SUPREME COURT OF NEW YORK
KINGS COUNTY

People v. Garcia[1]
(decided August 26, 2010)

Jose Garcia, at the direction of his attorney, pled guilty to "a single count of criminal possession of a controlled substance in the seventh degree," as a result of allegedly selling cocaine to two people in Kings County, New York.[2] Consequently, Garcia faced deportation consequences, which he was not made aware of until two years later when he was arrested at JFK International Airport.[3] Garcia then filed a CPL 440.10 motion seeking to vacate his judgment of conviction, alleging that, as a result of the recent Supreme Court decision in *Padilla v. Kentucky*,[4] he received ineffective assistance of counsel because his defense counsel failed to inform him of the immigration consequences of a plea agreement.[5] Moreover, in his affidavit, the defendant insisted that had Mr. Stoll correctly informed him about the immigration consequences of his plea, he would have never taken the plea, implying that his rights were violated under the U.S. Constitution[6] and the New York Constitution.[7] The *Garcia* court then granted the defendant's CPL 440.10 motion, holding that *Padilla* was to be applied retroactively, and that the defendant received ineffective

[1] 907 N.Y.S.2d 398 (N.Y Sup. Ct. 2010).

[2] *Id.* at 399.

[3] *Id.* at 400-01.

[4] 130 S. Ct. 1473, 1486 (U.S. 2010) (holding that defense counsel must inform their clients of immigration consequences as a result of accepting a guilty plea).

[5] *Garcia*, 907 N.Y.S.2d at 399.

[6] The Sixth Amendment to the United States Constitution states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[7] Article I, section 6 of the New York Constitution states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her." *See also Garcia*, 907 N.Y.S.2d at 401.

assistance of counsel as he satisfied both prongs of the *Strickland* test.[8]

On May 24, 2006, Detective Ryan allegedly observed the defendant, Jose Garcia, selling cocaine.[9] The defendant was subsequently "indicted on two counts each of criminal sale of a controlled substance in the third degree,[10] criminal sale of a controlled substance in the fifth degree,[11] and criminal possession of a controlled substance in the seventh degree."[12] On February 27, 2008, while being represented by attorney Andrew Stoll, the defendant, Garcia, accepted a plea offer in which he would plead guilty to "a single count of criminal possession of a controlled substance in the seventh degree."[13] Immediately after accepting the plea he was sentenced.[14] However, during the plea proceeding, the court informed Mr. Stoll that the defendant should assume he is deportable.[15]

The defendant alleged that before entering the plea of guilty, he asked Mr. Stoll about the possible immigration consequences of a guilty plea, and Mr. Stoll, who was unfamiliar with immigration law, "declined to research the issue . . . and informed the defendant he should seek [outside] advice from an immigration specialist."[16] As a result, the defendant, having limited financial resources, "paid an immigration paralegal to assess his situation and was erroneously informed that a single misdemeanor conviction would have no adverse immigration consequences."[17] Thus, the defendant argued that Mr. Stoll's ineffective of assistance of counsel forced him to rely upon incorrect advice of a non-professional.[18]

At the time, the defendant was a lawful resident of the United

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[8] *Garcia*, 907 N.Y.S.2d at 404-05, 407 (reasoning that because the defendant was prejudiced as a result of his attorney failing to inform him of the possible immigration consequences of his plea agreement, and telling him to seek outside immigration advice, he satisfied both prongs of the *Strickland* test).

[9] *Id.* at 399.

[10] *Id.* (violating N.Y PENAL LAW § 220.39(1) (McKinney 2010)).

[11] *Id.* (violating N.Y PENAL LAW § 220.31 (McKinney 2010)).

[12] *Id.* (violating N.Y PENAL LAW § 220.03 (McKinney 2010)).

[13] *Garcia*, 907 N.Y.S.2d at 399-400.

[14] *Id.* at 400.

[15] *Id.* Mr. Stoll also admitted to the court that his client had retained independent immigration advice. *Id.*

[16] *Id.*

[17] *Garcia*, 907 N.Y.S.2d at 400.

[18] *Id.*

States dating back to 2005, but was still "a native citizen of the Dominican Republic."[19] Following his plea and sentencing in this case, the defendant traveled outside the United States, believing his conviction in 2008 "would not cause any immigration issues."[20] However, on April 14, 2010, only one day following his re-entry into the United States at JFK International Airport, he was arrested by Immigration and Customs Enforcement officials.[21] The defendant was charged with violating sections 212(a)(2)(A)(i)(I),[22] and 212 (a)(2)(A)(i)(II),[23] of the Immigration and Nationality Act ("INA").[24]

Subsequently, on June 30, 2010 the defendant filed a CPL 440.10 motion seeking to vacate his judgment of conviction, alleging that as a result of the recent Supreme Court decision in *Padilla v. Kentucky*,[25] which held that defense counsel must inform their clients of immigration consequences as a result of accepting a guilty plea, he received ineffective assistance of counsel as his defense counsel failed to inform him of the immigration consequences of his 2008 guilty plea to a controlled substance offense.[26]

The issue before the court in *Garcia* was whether the recent United States Supreme Court decision in *Padilla v. Kentucky*[27] was to be applied retroactively, and if so, whether Garcia established a successful ineffective assistance of counsel claim under both the two prong test of *Strickland v. Washington*,[28] and New York's "meaning-

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[19] *Id.*

[20] *Id.*

[21] *Id.* at 400-01.

[22] *Garcia*, 907 N.Y.S.2d at 401. Commission of a crime of moral turpitude. *Id*. This was later dismissed by the immigration court as it was a result of the defendant's 1996 New York attempted assault conviction, which was "improperly brought because he had previously obtained a waiver of that conviction when he obtained a green card in 2005." *Id.*

[23] *Id.* Commission of a crime relating to a controlled substance. *Id.*

[24] *Garcia*, 907 N.Y.S.2d at 401.

[25] 130 S. Ct. 1473 (U.S. 2010).

[26] *Garcia*, 907 N.Y.S.2d at 399. The defendant also insisted that had he been correctly informed about the immigration consequences of his plea by Mr. Stoll, he would have never taken the plea. *Id.* at 401.

[27] *See* 130 S. Ct. at 1486 (establishing that an ineffective assistance of counsel claim can be brought under *Strickland* if a criminal defendant is not informed by his or her counsel about the possible immigration consequences of the plea agreements).

[28] 466 U.S. 668 (1984). The first prong requires the defendant to show that counsel's representation was deficient and that it "fell below an objective standard of reasonableness." The second prong requires the defendant show that he was prejudiced. *Id.* at 687-88.

ful representation" standard.[29] The court went on to conclude that *Padilla* was to be applied retroactively, and that Garcia established a successful ineffective assistance of counsel claim under both the *Strickland* and New York standards.[30]

Before *Padilla* was decided, the rule in New York and several other states was that deportation constituted a collateral consequence, and "failure by a defendant's attorney to warn the defendant of the possibility of deportation was not grounds to claim ineffective assistance of counsel."[31] However, this changed when the United States Supreme Court decided *Padilla*.[32] In *Padilla*, the petitioner, Jose Padilla, pled guilty to the "transportation of a large [quantity] of marijuana in his tractor-trailer . . . in Kentucky."[33] The petitioner was a "native of Honduras, [but had] been a lawful permanent resident of the United States for more than 40 years."[34] During his post-conviction proceeding, the petitioner claimed that his counsel failed to advise him of the immigration consequences resulting from the plea agreement.[35] Had he not received erroneous advice from his attorney, the petitioner insisted that he would have gone to trial.[36]

The Supreme Court of Kentucky denied post-conviction relief to Padilla, holding that "the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a 'collateral' consequence of his conviction."[37] The United States Supreme Court

[29] *Garcia*, 907 N.Y.S.2d at 403 (quoting People v. Baldi, 429 N.E.2d 400, 405 (N.Y. 1981)) ("So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.").

[30] *Garcia*, 907 N.Y.S.2d at 404-05, 407.

[31] *Id.* at 401. *See* People v. Ford, 657 N.E.2d 265 (N.Y 1995); *see also* People v. Gravino, 928 N.E.2d 1048 (N.Y 2010); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel And The Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002) (showing that the rule stating that attorneys have no responsibility to inform their clients of collateral consequences was not just the rule in New York, as "eleven federal circuits, more than thirty states, and the District of Columbia have held that lawyers need not explain collateral consequences").

[32] *Garcia*, 907 N.Y.S.2d at 401.

[33] *Padilla*, 130 S. Ct. at 1477.

[34] *Id.*

[35] *Id.* at 1477-78. The petitioner stated that his counsel told him that because he had been in the country for more than forty years, he did not have to worry about his immigration status. *Id.*

[36] *Id.* at 1478.

[37] *Padilla*, 130 S. Ct. at 1478 ("In its view, neither counsel's failure to advise petitioner

then granted certiorari to decide the issue of whether Padilla's counsel was obligated to advise him "that the offense to which he was pleading guilty would result in his removal from this country."[38] The Court ultimately held that the petitioner's counsel was obligated to advise him that he may be deported if he accepts the guilty plea.[39]

The *Padilla* Court began its analysis by explaining that the state of federal immigration law has changed dramatically over the last ninety years, and as a result, "[t]he 'drastic measure' of deportation or removal, is now virtually inevitable for a vast number of noncitizens convicted of crimes."[40] Moreover, the Court held that because deportation is a consequence of a criminal conviction, it makes "it difficult to classify it as either a direct or a collateral consequence."[41] Thus, when evaluating a *Strickland* claim, it would be "ill-suited" to determine whether the consequence of deportation is direct or collateral.[42] Therefore, the Court concluded that accepting the petitioner's claims as true, he satisfied the first prong of the *Strickland* test, but stated that they would not decide whether he was prejudiced as a result of taking the plea.[43]

In addition, the Court reasoned that a holding limited to af-

about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.").

[38] *Id.* ("We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.").

[39] *Id.* at 1486.

[40] *Id.* at 1478. *See, e.g.*, Natsu Taylor Saito, *Judgments Judged And Wrongs Remembered: Examining The Japanese American Civil Liberties Cases on Their Sixtieth Anniversary: Interning the "Non-Alien" Other: The Illusory Protections of Citizenship*, 68 LAW & CONTEMP. PROB. 173, 201 (2005). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) made it "easier to deport immigrants not only for their political associations, but also for minor criminal convictions." *Id.* The IIRIRA allowed for retroactive deportation of "for a wide range of minor crimes that have been redefined as 'aggravated felonies.' " *Id.* Because of this, "numerous long-time permanent residents have been deported for misdemeanor pleas or convictions several decades old." *Id.*

[41] *Padilla*, 130 S. Ct. at 1482.

[42] *Id.* This is significant because prior to *Padilla*, the general rule was that "counsel's failure to inform a defendant of the collateral consequences of a guilty plea is never deficient performance under *Strickland*." Santos-Sanchez v. United States, 548 F.3d 327, 334 (5th Cir. 2008).

[43] *Padilla*, 130 S. Ct. at 1483-84. In order to satisfy the first prong of the Strickland test, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In order to satisfy the second prong of the Strickland test, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

firmative misadvice,[44] which is what the Solicitor General has urged it to conclude, would invite "two absurd results."[45] First, the Court believed that "it would give [attorneys] an incentive to remain silent" on important matters, "even [if] the answers are readily available."[46] Second, the Court stated "it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."[47]

The *Padilla* Court also addressed the concern of the possible increase in litigation as a result of its decision.[48] The Court explained that for at least the past fifteen years, it has been a professional norm for counsel to provide advice on deportation consequences of their client's plea, and therefore, it is "unlikely that [its] decision [would] have a significant [impact] on those convictions already obtained as the result of plea bargains."[49]

Moreover, the Court stated that requiring counsel to inform clients about the possibility of deportation benefits both the State and noncitizen defendants.[50] The Court reasoned that attorneys who are aware of the consequence of possible deportation can now "creatively" plea bargain with the prosecution "in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."[51] Furthermore, the Court explained that a defendant who is aware of the threat of deportation, may be more inclined to plead guilty to an offense that will not impose the penalty of deportation on them, in exchange for dismissing a charge that would.[52] Thus, for the reasons stated above, the Court concluded that an inef-

[44] *Padilla*, 130 S. Ct. at 1484 ("In the United States' view, 'counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ,' though counsel is required to provide accurate advice if she chooses to discusses these matters.").

[45] *Id.*

[46] *Id.* (explaining that attorneys should not be encouraged to say nothing when they know that their clients face possible deportation from the country).

[47] *Id.*

[48] *Id.*

[49] *Padilla*, 130 S. Ct. at 1485 ("We should therefore presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.").

[50] *Id.* at 1486 ("By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.").

[51] *Id.*

[52] *Id.*

fective assistance of counsel claim can be brought under *Strickland* for counsel's failure to inform his or her clients about possible immigration consequences of their plea.[53]

Following the Court's holding in *Padilla*, the lower courts were charged with deciding whether *Padilla* is to be applied retroactively, and therefore should be applied to those convictions which occurred prior to *Padilla*. In order to determine whether *Padilla* should be applied retroactively, the *Garcia* court discussed *Teague v. Lane*,[54] which set forth the standard in determining when to apply decisions retroactively.[55] The *Teague* Court adopted Justice Harlan's view of retroactivity stemming from his opinion in *Mackey v. United States*,[56] and explained that new rules should never be applied retroactively to cases on collateral review.[57] However, Justice Harlan identified two exceptions to that rule.[58] The first exception indicates that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' "[59] The second exception suggests that "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.' "[60]

The *Teague* Court, however, modified the second exception, stating that it is to be "reserved for watershed rules of criminal procedure."[61] Moreover, the Court limited the scope of the second exception to those new procedures, without which the likelihood of an ac-

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[53] *Id.*

[54] 489 U.S. 288 (1989).

[55] *Id.* at 310 (explaining that a new rule will not be applied retroactively unless it falls within one of the exceptions).

[56] 401 U.S. 667 (1971).

[57] *Teague*, 489 U.S. at 305, 310. Meaning also that if a rule is not considered "new" it could be applied retroactively. *Id.* The Court also explained that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* at 301.

[58] *Id.* at 307.

[59] *Id.* (quoting *Mackey*, 401 U.S. at 692).

[60] *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 693).

[61] *Id.* at 311. The Court reasoned that Justice Harlan's opinion in *Mackey* implied that the new rule must be a "bedrock procedural element" for it to be applied retroactively. *Id.* Moreover, the court explained that a "watershed" rule is one that "will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such . . . is the case with the right to counsel at trial now held a necessary condition precedent to any conviction." *Id.* (emphasis in original).

curate conviction would be greatly diminished.[62] Essentially, the Court explained that new constitutional rules of criminal procedure would not be applied retroactively unless they fall within one of these exceptions.[63]

With regards to the *Padilla* decision specifically, the courts are split on whether or not it announced a new rule, and if so, whether or not to adopt it retroactively when applying the *Teague* exceptions.[64] In *United States v. Hubenig,*[65] the petitioner, Adam Hubenig, a Canadian citizen, was arrested while visiting Yosemite National Park.[66] Mark Fahrety, a National Park Service Ranger, stopped the petitioner's car and subsequently arrested him for a traffic control violation, excessive speed, and possession of a controlled substance.[67] John Frankel, the attorney representing the petitioner, advised him to plead guilty to all three offenses even though Frankel was aware that the petitioner was a citizen of Canada, and that he had been convicted of possession of a controlled substance a few months prior.[68] Taking his attorney's advice, the petitioner pled guilty to all three charges.[69] However, in the fall of 2008, the petitioner was subjected to deportation proceedings as a result of his two prior convictions for drug possession.[70] Subsequently, the petitioner filed a writ of *coram nobis,*[71]

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[62] *Id.* at 313.

[63] *Teague*, 489 U.S. at 310. *See also* People v. Eastman, 648 N.E.2d 459, 465 (N.Y 1995) (observing that New York has also adopted the *Teague* exceptions for retroactivity).

[64] *See* United States v. Hubenig, No. 6:03-mj-040, 2010 U.S. Dist. LEXIS 80179 (E.D. Cal. July 1, 2010); United States v. Chaidez, No. 03 CR 636-6, 2010 U.S. Dist. LEXIS 81860 (N.D. Ill. Aug. 11, 2010); People v. Bennett, 903 N.Y.S.2d 696 (N.Y City Crim. Ct. 2010); United States v. Obonaga, No. 07-CR-402 (JS), 2010 U.S. Dist. LEXIS 63872 (E.D.N.Y June 24, 2010) (holding that *Padilla* should be applied retroactively); *but see* Gacko v. United States, No. 09-CV-4938 (ARR), 2010 U.S. Dist. LEXIS 50617 (E.D.N.Y May 20, 2010); People v. Kabre, 905 N.Y.S.2d 887 (N.Y City Crim. Ct. 2010) (holding that *Padilla* should not be applied retroactively).

[65] 2010 U.S. Dist. LEXIS 80179.

[66] *Id.* at *4.

[67] *Id.*

[68] *Id.* at *4-5.

[69] *Id.* at *5. As a result, the petitioner "was fined $350.00, sentenced to twelve months of unsupervised probation, and ordered to stay away from Yosemite National Park for the full term of his probation." *Hubenig*, 2010 U.S. Dist. LEXIS 80179, at *5.

[70] *Id.*

[71] *Id.* at *1. "The writ of *coram nobis* is an extraordinary remedy that allows a petitioner to attack an unconstitutional or unlawful conviction after the petitioner has served his sentence and is no longer in custody." *Id*. at *3. (emphasis in original). A petitioner must establish the following to qualify for *coram nobis* relief: "(1) a more usual remedy is not availa-

and the primary issue presented before the court in addressing possible *coram nobis* relief was whether *Padilla* applied retroactively to the petitioner's case.[72]

The court, looking at the *Teague* analysis, first tackled the issue of whether or not *Padilla* announced a "new" rule.[73] Its analysis began by stating that even when the "Supreme Court applies a well-established rule of law in a new way based on the specific facts of a particular case, it does not generally establish a new rule."[74] Additionally, the *Teague* court stated that *Strickland* is to be applied on a case by case basis.[75] As such, it concluded that because the issue in *Padilla* was whether or not the defendant had a valid claim for ineffective assistance of counsel under *Strickland*, the *Padilla* Court simply applied *Strickland* to the specific facts of the case, and thus, did not create a new rule.[76]

The court also noted that in a number of somewhat recent Supreme Court opinions applying *Strickland* to different examples of counsels' behavior, the Supreme Court has yet to apply a "new rule status" to any of the cases.[77] The *Hubenig* court analogized those cases to *Padilla*, where the Supreme Court also applied *Strickland* to "defense counsel's failure to advise her client regarding the possible

ble; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction to satisfy the case and controversy requirement of Article III; and (4) the error suffered is of the most fundamental character." *Id.* at *5-6.

[72] *Hubenig*, 2010 U.S. Dist. LEXIS 80179, at *12. The court first concluded that the first three elements to qualify for *coram nobis* relief were satisfied, leaving only the question of whether petitioner received ineffective assistance of counsel, which can satisfy the fourth element. *Id.* at *6, 9-12. Thus, the court had to address whether or not *Padilla* applied retroactively. *Id.* at 12.

[73] *Id.* at *12-13. The court stated that *Teague's* general principle is that " 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.' " *Id.* (quoting *Teague*, 489 U.S. at 310).

[74] *Hubenig*, 2010 U.S. Dist. LEXIS 80179, at *13.

[75] *Id.* at *14.

[76] *Id.* at *14-16, 21. The *Hubenig* court stated that " '[i]f the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.' " *Id.* at *14-15 (quoting Wright v. West, 505 U.S. 277, 308 (1992)).

[77] *Id.* at *15. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 383 (2005) (failing to investigate a file that contained evidence that the state intended to use in aggravation); Wiggins v. Smith, 539 U.S. 510, 524-25 (2003) (failing to investigate Wiggins's background, regardless of the fact that there was evidence of his abusive upbringing); Williams v. Taylor, 529 U.S. 362, 395 (2000) (failing to look up available state records indicating Williams' "nightmarish childhood").

immigration consequences of his guilty plea."[78] Moreover, the court determined that *Padilla* was not to be considered a "new rule" because the rule is not a "novel concept."[79] As one example, the court pointed out that in another Ninth Circuit decision, *United States v. Kwan*,[80] decided five years before *Padilla*, the court ruled that counsel had a responsibility not to mislead his client when advising whether a guilty plea would create any deportation consequences.[81]

Furthermore, the *Hubenig* court reasoned that because the *Padilla* Court gave serious consideration to the possibility that its ruling would open the "floodgates" to new litigation, it intended the rule to be applied retroactively.[82] Thus, for all the reasons stated above, the *Hubenig* court concluded that *Padilla* should be applied retroactively as it did not establish a "new rule."[83] Therefore, the petitioner's claims were found to have satisfied both prongs of the *Strickland* test, his writ of *coram nobis* was granted, and his guilty pleas were vacated.[84]

New York courts have also addressed the issue of whether to apply *Padilla* retroactively. In *People v. Bennett*,[85] a New York criminal court case, the court held that the *Padilla* decision should be applied retroactively to the defendant's case, as it did not announce a new rule, but merely applied the rule in *Strickland* to a new set of facts.[86] In *Bennett*, the defendant was arrested in June of 2005 for

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[78] *Id.* at *16. *See also Chaidez*, 2010 U.S. Dist. LEXIS 81860, at *11-12, 20 (holding also that *Padilla* was an extension of the rule in *Strickland*, and that it did not overturn any prior decision of the Supreme Court, and thus could be applied retroactively).

[79] *Hubening*, 2010 U.S. Dist. LEXIS 80179, at *16.

[80] 407 F.3d 1005 (9th Cir. Cal. 2005).

[81] *Hubenig*, 2010 U.S. Dist. LEXIS 80179, at *17. *See Kwan*, 407 F.3d at 1017; *see also* INS v. St. Cyr, 533 U.S. 289, 322, 323 n.50 (2001) (stating that "competent defense counsel, following the advice of numerous practice guides" would have advised their clients regarding whether or not their conviction could possibly make them deportable," and that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence").

[82] *Hubenig*, 2010 U.S. Dist. LEXIS 80179, at *20. *See Padilla*, 130 S. Ct. at 1485 (stating that "we must be especially careful about recognizing new grounds for attacking the validity of guilty plea," and that "[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains").

[83] *Id.* at *21.

[84] *Id.* at *26-27.

[85] 903 N.Y.S.2d 696 (N.Y City Crim. Ct. 2010).

[86] *Id.* at 699-700.

possession of marijuana.[87] Subsequently, in December of 2005, the defendant pled guilty to "criminal possession of marijuana in the fifth degree."[88]

Bennett's affidavit alleged that he only entered into the plea agreement because his attorney failed to inform him of immigration consequences he may suffer as a result of his plea.[89] The defendant alleged that before he agreed to the plea, he told his attorney, Jeffrey Pogrow, that he had a previous violation for possessing marijuana and that his mother filed a petition on his behalf to make him a permanent resident of the United States.[90] Bennett claimed he asked his attorney, Mr. Pogrow, if his plea would have any immigration consequences, to which Mr. Pogrow said " 'no,' " and that he " 'did not think it would.' "[91]

However, on December 14, 2005, Mr. Pogrow had indicated to the court on the record that he did indeed inform the defendant of possible immigration consequences.[92] However, the defendant took that to mean that they had simply discussed the consequences and that there were none.[93] The defendant argued that since he agreed to the plea deal, his life was "turned upside down" because his adjustment of status was denied, and as a result, he was deemed "deportable from the United States based upon the subject conviction."[94] The defendant insisted that, had he known of these consequences resulting from a guilty plea, he would have gone to trial instead.[95] Mr. Pogrow's affidavit on the other hand stated that he did indeed inform the defendant that it was possible he could have immigration consequences that could affect his immigration status.[96] Moreover, Mr. Pogrow stated that despite his advice, the defendant chose not to go to trial and instead accepted the plea deal.[97]

The *Bennett* court concluded that *Padilla* "did not announce a

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[87] *Id.* at 697.

[88] *Id.* The defendant did not file a direct appeal of his conviction. *Id.*

[89] *Bennett*, 903 N.Y.S.2d at 697.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Bennett*, 903 N.Y.S.2d at 697-98.

[95] *Id.* at 698.

[96] *Id.*

[97] *Id.*

new constitutional rule, but merely applied the well-settled rule in *Strickland* to a particular set of facts."[98] The court reasoned that because *Padilla* simply held that *Strickland* "applies to advice concerning deportation, whether mis-advice or no advice at all," it did not overrule a clear past precedent.[99] Thus, the *Bennett* court ruled that, rather than creating a new rule, *Padilla* merely extended an existing one.[100] Additionally, the court believed "if the Supreme Court did not intend for *Padilla* to be retroactively applied, that would render meaningless the majority's lengthy discussion about concerns that *Padilla* would open the 'floodgates' of challenges to guilty pleas."[101]

Furthermore, the *Bennett* court reasoned that in both, *People v. Ford*,[102] and *People v. McDonald*,[103] two New York cases decided before *Padilla*, the courts found it possible that misinformation given by an attorney concerning immigration consequences may constitute ineffective assistance of counsel under *Strickland*.[104] As such, the *Bennett* court concluded that the holding in *Padilla*, did not "depart[] from established precedent," and thus, could be applied retroactively, as it did not create a new rule.[105]

Unlike *Bennett* and *Hubenig*, *People v. Kabre*[106] held that *Pa-*

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[98] *Id.* at 699.

[99] *Bennett*, 903 N.Y.S.2d at 699. The Supreme Court has also held in *Williams* that applying *Strickland* to a new set of facts did not establish a new rule under *Teague* because merely applying *Strickland* to a new scenario does not create a new rule, as "it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the States." *Williams*, 529 U.S. at 391.

[100] *Bennett*, 903 N.Y.S.2d at 700.

[101] *Id.* (citing *Padilla*, 130 S. Ct. at 1485) (stating "we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas," and that "[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains").

[102] 657 N.E.2d 265 (N.Y. 1995).

[103] 802 N.E.2d 131 (N.Y. 2003).

[104] *See Ford*, 657 N.E.2d at 268 ("Although the failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel, some Federal courts have held that affirmative misstatements by defense counsel, may, under certain circumstances."); *see also McDonald*, 802 N.E.2d at 132 ("[U]nder certain circumstances, a defense counsel's incorrect advice as to deportation consequences of a plea may constitute ineffective assistance of counsel.").

[105] *Bennett*, 903 N.Y.S.2d at 700. In addition, the court found that the defendant satisfied both prongs of the *Strickland* test, as his attorney's representation fell below reasonable professional norms, and because he was prejudiced as a result of this. *Id.* at 702.

[106] 905 N.Y.S.2d 887 (N.Y City Crim. Ct. 2010).

dilla was not to be applied retroactively.[107] In *Kabre*, the petitioner, a citizen of Burkina Faso, was arrested and subsequently charged with trademark counterfeiting in the third degree in 2002, 2003, and 2004.[108] Each of these cases was resolved subsequent to the petitioner agreeing to a guilty plea.[109] As a result of these three convictions, the petitioner had a total of nine convictions for trademark counterfeiting.[110] When the petitioner discovered he could possibly be deported as a result of these convictions, he sought to vacate the three judgments, arguing his "prior counsel was ineffective for not giving [him] any advice at all about the potential immigration consequences of his convictions."[111] The petitioner also claimed had he known about the possible immigration consequences of a guilty plea, he would have gone to trial instead of accepting the plea.[112]

The court, quoting *Teague*, stated that "a 'new' rule [i]s one that breaks new ground or imposes a new obligation on the states or on the federal government; a rule is also new if the result was not '*dictated* by precedent existing at the time the defendant's conviction became final.' "[113] The court rationalized that the petitioner would be entitled to relief if the New York courts in 2005[114] "would have been required by controlling United States Supreme Court precedent to rule that failure to discuss the immigration consequences of a guilty plea was ineffective assistance of counsel."[115] After analyzing both New York and federal law, the court concluded that the law in 2005 did not require attorneys to give any advice about the possible immigration consequences of a guilty plea.[116] Thus, the court ruled that *Padilla* established a new rule, as it was not dictated by

[107] *Id.* at 891 (concluding that "in *Padilla* the Supreme Court announced a new rule of criminal procedure rather than applied settled law to a new set of facts and that the *Padilla* rule is not a 'watershed' change that must be applied retroactively to cases on collateral review"). *See also Gacko*, 2010 U.S. Dist. LEXIS 50617, at *6 (E.D.N.Y May 20, 2010) (holding also that *Padilla* was not to be applied retroactively).

[108] *Kabre*, 905 N.Y.S.2d at 890.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 889.

[112] *Id.* at 890.

[113] *Kabre*, 905 N.Y.S.2d at 892 (quoting *Teague*, 489 U.S. at 301, 333) (emphasis in original).

[114] *Id.* 2005 is "when the last conviction at issue [would become] final." *Id.*

[115] *Id.* at 892.

[116] *Id.* at 895.

precedent.[117]

Additionally, the court held *Padilla* to be a new rule even though it did not overrule any Supreme Court decision because it did "overrule decisions from ten of the federal circuit courts and twenty-three states, and certainly has in this sense established a new rule in those jurisdictions."[118] Moreover, the court indicated that it has "found no decision of the United States Supreme Court holding that one of its decisions overruling a majority of the lower federal courts resulted from a mere application of settled law and *was not a new rule*"[119] For these reasons, the court concluded that *Padilla* established a new rule.[120]

The court also disagreed with the reasoning previously applied by the court in *Bennett*.[121] The court believed the *Bennett* court wrongfully concluded, among other things,[122] that *Padilla* was an old rule because it merely applied *Strickland* to a new set of facts, which is exactly what the *Williams* Court did.[123] In contrast, when analyzing *Padilla*, the *Kabre* court reasoned that it "did not simply apply *Strickland* or any other Supreme Court precedent to an issue considered before."[124] Therefore, the court stated that a ruling requiring courts to judge an attorney's performance in an area that was consi-

[117] *Kabre*, 905 N.Y.S.2d at 895-96 (concluding that no New York court in 2005 would have found a Supreme Court case holding that an ineffective assistance of counsel claim can be brought against an attorney for failing to inform their clients about possible immigration consequence of a plea, and that it was irrelevant whether or not the consequences were direct or collateral when "analyzing the scope of the Sixth Amendment right to effective assistance of counsel").

[118] *Id.* at 896.

[119] *Id.* (emphasis added).

[120] *Id.* at 897.

[121] *Id.* at 896.

[122] *Kabre*, 905 N.Y.S.2d at 897-98. The court disagreed with the fact that the *Bennett* court took *Padilla*'s discussion regarding a potential increase of litigation to mean that it anticipated being applied retroactively, and it also disagreed with the fact that *Bennett* believed *McDonald* showed *Padilla* was not a break from precedent, as other New York courts had not followed that rule even after it was decided. *Id.*

[123] *Id.* at 896-97. The Supreme Court in *Williams* concluded that the failure to look up available state records amounted to ineffective assistance of counsel by applying those facts to *Strickland*. *Williams*, 529 U.S. at 391, 395.

[124] *Kabre*, 905 N.Y.S.2d at 897 (stating that "[t]he issue was not whether an alien defendant has the same right to a competent lawyer as has a citizen defendant, but whether the scope of that representation extends to giving advice about the consequences of a conviction in addition to the sentencing," which was never previously required by any federal appellate court).

dered collateral prior to *Padilla* breaks new ground and is thus " 'new.' "[125]

While the court concluded that *Padilla* was a new rule, in order to fully analyze whether *Padilla* should be applied retroactively, the *Kabre* court examined the *Teague* exceptions.[126] The court noted that "a new rule will be applied retroactively only if it fits within the exception created for 'watershed' rules which alter a 'bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial.' "[127] Thus, the court, quoting *Whorton v. Bockting*,[128] acknowledged that a "watershed rule must, therefore, be necessary to prevent an 'impermissibly large risk of an inaccurate conviction' and one which alters our understanding of the 'bedrock procedural elements essential to the fairness of a proceeding.' "[129]

The court concluded that the "*Padilla* [rule] is not necessary to prevent any risk of an inaccurate conviction," and that it does not "alter the understanding of the bedrock procedural elements essential to the fairness of the proceeding, even though it [discusses] the right to counsel."[130] The court suggested that only *Gideon v. Wainwright*,[131] which established the right to counsel, qualifies as a "watershed" ruling, and that the "*Padilla* [rule] is not as sweeping and fundamental as that of *Gideon*, and it does not, therefore, rise to the status of a watershed rule that must be applied retroactively."[132] Therefore, the *Kabre* court stated that the new rule, which does not fall within the *Teague* exceptions, is not to be applied retroactively, and the petitioner is not entitled to relief.[133]

The court in *Garcia* explained that *Padilla* applied *Strickland*

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[125] *Id.*

[126] *Id.* at 898.

[127] *Id.* (citing *Teague*, 489 U.S. at 311). Noting that the Supreme Court has stressed that the exception is exceedingly narrow. *Id.*

[128] 549 U.S. 406 (2007).

[129] *Kabre*, 905 N.Y.S.2d at 899 (quoting *Whorton*, 549 U.S. at 418).

[130] *Id*. at 899.

[131] 372 U.S. 335 (1963).

[132] *Kabre*, 905 N.Y.S.2d at 899 (reasoning that "[i]t is unconscionable to convict and incarcerate a defendant who had no lawyer to give advice about the legal process, present a defense, or argue for leniency," however, "it does not shock the conscience to deny a hearing about what immigration advice was given six years ago or more to a defendant who already had a substantial criminal record and avoided incarceration by taking a plea").

[133] *Id.* at 899-900.

to a new set of facts, and as a result, "*Padilla* did not create a new rule."[134] The *Garcia* court also agreed with the reasoning of the *Padilla* Court, which explained that it "was ill-suited [in] the immigration context" to distinguish between collateral and direct consequences of a criminal conviction, "and that the distinction between no advice and misadvice leads to absurd results."[135] Consequently, the court concluded that *Padilla* should be applied retroactively to the defendant's case.[136]

The *Garcia* court was correct in deciding that *Padilla* was not a new rule, and therefore, should be applied retroactively to the defendant's case.[137] It is unequivocal that, like the *Bennett* and *Hubenig* courts, *Padilla* was not a break from precedent.[138] The *Kabre* court was incorrect when ruling that *Padilla* did break from precedent and was therefore a new rule, but should not be applied retroactively as it did not fit into one of the two *Teague* exceptions.[139] Even though the *Kabre* court does bring up interesting points about the fact that *Padilla* overruled the majority of the lower federal courts,[140] this is unpersuasive. *Padilla* simply applied *Strickland* to a different set of facts, just as several other courts did.[141]

Furthermore, even though the *Garcia* court properly ruled that the *Padilla* rule was not new, and therefore should be applied retroactively, it did not analyze, nor did it have to, the possibility of it being

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[134] *Garcia*, 907 N.Y.S.2d at 404.

[135] *Id.*

[136] *Id.* In addition, the *Garcia* court also stated that it interpreted *Padilla* as holding that "since the severe changes affecting immigration law in recent years, the *Strickland* standards have not been met where defense attorneys failed to give correct advice to clients in criminal cases facing deportation, when the immigration consequences were readily ascertainable, as they were in *Padilla* and in *Garcia*." *Id.* Furthermore, the court ruled that because the defendant's attorney did not inform him of possible immigration consequences and told him to seek outside immigration advice, and because the defendant was prejudiced by this, the defendant satisfied both prongs of the *Strickland* test, as well as the New York "meaningful representation" test, and therefore, was successful in establishing ineffective assistance of counsel. *Id.* at 407. The court then granted the defendants CPL 440.10 motion, and as a result, the defendant's plea and sentence were vacated. *Garcia*, 907 N.Y.S.2d at 407.

[137] *Id.* at 404.

[138] *See Hubenig*, 2010 U.S. Dist. LEXIS 80179, at *16-17; *see also Bennett*, 903 N.Y.S.2d at 699.

[139] *Kabre*, 905 N.Y.S.2d at 896.

[140] *Id.*

[141] *See, e.g.*, Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000) (applying *Strickland* to a different set of facts).

a new rule. Following the three prong test in *People v. Mitchell*,[142] a New York Court of Appeals case, even if the *Garcia* court decided that *Padilla* was a new rule, it still would have most likely been applied retroactively to the defendant's case. According to *Mitchell*, in determining the retroactive effect of a new rule, three factors must be evaluated: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application."[143]

When analyzing the first prong, it is clear that there is a very specific purpose to be served by the new *Padilla* rule. As a result of several changes in immigration law, "[t]he 'drastic measure' of deportation or removal, is now virtually inevitable for a vast number of noncitizens convicted of crimes."[144] Therefore, the purpose of the *Padilla* rule is to ensure that criminal defendants understand the risk of possible immigration consequences resulting from their guilty pleas. Requiring attorneys to inform their clients about these possible consequences will best serve this purpose.

With regard to the second prong of the *Mitchell* test, even though attorneys in New York have relied on *Ford*,[145] even *Ford* stated that "[a]lthough the failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel, some federal courts have held that affirmative misstatements by defense counsel, may, under certain circumstances."[146] Thus, it is evident that the rule was not set in stone, and could be up for interpretation depending on the circumstances, which is precisely what the court stated in *McDonald*.[147] Moreover, as stated in *INS v. St. Cyr*,[148]

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[142] 606 N.E.2d 1381 (N.Y. 1992). This test is to be used "when the [c]ourt is confronted with the question of whether to grant retroactive effect to a new rule or to apply the rule." *Id.* at 1385.

[143] *Id.* at 1384.

[144] *Padilla*, 130 S. Ct. at 1478. "While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation." *Id.*

[145] *Ford*, 657 N.E.2d at 268 (explaining that because deportation is a collateral consequence, "our Appellate Division and the Federal courts have consistently held that the trial court need not, before accepting a plea of guilty, advise a defendant of the possibility of deportation").

[146] *Id.* at 268-69.

[147] *McDonald*, 802 N.E.2d at 132 (stating that "under certain circumstances, a defense counsel's incorrect advice as to deportation consequences of a plea may constitute ineffective assistance of counsel").

"competent defense counsel, following the advice of numerous practice guides" would have advised their clients regarding whether or not their conviction could possibly make them deportable.[149] Therefore, it is unequivocal that the reliance on the old rule was not mandatory, as the cases left open other possibilities.

As for the third prong of the *Mitchell* test, as stated previously, applying *Padilla* retroactively would not substantially increase the amount of litigation.[150] The *Padilla* Court addressed this issue and clearly explained that it has been a custom for counsel to provide advice on deportation consequences of their client's plea over the last fifteen years, and therefore, it is unlikely that its "decision . . . [would] have a significant effect on those convictions already obtained as the result of plea bargains."[151] Moreover, *Padilla* stressed that not everyone who has ever faced immigration consequences after a guilty plea would now "storm" the courts.[152] The Court explained that "[t]hose who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea."[153] Thus, the risk of the challenge resulting in a less favorable outcome for the defendant will provide a compelling reason not to go through with it, and is another reason why there will not be a substantial increase in litigation.[154] In addition, because *Strickland* is so difficult to overcome, prior convictions are not likely to be disturbed,[155] and an "opening of the floodgates" is not expected. Therefore, after analyzing all three prongs of the *Mitchell* test with respect to the new *Padilla* rule, it is clear that it should be applied retroactively to the defendant's case, even if it was announced as a new rule.

Moreover, the recent trend in New York regarding this issue is that *Padilla* should be applied retroactively.[156] Five months after

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[148] 533 U.S. 289.

[149] *Id.* at 323 n.50 (2001).

[150] *Padilla*, 130 S. Ct. at 1485.

[151] *Id.* at 1485 (explaining that it should "presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty").

[152] *Id.*

[153] *Id*.

[154] *Id.* at 1485-86.

[155] *Padilla*, 130 S. Ct. at 1485. *See also Strickland*, 466 U.S. at 693 ("Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.").

[156] *See, e.g.*, People v. Nunez, No. 2009-1833 S CR., 2010 N.Y Misc. LEXIS 6163 (N.Y. 2d Dept. App. Term Dec. 15, 2010).

the trial court's decision in *Garcia*, the New York Second Department Appellate Term decided *People v. Nunez*.[157] The court, using the same reasoning evident in *Garcia*, *Bennett*, and *Hubenig*, ruled that *Padilla* was to be applied retroactively because it was not a "new rule," as it "merely applied the well-established *Strickland* standard to the facts therein."[158]

Failure to apply *Padilla* retroactively would constitute a grave injustice to people who were provided with incorrect information about possible immigration consequences of a plea agreement or who were not provided with information at all. As the *Padilla* Court pointed out, there is no reason that, in times like this, where immigration law is undergoing dramatic changes,[159] counsel should not have to inform his or her clients about possible deportation as a result of them accepting certain plea agreements.[160] This severely prejudices the criminal defendants because, in some cases, they would not accept a deal knowing these possible deportation consequences, and could take their chances at trial.

Additionally, positive effects on the legal profession are certain to come following the decision of *Padilla*. Requiring defense attorneys to notify their clients of possible deportation consequences will only make their job easier. The *Padilla* Court stated that "[b]y bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."[161] This is evidenced by certain statutes that allow for the deportable criminal defendant to "waive the right to notice and a hearing . . . and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement."[162]

The *Padilla* decision will also likely "encourage closer working relationships between the criminal defense and immigration bars,

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[157] *Id*.

[158] *Id.* at *6 (stating also that *Padilla* "is the application of a well-established old rule").

[159] *Padilla*, 130 S. Ct. at 1478.

[160] *Id.* at 1483-84.

[161] *Padilla*, 130 S. Ct. at 1486. *See also* Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of Padilla v. Kentucky: Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 CRIM. JUST. 36, 40 (2010) (stating that "[t]here is also evidence that prosecutors take the possibility of deportation and other collateral consequences into account in plea negotiations").

[162] *See, e.g.*, 8 U.S.C.A. § 1228(C)(5) (West 2010).

and a better understanding by defense lawyers of what is concededly a complex and uncertain area of the law."[163] Furthermore, prosecutors will benefit from the *Padilla* decision. Prosecutors can recommend deportation instead of a jail sentence in guilty pleas, which is a strategy that has been used before,[164] but by now requiring defense attorneys to inform their clients of the possible deportation consequences, criminal defendants may now be more inclined to accept these guilty pleas. The Court in *Padilla*, like *Hubenig*, cited *St. Cyr*, and concluded that in most cases, these defendants are more concerned with staying in the United States and avoiding jail time.[165] Prior to *Padilla*, the fact that attorneys were not held accountable for failing to disclose possible deportation consequences to their clients, when this is what their clients cared about most, was nonsensical.

If the United States Supreme Court, or the New York Court of Appeals eventually ruled that *Padilla* could not be applied retroactively, and that it only affects future cases, how could one justify this to the criminal defendants, who, prior to *Padilla* were not advised of the possible deportation consequences of their plea? It seems like the only logical and reasonable thing to do is to apply *Padilla* retroactively, just like the *Nunez*, *Bennett*, *Hubenig*, and *Garcia* courts rightfully did.

Adam Hyman[*]

[163] Love & Chin, *supra* note 161, at 40.

[164] *See, e.g.*, State v. Rodriguez, 45 P.3d 541, 547 (Wash. 2002) (explaining that the witness accepted a plea of guilty because the prosecutor suggested deportation as opposed to a jail sentence).

[165] *Padilla*, 130 S. Ct. at 1483; *St. Cyr*, 533 U.S. at 323 ("[P]reserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.").

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