PADILLA V. KENTUCKY: OVERCOMING *TEAGUE*'S "WATERSHED" EXCEPTION TO NON-RETROACTIVITY

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Imagine that law enforcement officials pull you over as part of a routine traffic safety inspection and discover marijuana in the bed of your truck. Police officers place you under arrest, and the State charges you with felony marijuana trafficking, as well as several misdemeanors. Upon your arraignment, the court assigns an overburdened public defender to handle your case. Although you believe you are innocent of all charges, the State offers you a favorable plea deal that will limit your sentence exposure and ensure that your criminal record remains free of any felony convictions. Your attorney advises you to accept the plea deal, assuring you that by pleading guilty, you will be released from prison after just a few months' time, allowing you to return to your family and get on with your life. Rather than risk a lengthy trial and appeals process, you accept the plea deal, serve your time, and return to your family.

Now imagine that several years have passed, and life has returned to normal. That is, until a United States Immigration and Customs Enforcement official knocks on your door. Although you have lived in the United States for decades, have raised U.S.-citizen children, and have served as a productive member of American society, the immigration official informs you that you are being deported back to your home country. Shocked and confused, you appear before an immigration judge, who informs you that by pleading guilty to those misdemeanors several years back, you placed yourself under the jurisdiction of the Board of Immigrations. You plead with the judge; your job, your family, your entire life is here in the United States. Had you known the conviction would render you deportable, you would have gone to trial and vigorously contested your guilt, rather than accepting a guilty plea for a crime you did not commit. Although the judge sympathizes with your plight, he tells you that there

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is nothing he can do. The minute you pled guilty, your fate was sealed.

This scenario is all too familiar to Jose Padilla, who pled guilty to several misdemeanor drug charges in 2001, after his court-appointed attorney told him he "did not have to worry" about his plea affecting his immigration status. Fortunately, through a series of direct appeals and post-conviction proceedings, Padilla was able to challenge his conviction all the way up to the Supreme Court of the United States.

In 2010, the Supreme Court issued a landmark decision in Padilla's case, holding that defense attorneys have an affirmative obligation to advise noncitizens about the deportation consequences of a guilty plea.[1] The Court's holding in *Padilla* overruled decades of lower court precedent regarding noncitizens' Sixth Amendment rights. The new rule announced in *Padilla* seems to have "mark[ed] a major upheaval in Sixth Amendment law,"[2] which stands to profoundly impact the overlap between immigration and constitutional criminal procedure.

In recent years, Congress has significantly restricted its immigration laws and has steadily expanded the category of offenses that may render a noncitizen deportable. Indeed, an increasing number of offenses will now render noncitizens "automatically deportable" through expedited procedures intended to ensure that the deportation occurs as soon as the alien is released from prison after serving the sentence imposed for an underlying conviction. Now, more than ever, noncitizens need attorneys who will effectively explain these issues to them when discussing the implications of their strategic choices during criminal proceedings. Unfortunately, many attorneys have not kept up with the changing immigration laws, and many noncitizens now face deportation as a result of their counsel's ineffective guidance.

Thus, for many noncitizen detainees, the *Padilla* decision could not have come at a better time. The *Padilla* decision has paved the way for an influx of habeas corpus petitions filed by individuals seeking to vacate their convictions based on *Padilla*'s Sixth Amendment standard. However, since this decision came down relatively recently, the vast majority of habeas petitions based on *Padilla*'s holding have sought to apply the *Padilla* standard retroactively to convictions that became final before the Supreme Court decided *Padilla*.

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1 Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

2 *Id.* at 1491 (Alito, J., concurring).

Unfortunately for habeas petitioners post-*Padilla*, the prevailing federal retroactivity doctrine has effectively barred retroactive application of the vast majority of new rules announced by the Supreme Court. In *Teague v. Lane*,[3] the Supreme Court announced that new rules of criminal procedure would not apply retroactively on collateral review unless the rule fell under one of two narrow exceptions.[4]

The first *Teague* exception permits retroactive application of new procedural rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[5] The second *Teague* exception applies to "watershed rules of criminal procedure"[6]—ones that are necessary to prevent an impermissibly large risk of an inaccurate conviction, and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[7] The Supreme Court has emphasized the tremendously limited scope of *Teague*'s watershed exception, and has stated that "it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty."[8] As the Court has remarked, it is "unlikely that many such components of basic due process have yet to emerge," and to this date, the Supreme Court has yet to find a new rule that falls within the second *Teague* exception.[9]

Lower courts remain divided on the issue of *Padilla*'s retroactivity, and in the past year, federal courts have struggled to define the scope of *Padilla* and its application to habeas petitioners. For the most part, federal courts applying the *Teague* analysis to *Padilla* have struggled with the threshold issue of whether *Padilla*'s central holding laid down a "new rule of criminal procedure," or merely reinterpreted the existing Sixth Amendment standard as applied to plea proceedings. Some courts have applied *Padilla*'s principles retroactively on the grounds that *Padilla* did not forge a new rule, but merely applied the *Strickland* analysis to a new circumstance.[10] Other courts have denied

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3 489 U.S. 288 (1989).

4 *Id.* at 310 (plurality opinion).

5 *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part) (internal quotation marks omitted)).

6 *Id.*

7 Whorton v. Bockting, 549 U.S. 406, 418 (2007) (quoting Tyler v. Cain, 533 U.S. 656, 665 (2001)).

8 Beard v. Banks, 542 U.S. 406, 417 (2004) (quoting O'Dell v. Netherland, 521 U.S. 151, 157 (1997)).

9 *Beard*, 542 U.S. at 417 (quoting Graham v. Collins, 506 U.S. 461, 478 (1993)).

10 *See, e.g.*, United States v. Orocio, 645 F.3d 630, 639–40 (3d Cir. 2011) (holding *Padilla* was not a new rule because it only extended counsel's obligation to advise the defendant of immigration consequences of a guilty plea).

retroactivity, finding that *Padilla* did, in fact, announce a new rule of criminal procedure that would not apply to petitioners whose convictions became final before *Padilla* was decided.[11]

After a year of debate on this issue, the Supreme Court will set out to answer the question of *Padilla*'s retroactivity this fall when it decides *Chaidez v. United States*.[12] In August 2011, the Seventh Circuit Court of Appeals denied relief on a habeas petitioner's *Padilla*-based ineffective assistance of counsel claim, concluding that *Padilla* announced a new rule of criminal procedure that did not apply to the petitioner's conviction, which became final before *Padilla* was announced.[13] The Seventh Circuit's decision created a circuit split on the issue, which is now ripe for Supreme Court review. The Supreme Court's forthcoming decision in *Chaidez* will settle once and for all whether *Padilla* created a "new rule" that is subject to further *Teague* analysis. However, because neither party in *Chaidez* has raised any question regarding the applicability of *Teague*'s exceptions,[14] this issue will very likely remain an open question.[15]

Although the Supreme Court is unlikely to rule on this question, many lower federal courts considering *Padilla*'s retroactivity have confronted the *Teague* exceptions head-on. These lower courts have all determined that *Padilla*'s rule does not fall within either of *Teague*'s two narrow exceptions.[16] However, in light of the forthcoming decision in *Chaidez*, this question warrants a closer look. In the certiorari

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11 *See, e.g.*, United States v. Chang Hong, 671 F.3d 1147, 1159 (10th Cir. 2011) (ruling that *Padilla* announced a new rule that does not apply retroactively because it does not fall within either of the *Teague* exceptions); Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011), *cert granted*, 80 U.S.L.W. 3608 (U.S. Apr. 30, 2012) (No. 11-820) (holding that *Padilla* announced a new rule which does not apply retroactively).

12 Chaidez v. United States, 80 U.S.L.W. 3608 (Apr. 30, 2012) (No. 11-820).

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

14 *See* Petition for Writ of Certiorari at 7, Chaidez v. United States, No. 11-820 (U.S. Dec. 23, 2011) ("[S]ave exceptions not relevant here, a rule of criminal procedure that 'breaks new ground or imposes a new obligation on the States or the Federal Government' will not be given retroactive effect on collateral review." (quoting Teague v. Lane, 489 U.S. 288, 301 (1989))).

15 There are, however, two petitions for certiorari pending before the Supreme Court that directly address the applicability of the second *Teague* exception to *Padilla*. *See* Petition for Writ of Certiorari, Figueroa-Sanchez v. United States, No. 12-164 (U.S. July 27, 2012), 81 U.S.L.W. 3092; Petition for a Writ of Certiorari, Mathur v. United States, No. 12-439 (U.S. Oct. 9, 2012), 2012 WL 4842975. Should the Court avoid answering this more direct question in *Chaidez*, it could choose to grant certiorari in either of these cases to decide the issue once and for all.

16 *See, e.g.*, *Chang Hong*, 671 F.3d at 1159 (finding that *Padilla* "is not within either of the extremely narrow *Teague* exceptions to the retroactivity bar"); *Chaidez*, 655 F.3d at 686 (holding that "*Padilla* announced a new rule that does not fall within either of Teague's exceptions . . .").

documents filed in the Supreme Court, the parties in *Chaidez* argued that the question of *Padilla*'s retroactivity was one of "exceptional importance" which "go[es] to the core of the legitimacy of criminal convictions."[17] Amicus briefs in support of *Chaidez*'s petition for certiorari argued that *Padilla*'s scope is central to the "proper and fair functioning of our justice system,"[18] indicating that many, if not most immigrants, when properly advised by counsel, would choose to vigorously defend themselves before a jury rather than face the automatic immigration consequences of a guilty plea.[19] The parties' acknowledgements in *Chaidez* show just how important *Padilla*'s principles are to the fairness of a criminal proceeding. Given the exceptional importance of *Padilla*'s principles, there is room to argue that, should the Court find that *Padilla* announced a new rule, *Padilla* should fall under the second *Teague* exception for bedrock rules of criminal procedure.

The scholarly literature regarding *Padilla*'s scope likewise supports this conclusion. Many scholars have hinted that *Padilla*'s decision will have an immensely profound impact on Sixth Amendment jurisprudence, and could one day even be interpreted as a "deportation *Gideon*," which would guarantee a right to legal counsel in deportation hearings. One scholar has even remarked that the Supreme Court's decision in *Padilla* marked a "watershed" in the Court's approach to regulating plea proceedings.[20] These scholarly arguments lend support to the idea that *Padilla* truly represented a "bedrock" rule of criminal procedure that should fall within *Teague*'s watershed exception.

This Comment will discuss the doctrinal underpinnings of *Teague*'s retroactivity standard, and will analyze *Teague*'s application to *Padilla*-based claims, arguing that *Padilla* might fall under *Teague*'s watershed exception. Part I summarizes the Court's pre-*Padilla* Sixth Amendment precedent in the context of habeas petitioners' ineffective assistance of counsel claims. Part II discusses the Supreme Court's decision in *Padilla* and delineates the ways in which *Padilla* changed the existing Sixth Amendment jurisprudence. Part III out-

17 Petition for Writ of Certiorari, *supra* note 14, at 16.

18 Brief for Constitutional Accountability Center as Amicus Curiae Supporting the Petition at 12, *Chaidez*, No. 11-820 (U.S. Jan. 20, 2012).

19 Brief for National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center and Immigrant Defense Project as Amici Curiae Supporting Petition for Writ of Certiorari at 10, *Chaidez*, No. 11-820 (U.S. Jan. 30, 2012).

20 Stephanos Bibas, *Regulating The Plea-Bargaining Market: From Caveat Emptor To Consumer Protection*, 99 CALIF. L. REV. 1117, 1118 (2011).

lines the Court's retroactivity doctrine—highlighting *Teague*'s watershed exception—and includes a survey of the federal courts and the various approaches taken in applying the retroactivity doctrine to *Padilla*-based claims. Finally, in Part IV, this Comment will discuss the immense impact that *Padilla* has, and will continue to have, on Sixth Amendment jurisprudence and the crossover between immigration and constitutional criminal procedure. This Comment will argue that *Padilla* announced a new rule of criminal procedure, but that the rule nonetheless deserves retroactive effect. In light of *Padilla*'s potential influence, this Comment will argue that the Court has finally encountered the first new rule that qualifies under *Teague*'s seemingly insurmountable watershed exception.

I. HABEAS CORPUS AND THE SIXTH AMENDMENT

Article I, Section 9 of the United States Constitution requires the government to provide a right to legal redress against unlawful criminal detention.[21] This right, known as the Writ of Habeas Corpus, allows a criminal convict to challenge his conviction in state or federal court, giving him the opportunity to advance arguments that call into question the lawfulness of his conviction and sentence. In most instances, a petitioner may only seek habeas relief once he has exhausted all of his opportunities for direct appeal.[22]

In the two years since the Supreme Court decided *Padilla*, federal courts have received an influx of habeas corpus petitions filed on behalf of noncitizens seeking to vacate or set aside their sentences based on the Sixth Amendment right recognized in *Padilla*. Federal courts have jurisdiction to entertain a petition for federal habeas review under 28 U.S.C. § 2255, 28 U.S.C. § 2254, and 28 U.S.C. § 2241, which make up part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Section 2241 grants federal courts power to entertain an application for a writ of habeas corpus filed by an individual held in custody in violation of the United States Constitution.[23] Section 2254 provides a federal remedy for state prisoners who are found to be in state custody in violation of the Constitution or the laws of the United States. Section 2255 serves as the federal counterpart to § 2254, per-

21 U.S. CONST. art. I, § 9, cl. 2.

22 *See* 28 U.S.C. § 2254(b)(1)(A) ("An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.").

23 28 U.S.C. § 2241(c)(3) (2006).

mitting a "prisoner in custody under sentence of a court established by Act of Congress [to] claim[] the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack . . . ."[24] Generally, habeas petitioners are subject to a one-year statute of limitations, which runs from the date on which judgment of conviction becomes final.[25] However, if the Supreme Court recognizes a new constitutional right and permits lower courts to apply the new right retroactively, AEDPA grants petitioners one year to apply for habeas relief based on the new constitutional standard.[26]

Criminal convicts may apply for habeas relief in a number of different circumstances. However, convicts most commonly base their habeas petitions on Sixth Amendment right-to-counsel violations. In the last few decades, the vast majority of these cases have centered on claims of ineffective assistance of counsel during trial or plea proceedings.[27] Although the Sixth Amendment does not explicitly guarantee anything more than minimal legal representation in criminal proceedings, the Supreme Court has interpreted the Sixth Amendment to confer upon individuals the right to effective assistance of counsel throughout the course of a criminal prosecution.[28] The Supreme Court had the opportunity to define the scope of this Sixth Amendment right in the landmark case *Strickland v. Washington*. In *Strickland*, the defendant filed for a writ of habeas corpus following his murder conviction, claiming that his counsel had rendered ineffective assistance at his sentencing hearing by failing to investigate and present certain arguments to the sentencing judge.[29] Upon reviewing the defendant's claims, the *Strickland* Court delineated a two-prong test for determining whether an ineffective assistance of counsel claim will prevail:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that coun-

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24 28 U.S.C. § 2255(a) (2006 & Supp. I 2008).

25 28 U.S.C. § 2244(d)(1)(A) (2006); 28 U.S.C. § 2255(f)(1) (2006 & Supp. I 2008).

26 28 U.S.C. § 2244(d)(1)(C) (2006); 28 U.S.C. § 2255(f)(3) (2006 & Supp. I 2008).

27 *See, e.g.*, ROGER A. HANSON & HENRY W.K. DALEY, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (1995) (stating that ineffective assistance of counsel was, by far, the most common claim asserted by state prisoners in habeas petitions, and that claims of ineffective assistance of counsel were found in 25% of all habeas petitions).

28 Strickland v. Washington, 466 U.S. 668, 686 (1984).

29 *Id.* at 675–76.

> sel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[30]

With respect to the first prong of this test, the Court recognized the standard for attorney performance as that of reasonably effective assistance.[31] Thus, in order to satisfy the first prong, a defendant claiming ineffective assistance of counsel must show that "counsel's representation fell below an objective standard of reasonableness."[32] The Court then expounded on the prejudice prong, requiring the defendant to show that "but for counsel's unprofessional errors, the result of the proceeding would have been different."[33]

Strickland involved a petitioner who alleged ineffective assistance of counsel during trial and at sentencing. For a short time, it remained an open question whether the *Strickland* standard would apply to ineffective assistance of counsel claims arising from the plea process. However, a year later, in *Hill v. Lockhart*, the Supreme Court affirmed the application of the two-prong *Strickland* test in the context of a guilty plea, albeit slightly modifying the second *Strickland* prong.[34] Thus, in addition to proving that his attorney's performance was deficient, a petitioner claiming ineffective assistance of counsel during plea proceedings "must show that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[35]

Federal and state courts alike now unanimously agree that the Sixth Amendment requires an attorney to inform his client about the direct consequences—incarceration, fines, probation, etc.—of a guilty plea before entering the plea in court. Thus, when a petitioner claims that his attorney did not inform him of the direct consequences of his guilty plea, courts promptly turn to the *Strickland* analysis. However, even after *Strickland*, many courts continued to assume that the Sixth Amendment did not require defense counsel to inform a client about a guilty plea's collateral consequences.[36] Furthermore,

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30 *Id.* at 687.

31 *Id.* (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); McMann v. Richardson, 397 U.S. 759, 770–71 (1970); Trapnell v. United States, 725 F.2d 149, 151–52 (2d Cir. 1983)).

32 *Strickland*, 466 U.S. at 688.

33 *Id.* at 694.

34 Hill v. Lockhart, 474 U.S. 52, 57, 59 (1985).

35 *Id.* at 58–59.

36 Collateral consequences are the additional civil penalties, generally mandated by statute, that attach to criminal convictions. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006). Collateral consequences may include loss or restriction of professional license, loss of voting rights, ineligibility for public funding, registration requirements for criminal databases, etc. Gabriel J. Chin & Richard W.

until 2010, many state and federal courts included deportation within their definition of "collateral consequences." Accordingly, many courts did not require defense counsel to explain to their client the fact that a guilty plea could render them automatically deportable.[37]

It was against this backdrop that the Supreme Court granted a writ of certiorari to the Supreme Court of Kentucky[38] to decide whether, as a matter of federal law, petitioner Jose Padilla's attorney had an obligation to advise his client that the offense to which he was pleading guilty would result in automatic deportation.[39] By granting certiorari, the Supreme Court paved the way for a "major upheaval in Sixth Amendment law."[40]

II. THE SUPREME COURT'S DECISION IN *PADILLA V. KENTUCKY*

Jose Padilla had been a lawful permanent resident of the United States for over forty years when he was caught driving a truck carrying marijuana and drug paraphernalia.[41] Padilla was subsequently indicted for his offense.[42] Upon advice from his court-appointed attorney, Padilla pled guilty to three misdemeanor drug-related charges.[43] Although the plea substantially reduced the amount of time that Padilla

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Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699–700 (2002).

37 *See, e.g.*, Santos-Sanchez v. United States, 548 F.3d 327, 336 (5th Cir. 2008); Broomes v. Ashcroft, 358 F.3d 1251, 1256–57 (10th Cir. 2004); United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); United States v. Yearwood, 863 F.2d 6, 7 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985) (federal courts applying the collateral consequences doctrine to advice regarding deportation consequences of a guilty plea). *See also* Oyekoya v. State, 558 So. 2d 990, 990–91 (Ala. Crim. App. 1989); State v. Rosas, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995); Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005); State v. Montalban, 810 So. 2d 1106, 1110 (La. 2002); Commonwealth v. Frometa, 555 A.2d 92, 93–94 (Pa. 1989) (state courts applying the collateral consequences doctrine to advice regarding deportation consequences of a guilty plea). In recent years, Congress has adopted and amended various provisions of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which identifies certain "aggravated felonies" which, if committed, will subject immigrants to automatic deportation, without giving them an opportunity for any meaningful form of judicial review. *See* 8 U.S.C. §§ 1101(a)(43), 1228 (2006). The "aggravated felony" category has steadily expanded over the years.

38 Padilla v. Kentucky, 555 U.S. 1169 (2009).

39 Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

40 *Id.* at 1491 (Alito, J., concurring in the judgment).

41 *Id.* at 1477 (Opinion of the Court).

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

43 *Padilla*, 130 S. Ct. at 1478; *Padilla*, 253 S.W.3d at 483.

would spend in custody, his conviction rendered him automatically deportable under revised immigration laws.[44]

Upon application for habeas relief, Padilla claimed that his attorney had not only failed to advise him that his guilty plea would subject him to deportation proceedings,[45] but had affirmatively told him that he "did not have to worry about immigration status since he had been in the country so long."[46] Padilla claimed that he relied on his counsel's erroneous advice when he pleaded guilty to the drug charges, and alleged that he would have insisted on going to trial had he not received incorrect advice from his attorney.[47]

Even assuming the truth of Padilla's allegations, the Supreme Court of Kentucky denied Padilla's motion without granting him an evidentiary hearing. The court based its ruling on the ground that while the Sixth Amendment guaranteed accurate advice from counsel regarding the direct consequences of a guilty plea, it did not protect defendants from clearly erroneous advice regarding deportation because deportation was merely a "collateral consequence" of a conviction.[48] Applying the "collateral consequences" doctrine, the Kentucky Supreme Court concluded:

> As 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[s] or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief. . . .[49]

After his postconviction petition was denied by the Kentucky Supreme Court, Padilla petitioned for a writ of certiorari directly to the United States Supreme Court.[50] Padilla's petition for certiorari highlighted two important questions. The first question was whether "the mandatory deportation associated with a plea to an 'aggravated felony' . . . can still be described as a 'collateral consequence' of a criminal conviction which relieves counsel from any affirmative duty to ad-

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44 *Padilla*, 130 S. Ct. at 1478; *see also* 8 U.S.C. §§ 1101(a)(43)(B), 1228 (2006) (defining "aggravated felony" to include "trafficking in a controlled substance" and providing that aliens convicted of an "aggravated felony" may be deported without receiving any form of review by a federal court).

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

46 *Padilla*, 253 S.W.3d at 483.

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

48 *Id.*

49 *Padilla*, 253 S.W.3d at 485.

50 Petition for Writ of Certiorari, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

vise[.]"[51] The second question was "whether an attorney's 'flagrant' or 'gross' misadvice on a collateral matter, such as mandatory deportation, can constitute grounds for setting aside the guilty plea."[52] On February 23, 2009, the Supreme Court granted certiorari and set out to answer these two questions.[53]

In a 7-2 decision, the *Padilla* Court rejected the Kentucky Supreme Court's formalistic approach and held that the Sixth Amendment requires defense counsel to inform noncitizen clients about immigration consequences before entering a guilty plea.[54] The Court acknowledged the Kentucky Supreme Court's avowal of the "collateral consequences" doctrine, and recognized that Kentucky was not alone in adopting that view.[55] Although the members of the Court equivocated on their own views of the collateral consequences doctrine, the majority made it very clear that the collateral versus direct distinction was ill-suited to evaluating ineffective assistance of counsel claims concerning the specific risk of deportation.[56] As a matter of law, the *Padilla* Court removed deportation out of the civil, collateral consequence realm, and for the first time in Supreme Court history, applied the *Strickland* analysis to an attorney's failure to advise his client of the immigration consequences of his guilty plea.[57] As the Court stated, "[t]he severity of deportation—'the equivalent of banishment or exile, . . .'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[58]

Padilla is now well-settled law going forward. Criminal defense attorneys now have an affirmative obligation to inform their clients about the deportation consequences of a guilty plea, and failure to do so may properly give rise to a claim for habeas relief. However, as with all constitutional cases, the *Padilla* decision did not immediately alleviate the problems faced by the hundreds of noncitizens who, at the time, faced deportation after having received deficient information at a plea proceeding. Consequently, courts have been left with the burdensome task of determining the retroactivity of *Padilla*'s

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51 *Id.* at 7.

52 *Id.* at 7–8.

53 Padilla v. Kentucky, 555 U.S. 1169 (2009).

54 Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

55 *Id.* at 1481.

56 *Id.* at 1481–82.

57 *Id.* at 1482.

58 *Id.* at 1486 (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (internal citation omitted)).

central holding.[59] State and federal courts have split regarding the retroactive application of *Padilla*, and courts have spent countless hours considering these backward-looking *Padilla* claims. As is the case with all habeas matters, determination of this issue could result in the reversal of many state and federal prisoners' convictions. More importantly, courts ruling on *Padilla*'s retroactivity stand to significantly impact the number of noncitizens facing deportation as a consequence of their conviction. If *Padilla* were found to apply retroactively, many current inmates who will face deportation after the conclusion of their prison sentence would have the opportunity to challenge their convictions due to the fact that their attorneys did not inform them that a guilty plea would result in automatic deportation. In this case, perhaps now more than ever, determination on the issue of retroactivity will have a significant impact on the scope of the Supreme Court's ruling.

III. SURVEYING THE COURTS

Since the Supreme Court decided *Padilla* in 2010, hundreds of petitioners have filed for habeas relief, claiming ineffective assistance of counsel in violation of the Sixth Amendment due to their attorneys' failure to advise them of the immigration consequences of a guilty plea. Given *Padilla*'s recent status, the overwhelming majority of these petitioners seek retroactive application of *Padilla*'s central holding. Courts have adopted various approaches to handle these claims and, as a result, have come to very different conclusions regarding retroactivity. Many courts have refused to address the issue of retroactivity and have dismissed petitioners' claims under a straightforward application of *Strickland*'s ineffective assistance of counsel standard. Other courts have instead chosen to tackle the issue of retroactivity head-on. Courts that have selected this approach have assumed different positions regarding *Padilla*'s status as a "new rule" or an "old rule." This judgment has proven to be outcome-determinative in each and every case considering *Padilla*'s retroactivity. This Section will explore the various approaches that state and lower federal courts have adopted to handle the retroactivity of *Padilla*, and will explain the possible flaws in many of the lower courts' arguments.

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59 *See* Maria Baldini-Potermin, Padilla v. Kentucky *One Year Later: Courts Split over Interpretation and Application of the U.S. Supreme Court's Constitutional Holdings*, 88 INTERPRETER RELEASES 1449, 1450–51 (June 13, 2011) (noting cases in which courts evaluated claims of ineffective assistance based on failure to inform about a guilty plea's deportation consequences).

A. Courts Eschewing Padilla*'s Retroactivity*

When called upon to determine the retroactivity of *Padilla*, many state and federal courts have assumed, for argument's sake, that the *Strickland* analysis would apply to the given claim, and have then dismissed those *Padilla*-based claims under either the first or second prong of *Strickland*. Take, for example, the Western District of Washington's ruling in *Torres v. United States*[60] in October 2011. Petitioner Uriel Valdovinos Torres pled guilty to one charge of conspiracy to distribute a controlled substance and was sentenced to 120 months of incarceration on December 7, 2009, a few months before the Supreme Court decided *Padilla*. Torres filed a § 2255 habeas petition based on his claim that he received ineffective assistance of counsel because his attorney allegedly failed to inform him that his guilty plea would subject him to deportation,[61] and that he would not qualify for cancellation of removal.[62] Given that Torres' conviction became final before the Supreme Court issued *Padilla*, Torres sought to retroactively apply the rule announced in *Padilla* to his claim on collateral review.[63] After briefly discussing the current controversy over *Padilla*'s retroactivity, the court decided that it need not resolve the issue of whether *Padilla* states a new rule or merely restates existing law, because even assuming *Padilla* did apply retroactively, Torres' claim would not satisfy either of the *Strickland* prongs.[64]

The *Torres* court first considered whether Torres' attorney had fallen below "an objective standard of reasonableness."[65] The court found that "unlike the attorney in *Padilla* who told Padilla that he 'did not have to worry about immigration status since he had been in the country so long,' [Torres' attorney had] told him that his crime was an aggravated felony" that could subject him to deportation, although she did not tell him that a guilty plea would result in automat-

60 No. C10-5896, 2011 WL 5025148 (W.D. Wash. Oct. 21, 2011).

61 *Id.* at *1.

62 In order to qualify for cancellation of removal, an alien must show that: (1) he has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application; (2) he has been a person of good moral character during such period; (3) he has not been convicted of certain crimes; and (4) removal would result in exceptional and unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. § 1229b(b)(1) (2006).

63 *Torres*, 2011 WL 5025148, at *1-2.

64 *Id.* at *2.

65 Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

ic deportation.[66] Despite the fact that Torres' attorney did not paint a complete picture for Torres, the court lauded her for providing Torres with technically correct information, and concluded that her performance did not fall below an objective standard of reasonableness under *Strickland*.[67]

Although the court could have dismissed Torres' claim based on Torres' failure to satisfy the first *Strickland* prong, the court went on to consider Torres' claim under *Strickland*'s prejudice prong. Torres maintained that had he known that accepting a plea agreement meant foregoing his opportunity to pursue cancellation of removal from the United States, he would not have accepted the plea and would instead have gone to trial.[68] However, the court rejected Torres' claim, recognizing that Torres would not have been eligible for cancellation of removal even if he had gone to trial, because he had not been in the country long enough before being arrested.[69] Finding that Torres had failed to prove the requisite level of prejudice, the court dismissed Torres' *Padilla*-based claim without addressing the issue of retroactivity.[70]

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66 *Torres*, 2011 WL 5025148, at *5 (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010)).

67 *Id.* *Accord* United States v. Stubbs, No. 2:02-cr-61-FtM-29DNF, 2011 WL 3566839, at *5 (M.D. Fla. Aug. 15, 2011); Obomighie v. United States, Civ. No. 11-746, Cr. No. 91-391, 2011 WL 2938218, at *3 (D. Md. July 18, 2011); Jae Myung Pak v. United States, Civ. No. 10-1982, Cr. No. 92-49, 2011 WL 1298559, at *3 (D. Md. Mar. 31, 2011); Sanchez-Contreras v. United States, Nos. 10-CV-4008, 08-CR-4079, 2011 WL 939005, at *3 (N.D. Iowa Mar. 16, 2011); Gill v. United States, Nos. CV-10-3786, CR-07-1382, 2010 WL 4916642, at *3 (C.D. Cal. Nov. 30, 2010) (district court cases as of March 2012, assuming retroactivity, but dismissing claim on first *Strickland* prong).

68 *Torres*, 2011 WL 5025148, at *5.

69 *Id.* at *6.

70 *Id.* *Accord* Robles v. Cate, No. CIV S-10-3398, 2011 WL 4710800, at *3 (E.D. Cal. Oct. 4, 2011); Quijada v. United States, Nos. 2:10-CV-403, 05-CR-171(6), 2011 WL 4687534, at *1 (S.D. Ohio Oct. 4, 2011); Richards v. United States, Nos. 11 CV 1341, 09 CR 562, 2011 WL 3875335, at *3, *4 (S.D.N.Y. Sept. 1, 2011); Infante v. United States, Nos. 8:11-CV-1525-T-17TBM, 8:95-CR-288-T-17TBM, 2011 WL 3268426, at *2 (M.D. Fla. Aug. 1, 2011); Hill v. New York, No. 10-CV-0150, 2011 WL 2671506, at *3 (W.D.N.Y. July 8, 2011); Gonzalez v. United States, No. 5:11-cv-197-Oc-36DNF, 2011 WL 1811655, at *2 (M.D. Fla. May 12, 2011); Limones v. United States, Nos. 1:07-CR-356-5-TWT, 1:10-CV-2265-TWT, 2011 WL 1157371, at *5 (N.D. Ga. Mar. 29, 2011); 1:10-CV-2265, 2011 WL 1157371, at *5 (N.D. Ga. Mar. 29, 2011); United States v. Aceves, Civ. No. 10-00738, Cr. No. 08-00501, 2011 WL 976706, at *4 (D. Haw. Mar. 17, 2011); Banos v. United States, Nos. 10-23314 CIV, 98-00015 CR, 2011 WL 835799, at *3 (S.D. Fla. Feb. 14, 2011); Smith v. United States, Nos. 10-21507-Civ, 09-20952-Cr, 2011 WL 837747, at *9, *10–11 (S.D. Fla. Feb. 4, 2011); Gudiel-Soto v. United States, 761 F. Supp. 2d 234, 238–39 (D.N.J. 2011); Brown v. United States, No. 10 Civ. 3012, 2010 WL 5313546, at *4, *5, *6 (E.D.N.Y. Dec. 17, 2010); United States v. Gutierrez Martinez, Civ. No. 10-2553, Cr. No. 07-91(5), 2010 WL 5266490, at *2, *3 (D. Minn. Dec. 17, 2010); Falcon v. D.H.S., No. SACV 07-66, 2010 WL 5651187, at *10 (C.D. Cal. Nov. 29, 2010); LaPorte v. Artus, No. 9:06-cv-1459, 2010 WL 4781475, at *2

In an exercise of caution, many courts have taken the route that the *Torres* court took, assuming for argument's sake that *Padilla* applies retroactively, but dismissing the petitioner's *Strickland* claim on the merits, either under the deficient performance prong, the prejudice prong, or, as in *Torres*, both prongs. This trend illustrates the extreme difficulty that petitioners will face when raising *Padilla* claims, even if the Supreme Court were to declare that *Padilla* applies retroactively. By avoiding the issue of retroactivity, lower courts can reduce the number of cases that go up on appeal, and are thus able to moderate the "floodgates" fear that courts often face when deciding whether a case applies retroactively. Courts tend to prefer this more passive approach. Unfortunately, courts were only able to delay the issue of *Padilla*'s retroactivity for so long. While courts have succeeded in dismissing many claims on a straightforward *Strickland* analysis, there remain a large number of claims that would not fail under either *Strickland* prong. These cases have required courts to confront the issue of retroactivity head-on.

B. Courts Confronting Padilla*'s Retroactivity*

Where courts have come across *Padilla* claims where counsel's effectiveness clearly fails under both *Strickland* prongs, they have been forced to apply the Supreme Court's somewhat muddled retroactivity doctrine to determine whether the petitioner can benefit from retroactive application of the Sixth Amendment standard recognized in *Padilla*. After briefly reviewing the history of the retroactivity doctrine in federal habeas proceedings, and laying out the standards that govern retroactivity of new constitutional rules, this Section will explain the two approaches adopted by federal courts addressing retrospective *Padilla* claims.

1. Retroactivity Doctrine in Federal Habeas Proceedings

The Supreme Court has struggled with the retroactive application of new rules of constitutional criminal procedure for decades. "Before 1965, the Supreme Court assumed that all of its decisions should

(N.D.N.Y. Nov. 17, 2010); Haddad v. United States, Civ. No. 07-12540, Cr. No. 97-80150, 2010 WL 2884645, at *6 (E.D. Mich. July 20, 2010); United States v. Millan, Nos. 3:06cr458, 3:10cv165, 2010 WL 2557699, at *1 (N.D. Fla. May 24, 2010) (district court cases as of March 2012, assuming retroactivity, but dismissing claim on second Strickland prong).

apply retroactively."[71] However, when the Court started to selectively incorporate the Bill of Rights against the states in the 1960s, it began to recognize the harsh burden that a presumption of retroactivity would impose on state courts.[72] To help alleviate this burden, the Court enunciated a three-part test to be applied to cases involving a question of retroactivity in *Linkletter v. Walker*.[73] At issue in *Linkletter* was the retroactivity of the new exclusionary rule[74] established in *Mapp v. Ohio*.[75] In the *Linkletter* Court's view, retroactivity was to be determined "by examining the purpose of the [new] rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the [new] rule."[76] Applying this three-part test, the Court in *Linkletter* held that the exclusionary rule would not apply retroactively in collateral habeas proceedings.[77]

For the next several years, courts applied the *Linkletter* test irrespective of whether the case came before the court on direct or collateral review. However, *Linkletter* was met with immense dissatisfaction from jurists at every level,[78] and by the late 1980s, the Supreme Court recognized the need for modifications to the *Linkletter* rule, es-

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71 Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 427 (1994).

72 The process of selective incorporation led to some of the twentieth century's most influential Supreme Court decisions, including *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that all evidence obtained by searches and seizures in violation of the Fourth Amendment must be excluded from criminal proceedings in state court), *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Sixth Amendment against states by holding that state court defendants have a right to counsel), and *Miranda v. Arizona*, 384 U.S. 436 (1966) (incorporating the Fifth Amendment against states and holding that suspects must be informed of their right to an attorney and their right against self-incrimination prior to being questioned by authorities). As a result of these decisions, the nation "move[d] from a state-based criminal justice system to a criminal justice system that ha[d] to conform with nationally imposed rules." *See The Supreme Court: A Nation of Liberties* (PBS television broadcast Feb. 7, 2007), *available at* http://www.pbs.org/wnet/supremecourt/about/pop_transcript3.html (discussing the impact of selective incorporation on the criminal justice system in an interview with Professor Joseph F. Kobylka). Had these new rules of constitutional criminal procedure applied retroactively, state courts would have faced an overwhelming influx of direct and collateral challenges brought on behalf of state prisoners, seeking retroactive application of the new rules.

73 381 U.S. 618, 636 (1965).

74 *Id.* at 621–22.

75 367 U.S. 643, 655 (1961).

76 Teague v. Lane, 489 U.S. 288, 302 (1989) (citing *Linkletter*, 381 U.S. at 636–40).

77 *Linkletter*, 381 U.S. at 639.

78 *See, e.g.*, Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1557 n.3, 1558 (1975) (delineating the struggles that lower courts faced in applying the *Linkletter* test); James B. Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 417, 419–20 (1969) (discussing the positions of various Supreme Court justices regarding the *Linkletter* test).

pecially in the criminal context.[79] In a series of dissenting opinions, Justice Harlan deeply criticized the *Linkletter* test and argued that the Court should retroactively apply new rules to all convictions that were not yet final at the time the new rule was announced.[80] The Court adopted Harlan's arguments in *Griffith v. Kentucky*,[81] holding that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[82]

Inspired by Justice Harlan and the decision in *Griffith*, the Supreme Court finally embraced a distinction between cases on direct review and cases on collateral review, and established a more coherent test for retroactivity in *Teague v. Lane*.[83] In *Teague*, the petitioner, convicted of attempted murder and other offenses, filed a habeas petition seeking to receive the benefits of the new rule established in *Taylor v. Louisiana*,[84] which held that the Sixth Amendment required jury venire to be drawn from a fair cross-section of the community.[85] The petitioner requested that this fair cross-section requirement be extended to the petit jury that convicted him.[86] The Court, however, found that it was unnecessary to reach this question, because doing so would require the Court to apply the rule from *Taylor* retroactively.[87] The Court announced that "[r]etroactivity is properly treated as a threshold question,"[88] and set out to "clarify how the question of retroactivity should be resolved for cases on collateral review."[89] Justice O'Connor, writing for the plurality, expressed her belief that *Linklet-*

79 *See Teague*, 489 U.S. at 303 ("Not surprisingly, commentators have 'had a veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative.'").

80 *See* Mackey v. United States, 401 U.S. 667, 680–81 (1971) (Harlan, J., concurring in part and dissenting in part) (arguing that "[r]efusal to apply new constitutional rules to all cases arising on direct review" produces "unacceptable ancillary consequences"); Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) ("Indeed, I have concluded that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down.").

81 479 U.S. 314 (1987).

82 *Id.* at 322.

83 489 U.S. 288, 305, 310 (1989).

84 419 U.S. 522 (1975).

85 *Teague*, 489 U.S. at 292.

86 *Id.* at 299.

87 *Id.* at 316 ("Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.").

88 *Id.* at 300.

89 *Id.*

ter "require[d] modification,"[90] and thus went on to establish a new test, which now universally governs the question of retroactivity.

The Court first reaffirmed the implication from *Linkletter* that "old rules" would apply retroactively on both direct and collateral review.[91] Under *Teague*, a rule that is "'merely an application of the principle that governed'" a prior Supreme Court case is an old rule that applies retroactively.[92] On the other hand, a case that "breaks new ground or imposes a new obligation on the States or the Federal Government" is considered to have announced a "new rule" for purposes of determining retroactivity.[93] In deciding whether a particular case qualifies as a "new rule," courts must consider whether the result of the case was "*dictated* by precedent existing at the time the defendant's conviction became final."[94]

Assuming that most cases announced new rules, the Court adopted Justice Harlan's direct-collateral distinction and held that a new rule receives full retroactivity for cases on direct review.[95] The Court held, on the other hand, that new rules should rarely apply retroactively to cases on collateral review. The Court established two narrow exceptions to the general presumption against retroactivity.

First, the Court held that a new rule may apply retroactively if it placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Thus, new rules that are substantive, and not procedural, fall outside the *Teague* constraints. The Court has expounded on this distinction by explaining that a rule is substantive when "it alters the range of conduct or the class of persons the law punishes."[96] If, however, a new rule regulates "the manner of determining the defendant's culpability,"[97] it qualifies as a procedural rule that does not apply retroactively.

Second, the Court carved out an exceedingly narrow exception for "watershed rules of criminal procedure"[98] that implicate the "fundamental fairness and accuracy of the criminal proceeding."[99] A new rule will only fall under *Teague*'s watershed exception if it satisfies two

90 *Id.* at 301.
91 *Id.* at 307.
92 *Id.* (quoting Yates v. Aiken, 484 U.S. 211, 216–17 (1988)).
93 *Teague*, 489 U.S. at 301.
94 *Id.* (emphasis in original).
95 *Id.* at 304.
96 Schriro v. Summerlin, 542 U.S. 348, 353 (2004).
97 *Id.* (emphasis omitted).
98 *Teague*, 489 U.S. at 311.
99 Whorton v. Bockting, 549 U.S. 406, 416 (2007) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

requirements: (1) "Infringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,'" and (2) "the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding.'"[100] Despite strong criticism, *Teague*'s presumption against retroactivity on collateral review remains in effect today.[101]

Teague's watershed exception is exceptionally rare. Indeed, in the years following *Teague*, the Court has "yet to find a new rule that falls under the second *Teague* exception."[102] Since *Teague* was decided in 1989, the Supreme Court has considered fourteen cases where the petitioner argued that a new rule is "watershed" in nature and in every case the Court has refused to find the rule as such.[103] As a guide to the type of rule that would receive watershed status, the Court has repeatedly identified the universal right to counsel in criminal proceedings[104] established in *Gideon v. Wainwright*.[105] Nevertheless, the Court in *Teague* made sure to highlight the rarity of such a landmark case, and stated that it was "unlikely that many such components of basic due process have yet to emerge."[106]

The *Teague* precedent has come under fire in the last few decades, in part due to the extremely narrow application of *Teague*'s watershed

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100 Tyler v. Cain, 533 U.S. 656, 665 (2001) (emphasis omitted) (quoting *Teague*, 489 U.S. at 311).

101 Courts frequently interpret the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, to have codified the *Teague* analysis. *Whorton*, 549 U.S. at 415 n.3. For a discussion of relevant AEDPA provisions, see *supra* Part I. Petitions filed under AEDPA make up the vast majority of habeas petitions filed today, and only become necessary when the petitioner requests review of a final conviction. A case becomes final "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" before the decision for which retroactive application is sought. Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965). The *Teague* presumption against retroactivity only exists in the criminal context, and more specifically, only applies to cases on collateral review. The question of civil adjudicatory retroactivity remains a murky area and is outside the scope of this Comment.

102 Beard v. Banks, 542 U.S. 406, 417 (2004).

103 For a brief overview of the post-*Teague* cases that have contemplated retroactivity, see Ezra D. Landes, *A New Approach To Overcoming the Insurmountable "Watershed Rule" Exception To* Teague*'s Collateral Review Killer*, 74 MO. L. REV. 1, 10 n.67 (2009).

104 *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1990) ("Whatever one may think of the importance of respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception."); *Beard*, 542 U.S. at 420 (citing Saffle v. Parks, 494 U.S. 485, 495 (1990)); O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)); Gray v. Netherland, 518 U.S. 152, 170 (1996) (citing *Saffle*, 494 U.S. at 495) (all reaffirming *Gideon*'s position as the quintessential watershed rule).

105 372 U.S. 335, 345 (1963).

106 Teague v. Lane, 489 U.S. 288, 313 (1989).

exception.[107] Moreover, scholars have identified an inherent conflict in the Court's reasoning in *Teague*, which has led to much confusion among the lower courts when applying *Teague*'s retroactivity principles.[108] The *Teague* Court made clear that old rules are retroactive, while new rules are not. Thus, in order for a court to deny retroactivity under *Teague*, it must first find that the rule in question is "new" because it was not "dictated by precedent existing at the time the defendant's conviction became final."[109] Nevertheless, at the same time, the court must find that the "new" rule does not fall under *Teague*'s watershed exception, because it does not "'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding."[110] Ezra D. Landes, a California criminal defense attorney, has poignantly identified this conflict as follows: "the Court must eschew obviousness to satisfy the need for newness, while at the same time acknowledging obviousness to avoid 'watershedness.'"[111] This inherent tension rears its ugly head every time the Court considers retroactivity under *Teague*, and yet the Court has repeatedly ignored the conflict and struck down every retroactivity claim premised on *Teague*'s watershed exception.

As soon as the Court decided *Padilla* in 2010, lower courts were inundated with habeas petitions arguing for retroactivity. The surge of habeas petitions has forced lower courts to confront the inherent tension in *Teague* once again, in attempting to determine whether the rule announced in *Padilla* represents a new constitutional rule, and, if so, whether *Padilla* falls under *Teague*'s watershed exception. State courts and lower federal courts today remain split on this issue.[112] To

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107 *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1817 (1991) ("Equally troubling is the narrowness of the exceptions to *Teague*'s rule barring consideration of new law claims."). *See also* Barry Friedman, Pas De Deux: *The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2496 & n.143 (1993) (stating that "*Teague* should be overruled," and that quite "[f]rankly, the Court ought to be just a little embarrassed with itself"); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 50 n.155 (1991) (citing additional articles that criticize *Teague*).

108 *See Teague*, 489 U.S. at 301 ("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.").

109 *Id.* (emphasis omitted).

110 Tyler v. Cain, 533 U.S. 656, 665 (2001) (quoting *Teague*, 489 U.S. at 311 (emphasis omitted)).

111 Landes, *supra* note 103, at 16.

112 *E.g.*, *compare* United States v. Orocio, 645 F.3d 630, 634 (3d Cir. 2011) (finding that *Padilla* did not announce a new rule, and therefore applies retroactively) *with* Chaidez v. United States, 655 F.3d 684, 690 (7th Cir. 2011) *and* United States v. Chang Hong, 671

date, no court has found *Padilla* to apply retroactively under *Teague*'s watershed exception. However, in light of the significant impact that *Padilla* stands to have on Sixth Amendment jurisprudence, it may be time for the courts to finally recognize *Padilla* as the first case in history to fall under *Teague*'s "watershed" exception.

a. Old Rule, Retroactive

It was only a matter of time before the courts encountered a *Padilla* claim that satisfied both *Strickland* prongs and would thus be forced to determine the retroactivity of *Padilla*'s central holding. The Third Circuit Court of Appeals, the first federal appellate court to encounter such a claim, took up the issue in the summer of 2011 in *United States v. Orocio*.[113] The Third Circuit's holding in *Orocio* laid a foundation for understanding *Padilla*'s rule as one that applies retroactively on collateral review.

Gerald Orocio pled guilty to one count of possession of a controlled substance on October 7, 2004.[114] This conviction rendered Orocio automatically deportable, and removal proceedings were initiated against Orocio several years later.[115] Orocio then filed a petition for writ of error coram nobis[116] to challenge the plea conviction. Orocio argued that his attorney's failure to advise him of the immigration consequences of pleading guilty to a federal drug charge constituted ineffective assistance of counsel in violation of the Sixth Amendment.[117] A New Jersey District Court denied Orocio's petition, and Orocio appealed. While Orocio's appeal was still pending, the Supreme Court decided *Padilla*.[118] Seizing this opportunity, Orocio sought to retroactively avail himself of the rule established in *Padilla*.[119]

F.3d 1147, 1158 (10th Cir. 2011) (both finding that *Padilla* announced a new rule that did not fall under either *Teague* exception, and that *Padilla* therefore did not apply retroactively).

113 *Orocio*, 645 F.3d at 633–34.

114 *Id.* at 634.

115 *Id.*

116 Federal courts have the power to vacate a judgment of conviction by granting the ancient writ of error coram nobis as a last resort to petitioners who have exhausted or waived any statutory right of review, and who thus cannot obtain collateral relief through any alternative remedy. This extraordinary remedy is granted "only under circumstances compelling such action to achieve justice." United States v. Morgan, 346 U.S. 502, 511 (1954).

117 *Orocio*, 645 F.3d at 634.

118 *Id.* at 633.

119 *Id.* at 637.

Acknowledging that Orocio had established a prima facie case under *Strickland*, the *Orocio* court set out to tackle the issue of *Padilla*'s retroactive application to Orocio's claim. In order to do so, the court recognized that it would need to determine whether *Padilla* announced a new rule or merely applied *Strickland* in a new context. Under *Teague*, an old rule would apply retroactively, while a new rule would not, unless it fell under one of *Teague*'s narrow exceptions. The court in *Orocio* identified three principles that guide the "new rule" inquiry:

> (1) "case law need not exist on all fours to allow for a finding under *Teague* that the rule at issue was dictated by . . . precedent," (2) "*Strickland* is a rule of general applicability which asks whether counsel's conduct was objectively reasonable and conformed to professional norms based 'on the facts of the particular case, viewed as of the time of counsel's conduct,'" and (3) "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."[120]

The court acknowledged that *Padilla* was indeed the first Supreme Court case to apply *Strickland* to an attorney's failure to advise his client about the deportation consequences of a guilty plea.[121] But although no case law existed "on all fours" with *Padilla*,[122] the *Orocio* court nonetheless believed that *Strickland* included enough breathing room to have encompassed Jose Padilla's claim without creating a new rule of criminal procedure.[123] In the court's view, when Jose Padilla pled guilty, it was "hardly novel" for an attorney to provide advice to his client at the plea stage concerning the immigration consequences of a guilty plea.[124]

The Third Circuit is not alone in holding this position. District Courts sitting in the Ninth Circuit similarly hold that *Padilla* represents an "old rule" for *Teague* purposes and should thus apply retroactively on collateral review.[125] The current leading case in the Ninth

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120 *Id.* at 639 (citation omitted) (emphasis omitted) (summarizing the effect of *Teague* and *Strickland* on the inquiry into whether *Padilla* announced a new rule).

121 *Id.* at 637 ("It is true that the precise question of whether the civil removal consequences of a plea are within the scope of *Strickland* had never been addressed by the Supreme Court before *Padilla*.").

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

123 *Id.* at 640–41.

124 *Id.* at 639 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) ("For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the [removal] consequences of a client's plea.")).

125 Although the Ninth Circuit Court of Appeals has not ruled on this issue, federal district courts in the Ninth Circuit almost unanimously apply *Padilla* retroactively. For examples of the Ninth Circuit's retroactive application of *Padilla*, see *United States v. Hurtado-Villa*, Nos. CV-10-01814, CR-08-01249, 2011 WL 4852284, at *6 (D. Ariz. Aug. 12, 2011); *Song v. United States*, Nos. CV 09-5184, CR 98-0806, 2011 WL 2533184, at *2 n.1 (June 27, 2011);

Circuit is *United States v. Hubenig*.[126] Andrew Hubenig's attorney advised him to plead guilty to a number of offenses committed while he was visiting Yosemite National Park. At the time Hubenig's attorney offered this advice, he was aware that Hubenig was a Canadian citizen, and nonetheless failed to discuss with Hubenig whether a guilty plea to the pending charges would affect his immigration status. On his attorney's advice, Hubenig pled guilty, rendering him automatically deportable. Hubenig filed for a writ of error coram nobis alleging a Sixth Amendment violation based on the holding in *Padilla*.

Like the court in *Orocio*, the *Hubenig* court held that *Padilla* merely reiterated the old *Strickland* rule in a new context, and would therefore apply retroactively to Hubenig's claim on collateral review.[127] As justification for this holding, the Hubenig court cited three recent Supreme Court opinions applying the *Strickland* test in a variety of different factual contexts: *Rompilla v. Beard*,[128] *Wiggins v. Smith*,[129] and *Williams v. Taylor*.[130] The *Hubenig* court noted that none of these cases have been afforded new rule status under *Teague*.[131] Curiously, however, each of the cases cited in Hubenig required the Supreme Court to review decisions by state courts that were "contrary to, or involved an unreasonable application of" the *Strickland* standard, under 28

United States v. Krboyan, Nos. 1:10-cv-02016, 1:02-cr-05438, 2011 WL 2117023, at *9 (E.D. Cal. May 27, 2011).

126 No. 6:03-mj-040, 2010 WL 2650625 (E.D. Cal. July 1, 2010).

127 *Id.* at *8; *accord* Jiminez v. Holder, No. 10-cv-1528, 2011 WL 3667628, at *4 (S.D. Cal. Aug. 19, 2011); United States v. Reid, No. 1:97-CR-94, 2011 WL 3417235, at *3–4 (S.D. Ohio Aug. 4, 2011); Song v. United States, Nos. CV 09-5184, CR 98-0806, 2011 WL 2940316, at *2 (C.D. Cal. July 15, 2011); United States v. Dass, No. 05-140 (3), 2011 WL 2746181, at *4–5 (D. Minn. July 14, 2011); United States v. Krboyan, Nos. 1:02-cr-05438, 1:10-cv-02016, 2011 WL 2117023, at *9 (E.D. Cal. May 27, 2011); United States v. Zhong Lin, No. 3:07-CR-44, 2011 WL 197206, at *1–2 (W.D. Ky. Jan. 20, 2011); Luna v. United States, No. 10CV1659, 2010 WL 4868062, at *4 (S.D. Cal. Nov. 23, 2010); Al Kokabani v. United States, Nos. 5:06-CR-207-FL, 5:08-CV-177-FL, 2010 WL 3941836, at *6 (E.D.N.C. July 30, 2010) (district court cases that remain good law within their circuits as of March 2012, holding that *Padilla* did not announce a new rule).

128 545 U.S. 374, 383 (2005) (applying *Strickland* to defense counsel's failure to examine the court file on defendant's prior conviction for rape and assault during the sentencing phase of a capital murder trial).

129 539 U.S. 510, 524, 533 (2003) (applying *Strickland* to counsel's decision not to expand investigation of petitioner's life history for mitigating evidence beyond presentence investigation ("PSI") report and department of social services records).

130 529 U.S. 362, 390 (2000) (applying *Strickland* to defense attorney's failure to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial).

131 United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *6 (E.D. Cal. July 1, 2010).

U.S.C. § 2254(d)(1).[132] In all of these cases, lower federal courts reviewing the state court decisions on habeas review had previously identified § 2254(d)(1) as the governing standard for the given set of facts.[133] These cases are easily distinguishable from *Padilla*. *Padilla* came to the United States Supreme Court directly from the Supreme Court of Kentucky, without going through the traditional line of habeas review in lower federal courts. Thus, the Supreme Court in *Padilla* never even considered whether the lower court's decision was "contrary to, or involved an unreasonable application of" the *Strickland* standard. Instead, the Supreme Court, for the first time in history, reinterpreted the underlying principles in *Strickland* to apply in a completely new factual context. Plainly put, *Padilla* was not was not merely a reiteration of the old *Strickland* standard. For that reason alone *Padilla* could be considered a "new rule" for *Teague* purposes.

Despite this potential flaw, the reasoning in *Orocio* and *Hubenig* represents a step in the right direction. Both courts highlighted the Supreme Court's statement in *Padilla* that it had "given serious consideration" to the argument that its ruling would open the "floodgates" to new litigation challenging prior guilty pleas.[134] The *Orocio* and *Hubenig* courts were correct in arguing that the entire "floodgates" discussion would have been unnecessary if the Supreme Court intended *Padilla* to be a new rule that would apply only prospectively.[135] However, by automatically concluding that *Padilla* was therefore intended to be an "old rule," these courts ignored the possibility that the Supreme Court intended *Padilla* to be a "new rule" that nevertheless applied retroactively through one of the *Teague* exceptions. It is thus useful to review those cases that have considered the application of *Teague*'s "watershed" exception.

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132 Pursuant to 28 U.S.C. § 2254(d)(1), federal courts hold habeas jurisdiction over individuals in state custody when their conviction in state court resulted from a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2006).

133 An individual in state custody may apply for habeas relief after exhausting his state court remedies, 28 U.S.C. § 2254(b)(1)(A) (2006), if the decision in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

134 *Hubenig*, 2010 WL 2650625, at *7; United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) (both citing Padilla v. Kentucky, 130 S. Ct. 1473, 1484–85 (2010)).

135 *Hubenig*, 2010 WL 2650625, at *7; *Orocio*, 645 F.3d at 641.

b. New Rule, Not Retroactive

The Seventh and Tenth Circuits have now affirmatively recognized *Padilla* as a "new rule" for *Teague* purposes, and have thus declined to extend retroactive application to *Padilla*'s Sixth Amendment standards pursuant to *Teague*'s non-retroactivity rule. In August of 2011, the Seventh Circuit Court of Appeals considered a coram nobis petition filed on behalf of Roselva Chaidez, an alien subjected to deportation following her conviction for mail fraud.[136] Chaidez's petition alleged that her trial counsel offered ineffective assistance by failing to inform her that her guilty plea carried the risk of deportation.[137] As Chaidez's conviction became final prior to the Supreme Court's decision in *Padilla*, Chaidez sought retroactive application of the Sixth Amendment standards announced in *Padilla*.[138] Applying *Teague*, the *Chaidez* court held that *Padilla* announced a new rule of criminal procedure that did not apply retroactively on collateral review.[139]

In arriving at this conclusion, the court acknowledged that *Padilla* was in fact an extension of *Strickland*. However, the court correctly noted that this fact does not speak to whether *Padilla* announced a new rule.[140] In deciding whether *Padilla* was a new rule, the court considered whether the result in *Padilla* was dictated by prior precedent at the time that Jose Padilla's conviction became final.[141] The court concluded that *Padilla*'s outcome was "susceptible to reasonable debate" at the time that *Padilla* was decided.[142] That the members of the *Padilla* Court expressed such an "array of views" indicated to the *Chaidez* court that *Padilla* was not, in fact, dictated by precedent. In the *Chaidez* court's view, the *Padilla* concurrence left no doubt that Justice Alito and Chief Justice Roberts considered the case to be ground-breaking.[143] This sentiment of the concurrence, coupled with

136 Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011).

137 *Id.*

138 *Id.* at 688.

139 *Id.* at 694.

140 *Id.* at 692 (citing Butler v. McKellar, 494 U.S. 407, 415 (1990) ("[T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*.")).

141 *Id.* at 691–92.

142 *Id.* at 689, 694.

143 *Id.* at 689 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1488, 1491, 1492 (2010) (Alito, J., concurring) (referring to the majority's holding as a "dramatic departure from precedent," "a major upheaval in Sixth Amendment law," and a "dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment")).

the fact that two Justices issued a dissenting opinion chiding the majority for breaking with precedent, convinced the *Chaidez* court that *Padilla* announced a "new rule" that was not dictated by prior precedent.[144]

In April of this year, the Supreme Court granted a writ of certiorari to the parties in *Chaidez*. The Court's decision this fall will settle once and for all whether *Padilla* created a "new rule" that is subject to further *Teague* analysis. However, because both parties in *Chaidez* have stipulated that if *Padilla* announced a new rule, neither of *Teague*'s exceptions to non-retroactivity would apply,[145] the Supreme Court is not likely to weigh in on *Padilla*'s qualification under *Teague*'s watershed exception.

To date, at least three circuit courts of appeals have considered the application of the second *Teague* exception to *Padilla*'s ruling. In August of 2011, the Tenth Circuit became the first Court of Appeals to weigh in on the new circuit split in *United States v. Chang Hong*.[146] In September of 2010, several months after the Supreme Court decided *Padilla*, Chang Hong filed a motion to set aside his guilty plea, alleging that his counsel offered ineffective assistance by failing to inform him that pleading guilty to his offense would subject him to automatic deportation. Noting that the Supreme Court had never applied *Strickland* to the collateral consequences of conviction, the Chang Hong court followed *Chaidez*'s lead and concluded that *Padilla* announced a new rule that was not dictated by prior precedent.[147]

The court's reasoning behind this part of the conclusion is persuasive, and has found support among many lower courts, as well as from the Fifth Circuit Court of Appeals this past May.[148] However, the

144 *Id.* at 689–90.

145 *Id.* at 688. *See also* Petition for Writ of Certiorari, *supra* note 14, at 7.

146 671 F.3d 1147 (10th Cir. 2011).

147 *Id.* at 1155.

148 *See* United States v. Amer, 681 F.3d 211, 212–13 (5th Cir. 2012) ("[W]e join the Seventh and Tenth Circuits in holding that *Padilla* announced a 'new' rule within the meaning of *Teague*."). *See also* Ufele v. United States, 825 F. Supp. 2d 193, 197 (D.D.C. Nov. 18, 2011); United States v. Garcia, Nos. 2:88-cr-31-FtM-29DNF, 2:89-cr-32-FtM-29, 2011 WL 5024628, at *3 (M.D. Fla. Oct. 21, 2011); Sarria v. United States, No. 11-20730-CIV, 2011 WL 4949724, at *5 (S.D. Fla. Oct. 18, 2011); United States v. Abraham, No. 8:09CR126, 2011 WL 3882290, at *2–3 (D. Neb. Sept. 1, 2011); Zoa v. United States, Civ. No. 10-2823, Cr. No. 06-235, 2011 WL 3417116, at *2 (D. Md. Aug. 1, 2011); United States v. Chapa, 800 F. Supp. 2d 1216, 1221–22 (N.D. Ga. July 12, 2011); Llanes v. United States, No. 8:11-cv-682-T-23TBM, 2011 WL 2473233, at *2 (M.D. Fla. June 22, 2011); Ellis v. United States, 806 F. Supp. 2d 538, 548 (E.D.N.Y. June 3, 2011); Dennis v. United States, 787 F. Supp. 2d 425, 429 (D.S.C. Apr. 19, 2011); Mendoza v. United States, 774 F. Supp. 2d 791, 797 (E.D. Va. Mar. 24, 2011); Doan v. United States, 760 F. Supp. 2d 602, 605 (E.D. Va. Jan. 4, 2011); United States v. Hough, No. 2:02-cr-00649-1, 2010 WL 5250996, at *3–4 (D.N.J. Dec. 17,

deductions that followed from this conclusion are less compelling. Because the parties in *Chang Hong* had not filed any stipulations, the court next took it upon itself to determine whether *Padilla* fell under *Teague*'s "watershed" exception.[149] The court identified *Gideon* as the paradigmatic example of a case that fit this exception. But when called upon to determine whether *Padilla* similarly fit the exception, the only answer the court could give was, "*Padilla* is not *Gideon*."[150]

As support for its "*Padilla* is not *Gideon*" stance, the *Chang Hong* court stated:

> [*Padilla*] does not affect the determination of a defendant's guilt . . . . *Padilla* would only be at issue in cases where the defendant admits guilt and pleads guilty. In such situations, because the defendant's guilt is established through his own admission . . . *Padilla* is simply not germane to concerns about risks of inaccurate convictions or fundamental procedural fairness.[151]

This same unsubstantiated argument was again advanced several months later by the Eleventh Circuit in *Figuereo-Sanchez v. United States*.[152] In *Figuereo-Sanchez*, the Eleventh Circuit assumed, for argument's sake, that Padilla announced a new rule,[153] but refused to apply the rule retroactively because it concluded that *Padilla* did not fall under the second *Teague* exception.[154] Although the court acknowledged that "a guilty plea as a result of ineffective assistance of counsel may result in an inaccurate conviction,"[155] it refused to accept that "ineffective assistance of counsel . . . is on par with deprivation of counsel under *Gideon* in terms of its presumed effect on the accuracy of the proceedings."[156]

The "*Padilla* is not *Gideon*" argument arose most recently in the Fourth Circuit's decision denying *Padilla*'s retroactive effect in *United*

2010); United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010); United States v. Gilbert, No. 2:03-cr-00349-1, 2010 WL 4134286, at *3 (D.N.J. Oct. 19, 2010) (district court cases that remain good law within their respective circuits as of March 2012, holding that *Padilla* announced a new rule).

149 United States v. Chang Hong, 671 F.3d 1147, 1151 (10th Cir. 2011). Because *Padilla*'s rule is procedural and not substantive, the Court did not consider the first *Teague* exception. *Id.* at 1157.

150 *Id.* at 1158.

151 *Id.*

152 678 F.3d 1203 (2012), *petition for cert. filed*, 81 U.S.L.W. 3092 (U.S. July 27, 2012) (No. 12-164).

153 *Id.* at 1208.

154 *Id.* at 1208–09.

155 *Id.* at 1209.

156 *Id.*

States v. Mathur.[157] As compared to *Gideon*, the *Mathur* court found that *Padilla* was "much more limited in scope" and had a "far less direct and profound" relationship with the "accuracy of the factfinding process."[158] The Fourth Circuit noted that *Padilla* violations only occur once a defendant has pled guilty and submitted himself to sentencing. In the court's view, "[w]hen such a defendant is surprised at a later date by the initiation of deportation proceedings that were not forecast by defense counsel, the injustice, while real, nevertheless does not cast doubt on the verity of the defendant's admission of guilt."[159]

This position ignores the many petitioners' arguments that they pled guilty not because they admitted guilt, but because their attorneys advised them to accept a plea deal to avoid harsher consequences that could potentially arise out of a wrongful conviction for a greater charged offense. If petitioners knew that a guilty plea could lead to deportation, then they might choose to accept the risk of wrongful conviction if, in doing so, they could potentially avoid removal. In such situations, *Padilla* would certainly be "germane to concerns about risks of inaccurate convictions."[160]

The "*Padilla* is not *Gideon*" argument can also be seen in a number of lower court decisions considering whether *Padilla* fits *Teague*'s watershed exception,[161] and to date, no court has truly provided an adequate analysis of the possibility. However, the Supreme Court may have the opportunity to weigh in on the possibility this fall when it rules in *Chaidez*.[162] Indeed, amicus briefs filed with the Supreme Court in Chaidez's case indicate that many, if not most, immigrants, when properly advised by counsel, would choose to go to trial before

157 685 F.3d 396, 399 (2012), *petition for cert. filed*, 2012 WL 4842975 (U.S. Oct. 9, 2012) (No. 12-439).

158 *Id.* (quoting Whorton v. Bockting, 549 U.S. 406, 419 (2007)).

159 *Id.* at 400.

160 *See* United States v. Chang Hong, 671 F.3d 1147, 1158 (10th Cir. 2011).

161 *See, e.g.*, Rodriguez v. United States, No. 1:10-CV-23718, 2011 WL 3419614, at *7 (S.D. Fla. Aug. 4, 2011); Doan v. United States, 760 F. Supp. 2d 602, 606 (E.D. Va. 2011) ("'However laudable' a rule requiring that noncitizen defendants be informed of the immigration consequences of plea bargains might be, such a rule 'has none of the primacy and centrality of the rule adopted in *Gideon*.'" (quoting Beard v. Banks, 542 U.S. 406, 420 (2004))).

162 The parties in *Figuereo-Sanchez* and in *Mathur* have also recently filed petitions for certiorari, which the Court will likely consider sometime after it hears oral arguments in *Chaidez*. It is likely that the court will defer action on these petitions until after it has decided *Chaidez*, since *Chaidez* will likely be dispositive on the issue of *Padilla*'s retroactivity. However, it is possible that the Court's ruling in Chaidez might fail to answer the question of whether *Padilla* falls under the second *Teague* exception. If that were the case, these pending petitions for certiorari might become more appealing to the Court.

a jury rather than face the automatic immigration consequences of a guilty plea.[163] In light of this argument, the Supreme Court might choose to acknowledge that *Padilla*'s ruling truly affects the accuracy of criminal convictions.

2. *Identifying the Tension in Determining* Padilla*'s Retroactivity*

To date, no federal or state court has extended retroactive treatment to *Padilla* under the second *Teague* exception reserved for "watershed rules of criminal procedure." However, a number of courts have danced around the issue, and at the very least, have left room to argue for this possibility. Consider, for example, the opinion issued in *Santos-Sanchez v. United States*.[164] Jesus Natividad Santos-Sanchez was charged with aiding and abetting the illegal entry of a Mexican alien. Santos-Sanchez pleaded guilty to the charge and was sentenced to probation. Because Santos-Sanchez was a resident alien at the time of his plea, the resulting conviction rendered Santos-Sanchez automatically deportable upon completion of his probation. Santos-Sanchez filed a writ of error coram nobis, alleging that his attorney had offered ineffective assistance when he failed to inform him about the immigration consequences of his guilty plea.[165] Santos-Sanchez's petition made it all the way up to the United States Supreme Court, but during the pendency of Santos-Sanchez's petition, the Supreme Court decided *Padilla*. Santos-Sanchez's case was thus remanded for further proceedings consistent with *Padilla*,[166] perhaps signaling to the lower court the potential for retroactive application of *Padilla*'s ruling.[167]

On remand, the District Court for the Southern District of Texas attempted to determine whether *Padilla* applies retroactively, and de-

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163 *See* Brief of National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center and Immigrant Defense Project as Amici Curiae Supporting of Petition for Writ of Certiorari, *supra* note 19, at 10 (noting that the immigration consequences of a conviction are often the greatest priority to immigrant clients).

164 No. 5:06-cv-153, 2011 WL 3793691 (S.D. Tex. Aug. 24, 2011).

165 *Id.* at *1.

166 Santos-Sanchez v. United States, 130 S. Ct. 2340 (2010).

167 The Supreme Court's decision to remand *Santos-Sanchez*, rather than to take the opportunity to rule on the retroactivity of *Padilla* through the *Santos-Sanchez* vehicle, could be interpreted to imply *Padilla*'s retroactive effect. *See, e.g.* Danielle M. Lang, Comment, Padilla v. Kentucky*: The Effect Of Plea Colloquy Warnings On Defendants' Ability To Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 971–72 (2012) (arguing that *Padilla* should apply retroactively, but only because *Padilla* was not a "new rule" for *Teague* purposes). Although not dispositive on the issue, the Court's decision to remand may have served as an implicit starting point for the *Santos-Sanchez* court's retroactivity analysis on remand.

cided outright that it must apply retroactively, because, in the court's view, *Padilla* itself came to the Supreme Court on collateral review, and it "both announced and applied its own rule."[168] The court applied *Teague* and concluded that, had the rule not been intended to apply retroactively, it would not have applied to the petitioner in *Padilla*, but would only apply to subsequent defendants bringing *Padilla* claims.[169] The court then worked backwards to determine which of three scenarios applied to *Padilla*: "(1) *Padilla* announced an old rule; (2) *Padilla* announced a new rule and the first *Teague* exception applies; or (3) *Padilla* announced a new rule and the second *Teague* exception applies." All three scenarios—and only these three scenarios—would lead to retroactivity.[170]

The court ultimately discarded all three scenarios. Like the *Chaidez* and *Chang Hong* courts, the *Santos-Sanchez* court determined that *Padilla* did not reiterate an old rule, because reasonable jurists could have disagreed about the requirements of the Sixth Amendment prior to *Padilla*.[171] The court likewise dismissed the second scenario, because *Padilla* announced a procedural rather than a substantive rule, and thus did not fall under the first *Teague* exception.[172] Finally, in a total of five sentences, the court dismissed the possibility that *Padilla* fell under the second *Teague* exception, offering the same "*Padilla* is not *Gideon*" argument advanced by the *Chang Hong* court.[173]

Thoroughly confounded, the court ultimately abandoned its quest, and concluded that "*Padilla*'s holding could not be readily reconciled with the *Teague* framework."[174] Nevertheless, because all roads would lead to retroactivity, and would thus require the court to

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168 *Santos-Sanchez*, No. 5:06-cv-153, 2011 WL 3793691, at *3 & *10 (S.D. Tex. Aug. 24, 2011). The Court discussed *Graham v. Collins*, in which the Supreme Court made it clear that when a case is on collateral review and the holding sought by the defendant would announce a new rule that does not fit a *Teague* exception, the Court will refuse to apply or announce the rule in that case. 506 U.S. 461, 463, 477–78 (1993).

169 *Santos-Sanchez*, No. 5:06-cv-153, 2011 WL 3793691 at *10. As is discussed below, this premise is flawed. The Supreme Court took Padilla's case on *direct* review of the *state's collateral proceedings*—not on collateral review of a state court decision. Under *Danforth v. Minnesota*, 128 S.Ct. 1029, 1038 (2008), *Teague*'s retroactivity doctrine does not bind state courts in state collateral proceedings. Therefore, *Teague* would not have applied during the Supreme Court's direct review of Kentucky's collateral proceedings.

170 *Santos-Sanchez*, 2011 WL 3793691 at *3.

171 *Id.* at *6–9.

172 *Id.* at *9–10.

173 *Id.* at *10 ("[T]he Supreme Court has pointed to *Gideon v. Wainwright*, as the prototypical example of a decision that implicates the second *Teague* exception. . . . In light of this incredibly high threshold, it seems improper to consider *Padilla* holding (sic) to be a 'watershed rule of criminal procedure.'").

174 *Id.*

reach the merits of the petitioner's claims, the court found it unnecessary to choose among the three unsatisfactory scenarios.[175]

The opinion in *Santos-Sanchez* may not stand as the most pristine specimen of legal analysis, and there are certainly flaws in the path taken by the *Santos-Sanchez* court. To begin with, the court seems to have muddled the procedural posture of *Padilla* itself. Although the court in *Santos-Sanchez* indicated that *Padilla* was before the Supreme Court on "collateral review," the court failed to take note of the fact that the Supreme Court took Padilla's case on *direct* review of the *state's collateral proceedings*—not on collateral review of a state court decision. This is an important distinction, because under existing Supreme Court precedent, *Teague*'s retroactivity doctrine does not bind state courts in state collateral proceedings.[176] Thus, the fact that the Supreme Court "both announced and applied its own rule"[177] in *Padilla* does not necessarily indicate that the *Padilla* ruling was intended to apply retroactively on federal habeas to cases that became final on direct review prior to the *Padilla* decision.

However, if one were to assume, for argument's sake, the accuracy of the *Santos-Sanchez* court's initial premise—that *Padilla* was intended to announce a retroactive rule because the Supreme Court applied that rule to the *Padilla* petitioner himself—the logical reasoning that followed from that premise is sound. By working backwards, the *Santos-Sanchez* court seems to have identified the underlying tension created by retroactivity analysis with respect to *Padilla*. The court implicitly recognized both that *Padilla* announced a new rule, and that it was intended to apply retroactively. The court scarcely addressed the possibility that *Teague*'s watershed exception would apply to *Padilla*, which is unsurprising given courts' unrelenting reluctance to apply the exception.

In a footnote, the *Santos-Sanchez* court "speculate[d] whether *Padilla* marked the announcement of a third 'new rule' exception under *Teague* that applies exclusively to *Padilla*'s holding because" of the unique nature of deportation.[178] Although it is possible that *Padilla* created a new exception, such a construct seems unnecessary, given the possibility that *Padilla* fits into the existent *Teague* framework. Nevertheless, the court seems to be on to something by recognizing

175 *Id.*

176 *See* Danforth v. Minnesota, 128 S. Ct. 1029, 1038 (2008) (holding that *Teague* did not "explicitly or implicitly constrain[] the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas").

177 *Santos-Sanchez*, No. 5:06-cv-153, 2011 WL 3793691 at *10.

178 *Id.* at *10 n.99.

that *Padilla* should be an exception to *Teague*'s general presumption against retroactivity. It seems that *Teague*'s watershed exception would resolve the paradox identified in *Santos-Sanchez*—a paradox that has seemed to plague jurists and scholars alike in the debate over *Padilla*'s retroactivity.[179]

IV. AN ARGUMENT FOR *PADILLA* AS A TRULY "WATERSHED" RULING

Despite many courts' arguments to the contrary, *Padilla* seems to have created a "new" constitutional norm that has marked a "major upheaval in Sixth Amendment law."[180] Prior to 2010, federal courts adhered to the belief that deportation was a purely civil matter, and as such, could at best be considered a collateral consequence of conviction. *Padilla* overcame this formalistic distinction by noting that the "landscape of federal immigration law has changed dramatically over the last 90 years."[181] In his majority opinion, Justice Stevens sought a middle ground, noting that deportation resulting from a criminal conviction is now, "because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence."[182] Due to the changes in federal immigration law, the Supreme Court recognized the need to institute a change in its Sixth Amendment jurisprudence, and in doing so, the Court broke new ground in abandoning the divide between criminal and civil labels in the deportation context.[183] In fact, the Court im-

179 Dan Kesselbrenner, writing for the National Immigration Project of the National Lawyers Guild, briefly advanced this argument in an advisory to practitioners regarding the impact of *Padilla* on habeas claims. Kesselbrenner argues that *Padilla* did not announce a new rule of criminal procedure and should thus apply retroactively on habeas review. However, he argues in the alternative that if *Padilla* is seen to announce a new rule, practitioners should argue that the rule is "watershed" in nature, and subject to the second *Teague* exception. Dan Kesselbrenner, Nat'l Immigration Project of the Nat'l Lawyers Guild, *A Defending Immigrants Partnership Practice Advisory: Retroactive Applicability of* Padilla v. Kentucky, 2–5 (2011), *available at* www.nationalimmigrationproject.org/legal resources/practice_advisories/padilla%20retro%20revised%203-2011.pdf. Kesselbrenner does, however, admit that this argument may be difficult to make in light of the fact that other "landmark" decisions like *Crawford v. Washington* have not been identified as qualifying for "watershed" status.

180 Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring).

181 *Id.* at 1478.

182 *Id.* at 1482.

183 Many scholars have likewise recognized the fact that *Padilla* "broke new ground" in Sixth Amendment jurisprudence. For example, in a UCLA Law Review article, Professor Daniel Kanstroom referred to *Padilla* as a "pathbreaking decision" that created a "new constitutional norm." Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1463, 1472 (2011). *See also* Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v.

plicitly recognized the novelty of its position when it acknowledged that its holding would recognize new grounds for attacking the validity of a guilty plea.[184] Although the Supreme Court had never applied the collateral versus direct distinction to define the scope of reasonably effective assistance of counsel, the result in *Padilla* certainly was not dictated by prior lower court precedent,[185] and at the time *Padilla* was decided, its result was certainly in dispute even among members of the nation's highest court.[186] In light of the Court's precedent at the time *Padilla* arrived on its docket, it seems relatively clear that *Padilla* did, in fact, announce a new rule of criminal procedure.

So what, then, is left of the retroactivity question? As outlined above, many courts have ruled that *Padilla* cannot apply retroactively in light of the conclusion that *Padilla* announced a new rule.[187] However, these premises entirely ignore the possibility that *Padilla* falls under *Teague*'s rare watershed exception.

Although courts have repeatedly underscored the extreme rarity with which *Teague*'s watershed exception would apply, *Padilla* is the ideal candidate for "watershed" status, if ever one were to exist.[188] As

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Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 CRIM. JUST. 36, 37 (2010) ("[T]he U.S. Supreme Court broke new ground in holding that a criminal defense lawyer had failed to provide his noncitizen client competent representation as required by the Sixth Amendment when he did not warn him that he was almost certain to be deported if he pled guilty.").

184 *Padilla*, 130 S. Ct. at 1485 ("Likewise, although we must be especially careful about recognizing *new* grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial." (emphasis added)).

185 *See* Chin & Holmes, *supra* note 36, at 697, 699 (noting that "virtually all jurisdictions"—including "eleven federal circuits, more than thirty states, and the District of Columbia"—"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation).

186 As was noted by the *Chaidez* court, the fact "[t]hat the members of the *Padilla* Court expressed such an 'array of views'" suggests "that *Padilla* was not dictated by precedent." Chaidez v. United States, 655 F.3d 684, 689 (7th Cir. 2011).

187 *See, e.g.*, United States v. Chang Hong, 671 F.3d 1147, 1150, 1156–57 (10th Cir. 2011) ("*Padilla* does not apply retroactively to cases on collateral review"); *Chaidez*, 655 F.3d at 686 (reversing the District Court decision applying *Padilla* retroactively).

188 Indeed, many legal scholars have referred to *Padilla* as a "watershed" decision, without regard to its retroactivity. *See, e.g.*, Bibas, *supra* note 20, at 1118 (remarking that the Supreme Court's decision in *Padilla* marked a "watershed in the Court's approach to regulating plea" proceedings); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1299, 1332 (2011) (stating that *Padilla* may "mark[] the beginning of a significant reconceptualization of the nature of deportation," representing a "critical pivot point" in the Court's right to counsel jurisprudence); Duncan Fulton, Comment, *Emergence of a Deportation Gideon?: The Impact of* Padilla v. Kentucky *on Right to Counsel Jurisprudence*, 86 TUL. L. REV. 219, 244 (2011) (arguing that *Padilla* represents a "watershed moment in Sixth Amendment jurisprudence").

the parties in *Chaidez* have argued to the Supreme Court, the question decided in *Padilla* is one of "exceptional importance" which "go[es] to the core of the legitimacy of criminal convictions."[189] This is because, as Justice Stevens noted in the *Padilla* majority, in light of changes to current immigration laws, which now make deportation virtually inevitable in a large number of cases, "accurate legal advice for noncitizens accused of crimes has never been more important."[190] Indeed, the majority based its opinion on the fact that "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."[191] If armed with the knowledge that a conviction is almost certain to land a defendant in immigration court, a defendant may very well choose to risk going to trial rather than accept a plea deal offering a reduced sentence. True, many of the noncitizen defendants who have accepted plea deals have done so with full knowledge of their own guilt. However, it is also possible that many innocent individuals have accepted guilty pleas simply because the risk and inconvenience of going to trial were much greater than the consequences resulting from the given plea deal. Simply put, information about the deportation consequences of one's actions may be the most powerful tool available to noncitizens when interacting with the criminal justice system. By depriving a noncitizen defendant of this powerful tool, the system denies him a constitutional right that stands to have a profound impact on the "fundamental fairness" of the criminal proceedings against him.

It is thus clear that *Padilla*'s rule will have a significant impact on criminal procedure in the immigration context going forward. However, the question remains whether *Padilla* is sufficiently important to rise to the level of a "watershed rule of criminal procedure" that warrants retroactivity under *Teague*. Although courts have yet to extend this exception to a single case arising on collateral review, federal and state courts exalt the rule announced in *Gideon v. Wainwright*[192] as one that is deserving of the "watershed" title. In *Gideon*, the Supreme Court pronounced that the Sixth Amendment requires that indigent criminal defendants in all state and federal felony cases be afforded legal representation.[193] In the majority opinion, Justice Black highlighted that "[r]eason and reflection require us to recognize that in

189 Petition for Writ of Certiorari, *supra* note 14, at 16.
190 Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).
191 *Id.*
192 372 U.S. 335 (1963).
193 *Id.* at 343–45.

our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[194]

It is unsurprising that *Gideon* has been viewed as marking a watershed moment in Sixth Amendment jurisprudence and that its magnitude has remained unrivaled in the eyes of the Court for decades. However, it now seems that *Gideon* may finally have met its match. Mere weeks after the Supreme Court issued its opinion in *Padilla*, immigrants' rights advocates were referring to *Padilla* as a "'*Gideon* Decision' for Immigrants,"[195] and academics alluded to *Padilla* becoming a "deportation *Gideon*" that could one day come to guarantee the Sixth Amendment right to counsel in deportation proceedings.[196] One scholar has noted that, in light of *Padilla*, "[i]t now seems a rather striking irony and possibly a constitutional problem that a criminal defendant has a constitutional right to counsel who can explain and advise as to at least some possible deportation consequences, while a person arrested for being simply out of status has no such right."[197] It seems reasonably plausible that in the next several years, the Supreme Court will announce that its holding in *Padilla* was intended to resolve that inconsistency.

The language in *Padilla* supports the notion that fundamental fairness norms in deportation hearings have significantly expanded over the years, and that the "bedrock procedural elements" recognized in *Gideon* should have at least some hold for noncitizens facing deportation proceedings, whether or not the noncitizen is subject to deportation due to a criminal conviction. The Court in *Padilla* deemed deportation to be the "equivalent of banishment or exile"[198] and acknowledged that a noncitizen's sense of security in this country may be one of his most valued intangible possessions.[199] Given the drastic effects that deportation may have on a noncitizen's sense of

194 *Id.* at 344.

195 *See, e.g.*, Maria Teresa Rojas, *A "*Gideon *Decision" for Immigrants*, OPEN SOC'Y FOUND. BLOG (Apr. 7, 2010), http://www.soros.org/voices/gideon-decision-immigrants (suggesting that *Padilla* "completely change[d] the landscape for immigrants facing criminal charges").

196 *See* Fulton, *supra* note 188, at 244.

197 Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 319 (2011).

198 Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (citing Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)).

199 *See, e.g.*, *Padilla*, 130 S. Ct. at 1480 ("[D]eportation 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." (emphasis added)).

security—arguably tantamount to a "basic human need[]"[200]—it is conceivable that the Court intended to extend the Sixth Amendment standard announced in *Padilla* not only to strictly criminal proceedings, but also to deportation proceedings themselves, which now fall somewhere in between the civil and criminal realms.[201]

Padilla carries even greater importance if one interprets the decision to have extended *Gideon* to all deportation proceedings. Statistics show that representation by counsel may be the single most important factor in predicting success on a noncitizen's application for relief during removal proceedings. From fiscal year 2006 through 2010, less than half of the noncitizens whose removal proceedings were completed were represented by legal counsel.[202] In 2007, a representative year, represented detainees in defensive asylum cases received relief in 27% of their cases, while only 8% of those without representation were successful.[203] In 2009, only 3% of detained, unrepresented asylum-seekers were granted relief, although as many as 39% of immigrant detainees had potentially meritorious claims.[204] In light of these statistics, it is easy to construe the rights recognized in *Padilla* as rights that are necessary to prevent an impermissibly large risk of inaccuracy in the deportation process—a prerequisite for watershed status.

The overlap between *Padilla* and *Gideon* is undeniable. As Margaret Love and Gabriel Chin argued in an article in *Criminal Justice*, "*Padilla* may turn out to be the most important right to counsel case since *Gideon*."[205] It may, thus, be time for courts to put to rest the "*Pa-*

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200 In 2006, the American Bar Association ("ABA") unanimously endorsed the establishment of the right to counsel in civil proceedings where "basic human needs" are at stake. ABA House of Delegates Res. 112A (Aug. 7, 2006), reprinted in Justice Howard H. Dana, Jr., *ABA 2006 Resolution on Civil Right to Counsel*, 2006 EDWARD V. SPARER SYMPOSIUM: CIVIL *GIDEON*: CREATING A CONSTITUTIONAL RIGHT TO COUNSEL IN THE CIVIL CONTEXT, 15 TEMP. POL. & CIV. RTS. L. REV. 501, 507, 508 (2006). Not all states have adopted such a position, and the Supreme Court has not explicitly embraced this view. Nevertheless, the ABA resolution suggests a trend toward an expanded perception of the Sixth Amendment that is not a far cry from the view espoused in *Padilla*.

201 *See Padilla*, 130 S. Ct. at 1481 (stating that deportation "is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process" (internal citation omitted)).

202 EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK G1 (2011), available at http://www.justice.gov/eoir/statspub/syb2000main.htm.

203 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008).

204 *See* Kanstroom, *supra* note 183, at 1511–12 (citing statistics reported by the Constitution Project and the New York City Bar Justice Center).

205 Love & Chin, *supra* note 183, at 37.

dilla is not *Gideon*" argument, and to finally recognize *Padilla* as the first case in history to fall under *Teague*'s "watershed" exception. There are, of course, limitations that habeas petitioners will face even if *Padilla* is applied retroactively. For example, a large part of the problem facing immigrants is not their counsel's inadequacy, but the substantive immigration law itself. So while *Padilla* may have marked a "watershed" moment for noncitizens facing deportation, there will still be many institutional hurdles to overcome before *Padilla*'s retroactivity can take full effect.[206] Further, given the statute of limitations that applies to habeas claims,[207] a number of petitioners may be procedurally barred from applying for habeas relief even after a determination on the issue of retroactivity. Nonetheless, because of the continuing availability of extraordinary relief,[208] *Padilla*'s retroactivity remains a hot topic, as the Supreme Court made clear when it granted certiorari in *Chaidez* this spring. And although the Court's decision in *Chaidez* may not address the application of *Teague*'s exceptions, it is possible that the High Court may one day take it upon itself to consider *Padilla*'s "watershed" status.

V. CONCLUSION

There is little doubt that the rule announced in *Padilla* has had a profound impact on Sixth Amendment jurisprudence in the "crimmigration"[209] context going forward. *Padilla* has ensured that noncitizen defendants will receive information regarding the immigration consequences of their tactical decisions, and may even one day guarantee noncitizens the right to counsel in non-criminal deportation proceedings. The magnitude of *Padilla*'s holding can be seen in the sheer number of noncitizens who have sought to benefit from its rule in the past two years. It is true that as AEDPA's one-year statute of limitations gradually tolls, the number of detainees who may have vi-

206 *See* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1402–03 (2011) (arguing that the content of the substantive criminal law creates just as many problems for noncitizen defendants as does defense counsel's inadequacy).

207 If the Supreme Court recognizes a new constitutional right and permits lower courts to apply the new right retroactively, § 2255 grants habeas petitioners one year to apply for habeas relief based on the new constitutional standard. 28 U.S.C. § 2255(f)(3) (Supp. I 2008).

208 After the statute of limitations under § 2255 has run out, the federally convicted noncitizen may still have a coram nobis remedy under 28 U.S.C. § 1651, the All Writs Act. United States v. Denedo, 129 S. Ct. 2213, 2218–19, 2221–24 (2009).

209 "Crimmigration" is a term used to define the intersection of criminal and immigration law. *See* Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1708 (2011).

able *Padilla* claims will begin to wane. Nonetheless, acknowledging *Padilla* as a new watershed constitutional rule is an important logical and symbolic step in expanding right-to-counsel jurisprudence in the immigration arena. The landmark decision in *Padilla* thus stands to have an even greater impact if it is recognized to have overcome the seemingly insurmountable "watershed" exception to *Teague*'s general presumption against retroactivity. Indeed, if *Padilla* does not satisfy this exception, it is difficult to conceive of a rule that ever would.