Touro Law Review

Volume 29
Number 4 *Annual New York State Constitutional Issue*

Article 25

March 2014

"But My Attorney Didn't Tell Me I'd Be Deported!"--The Retroactivity of Padilla

Tara M. Breslawski

"But My Attorney Didn't Tell Me I'd Be Deported!"--The Retroactivity of Padilla

Cover Page Footnote
29-4

"BUT MY ATTORNEY DIDN'T TELL ME I'D BE DEPORTED!"—THE RETROACTIVITY OF PADILLA

UNITED STATES SUPREME COURT

Chaidez v. United States[1]
(decided February 20, 2013)

I. HISTORICAL OVERVIEW

A. The Sixth Amendment

A defendant's right to assistance of counsel in a criminal prosecution is a right so fundamental that the Founding Fathers included it in the Bill of Rights.[2] This protection derives from the Counsel Clause of the Sixth Amendment, providing in pertinent part that the accused shall "have the Assistance of Counsel for his defence."[3] This guarantee exists as a mechanism to ensure that the criminally accused receive a fair trial.[4] The right is so important that appointed counsel is available to every defendant who cannot afford retained counsel to defend the criminal charges brought against them.[5] Notwithstanding the inherent guarantees afforded by the Sixth Amendment, there is no assurance that counsel will effectively preserve the defendant's rights.[6] However, because the right exists to afford a defendant a fair trial, the Sixth Amendment is interpreted as guaranteeing the right to *effective* assistance of counsel.[7] In order to determine whether an attorney's performance has failed to meet this "effective" threshold, the United States Supreme Court initially set the benchmark for ineffective assistance of counsel at arising where

[1] 133 S. Ct. 1103 (2013).
[2] U.S. CONST. amend. VI.
[3] *Id.*
[4] Gideon v. Wainwright, 372 U.S. 335, 340 (1963).
[5] Strickland v. Washington, 466 U.S. 668, 685 (1984).
[6] *Id.*
[7] *Id.* at 686.

"counsel's conduct so undermined the proper functioning of the adversarial process that [consequently,] the trial cannot be relied on as having produced a just result."[8] However, through more recent case law, the Supreme Court has refined the test used to determine whether counsel's representation has met the threshold, thereby upholding the defendant's Sixth Amendment right.

B. Ineffective Assistance Claims as a Result of Deportation – *Strickland v. Washington* and *Padilla v. Kentucky*

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."[9] Although a defendant may spend time independently researching his charges and potential defenses after he is arrested for a crime, this is hardly equivalent to the knowledge and experience of an attorney. However, there is little difference between a defendant doing research for his own case and an attorney claiming to represent a defendant, but failing to provide any actual assistance.[10] Thus, it is imperative in preserving the quality of and pursuing justice in our judicial system, that the criminally accused not merely be afforded the right to counsel, but rather, "the right to . . . the *effective* assistance of counsel."[11]

In *Strickland v. Washington*,[12] the Court established a two-prong test that is still used in all ineffective assistance of counsel claims today. The first prong requires that the defendant show counsel's performance was constitutionally deficient.[13] A defendant may satisfy this prong by evidence that counsel made serious, fundamental errors such that the Sixth Amendment "counsel" guarantee was not fulfilled.[14] Once a defendant has shown that the "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms,"[15] the claim is analyzed under to the second part of the test. The second prong requires a showing that

---

[8] *Id.*

[9] *Id.* at 684.

[10] *Strickland*, 466 U.S. at 685.

[11] *Id.* at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970)) (emphasis added).

[12] 466 U.S. 668 (1984).

[13] *Id.* at 687.

[14] *Id.*

[15] *Id.* at 688.

counsel's deficient performance prejudiced the defendant.[16] A defendant may satisfy this requirement by showing that, but for the counsel's deficient performance, the trial would have had a different outcome.[17] In contrast, a defendant may not satisfy the second prong by merely demonstrating that counsel made an error in the course of representation, if that error had no bearing on the outcome of the proceeding.[18] Once the two *Strickland* prongs are satisfied, a court will likely find that the defendant's counsel did not provide the defendant with the constitutional guarantee of effective assistance of counsel.

In a recent landmark case, *Padilla v. Kentucky*,[19] the Court took *Strickland* one step further when faced with the question of whether counsel's failure to discuss deportation consequences of a guilty plea with a defendant could give rise to a claim for ineffective assistance of counsel.[20] Prior to *Padilla*, deportation had long been considered a collateral consequence, and thus, not a factor within the scope of the Sixth Amendment right to effective counsel.[21] However, the Court in *Padilla* recognized that the *Strickland* two-prong test of effective assistance of counsel failed to distinguish between direct and collateral consequences.[22] Although deportation is a severe penalty that often accompanies criminal convictions, it is a civil consequence in nature, and thus, was not considered a direct consequence protected by the Sixth Amendment right to effective assistance of counsel.[23] Ultimately, in *Padilla*, the Court concluded that because immigration consequences are so closely connected to a criminal conviction, it is likely they are direct and therefore defendants are entitled to constitutionally effective assistance of counsel in advising of those potential consequences.[24]

At the heart of the Court's ruling was its careful consideration of the severity of removal from the country, which makes advising a defendant of deportation as either a mandatory, or even possible, consequence of pleading guilty, inextricably related to the accused's

---

16 *Id.* at 687.
17 *Strickland*, 466 U.S. at 694.
18 *Id.* at 691.
19 130 S. Ct. 1473 (2010).
20 *Padilla*, 130 S. Ct. at 1478.
21 *Id.* at 1481.
22 *Id.*
23 *Id.*
24 *Id.* at 1482.

right to assistance of counsel.[25] The Court noted that while every attorney might not be familiar with the immigration consequences accompanying criminal charges, counsel is nonetheless expected to become acquainted with the law, potential consequences of the charges, and if necessary, research the potential of deportation.[26] The Court also addressed the potential floodgate issue and whether this decision would have an impact on convictions previously obtained by guilty pleas that resulted in deportation. The majority proposed that because lower courts have applied the *Strickland* test for years, these courts should not have a problem altering it to include this new standard.[27] Furthermore, the Court acknowledged that it has been the professional norm for attorneys to inform their clients when there is a potential for deportation, and thus, there should not be an influx of appeals claiming ineffective assistance of counsel based on *Padilla*.[28] As the subsequent history of *Padilla* shows, the majority was quite wrong with their hypothesis.

C. Writ of Coram Nobis

The writ of coram nobis is encompassed within the All Writs Act and "provides a method for collaterally attacking a criminal conviction when a defendant is not in custody, and thus, cannot proceed under 28 U.S.C. § 2255."[29] A court will allow the use of this writ only when there is a continuing "civil disability resulting from a conviction" that requires collateral relief.[30] A circuit court has also described the use of this writ as limited to "extraordinary" cases when the error is fundamental and there is no other available remedy.[31] In order to seek this writ as a form of relief, the petitioner must show: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character."[32]

Because of the uniqueness of deportation proceedings as a

---

[25] *Padilla*, 130 S. Ct. at 1483.
[26] *Id.*
[27] *Id.* at 1485.
[28] *Id.*
[29] Chaidez v. United States, 655 F.3d 684, 687 (7th Cir. 2011).
[30] *Id.*
[31] United States v. Akinsade, 686 F.3d 248, 252 (4th Cir. 2012).
[32] *Id.* (quoting Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987)).

consequence to guilty pleas, this writ is the most commonly sought remedy in the federal system for claims of ineffective assistance of counsel. Immigration removal proceedings often do not begin until after a person is released from his or her custodial sentence, and therefore, the normal remedy of appeal is not available.[33] In the cases where the defendant is given incorrect advice or is not advised on the matter of deportation at all, there is no reason for a defendant to attack the conviction prior to the commencement of immigration proceedings, and thus, the writ should be available as a remedy.[34] Removal from the country would clearly be considered an adverse consequence such that it would satisfy the Article III requirement.[35] Finally, ineffective assistance of counsel claims may require a case-by-case determination to analyze whether the attorney's error was so serious that it prejudiced the defendant, and thus, whether the defendant is entitled to relief under the writ.[36] It appears in most cases that the first three factors would be satisfied for a defendant seeking relief from ineffective assistance under this writ and the ultimate decision will rest on the graveness of the attorney's error.

II. RETROACTIVITY OF "NEW" AND "OLD" RULES – *TEAGUE V. LANE*

In *Teague v. Lane*,[37] the Court explained that "[r]etroactivity is . . . a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[38] However, the determination of whether a rule is a "new rule" is not simple. The Court held, generally speaking, a rule is "new" when it "breaks new ground or imposes a new obligation on the States or the Federal Government."[39] In other words, when a rule is not "*dictated* by precedent existing at the time the defendant's conviction became final" it will be considered "new."[40] If the Court does determine that a "new rule" has been established, this rule will only apply to cases

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Akinsade*, 686 F.3d at 252-53.
[37] 489 U.S. 288 (1989).
[38] *Id.* at 300.
[39] *Id.* at 301.
[40] *Id.*

on direct review and will apply to cases on collateral review in two limited circumstances.[41] The two exceptions to refusing to retroactively apply the "new rule" to collateral appeals are when the rule is "substantive" or when it is a " 'watershed rul[e] of the criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[42] In *Teague*, the Court stated the idea of finality in the justice system was the driving force behind denying retroactivity to a "new rule" and "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[43]

To the contrary, a rule is considered an "old rule" if a "court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution."[44] If the rule is classified as an "old rule," it is applied retroactively to cases on both collateral and direct appeal.[45]

Unfortunately there is a lack of clarity among the courts because the determination of whether a rule is "new" or "old" becomes exceedingly difficult when it appears that the rule simply extends the reasoning of a prior case.[46] In *Padilla*, it is clear that the main question before the Court was whether Padilla's counsel was ineffective and fell below the objective standard of reasonableness as set forth by *Strickland*.[47] Because *Padilla* has its foundations in *Strickland*, both district and circuit courts across the country are split on whether *Padilla*'s decision to include a failure to warn about immigration consequences of a guilty plea as a violation of Sixth Amendment rights was just an extension of the *Strickland* decision or was an entirely new rule.[48]

---

[41] *Id.* at 303; *Chaidez*, 655 F.3d at 688.

[42] *Chaidez*, 655 F.3d at 688 (quoting Whorton v. Bockting, 549 U.S. 406, 416 (2007) (citations omitted)).

[43] *Teague*, 489 U.S. at 309; *see also* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.").

[44] United States v. Chang Hong, 671 F.3d 1147, 1153 (10th Cir. 2011) (quoting O'Dell, III v. Netherland, 521 U.S. 151, 156 (1997) (internal quotation omitted)).

[45] *Id.* at 1153.

[46] *Id.* at 1154.

[47] *Id.*

[48] *See Chaidez*, 655 F.3d 684; *see also* cases cited *infra* section III.

III. RETROACTIVITY IN FEDERAL CIRCUITS

A. Third Circuit

In *Mendoza v. United States*,[49] Mario Mendoza was an Ecuadorian immigrant and resided in New Jersey.[50] While working as a licensed realtor, the government charged him with "conspiring to fraudulently induce the Federal Housing Authority to insure mortgage loans."[51] Mendoza's counsel advised him that jail time could be avoided through a guilty plea, but failed to mention that pleading guilty to an aggravated felony would also carry a mandatory deportation consequence.[52] Mendoza entered the guilty plea in March 2006, and subsequently learned prior to his sentencing that he may be subject to removal from the country.[53] After he was sentenced, the government began the deportation process and he was forced to leave the country.[54]

Mendoza filed a motion pursuant to Title 28, Section 2255 in an attempt to have his sentence vacated and guilty plea withdrawn.[55] In this motion, he claimed his counsel did not advise him of the potential deportation consequences of his guilty plea and this could be evidence of ineffective assistance of counsel.[56] Shortly after Mendoza submitted this motion, the decision in *Padilla* was rendered, and Mendoza accordingly withdrew his motion and filed a petition for a writ of error coram nobis, once again claiming ineffective assistance of counsel.[57] In that petition, Mendoza stated that he would not have pled guilty if he had known of the immigration consequences of that plea.[58]

The District Court found Mendoza to have unduly delayed in filing his petition for ineffective assistance of counsel, but Mendoza contended that this delay was due to the absence of Supreme Court

---

[49] 690 F.3d 157 (3d Cir. 2012).
[50] *Id.* at 158.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Mendoza*, 690 F.3d at 159.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

precedent at the time of his plea.[59] The Third Circuit found that regardless of his delay in filing the petition, *Padilla* did not apply retroactively because it did not create a "new rule."[60] In that Circuit, attorneys had always been expected to advise defendants of the immigration consequences of a guilty plea.[61] "More importantly, the government would certainly be unduly prejudiced by the re-prosecution of a case involving facts nearly a decade dormant."[62]

B. Fourth Circuit

The Fourth Circuit addressed an ineffective assistance of counsel claim in *United States v. Akinsade*.[63] Akinsade was a Nigerian immigrant who became a legal permanent resident in the United States in 2000.[64] Shortly before he became a legal resident, he was charged with embezzlement while working as a bank teller.[65] During the plea proceedings, Akinsade raised the issue of immigration consequences at least twice to his attorney.[66] The attorney gave incorrect advice to both inquisitions and assured Akinsade that he could not be deported based on this one offense.[67] Based on this assurance, Akinsade pled guilty and was ultimately subject to immigration proceedings nine years later, based on the embezzlement conviction.[68] Accordingly, Akinsade sought a writ of coram nobis, claiming he was prejudiced by his counsel's misadvice.[69]

In analyzing whether Akinsade was in fact prejudiced, the court distinguished his situation from the defendant's situation in *United States v. Foster*.[70] In *Foster*, the court found that Foster was not prejudiced by his counsel's misadvice because the judge gave a detailed and explicit explanation of the severity of his sentence during a hearing.[71] Unlike Foster, the judge did not give Akinsade a de-

---

[59] *Mendoza*, 690 F.3d at 159-60.
[60] *Id.* at 160.
[61] *Id.*
[62] *Id.* at 161.
[63] 686 F.3d 248 (4th Cir. 2012).
[64] *Id.* at 250.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Akinsade*, 686 F.3d at 250-51.
[69] *Id.* at 251.
[70] 68 F.3d 86 (4th Cir. 1995).
[71] *Id.* at 88.

tailed explanation informing him that his plea mandated deportation;[72] instead, the judge only advised that it *may* lead to deportation.[73] Because the judge's explanation in *Akinsade* was not as explicit as the one in *Foster*, the court found it was reasonable for Akinsade to continue to rely on his counsel's advice.[74] The court justified its decision explaining that "[i]f a district court's admonishment so happens to correct the deficient performance then there is no prejudice; however, if there is no correction, then our scrutiny is not directed toward the district court but appropriately to the constitutional offender."[75] Therefore, because the district court did not fix the attorney's misadvice, and Akinsade clearly was concerned about the potential immigration consequences of his plea, as evidenced by his inquisitions, Akinsade was prejudiced by the ineffective assistance of counsel.[76] Affirmative misrepresentations regarding the deportability of a defendant results in ineffective assistance, a fundamental error that may be relieved through a writ of coram nobis.[77] In a footnote, the court recognized that because neither party disagreed that the misadvice satisfied *Strickland*'s first prong of constitutionally deficient assistance, it would not address whether *Padilla* was retroactively applicable to Akinsade's case.[78]

C. Fifth Circuit

The Fifth Circuit has decided two cases on this issue, *United States v. Amer*[79] and *Marroquin v. United States*.[80] The issue before the Court in *Amer* was one of first impression within the circuit, regarding the application of *Padilla*. Amer pled guilty to a drug related charge and was subsequently eligible to be deported.[81] After the decision in *Padilla*, Amer submitted a motion to vacate claiming ineffective assistance of counsel based on his attorney's failing to advise

---

[72] *Akinsade*, 686 F.3d at 254.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 255.
[76] *Id.* at 254.
[77] *Akinsade*, 686 F.3d at 256.
[78] *Id.* at 251 n.3.
[79] 681 F.3d 211 (5th Cir. 2012).
[80] 480 F. App'x 294 (5th Cir. 2012).
[81] *Amer*, 681 F.3d at 212.

him of the potential of deportation.[82]

In order to determine whether Amer could prevail on his claim, the Fifth Circuit first considered the guidelines set forth in *Teague* in order to determine whether to retroactively apply the precedent set by the Court in *Padilla*.[83] As previously stated, a rule is "new," and thus, not applied retroactively unless it was "*dictated* by precedent existing at the time the defendant's conviction became final."[84] The court construed the decision in *Padilla* as a drastic departure from precedent, recognizing that prior to *Padilla* attorneys had no duty to advise defendants of the potential consequence of deportation accompanying a guilty plea.[85] Rather, counsel's duty was previously limited to advising the defendant on the direct consequences of the guilty plea, as opposed to collateral consequences, including immigration status.[86] The court also noted that *Padilla* was not merely an expansion of the *Strickland* test, but instead created a new basis on which defendants may vacate their guilty pleas.[87] Therefore, because the court found *Padilla* to have created a new rule, it did not apply the ruling retroactively to Amer's claim.[88]

Likewise, the court in *Marroquin* found that *Padilla* created a new rule, and thus, was not retroactive.[89] Marroquin pled guilty to transporting an illegal immigrant within the United States, and thus, was subjected to immigration proceedings.[90] She subsequently filed a writ of coram nobis, citing *Padilla* as the basis for her ineffective assistance of counsel claim, and alleged that her attorney failed to advise her of the immigration consequences of her plea.[91] Relying squarely on the circuit court's decision in *Amer*, the court upheld the ruling that *Padilla* was a "new" rule within the meaning of *Teague*, and thus, could not apply retroactively to Marroquin's claim.[92]

---

82 *Id.*
83 *Id.*
84 *Teague*, 489 U.S. at 301.
85 *Amer*, 681 F.3d at 213-14.
86 *Id.* at 214.
87 *Id.*
88 *Id.*
89 *Marroquin*, 480 F. App'x at 296.
90 *Id.* at 295.
91 *Id.* at 295-96.
92 *Id.* at 296.

D. Tenth Circuit

In *United States v. Chang Hong*,[93] the Tenth Circuit addressed an ineffective assistance of counsel claim. Hong emigrated from South Korea and became a permanent legal resident of the United States.[94] In 2007, he pled guilty to a drug possession and was subsequently subjected to immigration removal proceedings.[95] In 2010, Hong sought to vacate his conviction and withdraw his guilty plea, claiming ineffective assistance of counsel.[96] In his motion to vacate, he claimed his attorney did not advise him of the potential deportation that accompanied his guilty plea.[97] Hong's motion was filed after the Supreme Court rendered its decision in *Padilla*, and thus, Hong used that decision as the basis for his claim.[98]

In determining whether to apply *Padilla* to Hong's claim, the court employed a three-step analysis to determine its retroactivity.[99] This three-step analysis included whether the conviction was final at the time *Padilla* was decided, whether *Padilla* created a "new rule," and finally, if that rule was in fact "new," whether it fell within the two exceptions to nonretroactivity.[100] The court found the conviction was final and also that the rule in *Padilla* was "new," but that it did not fall within the two prescribed exceptions.

In finding that *Padilla* created a "new rule," the court reasoned that "[b]efore *Padilla*, most state and federal courts had considered the failure to advise a client of potential collateral consequences of a conviction to be outside the requirements of the Sixth Amendment."[101] The court also considered the lack of unanimity in the Supreme Court in rendering its landmark decision, citing both the concurrence and dissent from *Padilla*.[102] Based on these two opin-

---

[93] 671 F.3d 1147 (2011).

[94] *Chang Hong*, 671 F.3d at 1148.

[95] *Id.* at 1148-49.

[96] *Id.* at 1149.

[97] *Id.*

[98] *Id.*

[99] *Chang Hong*, 671 F.3d at 1150.

[100] *Id.* at 1151.

[101] *Id.* at 1154.

[102] *Id.* at 1154-55.

> In a concurrence, Justice Alito . . . stated 'the Court's decision marks a major upheaval in Sixth Amendment law' and noted the majority failed to cite any precedent for the premise that a defense counsel's failure to provide advise concerning the immigration consequences of a criminal

ions, the circuit court found it hard to believe that the *Padilla* rule was "compelled or dictated by the Court's prior precedent."[103] The court in *Hong* further expressed its disapproval of the Third Circuit's holding in *United States v. Orocio*,[104] which stated *Padilla* was an "old rule," and thus, could be retroactively applied on collateral review.[105] In contrast to relying on the long-standing professional norms argument as the Third Circuit did, the Tenth Circuit found *Padilla* created a new rule because "it applied *Strickland* to collateral civil consequences of conviction—a line courts had never crossed before."[106] The court's final argument to support its position of *Padilla* creating a new rule was the distinction between "*what* it applies—*Strickland*—[and] *where* it applies—collateral immigration consequences of a plea bargain."[107]

Ultimately, the court did not find that *Padilla* applied to Hong's claim because as a "new rule" it needed to fall within the two narrow exceptions in order to retroactively apply.[108] The court stated *Padilla* did not fall within the first exception because it did not create a substantive rule, but instead a procedural one.[109] The Tenth Circuit also found that *Padilla* did not fall within the second exception either because the Supreme Court had repeatedly refused to find a rule created to be so fundamental to criminal procedure that it should be available retroactively.[110] Thus, because the "new rule" of *Padilla* did not fall within the prescribed exceptions, it could not be retroactively applied on collateral appeals and the Tenth Circuit denied Hong's motion.[111]

> conviction violated a defendant's right to counsel. . . . Similarly, Justice Scalia in a dissent . . . argued the Sixth Amendment right to counsel does not extend to 'advice about the collateral consequences of conviction' and that the Court, until *Padilla*, had limited the Sixth Amendment to advice directly related to defense against criminal prosecutions. *Id.*

[103] *Chang Hong*, 671 F.3d.at 1155.

[104] 645 F.3d 630 (2011).

[105] *Chang Hong*, 671 F.3d at 1155. "[B]ecause *Padilla* followed directly form *Strickland* and long-established professional norms, it is an "old rule" for *Teague* purposes and is retroactively applicable on collateral review." *Orocio*, 645 F.3d at 641.

[106] *Chang Hong*, 671 F.3d at 1155.

[107] *Id.* at 1156.

[108] *Id.* at 1157.

[109] *Id.* (noting that because it was simply a change in the way an attorney advises a defendant before entering a guilty plea, it was only a procedural rule change).

[110] *Id.* at 1157-58.

[111] *Chang Hong*, 671 F.3d at 1159.

E. Second Circuit and Civil Commitments

The Second Circuit did not hear a relevant immigration case addressing whether *Padilla* could be applied retroactively, but instead rendered a decision on an attorney's failure to warn of the possibility of civil commitment, comparing that consequence to deportation. In *United States v. Youngs*,[112] Youngs pled guilty to possessing child pornography.[113] During the plea hearing, the court explained the consequences of his plea, including the minimum and maximum jail sentences, the term of supervised release, and the registration as a sex offender.[114] However, this plea colloquy did not include the potential of civil commitment.[115] Youngs argued that this failure to warn was equivalent to an attorney failing to warn a noncitizen defendant of the potential for deportation that often accompanies a guilty plea.[116] Although some consequences of guilty pleas had long been considered collateral, and thus, do not require an explanation, Youngs argued that after the decision in *Padilla*, the court should follow suit in removing the distinction between direct and collateral consequences.[117]

However, the Second Circuit rejected Youngs's argument. The court explained that *Padilla* was not persuasive in Youngs's situation because deportation is a "nearly automatic" consequence, whereas the possibility of civil commitment is a much more "remote and uncertain consequence."[118] The court also departed from a recent Eleventh Circuit decision which extended *Padilla* to "affirmative misrepresentations by counsel regarding civil commitment."[119] That case was distinguishable from *Youngs* because the holding in that decision was strictly limited to a Sixth Amendment ineffective assistance of counsel claim, whereas Youngs' claim was directed at the court for failing to warn him during the plea colloquy.[120] Ultimately, the court held that the district court was not required to advise Youngs of the possibility of civil commitment in order to uphold his

---

112 687 F.3d 56 (2012).
113 *Id.* at 58.
114 *Id.*
115 *Id.*
116 *Id.* at 61.
117 *Youngs*, 687 F.3d at 60-61.
118 *Id.* at 62-63.
119 *Id.* at 62 n.4.
120 *Id.*

guilty plea as knowing and voluntary.[121] The court also advised that although an allegation of a court's failure to warn about the possibility of civil commitment cannot be brought based on *Padilla*, attorneys should not be discouraged from always advising their clients of the potential consequences of guilty pleas, both collateral and direct.[122]

IV. THE NEW YORK CONSTITUTION AND THE EFFECTIVE ASSISTANCE OF COUNSEL

The New York Constitution also includes a right to counsel, similar to that of the United States Constitution. It provides: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ."[123] Comparable to the federal right to counsel, this state standard makes it clear a person is entitled to counsel, but does not specify how that counsel must perform. In determining how adequate counsel's performance must be, New York courts rely on precedent from *People v. Benevento*,[124] which set the threshold at "meaningful representation."[125] This standard is objectively measured based on whether counsel used a "reasonable and legitimate strategy under the circumstances" and not simply whether the attorney won the case.[126]

New York courts also employ the *Strickland* two-prong test to determine whether counsel's performance was deficient.[127] In New York, a defendant must satisfy the two prongs set forth in *Strickland* in order to prevail on an ineffective assistance of counsel claim.[128] However, when the claim is analyzed under the New York State Constitution as opposed to the United States Constitution, the prejudice test under *Strickland* is only examined in the general context of whether counsel made an error that did not allow the defendant to have a fair trial.[129]

Similar to the extension of *Strickland* through the Court's de-

---

121 *Id.* at 63.
122 *Youngs*, 687 F.3d at 63 n.6.
123 NY CONST. art. I § 6.
124 697 N.E.2d 584 (N.Y. 1998).
125 *Id.* at 587.
126 *Id.*
127 *Id.*
128 *Id.*
129 *Benevento*, 697 N.E.2d at 588.

cision in *Padilla*, in *People v. McDonald*[130] the right to effective assistance of counsel was expanded to include an attorney's failure to advise a defendant about the immigration consequences of a guilty plea in New York. However, the standard established in *McDonald* is not quite as broad as that of *Padilla*. In *McDonald*, a Jamaican immigrant, who was a lawful permanent resident of the United States, was charged with possessing and selling marijuana.[131] Upon advice of counsel, McDonald pled guilty to a lesser charge.[132] Shortly after sentencing, immigration proceedings were initiated against McDonald.[133] Almost two months after the immigration proceedings commenced, McDonald's counsel moved to vacate the judgment based on his own ineffective assistance of counsel.[134] Defense counsel stated that he had "incorrectly advised [McDonald] that his guilty plea 'would *not* result in deportation.' "[135] Counsel also stated that McDonald had maintained his innocence prior to entering the guilty plea, and only entered such plea based on counsel's "affirmative misstatements."[136]

In analyzing whether McDonald satisfied the first prong of the *Strickland* test for his ineffective assistance of counsel claim, the court stated that although the "mere failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel[,] . . . affirmative misstatements by defense counsel may, under certain circumstances, constitute ineffective assistance of counsel."[137] Because counsel admitted that he incorrectly informed McDonald of his potential for deportation, the court found this prong to be satisfied. However, in McDonald's motion to vacate, it only stated that he was misinformed by counsel, but not that, but for counsel's misadvice, McDonald would not have pled guilty.[138] Therefore, the court found that the second prong of the *Strickland* test was not satisfied, and thus, McDonald's motion was denied.[139]

For almost a decade after *McDonald*, only affirmative mis-

---

130 802 N.E.2d 131 (N.Y. 2003).
131 *Id.* at 132.
132 *Id.*
133 *Id.*
134 *Id.* at 132-33.
135 *McDonald*, 802 N.E.2d at 133.
136 *Id.*
137 *Id.* at 134.
138 *Id.* at 135.
139 *Id.*

statements by counsel were sufficient to satisfy the first prong of *Strickland* for ineffective assistance of counsel claims in regard to deportation. However, after the decision in *Padilla* was handed down, the New York courts began to apply the standard coming out of that case, holding counsel responsible for a failure to advise on the issue of deportation. Similar to the disagreement in federal courts, the New York courts have also had a difficult time in coming to a uniform decision on the retroactivity of *Padilla.*

V. RETROACTIVITY IN NEW YORK COURTS

A. Appellate Division Decisions

Similar to the circuit split in the federal judicial system, the different departments of the Appellate Division in New York have rendered inconsistent decisions when addressing the retroactivity of *Padilla*.

1. First Department

In the First Department, the court has addressed three cases dealing with the retroactivity of *Padilla*. First, in *People v. Hernandez*,[140] the court was extremely split in regard to the effect of *Padilla* and three different opinions were submitted. Hernandez was a Dominican Republic native who pled guilty in 2007 to sexual abuse and was consequently subject to deportation.[141] He filed a motion to vacate his conviction based on ineffective assistance of counsel, but his motion was denied by the lower court.[142] The first concurring opinion stated that Hernandez sufficiently proved that his counsel had not warned him of the immigration consequences of his plea, but he had not established that he was prejudiced by this deficient performance.[143] The opinion referred to the record which established that Hernandez took the plea simply because it was his best option, and not because his attorney had not advised him of his potential deporta-

[140] 950 N.Y.S.2d 268 (App. Div. 1st Dep't 2012).
[141] *Id.* at 270-71 (Freedman, J., dissenting).
[142] *Id.* at 272.
[143] *Id.* at 268-69 (Sweeny, J., concurring).

tion.[144] Therefore, that concurring opinion chose not to address the retroactivity of *Padilla*.[145]

The second concurring opinion in *Hernandez* also agreed that Hernandez did not show any prejudice by his counsel's deficient performance.[146] This opinion again relied on the record which evidenced that Hernandez was dishonest when discussing his past criminal history, as well as this case.[147] The second concurring opinion also noted that Hernandez was not prejudiced because he had previously been convicted of a felonious assault which rendered him deportable, regardless of the outcome of this case.[148] Therefore, that opinion did not address *Padilla* or its retroactivity.

Finally, the dissenting opinion found that Hernandez had been deprived of the effective assistance of counsel.[149] That opinion relied heavily on the record and included the attorney's testimony which stated he did not remember whether he had discussed the immigration consequences of the plea, but doubted it because it was not his usual practice to do so.[150] The dissenting judge believed that this lack of advice would satisfy the first prong of *Strickland*.[151] Furthermore, the record stated that Hernandez was the "sole provider for and primary caretaker of his six children."[152] Therefore, the dissenting judge stated it was likely Hernandez was prejudiced by the deficient performance of his counsel because he would have risked going to trial instead of being automatically deported and taken away from his children "indefinitely."[153] Thus, the second prong of *Strickland* was satisfied and Hernandez sufficiently made a claim for ineffective assistance of counsel.[154] Although this opinion did not address the retroactivity of *Padilla*, it is likely the dissenter would have found it to be retroactive because he found Hernandez had established a violation of his Sixth Amendment rights.

---

144 *Id.* at 269.
145 *Hernandez*, 950 N.Y.S.2d at 269 (Sweeny, J., concurring).
146 *Id.* (Manzanet Daniels, J., concurring).
147 *Id.*
148 *Id.*
149 *Id.* at 270 (Freedman, J., dissenting).
150 *Hernandez*, 950 N.Y.S.2d at 271 (Freedman, J., dissenting).
151 *Id.* at 272.
152 *Id.* at 274.
153 *Id.* at 274-275.
154 *Id.* at 273, 275.

In *People v. Ogunmekan*,[155] the First Department refused to address the retroactivity of *Padilla* or even look at whether the attorney provided advice on the immigration consequences of a plea until the prejudice prong of *Padilla* was satisfied. Even though Ogunmekan pled guilty to a crime that would render him deportable and it was unclear whether his counsel advised him of potential deportation, Ogunmekan failed to demonstrate that, but for his counsel failing to advise him of this consequence, he would have went to trial.[156] Thus the court did not go any further into determining "new" versus "old" rules and the subsequent retroactive effect.[157]

Finally, in *People v. Baret*,[158] the court addressed the issue of retroactivity and came to a decision on the matter.[159] Baret was convicted of selling a controlled substance, a crime that rendered him deportable.[160] Baret filed a motion to vacate claiming his attorney was ineffective for failing to advise him of the deportation consequence of his conviction.[161] The court used the standards set forth by *Strickland* and found *Padilla* to apply retroactively to Baret's motion.[162] The court stated that "[w]hen a Supreme Court decision applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an 'old' rule, and is always retroactive."[163] In New York, the Court of Appeals had previously held that immigration status was a collateral consequence of a conviction or plea, and thus, a failure to warn of this consequence would not amount to ineffective assistance unless there was evidence of actual misadvice.[164] However, after *Padilla*, it was clarified that *Strickland* must apply to giving advice on immigration consequences.[165] Therefore, because *Padilla* was found to be retroactive, the court held Baret was entitled to a hearing to determine whether the advice his attorney gave him on the immigration consequences was constitutionally deficient and if it was deficient, whether it was likely

---

155 945 N.Y.S.2d 58 (App. Div. 1st Dep't 2012).
156 *Id.* at 60-61.
157 *Id.*
158 952 N.Y.S.2d 108 (App. Div. 1st Dep't 2012).
159 *Id.*
160 *Id.* at 109.
161 *Id.*
162 *Id.*
163 *Baret*, 952 N.Y.S.2d at 110.
164 *Id.*
165 *Id.*

Baret would have went to trial instead of pleading.[166]

2. Second Department

The Second Department has recently addressed one significant case on the matter of effective assistance of counsel and its relation to deportation.[167] Picca was born in Italy, lived in France for part of his childhood, and ultimately immigrated to the United States where he became a lawful permanent resident.[168] He had consistently worked in the United States, as well as met and married an American citizen and had children who are American citizens.[169] In 2005, Picca was charged with drug offenses and pled guilty, based on the advice of counsel.[170] The plea required Picca to enter a drug program, but he relapsed shortly after his completion of the program and removal proceedings were initiated.[171] Picca submitted a motion to vacate his conviction and claimed he was unaware of the immigration consequences of his plea.[172]

Similar to the other departments, the Second Department first looked to *Strickland* to determine if Picca had satisfied the two-prong test for ineffective assistance of counsel.[173] The court also recognized, pursuant to *Padilla*, that failure of an attorney to warn about immigration consequences or misadvising about these consequences could constitute ineffective assistance.[174] Picca attested that he was unaware of the potential for deportation until his wife went out on her own and consulted an immigration attorney.[175] After determining that this satisfied the first prong of *Strickland*, the court then turned to whether the second prong was satisfied in a *Padilla* context.[176] The record contained evidence of Picca having substantial ties in the

---

166 *Id.*

167 People v. Picca, 947 N.Y.S.2d 120 (App. Div. 2d Dep't 2012).

168 *Id.* at 122.

169 *Id.*

170 *Id.* at 123.

171 *Id.*

172 *Picca*, 947 N.Y.S.2d at 123.

173 *Id.* at 124-25.

174 *Id.* at 125.

175 *Id.* at 126.

176 *Id.* at 127 (noting that to satisfy the second prong of *Strickland* under *Padilla*, the defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances") (quoting *Padilla*, 130 S. Ct. at 1485).

United States, including a wife, family, and children.[177] Taking these facts into consideration, the court found that "the defendant's averments sufficiently alleged that a decision to reject the plea offer, and take a chance, however slim, of being acquitted after trial, would have been rational."[178] Ultimately, the court found that Picca had satisfied the two prongs of *Strickland*, and thus, remanded the case for a determination on Picca's ineffective assistance claim.[179] In a footnote, the court explained that it was not addressing the retroactivity of *Padilla* because Picca's "direct appeal was pending at the time the [*Padilla*] decision . . . was rendered," and thus, Picca was entitled to apply that rule to his case.[180]

3. Third Department

The Third Department has discussed three relevant cases in the past year. In *People v. Glasgow*,[181] Glasgow was a citizen of Guyana, but had become a lawful permanent resident in the United States.[182] In 2005, he was charged with a drug offense and ultimately pled guilty to a lesser charge.[183] After removal proceedings were subsequently initiated against Glasgow, he filed a motion to vacate his conviction in order to remain in the country.[184] He alleged his attorney had misinformed him of the potential immigration consequences that accompanied his guilty plea, and thus, violated his right to effective counsel.[185] Once again the court relied upon the federal standard of *Strickland*'s two-prong test in order to determine if Glasgow's claim of deprivation of meaningful representation was legitimate.[186] In support of his argument, Glasgow explained that he had spoken with his attorney about the possibility of removal, but the attorney summarily dismissed his concerns by suggesting that the risk of deportation was minimal because he was a "small fish" in compar-

---

177 *Picca*, 947 N.Y.S.2d at 130.
178 *Id.* at 130.
179 *Id.* at 132-33.
180 *Id.* at 125 n.1.
181 943 N.Y.S.2d 674 (App. Div. 3rd Dep't 2012).
182 *Id.* at 675.
183 *Id.*
184 *Id.*
185 *Id.*
186 *Glasgow*, 943 N.Y.S.2d at 676.

ison to other deportable criminals.[187] Also significant to the court's decision was the fact that Glasgow's attorney had testified that he had advised his client on the likelihood of immigration consequences accompanying his guilty plea.[188] The court ultimately found that because Glasgow had been "advised that removal was a possible consequence of his guilty plea, and was not misinformed to the contrary, he did not establish that counsel failed to fulfill his obligations on this issue or that his advice was deficient so as to satisfy . . . an ineffective assistance of counsel claim."[189] Simply because the attorney shared his opinion on what he believed to be the likelihood of deportation, and the court found to the contrary, he cannot be found to have provided constitutionally deficient assistance.[190]

Shortly after *Glasgow*, the Third Department decided *People v. Carty*,[191] another case in which an ineffective assistance of counsel claim was brought. Carty was not a citizen of the United States and immigration proceedings were initiated after Carty pled guilty to the charged drug offense.[192] Carty moved to vacate his guilty plea on the ground that neither his attorney, nor the court, advised him of the potential for his deportation.[193] However, unlike the other cases discussed in which the defendants were known to be immigrants, Carty's background information stated that he was a United States citizen even though he was not.[194] Carty never took any steps to correct this mistake or to inform his attorney that he was not in fact a citizen of the United States.[195] Consequently, his attorney never discussed the possibility of deportation with Carty because it appeared to be irrelevant.[196] Although the court did not go into an in-depth analysis of the retroactivity of *Padilla*, the opinion included a footnote which stated that the Court in *Padilla* suggested its holding

---

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* ("The fact that counsel, in advising defendant to accept the favorable plea deal, may have expressed his experience-based assessment of the *likelihood* that removal proceedings might or might not be initiated depending upon different factors was not misleading . . . ." *Glasgow*, 943 N.Y.S.2d at 676.).

[191] 947 N.Y.S.2d 617 (App. Div. 3rd Dep't 2012).

[192] *Id.* at 618.

[193] *Id.*

[194] *Id.* at 619.

[195] *Id.*

[196] *Carty*, 947 N.Y.S.2d at 619.

should "apply to collateral challenges to final convictions."[197] Therefore, the court retroactively applied its principles to the case at hand and found that only when "attorneys *know* that their clients face possible exile form this country and separation from their families" that they are required to advise the defendant about immigration consequences.[198] Therefore, Carty failed to prove that his counsel's performance was deficient and the Third Department rejected his claim accordingly.[199]

Finally, the Third Department heard *People v. Haley*[200] in June of 2012. Haley was a Guyanese immigrant who had become a lawful permanent resident of the United States.[201] In 2002, he pled guilty to aggravated unlicensed operation of a vehicle and driving while intoxicated.[202] As a result of this plea, deportation proceedings were initiated against Haley.[203] In turn, Haley promptly filed a motion to vacate his conviction claiming his attorney had not advised him of his possible deportation.[204] The court explained that Haley would have to satisfy the federal standard for ineffective assistance of counsel created by *Strickland* in order to prevail on his claim to have the conviction vacated.[205] Without properly analyzing the issue of retroactivity, the court presumed that the Court in *Padilla* intended for its rule of law to be retroactively applied.[206] However, Haley had previous convictions on his record that rendered him a deportable alien notwithstanding the conviction at issue; therefore, under *Strickland* and *Padilla*, the court could not have found that Haley was prejudiced by the failure of his attorney to warn him of his possible deportation.[207]

---

197 *Id.* at 619 n.3.

198 *Id.* at 620 (quoting *Padilla*, 130 S. Ct. at 1484).

199 *Id.* at 620-21.

200 946 N.Y.S.2d 678 (App. Div. 3rd Dep't 2012).

201 *Id.* at 679.

202 *Id.*

203 *Id.*

204 *Id.*

205 *Haley*, 946 N.Y.S.2d at 679.

206 *Id.*

207 *Id.* "[R]egardless of whether defendant pleaded guilty to the charges . . . , had been found guilty after trial or had been acquitted, his status as a deportable alien would not have been affected." *Id.*

4. Appellate Term

In *People v. Hassan*,[208] the Appellate Term addressed a similar ineffective assistance of counsel claim and the effect of *Padilla*.[209] Hassan was charged with a drug offense to which he subsequently pled guilty.[210] Thereafter, Hassan filed a motion to vacate his conviction on the grounds of his attorney's misadvice in regards to the immigration consequences of his plea.[211] As an initial matter, the Appellate Term observed that in order for any defendant to prevail on such a claim, he must either satisfy the federal standard set forth in *Strickland* or the New York standard of "meaningful representation" set forth in *Benevento*.[212] Because Hassan claimed he specifically asked his attorney about the potential immigration consequences of his plea and his attorney assured him there would not be any repercussions, Hassan satisfied the first prong of the *Strickland* test.[213] Hassan also satisfied the second prong of the *Strickland* test by and through his claim that had his attorney informed him of the potential consequence of deportation, he would have taken the risk and proceeded to trial.[214] In determining that *Strickland* was satisfied, in adherence with the Third Department's approach in *Glasgow*, the court held that it need not determine the retroactivity of *Padilla*.[215]

VI. PUTTING THE QUESTION TO REST: *CHAIDEZ*

The United States Supreme Court recently put to rest the questions surrounding the retroactive application of the precedent established by the Court in *Padilla* in *Chaidez v. United States*.[216] The Court granted certiorari to this case after the Seventh Circuit concluded that, although *Padilla* created a new rule, it could not be applied retroactively because it did not fit squarely within one of the two exceptions identified in *Teague*.

---

[208] No. 2010-2643, at *1 (N.Y. Sept. 13, 2012).

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* (noting that Hassan satisfied the two prongs of Strickland, and thus, the court did not need to consider the New York standard of "meaningful representation").

[213] *Hassan*, No. 2010-2643 at *1.

[214] *Id.*

[215] *Id.* at *2.

[216] 133 S. Ct. 1103 (2013).

Chaidez was a native Mexican who moved to the United States and became a lawful permanent resident.[217] In 2003, she was indicted for mail fraud and charged with an aggravated felony because the fraud caused a loss exceeding $10,000.[218] Relying upon her counsel's advice, Chaidez entered a guilty plea and immigration removal proceedings were initiated subsequent to the entry of her sentence.[219] Seeking to vacate her conviction in order to remain in the country, Chaidez filed a writ of coram nobis in which she claimed ineffective assistance of counsel.[220] *Padilla* was decided while this writ was pending review.[221] In the subsequent review of Chaidez's writ, the district court found *Padilla* to be a mere "application of the Court's holding in *Strickland* . . .;"[222] thus, it was an "old rule" that could be retroactively applied to Chaidez's case.[223] Consequently, the district court considered the merits of Chaidez's writ of coram nobis and ultimately vacated her conviction.[224]

On appeal, the government argued against the district court's retroactive application of *Padilla*.[225] In its decision, the Seventh Circuit cited to language from *Padilla* in which the Court "[n]ot[ed] that it had 'never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*.' "[226] Likewise, the court observed that many federal district courts, as well as circuit courts, had all held, prior to *Padilla*, that counsel was not required under the Sixth Amendment to provide information about collateral, as opposed to direct, consequences of a guilty plea.[227] Using this rationale, because *Strickland* did not include a requirement to advise a client about immigration consequences, it follows that *Padilla* created a "new rule" that "constitutionally effective assistance of counsel requires advice about a civil penalty imposed by the Executive

---

[217] *Id.* at 1105.
[218] *Id.* at 1105-06.
[219] *Id.* at 1106.
[220] *Id.*
[221] *Chaidez*, 133 S. Ct. at 1106.
[222] *Chaidez*, 655 F.3d at 686.
[223] *Chaidez*, 133 S. Ct. at 1106.
[224] *Id.*
[225] *Id.*
[226] *Chaidez*, 655 F.3d at 687 (quoting *Padilla*, 130 S. Ct. at 1481 (internal quotation marks omitted)).
[227] *Id.* at 690.

Branch . . . after the criminal case is closed."[228]

The Supreme Court ultimately affirmed the Seventh Circuit's decision, finding that, based on the framework set forth by *Teague*, *Padilla* was a "new rule," and thus, not retroactive.[229] The Court noted *Padilla* would have been considered an "old rule" if it simply clarified that a lawyer would be considered ineffective if he or she did not inform the defendant of the potential for deportation.[230] However, the Court instead concluded that *Padilla* created a prerequisite to the *Strickland* test.[231] It established that a court must first look to whether the Strickland test is appropriate to apply before determining whether the counsel's performance was ineffective.[232] Because the Court found it to be the initial inquiry, it stated "[i]f that does not count as breaking new ground or imposing a new obligation, we are hard pressed to know what would."[233] Therefore, as a "new rule," *Padilla* may not be used retroactively to overturn a conviction for a defendant, including Chaidez, whose conviction became final before *Padilla*.[234]

Tara M. Breslawski[*]

---

[228] *Id.* at 693. "Under *Teague*, a rule is old only if it sets forth the *sole* reasonable interpretation of existing precedent." *Id.* at 692. Although it would seem that *Padilla* is just an example of *Strickland* being applied to a specific set of facts and thus is just an extension of *Strickland*, *Padilla* is sufficiently novel and should be held to have created an entirely separate and new rule. *Id.* at 692-93.

[229] *Chaidez*, 133 S. Ct. at 1105.

[230] *Id.* at 1108.

[231] *Id.* "*Padilla* had to develop new law, establishing that the Sixth Amendment applied at all, before it could assess the performance of Padilla's lawyer under *Strickland*." *Id.* at 1111.

[232] *Id.* at 1110.

[233] *Chaidez*, 133 S. Ct. at 1110. (internal quotation marks omitted).

[234] *Id.* at 1113.

[*] J.D. Candidate 2014, Touro College Jacob D. Fuchsberg Law Center; Western New England College, B.S.C.J. (2011). Special Thanks: To my parents, who have provided me with unconditional love and support over the years and always pushed me to pursue my dreams. To Alexander DePalo for being a shoulder to lean on through thick and thin. To A.U.S.A. Lara Treinis-Gatz for showing me the ropes throughout law school and lending a helping hand. To the members of the *Touro Law Review*, especially Danielle M. Hansen, for their guidance and advice throughout this process.