Notre Dame Journal of Law, Ethics & Public Policy

Volume 29 | Issue 1 Article 7

2015

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Cover Page Footnote

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CHAIDEZ V. UNITED STATES – YOU CAN'T GO HOME AGAIN

ARAM A. GAVOOR* & JUSTIN M. ORLOSKY**

ABSTRACT

This article examines a 2013 Supreme Court decision, Chaidez v. United States*, in which the Court declined to apply retroactively another recent decision,* Padilla v. Kentucky. *To many observers,* Chaidez *appears to be a discrete departure from previous Sixth Amendment right to counsel jurisprudence. On a personal level, noncitizens who pled guilty to a crime without being apprised of the plea's removal risks are now unable to seek redress under* Padilla *and return to their homes in the United States. This article examines relevant Sixth Amendment and retroactivity jurisprudence and proposes an explanation for the Court's apparent about-face.*

I. INTRODUCTION

Until relatively recently, federal immigration law lacked clarity regarding the removal of noncitizens.[1] In the past, an immigrant who committed a removable offense would not inevitably be removed in practice.[2] In the mid-1990s, however, Congress passed two laws affecting criminal procedure for noncitizens.[3] Now, a noncitizen who commits an "aggravated felony" will almost inevitably be removed from the

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1. *See* Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

2. *See* Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889–90.

3. Immigration Act of 1990, Pub. L. No. 101-649, § 5, 104 Stat. 4978, 5050 (eliminating judicial discretion in the deportation process); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 240B, 110 Stat. 3009-546, 3009-596 (eliminating Attorney General discretion with a few exceptions). Aggravated felons remain a top priority for removal in the Obama Administration. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Director, U.S. Immig. & Customs Enforcement, et al. 3 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (discussing "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" and classifying "aliens "convicted of an 'aggravated felony[ ]' . . ." in "Priority 1" of "Civil Immigration Enforcement Priorities").

United States.[4] As a result, many citizens who pled guilty to criminal charges were subsequently removed. Some sought to challenge their original guilty pleas, arguing that counsel provided constitutionally deficient assistance by failing to apprise them of a guilty plea's removal risks.[5]

The Supreme Court addressed this issue in *Padilla v. Kentucky*,[6] whether noncitizens may collaterally challenge their guilty pleas after final judgment by alleging constitutionally deficient counsel.[7] The *Padilla* Court held that a noncitizen receives constitutionally deficient assistance under the Sixth Amendment when such counsel fails to provide the noncitizen with information regarding the consequences of a guilty plea for removal.[8] Following *Padilla*, a noncitizen may challenge a guilty plea that results in removal if counsel did not advise him of the removal risks of entering such a plea during the plea process.[9]

In *Chaidez v. United States*,[10] decided in February 2013, the Supreme Court held that *Padilla* does not retroactively apply to cases made final before *Padilla* was decided in 2010.[11] The Court's decision is surprising because the *Padilla* opinion and prior Sixth Amendment jurisprudence indicate that the *Padilla* decision would apply retroactively.[12] Yet, even a brief consideration of the practical consequences of retroactive application of *Padilla* helps to elucidate the Court's decision. The Supreme Court engaged in judicial revision to avert a quagmire in government whereby a consequent flood of litigation would have swamped already heavily burdened courts and further depleted public coffers.[13] Since relevant Sixth Amendment jurisprudence provided scant support for the Court's decision,[14] the majority defended its opinion by elevating a mere rhetorical counterargument to a substan-

4. *See Padilla*, 559 U.S. at 364–65 (describing removal as a "practically inevitable" result upon conviction of certain crimes).

5. *See, e.g.*, United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); *Padilla*, 559 U.S. 356. In *Padilla*, the Court considered it particularly relevant that following IIRIRA, deportation would be "nearly an automatic result" for many crimes and thus counsel could more easily advise on questions of removal by consulting the relevant statue. *See Padilla*, 559 U.S. at 366.

6. 559 U.S. 356 (2010).

7. *Id.* at 360.

8. *See id.* at 374. The Supreme Court declined to distinguish "direct" and "collateral" consequences of a guilty plea in the context of removal. *See id.* at 365.

9. *See id.* at 365 (defining the scope of constitutionally "reasonable professional assistance" to require affirmative statements about the consequences of a guilty plea for deportation (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

10. 133 S. Ct. 1103.

11. *Id.* at 1113.

12. *See generally*, *Padilla*, 559 U.S. 356; INS v. St. Cyr, 533 U.S. 289 (2001); Lewis v. Johnson, 359 F.3d 646 (3d Cir. 2004); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011).

13. *See infra* Part III.B.

14. *See infra* Part III.A.

tive holding.[15] Hence, the Court made the right decision but for the wrong (purported) reasons.

II. Background

In 1977, Roselva Chaidez, a native of Mexico, became a lawful permanent resident in the United States.[16] She was indicted for mail fraud in 2003.[17] Following the advice of counsel, Ms. Chaidez pled guilty and received a sentence of four years' probation.[18] Five years later, the government initiated removal proceedings against her after she revealed her guilty plea in an application for naturalization.[19] Government officials sought her removal because her criminal conviction rendered her removable from the United States as an aggravated felon under immigration law.[20] In January 2010, Ms. Chaidez filed a motion for a writ of *coram nobis*,[21] arguing that her counsel was constitutionally deficient because she was not informed that a guilty plea could result in removal.[22] While her motion was pending before the district court, the Supreme Court decided *Padilla*.[23]

A. *The District Court Applied Padilla Retroactively By Adopting Strickland*

As a result of the Supreme Court's decision in *Padilla*, the district court needed to resolve the issue of whether the case holding would apply retroactively to Ms. Chaidez's motion.[24] Courts utilize a *Teague* analysis to determine the retroactivity of criminal procedure laws.[25] Specifically, 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."[26] The district court held that *Padilla* "did not announce a new rule for *Teague* purposes" and thus its precedent controlled.[27] The district court reasoned that *Padilla* was merely an ordinary application of *Strickland v. Washington*,[28] where the

15. *See The Supreme Court, 2012 Term—Leading Cases:* Chaidez v. United States, 127 Harv. L. Rev. 238, 245–47 (2013) [hereinafter *The Supreme Court, 2012 Term:* Chaidez v. United States]

16. Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011).

17. *Id.*

18. *Id.*

19. *Id. See* Form N-400: *Application for Naturalization*, Dep't of Homeland Sec., U.S. Citizenship & Immig. Servs., *available at* http://www.uscis.gov/sites/default/files/files/form/n-400.pdf.

20. *See Chaidez*, 655 F.3d at 686. *See also* 8 U.S.C. § 1101(a)(43)(M)(i) (2013).

21. A writ of *coram nobis* provides a means to collaterally attack the criminal conviction of a person who is not "in custody" and therefore cannot seek relief under a writ of *habeas corpus*. *See* Chaidez v. United States, 133 S. Ct. 1103, 1106 (2013).

22. *Chaidez*, 655 F.3d at 686.

23. *Id.*

24. United States v. Chaidez, 730 F. Supp. 2d 896 (N.D. Ill. 2010).

25. *See Chaidez*, 655 F.3d at 688 (citing Teague v. Lane, 489 U.S. 288, 301 (1989)).

26. *Id.*; *see* Whorton v. Bockting, 549 U.S. 406, 416 (2007).

27. *Chaidez*, 730 F. Supp. 2d at 904 (cited in Chaidez v. United States, 133 S. Ct. 1103, 1106 (2013)).

28. *Id.* Under *Strickland*, the Court engages in a two-pronged analysis. First, the Court considers whether counsel's representation "fell below an objective standard of

Supreme Court held that counsel failed to satisfy reasonable professional standards by failing to present character and emotional evidence at a sentencing hearing, and thus was constitutionally deficient.[29] On the facts, the judge found counsel to be deficient, causing prejudice.[30] Accordingly, the district court granted Ms. Chaidez's petition, vacating her conviction.[31]

B. *The Seventh Circuit's Reversal On Precedential Disagreement Grounds*

On appeal, the Seventh Circuit Court of Appeals reversed in a split panel.[32] Judge Flaum, joined by Judge Bauer, determined the "sole issue" to be whether *Padilla* established a new constitutional rule of criminal procedure.[33] *Teague* dictates that new rules typically do not apply retroactively.[34] And a rule is new if it was not "dictated by precedent existing at the time the defendant's conviction became final."[35] Whether *Padilla* was a new rule depends on whether its decision was "susceptible to debate among reasonable minds."[36] Thus the pertinent inquiry is "whether a . . . court considering [Chaidez's] claim at the time [her] conviction became final – pre-*Padilla* – would have felt compelled by existing precedent to conclude that [*Padilla*] was required by the Constitution."[37] To support its decision, the Seventh Circuit panel relied on the lack of unanimity in the *Padilla* opinion,[38] and the consensus among lower courts that "collateral" issues were *not* subject to Sixth Amendment protections under the right to counsel.[39]

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reasonableness." Strickland v. United States, 466 U.S. 668, 688 (1984). Second, the Court considers whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

29. Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

30. *Chaidez*, 655 F.3d at 686.

31. *Id.*

32. *Id.* at 694.

33. *Id.* at 688.

34. *Id.* ("[A] new rule applies retroactively on collateral review if (1) it is substantive or (2) it is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.'" (citing Whorton v. Bockting, 549 U.S. 406, 416 (2007)). Chaidez did not allege that either of these *Teague* exceptions applied to her petition. *Id.*

35. Teague v. Lane, 489 U.S. 288, 301 (1989) (emphasis omitted).

36. Butler v. McKellar, 494 U.S. 407, 415 (1990) (cited in *Chaidez*, 655 F.3d at 688).

37. *Chaidez*, 655 F.3d at 689 (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)) (internal quotation marks omitted).

38. *Chaidez*, 655 F.3d at 689 (citing Beard v. Banks, 542 U.S. 406, 414 (2004) for the proposition that a lack of unanimity among Justices suggests that a case announces a new rule). In *Padilla*, Justices Kennedy, Ginsburg, Breyer and Sotomayor joined in a plurality opinion while Justices Alito and Roberts delivered a concurring opinion; Justices Scalia and Thomas dissented. Padilla v. Kentucky, 559 U.S. 356, 359 (2010).

39. *Chaidez*, 655 F.3d at 689 (citing Butler v. McKellar, 494 U.S. 407, 415 (1990) for the proposition that differing positions among lower courts suggests that a case announces a new rule); *Padilla*, 559 U.S. at 375–76 (Alito, J., concurring in judgment) ("Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction," not collateral consequences of conviction, such as deportation).

And yet, the panel recognized that applying "*Strickland* to unique facts generally will not produce a new rule."[40] The court distinguished *Padilla* as a "rare exception" to the proposition in *Williams v. West* that applications of new facts to an old rule typically does not create a new rule.[41] The court construed *Padilla* as "sufficiently novel to qualify as a new rule."[42] Moreover, the court relied on language in *Padilla* requiring counsel to "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences" when "the law is not succinct and straightforward."[43] When the consequences of a guilty plea are "truly clear," however, counsel must "give correct advice."[44] The court found this language to be so "nuanced" that it could not have been dictated by existing precedent.[45] As a result, the court held that *Padilla* was a new rule under the *Teague* retroactivity analysis and remanded the case.[46] Judge Williams dissented, arguing that professional norms mandated counsel to advise on potential risks of removal, while noting that the *Padilla* court explicitly rejected the commonly accepted distinction between direct and collateral consequences.[47]

C. *The Supreme Court Affirmed the Appeals Court*

The Supreme Court granted certiorari and affirmed the Seventh Circuit's decision.[48] Writing for the Court, Justice Kagan began with the proposition that "apply[ing] a general standard to the kind of factual circumstances it was meant to address" rarely will result in a new rule under *Teague*.[49] For a rule of criminal procedure to be new and thus retroactive for *Teague* purposes, it must be novel.[50] A rule is novel—and thus new under *Teague*—if it was not "apparent to all reasonable jurists" before establishment.[51]

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40. *Chaidez*, 655 F.3d at 692. *See also* Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in the judgment) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.").

41. *Chaidez*, 655 F.3d at 692 ("'Where the beginning point is a rule of . . . general application, . . . it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.'") (quoting *Wright*, 505 U.S. at 309 (Kennedy, J., concurring in the judgment)).

42. *Chaidez*, 655 at 693.

43. *Padilla*, 559 U.S. at 369 (cited in *Chaidez*, 655 F.3d at 693).

44. *Id.*

45. *Chaidez*, 655 F.3d at 693 (citing *Padilla*, 559 U.S. at 369).

46. *Id.* at 694.

47. *Id.* at 694, 697 (Williams, J., dissenting).

48. Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013).

49. *Id.* at 1107. *See also* Wright v. West, 505 U.S. 277, 309 (1992); Williams v. Taylor, 529 U.S. 362, 391 (2001).

50. *Chaidez*, 133 S. Ct. at 1107 ("[G]arden-variety applications of the test in *Strickland* . . . for assessing claims of ineffective assistance of counsel do not produce new rules."); Teague v. Lane, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.").

51. *Chaidez*, 133 S. Ct. at 1107 (citing Lambrix v. Singletary, 520 U.S. 518, 527 (1997)).

Instead of relying on language in *Padilla* linking counsel's duty to advise with the clarity of immigration law, as the Seventh Circuit opined,[52] the majority found novelty in the threshold question of whether removal was a collateral issue outside the scope of the Sixth Amendment.[53] *Padilla* decided this preliminary question of scope, an issue never before decided,[54] holding that collateral removal claims satisfied Sixth Amendment requirements.[55] Only afterwards did the Court engage in a *Strickland* analysis on the merits to determine whether counsel was constitutionally deficient.[56]

The majority further argued that *Padilla* was a new rule under *Teague* because no Supreme Court precedent "dictated" the result.[57] Like the Seventh Circuit, the Court considered it significant that before *Padilla* the vast majority of lower courts did not extend Sixth Amendment protections to require that counsel inform clients of a guilty plea's collateral consequences, including removal.[58] Before *Padilla*, only two state courts held that the Sixth Amendment's right to counsel extended to advice about a guilty plea's collateral consequences.[59] Hence, the majority upheld the ruling of the Seventh Circuit, holding *Padilla* to be a new rule under *Teague*.[60] As a result, *Chaidez*, and other cases final on direct review before *Padilla*, may not benefit from the *Padilla* Court's ruling.[61]

Believing that the Sixth Amendment ensures the right to counsel only for direct consequences of criminal proceedings, Justice Thomas wrote a concurring opinion.[62] He rejected the Court's *Padilla* holding,

52. *Chaidez*, 655 F.3d at 693.

53. *Chaidez*, 133 S. Ct. at 1108 ("[P]rior to asking *how* the *Strickland* test applied [(did this attorney act unreasonably?)], *Padilla* asked *whether* the *Strickland* test applied [(should we even evaluate if this attorney acted unreasonably?)].").

54. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (cited in *Chaidez*, 133 S. Ct. at 1112).

55. *Padilla*, 559 at 365 ("We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland* . . . . Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.") (citations omitted). *See also Chaidez*, 133 S. Ct. at 1112 ("Even in *Padilla* we did not eschew the direct-collateral divide across the board.").

56. *See Chaidez*, 133 S. Ct at 1108. Under *Strickland*, "[a] defendant claiming ineffective assistance of counsel must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' and (2) that counsel's deficient performance prejudiced the defendant." Roe v. Flores-Ortega, 528 U.S. 470, 476–77 (2000) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

57. *See Chaidez*, 133 S. Ct. at 1110 (citing Teague v. Lane, 489 U.S. 288, 301 (1989)). In Hill v. Lockhart, 474 U.S. 52 (1985), the Court explicitly left open whether advice of counsel concerning collateral consequences must satisfy the Sixth Amendment. *See Chaidez*, 133 S. Ct. at 1108.

58. *Chaidez*, 133 S. Ct. at 1109.

59. *Id.*

60. *Id.* at 1113. *See also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706 (2002) (recognizing the exclusion of advice about collateral consequences from the Sixth Amendment's scope as one of "the most widely recognized rules of American law").

61. *See Chaidez*, 133 S. Ct. at 1113.

62. *Id.*

namely that the Sixth Amendment mandates counsel to provide advice regarding collateral consequences of a guilty plea, including removal.[63] Considering *Padilla* to have been wrongly decided, Justice Thomas concluded that the entire *Teague* analysis was unnecessary.[64] Accordingly, he concurred only in the judgment.[65] Justice Sotomayor, joined by Justice Ginsburg, dissented.[66] The dissent echoed the district court opinion, arguing that *Padilla* was not a new rule but rather a "garden-variety application[ ] of . . . *Strickland* . . . ."[67] To establish ineffective assistance of counsel under *Strickland*, a defendant first must demonstrate that counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms."[68] And for over a decade, professional norms have coalesced around the practice of informing clients about the removal risks of a guilty plea.[69] As a result, *Padilla* was not novel, and its edict did not create a new law because it was entirely consistent with professional standards *at the time the case was decided*.[70]

Additionally, the dissent closely read a line of recent lower court cases holding that affirmative misstatements about the removal risks of a guilty plea constituted deficient performance under *Strickland*.[71] The Supreme Court adopted this view in *INS v. St. Cyr*.[72] The *St. Cyr* Court emphasized the ABA's ethical standards for criminal defense attorneys, including remaining apprised about removal risks, as a "basic rule of professional conduct."[73] According to the dissent, the Court's general approval of ABA ethical standards regarding affirmative misstatements, coupled with lower court decisions, affirmed in *St. Cyr*, holding that affirmative misstatements about removal risks were covered by the Sixth Amendment, "foreshadowed" *Padilla*, thus making its decision less than novel.[74] According to Justice Sotomayor, *Padilla* was not a discrete shift

63. *Id.* at 1114 ("[T]here is no basis in text or in principle to expand the reach of this guarantee to guidance concerning the collateral consequences of a guilty plea.") (citations omitted) (internal quotation marks omitted).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (internal quotation marks omitted).

68. Strickland v. Washington, 466 U.S. 668, 688 (1984).

69. *Chaidez*, 133 S. Ct. at 1116–17, n.3 (citing 3 ABA Protect on Standards for Criminal Justice, Standards Relating to Pleas of Guilty § 3.2(b), Commentary, p.71 (App. Draft 1968)); INS v. St. Cyr, 533 U.S. 289, 323, n.50 (2001) ("competent defense counsel" would inform his client about the deportation consequences of a guilty plea).

70. *Chaidez*, 133 S. Ct. at 1114.

71. *Id.* at 1118 (citing United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002); United States v. Kwan, 407 F.3d 1005, 1015 (9th Cir. 2005)).

72. 533 U.S. 289 (2001).

73. United States v. Kwan, 407 F.3d 1005, 1016 (9th Cir. 2005) (interpreting INS v. St. Cyr, 533 U.S. 289 (2001)).

74. *Chaidez*, 133 S. Ct. at 1119. The majority distinguishes between affirmative misstatements and omissions regarding collateral consequences of a guilty plea. *Id.* at 1113. The dissent notes, however, that a similar argument was rejected in *Padilla* and that such a categorical distinction is inconsistent with *Strickland's* requirement of a case-by-case assessment of counsel's performance. *Id.* at 1119–20.

in Sixth Amendment right to counsel jurisprudence, as the majority argued.[75]

Finally, the dissent criticized the majority opinion as "paradoxical."[76] The majority emphasized that *Padilla* established that the collateral consequences of a guilty plea, including removal, were covered by the Sixth Amendment's right to counsel.[77] Justice Stevens in *Padilla*, however, declined to distinguish "direct" and "collateral" consequences,[78] eschewing the distinction as "irrelevant" for the purposes of determining the duty of counsel to advise upon removal risks during the plea process.[79]

III. Discussion

A. Strickland *Has Never Announced a "New Rule" Under* Teague

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."[80] The *Strickland* Court established a two-part standard to evaluate ineffective assistance of counsel claims across the "variety of circumstances" that may arise.[81] According to this "now-familiar test[, a] defendant claiming ineffective assistance of counsel must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant."[82] In the first prong, the Court declined to adopt "detailed guidelines for representation," instead favoring a more flexible reasonableness standard.[83] The Court explained: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[84] Counsel has "duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."[85] Accordingly, *Strickland* applies to all ineffective assistance claims, including those arising during the plea process.[86]

In *Teague v. Lane*,[87] the Court announced that "[r]etroactivity is . . . a threshold question, for, once a new rule is applied to the defendant in

75. *Id.* at 1120.
76. *Id.*
77. *Id.* at 1108.
78. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.").
79. *Chaidez*, 133 S. Ct. at 1117.
80. Strickland v. Washington, 466 U.S 668, 684 (1984).
81. *Id.* at 689.
82. Roe v. Flores-Ortega, 528 U.S. 470, 476–77 (2000) (quoting *Strickland*, 466 U.S. at 688) (internal quotation marks omitted).
83. *Strickland*, 466 U.S. at 689. ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."). *Id.* at 688–89.
84. *Id.* at 688.
85. *Id.*
86. *See* Hill v. Lockhart, 474 U.S. 52, 58 (1985).
87. 489 U.S. 288 (1989).

the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[88] In general, a rule is "new" when it "breaks new ground or imposes a new obligation on the States or the Federal Government,"[89] or, alternatively, when it was not "dictated by precedent existing at the time the defendant's conviction became final."[90] A rule is "old" 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."[91] Both "old" and "new" rules apply on direct review,[92] but only "old" rules typically apply retroactively in cases on collateral review.[93] Post-*Teague* decisions confirmed that application of a general rule does not typically create a "new" rule.[94] Indeed, Justice Kennedy later recalled "[w]here the beginning point is a rule of . . . general application, 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."[95]

It is unprecedented for the Court to hold that a *Strickland* analysis created a new rule under *Teague*.[96] In *Roe v. Flores-Ortega*,[97] for instance, a state prisoner sought *habeas* relief, claiming ineffective assistance of counsel because his attorney failed to apprise him of the right to appeal.[98] The Court considered the argument that imposing such a

88. *Id.* at 300.

89. *Id.* at 301.

90. *Id.*

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

92. *See Teague*, 489 U.S. at 303; *see also* Chaidez v. United States, 133 S. Ct. 1103 (2013). "*Teague* stated two exceptions: [W]atershed rules of criminal procedure and rules placing conduct beyond the power of the [government] to proscribe apply on collateral review, even if novel." *Id.* at 1107, n.3 (internal quotation marks omitted). Chaidez, however, did not allege that either exception was relevant to her case. *Id.*

93. *See Chang Hong*, 671 F.3d at 1153. In *Teague*, the Court provided an example of a decision that did not announce a new rule but instead was dictated by existing precedent: *Francis v. Franklin*, 471 U.S. 307 (1985). *Teague*, 489 U.S. at 307. *Francis* involved an application of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which the Court held that due process is violated if jury instructions "had the effect of relieving the State of the burden of proof" regarding *mens rea*. *Teague*, 489 U.S. at 521. The majority in *Francis* rejected the dissent's distinction between mandatory and permissive presumptions of *mens rea* in the two cases as insufficient to qualify the general "rule of *Sandstrom* and the wellspring due process principle from which it was drawn." *Francis*, 471 U.S. at 326.

94. *See* Stringer v. Black, 503 U.S. 222, 229 (1992) (holding that despite "differences in the use of aggravating factors under the Mississippi capital sentencing system and their use in the Georgia system in *Godfrey* [*v. Georgia*, 446 U.S. 420 (1980)]," *Clemons* [*v. Mississippi*, 494 U.S. 738 (1989)] did not establish a "new rule" because "those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final.").

95. Wright v. West, 505 U.S. 277, 309 (1992) (opinion concurring in the judgment).

96. *See Chaidez*, 133 S. Ct at 1114–15 ("[The Supreme Court] ha[s] never found that an application of *Strickland* resulted in a new rule.") (citation omitted).

97. 528 U.S. 470 (2000).

98. *Id.* at 474.

duty on defense counsel was barred by *Teague*.[99] However, the Court rejected this argument, holding that counsel has a duty to consult with a defendant about the possibility of appeal when there is reason to believe either "(1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."[100] The Court remanded the case with instructions to apply "the circumstance-specific reasonableness inquiry required by *Strickland* . . . ."[101]

In the context of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), the Court has similarly reinforced that application of *Strickland* to new circumstances does not create a "new rule." Section 2254(d) prohibits *habeas* relief unless a state court decision involved an "unreasonable application of clearly established Federal law."[102] In *Wiggins v. Smith*,[103] for instance, the Court considered whether another case, *Williams v. Taylor*,[104] announced a "new rule" from its application of *Strickland*.[105] *Williams* involved counsel's failure to present mitigating evidence at sentencing,[106] whereas *Strickland* involved counsel's failure to present character and emotional evidence.[107] The *Wiggins* Court announced that it "made no new law in resolving [Williams'] ineffectiveness claim," as its decision merely applied *Strickland* to a new set of facts.[108]

B. *Prudential Concerns Motivated the* Chaidez *Court*

It is particularly surprising that the *Chaidez* Court declined to apply retroactively the decision in *Padilla*. Language in the *Padilla* opinion strongly suggests that it would apply retroactively. In fact, the Court dismissed concerns that *Padilla* would spawn a "floodgate" of new litigation.[109] And the Court had never held that a *Strickland* application created a new rule under *Teague*.[110] *Padilla* appeared to be a

99. *Id.* at 475 ("The judge concluded, however, that *Stearns* announced a new rule that could not be applied retroactively on collateral review to respondent's case. See *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989). Thus, the Magistrate Judge recommended that the habeas petition be denied.").

100. *Id.* at 480.

101. *Id.* at 478. On remand, the Ninth Circuit applied *Strickland* and granted *habeas* relief. Flores-Ortega v. Roe, 39 F.App'x 604 (9th Cir. 2002).

102. 28 U.S.C. § 22254(d)(1) (1996). *See also* Schwab v. Crosby, 451 F.3d 1308, 1323 (11th Cir. 2006) ("The content of the § 2254(d) unreasonable application test is drawn in large part from the *Teague v. Lane* nonretroactivity doctrine and the decisions explicating it.") (citation omitted).

103. 539 U.S. 510 (2003).

104. 529 U.S. 362 (2000).

105. *Wiggins*, 539 U.S. at 512.

106. *Williams*, 529 U.S. at 372.

107. Strickland v. Washington, 466 U.S. 668, 673 (1984).

108. *Wiggins*, 539 U.S. at 542 (internal quotation marks omitted). *See also* Rompilla v. Beard, 545 U.S. 374 (2005).

109. Padilla v. Kentucky, 559 U.S. 356, 372 (2010) ("It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains.").

110. *See* Chaidez v. United States, 133 S. Ct. 1103, 1114–15 (2013) ("[The Supreme Court] ha[s] never found that an application of *Strickland* resulted in a new rule.").

straightforward application of *Strickland*, reflecting gradual changes in professional standards.[111]

Why did the Court engage in apparent judicial "revision"?[112] First, practical concerns favor prospectively limiting *Padilla*. Petitions for a writ of *coram nobis* are not limited by a statute of limitations because such relief emerges from equitable doctrine.[113] Consequently, there is a potential for a "floodgate" of litigation over collateral deportation issues that could span decades. The principal check on the availability of the writ of *coram nobis* is laches.[114] Since *Padilla* is a recent decision, it is doubtful that claims like *Chaidez* would be barred due to unreasonable delay—at least for the near future.[115] Actual records, if ever kept, may no longer be available while potential witnesses are more likely to have forgotten relevant details. Even if a "floodgate" of litigation did not materialize, cases that did arise would be exceedingly difficult for courts to decide given the time since final judgment.[116]

Next, retroactive application of *Padilla* would be burdensome for the US government. Such a decision would have created a logistical ordeal, involving an array of federal agencies, including the US Department of Homeland Security,[117] Federal Bureau of Investigation,[118] and the Department of Justice.[119] Given the recent government shutdown in 2013 and dwindling budgets, it is doubtful that federal agencies could actually accommodate the added requirements that retroactive application of *Padilla* would impose.

Finally, retroactive application of *Padilla* would be particularly unfair to attorneys. Before *Padilla*, nearly all state and lower federal courts held, pursuant to the Sixth Amendment, that attorneys were not required to provide evidence of collateral consequences of plea agreements, including removal.[120] Although the ABA considered it "good practice" for attorneys to inform clients of the immigration conse-

111. *See id.* at 1114 ("*Strickland*'s reasonableness prong therefore takes its content from the standards by which lawyers judge their professional obligations, and those standards are subject to change.") (citations omitted). *See also The Supreme Court, 2012 Term:* Chaidez v. United States, *supra* note 15, at 245–47.

112. *See Chaidez*, 133 S. Ct. at 1117.

113. *See* Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011). The government initiated deportation proceedings five years after her guilty plea, after which she filed a petition for a writ of *coram nobis*. *See also id.* at 687 ("The [w]rit [of *coram nobis*] is an extraordinary remedy.").

114. *See, e.g.*, United States v. Riedl, 496 F.3d 1003 (9th Cir. 2007); Craven v. United States, 26 F. App'x 417 (6th Cir. 2001).

115. *See* Blanton v. United States, 94 F.3d 227, 235 (6th Cir. 1996).

116. It is perhaps noteworthy that Justice Kagan, who wrote the majority opinion in *Chaidez*, was the Solicitor General of the United States.

117. *See* Homeland Security Act of 2002, 6 U.S.C. § 101 (2006).

118. *See, e.g., Policy Manual: Vol. 12, Part B, Ch. 2*, U.S. Citizenship & Immig. Serv. (Oct. 28, 2014), http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter2.html (describing the role of the FBI in criminal record background checks for certain immigration purposes).

119. *See, e.g.*, 8 U.S.C. § 1226 (2006).

120. *See* Chaidez v. United States, 133 S. Ct. 1103, 1109 (2013).

quences of a plea agreement,[121] such recommendations were not the law.[122] Although the *St. Cyr* Court explicitly endorsed such ABA recommendations, it did not actually change the black-letter law, which limited the duty of attorneys to inform clients of the "direct" consequences of a guilty plea.[123] Although informing clients about removal may have been wise, it was not required.[124] Before *Padilla*, counsel had a strong incentive to remain silent about collateral consequences because affirmative misstatements could risk *Strickland* liability.[125] Hence, extending *Padilla* retroactively would force criminal defense attorneys to appear in court to answer for actions in accord with the law *at that time*.

IV. Conclusion

At first, the *Chaidez* decision is perplexing. Language in the *Padilla* opinion indicates that the Court anticipated its retroactive application.[126] To justify this about face, the Court in *Chaidez* cites the novelty of a distinction that it previously regarded as irrelevant in *Padilla*.[127] Indeed, the dissent in *Chaidez* is being less than bombastic when describing the majority's reasoning as "paradoxical."[128] Although the majority's reasoning is somewhat tenuous, misconstruing the *Padilla* opinion's rhetorical structure,[129] its motivations are far less clouded. The *Chaidez* Court reaches a sensible (although unsupported) decision, balancing the desire to address the harsh consequences of removal against the fear of judicial backlash from reopening cases that would be particularly difficult to adjudicate. The end seems to have justified the means.

121. *See id.* at 1117 (citing 3 ABA Protect on Standards for Criminal Justice, Standards Relating to Pleas of Guilty § 3.2(b), Commentary, p.71 (App. Draft 1968)).

122. *See* Padilla v. Kentucky, 559 U.S. 356, 364–74 (2010).

123. *See id.*

124. *See id.*

125. *See The Supreme Court, 2012 Term:* Chaidez v. United States, *supra* note 15, at 245–47; Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 Iowa L. Rev. 119, 123–24 (2009).

126. *Padilla*, 559 U.S. at 369–71.

127. Chaidez v. United States, 133 S. Ct. 1103, 1108 (2013). *See also The Supreme Court, 2012 Term:* Chaidez v. United States, *supra* note 15, at 245–47.

128. *See Chaidez*, 133 S. Ct. at 1120.

129. *See The Supreme Court, 2012 Term:* Chaidez v. United States, *supra* note 15, at 245–47.