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Padilla's Collateral Attack Effect on Existing Federal Convictions

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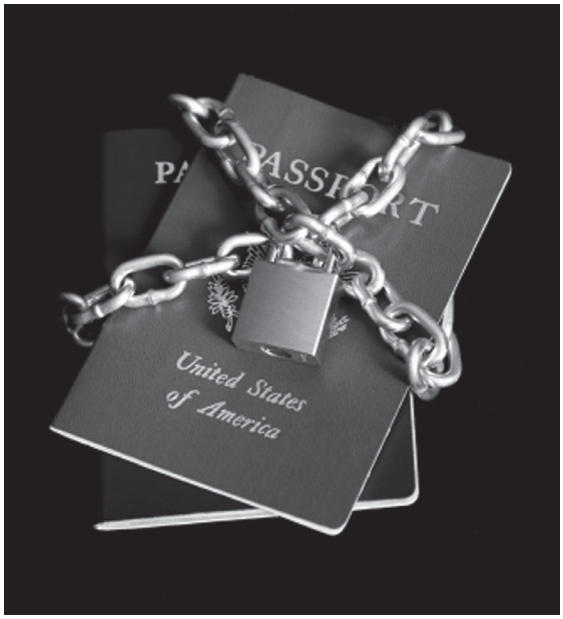
By: Rachel A. Cartier

I. Introduction

In *Padilla v. Kentucky*, the U.S. Supreme Court stated "[i]t is our responsibility under the Constitution to ensure that no criminal defendant–whether a citizen or not–is left to the 'mercies of incompetent counsel.'"[1] This is particularly important today because, in 2008, U.S. Immigration and Customs Enforcement "removed"[2] 97,133[3] "known criminal aliens"[4] from the United States.[5] "Criminal aliens" are non-citizens with deportable offenses such as: crimes of moral turpitude; multiple criminal convictions; aggravated felonies; high speed flight; failure to register as a sex offender; certain drug offenses; certain firearm offenses; espionage/sabotage/treason; domestic violence; stalking; child abuse; violations of protective orders; crimes against children; trafficking; failure to register or falsification of documents; and terrorist activities.[6] As of June 2009, there were 94,498 aliens in state and federal custody, making up 4.1 percent of the total in-custody population.[7] Recent U.S. Census Bureau statistics show over twenty-one million non-citizens residing in the United States, and it is unclear as to how many have deportable convictions on their records.[8] As the Supreme Court has indicated, non-citizens are entitled to the same constitutional protections as citizens regarding legal representation.[9]



The Sixth Amendment of the U.S. Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[10]

The U.S. Supreme Court built upon the Sixth Amendment in *Strickland v. Washington* and held that counsel must meet the performance standard of "reasonably effective assistance."[11] In order to succeed on a Sixth Amendment claim of ineffective assistance of counsel, the defendant has the burden of proof to show that: (1) counsel's representation fell below the "reasonably effective counsel" standard;[12] and (2) there is a "reasonable probability" that but for counsel's unprofessional errors, the result of the proceeding would have been different.[13]

On March 31, 2010, the U.S. Supreme Court once again expanded the reach of the Sixth Amendment and held in *Padilla v. Kentucky* that counsel has an obligation to advise their clients of possible immigration consequences upon entering guilty pleas.[14] They further held that a failure to do so constitutes "ineffective counsel" and thus can render a plea agreement constitutionally invalid.[15] The Supreme Court did not clarify whether *Padilla* would be applied retroactively to existing convictions, but the Court did state, "[it] now hold[s] that counsel must inform her client whether his plea carries a risk of deportation,"[16] and "[i]t seems unlikely that [their] decision today will have a significant effect on those convictions already obtained as a result of plea bargains."[17] The Supreme Court's vagueness has resulted in a split in U.S. courts as they grapple with the language in *Padilla*, as well as existing case precedents to determine whether this is a "new rule" that should be applied retroactively.[18]

This uncertainty could have a profound impact because in 2009, guilty pleas made up 96.3 percent of the convictions in U.S. district courts.[19] Courts now have to balance the finality of convictions against defendants' constitutional rights. This piece

will analyze who can raise *Padilla* as a collateral attack to an existing federal conviction.[20] It will first examine the opinion of *Padilla*, whether and to what extent *Padilla* should be applied retroactively to federal convictions, the procedural hurdles in place for collaterally challenging a federal conviction, and whether a defendant would want to raise this collateral attack. It will conclude by determining the likelihood of whether *Padilla* "will have a significant effect on those convictions already obtained as the result of plea bargains."[21]

II. Padilla v. Kentucky

Jose Padilla had lived lawfully in the United States for forty years as a permanent resident.[22] Mr. Padilla was then charged in Kentucky with transportation of a large amount of marijuana and drug distribution.[23] His counsel told him not to worry about deportation consequences because he had lived in the country for so long.[24] Mr. Padilla then pled guilty to the drug distribution offense and subsequently faced deportation.[25] Mr. Padilla claimed he would have gone to trial instead of pleading guilty had he known the charge put him at risk for deportation.[26] The Kentucky Supreme Court denied Mr. Padilla's post-conviction relief on the grounds that deportation is a "collateral" consequence of a conviction, and as such, the Sixth Amendment does not protect defendants from erroneous advice regarding deportation consequences.[27]

The U.S. Supreme Court started its analysis with an overview of immigration law and the changes that have increased the chances of deportation because of a criminal conviction.[28] Now there is a broad class of deportable offenses and judges have limited authority to prevent deportation.[29] The Court specifically pointed out that in 1996, Congress eliminated the Attorney General's authority to grant discretionary relief to aliens facing deportation, thereby making deportation "practically inevitable" for those with deportable offenses.[30] This high likelihood of deportation means it is more important now than ever for counsel to advise their clients regarding potential consequences.[31] Deportation is "sometimes the most important part of the penalty" imposed on non-citizens.[32]

Responding to the Kentucky Supreme Court, the U.S. Supreme Court pointed out that it does not distinguish between direct and collateral consequences for the purpose of *Strickland*'s "reasonably effective counsel" requirement.[33] The Court stated it was not important to make this distinction due to the intimate relationship between deportation and the criminal process, which makes it uniquely difficult to classify the consequence as direct or collateral.[34] Therefore, *Strickland* applies to situations where counsel must brief a client who is about to enter a plea with potential immigration consequences.[35]

In determining whether a counsel's failure to a client of immigration consequences fell below *Strickland*'s "reasonably effective counsel" requirement, the Court recognized that the weight of prevailing professional norms supports the view that counsel must advise his or her client of potential immigration consequences, including the right to remain and the right not to be excluded from the United States.[36] The Court held that affirmative wrong advice is as bad as no advice and that counsel must at least advise their client there may be adverse immigration consequences.[37]

In addition, the Supreme Court stated it considered the importance of protecting the finality of guilty plea convictions.[38] It recognized that pleas are less frequently the subject of collateral challenges than convictions, accounting for only thirty percent of habeas petitions filed while nearly ninety-five percent of all criminal convictions result in the filing of habeas petitions.[39] The Court, therefore, did not feel that this ruling would open the floodgates to challenges of convictions obtained by plea bargains.[40] It ultimately held that counsel must inform a client of whether his plea carries a risk of deportation, and Mr. Padilla proved that his counsel was constitutionally deficient because she did not inform him of potential immigration consequences.[41] As such, the case was remanded to the lower court to determine whether Mr. Padilla had been prejudiced and was thus entitled to have his conviction overturned.[42]

III. Effect on Collateral Attacks on Federal Convictions

The road through appeal is a long one.[43] If a defendant wants to challenge a conviction, the defendant must file under the direct appeal process, exhausting all of the appropriate avenues.[44] Once that is complete, a defendant may file a collateral challenge to their conviction.[45] Collateral attacks are separate "quasi-civil" proceedings from the direct appeal, usually filed with the original trial court.[46] Only constitutional claims or those resulting in a serious miscarriage of justice are "cognizable" on collateral attack.[47] Ineffective counsel implicates the Sixth Amendment right to counsel and would thus qualify as a constitutional claim.[48]

A. Does *Padilla* apply retroactively to existing convictions?

Since 1965, the U.S. Supreme Court has presented "confused and confusing" jurisprudence with regard to the retroactive application of new constitutional rules of criminal procedure.[49] *Padilla* appears to be no different. Reasonable jurists are split with respect to whether *Padilla* should apply retroactively,[50] with the lower courts divided.[51] The language

of *Padilla* offers some insight into the Court's opinion on the "floodgates" theory:

> We confronted a similar "floodgates" concern . . . but nevertheless applied *Strickland* . . . [a] flood did not follow in that decision's wake . . . [s]urmounting *Strickland*'s high bar is never an easy task . . . [i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains.[52]

These statements indicate that the Court considered the potential floodgates concerns and had determined that the constitutional right to receive effective counsel outweighed the need for finality. On the other hand, the Court states: "[l]ikewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas. . . ."[53] Further, "we now hold that counsel must inform her client whether his plea carries a risk of deportation"[54] because "our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."[55] This conclusion indicates that an attorney's duty to inform a client of immigration consequences is a "new rule," and only at this point have deportation consequences become inevitable enough to warrant their inclusion during the plea bargaining process. These statements are powerful but unclear, leaving the courts little guidance in determining whether *Padilla* should be applied retroactively.[56]

***Courts are split as to whether* Padilla *announced a "new rule" or just applied a well-established principle under* Strickland.**

1. *What precedential case law does this U.S. Supreme Court provide to determine whether a rule of criminal procedure should be applied retroactively?*

In *Teague v. Lane*,[57] the U.S. Supreme Court outlined the analysis to determine whether a rule applies retroactively, which is "unwavering in use today."[58] *Teague* holds old rules should be applied retroactively to cases on direct or collateral review;[59] however, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[60] The question then becomes whether or not the case announced a "new rule." The Court acknowledged:

> It is admittedly difficult to determine when a case announces a new rule. . . . [H]owever, a case announces a new rule when it breaks new ground or imposes a new obligation on the States of the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent at the time the defendant's conviction became final.[61]

Courts are split as to whether *Padilla* announced a "new rule" or just applied a well-established principle under *Strickland*.[62]

The Supreme Court provided an exception for "new rules" to be applied retroactively to cases on collateral review "only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[63] A rule is substantive when "it alters the range of conduct or the class of persons the law punishes,"[64] and it is procedural when it regulates the "manner of determining the defendant's culpability."[65] A rule is "watershed" only if it satisfies two requirements: (1) "[i]nfringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,'"[66] and (2) "the rule must 'alter our understanding of the 'bedrock procedural elements' essential to the fairness of the proceeding.'"[67]

i. Does *Padilla's* holding constitute a "new rule"?

In determining whether something is a "new rule," the U.S. Supreme Court stated in *Williams v. Taylor* that the courts must determine whether they applied a well-established constitutional principle that has been considered precedent, and if not, it is a new rule.[68] A rule will be considered a "new rule" if it imposes a new obligation on the states or federal government that falls outside the universe of federal law.[69]

In *Butler v. McKellar*, the Supreme Court applied its test of determining a "new rule" and held the bar to police-initiated interrogation following a suspect's request for counsel in a separate investigation, set forth in *Arizona v. Roberson*,[70] was a "new rule."[71] Even though the Court in *Roberson* stated it was directly controlled by *Edwards v. Arizona*, which bars police initiated interrogation after the defendant invokes his Fifth Amendment right,[72] the *Butler* decision "is not conclusive for purposes of deciding whether the current decision is a new rule under *Teague*."[73] The Court further acknowledged that there was a "significant difference of opinion on the part of several lower courts that had considered the question previously."[74] This in-

dicated that there was "debate among reasonable minds"[75] and that "it would not have been illogical or drudging application of *Edwards* to decide it did not extend to the facts of *Roberson*."[76] Due to the fact that there was not strong precedent, the Court held that the *Roberson* rule applying a defendant's single invocation of his Fifth Amendment right to all matters[77] was a "new rule" and thus did not apply retroactively to cases on collateral attack.[78]

Since 2002, six of the U.S. Circuit Courts of Appeals have all *clearly* held that potential immigration consequences were collateral consequences of a plea, and therefore, counsel had no constitutional obligation to advise a non-citizen client of the possible immigration consequences prior to the client entering a plea.[79] In *United States v. Fry*, the Ninth Circuit Court of Appeals stated that as of 2003, all other circuits to address the question of "whether or not counsel performs deficiently by failing to advise a defendant of immigrations consequences" have found that deportation is a collateral consequence; thus, counsel has no duty to advise a client of immigration consequences.[80] The debate as to whether immigration consequences fell under the requirements of due process or the Federal Rules of Criminal Procedure occurred even though the Court found it is the "weight of the prevailing norms" that requires counsel to advise their client of potential immigration consequences.[81] Like *Butler,* it seems that "reasonable minds" could disagree, and therefore this should constitute a "new rule."[82]

In addition, as articulated in *Williams*,[83] this holding does impose a new responsibility on the federal government because federal defenders will be now required to advise their clients of potential immigration consequences upon entering a guilty plea.[84] This same obligation could also be forced upon federal court judges.[85] Therefore, *Padilla* constitutes a "new rule" and would not be applicable to cases on collateral review unless it fell into the "watershed rule" exception.[86]

ii. If it constitutes a "new rule," does it fall into the *Teague* "watershed rule" exception?

In fourteen separate cases, the U.S. Supreme Court has been asked to determine whether or not a rule is "watershed," and fourteen times the Court has not applied the exception.[87] In *Teague*, the Supreme Court stated that the *Gideon v. Wainwright* right to counsel for indigent defendants for a serious crime[88] would constitute a watershed rule.[89] The Supreme Court stated, "[w]e have repeatedly emphasized the limited scope of the second *Teague* exception, explaining that 'it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.'"[90] Furthermore, "any qualifying rule 'would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge,'"[91] thus "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception."[92] Although *Padilla* involves the Sixth Amendment right to effective counsel, it is unlikely to constitute a "watershed rule" because the Supreme Court has yet to find one and has issued strongly worded opinions against them.[93]

iii. Assuming *Padilla* is an old rule or a "new rule" that fits into an exception under *Teague*, how far back should *Padilla* apply retroactively?

The Supreme Court stated in 1996 that deportation became "practically inevitable"[94] for those with a deportable criminal conviction because that was when "Congress . . . eliminated the Attorney General's authority to grant discretionary relief from deportation."[95] Therefore, it could be presumed that prior to 1996, deportation was not "practically inevitable"[96] for aliens convicted with deportable offenses. It would also follow that only after deportation became "practically inevitable"[97] would attorneys have a duty to advise their clients of potential immigration consequences. Therefore, a reasonable conclusion would be that only defendants with convictions post-1996 would be able to use *Padilla* to collaterally attack those convictions, greatly reducing the number of federal convictions that could be collaterally attacked.

B. Does a Conviction Fail the Two-Prong Test Set Forth in *Strickland*?

The first prong of the *Strickland* test requires the court to find that the petitioner was not advised of immigration consequences; however, the Court stated that the duty to inform has been a part of the professional responsibility of counsel for at least the past fifteen years, according to professional norms.[98] Therefore counsel benefits from a presumption that it has satisfied this obligation when advising their clients of plea consequences.[99] This responsibility puts the burden on the defendant to prove that he was not advised of potential immigration consequences. This burden could be very difficult since not all conversations between an attorney and her client are on the record, and most attorneys are probably unwilling to sign declarations stating that they did not warn their clients of potential immigration consequences.

The second prong compels a petitioner to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[100] This requirement allows courts to evaluate the original plea agreement to determine whether the defendant could have received a better offer or in light of the evidence and very real deportation possibilities, decided to go to trial instead. The Court recognized that this could take a significant amount of analysis from the lower courts, acknowledged that these courts were "now quite experienced with applying *Strickland*,"[101] and decided to "effectively and

efficiently use its framework to separate specious claims form those with substantial merit."[102]

C. Does a conviction meet the procedural requirements?

After a defendant has completed the direct appeal process, the defendant can file a collateral challenge to his or her conviction.[103] In order to proceed on the collateral challenge, the defendant has to meet any procedural requirements set forth in the applicable statute or case law.[104] The most common type of federal post-conviction remedy is a writ of habeas corpus, and there is a "related but distinct" rarely used writ of *coram nobis* as well.[105]

1. Writ of Habeas Corpus

Under 28 U.S.C. 2254, a defendant can file an application for a writ of habeas corpus in the district court on the ground that he or she is in custody in violation of the U.S. Constitution.[106] The term "in custody" has been liberally construed to require only that the defendant is still completing a part of their sentence, which can include probation.[107]

28 U.S.C. 2255 does provide for a one-year statute of limitations from:

> (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.[108]

If *Padilla* sets forth a "new rule," then defendants have until March 31, 2011, one year after the decision, to challenge their convictions. If it is an old rule, then defendants have one year from the date of their original conviction.

A writ for habeas corpus will not be granted unless the applicant has exhausted all of his remedies in the state court, there is an absence of available process, or circumstances are such that they render the process ineffective.[109] The defendant has to make sure that he has exhausted all of these remedies. The applicant has to prove that the lower court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"[110] or that his claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . ."[111] The defendant would be able to demonstrate his claim by proving his or her case was out of compliance with *Padilla* and *Strickland*, and thus he or she suffered an unreasonable application of clearly established federal law.

2. Writ of Coram Nobis

The writ of *coram nobis*[112] is "an extraordinary remedy" that allows a petitioner to attack an unconstitutional conviction after the petitioner has served his or her sentence and is no longer in custody.[113] There is no statute of limitations for the writ of *coram nobis*.[114] The writ should be granted "only under circumstances compelling such action to achieve justice."[115] The Ninth Circuit requires a petitioner to prove the following to qualify for *coram nobis* relief:

(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction to satisfy the case and controversy requirement of Article III; and (4) the error suffered is of the most fundamental character.[116]

A writ of *coram nobis* is filed after a defendant has served his sentence[117] when a more usual remedy is unavailable. The petitioner is responsible for establishing that valid reasons existed for not attacking the conviction earlier and that he sustained sufficiently adverse consequences to satisfy Article III's case and controversy requirement. This threshold question could require that the petitioner show that actual deportation proceedings are underway to meet this requirement. Petitioner would be able to rely on *Padilla* and *Strickland* to prove that the error he suffered is of the most fundamental character.

D. Does the party really want to overturn their conviction?

The Supreme Court in *Padilla* recognized those "who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea"[118] and "the challenge may result in a less favorable outcome for the defendant."[119] Defendants voluntarily agree to enter plea agreements, and a petitioner who collaterally challenges his agreement and has it set aside could easily be forced to go to trial to face much stiffer penalties. Although the Court in *Padilla* stated "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process,"[120] it appears that the government could have the upper hand, which could leave defendants to the mercy of the prosecutor.

IV. Conclusion

If courts decide to apply *Padilla* retroactively, it will only affect a small number of convictions. *Padilla* requires the conviction be (1) post-1996; (2) of a non-citizen; (3) convicted of a deportable offense; (4) who can prove that he or she was not advised of potential immigration consequences; (5) who is now facing immigration/adverse consequences such that he or she has standing; (6) that he can meet the procedural requirements for their choice of remedy (habeas corpus or writ of *coram nobis*); and (7) he is willing to give up the benefit of his or her plea agreement in an attempt to get a better deal. Unless previous witnesses or evidence is unavailable, there is nothing to suggest that prosecutors will be willing to bargain for pleas that avoid immigration consequences, especially since there is no easy way out with so many deportable convictions.[121] Therefore, trial is the most likely option for any plea deemed constitutionally invalid, and chances of success are uncertain at best.

Whether *Padilla* applies retroactively or not, the Supreme Court was correct in stating "[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains."[122] It does not appear as though the "floodgates"[123] will open, filling the courts with writs of habeas corpus and *coram nobis*. At the same time, the Supreme Court achieved its goal in protecting non-citizens from the "'mercies of incompetent counsel.'"[124] At the very least, it established a solid precedent across the United States regarding the advisement of potential immigration consequences, if not a "new rule" all together. **CLB**

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1 Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)).

2 Removal is defined as the "compulsory and confirmed movement of an inadmissible or deportable alien out of the United states based on an order of removal." Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Annual Report July 2009, Immigration Enforcement Actions: 2008 2 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

3 This does not include those who were removed by U.S. Customs and Border Protection. *Id*. at 4 n. 6.

This also does not include those aliens that were allowed to "return" to their home countries, which is defined as the "confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal." *See id.* at 2.

4 Alien is defined at "a resident born in or belonging to another country who has not acquired citizenship by naturalization." *Definition of Alien*, http://dictionary.reference.com/browse/alien (last visited July 9, 2010).

5 Office of Immigration Statistics, *supra* note 2, at 4.

6 8 U.S.C. § 1227 (2008).

7 Heather C. West, Bureau of Justice Statistics, U.S. Dep't of Justice, Prison Inmates at Midyear 2009-Statistical Tables 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf.

8 *2006-2008 American Community Survey*, U.S. Census Bureau, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_DP3YR2&-ds_name=&-_lang=en&-redoLog=false (last visited Oct. 6, 2010).

9 *See Padilla*, 130 S. Ct. at 1486 (citing *McMann*, 397 U.S. at 771).

10 U.S. Const. amend. VI.

11 Strickland v. Washington, 466 U.S. 668, 687 (1984) (noting a consensus among circuit courts that "reasonably effective assistance" is the minimum standard for competent representation).

12 *Id.* at 687-688 (ruling that the burden of proof falls on the defendant to show that counsel failed to meet reasonably effective standard).

13 *Id.* at 687-694 (describing the standard for prejudice required in making an argument of ineffective assistance of counsel).

14 *See Padilla*, 130 S. Ct. at 1478 (holding that "counsel must inform her client whether his plea carries a risk of deportation").

15 *See id.* at 1486-87 (explaining that the seriousness of deportation as a consequence of a criminal plea and the impact on families require constitutional protection of effective counsel for non-citizens).

16 *Id.* at 1486.

17 *Id.* at 1485.

18 *Padilla* does apply retroactively. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *8 (E.D. Cal. July 1, 2010) (reasoning that the court indicated that *Padilla* was not a new rule because it was to be applied retroactively and a new rule could only be applied prospectively); United States v. Obonaga, No. 10-CV-2951, 2010 WL 2710413, at *1 (E.D.N.Y. June 30, 2010) (discussing the importance of determining whether or not *Padilla* is a new rule in deciding the timeliness of otherwise time barred habeas petitions); New York v. Bennett, 903 N.Y.S.2d 696, *3 (N.Y. Crim. Ct. 2010) (noting two exceptions which allow a new rule to be applied retroactively in the absence of clear language in the *Padilla* opinion); United States v. Millan, Nos. 3:06cr458/RV, 3:10cv165/RV/MD, 2010 WL 2557699, at *1 (N.D. Fla. May 24, 2010) (asserting that *Padilla* is based on *Strickland*, not new law); United States v. Guzman-Garcia, No. CR F 06-0390 LJO, 2010 WL 1791247, at *2 (E.D. Cal. May 3, 2010). Other courts refused to apply Padilla retroactively, however. *See* Gacko v. United States, No. 09-CV-4938, 2010 WL 2076020, at *3 (E.D.N.Y. May 20, 2010) (refusing to apply *Padilla* retroactively); United States v. Romero-Ramos, No. CR-09-6058-EFS, 2010 WL 2028086, at *2 (E.D. Wash. May 17, 2010) (distinguishing *Padilla*, a habeas petition, from a collateral attack).

19 Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Table 5.34.2009 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t5342009.pdf.

20 I will only address federal convictions because prior to *Padilla* there was no federal rule requiring attorneys to advise their clients of possible immigration consequences; while, twenty-eight states, Puerto Rico, and the District of Columbia all had adopted statutes or forms requiring the advisement of immigration consequences in one form or another. Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at *1AA, *Padilla*, 130 S. Ct. 1473 (2010) (No. 08-651). The brief of the National Association of Criminal Defense Lawyers lists these jurisdictions as the following: Alaska (Ala. R. Crim. P. 11(c)(3)); California (Cal. Penal Code § 1016.5 (West 2008)); Connecticut (Conn. Gen. Stat. § 54-1j (West 1960)); District of Columbia (D.C. Code § 16-713 (2001)); Florida (Fla. R. Crim. P. 3.172(c)(8)); Georgia (Ga. Code Ann. § 17-7-93(c) (1982)); Hawaii (Haw. Rev. Stat. §§ 802E-1, 802E-2, 802E-3 (1986)); Idaho (Idaho Crim. R. 11(d)(1)); Illinois (725 Ill. Comp. Stat. Ann. 5/113-8 (West 1992)); Iowa (Iowa Code Ann. § 2.8(2)(b)(3) (West 1949)); Kentucky (Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC–491 (Rev. 2/2003), *available at* http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf); Maine (Me. R. Crim. P. 11(h)); Maryland (Md. R. 4-242(e)); Massachusetts (Mass. Ann. Laws ch. 278, §

29D (LexisNexis 1997)); Minnesota (Minn. R. Crim. P. 15.01 subd. 1(10)(d) (felony cases), (Minn. R. Crim. P. 15.02(2)) (misdemeanor cases)); Montana (Mont. Code Ann. § 46-12-210(1)(f) (1978)); Nebraska (Neb. Rev. Stat. § 29.1819.02 (1943)); New Jersey (Criminal Plea Forms and Judgment of Conviction, Directive No. 14-08, N.J. Administraitve Office of the Courts (Oct. 8, 2008)); New Mexico (N.M. Dist. Ct. R. Crim. P. 5-303(F)(5)); New York (N.Y. Crim. Proc. Law § 220.50(7) (McKinney 1962)); North Carolina (N.C. Gen. Stat. § 15A-1022(a)(7) (1999)); Ohio (Ohio Rev. Code Ann. § 2943.031 (LexisNexis 1912)); Oregon (Or. Rev. Stat. § 135.385(2)(d) (1989)); Puerto Rico (P.R. Laws Ann. tit. 34, App. II, Rule 70 (1954)); Rhode Island (R.I. Gen. Laws § 12-12-22 (1957)); Texas (Tex. Code Crim. Proc. Ann. art. § 26.13(a)(4) (West 1997)); Vermont (Vt. Stat. Ann. tit. 13, § 6565(c) (1958)); Washington (Wash. Rev. Code Ann. § 10.40.200 (West 1980)); and Wisconsin (Wis. Stat. Ann. § 971.08(1)(c) (West 1957)). *Id.*

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

[22] *Id.* at 1477.

[23] *Id.*

[24] *Id.* at 1478.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See id.* (noting an increase in the number of deportable offenses and less discretion for judges to waive deportation).

[29] *Id.*

[30] *Id.* at 1480.

[31] *Id.*

[32] *Id.*

[33] *See id.* at 1481(asserting that deportation is a severe penalty, not merely a collateral matter).

[34] *Id.*

[35] *See id.* at 1482 (concluding that legal advice about deportation falls within the standard of effective counsel outlined in *Strickland*).

[36] *Id.* at 1482-83.

[37] *See id.* at 1484.

[38] *Id.*

[39] *Id.* at 1485.

[40] *See id.* (noting that *Strickland* was not followed by a flood of challenges).

[41] *Id.* at 1486-1487.

[42] *Id.* at 1487.

[43] *See* Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, The Nat'l Ass'n of Crim. Def. Law. Champion Mag., June 2005, at 17-18, *available at* http://www.nacdl.org/public.nsf/0/797601a347c2a9288525703100599 5fl?OpenDocument (describing statutory, judicial, and procedural obstacles in the criminal appeals process).

[44] *Id.* at 16.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Strickland v. Washington, 466 U.S. 668, 684 (1984) (holding that the right to counsel is protected by the Sixth Amendment, making a claim of ineffective assistance a constitutional claim).

[49] Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," after* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Procedure in Postconviction Proceedings*, 46 Am. Crim. L. Rev. 1, 3 (2009).

[50] United States v. Obonaga, No. 10-CV-2951, 2010 WL 2710413, at *1 (E.D.N.Y. June 30, 2010) (indicating that the relatively recent publication of the *Padilla* decision has left little opportunity to clarify the decision through further rulings).

[51] *See* text accompanying *supra* note 18. *See* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *8 (E.D. Cal. July 1, 2010) (identifying differing interpretations of the dicta, "now holds," used by the Supreme Court in *Padilla*); *Id*. at *1 (identifying U.S. district court decisions that held *Padilla* to be applied retroactively and others that held *Padilla* to have no retroactive effect); New York v. Bennett, 903 N.Y.S.2d 696, *3 (N.Y. Crim. Ct. 2010) (identifying two instances in which a new rule can be applied retroactively); United States v. Millan, Nos. 3:06cr458/RV, 3:10cv165/RV/MD, 2010 WL 2557699, at *1 (N.D. Fla. May 24, 2010) (holding that *Padilla* is not new law and does apply retroactively); United States v. Guzman-Garcia, No. CR F 06-0390 LJO, 2010 WL 1791247, at *2 (E.D. Cal. May 3, 2010) (applying *Padilla* retroactively); *but see* Gacko v. United States, No. 09-CV-4938, 2010 WL 2076020, at *3 (E.D.N.Y. May 20, 2010) (refusing to apply *Padilla* retroactively); United States v. Romero-Ramos, No. CR-09-6058-EFS, 2010 WL 2028086, at *2 (E.D. Wash. May 17, 2010) (distinguishing *Padilla*, a habeas petition, from a collateral attack).

[52] Padilla v. Kentucky, 130 S. Ct. 1473, 1484-85 (2010).

[53] *Id.* at 1485.

[54] *Id.*

[55] *Id.* at 1486.

[56] *See* Baruwa v. Caterisano, No. DKC-09-1278, 2010 WL 2509967, at *1 (D. Md. June 17, 2010) (noting that the Supreme Court did not establish whether its *Padilla* ruling should be applied retroactively).

[57] Teague v. Lane, 489 U.S. 288, 310 (1989).

[58] Ezra D. Landes, *A New Approach to Overcoming the Insurmountable "Watershed Rule" Exception to* Teague*'s Collateral Review Killer*, 74 Mo. L. Rev. 1, 7 (2009).

[59] Whorton v. Bockting, 549 U.S. 406, 416 (2007).

[60] *Teague*, 489 U.S. at 310. The word "final" indicates that the Court will apply "new rules" retroactively to those cases on direct review, but they will not apply to cases on collateral review. *Id.* (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). In *Linkletter v. Walker*, the Court defined final as "the judgment of conviction was rendered, the unavailability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*." 381 U.S. 618, 622 n. 5 (1965).

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

[62] *See* text accompanying *supra* note 31.

[63] *Whorton*, 549 U.S. at 416 (citing Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311)).

[64] Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

[65] *Id.*

[66] Tyler v. Cain, 533 U.S. 656, 665 (2001) (citing Sawyer v. Smith, 497 U.S. 227, 241-242 (1990) (quoting *Teague*, 489 U.S. at 311)).

[67] *Tyler*, 533 U.S. at 665 (citing Sawyer v. Smith, 497 U.S. at 241-42 (quoting *Teague*, 489 U.S. at 311)).

[68] Williams v. Taylor, 529 U.S. 362, 380-81 (2000).

[69] *Id.* at 381.

[70] 486 U.S. 675, 687-88 (1988).

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

[72] Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

[73] *Butler*, 494 U.S. at 415.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *See Arizona*, 486 U.S. at 687-88 (holding that, once a suspect has invoked the right to counsel, that right must be honored even by different law enforcement personnel and on different matters).

[78] *Butler*, 494 U.S. at 415.

[79] Santos-Sanchez v. United States, 548 F.3d 327, 337 (5th Cir. 2008), *abrogated by* Padilla v. Kentucky, 130 S. Ct. 1473, 1473; Enwonwu v. United States, No. 06-1825, 2006 WL 2729703 at *7 (1st Cir. Sept. 26, 2006), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Gonza-

lez, 202 F.3d 20, 25 (1st Cir. 2000), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Matar, No. 05-3929, 2006 WL 3724638 at 555 (7th Cir. Dec. 15, 2006), *abrogated by Padilla*, 130 S. Ct. at 1473; Broomes v. Ashcroft, 358 F.3d 1251, 1256 (10th Cir. 2004), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Amador-Leal, 276 F.3d 511, 517 (9th Cir. 2002), *abrogated by Padilla*, 130 S. Ct. at 1473; El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002), *abrogated by Padilla*, 130 S. Ct. at 1473.

[80] *Fry*, 322 F.3d at 1200 (citing United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993), *abrogated by Padilla*, 130 S. Ct. at 1473; *Gonzalez*, 202 F.3d at 25, *abrogated by Padilla*, 130 S. Ct. at 1473; Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990), *abrogated by Padilla*, 130 S. Ct. at 1473; Santos v. Kolb, 880 F.2d 941, 945 (7th Cir. 1989), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir. 1988), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985), *abrogated by Padilla*, 130 S. Ct. at 1473; United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975), *abrogated by Padilla*, 130 S. Ct. at 1473.

[81] *Padilla*, 130 S. Ct. at 1482.

[82] *See Butler*, 494 U.S. at 415 (identifying court rulings in which opinions differed as to whether or not a new rule was being established).

[83] Williams v. Taylor, 529 U.S. 362, 380-81 (2000).

[84] *See Padilla*, 130 S. Ct. at 1478 (holding that the defendant would have been advised of immigration consequences by constitutionally competent representation).

[85] *Id.*

[86] *See* Whorton v. Bockting, 549 U.S. 406, 416 (2007) (citing Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989))).

[Schriro] v. Summerlin, 542 U.S. 348, 353 (2004).

[87] Landes, *supra* note 58, at 2. These non-sentencing cases all held that the rule was not "watershed." Butler v. McKellar, 494 U.S. 407, 415 (1990) (addressing *Arizona* which barred police-initiated interrogation following a suspects request for counsel in another matter); Gilmore v. Taylor, 508 U.S. 333, 345 (1993) (citing Falconer v. Lane, 905 F.2d 1129, 1136-1137 (7th Cir. 1990), which barred jury instructions for murder that did not consider a diminished mental state); Goeke v. Branch, 514 U.S. 115, 120 (1995) (focusing on the rule that gave recaptured fugitives a right to appeal).

[88] Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

[89] *See Teague*, 489 U.S. 288 311-12 (1989) (holding that a new rule could be applied retroactively if needed to preserve ordered liberty).

[90] Beard v. Banks, 542 U.S. 406, 417 (2004) (citing O'Dell v. Netherland, 521 U.S. 151, 157 (1997) (quoting Graham v. Collins, 506 U.S. 461, 478 (1993))).

[91] *Beard*, 542 U.S. at 417 (citing *Graham*, 506 U.S. at 478 (quoting *Teague*, 489 U.S. at 313)).

[92] *Beard*, 542 U.S. at 417.

[93] Landes, *supra* note 58, at 2.

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

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 1485.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Newton, *supra* note 43, at 16.

[104] *See id*. at 17 (identifying federal statutes under which a defendant may bring a habeas claim).

[105] *Id.*

[106] 28 U.S.C. § 2254 (1996).

[107] Maleng v. Cook, 490 U.S. 488, 492 (1989).

[108] § 2255.

[109] § 2254.

[110] *Id.*

[111] *Id.*

[112] Although not specifically authorized by Congress, the courts get the power to employ *coram nobis* through 28 U.S.C. 1651(a). United States v. Morgan, 346 U.S. 502, 506-07 (1954).

[113] *Id*. at 511.

[114] *Id.* at 507.

[115] *Id.* at 511.

[116] United States v. Kwan, 407 F.3d 1005, 1011 (9th Cir. 2005), *abrogated by* Padilla v. Kentucky, 130 S. Ct. 1473, 1473 (2010).

[117] *Morgan*, 346 U.S. at 508.

[118] *Padilla*, 130 S. Ct. at 1485-86.

[119] *Id.*

[120] *Id.* at 1486.

[121] *See* 8 U.S.C. § 1227 (2008) (identifying a full listing of deportable offenses for criminal aliens).

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

[123] *Id.* at 1484-85.

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

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