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# Representing Noncitizens in Criminal Proceedings: Resolving Unanswered Questions in Padilla v. Kentucky

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# COMMENTS

# REPRESENTING NONCITIZENS IN CRIMINAL PROCEEDINGS: RESOLVING UNANSWERED QUESTIONS IN *PADILLA V. KENTUCKY*

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## I. INTRODUCTION

In *Padilla v. Kentucky*, the U.S. Supreme Court decided that an attorney is obligated to tell a noncitizen client that pleading guilty to a crime may result in the client's forced removal from the United States.[1] The defendant, Jose Padilla, claimed that his counsel failed to advise him that choosing to plead guilty might result in his deportation. This failure, Padilla argued, violated his Sixth Amendment right to effective assistance of counsel.[2] The Court agreed: "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation."[3] In reaching this conclusion, the Court reasoned that "[o]ur longstanding Sixth Amendment precedents, the seriousness of deportation as a risk of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."[4]

Two major issues remain unresolved in the wake of this pivotal opinion. First, the Supreme Court did not say whether its decision should apply retroactively to cases on collateral review. To date, only three federal circuit courts have decided whether defendants whose convictions are final should be able to seek relief based on *Padilla*.[5] As a result, most lower

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[1] 130 S. Ct. 1473, 1478 (2010).

[2] *Id.* at 1481–82.

[3] *Id.* at 1478.

[4] *Id.* at 1486.

[5] United States v. Hong, No. 10-6294, 2011 WL 3805763, at *1 (10th Cir. Aug. 30,

courts are forced to revisit this issue anew every time a defendant raises *Padilla* to challenge a final conviction. Second, it is uncertain whether Padilla will actually prevail on his claim of ineffective assistance of counsel. The Court remanded the case to the Kentucky Supreme Court because it concluded that Padilla's entitlement to relief "will depend on whether he can demonstrate prejudice as a result [of counsel's deficient performance], a question we do not reach because it was not passed on below."[6]

Further clarification of these issues is imperative. These issues impact the lives of some of the most vulnerable people in the country—noncitizens. Today, noncitizens, whether illegal aliens or lawful permanent residents, can be removed from the United States for even the most minor drug offenses.[7] Once removed, the individual is often barred from coming back to the United States.[8] So for an individual without United States citizenship, being found guilty in a criminal case means facing punishment associated not just with the crime itself, but also with the individual's legal status in the country. In light of these high stakes, federal and state courts throughout the United States require guidance to address immigration issues in criminal proceedings in a way that is uniform, just, and efficient. Lacking such guidance, they must apply the standard announced in *Padilla*, but with little direction as to whether the decision allows for retroactive application and what kind of "prejudice" a noncitizen defendant must prove to prevail on a claim of ineffective assistance of counsel.

This Comment argues that *Padilla v. Kentucky* should be applied retroactively because it did not announce a new constitutional rule of criminal procedure. Next, this Comment argues that Jose Padilla was "prejudiced" and therefore meets the requirement under *Strickland v. Washington* for showing that his Sixth Amendment right was violated.[9]

Part II provides the background for this Comment, beginning in Part II.A with a description of the recent convergence of immigration and criminal law. Part II.B provides background on the Sixth Amendment and

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2011) (holding that *Padilla* announced a new rule and is not retroactively applicable to cases on collateral review); Chaidez v. United States, No. 10-3623, 2011 WL 3705173, at *1 (7th Cir. Aug. 23, 2011) (same); United States v. Orocio, 645 F.3d 630, 634 (3d Cir. 2011) (holding that *Padilla* did not announce a new rule and is retroactively applicable).

[6] *Padilla*, 130 S. Ct. at 1487.

[7] *Id.* at 1477 n.1.

[8] OFFICE OF IMMIGRATION LITIGATION, U.S. DEP'T OF JUSTICE, IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: *PADILLA V. KENTUCKY* 41–44 (2010), http://www.justice.gov/civil/docs_forms/REVISED Padilla v. Kentucky Reference Guide_11-8-10.pdf (discussing the grounds for inadmissibility and bars on readmission).

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

*Strickland v. Washington*. Part II.C explores implications of the Supreme Court's decision in *Padilla* and the standard for retroactivity under *Teague v. Lane*. Part III provides support for the arguments that *Padilla* should be applied retroactively and that on remand, Jose Padilla should prevail on his claim.

## II. BACKGROUND

### A. THE NEW "CRIMMIGRATION" SYSTEM

Between 2003 and 2008, the United States government removed nearly 1.5 million noncitizens from the country.[10] In the last decade, the number of foreign nationals deported from the United States has doubled.[11] The Supreme Court in *Padilla v. Kentucky* recognized that these numbers increased so dramatically because of changes in immigration law.[12] In fact, the Court appeared concerned with the increasingly punitive nature of criminal law for noncitizens.[13] The lack of consensus in the opinion, however, highlights the controversies lying at the heart of the case related to immigration and criminal law.[14]

Criminal law in the United States is a harsh and unpredictable system for noncitizens.[15] In the first paragraph of the opinion, the Court observes that "Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense."[16] Given the state of the law, the Court stressed that deportation for noncitizens who commit a removable offense is "practically inevitable," barring a decision by the Attorney General to exercise his limited discretionary power to cancel removal.[17]

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[10] *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1565 (2010) (stating that 1,446,338 noncitizens were removed from the United States between 2003 and 2008).

[11] Kyung Jin Lee, *U.S. Deportations Double over 10 Years*, MEDILL REPORTS (Feb. 23, 2010), http://news.medill.northwestern.edu/chicago/news.aspx?id=157904.

[12] *Padilla*, 130 S. Ct. at 1478–79.

[13] *See id.*

[14] Justice Stevens wrote the majority opinion and was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justice Alito concurred, joined by Chief Justice Roberts, and Justices Scalia and Thomas dissented. *See id.* at 1477.

[15] *See* Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 48 (2010) ("Noncitizen criminal defendants find themselves on unequal footing with U.S. citizen defendants. Noncitizens are often subjected to disparate treatment in bail and sentencing because of their immigration status.") (citations omitted).

[16] *Padilla*, 130 S. Ct. at 1477 n.1; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

[17] *Padilla*, 130 S. Ct. at 1480.

*Padilla* thus deals with an area of law that has harsh consequences for defendants who often have little or no knowledge of the American legal system and whose criminal defense attorneys may not adequately research the impact of the defendant's immigration status on their criminal case.[18] The Court's discussion reflects a theme recognized by scholars and commentators: the increasing criminalization of immigration.[19] Others refer to the new "crimmigration system."[20] Indeed, "the preoccupation with enforcement has left noncitizens in deportation proceedings exposed to large risks of error when the personal stakes are high."[21] The potential consequences—being forced to leave the United States and to separate from one's family—are serious. According to Professor Cruz, "[w]ithout knowledge of the immigration consequences of a conviction, or the individual's eligibility for immigration relief in general, defense counsel may not be able to diffuse the fears that cloud the noncitizen judgment, resulting in hasty plea decisions."[22] As a result, she argues, "[i]gnorance and marginalization of immigration law in the adjudication of a criminal case involving a noncitizen can be catastrophic."[23]

Before analyzing the Kentucky Supreme Court's decision, the U.S. Supreme Court in *Padilla* described how changes in federal immigration law over the last century "have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation."[24] As a result, the Court observed, "[t]he 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[25] The Immigration and Nationality Act (INA) sets forth classes of deportable aliens.[26] For example, if an alien is convicted of two or more crimes of moral turpitude, he or she is automatically deportable. As for drug offenses, the law reads:

> [a]ny 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

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[18] *Id.* at 1483 ("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 [immigration law].").

[19] Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476 (2007).

[20] *See, e.g.*, Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 670 (2008); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

[21] Legomsky, *supra* note 19, at 469.

[22] Cruz, *supra* note 15, at 61–62.

[23] *Id.* at 62.

[24] Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

[25] *Id.*

[26] Immigration and Nationality Act (INA) § 237, 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

> a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.[27]

In light of the state of the law, the Court insisted that accurate legal advice for noncitizens in criminal proceedings "has never been more important" because "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[28]

### B. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Because of *Padilla*, defendants in deportation proceedings can now contend that their counsel was deficient for not advising that their guilty plea could lead to deportation. However, as the Court recognized, "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy" the standard under the seminal case of *Strickland v. Washington*.[29] That standard requires defendants to show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant.

The Sixth Amendment provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[30] The first prong of *Strickland*'s two-prong test requires that, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness."[31] The second prong, known as the prejudice prong, requires the defendant to "show that the deficient performance prejudiced the defense."[32] A defendant seeking to prevail on a *Strickland* claim must show that both prongs have been satisfied.[33]

Because it is so common for defendants to plead guilty in criminal proceedings,[34] the Court has "long recognized that the negotiation of a plea

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[27] *Id.*

[28] *Padilla*, 130 S. Ct. at 1480.

[29] *Id.* at 1485 n.12; Strickland v. Washington, 466 U.S. 668 (1984).

[30] U.S. CONST. amend. VI.

[31] *Strickland*, 466 U.S. at 687–88.

[32] *Id.* at 687; *see also* Hill v. Lockhart, 474 U.S. 52, 59 (1985) ("[T]o satisfy [*Strickland*'s] '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.").

[33] *See* Smith v. Robbins, 528 U.S. 259, 289 (2000) ("[The defendant] must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel.").

[34] Joanne Gottesman, *Avoiding the "Secret Sentence": A Model for Ensuring that New*

bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[35] The overwhelming majority of criminal convictions result from guilty pleas.[36] When a defendant enters a guilty plea, that plea must "represent[] a voluntary and intelligent choice among the alternative courses of action open to the defendant."[37] *Hill v. Lockhart* established that *Strickland* applies to an attorney's advice regarding a guilty plea.[38] Therefore, a defendant can successfully argue that his or her guilty plea was not "voluntary and intelligent" if the defendant can show that defense counsel was constitutionally deficient and that the defendant pled guilty as a result.

### C. *PADILLA V. KENTUCKY* AND ITS IMPLICATIONS

#### *1. Jose Padilla's Path to the U.S. Supreme Court*

Defendant Jose Padilla was born in Honduras but lived in the United States as a legal permanent resident for over forty years.[39] He also served his country as a member of the United States military during the Vietnam War.[40] In 2001, Padilla was indicted for and pled guilty to trafficking marijuana.[41] In 2004, Padilla found himself in deportation proceedings.[42] Realizing he was in deportation proceedings because of his guilty plea, Padilla filed a petition for postconviction relief[43] on the grounds that he was

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*Jersey Criminal Defendants Are Advised About Immigration Consequences Before Entering Guilty Pleas*, 33 SETON HALL LEGIS. J. 357, 359 (2009).

[35] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

[36] Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 697 (2002) ( "[O]ver ninety percent of criminal convictions result from guilty pleas.").

[37] North Carolina v. Alford, 400 U.S. 25, 31 (1970).

[38] Hill v. Lockhart, 474 U.S. 52, 58 (1985) ("We hold . . . that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.").

[39] *Padilla*, 130 S. Ct. at 1477.

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

[41] *Id.* ("Padilla was indicted . . . for trafficking in 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. Padilla, represented by counsel, moved to enter a guilty plea to the three drug-related charges, in exchange for dismissal of the remaining charge, and a total sentence of ten years on all charges. 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.").

[42] *Id.* Under immigration law, any noncitizen who commits an aggravated felony, as Padilla did, is automatically deportable. *See supra* Part II.A; OFFICE OF IMMIGRATION LITIGATION, *supra* note 8, at 9; *see also Padilla*, 130 S. Ct. at 1478 (noting that Padilla's guilty plea made his deportation "virtually mandatory").

[43] The purpose of postconviction relief is

denied his Sixth Amendment constitutional right to effective assistance of counsel. In his petition, Padilla contended that his counsel should have informed him that pleading guilty might have negative immigration consequences. Instead, his counsel allegedly told him not to worry about immigration status because of the amount of time he had been in the country.[44]

After the trial court denied Padilla's motion for postconviction relief, the Kentucky Court of Appeals reversed and remanded for an evidentiary hearing.[45] On appeal, the Supreme Court of Kentucky ruled that Padilla did not have a claim for relief.[46] It reasoned that because "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief."[47] The United States Supreme Court granted certiorari to decide "whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country."[48]

Overruling the Kentucky Supreme Court, the U.S. Supreme Court held that Padilla's counsel was constitutionally deficient for failing to advise Padilla that his drug conviction rendered him vulnerable to automatic deportation.[49] It concluded that given the seriousness of deportation as a consequence of a guilty plea, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[50] Furthermore, "[o]ur longstanding Sixth Amendment precedents, the seriousness of deportation as a risk of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."[51]

The U.S. Supreme Court rejected the Kentucky Supreme Court's argument that because deportation is a collateral consequence of a criminal

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to provide a means of inquiry into the alleged constitutional infirmity of a judgment or sentence, and to afford a simple and efficient remedy to any prisoner who claims that his or her conviction was obtained by a disregard of the fundamental fairness essential to the very concept of justice.

24 C.J.S. *Criminal Law* § 2223 (2006).

[44] *Padilla*, 253 S.W.3d at 483 (stating that Padilla's counsel allegedly advised that "he 'did not have to worry about immigration status since he had been in the country so long'").

[45] *Id.* at 484.

[46] *Id.* at 485.

[47] *Id.*

[48] Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

[49] *Id.*

[50] *Id.* at 1482.

[51] *Id.* at 1486.

conviction, counsel is not required to advise his client of possible deportation.[52] The Court acknowledged that the distinction between direct and collateral consequences was not entirely clear. However, the Court had never applied the direct–collateral distinction in the context of a *Strickland* claim.[53] Even so, the distinction was not at issue in Padilla's case "because of the unique nature of deportation."[54] The close link between deportation and the criminal process made deportation "uniquely difficult to classify as either a direct or collateral consequence."[55] Finding that Padilla could raise a *Strickland* claim, the Court then applied the first prong of the *Strickland* analysis—whether counsel's representation "fell below an objective standard of reasonableness."[56] The Court held that counsel's performance was not objectively reasonable because current professional norms dictated that attorneys must advise clients of deportation risks in criminal proceedings and because counsel should have realized that Padilla was deportable "simply from reading the text of the [immigration] statute."[57]

Finally, the Court concluded that "[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'"[58] The serious consequences of not protecting noncitizen defendants from this risk included "the concomitant impact of deportation on families living lawfully in this country."[59]

### *2. Implications of the Decision*

For some observers, *Padilla* marks a transformation in the criminal justice system.[60] *Padilla* requires defense attorneys who were not "well versed" in immigration law before to have at least some understanding of immigration law.[61] To that end, the federal government, as well as many state governments, have issued new manuals to train attorneys.[62] The U.S.

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[52] *Id.* at 1481.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1482.

[56] Strickland v. Washington, 466 U.S. 686, 688 (1984).

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

[58] *Id.* at 1486 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

[59] *Id.*

[60] Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, CRIM. JUST., Fall 2010, at 21, 21 ("There are only a handful of Supreme Court decisions in the past 50 years that can be said to have transformed the operation of the criminal justice system. *Padilla v. Kentucky* may be such a case.").

[61] OFFICE OF IMMIGRATION LITIGATION, *supra* note 8.

[62] The Department of Justice's Office of Immigration Litigation in 2010 issued a comprehensive overview of the Immigration and Nationality Act provisions relevant to

Department of Justice's Office of Immigration Litigation acknowledged that because of *Padilla*, "it is even more important than ever for prosecutors, defense counsel, judges, and other interested parties at the federal and local levels to have a basic understanding of the immigration consequences that flow from an alien's guilty plea."[63]

For noncitizen defendants, *Padilla* provides a better chance to challenge their criminal convictions in cases where they did not realize that pleading guilty could lead to removal from the United States. The Court's decision, however, does not guarantee criminal defendants a successful challenge to their guilty pleas.[64] *Padilla* only addressed the first prong of the *Strickland* two-prong test and left open the question of whether counsel's deficient performance prejudiced the defendant.[65]

After *Padilla*, a defendant may assert that if it were not for counsel's bad advice, he or she would have chosen to go to trial rather than entering a guilty plea. However, because in most cases the defendant's conviction is already final, the defendant must collaterally challenge that conviction by filing a federal habeas corpus or state postconviction petition.

Still, Supreme Court decisions do not always apply to collateral review of convictions that became final before the Supreme Court issues its new opinion. In such cases, the Supreme Court has held that "new" constitutional rules of criminal procedure should not apply to these cases.[66] Therefore, new constitutional rules of criminal procedure are generally not retroactively applicable to cases on collateral review.[67]

Federal and state courts applying *Padilla* have ruled differently on the issue of whether the case announced a new constitutional rule of criminal procedure. If the Court in *Padilla* announced a new constitutional rule of

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noncitizens facing criminal charges. The ninety-two-page guide's purpose is to help judges and attorneys "in understanding the immigration consequences of an alien's guilty plea in a criminal case." *Id.*

[63] *Id.* at i.

[64] *See, e.g.*, Hutchings v. United States, 618 F.3d 693, 698 n.3 (7th Cir. 2010) ("*Padilla* . . . has no bearing on our decision in this case because we need not decide whether Wertz's performance was deficient to reach our conclusion that Hutchings was not prejudiced and therefore not entitled to habeas relief."); Gacko v. United States, No. 09-CV-4938 (ARR), 2010 WL 2076020, at *3–4 (E.D.N.Y. May 20, 2010) ("Even if petitioner's motion were timely, and assuming that he has sufficiently shown that trial counsel failed to advise him or misadvised him of the immigration consequences of his plea under *Padilla v. Kentucky*, I cannot find that he would meet the second prong of *Strickland*.").

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

[66] Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

[67] *Id.*

criminal procedure, as some lower courts have decided that it did, then it cannot be applied retroactively to cases on collateral review unless it falls under two narrow exceptions.[68] This Comment argues that *Padilla* applied the familiar *Strickland v. Washington* standard of effective assistance of counsel to a new set of facts.[69] Therefore, retroactive application of *Padilla*'s rule is warranted.

## D. THE *TEAGUE V. LANE* STANDARD OF RETROACTIVITY

### *1. The* Teague v. Lane *Decision*

The Court's 1989 decision in *Teague v. Lane*, which governs whether a decision can be applied retroactively to criminal cases on collateral review, provides the basis for evaluating the retroactivity of *Padilla*.[70] Under *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government" or "if the result was not dictated by precedent existing at the time the defendant's conviction became final."[71] Whereas new rules only apply to cases on collateral review in certain circumstances, rules already in existence ("dictated by precedent") apply to cases on direct and collateral review.[72]

In *Teague*, an African-American defendant argued that his conviction by an all-white jury violated his Sixth Amendment right to a fair jury trial.[73] The defendant, on collateral appeal, urged the Court to conclude that he was denied his Sixth Amendment right because he was not "tried by a jury that was representative of the community."[74] He based his argument on *Taylor v. Louisiana*, where the Court held that under the Sixth Amendment the jury venire must be "drawn from a source fairly representative of the community."[75] A plurality of the Court, however, stated that it would not

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[68] The two exceptions to the general non-retroactivity rule for cases on collateral review are: first, for a rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and second, for a "watershed rule[] of criminal procedure," which essentially means that it "requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *Id.* at 311 (citing Mackey v. United States, 401 U.S. 667, 692–93 (1971)).

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

[70] 489 U.S. 288 (1989).

[71] *Id.* at 301.

[72] *See, e.g.*, Whorton v. Bockting, 549 U.S. 406 (2007).

[73] *Teague*, 489 U.S. at 292–93.

[74] *Id.* at 293, 299.

[75] *Id*. at 292 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)). The defendant also argued that he should benefit from *Batson v. Kentucky*, in which the Court changed the evidentiary standard for a defendant to make a prima facie case of racial discrimination when a prosecutor challenges members of the jury venire. However, the Court rejected the

address the central question: whether the Sixth Amendment's fair cross section requirement should extend to the petit jury.[76] The Court explained that the defendant's proposal would constitute a new rule.[77] The Court proceeded to analyze and reformulate its retroactivity jurisprudence, determining that even if it were to adopt the defendant's proposed rule, as a new rule it would be inapplicable on collateral appeal.[78]

Accordingly, the *Teague* Court concluded that a new constitutional rule of criminal procedure should be applied retroactively to cases on direct review, but not to cases on collateral review.[79] The Court noted that the distinction between cases on direct review versus collateral review is a sharp one.[80] On direct review, a defendant directly appeals a finding of a lower court, and therefore, the defendant's conviction is not yet final. By contrast, on collateral review, the defendant's conviction is final and the defendant is petitioning for relief from that conviction.[81] However, if the case involves an "old rule," it applies both collaterally and on direct review.[82]

*Teague* is considered a landmark decision[83] because it rejected the ad hoc approach of *Linkletter v. Walker* and established a more concrete test for deciding whether a rule should be applied to cases on collateral review.[84] The Court announced:

> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it

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defendant's contention based on its prior holding that *Batson* was not retroactive on collateral review. *Teague*, 489 U.S. at 294–96 (citing Batson v. Kentucky, 476 U.S. 79, 96–97; Allen v. Hardy, 478 U.S. 255, 258).

[76] *Id*. at 292.

[77] *Id.* at 301 ("Given the strong language in *Taylor* and our statement in *Akins v. Texas*, that '[f]airness in [jury] selection has never been held to require proportional representation of races upon a jury,' application of the fair cross section requirement to the petit jury would be a new rule.").

[78] *Id.* at 310.

[79] *Id.* at 310. Notably, *Teague* has been determined to apply to procedural, not substantive, rules. *See* Muth v. Frank, 412 F.3d 808, 816 (7th Cir. 2005); Bousley v. United States, 523 U.S. 614, 620 (1998) ("*Teague* by its own terms applies only to procedural rules . . . .").

[80] *Teague*, 489 U.S. at 307 (noting "the important distinction between direct and collateral review") (quoting Yates v. Aiken, 484 U.S. 211, 215 (1988)).

[81] *See, e.g.*, Shea v. Louisiana, 470 U.S. 51, 58 (1985) (discussing the distinction between direct and collateral review).

[82] *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 416 (2007).

[83] Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1870 (1997).

[84] *See Teague*, 489 U.S. at 300; Linkletter v. Walker, 381 U.S. 618 (1965).

> breaks new ground or imposes a new obligation on the States or the Federal Government.[85]

The Court also emphasized that when a court makes a decision announcing a new rule, it should also decide, at that time, if its decision is retroactive.[86]

### *2.* Teague v. Lane*'s Progeny*

*Teague v. Lane* appears to have caused as much confusion as it sought to resolve.[87] The Court itself has said that its *Teague* jurisprudence is "confused and confusing."[88] Although *Teague* remains good law and courts continue to apply the basic logic of the opinion, the reasoning behind subsequent decisions does not always appear consistent.

Although *Teague* was a plurality opinion, later that same year, a majority of the Court endorsed it in *Penry v. Lynaugh*.[89] In *Penry*, the defendant sought federal habeas relief from a murder conviction and sentence of death.[90] The Court held that the rule that *Penry* sought to apply to his case was not a new rule.[91] The rule had been articulated in *Jurek v. Texas*, where the Supreme Court held that the Eighth Amendment required the person deciding the defendant's sentence to be allowed to consider all relevant mitigating evidence.[92] According to the Court, Penry's claim did not require the application of a new rule because "the relief Penry seeks does not 'impos[e] a new obligation' on the State of Texas . . . . Rather, Penry simply asks the State to fulfill the assurance upon which *Jurek* was based."[93]

By contrast, a year later in *Butler v. McKellar*, the Court held that the

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

[86] *Id.* at 300 ("[W]hether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.") (citing Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 64 (1965)).

[87] *See, e.g.*, Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 815 (2003) ("[T]he 'controversial jurisprudence of "new" law' seems far from settled.").

[88] Danforth v. Minnesota, 552 U.S. 264, 271 (2008).

[89] Penry v. Lynaugh, 492 U.S. 302 (1989); *see also* Shannon, *supra* note 87, at 823.

[90] *Penry*, 492 U.S. at 302.

[91] Relying on Supreme Court precedent, Penry sought the benefit of a rule that when mitigating evidence regarding his mental retardation and history of abuse is presented, Texas juries must "be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death." *Id.* at 315.

[92] 428 U.S. 262, 271 (1976).

[93] *Penry*, 492 U.S. at 315.

particular case upon which defendant relied, *Arizona v. Roberson*,[94] announced a new rule. The Court stated that before *Roberson*, there was "significant difference of opinion" among lower courts, as well as between two federal courts of appeals dealing with the *Roberson* issue, showing that the result in *Roberson* was "susceptible to debate among reasonable minds."[95] Still, the Court added that whether a decision comes "within the 'logical compass' of an earlier decision . . . is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*."[96]

Just a few months later, in *Sawyer v. Smith*,[97] the Supreme Court provided further explanation for the motivation behind its decision in *Teague*. The *Teague* rule, the Court explained, attempts to "ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered."[98] This purpose relates to the underlying goal of federal habeas corpus relief: "to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine."[99]

In *Saffle v. Parks*, the Court stated that to determine whether a new rule exists, a court must assess whether "a state court considering [defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [defendant] seeks was required by the Constitution."[100] The Court also declared, "[t]he explicit overruling of an earlier holding no doubt creates a new rule."[101] Two years later, in *Wright v. West*, a state prisoner accused of grand larceny sought habeas corpus relief.[102] The Court stated that a rule is new if it "can be *meaningfully* distinguished from that established by *binding* precedent at the time his state court conviction became final."[103] Furthermore:

> Even though we have characterized the new rule inquiry as whether 'reasonable

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[94] 486 U.S. 675 (1988).

[95] Butler v. McKellar, 494 U.S. 407, 415 (1990).

[96] *Id.*

[97] Sawyer v. Smith, 497 U.S. 227 (1990).

[98] *Id.* at 234.

[99] *Id.*

[100] 494 U.S. 484, 488 (1990); *see also* O'Dell v. Netherland, 521 U.S. 151, 156 (1997) ("[W]e will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.").

[101] *Saffle*, 494 U.S. at 488.

[102] 505 U.S. 277, 282–84 (1992).

[103] *Id.* at 304 (emphasis added).

> jurists' could disagree as to whether a result is dictated by precedent . . . the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new.[104]

In *Whorton v. Bockting*, the Court held that its 2004 decision in *Crawford v. Washington* announced a new constitutional rule of criminal procedure.[105] *Crawford* announced a new rule because it was not "dictated" by precedent and its holding "[wa]s flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled."[106] In other cases, the Court has said that asking whether a decision is "*dictated* by precedent" is the same as asking "whether *no other* interpretation was reasonable."[107] Similarly, a rule is not dictated by precedent unless it would be "apparent to *all reasonable jurists*."[108]

In sum, it would be overly optimistic to find a bright-line rule in *Teague*'s progeny. Because *Teague* requires a case-by-case analysis, guidance can be found in the facts of a case and the rule a petitioner is asking to be applied. The Court recently clarified that "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule."[109]

## III. DISCUSSION

This Comment argues two points. First, *Padilla v. Kentucky* applies the *Strickland* standard for effective assistance of counsel to a new set of facts; therefore it does not announce a new rule of criminal procedure. While courts applying *Padilla* diverge on the issue of retroactivity, many favor applying *Padilla* retroactively. Moreover, the arguments for retroactivity are stronger than those in favor of only applying *Padilla*

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[104] *Id.*

[105] 549 U.S. 406, 413 (2007) ("[W]hile [petitioner's] appeal was pending, we issued our opinion in *Crawford*, in which we overruled *Roberts* and held that '[t]estimonial statements of witnesses absent from trial' are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness].'").

[106] *Id.* at 416. For other cases applying this *Teague* standard, see Danforth v. Minnesota, 552 U.S. 264, 266 (2008); Beard v. Banks, 542 U.S. 406, 408 (2004); Williams v. Taylor, 529 U.S. 362, 379 (2000).

[107] Lambrix v. Singletary, 520 U.S. 518, 538 (1997) ("[T]he *Teague* inquiry—which is applied to Supreme Court decisions that are, one must hope, *usually* the most reasonable interpretation of prior law—requires more than that. It asks whether *Espinosa* was *dictated* by precedent—*i.e.*, whether *no other* interpretation was reasonable."); *see also Williams*, 529 U.S. at 381 ("[A] federal habeas court operates within the bounds of comity and finality if it applies a rule 'dictated by precedent existing at the time the defendant's conviction became final.'") (citing Teague v. Lane, 489 U.S. 288, 301 (1989)).

[108] *Lambrix*, 520 U.S. at 528 (emphasis added).

[109] *Danforth*, 552 U.S. at 271.

prospectively. Second, this Comment argues that Padilla can demonstrate "prejudice," as required under *Strickland.*

### A. *PADILLA*'S IMMEDIATE AFTERMATH

Judges across the country have lamented that the *Padilla* decision does not say if it should apply retroactively to cases on collateral review.[110] "Reasonable jurists" disagree about *Padilla*'s retroactive effect.[111] As a result, some federal habeas petitioners can successfully challenge their convictions based on *Padilla* while others are barred from relying on *Padilla* at all.

With federal circuit courts now split on whether *Padilla* can be retroactively applied, the U.S. Supreme Court may soon need to revisit *Padilla*.[112] The Third Circuit first decided the issue, followed closely by the Seventh and Tenth Circuits.[113] In *United States v. Orocio,* the Third Circuit unanimously held that *Padilla* did not announce a new rule and can be applied retroactively to cases on collateral review.[114] Rejecting the government's argument, the Third Circuit held that "because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule' . . . and is retroactively applicable on collateral review."[115] A split Seventh Circuit panel disagreed with the Third Circuit, finding in *Chaidez v. United States* that *Padilla* announced a new rule.[116] The Seventh Circuit said it remained "persuaded by the weight of lower court authority that, in 2004, a jurist could reasonably have reached a conclusion contrary to the holding in *Padilla*."[117] Similarly, the Tenth Circuit held that *Padilla* announced a new rule that did not apply retroactively.[118]

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[110] *See, e.g.*, Llanes v. United States, No. 8:11-cv-682-T-23TBM, 2011 WL 2473233, at *1 (M.D. Fla. June 22, 2011) ("*Padilla* fails to resolve (or even discuss) retroactivity . . . ."); United States v. Hernandez-Monreal, Nos. 1:07cr337 (LMB), 1:10cv618 (LMB), 2010 WL 2400006, at *1 (E.D. Va. June 14, 2010).

[111] People v. Obonaga, No. 07-CR-402 (JS), 2010 WL 2629748, at *1 (E.D.N.Y. June 24, 2010); *Llanes*, 2011 WL 2473233, at *1 ("[N]o federal circuit court has addressed *Padilla*'s retroactivity.").

[112] As of the date of publication, three federal circuit courts have ruled on the issue.

[113] United States v. Hong, No. 10-6294, 2011 WL 3805763, at *1 (10th Cir. Aug. 30, 2011); Chaidez v. United States, No. 10-3623, 2011 WL 3705173, at *4 (7th Cir. Aug. 23, 2011); United States v. Orocio, 645 F.3d 630, 634 (3d Cir. 2011).

[114] 645 F.3d at 634. Judge Chagares joined the majority's decision that *Padilla* is retroactive, and only dissented on the question of whether Orocio was prejudiced by his counsel's ineffectiveness. *Id.* at 647.

[115] *Id.* at 641.

[116] *Chaidez*, 2011 WL 3705173, at *4.

[117] *Id.* at *6.

[118] *Hong*, 2011 WL 3805763, at *1.

The Third Circuit's sound judgment should guide other federal circuit courts, and ultimately, the U.S. Supreme Court, on the issue of *Padilla*'s retroactivity. Moreover, a number of decisions after *Orocio* suggest that courts outside of the Third Circuit are persuaded by *Orocio*'s reasoning.[119]

By contrast, the Seventh and Tenth Circuit opinions fall short. For example, the *Chaidez* majority adopted particular guiding principles under *Teague* and its progeny as "absolute," despite the Supreme Court's recent statement that its *Teague* jurisprudence is "confused and confusing."[120] The majority also claimed that *Padilla* was not dictated by precedent in part because the competing *Padilla* opinions expressed an "array of views" and lower courts were split on the issue.[121] Neither of these reasons is dispositive in a new rule analysis, as explained below. In addition, the *Chaidez* majority conceded that its holding considered *Padilla* a "rare exception" to the rule that "the application of *Strickland* to unique facts generally will not produce a new rule," and that *Strickland* can resolve "virtually all ineffective-assistance-of-counsel claims."[122] But the majority explained that *Padilla* was a "rare exception" only because the Court had never before stated *Padilla*'s exact rule and because, if *Padilla* were an old rule, it would be "hard to imagine an application of *Strickland* that would qualify as a new rule."[123] However, as Judge Williams argued in dissent, *Padilla* "simply clarified that a violation of [prevailing professional norms] amounts to deficient performance under *Strickland v. Washington*."[124]

Even before the courts of appeals ruled, a number of lower courts applied *Padilla* retroactively.[125] A New York state court held that *Padilla*

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[119] Rodriguez v. United States, No. 1:10–CV–23718–WKW [WO], 2011 WL 3419614, at *8 (S.D. Fla. Aug. 4, 2011) ("[T]he strong authority that *Padilla* is not a new rule, including the Third Circuit's recent decision in *Orocio*, and the authorities cited therein, should have put litigants on notice of potential claims long before *Padilla* was handed down."); Song v. United States, Nos. CV 09–5184 DOC, CR 98–0806 CM, 2011 WL 2940316, at *2 (C.D. Cal. July 15, 2011) ("The instant Court's conclusion that *Padilla* set forth on 'old rule' to be applied retroactively on collateral review accords with the only published circuit court decision on this issue.") (citing *Orocio*, 645 F.3d 630); Constanza v. State, No. A10-2096, 2011 WL 3557824, at *2 (Minn. Ct. App. Aug. 15, 2011).

[120] *Chaidez*, 2011 WL 3705173, at *7; Danforth v. Minnesota, 552 U.S. 264, 271 (2008).

[121] *Chaidez*, 2011 WL 3705173, at *11.

[122] *Id.* at *7.

[123] *Id.*

[124] *Id.* at *9.

[125] *See, e.g.*, Amer v. United States, No. 1:06CR118–GHD, 2011 WL 2160553, at *2 (N.D. Miss. May 31, 2011); Luna v. United States, No. 10CV1659-JLS(POR), 2010 WL 4868062, at *3–4 (S.D. Cal. Nov. 23, 2010); United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3184150, at *6 (N.D. Ill. Aug. 11, 2010); United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *5–6 (E.D. Cal. July 1, 2010); People v. Nunez, 917 N.Y.S.2d 806, 809 (App. Term 2010); People v. Garcia, 907 N.Y.S.2d 398, 403 (Sup. Ct. 2010).

should be applied retroactively because the case "did not announce a new constitutional rule, but merely applied the well-settled rule of *Strickland* to a particular set of facts."[126] Reasoning that *Padilla* did not overrule any "clear past precedent," the court cited as support the Supreme Court's 2000 opinion in *Williams v. Taylor*.[127] In *Williams*, the Court addressed the retroactivity of a case that applied *Strickland* and concluded that "it can hardly be said that recognizing the right to effective counsel 'breaks new ground or imposes a new obligation on the States.'"[128] Similar to the New York court, a California district court held that *Padilla* should be applied retroactively because it "evinced an old rule."[129] In Texas, a petitioner was allowed to benefit from *Padilla* even though he was convicted fourteen years before *Padilla* was handed down.[130] The Colorado Court of Appeals did not decide if *Padilla* was retroactive but nevertheless said that Colorado law had a history of acknowledging the same duties for counsel that *Padilla* required.[131]

By contrast, some federal and state courts proclaim that *Padilla* should not be applied retroactively.[132] In *People v. Kabre*, a defendant sought relief from three convictions related to trademark counterfeiting. He argued that his counsel failed to advise him that there might be immigration consequences to his guilty plea. In response, the New York trial court held that *Padilla* announced a new rule and "is not to be applied retroactively on collateral review of misdemeanor convictions."[133] The court applied the *Teague* standard to determine if *Padilla* was dictated by precedent.[134] The court explained that not only did *Padilla* come to the opposite conclusion as

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[126] People v. Bennett, 903 N.Y.S.2d 696, 699 (Crim. Ct. 2010); *see also Hubenig*, 2010 WL 2650625, at *5 ("[S]pecific applications of *Strickland* do not generally establish a new rule for purposes of *Teague*.").

[127] *Bennett*, 903 N.Y.S.2d at 699.

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

[129] *Luna*, 2010 WL 4868062, at *3.

[130] Guadarrama-Melo v. United States, No. 1:08–CV–588, 2011 WL 2433619, at *3 (E.D. Tex. May 2, 2011).

[131] People v. Kazadi, No. 09CA2640, 2011 WL 724754, at *3 (Colo. App. Mar. 3, 2011).

[132] *See, e.g.*, Llanes v. United States, No. 8:11-cv-682-T-23TBM, 2011 WL 2473233, at *2 (M.D. Fla. June 22, 2011) (holding that *Padilla* announced a new rule that does not apply retroactively); Doan v. United States, 760 F. Supp. 2d 602, 605 (E.D. Va. 2011) (stating that *Padilla* announced a new rule); Haddad v. United States, Civil No. 07-12540, Criminal No. 97-80150, 2010 WL 2884645, at *6 (E.D. Mich. July 20, 2010) (stating it is unlikely that *Padilla* will be applied retroactively).

[133] People v. Kabre, 905 N.Y.S.2d 887, 889 (Crim. Ct. 2010).

[134] *Id.* at 892 ("Petitioner can prevail here only if a New York court in 2005 (when the last conviction at issue here became final) would have been required by controlling United States Supreme Court precedent to rule that failure to discuss the immigration consequences of a guilty plea was ineffective assistance of counsel.").

the New York Court of Appeals did in 1995,[135] but it also overruled a significant number of federal and state court decisions.[136] On the other hand, the court acknowledged that before *Padilla*, New York precedent dictated that where defense counsel does give advice about immigration consequences, that advice should not be incorrect.[137] Still, the court declined to apply *Padilla* retroactively, "at least with respect to a misdemeanor conviction," because, the court said, in contrast to the immigration consequences of a felony conviction, the immigration consequences of a misdemeanor conviction are "often unclear."[138]

Some courts decline to conclude anything about *Padilla*'s retroactivity at all.[139] Others decide the issue without much reasoning,[140] or based on disjointed or confusing reasoning. In *United States v. Shafeek*, pro se defendant Shafeek collaterally attacked his bank fraud conviction.[141] Finding first that "it appears that the rule announced [by *Padilla*] is not a 'new rule,'" the Michigan district court held that "Shafeek cannot show that the *Padilla* opinion should be applied retroactively."[142] This reasoning is confused: if *Padilla* did not announce a new rule, then by default it was an old rule, and therefore Shafeek could show that the decision should be applied retroactively. Similarly, in *Gacko v. United States*, although the parties did not raise the issue, the New York district court judge addressed *Padilla* by finding that it did not support the defendant's case because the defendant could not show prejudice.[143] The judge stated that "[w]hile this decision clarified the obligation of counsel under *Strickland v. Washington*, I cannot find that is a 'newly recognized' right that was made retroactively

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[135] *See* People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995) ("Deportation is a collateral consequence of conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system. Therefore, our Appellate Division and the Federal courts have consistently held that the trial court need not, before accepting a plea of guilty, advise a defendant of the possibility of deportation.").

[136] *Kabre*, 905 N.Y.S.2d at 895.

[137] *Id.* at 890.

[138] *Id.*

[139] *See, e.g.*, United States v. Hernandez-Monreal, Nos. 1:07cr337 (LMB), 1:10cv618 (LMB), 2010 WL 2400006, at *1 (E.D. Va. June 14, 2010) (concluding, with little reasoning, that defendant could not rely on *Padilla* to support his habeas petition).

[140] People v. Obonaga, No. 07-CR-402 (JS), 2010 WL 2629748, at *1 (E.D.N.Y. June 24, 2010) (finding that the Supreme Court was not clear on whether *Padilla* applies retroactively and, "given this uncertainty, and the weakness of [defendant's] substantive claims, the Court elects to assume *arguendo* that *Padilla* applies retroactively").

[141] United States v. Shafeek, No. 05-81129, 2010 WL 3789747, at *1 (E.D. Mich. Sept. 22, 2010).

[142] *Id.* at *3.

[143] Gacko v. United States, No. 09-CV-4938 (ARR), 2010 WL 2076020, at *3 (E.D.N.Y. May 20, 2010).

applicable to cases on collateral review as required by the statute."[144]

### B. *PADILLA V. KENTUCKY* SHOULD BE APPLIED RETROACTIVELY

*Padilla v. Kentucky* should be applied retroactively to cases on collateral review. *Padilla* did not announce a new constitutional rule of criminal procedure because it applied the *Strickland* standard to a new set of facts. As others have acknowledged, "[t]he notion that a defense attorney has a duty to advise his client properly before a plea is not new . . . . [E]xpanding the rights of noncitizens at the time of plea based upon a definitive deportation consequence is a *new interpretation* of effective assistance of counsel."[145]

Determining whether a decision is retroactive is hardly clear-cut. The Supreme Court itself has recognized the difficulty in determining whether a decision actually announces a new rule, or "whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law."[146] *Padilla*, however, falls within the latter category: it applied a well-established constitutional principle, the Sixth Amendment right to effective assistance of counsel, to a case similar to prior cases.

The strongest support for this argument is the Supreme Court's ruling in *Williams v. Taylor*. *Williams* suggested that where a court recognizes the right to effective assistance of counsel, it generally does not announce a new rule.[147] Even if *Williams* cannot be read to announce such a categorical rule, *Teague v. Lane* still mandates a finding that *Padilla* did not announce a new rule. Accordingly, *Padilla* did not announce a new rule because (1) *Williams* suggested a categorical rule for ineffective assistance of counsel claims, (2) *Padilla* was based on "clearly established" law, (3) *Padilla* was dictated by precedent, (4) in the opinion, the Court indicated that it should be applied retroactively, and finally (5) both practical and policy concerns weigh in favor of *Padilla*'s retroactivity.

#### *1.* Williams v. Taylor

The question of *Padilla*'s retroactivity can be best answered by looking at the Supreme Court's ruling in *Williams v. Taylor*. The Court in

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[144] *Id.*

[145] John L. Holahan & Shauna Faye Kieffer, *Padilla Motions*, BENCH & BAR OF MINN., Aug. 2010, at 26 (emphasis added).

[146] *See, e.g.*, Desist v. United States, 394 U.S. 244, 263 (1969).

[147] 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.'").

*Williams* addressed the question of how far the *Strickland* standard extends before a new rule is announced. In the case, petitioner Williams sought federal habeas relief from his capital murder conviction and the death penalty. Williams contended that his counsel was ineffective for failing to present significant mitigating evidence.[148] As an initial matter, the Court had to decide whether Williams sought to apply a new or old rule. It found the question "easily answered" because "[i]t is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'"[149] Further, "it can hardly be said that recognizing the right to effective counsel 'breaks new ground or imposes a new obligation on the States.'"[150] The Court explained that its precedent "dictated" that the Virginia Supreme Court apply *Strickland* to Williams's claim.[151] Therefore, *Williams* suggests that where a court recognizes a right to ineffective assistance of counsel, it generally does not announce a new rule. A number of recent Supreme Court decisions also support this argument.[152]

### *2. "Clearly Established" Law*

Even if *Williams* cannot be read to announce such a categorical rule, the "clearly established" standard mandates a finding that *Padilla* did not announce a new rule. *Teague*'s prohibition on "reliance on 'new rules'" has been described as "the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law.'"[153] This statutory provision, part of the Antiterrorism and Effective Death Penalty Act (AEDPA),[154] requires a state court in habeas proceedings to decide if a defendant should be granted relief based on "clearly established Federal

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[148] *Id.* at 370–71.

[149] *Id.* at 391.

[150] *Id.* ("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.").

[151] *Id.*

[152] *See* United States v. Hubenig, 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*.")*; see also* Rompilla v. Beard*,* 545 U.S. 374, 383, 393 (2005); Wiggins v. Smith*,* 539 U.S. 510, 522 (2003); *Williams*, 529 U.S. at 391.

[153] Glenda K. Harnad, *Construction and Application of Teague Rule Concerning Whether Constitutional Rule of Criminal Procedure Applies Retroactively to Case on Collateral Review—Supreme Court Cases*, 44 A.L.R. FED. 2D 557, 569–70 (2010).

[154] Antiterrorism and Effective Death Penalty Act of 1996 § 104, 28 U.S.C. § 2254 (2006).

law, *as determined by the Supreme Court of the United States*."[155] As stated in *Williams*, the "source of clearly established law" is restricted to "this Court's jurisprudence."[156] Later in her opinion, Justice O'Connor stated that "the 'clearly established Federal law' phrase bears only a slight connection to our *Teague* jurisprudence."[157] However, Justice O'Connor did not specify what the exact standard under *Teague* is or should be.[158] Furthermore, a number of scholars have suggested that distinguishing new and old rules under *Teague* requires looking at clearly established Federal law as interpreted by the Supreme Court.[159]

Therefore, like in *Williams*, the law in question in *Padilla* was the *Strickland* rule, which the Court has held qualifies as "clearly established Federal law." If neither *Williams* nor the "clearly established" standard resolves the question of *Padilla*'s retroactivity, other factors weigh in favor of finding that *Padilla* did not announce a new rule.

### *3. "Dictated by Precedent"*

The argument that *Padilla* "was not *dictated* by precedent existing at the time the defendant's conviction became final"[160] falls short because every new application of an old precedent is not automatically labeled a new rule. As an initial matter, "dictated by precedent" is open to interpretation.[161] Scholars note that the Supreme Court has suggested that the phrase "dictated by precedent" should not be interpreted too narrowly.[162] In *Stringer v. Black*, the Court found that "[t]he purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents."[163] Both Supreme Court and lower court precedent supports the argument that the conclusion in *Padilla* was a reasonable interpretation of

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[155] *Williams*, 529 U.S. 362, 402–03 (2000) (quoting § 2254) (emphasis added).

[156] *Id.* at 412.

[157] *Id.*

[158] *See id.*

[159] *See, e.g.*, Brian R. Means, FEDERAL HABEAS MANUAL § 7, at 367 (2010) (stating that while one federal circuit court has stated otherwise, "[t]here is considerable authority supporting the proposition that only the United States Supreme Court can establish a 'new rule' of constitutional law for *Teague* purposes").

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

[161] 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.6(d) (3d ed. 2007) ("[I]n *Teague*, it was far from clear as to how literally lower courts should read Justice O'Connor's reference to a result 'not dictated' by precedent.").

[162] *Id.*; *see also* Penry v. Lynaugh, 492 U.S. 302, 318–19 (1989).

[163] 503 U.S. 222, 237 (1992). The Court specified that "[r]easonableness, in this as in many other contexts, is an objective standard, and the ultimate decision whether [the decision at issue] was dictated by precedent is based on an objective reading of the relevant cases." *Id.*

existing precedent.

i. U.S. Supreme Court Precedent

In *Sawyer v. Smith*, the Supreme Court interpreted "dictated by precedent" to mean that a new rule is announced where "we do not think a state court viewing petitioner's case at the time his conviction became final could have concluded that our Eighth Amendment precedents compelled such a rule."[164] The Court in *Padilla,* by contrast*,* explained that the rule obliging counsel to tell clients about deportation risks is based on "[o]ur longstanding Sixth Amendment precedents."[165] Therefore, at the time Padilla's conviction became final, a state court could have concluded that the Supreme Court's Sixth Amendment precedents compelled the rule requiring counsel to inform him of deportation risks.

The result in *Padilla* was grounded in Supreme Court precedent.[166] First, the Court itself stated that it has never distinguished between collateral and direct consequences in a Sixth Amendment effective assistance of counsel case.[167] Although deportation has historically been viewed as a collateral consequence of a conviction,[168] it would nevertheless fall within the ambit of the Sixth Amendment. In *Hill v. Lockhart*, the Supreme Court declined to create a categorical rule barring collateral consequences from the scope of what an attorney was obligated to tell a client.[169] Second, prior Supreme Court decisions recognize the importance of deportation as a consequence of a guilty plea. In *INS v. St. Cyr*, the Court acknowledged that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."[170] The Court then quoted Matthew Bender: "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[171]

Furthermore, no Supreme Court opinion foreclosed the possibility that the Court would reach the conclusion that it did in *Padilla*. *Padilla* did not overrule any prior Supreme Court decision because the Court has never held that the Sixth Amendment right to counsel *did not* include the right to

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[164] 497 U.S. 227, 238 (1990).

[165] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

[166] *Id.*

[167] *Id.* at 1481.

[168] *See, e.g.*, Santos-Sanchez v. United States, 548 F.3d 327, 336 (5th Cir. 2008), *vacated*, 130 S. Ct. 2340 (2010).

[169] 474 U.S. 52, 55 (1985) (noting that the court below, the Eighth Circuit, decided that parole eligibility is a collateral, not direct, consequence of a guilty plea).

[170] 533 U.S. 289, 322 (2001).

[171] *Id.* at 322–23 (citations omitted).

be advised of potential immigration consequences. Admittedly, if a decision did not explicitly overrule a prior decision, it is more difficult to determine if a new rule was created.[172] However, cases where the Supreme Court announces a new rule often explicitly overrule a prior decision. For example, *Crawford v. Washington* announced a new rule because it overruled *Ohio v. Roberts*.[173] In *Allen v. Hardy*, the Court held that the rule in *Batson v. Kentucky* was "an explicit and substantial break with prior precedent" because it "overruled [a] portion of *Swain.*"[174]

ii. Lower Court Precedent

Some scholars note that *Padilla* effectively overruled a number of state and federal decisions.[175] However, as seen in *Sawyer*, the Court's focus is on whether a state court "could have concluded that *our* Eighth Amendment precedents compelled such a rule."[176] Accordingly, the Supreme Court's Sixth Amendment precedent determines whether the Court announced a new rule in *Padilla*. The focus should not be on how many lower court opinions the Court overruled. A finding that federal or state courts have ruled contrary to a Supreme Court's decision is not dispositive of whether the Supreme Court announced a new rule.

Courts have found that a Supreme Court opinion overruling precedents from several federal circuits nevertheless did not announce a new rule. In *Roe v. Flores-Ortega*, the Supreme Court held that *Strickland* applies where defense counsel fails to file a notice of appeal on behalf of a client.[177] As a result, the Court overruled the per se rule from several federal circuits stating that "defense counsel had a duty to file a notice of appeal in all cases, except where the defendant affirmatively consented to refrain from filing an appeal."[178] Later, the Ninth Circuit held that *Flores-Ortega* did not announce a new rule, stating: "*Flores-Ortega* broke no new ground in holding that reasonably effective performance requires a defense attorney to discuss an appeal with her client whenever there is a rational basis to think

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[172] *See, e.g.*, 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.").

[173] *See* Whorton v. Bockting, 549 U.S. 406, 416 (2007).

[174] 478 U.S. 255, 258 (1986).

[175] *See, e.g.*, *The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 179, 204 (2010) ("While the decision is not inconsistent with the Court's prior opinions, it overturns nearly unanimous agreement among state and federal courts.").

[176] Sawyer v. Smith, 497 U.S. 227, 238 (1990) (emphasis added).

[177] 528 U.S. 470 (2000).

[178] Tanner v. McDaniel, 493 F.3d 1135, 1140 (9th Cir. 2007).

that her client should appeal."[179] The court explained that *Strickland*'s application to ineffective assistance of counsel claims was well-established and the ruling in *Flores-Ortega* was supported by American Bar Association standards and indications in the Court's own precedent.[180]

Yet one New York judge observed that *Padilla* "overruled decisions from ten of the federal circuit courts and twenty-three states, and certainly has in this sense established a new rule in those jurisdictions."[181] In *United States v. Fry*, for example, the Ninth Circuit held that counsel was not deficient for failing to tell the defendant that he could be deported as a result of a conviction.[182] Looking to other circuits, the Ninth Circuit found consensus that "deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel."[183] However, other courts have found that erroneous advice, as opposed to a failure to advise, does amount to ineffective assistance of counsel.[184]

The Supreme Court has "long required effective assistance of counsel on all important decisions in plea bargaining that could affect the outcome of the plea process."[185] Therefore, the claim that *Padilla* overturned

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[179] *Id.* at 1142.

[180] *Id.* at 1141–42. The Court noted that "both from Supreme Court precedent and as a matter of common sense . . . the decision whether to appeal requires reasoned legal advice from counsel." *Id.* at 1142.

[181] People v. Kabre, 905 N.Y.S.2d 887, 896 (Crim. Ct. July 22, 2010) ("'Dictated by precedent' is not the only formulation of the rule. Another factor is whether the Supreme Court has overruled past authority: a decision which overrules a prior case is obviously a new rule. *Padilla* did not . . . overrule any prior Supreme Court decision because there were no prior decisions which held that the Sixth Amendment guarantee of effective assistance of counsel applied to advice on a consequence hithertofore considered collateral. The decision in *Padilla* effectively did overrule decisions from ten of the federal circuit courts and twenty-three states, and certainly has in this sense established a new rule in those jurisdictions.") (citation omitted).

[182] 322 F.3d 1198, 1200 (9th Cir. 2003).

[183] *Id.* (quoting United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993)); *see also* United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); United States v. Yearwood, 863 F.2d 6, 7 (4th Cir. 1988).

[184] *See, e.g.*, United States v. Kwan, 407 F.3d 1005, 1015–17 (9th Cir. 2005); United States v. Choi, 581 F. Supp. 2d 1162, 1163 (N.D. Fla. 2008) ("I assume without deciding that the attorney had no duty to advise Choi on the subject of deportation at all. But when Choi asked, the attorney could not properly provide an incorrect answer, without making an objectively reasonable effort to learn the truth."). It should be noted that while the Court acknowledged the misadvice versus failure to advise distinction in *Padilla*, it ultimately refused to make the distinction in reaching its holding. Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) ("There is no relevant difference 'between an act of commission and an act of omission' in this context.").

[185] United States v. Orocio, 645 F.3d 630, 638 (3d Cir. 2011) (internal citations omitted).

"unanimous" judicial agreement overstates the reality because many recent federal and state court rulings in fact paved the way for *Padilla*.[186] According to the Kentucky Supreme Court, Padilla correctly pointed out that "a number of jurisdictions which have held that failure to advise of a collateral matter is not ineffective assistance have nevertheless held that there is an exception for cases where the attorney misadvised the defendant on the consequences of his plea with regard to immigration."[187] In 2002, the Second Circuit held that "affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable."[188] In another opinion, the Second Circuit stated that removal for noncitizens is "not merely a collateral matter outside the scope of counsel's duty to provide effective representation."[189] In 2004, the Supreme Court of Georgia ruled that a defense attorney was ineffective because he misrepresented to his client that there would be no negative immigration consequences of her guilty plea.[190] The New Mexico Supreme Court, departing from Tenth Circuit precedent, ruled that an "attorney's non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance."[191]

### *4. Indications of Retroactivity in the* Padilla *Decision*

Some courts claim that *Padilla* is devoid of any indication that it should be applied retroactively.[192] Yet several passages in the opinion suggest that the Court expected retroactive application. The Court stated:

> It seems unlikely that our decision today will be have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15

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[186] *Id.* at 640 ("Lower court decisions not in harmony with *Padilla* were, with few exceptions, decided before 1995 and pre-date the professional norms that, as the *Padilla* court recognized, had long demanded that competent counsel provide advice on the removal consequences of a client's plea.").

[187] Commonwealth v. Padilla, 253 S.W.3d 482, 484–85 (Ky. 2008) (citing State v. Rojas-Martinez, 125 P.3d 930, 935 (Utah 2005)); *see also* United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); United States v. Couto, 311 F.3d 179 (2d Cir. 2002); Downs-Morgan v. United States, 765 F.2d 1534, 1539–41 (11th Cir. 1985)); Gonzalez v. State, 83 P.3d 921 (Or. Ct. App. 2004).

[188] *Cuoto*, 311 F.3d at 188.

[189] *Padilla*, 130 S. Ct. at 1480 (citing Janvier v. United States, 793 F.2d 449 (2d Cir. 1986)) ("Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel's duty to provide effective representation.").

[190] Rollins v. State, 591 S.E.2d 796, 799–800 (Ga. 2004).

[191] State v. Paredez, 101 P.3d 799, 804 (N.M. 2004).

[192] *See, e.g.*, United States v. Shafeek, Nos. 05-81129, 10-12670, 2010 WL 3789747, at *2 (E.D. Mich. Sept. 22, 2010).

> years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea.[193]

The Court also found it "significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences."[194]

Finally, the argument for *Padilla*'s retroactivity is grounded in the reality that although our fundamental constitutional principles do not change, the nation does.[195] *Strickland*, in particular, is not stagnant: "*Strickland* did not freeze into place the objective standards of attorney performance prevailing in 1984, never to change again."[196]

### *5. Practical and Policy Considerations*

Even if *Padilla* were determined to be a new rule and therefore non-retroactive, a state court can still decide to give effect to *Padilla* in deciding a case on collateral review. The Supreme Court in *Danforth v. Minnesota* held that the *Teague* rule does not prohibit state courts from giving "broader effect" to a new constitutional rule of criminal procedure than required by the Supreme Court in the opinion at issue.[197] Limiting the *Teague* rule to the context of federal habeas relief means that *Teague* does not necessarily impact state courts considering postconviction petitions.

Moreover, the concern that *Padilla* will open the "floodgates" for defendants seeking to challenge their convictions is likely unfounded. The Supreme Court deemed it "unlikely" that its decision would have "significant effect" on already final convictions.[198] Professional norms already obligate attorneys to give clients advice about the risk of deportation in guilty pleas.[199] Additionally, the cases decided since *Padilla*

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[193] *Padilla*, 130 S. Ct. at 1485; *see also* People v. Bennett, 903 N.Y.S.2d 696, 700 (Crim. Ct. 2010) ("[I]f the Supreme Court did not intend for *Padilla* to be retroactively applied, that would render meaningless the majority's lengthy discussion about concerns that *Padilla* would open the 'floodgates' of challenges to guilty pleas.").

[194] *Padilla*, 130 S. Ct. at 1486 n.15.

[195] In Justice Harlan's words: "One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).

[196] United States v. Orocio, 645 F.3d 630, 640 (3d Cir. 2011) (citations omitted) (emphasizing that *Strickland* relies "on the legal profession's *maintenance* of standards").

[197] 552 U.S. 264, 266 (2008) ("The question in this case is whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not.").

[198] *Padilla*, 130 S. Ct. at 1485.

[199] *Id.*

demonstrate that defendants still face many hurdles to obtaining relief. These hurdles include the one-year statute of limitations for federal habeas petitions and the limits of postconviction remedies.[200] In addition, as will be discussed below, a successful *Strickland* claim requires the defendant to show he or she was prejudiced by counsel's conduct.

In sum, *Padilla* should be applied retroactively to cases on collateral review because it did not overrule any Supreme Court decision and finds support in Supreme Court, federal, and state precedent.

### C. PADILLA SHOULD PREVAIL UNDER *STRICKLAND*'S "PREJUDICE PRONG"

The Kentucky Supreme Court has not yet decided the question on remand from the U.S. Supreme Court: whether Jose Padilla is entitled to relief on his claim of ineffective assistance of counsel.[201] The Kentucky court must address whether a noncitizen defendant who has entered a guilty plea for a crime can show prejudice under the standard established in *Strickland* where his counsel failed to advise him that his guilty plea could lead to his forced removal from the United States. Padilla succeeded in showing that "counsel's representation fell below an objective standard of reasonableness."[202] However, Padilla must now demonstrate that his counsel's "deficient performance prejudiced the defense."[203]

#### *1. Demonstrating "Prejudice" in the Context of a Guilty Plea*

The Supreme Court noted that on remand, Padilla may face an uphill battle: "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong."[204] The prejudice prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[205] A reasonable probability is a probability "sufficient to undermine confidence in the outcome."[206] The Supreme Court requires a defendant to show prejudice because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of

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[200] *See, e.g.*, Diaz v. Brown, No. 10-CV-0457M, 2011 WL 677476, at *1 (W.D.N.Y. Feb. 16, 2011); State v. Chavez, 246 P.3d 1219, 1219–20 (Utah Ct. App. 2011).

[201] *Id.* at 1487.

[202] *Id.* at 1486–87; Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

[203] *Strickland*, 466 U.S. at 687–88.

[204] *Padilla*, 130 S. Ct. at 1485 n.12. The Court also states that "[s]urmounting *Strickland*'s high bar is never an easy task." *Id.* at 1485.

[205] *Strickland*, 466 U.S. at 694.

[206] *Id.*

a criminal proceeding if the error had no effect on the judgment."[207] Ultimately, whether a defendant meets the standard of showing prejudice is a fact-based inquiry.[208]

To assess prejudice in the context of a guilty plea, a court must apply the legal standard found in *Hill v. Lockhart*[209]: "in order to 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."[210] In *Hill v. Lockhart*, the petitioner's argument failed because he did not allege that if counsel properly informed him about his parole eligibility date, he would have chosen to go to trial instead of pleading guilty.[211] In addition, petitioner "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty."[212]

In some cases, a defendant need not show that rejecting a plea bargain "would have been rational under the circumstances" because prejudice may be presumed.[213] The Supreme Court in *Roe v. Flores-Ortega* established that prejudice must be presumed where there is a "serious denial of the entire judicial proceeding."[214] *Flores-Ortega* was an "unusual" case because the reliability of the judicial proceeding was not in question.[215] Instead, counsel's errors "deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether."[216] The Court explained: "Like the decision whether to appeal, the decision whether to plead guilty (i.e., waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise

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[207] *Id.* at 691.

[208] Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000) ("As 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 particular case.").

[209] *See Strickland*, 466 U.S. at 695 ("The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors."); *see also Padilla*, 130 S. Ct. at 1485 n.12 ("Whether *Strickland* applies to Padilla's claim follows from *Hill* [*v. Lockhart*] . . . .").

[210] 474 U.S. 52, 59 (1985); *see also* Hutchings v. United States, 618 F.3d 693 (7th Cir. 2010).

[211] *Hill*, 474 U.S. at 53.

[212] *Id.* at 60.

[213] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010).

[214] 528 U.S. 470, 483 (2000).

[215] *Id.*

[216] *Id.*

entitled."[217] The Supreme Court also stated that "grossly deficient performance" by counsel may constitute prejudice.[218]

Even if prejudice is not presumed, a defendant can demonstrate that it would have been rational for him to reject a plea offer.[219] As the Third Circuit stressed in *United States v. Orocio*, the inquiry is whether the attorney's ineffective conduct "affected the outcome *of the plea process*."[220] The Supreme Court "has never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice."[221] A court should ask only whether the defendant would have "rationally gone to trial in the first place."[222] This rationality test should be straightforward for a noncitizen defendant like Padilla who "might rationally be more concerned with removal [from the United States] than with a term of imprisonment."[223]

### *2. The Case for Padilla*

On remand, the Kentucky Supreme Court should focus on whether counsel's performance affected the outcome of the plea process, not what the outcome of Padilla's hypothetical trial would have been.[224] The U.S. Supreme Court in *Padilla* should have gone further to acknowledge the impact of *Flores-Ortega* on Padilla's case. Like the defendant in *Flores-Ortega*, Padilla was denied "the entire judicial proceeding," any trial at all, because of his counsel's erroneous advice.[225] Furthermore, some courts have found that prejudice is "self-evident" where a noncitizen defendant faces deportation because of counsel's errors.[226]

Even if the Kentucky court does not presume prejudice or find that it is "self-evident" in Padilla's case, Padilla can still prevail. To succeed, Padilla must demonstrate that his attorney's performance affected the plea process and that his alternative "decision to reject the plea bargain would

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[217] *Id.* at 485.

[218] *See, e.g.*, Williams v. Taylor, 529 U.S. 362 (2000); *Flores-Ortega*, 528 U.S. at 471.

[219] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010).

[220] 645 F.3d 630, 643 (3d Cir. 2011) (emphasis added) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

[221] *Id.*

[222] *Id.*

[223] *Id.* (quoting *Padilla*, 130 S. Ct. at 1483).

[224] *See* United States v. Denedo, NMCCA 9900680, 2010 WL 996432, at *3 (N-M. Ct. Crim. App. Mar. 18, 2010) ("In many guilty plea cases the prejudice inquiry will involve a determination whether without counsel's error, counsel would have made a different recommendation as to the plea." (citing United States v. Ginn, 47 M.J. 236, 247 (C.A.A.F. 1997))).

[225] Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000).

[226] *See, e.g.*, Commonwealth v. Frometa, 531 A.2d 434 (Pa. Super. Ct. 1987).

have been rational under the circumstances."[227] He certainly does not need to "show that he would have been acquitted at a trial."[228] Padilla's counsel's performance undoubtedly affected the plea process: Padilla argued that he was "substantially induced by his attorney's mistaken advice regarding his immigration status."[229]

Next, Padilla can show that a decision to go to trial would have been rational. Unlike the defendant in *Hill*, Padilla can allege "special circumstances" to support the conclusion that he would place "particular emphasis" on his immigration status in deciding whether to plead guilty. [230] The Supreme Court has stressed on multiple occasions that "[p]reserving the client's right to remain in the United States may be more important to the client than *any potential jail sentence.*"[231]

Simply put, faced with the choice of either going to trial or accepting a plea bargain that would certainly result in mandatory deportation, a rational person in Padilla's position would likely choose to go to trial. Faced with the same decision and the same "dire immigration consequences," the Third Circuit held that the defendant, Orocio, would have reasonably chosen to go to trial even though he faced an aggravated felony charge with a minimum ten-year sentence.[232] The court thus held that Orocio "alleged sufficient prejudice under *Strickland*" to warrant a remand.[233] In the same way, it would have been reasonable for Padilla to go to trial instead of suffering the automatic "dire immigration consequences" of a guilty plea, even though he faced drug trafficking charges. Padilla explicitly raised with counsel his serious concerns about potential immigration consequences.[234] As the Second Circuit has held, a defendant's statements regarding what he would have done in a plea bargain "in combination with some objective evidence, such as a significant sentencing disparity, is sufficient to support a prejudice

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[227] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010).

[228] United States v. Choi, 581 F. Supp. 2d 1162, 1163 (N.D. Fla. 2008). The Supreme Court has stated that this is particularly important in cases involving indigent defendants: "[I]t is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Flores-Ortega*, 528 U.S. at 486.

[229] Commonwealth v. Padilla, 253 S.W.3d 482, 484 (Ky. 2008).

[230] Hill v. Lockhart, 474 U.S. 52, 60 (1985).

[231] *Padilla*, 130 S. Ct. at 1485 (emphasis added) (quoting INS v. St. Cyr, 533 U.S. 289 (2001)).

[232] United States v. Orocio, 645 F.3d 630, 645 (3d Cir. 2011).

[233] *Id.* at 636.

[234] As a Kentucky Supreme Court judge pointed out, Padilla "raised the issue [of deportation] himself." *Padilla*, 253 S.W.3d at 485 (Cunningham, J., dissenting).

finding."[235] Here, Padilla's statements in combination with the objective evidence—certain deportation from his home of forty years, the United States—should be sufficient to support a prejudice finding.

## IV. CONCLUSION

Many questions remain following the Supreme Court's ruling in *Padilla v. Kentucky*, including whether it should have retroactive effect and whether Padilla was prejudiced. Federal circuit courts recently deciding the issue are split, indicating that the Supreme Court may have to revisit its decision. This Comment argued that *Padilla* should be applied retroactively because it did not announce a new constitutional rule of criminal procedure, but rather applied the existing *Strickland v. Washington* standard of effective assistance of counsel to a new set of facts. On remand to the Kentucky Supreme Court, Padilla should prevail on his *Strickland* claim.

Immigration law in the United States today can have devastating consequences for individuals and families—its growing use as a tool for deportation separates families, uproots the working lives of thousands of people, and has significant consequences for the economy of a country so dependent on foreign labor. How the questions remaining from *Padilla* play out in the coming months and years will tell much about how the legal system's treatment of noncitizens in criminal proceedings is likely to unfold. *Padilla* may come to signal the legal community's recognition of the close link between immigration and criminal law. It may also signal that the legal community is moving further toward acknowledging that criminal punishment for a noncitizen is different from punishment for a citizen. Practically speaking, however, few defendants may actually feel *Padilla*'s impact because the "prejudice" prong of *Strickland v. Washington* is often difficult to prove.

[235] United States v. Brown, 623 F.3d 104, 112 (2d Cir. 2010) (internal quotation marks omitted) (quoting Pham v. United States, 317 F.3d 178, 182 (2d Cir. 2003)).