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Teague New Rules Must Apply in Initial-review Collateral Proceedings: The Teachings of *Padilla, Chaidez*, and *Martinez*

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Teague New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of *Padilla*, *Chaidez* and *Martinez*

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In *Padilla v. Kentucky*, the U.S. Supreme Court ruled that the Sixth Amendment requires defense attorneys to counsel their noncitizen clients about the immigration consequences of a plea.[2] Padilla had pled guilty in state court to a drug crime. After his conviction became final, he filed a state postconviction motion alleging that his attorney rendered ineffective assistance of counsel by failing to advise him that his plea would trigger deportation. In holding that Padilla was entitled to competent advice regarding the consequences of his plea, the Court recognized what professional norms have required for at least the last two decades.[3]

Padilla left undecided the critical question of whether its holding applies to other noncitizen defendants whose pleas were final before March 31, 2010, when the Court issued its opinion. The Court took up this question in *Chaidez v. United States*, a case raising this issue in the context of a writ of *coram nobis* under 28 U.S.C. § 1651(a) involving a federal conviction.[4] Assuming, but not deciding, that the retroactivity

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2. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486–87 (2010).

3. *See id.* at 1482 (citing to numerous sources of professional norms "support[ing] the view that counsel must advise her client regarding the risk of deportation," including materials from the National Legal Aid and Defender Association and the American Bar Association).

4. *See* Chaidez v. United States, 133 S. Ct. 1103, 1106 (2013).

framework set out in *Teague v. Lane* applied to a federal conviction,[5] the Court held that *Padilla* established a "new rule" and, therefore, was not available in postconviction proceedings involving pleas that became final before *Padilla*.[6]

In so ruling, the Court held for the first time that an application of the ineffective assistance of counsel standard in *Strickland v. Washington* resulted in a new rule.[7] Under *Strickland*, the "proper measure of attorney performance" is "reasonableness under prevailing professional norms."[8] The Court held in *Chaidez*, however, that *Padilla* did not simply involve application of the *Strickland* standard.[9] According to the Court, *Padilla* had first answered the "threshold" question of whether the scope of the Sixth Amendment's guarantee of competent criminal defense counsel encompasses the duty to warn about the risk of deportation.[10]

In deciding that *Padilla* established a new rule, the Court expressly declined to consider Chaidez's additional arguments that (1) *Teague*'s retroactivity framework does not apply when a federal, as opposed to a state, conviction is at issue; and (2) new rules about ineffective assistance of counsel should apply to postconviction proceedings in which ineffective assistance of counsel claims are raised for the first time.[11]

This article focuses on Chaidez's last argument regarding the application of certain types of new rules in postconviction proceedings, notwithstanding *Teague*. This argument relies upon the Court's 2012 decision in *Martinez v. Ryan*, a federal habeas case involving review of a state criminal conviction on ineffective assistance of counsel grounds.[12] The Court in *Martinez* recognized that, where a collateral proceeding is the defendant's first opportunity to raise a claim of ineffective assistance, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffectiveness-assistance claim."[13] As explained below, it is well established that new rules apply on direct appeal. Chaidez's argument that *Padilla*'s new rule should apply in postconviction proceedings as if she were on direct appeal relied on *Martinez*'s recognition of the functional equivalence of postconviction

5. *See id.* at 1105 (citing Teague v. Lane, 489 U.S. 288 (1989)).

6. *See id.* at 1107–11 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

7. *See Strickland*, 466 U.S. at 688.

8. *Id.*

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

10. *See id.*

11. *See id.* at 1113 n.16.

12. *See* Brief for Petitioner at 30–31, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820), 2012 WL 2948891, at *30–31 (citing Martinez v. Ryan, 132 S. Ct. 1309 (2012)). The federal habeas provision that governs review of state convictions is 28 U.S.C. § 2254 (2012).

13. *See Martinez*, 132 S. Ct. at 1317.

proceedings and a direct appeal in the context of initial ineffective assistance of counsel claims.[14]

Chaidez's argument has implications not just for convictions under federal postconviction review but for convictions under state collateral review. The Florida Supreme Court has considered whether there are circumstances in which *Padilla* governs postconviction challenges involving pleas that became final before *Padilla*, even though *Padilla* established a new rule.[15] Months before the Supreme Court's ruling in *Chaidez*, the Florida Supreme Court decided three postconviction cases involving state convictions that were final before *Padilla*.[16] In these cases—*Hernandez v. State*, *Diaz v. State*, and *Castaño v. State*—the court anticipated the United States Supreme Court's *Chaidez* opinion, holding that the "new rule" established by *Padilla* was not "retroactive."[17] The court, however, carved out an exception to find in favor of the third petitioner, Castaño, holding that she was eligible for relief because she was already in the postconviction "pipeline" despite her conviction having become final before *Padilla* was decided.[18] While the majority gave virtually no reasoning for its decision, a concurrence written by Justice Pariente and joined by two other justices roughly tracked the rationale of Chaidez's last argument about initial-review collateral proceedings.[19]

This article argues for a "postconviction pipeline" based in part on the reasoning behind Justice Pariente's *Castaño* concurrence and Chaidez's argument relying on *Martinez*. The proposed pipeline includes any properly filed postconviction motion in state or federal court which involves an initial challenge to a criminal conviction. For the constitutional and prudential reasons discussed below, new procedural constitutional rules must govern in these "initial-review collateral proceedings," even if *Teague* would normally dictate otherwise.[20]

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14. *See* Brief for Petitioner, *supra* note 12, at 30–31.

15. *See generally* Castaño v. State, No. SC11-1571, 2012 WL 5869668 (Fla. Nov. 21, 2012) (per curiam); Diaz v. State, No. SC11-1281, 2012 WL 5869664 (Fla. Nov. 21, 2012) (per curiam); Hernandez v. State, Nos. SC11-941, SC11-1357, 2012 WL 5869660 (Fla. Nov. 21, 2012) (per curiam).

16. *See Castaño*, 2012 WL 5869668; *Diaz*, 2012 WL 5869664; *Hernandez*, 2012 WL 5869660. The postconviction motions were filed under Florida Rule of Criminal Procedure 3.850 (2012).

17. *See Castaño*, 2012 WL 5869668; *Diaz*, 2012 WL 5869664; *Hernandez*, 2012 WL 5869660. Another state court came to the opposite conclusion, holding that *Padilla* did not announce a new rule but only applied the old rule of *Strickland*. Commonwealth v. Clarke, 460 Mass. 30, 949 N.E.2d 892 (2011).

18. *Castaño*, 2012 WL 5869668, at *3 (Pariente, J., concurring).

19. *See id.*

20. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

I. RETROACTIVITY

In the 1965 decision *Linkletter v. Walker*, the U.S. Supreme Court announced principles for determining whether a new rule—there *Mapp v. Ohio*'s extension of the exclusionary rule to the states—should be available to state prisoners in federal habeas proceedings whose convictions were already final on direct appeal.[21] Stating that the Constitution was indifferent to whether a decision applied retroactively, the Court adopted a "practical approach," holding that the retroactive effect of each new rule should be determined on a case-by-case basis by "looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[22] It held that Linkletter could not rely on *Mapp* to seek habeas relief from a conviction that was affirmed more than a year before *Mapp* was decided.[23] After *Linkletter*, the Court went on to refuse to apply new decisions to "convictions at various stages of trial and direct review."[24] The Court could make some decisions prospective only, granting relief to the litigants in the case that announced the rule and to no one else. Although the Court recognized the "[i]nequity" of "according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue," the Court considered this disparate treatment "an insignificant cost for adherence to sound principles of decision-making."[25]

The Court retooled its retroactivity jurisprudence in the 1980s, largely embracing the framework proposed earlier by Justice Harlan in a number of dissenting and concurring opinions.[26] In *Griffith v. Kentucky*,

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21. Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 642 (1961). For a history of the Court's retroactivity jurisprudence, *see* Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161 (2005); *see also* Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," after* Danforth v. Minnesota: *Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1 n.17 (2009) (collecting sources); Randy Hertz & James Liebman, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 25.2 (6th ed. 2011).

22. *Linkletter*, 381 U.S. at 629.

23. *Id.* at 640.

24. Stovall v. Denno, 388 U.S. 293, 300 (1967); *see also* Johnson v. New Jersey, 384 U.S. 719 (1966) (refusing to apply a decision to a case on direct appeal).

25. *Stovall*, 388 U.S. at 301 (citations omitted).

26. *See* Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting); Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part). The Supreme Court later characterized the term "retroactivity" as misleading because it suggests a "judicial power to create new rules of law." Danforth v. Minnesota, 552 U.S. 264, 271 (2008). But, the Court has explained, a "newly announced right" exists prior to its announcement. *Id.* When the Court determines retroactivity of a new rule, it assesses not "temporal scope[,]" but

the Court held that new rules must apply to all cases not yet final on direct appeal.[27] The Court found that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[28] The Constitution forbids the Court from "legislat[ing]" new rules and limits its power to announcing them in the context of a case or controversy.[29] The Court endorsed Justice Harlan's views that (1) "to disregard current law in adjudicating cases before us that have not already run the full course of appellate review" is to legislate rather than adjudicate;[30] and (2) the "selective application of new rules" would fail to treat "similarly situated defendants the same."[31] Fairness thus prevented the Court from "'[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'"[32]

Turning to the application of new decisions to convictions already final on direct appeal, the Court next replaced *Linkletter* with the test announced in *Teague v. Lane*.[33] Teague was before the Court on a fed-

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"whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Id.* The term "redressability," the Court has suggested, may be more accurate. *Id.* at 271 n.5.

27. *See* Griffith v. Kentucky, 479 U.S. 314, 322 (1987). A pending case is one for which the time to petition for certiorari before the U.S. Supreme Court has not yet expired. *See* Beard v. Banks, 548 U.S. 406, 411 (2006). The *Griffith* rule thus applies to cases in which a notice of appeal has not yet been filed, cases pending after a notice has been filed, and cases denied on appeal where the time to file for certiorari or rehearing has not yet expired. Courts sometimes refer to such a case as a "pipeline" case or a case still in the direct-appeal pipeline. *See, e.g.*, United States v. Fernandez, 397 F. App'x 433, 443–44 (10th Cir. 2010); United States v. Rodriguez, 406 F.3d 1261, 1298 (11th Cir. 2005) (Barkett, J., dissenting from denial of rehearing en banc); United States v. Brown, 444 F.3d 519, 520 (6th Cir. 2006).

28. *Griffith*, 479 U.S. at 322.

29. *Id.*

30. *Id.* at 323 (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring in judgment) (internal quotations omitted).

31. *Id.* (citing *Desist*, 394 U.S. at 258–59 (Harlan, J., dissenting)); *see also id.* ("[T]he problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule.") (quoting United States v. Johnson, 457 U.S. 539, 556, n.16 (1982) (emphasis in original)).

32. *Id.* (quoting *Mackey*, 401 U.S. at 679) (Harlan, J., concurring in part and dissenting in part)).

33. *See generally* Teague v. Lane, 489 U.S. 288, 299–311 (1989). This part of *Teague* was adopted by only four justices. *See id.* at 291. A majority of the Court subsequently acceded to it, however. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 314 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002). Justice O'Connor's opinion in *Teague* essentially adopted the test for retroactivity put forth by Justice Harlan in his concurrence in *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part). *See* Teague, 489 U.S. at 310 (O'Connor, J., concurring) ("we now adopt Justice Harlan's view of retroactivity for cases on collateral review").

eral habeas challenge to a state conviction.[34] He argued that the Court should extend the Sixth-Amendment's fair cross-section requirement to a petit jury.[35] The Court held that the requested extension would be a new rule because "the result was not dictated by precedent existing at the time the defendant's conviction became final" and that the new rule could not apply in Teague's federal habeas proceedings.[36] Looking to the purpose of federal habeas review of state convictions and the "interests of comity and finality," the Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[37] Rejecting its prior approach, the Court found that, if a new rule were announced in a case, "evenhanded justice [would require] that it be applied retroactively to all who are similarly situated."[38]

Thus, under *Teague*, the extent of a rule's application depends on whether it is an "old rule" or a "new rule."[39] An old rule rasies no retroactivity concerns and, therefore, applies to all criminal cases and can be raised in postconviction proceedings.[40] New rules, in contrast, are not retroactive unless they fall into two narrow exceptions.[41]

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34. *Teague* was decided before the Antiterrorism and Effective Death Penalty Act (AEDPA) amended the federal habeas statute to impose a relitigation bar. *See* 28 U.S.C. § 2254(d)(1) (a federal court cannot overturn a state conviction based on a claim "that was adjudicated on the merits" in state proceedings unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). For a discussion of how AEDPA's relitigation bar relates to *Teague*, *see infra* Part IV.C.

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

36. *Id.* at 301 (citation and emphasis omitted).

37. *Id.* at 308–10.

38. *Id.* at 300.

39. A new rule includes a rule that a litigant is seeking to establish in his or her case as well as a rule that a litigant is seeking to rely upon that was announced in another case (after the litigant's conviction had already become final). Caspari v. Bohlen, 510 U.S. 383, 390 (1994).

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

41. "Substantive" new rules—rules that decriminalize conduct or alter punishment—are retroactive. *Teague*, 489 U.S. at 311 ("Substantive" rules are those that put conduct or punishment "beyond the power of the criminal law-making authority to proscribe.") (internal citations omitted). New procedural rules, however, are only retroactive if they are "watershed," such that they undermine the accuracy of the criminal proceeding and "implicate the fundamental fairness of the trial." *Id.* at 311–12. The only new procedural rule that has ever been recognized as such a "watershed" rule is *Gideon v. Wainwright*'s holding that criminal defendants facing a deprivation of liberty have a right to appointed counsel. Gideon v. Wainwright, 372 U.S. 335, 348–49 (1963). Although *Teague* was decided after *Gideon*, the Court has recognized post-*Teague* that *Gideon* was a watershed procedural rule. *See Whorton*, 549 U.S. at 419. The Court has gone so far as to say that it is unlikely that it will ever announce another "watershed" new rule that would qualify for *Teague*'s second exception. *Id.* at 418 (citation omitted).

State courts reviewing state convictions may give broader effect to new rules than what is required under *Teague*.[42] In *Danforth v. Minnesota*, the U.S. Supreme Court held that states are not bound by the Supremacy Clause to adopt the *Teague* test for retroactivity.[43] Central to the Court's decision was the observation that *Teague* involved a state conviction on review in federal habeas.[44] Such federal review of state convictions implicates "[f]ederalism and comity considerations," including "respect for the finality of state convictions."[45] The Court reasoned that states could decide for themselves whether to give greater retroactive effect to new rules because the "finality of state convictions is a *state* interest, not a federal one."[46] As such, the comity rationale underlying *Teague* does not apply when states review convictions in their own system of collateral review. The Court observed that "[i]f anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*."[47]

As a result, some states have not adopted *Teague*'s retroactivity analysis for new rules, but instead use their own.[48] For example, Florida uses a standard that "provides more expansive retroactivity standards than those adopted in *Teague*."[49] *Teague* may remain relevant as setting

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42. Maryland, for example, ruled prior to *Chaidez* that *Padilla* is retroactive based on state principles that sweep more broadly than *Teague*. Denisyuk v. Maryland, 30 A.3d 914 (Md. 2011).

43. Danforth v. Minnesota, 552 U.S. 264, 289 (2008). Danforth was convicted after trial in Minnesota court. He argued that his Sixth Amendment right to confront his accuser was violated. On appeal, the Minnesota Court of Appeals rejected Danforth's claim based on the U.S. Supreme Court's rule in *Ohio v. Roberts*, 448 U.S. 56 (1980). Danforth's conviction became final in 1998 when the Minnesota Supreme Court denied review. Then, in 2004, the U.S. Supreme Court overturned *Ohio* to decide in *Crawford v. Washington*, 541 U.S. 36 (2004), that defendants have a right to confront their accusers. Danforth initiated federal habeas proceedings, arguing that his conviction was obtained in violation of *Crawford*. The Minnesota Supreme Court ruled against him, holding that *Crawford* was a nonretroactive new rule and that states could not give broader retroactive effect to new rules than what was required under *Teague*. The U.S. Supreme Court reversed the Minnesota Supreme Court.

44. *Danforth*, 552 U.S. at 278–79. *Danforth* expressly did not address whether *Teague* applies to review of federal convictions in 28 U.S.C. § 2255 proceedings. *Id.* at 269 n.4 ("this case does not present the question[ ] . . . whether the *Teague* rule applies to cases brought under 28 U.S.C. 2255 (2000 ed. and Supp. V)."

45. *Id.* at 279.

46. *Id.* at 280.

47. *Id.* at 279–80.

48. The majority of states, however, have adopted *Teague* notwithstanding the fact that *Teague* was based on comity concerns that are not present when state courts review state convictions. *See* Lasch, *supra* note 21, at 42 n.306 (noting that thirty-seven states apply *Teague*). Compelling arguments exist for states to opt not to follow *Teague* and to give broader effect to new rules. *See generally id.*; *see also* Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421 (1993).

49. Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005) (per curiam); *see also* Witt v. State, 387 So. 2d 922 (Fla. 1980) (per curiam); The Florida *Witt* test is based on the pre-*Teague* test for

a floor regarding retroactivity. In *Danforth*, the U.S. Supreme Court stated that "the remedy a state court chooses to provide its citizens for violation of the Federal Constitution is primarily a question of state law" but that federal law "'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'"[50] Under this view, a state's analysis of whether a rule is "new" or "old" and whether a new rule applies in postconviction proceedings must be at least as generous to defendants as *Teague*.

II. *TEAGUE*'S THRESHOLD QUESTION

The Court found in *Teague* that there would be "harm" if it were to announce a new rule on collateral review to benefit one petitioner while not giving the benefit of the new rule to others whose appeals were final.[51] The Court dealt with this inequity by mandating that federal courts ask a "threshold question" regarding "whether the court is obligated to apply the *Teague* rule to the defendant's claim."[52] If a rule is new and falls outside the limited exceptions for retroactivity, the court cannot reach the merits of the case.[53] Before reviewing a state convic-

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retroactivity set out in *Linkletter*. Linkletter v. Walker, 381 U.S. 618 (1965). Other states have also adopted tests based on *Linkletter*. *See, e.g.*, State v. Smart, 202 P.3d 1130, 1140 n.81 (Alaska 2009); State v. Whitfield, 107 S.W. 3d 253, 268 (Mo. 2003) (en banc).

50. *Danforth*, 552 U.S. at 288 (quoting Am. Trucking Ass'n, v. Smith 496 U.S. 167, 178–79 (1990) (plurality opinion)). However, in a footnote earlier in the opinion, the Court noted that it was an open question "whether States are required to apply [*Teague*] 'watershed' rules in state post-conviction proceedings." *Id.* at 269 n. 4. In a dissent, Justice Roberts disputed the majority's conclusion that states would be bound by a U.S. Supreme Court decision finding a rule retroactive, arguing that there was no "basis" for the "majority's logic for concluding that States are free to hold our decisions retroactive when we have held they are not, but not free to hold that they are not when we have held they are." *Id.* at 309–10 (Roberts, J., dissenting). In a case decided in the year before *Teague*, the U.S. Supreme Court stated that South Carolina was bound to accept the Court's determination regarding whether a case announced a new rule or not. Yates v. Aiken, 484 U.S. 211, 217–18 (1988).

51. Teague v. Lane, 489 U.S. 288, 315 (1989) (quoting Hankerson v. North Carolina, 432 U.S. 233, 247 (1977) (Powell, J., concurring) (internal quote omitted)) ("But the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal of administration of justice with an even hand.'").

52. Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

53. *See, e.g.*, *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (per curiam) (refusing to consider merits of petitioner's claim because a favorable ruling would "create and apply a new procedural rule in violation of *Teague v. Lane*"). Because the *Teague* threshold test prevents courts from reaching the merits of claims, it, unlike *Linkletter*, thwarts the development of constitutional new rules in the criminal procedural context. According to a leading treatise on federal habeas corpus proceedings, "[t]here is considerable consensus among commentators . . . that Teague's 'threshold question' rule is misguided." Hertz & Liebman, *supra* note 21, at § 25.4 (citing articles, arguing that the threshold question was not a holding in Teague's plurality opinion, and giving eight reasons why the merits should be decided before the new/old rule question); *see also* Susan Bandes, *Taking Justice To Its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2455 (1993) (*Teague* purports to "remedy the unfair results of former retroactivity

tion on federal habeas, a court must first ask whether disposition of the case would require announcing a nonretroactive new rule.[54] *Teague*'s approach to dealing with the harm of not treating similarly situated litigants alike is thus to inflict harm on all postconviction litigants by making virtually all new rules inapplicable to their cases.

If a state waives the *Teague* defense, a federal court "may, but need not, decline to apply *Teague*."[55] However, if a state asserts *Teague*, a "court *must* apply *Teague* before considering the merits of the claim."[56] Moreover, a federal court must decide the threshold question even if prior courts had not, as long as the government has properly raised the issue.[57] Thus federal courts reviewing state convictions on federal

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rules" but "merely succeeds in creating a new arbitrary category of remediless prisoners: those whose cases happen to be on collateral, rather than direct, review at the auspicious moment when the Court hands down a decision classified as 'new law' "); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1742 (1991) (characterizing the threshold test as "threshold uncertainty" that results in unpredictability); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 287 (1998) (criticizing the lack of guidance regarding what constitutes a new rule as "leaving federal courts a zone of discretion with which they can make outcome determinative decisions without necessarily reaching the merits of the claims").

54. It is often difficult to discern whether a rule is new or old. *See, e.g.*, Burdine v. Johnson, 262 F.3d 336, 342 (5th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1120 (2002) ("Even in *Teague*, the plurality opinion acknowledged that the task of determining whether a case announces a new rule is often difficult."). *Teague* reversed the prior rule of deciding the merits first. *See Am. Trucking Ass'n*, 496 U.S. at 190 (plurality opinion) (citing Consol. Foods Corp. v. Unger, 456 U.S. 1002, 1003 (1982) ("we have generally considered the question of retroactivity to be a separate problem [from the merits], one that need not be resolved in the law-changing decision itself").

55. *Caspari*, 510 U.S. at 389. Because retroactivity is not constitutional or statutory, it is not jurisdictional. *See* Collins v. Youngblood, 497 U.S. 37, 40–41 (1990); *see also Linkletter*, 381 U.S. at 629 (the "Constitution neither prohibits nor requires retroactive effect"); Hopkins v. Reeves, 524 U.S. 88, 94 n.3 (1998) (refusing to decide *Teague* issue and proceeding to the merits because the state had raised the *Teague* issue for the first time on its petition for certiorari).

56. *Caspari*, 510 U.S. at 389 (emphasis in original); *see also Collins*, 497 U.S. at 41; Schiro v. Farley, 510 U.S. 222, 228–29 (1994).

57. Horn v. Banks, 536 U.S. 266, 267 (2002) (per curiam); *Caspari*, 510 U.S. at 389. In *Horn*, Banks, the defendant, was convicted under Pennsylvania law for first-degree murder and had been sentenced to death. 536 U.S. at 268. After exhausting a direct appeal, the defendant filed a state postconviction motion relying on *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), which struck down capital sentencing rules that required juries to disregard mitigating factors not found unanimously. *Id.* at 268–69, 271; Petition for Writ of Certiorari, *Horn*, 536 U.S. 266 (No. 01-1385). The Pennsylvania Supreme Court reached the merits of Banks' ineffectiveness claim without first deciding whether *Mills* was retroactive and ruled against him. *Horn*, 536 U.S. at 267. Banks then pursued federal postconviction proceedings. *Id.* at 268. The U.S. Court of Appeals for the Third Circuit found that it did not have to rule on the retroactivity of the *Mills* rule because the Pennsylvania Supreme Court had not addressed it. *Id.* at 267. The U.S. Supreme Court reversed, holding that "federal courts must address the *Teague* question when it is properly argued by the government." *Id.* (citing *Caspari*, 510 U.S. at 389). On remand, the U.S. Court of Appeals granted Banks' habeas petition. Banks v. Horn, 316 F.3d 228,

habeas must first decide the *Teague* question—whether a case involves application of a new or old rule—before proceeding to the merits of a case brought in collateral proceedings. In a case found to involve a non-retroactive new rule, a court must decline to reach the merits.[58]

The rule mandating that the new/old rule question be decided before the merits applies in federal habeas review of state convictions because this was the procedural posture in *Teague*. Most states, however, have adopted *Teague*'s threshold question test when evaluating convictions in state collateral proceedings.[59] As discussed above, states have the power to fashion rules for retroactivity that are at least as generous to litigants as *Teague*.[60] In cases on certiorari to the U.S. Supreme Court directly from state court, states have argued that, as a matter of state law, the old/new rule question be decided before the merits of the case.[61]

III. Initial-Review Collateral Proceedings

A. Martinez v. Ryan

In the federal system, ineffective-assistance challenges are often brought in postconviction proceedings and not on direct appeal.[62] Many states similarly require that ineffective-assistance claims be brought in collateral proceedings or have created systems that encourage channeling of claims into such proceedings.[63] The U.S. Supreme Court has grappled with how to ensure that litigants can access the court system to

247 (3d Cir. 2003). The Supreme Court, however, reversed this decision, holding under *Teague* that *Mills* established a new, nonretroactive rule. Beard v. Banks, 542 U.S. 406, 410, 416 (2004).

58. In a federal habeas case governed by AEDPA, a court must also decide whether resolution of the case involves only "clearly established law" under 28 U.S.C. § 2254(d)(1) (2012). *See* discussion *infra* Part IV.

59. *See supra* note 48.

60. *See supra* note 42 and accompanying text.

61. *See, e.g.*, Mallett v. Missouri, 494 U.S. 1009, 1011–12 (1990) (raising *Teague* threshold issue as a defense in an opposition to a petition for certiorari to the United States Supreme Court). As discussed *infra* Part IV.C., Kentucky could have asserted the *Teague* issue in *Padilla* but did not. Even if the comity rationale underlying the *Teague* rule applies in cases involving review of state collateral proceedings on certiorari to the U.S. Supreme Court, that same rationale would not apply to state courts' review of state convictions. *See* discussion *supra* Part I. There are compelling reasons why states should not adopt *Teague*'s threshold question test. *See supra* note 48. Similar arguments support the view that federal courts need not follow *Teague* when reviewing federal, as opposed to state, convictions.

62. *See* Massaro v. United States, 538 U.S. 500, 504 (2003).

63. *See, e.g.*, *Trevino*, 133 S. Ct. at 1915 ("The structure and design of the Texas system [for IAC claims] in actual operation, however, make it 'virtually impossible' for an ineffective assistance claim to be presented on direct review.") (quoting Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)); Commonwealth v. Zinser, 446 Mass. 807, 808–09 (2006) (ineffective assistance of counsel claim is "not one that an appellate court could have resolved on direct appeal in the first instance" and therefore was appropriately raised in postconviction).

raise ineffective assistance of counsel claims, given that these claims are typically brought in postconviction proceedings. In *Martinez v. Ryan*, the Court concluded that when postconviction proceedings are a defendant's first opportunity to raise the issue of ineffectiveness of trial counsel, collateral review may become the functional equivalent of a direct appeal.[64]

Martinez argued that he had a constitutional right to counsel to assist him in raising his ineffective assistance of counsel (IAC) claim.[65] The right to counsel at trial and on a first appeal as of right is well established.[66] But the U.S. Supreme Court has broadly refused to extend this right to discretionary and collateral proceedings. In *Ross v. Moffitt*, the Court held that there was no constitutional right to counsel in *discretionary* appeals beyond the first appeal as of right or in petitioning for certiorari in the Supreme Court.[67] The Court later held in *Pennsylvania v. Finley*[68] and *Murray v. Giarratano* that there is no constitutional right to counsel in state postconviction proceedings.[69] In both *Moffitt* and *Finley*, the Court reasoned that the defendant had not been denied meaningful access to the courts because he had the benefit of the briefs, record, and opinion from the direct appeal.[70]

More recently, however, the Court has recognized a right to counsel outside the context of a direct appeal as of right. In *Halbert v. Michigan*, the Court held that the defendant had a due process right to counsel for a petition for a *discretionary* appeal where it was the defendant's first opportunity to appeal from his conviction.[71] *Halbert* involved Michigan's system of treating appeals from pleas of guilty or nolo contendere

64. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

65. *See* Brief for Petitioner at 16–21, *Martinez*, 132 S. Ct. 1309 (No. 10-1001). For an argument that effective counsel on postconviction is required under an access to court rationale, *see* Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219 (2012).

66. In federal prosecutions, the right to counsel at trial and on appeal is guaranteed by the Sixth Amendment, as is the right to trial counsel in state prosecutions. Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938); Johnson v. United States, 352 U.S. 565, 565 (1957); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (Sixth Amendment incorporated by Fourteenth Amendment). The right to appellate counsel on first appeal as of right in state cases is independently sourced in the Equal Protection and Due Process clauses of the Fourteenth Amendment. Douglas v. California, 372 U.S. 353, 357–58 (1963); Evitts v. Lucey, 469 U.S. 387, 404–05 (1985).

67. Ross v. Moffitt, 417 U.S. 600, 614–15 (1974) (finding that Moffitt's claims had already "once been presented by a lawyer and passed upon by an appellate court.") (quoting Douglas v. California, 372 U.S. 353, 356 (1963)).

68. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

69. Murray v. Giarratano, 492 U.S. 1, 11–12 (1989).

70. *See Moffitt*, 417 U.S. at 615; *Finley*, 481 U.S. at 557.

71. Halbert v. Michigan, 545 U.S. 605, 623–24 (2005).

differently from other appeals in criminal cases.[72] Normally, a Michigan defendant would have the automatic right to a direct appeal from a conviction and therefore the right to counsel under *Douglas*.[73] But if that defendant pled guilty or nolo contendere, she could appeal only by leave of the court, and some judges declined to appoint counsel for this discretionary appeal.[74] Relying on *Moffitt*, Michigan's Supreme Court approved this practice.[75] The Supreme Court reversed, observing that a Michigan court's ruling on an application for leave to appeal provided "the first, and likely the only, direct review the defendant's conviction and sentence will receive."[76] The Supreme Court distinguished this "first-tier appeal" from the "second-tier" review at issue in *Moffitt*. Unlike an appellant seeking second-tier discretionary review, "[a] first-tier review applicant, forced to act pro se, will face a record unreviewed by appellate counsel, and will be equipped with no attorney's brief prepared for, or reasoned opinion by, a court of review."[77]

Martinez involved a possible exception to *Finley* and *Giarratano* for first-tier review of IAC claims that the Court had left open in *Coleman v. Thompson*.[78] *Coleman* involved federal habeas review of a Virginia conviction. Several claims, including an IAC claim, were first raised in state habeas proceedings rather than on direct appeal. Normally, a state defendant must present an issue on direct appeal in state court before raising it in collateral proceedings.[79] Virginia, however, required that IAC claims relating to trial counsel be brought initially in state habeas rather than on direct appeal.[80] A Virginia trial court held an evidentiary hearing and dismissed Coleman's IAC claim. Coleman appealed to the Virginia Supreme Court, but his attorney filed the notice of appeal three days late. The Virginia Supreme Court dismissed the appeal as untimely and the federal district court in turn dismissed Coleman's federal habeas petition as procedurally defaulted, finding that independent and adequate state grounds existed for the state court's decision. Coleman sought to excuse the default because his postconviction attorney had been ineffective by filing an untimely notice of

72. *Id.* at 612.

73. *See id.* at 609–10, 612 (citing Douglas v. California, 372 U.S. 353, 357 (1963); People v. Bulger, 614 N.W.2d 103, 106–07 (Mich. 2000)).

74. *Halbert*, 545 U.S. at 609.

75. *See id.* at 609; *see also Bulger*, 614 N.W.2d at 112 (Mich. 2000); People v. Harris, 681 N.W.2d 653, 653 (Mich. 2004).

76. *Halbert*, 545 U.S. at 619.

77. *Id.*

78. Coleman v. Thompson, 501 U.S. 722, 755 (1991).

79. *See* Murray v. Carrier, 477 U.S. 478, 488–89 (1986).

80. *See Coleman*, 501 U.S. at 755.

appeal.[81] Ineffectiveness of counsel can excuse a procedural default, but only when the Constitution guarantees effective counsel in the first place.[82] Coleman argued that the Fourteenth Amendment mandated an exception to the rule of *Finley* and *Giarratano* "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."[83] His argument that a defendant has the right to counsel to raise IAC claims on postconviction rests on the observation that such a proceeding is the equivalent of direct appeal because it is the first opportunity to present an IAC claim.[84] But Coleman went one step further, arguing that he was entitled to effective counsel to *appeal* the denial of his IAC claim. The U.S. Supreme Court treated this as an argument for a right to counsel on second-tier review, a situation more akin to *Moffitt*.[85] The Court determined that it did not have to reach Coleman's claim regarding a right to counsel in his collateral proceedings because he was in fact able to receive first-tier review of his IAC claim in state habeas proceedings with the assistance of counsel.[86]

Martinez presented the constitutional question left open in *Coleman*: "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."[87] Martinez was a federal habeas petitioner with an Arizona conviction who argued ineffective assistance of counsel.[88] Arizona law barred him from raising this claim on direct review. His first opportunity was in state postconviction proceedings.[89] Martinez's postconviction counsel had not raised the ineffectiveness claim because she believed that Martinez had "no meritorious claims."[90] The failure to present the IAC claim in the initial state postconviction petition consti-

81. *Id.* at 752.

82. *See id.*; *see id.* at 754–55.

83. *Id.* at 755.

84. *Id.* at 756.

85. *See id.* at 756–57.

86. *See Coleman*, 501 U.S. at 756 ("Coleman has had his 'one and only appeal,' if that is what a state collateral proceeding may be considered; the Buchanan County Circuit Court, after a 2-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims.").

87. Martinez v. Ryan, 132 S. Ct. at 1315; *see also* Petition for a Writ of Certiorari at i, Martinez v. Ryan, 132 S. Ct. 1309 (2012) (No. 10-101001), 2011 WL 398287, at i (question presented: "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.").

88. *Martinez* 132 S. Ct. at 1314–15.

89. *See id.* at 1316.

90. *Id.* at 1313.

tuted procedural default foreclosing federal review.[91] Martinez's new attorney argued that the procedural default should be excused because Martinez had a Fourteenth Amendment right to effective state postconviction counsel and that this right had been violated when postconviction counsel failed to raise the trial IAC issue.[92] Martinez argued that he was entitled to effective counsel in collateral proceedings because it was the first opportunity to raise his IAC claim.[93] The Court referred to such collateral proceedings as "initial-review collateral proceedings."[94]

Having been presented with the constitutional question left open by *Coleman*, the Court again declined to answer it. Rather than rely on a constitutional right to counsel, the Court ruled on the basis of its discretionary authority over the equitable rules of procedural default.[95] The Court nevertheless relied on the fact that state postconviction proceedings are normally the first-tier review of IAC claims.[96] As in *Halbert*, the Court found that a pro se defendant would not have the benefit of an attorney's brief or court's opinion addressing his IAC claims.[97] The Court characterized "the collateral proceeding" as "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."[98] As an equitable matter, the Court found that the procedural default for failing to raise an IAC claim in state court could be excused if the state did not provide postconviction counsel or if postconviction counsel was ineffective.

Martinez recognized the equivalence of direct appeal and initial-review collateral proceedings when analyzing whether a procedural default should apply. The Court stated its holding as: "[w]here, under state law, claims of ineffective assistance of trial counsel *must* be raised

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91. *See id.* Commentators have criticized procedural default rules. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1234–36 (1986) (arguing that a "procedural default" is typically a consequence of a "breakdown in the adversary process" such that the prosecution rather than the defense should bear the costs of forfeiture); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 2, 82 (2002) (procedural default rules deprive death penalty defendants from any "meaningful" postconviction review).

92. *Martinez*, 132 S. Ct. at 1314–15.

93. *Id.* at 1315. *See also* Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in* Maples *and* Martinez *to Restore It*, 45 CREIGHTON L. REV. 185, 213 (2011) (arguing that the U.S. Supreme Court should "extend the right to counsel to first state post-conviction proceedings"); Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 Md. L. Rev. 1393 (1999), (arguing for a constitutional right to counsel in postconviction proceedings).

94. *Martinez*, 132 S. Ct. at 1314–15.

95. *Id.* at 1318.

96. *See id.*

97. *Id.* at 1317.

98. *Id.*

in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."[99] The Court made a "narrow exception" to the rule in *Coleman* for situations in which a petitioner is *required* to defer IAC claims to postconviction.[100] Subsequently, however, in *Trevino v. Thaler* the Court applied the *Martinez* exception in a Texas case in which the IAC claim could theoretically have been brought on direct appeal but the opportunity was not "meaningful."[101]

Martinez involved Arizona law, which flatly prohibits defendants from raising IAC on direct appeal.[102] An Arizona defendant's sole forum for presenting such a claim is in postconviction.[103] In contrast, Texas does not absolutely bar IAC claims from being brought on direct appeal.[104] Trevino had been sentenced to death. Texas has a dual-track review system for capital cases.[105] When a defendant is sentenced to death and appeals, the court appoints counsel to simultaneously pursue postconviction claims, including IAC.[106] Litigants are highly discouraged from pursuing IAC claims on direct appeal.[107] Nevertheless, Texas argued that Trevino *could* have attempted to raise IAC issues in the direct appeal by filing a motion for new trial within thirty days of sentencing.[108] Because the bar on raising IAC claims on direct appeal is not absolute, Texas argued, *Martinez* should not excuse a Texas defendant's procedural default.[109] In an amicus brief, the Attorneys General of half

99. *Id.* at 1320 (emphasis added).

100. *Id.* at 1311.

101. Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013).

102. *See Martinez*, 132 S. Ct. at 1314 (citing State v. Spreitz, 39 P.3d 525, 527 (2002)).

103. *Id.* at 1313.

104. Brief for the Respondent at 21–23, *Trevino*, 133 S. Ct. 1911 (2013) (No. 11-10189).

105. Trevino v. Thaler, 449 F. App'x 415, 426 (5th Cir. 2011).

106. TEX. CODE CRIM. PROC. art. 11.071 § 3(a) (2011).

107. The Texas Court of Criminal Appeals has stated: "As a general rule, one should *not* raise an issue of ineffective assistance of counsel on direct appeal." Mata v. State, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007) (quoting Jackson v. State, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994) (Baird, J., concurring)) (emphasis in original). The court further explained, "This is so because a trial record is generally insufficient to address claims of ineffective assistance of counsel in light of the 'strong presumption that (trial) counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.*

108. Brief for the Respondent at 31–32, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (No. 11-10189) (citing, *inter alia*, Reyes v. State, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993)).

109. Curiously, Texas conceded that "if direct-appeal counsel fails [to raise an IAC claim], the federal habeas court will be able to consider the claim because the unconstitutional ineffectiveness of counsel on direct appeal will serve as cause to excuse the procedural default of the ineffectiveness claim." *Id.* at 24–25. The Court responded to this argument by observing that Texas could "point[ ] to no case in which such a failure by appellate counsel has been deemed constitutionally ineffective." *Trevino*, 133 S. Ct. at 1920. The Court noted that the "lack of

the States (including Florida) supported Texas' position, asserting that *Martinez* should not apply to the "vast majority" of states.[110]

The U.S. Supreme Court ruled in favor of Trevino, finding that the "structure, design, and operation" of the Texan system "does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal."[111] The Court characterized the difference between the Arizona and Texas procedural schemes as "a distinction without a difference."[112] Without the *Martinez* exception, the Court found that "the Texas procedural system would create significant unfairness" because "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review."[113] Initial-review collateral proceedings and direct appeals can thus be functionally equivalent, even if there is some chance that a claim could have been brought on direct appeal.

B. Chaidez v. United States

It is against this backdrop that Roselva Chaidez argued to the U.S. Supreme Court that *Padilla* involved the application of the old rule of *Strickland v. Washington* and that, if *Padilla* established a new rule, the rule should apply in "initial-review collateral proceeding" cases like hers.[114] Chaidez had pled guilty to the federal crime of mail fraud after her defense attorney allegedly failed to advise her that immigration law categorizes the offense as an aggravated felony that triggers deportation.[115] Before the Supreme Court decided *Padilla*, Chaidez petitioned for a writ of *coram nobis* in U.S. district court to set aside her conviction because of her lawyer's deficient performance.[116] Because there is no deadline for filing a writ of *coram nobis* in federal court, and because she filed within a reasonable period of time, her petition was found to be timely.[117] After *Padilla* was decided, she sought to rely upon it to argue

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authority is not surprising given the fact that the Texas Court of Criminal Appeals has directed defendants to bring such claims on collateral review." *Id.*

110. Brief of Amici Curiae Utah and 24 Other States in Support of Respondent, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (No. 11-10189).

111. *Trevino*, 133 S. Ct. at 1921.

112. *Id.*

113. *Id.*

114. Brief for Petitioner at 30 Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820) (quoting Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012)).

115. *See* Chaidez v. United States, 133 S. Ct. 1103, 1106 (2013).

116. *See id.*

117. The U.S. district court rejected the government's laches argument. *See* U.S. v. Chaidez, No. 03 CR 636–6, 2010 WL 3979664, at *3 (N.D. Ill. Oct. 6, 2010) (finding that a seven month delay in filing a writ for *coram nobis* was "reasonably diligent"), *overruled on other grounds by* 133 S. Ct. 1103, 1106 (2013).

that her attorney had breached his Sixth Amendment duty to advise her about deportation.[118]

Because Chaidez's ineffective assistance claim—like the great majority of such claims—arose in the context of a postconviction proceeding rather than a direct appeal, the issue was whether *Padilla* applied to her case.[119] Chaidez argued to the district court and court of appeals that *Padilla* did not establish a new rule but merely applied *Strickland v. Washington*'s old rule governing ineffective assistance of counsel claims.[120] In a petition for rehearing and rehearing en banc before the court of appeals, Chaidez further argued that *Teague*'s retroactivity framework did not apply to her case because *Teague* involved a state conviction on federal habeas review, a context that raised comity concerns that are not present when a federal court reviews a federal conviction.[121] Relying on *Martinez*, she also argued in briefing to the U.S. Supreme Court that any new rule must apply to new or pending postconviction claims like hers that initially raise ineffective assistance of counsel claims.[122]

The Court rejected Chaidez's first argument, ruling that *Padilla* established a new rule under the framework of *Teague*.[123] As mentioned above, this was the first time that the Court had held that an application of *Strickland* created a new rule. The Court declined, however, to rule on Chaidez's other claims, stating in a footnote that they had not been properly preserved.[124] *Chaidez* thus left open the questions whether (1)

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118. *See Chaidez*, 133 S. Ct. at 1106.

119. *See id.*

120. *See id.* at 1111; *see also* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("The proper measure of attorney performance [is] simply reasonableness under prevailing professional norms.").

121. *Compare Chaidez*, 133 S. Ct. at 1106 (concerning a federal conviction of mail fraud), *with* Teague v. Lane, 489 U.S. 288 (1989) (involving a state court conviction for three counts of attempted murder, two counts of armed robbery, and one count of aggravated battery); *see also Chaidez*, 133 S.Ct. at 1113 n. 16.

122. *See* Brief for Petitioner, *supra* note 12.

123. *See* Chaidez, 133 S. Ct. at 1111.

124. *See id.* at 1113 n.16. The Court stated:

> Chaidez makes two back-up arguments in her merits briefs—that *Teague*'s bar on retroactivity does not apply when a petitioner challenges a federal conviction, or at least does not do so when she makes a claim of ineffective assistance. Brief for Petitioner 27–39. But Chaidez did not include those issues in her petition for certiorari. Nor, still more critically, did she adequately raise them in the lower courts. Only her petition for rehearing en banc in the Seventh Circuit at all questioned *Teague*'s applicability, and her argument there—that a "*Teague*-light" standard should apply to challenges to federal convictions—differs from the ones she has made in this Court. *See* Petition for Rehearing and for Rehearing En Banc in No. 10–3623(CA7), p. 13. Moreover, we cannot find any case in which a federal court has considered Chaidez's contention that *Teague* should not apply to ineffective assistance claims. "[M]indful that we are a court of review, not of first

Teague's retroactivity framework applies to review of federal, as opposed to state, convictions; and (2) whether *Padilla* is the governing standard in postconviction cases involving pre-*Padilla* pleas raising initial ineffective assistance of counsel claims that could not have been brought on direct appeal.[125]

C. *Florida's Postconviction Pipeline*

The Florida Supreme Court has taken up the question of whether *Padilla*'s new rule applies to an initial-review collateral proceeding involving ineffective assistance of counsel. The trio of cases—*Hernandez, Diaz, and Castaño*—involved three noncitizens with Florida convictions who filed for postconviction relief under Florida Rule of Criminal Procedure 3.850.[126] Each had a final criminal conviction before *Padilla* was decided. Each alleged that their lawyers failed to advise them that their pleas made them subject to "presumptively mandatory deportation."[127]

Castaño, like Chaidez, filed for postconviction relief before *Padilla*, and her case was still pending when the decision was rendered. She filed her petition within two years of her conviction becoming final, as required by Rule 3.850(b).[128] Hernandez and Diaz filed their motions after *Padilla* and beyond the rule's two-year deadline. Although the Florida Supreme Court ruled that *Padilla* "does not apply retroactively," the court made an important exception to this holding in *Castaño* by grandfathering certain "pipeline" postconviction claims.[129] The court

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view," we decline to rule on Chaidez's new arguments. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005).

Id.

125. Thus, in *Chaidez* the Court for the first time applied *Teague* to a federal conviction, without deciding whether *Teague* applies at all.

126. *See* Castaño v. State, No. SC11-1571, 2012 WL 5869668 (Fla. Nov. 21, 2012) (per curiam); Diaz v. State, No. SC11-1281, 2012 WL 5869664 (Fla. Nov. 21, 2012) (per curiam); Hernandez v. State, Nos. SC11-941, SC11-1357, 2012 WL 5869660 (Fla. Nov. 21, 2012) (per curiam).

127. *Hernandez*, 2012 WL 5869660, at *3. When pleading guilty, each received some version of the generic judicial warning under Florida Rule of Criminal Procedure 3.172(c)(8) that the plea "may subject" him or her to deportation. *Id.* The Rule requires that the judge accepting the plea warn each defendant—citizen and noncitizen alike—that "if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service." FLA. R. CRIM. P. 3.172(c)(8) (2012). The Florida Supreme Court ruled that the generic judicial warning that deportation "may" result from a plea does not automatically cure the prejudice of defense counsel's deficient performance when deportation was not just possible but "presumptively mandatory." *Hernandez*, 2012 WL 5869660, at *4.

128. *See* FLA. R. CRIM. P. 3.850(b) (2012).

129. *Castaño*, 2012 WL 5869668, at *1 (Pariente, J., concurring). In so doing, the Court skipped over the threshold issue of whether *Padilla* constitutes a new or an old rule. The Court assumed that *Padilla* had established a "new rule" and analyzed whether it was a retroactive new

issued a per curiam decision holding that because Castaño's "postconviction proceeding was pending when the United States Supreme Court issued *Padilla* . . . *Padilla* does apply to Castaño's pending case."[130] Justice Pariente, in an opinion in which Justices Quince and Perry concurred, explained the Court's conclusion. She noted that (1) Castaño, unlike Hernandez, had filed her petition in a timely manner; (2) Castaño filed her petition before *Padilla* was decided; and (3) her petition was still pending when *Padilla* was decided.[131] Recognizing the general principle that new rules do not apply in postconviction proceedings, she found that *Padilla* was different because it "created new law that would apply to a claim raised in postconviction, not on direct appeal."[132] Her reasoning on this last point tracked that of Chaidez's *Martinez* argument: Because ineffective assistance of counsel claims are typically brought for the first time in collateral proceedings (initial-review collateral proceedings), litigants should receive the benefit of new rules governing these claims created in a postconviction context. Consistent with *Griffith's* reasoning that "similarly situated defendants" must be treated "the same,"[133] Justice Pariente further observed that it "would be inequitable and illogical to hold that only one of two similarly situated defendants—Padilla and not Castaño—should receive the benefit of the United States Supreme Court's decision."[134]

The Florida pipeline exception established in *Castaño* straightforwardly includes any postconviction litigant who filed a timely motion before *Padilla* and whose case was still pending. The scope of the postconviction pipeline is arguably broader, however. Anyone with a pre-*Padilla* plea who files a timely motion (i.e., within two years of the conviction becoming final) would appear to be covered, even if the motion was filed *after Padilla* was decided.[135] No relevant distinction exists between a timely motion filed before *Padilla* or after *Padilla*, since both types of motions fall within the postconviction pipeline. As discussed above, in the context of direct appeals, a litigant receives the

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rule, holding that it was not. *Id.* (majority opinion). *Chaidez* later ruled that *Padilla* had established a new rule.

130. *Id.* Castaño had filed a timely postconviction motion. If she had not, the Court would likely have not ruled in her favor.

131. While Justice Pariente stressed the timelinesss of Castaño's motion and pointed out that Hernandez had waited nine years to file his postconviction case, she did not at any point refer to the two-year deadline under Rule 3.850. It is therefore not clear whether she was referring to timeliness under the Rule or to the absence of a laches problem in Castaño's case. *See id.* (Pariente, J., concurring).

132. *Id.* at *3.

133. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).

134. *Castaño*, 2012 WL 5869668, at *3 (Pariente, J., concurring).

135. FLA. R. CRIM. PRO. 3.850(b).

benefit of a new rule even if she files a (timely) appeal after the decision creating the new rule.[136]

While the *Castaño* pipeline expressly excluded Hernandez, Justice Pariente's concurrence does not satisfactorily explain why the "new law" of *Padilla* would not also apply to Hernandez. If *Padilla* created a new rule intended to apply in postconviction proceedings it should have applied equally to Hernandez, who was also in postconviction proceedings. It would have been more consistent with the decision to grant relief to Castaño for the Court to have held in *Hernandez* that *Padilla* established a new rule which applies to postconviction claims involving convictions that were final before *Padilla*. The relevant contrast between Castaño and Hernandez lies in the *timeliness* of their petitions (rather than in whether they were filed before or after *Padilla*). After finding that *Padilla* is "new law" that governs in postconviction proceedings, the Court could then have denied relief to Hernandez because his petition was untimely.[137] Such reasoning would have squared with the court's decision to grant relief to Castaño and not Hernandez.

IV. THE CASE FOR A POSTCONVICTION PIPELINE

The *Castaño* line of reasoning that *Padilla* was "new law" intended to apply in postconviction proceedings and Chaidez's argument based on *Martinez* is correct. New rules relating to ineffective assistance claims must govern in initial-review collateral proceedings for the same constitutional reasons that the U.S. Supreme Court has said litigants must have the benefit of new rules on direct appeal. As recognized by the Court in *Griffith*, Article III mandates that new rules be announced in the context of deciding the outcome of a case or controversy.[138] Once announced, new rules must apply to all pending cases because the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review [would] violate[ ] basic norms of constitutional adjudication."[139] The Court has observed in the civil context that "[a]s a

136. *See supra* note 27 and accompanying text.

137. Recognizing a pipeline would not undo the finality of all convictions in postconviction proceedings. Litigants would need to otherwise qualify for postconviction relief, including complying with any filing deadlines.

138. *Griffith*, 479 U.S. at 322. The U.S. Supreme Court has recognized that litigants have little incentive to press their claims unless any new rule declared in their case would apply to them. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991) ("A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether.").

139. *Griffith*, 479 U.S. at 322. States must follow *Griffith* on this point, at least in civil cases. *See* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 100 (1993) (holding in tax case that *Griffith* overturns more restrictive state rule).

matter of purely judicial mechanics," new rules must apply to similarly situated individuals, because holding otherwise "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally."[140]

A. *The Logic of* Griffith

As applied to initial-review collateral proceedings, the logic of *Griffith* dictates that cases properly in the postconviction pipeline receive the benefit of any new rule announced, even if the new rule was announced after the conviction became final on direct appeal. Because IAC claims typically are not brought on direct appeal, litigants in initial-review collateral proceedings are similarly situated to litigants on direct appeal.[141] Fairness requires that courts treat people the same regardless of whether initial review is channeled to direct or collateral proceedings.[142]

Under *Griffith*, a defendant with a pending appeal may benefit from a new rule only if the rule relates to an issue properly preserved in the appeal.[143] Unless finality is pegged to postconviction proceedings in IAC cases, defendants in states that hear IAC claims in collateral proceedings will generally derive no benefit from the *Griffith* rule.[144] The following three examples illustrate this problem as well as the disparate treatment of litigants subject to different state procedural schemes. Litigant #1 is in a state that channels IAC claims into direct appeal.[145] While the appeal is pending, the U.S. Supreme Court announces a new rule affecting IAC claims. Under *Griffith*, this litigant straightforwardly

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140. *James B. Beam Distilling Co.*, 501 U.S. at 535, 537. Moreover, the Court in *Teague* recognized that the "fact that life and liberty are at stake in criminal prosecutions" is a reason that finality "'should not have as much place in criminal as in civil litigation.'" 489 U.S. at 309 (citing Henry Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.CHI.L.REV. 142, 150 (1970)) (emphasis omitted).

141. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (Where a collateral proceeding is the defendant's first opportunity to raise a claim of ineffective assistance, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim.").

142. *Griffith* recognized the importance of treating "similarly situated defendants the same." *Griffith*, 479 U.S. at 323 (citing Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting)).

143. *See* Ford v. Georgia, 498 U.S. 411, 418 (1991) (requiring that a petitioner have raised in his appeal the claim pertaining to the newly announced rule); *see also* United States v. Verbitskaya, 406 F.3d 1324, 1340 n. 18 (11th Cir. 2005) ("The *Griffith* holding . . . applies only to defendants who preserved their objections throughout the trial and appeals process.").

144. Because individuals who accept plea agreements often do not file an appeal, cases involving a *Padilla* claim typically have not been appealed.

145. Idaho essentially channels IAC claims into direct appeal in death penalty cases. Although IAC claims are brought on postconviction rather than on direct appeal, they must be filed within forty-two days of the entry of judgment and are consolidated with other claims on review before Idaho's highest court. *See* Idaho Code § 19-2719(3) & (6).

receives the benefit of the new rule. Litigant #2 is in a different jurisdiction that uses a system of parallel direct and postconviction proceedings.[146] This litigant files a direct appeal on issues unrelated to IAC but also raises an IAC claim on postconviction. While both the appeal and the postconviction claim are pending, the U.S. Supreme Court announces a new rule relating to the IAC claim. This litigant could argue that *Griffith*'s appellate pipeline applies because her conviction was not yet final when the new rule was announced.[147] She, however, might not prevail because her pending appeal was unrelated to the IAC claim.[148] Litigant #3 is in one of the many states where postconviction IAC claims are typically filed after the conclusion of any direct appeal. Without a postconviction pipeline, this litigant definitely would not receive the benefit of any newly announced procedural rule (unless it falls within one of the narrow *Teague* exceptions).

These examples illustrate how people are treated differently even though they each seek initial review of an IAC claim. Without a postconviction pipeline, receiving the benefit of a new rule hinges on the vagaries of a state's system for reviewing claims. Moreover, states like Arizona (where IAC claims must be brought on postconviction) provide no forum for litigants to argue for a new rule. In states like Texas (where IAC claims on direct appeal are theoretically permitted), litigants would be induced to raise their IAC claims on direct review in order to avoid the risk of needing to argue for a new rule on postconviction.[149]

The U.S. Supreme Court has found that there are good reasons to

146. Only a few states utilize a system of consolidated or parallel proceedings. *See* Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001) (noting that, in 2001, "only California, Colorado, Idaho, and Texas ha[d] statutory schemes that require[d] capital defendants to pursue simultaneously postconviction and direct appeal claims in appealing to the state's highest court"). It is often unrealistic to expect that litigants raise IAC claims on direct appeal or on postconviction with a short filing deadline. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 690 (2007) (because of tight deadlines and the inability to quickly retain new counsel "an overwhelming majority of defendants do not raise trial attorney ineffectiveness challenges in their motions for a new trial"). As a result, some litigants in states that require IAC be raised in consolidated or concurrent proceedings file their claims well after deadlines have passed. *See, e.g.*, Hoffman v. Arave, 236 F.3d 523, 531 (2001) (review of IAC claim on federal habeas permitted in Idaho case despite postconviction claim being filed past the deadline of forty-two days after the entry of judgment) (citing Brecheen v. Reynolds, 41 F.3d 1343, 1364 (10th Cir.1994); Guinan v. United States, 6 F.3d 468, 471–73 (7th Cir.1993); Ciak v. United States, 59 F.3d 296, 303–04 (2d Cir.1995)). These litigants, like litigant #3 described below, would need the postconviction pipeline to benefit from new rules.

147. *Teague* arguably does not apply to convictions not yet final, even if the pending appeal is unrelated to the IAC claim.

148. *See supra* note 143 for cases holding that an issue must be raised in an appeal for any newly announced rule to apply.

149. The U.S. Supreme Court has recognized that procedural rules should "induce litigants to present their contentions to the right tribunal at the right time." Massaro v. U.S., 538 U.S. 500,

keep IAC claims in postconviction proceedings.[150] In *Massaro v. U.S.*, the Court ruled that federal defendants need not raise IAC claims on direct appeal, even where the deficient performance is apparent from the trial record.[151] One ground for the Court's decision was the recognition that "requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal" does not "promote" conservation of judicial resources.[152] Often, ineffective assistance of counsel claims require factual investigation outside the trial court record.[153] As a general rule, direct appeal attorneys are neither funded, nor expected, to do investigations and appellate courts consider only the facts in the trial court record. Moreover, if an attorney represents a defendant both at trial and on appeal, the attorney is not likely to file an IAC claim against him or herself.[154] Cognizant of the downsides of funneling IAC claims into direct appeals, most states at the time *Massaro* was decided required, or at least permitted, litigants to raise IAC claims for the first time in post-

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504 (2003) (quoting Guinan v. U.S., 6 F.3d 468, 474 (1993) (Easterbrook, J. concurring) (internal quotations omitted). *See also supra* Part III.A.

150. Trevino v. Thaler, 133 S. Ct. 1911, 1917 ("States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review.") (citing to Martinez v. Ryan, 132 S.Ct. 1309 (2012)). *See also* Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1126–29 (1999) (discussing why most IAC claims are brought in postconviction proceedings).

151. *See* Massaro v. United States, 538 U.S. 500, 504 (2003).

152. *Id.* Massaro was a federal prisoner who had been convicted of murder in aid of racketeering. He filed a direct appeal without raising an ineffective assistance of counsel claim. After this was dismissed, he filed a federal habeas petition under 28 U.S.C. § 2255 seeking to vacate his conviction. He argued that trial counsel had rendered ineffective assistance of counsel by rejecting an offer to continue the case after the prosecution had revealed a key piece of evidence. The district court held that his claim was procedurally barred because he had not raised it on direct appeal. *See id.* at 502.

153. *Trevino*, 133 S. Ct. at 1918 (IAC claims often "depend[ ] on evidence outside the trial record" and developing the record on direct appeal is often constrained by tight deadlines) (quoting *Martinez*, 132 S. Ct. at 285) (internal quotations omitted). *See also* Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) ("Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral proceedings, particularly if he retained trial counsel on direct appeal."); Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 609–10 (2011) (discussing the difficulty of gathering evidence for an IAC claim while incarcerated and without the assistance of counsel).

154. *Trevino*, 133 S. Ct. at 1917 (recognizing that ineffective assistance claims "normally require[ ] a different attorney"). *See also* Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998) (stating that "it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons") (citing Kentucky Bar Association Opinion E–321 (July 1987)); People v. Smith, 863 P.2d 192, 198–99 (Cal. 1993) (noting that "when a defendant claims after trial or guilty plea that defense counsel was ineffective, and seeks substitute counsel to pursue the claim, the original attorney is placed in an awkward position" and "[t]he potential for conflict is obvious" when an "attorney must defend against charges from the very client he or she is supposed to be representing").

conviction proceedings.[155]

Under the right conditions, defendants could be better off if IAC claims were channeled into direct review.[156] But unless direct review proceedings are extensively revamped to permit new counsel, lengthy factual investigation, and robust access to the trial court, encouraging defendants to bring IAC claims on direct appeal would be misguided. Raising IAC claims on direct appeal is risky for defendants because the claim is not likely to be granted unless there is an opportunity (and sufficient time) to develop the record. Moreover, once a claim is denied on direct appeal, it typically cannot be raised again on postconviction.[157]

The rationale of *Griffith* should compel courts to endorse the Florida Supreme Court's suggestion in *Castaño* that there be a postconviction pipeline for initial-review claims. The pipeline would include all cases properly filed in collateral proceedings that are pending, regardless of whether the case was filed before or after the announcement of a new rule.[158] Such a postconviction pipeline would relate to initial-review postconviction claims in precisely the same way that *Griffith*'s direct review pipeline relates to claims that are properly raised at trial and on direct appeal. The inequity illustrated in the examples above would disappear.

B. *Finality and Comity*

An additional reason not to apply *Teague* in the initial-review collateral context is that the finality and comity concerns underlying that decision do not exist. *Teague*'s rule that nonretroactive new constitutional rules do not apply in federal habeas review of state convictions rested on a reluctance to encroach on a state's interest in coming to closure in a case.[159] The *Teague* rule "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[160] But if initial-review collateral proceedings are tantamount to direct review, any comity concerns arising from federal review of state decisions would be no different than in *Griffith*. In *Griffith*, the Court did not discuss comity as a concern when a federal court announces a new rule that overturns a state

155. *See Massaro*, 538 U.S. at 508 ("A growing majority of state courts now follow the rule we adopt today.").

156. *See* Primus, *supra* note 146, at 679 (detailing a proposal to reform the direct appeal process to permit fair consideration of IAC claims).

157. *Id.* at 691.

158. This would make the postconviction pipeline analogous to the direct appeal pipeline. For a discussion of what is included in the direct appeal pipeline. *See* discussion *supra* note 27.

159. *See* discussion *supra* Part I.

160. Butler v. McKellar, 494 U.S. 407, 414 (1990).

conviction on direct appeal.[161] With respect to finality, if a claim is incapable of (or discouraged from) being fully raised in a direct appeal, there can be no finality until the claim is heard on collateral review.[162] Commentators have noted that "finality as to some kinds of attacks . . . cannot possibly set in—because those claims cannot possibly arise, or at least usually do not arise—until after the direct appellate process has ended."[163] As a result, "finality ought not to set in with regard to claims as to which state law does not provide an 'opportunity for full and fair litigation' at 'trial and on direct appeal.'"[164] Justice Harlan, whose retroactivity jurisprudence was enshrined in *Teague*, expressed a concern with finality in cases involving "relitigat[ion]," not initial litigation.[165]

C. *Stunted Evolution of Norms*

A further set of concerns relates to ensuring the evolution of constitutional IAC norms. Unless new constitutional rules like *Padilla* can be announced in initial-review collateral proceedings, the constitutional law on IAC claims cannot evolve. As shown above, *Teague* prevents federal courts from ruling on the merits of a constitutional postconviction claim unless they first decide that the case involves a *Teague* old rule or a retroactive new one.[166] This threshold question approach rests on an implicit assumption that new procedural constitutional rules will natu-

161. Griffith v. Kentucky, 479 U.S. 314 (1987).

162. *Massaro*, 538 U.S. at 508–09.

163. Hertz & Liebman, *supra* note 21, at § 25.6 (citing to Withrow v. Williams, 507 U.S. 680, 688 (1993) ("'restricting the litigation of Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation'") (quoting Kimmelman v. Morrison, 477 U.S. 365, 378 (1986)). Two commentators cited in *Teague* recognized that finality with respect to certain claims should not set in until after postconviction review. Teague v. Lane, 489 U.S. 288, 309 (1989) (citing to Henry Friendly and Paul Bator); *see* Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) (listing claims that should not be barred on collateral review, including claims that could not have been raised previously, and suggesting that failure to provide for review of such claims could constitute a due process violation); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 454 (1963) (noting types of cases in which "relitigation serves obvious and appropriate ends"). One court has observed that *Teague* does not "come into play" when the constitutional violation "'typically do[es] not occur until after the trial and direct review are completed.'" Sanders v. Sullivan, 900 F.2d 601, 606 (2d Cir. 1990). Otherwise, *Teague* would "emasculate[ ]" the right in question. *Id.*

164. Hertz & Liebman, *supra* note 21, at § 25.6. This approach comports with the role of habeas as providing a forum for claims for which "no opportunity for full and fair litigation" have occurred. *Id.* (citing authorities).

165. *Mackey*, 401 U.S. at 691.

166. This test is the federal *Teague* threshold test. *See* discussion *supra* Part II. Most states follow *Teague*, although some do not. *See* supra note 48 and accompanying text. Moreover, if it is a claim covered by AEDPA, the court must also find that resolution of the case would involve only "clearly established" law. 28 U.S.C. § 2254(d)(1) (2012). *See* discussion *infra* notes 189–193 and accompanying text. At least one court has held that, unlike *Teague*'s threshold question, 28 U.S.C. § 2254(d)(1) is not waivable. *See* Moore v. Mitchell, 708 F.3d 760, 784 (6th Cir. 2013).

rally develop in cases on direct appeal. But IAC claims almost exclusively appear first in postconviction proceedings rather than on direct appeal. Without a postconviction pipeline, courts would have little opportunity to make new rules of criminal procedure.

In *Padilla*, the U.S. Supreme Court faced no potential barrier to announcing a new constitutional rule of criminal procedure because the State did not assert *Teague* as a defense.[167] *Padilla* involved a state conviction that had been upheld by the Kentucky Supreme Court.[168] Padilla sought, and was granted, certiorari in the U.S. Supreme Court.[169] Even though Kentucky follows *Teague*, it declined to argue that Padilla's claim was barred on the grounds that it would involve establishing a new rule.[170] The Court thus was clearly permitted to proceed to the merits of Padilla's Sixth Amendment claim.[171]

In its decision in *Chaidez*, the U.S. Court of Appeals for the Seventh Circuit pointed out the State's waiver of the *Teague* issue in *Padilla*.[172] Chaidez had argued that the fact that the U.S. Supreme Court had ruled on the merits of the Sixth Amendment issue in *Padilla* without first deciding whether it was a new rule meant that the Court believed it to be an old rule.[173] The Seventh Circuit disagreed, stating "[i]n light of the fact that Kentucky did not raise *Teague* as a defense in *Padilla,* we do not assign significance to *Padilla*'s procedural posture."[174] The court noted that "[w]hile '[r]etroactivity is properly treated as a threshold question,' *Teague* 'is not "jurisdictional" in the sense that [the] Court . . . *must* raise and decide the issue *sua sponte.*'"[175] Before the U.S. Supreme Court, the federal government argued the same point.[176]

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

168. *See Padilla*, 130 S. Ct. at 1478. *Teague*, in contrast, involved federal habeas review of a state conviction.

169. *See id.*

170. Leonard v. Commonwealth, 279 S.W.3d 151, 160 (Ky. 2009) (adopting the *Teague* test for retroactivity).

171. As explained above, only in cases in which the government raises a *Teague* issue is a court obligated to consider the threshold question of whether the case involves a new rule. *See supra* Part II. Padilla was before the Court on a petition for certiorari rather than federal habeas review. The U.S. Supreme Court has not ruled whether a state can assert a *Teague* defense in a case involving certiorari on direct review from a state court decision, as opposed to review on federal habeas. However, states have raised *Teague* as a defense in cases involving the same procedural posture as *Padilla*. *See supra* note 61.

172. *See* Chaidez v. United States, 655 F.3d 684, 693–94 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).

173. *See id.*

174. *Id.* at 693.

175. *Id.* (citing Collins v. Youngblood, 497 U.S. 37, 40–41 (1990) (emphasis in original)).

176. The U.S. government argued that "the *Teague* defense 'is not jurisdictional,' and the State may waive or forfeit it in individual cases." Brief for the United States at 19, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820), 2012 WL 1097108, at *19 (citing *Collins*, 497 U.S.

Padilla's procedural oddity is further illustrated by the fact that Padilla got the benefit of the new rule and Chaidez did not. Under *Teague*, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[177] But since *Padilla* did not address the threshold question of whether it would announce a new rule, Padilla got the benefit of the decision in his case and no one else with convictions that were final before *Padilla* did.

A legacy of *Teague* is that new, constitutional procedural rules may not be announced in collateral proceedings unless the State waives the *Teague* issue (as in *Padilla*) or the rule fits a narrow exception to nonretroactivity (like *Gideon*).[178] Commentators have criticized *Teague* for its general stunting effect on the evolution of constitutional law relating to criminal procedure.[179] The *Teague* effect is particularly pronounced in the IAC context because defendants typically have little meaningful opportunity to have their IAC claims decided on direct appeal.[180] Absent a postconviction pipeline, *Teague's* threshold test threatens to bar any development that would be a new constitutional rule.

Martinez itself provides a telling example. The Court observed that *Coleman* "left open" the constitutional question of "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."[181] The Court in *Martinez* limited its decision to an "equitable ruling," saving the constitutional question for another day.[182] But if *Teague* applies, the Court will likely never reach *Coleman*'s unanswered question. Indeed, in *Martinez*, Arizona had argued *Teague* as a bar to relief.[183]

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at 41; Schiro v. Farley, 510 U.S. 222, 228–29 (1994)) (some internal quotation marks omitted). Thus, "[w]hen a State forfeits the *Teague* bar, the Court may therefore announce a new rule even though the case might otherwise have presented *Teague* issues." *Id.* Because Kentucky did not "raise *Teague* as a defense," the government argued that the Court in *Padilla* was free to rule on the merits of the Sixth Amendment issue and its ruling "does not imply any conclusion about retroactivity." *Id.*

177. Teague v. Lane, 489 U.S. 288, 300 (1989). *See also supra* Part II.

178. *See supra* note 41.

179. *See, e.g.*, James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 575 (1991) (*Teague* reduces lower courts to "ministerial task of putting into operation decisions that the Supreme Court renders on direct review"). The U.S. Supreme Court has acknowledged that concerns about constitutional law becoming "ossified" can be valid, at least in cases involving individual rights. *See* Davis v. U.S., 131 S.Ct. 2419, 2433 (2011).

180. *See* discussion of Trevino v. Thaler *supra* Part III.A.

181. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

182. *Id.* at 1319–20. Because the Court announced a new equitable rule relating to the operation of federal review of state convictions, rather than a constitutional new rule, *Teague*'s threshold question rule did not apply and the Court was free to announce the new rule.

183. *See* Respondent's Brief on the Merits at 36–41, *Martinez*, 132 S. Ct. 1309 (2012) (No. 10-

Teague's threshold test insulates other important questions from review. Any claim based on facts outside the trial court record could be barred if the Court finds that a new rule is needed to resolve it. Such claims might involve newly discovered evidence, improperly withheld exculpatory evidence under *Brady v. Maryland*,[184] or the failure of counsel to investigate or develop relevant facts. The paralysis of constitutional rule-making in the IAC context is particularly problematic because the effectiveness of counsel is tagged to prevailing professional norms under *Strickland* and are therefore intended to track changes in the practice of law.[185] Thus, by definition, the relevant constitutional standard is evolving. Unless courts can announce new rules relating to the scope of *Strickland*, IAC rulings stand to become increasingly unhitched from professional norms.

Teague's effect might be limited if applications of *Strickland*'s test for deficient counsel never resulted in a new rule. Traditionally, applications of *Strickland* have been old rules, posing no problem for the evolution of Sixth Amendment law.[186] But *Chaidez* now teaches us that applications of *Strickland* can constitute new rules. As professional norms evolve, courts will inevitably consider whether the Sixth Amendment requires attorneys to advise their clients of other consequences of their pleas, such as those relating to voting rights, employment, occupational and professional licensing, business licensing, motor vehicle licensing, ability to secure government contracts, loans, and grants, government benefits, Second Amendment rights, future sentencing consequences, recreational licenses, and family and domestic rights.[187] One way out of this predicament would be for the Court to rule that any future ruling about collateral consequences of pleas would not involve a new rule. The Court could find that the new rule of *Padilla* broke the collateral consequences barrier, making any further expansion of profes-

1001). Martinez responded that there would be no new rule, merely an extension of *Douglas v. California*, 372 U.S. 353 (1963), and *Evitts v. Lucey*, 469 U.S. 387 (1985), to another form of appeal — the initial-review collateral proceeding. Reply Brief at 16–19, *Martinez*, 132 S. Ct. 1309 (2012) (No. 10-1001). Particularly in light of *Chaidez*, it is unlikely the Court would agree. *See* Chaidez v. United States, 133 S. Ct. 1103, 1110 (2013) ("[W]hen we decided *Padilla*, we answered a question about the Sixth Amendment's reach that we had left open[.]").

184. Brady v. Maryland, 373 U.S. 83 (1963).

185. Under *Strickland*, the "proper measure of attorney performance" is "reasonableness under prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 688 (1984).

186. *See* Brief for Petitioner at 16, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820), 2012 WL 2948891, at *15 (noting that "[i]n the three decades since *Strickland* was decided, this Court has applied its standard in a multitude of settings, but it has *never* held that applying *Strickland* in new circumstances announced a new rule").

187. The American Bar Association has cataloged numerous consequences of plea agreements in an online database. NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, http://www.abacollateralconsequences.org.

sional norms just an application of the old rule of *Strickland*.[188] With such a ruling, the evolution of IAC constitutional norms in the collateral consequences area could continue unfettered by *Teague*. But unless and until the Court so rules, a postconviction pipeline is required to permit IAC norms to track the expanding duty of counsel to warn of consequences previously considered collateral by some courts.

In federal habeas cases involving state convictions, the positive effect of a postconviction pipeline might be limited because of the separate, statutory relitigation bar created by AEDPA. *Teague* is a court-generated retroactivity rule that applies to federal habeas review of state convictions "on the merits."[189] It co-exists with the federal habeas statute. The habeas statute, as modified in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA), poses an additional barrier to federal court review through its strict "relitigation" bar.[190] A court cannot overturn a state conviction based on a claim "that was adjudicated on the merits" in state proceedings unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[191]

The U.S. Supreme Court has made clear that AEDPA's amendments to the habeas statute "did not codify *Teague*" and that "the AEDPA and *Teague* inquiries are distinct."[192] As a result, even if

188. It is unclear the extent to which immigration consequences stand apart from other consequences that could be described as collateral. The Court in *Padilla* expressly declined to characterize immigration consequences as "collateral," stating that it had never used this label to describe immigration consequences. *Padilla*, 130 S. Ct. at 1481. However, part of Justice Kagan's opinion in *Chaidez* appears to support the argument that expansion of the Sixth Amendment duty to include advice about other types of consequences would not announce a new rule. In explaining why *Padilla* was a new rule, she noted: "Before *Padilla*, we had declined to decide whether the Sixth Amendment had any relevance to a lawyer's advice about matters not part of a criminal proceeding." 133 U.S. at 1110.

189. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); *see also* Hertz & Liebman, *supra* note 21, at § 25.2 (retroactivity is a "judge-made and prudential" doctrine).

190. *Greene*, 132 S. Ct. at 44. The U.S. Supreme Court has characterized AEDPA's bar as "'difficult to meet' because the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Id.* at 43–44 (citing Harrington v. Richter, 131 S. Ct. 770, 786 (2011)) (internal quotations and citations omitted).

191. 28 U.S.C. § 2254(d)(1) (2006).

192. *Greene*, 132 S. Ct. at 44 (citing Horn v. Banks, 536 U.S. 266 (2002) (per curiam)). Indeed, the Court has expressly left open the question whether AEDPA's relitigation bar would prevent a federal habeas petitioner from receiving the benefit of a new rule even after it were found retroactive under *Teague*. *See id.* While there are differences between the *Teague* retroactivity rule and AEDPA's relitigation bar, the Supreme Court has equated *Teague*'s old/new rule test with the requirement under the federal habeas statute that law be "clearly established" before it can serve as a basis for reversing a state conviction. 28 U.S.C. § 2254(d)(1) (2006); *see* Williams v. Taylor, 529 U.S. 362, 379 (2000) ("The antiretroactivity rule recognized in *Teague*, which prohibits reliance on 'new rules,' is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law.'). The Court noted that the only

Teague were held not to apply in initial-review collateral proceedings, the AEDPA bar will apply in state conviction federal habeas cases, making it impossible for new law to evolve in this category of cases. There may be arguments that AEDPA's bar must align with the postconviction pipeline. But even if AEDPA stands as an independent bar in federal habeas cases involving state convictions, the postconviction pipeline would ensure the availability of all other types of review for the evolution of IAC rules. These types of review include federal habeas review of federal convictions under 28 U.S.C. § 2255, state court review of state convictions, and direct certiorari review of state convictions.[193] As discussed above, under *Danforth*, states may be more generous in their retroactivity analysis than the U.S. Supreme Court.[194] Even if the U.S. Supreme Court were to reject the postconviction pipeline, nothing prevents states from embracing it.

V. CONCLUSION

The U.S. Supreme Court and state courts should adopt the postconviction pipeline described in this article and grounded in both Justice Pariente's opinion in *Castaño* and Chaidez's argument based on *Martinez*. If an initial-review collateral proceeding is the equivalent of a direct appeal, it must be treated as a direct appeal for retroactivity purposes. To hold otherwise would be to raise both constitutional and policy concerns.

A postconviction pipeline would appropriately reconcile the potential conflict between the principles of *Griffith* and *Teague*. New rules must be announced. *Griffith* requires that, once they are, similarly situated defendants must be given the benefit of the new rule. *Teague* places a barrier against announcing new rules in postconviction proceedings.

"caveat" to the equivalence was that that a *Teague* "old" rule did not necessarily need to be established by the U.S. Supreme Court. *Id.* at 412. For a discussion of the ways in which the statutory test differs from *Teague*, *see* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 232 n. 126 (2008) (discussing differences between AEDPA and *Teague*); *see also* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 959 (1998) (explaining that *Teague* still applies even after AEDPA).

193. As others have noted, AEDPA's relitigation bar and the *Teague*'s new/old rule test have increased the importance of state court review, federal review of federal convictions, and U.S. Supreme Court certiorari review of state court decisions. *See generally* Shay & Lasch, *supra* note 192; *see also* Hertz & Liebman, *supra* note 21, at § 25.1 (AEDPA converts the certiorari petition process "into a defendant's first *and* last opportunity to secure relief" on basis of new rule); *see also* Spencer v. Georgia, 500 U.S. 960, 960 (1991) (Kennedy, J., concurring in the denial of certiorari) (stating that certiorari would have been appropriate if the claim could not have been heard on federal habeas review).

194. *See supra* notes 42–47 and accompanying text.

But since new IAC rules are typically announced on postconviction, the *Teague* rule threatens to either forbid the announcing of new IAC rules or to breach the *Griffith* prohibition on announcing a new rule without applying it to similarly situated defendants. The Court in *Padilla* was able to thread this needle because the State did not raise *Teague* as a defense. As a result, Padilla got the benefit of the new rule announced in his case, while no one else did.

Teague is aimed at limiting the circumstances under which federal courts will overturn the actions of a state trial court based on a subsequent change in the law. But when a claim is raised for the first time in a postconviction motion, trial courts should rule according to the most current law. There is no *Teague* concern when trial courts use present day law to make an initial ruling on a claim, regardless of whether that ruling occurs in postconviction proceedings. In both direct review and initial-review collateral proceedings, courts should heed Justice Harlan's call to adjudicate cases "in light of [their] best understanding of governing constitutional principles."[195] Otherwise, "it is difficult to see why [courts] should so adjudicate any case at all."[196]

The U.S. Supreme Court deferred the pipeline issue in *Chaidez*, giving lower federal and state courts an important chance to be heard first. These courts are now faced with the opportunity to chart a sensible course through the two shoals of retroactivity jurisprudence created by *Griffith* and *Teague*. Even if the U.S. Supreme Court ultimately rejects the postconviction pipeline, however, the States can, and should, embrace it. Others have persuasively argued that States should not follow *Teague*.[197] But adopting the postconviction pipeline does not require a categorical rejection of *Teague*. To the contrary, the postconviction pipeline aligns with *Teague*'s underlying goal to restrict new rules to first-tier review.

195. Mackey, 401 U.S. at 679 (Harlan, J., concurring in part and dissenting in part).
196. *Id.*
197. *See* Lasch, *supra* note 21.