Tennessee Journal of Law and Policy

Volume 9 | Issue 1 Article 4

May 2013

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William N. Conlow
Rutgers University School of Law

ARTICLE

PRECEDENT, FAIRNESS, AND COMMON SENSE DICTATE THAT *PADILLA V. KENTUCKY* SHOULD APPLY RETROACTIVELY

William N. Conlow[*]

In 2010, the Supreme Court decided the landmark case of Padilla v. Kentucky. *The* Padilla *Court's holding was that failure of counsel to advise a non-citizen criminal defendant about the immigration consequences of a guilty plea constitutes ineffective assistance of counsel. This article addresses whether* Padilla *applies to convictions that occurred before* Padilla *was decided, in March 2010.*

First, this article provides background on relevant immigration law, Padilla v. Kentucky, *and the Supreme Court's retroactivity case law. Then, this article considers how lower courts have addressed the issue of retroactivity in the approximately twenty-seven months after the* Padilla *decision. This article also provides in-depth analysis of circuit courts and state supreme courts which have addressed the retroactivity issue. This article then critically analyzes the common arguments for and against applying* Padilla *retroactively. Finally, this article proposes that* Padilla *apply to all non-citizens who have been deported as a result of ineffective assistance of counsel.*

On April 30, 2012, the Supreme Court granted certiorari to decide the issue this article discusses.

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[*] Rutgers University School of Law—Camden, J.D. expected 2013. Special thanks to Justin T. Loughry, Esq. and Prof. Michael A. Carrier. I want to thank the former for being the model of what a good lawyer should be, and for inspiring this article, and the latter for being an extraordinary teacher. I am dedicating this article to my soon-to-be alma mater, Rutgers University School of Law—Camden. May it survive the sometimes-ugly machinations of New Jersey politics.

Although "confused and confusing," the Supreme Court's retroactivity case law supports a finding that Padilla *applies retroactively. Similarly, fairness dictates that non-citizens who have received ineffective assistance of counsel, and been deported as a result, should be afforded a remedy. Common sense also dictates that* Padilla *applies retroactively. A plain reading of the* Padilla *case clearly imagines the retroactive effect of the* Padilla *holding. Moreover, the Supreme Court's application of the* Padilla *rule to Jose Padilla was, in every sense, similar to those who would benefit from* Padilla *being retroactive. For these reasons, precedent, fairness and common sense dictate that* Padilla *should apply retroactively.*

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I. Introduction

In 2010, the Supreme Court handed down the landmark decision of *Padilla v. Kentucky*.[1] *Padilla* held that criminal defense attorneys have an affirmative obligation to advise their clients about immigration consequences of a plea bargain. The promise of *Padilla* is great: to provide a remedy for the injustice that occurs when an attorney falsely tells a non-citizen that he will not be deported as a result of a guilty plea. For the many non-citizens that have been deported after receiving ineffective assistance of counsel, successfully challenging a plea bargain may mean that they can return to their families in the United States.[2] However, courts have found ways of circumventing *Padilla*. For example, "one unanswered question left in *Padilla*'s wake[,] that could have the effect of seriously circumscribing the protection that *Padilla* provides,"[3] is whether *Padilla* applies retroactively or not.

This article addresses whether *Padilla* applies retroactively—in other words, to cases that are brought based on convictions that occurred before *Padilla* was decided, in March 2010.[4] On April 30, 2012, the Supreme Court granted certiorari to decide this issue.[5] If *Padilla*

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

[2] Determining the number of people who could potentially bring *Padilla* claims is extremely difficult. But, data suggests that *Padilla* will reach a large number of non-citizens. For example, "More than 128,000 noncitizens with criminal convictions were deported in 2009 [alone, and a]pproximately 95,000 noncitizens were incarcerated in state and federal prisons and jails as of June 30, 2009." Gary Proctor and Nancy King, *Post* Padilla: Padilla's *Puzzles for Review in State and Federal Courts*, Fed. Sentencing Rep., Vol. 23, No. 3, 239, 239 (Vera Inst. of Justice, Feb. 2011) (citation omitted).

[3] Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 947 (2012).

[4] Padilla, 130 S. Ct. at 1473.

[5] Chaidez v. United States, 132 S. Ct. 2101 (2012).

does not apply retroactively, then the constitutional holding of *Padilla v. Kentucky* applies to the pre-2010 conviction of only one individual—Jose Padilla.[6] This article argues that precedent, fairness and common sense dictate that *Padilla* should apply "retroactively" to all non-citizens that can show ineffective assistance of counsel.

This article will proceed in six sections. Following this introductory section, the second and third sections will briefly discuss relevant immigration law and "retroactivity" case law, respectively. The fourth section discusses how courts have decided the issue of *Padilla*'s retroactivity and analyzes the bases of those decisions. The fifth section of this article argues that courts have, generally, ignored the fact that governing case law, fundamental fairness and common sense dictate that *Padilla* should apply retroactively to *all* cases on collateral review. Finally, the sixth and last section concludes by summarizing why *Padilla* should apply retroactively.

II. Background – Immigration Law

Criminal law and immigration law, once separate entities, now overlap in many areas. One scholar has called the overlapping areas of criminal law and immigration law the "crimmigration system."[7] The history of the American "crimmigration system" has been defined by an "increasingly harsh treatment of criminals [which] is

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[6] Arguably, the Supreme Court has applied the rule of *Padilla* a second time. *See infra* p. 25.

[7] Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008); *see also* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. REV. 1461, 1467 (2011) (calling the Padilla decision a "recognition of the convergence between the deportation and criminal systems").

mirrored in the increasingly harsh treatment of non-citizens in the United States."[8]

The starting point for how immigration law informed the result in *Padilla*—and the effect that it has on our retroactivity analysis—is the *Padilla* decision itself. The Court found that over the last century there has been a "steady expansion of deportable offenses."[9] The Court also noted that, in 1990, Congress eliminated the "judicial recommendation against deportation" ("JRAD") procedure,[10] which had previously given judges the discretion to determine whether deportation was warranted "on a case-by-case basis."[11]

The Justices who decided *Padilla* seem to be in agreement that immigration law is "complex,"[12] and that there are "numerous situations in which the deportation consequences of a plea are unclear."[13] Whether an offense is deportable is often dictated by abstruse subcategories of federal law. Further complications exist because it is often difficult to determine whether a state law offense qualifies under one of these subcategories.[14] Therefore, when a non-

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[8] Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008). Of particular important in this article is the fact that, "[I]n the 1980s and 1990s, [Congress] dramatically expanded the scope of criminal deportation grounds and, consequently, greatly expanded the number of non-citizens deported for criminal offenses." *Id.* at 670.

[9] Padilla, 130 S. Ct. at 1480.

[10] *Id.*

[11] *Id.* at 1479.

[12] *Id.* at 1483.

[13] *Id.* at 1477; *see also, id.* at 1490 (Alito, J., concurring) (finding that making "the determination whether immigration law . . . makes a particular offense removable" is often difficult).

[14] "Legal counsel, [Immigration and Customs Enforcement] attorneys, and immigration judges must determine whether the criminal conviction, often a state crime, qualifies as a deportable offense . . . [and t]his analysis often requires the mastery of both criminal and immigration law." Aarti Kohli, *Does the Crime Fit the Punishment?:*

citizen is convicted of a state-level offense it "raise[s] the challenge of determining [if that] state criminal conviction fits under a federal category that" requires deportation.[15] Adding to the uneven application of the law, the Constitution does not generally apply to non-citizens;[16] however, recent Supreme Court decisions, such as *Padilla*, have challenged this principle.

In the mid-nineties, Congress greatly expanded the number of crimes that resulted in deportation.[17] The result of these changes is that "non-violent offenders with minor criminal histories are often deported."[18] Further, federal

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Recent Judicial Actions Expanding the Rights of Noncitizens, 2 CAL. L. REV. CIRCUIT 1, 3 (2011).

[15] Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 672 (2008).

[16] Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 311 (2011) ("If you think defending the rights of criminal defendants is difficult (and it surely is), try working without a constitution for a while—that is what a lot of immigration law is[.]").

[17] Put differently, Congress made lesser and non-violent crimes much more likely to result in deportation. "Harsh 1996 laws known by their acronyms—AEDPA and IIRIRA—reflected a rather broad-brush crime control justification for deportation and radically changed and expanded the system." Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. Rev. 1461, 1477 (2011). "[T]he Anti-Terrorism and Effective Death Penalty Act [("AEDPA")]... expanded the aggravated felony category[, a provision that requires mandatory deportation,] to include crimes such as gambling and bribery." Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 6 (2011). "[With the] 1996 law, the Illegal Immigrant Reform and Immigrant Responsibility Act [("IIRIRA")], Congress further broadened the definition of aggravated felony to include drug offenses, thefts, burglaries, and crimes of violence." *Id.*

[18] Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 20 (2011).

policymakers and law enforcement officials have increasingly viewed the issue of immigration in the context of national security.[19] The "U.S. Department of Homeland Security [now] controls most of the [immigration] system through its subagencies[.]"[20] Also, "Counterintuitively, immigration judges are employees of the Attorney General, not the judicial branch."[21] Further, immigration laws, including those "that govern mandatory deportation," do not weigh aggravating or mitigating factors, such as how long a non-citizen has lived in the United States, or whether the non-citizen has family ties in the United States.[22]

Broadly, immigration policy places great weight on familial relationships.[23] Therefore, when the adjudications of criminal cases affect families, it is appropriate for courts to consider the effect upon families. The *Padilla* Court itself found that the "impact of deportation on families living lawfully in this country" weighed in favor of the rule that criminal defense attorneys must provide proper advice

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[19] For example, "During the 1996 debate on the Anti-Terrorism and Effective Death Penalty Act . . . some members of Congress equated noncitizens with terrorist aliens." *Id.* at 6. In addition, the enforcement of immigration laws has become the prerogative of the Department of Homeland Security, where its "personnel...investigate and detain non-citizens charged with being deportable . . . and represent the government in the deportation process before the immigration courts." Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 671 (2008).

[20] Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. REV. 1461, 1465 (2011).

[21] Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 14 (2011).

[22] *Id.* at 2.

[23] *See* Bridgette A. Carr, *Incorporating A "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009) (discussing the relationship between familial relationships and immigration law).

about the immigration consequences of a plea.[24] The immigration system, in its current form, "operates like a blunt instrument, and in the process wreaks havoc on the lives of noncitizens and their children, spouses, and parents."[25]

It follows logically that if the effect of a criminal sanction on families weighs in favor of the creation of the rule announced in *Padilla*, then it also weighs in favor of applying that rule retroactively. Families of criminal defendants will be no less harmed by deportations of their family members that resulted from plea agreements before *Padilla* than they will by deportations of their family members that occurred after *Padilla*. In fact, families are more likely to be harmed by pre-*Padilla* pleas, to the extent that non-citizens are more likely to have lived in the United States for longer and established deeper roots.

III. Background – *Padilla v. Kentucky*, and Governing Case Law

Padilla v. Kentucky was a landmark decision.[26]

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[24] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010); *see also* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 823 (2011) (finding that "[a]ny analysis of the severity of a penalty . . . properly encompasses the impact both on clients and their families").

[25] Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 20-21 (2011).

[26] *See* Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 947 (2012) (calling Padilla a "landmark decision[]"); *see also* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011) (calling Padilla a "seismic event").

Padilla held that non-citizens who have been deported as a result of a guilty plea where they received incorrect advice about the deportation consequences of their plea can attack their plea under the existing standard for ineffective assistance of counsel[27]—i.e. *Strickland v. Washington*.[28] Those bringing "*Padilla* claims"[29] are not challenging their deportation. In fact, even a successful *Padilla* claim may still result in the original charges being re-filed.[30] In addition, to succeed on an ineffective assistance of counsel claim, *Strickland*'s "high bar" must be surmounted.[31]

Prior to *Padilla*, a deported non-citizen had no recourse if he relied on his lawyer's false counsel that he would not be deported as a result of his plea bargain.

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[27] *Padilla* was a 7-2 decision. Justice Alito, in concurrence, did not join the Court's opinion on the crucial issue of whether *Padilla* would extend to conduct beyond affirmative misadvice. *Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring) ("I therefore cannot agree with the Court's apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.").

[28] 466 U.S. 668 (1984).

[29] This article uses the term "*Padilla* claims" throughout as shorthand for a person who brings an ineffective assistance of counsel claim under *Padilla*. *See, e.g.*, Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944 (2012). Relatedly, this article uses the term "petitioner" to refer to the individual bringing the *Padilla* claim, unless doing so would be confusing or misleading.

[30] It is important to note that all *Padilla* claims are challenging plea bargains, which, by definition, contain a bargained-for benefit for the petitioner. In other words, one possible criticism of *Padilla* is that it opens the door for non-citizen defendants who would likely not have benefited from going to trial to argue that they would have gone to trial if they had been properly advised about the immigration consequences of their plea. However, as the Court noted, "There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." Padilla, 130 S. Ct. at 1485.

[31] "Surmounting *Strickland*'s high bar is never an easy task." *Id.* at 1485.

Padilla came down in March, 2010.[32] Some courts have held that *Padilla* does not apply retroactively—that is, to guilty pleas[33] that occurred before that date.[34] In *Teague v. Lane*,[35] the Supreme Court explained when rules of constitutional procedure apply retroactively: "new rules" generally do not apply retroactively, to a case on collateral review;[36] "old rules," which merely announce what a rule has always been, always apply retroactively to cases on both direct and collateral review.[37]

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[32] *Id.* at 1473.

[33] *Padilla* only applies to criminal defendants who enter into a plea bargain. If a criminal defendant goes to trial and loses, then he could not have suffered prejudice under *Strickland*, because the result—deportation—would have been the same whether or not he had received effective assistance of counsel. *See e.g.* Maxwell v. United States, CIV.A. JKB-11-3190, 2011 WL 5870041, slip op. at 3 (D. Md. Nov. 21, 2011) (holding that "relief under a Sixth Amendment analysis...does not apply to [Petitioner's] case...[because u]nlike the defendant in *Padilla,* [the Petitioner] did not plead guilty; thus, his trial counsel was not remiss in failing to tell him a guilty plea could result in his deportation").

[34] The *Padilla* Court did not state explicitly whether their holding would apply retroactively. 130 S. Ct. at 1473.

[35] 489 U.S. 288 (1989).

[36] *Id.* at 307 (plurality opinion) (holding that, for new rules, the "general rule [is] nonretroactivity for cases on collateral review").

[37] Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."). It is axiomatic that old rules apply "retroactively." If a case does not announce a new rule, there is no need for the court to "announce" what the old rule is or state that the case is an "old rule." Therefore, when courts are analyzing whether a case applies retroactively they usually say that the case is an application of an old rule to a new set of facts, as opposed to referring to the case as simply an "old rule." *See* Marroquin v. United States, CIV.A. M-10-156, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011) (stating that "a majority of courts have found that *Padilla* is simply the application of an old rule"); *but see* Song v. United States, CV 09-5184 DOC, 2011 WL 2940316, slip op. at 2 (C.D. Cal. July 15, 2011) (concluding "that *Padilla* set forth on [sic] 'old rule'").

The "old rules" category includes when "a well-established rule of law [is applied] in a new way based on the specific facts of a particular case."[38] However, the fact that a case was "not dictated by precedent," weighs in favor of finding that a case announces a new rule.[39] Some courts have mistakenly found that a case was 'not dictated by precedent' if 'reasonable jurists' could have disagreed with the result of the case that announced or applied the rule.[40] The Supreme Court, however, stated that "the unlawfulness of [the petitioner's] *conviction* [being] apparent to all reasonable jurists"[41] weighs in favor of retroactivity, not whether all reasonable jurists would agree with the result of an appellate decision announcing the rule of constitutional criminal procedure.[42]

Courts debating retroactivity have reached different conclusions based on their interpretation of the above language. Every court that has held that *Padilla* applies retroactively, and stated how it reached that conclusion, found that *Padilla* was not "new."[43] While courts'

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[38] United States v. Hubenig, 6:03-MJ111-040, 2010 WL 2650625, slip op. at 5 (E.D. Cal. July 1, 2010) (citing Stringer v. Black, 503 U.S. 222, 228-29 (1992)).

[39] Teague, 489 U.S. at 301 (plurality opinion) (finding that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

[40] *See infra* pp. 26-27 (noting that courts have placed undue weight on the split among the Justices in *Padilla*).

[41] Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997) (emphasis added).

[42] This is a technical distinction; however, it is important to note that regardless of whether *Padilla* is applied retroactively, those who have valid *Padilla* claims nonetheless suffered a constitutional violation—and, therefore, their *conviction* was *unlawful. See* cases cited *infra* note 47. The only issue, then, that 'reasonable jurists' can debate, is whether their unlawful conviction can be remedied.

[43] There are two instances when a "new rule" will apply retroactively: 1) when the rule "places certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe"; and 2) if the rule's existence is "implicit in the concept of

decisions have turned on their interpretations of Supreme Court precedent, critical language has gone largely overlooked. For example, the *Teague* Court admonished that:

> We [will] simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated . . . We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated.[44]

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ordered liberty." Teague, 489 U.S. at 307 (plurality opinion) (internal citations omitted) (internal quotation marks omitted). However, no court has held that *Padilla* fits into either of these exceptions. *See* Mudahinyuka v. United States, 10 C 5812, 2011 WL 528804, slip op. at 4 (N.D. Ill. Feb. 7, 2011) ("This court is not aware of any decision by a state or federal court holding that the Supreme Court recognized a new right in *Padilla* that is also retroactively applicable to cases on collateral review.") In other words, the basis for applying *Padilla* retroactively or not has always turned on the old rule/new rule distinction.

[44] Teague, 489 U.S. at 316 (plurality opinion).

This language, and, more importantly, the underlying declaration, has largely been ignored by courts in deciding whether *Padilla* applies retroactively.[45]

The Supreme Court itself has noted that the case law governing retroactivity is "confused and confusing."[46] One possible source of the confusion is that retroactivity is a "misnomer."[47] In other words, as one court put it, "those

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[45] Research for this article uncovered only one reported decision which attributes significance to the Supreme Court's self-proscription against creating new rules that do not apply to all defendants on collateral review. *See* Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011) ("[W]hen a case is on collateral review and the holding sought by the defendant would announce a new rule that does not fit a *Teague* exception, the Supreme Court will *refuse to apply or announce the rule in that case. Padilla* was before the Supreme Court *on collateral review* and the Supreme Court's *holding (rule) was applied* to Padilla.") (emphasis in original) (footnote omitted).

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

[47] Santos-Sanchez v. United States, 5:06-CV-153, slip op. at 5 (referring to "retroactivity" as a "misnomer"); *see also* Danforth v. Minnesota, 552 U.S. 264, 271 (2008)

> (Not[ing] at the outset that the very word 'retroactivity' is misleading because it speaks in temporal terms. 'Retroactivity' suggests that when we declare that a new constitutional rule of criminal procedure is 'nonretroactive,' we are implying that the right at issue was not in existence prior to the date the 'new rule' was announced. But this is incorrect. As we have already explained, the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.)

who suffered violations of constitutional rules of criminal procedure that were articulated after their convictions became final, nevertheless, suffered constitutional violations. Therefore, the term 'retroactive' is a misnomer because the question is really one of 'redressability.'"[48] Perhaps because of the admittedly difficult nature of applying retroactivity case law, courts have varied widely in their retroactivity analysis. The result has been an inconsistent approach—both in terms of what statements of the Supreme Court lower courts have deemed are controlling, and in the results those lower courts have ultimately reached.

IV. Analyses of Courts' Decisions on *Padilla*'s retroactivity

A. Lower Courts

Whether *Padilla*'s holding applies retroactively is a "hot" topic in both federal and state courts. In the twenty-seven months since *Padilla* was decided, more than fifty courts have reached definitive conclusions regarding whether *Padilla* applies retroactively.[49] Four circuit courts

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[48] Santos-Sanchez v. United States, 5:06-CV-153, slip op. at 5. While the author of this article agrees with this court's analysis, the term "retroactive" is still used throughout this article in conformity with the language of the Supreme Court. *See* 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, 35-36 (2009) (discussing the Supreme Court's use of the terms 'retroactivity' and 'redressabiltiy').

[49] This includes all reported decisions that have reached a substantive conclusion regarding *Padilla*'s retroactive application, including opinions that were later abrogated by a different case. Opinions that relegate discussion of retroactivity to a footnote, or otherwise mention the issue only briefly, were not counted. Unpublished opinions, and

have directly addressed the issue, with the Third Circuit[50] answering the retroactivity question affirmatively, and the Seventh,[51] Tenth,[52] and Fifth[53] Circuits reaching the opposite conclusion. Arguably, other circuits have addressed the issue—but only fleetingly,[54] or by implication.[55]

Among federal district courts that have considered the issue, courts in California,[56] Georgia,[57] Illinois,[58] Minnesota,[59] Mississippi,[60] Ohio,[61] and Texas[62] have found

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opinions that apply binding precedent, are not discussed in this article unless they are particularly illuminating on some relevant issue of law.

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

[51] Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011).

[52] United States v. Chang Hong, No. 10–6294, 2011 WL 3805763 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011).

[53] United States v. Amer, 681 F.3d 211, 211 (2012).

[54] United States v. Hernandez–Monreal, 404 Fed.Appx. 714, 716 n.1 (4th Cir. 2010) (unpublished) (stating that "nothing in the *Padilla* decision indicates that it is retroactively applicable to cases on collateral review").

[55] Arguably, both the Fifth and Ninth Circuits have applied *Padilla* retroactively without explicitly stating so. In an unpublished opinion, on remand from the Supreme Court, the Fifth Circuit stated: "[w]e find that *Padilla* has abrogated our holding in *Santos-Sanchez*. We therefore vacate the district court's denial of Santos-Sanchez's petition for a writ of coram nobis and remand to the district court for further proceedings consistent with *Padilla*." Santos-Sanchez v. United States, 381 F. App'x 419, slip op. at 1 (5th Cir. 2010) (per curiam) (unpublished). Therefore, because the Fifth Circuit applied *Padilla* retroactively in *Santos-Sanchez*, it could be argued that, in the Fifth Circuit, *Padilla* applies retroactively by implication. Similarly, a California district court argued that the Ninth Circuit applied *Padilla* retroactively in another case. United States v. Krboyan, 1:02-CR-05438 OWW, 2011 WL 2117023, slip op. at 9 (E.D. Cal. May 27, 2011) ("Based on the Ninth Circuit's retroactive application of *Padilla* in [*United States v.*] *Bonilla*, [637 F.3d 980, 982 (9th Cir. 2011)], *Padilla* applies retroactively to Petitioner's writ of error coram nobis.").

[56] Four district courts in California have found that *Padilla* applies retroactively. *See* Jiminez v. Holder, 10-CV-1528-JAH NLS, 2011 WL 3667628, slip op. at 4 (S.D. Cal. Aug. 19, 2011); Luna v. United States, 10CV1659 JLS POR, 2010 WL 4868062, slip op. at 3 (S.D. Cal. Nov.

that *Padilla* applies retroactively to cases on collateral review. Similarly, state courts in Illinois,[63] Maryland,[64] Massachusetts,[65] Michigan,[66] Minnesota,[67] New York,[68] and Texas[69] have reached the conclusion that *Padilla* applies retroactively. Among the courts that reached the opposite conclusion, that *Padilla* does not apply

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23, 2010); United States v. Hubenig, 6:03-MJ-040, 2010 WL 2650625, slip op. at 7 (E.D. Cal. July 1, 2010); United States v. Krboyan, 1:02-CR-05438 OWW, slip op. at 9.

[57] *See* United States v. Chong, CR 101-078, 2011 WL 6046905, slip op. at 2 (S.D. Ga. Jan. 12, 2011).

[58] *See* United States v. Diaz-Palmerin, 08-CR-777-3, 2011 WL 1337326, slip op. at 4 (N.D. Ill. Apr. 5, 2011).

[59] *See* United States v. Dass, CRIM. 05-140 (3) JRT, 2011 WL 2746181, slip op. at 5 (D. Minn. July 14, 2011)

[60] *See* Amer v. United States, 1:06CR118-GHD, 2011 WL 2160553, slip op. at 3 (N.D. Miss. May 31, 2011)

[61] *See* United States v. Reid, 1:97-CR-94, 2011 WL 3417235, slip op. at 3 (S.D. Ohio Aug. 4, 2011).

[62] *See* Guadarrama-Melo v. United States, 1:08-CV-588, 2011 WL 2433619, slip op. at 3 (E.D. Tex. May 2, 2011); Marroquin v. United States, CIV.A. M-10-156, 2011 WL 488985, slip op. at 7 (S.D. Tex. Feb. 4, 2011); McNeill v. United States, No. A–11–CA–495 SS A-11-CA-495 SS, 2012 WL 369471, slip op. at 3 (W.D. Tex. Feb. 2, 2012) Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011); Zapata-Banda v. United States, CIV. B:10-256, 2011 WL 1113586, slip op. at 5 (S.D. Tex. Mar. 7, 2011).

[63] *See* People v. Gutierrez, 954 N.E.2d 365, 377 (Ill. Ct. App. 2011).

[64] *See* Denisyuk v. State, 30 A.3d 914, 928 (Md. 2011).

[65] *See* Com. v. Clarke, 949 N.E.2d 892, 895 (Mass. 2011).

[66] *See* People v. Abbas, 794 N.W.2d 617, 617 (Mich. 2011).

[67] *See* Campos v. State, 798 N.W.2d 565, 571 (Minn. Ct. App. 2011).

[68] *See* People v. Bennett, 903 N.Y.S.2d 696, slip op. at 4 (Crim. Ct. 2010); People v. Garcia, 907 N.Y.S.2d 398, slip op. at 7 (Sup. Ct. 2010); People v. Nunez, 917 N.Y.S.2d 806, slip op. at 3 (App. Term 2010).

[69] *See* Ex parte De Los Reyes, 350 S.W.3d 723, 729 (Tex. App. 2011); *see also* Ex parte Tanklevskaya, 01-10-00627-CR, 2011 WL 2132722, slip op. at 7 (Tex. App. May 26, 2011).

retroactively, are federal courts in Alabama,[70] California,[71] the District of Columbia,[72] Florida,[73] Georgia,[74] Maryland,[75] Michigan,[76] New Jersey,[77] New York,[78] Rhode Island,[79] South Carolina,[80] and Virginia,[81] and state courts

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[70] *See* Emojevwe v. United States, 1:10CV229-MEF, 2011 WL 5118800, slip op. at 3 (M.D. Ala. Sept. 29, 2011).

[71] *See* United States v. Cervantes-Martinez, 10CR4776 JM, 2011 WL 4434861, slip op. at 3 (S.D. Cal. Sept. 23, 2011).

[72] *See* Ufele v. United States, CRIM. 86-143 RCL, 2011 WL 5830608, slip op. at 3. (D.D.C. Nov. 18, 2011).

[73] *See* United States v. Garcia, 2:88-CR-31-FTM-29DNF, 2011 WL 5024628, slip op. at 3 (M.D. Fla. Oct. 21, 2011); Llanes v. United States, 8:11-CV-682-T-23TBM, 2011 WL 2473233, slip op. at 2 (M.D. Fla. June 22, 2011); United States v. Macedo, 1:03-CR-00055-MP-AK, 2010 WL 5174342, slip op. at 1 (N.D. Fla. Dec. 15, 2010).

[74] *See* United States v. Chapa, 800 F.Supp. 2d 1216, 1225 (N.D. Ga. 2011).

[75] *See* Zoa v. United States, CIV. PJM 10-2823, 2011 WL 3417116, slip op. at 2 (D. Md. Aug. 1, 2011).

[76] *See* United States v. Shafeek, CRIM. 05-81129, 2010 WL 3789747 (E.D. Mich. Sept. 22, 2010). *See infra* note 98 (discussing the *Shafeek* opinion).

[77] *See* United States v. Gilbert, 2:03-CR-00349-WJM-1, 2010 WL 4134286, slip op. at 3 (D.N.J. Oct. 19, 2010);United States v. Hough, 2:02-CR-00649-WJM-1, 2010 WL 5250996, slip op. at 4 (D.N.J. Dec. 17, 2010).

[78] *See* Ellis v. United States, 806 F.Supp.2d 538, 550 (E.D.N.Y. June 3, 2011).

[79] *See* United States v. Agoro, CR 90-102 ML, 2011 WL 6029888, slip op. at 7 (D.R.I. Nov. 16, 2011).

[80] *See* Dennis v. United States, 787 F.Supp. 2d 425, 430 (D.S.C. 2011).

[81] *See* Doan v. United States, 760 F.Supp. 2d 602, 605 (E.D. Va. 2011); Mendoza v. United States, 774 F.Supp. 2d 791, 798 (E.D. Va. 2011).

in Arizona,[82] Florida,[83] Maryland,[84] Michigan,[85] New York,[86] and North Carolina.[87]

Among courts that discussed *Padilla*'s retroactivity, both the quality and quantity of analysis varies greatly. For example, some courts have summarily stated that *Padilla* does not apply retroactively, without stating a basis for that conclusion.[88] Additionally, many courts have noted the issue, but decided the case without reaching it. For example, many courts considering a collateral attack on a guilty plea under *Padilla*, have found that, even assuming *Padilla* applies retroactively, the petitioner could not surmount *Strickland's* "high bar"[89] to show ineffective assistance of counsel.[90]

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[82] *See* State v. Poblete, 260 P.3d 1102, 1106 (Ariz. Ct. App. 2011).

[83] *See* Barrios-Cruz v. State, 63 So.3d 868, 873 (Fla. Dist. Ct. App. 2011); Hernandez v. State, 61 So.3d 1144, 1151 (Fla. Dist. Ct. App. 2011); Smith v. State, 85 So.3d 551, 552 (Fla. Dist. Ct. App. 2012); State v. Shaikh, 65 So.3d 539, 540 (Fla. Dist. Ct. App. 2011).

[84] *See* Miller v. State, 196 Md. App. 658, 677 (2010).

[85] *See* People v. Gomez, 295 Mich.App. 411, 411 (2012).

[86] *See* People v. Kabre, 905 N.Y.S.2d 887, slip op. at 4 (Crim. Ct. 2010); *see also infra* note 159 (discussing *Kabre*).

[87] *See* State v. Alshaif, 724 S.E.2d 597, 604 (N.C. Ct. App. 2012).

[88] For example, one court simply stated that "the 2010 *Padilla* decision does not apply retroactively[,]" without providing any basis for that conclusion. United States v. Cervantes-Martinez 10CR4776 JM, 2011 WL 4434861, slip op. at 3 (S.D. Cal. Sept. 23, 2011).

[89] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) (noting that "[s]urmounting *Strickland*'s high bar is never an easy task").

[90] *See, e.g.*, Masterman v. United States, 1:96-CR-05306-OWW, 2010 WL 4366156, slip op. at 2 (E.D. Cal. Oct. 27, 2010) (finding that even "[a]ssuming *arguendo* that Padilla applies retroactively and thus that Petitioner's claim is timely under section 2255(f)(3), Petitioner's claim lacks merit") (emphasis in original); Trujillo v. State, 71A03-1102-PC-73, 2011 WL 5909637, slip op. at 6 n.3 (Ind. Ct. App. Nov. 28, 2011) ("assum[ing] for the sake of argument, but explicitly []not decid[ing], that the case announcing th[e] rule, i.e., *Padilla v. Kentucky,* applies retroactively to the instant case[, the court determined that it] need not address these matters because [it could] resolve this issue on grounds of lack of a showing of prejudice") (citation omitted).

A number of courts have also considered whether *Padilla* applies retroactively to federal habeas corpus petitions.[91] To find that *Padilla* applies retroactively in this context, courts would be required to make the potentially contradictory determinations that *Padilla* is "newly recognized" under federal habeas corpus law[92] but not a "new rule" under *Teague*.[93] Put differently, these courts are not giving consideration to whether *Padilla* is the application of an "old rule" for *Teague* purposes.[94]

Unsurprisingly, courts that have assumed that *Padilla* is "new" for *Teague* purposes have determined that *Padilla* does not apply retroactively[95] to cases on collateral

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[91] 28 U.S.C. § 2255 (2008).

[92] *See id.* at § 2255(f)(3) (extending the 1-year statute of limitations in federal habeas corpus petitions when "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") (emphasis added).

[93] *See* United States v. Estrada-Perez, CRIM. 02-403(3) DSD, 2011 WL 2965249, slip op. at n.1 (D. Minn. July 22, 2011) (stating that "[i]f *Padilla* did not announce a new rule, then it would be illogical to find a right 'newly recognized' in March 2010[, when *Padilla* was decided]"); Asif v. Comm'r of Correction, 32 A.3d 967, 969 (2011) (stating "we find somewhat inconsistent the petitioner's argument that *Padilla* represents a new fact but does not set forth a new rule").

[94] Often, these courts will say "assuming arguendo" or "assuming for Petitioner's benefit" that *Padilla* is new, it does not apply retroactively. *See, e.g.*, Rodriguez v. United States, 1:10-CV-23718-WKW, 2011 WL 3419614, slip op. at 6 (S.D. Fla. Aug. 4, 2011) ("Assuming for Ms. Rodriguez's benefit that the *Padilla* decision in fact announced a 'new rule,' Ms. Rodriguez must show that the right announced in *Padilla* was made retroactively applicable to cases on collateral review[.]") (footnote omitted) (citations omitted).

[95] As noted previously, the term "retroactivity" is a misnomer. *See supra*, p. 10. Its definition becomes even more abstruse when courts are applying a specific case to federal habeas petitions. Courts are, in effect, considering retroactivity under two separate and distinct areas of the law—federal statutory law governing habeas petitions and the "constitutional rule" case law under *Teague* and its progeny.

review.[96] In other words, these courts—regardless of whether they explicitly say so—are not analyzing whether *Padilla* applies retroactively under Supreme Court precedent, but, rather, whether *Padilla*'s holding is retroactive under a specific statutory provision.[97] In certain instances, the language of a court's opinion makes it unclear whether they are considering *Padilla*'s potential retroactivity under Supreme Court precedent or federal law.[98]

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[96] Under *Teague*, there are two narrow instances where a *new* rule of constitutional criminal procedure can apply retroactively. *See supra* note 43 (discussing the circumstances by which a "new" rule of constitutional criminal procedure can apply retroactively). *Cf.* Mudahinyuka v. United States, 10 C 5812, 2011 WL 528804, slip op. at 4 (N.D. Ill. Feb. 7, 2011) ("This court is not aware of any decision by a state or federal court holding that the Supreme Court recognized a new right in *Padilla* that is also retroactively applicable to cases on collateral review.") *and* Haddad v. United States, CIV. 07-12540, 2010 WL 2884645, slip op. at 6 (E.D. Mich. July 20, 2010) (assuming that *Padilla* is a new rule, and finding that "it is unlikely that *Padilla* will be made retroactive to convictions under collateral attack") *with* Masterman v. United States, 1:96-CR-05306-OWW, 2010 WL 4366156, slip op. at 2 (E.D. Cal. Oct. 27, 2010) (citing authority for the court's proposition that "*Padilla* applies retroactively [under] 2255(f)(3)," but ultimately finding that *Padilla* was not retroactive to the instant case because *Strickland*'s high bar could not be surmounted).

[97] It still may be possible that *Padilla* is a "newly recognized" rule under 28 U.S.C. § 2255(f)(3), but not a "new rule" under *Teague*. In that case, it would apply retroactively to habeas corpus petitions. However, no court has yet reached this conclusion explicitly. *Cf.* Carrasco v. United States, EP-11-CV-161-DB, 2011 WL 1743318, slip op. at 3 (W.D. Tex. Apr. 28, 2011) (assuming that *Padilla* applies retroactively and still considering a 28 U.S.C. § 2255(f)(3) motion, but ultimately concluding that the motion was untimely).

[98] For example, in *United States v. Shafeek*, it is unclear whether the court it is determining *Padilla*'s potential retroactivity under Supreme Court precedent (e.g. *Teague*) or habeas corpus law. CRIM. 05-81129, 2010 WL 3789747 (E.D. Mich. Sept. 22, 2010). To be sure, the petitioner in that case is proceeding under 28 U.S.C. § 2255, and the court is specifically considering "whether the *Padilla* decision was

The above information shows that state courts are more likely than federal courts to determine that *Padilla* applies retroactively. The fact that federal courts are less likely to find that *Padilla* applies retroactively is unsurprising, considering that federal habeas law has a strict statute of limitations.[99] By contrast, state courts are able to conduct their own retroactivity analysis under their state constitution;[100] moreover, there are a number of reasons why a state court would prefer to resolve the retroactivity issue under its state constitution.[101]

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meant to be applied retroactively" under 28 U.S.C. § 2255(f)(3). *Id.* at 2. Still, however, the court's retroactivity analysis mentions only how to apply *Teague*. *Id.* The court's ultimate conclusion is that "[b]ecause the *Padilla* opinion may not be considered a 'new rule,' Shafeek cannot show that the *Padilla* opinion should be applied retroactively." *Id.* at 3. The court's conclusion, to the extent that it says that opinions that are not "new rules" cannot be applied retroactively, gets a crucial portion of *Teague* backwards. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (holding that "*new* constitutional rules of criminal procedure will *not* be [retroactive] to those cases which have become final before the new rules are announced") (emphasis added). *But cf.* United States v. Bacchus, CR 93-083S, 2010 WL 5571730, slip op. at 1 (D.R.I. Dec. 8, 2010) (calling the *Shafeek* opinion, "a well-reasoned decision, [which] concluded that the Supreme Court did not announce a 'new rule' in *Padilla* and that retroactive application was not warranted under *Teague v. Lane*").

[99] 28 U.S.C. § 2255(f) (one-year statute of limitations).

[100] *See* Danforth v. Minnesota, 552 U.S. 264, 289 (2008) ("States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal *Teague* standard. Rather, they have developed *state* law to govern retroactivity in state postconviction proceedings.") (emphasis in original).

[101] For example: 1) if the issue of retroactivity is being raised pursuant to a state case (*see e.g.* State v. Gaitan, 206 N.J. 330 (2011) (accepting certiorari from State v. Gaitan, 419 N.J. Super. 365 (App. Div. 2011) to decide whether State v. Nunez-Valdez, 200 N.J. 129 (2009), applies retroactively)); 2) a state may have its own—possibly more favorable—case law regarding the retroactivity of constitutional rules of criminal procedures (*see e.g.* State v. Bonilla, 957 N.E.2d 682, 682 n.2 (Ind. Ct. App. 2011) ("We need not address the retroactive application of *Padilla,* as its holding was consistent with Indiana decisions that

Because cases on this issue are coming out so quickly, and because of the confusion over how to apply *Teague*, it is difficult to determine whether retroactive application is the majority position. Consequently, courts that have determined what the majority position is, have, unsurprisingly, found that their position is that of the majority.[102] Although the total number of courts that favor retroactivity is important, the opinions of appellate courts carry more weight because they create binding precedent in a larger number of jurisdictions.

B. Circuit Court and State Supreme Court Opinions

1. Third Circuit

In *United States v. Orocio*,[103] the Third Circuit, applying *Teague*, held that *Padilla* applied retroactively to cases on collateral review. The Third Circuit was the first circuit to address the issue.[104] Like every other court that

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predated *Padilla*[.]")); and 3) precedent (such as an unfavorable appellate decision) may preclude a state court from finding retroactivity under federal law.

[102] *Cf.* Marroquin v. United States, CIV.A. M-10-156, 2011 WL 488985, slip op. at 2 (S.D. Tex. Feb. 4, 2011) (finding that "a majority of courts have found that *Padilla* is simply the application of an old rule, concluding that *Padilla'* s holding applies retroactively") *with* United States v. Abraham, 8:09CR126, 2011 WL 3882290, slip op. at 2 (D. Neb. Sept. 1, 2011) ("The weight of authority appears to favor nonretroactivity."); *see also* United States v. Agoro. CR 90-102 ML, 2011 WL 6029888, slip op. at 6 (D.R.I. Nov. 16, 2011) (noting the disagreement over what the majority position is).

[103] 645 F.3d 630 (3d Cir. 2011).

[104] Orocio was decided on June 29, 2011. *Id.* The Seventh, Tenth, and Fifth Circuit opinions were decided on Aug. 23, 2011; August 30, 2011; and May 9, 2012, respectively. Chaidez v. United States, 655 F.3d 684, 684 (7th Cir. 2011); United States v. Chang Hong, 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011); United States v. Amer 681 F.3d 211, 211 (2012).

has reached the conclusion that *Padilla* applies retroactively, the *Orocio* court found that *Padilla* was not a "new rule" under *Teague*.[105]

The Third Circuit's analysis was more comprehensive than that of the Seventh, Tenth, and Fifth Circuits—including considering the proper scope of *Wright v. West*,[106] *Strickland v. Washington*,[107] and *Hill v.*

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[105] Orocio, 645 F.3d at 641 ("We therefore hold that, because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule' for *Teague* purposes and is retroactively applicable on collateral review."); *see also* Mudahinyuka v. United States, 10 C 5812, 2011 WL 528804, slip op. at 4 (N.D. Ill. Feb. 7, 2011) ("This court is not aware of any decision by a state or federal court holding that the Supreme Court recognized a new right in *Padilla* that is also retroactively applicable to cases on collateral review.")

[106] *See* Orocio, 645 F.3d at 640-641 (interpreting *Wright v. West* for the proposition that "a court's disposition of each individual factual scenario arising under the long-established *Strickland* standard is not in each instance a 'new rule,' but rather a new application of an 'old rule' in a manner dictated by precedent" (citing 505 U.S. 277, 308-309 (1992) (Kennedy, J., concurring))). Notably, the *Chaidez* court also quotes the same language from *Wright* and draws the same conclusion that the Third Circuit does from that case, namely "that the application of *Strickland* to unique facts generally will not produce a new rule." Chaidez v. United States, 655 F.3d 684, 692 (7th Cir. 2011). The *Chang Hong* and *Amer* courts do not mention *Wright v. West*. United States v. Chang Hong, No. 10–6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011), as amended (Sept. 1, 2011); United States v. Amer, 681 F.3d 211, 211 (2012).

[107] *See* Orocio, 645 F.3d at 639 ("[T]he *Strickland* Court identified certain basic duties that criminal defense attorneys must carry out to perform competently within the meaning of the Sixth Amendment, including a duty to consult with the defendant on important decisions. When the Supreme Court decides a *Strickland* case with novel facts, we do not place emphasis on the *particular* duty identified by the Supreme Court as a basis for classifying the rule as 'new' for *Teague* purposes. We look instead to precedents and then-existing professional norms to determine whether the decision broke new ground.") (internal citations omitted) (emphasis in original). While the Seventh, Tenth, and Fifth Circuits acknowledge that "*Padilla* is a *Strickland* case[,]" those courts ultimately conclude that other factors lead it to conclude that *Padilla* is

Lockhart.[108] However, the Third Circuit omitted any language from *Teague* which explains why cases decided on collateral review must apply "retroactively" to other cases similarly decided on collateral review. The fact that the *Orocio* court was able to reach the conclusion that *Padilla* applies retroactively without considering the Supreme Court's self-proscription from issuing constitutional "advisory opinions,"[109] which weighs greatly in favor of retroactivity, shows the logical strength of the position that *Padilla* applies retroactively.

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a "new rule." Chang Hong, 10-6294, slip op. at 5; Chaidez, 655 F.3d at 687; Amer, 681 F.3d at 214 (2012).

[108] The Third Circuit considered *Hill* in a number of different contexts. *See* Orocio, 645 F.3d at 639 ("*Padilla* is set within the confines of *Strickland* and *Hill,* as it concerns what advice an attorney must give to a criminal defendant at the plea stage."); *see also id.*, at 638 (finding that the argument that *Padilla* is new is undercut by *Hill*'s language that *Strickland* claims are governed by the "range of competence demanded from attorneys" (citing Hill v. Lockart, 474 U.S. 52, 56 (1985))) (internal citations omitted). The Third Circuit also convincingly argues that the *Padilla*'s court "floodgates" discussion, which compares *Hill* with *Padilla*, assumes retroactive application of the Court's opinion in *Padilla*: "'[w]e confronted a similar 'floodgates' concern in *Hill,* but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.... A flood did not follow in that decision's wake.'" *Id.* at 644 (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1484-1485 (2010). By contrast, the Seventh Circuit did not mention *Hill v. Lockart* in the context of the Court's "floodgates" argument in *Padilla*, although it did mention that *Hill* provides a similar basis for analyzing *Strickland* claims. Chaidez v. United States, 655 F.3d at 691 (citing Hill, 474 U.S. at 56)). Ultimately, the Seventh Circuit found that, "[In *Padilla*, t]he majority's characterization of *Hill*, suggests that it did not understand the rule set forth in *Padilla* to be dictated by precedent." Chaidez, 655 F.3d at 689-690. The *Amer* court also interprets the *Padilla* Court's discussion of *Hill* as evidence that *Padilla* does not apply retroactively. Amer, 681 F.3d at 214; *see also infra* p. 20 (discussing the *Amer* court's characterization of *Hill*). The *Chang Hong* court does not mention *Hill v. Lockart*. Chang Hong, No. 10–6294.

[109] Teague v. Lane, 489 US 288, 316 (1989) (plurality opinion).

2. Seventh Circuit

In *Chaidez v. United* States,[110] the Seventh Circuit held that *Padilla* did not apply retroactively. The Seventh Circuit offered a number of factors disfavoring retroactive application of *Padilla*. For example, the court found that "[l]ack of unanimity on the [Supreme] Court in deciding a particular case[, and in lower court's prior determinations of the issue,] support[] the conclusion that the case announced a new rule."[111] The *Chaidez* court also found that "to the extent that [it was able to] discern whether members of the Court understood *Padilla* to be a new rule, []the clearest indications [were found] in the concurrence and dissent, which [left the court with] no doubt that at least four Justices view *Padilla* as new."[112]

Along with the Third Circuit,[113] the Seventh Circuit correctly noted that the general rule is that a case applying *Strickland* to a new set of facts does not create a new rule for *Teague* purposes.[114] En route to finding that *Padilla* was a "rare exception"[115] to this rule, the Seventh Circuit placed undue weight on the disagreement between the Supreme Court and lower courts,[116] and among the Justices

[110] 655 F.3d 684 (7th Cir. 2011) *cert. granted* 132 S. Ct. 2101 (2012).
[111] *Id.* at 689.
[112] *Id.* at 694.
[113] United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011) (noting that "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent") (internal citations omitted).
[114] Chaidez, 655 F.3d at 692 ("recogniz[ing] that the application of *Strickland* to unique facts generally will not produce a new rule" (citing Williams v. Taylor, 529 U.S. 362, 382 (2000) (Stevens, J., concurring in relevant part))).
[115] Chaidez, 655 F.3d at 693.
[116] *Id.* at 692. (stating that the court was "persuaded by the weight of lower court authority").

themselves.[117] Disagreement, as the dissent in *Chaidez* noted, "does not alter the fact that prevailing professional norms at the time of [a petitioner's] plea required a lawyer to advise her client of the immigration consequences of a guilty plea...[and, t]he concurring and dissenting opinions do not alter the straightforward application of *Strickland*[,]" in *Padilla*.[118]

In giving too much weight to inferences from the concurrence and dissent, the Seventh Circuit ignored the intent of the majority in *Padilla*. While the *Chaidez* court acknowledged "indirect language" that supports the position that the Supreme Court meant *Padilla* to apply retroactively, it fails to identify that language or give it any weight in its determination of whether *Padilla* applies retroactively.[119] In short, the Seventh Circuit relied too heavily on its own inferences from the concurrence and dissenting opinions and the split among the lower courts.

The Supreme Court accepted certiorari in *Chaidez* to decide if *Padilla* applies retroactively.[120]

3. Tenth Circuit

In *United States v. Chang Hong*,[121] the Tenth Circuit held that *Padilla* does not apply retroactively. Among courts that have reached the retroactivity question in the negative, the *Chang Hong* court is one of the most ambitious in its analysis of whether *Padilla* qualifies as a

[117] *Id.* at 689 (finding that "[l]ack of unanimity on the [Supreme] Court in deciding a particular case supports the conclusion that the case announced a new rule").
[118] *Id.* at 696-697 (dissent).
[119] *Id.* at 693.
[120] Chaidez v. United States, 132 S. Ct. 2101 (2012).
[121] United States v. Chang Hong, No. 10–6294, 2011 WL 3805763 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011).

"new rule" under *Teague*.[122] The basis for its conclusion that *Padilla* created a new rule is that "*Padilla* extended the Sixth Amendment right to effective counsel and applied it to an aspect of a plea bargain previously untouched by *Strickland*."[123] Under *Teague,* the holding of a case will not be deemed to have created a new rule—and it will, therefore, be retroactively applicable to cases on collateral review—if it applies an old rule to a new set of facts.[124] Therefore, the fact that the holding of a case reaches into an area "previously untouched" is not helpful for determining whether it is an application of an old rule to a new set of facts. By the *Chang Hong* court's reasoning, it would be difficult to imagine a holding that merely applied an old rule to a new set of facts.

The *Chang Hong* court also addressed the important language in *Padilla* that implies retroactive application[125]: "[Petitioner] argues there would be no need to discuss pleas 'already obtained' if the case did not apply retroactively."[126] In rejecting this argument the *Chang Hong* court said that it "interpret[ed] the Court's statement to simply recognize that past decisions enumerating the contours of *Strickland* have not led to a surfeit of collateral attacks on guilty pleas. The force of the Court's argument is that *Padilla* would have a similar (lack of) effect on guilty pleas."[127] The *Chang Hong* court, in other words, said that

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[122] *Cf. id.* at 8 (stating that "*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") *with* Chaidez, 655 F.3d at 693 (calling it a "rare exception" when a *Strickland* case produces a new rule).

[123] Chang Hong, No. 10–6294, slip op. at 8.

[124] *See* Chaidez, 655 F.3d at 688 ("Under *Teague,* a constitutional rule of criminal procedure applies to all cases on direct and collateral review if it is not a new rule, but rather an old rule applied to new facts.").

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

[126] Chang Hong, No. 10–6294, slip op. at 9-10 (citing *Padilla*, 130 S. Ct. at 1485).

[127] *Id.* at 10.

the Supreme Court's use of the past tense, "already obtained," referred to "past decisions". However, the Supreme Court plainly used the phrase "*convictions* already obtained," not referring to past *decisions*.[128]

Perhaps recognizing that their interpretation of the Court's language in *Padilla* is unpersuasive, the *Chang Hong* court also stated that "it [would be] unwise to imply retroactivity based on dicta."[129] However, the *Chang Hong* court itself relies on the dicta of the concurring and dissenting opinions.[130] Adding to its seemingly uneven analysis, the Tenth Circuit also failed to cite any language from *Teague*, or *Teague's* progeny, that might indicate that *Padilla* should be applied retroactively.

4. Fifth Circuit

In May 2012, the Fifth Circuit became the fourth, and likely final, circuit to weigh in on *Padilla*'s retroactivity when it decided *United States v. Amer*.[131] The court noted at the outset that the "issue presently is pending before the Supreme Court."[132] The court ultimately agreed with the Seventh and Tenth Circuits, that *Padilla* was "new" within the meaning of *Teague*.[133] The *Amer* court found that the Supreme Court's decision in *Padilla* was not "*dictated* by precedent."[134] In making this determination the *Amer* court fashioned its own test which includes three factors:

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[128] *Padilla*, 130 S. Ct. at 1485 (emphasis added).
[129] Chang Hong, No. 10–6294, slip op. at 10.
[130] *Id.* at 6 ("We take the concurrence and dissent as support for our conclusion that reasonable jurists did not find the rule in *Padilla* compelled or dictated by the Court's prior precedent.")
[131] 681 F.3d 211 (2012).
[132] *Id.* (citing Chaidez v. United States, 132 S. Ct. 2101 (2012).
[133] Amer, 681 F.3d at 211.
[134] *Id.* (citing Teague, 489 U.S. at 301 (plurality opinion)).

1) whether the decision announcing the rule at issue purported to rely on "controlling precedent,"[135]
2) whether there was a "difference of opinion on the part of ... lower courts that had considered the question,"[136] and
3) whether the Justices expressed an "array of views.[137]

The court found that the *Padilla* Court did not "purport[] to" rely on controlling precedent because the *Padilla* Court stated in a footnote that, "the *Hill* [*v. Lockart*] Court did not resolve the particular question respecting misadvice that was before it."[138] However, the Supreme Court immediately followed that statement with the statement that, "[Hill's] import is nevertheless clear[, and w]hether *Strickland* applies to Padilla's claim follows from *Hill,* regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it."[139] *Padilla* builds upon the precedents of *Hill* and *Strickland.* The *Padilla* Court's reliance on these prior cases is deep and unambiguous.

With regard to the difference of opinion among lower courts, the Fifth Circuit makes the same error of circular logic that the Seventh and Tenth Circuits make. The *Amer* court found that "the near-universal position of the lower state and federal courts," that failure to advise a non-citizen that deportation will result from a guilty plea does *not* constitute ineffective assistance of counsel, evinces that *Padilla* should not apply retroactively.[140]

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[135] Amer, 681 F.3d at 213 (citing Lambrix v. Singletary, 520 U.S. 518, 528 (1997)).
[136] Amer, 681 F.3d at 213 (citing Butler v. McKellar, 494 U.S. 407, 415 (1990)).
[137] Amer, 681 F.3d at 213 (citing O'Dell v. Netherland, 521 U.S. 151, 159 (1997)).
[138] 130 S.Ct. 1473, 1485 n. 12.
[139] *Id.*
[140] Amer, 681 F.3d at 214.

Relying on these lower courts' holdings, however, ignores the fact that the basis of these opinions was the direct-collateral consequences distinction, which was explicitly repudiated in *Padilla*.[141]

Finally, the Fifth Circuit argues that *Padilla* is not retroactive because the concurrence and dissent represent an "array of views," which shows that *Padilla* announced a new rule. Like the Seventh and Tenth Circuits before it, the Fifth Circuit gives undue weight to the dicta of a concurring and dissenting opinions. The *Amer* court's reliance on the concurring and dissenting opinions presents a stark contrast with its unwillingness to consider any reason why *Padilla* might apply retroactively.

The court states in a footnote that it will not consider the *Padilla* majority's suggestion that *Padilla* should apply retroactively—or any other reason why *Padilla* apply retroactively—because it does not want to "perceive a dictate from an inference."[142] However, the *Amer* court relies on its own inferences from the concurrence and dissent. It is illogical to ignore the opinion of the Court while defining the reach of a case through inferences from minority opinions.

5. State Supreme Courts

The opinions of state supreme courts are of great consequence, because, like circuit court opinions, they can be overturned only by the Supreme Court. Additionally, the vast majority of guilty pleas occur in state court proceedings.[143] As a result, it can be argued that state law

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[141] Padilla v. Kentucky, 130 S. Ct. 1473, 1482, (2010) ("The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.").

[142] Amer, 681 F.3d at 214, n. 2.

[143] In 2004, for example, more than five times as many guilty pleas occurred in state courts than occurred in their federal counterparts. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of

precedent has a greater practical impact than its federal counterpart.

It has been noted that *Padilla*—in holding that failure of counsel to advise a client about the immigration consequences of a guilty plea constitutes ineffective assistance of counsel—abrogated precedent in many state and federal jurisdictions.[144] Still, there are state supreme courts that have applied *Padilla* retroactively, including the highest courts in Maryland,[145] Massachusetts[146] and Michigan.[147] The New Jersey Supreme Court, by contrast, found that *Nunez-Valdez*, a case decided under New Jersey law that is substantially similar to *Padilla,* did not apply retroactively.[148] As noted above, it is within the purview of

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Criminal Justice Statistics Online, tbl.5.26.2004, http://www.albany.edu/sourcebook/pdf/t5242004.pdf (showing that 70,591 guilty pleas were entered in District Courts in 2004) (last visited July, 2012); Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, tbl.5.46.2004, http://www.albany.edu/sourcebook/pdf/t5462004.pdf (showing that available data documents 553,356 guilty pleas obtained in state courts in 2004) (last visited July, 2012). The Department of Justice estimates that their data only shows approximately half of the actual number of convictions that occur in state courts. *Id.* Because we do not have data available for these convictions we cannot know how many were the result of guilty pleas or plea bargains. However, if these convictions follow the trend, then it is possible that state courts handled more than ten times as many guilty pleas as federal courts.

[144] *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring) (stating that "the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel") *with* State v. Nunez-Valdez, 200 N.J. 129 (2009) (finding that, under the N.J. constitution, the right to effective assistance of counsel applied to the immigration consequences of a plea).

[145] *See* Denisyuk v. State, 30 A.3d 914, 923 (Md. 2011).

[146] *See* Com. v. Clarke, 949 N.E.2d 892, 895 (Mass. 2011).

[147] *See* People v. Abbas, 794 N.W.2d 617, 617 (Mich. 2011).

[148] State v. Gaitan, A-109 SEPT.TERM 2010, 2012 WL 612311, slip op. at 20 (N.J. Feb. 28, 2012) (*Padilla* is not entitled to retroactive

state courts to find that *Padilla*'s central holding is retroactive under their own case law.[149]

Many state supreme courts have made statements concerning *Padilla*'s retroactivity without deciding the issue. For example, the Delaware Supreme Court has addressed *Padilla*'s retroactivity only briefly—in the footnote of an unpublished opinion.[150] The Delaware Supreme Court found that "United States Supreme Court and Delaware Supreme Court precedents suggest that the rule in *Padilla* may not retroactively apply."[151] Similarly, the Georgia[152] and Maine[153] Supreme Courts chose not to address the issue. More important than the result of any one court is the quality of the analysis that supports that court's conclusion.

C. Evaluation of Common Arguments For Applying *Padilla* Retroactively

1. The *Padilla* Decision Itself Would Have Been Precluded By a Retroactivity Bar

Jose Padilla's guilty plea, from 2002, was itself on

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application, [and, therefore,] we find no attorney violation of *Padilla's* requirements in this matter. As for *Nuñez–Valdéz*, we find in this record no deficiency like what occurred in that matter[.]")

[149] *See* State v. Bonilla, 957 N.E.2d 682, 682 n.2 (Ind. Ct. App. 2011) (finding that the court "need not address the retroactive application of *Padilla,* as its holding was consistent with Indiana decisions that predated *Padilla*"); s*ee also supra* note 101 (explaining when a state may wish to find the rule of *Padilla* retroactive under its own case law).

[150] Ruiz v. State, 23 A.3d 866, slip op. at 3 n.19 (Del. July 6, 2011) (unpublished).

[151] *Id.*

[152] *See* Smith v. State, 287 Ga. 391, 404 (2010).

[153] *See* State v. Ali, 32 A.3d 1019, 1023 (Me. 2011).

collateral review;[154] research for this article uncovered only one published case[155] to attribute proper significance to that fact.[156] This fact is significant in understanding what "retroactivity" truly means for *Padilla.* Without a doubt, all of those bringing *Padilla* claims based on convictions that occurred after 2002 are in every way "similarly situated" to Jose Padilla.[157] Therefore, it is nonsensical to apply *Padilla* only prospectively, when that same retroactivity bar would have precluded the result in *Padilla* itself.[158] Another way of putting this, is that *Padilla* announced a rule on collateral review, and that when a rule is announced on collateral review, it *must* apply retroactively to "avoid the[]

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[154] "Final judgment was entered October 4, 2002." Com. v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[155] *See* Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, 3 (S.D. Tex. Aug. 24, 2011). The *Santos-Sanchez* court found that, because *Padilla* was itself decided on collateral review, "[i]t is incontrovertible that if *Padilla* is analyzed under *Teague*, it must be applied retroactively to [other] cases on collateral review." *Id.*

[156] For example, the Third Circuit opinion, holding that *Padilla* does apply retroactively, contains a section on "*Teague* and retroactivity," but does not mention that *Teague*'s statement that the Supreme Court will apply all decisions on collateral review retroactively in fairness to those "similarly situated". U.S. v. Orocio, 645 F.3d 630, 637 (3d Cir. 2011); *see* Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion).

[157] In other words, convictions that occurred before 2012, like Jose Padilla's 2002 conviction, occurred before the Court's *decision* in *Padilla.*

[158] Consider the case of *People v. Kabre.* 905 N.Y.S.2d 887, slip op. at 4 (Crim. Ct. 2010). The *Kabre* court held that, "Petitioner can prevail here only if a New York court in 2005 (when the last conviction at issue here became final) would have been required by controlling United States Supreme Court precedent to rule that failure to discuss the immigration consequences of a guilty plea was ineffective assistance of counsel." *Id.* The *Kabre* court does not explain why it is appropriate to apply the rule announced in *Padilla* retroactively to a conviction that occurred in 2002, but not apply that same rule in *Kabre*, when Kabre's conviction occurred in 2005.

problems of rendering advisory constitutional opinions and creating inequities resulting from the uneven application of constitutional rules."[159]

2. A *Teague* Analysis Necessarily Results in Retroactive Application of *Padilla*

Under a *Teague* analysis, a rule of constitutional criminal procedure always applies retroactively. The plurality in *Teague* said that the Supreme Court will "simply refuse to announce a new rule in a case unless the rule would be applied retroactively to the defendant in the case *and to all others similarly situated.*"[160] *Teague*'s statement is that the law will not allow the application of "retroactivity" principles to result in an uneven application of constitutional rules. Thus, the Supreme Court will apply all decisions on collateral review retroactively in fairness to those "similarly situated."[161] By itself, this is dispositive on the issue of whether *Padilla* should apply retroactively.[162]

In short, courts analyzing *Padilla* under *Teague* should always reach the conclusion that *Padilla* applies retroactively.[163] In other words, "*Teague* establishes that

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[159] People v. De Jesus, 30 Misc. 3d 1203(A), slip op. at 10 (N.Y. Sup. Ct. 2010) (unpublished disposition).

[160] Teague v. Lane, 489 U.S. 288, 316 (1989) (emphasis added).

[161] *Id.* See 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, 71 (2009) (concluding that "full retroactivity...serves the goals of according fairness to similarly situated litigants").

[162] We must remember that our analysis here is whether the Supreme Court intended for *Padilla* to be retroactive. Because the Supreme Court does not create new constitutional rules unless they will apply retroactively to all those similarly situated, *Padilla* should apply retroactively.

[163] That does not mean that a *Teague* analysis is never called for. *See supra* p. 13 (showing how the *Teague* analysis of "new rules" affects

where the Court does announce a 'new' rule of constitutional criminal procedure in the exercise of its collateral review powers, it will be doing so because the new rule fits within one of the two *Teague* exceptions, and, therefore, applies retroactively to all similarly situated cases."[164] Therefore, even in the unlikely event Supreme Court intended for *Padilla* to be considered a "new rule," one of the *Teague* exceptions necessarily applies, and the rule applies retroactively.

3. The Supreme Court Has Already Applied *Padilla* Retroactively

Less than a week after *Padilla* came down, the Supreme Court "remanded [a case back] to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Padilla*[.]"[165] The Supreme Court's remand undercuts the argument that *Padilla* should apply only prospectively. When the Supreme Court decided *Padilla*, it announced the rule that non-citizens who are deported as a result of the ineffective assistance of counsel can challenge their underlying conviction. Also, in addition to *announcing* the rule of *Padilla*, the *Padilla* Court also *applied* the rule of *Padilla* to Jose Padilla's 2002

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the analysis of "newly recognized" rights under federal habeas law). Moreover, it has been noted that "*Teague* does a poor job" of helping courts decide whether the rule of a case should apply retroactively. Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011).

[164] People v. De Jesus, 30 Misc. 3d 1203(A), slip op. at 10-11 (N.Y. Sup. Ct. 2010) (unreported disposition).

[165] Santos-Sanchez v. United States, 130 S. Ct. 2340, 2340 (2010).

conviction.[166] This was the first instance of the Supreme Court applying the rule of *Padilla* retroactively.[167]

Less than a week later, the Supreme Court applied *Padilla* retroactively *for a second time*, to Jesus Santos-Sanchez's 2003 conviction.[168] In other words, the Supreme Court has itself applied *Padilla* retroactively on two separate occasions: once to Jose Padilla's 2002 conviction, and then again to Jesus Santos-Sanchez's 2003 conviction. Only a few courts have noted the significance of this fact.[169] Considering that one of the goals of the Supreme Court's retroactivity jurisprudence is to "avoid[] the inequity resulting from the uneven application" of the law,[170] courts that refuse to apply *Padilla* to convictions that occurred prior to the decision in *Padilla* do so in direct conflict with the Supreme Court.

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[166] "Final judgment was entered October 4, 2002." Com. v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[167] Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011) (finding that "the Supreme Court's *holding (rule) was applied* to Padilla") (emphasis in original).

[168] Santos-Sanchez, 130 S. Ct. at 2340; *see also* Santos-Sanchez v. United States, 548 F.3d 327, 329 (5th Cir. 2008) ("[In September, 2003,] Santos-Sanchez appeared before a magistrate judge and pleaded guilty.") *cert. granted and judgment vacated*, 130 S. Ct. at 2340 (2010).

[169] Research for this article uncovered only one published opinion that explicitly stated that the Supreme Court's remand of *Santos-Sanchez* was evidence that *Padilla* should apply retroactively. Com. v. Clarke, 949 N.E.2d 892, 904 (Mass. 2011) ("A few days after its decision in *Padilla,* the Supreme Court remanded [*Santos-Sanchez*, id.,] for further consideration in light of *Padilla*. That case, too, was on collateral review and the conviction had become final before the Court's decision in *Padilla.*") (citation omitted).

[170] Teague v. Lane, 489 U.S. 288, 316 (plurality opinion).

D. Evaluation of Common Arguments Against Applying Retroactively

1. The Language of the Concurrences and Dissenting Justices Makes Clear that They Think Padilla is New.

All three circuits that held that *Padilla* did not apply retroactively relied, at least in part, on the fact that the decision in *Padilla*[171] was not unanimous.[172] This argument gives undue weight to the concurring and dissenting justices, and more broadly, to the existence of dissenting opinions as evidence that a decision should not apply retroactively. Moreover, this argument ignores the majority's clear intention to apply *Padilla* retroactively.

Implicit throughout the majority's opinion in *Padilla* is that it will apply retroactively. For example, the *Padilla* Court stated that it was unlikely that *Padilla* would "have a significant effect on those convictions *already obtained* as the result of plea bargains. For at least the *past*

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[171] In *Padilla*, Justice Alito wrote a concurring opinion, in which Chief Justice Roberts joined, stating that he would have limited the holding of *Padilla* to finding that a showing of ineffective assistance of counsel required "affirmative misadvice." Padilla v. Kentucky, 130 S. Ct. 1473, 1492 (2010) (Alito, J., concurring); Justice Scalia wrote a dissenting opinion, in which Justice Thomas joined, in which he argued that the Sixth Amendment's right to counsel did not cover the "collateral consequences" of a plea bargain. *Id.* at 1494 (Scalia, J., dissenting).

[172] *See* Chaidez v. United States, 655 F.3d 684, 689 (7th Cir. 2011) ("The majority opinion in *Padilla* drew a concurrence authored by Justice Alito and joined by Chief Justice Roberts, as well as a dissenting opinion authored by Justice Scalia and joined by Justice Thomas. That the members of the *Padilla* Court expressed such an 'array of views' indicates that *Padilla* was not dictated by precedent."); *see also* United States v. Chang Hong, No. 10–6294, 2011 WL 3805763, slip op. at 6 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011) ("We take the concurrence and dissent as support for our conclusion that reasonable jurists did not find the rule in *Padilla* compelled or dictated by the Court's prior precedent.").

15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[173] Generally, those who argue that *Padilla* should be applied retroactively have noted that the Court's language implies retroactive application.[174] Similarly, courts that found *Padilla* to apply retroactively have cited that same language.[175]

The main tool in determining whether *Padilla* applies retroactively is Supreme Court precedent. Therefore, it is beyond dispute that the Supreme Court has the power to determine whether cases, including *Padilla*, apply retroactively. Most courts that have considered whether *Padilla* applies retroactively believed that the majority's intent regarding retroactivity warranted discussion.[176] However, many courts that have held *Padilla* is not retroactive have seemed to give more weight to the concurring and dissenting justices.[177] At least some of these courts seem to think that the mere existence of concurring

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[173] Padilla v. Kentucky, 130 S.Ct. 1473, 1485 (2010) (emphasis added).

[174] Dan Kesselbrenner, *A Defending Immigrants Partnership Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant After* Padilla v. Kentucky, *National Immigration Project*, 3 (June 24, 2010), available at http://nationalimmigrationproject.org/legalresources/cd_pa_padilla_retroactivity.pdf (last visited July, 2012).

[175] *See* United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011).

[176] *See, e.g.*, United States v. Chang Hong, No. 10–6294, 2011 WL 3805763, slip op. at 10 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011) (holding that *Padilla* does not apply retroactively, but still discussing whether the majority intended for *Padilla* to apply retroactively).

[177] While courts do not generally reveal how much weight they are giving different considerations, some acknowledge that they find the language of the concurrence and dissent more instructive. *See* Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011) (finding that "to the extent that [it was able to] discern whether members of the Court understood *Padilla* to be a new rule, []the clearest indications [were found] in the concurrence and dissent, which [left the court with] no doubt that at least four Justices view *Padilla* as new").

and dissenting opinions evinces that *Padilla* is a new rule.[178] This ignores clear Supreme Court precedent "that the mere existence of a dissent [fails] to show that the rule is new."[179]

Courts holding that *Padilla* did not apply retroactively gave too much weight to their own inferences from the concurring and dissenting opinions, while ignoring the clear intent of the majority, which was to apply *Padilla* retroactively. For example, as the *Chaidez* court notes, the dissenting justices—and, to some extent, the concurring justices—clearly view *Padilla* as "new."[180] But, it is axiomatic that justices who disagree with a decision would regard that decision as new; otherwise, a dissenting justice would be required to argue that the result reached by the majority was dictated by precedent, but that they disagree with that controlling precedent.

2. The Pre-Padilla Split Among the Lower Federal Courts Evinces that the Padilla Decision Announces a "New" Rule.

The argument that the pre-*Padilla* split among lower federal courts demonstrates that *Padilla* is new ignores the basis for the Supreme Court's holding in *Padilla*. In holding that the direct-collateral consequences distinction was inappropriate under *Strickland*, the Court undermined the basis for the lower courts' holding; *Padilla* did not create a new constitutional rule. In fact, in *Padilla*, the Supreme Court noted that it had "never applied a distinction between direct and collateral consequences to

[178] *See id.* at 694 (finding that the concurrence and dissent "leave no doubt that at least four Justices view *Padilla* as new").
[179] Beard v. Banks, 542 U.S. 406, 416 n.5 (2004).
[180] Chaidez v. United States, 655 F.3d 684, 693 (7th Cir. 2011).

define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[181]

Because the lower courts' decisions not to apply the 6th Amendment/*Strickland* to immigration consequences of a guilty plea were based on the erroneous direct-collateral consequences distinction, courts' reliance on these earlier opinions was misplaced.[182] Even if we accept, *arguendo*, that the pre-*Padilla* split among lower federal courts was evidence that *Padilla* created a new rule, there is no precedent which gives that split any significant weight. Contrarily, for example, courts considering whether the holding of *Roe v. Flores-Ortega*[183] applied retroactively found that "[d]espite the existence of conflicting authority prior to the Court's decision, and the relative specificity of the rule that the Supreme Court laid out...*Flores–Ortega* did not announce a new rule[,]" and therefore applied retroactively.[184]

"[T]he mere existence of conflicting authority does not necessarily mean a rule is new."[185] In short, courts should not place any significant weight on the pre-*Padilla* split among lower federal courts in their retroactivity analyses because there is no precedent to do so.

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[181] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

[182] *See* Chaidez, 655 F.3d at 697 (7th Cir. 2011) (dissent); *but see* United States v. Chang Hong, 10-6294, 2011 WL 3805763d, slip op. at 7 (10th Cir. Aug. 30, 2011), as amended (Sept. 1, 2011) ("lower courts had adhered to this direct versus collateral dichotomy. The departure from that longstanding legal distinction, and the application of *Strickland* to immigration consequences of a guilty plea, was an extension of *Strickland* into previously untread [sic] grounds"); Chaidezs, 655 F.3d at 689 (finding that "lower courts were split on the issue[, which is evidence that] the outcome of the case was susceptible to reasonable debate . . . [, and] that *Padilla* announced a new rule").

[183] Roe v. Flores-Ortega, 528 U.S. 470, 476 (2000) (obligations of counsel to inform their clients about their appellate rights).

[184] Com. v. Clarke, 949 N.E.2d 892, 901 (2011).

[185] Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment)).

3. Padilla is New Because Applying "Collateral Consequences" of a Plea to the 6th Amendment/Strickland Test Has Never Been Done Before

When considering retroactivity under *Teague*, the general rule is that application of an old rule to a new set of facts will not create a new rule.[186] However, some courts have found that the Supreme Court's expansion of *Strickland* into the area of "collateral consequences" of a guilty plea, which had previously been "outside the requirements of the Sixth Amendment," weighed against applying *Padilla* retroactively.[187] By contrast, courts in the past have considered other expansions of *Strickland* to new factual situations to have not created a new rule for *Teague* purposes.[188] Courts that have reached the conclusion that

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[186] Even the *Chiadez* court, which held that *Padilla* created a new rule, acknowledged the general rule that ordinarily new applications of an old rule does not create a new rule for *Teague* purposes. Chaidez, 655 F.3d at 692 (noting that "the application of *Strickland* to unique facts generally will not produce a new rule" citing Williams v. Taylor, 529 U.S. 362, 382 (2000) (Stevens, J., concurring in relevant part)).

[187] United States v. Chang Hong, 10-6294, 2011 WL 3805763, slip op. at 6 (10th Cir. Aug. 30, 2011), as amended (Sept. 1, 2011); *see also* Chaidez, 655 F.3d at 691 (finding that "prior to *Padilla,* the Court had not foreclosed the possibility that advice regarding collateral consequences of a guilty plea could be constitutionally required. But neither had the Court required defense counsel to provide advice regarding consequences collateral to the criminal prosecution at issue") (internal citation omitted).

[188] *See* Newland v. Hall, 527 F.3d 1162, 1197 (11th Cir. 2008) (finding that "[*Williams*] and *Rompilla* are not new law under *Teague.*" (citing Williams v. Taylor, 529 U.S. 362 (2000) and Rompilla v. Beard, 545 U.S. 374, (2005) (holding that there was an obligation of counsel to conduct reasonable investigation to determine mitigating factors to present at penalty phase of capital murder case))); Com. v. Clarke, 949 N.E.2d 892, 901 (2011) (finding that the Third, Fourth, and Ninth Circuits all found the *Flores-Ortega* expansion of *Strickland* not to be a

Padilla does not apply retroactively have not cited an example of a case that created a new rule under *Strickland.* In determining whether the application of *Strickland* to a new set of facts constituted a new rule for *Teague* purposes, many courts[189] cited Justice Kennedy's concurrence in *Wright v. West*: "[where, as with *Strickland*, you have] a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."[190]

The Seventh Circuit found that *Padilla* was a "rare exception" to the rule that a case does not announce a new rule if it is merely applying a new set of facts to an old rule (*Strickland*).[191] In so holding, the *Chiadez* court said that *Padilla*'s holding "requir[ing] a criminal defense attorney to provide advice about matters not directly related to their client's criminal prosecution...was sufficiently novel as to qualify as a new rule."[192] However, the Supreme Court had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*[.]"[193] Additionally, the Supreme Court recognized, nearly a decade before *Padilla*, that "alien defendants considering whether to enter into a plea

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new rule, but that the Fifth Circuit assumed *Flores-Ortega* to be a new rule without explanation (citing Roe v. Flores–Ortega, 528 U.S. 470, 476 (2000) (obligations of counsel to inform their clients about their appellate rights)) (internal citations omitted)).

[189] *See, e.g.*, Chaidez, 655 F.3d at 692; United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011); Tanner v. McDaniel, 493 F.3d 1135, 1144 (9th Cir. 2007); United States v. Hubenig, 6:03-MJ-040, 2010 WL 2650625, slip op. at 5 (E.D. Cal. July 1, 2010).

[190] 505 U.S. 277, 309 (1992) (Kennedy, J., concurring).

[191] Chaidez, 655 F.3d at 693.

[192] *Id.*

[193] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (internal citations omitted).

agreement are acutely aware of the immigration consequences of their convictions."[194]

V. Proposal

Common sense and fundamental fairness dictate that *Padilla v. Kentucky* be applied retroactively. If Padilla is applied retroactively, the next question is should *Padilla* apply retroactively to only *some* categories of petitioners. For example, one court found that *Padilla* would apply to "guilty pleas obtained after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[.]"[195] There is indirect support for this proposition from *Padilla*: "[f]or at least *the past 15 years*, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[196] In other words, the Supreme Court's backward-looking language, which supports applying *Padilla* retroactively, can also be offered as support for limiting *Padilla* to only those whose convictions which occurred after, approximately, March, 1995.[197]

There are essentially three categories of *Padilla* petitioners:

1) Those who pled guilty prior to March, 1995
2) Those who pled guilty after March, 1995, but before the March, 2010 *Padilla* decision
3) Those who pled guilty after the March, 2010 *Padilla* decision

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[194] I.N.S. v. St. Cyr, 533 U.S. 289, 322 (2001) (citing Magana-Pizano v. INS, 200 F.3d 603, 612 (C.A.9 1999)).

[195] Com. v. Clarke, 949 N.E.2d at 895. The *Clarke* court does not rule out the possibility that *Padilla* applies to convictions obtained before the mid-1990s.

[196] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) (emphasis added).

[197] It should also be noted that the Supreme Court says "*at least* 15 years." *Id.* (emphasis added).

No one disputes that *Padilla* applies, prospectively, to those in category 3). Similarly, for courts that have found that *Padilla* applies retroactively, *Padilla* will apply to pleas between 1995 and 2010. Therefore, the question, which courts have generally not considered, is, if *Padilla* does apply retroactively, does it apply to convictions that occurred before 1995. For the same reasons that *Padilla* applies to those that occurred after 1995—namely, that the result is dictated by the Court's opinion in *Teague*, and fundamental fairness—*Padilla* should apply to convictions that occurred before 1995.

Firstly, if, as courts applying *Padilla* retroactively have held, *Padilla* is merely an application of new facts to an old rule, then *Padilla* will apply retroactively to all cases.[198] In other words, *Padilla* merely holds that *Strickland*'s test for effective assistance of counsel applies to the deportation context. Courts are generally experienced in handling *Strickland* claims.[199] And, in doing so, courts are cautious in avoiding "hindsight bias."[200] With this in mind, the question becomes how can *Padilla/Strickland* apply to a conviction that occurred when, perhaps, "professional norms [did not]...impose[] an obligation on counsel to provide advice on the deportation consequences

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[198] *See, e.g.*, Com. v. Clarke, 949 N.E.2d at 903 (finding that *Padilla* "is the definitive application of an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts. It is not the creation of a new constitutional rule").

[199] *See* Padilla, 130 S. Ct. at 1485 ("There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.").

[200] *See* Rompilla v. Beard, 545 U.S. 374, 381 (2005) (finding that "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving deference to counsel's judgments" (citing Strickland v. Washington, 466 US 668, 689 (1984))).

of a client's plea."[201] The answer is that pre-1995 *Padilla* claims will be limited.

Applying pre-1995 professional norms, *Padilla* claims may be limited to affirmative misadvice; Justice Alito's concurrence, highlighting his dispute with the majority in *Padilla*, said "that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms."[202] In other words, the main difference between the majority and concurring Justices, in *Padilla*, is that the latter would have limited *Strickland* violations, in the immigration context, to when a lawyer gives his client affirmative misadvice.[203] In this context, the Court's statement that, "For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea,"[204] exists as a justification for faulting attorneys who are silent about their client's inevitable deportation—as opposed to faulting only those attorneys who give affirmative misadvice—and does not exist to limit *Padilla* claims to those convictions that have occurred in the past fifteen years. Therefore, the Court's opinion should not be used to limit *Padilla*'s reach to pleas occurring within a certain timeframe.

Secondly, fundamental fairness dictates that *Padilla* apply to anyone who can surmount *Strickland*'s high bar. However, courts considering whether *Padilla* applies retroactively have not considered fundamental fairness—or even a balancing approach.[205] It is understandable that

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

[202] *Id.* at 1488 (2010) (Alito, J., concurring).

[203] Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. Rev. 1461, 1480 (2011) ("Justice Alito and Chief Justice Roberts concurred, but only as to misadvice.").

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

[205] While courts have failed to consider fundamental fairness, there is much scholarly literature devoted to considering how fairness affects

courts do not take into equitable considerations in their retroactivity analysis because nothing in *Teague* or its progeny permits such considerations. But the merits of *Teague* as a basis for determining retroactively is, at best, questionable; at worst, the admittedly "confused and confusing"[206] case law governing the retroactive application of constitutional rules creates an uneven, unfair and unjust basis for determining whether a rule applies retroactively.[207]

Consequently, as, perhaps, *Padilla* demonstrates, fairness should play more of a factor in whether a newly-recognized constitutional rule of criminal procedure applies to a class of petitioners. In determining whether *Padilla* applies retroactively, courts should follow the Supreme Court's lead in *Padilla*, and refrain from "engaging within the traditional frames of formalism [and] the institutional concerns of courts[;]"[208] instead, courts should consider fundamental fairness in their retroactivity analysis.

The Supreme Court does not *create* new constitutional rules of criminal procedure. Therefore, non-citizens who were not given appropriate advice regarding the immigration consequences of their plea have necessarily had their constitutional rights violated. As such,

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the plight of non-citizens within the criminal justice system. *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. Rev. 1461, 1465 (2011) (concluding that "[d]eportation...must comply with [the] constitutional requirements of fundamental fairness and due process").

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

[207] *See* Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011) (finding that "*Teague* does a poor job" of helping courts decide whether the rule of a case should apply retroactively).

[208] McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011).

courts should find that *Padilla* applies retroactively to all cases on collateral review, so that non-citizens who have had their rights violated, and have been deported as a result, have redress.

VI. Conclusion

The Supreme Court's "retroactivity" case law dictates that *Padilla v. Kentucky* apply retroactively. However, the courts that have considered whether *Padilla* applies retroactively have reached mixed results. Courts have generally failed to mention the Supreme Court's own statement that, to avoid issuing constitutional advisory opinions, it will not apply a rule to a case on collateral review unless that rule applies to *all others similarly situated.* Moreover, the Supreme Court itself applied *Padilla* retroactively. Therefore, properly considering the Supreme Court's "retroactivity" case law, *Padilla* should apply retroactively.

Absent from the Supreme Court's retroactivity case law is consideration of fundamental fairness. Fairness requires that the rule of *Padilla* be applied retroactively to any petitioner who can surmount *Strickland*'s high bar to show ineffective assistance of counsel. To bring successful *Padilla* claims, petitioners must show that they received ineffective assistance of counsel, and that they were deported as a result. Petitioners who can make such a showing have necessarily suffered a constitutional violation. The question then is whether they will have redress. Fundamental fairness requires that *Padilla* apply retroactively so that those who were deported as a result of their constitutionally ineffective assistance of counsel have a remedy. In short, *Padilla v. Kentucky* should apply retroactively.[209]

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[209] Just weeks before this article was published, the Supreme Court of the United States decided *Chaidez v. United States.* In a 7-2 decision,

the Supreme Court decided that *Padilla* did not apply retroactively. Both the Opinion of the Court and the dissent provide a comprehensive "*Teague*" analysis. However, the Court did not distinguish Jose Padilla's 2002 conviction and Roselva Chaidez's 2004 conviction. Nor did the Court explain why the former warranted retroactive application but the latter did not. In short, the Court's analysis ignored fairness and common sense. Although *Padilla*'s retroactivity is now settled, the approach to retroactivity offered in this Article can be applied, by analogy, to future retroactivity cases.