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BY: RACHEL A. CARTIER

I. INTRODUCTION

In Padilla v. Kentucky, the U.S. Supreme Court stated “[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercy of incompetent counsel.’”1 This is particularly important today because, in 2008, U.S. Immigration and Customs Enforcement “removed”2 97,1333 “known criminal aliens”4 from the United States.5 “Criminal aliens” are non-citizens with deportable offenses such as: crimes of moral turpitude; multiple criminal convictions; aggravated felonies; high speed flight; failure to register as a sex offender; certain drug offenses; certain firearm offenses; espionage/sabotage/treason; domestic violence; stalking; child abuse; violations of protective orders; crimes against children; trafficking; failure to register or falsification of documents; and terrorist activities.6 As of June 2009, there were 94,498 aliens in state and federal custody, making up 4.1 percent of the total in-custody population.7 Recent U.S. Census Bureau statistics show over twenty-one million non-citizens residing in the United States, and it is unclear as to how many have deportable convictions on their records.8 As the Supreme Court has indicated, non-citizens are entitled to the same constitutional protections as citizens regarding legal representation.9

The Sixth Amendment of the U.S. Constitution states:

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 where in 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 defense.10

The U.S. Supreme Court built upon the Sixth Amendment in Strickland v. Washington and held that counsel must meet the performance standard of “reasonably effective assistance.”11 In order to succeed on a Sixth Amendment claim of ineffective assistance of counsel, the defendant has the burden of proof to show that: (1) counsel’s representation fell below the “reasonably effective counsel” standard;12 and (2) there is a “reasonable probability” that but for counsel’s unprofessional errors, the result of the proceeding would have been different.13

On March 31, 2010, the U.S. Supreme Court once again expanded the reach of the Sixth Amendment and held in Padilla v. Kentucky that counsel has an obligation to advise their clients of possible immigration consequences upon entering guilty pleas.14 They further held that a failure to do so constitutes “ineffective counsel” and thus can render a plea agreement constitutionally invalid.15 The Supreme Court did not clarify whether Padilla would be applied retroactively to existing convictions, but the Court did state, “[i]t now hold[s] that counsel must inform her client whether his plea carries a risk of deportation.”16 and “[i]t seems unlikely that [their] decision today will have a significant effect on those convictions already obtained as a result of plea bargains.”17 The Supreme Court’s vagueness has resulted in a split in U.S. courts as they grapple with the language in Padilla, as well as existing case precedents to determine whether this is a “new rule” that should be applied retroactively.18

This uncertainty could have a profound impact because in 2009, guilty pleas made up 96.3 percent of the convictions in U.S. district courts.19 Courts now have to balance the finality of convictions against defendants’ constitutional rights. This piece
will analyze who can raise Padilla as a collateral attack to an existing federal conviction. It will first examine the opinion of Padilla, whether and to what extent Padilla should be applied retroactively to federal convictions, the procedural hurdles in place for collaterally challenging a federal conviction, and whether a defendant would want to raise this collateral attack. It will conclude by determining the likelihood of whether Padilla “will have a significant effect on those convictions already obtained as the result of plea bargains.”

II. Padilla v. Kentucky

Jose Padilla had lived lawfully in the United States for forty years as a permanent resident. Mr. Padilla was then charged in Kentucky with transportation of a large amount of marijuana and drug distribution. His counsel told him not to worry about deportation consequences because he had lived in the country for so long. Mr. Padilla then pled guilty to the drug distribution offense and subsequently faced deportation. Mr. Padilla claimed he would have gone to trial instead of pleading guilty had he known the charge put him at risk for deportation. The Kentucky Supreme Court denied Mr. Padilla’s post-conviction relief on the grounds that deportation is a “collateral” consequence of a conviction, and as such, the Sixth Amendment does not protect defendants from erroneous advice regarding deportation consequences.

The U.S. Supreme Court started its analysis with an overview of immigration law and the changes that have increased the chances of deportation because of a criminal conviction. Now there is a broad class of deportable offenses and judges have limited authority to prevent deportation. The Court specifically pointed out that in 1996, Congress eliminated the Attorney General’s authority to grant discretionary relief to aliens facing deportation, thereby making deportation “practically inevitable” for those with deportable offenses. This high likelihood of deportation means it is more important now than ever for counsel to advise their clients regarding potential consequences. Deportation is “sometimes the most important part of the penalty” imposed on non-citizens.

Responding to the Kentucky Supreme Court, the U.S. Supreme Court pointed out that it does not distinguish between direct and collateral consequences for the purpose of Strickland’s “reasonably effective counsel” requirement. The Court stated it was not important to make this distinction due to the intimate relationship between deportation and the criminal process, which makes it uniquely difficult to classify the consequence as direct or collateral. Therefore, Strickland applies to situations where counsel must brief a client who is about to enter a plea with potential immigration consequences.

In determining whether a counsel’s failure to a client of immigration consequences fell below Strickland’s “reasonably effective counsel” requirement, the Court recognized that the weight of prevailing professional norms supports the view that counsel must advise his or her client of potential immigration consequences, including the right to remain and the right not to be excluded from the United States. The Court held that affirmative wrong advice is as bad as no advice and that counsel must at least advise their client there may be adverse immigration consequences.

In addition, the Supreme Court stated it considered the importance of protecting the finality of guilty plea convictions. It recognized that pleas are less frequently the subject of collateral challenges than convictions, accounting for only thirty percent of habeas petitions filed while nearly ninety-five percent of all criminal convictions result in the filing of habeas petitions. The Court, therefore, did not feel that this ruling would open the floodgates to challenges of convictions obtained by plea bargains. It ultimately held that counsel must inform a client of whether his plea carries a risk of deportation, and Mr. Padilla proved that his counsel was constitutionally deficient because she did not inform him of potential immigration consequences. As such, the case was remanded to the lower court to determine whether Mr. Padilla had been prejudiced and was thus entitled to have his conviction overturned.

III. Effect on Collateral Attacks on Federal Convictions

The road through appeal is a long one. If a defendant wants to challenge a conviction, the defendant must file under the direct appeal process, exhausting all of the appropriate avenues. Once that is complete, a defendant may file a collateral challenge to their conviction. Collateral attacks are separate “quasi-civil” proceedings from the direct appeal, usually filed with the original trial court. Only constitutional claims or those resulting in a serious miscarriage of justice are “cognizable” on collateral attack. Ineffective counsel implicates the Sixth Amendment right to counsel and would thus qualify as a constitutional claim.

A. Does Padilla Apply Retroactively to Existing Convictions?

Since 1965, the U.S. Supreme Court has presented “confused and confusing” jurisprudence with regard to the retroactive application of new constitutional rules of criminal procedure. Padilla appears to be no different. Reasonable jurists are split with respect to whether Padilla should apply retroactively, with the lower courts divided. The language
of Padilla offers some insight into the Court’s opinion on the “floodgates” theory:

We confronted a similar “floodgates” concern . . . but nevertheless applied Strickland . . . [a] flood did not follow in that decision’s wake . . . [s]urmounting Strickland’s high bar is never an easy task . . . [i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains.52

These statements indicate that the Court considered the potential floodgates concerns and had determined that the constitutional right to receive effective counsel outweighed the need for finality. On the other hand, the Court states: “[i] ikewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas. . . .”53 Further, “we now hold that counsel must inform her client whether his plea carries a risk of deportation”54 because “our long-standing Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”55

This conclusion indicates that an attorney’s duty to inform a client of immigration consequences is a “new rule,” and only at this point have deportation consequences become inevitable enough to warrant their inclusion during the plea bargaining process. These statements are powerful but unclear, leaving the courts little guidance in determining whether Padilla should be applied retroactively.56

1. What precedential case law does this U.S. Supreme Court provide to determine whether a rule of criminal procedure should be applied retroactively?

In Teague v. Lane,57 the U.S. Supreme Court outlined the analysis to determine whether a rule applies retroactively, which is “unwavering in use today.”58 Teague holds old rules should be applied retroactively to cases on direct or collateral review;59 however, “new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”60 The question then becomes whether or not the case announced a “new rule.” The Court acknowledged:

It is admittedly difficult to determine when a case announces a new rule. . . . [H]owever, a case announces a new rule when it breaks new ground or imposes a new obligation on the States of the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent at the time the defendant’s conviction became final.61

Courts are split as to whether Padilla announced a “new rule” or just applied a well-established principle under Strickland.62

The Supreme Court provided an exception for “new rules” to be applied retroactively to cases on collateral review “only if (1) the rule is substantive or (2) the rule is a ‘watershed rule[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.”63 A rule is substantive when “it alters the range of conduct or the class of persons the law punishes,”64 and it is procedural when it regulates the “manner of determining the defendant’s culpability.”65 A rule is “watershed” only if it satisfies two requirements: (1) “[i]nfringement of the rule must ‘seriously diminish the likelihood of obtaining an accurate conviction,’”66 and (2) “the rule must alter our understanding of the ‘bedrock procedural elements’ essential to the fairness of the proceeding.”67

i. Does Padilla’s holding constitute a “new rule”?

In determining whether anything is a “new rule,” the U.S. Supreme Court stated in Williams v. Taylor that the courts must determine whether they applied a well-established constitutional principle that has been considered precedent, and if not, it is a new rule.68 A rule will be considered a “new rule” if it imposes a new obligation on the states or federal government that falls outside the universe of federal law.69

In Butler v. McKellar, the Supreme Court applied its test of determining a “new rule” and held the bar to police-initiated interrogation following a suspect’s request for counsel in a separate investigation, set forth in Arizona v. Roberson,70 was a “new rule.”71 Even though the Court in Roberson stated it was directly controlled by Edwards v. Arizona, which bars police initiated interrogation after the defendant invokes his Fifth Amendment right,72 the Butler decision “is not conclusive for purposes of deciding whether the current decision is a new rule under Teague.”73 The Court further acknowledged that there was a “significant difference of opinion on the part of several lower courts that had considered the question previously.”74 This in-

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dicated that there was “debate among reasonable minds” and that “it would not have been illogical or drudging application of Edwards to decide it did not extend to the facts of Roberson.”

Due to the fact that there was not strong precedent, the Court held that the Roberson rule applying a defendant’s single invocation of his Fifth Amendment right to all matters was a “new rule” and thus did not apply retroactively to cases on collateral attack.

Since 2002, six of the U.S. Circuit Courts of Appeals have all clearly held that potential immigration consequences were collateral consequences of a plea, and therefore, counsel had no constitutional obligation to advise a non-citizen client of the possible immigration consequences prior to the client entering a plea. In United States v. Fry, the Ninth Circuit Court of Appeals stated that as of 2003, all other circuits to address the question of “whether or not counsel performs sufficiently by failing to advise a defendant of immigration consequences” have found that deportation is a collateral consequence; thus, counsel has no duty to advise a client of immigration consequences. The debate as to whether immigration consequences fell under the requirements of due process or the Federal Rules of Criminal Procedure occurred even though the Court found it is the “weight of the prevailing norms” that requires counsel to advise their client of potential immigration consequences. Like Butler, it seems that “reasonable minds” could disagree, and therefore this should constitute a “new rule.”

In addition, as articulated in Williams, this holding does impose a new responsibility on the federal government because federal defendants will be now required to advise their clients of potential immigration consequences upon entering a guilty plea. This same obligation could also be forced upon federal court judges. Therefore, Padilla constitutes a “new rule” and would not be applicable to cases on collateral review unless it fell into the “watershed rule” exception.

ii. If it constitutes a “new rule,” does it fall into the Teague “watershed rule” exception?

In fourteen separate cases, the U.S. Supreme Court has been asked to determine whether or not a rule is “watershed,” and fourteen times the Court has not applied the exception. In Teague, the Supreme Court stated that the Gideon v. Wainwright right to counsel for indigent defendants for a serious crime would constitute a watershed rule. The Supreme Court stated, “[w]e have repeatedly emphasized the limited scope of the second Teague exception, explaining that ‘it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.’” Furthermore, “any qualifying rule ‘would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge,’” thus “it should come as no surprise that we have yet to find a new rule that falls under the second Teague exception.” Although Padilla involves the Sixth Amendment right to effective counsel, it is unlikely to constitute a “watershed rule” because the Supreme Court has yet to find one and has issued strongly worded opinions against them.

iii. Assuming Padilla is an old rule or a “new rule” that fits into an exception under Teague, how far back should Padilla apply retroactively?

The Supreme Court stated in 1996 that deportation became “practically inevitable” for those with a deportable criminal conviction because that was when “Congress . . . eliminated the Attorney General’s authority to grant discretionary relief from deportation.” Therefore, it could be presumed that prior to 1996, deportation was not “practically inevitable” for aliens convicted with deportable offenses. It would also follow that only after deportation became “practically inevitable” would attorneys have a duty to advise their clients of potential immigration consequences. Therefore, a reasonable conclusion would be that only defendants with convictions post-1996 would be able to use Padilla to collaterally attack those convictions, greatly reducing the number of federal convictions that could be collaterally attacked.

B. DOES A CONVICTION FAIL THE TWO-PRONG TEST SET FORTH IN STRICKLAND?

The first prong of the Strickland test requires the court to find that the petitioner was not advised of immigration consequences; however, the Court stated that the duty to inform has been a part of the professional responsibility of counsel for at least the past fifteen years, according to professional norms. Therefore counsel benefits from a presumption that it has satisfied this obligation when advising their clients of plea consequences. This responsibility puts the burden on the defendant to prove that he was not advised of potential immigration consequences. This burden could be very difficult since not all conversations between an attorney and her client are on the record, and most attorneys are probably unwilling to sign declarations stating that they did not warn their clients of potential immigration consequences.

The second prong compels a petitioner to “convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” This requirement allows courts to evaluate the original plea agreement to determine whether the defendant could have received a better offer or in light of the evidence and very real deportation possibilities, decided to go to trial instead. The Court recognized that this could take a significant amount of analysis from the lower courts, acknowledged that these courts were “now quite experienced with applying Strickland,” and decided to “effectively and
efficiently use its framework to separate specious claims form those with substantial merit.”

C. DOES A CONVICTION MEET THE PROCEDURAL REQUIREMENTS?

After a defendant has completed the direct appeal process, the defendant can file a collateral challenge to his or her conviction. In order to proceed on the collateral challenge, the defendant has to meet any procedural requirements set forth in the applicable statute or case law. The most common type of federal post-conviction remedy is a writ of habeas corpus, and there is a “related but distinct” rarely used writ of coram nobis as well.

1. Writ of Habeas Corpus

Under 28 U.S.C. 2254, a defendant can file an application for a writ of habeas corpus in the district court on the ground that he or she is in custody in violation of the U.S. Constitution. The term “in custody” has been liberally construed to require only that the defendant is still completing a part of their sentence, which can include probation.

28 U.S.C. 2255 does provide for a one-year statute of limitations from:

(1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

If Padilla sets forth a “new rule,” then defendants have until March 31, 2011, one year after the decision, to challenge their convictions. If it is an old rule, then defendants have one year from the date of their original conviction.

A writ for habeas corpus will not be granted unless the applicant has exhausted all of his remedies in the state court, there is an absence of available process, or circumstances are such that they render the process ineffective. The defendant has to make sure that he has exhausted all of these remedies. The applicant has to prove that the lower court’s decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or that his claim relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . .” The defendant would be able to demonstrate his claim by proving his or her case was out of compliance with Padilla and Strickland, and thus he or she suffered an unreasonable application of clearly established federal law.

2. Writ of Coram Nobis

The writ of coram nobis is “an extraordinary remedy” that allows a petitioner to attack an unconstitutional conviction after the petitioner has served his or her sentence and is no longer in custody. There is no statute of limitations for the writ of coram nobis. The writ should be granted “only under circumstances compelling such action to achieve justice.” The Ninth Circuit requires a petitioner to prove the following to qualify for coram nobis relief:

(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction to satisfy the case and controversy requirement of Article III; and (4) the error suffered is of the most fundamental character.

A writ of coram nobis is filed after a defendant has served his sentence when a more usual remedy is unavailable. The petitioner is responsible for establishing that valid reasons existed for not attacking the conviction earlier and that he sustained sufficiently adverse consequences to satisfy Article III’s case and controversy requirement. This threshold question could require that the petitioner show that actual deportation proceedings are underway to meet this requirement. Petitioner would be able to rely on Padilla and Strickland to prove that the error he suffered is of the most fundamental character.

D. DOES THE PARTY REALLY WANT TO OVERTURN THEIR CONVICTION?

The Supreme Court in Padilla recognized those “who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea” and “the challenge may result in a less favorable outcome for the defendant.” Defendants voluntarily agree to enter plea agreements, and a petitioner who collaterally challenges his agreement and has it set aside could easily be forced to go to trial and face much stiffer penalties. Although the Court in Padilla stated “informed consideration of possible deportation can only benefit both the State and non-citizen defendants during the plea-bargaining process,” it appears that the government could have the upper hand, which could leave defendants to the mercy of the prosecutor.
If courts decide to apply Padilla retroactively, it will only affect a small number of convictions. Padilla requires the conviction be (1) post-1996; (2) of a non-citizen; (3) convicted of a deportable offense; (4) who can prove that he or she was not advised of potential immigration consequences; (5) who is now facing immigration/adverse consequences such that he or she has standing; (6) that he can meet the procedural requirements for their choice of remedy (habeas corpus or writ of coram nobis); and (7) he is willing to give up the benefit of his or her plea agreement in an attempt to get a better deal. Unless previous witnesses or evidence is unavailable, there is nothing to suggest that prosecutors will be willing to bargain for pleas that avoid immigration consequences, especially since there is no easy way out with so many deportable convictions. Therefore, trial is the most likely option for any plea deemed constitutionally invalid, and chances of success are uncertain at best.

Whether Padilla applies retroactively or not, the Supreme Court was correct in stating “[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains.” It does not appear as though the “floodgates” will open, filling the courts with writs of habeas corpus and coram nobis. At the same time, the Supreme Court achieved its goal in protecting non-citizens from the “mercy of incompetent counsel.” At the very least, it established a solid precedent across the United States regarding the advisement of potential immigration consequences, if not a “new rule” all together.

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3. This does not include those who were removed by U.S. Customs and Border Protection. Id. at 4 n. 6.
4. Alien is defined as “a resident born in or belonging to another country who has not acquired citizenship by naturalization.” Definition of Alien, http://dictionary.reference.com/browse/alien (last visited July 9, 2010).
9. See Padilla, 130 S. Ct. at 1486 (citing McMann, 397 U.S. at 771).
10. U.S. Const. amend. VI.
12. Id. at 687-688 (ruling that the burden of proof falls on the defendant to show that counsel failed to meet reasonably effective standard).
13. Id. at 687-694 (describing the standard for prejudice required in making an argument of ineffective assistance of counsel).
14. See Padilla, 130 S. Ct. at 1478 (holding that “counsel must inform her client whether his plea carries a risk of deportation”).
15. See id. at 1486-87 (explaining that the seriousness of deportation as a consequence of a criminal plea and the impact on families require constitutional protection of effective counsel for non-citizens).
16. Id. at 1486.
17. Id. at 1485.

21 Padilla, 130 S. Ct. at 1485.
22 Id. at 1477.
23 Id.
24 Id. at 1478.
25 Id.
26 Id.
27 Id.
28 See id. (noting an increase in the number of deportable offenses and less discretion for judges to waive deportation).
29 Id.
30 Id. at 1480.
31 Id.
32 Id.
33 See id. at 1481 (asserting that deportation is a severe penalty, not merely a collateral matter).
34 Id.
35 See id. at 1482 (concluding that legal advice about deportation falls within the standard of effective counsel outlined in Strickland).
36 Id. at 1482-83.
37 See id. at 1484.
38 Id.
39 Id. at 1485.
40 See id. (noting that Strickland was not followed by a flood of challenges).
41 Id. at 1486-1487.
42 Id. at 1487.
44 Id. at 16.
45 Id.
46 Id.
47 Id.
48 Strickland v. Washington, 466 U.S. 668, 684 (1984) (holding that the right to counsel is protected by the Sixth Amendment, making a claim of ineffective assistance a constitutional claim).
50 United States v. Obonaga, No. 10-CV-2951, 2010 WL 2710413, at *1 (E.D.N.Y. June 30, 2010) (indicating that the relatively recent publication of the Padilla decision has left little opportunity to clarify the decision through further rulings).
53 Id. at 1485.
54 Id.
55 Id. at 1486.
56 See Baruwa v. Caterisano, No. DKC-09-1278, 2010 WL 2509967, at *1 (D. Md. June 17, 2010) (noting that the Supreme Court did not establish whether its Padilla ruling should be applied retroactively).
60 Teague, 489 U.S. at 310. The word “final” indicates that the Court will apply “new rules” retroactively to those cases on direct review, but they will not apply to cases on collateral review. Id. (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). In Linkletter v. Walker, the Court defined final as “the judgment of conviction was rendered, the unavailability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Mapp v. Ohio.” 381 U.S. 618, 622 n. 5 (1965).
61 Teague, 489 U.S. at 301.
62 See text accompanying supra note 31.
63 Whorton, 549 U.S. at 416 (citing Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague, 489 U.S. at 311)).
65 Id.
67 Tyler, 533 U.S. at 665 (citing Sawyer v. Smith, 497 U.S. at 241-42 (quoting Teague, 489 U.S. at 311)).
69 Id. at 381.
73 Butler, 494 U.S. at 415.
74 Id.
75 Id.
76 See Arizona, 486 U.S. at 687-88 (holding that, once a suspect has invoked the right to counsel, that right must be honored even by different law enforcement personnel and on different matters).
77 Butler, 494 U.S. at 415.
78 Santos-Sanchez v. United States, 548 F.3d 327, 337 (5th Cir. 2008), abrogated by Padilla v. Kentucky, 130 S. Ct. 1473, 1473; Enwonwu v. United States, No. 06-1825, 2006 WL 2729703 at *7 (1st Cir. Sept. 26, 2006), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Gonz-
lez, 202 F.3d 20, 25 (1st Cir. 2000), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Matar, No. 05-3929, 2006 WL 3724638 at 555 (7th Cir. Dec. 15, 2006), abrogated by Padilla, 130 S. Ct. at 1473; Brooms v. Ashcroft, 358 F.3d 1251, 1256 (10th Cir. 2004), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Amador-Leal, 276 F.3d 511, 517 (9th Cir. 2002), abrogated by Padilla, 130 S. Ct. at 1473; El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002), abrogated by Padilla, 130 S. Ct. at 1473.

80 Fry, 322 F.3d at 1200 (citing United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993), abrogated by Padilla, 130 S. Ct. at 1473; Gonzalez, 202 F.3d at 25, abrogated by Padilla, 130 S. Ct. at 1473; Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990), abrogated by Padilla, 130 S. Ct. at 1473; Santos v. Kolb, 880 F.2d 941, 945 (7th Cir. 1989), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir. 1988), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985), abrogated by Padilla, 130 S. Ct. at 1473; United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975), abrogated by Padilla, 130 S. Ct. at 1473.

81 Padilla, 130 S. Ct. at 1482.

82 See Butler, 494 U.S. at 415 (identifying court rulings in which opinions differed as to whether or not a new rule was being established).


84 See Padilla, 130 S. Ct. at 1478 (holding that the defendant would have been advised of immigration consequences by constitutionally competent representation).

85 Id.


88 Landes, supra note 58, at 2. These non-sentencing cases all held that the rule was not “watershed.” Butler v. McKellar, 494 U.S. 407, 415 (1990) (addressing Arizona which barred police-initiated interrogation following a suspects request for counsel in another matter); Gilmore v. Taylor, 508 U.S. 333, 345 (1993) (citing Falconer v. Lane, 905 F.2d 1129, 1136-1137 (7th Cir. 1990), which barred jury instructions for murder that did not consider a diminished mental state); Goeke v. Branch, 514 U.S. 115, 120 (1995) (focusing on the rule that gave recaptured fugitives a right to appeal).


90 See Teague, 489 U.S. 288 311-12 (1989) (holding that a new rule could be applied retroactively if needed to preserve ordered liberty).


92 Beard, 542 U.S. at 417 (citing Graham, 506 U.S. at 478 (quoting Teague, 489 U.S. at 313)).

93 Landes, supra note 58, at 2.

94 Padilla, 130 S. Ct. at 1480.

95 Id.

96 Id.

97 Id.

98 Id. at 1485.

99 Id.

100 Id.

101 Id.

102 Id.

103 Newton, supra note 43, at 16.

104 See id. at 17 (identifying federal statutes under which a defendant may bring a habeas claim).

105 Id.


108 § 2254.

109 § 2254.

110 Id.

111 Id.


113 Id. at 511.

114 Id. at 507.

115 Id. at 511.


117 Morgan, 346 U.S. at 508.

118 Padilla, 130 S. Ct. at 1485-86.

119 Id.

120 Id. at 1486.


122 Padilla, 130 S. Ct. at 1485.

123 Id. at 1484-85.

124 Id. (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

ABOUT THE AUTHOR

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