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Chaidez v United States: Breaking Old Ground

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CHAIDEZ V. UNITED STATES: BREAKING OLD GROUND

ABSTRACT

In *Padilla v. Kentucky*, the United States Supreme Court held that the Sixth Amendment of the United States Constitution requires defense counsel to advise his or her noncitizen criminal client about the impact of a guilty plea on the client's immigration status. When an attorney fails to provide his or her client that advisement, that client is deprived the effective assistance of counsel guaranteed by the Sixth Amendment. In *Chaidez v. United States*, the Supreme Court held that *Padilla* announced a "new rule" and therefore relief based upon the holding of *Padilla* would only be available prospectively. Defendants whose convictions were final prior to *Padilla*, including Roselva Chaidez, could not bring claims of ineffective assistance of counsel under *Padilla* and were therefore denied justice.

This Comment argues that the holding of *Padilla* was not a new rule. Specifically, changes to immigration law enacted in 1996, not *Padilla*, triggered the right of noncitizen criminal defendants to advisement about the immigration consequences of a guilty plea. Because of these changes, *Padilla* was a straightforward application of the existing *Strickland v. Washington* test for ineffective assistance of counsel, applied to new circumstances created by the 1996 changes in immigration law. Because *Padilla* did not announce a new rule, but only applied an existing rule to new circumstances, the holding should have applied retroactively, and Roselva Chaidez should have had her conviction vacated pursuant to *Padilla*.

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INTRODUCTION

On December 3, 2003, Roselva Chaidez and Jose Padilla faced the same dilemma. Both were lawful permanent residents of the United States.¹ Each had pleaded guilty to a charge without understanding that a guilty plea would result in deportation, as required by United States immigration laws passed in 1996.² Neither Chaidez's nor Padilla's attorney had provided their client with advisement about the immigration consequences of her or his plea.³

Ten years later, Chaidez and Padilla are in dramatically different situations. A court has vacated Jose Padilla's conviction; although he still faces the underlying criminal charges, he is no longer facing automatic deportation.⁴ Roselva Chaidez, on the other hand, is not as fortunate; the Supreme Court refused to recognize her rights and prevent her deportation.⁵ These very different results are not due to the factual differences in the cases but rather the result of timing and inconsistent decisions by the Supreme Court.

Three cases are critical to understanding the stories of Roselva Chaidez and Jose Padilla. In *Strickland v. Washington*,⁶ the Court set forth the test for determining what constitutes effective or ineffective counsel in a criminal proceeding.⁷ *Teague v. Lane*⁸ provides the standard

1. *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010); *United States v. Chaidez*, 730 F. Supp. 2d 896, 898 (N.D. Ill. 2010), *rev'd*, 655 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).

2. *Padilla*, 559 U.S. at 359; *Chaidez*, 730 F. Supp. 2d at 896.

3. *Padilla*, 559 U.S. at 359; *Chaidez*, 730 F. Supp. 2d at 904; *Commonwealth v. Padilla*, 253 S.W.3d 482, 483–84 (Ky. 2008), *rev'd and remanded*, 559 U.S. 356 (2010).

4. *Padilla v. Commonwealth*, 381 S.W.3d 322, 330–31 (Ky. Ct. App. 2012).

5. *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013).

6. 466 U.S. 668 (1984).

7. *Id.* at 687.

for when a rule of criminal procedure applies retroactively.⁹ *Padilla v. Kentucky*¹⁰ recognizes a noncitizen criminal defendant's right to advisement about the immigration consequences of a guilty plea.¹¹

In *Padilla v. Kentucky*, the United States Supreme Court held that after changes to immigration law enacted in 1996 expanded the number of deportable offenses and nearly eliminated prosecutorial discretion, a criminal defendant has the right to advisement about the immigration consequences of a guilty plea.¹² When a defense attorney fails to provide a criminal defendant accurate information about the deportation ramifications of a guilty plea, the defendant has not received the effective assistance of counsel guaranteed by the Sixth Amendment.¹³ A lack of effective assistance of counsel satisfies the first prong of the two-prong *Strickland* test that courts use to determine whether to vacate a criminal conviction.¹⁴

Following the *Padilla* decision, the federal appellate circuits split on whether the *Padilla* holding retroactively applies to final convictions.¹⁵ The Third Circuit held that the *Padilla* rule applies retroactively, while the Fifth, Seventh, and Tenth Circuits held that it does not.¹⁶ Although the circuits split on whether *Padilla* should apply retroactively, there was unanimity that *Teague* provided the correct standard to apply in making the determination; all of the circuits applied the *Teague* standard regardless of whether deciding either in favor of or against retroactivity.¹⁷ The *Teague* standard appears straightforward: a decision that creates a new rule is generally not retroactive; a decision that applies an old rule to new circumstances is retroactive.¹⁸

In *Chaidez v. United States*,¹⁹ the Supreme Court resolved the dispute among the circuits by holding that *Padilla* announced a new rule under *Teague*, and therefore did not apply retroactively.²⁰ The Court held that while the result in *Padilla* came from an ordinary application of the

8. 489 U.S. 288 (1989).

9. *Id.* at 310.

10. 559 U.S. 356 (2010).

11. *Id.* at 374.

12. *Id.* at 363–64, 374.

13. See *INS v. St. Cyr.*, 533 U.S. 289, 323 n.50 (2001); U.S. CONST. amend. VI.

14. See *Padilla*, 559 U.S. at 366–67. The first prong is representation that falls below reasonable professional standards; the second is likelihood of a different outcome absent the deficient representation. *Id.* at 366.

15. Allison C. Callaghan, Comment, *Padilla v. Kentucky: A Case for Retroactivity*, 46 U.C. DAVIS L. REV. 701, 703 (2012).

16. *Id.*

17. *United States v. Amer.*, 681 F.3d 211, 212 (5th Cir. 2012); *United States v. Chang Hong*, 671 F.3d 1147, 1150 (10th Cir. 2011); *Chaidez v. United States*, 655 F.3d 684, 686 (7th Cir. 2011); *United States v. Orocio*, 645 F.3d 630, 635 (3d Cir. 2011), *abrogated by* *Chaidez v. United States*, 133 S. Ct. 1103 (2013).

18. See *Teague v. Lane*, 489 U.S. 288, 310 (1989).

19. 133 S. Ct. 1103 (2013).

20. *Id.* at 1113.

established *Strickland* test, the decision to apply *Strickland* to any collateral consequence of a conviction broke new ground and created a new rule.²¹ Justice Kagan, writing for the majority, noted that *Padilla* “breach[ed] the previously chink-free wall between direct and collateral consequences.”²² This perceived breach was the basis for the *Chaidez* Court’s decision that *Padilla* constituted a new rule. The dissent, on the other hand, argued the changes to immigration law in 1996 redefined professional norms for defense counsel.²³ The new professional norms required defense counsel to advise noncitizen clients about the immigration consequences of a guilty plea under existing rules. These new professional norms, in the dissent’s view, were new circumstances, not a new rule, and dictated the outcome of the *Strickland* test in *Padilla* making the decision retroactive under *Teague*.

This Comment argues that the dissent in *Chaidez* was correct in determining that the *Padilla* holding did not create a new rule. This Comment further argues that Justice Kagan’s wall between direct and collateral consequences never existed in Supreme Court precedent prior to her announcement of the distinction. To the extent it existed in lower court precedent, the wall was not only chinked at the time of the *Padilla* decision but had a gaping hole regarding deportation. Finally, this Comment will argue that Roselva Chaidez had the same right to advisement about the immigration consequences of her guilty plea as Jose Padilla. When the Supreme Court failed to recognize her right to advisement, Roselva Chaidez suffered an injustice, and so did the Bill of Rights.

I. BACKGROUND

Padilla held that the Sixth Amendment requires defense counsel to advise his or her noncitizen criminal client about the impact of a guilty plea on the client’s immigration status.²⁴ In *Chaidez*, the Court held that this duty constituted a new rule as defined by the *Teague* test and therefore was not retroactive.²⁵ *Chaidez*, as a result, was not entitled to have her conviction vacated.²⁶ This ruling is peculiar because *Chaidez*’s guilty plea came over a year after Jose Padilla’s conviction. If Jose Padilla had a Sixth Amendment right to information about the deportation consequences of a guilty plea in 2002, how did *Chaidez* not have the same right in 2003? To comprehend that determination, it is necessary to understand how the Court applied the *Strickland* test in *Padilla* and the importance of the 1996 changes in immigration law.

21. *Id.* at 1110–11.

22. *Id.* at 1110.

23. *Id.* at 1115 (Sotomayor, J., dissenting).

24. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

25. *Chaidez*, 133 S. Ct. at 1110–11.

26. *See id.* at 1113.

A. 1996 Immigration Law Changes

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act²⁷ (IIRIRA) and the Antiterrorism and Effective Death Penalty Act²⁸ (AEDPA), which increased the number of deportable offenses.²⁹ Among the changes brought by the 1996 laws was a new definition of “aggravated felony,”³⁰ specifically, reducing the qualifying sentence from five years to one year.³¹ The laws also “abolished the Attorney General’s authority to grant discretionary relief from removal for all but a small number of offenses.”³² This meant that noncitizen defendants sentenced to one year or longer of incarceration automatically qualified for deportation.

This new near certainty of deportation led the *Padilla* Court to recognize defense counsel’s obligation to advise clients about how a guilty plea could affect their immigration statuses.³³ The Court held that because the new immigration laws made deportation an “integral part . . . of the penalty that may be imposed on noncitizen defendants,”³⁴ the Sixth Amendment applies to advisement about the deportation consequences of a criminal conviction.³⁵

The *Padilla* Court noted that after the 1996 changes in immigration law, it had become the prevailing professional norm for defense counsel to inform a noncitizen client about the ramification of a guilty plea on his or her deportation status.³⁶ These professional norms are the measuring stick of *Strickland*, and the change in professional norms dictated the outcome of the *Strickland* test in *Padilla*.³⁷

B. *Strickland v. Washington*: What Constitutes Ineffective Assistance of Counsel?

The *Strickland* Court established a two-prong test for determining whether to vacate a criminal conviction due to ineffective assistance of

27. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. & 18 U.S.C.).

28. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, & 42 U.S.C.).

29. Matthew A. Spahn, Comment, *Padilla Retroactivity: A Critique of the Tenth Circuit’s Ruling That Padilla v. Kentucky Does Not Apply Retroactively to Cases on Collateral Review* [*United States v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011)], 51 WASHBURN L.J. 767, 767–68 (2012).

30. 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, 782 (2012).

31. *Id.*

32. *Chaidez v. United States*, 133 S. Ct. 1103, 1116 (2013) (Sotomayor, J., dissenting) (citing *Padilla v. Kentucky*, 559 U.S. 356, 363–64 (2010)).

33. *Padilla*, 559 U.S. at 363–64.

34. *Id.* at 364.

35. *Id.* at 364, 366.

36. *See id.* at 367.

37. *Id.* at 366–67.

counsel.³⁸ The first prong examines whether the assistance counsel provided met current professional norms.³⁹ Assistance of counsel is ineffective when the attorney's performance "falls 'below an objective standard of reasonableness,' as indicated by 'prevailing professional norms.'"⁴⁰ The *Strickland* Court identified professional norms as "American Bar Association standards and the like."⁴¹ *Strickland's* second prong determines whether the deficiency in the assistance of counsel caused prejudice significant enough to make a different outcome likely.⁴² A petitioner must meet both prongs of the test to have a court vacate a conviction.⁴³

When changing professional norms dictate a decision under *Strickland* they establish a new duty for defense counsel without creating a new rule under *Teague*.⁴⁴ Over time, the Supreme Court has recognized new standards for the effective assistance of counsel prong of the *Strickland* test.⁴⁵ At the same time, the Court frequently holds that changes in professional norms dictate the outcome of the *Strickland* test.⁴⁶ In *Wiggins v. Smith*,⁴⁷ the Court held that *Williams v. Taylor*,⁴⁸ which requires defense counsel to conduct background investigations in certain cases, did not create a new rule.⁴⁹ In *Roe v. Flores-Ortega*,⁵⁰ the Court held that performance by counsel is ineffective when it deprives a defendant of an appeal.⁵¹ In *Rompilla v. Beard*,⁵² the Court found defense counsel to be ineffective because he did not investigate a client's prior convictions.⁵³ Each time, the Court held that the decision was not a new rule.⁵⁴ In each of these cases, the Court held that the professional norms of the time dictated the outcome of the *Strickland* test, that the rules were not new, and therefore the rules applied retroactively.⁵⁵

C. Padilla v. Kentucky Establishes a New Duty

Jose Padilla had lived in the United States for over forty years when he pleaded guilty in 2002 to transporting marijuana.⁵⁶ He was a Vietnam

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

39. *Id.*

40. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)).

41. *Strickland*, 466 U.S. at 688.

42. *Id.* at 687.

43. *Id.*

44. *Id.* at 784.

45. Spahn, *supra* note 29, at 782–84.

46. *Id.*

47. 539 U.S. 510 (2003).

48. 529 U.S. 362 (2000).

49. *Chaidez v. United States*, 133 S. Ct. 1103, 1115 (2013) (Sotomayor, J., dissenting).

50. 528 U.S. 470 (2000).

51. *Id.* at 477.

52. 545 U.S. 374 (2005).

53. *Id.* at 389–90.

54. Spahn, *supra* note 29, at 784.

55. *See id.* at 782–84.

56. *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010); *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd and remanded*, 559 U.S. 356 (2010).

War veteran and lawful permanent resident of the United States.⁵⁷ Provisions of the 1996 immigration laws required his deportation as a result of his decision to plead guilty to drug trafficking.⁵⁸ After learning he was eligible for deportation, Padilla filed a motion in state court for post-conviction relief based on a Sixth Amendment claim of ineffective assistance of counsel.⁵⁹ Padilla claimed his attorney had told him he “did not have to worry about immigration status since he had been in the country so long.”⁶⁰ Initially, the state trial court denied Padilla’s request for relief.⁶¹ Padilla appealed, and the state appellate court reversed the trial court, vacating his conviction.⁶² Ultimately, the Kentucky Supreme Court reversed the appellate court and reinstated the trial court order denying relief.⁶³

Padilla appealed and the Supreme Court granted certiorari.⁶⁴ The Court applied the *Strickland* test, found that Padilla had not received the effective assistance of counsel, and held that a criminal defendant has a Sixth Amendment right to advisement about the immigration consequences of a guilty plea.⁶⁵ The Court held that current professional norms required defense counsel to provide information about the immigration consequences of a conviction.⁶⁶

D. Teague v. Lane: Is a Rule Retroactive?

Courts use the *Teague* standard to determine when a rule of criminal procedure is retroactive.⁶⁷ *Teague* holds that once a conviction is final, a defendant cannot benefit from a subsequent ruling if that ruling announces a new rule.⁶⁸ However, if the ruling is merely an established principle applied to new circumstances, it is not a new rule and the decision applies retroactively.⁶⁹ The central question faced by the *Chaidez* Court was whether to apply *Padilla* retroactively to Roselva Chaidez’s conviction.⁷⁰ *Teague* defines a new rule as a decision that “breaks new ground,” “imposes a new obligation” on the government, or is “not dictated by [existing] precedent.”⁷¹ In order to determine if *Padilla* applied retroactively, the *Chaidez* Court had to determine whether the *Padilla* decision

57. *Padilla*, 559 U.S. at 359.

58. *Id.* at 359, 363–64.

59. *Padilla*, 253 S.W.3d at 483.

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

61. *Id.*

62. *Id.* at 485.

63. *Padilla*, 253 S.W.3d at 485.

64. *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010).

65. *Id.* at 360, 366, 374.

66. *Id.* at 367.

67. *Id.* at 1107.

68. *Id.*

69. *Id.*

70. *Chaidez v. United States*, 133 S. Ct. 1103, 1105 (2013).

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

“broke new ground,” “imposed a new obligation” on the government, or was “dictated by precedent.”

II. CHAIDEZ V. UNITED STATES

A. Facts

Roselva Chaidez, originally from Mexico, obtained lawful permanent resident status in the United States in 1977.⁷² Approximately twenty years later, she pleaded guilty to two counts of mail fraud for helping to defraud an automobile insurance company.⁷³ Under the 1996 immigration laws, the two counts to which Chaidez pleaded guilty qualified as “aggravated felonies” and, unbeknownst to Chaidez, triggered her deportation under the 1996 laws.⁷⁴ In 2004, Chaidez’s convictions became final.⁷⁵

Five years later, Chaidez applied for United States citizenship.⁷⁶ Chaidez’s application alerted immigration officials of her convictions, and the government initiated deportation proceedings against her.⁷⁷ In an attempt to avoid deportation, Chaidez sought to have her convictions vacated by filing a writ of coram nobis with the Federal District Court for the Northern District of Illinois.⁷⁸ Chaidez maintained that her attorney never informed her of the immigration consequences of pleading guilty, and at the time of her plea she was unaware of the deportation implications of her plea.⁷⁹ Chaidez claimed that her attorney’s failure to inform her of the deportation implications of her guilty pleas amounted to ineffective assistance of counsel under the Sixth Amendment.⁸⁰ Chaidez filed an affidavit that she would not have accepted the plea bargain if she was aware that she could face deportation as a result.⁸¹ The district court determined this affidavit satisfied the prejudice prong of the *Strickland* test.⁸² Chaidez filed her corrected petition for relief with the district court just one week before the Supreme Court decided *Padilla*.⁸³

72. *Chaidez*, 133 S. Ct. at 1105.

73. *Id.* at 1105–06.

74. *Id.* at 1106.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *United States v. Chaidez*, 730 F. Supp. 2d 896, 904 (N.D. Ill. 2010), *rev’d*, 655 F.3d 684 (7th Cir. 2011), *aff’d*, 133 S. Ct. 1103 (2013).

82. *Id.*

83. *Id.* at 898. Chaidez needed to submit a corrected petition explaining why she had waited so long to file. *Id.* at 898, 904.

B. Procedural History

After learning she faced deportation, Chaidez petitioned the district court to have her convictions vacated on Sixth Amendment grounds.⁸⁴ The district court ruled that the *Padilla* decision was an ordinary application of *Strickland*, did not break new ground, was not a new rule,⁸⁵ and therefore applied retroactively and applied to Chaidez's claim.⁸⁶ The district court granted Chaidez's motion and vacated her conviction, finding that Chaidez's attorney had not informed her of relevant deportation issues and that Chaidez's lack of knowledge created prejudice sufficient to believe that the outcome could have been different had the information been provided to Chaidez.⁸⁷

The Government appealed and the Seventh Circuit reversed, finding that *Padilla* did announce a new rule.⁸⁸ The Seventh Circuit reasoned that the Supreme Court had never before required defense counsel to advise a client about a collateral consequence of a guilty plea.⁸⁹ The Seventh Circuit held that *Padilla* violated the accepted "distinction between direct and collateral consequences."⁹⁰ Judge Williams of the Seventh Circuit dissented, arguing that *Padilla* only applied the established *Strickland* test to an attorney's duty to inform a client about deportation issues after the enactment of the 1996 changes in immigration law.⁹¹

C. Majority Opinion

Justice Kagan wrote the majority opinion for the Court in which Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito joined.⁹² In analyzing whether *Padilla* has retroactive effect, the majority applied the *Teague* standard.⁹³ Justice Kagan acknowledged that under *Teague*, garden-variety applications of *Strickland* to new circumstances do not produce new rules and are therefore retroactive.⁹⁴ However, Justice Kagan determined that *Padilla* was more than a straightforward application of *Strickland*.⁹⁵ Justice Kagan argued that before the *Padilla* Court applied *Strickland* it first analyzed whether *Strickland* applied to advisement about deportation, a collateral consequence of conviction.⁹⁶ It

84. *Id.* at 898, 904.

85. *Id.* at 904.

86. *Id.*

87. *United States v. Chaidez*, No. 03 CR 636-6, 2010 WL 3979664, at *3-4 (N.D. Ill. Oct. 6, 2010), *rev'd*, 655 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).

88. *Chaidez*, 655 F.3d at 694.

89. *Id.* at 693.

90. *Chaidez v. United States*, 133 S. Ct. 1103, 1106 (2013) (quoting *Chaidez*, 655 F.3d at 691) (internal quotation marks omitted).

91. *Id.* (citing *Chaidez*, 655 F.3d at 697-99 (Williams, J., dissenting)).

92. *Id.* at 1105.

93. *Id.* at 1107.

94. *Id.*

95. *Id.* at 1108.

96. *Id.*

was this preliminary analysis that Justice Kagan pointed to as breaking new ground under *Teague*, by applying the Sixth Amendment to any collateral consequence of conviction.⁹⁷

Justice Kagan began her analysis by discussing *Hill v. Lockhart*,⁹⁸ which extended the Sixth Amendment to the plea process.⁹⁹ In that case, the petitioner sought to have his conviction, obtained through a guilty plea, overturned because his counsel provided inaccurate information about parole eligibility.¹⁰⁰ Applying *Strickland* to the petitioner's claim, the *Hill* Court determined that Hill did not meet the second prong of the test; the inaccurate information did not cause him prejudice.¹⁰¹ Because the petitioner failed to show prejudice, the Court did not determine whether inaccurate information about parole eligibility constituted a violation of the Sixth Amendment guarantee to effective assistance of counsel.¹⁰² Because the *Hill* Court did not determine whether inaccurate advisement about a collateral consequence of conviction, parole eligibility, constituted ineffective assistance of counsel, Justice Kagan did not consider the divide between direct and collateral consequences to have been breached.¹⁰³

Justice Kagan went on to argue that when the *Padilla* Court went through a separate analysis of whether to apply *Strickland* to the issue of advisement about immigration issues, the Court was acknowledging the existence of the collateral distinction.¹⁰⁴ It was this decision to apply *Strickland* to a collateral consequence of conviction—deportation—that Kagan argued broke new ground and created a new rule.¹⁰⁵ The crux of the majority's opinion in *Chaidez* is that prior to *Padilla* the Supreme Court had never applied the Sixth Amendment to any collateral consequence of a guilty plea.¹⁰⁶ In deciding *Padilla*, Justice Kagan wrote, the Court “breach[ed] the previously chink-free wall between direct and collateral consequences.”¹⁰⁷

D. Justice Thomas's Concurring Opinion

Justice Thomas joined in the dissent in *Padilla*.¹⁰⁸ He did not believe that the Sixth Amendment extended any requirements of counsel

97. *Id.* at 1110.

98. *Id.* at 1108 (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)).

99. *See Hill*, 474 U.S. at 57.

100. *See id.* at 54–55.

101. *Id.* at 60.

102. *See Chaidez*, 133 S. Ct. at 1108.

103. *Id.*

104. *Id.* at 1110.

105. *Id.* at 1110–11.

106. *See id.*

107. *Id.* at 1110.

108. *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010).

beyond “defense against prosecution of the charged offense.”¹⁰⁹ Justice Thomas argued that *Padilla* was wrongly decided. Justice Thomas believed there was no right to advisement about immigration issues for the Court to apply “either prospectively or retrospectively.”¹¹⁰ Because he believed the Court decided *Padilla* incorrectly, Justice Thomas argued that a *Teague* analysis was unnecessary and concurred only in the judgment in *Chaidez*.¹¹¹

E. Dissenting Opinion

Justice Sotomayor authored the dissent in *Chaidez*, which Justice Ginsburg joined.¹¹² The dissent attacked Justice Kagan’s contention that a distinction between direct and collateral consequence existed in Supreme Court precedent.¹¹³ Justice Sotomayor pointed out that many of the lower court cases acknowledging a distinction between direct and collateral consequences were decided prior the passage of IIRIRA in 1996.¹¹⁴ This is important, Justice Sotomayor argued, because the 1996 laws changed the professional norms regarding advisement about the immigration consequences of a criminal conviction.¹¹⁵ Justice Sotomayor considered the 2001 decision *INS v. St. Cyr*¹¹⁶ to be a watershed decision regarding advisement about immigration issues in the context of a criminal proceeding, and noted that after *St. Cyr* a majority of circuit courts began acknowledging defense counsel’s duty to inform clients about deportation issues.¹¹⁷

The dissent in *Chaidez* argued that applying *Strickland* to the immigration consequences of a conviction did not break new ground.¹¹⁸ In *St. Cyr*, a case unrelated to the Sixth Amendment, the Court noted that competent criminal defense counsel would advise a client about the deportation consequences of a guilty plea.¹¹⁹ Justice Sotomayor pointed to appellate court decisions in *United States v. Kwan*¹²⁰ and *United States v. Couto*,¹²¹ each of which cited *St. Cyr* in applying *Strickland* to counsel misstatements about the deportation consequences of a guilty plea.¹²² In

109. *Chaidez*, 133 S. Ct. at 1114 (Thomas, J., concurring) (quoting *Padilla*, 559 U.S. at 389) (internal quotation mark omitted).

110. *Id.*

111. *Id.*

112. *Id.* at 1114 (Sotomayor, J., dissenting).

113. *See id.* at 1117–18.

114. *Id.* at 1118.

115. *Id.* at 1116.

116. 533 U.S. 289 (2001).

117. *Chaidez*, 133 S. Ct. at 1118 (Sotomayor, J., dissenting).

118. *See id.* at 1120–21.

119. *See id.* at 1111 (majority opinion) (citing *St. Cyr*, 533 U.S. at 323 n.50 (dealing with the retroactivity of IIRIRA and AEDPA)).

120. 407 F.3d 1005 (9th Cir. 2005).

121. 311 F.3d 179 (2d Cir. 2002), *abrogated by* *Padilla v. Kentucky*, 559 U.S. 356 (2010).

122. *See Chaidez*, 133 S. Ct. at 1118 (Sotomayor, J., dissenting) (citing *Kwan*, 407 F.3d at 1015; *Couto*, 311 F.3d at 188).

Kwan and *Couto*, federal circuit courts held that defense counsel's misstatements about immigration issues could constitute ineffective assistance of counsel under *Strickland*.¹²³ However, where the *Chaidez* majority saw *Kwan* and *Couto* as part of an established chain of precedent regarding attorney misstatements to a client,¹²⁴ the dissent instead saw a clear precedent of applying *Strickland* to advisement about the immigration consequences of a criminal conviction.¹²⁵

Justice Sotomayor argued that the outcome of the *Strickland* test in *Padilla* was dictated by the combination of precedent for applying *Strickland* to deportation issues and the change in prevailing professional norms that requiring defense counsel to advise a client about deportation after the 1996 changes in immigration law. With the outcome dictated by the 1996 changes in immigration law and the change in prevailing professional norms in response to that legislation, *Padilla* did not announce a new rule under *Teague* and therefore should have been retroactive.¹²⁶

III. ANALYSIS

In arguing that a "chink-free" wall between the direct and collateral consequences of a criminal conviction existed prior to *Padilla*, Justice Kagan ignored three lines of precedent that rendered the wall either non-existent or thoroughly breached. The failure to acknowledge these precedents led to the erroneous decision that *Padilla* does not apply retroactively. First, the language of *Padilla* both denies the existence of Justice Kagan's wall and indicates that the Court anticipated the *Padilla* decision would be retroactive.¹²⁷ Second, the *Hill* Court had applied the *Strickland* test to the issue of advisement about parole eligibility, a collateral consequence of criminal conviction, clearly breaching Justice Kagan's wall.¹²⁸ Finally, *St. Cyr*, *Kwan*, and *Couto* each recognized a criminal defendant's right to information about the immigration consequences of a guilty plea after 1996.¹²⁹ Individually, each line of precedent provides a significant challenge to Justice Kagan's reasoning; taken together, the challenge is insurmountable.

Without the incorrect distinction between direct and collateral consequences, the 1996 changes in immigration law clearly dictated the result of the *Strickland* analysis in *Padilla*. With the *Padilla* outcome dictated, the *Teague* analysis in *Chaidez* should have resulted in the *Padilla* ruling applying retroactively.

123. *Id.* (citing *Kwan*, 407 F.3d at 1015; *Couto*, 311 F.3d at 188).

124. *See id.* at 1111 n.12, 1112 (majority opinion).

125. *See id.* at 1118 (Sotomayor, J., dissenting).

126. *See id.* at 1120–21.

127. *Padilla v. Kentucky*, 559 U.S. 356, 365, 371–72 (2010).

128. *Hill v. Lockhart*, 474 U.S. 52, 58–60 (1985).

129. *INS v. St. Cyr*, 533 U.S. 289, 321–24 (2001); *United States v. Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005), *abrogated by Padilla*, 559 U.S. 356; *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002), *abrogated by Padilla*, 559 U.S. 356.

A. Padilla Said What?

The language of *Padilla* refutes two key elements of Justice Kagan's reasoning. First, the *Padilla* Court flatly rejected the distinction between collateral and direct consequences when it comes to Sixth Amendment analysis.¹³⁰ Second, the *Padilla* Court specifically acknowledged the possibility of opening the door to future claims as a result of granting Padilla's request.¹³¹

1. Justice Stevens: What Wall?

When Justice Kagan argued that *Padilla* "breach[ed] the previously chink-free wall between direct and collateral consequences," she quoted the *Padilla* decision: "*Strickland* applies to Padilla's claim."¹³² It is an ironic choice of quotation because just two paragraphs earlier in the *Padilla* decision, Justice Stevens addressed the direct versus collateral distinction head-on: "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."¹³³ Justice Stevens discussed how, aside from the general issue of collateral versus direct consequences of conviction, deportation has a unique relationship to criminal conviction for the defendant.¹³⁴ Justice Stevens also noted the century-long history of connecting immigration status to criminal conviction.¹³⁵ According to the *Padilla* Court, the wall that is the basic underpinning of the *Chaidez* decision did not exist.

2. Floodgates?

The plain language of *Padilla* anticipated retroactivity.¹³⁶ Although it is dicta, Justice Stevens addressed the Government's concern that *Padilla* would open the floodgates to new claims.¹³⁷ Rather than arguing a flood could not occur because *Padilla* would not be retroactive, the Court pointed to the same concerns regarding the *Hill* decision.¹³⁸ Justice Stevens assured the Government that, in spite of *Hill* being applied retroactively, "[a] flood did not follow" because the prejudice prong of the *Strickland* standard was such a high bar to overcome.¹³⁹ This discussion

130. *Padilla*, 559 U.S. at 365.

131. *Id.* at 372–74.

132. *Chaidez v. United States*, 133 S. Ct. 1103, 1110 (2013) (quoting *Padilla*, 559 U.S. at 366) (internal quotation marks omitted).

133. *Padilla*, 559 U.S. at 365 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

134. *Id.* at 365–66.

135. *Id.*

136. *See id.* at 371–72 (discussing the possibility of a flood of cases based on the ruling).

137. *Id.*

138. *Id.*

139. *Id.* at 371.

demonstrates that the *Padilla* Court anticipated its holding would be retroactive.¹⁴⁰

B. *Hill v. Lockhart: Breaching the Direct Versus Collateral Distinction*

Even if Justice Kagan's contention that there was a distinction between direct and collateral consequence is accepted, *Hill v. Lockhart* breached it in 1985.¹⁴¹ The central underpinning of Justice Kagan's argument in *Chaidez* is that the application of the *Strickland* standard to any collateral consequence of conviction was a departure from precedent.¹⁴² Justice Kagan noted that the *Hill* Court explicitly left open whether *Strickland* applied to collateral consequences.¹⁴³ The plain language of *Hill* supports this proposition, and *Hill* declined to rule on the issue of collateral consequences generally.¹⁴⁴ What Justice Kagan ignored is that the *Hill* Court did perform a *Strickland* analysis on the issue of advisement about parole eligibility.¹⁴⁵ Specifically, the *Hill* Court found that the petitioner failed to meet the second prong of the *Strickland* test.¹⁴⁶ If Kagan's wall existed, the *Hill* Court could have simply dismissed the claim on the collateral distinction basis—it did not.¹⁴⁷

Justice Kagan pointed to Part II of *Padilla*, where the Court analyzed whether to apply *Strickland*, as an indication of breaking new ground regarding collateral consequences.¹⁴⁸ However, this ignored that the *Hill* Court, without analyzing whether to apply *Strickland*, did apply *Strickland* to the collateral consequence of parole eligibility.¹⁴⁹ Justice Kagan's central point, that *Padilla* was the first case to apply *Strickland* to a collateral consequence of a conviction, is simply erroneous. The *Hill* Court breached the distinction over a quarter of a century earlier.

C. *St. Cyr, Kwan, and Couto Recognize a Defendant's Right to Be Informed About the Immigration Consequences of a Guilty Plea After 1996*

The words of Justice William Brennan perfectly describe the error Justice Kagan made in *Chaidez*: “[T]he Framers of the Bill of Rights did not purport to ‘create’ rights. Rather, they designed

140. Spahn, *supra* note 29, at 796–97.

141. See *Hill v. Lockhart*, 474 U.S. 52, 56–60 (1985) (applying the *Strickland* test to counsel's advice about parole eligibility, a collateral consequence).

142. *Chaidez v. United States*, 133 S. Ct. 1103, 1110 (2013).

143. *Id.* at 1108.

144. *Hill*, 474 U.S. at 60 (“We find it unnecessary to determine whether . . . erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel.”).

145. *Id.* at 58–59.

146. *Id.* at 60.

147. See *Hill*, 474 U.S. 52.

148. *Chaidez*, 133 S. Ct. at 1110.

149. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (“We confronted a similar ‘floodgates’ concern in *Hill*, but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.” (citation omitted)).

the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.”¹⁵⁰

The *Padilla* decision did not create a right to information about the immigration consequences of a guilty plea; rather, it recognized that right as a manifestation of the Sixth Amendment after the 1996 immigration laws went into effect. Three cases illustrate the recognition of that right prior to *Padilla*’s conviction. In *St. Cyr*, the Court acknowledged that the 1996 changes in immigration law altered the professional norms for criminal defense counsel.¹⁵¹ *Kwan* and *Couto* each acknowledged this right in relation to the Sixth Amendment.¹⁵² Justice Kagan incorrectly viewed these three cases as assigning an obligation on defense counsel, rather than recognizing a right of criminal defendants.

1. The Court Recognizes the Impact of IIRIRA and AEDPA in *St. Cyr*

St. Cyr is not a Sixth Amendment case; instead, it is a case about the retroactivity of IIRIRA and AEDPA.¹⁵³ However, referring to IIRIRA and AEDPA, Justice Stevens wrote in his majority opinion, “[C]ompetent defense counsel, following the advice of numerous practice guides, would have advised [a client] concerning the provision’s importance.”¹⁵⁴ While this quote is dicta, one can infer the Supreme Court’s recognition that after the 1996 immigration law changes, the Sixth Amendment’s guarantee of effective assistance of counsel includes advisement about immigration consequences of criminal proceedings.

Even though *St. Cyr* is not a Sixth Amendment case, it is a clear statement from the Court that effective assistance of counsel includes advisement about the immigration ramifications of criminal proceedings after the 1996 immigration laws became effective. Regardless of whether this is an acknowledgment of a breach in Justice Kagan’s wall or a statement of the wall’s nonexistence, it refutes the idea of a pristine distinction.

2. *Kwan* and *Couto* apply *St. Cyr* to the Sixth Amendment

While *St. Cyr* did not deal directly with the Sixth Amendment implications of the 1996 immigration law changes, *Kwan* and *Couto* did.¹⁵⁵ Each decision noted that IIRIRA and AEDPA made deportation nearly automatic following certain convictions.¹⁵⁶ Because the consequence of

150. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting).

151. *INS v. St. Cyr*, 533 U.S. 289, 321, 323 n.50 (2001).

152. *United States v. Kwan*, 407 F.3d 1005, 1016 (9th Cir. 2005), *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010); *United States v. Couto*, 311 F.3d 179, 187–88 (2d Cir. 2002), *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010).

153. *St. Cyr*, 533 U.S. at 292–93.

154. *Id.* at 323 n.50.

155. *Kwan*, 407 F.3d at 1016; *Couto*, 311 F.3d at 187–88.

156. *Kwan*, 407 F.3d at 1008–09; *Couto*, 311 F.3d at 189–90.

deportation had become a nearly automatic result of certain criminal convictions for noncitizen defendants, each decision held that *Strickland* applies to defense counsel's misstatements about deportation.¹⁵⁷ Both decisions cited *St. Cyr* as acknowledgment by the Supreme Court of a defendant's right to advisement about the immigration consequences of a criminal conviction.¹⁵⁸

When viewed in the light of *Kwan* and *Couto*, the announcement in *Padilla* essentially expanded the existing prohibition against misstatements to include omissions: no misstatements (*Kwan* and *Couto*) or omissions (*Chaidez*) about deportation.¹⁵⁹ Justice Kagan argued that this distinction has meaning; she placed *Kwan* and *Couto* in a line of cases that prohibit attorney misstatements in general and gave no weight to the cases' importance in recognizing the right of a criminal defendant to information about the immigration consequences of a guilty plea.¹⁶⁰

Adding a prohibition against attorney omissions to an existing rule prohibiting attorney misstatements about deportation, however, is only significant if viewed from the attorney's side of the attorney-client equation. While there is admittedly a difference between requiring an attorney to provide accurate information and prohibiting an attorney from providing inaccurate information, there is no difference from the point of view of a criminal defendant: either way, the defendant lacks the necessary information to make an informed decision. By viewing these obligations from the vantage point of the attorney, Justice Kagan misinterpreted the Sixth Amendment. The Sixth Amendment does not confer obligations upon attorneys; it recognizes the rights of criminal defendants.¹⁶¹

St. Cyr did not create an obligation that attorneys provide accurate information about the immigration consequences of a guilty plea after the 1996 changes in the law; rather, it recognized that after the 1996 changes in the law defendants have a right to accurate information about the immigration consequences of a guilty plea. This right is what ultimately determines what information defense counsel has a duty to provide, not the reverse. Jose Padilla had the right to advisement by counsel about the immigration consequences of his guilty plea in 2002. The Supreme Court recognized it and provided him the relief to which he was entitled.

157. *Kwan*, 407 F.3d at 1015–16; *Couto*, 311 F.3d at 188.

158. *Kwan*, 407 F.3d at 1016; *Couto*, 311 F.3d at 187–88.

159. *Chaidez v. United States*, 133 S. Ct. 1103, 1118–19 (2013) (Sotomayor, J., dissenting).

160. *Id.* at 1112 (majority opinion).

161. See U.S. CONST. amend. VI.

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

Id. (emphases added).

Roselva Chaidez had the exact same right in 2003, but the Supreme Court failed to recognize it and denied her the relief to which she was entitled.

D. Strickland Dictated the Outcome in Padilla

Writing for the majority in *Padilla*, Justice Stevens specifically pointed to IIRIRA and AEDPA as critical factors in the decision: “[I]mportantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.”¹⁶² The Court stated that because of the near automatic nature of the consequence it was “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”¹⁶³

With the wall between direct and collateral consequence either never having existed, or if it had, having been breached by the time of *Padilla*, the Court applied the first prong of the *Strickland* test: whether the assistance of counsel was effective.¹⁶⁴ Using the professional norms of the time as the measuring stick, *Strickland* dictated that the *Padilla* Court find counsel ineffective for failing to warn Padilla about the impact of a guilty plea on his immigration status.¹⁶⁵ Professional norms are the measuring stick of *Strickland*; when the norms changed in response to the 1996 immigration law changes, that change dictated the outcome of the *Strickland* test in *Padilla*.

E. The Supreme Court Should Have Found Padilla Retroactive Under Teague in Chaidez

If a wall ever existed between direct and collateral consequences,¹⁶⁶ it was far from chink-free by the time *Padilla* was decided. Justice Kagan emphasized the fact that the *Padilla* Court went through a separate analysis to determine whether to apply *Strickland*.¹⁶⁷ The point she ignored was that the *Padilla* Court decided *Strickland* did apply—and further noted that the prevailing professional norms dictated the outcome.¹⁶⁸ Applying the Sixth Amendment to collateral consequences was not breaking new ground.

Without the distinction of direct versus collateral consequences to cloud the issue, nothing else about the *Padilla* case was anything other than a garden-variety application of *Strickland*.¹⁶⁹ *Padilla* merely applied

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

163. *Id.* (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982), *abrogated by Padilla*, 559 U.S. 356).

164. *Id.*

165. *See id.* at 366–67.

166. *See id.* at 365 (“We, however, have never applied a distinction between direct and collateral consequences . . .”).

167. *Chaidez v. United States*, 133 S. Ct. 1103, 1110 (2013).

168. *See id.* at 1114–15 (Sotomayor, J., dissenting).

169. *Id.* at 1114.

the standard for effective counsel from *Strickland* to a new set of circumstances: the deportation consequences of a guilty plea—after the enactment of the 1996 immigration laws.¹⁷⁰ Under *Teague*, a rule that is the result of applying established precedent to new circumstances is retroactive;¹⁷¹ the *Chaidez* dissent correctly concluded that this was the case with the *Padilla* decision.

CONCLUSION

The *Chaidez* decision was an injustice. Had circumstances alerted Roselva Chaidez to her deportation status earlier than it did, perhaps she would have beaten Jose Padilla to the Supreme Court and received the relief to which she was entitled. The *Chaidez* Court ignored the *Hill*, *St. Cyr*, *Kwan*, and *Couto* decisions—and the language of the *Padilla* decision itself—when it determined that *Padilla* announced a new rule. *Hill*, *St. Cyr*, *Kwan*, and *Couto* had already established a defendant's right to information about the immigration consequences of a criminal conviction. Precedent for applying *Strickland* to collateral consequences of a criminal conviction, specifically immigration consequences, already existed.¹⁷²

If the chink-free wall between direct and collateral consequences ever existed, it had gaping holes punched through it by the time of the *Padilla* decision. The prevailing professional norms required criminal defense counsel to advise a client about the deportation consequences of a guilty plea. These two facts, when measured against *Strickland*, dictated the outcome in *Padilla*. Under *Teague*, a dictated outcome does not establish a new rule. Because *Padilla* did not announce a new rule, its holding should have applied retroactively to Roselva Chaidez.

Levi Price *

170. *Id.* at 1115.

171. *Id.* at 1107 (majority opinion).

172. *Id.* at 1118 (Sotomayor, J., dissenting).

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