See id.* at *2 (crediting Lin's testimony that he "entered into his plea agreement based upon mistaken legal advice only recently revealed").

[8] Brief of Defendant-Appellee at *3, Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) (No. 10-3623).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at *8–9.

[15] *Id.* at *7–8.

[16] *See generally* United States v. Chaidez, 730 F. Supp. 2d 896, 898 (N.D. Ill. 2010), *rev'd* 654 F.3d 684 (7th Cir. 2011); Motion to Withdraw Plea of Guilty and Set Aside Judgment of Conviction and Sentence, United States v. Zhong Lin, No. 07CR00044, 2010 WL 6510225 (W.D. Ky. Nov. 19, 2010) [hereinafter Motion to Withdraw Plea].

constitutes ineffective assistance of counsel.[17] Despite their nearly identical circumstances, however, the courts hearing their petitions came to vastly different outcomes due to a difference in opinion regarding whether *Padilla* applied retroactively.[18] Mr. Lin filed a writ of *coram nobis* to challenge his federal conviction in the Western District of Kentucky.[19] Judge Heyburn of that court determined that *Padilla* applied retroactively and, accordingly, could provide relief for Mr. Lin, even though it was decided after Mr. Lin's conviction became final.[20] Judge Heyburn granted Mr. Lin's petition for *coram nobis*, and Mr. Lin is now free to continue living in the United States.[21] Ms. Chaidez also filed a writ of *coram nobis*,[22] which was initially granted by Judge Gottschall in the Northern District of Illinois.[23] On appeal in the Seventh Circuit, however, a two-judge majority found *Padilla* did not apply retroactively, making relief unavailable to individuals such as Ms. Chaidez, whose convictions had already become final.[24] The ruling maintained Ms. Chaidez's conviction, as well as her deportable status. One can imagine that, had Ms. Chaidez been living in Western Kentucky, rather than Northern Illinois, her case may have turned out very differently.

Deportation may be the most severe part of the penalty that can be imposed on noncitizen defendants.[25] Yet, until *Padilla*,

---

[17] Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

[18] *See* Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011); United States v. Zhong Lin, No. 3:07-CR-44-H, 2011 WL 197206, at *1–2 (W.D. Ky. Jan. 20, 2011).

[19] *See generally* Motion to Withdraw Plea, *supra* note 16.

[20] *Id.* at *1–2.

[21] *Id.* at *3.

[22] United States v. Chaidez, 730 F. Supp. 2d 896, 898 (N.D. Ill. 2010), *rev'd*, 654 F.3d 684 (7th Cir. 2011).

[23] *Id.* at 904.

[24] *Id.* at 694. Judge Williams dissented, framing *Padilla* as an application of an old rule (*Strickland*) to new facts. *Id.* at 694–96 (Williams, J., dissenting). Since Judge Williams was one of only three judges considering Ms. Chaidez' petition, the result was essentially dictated by the fact that one way of framing *Padilla*'s rule got one more vote than another. *See id.*

[25] Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

most courts considered deportation a "collateral consequence" of a guilty plea, which an attorney had no duty to discuss with her client.[26] It is clear that, post-*Padilla*, defendants who do not receive immigration advice from counsel before entering a guilty plea have a viable claim with which they may challenge their conviction.[27] It is unclear, however, whether defendants whose convictions became final *before Padilla* (such as Mr. Lin and Ms. Chaidez), will also reap the benefit of the *Padilla* decision. The Supreme Court has yet to address the issue of the retroactive application of *Padilla*, and it appears unlikely that it will do so in the near future.[28] Thus, it is imperative that lower courts correctly interpret *Padilla* to apply retroactively, as this interpretation is most accurate and helps correct the injustice suffered by ill-informed and uninformed noncitizen defendants.

This Note argues that an accurate application of *Padilla* requires courts to properly frame the rule of *Padilla* so as to apply the decision retroactively. Part IA provides an overview of recent changes to the relationship between criminal and immigration law, as well as a summary of the Supreme Court's decision in *Padilla v. Kentucky*.[29] Part IB explores the question of *Padilla*'s retroactive applicability and the potentially substantial consequences of the slight variation in courts' framing of *Padilla's* rule.[30] Part IC examines the reasoning of courts that have arrived at contradictory interpretations of the rule.[31] Part II recommends two ways for courts to properly apply *Padilla* to ensure that defendants whose convictions became final

---

[26] *See infra* Part I.

[27] Defendants convicted in federal courts challenge their convictions under 28 U.S.C. § 2255. Act of June 25, 1948, 28 U.S.C. § 2255 (2006). Defendants convicted in state court may do so under state post-conviction relief statutes, *see, e.g.*, N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005), and under 28 U.S.C. § 2254 once they have exhausted their state remedies. *See* 28 U.S.C. § 2254(a).

[28] The Supreme Court denied certiorari on a case presenting the issue of *Padilla*'s retroactivity as recently as October 2011. *See* Commonwealth v. Morris, 705 S.E.2d 503 (2011), *cert. denied*, 132 S. Ct. 115 (2011).

[29] *See infra* Part IA.

[30] *See infra* Part IB.

[31] *See infra* Part IC.

before the decision realize the benefits of *Padilla*. Part IIA gives several reasons why it is more appropriate for courts to frame *Padilla*'s rule as "the right to effective counsel"; Part IIB discusses state courts' unique ability to give broader effect to *Padilla*, even if it is deemed "nonretroactive" under federal standards; and Part IIC assures that neither option will greatly disrupt interests of finality.[32] The Note concludes that it is incumbent upon courts to apply *Padilla* retroactively and to correct the harm to noncitizens whose lives have been upended by their counsels' failure.

I. THE *PADILLA* LANDSCAPE AND THE QUESTION OF RETROACTIVITY

Before 2010, most courts recognized a distinction between the criminal and civil consequences of criminal convictions in the case of a non-citizen defendant.[33] The specific elements of a defendant's sentence were considered criminal or "direct" consequences, whereas the deportation implications of a criminal conviction were considered civil or "collateral" consequences.[34] The latter were considered outside the scope of representation required by the Sixth Amendment.[35] Thus, the failure of a defense attorney to advise his or her client of any civil consequence of a criminal conviction was not grounds for an ineffective counsel claim.[36]

Two pieces of legislation—The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[37] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

---

[32] *See infra* Part II.

[33] Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 307 (2011).

[34] *Id.*

[35] United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003).

[36] *Id.*

[37] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C.).

("IIRIRA")[38]—created even more overlap between criminal law and civil immigration law. Both dramatically expanded the list of deportable criminal offenses and eliminated judicial discretion over certain types of deportation orders.[39] In the wake of this legislation, deportation is often a virtually automatic result of criminal conviction.[40] Additionally, AEDPA and IIRIRA apply retroactively, rendering deportable countless noncitizens that were charged and convicted at a time when deportation was less than a remote possibility.[41] These results have led many to complain that the laws are unduly harsh.[42]

A. Padilla v. Kentucky

In its 2010 decision in *Padilla v. Kentucky*,[43] the United States Supreme Court took a significant step in addressing the overlap between criminal and civil consequences, acknowledging the unworkable nature of the "direct" versus "collateral"

---

[38] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8, 18, 28 U.S.C.).

[39] Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 99–100 (1998).

[40] Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891 (2000).

[41] *See* Morawetz, *supra* note 39, at 97, 99; *see also* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 708–09 (2008) ("[D]ue to the retroactive nature of the grounds of deportation expanded in 1996, non-citizens who pled guilty many years ago will now face immigration consequences if the government becomes aware of their past offenses.").

[42] *See, e.g.*, Amy Langenfeld, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041 (1999); Morawetz, *supra* note 39, at 97. The effects of these laws may be felt most strongly by certain groups. *See* Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315 (2009); Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382 (2009).

[43] Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

distinction.[44] In that case, Jose Padilla, a native of Honduras and a Vietnam War veteran, who had been a lawful permanent resident of the United States for more than forty years, pled guilty to drug charges.[45] As a result, Padilla faced mandatory deportation under U.S. immigration law.[46] In post-conviction proceedings, Padilla alleged that his counsel had "not only failed to advise him of [deportation consequences] prior to entering his plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'"[47] Padilla claimed that, were it not for his counsel's erroneous advice, he would have insisted on going to trial,[48] and he thereby challenged the plea's validity under the ineffective counsel test of *Strickland v. Washington*.[49] According to *Strickland*, a defendant may challenge the validity of his guilty plea on the basis of ineffective assistance of counsel by showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. . . . [And] that the deficient performance prejudiced the defense."[50]

The Supreme Court found that, under *Strickland*, the failure of Padilla's counsel to inform Padilla of the immigration consequences of pleading guilty rendered counsel's performance constitutionally deficient.[51] The Court found the distinction between "direct" and "collateral" consequences ill suited for the case because of the close connection between deportation and the criminal process.[52] Writing for the majority, Justice Stevens explained that defense counsel had an obligation to inform

---

[44] *See id*. at 1482.

[45] *Id.* at 1477.

[46] *Id.*; see also Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

[47] *Padilla*, 130 S. Ct. at 1478 (citing Padilla v. Kentucky, 253 S.W.3d 482, 483 (Ky. 2008)).

[48] *Id.*

[49] Strickland v. Washington, 466 U.S. 668 (1984).

[50] *Id.* at 687.

[51] *Padilla*, 130 S. Ct. at 1482–83.

[52] *Id.* at 1482.

clients of the possible deportation consequences of their plea.[53] Failure to do so, the Court held, provided the defendant the basis for a claim of ineffective counsel under *Strickland*.[54] In arriving at this conclusion, the Court considered the changing landscape of federal immigration law over the last ninety years, and noted that

> [w]hile once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.[55]

In light of these changes, the Court considered deportation consequences to be "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."[56]

The Court further noted that professional norms already supported the view that defense counsel was obligated to inform her client of the risk of deportation.[57] These professional standards strongly indicated that counsel's failure to inform her client rendered her performance ineffective, since, under *Strickland,* the evaluation of whether counsel's performance is

---

[53] *Id.* at 1483.

[54] *See id*. at 1482.

[55] *Id.* at 1478 (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

[56] *Id.* at 1480.

[57] *Id.* at 1482 (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.2(f), at 116 (3d ed. 1999); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.1(a), at 197 (3d ed. 1993); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 13:23, at 555, 560 (3d ed. 2004); G. NICHOLAS HERMAN, PLEA BARGAINING § 3.03, at 20–21 (1997); 2 INST. OF LAW & JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, at D10, H8–H9, J8 (2000); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2 (1995); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 713–18 (2002)).

constitutionally deficient is "necessarily linked to practice and expectations of the legal community."[58]

B. Retroactivity and the Problem of Framing

Padilla has been lauded by many in the legal community as a great step towards preventing avoidable and wrongful deportations.[59] The decision provides a new avenue of post-conviction relief for noncitizen criminal defendants.[60] Many courts are now struggling, however, with the question of whether the relief secured by *Padilla* is available to a defendant whose conviction became final before *Padilla*, but who is still awaiting the deportation resulting from that conviction. Courts are greatly divided on the issue of retroactivity.[61]

Under *Teague v. Lane*—the seminal case on the retroactive application of new decisions dealing with constitutional criminal

---

[58] *Id.*

[59] *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461, 1463 (2011).

[60] *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1137–51 (2011).

[61] For cases applying *Padilla* retroactively, see generally United States v. Orocio, 645 F.3d 630 (3d Cir. 2011); United States v. Dass, No. CRIM. 05-140 (3) JRT, 2011 WL 2746181 (D. Minn. July 14, 2011); Marroquin v. United States, No. M-10-156, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011); Martin v. United States, No. 09-1387, 2010 WL 3463949 (C.D. Ill. Aug. 25, 2010); Al Kokabani v. United States, No. 5:06-CR–207-FL, 2010 WL 3941836 (E.D.N.C. July 30, 2010); United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625 (E.D. Cal. July 1, 2010); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011); People v. Garcia, 907 N.Y.S.2d 398, 400 (Sup. Ct. 2010); *Ex parte* Tanklevskaya, No. 01-10-00627-CR, 2011 WL 2132722 (Tex. Ct. App. May 26, 2011). For cases declining to apply *Padilla* retroactively, see generally United States v. Chang Hong, No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011); Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011); United States v. Gilbert, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286 (D.N.J. Oct. 19, 2010); State v. Truong, No. CR-96-1681, 2010 Me. Super. LEXIS 104 (July 30, 2010); People v. Kabre, 905 N.Y.S.2d 887 (Crim. Ct. 2010).

procedure[62]—"an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."[63] A new rule may apply retroactively, however, if "(1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[64] *Padilla* did not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and therefore did not create a substantive rule.[65] A watershed decision is one that "requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[66] The exception is based on the idea that "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will [at times] properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[67] This exception, however, is very narrow[68] and neither the courts nor this Note advocate its application to *Padilla*.[69] The Court in *Teague* admitted the difficulty in determining whether a case announces a new rule but gave limited guidance, explaining that "a case announces a new rule when it breaks new ground or imposes a new

---

[62] Teague v. Lane, 489 U.S. 288 (1989).

[63] Whorton v. Bockting, 549 U.S. 406, 416 (2007).

[64] *Id.* (citing Saffle v. Parks, 494 U.S. 484, 495 (1990)).

[65] *Teague*, 489 U.S. at 307 (explaining the "substantive rule" exception); *see also* State v. Gaitan, No. A-109-10, 2012 WL 612311, at *12 (N.J. Feb. 28, 2012) ("[*Padilla*] does not implicate substantive criminal activity . . . .").

[66] *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971)).

[67] *Id.* (quoting *Mackey*, 401 U.S. at 693–94) (internal quotation marks omitted).

[68] *See* Beard v. Banks, 542 U.S. 406, 407 (2004) (discussing the narrowness of *Teague*'s "watershed" exception).

[69] *See, e.g.*, United States v. Chang Hong, No. 10-6294, 2011 WL 3805763, at *8–9 (10th Cir. Aug. 30, 2011) (finding that *Padilla* was not a watershed decision); Mathur v. United States, Nos. 7:07-CR-92-BO, 7:11-CV-67-BO, 2011 WL 2036701, at *2 (E.D.N.C. May 24, 2011) (same); Doan v. United States, 760 F. Supp. 2d 602, 605–06 (E.D. Va. 2011) (same).

obligation on the States or the Federal Government," or "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[70]

Courts faced with petitions for post-conviction relief relying on a retroactive application of *Padilla* are all faced with the same question: Does *Teague* prohibit retroactive application of *Padilla*? Although the question is the same, courts are coming to starkly different answers; much of the variation may be attributed to a difference in rule framing. In the course of their *Teague* analyses, courts are framing *Padilla*'s rule one of two ways—the right to effective counsel or counsel's requirement to inform clients of the potential immigration consequences. A court's choice as to how to frame *Padilla*'s rule effectively determines whether a defendant will be permitted to stay in the country or be removed.[71]

Courts rarely announce a rule in explicit terms; in fact, courts determining whether *Padilla* created a new rule for *Teague* purposes appear hesitant to directly identify what exactly *Padilla*'s rule is.[72] Even in the absence of a clear announcement, however, the way these courts frame *Padilla*'s rule can be deduced from the language and reasoning they use.

In *Doan v. United States*, the Eastern District of Virginia considered Justice Alito's suggestion in his concurrence that defense counsel merely be required to inform clients that a conviction may have immigration consequences, without attempting to explain what those consequences may be.[73] The *Doan* court described Justice Alito's recommendation as a "different *rule* than the one adopted by the majority."[74] From this, it can be inferred that the *Doan* court interpreted *Padilla*'s

---

[70] *Teague*, 489 U.S. at 301.

[71] *See* Wright v. West, 505 U.S. 277, 311 (1992) ("The crux of the analysis when *Teague* is invoked . . . is identification of the rule on which the claim for [post-conviction] relief depends.").

[72] Certainly some courts do directly identify *Padilla*'s rule. *See* Amer v. United States, No. 1:06CR118-GHD, 2011 WL 2160553, at *3 (N.D. Miss. May 31, 2011).

[73] *Doan*, 760 F. Supp. 2d at 605 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring)).

[74] *Id.* (emphasis added).

majority rule as requiring counsel to inform clients of the potential immigration consequences of a conviction. After framing the rule as such, the *Doan* court found that *Padilla* created a new rule, and was therefore not retroactive.[75]

The District Court of New Jersey was clearer about what it determined *Padilla*'s rule to be in *U.S. v. Gilbert*.[76] The *Gilbert* court concluded that the "*Padilla* decision *requiring counsel to advise a non-citizen client of deportation consequences* is a new constitutional rule and should not be applied retroactively to Plaintiff's 2006 sentence."[77] Like the *Doan* court, the *Gilbert* court framed *Padilla*'s rule in a narrow, fact-specific way. The rule, as characterized by the *Gilbert* court, was a departure from prior case law and professional norms and was worthy of the "new rule" label.[78]

Courts applying *Padilla* retroactively, on the other hand, have framed the rule very differently. In *Commonwealth v. Clarke*, for instance, the Supreme Court of Massachusetts found guidance in previous United States Supreme Court decisions explaining that the *Strickland* test "is one which of necessity requires a case-by-case examination of the evidence,"[79] and that "application of *Strickland* in [a] novel context [does] not create [a] new rule."[80] The *Clarke* court concluded, "*Padilla* is not a 'new rule' but merely an application of *Strickland*,"[81] and consequently applied retroactively under *Teague*.[82] Other courts applying *Padilla* retroactively use similar reasoning, demonstrating a common choice in framing.[83]

---

[75] *Id.* at 605–06.

[76] *See generally* United States v. Gilbert, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286 (D.N.J. Oct. 19, 2010).

[77] *Id.* at *3 (emphasis added).

[78] *See id.* (ruminating on the lack of Third Circuit or Supreme Court rulings on whether "an attorney must make a client aware of possible future immigration proceedings . . . .").

[79] Commonwealth v. Clarke, 949 N.E.2d 892, 900 (Mass. 2011) (quoting Williams v. Taylor, 529 U.S. 362, 382 (2000)).

[80] *Id.* (quoting Osagiede v. United States, 543 F.3d 399, 408 n.4 (7th Cir. 2008)).

[81] *Id.* at 901.

[82] *Id.* at 904.

[83] *See, e.g.*, People v. Garcia, 907 N.Y.S.2d 398, 404 (Sup. Ct. 2010)

The framing in *Doan* and *Gilbert* is typical of courts that have declined to apply *Padilla* retroactively. These courts framed *Padilla*'s rule as counsel's duty to inform clients of deportation consequences of pleas.[84] Since this rule was not "*dictated* by precedent existing at the time the defendant's conviction became final," it is necessarily a new rule[85] and may not be applied retroactively unless it qualifies for one of *Teague*'s very narrow exceptions.[86] In contrast, courts that have applied *Padilla* retroactively, such as the *Clarke* court, frame the rule as the right to effective counsel, as explained in *Strickland*.[87] According to those courts, the right to counsel does not "break[] new ground or impose[] a new obligation on the State or Federal Government"; rather, it is an old rule[88] and must apply retroactively. As these cases demonstrate, the way that a particular court frames *Padilla*'s rule effectively dictates the eventual outcome of its retroactivity analysis.

C. Split Among the Courts

Following *Padilla*, various courts have applied the *Teague* doctrine to allegations involving plea deals entered into pre-*Padilla*, and have come to opposite conclusions regarding the retroactive application of the *Padilla* decision.[89] This variation

---

(concluding *Padilla* merely "applied its *Strickland* precedents to a new set of facts").

[84] *See* Doan v. United States, 760 F. Supp. 2d 602, 605 (E.D. Va. 2011); United States v. Gilbert, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286, at *3 (D.N.J. Oct. 19, 2010).

[85] Teague v. Lane, 489 U.S. 288, 301 (1989).

[86] Although a few writers advocate application of *Teague*'s "watershed rule" exception to *Padilla*, this view is not generally supported. *See infra* Part I.C.

[87] *See, e.g.*, Al Kokabani v. United States, No. 5:06-CR-207-FL, 2010 WL 3941836, at *5 (E.D.N.C. July 30, 2010); *Clarke*, 949 N.E.2d at 904; *Garcia*, 907 N.Y.S.2d at 400.

[88] *Teague*, 489 U.S. at 301.

[89] *See* cases cited *supra* note 61 (listing cases applying *Padilla* retroactively and cases not applying *Padilla* retroactively, all using the *Teague* retroactivity analysis).

may be due to a difference in framing.[90] Through an examination of specific reasons courts have provided in their retroactivity analysis, it is apparent that the difference in rule framing pervasively dictates results.

Courts that have applied *Padilla* retroactively have identified *Padilla*'s rule as the right to effective counsel, as explained in *Strickland*. Such framing produces an "old rule" for *Teague* purposes, and therefore requires retroactive application. Some courts have found further support for this conclusion in language from the *Padilla* opinion. Courts that have declined to apply *Padilla* retroactively have identified *Padilla*'s rule as counsel's requirement to inform clients of the potential immigration consequences of a guilty plea. Such framing produces a "new rule" for *Teague* purposes, and therefore prohibits retroactive application. These courts have found that neither of the exceptions to *Teague*'s rule that new rules of criminal procedure do not apply retroactively apply to *Padilla*.

The majority of opinions applying *Padilla* retroactively have found that the decision did not create a new rule.[91] The Third Circuit took this approach in *United States v. Orocio*. In *Orocio*, the court held that *Padilla* recognized "that a plea agreement's immigration consequences constitute the sort of information an alien defendant needs" in order to make decisions "affecting the outcome of the plea process."[92] Thus, according to the *Orocio* court, the requirement that counsel inform his or her client of immigration consequences provides nothing new, as "the Court had long required effective assistance of counsel on all 'important decisions,' in plea bargaining that could 'affect[] the

---

[90] *See supra* Part I.B.

[91] *See, e.g.*, United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) (holding that *Padilla* "is an 'old rule' for *Teague* purposes and is retroactively applicable on collateral review"); Bawaneh v. United States, No. CV-10-7805 CAS, 2011 WL 1465775, at *2 (C.D. Cal. Apr. 18, 2011) (old rule); United States v. Chavarria, No. 2:10-CV-191 JVB, 2011 WL 1336565, at *2–3 (N.D. Ind. Apr. 7, 2011) (old rule), *order vacated on reconsideration*, No. 2:10-CV-191 JVB, 2011 WL 4916568 (N.D. Ind. Oct. 14, 2011); United States v. Diaz-Palmerin, No. 08-cr-777-3, 2011 WL 1337326, at *4 (N.D. Ill. Apr. 5, 2011) (old rule).

[92] *Orocio*, 645 F.3d at 638.

outcome of the plea process.'"[93] The court further noted, "[e]very *Strickland* claim requires a fact-specific inquiry, but it is not the case that every *Strickland* ruling on new facts requires the announcement of a 'new rule.'"[94] Similarly, in *United States v. Hubenig*, the Eastern District of California noted that "[w]hen the Supreme Court applies a well-established rule of law in a new way based on the specific facts of a particular case, it does not generally establish a new rule."[95] The Supreme Court of Massachusetts, in *Commonwealth v. Clarke*, similarly reasoned that *Padilla* did not create a new rule, but rather had applied "an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts."[96] In other words, these courts considered *Padilla* to have simply "applied an old rule in a new context."[97]

Courts that have found that *Padilla* did not create a new rule have, in some instances, also had to grapple with the fact that *Padilla* overruled precedent in their jurisdiction,[98] which opponents of *Padilla*'s retroactive application argue shows that "the result [of *Padilla*] was not *dictated* by precedent existing at the time the defendant's conviction became final," and is therefore a new rule under the limited guidance of *Teague*.[99] Addressing that argument in *Hubenig*, the Eastern District of California found the existence of conflicting precedent "not dispositive of whether [*Padilla*] established a new rule for *Teague* purposes," because "the standard for determining when a case establishes a new rule is 'objective,' and the mere

---

[93] *Id.* (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985); Strickland v. Washington, 466 U.S. 668, 688 (1984)).

[94] *Id.* at 640.

[95] United States v. Hubenig, No. 6:03-MJ-040, 2010 WL 2650625, at *5 (E.D. Cal. July 1, 2010).

[96] Commonwealth v. Clarke, 949 N.E.2d 892, 903 (Mass. 2011).

[97] People v. Garcia, 907 N.Y.S.2d 398, 403 (Sup. Ct. 2010).

[98] *See* Chaidez v. United States, 655 F.3d 684, 690 (7th Cir. 2011) ("Prior to *Padilla*, the lower federal courts, including at least nine Courts of Appeals, had uniformly held that the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea.").

[99] *See id.* at 688–91.

existence of conflicting authority does not necessarily mean a rule is new."[100] Other courts have responded in a similar fashion.[101]

Courts that have found that *Padilla* relief should not be made retroactively available to defendants whose conviction pre-dates *Padilla* have argued that the decision created a new rule.[102] In *United States v. Chapa*, the Northern District of Georgia found that *Padilla*'s result "was not *dictated* by precedent existing at the time [that a pre-*Padilla* defendant's] conviction became final," because existing precedent nation-wide "dictated the opposite result."[103] Additionally, in *United States v. Perez*, the District of Nebraska pointed out that it was not the "prevailing professional norm" to inform a defendant of immigration consequences of his guilty plea.[104]

Other courts have cited Alito's concurrence and Scalia's dissent in *Padilla* as support for classifying *Padilla* as having announced a new rule. For instance, in *Mendoza v. United States*, the Eastern District of Virginia pointed to the very existence of *Padilla*'s concurrence (by Justice Alito) and dissent (by Justice Scalia) as evidence of a new rule.[105] The court highlighted language from Justice Alito's opinion, noting that the majority "effectively overruled 'the longstanding and unanimous position of the federal courts . . . that reasonable defense counsel generally need only advise a client about the *direct*

---

[100] *Hubenig*, 2010 WL 2650625, at *7 (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)).

[101] *See, e.g.*, *Garcia*, 907 N.Y.S.2d at 404 (citing *Williams*, 529 U.S. at 410; Wright v. West, 505 U.S. 277, 304 (1992)); *Ex parte* Tanklevskaya, No. 01-10-00627-CR, 2011 WL 2132722, at *6–7 (Tex. Ct. App. May 26, 2011).

[102] *E.g.*, Dennis v. United States, 787 F. Supp. 2d 425, 427–30 (D.S.C. 2011); Mendoza v. United States, 774 F. Supp. 2d 791, 797 (E.D. Va. 2011); Banos v. United States, No. 10-23314-CIV, 2011 WL 835789, at *2 (S.D. Fla. Mar. 4, 2011); Doan v. United States, 760 F. Supp. 2d 602, 605–06 (E.D. Va. 2011); United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010).

[103] United States v. Chapa, 800 F. Supp. 2d 1216, 1221 (N.D. Ga. 2011) (citing Teague v. Lane, 489 U.S. 288, 301 (1989)).

[104] *Perez*, 2010 WL 4643033, at *2 (citing Wiggins v. Smith, 539 U.S. 510, 521 (2003)).

[105] *Mendoza*, 774 F. Supp. 2d at 797.

consequences of a criminal conviction.'"[106] Similarly, in *United States v. Chang Hong*, the Tenth Circuit determined that *Padilla* created a new rule, finding support for their conclusion in Justice Scalia's argument that, before *Padilla,* the Supreme Court "had limited the Sixth Amendment to advice directly related to defense against criminal prosecutions," and does not require advice on collateral consequences of convictions.[107] These separate opinions, these courts argue, show that "reasonable jurists did not find the rule in *Padilla* compelled or dictated by the Court's prior precedent."[108]

A few academics have taken the position that *Padilla* created a new rule, but that it qualifies for retroactive application under the "watershed decision" exception to *Teague*.[109] They reason that, without *Padilla*'s requirement to inform a defendant of the deportation consequences of his guilty plea, innocent defendants who are pessimistic about their chances at trial will be more likely to submit false guilty pleas in exchange for favorable plea bargains.[110] Thus, "the likelihood of an accurate criminal conviction is seriously diminished."[111] The watershed exception is extremely narrow,[112] however, and the majority of courts that have found that *Padilla* created a new rule have refused to classify it as watershed rule.[113]

---

[106] *Id.* (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1487 (2010) (Alito, J., concurring)).

[107] United States v. Chang Hong, No. 10-6294, 2011 WL 3805763, at *6 (10th Cir. Aug. 30, 2011) (quoting *Padilla*, 130 S. Ct. at 1494–95 (Scalia, J., dissenting)).

[108] *Id.*; *Mendoza*, 774 F. Supp. 2d at 797.

[109] *See* Bibas, *supra* note 60, at 1137–51; John L. Holahan & Shauna Faye Kieffer, Padilla *Motions Effective Assistance of Counsel Where Pleas Mandate Deportation*, BENCH & B. MINN., Aug. 2010, at 25, 26.

[110] *See* Holahan & Kieffer, *supra* note 109.

[111] *Id.* at 27.

[112] *See* Beard v. Banks, 542 U.S. 406, 407 (2004) ("[The Supreme Court] has repeatedly emphasized the limited scope of the . . . exception—for 'watershed rules of criminal procedure . . .'—which 'is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.'" (citations omitted) (quoting O'Dell v. Netherland, 521 U.S. 151, 157 (1997))).

[113] *E.g.*, United States v. Chang Hong, No. 10-6294, 2011 WL 3805763,

Courts that have held that *Padilla* created a new rule, before declining to apply it retroactively, have had to determine that it is not a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings."[114] In *Chang Hong*, the court pointed out the narrowness of the "watershed" exception, and noted that "the [Supreme] Court has rejected every attempt to fit a case within the exception."[115] In *Llanes v. United States*, the Middle District of Florida found that *Padilla*'s requirement that counsel provide immigration advice is less significant than what the Supreme Court envisioned as qualifying as a watershed rule.[116] These courts, and many others, have found that *Padilla* does not "alter [the Court's] understanding of bedrock procedural elements essential to the fairness of a proceeding,"[117] and, therefore, does not qualify for *Teague*'s exception to the general rule that new rules of criminal procedure do not apply retroactively.[118]

Although the *Padilla* Court did not make an explicit holding on retroactivity,[119] many lower courts interpreting *Padilla* have pointed to certain language in the Supreme Court's opinion to

---

at *8–9 (10th Cir. Aug. 30, 2011); Mathur v. United States, Nos. 7:07-CR-92-BO, 7:11-CV-67-BO, 2011 WL 2036701, at *2 (E.D.N.C. May 24, 2011); Doan v. United States, 760 F. Supp. 2d 602, 605–06 (E.D. Va. 2011).

[114] Llanes v. United States, No. 8:11-CV-682-T-23TBM, 2011 WL 2473233, at *2 (M.D. Fla. June 22, 2011) (quoting United States v. Swindall, 107 F.3d 831, 835 (11th Cir. 1997)) (internal quotation marks omitted). Under *Teague*, even new rules apply retroactively if they constitute watershed rules of criminal procedure. *See infra* Part II.A.

[115] *Chang Hong*, 2011 WL 3805763, at *8.

[116] *Llanes*, 2011 WL 2473233, at *2 (noting *Padilla*'s notification requirement is "far different from *Gideon*'s establishment of the right to counsel").

[117] Whorton v. Bockting, 549 U.S. 406, 418 (2007) (quoting Tyler v. Cain, 533 U.S. 656, 665 (2001)) (internal quotation marks omitted).

[118] *See, e.g.*, Doan v. United States, 760 F. Supp. 2d 602, 605–06 (E.D. Va. 2011).

[119] Absence of an explicit holding of retroactivity by the Supreme Court does not indicate the Court does not intend retroactive application, as the Court may "[establish] principles of retroactivity and [leave] the application of those principles to lower courts." *Tyler*, 533 U.S. at 663.

support its retroactive application.[120] Most persuasive, perhaps, has been the Court's response to the Solicitor General's concern that its decision would open the "floodgates."[121] The Court stated:

> 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.[122]

According to the court in *Hubenig*, the Supreme Court's "floodgates" discussion "signaled that it understood its holding in *Padilla* would apply retroactively."[123] If the Supreme Court did not intend retroactive application of *Padilla*, the *Hubenig* court reasoned, the "floodgates" discussion would have been unnecessary.[124] Likewise, in *People v. Garcia*, the Kings County Supreme Court noted the Supreme Court's treatment of the "floodgate" issue was "reason[] in [itself] to apply *Padilla* retroactively."[125]

II. The Need for Retroactive Application

Defendants have very few feasible options following a denial of collateral post-conviction relief; thus, collateral proceedings become paramount. In cases where courts determine that *Padilla* may not be applied retroactively to finalized convictions, petitioners may theoretically still have recourse through a petition for habeas corpus.[126] In reality, however, the "great

---

[120] *See, e.g.*, United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *7 (E.D. Cal. July 1, 2010); People v. Garcia, 907 N.Y.S.2d 398, 402 (Sup. Ct. 2010).

[121] Padilla v. Kentucky, 130 S. Ct. 1473, 1484–85 (2010).

[122] *Id.*

[123] *Hubenig*, 2010 WL 2650625, at *7.

[124] *Id.*; *see also* People v. De Jesus, 30 Misc. 3d 1203(A) (N.Y. Sup. Ct. 2010) (unpublished table decision).

[125] *Garcia*, 907 N.Y.S.2d at 402.

[126] 28 U.S.C. § 2241(a) (2006).

writ" is unlikely to provide relief in these cases.[127] In order to obtain habeas relief, except in extraordinary cases,[128] a petitioner must first exhaust all remedies available in state court.[129] This may include a variety of collateral attacks available through state statutes.[130] Additionally, AEDPA imposes a one-year statute of limitations for filing habeas petitions.[131] The statute begins running when a defendant's judgment becomes final by the conclusion of direct review.[132] Furthermore, individuals may be deported before their habeas petitions are reviewed,[133] and in such cases, are often barred from habeas relief.[134] Thus, "few

---

[127] *See* Margaret Colgate Love & Gabriel J. Chin, Padilla v. Kentucky*: The Right to Counsel and the Collateral Consequences of Conviction*, CHAMPION, May 2010, at 20, *available at* http://www.pardonlaw.com/materials/love-chin_may_feature.pdf.

[128] *See, e.g.*, Lee v. Stickman, 357 F.3d 338, 343–44 (3d Cir. 2004) (exhaustion requirement excused because unresolved petition challenging conviction pended in state court for eight years). *But see, e.g.*, Williams v. Sims, 390 F.3d 958, 963 (7th Cir. 2004) (exhaustion requirement not excused though state delayed because petitioner's *habeas* petition was untimely).

[129] § 2254(b)(1)(A).

[130] *See, e.g.*, N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005) (motion to vacate judgment).

[131] § 2244(d)(1). AEDPA additionally greatly restricts habeas relief by limiting it to cases that have been adjudicated in state court "contrary to, or [in] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 2254(d)(1). *See generally* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741 (2010).

[132] § 2244(d)(1)(A). If a defendant unsuccessfully petitions for certiorari in the highest state court or the Supreme Court of the United States, his petition becomes "final by the conclusion of direct review" on the day certiorari is denied, with that day counting as the first day of the one-year limitation. Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 13 (2004).

[133] *See* Immigration and Nationality Act, 8 U.S.C. § 1252(b)(3)(B) (1999) ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

[134] Some courts find petitions from deported individuals are moot. *See,*

will navigate this procedural minefield successfully."[135] Therefore, for defendants seeking the protection of *Padilla*, post-conviction challenges may provide the last chance to avoid deportation.

Additionally, there may be a substantial length of time between when a noncitizen's criminal conviction becomes final and the time he or she is removed. There is a tremendous backlog of cases in immigration courts.[136] In September 2011, 297,551 cases were pending in immigration courts,[137] 24,661 of which involved individuals rendered deportable by criminal convictions.[138] The average length of time criminal immigration cases had been pending was 403 days.[139] The wait in some courts, however, is significantly longer.[140] The time courts take to render decisions is also very long. Courts took, on average, 166 days to render removal decisions issued in September 2011.[141] Immigration courts in New York City took an average

---

e.g., Sule v. INS, No. 98-1090, 1999 WL 668716, at *2 (10th Cir. Aug. 27, 1999). For a discussion on the permissibility of habeas review for deported individuals, however, see Alison Leal Parker, Note, *In Through the Out Door? Retaining Judicial Review for Deported Lawful Permanent Resident Aliens*, 101 COLUM. L. REV. 605 (2001).

[135] Love & Chin, *supra* note 127, at 20.

[136] *See* Leni B. Benson & Russell R. Wheeler, Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication 31 (Jan. 12, 2012) (unpublished manuscript), *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/01/ACUS-Immigration-Removal-Adjudication-Draft-Report-1_12_12.pdf (discussing the increase in "per judge workload" and the resulting backlog in immigration courts).

[137] *Immigration Court Backlog Tool*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ (select "Pending Cases" under "What to graph"; then select "All Charges" under "Charge Type") (last visited Feb. 24, 2012).

[138] *Id.* (select "Pending Cases" under "What to graph"; then select "Criminal/Nat. Sec./Terror" under "Charge Type"). The number of pending criminal immigration cases also includes individuals allegedly deportable on national security or terrorism grounds. *Id.*

[139] *Id.* (select "Average Days" under "What to tabulate"; then select "Criminal/Nat. Sec./Terror" under "Charge Type").

[140] In Los Angeles, for example, criminal immigration cases pending in September 2011 had been pending, on average, for 699 days. *Id.*

[141] *Immigration Court Processing Time by Outcome*, TRAC IMMIGR.,

of 623 days to process removal decisions.[142] This data reveals that criminal immigration proceedings often involve convictions finalized more than a year and a half earlier, and in some cities, such as New York and Los Angeles, three or more years earlier. Thus, the potential class of claimants affected by the retroactivity of *Padilla* remains huge.

The following section explains why an accurate application of *Padilla* requires courts to frame its rule as the right to effective counsel. Courts inaccurately framing the rule as counsel's requirement to inform clients of the potential immigration consequences improperly deny petitioners access to *Padilla*'s benefits.

A. Courts Must Frame Padilla*'s Rule as the Right to Effective Counsel, as explained in* Strickland

A proper application of *Padilla* requires courts to frame *Padilla*'s rule as the right to effective counsel, and thereby apply the decision retroactively. *Strickland* is a rule of general application, which is seldom likely to create a "new rule" for *Teague* purposes. While application of *Strickland* to new facts may yield a novel result, as was the case in *Padilla*, such a result does imply creation of a "new rule." Rather, a case's fact-specific novel result may be its holding, which courts should not mistake for the case's broader rule.

1. A Rule of General Application

In his concurring opinion, Justice Alito claimed that the imposition of a duty to inform clients of immigration consequences "marks a major upheaval in Sixth Amendment

---

http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (select "Average Days" under "What to tabulate"; then select "Removals" under "Outcome Type") (last visited Feb. 24, 2012). This measures the average number of days between the recorded filing date and the date the case was closed. *About the Data*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/about_data.html (last visited Feb. 24, 2012).

[142] *Immigration Court Processing Time by Outcome*, *supra* note 141.

law,"[143] and pointed out an absence of precedent "holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel."[144] Several courts have pointed to this language as evidence that *Padilla* created a new rule.[145] This reasoning, however, ignores the nature of *Strickland*'s inquiry into whether counsel's performance was constitutionally effective.

Strickland calls for a fact-centered analysis, requiring "a case-by-case examination of the evidence . . . ."[146] It created a rule of general application, "establish[ing] a broad and flexible standard for the review of an attorney's performance in a variety of factual circumstances."[147] In his concurring opinion in *Wright v. West*, Justice Kennedy explained the unlikelihood of a rule of general application creating a new rule for *Teague* purposes: "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 . . . ."[148] Justice Kennedy made it clear that, in the application of such rules, "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."[149] Therefore, rules that rely on case-by-case examinations, such as *Strickland*, may be applied in a variety of circumstances without establishing a new rule for *Teague* purposes.[150]

---

[143] Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring).

[144] *Id.*

[145] *See, e.g.*, United States v. Chang Hong, No. 10-6294, 2011 WL 3805763, at *6 (10th Cir. Aug. 30, 2011); Sarria v. United States, No. 11-20730-CIV, 2011 WL 4949724, at *5 (S.D. Fla. Oct. 18, 2011); Mendoza v. United States, 774 F. Supp. 2d 791, 797 (E.D. Va. 2011).

[146] Williams v. Taylor, 529 U.S. 362, 391 (2000) (quoting Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment)) (internal quotation marks omitted).

[147] Newland v. Hall, 527 F.3d 1162, 1197 (11th Cir. 2008).

[148] *Wright*, 505 U.S. at 308 (Kennedy, J., concurring).

[149] *Id.* at 309.

[150] *Id.* at 308–09.

Justice Kennedy's point is well illustrated by several Supreme Court decisions applying *Strickland* to various fact patterns, none of which have been deemed to have created a new rule for *Teague* purposes.[151] In *Williams v. Taylor*, the Court applied *Strickland* to determine that counsel's failure to introduce known evidence regarding defendant's borderline mental retardation and troubled childhood constituted ineffective assistance of counsel.[152] Three years later, in *Wiggins v. Smith*,[153] the Court applied *Strickland* to counsels' failure to investigate their defendant's dysfunctional background, finding such conduct to constitute ineffective assistance.[154] Yet again, in *Rompilla v. Beard*,[155] the Court applied *Strickland* to find that defense counsel's failure to sufficiently investigate aggravating factors in the sentencing phase of a defendant's capital murder trial constituted ineffective assistance, despite suggestions by the defendant's family that mitigating factors were not present.[156] Despite the fact that these cases created or imposed on defense counsel a set of increased obligations, not one of the cases has been found to have created a new rule. They are, rather, applications of *Strickland*'s articulation of the right to effective counsel, which "can hardly be said [to]. . . 'break[s] new ground or impose[s] a new obligation on the States.'"[157]

Padilla is another in a long line of *Strickland* cases applying an old rule of general application to new circumstances: counsel's failure to inform a client of deportation consequences following significant changes in immigration law.[158] *Padilla*'s

---

[151] *See* Al Kokabani v. United States, No. 5:06-CR-207-FL, 2010 WL 3941836, at *4 (E.D.N.C. July 30, 2010).

[152] Williams v. Taylor, 529 U.S. 362, 391 (2000).

[153] Wiggins v. Smith, 539 U.S. 510 (2003).

[154] *Id.* at 523–27.

[155] Rompilla v. Beard, 545 U.S. 374 (2005).

[156] *Id.* at 383.

[157] *Williams*, 529 U.S. at 391 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

[158] *See supra* Part I (discussing the changes to immigration law brought by AEDPA and IIRIRA); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010) ("[AEDPA and IIRIRA's] changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction.").

pronouncement that an attorney's failure to inform his or her client of a plea's deportation consequences constitutes ineffective counsel[159] may have differed from any previous applications of *Strickland*, but considering the nature of *Strickland* inquiries, did not establish a new rule. Some courts have argued that *Padilla*'s application of *Strickland* is exceptional, as it imposes a duty on defense counsel to advise on collateral consequences.[160] As the Court noted in *Padilla*, however, "[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[161] *Padilla* simply involved another instance of the familiar pattern of a rule of general application: an old rule applied to new facts, yielding new results.

2. Wide Rules, Narrow Holdings

Courts framing *Padilla*'s rule as counsel's requirement to inform clients of immigration consequences of a conviction may be failing to distinguish the case's "rule" from its holding. *Black's Law Dictionary* defines a "legal ruling" as "a ruling on a point of law . . . reached by the judge as a necessary step in the decision,"[162] and a holding as "1. A court's determination of a matter of law pivotal to its decision," and "2. A ruling on evidence or other questions presented at trial."[163] Although these may sound similar, there are meaningful differences between the two.[164] A holding is attached to a particular case, and is often fact-specific.[165] Rules, on the other hand, can be synthesized

---

[159] *Padilla*, 130 S. Ct. at 1483.

[160] *See, e.g.*, United States v. Laguna, No. 10 CR 342, 2011 WL 1357538, at *4 (N.D. Ill. Apr. 11, 2011).

[161] *Padilla*, 130 S. Ct. at 1481 (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

[162] BLACK'S LAW DICTIONARY 629 (3d pocket ed. 2006).

[163] *Id.* at 331.

[164] David H. Tennant, *The Hazards of Over-Selling: Ipse Dixits and Other Unsubstantiated Arguments*, FOR DEF., Aug. 2006, at 72, 72.

[165] Bentele, *supra* note 131, at 744 ("[D]efining the holding of a case is less straightforward; those seeking to expand the reach of a precedent will characterize the decision broadly, while one who disapproves of the previous

from multiple cases,[166] and, therefore, often have wider or more general application than holdings. Particularly in the context of *Teague*'s retroactivity analysis, "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule."[167] With this framework in mind, it appears reasonable, if not necessary, to characterize *Padilla*'s rule as the more general principle of "the right to counsel," and its holding as the more fact-specific principle that counsel's failure to inform clients of deportation consequences constitutes ineffective assistance.

The difference between a case's holding and its rule for *Teague* purposes is well illustrated in *Lewis v. Johnson*.[168] In 1987, Charles Lewis pled guilty to six counts of robbery and nine other criminal offenses in the Pennsylvania Court of Common Pleas, and was sentenced to thirty to sixty years in prison.[169] In the eight years following his conviction, Lewis filed two petitions in Pennsylvania state court for post-conviction relief, alleging that his court-appointed trial counsel was ineffective on a number of grounds, including for failing to file a direct appeal.[170] Both petitions were denied.[171] The court found that relief was precluded by Pennsylvania case law that had held "trial counsel cannot be found ineffective for failing to file a direct appeal when not requested to do so."[172] In August 2000, Lewis filed a petition for writ of habeas corpus in the District Court for the Western District of Pennsylvania, but his petition was denied.[173] Lewis appealed, relying on *Roe v. Flores-Ortega*,[174] decided by the Supreme Court two months before he had filed his habeas petition,[175] in which the Court used the

---

outcome will narrow it to its specific facts.").

[166] Tennant, *supra* note 164, at 72.

[167] Williams v. Taylor, 529 U.S. 362, 382 (2000).

[168] Lewis v. Johnson, 359 F.3d 646 (3d Cir. 2004).

[169] *Id.* at 649.

[170] *Id.* at 650–51.

[171] *Id.*

[172] *Id.* at 650.

[173] *Id.* at 651.

[174] Roe v. Flores-Ortega, 528 U.S. 470 (2000).

[175] *Lewis*, 359 F.3d at 651.

Strickland test to find that "counsel had a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."[176]

Since *Flores-Ortega* was decided after Lewis' conviction became final, the Third Circuit conducted a *Teague* analysis to determine whether the decision applied retroactively.[177] The court framed *Flores-Ortega*'s rule as "the *Strickland* standard," and, thus, found it to be an "old rule," which applied retroactively.[178] Applying the *Flores-Ortega* decision to Lewis' case, the Third Circuit reversed and remanded, instructing the district court to grant Lewis' petition conditioned upon the Commonwealth's reinstatement of his right of first appeal.[179] The court characterized *Flores-Ortega* as holding that "criminal defense attorneys have a constitutional duty to consult and advise defendants of their appellate rights."[180] Although this holding was contrary to state case law, the court properly recognized that *Strickland*, as a rule of general application, may produce novel results, but is, by no means, a new rule.[181] It further noted that "case law need not exist on all fours to allow for a finding under *Teague* that the rule at issue was dictated by Supreme Court precedent."[182] Had the court mistaken *Flores-Ortega*'s holding (criminal defense attorneys have a constitutional duty to advise defendants of their appellate rights) for its rule (the right to effective counsel), Lewis would probably not have found habeas relief.

In the last fifteen years, it has become even more important that courts differentiate between rules and holdings during *Teague* retroactivity inquiries. In addition to imposing a one-

---

[176] *Flores-Ortega*, 528 U.S. at 480.

[177] *Lewis*, 359 F.3d at 652–57.

[178] *See id.* at 655 ("*Flores-Ortega*'s application of the *Strickland* standard was dictated by precedent and merely clarified the law as it applied to the particular facts of that case.").

[179] *Id.* at 662.

[180] *Id.* at 652.

[181] *Id.* at 655.

[182] *Id.*

year statute of limitations on habeas filing,[183] AEDPA has greatly limited the claims on which relief may be granted.[184] AEDPA included an amendment to the habeas corpus statutes providing:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States* . . . .[185]

In recent years, "clearly established Federal law, as determined by the Supreme Court" has been interpreted as Supreme Court holdings,[186] and often in a manner narrowly tailored to the facts of the case.[187] Thus, unless a habeas petitioner presents a claim with a substantially similar fact pattern as a case previously decided by the Supreme Court, district courts will likely find that the state court conviction was not "contrary to" or "an unreasonable application of, clearly established federal law"[188] and that habeas relief, therefore, cannot be granted.[189]

However, a small oasis in this restricted habeas jurisprudence may be found for petitioners relying on decisions announced after their convictions became final. In *Williams v. Taylor*, the Supreme Court stated, "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme

---

[183] *See supra* Part II (discussing AEDPA's statute of limitations for filing petitions for habeas corpus).

[184] *See* Stefan Ellis, Gonzalez v. Crosby *and the Use of Federal Rule of Civil Procedure 60(b) in Habeas Proceedings*, 13 U. PA. J. CONST. L. 207, 208 (2010).

[185] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. 1, § 104, 110 Stat. 1214, 1218–19 (codified at 28 U.S.C. § 2254(d)(1) (2006)). AEDPA amended 28 U.S.C. § 2254. *Id.*

[186] Bentele, *supra* note 131, at 741.

[187] *See id.* at 751–54.

[188] § 2254(d)(1)–(2).

[189] Bentele, *supra* note 131, at 746.

Court of the United States' under [AEDPA]."[190] According to this instruction, if a habeas petitioner relies on a Supreme Court decision announced after his conviction became final, and if the court entertaining the petition finds the rule of the relied upon case is old, the petitioner may reap the benefits of the case *even if the facts of his case are not substantially similar*. In contrast, if the same petitioner relied on the same Supreme Court case, but the case had been decided *before* his conviction became final, he could only realize the protections of its holding, which might require the facts of the two cases to be substantially similar. It appears that retroactively applied decisions may offer wider habeas relief. When a court mistakes a holding for a rule in its *Teague* analysis, however, it extinguishes this opportunity.

Courts that have declined to apply *Padilla* retroactively failed to appreciate *Strickland*'s nature as a rule of general applicability. These courts inaccurately identified *Padilla*'s rule, perhaps confusing it with the case's holding. Their incorrect application of *Padilla* deprived petitioners of what may have been their last opportunity to maintain their lives in the United States.

B. Alternatively, State Courts Should Use Their Power Under Danforth v. Minnesota *to Give Broader Effect to New Rules*

A proper appreciation for the *Strickland* rule's nature as a rule of general application, as well as for the distinction between *Padilla*'s "rule" and its "holding," compel courts to frame *Padilla*'s rule as the right to effective counsel—an old rule which thus requires retroactive application.[191] State courts that remain unconvinced, however, have an alternative means by which they may give *Padilla* retroactive effect. Even after concluding that *Padilla* created a new rule, and that it therefore does not apply retroactively under *Teague*, state courts may give *Padilla* retroactive effect through their power under *Danforth v. Minnesota*.[192]

---

[190] Williams v. Taylor, 529 U.S. 362, 412 (2000) (quoting § 2254(d)(1)).

[191] *See supra* Part II.A.

[192] Danforth v. Minnesota, 552 U.S. 264 (2008).

The Supreme Court's 2008 decision in *Danforth v. Minnesota* greatly altered retroactivity jurisprudence.[193] The Court examined "whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion."[194] The majority concluded that it did not; instead, according to the Court, *Teague* "limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*."[195] Thus, under *Danforth*, a state may design its own retroactivity standards for federal constitutional rules in excess of the federal minimum set by *Teague*.[196] State courts have already begun using their power under *Danforth* to design their own retroactivity principles.[197]

In the *Padilla* context, if the highest state court determines that *Padilla* created a new rule, and is thus not retroactively applicable under *Teague*, the court may apply its own retroactivity principles in a manner allowing for retroactive application of *Padilla*. *Padilla* applications provide a perfect opportunity for state courts to revise their retroactivity principles in a way that provides greater post-conviction relief in the wake of AEDPA's constriction of federal habeas relief.[198]

---

[193] *See generally* Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1 (2009).

[194] *Danforth*, 552 U.S. at 266.

[195] *Id.* at 282.

[196] *Id.* at 288.

[197] *See, e.g.*, State v. Jess, 184 P.3d 133, 154 n.20 (Haw. 2008) (declining to follow *Teague*); Morris v. State, No. W2008–01449–CCA–R3–PC, 2010 WL 3970371, at *23 (Tenn. Crim. App. Oct. 11, 2010) (recognizing conflict, but deferring to *Teague* until state Supreme Court determines the issue).

[198] *See supra* Part II.

C. Finality Interests

Since "retroactive application may affect defendants whose trials are long since over," it involves important finality concerns.[199] These concerns are especially relevant in the retroactive application of *Padilla*, which may affect a large number of final convictions. In *Barrios Cruz v. State*, the court concluded that a retroactive application of *Padilla* "would undermine the perceived and actual finality of criminal judgments," and declined to apply *Padilla* retroactively.[200] Many other courts express similar finality concerns.[201]

However, applying *Padilla* retroactively will not significantly hamper interests of finality, because defendants permitted to benefit from *Padilla* still face a significant hurdle. A successful claim of ineffective counsel under *Strickland* requires that a defendant prove not only that his counsel's performance was deficient, but also that he was prejudiced by the deficient performance.[202]

In *Padilla*, the majority "[gave] serious consideration to the concerns . . . regarding the importance of protecting the finality of convictions obtained through guilty pleas," but explained, "[s]urmounting *Strickland*'s high bar is never an easy task . . . . [T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[203] The majority predicted that "lower courts—now quite experienced with applying *Strickland*—[could] effectively and efficiently use its framework to separate specious claims from those with substantial merit."[204] This prediction appears to have been

---

[199] Ellen E. Boshkoff, *Resolving Retroactivity After* Teague v. Lane, 65 IND. L.J. 651, 658 (1990); *see also* Teague v. Lane, 489 U.S. 288, 309 (1989).

[200] Barrios-Cruz v. State, 63 So. 3d 868, 873 (Fla. Dist. Ct. App. 2011).

[201] *See, e.g.*, United States v. Chang Hong, No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011); United States v. Agoro, No. CR 90-102 ML, 2011 WL 6029888 (D.R.I. Nov. 16, 2011).

[202] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[203] Padilla v. Kentucky, 130 S. Ct. 1473, 1484–85 (2010).

[204] *Id.* at 1485.

accurate, as some courts have applied *Padilla* retroactively, but found that claims did not warrant relief because defendants failed to show prejudice.[205] Others avoided the retroactivity analysis altogether by first determining that a defendant was not prejudiced.[206] Accurate application of *Strickland*'s prejudice requirement ensures that retroactive application of *Padilla* will only disturb the finality of meritorious claims.

CONCLUSION

Certain criminal acts render a lawful permanent resident deportable in an instant.[207] Even misdemeanors, such as possession of thirty-one grams of marijuana[208] or distribution of obscene material,[209] can lead to removal.[210] The *Padilla* Court carefully considered the "[changing] landscape of federal immigration law" and recognized that "deportation is an integral part . . . of the penalty that may be imposed on noncitizen defendants."[211] Based on these considerations, it found that an attorney has a duty to advise her client of deportation consequences of a guilty plea, and failure to do so is grounds for a claim of ineffective counsel.[212]

Padilla was a victory for many, but that victory was diminished by some jurisdictions' refusal to apply *Padilla* retroactively.[213] The stark division among courts as to whether

---

[205] *See, e.g.*, Al Kokabani v. United States, No. 5:06–CR–207–FL, 2010 WL 3941836 (E.D.N.C. July 30, 2010); Boakye v. United States, No. 09 Civ. 8217, 2010 WL 1645055 (S.D.N.Y. Apr. 22, 2010).

[206] *See, e.g.*, Gudiel-Soto v. United States, 761 F. Supp. 2d 234, 239 (D.N.J. 2011).

[207] *See generally* Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1708 (2011) (criticizing "crimmigration" law for basing life-altering immigration decisions on one instant of interaction between individuals and the State).

[208] *See, e.g.*, N.Y. PENAL LAW § 221.10 (McKinney 2008).

[209] *See, e.g.*, N.Y. PENAL LAW § 235.05 (McKinney 2008).

[210] 8 U.S.C. § 1227(a)(2)(B) (2006).

[211] Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

[212] *Id.* at 1484.

[213] *See* Naima Said & Laila Said-Alam, *Preserving Right to U.S.*

Padilla created a new rule for *Teague* purposes, and thus could not be applied retroactively, effectively leaves a noncitizen defendant's fate to the happenstance of his or her location of conviction.[214] Courts that have found that *Padilla* created a new rule did so because they framed *Padilla*'s rule as an attorney's duty to provide immigration advice.[215] Framing the rule in this way, however, ignores *Strickland*'s nature as a rule of general application, as well as the distinction between *Padilla*'s rule and holding.[216] By mischaracterizing *Padilla*'s rule, courts not only apply *Padilla* inaccurately, but they also miss an opportunity to correct great harm to uninformed or ill-informed noncitizen defendants and the families and communities from which they are removed.[217] In contrast, framing *Padilla*'s rule as the right to effective counsel allows courts to address these harms without greatly disturbing interests of finality.[218] State courts have the additional option of giving *Padilla* retroactive effect, even if they find it "nonretroactive" under *Teague*.[219] *Padilla* has the potential to be a victory for accuracy and fairness in criminal proceedings, but it is up to the courts to fulfill its promise.

Citizenship in State Courts, MD. B.J., Sept.-Oct. 2011, at 6, 13.

[214] *See supra* Introduction (demonstrating the impact of different jurisdictions' opposite conclusions on the issue of *Padilla*'s retroactivity).

[215] *See supra* Part I.B.

[216] *See supra* Part II.A.

[217] *See* Said & Said-Alam, *supra* note 213, at 13 ("By narrowly construing *Padilla*, the Maryland Court of Appeals missed an opportunity to correct egregious harm to Maryland's youngest citizens facing the unquantifiable social cost of permanent separation from what could be the sole breadwinning parent.").

[218] *See supra* Part II.C.

[219] *See supra* Part II.B (discussing states' power under *Danforth v. Minnesota* to give broader effect to new rules).