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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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.
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 (3d 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*, Padilla should apply retroactively. 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*. Part II explores the intractable circuit split by examining the divergent conclusions reached by the Third, Fifth, Seventh, and Tenth Circuits on the issue. Part III contends that the Third Circuit properly held that Padilla did not announce a new constitutional rule and is retroactively applicable. 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. Second, the plain language used by the Court demonstrates that it intended Padilla to apply retroactively. Finally, because Padilla protects the fundamental fairness of the plea bargaining process, the proper carriage of justice compels that it have retroactive effect. 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


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).


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

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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 380, 385 (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. Alameda, 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.”

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. In *Strickland v. Washington*, the defendant pled guilty to an indictment that included three capital murder charges stemming from a ten-day crime spree. The defendant was sentenced to death on each of the murder counts. 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.

negotiations because negotiations are not formal judicial proceedings); Kanikaynar v. Sisneros, 190 F.3d 1113, 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).

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. LAFAYETTE ET AL., 3 CRIMINAL PROCEDURE § 11.1(a) (3d ed. 2010) (discussing defendants' rights under Sixth Amendment jurisprudence).


22 See *id.* 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. 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. 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.” Second, the petitioner must show that the deficient performance prejudiced the defense by depriving the defendant of a fair trial, with a reliable result.

Over the last century, courts have gradually extended the right to the effective assistance of counsel to all stages of a criminal prosecution. 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. In a notable extension of the Sixth Amendment right, the
Supreme Court applied Strickland to ineffective assistance of counsel claims stemming from the pleading stage in Hill v. Lockhart. In Hill, the Court held that the Sixth Amendment guarantees a defendant the right to effective assistance of counsel when pleading guilty.

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


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).


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 HARR. 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).


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. 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. These sanctions often restrict the convicted individual's social, economic, and political access. 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. Therefore, the constitutional protections provided to

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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).


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. 1977) (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, 1469-67 (2011) [hereinafter Fifth-and-a-Half Amendment]; Sweeney, supra note 33, at 34; see, e.g., United States v. Amador-Leal, 276 F.3d 311, 316-17 (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 deportation is a collateral consequence, a sentencing court has no 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.
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. The Court found that established norms of practice have long directed attorneys to advise their clients of the risk of deportation. The Court concluded that Padilla’s counsel could have readily determined the near-mandatory deportation he would face by simply reading the removal statute. 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. Not reaching Strickland’s second prong, the Court remanded the issue of whether Padilla suffered sufficient prejudice to warrant relief to the Kentucky court.


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. 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.
became final before the decision's announcement. Teague represents the seminal standard for determining possible retroactive application of a rule of criminal procedure.

Under Teague, the determination of retroactivity involves a three-step process. First, as a threshold matter, the court must determine when the petitioner's conviction became final. 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.

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. That is, the court must decide whether the rule is "new" or "old." This inquiry is the most tenuous aspect of the retroactivity analysis.

The Supreme Court has articulated the definition of a new rule in numerous ways, leaving the scope and meaning of the term largely malleable. 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)).


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.


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.” 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. 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. However, the Court has emphasized that “the mere existence of conflicting authority” does not alone imply a new rule. Finally, the Court has asserted that only in rare cases will a case announce such a novel result as to constitute a new rule.

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. Under the first exception, Teague permits the


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 493) (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 (1985) 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).


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. 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.
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. The Court has narrowly
construed this exception, suggesting that only one case — Gideon v.
Wainwright — would fall within its scope.

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. However,
if a rule is characterized as new, it will not apply retroactively on collateral review. 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.

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. Amongst the

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*See supra* note 86 and accompanying text.

*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).

courts of appeals, there is an entrenched split between the Third Circuit, and the Fifth, Seventh, and Tenth Circuits on the issue. The Third Circuit has held that Padilla announced an old rule of criminal procedure and therefore is retroactively applicable. 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.

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. Police charged him with drug trafficking and he faced a ten-year sentence. Pursuant to a plea

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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 991115, 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. Following completion of his sentence, the Department of Homeland Security placed Orocio in removal proceedings. 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. Orocio contended that he would not have pled guilty if he had received such proper advisement. The issue before the court was whether Orocio could benefit from the retroactive application of the Supreme Court’s decision in Padilla.

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

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. Thus, Padilla simply reaffirmed counsel’s duty to a defendant during the critical plea process by “merely clarif[y]ing] the law as it applied to the particular facts of that case.” 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).

See id.; see also Orocio, 645 F.3d at 634.
See Orocio, 645 F.3d at 634.
See id. at 634-35.
See id.
See id.
See id. at 639-40.
See id. at 639.
See id. (citing Lewis v. Johnson, 359 F.3d 646, 655 (3d Cir. 2004)).
See id. at 639.
See id.
See id.
See id.
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,
pled guilty and received a sentence, rendering them deportable from the United States. After the government initiated deportation proceedings, the petitioners sought to vacate their convictions. 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.

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. 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.” However, each framed that determination differently than the Orocio court had. 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.” 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. 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.

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. 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. 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.

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. 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. 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.” 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. 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. The Fifth, Seventh, and Tenth Circuits concluded that Padilla announced a new rule of criminal procedure under Teague.

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. 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. 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. 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. 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.

III. ANALYSIS

The Third Circuit in Orocio correctly held that Padilla did not announce a new rule under Teague and is thus retroactively applicable. 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. Second, the plain language of the Supreme Court’s opinion illustrates its clear intent that Padilla have retroactive effect. Finally, because the decision implicates the fundamental fairness of criminal proceedings, Padilla should apply retroactively.

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. The Supreme Court’s decision in Teague governs the retroactivity analysis. To establish retroactivity under Teague, a court must determine whether the Constitution, as interpreted by precedent, compelled the rule announced by the Supreme Court. Therefore, the question of Padilla’s retroactive applicability necessarily turns on whether precedent dictated the Court’s decision in that case.

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. Therefore, when a decision is a mere application of a principle that governed a prior decision, that decision applies retroactively. 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).
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).
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.\textsuperscript{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.\textsuperscript{152} Therefore, the Court simply applied its seminal \textit{Strickland} performance and prejudice test to resolve Padilla's claim.\textsuperscript{153}

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


\textsuperscript{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 \textit{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 \textit{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).

\textsuperscript{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 \textit{Strickland} standard in a straightforward manner); Denisyuk, 422 Md. at 479 (stating that Padilla followed existing precedent, rather than departing from it).

\textsuperscript{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).

\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{157} In turn, \textit{Padilla} recognized — as highlighted by the \textit{Orocio} court — that information regarding deportation consequences is critical to a defendant’s calculus when pleading guilty.\textsuperscript{158} Therefore, the Court’s decision represents a mere application of the principles that governed the Court’s holdings in \textit{Strickland} and \textit{Hill}, demonstrating that precedent dictated the result in \textit{Padilla}.\textsuperscript{159} Therefore, because \textit{Padilla} stands as an extension of longstanding constitutional precedent under \textit{Teague}, the case did not establish a new rule of prospective application only.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{156} See \textit{Hill} v. \textit{Lockhart}, 474 U.S. 52, 56-58 (1985) (holding that \textit{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).
\item \textsuperscript{157} See \textit{Hill}, 474 U.S. at 56-58; \textit{Strickland}, 466 U.S. at 688; \textit{Orocio}, 645 F.3d at 639.
\item \textsuperscript{158} See \textit{Padilla} v. \textit{Kentucky}, 130 S. Ct. 1473, 1481 (2010) (holding that it is uniquely difficult to separate the penalty of deportation from the underlying conviction); \textit{Orocio}, 645 F.3d at 638 (citing \textit{Strickland}, 466 U.S. at 688); see also INS v. St. Cyril, 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).
\item \textsuperscript{159} See \textit{Padilla}, 130 S. Ct. at 1486; see also Gray Proctor & Nancy King, \textit{Post Padilla: Padilla’s Puzzles for Review in State and Federal Courts}, 23 \textit{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 \textit{Strickland}, \textit{Hill}, and \textit{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).
Furthermore, the Supreme Court has elsewhere held that applying Strickland to a particular set of facts does not constitute a new rule.\textsuperscript{161} A string of recent Supreme Court cases applying Strickland to different factual contexts substantiates this stance.\textsuperscript{162} In none of these cases have the courts afforded the Supreme Court's decisions new rule status under Teague.\textsuperscript{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.\textsuperscript{164} Therefore, the Third Circuit in Orocio properly concluded that, under Teague, Padilla constitutes an old rule that is retroactively applicable.

\textsuperscript{161} See Williams v. Taylor, 529 U.S. 362, 390-91 (2000); Wright v. West, 503 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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.\(^{172}\)

\(^{165}\) 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).


\(^{169}\) See Padilla, 130 S. Ct. at 1488 (Alito, J., concurring in judgment).

\(^{170}\) See id. at 1494-97 (Scalia, J., dissenting).


\(^{172}\) See Chang Hong, 671 F.3d at 1155; Chaidez, 655 F.3d at 689-90.
The argument that precedent did not dictate \textit{Padilla}'s outcome fails because the Court rejected the lower courts’ reliance on the distinction between direct and collateral consequences.\textsuperscript{173} Lower courts had held that advice regarding the deportation consequences of a conviction was beyond constitutional protection because deportation was a collateral consequence.\textsuperscript{174} However, the Supreme Court in \textit{Padilla} disagreed.\textsuperscript{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.\textsuperscript{176} Moreover, the Court highlighted that it had never applied such a distinction to define the ambit of constitutionally adequate representation under \textit{Strickland}.\textsuperscript{177} Therefore, while overruling the conclusion of virtually every lower court, the Court in \textit{Padilla} did not break with precedent and create a new rule.\textsuperscript{178} Rather, the Court abrogated the lower courts’ decisions because they had impermissibly removed advice regarding deportation from protection under the Sixth Amendment and \textit{Strickland}.\textsuperscript{179}

As the Court has elsewhere emphasized, where a rule resolves an existing conflict in authority, that rule is not necessarily new.\textsuperscript{180}

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

\textsuperscript{174} \textit{See Padilla}, 130 S. Ct. at 1492 (Alito, J., concurring) (stating majority in \textit{Padilla} casually dismissed unanimous position of lower courts); \textit{Chaidez}, 655 F.3d at 690 (stating that, prior to \textit{Padilla}, the lower courts had uniformly held that the Sixth Amendment did not require counsel to advise regarding collateral consequences); \textit{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).

\textsuperscript{175} \textit{See Padilla}, 130 S. Ct. at 1481.

\textsuperscript{176} \textit{See id.} at 1481-82; \textit{see also} John J. Francis, \textit{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).

\textsuperscript{177} \textit{See Padilla}, 130 S. Ct. at 1482; \textit{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).

\textsuperscript{178} \textit{See Padilla}, 130 S. Ct. at 1481-82.

\textsuperscript{179} \textit{See id.}

not compel the conclusion that precedent did not dictate the Court’s decision. Rather, the Court in Padilla merely applied its longstanding Sixth Amendment jurisprudence to the facts of the case and, thus, did not announce a new rule.

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. Under this canon of interpretation, where language is clear and unambiguous, courts consider it to mean what it plainly expresses. 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.

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

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, 336 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).
application. The Court explicitly addressed concerns that its decision might call into question the finality of convictions already obtained through guilty pleas. 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. 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. As a result, the Court asserted that an assumption that counsel had satisfied duties to provide proper advice to noncitizen clients was reasonable. Accordingly, the Court stated that its decision would be unlikely to affect those convictions already obtained through plea bargains.

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

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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, 1388-90 (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.

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

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. These critics contend that the Court's discussion was mere dicta and not binding upon lower court determinations. Instead, these opponents argue that "a reasonable jurist" considering the issue could easily have reached a conclusion contrary to the holding in *Padilla*. In such circumstances, under *Teague*, some courts have found that a case announces a new rule. Pursuant to this reasoning, a jurist considering *Padilla*'s claim would not have concluded that precedent compelled the application of *Strickland*. 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. 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. Consequently, as the *Padilla* court reached a result that was

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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.


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


\(^{205}\) 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).


\(^{210}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{218} With ninety-seven percent of criminal cases

\begin{footnotesize}
\textsuperscript{212} See Padilla, 130 S. Ct. at 1485.
\textsuperscript{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).
\textsuperscript{216} See United States v. Orocio, 645 F.3d 630, 642-43 (3d Cir. 2011).
\textsuperscript{217} See Kanstroom, Fifth-and-a-Half Amendment, supra note 39, at 1465-67; Smyth, supra note 187, at 805-09.
\end{footnotesize}
disposed of by guilty pleas, Padilla addresses one of the most critical stages in the criminal justice process.\textsuperscript{219} Padilla recognized that a competent attorney may creatively bargain to craft a conviction and sentence that suits both sides’ interests.\textsuperscript{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.\textsuperscript{221} In order to ensure the fairness of plea-bargaining, a noncitizen defendant must have sufficient information to evaluate bargained-for sentences.\textsuperscript{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.\textsuperscript{223} Pleas taken without such information are hardly “knowing,” “intelligent,” and “voluntary” as mandated by the Fifth Amendment Due Process requirement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{220} See Padilla, 130 S. Ct. at 1486.


\textsuperscript{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.

\textsuperscript{223} See Francis, supra note 176, at 693.

\textsuperscript{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.


\textsuperscript{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. Therefore, Padilla's retroactive effect implicates the fundamental fairness and accuracy of the criminal justice process.

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. Deportation constitutes a particularly severe penalty, depriving the convicted noncitizen of liberty and property. In many cases, noncitizen defendants have spent decades in the United States, contributing to American civil society by working and paying taxes. Deportation irreparably rips thousands of convicted noncitizens' relatives apart, contravening the preservation of the family. 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. Such protection should not be predicated on whether an individual entered a plea prior or subsequent to the Court's announcement in Padilla. 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.

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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).
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.
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).