NOTES

PADILLA RETROACTIVITY ON STATE LAW GROUNDS

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INTRODUCTION 1652
I. CRIMINAL IMMIGRATION 1654
A. *Historical Development* 1654
B. *Current Criminal Immigration Law* 1656
II. CASE LAW CONTEXT 1659
A. *The Sixth Amendment Right to Effective Assistance of Counsel* 1659
B. *Effective Assistance of Counsel in the Immigration Context* 1660
C. *Retroactivity of* Padilla *Claims* 1662
1. *Commonwealth v. Clarke*: *Padilla* Applies Retroactively in Massachusetts 1664
2. *Chaidez v. United States*: *Padilla* is Not Retroactive Under Federal Law 1665
3. *Danforth v. Minnesota*: States May Provide Retroactive Remedies for Constitutional Violations Under State Law 1665
III. *PADILLA* RETROACTIVITY IN STATE COURTS FOLLOWING *CHAIDEZ* 1666
A. State v. Garcia*:* Padilla *is Not Retroactive in South Dakota* 1666
B. Commonwealth v. Sylvain*:* Padilla *Remains Retroactive in Massachusetts* 1670
C. Miller v. State*:* Padilla *is No Longer Retroactive in Maryland* 1672
D. State v. Ramirez*:* Padilla *is Retroactive in New Mexico* 1674
E. People v. Baret*:* Padilla *is Not Retroactive in New York* 1675
IV. *THIERSAINT V. COMMISSIONER*: CONNECTICUT'S PENDING *PADILLA* RETROACTIVITY CASE 1679

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V. STATES SHOULD ABANDON *TEAGUE V. LANE* AND APPLY *PADILLA* RETROACTIVELY 1681
A. *Retroactive Application of* Padilla *Will Prevent Deportations Resulting From Unconstitutional Convictions* 1681
B. *The Federal Standard for Retroactivity of "New" Constitutional Rules is Incredibly Narrow and Not Binding on States* 1683
C. *Retroactivity on the State Level Will Provide Needed Relief to Noncitizens Convicted of Minor Crimes* 1685
CONCLUSION 1687

INTRODUCTION

Criminal convictions often have devastating immigration consequences for noncitizens in the United States.[1] Unwitting noncitizen defendants who plead guilty to deportable offenses, many of which carry only minimal criminal punishments, face the immigration consequence of deportation with no opportunity to seek relief from removal, such as through cancellation of removal, asylum withholding of removal, or waiver of inadmissibility grounds.[2] However, Congress's progressive steps to impose harsher and harsher consequences on noncitizens convicted of crimes have not gone unnoticed; attorney practices, professional standards, and even laws in some states have evolved to offer basic protections to noncitizen defendants. For example, the American Bar Association recommends, and many states' laws require, that criminal trial judges warn defendants about possible immigration consequences of guilty pleas.[3] Nevertheless, federal law did not provide for such protections for noncitizen defendants until the Supreme Court's 2010

[1] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 360-64 (describing the development of immigration law and finding that "removal is practically inevitable" for a noncitizen found guilty of removable offenses); *see also* Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment,* 14 SCHOLAR 767, 770-73 (2012) (detailing the broad application of the criminal grounds of removability).

[2] Such was the case in *Chaidez v. United States*, 133 S. Ct. 1103, 1106 (2013),where the noncitizen defendant pled guilty to mail fraud, received four years' probation and an order to pay restitution; as a result, he was subject to removal and ineligible for relief.

[3] *See, e.g.*, MASS. GEN. LAWS. ch. 278, § 29D (2004) (requiring judges to warn criminal defendants of potential immigration consequences before accepting defendants' admissions of sufficient facts or pleas of guilty or *nolo contendere*); ABA STANDARDS FOR CRIMINAL JUSTICE 14-1.4 (3d ed. 1999) (advising judges to warn defendants of possible collateral consequences of convictions, including immigration consequences, before accepting guilty or *nolo contendere* pleas).

decision in *Padilla v. Kentucky*.[4] *Padilla* declared that the Sixth Amendment right to effective assistance of counsel encompasses a noncitizen defendant's right to be warned by his or her criminal defense attorney of the potential immigration consequences of accepting a guilty plea.[5]

The Supreme Court did not articulate a comprehensive framework for applying *Padilla*, and lower courts reached contradicting conclusions about its application in various situations, including retroactivity.[6] The Massachusetts Supreme Judicial Court adopted the minority view, applying *Padilla* retroactively to convictions that were final before the Supreme Court's decision.[7] The majority of courts, however, ruled that *Padilla* does not apply retroactively.[8] The Supreme Court ultimately sided with that majority, holding in *Chaidez v. United States*[9] that *Padilla* does not apply retroactively.[10] The Court came to this conclusion because of *Teague v. Lane,*[11] which mandates that "new" constitutional rules, or rules that were not "dictated by precedent" when announced, will only apply retroactively when one of two narrow exceptions apply.[12] The Court in *Chaidez* mandated prospective application of *Padilla* in federal courts, holding that *Padilla* announced a new rule for which there was no exception.[13]

Despite the Supreme Court's holding, the question of *Padilla*'s retroactivity is not definitively settled, as states are able to provide broader remedies for constitutional violations than federal law requires.[14] Since *Chaidez*, at least six state supreme courts have granted certiorari in cases that center on *Padilla*'s retroactivity as a matter of state law. In September 2013, Massachusetts

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[4] 559 U.S. 356 (2010).

[5] *Id.* at 374.

[6] Allison C. Callaghan, Comment, Padilla v. Kentucky*: A Case for Retroactivity*, 46 U.C. DAVIS L. REV. 701, 703 (2012) (discussing the problems lower courts have had in applying *Padilla*).

[7] *See* Commonwealth v. Clarke, 949 N.E.2d 892, 907 (Mass. 2011) (holding that *Padilla* "is to be retroactively applied to convictions obtained on or after April 1, 1997").

[8] Chaidez v. United States, 133 S. Ct. 1103, 1107 n.2 (2013).

[9] *Id.* at 1103.

[10] *Id.* at 1103.

[11] 489 U.S. 288 (1989).

[12] *Id.* at 301, 311. The two exceptions allowing for retroactive application are when a rule declares "'certain kinds of primary, private individual conduct [to be] beyond the power of the criminal law-making authority to proscribe,'" and when a rule recognizes a safeguard that is "'implicit in the concept of ordered liberty.'" *Id.* at 311 (quoting Mackey v. United States*,* 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

[13] *Chaidez*, 133 S. Ct. at 1110 (2013) (finding that *Padilla* imposed a "new obligation" by "breaking new ground").

[14] Danforth v. Minnesota, 552 U.S. 264, 290-91 (2008) (quoting American Trucking Assns. v. Smith, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting)) (stating that the determination of the "availability or unavailability of remedies" is a "'mixed question of state and federal law'").

became the first state to provide for a greater remedy under *Padilla* than federal law requires; its Supreme Judicial Court opted to continue applying *Padilla* retroactively to state convictions.[15] Shortly thereafter, New Mexico also applied *Padilla* retroactively.[16] The highest courts in South Dakota, Maryland, and New York reached the opposite conclusion. The South Dakota Supreme Court applied its own state retroactivity test to decide *Padilla* would not be applied retroactively, while the Maryland Court of Appeals declared that it was bound by *Chaidez*, and similarly could not apply *Padilla* retroactively.[17] The New York Court of Appeals held that under both the federal and state retroactivity tests, *Padilla* does not apply retroactively.[18] A similar appeal remains pending in Connecticut.[19]

This Note will argue that state supreme courts should apply *Padilla* retroactively. Part I provides a brief overview of the immigration consequences of criminal convictions and the challenges of interpreting immigration law's treatment of criminal convictions. Part II reviews the case law context of *Padilla* claims, including the Sixth Amendment right to effective assistance, the retroactivity standards for newly announced constitutional rules, and the first decisions regarding the retroactivity of *Padilla* itself. Part III compares the first state law retroactivity rulings: Massachusetts's and New Mexico's holdings that *Padilla* applies retroactively, and South Dakota's, Maryland's and New York's rulings that it does not. Part IV reviews a *Padilla* retroactivity case now pending in Connecticut. Finally, Part V argues that all states should abandon the federal retroactivity framework and apply *Padilla* retroactively.

I. CRIMINAL IMMIGRATION

A. *Historical Development*

An understanding of how the immigration law treats criminal convictions is fundamental to appreciating why *Padilla* retroactivity is crucial. Federal law first provided for deportation of noncitizens with criminal convictions in 1917. The Immigration Act of 1917[20] generally required deportation of noncitizens convicted of crimes involving moral turpitude.[21] However, the Act also provided an important opportunity for relief for noncitizens facing deportation because of a crime involving moral turpitude by authorizing judges in criminal

[15] Commonwealth v. Sylvain, 995 N.E.2d 760, 770-01 (Mass. 2013).

[16] State v. Ramirez, No. 33,604, 2014 WL 2773025, at *1 (N.M. June 19, 2014).

[17] Miller v. State, 77 A.3d 1030 (Md. 2013); State v. Garcia, 834 N.W.2d 821 (S.D. 2013).

[18] People v. Baret, 2014 WL 2921420, at *26, *28-29 (N.Y. June 30, 2014).

[19] Thiersaint v. Warden, No. CV104003350S, 2012 WL 6786081 (Conn. Super. Ct. Dec. 7, 2012), *cert. granted sub nom.* Thiersaint v. Commissioner, No. SC19134, --- A.2d --- (Conn. 2013).

[20] Immigration Act of 1917, Pub. L. No. 301, § 19, 39 Stat. 889.

[21] *Id.* (highlighting criminal acts of noncitizens that warrant deportation).

proceedings to issue recommendations against deportation.[22] Although referred to as a "judicial recommendation against deportation," or JRAD, the criminal judge's recommendation was binding on immigration officials and prevented deportation.[23] Therefore, despite calling for deportation of criminal noncitizens, the 1917 Act did not create any "automatically deportable offense[s]," as "judges retained discretion to ameliorate unjust results on a case-by-case basis."[24]

In the decades that followed, Congress increasingly limited, and ultimately abolished, judges' authority to issue JRADs, while simultaneously expanding the criminal grounds for deportation. The Immigration and Nationality Act of 1952 ("INA") continued to authorize JRADs for most crimes but eliminated the option for all drug crimes.[25] The Anti-Drug Abuse Act of 1988 introduced the category of "aggravated felonies" to immigration law.[26] The Act amended the INA to require detention and deportation of all noncitizen aggravated felons, or those who had committed any of a defined set of crimes, consisting of murder and trafficking in specific drugs, firearms, and explosives (and attempts or conspiracies to commit these crimes).[27] Originally, JRADs were also available for noncitizens convicted of aggravated felonies.[28] However, the Immigration Act of 1990 did away with JRADs entirely and expanded the definition of "aggravated felony" to include crimes of violence and money laundering crimes.[29] The 1990 Act also prohibited the Attorney General from granting discretionary relief from deportation to aggravated felons who had served prison sentences of five or more years.[30] Thus, the 1990 Act required

[22] *Id.* at 889-90.

[23] Padilla v. Kentucky, 559 U.S. 356, 361-62 (2010).

[24] *Id.* at 362.

[25] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241(b), 66 Stat. 208 (authorizing judicial recommendations against deportation for crimes involving moral turpitude); *id.* at § 241(a)(11), 66 Stat. 206-07 (defining drug-related deportation grounds).

[26] The Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7342, 102 Stat. 4469; Diana R. Podgorny, Comment, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept,* 99 J. CRIM. L. & CRIMINOLOGY 287, 289 (2009).

[27] The Anti-Drug Abuse Act of 1988, §§ 7342-44 (providing guidelines on the detention and deportation of aliens with aggravated felony convictions).

[28] 8 U.S.C. § 1251(b) (1988) (stating that § 1251(a)(4), which mandates deportation of aliens with qualifying convictions, shall not apply to an alien for whom a sentencing court made a recommendation against deportation).

[29] Immigration Act of 1990, Pub. L. No. 101-649, §§ 501, 505, 104 Stat. 5048-50.

[30] *Id.* at § 511, 105 Stat. 5052 (amending the rule that the Attorney General could not provide discretionary relief to aggravated felons who served five or more years in prison); 8 U.S.C. § 1182(c) (1994) (repealed by the Illegal Immigration Reform and Immigrant Responsibility Act). The INA and the Immigration Act of 1917 both allowed the Attorney General the discretion to re-admit otherwise excludable permanent residents returning from a temporary stay abroad. Immigration and Nationality Act of 1952, § 212(c); Immigration

deportation for noncitizens convicted of a broad set of crimes and removed all avenues for discretionary relief.

The list of aggravated felonies, or crimes resulting in deportation without the opportunity to seek relief, has continued to grow. In 1994, the statutory definition of aggravated felony swelled to include seventeen subparts, including crimes such as theft, document fraud, and tax evasion.[31] Two years later, in 1996, Congress again expanded the list of aggravated felonies to include crimes relating to bribery, forgery, and obstruction of justice, among others.[32] That same year, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), prohibiting the Attorney General from providing discretionary relief to all noncitizens convicted of aggravated felonies, regardless of the length of sentence.[33] The immigration statutes governing criminal grounds of deportation and availability of relief from deportation have not been amended significantly since 1996.[34]

B. *Current Criminal Immigration Law*

Immigration laws have developed to impose severe immigration consequences for noncitizens with criminal convictions. However, statutes that outline these consequences often fail to provide comprehensive definitions of their terms. Federal immigration laws establish two general categories of crimes – crimes involving moral turpitude and aggravated felonies – but do not adequately define either.[35] There is general agreement, however, that

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Act of 1917, § 3. Various Board of Immigration Appeals and Federal Court decisions expanded the Attorney General's discretion to also allow for the cancellation of the deportation of permanent residents. *See generally* I.N.S. v. St. Cyr, 533 U.S. 289, 293-96 (2001) (quoting Silva, 16 I. & N. Dec. 26, 29 (Board of Immigration Appeals 1976)) (reviewing the development of § 212(c) relief and stating that it "was literally applicable only to exclusion proceedings, but it . . . has been interpreted by the Board of Immigration Appeals (BIA) to authorize any permanent resident alien with 'a lawful unrelinquished domicile of seven consecutive years' to apply for a discretionary waiver from deportation").

[31] Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103–416, 108 Stat. 4305 (codified at 8 U.S.C. § 1101(a)(43) (1994)).

[32] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1277-78.

[33] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (repealing the discretionary waiver of deportation for aliens convicted of certain crimes); *id.* at § 304(a)(3), 110 Stat. 3009-594 (excluding aliens who have been convicted of aggravated felonies from eligibility for cancellation of removal).

[34] Natalya Shatniy, Comment, *Economic Effects of Immigration: Avoiding Past Mistakes and Preparing for the Future*, 14 SCHOLAR 869, 876-81 (2012) (reviewing the history of major immigration reform in the United States).

[35] ROBERT JAMES MCWHIRTER, ABA, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 128, 130, 146 (2d ed. 2006); Meneses, *supra* note 1, at 779-81 (discussing the difficulties of defining aggravated felonies and crimes of moral

aggravated felony is a term of art, which encompasses crimes that are neither aggravated nor felonious.[36] *Conviction* is also a term of art in the immigration context. In addition to applying to actual guilty verdicts, the immigration definition of *conviction* includes *nolo contendere* pleas and admissions of sufficient facts when accompanied by "some form of punishment, penalty, or restraint" on the defendant.[37] Accordingly, expunged convictions carry the same immigration consequences as do convictions that are not expunged.[38] A defendant whose case is continued without a finding after he admits sufficient facts of a charge and completes probation also has been convicted for immigration purposes.[39] Moreover, because the federal immigration law does not easily apply to each state's distinct criminal code, courts must consider criminal statutes one at a time to decide whether they trigger immigration consequences.[40] This creates ambiguities that frustrate the efforts of criminal defense attorneys and sometimes results in different immigration consequences for similarly situated noncitizens.[41]

Despite the ambiguity of the immigration law's treatment of criminal convictions, the immigration consequences of criminal activity are severe. Generally speaking, a noncitizen – even a lawful permanent resident, or Green Card holder – who has been convicted of a crime involving moral turpitude or

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turpitude); *see also* Padilla v. Kentucky, 559 U.S. 356, 377-78 (2010) (Alito, J., concurring) (criticizing the majority for imposing a rule that requires criminal defense counsel to interpret complex immigration statutes).

[36] *See, e.g.*, United States v. Graham, 169 F.3d 787, 793 (ruling that a conviction of the New York misdemeanor of petit larceny triggers the aggravated felony provisions of the INA); *see also* Meneses, *supra* note 1, at 781 (describing the "[e]volving [d]efinition of '[a]ggravated [f]elony'"); Podgorny, *supra* note 26, at 294 ("Some scholars argue that under federal criminal law the term aggravated simply refers to a criminal activity made worse, or more severe, by violence, but the 1996 Acts categorize many offenses that do not involve violence, or any circumstances making them more severe, as aggravated felonies.").

[37] 8 U.S.C. § 1101(a)(48)(A) (2006).

[38] *See, e.g.*, Ramirez-Castro v. INS, 287 F.3d 1172, 1174 (9th Cir. 2002) ("[A]n expunged conviction qualifies as a conviction under the INA.").

[39] *See, e.g.*, De Vega v. Gonzalez, 503 F.3d 45, 49 (1st Cir. 2007) (affirming the Board of Immigration Appeals' determination that De Vega had been convicted for immigration purposes when she admitted sufficient facts for the crimes of larceny and false representations, the trial court continued her proceedings without a finding, and De Vega was ordered to pay restitution).

[40] *See* Meneses, *supra* note 1, at 799-801 (describing the difficulty that courts experience in applying the ambiguous definition of moral turpitude to various crimes).

[41] *See id.* at 797 ("Circuits debated whether DWI offenses constituted 'aggravated felonies' . . . for years until the matter was finally resolved in the negative by the Supreme Court [but] not . . . until many hundreds of lawful permanent residents and other aliens were deported . . . ." (footnote omitted)); Podgorny, *supra* note 26, at 306 (arguing that by applying a modified categorical approach to evaluating whether or not a crime is an aggravated felony, "[e]ven a single judge's evaluation of the record of conviction for different defendants can lead to different results").

an aggravated felony risks deportation,[42] refusal of admission to the United States after travel abroad,[43] and/or denial of an application for naturalization.[44] Moreover, such criminal convictions make noncitizens ineligible for most forms of defensive relief, such as cancellation of removal,[45] asylum,[46] withholding of removal,[47] and waiver of inadmissibility grounds.[48]

The immigration consequences of a conviction often dwarf the criminal punishment resulting from that conviction despite the fact that the Supreme Court has long maintained that deportation is not a punishment.[49] For example, in *Chaidez*, the petitioner contested her prior conviction for mail fraud, for which she was sentenced to four years of probation and ordered to pay restitution.[50] This disposition meant that Chaidez, a 20-year lawful permanent resident of the United States, was an aggravated felon subject to deportation and ineligible for most forms of relief.[51] In *Commonwealth v. Sylvain*,[52] the defendant pled guilty to simple possession of cocaine. He received an eleven-month suspended sentence and also faced deportation as an aggravated felon.[53] In *Da Silva Neto v. Holder*,[54] the petitioner admitted to sufficient facts of a charge of malicious destruction of property.[55] The charge was dismissed after the petitioner completed eleven months of probation and an anger management course, but the disposition of the charge was a conviction of a crime involving moral turpitude for immigration purposes.[56] This rendered Da Silva Neto removable and ineligible for cancellation of removal.[57]

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[42] 8 U.S.C. § 1182(a)(2) (2012).

[43] *Id.* at § 1227(a)(2) (2012).

[44] *Id.* at § 1427(a)(3) (2012) (requiring good moral character for naturalization); 8 U.S.C. § 1101(f)(8) (2012) (establishing that a person who has been convicted of an aggravated felony does not have good moral character).

[45] *Id.* at § 1229b(a)-(b) (2012).

[46] *Id.* at § 1158(b)(2)(A)-(B) (2012).

[47] *Id.* at § 1231(b)(3)(B)(ii) (2012) (prohibiting the grant of withholding of removal to a noncitizen who "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States"); 8 C.F.R. § 208.16(d)(3) (2013) (requiring a presumption "that an alien convicted of an aggravated felony has been convicted of a particularly serious crime" and is therefore ineligible for withholding of removal).

[48] 8 U.S.C. § 1182(h) (2012).

[49] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010) ("[D]eportation . . . is not, in a strict sense, a criminal sanction."); Fong Yue Ting v. United States, 149 U.S. 689, 730 (1893) ("The order of deportation is not a punishment for crime.").

[50] *Chaidez v. United States*, 133 S. Ct. 1103, 1105-06 (2013).

[51] *Id.* at 1106; *see also supra* notes 42-48.

[52] 995 N.E.2d 760, 763 (Mass. 2013).

[53] *Id.* at 763.

[54] 680 F.3d 25, 27 (1st Cir. 2012).

[55] *Id.*

[56] *Id.* at 27, 32.

[57] *Id.* at 28.

As these examples demonstrate, noncitizens are often subject to removal for crimes that carry very limited punishments, such as probation. In such circumstances, the immigration consequence is of far greater importance to the noncitizen than the criminal punishment.[58] Recognizing this incongruence, professional standards generally require counsel to advise noncitizen criminal defendants of the immigration consequences of a criminal conviction.[59] In recent years, courts have also recognized a noncitizen's right to be advised of the immigration consequences of a conviction.[60] The following section will detail the recognition and scope of this right on the federal level.

II. CASE LAW CONTEXT

A. *The Sixth Amendment Right to Effective Assistance of Counsel*

The Sixth Amendment provides for various rights and protections for criminal defendants, including the right to "have Assistance of Counsel for [their] defence."[61] In *McMann v. Richardson*,[62] the Supreme Court acknowledged that the right to assistance of counsel encompasses a right to *effective* assistance of counsel.[63] In *Strickland v. Washington*,[64] the Supreme Court defined effective assistance and established the elements of successful ineffective assistance of counsel claims.[65] If a court finds that a criminal defendant was convicted as a result of having received ineffective assistance of counsel, the verdict must be set aside.[66]

There are two elements in an ineffective assistance of counsel claim. First, the convicted defendant must establish that his or her counsel's assistance was "deficient."[67] To evaluate whether an attorney's performance was deficient,

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[58] *Cf.* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (suggesting that creative plea bargaining to eliminate the risk of deportation could be beneficial to both the defendant and the prosecution).

[59] *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 3 at 14-3.2(f) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.").

[60] *See, e.g.*, People v. Pozo, 746 P.2d 523, 529 (Colo. 1987) (confirming the materiality of "potential deportation consequences of guilty pleas in criminal proceedings brought against alien defendants"); State v. Paredez, 101 P.3d 799, 804-05 (N.M. 2004) (discussing the importance of having a noncitizen's counsel explain the deportation consequences to noncitizen defendant).

[61] U.S. CONST. amend. VI.

[62] 397 U.S. 759, 771 (1970).

[63] *Id.* ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . .").

[64] 466 U.S. 668, 687 (1984).

[65] *Id.*

[66] *Id.* at 686-87.

[67] *Id.*

courts consider whether the representation was "reasonable considering all the circumstances," including "prevailing professional norms."[68] Courts must apply "highly deferential" scrutiny when reviewing the reasonableness of representation and must "evaluate the conduct from the counsel's perspective at the time."[69]

Second, a finding of ineffective assistance of counsel requires that the attorney's deficiency prejudiced the defendant.[70] The *Strickland* Court first rejected two possible methods of establishing prejudice, declaring that it is not enough to show that an attorney's "errors had some conceivable effect on the outcome of the proceeding," but neither must a convicted defendant establish by a preponderance of the evidence that counsel's error affected the verdict.[71] Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[72] When both of these elements are satisfied, the defendant's constitutional right to effective assistance of counsel was violated and the conviction must be vacated.

B. *Effective Assistance of Counsel in the Immigration Context*

Although *Strickland* ensured the right to effective assistance of counsel, the scope of this right developed over the following decades. *Strickland* did not apply to immigration situations for thirty-six years following the original recognition of the right to effective assistance.[73] Before reaching the immigration sphere, the Supreme Court first extended the availability of ineffective assistance of counsel claims to convictions reached as the result of plea bargains.[74] To apply *Strickland* to plea bargains, the Court held that a lawyer is deficient if he or she provides incorrect and unreasonable advice about a plea deal.[75] Accepting the plea prejudices a defendant who would not have pled guilty but for his attorney's misadvice.[76]

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[68] *Id.* at 688-90 (providing American Bar Association guidelines as one example of how to define such norms).

[69] *Id.* at 689.

[70] *Id.* at 687.

[71] *Id.* at 693-94.

[72] *Id.* at 694.

[73] *See* Padilla v. Kentucky, 559 U.S. 356, 374-75 (2010).

[74] Hill v. Lockhart, 474 U.S. 52, 58-59 (1985) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

[75] *Id.* at 56 (discussing the impact of counsel's advice on the voluntariness of a plea).

[76] *Id.* at 55-56; *see also* Brady v. United States, 397 U.S. 742, 755 (1970) (en banc) (citing Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)) (adopting the Fifth Circuit's definition of voluntary guilty pleas, which includes an awareness of the direct consequences of the plea).

Circuit courts limited *Strickland*'s impact on plea bargains by distinguishing cases in which counsel's erroneous advice regarded a collateral, not direct, consequence of the plea.[77] Under this framework, when counsel misadvises or fails to advise a defendant regarding a collateral matter, such as the consequences of violating a probation order, the defendant does not have a viable ineffective assistance of counsel claim.[78] Circuit courts unanimously found that immigration consequences are collateral to guilty pleas, meaning that noncitizen defendants who pled guilty after receiving faulty advice concerning the immigration consequences of that plea were unable to later raise ineffective assistance of counsel claims.[79]

The Supreme Court ultimately rejected the circuit courts' categorization of immigration consequences as collateral to criminal convictions. In *Padilla*, the Court examined the "unique nature of deportation" and found it to be "intimately related to the criminal process."[80] The decision provided a detailed overview of the development of immigration law's treatment of criminal convictions and acknowledged that deportation is often "an automatic result" of many convictions.[81] The Court further recognized that, as such, deportation as a consequence of a conviction is "ill suited" to the "collateral versus direct distinction," and failure to correctly advise a noncitizen defendant about the immigration consequences of a guilty plea can give rise to an ineffective assistance of counsel claim.[82]

[77] *See, e.g.*, Steele v. Murphy, 365 F.3d 14, 17 (1st Cir. 2004) (highlighting the distinction between direct and collateral consequences with respect to the effect of counsel's ineffective assistance); Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988) (holding that defendants need not be advised of every collateral consequence); United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (citing *Brady*, 397 U.S. at 755) ("We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences."). In *Padilla v. Kentucky*, the Supreme Court acknowledged the collateral-direct consequence test employed by circuit courts but denied having adopted such a distinction, finding no reason to consider "[w]hether that distinction is appropriate." 559 U.S. 356, 365 (2010); *see also infra* notes 83-84 and accompanying text.

[78] *See* Parry v. Rosemeyer, 64 F.3d 110, 114 (3rd Cir. 1995).

[79] Santos-Sanchez v. United States, 548 F.3d 327, 335-36 (5th Cir. 2008); Zhang v. United States, 506 F.3d 162, 167 (2nd Cir. 2007); United States v. Amador-Leal, 276 F.3d 511, 517 (9th Cir. 2002); El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Gonzalez, 202 F.3d 20, 25 (1st. Cir 2000); Kandiel v. United States, 964 F.2d 794, 796 (8th Cir. 1992); Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); Santos v. Kolb, 88 F.2d 941, 945 (7th Cir. 1989); United States v. Romero-Villa, 850 F.2d 177, 179 (3d Cir. 1988); United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985).

[80] Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010).

[81] *Id.*

[82] *Id.* at 366.

C. *Retroactivity of* Padilla *Claims*

Padilla's reach was not entirely clear from the Supreme Court's decision.[83] Among other questions left to resolve,[84] lower courts needed to determine whether *Padilla* would apply retroactively.[85] This question is governed by *Teague v. Lane*,[86] which defined the standard for when constitutional rules of criminal procedure apply retroactively to convictions on collateral review.[87] In *Teague*, a plurality of the Supreme Court advocated abandoning prior retroactivity jurisprudence to adopt the standard proposed decades earlier by Justice Harlan,[88] which would resolve the retroactivity question by evaluating the newness of the rule.[89] Later that term, a majority of the Court adopted the plurality's new retroactivity standard as it applied to capital sentencing.[90] In 1993, a majority of the Court applied *Teague* in a noncapital case.[91]

A new rule is one that "breaks new ground or imposes a new obligation on the States or the Federal Government" and therefore is "not *dictated* by

[83] Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L. J. 944, 965-84 (2012) (discussing applications of *Padilla* in 265 lower court decisions).

[84] *See, e.g.*, Lindsay C. Nash, *Considering the Scope of Advisal Duties Under* Padilla, 33 CARDOZO L. REV. 549, 551-52 (2011) (investigating the "scope of the duty to advise" under *Padilla*, and mentioning retroactivity and the manner of proving prejudice as additional questions raised by the decision); Kara B. Murphy, Comment, *Representing Noncitizens in Criminal Proceedings: Resolving Unanswered Questions in* Padilla v. Kentucky, 101 J. CRIM. L. & CRIMINOLOGY 1371, 1371-72 (raising questions regarding *Padilla*'s retroactivity and prejudice standard).

[85] *See* Lang, *supra* note 83, at 967 (finding that out of the 265 analyzed opinions, 38 cases applied *Padilla* retroactively and 20 did not; the rest did not reach retroactivity questions); *see also* Callaghan, *supra* note 6 (advocating retroactive application of *Padilla* in certain situations); Michael Hartley, Note, *What's New is Old Again: Why* Padilla v. Kentucky *Applies Retroactively*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 95, 100 (2011) (arguing that *Padilla* applies retroactively).

[86] 489 U.S. 288 (1989).

[87] *Id.* at 310 (plurality opinion) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

[88] *Id.* at 303 (citing Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part)).

[89] *Id.* at 310 (reasoning that new constitutional commands that could disrupt ongoing cases).

[90] Penry v. Lynaugh, 492 U.S. 302, 313-14 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) ("In our view, the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity.")

[91] Gilmore v. Taylor, 508 U.S. 333, 344 (1993) (holding that a rule declaring unconstitutional ambiguous murder and manslaughter jury instructions is new and does not apply retroactively).

precedent existing at the time the defendant's conviction became final."[92] When the Court announces a new constitutional rule, that rule will generally not apply retroactively on collateral review of a conviction.[93] A plurality of the Court reasoned that prospective application of rules promotes judicial interests of finality, comity within the federal system, and equal application of the law.[94]

New constitutional rules apply retroactively on collateral review when one of two exceptions applies. A new rule will apply retroactively if it declares "'certain kinds of primary, private individual conduct [to be] beyond the power of the criminal law-making authority to proscribe.'"[95] A new rule also applies retroactively if it calls for the provision of safeguards that are "'implicit in the concept of ordered liberty.'"[96] This second exception has a small scope and is limited to "procedures [that are] essential to the substance of a full hearing."[97] It only applies to "watershed rules of criminal procedure," such as the right to counsel for criminal defendants.[98] Thus, courts considering whether to apply *Padilla* retroactively must first decide if *Padilla* announced a new rule and, if so, whether that rule falls under either of *Teague*'s exceptions.

State and lower federal courts that took up the question of *Padilla*'s retroactivity did not reach a consensus. By the time the Supreme Court addressed the matter, three circuit courts – the Fifth, Seventh, and Tenth Circuits – had determined *Padilla* applied prospectively because it announced a new rule that did not meet a *Teague* exception, whereas the Third Circuit determined that *Padilla* announced an old rule and applied retroactively.[99] The opposite balance prevailed among state courts and federal district courts, as the majority of these courts sided with the Third Circuit and applied *Padilla* retroactively.[100] The Massachusetts Supreme Judicial Court, through its

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

[93] *Id.* at 303 (explaining Justice Harlan's proposed framework, which a plurality of the Court adopts).

[94] *Id.* at 300, 308-10 (identifying finality, comity, and "evenhanded justice" as important interests threatened by retroactive application of new constitutional rules). *Teague* was a plurality opinion, but it was adopted by a majority of the court that same year. *Penry*, 492 U.S. at 313.

[95] *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

[96] *Id.* (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)).

[97] *Id.* (quoting *Mackey,* 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)).

[98] *Id.* at 311-12 (citing *Mackey,* 401 U.S. at 694 (Harlan, J., concurring in part and dissenting in part)).

[99] *Compare* United States v. Amer, 681 F.3d 211 (5th Cir. 2012) (not retroactive), Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) (not retroactive), *and* United States v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011) (not retroactive), *with* United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011) (retroactive).

[100] In Danielle Lang's empirical analysis of 265 lower court cases that addressed *Padilla*

decision in *Commonwealth v. Clarke*,[101] was among those to apply *Padilla* retroactively.

1. *Commonwealth v. Clarke*: *Padilla* Applies Retroactively in Massachusetts

The Massachusetts Supreme Judicial Court found many reasons to apply *Padilla* retroactively.[102] It gave special weight to *Williams v. Taylor*,[103] in which the Supreme Court applied *Strickland* to find that the petitioner had received ineffective assistance of counsel when his attorney failed to present mitigating evidence at sentencing. Although the Court had never before set aside a criminal conviction because of a defense attorney's failure to provide mitigating evidence,[104] the *Williams* Court nevertheless applied *Strickland* retroactively: *Williams* did not announce a "new" rule under *Teague* because "the merits of [the] claim are squarely governed by [the] holding in *Strickland* . . . ."[105] Indeed, as the Massachusetts Supreme Judicial Court acknowledged, the Supreme Court in *Williams* went on to announce that "it can hardly be said that recognizing the right to effective counsel 'breaks new ground or imposes a new obligation on the States.'"[106] As such, the Massachusetts Justices found *Padilla* to be "the definitive application of an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts. It is

in the twenty-two months following the decision, thirty-eight cases applied *Padilla* retroactively, with decisions coming from one circuit court, fourteen district courts, and eight state courts. Twenty cases reached the opposite conclusion, with decisions coming from eight district courts and seven state courts. *See* Lang, *supra* note 83, at 965-67.

[101] 949 N.E.2d 892, 895 (Mass. 2011).

[102] The Court did impose a timeframe on retroactivity: only convictions that became final after April 1, 1997 would benefit from *Padilla*. *Id.* at 904. This date marks the enactment of IIRIRA, which drastically expanded and heightened the immigration consequences of convictions. *See supra* note 33 and accompanying text (explaining how IIRIRA changed the immigration consequences of criminal convictions).

[103] 529 U.S. 362, 367 (2000).

[104] *Id.* at 392-93 (citing Hill v. Lockhart, 474 U.S. 52 (1985)) (discussing an analogous case in which counsel failed to challenge aggravating factor at sentencing, in absence of Supreme Court case considering failure to offer mitigating evidence in ineffective assistance claims).

[105] *Id.* at 390.

[106] *Id.* at 391 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion)). The Court also relied on an earlier concurrence by Justice Kennedy, in which he explained that "'[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.'" *Clarke,* 949 N.E.2d at 898 (Kennedy, J., concurring) (quoting Wright v. West, 505 U.S. 277, 309 (1992)).

not the creation of a new constitutional rule."[107] Thus, the court held that *Padilla* applies retroactively under federal retroactivity law, allowing defendants whose convictions were final before *Padilla* to nonetheless challenge their convictions under *Padilla*.

2. *Chaidez v. United States*: *Padilla* is Not Retroactive Under Federal Law

Despite the Massachusetts Supreme Judicial Court's close study of Supreme Court case law in its decision in *Clarke*, the Supreme Court reached the opposite conclusion regarding *Padilla* retroactivity when it took up the question in 2013 in *Chaidez v. United States*. The Court acknowledged that in "garden-variety applications of the test in *Strickland*," the Court does not announce new rules.[108] However, *Padilla* was unique – not "garden-variety" – because it first "considered a threshold question: Was advice about deportation 'categorically removed' from the scope of the Sixth Amendment . . . because it involved only a 'collateral consequence' of a conviction . . . ?"[109] The Court reasoned that, given the previous consensus regarding the "collateral" status of immigration consequences of convictions, *Padilla* did "'break[] new ground.'"[110] Therefore, *Padilla* announced a new rule and does not apply retroactively to cases in federal courts on collateral review.[111]

3. *Danforth v. Minnesota*: States May Provide Retroactive Remedies for Constitutional Violations Under State Law

Although *Chaidez* is binding on all federal courts, the same is not true for state courts. This exception is not found within the text of *Chaidez* itself but

[107] *Clarke*, 949 N.E.2d. at 903. The Massachusetts Court also found support for its decision in the Supreme Court's response in *Padilla* to concerns that extension of *Strickland* to immigration warnings would flood the courts with new ineffective assistance claims. *Id.* (citing Padilla v. Kentucky, 559 U.S. 356, 371-72 (2010)). The Supreme Court expressed serious doubt over such concerns "in terms that would have been superfluous if the holding were not applicable to convictions already final." *Id.*

[108] *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (applying general standards, even to new facts, does not announce a new rule).

[109] *Id*. at 1108 (quoting *Padilla*, 559 U.S. at 366).

[110] *Id.* at 1110 (alteration in original) (quoting *Teague*, 489 U.S. at 301).

[111] In the past, the Supreme Court has often asserted that "under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." Penry v. Lynaugh, 492 U.S. 302, 313 (1989) *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002). As such, whether a proposed rule is "new" is a threshold matter. *Id.* In this way, *Padilla* and *Chaidez* seem to break with precedent: *Padilla* did not first address the threshold retroactivity question, which was not considered until three years later in *Chaidez*. The Massachusetts Supreme Judicial Court recognized this development, noting that *Padilla* itself "came as the result of a postconviction collateral attack." *Commonwealth v. Sylvain*, 995 N.E.2d 760, 766 n.9 (Mass. 2013).

rather is derived from *Danforth v. Minnesota*.[112] There, the Court reviewed the Minnesota Supreme Court's ruling that "state courts are not free to give a Supreme Court decision announcing a new constitutional rule of criminal procedure broader retroactive application" than it receives in federal courts.[113] In an opinion by Justice Stevens, the Court squarely rejected the Minnesota Supreme Court's holding.[114] In doing so, Justice Stevens took pains to differentiate between constitutional rights and constitutional remedies: when the Supreme Court "articulat[es]" a "new" constitutional rule, it does not create new law but merely recognizes a constitutional right that has always existed.[115] Any violation of this right is certainly a constitutional violation, regardless of whether it occurred before or after the Court's articulation of the right.[116] However, not all constitutional violations will receive the benefit of constitutional remedies, as *Teague* established that "new" (or newly articulated) constitutional rules will not be remedied in federal habeas proceedings.[117] State courts, however, can opt to provide broader remedies for constitutional violations in state collateral review of convictions.[118] As such, *Danforth* created the potential for important developments in post-conviction relief from state convictions.[119]

III. *PADILLA* RETROACTIVITY IN STATE COURTS FOLLOWING *CHAIDEZ*

A. State v. Garcia*: Padilla is Not Retroactive in South Dakota*

Unlike most states, South Dakota long ago rejected *Teague v. Lane* as the state retroactivity standard. In 1990, before *Danforth* even confirmed states' abilities to adopt their own retroactivity standards, the South Dakota Supreme

[112] 552 U.S. 264, 265 (2008).

[113] *Id.* at 268 (finding that states can provide greater remedies for Confrontation Clause violations than required by the federal Constitution).

[114] *Id.* at 266 ("The question in this case is whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We . . . now hold that it does not.").

[115] *Id.* at 271.

[116] *Id.*

[117] Teague v. Lane, 489 U.S. 288, 303 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

[118] Danforth v. Minnesota, 552 U.S. at 277-81 (finding support in the language and reasoning of *Teague*).

[119] Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings,* 46 AM. CRIM. L. REV. 1, 3 (2009) (arguing that retroactive application of new constitutional rules of criminal procedure will promote fairness and uniformity in application and will allow lower courts to "participate in important doctrinal development").

Court in *Cowell v. Leapley*[120] ruled that *Teague* offers an "unduly narrow" opportunity for retroactive application of new rules.[121] The state instead applies its own test, which considers "'(1) The purpose of the decision, (2) reliance on the prior rule of law, and (3) the effect upon the administration of justice.'"[122]

Before applying the state's retroactivity test to *Padilla*, [123] the South Dakota Supreme Court had only applied the retroactivity test once before, when it articulated the new test in *Cowell*. Thus, *Cowell* provides important guidance for how the standard is applied. In *Cowell,* the court considered the retroactive application of *Edwards v. Arizona*[124] and *Arizona v. Roberson*.[125] Both cases concerned the scope of the right to counsel during custodial interrogations.[126] The court deferred to U.S. Supreme Court holdings that both of these cases announced new rules, but applied the state test to determine whether the new rules would apply retroactively.[127] However, for each element of the state test, the South Dakota Supreme Court deferred to the U.S. Supreme Court's findings[128] in *Solem v. Stumes*,[129] which held that the rule announced in *Edwards* did not apply retroactively.[130]

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[120] 458 N.W.2d 514, 518 (S.D. 1990).

[121] *Id.* In fact, *Danforth* cited *Cowell* as an example of a state case that recognized that *Teague* only binds federal courts. *Danforth*, 552 U.S. at 281. *Cowell* rearticulates the federal test that predated *Teague*. *See, e.g.*, McCafferty v. Solem, 449 N.W.2d 590, 593 (S.D. 1989), superseded on other grounds by State v. Raymond, 540 N.W.2d 407, 409 (S.D. 1995); State v. One 1966 Pontiac Auto, 270 N.W.2d 362 (S.D. 1978) (articulating a multi-part test to determine retroactivity).

[122] State v. Garcia, 834 N.W.2d 821, 824 (S.D. 2013) (quoting *Cowell*, 458 N.W.2d at 517).

[123] *See infra* notes 138-146 and accompanying text (discussing the *Garcia* case).

[124] 451 U.S. 477, 484-85 (1981) (holding that police may not question a suspect who has properly invoked *Miranda* rights for further questioning until suspect initiates contact with police).

[125] 486 U.S. 675, 682 (1988) (holding that invoking the right to counsel prevents police from approaching suspect for further questioning until valid waiver is obtained, even for questions regarding other crimes).

[126] *Id.* (quoting *Edwards*, 451 U.S. at 484-85) ("[A]fter a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'").

[127] Cowell v. Leapley, 458 N.W.2d 514, 519 (S.D. 1990) (citing Solem v. Stumes, 465 U.S. 638, 647 (1984)) (ruling that *Edwards* articulated a new rule); *Id.* (citing Butler v. McKellar, 494 U.S. 407 (1990)) (ruling that *Roberson* articulated a new rule). The Court also relied heavily on findings in *Stumes* when applying its own retroactivity test. *Id.* at 518-19.

[128] *Cowell*, 458 N.W.2d at 519 ("We, too, perceive such problems and note them as valid bases not to apply *Edwards* and *Roberson* retroactively.").

[129] 465 U.S. 638 (1984).

[130] *Id.* at 649-50 (holding that *Edwards* announced a new rule because case law did not

The entire discussion of the retroactivity standard in *Cowell* is confined to just over one page of the decision and, despite the opinion's criticism of the limited opportunity for retroactivity under *Teague*,[131] the application of the state standard also suggests limited retroactive application of new rules. The South Dakota Supreme Court explained that the first prong of the retroactivity standard – the purpose of the new rule – weighs in favor of retroactive application only if the rule "improve[s] the accuracy of criminal trials."[132] The *Edwards* and *Roberson* rules, the Court found, do not satisfy this prong because assistance of counsel during an interrogation will not ensure the accuracy of the information provided in the interrogation and thus would not "enhance the reliability of the fact-finding process" at trial.[133] Accordingly, the purpose inquiry is limited solely to considerations of factual accuracy.

The *Edwards* and *Roberson* rules also failed the second and third prongs of the state retroactivity test. *Cowell*'s second prong considers law enforcement's reliance on the prior rule.[134] *Edwards* and *Roberson* fail this prong because law enforcement had justifiably relied on the absence of any rule prohibiting questioning of a defendant "on unrelated charges for which he had not invoked his right to counsel."[135] The *Cowell* Court thus suggests that law enforcement's reliance on the absence of a detailed definition of the scope of a recognized rule, such as the right to counsel, will weigh against retroactive application of an expansion of that rule. Finally, the *Edwards* and *Roberson* rules fail the final prong of the retroactivity test – the effect of retroactive application on the administration of justice – because the number of defendants who would be affected "is surely significant."[136] The South Dakota Supreme Court's decision on this third prong relies entirely on the U.S. Supreme Court's finding in *Stumes*, where the Court could "only guess" at the potential effect of retroactive application on judicial processes.[137]

The South Dakota Supreme Court did not again apply its state retroactivity standard until twenty-three years later, in *State v. Garcia*.[138] In that case, Mexican citizen Pablo Garcia challenged his 2004 conviction, resulting from a guilty plea, for possession of one to ten pounds of marijuana.[139] In February of

"foreshadow[]" the rule and because of prior reliance on the old rule).

[131] *See supra* note 120 and accompanying text (noting that *Teague* was only binding on federal courts).

[132] *Cowell*, 458 N.W.2d at 518 (indicating that accuracy in criminal trials is of paramount importance).

[133] *Id.* at 518-19 (internal quotations omitted) (quoting *Stumes*, 465 U.S. at 643-44).

[134] *Id.* at 517.

[135] *Id.* at 519.

[136] *Id.* at 519 (quoting *Stumes*, 465 U.S. at 650).

[137] *Id.* (quoting *Stumes*, 465 U.S. at 650).

[138] 834 N.W.2d 821, 823 (S.D. 2013) (analyzing whether *Padilla* should apply retroactively).

[139] *Id.* The facts of Garcia's case are unusual: the South Dakota Supreme Court opinion

2012, more than a year before the *Chaidez* ruling, Garcia appealed the non-retroactivity determination of the trial court to the South Dakota Supreme Court.[140] The state Supreme Court considered two issues: whether *Padilla* announced a new rule and whether *Padilla* applies retroactively.[141] The U.S. Supreme Court decided *Chaidez* about five months before South Dakota issued its decision.[142]

As in *Cowell*, the South Dakota Supreme Court applied the state test to reach the same decision as the U.S. Supreme Court. Also as in *Cowell,* the court's retroactivity analysis was limited: the court dedicated about one and a half pages of its eight-page decision to applying the test.[143] First, the South Dakota Supreme Court found that *Padilla*'s purpose of ensuring effective assistance of counsel has nothing to do with establishing "the actual guilt or innocence of the individual."[144] Second, although at the time of Garcia's 2004 conviction South Dakota had not yet rejected ineffective assistance of counsel claims based on inaccurate or absent immigration warnings, his attorney "would have justifiably relied" on "the almost universal holding among federal and state courts" that rejected such claims.[145] Finally, the South Dakota Supreme Court found that retroactive application of *Padilla* could

explains that Garcia was in fact removed because of the aggravated felony conviction. *Id.* at 822. Then, "[f]ollowing Garcia's removal, a new permanent residence card arrived at Garcia's South Dakota residence" where his family still resided. *Id.* Garcia reentered the U.S., presumably with his new permanent residence card, and in September 2011 he received "a notice of intent/decision to reinstate the prior removal/deportation order," at which point Garcia filed the motion to reopen and vacate his conviction. *Id.*

[140] Brief of Appellant at 1, *Garcia*, 834 N.W.2d 821 (No. 26257).

[141] *Garcia*, 834 N.W.2d at 823. The State also argued that the appeal should be dismissed for lack of jurisdiction, but the Court did not address those arguments. Brief of Appellee at 6-7, *Garcia*, 834 N.W.2d 821 (No. 26257).

[142] The U.S. Supreme Court decided *Chaidez* on February 2, 2013. Chaidez v. U.S., 133 S. Ct. 1103, 1103 (2013). The South Dakota Supreme Court decided *Garcia* on June 26, 2013. *Garcia*, 834 N.W.2d at 821.

[143] *Garcia*, 834 N.W.2d at 824-25. The brevity of the court's analysis may be at least partially due to the lack of Garcia's arguments on brief: Garcia relied on *Teague* only and did not make arguments for retroactivity under the *Cowell* test. Brief of Appellant, *supra* note 140, at 8-10 (arguing exclusively that *Teague* applied). The State did brief *Cowell* arguments. Brief of Appellee, *supra* note 141, at 9-14. Moreover, while the State submitted a supplemental brief following the *Chaidez* decision and urged adoption of that holding, Garcia did not submit any supplemental brief arguing for a different holding than *Chaidez*. Appellee's Supplemental Brief at 1-2, *Garcia*, 834 N.W.2d 821 (No. 26257) (arguing that Appellant's claim should be dismissed following *Chaidez*).

[144] *Garcia*, 834 N.W.2d at 824-25 (stating instead that the purpose is to counsel clients about the results of potential punishment).

[145] *Garcia*, 834 N.W.2d at 825. In 2005, one year after Garcia's conviction, South Dakota found immigration consequences of criminal convictions to be collateral consequences and therefore beyond the scope of ineffective assistance of counsel claims. Nikolaev v. Weber*,* 705 N.W.2d 72, 74-75 (S.D. 2005).

"disrupt[] . . . the criminal justice system" by "undermin[ing] the finality of any guilty plea" entered before *Padilla*.[146] Thus, *Padilla* remains prospective within South Dakota.

B. Commonwealth v. Sylvain*:* Padilla *Remains Retroactive in Massachusetts*

On September 13, 2013, the Massachusetts Supreme Judicial Court issued a new decision regarding *Padilla*'s retroactivity following the U.S. Supreme Court's non-retroactivity holding in *Chaidez*.[147] The court considered the validity of Kempess Sylvain's 2007 guilty plea and conviction for possession of cocaine, which resulted in an eleven-month sentence that was suspended for two years.[148] Sylvain's former defense counsel provided an affidavit acknowledging that he knew that Sylvain, a twelve-year lawful permanent resident, was not a U.S. citizen, but advised Sylvain that this disposition "was not likely to result in his deportation."[149]

Sylvain raised multiple arguments in support of retroactive application of *Padilla* in Massachusetts. In addition to arguing for divergence from the federal *Teague* test[150] and for recognition of broader rights under the Massachusetts Constitution,[151] Sylvain pointed to differences in Massachusetts and federal procedural laws as a basis for retroactive application. In Massachusetts, *Padilla* claims cannot generally be raised on direct appeal but must be raised through motions for post-conviction relief.[152] Given that the

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[146] *Id.* The court, however, was also mindful of the U.S. Supreme Court's contrary prediction that *Padilla* would not open any floodgates. *Id.* at 825 (citing Padilla v. Kentucky, 559 U.S. 356, 371-72 (2010)).

[147] Commonwealth v. Sylvain, 995 N.E.2d 760, 760 (Mass. 2013) (remanding the case to the lower court "to determine if defense counsel's erroneous advice prejudiced defendant"). *See also supra* Part II.C.1-2 (reviewing Massachusetts's original retroactivity determination and the Supreme Court's *Chaidez* decision).

[148] Brief for the Defendant-Appellant at 1-2, 4, *Sylvain*, 995 N.E.2d 760.

[149] *Sylvain*, 995 N.E.2d at 764.

[150] Brief for the Defendant-Appellant, *supra* note 148, at 12-17 (arguing that application of the *Teague* framework should yield a different result from *Chaidez*).

[151] *Id.* at 24-31 (arguing that Art. XII of the Massachusetts Constitution requires retroactive application of *Padilla*).

[152] *Id.* at 21 (quoting Commonwealth v. Zinser, 847 N.E.2d 1095, 1098 (Mass. 2006)) ("'Absent exceptional circumstances, we do not review claims of ineffective assistance of counsel for the first time on appeal' . . . . Put another way, our courts strongly disfavor raising claims of ineffective assistance on direct appeal."); Mass. R. Crim. P. 30 (detailing the proper motion procedure for post-conviction relief). The Commonwealth countered that allowing for retroactive application for such guilty pleas would give defendants "more rights than a similarly situated defendant who has gone to trial" and filed a direct appeal. Brief for the Commonwealth at 25, *Sylvain*, 995 N.E.2d 760. The Commonwealth further argued that retroactive application would incentivize defendants to "plead guilty, wait an indefinite amount of time until a 'new rule' is decided in [their] favor, and then move to withdraw [their] guilty pleas gaining the benefit of the new rule." *Id.* at 27-28. Of course, noncitizens

first time that a defendant can make a *Padilla* claim in Massachusetts is through a post-conviction motion, Sylvain argued that such motions should be treated as direct appeals, not subject to retroactivity analysis.[153]

Finally, Sylvain also distinguished the facts of his case from those of *Chaidez*. The defendant in *Chaidez* challenged her conviction because her attorney failed to provide any kind of warnings relating to immigration consequences of her conviction.[154] In rejecting Chaidez's arguments supporting retroactive application of *Padilla,* the Supreme Court acknowledged that "a minority of courts recognized a separate rule for material misrepresentations, regardless whether they concerned deportation or another collateral matter."[155] As Chaidez herself did not allege such affirmative misadvice, the *Chaidez* holding may be limited to situations in which an attorney fails to provide any information regarding immigration consequences and does not extend to situations involving affirmative misadvice.[156] Accordingly, Sylvain argued that the Massachusetts Supreme Judicial Court could adopt *Chaidez* as a matter of state law for failure to advise situations yet still apply *Padilla* retroactively to cases like Sylvain's, in which the attorney provided affirmative misadvice.[157]

The Massachusetts Supreme Judicial Court affirmed its prior *Padilla* retroactivity holding in *Clarke*, diverging from the federal application of *Teague* and relying on state constitutional grounds.[158] First, the Massachusetts

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facing removal because of a guilty plea do not have the luxury of time to wait for such a development in the law.

[153] Brief for the Defendant-Appellant, *supra* note 148, at 23.

[154] Chaidez v. United States, 133 S. Ct. 1103, 1106 (2013).

[155] *Id.* at 1112. The Commonwealth, however, pointed out that although the "Court in *Chaidez* merely recognized that 'three federal circuits (and a handful of state courts) held before *Padilla* that misstatements about deportation could support an ineffectiveness claim' . . . . The Court never stated that this was indeed a separate rule that could lead to separate relief." Brief for the Commonwealth, *supra* note 152, at 35-36 (quoting *Chaidez*, 113 S. Ct. at 1112).

[156] Brief for the Defendant-Appellant, *supra* note 148, at 32; *see also* Danielle R. Acker Susanj, *Retroactivity,* Strickland*, and Alien Criminal Defendants: How the* Chaidez *Decision Raised More Questions Than It Answered*, 162 U. PA. L. REV. ONLINE 55, 67 ("[I]t appears to be an open question whether, after *Chaidez*, claims of misadvice are available on collateral review."); Jeffrey L. Fisher & Kendall Turner, *The Retroactivity of* Padilla *After* Chaidez v. United States, 37-MAR CHAMPION at 43, 44 (2013) ("[A]ny defendants who can show that their attorneys misled them regarding deportation consequences of their pleas can argue that they are entitled to relief on collateral review, notwithstanding *Chaidez*.").

[157] Brief for the Defendant-Appellant, *supra* note 148, at 33 (quoting *Chaidez*, 133 S. Ct. at 1112) ("Thus, even if this Court were to find that *Padilla* created a 'new rule' when it concluded that the Sixth Amendment extends to failure to advise about immigration consequences, prior to *Padilla* there existed 'a separate rule for material misrepresentations' that was firmly in place when the defendant pled guilty . . . .").

[158] *See infra* notes 159-164 and accompanying text. The Court did not address Sylvain's argument equating Massachusetts's post-conviction motions with direct appeals or his

Supreme Judicial Court reviewed and rejected the U.S. Supreme Court's reasoning in *Chaidez*.[159] Writing for a unanimous court, Justice Cordy observed that the Supreme Court's application of *Teague* has not remained consistent: although "new" rules were originally defined as those "'not dictated by precedent,'"[160] the Supreme Court later "expanded the meaning of what is 'new' to include results not 'apparent to all reasonable jurists' at the time."[161] Acknowledging its authority under *Danforth* to provide greater remedies for constitutional violations than required by federal law,[162] the Supreme Judicial Court in *Sylvain* announced that Massachusetts courts would continue to adhere to the "original construction" of the *Teague* test and would not adopt the expanded test reflected in more recent decisions like *Chaidez.*[163] Pursuant to the original *Teague* framework, as understood by the Massachusetts Supreme Judicial Court and reflected in its *Clarke* decision, *Padilla* remains retroactive for Massachusetts state law convictions.[164]

C. Miller v. State*:* Padilla *is No Longer Retroactive in Maryland*

Like Massachusetts, the Court of Appeals of Maryland has also considered the question of *Padilla* retroactivity on two occasions, both before and after the Supreme Court's *Chaidez* ruling.[165] In its original retroactivity analysis, the court concluded that *Padilla* did not announce a "new rule" and therefore applied retroactively.[166] The court went so far as to note that, under *Danforth*, "even if the Supreme Court ever were to hold that *Padilla* is not retroactive . . .

argument that *Chaidez* did not govern the retroactivity of *Padilla* claims based on affirmative misadvice. *See supra* notes 152-157 and accompanying text.

[159] Commonwealth v. Sylvain, 995 N.E.2d 760, 766-69 (Mass. 2013) (discussing how *Chaidez* is at odds with precedent in Massachusetts).

[160] *Id*. at 767 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

[161] *Id.* at 769 (quoting Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997)).

[162] *Id.* at 769-70 ("Our ability to . . . expand the availability of remedies for violations of Federal constitutional rights, is specifically permitted by the Supreme Court's decision in *Danforth*.").

[163] *Id.* at 769.

[164] In addition to affirming the court's decision in *Clarke*, Justice Cordy explained that the Declaration of Rights of the Massachusetts Constitution also protects a defendant's right to have immigration advice prior to the entry of a guilty plea. *Id.* at 771; *see also* MASS. CONST. pt. 1, art. XII (outlining procedural protections and rights for criminal defendants, which today is interpreted to include the right to effective assistance of counsel). Justice Cordy explained that, as with the federal law, state standards of effective assistance "evolve[] according to the advancement of professional norms" and that by the time *Padilla* was decided, state professional norms had evolved such that the state constitution likewise required that counsel provide effective immigration warnings. *Sylvain,* 995 N.E.2d at 771.

[165] *See* Miller v. State, 77 A.3d 1030 (Md. 2013); Denisyuk v. State, 30 A.3d 914 (Md. 2011).

[166] *Denisyuk,* 30 A.3d at 925.

that holding would have no adverse effect" on its ruling.[167] Nevertheless, this initial confidence did not prevent the court from later reaching new conclusions regarding *Padilla* retroactivity.

Maryland's second ruling on *Padilla* retroactivity, *Miller v. State*,[168] came a mere twelve days following Massachusetts's holding in *Sylvain*. In a 4-3 decision, the Maryland court reversed its prior holding and declined to overturn the conviction of Lincoln Miller, a citizen of Belize, who in 1999 had pled guilty to possession of cocaine with intent to distribute.[169] The court recognized that it was not bound by *Teague* and declined to adopt generally *Teague* as the state's test for retroactivity.[170] Nevertheless, the court declared itself bound by the federal rule for *Padilla* retroactivity because no independent state basis could support a contrary holding.[171] As the Maryland court had previously held that "'[t]here is no distinction between the right to counsel guaranteed by the Sixth Amendment and Art. 21 of the Maryland Declaration of Rights,'" the Court could not articulate an independent state law basis to support ineffective assistance claims, leaving the state bound by the Supreme Court's retroactivity determination.[172]

The Court of Appeals articulated two additional reasons for declining to apply *Padilla* retroactively. First, by the time of Miller's 1999 conviction, the Maryland Court of Appeals had adopted a rule requiring trial courts to advise defendants about possible immigration consequences, but failure to provide such warnings "did not render a guilty plea involuntary."[173] Finally, the court also expressed concerns that a contrary finding would lead to inequitable applications of law, as defendants convicted under state law would be able to

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[167] *Id.* at 924 n.8 (noting that state courts have wide discretion to review their own state law convictions).

[168] 77 A.3d 1030, 1030 (Md. 2013).

[169] *Id.* at 1032. The Court also had preliminary matters to overcome: the State argued that Miller waived his right to seek post-conviction relief because he did not appeal his guilty plea. *Id.* at 1037. The Court identified a possible waiver of Miller's right to post-conviction relief, but decided "nonetheless, [to] exercise . . . discretion to address Miller's contentions" because of the long, complicated procedural history and because of the recent *Chaidez* holding. *Id.* at 1040 (stating that the issue "begs" to be decided in the wake of Supreme Court rulings). The State also argued that Miller's original motion for post-conviction relief alleged only that his plea was involuntary because of his ignorance regarding the immigration consequences of the plea; he did not raise ineffective assistance of counsel claims, so *Padilla* does not apply. Brief of Respondent/Cross-Petitioner at 17-18, *Miller*, 77 A.3d 1030. The Maryland Court of Appeals did not address this concern in its decision.

[170] *Miller*, 77 A.3d at 1042.

[171] *Id.* at 1043 (citing Arizona v. Evans, 514 U.S. 1, 8-9 (1995)) ("Miller's allegations of violations . . . can only be redressed were we to find independent state bases for doing so . . . .").

[172] *Id.* at 1044-45 (quoting State v. Tichnell, 509 A.2d 1179, 1185 (Md. 1986)).

[173] *Id.* at 1045 (discussing Rule 4-242(e) and comments).

bring collateral attacks against their convictions, while defendants convicted under federal law would not.[174]

The dissent in *Miller*, authored by Chief Justice Barbera, offers a different understanding of the Maryland Court's initial *Padilla* retroactivity case, *Denisyuk v. State*.[175] The Chief Justice argued that, while *Denisyuk* did apply the federal definition of the Sixth Amendment right to effective assistance of counsel, it applied a state – not federal – retroactivity test, which should again be applied in *Miller*.[176] She also took issue with the majority's concern that applying *Padilla* retroactively to state convictions would create tension with the federal system.[177] Instead, Chief Justice Barbera recognized such dissonance as "a byproduct of our federal system," which has been accepted by the Supreme Court.[178]

D. State v. Ramirez*: Padilla is Retroactive in New Mexico*

The New Mexico Supreme Court recognized ineffective assistance claims based on counsel's failure to provide specific advice relating to immigration consequences of a guilty plea in *State v. Paredez*[179] in 2004, six years prior to the Supreme Court's decision in *Padilla*.[180] As such, the state court's retroactivity decision in *State v. Ramirez*[181] considers the retroactivity of *Paredez*, not *Padilla*. In *Ramirez*, the Court considered the validity of Martin Ramirez's 1997 convictions for possession of up to one ounce of marijuana, possession of drug paraphernalia, and identity concealment.[182] The Court concluded that *Paredez* did not announce a new rule and applies retroactively, thus allowing Martin Ramirez to attack his convictions on collateral review.[183]

The New Mexico Supreme Court had previously adhered to the federal construction of *Teague*[184] while recognizing the state's ability pursuant to

[174] *Id.* at 1042 n.9.

[175] *Id.* at 1047 (Barbera, C.J., dissenting) (quoting Denisyuk v. State, 30 A.3d 914, 925-26 (Md. 2011)) ("Under Maryland's retroactivity jurisprudence, *Padilla* did not overrule 'prior law' and declare 'a new principle of law.'").

[176] *Id.*

[177] *Id.*

[178] *Id.* at 1046 (citing Mills v. Rogers, 457 U.S. 291, 300, (1982)).

[179] 101 P.3d 799, 804-05 (N.M. 2004).

[180] *Id.* At that time, New Mexico court rules already required trial judges, but not attorneys, to advise defendants that a conviction may affect their immigration status. *Id.* at 802. The Supreme Court of Colorado came to a similar conclusion regarding ineffective assistance claims even earlier. People v. Pozo, 746 P.2d 523, 529 (Colo. 1987). However, in Colorado, ineffective assistance claims are only viable when the attorney had "sufficient information to form a reasonable belief that the client was in fact an alien." *Id.*

[181] State v. Ramirez, No. 33,604, 2014 WL 2773025, at *1 (N.M. June 19, 2014).

[182] *Id.*

[183] *Id.* at *6-7.

[184] State v. Forbes, 119 P.3d 144, 147 (N.M. 2005) (adopting *Teague* as the state's

Danforth to provide for greater retroactive application of constitutional rules.[185] Nonetheless, in *Ramirez*, the Court reached a different holding than the U.S. Supreme Court by applying the *Teague* framework to the circumstances and legal history in New Mexico.[186] The Court focused heavily on New Mexico's long history of recognizing noncitizen defendants' rights to immigration warnings.[187] Since 1990, "the New Mexico Supreme Court required lawyers to advise their clients about immigration consequences as part of the criminal guilty plea proceeding."[188] This requirement, coupled with professional guidelines from the time of Ramirez's conviction instructing criminal defense attorneys to provide immigration warnings,[189] distinguished New Mexico's regime from the federal one. As such, the New Mexico Supreme Court determined that *Paredez* announced an old rule, which "'did nothing more than apply the existing rule of *Strickland*.'"[190] Thus, New Mexican defendants with convictions from 1990 or later may attack their convictions based on inadequate immigration advice.[191]

E. People v. Baret*: Padilla is Not Retroactive in New York*

In 2003, New York state courts established that a defense counsel's affirmative misadvice regarding the immigration consequences of accepting a guilty plea can give rise to vacatur under *Strickland*.[192] However, the state did

retroactivity test).

[185] Kersey v. Hatch, 237 P.3d 683, 688 (N.M. 2010).

[186] *Ramirez,* 2014 WL 2773025, at *3.

[187] *Id.* at *4-6.

[188] *Id.* at *5.

[189] *Id.* at *6 (citing 3 ABA Standards for Criminal Justice 14-3.2 cmt., at 75 (2d ed. 1980)); *see also* NEW MEXICO PUBLIC DEFENDER DEP'T, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2(b) (1998), *reprinted in* 2 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: STANDARDS FOR ATTORNEY PERFORMANCE H6 (2000) (instructing that "counsel should . . . make sure the client is fully aware of . . . the other potential effects of conviction upon immigration status").

[190] *Ramirez*, at *5 (quoting *Chaidez*, 133 S. Ct. 1103, 1114 (2013) (Sotomayor, J., dissenting)).

[191] A similar case remains pending before the New Mexico Supreme Court. State v. Alvarez, No. 31,987, 2012 WL 5838945 (N.M. Ct. App. Oct. 10, 2012), *cert. granted*, 299 P.3d 423 (N.M. 2012). However, the defendant in *Alvarez* challenges the validity of his 1986 conviction for possession of cocaine with intent to distribute, and thus likely has little chance of success. *Id.* at *1. This is despite the fact that the defendant in *Alvarez* became removable when he rendered the plea; IIRIRA did not make his situation any worse. *Id.*; *see also* 8 U.S.C. § 1251(a)(11) (1982) (requiring the deportation of any noncitizen who "at any time has been convicted or . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs").

[192] People v. McDonald, 802 N.E.2d 131, 134-35 (N.Y. 2003) (applying *Strickland's* two-prong analysis).

not recognize ineffective assistance of counsel claims based on the complete lack of advice regarding immigration consequences until the Supreme Court's *Padilla* holding.[193] As such, the case recently decided by the New York Court of Appeals, *People v. Baret*,[194] considered the retroactive application of *Padilla* when an attorney failed to provide any advice about the immigration consequences of a guilty plea.[195]

In *Baret*, Dominican citizen and long-time U.S. resident Roman Baret challenged his guilty plea and conviction for criminal sale of a controlled substance, cocaine.[196] He was sentenced to two to six years of incarceration;[197] however, he served significantly less time in an alternative "shock" incarceration program.[198] Baret raised myriad arguments in support of retroactive application of *Padilla* in New York,[199] all of which were squarely rejected by the New York Court of Appeals.

The Court recognized its authority pursuant to *Danforth* to depart from *Teague*[200] and that it had inadvertently done so in the past by misinterpreting the federal exception for retroactive application of new "watershed rules" of criminal procedure.[201] In *People v. Eastman*,[202] the New York Court of

[193] *Id.* at 134 (discussing earlier state cases).

[194] 2014 WL 2921420, at *1 (N.Y. June 30, 2014).

[195] *Id.* at *6-7.

[196] Brief for Respondent-Appellant at 3-4, *Baret*, 2014 WL 2921420.

[197] *Baret*, 2014 WL 2921420, at *2-3.

[198] Brief of Defendant-Respondent at 11, *Baret*, 2014 WL 2921420. New York's shock incarceration program, available for certain convicted persons, calls for reduced sentence lengths but "rigorous physical activity, intensive regimentation and discipline and rehabilitation therapy and programming" throughout the period of incarceration. N.Y. CORRECT. LAW § 865(2) (McKinney 2010).

[199] Baret argued that New York should follow Massachusetts by applying its own interpretation of *Teague*; that the state's retroactivity test would require retroactive application; that the Court should recognize the right to immigration warnings under the state constitution; that *Padilla* should be applied retroactively as a "watershed" exception to *Teague*; and that *Chaidez* does not fulfill *Teague*'s goals of comity, finality, and even-handed application of the law. Brief of Defendant-Respondent, *supra* note 198, at 22-68.

[200] *Baret*, 2014 WL 2921420, at *26.

[201] *Id.* at *25-26; *see also supra* notes 98-101 and accompanying text. The Court also recognized that, as Baret and amici suggested, the Court had assumed it was obligated to apply *Teague* when it decided *People v. Eastman*, 481 U.S. 186, 189-90 (1987). *Baret*, 2014 WL 2921420, at *25; Brief for Immigrant Defense Project as Amicus Curiae Supporting Defendant-Appellant at 22 n.2, *Baret,* 2014 WL 2921420, *archived at* http://perma.cc/WW2A-8PGG ("*Eastman* was decided before *Danforth* and contains language that indicates that the *Eastman* Court felt compelled to apply *Teague*."); Brief of Defendant-Respondent, *supra* note 198, at 54.

[202] 481 U.S. 186, 189-90 (1987) (announcing that "[w]here two or more defendants are tried jointly . . . the pretrial confession of one of them that implicates the others is not admissible against the others unless the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination").

Appeals applied *Teague* to determine that the rule announced in *Cruz v. New York,*[203] although new, applied retroactively as a watershed rule of criminal procedure.[204] However, in *Baret*, the Court cited subsequent Supreme Court language explaining the exception to conclude that the federal exception for watershed rules of criminal procedure is far narrower than that which the Court articulated in *Eastman*.[205] Applying what it considers to be the correct interpretation of the federal exception, the Court concluded that *Padilla* does not fall under the exception because it did not "'constitute a previously unrecognized bedrock procedural element'"[206] – it merely "'implicates'" such an element[207] – nor did *Padilla* cure "'an impermissibly large risk of an inaccurate conviction.'"[208]

The Court of Appeals also declined to depart from the federal interpretation of *Teague* to apply *Padilla* retroactively as an old rule,[209] as Massachusetts and New Mexico had done. The Court reasoned that such a departure from the federal standard was not warranted, given the Court's own 1995 ruling that "defense counsel were not 'under a duty to warn defendants of the possible deportation consequences before entering a guilty plea.'"[210] *Padilla*'s "flat[] contradict[ion]" of New York's previous rule thus precluded a finding that *Padilla* announced an old rule in the state.[211]

Finally, the Court also held that if it were to apply the state retroactivity test, *Padilla* would not apply retroactively. In *People v. Pepper*,[212] the New York Court of Appeals adopted the pre-*Teague* federal retroactivity test,[213] as

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[203] *Id.*

[204] People v. Eastman, 648 N.E.2d 459, 465 (N.Y. 1995) ("As the rule announced in *Cruz* is central to an accurate determination of guilt or innocence, . . . the admission of the codefendant's inculpatory confession against the defendant undermined the fundamental fairness of the trial . . . .").

[205] *Baret*, 2014 WL 2921420, at *25-26 ("[W]e have no doubt that the Supreme Court . . . would have disagreed with our assessment that, pursuant to *Teague, Cruz* was a watershed rule.").

[206] *Id.* at 22 (quoting Whorton v. Bockting, 549 U.S. 406, 421 (2007)).

[207] *Id.* at 25 (quoting *Eastman*, 648 N.E.2d at 465).

[208] *Id.* at 24 (quoting *Whorton*, 549 U.S. at 418).

[209] *Id.* at 28-29.

[210] *Baret*, 2014 WL 2921420, at *28 (quoting Desist v. United States, 394 U.S. 244, 246-54 (1969)) (applying *Desist* to determine retroactive application of a rule preventing defendants from waiving the right to counsel without counsel present).

[211] *Id.* In dissent, Judge Rivera asserted that *Padilla* announced an old rule under "the well-established standard of *Strickland* . . . ." because it "merely recognized" what New York attorneys "had known for years, that the immigration consequences of a guilty plea are so weighty and of such critical importance . . . that a defense lawyer who fails to inform a client of these potential consequences falls far short of professional norms." *Baret*, 2014 WL 2921420, at *1, *3 (Rivera, J., dissenting).

[212] 423 N.E.2d 366, 369 (N.Y. 1981).

[213] *Id.* (quoting *Desist*, 394 U.S. at 246-54) ("The Supreme Court stressed, and . . . we

articulated in *Desist v. United States*.[214] Like the *Cowell* test in South Dakota,[215] the New York test calls for courts to consider three factors: "'(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'"[216]

New York courts give special weight to the purpose of the new rule: if the purpose is central to the fact-finding process and to the "'reliable determination'" of innocence or guilt, the rule should apply retroactively.[217] The rule purpose inquiry, however, was previously broader than in South Dakota; in New York, a rule geared towards "cur[ing a] constitutional infirmity," such as a violation of the Sixth Amendment right to counsel, generally merited retroactive application.[218] Nonetheless, in *Baret*, the Court applied a narrower and more literal interpretation of the purpose factor to find that "*Padilla* has nothing to do with a reliable determination of guilt or innocence; rather, *Padilla* assures that noncitizen defendants appreciate the immigration risks that inhere in guilty pleas to crimes they acknowledge during the plea allocution to having committed."[219] Thus, while not articulating whether *Teague* or *Pepper* controlled the retroactivity determination,[220] the

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had occasion to weigh [the] three [*Desist*] factors. . . . We see no reason to depart from that course here.").

[214] 394 U.S. at 246-54 (citing Katz v. United States, 389 U.S. 347 (1967)) (holding that the new search and seizure rule announced in *Katz* applies prospectively).

[215] *See supra* notes 120-127, 129-132 and accompanying text.

[216] *Pepper*, 423 N.E.2d at 369 (quoting *Desist*, 394 U.S. at 249). The balancing test is more commonly referred to as the *Linkletter* test. *See* Linkletter v. Walker, 381 U.S. 618 (1965). The *Linkletter* test was replaced by *Teague v. Lane*. 489 U.S. 288, 310 (plurality opinion) (1989); *see also supra* Part II.C.

[217] Baret, 2014 WL 2921420, at *28-29 (quoting *Pepper*, 423 N.E.2d at 369); *see also* People v. Favor, 624 N.E.2d 631, 637 (N.Y. 1993) (mandating retroactive application of a rule allowing the defendant's presence at a pretrial evidentiary hearing because that presence is essential to the fact-finding process).

[218] People v. Mitchell, 606 N.E.2d 1381, 1386 (N.Y. 1992) (mandating prospective application of a state rule allowing for defendant's participation in juror *voir dire* because the rule does not have constitutional implications and is not central to the fact-finding process). The Court also previously recognized that the state test, as compared to the federal test, allows state courts to "expand the protection accorded defendants." *Id.* at 1385.

[219] *Baret*, 2014 WL 2921420, at *29. The Court also ruled that the second two factors disfavored retroactivity: attorneys relied on the *Ford* ruling that they did not have to provide immigration warnings, and because of the "sheer volume" of convictions by guilty plea, retroactive application would adversely affect the administration of justice. *Id.* at *29-30.

[220] *Id.* at *3-4 (Lippman, C.J., dissenting) (criticizing the majority for declining to "clarify whether [the Court] will exercise its independent judgment to account for any unique state values and policies in determining the retroactivity of federal rules").

Court of Appeals ruled that *Padilla* does not apply retroactively to state law convictions.[221]

IV. *THIERSAINT V. COMMISSIONER*: CONNECTICUT'S PENDING *PADILLA* RETROACTIVITY CASE

The state court *Padilla* retroactivity decisions discussed above will likely influence other states' considerations of *Padilla* retroactivity. Connecticut's highest court is currently considering such a case. Prior to *Padilla*, courts in Connecticut had rejected ineffective assistance of counsel claims based on failure to provide immigration warnings.[222] Neither the state Supreme Court nor appellate-level courts had made decisions regarding *Padilla*'s retroactivity until after the Supreme Court decided *Chaidez*.[223] Since then, the state's appellate courts have followed *Chaidez* and applied *Padilla* prospectively,[224] reasoning that this approach is appropriate because the Connecticut Supreme Court adopted *Teague* as the state's standard for retroactivity in 2002.[225] The Connecticut Supreme Court later recognized its authority under *Danforth* to allow for broader remedies for constitutional violations than the *Teague* test requires,[226] but it has continued to apply *Teague* when considering constitutional rules.[227]

The Connecticut Supreme Court accepted *Thiersaint v. Commissioner* directly from the state's habeas trial court to consider whether *Padilla* would apply retroactively within the state.[228] Thiersaint, a Haitian citizen, came to the United States as a lawful permanent resident in 1994 at the age of fourteen.[229] In 2007, he pled guilty to possession of cocaine with intent to sell.[230] He was sentenced to seven years, which was suspended after two years.[231] Upon his

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[221] *Id.* at *28-29 (majority opinion).

[222] *See, e.g.*, Niver v. Comm'r of Corr., 919 A.2d 1073, 1075-76 (Conn. App. Ct. 2007) (acknowledging the potentially "great" consequences for immigration, but holding that these do not ultimately rise to a Constitutional violation).

[223] *See, e.g.*, Asif v. Comm'r of Corr., 32 A.3d 967 (Conn. App. Ct. 2011) (dismissed on other grounds); State v. Guerra, 31 A.3d 68, 68 (Conn. App. 2011) (dismissed for lack of subject matter jurisdiction).

[224] *See* Saksena v. Comm'r of Corr., 76 A.3d 192, 196 (Conn. App. Ct. 2013) (finding *Padilla* inapplicable because it was decided after the guilty pleas at issue in the case).

[225] *See* Duperry v. Solnit, 803 A.2d 287 (Conn. 2002).

[226] *See* Luurtsema v. Comm'r of Corr., 12 A.3d 817, 826 n.14 (2011).

[227] Like many states, Connecticut does not have its own rule for retroactive application of new interpretations of substantive criminal laws. *Id*. at 827-31.

[228] Thiersaint v. Warden, No. CV104003350S, 2012 WL 6786081 (Conn. Super. Ct. Dec. 7, 2012), *cert. granted sub nom.* Thiersaint v. Comm'r of Corr., --- A.2d --- (Conn. 2013).

[229] *Id.* at *1.

[230] *Id.* at *3 (citing CONN. GEN. STAT. § 21a-277(a) (2012)).

[231] *Id*.

release from state prison, Thiersaint was taken into immigration custody, and he was ordered removed on February 27, 2009.[232] Thiersaint filed a state habeas action, which was decided in his favor on December 7, 2012, months before the Supreme Court's *Chaidez* ruling.[233] There, the court quoted its own prior decision, reaffirming that *Padilla* announced an old rule and applies retroactively.[234]

Unlike many other *Padilla* cases, the habeas court in *Thiersaint* considered "the importance [the] defendant places upon preserving his . . . right to remain in this country," as this individualized inquiry informs the prejudice prong of *Strickland* concerning whether the defendant would have rejected the plea offer but for the attorney's misadvice.[235] After reviewing the specifics of Thiersaint's situation, the habeas court determined that Thiersaint would have rejected the guilty plea had he been adequately informed, and vacated his conviction.[236] The state appealed, arguing that *Padilla* should not apply retroactively.[237]

Thiersaint may have a slim chance of achieving retroactive application of *Padilla*. Connecticut does not have a history of professional standards requiring defense counsel to provide immigration warnings to noncitizen clients,[238] as New Mexico does. Neither does Connecticut use an alternate

[232] *Id.* at *4. At the time of the Superior Court decision, Thiersaint remained in the United States, still subject to removal, but had been released from custody. *Id.* This is because following the earthquake in Haiti in 2010, the United States temporarily stopped removing noncitizens to Haiti. *Id.* The United States reinitiated removals to Haiti in April 2011. Press Release, Department of Homeland Security, Policy for Resumed Removals to Haiti (Apr. 1, 2011), *archived* at http://perma.cc/DH5U-M4DP.

[233] *Thiersaint*, No. CV104003350S, at *1.

[234] *Id.* at *11-13; *accord* Bakrina v. Warden, 2012 Conn. Super. LEXIS 1035 (Conn. Apr. 12, 2012) (finding that *Padilla* must have announced an old rule because otherwise Padilla himself wouldn't have been able to benefit from the rule; that, as an extension of *Strickland*, *Padilla* announced an old rule; that the majority in *Padilla* would not have downplayed "floodgates" concerns if the rule were to apply prospectively only; and that requirements that Connecticut trial courts provide immigration warnings demonstrates that the professional norm in the state was to provide immigration advice).

[235] *Id.* at *16.

[236] *Id.* at *18-19. Thiersaint's story is surely sympathetic: his leg was amputated following an accident, and amputees in Haiti are often "blame[d] for their disabilities" and treated as "outcasts." *Id.* at *7. Further, Haiti generally holds citizens deported for criminal reasons in jail for months, where conditions are horrible and the disabled are treated harshly. *Id.* at *6-7.

[237] The party briefs are not available in this case, nor is any opinion certifying the state's appeal. The Supreme Court website, however, provides a short synopsis for the issues on appeal. Emmanuel Thiersaint v. Comm'r Of Corr., SC 19134, *archived at* http://perma.cc/U2YZ-6M9K (last visited July 10, 2014).

[238] However, it should be noted that Connecticut has required criminal courts (although not defense attorneys) to warn noncitizen defendants about the possibility of deportation since 1985. CONN. GEN. STAT. § 54-1(j) (1985).

retroactivity test that extends to state constitutional rules, as New York does. Finally, like Maryland, Connecticut's right to counsel mirrors the federal right;[239] it does not offer more protections than the U.S. Constitution. Thus, retroactive application of *Padilla* in Connecticut will require a departure from the federal standard and the adoption of a currently undefined state rule for retroactive application. However, as Part V argues, there are many reasons why the Supreme Court of Connecticut, and the highest courts in all states, should abandon *Teague* and apply *Padilla* retroactively.

V. STATES SHOULD ABANDON *TEAGUE V. LANE* AND APPLY *PADILLA* RETROACTIVELY

A. *Retroactive Application of* Padilla *Will Prevent Deportations Resulting From Unconstitutional Convictions*

Removal from the United States can be devastating,[240] possibly causing noncitizens to suffer harms including separation from family and loss of livelihood. Indeed, according to one study, thirty-one percent of El Salvadoran deportees were forcibly separated from spouses and children upon removal from the United States.[241] The consequences of deportation also extend beyond the noncitizen's nuclear family: there are about forty million foreign-born individuals living in the United States, accounting for thirteen percent of the population.[242] Foreign-born individuals comprise an even greater percentage of the U.S. workforce.[243] Given the size of the immigrant population in the United States, harsh deportation laws can affect individuals, families, and communities.

The deportations that cause the most injury are likely those of noncitizens who have lived in the United States for long periods of time, as these individuals will have established more ties in their communities. Deportation after years of residence in the United States can occur because of a noncitizen's criminal conviction, but often this triggering conviction occurs years before the deportation. Such delayed immigration responses to criminal

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[239] *Cf.* Bryant v. Comm'r of Corr., 964 A.2d 1186, 1193 (Conn. 2009).

[240] *Cf.* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)) ("We have long recognized that deportation is a particularly severe 'penalty' . . . .").

[241] Jacqueline Hagan, Karl Eschbach & Nestor Rodriguez, *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64, 75 (2008).

[242] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Paul Ryan, Chairman of the House Committee on the Budget, May 8, 2013, *archived at* http://perma.cc/BP5J-LKRH.

[243] U.S. DEP'T OF LABOR, FOREIGN-BORN WORKERS: LABOR FORCE CHARACTERISTICS – 2013, at 1 (2014), *archived at* http://perma.cc/BK5F-LQF9 (reporting that foreign-born laborers account for 16.3% of the U.S. labor force).

convictions have two main causes. First, unlike criminal law,[244] immigration laws generally apply retroactively.[245] Thus, when a new immigration law adds a criminal ground for deportation, noncitizens previously convicted of that crime – before it triggered deportation – will still be deported under the new law. Second, in recent years, Immigration and Customs Enforcement ("ICE") has focused more of its resources on finding and deporting long-time residents with old criminal convictions.[246] As there is no statute of limitations for the criminal grounds of deportation,[247] a noncitizen may be deported for a crime committed decades ago.

The troubling state of immigration law has not gone unnoticed: there is growing popular support for immigration reform[248] and ongoing consideration of comprehensive legislative reform.[249] However, as federal reform continues to stall, more and more states are adopting measures to benefit noncitizen populations.[250] Retroactive application of *Padilla* would provide states with an additional means of protecting their noncitizen residents. Indeed, now that the Supreme Court has recognized that the Constitution requires defense attorneys to advise noncitizen defendants about the immigration consequences of a guilty plea, states should be particularly concerned about deportations resulting from old convictions. Even though the Court only recently recognized the right to immigration advice, the Constitution has always required such advice.[251] Thus, regardless of when a noncitizen enters a guilty plea, the Sixth Amendment mandates that the noncitizen receive immigration advice about the

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[244] The Ex Post Facto clause of the Constitution prohibits retroactive application of criminal laws. U.S. CONST. art. I § 9.

[245] Meneses, *supra* note 1, at 840 ("The retroactively applicable laws of 1996 made thousands of lawful permanent residents subject to deportation for conduct committed prior to the passage of this legislation.").

[246] *Id.* at 806-08.

[247] *Id.* at 772.

[248] Poll, CNN ORC, Illegal Immigration Jan. 31 – Feb. 2, 2014 (2014), *archived at* http://perma.cc/798Q-FL53 (indicating that 54% of registered voters support a pathway to citizenship, as compared to 38% in 2010); Poll, Fox News, Poll: Voters say US Still in Recession, Glad They Know Snowden Secrets (2014), *archived at* http://perma.cc/M7UW-WUFG (indicating that 68% of registered voters support a pathway to citizenship).

[249] David Nakamura, *Senators to Unveil Path to Citizenship,* WASH. POST, Apr. 16, 2013, at A1.

[250] Fourteen states provide in-state tuition rates to undocumented students, and seven additional states are considering similar measures. Kimberly Hefling, *More States Granting In-State Tuition to Immigrants*, BOS. GLOBE, Feb. 2, 2014, at A13. California has taken even more steps to protect immigrants: in October 2013, the state enacted legislation prohibiting California police from prolonging custody of minor offenders so that ICE can take them into federal custody. Patrick McGreevy, *California Forges Ahead on Immigration Laws*, WASH. POST, Oct. 7, 2013, at A15.

[251] *See* Danforth v. Minnesota, 552 U.S. 264, 271 (2008) (explaining that rights always exist in the Constitution, and that the articulation of a new rule does not create the right).

plea. If such advice was not given, the conviction is unconstitutional even if it predates *Padilla*. Deportation resulting from unconstitutional convictions raises fundamental questions of fairness, as noncitizen defendants must endure not only the injustice of the unconstitutional conviction, but also banishment, loss of livelihood, and separation from family. By applying *Padilla* retroactively, states would provide noncitizens the opportunity to challenge their convictions, and thereby limit deportations – and the harms they trigger– based on unconstitutional grounds.

B. *The Federal Standard for Retroactivity of "New" Constitutional Rules is Incredibly Narrow and Not Binding on States*

In addition to protecting against deportation because of unconstitutional convictions, *Padilla* retroactivity at the state level makes sense as a matter of retroactivity law. The Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Sylvain* considered the U.S. Supreme Court's increasingly broad definition of what constitutes a "new constitutional rule."[252] The original definition, from *Teague* itself, states that a new rule "breaks new ground or imposes a new obligation on the States or the Federal Government" or, put a different way, is "not *dictated* by precedent existing at the time the defendant's conviction became final."[253] The year after *Teague* was decided, the definition of a "new" rule already began to broaden: in *Butler v. McKellar*, the Court indicated that a rule that is "susceptible to debate among reasonable minds," perhaps as demonstrated by a circuit split, is a new rule even if the Supreme Court finds that the rule is "controlled" by a prior decision.[254] The Court later found that a rule is new unless it was "apparent to all reasonable jurists" at the

[252] Commonwealth v. Sylvain, 995 N.E.2d 760, 769 (Mass. 2013) (quoting Colwell v. State, 59 P.3d 463, 471 (Nev. 2003)) ("Although we consider the retroactivity framework established in *Teague* to be sound in principle, the Supreme Court's post-*Teague* expansion of what qualifies as a 'new' rule has become so broad that 'decisions defining a constitutional safeguard rarely merit application on collateral review.'"); *see also* Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm*, 35 N.M. L. REV. 161, 212 (2005) ("As fifteen years of *Teague* have taught, the new rule doctrine is interpreted in such an extraordinarily broad manner that it is removed from the traditional concerns and concepts that gave rise to retroactivity limits in general and in the context of habeas corpus proceedings in particular."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1816 (1991) (criticizing *Teague* as imposing "far too expansive" a definition of "new" rules). The Court's limited use of *Teague*'s two exceptions, which allow for retroactive application of new rules, has also faced vehement criticism. *See, e.g.*, Entzeroth, *supra*, at 196 (reviewing Supreme Court decisions after *Teague* and finding that the first exception only applies to defendants who can no longer be executed, and that no case had fallen under the second exception between 1989 and 2004).

[253] Teague v. Lane, 489 U.S. 288, 300 (1989).

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

time of the conviction.[255] This language, also quoted in *Chaidez*, suggests that if any court (or reasonable jurist) finds a proposed rule to be unwarranted, then the rule, when ultimately recognized, is "new" and can only apply retroactively if certain narrow exceptions apply.[256] It is hard to imagine a constitutional rule that is not "new" under such a definition.[257] Indeed, the Supreme Court has recognized only two rules that are not "new" under this analysis.[258] Both these "old" rules relate to death penalty sentences, where the Court may be more inclined to apply constitutional rules retroactively.[259] Given the extreme limitation on retroactive remedies for constitutional violations at the federal level, states should consider providing greater remedies to their own citizens and residents for questions of state law retroactivity.

Considering the purposes of *Teague*, it is perfectly reasonable that states would develop their own retroactivity standards. The Supreme Court has reasoned that limited retroactivity on collateral review furthers the interests of comity and finality.[260] However, both scholars and the Court acknowledge that state post-conviction relief raises no comity concerns.[261] The Supreme Court's

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

[256] Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013); *see also* Fallon & Meltzer, *supra* note 252, at 1816 (criticizing *Teague* because it "disabl[es] federal habeas courts from granting relief whenever reasonable disagreement is possible about whether a right currently exists").

[257] Entzeroth, *supra* note 252, at 195 ("Given the role of the Supreme Court in our nation's judicial structure as the court that resolves conflicts and confusions in federal law, it is hard to imagine any case that the Supreme Court selects for review that would not result in a new decision.").

[258] Stringer v. Black, 503 U.S. 222, 228-29 (1992) (citing Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988)) (holding that the rule from *Maynard* that aggravating circumstances meriting death penalty sentences cannot be vague or arbitrary was dictated by prior case law and therefore applies retroactively); Penry v. Lynaugh, 492 U.S. 302, 315 (1989) (citing Jurek v. Texas, 428 U.S. 262 (1976)) (holding that the rule allowing a defendant facing the death penalty to instruct the jury to consider "mitigating evidence of mental retardation" was dictated by *Jurek* and applies retroactively), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

[259] *Cf.* Schriro v. Summerlin, 542 U.S. 348, 364-65 (2004) (Breyer, J., dissenting) (finding that in death penalty cases, many of the arguments against retroactive application, such as finality of litigation and the preservation of court resources, are unpersuasive).

[260] Teague v. Lane, 489 U.S. 288, 308 (1989); Danforth v. Minnesota, 552 U.S. 264, 279-80 (2008).

[261] *Danforth*, 552 U.S. at 279-80 ("If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*."); Lasch, *supra* note 119, at 44 ("Because *Teague* was rooted in large part on considerations of comity, it is inappropriate to use *Teague* as a starting point on considering what retroactivity rules should apply in intra-system post-conviction review."). Scholars also note that finality concerns are reduced in state postconviction review because the proceedings are held much earlier than federal habeas proceedings, the proceedings are part of a unified state system of review, and the importance of finality in furthering

unwillingness to require state courts to offer greater remedies for constitutional violations than some state courts find appropriate does not mean that all states are bound to the federal rule.[262] Indeed, federal courts have no opportunity to achieve *Teague*'s goal of comity by respecting differences in states' laws if the states continue to adopt federal retroactivity standards. *Teague* itself provides almost no opportunity for retroactive remedies for constitutional violations, but instead assumes that states will act to provide such remedies retroactively as a matter of state law.[263] State courts therefore should not hesitate to abandon *Teague v. Lane* as the state rule. Continuing application of *Teague* at the state level will deny defendants any real opportunity to challenge admittedly unconstitutional convictions.

C. *Retroactivity on the State Level Will Provide Needed Relief to Noncitizens Convicted of Minor Crimes*

The Department of Homeland Security prioritizes the deportation of criminal noncitizens.[264] ICE, the enforcement arm of the Department of Homeland Security, has been successful in this mission: in fiscal year 2013, 82% of the 133,551 noncitizens removed from the interior of the United States (a total of about 109,500 noncitizens) had criminal convictions.[265] Of this 82%, 30,977 removed noncitizens became ICE priorities because of a "level three crime,"[266] which is a crime that is punishable by less than one year.[267] Because of the structure of criminal laws in the United States, it is probable that the vast majority of these 30,977 noncitizens had prior state, not federal, convictions.[268]

deterrence and rehabilitation is generally overstated. *Id.* at 57-59; *see also* Allison Syré, Padilla v. Kentucky*: Bending Over Backward for Fairness in Noncitizen Criminal Proceedings,* 20 J.L. & POL'Y 677, 707 (2012) (arguing that finality is not implicated by retroactive application of *Padilla* because defendants will also have to prove prejudice to succeed on a *Padilla* claim).

[262] Lasch, *supra* note 119, at 41 (arguing that the *Teague* standard is a "baseline" for states).

[263] *Cf. Danforth*, 552 U.S. at 270-71 (acknowledging that the Court's own retroactivity holdings are not based on "sound policy").

[264] Memorandum from John Morton, Dir. U.S. Immigration & Customs Enforcement, to all Immigration & Customs Enforcement Employees (Mar. 2, 2011), *archived at* http://perma.cc/8XXP-T8WL.

[265] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ERO ANNUAL REPORT: FY 2013 ICE IMMIGRATION REMOVALS 1 (2013), *archived at* http://perma.cc/HBV7-ZRSD. This number does not include noncitizens who were apprehended and deported at the border. *Id.*

[266] *Id.* at 2.

[267] Memorandum from John Morton, *supra* note 264, at 2.

[268] In fiscal year 2010, 16,470 federal defendants were sentenced to between one and twelve months of prison. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 11 (2010). Under federal law, a crime is a felony if it is punishable by at least one year. 18 U.S.C. § 3559(a) (2012). In 2010, New York alone reported 226,698 misdemeanor convictions. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 2008-2012

Since more immigrants face deportation because of state convictions than federal convictions, retroactive application of *Padilla* at the state level would have a greater impact than a federal retroactivity rule.

It may be entirely appropriate that additional relief is available to state defendants as compared to federal defendants. While some may contest the merits of deporting criminal noncitizens generally,[269] the trend of U.S. immigration policy certainly suggests widespread support for deporting dangerous criminal noncitizens.[270] The federal government concentrates its prosecutorial power on felonies,[271] and as such, more noncitizen federal convicts will likely be deemed dangerous and deserving of deportation. However, noncitizens with misdemeanor convictions – generally, state law convictions – are much less likely to be dangerous. Indeed, cases abound of noncitizens facing deportation for state convictions for "misdemeanor shoplifting," "selling a bag of marijuana," or even "turnstile jumping."[272] Defendants facing such charges would have better chances of negotiating plea deals that would not result in automatic deportation than would defendants facing more serious federal charges.[273] Defendants facing charges for minor crimes may also be under a great deal of pressure to accept a plea deal, even if innocent.[274] By applying *Padilla* retroactively at the state level, states would

DISPOSITIONS OF ADULT ARRESTS 5 (2013), *archived at* http://perma.cc/A8NA-WZGY.

[269] *See, e.g.*, David C. Koelsch, *Embracing Mercy: Rehabilitation as a Means to Fairly and Efficiently Address Immigration Violations*, 8 INTERCULTURAL HUM. RTS. L. REV. 323 (2013) (advocating rehabilitation over deportation).

[270] *See supra* Part I.A (providing an overview of federal immigration law's historical treatment of noncitizens with criminal convictions).

[271] In fiscal year 2010, the U.S. Attorneys' Office reported 49,805 federal defendants received sentences of longer than one year. U.S. DEP'T OF JUSTICE, *supra* note 268, at 11.

[272] Meneses, *supra* note 1, at 774-75.

[273] The defendant in *People v. Baret* contended that noncitizen defendants who offered guilty pleas for serious crimes would not benefit if *Padilla* applied retroactively because they would not be able to establish that, with proper immigration advice, they would have been able to negotiate a plea that would not trigger immigration consequences. Brief of Defendant-Respondent, *supra* note 198, at 30-31. However, while defendants facing lesser charges may be far more likely to negotiate a plea deal that would not trigger immigration consequences, the Supreme Court made clear that the prejudice element of *Padilla* is satisfied if the defendant would not have accepted the guilty plea but for the attorney's misadvice or lack of advice; the defendant need not prove that he would have received a different outcome at trial, or that a different plea deal may have been available. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

[274] *See, e.g.*, Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 48 (2013) (analyzing study results and concluding that many people accept a guilty plea "in return for a perceived benefit"); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, Cornell Law Faculty Working Papers, Paper 113, at 7 (2014), *archived at* http://perma.cc/PZ2Q-TM7V ("[T]he modern American justice system has three features that . . . pressure . . .

reduce the number of noncitizens deported for unconstitutional convictions for minor crimes and thereby protect noncitizen and citizen members of the community from the severe consequences of deportation.

CONCLUSION

The nature of federal immigration law should be an important consideration for state courts considering *Padilla*'s retroactivity. As the Massachusetts Supreme Judicial Court has recognized, the severity of the immigration consequences for criminal convictions raises questions of "fundamental fairness" when those convictions may be invalid because of ineffective assistance of counsel.[275] The Constitution requires that defense counsel advise noncitizen defendants of immigration consequences of plea deals; convictions achieved without this advice are unconstitutional.[276]

The injustice of an unconstitutional conviction is magnified in a *Padilla* case, where the defendant suffers not only from his sentence and criminal record, but also from deportation. Further, there is no statute of limitations for when ICE can initiate deportation of a noncitizen because of a previous criminal conviction,[277] and immigration laws apply retroactively to mandate removal of noncitizens for crimes committed years ago.[278] As such, if *Padilla* does not apply retroactively, noncitizens who accepted guilty pleas prior to 2010 without knowing the immigration consequences of their conviction will face deportation despite the fact that their convictions are unconstitutional. Even if we wish to remove noncitizens on criminal grounds, deportation should certainly not result from an unconstitutional conviction. States should avoid this injustice by rejecting *Teague* and applying *Padilla* retroactively to state law convictions.

States may apply *Padilla* retroactively on a number of grounds. They may find a right to immigration warnings under the state constitution, apply a modified *Teague* test within their state, or adopt a different rule entirely for retroactivity of new constitutional rules. Regardless of the means of achieving *Padilla* retroactivity, the impact will be profound. By granting noncitizen defendants the ability to challenge their unconstitutional convictions, states will grant these noncitizens the opportunity to stay in the United States, or at

innocent defendants [to] plead[] guilty: (1) the system's need (or at least perceived need) for the overwhelming majority of defendants to plead guilty; (2) draconian sentences for many offenses and offenders; and, (3) an almost complete lack of judicial regulation of the plea bargaining process[, which] combine to create a system in which innocent defendants can be coerced to plead guilty.").

[275] Commonwealth v. Sylvain, 995 N.E.2d 760, 772 (Mass. 2013).

[276] *Padilla*, 559 U.S. at 373-74.

[277] Meneses, *supra* note 1, at 772.

[278] *Id.* at 840 ("The retroactively applicable laws of 1996 made thousands of lawful permanent residents subject to deportation for conduct committed prior to the passage of this legislation.").

least the opportunity to fight to stay with their families and in their communities. As the possibility of federal immigration reform diminishes,[279] it is more important now than ever that states act to protect their own residents and citizens.

[279] *See* Julia Preston, *Immigration Advocates Undeterred as House Departs Without Action*, N.Y. TIMES, Dec. 13, 2013, at A1.