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¿Qué Pueden Hacer? Ineffective-Assistance-of-Counsel Claims in a Post-Padilla World

by

Patrick O'Brien

Occasional Paper No. 76
May 2012

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MICHIGAN STATE UNIVERSITY

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Abstract

This paper analyzes the U.S. Supreme Court's decision in *Padilla v. Kentucky*, wherein it addressed ineffective-assistance-of-counsel claims brought forth by a lawful immigrant. It goes on to examine ensuing applications of the *Padilla* decision by Federal Circuit Courts in *United States v. Orocio* and *United States v. Chaidez*. In *Padilla v. Kentucky* the Court held that legal counsel must advise immigrants facing legal charges of the risk of deportation. The Circuit Courts provided contradictory interpretations about whether or not the *Padilla* decision should be applied retroactively. The paper goes on to point out that most immigration matters are decided by immigration judges and the Board of Immigration Appeals (BIA). It further holds that since federal judges and state courts have little experience adjudicating immigration matters, the action of determining whether an attorney has rendered effective counsel concerning immigration matters become even more difficult. The paper contends that regardless of the various interpretations of the *Padilla* decision by the Circuit Courts, changes at the local, state, and Federal levels are needed to ensure that the Sixth Amendment rights of those with immigration statuses are protected.

About the Author

Patrick O'Brien *has dual bachelors and master degrees from the University of Notre Dame and spent two years teaching secondary Spanish in Phoenix, Arizona. He recently completed the second year of law school at Michigan State University College of Law.*

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Introduction

Guillermo, an immigrant from Mexico and a legal permanent resident of the United States, works on the west side of the state of Michigan as an agricultural laborer. Each day, he rises at 5 a.m. and drives his pick-up truck to a nearby asparagus farm. Guillermo picks asparagus each day for twelve hours and then returns to a rented room in Holland, Michigan. On the weekends, Guillermo and a few other workers go to a local bar to relax and watch *Pachuca*, the professional soccer team from their hometown in the Mexican state of *Hidalgo*. Guillermo picks his friends up in his truck in the evening and drops them off late at night. One Saturday night, Guillermo has just finished dropping off the last of his friends when he is pulled over by a police officer. The police officer suspects that Guillermo has been drinking, so he requests that Guillermo exit the vehicle so he can administer a sobriety test.

The officer also glances at the truck and notices a small duffel bag in the truck bed. He requests that Guillermo open the bag so he can see the contents. Guillermo complies with the officer's requests, knowing that the friend he just dropped off left the bag in the truck. Upon opening the duffel bag, the officer notices a white, powdery substance in clear plastic bags. The officer immediately arrests Guillermo and takes him to jail.

Guillermo is assigned a public defender who has over fifty other open cases in addition to Guillermo's. Despite Guillermo's insistence that the duffel bag and cocaine are not his, the public defender convinces Guillermo to take the state's plea deal and plead guilty to possession of cocaine in exchange for a lighter prison sentence. Guillermo does not think to ask his attorney about any immigration consequences to the plea deal and the public defender does not consider the risk of deportation. The public defender tells Guillermo that because he is a legal permanent resident, a possession of cocaine charge will not render any "collateral consequences," such as deportation. It takes Guillermo a month in jail to realize that he will be deported back to Mexico once his sentence is over. Does Guillermo have a legal recourse? More importantly, could a better education, program, or rule have better prepared the public defender's legal advice or strategy?

This paper analyzes the U.S. Supreme Court's 2010 decision in *Padilla v. Kentucky*, wherein the Supreme Court considered legal questions similar to the ones faced by Guillermo above. Next, it discusses the Court's application of the ineffective legal counsel framework developed by the *Padilla* Court and two subsequent judicial decisions by the Seventh and Third Circuit Courts which applied the *Padilla* framework. Finally, an analysis of the subsequent decisions by the Seventh and Third Circuit will determine whether the Supreme Court in *Padilla* intended its decision to constitute a "new rule" and whether or not its decision would apply retroactively to Sixth Amendment ineffective-assistance-of-counsel claims. This paper contends that the Supreme Court in *Padilla* likely intended to apply its decision retroactively. However, regardless of this contention, changes at the federal, state, and local levels are needed in practices to ensure that the Sixth Amendment rights of those with immigration statuses are protected regardless of *Padilla's* interpretation.

The Judicial Framework by which Sixth Amendment Ineffective-Assistance-of-Counsel Claims are Evaluated

Before analyzing the ramifications of subsequent judicial decisions relative to *Padilla*, it is necessary to understand the framework within which the Supreme Court decides cases involving ineffective-assistance-of-counsel claims. *Padilla v. Kentucky's* starting point necessarily begins with the Sixth Amendment, an amendment guaranteeing the right to assistance of counsel in judicial proceedings. (Zelnick, 2003, 365). The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence (U.S. Const., Amend. 6).

Subsequent judicial proceedings have entrenched within the Sixth Amendment the right to *effective* judicial counsel. (*Strickland v. Washington*, 1983). That is to say, all those tried in judicial proceedings have the right to an attorney who effectively and objectively advocates for their rights. (Zelnick, 2003, 365-66).

The precedent applied by the *Padilla* court began with the U.S. Supreme Court's decision in *Strickland v. Washington*, a case which clarified the Sixth Amendment by setting the initial framework for judging Defendants' claims of ineffective assistance of counsel. In *Strickland*, the court promulgated a two prong test that, if satisfied, would give defendants access to a remedy under the Sixth Amendment. The defendant must first demonstrate unreasonable deficiencies in the performance of his or her legal counsel. Second, this deficient performance must materially and substantially prejudice the defendant's right to a fair trial. The court is notably silent on the issue of a remedy should a defendant prove his ineffective-assistance-of-counsel claim.

Subsequent judicial decisions by the Supreme Court and in the various Circuits have effectively employed the *Strickland* framework and distilled its two prong test. For example, the case *United States v. Springs* distilled *Strickland's* reasonableness test by indicating that attorneys need not force their clients to take a plea bargain. In *Springs*, petitioner Spring brought an ineffective counsel claim contending that his attorney did not "insist" he take the proffered plea. (*United States v. Springs*, 1993). At sentencing, Springs was found guilty of the charges against him and sentenced to 120 months in jail, 58 more months than the original plea bargain. The Seventh Circuit indicated that Petitioner Springs' greater sentence was not indicative of attorney misconduct and his sentence could hardly be construed as undue because it fell within the sentencing guidelines.

Two other cases distinguish *Strickland's* reasonableness test by yielding concrete examples of those situations where attorney conduct fell short of the threshold for professional conduct. One such case, *Boria v. Keane* (1999), held that where an attorney fails to notify or discuss the advisability of accepting a proffered plea, his conduct has breached the constitutional rights of his client. In *Boria*, the court indicated that had counsel "advised his two new clients . . . of his professional judgment that it was almost impossible to obtain an acquittal in Orange County, there would have been more than a 'reasonable probability' that the father would have organized the family to persuade petitioner not to pursue the suicidal course he seemed bent on following." (*Boria v. Keane*, 1996:33). Thus, *Boria* makes clear that the notification and discussion of plea bargains falls within the standard of reasonableness for purposes of the *Strickland* test. Similarly, *Hoffman v. Arave* (2006) from the Ninth Circuit specifies that an attorney's lack of familiarity with the relevant law falls below the professional standards expected of an attorney. In *Hoffman*, the counsel's unfamiliarity with the law led his client to reject a plea that would have saved him from the death penalty. Counsel, who had never tried a capital murder case, advised Hoffman to reject the plea predicated on faulty information concerning the law. The *Hoffman* court held that Hoffman's attorney exhibited deficient performance of counsel as he "recommended that his client risk much in exchange for very little" (*Hoffman v. Arave*, 2006:7357). These two case examples illustrate how *Strickland's* reasonableness test centers on the attendant facts and circumstances of the cases, counsel's attention to his client's case, and familiarity with the relevant law.

The second prong of the *Strickland* test requires that the petitioner show with "reasonable probability" that but for the counsel's deficient conduct the result of the judicial proceeding would have been different. (*Strickland v. Washington*, 1983). Whereas *Strickland* omitted specific examples of attorney "reasonableness," the case detailed several examples of prejudice, including attorney conflict of interest, "unprofessional errors" materially affecting the outcome of the judicial proceeding, and unreasonable and partial application of "the standards that govern the decision" (*Strickland v. Washington*, 1983).

The case *Nunes v. Miller* (2003) further defines the prejudice prong of the *Strickland* test. Mr. Nunes' ineffective counsel claim stemmed from a failure to properly convey the state's plea bargain whereby Mr. Nunes would plead guilty to voluntary manslaughter and serve eleven years in prison instead of going to trial on a second-degree murder charge. Instead, Nunes went to trial where he was convicted of second-degree murder

and sentenced to fifteen years to life in prison. The Court in *Nunes* held that a petitioner need not prove his claim of prejudice with "absolute certainty." (*Nunes v. Miller*, 2003). Rather, the majority indicated that Petitioner Nunes should have been afforded an evidentiary hearing as his assertion of prejudice was substantiated by a "reasonable probability." (*Nunes v. Miller*, 2003). Thus, where a claim of prejudice is substantiated by "reasonable probability," the second prong of the *Strickland* test is satisfied.

Hoffman v. Arave further illuminates the meaning of prejudice in its implication that prejudice depends upon the attendant facts and circumstances surrounding the attorney-client relationship. In *Hoffman*, the petitioner claimed that his right to effective assistance of counsel was violated after counsel's faulty understanding of the law induced counsel to recommend a rejection of the state's plea deal. In its holding, the *Hoffman* court took into account petitioner Hoffman's highly "compliant personality" and deference to counsel in deciding that "Hoffman probably would have gone along with [counsel's] suggestion and would have accepted the plea agreement." (*Hoffman v. Arave*, 2006:7360). Thus, *Hoffman* further distinguishes the prejudice prong by allowing courts to analyze the attendant facts surrounding the relationship between an attorney and a client, such as a defendant's compliant personality, in determining whether a judicial proceeding would have been different but for the ineffective assistance of counsel.

The *Padilla v. Kentucky* Decision

Jose Padilla, a native of Honduras, had resided in the United States for over forty years as a lawful permanent resident. During his time in the United States, Mr. Padilla was a member of the armed forces and served in Vietnam. At trial in Kentucky, Mr. Padilla was charged with "trafficking in more than five pounds of marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor/trailer without a weight and distance tax number" (*Padilla v. Kentucky*, 2010:2). The tendered plea bargain allowed Mr. Padilla to plead guilty to the drug charges and in exchange, the State would drop the remaining charge. Mr. Padilla would receive a sentence of ten years in jail, with the first five years spent in jail and the remaining years spent on probation. At the advice of his counsel, Mr. Padilla took the State's plea offer, relying upon the assuring words of his counsel that Mr. Padilla "did not have to worry about immigration status since he had been in the country so long" (*Padilla v. Kentucky*, 2010). However, Mr. Padilla's acceptance of the state's plea rendered him immediately deportable under 8 U.S.C.A. § 1227 (a)(2)(B)(i), which states:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable (Immigration and Nationality Act, 1996).

As a consequence of his conviction under the above federal statute, Mr. Padilla faced almost certain deportation after his five years of incarceration (legal permanent residents are subject to immigration statutes until they become legal citizens).

Nearly two years after the acceptance of the plea bargain, Mr. Padilla filed a motion for post-conviction relief, alleging deficient assistance of counsel. Mr. Padilla based his motion upon the uninformed advice of his counsel and alleged that he would have gone to trial had he not relied upon the deficient advice of his attorney. Ultimately, the Supreme Court of Kentucky (253 S.W.3d 482) rejected Mr. Padilla's argument, holding that deportation was a collateral matter and as such, "counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief" (*Padilla v. Kentucky*, 2010). The Supreme Court issued a writ of certiorari in 2009 to decide whether, "as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country" (*Padilla v. Kentucky*, 2010:2). In other words, the Supreme Court issued its writ of certiorari to determine whether deportation, an otherwise collateral consequence of a conviction or a guilty plea, could serve as the basis of a Sixth Amendment ineffective-assistance-of-counsel claim.

Ultimately, the U.S. Supreme Court's decision in *Padilla* declassified deportation as a collateral matter. Justice Stevens' opinion traced the genesis of American immigration law, focusing on the Immigration and Nationality Act's 1996 revisions which "eliminated the Attorney General's authority to grant discretionary relief from deportation" (*Padilla v. Kentucky*, 2010 quoting 110 Stat. 3009-596:6). Justice Stevens noted that this lack of judicial discretion virtually assured a noncitizen defendant of deportation if the noncitizen committed a removable offense. Because of the statute's rigidity, the Court, while not explicitly holding that a collateral matter could serve as the basis for a Sixth Amendment ineffective-assistance-of-counsel claim, held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel" (*Padilla v. Kentucky*, 2010:9).

After determining the validity of Mr. Padilla's basis for his ineffective-assistance-of-counsel claim, the Court turned to whether the claim passed the two-part *Strickland v. Washington* test. The *Padilla* Court first defined "reasonableness," as "necessarily linked to the practice and expectations of the legal community" (*Padilla v. Kentucky*, 2010). These practices and expectations are evaluated by the "prevailing professional norms" of the legal community (*Padilla v. Kentucky*, 2010). Based upon these norms, the Court determined that Mr. Padilla's claim satisfied the first prong of the *Strickland* test by proving Mr. Padilla's representation fell below the reasonableness standard. In determining that counsel's actions fell below a standard of reasonableness, the Court focused on the following three items: 1) the gravity of deportation, 2) the ease of reading the pertinent immigration statutes, and 3) counsel's false assurances.

The Court first noted that the consequence of deportation often outweighs the direct consequences of the crime (such as jail time). Because of the gravity in consequence, the Court also noted that a reasonable attorney should have consulted the relevant immigration statute. Without consultation of the removal statute, counsel should never have told Mr. Padilla that he would not face deportation. Consequently, the Court determined that Mr. Padilla's claim successfully demonstrated the unreasonable nature of counsel's actions. In the opinion, Justice Stevens noted that "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation" (*Padilla v. Kentucky*, 2010:9). The Court did not address the second prong of the *Strickland* test, but instead left the prejudice decision up to the Supreme Court of Kentucky.

While *Padilla v. Kentucky* employed the *Strickland* test in its rationale, the Court also went a step further by blurring the line between direct and collateral consequences to guilty pleas. The Kentucky Supreme Court originally noted in *Padilla* that an ineffective-assistance-of-counsel claim, rooted in a collateral matter (collateral matters are those matters that do not fit within the sentencing authority of the state trial court) rests "outside the scope of representation required by the Sixth Amendment" (*Padilla v. Kentucky*, 2010 quoting *Com. v. Kentucky*, 2008:7). Justice Stevens did not specifically address whether collateral consequences of guilty pleas fell within the auspices of the Sixth Amendment. However, he did note that "[w]e, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionality" (*Padilla v. Kentucky*, 2010:8). Justice Stevens' words thereby allowed a collateral matter, such as deportation, to fall under judicial review.

United States v. Orocio (*Padilla* Retroactively Applied)

The issue concerning the precedent set by *Padilla* was addressed by *United States v. Orocio* on June 29, 2011. The facts in *Orocio* mirror many of the facts of *Padilla* in that the plaintiff, Gerald Orocio, was arrested and later charged in federal court with drug trafficking on October 3, 2003. Orocio was assigned a public defender, to whom Orocio disclosed that he was a legal permanent resident of the United States. Orocio retained private counsel in 2004. Prior to trial, the government offered Mr. Orocio a plea deal whereby Mr. Orocio was charged with controlled substance possession instead of drug trafficking and "would receive a sentence of time served plus a two-year period of supervised release" (*United States v. Orocio*, 2011:4-5). Counsel did not inform Mr. Orocio of the immigration consequences before Mr. Orocio decided to accept the plea agreement on October 7, 2004.

After successful completion of the two-year supervised release, removal proceedings were initiated against Mr. Orocio due to a violation of 8 U.S.C.A. § 1227 (a)(2)(B)(i). Mr. Orocio decided to file a petition for a writ of error *coram nobis*, which "is available to 'persons not held in custody [to] attack a conviction for fundamental defects, such as ineffective assistance of counsel" (*United States v. Orocio*, 2011). In his petition, Mr. Orocio contended that his attorney was deficient for two reasons: failing to fully investigate his eligibility for a federal "first offense" dispensation and failing to advise Mr. Orocio of the adverse immigration consequences of his plea (*United States v. Orocio*, 2011). After the federal District Court denied Mr. Orocio's petition, Mr. Orocio appealed to the Court of Appeals for the Third Circuit to determine whether Mr. Orocio was "entitled, retroactively, to the benefit of that ruling [the *Padilla* decision]" (*United States v. Orocio*, 2011:5).

The Court of Appeals for the Third Circuit held that the proper reading of *Padilla* allowed for retroactive review of ineffective-assistance-of-counsel claims if immigration status was a collateral consequence. Judge Pollak explained the Court's rationale, stating that "[t]he application of *Strickland* to the *Padilla* scenario is not so removed from the broader outlines of precedent as to constitute a 'new rule,' for the Court had long required effective assistance of counsel on all 'important decisions'" (*United States v. Orocio*, 2011 quoting *Strickland v. Washington*, 1984:13). Moreover, in responding to the contention that *Padilla* "clearly broke new ground" by mandating that attorneys inform their clients of collateral immigration consequences, the Third Circuit stated further: the *Padilla* "Court straightforwardly applied the *Strickland* rule – and the norms of the legal profession that insist upon adequate warning to criminal defendants of immigration consequences – to the facts of Jose Padilla's case" (*United States v. Orocio*, 2011:14). After explaining its understanding of *Padilla*'s precedential effect, the Court found substantial evidence that Petitioner Orocio satisfied the two-pronged *Strickland* test. Therefore, the Court vacated the lower court's ruling and remanded the case to allow the lower court's application of the *Padilla* framework.

The decision of the Court in *Orocio* to apply *Padilla* retroactively will likely reverberate throughout the other Circuits for some time to come. Notable in *Orocio* is the fact that the Court looked past the words of the *Padilla* Court. *Padilla's* conflicting language, such as "we *now* [emphasis added] hold that counsel must inform her client whether his plea carries a risk of deportation" due to "our longstanding Sixth Amendment precedents" (*Padilla v. Kentucky*, 2010:17), implies that its holding constitutes a "new rule." However, the *Padilla* Court also addressed the "floodgate" argument in its attempt to assuage fears that its decision could open up a litany of retroactive ineffective-assistance-of-counsel claims. After all, an appellant's conviction would have to satisfy the following conditions to even qualify for relief:

(1) Post-1996;
(2) of a non-citizen;
(3) who was convicted of a deportable offense;
(4) and can prove that he or she was not advised of potential immigration consequences;
(5) who now faces immigration/adverse consequences;
(6) who can meet the procedural requirements for their choice of remedy;
(7) and is willing to give up the benefits of his or her plea agreement in attempting to get a better deal (Cartier, 2010, p. 63).

Therefore, the Court in *Orocio* transcended *Padilla's* schizophrenic language and looked at *Padilla's* plain intent and legislative history. Justice Pollak wrote that "because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule'" (p. 19). Consequently, "Mr. Orocio is . . . entitled to the benefit of its holding" (p. 19-20).

***United States v. Chaidez* (*Padilla* Not Retroactively Applied)**

The Court of Appeals for the Seventh Circuit reached a different conclusion concerning *Padilla's* retroactive application. The facts of *Chaidez v. United States* (2011) parallel those of both *Orocio* and *Padilla*. In *Chaidez*, the petitioner Roselva Chaidez was a lawful permanent resident from Mexico indicted in June of 2003 on three counts of mail fraud in excess of $10,000. At the urging of her counsel, she pled guilty to two of the three counts of mail fraud and was sentenced to four years' probation. Chaidez's

guilty plea rendered her deportable under INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii), which reads:

> (2) Criminal offenses. . .
>
> (A) General crimes
>
> (iii) Aggravated felony
>
> Any alien who is convicted of an aggravated felony is deportable (Immigration and Nationality Act, 1996).

Chaidez's plea to the two counts of mail fraud in excess of $10,000 constituted an "aggravated felony" for the purposes of the Immigration and Nationality Act. Under INA 101(a)(43)(M)(i); 8 U.S.C. § 1101(a)(43)(M)(i), an aggravated felon means:

> (M) an offense that-
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 (Immigration and Nationality Act, 1996).

Removal proceedings against Chaidez were initiated in 2009 and Chaidez's *writ of coram nobis* was filed in Federal District Court in January of 2010. Interpreting the recent *Padilla* decision to apply retroactively, the federal judge granted Chaidez's petition. This decision was short-lived, however, as the case was later appealed to the Court of Appeals for the Seventh Circuit.

The Court of Appeals for the Seventh Circuit's decision parted ways with the lower court by announcing that *Padilla* announced a "new rule" and accordingly could not be applied retroactively. The Seventh Circuit relied on several factors in this determination, first citing the lack of unanimity in the opinions of the various districts and circuits as evidence of a "new rule." If lower courts split on the issue, Judge Flaum concluded, "the Court has concluded that the outcome of the case was susceptible to reasonable debate" (*Chaidez v. United States*, 2011:8). This lack of unanimity and the debate surrounding the retroactive nature of *Padilla* "convince[d]" the Seventh Circuit that "*Padilla* announced a new rule" (p. 9).

The Court justified its "lack of unanimity" argument by also noting the opinions of the nine justices in the *Padilla* decision. Specifically, the Seventh Circuit noted that the concurrence of Justices Alito and Chief Justice Roberts left "no doubt" that the two "considered *Padilla* to be ground-breaking" rather than an extension of the *Strickland* standard (*Chaidez v. United States*, 2011). Moreover, the Seventh Circuit noted that Justices Scalia and Thomas authored a dissent criticizing the *Padilla* decision as one "not dictated by precedent" (*Chaidez v. United States,* 2011). This array of opinion, in the eyes of the Court, justified the Court's understanding of *Padilla* as establishing a "new rule" as opposed to a modification or extension of *Strickland*.

Finally, the Court attacked the arguments of the Third Circuit, indicating that "[t]he fact that *Padilla* is an extension of *Strickland* says nothing about whether it was new or not" (*Chaidez v. United States*, 2011). The Court cited *Butler v. McKellar* (1990) which stated "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule'" (*Chaidez v. United States*, 2011:16). According to the Court, therefore, the fact that *Padilla* extended *Strickland* is not controlling as to whether a new rule was established by the Supreme Court. Moreover, the Court noted the nuances of *Padilla* which distinguished the case from *Strickland*. Specifically, the Court pointed to the *Padilla* Court's distinction between "truly clear" deportation consequences and "unclear or uncertain" deportation consequences. According to the Court, this distinction "cannot . . . be characterized as having been dictated by precedent" (*Chaidez v. United States*, 2011:13). Accordingly, the Seventh Circuit held that *Padilla* announced a "new rule" and as such, could not be applied retroactively to Petitioner Chaidez's *writ of coram nobis*.

Notwithstanding the Court's rationale, Justice Williams penned a dissent which mirrored the Third Circuit's interpretation and application of *Padilla*. Justice Williams first noted that *Padilla v. Kentucky* "simply clarified that a violation of these norms [of *effective* attorney conduct] amounts to deficient performance under *Strickland v. Washington*" (*Chaidez v. United States*, 2011). Justifying his assertion, Justice Williams addressed the arguments of the majority; specifically, the argument that the concurrence and dissent in *Padilla* compelled the Seventh Circuit to view the *Padilla* decision as a new rule. Justice Williams wrote:

> The existence of concurring and dissenting views does not alter the fact that the prevailing professional norms at the time of Chaidez's plea required a lawyer to advise her client of the immigration consequences of a guilty plea. Even in light of dissenting views, '*Strickland* did not freeze into place the objective standards of attorney performance prevailing in 1984, never to change again' (*Chaidez v. United States*, 2011:26).

Justice Williams' words imply that *Strickland* contemplated a fluid understanding of professional norms that would adjust with the changing times. Therefore, the majority's argument missed the point completely.

Moreover, Justice Williams noted that the Supreme Court in *Padilla* specifically mentioned that it had never differentiated between a direct or collateral consequence of an immigration plea. Therefore, any argument that points to unanimity among the lower courts regarding immigration pleas as "collateral" is meaningless because the Supreme Court itself never differentiated between these consequences. And finally, Justice Williams read into the *Padilla* court a desire or "intent" to apply its decision retroactively. Justice Williams chastised the majority by pointing to the plain language of the *Padilla* decision. He noted:

> My colleagues downplay the plain language in *Padilla* that itself signals anticipated retroactive application. The majority in *Padilla* specifically stated that its decision will not 'open the floodgates' to challenges of convictions and further stated that '[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as a result of plea bargains (*Chaidez v. United States*, 2011:29).

Here, Justice Williams' words mirror the language of the Third Circuit in his emphasis on the "floodgates argument."

The Third Circuit's Interpretation of *Padilla* is Correct

Upon closer analysis, the Third Circuit's interpretation in *United States v. Orocio* of *Padilla v. Kentucky* is the correct interpretation. Justice Williams' dissent in *United States v. Chaidez* goes a long way in explaining why the Third Circuit is correct. First, Justice Williams' emphasis on the *intent* of the Supreme Court in *Padilla* is notable. Why would the Supreme Court's majority address the "floodgate" argument in its rationale if it did not *intend* for its decision to apply retroactively? This floodgate argument forecasts the question of retroactivity and its language should leave little question as to the Court's intent.

Moreover, an argument in support of a "new rule" interpretation highlighting the fact that *Padilla* allowed a collateral matter to serve as the basis for a Sixth Amendment defective counsel claim misses the point. The distinction between "collateral" and "direct" consequences to guilty pleas was addressed by the *Padilla* Court. Justice Stevens noted in the *Padilla* opinion that "[w]e, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionality" (*Padilla v. Kentucky*, 2010:8). Justice Stevens' words support the inference that a distinction between consequences is not given much weight in the Supreme Court. Therefore, an argument emphasizing *Padilla's* entertainment of a "collateral" matter is not a strong contention.

Finally, from an equitable standpoint, public policy favors a retroactive application of *Padilla*. There would likely be very few petitioners seeking retroactive review of their cases for numerous reasons. Rachel A. Cartier, in justifying the interpretation of *Padilla's* retroactive ability, enunciated the high burden of adjudicating a retroactive Sixth Amendment deficient counsel claim (Cartier, 2008, p. 63). This high burden excludes a high number of potential petitioners. The Supreme Court's language in *Padilla* strengthens this equitable argument. The Supreme Court did not believe its decision would cause a "floodgate" of new litigation. Therefore, it is important that the few petitioners who qualify under *Padilla* have their day in court.

What Does this Split Mean for Ineffective-Assistance-of-Counsel Claims, Rooted Out of "Collateral" Immigration Consequences, Going Forward?

The first, and perhaps the most obvious, symptom of the dual interpretation of *Padilla v. Kentucky* is the redressability of Petitioners' claims of ineffective assistance

of counsel. Should courts decide to follow the Third Circuit's application of *Padilla*, deficient counsel claims stemming from an uninformed plea or unjust conviction pre-*Padilla* will likely be heard. Conversely, those claims will not be heard if the courts choose to adhere to the Seventh Circuit's application of *Padilla*. Either application will pose important consequences on any forthcoming claims of ineffective assistance of counsel. Ultimately, the Supreme Court will have to decide the applicability of its decision in *Padilla* to pre-*Padilla* claims.

Assuming the Supreme Court adopts the Third Circuit's adaptation of *Padilla*, petitioners could bring ineffective-assistance-of-counsel claims as far back as 1996. However, there are likely a plethora of potential claims from petitioners who no longer reside in the United States (as they have already been deported through government-initiated removal proceedings). Therefore, the application of the Third Circuit's interpretation of *Padilla* could pose a logistical nightmare. Rachel E. Rosenbloom, an assistant professor of law at Northeastern University School of Law, indicates in her article, *Will Padilla Reach Across the Border?*, that it is highly unlikely that any deported individual outside of the United States could return for judicial proceedings (Rosenbloom, 2010). Rosenbloom is likely correct in her assertion. A removed individual would only have two recourses in returning to the United States for an adjudication of his or her claim: a non-immigrant visa or a visa waiver. However, to even apply for a non-immigrant visa, the removed individual would have to wait ten years. According to INA § 212(a); 8 U.S.C.A. § 1182:

> Any alien not described in clause (i) who-
> (I) has been ordered removed under section 240 or any other provision of the law or
> (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible (Immigration and Nationality Act, 1996).

Since INA § 240; 8 U.S.C.A. § 1229 concerns removal proceedings initiated by the U.S. government, nearly all removed individuals with deficient counsel claims would fall under its authority. Therefore, any application for a nonimmigrant visa would have to wait ten years. This wait would make an adjudication of any deficient counsel claim virtually impossible for a removed individual.

Similarly, the visa waiver program under INA § 217; 8 U.S.C.A. § 1187 presents another challenge for an immigrant seeking an adjudication of his or her Sixth Amendment deficient counsel claim. The visa waiver program allows nonimmigrant visitors from countries to waive the nonimmigrant visa requirements of INA § 212(a); 8 U.S.C.A. § 1187 as long as they are seeking entry as a tourist for 90 days or less and come from a country with a low nonimmigrant visa refusal rate (see INA § 217; 8 U.S.C.A. § 1187). Therefore, removed individuals from countries such as Mexico, Guatemala, and other countries with large nonimmigrant visa refusal numbers are virtually excluded for the purposes of the visa waiver program. Moreover, the removed individual may be barred by other provisions prohibiting those with previous visa violations from applying to the program. Under INA § 217(a)(6) & (7); 8 U.S.C.A. § 1187, these individuals must meet the following requirements to qualify for the visa waiver program:

> (6) Not a safety threat
> The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.
> (7) No previous violation
> If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant (Immigration and Nationality Act, 1996).

Depending upon the interpretation of clause six above, a United States consulate could easily determine that a deported individual would pose a safety threat to the United States based upon his or her contested plea or conviction. Moreover, any removed individual who entered the United States without documentation is effectively barred from relief under clause seven.

Rosenbloom argues that a removed individual could seek humanitarian parole into the United States under the auspices of INA § 212(d)(5)(A); 8 U.S.C.A. § 1182(d)(5)(A), which grants authority on a case-by-case basis for "urgent reasons" or a "significant public benefit" (2010: 339-40). However, it is highly likely that this type of parole would be granted only in rare instances. Therefore, Rosenbloom concludes that the adjudication of any deficient counsel claims with immigration consequences would have to proceed with the petitioner remaining in his or her homeland.

Assuming the Supreme Court adopts the Seventh Circuit's Interpretation of *Padilla*, individuals could only bring deficient counsel claims under the Sixth Amendment if their initial case was adjudicated after the Supreme Court's decision in *Padilla v. Kentucky*. Applying this rule to the hypothetical situation described in the Introduction, if Guillermo wanted to bring a deficient counsel claim against his public defender, the initial case must have been adjudicated prior to March 31, 2010. Otherwise, Guillermo could not bring a deficient counsel claim rooted in consequences to immigration status.

Regardless of the Split in the Circuits, What Must Federal, State, and Local Government do as a Whole to Ensure Compliance with *Padilla*, Regardless of Whether it is a New Rule or Not?

Ultimately, the Supreme Court of the United States will determine the proper application of *Padilla v. Kentucky*. As previously discussed, this paper suggests that the proper approach is that enunciated by the Third Circuit in *United States v. Orocio*, in which the court held that *Padilla* should apply retroactively. Until the contradictory decisions are resolved, however, there are tangible steps that can be taken with federal statute, state courts, and local attorneys to prevent deficient counsel claims or to remedy existing claims.

Federal Level Remedies to Ineffective-Assistance-of-Counsel Claims with Immigration Consequences

1. Expand INA § 212(a) to include a category of exception for those who are returning to adjudicate an ineffective-assistance-of-counsel claim with immigration consequences.

As stated earlier, INA § 212(a); 8 U.S.C.A. § 1182 lists the classes of aliens ineligible for visas or admission. Clauses six and seven of the statute allow the issuance of visas if the person is not a safety threat and does not have a violation relative to the conditions of any previous admission as a nonimmigrant.

Because of these restrictive clauses, Congress should insert a provision allowing entrance to the United States for those returning to adjudicate their ineffective-assistance-of-counsel claims on a temporary visa. Rosenbloom (2010) provides a prime example of the necessity of such an exception. She writes that with every plea or conviction, there is always a chance that the judgment against an individual could be vacated. Moreover, there is no guarantee that the prosecutor would re-prosecute the case against the removed individual after the vacated judgment (Rosenbloom, 2010). Therefore, a removed individual could potentially have a legally protected right to remain in the United States. However, under INA § 212(a), that individual is unable to re-enter the United States due to his or her previous removal. INA § 212(a) would prohibit re-entry because he or she had been removed following valid removal proceedings. To prevent the situation that Rosenbloom posits, it is imperative for Congress to pass a provision that would relax an alien's ineligibility for a nonimmigrant visa when a Sixth Amendment deficient counsel claim is pending.

2. Expand the parole rule under INA § 212(d)(5)(A) to include the adjudication of ineffective-assistance-of-counsel claims as a "significant public interest."

Congress should expand the parole rule under INA § 212(d)(5)(A) to streamline the ability of individuals to return to the United States and adjudicate their deficient counsel claims. As stated in INA § 212(d)(5)

> (A): The Attorney General may, except as provided in subparagraph (B) or in section 1184 (f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the

alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States (Immigration and Nationality Act, 1996).

For removed individuals outside of the United States, it is extremely difficult to qualify for parole under the statute's "humanitarian" or "significant public benefit" language. While this statute allows those detained *in* the United States parole to be "witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies," (Rosenbloom, 2010, 339 n. 66 quoting 8.C.F.R. § 212.5(b)(4) (2010)), there is a lack of a tangible recourse for those *outside* of the United States. Therefore, it is important within the context of ineffective-assistance-of-counsel claims that declaratory language be inserted in the INA § 212(d)(5)(A) statute. This language should say something to the effect that individuals outside of the United States are allowed parole if they have a pending Sixth Amendment ineffective-assistance-of-counsel claim pertaining to immigration matters.

3. Suspend the "low-immigrant refusal" clause to those who seek to adjudicate their ineffective-assistance-of-counsel claims a chance to seek a visa waiver under INA § 217.

Finally, qualifying language should be inserted in INA § 217; 8 U.S.C.A. § 1187 that eases the country restrictions on the visa waiver program. The statute limits the qualification of non-immigrants to the visa waiver program only if they meet the following:

2) Qualifications
Except as provided in subsection (f), a country may not be designated as a program country unless the following requirements are met:

(A) Low nonimmigrant visa refusal rate--
Either—

(i) the average number of refusals of nonimmigrant visitor visas for nationals of that country during—

(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and
(II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or

(ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent (INA § 217(c)(2)(A) (2010); 8 U.S.C.A. § 1187 (c)(2)(A) (Immigration and Nationality Act, 1996).

Countries such as Mexico and Guatemala, with a substantially higher rate of visa refusals to the United States each year, are not countries that the United States has allowed to participate in the visa waiver program. Including those countries among qualifying countries would better serve the cause of justice and allow nationals of that country the ability to adjudicate their ineffective-assistance-of-counsel claims.

State Level Remedies to Ineffective-Assistance-of-Counsel Claims with Immigration Consequences

Post-*Padilla*, state courts will have to now determine whether attorneys have rendered effective assistance of counsel as it pertains to immigration matters (Garcia Hernandez, 2010). Because most immigration matters are decided by immigration judges, the Board of Immigration Appeals (BIA), and federal judges, state courts have little experience adjudicating immigration matters. Thus, determining whether an attorney has rendered effective counsel concerning immigration matters is even more difficult. In *When State Courts Meet Padilla*: *A Concerted Effort is Needed to Bring State Courts up to Speed on Crime-based Immigration Law Provisions*, Garcia Hernandez (2010) offers several concrete steps that state courts can take to cure their deficiencies in immigration law. For example, state courts can hire clerks versed

in the relevant immigration statutes. Moreover, Courts should expand their legal research capabilities to include immigration law (Garcia Hernandez, 2010). State courts should also actively seek out public defenders and court translators to serve those who do not speak English. Because local judges hear so many cases, judges should have their finger on the cultural and linguistic pulse of the community. Therefore, if a city has a large Spanish-speaking population, steps should be taken to reduce any language barrier between the courts and the people.

Finally, state courts should understand and remain current on the changing and fluid nature of immigration law. The director of the United States Immigration Services frequently publishes immigration bulletins. These bulletins guide the actions of the Immigration and Customs Enforcement Agents and their treatment of certain undocumented individuals or legal permanent residents of the United States. Understanding these guidelines is imperative for rendering effective immigration advice.

What Can Attorneys do to Better Represent their Clients?

The concurrence of Justice Alito in *Padilla v. Kentucky* is not conducive to effective assistance of counsel by local attorneys. Justice Alito wrote in his concurrence that:

> In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney (*Padilla v. Kentucky*, 2010:1).

If Justice Alito's words were binding, attorneys would likely tell their clients that *any* plea or conviction could bring adverse immigration consequences. While this advisement may alleviate some issues for attorneys, a statement such as this one would likely become "white noise" and simply ignored. Because the majority did not adopt Justice Alito's concurrence, it is clear an attorney must do more than merely "advise the defendant" that a plea bargain "may" have immigration consequences. In reaching its determination that a failure to advise a client of adverse immigration consequences constituted deficient counsel, the majority of the Court in *Padilla* consistently relied on the gravity of deportation, the ease of reading the pertinent immigration statutes, and counsel's false assurances (*Padilla v. Kentucky*, 2010). Justice Alito's concurrence only addresses the third prong (false assurances), which would not put any onus on an attorney to read or become versed in any immigration statute; nor would the concurrence eliminate the potential for deportation. It is clear that the majority expected more out of attorneys.

Therefore, it is imperative that attorneys take the proper steps in educating themselves on immigration issues and have resources at their disposal to properly advise their clients. Defense attorneys should periodically enroll in continuing education classes to understand the rudiments of immigration law. Moreover, a centralized hotline or immigration resource center would also serve attorneys well. Finally, attorneys who defend clients with "collateral" immigration issues should not hesitate to refer their client to other attorneys. For example, if there is an extreme language barrier between client and attorney, it would make sense for the attorney to refer that client to an attorney who spoke the target language. Attorneys could arrange a quid pro quo arrangement, whereby a referral to one attorney would be reciprocated by the receiving attorney. Above all, Padilla requires that attorneys take the steps necessary to comply with each person's Sixth Amendment rights under the Constitution.

Conclusion

Guillermo's future legal predicament is dependent upon several factors that are out of his control: the date of his arrest, his attorney, the lower court's interpretation of *Padilla*, and his country of residence. Guillermo may prevail in his claim of deficient counsel but it is also just as likely that he will fail. From Guillermo's situation, it becomes clear that the federal government, state courts, and most importantly, attorneys, must adapt and work to eradicate the precarious crossroads of immigration and criminal law. There are certainly no easy answers to the legal issues facing Guillermo and countless other undocumented immigrants and legal permanent residents. However, there are concrete solutions that can help alleviate these situations and strengthen the justice system.

References

Boria v. Keane, 99 F.3d 492 (1996).

Butler v. McKellar, 495 U.S. 407 (1990).

Cartier, R. A. (2010). Padilla's Collateral Attack Effect on Existing Federal Convictions. *Criminal Law Brief*. 6: 58-65.

Com. v. Kentucky, 253 S.W.3d 482 (2008**).**

García Hernandez, C. C. (2010). When State Courts Meet Padilla: A Concerted Effort is Needed to Bring State Courts up to Speed on Crime-based Immigration Law Provisions. *Journal of Public Interest Law*. 12: 299 – 330.

Hoffman v. Arave, 455 F.3d 926 (2006).

Immigration and Nationality Act, Aliens and Nationality, 8 U.S.C.A. § 1227 (1996).

Immigration and Nationality Act, Aliens and Nationality 8 U.S.C.A. § 1227 (a)(2)(B)(i) (1996).

Immigration and Nationality Act, Aliens and Nationality 8 U.S.C. § 1101(a)(43)(M)(i) (1996).

Immigration and Nationality Act, Aliens and Nationality 8 U.S.C.A. § 1182 (1996).

Immigration and Nationality Act, Aliens and Nationality 8 U.S.C.A. § 1187 (1996).

Immigration and Nationality Act, Aliens and Nationality 8 U.S.C.A. § 1182(d)(5)(A) (1996).

Nunes v. *Miller*, 350 F.3d 1045 (2003).

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

Rosenbloom, R. E. (2010). Will Padilla Reach Across the Border? *New England Law Review*. 45:327 -352.

Strickland v. Washington, 466 U.S. 668(1983).

United States v. Chaidez, 655 F.3d 684 (2011).

United States v. Orocio, 645 F.3d 630 (2011).

U.S. Constitution, Amendment 6, Right to Speedy Trial, Confrontation of Witnesses. *U.S. Constitution Online*. Retrieved from: http://www.usconstitution.net/const.html#Am6.

Zelnick, K. H. (2002-2003) In *Gideon's* Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion. *American Journal of Criminal Law*. 30:363-399.