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To Plea or Not to Plea: Retroactive Availability of Padilla v. Kentucky to Noncitizen Defendants on State Postconviction Review

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TO PLEA OR NOT TO PLEA: RETROACTIVE AVAILABILITY OF *PADILLA V. KENTUCKY* TO NONCITIZEN DEFENDANTS ON STATE POSTCONVICTION REVIEW

*Jaclyn Kelley**

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INTRODUCTION

Imagine the following scenario: José, a Mexican national, has lived in the United States since he was five years old and is a lawful permanent resident.[1] His wife is a U.S. citizen, as are his four children. The United States is his home. One day, police catch José with a small amount of marijuana, and he is sentenced to twenty days in jail for misdemeanor drug possession. A year later, José is caught with a tablet of Xanax for which he does not have a prescription. He pleads guilty to a second misdemeanor.[2]

When José pleaded guilty, he did not know that his second conviction would lead to his deportation. His attorney never warned him of the harsh penalties built into the Immigration and Nationality Act ("INA") for those with criminal convictions or the threat those penalties posed to his immigration status as a lawful permanent resident ("LPR"). Under the INA, José's offense, though a misdemeanor, qualifies as an "aggravated felony" because it was his second misdemeanor possession offense.[3] Noncitizens with such drug convictions are often deportable regardless of how long they have been in the country. When José went to prison, Immigration and Customs Enforcement ("ICE") put an "immigration detainer" on him—an administrative hold that marked him for deportation upon completion of his time. Eventually, José was ordered deported to Mexico and forced to leave his family behind.

Luckily for José, he was able to appeal his case, and the U.S. Supreme Court held that simple possession of an unauthorized prescription drug and a sentence of ten days did not constitute an "aggravated felony."[4] As a result, José was not rendered "deportable" under the INA and was able to remain in the United States. But if José had been convicted of something a bit more serious, like possession of marijuana or Xanax with the intent to sell, his case likely would have gone the other way.[5]

José's case is not unique. The United States incarcerates hundreds of thousands of noncitizen criminal defendants each year. In 2010, there

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1. A lawful permanent resident, also called an "LPR" or "green-card holder," has permission to remain in the country indefinitely and after several years is typically eligible to adjust to citizenship. *See* Immigration and Nationality Act § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2006).

2. These are the actual facts from *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580–83 (2010). The rest of the story is a hypothetical account of how the criminal proceedings that took place before the immigration case might have played out.

3. *See id.* at 2583.

4. The Supreme Court ultimately held that the aggravated felony provisions under which the respondent in *Carachuri-Rosendo* was ordered deported did not apply because he had only served ten days in jail for simple possession, not "drug trafficking," as the statute requires. *See id.* at 2579.

5. Those crimes probably would have been considered "drug trafficking" under the INA. Drug trafficking is an aggravated felony. Immigration and Nationality Act § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2006).

were about 55,000 "criminal aliens"[6] in federal prisons, accounting for approximately 25 percent of all federal prisoners.[7] In 2009, there were about 296,000 noncitizens in state and local jails.[8] Like José, these defendants usually do not know that their convictions may make them automatically deportable under the INA.[9]

Under the Supreme Court's recent ruling in *Padilla v. Kentucky*, criminal defense attorneys have an affirmative duty to give specific, accurate advice to noncitizen clients regarding the deportation risk of potential pleas.[10] This rule helps assure that, going forward, noncitizens will be in a position to make informed plea decisions. Knowing the potential consequences of a conviction, they may choose to go to trial, risking a longer sentence but possibly avoiding conviction and subsequent deportation. Unfortunately, for some noncitizen defendants, *Padilla* was decided too late; at the time *Padilla* was announced, they had already pleaded guilty, relying upon the advice of defense counsel who failed to advise them of the potential immigration consequences of their conviction. Under what circumstances should relief be available to such noncitizen defendants?

This Note argues that courts should apply the rule of *Padilla v. Kentucky* retroactively on state postconviction review to at least the limited group of defendants whose cases were on direct review when *Padilla* was decided.[11] Part I discusses *Padilla* in light of the ineffective assistance of counsel doctrine set forth in *Strickland v. Washington*.[12] Part II traces the development of the Supreme Court's federal retroactivity jurisprudence and explains why *Padilla* probably does not apply retroactively under this line of cases. Part II then explains why state courts may still fashion a rule that would allow noncitizens to benefit from retroactive application of *Padilla* on postconviction review.

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6. "Criminal aliens" are "[n]oncitizens who are residing in the United States legally or illegally and are convicted of a crime." U.S. GOV'T ACCOUNTABILITY OFFICE, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS (2011), *available at* http://www.gao.gov/assets/320/316959.pdf. This definition includes not only undocumented immigrants, but it also includes those who have some form of legal status, such as legal permanent residency (a "green card"), a visitor visa, etc. Because of the negative political and social connotations of the term "alien," this Note will use the term "noncitizen" in place of "alien" except where directly quoting.

7. *Id.* at 7.

8. *See id.* at 10.

9. For a list of grounds that make an undocumented person "inadmissible" and effectively requiring deportation, see Immigration and Nationality Act §§ 237, 212, 8 U.S.C. §§ 1182, 1227 (2006).

10. 130 S. Ct. 1473, 1486 (2010).

11. Direct review is the initial phase of adjudication and appeal leading to final judgment. Postconviction review is a form of appeal in which a defendant can challenge his otherwise final conviction. Procedures for this process vary by state. At the federal level, postconviction review is called habeas corpus.

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

Finally, for three reasons, Part III argues that state courts should apply *Padilla* in state postconviction proceedings for at least the limited class of defendants whose cases were on direct review when *Padilla* was decided. First, applying *Padilla* to such defendants is the best way to eliminate inequity between similarly situated defendants. Second, applying *Padilla* to those defendants on direct review at the time *Padilla* was decided is consistent with the underlying purposes of habeas retroactivity doctrine. Finally, extending *Padilla* to this limited class of defendants strikes the appropriate balance between fairness and administrative concerns.

I. *PADILLA* AND INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees the right to effective assistance of counsel in criminal proceedings.[13] Under the Supreme Court's recent ruling in *Padilla v. Kentucky*, this means criminal defense attorneys have an affirmative duty to give specific, accurate advice to noncitizen clients regarding the deportation risk of potential pleas.[14] This Part situates *Padilla* within the ineffective assistance of counsel doctrine set forth in *Strickland v. Washington*. Section I.A presents the *Strickland* test for ineffective assistance of counsel claims. Section II.A discusses *Padilla* and some of its potential implications in the *Strickland* context.

A. *The Right to Effective Assistance of Counsel:* Strickland v. Washington

When a defense attorney's performance falls below the level of performance guaranteed by the Sixth Amendment, a defendant may challenge his conviction by bringing an ineffective assistance of counsel claim. In most states, defendants may not bring an ineffective assistance of counsel claim on direct review. They may only bring the claim during postconviction proceedings. If successful, the defendant is granted a new trial and may re-litigate the original case.

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-prong test set forth by the Supreme Court in *Strickland v. Washington*.[15] First, the defendant must demonstrate that his defense attorney's performance was deficient.[16] With a strong presumption of effectiveness, courts assess whether the attorney's advice was unreasonable in light of "prevailing professional norms."[17] Second, the defendant must demonstrate that his defense attorney's "deficient performance prejudiced

13. *Id.*
14. *Padilla*, 130 S. Ct. at 1482.
15. *Strickland*, 466 U.S. at 687.
16. *Id.*
17. *Id.* at 688.

the defense."[18] He must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[19]

B. *The New Law: Counsel Must Explain Risk of Deportation to Noncitizens*

On March 31, 2010, the U.S. Supreme Court decided *Padilla v. Kentucky*.[20] José Padilla, a native of Honduras, had been a lawful permanent resident of the United States for forty years when he was caught driving a tractor-trailer containing a large amount of marijuana.[21] He pleaded guilty to drug trafficking but later brought an ineffective assistance of counsel claim under *Strickland*.[22] He argued that his defense counsel made two major errors. First, his counsel failed to advise him that a drug trafficking conviction would make him automatically removable under U.S. immigration law.[23] Second, his lawyer gave him affirmative misadvice when she said he "did not have to worry about immigration status since he had been in the country so long."[24] Had he known that this drug trafficking conviction would make his deportation "virtually mandatory," Mr. Padilla argued, he would have insisted on going to trial instead of accepting the plea bargain.[25]

The Supreme Court granted certiorari to determine whether the failure of Mr. Padilla's counsel to advise him of such adverse immigration consequences constituted grounds to bring an ineffective assistance of counsel claim under the Sixth Amendment on postconviction review.[26] In an opinion by Justice Stevens, the Court held by a seven to two majority that to satisfy the Sixth Amendment right to counsel guaranteed by the Constitution, "counsel must advise her client regarding the risk of deportation" that comes with certain guilty pleas.[27] The Court remanded the case to the Supreme Court of Kentucky to determine whether Mr. Padilla had suffered prejudice as a result of his counsel's deficient performance.[28] The opinion did not address whether *Padilla* would be effective retroactively.

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18. *Id.* at 687.
19. *Id.* at 694.
20. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).
21. *Id.* at 1477.
22. *Id.* at 1476.
23. *Id.* at 1478.
24. *Id.* (internal quotation marks omitted).
25. *Id.*
26. *Id.*
27. *Id.* at 1482.
28. *Id.* at 1487.

Once a defendant establishes that his counsel's performance was deficient under *Padilla* and *Strickland* for failure to advise him of the immigration consequences of his conviction, he must still overcome a high bar to show that he suffered prejudice from his defense counsel's deficient performance.[29] Ultimately, a defendant would have to prove that he would have gone to trial had he known of the potential for deportation.[30] Where there is strong evidence against the defendant in the underlying case, this is a particularly heavy burden. Such evidence tends to support the conclusion that, despite the risk of deportation, taking the plea was the better option. Furthermore, even if a defendant wins his ineffective assistance of counsel claim, he must still re-litigate the original case.[31] Still, for many immigrants facing deportation, even a limited option like this one is worthwhile if it means remaining in the United States, the country they call home.

II. Retroactivity Doctrine: When New Rules Apply to Old Cases

Whether a rule applies retroactively hinges on whether a defendant is on direct review or postconviction review. All Supreme Court rules apply to defendants whose cases are on direct review when the decision is announced.[32] For defendants in postconviction proceedings, however, federal and state rules differ on the matter of retroactive application.[33] Typically, federal rules do not permit retroactive application of recently-announced laws to defendants who have already been convicted. But state courts may choose to broaden the scope of retroactive relief.[34] In fact, some state appellate courts have already done this, holding that *Padilla* applies retroactively.[35]

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29. *See* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 How. L.J. 675, 710 (2011) (explaining the difficulty in establishing that counsel was deficient because the standard is highly deferential to counsel's decisions).

30. *Id.* at 711–12. To meet the "prejudice" prong, a defendant must have had a reasonable likelihood that the case would come out differently without counsel's error. It follows that in a *Padilla* case, the defendant would have to have a strong enough case to go to trial instead of taking a plea in order to have experienced prejudice.

31. Postconviction relief generally sets aside the conviction and remands the case to a lower court to retry the case. *See generally* Wayne R. LaFave et al., Criminal Procedure § 11.7(e) (3d ed.) (Westlaw).

32. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

33. *See* Danforth v. Minnesota, 552 U.S. 264, 288–89 (2008); Teague v. Lane, 489 U.S. 288 (1989).

34. *See Danforth* 552 U.S. at 266.

35. People v. Gutierrez, 954 N.E.2d 365, (Ill. App. Ct. 2011); Denisyuk v. State, 30 A.3d 914 (Md. 2011); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011); Campos v. State, 798 N.W.2d 565 (Minn. Ct. App. 2011); State v. Ramirez, 278 P.3d 569 (N.M. Ct.

Although many states follow the federal retroactivity formulation in their own postconviction proceedings, they are not required to do so.[36] State courts are only required to provide redress for at least as broad a range of constitutional violations as federal habeas.[37] The federal rules function as a floor, not a ceiling.

This Part traces the development of the Supreme Court's federal retroactivity jurisprudence and explains why *Padilla* probably does not apply retroactively under this line of cases. It then explains why state courts may still fashion a rule that would allow noncitizens to benefit from retroactive application of *Padilla* on postconviction review. Section II.A sets forth the Supreme Court's early retroactivity cases, *Linkletter v. Walker* and *Griffith v. Kentucky*. Section II.B presents the current controlling case on federal retroactivity, *Teague v. Lane*, and explains the importance of the "new rule" versus "old rule" distinction. Section II.C explains how *Greene v. Fisher*, the Court's newest retroactivity decision, relates to *Teague*. Section II.D explains why *Padilla* probably does not apply retroactively under this line of cases. Section II.E describes how, despite the state of federal retroactivity jurisprudence, *Danforth v. Minnesota* permits states to fashion a standard of retroactive relief that would allow noncitizens the benefit of *Padilla* on postconviction review.

A. Linkletter v. Walker *and* Griffith v. Kentucky: *New Rules Apply to Cases on Direct Review*

In *Linkletter v. Walker*, the Court decided that a rule of criminal procedure should not be applied on federal habeas review to a case in which the conviction was final before the rule came down.[38] There, the rule of *Mapp v. Ohio*, applying the exclusionary rule to the states, was not applied to the case on habeas review.[39] The *Linkletter* Court set out a three-prong test to reach its holding: First, the court should look at the purpose of the rule to be applied retroactively. Second, the court should examine the reliance of the criminal justice system on the existing rule being replaced. Finally, the court should consider "the effect on the administration of justice of a retrospective application" of the rule.[40]

However, the *Linkletter* doctrine was applied inconsistently, resulting in disparate treatment of defendants on direct review.[41] Under *Linkletter*, some courts applied new rules while a defendant was on direct review,

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App. 2012); People v. Nunez, 917 N.Y.S.2d 806 (N.Y. App. Term 2010); *Ex parte* De Los Reyes, 350 S.W.3d 723 (Tex. Ct. App. 2011).

36. *See Danforth*, 552 U.S. at 266.

37. *See id.* at 275.

38. 381 U.S. 618, 640 (1965).

39. *Id.*

40. *Id.* at 636.

41. Teague v. Lane, 489 U.S. 288, 302–03 (1989).

but others did not. The Court sought to correct this uneven treatment in *Griffith v. Kentucky*, holding that all new rules would apply to defendants on direct review.[42] *Griffith* adopted the view formerly proposed by Justice Harlan in his oft-cited dissenting opinions in *Desist v. United States* and *Mackey v. United States*.[43] In Justice Harlan's view, the purpose of habeas is to review constitutional defects in criminal proceedings in order to protect defendants from harmful error of conviction and the consequences that follow.[44]

The *Griffith* Court explicitly adopted the principles described by Justice Harlan in *Mackey* and *Desist*, articulating two reasons why it found his approach persuasive.[45] First, following Justice Harlan's rationale in *Mackey*, the *Griffith* Court found that the nature of judicial review requires a consistent application of rules.[46] In *Mackey*, Justice Harlan explained, "[i]f we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all."[47] The *Griffith* Court agreed that all similar cases pending on direct review should be adjudicated under the same rules in order to conform to norms of constitutional adjudication.[48]

Second, the *Griffith* Court held that unacceptable inequity would result between similarly situated defendants if rules were to be applied only to some defendants and not to others.[49] The Court cannot create the broad rules a legislature can; it can only evaluate individual issues in relation to the laws drawn by Congress.[50] Thus, if a new rule was not applied to all pending cases on direct review, the Court's decision announcing that rule would have the effect of favoring that defendant's case while failing to resolve similar cases under the prevailing constitutional standards at the time of their conviction. Justice Harlan denounced a system that would allow "simply 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 to subsequently flow by unaf-

42. 479 U.S. 314, 328 (1987).

43. *Id.* at 322; also see Justice Harlan's dissenting opinions in *Desist v. United States*, 394 U.S. 244, 256 (1969) and *Mackey v. United States*, 401 U.S. 667, 675 (1971).

44. *Mackey*, 401 U.S. at 693 (Such rights can be protected by those procedures "implicit in the concept of ordered liberty.") (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

45. *Griffith*, 479 U.S. at 322 ("In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").

46. *Id.* at 323.

47. *Mackey*, 401 U.S. at 679.

48. *Griffith*, 479 U.S. at 323.

49. *Id.* at 323.

50. *See* Desist v. United States, 394 U.S. 244, 258 (1969); *Griffith*, 479 U.S. at 323.

fected by that new rule."[51] Thus, *Griffith* held that all newly announced rules would be applied to defendants on direct review, whether they represented a new rule that shows a "clear break with the past," or an old rule.[52]

B. Teague v. Lane: *Federal Retroactivity on Habeas Review*

Although *Griffith* clearly settled that new constitutional rules always apply on direct review, it left open the question of whether new rules may apply retroactively on postconviction review. Two years after *Griffith*, the Court determined in *Teague v. Lane* that new constitutional rules should not be applied on federal habeas review when a defendant is appealing a final conviction.[53] Just as the *Linkletter* standard had led to inconsistencies on direct review, so had it caused discrepancies on postconviction review.[54] Under *Teague*, the Court's first inquiry when determining retroactivity on postconviction review is whether the rule is a "new rule" or an "old rule."[55] A rule is "new" when "it breaks new ground or imposes a new obligation on the States or the Federal Government ... to put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[56] If a rule is new, the Court must proceed to the next stage of the analysis, namely whether the rule fits into one of the two exceptions to nonretroactivity. If a rule is old, then the retroactivity analysis is unnecessary because the court should have applied the rule already. Only an old rule can apply on postconviction review unless it meets once of the two exceptions.

In making this decision, the Court again relied on Justice Harlan's dissenting opinion in *Desist*, where he wrote that it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation."[57] This set the general rule of nonretroactivity on postconviction review.

Continuing with Justice Harlan's reasoning, the *Teague* Court held that there are only two exceptions to the general nonretroactivity rule for new rules.[58] First, new substantive rules always apply to defendants on postconviction review. A substantive rule is described by Justice Harlan as a rule placing "certain kinds of primary, private individual conduct

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51. *Mackey*, 401 U.S. at 679.
52. *Griffith*, 479 U.S. at 328.
53. *See* Teague v. Lane, 489 U.S. 288 (1989).
54. *Id.* at 305.
55. *Id.* at 301.
56. *Id.* (emphasis in original).
57. *Id.* at 306 (quoting Desist v. United States, 394 U.S. 244, 689 (1969)).
58. *Id.* at 307.

beyond the power of the criminal law-making authority to proscribe."[59] This exception applies to situations where conduct was formerly punishable, but has now been decriminalized.[60]

Secondly, constitutional rights of procedure also apply to defendants on postconviction review. Such rights are those that are "implicit in the concept of ordered liberty,"[61] described by the *Teague* court as "watershed rules of criminal procedure."[62] This is a very high standard. The procedural rule must be so essential to determining the guilt or innocence of a party under the democratic regime of our Constitution that it must be made available to all defendants, regardless of the finality of their convictions.[63] Thus far, the Court has recognized only the rule of *Gideon v. Wainwright*, establishing the right to state-appointed counsel for indigent criminal defendants, as fitting into this *Teague* exception.[64]

C. *A Caveat to Retroactivity on Direct and Habeas:* Greene v. Fisher

In November 2011, the Supreme Court decided *Greene v. Fisher*, which added a wrinkle to *Teague*'s doctrine that most new rules should not be applied to a case after the defendant has exhausted his appeals and his conviction has become final.[65] *Greene* states that a defendant may have the benefit of a "new" rule announced while he is on direct review so long as it comes down before the final decision on the merits. In the case, the defendant appealed a decision of the Pennsylvania Superior Court in light of a relevant new rule regarding habeas claims under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) decided only three months after his last decision on the merits.[66]

Under AEDPA, there is a statutory rule of retroactivity related to the *Teague* jurisprudence which forbids a federal court from granting habeas relief to a state prisoner "with respect to any claim that has been adjudicated on the merits in State court proceedings unless the [state-court adjudication] . . . resulted in a decision that was contrary to . . . clearly established Federal law."[67] The Court considered the question of whether "clearly established Federal law" includes decisions of the Supreme Court

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59. *Id.* (quoting Mackey v. United States, 401 U.S. 667, 692 (1971).

60. Eve Brensike Primus, Supplement on Retroactivity 2 (2011) (on file with author). For example, the ban on interracial marriage once criminalized marriage between a White person and a person of another race but was struck down as unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967).

61. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

62. *Teague*, 489 U.S. at 311.

63. *Id.*

64. 372 U.S. 335 (1963).

65. 132 S. Ct. 38, 42 (2011).

66. *Id.* at 42–43.

67. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2006)).

that come down after the last state-court adjudication on the merits of the case but before the defendant's conviction becomes final.[68] In other words, the Court needed to decide whether a "new" rule should apply to a defendant when it comes down at any point on direct review, as *Griffith* would suggest, or only when it comes down before the last decision of any court on the merits.

In *Greene*, Justice Scalia wrote for the majority that inquiries about retroactivity under AEDPA must be distinct from those under *Teague*.[69] He stated that AEDPA did not adopt *Teague*, and thus, federal habeas would not be available to petitioners who wish to seek relief under a rule that was announced after their most recent adjudication on the merits.[70] However, Justice Scalia did suggest that in cases like the petitioner's, when a favorable new rule is announced such a short time after the last decision on the merits, then the petitioner is advised to file a petition for a writ of certiorari to the Supreme Court.[71] Such a petition, he said, would be likely to produce an order granting the petition, vacating the judgment below, and remanding the case.[72] Alternatively, a defendant in such a situation could assert his claim under the new rule on postconviction proceedings.[73] The Court has yet to decide whether AEDPA incorporated *Teague*'s two exceptions, so this remains an open question.[74]

Thus, when federal courts are determining whether they must apply a rule retroactively, they first analyze whether the rule is "new" or "old." If the rule is old, it must be applied at every stage. If it is new, *Greene* says the rule must be applied on direct review regardless of whether it existed at the last ruling on the merits, and on postconviction review only if it existed before the last ruling on the merits.[75] *Teague* says a new rule must not be applied on postconviction review unless it fits into one of two exceptions: (1) it is a substantive rule; or (2) it is "watershed," i.e., *Gideon*. This is the blueprint that federal courts must follow on federal habeas to determine if *Padilla* may apply retroactively. However, States are not constrained to this formula for application of rules during state postconviction proceedings.[76]

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68. *Id.* The "last decision on the merits" rule does not include appeals without opinions or procedural decisions. Thus, when challenging a conviction under AEDPA, a defendant may not be able to get the benefit of a rule that came down on direct appeal if, for example, it was decided after his trial but before his appeal that was confirmed without opinion.

69. *Id.* at 42.

70. *Id.*

71. *Id.* at 45.

72. *Id.*

73. *Id.*

74. *Id.* at 44.

75. *Id.* at 42.

76. *See* Danforth v. Minnesota, 522 U.S. 264, 288–89 (2008).

D. *Why* Teague *Likely Prevents* Padilla *on Federal Habeas*

Following the line of reasoning from *Teague*, noncitizens convicted of criminal offenses who were not informed of their probable deportations will likely not have the benefit of the *Padilla* rule on federal habeas review because it will be considered a new rule. Those who were on direct review in majority rule states will also not have the benefit of *Padilla*, since they cannot bring an ineffective assistance of counsel claim until postconviction.[77] But defendants who were on direct review in minority states will be able to use *Padilla*, as will all those who enter the criminal justice system post-*Padilla*. The rationale that new judicial decisions should be applied on habeas in order to fairly treat defendants who were similarly situated on direct review could theoretically lead to application of the *Padilla* rule on federal habeas. The interplay of the *Teague* and *Greene* doctrines described above, however, means that it is unlikely that relief will be granted under this rule.[78]

After *Padilla* was decided, federal and state prisoners who had received ineffective assistance of counsel because they had not been advised of immigration consequences, but who had already exhausted their state-level remedies, began to bring their claims on federal habeas.[79] On federal habeas, the question ultimately comes down to "whether Padilla escapes characterization as a 'new' rule, and if it does not, whether it fits within one of the *Teague* exceptions" described above.[80] Thus, defense attorneys argue that *Padilla* is simply an application of *Strickland* and therefore an "old rule," while prosecutors argue that *Padilla* is a "new rule." The Supreme Court granted certiorari on April 30, 2012, in *Chaidez v. United States*, discussed below, to decide this very question.[81]

Two federal circuit courts have held that *Padilla* does promulgate a new rule—denying habeas relief[82]—while one has held that *Padilla* does apply retroactively. In *Chaidez*, which the Supreme Court will hear in the Fall 2012 term, the Seventh Circuit held that *Padilla* is a new rule because

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77. "Majority rule states" refers to those states in which ineffective assistance of counsel claims may only be brought on postconviction review rather than on direct review.

78. Under *Teague v. Lane*, 489 U.S. 288 (1989), a defendant can bring a claim with any new rule only on postconviction review. *Greene v. Fisher*, 132 S. Ct. 38 (2011), created a small window of time within direct review, after the last decision on the merits but before the appeals have been exhausted and a final conviction entered that would allow a defendant to submit a claim using that rule before postconviction review.

79. LAFAVE ET AL., *supra* note 31, § 28.6(a).

80. *Id.*

81. 132 S. Ct. 2101 (2012) (granting writ of certiorari).

82. United States v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011); Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011); United States v. Orocio, 645 F.3d 630 (3d Cir. 2011).

of the "lack of unanimity" and the "array of views" among the justices.[83] Because a majority of lower courts had found that criminal defense lawyers needed only to explain direct consequences of a plea but not "collateral consequences," such as the risk of deportation, the Seventh Circuit held that *Padilla* effectively changed the law.[84] Thus, it announced a new rule. Similarly, in *Orocio*, the Tenth Circuit held that *Padilla* was a new rule because before that case, "most state and federal courts had considered the failure to advise a client of potential collateral consequences of a conviction to be outside the requirements of the Sixth Amendment."[85] The court held that the concurrences and dissents in the seven-to-two *Padilla* decision demonstrated that reasonable jurists could disagree about whether *Padilla* was compelled.[86]

In *Chang Hong*, the Tenth Circuit held that "*Padilla* is a new rule of constitutional law, [and] it does not apply retroactively to cases on collateral review."[87] The court looked to *Teague*'s three-step process to determine whether *Padilla* should apply retroactively: first, was the petitioner's conviction final before *Padilla* was decided? Second, was the *Padilla* rule "new"? And third, if new, did the rule fall into one of the exceptions to retroactivity?[88] The holding of non-retroactivity here turns on the analysis of prong two: whether the Supreme Court in *Padilla* announced a new rule or simply conducted a straightforward application of *Strickland*'s ineffective assistance of counsel test.[89] The formula for finding whether a rule is new or old is somewhat imprecise, the *Chang Hong* Court acknowledged, as it has been stated in a number of ways.[90] When an old rule is expressly overruled, it creates a new rule per se.[91] But when not overruling an old rule, a rule can be new "within the meaning of *Teague* 'if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.' "[92]

The Third Circuit took the opposite view of the Tenth and Seventh Circuits; it held that *Padilla* simply "clarified the law" and followed from *Strickland*'s clearly established rules on ineffective assistance of counsel

83. *Chaidez*, 655 F.3d at 689.

84. *Id.* at 690 (citing Commonwealth v. Clarke, 949 N.E.2d 892, 898 (Mass. 2011) for the proposition that nine circuits had previously held that failing to advise a noncitizen client of automatic deportation was not ineffective assistance of counsel).

85. *Id.*

86. *Id.* at 689.

87. *Chang Hong*, 671 F.3d at 1148.

88. *Id.* at 1150–51.

89. *Id.* at 1154.

90. *Id.* at 1153.

91. *Id.* at 1154.

92. *Id.* at 1153 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (emphasis in original)).

claims.[93] The Third Circuit also found that *Padilla* did not "break new ground" because the prevailing professional norm among attorneys at the time was to advise noncitizens of their immigration consequences.[94] Although this is a reasonable view that has been adopted by several lower courts,[95] we have seen that the *Teague* standard is very restrictive when it comes to determining whether rules are old or new.[96] This level of restriction in combination with the retroactivity analysis used in past Supreme Court cases makes it unlikely for the Supreme Court to take the Third Circuit's path.

It follows from the line of reasoning employed in other retroactivity cases since *Teague* that the present Supreme Court will probably consider *Padilla* to be a new rule. For example, in *Butler v. McKeller*,[97] the Supreme Court considered whether the rule announced by *Arizona v. Roberson*[98] should be considered new or old for purposes of retroactivity. In *Roberson*, the Court had found that the rule they announced followed directly from at least three prior decisions, including the famous *Miranda v. Arizona*.[99] Yet even though the *Roberson* Court had found that the rule followed as a logical extension of prior rules, the *Butler* Court said that "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*."[100] The Court held that under the first exception of *Teague*, the *Roberson* rule was new; it was more than just an application of an established rule to new facts and so could not apply retroactively.[101] Similar to *Butler*'s application of *Roberson* to new facts, the *Padilla* majority and concurrence agreed that Mr. Padilla's claim was governed by the old rule of

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

94. *Id.*

95. *See, e.g.*, McNeill v. United States, No. A-11-CA-495 SS, 2012 WL 369471, at *3 (W.D. Tex. Feb. 2, 2012) (finding *Padilla* retroactive and noting that all other courts in the circuit had thus far found the same, also because *Padilla* was a postconviction case that applied its own rule); Campos v. State, 798 N.W.2d 565, 569 (Minn. Ct. App. 2011) (finding that *Padilla* did not announce a new rule because *Padilla* itself was a postconviction proceeding and because it was a variation of *Strickland*).

96. See, for example, the analysis of the Eleventh Circuit noting that "*Teague* is a remarkably restrictive doctrine, and its second exception exceedingly narrow." Howard v. United States, 374 F.3d 1068, 1079 (11th Cir. 2004).

97. 494 U.S. 407 (1990).

98. 486 U.S. 675 (1988). The rule announced was that after a suspect invokes his right to counsel in relation to a specific crime, he is not to be interrogated about *any* crime until counsel is provided.

99. *Id.* at 684 ("That a suspect's request for counsel should apply to any questions the police wish to pose follows, we think, not only from *Edwards* and *Miranda*, but also from a case decided the same day as *Barrett* [*Colorado v. Spring*].").

100. *Butler*, 494 U.S. at 415.

101. *Id.*

Strickland.[102] If the Supreme Court follows its *Butler* logic in analyzing *Padilla* claims when it decides *Chaidez*, it will likely find that the rule is new because it seems to be simply an application of an old rule to new facts. Thus, analysis of whether the first exception to nonretroactivity under *Teague* applies probably will result in a finding of a new, nonretroactive rule.

The Court could still choose to apply *Padilla* retroactively under the second *Teague* exception for watershed rules of criminal procedure. However, it is even more unlikely that the Supreme Court will find that *Padilla* fits the second exception. The only rule thus far to be considered "watershed" is *Gideon v. Wainwright*, as mentioned above.[103] The Court has held that a rule "more limited in scope" than *Gideon* with less bearing on "accuracy of the factfinding" fails to be watershed.[104] Again taking the Court's analysis in *Butler* as an example, it is unlikely that *Padilla* will be a "watershed" rule. In *Butler*, the Court found that the *Roberson* rule, while it had a large potential impact on police investigatory procedures, was not "central to an accurate determination of innocence or guilt" and thus could not be a "watershed" rule.[105] In considering whether *Padilla* meets the "watershed" threshold, the Court is likely to find that the "rule, while certainly important, is not in the same category with Gideon, which effected a profound and 'sweeping' change" in criminal justice procedures that directly affect the determination of innocence or guilt.[106] Even where procedures help protect a defendant's rights, like the *Roberson* rule, unless they are equivalent to the guarantee of counsel, they will not meet this second exception. Conceding that the Supreme Court is likely to find that *Padilla* is a new rule for purposes of retroactivity, this Note turns to state postconviction review as a more likely ground for relief.

E. *State Retroactivity Doctrine:* Danforth v. Minnesota

Because states do not have to follow *Teague* per *Danforth v. Minnesota*, state retroactivity doctrine has the flexibility to allow a broader redress to defendants on postconviction review. In *Danforth*, the Supreme Court considered the question of whether *Teague* controlled the relief that states could provide on their own postconviction proceedings as well as what federal courts could provide on habeas.[107] In that case, both the Minnesota trial court and the appeals court employed *Teague* to determine that a

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

103. *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 407 (2007) ("*Gideon v. Wainwright* [is] the only case that this Court has identified as qualifying under this exception . . . .") (internal citations omitted).

104. *Id.*

105. *Butler*, 494 U.S. at 416 (quoting Teague v. Lane, 489 U.S. 288, 312–13 (1989)).

106. *Whorton*, 549 U.S. at 408 (quoting Beard v. Banks, 542 U.S. 406, 418 (2004)).

107. *See* Danforth v. Minnesota, 552 U.S. 264, 264 (2007).

new rule for evaluating the reliability of testimonial statements in criminal cases could not apply retroactively.[108] The Minnesota Supreme Court considered, among other theories, the argument that the state was free to apply a broader retroactivity standard than that of *Teague*.[109] It ultimately concluded that they were constrained to the federal standard and could not apply the new rules retroactively.[110] The U.S. Supreme Court granted certiorari to determine whether *Teague* or any other federal law would prohibit a state court from applying a Supreme Court rule of criminal procedure on state postconviction review even where such rule would be barred from retroactive application on federal habeas.[111]

Justice Stevens, writing for the majority, found that *Teague* "does not in any way limit the authority of a state court" to provide a remedy that would otherwise be unavailable under *Teague*'s nonretroactivity presumption.[112] The Court held that *Teague* set neither explicit nor implicit constraints on the states from providing remedies on postconviction review that are broader than what would be available on federal habeas.[113] The Court noted that the *Teague* opinion purported to tailor its rule to "the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings."[114] Justice O'Connor's plurality opinion in *Teague* was interpreted by the *Danforth* Court to be an interpretation of the federal habeas statute and to be justified by considerations of federalism, which are relevant only on *federal* habeas.[115] On state postconviction, the Court explained, the interest in uniformity of application does not outweigh the authority of the states to make and enforce their own laws.[116] Therefore, the Court held that states may provide remedy via retroactive application of rules on postconviction review that would not be available on federal habeas.[117]

However, even before *Danforth* was announced, states were varied in their retroactive applications of new rules.[118] For example, in evaluating

108. *Id.* at 268.
109. *See id.*
110. *Id.* at 267–68.
111. *Id.*
112. *Id.* at 282.
113. *Id.* at 275.
114. *Id.* at 277.
115. *Id.* at 278–79.
116. *Id.* at 280.
117. *Id.* at 282.
118. 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, 54 (2009).

cases after *Ring v. Arizona*,[119] some state courts considered themselves bound by *Teague*, while others did not. However, even among the group applying *Teague*, there was disparity as to whether the *Ring* rule was prospective or retroactive.[120] Those that did not follow *Teague* also came out varying ways; Florida and Idaho declared *Ring* not retroactive, and Missouri and Indiana the opposite.[121] The same split has already begun to occur in states evaluating the retroactivity of *Padilla*.[122] Some scholars suggest that to avoid the issue of "selective prospectivity" in state courts that leads to disparate results and to keep states invested in the development of the retroactivity doctrine, states should adopt full retroactivity as the default rule.[123]

III. STATE COURTS SHOULD APPLY *PADILLA* TO DEFENDANTS WHO WERE ON DIRECT REVIEW WHEN THAT CASE WAS DECIDED

Because *Padilla* is most probably a "new" procedural rule and likely will not apply on federal habeas, states should use their *Danforth* flexibility to give defendants relief at the state level. For three reasons, this Part argues that states should adopt the *Padilla* rule on state postconviction proceedings for those defendants whose cases were pending on direct appeal when *Padilla* was decided. First, Section III.A argues that applying *Padilla* to such defendants is the best way to eliminate inequity between similarly situated defendants. Second, Section III.B argues that applying *Padilla* to such defendants is consistent with the underlying purposes of habeas retroactivity doctrine. Finally, Section III.C argues that extending *Padilla* to this limited class of defendants strikes the appropriate balance between fairness and administrative concerns.

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119. 536 U.S. 584, 589 (2002) (holding that the Sixth Amendment requires states to provide a trial by jury in capital prosecutions).

120. *See, e.g.*, Bottosen v. Moore, 833 So.2d 693, 711 (Fla. 2002) (concurring opinion in which the court found *Ring* not retroactive under *Teague* but noting that "Florida state courts . . . are not bound by [the] precedent" of *Teague*); Head v. Hill, 587 S.E.2d 613, 619–20 (Ga. 2003) (applying *Teague* in finding *Ring not* retroactive); State v. Whitfield, 107 S.W.3d 253, 268–69 (Mo. 2003) (declining to use the *Teague* test and instead using *Linkletter* to find *Ring* did apply retroactively).

121. *Lasch, supra* note 118, at 55.

122. *Compare* People v. Gomez, 820 N.W.2d 217 (Mich. Ct. App. 2012) (holding *Padilla* nonretroactive because of relevant Michigan precedent and established retroactivity jurisprudence) *with* Denisyuk v. Maryland, 30 A.3d 914 (Md. 2011) (holding that *Padilla* would apply retroactively to cases occurring after 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act).

123. Lasch, *supra* note 118, at 52.

A. *Unfairness to Defendants in Majority Rule States*

The current patchwork of state approaches to ineffective assistance of counsel claims has created a situation in which similarly situated defendants have vastly disparate opportunities to pursue relief for the same type of constitutional violation. At present, defendants in most states may not use the *Padilla* rule on direct review.[124] It is barred until postconviction review.[125] In some states, however, defendants may raise an ineffective assistance of counsel claim under *Padilla* while on direct review.[126]

The ineffective assistance of counsel procedure in majority rule states mirrors the rule in federal courts: a defendant may not bring an ineffective assistance of counsel claim until postconviction proceedings.[127] Federal courts prefer defendants to bring such claims on postconviction review because the record normally is not sufficient to support such a claim on direct review.[128] Similar justifications exist at the state level. As an Iowa court recently explained, "[ineffective assistance of counsel] claims are generally preserved for postconviction proceedings unless there is a satisfactory record upon which to draw a conclusion."[129] Similarly, a New York court justified the rule by pointing to the need to develop the record: "[d]efendant's ineffective assistance of counsel claims, including his claim that counsel provided inappropriate advice to waive a jury, are unreviewable on direct appeal because they involve matters outside the record."[130]

Despite these justifications, the approach in majority rule states is unfair and untenable. It locks noncitizen defendants in a catch-22: the *Padilla* rule is "new" so it applies only on direct review, but noncitizen defendants cannot use the *Padilla* rule on direct review because it is an ineffective assistance of counsel claim. Defendants' inability to bring their ineffective assistance of counsel claims until postconviction proceedings means they likely lose the benefit of *Padilla*. Consider a defendant be-

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124. Ryan C. Turk, *Ineffective-Assistance-of-Counsel Blues: Navigating the Muddy Waters of Georgia Law After 2010 State Supreme Court Decisions*, 45 GA. L. REV. 1199, 1209–11 (2011). *See also* LAFAVE ET AL., *supra* note 31, § 11.7(e).

125. This rule developed for a variety of reasons, including the desire not to interrupt the appeals process with an evidentiary hearing. *See* LAFAVE ET AL., *supra* note 31, § 11.7(e); *see also* Turk, *supra* note 124, at 1209–11.

126. Turk, *supra* note 124, at 1209–11.

127. *Id.*

128. *See* Massaro v. United States, 538 U.S. 500, 504–05 (2003) ("[A postconviction] motion is preferable to direct appeal for deciding claims of ineffective assistance. When an ineffective assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus incomplete or inadequate for this purpose.").

129. State v. Rodriguez, 804 N.W.2d 844, 848 (Iowa 2011).

130. People v. Bradford, 926 N.Y.S.2d 88 (N.Y. App. Div. 2011).

tween trial and his appeal when *Padilla* was decided. First, state procedural rules bar him from bringing a claim on direct review, then retroactivity rules bar him from bringing the claim in postconviction proceedings. The defendant is caught in an unfair gap in coverage unique to ineffective assistance claims.[131] This double roadblock arises only because majority rule states prevent defendants from bringing such claims on direct review.

Some states apply a more flexible approach toward ineffective assistance of counsel claims. They allow defendants to bring such claims on direct appeal when the record is adequate, an exception to the general rule prohibiting ineffective assistance of counsel claims on direct review.[132] In Florida, for example, one appellate court determined that "such a[n ineffective assistance] claim is cognizable [even on direct review] when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable."[133]

Still, the benefit of such exceptions is almost entirely illusory. Defendants in these states will struggle to bring *Padilla* claims on direct review because the record will almost never be sufficient to support such claims.[134] Typically, the record does not contain information about what specific advice counsel did or did not give.[135] In order for the court to get such information, a hearing at which both the client and lawyer testified would be necessary.[136]

Some might argue that differing state approaches to ineffective assistance of counsel claims is merely federalism. States have all sorts of different procedures that can change the outcome of factually similar cases across states lines. In some states, for example, the direct review process is normally complete within two years. In others, the process may last four years due to variations in state criminal procedure and increased case volume.[137]

However, the Supreme Court's recent ruling in *Martinez v. Ryan* demonstrates that, while federalism concerns allow for varied criminal

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131. *See* Lasch, *supra* note 118, at 48–49.

132. Appellate courts in Florida, Iowa, Louisiana, Montana, and Texas have all laid out similar exceptions. *See, e.g.*, Benitez-Saldana v. State, 67 So. 3d 320, 322 (Fla. Dist. Ct. App. 2011); State v. Utter, 803 N.W.2d 647 (Iowa 2011); State v. G.T., Jr., 71 So. 3d 394 (La. Ct. App. 2011); State v. Howard, 265 P.3d 606 (Mont. 2011); Lopez v. State, 343 S.W.3d 137 (Tex. Crim. App. 2011).

133. *Benitez-Saldana*, 67 So. 3d at 322.

134. *See* Massaro v. United States, 538 U.S. 500, 500–01 (2003).

135. *See id.*

136. *See id.* at 501.

137. *See, e.g.*, *Criminal Procedure*, LEGAL INFORMATION INSTITUTE, CORNELL UNIVERSITY LAW SCHOOL (Aug. 19, 2010, 5:14 PM), http://www.law.cornell.edu/wex/criminal_procedure (stating that states have their own rules of criminal procedure that vary from one another and from the federal rules).

procedures, courts must handle ineffective assistance of counsel claims with extra care.[138] As the Court explained, the effective assistance of counsel at trial is a "bedrock principle in our justice system."[139] In *Martinez*, the Court held that a federal court may hear a claim on habeas where there is a procedural default in the initial state postconviction proceeding despite permitted different procedures for ineffective assistance of counsel from state to state.[140] The Court described the variation in states' ineffective assistance of counsel procedures and declined to hold that they need all be uniform.[141] Instead, the Court designed an "equitable ruling" that would allow states to maintain variable procedures but still provide for further redress on federal habeas regardless of what that procedure might be.[142]

In addition, some will attempt to justify this inequity by arguing it is a consequence of using "states as laboratories." However, this is an issue beyond that classic school of thought because of the subject matter and because it involves habeas relief, which is meant to control for inequities.[143] The right to remain in the country is implicated as a result of the interaction of federal immigration laws with the state policies in a way that can lead to very harsh results.[144] As discussed in Part I, removal from the country is typically the most severe consequence a noncitizen faces upon criminal conviction. In adjudicating the removal of criminal defendants from the country, the federal Executive Office for Immigration Review may not "go behind the record" to consider whether a noncitizen had the chance to procedurally challenge his conviction because he did not know he would be rendered deportable by his plea.[145] Rather,

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138. 132 S. Ct. 1309, 1316–17 (2012).

139. *Id.* at 1317.

140. *Id.* at 1320.

141. *Id.*

142. *Id.* at 1319–20.

143. "States as laboratories" is the theory of federalism that each state has the authority to implement different laws and policies. This view has been notably endorsed by former Justice Sandra Day O'Connor in several opinions. She most recently endorsed this idea in her dissenting opinion in *Gonzales v. Raich*, when she stated: "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" Gonzales v. Raich, 545 U.S. 1, 42 (2005) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting)).

144. *See supra* Introduction.

145. The immigration court must have used the categorical and modified categorical approaches to determine whether a noncitizen has been convicted of an aggravated felony. *See* Taylor v. United States, 495 U.S. 575 (1990). In the categorical approach, the immigration court compares the statute of conviction with the federal statute in the INA. In the modified categorical approach, the immigration court compares the statute of conviction and "judicially noticeable documents" such as a plea colloquy with the federal statute. Robles-Urrea v. Holder, 678 F.3d 702, 712 (9th Cir. 2012) (quoting United States v. Aguila-Montes de Oca, 655 F.3d 915, 937 (9th Cir. 2011)). Although the immigration court

immigration judges may only look at the criminal record to make their determination.[146]

Finally, habeas relief is premised on the notion that justice should be administered with an even hand by treating "similarly situated defendants" equally.[147] If the Court does not apply a new rule to all cases that were pending on direct review, then an "*actual inequity*" results as only some of many similarly situated defendants become the "chance beneficiary" of the new rule.[148] The Court has consistently held that such similarly situated defendants must "be entitled to invoke the new rule" on direct review.[149] Those defendants who were on direct review at the time *Padilla* came down face varied application of the *Padilla* rule on postconviction review depending on their state's rules on whether the state permitted ineffective assistance of counsel claims on direct review or only on postconviction review, and depending on their exact stage of direct review when the rule was announced. To prevent this inequity, state courts should apply *Padilla* retroactively to all defendants in this class.

B. *Purposes of Habeas and Retroactivity*

Applying *Padilla* to those on direct review when the case was decided is consistent with the broad purpose of habeas retroactivity doctrine. Although there are several competing theories regarding the purpose of habeas review, many scholars agree with Justice Harlan that the focus of habeas adjudication is to consider grave constitutional violations rather than the innocence of the petitioner.[150] The composition of the Court has a significant impact on the ideological approach taken to habeas.[151] As described above, however, the Court has developed a body of retroactivity law on habeas that comports with Justice Harlan's views.[152] This doctrine generally indicates that new rules apply retroactively on direct review but not on postconviction review unless they meet one of the two *Teague* exceptions.[153] As discussed, the *Padilla* rule is considered a new rule by

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may conduct these analyses, it may not re-decide whether or not the respondent was actually guilty of the crime.

146. *Robles-Urrea*, 673 F.3d at 712 (quoting *Aguila-Montes de Oca*, 655 F.3d at 940).

147. *See* Griffith v. Kentucky, 479 U.S. 314, 323 (1987); Desist v. United States, 394 U.S. 244, 258 (1969).

148. United States v. Johnson, 457 U.S. 537, 556 n.16 (1982).

149. *Id.* at 545.

150. *See, e.g.*, LAFAVE ET AL., *supra* note 31, § 28.2(d); Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U.L.Q. 151, 152 (1994); Lasch, *supra* note 118, at 62.

151. *See* LAFAVE, ET AL., *supra* note 31, § 28.2(d).

152. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (after describing the evolution of the retroactivity doctrine, the Court stated, "we now adopt Justice Harlan's view of retroactivity for cases on collateral review.").

153. *See supra* Part II.B.

several U.S. Courts of Appeals, including the *Chaidez* Court.[154] *Chaidez* was granted certiorari to be heard in the Fall 2012 term.[155] Because the Supreme Court is likely to agree that *Padilla* is a new rule, this Note assumes that *Padilla* is a new rule for purposes of the retroactivity analysis.[156]

Under Justice Harlan's reasoning, *Padilla* should be available on post-conviction review to defendants who were on direct review when it was announced because it is a new rule.[157] The rationale for drawing the line to permit at a least all those defendants whose cases were still pending on direct appeal "at the time of the law-changing decision" to invoke the new rule stems from the idea that a defendant's case should be judged based on the laws that were in place at the time of the final conviction.[158] This can cut both ways: a defendant-friendly rule such as *Padilla* could be announced while a defendant's case is on direct review, but so could a decision that favors the prosecution.[159] In theory, at the time a court is making the determination of a final conviction of a defendant, it should be aware of all applicable precedents. Thus, it makes sense to use those precedents that were on the books at that time to evaluate any potential violations on habeas.

While setting a general standard of nonretroactivity, Justice Harlan's theory on retroactivity for postconviction proceedings should also permit application of rules on habeas that were announced while a defendant was on direct review. In *Desist*, the Court revisited their recent summary of retroactivity rules from *Stovall v. Denno*[160] while considering whether the rule in *Katz v. United States*[161] should protect the petitioners from having

154. *See, e.g.*, United States v. Chang Hong, 671 F.3d 1147, 1156 (10th Cir. 2011), ("*Padilla* is a new rule of constitutional law not because of *what* it applies—*Strickland*—but because of *where* it applies—collateral immigration consequences of a plea bargain").

155. Chaidez v. United States, 132 S. Ct. 2101 (2012).

156. *See supra* Part II.D.

157. Griffith v. Kentucky, 479 U.S. 314, 322 (1987) (quoting United States v. Johnson, 457 U.S. 537, 545 (1982)).

158. *See* Mackey v. United States, 401 U.S. 667, 688–89 (1971) (Harlan, J., concurring).

159. That is, a defendant could bring a procedural challenge on postconviction review and a prosecution—friendly new rule could prevent him from prevailing even if that rule came down after his conviction was final.

160. 388 U.S. 293, 297 (1967), *modified by* Teague v. Lane, 489 U.S. 288, 316 (1989)). The Court in *Desist* describes the *Stovall* criteria as "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Desist v. United States, 394 U.S. 244, 249 (1969).

161. 389 U.S. 347 (1967) (holding that the Fourth Amendment protects against warrantless searches or seizures of conversations via electronic recordings regardless of whether there is a physical intrusion into the space). In *Katz*, the petitioner had been recorded making phone calls from a telephone booth, with the recording device attached to the exterior wall of the booth. The court ruled that this violated petitioner's right to privacy, noting that "The Fourth Amendment protects people, not places." *Id.* at 351.

their conversations in a hotel room recorded.[162] In his analysis, Justice Harlan explained why new procedural constitutional rules to apply on habeas: "[T]he habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[163] That is, new procedural rules upholding constitutional standards should also be applied retroactively on habeas review if they were announced while the defendant was on direct review, and typically they are.[164] Because *Padilla* is a new procedural rule, it should be available on postconviction review to defendants who were on direct review when it came down. However, as it is an ineffective assistance of counsel claim, a *Padilla* claim cannot be brought until after a conviction is final, even for defendants who were on direct at the time and should have been able to invoke it.[165] This creates unacceptable unfairness because of the severity of deportation for some but not others as the result of this discrepancy.

C. *Extending Relief to This Limited Class Strikes the Appropriate Balance Between Fairness and Administrability*

Despite competing concerns, the issue of deportation of criminal noncitizens requires special consideration. It is an unduly harsh consequence for noncitizens who have pled guilty to crimes making them removable under the INA, and it is on the rise due to the Obama administration's prosecutorial discretion efforts and Secure Communities.[166] Despite the seriousness of this punishment, there are various concerns competing with the goal of mitigating needless deportations. This Section considers issues of finality, disadvantage to the prosecution, and concerns related to opening the floodgates. It ultimately concludes that, for this class of defendants, *Padilla*'s goals override these concerns.

1. Will Such Claims Significantly Disrupt Finality of Decisions?

One of the chief arguments against retroactive application of any rule is the principle of finality: the general interest in leaving final

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162. *Desist*, 394 U.S. at 244–46.

163. *Id.* at 263.

164. *Id.*

165. *See supra* Part II.

166. Secure Communities is a program through which state and local law enforcement will coordinate with Immigration and Customs Enforcement and the FBI to cross-check databases, ensuring that noncitizen defendants detained by state or local law enforcement get referred to ICE and the FBI. This leads to the deportation of more noncitizens who otherwise might not come to the attention of ICE. Secure Communities has been implemented in fourteen states, and implementation in all states is intended by the end of 2013. *See* U.S. Dep't of Homeland Security, Immigration & Customs Enforcement, *Secure Communities*, ICE, available at http://www.ice.gov/secure_communities/ (last accessed Dec. 2, 2012).

judgments in a state of repose, rather than upsetting the judgment and starting anew.[167] Since habeas corpus review is an avenue for relitigation, this leads some to believe that it should be used sparingly or only for certain types of issues.[168] However, deportation is a serious enough consequence to warrant overriding the concern of finality in some cases, in particular those where the crime was not especially grave and removal seems like a disproportionate punishment. As the New Mexico Court of Appeals recently noted when holding that Padilla applies retroactively, "the duty [to extend *Padilla* relief] is even more pressing in cases ... where deportation was a near certainty for a relatively minor offense."[169] In addition, the narrow language of the *Padilla* decision and the limitation on the retroactive scope of the *Padilla* rule to those who were on direct review when the case was decided keeps the number of potential litigants low.

Some may worry that lack of notice of potential immigration consequences for the significant number of convicted noncitizens currently facing deportation might alone be enough to motivate a defendant to bring a *Padilla* claim on postconviction review. Some defendants may want to push through a shaky ineffective assistance of counsel claim because they would prefer any other punishment, including a longer prison sentence, to deportation. For others, the risk of relitigation may dissuade them from bringing non-meritorious claims. To bring the ineffective assistance motion, a petitioner must have evidence that he was denied the advice required by *Padilla* to his detriment and that there was prejudice as a result.[170] Because the outcome of a successful ineffective assistance of counsel claim means the conviction gets vacated and the case is remanded, defendants would also want to be sure that they have a probable chance of winning if they were to bring the case to trial. As the Court noted in *Padilla*, "the fact that a successful ineffective assistance of counsel claim results in undoing the plea bargain and reinstating the original charges imposes an intrinsic disincentive to seeking plea withdrawal—taking back the plea means giving up the benefit of the bargain and facing the original charges once again."[171]

However, for the class of defendants who would be able to benefit from this retroactive application of *Padilla*, allowing them to proceed with their claims would be a fair policy considering the gravity of deportation

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167. Richard H. Fallon and Daniel M. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1815–16 (1991) (describing Justice Harlan's and Professor Paul Mishkin's emphasis on the special interest of finality on habeas review).

168. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 683 (1971) ("[The] interest in finality might well lead to a decision to exclude completely certain legal issues ... [from] collateral attacks.") (Harlan, J., dissenting).

169. State v. Ramirez, 278 P.3d 569, 570 (N.M. Ct. App. 2012).

170. Strickland v. Washington, 466 U.S. 668, 687 (1984).

171. Chin, *supra* note 29, at 677.

and the limited pool of eligible defendants. As discussed, deportation is an extremely serious consequence of a conviction. Those who are removed from the country often lose their families, homes, and livelihood. Some scholars have criticized the limited availability of relief via retroactive application of rules on habeas under *Teague*, arguing that particularly serious penalties should be adjudicated with more leeway.[172] For example, some find it disturbing that the Court refuses to "relax *Teague*'s strictures in capital cases" because "allegations of constitutional defects that may have led to an unreliable imposition of a sentence of death require relaxation of principles that generally favor finality."[173] Although deportation does not rise to the level of severity of the death penalty, one might view this punishment as harsh enough to warrant an override of the finality principle where there is a strong case to be made.

2. Will Extending This Relief Disadvantage the Prosecution?

Limiting the retroactive reach of *Padilla* will minimize any disadvantage faced by the prosecution if re-litigation of a case is required. A worry that arises when a rule is extended retroactively is that guilty defendants will escape prosecution. If people get a second bite at the apple by withdrawing their plea and going to trial, then some immigrants who have actually committed crimes could be acquitted on the second go-round. Full retroactive application of *Padilla* could mean cases from crimes that happened a long time ago would be re-tried. This disadvantages the prosecution, as it will have a more difficult time gathering evidence and witnesses for a trial after many years have passed. From a public policy perspective, we want to minimize the risk that guilty people will escape punishment altogether.

While these concerns are legitimate, limiting the retroactive application of *Padilla* as this Note advocates minimizes these issues. *Padilla* was decided in 2010, which means only cases that were already on direct review in 2010 (or that have happened since then) could be re-litigated after a successful *Padilla* claim. Although this could mean a number of years have passed since the actual events occurred, this limited class at least creates a finite reach into the past. Those noncitizens convicted of crimes five, ten, or twenty years ago will not be bringing *Padilla* claims because the retroactivity of the rule does not extend to them. Thus, the prosecution's disadvantage will be minimal and the group of defendants getting a second shot will be those that are within the limited class and have meritorious cases.

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172. Fallon and Meltzer, *supra* note 167, at 1817.

173. *Id.*

3. Floodgates: Will the System Be Overwhelmed with *Padilla* Claims?

A third concern with extending retroactive application of *Padilla* is that a large group of criminal defendants will come rushing forward with claims, overburden the court, and open up the opportunity for overturning convictions that should have remained in repose. As discussed above, it is unlikely that there will be an unmanageable number of convicted noncitizens that would come forward under this rule. As one scholar pointed out, "the standards governing ineffective assistance of counsel suggest that withdrawn pleas will be few in number."[174] Although most in the criminal justice system enter pleas and there is a recent focus on deporting criminal defendants,[175] the *Strickland* standards for ineffective assistance of counsel will still be in place. This will limit the number of defendants that attempt to invalidate their convictions under *Padilla*. In addition, because this particular offense by counsel does not in itself speak to the innocence or guilt of the defendant, one would likely not risk bringing such a claim unless it would be possible to get a substantially lower sentence or a conviction for a crime not mandating removal, if possible.[176] Thus, limited retroactive application of *Padilla* should not create an issue of floodgates but rather should promote equity for similarly situated defendants across state lines.

CONCLUSION

Padilla v. Kentucky was a landmark decision in the overlapping worlds of criminal law and immigration law. It has the potential to impact some of the cases among the thousands of criminal noncitizens incarcerated each year. In light of recent administrative decisions on the part of the federal government to focus deportation efforts on convicted noncitizens, the accurate evaluation of such cases is of heightened importance. However, because of the established retroactivity doctrines, especially *Teague*, federal courts are unlikely to apply *Padilla* on federal habeas. Although states can opt for a wider application of the rule on their own postconviction proceedings, a strong interest in finality and the impracticality of

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174. Chin, *supra* note 29, at 677.

175. *See supra* Parts I, II.

176. Chin, *supra* note 29, at 677; *see also* Vivian Chang, *Where Do We Go From Here: Plea Colloquy Warnings and Immigration Consequences Post-*Padilla, 45 Mich. J.L. Reform 189, 191 (2012) (arguing that "*Padilla's* holding alone is not robust enough to safeguard the interests of non-citizen defendants" because the holding is limited to requiring only clear advice or a blanket warning, which is a very limited protection in practice); *cf.* Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel* 35 Pepp. L. Rev. 77 (2007) (suggesting that *Strickland's* standard may now have more bite in general as a result of ABA regulations).

opening the door to *Padilla* claims from noncitizens convicted many years ago makes courts unlikely to be willing to allow *Padilla* to apply retroactively to any convicted noncitizen. Extending the benefit of the rule to the limited class of noncitizens who were on direct review when *Padilla* came down remedies the disparity regarding when an ineffective assistance of counsel claim can be brought between defendants in minority and majority rule states. This allows similarly situated defendants to be treated similarly, promoting equity without opening the floodgates.

Going forward, the reality is that few convicted noncitizens will be able to use the *Padilla* holding on postconviction review if their convictions were final before *Padilla* was announced. However, those noncitizens who have been charged and will be charged with crimes after *Padilla* and going forward will be able to employ the rule on both federal habeas and state postconviction review in the future. The *Padilla* rule is a fairly simple mandate: defense attorneys must tell their clients of the potential for specific adverse immigration consequences if the law is clear. If it is not clear, they merely must warn of the potential for deportation, without more. Thus, the true effect of *Padilla* "will likely be primarily about the training, practices, and norms of defense attorneys rather than about litigating failure to comply with it."[177] Defense attorneys will be careful to inquire about their clients' immigration status and to give at least a perfunctory warning about immigration consequences, perhaps linking their client to an immigration attorney if possible. This rule may seem to have a narrow effect, given that many attorneys already did advise their noncitizen clients in this way before *Padilla* and that few defendants are realistically willing to risk trial rather than entering a plea when the evidence is stacked against them. However, for that band of noncitizens with a genuine chance that litigating their case would lead to acquittal and thus prevent deportation, this rule is a critical protection. Extending *Padilla* to application on state postconviction review for those defendants who were on direct review when it came down is a fair rule that operates within the legal constraints already in place in our system.

Of all the forms of punishment that follow from criminal convictions, deportation is a particularly severe consequence. Because federal courts are unlikely to be able to use *Padilla* on federal habeas due to *Teague* and *Greene*, state courts should allow *Padilla* on postconviction review in order to reduce the number of unnecessary deportations that result from ineffective assistance of counsel. Protection against deportation for noncitizen defendants should fall within the ambit of procedures that merit exception to the nonretroactivity rule.

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177. Chin, *supra* note 29, at 677.

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