# COMMENT

# *Padilla v. Kentucky*: A Case for Retroactivity

*Allison C. Callaghan*[*]

*In a landmark decision, the United States Supreme Court held in* Padilla v. Kentucky *that defense attorneys have an affirmative constitutional duty to advise noncitizen defendants of the potential immigration consequences of a criminal conviction. The Court concluded that failure to provide such advice constitutes ineffective assistance of counsel in violation of a defendant's Sixth Amendment rights. In the wake of* Padilla*, the lower courts have struggled to resolve many questions left unanswered by the Court, including whether the decision is retroactively applicable to convictions that became final before its announcement. Recognizing the exceptional importance of the issue, the Supreme Court recently granted certiorari to examine the question in* Chaidez v. United States. *This Comment argues that* Padilla *represents an "old rule" of constitutional law that, pursuant to* Teague v. Lane*, should be given retroactive effect by the Court.*

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 Senior Articles Editor, UC Davis Law Review, Volume 46; J.D. Candidate, University of California, Davis, School of Law, 2013; B.A. Government and History, Claremont McKenna College, 2007. Thanks to Professor Holly Cooper for inspiration, Anisa Afnani for thoughtful guidance, and Thomas Walsh for unwavering encouragement and support.

## INTRODUCTION

In a landmark decision, the United States Supreme Court held in *Padilla v. Kentucky* that defense attorneys have an affirmative constitutional duty to advise noncitizen defendants of the potential immigration consequences of a criminal conviction.[1] The Court concluded that failure to provide such advice constitutes ineffective assistance of counsel in violation of a defendant's Sixth Amendment rights.[2] In the wake of *Padilla*, the lower courts have struggled to resolve many questions left unanswered by the Court's decision, including whether *Padilla*'s dictate should apply retroactively to convictions that became final before its announcement.[3]

In the absence of explicit guidance from the Court, an intractable split has developed amongst both state and federal courts regarding *Padilla*'s debated retroactivity.[4] Of the sixty-one courts to address the issue, thirty-eight have held that *Padilla* is retroactively applicable.[5] Of the courts of appeals to rule on the issue, only the Third Circuit has held that *Padilla* is an "old rule" of constitutional law that applies retroactively on collateral review, while the Fifth, Seventh, and Tenth Circuits have reached the opposite conclusion.[6] Recognizing the entrenched split amongst the courts, as well as the exceptional importance of the issue, the Supreme Court recently granted certiorari to examine the question in *Chaidez v. United States*.[7]

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[1] 130 S. Ct. 1473, 1486 (2010); *see infra* Part I.B (discussing the Court's opinion in *Padilla*).

[2] *Padilla*, 130 S. Ct. at 1486.

[3] *See, e.g.*, Maria Baldini-Potermin, Padilla v. Kentucky *One Year Later: Courts Split over Interpretation and Application of the U.S. Supreme Court's Constitutional Holdings*, 88 NO. 23 INTERPRETER RELEASES 1449, 1450 (2011); Danielle M. Lang, Note, Padilla v. Kentucky: *The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 965-84 (2012) (reviewing 265 lower court cases addressing *Padilla* since its announcement).

[4] To date, thirty-eight federal and state courts have held that *Padilla* is retroactively applicable and twenty-three courts have reached the opposite conclusion. *See* Lang, *supra* note 3, at 967 (providing chart of retroactivity cases).

[5] *See id.*

[6] *See* United States v. Amer, 681 F.3d 211, 214 (5th Cir. 2012) (holding that the rule announced in *Padilla* does not apply retroactively); United States v. Chang Hong, 671 F.3d 1147, 1159 (10th Cir. 2011) (same); Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011), *cert. granted* 132 S. Ct. 2101 (Apr. 30, 2012) (No. 11-820) (same); United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) (holding that *Padilla* is retroactively applicable).

[7] 655 F.3d 684 (7th Cir. 2011), *cert. granted* 132 S. Ct. 2101 (Apr. 30, 2012) (No. 11-820). The case is scheduled for oral argument before the Court on October 30, 2012. *See* SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 2012, *available at*

This Comment argues that, under the precepts of the Court's seminal retroactivity framework as outlined in *Teague v. Lane*,[8] *Padilla* should apply retroactively.[9] Part I introduces Supreme Court jurisprudence establishing a constitutional guarantee of effective assistance of counsel under the Sixth Amendment, the Court's landmark *Padilla* decision, and the retroactivity analysis under *Teague*.[10] Part II explores the intractable circuit split by examining the divergent conclusions reached by the Third, Fifth, Seventh, and Tenth Circuits on the issue.[11] Part III contends that the Third Circuit properly held that *Padilla* did not announce a new constitutional rule and is retroactively applicable.[12] First, *Padilla* is merely an extension of the Court's prior articulation of the standard for effective assistance of counsel guaranteed by the Sixth Amendment.[13] Second, the plain language used by the Court demonstrates that it intended *Padilla* to apply retroactively.[14] Finally, because *Padilla* protects the fundamental fairness of the plea bargaining process, the proper carriage of justice compels that it have retroactive effect.[15] Therefore, the Supreme Court should apply the Third Circuit's approach and conclude that *Padilla* is retroactively applicable.

## I. BACKGROUND

The Sixth Amendment safeguards against unjustified deprivations of life and liberty by mandating specific procedural protections for

http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNov2012.pdf.

[8] 489 U.S. 288 (1989); see *infra* Part I for an introduction to *Teague*'s retroactivity analysis.

[9] *See* discussion *infra* Part III (arguing that *Padilla* did not establish a new rule under *Teague* and is retroactively applicable).

[10] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1477-97 (2010); *Teague*, 489 U.S. at 292-317; Strickland v. Washington, 466 U.S. 668, 687-96 (1984); discussion *infra* Part I (discussing the Supreme Court's Sixth Amendment jurisprudence).

[11] *See Amer*, 681 F.3d at 214; *Chang Hong*, 671 F.3d at 1159; *Chaidez*, 655 F.3d at 694; *Orocio*, 645 F.3d at 694; discussion *infra* Part II (examining the circuit split between the Third Circuit, and the Fifth, Seventh, and Tenth Circuits).

[12] *See* discussion *infra* Part III (arguing that *Padilla* did not announce a new rule and that the Third Circuit's holding — that *Padilla* is retroactively applicable — is proper).

[13] *See* discussion *infra* Part III.A (arguing that precedent dictated the result in *Padilla* and that, as a result, the decision did not announce a new rule).

[14] *See infra* Part III.B (arguing that the plain language of the Court's opinion in *Padilla* demonstrates that the Court intended its decision to have retroactive effect).

[15] *See infra* Part III.C (arguing that defendants that pled guilty, without full awareness of the deportation consequences of their plea, should benefit from *Padilla*).

anyone accused of committing a crime.[16] The Amendment guarantees that in all criminal prosecutions, a defendant has the right to assistance of counsel in his defense.[17] This right attaches at critical stages of a criminal prosecution after the initiation of adversarial judicial proceedings.[18] Over the last century, the Supreme Court

[16] *See* U.S. CONST. amend. VI; *see also* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 488 (2009); Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 36 (1991).

[17] *See* U.S. CONST. amend. VI; *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that a defendant has the right to the appointed counsel in criminal prosecutions in state courts through the Fourteenth Amendment); *see also Right to Counsel*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 477, 477-78 (2008).

[18] *See* Brewer v. Williams, 430 U.S. 387, 401 (1977) (holding right to counsel attached at interrogation after arraignment because adversarial proceedings had begun); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (holding that a showup after arrest is not a criminal prosecution at which the defendant has a right to counsel); United States v. Collins, 430 F.3d 1260, 1264 (10th Cir. 2005) (holding right to counsel attached at competency hearing); United States v. Kennedy, 372 F.3d 686, 693 (4th Cir. 2004) (holding right to counsel attached prior to grand jury investigation); United States v. McNeil, 362 F.3d 570, 572 (9th Cir. 2004) (holding right to counsel attached at indictment); United States v. Spruill, 296 F.3d 580, 585 (7th Cir. 2002) (holding right to counsel attached at post-indictment interrogations); United States v. Red Bird, 287 F.3d 709, 714 (8th Cir. 2002) (holding right to counsel attached after indictment and arraignment because arraignment constituted adversarial judicial proceeding); Mitzel v. Tate, 267 F.3d 524, 533 (6th Cir. 2001) (holding right to counsel attached at state pretrial hearing and remained in effect during subsequent polygraph and police questioning); United States v. Leon-Delfis, 203 F.3d 103, 110 (1st Cir. 2000) (holding right to counsel attached at arraignment); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892-93 (3d Cir. 1999) (holding right to counsel attached after defendant underwent preliminary arraignment, arrest, incarceration, and organized police investigation because defendant faced procedural and prosecutorial system); United States v. Gordon, 156 F.3d 376, 379 (2d Cir. 1998) (holding right to counsel attached at initiation of plea negotiations); Self v. Collins, 973 F.2d 1198, 1206 (5th Cir. 1992) (holding right to counsel attached after indictment and remained in force even though the defendant was not in custody because formal judicial proceedings had begun). *But see* United States v. Lewis, 483 F.3d 871, 874 (8th Cir. 2007) (holding right to counsel did not attach when authorities asked defendant to give a DNA sample); United States v. Alvarado, 440 F.3d 191, 199-200 (4th Cir. 2006) (holding right to counsel did not attach upon filing a criminal complaint because right only attaches with formal proceedings); Anderson v. Alameida, 397 F.3d 1175, 1180 (9th Cir. 2005) (holding right to counsel did not attach at arrest or extradition hearing because it was not the inception of adverse criminal proceedings); Lumley v. City of Dade City, 327 F.3d 1186, 1195 (11th Cir. 2003) (holding right to counsel did not attach while an injured defendant was in the hospital because formal proceedings had not begun); Styron v. Johnson, 262 F.3d 438, 447 (5th Cir. 2001) (holding right to counsel did not attach when defendant's case transferred because transfer is an administrative matter); United States v. Moody, 206 F.3d 609, 613-15 (6th Cir. 2000) (holding right to counsel did not attach during plea

gradually expanded the scope of the constitutional guarantee by recognizing that "the right to counsel is the right to the *effective* assistance of counsel."[19]

### *A. The* Strickland *Effective Assistance of Counsel Standard and the Collateral Consequences Limitation*

In 1984, the United States Supreme Court announced its seminal standard for adjudicating ineffective assistance of counsel claims pursuant to the Sixth Amendment.[20] In *Strickland v. Washington*, the defendant pled guilty to an indictment that included three capital murder charges stemming from a ten-day crime spree.[21] The defendant was sentenced to death on each of the murder counts.[22] After a collateral attack on his conviction in Florida state court failed, he filed a writ of habeas corpus claiming, in part, that he had received ineffective assistance of counsel.[23]

negotiations because negotiations are not formal judicial proceedings); Kanikaynar v. Sisneros, 190 F.3d 1115, 1119 (10th Cir. 1999) (holding right to counsel did not attach when the government asked the defendant to submit to chemical testing); United States v. Muick, 167 F.3d 1162, 1165 (7th Cir. 1999) (holding right to counsel did not attach when, prior to the defendant's indictment, counsel requested involvement in communications between the defendant and the government); Neighbour v. Covert, 68 F.3d 1508, 1511 (2d Cir. 1995) (holding right to counsel did not attach when police officers questioned the suspect because police had not arrested or charged the suspect with any crime); Roberts v. Maine, 48 F.3d 1287, 1290 (1st Cir. 1995) (holding right to counsel did not attach when authorities asked a defendant, suspected of drunk driving, to submit to a blood-alcohol test); Nelson v. Fulcomer, 911 F.2d 928, 941 (3d Cir. 1990) (holding right to counsel did not attach when the defendant gave an inculpatory response to police-orchestrated confrontation because police had not arrested the defendant).

[19] *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (holding the right to counsel is the right to the effective assistance of counsel). *See generally Gideon*, 372 U.S. at 342 (holding that the Sixth Amendment right to counsel in criminal proceedings applies to the states through the Fourteenth Amendment); Johnson v. Zerbst, 304 U.S. 458 (1938) (holding that the Sixth Amendment right to counsel in criminal proceedings withholds from federal courts the authority to deprive a defendant of his life or liberty); Powell v. Alabama, 287 U.S. 45 (1932) (holding that the Fourteenth Amendment obligates states to appoint counsel to represent criminal defendants); WAYNE R. LAFAVE ET AL., 3 CRIMINAL PROCEDURE § 11.1(a) (3d ed. 2010) (discussing defendants' rights under Sixth Amendment jurisprudence).

[20] *See* Strickland v. Washington, 466 U.S. 668, 687-96 (1984).

[21] *See* Washington v. Strickland, 693 F.2d 1243, 1246-47 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984).

[22] *See Strickland*, 466 U.S. at 675.

[23] *See id.* at 675-79.

In its decision, the Court articulated its influential two-part — performance and prejudice — test for establishing a claim of ineffective assistance of counsel.[24] First, the petitioner must demonstrate that counsel committed errors so serious that the representation performed fell short of the standard guaranteed by the Sixth Amendment.[25] The Court held that professional norms of practice articulated in American Bar Association standards and similar guides direct determinations of whether the representation provided met an "objective standard of reasonableness."[26] Second, the petitioner must show that the deficient performance prejudiced the defense by depriving the defendant of a fair trial, with a reliable result.[27]

Over the last century, courts have gradually extended the right to the effective assistance of counsel to all stages of a criminal prosecution.[28] Successful claims have been predicated on an attorney's professional qualifications; performance before and during trial, sentencing, jury selection and instruction; and performance on appeal.[29] In a notable extension of the Sixth Amendment right, the

[24] *See id.* at 687.

[25] *See id.* (holding that to establish the deficiency of counsel's performance, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment").

[26] *See id.* at 688; *see also* Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (holding that professional standards may serve as guides in determining reasonableness to the extent they describe those professional norms prevailing when the representation took place).

[27] *See Strickland*, 466 U.S. at 687.

[28] *See* 5 AM. JUR. PROOF OF FACTS 2D 267 § 1 (2012); *see also* Mempa v. Rhay, 389 U.S. 128, 134 (1967); United States v. Wade, 388 U.S. 218, 224-25 (1967); Escobedo v. Illinois, 378 U.S. 478, 488 (1964); Amanda N. Montague, *Recognizing All Critical Stages in Criminal Proceedings: The Violation of the Sixth Amendment by Utah in Not Allowing Defendants the Right to Counsel at Parole Hearings*, 18 BYU J. PUB. L. 249, 254-60 (2003) (discussing the expansion of the Sixth Amendment right to assistance of counsel to every critical stage in criminal proceedings).

[29] *See Right to Counsel*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 515, 545-49 (2011) (listing instances in which defendants have raised ineffective assistance of counsel claims); *see, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (holding counsel's failure to conduct any pretrial discovery and failure to timely file a suppression motion was prejudicial); Virgil v. Dretke, 446 F.3d 598, 613-14 (5th Cir. 2006) (holding counsel's failure to use challenges to remove biased jurors during voir dire was ineffective assistance because counsel had no rational reason for such inaction); Jansen v. United States, 369 F.3d 237, 243, 249 (3d Cir. 2004) (holding counsel's failure to argue that drugs found on defendant were for personal use was ineffective assistance); Baldayaque v. United States, 338 F.3d 145, 152 (2d Cir. 2003) (holding counsel's failure to file a post-conviction motion to vacate, despite defendant's direction, was ineffective assistance); Everett v. Beard, 290 F.3d 500, 515-16 (3d Cir. 2002) (holding failure to object to erroneous jury instructions was

Supreme Court applied *Strickland* to ineffective assistance of counsel claims stemming from the pleading stage in *Hill v. Lockhart*.[30] In *Hill*, the Court held that the Sixth Amendment guarantees a defendant the right to *effective* assistance of counsel when pleading guilty.[31]

However, courts have limited the guarantee of effective assistance of counsel in an important capacity: through the collateral consequences doctrine.[32] Federal and state courts have nearly uniformly held that this constitutional right extends only to direct, and not to collateral, consequences of a conviction.[33] While this demarcation by the courts has been clear, the distinction drawn between direct and collateral consequences is more ambiguous.[34] Most prominently, courts have characterized direct consequences as "definite, immediate and largely automatic effect[s]" on the range of a defendant's punishment.[35] Thus,

ineffective assistance because had counsel objected, the jury might not have convicted the defendant of murder); Dixon v. Snyder, 266 F.3d 693, 703-05 (7th Cir. 2001) (holding counsel's failure to cross-examine the sole eyewitness against defendant was ineffective assistance because witness testimony was the only direct evidence against the defendant); United States v. Novak, 903 F.2d 883, 887 (2d Cir. 1990) (holding representation by counsel, who later revealed that he gained admission to the bar by fraudulent means, constituted per se denial of effective assistance). *But see, e.g.*, Young v. Runnels, 435 F.3d 1038, 1043 (9th Cir. 2006) (holding counsel's subsequent unfitness finding by the State Bar Court did not render counsel per se ineffective without a showing of specific errors).

[30] *See* Hill v. Lockhart, 474 U.S. 52, 56-58 (1985).

[31] *See id.* at 58 (holding that *Strickland*'s two-part test for evaluating ineffective assistance of counsel claims applies to challenges to guilty pleas based on ineffective assistance of counsel).

[32] *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 693 (2008) [hereinafter *Mythical Divide*].

[33] *See* Chin & Holmes, *supra* note 32, at 706-08 (listing jurisdictions that have found that defense counsel's duty extends only to explaining direct consequences of a conviction under the Sixth Amendment); *Sixth Amendment: Effective Assistance of Counsel*, 124 HARV. L. REV. 199, 199 (2010); *see also* Jenny Roberts, *Ignorance Is Effectively Bliss*, 95 IOWA L. REV. 119, 124-25 (2009) [hereinafter *Ignorance*]; Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 52-53 (2010).

[34] *See* Steve Colella, *"Guilty, Your Honor": The Direct and Collateral Consequences of Guilty Pleas and the Courts That Inconsistently Interpret Them*, 26 WHITTIER L. REV. 305, 307-08 (2004); Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 96-101 (2011); Roberts, *Mythical Divide*, *supra* note 32, at 678; Sweeney, *supra* note 33, at 53.

[35] *See, e.g.*, Steele v. Murphy, 365 F.3d 14, 17 (1st Cir. 2004) (adopting standard articulated in Cuthrell v. Director, 475 F.2d 1364 (4th Cir. 1973), to define direct consequences); United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) (same);

direct consequences include such penal sanctions as imprisonment, jail time, probation, and imposition of a fine.[36] Alternatively, courts have defined collateral consequences as those civil sanctions stemming from the fact of conviction, rather than the explicit punishment issued by the court.[37] These sanctions often restrict the convicted individual's social, economic, and political access.[38] For instance, courts have uniformly characterized deportation, often triggered by the outcome of a criminal proceeding, as a remedial sanction and thus a collateral consequence.[39] Therefore, the constitutional protections provided to

United States v. Kikuyama, 109 F.3d 536, 537 (9th Cir. 1997) (same); Parry v. Rosemeyer, 64 F.3d 110, 114 (3d Cir. 1995) (same); King v. Dutton, 17 F.3d 151, 154 (6th Cir. 1994) (same); United States v. U.S. Currency in Amount of $228,536.00, 895 F.2d 908, 915-16 (2d Cir. 1990) (same); George v. Black, 732 F.2d 108, 110 (8th Cir. 1984) (same). *See generally* Sweeney, *supra* note 33, at 53-54 (discussing the various standards utilized by courts to define collateral consequences).

[36] *See* Chin & Holmes, *supra* note 32, at 703; Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents ?*, 61 AM. U. L. REV. 1, 24 (2011); Roberts, *Ignorance*, *supra* note 33, at 124.

[37] *See* Maddali, *supra* note 36, at 24-30; Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 635 (2006); Roberts, *Mythical Divide*, *supra* note 32, at 679.

[38] *See, e.g.*, Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1997) (revocation of parole); *Parry*, 64 F.3d at 114-15 (ineligibility for parole); United States v. Morse, 36 F.3d 1070, 1072 (11th Cir. 1994) (disqualification from public benefits); U.S. Currency, 895 F.2d at 914-17 (civil forfeiture); Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988) (honorable discharge from armed services); Landry v. Hoepfner, 840 F.2d 1201, 1217 (5th Cir. 1988) (revocation of driver's license); Meaton v. United States, 328 F.2d 379, 381 (5th Cir. 1964) (disenfranchisement); Martin v. Reinstein, 987 P.2d 779, 805-06 (Ariz. Ct. App. 1999) (civil commitment); State v. Barton, 609 P.2d 1353 (Wash. 1980) (higher penalty based on repeat offender law). *See generally* Chin & Holmes, *supra* note 32, at 705 (listing a variety of consequences generally considered collateral by the majority of courts); Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 307-08 (2005) (discussing collateral consequences affecting civil, political, social, and economic rights).

[39] *See* 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, 1464-67 (2011) [hereinafter *Fifth-and-a-Half Amendment*]; Sweeney, *supra* note 33, at 54; *see, e.g.*, United States v. Amador-Leal, 276 F.3d 511, 516-17 (9th Cir. 2002) (holding that district courts are not constitutionally required to warn defendants of the immigration consequences of a conviction because they are collateral in nature); United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988) (holding that as deportation is a collateral consequence, a sentencing court has not duty to inform a defendant of possible deportation); State v. Muriithi, 46 P.3d 1145, 1155 (Kan. 2002) (holding that, absent a statutory obligation, a trial court has no duty to advise a defendant regarding immigration consequences because they are collateral); People v.

criminal defendants have not traditionally attached to immigration proceedings stemming from a conviction.[40]

### *B. The* Padilla *Court's View on Ineffective Assistance of Counsel, Guilty Pleas, and Deportation*

In *Padilla*, the Supreme Court addressed whether counsel has a constitutional duty to provide advice regarding the immigration consequences of a guilty plea.[41] Jose Padilla, a lawful permanent resident and Vietnam veteran, pled guilty to the transportation of a large quantity of marijuana in Kentucky.[42] As a result, the Department of Homeland Security initiated removal proceedings against him.[43] In post-conviction proceedings, Padilla alleged that his counsel had failed to advise him of this potential deportation consequence, incorrectly stating that he "did not have to worry about immigration status since he had been in the country so long."[44] Padilla contended that he would have insisted on going to trial if his attorney had informed him that a guilty plea could render him deportable.[45] Yet, the Supreme Court of Kentucky held the Sixth Amendment does not guarantee effective assistance of counsel in matters of collateral consequence to a conviction.[46]

The Supreme Court granted certiorari to address the issue.[47] The Court's analysis began with a discussion of the dramatic changes in federal immigration law over the course of the last century.[48] The

DeJesus, 819 N.Y.S.2d 442, 445 (N.Y. Crim. Ct. 2006) (holding that deportation is a collateral consequence of a guilty plea); Nikolaev v. Weber, 705 N.W.2d 72, 76 (S.D. 2005) (holding that deportation is a collateral consequence and failure to advise a defendant of possible deportation does not amount to ineffective assistance of counsel); Valle v. State, 132 P.3d 181, 184 (Wyo. 2006) (holding that law is well-settled that counsel has no duty to advise a defendant concerning immigration consequences because of their collateral nature).

[40] *See* Sweeney, *supra* note 33, at 54.

[41] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010). *See generally* Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, 25 CRIM. JUST. 21, 22-31 (2010) (discussing the modern criminal justice justifications and public policy implications of *Padilla*); Kanstroom, *Fifth-and-a-Half Amendment*, *supra* note 39, at 1480 (discussing *Padilla* and questions left unanswered by the Court's opinion).

[42] *See Padilla*, 130 S. Ct. at 1477.

[43] *See id.* at 1477 n.1.

[44] *See id.* at 1478 (quoting Kentucky v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).

[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *See id.*

Court highlighted that immigration reforms have expanded the class of deportable offenses and limited the authority of judges to avert deportation.[49] These changes magnify the significance of deportation, making it potentially the most important part of a penalty imposed on a convicted noncitizen defendant.[50]

In the second part of its opinion, the Court discussed the constitutional right to effective assistance of counsel and the direct versus collateral consequences distinction.[51] The Court noted that most lower courts have distinguished between direct and collateral consequences in defining the scope of the Sixth Amendment right to counsel.[52] The Court underlined, however, that it had never itself made such a distinction.[53] The Court highlighted the unique nature of deportation by pointing to its severity as a strictly civil sanction bearing a particularly harsh penalty.[54] Moreover, the Court pointed to its certainty by highlighting the intimate connection between criminal convictions and the resulting, nearly mechanical, civil penalty of deportation.[55] Thus, because of its atypical nature, the Court found the classification of deportation in the pre-existing direct versus collateral consequences paradigm unworkable.[56] The Court concluded that advice regarding deportation is within the scope of the Sixth Amendment's guarantee of effective assistance of counsel under *Strickland*.[57] As a result, the Court held that counsel must inform a client whether a conviction carries a risk of deportation.[58]

Having determined that advice regarding deportation is within the ambit of the Sixth Amendment, in the third part of its opinion, the Court applied *Strickland*'s standard for ineffective assistance of counsel to Padilla's claim.[59] The Court stated that whether an attorney's

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[49] *See id.* at 1478-80.

[50] *See id.* at 1480.

[51] *See id.* at 1481.

[52] *See id.*; *see also Sixth Amendment: Effective Assistance of Counsel*, *supra* note 33, at 201.

[53] *See Padilla*, 130 S. Ct. at 1481 ("We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*.").

[54] *See id.* (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting)); *see also* Love, *supra* note 34, at 126.

[55] *See Padilla*, 130 S. Ct. at 1481 (citing United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)); *see also* Love, *supra* note 34, at 126.

[56] *See Padilla*, 130 S. Ct. at 1481.

[57] *See id.* at 1482.

[58] *See id.* at 1486.

[59] *See id.* at 1482-85.

performance fell below an objective standard of reasonableness depends on the "prevailing professional norms" of effective representation within the legal community.[60] Surveying a multitude of professional guidelines, the Court found that established norms of practice have long directed attorneys to advise their clients of the risk of deportation.[61] The Court concluded that Padilla's counsel could have readily determined the near-mandatory deportation he would face by simply reading the removal statute.[62] Therefore, by failing to advise him of the deportation consequences of a guilty plea, the Court held that his counsel's representation was constitutionally deficient.[63] Not reaching *Strickland*'s second prong, the Court remanded the issue of whether Padilla suffered sufficient prejudice to warrant relief to the Kentucky court.[64]

### *C. Retroactivity Under* Teague*: "New Rules" Versus "Old Rules"*

Whether an individual who received constitutionally deficient advice regarding the deportation consequences of a plea pre-*Padilla* may benefit from the Court's decision has divided the lower courts.[65] Under prevailing law, when a new constitutional ruling applies retroactively, petitioners may benefit from it even if their convictions

[60] *See id.*

[61] *See id.*

[62] *See id.* at 1483.

[63] *See id.*

[64] *See id.* at 1483-84.

[65] *See, e.g.*, United States v. Amer, 681 F.3d 211 (5th Cir. 2012) (holding that *Padilla* is not retroactively applicable); United States v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011) (same); United States v. Chaidez, 655 F.3d 684 (7th Cir. 2011) (same); United States v. Orocio, 645 F.3d 630 (3d Cir. 2011) (holding that *Padilla* is retroactively applicable); Sarria v. United States, No. 11-20730-CIV, 2011 WL 4949724 (S.D. Fla. Oct. 18, 2011) (holding that *Padilla* represents a departure from existing precedent and thus announces a new rule); United States v. Chavarria, Nos. 2:10-CV-191 JVB, 2:08-CR-192, 2011 WL 4916568 (N.D. Ind. Oct. 14, 2011) (holding that, under the Seventh Circuit's decision in *Chaidez v. United States*, *Padilla* announced a new rule); United States v. Hurtado-Villa, No. CV 10-01814-PHX-FJM, CR 08-01249-PHX, 2011 WL 4625957 (D. Ariz. Oct. 5, 2011) (holding that whether or not *Padilla* announced a new rule, the defendant's claim was time-barred); Quijada v. United States, Civ. No. 2:10-CV-403, 2011 WL 4687534, at *1 (S.D. Ohio Oct. 4, 2011) (stating that courts are divided on the issue of *Padilla*'s retroactive effect, but not reaching the issue); United States v. Fathalla, No. 07-CR-87, 2011 WL 4349368 (E.D. Wis. Sept. 15, 2011) (holding that *Padilla* did not announce a new rule and is not retroactively applicable on collateral review); United States v. Abraham, No. 8:09-CR-126, 2011 WL 3882290 (D. Neb. Sept. 1, 2011) (holding that *Padilla* did not announce a new rule and is not retroactively applicable on collateral review).

became final[66] before the decision's announcement.[67] *Teague* represents the seminal standard for determining possible retroactive application of a rule of criminal procedure.[68]

Under *Teague*, the determination of retroactivity involves a three-step process.[69] First, as a threshold matter, the court must determine when the petitioner's conviction became final.[70] If the Court rendered its decision after the conviction became final, the petitioner may not benefit from the announced rule, unless a retroactivity exception applies.[71]

Second, the court must survey the legal landscape existing before the announcement of the rule to determine whether the Constitution, as interpreted by precedent, compelled the Court's decision.[72] That is, the court must decide whether the rule is "new" or "old."[73] This inquiry is the most tenuous aspect of the retroactivity analysis.[74]

The Supreme Court has articulated the definition of a new rule in numerous ways, leaving the scope and meaning of the term largely malleable.[75] Most prominently, the Court has defined a new rule as

[66] A case is "final" where a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *See* United States v. Johnson, 457 U.S. 537, 542 n.8 (1982) (citing Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)).

[67] *See* LARRY W. YACKLE, POSTCONVICTION REMEDIES § 20 (1981 & Supp. 2008).

[68] 489 U.S. 288, 310 (1989).

[69] *See* Beard v. Banks, 124 S. Ct. 2504, 2510 (2004) (outlining the three step process conducted by the Court to determine retroactivity under *Teague*'s test); *see also* O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (same); Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (stating that application of *Teague* requires a federal court to engage in a three step process); Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (same).

[70] *See Banks*, 124 S. Ct. at 2510; *O'Dell*, 521 U.S. at 156; *Lambrix*, 520 U.S. at 527; *Caspari*, 510 U.S. at 390.

[71] *See Banks*, 124 S. Ct. at 2510 (discussing determinations of finality of convictions); Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that new rules apply retroactively to all cases, state or federal, pending on direct review or not yet final); *see also* DAN KESSELBRENNER, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWYERS GUILD, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: RETROACTIVE APPLICABILITY OF PADILLA V. KENTUCKY, 1-2 (2010), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_pa_padilla_retroactivity.pdf.

[72] *See Banks*, 124 S. Ct. at 2510; *O'Dell*, 521 U.S. at 156; *Lambrix*, 520 U.S. at 527 (citing Graham v. Collins, 506 U.S. 461, 469 (1993)); Saffle v. Parks, 494 U.S. 484, 488 (1990).

[73] *See* Whorton v. Bockting, 549 U.S. 406, 416 (2007); *Banks*, 124 S. Ct. at 2510; Wright v. West, 505 U.S. 277, 313 (1992).

[74] *See Bockting*, 549 U.S. at 416; *Griffith*, 479 U.S. at 328.

[75] *See Graham*, 506 U.S. at 506 (discussing various ways in which the Court has defined a new rule); *see also* Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the*

one that was not "*dictated* by precedent existing at the time the defendant's conviction became final."[76] In other cases, the Court has found a new rule where a case "breaks new ground" or "imposes a new obligation" on the States or the federal government.[77] Alternatively, cases have been found to announce a new rule where the decision reached constitutes a development in the law over which "reasonable jurists" could disagree.[78] However, the Court has emphasized that "the mere existence of conflicting authority" does not alone imply a new rule.[79] Finally, the Court has asserted that only in rare cases will a case announce such a novel result as to constitute a new rule.[80]

Third, if a court concludes that a rule is new, it must then consider whether the rule falls within either of *Teague*'s two narrow exceptions to non-retroactivity.[81] Under the first exception, *Teague* permits the

*Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 189 (2005).

[76] Teague v. Lane, 489 U.S. 288, 301 (1989) (emphasis in original); *see also Bockting*, 549 U.S. at 416 (quoting *Parks*, 494 U.S. at 495) (emphasis in original) (holding decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not dictated by precedent and thus Court announced a new rule); Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (holding a reasonable jurist would not have considered precedent to compel application of the Double Jeopardy Clause to a noncapital sentencing proceeding); Sawyer v. Smith, 497 U.S. 227, 234 (1990) (holding that result reached in *Caldwell v. Mississippi*, 472 U.S. 320 (1995) was not dictated by precedent existing when defendant's conviction became final); *Parks*, 494 U.S. at 488 (holding that the rule announced in *Penry v. Lynaugh*, 492 U.S. 302 (1989) constituted a new rule). *But cf. O'Dell*, 521 U.S. at 156 (holding that a case announces an old rule where precedent compels the conclusion that the Constitution required it).

[77] *Teague*, 489 U.S. at 301; *see also* Butler v. McKellar, 494 U.S. 407, 412 (1990) (discussing grounds on which a case may announce a new rule); *Penry*, 492 U.S. at 314-20 (holding rule sought by the petitioner would not impose a new obligation on the state of Texas and would not announce a new rule).

[78] *See Bockting*, 549 U.S. at 417 (holding that because *Crawford*, 541 U.S. at 36, overruled prior precedent, reasonable jurists could have concluded that the previous rule governed); *Banks*, 542 U.S. at 413-17 (holding that reasonable jurists could have disagreed regarding the outcome reached in *Mills v. Maryland*, 486 U.S. 367 (1988) and thus the case announced a new rule); Lambrix v. Singletary, 520 U.S. 518, 527-28, 532 (1997) (holding that a case announced a new rule because reasonable jurists could have reached a different result than that in *Espinosa v. Florida*, 505 U.S. 1079 (1992)); Wright v. West, 505 U.S. 277, 291 (1992).

[79] *See Wright*, 505 U.S. at 304 (O'Connor, J., concurring) (holding that the purpose of the new rule doctrine is to validate objectively reasonable interpretations of existing precedent); Stringer v. Black, 503 U.S. 222, 236-37 (1992) (same); *Butler*, 494 U.S. at 415 (same).

[80] *See* Gray v. Netherland, 518 U.S. 152, 187 (1996) (Ginsburg J., dissenting); Graham v. Collins, 506 U.S. 461, 506 (1993); *Wright*, 505 U.S. at 309 (Kennedy, J., concurring).

[81] *See* Schriro v. Summerlin, 542 U.S. 348, 353 (2004); *O'Dell*, 521 U.S. at 156-57;

retroactive application of a new rule if it addresses a substantive categorical guarantee accorded by the Constitution.[82] The Court has held that two classes of decisions constitute such substantive categorical guarantees: those that limit the scope of a criminal statute by interpreting its terms or that restrict the power of state or federal authority to proscribe or punish certain kinds of individual conduct.[83] Under the second exception, *Teague* permits the retroactive application of a new rule if it implicates the fundamental fairness and accuracy of the criminal proceeding.[84] The Court has narrowly construed this exception, suggesting that only one case — *Gideon v. Wainwright* — would fall within its scope.[85]

If a court determines that the announced constitutional rule of criminal procedure is old under *Teague*'s framework, it will apply retroactively to cases on both direct and collateral review.[86] However,

*Lambrix*, 520 U.S. at 539; *Teague*, 489 U.S. at 311.

[82] *See Summerlin*, 542 U.S. at 353; *Lambrix*, 520 U.S. at 539; Saffle v. Parks, 494 U.S. 484, 494-95 (1990) (citing *Penry*, 492 U.S. at 329, 330); *Teague*, 489 U.S. at 311 (citing Mackey v. United States, 401 U.S. 667, 692 (1971)).

[83] *See Summerlin*, 542 U.S. at 351-53; Bousley v. United States, 523 U.S. 614, 620-21 (1998); *Gray*, 518 U.S. at 170 (citing *Parks*, 494 U.S. at 494); *Penry*, 492 U.S. at 329-30; *Teague*, 489 U.S. at 311 (citing *Mackey*, 401 U.S. at 692); United States v. Thomas, 627 F.3d 534, 537 (4th Cir. 2010); Entzeroth, *supra* note 75, at 188; *see, e.g.*, Lawrence v. Texas, 539 U.S. 575, 558 (2003) (holding that criminalizing consensual adult sodomy was unconstitutional); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that under the Eighth Amendment, imposing the death penalty is an excessive punishment for a mentally retarded criminal).

[84] *See Summerlin*, 542 U.S. at 351-52; Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001); *Gray*, 518 U.S. at 170 (citing *Parks*, 494 U.S. at 495); Graham v. Collins, 506 U.S. 461, 478 (1993); *Teague*, 489 U.S. at 311-12. *See generally* Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 127-29 (2010) (discussing second exception under *Teague*).

[85] *See Summerlin*, 542 U.S. at 352 (characterizing the second *Teague* exception as extremely narrow); *Gray*, 518 U.S. at 170 (characterizing *Gideon v. Wainwright*, 374 U.S. 335 (1963) as the paradigmatic example of a watershed rule of criminal procedure); *Parks*, 494 U.S. at 495 (stating that *Gideon* is usually cited to illustrate the type of rule falling under *Teague*'s second exception); *see also* O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (holding that rule announced did not fall within second *Teague* exception); Sawyer v. Smith, 497 U.S. 227, 242-43 (1990) (same). *See generally* Beard v. Banks, 542 U.S. 406 (2004) (rejecting retroactivity for *Mills v. Maryland*, 486 U.S. 367 (1988)); Gilmore v. Taylor, 508 U.S. 333 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide).

[86] *See Teague*, 489 U.S. at 310; *see also* Whorton v. Bockting, 549 U.S. 406, 416 (2007). *See generally* Allen, *supra* note 84 (discussing jurisprudential principles underlying retroactivity and problems created by its application); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738-49 (1991) (discussing the new law doctrine of retroactivity in criminal cases); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium*

if a rule is characterized as new, it will not apply retroactively on collateral review.[87] Thus, whether the Court's decision in *Padilla* is retroactively applicable to cases on collateral review fundamentally turns on whether the case announced a new rule under *Teague*'s precepts.[88]

## II. AN EMERGING CIRCUIT SPLIT: *OROCIO*, *AMER, CHAIDEZ*, AND *CHANG HONG*

Since the Court's decision in *Padilla*, more than twenty-eight federal courts and sixteen state courts have reached opposing conclusions regarding whether *Padilla* is retroactively applicable.[89] Amongst the

*Approach*, 110 HARV. L. REV. 1055 (1997) (examining current retroactivity paradigm and advancing a new framework for retroactivity analysis); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 715-19 (1990) (criticizing *Teague*'s procedural approach to the retroactivity analysis as overly complex).

[87] *See supra* note 86 and accompanying text.

[88] *See* United States v. Amer, 681 F.3d 211, 212 (5th Cir. 2012); United States v. Chang Hong, 671 F.3d 1147, 1150 (10th Cir. 2011); United States v. Chaidez, 655 F.3d 684, 686 (7th Cir. 2011); United States v. Orocio, 645 F.3d 630, 639-40 (3d Cir. 2011).

[89] *See* United States v. Krboyan, No. 1:02-CR-05438 OWW, 2011 U.S. Dist. LEXIS 57073, at *9 (E.D. Cal. May 27, 2011) (holding that *Padilla* is retroactively applicable); United States v. Diaz-Palmerin, No. 08-CR-777-3, 2011 U.S. Dist. LEXIS 37151, at *8-9 (N.D. Ill. Apr. 5, 2011) (same); United States v. Chavarria, No. 2:10-CV-191 JVB, 2011 U.S. Dist. LEXIS 38203, at *7 (N.D. Ind. Apr. 4, 2011) (same); Zapata-Banda v. United States, No. B 10-256, 2011 U.S. Dist. LEXIS 36739, at *10-13 (S.D. Tex. Mar. 3, 2011) (same); Marroquin v. United States, No. 7:10-CV-156, 2011 U.S. Dist. LEXIS 11406, at *14 (S.D. Tex. Feb. 4, 2011) (same); United States v. Zhong Lin, No. 3:07-CR-44-H, 2011 U.S. Dist. LEXIS 5563, at *4 (W.D. Ky. Jan. 19, 2011) (same); United States v. Joong Ral Chong, No. CR 101-078, 2011 U.S. Dist. LEXIS 2923, at *6 (S.D. Ga. Jan. 12, 2011) (same); Luna v. United States, No. 10CV1659 JLS (POR), 2010 U.S. Dist. LEXIS 124113, at *8 (S.D. Cal. Nov. 23, 2010) (same); Martin v. United States, No. 09-1387, 2010 U.S. Dist. LEXIS 87706, at *10-11 (C.D. Ill. Aug. 25, 2010) (same); Al Kokabani v. United States, No. 5:06-CR-207-FL, 2010 U.S. Dist. LEXIS 110724, at *16 (E.D.N.C. July 30, 2010) (same); United States v. Hubenig, No. 6:03-MJ-040, 2010 U.S. Dist. LEXIS 80179, at *21 (E.D. Cal. July 1, 2010) (same); United States v. Obonaga, No. 07-CR-402 (JS), 2010 U.S. Dist. LEXIS 63872, at *3 (E.D.N.Y. June 24, 2010) (same); United States v. Millan, No. 3:06CR458/RV, 2010 U.S. Dist. LEXIS 62351, at *4-7 (N.D. Fla. May 24, 2010) (same); United States v. Guzman-Garcia, No. CR F 06-0390 LJO, 2010 U.S. Dist. LEXIS 42930, at *4-5 (E.D. Cal. Apr. 30, 2010) (same); State v. Limarco, 235 P.3d 1267, at *4-5 (Kan. Ct. App. Aug. 6, 2010) (same); Denisyuk v. State, No. 45, 2011 WL 5042332, at *478-80 (Md. Oct. 25, 2011) (same); Com. v. Clarke, 460 Mass. 30, 45 (2011) (same); People v. De Jesus, 30 Misc. 3d 748, 759-62 (N.Y. Sup. Ct. Dec. 24, 2010); Ex Parte Yekaterina Tanklevskaya, 361 S.W. 3d 86, 95 (Tex. App. May 26, 2011) (same); State v. Sandoval, 249 P.3d 163, 167 (Wash. 2011) (same); Lang, *supra*

courts of appeals, there is an entrenched split between the Third Circuit, and the Fifth, Seventh, and Tenth Circuits on the issue.[90] The Third Circuit has held that *Padilla* announced an old rule of criminal procedure and therefore is retroactively applicable.[91] Conversely, the Fifth, Seventh, and Tenth Circuits have held that *Padilla* announced a new rule such that the Court's decision does not have retroactive effect.[92]

### *A.* United States v. Orocio*: The Third Circuit Holds* Padilla *Retroactively Applicable*

In 2003, police arrested Gerald Orocio, a Filipino native and a lawful permanent resident, after finding thirty grams of methamphetamines in his car.[93] Police charged him with drug trafficking and he faced a ten-year sentence.[94] Pursuant to a plea

note 3, at 967-72 (reviewing 265 lower court cases addressing Padilla since its announcement). *But cf.* Mathur v. United States, No. 7:07-CR-92-BO, 2011 U.S. Dist. LEXIS 56801, at *6 (E.D.N.C. May 24, 2011) (holding that *Padilla* is not retroactively applicable); United States v. Correa-Gutierrez, No. 8:08CR267, 2011 U.S. Dist LEXIS 53017, at *2-3 (D. Neb. May 17, 2011) (same); Gonzalez v. United States, No. 5:11-CV-197-OC-36 DNF, 2011 U.S. Dist. LEXIS 50922, at *4-5 (M.D. Fla. May 12, 2011) (same); Hamad v. United States, 10-CV-5829(JG), 2011 U.S. Dist. LEXIS 45851, at *7 (E.D.N.Y. Apr. 28, 2011) (same); Dennis v. United States, 787 F. Supp. 2d 425, 430 (D.S.C. Apr. 19, 2011) (same); United States v. Laguna, No. 10 CR 342, 2011 U.S. Dist. LEXIS 38856, at *17 (N.D. Ill. Apr. 11, 2011) (same); Mendoza v. United States, 774 F. Supp. 2d 791, 798 (E.D. Va. 2011) (same); United States v. Nelson, No. 1:08-CR-068, 2011 U.S. Dist. LEXIS 24370, at *7-8 (S.D. Ohio Jan. 4, 2011) (same); Thai Hong Doan v. United States, 760 F. Supp. 2d 602, 606 (E.D. Va. 2011) (same); United States v. Hough, No.2:02-CR-00649-WJM-1, 2010 U.S. Dist. LEXIS 133703, at *11 (D.N.J. Dec. 16, 2010) (same); United States v. Macedo, No. l:03-CR-00055-MP-AK, 2010 U.S. Dist. LEXIS 136571, at *3 (N.D. Fla. Dec. 15, 2010) (same); United States v. Bacchus, CR No. 93-0835, 2010 U.S. Dist. LEXIS 139583, at *4 (D.R.I. Dec. 8, 2010) (same); United States v. Perez, No. 8:02CR296, 2010 U.S. Dist. LEXIS 119665, *6 (D. Neb. Nov. 9, 2010) (same); United States v. Gilbert, No. 2:03-CR-00349-WJM-1, 2010 U.S. Dist. LEXIS 110997, at *9 (D.N.J. Oct. 13, 2010) (same); United States v. Aguilar-Lopez, No. CR-09-6045-FVS-1, 2010 U.S. Dist. LEXIS 76537, at *9 (E.D. Wash. July 29, 2010) (same); Haddad v. United States, No. 07-12540, 2010 U.S. Dist. LEXIS 72799, at *16 (E.D. Mich. July 20, 2010) (same); Gacko v. United States, No. 09-CV-4938(ARR), 2010 U.S. Dist. LEXIS 50617, at *6 (E.D.N.Y. May 20, 2010) (same); Campos v. State, 798 N.W.2d 565, 571 (Minn. Ct. App. 2011) (same).

[90] *See Amer*, 681 F.3d at 213-14; *Chang Hong*, 671 F.3d at 1155; *Chaidez*, 655 F.3d at 686; *Orocio*, 645 F.3d at 639-40.

[91] *See Orocio*, 645 F.3d at 639-40.

[92] *See Amer*, 681 F.3d at 214; *Chang Hong*, 671 F.3d at 1155; *Chaidez*, 655 F.3d at 686.

[93] *See* Brief for Appellee at 7-8, *Orocio*, 645 F.3d 630 (No. 10-1231).

[94] *See* United States v. Orocio, No. 04-725(WHW), 2010 WL 99115, at *1 (D.N.J.

agreement with the Government, Orocio pled guilty to possession of a controlled substance, subject to a sentence of time served.[95] Following completion of his sentence, the Department of Homeland Security placed Orocio in removal proceedings.[96] He then appealed his conviction, arguing that his attorney had failed to provide effective assistance because he had not advised him of the immigration consequences of his guilty plea.[97] Orocio contended that he would not have pled guilty if he had received such proper advisement.[98] The issue before the court was whether Orocio could benefit from the retroactive application of the Supreme Court's decision in *Padilla*.[99]

The Third Circuit held that *Padilla* did not announce a new rule.[100] Looking to the intersection of *Strickland* and *Teague*, the court outlined three considerations to guide its retroactivity analysis.[101] First, it is not necessary that case law exist "on all fours" to conclude that precedent dictated the rule at issue.[102] Instead, the court must examine precedent and then-existing professional norms to determine if the decision created a new rule.[103] Second, whether counsel's performance was objectively reasonable under *Strickland* is a case-specific, factual analysis.[104] Third, the court stated that only in rare cases will a decision render such a novel result that it creates a new rule.[105]

The court concluded that the rule announced in *Padilla* emanated from well-established constitutional principles guaranteeing effective assistance of counsel and, specifically, the precedents of *Strickland* and *Hill*.[106] Thus, *Padilla* simply reaffirmed counsel's duty to a defendant during the critical plea process by "merely clarif[ying] the law as it applied to the particular facts of that case."[107] The court also found that professional norms have long-demanded reasonable counsel to advise a noncitizen client of the immigration consequences of a guilty

Jan. 6, 2010).

95 *See id.*; *see also Orocio*, 645 F.3d at 634.

96 *See Orocio*, 645 F.3d at 634.

97 *See id.* at 634-35.

98 *See id.*

99 *See id.*

100 *See id.* at 639-40.

101 *See id.* at 639.

102 *See id.* (citing Lewis v. Johnson, 359 F.3d 646, 655 (3d Cir. 2004)).

103 *See id.* at 639.

104 *See id.*

105 *See id.*

106 *See id.*

107 *See id.*

plea.[108] On these bases, the *Orocio* court held that *Padilla* announced an old rule under *Teague* and was thus retroactively applicable.[109]

The court then addressed the question of whether Orocio's counsel was ineffective under the standards set out in *Padilla* and *Strickland*.[110] Based on established professional standards, the court found Orocio's counsel was deficient because he failed to advise Orocio of the immigration consequences of his plea.[111] Finally, the court concluded that Orocio might have rationally elected to go to trial if he had been made aware of the immigration consequences of a guilty plea.[112] The court remanded the case, finding an evidentiary hearing necessary to determine whether Orocio suffered prejudice from his counsel's deficient representation.[113]

### *B.* United States v. Amer*,* Chaidez v. United States*, and* United States v. Chang Hong*: The Fifth, Seventh, and Tenth Circuits Hold* Padilla *Retroactively Inapplicable*

By contrast, the Fifth, Seventh, and Tenth Circuits, in similarly reasoned opinions, reached the opposite conclusion of the Third Circuit in *Orocio*.[114] In *United States v. Amer*, *Chaidez v. United States*, and *United States v. Chang Hong*, these courts of appeals were presented with the same question of whether the rule announced in *Padilla* may be applied retroactively.[115] Concluding that *Padilla*'s result was susceptible to debate by reasonable jurists and not compelled by precedent, the Fifth, Seventh, and Tenth Circuits held that the rule announced by the Court was new, and thus, retroactively inapplicable on collateral review.[116]

In *Amer, Chaidez*, and *Chang Hong*, the factual circumstances of the defendant-petitioners and their claims on appeal were largely similar.[117] In each case, the petitioner, a lawful permanent resident,

[108] *See id.* (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010)).

[109] *See id.* at 641.

[110] *See id.*

[111] *See id.*

[112] *See id.* at 645.

[113] *See id.* at 646-47.

[114] *See* United States v. Amer, 681 F.3d 211, 214 (5th Cir. 2012); United States v. Chang Hong, 671 F.3d 1147, 1155 (10th Cir. 2011); United States v. Chaidez, 655 F.3d 684, 689 (7th Cir. 2011). *But cf. Orocio*, 645 F.3d at 641 (holding that *Padilla* is retroactively applicable).

[115] *See Amer*, 681 F.3d at 212; *Chang Hong*, 671 F.3d at 1151; *Chaidez*, 655 F.3d at 688.

[116] *See Amer*, 681 F.3d at 214; *Chang Hong*, 671 F.3d at 1155; *Chaidez*, 655 F.3d at 689.

[117] *See Amer*, 681 F.3d at 212; *Chang Hong*, 671 F.3d at 1148-49; *Chaidez*, 655 F.3d

pled guilty and received a sentence, rendering them deportable from the United States.[118] After the government initiated deportation proceedings, the petitioners sought to vacate their convictions.[119] Each of the defendant-petitioners argued that their attorneys had provided ineffective assistance of counsel by failing to advise of the immigration consequences of their pleas, in contravention of *Padilla*'s instruction.[120]

In determining *Padilla*'s possible retroactive effect, the foundational issue before the Fifth, Seventh, and Tenth Circuits was whether *Padilla* announced a new rule of criminal procedure. Each court found that *Teague*'s retroactivity test governed its analysis of the issue.[121] Each circuit employed the traditional formula, stating that a rule is new if it was not "*dictated* by precedent existing at the time the defendant's conviction became final."[122] However, each framed that determination differently than the *Orocio* court had.[123] The courts explained that an outcome is dictated by precedent where a court, then-examining the claim, "would have felt compelled by existing precedent to conclude that the rule was required by the Constitution."[124] In determining whether existing precedent dictated a particular decision, each court found that the inquiry turns on whether the outcome of the case was susceptible to debate by reasonable jurists.[125] A showing of a lack of unanimity on the Court or among the lower courts on the issue suggests that the rule announced was not dictated by precedent and, thus, is not new.[126]

at 686.

[118] *See Amer*, 681 F.3d at 212; *Chang Hong*, 671 F.3d at 1148-49; *Chaidez*, 655 F.3d at 686; Brief of Defendant-Appellee at 3, *Chaidez*, 655 F.3d 684 (No. 10-3623); Brief of Appellant at 3, *Chaidez*, 655 F.3d 684 (No. 11-820); Amer v. United States, No. 1:06CR118-GHD, 2011 WL 2160553, at *1 (N.D. Mass. May 31, 2011).

[119] *See Amer*, 681 F.3d at 212; *Chang Hong*, 671 F.3d at 1149; *Chaidez*, 655 F.3d at 686.

[120] *See* cases cited *supra* note 119.

[121] *See Amer*, 681 F.3d at 212-13; *Chang Hong*, 671 F.3d at 1150-51; *Chaidez*, 655 F.3d at 688.

[122] *See Amer*, 681 F.3d at 213 (quoting *Teague v. Lane*, 489 U.S. 288, 301) (emphasis in original); *Chang Hong*, 671 F.3d at 1153 (same); *Chaidez*, 655 F.3d at 688 (same).

[123] *See* United States v. Orocio, 645 F.3d 630, 639 (3d. Cir. 2011).

[124] *See Chang Hong*, 671 F.3d at 1151 (quoting O'Dell v. Netherland, 521 U.S. 151, 156 (1997)); *Chaidez*, 655 F.3d at 689 (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)).

[125] *See Amer*, 681 F.3d at 213; *Chang Hong*, 671 F.3d at 1153; *Chaidez*, 655 F.3d at 688-89.

[126] *See Amer*, 681 F.3d at 213-14; *Chang Hong*, 671 F.3d at 1153-55; *Chaidez*, 655 F.3d at 689-91.

Applying this framework to *Padilla*, the Fifth, Seventh, and Tenth Circuits pointed to the "array of views" expressed by the Justices in the *Padilla* decision.[127] The courts also highlighted the near unanimity of the lower courts, prior to *Padilla*, in holding that the Sixth Amendment did not require counsel to advise noncitizen defendants of the immigration consequences of a guilty plea.[128] On these grounds, the courts concluded that the result reached in *Padilla* was "susceptible to debate," as a reasonable jurist could have determined that precedent compelled a different outcome.[129]

While recognizing that *Padilla* had stemmed from *Strickland*, the courts concluded that its application to the collateral immigration consequences of a plea bargain represented an extraordinary result not dictated by precedent.[130] The Seventh Circuit concluded that *Padilla* represented a "rare exception" to the rule that the application of *Strickland* to a particular set of facts generally does not result in a new rule.[131] It found that *Padilla*'s requirement that counsel provide advice regarding a civil penalty imposed by the government following the conclusion of the criminal case to be "sufficiently novel to qualify as a new rule."[132] Similarly, the Tenth Circuit stated that *Padilla*'s abandonment of the traditional distinction between direct and collateral consequences maintained by the lower courts represented an unconventional extension of *Strickland*.[133] The Fifth Circuit highlighted that *Padilla*'s application of *Strickland* to advice required in plea-bargaining sprung from *Hill*, which did not "control" the decision.[134] The Fifth, Seventh, and Tenth Circuits concluded that *Padilla* announced a new rule of criminal procedure under *Teague*.[135]

The courts then addressed the question of whether *Padilla*, despite constituting a new rule, could have retroactive effect by falling within one of *Teague*'s exceptions.[136] In *Amer* and *Chaidez*, the parties

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[127] *See Amer*, 681 F.3d at 213; *see also Chang Hong*, 671 F.3d at 1154-55; *Chaidez*, 655 F.3d at 689-90.

[128] *See Amer*, 681 F.3d at 213-14; *Chang Hong*, 671 F.3d at 1154; *Chaidez*, 655 F.3d at 690.

[129] *See Amer*, 681 F.3d at 214; *Chang Hong*, 671 F.3d at 1155.

[130] *See Amer*, 681 F.3d at 214; *Chang Hong*, 671 F.3d at 1154; *Chaidez*, 655 F.3d at 692-93.

[131] *See Chaidez*, 655 F.3d at 691-93 (citing Williams v. Taylor, 529 U.S. 362, 382 (2000)).

[132] *See id.* at 693.

[133] *See Chang Hong*, 671 F.3d at 1155.

[134] *See Amer*, 681 F.3d at 214 (citations omitted).

[135] *Id.*; *Chaidez*, 655 F.3d at 694.

[136] *See Amer*, 681 F.3d at 212 n.1; *Chang Hong*, 671 F.3d at 1156-59; *Chaidez*, 655

conceded that, if *Padilla* announced a new rule, neither exception to non-retroactivity would apply.[137] In *Chang Hong*, the Tenth Circuit found *Padilla* was procedural in nature, rather than substantive, and thus not within the scope of the first *Teague* exception.[138] Furthermore, as *Padilla*'s result did not derive from concern regarding the fairness and accuracy of criminal proceedings, the Tenth Circuit concluded that it did not fall within *Teague*'s second exception.[139] Determining that neither *Teague* exception to the retroactivity bar applied to *Padilla*, the Fifth, Seventh, and Tenth Circuits held that *Padilla* announced a new rule of criminal procedure, retroactively inapplicable on collateral review.[140]

## III. ANALYSIS

The Third Circuit in *Orocio* correctly held that *Padilla* did not announce a new rule under *Teague* and is thus retroactively applicable.[141] First, *Padilla* did not announce a new rule because the Court's decision represents a mere extension of Sixth Amendment jurisprudence guaranteeing effective assistance of counsel.[142] Second, the plain language of the Supreme Court's opinion illustrates its clear intent that *Padilla* have retroactive effect.[143] Finally, because the decision implicates the fundamental fairness of criminal proceedings, *Padilla* should apply retroactively.[144]

F.3d at 688.

[137] *See Amer*, 681 F.3d at 212 n.1; *Chaidez*, 655 F.3d at 688.

[138] *See Chang Hong*, 671 F.3d at 1157; *see also Amer*, 681 F.3d at 212 n.1 (stating that neither party argued that either of *Teague*'s narrow exceptions applied).

[139] *See Chang Hong*, 671 F.3d at 1158.

[140] *See Amer*, 681 F.3d at 214; *id.*; *Chaidez*, 655 F.3d at 694.

[141] *See* United States v. Orocio, 645 F.3d 630, 635-36 (3d Cir. 2011); discussion *infra* Part III.A-C (arguing *Padilla* did not announce a new rule of criminal procedure).

[142] *See* Strickland v. Washington, 466 U.S. 668, 684-96 (1984); discussion *infra* Part III.A (arguing that precedent dictated the result reached by the Court in *Padilla* and thus the case did not announce a new rule of criminal procedure).

[143] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1484-85 (2010); *Orocio*, 645 F.3d at 641; discussion *infra* Part III.B (arguing that the plain language of the Court's opinion demonstrates that the Court intended its decision to have retroactive effect).

[144] *See* discussion *infra* Part III.C (arguing that because *Padilla* implicates the fundamental fairness of the criminal justice process it should apply retroactively).

### *A. Precedent Dictated* Padilla*'s Result as a Factually Specific Extension of* Strickland*'s Constitutional Standard*

As discussed above, in order for a petitioner to benefit post-conviction from a newly announced constitutional rule, a court must determine whether the rule has retroactive effect.[145] The Supreme Court's decision in *Teague* governs the retroactivity analysis.[146] To establish retroactivity under *Teague*, a court must determine whether the Constitution, as interpreted by precedent, compelled the rule announced by the Supreme Court.[147] Therefore, the question of *Padilla*'s retroactive applicability necessarily turns on whether precedent dictated the Court's decision in that case.[148]

Where a prior holding "designed for the specific purpose of evaluating a myriad of factual contexts" serves as the beginning point for a decision, that decision was dictated by precedent.[149] Therefore, when a decision is a mere application of a principle that governed a prior decision, that decision applies retroactively.[150] In *Padilla*, the

[145] *See* Teague v. Lane, 489 U.S. 288, 311-17 (1989). *See generally* Allen, *supra* note 84 (discussing jurisprudential principles underlying retroactivity and problems created by its application); Fallon & Mertzer, *supra* note 86 (discussing the new law doctrine of retroactivity in criminal cases); Fisch, *supra* note 86 (examining current retroactivity paradigm and advancing a new framework for retroactivity analysis).

[146] *See Teague*, 489 U.S. at 311-17; *see also* Beard v. Banks, 124 S. Ct. 2504, 2510 (2004) (outlining the three step process conducted by the Court to determine retroactivity under *Teague*'s test); O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (stating that application of *Teague* requires a federal court to engage in a three step process); Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (same); Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (same).

[147] *See Teague*, 489 U.S. at 311-17; *see also* Beard v. Banks, 124 S. Ct. 2504, 2510 (2004) (outlining the three step process conducted by the Court to determine retroactivity under *Teague*'s test); O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (stating that application of *Teague* requires a federal court to engage in a three step process); Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (same); Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (same); discussion *supra* Part I.C (describing the three step retroactivity test under *Teague*).

[148] *See* United States v. Amer, 681 F.3d 211, 213 (5th Cir. 2012); United States v. Chang Hong, 671 F.3d 1147, 1153-55 (10th Cir. 2011); United States v. Chaidez, 655 F.3d 684, 688 (7th Cir. 2011); United States v. Orocio, 645 F.3d 630, 635-36 (3d Cir. 2011).

[149] *See* Wright v. West, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in judgment); *see also* Williams v. Taylor, 529 U.S. 362, 382 (2000) (quoting *West*, 505 U.S. at 309); Graham v. Collins, 506 U.S. 461, 506 (1993) (same).

[150] *See Teague*, 489 U.S. at 301 (stating that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final") (emphasis in original); *see, e.g.*, Whorton v. Bockting, 549 U.S. 406, 416 (2007) (holding that precedent did not dictate the decision in *Crawford v. Washington*, 541 U.S. 36 (2003), and thus Court announced a new rule); *Caspari*, 510

Court relied on a string of decisions to conclude that deportation is a particularly severe penalty, ill-suited to the collateral consequences doctrine.[151] Rejecting the doctrine's applicability, the Court held that advice regarding the deportation consequences of a conviction is within the scope of the Sixth Amendment.[152] Therefore, the Court simply applied its seminal *Strickland* performance and prejudice test to resolve Padilla's claim.[153]

The Supreme Court has long held that, prior to pleading guilty, a defendant is entitled to the effective assistance of competent counsel.[154] In *Strickland*, the Court established that the Sixth Amendment requires effective counsel to advise a client regarding all-important decisions during the course of representation.[155] In *Hill*, the Court held that the Sixth Amendment guarantees effective assistance

U.S. at 393 (holding that a reasonable jurist would not have considered precedent to compel application of the Double Jeopardy Clause to a noncapital sentencing proceeding); Sawyer v. Smith, 497 U.S. 227, 234 (1990) (holding that result reached in *Caldwell v. Mississippi*, 472 U.S. 320 (1990), was not dictated by precedent existing when defendant's conviction became final).

[151] *See Padilla*, 130 S. Ct. at 1481-82 (citing INS v. St. Cyr, 533 U.S. 289, 322 (2001)); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); Fong Yue v. United States, 149 U.S. 698, 740 (1893)); United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982).

[152] *See Padilla*, 130 S. Ct. at 1482; *see also Chaidez*, 655 F.3d at 695 (Williams, J., dissenting) (stating that the *Padilla* Court cited, relied on, and applied *Strickland* to Padilla's claim); *Orocio*, 645 F.3d at 638 (noting that *Padilla* stated the Court had never applied a distinction between direct and collateral consequences to define constitutionally reasonable assistance under *Strickland*); Denisyuk v. State, 422 Md. 462, 474 (2011) (stating that *Padilla* rejected the argument that counsel need not warn clients of collateral deportation consequences).

[153] *See Padilla*, 130 S. Ct. at 1482-84; *see also Orocio*, 645 F.3d at 638-39 (stating that the *Padilla* Court applied the *Strickland* standard in a straightforward manner); *Denisyuk*, 422 Md. at 479 (stating that *Padilla* followed existing precedent, rather than departing from it).

[154] *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (holding that the right to counsel necessarily includes the right to effective assistance of counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that a defendant, when pleading guilty to a felony charge, has a federal right to the assistance of counsel); Powell v. Alabama, 287 U.S. 45, 68 (1932) (holding that the right to assistance of counsel is protected by the Due Process Clause of the Fourteenth Amendment); *see also* Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940).

[155] *See* Strickland v. Washington, 466 U.S. 688, 688 (1984); *see also Orocio*, 645 F.3d at 638 (stating that the Court's application of *Strickland* to Padilla's claims was within the outlines of precedent); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1999) (stating counsel is obligated to consult a client on important decision and keep a client informed of important developments in the course of the prosecution).

of counsel during the plea bargaining process.[156] Taken together, these cases require counsel to provide reasonable advice such that their clients may make informed, knowing, and voluntary decisions whether to plead guilty.[157] In turn, *Padilla* recognized — as highlighted by the *Orocio* court — that information regarding deportation consequences is critical to a defendant's calculus when pleading guilty.[158] Therefore, the Court's decision represents a mere application of the principles that governed the Court's holdings in *Strickland* and *Hill*, demonstrating that precedent dictated the result in *Padilla*.[159] Therefore, because *Padilla* stands as an extension of long-standing constitutional precedent under *Teague*, the case did not establish a new rule of prospective application only.[160]

[156] *See* Hill v. Lockhart, 474 U.S. 52, 56-58 (1985) (holding that *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel); *see also Richardson*, 397 U.S. at 767 (holding that a guilty plea may be challenged in situations where a defendant does not receive effective assistance of counsel); McCarthy v. United States, 394 U.S. 459, 466 (1969) (in order for a plea to be valid, it must be voluntary and the defendant must be aware of its consequences).

[157] *See Hill*, 474 U.S. at 56-58; *Strickland*, 466 U.S. at 688; *Orocio*, 645 F.3d at 639.

[158] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (holding that it is uniquely difficult to separate the penalty of deportation from the underlying conviction); *Orocio*, 645 F.3d at 638 (citing *Strickland*, 466 U.S. at 688); *see also* INS v. St. Cyr, 533 U.S. 289, 322 (2001) (stating that noncitizen defendants consider, in particular, the immigration consequences of a conviction when deciding whether to plead guilty).

[159] *See Padilla*, 130 S. Ct. at 1486; *see also* Gray Proctor & Nancy King, *Post Padilla: Padilla's Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G REP. 239, 240 (2011), *available at* http://law.vanderbilt.edu/download.aspx?ID=6307. In two recent decisions, the Supreme Court applied the precedents of *Strickland*, *Hill*, and *Padilla* to questions of ineffective assistance of counsel during the plea process. *See* Missouri v. Frye, 132 S. Ct. 1399, 1404-09 (2012) (holding that defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused); Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (holding that defense counsel's advice to his client to reject a plea bargain based on counsel's misperception of the law was ineffective assistance of counsel under the Sixth Amendment).

[160] *See id.*; discussion *supra* Part II.A (discussing the Third Circuit's holding in *Orocio*); *see, e.g.*, United States v. Reid, No. 1:97-CR-94, 2011 WL 3417235 (S.D. Ohio Aug. 4, 2011) (holding *Padilla* announced an old rule under *Teague* and is thus retroactively applicable); United States v. Dass, No. 05-140(3) (JRT/FLN), 2011 WL 2746181 (D. Minn. July 14, 2011) (same); Song v. United States, No. 09 Civ. 51842011, WL 2533184 (C.D. Cal. June 27, 2011) (same); Amer v. United States, No. 1:06CR118-GHD, 2011 WL 2160553 (N.D. Miss. May 31, 2011) (same); Zapata-Banda v. United States, No. B:10-CV-256, 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011) (same); United States v. Zhong Lin, No. 3:07-CR-44-H, 2011 WL 197206 (W.D. Ky. Jan. 20, 2011) (same); United States v. Joong Ral Chong, No. CR 101-078, 2011 WL 6046905 (S.D. Ga. Jan. 12, 2011) (same); Luna v. United States, No. 10CV1659 JLS

Furthermore, the Supreme Court has elsewhere held that applying *Strickland* to a particular set of facts does not constitute a new rule.[161] A string of recent Supreme Court cases applying *Strickland* to different factual contexts substantiates this stance.[162] In none of these cases have the courts afforded the Supreme Court's decisions new rule status under *Teague*.[163] Because *Padilla* merely applied *Strickland* to a specific set of facts, reaching a result dictated by precedent, the decision did not announce a new rule.[164] Therefore, the Third Circuit in *Orocio* properly concluded that, under *Teague*, *Padilla* constitutes an old rule that is retroactively applicable.

(POR), 2010 WL 4868062 (S.D. Cal. Nov. 23, 2010) (same); United States v. Hubenig, No. 6:03-MJ-040, 2010 WL 2650625 (E.D. Cal. July 1, 2010) (same); People v. Gutierrez, 954 N.E.2d 365 (Ill. App. Ct. 2011) (same); Campos v. State, 798 N.W.2d 565 (Minn. Ct. App. 2011) (same); People v. Nunez, 917 N.Y.S.2d 806 (N.Y. App. Term. 2010) (same); *Ex parte* Tanklevskaya, No. 01-10-00627-CR, 2011 WL 2132722 (Tex. App. May 26, 2011) (same).

[161] *See* Williams v. Taylor, 529 U.S. 362, 390-91 (2000); Wright v. West, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring) (stating that the *Teague* analysis "requires a case-by-case examination of the evidence . . . [so] we can tolerate a number of specific applications without saying that those applications themselves create a new rule"); Frazer v. South Carolina, 430 F.3d 696, 714 (4th Cir. 2005) (Motz, J., concurring).

[162] *See* Rompilla v. Beard, 545 U.S. 374, 380-83 (2005) (applying *Strickland*'s standard to counsel's failure to investigate a file containing evidence that the state intended to use in aggravation); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (applying *Strickland*'s standard to counsel's failure to investigate defendant's background); *Williams*, 529 U.S. at 390-92 (holding *Strickland* provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims); Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (holding that *Strickland* governs ineffective assistance of counsel claims for failure to file a notice of appeal); *see also* Newland v. Hall, 527 F.3d 1162, 1197 (11th Cir. 2008) (reviewing recent cases wherein the Court determined specific applications of *Strickland* were not new rules under *Teague*); Proctor & King, *supra* note 159, at 240 (discussing retroactive application of *Padilla* under *Teague*).

[163] *See Rompilla*, 545 U.S. at 383 (holding that counsel's failure to investigate a file containing evidence that the state intended to use constituted ineffective assistance under *Strickland*); *Wiggins*, 539 U.S. at 524 (holding that counsel's failure to investigate defendant's background, despite evidence of childhood abuse, constituted ineffective assistance under *Strickland*); *Williams*, 529 U.S. at 390-92 (holding that counsel's failure to uncover available state records indicating defendant's abusive upbringing constituted ineffective assistance under *Strickland*).

[164] *See* People v. Gutierrez, 954 N.E.2d 365, 377 (Ill. App. Ct. 2011) (holding that *Padilla* merely expanded *Strickland* to include counsel's obligation to inform a defendant of possible deportation consequences); Denisyuk v. State, 422 Md. 462, 481-82 (2011) (holding *Strickland* sets forth a general standard for application to a specific set of facts); Commonwealth v. Clarke, 460 Mass. 30, 38 (2011) (holding that *Strickland* provides a general standard for ineffective assistance of counsel claims compelling a case-by-case application that will rarely create a new rule).

Critics of *Orocio*'s approach argue that *Padilla* announced a new rule because precedent did not compel the result reached by the Court.[165] Prior to *Padilla*, the lower courts had nearly unanimously held that the Sixth Amendment did not compel counsel to advise a client of collateral consequences.[166] Therefore, these critics assert that *Padilla* affected a dramatic change in the legal landscape.[167] Moreover, opponents of *Padilla*'s retroactivity contend that the Justices' diverging opinions indicate that precedent did not dictate the result reached by the Court.[168] In his concurrence, joined by Chief Justice Roberts, Justice Alito characterized the majority's holding as a "significant dramatic departure from precedent."[169] Furthermore, Justices Scalia and Thomas would have declined to impose any Sixth Amendment obligation altogether.[170] Accordingly, some contend that counsel's failure to advise a defendant of the immigration consequences of a guilty plea would not have been objectively unreasonable.[171] Thus, these critics conclude precedent did not compel the Court's finding of a constitutional right to advice regarding possible deportation.[172]

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[165] *See, e.g.*, United States v. Amer, 681 F.3d 211, 213-14 (5th Cir. 2012) (holding that *Padilla* is not retroactively applicable); United States v. Chang Hong, 671 F.3d 1147, 1153-56 (10th Cir. 2011) (same); United States v. Chaidez, 655 F.3d 684, 689-90 (7th Cir. 2011) (same); Sarria v. United States, No. 11-20730-CIV, 2011 WL 4949724 (S.D. Fl. Oct. 18, 2011) (same).

[166] *See Chang Hong*, 671 F.3d at 1154; *Chaidez*, 655 F.3d at 690; *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 n.9 (2010) (collecting cases); Chin & Holmes, *supra* note 32, at 699 (stating that most state and federal courts have held that counsel need not explain collateral consequences under the Sixth Amendment). *But cf.* United States v. Kwan, 407 F.3d 1005, 1015-17 (9th Cir. 2005) (finding that misadvice regarding immigration consequences of plea failed to satisfy professional standards of competent counsel); United States v. Couro, 311 F.3d 179, 188 (2d Cir. 2002) (holding that attorney's affirmative misadvice regarding deportation constituted ineffective assistance of counsel).

[167] *See Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring in judgment); Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?* 45 NEW ENG. L. REV. 305, 306 (2011); Proctor & King, *supra* note 159, at 240 (highlighting that only three state courts and no federal courts adopted the position taken by *Padilla* prior to the Court's decision).

[168] *See Chang Hong*, 671 F.3d at 1154-55; *Chaidez*, 655 F.3d at 689; United States v. Laguna, No. 10 CR 342, 2011 WL 1357538, at *5 (N.D. Ill. Apr. 11, 2011); Doan v. United States, 760 F. Supp. 2d 602, 605 (E.D. Va. 2011).

[169] *See Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring in judgment).

[170] *See id.* at 1494-97 (Scalia, J., dissenting).

[171] *See Laguna,* 2011 WL 1357538, at *5; Mendoza v. United States, 774 F. Supp. 2d 791, 797 (E.D. Va. 2011); *Doan*, 760 F. Supp. 2d at 605.

[172] *See Chang Hong*, 671 F.3d at 1155; *Chaidez*, 655 F.3d at 689-90.

The argument that precedent did not dictate *Padilla*'s outcome fails because the Court rejected the lower courts' reliance on the distinction between direct and collateral consequences.[173] Lower courts had held that advice regarding the deportation consequences of a conviction was beyond constitutional protection because deportation was a collateral consequence.[174] However, the Supreme Court in *Padilla* disagreed.[175] The Court concluded that the traditional collateral versus direct consequences paradigm was ill-suited to the particularly severe penalty of the civil deportation sanction.[176] Moreover, the Court highlighted that it had never applied such a distinction to define the ambit of constitutionally adequate representation under *Strickland*.[177] Therefore, while overruling the conclusion of virtually every lower court, the Court in *Padilla* did not break with precedent and create a new rule.[178] Rather, the Court abrogated the lower courts' decisions because they had impermissibly removed advice regarding deportation from protection under the Sixth Amendment and *Strickland*.[179]

As the Court has elsewhere emphasized, where a rule resolves an existing conflict in authority, that rule is not necessarily new.[180] Therefore, the fact that *Padilla* overruled lower court decisions does

[173] *See Padilla*, 130 S. Ct. at 1482 (finding the civil, yet severe sanction of deportation ill-suited to the traditional collateral consequences paradigm); *see also Chaidez*, 655 F.3d at 697 (Williams, J., dissenting) (discussing the Supreme Court's recent disassociation with the collateral versus direct consequences distinction).

[174] *See Padilla*, 130 S. Ct. at 1492 (Alito, J., concurring) (stating majority in *Padilla* casually dismissed unanimous position of lower courts); *Chaidez*, 655 F.3d at 690 (stating that, prior to *Padilla*, the lower courts had uniformly held that the Sixth Amendment did not require counsel to advise regarding collateral consequences); Chin & Holmes, *supra* note 32, at 699 (listing state and federal cases in which courts have held that counsel need not explain collateral consequences under the Sixth Amendment).

[175] *See Padilla*, 130 S. Ct. at 1481.

[176] *See id.* at 1481-82; *see also* John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea*, 36 U. MICH. J. L. REFORM 691, 734 (2003) (arguing that post-1996 immigration law reforms, deportation is unique in its severity and certainty).

[177] *See Padilla*, 130 S. Ct. at 1482; *see also In re* Resendiz, 19 P.3d 1171, 1183 (Cal. 2001) (discussing ineffective assistance of counsel jurisprudence under the Sixth Amendment and the origins of the collateral consequences doctrine).

[178] *See Padilla*, 130 S. Ct. at 1481-82.

[179] *See id.*

[180] *See* Williams v. Taylor, 529 U.S. 362, 410 (2000) (holding that the existence of conflicting authority does not necessarily signal the creation of a new rule); Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring); Stringer v. Black, 503 U.S. 222, 236-37 (1992) (holding that the purpose of the new rule doctrine is to validate objectively reasonable interpretations of existing precedent).

not compel the conclusion that precedent did not dictate the Court's decision.[181] Rather, the Court in *Padilla* merely applied its long-standing Sixth Amendment jurisprudence to the facts of the case and, thus, did not announce a new rule.[182]

### *B. The Plain Language of* Padilla *Demonstrates the Supreme Court's Intent for Its Decision to Apply Retroactively*

In construing a statute or the Constitution, courts frequently employ the plain meaning rule to interpret the language used by Congress or the Framers.[183] Under this canon of interpretation, where language is clear and unambiguous, courts consider it to mean what it plainly expresses.[184] An examination of the plain language employed by the Court in *Padilla* compels the conclusion that the Court intended its decision to have retroactive effect.[185]

The Department of Homeland Security deported nearly a million people on criminal grounds between 1997 and 2007.[186] Consequently, there are many potential beneficiaries of *Padilla*'s retroactive

[181] *See Williams*, 529 U.S. at 410.

[182] *See id.* at 390-91; *West*, 505 U.S. at 308; Frazer v. South Carolina, 430 F.3d 696, 714 (2005) (Motz, J., concurring).

[183] *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 485 (1917) (holding that where the language of a statute is plain, a court's sole function is to enforce it according to its terms); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 33 (1895) (holding that where there is no ambiguity in the language of a statute, a court must give the words their ordinary meaning); Lake County v. Rollins, 130 U. S. 662, 670-71 (1889) (holding that where words express a plain and distinct meaning, a court has no occasion to utilize another means of interpretation). *See generally* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2011) (describing the plain meaning rule).

[184] *See* 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 178, § 46:1; *see, e.g.*, BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004) (holding preeminent canon of statutory interpretation requires court to look to the plain meaning of a statute); Medical Center Pharmacy v. Mukasey, 536 F.3d 383 (5th Cir. 2008) (same); United States v. Sabri, 326 F.3d 937 (8th Cir. 2003) (same); California Save Our Streams Council, Inc. v. Yeutter, 887 F.2d 908 (9th Cir. 1989) (same).

[185] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1484-85 (2010); *see, e.g.*, United States v. Dass, No. 05-130(3), 2011 WL 2746181, at *1 (D. Minn. July 14, 2011) (stating that the Court signaled it understood its holding to apply retroactively); Marroquin v. United States, No. 7:10-CV-156, 2011 U.S. Dist. LEXIS 11406, at *7 (S.D. Tex. Feb. 4, 2011) (same); Al Kokobani v. United States, 5:06-CR-207, 2010 WL 3941836, at *4-6 (E.D.N.C. July 30, 2010) (same); United States v. Hubenig, No. 6:03-MG-040, 2010 WL 2650625, at *7 (E.D. Cal. July 1, 2010) (same).

[186] *See* HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 19 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us0409webwcover.pdf.

application.[187] In its opinion, the Court explicitly addressed concerns that its decision might call into question the finality of convictions already obtained through guilty pleas.[188] The State of Kentucky, the Solicitor General, and others had argued that extending *Strickland*'s applicability could result in a proliferation of future claims by opening the "floodgates" to litigation.[189] Yet, the Court explicitly dismissed this concern, stating that standards mandating counsel to advise clients of deportation consequences had been in place for over fifteen years.[190] As a result, the Court asserted that an assumption that counsel had satisfied duties to provide proper advice to noncitizen clients was reasonable.[191] Accordingly, the Court stated that its decision would be unlikely to affect those convictions already obtained through plea bargains.[192]

If the Court had actually intended *Padilla* to only apply prospectively, the "floodgates" discussion would have been unnecessary.[193] If the Court had sought to foreclose any future post-conviction claims based on its decision, it would not have addressed

[187] *See id. But cf.* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 815-18 (2011) (arguing that institutional pressures will result in a return to the limiting principle of the collateral consequences rule, despite *Padilla*'s holding to the contrary).

[188] *See Padilla*, 130 S. Ct. at 1484-85.

[189] *See id.*; *see also* Jenny Roberts, *Proving Prejudice Post-Padilla*, 54 HOW. L.J. 693, 741-44 (2011) [hereinafter *Proving Prejudice*] (discussing finality and the floodgates concern raised in *Padilla*).

[190] *See Padilla*, 130 S. Ct. at 1485; *see also* Roberts, *Proving Prejudice*, *supra* note 189, at 741-44 (discussing finality and the floodgates concern raised in *Padilla*). In a case decided in the wake of *Padilla*, the Supreme Court similarly dismissed concern that its holding that defense counsel's advice to his client to reject a plea bargain based on counsel's misperception of the law was ineffective assistance of counsel under the Sixth Amendment might "open the floodgates to litigation." *See* Lafler v. Cooper, 132 S. Ct. 1376, 1389-90 (2012) (stating that "[c]ourts have recognized claims of this sort for over 30 years and yet there is no indication that the system is overwhelmed by these types of suits"); *see also* SEJAL ZOTA, DAN KESSELBRENNER & DAWN SEIBERT, PRACTICE ADVISORY: IMPLICATIONS OF *LAFLER V. COOPER* ON RETROACTIVE APPLICATION OF *PADILLA V. KENTUCKY* 6 (2012), *available at* http://crimmigration.com/files/0/6/4/7/5/167292-157460/Lafler_practice_advisory_3_29_12.pdf.

[191] *See Padilla*, 130 S. Ct. at 1485.

[192] *See id.*

[193] *See* United States v. Chaidez, 655 F.3d 684, 698 (7th Cir. 2011) (Williams, J., dissenting); Al Kokobani v. United States, 5:06-CR-207, 5:08-CV-177, 2010 WL 3941836, at *4-6 (E.D.N.C. July 30, 2010); United States v. Hubenig, No. 6:03-MJ-040, 2010 WL 2650625, at *7 (E.D. Cal. July 1, 2010); People v. Bennett, 28 Misc. 3d 575, 580 (N.Y. Crim. Ct. 2010); KESSELBRENNER, *supra* note 71, at 1.

concerns that such claims would proliferate.[194] Therefore, based on the plain language of the *Padilla* opinion, the Court made its intent apparent that *Padilla* should apply retroactively.[195] Consequently, the Third Circuit properly held that *Padilla* is retroactively applicable.[196]

Some opponents of *Padilla*'s retroactivity disregard the Court's discussion of an increase in post-conviction claims, stating the Court never actually held *Padilla* has retroactive effect.[197] These critics contend that the Court's discussion was mere dicta and not binding upon lower court determinations.[198] Instead, these opponents argue that "a reasonable jurist" considering the issue could easily have reached a conclusion contrary to the holding in *Padilla*.[199] In such circumstances, under *Teague*, some courts have found that a case announces a new rule.[200] Pursuant to this reasoning, a jurist considering Padilla's claim would not have concluded that precedent compelled the application of *Strickland*.[201] Prior to *Padilla*, nearly every lower court had concluded that defendants had no right to advice regarding deportation, as it was merely a collateral consequence.[202] Therefore, critics of *Padilla*'s retroactive application argue that a jurist examining the issue would have concluded that counsel did not have a constitutional duty to provide such advice.[203] Consequently, as the *Padilla* court reached a result that was

[194] *See Chaidez*, 655 F.3d at 689 (Williams, J., dissenting); United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011); *see also* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (addressing a similar argument but applying *Strickland* to a claim that counsel failed to advise a defendant regarding a parole eligibility prior to pleading guilty).

[195] *See Padilla*, 130 S. Ct. at 1485.

[196] *See Orocio*, 645 F.3d at 641.

[197] *See* Santos-Sanchez v. United States, No. 5:06-cv-153, 2011 WL 3793691, at *2 (S.D. Tex. Aug. 24, 2011); Barrio-Cruz v. Florida, 63 So.3d 868, 871 (Fla. Dist. Ct. App. 2011).

[198] *See Santos-Sanchez*, 2011 WL 3793691, at *2.

[199] *See* United States v. Chang Hong, 671 F.3d 1147, 1155 (10th Cir. 2011); *Chaidez*, 655 F.3d at 692.

[200] *See* O'Dell v. Netherland, 521 U.S. 151, 160 (1997); Butler v. McKellar, 494 U.S. 407, 415 (1990); *see also* Beard v. Banks, 542 U.S. 406, 413 (2004) (stating that the issue is whether, at the time of the conviction, the impropriety of the defendant's conviction was clear to all reasonable jurists).

[201] *See Chang Hong*, 671 F.3d at 1152; *Chaidez*, 655 F.3d at 688-92.

[202] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 n.9 (2010) (collecting cases); *Chaidez*, 655 F.3d at 690 (stating that state and federal courts had uniformly held that counsel need not explain collateral consequences under the Sixth Amendment prior to *Padilla*); Chin & Holmes, *supra* note 32, at 699.

[203] *See Chang Hong*, 671 F.3d at 1154-55; *Chaidez*, 655 F.3d at 690; sources cited *supra* note 78.

susceptible to debate based on lower court precedent, *Padilla* announced a new rule.[204]

However, the argument that a reasonable jurist would not feel compelled to adopt the rule stated in *Padilla* fails because its focus is too narrow.[205] Under *Strickland*'s first prong, a court must determine whether counsel's performance fell below an objective standard of reasonableness.[206] This determination necessarily depends on the "practice and expectations of the legal community."[207] The weight of established professional standards have long-compelled reasonable counsel to advise of the risk of deportation.[208] Based on this well-established professional authority, a reasonable jurist could have reached the same conclusion as that of the Court.[209] Moreover, *Strickland* "did not freeze into place the objective standards of attorney performance" in existence at the time the *Strickland* decision was announced.[210] Instead, *Strickland* specifically commands that the reasonableness of an attorney's performance is measured under the "norms of practice" prevailing at the time.[211] The fact that the standards requiring counsel to advise a noncitizen defendant of the

[204] *See Chang Hong*, 671 F.3d at 1154-55; *Chaidez*, 655 F.3d at 694; *see, e.g.*, Dennis v. United States, 787 F. Supp. 2d 425 (D.S.C. 2011) (holding *Padilla* announced a new rule and thus is not retroactively applicable); Mendoza v. United States, 774 F. Supp. 2d 791, 798 (E.D. Va. 2011) (same); United States v. Bacchus, No. 93-083S, 2010 WL 5571730 (D.R.I. Dec. 8, 2010) (same); United States v. Perez, No. 802CR296, 2010 WL 4643033 (D. Neb. Nov. 9, 2010) (same).

[205] *See Padilla*, 130 S. Ct. at 1482 (holding that the proper measure of attorney performance is reasonableness under prevailing professional norms); Strickland v. Washington, 466 U.S. 668, 688 (1984) (holding that constitutionally deficient performance is necessarily linked to the practice and expectations of the legal community); *see also* Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (holding that prevailing norms of practice, as reflected in professional guides such as the American Bar Association standards, are guides to determining reasonableness); Florida v. Nixon, 543 U.S. 175, 191 (2004) (same); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (same); Williams v. Taylor, 529 U.S. 362, 396 (2000) (same).

[206] *See Strickland*, 466 U.S. at 687.

[207] *See Padilla*, 130 S. Ct. at 1482.

[208] *See id.* (finding that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation"). *See generally* Chin & Holmes, *supra* note 32, at 713-23 (surveying various professional guides regarding counsel's duty to provide advice regarding collateral consequences).

[209] *See, e.g.*, Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 59-64 (2010) (arguing that counsel has an ethical and moral duty to advise clients about the immigration consequences).

[210] *See* United States v. Orocio, 645 F.3d 630, 640 (3d Cir. 2011).

[211] *See Strickland*, 466 U.S. at 688.

potential immigration consequences of a conviction had been in place for more than fifteen years prior to the announcement of *Padilla* compels the conclusion that a jurist examining the issue would have determined that counsel had an affirmative duty to provide such advice.[212]

Moreover, prior to *Padilla*, the Court had held that the Sixth Amendment guarantees a defendant the right to effective assistance of counsel when pleading guilty.[213] The Court had also recognized that a reasonable attorney would provide advice regarding immigration consequences before it formally found this duty compelled by the Constitution.[214] Therefore, based on long-standing professional standards and precedent, a jurist could easily have concluded that counsel had a duty to advise regarding deportation.[215] Thus, *Orocio* properly held that the representation of the petitioner's attorney was deficient because he had failed to provide effective assistance under prevailing professional norms.[216]

### *C.* Padilla *Implicates the Fundamental Fairness of Criminal Proceedings and Must Apply Retroactively*

The issue of *Padilla*'s retroactive effect raises serious questions regarding the fundamental fairness of criminal proceedings.[217] *Padilla* involves elemental concerns regarding the integrity of the adversarial process by protecting a defendant's Sixth Amendment right to effective assistance of counsel.[218] With ninety-seven percent of criminal cases

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[212] *See Padilla*, 130 S. Ct. at 1485.

[213] *See* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that *Strickland*'s two-part test for evaluating ineffective assistance of counsel claims applies to challenges to guilty pleas based on ineffective assistance of counsel).

[214] *See* INS v. St. Cyr, 533 U.S. 289, 322 n.48 (2001).

[215] *See* Bobby v. Van Hook, 130 S. Ct. 4, 16 (2009) (holding that prevailing norms of practice, as reflected in professional guides such as the American Bar Association standards, are guides to determining reasonableness); Florida v. Nixon, 543 U.S. 175, 191 (2004) (same); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (same); Williams v. Taylor, 529 U.S. 362, 396 (2000) (same).

[216] *See* United States v. Orocio, 645 F.3d 630, 642-43 (3d Cir. 2011).

[217] *See* Kanstroom, *Fifth-and-a-Half Amendment*, *supra* note 39, at 1465-67; Smyth, *supra* note 187, at 805-09.

[218] *See Padilla*, 130 S. Ct. at 1481-82; Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 68 (2000) ("The [ ] Sixth Amendment right to counsel . . . aimed to save innocent defendants from erroneous convictions and to promote a parity of courtroom rights between the defendant and the government."); Kanstroom, *Fifth-and-a-Half Amendment*, *supra* note 39, at 1471; Smyth, *supra* note 187, at 805-09.

disposed of by guilty pleas, *Padilla* addresses one of the most critical stages in the criminal justice process.[219]

*Padilla* recognized that a competent attorney may creatively bargain to craft a conviction and sentence that suits both sides' interests.[220] An attorney's prescience of the potential immigration consequences stemming from a plea are particularly important as, for example, reducing a sentence from 365 to 364 days may spare a noncitizen automatic removal.[221] In order to ensure the fairness of plea-bargaining, a noncitizen defendant must have sufficient information to evaluate bargained-for sentences.[222] Without knowing all of the consequences of a guilty plea, a defendant may be unable to make an informed decision as to whether to proceed to trial or plead guilty.[223] Pleas taken without such information are hardly "knowing," "intelligent," and "voluntary" as mandated by the Fifth Amendment Due Process requirement.[224] Therefore, the accuracy of millions of criminal removals effectuated through guilty pleas in recent years turns on whether defense counsel carried out proper advisement.[225]

The failure of counsel to advise a noncitizen of the deportation consequences of a plea maligns the fairness of the outcome of the criminal proceedings.[226] Generally, the only means for a noncitizen to seek redress for counsel's failure to provide constitutionally reasonable representation is by collaterally attacking his or her conviction by

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[219] *See Orocio*, 645 F.3d at 642-43; BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FEDERAL JUSTICE STATISTICS 12 (2009), *available at* http://www.bjs.gov/content/pub/pdf/ fjs09.pdf.

[220] *See Padilla*, 130 S. Ct. at 1486.

[221] *See* Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79, 81 (2001); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1139 (2011) [hereinafter *Plea-Bargaining Market*]; *see also* State v. Quintero Morelos, 137 P.3d 114, 119 (Wash. Ct. App. 2006).

[222] *See Padilla*, 130 S. Ct. at 1484, 1486; Libretti v. United States, 516 U.S. 29, 50-51 (1995); Bibas, *Plea-Bargaining Market*, *supra* note 221, at 1140-41.

[223] *See* Francis, *supra* note 176, at 693.

[224] *See* Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (holding defendant must knowingly and voluntarily waive his rights on the record before a court can accept a guilty plea); Francis, *supra* note 176, at 694.

[225] *See* Bibas, *Plea-Bargaining Market*, *supra* note 221, at 1118-19; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS 96-104 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

[226] *See* David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1538-40 (2011); Sweeney, *supra* note 33, at 82-87.

seeking the retroactive application of *Padilla*.[227] Therefore, *Padilla*'s retroactive effect implicates the fundamental fairness and accuracy of the criminal justice process.[228]

The *Orocio* court properly held that defendants that pled guilty prior to *Padilla*, unaware that their pleas would lead to deportation, merit application of the *Padilla*'s holding.[229] Deportation constitutes a particularly severe penalty, depriving the convicted noncitizen of liberty and property.[230] In many cases, noncitizen defendants have spent decades in the United States, contributing to American civil society by working and paying taxes.[231] Deportation irreparably rips thousands of convicted noncitizens' relatives apart, contravening the preservation of the family.[232] Fairness in the criminal justice system requires that courts protect the integrity of plea-bargaining by ensuring individuals have received proper advice regarding deportation consequences.[233] Such protection should not be predicated on whether an individual entered a plea prior or subsequent to the Court's announcement in *Padilla*.[234] As *Orocio* properly held, *Padilla* must apply retroactively to ensure that all defendants that entered guilty pleas, resulting in deportation, did so voluntarily and knowingly.[235]

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[227] *See* Proctor & King, *supra* note 159, 239-40; Rachel E. Rosenbloom, *Will* Padilla *Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 336-38 (2011).

[228] *See* Kanstroom, *Fifth-and-a-Half Amendment*, *supra* note 39, at 1465-67; Smyth, *supra* note 187, at 805-09.

[229] *See* United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011).

[230] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1477-78 (2010).

[231] *See, e.g.*, *Padilla*, 130 S. Ct. at 1477-78 (finding that the defendant was a legally permanent resident for more than forty years and served in the Vietnam War); Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011) (finding that the defendant came to the U.S. in 1971); Denisyuk v. State, 422 Md. 462, 467 (2011) (finding that thirty-one year old defendant immigrated to the U.S. with his family at the age of fourteen).

[232] *See* Francis, *supra* note 176, at 716-17.

[233] *See Padilla*, 130 S. Ct. at 1484, 1486; Libretti v. United States, 516 U.S. 29, 50-51 (1995); Bibas, *Plea-Bargaining Market*, *supra* note 221, at 1140-41.

[234] *See Padilla*, 130 S. Ct. at 1481; Kanstroom, *Fifth-and-a-Half Amendment*, *supra* note 39, at 1480-87; Maddali, *supra* note 36, at 21-30.

[235] *See* Brady v. United States, 397 U.S. 742, 748 (1970) (holding that a guilty plea must be voluntary and knowing, with sufficient awareness of likely consequences); McCarthy v. United States, 394 U.S. 459, 466-67 (1969) (holding that for a plea to be valid, the plea must be voluntary and the defendant must be aware of its consequences); United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011).

## CONCLUSION

The Third Circuit in *Orocio* properly concluded that *Padilla* did not announce a new rule under *Teague*.[236] Conversely, the decisions of the Fifth, Seventh, and Tenth Circuits, in *Amer*, *Chaidez*, and *Chang Hong*, to the contrary were misplaced.[237] First, the result in *Padilla* was dictated by then-existing Sixth Amendment jurisprudence guaranteeing a defendant's right to assistance of counsel.[238] Second, the plain language used by the Court demonstrates its intent that *Padilla* apply retroactively.[239] Finally, because *Padilla* protects the fundamental fairness of the plea bargaining process, the proper carriage of justice compels that it have retroactive effect.[240] Therefore, the Supreme Court should affirm the Third Circuit's analysis to hold that *Padilla* did not announce a new rule and is thus retroactively applicable when it considers the issue in *Chaidez v. United States*.[241]

[236] *See* discussion *supra* Part II.A (discussing the Third Circuit's holding in *Orocio*); discussion *supra* Part III (arguing that *Orocio* properly held that *Padilla* did not announce a new rule of criminal procedure).

[237] *See* discussion *supra* Part II.B (discussing the holdings of the Fifth, Seventh, and Tenth Circuits in *Amer*, *Chaidez*, and *Chang Hong*, respectively); discussion *supra* Part III (arguing that *Orocio* properly held that *Padilla* did not announce a new rule, contrary to the holdings in *Amer*, *Chaidez* and *Chang Hong*).

[238] *See* discussion *supra* Part III.A (arguing that precedent dictated the result reached by the Court in *Padilla*).

[239] *See* discussion *supra* Part III.B (arguing that the plain language of the Court's opinion in *Padilla* demonstrates the Court's contemplation that the rule announced would apply retroactively).

[240] *See* discussion *supra* Part III.C (arguing that because *Padilla* implicates the fairness of criminal proceedings, the decision should apply retroactively).

[241] 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3429 (U.S. Apr. 30, 2012) (No. 11-820); discussion *supra* Part III (arguing *Padilla* announced an old rule of criminal procedure under *Teague* and thus is retroactively applicable).