CASE NOTE

RETROACTIVITY, *STRICKLAND*, AND ALIEN CRIMINAL DEFENDANTS: HOW THE *CHAIDEZ* DECISION RAISED MORE QUESTIONS THAN IT ANSWERED

DANIELLE R. ACKER SUSANJ†

INTRODUCTION

When the United States Supreme Court decides to hear a case, it does not grant certiorari simply on the case itself—it chooses to answer a "question presented" by that case. So in *Chaidez v. United States*,[1] the Court granted certiorari on the question "whether the principle articulated in *Padilla* [*v. Kentucky*] applies to persons whose convictions became final before its announcement."[2] But in answering that question, *Chaidez* left unanswered—and raised—even more questions.

In the 2010 landmark case *Padilla v. Kentucky*, the Court declared that defense lawyers must inform noncitizen criminal defendants of the removal consequences of pleading guilty.[3] In the years that followed, federal and state courts grappled with—and ultimately split over—whether *Padilla* applied only to defendants whose cases were still on direct appeal, or also to those whose convictions were final before *Padilla*. The Supreme Court granted certiorari in *Chaidez*, and, in an opinion authored by Justice Kagan, upheld the Seventh Circuit's ruling[4] that *Padilla* established a "new rule" not available retroactively.[5]

† Articles Editor, *University of Pennsylvania Law Review*, Volume 161. J.D., University of Pennsylvania Law School; B.A., Wheaton College.

1 133 S. Ct. 1103 (2013).

2 Brief for Petitioner at i, *Chaidez*, 133 S. Ct. 1103 (No. 11-820), 2012 WL 2948891.

3 130 S. Ct. 1473, 1478 (2010).

4 Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103.

5 133 S. Ct. at 1107-11.

But the Court's ruling did not address several of the difficult questions that come up in retroactivity analysis, particularly for any rule premised on *Strickland v. Washington*.[6] It also left many questions open for alien petitioners who seek relief from their convictions. Part I of this Note discusses how the Court has traditionally handled the retroactive application of rules to habeas petitioners and how the issue arose after *Padilla*. It summarizes the *Teague*[7] rule for retroactivity and the problem the *Padilla* decision posed for lower courts determining its retroactive application. Part II discusses the *Chaidez* decision and notes the various policy and practical concerns implicated (and ignored) in its retroactivity analysis. Part III notes the open questions that persist after *Chaidez*—particularly for petitioners whose lawyers affirmatively gave them wrong information at the time they pleaded guilty—and examines where the Court may be heading with its recent plea jurisprudence. Finally, Part III also questions how long *Teague* and *Strickland* can function together, as new norms in criminal procedure evolve, become prevailing, and ultimately gain recognition from courts.

I. BACKGROUND: RETROACTIVE RULES AND THE GREAT WRIT

When the Supreme Court requires a procedural protection for criminal defendants, often it must determine *which* criminal defendants should get the benefit of that rule. Its current approach is to limit claims under "new" rules to defendants whose convictions are on direct review, while allowing all petitioners, even those whose convictions are final, to seek the protection of rules that are not new.

A. *The Development of Postconviction Review*

The question of when a Supreme Court decision on criminal procedure should apply retroactively to cases on collateral review became more complicated as the Warren Court began issuing sweeping rulings, such as *Miranda v. Arizona*[8] and *Mapp v. Ohio*,[9] that revolutionized criminal procedure. The potentially huge number of petitioners who could have taken advantage of those new rules led the Court to determine that retroactivity would not be automatic, but would depend on the purpose of the new rule, the extent of

---

6 466 U.S. 668 (1984) (establishing a Sixth Amendment right to effective assistance of counsel).

7 Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion).

8 *See* 384 U.S. 436 (1966) (requiring certain preinterrogation warnings for individuals taken into custody).

9 *See* 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule against the states).

reliance on the old rule, and the effect of retroactive application on the administration of justice.[10] Justice Harlan criticized the Court's retroactivity approach in his dissents from the line of cases that followed, arguing that all decisions should apply retroactively to cases on direct review, but that "new" rules should not apply to cases on collateral review.[11] Decades later, in *Griffith v. Kentucky*[12] and *Teague v. Lane*,[13] the Court adopted Justice Harlan's views about retroactivity.

B. *The* Teague *Rule*

New constitutional rules of criminal procedure do not apply retroactively to cases on collateral review.[14] So in a case like *Chaidez*, the threshold question is whether the rule the petitioner seeks to take advantage of is "new." If it is, the rule applies retroactively only if it falls under one of two exceptions: (1) it places new constitutionally protected conduct beyond the government's authority to regulate, or (2) it implicates fundamental fairness and bears on guilt or innocence.[15] While the Supreme Court has handled the question of retroactivity multiple times and has provided some guidance, the contours of what constitutes a new rule remain fuzzy. Some have

---

10 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1241 (6th ed. 2009) (citing Stovall v. Denno, 388 U.S. 293, 297 (1967)).

11 *See, e.g.*, Mackey v. United States, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting), *overruled by* Griffith v. Kentucky, 479 U.S. 314 (1987); *see also* FALLON, JR. ET AL., *supra* note 10, at 1241-42 (presenting Justice Harlan's position).

12 479 U.S. at 321-23.

13 489 U.S. 288, 310 (1989) (plurality opinion). Although *Teague* was a plurality decision, subsequent majorities of the Court have accepted its approach. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 313 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002); *see also* FALLON, JR. ET AL., *supra* note 10, at 1242. *Teague* controls retroactivity analysis for many types of postconviction review of both federal and state convictions. However, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits retroactivity for habeas petitions filed under the Act that seek federal review of a state conviction, if a state court has already ruled on the merits of the claim being raised. *See* 28 U.S.C. § 2254(d) (2006).

14 The Court has held that *Teague* applies only to rules of criminal procedure, not to substantive rules of criminal law. *See* Bousley v. United States, 523 U.S. 614, 620 (1998).

15 *Teague*, 489 U.S. at 290; FALLON, JR. ET AL., *supra* note 10, at 1245-46. The first exception relates to new rules governing "primary conduct," which apply retroactively because they place certain actions outside of the government's power, or protect certain conduct from government interference or regulation. *See* Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004) (citations omitted). Under the second exception, rules will be retroactive only if they are "watershed" rules of criminal procedure, "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311, 313. While the Court has never found such a rule, it has suggested repeatedly that the rule articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), would have fallen under this exception. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1990).

argued, however, that "it is clear that the Court generally defines a new rule expansively and instances where rules have retroactive application narrowly."[16]

A rule that "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final'" may be new, the Court has said.[17] When finding that a case announces a new rule, the Court has often discussed whether reasonable jurists disagreed on the issue prior to the Court's decision.[18] *Teague*'s "'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[19] If lower courts have been split, that conflict militates toward a rule being new.[20]

The easiest way to identify a new rule is if it overrules prior precedent.[21] On the other hand, a rule is not new if it was dictated by precedent that controlled or required the outcome. The question "is more difficult . . . when a decision extends the reasoning" of previous cases.[22] Justice Kennedy pondered this question in his concurrence in *Wright v. West*, in which the Court considered a criminal procedure rule that required a case-by-case evaluation of what is rational: "Where the beginning point is . . . 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."[23]

---

16 ERWIN CHEMERINSKY, FEDERAL JURISDICTION 939 (5th ed. 2007).

17 *Saffle*, 494 U.S. at 488 (quoting *Teague*, 489 U.S. at 301); *see also* O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (considering these factors).

18 *See, e.g.*, Beard v. Banks, 542 U.S. 406, 416 (2004) (stating that the differing of reasonable jurists points to a new rule); Caspari v. Bohlen, 510 U.S. 383, 395 (1994) (same); Graham v. Collins, 506 U.S. 461, 467-68 (1993) (same).

19 Butler v. McKellar, 494 U.S. 407, 414 (1990).

20 *See, e.g.*, *Caspari*, 510 U.S. at 395 (relying largely on lower court division in finding a new rule). *But see* Williams v. Taylor, 529 U.S. 362, 409-10 (2000) (stating, in the context of 28 U.S.C. § 2254(d)(1), that conflict among courts alone is not sufficient to show a new rule).

21 *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 416 (2007) (finding Crawford v. Washington, 541 U.S. 36 (2004), to establish a new rule because it overruled prior governing precedent).

22 *Saffle*, 494 U.S. at 488. *See generally* Sawyer v. Smith, 497 U.S. 227, 233-41 (1990) (discussing at length whether the rule announced by Caldwell v. Mississippi, 472 U.S. 320 (1985), was dictated by prior cases).

23 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment). The *Wright* Court considered the application of the standard for sufficiency of evidence established in *Jackson v. Virginia*, 443 U.S. 307 (1979)—"whether any rational trier of fact could have found guilt beyond a reasonable doubt." *Wright*, 505 U.S. at 308.

C. Padilla v. Kentucky

On the advice of his lawyer, Jose Padilla pleaded guilty to a drug trafficking offense, which made him eligible for removal.[24] Padilla filed for postconviction relief, arguing that his lawyer had told him that he "did not have to worry about" being deported, which deprived him of the effective assistance of counsel in his decision to plead guilty.[25] The Supreme Court of Kentucky ruled without an evidentiary hearing that Padilla had not stated a claim for denial of effective assistance of counsel because he was not entitled to effective assistance regarding collateral consequences.[26] The Supreme Court of Kentucky was the first court to hold that misadvice could not constitute ineffective assistance,[27] but most federal and state courts before *Padilla* had held that defense attorneys were not required to give affirmative advice on the collateral consequences of guilty pleas, including removal.[28]

The Supreme Court, however, reversed, with five Justices joining the holding that "constitutionally competent counsel would have advised" that a conviction would make the defendant subject to removal, if that consequence were clear.[29] The Court placed this requirement under the *Strickland* line of cases; it ruled that a defense attorney's failure to advise that a conviction would make a defendant automatically deportable violated the Sixth Amendment right to effective assistance of counsel.[30] Under *Strickland*, the Court asked whether the defense attorney's conduct "fell below an objective standard of reasonableness."[31] The Court measures this by the "practice and expectations of the legal community,"[32] examined "under prevailing professional norms."[33] Those norms, the *Padilla* Court concluded, recognized that providing advice on deportation consequences was a duty of the criminal defense attorney.[34] The Court noted that it had previously recognized in *INS v. St. Cyr* that removal consequences are relevant to the

---

24 Padilla v. Kentucky, 130 S. Ct. 1473, 1477 & n.1 (2010).

25 *Id.* at 1478 (citation and internal quotation marks omitted).

26 Commonwealth v. Padilla, 253 S.W.3d 482, 484-85 (Ky. 2008), *rev'd*, 130 S. Ct. 1473.

27 *See Padilla*, 130 S. Ct. at 1493-94 (Alito, J., concurring in the judgment).

28 *Id.* at 1487 (citations omitted); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (reviewing lower court decisions).

29 *Padilla*, 130 S. Ct. at 1478, 1483 (majority opinion).

30 *See id.* at 1482, 1486-87. *Strickland*'s standard for ineffective assistance of counsel was first applied to guilty pleas in *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

31 *Padilla*, 130 S. Ct. at 1482 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

32 *Id.*

33 *Id.* (citation and internal quotation marks omitted).

34 *Id.* at 1482-83.

decision whether to plead guilty.[35] According to the Court, "For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[36] Further, the Court observed that it had never held relevant the distinction between direct criminal consequences and collateral consequences of conviction in the context of ineffective assistance of counsel.[37]

In his opinion concurring in the judgment, Justice Alito, joined by Chief Justice Roberts, suggested that the Court's opinion was too broad. Justice Alito would have held that constitutionally effective counsel (1) must refrain from "unreasonably providing incorrect advice," and (2) should inform defendants that pleading guilty "may have adverse immigration consequences" and advise them to contact an immigration attorney for more information.[38] Justice Scalia, joined by Justice Thomas, dissented, arguing that the Sixth Amendment only "guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n],'" and that therefore the majority was "swinging a sledge where a tack hammer is needed."[39]

The *Padilla* opinion did not address whether it would apply retroactively. So in the following years, lower courts split over whether *Padilla* applied to petitioners whose convictions were already final.[40]

II. THE *CHAIDEZ* DECISION

A. *Background of the Case*

Roselva Chaidez entered the United States from Mexico, and in 1977 became a legal permanent resident.[41] In 2003, she was charged with three counts of mail fraud in connection with an insurance fraud scheme and, later that year, on the advice of her attorney, pleaded guilty to two of the

---

35 *Id.* at 1483 (citing INS v. St. Cyr, 533 U.S. 289, 322 (2001)).

36 *Id.* at 1485.

37 *Id.* at 1481.

38 *Id.* at 1487, 1494 (Alito, J., concurring in the judgment).

39 *Id.* at 1494 (Scalia, J., dissenting) (alterations in original) (quoting U.S. CONST. amend. VI).

40 *Compare* United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011) (concluding that *Padilla* applies retroactively), *and* Commonwealth v. Clarke, 949 N.E.2d 892, 899-901, 907 (Mass. 2011) (same), *with* United States v. Amer, 681 F.3d 211, 214 (5th Cir. 2012) (concluding that *Padilla* does not apply retroactively), United States v. Chang Hong, 671 F.3d 1147, 1159 (10th Cir. 2011) (same), Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011) (same), *aff'd*, 133 S. Ct. 1103 (2013), *and* State v. Gaitan, 37 A.3d 1089, 1107 (N.J. 2012) (same). The Fourth Circuit similarly noted that "nothing in the *Padilla* decision indicates that it is retroactively applicable to cases on collateral review." United States v. Hernandez-Monreal, 404 F. App'x 714, 715 n.* (4th Cir. 2010).

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

counts and received a sentence of four years of probation.[42] Because the federal fraud charges to which Chaidez pleaded guilty involved more than $10,000, she became eligible for removal as an aggravated felon, and removal proceedings began in 2009.[43] Chaidez then sought to have her conviction overturned, claiming ineffective assistance of counsel because her attorney failed to tell her that pleading guilty to mail fraud could lead to her removal.[44]

While Chaidez's petition was pending, the Supreme Court decided *Padilla*. The district court hearing Chaidez's petition determined that *Padilla* was not a new rule,[45] granted her petition, and vacated her conviction.[46] The government appealed, claiming that *Padilla* was a new rule that should not have been applied retroactively, and the Seventh Circuit reversed, holding for the government.[47]

The Supreme Court granted certiorari,[48] perhaps influenced by the Solicitor General's (SG) brief supporting review.[49] The SG's brief argued that the Seventh Circuit's decision was correct but that this "recurring" issue "of substantial importance" had resulted in a direct conflict among the courts of appeals.[50] The SG's sole commentary on the case's appropriateness as a vehicle was an assertion that it would be "suitable," citing to Chaidez's own petition for certiorari.[51] While the SG argued that the two *Teague* exceptions to nonretroactivity for new rules did not apply in *Chaidez*,[52] it did not note that Chaidez had, in fact, waived the argument that the *Padilla* rule could fit

---

42 *Id.*

43 *Id.*; *see also* 8 U.S.C. §§ 1101(a)(43)(M)(i), 1227(a)(2)(A)(iii) (2006) ("Any alien who is convicted of [fraud in which the loss to the victim exceeds $10,000] is deportable.").

44 *Chaidez*, 655 F.3d at 686. Because Chaidez was not in custody when she filed her petition, she filed a writ of *coram nobis*, which allows a petitioner who is no longer "in custody"—and so ineligible for habeas relief—to collaterally attack her conviction. *See Chaidez*, 133 S. Ct. at 1106 n.1; *Chaidez*, 655 F.3d at 686.

45 United States v. Chaidez, 730 F. Supp. 2d 896, 904 (N.D. Ill. 2010), *rev'd*, 655 F.3d 684, *aff'd*, 133 S. Ct. 1103.

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

47 *Chaidez*, 655 F.3d at 686, 694.

48 Chaidez v. United States, 132 S. Ct. 2101 (2012).

49 *Cf.* RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 23 (2012) (noting that the Supreme Court is more likely to grant certiorari petitions from the SG, or from those the SG supports, than from any other party).

50 Brief for the United States at 8, *Chaidez*, 133 S. Ct. 1103 (No. 11-820), 2012 WL 1097108.

51 *See id.* at 21 ("This case is a suitable vehicle for the Court to resolve the question of *Padilla*'s retroactivity. The question is squarely presented and determinative of petitioner's right to relief." (citations omitted)).

52 *Id.* at 11.

the exceptions[53]—meaning that if the Court found *Padilla* to be a new rule and therefore nonretroactive, it would be less appropriate for the Court to go on and analyze the exceptions, as it typically has in *Teague* cases.

B. *The Decision*

In a 7–2 decision, the Supreme Court held that, under a *Teague* analysis, "*Padilla* does not have retroactive effect."[54] According to *Teague*, the Court observed, a rule is not new when it applies a general standard to "the kind of factual circumstances it was meant to address"; "garden-variety applications" of *Strickland* are not new.[55] But the majority characterized *Padilla* as having answered a threshold question before analyzing the *Strickland* issue of ineffective assistance: first, the *Padilla* Court had to determine if "advice about deportation" was "'categorically removed' from the scope of the Sixth Amendment right to counsel."[56] Because the *Padilla* Court, before determining *how Strickland* applied, first had to decide *whether Strickland* applied, its answer "required a new rule."[57]

The opinion also places great weight on another *Teague* factor—whether reasonable jurists disagreed about the classification of the rule. At multiple points, the opinion notes that a rule is new unless it would have been "apparent to all reasonable jurists," phrasing taken from the Court's decision in *Lambrix v. Singletary*, an earlier *Teague* case.[58] The Court noted that following *Hill v. Lockhart*,[59] in which the Court left open "whether advice concerning a collateral consequence must satisfy Sixth Amendment requirements," lower courts had concluded "almost unanimously" that it did not.[60] Because *Padilla*'s holding "that the failure to advise about a noncriminal consequence could violate the Sixth Amendment" was not "apparent

---

53 *See* Chaidez v. United States, 655 F.3d 684, 688 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 ("The parties agree that . . . neither exception to non-retroactivity applies.").

54 *Chaidez*, 133 S. Ct. at 1105. Noting that he "continue[s] to believe that *Padilla* was wrongly decided," Justice Thomas concurred only in the judgment. *Id.* at 1113-14 (Thomas, J., concurring in the judgment). Justice Sotomayor, joined by Justice Ginsburg, dissented. *Id.* at 1114 (Sotomayor, J., dissenting).

55 *Id.* at 1107 (majority opinion); *see also supra* notes 21-23 and accompanying text.

56 *Chaidez*, 133 S. Ct. at 1108 (citation omitted).

57 *Id.*

58 *See, e.g.*, *id.* at 1107, 1111 (quoting Lambrix v. Singletary, 520 U.S. 518, 528 (1997)).

59 474 U.S. 52 (1985).

60 *See Chaidez*, 133 S. Ct. at 1108-09 (noting that ten federal appellate courts and almost thirty state courts had so held, while only two state courts thought that failure to advise as to deportation or other collateral consequences could violate the Sixth Amendment).

to all reasonable jurists," it was a new rule, the Court said.[61] The Court acknowledged that there was not the same consensus before *Padilla* against claims premised on a lawyer's misadvice. But it set to the side the category of misadvice[62] before again concluding that *Chaidez* had not established "that all reasonable judges, prior to *Padilla*, thought they were living in a *Padilla*-like world."[63]

Interestingly, the footnotes in the decision read like the seeds of the vehicle section of a good brief in opposition to certiorari—a brief that was not written, of course, because the SG acquiesced in the grant of certiorari. The Court had to note that (1) it was assuming, without deciding, that the fact that Chaidez petitioned for a writ of *coram nobis* rather than habeas corpus was irrelevant;[64] (2) Chaidez had not argued that either *Teague* exception applied;[65] (3) it was not evaluating whether *Teague*, with its emphasis on federalism and comity, is inapplicable to federal convictions;[66] (4) it was not deciding whether *Padilla* claims must remain available on collateral review because they cannot be brought earlier;[67] and (5) misadvice was not present in Chaidez's claim.[68]

C. *The Dissent*

Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that *Padilla* "did nothing more than apply the existing rule of *Strickland* . . . in a new setting, the same way the Court has done repeatedly in the past."[69] *Padilla*, she said, was a "straightforward" application of *Strickland*, "rooted in 15 years of professional standards and the Court's prior *St. Cyr* decision," and so was not a new rule.[70] In fact, she observed that the Court had "never found that an application of *Strickland* resulted in a new rule" before

---

61 *Id.* at 1111 (citation and internal quotation marks omitted).

62 *See id.* at 1112 (noting that the rule in some circuits "that a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead his client on any important matter" had "co-existed happily with precedent" holding that a defendant need not be advised of the deportation consequences of a guilty plea).

63 *Id.*

64 *Id.* at 1106 n.1. For an explanation of the writ, see *supra* note 44.

65 *Id.* at 1107 n.3.

66 *Id.* at 1113 n.16. Chaidez failed to adequately raise this argument below or at the certiorari stage. *Id.*

67 *Id.* Chaidez also failed to raise this argument before the merits stage. *Id.*

68 *Id.* at 1112.

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

70 *Id.* at 1120.

Chaidez.[71] Justice Sotomayor argued that the *Padilla* rule should be no different, for when the Court "merely" applies *Strickland* "in a way that corresponds to an evolution in professional norms," it makes "no new law."[72]

She also took the majority to task for "fail[ing] to account for the development of professional standards over time" when surveying the law of the lower courts before *Padilla*.[73] In more recent years, she noted, lower courts had made an exception to earlier case law by allowing *Strickland* claims to go forward where lawyers had made "affirmative misstatements about the immigration consequences of a guilty plea."[74] These decisions, she argued, had already breached the divide between direct and collateral consequences.[75]

D. *Evaluating the Decision*

While the *Chaidez* decision answered (in the negative) the question whether Chaidez could successfully raise a *Padilla* claim, it left open more issues than it clarified and failed to comment on many considerations the Court has traditionally found to be important in *Teague* cases.

1. "Reasonable Jurists"

Justice Kagan followed the lead of many of the Court's previous decisions by relying heavily on the fact that the *Padilla* rule was not "apparent to all reasonable jurists." As the dissent noted, "What truly appears to drive the majority's analysis is its sense that *Padilla* occasioned a serious disruption in lower court decisional reasoning."[76] Generally, if the Court discusses "reasonable jurists" in a *Teague* case, the habeas petitioner is doomed.[77] The "reasonable jurists" language is found nowhere in *Teague*, but rather seems to have developed later; most cases cite to *Lambrix v. Singletary*[78] when discussing this factor.[79] The *Lambrix* Court, in turn, relied on language from *Butler v. McKellar* that asked whether the rule was "susceptible to debate

---

71 *Id.* at 1114-15, 1115 n.1 (citing Lafler v. Cooper, 132 S. Ct. 1376 (2012); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Roe v. Flores-Ortega, 528 U.S. 470 (2000); and Hill v. Lockhart, 474 U.S. 52 (1985)).

72 *Id.* at 1115.

73 *Id.* at 1118.

74 *Id.*

75 *Id.* at 1119.

76 *Id.* at 1120.

77 *See supra* notes 18-20 and accompanying text.

78 520 U.S. 518 (1997).

79 *See, e.g.*, *Chaidez*, 133 S. Ct. at 1107 (majority opinion).

among reasonable minds,"[80] similar to the formulation in *Sawyer v. Smith* of whether "reasonable jurists may disagree."[81]

But while the Court consistently discusses this factor when finding a rule to be new, it tends to ignore or downplay it when finding a rule to be retroactive. In *Williams v. Taylor*, Justice Stevens stated that *Teague*'s emphasis on respecting "'reasonable, good-faith interpretations' by state courts is an explanation of policy, not a statement of law."[82] The Court went on to explain,

> "[E]ven though [this Court has] characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new."[83]

And in *Stringer v. Black*, the Court made no mention of "reasonable jurists" when it asserted that the court of appeals below had acted unreasonably—according to an "objective standard"—by not applying Supreme Court precedent.[84] It was left to the three dissenters to note that the Court's holding implied that "no reasonable jurist" could have believed that certain precedent cases did not apply to the petitioner, even though the dissent itself did not think the Court's holding was so "obvious."[85]

This reliance on the existence of disagreement among reasonable jurists begins to seem like a bit of post hoc rationalization when it surfaces only in cases where the rule is found to be new. It is worth asking, then, how helpful the formulation really is. For a Court with a docket made up in large part of circuit splits,[86] where, by definition, presumably reasonable jurists explicitly disagree, it will be the unusual case in which the Court issues a rule that was already universally predicted, or at least not contravened, by lower courts. Any time the Court took up a case presenting a

---

80 494 U.S. 407, 415 (1990); *see also Lambrix*, 520 U.S. at 528.

81 497 U.S. 227, 234 (1990).

82 529 U.S. 362, 383 (2000) (opinion of Stevens, J.). Although the *Williams* Court discussed *Teague*, *Williams* was in fact an AEDPA case. *See id.* at 375.

83 *Id.* at 410 (majority opinion) (internal citation omitted in original) (quoting Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment)).

84 503 U.S. 222, 237 (1992) (noting that the court below was bound by Godfrey v. Georgia, 446 U.S. 420 (1980)).

85 *Id.* at 238 (Souter, J., dissenting).

86 *See* John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S. L. WK. 393, 393 (Sept. 27, 2011) (finding that from October Term 2005 through October Term 2010, 37.8% of the Court's merits cases presented circuit splits).

circuit split, either to reverse a lower court or even to write an opinion that was not unanimous, this factor would require that the Court's rule be labeled "new."[87] But allowing the "reasonable jurists" factor to dictate the outcome would override the various considerations that led to the *Teague* doctrine.[88] In fact, Justice O'Connor, the author of *Teague*, once observed that the "'all reasonable jurists' standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one."[89] Indeed, even Justice Kagan noted in *Chaidez*, "Dissents have been known to exaggerate the novelty of majority opinions; and 'the mere existence of a dissent,' like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new."[90] This acknowledgment seems to undermine the majority's heavy reliance on the "reasonable jurists" factor.

It may be time to abandon the "reasonable jurists" factor as an indicator of a new rule under *Teague*. Although the "reasonable jurists" factor reflects *Teague*'s concern with respecting lower courts, it does not appear to be helping the Court reach its decisions. The Court has seemingly abandoned the factor when it decides that a rule is not new—likely because in a case where a rule is made retroactive, a majority's discussion of the factor would only highlight the implication that any lower courts—and dissenting Justices—who opposed that rule were "unreasonable."[91] And if the Court only discusses the factor in decisions that conclude that a rule is new, it seems that the factor contributes little to the Court's analysis; rather, it merely supports an already-reached decision that a rule is new.

2. Leaving Open the Issue of Misadvice

The scope of the majority opinion and the apparent understanding of the dissent seem to leave open the possibility that the *Chaidez* decision applies only to the failure to give advice, while claims of misadvice may remain available to habeas petitioners on collateral review. Chaidez alleged that her attorney failed to advise her whether her guilty plea could result in

---

87 Disagreement among reasonable jurists does not include, of course, situations such as summary reversals where a lower court explicitly refuses to follow established precedent.

88 *See infra* subsection II.D.3.

89 Williams v. Taylor, 529 U.S. 362, 410 (2000).

90 Chaidez v. United States, 133 S. Ct. 1103, 1110 n.11 (2013) (citations omitted).

91 *Cf.* Beard v. Banks, 542 U.S. 406, 416 n.5 (2004) ("Because the focus of the inquiry is whether *reasonable* jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new.").

removal.[92] Padilla, by contrast, alleged that his lawyer had affirmatively misled him by telling him that his guilty plea would not make him eligible for deportation.[93] Padilla's counsel advocated for the broad rule that the Court ultimately adopted, but as a fallback position, also suggested that the Court could rule simply that misadvice is a Sixth Amendment violation, without establishing an affirmative duty.[94] But because Chaidez was not alleging misadvice, her counsel had no incentive to advocate for a mixed rule on retroactivity. As yet another consequence of the Court's taking *Chaidez* as its vehicle on this issue, the parties did not raise the possibility of the retroactivity of one part of the *Padilla* rule but not of the other.

As a result, it appears to be an open question whether, after *Chaidez*, claims of misadvice are available on collateral review.[95] This speculation hinges in part on the fact that the government almost conceded that point at oral argument. Deputy Solicitor General Michael Dreeben stated, in response to a question from Justice Sotomayor, "I would probably not disagree that misadvice claim was not new before Padilla and it's not really addressed by Padilla's rationale."[96] The *Chaidez* opinion itself furthered the ambiguity of Mr. Dreeben's "probably not." The Court noted that the *Padilla* decision had determined not to exempt "a lawyer's advice (or non-advice) about a plea's deportation risk" from "Sixth Amendment scrutiny," and had applied the *Strickland* test when a lawyer "gives (or fails to give) advice about immigration consequences."[97] Those statements could imply that the rule the Court was considering encompassed both misadvice and non-advice. But the Court went on to reject Chaidez's argument that the lower court cases prohibiting misadvice demonstrated that the *Padilla* rule was not new. While three federal circuits and some state courts had held misstatements to constitute ineffective assistance of counsel, the Court described the rule established by those decisions as "only that a lawyer may

---

92 *Chaidez*, 133 S. Ct. at 1106.

93 Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

94 Brief of Petitioner at i, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 1497552. This, of course, is the position that Justice Alito, joined by Chief Justice Roberts, ultimately took in *Padilla*. *See supra* text accompanying note 38.

95 *See, e.g.*, MICHAEL K. MEHR, IMMIGRANT LEGAL RES. CTR., POST-CONVICTION RELIEF IN CALIFORNIA SHOULD BE UNAFFECTED BY *CHAIDEZ V. UNITED STATES* 2 (2013), *available at* http://www.ilrc.org/files/documents/ilrc-pcr_in_calif_not_affected_by_chaidez_march_2013.pdf (assuming that misadvice claims will be available retroactively for habeas petitioners); Benach Ragland LLP, *Thoughts on the Supreme Court's Opinion in* Chaidez, LIFTED LAMP (Feb. 22, 2013), http://liftedlamp.wordpress.com/2013/02/22/thoughts-on-the-supreme-courts-opinion-in-chaidez (questioning the status of misadvice claims on collateral review).

96 Transcript of Oral Argument at 32, *Chaidez*, 133 S. Ct. 1103 (No. 11-820), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-820.pdf.

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

not affirmatively misrepresent his expertise or otherwise actively mislead his client on any important matter."[98] Those decisions, the Court said, "coexisted happily with precedent, from the same jurisdictions (and almost all others), holding that deportation" did not warrant an exception to the collateral consequences rule.[99] And this "separate rule for material misrepresentations" did "not apply to Chaidez's case" but had "lived in harmony with the exclusion of claims like hers from the Sixth Amendment."[100]

The dissent disagreed with the majority's characterization of the significance of lower court precedent on misadvice, but seemed to further the idea that the majority was not ruling on the retroactivity of the misadvice rule. The dissent characterized lower court rulings that permitted misadvice claims as recognizing "an important exception to the collateral/direct consequences distinction."[101] But, the dissent noted, the majority looked at misadvice cases as having "merely applied the age-old principle that a lawyer may not affirmatively mislead a client."[102]

Thus, much of the majority's language and the dissent's understanding of the majority support the idea that what the Court held in *Chaidez* was that the affirmative duty to advise a client about removal consequences was not retroactive. But the status of the rule preventing a lawyer from misadvising a client about removal consequences seems to remain in limbo.

3. (Not) Dealing with Habeas Policy and the Practical Consequences of Retroactivity

Although none of the opinions spends much time contemplating policy or practical consequences, it is worth considering how the outcome of *Chaidez* fits with the sometimes competing purposes and policies that underlie habeas review. Particularly, it seems that many of these considerations support at least part of the majority's decision, while presenting some cautionary principles for the outcome the dissent would have adopted. Habeas review must protect the role of the judiciary and the finality of its decisions and respect federalism concerns over the relationship between state and federal courts, while also ensuring accuracy, equality, and finality in the administration of justice.[103]

---

98 *Id.* at 1112.

99 *Id.*

100 *Id.*

101 *Id.* at 1119 (Sotomayor, J., dissenting).

102 *Id.*

103 For an overview of the various policy considerations at issue, see CHEMERINSKY, *supra* note 16, at 891-95.

a. *Federalism and the Role of the Judiciary*

Overturning a lower court conviction, particularly on habeas review many years after the criminal proceedings began, raises hard questions about the role of the judiciary. Part of the debate over retroactivity hinges on what it has to say about the role of judges in our judicial system. One view, attributed to Blackstone, is that judges, rather than making law, declare what the law is.[104] Under this logic, a judicial decision should typically have retroactive effect, because it simply declares what the law always was.[105] At the same time, "there is also recognition that unrestrained application [of this principle] could create chaos in the judicial system,"[106] which is why principles of restraint like the *Teague* rule limit the retroactivity of claims on collateral review.

The Supreme Court has also expressed a desire to respect, rather than overturn, the good faith decisions of lower courts made in reliance on precedent.[107] One of the concerns expressed in *Teague* was respect for the "interests of comity and finality" of lower court decisions.[108] The Supreme Court has seemed sympathetic to the concerns of state court judges, noting that state courts "are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover . . . new constitutional commands."[109] Additionally, states and their courts are the initial arbiters of much of criminal law; they "possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[110] As the Court has expressed, limits on habeas "reflect our enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'"[111]

This respect suggests that state court convictions on federal habeas review, like Jose Padilla's, should be treated carefully by lower federal courts, and helps explain why the Supreme Court chose in *Chaidez* not to make

---

104 Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 107 (2010); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

105 Allen, *supra* note 104, at 108.

106 *Id.* at 109.

107 CHEMERINSKY, *supra* note 16, at 939-40.

108 Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion). Allowing criminal law decisions to remain final also enhances the deterrent effect of judges' rulings. *Id.* at 309.

109 Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982).

110 *Id.* at 128 (citation omitted).

111 Calderon v. Thompson, 523 U.S. 538, 555 (1998) (citations omitted).

retroactive a rule that would threaten state court convictions. But Chaidez sought review of a federal conviction. Although the Court did not consider the significance of the federal nature of Chaidez's conviction (because Chaidez had waived this argument),[112] the federalism rationale of *Teague* cannot support a limit on federal review of federal convictions. Additionally, AEDPA governs retroactivity when the state has ruled on the merits of a claim on postconviction review,[113] so *Teague* now applies only when the state has not reached the merits of the issue, making the desire to respect state courts' decisional reasoning somewhat less of a concern. But, had *Chaidez* made *Padilla* retroactive, state courts would have been bound by the decision, so state court convictions would have been unsettled even though the conviction on review before the Court was federal.[114] Additionally, *Teague*'s commitment to respecting the good faith interpretations of lower courts remains salient whether the lower court is state or federal. Notably, although *Chaidez* made *Padilla* nonretroactive, state courts are still free to apply the rule retroactively;[115] it is possible that *Padilla* could be retroactive in some states even though it is not retroactive in the federal system.

Another relevant concern in deciding retroactivity is the extent to which we need a federal court to police a rule by making it retroactive. The Warren Court was concerned with the reluctance of some state courts to enforce constitutional protections for all individuals; some have argued that the Rehnquist Court then saw this as the driving purpose of federal habeas review, considering that review to be less important where state reluctance had diminished.[116] This has interesting implications for the *Padilla* rule, which is based on evolving professional norms—norms that could have changed earlier in some jurisdictions than in others. Since some state courts already had rules similar to *Padilla*, retroactive application may have been less necessary; many state criminal defendants benefitted from the protection of some form of the *Padilla* rule anyway. Furthermore, as Justice Alito noted in his concurrence in *Padilla*, the flexible standard governing the withdrawal of

---

112 *See* Chaidez v. United States, 133 S. Ct. 1103, 1113 n.16 (2013).

113 *See supra* note 13 (discussing AEDPA's limits on retroactivity).

114 It remains an open question whether state courts are bound to apply retroactively "watershed" rules that are retroactive under *Teague*. *See* Danforth v. Minnesota, 552 U.S. 264, 269 n.4 (2008).

115 *See id.* at 266 (holding that state courts may apply "new" rules of criminal procedure retroactively, even if federal courts may not).

116 *See* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2425 (1993) (characterizing the Rehnquist Court's view of the purpose of habeas corpus as "deter[ring] the state courts from ignoring fundamental federal rights").

guilty pleas could encompass pleas made on incomplete or incorrect information, so state judges could permit withdrawal regardless of *Padilla*.[117]

b. *Equality and Accuracy Concerns in Retroactivity*

Concerns the *Teague* Court stressed repeatedly, and that are always implicated in determining the retroactivity of decisions, are the equal administration of law and the accuracy of convictions resulting from that administration.

The Warren Court's three-factor balancing test for determining whether a rule would be retroactive[118] had the effect of not always applying all rules equally to all petitioners.[119] Concern over the equal administration of justice was one of the driving themes of the *Teague* opinion; the plurality stated that "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated."[120] Padilla's conviction was already final when the Supreme Court decided his case, but the rule in *Padilla* was nevertheless applied to him. This means that now that the rule is not retroactive, he was treated unequally compared to others whose convictions were also final but who cannot receive the benefit of the rule—like Chaidez.

The *Teague* plurality also noted that "our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review."[121] This consideration explains the second exception to *Teague*—watershed rules that could go to the innocence of a defendant or the accuracy of his conviction should apply retroactively.[122] Accuracy concerns also led the Court to continue to allow claims of *Miranda* violations on habeas review, after foreclosing, in *Stone v. Powell*, claims on habeas for Fourth Amendment exclusionary rule violations already litigated in state court.[123] The Court stated that a defendant's inculpatory statements made without *Miranda* warnings would be less

---

117 *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring in the judgment) (noting other ways courts could have addressed the problems presented in the case).

118 *See supra* note 10 and accompanying text.

119 *See* Teague v. Lane, 489 U.S. 288, 303 (1989) (plurality opinion) (noting that the Court's earlier approach to retroactivity resulted in "unequal treatment of those who were similarly situated"); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1744-45 (1991) (characterizing the Court's decision in Griffith v. Kentucky, 479 U.S. 314 (1987), as based in part on the desire to undo the inequality of earlier approaches to retroactivity).

120 *Teague*, 489 U.S. at 315.

121 *Id.* at 313 (citations omitted).

122 *Id.* at 311, 313.

123 *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 688 (1993) (declining to extend the rule in Stone v. Powell, 428 U.S. 465 (1976), to habeas claims premised on *Miranda* violations).

reliable as evidence on which to base the determination of guilt or innocence at trial.[124] Thus, the *Miranda* rule could bear on the "correct ascertainment of guilt."[125] The accuracy of a conviction is of less concern in *Padilla* claims, however. *Miranda* claims at least go to statements that will be used in the determination of guilt; *Padilla* claims, however, go simply to a defendant's decision to plead guilty. What drives this decision may be strategy or a concern about consequences, but it does not assist in determining whether the defendant actually committed the crime.

c. *Lack of Finality*

Retroactivity disturbs final convictions, frustrating both the victims of crime and the public—a problem that Justice Sotomayor's dissenting opinion does not acknowledge. Although Padilla himself was convicted of drug trafficking, a "victimless" crime, and Chaidez was convicted of fraud on an insurance company, perhaps an unsympathetic victim, others who would have raised *Padilla* claims on habeas may have left behind victims. Those who challenge their sentences on habeas typically do so years after the original crimes took place. The Court has noted, "Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out."[126] Postconviction review also places heavy financial costs on courts, often requiring years of litigation.[127] The *Chaidez* dissent could have refuted this finality criticism by noting that petitioners under *Strickland* must show that the ineffective assistance of counsel prejudiced the defense.[128] Showing prejudice has typically been very difficult for petitioners,[129] making it unlikely that even retroactive application of *Padilla* would have freed large numbers of convicted criminals. But it still would have involved the time and expense of additional litigation.

---

124 *Id.* at 692 (citations omitted).

125 *Id.*

126 Calderon v. Thompson, 523 U.S. 538, 556 (1998).

127 *See* McCleskey v. Zant, 499 U.S. 467, 491 (1991) (citation omitted).

128 *See* Strickland v. Washington, 466 U.S. 668, 692 (1984) ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

129 Padilla v. Kentucky, 130 S. Ct. 1473, 1485 n.12 (2010).

III. IMPLICATIONS AND OPEN QUESTIONS

The *Chaidez* decision leaves open several questions about what claims might still be available to alien criminal defendants. As noted above, the Court in *Chaidez* was ambiguous as to whether its rule covers misadvice, raising the question whether those whose convictions are final might still raise misadvice claims. The decision also sharpens the debate over where the Court has been coming from—and where it is headed—in plea bargaining and "crimmigration" law. Finally, the decision avoids dealing with the question of how a standard built on norms that can change (i.e., *Strickland*) can apply retroactively; in the future, the Court should grapple with this issue.

A. *What About Misadvice?*

The *Chaidez* decision seems to leave open whether claims of misadvice regarding removal consequences are available to petitioners whose convictions were final before *Padilla*.[130] While we know the duty to provide affirmative removal advice is not retroactive, arguments could remain open to alien petitioners who seek relief in federal court from a plea they accepted after their attorney told them it would not subject them to removal. And of course, these same arguments could be raised in state court, along with the argument that state courts need not follow the Supreme Court's lead on *Padilla*'s nonretroactivity.[131]

Under the *Chaidez* majority's heavy reliance on the views of reasonable jurists, retroactivity of the misadvice prohibition is less problematic than retroactivity of the affirmative duty. Chaidez's attorneys faced an uphill battle in convincing a majority of the Court that the affirmative duty was not a new rule; after all, four of the Justices—those who concurred in or dissented from *Padilla*—had not even thought the rule was correct, let alone not novel.[132] On retroactivity then, presumably Chaidez started four votes down. But on the issue of misadvice, seven Justices were in agreement: the concurring Justices in *Padilla* agreed that *Strickland* prevented it, and asserted that such a ruling would "not require any upheaval in the law."[133] As Justice Alito observed, no lower courts, other than the Kentucky Supreme Court, had held that affirmative misadvice could "*never* give rise to ineffective

130 *See supra* subsection II.D.2.

131 *See supra* text accompanying note 115.

132 *Cf.* Transcript of Oral Argument, *supra* note 96, at 15 ("Justice Scalia: 'But you, on the other hand, would agree, would you not, that those who dissented from [*Padilla*] would regard it as a new rule?' Mr. Fisher: 'That's a tricky question to answer, Justice Scalia.' Justice Scalia: 'Well, I think it's an easy question to answer.'").

133 *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring in the judgment).

assistance,"[134] so his approach prohibiting misadvice would not have contravened the lower courts to the same extent that the majority opinion did. Forcing one outlier state to follow retroactively the rule against misadvice seems much less threatening to *Teague*'s values of federalism and respect for lower courts.[135] Just as Deputy Solicitor General Dreeben had conceded that the rule against misadvice was "probably not" new and "not really addressed by Padilla's rationale,"[136] so also the *Chaidez* majority called it "a separate rule for material misrepresentations,"[137] while the dissent referred to it as "the age-old principle that a lawyer may not affirmatively mislead a client."[138]

Additionally, concerns about what conduct can fairly be expected from defense attorneys are less of an issue for the retroactivity of the rule against misadvice. It seems particularly unfair to scrutinize retroactively the conduct of defense lawyers who had little warning—depending on the strength of the professional norms around them—that their role included an affirmative duty to provide correct information on removal consequences. But it is not a stretch to assume that defense attorneys would not feel free to give patently wrong advice to a client—even on a topic beyond the scope of their representation. It seems far less reasonable to expect defense attorneys to have always appreciated the eventual *Padilla* rule, with its duty to advise clients on clear removal consequences. Defense lawyers in some states, in fact, already had been told that they did not need to worry about providing such advice. But no state (until Kentucky in the *Padilla* case) had ever declared that misadvice had no constitutional implications. And it seems most unfair to deny relief to those individuals who received patently wrong information that was integral to their ultimate decision to plead guilty.

Further, since many states, and presumably individual defense counsel, already recognized this rule concerning misadvice, retroactivity would likely result in relatively few habeas petitions. This cuts against the prohibition on misadvice being a new rule, as it was a preexisting duty in many states. It also addresses some equality issues. Since Padilla received both misadvice and the benefit of the rule in his case, so too would others who were similarly situated. Additionally, assuming that many defense lawyers had been operating under the prevailing norm against misadvice, retroactive

---

134 *Id.* at 1494.

135 *See id.*; *see also* Chaidez v. United States, 133 S. Ct. 1103, 1118 & n.6 (2013) (Sotomayor, J., dissenting) (discussing the agreement among lower courts regarding the treatment of affirmative misstatements).

136 Transcript of Oral Argument, *supra* note 96, at 32.

137 *Chaidez*, 133 S. Ct. at 1112 (majority opinion).

138 *Id.* at 1119 (Sotomayor, J., dissenting).

application would provide relief to the few defendants who did not receive such a lawyer. Finally, while the decision to take a plea seems to imply a defendant's guilt, the presence of misadvice makes this conclusion less certain. A defendant who had been positively informed that the decision to plead guilty would not result in deportation might decide to plead guilty—even, presumably, if she were innocent—in order to avoid the risk of going to trial on a more serious charge that might result in deportation. But a defendant who was not advised one way or the other would seem less likely to have made such an explicit decision. In this way, misadvice could actually bear on whether the administration of law leads to accurate convictions.

B. *A New Direction After All?*

The *Chaidez* Court's decision that the *Padilla* rule was "new" adds an interesting dimension to the debate over what the Court has been doing in its recent plea bargaining jurisprudence. Over the past few years, the Court has expanded the claims available, often on habeas, to petitioners who allege flaws in the way their pleas came about.

Strickland's reasonableness requirement has long been viewed as a weak one;[139] tales abound of shocking defense attorney conduct that has been upheld under *Strickland*.[140] The Court may be expanding *Strickland*'s reach, however; alongside *Padilla*, it has recently issued other decisions that strengthen the demands of *Strickland*,[141] among them the duty to investigate potential mitigating factors in capital cases.[142] More recently, the Court held in *Missouri v. Frye* that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused," and that failure to communicate offers constitutes ineffective assistance under *Strickland*.[143] In *Lafler v. Cooper*, a case decided the same day as *Frye*, the Court extended

---

139 *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1145 (2011) (noting that *Strickland* had long been viewed as "toothless").

140 *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 809 (4th ed. 2011) (describing defense attorneys who have been accused of ineffective assistance under *Strickland* for "sleeping, being drunk or drugged, or otherwise being physically unable to present an effective defense").

141 *See, e.g.*, Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding a lawyer's failure to consult with his client about filing an appeal when a rational defendant would want to appeal to be ineffective assistance of counsel).

142 *See* Bibas, *supra* note 139, at 1145 & n.145 (noting the Court's recent case law on the duty to investigate in Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); and Williams v. Taylor, 529 U.S. 362 (2000)).

143 132 S. Ct. 1399, 1408 (2012).

Frye's application of *Strickland* for plea offers to a case where a lawyer gave erroneous advice about a plea, resulting in the defendant's rejection of the plea.[144] That defendant's case was on postconviction review, signaling that the rules are retroactive and thus, presumably, not new.[145] Both cases relied on "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[146] Indeed, as the Court noted in *Frye*, about ninety-five percent of criminal convictions result from guilty pleas, making plea bargains "central to the administration of the criminal justice system."[147]

Perhaps the Court is telling us that we have been misunderstanding what *Strickland* really required all along.[148] Professor Josh Bowers views the Court's approach to guilty pleas in *Padilla* as similar to its past approach: "the fairness principles that animate the Court's decision in *Padilla* are the same principles that have animated its guilty-plea and plea-bargaining jurisprudence all along."[149] He views *Padilla* as a "potentially substantial step down a well-worn path," "an unfamiliar result reached through familiar means."[150]

But others see *Padilla* as a remarkable change of direction in the Court's plea jurisprudence. Professor Stephanos Bibas has described *Padilla* as a "tremor" resulting in "large shifts in landscape"—"the dawn of a new era" in the Court's regulation of plea bargaining.[151] Justice Alito's description of the decision suggests that he views it similarly, calling it a "dramatic departure from precedent," a "new approach," and a "major upheaval in Sixth Amendment law."[152] The Court has continued to look to *Padilla* in cases that have expanded the protections available to those who plead guilty, relying on the *Padilla* rule to bolster its analysis in both *Lafler* and *Frye*.[153] And *Chaidez*'s labeling of *Padilla* as "new" seems to validate these views. The Court described the *Padilla* decision as having "breach[ed] the previously

---

144 132 S. Ct. 1376, 1390-91 (2012).

145 *Id.* at 1390; *see also In re* Graham, 714 F.3d 1181, 1182 (10th Cir. 2013) (collecting cases that conclude that *Lafler* did not establish a new rule of constitutional law).

146 *Id.* at 1388; *see also Frye*, 132 S. Ct. at 1407.

147 132 S. Ct. at 1407 (citations omitted).

148 The Court has not told us whether other recent ineffective assistance cases apply retroactively. *See, e.g.*, Lewis v. Johnson, 359 F.3d 646, 654 n.5 (3d Cir. 2004) (noting that whether Roe v. Flores-Ortega, 528 U.S. 470 (2000), "constitutes an 'old' rule for retroactivity purposes is a question of first impression").

149 Josh Bowers, *Fundamental Fairness and the Path from* Santobello *to* Padilla*: A Response to Professor Bibas*, 2 CALIF. L. REV. CIRCUIT 52, 54 (2011).

150 *Id.*

151 Bibas, *supra* note 139, at 1137-39.

152 Padilla v. Kentucky, 130 S. Ct. 1473, 1488, 1491 (2010) (Alito, J., concurring in the judgment).

153 *See* Missouri v. Frye, 132 S. Ct. 1399, 1405-06 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

chink-free wall between direct and collateral consequences."[154] If that did not count as "break[ing] new ground," the Court continued, "we are hard pressed to know what would."[155] These various descriptions, and the simple designation of *Padilla* as "new," seem to confirm that *Padilla* changed the world of plea bargaining law in a way that was different from the Court's previous cases.

Padilla's newness validates the concerns Justice Alito expressed in his concurrence in that case. Had *Padilla* been a simple application of *Strickland*, it is possible that it would not have led to arguments for expanding its rationale even further, to other collateral consequences. Many collateral consequences besides removal may follow a criminal conviction; now that the Court has broken new ground by finding that one technically "collateral" consequence falls within the scope of *Strickland*, future litigants will argue that this new rule should be extended to those other consequences. As Justice Alito put it,

> This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.[156]

Padilla and the Court's other recent plea bargaining cases may dramatically shape the landscape of habeas litigation going forward, even though *Chaidez* has told us *Padilla* cannot do so retroactively. Typically, defendants entering guilty pleas waive their rights to appeal most issues,[157] so most habeas petitioners are defendants who went to trial.[158] Thus, for those who plead guilty, ineffective assistance may be the one claim that remains available.[159] When *Strickland* claims were practically impossible to win, this

---

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

155 *Id.* (alteration in original) (citation and internal quotation marks omitted).

156 *Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring in the judgment) (citation omitted).

157 Bibas, *supra* note 139, at 1123; *see also* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 1592-93 (3d ed. 2007) (noting limits on the claims available to habeas petitioners who have pleaded guilty).

158 Habeas petitioners are much more likely to have been convicted at trial than to have pleaded guilty, and to have been convicted of more serious offenses with longer sentences. *See* MILLER & WRIGHT, *supra* note 157, at 1592. One study found that while the jury trial rate for felonies in urban areas was 6%, 62% of state court petitioners and 66% of federal petitioners had gone to trial. *Id.*

159 The same study found that between 41% and 45% of all habeas petitioners (both those who went to trial and those who pleaded guilty) raised the claim of ineffective assistance of

meant that few claims by defendants who pleaded guilty were likely to be successful. But as the Court expands the scope of plea bargaining issues cognizable under *Strickland*, the potential for litigation likewise expands. Because defendants who plead guilty so significantly outnumber those who go to trial, the number of defendants getting access to more claims may be growing exponentially.

C. *The Future of* Strickland *and* Teague

The Court, by finding *Padilla* to be new, avoided a difficult issue, one it should confront if it ever decides a *Strickland*-based rule is retroactive. *Strickland* defines reasonableness in part by prevailing professional norms, norms that evolve and change over time. As the Court in *Padilla* stated, the professional norms instructing defense attorneys to provide removal advice had existed for "at least the past 15 years."[160] The *Padilla* Court's identification of a specific point in time at which norms changed highlights the challenge of *Strickland* and retroactivity: if norms changed fifteen years ago, that would imply that at some point they were new, because at some point before norms develop, they do not exist. Assume that *Chaidez* had adopted the dissent's approach and applied *Padilla* retroactively. According to the Court, the norms were clearly not new fourteen years ago, but were they new sixteen years ago? And if *Teague* only allows retroactive application of rules that are not new, what does this mean for applying a rule based on prevailing norms to the time period (sixteen years ago, in the *Padilla* hypothetical) when those norms did not yet exist—and so were new?[161] Would a habeas petitioner whose case became final fifteen years and one month before the *Padilla* decision be unable to take advantage of the rule, since the norms did not exist when his case became final (and so to him the rule is new)?[162]

Certainly, trying to draw the line between what is new and what is not in the context of a constitutional standard that relies on changing norms is challenging. The Court avoided this problem in *Chaidez* because *Padilla* was new, but it is not impossible to imagine other *Teague* cases in which a

---

counsel. *Id.* at 1593. When a defense attorney had failed to explain a plea agreement and its consequences adequately, petitioners often claimed they were misled into making the plea. *Id.*

160 *Padilla*, 130 S. Ct. at 1485 (majority opinion).

161 *Cf. id.* at 1488 (Alito, J., concurring in the judgment) ("Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands." (citation omitted)).

162 It is not impossible (although it is difficult) for habeas petitioners to raise claims related to convictions that are as many as twenty years old. *See, e.g.*, Bell v. Thompson, 545 U.S. 794, 796 (2005) (considering a habeas claim from a defendant convicted of a crime committed in 1985).

petitioner has prevailed by arguing that a norm had developed that made her defense counsel's conduct a violation of *Strickland*. Indeed, Justice Sotomayor argued as much in *Chaidez*, noting that the only change *Padilla* prompted in the law was that "the underlying professional norms" meant "that counsel's failure to give this advice now amounted to constitutionally deficient performance."[163] Again, because *Strickland* is premised on norms, which change and evolve, this problem is not unique to *Padilla*; it could come up any time the Court recognizes a norm that makes defense counsel's behavior ineffective under *Strickland*.[164]

One solution would be for courts to grant a habeas petitioner the benefit of retroactive *Strickland*-based rules only if the petitioner can show that the rule was not new at the time the alleged violation took place. But that would require courts to determine, potentially, on which month norms flipped—and would that not vary by geographic location? It certainly seems likely that the *Padilla* norms would have developed in border states or urban areas like New York before they developed in rural South Dakota. There will not always be a statute or case to pinpoint the exact date, so it becomes impossible to know what the judge should or would look to in making his decision. Not only would this require a difficult factual finding by judges, but it also would ask them to make a tricky legal determination, balancing a *Strickland* standard based on local customs and norms with *Teague*'s emphasis on uniformity in the treatment of criminal defendants. Any time a *Strickland* rule is premised on issues that might be more salient in some parts of the country than in others, retroactivity could vary. But equality is central, according to *Teague*, to deciding whether a rule is new. Given the reliance on changing norms, the implication for making *Strickland* rules retroactive is that similarly situated litigants—habeas petitioners—may be treated differently depending on whether they were convicted in a part of the country that developed the relevant norms earlier or later.

It seems arbitrary to enforce retroactively any rule that is the product of changing norms, since at some point those norms must have been new—but by definition, *Strickland* rules will often be the products of changing norms, and the Court has never suggested that this would prevent their retroactivity. Certainly the Court in *Chaidez* did not imply that future *Strickland* cases

---

163 Chaidez v. United States, 133 S. Ct. 1103, 1116 (2013) (Sotomayor, J., dissenting).

164 In fact, the puzzle of how to identify an evolving constitutional norm comes up in other areas as well. In the oral argument in *Hollingsworth v. Perry*, Justice Scalia pressed respondents' counsel Ted Olson to provide a date on which it became unconstitutional to prohibit gay marriage, and Mr. Olson stated that he could provide no specific date, because it was "an evolutionary cycle." Transcript of Oral Argument at 40, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf.

that rely on developing norms can never be retroactive. But the inherent messiness of this determination suggests that not just *Padilla*, but perhaps any *Strickland* rule that relies on changing norms, is simply too complicated to be made retroactive.

These questions implicate a more fundamental conflict, between the nature of habeas review and the *Strickland* rule. How do we balance habeas—seen as the last safety valve to protect fundamental rights, rather than the point at which to litigate garden-variety claims—with *Strickland* standards that evolve over time, typically through incremental litigation? The issue comes down to what we think we are doing when we permit habeas litigation. Courts often speak of habeas as a final backstop to protect essential rights and freedoms, to ensure that the innocent are set free[165]—not to permit endless litigation over mistakes not implicating those fundamental issues. But postconviction review often will be the first time defendants can raise *Strickland* ineffective assistance of counsel claims.[166] Thus, *Strickland* roots the development of ineffective assistance claims on the evolution of norms—norms that must evolve through litigation on habeas. But because habeas has traditionally been about the enforcement of clearly established rights, not the development of new norms and claims, it is hard to see how the purposes of both *Strickland* and habeas can be served simultaneously in postconviction litigation.

CONCLUSION

The Court's opinion in *Chaidez* made the question of *Padilla*'s retroactive application seem quite simple, with its argument that the fact that *Strickland* could even apply to claims like Jose Padilla's and Roselva Chaidez's represented a new direction for the Court. But the decision left open whether other claims—claims that attorneys actively misled defendants—might still be available retroactively. As the Court continues to grant more expansive protection to criminal defendants who plead guilty, difficult questions will also arise regarding how to deal with retroactivity under a standard that relies on norms that evolve over time. Just as the Court changed its approach to retroactivity in *Teague*, reacting to the Warren

---

165 *See, e.g.*, Mackey v. United States, 401 U.S. 667, 685-87 (1971) (Harlan, J., concurring in part and dissenting in part).

166 *See* Brief for Petitioner, *supra* note 2, at 30 (claiming that *Padilla*-type claims "must be litigated in . . . initial-review collateral proceedings" (citation and internal quotation marks omitted)); *see also* Massaro v. United States, 538 U.S. 500, 508-09 (2003) (permitting federal petitioners to raise ineffective assistance claims for the first time on collateral review).

Court's increasing protections for criminal defendants, so too must the Roberts Court reevaluate how it will deal with retroactivity in *Strickland* cases, against the backdrop of changing protections for defendants who plead guilty.

Preferred Citation: Danielle R. Acker Susanj, Case Note, *Retroactivity,* Strickland*, and Alien Criminal Defendants: How the* Chaidez *Decision Raised More Questions than It Answered,* 162 U. PA. L. REV. ONLINE 55 (2013), http://www.pennlawreview.com/online/162-U-Pa-L-Rev-Online-55.pdf.