THE "NOT SO SUPREME" COURT: STATE LAW DICTATES SUPREME COURT DECISION IN *CHAIDEZ*

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ABSTRACT

In the landmark case of Padilla v. Kentucky, *the U.S. Supreme Court held that a criminal defense counsel must inform a noncitizen criminal defendant of the deportation consequences of a guilty plea. The decision was based on long-standing principles governing effective assistance of counsel and the fact that immigration law has been intimately tied to the criminal process for nearly one hundred years. Then in* Chaidez v. United States, *the U.S. Supreme Court held that the* Padilla *decision would not be applied retroactively to cases that were finalized before* Padilla. *The Court reasoned that* Padilla *was a new law that changed the law in many lower courts.*

This article argues that the Supreme Court erred in its ruling in Chaidez. *First,* Padilla *was not new law but old law applied to a new factual context. Secondly, the U.S. Supreme Court incorrectly allowed state law to dictate their decision. The* Padilla *decision should apply retroactively and provide relief for thousands of defendants who were denied due process. However, because of the error in* Chaidez, *defendants like Roselva Chaidez – whose case was finalized one week before the* Padilla *decision – were denied the benefit of the* Padilla *decision and ultimately faced deportation.*

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INTRODUCTION

In March 2010, the Supreme Court held in *Padilla v. Kentucky* that defense counsel must inform a noncitizen defendant of the deportation consequences of a guilty plea.[1] Failure to do so would render counsel's representation below the reasonableness requirement of

1. 559 U.S. 356, 360 (2010); *see* FED. R. CRIM. P. 11(b)(1) (explaining that before accepting a criminal plea of guilty, a court must determine that the defendant understands his rights, which include, but are not limited to, the right to be represented by counsel, the waiver of trial rights, any maximum penalty, and any mandatory minimum penalty); Berkow v. State, 573 N.W.2d 91, 95 (Minn. Ct. App. 1997) (citing Boykin v. Alabama, 395 U.S. 238, 242–43 (1969) ("A plea of guilty is a waiver of several trial rights guaranteed by the Fifth and Sixth Amendments, and thus, to be valid as a matter of due process, must be voluntarily and intelligently made.")), *aff'd*, 583 N.W.2d 562 (Minn. 1998). The term "deportation" specifically refers to the process of removing aliens, such as lawful permanent residents, who were legally in the United States but later became removable for a reason such as being convicted of certain crimes. 8 U.S.C. § 1227 (2012). An alien who is considered "inadmissible" was not in legal status in the United States at the time of being found subject to removal. *See* 8 U.S.C. § 1183 (2012). "Removal" is "[t]he expulsion of an alien from the United States," which may be based on grounds of "deportability" or "inadmissibility." *See Definition of Terms*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/definition-terms (last visited Aug. 22, 2014); *see also* 8 U.S.C. § 1229(a) (2012).

the Sixth Amendment's guarantee of effective assistance of counsel.[2] The Supreme Court opened its decision by writing:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The 'drastic measure' of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.[3]

To begin his analysis in *Padilla*, Supreme Court Justice John Paul Stevens delivered an eloquent history lesson to support the Court's eventual holding.[4] This is a fitting start to this article as well, because it aims to show that spanning over seventy years, the Supreme Court redefined and solidified the meaning of the Sixth Amendment right to counsel to benefit U.S. citizens and noncitizens alike.

A. Padilla *Should Apply Retroactively*

"[C]ommon law consists of the rules that are generated at the present moment by application of the *institutional principles* of adjudication."[5] By February 2013, common law provided the Supreme Court with fundamental Sixth Amendment principles on which to base its decision in *Chaidez v. United States*, but the Court failed to do so.[6] It held that noncitizen defendants whose criminal convictions became final *before* the *Padilla* decision was issued could not seek relief based on that decision.[7] Based on the *Teague v. Lane* analysis, the Court held that the *Padilla* decision declared a "new rule" because *Padilla* changed the law in many lower courts.[8] Thus, *Padilla* could not be

2. *Padilla*, 559 U.S. at 360.

3. *Id*. at 360 (internal citations omitted).

4. *See id*.

5. H. Jefferson Powell, *The Rationality of the Common Law*, 64 NOTRE DAME L. REV. 767, 769 (1989) (emphasis added) (quoting MELVIN EISENBERG, THE NATURE OF THE COMMON LAW 146 (Harvard University Press ed., 1988)).

6. *See* Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013); *see also Padilla*, 559 U.S. at 374.

7. *Chaidez,* 133 S. Ct. at 1105.

8. *Id*. at 1110; Teague v. Lane, 489 U.S. 288, 301 (1989) (holding that a "case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.").

applied retroactively.[9] However, the Court erred in this holding because the primary frame of reference should have been the Supreme Court's prior precedent.[10]

Considering the history of Supreme Court cases construing the meaning of the Sixth Amendment and the language used by the Supreme Court in *Padilla*, the Court in *Chaidez* departed from long-standing principles protecting constitutional due process and the Sixth Amendment right to counsel.[11] Therefore, *Padilla* should apply retroactively to provide relief to noncitizens whose convictions were already final on the date of that decision.

I. THE EVOLUTION OF THE SIXTH AMENDMENT

On March 31, 2010, the U.S. Supreme Court in *Padilla* held that defense counsel must inform her client whether his guilty plea in criminal proceedings carried a risk of deportation.[12] This holding was based on the foundation of Supreme Court cases concerning the Sixth Amendment right to counsel dating back to over seventy years prior.[13]

A. The Sixth Amendment of the U.S. Constitution and Johnson v. Zerbst

The Sixth Amendment of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against

9. *Chaidez*, 133 S. Ct. at 1113.

10. Rebecca Sharpless, Chaidez v. US*: Assuming* Teague *Applies,* Padilla *Announced a New Rule*, CRIMMIGRATION (Feb. 22, 2013), http://crimmigration.com/2013/02/22/chaidez-v-us-assuming-teague-applies-padilla-announced-a-new-rule/ (citing *Chaidez*, 133 S. Ct. at 1120 (Sotomayor, J., dissenting) (explaining that the "new rule" test in *Teague* has been characterized as "objective," and that therefore the proper frame of reference was the Supreme Court's own jurisprudence)); *see also* Wright v. West, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring) ("[When using] rule[s] designed for the specific purpose 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, one not dictated by precedent.").

11. *See Chaidez*, 133 S. Ct. at 1115–16, 1115 n.1 (Sotomayor, J., dissenting).

12. *Padilla*, 559 U.S. at 374.

13. *Id.* at 365–66 ("[A]dvice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.").

> him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[14]

In 1938, the Supreme Court held in *Johnson v. Zerbst* that one of the safeguards of the Sixth Amendment is that the court must appoint counsel to assist a criminal defendant if the defendant has not waived his right to counsel.[15] The Court explained that the holding protects the fundamental human rights of life and liberty for all people.[16] It recognized that the average defendant does not have the adequate legal skill to preserve these rights, especially when he must defend himself against an experienced opponent in the prosecution.[17] The Court explained that the seemingly simple, orderly, and necessary knowledge a lawyer possesses often is intricate, complex, and mysterious to an untrained layman.[18] Accordingly, *Johnson* affirmed that the Sixth Amendment provides a right to counsel for a criminal defendant.[19]

B. Strickland v. Washington *and* Hill v. Lockhart

Approximately a half-century later, the U.S. Supreme Court decided *Strickland v. Washington*.[20] Charles Strickland pled guilty to three murder counts, and after the trial judge sentenced Strickland to death, Strickland sought collateral relief on the ground that his defense counsel had rendered ineffective assistance at his prior sentencing proceeding.[21] Strickland argued his counsel's assistance was

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14. U.S. CONST. amend. VI.

15. Johnson v. Zerbst, 304 U.S. 458, 468 (1938) ("If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the hearing of trial may be lost in the course of the proceedings due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed." (internal quotation marks omitted)).

16. *Id.*

17. *Id.* at 462–63.

18. *Id.* at 463; *see also Padilla*, 559 U.S. at 369 ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.").

19. *Johnson*, 304 U.S. at 468.

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

21. *Id.* at 672, 675.

ineffective because he failed "to request a psychiatric report, to investigate and present character witnesses, [and] seek a presentence investigation report."[22] Apparently, these decisions by defense counsel were motivated to prevent the State from cross-examining respondent and to prevent it from presenting psychiatric evidence of its own.[23] Further, a presentence report, in counsel's judgment, would have weighed negatively against Strickland because the report would have included his criminal history, thus destroying his case.[24]

The Court addressed the question: What does the Sixth Amendment right to counsel actually mean, and how effective does the defense counsel have to be?[25] The Supreme Court in *Strickland* found that, in order to prove defense counsel was ineffective, a defendant must show that his counsel's ineffectiveness led to a violation of his Sixth Amendment rights.[26] The Court made this determination based on a two-part test: (1) whether the performance of defense counsel fell below a "highly deferential" standard of "reasonably effective performance"; and (2) whether the performance prejudiced the defendant's right to a fair trial, i.e. "that there is a reasonable [probability] that, but for counsel's unprofessional errors, the result of the proceeding would be different."[27] The Court explained that a "reasonable probability is a probability sufficient to undermine confidence in the outcome."[28] The totality of the evidence must be considered, and the main focus in deciding an ineffective assistance claim must be the "fundamental fairness" of the challenged proceeding.[29]

The Court found that defense counsel's conduct was reasonable and that Strickland did not suffer sufficient prejudice to warrant setting aside his death sentence and permitting a new hearing.[30] The

22. *Id.* at 675.

23. *Id.* at 673.

24. *Id.* at 672–73 ("In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family.").

25. Sui Chung & Michael S. Vastine, *"Looking on Darkness Which the Blind Do See": An Analysis of the Sixth Amendment Rights of Noncitizens and the Application of* Padilla v. Kentucky *in the Florida Courts*, 17 BENDER'S IMMIGR. BULL. 356, 357 (Mar. 2012) (citing *Strickland*, 466 U.S. at 668).

26. *Id.*

27. *Id.*

28. *Strickland*, 466 U.S. at 694.

29. *See id.* at 696.

30. *Id.* at 700.

Court's two-pronged test remains the standard today for ineffective assistance of counsel claims and was the basis for *Padilla*.[31]

One year after *Strickland*, the Supreme Court in *Hill v. Lockhart* applied the *Strickland* test in the guilty plea context.[32] The Court held that in order to satisfy the second prong of *Strickland*, which requires a showing of prejudice, "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."[33] For years to come, *Strickland* and *Lockhart* became precedential decisions providing the framework for Supreme Court ineffective assistance claims.[34] For example, in *Roe v. Flores-Ortega*, the Court vacated and remanded the opinion of the Ninth Circuit Court of Appeals addressing whether Roe's defense counsel deficiently performed for failing to file an appeal at Roe's request.[35] The Court explained that it "broke no new ground" by remanding the case to be consistent with the standards laid out in *Strickland* and *Lockhart*.[36]

*C. Noncitizens' Rights Pre-*Padilla

Prior to the *Padilla* decision in 2010, most courts did not extend the Sixth Amendment right to effective assistance of counsel to require defense counsel to advise a noncitizen client of the immigration consequences of a guilty plea.[37] Courts labeled immigration consequences as "indirect or collateral consequences that did not fall within constitutional protection."[38]

For example, in 1987, the Florida Supreme Court considered in *State v. Ginebra* whether a noncitizen defendant may "collaterally attack his guilty plea on the basis that his counsel was ineffective in failing to advise him that the guilty plea could subject him to deportation."[39] The court held that defense counsel must only advise his

31. Chung & Vastine, *supra* note 25, at 357; *see also* Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

32. Hill v. Lockhart, 474 U.S. 52 (1985); Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 950 (2012).

33. *Lockhart*, 474 U.S. at 59.

34. *See, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Premo v. Moore, 131 S. Ct. 733, 743 (2011); *Padilla*, 559 U.S. at 371; Roe v. Flores-Ortega, 528 U.S. 470, 484–85 (2000).

35. *Flores-Ortega*, 528 U.S. at 487.

36. *Id.* at 484–85.

37. Chung & Vastine, *supra* note 25, at 357.

38. *Id.*

39. State v. Ginebra, 511 So. 2d 960, 960 (Fla. 1987), *superseded by* FLA. R. CRIM. P. 3.172 *as stated in* State v. Dickey, 928 So. 2d 1193, 1195 (Fla. 2006).

client of the direct consequences of a guilty plea to satisfy the effective assistance standard.[40] This did not include possible deportation.[41] The court reasoned that the Florida Rules of Criminal Procedure provide the "areas which a trial court judge must inquire of the defendant before accepting a guilty plea."[42] The direct consequences the trial judge must address are encompassed by "only those consequences of the sentence which the trial court can impose."[43] The court opined that a defense counsel's duty, in regard to guilty pleas, is to provide the defendant "with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial."[44] A guilty plea without knowledge of deportation consequences does not undermine the plea itself.[45]

In a similar fashion, the Arizona Court of Appeals in *State v. Vera* held that the "potential deportation of an alien defendant is deemed a collateral consequence of his guilty plea because that sanction is controlled by an agency which operates beyond the direct authority of the trial judge."[46] Many courts at the federal level followed this reasoning as well, holding that the only consequences relevant to be considered for a guilty plea are those that are pertinent to the trial itself.[47] The Court of Appeals for the Eleventh Circuit, in *United States v. Campbell*, explained that the Federal Rules of Criminal Procedure require that guilty pleas be voluntary and that they may be withdrawn in the interest of justice.[48] The court elaborated that actual knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent plea; therefore, the lack thereof does not render a plea involuntary.[49]

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40. *Id.*

41. *Id.* at 961.

42. *Id.*

43. *Id.*

44. *Id.* at 961–62 (quoting Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984)).

45. *Id.* (citing United States v. Sambro, 454 F.2d 918, 921 (D.C. Cir. 1971)).

46. State v. Vera, 766 P.2d 110, 111 (Ariz. Ct. App. 1988) (quoting Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977)); *see also* Nunez Cordero v. United States, 533 F.2d 723, 726 (1st Cir. 1976) (holding that a judge is not required to inform a defendant of the possibility of deportation as a collateral consequence but that defense counsel is in a better position to ascertain the personal circumstances of his client).

47. *See* United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985); United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982); Fruchtman v. Kenton, 531 F.2d 946, 948–49 (9th Cir. 1976); Michel v. United States, 507 F.2d 461, 464–65 (2d Cir. 1974); *Sambro*, 454 F.2d at 922–23.

48. *Campbell*, 778 F.2d at 767–68; *see also* FED. R. CRIM. P. 11(b)(2), 32(d).

49. *Campbell*, 778 F.2d at 768–69.

The court in *Campbell* expressly declined to follow *Edwards v. State* because it did not agree that counsel was required to inform her client of collateral consequences such as deportation.[50] On January 21, 1981, Florida's Third District Court of Appeal held in *Edwards* that the noncitizen defendant would be entitled to relief based upon ineffective assistance of counsel, and could vacate his conviction if he could prove four things: (1) he was not advised by his counsel of the deportation consequence; (2) he was not otherwise aware of the consequence; (3) had he known he would be deported, he would not have entered a guilty plea; and (4) the conviction would, in fact, result in deportation.[51]

The *Edwards* court explained that a *collateral* consequence of a guilty plea is *not* necessarily an *insignificant* consequence.[52] At times, deportation is a far more extreme penalty than the direct consequences that result from a guilty plea to an offense.[53] Courts have described deportation to be "'the equivalent of banishment,' 'a savage penalty,' 'a life sentence of exile,' and an event that results in 'loss of property or life; or of all that makes life worthwhile.'"[54] By looking at deportation in this light, the *Edwards* court found that a defendant lacking awareness of these consequences cannot make an informed and intelligent choice.[55]

Edwards dispelled the notion that potential deportation should be an obvious consequence to a noncitizen defendant.[56] The court compared it to an American citizen's rights, such as the right to plead not guilty and maintain innocence, the right to a trial by jury, and

50. *Id.* (citing Edwards v. State, 393 So. 2d 597 (Fla. Dist. Ct. App. 1981)).

51. *Edwards*, 393 So. 2d at 600.

52. *Id.* at 598.

53. *Id.*

54. *Id.* (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1947)); Jordan v. DeGeorge, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

55. *Edwards*, 393 So. 2d at 599; United States v. Shapiro, 222 F.2d 836, 840 (7th Cir. 1955) (setting aside conviction and permitting defendant to withdraw plea of nolo contendere where defendant mistakenly believed he was a United States citizen and was unaware of the deportation consequences of his plea); People v. Giron, 523 P.2d 636, 639 (Cal. 1974) (allowing withdrawal of guilty plea where defendant and trial court were unaware at time of plea that it would subject defendant to deportation); People v. Wiedersperg, 118 Cal. Rptr. 755, 758–59 (Dist. Ct. App. 1975) (holding that trial court had sufficient grounds to entertain petition for writ of error where defense counsel was initially unaware of defendant's alien status); s*ee also* United States v. Briscoe, 432 F.2d 1351, 1353 (D.C. Cir. 1970) ("Under appropriate circumstances the fact that a defendant has been misled as to consequences of deportability may render his guilty plea subject to attack."); Commonwealth v. Wellington, 451 A.2d 223, 224 (Pa. Super. Ct. 1982) ("A guilty plea is a waiver of treasured rights, and to be valid it must be knowingly, intelligently, and voluntarily made.").

56. *See* Edwards v. State, 393 So. 2d 597, 599–600 (Fla. Dist. Ct. App. 1981).

the right to confront the witnesses against him.[57] Florida Rule of Criminal Procedure 3.172 requires "that these and other fundamental rights be diligently explained to every defendant before [they enter a guilty plea and waive these rights]."[58] *Edwards* cautioned that courts must not make assumptions that basic rights are known or understood.[59] The right of a noncitizen defendant to receive effective counsel and be made aware of deportation consequences is no different than other fundamental rights; thus defense counsel should provide a defendant with correct advice concerning potential immigration consequences.[60]

The Fifth District Court of Appeals of Indiana, in deciding *Williams v. State*, followed this reasoning and differentiated between the duties of the trial court and of defense counsel.[61] The court held that a trial court is under no duty to inform a noncitizen defendant of deportation consequences.[62] However, the court found that defense counsel had a more general duty to provide his client an opportunity to enter a plea of guilty that is voluntary, intelligent, informed, and consciously chosen.[63] An attorney's duties to his client are not divided by a "bright line" drawn between direct and collateral consequences.[64] The court explained that the Sixth Amendment "guarantees the right to counsel at any critical stage of prosecution where counsel's absence 'might [detract] from the [defendant's] right to a fair trial.'"[65] The purpose of defense counsel is to be a "guiding hand" at every step in the process, and this purpose would not be

57. *Id.* at 600.

58. *Id.*; FLA. R. CRIM. P. 3.172.

59. *Edwards,* 393 So. 2d at 599–600; *see also* Miranda v. Arizona, 384 U.S. 436, 468 (1966) ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."); Montoya v. United States, 392 F.2d 731, 735 (5th Cir. 1968) (quoting *Miranda*, 384 U.S. at 471–472) ("No amount of circumstantial evidence that the person may have been aware (of his rights) will suffice [in lieu of a warning] . . . .").

60. *Edwards*, 393 So. 2d at 599–600; *see also* People v. Correa, 465 N.E.2d 507, 512 (Ill. App. Ct. 1984); ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 25–27 (American Bar Association 2001) ("A deportation may result in 'loss of both property and life; or all that makes life worth living.' As a result, every criminal lawyer dealing with alien defendants or victims should know something about immigration crimes." (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922))). In all situations, a criminal defense attorney should determine a client's immigrant status and the ramifications of a conviction of any crime. Only United States citizens may not be deported, leaving everyone else vulnerable, even lawful permanent residents.

61. Williams v. State, 641 N.E.2d 44, 46–49 (Ind. Ct. App. 1994).

62. *Id.* at 47.

63. *Id.* at 48–49.

64. *Id.* at 49.

65. *Id.* (quoting United States v. Wade, 388 U.S. 218, 226 (1967)).

fulfilled if it did not point out the deportation consequences of a guilty plea.[66]

As discussed above, there was a clear divide in opinion across all state and federal courts as to whether defense counsel should be required to advise a noncitizen defendant concerning the immigration consequences of a guilty plea.[67] To resolve the issue, the Supreme Court granted certiorari in *Padilla v. Kentucky*.[68]

II. *PADILLA V. KENTUCKY*

A. Background of the Case

On March 31, 2010, the U.S. Supreme Court decided *Padilla v. Kentucky*.[69] The case involved Jose Padilla, "a native of Honduras, [who had] been a lawful permanent resident of the United States for more than forty years."[70] A grand jury indicted Padilla for "trafficking more than five pounds of marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor/trailer without a weight and distance tax number."[71] In exchange for a dismissal of the tractor/trailer violation and sentence of ten years, Padilla, represented by counsel, entered a guilty plea to the three drug-related charges.[72]

Before the Supreme Court, Padilla claimed that his counsel failed to advise him that he would be deported if he entered a guilty plea.[73] Padilla asserted that his counsel told him that he "did not have to worry about immigration status since he had been in the country so long."[74] Padilla alleged that he would have taken his case to trial had his attorney given him proper advice.[75]

The U.S. Supreme Court addressed the issue of whether Padilla's counsel had an obligation to advise him that a guilty plea in his case would result in his deportation from the United States.[76] Previously,

66. *Id.*

67. United States v. Campbell, 778 F.2d 764, 768–69 (11th Cir. 1985).

68. Padilla v. Kentucky, 559 U.S. 356, 359–60 (2010).

69. *Id.* at 356.

70. *Id.* at 359.

71. Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

72. *Id.* ("The plea agreement provided that Padilla would serve five years of his ten year sentence, and would be sentenced to probation for the remaining five years. Final judgment was entered October 4, 2002.").

73. *Padilla*, 559 U.S. at 356.

74. *Id.* at 359 (quoting Commonwealth v. Padilla, 253 S.W.3d at 483).

75. *Id.*

76. *Id.* at 360.

the Kentucky Supreme Court held that Padilla's counsel did not have this obligation because "the Sixth Amendment's guarantee of effective assistance of counsel [did] not protect a criminal defendant from erroneous advice about deportation because it was merely a 'collateral' consequence."[77] The U.S. Supreme Court rejected the Kentucky Supreme Court's reasoning and agreed with Padilla that a constitutionally competent counsel would have advised him that a guilty plea to his drug trafficking charge would automatically make him subject to deportation.[78]

B. History of the Relationship Between Criminal Convictions and Deportation

The Supreme Court in *Padilla* explained that the immigration consequences of a conviction have always been a major consideration during the sentencing procedure in criminal proceedings.[79] In 1917, Congress enacted the Immigration Act of 1917, which allowed judges to issue a judicial recommendation against deportation, or "JRAD."[80] A JRAD provided protection for noncitizens, which minimized the risk of unjust deportation, and a judge had the power to declare that the alien would not be deported based on the particular conviction at hand.[81] JRADs were even issued and considered valid in certain cases for crimes involving moral turpitude, such as narcotics offenses.[82] Moreover, the Second Circuit in 1986 held in *Janvier v. United States* that a defendant's Sixth Amendment right to effective

77. *Id.* at 359.

78. *Id.* at 360; *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable"); 8 U.S.C.A. § 1101(a)(43) (West 2014) (defining "aggravated felony" to include, without limitation, crimes such as murder, rape, sexual abuse of a minor, burglary, child pornography, drug trafficking, or human trafficking).

79. *See Padilla*, 559 U.S. at 360–64.

80. *Id.*; *see also* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge As Immigration Judge*, 51 EMORY L.J. 1131, 1143–44 (2002) ("Until 1990, the INA provided that its primary criminal deportation ground—conviction for a crime involving moral turpitude—would not apply if the sentencing judge recommended that the offender not be deported. The statute required the judge to provide 'due notice' to the [Immigration and Naturalization Service ("INS")] and prosecution authorities, who could then respond. Judicial Recommendations Against Deportation (known as "JRADs") were binding on the INS, so that the moral turpitude conviction could not be used as a basis for deportation. JRADs did not disturb the INS's authority to deport a noncitizen offender on other grounds. Notably, the statute empowered state court judges to issue JRADs, thus permitting them to decide the immigration consequences of a state criminal conviction.").

81. *Padilla*, 559 U.S. at 361–62.

82. *Id.*

assistance of counsel included that defense counsel request a JRAD where prevention of deportation was warranted.[83]

Post-*Janvier*, the immigration implications of criminal convictions and guilty pleas for noncitizens became even greater.[84] Congress abolished the use of JRADs in 1990, and in 1996, eliminated the Attorney General's discretionary authority to vacate removal orders for noncitizens convicted of crimes.[85] Now, but for limited exceptions, removal from the United States is "practically inevitable" when a noncitizen commits an offense subjecting him to an order of deportation.[86] Considering this development in judicial procedure and law, the Supreme Court in *Padilla* found that deportation is a vital part of the sentencing procedure for noncitizen criminal defendants, and accurate legal advice concerning a guilty plea is more important than ever.[87]

C. Effective Assistance of Counsel

The Supreme Court in *Padilla* rejected the importance that the Kentucky Supreme Court placed on deportation being a collateral consequence of a guilty plea.[88] In fact, the Supreme Court explained that it is irrelevant as to whether deportation was a collateral or direct consequence of a guilty plea because it had never applied a distinction between direct and collateral consequences in reference to the scope of "reasonable professional assistance."[89] Deportation has always been a "particularly severe penalty," and is "intimately related to the criminal process."[90] As discussed earlier, criminal convictions and the penalty of deportation have been linked together for nearly a century.[91] The evaluation of deportation as a direct or collateral consequence is inappropriate in this context.[92]

83. *Id.* at 363 (citing Janvier v. United States, 793 F.2d 449, 455 (2d Cir. 1986)).
84. *See id.*
85. *Id.*
86. *Id.* at 363–64.
87. *Id.* at 364.
88. *See id.* at 364–65.
89. *Id.* at 365.
90. *Id.*
91. *Id.* at 365–66.
92. *Id.* at 366.

D. The Strickland *Test*

The Supreme Court held that advice regarding deportation fell into the Sixth Amendment's protection for criminal defendants and that the *Strickland* test applied to Padilla's claim.[93] The *Strickland* test is a two-pronged approach: (1) "whether counsel's representation fell below an objective standard of reasonableness"; and (2) "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[94]

The first prong is linked to the expectations of the legal community, and the proper measure of attorney performance is the "reasonableness under prevailing professional norms."[95] The Court found that prevailing professional norms supported the view that defense counsel must advise the defendant of the risk of deportation, because "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[96]

The Supreme Court explained the difference in duty for defense counsel assisting defendants with complex immigration issues from that of defense counsel assisting defendants with straightforward immigration concerns.[97] When counsel can easily determine through a simple reading of the applicable immigration statute that deportation is warranted for the defendant, counsel is required to provide correct advice concerning this consequence of a guilty plea.[98] Further, the Court explained that immigration law can be complex, and there will be situations in which the deportation consequences of a particular plea are unclear or uncertain.[99] The duty of defense counsel in such cases is more limited.[100] When the immigration law is not "succinct and straightforward," a criminal defense attorney is only required to advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[101] On the

93. *Id.*
94. *Id.* (quoting Strickland v. Washington, 466 U.S. 688, 694 (1984)).
95. *Id.*
96. *Id.* at 368 (citation omitted) (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 322 (2001)).
97. *Id.* at 369.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

other hand, when it is clear that deportation is inevitable, "the duty to give correct advice is equally clear."[102]

Padilla's defense counsel could have determined that Padilla's plea would make him deportable simply from reading the text of the statute, which specifically commanded that Padilla's controlled substances charge would result in deportation.[103] Padilla's counsel affirmatively advised him that his conviction would not result in deportation, despite the fact that his deportation was presumptively mandatory.[104]

The United States argued that these types of ineffective assistance of counsel claims must be limited to "affirmative misadvice," and only if defense counsel chose to discuss immigration consequences.[105] The Court dispelled this notion as absurd, holding that there is no difference "between an act of commission and an act of omission."[106] If the Court held otherwise, an incentive would exist for counsel to remain silent on these matters, which would compete with the obligation to advise the client of "the advantages and disadvantages of a plea agreement."[107] Further, it is the duty of counsel to provide the client with advice about deportation; the failure to do so "clearly satisfies the first prong of the *Strickland* analysis."[108]

The Court held that Padilla's counsel provided constitutionally deficient representation by failing to correctly advise him of the immigration consequences of his guilty plea.[109] Therefore, the Court effectively declared a final ruling that, in general, defense counsel is required to advise his noncitizen client of the deportation consequences of a guilty plea.[110]

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102. *Id.* While this logic seems straightforward, its application may be difficult. The line to be drawn between simple and complex immigration issues may not be very clear.

103. *Id.* at 368; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2012) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

104. *Padilla*, 559 U.S. at 368–69.

105. *Id.* at 369–70.

106. *Id.* at 370; *see also* Strickland v. Washington, 466 U.S. 668, 690 (1984) ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.").

107. *Padilla*, 559 U.S. at 370 (quoting Libretti v. United States, 516 U.S. 29, 50–51 (1995)).

108. *Id.* at 371.

109. *Id.* at 374.

110. *Id.*

III. *PADILLA*: RETROACTIVE OR NOT?

A. The "Retroactivity" Issue

The next issue before the Court was whether the holding in *Padilla* would apply retroactively.[111] The legal term "retroactive" means "anything that is applicable or effective from a date earlier than the present date."[112] Often, courts must determine the proper limitations on the temporal reach of statutes or case law.[113] For example, in *Whorton v. Bockting*, the Supreme Court addressed whether the rule announced in *Crawford v. Washington* applied retroactively.[114] In *Crawford*, the Court held that statements of hearsay are admissible only where the declarant is unavailable, and where the defendant has had a prior opportunity to cross-examine the witness.[115] *Crawford* overruled prior Supreme Court precedent in *Ohio v. Roberts*.[116] The Court in *Bockting* held that *Crawford* did not apply retroactively; thus, it did not apply to cases prior to the Court issuing the *Crawford* decision.[117]

From the time the Supreme Court decided *Padilla* on March 31, 2010, to February 20, 2013, the date that the Supreme Court issued its decision in *Chaidez v. United States*, many courts addressed whether noncitizen defendants whose convictions became final before *Padilla* could retroactively seek relief based on that decision.[118] Federal and state courts across the country were split, and the Supreme Court resolved the issue in *Chaidez*.[119]

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111. Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013).

112. *What is Retroactive?*, THE LAW DICTIONARY, http://thelawdictionary.org/retroactive-2/#axzz2RrmxqOzQ (last visited Sep. 21, 2014).

113. R.A.M. of S. Fla., Inc. v. WCI Cmtys., Inc., 869 So. 2d 1210, 1215 (Fla. Dist. Ct. App. 2004).

114. Whorton v. Bockting, 549 U.S. 406, 409 (2007); Crawford v. Washington, 541 U.S. 36, 59 (2004).

115. *Bockting*, 549 U.S. at 413; *Crawford*, 541 U.S. at 59.

116. *Crawford*, 541 U.S. at 68–69 (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that the Confrontation Clause permitted the admission of a hearsay statement made by a declarant unavailable to testify if the statement bore sufficient indicia of reliability).

117. *Bockting*, 549 U.S. at 421.

118. *See* United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011) (holding that *Padilla* applied retroactively) *abrogated by* Chaidez v. United States, 133 S. Ct. 1103 (2013); *see also* United States v. Chang Hong, 671 F.3d 1147, 1159 (10th Cir. 2011) (holding that *Padilla* did not apply retroactively) *as amended Sept. 1, 2011*; State v. Barros, 41 A.3d 601, 604 (N.J. Super. Ct. App. Div. 2012) (holding that *Padilla* could not be applied in New Jersey state courts, but could be applied at the federal level).

119. *Chaidez*, 133 S. Ct. at 1113.

B. Chaidez v. United States

Roselva Chaidez, a native of Mexico, entered the United States in 1971 and became a lawful permanent resident in 1977.[120] About twenty years later, she assisted in defrauding an automobile insurance company out of $26,000 by staging a car accident.[121] In June 2003, Chaidez was indicted on three counts of fraud, and in December 2003, she pled guilty to two of those counts.[122] In April 2004, the court sentenced her to four years of probation, which she did not appeal.[123]

According to United States immigration law, the offenses to which Chaidez pleaded guilty were "aggravated felonies," which rendered her eligible for deportation.[124] The Department of Homeland Security ("DHS") initiated removal proceedings against Chaidez in 2009, discovering the felony conviction when she submitted an application for citizenship.[125] To avoid deportation, Chaidez filed a petition for writ of error *coram nobis* in March 2010, complaining that her attorney did not inform her that pleading guilty would subject her to deportation.[126] One week later, the Supreme Court held in *Padilla* that a noncitizen could bring a claim for ineffective assistance of counsel where counsel failed to inform the defendant that a guilty plea would result in deportation.[127]

In August 2010, the Illinois District Court held that *Padilla* may be applied retroactively to Chaidez's case despite the fact that her conviction became final before the Supreme Court decided *Padilla*.[128] Subsequently, the Seventh Circuit Court of Appeals reversed in August 2011 and held that *Padilla* declared a "new rule" and did not apply retroactively, thus making Chaidez ineligible for relief under *Padilla*.[129] Finally, in February 2013, the Supreme Court affirmed the

120. *Id.* at 1105; Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).

121. *Chaidez*, 655 F.3d at 686.

122. *Id.*

123. *Id.*

124. *Chaidez*, 133 S. Ct. at 1106; *see also* 8 U.S.C.A. § 1101(a)(43)(M)(i) (West 2014); 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

125. *Chaidez*, 655 F.3d at 686.

126. United States v. Chaidez, 730 F. Supp. 2d 896, 898 (N.D. Ill. 2010), *rev'd*, 665 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013); *see also Chaidez*, 133 S. Ct. at 1106 n.1 ("A petition for a writ of *coram nobis* provides a way to collaterally attack a criminal conviction for a person, like Chaidez, who is no longer 'in custody' and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or § 2241.").

127. *Chaidez*, 730 F. Supp. 2d at 898; *see also* Padilla v. Kentucky, 559 U.S. 356, 388 (2010).

128. *Chaidez*, 730 F. Supp. 2d at 904.

129. *Chaidez*, 655 F.3d at 694.

Seventh Circuit's decision holding that defendants whose convictions became final on direct review prior to *Padilla* cannot benefit from its holding.[130]

C. Teague v. Lane: *Old or New Law?*

The Supreme Court in *Chaidez* applied the retroactivity analysis from *Teague v. Lane*, which held that a "case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[131] In that scenario, a person is not eligible for relief under the rule if his or her conviction was already final when the Court declared the "new rule."[132] On the other hand, a case does *not* announce a "new rule" when it is merely an application of an established principle to a different set of facts.[133] In this situation, the Court's holding may be applied retroactively, thus granting a means of relief for those whose convictions became final before the ruling.[134]

D. The Supreme Court Declined to Apply Padilla *Retroactively*

The Supreme Court in *Chaidez* held that *Padilla* did not apply retroactively because the *Padilla* decision established a "new rule" in its holding.[135] The Court explained that "garden-variety" applications of the test in *Strickland* do not produce new rules under the *Teague* analysis.[136] Applications of established principles to different sets of facts do not yield new rules.[137] The Court explained that if the *Padilla* court had simply applied the *Strickland* test to Padilla's claim and found that "a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent," then *Padilla* could

130. *Chaidez*, 133 S. Ct. at 1113; *see also Supreme Court Holds* Padilla *Does Not Apply Retroactively to Cases Already Final on Direct Review*, 90 INTERPRETER RELEASES 509, 509 (2013) [hereinafter INTERPRETER RELEASES].

131. *Chaidez*, 133 S. Ct. at 1107 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

132. *Id.*

133. *Id.* (quoting *Teague*, 489 U.S. at 307).

134. *Chaidez*, 133 S. Ct. at 1106 (quoting United States v. Chaidez, 730 F. Supp. 2d 896, 904 (N.D. Ill. 2010), *rev'd*, 665 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013)) ("The District Court determined that '*Padilla* did not announce a new rule for *Teague* purposes,' and therefore should apply to Chaidez's case.").

135. *Id.* at 1113.

136. *Id.* at 1107; INTERPRETER RELEASES, *supra* note 130, at 510.

137. INTERPRETER RELEASES, *supra* note 130, at 510.

have applied retroactively.[138] However, *Padilla* did more than just apply *Strickland*'s general standard to another factual situation.[139]

Padilla first held that advice concerning deportation was not "categorically removed" from the scope of the Sixth Amendment right to counsel.[140] The *Padilla* Court further held that a direct versus collateral consequences analysis was "ill-suited" when applying the *Strickland* test.[141] The Court in *Chaidez* explained, prior to asking how the *Strickland* test applied, that *Padilla* asked whether that test applied at all, a question that came to the *Padilla* Court "unsettled" by other courts.[142] Most courts, but not all, held that the Sixth Amendment did not require attorneys to inform their clients of a conviction's collateral consequences, including deportation.[143] Therefore, the *Padilla* Court "broke new ground," imposed a new obligation for defense counsel, and altered the law of most jurisdictions.[144] *Chaidez* held that *Padilla* created a new rule, and it did not "apply retroactively to cases already final on direct review when *Padilla* was decided."[145]

E. Supreme Court Cases Finding New Laws Not Retroactive

Before the *Chaidez* decision, the Supreme Court addressed similar retroactivity issues in other cases and used the *Teague* analysis.[146] For example, in *Bockting*, the Supreme Court addressed whether a new interpretation of the Sixth Amendment's Confrontation Clause would be applied retroactively.[147] A Nevada trial court convicted Martin Bockting for sexual assault on his six-year-old stepdaughter.[148] The court allowed Bockting's wife and a police detective to testify concerning the stepdaughter's out-of-court statements, otherwise known as hearsay, because the court determined that the child was too distressed to testify.[149] The court rejected Bockting's

138. *Chaidez*, 133 S. Ct. at 1108.

139. *Id.*; *see also* INTERPRETER RELEASES, *supra* note 130, at 510.

140. Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

141. *Id.*; *see also Chaidez*, 133 S. Ct. at 1112.

142. *Chaidez*, 133 S. Ct. at 1108; *see also* INTERPRETER RELEASES, *supra* note 130, at 510.

143. *Chaidez*, 133 S. Ct. at 1106.

144. INTERPRETER RELEASES, *supra* note 130, at 510; *see also Chaidez*, 133 S. Ct. at 1110.

145. INTERPRETER RELEASES, *supra* note 130, at 510; *see also Chaidez*, 133 S. Ct. at 1113.

146. Whorton v. Bockting, 549 U.S. 406, 416 (2007); Beard v. Banks, 542 U.S. 406, 411 (2004).

147. *Bockting*, 549 U.S. at 409. The Confrontation Clause reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

148. *Bockting*, 549 U.S. at 409–12.

149. *Id.* at 411.

claim that admitting this testimony would violate the Confrontation Clause.[150]

On appeal, the Nevada Supreme Court affirmed the trial court's decision relying on Supreme Court precedent pursuant to *Roberts*, which held that the Confrontation Clause permits the use of hearsay statements if the statement bears adequate "indicia of reliability."[151] While Bockting's renewal claim was pending, the Supreme Court overruled *Roberts* in *Crawford*, holding that statements of hearsay are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]."[152] Bockting argued that the *Crawford* decision should retroactively apply to his case and the Court should exclude the hearsay statements.[153] Applying the *Teague* analysis, the Supreme Court rejected his argument and held that the *Crawford* decision was a new rule because it was "flatly inconsistent" with prior precedent and the decision overruled *Roberts*. The Court did not apply *Crawford* retroactively to Bockting's claim.[154]

Further, in *Beard v. Banks*, the Supreme Court found that its decision in *Mills v. Maryland* was a new rule because it extended its own general principles in *Lockett v. Ohio* to include the consideration of individual jurors rather than the jury as a whole.[155] In *Lockett*, the Supreme Court struck down Ohio's death penalty statute because it prevented the jury from considering certain aspects of a defendant's character or record as mitigating factors.[156] The Court found that a jury must be allowed to consider mitigating factors that may call for a less severe penalty than death.[157] Subsequently, the Supreme Court in *Mills* relied on *Lockett* to find that in capital cases, individual jurors may not be precluded from considering mitigating factors that would support a sentence less than death.[158] The holding overruled a Maryland statute that led the jurors to believe they were precluded from considering any mitigating evidence unless *all* the jurors *unanimously* agreed on the existence of a particular mitigating cir-

150. *Id.*

151. *Id.* at 412 (citing Ohio v. Roberts, 448 U.S. 56, 74 (1980)).

152. *Id.* at 413 (alteration in original) (quoting Crawford v. Washington, 541 U.S. 36, 59 (2004)).

153. *Id.* at 414.

154. *Id.* at 421.

155. Beard v. Banks, 542 U.S. 406, 416 (2004).

156. *Id.* at 414–16 (citing Lockett v. Ohio, 438 U.S. 586, 608 (1978)).

157. *Lockett*, 438 U.S. at 608.

158. *Banks*, 542 U.S. at 413–14 (citing Mills v. Maryland, 486 U.S. 367, 374–75 (1988)).

cumstance.[159] The Supreme Court in *Banks* applied the *Teague* analysis and held that *Mills* was a new rule because it "broke new ground" by specifically extending *Lockett*'s principles to the rules governing individual jurors.[160] Thus, the Court did not apply *Mills* retroactively to the defendant's case in *Banks*.[161] In the two situations discussed above, the Supreme Court did not apply cases retroactively where there had been explicit overruling of prior precedent.

IV. ARGUMENTS IN SUPPORT OF RETROACTIVE APPLICATION OF *PADILLA*

For the reasons stated below, the Supreme Court erred in *Chaidez* by finding *Padilla* to be a "new rule." *Padilla* was a new application of an old rule from *Teague*; therefore, *Padilla* should apply retroactively to cases already final before the date the Supreme Court issued the *Padilla* decision.

A. The Supreme Court in Chaidez *Should Have Relied upon Its Own Precedent*

The majority's holding in *Chaidez* is supported by faulty reasoning. Before determining *how* the *Strickland* test applied, the Supreme Court in *Padilla* addressed *whether* the test applied at all.[162] *Padilla* held that *Strickland* applied, but also that the analysis would *not* depend on whether "deportation" was a collateral consequence or not, thus contradicting many lower courts.[163] According to the *Chaidez* majority, this preliminary determination by *Padilla* was an excessive step beyond simply administering a *Strickland* test analysis.[164] Thus, *Padilla* created a new rule because it disagreed with the analysis used by many lower courts.[165] The Court erred in this reasoning because the Supreme Court should be the proper vantage point from which to judge the newness of a rule under *Teague*, not lower courts.[166] In 1992, the Supreme Court wrote, "[t]he standard for de-

159. *Mills*, 486 U.S. at 384.

160. *Banks*, 542 U.S. at 416 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (original alterations omitted) (internal quotation marks omitted)).

161. *Id.* at 419–20.

162. Chaidez v. United States, 133 S. Ct. 1103, 1108 (2013).

163. Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

164. *See Chaidez*, 133 S. Ct. at 1108.

165. *See id.*

166. *See* Sharpless, *supra* note 10 (quoting *Chaidez*, 133 S. Ct. at 1120 (Sotomayor, J., dissenting)).

termining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new."[167]

The Supreme Court cases discussed above, *Bockting* and *Banks*, forge a synthesis to show that the Supreme Court should have relied on its own precedent to conduct a *Teague* analysis. In *Bockting*, the Court found the rule in question to be a "new rule" because the Court overruled prior Supreme Court precedent.[168] Further, the Court relied solely on a slew of Supreme Court cases to derive the foundation for its analysis.[169] In *Banks*, the Supreme Court examined whether the *Mills* decision was a sufficiently novel extension of the Court's earlier holding in *Lockett* to compel a finding that *Mills* constituted a "new rule."[170] The Court held that it was a new rule, coming to its decision by analyzing prior Supreme Court precedent and examining the language of *Lockett* and *Mills*.[171]

B. Padilla *Did Not Declare a "New Rule"*

The plain language of the *Padilla* decision dictates that the Supreme Court's determination in *Chaidez* is unfounded. In fact, the *Padilla* majority held that the Court had never distinguished between direct and collateral consequences in defining the scope of reasonable professional assistance required under *Strickland*.[172] *Padilla* did not create a new rule, but merely asserted that an improper analysis had been previously applied by the Kentucky Supreme Court.[173] The dissent in *Chaidez* explained that *Padilla* demonstrated that lower courts were misguided by applying a direct versus collat-

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167. *Chaidez*, 133 S. Ct. at 1120 (Sotomayor, J., dissenting) (quoting Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring)).

168. Whorton v. Bockting, 549 U.S. 406, 416 (2007).

169. *See id.* at 420 (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)) ("The *Crawford* rule . . . did not 'alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.'"); *see, e.g.*, Davis v. Washington, 547 U.S. 813 (2006); Schriro v. Summerlin, 542 U.S. 348 (2004); Saffle v. Parks, 494 U.S. 484 (1990); Teague v. Lane, 489 U.S. 288 (1989); Griffith v. Kentucky, 479 U.S. 314 (1987); Ohio v. Roberts, 448 U.S. 56 (1980); Gideon v. Wainwright, 372 U.S. 335 (1963).

170. Beard v. Banks, 542 U.S. 406, 410 (2004).

171. *See id.*

172. Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

173. *Id.* at 364–65 ("The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters . . . . We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*.").

eral consequences review.[174] *Padilla* declared that *Strickland* was the proper analysis alone and applied it to the facts of the case.[175] Under *Teague*, a holding of this type is applied retroactively.[176]

The majority in *Chaidez* held that *Padilla* declared a "new rule" by first deciding whether or not to apply the *Strickland* test.[177] In layman's terms, the *Padilla* Court figured out what they were going to do before they did it, and according to the majority in *Chaidez*, this type of action constitutes a "new" rule of law.[178] In reality, "*Padilla* did nothing more than apply the existing rule of *Strickland* in a new setting, the same way the Court had done repeatedly in the past."[179] The dissent in *Chaidez* disagreed with the majority because, in its opinion, "*Padilla* fell squarely within the metes and bounds established by *Strickland*."[180]

Strickland "did not provide a comprehensive definition of deficient performance," but rather held that, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,'" which are subject to change.[181] Despite the many different settings in which *Strickland* had been applied, the Supreme Court has yet to find that an application of *Strickland* constitutes a new rule.[182] Rather, when the Court applies "*Strickland* in a way that corresponds to an evolution in professional norms," no new law is made.[183]

The Supreme Court in *Roe v. Flores-Ortega* explained, "[a]s with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the *facts* of a

174. *See* Sharpless, *supra* note 10; *see also Padilla*, 559 U.S. at 365–66. The court in *Padilla* explained that "deportation is . . . intimately related to the criminal process" and "deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." *Padilla*, 559 U.S. at 365–66; *see also* Spencer v. Kemna, 523 U.S. 1, 8 (1998) (pointing to examples of collateral consequences of a conviction, including disadvantages such as the "deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses").

175. *Padilla*, 559 U.S. at 366.

176. *See* Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013) (discussing *Teague* and explaining that applications of principles that governed prior decisions to new sets of facts do not yield new rules).

177. See *id.* at 1108 for the Court's discussion of the *Strickland* test.

178. *Id.*

179. *Id.* at 1114 (Sotomayor, J., dissenting) (citation omitted).

180. *Id.*

181. *Id.* (alteration in original) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

182. *Id.* at 1114–15.

183. *Id.* at 1115.

particular case."[184] The Court expounded in *Wright v. West* that because this is "a rule designed for the specific purpose 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, one not dictated by precedent."[185] Generally, applications of *Strickland* to new factual scenarios do not yield new rules.[186] For example, in *Wiggins v. Smith*, the Supreme Court "found that *Williams v. Taylor* 'made no new law' when it held that *Strickland* extended to an attorney's responsibility to conduct a background investigation in a capital case."[187] Rather, "in referring to the ABA Standards for Criminal Justice as guides, [*Williams*] applied the same 'clearly established' precedent of *Strickland*," that the Court applied in *Padilla*.[188] Equally, in *Lafler v. Cooper*, the Supreme Court held that the Sixth Amendment extended to advice concerning plea offers, because failure to provide this advice constituted attorney misconduct covered by *Strickland*.[189] When the Court applies "*Strickland* in a way that corresponds to an evolution in professional norms," no new law is made.[190]

C. The Supreme Court Expected Courts to Apply Padilla *Retroactively*

The Supreme Court in *Padilla* addressed the concern of how its decision would affect decisions already final on direct review.[191] The Court did not preclude the theoretical possibility of an "effect on those convictions already obtained as the result of plea bargains," although it called such an effect "unlikely."[192] The Court was not worried about a floodgate of excessive claims opening because it felt 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."[193] Not only did the Court anticipate retroactive application of its decision to cases already final on direct review, but it explained that lower courts

184. Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000) (emphasis added) (citing *Strickland*, 466 U.S. at 695–96).

185. Wright v. West, 505 U.S. 277, 309 (1992) (emphasis added).

186. *See Chaidez*, 133 S. Ct. at 1115 (Sotomayor, J., dissenting).

187. *Id.* (quoting Wiggins v. Smith, 539 U.S. 510, 522 (2003)).

188. *Id.* (alteration in original) (quoting *Wiggins*, 539 U.S. at 522).

189. *Id.* (citing Lafler v. Cooper, 132 S. Ct. 1376, 1384–85 (2012)).

190. *Id.*

191. *See* Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

192. *Id.*

193. *Id.*

would continue to apply the *Strickland* test to these claims, just as the Court did in *Padilla*.[194] It is clear from this language that the Court did not create new law in *Padilla*, and that it intended for lower courts to apply *Strickland* in the same manner retroactively.[195]

CONCLUSION

The "new rule" test in *Teague* has been characterized as "objective," and therefore the proper frame of reference that should have been applied in *Chaidez* was the Supreme Court's own jurisprudence.[196] The Supreme Court would not have had the opportunity to hear the case in *Padilla* if a long line of Supreme Court cases had not come beforehand, each providing an incremental piece to refine the meaning of the Sixth Amendment right to counsel.[197] These cases established the principles, rules, tests, and proper analyses with which to make the decision.[198]

Johnson, in 1938, required federal courts to appoint defense counsel to assist a criminal defendant because the Court recognized that the average defendant did not have the adequate legal skill to defend himself.[199] The Court explained that the purpose in its holding was to safeguard the fundamental human rights of life and liberty.[200] In 1984, *Strickland* refined the Sixth Amendment right to counsel to mean "the right to the *effective assistance* of counsel."[201] *Strickland* also provided a two-part test, which is applied today, for determining whether defense counsel's representation met a reasonable standard of effective assistance.[202] Then in 1985, *Lockhart* specifically applied the *Strickland* test in the context of guilty pleas.[203] The Court held

194. *See id.*

195. *See id.*

196. Sharpless, *supra* note 10; *see also* Chaidez v. United States, 133 S. Ct. 1103, 1120–21 (2013) (Sotomayor, J., dissenting). The *Chaidez* dissent noted that "[f]aithfully applying the *Teague* rule depends . . . on an examination of this Court's reasoning and an objective assessment of the precedent at issue." The dissent further explained that "[i]n *Padilla*, [the Court] did nothing more than apply *Strickland*. By holding to the contrary, [the majority's] decision deprives defendants of the fundamental protection of *Strickland*, which requires that lawyers comply with professional norms with respect to any advice they provide to clients." *Id.* (citation omitted).

197. *See generally* Hill v. Lockhart, 474 U.S. 52 (1985); Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

198. *See generally* cases cited *supra* note 197.

199. *Johnson*, 304 U.S. at 462–63.

200. *Id.* at 465.

201. *See Strickland*, 466 U.S. at 686 (emphasis added).

202. Chaidez v. United States, 133 S. Ct. 1103, 1110 (2013).

203. *See Lockhart*, 474 U.S. at 57.

that "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."[204]

Relying on these foundational cases and the professional norms at the time, the Supreme Court held in *Padilla* that criminal defense counsel must provide advice to a noncitizen defendant concerning the deportation consequences of a guilty plea.[205] The Court explained that it "long recognized that deportation is a particularly severe 'penalty,'" which is "intimately related to the criminal process," and that the Supreme Court "has enmeshed criminal convictions and the penalty of deportation for nearly a century."[206] The holding in *Padilla* did not establish a new law, but merely exposed the error of a lower state court and clarified what it means to provide reasonably effective assistance of counsel. Therefore, the Seventh Circuit and the Supreme Court should never have departed from this principle, including during the period in which Roselva Chaidez brought her ineffective assistance of counsel claim.[207] The Supreme Court erred in *Chaidez* by holding that *Padilla* did not apply retroactively.

204. *Id.* at 59.

205. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

206. *Id.* at 365–66 (citation omitted).

207. *Contra Chaidez*, 133 S. Ct. at 1113, *aff'g* Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011).