IMMIGRANT DEFENSE PROJECT

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A *Defending Immigrants Partnership* Practice Advisory*

Seeking Post-Conviction Relief Under *Padilla v. Kentucky* After *Chaidez v. U.S.*

February 28, 2013

On March 31, 2010, in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), the Supreme Court held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. On February 20, 2013, however, the Court held in *Chaidez v. U.S.*, No. 11-820, slip. op. (February 20, 2013), that *Padilla* is a "new rule" that does not apply retroactively to Ms. Chaidez' case involving a federal conviction that was final before *Padilla*. This advisory will discuss claims for post-conviction relief that can still be asserted by immigrants who were not properly advised regarding the immigration consequences of a pre-*Padilla* criminal case.

Some Key Take-Away Points re: *Chaidez*

- ***Chaidez* maintains the right of immigrant defendants to use *Padilla* to challenge convictions that were not final as of March 31, 2010.**
- Even in the case of an immigrant whose conviction became final before March 31, 2010, *Chaidez* preserves the right of an immigrant to establish ineffective assistance under the Sixth Amendment—at least in certain jurisdictions—**if the immigrant can show that he or she was affirmatively misadvised** regarding immigration consequences of the criminal case**.**
- An immigrant may be able to raise an ineffective assistance claim relating to a pre-March 31, 2010 conviction where the **defense lawyer also violated an established constitutional duty** such as failing to negotiate effectively to mitigate harm in the plea.
- *Chaidez* leaves open the argument that, even for a conviction that became final before March 31, 2010, ***Padilla* applies in a first post-conviction proceeding** because such a proceeding is the equivalent of a direct appeal for purposes of an ineffective assistance claim**.**
- Immigrants convicted before March 31, 2010 in some states may be able to **assert successful ineffective assistance claims under state constitutional principles**.
- Immigrants convicted in state courts may be able to **argue that state retroactivity principles mandate application of *Padilla* to convictions final before March 31, 2010**.
- *Padilla* may continue to **apply to state post-conviction cases filed before March 31, 2010**.

What is Covered in this Practice Advisory

This advisory describes the holding of *Chaidez v. U.S.* and provides initial guidance on claims and strategies—both in federal and state cases—that may be available to noncitizens with convictions **final prior to March 31, 2010**. The advisory also attaches a sample brief for arguing that, regardless of *Chaidez*, *Padilla* applies in a first post-conviction proceeding.

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I. Background

In *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen defendant regarding the risk of deportation arising from a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. 559 U.S. 356 (2010).

Not long after *Padilla*, prosecutors began challenging application of the decision to criminal convictions that were final before the Supreme Court's announcement of the *Padilla* decision on March 31, 2010. They argued that immigrants whose convictions were already final could not benefit from *Padilla* because it announced a "new rule" and, thus, it could not be applied in collateral challenges to past convictions under the principles set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (when the Court announces a "new rule," a person whose conviction is already final may not benefit from that decision in a habeas or similar proceeding unless the rule is a "watershed rule of criminal procedure" or a rule placing "conduct beyond the power of the [government] to proscribe"). They cited federal and state court decisions that, in the years before *Padilla*, had often found that the Sixth Amendment did not apply to so-called "collateral consequences" of a criminal conviction such as deportation, *see, e.g., Santos-Sanchez v. U.S.*, 548 F.3d 327, 334 (5th Cir. 2008); *People v. Ford*, 86 N.Y. 2d 397, 403-04 (1995), even though the Court in *Padilla* had noted that the Court itself had never applied a distinction between the direct and collateral consequences of a criminal conviction to define the scope of the constitutionally "reasonable professional assistance" required under *Strickland v. Washington*, 466 U.S. 668 (1984).

After litigation in federal and state courts on the question of the application of *Padilla* to convictions already final before that decision, a split quickly developed in both federal and state courts. Compare *United States v. Orocio*, 645 F. 3d 630 (3d Cir. 2011) (retroactive); *Commonwealth v. Clarke*, 460 Mass. 30 (2011) (retroactive); with *Chaidez v. U.S.*, 655 F. 3d 684 (7th Cir. 2011) (not retroactive); *U.S. v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011) (not retroactive); *State v. Gaitan*, 209 N.J. 339 (2012) (not retroactive). On April 30, 2012, the Supreme Court granted cert in *Chaidez v. U.S.* to resolve this growing split in both federal and state courts.

II. Holding of Chaidez v. U.S.

In 2009, Roselva Chaidez, a long-time lawful permanent resident, filed a petition for a federal writ of error coram nobis challenging the constitutionality of her conviction. She argued that her trial attorney's failure to advise her of the immigration consequences of pleading guilty constituted ineffective assistance of counsel under the Sixth Amendment. Her attorney had failed to advise her that her plea to mail fraud qualified as an aggravated felony under 8 U. S. C. §1101(a)(43)(M)(i) and thereby mandated her removal from the United States.

While her petition was pending – but six years after her conviction had become final—the Supreme Court issued its decision in *Padilla v. Kentucky* holding that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas. 559 U.S. 356. The District Court granted Ms. Chaidez relief, holding that *Padilla* did not announce a "new rule," but simply applied the longstanding rule in *Strickland v. Washington*, and thus applied to Ms. Chaidez's already-final conviction. The Seventh Circuit reversed, holding that *Padilla* had declared a new rule of criminal procedure and should not apply in a collateral challenge to an already-final conviction.

The Supreme Court granted certiorari and, on February 20, 2013, in a 7-2 opinion, affirmed the Seventh Circuit and held that "under the principles set out in *Teague* v. *Lane*," *Padilla* is a new rule that does not retroactively apply to Ms. Chaidez's case. *Chaidez*, No. 11-820, slip op. at 1. The Court found that Ms. Chaidez could not benefit from the decision in *Padilla* even though the professional norms supporting the duty to advise of immigration consequences were firmly in place at the time of her plea, two years after that of Mr. Padilla's.

The majority found that *Padilla* was a new rule because it "broke new ground" or "imposed a new obligation" on the government. *Chaidez*, No. 11-820, slip op. at 9-10 (quoting *Teague v. Lane*, 489 U.S. at 301). Specifically, the Court found that "*Padilla* did *more* than just apply *Strickland*'s general standard to yet another factual situation." Rather, the Court first considered the threshold question whether "advice about deportation was 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction, rather than a component of a criminal sentence":

> In other words, prior to asking *how* the *Strickland* test applied ("Did this attorney act unreasonably?"), *Padilla* asked *whether* the *Strickland* test applied ("Should we even evaluate if this attorney acted unreasonably?"). And as we will describe, that preliminary question about *Strickland*'s ambit came to the *Padilla* Court unsettled—so that the Court's answer ("Yes, *Strickland* governs here") required a new rule.
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> *Chaidez*, slip op. at 6.

The Court reasoned because *Padilla*'s ruling answered an open question about the Sixth Amendment's reach in a way that altered and disrupted the law of most jurisdictions, it broke new ground.

In her dissent, Justice Sotomayor, joined by Justice Ginsburg, challenged the majority's view. She disputed the notion of a "threshold question," arguing that the majority's opinion rests on a distinction—between direct and collateral consequences of a conviction—that "the Court has never embraced and that *Padilla* found irrelevant to the issue it ultimately decided." *Chaidez*, slip op. at 7 (Sotomayor, J., dissenting). Instead, she adopted the Petitioner's argument:

> *Padilla* did nothing more than apply the existing rule of *Strickland v. Washington*, 466 U.S. 668 (1984), in a new setting, the same way the Court has done repeatedly in the past: by surveying the relevant professional norms and concluding that they unequivocally required attorneys to provide advice about the immigration consequences of a guilty plea.
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> *Chaidez*, slip op. at 1 (Sotomayor, J., dissenting).

In a footnote, the Court expressly declined to address petitioner's two additional arguments because they were not adequately raised in the lower courts: 1) *Teague*'s bar on retroactivity does not apply when a petitioner collaterally challenges a *federal* conviction and 2) *Teague* notwithstanding, *Padilla* (and other new rules) apply to first post-conviction proceedings raising ineffective assistance of counsel claims because they cannot be brought on direct appeal. *Chaidez*, slip op. at 15, n. 16. Curiously, even though the *Chaidez* Court applied *Teague* for the first time in a federal case, it did so while specifically declining to decide whether *Teague* applies to federal collateral review.

Significantly, the Court reaffirmed *Padilla*'s core holding that for at least the past fifteen years, professional norms have required defense counsel to advise of immigration consequences. *Chaidez*, slip op. at 14, n. 15; slip op. at 1 (Sotomayor, J., dissenting). In fact, *Chaidez* cited to a 1968 ABA standard that instructed criminal lawyers to advise their noncitizen clients about the risks of deportation. *Chaidez*, slip op. at 14, n. 15 (citing 3 ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty §3.2(b), Commentary, p. 71 (App. Draft 1968)). Thus, the Court in no way diminished the force or scope of *Padilla*'s core holding, and if anything strengthened it.

III. Federal Post-Conviction Claims and Strategies after *Chaidez*

Padilla v. Kentucky continues to apply to convictions that were not final before **March 31, 2010**. *Chaidez v. U.S.* does not in any way adversely impact those cases. There may also be claims available to noncitizens with convictions that became **final prior to March 31, 2010**. This section describes some of those claims that litigants may still raise on federal post-conviction review.[1]

A. Noncitizens can continue to raise claims involving affirmative "material misrepresentations"

A Sixth Amendment challenge based on erroneous advice is arguably not governed by *Chaidez.* The *Chaidez* Court explicitly distinguished these claims from the claim at issue in *Chaidez*, referring to a "separate rule for material misrepresentations."[2] The Court articulated the rule governing such claims as devoid of connection to the type of misrepresentation: A lawyer violates the Sixth Amendment when he "affirmatively misrepresent[s] his expertise or otherwise actively mislead[s] his client on any important matter, however related to a criminal prosecution."[3]

This argument has greatest force in the Second, Ninth and Eleventh Circuits, which the Court identified as recognizing this harm.[4] The Court's focus was on circuits that had so held at the time of Ms. Chaidez's plea. The Fifth Circuit held after the time of Ms. Chaidez's plea that affirmative misrepresentations regarding immigration consequences could establish a claim for ineffective assistance.[5]

Practitioners within other circuits should research the case law regarding "material misrepresentations" generally to find support for this argument; in particular, the law in the area of misstatements regarding parole eligibility may provide strong support for such an argument.[6]

What constitutes a "material misrepresentation" or "misleading" the client is open for interpretation. In cases with no clear affirmative misstatement, practitioners can attempt to construct an argument that the attorney's conduct, communications (or lack thereof), and/or emphasis on penal consequences as the sole consideration relative to the plea agreement constituted a "material misrepresentation" of the plea's consequences, or operated to "mislead" the defendant into believing that there were no immigration consequences to the plea.

Practice tip: In framing these claims, use the *Chaidez* language regarding "affirmative misrepresentations," and "misleading the client" and de-emphasize reliance on *Padilla*.

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[1] This is not an exhaustive list of arguments, but presents some of the stronger arguments available in federal post-conviction review.

[2] Op. at 13.

[3] *Id.* The United States has also implicitly endorsed the distinction between the claims of duty to advise and affirmative misrepresentations, stating in *Chaidez* that pre-*Padilla* lower court holdings to that effect rested "on the ground that all criminal defense attorneys have a duty not to misrepresent their expertise on any topic." Br. at 14, n.4.

[4] *See United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179 (2nd Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534 (11th Cir. 1985).

[5] *Santos-Sanchez v. United States*, 548 F.3d 327 (5th Cir. 2008) (acknowledging the legitimacy of *Couto* and *Kwan* but finding no affirmative misrepresentation). *See also United States* v. *Mora-Gomez*, 875 F. Supp. 1208, 1212 (E.D. Va. 1995) ("[T]he clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance").

[6] *See Mora-Gomez*, 875 F.Supp. at 1212 (relying on *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979) (erroneous advice on parole eligibility), to find that erroneous advice regarding deportation presented a Sixth Amendment claim).

B. Raise claim in the context of an established constitutional duty such as the duty to negotiate effectively

Despite the lack of a remedy for *Padilla* violations pertaining to convictions that were final on March 31, 2010,[7] the immigration harm can provide relevant background that might favorably influence a factfinder evaluating the case for compliance with an established constitutional duty.[8] For a list of established claims for post-conviction relief, *see generally* Norton Tooby and J.J. Rollin, Post-Conviction Relief for Immigrants.[9]

For example, noncitizens with pre-*Padilla* final convictions should investigate a claim for ineffective assistance based on a violation of the duty to mitigate harm under *Glover v. United States*, 531 U.S. 198 (2001) or deficient plea bargaining under the duty to negotiate an effective plea bargain under *Missouri v. Frye* and *Lafler v. Cooper.*[10] While this argument may sound similar to that rejected by *Chaidez*, it was not presented to the Court so it is not foreclosed.[11]

Practice Tip: Frame the claim as a "failure to negotiate effectively" as opposed to a failure to advise regarding immigration consequences.

In making a claim that defense counsel did not secure a reasonably negotiable alternative plea or sentence to limit the adverse immigration consequences, practitioners should document alternative safe pleas that would have been available for the charged offense in the respective jurisdiction; best practices that local defense counsel followed with such offenses, e.g., that

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[7] In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Supreme Court stated the following with regard to its retroactivity jurisprudence: "What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Id*. at 271. The *Danforth* Court noted that the term "retroactivity" is somewhat misleading, because it implies that the constitutional right did not exist prior to its announcement; the Court indicated that it made more sense to reference the '"redressability' of violations of new rules, rather than the 'retroactivity' of such rules." *Id.* The Court decided to continue to use the term "retroactivity" out of concern that "it would likely create, rather than alleviate, confusion to change our terminology at this point." *Id.* n. 5. Thus, *Chaidez* did not hold that a *Padilla* violation couldn't exist prior to *Padilla*, it rather held that such a violation was not redressable.

[8] If the claim litigated requires demonstrating that the defendant was prejudiced (i.e. would have rejected the plea absent the deficient performance, conflict of interest, etc.), the immigration harm may be specifically relevant to the claim.

[9] https://nortontooby.com/node/652

[10] *Missouri v. Frye*, _ U.S. _, 132 S. Ct. 1399, 1406 (2012); *Lafler v. Cooper*, _U.S. _, 132 S. Ct. 1376, 1384. *Cf. Vartelas v. Holder,* _ U.S. _, 132 S.Ct. 1479, 1492 n. 10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, e.g., possession of counterfeit securities—or exercise a right to trial."); *United States* v. *Castro*, 26 F. 3d 557, 561 (5th Cir. 1994) (holding that counsel's failure to seek judicial recommendation against deportation may amount to ineffective assistance of counsel). Also, the professional standards have long made clear that immigration consequences should inform negotiation strategy. *See, e.g.*, National Legal Aid And Defender Assn., Performance Guidelines For Criminal Representation § 6.2 (1995) ("In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation. . . . In developing a negotiation strategy, counsel should be completely familiar with . . . the advantages and disadvantages of each available plea according to the circumstances of the case."); ABA Standards on Plea of Guilty, 14.3-2(b) (3d ed. 1999) ("To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by … the defendant in reaching a decision. Defense counsel should not recommend … acceptance of a plea unless appropriate investigation and study of the case has been completed.").

[11] *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (finding that *stare decisis* is not applicable unless the issue was "squarely addressed" in the prior decision). *See also Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents") (citations omitted).

it was the norm for defense counsel to arrange for a plea to drug solicitation in a case in which the client was charged with possession with intent to sell; and existing resources available to assist trial counsel develop safe immigration pleas. *Lafler* and *Frye* are not "new rules" and should apply retroactively to pre-*Padilla* final convictions.[12] Practitioners should research applicable federal precedent to support the "duty to negotiate effectively."[13]

C. Argue that *Padilla* applies to *Strickland* claims on first federal post-conviction review

Even if *Teague* applies to post-conviction review of federal convictions, practitioners should consider arguing that *Teague* does not apply to *Strickland* claims raised on the equivalent of direct review in cases final prior to March 31, 2010. As highlighted in Section II, the *Chaidez* Court declined to address the argument that *Padilla* (and other new rules) apply to a first federal post-conviction proceeding raising ineffective assistance of counsel because that claim cannot be raised on direct appeal.

The Supreme Court has ruled that ineffective assistance of counsel challenges to federal convictions—at least those that depend on evidence outside the record, as *Padilla* claims would—must be raised for the first time on post-conviction review.[14] Thus, *Padilla-Strickland* claims are not aired for the first time until post-conviction review, and in such cases no prior court has previously passed on the merits of such a claim and considered the relevant norms. Therefore, *Teague* concerns of finality and fairness to the lower court that has faithfully applied existing law do not apply to such initial-review collateral proceedings that are the equivalent of a defendant's direct appeal. Applying *Teague* to federal ineffective-assistance claims would also generate significant administrative problems.

No federal court has yet ruled on this initial-review argument, which is bolstered by the Supreme Court's decision last term in *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (reaffirming that "the first designated proceeding for a [defendant] to raise a claim of ineffective assistance," is, for purposes of the procedural default doctrine, the "equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."). The Supreme Court's forthcoming decision in *Trevino v. Thaler*, No. 11-10189 (argued February 25, 2013) may also impact the scope of the initial-review argument. There, the Court must decide whether it will extend *Martinez v. Ryan* to Texas proceedings, which seemingly encourage ineffective assistance claims to be brought on collateral review, but do not require it. This initial-review argument is fully developed in the Sample Brief included in the Appendix.

D. Argue that Teague does not apply to federal post-conviction review

The *Chaidez* Court also expressly declined to address Petitioner's broader argument that *Teague* does not apply to post-conviction filings involving federal convictions. Practitioners may consider raising this question in future litigation, as *Teague* itself involved federal collateral review of a *state* conviction, and did not address the question

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[12] *See Lafler*, 132 S. Ct. at 1390 (finding that *Strickland's* application to plea negotiations, including rejected plea offers, was "clearly established" Supreme Court law); *Chaidez*, slip op. at 5, n. 4. ("[A]s we have explained, "clearly established" law is not "new" within the meaning of *Teague*." (citing *Williams*, 529 U. S., at 412)).

[13] *See, e.g., United States v. Gordon*, 156 F.3d.376 (2d Cir. 1998) (defendant was denied effective assistance of counsel at plea negotiations when defense counsel grossly underestimated defendant's potential maximum sentence); *Aeid v. Bennett*, 296 F.3d 58 (2d Cir. 2002) (defense attorney's performance deficient where he underestimated sentencing exposure after trial, causing defendant to reject favorable plea).

[14] *Massaro v. United States*, 538 U.S. 500, 508 (2003).

of the whether the retroactivity principles also apply to collateral review of federal convictions.[15]

Further, in *Danforth v. Minnesota,* 552 U.S. 264, 279 (2008), the Court explained that the *Teague* analysis, concerned with comity, federalism and minimizing federal intrusion into state criminal proceedings "was meant to apply *only to federal courts considering habeas corpus petitions challenging state-court criminal convictions*." Thus, the important federalism interests furthered by *Teague*'s retroactivity regime are not implicated when a federal court engages in post-conviction review of a federal, as opposed to a state, conviction. Since *Danforth*, the Sixth and Ninth Circuits have stated that *Danforth* casts serious doubt on their respective precedents applying *Teague* to federal collateral review of federal convictions.[16] The strength of the argument remains uncertain as the *Chaidez* Court did apply *Teague* in reviewing petitioner's federal conviction (without expressly ruling on it, however). Also, should one convince the court of *Teague's* inapplicability, there is still a question of what, if any, retroactivity principles should apply and whether *Padilla* applies retroactively under the alternative standard. For a discussion of broader, alternative standards adopted by state courts, *see* Section IV.E.

IV. State Post-Conviction Claims and Strategies after *Chaidez*.

Padilla v. Kentucky continues to apply to state convictions that were not final before **March 31, 2010**. There may also be claims available to noncitizens with state convictions that became **final prior to March 31, 2010**. This section describes some of those claims that litigants may still raise on state post-conviction review.[17]

The retroactivity test and procedural default rules for post-conviction relief vary dramatically from state to state. A review of how *Chaidez* affects each of the states is beyond the scope of this advisory. Fortunately, a resource already exists that addresses state post-conviction remedies in all state jurisdictions.[18]

A. State claims based on a "material misrepresentation" survive Chaidez

As discussed in Sec. III.A, *supra*, claims based on material misrepresentations pertaining to convictions that were final on March 31, 2010 may still be made post-*Chaidez*. Practitioners should research the case law in their jurisdiction to determine whether courts specifically recognized these claims pre-*Padilla*.[19] In the absence of case law directly on point, look for case law in analogous situations; one of the most common of these is misadvice in the area of parole eligibility.[20]

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[15] *Teague v. Lane*, 489 U.S. at 327 n.1 (Brennan, J., dissenting) ("The plurality does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners."); *see also Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008) (reserving the question "whether the Teague rule applies to cases brought under 28 U.S.C. § 2255").

[16] *See Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th Cir. 2009); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189-90 (9th Cir. 2011).

[17] This is not an exhaustive list of arguments, but presents some of the stronger arguments available in state post-conviction review.

[18] *See* D. Wilkes, State Post-conviction Remedies and Relief Handbook (2009) for a state-by-state summary of post-conviction vehicles and procedures

[19] *See Rubio* v. *State*, 124 Nev. 1032, 1041 (2008) (*per curiam*) ("a growing number of jurisdictions have adopted the affirmative misrepresentation exception to the collateral consequence rule"); *In re Resendiz*, 25 Cal.4th 230 (2001); *People* v. *Correa*, 108 Ill. 2d 541, 550–52 (1985); *People* v. *McDonald*, 1 N. Y. 3d 109, 113–15 (2003); *Alguno* v. *State*, 892 So. 2d 1200, 1201 (Fla. App. 2005) (*per curiam*); *State* v. *Rojas-Martinez*, 125 P.3d 930, 933-35 (Utah 2005); *In re Yim*, 139 Wash. 2d 581, 588 (1999); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *State v. Nunez-Valdez*, 200 NJ. 129 (2009); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *State v. Paredez*, 136 N.M. 533 (2004).

[20] *See, e.g., In re Moulton*, 158 Vt. 580, 584 (1992).

B. Raise claim in the context of an established constitutional duty such as the duty to negotiate effectively

See Sec. III.B, *supra*. Practitioners should research the case law in their jurisdictions to uncover analogous case law finding a duty to negotiate effectively.[21] One situation that may yield helpful relevant case law is where the defense attorney conducts negotiations based on a misunderstanding of the defendant's sentencing exposure.[22]

Practice Tip: Frame the claim as a "failure to negotiate effectively" as opposed to a failure to advise regarding immigration consequences.

C. Argue that Padilla applies in a first state post-conviction proceeding

For a thorough explication of this argument, see Sec. III.C, *supra*, and the Sample Brief in the Appendix.

D. Assert an ineffective assistance of counsel claim under your state constitution

Prior to *Padilla*, three state courts had articulated a duty to advise regarding immigration consequences as a matter of state constitutional law.[23] Practitioners should research their state law regarding ineffective assistance of counsel to see whether such a claim is foreclosed. If not, establishing this duty under state law will likely involve asking the court to undertake an inquiry similar to that undertaken by the *Padilla* court. Thus, practitioners will need to present evidence of the "prevailing professional norms" within their states that support a duty under the state constitution to advise regarding immigration consequences.[24] It is important to emphasize materials published prior to the date of the defendant's plea, although the Supreme Court included some materials dated after 2002, the date of Mr. Padilla's plea, as evidence that the norms existed in 2002.[25]

This argument may exist even if a state has case law specifically holding that there is no duty to advise regarding immigration consequences under the state constitution. This is particularly true if the unhelpful precedent was issued before the passage of Antiterrorism and Effective Death Penalty Act of 1996 **(**AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[26] Thus, for example, if the state precedent was based on immigration law prior to 1996, practitioners can argue that the 1996 changes render that precedent

Practice tip: Survey your state constitutional law to determine whether it supports a state constitutional duty to advise regarding immigration consequences.

[21] *See People v. Bautista*, 115 Cal.App.4th 229, 238-42 (2004) (attorney failed to "attempt to 'plead upward,' that is, pursue a negotiated plea for violation of a greater . . . offense" that carried less severe immigration consequences).
[22] *See* fn 13, *supra*.
[23] *See People v. Pozo*, 746 P.2d 523 (Colo. 1987); *State v. Paredez*, 136 N.M. 533 (2004); *People v. Soriano*, 194 Cal.App.3d 1470 (1987). Prior to *Padilla*, appellate courts in almost 30 states held that the failure to advise regarding immigration consequences did not violate the Sixth Amendment. *See Chaidez*, Op. at 7 & n.8 (compiling cases). Accordingly, appellate courts in twenty states had not addressed the issue under the federal constitution, or presumably under the state constitution.
[24] *See Padilla v. Kentucky*, 130 S.Ct 1473, 1482-83 (citing numerous standards, performance guides, resources, articles, and practice manuals in support of its holding that professional norms required that a defense attorney advise his client regarding immigration consequences).
[25] *See id.*
[26] *Compare People v. Ford*, 86 N.Y.2d 397 (1995) (no duty under the state constitution to advise regarding immigration consequences) *with People v. DeJesus*, 935 N.Y.S.2d 464 (Sup Ct, NY County 2011) (duty under state constitution to advise regarding immigration consequences) *and People v. Burgos*, 950 N.Y.S.2d 428 (Sup Ct, N.Y. County 2012) (same).

unavailing as to convictions entered after the effective dates of AEDPA (April 24, 1996) and IIRIRA (April 1, 1997).[27]

E. Argue that state retroactivity principles mandate retroactive application of Padilla

States can adopt broader retroactivity principles than those articulated in *Teague v. Lane*, 489 U.S. 288 (1989).[28] Maryland, for example, has held that *Padilla* applies retroactively to pre-*Padilla* cases under broader state retroactivity principles.[29] The first question is whether a state has explicitly (or implicitly) adopted *Teague*. Practitioners should research state retroactivity jurisprudence to ascertain whether the court of last resort has expressly adopted *Teague*.[30] If a state has adopted *Teague*, it may still be possible to make the argument detailed in Sec. III.C and IV.C, *supra*, that *Teague* should not be applied in a first collateral proceeding raising an ineffective assistance of counsel claim.[31]

Some states have adopted *Teague* pre-*Danforth* without addressing the propriety of doing so.[32] If the court, for example, reasoned that federal retroactivity "govern[s]" the situation, there may be an argument that the court felt compelled to apply *Teague*. Practitioners can argue that the court should address the issue of whether *Teague* should govern the retroactivity of federal rules of constitutional procedure, in the context of state post-conviction relief, after full evidentiary development and legal briefing.

If the state has not expressly adopted *Teague* post-*Danforth*, practitioners may argue that the state should adopt the reasoning of other state courts of last resort that have diverged from *Teague*.[33] If the court applies a different test, one still must persuade the court that the application of that test leads to retroactive application of *Padilla*.[34]

In states that have diverged from *Teague*, there are at least two types of tests used to determine the retroactive application of federal rules of criminal procedure:

(1) Some states use the pre-*Teague* "balancing test" described in *Linkletter v. Walker*, 381 U.S. 618, 636 (1965).[35] This test requires the court to balance three factors to determine whether a "new" rule merits retroactive application: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.[36]

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[27] The same argument could be made regarding any major change in immigration law, for example, the Immigration Act of 1990. *See Padilla*, 130 S.Ct. at 1480.

[28] *See Danforth v. Minnesota*, 552 U.S. 264 (2008).

[29] *Denisyuk v. State,* 30 A.3d 914, 924-925 (Md. 2011).

[30] Practitioners may want to research their state's retroactivity jurisprudence pertaining to state rules of constitutional criminal procedure. State courts "generally have the authority to determine the retroactivity of their own decisions." *People v. Mitchell*, 80 N.Y.2d 519, 526 (1992). A state may apply broader retroactivity principles for state rules of constitutional criminal procedure, which one can argue should be imported into the state retroactivity analysis for federal rules of constitutional criminal procedure.

[31] If your state has expressly adopted *Teague* but not in the context of a *Strickland* claim, practitioners can argue that the applicability of *Teague* to a first collateral proceeding raising an ineffective assistance of counsel claim is an issue of first impression. This allows a practitioner to make any of the non-*Teague* arguments in this advisory.

[32] *See, e.g., People v. Eastman*, 85 N.Y.2d 265, 275 (1995).

[33] *See Colwell v. State*, 118 Nev. 807, 816-21 (2003) (describing federal retroactivity jurisprudence and explaining the decision to diverge from *Teague*).

[34] Because of the strong systemic interest in finality of criminal convictions, these theoretically divergent tests nearly always produce the same nonretroactivity result as *Teague*.

[35] *See, e.g., Potts v. State*, 300 Md. 567, 578 (1984); *State v. Smart*, 202 P.3d 1130 (Alaska 2009); *Cowell v. Leapley*, 458 N.W.2d 514 (S.D. 1990); *Hernandez v. State*, 2012 WL 5869660 * 5, __ So.3d __, __ (Fla. 2012); *People v. Maxson*, 482 Mich. 385, 393 (2008).

[36] *See Hernandez, at* *5.

(2) Some states have adopted *Teague* in principle but not the narrow federal interpretation of those principles.[37]

Practitioners should pay attention to the interaction between their state's available procedural vehicles and the retroactivity argument. In some states, depending on the date of conviction, to make a timely filing a litigant must assert that *Padilla* was "new," or a "significant change in the law."[38] However, the litigant may also need to assert that *Padilla* applies retroactively to a final conviction.[39] These arguments can contradict each other; thus, practitioners should be mindful of the limitations of the procedural vehicle as they fashion state retroactivity arguments.

F. Padilla applies to convictions that were not final on March 31, 2010 under the law of the convicting state jurisdiction

If a litigant can successfully assert that his conviction was not final on March 31, 2010, *Chaidez* allows him access to a remedy for a *Padilla* violation. A conviction is considered "final" under *Teague* when "the availability of appeal [has been] exhausted, and the time for petition for certiorari ha[s] elapsed."[40]

Practitioners should research their state law to ascertain whether there are any arguments that the conviction was not final on March 31, 2010. One possibility exists in a rule allowing an extension of the usual time period for filing an appeal. For instance, in New York, the initial filing deadline for a direct appeal is thirty days from the date of imposition of sentence.[41] However, a defendant may obtain an extension of the thirty-day deadline, for a period up to one year.[42] In a slightly different context, the Second Circuit has held that this extension under state law does not alter the nature of the ensuing appeal.[43] Therefore, practitioners in New York can argue that the conviction did not become final until the deadline in NYCPL 460.30 had elapsed.

Alternatively, there may be grounds to file a direct appeal even after the deadline has expired, if defense counsel was ineffective for not filing the notice in a timely fashion.[44] If a defendant can get the direct appeal reinstated post-*Chaidez*, that opens up an argument that the conviction was non-final on March 31, 2010.

Practice tip: Use the latest possible deadline for filing a direct appeal to argue that the conviction was not final on March 31, 2010.

[37] *See, e.g., Danforth v. State*, 761 N.W.2d 493, 500 (Minn. 2009) (adopting *Teague* but declining to adopt the federal definition of a "watershed rule" in favor of a "fundamental fairness" inquiry); *Rhoades v. State*, 149 Idaho 130 (2010); *Colwell*, 118 Nev. 807 (2003).
[38] *See, e.g., In re Jagana* 2012 WL 3264948 (Wash. App. Div. 1 2012).
[39] *See id.*
[40] *Teague v. Lane*, 489 U.S. at 295 (internal quotations omitted).
[41] *See* NYCPL 460.10.
[42] *See* NYCPL 460.30.
[43] *See Cardenas-Abreu v. Holder*, No. 09-2439, 378 F. App'x 59 (2d Cir. May 24, 2010) (appeal filed under NYCPL 460.30 is "equivalent to any other direct appeal for the purposes of finality").
[44] *See Roe v. Flores-Ortega* 528 U.S. 470, 480 (2000) ("[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing"); *see also Rodriquez v. United States,* 395 U.S. 327 (1969) (failing to file a notice of appeal upon the defendant's request constitutes deficient performance). In a jurisdiction where it is fairly easy to succeed on a claim of a failure to file a notice of appeal, this strategy may present an attractive option. However, practitioners should be mindful that this argument presents a direct contradiction to the argument in sec. IV.C, *supra*.

G. Padilla may apply to post-conviction relief cases filed by March 31, 2010

Despite holding that *Padilla* is not generally retroactive on state collateral review,[45] Florida has carved out an exception for petitioners whose PCR cases were pending when *Padilla* was decided.[46] This exception would seem to apply regardless of the date of the conviction at issue. The *Castano* Court declined to articulate its rationale for the decision, although *Hernandez*, issued the same day, was based on non-*Teague* state retroactivity principles. Litigants whose petitions were filed by March 31, 2010 may be able to use *Castano* to argue that state retroactivity principles (*see* Sec. III.E, *supra*) mandate the retroactive application of *Padilla* to their cases.

H. Possible strategies for pending state post-conviction relief cases pertaining to convictions final on March 31, 2010

1. In jurisdictions where it is possible to amend the petition, ask the court to ground the decision in state constitutional law.
    a. If the petitioner won in the trial court but the case is now on appeal, and state law permits it:
        i. Practitioners can file a motion to reargue/renew, asking the trial court to ground the decision in state constitutional law. This might be particularly useful if the petition raised the state constitution but the court did not address it.
        ii. Practitioners can ask the appellate court to consider, or remand for a decision on, the state constitutional argument.
    b. If the petitioner lost in the trial court, but raised the state constitutional claim below and the court did not address it, practitioners will need to make the strategic decision whether to press the state constitutional argument in the appellate court, or ask for a remand for the trial court to consider it.
2. If the case is in the trial court, amend the pleadings to frame the issues consistent with the points in subsections (A) thru (G) above. In some instances practitioners can amend the pleadings even after trial.[47]
3. In Massachusetts, New York, and New Mexico, practitioners can argue that the state should not adopt *Teague* as the retroactivity test, or the narrow federal interpretation of *Teague*, as permitted by *Danforth v. Minnesota*.[48]

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[45] S*ee Hernandez v. State*, 2012 WL 5869660 (Fla. 2012).
[46] *See Castano v. State*, 2012 WL 5869668 (Fla. 2012).
[47] *See, e.g., V.R.C.P. 15(b).*
[48] *See Commonwealth v. Clarke*, 460 Mass. 30 (2011), *People v. Baret*, 952 N.Y.S.2d 108 (A.D.1 2012), *People v. Rajpaul*, 954 N.Y.S.2d 249 (A.D.3 2012), and *State v. Ramirez,* 2012–NMCA–057, 278 P.3d 569, *cert. granted,* —— –NMCERT——, —— N.M. ——, —— P.3d —— (No. 33,604, June 5, 2012).

V. RESOURCES

Immigrant Defense Project Padilla PCR webpage:
http://immigrantdefenseproject.org/defender-work/padilla-pcr

Immigrant Legal Resource Center:
http://www.ilrc.org/

National Immigration Project of National Lawyers Guild:
http://www.nationalimmigrationproject.org/

Norton Tooby & J.J. Rollin, Post-Conviction Relief for Immigrants:
https://nortontooby.com/node/652

Defending Immigrants Project:
http://defendingimmigrants.org/

The Defending Immigrants Partnership is staffed by the Immigrant Defense Project (IDP), the Immigrant Legal Resource Center (ILRC), and the National Immigration Project of the National Lawyers Guild (NIPNLG). Since its inception in October 2002, the Partnership has coordinated on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent noncitizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions

VI. Appendix – Sample Brief on Initial-Review Argument

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court held in *Chaidez v. United States*, 133 S. Ct. ___ (2013), that its earlier ruling in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), announced a "new rule" of criminal procedure and thus does not apply retroactively across the board. At the same time, the Court expressly reserved the question – and directed lower courts to consider in the first instance – whether *Padilla* applies retroactively in a particular subset of cases: those, as here, in which a defendant challenges federal conviction in a timely filed first post-conviction motions (what the Court now calls "initial-review collateral proceedings," *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012)). *See Chaidez*, 133 S. Ct. at ___ n.16.

This Court should hold here that it does. The Supreme Court's general bar on applying "new rules" retroactively derives from *Teague v. Lane*, 489 U.S. 288 (1989). This bar is based on comity and finality. But no comity interests are at stake when a federal court reviews the legitimacy of a federal, as opposed to state, conviction. And no finality considerations need to be accommodated by a separate nonretroactivity rule when – as is also the case here – the claim at issue can be brought only on collateral, as opposed to direct, review and the substantive doctrine already accounts for that reality.

Applying *Teague* to ineffective-assistance claims in first post-conviction motions would not only lack any theoretical basis, but it would also generate profound administrative problems. The Supreme Court held a decade ago in *Massaro v. United States*, 538 U.S. 500 (2003), that ineffective-assistance claims challenging federal convictions should generally be brought on collateral instead of direct review because the former provides a better setting in which to litigate such claims. Since that decision, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record must be litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review, courts have universally declined to consider them, instead dismissing such claims *without prejudice* to defendants' ability to present those claims on collateral review.

Holding here that *Teague* applies to ineffective-assistance claims brought in first federal post-conviction review proceedings would upend this system. Because direct review would be the only time defendants could be assured of having their claims assessed without respect to whether they were seeking new rules, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review. In other words, holding that *Teague* applies in this context would reintroduce all of the practical difficulties that the Supreme Court sought to prevent in *Massaro* and leave federal courts no legitimate way of mitigating the resulting inefficiencies, increased burdens, and procedural unfairness. There is no good reason for going back down that abandoned road.

ARGUMENT

I. Even Though *Padilla* Is A "New Rule," It Should Apply In The First Post-Conviction Proceeding Of A Person Challenging A Federal Conviction.

Teague v. Lane, 489 U.S. 288 (1989), did not present, and the Supreme Court did not there resolve, the question whether its retroactivity regime applies to post-conviction filings challenging federal, as opposed to state, convictions. *See Teague*, 489 U.S. at 327

n.1 (Brennan, J., dissenting) (noting that the Court "does not address whether the rule it announces today extends to claims brought by federal, as well as state, prisoners"). Years later, the Supreme Court expressly reserved the issue. *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008). This Court should hold, at least with respect to claims – as here – of ineffective assistance of counsel that depend on evidence outside the trial record, that *Teague* does not apply to such filings.

A. *Teague*'s Comity And Finality Concerns Do Not Apply In This Context.

Teague's bar against the retroactive application of new constitutional rules of criminal procedure rests on two bases: comity and finality. *Teague*, 489 U.S. at 308. Neither of these interests justifies applying *Teague* to a person seeking collateral relief from a federal conviction due to ineffective assistance of counsel. Comity considerations are absent when a federal court is reviewing a federal conviction, and *Strickland*'s highly deferential framework already accommodates the finality interest at stake when a court adjudicates an ineffective-assistance challenge to a federal conviction on collateral review.

1. *Comity.* *Teague*'s bar against applying new rules to cases on collateral review is motivated in part by "comity" considerations – that is, the reluctance federal courts should have to upset state convictions. *Teague*, 489 U.S. at 308; *see also Danforth*, 552 U.S. at 280 (*Teague* is intended to "minimiz[e] federal intrusion into state criminal proceedings" – that is, "to limit the authority of federal courts to overturn state convictions"); *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in part and concurring in the judgment) *(*emphasizing "[t]he comity interest served by *Teague*"). Federal review of state convictions is highly "intrusive" because it "forces the States to marshal resources" to keep convicted inmates locked up, even when the state trial "conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310.[49]

This comity interest is not implicated when, as in this case, the challenged judgment was issued by a federal rather than a state court.

2. *Finality.* Nor do *Teague* concerns about preserving the finality of criminal judgments pertain here, where petitioner's claim could not have been raised on direct review of her federal conviction and the constitutional law under which she seeks relief already accounts for the fact that the claim must be pressed on collateral review.

a. In *Teague*, the petitioner "repeated" – as all state habeas petitioners must – a claim that he had already raised in state court. *Id.* at 293.[50] In other words, the petitioner was

[49] For further expressions of this comity interest, see *Stringer v. Black*, 503 U.S. 222, 235 (1992) (federalism is "one of the concerns underlying the nonretroactivity principle"); *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) ("The 'new rule' principle . . . fosters comity between federal and state courts."); *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (Stevens, J., concurring in part and concurring in the judgment) ("*Teague* established . . . that a federal habeas court operates within the bounds of comity and finality" if it follows the "dictated by precedent" standard); *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) ("Comity interests and respect for state autonomy" support *Teague.*).

[50] Of course, state prisoners sometimes try to press claims for the first time in federal habeas proceedings. But when they do so, federal courts must either dismiss those claims for failure to exhaust the prisoner's state-court remedies or deny them as procedurally defaulted. See Rose v. Lundy, 455 U.S. 509, 518 (1982) (exhaustion); Murray v. Carrier, 477 U.S. 478, 496 (1986) (procedural default).

attempting to use collateral review to obtain a second bite at the judicial apple: he wanted a federal court to entertain a constitutional claim that a state court had rejected previously. The Supreme Court held that in that context, respect for the finality of state-court judgments allows federal courts to apply only "old rules" on collateral review. *Teague*'s nonretroactivity principle thus relies on a critical assumption: namely, that habeas petitioners have already had full and fair opportunities to raise their constitutional claims. 489 U.S. at 308-09; *see also Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., dissenting) (restrictions on retroactivity presume that the defendant "had a fair opportunity to raise his arguments in the original criminal proceeding").

This assumption does not apply to initial *Padilla*-type challenges to federal convictions. In *Massaro v. United States*, 538 U.S. 500, 508 (2003), the Supreme Court instructed that ineffective-assistance challenges to federal convictions must be raised for the first time on collateral review – at least when they depend on evidence outside of the trial record. *Padilla* claims fit that mold. Specifically, trial records generally do not include evidence as to whether defense attorneys advised their clients that pleading guilty would have deportation consequences. *See Padilla*, 130 S. Ct. at 1483. Even in the rare instances in which a trial record does include such information, it does not provide the evidence necessary to show – as required by the prejudice prong of the *Strickland/Padilla* test – that if the defendant had received such advice, she would not have pleaded guilty. *See id.* Accordingly, *Padilla*-type claims must be litigated in what the Supreme Court has called "initial-review collateral proceedings." *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). As such, there is no basis for applying *Teague* in this context.

Indeed, the Supreme Court has already recognized that another judicially created equitable doctrine governing the availability of habeas relief, the procedural default doctrine, should not apply in these circumstances. The procedural default doctrine precludes a federal court from granting habeas relief when the defendant "fail[ed] to raise a claim on [direct] appeal." *Murray v. Carrier*, 477 U.S. 478, 491 (1986). Just like *Teague*, this doctrine is designed to "respect the law's important interest in the finality of judgments," *Massaro*, 538 U.S. at 504. Yet in *Massaro*, the Court held that the procedural default doctrine does not apply to ineffective assistance challenges to federal convictions that are raised for the first time on collateral review. *Id.* at 509. And last Term in *Martinez*, the Supreme Court reaffirmed that "the first designated proceeding for a [defendant] to raise a claim of ineffective assistance," is, for purposes of the procedural default doctrine, the "equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez*, 132 S. Ct. at 1317.

The same reasoning applies here. Because *Padilla*-type claims must be raised for the first time on collateral review, such "initial-review collateral proceedings" are the "equivalent of a [defendant's] direct appeal." As such, there is no basis for applying *Teague* in this context.

b. To be sure, some interest in repose exists respecting any federal judgment "that has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." *United States v. Frady*, 456 U.S. 152, 164 (1982). But

Strickland's constitutional formula already fully protects that interest when someone raises an ineffective-assistance claim for the first time on collateral review.

Recognizing that ineffective-assistance claims are almost always brought on collateral review, and therefore almost always implicate finality interests of the "strongest" order, 466 U.S. at 697, the Court has structured the *Strickland* test to protect legitimate finality interests. Thus, the Court has stressed that because final judgments carry a "strong presumption of reliability," *id.* at 696, the inquiry into an attorney's performance is "highly deferential," *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). In particular, that inquiry turns not on whether the attorney made errors (even "significant errors," *Lockhart v. Fretwell*, 506 U.S. 364, 379 (1993) (Stevens, J., dissenting)), but rather on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

Strickland's prejudice prong is also expressly designed to protect "the fundamental interest in the finality of" convictions and "guilty pleas." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In contrast to typical constitutional claims, in which the prosecution bears the burden of showing that any procedural impropriety was harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 24 (1967), ineffective-assistance claims require the defendant to show that he was prejudiced by his counsel's deficient performance. *Strickland*, 466 U.S. at 694.[51] That prejudice requirement is "highly demanding," *Kimmelman*, 477 U.S. at 382: the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Accordingly, as this Court noted in *Strickland*, the "principles governing ineffectiveness claims should apply in federal collateral proceedings" just as they would "on direct appeal." *Id.* at 697.

The Supreme Court's treatment of the ineffective-assistance claim in *Padilla* itself illustrates this reality. *Padilla* arose on state collateral review, and the Court expressly assumed that other similar claims would arise in "habeas proceeding[s]" or otherwise in "collateral challenges." 130 S. Ct. at 1485-86. The Court, therefore, was careful to "give[] serious consideration" to "the importance of protecting the finality of convictions obtained through guilty pleas." *Id.* at 1484. Yet even though Kentucky has adopted the *Teague* doctrine, *see Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009), and even though the Supreme Court has the authority to raise *Teague* sua sponte, *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), the Court did not feel the need to consider whether *Teague* might bar relief. Instead, the Court simply asked whether Padilla's ineffective-assistance claim "surmount[ed]" *Strickland*'s already "high bar." *Padilla*, 130 S. Ct. at 1485. Finding that it did, there was no need for additional analysis.[52]

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[51] The only other frequently litigated constitutional claim that requires a demonstration of prejudice is a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed exculpatory evidence. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999). Such claims are also typically brought for the first time on collateral review.

[52] Similarly, in Missouri v. Frye, 132 S. Ct. 1399 (2012), another case arising on state collateral review, the Supreme Court did not consider whether Teague affected the availability of relief, but simply applied Strickland directly to respondent's ineffective-assistance claim.

B. Applying *Teague* In This Context Would Cause Administrative Problems And Be Fundamentally Unfair.

Not only is there no theoretical reason to apply *Teague* to ineffective-assistance claims challenging federal convictions, but doing so would trigger serious practical difficulties and threaten profound unfairness.

"Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." *Massaro*, 538 U.S. at 504 (quotation marks and citation omitted); *see also Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). Accordingly, in *Massaro*, the Supreme Court refused to apply the procedural default doctrine to ineffective-assistance challenges to federal convictions because doing so "would have the opposite effect." 538 U.S. at 504. Namely, "defendants would feel compelled to raise [ineffective-assistance claims] before there has been an opportunity fully to develop the factual predicate[s] for the claim[s]," and such claims "would be raised for the first time in a forum not best suited to assess those facts." *Id*.

Since *Massaro*, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record have been litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review and they are potentially meritorious, court decline to consider them, instead dismissing such claims "without prejudice to [defendants'] ability to present those claims properly in the future." *United States v. Wilson*, 240 F. App'x 139, 145 (7th Cir. 2007) (quotation marks and citation omitted).[53] This system – just as the Supreme Court expected – has promoted the efficient disposition of direct appeals and has ensured that federal defendants are treated fairly because, as the Government itself said in *Massaro*, defendants raising ineffective-assistance claims for the first time on collateral review are able to obtain "the same relief" that they could have obtained had the claims been adjudicated on direct review, U.S. Br. 34, *Massaro v. United States*, *available at* 2002 WL 31868910.

Applying *Teague* to ineffective-assistance claims brought in first federal post-conviction review proceedings would upend this system, reintroducing all of the administrative difficulties that this Court sought to prevent in *Massaro*. Direct review would become the only setting in which a defendant could be assured of having a legal argument adjudicated on its merits without regard to whether the claim might be considered "new." Under such a regime, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review.

Faced with an onslaught of ineffective-assistance claims on direct review and an inability to adjudicate them properly, Courts in this Circuit would have three basic choices, none of them acceptable.

First, Courts in this Circuit might try to adjudicate ineffective-assistance claims as part of direct review. But, as the Supreme Court explained in *Massaro*, such claims – at

[53] See also, e.g., United States v. Huard, 342 F. App'x 640, 643-44 (1st Cir. 2009); United States v. Morris, 350 F.3d 32, 39 (2d Cir. 2003); United States v. King, 388 F. App'x 194, 198 (3d Cir. 2010); United States v. Brooks, 444 F. App'x 629, 629 (4th Cir. 2011); United States v. Fearce, 455 F. App'x 528, 530 (5th Cir. 2011); United States v. Allen, 254 F. App'x 475, 478 (6th Cir. 2007); United States v. Cameron, 302 F. App'x 475, 476 (7th Cir. 2008); United States v. Kottke, 138 F. App'x 864, 866 (8th Cir. 2005); United States v. Carney, 65 F. App'x 255, 257 (10th Cir. 2003); United States v. Bolden, 343 F. App'x 574, 577 (11th Cir. 2009).

least when, as here, they depend on facts beyond the trial record – cannot be properly litigated on direct review because the trial record will not "disclose the facts necessary to decide either prong of the *Strickland* analysis." 538 U.S. at 505. Without a fully developed factual record (like the kind that, as this case shows, can be developed only on collateral review), even meritorious ineffective-assistance claims will fail. *Id.* at 506.

Furthermore, litigating ineffective-assistance claims on direct review puts appellate counsel "into an awkward position vis-à-vis trial counsel." *Id*. When appellate counsel also served as trial counsel, he would be understandably reluctant – if not prohibited by ethical rules[54] – to bring a claim about his own ineffectiveness. *See* Amicus Br. for Nat'l Ass'n of Federal Defenders 15-18, *Chaidez v. United States*, *available at* 2012 WL 3041308. Even when different attorneys handled district court and appellate proceedings, tension would arise between the two that would impede litigation of an ineffective-assistance claim and bleed over into other issues on appeal as well. As the Supreme Court has noted, "[a]ppellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline," and such assistance may be less forthcoming if appellate counsel will also be using that information to assess "trial counsel's own incompetence." *Id*.

Second, the Court of Appeals might – as it sometimes did before *Massaro* – stay appellate proceedings whenever defendants raise ineffective-assistance claims and remand the cases to this Court for evidentiary hearings to develop the records necessary to decide such claims. *See, e.g.*, *United States v. Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001); *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). But, as the Government explained in *Massaro*, this practice is undesirable because "[a] routine resort to remand would delay imposition of a final judgment and would have the effect of undermining AEDPA's strict limitations on the filing of successive [post-conviction] motions." U.S. Br. 30 n.14; *see also Wilson*, 240 F. App'x at 145 ("Since *Massaro*, we have not remanded any case [on direct review] for an evidentiary hearing of an attorney's effectiveness."). Far from protecting society's interest in the finality of criminal judgments, forcing ineffective-assistance claims into direct review would actually impede it.

Third, Courts in this Circuit could continue dismissing ineffective-assistance claims whenever they were brought on direct review, thereby forcing defendants to bring them subject to *Teague* on collateral review. But under this scenario, defendants would suffer a fundamental injustice: they would *never* be able to obtain unfiltered review of ineffective-assistance claims that depend (as nearly all do) on introducing evidence outside the trial record. If defendants on direct review pressed such claims, the Court of Appeals would dismiss the claims with instructions to raise them on collateral review. And if defendants brought such claims on collateral review, and those claims required this Court to create a "new rule" to grant relief, *Teague* would prevent the Court from doing so. Defendants would thus find themselves ensnared in a Catch-22. Just as Major Major had a policy of never seeing anyone in his office while he was in his office and would accept visitors into his office only when he was not there,[55] so applying Teague in

[54] See ABA Model Rule of Professional Conduct 1.7(a)(2) ("lawyer shall not represent a client if . . . there is a significant risk that the lawyer's representation of [the] client will be materially limited by . . . a personal interest of the lawyer." (Or cite to state rule on point)

[55] See Joseph Heller, Catch-22, p. 106 (1961).

this context would leave defendants without any appropriate time to raise ineffective-assistance claims that depend on creating a "new rule." Such claims would always be either too early or too late.

Such a state of affairs would be not only unfair but it would contravene "the general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . , whenever that right is invaded." 3 William Blackstone, Commentaries on the Laws of England *23 (1768). It bears remembering that *Teague* is really a doctrine about "redressability." *Danforth*, 552 U.S. at 271 n.5. The doctrine is not premised on the view that the Supreme Court's decisions themselves create new constitutional rights that did not exist before. Instead, *Teague* provides that even when a conviction has been secured in violation of the Constitution, a federal court cannot remedy that violation if the error was not clear at the time the defendant's conviction became final. *Id.* at 271. This non-redressability principle is perfectly acceptable against the backdrop of a regime in which defendants have opportunities prior to collateral review to ask courts to announce and to apply new rules. It cannot be justified, however, when no prior opportunity exists.

Preserving the possibility of a remedy when a defendant has been denied effective assistance of counsel – even when affording relief requires the articulation of a new rule – is especially important because "it is through counsel that the accused secures his other rights." *Kimmelman*, 477 U.S. at 377. In other words, "the fairness and regularity" of the criminal justice system depends upon ensuring that lawyers live up to their Sixth Amendment obligations, and upon the federal courts' ability to refine those obligations in light of ever-evolving circumstances in the criminal justice system. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The *Teague* doctrine should not hamstring this Court's ability to define and enforce those obligations.