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What's New Is Old Again: Why *Padilla v. Kentucky* Applies Retroactively

Michael Hartley

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Michael Hartley*

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* Candidate for Juris Doctor, Washington and Lee University School of Law, 2012; Bachelor of Arts in Psychology, University of Virginia, 2001. I am grateful to Professor J.D. King for guiding me through the drafting of this Note. Thanks also to Robbie Clarke for your support and encouragement. And thank you to my wife, Dr. Sarah Lucas Hartley, for your patience and for your abiding ear during the months I only spoke of retroactivity.

Introduction

In *Padilla v. Kentucky*,[1] the United States Supreme Court vacated the guilty plea of a legal permanent resident, ruling that the defendant's attorney provided him constitutionally ineffective assistance of counsel.[2] The defendant pleaded guilty to felony drug charges after his attorney advised him that he would not suffer any adverse immigration consequences.[3] After his guilty plea, the defendant became subject to deportation proceedings.[4]

The Court held that the Sixth Amendment requires counsel to correctly advise defendants of the immigration consequences of a guilty plea.[5] Lower courts had required counsel to advise clients only regarding the direct consequences of a guilty plea and not for collateral consequences (i.e., those occurring outside the sentencing process).[6] After acknowledging lower court precedent, the Court noted that it has never required such a distinction in deciding ineffective assistance of counsel cases.[7] Yet, the Court was silent as to the retroactive application of *Padilla* and so provided little guidance for the lower courts.[8]

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1. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (holding that counsel must inform clients of the deportation risks resulting from a guilty plea). The Court continued: "Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." *Id.*

2. *See id.* at 1486–87 (finding that Padilla's counsel was constitutionally deficient and remanding to determine whether Padilla can show prejudice in order to gain relief).

3. *Id.* at 1478.

4. *Id.*

5. *See id.* at 1483 (requiring that, at a minimum, counsel advise that pleading guilty *may* carry adverse immigration consequences but that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear").

6. *See* Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124–25 (2009) (noting that most jurisdictions do not require a defendant to be informed of collateral consequences regardless of severity); *see also Padilla*, 130 S. Ct. at 1487–88 (Alito, J., concurring) (observing that the "longstanding and unanimous position of the federal courts" only required counsel to advise clients of direct consequences and noting that the Supreme Court has never required advice on collateral consequences such as civil commitment, ineligibility to possess firearms, and dishonorable discharge from the Armed Forces).

7. *See Padilla*, 130 S. Ct. at 1481 (acknowledging that lower courts have applied the distinction, but adding that the Court did not need to consider the distinction's value because of the "unique nature of deportation").

8. *See id.* at 1486 (requiring counsel in future cases to inform clients of deportation risks but remaining silent as to the retroactive application of the decision).

The stories of three defendants illustrate the inconsistent reaction of lower courts to *Padilla*. These cases, presented below, demonstrate the confusion in *Padilla*'s wake as to whether *Padilla* applies retroactively or not, and whether its holding is limited to the immigration context.

On December 3, 2003, Roselva Chaidez, a legal permanent resident, considered entering a guilty plea to charges of mail fraud.[9] Ms. Chaidez moved to the United States in the 1970's and, as of 2003, was living with her children and grandchildren.[10] Ms. Chaidez managed to avoid jail; the plea was for four years' probation.[11] Ms. Chaidez was not informed of any immigration consequences, and she only learned that deportation proceedings had begun against her after she filed for citizenship.[12] Nearly two years after requesting citizenship, Ms. Chaidez was called before an immigration court that informed her the government was going to deport her.[13] Suddenly, she risked being forced to leave her family and her home of forty years. Then, two days before the Supreme Court heard arguments in *Padilla*, Chaidez filed a petition for writ of error *coram nobis* alleging that the court accepting her plea and her counsel both failed to advise her of the immigration consequences of her plea.[14]

Before *Padilla*, no Supreme Court precedent existed requiring such advice.[15] After *Padilla*, the District Court for the Northern District of Illinois decided that *Padilla* applies retroactively to Chaidez's *coram nobis* petition and ordered an evidentiary hearing.[16] Then, in a later opinion after the hearing, the same court found that Chaidez is entitled to relief from her guilty plea.[17]

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9. United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *1 (N.D. Ill. Oct. 6, 2010).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring) (stating that the majority cites no Supreme Court or federal case that has shared *Padilla*'s holding).

16. *See* United States v. Chaidez, 730 F.Supp. 2d 896, 904–05 (N.D. Ill. 2010) (finding no retroactivity problem raised by Ms. Chaidez's claim and stating what Ms. Chaidez must show in order to prevail at the evidentiary hearing).

17. *See* United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *3–4 (N.D. Ill. Oct. 6, 2010) (granting relief because Ms. Chaidez proved that she would have risked trial for the opportunity to fight deportation rather than acquiesce to near automatic deportation by pleading guilty).

In 1999, Lincoln Miller, a lawful permanent resident since 1981, who lived in New York with his wife of 24 years, pleaded guilty in a Maryland court to possession of 448 grams of cocaine with intent to distribute.[18] He served five years.[19] Fatefully, Mr. Miller took a trip to Belize in 2008, and upon his return, was detained by immigration officials at the airport.[20] Facing deportation, four years after his release from prison, Mr. Miller filed a petition for a writ of error *coram nobis* to attack his guilty plea on grounds that he was not advised of the immigration consequences of his guilty plea.[21] The Special Court of Appeals of Maryland denied Mr. Miller relief.[22] The court concluded that deportation is a collateral consequence of a guilty plea and that *Padilla* announced a new rule that does not apply retroactively.[23]

A third case highlights the possibility that *Padilla* applies beyond immigration, which adds more impact to the retroactivity issue.[24] Gary Bauder, a United States citizen, pled no contest to charges of aggravated stalking of a minor in 2002.[25] His plea agreement detailed his punishment but did not mention potential civil commitment, and his attorney assured him that he could not be subject to involuntary civil commitment as a result of pleading guilty.[26] Nonetheless, Bauder has been involuntarily civilly committed since 2007.[27] The Eleventh Circuit Court of Appeals used *Padilla* in affirming the district court, which granted Mr. Bauder relief on his habeas corpus petition.[28] Mr. Bauder pleaded guilty before *Padilla* and nothing in his case involved

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18. Miller v. State, 11 A.3d 340, 341 (Md. Ct. Spec. App. 2010).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.* at 355 (affirming the denial of defendant's petition for *coram nobis*).

23. *See id.* at 352 (surveying precedent that labels deportation a collateral consequence and concluding that *Padilla* overruled a "monolith" of precedent and therefore created a new rule that cannot be applied retroactively).

24. *See* Bauder v. Dep't. of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010) (stating that when the law is ambiguous, a criminal defense attorney must inform his client of any adverse collateral consequences).

25. *Id.* at 1273.

26. *Id.* at 1273–74.

27. *Id.* at 1273 n.2.

28. *See id.* at 1275 (quoting *Padilla* to observe that at a minimum, even when the law is unclear, attorneys must advise clients of possible "adverse [collateral] consequences"). Notably, in quoting *Padilla*, the Eleventh Circuit changed "immigration" to "[collateral]." *Id.*

immigration.[29] Within six months of the Supreme Court decision, the Eleventh Circuit extended the reasoning of *Padilla* to civil commitment for sexual offenders.[30]

Three defendants similarly situated yet disparately disposed. Courts will continue to face Sixth Amendment claims by defendants seeking to vacate guilty pleas entered prior to the *Padilla* decision—both within and outside the immigration context. Different conclusions in the Third and Seventh Circuits illustrate the ongoing issue. The Third Circuit unanimously held that *Padilla* applies retroactively.[31] Meanwhile, the Seventh Circuit—over a dissent—reversed *Chaidez*, holding that *Padilla* announced a new rule and therefore does not apply retroactively.[32]

Ironically, Mr. Miller's case was also reversed on appeal.[33] The Court of Appeals of Maryland adopted the reasoning of the Northern District of Illinois, while the Seventh Circuit reached the same conclusion as the lower Maryland court.[34] So, both Ms. Chaidez and Mr. Miller still received different outcomes for their similar situation. In 2010, the United States deported 168,532 noncitizens convicted of crimes and, as of June 30, 2009, 95,000 noncitizens remained incarcerated.[35] Many of these criminal defendants may have valid claims under *Padilla*. And these numbers do not consider the number

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29. *Id*.

30. *See id.* at 1275 (explaining that counsel was deficient for affirmatively misadvising Mr. Bauder regarding the civil commitment consequences of his guilty plea).

31. *See* United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) ("We therefore hold that, because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule' for *Teague* purposes and is retroactively applicable on collateral review."). Judge Chagares concurred regarding the majority's retroactivity analysis but dissented on the merits of Orocio's ineffectiveness claim. *Id*. at 647.

32. *See* Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011) ("Because we conclude that *Padilla* announced a new rule that does not fall within either of *Teague*'s exceptions, we reverse the judgment of the district court.").

33. *See* Miller v. State, ____ A.3d ___, 2011 WL 5902523, *1 (Md. 2011) (vacating the judgment of the Court of Special Appeals in light of Denisyuk v. State, 30 A.3d 914 (Md. 2011)).

34. *See* Denisyuk v. State, 30 A.3d 914, 923–24 (Md. 2011) (concluding that *Padilla* applies retroactively); *Chaidez*, 655 F.3d at 686 (concluding that *Padilla* announced a new rule that does not apply retroactively).

35. Gray Proctor & Nancy King, *Post* Padilla*:* Padilla*'s Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G. REP. 239, 239 (2011); DEPARTMENT OF HOMELAND SECURITY, 2010 YEARBOOK OF IMMIGRATION STATISTICS, Table 38, www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/table38d.xls (last visited Dec. 20, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

of defendants subject to civil commitment, much less defendants subject to other serious collateral consequences such as registration and civil commitment for sex offenders, the loss of civic rights, or government benefits.[36] Nor do those numbers mention noncitizens living in the United States who have yet to cross paths with the criminal justice system.

This Note will show that, to decide *Padilla*, the Court straightforwardly applied its ineffective assistance of counsel doctrine.[37] Under the Court's retroactivity doctrine, such a straightforward application of clearly established law, especially in a factually intensive context, leads to retroactive application of a decision by the Court.[38] Thus, *Padilla* applies retroactively.[39] And those who pleaded guilty prior to the *Padilla* decision can benefit from its holding, provided they can show that they were prejudiced by not being advised about the deportation consequences of their pleas.[40]

Ineffective assistance of counsel doctrine begins with the Supreme Court case *Strickland v. Washington*.[41] *Strickland* set up a two-prong test for courts to use in determining whether counsel met the requirements of the Sixth Amendment: whether counsel was constitutionally deficient and whether the defendant was prejudiced by

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36. *See* Roberts, *supra* note 6, at 124 (listing serious consequences that can follow criminal convictions and are often categorized as collateral); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1496 (2010) (Scalia, J., dissenting) (arguing that requiring advice regarding collateral consequences has "no logical stopping point" and listing other collateral consequences (citing *Padilla*, 130 S. Ct. at 1487–88) (Alito, J., concurring)).

37. *See* Proctor & King, *supra* note 35, at 241 ("The Court in *Padilla* relied on an unqualified application of the well-known standard that it had first applied in *Strickland* . . . ."). "*Padilla* is like other *Strickland* progeny that apply retroactively." *Id.*

38. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *5 (E.D. Cal. July 1, 2010) (referencing Supreme Court precedent to demonstrate that rules of general application requiring case-by-case examination apply retroactively because they do not create a new rule (citing Williams v. Taylor, 529 U.S. 362, 391 (2000); Wright v. West, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring))).

39. *See* United States v. Chaidez, 730 F.Supp. 2d 896, 902 (N.D. Ill. 2010) ("Accordingly, . . . *Padilla* did not announce a new rule . . . and [applies retroactively].").

40. *See Padilla*, 130 S. Ct. at 1485 ("Surmounting *Strickland*'s high bar is never an easy task . . . a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.") (citations omitted).

41. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a convicted defendant can successfully claim ineffective assistance of counsel by showing both that counsel's performance was deficient and also that the deficient performance prejudiced the defendant).

the constitutionally deficient performance.[42] In *Hill v. Lockhart*,[43] the Court applied *Strickland* to guilty pleas and modified the prejudice prong to require a showing that, but for counsel's deficient advice, a defendant would have gone to trial rather than plead guilty.[44]

Retroactivity analysis begins with the Supreme Court case *Teague v. Lane*.[45] In *Teague*, the Court ruled that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[46] The Court suggested that retroactivity should be addressed as a threshold question in any case announcing a new rule and that new rules are defined as "break[ing] new ground" or when a result is "not dictated by precedent existing at the time the defendant's conviction became final."[47]

Thus, if *Padilla* announced a new rule of constitutional criminal procedure, defendants collaterally attacking their guilty pleas would be unable to benefit from the decision.[48] However, because *Padilla* merely applied *Strickland* to the facts of the case and precedent dictated the result, *Padilla* did not announce a new rule.[49] Because *Padilla* is not a new rule, defendants who pleaded guilty without advice regarding potentially adverse immigration consequences may have a remedy through collateral review of those guilty pleas.[50]

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42. *See id.* (explaining deficient performance as "counsel ma[king] errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that prejudice exists where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

43. *See* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that the two-prong *Strickland* test applies when defendants challenge guilty pleas based on ineffective assistance of counsel).

44. *See id.* at 59 ("[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

45. *See* Teague v. Lane, 489 U.S. 288, 299 (1989) (holding that petitioner's proposed new rule "should not be applied retroactively to cases on collateral review").

46. *Id.* at 310.

47. *See id.* at 300–01 (suggesting retroactivity be addressed as a threshold to maintain fairness among all persons similarly situated and admitting the difficulty in defining new rules for retroactivity purposes).

48. *See Padilla*, 130 S. Ct. at 1486 (remaining silent as to the retroactive application of the decision).

49. *See id.* at 1482–84 (applying the analysis in *Strickland* to the facts of *Padilla*).

50. *See id.* at 1485 ("Surmounting *Strickland*'s high bar is never an easy task . . . . [A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.").

This Note demonstrates why *Padilla* did not announce a new rule. In Part I, I review the *Padilla* decision in detail. In Part II, I briefly summarize the retroactivity doctrine as articulated by the Supreme Court in *Teague* and its progeny. Part III analyzes the Supreme Court retroactivity doctrine as it applies to *Padilla*. Part IV then summarizes the debate among lower courts as to whether *Padilla* applies retroactively and why. In Part V, I present my argument that *Padilla* applies retroactively because the Court straightforwardly applied *Strickland*, a clearly-established rule that requires a case-by-case examination of the facts, and as a result, it did not announce a new rule.

I. The Padilla *Decision*

A. Facts and Lower Court History

After police pulled over his tractor-trailer and discovered the one thousand pounds of marijuana he was carrying, Jose Padilla, a lawful permanent resident of the United States, considered pleading guilty to a charge of trafficking marijuana.[51] His attorney advised that deportation would not result from the plea due to Padilla's military service and forty years residing in the United States.[52]

Padilla pleaded guilty and, contrary to the advice of his attorney, subsequently became the subject of deportation proceedings.[53] The Court acknowledged that this result was virtually automatic because almost every drug offense creates a presumption of mandatory deportation.[54] Padilla sought post-conviction relief, arguing that his attorney denied him effective assistance of counsel.[55] The Supreme Court of Kentucky denied relief,

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51. *Padilla*, 130 S. Ct. at 1477; *see also* Nina Totenberg, *High Court: Lawyers Must Give Immigration Advice*, NAT'L PUB. RADIO (Mar. 31, 2010), http://www.npr.org/templates/story/story.php?storyId=125420249 (last visited Nov. 25, 2011) ("[A]mong his registered cargo were 23 Styrofoam boxes containing a half-ton of marijuana.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

52. *Padilla*, 130 S. Ct. at 1478.

53. *Id.*; *see also*, Totenberg, *supra* note 51 ("The guilty plea triggered a mandatory deportation.").

54. *See Padilla*, 130 S. Ct. at 1477 n.1 ("Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).").

55. *Id.* at 1478 (citations omitted).

classifying deportation as a collateral consequence outside the scope of the Sixth Amendment.[56]

B. The United States Supreme Court Holding

On March 31, 2010, the Supreme Court reversed the Kentucky Supreme Court and ruled that counsel must inform clients of the deportation risks of a guilty plea.[57] Both affirmative misadvice and silence count as ineffective assistance of counsel after *Padilla*.[58] Recognizing that immigration is a complex "legal specialty," the Court limited its holding by requiring correct advice only when deportation consequences are clear but allowing mere advice of possible deportation risks when the applicable immigration law is unclear.[59]

The Court held that Padilla's counsel was constitutionally deficient, finding for Mr. Padilla on the first prong of *Strickland* and remanding on the issue of prejudice.[60] The Court observed that under *Strickland*, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[61] The Court then noted: "The

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56. *Id.*

57. *See id.* at 1486–87 (finding that Mr. Padilla "sufficiently alleged that his counsel was constitutionally deficient" and reversing the judgment of the Supreme Court of Kentucky).

58. *See id.* at 1484 (rejecting a request to limit its holding to affirmative misadvice and finding that such a limit would invite the "absurd results" of attorneys remaining silent on "matters of great importance" and would deny clients "the most rudimentary advice on deportation even when it is readily available").

59. *See id.*, 130 S.Ct. at 1483 (acknowledging a limited duty of counsel in "situations where the deportation consequences of a guilty plea are unclear or uncertain"). The Court continued:

> When the law is not succinct and straightforward, . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.

Id.

60. *See id.* at 1483–84 ("Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*."). "Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance." *Id.*

61. *Id*. at 1482 (quoting *Strickland*, 466 U.S. at 688).

weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[62]

Central to the retroactivity issue (whether or not *Padilla* announced a new rule) is the fact that the Court had never before required counsel to advise of the immigration consequences of guilty pleas.[63] Lower courts, including the Kentucky Supreme Court, had rules excluding collateral consequences from the scope of what the Sixth Amendment requires.[64] Notably, the Court acknowledged that it has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[65] The Court concluded that the direct/collateral distinction remained unnecessary to *Padilla* "because of the unique nature of deportation."[66]

C. The Reach and Impact of Padilla

Justice Alito, writing also for Chief Justice Roberts, concurred in the result.[67] Justice Alito wrote separately because he would have limited the holding to finding only that affirmative misadvice about deportation risks would rise to the level of constitutionally deficient counsel.[68] Justice Alito found such a limitation to be more consistent with lower court precedent that required counsel only to advise clients regarding the direct consequences of a conviction.[69]

Justice Stevens, in the majority opinion, countered that limiting the holding to affirmative misadvice invites "two absurd results": one, it

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62. *Id.* (citations omitted).

63. *See id.* at 1491 (Alito, J., concurring) (observing that the *Padilla* majority cites no case holding that an attorney must advise criminal defendants about the removal consequences of a guilty plea).

64. *See* Roberts, *supra* note 6, at 124–25 (noting that most jurisdictions do not require a defendant to be informed of collateral consequences regardless of severity).

65. *Padilla*, 130 S. Ct. at 1481.

66. *See id.* ("Whether that distinction is appropriate is a question we need not consider in this case . . . .").

67. *Id.* at 1487.

68. *See id.* ("I concur in the judgment because a criminal defense attorney fails to provide effective assistance of counsel within the meaning of [*Strickland*] if the attorney misleads a noncitizen client regarding the removal consequences of a conviction.").

69. *See id.* ("Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction.").

incentivizes counsel to remain silent in order to avoid liability, even when the law is clear; and, two, it denies the defendants least able to represent themselves access to basic advice on deportation consequences, even when counsel could easily provide it.[70] Justice Stevens stated for the Court that: "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'"[71]

The Court believed its decision would have only a minimal effect on existing convictions resulting from guilty pleas.[72] The Court expressed this belief in the face of concerns about a flood of litigation threatening to undermine the finality of guilty pleas.[73] The Court noted that it "confronted a similar 'floodgates' concern in [*Hill v. Lockhart*] but nevertheless applied *Strickland* [and] . . . [a] flood did not follow in that decision's wake."[74] Considering that "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea," the Court presumed that attorneys have advised accordingly;[75] thus, few defendants will have grounds to challenge their guilty pleas.[76]

The Court further remarked that guilty pleas account for 95% of all criminal convictions while only accounting for 30% of habeas petitions filed.[77] Additionally limiting *Padilla*'s impact is the increased risk defendants face when collaterally attacking a guilty plea.[78] Because "those

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70. *See id*. at 1484 ("Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" (quoting Libretti v. United States, 516 U.S. 29, 50–51 (1995))).

71. *Id.* (quoting Hill v. Lockhart, 474 U.S. 52, 62 (1985) (White, J., concurring)).

72. *See id.* at 1485 ("It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains.").

73. *See id.* (stating the concerns of the Solicitor General, the state of Kentucky, and *amici*).

74. *Id.* at 1484–85.

75. *Id*.

76. *See id.* (presuming "counsel satisfied their obligation" and advised their clients competently (citing *Strickland*, 466 U.S. at 689)).

77. *See id.* (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, 418 (31st ed. 2005) (Table 5.17), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1219 and VICTOR E. FLANGO, NAT'L CTR. FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 36–38 (1994), respectively).

78. *See id.* at 1485–86 (recounting *Hill* prejudice as a defendant's preference for trial over pleading guilty).

who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea," the Court noted that defendants who do so face a potentially "*less favorable* outcome."[79] Thus, while noting that it "must be especially careful about recognizing new grounds for attacking the validity of guilty pleas,"[80] the Court expressed its confidence in *Padilla*'s minimal effect because "practice has shown that pleas are [infrequently] the subject of collateral challenges . . . ."[81]

While the above statements imply retroactive application of *Padilla*, the Court did not expressly address the issue. As lower courts apply the decision, they continue to disagree as to whether *Padilla* does apply retroactively.[82] The federal circuit courts that have addressed *Padilla*'s retroactivity have arrived at opposite conclusions.[83]

II. A Brief Review of Retroactivity

The Supreme Court articulated the prevailing standard for retroactivity in the criminal procedure context in *Teague v. Lane*.[84] While Justice O'Connor's plurality opinion in *Teague* announces the general rule for the Supreme Court's retroactivity doctrine, the Court has continued to revisit and refine the doctrine—beginning the year after *Teague* was decided.[85]

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79. *Id.*

80. *Id.* at 1485.

81. *Id.*

82. *See* Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804, at *3 (N.D. Ill. Feb. 7, 2011) ("District courts have issued divergent opinions on the question of whether *Padilla* [applies retroactively].") (citations omitted); United States v. Gutierrez Martinez, No. 10-2553, 2010 WL 5266490, at *2–3 (D. Minn. Dec. 10, 2010) (collecting cases).

83. *Compare* United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) (holding *Padilla* applies retroactively) *with* Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011) (holding *Padilla* announced a new rule that does not apply retroactively).

84. Teague v. Lane, 489 U.S. 288, 316 (1989) (holding that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated"); *see* Doan v. United States, 760 F.Supp.2d 602, 605 (E.D. Va. 2011) ("[Retroactivity] analysis must begin with Teague."); United States v. Chaidez, 730 F.Supp.2d 896, 899 (N.D. Ill. 2010) (citing Teague as the "landmark decision" regarding retroactivity analysis); Miller v. State, 11 A.3d 340, 343–44 (Md. Ct. Spec. App. 2010) (explaining that Teague articulates the Supreme Court retroactivity doctrine and "the most manageable statement yet provided as to what constitutes a new [rule]").

85. *See* Butler v. McKellar, 494 U.S. 407, 412–14 (1990) (extrapolating the *Teague* definition of a new rule); Saffle v. Parks, 494 U.S. 484, 488 (1990) (explaining the definition and proper inquiries to ask in defining a new rule); Stringer v. Black, 503 U.S. 222, 227–28 (1992) (allowing that a decision that does not announce a new rule might nonetheless create

This Section highlights the Court's guidance for defining new rules as it has been developed post-*Teague*.

In *Teague*, the Court determined that decisions creating a new constitutional rule of criminal procedure apply only prospectively; however, decisions applying an existing standard or test will apply retroactively.[86] In other words, old rules apply to all cases (whether on direct or collateral review), but new rules only apply to cases not yet final on direct review.[87]

The Court did carve out two narrow, and difficult to reach, exceptions where new rules of constitutional criminal procedure will apply retroactively.[88] The first exception applies a new rule retroactively when the rule places "'certain . . . conduct beyond the power of the criminal law-making authority to proscribe. . . .'"[89] Rephrased, this exception allows retroactive application of new substantive law rather than new procedural law.[90] The substantive exception requires retroactive application for rules that alter government authority to criminalize conduct or impose punishment.[91]

The second exception permits retroactive application of "watershed rules of criminal procedure," which are critical to the fundamental fairness and accuracy of the trial.[92] The watershed exception applies only when a rule is necessary to prevent "an impermissibly large risk of an inaccurate

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a new rule "because the prior decision is applied in a novel setting"); Wright v. West, 505 U.S. 277, 308 (1992) ("[Retroactivity] of an old rule in a novel setting . . . depends in large part on the nature of the rule."). "If [it] requires a case-by-case examination . . . then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." *Id.*

86. *See Teague*, 489 U.S. at 316 (holding that new rules of constitutional procedure will not apply retroactively unless through one of the two articulated exceptions).

87. *See* Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review.").

88. *See* Beard v. Banks, 542 U.S. 406, 408 (2004) ("Under our retroactivity analysis as set forth in [*Teague*], federal habeas corpus petitioners may not avail themselves of new rules of constitutional criminal procedure outside two narrow exceptions.") (citations omitted).

89. Teague, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

90. *See* Schriro v. Summerlin, 542 U.S. 348, 353 (2004) (defining the substantive rule exception to *Teague*).

91. *See id.* ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.").

92. *See Teague*, 489 U.S. at 311 (requiring an exception for procedures that are "implicit in the concept of ordered liberty") (citations omitted).

conviction," and the rule must "alter [] understanding of the bedrock procedural elements essential to the fairness of a proceeding."[93] The Court has noted: "[I]n the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status."[94]

The key inquiry, then, in determining whether a decision applies retroactively is whether the decision announces a new rule or applies old law.[95] In *Teague*, the Court acknowledged the inherent difficulty of defining new rules and offered as guidelines that a new rule "breaks new ground" or is "not dictated by precedent" or "imposes a new obligation on the government."[96] The Court has since provided further articulations to guide this determination, including this warning: "In the vast majority of cases, . . . where the new decision is reached by an extension of the reasoning of previous cases, the inquiry will be . . . difficult."[97] The Court later clarified: "The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases."[98]

Unfortunately, the Court concedes that difficulty remains in determining whether a case extending the reasoning of prior cases and overruling lower court precedent announces a new rule.[99] To assist in the confusion, the Court indicated that applications of old rules to new contexts, when not dictated by precedent, might create a new rule.[100] For example, the Court has found a new rule in the capital sentencing context where precedent supported a decision but did not mandate its extension from a focus on the sentencer to the individual jurors.[101]

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93. Whorton v. Bockting, 549 U.S. 406, 418 (2007).

94. *Id.*

95. *See id.* at 416 ("Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review.").

96. *See Teague*, 489 U.S. at 301 (acknowledging difficulty in determining when a case announces a new rule).

97. Butler v. McKellar, 494 U.S. 407, 412–13 (1990).

98. Saffle v. Parks, 494 U.S. 484, 488 (1990).

99. *See Teague*, 489 U.S. at 301 ("It is admittedly often difficult to determine when a case announces a new rule, and [it is difficult] to define the spectrum of what may or may not constitute a new rule for retroactivity purposes.").

100. *See* Stringer v. Black, 503 U.S. 222, 228 (1992) ("[I]t is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent.").

101. *See* Beard v. Banks, 542 U.S. 406, 413–16 (2004) ("Thus, although the *Lockett* principle . . . could be thought to support the *Mills* rule . . . . [*Lockett*] did not

However, the Court has also said: "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. "[102] *Strickland* is an example of such a rule.[103] The Court has found that the *Strickland* test is "clearly established" precedent that does not break new ground or impose new obligations on States.[104] According to the Court, "[*Strickland*] provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims."[105]

Perhaps one of the most relevant statements related to the *Padilla* retroactivity inquiry comes from *Teague* itself, where the Court said: "Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[106]

The Court recently ruled that State law governs State habeas corpus petitions, and that States are free to apply decisions retroactively even when the Supreme Court holds that a rule does not apply retroactively in the federal courts.[107] And State procedural rules can present another hurdle. For example, the Supreme Court of Virginia recently ruled that defendants' allegations of ineffective assistance of counsel do not constitute errors of fact sufficient to use certain State petitions for collateral relief.[108] Emphasizing the importance and impact of *Padilla*, one Virginia judge has refused to follow the Supreme Court of Virginia ruling, stating that

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compel *Mills* . . . . Accordingly, *Mills* announced a new rule . . . .").

102. Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy J., concurring).

103. *See* Williams v. Taylor, 529 U.S. 362, 391 (2000) ("[T]he *Strickland* test 'of necessity requires a case-by-case examination . . . .'" (quoting *Wright*, 505 U.S. at 308)).

104. *See id.* ("[I]t can hardly be said that recognizing the right to effective counsel 'breaks new ground or imposes new a new obligation on the States.'" (quoting *Teague*, 489 U.S. at 301)).

105. *Id.*

106. *Teague*, 489 U.S. at 300.

107. *See* Danforth v. Minnesota, 552 U.S. 264, 282 (2008) ("[*Teague*] limits the kinds of . . . relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*.").

108. *See* Commonwealth v. Morris, 705 S.E.2d 503, 508 (Va. 2011) ("[A] claim of ineffective assistance of counsel does not constitute an error of fact for which coram vobis will lie under [Virginia] Code § 8.01-677.").

constitutional rights would be violated if he did.[109] However, these procedural concerns lie beyond the scope of this Note.

The reader is not alone if confused on the retroactivity doctrine. The split among the lower courts exemplifies the difficulty in applying the retroactivity doctrine to Supreme Court decisions.[110] This Note will provide a more detailed explanation of the different lower court approaches in Part IV.

III. Applying the Retroactivity Doctrine to Padilla

To determine retroactivity, the Supreme Court has given this guidance:

> Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process . . . . First, the court must determine when the defendant's conviction became final. Second, . . . the court must decide whether the rule is actually 'new.' Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.[111]

In order to be a new rule, *Padilla* would have to "impose a new obligation" on government, "break new ground" or otherwise not be "dictated by precedent."[112] Additionally, *Padilla* could create a new rule if the decision represents an unpredictable extension of precedent into a new factual context.[113] However, if in *Padilla*, the Court merely applied clearly established law, or if it applied a rule requiring a case-by-case factual examination, then the decision will apply retroactively even if it represents an extension of precedent.[114]

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109. *See* Tom Jackman, *Loudon Judge Defies Va. Supreme Court, Continues to Reopen Immigrants' Cases*, WASH. POST (Feb. 6, 2011), http://www.washingtonpost.com/local/loudoun-judge-defies-va-supreme-court-continues-to-reopen-immigrants-cases/2011/02/06/AB3BovQ_story.html (last visited Nov. 25, 2011) (describing how a judge defied a Virginia Supreme Court ruling) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

110. *See* United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010) (citing courts coming to opposite conclusions as to *Padilla* retroactivity).

111. Beard v. Banks, 542 U.S. 406, 411 (2004).

112. *See Teague*, 489 U.S. at 301 (providing general guidelines as to what constitutes a new rule).

113. *See* Stringer v. Black, 503 U.S. 222, 228 (1992) ("[I]t is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent.").

114. *See* Williams v. Taylor, 529 U.S. 362, 391 (2000) (Kennedy, J., concurring)

A. Straightforward Strickland

In *Padilla*, the Court made this much clear: "*Strickland* applies to Padilla's claim."[115] After commenting that a direct/collateral consequences distinction remains unnecessary to *Strickland* analyses, the Court justified including deportation within the scope of the Sixth Amendment.[116] Because it is a "severe penalty" that is "nearly an automatic result" from its "intimate[] relat[ion] to the criminal process," the Court concluded that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[117]

In Part III of the majority opinion, the Court analyzed the case under the first prong of *Strickland* and found that Mr. Padilla received constitutionally deficient assistance of counsel.[118] The Court reaffirmed that "[p]revailing norms of practice" guide the question of "whether counsel's representation 'fell below an objective standard of reasonableness.'"[119] Citing multiple sources, the Court concluded: "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[120] And the Court recounted its previously stated expectation that counsel would "follow the advice of [those] practice guides," especially given the Court's past recognition that noncitizen defendants might prefer jail to deportation.[121] In fact, the Court has previously acknowledged that the ABA Standards for Criminal Justice have advised informing defendants of immigration consequences since 1982.[122]

(explaining that *Strickland* represents "'clearly established Federal law'" that "'requires a case-by-case factual examination of the evidence'" and applies retroactively because it neither breaks new ground nor imposes new obligations on the States (quoting Wright v. West, 505 U.S. 277, 308 (1992))); *Teague*, 489 U.S. at 301 (discussing how to determine when a case announces a new rule).

115. *Padilla*, 130 S. Ct. at 1482.

116. *See id.* at 1481–82 (including deportation within the scope of the Sixth Amendment because it is "uniquely difficult to classify as either a direct or collateral consequence").

117. *Id.*

118. *See id.* at 1482–83 (reviewing Mr. Padilla's claim to see if his counsel's performance "'fell below an objective standard of reasonableness'" (quoting *Strickland*, 466 U.S. at 688)).

119. *Id.* at 1482.

120. *Id.*

121. *See id.* at 1483 (noting the Court's previous statements regarding counsel's responsibilities to noncitizen clients (citing I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001))).

122. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 322 n.48 (2001) ("[T]he American Bar

The Court remanded the case to allow Mr. Padilla an attempt to show prejudice under *Strickland*'s second prong.[123] But the Court warned: "Surmounting *Strickland*'s high bar is never an easy task."[124] Thus, it is clear that *Strickland* disposed of Mr. Padilla's claim.

The briefs before the Court in *Padilla* raised the concern that ruling Mr. Padilla's counsel constitutionally deficient would open the floodgates and undermine the finality of numerous guilty pleas.[125] Such worries imply that the Court's ruling might be "breaking new ground" and leading to new litigation. However, the Court dismissed these concerns, presuming that most defendants facing the risk of deportation receive effective assistance from their counsel.[126]

The Court highlighted how similar concerns had proved unfounded after its decision in *Hill v. Lockhart*.[127] And the same principles stemming the flood after *Hill* apply to *Padilla*, the Court reasoned, because *Strickland* requires a defendant to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[128] The Court then added what seems like an unambiguous statement that it expected its decision to apply retroactively when it said: "It seems unlikely that our decision today will have a significant effect on those convictions *already obtained* as the result of plea bargains."[129] If *Padilla* applied only prospectively, then there would be no effect on "convictions already obtained."

Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" (citing 3 ABA Standards for Criminal Justice 14-3.2 Comment, 75 (2d ed. 1982))).

123. *See Padilla*, 130 S. Ct. at 1483–84 ("Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.").

124. *Id.* at 1485.

125. *See id.* at 1484 ("We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas.").

126. *See id.* at 1485 ("For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea . . . . "). "We . . . presume that counsel satisfied their obligation . . . ." *Id.*

127. *See id.* at 1484–85 ("We confronted a similar 'floodgates' concern in *Hill* . . . but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty."). "A flood did not follow in that decision's wake." *Id.*

128. *Id.*

129. *Id.* (emphasis added).

B. Breaking New Ground

The argument that *Padilla* announced a new rule hinges on the finding that a noncitizen defendant facing the risk of deportation is entitled to the Sixth Amendment guarantee of effective assistance of counsel.[130] The Court rejected the lower courts' distinction between direct and collateral consequences for the purposes of defining the scope of the entitlement to effective assistance of counsel.[131] However, *Padilla* does offer a novel articulation of effective assistance of counsel—never before had the Court required advice beyond the direct consequences of a plea agreement.[132]

Some, including Justice Scalia, argue that *Padilla* opened the door to ineffective assistance claims for other collateral consequences.[133] These arguments assert that the Court "br[oke] new ground" in that *Padilla* was not "dictated by precedent."[134] Based on this reasoning, some lower courts have ruled that *Padilla* did announce a new rule and so does not apply retroactively.[135]

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130. *See* Miller v. State, 11 A.3d 340, 344–46 (Md. Ct. Spec. App. 2010) (relying on lower court precedent to argue that the Court announced a new rule extending the Sixth Amendment right to counsel to cover advice regarding the deportation consequences of a criminal conviction); *see also* United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010) (finding *Padilla* announced a new rule because "failure to inform a defendant of the prospect of deportation" was not required by Eighth Circuit precedent).

131. *See Padilla*, 130 S. Ct. at 1481 (finding unnecessary the direct/collateral consequences distinction applied by the Kentucky Supreme Court and other lower courts).

132. *See* Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, 25 CRIM. JUST. 21, 22 (2010) ("It is the first time the Court has extended the Sixth Amendment right to counsel to a consequence of conviction that is not part of the court-imposed punishment.").

133. *See Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting) ("Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping point."); Chin & Love, *supra* note 132, at 24 ("Deportation is but one of a broad range of rights and privileges that may be affected by criminal conviction . . . ."). "At least in some cases, these consequences will share the characteristics the Court recognized as important in *Padilla* . . . ." *Id.*

134. *See* Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804, at *3 (N.D. Ill. Feb. 7, 2011) ("[Some] district courts . . . have held that *Padilla* did announce a 'new constitutional rule,' stressing that the result in *Padilla* was not dictated by precedent . . . [and] have further held that *Padilla* should *not* be considered retroactive for this very reason.").

135. *See Perez*, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010) ("Thus, this Court is convinced that *Padilla* created a 'new rule' that should not apply retroactively."); United States v. Gilbert, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286, at *3 (D. N.J. Oct. 19, 2010) ("Thus, the 2010 *Padilla* decision requiring counsel to advise a non-citizen client of deportation consequences is a new constitutional rule and should not be applied retroactively . . . .").

Of course, courts have long applied the Sixth Amendment right to effective assistance of counsel to collateral consequences to some degree.[136] Rather than limiting the right to counsel to direct consequences, courts have instead held that when applied to collateral consequences, the standard of care only requires avoiding affirmative misadvice.[137] A few courts have even preceded the Supreme Court in requiring counsel to correctly advise on serious collateral consequences including deportation and sexual offender registration.[138]

Justice Alito argued in his concurrence that the Court should limit its holding to require counsel to avoid affirmative misadvice and to at least advise noncitizen defendants that pleading guilty "*may* have adverse immigration consequences."[139] Importantly, though, Justice Alito did see *Padilla* as "falling within the [scope] of *Strickland*," as he makes clear in Part II of his opinion.[140] Justice Alito agreed with the majority that the Sixth Amendment extends to require at least some advice about deportation consequences, but he argued that the Court should only require advice of the possibility of deportation.[141] While his concurrence implies that *Strickland* straightforwardly governed *Padilla*, Justice Alito did call the holding a "dramatic expansion" and a "major upheaval in Sixth

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136. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 708–09 (2002) (listing the varying degrees to which lower courts require advice about collateral consequences).

137. *See Leading Case: Criminal Law and Procedure—Sixth Amendment—Effective Assistance of Counsel:* Padilla v. Kentucky, 124 HARV. L. REV. 199, 205–06 (2010) (explaining the approach "widely adopted by the lower courts" that *Strickland* applies to collateral consequences at least to the degree of avoiding affirmative misadvice).

138. *See* Proctor & King, *supra* note 35, at 239 ("[T]hree state courts had interpreted the Sixth Amendment to impose a duty on counsel to provide advise [sic] about the risks of deportation to clients who are pleading guilty."); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 697–98 (2008) (discussing the New Mexico Supreme Court's holding that counsel must correctly advise noncitizen defendants about the immigration consequences of a guilty plea).

139. *See Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring) (stating, "in [his] view," an attorney's requirements).

140. *See id.* at 1487, 1492–94 (applying *Strickland* to reach the same result as the majority but arguing that the holding, under *Strickland*, should only require attorneys to avoid affirmative misadvice and to at least warn noncitizen defendants of the possibility of adverse immigration consequences).

141. *See id.* at 1494 ("I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation . . . . "). "[T]he attorney should advise the client that a criminal conviction may have adverse [immigration] consequences . . . and that the client should consult an immigration specialist . . . ." *Id.*

Amendment law," noting that the holding was contrary to every lower federal court.[142]

Some lower courts have found that *Padilla* created a new rule based on Justice Alito's comments regarding the impact on lower court precedent.[143] However, other courts have ruled that, in *Padilla*, the Court merely applied its clearly established *Strickland* doctrine.[144]

C. So Which Is It?

So far, lower courts disagree on whether *Padilla* announced a new rule or applied its existing *Strickland* test to the facts of the case.[145] No court has found *Padilla* to be a new rule that falls within one of the two exceptions to nonretroactivity, though some have argued that *Padilla* meets the requirements to be a watershed case.[146] However, given the Court's prior language, it seems unlikely that *Padilla* would fall under the "watershed" exception.[147] Then there are some courts that have avoided the retroactivity question altogether.[148] The next Section explores the opposing

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142. *See id.* at 1492 (arguing that the majority "casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences").

143. *See* Miller v. State, 11 A.3d 340, 348 (Md. Ct. Spec. App. 2010) ("Justice Alito repeatedly referred to the majority opinion as one that was breaking new ground.").

144. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *6 (E.D. Cal. July 1, 2010) ("[T]his Court concludes that *Padilla*'s application of *Strickland*'s well-established test for determining whether counsel's performance was objectively reasonable did not produce a novel result and, therefore, did not announce a new rule . . . .").

145. *See* Denisyuk v. State, 30 A.3d 914, 923–25 (Md. 2011) (collecting cases that reach different conclusions on *Padilla*'s retroactivity); United States v. Gutierrez Martinez, No. 10-2553, 2010 WL 5266490, at *2 (D. Minn. Dec. 17, 2010) ("Courts that have considered the question of *Padilla*'s retroactive application have reached conflicting results.").

146. *See Gutierrez Martinez*, No. 10-2553, 2010 WL 5266490 at *2–3 (listing cases and their various holdings on *Padilla* retroactivity but not listing any finding *Padilla* to fall within *Teague*'s two exceptions to nonretroactivity for new rules); John L. Holahan & Shauna Faye Kieffer, *Effective Assistance of Counsel Where Pleas Mandate Deportation*, BENCH & BAR OF MINN. (Aug. 10, 2010), *available at* http://mnbenchbar.com/2010/08/padilla-motions/ ("[I]t appears that the *Padilla* decision is a watershed rule of fundamental fairness, and should be applied retroactively.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

147. *See* Whorton v. Bockting, 549 U.S. 406, 407–08 (2007) ("Gideon v. Wainwright, 372 U.S. 335 [1963] . . . [is] the only case that this Court has identified as qualifying under [the watershed] exception . . . .").

148. *See Gutierrez Martinez*, 2010 WL 5266490, at *3 ("In light of the confusion engendered by *Padilla*, several courts have bypassed the question of retroactivity

approaches taken by lower courts in deciding whether *Padilla* announced a new rule.

IV. Lower Court Reaction

Recall the defendants from the Introduction. Their disparate treatment exists for two reasons. One arises from disagreement over *Padilla*'s impact.[149] Some courts have concluded that *Padilla* merely articulated clearly established law that applies to guilty pleas entered before and after the Court's decision.[150] Other courts, however, have ruled that *Padilla* broke new ground and announced a new rule that only applies prospectively to guilty pleas entered after the decision.[151]

The second reason for the discrepancy springs from the rationale of *Padilla*. Even though the Court expressly limited its holding to noncitizens facing deportation,[152] the dissent and commentators have argued that its logic easily extends to all collateral consequences, such as civil commitment, loss of voting rights, inability to carry firearms, and loss of professional licenses.[153]

Many seeking post-conviction relief for ineffective assistance of counsel must guess whether the court in which they file their petition will apply *Padilla* retroactively and whether or not the court will restrict *Padilla* to the immigration context or extend it to all unique and severe collateral consequences. In the following Sections, this Note will show, through the

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where . . . the petitioner was not prejudiced.").

149. *See id.* at *2 ("Courts that have considered the question of *Padilla*'s retroactive application have reached conflicting results.").

150. *See* United States v. Orocio, 645 F.3d 630, 637–41 (3d Cir. 2011) (finding that *Padilla* logically followed from the clearly established law of *Strickland* and *Hill*); United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *6 (E.D. Cal. July 1, 2010) ("[T]his Court concludes that *Padilla*'s application of *Strickland*'s well-established test for determining whether counsel's performance was objectively reasonable did not produce a novel result and, therefore, did not announce a new rule . . . .").

151. *See* Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. Aug. 23, 2011) (concluding that *Padilla* announced a new rule); Miller v. State, 11 A.3d 340, 347 (Md. Ct. Spec. App. 2010) ("Justice Alito repeatedly referred to the majority opinion as one that was breaking new ground.").

152. *See Padilla*, 130 S. Ct. at 1482 (labeling deportation as "uniquely difficult to classify as either a direct or a collateral consequence").

153. *See id.* at 1496 (Scalia, J. dissenting) (arguing that extending the *Strickland* doctrine to deportation has "no logical stopping point"); *Leading Case*, *supra* note 137, at 206–08 (suggesting that other collateral consequences meet "the *Padilla* test," thus warranting similar treatment).

lower courts' analysis, that the Court applied *Strickland* to decide *Padilla*. Under the Court's language in analyzing retroactivity, *Padilla* did not create a new rule.

A. Arguments for Retroactivity

In *U.S. v. Chaidez*,[154] the Northern District of Illinois framed the retroactivity issue as whether *Padilla* announced a categorical rule that counsel must advise defendants of immigration consequences or an application of *Strickland* to a case where the attorney factually fell below professional norms at the time of the guilty plea.[155] Ultimately, the court decided that *Padilla* applies retroactively because the Supreme Court merely applied *Strickland*, which provides guidance for "virtually all ineffective-assistance-of-counsel claims."[156]

The court observed that lower courts have been split on the retroactivity issue and then determined *Padilla* did not announce a new rule for two reasons.[157] First, the court concluded that the Supreme Court, by not addressing retroactivity as a threshold question in *Padilla*, indicated its understanding that the decision did not announce a new rule.[158] Secondly, the court stated that retroactively applying the *Padilla* decision achieves *Teague*'s goal of promoting finality of judgments while allowing for review of constitutional errors.[159]

The *Chaidez* court restated the *Teague* rule that a new rule is announced when the Supreme Court overturns its own precedent.[160] However, it also cited a subsequent Supreme Court decision that

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154. *See* United States v. Chaidez, 730 F. Supp. 2d 896, 904 (N.D. Ill. 2010) (holding that *Padilla* applied retroactively).

155. *See id.* at 901 ("*Padilla* could be described as establishing a per se rule that counsel must inform a client of immigration consequences before an informed guilty plea may be entered."). "Alternatively, the case can be read as a straightforward application of *Strickland*.") *Id*.

156. *See id.* at 902 (quoting Williams v. Taylor, 529 U.S. 362, 391 (2000)).

157. *See id.* at 899, 902 ("[T]he court is convinced that *Padilla* did not announce a new rule for two reasons.").

158. *See id.* at 902–03 (describing the principles behind *Teague* retroactivity and finding that none of the three opinions in *Padilla* addressed the issue, apparently with the understanding that it would apply retroactively).

159. *See id.* at 903–04 (stating that the flexibility of the *Strickland* test allows for both the review of constitutional errors and protecting the finality of convictions).

160. *See id.* at 899 ("When the Court overturns its own prior precedent, clearly a new rule is established." (citing Saffle v. Parks, 494 U.S. 484, 488 (1990))).

acknowledged the difficulty of defining a new rule when the Supreme Court extends its precedent to a new factual context.[161] Indeed, as the court correctly observed, in cases where the Supreme Court has found a decision to be dictated by precedent, the Court lacked unanimity as to that result.[162]

Addressing the overwhelming contrary precedent, the court recalled the Supreme Court's observation that "the mere existence of conflicting authority does not mean a rule is new."[163] The court added that, according to Justice Kennedy, whether a rule is new or is an old rule applied in a new context "depends in large part on the nature of the rule."[164] Justice Kennedy has explained that a rule of general application (i.e. one requiring case-by-case factual examination) will lead to the Court tolerating "a number of specific applications without saying that those applications themselves create a new rule."[165] In the same regard, the court noted that *Strickland* cases rarely yield new rules.[166] *Strickland*, by its terms, requires a case-by-case examination of the facts.[167] In fact, the Supreme Court has applied prevailing professional norms to new factual contexts repeatedly without deeming those decisions new rules.[168]

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161. *See id.* at 899–900 ("'[I]t is more difficult, however, to determine whether [the Court] announces a new rule when a decision extends the reasoning of [its] prior cases.'" (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990))).

162. *See id.* at 900 ("In [Penry v. Lynaugh, 492 U.S. 302, 318–19 (1989)] and [Stringer v. Black, 503 U.S. 222, 237 (1992)], the Court determined that the results were 'dictated' by [precedent]. Yet, neither of these decisions was unanimous.").

163. *Id.* at 901 (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)).

164. *See id*. at 902 ("Whether the prisoner seeks application of an old rule in a novel setting, depends in large part on the nature of the rule." (quoting Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring))).

165. *See* Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring) (explaining the *Teague* requirements of a new rule).

166. *See* United States v. Chaidez, 730 F. Supp.2d 896, 902 (N.D. Ill. 2010) ("[T]he only question for this court is whether [*Padilla*] is 'the infrequent [*Strickland*] case that yields a result so novel that it forges a new rule.'" (quoting Osagiede v. United States, 543 F.3d 399, 408 n.4 (7th Cir. 2008))).

167. *See* Williams v. Taylor, 529 U.S. 362, 391 (2000) (labeling *Strickland* as established law that "of necessity requires a case-by-case examination of the evidence" and observing that *Strickland* is a clear rule that does not "break new ground" when it is applied).

168. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *6 (E.D. Cal. July 1, 2010) ("The Supreme Court has issued a number of relatively recent opinions applying the *Strickland* test in a variety of different factual contexts; none of these cases has been afforded new rule status under *Teague*." (citing Rompilla v. Beard, 545 U.S. 374, 380 (2005); Wiggins v. Smith, 539 U.S. 510, 522 (2003); Williams v. Taylor, 529 U.S. 362, 391 (2000))).

Chaidez observed that a critical element of a *Strickland* analysis is the professional standards in use at the time the conviction becomes final.[169] The court observed that the Supreme Court has for nearly 10 years recognized deportation as a significant consequence of conviction and that professional standards advise counsel to inform their clients of immigration consequences to guilty pleas.[170] And, as stated above, the Supreme Court has found professional norms to require as much dating back to 1982.[171]

Additionally, *Chaidez* noted that if the Supreme Court did not anticipate retroactivity, then its dismissal of the floodgates concern would be unnecessary because the inquiry into ineffective assistance of counsel is by its nature retroactive.[172] Accordingly, the court remanded the case to allow Ms. Chaidez to make an ineffective assistance of counsel claim.[173] On a subsequent hearing, the same court granted Ms. Chaidez relief based on *Padilla*.[174]

The Third Circuit, in *United States v. Orocio*, recently concluded that "[t]he application of *Strickland* to the *Padilla* scenario is not so removed from the broader outlines of precedent as to constitute a 'new rule.'" [175] The unanimous court found that *Padilla* "reaffirmed" the *Strickland* principles that guide defense counsel's obligations to the defendant during guilty pleas.[176] Additionally, the Third Circuit concluded that *Padilla* did

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169. *See Chaidez*, 730 F.Supp.2d at 903 ("A post-conviction court applying *Strickland* is bound to consider whether counsel's assistance was effective with relevance to professional standards *as they existed at the time of conviction*." (citing Conner v. McBride, 375 F.3d 643, 656 (7th Cir. 2004))).

170. *See id.* at 903 ("The Supreme Court, itself, recognized as early as 2001 that immigration consequences of guilty pleas would be critically important to defendants and that 'competent defense counsel, following the advice of numerous practice guides' would be expected to advise clients [accordingly]." (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 323 & n.50 (2001))).

171. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 322 n.48 (2001) (citing the 1982 edition of the ABA Standards for Criminal Justice for the practice guideline that counsel "should fully advise the defendant of [deportation] consequences").

172. *See* United States v. Chaidez, 730 F. Supp.2d 896, 903–04 (N.D. Ill. 2010) (adding that the ineffective assistance of counsel inquiry requires collateral review because few defendants who plead guilty have grounds or desire for direct appeal).

173. *See id.* at 905 ("Now that Chaidez has established a legally sufficient claim for relief, she is entitled to an evidentiary hearing.").

174. *See* United States v. Chaidez, No. 6:03-mj-040, 2010 WL 3979664, at *3–4 (N.D. Ill. Oct. 6, 2010) (vacating the conviction because counsel failed to warn Chaidez that a guilty plea carried immigration consequences).

175. United States v. Orocio, 645 F.3d 630, 638 (3d Cir. 2011).

176. *See id.* ("Far from extending the *Strickland* rule into uncharted territory, *Padilla* reaffirmed defense counsel's obligations to the criminal defendant during the plea

not "break new ground" because *Padilla* straightforwardly applied *Strickland* by analyzing long-established professional norms.[177] Finally, the court pointed to the floodgates discussion as indication that the Supreme Court anticipated *Padilla* applying retroactively.[178]

Other courts agree with various aspects of the *Orocio* and *Chaidez* reasoning.[179] Some focus on the Supreme Court recognition that *Strickland* often applies to new factual contexts but rarely—if ever—creates new rules.[180] Additionally, courts agree that the Supreme Court anticipated retroactive application as indicated by its language dismissing the floodgates concerns.[181] Other courts hinge the retroactivity issue on the Court's emphasis on prevailing professional norms.[182]

Similar analysis led prominent scholars to agree that *Padilla* applies retroactively.[183] In addition to the reasoning above, the commentators suggested that the Supreme Court indicated that creating a direct/collateral consequences distinction would be a substitution for the well-established *Strickland* standard.[184] Additionally, the scholars point out that the Supreme Court not only expected *Padilla* to apply retroactively but also that it would affect the finality of only a minimal number of convictions.[185] The Court based this expectation on two presumptions: that counsel will

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process.").

177. *See id.* (observing that the Supreme Court analyzed *Padilla* according to prevailing professional norms in spite of contrary lower court rulings).

178. *See id.* ("[C]lose scrutiny of the *Padilla* opinion leads us to consider it not unlikely that the *Padilla* Court anticipated the retroactive application of its holding on collateral review when it considered the effect its decision would have on final convictions.").

179. *See* Proctor & King, *supra* note 35, at 240 n.30 (collecting cases that find *Padilla* applies retroactively).

180. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *5 (E.D. Cal. July 1, 2010) (noting that the Supreme Court has applied *Strickland* in numerous new contexts without finding those decisions to be new rules (citing Newland v. Hall, 527 F.3d 1162, 1197 (11th Cir. 2008))).

181. *See id.* at *7 ("If the Court intended *Padilla* to be a new rule which would apply only prospectively, the entire 'floodgates' discussion would have been unnecessary.").

182. *See* Martin v. United States, No. 6:03-mj-040, 2010 WL 3463949, at *3 (C.D. Ill. Aug. 25, 2010) (finding that *Padilla* did not break new ground because the Supreme Court based its decision on prevailing professional norms and applied *Strickland*).

183. *See* Proctor & King, *supra* note 35, at 240–41 (concluding that *Padilla* is not a new rule and, like other *Strickland* decisions, applies retroactively).

184. *See id.* at 240 (calling such a distinction an ineffective "shorthand" or "alternative").

185. *See id.* at 240–41 ("Without a mention of *Teague*, the Court explained that its decision would not likely affect the finality of most convictions.").

have adhered to prevailing professional norms and that few defendants will risk forfeiting the advantages of their plea agreements.[186]

B. Arguments Against Retroactivity

The Court of Special Appeals of Maryland, acting in its capacity as a retroactivity sommelier, recently addressed the task of determining "whether [*Padilla*] represents simply the decanting of old wine in new bottles or the uncorking of a new wine."[187] After restating the holding in *Padilla*, the court continued: "The taste test now before us asks us to assess the vintage of [*Padilla*]. Will it or will it not date back to invalidate a guilty plea entered [before *Padilla*]?"[188]

Notably, the petitioner, Mr. Miller, filed for relief prior to *Padilla*, so at least initially he was not trying to take advantage of a new Supreme Court ruling.[189] The trial court judge hearing the *coram nobis* petition denied it by concluding that deportation was not a direct consequence of the plea.[190] After *Padilla*, Mr. Miller appealed that decision, arguing that his petition's denial was now "untenable."[191]

The Court of Special Appeals began with the keystone to its analysis by noting that the denial was based upon the "well-settled Maryland (and, indeed, national) law" that relied on the collateral/direct distinction and only allowed guilty plea attacks when defendants were denied advice as to the direct consequences.[192] Despite *Padilla*'s language to the contrary, the *Miller* court labeled the collateral/direct consequences distinction "critical."[193] The court further noted the Maryland precedent accorded with

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186. *See Padilla*, 130 S. Ct. at 1485 (presuming that counsel have adhered to professional norms and explaining that defendants who collaterally attack their pleas "lose the benefit of the bargain obtained as a result of the plea").

187. *See* Miller v. State, 11 A.3d 340, 341 (Md. Ct. Spec. App. 2010) (framing the issue of *Padilla* retroactivity).

188. *Id.*

189. *See id.* (stating Mr. Miller filed his *coram nobis* petition June 18, 2009 and the Supreme Court announced *Padilla* March 31, 2010).

190. *See id.* at 341–42 (concluding that deportation was only a collateral and not a direct consequence of his conviction).

191. *Id.* at 342.

192. *See id.* at 342 ("[A] guilty plea may not be attacked on the ground that the defendant had not been advised with respect to the collateral consequences (as opposed to direct consequences) of the conviction.").

193. *See id.* at 351 (citing Maryland case law on the "critical distinction between a direct consequence of conviction and a collateral consequence").

the federal circuits but was contrary to *Padilla*.[194] In the face of what it labeled a "monolith of preexisting law" holding the opposite, the court found it unreasonable to consider *Padilla* an application of well-settled law.[195] Instead, the court cited Justice Alito's concurrence that the majority opinion marked a "dramatic departure" from "longstanding and unanimous" precedent in the federal courts and was "squarely athwart the well-worn and familiar path."[196] Labeling *Padilla* a new rule, the court decided against relief for Mr. Miller, whose conviction was "long beyond direct review."[197]

Indeed, most courts that find *Padilla* to be a new rule refer to the fact that eleven federal circuits and thirty states did not require attorneys to advise defendants of collateral consequences to their guilty pleas.[198] However, as Mr. Miller argued and the Court of Special Appeals observed, distinguishing between collateral and direct consequences is now inappropriate.[199]

Analyzing the *Teague* doctrine, the *Miller* court found it "clear" that *Padilla* announced a new rule in that it "overruled a longstanding practice that lower courts had uniformly approved."[200] Believing it an important difference, the court distinguished that *Padilla* was not prohibited by Supreme Court precedent but concluded that it was not dictated by precedent.[201] According to the court, the only "antecedent rumbling"

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194. *See id*. ("Just as did the federal circuit courts of appeal, Maryland consistently held that deportation was a collateral consequence of conviction . . . .").

195. *See id.* ("[I]t is unreasonable, therefore, to say that [*Padilla*] did nothing but apply predictable and well-settled law.").

196. *See id.* at 347 ("The concurring opinion in [*Padilla*] was more introspective than was the majority opinion.").

197. *See id*. at 352 ("Accordingly, [*Padilla*] will not apply retroactively [to the case] now before us.").

198. *See* Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804, at *3 (N.D. Ill. Feb. 7, 2011) ("Other district courts . . . have held that *Padilla* did announce a [new rule], stressing that the result in *Padilla* was not dictated by precedent in the majority of federal courts . . . .").

199. *See* Miller v. State, 11 A.3d 340, 343 (Md. Ct. Spec. App. 2010) ("The appellant is correct that automatically rejecting a defendant's claim on the basis of the collateral consequence-direct consequence distinction is no longer proper.").

200. *See id.* at 344–45 (applying *Teague* to *Padilla* and concluding the decision was not dictated by precedent).

201. *See id.* at 345 ("[The Court was] free to go either way. That by no means implies that the Court's decision was one 'dictated by precedent.' It was simply not prohibited by its own precedent.").

possibly predicting the *Padilla* decision came down after Mr. Miller's guilty plea and so offered him no relief.[202]

The court also accorded retroactivity weight to the Supreme Court's description of the dramatic change in immigration law over the past ninety years.[203] The implication, observed the court, was that the law must change in order to accommodate the changed law.[204] According to the Special Court of Appeals of Maryland, the Supreme Court's discussion of prevailing professional norms was a "classic argumentative technique" to justify changing the law to what the Court thought it ought to be.[205] The court then observed that it is irrelevant whether the *Padilla* majority thought it announced a new rule.[206] Instead, the court took it upon itself to objectively measure whether *Padilla* did in fact change the law.[207]

The Seventh Circuit applied similarly arduous reasoning when it reversed *Chaidez*. The majority acknowledged that the Supreme Court expressly applied *Strickland* to *Padilla*, but concluded *Padilla* announced a new rule because lower courts had held otherwise.[208] So much contrary lower court precedent suggests a new rule, according to the court, because most lower courts were not unreasonable in holding contrary to *Padilla* prior to its announcement.[209] The majority "remain[ed] persuaded by the weight of lower court authority."[210] Similarly, the court reasoned that

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202. *See id.* at 346 ("Even as of that first fleeting hint of something 'blowin' in the wind,' the time had already long since lapsed for any direct review of the appellant's guilty plea of June 1, 1999.").

203. *See id.* at 345–46 (stating that the Court from the outset was "responding to a dramatically changing situation").

204. *See id*. at 346 ("The implication was unmistakable that the law providing some relief to non-citizens, far from remaining static, would have to change to meet the changing needs of changing times, to wit, the 'dramatic rais[ing of] the stakes.'" (quoting *Padilla*, 130 S. Ct. at 1480)).

205. *See id.* at 346–47 ("The Supreme Court was unquestionably justifying the change it was about to make."). "That, by definition, is making new law." *Id.*

206. *See id.* at 347 ("Our search internally for Freudian clues as to what [*Padilla*] thought about itself, however, is very secondary.").

207. *See id.* ("What ultimately matters is not whether the Supreme Court majority subjectively thought it was changing the law, but whether, as an objectively measured fact, it did change the law.").

208. *See* Chaidez v. United States, 655 F.3d 684, 690 (7th Cir. 2011) ("Our conclusion that *Padilla* announced a new rule finds additional support in pre-*Padilla* decisions by state and federal courts.").

209. *See id.* at 692 (referring to the "large majority of federal and state courts" not requiring counsel to advise defendants of immigration consequences of guilty pleas in the absence of Supreme Court precedent).

210. *Id.*

because *Padilla* includes concurring and dissenting opinions, the rule must not have been dictated by precedent and so must be new.[211]

Conceding that *Padilla* represents an extension of *Strickland*, the majority stated that such an extension is an old rule only when it is "the *sole* reasonable interpretation of existing precedent."[212] The court went on to concede that any extension of *Strickland* will rarely be a new rule and then decided that *Padilla* was an example of that rare exception.[213] The court wondered, "[I]f *Padilla* is considered an old rule, it is hard to imagine an application of *Strickland* that would qualify as a new rule."[214] With that statement, the majority essentially paraphrased Justice Kennedy's observation that in applying *Strickland*, "it will be the infrequent case that yields a result so novel that it forges a new rule."[215] Yet, the Seventh Circuit concluded that a direct application of *Strickland*, guided by long-established professional norms, must be that infrequent case.[216] For the majority, a reversal of lower court precedent carried more weight than the professional norms that guide *Strickland* analyses.

As the dissent observed: "The existence of concurring and dissenting views does not alter the fact that the prevailing professional norms at the time of Chaidez's plea required a lawyer to advise her of the immigration consequences of a guilty plea."[217] The dissent further noted that the concurring Justices in *Padilla* both agreed that *Strickland* requires attorneys to at least advise that pleading guilty may have adverse immigration consequences.[218] The Third Circuit put it well: "It [is] 'hardly novel' for counsel to provide advice to defendants at the plea stage concerning the immigration consequences of a guilty plea."[219]

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211. *See id.* at 689 ("That the members of the *Padilla* Court expressed such an 'array of views' indicates that *Padilla* was not dictated by precedent." (citing O'Dell v. Netherland, 521 U.S. 151, 159 (1997))).

212. *See id.* at 692 (reasoning that the fact that *Padilla* applies *Strickland* is not conclusive on whether *Padilla* announced a new rule).

213. *See id*. at 692 ("We recognize the application of *Strickland* to unique facts will generally not produce a new rule . . . ."). "We believe *Padilla* to be the rare exception." *Id.*

214. *Id.*

215. Wright v. West, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring).

216. *See* Chaidez v. United States, 655 F.3d 684, at 692–93 (7th Cir. 2011) ("We believe *Padilla* to be the rare exception.").

217. *Id.* at 696 (Williams, J., dissenting).

218. *See id.* (referring to Justice Alito's concurring opinion, which also conflicted with lower court precedent).

219. United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011)

Notably, the Seventh Circuit ignored—and the *Miller* court addressed only in a footnote[220]—the Supreme Court's observation that: "It seems unlikely that our decision today will have significant effect on those convictions *already obtained* as the result of plea bargains."[221] Clearly, the Court anticipated some effect on convictions that preceded the *Padilla* announcement.

In finding *Padilla* created a new rule, the Tenth Circuit advanced similar arguments regarding lower court precedent and *Padilla*'s concurring and dissenting opinions.[222] The Tenth Circuit did acknowledge that *Padilla* did not overturn Supreme Court precedent and that the Court had nearly ten years prior recognized the importance of considering the deportation risk associated with guilty pleas.[223] And the court conceded, "Without doubt, *Padilla* is a *Strickland* case."[224] Still, the court concluded *Padilla* announced a new rule because "[w]hile the Supreme Court had never foreclosed the application of *Strickland* to collateral consequences of a conviction, it had never applied *Strickland* to them either."[225]

Lower courts mirror the analysis of the Court of Special Appeals of Maryland and the Seventh and Tenth Circuits in that most courts finding against retroactivity have focused on the precedent issue.[226] The courts make two precedent arguments: one argues that existing precedent in either the relevant circuit or State held the opposite of *Padilla* and so *Padilla* overturned uniform law, and the second argument claims that the lack of Supreme Court precedent meant that the announcement of *Padilla* created new law.[227]

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220. *See* Miller v. State, 11 A.3d 340, 347 n.5 (Md. Ct. Spec. App. 2010) (finding the two "*nisi prius* opinions relied on by the appellant" to be "singularly unpersuasive" in that they relied on the apparent belief of the Court that *Padilla* would be fully retroactive).

221. *See Padilla*, 130 S. Ct. at 1485 (emphasis added).

222. *See* United States v. Chang Hong, ___F.3d___, 2011 WL 3805763, at *6 (10th Cir. 2011) (identifying lower court precedents contrary to *Padilla* and observing Justice Alito's concurrence and Justice Scalia's dissent).

223. *See id.* at *7 (summarizing counter-arguments that *Padilla* is not a new rule).

224. *Id.* at *5.

225. *Id.* at *7.

226. *See* Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804, at *3 (N.D. Ill. Feb. 7, 2011) ("Other district courts . . . have held that *Padilla* did announce a [new rule], stressing that the result in *Padilla* was not dictated by precedent in the majority of the federal courts.").

227. *See* United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *3 (D. Neb. Nov. 9, 2010) (finding against retroactivity because neither Supreme Court nor the Eighth Circuit precedent required advising defendants of immigration consequences prior to *Padilla*); *see also* United States v. Gilbert, No. 2:03-cr-00349-WJM-1, 2010 WL 4134286,

Also, like *Miller*, some courts have argued that the only hint at the *Padilla* decision was 2001 dicta that in no way dictated the ultimate result of *Padilla*.[228] One court concluded it was "unlikely" that the defendant could show that prevailing professional norms counseled attorneys to advise defendants of possible immigration consequences at the time the defendant's conviction became final.[229] Notably, in that case the conviction became final in 1997, and in the same dicta referred to by other courts, the Supreme Court observed that prevailing professional norms dating back to 1982 advised attorneys to do what *Padilla* now requires.[230]

C. Evading Retroactivity

Some courts have concluded that determining the retroactivity question is not necessary to decide the cases before them because the defendants could not clear the prejudice hurdle.[231] In order to succeed in overturning a guilty plea under *Hill v. Lockhart*: "[T]he defendant must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[232] Some courts have taken this tack because the Supreme Court, in *Strickland*, instructed as much: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[233]

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at *3 (D. N.J. Oct. 19, 2010) ("Neither the Third Circuit nor the Supreme Court have ever ruled on whether or not an attorney must make a client aware of possible future immigration proceedings in order to comply with the 6th Amendment prior to the *Padilla* case.").

228. *See* People v. Kabre, 905 N.Y.S.2d 887, 892–93 (N.Y. Crim. Ct. 2010) (finding that the dicta in I.N.S. v. St. Cyr, 533 U.S. 289, 322 n.48 (2001) did not provide a clear signal from the Supreme Court that dictated the result in *Padilla*).

229. *See* Haddad v. United States, No. 97-80150, 2010 WL 2884645, at *6 (E.D. Mich. July 20, 2010) (concluding that defendant could not show prevailing professional norms in 1997 required the same as the Supreme Court now requires under *Padilla*). The *Haddad* court also found it "unlikely" that *Padilla* will be applied retroactively and "equally unlikely" that defendant could show prejudice. *Id.*

230. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 322 n.48 (2001) (citing the 1982 edition of the ABA Standards for Criminal Justice for the practice guideline that counsel "should fully advise the defendant of [deportation] consequences").

231. *See* United States v. Gutierrez Martinez, No. 10-2553, 2010 WL 5266490, at *3 (D. Minn. Dec. 17, 2010) (stating that in the face of *Padilla* retroactivity confusion, some courts have denied collateral relief because defendant could not show prejudice).

232. Hill v. Lockhart, 474 U.S. 52, 59 (1985)

233. Strickland v. Washington, 466 U.S. 668, 697 (1984).

Courts have used different aspects of individual cases in disposing of defendants' claims on prejudice grounds. One court decided that a defendant's claims obviated the need to discuss *Padilla* retroactivity.[234] Noting uncertainty on the issue, the court assumed without deciding that *Padilla* applies retroactively and denied the defendant's claims on the prejudice prong.[235] Another court first decided that *Padilla* does apply retroactively then denied relief on prejudice grounds.[236] The finding of prejudice was based on the fact that both the judge and the plea agreement informed the defendant of deportation risks.[237] Yet another court, after finding that *Padilla* did not apply retroactively, added that even if its nonretroactivity conclusion was wrong, the defendant could not show prejudice because he had other criminal charges subjecting him to deportation.[238]

One court concluded the defendant could not show prejudice where the sentencing judge informed the defendant that deportation was likely.[239] A wrinkle in that case was that the defendant was an illegal alien and so was subject to deportation regardless of the guilty plea.[240] The court also found this fact sufficient to show a lack of prejudice.[241]

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234. *See* United States v. Obonaga, No. 10-CV-2951, 2010 WL 2710413, at *1 (E.D.N.Y. June 30, 2010) (denying defendant's claims because both his plea agreement and the judge, during allocution, expressly articulated that the defendant would be deported following a guilty plea).

235. *See id.* at *2 ("[E]ven if counsel erred in failing to inform him that he might get deported, [defendant] nevertheless 'underst[ood]' this risk before he pled guilty."). "It follows then that counsel's alleged error did not prejudice [defendant]." *Id.*

236. *See* Al Kokabani v. United States, No. 5:06-CR-207-FL, 2010 WL 3941836, at *6–7 (E.D.N.C. July 30, 2010) (finding *Padilla* applicable but granting summary judgment to the government because defendant was aware of the possible deportation consequences of his guilty plea).

237. *See id.* at *6 ("Thus, at the time he pled guilty, [p]etitioner clearly understood he was risking adverse immigration consequences by doing so.").

238. *See* United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *3 (D. Neb. Nov. 9, 2010) (finding that the defendant would still be subject to deportation because if his federal guilty plea was vacated, his state charges would be reinstated).

239. *See* United States v. Gutierrez Martinez, No. 10-2553, 2010 WL 5266490, at *4 (D. Minn. Dec. 17, 2010) ("[D]uring the sentencing hearing, the [c]ourt informed Gutierrez Martinez he would likely be deported.").

240. *See id.* (noting that defendant's presentencing report listed him as being in the country illegally since 2003).

241. *See id.* (finding that where his guilty plea did not affect his deportation status, the defendant did not suffer prejudice because the deportation decision "would not have affected his decision whether to plead or go to trial").

The Supreme Court indicated that courts might dispose of claims seeking relief under *Padilla* in this manner; when dismissing the floodgates concerns, it said: "There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit."[242] Yet, prejudice has not been a uniformly insurmountable hurdle for petitioners; Roselva Chaidez successfully showed the court that she would prefer trial to the near automatic deportation resulting from her guilty plea[243] Importantly, Ms. Chaidez had received probation for her sentence, and her plea was entered without the benefit of a written plea agreement.[244] Further, the government did not rebut her testimony that she would have preferred to risk prison over almost certain deportation in order to gain the chance to stay with her family.[245]

A New York court found another way of avoiding retroactivity when it found that because the relevant immigration law was unclear, counsel's nonadvice was bad practice but not constitutionally deficient.[246] This decision appears to be consistent with *Padilla*'s limitation on its holding.[247] The New York court also distinguished the case before it in that the nonadvice on unclear law regarded completion of a drug treatment program.[248] The court found counsel to be effective and distinguished the case from ineffective assistance of counsel cases because the defendant

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242. *Padilla*, 130 S. Ct. at 1485.

243. *See* United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *3 (N.D. Ill. Oct. 6, 2010) (concluding that Ms. Chaidez would have gone to trial if she had known of the immigration consequences of the guilty plea).

244. *See id.* ("Chaidez entered her guilty plea without the benefit of a plea agreement.").

245. *See id.* (giving particular credit to her testimony that the risk of jail was worth the opportunity to avoid deportation).

246. *See* People v. Cristache, 907 N.Y.S.2d 833, 845 (N.Y. Crim. Ct. 2010) ("Given the particular circumstances of defendant's plea and plea counsel's accurate, albeit incomplete, advice, the Court finds that plea counsel satisfied her 'more limited' constitutional duty under *Padilla* to 'do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences.'" (quoting *Padilla*, 130 S. Ct. at 1483)).

247. *See Padilla*, 130 S. Ct. at 1483 ("There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain . . . ."). "[Then], a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may* carry a risk of adverse immigration consequences." *Id.* (emphasis added).

248. *See Cristache*, 907 N.Y.S.2d at 845 ("Defendant, of course, may have been in a better legal position to argue that plea counsel was deficient, had his guilty pleas been vacated upon his *successful completion* of drug treatment.").

failed to uphold his end of the bargain and so placed himself in the precarious position.[249]

D. Beyond Immigration

Some advocate expanding *Padilla* beyond the immigration context, arguing that other collateral consequences—such as loss of child custody, loss of government benefits, or loss of professional privileges—are all equally as serious as deportation.[250] And, they argue, the reasoning behind the *Padilla* decision applies to those consequences with equal force.[251]

Some appellate courts agree and have already applied *Padilla* beyond the immigration context.[252] These decisions highlight how the retroactivity of *Padilla* might affect more than immigration law. For example, the Eleventh Circuit extended *Padilla*'s reasoning to sex offender civil commitments in vacating Gary Bauder's guilty plea.[253] And the Georgia Court of Appeals agreed that the *Padilla* reasoning applies equally to sex offender registration.[254]

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249. *See id.* ("Defendant's insurmountable problem is the particular facts of his case. He failed to complete treatment and is now reaping the precise consequences about which he was warned by plea counsel.").

250. *See* Chin & Love, *supra* note 132, at 24 (arguing that certain collateral consequences beyond deportation also can result and also are of supreme importance to defendants); Roberts, *supra* note 6, at 170 (arguing that defendants require advice on collateral consequences to make an informed guilty plea); *see also* Commonwealth v. Abraham, 996 A.2d 1090, 1094–95 (Pa. Super. Ct. 2010) (applying *Padilla* to the statutory loss of pension benefits from a criminal conviction).

251. *See* Chin & Love, *supra* note 132, at 24 ("The logic of *Padilla*, then, is not restricted to immigration consequences, but extends to the various ways in which Congress and the states have made criminal conviction legally operative in contexts beyond the formal sentence imposed by the court.").

252. *See* Bauder v. Dept. of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010) (replacing "immigration" with "collateral" consequences in requiring counsel to advise defendants of civil commitment consequences to guilty pleas); Wilson v. State, 244 P.3d 535, 538–39 (Alaska Ct. App. 2010) (citing *Padilla*—without addressing retroactivity—to support a finding of ineffective assistance of counsel for inaccurately advising on the civil consequences of a no contest plea); *see also* Chin & Love, *supra* note 132, at 23 (arguing that the logic of *Padilla* applies to many collateral consequences).

253. *See Bauder*, 619 F.3d at 1275 ("[T]he Supreme Court has noted that when the law is unclear a criminal defense attorney must advise his client that the 'pending criminal charges may carry a risk of adverse [collateral] consequences.'" (quoting *Padilla*, 130 S. Ct. at 1483)).

254. *See* Taylor v. State, 698 S.E.2d 384, 387–89 (Ga. App. 2010) (concluding the factors deciding *Padilla* to be equally applicable to the consequences of sex offender registration).

Note that *Padilla* not only limited its language to immigration law, but its reasoning specifically rested on changes in immigration law.[255] Further, the Court specifically labeled deportation as "uniquely difficult to classify as either a direct or collateral consequence."[256] The Court carefully applied *Strickland* only to deportation.[257] Notably, in extending *Padilla* to civil commitment, the Eleventh Circuit, in quoting *Padilla*, changed the Court's word "immigration" to "[collateral]" despite the Court's refusal to apply the labels direct and collateral.[258]

As these courts show, the reasoning of *Padilla* can be persuasive when applied to other contexts.[259] Many collateral consequences result from law that is relatively clear and readily available to attorneys.[260] Professional norms can often be shown to counsel attorneys to advise their clients on such consequences.[261] And defendants surely would consider many collateral consequences, such as deportation, to be more punitive than the direct consequence of prison.[262] As noted above, the Supreme Court continues to apply *Strickland* to new factual contexts, and doing so has yet to yield a new rule.[263]

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255. *See Padilla*, 130 S. Ct. at 1481–82 (including deportation within the scope of the Sixth Amendment entitlement to effective assistance of counsel because of the increasing integration of immigration and criminal law).

256. *Id.* at 1476.

257. *See id.* at 1482 ("The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the *specific risk of deportation*.") (emphasis added).

258. Bauder v. Dept. of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010).

259. *See* Chin & Love, *supra* note 132, at 24 ("The logic of *Padilla*, then, is not restricted to immigration consequences, but extends to the various ways in which Congress and the states have made criminal conviction legally operative in contexts beyond the formal sentence imposed by the court.").

260. *See id.* at 25 (listing serious collateral consequences and the statutes that impose them).

261. *See id.* ("By the early 1980s, the ABA Criminal Justice Standards on the Legal Status of Prisoners described collateral consequences as 'archaic,' and proposed that they were headed for extinction.").

262. *See id.* ("[I]t might be said that for many people convicted of crime, the resulting status is the punishment.").

263. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *6 (E.D. Cal. July 1, 2010) ("The Supreme Court has issued a number of relatively recent opinions applying the *Strickland* test in a variety of different factual contexts; none of these cases has been afforded new rule status under *Teague*." (citing Rompilla v. Beard, 545 U.S. 374, 380 (2005); Wiggins v. Smith, 539 U.S. 510, 522 (2003); Williams v. Taylor, 529 U.S. 362, 391 (2000))).

Perhaps the most important and practical consequence of *Padilla* is that courts and counsel, having read *Padilla* and applying its logic, will now, as a best practice, advise defendants of all foreseeable and relevant collateral consequences beyond deportation.[264]

V. Padilla *Applies Retroactively*

In *Padilla*, seven Justices agreed that *Strickland* decided the case and that, at a minimum, a criminal defense attorney must advise her client that there may be adverse immigration consequences to pleading guilty.[265] One wonders how the Court could have stated more clearly: "*Strickland* applies to Padilla's claim."[266]

Those who argue against retroactivity focus on the newness of *Padilla*'s holding.[267] But the decision was new to the lower courts, not to the Supreme Court.[268] The lower courts applied an as yet unnecessary distinction between direct and collateral consequences that cut against the prevailing professional norms that guide *Strickland* analyses.[269] The Supreme Court did not overrule its own precedent, and a decision that overturns lower court precedent does not automatically create a new rule.[270]

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264. *See* Chin & Love, *supra* note 132, at 32 (predicting that after *Padilla*, courts and counsel—including prosecutors—will advise defendants of many collateral consequences in order to avoid appellate courts vacating guilty plea agreements).

265. *See Padilla*, 130 S. Ct. at 1483, 1487 (requiring at least advice regarding possible deportation consequences).

266. *Id.* at 1482.

267. *See* United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *5 (N.D. Ill. Oct. 6, 2010) (finding support for concluding *Padilla* created a new rule in contrary, pre-*Padilla* lower court holdings); Mudahinyuka v. United States, No. 10 C 5812, 2011 WL 528804, at *3 (N.D. Ill. Feb. 7, 2011) ("Other district courts . . . have held that *Padilla* did announce a [new rule], stressing that the result in *Padilla* was not dictated by precedent in the majority of federal courts . . . .").

268. *See Leading Case*, *supra* note 137, at 204 ("While the decision is not inconsistent with the Court's prior opinions, it overturns nearly unanimous agreement among state and federal courts."). "Despite Justice Scalia's protestations, the majority is correct that the Court has never actually distinguished between direct and collateral consequences in the right to counsel context . . . ." *Id.* at 204 n.64.

269. *See Padilla*, 130 S. Ct. at 1481 ("Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation."). "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 1482.

270. *See* Saffle v. Parks, 494 U.S. 484, 488 (1990) ("The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases.").

Padilla represents an example of a decision that overrules lower court precedent and nonetheless applies retroactively.

Padilla applies retroactively because the Court straightforwardly applied *Strickland*, which, according to the Court, is clearly established law.[271] It has been suggested that applying *Strickland* to new facts might never create a new rule for retroactivity purposes.[272] The Court has previously stated: "*Strickland* guides virtually all ineffective assistance of counsel claims."[273] In fact, the Court has recently applied *Strickland* to new factual contexts and each case has been found to apply retroactively.[274]

Strickland will often lead to new results because it exemplifies a rule of general applicability that requires a case-by-case examination of the facts.[275] This type of rule will not create a new rule for *Teague* purposes when it is applied in novel factual contexts.[276] *Strickland*, the Court has said, because it is so clearly established as a rule, cannot be construed as breaking new ground or imposing new obligations on government.[277] In *Padilla*, the Court acknowledged that lower courts are now "quite experienced with applying *Strickland*" and "can effectively and efficiently use its framework" to apply it in cases where counsel failed to advise a defendant about possible deportation consequences of a guilty plea.[278]

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271. *See* Williams v. Taylor, 529 U.S. 362, 391 (2000) ("It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law. . . .'" (quoting Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring))).

272. *See* Wright v. West, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring) ("Where the [retroactivity issue involves] a rule of this general application, a rule designed for the specific purposes of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule . . . .").

273. *See Williams*, 529 U.S. at 391 ("[T]he *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims . . . .").

274. *See* Newland v. Hall, 527 F.3d 1162, 1197 (11th Cir. 2008) ("*Williams*, *Wiggins*, and *Rompilla* are not new law under *Teague* . . . . In [those cases], the Court did nothing more than apply *Strickland*'s standard to a specific set of circumstances . . . ." (citing *Williams*, 529 U.S. at 395; Wiggins v. Smith, 539 U.S. 510, 524 (2003); Rompilla v. Beard, 545 U.S. 374, 383 (2005))).

275. *See Williams*, 529 U.S. at 391 ("[T]he *Strickland* test 'of necessity requires a case-by-case examination of the evidence . . . .'" (quoting *Wright*, 505 U.S. at 308–09) (Kennedy, J., concurring)).

276. *See Wright*, 505 U.S. at 308–09 (Kennedy, J., concurring) ("Where the [retroactivity issue involves] a rule of this general application, a rule designed for the specific purposes of evaluating myriad factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule.").

277. *See* Williams v. Taylor, 529 U.S. 362, 391 (2000) ("[I]t can hardly be said that recognizing the right to effective counsel 'breaks new ground or imposes a new obligation on the States.'" (quoting *Teague*, 489 U.S. at 301)).

278. *Padilla*, 130 S. Ct. at 1485.

The Court did not state *Teague* as among its reasons for believing that *Padilla* will not open the floodgates to new litigation.[279] Instead, the Court presumed "that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty."[280] Additionally, the Court noted *Strickland*'s "high bar" that requires a defendant to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[281] Defendants willing to attempt that persuasion have the additional disincentive that collaterally attacking their guilty plea means "los[ing] the benefit of the bargain obtained as a result of the plea . . .," which "ultimately . . . may result in a *less favorable* outcome for the defendant."[282] Despite disagreement over the reach of the majority opinion, neither the concurrence nor the dissent expressed alarm that there was no mention of *Teague* or retroactivity as a bar to future claims seeking relief under *Padilla*.[283] And, as one court observed, the entire floodgates discussion would be unnecessary if the Court did not intend *Padilla* to apply retroactively.[284]

Further, the Court's own language plainly signals its anticipation (perhaps its foregone conclusion) that *Padilla* would apply retroactively: "It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains."[285] The Court could not intend *Padilla* to apply only prospectively if it considered at least *some* effect on convictions "*already obtained*" as of the date of the decision.[286]

The decision represents a straightforward application of *Strickland* to a new factual context, and it remains consistent with prevailing professional norms, which guide *Strickland* analyses.[287] Thus, *Padilla* applies retroactively.

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279. *See id.* at 1484–86 (dismissing concerns that *Padilla* would open the floodgates to defendants attacking guilty pleas).

280. *Id.* at 1485.

281. *Id.*

282. *Id.* at 1485–86.

283. *See* United States v. Chaidez, 730 F.Supp. 2d 896, 903 (N.D. Ill. 2010) ("In *Padilla*, despite three separate opinions, no member of the Court even mentioned *Teague* or any retroactivity issue.").

284. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *7 (E.D. Cal. July 1, 2010) ("If the Court intended *Padilla* to be a new rule which would apply only prospectively, the entire 'floodgates' discussion would have been unnecessary.").

285. *Padilla*, 130 S. Ct. at 1485.

286. *Id.* (emphasis added).

287. *See id.* ("'The proper measure of attorney performance remains simply

VI. Conclusion

After *Padilla*, attorneys are on notice that the Supreme Court might one day recognize other collateral consequences as rising to the same level of severity as deportation. At a minimum, counsel should advise defendants of the relevant, potentially adverse, collateral consequences that might result from their conviction. When such consequences result from succinct and straightforward law, counsel should be careful to provide correct advice to their clients. Prosecutors too, in order to protect the finality, accuracy, and fairness of guilty pleas should include in plea agreements advice and disclosures of the relevant collateral consequences that are likely to result from the defendant pleading guilty.

As Justice Stevens said, "By bringing [all] consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."[288]

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reasonableness under prevailing professional norms.'" (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984))).

288. *Id.* at 1486.