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REDRESS IN STATE POSTCONVICTION PROCEEDINGS FOR INEFFECTIVE CRIMMIGRATION COUNSEL

*Christopher N. Lasch**

INTRODUCTION

In its 2010 decision in *Padilla v. Kentucky*,[1] the U.S. Supreme Court held the Sixth Amendment right to effective assistance of counsel in criminal cases includes the right to receive counsel on whether a guilty plea is accompanied by a risk of deportation.[2] But in 2013, the Court took back some of what it had given. Although most *Padilla* claims properly arise in postconviction litigation initiated after the expiration of direct review,[3] in *Chaidez v. United States* the Court held that *Padilla* had announced a "new rule" of constitutional criminal procedure that would not be retroactively applied to cases already final on direct review.[4]

The Supreme Court has been clear, however, that its *Teague*[5] antiretroactivity rule—the rule the Court applied in *Chaidez* to bar ret-

* Assistant Professor, University of Denver Sturm College of Law; J.D., Yale Law School; A.B., Columbia College. My thanks go to Denver Law for my pre-tenure leave, during which significant work was accomplished on this Article. I also owe a special debt to César Cuauhtémoc García Hernández, who invited me to participate in an online symposium on *Chaidez*, for his blog *crImmigration*. I learned a great deal from the other symposium panelists, and gained special insight into *Chaidez* in the process of crafting my three posts: *Symposium:* Chaidez *and the Crumbling Foundations of the* Teague *Rule*, CRIMMIGRATION (Nov. 1, 2012, 4:04 AM), http://crimmigration.com/2012/11/01/chaidez-and-the-crumbling-foundations-of-the-teague-rule.aspx; *Symposium:* Chaidez*—An Opportunity for the Court to Continue Its Path Away from "Antitretroactivity" and Toward "Redressability,"* CRIMMIGRATION (Nov. 5, 2012, 4:01 AM), http://crimmigration.com/2012/11/05/symposium-chaidezan-opportunity-for-the-court-to-continue-its-path-away-from-antiretroactivity-and-toward-redressability.aspx; Chaidez*: Ignoring Precedent & Procedural Posture*, CRIMMIGRATION (Feb. 26, 2013, 9:04 AM), http://crimmigration.com/2013/02/26/chaidez-ignoring-precedent—procedural-posture.aspx. I am also indebted to Giovanna Shay, who contributed valuable suggestions and insights. Finally, my exploration of *Padilla*'s retroactivity while authoring, as counsel of record, a number of amicus briefs on behalf of legal scholars during 2013 and 2014 (including on the *Baret*, *Ramirez*, *Sylvain*, and *Thiersaint* cases discussed herein), was deeply informed and constantly renewed by my thoughtful clients. Of course, any problems that remain are solely my own.

1. Padilla v. Kentucky, 559 U.S. 356 (2010).
2. *Id.* at 374.
3. *See infra* Part IV.A.2.b.
4. Chaidez v. United States, 133 S. Ct. 1103 (2013).
5. Teague v. Lane, 489 U.S. 288 (1989).

roactive application of *Padilla*—does not bind the states.[6] Instead, states are free to craft their own rules for determining when the violation of a "new" constitutional rule will entitle a defendant to redress in state postconviction proceedings.[7] As of this writing, the highest courts in eight states have addressed *Padilla* retroactivity after *Chaidez*,[8] and two others—in Connecticut[9] and New York[10]—are currently considering the question. This Article explains why state courts

6. Danforth v. Minnesota, 552 U.S. 264 (2008).

7. *See id.* at 282.

8. Massachusetts determined, as a matter of state law, that *Padilla* did not announce a "new" constitutional rule, and therefore the state's antiretroactivity rule was not implicated. Commonwealth v. Sylvain, 995 N.E.2d 760, 770 (Mass. 2013) (discussed *infra* Part IV.B.1). New Mexico recently joined Massachusetts in holding that the right to effective crimmigration counsel is not new. Ramirez v. State, No. 33,604, 2014 WL 2773025 (N.M. June 19, 2014) (discussed *infra* notes 242–254 and accompanying text). Iowa, Maryland, Nebraska, South Carolina, South Dakota, and Texas, consistent with *Chaidez*, held that *Padilla* is not retroactive. Trong Duc Luong Nguyen v. State, No. 11-0549, 2013 WL 1170326, at *2 (Iowa Mar. 22, 2013) (per curiam); Miller v. State, 77 A.3d 1030 (Md. 2013); State v. Osorio, 837 N.W.2d 66, 69–70 (Neb. 2013); Hamm v. State, 744 S.E.2d 503, 505 (S.C. 2013); State v. Garcia, 834 N.W.2d 821, 826 (S.D. 2013); *Ex Parte* De Los Reyes, 392 S.W.3d 675, 676 (Tex. Crim. App. 2013). The Maryland decision in *Miller* was particularly noteworthy, as it overturned the Court of Appeals' pre-*Chaidez* decision *Denisyuk v. State*, which held, as a matter of state law, that *Padilla* should be retroactively applied in all cases involving a guilty plea after April 1, 1997, the effective date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which *Padilla* identified as "dramatically rais[ing] the stakes of a noncitizen's criminal conviction." Denisyuk v. State, 30 A.3d 914, 925 (Md. 2011) (quoting Padilla v. Kentucky, 559 U.S. 356, 364 (2010)).

Nevada has touched on the issue of *Padilla* retroactivity only in unpublished opinions that lack precedential value. It is unclear whether it is significant that although prior to *Chaidez* the Supreme Court of Nevada scrupulously avoided reaching the merits of *Padilla* retroactivity, *e.g.*, Canedo v. State, No. 58992, 2012 WL 1252964 (Nev. Apr. 11, 2012); Velasco v. State, No. 59403, 2012 WL 1655978 (Nev. May 9, 2012), after *Chaidez* the court has explicitly stated (in unpublished opinions) that *Padilla* is not retroactive. *E.g.*, Frias v. State, No. 60641, 2013 WL 1092449 (Nev. Mar. 14, 2013); Leon v. State, No. 61816, 2013 WL 3231638 (Nev. June 13, 2013). *But cf.* Trujillo v. State, 310 P.3d 594, 596 (Nev. 2013) (published decision in which the Nevada Supreme Court left unaddressed the lower court's conclusion that *Padilla* applies retroactively).

In a case decided prior to *Chaidez*, the New Jersey Supreme Court determined as a matter of state law that *Padilla* would not be retroactively applied. State v. Gaitan, 37 A.3d 1089, 1109 (N.J. 2012), *cert. denied*, 133 S. Ct. 1454 (2013). The court noted, however, that New Jersey precedent predating *Padilla* recognized that counsel who provides affirmative misadvice to a client about the immigration consequences of a criminal conviction may render ineffective assistance of counsel. *Id.* at 1109. Thus, the court recognized that *Padilla* retroactivity was only at issue to the extent *Padilla* enlarged the right to effective assistance of counsel. *Id.*; *cf.* Medina v. State, No. 59491, 2012 WL 4041326 (Nev. Sept. 12, 2012) (citing Rubio v. State, 194 P.3d 1224, 1232 (2008)); People v. Kazadi, 284 P.3d 70, 73 (Colo. App. 2011) (noting that "even if *Padilla* announced a new rule under federal law, Colorado law . . . has long recognized the very duties that the Supreme Court discussed in *Padilla*"), *aff'd*, 291 P.3d 16 (Colo. 2012); *see also* Jeffrey L. Fisher & Kendall Turner, *The Retroactivity of* Padilla *After* Chaidez v. United States, CHAMPION, Mar. 2013, at 43, 44 (arguing that "defendants who can show that their attorneys misled them regarding deportation consequences of their pleas can argue that they are entitled to relief on collateral review, notwithstanding *Chaidez*").

9. In *Thiersaint v. Warden*, No. CV104003350S, 2012 WL 6786081, at *11 (Conn. Super. Ct. Dec. 7, 2012), the state habeas court held *Padilla* should be retroactively applied. The warden

considering claims properly raised for the first time in state postconviction proceedings should grant redress for violations of the *Padilla* rule.[11]

Part II discusses "crimmigration" and the rise of the right to effective crimmigration counsel. Crimmigration—the expanded linking of the criminal and immigration justice systems since 1986—was the backdrop for the *Padilla* decision holding that the Sixth Amendment requires defense counsel to provide adequate advice concerning the immigration consequences of a criminal plea.[12] Part III recounts how the Court lost its will to enforce the *Padilla* right, as evidenced by the *Chaidez* decision holding the *Padilla* rule would not be retroactively applied to convictions already final when *Padilla* was announced. Understanding *Chaidez* requires some background, Part III first examines the Supreme Court's *Griffith* and *Teague* rules for applying "new" rules of constitutional criminal procedure, briefly discussing the theoretical underpinnings of those rules, and then turns to the Court's reframing of retroactivity as "redressability" in *Danforth v. Minnesota*. The final subpart of Part III discusses the Court's decision in *Chaidez* holding *Padilla* to be a new rule subject to *Teague*'s bar on applying such new rules in collateral attack proceedings.

Part IV briefly introduces two of the cases in which *Padilla* retroactivity was recently litigated in state supreme courts, and then examines the specific ways in which the policies underlying the *Griffith*/*Teague*

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appealed, No. AC 35371 (Jan. 23, 2013), and the appeal was transferred to the Connecticut Supreme Court, No. SC 19134, on April 15, 2013. The case was argued on April 29, 2014.

10. In *People v. Baret*, 952 N.Y.S.2d 108 (App. Div. 2012), New York's First Department concluded that

> *Padilla* did not establish a "new" rule under *Teague*; rather, it followed from the clearly established principles of the guarantee of effective assistance of counsel under *Strickland* and "merely clarified the law as it applied to the particular facts." Rather than overrule a clear past precedent, *Padilla* held that *Strickland* applies to advice concerning deportation, whether it be incorrect advice or no advice at all.

Id. at 110 (citations omitted) (quoting United States v. Orico, 645 F.3d 630, 639 (3d Cir. 2011)). The New York Court of Appeals granted the prosecution's application for leave to appeal on June 5, 2013. People v. Baret, 993 N.E.2d 1275 (N.Y. 2013). The case was argued on May 1, 2014.

11. For other treatments of this question, see, for example, Rebecca Sharpless & Andrew Stanton, Teague *New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of* Padilla*,* Chaidez *and* Martinez, 67 U. MIAMI L. REV. 795 (2013); Fisher & Turner, *supra* note 8; Kara B. Murphy, Comment, *Representing Noncitizens in Criminal Proceedings: Resolving Unanswered Questions in* Padilla v. Kentucky, 101 J. CRIM. L. & CRIMINOLOGY 1371 (2011); Alison Syré, Note, Padilla v. Kentucky*: Bending Over Backward for Fairness in Noncitizen Criminal Proceedings*, 20 J.L. & POL'Y 677 (2012).

12. I use the terms "crimmigration advice" or "crimmigration counsel" to refer to the lawyer's performance in counseling her client with respect to the immigration consequences of a criminal conviction.

rules are different when applied in state postconviction proceedings. Because the finality concerns driving the *Teague* antiretroactivity rule are either absent or weakly present, and because the concerns underlying the *Griffith* rule of redressability—concerns with providing a forum for constitutional claims and treating similarly situated litigants equally—are strongly present, Part IV concludes that the *Griffith* rule, and not the *Teague* rule, should govern in state postconviction proceedings.

Part V considers a question left open in *Chaidez*: whether the *Padilla* rule should be considered a "watershed" rule, subject to an exception on *Teague*'s bar to redress.[13] Because *Padilla* should be considered a watershed rule, even state courts that adhere to *Teague* ought to grant redress for violations of the *Padilla* rule, even if the violation predated *Padilla.* Part VI concludes by briefly examining how the crimmigration context in which *Padilla* retroactivity is being litigated may impact judicial decision making.

II. Crimmigration and the Right to Effective Crimmigration Counsel

A. The Rise of Crimmigration

In 2006, Juliet Stumpf coined the term "crimmigration," describing the "merger" of criminal law and immigration law that had been occurring with increased intensity since the late 1980s as a "crimmigration crisis."[14] Crimmigration has many facets,[15] but the one that ultimately caught the Court's eye in *Padilla* was the harnessing of the

13. *See* Chaidez v. United States, 133 S. Ct. 1103, 1107 n.3 (2013).

14. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*]. For other scholarly contributions to the "crimmigration" literature, see, for example, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. Rev. 1705, 1720–21 (2011); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 Colum. L. Rev. Sidebar 135 (2009) [hereinafter Chacón, *Managing Migration*]; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn. L. Rev. 1827 (2007); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. Chi. Legal F. 317, 321–24; Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281 (2010); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. Int'l L. & Com. Reg. 639 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. Third World L.J. 81 (2005); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 Geo. Immigr. L.J. 611 (2003).

15. Jennifer Chacón, for example, describes "three distinct trends: the increasingly harsh criminal consequences attached to violations of laws regulating migration, the use of removal as an adjunct to criminal punishment in cases involving noncitizens, and the rising reliance on criminal

criminal justice system by the immigration justice system.[16] Between 1986 and 2009 (the year before *Padilla* was decided), deportations jumped from 24,592 to 393,289.[17] This tenfold rise in deportations was largely made possible by the construction of an effective pipeline from the criminal justice system to the immigration system. While in 1986 criminal violations resulted in only 1,978 deportations (accounting for about 3% of total deportations),[18] in 2009 that number had grown nearly 65 times, with 128,345 criminally based deportations[19] (accounting for nearly 33% of the total).[20] The legal structures of this pipeline included both an increase in the number of crimes considered grounds for deportation and the creation of legal mechanisms for shuttling immigrants from the hands of criminal justice officials into those of immigration officials.

Stumpf and others have thoroughly documented the steady proliferation of criminal grounds for deportation since 1988.[21] The Anti-Drug Abuse Act of 1988 created the "aggravated felony" category of crimes that trigger deportation, and Congress has repeatedly expanded the definition.[22] And in 1996, Congress made drug crimes, and even a single "crime involving moral turpitude," deportable offenses.[23] While widening the net to bring many more criminal defendants into immigration proceedings, Congress also took steps to limit the discretion of immigration officials, both with respect to the detention of sus-

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law enforcement actors and mechanisms in civil immigration proceedings." Chacón, *Managing Migration*, *supra* note 14, at 135–36 & nn.2–4 (footnotes omitted).

16. César Cuauhtémoc García Hernández, in his article *Criminal Defense After* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 479–87 (2012), puts *Padilla* in its context more thoroughly than I do here, and I commend readers to his analysis.

17. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 95 tbl.36 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

18. MARY DOUGHERTY ET AL., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2004, at 6 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf.

19. OFFICE OF IMMIGRATION STATISTICS, *supra* note 17, at 103 tbl.38.

20. In fiscal year 2011, criminally based deportations had risen to 48%. JOHN SIMANSKI & LESLEY M. SAPP, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2011, at 6 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

21. *See, e.g.*, Stumpf, *The Crimmigration Crisis*, *supra* note 14, at 382–84; Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 655–57 (2011).

22. Stumpf, *The Crimmigration Crisis*, *supra* note 14, at 383 (citing Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469).

23. *Id.* (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1277 (codified at 8 U.S.C. § 1227(a)(2)(A)(i) (2012)); *see also* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 148 (2013).

pected immigration violators[24] and with respect to various forms of discretionary relief from deportation.[25]

At the same time, Congress and the Executive Branch created the legal structures of the criminal-to-immigration pipeline.[26] In 1996, Congress enacted legislation allowing agreements between the federal government and local law enforcement agencies that essentially deputize local officials to act as immigration officials.[27] These "287(g) agreements"[28] were of two types: jail agreements, whereby jail officials were deputized; and task force agreements, whereby police officers were deputized.[29] Although 287(g) agreements rose in popularity following the terrorist attacks of September 11th, due in part to the federal government's "determination . . . to enlist state and local police in the routine enforcement of federal immigration laws, criminal and civil alike,"[30] at the end of 2012 the federal government essentially abandoned the task force 287(g) model,[31] reportedly based on the superior efficacy of another criminal-to-immigration pipeline program, "Secure Communities."

Secure Communities, launched in March 2008, had as its stated purpose the focusing of deportation resources on immigrants who committed serious crimes.[32] The program targets for immigration enforcement prisoners awaiting trial or serving sentences for local,

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24. Das, *supra* note 23, at 147–48.

25. *See, e.g.*, Vázquez, *supra* note 21, at 656–57; Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 146–47 (2012).

26. *See, e.g.*, Vázquez, *supra* note 21, at 657–60; Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1763–67 (2013) (detailing programs that "increase Immigration and Customs Enforcement (ICE) access to state and local defendants"); Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1172–81 (2012) (same).

27. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009, 3009-563 to -564 (codified at 8 U.S.C. § 1357(g) (2012)).

28. The agreements are known as "287(g) agreements" because they are authorized by section 287(g) of the Immigration and Nationality Act. 8 U.S.C. § 1357(g).

29. Banks, *supra* note 26, at 1174–76.

30. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085 (2004); *see also* Banks, *supra* note 26, at 1174 (documenting proliferation of 287(g) agreements mostly during 2007–08).

31. *See* U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2013, at 16 (2013), *available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf (reducing the 287(g) budget by $17 million and indicating the federal government would suspend consideration of requests for new 287(g) agreements); *see also* Michele Waslin, *ICE Scaling Back 287(g) Program*, IMMIGR. IMPACT (Oct. 19, 2012), http://www.immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program/.

32. Press Release, U.S. Immigration and Customs Enforcement, ICE Unveils Sweeping New Plan To Target Criminal Aliens in Jails Nationwide: Initiative Aims To Identify and Remove Criminal Aliens From All U.S. Jails and Prisons (Mar. 28, 2008), *available at* http://www.ice.gov/news/releases/0803/080328washington.htm.

state, or federal crimes. It works by linking federal crime, immigration, and fingerprint databases. Under Secure Communities, when local law enforcement officials submit booking fingerprints to the FBI for criminal background checks, these fingerprints are then transmitted by the FBI to the Department of Homeland Security (DHS). DHS then determines which prisoners to target for immigration enforcement[33] and uses immigration "detainers" to gain custody of them.[34]

Before 1987, an immigration detainer served merely to notify jail or prison officials of federal immigration officials' interest in a prisoner, and to request that federal immigration officials be notified before release of the targeted prisoner.[35] But in 1987, the Executive Branch enacted federal regulations that appeared to *require* agencies receiving an immigration detainer to maintain custody of the targeted prisoner for up to forty-eight hours after his or her release date, to allow time for immigration officials to arrive and take custody.[36] Secure Communities has increased tenfold the use of immigration detainers as an enforcement tool,[37] and the United States now issues approxi-

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33. David J. Venturella, *Secure Communities: Identifying and Removing Criminal Aliens*, POLICE CHIEF, Sept. 2010, at 40, 43–44, http://www.nxtbook.com/nxtbooks/naylor/CPIM0910/index.php#/40.

34. I have discussed immigration detainers, and some of the legal problems associated with their use, elsewhere. *See generally* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority To Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008) [hereinafter Lasch, *Enforcing the Limits*]; Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149 (2013) [hereinafter Lasch, *Rendition Resistance*]; Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281 (2013) [hereinafter Lasch, *Preempting Detainers*]; Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629 (2013) [hereinafter Lasch, *Detainers After* Arizona].

35. See Form I-247 (March 1, 1983) (on file with the author) ("IT IS REQUESTED THAT YOU: . . . [n]otify this office of the time of release at least 30 days prior to release or as much in advance of release as possible."); *see also* Fernandez-Collado v. INS, 644 F. Supp. 741, 743 n.1 (D. Conn. 1986) (describing immigration detainer as "merely a method of advising the prison officials to notify the I.N.S. of the petitioner's release or transfer").

36. 8 C.F.R. § 287.7(d) (2014) (stating that a local law enforcement agency receiving an immigration detainer "*shall maintain custody* of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department" (emphasis added)). *See generally* Lasch, *Enforcing the Limits*, *supra* note 34, at 182–85 (describing the history of the current regulatory regime). While some courts had held the use of "shall" in the regulation rendered it mandatory upon state officials, *e.g.*, Rios-Quiroz v. Williamson Cnty., No. 3-11-1168, 2012 WL 3945354, at *4 (M.D. Tenn. Sept. 10, 2012), the Third Circuit rejected this conclusion, holding that "settled constitutional law clearly establishes that [immigration detainers] must be deemed requests." Galarza v. Szalczyk, 745 F.3d 634, 643 (3d Cir. 2014).

37. ICE placed 14,803 immigration detainers in fiscal year 2007 and 20,339 in fiscal year 2008. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2008, at 36 (2008), *available at* http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf; U.S. DEP'T OF HOMELAND SEC.,

mately 250,000 immigration detainers each year.[38] Detainers are perhaps the single most important mechanism feeding the criminal-to-immigration pipeline and driving the record numbers of deportations seen in recent years.[39]

Crimmigration and its accompanying explosion in the number of people being funneled from the criminal justice system into the immigration system have troubling racial aspects, which scholars have noted. Like the criminal justice system,[40] the immigration justice system disproportionately impacts people of color.[41] Crimmigration's

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BUDGET-IN-BRIEF: FISCAL YEAR 2009, at 35 (2009), *available at* http://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf. In fiscal years 2009 and 2010, ICE issued 234,939 and 239,523 detainers respectively, or approximately 20,000 per month. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2011, at 63 (2011), *available at* http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf; U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2012, at 79 (2012), *available at* http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf.

38. The numbers listed above for fiscal years 2009 and 2010, *supra* note 37, are from ICE's Criminal Alien Program. Other ICE programs may make the number of detainers issued even greater. *See* Complaint for Injunctive and Declaratory Relief and Petition for Writ of Habeas Corpus at ¶ 28, Moreno v. Napolitano, No. 11-cv-05452, 2012 WL 5995820 (N.D. Ill. Nov. 30, 2012) (alleging 270,988 detainers were issued in fiscal year 2009).

39. *See* Elise Foley, *Deportation Hits Another Record Under Obama Administration*, HUFFINGTON POST (Dec. 21, 2012), http://www.huffingtonpost.com/2012/12/21/immigration-deportation_n_2348090.html (discussing Press Release, U.S. Immigration & Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance To Further Focus Resources (Dec. 21, 2012), *available at* http://www.ice.gov/news/releases/1212/121221washingtondc2.htm) (noting 409,849 deportations in FY2012 and 396,906 in FY2011).

40. *See generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010); MARC MAUER, SENTENCING PROJECT, RACE TO INCARCERATE (1999).

41. *See, e.g.*, KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 13–53 (2004) (describing the historical relationship between immigration enforcement and racial subordination); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, etc.)*, 13 CHAP. L. REV. 583, 608–13 (2010); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998) (describing the roots of immigration law's plenary power doctrine—which permits racial discrimination, in the nineteenth century race-based laws—and arguing that the "Supreme Court's immigration jurisprudence represents the last vestige of an antique period of American law"); Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 CAP. U. L. REV. 13, 27–34 (1998); García Hernández, *supra* note 16, at 480–83 (tracing crimmigration's history to nineteenth century "racist displeasure with Chinese immigrants"); Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447, 449 (2006) (analyzing a five-day immigration raid in Chandler, Arizona, to conclude that "Latinos (particularly dark-complected, poor, and working class) are at risk before the law").

connection of these two systems operates as a "force multiplier"[42] of racial disparity in the areas of both enforcement and detention.

On the enforcement side, for example, the existence of a pipeline from local criminal justice systems into the federal immigration system raises fears that the immigration "tail" will wag the criminal enforcement "dog" and lead to ubiquitous racial profiling.[43] And on the de-

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42. This sinister term was originally coined by Kris Kobach to advocate in favor of crimmigration. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179 (2006). Kobach argued that state and local police officers have "inherent authority" to enforce immigration laws, and suggested that harnessing state and local law enforcement would operate as a "force multiplier" to assist "[b]eleaguered ICE agents," *id.* at 234, that might "mean the difference between success and failure in enforcing the nation's immigration laws generally." *Id.* at 181. Kobach attempted to link immigration enforcement and national security, suggesting that had his "force multiplier" been in place, "several terrorists might have been arrested, and the 9/11 plot might have unraveled." *Id.* at 235. Here, I attempt to give the term a more appropriate usage.

43. Critics of the federal government's detainer practices have raised concern that local police agencies engage in racial profiling, making arrests "for the sole purpose of having the individual's immigration status checked" and "on charges they never intend to pursue." AM. CIVIL LIBERTIES UNION ET AL., COMMENTS ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DRAFT DETAINER POLICY 15 (2010), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf. Studies suggest the fear is not ill-founded. Analysis of arrests in Irving, Texas, indicated that when local officials' access to immigration officials who could place immigration detainers expanded, discretionary arrests of Hispanics for low-level misdemeanors spiked. Trevor Gardener II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* 4–6 (Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity, U.C. Berkeley Law School, Policy Brief Sept. 2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (observing correlation between issuance of detainers and profiling of Latinos in Irving, Texas). After community protests against racial profiling caused ICE to announce that it would no longer screen individuals arrested for petty offenses, the discretionary arrest rate for Hispanics declined. *Id.* at 5–6. Similarly, a study of the 287(g) program's implementation in North Carolina revealed

> [a]necdotal evidence and other data suggest[ing] that § 287(g)-deputized law enforcement officers in some North Carolina counties are violating legal standards and engaging in racial profiling by stopping motorists in the community who appear to be Hispanic/Latino. . . . Concerns mount daily that law enforcement officers equate Hispanic last names and appearances with criminality and use national origin and ethnicity without probable cause or reasonable suspicion to stop and detain residents.

AM. CIVIL LIBERTIES UNION OF N.C. LEGAL FOUND. & IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNIV. OF N.C. AT CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(g) PROGRAM IN NORTH CAROLINA 44 (2009), *available at* http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf. Other examples abound. In Atherton, California, located in San Mateo County, where the sheriff works "hand in hand" with federal immigration officials and honors all federal immigration detainers, *see* Bob Egelko, *Sheriffs Divided on Immigration Policy*, SFGATE (Dec. 6, 2012), http://www.sfgate.com/bayarea/article/Sheriffs-divided-on-immigration-policy-4098509.php, an informal study found that 175 of 182 drivers ticketed from February to July 2013 had Hispanic last names. Christina Sterbenz, *Engineer Finds Evidence of Supposed Discrimination in Rich San Francisco Suburb*, BUS. INSIDER (Aug. 7, 2013, 5:43 PM), http://www.businessinsider.com/kent-brewster-analyzes-atherton-police-blotter-2013-8. And a report examining law enforcement practices in Bedford County, Tennessee concluded that "[i]mmigrants are targeted at disproportionate rates by officers of Bedford County law enforcement agencies, particularly the Shelbyville Police Department, as a

tention side, with mass incarceration in the criminal justice system having been identified by Michelle Alexander as the "New Jim Crow,"[44] crimmigration—which puts detentive force behind "anti-immigration policy both at the state and federal level"—is the obvious "next frontier in the incarceration of black and brown bodies."[45] It is no surprise that immigrant detainees are the fastest growing segment of America's huge incarcerated population,[46] with some 90% of detained immigrants hailing from Mexico, Central America, or the Caribbean.[47]

This, then, was the backdrop for the Court's decision in *Padilla v. Kentucky*.

B. Padilla *and the Right to Effective Crimmigration Counsel*

Jose Padilla, born in Honduras in 1950, came to the United States in the 1960s as a teenager.[48] Aside from a single two-week visit, Padilla never again returned to Honduras.[49] He became a lawful permanent resident, served the United States in Vietnam, and was honorably discharged from military service.[50] He was married twice, with two adult children from the first marriage and one from the second.[51] He made his home in California with his family—his second wife, three disabled children, and mother-in-law.[52]

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pretext for making arrests that will enable jailers to contact ICE." SARAH WHITE & SALMUN KAZEROUNIAN, TENN. IMMIGRANT & REFUGEE RIGHTS COAL., THE FORGOTTEN CONSTITUTION: RACIAL PROFILING AND IMMIGRATION ENFORCEMENT IN BEDFORD COUNTY, TENNESSEE 6 (2011), *available at* http://www.tnimmigrant.org/storage/The%20Forgotten%20Constitution.pdf.

44. *See generally* ALEXANDER, *supra* note 40.

45. Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*, 48 CAL. W. L. REV. 351, 358 (2012).

46. Robert Koulish, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 477 (2008) (noting the "close nexus . . . between immigrant detention policies and the new boom market in private detention"); *see also* Vargas-Vargas, *supra* note 45, at 366–67 ("There is no question that brown bodies are serving as another very real and profound source for mass incarceration, and such incarceration is legally sanctioned via this notion of immigration reform.").

47. DORA SCHIRIRO, IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

48. Brief of Petitioner at 8, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651); *see also* Padilla v. Commonwealth (*Padilla II*), 381 S.W.3d 322, 329 (Ky. Ct. App. 2012).

49. *Padilla II*, 381 S.W.3d at 329.

50. *Id.* at 324; *see also* Joint Appendix at 72, *Padilla*, 559 U.S. 356 (No. 08-651), 2009 WL 1499270 (RCr 11.42 motion).

51. *Padilla II*, 381 S.W.3d at 324.

52. *Id.*

Mr. Padilla obtained his commercial driver's license in Nevada[53] and made his living as a self-employed truck driver.[54] He owned his own 18-wheeler, a 1995 Freightliner.[55] On September 17, 2001, at a weigh station off Interstate 65 in Elizabethtown, Kentucky, an inspector noticed that Padilla did not have a proper "weight and distance tax number" (KYU number) on his truck, and believed Padilla appeared nervous.[56] A consent search of the truck's cab revealed a "pipe filled with marijuana and rolling papers,"[57] and Padilla was arrested for possession of marijuana and drug paraphernalia. A search of the tractor-trailer after Padilla's arrest revealed over 1,000 pounds of marijuana,[58] and Padilla was charged with trafficking in marijuana in addition to the other charges.[59]

Padilla pleaded not guilty and was initially released on bond. On September 19, 2001, however, "after telephonic request of the Motor Vehicle Enforcement" the judge ordered sua sponte that Padilla's bond be revoked and that he be held without bail, "as defendant is believed to be an illegal alien and is awaiting deportation by the Federal authorities."[60] On September 20, federal immigration officials in Louisville transmitted to the Hardin County jail a Form I-247 immigration detainer, advising Padilla's jailers that "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States" and that "Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien."[61]

Padilla remained in jail for the next year as he defended his case.[62] On August 22, 2002, the day he was scheduled to go to trial, he accepted a plea agreement.[63] He pleaded guilty to the felony charge of trafficking in marijuana and misdemeanor charges of possession of marijuana and possession of drug paraphernalia.[64] He was sentenced on September 17, 2002, in accordance with the plea agreement, to a

53. Joint Appendix, *supra* note 50, at 79, 84.

54. *Padilla II*, 381 S.W.3d at 327.

55. Joint Appendix, *supra* note 50, at 67.

56. *Padilla II*, 381 S.W.3d at 327; *see also* Joint Appendix, *supra* note 50, at 47–48 (indictment).

57. Joint Appendix, *supra* note 50, at 48 (indictment).

58. *Id.* at 48–49.

59. *Id.* at 47–49.

60. *Id.* at 43 (order); *see also* Brief of Petitioner, *supra* note 48, at 8–9.

61. Joint Appendix, *supra* note 50, at 44–46 (Form I-247 immigration detainer).

62. Brief of Petitioner, *supra* note 48, at 9.

63. *Padilla II*, 381 S.W.3d 322, 327 (Ky. Ct. App. 2012).

64. Joint Appendix, *supra* note 50, at 57–60 (Order).

ten-year sentence, with five years to be served and five years to be probated.[65]

In August 2004, Jose Padilla filed a timely postconviction motion to vacate the criminal judgment,[66] alleging his trial lawyer had misadvised him with respect to the immigration consequences of his conviction and thereby rendered ineffective assistance of counsel.[67] Specifically, Padilla alleged his attorney told him that he "did not have to worry about immigration status since he had been in the country so long."[68] To the contrary, Padilla alleged, the Immigration and Nationality Act specified that a conviction like Mr. Padilla's would render him deportable.[69] Finally, Padilla alleged that but for counsel's misadvice, Padilla "would not have plead guilty but would have insisted on going to trial."[70]

The trial court denied Padilla's motion to vacate the judgment, "on the basis that a valid guilty plea does not require that the defendant be informed of every possible consequence of a guilty plea."[71] (The court also noted that Padilla was on notice of the possibility of deportation because of the change in his bond status, which had been caused by the suspicion that Padilla was an immigration violator.)[72] The Kentucky Court of Appeals reversed and remanded for an evidentiary hearing.[73] In so doing, the court of appeals distinguished a recent decision of the Kentucky Supreme Court holding "collateral consequences [such as immigration consequences] are outside the scope of representation required by the Sixth Amendment." The court of appeals held that notwithstanding this general rule, such "gross misadvice" as was alleged by Padilla would justify postconviction relief.[74] The Kentucky Supreme Court reversed, adhering to its categorical rule that "collateral consequences are outside the scope of

65. *Id.* at 61–68 (Judgment and Order Imposing Sentence).

66. Padilla's motion was filed pursuant to Kentucky Criminal Rule 11.42. Such a motion must be filed "within three years after the judgment becomes final," KY. R. CRIM. P. 11.42(10), and Padilla's motion was filed less than two years after his judgment (which he did not appeal).

67. Joint Appendix, *supra* note 50, at 71–74 (RCr 11.42 Motion).

68. *Id.* at 72 (RCr 11.42 Motion).

69. *Id.* (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2012) and its predecessor statute).

70. *Id.* at 72–73 (RCr 11.42 Motion).

71. Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd and remanded*, 559 U.S. 356 (2010).

72. *Id.*

73. *Id.*

74. *Id.* at 483–84 (discussing the Court of Appeals' distinguishing of *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005)).

the guarantee of the Sixth Amendment right to counsel."[75] The U.S. Supreme Court granted certiorari.[76]

Padilla thus confronted the Supreme Court with all the hallmarks of crimmigration—a Latino criminal defendant held in pretrial detention because of an immigration detainer, which would then funnel him into an immigration system, having already been branded by his criminal conviction as deportable and ineligible for any form of discretionary relief.[77] Quite remarkably, the Court grounded its holding in these very realities of crimmigration law, indicating by the very first paragraph of its analysis it would give them dispositive weight:

> The landscape of federal immigration law has changed dramatically over the last 90 years. 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. The "drastic measure" of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.[78]

After recounting the history in some detail, in essence describing the criminal-to-immigration pipeline described here,[79] the Court concluded that "[t]hese changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[80] The Court explained that the "inevitable"[81] nature of the pipeline means there is no meaningful distinction between those consequences occurring on the criminal end of the pipeline and those occurring on the immigration end of the pipeline. Because "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders[,] . . . we find it 'most difficult' to divorce the penalty from the conviction in the deportation context."[82] The very nature of crimmigration, then, led the Court to reject the direct-versus-collateral-consequences analysis and conclude that the Court's

75. *Id.* at 485. A number of lower courts had held "collateral consequences" to be beyond the Sixth Amendment's reach. *See Padilla*, 559 U.S. at 365 n.9 (collecting cases). But some state courts had recognized counsel's duty to provide effective crimmigration counsel. *See, e.g.*, People v. Pozo, 746 P.2d 523 (Colo. 1987); State v. Paredez, 101 P.3d 799 (N.M. 2004).

76. Padilla v. Kentucky, 555 U.S. 1169 (2009).

77. *See* Brief of Petitioner, *supra* note 48, at 5–7 (identifying Padilla's drug trafficking offense as an "aggravated felony" which rendered him both deportable and ineligible for relief).

78. *Padilla*, 559 U.S. at 360 (citation omitted).

79. *Id.* at 360–64.

80. *Id.* at 364 (footnote omitted).

81. *Id.* at 360.

82. *Id.* at 366 (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)).

longstanding Sixth Amendment jurisprudence applied with full force.[83]

In particular that jurisprudence was the test for ineffective assistance of counsel set forth in the Court's 1984 decision in *Strickland v. Washington*.[84] Of the two parts of the *Strickland* test, the *Padilla* Court concerned itself only with the first—"whether counsel's representation 'fell below an objective standard of reasonableness.'"[85] The Court noted this test is one of "prevailing professional norms," which are "necessarily linked to the practice and expectations of the legal community."[86] The Court then drew upon authorities spanning from 1993 to 2009, all requiring defense counsel to advise their clients as to immigration consequences of a criminal conviction,[87] in determining that counsel is obligated to provide such advice.[88] The Court also relied upon these longstanding professional norms to rebuff the suggestion that applying *Strickland* to cases involving immigration consequences would loose the floodgates of litigation.

> It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.[89]

Finding the deficient performance prong of the *Strickland* test easily met, the Court left application of the second prong of the *Strickland*

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83. *Id.* ("We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.").

84. Strickland v. Washington, 466 U.S. 668 (1984).

85. *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 688).

86. *Id.* (quoting *Strickland*, 466 U.S. at 688).

87. *Id.* at 366–69.

88. As César Cuauhtémoc García Hernández has pointed out, "[a]ll, however, is not perfect" with the *Padilla* application of *Strickland* in the context of providing crimmigration advice. César Cuauhtémoc García Hernández, Strickland-*Lite:* Padilla*'s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 849 (2013). The *Padilla* Court adopted a two-tiered duty for defense counsel. In cases where the immigration consequences of a conviction are "truly clear," defense counsel must convey those consequences. *Id.* at 851 (quoting *Padilla*, 559 U.S. at 369). But if "the law is not succinct and straightforward," counsel need only advise her client that a conviction "may carry a risk of adverse immigration consequences." *Id.* (quoting *Padilla*, 559 U.S. at 381). This "'*Strickland*-lite' duty to investigate immigration consequences allows an attorney to cease investigation for reasons completely unrelated to a calculation that further investigation would yield the defendant no additional benefit. . . . Nowhere else in the duty-to-investigate case law can one find such an end point." *Id.* at 851–52.

89. *Padilla*, 559 U.S. at 372 (citations omitted) (citing *Strickland*, 466 U.S. at 689).

test—prejudice flowing from counsel's deficient performance—for the Kentucky courts on remand.[90]

It is worth briefly recounting the next chapter in Jose Padilla's story because it well illuminates some of the realities of the plea bargaining process and the concomitant challenges in effectuating *Padilla*'s right to effective crimmigration counsel.[91] The evidentiary hearing conducted by the Kentucky trial court revealed that Padilla's attorney believed that Padilla was "an illegal alien," and had no idea Padilla was a lawful permanent resident. As Padilla's counsel before the U.S. Supreme Court pointed out, Padilla's trial counsel did nothing to disabuse the trial court of its misimpression that Padilla was "believed to be an illegal alien," upon which the trial court rested its order revoking bail and holding Padilla without bond.[92] Counsel's failure even to understand his client's immigration status may have resulted in his pretrial detention and contributed to Padilla's willingness to plea bargain.[93] This is particularly likely given that Mr. Padilla testified he believed he would be released on parole as a result of the plea bargain.[94]

Padilla's attorney believed—also incorrectly—"that because Padilla was a veteran who had lived in the United States for over forty years, he would not be deported."[95] He conveyed this to Padilla and to Padilla's wife, Ingrid.[96] On the day of Padilla's scheduled trial, his counsel urged Ingrid to persuade Padilla to accept the plea offer.[97] She did so, believing that he would not be deported and that he would be eligible for parole.[98] Padilla's daughter Yoshii also contributed to Padilla accepting the plea. Although he had previously maintained his

90. *Id.* at 369.

91. *See generally* Yolanda Vázquez, *Realizing* Padilla*'s Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169 (2011).

92. Brief of Petitioner, *supra* note 48, at 8–9.

93. *See* Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 400 (2012) (noting that studies have linked time defendants spend in pretrial detention to increased willingness to plea bargain); *see also* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 240 (2007) ("A large proportion of defendants thus make the decision to plead guilty not while they remain 'on the street' but from behind bars, minimizing the perception of a guilty plea as a loss from the status quo baseline.").

94. *Padilla II*, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012); *see also* Covey, *supra* note 93, at 240 ("Where the expected sentence following a guilty plea is time served, and the cost of holding out for a trial is continued detention, the perception that a guilty plea is a gain and trial a loss is virtually overwhelming.").

95. *Padilla II*, 381 S.W.3d at 327.

96. *Id.* at 327–28.

97. *Id.* at 328.

98. *Id.*

innocence[99] and rejected a similar offer, Padilla accepted the plea offer on the day of trial because both Ingrid and Yoshii were "distraught over his potential prison sentence."[100] Padilla testified that had he known that his plea would render him deportable, "he would have insisted on a trial because deportation was the same as 'putting a gun' to his head."[101]

The Kentucky trial court denied Padilla's postconviction motion, holding it would have been irrational for Padilla to proceed to trial given the evidence against him: "A rational defendant would not have risked a sentence of ten years by insisting on going to trial in this case."[102] Fortunately, the *Padilla* Court, cognizant of the criminal-to-immigration pipeline, had squarely confronted the fact that given the realities of crimmigration, the immigration consequences of a particular case might be of far greater importance to a defendant like Jose Padilla than the criminal consequences.[103] The Kentucky Court of Appeals, however, heeded *Padilla*'s teaching that "the noncitizen defendant's right to remain in the United States 'may be more important to the [defendant] than any jail sentence.'"[104] The court found that under the circumstances, Padilla's decision was eminently rational:

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99. *Id.* The trial court held that Padilla could not establish prejudice from his lawyer's misadvice concerning the immigration consequences attendant to a plea, because the evidence of guilt would have made going to trial an irrational choice for Padilla. *Id.* The Kentucky Court of Appeals, however, found that based on all of the evidence, including Padilla's own testimony that he "had no right to inspect the contents of the load he transported and was unaware that he was transporting marijuana," a "reasonable jury could find that Padilla was unaware that the load he transported contained marijuana." *Id.* at 330.

100. *Id.* at 327.

101. *Padilla II*, 381 S.W.3d at 327.

102. *Id.* at 328.

103. Padilla v. Kentucky, 559 U.S. 356, 368 (2010) ("'[P]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.' Likewise, we have recognized that 'preserving the possibility of' discretionary relief from deportation . . . 'would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.'" (citation omitted) (quoting INS v. St. Cyr, 533 U.S. 289, 322–23 (2001))).

104. *Padilla II*, 381 S.W.3d at 329 (alteration in original) (quoting *Padilla*, 559 U.S. at 368). By eviscerating the direct-versus-collateral consequences distinction, and requiring counsel to attend to the immigration consequences based on their importance *to the defendant*, the Court gave constitutional backing to the practice of client-centered, holistic lawyering. *See* Robin Steinberg, *Heeding* Gideon*'s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 974 (2013) ("*Padilla* clarifies what holistic defense was created to address—that criminal case dispositions have dire consequences and effects in many areas of a client's life that must be addressed."); *see also* McGregor Smyth, *"Collateral" No More: The Practical Imperative for Holistic Defense in a Post-*Padilla *World . . . or, How To Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 144 (2011).

"[F]or Padilla, exile is a far worst [sic] prospect than the maximum ten year sentence."[105]

III. The Supreme Court's Failure to Enforce the Right to Effective Crimmigration Counsel

Padilla announced that the *Strickland* test would govern claims of ineffective assistance relating to crimmigration advice. The next challenge for the Court would be in enforcing the *Padilla* rule. The *Chaidez* case presented the Court with the opportunity to define the circumstances under which a *Strickland* violation regarding crimmigration advice could be remedied.

The question presented in Roselva Chaidez's petition for certiorari was "whether *Padilla* applies to persons whose convictions became final before its announcement."[106] Some background on the Court's "retroactivity"[107] jurisprudence is necessary to understand the decision the Court faced in *Chaidez*.

A. The Griffith/Teague *Retroactivity Rules and Their Underlying Policies*

The U.S. Supreme Court's rules for deciding "retroactivity" questions are embodied in two seminal decisions. In its 1987 decision in *Griffith v. Kentucky*,[108] the Court established a rule of full retroactivity in proceedings on direct review. And in *Teague v. Lane*,[109] it established a rule of nonretroactivity (with two narrow exceptions, for rules placing conduct "beyond the power of the criminal law-making authority to proscribe" and "watershed" rules implicating a trial's fundamental fairness) in federal habeas corpus proceedings to review a state court criminal conviction.

The policy considerations underlying these rules took shape over four decades from the late 1940s to the late 1980s when *Griffith* and *Teague* were decided.[110] Understanding the policies animating the

105. *Padilla II*, 381 S.W.3d at 330.

106. Petition for a Writ of Certiorari at i, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820).

107. Before *Danforth v. Minnesota*, questions such as that presented in *Chaidez* were referred to as "retroactivity" questions. *See* Danforth v. Minnesota, 552 U.S. 264, 271 n.5 (2008). As discussed below, *see infra* notes 142–163 and accompanying text, *Danforth* suggested a shift in terminology. Here I will use "retroactivity" in discussing cases before *Danforth*, to be consistent with historical usage.

108. Griffith v. Kentucky, 479 U.S. 314 (1987).

109. Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion).

110. I traced this history in an earlier article. Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give*

Griffith/Teague rules is important here for several reasons. First, a critical analysis of *Chaidez*[111] depends on understanding the reasons underlying the rules the Court applied there. Second, an understanding of those reasons is essential to a discussion of what state postconviction courts ought to do when confronted with questions of *Padilla*'s retroactivity.[112]

The roots of *Griffith* and *Teague* lie in the expansion of federal habeas corpus review of state criminal judgments.[113] This expansion caused the Court in 1965 to announce, in *Linkletter v. Walker*,[114] a three-factor balancing test for determining the retroactivity in federal habeas proceedings for violation of a new constitutional rule. The *Linkletter* test was soon applied beyond federal habeas cases, though, "produc[ing] strikingly divergent results" and drawing scathing criticism.[115] In two influential opinions (his dissent in *Desist v. United States*[116] and his separate opinion in *Mackey v. United States*[117]), Justice Harlan outlined a framework that would later be adopted nearly wholesale in *Griffith* and *Teague*.

Griffith's rule of retroactivity for cases on direct review was grounded in Justice Harlan's conclusion that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[118] First, the Court noted, "the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule."[119] In particular, Justice Harlan had feared that allowing new rules to justify redress only prospectively would eliminate the obligation of lower courts to decide claims and eviscerate their "responsibility for developing or interpreting the Constitution."[120] This, Justice Harlan believed, would effectively freeze constitutional doctrine and render the lower courts "automatons."[121]

Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings, 46 AM. CRIM. L. REV. 1, 8–27 (2009); *see also id.* at 8 n.17 (referencing other scholarly works tracing the development of the *Griffith*/*Teague* rules).

111. *See infra* Part III.C.

112. *See infra* Part IV.

113. Lasch, *supra* note 110, at 32; *see also* Danforth v. Minnesota, 552 U.S. 264, 272–73 (2008).

114. Linkletter v. Walker, 381 U.S. 618, 629 (1965).

115. *Danforth*, 552 U.S. at 273.

116. Desist v. United States, 394 U.S. 244, 257 (1969) (Harlan, J., dissenting).

117. Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

118. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

119. *Id.*

120. *Mackey*, 401 U.S. at 680 (Harlan, J., concurring in the judgments in part and dissenting in part).

121. *Id.*

Second, and equally importantly, a system of less than full redressability would produce intolerable inequalities. To give redress to one litigant and deny it to others on direct review would be treating "similarly situated defendants" differently without a principled reason for doing so.[122]

Teague's rule of nonretroactivity for cases on federal habeas corpus review, on the other hand, was grounded in Justice Harlan's concerns for comity and respect for the finality of state court judgments.[123] "Federalism and comity considerations," of course, "are unique to *federal* habeas review of state convictions."[124] Those concerns were not at stake in *Chaidez*, which concerned federal review of a *federal* conviction, and are not at stake in state postconviction proceedings, which concern state review of a state conviction. The finality concern underlying the *Teague* antiretroactivity rule, on the other hand, is implicated in both contexts.[125] Finality arrived in the *Teague* opinion as a relevant consideration by way of Justice Harlan's opinion in *Mackey*. "Finality in the criminal law is an end which must always be kept in plain view," Justice Harlan had written, citing influential law review articles by Harvard law professor Paul Bator and by Second Circuit Judge Henry Friendly.[126] The *Teague* opinion referenced Justice Harlan's *Mackey* opinion as well as the Bator and Friendly articles.[127]

While *Teague*'s reliance on finality as a justification for nonredressability finds its roots in the articles of Professor Bator and Judge Friendly, it is important to note that neither author unqualifiedly embraced finality. Indeed, both recognized the existence of, in Professor Bator's words, "general categories where . . . the first go-around . . . should not count, and where relitigation serves obvious and appropriate ends."[128] For Professor Bator, collateral review was generally justified where the initial review failed to provide an opportunity to

122. *Griffith*, 479 U.S. at 323 (citing Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting)).

123. *See* Danforth v. Minnesota, 552 U.S. 264, 279 (2008).

124. *Id.*

125. *See id.* at 280 (noting that finality is "implicated in the context of state as well as federal habeas . . . [and] is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts").

126. *Mackey*, 401 U.S. at 690 (Harlan, J., concurring in the judgments in part and dissenting in part) (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146–51 (1970)).

127. Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion) (citing *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in the judgments in part and dissenting in part)).

128. Bator, *supra* note 126, at 454.

litigate essential claims.[129] He provided as an example a defendant's claim that "the failure of the state to provide counsel deprived him of a fair chance to make his defense."[130] For Professor Bator, it was a matter of due process that a state should provide a forum for such claims to be litigated.[131] Judge Friendly similarly excepted from finality's ambit the raising on collateral attack of constitutional claims, the factual bases of which "are *dehors* the record and their effect on the judgment was not subject to consideration and review on appeal."[132] Like Professor Bator, Judge Friendly suggested a state's failure to permit postconviction review of such claims might amount to a due process violation.[133]

The *Teague* Court recognized that even the interests in comity and finality that are present when a federal habeas court reviews a state court judgment must yield in the face of a sufficiently important new constitutional rule. Into this category, *Teague* put: (1) rules that place conduct "beyond the power of the criminal law-making authority to proscribe"; and (2) "watershed" rules of constitutional criminal procedure.[134] Both exceptions were drawn from Justice Harlan's opinions in *Desist* and *Mackey*.

The "substantive due process" exception to the *Teague* rule—for rules placing conduct "beyond the power of the criminal law-making authority to proscribe"—was taken directly from Justice Harlan's opinion in *Mackey*.[135] Justice Harlan's view was that a substantive due process rule "forbid[ding] the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior" represented "the clearest instance where finality interests should yield," given "the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected."[136]

The watershed exception to the *Teague* rule combined aspects of Justice Harlan's *Mackey* and *Desist* opinions. The watershed exception has two requirements—a new rule must not only be "implicit in

129. *Id.* at 455–60.

130. *Id.* at 458.

131. *Id.* at 459–60.

132. Friendly, *supra* note 126, at 152 (quoting Waley v. Johnston, 316 U.S. 101, 104–05 (1942)).

133. *Id.* at 168.

134. Teague v. Lane, 489 U.S. 288, 307–15 (1989) (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

135. *Id.* at 307 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in the judgments in part and dissenting in part)).

136. *Mackey*, 401 U.S. at 692–93 (Harlan, J., concurring in the judgments in part and dissenting in part).

the concept of ordered liberty," but it must also be a rule that promotes the accuracy of the fact-finding process.[137] Justice Harlan endorsed the first watershed requirement—that a new constitutional rule be "implicit in the concept of ordered liberty"—but not the accuracy requirement. Although he had earlier favored an accuracy requirement,[138] Justice Harlan explicitly rejected it in *Mackey*, in part because he found "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values."[139] *Teague* thus based its watershed exception on Justice Harlan's writings, but imported the accuracy requirement despite the expressed views of Justice Harlan's more recent opinion in *Mackey*.

Taken together, *Griffith* and *Teague* reveal four distinct rules reflecting the competing policies at work in the Court's crafting of its retroactivity jurisprudence:

(1) The *Griffith* retroactivity rule. Here, the Court considered claims being litigated in the first round of review, and the Court's dominant concerns were with providing litigants equal access to a forum for constitutional claims and an opportunity for courts to develop constitutional doctrine.
(2) The *Teague* antiretroactivity rule. Addressing the rules for federal habeas review of state court judgments, in which claims are typically being *relitigated* in a federal forum after having been litigated once in state court, the Court's dominant concerns were comity and finality.
(3) The *Teague* substantive due process retroactivity rule. Where a new constitutional rule limits the scope of the criminal law, "the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected"[140] overcomes any interests in finality or comity presented by federal review of state court judgments.
(4) The *Teague* watershed retroactivity rule. Where a new constitutional rule is both "implicit in the concept of ordered liberty"

137. *Teague*, 489 U.S. at 311–12 (plurality opinion) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part)).

138. The *Teague* Court relied on Justice Harlan's *Desist* opinion in adding the accuracy requirement. *Id.* at 312 (citing Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)). The accuracy requirement endorsed by Justice Harlan in his *Desist* opinion, however, was a concern with *procedural* accuracy, not factual accuracy. *See* Lasch, *supra* note 110, at 28–29. At any rate, Justice Harlan in *Mackey* rejected any concern with accuracy.

139. *Mackey*, 401 U.S. at 695 (Harlan, J., concurring in the judgments in part and dissenting in part); *see also* Bator, *supra* note 126, at 449 (urging a focus "not so much [on] the substantive question whether truth prevailed" but on whether fair process had been afforded for determining the facts).

140. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part).

> *and* promotes the accuracy of the fact-finding process,[141] the need to apply such a watershed rule overcomes any interests in finality or comity presented by federal review of state court judgments.

B. One Step Forward: Danforth *and the Embrace of "Redressability" (Not "Retroactivity")*

The Court had occasion to elucidate the scope of the *Teague* rule in 2007, when it granted certiorari in *Danforth v. Minnesota*,[142] to decide whether state courts are required to adhere to *Teague* when determining whether U.S. Supreme Court decisions apply retroactively in state court proceedings.[143] *Danforth* arose from a state postconviction petition in which the petitioner claimed the use of a videotaped interview of a child witness at his 1996 trial violated the constitutional rule announced in the Court's 2004 decision in *Crawford v. Washington*.[144] The Minnesota courts held themselves bound to apply the *Teague* antiretroactivity rule, and further held that *Teague* barred application of the *Crawford* rule in petitioner's postconviction proceedings.[145] The Minnesota Supreme Court rejected Danforth's argument that *Teague* only limits the scope of federal habeas review "and does not limit the retroactive application of new rules in *state* postconviction proceedings."[146]

The Supreme Court reversed, holding that in state postconviction proceedings, *Teague* does not "explicitly or implicitly constrain[] the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas."[147] There are several aspects of *Danforth* that are important both for understanding the *Chaidez* decision and for considering what factors should guide state postconviction courts faced with determining whether to apply *Padilla* to convictions predating the decision.

At the outset of its analysis, the *Danforth* Court explained that it "may . . . make more sense to speak in terms of the 'redressability' of violations of new rules, rather than the 'retroactivity' of such rules."[148]

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141. *Teague*, 489 U.S. at 311–12 (plurality opinion) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part)).

142. Danforth v. Minnesota, 550 U.S. 956 (2007).

143. Petition for Writ of Certiorari at 4–5, Danforth v. Minnesota, 552 U.S. 264 (2008) (No. 06-8273).

144. Crawford v. Washington, 541 U.S. 36 (2004).

145. *Danforth*, 552 U.S. at 267–68.

146. *Id.* at 268 n.2 (quoting Danforth v. State, 718 N.W.2d 451, 456 (Minn. 2006)).

147. *Id.* at 275. A more thorough analysis of *Danforth* is available in my earlier article. *See* Lasch, *supra* note 110, at 33–42.

148. *Danforth*, 552 U.S. at 271 n.5.

The use of "retroactivity" terminology, the Court said, falsely "suggests that when we declare that a new constitutional rule of criminal procedure is 'nonretroactive,' we are implying that the right at issue was not in existence prior to the date the 'new rule' was announced."[149] New constitutional rules, the Court explained, are discovered—not created. The question of whether a new rule is retroactive is more properly considered as whether a particular defendant who suffered a violation of the new rule prior to its announcement is entitled to *redress* for the violation.[150]

The Court thus emphasized that *Teague*'s antiretroactivity rule is not a constitutional rule. *Teague* does not define the contours of the Court's newly announced constitutional rights;[151] rather, "*Teague*'s general rule of nonretroactivity was an exercise of [the] Court's power to interpret the federal habeas statute."[152] This interpretation was grounded in "equitable and prudential considerations" concerning the scope of federal habeas relief.[153] Those considerations, of course, included "comity and respect for the finality of state convictions." Comity, the Court noted, is a concern "unique to *federal* habeas review of state convictions."[154] As for finality, the Court concluded: "[F]inality of state convictions is a *state* interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts."[155]

Danforth instructs the state courts to craft their own redressability rules, based on their own assessment of the equitable and prudential considerations pertinent to the state. It is worth pondering whether the three pro-retroactivity rules in the *Griffith*/*Teague* coterie of retroactivity rules[156] are also non-constitutional rules that the states may disregard as they fashion their own redressability rules. The *Griffith* retroactivity rule, by its terms, requires state courts as well as federal courts to apply new constitutional rules to cases not yet final on direct

149. *Id.* at 271.

150. *Id.*

151. *Id.* (clarifying that "the 'retroactivity' of a new rule is not the temporal scope of a newly announced right"); *see also id.* at 275 (holding that "*Linkletter* and then *Teague* considered what constitutional violations may be remedied on federal habeas. They did not define the scope of the 'new' constitutional rights themselves." (footnote omitted)).

152. *Id.* at 278.

153. *Id.*

154. *Danforth*, 552 U.S. at 279.

155. *Id.* at 280.

156. *See supra* notes 108–141 and accompanying text.

review.[157] And although the *Teague* opinion did not specifically identify the substantive due process retroactivity rule as binding on state courts, the Court's later opinion in *Penry v. Lynaugh*[158] suggests this rule is constitutionally based and binding on the state courts.[159] Finally, whether the watershed retroactivity rule—which has never encountered a constitutional rule that meets its requirements—is binding on the states was a question explicitly left open in *Danforth*.[160] Even if these rules requiring redress are not binding on the states, the fact that the Court has held certain circumstances sufficient to overcome the comity and finality concerns presented when a new federal constitutional rule is applied to a state criminal judgment suggests a state court would be hard pressed to justify denying redress in circumstances where comity and finality are lessened.[161] Thus, the justifica-

157. Griffith v. Kentucky, 479 U.S. 314, 328 (1986) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ."). Whether the *Griffith* rule is constitutionally based has been questioned. *See, e.g.*, Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 MICH. ST. L. REV. 541, 607–08 (criticizing the Court's "transparently inadequate explanations" for "its supposed constitutional power to govern state criminal appeals"); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1076 n.129 (1997) (suggesting that the Court's "[s]ubsequent opinions . . . cast doubt upon the extent to which the result in *Griffith* was grounded in the Constitution"). *But see* TGX Corp. v. Simmons, 786 F. Supp. 587, 593 (E.D. La. 1992) (stating that "*Griffith* rested squarely on constitutional grounds").

158. Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

159. In *Penry*, the Court noted that Justice Harlan had rooted his substantive due process exception to nonretroactivity in "categorical guarantees accorded by the Constitution," and noted that where "the Constitution itself deprives the State of the power to impose a certain penalty, . . . the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force." *Id.* at 329–30. *See In re* Holladay, 331 F.3d 1169, 1173 (11th Cir. 2003) (holding that "there is no question that the new constitutional rule abstractly described in *Penry* and formally articulated in *Atkins* is retroactively applicable to cases on collateral review").

160. *Danforth*, 552 U.S. at 269 n.4. The fact that Congress, and many states, have carved out explicit exceptions to other finality-serving doctrines to accommodate watershed rules, suggests that even if redress might constitutionally be withheld for violations of such rules, it is not likely to be. *See, e.g.*, 28 U.S.C. § 2244(d)(1)(C) (2012) (tolling the statute of limitations for a federal habeas petition for a claim based on a constitutional right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"); *id.* § 2244(b)(2)(A) (permitting a successor habeas petition based on a newly recognized constitutional right made retroactive); KY. R. CRIM. P. 11.42(10)(b) (tolling the statute of limitations for a state postconviction action if based on a newly recognized right made retroactive); TENN. CODE ANN. § 40-30-122 (2012) (permitting retroactive application, in state postconviction proceedings, of a "new rule of constitutional criminal law . . . [that either] places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty").

161. *See* Lasch, *supra* note 110, at 40–42.

tions for each of the Court's three pro-retroactivity rules are instructive for state courts addressing redressability.

A final question left open in *Danforth* was whether the Court's reasoning freeing the states from the strictures of *Teague* would apply with equal force to *federal* postconviction proceedings.[162] Although the question was left open, the *Danforth* majority suggested that "[m]uch of the reasoning applicable to applications for writs of habeas corpus filed pursuant to § 2254 seems equally applicable in the context of [28 U.S.C.] § 2255 motions."[163] Arguably, though, in assessing redressability, federal postconviction actions are in all relevant respects analogous to state postconviction proceedings.[164] As with state postconviction proceedings, there are no comity considerations when a federal court reviews a federal criminal conviction. Likewise, the finality considerations presented in federal postconviction proceedings are analogous to those presented in state postconviction proceedings—in both cases a criminal judgment is reopened at the conclusion of the direct review track.

Indeed it was a claim arising in federal postconviction proceedings that presented the Court with the opportunity to decide the retroactivity of *Padilla v. Kentucky* and the Court's decision applying *Strickland* to claims of ineffective crimmigration counsel.

C. Two Steps Backward: Chaidez *and the Retreat to Retroactivity*

Like Jose Padilla, Roselva Chaidez had been a lawful permanent resident for decades before she was charged with the crime that would make her deportable. Born in Mexico in the 1950s,[165] Ms. Chaidez migrated to the United States in the 1970s and became a lawful permanent resident in 1977.[166] She lives in Chicago with her three children and two grandchildren, all of whom are United States citizens.[167] Ms. Chaidez is responsible for caring for her grandchildren while her daughter works.[168] Ms. Chaidez's only relatives in Mexico are half-brothers and half-sisters with whom she has had no contact since the mid-1990s.[169]

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162. *Danforth*, 552 U.S. at 269 n.4.

163. *Id.* at 281 n.16.

164. Lasch, *supra* note 110, at 65–67.

165. *See* Petition for Writ of Error Coram Nobis at 6, United States v. Chaidez, No. 1:09-cv-06372 (N.D. Ill. Oct. 11, 2009) (listing Ms. Chaidez's age as 53).

166. Brief for Petitioner at 2, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820).

167. *Id.*

168. United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *1 (N.D. Ill. Oct. 6, 2010).

169. Petition for Writ of Error Coram Nobis, *supra* note 165, at 6.

In 2003, Ms. Chaidez was charged in federal district court with three counts of mail fraud. She had been persuaded by others to participate in an insurance fraud scheme,[170] whereby she falsely claimed to have been a passenger involved in a car accident. Ms. Chaidez received $1,200 for her part in the scheme, but because the total amount paid by the insurance company was $26,000, the charges she faced qualified as aggravated felonies.[171] (In 1996, Congress had reduced the loss threshold for acts of fraud to qualify as an aggravated felony from $200,000 to $10,000.)[172]

On December 3, 2003, Ms. Chaidez entered a "blind" plea to two counts of the indictment.[173] She was sentenced to four years' probation and ordered to pay restitution.[174] Ms. Chaidez faithfully and successfully attended to the obligations of her probated sentence.[175]

In July 2007, Ms. Chaidez applied for U.S. citizenship.[176] Ms. Chaidez, who does not speak English, received assistance from non-attorneys in filling out her application.[177] The application stated she had never been convicted of a crime.[178] On October 15, 2008, Ms. Chaidez was interviewed by immigration authorities, who asked her about the 2003 fraud conviction.[179] Ms. Chaidez admitted she had been convicted.[180] Immigration officials told Ms. Chaidez they needed to conduct further investigation, and she would be contacted.[181]

In March 2009, Ms. Chaidez received a Notice to Appear, indicating the United States sought to deport her based on her mail fraud convictions.[182] In October 2009, Ms. Chaidez, with the assistance of counsel, petitioned for a writ of *coram nobis* in the federal district court where she had been convicted.[183] Her petition alleged that neither the

170. Brief for Petitioner, *supra* note 166, at 2. The United States acknowledged at Ms. Chaidez's plea hearing that she was "not aware of the specifics of the scheme." *Id.*

171. *Id.* at 2–3.

172. Petition for a Writ of Certiorari, *supra* note 106, at 4–5 (citing 8 U.S.C. § 1101(a)(43)(M)(i) (2012); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 to -628).

173. Petition for Writ of Error Coram Nobis, *supra* note 165, at 2.

174. *Id.*

175. *Id.*

176. United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *1 (N.D. Ill. Oct. 6, 2010).

177. *Id.* at *1–2.

178. *Id.* at *1.

179. *Id.*

180. *Id.* at *2.

181. *Id.* at *1.

182. *Chaidez*, 2010 WL 3979664, at *1.

183. Petition for Writ of Error Coram Nobis, *supra* note 165.

court nor her court-appointed counsel had advised her of the immigration consequences attendant to her guilty plea.[184] Given that Ms. Chaidez had completed the terms of her probation and was no longer "in custody" relating to her conviction, *coram nobis* rather than habeas corpus was the appropriate procedural vehicle for Ms. Chaidez to bring her postconviction challenge to her plea.[185]

The district court dismissed Ms. Chaidez's first petition because it was improperly filed as a new civil action, and directed that the petition be filed in her criminal case.[186] Shortly after Ms. Chaidez filed her corrected petition, the U.S. Supreme Court decided *Padilla*.[187] The government quickly asserted *Padilla* could not be applied retroactively in Ms. Chaidez's case.[188]

The district court required Ms. Chaidez to supplement her petition with an affidavit,[189] dispensing with the government's retroactivity argument by holding that *Padilla* merely applied *Strickland*, and noting the Court's statement in *Padilla* that "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[190] After Ms. Chaidez submitted her affidavit, the district court issued a more thorough opinion on *Padilla*'s retroactivity. The court once again found *Padilla* to be fully applicable in Ms. Chaidez's case. The court noted that *Padilla* itself arose from the postconviction track—yet the Supreme Court failed to raise the *Teague* rule sua sponte, though it could have (and indeed had done so in *Teague* itself).[191] "[I]f Chaidez's claim is barred by *Teague*, Padilla's claim should have been barred as well," wrote the court.[192] The court found affirmative support for the notion that the *Padilla* Court intended its decision to be retroactive in the Court's concern with the floodgates argument raised by the government: "If the Court intended *Padilla* to

184. *Id.* at 2.

185. United States v. Chaidez, No. 03 CR 636-6, 2010 WL 2740282, at *1 (N.D. Ill. July 8, 2010) (order requiring petitioner to submit affidavit).

186. United States v. Chaidez, 730 F. Supp. 2d 896, 898 (N.D. Ill. 2010).

187. *Id.*

188. Government's Supplemental Response in Opposition to Defendant's Motion for Writ of Error *Coram Nobis* at 1–2, United States v. Chaidez, No. 03 CR 636-6 (N.D. Ill. Apr. 7, 2010).

189. *Chaidez*, 2010 WL 2740282, at *3. The district court's order also noted that Ms. Chaidez's affidavit should address the timeliness of her filing. *Id.* at *2. The government had earlier raised laches as a defense to Ms. Chaidez's petition. Government's Response in Opposition to Defendant's Motion for Writ of Error *Coram Nobis* at 5, United States v. Chaidez, No. 03 CR 636-6 (N.D. Ill. Mar. 29, 2010).

190. *Chaidez*, 2010 WL 2740282, at *2 (quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010)).

191. *Chaidez*, 730 F. Supp. 2d at 902–03.

192. *Id.* at 903.

be a new rule which would apply only prospectively, the entire 'floodgates' discussion would have been unnecessary."[193]

The district court also noted that giving *Padilla* retroactive effect in Ms. Chaidez's case was completely consistent with the policies underlying *Teague.* First, the court found the *Strickland* standard by its nature accommodates the finality interest served by *Teague*, because "[a] post-conviction court applying *Strickland* is bound to consider whether counsel's assistance was effective with reference to professional standards *as they existed at the time of the conviction.*"[194] Second, because *Strickland* ineffectiveness claims are typically brought in postconviction proceedings because of the need for factual development not available on appeal, "the court hearing the *Strickland* claim in a collateral attack on a federal conviction will serve a function similar to the appellate court."[195] As such, postconviction proceedings provide the only forum for constitutional development of claims relating to ineffectiveness: "If the Supreme Court had refused on retroactivity grounds to reach the constitutional claim in *Padilla*, no court would ever have been able to establish that counsel must advise about immigration consequences of a guilty plea."[196]

Having once again determined that the *Padilla* rule would apply to Ms. Chaidez's petition, the court conducted an evidentiary hearing. Ms. Chaidez testified that her court-appointed attorney never told Chaidez her guilty plea made her deportable, and that she only became aware of these consequences when she received the Notice to Appear in March 2009.[197] Ms. Chaidez testified "that her family and her life are in the United States," that she "would have done everything possible to remain in the United States," and that she would have gone to trial had she known of the immigration consequences.[198] The district court credited Ms. Chaidez's testimony, found that she had timely presented her claims (rejecting the government's laches defense), and granted her petition to vacate her conviction.[199]

The Seventh Circuit reversed.[200] Whereas the district court had engaged in a functional assessment of whether application of *Teague* to

193. *Id.* (quoting United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at * 7 (E.D. Cal. July 1, 2010)).

194. *Id.* This argument is amplified below. *See infra* Part IV.A.4.

195. *Id.* at 904. This argument is amplified below. *See infra* Part IV.A.3.

196. *Id.* This argument is amplified below. *See infra* Part IV.A.5.

197. United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *1 (N.D. Ill. Oct. 6, 2010).

198. *Id.*

199. *Id.* at *2–4.

200. Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011).

Chaidez's claim *made sense,* the Seventh Circuit undertook a mechanical application of *Teague.* The Seventh Circuit began its analysis by identifying a "new" rule as one not "dictated by precedent."[201] Without irony, and without any acknowledgment of the district court's assessment of the finality interests at stake in this federal *postconviction* case, the court noted that *Teague* was fashioned to respond to the unique interests at stake in federal habeas review of state court criminal judgments.[202] Given the test ("dictated by precedent"), the result was foreordained. To reach it, the Seventh Circuit relied heavily on disuniformity on the Court itself (two Justices concurring and two dissenting in *Padilla*, confirming that the decision was not "dictated by precedent")[203] and the relative pre-*Padilla* unanimity among the lower courts that immigration consequences were "collateral" and therefore not within the scope of counsel's duties.[204]

The Supreme Court granted certiorari in April 2012.[205]

It is important to understand just what was at stake in *Chaidez*. Ms. Chaidez's case, in which she first learned of the immigration consequences of her guilty plea nearly six years later, was exemplary of a commonplace occurrence given the realities of crimmigration. It is an essential component of the crimmigration system that *any* criminal conviction can be an entry point to the criminal-to-immigration pipeline *at any time*. The conviction can be ancient.[206] It can be completely served, as Ms. Chaidez's conviction was.[207] It can even be

201. *Id.* at 688 (emphasis omitted) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion)).

202. *Id.*

203. *Id.* at 689–90, 694.

204. *Id.* at 690–92.

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

206. *See* Brief of the American Immigration Lawyers Association as Amicus Curiae in Support of Petitioner at 12, 16, 18–20, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820) (detailing a case of an 81-year-old man deported for a crime committed twenty years earlier, a case of a 62-year-old who died in immigration detention in 2008 while in deportation proceedings based on convictions from 1979, and the case of Juan Lopez, who sought postconviction relief from a 25-year-old conviction); *see also, e.g.*, Christie v. Elwood, Civil No. 11-7070 (FLW), 2012 WL 266454, at *1 (D.N.J. Jan. 30, 2012) (detailing ICE's arrest of Harold Christie in 2012 and initiation of deportation proceedings based on convictions occurring between 1985 and 1996).

207. *See* Brief of the American Immigration Lawyers Association as Amicus Curiae in Support of Petitioner*, supra* note 206, at 14–16 (detailing case of Emanuel Sumanariu, who was put into deportation proceedings long after completing probation and paying restitution); *see also, e.g.*, Castaneda v. Souza, Civil Action No. 13-10874-WGY, 2013 WL 3353747 (D. Mass. July 3, 2013) (detailing the case of Leiticia Castaneda, who was put into deportation proceedings in 2013 after completing her probation in 2010); Baquera v. Longshore, No. 13-cv-00543-RM-MEH, 2013 WL 2423178, at *2–3 (D. Colo. June 4, 2013) (detailing the case of Erick Rogelio Nieto Baquera, who was put into deportation proceedings in 2013 after completing his probation in 2007); Santos-Sanchez v. Elwood, Civil Action No. 12-6639 (FLW), 2013 WL 1165010 (D.N.J.

dismissed after diversion or expunged.[208] What is unique about crimmigration, making the retroactivity question so important, is that the vitality of the criminal conviction endures long after the criminal process is complete. All it takes is some contact with immigration officials—whether initiated by the immigrant herself, as in Ms. Chaidez's case,[209] or by some contact with the criminal system, even on a minor offense[210]—for an old conviction to trigger adverse immigration consequences. Thus, a failure of crimmigration counsel may lie dormant and fail to surface for years.[211] The Supreme Court's decision in *Chaidez* would make or break the future for those who learned only later that their important decision to plead guilty had been made without any understanding of the deportation consequences of a conviction.

Chaidez thus offered the Court an opportunity to continue the project it had begun in *Padilla*—accommodating constitutional law to the

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Mar. 20, 2013) (detailing the case of Luz de Alba Santos-Sanchez, put into immigration proceedings in 2012 based on a conviction for which she was sentenced to 8 days' time served in 2008).

208. *See* Brief of the American Immigration Lawyers Association as Amicus Curiae in Support of Petitioner, *supra* note 206, at 12–14 (detailing the case of Jorge (George) Aguilar, who was put in proceedings in 2010 and deported based on a 2004 conviction that had been expunged); *see also infra* Part IV (detailing case of Jose Rodriguez).

209. Brief for Active and Former State and Federal Prosecutors as Amici Curiae in Support of Petitioner at 18–21, *Chaidez*, 133 S. Ct. 1103 (No. 11-820) [hereinafter Brief for Active and Former State and Federal Prosecutors] (detailing the case of "Mr. A," who was put into immigration proceedings, based on a nine-year-old conviction, when he attempted to renew his lawful permanent resident card); s*ee also* Jaghoori v. Lucero, Civil Action No. 1:11-cv-1076, 2012 WL 604019 (E.D. Va. Feb. 22, 2012) (detailing the case of Azim Abdul Jaghoori, who was detained and put into immigration proceedings based on a 1995 conviction when he re-entered the country after traveling abroad in 2009), *abrogated by* Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012).

210. *See, e.g.*, Santos-Gonzalez v. Reno, 93 F. Supp. 2d 286, 287–88 (E.D.N.Y. 2000) (detailing the case of Jose Dimas Santos-Gonzalez, a lawful permanent resident whose arrest for turnstile jumping in 1998 led to him being found deportable for a conviction from 1986); Keo v. Lucero, No. 1:11cv614, 2011 WL 2746182, at *1 (E.D. Va. July 13, 2011) (detailing the case of Rigian Keo, who was taken into custody in January 2011—"an event surely triggered by his December 14, 2010 arrest for malicious wounding, which was ultimately *nol prossed*"—for deportation based on a 2003 conviction), *abrogated by Hosh*, 680 F.3d 375; Martinez-Cardenas v. Napolitano, No. C13-0020-RSM-MAT, 2013 WL 1990848 (W.D. Wash. Mar. 25, 2013) (detailing the case of Federico Martinez-Cardenas, arrested in 2012 for charges later dismissed, but delivered to federal custody via an immigration detainer and put into immigration proceedings based on 2006 conviction), *report and recommendation adopted*, No. C13-0020-RSM, 2013 WL 2006940 (W.D. Wash. May 13, 2013).

211. Additionally, Congress can attach immigration consequences to a criminal conviction well after the fact, with retroactive effect. *See generally* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 829–40 (2012) (suggesting *Padilla* allows application of criminal ex post facto doctrine in immigration proceedings). This also creates the possibility that a criminal conviction long dormant will be given new life in deportation proceedings.

realities of crimmigration law. In *Padilla* those realities caused the Court to recognize a right to effective crimmigration counsel. *Chaidez* would determine whether the Court would afford the opportunity for redress to immigrants whose claims were triggered by events that predated *Padilla* but surfaced only later.

The context of the case also presented the Court with the chance to continue what it had begun in *Danforth*—stepping away from "retroactivity" and toward "redressability," with redressability decisions framed in terms of the policy considerations underlying the *Griffith*/*Teague* redressability rules, rather than in terms of the scope of a constitutional rule. Chaidez's case, after all, arose not in federal habeas review of a state court judgment (the context for which the *Teague* rule was designed), but rather in federal postconviction proceedings to review a *federal* judgment. *Danforth* had specifically reserved the question of whether *Teague* applied in such proceedings,[212] and Chaidez argued in the Supreme Court that *Teague* should not apply in this context, "at least with respect to claims of ineffective assistance of counsel that depend on evidence outside the trial record."[213]

Chaidez first pointed out that the comity concerns underlying *Teague* are not present in federal review of a federal criminal judgment.[214] As for finality, Chaidez acknowledged that "some interest in repose" was present in federal postconviction proceedings like hers.[215] But she urged the Court to find the finality concerns underlying *Teague* were adequately addressed in two ways. First, Chaidez noted that claims of ineffective assistance of counsel are properly raised for the first time in postconviction proceedings, and that unlike claims presented in federal habeas proceedings to review state-court judgments, such claims are not presented for "repeated" litigation.[216] Second, Chaidez argued that the standard for judging ineffectiveness claims—the *Strickland* test the *Padilla* Court applied to claims of ineffective crimmigration counsel—embodied finality protections that rendered *Teague* superfluous.[217] For both these reasons,[218] Chaidez

212. Danforth v. Minnesota, 552 U.S. 264, 269 n.4 (2008). The Court specifically reserved the question of whether *Teague* applies in proceedings under 28 U.S.C. § 2255, *id.*, whereas Chaidez pursued relief via a petition for writ of *coram nobis*. The parties in *Chaidez* acknowledged that there was no relevant difference between the two procedures. *Chaidez*, 133 S. Ct. at 1106 n.1.

213. Brief for Petitioner, *supra* note 166, at 27.

214. *Id.* at 28–29.

215. *Id.* at 31.

216. *Id.* at 29–31. *See infra* Part IV.

217. Brief for Petitioner, *supra* note 166, at 31–33. *See infra* Part IV.A.4.

218. Chaidez raised additional arguments concerning "administrative problems" with applying *Teague* in the context presented, which I do not address here. Brief for Petitioner, *supra* note 166, at 34–39.

argued the finality concerns present in *Teague* were not present in her case, and *Teague* should not be applied.

Chaidez presented a thoughtful analysis of the extent to which comity and finality concerns were presented by her case. And she pointed out that the Court had never decided that *Teague* applied in the federal postconviction context.[219] The Court, however, brushed off Chaidez's arguments, holding them not properly preserved for the Court's consideration.[220] (Chaidez had not presented her arguments that *Teague* did not apply in her petition for certiorari or in the Seventh Circuit until her petition for rehearing.[221] Her argument in her response brief was limited to demonstrating that *Padilla* merely applied *Strickland* and did not fashion a "new" constitutional rule.[222]) The Court extended *Teague*'s application to a federal postconviction proceeding for the first time without considering the valid arguments for not doing so. It did so despite the fact that the Court has previously considered *Teague*'s applicability when not raised by the parties—for example, in *Teague* itself, where the question of retroactivity had only been raised in an amicus brief.[223] It did so despite the fact that both parties had fully briefed the issue of *Teague*'s applicability.[224] It did so by ignoring the reasoning of the district court that had

219. *Id.* at 27. In *Bousley v. United States*, 523 U.S. 614 (1998), the Court appeared to assume *Teague*'s applicability in proceedings to vacate a federal conviction brought pursuant to 28 U.S.C. § 2255. The parties had not raised the *Teague* issue, but an amicus brief urged the Court to apply *Teague*. *Id.* at 619. The Court held *Teague* inapplicable because the "new" law relied upon by Bousley was a decision in which the Court interpreted a criminal statute, not a new "constitutional rule[] of criminal procedure." *Id.* at 619–20 (quoting Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion)).

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

221. *Id.*

222. Brief of Defendant/Appellee Roselva Chaidez, Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) (No. 10-3623).

223. *Teague*, 489 U.S. at 300 (plurality opinion) (holding "*sua sponte* consideration of retroactivity is far from novel"); *cf. Bousley*, 523 U.S. at 619 (considering applicability of *Teague* even when raised only in amicus brief).

224. In *Teague*, the Court noted that while the parties had not briefed the issue of retroactivity with respect to the fair cross-section claim raised by Teague, they had briefed retroactivity with respect to the *Batson* claim raised. *Teague*, 489 U.S. at 300 (plurality opinion). The parties' briefs addressing *Batson* retroactivity did not bear at all on the questions the Court proceeded to address, however. The Court launched its inquiry into retroactivity based on an amicus brief that urged the Court to avoid the merits of Teague's fair cross-section claim on retroactivity grounds. *Id.* at 300–01. It then proceeded to dispense with the *Linkletter* rule for retroactivity, which had hitherto been applied in cases on federal habeas review, and construct an entirely new retroactivity jurisprudence. *Id.* at 301. Here, by contrast, both parties fully briefed the issue of whether *Teague* should apply in the specific context presented by *Chaidez*. *See* Brief for Petitioner, *supra* note 166, at 27–39; Brief for the United States at 25–53, *Chaidez*, 133 S. Ct. 1103 (No. 11-820). Amicus briefs also briefed the issue. *See* Brief of Amicus Curiae National Ass'n of Federal Defenders in Support of the Petitioner at 7–8, *Chaidez*, 133 S. Ct. 1103 (No. 11-820) (arguing *Teague*'s underlying policies did not favor its application in Chaidez's case); Brief

held in Chaidez's favor, partly on the grounds raised by Chaidez.[225] And it did so by ignoring its own teachings in *Danforth*, that *Teague* is a rule of redressability, informed by "equitable and prudential considerations" concerning the scope of federal habeas relief.[226]

Those equitable and prudential considerations clearly would have favored Roselva Chaidez in this particular case. She raised her ineffective-assistance-of-counsel claim at the proper procedural moment, in the court of her conviction, and through the correct procedural vehicle[227]—just as Padilla had. (A challenge to her claim as time-barred was properly rejected by the district court.[228]) She raised her claim before *Padilla* was decided, *Padilla* was announced while her claim was pending, and the district court ruled on her claim after *Padilla* was decided. Given this procedural posture, the comity and finality concerns behind the *Teague* rule were nowhere in sight, and equitable and prudential considerations favored redress. To paraphrase the district court, if Padilla was entitled to redress, Chaidez should have been as well.[229]

It is clear that the Court *could* have addressed the issues raised by Chaidez concerning *Teague*'s applicability in the context of her case. Arguably, this should have been the threshold issue in *Chaidez*. By choosing instead to ignore the "equitable and prudential considerations," as well as the finality and comity interests, relevant to determining whether to extend the *Teague* rule to ineffective assistance claims properly first raised in federal postconviction proceedings, the *Chaidez* Court significantly undermined the Court's careful decision in *Danforth.*

The *Chaidez* Court accomplished this in a single sentence of the opinion, broadly and falsely claiming, without supporting authority or reference to *Danforth*, that *Teague* bars application of a "new rule" in a "habeas or similar proceeding."[230] *Danforth* had been clear that *Teague* was fashioned for the specific context of federal habeas review of state-court criminal judgments. The *Chaidez* Court's very next sen-

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Amici Curiae of Habeas Scholars and Constitutional Accountability Center in Support of Petitioner at 6–12, *Chaidez*, 133 S. Ct. 1103 (No. 11-820).

225. *See supra* notes 186–199.

226. Danforth v. Minnesota, 552 U.S. 264, 278 (2008).

227. *See* United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *1 n.1 (N.D. Ill. Oct. 6, 2010) (explaining the use of *coram nobis*).

228. *Id.* at *3 (holding that Chaidez had been diligent in bringing her claim and that laches did not bar relief).

229. United States v. Chaidez, 730 F. Supp. 2d 896, 903 (N.D. Ill. 2010) ("[I]f Chaidez's claim is barred by *Teague*, Padilla's claim should have been barred as well.").

230. Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013).

tence completed the evisceration of *Danforth*: "Only when we apply a settled rule may a person avail herself of the decision on collateral review."[231] The use of these vague, imprecise phrases—"collateral review" and "habeas or similar proceeding"—undid the *Danforth* Court's understanding that not all collateral review is the same, and not all collateral review is *similar* to federal habeas review of state-court judgments. *Danforth* stood for the principle that because it was redressability, not retroactivity, that was at stake, different procedural contexts might benefit from different redressability rules. *Chaidez*'s willingness to turn a blind eye to Chaidez's arguments seemed to signal a return to retroactivity.[232]

Chaidez established, and the district court understood, that the procedural context of her claim was different—in ways relevant to the underlying policy concerns animating the *Teague* rule—from the procedural context for which *Teague* was fashioned. Instead of addressing these arguments, the Court turned to the question of whether the *Padilla* rule was a "new" constitutional rule. Like the district court,[233] other lower courts had concluded that *Padilla* merely applied *Strickland* in the crimmigration context.[234] The Supreme Court, however,

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231. *Id.*

232. Previously I offered two reasons for the Court's choice to leave Chaidez's arguments unaddressed. I wrote:

> On the one hand, it appears the Court may have lost its way, and forgotten the truths of *Teague* expounded just four years ago in *Danforth*. Even more dismal, it may be that the Court was simply so eager to shut off the flow of *Padilla* claims that it was willing to ignore the implications of the procedural posture of Roselva Chaidez's case when it granted certiorari.

Christopher N. Lasch, Chaidez*: Ignoring Precedent & Procedural Posture*, CRIMMIGRATION (Feb. 26, 2013, 9:04 AM), http://crimmigration.com/2013/02/26/chaidez-ignoring-precedent—procedural-posture.aspx. To these I would add the following possible explanations. Perhaps the Court—misled by the question presented in Chaidez's certiorari petition, *see* Petition for a Writ of Certiorari, *supra* note 106, at i ("The question presented is whether *Padilla* applies to persons whose convictions became final before its announcement.")—failed to vet the petition and understand that the procedural context of the case would not permit resolution of the question presented. Perhaps the Court simply wanted to reach the question of whether *Padilla* was a "new rule" and was not willing to wait for a state court case to come up through federal habeas review (the context in which *Teague* would have been obviously applicable). Finally, the explanation may be simply that changes in personnel on the Court since 2008 have weakened the Court's commitment to *Danforth*'s nuanced understanding of retroactivity and redressability.

233. *See Chaidez*, 730 F. Supp. 2d at 900–04.

234. *E.g.*, United States v. Orocio, 645 F.3d 630, 641 (3rd Cir. 2011) (holding that "because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule' for *Teague* purposes"); Commonwealth v. Clarke, 949 N.E.2d 892, 901 (Mass. 2011) (holding that *Padilla* was "not a 'new rule' but merely an application of *Strickland*"); Denisyuk v. State, 30 A.3d 914, 925 (Md. 2011) (determining, as a matter of state retroactivity law, that *Padilla* did not announce a "new" rule); *see also* Michael Hartley, Note, *What's New Is Old Again: Why* Padilla v. Kentucky *Applies Retroactively*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 95, 132 (2011) (arguing *Padilla* was a straightforward application of *Strickland* and there-

held that before *Padilla* applied *Strickland* it first "considered a threshold question: Was advice about deportation '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 the criminal sentence?"[235] Indeed, the Court explained, it had been compelled to address this threshold question by the plethora of lower court decisions that had drawn the distinction between direct and collateral consequences, and the uncertainty that prevailed on the question of whether such a distinction was relevant to resolution of claims of ineffective crimmigration counsel.[236]

The Court affirmed the Seventh Circuit, holding *Padilla* to be a new constitutional rule. Because Chaidez had not raised the question of whether *Padilla* was a watershed rule, the Court did not address it.[237]

Danforth, of course, instructs that *Chaidez* does not bind the states.[238] Even states that apply the *Teague* framework in state post-

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fore not a new rule); Murphy, *supra* note 11 (same); Syré, *supra* note 11 (same); Matthew A. Spahn, Comment, Padilla *Retroactivity: A Critique of the Tenth Circuit's Ruling that* Padilla *Does Not Apply Retroactively to Cases on Collateral Review [*United States v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011)]*, 51 WASHBURN L.J. 767 (2012) (same); Allison C. Callaghan, Comment, Padilla v. Kentucky*: A Case for Retroactivity*, 46 U.C. DAVIS L. REV. 701 (2012) (same); Gary Proctor & Nancy King, *Post* Padilla*:* Padilla*'s Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G REP. 239, 240–41 (2012) (suggesting the "weight of emerging authority" was against *Padilla* being a "new" rule).

235. *Chaidez*, 133 S. Ct. at 1108 (quoting Padilla v. Kentucky, 559 U.S. 356, 366 (2010)).

236. *Id.* (holding that because the "preliminary question about *Strickland*'s ambit came to the *Padilla* Court unsettled[,] . . . the Court's answer ('Yes, *Strickland* governs here') required a new rule"). Justice Sotomayor, joined by Justice Ginsburg in dissent, found this unconvincing. *See id.* at 1120 (Sotomayor, J., dissenting) (arguing that "the majority reaches the paradoxical conclusion that by declining to apply a collateral-consequence doctrine the Court had never adopted, *Padilla* announced a new rule"); *cf.* Michael S. Vastine, *Trying (& Failing) To Find Logic in* Chaidez, CRIMMIGRATION (March 4, 2013, 4:00 AM), http://crimmigration.com/2013/03/04/trying-and-failing-to-find-logic-in-chaidez-v-holder.aspx (noting that finding *Padilla* to be a "new" rule "required some logic that surprises and does not convince me"). Assessing the merits of the "new" rule debate in *Chaidez* is beyond the scope of this Article. What is important for present purposes is the indeterminacy of the "new rule" analysis. *See infra* Part IV.B.1.

237. *Chaidez*, 133 S. Ct. at 1107 n.3. Additionally, although the Court did not explicitly reserve this issue, it has been suggested that the *Padilla* rule, to the extent it encompasses affirmative misadvice, may not be a "new" rule at all. *See* Fisher & Turner, *supra* note 8, at 44.

238. As Maryland's highest court noted in its pre-*Chaidez* decision holding *Padilla* retroactive as a matter of state law: "[E]ven if the Supreme Court ever were to hold that *Padilla* is not retroactive under *Teague*, that holding would have no adverse effect on our analysis here." *Denisyuk*, 30 A.3d at 925 n.8.

Given its express reservation of the issue, *Chaidez* does not even bind the lower federal courts in determining whether *Teague* applies to ineffective crimmigration counsel claims brought in federal postconviction proceedings. While the remainder of this Article focuses on *Padilla* retroactivity in state postconviction proceedings, the same analysis would apply to federal postconviction proceedings. *See* Lasch, *supra* note 110, at 65–68 (arguing that federal postconviction is

conviction proceedings are not obligated to do so, and therefore may alter that framework to suit state interests in providing or limiting redressability.[239] While the *Chaidez* Court may have taken a step back from confronting the realities of crimmigration, including its opening of a new "market" for mass incarceration of people of color,[240] the states need not and ought not do so.

IV. What Redressability Rules Should Govern Claims of Ineffective Crimmigration Counsel Brought in State Postconviction Proceedings?

What redressability rules should the states adopt that will be consistent with the realities of the crimmigration system, while also balancing the states' conflicting interests in the finality of criminal judgments and in redressing constitutional violations? Consideration of two of the cases recently presenting this question to a state's highest court will provide a factual underpinning to help answer this question.[241]

Martin Ramirez (New Mexico)

In 2009, Martin Ramirez learned that his 1997 misdemeanor convictions in New Mexico would result in his deportation to Mexico.[242] Mr. Ramirez had sought to have the Department of Homeland Security waive these grounds of inadmissibility, in part because of the hardship his deportation would cause his daughter, Anita, a U.S. citizen.[243] By the end of March 2009, Mr. Ramirez's daughter had moved in with him, and Mr. Ramirez was providing Anita financial support as well as taking care of her two daughters while Anita pursued her education.[244]

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more properly analogized to state postconviction, in determining finality and comity interests, than it is to federal habeas review of state court judgments).

239. Danforth v. Minnesota, 552 U.S. 264, 275 (2008) (holding that states may "provide remedies for a broader range of constitutional violations than are redressable on federal habeas"); *see also Denisyuk*, 30 A.3d at 924 n.8.

240. *See* Vargas-Vargas, *supra* note 45, at 357–58 (arguing that incarceration stemming from the war on drugs has "no growth potential," but that "prison companies can justify the building of new prisons based on a whole new kind of prisoner: the illegal alien, and more specifically, the 'Mexican'" (emphasis omitted)).

241. Both of the cases I discuss here were recently decided, as is detailed below. I discuss the cases not for their ultimate holdings, however, but rather because the facts of these two exemplary cases provide a useful framework for exploring the numerous considerations state courts must grapple with in addressing the *Padilla* retroactivity question.

242. Record Proper at 6–8, Ramirez v. State, No. 33,604, 2014 WL 2773025 (N.M. June 19, 2014) (on file with author) (Decision on Application for Waiver of Grounds of Inadmissibility, dated June 22, 2009).

243. *Id.*

244. *Id.* at 8.

Unsuccessful with DHS, Mr. Ramirez filed a petition for writ of *coram nobis*[245] in New Mexico's Second Judicial District Court in Bernalillo County, seeking to vacate his convictions.[246] At a hearing on the petition, the court accepted Mr. Ramirez's allegations—that but for the failure of his court-appointed counsel to advise him of the immigration consequences of his guilty plea, he would have not entered a guilty plea—as admitted.[247] The sole point of contention was whether the constitutional rule announced in the 2004 New Mexico Supreme Court decision in *State v. Paredez*[248]—that criminal defense counsel has a duty to provide competent counsel regarding the immigration consequences of criminal convictions—is a "new" constitutional rule that should not be applied in postconviction proceedings.[249] On January 13, 2010, the district court held the *Paredez* rule could not be applied in Mr. Ramirez's proceedings.[250]

Mr. Ramirez appealed. While his appeal was pending, the U.S. Supreme Court decided *Padilla v. Kentucky*,[251] which confirmed what the New Mexico Supreme Court had decided in *Paredez* in 2004: defense counsel has an obligation to provide competent advice to a client who may suffer adverse immigration consequences as a result of a guilty plea in a criminal case. The court of appeals held the *Paredez* and *Padilla* rules are not new constitutional rules, but rather "extensions of a previously entrenched duty to provide representation and are retroactive."[252] The court of appeals further held the State's failure to contest Mr. Ramirez's factual allegations meant that Mr. Ramirez "completely established ineffective assistance of counsel and

245. In New Mexico, a criminal defendant who is in custody or otherwise under restraint (such as probation) due to a criminal conviction, may petition for a writ of habeas corpus. N.M. R. CRIM. P. 5-802(A). For a criminal defendant like Mr. Ramirez, who is no longer under restraint, a motion to vacate pursuant to Civil Rule 1-060(B) (the equivalent of what used to be a petition for writ of *coram nobis*) is the appropriate postconviction vehicle. *See* State v. Barraza, 267 P.3d 815, 817–19 (N.M. Ct. App. 2011). Mr. Ramirez's petition for writ of *coram nobis* was construed by the New Mexico Court of Appeals as a Rule 1-060(B) motion. State v. Ramirez, 278 P.3d 569, 570 (N.M. Ct. App.), *aff'd*, 2014 WL 2773025.

246. *See* Record Proper, *supra* note 242, at 1–9 (on file with the author) (petition and attachments); *id.* at 10–12 (amended petition).

247. *See* Transcript at 3–5, State v. Ramirez, No. CV-2009-10638 (N.M. 2d Jud. Dist. Ct. Jan. 13, 2010) (on file with the author).

248. State v. Paredez, 101 P.3d 799, 804 (N.M. 2004). Like Roselva Chaidez, Mr. Ramirez brought his postconviction action before *Padilla* was decided.

249. *Cf.* Kersey v. Hatch, 237 P.3d 683, 691 (N.M. 2010) (applying *Teague* in state postconviction proceedings).

250. Record Proper, *supra* note 242, at 31.

251. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

252. State v. Ramirez, 278 P.3d 569, 570 (N.M. Ct. App. 2012), *aff'd*, No. 33,604, 2014 WL 2773025 (N.M. June 19, 2014).

prejudice," and remanded the case with instructions to allow Mr. Ramirez to withdraw his guilty plea.[253]

The New Mexico Supreme Court granted the State's petition for review.[254] Oral arguments were held on January 14, 2014, and the case was decided on June 19, 2014.[255]

Jose Rodriguez (Tennessee)

Jose Rodriguez is a Mexican citizen who was lawfully residing in Tennessee when he was charged with patronizing prostitution.[256] When a settlement offer was extended that would include expungement after a period of diversion, Rodriguez accepted the offer on the advice of his lawyer, who told him he should take it because his record would be expunged.[257] Rodriguez's lawyer did not know that an expunged conviction can trigger deportation.[258] In September 2007 Rodriguez entered his guilty plea.[259] He completed the period of diversion and the conviction was expunged in January 2010.[260]

On March 31, 2011 (one year after *Padilla* was decided), Rodriguez filed a postconviction petition[261] alleging his lawyer failed to properly investigate the immigration consequences of his plea and gave Rodriguez "erroneous[] advice encouraging [him] to enter a guilty plea."[262]

Because Rodriguez's petition was filed more than one year after his conviction became final, his petition alleged Tennessee's one-year statute of limitation[263] should not apply because his petition was filed

253. *Id.* at 576.

254. State v. Ramirez, 294 P.3d 1244 (N.M. 2012).

255. *Ramirez*, 2014 WL 2773025 (holding, as a matter of state law, that the rule announced in *Paredez* (and presumably *Padilla*) was not a new rule). On March 17, 2014, before *Ramirez* was decided by the state supreme court, the New Mexico Court of Appeals reversed its course, stating that "*Ramirez*'s holding that *Padilla* could be retroactively applied was reversed by the United States Supreme Court in *Chaidez v. United States*." State v. Trammell, No. 31,097, 2014 WL 1998972, at *5 (N.M. Ct. App. Mar. 17, 2014) (citation omitted). In light of the New Mexico Supreme Court's decision in *Ramirez*, the New Mexico Court of Appeals may need to visit the question yet again.

256. Technical Record on Appeal at 3, State v. Rodriguez, No. M2011-01485-CCA-R3-PC (Tenn. Crim. App. Oct. 24, 2011) (on file with author). This is categorized as a "crime involving moral turpitude." *Id.* at 4 (citing 8 U.S.C. § 1182(a) (2012)). *See generally* 8 U.S.C. § 1182(a)(2)(D)(ii) ("Any alien who . . . directly or indirectly procures or attempts to procure . . . prostitutes or persons for the purpose of prostitution . . . is inadmissible.").

257. Technical Record on Appeal, *supra* note 256, at 3–4.

258. *Id.* at 4.

259. *Id.*

260. *Id.* at 13.

261. The petition was filed pursuant to the Tennessee Post-Conviction Procedure Act, TENN. CODE ANN. § 40-30-101 to -122 (2012).

262. Technical Record on Appeal, *supra* note 256, at 5.

263. *See* TENN. CODE ANN. § 40-30-102(a).

within one year of *Padilla* and *Padilla* had "applied *Strickland v. Washington* . . . to the facts in *Padilla* retroactively."[264] The trial court, however, held that since no appellate court had held *Padilla* to have retroactive effect, Rodriguez's petition was time-barred.[265]

The court of criminal appeals affirmed. The court first held that "post-conviction relief is not available from an expunged record because there is no conviction to challenge."[266] But even if an expunged conviction could be attacked in postconviction proceedings, the court (citing to a string of decisions holding *Padilla* not retroactive) held Mr. Rodriguez's petition untimely.[267] The Tennessee Supreme Court accepted review.

After oral argument,[268] the court decided the case on other grounds.[269]

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These cases represent two core truths about crimmigration. Martin Ramirez, like Roselva Chaidez and many others, found himself in immigration proceedings years after his criminal case was over. A recent study demonstrates the pervasiveness of old convictions used as the basis for deportation. More than 50,000 people in a recent 16-month period were the subjects of immigration detainers based on criminal convictions more than 5 years old, and nearly 25,000 people were subject to detainers based on convictions more than 10 years old.[270]

Jose Rodriguez's case exemplifies a second truth about crimmigration—its failure to live up to its stated priorities. Although the crimi-

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264. Technical Record on Appeal, *supra* note 256, at 2–3; *see also* TENN. CODE ANN. § 40-30-102(b)(1) (providing that if a postconviction claim is "based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial," and "retrospective application of that right is required," the postconviction action may be filed "within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial").

265. Technical Record on Appeal, *supra* note 256, at 14–16.

266. Rodriguez v. State, No. M2011-01485-CCA-R3-PC, 2013 WL 59449, at *3 (Tenn. Crim. App. Jan. 7, 2013).

267. *Id.* at *4.

268. Oral Argument, Rodriguez v. State, M2011-01485-CCA-R3-PC (Tenn. Oct. 2, 2013), *available at* https://www.tncourts.gov/courts/supreme-court/arguments/2013/10/02/jose-rodriguez-aka-alex-lopez-v-state-tennessee.

269. Rodriguez v. State, No. M2011-01485-SC-R11-PC, 2014 WL 1347085 (Tenn. April 24, 2014) (holding that an expunged conviction is not susceptible to postconviction attack).

270. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FEW ICE DETAINERS TARGET SERIOUS CRIMINALS (2013), *available at* http://trac.syr.edu/immigration/reports/330 (reporting that nearly half of those immigration detainers issued on the basis of a past conviction during the period of study were based on a conviction more than five years old).

nal-to-immigration pipeline is supposed to channel serious criminals into deportation,[271] in fact most persons enter the pipeline like Jose Rodriguez, with no conviction at all or at most a minor conviction.[272] The ensnaring of immigrants based on nothing more than minor charges has been a leading factor spurring resistance to local involvement in federal immigration enforcement.[273]

In the crimmigration system, minor crimes, even dismissed and expunged crimes, can be the entry point, often years later, into a pipeline that "virtually inevitabl[y]" leads to the "'drastic measure' of deportation or removal"[274] that the Court has recognized as "an integral part—indeed, sometimes the most important part—of the penalty" for those crimes.[275] These truths highlight the importance of the *Padilla* retroactivity question, and its uniqueness.

A. Griffith*, Not* Teague*, Should Govern* Padilla *Claims Properly First Raised in State Postconviction Proceedings*

Examining the application of *Teague* with these cases in mind demonstrates the *Teague* antiretroactivity rule ought not to be applied to *Padilla* claims properly brought in state postconviction proceedings. The principles animating *Teague*'s rule—comity and finality—are simply not applicable. Comity is not a concern where a state court is reviewing a state-court judgment.[276] And, as is shown below, finality concerns do not favor denying redress in the context of a state postconviction proceeding in which the petitioner asks the postconviction court to apply or develop[277] a new constitutional rule[278] to a claim of

271. *See supra* note 32 and accompanying text.

272. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 270, at tbls.2 & 3 (reporting that 47.7% of those subject to detainers over a 16-month period had no criminal conviction, and 17% were convicted of a "Level 3" offense carrying a sentence of less than a year; only 23% had a "Level 1" conviction).

273. In King County, Washington, for example, a resolution limiting detainer compliance recited the fact that over a three-year period 78% of detainers received at the adult jail targeted persons with no prior criminal history. King County, Wash., Ordinance No. 17706 (Dec. 2, 2013), *available at* http://mkcclegisearch.kingcounty.gov/LegislationDetail.aspx?ID=1445647&GUID=19C2080B-1877-43FA-9B5B-B725F94F428D&Options=ID%7cText%7c&Search=2013-0285. Similarly, a resolution passed in Miami-Dade County, Florida, recited that 57% of detainers received in 2011 and 61% in 2012 did not involve a felony charge. Miami-Dade County, Fla., Res. No. R-1008-13 (Dec. 3, 2013), *available at* http://www.scribd.com/doc/192144641/MDC-Resolution-on-ICE-Detainers-Official-Clerk-Copy-Passed-December-3-2013.

274. Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

275. *Id.* at 364 (footnote omitted).

276. *See* Danforth v. Minnesota, 552 U.S. 264, 279 (2008).

277. The *Teague* rule acts to bar a court from granting redress based on the application of a new rule announced in another decision, but it also bars a court from developing a new rule and granting redress upon it. Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion).

ineffective assistance of trial counsel.[279] While the policies underlying *Teague* are inapplicable, the principles supporting redressability articulated in *Griffith* are fully present. State postconviction courts should apply the *Griffith* rule of redressability, rather than *Teague*'s antiredressability rule, in these cases.

1. The Temporal and Procedural Dimensions of Finality

Before considering whether the finality concerns behind the *Teague* antiretroactivity rule support its application in state postconviction proceedings, it is important to undertake some dissection of finality.[280] Finality is often invoked as a monolithic, impenetrable value to be balanced against the value of correcting errors in criminal cases.[281] Indeed, that was how finality was deployed in *Teague* itself. After noting that finality was a well-established value in civil cases,[282] the Court went on to find finality "essential to the operation of our criminal justice system."[283] The *Teague* Court's limited elaboration of finality revealed a view that finality would attach at a given time in the life of a criminal case and attain a prominence over error correction that would be nearly insuperable.[284] Quoting Professor Bator, the Court wrote: "[I]f a criminal judgment is ever to be final, the notion of legality must *at some point* include the assignment of final competence

278. For the purpose of discussing finality, I assume arguendo that *Padilla* announced a "new rule," as the Court held in *Chaidez*. But state courts are not bound by *Chaidez* and may reach their own conclusions as to whether *Padilla* announced a "new rule." The indeterminacy of what constitutes a "new rule" is one of many compelling reasons to dispense with the *Teague* inquiry altogether. *See infra* Part IV.B.1.

279. *Chaidez* specifically failed to address the claim that "*Teague* should not apply to ineffective assistance claims." Chaidez v. United States, 133 S. Ct. 1103, 1113 n.16 (2013). It is therefore possible that the United States Supreme Court will apply *Teague* consistent with the principles set forth here. State courts need not wait for the Supreme Court to decide the issue, particularly since, as is demonstrated herein, the interests at stake when ineffective assistance of counsel claims are brought in state postconviction proceedings are different from the interests animating the *Teague* rule in federal habeas corpus proceedings to determine the validity of state court judgments.

280. A valuable contribution has been recently made to the discourse on finality. *See* Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments* Less *Final Can Further the "Interests of Finality*," 2013 UTAH L. REV. 561.

281. Engle v. Isaac, 456 U.S. 107, 135 (1982) (stating that "[i]n appropriate cases [comity and finality] must yield to the imperative of correcting a fundamentally unjust incarceration").

282. *Teague*, 489 U.S. at 308 (plurality opinion) ("[I]t has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule.").

283. *Id.* at 309.

284. *Teague*'s two pro-retroactivity rules, the substantive due process and the "watershed" rules, *see supra* Part III.A, are the only circumstances *Teague* recognized in which the need to apply a new constitutional rule would overcome finality once it has attached.

to determine legality."[285] *Teague* accordingly adopted a fixed procedural "trigger point"—the end of direct review—for application of *Teague*'s antiretroactivity rule.[286]

Teague's selection of a single trigger point comported with the Court's recital of only a single justification (borrowed from Professor Bator) for valuing finality: "Without finality, the criminal law is deprived of much of its deterrent effect."[287] But closer examination of the sources *Teague* relied on to support its emphasis on finality[288] reveals that the monolithic value of finality can be broken down into two distinct values that I will call "temporal finality" and "procedural finality."

Temporal finality is the perceived value in having criminal proceedings conclude within as short a *time* as possible. Professor Bator, for example, believed that a "statutory time limit" for seeking federal habeas review would be justified, since the passage of time might be accompanied by "loss of evidence or absence or death of witnesses, which may . . . effectively bar retrial of the case."[289] Similarly, Judge Friendly emphasized the value of temporal finality, noting that "[t]he longer the delay, the less the reliability of the determination of any factual issue giving rise to the [collateral] attack," the less the likelihood of a retrial even taking place, and the less accurate the retrial if it does take place.[290]

Procedural finality, on the other hand, arises not with the passage of time but with a litigant's opportunity to raise a constitutional claim.

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285. *Teague*, 489 U.S. at 309 (plurality opinion) (emphasis added) (quoting Bator, *supra* note 126, at 450–51).

286. *Id.* at 310. The *Teague* trigger point is discussed in more depth below. *See infra* Part IV.B.2.

287. *Teague*, 489 U.S. at 309 (plurality opinion).

288. Elsewhere I have suggested that *Teague*'s concern with finality may be overblown. *See* Lasch, *supra* note 110, at 57–60. That argument is not necessary to show that *Teague* ought not be imported into state postconviction proceedings.

289. Bator, *supra* note 126, at 517.

290. Friendly, *supra* note 126, at 147. Justice Harlan made the same points. *See* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (noting that retrial after a grant of the habeas writ "compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed" and "may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first"). The Supreme Court has recognized the temporal value of finality in crafting other habeas doctrines. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (adopting a rule requiring the habeas petitioner to demonstrate "actual prejudice" from constitutional error, because retrial after habeas grant "imposes significant 'social costs,' including . . . the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make obtaining convictions on retrial more difficult" (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)).

Professor Bator's critique of federal habeas jurisdiction was leveled principally at the *relitigation* of constitutional issues.[291] He made explicit exceptions to his argument, first where "no opportunity at all was provided to litigate a question," and second where the "conditions under which a question was litigated were not fairly and rationally adapted for the reaching of a correct solution."[292] In the first instance, Professor Bator would have permitted *initial* litigation of the question on collateral review; in the second he would have permitted *relitigation*.[293] Likewise, Judge Friendly—who argued broadly that finality was sufficiently valuable that collateral attack should be available only to those who asserted their actual innocence—made exceptions to this rule both where "collateral attack is the [first and] only avenue for the defendant to vindicate his rights" and also where a state does not provide "proper procedure" in the initial forum for litigating the constitutional claim.[294]

Although the *Teague* Court did not differentiate between these two finality values, there is strong evidence that *Teague* is rooted in procedural—not temporal—finality. First, *Teague* is one in a series of Supreme Court decisions crafting judicial "defenses" to the habeas writ,[295] each of which were primarily rooted in procedural finality.[296] Indeed the Court declined to craft a judicial defense to the writ that

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291. *See* Bator, *supra* note 126, at 451 (asking, "[I]f a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding 'count'?").

292. *Id.* at 455.

293. *Id.*

294. Friendly, *supra* note 126, at 152–53.

295. *See* McCleskey v. Zant, 499 U.S. 467 (1991) (barring review in a second or subsequent habeas petition of claims that should have been raised in an earlier petition); Wainwright v. Sykes, 433 U.S. 72 (1977) (establishing rule that claims not presented to state courts in accordance with state procedural rules would be deemed "procedurally defaulted" and not susceptible to litigation in federal habeas review absent a showing of cause and prejudice).

296. Like in *Teague*, the Court's decision in *Wainwright* did not support its rule by reference to the specific harms identified with temporal finality. In *McCleskey v. Zant*, the Court identified its abuse-of-the-writ doctrine as "implicat[ing] nearly identical concerns" as addressed by the procedural default doctrine set forth in *Wainwright*. *McCleskey*, 499 U.S. at 490–91. The Court did mention the harms to a retrial after a habeas grant, due to "erosion of memory" and "dispersion of witnesses," associated with temporal finality. *Id.* at 491. But, at the end of the day, the fact that "both the abuse-of-the-writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time," *id.* at 490, demonstrates that procedural finality is the necessary precondition to these doctrines.

would explicitly and primarily serve temporal finality.[297] Second, the *Teague* decision did not advert to the harms occasioned by the passage of time—the hallmark of temporal finality.[298] Third, *Teague* delineated the trigger point for its antiretroactivity rule in procedural rather than temporal terms.[299]

The attention to procedural finality (and inattention to temporal finality) in *Teague* is consistent with the thinking of the authors who influenced the Court's decision. While Professor Bator and Judge Friendly valued both temporal and procedural finality, for them the procedural value clearly trumped the temporal value. Temporal finality was part of their justification for curtailing collateral review,[300] but it was insufficient unless accompanied by procedural finality.[301] And, while Professor Bator favored setting time limits for collateral attack, which would explicitly serve the temporal finality value, here again temporal finality was insufficient without procedural finality; Professor Bator would have excepted from any time limits the raising of a claim which could not have been raised within the allotted time and therefore had not attained procedural finality.[302]

In considering whether and how the *Teague* antiretroactivity rule should be applied in state postconviction proceedings, then, procedural finality should be the principal concern.[303]

2. Padilla *Claims and Procedural Finality Concerns*

The *Teague* rule's concern with procedural finality cannot be divorced from the precise context in which it was forged. Federal habeas review of state-court judgments addresses claims that have already been subject to one full round of litigation in state court, typically including adjudication in a trial court as well as one or more appellate courts.[304] But most states have rules in place to ensure that

297. Day v. McDonough, 547 U.S. 198, 214 (2006) (Scalia, J., dissenting) (noting that unlike the other judicially created defenses, "no time limitation—not even equitable laches—was imposed [in federal habeas proceedings] to vindicate comity and finality").

298. *See* Teague v. Lane, 489 U.S. 288, 308–10 (1989) (plurality opinion).

299. *Id.* at 310.

300. *See supra* notes 289–290 and accompanying text.

301. *See supra* notes 128–133 and accompanying text.

302. Bator, *supra* note 126, at 517 n.204 ("Of course I would not suggest imposing such a limit in cases where the whole point of affording a collateral jurisdiction is to enable prisoners to raise federal claims not previously available to them.").

303. While some *Padilla* claims strongly implicate temporal finality concerns, those concerns do not justify application of the *Teague* antiretroactivity rule. Other rules—statutes of limitation or the doctrine of laches—are explicitly suited to serve temporal finality. *See infra* Part IV.A.2.a.

304. The doctrines of exhaustion and procedural default, both referenced in *Teague*, 489 U.S. at 297–99, generally require that a habeas petitioner have subjected his or her constitutional claims to a full round of review in the state courts before bringing them in a habeas petition.

postconviction proceedings are not a forum for *relitigation* of constitutional claims.[305] Ineffective assistance of counsel claims in general, and *Padilla* claims in particular, are properly brought in postconviction proceedings for an initial round of adjudication.[306]

a. Other Procedural-Finality-Serving Doctrines that Channel Claims to the Right Forum at the Right Time

Most states have finality-serving doctrines to ensure that claims are raised at the appropriate time and by the appropriate procedural vehicle. These doctrines serve both temporal and procedural finality;[307] claims must be brought in a timely manner and are not subject to endless relitigation.

Generally the failure to bring a constitutional claim at the earliest possible moment can result in what is commonly called "waiver" or "procedural default." Constitutional claims that could have been, but were not, raised on direct review may be dispensed with in postconviction proceedings under this doctrine.[308] The doctrine, by definition, serves the procedural finality value, which arises when a litigant has the *opportunity* to raise a constitutional claim.

A claim that has been raised and decided on direct appeal may be subject to a res judicata or direct estoppel bar in postconviction proceedings.[309] While the waiver doctrine forces claims to be brought as

305. *See infra* Part IV.A.2.a.

306. *See infra* Part IV.A.2.b.

307. The possibility of new immigration consequences attaching retroactively to old criminal convictions, *see supra* note 211 and accompanying text, turns state interests in temporal and procedural finality on their ear. It makes little sense to accord a criminal conviction "finality" when new consequences can still spring from it. Where Congress has attached new immigration consequences to an old conviction, the retroactive application of such consequences should justify retroactive application of criminal doctrines affecting the validity of the conviction. *Cf.* Meneses, *supra* note 211 (arguing that *Padilla* suggests Congress ought not be permitted to attach immigration consequences retroactively).

308. The doctrine is codified by statute in Tennessee. *See* TENN. CODE ANN. § 40-30-106(g) (2012) (generally holding a claim waived "if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented"). New Mexico provides exceptions to the rule, evidencing circumstances in which the procedural finality value is not dominant. "A habeas corpus petitioner will not be precluded . . . from raising issues . . . that could have been raised on direct appeal either when fundamental error has occurred, or when an adequate record to address the claim properly was not available on direct appeal." Duncan v. Kerby, 851 P.2d 466, 468 (N.M. 1993) (citation omitted); *see also, e.g.*, Campos v. Bravo, 161 P.3d 846, 852 (N.M. 2007) (holding that although the record was adequate for litigation of the constitutional claim on direct appeal, the claim was of fundamental error and therefore could be reviewed in habeas proceedings despite a failure to raise the claim on direct appeal).

309. *See, e.g.*, Commonwealth v. Rodriguez, 823 N.E.2d 1256, 1260 (Mass. 2005) ("We conclude that principles of direct estoppel operate as a bar to the defendant's attempt in her rule 30(b) motion to relitigate issues in her motion to suppress.").

early as possible, the direct estoppel doctrine serves procedural finality[310] by ensuring that postconviction proceedings are not a second round of litigation for claims raised in earlier direct review or postconviction[311] proceedings.

Together, these doctrines result in a finely calibrated set of procedures to channel constitutional claims to the proper forum at the proper time. While the waiver doctrine forces claims to be brought as early as possible, the res judicata doctrine prevents relitigation, generally ensuring that postconviction proceedings are not a second round of litigation for claims raised in earlier direct review or postconviction proceedings. The finality concerns underlying *Teague* are amply, precisely, and completely served by these doctrines—and state-specific variations on these doctrines represent the balancing of the state interest in correcting constitutional error against the state interest in procedural finality.

Some jurisdictions use the doctrine of laches to serve *temporal* finality concerns. For example, when Roselva Chaidez filed her postconviction action in 2009 seeking to vacate her 2004 conviction,[312] the government sought to bar Chaidez from postconviction relief through the doctrine of laches.[313] The district court found, though, that Chaidez brought her postconviction action promptly after learning of the adverse immigration consequences caused by her guilty plea.[314]

Other jurisdictions have addressed *temporal* finality concerns by placing a time limit on when a first postconviction action can be brought. Tennessee, for example, has a one-year statute of limitations for postconviction actions.[315] While such time limits certainly serve

310. Here again, New Mexico law evidences a weakened interest in procedural finality, as compared to the state's apparent interest in constitutional error correction. New Mexico does not adhere to a strict rule of res judicata. If a "habeas petitioner can show that there has been an intervening change of law or fact, or that the ends of justice would otherwise be served, principles of finality do not bar relitigation of an issue adversely decided on direct appeal." Clark v. Tansy, 882 P.2d 527, 532 (N.M. 1994); *see also Duncan*, 851 P.2d at 469 (describing "res judicata in the habeas corpus setting as an equitable, discretionary, and flexible judicial doctrine" and suggesting that the opportunity for full factual development of a claim during the direct review track is an important factor for the postconviction court to consider in deciding whether to apply res judicata).

311. *See* Manlove v. Sullivan, 775 P.2d 237, 241 (N.M. 1989) (noting that "collateral estoppel principles may, at the discretion of a subsequent habeas corpus court, prevent relitigation of issues argued and decided on a previous habeas corpus petition").

312. *See supra* notes 183–204.

313. Government's Response in Opposition to Defendant's Motion for Writ of Error *Coram Nobis, supra* note 189, at 5–6.

314. United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *3 (N.D. Ill. Oct. 6, 2010).

315. TENN. CODE ANN. § 40-30-102(a) (2012).

the state interest in finality, they are by nature blunt instruments. Accordingly, most time limitations contain explicit exceptions to allow claims to be brought where delay is not attributable to the defendant.[316] Tennessee's statute of limitations contains no such exception, however, suggesting Tennessee apparently values, at least for purposes of postconviction actions, temporal finality more than procedural finality.[317] Because Jose Rodriguez filed his postconviction motion in 2011, some three-and-a-half years after his guilty plea, the trial court found his motion would be time-barred.[318]

In New Mexico, by contrast, the postconviction petition filed by Martin Ramirez was subject to no statutory limitations period. Although the rule pursuant to which Mr. Ramirez pursued postconviction relief requires action to be taken "within a reasonable time,"[319] the New Mexico Supreme Court has construed the rule as imposing no statute of limitations.[320] The court's decision, finding it "only logical that a void conviction cannot be vitalized by the lapse of time,"[321] demonstrates a higher value assigned to constitutional error correction than to temporal finality.

Importing the *Teague* antiredressability rule does not adequately address state finality concerns. Under the *Teague* rule, finality is the dominant concern once direct review is complete. As is shown here, the *Teague* rule is not calibrated to consider claims properly raised in postconviction proceedings, and results in the denial of a forum and elimination of state courts' participation in shaping federal constitutional doctrine.[322]

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316. *See, e.g.*, 42 PA. CONS. STAT. § 9545(b)(1)(ii) (2014) (allowing exception to one-year time limit where "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence"); KY. R. CRIM. P. 11.42(10)(a) (allowing similar exception to three-year statute of limitations for postconviction action).

317. There is no "discovery" rule in Tennessee whereby a postconviction litigant who was not aware of the factual basis of her constitutional claims can avoid strict application of the statute of limitations. Passarella v. State, 891 S.W.2d 619, 625 (Tenn. Crim. App. 1994) ("This Court refuses to engraft a discovery rule over the statute of limitations in post-conviction cases.").

318. Technical Record on Appeal, *supra* note 256, at 14–16.

319. Mr. Ramirez pursued relief by filing a petition for writ of *coram nobis*, which the New Mexico Court of Appeals treated as a motion made pursuant to New Mexico Civil Rule 1-060(B). State v. Ramirez, 278 P.3d 569, 570 (N.M. Ct. App. 2012) (citing State v. Barraza, 267 P.3d 815 (N.M. Ct. App. 2011), *aff'd*, No. 33,604, 2014 WL 2773025 (N.M. June 19, 2014)). By the terms of Rule 1-060(B), such a motion must be made "within a reasonable time." *See* N.M. R. CIV. P. 1-060(B)(6); *see also* State v. Tran, 200 P.3d 537, 542 (N.M. Ct. App. 2008) (construing petition for writ of *coram nobis* as a motion pursuant to Rule 1-060(B)(4)).

320. State v. Romero, 415 P.2d 837, 840 (N.M. 1966).

321. *Id.*

322. *See infra* Part IV.A.3–5.

b. *Padilla* Claims—Properly Raised for Initial Adjudication in Postconviction Proceedings

A *Padilla* claim—that trial counsel was ineffective by failing to advise a criminal defendant of the adverse immigration consequences attendant to a guilty plea—is among the class of claims that cannot normally be adjudicated on direct review.[323] Most states permit, or even prefer, claims of ineffective assistance of counsel to be raised for the first time in postconviction proceedings.[324] Because such claims generally require investigation and fact development not available during direct review, the appellate record is generally insufficient to review claims of ineffective assistance of counsel.[325]

For precisely these reasons, the U.S. Supreme Court has determined that ineffective assistance claims are properly brought for the first time in postconviction proceedings.[326] Noting that "'[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time,'" the Court held that penalizing litigants for not raising ineffectiveness on direct appeal "would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim."[327]

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323. As noted above, most states employ a waiver doctrine to prevent litigants from raising claims in postconviction proceedings that ought to be raised on direct review. *See supra* Part IV.A.2.a.

324. *See, e.g.*, Commonwealth v. Zinser, 847 N.E.2d 1095, 1098 (Mass. 2006) ("[O]ur courts strongly disfavor raising claims of ineffective assistance on direct appeal."); State v. Arrendondo, 278 P.3d 517, 529 (N.M. 2012) (noting that the New Mexico Supreme Court "prefers that these claims be brought under habeas corpus proceedings"); Kendricks v. State, 13 S.W.3d 401, 405 (Tenn. Crim. App. 1999) (holding that the postconviction court erred in barring petitioner's ineffective assistance of counsel claims for failure to raise them on direct appeal).

325. *See, e.g.*, Duncan v. Kerby, 851 P.2d 466, 468–69 (N.M. 1993) ("The rationale is that even assuming that a criminal defendant has a new attorney to handle his direct appeal, the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness because conviction proceedings focus on the defendant's misconduct rather than that of his attorney."); State v. Paredez, 101 P.3d 799, 806 (N.M. 2004) ("[W]hen the record does not contain all the facts necessary for a full determination of the issue, 'an ineffective assistance of counsel claim is more properly brought through a habeas corpus petition . . . .'" (quoting State v. Roybal, 54 P.3d 61, 67 (N.M. 2002))); *Kendricks*, 13 S.W.3d at 405 (noting that the court had "previously warned defendants and their counsel of the dangers of raising the issue of ineffective assistance of trial counsel on direct appeal because of the significant of [sic] amount of development and factfinding such an issue entails," and citing cases); Thompson v. State, 958 S.W.2d 156, 161–62 (Tenn. Crim. App. 1997) (describing the raising of ineffective assistance on direct appeal as a "practice fraught with peril" because of the possibility that the claim will be decided without the benefit of an evidentiary hearing, and citing cases).

326. Massaro v. United States, 538 U.S. 500 (2003).

327. *Id.* at 504 (alteration in original) (quoting Guinan v. United States, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring)).

In short, an ineffectiveness claim typically relies on facts that "are *dehors* the record and their effect on the judgment was not subject to consideration and review on appeal."[328] Both Professor Bator and Judge Friendly, whose views on finality were ultimately enshrined in *Teague*, excluded such claims from their broader view that finality should foreclose collateral review of criminal judgments.[329] Professor Bator specifically excluded claims involving denial of the right to counsel,[330] of which a claim of ineffective assistance is a subspecies. Both Professor Bator and Judge Friendly excluded claims involving defects in a guilty plea.[331] A claim that a guilty plea was caused by ineffective assistance of counsel is a claim that the plea was rendered involuntary by virtue of counsel's deficient performance.[332]

3. Martinez v. Ryan—*Procedural Finality for Claims Properly First Raised in Postconviction Proceedings*

The U.S. Supreme Court recently recognized, in its 2012 decision in *Martinez v. Ryan*,[333] that in assessing the finality interest owing to a state-court adjudication challenged on federal habeas review, claims of ineffective assistance of counsel brought properly for the first time in postconviction proceedings should be treated as though they were being pursued on direct review.

Martinez concerned the application of the procedural default doctrine, which—like *Teague*—serves interests in comity and procedural finality that arise when a federal court reviews a state-court judgment in habeas proceedings. In *Martinez*, the Court considered whether the procedural default of failing to raise a claim of ineffective assistance of trial counsel could be excused by the absence or ineffectiveness of postconviction counsel.[334] Ordinarily, the absence or deficiency of

328. Friendly, *supra* note 126, at 152 (quoting Waley v. Johnston, 316 U.S. 101, 104–05 (1942)).

329. *See* Jaclyn Kelley, Note, *To Plea or Not To Plea: Retroactive Availability of* Padilla v. Kentucky *to Noncitizen Defendants on State Postconviction Review*, 18 MICH. J. RACE & L. 213, 230–35 (2012) (noting the unfairness of applying the *Teague* bar to ineffectiveness claims raised in state postconviction proceedings).

330. Bator, *supra* note 126, at 458.

331. *See id.* at 457 (indicating claims involving coerced guilty pleas could properly be brought in postconviction proceedings); Friendly, *supra* note 126, at 152 (same for guilty plea procured by improper means).

332. *See* Hill v. Lockhart, 474 U.S. 52, 56–57 (1985) (holding that where defendant enters a plea upon the advice of counsel the voluntariness of the plea is determined by the test for ineffective assistance of counsel).

333. Martinez v. Ryan, 132 S. Ct. 1309 (2012).

334. *Id.* The procedural default doctrine requires a litigant to raise the claim in the proper way, according to state law. That, and the fact that the rule is relaxed where a litigant can show "cause" for not doing so, indicate that it is procedural finality, not temporal finality, that is served by the procedural default rule.

counsel is recognized as "cause" to excuse a procedural default in state court proceedings only if it amounts to a denial of the *constitutional* right to counsel.[335] And because generally there is no constitutional right to counsel in state postconviction proceedings, the Court had held in *Coleman v. Thompson* that the absence or deficiency of postconviction counsel would not constitute cause for a procedural default.[336]

But in *Martinez* the Court reassessed this calculus. The *Martinez* Court began by noting that the procedural default rule is among those rules, specific to federal habeas corpus review of state court judgments, "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism."[337] Nonetheless, finality did not carry the day—precisely because Martinez's claim of ineffective trial counsel would have been properly brought for the first time in postconviction proceedings. "Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial," wrote the Court, "the collateral proceeding is in many ways *the equivalent of a prisoner's direct appeal* as to the ineffective-assistance claim."[338]

In light of the similarities between direct review proceedings and "initial-review collateral proceedings" presenting the first opportunity to raise a claim, the Court essentially imported the rules for direct review proceedings. Thus, because absent or ineffective counsel on direct review will constitute cause to excuse a procedural default, the same rule applies to absent or ineffective counsel on postconviction review of a claim properly brought for the first time in postconviction proceedings—even though the absence or ineffectiveness does not in that instance amount to a *constitutional* denial of counsel.

Martinez confirms that *Padilla* claims of ineffective crimmigration counsel that are properly raised for the first time in postconviction proceedings do not implicate procedural finality any more than claims

335. *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991).

336. *Id.* at 752–53.

337. *Martinez*, 132 S. Ct. at 1316.

338. *Id.* at 1317 (emphasis added). In *Trevino v. Thaler*, the Court held that the *Martinez* rule applies in jurisdictions that do not *require* ineffectiveness claims to be brought in postconviction proceedings, if the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013).

raised on direct review.[339] Finality, the principal policy consideration that might support application of the *Teague* rule here, is absent. Instead, *Martinez* demonstrates that because claims of ineffectiveness are generally encouraged to be brought in postconviction proceedings for the first time, it is the policy reasons underlying the *Griffith* rule of retroactivity that are implicated when a *Padilla* claim is so presented: "the opportunity to . . . obtain an adjudication on the merits of his claims."[340]

As the Court wrote in *Griffith*, "the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule."[341] This "basic norm[] of constitutional adjudication"[342] supported the *Griffith* Court's determination that a rule of redressability must apply to cases on direct review, and is no less applicable to postconviction actions in which *Padilla* claims are raised. Just as absent or ineffective postconviction counsel in *Martinez* was deemed cause to excuse a procedural default because it threatened the opportunity for "an adjudication on the merits," even so would applying *Teague*'s antiredressability rule to *Padilla* claims brought in postconviction proceedings render state courts powerless to reach the merits of many such claims. The *Griffith* redressability rule is appropriate in this instance, to ensure that claims properly brought for the first time in postconviction proceedings are brought in a forum capable of reaching the merits.

339. Chaidez raised this argument to the United States Supreme Court, *see* Brief for Petitioner, *supra* note 166, at 27–33, and I have argued previously that in *Chaidez* the Court had an opportunity to rule on a basis more principled than the *Teague* "new rule" inquiry allowed. *See* Christopher N. Lasch, *Symposium:* Chaidez *and the Crumbling Foundations of the* Teague *Rule*, CRIMMIGRATION (Nov. 1, 2012, 4:04 AM), http://crimmigration.com/2012/11/01/chaidez-and-the-crumbling-foundations-of-the-teague-rule.aspx; *see also* Fisher & Turner, *supra* note 8, at 43–44. For a searching analysis and presentation of the argument that *Padilla* claims should not be subject to the *Teague* analysis when properly presented for the first time on postconviction review, see generally Sharpless & Stanton, *supra* note 11. The argument can be extended beyond *Padilla* claims to any claim properly presented for initial adjudication in state postconviction proceedings. *See* Lasch, *supra* note 110, at 44–46 (noting that "state and federal postconviction proceedings . . . provide an *initial* forum for the litigation of certain constitutional claims" such as ineffective assistance of counsel, government suppression of exculpatory evidence, and juror misconduct); *see also id.* at 49 (arguing that for such claims "the selection of a 'trigger point' before the claims may even be raised makes little sense").

340. *Martinez*, 132 S. Ct. at 1317.

341. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

342. *Id.*

4. Procedural Finality Protections Embodied in the Substantive Law Governing Padilla *Claims*

The *Teague* antiredressability rule is superfluous given the claim at issue here, ineffective assistance of counsel, which has built-in safeguards to protect the finality of criminal judgments. Both the deficient performance and prejudice components of the legal standard safeguard a state's procedural finality interest. The *Teague* antiredressability rule is unnecessary given these protections.

Strickland v. Washington[343] established the now-familiar two-part test for ineffective assistance of counsel. *Padilla* in turn relied on *Strickland*, which requires a defendant to prove not only that trial counsel's performance was deficient, but also that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[344]

Both prongs of the *Strickland* test protect finality. In evaluating whether counsel's performance was constitutionally deficient, *Strickland* eschews a post hoc judgment: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct *from counsel's perspective at the time*."[345] Reviewing courts are thus explicitly instructed not to consider evolving standards of performance—by this requirement, ineffective assistance of counsel claims are already frozen in amber.[346]

The *Strickland* Court's discussion announcing the standard for assessing deficient performance indicates the Court was motivated by its concern with the finality of judgments: "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of

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343. Strickland v. Washington, 466 U.S. 668 (1984).

344. *Id.* at 694.

345. *Id.* at 689 (emphasis added); *see also id.* at 690 (instructing postconviction courts to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed *as of the time of counsel's conduct*" and measured against "*prevailing* professional norms" (emphasis added)).

346. *See* Leading Case, *Sixth Amendment—Assistance of Counsel—Retroactivity*—Chaidez v. United States, 127 HARV. L. REV. 238, 238 (2013) ("The jurisprudence that governs ineffective assistance of counsel dictates a conclusive if imprecise timestamp when attorney deficiency outstrips constitutional bounds: the very moment prevailing norms of professional conduct deem it so.").

counsel's unsuccessful defense."[347] *Teague*'s antiredressability rule is not required to serve finality concerns where the legal standard by which claims are tested is specifically linked to the time of the alleged error.

The *Strickland* Court also included a prejudice component in announcing the test for ineffective assistance of counsel. Here the Court explicitly considered finality. The Court rejected the idea that counsel's deficient performance should merit automatic reversal, with no prejudice requirement, and instead sought to fashion a test that would identify errors of counsel "sufficiently serious to warrant setting aside the outcome of the proceeding."[348] The Court also rejected a prejudice test that would require a defendant to demonstrate prejudice by a preponderance of the evidence. The Court noted that such a test would "reflect[] the profound importance of finality in criminal proceedings,"[349] but decided that "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."[350]

Thus, in calibrating the prejudice prong of the *Strickland* test, the Court explicitly considered the finality owed to state-court judgments. Superimposing a second finality-serving doctrine, the *Teague* antiredressability rule skews the fine balance struck by the Court in *Strickland*. This is particularly so given that *Teague* gives overwhelming voice to finality, denying redress in nearly all claims brought after the conclusion of direct review. The *Strickland* Court rejected this overemphasis on finality in fashioning its prejudice prong.

5. State Courts' Interest in Developing Constitutional Law for Claims Properly Brought Initially in Postconviction Proceedings

State courts, no less than federal courts, have the duty to adjudicate federal constitutional claims.[351] Importing *Teague* in this context

347. *Strickland*, 466 U.S. at 690.

348. *Id.* at 693.

349. *Id.* at 693–94.

350. *Id.* at 694.

351. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); *see also* Arizona v. Evans, 514 U.S. 1, 8 (1995) ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution."); Robb v. Connolly, 111 U.S. 624, 637 (1884) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ; for the

would deny state courts the important opportunity to discharge this duty. It would prevent state courts from developing federal constitutional law concerning ineffective assistance of counsel (and all other claims that are properly first brought in postconviction proceedings), realizing Justice Harlan's fear that a rule of prospectivity would reduce the lower courts "largely to the role of automatons, directed by [the Supreme Court] to apply mechanistically all then-settled federal constitutional concepts to every case before them."[352]

Teague, when applied in federal habeas corpus proceedings, "eliminates a previously available federal forum in which state prisoners may argue for new federal procedural rules."[353] Importing *Teague* into state postconviction proceedings eliminates a state forum for doing so—a state forum that is all the more important for constitutional development given *Teague*'s removal of a federal forum.

The importance of state court voices in developing federal constitutional law should not be underestimated. The Supreme Court relies on state courts to serve as proving grounds for constitutional arguments.[354] Indeed, in *Padilla* the U.S. Supreme Court relied in part upon New Mexico's *Paredez* decision to support its decision that there is no constitutional difference between an attorney's misadvice and non-advice concerning immigration consequences.[355] But had *Paredez* indeed been a "new" rule of constitutional law, a strict application of *Teague* in New Mexico postconviction proceedings would have prevented New Mexico from announcing *Paredez* at all.

Application of *Teague* to claims properly presented initially in postconviction proceedings would effectively remove state courts' voices from the important ongoing dialogue over the shape and scope of federal constitutional rights. Indeed, applying *Teague* in this way runs counter to the foundational premise of *Teague*. Justice Harlan be-

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judges of the State courts are required to take an oath to support that Constitution, and they are bound by it . . . as the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.").

352. Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

353. Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 191 (2005).

354. *See* Johnson v. Texas, 509 U.S. 350, 379 (1993) (O'Connor, J., dissenting) (referring to the Supreme Court's practice of allowing "emerging constitutional issues" to "percolate" in the state courts); *see also* Maryland v. Balt. Radio Show, Inc., 338 U.S. 912, 917–18 (1950) (noting that the Supreme Court may deny certiorari to allow constitutional issues to be "further illumined by the lower courts").

355. Padilla v. Kentucky, 559 U.S. 356, 370 (2010) (citing State v. Paredez, 101 P.3d 799, 804–05 (N.M. 2004)).

lieved only comity and finality justified curtailing federal habeas review because a federal habeas court reviews constitutional claims that have already been adjudicated in state court.

Justice Harlan recognized that relitigation of constitutional issues in federal habeas proceedings might serve a "deterrence function,"[356] "forcing trial and appellate courts in both the federal and state system to toe the constitutional mark."[357] But this function might be adequately served (and tempered by comity), Justice Harlan believed, by limiting federal habeas courts to applying constitutional rules that were in effect at the time of the state-court adjudication.[358] The Court in *Teague* likewise counted among the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus"[359] the "understandabl[e] frustrat[ion]" experienced by state courts "when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."[360] Comity was thus deployed in *Teague* to protect the ability of state courts to adjudicate federal constitutional issues and to incentivize them to do so faithfully.

The finality interest served by *Teague* also was premised on an initial adjudication of constitutional claims in state court. We have seen that Justice Harlan, and ultimately the Court, relied on Professor Bator's work. And Bator explicitly grounded his views in the capacity of state-court judges to determine federal constitutional issues. "[D]eciding federal questions is an intrinsic part of the business of state judges," Bator wrote.[361] Permitting the relitigation of constitutional claims anew on federal habeas review, for Bator, would squander "all of the intellectual, moral, and political resources involved in the legal system"—including any "sense of responsibility" among state court judges.[362]

Whether cast in terms of comity or finality, the premise of *Teague* is the availability of a forum in which state courts will adjudicate in the first instance the merits of constitutional issues presented. Both Jus-

356. Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting).

357. *Mackey*, 401 U.S. at 687 (Harlan, J., concurring in the judgments in part and dissenting in part).

358. *Id.* at 688–89.

359. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (alteration in original) (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in the judgment)).

360. *Id.* (third alteration in original) (quoting Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982)).

361. Bator, *supra* note 126, at 510–11.

362. *Id.* at 451; *see also id.* at 506 ("The crucial issue is the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of *his* business: the decision of federal questions properly raised in state litigation.").

tice Harlan and Bator justified imposing limits on federal habeas review by emphasizing that such review always occurs after a round of litigation in which the state courts have had the opportunity to apply federal constitutional law, subject to review by the U.S. Supreme Court.[363] *Teague*'s deference to state courts is premised on state courts' faithful discharge of this obligation, and upon the existence of a full round of unlimited review, as the *Griffith* rule establishes, in which constitutional innovation is permitted and even required.

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Because *Padilla* claims of ineffective crimmigration counsel are properly brought initially in state postconviction proceedings, they should be subject to the principles supporting redressability articulated in *Griffith v. Kentucky* and not the antiredressability principles behind *Teague*.

B. Avoiding the Problems that Have Plagued the Teague *Rule*

As is shown above, the *Teague* antiretroactivity rule is both inappropriate and unnecessary when applied to *Padilla* claims properly brought for the first time in state postconviction proceedings.[364] By eschewing the *Teague* rule altogether, or modifying its application, state courts can avoid the three principle problems that have plagued administration of the *Teague* rule.

1. The Intractable "New Rule" Inquiry

The very first step of the *Teague* inquiry—whether a constitutional rule is a "new rule," triggering *Teague*'s antiredressability rule—has

363. [T]his Court's function in reviewing a decision allowing or disallowing a writ of habeas corpus is, and always has been, significantly different from our role in reviewing on direct appeal the validity of nonfinal criminal convictions. While the entire theoretical underpinnings of judicial review and constitutional supremacy dictate that federal courts having jurisdiction on direct review adjudicate every issue of law, including federal constitutional issues, fairly implicated by the trial process below and properly presented on appeal, federal courts have never had a similar obligation on habeas corpus.

Habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review.

Mackey, 401 U.S. at 682–83 (Harlan, J., concurring in the judgments in part and dissenting in part); *see also, e.g.*, Bator, *supra* note 126, at 512 (referring to "federal questions already adjudicated by state courts and subject to Supreme Court review").

364. *See supra* Part IV.A.

drawn scathing criticism for its unpredictability.[365] The perceived indeterminacy of the new rule inquiry has been the most persistent criticism. According to the authors of the seminal work on federal habeas corpus, "[t]he inherent ambiguity of the term 'new rule' and the Court's repeated changes of direction in defining it have left the lower courts floundering."[366] Some have claimed the new rule test has served as little more than "a screen for covert rulings on the merits."[367]

One need look no further than New Mexico to appreciate the indeterminacy of *Teague*'s new rule inquiry. New Mexico's appellate court spent considerable intellectual resources determining that neither *Paredez* nor *Padilla* announced a new rule of constitutional criminal procedure.[368] The court analyzed the new rule jurisprudence of *Teague* and its progeny, the substantive law of *Strickland* and its progeny, this Court's jurisprudence, and the *Padilla* decision itself, in concluding that *Paredez* and *Padilla* did not announce a new rule.[369] Contrary to all of the signs apparent to the New Mexico court, the Supreme Court in *Chaidez* held that *Padilla* did in fact announce a new rule of constitutional criminal procedure.[370] But state courts are not required to follow *Teague* or *Chaidez*.[371] They can avoid the inde-

365. *See, e.g.*, John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 UMKC L. REV. 581, 588 (1990) (noting that *Teague* defines a "new rule" in two contradictory ways, each representing one end of the "newness" spectrum); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1742 (1991) (describing the "new rule" inquiry as a "threshold uncertainty" contributing to the unpredictability of the *Linkletter* era).

366. 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.5, at 993 (3d ed. 1998).

367. *Id.*; *see also* Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 287 (1998) ("*Teague* and its progeny have failed to provide sufficient guidance for determining when a rule is new, thus leaving federal courts a zone of discretion with which they can make outcome determinative decisions without necessarily reaching the merits of the claims.").

368. *See* State v. Ramirez, 278 P.3d 569, 570–74 (N.M. Ct. App. 2012), *aff'd*, No. 33,604, 2014 WL 2773025 (N.M. June 19, 2014).

369. Similarly, the Massachusetts Supreme Judicial Court in 2011 concluded that "the reasoning and language of the *Padilla* decision itself" supported a conclusion that *Padilla* did not announce a "new rule." Commonwealth v. Clarke, 949 N.E.2d 892, 901 (Mass. 2011). A "fair reading" of *Padilla*, the court concluded, "suggests that the Justices themselves assumed that their holding would be retroactively applied." *Id.* at 903.

370. Chaidez v. United States, 133 S. Ct. 1103 (2013); *see also* Leading Case, *supra* note 346, at 245–47 (2013) (arguing that "the *Chaidez* version of the *Teague* analysis of newness construed the mere mention of the direct/collateral distinction as a contributing factor to the *Padilla* holding. . . . [T]he *Chaidez* gloss on *Teague* injects additional arbitrariness into the process, which is now less tied to the substance of retroactivity policy than to the minutiae of opinion language, structure, and argumentation.").

371. *See* Danforth v. Minnesota, 552 U.S. 264, 269 (2008).

terminacy of the new rule test by declining to apply *Teague* to claims properly first raised in postconviction proceedings.

Alternatively, in applying the *Teague* framework to such claims, state courts can adhere to a definition of new rule that recognizes the lesser procedural finality interests at stake in state postconviction (as opposed to federal habeas corpus) proceedings.[372] Rather than focusing on whether a potentially new rule is "dictated by precedent,"[373] for example, the New Mexico Court of Appeals in Mr. Ramirez's case hewed to the other end of the "newness spectrum,"[374] focusing on whether a potentially new rule is "flatly inconsistent [with] or explicitly contrary to precedent."[375]

The Massachusetts Supreme Judicial Court followed this same path in *Commonwealth v. Sylvain*.[376] While it continued to find the *Teague* framework for determining retroactivity questions to be "sound in principle," the court noted it was entitled to apply that framework independently and reach conclusions different from those reached by the U.S. Supreme Court.[377] The court specifically faulted the Supreme Court for adopting an increasingly broad definition of what constitutes a new rule for purposes of the *Teague* antiretroactivity analysis.[378] Instead of asking whether the *Padilla* decision would have been "apparent to all reasonable jurists" the court ultimately asked whether "Massachusetts precedent at the time *Padilla* was decided would have dictated an outcome contrary to that in *Padilla*."[379] Adhering to its pre-*Chaidez* analysis of the new rule question,[380] and siding with Justice Sotomayor's dissent in *Chaidez*, the court held that *Padilla* was not new, "for the simple reason that it applied a general standard—designed to change according to the evolution of existing professional norms—to a specific factual situation."[381]

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372. *Cf.* Colwell v. State, 59 P.3d 463, 470 (Nev. 2002) (indicating that the state would apply the *Teague* "framework" but could deviate from federal determinations of *Teague*'s new rule question).

373. *See Chaidez*, 133 S. Ct. at 1110–11 (holding *Padilla* announced a new rule because "[n]o precedent of our own '*dictated*' the [result]" and the result "would not have been—in fact, was not—'apparent to all reasonable jurists' prior to our decision" (quoting Lambrix v. Singletary, 520 U.S. 518, 528 (1997)).

374. *See* Blume & Pratt, *supra* note 365, at 588.

375. State v. Ramirez, 278 P.3d 569, 571–72 (N.M. Ct. App. 2012), *aff'd*, No. 33,604, 2014 WL 2773025 (N.M. June 19, 2014).

376. Commonwealth v. Sylvain, 995 N.E.2d 760 (Mass. 2013).

377. *Id.* at 770 (citing Danforth v. State, 761 N.W.2d 493 (Minn. 2009)).

378. *Id.* at 769.

379. *Id.* at 771.

380. *See supra* note 8 and accompanying text.

381. *Sylvain*, 995 N.E.2d at 770–71.

Quoting Justice Sotomayor, the *Sylvain* court noted that *Padilla* was driven not by changes in the Sixth Amendment, but in immigration law.[382] *Sylvain* represents one response to the rise of crimmigration and the unique set of concerns crimmigration presents for retroactivity questions. Indeed, the New Mexico Supreme Court followed this approach in Mr. Ramirez's case, holding that the right to effective crimmigration counsel had existed since at least 1990 in New Mexico and was not a new constitutional rule.[383]

2. Selection of an Appropriate "Trigger Point" for Redressability

The *Teague* rule has also been criticized for the arbitrariness of using the conclusion of direct review as a "trigger point" to separate those who will receive redress for a constitutional violation from those who will not. As Justice White put it, "otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system."[384]

Of course, any antiredressability rule requires a "trigger point—a way of separating those who will benefit from a new decision from those who will not," and any trigger point "creates distinctions that are subject to serious fairness objections; the only question is which method has the fewest shortcomings."[385] *Teague*'s selection of the close of direct review as a trigger point has a certain logic for claims brought in federal habeas corpus proceedings challenging a state court judgment: *Teague* gives effect to comity and finality concerns by preventing relitigation in federal court, based on a (presumably more favorable) new constitutional rule, of claims already decided in state court.

State postconviction courts considering claims that have already been raised and adjudicated on direct appeal could conceivably be correct in applying *Teague* to such claims.[386] But applying *Teague*'s

382. *Id.* at 768 (citing Chaidez v. United States, 133 S. Ct. 1103, 1116 (2013) (Sotomayor, J., dissenting)).

383. Ramirez v. State, No. 33,604, 2014 WL 2773025, at 1 (N.M. June 19, 2004). Like the Massachusetts Supreme Judicial Court in *Sylvain*, the New Mexico Supreme Court in *Ramirez* aligned itself not with the *Chaidez* majority, but with Justice Sotomayor's dissent. *Id.* at *5–6.

384. Griffith v. Kentucky, 479 U.S. 314, 331 (1987) (White, J., dissenting); *see also* Schriro v. Summerlin, 542 U.S. 348, 358–66 (2004) (Breyer, J., dissenting) (criticizing use of *Teague* trigger point in determining which death row inmates would benefit from the Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)).

385. Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 987, 990 (2006).

386. *See, e.g.*, Kersey v. Hatch, 237 P.3d 683 (N.M. 2010) (applying *Teague* to a claim that had already been adjudicated on direct review). That a state court would permit relitigation in post-

direct review trigger point to claims properly brought for the first time in postconviction proceedings (like *Padilla* claims of ineffective crimmigration counsel) makes no sense at all. Such claims are not ordinarily properly brought on direct review,[387] and the close of direct review proceedings is a trigger point that is on the one hand completely unrelated to the claims to be decided, and on the other hand guaranteed to deny litigants bringing these claims even one forum in which the constitutional doctrine at stake may be developed. The *Teague* trigger point applied to these claims is, to put it mildly, "subject to serious fairness objections."[388]

Applying the *Teague* rule, with its trigger point at the close of direct review proceedings, to claims properly brought first in state postconviction proceedings, makes no sense and works a positive unfairness on the litigants. If state courts retain the *Teague* framework for such claims, they should do so with a modification of the trigger point. Because claims properly brought for the first time in postconviction proceedings are analogous to those brought on direct review,[389] the finality concerns animating *Teague* are not triggered until the close of postconviction review. The proper trigger point for an antiredressability rule like *Teague*'s, applied to such claims, would be the close of postconviction review.

Such a trigger point would also ensure that the policies underlying the *Griffith* rule of redressability are given effect throughout the first full round of litigation of such claims. Just as the policies underlying *Griffith* require redress for claims through the direct review track, even so do they require redress for claims properly brought for the first time in postconviction proceedings through the postconviction review track.

3. Teague*'s Overly Narrow "Watershed" Rule*

Applying the *Teague* rule in state postconviction proceedings imports a third much-criticized aspect of *Teague*: its overly narrow exception for watershed rules of constitutional criminal procedure. In theory, *Teague* allows full redressability for such watershed rules. But in practice, the Court has not recognized a single watershed rule since

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conviction proceedings of such a claim suggests, however, a lessened state interest in procedural finality under the circumstances.

387. *See supra* Part IV.A.2.b.

388. Heytens, *supra* note 385, at 990.

389. *See supra* Part IV.A.3 (discussing the reasoning of *Martinez v. Ryan*).

Teague was announced.[390] *Teague*'s watershed exception has been criticized as being so narrow as to be "virtually non-existent,"[391] and assailed as relying upon "a deeply flawed epistemology."[392]

The *Teague* watershed rule has two requirements—a new rule must not only be "implicit in the concept of ordered liberty," but it must also be a rule that promotes the accuracy of the fact-finding process.[393] The *Teague* decision imported the accuracy requirement despite the expressed views of Justice Harlan, whose views on retroactivity were so influential on the Court. Justice Harlan endorsed the first watershed requirement—that a new constitutional rule be "implicit in the concept of ordered liberty"—but not the accuracy requirement. Although he had earlier favored an accuracy requirement, in *Mackey* Justice Harlan explicitly rejected it, in part because he found "inherently intractable the purported distinction between those new rules that are designed to improve the fact-finding process and those designed principally to further other values."[394]

If state courts apply the *Teague* framework as a matter of state law, they should modify the watershed exception as applied to claims properly first raised in postconviction proceedings. The state interest in procedural finality is much greater when a state criminal judgment is attacked in federal habeas corpus proceedings (in which case the *Teague* rule governs) than it is when a litigant properly brings a *Padilla* claim of crimmigration counsel ineffectiveness for the first time in state postconviction proceedings.[395]

The *Teague* rule, as noted above, was designed to serve interests in comity and procedural finality. But due process requires that even those interests must yield in the face of a sufficiently important new constitutional rule. *Teague* thus recognized that violations of water-

390. As is discussed more fully below, *see infra* Part V, the Court has repeatedly pointed to expansion of the right to counsel as the "paradigmatic example of a watershed rule of criminal procedure." Gray v. Netherland, 518 U.S. 152, 170 (1996).

391. Entzeroth, *supra* note 353, at 195–96; *see also* Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1694 (2007) ("[N]o new procedural rule has yet satisfied the *Teague* exception, and the Court has strongly intimated that none shall.").

392. David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 41 (1991).

393. Teague v. Lane, 489 U.S. 288, 311–12 (1989) (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

394. *Mackey*, 401 U.S. at 695 (Harlan, J., concurring in the judgments in part and dissenting in part); *see also* Bator, *supra* note 126, at 449 (urging a focus "not so much [on] the substantive question whether truth prevailed" but on whether fair process had been afforded for determining the facts).

395. *See supra* Part IV.A.

shed rules are so unjust as to outweigh not only the finality concerns underlying *Teague* but the comity concerns as well.[396] In state postconviction proceedings, where comity is not an issue and finality concerns are lessened,[397] a different rule should pertain. Eliminating the accuracy requirement of the *Teague* watershed exception, and adopting the watershed exception as proposed by Justice Harlan in his *Mackey* opinion, strikes a more appropriate balance.

As is shown more fully below,[398] the right to counsel has always been considered a "bedrock procedural element" that is "implicit in the concept of ordered liberty." It has been on the second of *Teague*'s requirements—the accuracy requirement criticized by Justice Harlan—that some courts have grounded the conclusion that *Padilla* is not a watershed rule.[399] Applying the *Teague* framework as modified to eliminate the accuracy requirement, state courts should hold that the *Padilla* rule, defining the scope of this most essential constitutional right, is a watershed rule when applied to claims of ineffective assistance of counsel properly raised for the first time in state postconviction proceedings.

V. *PADILLA* AS "WATERSHED" RULE

Even if state courts decline to modify the *Teague* watershed exception as applied to *Padilla* claims properly raised for the first time in state postconviction proceedings,[400] they should nonetheless conclude that *Padilla* is a watershed rule.

Justice Harlan used the *Gideon* decision extending the right to counsel to all felony cases as an example of a decision that "alter[ed] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[401] And U.S. Supreme Court cases applying the *Teague* watershed exception repeatedly reference *Gideon* as the paradigmatic watershed rule.[402] In

396. *See Teague*, 489 U.S. at 311–13 (plurality opinion).

397. *See supra* Part IV.A.

398. *See infra* Part V.

399. *See, e.g.*, United States v. Mathur, 685 F.3d 396, 397 (4th Cir. 2012) (holding that *Padilla* does not "enhance the 'accuracy of the factfinding process'" (quoting Whorton v. Bockting, 549 U.S. 406, 419 (2007))), *cert. denied*, 133 S. Ct. 1457 (2013); United States v. Chang Hong, 671 F.3d 1147, 1158 (10th Cir. 2011) (holding that "*Padilla* does not concern the fairness and accuracy of a criminal proceeding, but instead relates to the deportation consequences of a defendant's guilty plea").

400. *See supra* Part IV.B.3.

401. Mackey v. United States, 401 U.S. 667, 693–94 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (citing Gideon v. Wainwright, 372 U.S. 335, 349 (1963)).

402. *See, e.g.*, *Whorton*, 549 U.S. at 419–21; Beard v. Banks, 542 U.S. 406, 417–18 (2004) ("[L]awyers in criminal courts are necessities, not luxuries. *The right of one charged with crime*

Strickland, the Court specifically linked the effective assistance of counsel to the reliability of the outcome, and in doing so explicitly addressed the finality concerns which serve as a counterweight to declaring any rule a watershed rule: "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."[403]

In its per curiam decision in *McConnell v. Rhay* in 1968, the Court held that the right to counsel at sentencing must be given retroactive effect. The Court did not distinguish between the right to counsel at sentencing and the right to counsel at any other critical juncture in a criminal case:

> This Court's decisions on a criminal defendant's right to counsel at trial, at certain arraignments, and on appeal, have been applied retroactively. The right to counsel at sentencing is no different. As in these other cases, the right being asserted relates to "the very integrity of the fact-finding process." . . . The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication.[404]

The Supreme Court's recent decisions in *Missouri v. Frye*[405] and *Lafler v. Cooper*[406] concerning the Sixth Amendment right to effective counsel during plea negotiations—including *Padilla*—reaffirm the Court's commitment to the right to counsel as a "bedrock procedural element." Just as it did in *McConnell v. Rhay*, the Court has rejected in these recent cases a concern with accuracy that focuses only on the result of the criminal trial, and recognized the reality of today's criminal justice system:[407]

> Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what

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to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." (quoting *Gideon*, 372 U.S. at 344)); Kitchens v. Smith, 401 U.S. 847, 847 (1971) (per curiam) (reversing state court judgment holding *Gideon* not retroactive, and holding "*Gideon* is fully retroactive").

403. Strickland v. Washington, 466 U.S. 668, 694 (1984).

404. McConnell v. Rhay, 393 U.S. 2, 3–4 (1968) (per curiam) (citations omitted) (quoting Linkletter v. Walker, 381 U.S. 618, 639 (1965)).

405. Missouri v. Frye, 132 S. Ct. 1399 (2012).

406. Lafler v. Cooper, 132 S. Ct. 1376 (2012).

407. For a discussion of the Court's evolving recognition that the right to counsel embodies a constitutional norm beyond simply guaranteeing a fair trial, see Christopher N. Lasch, *"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, IOWA L. REV. (forthcoming 2014).

> plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.[408]

Chaidez instructs that *Padilla* is a new rule precisely because the Court acknowledged that the Sixth Amendment's reach extended to a context to which the lower courts nearly unanimously held beyond it.[409] *Padilla* thus enlarged the *scope* of the right to counsel, just as *Gideon* had when it extended the Sixth Amendment's right to noncapital state court proceedings.[410]

Supreme Court jurisprudence thus suggests it is reasonable to believe the Court will treat the expanded scope of the Sixth Amendment in *Padilla* as a watershed constitutional rule requiring retroactive application.[411] While *Teague*'s watershed exception has been excoriated by commentators who have criticized Justice O'Connor's narrowing of Justice Harlan's formulation of the watershed exception in *Mackey*,[412] one consistency between Justice Harlan's *Mackey* opinion and the *Teague* formulation is clear: An expansion of the right to counsel clearly qualifies as a watershed rule no matter what test is used.[413]

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408. *Frye*, 132 S. Ct. at 1407 (alterations in original) (citations omitted) (quoting *Lafler*, 132 S. Ct. at 1388; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); *see also Lafler*, 132 S. Ct. at 1385–86 (reaffirming that the Sixth Amendment does not exist solely to guarantee a fair trial, but extends its scope to pretrial and posttrial proceedings).

409. Chaidez v. United States, 133 S. Ct. 1103, 1109–10 (2013) (noting that the lower courts "almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation" and that *Padilla* "answered a question about the Sixth Amendment's reach that we had left open").

410. *Cf.* Lasch, *supra* note 407 (arguing that *Padilla* is a decision rule analogous to *Strickland*, and therefore implicitly recognizes an unannounced *Gideon*-like rule expanding the right to counsel).

411. In *Chaidez*, the Court noted that the question of whether *Padilla* was a watershed exception to the *Teague* rule was not before the Court. *Chaidez*, 133 S. Ct. at 1107 n.3.

412. *See, e.g.*, Roosevelt III, *supra* note 391, at 1694 ("*Teague* combined the two Harlan formulations [from *Desist* and *Mackey*], an innovation with little obvious justification other than, perhaps, that a conjunction is harder to satisfy than either element alone.").

413. *See* Jennifer H. Berman, Comment, Padilla v. Kentucky*: Overcoming* Teague*'s "Watershed" Exception to Non-Retroactivity*, 15 U. PA. J. CONST. L. 667, 672 (2012) (arguing that "the Court has finally encountered the first new rule that qualifies under *Teague*'s seemingly insurmountable watershed exception"). *But see, e.g.*, People v. Kabre, 905 N.Y.S.2d 887, 899 (Crim. Ct. 2010) (holding *Padilla* not a watershed rule).

VI. Conclusion: The States' Potential Role in Mitigating the Crimmigration Crisis

The above analysis argues strongly in favor of *all* state courts affording redress for violations of the *Padilla* right to effective crimmigration counsel, at least where such claims are properly raised for the first time in state postconviction proceedings.[414] But illogic persists in the law. It does so not because of our incapacity but because it serves inequality.

What is most likely to actually happen, then, despite this compelling logic, is not a uniform granting of redress in the state courts.[415] Instead, results will vary across jurisdictions.[416] And the state interest that will determine whether states apply *Teague* to bar litigants from redress for *Padilla* violations will likely be neither the interest in temporal finality nor the interest in procedural finality. Rather, the determinative state interest will be the one most closely tied to the specific context of this litigation—the state's perceived interest in either fueling the crimmigration machinery or slowing it.

Those states that have attempted to supplement federal immigration enforcement efforts, by actively tying their criminal justice systems to the federal immigration removal system, have garnered the most visible attention.[417] Arizona, in particular, with its restrictionist Senate Bill (S.B.) 1070, was at the center of a debate over whether states ought to engage affirmatively in immigration enforcement.[418] The Court's rebuke in *Arizona v. United States*,[419] holding S.B. 1070 preempted by federal law, will not end the debate.[420] *Arizona* failed to address the core issues that have emerged from the "crimmigration

414. *See supra* Parts IV–V.

415. The states have been nonuniform on the question of whether to adhere to *Teague*. *Compare* Danforth v. State, 761 N.W.2d 493, 499–500 (Minn. 2009) (adhering to *Teague* even after *Danforth v. Minnesota*), *and* Rhoades v. State, 233 P.3d 61, 64 (Idaho 2010) (same), *with* State v. Smart, 202 P.3d 1130 (Alaska 2009) (applying state law retroactivity test different from *Teague*), *and* State v. Garcia, 834 N.W.2d 821 (S.D. 2013) (same). They have likewise been nonuniform in determining whether, under *Teague* or a similar analysis, *Padilla* was a new rule. *Compare* State v. Gaitan, 37 A.3d 1089, 1108 (N.J. 2012) (holding that "measured at the time of [a] guilty plea in 2008, *Padilla* was novel and unanticipated"), *and* Campos v. State, 816 N.W.2d 480, 490 (Minn. 2012) (holding *Padilla* to be a new rule), *with* Commonwealth v. Clarke, 949 N.E.2d 892, 901 (Mass. 2011) (holding *Padilla* to be "merely an application of *Strickland*").

416. *See supra* note 8.

417. *See, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 Duke L.J. 251 (2011) (arguing pieces of state legislation like Arizona's S.B. 1070 and copycat measures are preempted).

418. *See* Lasch, *Detainers After* Arizona, *supra* note 34, at 640–46 (describing the rise of S.B. 1070 as a focal point for the debate over state participation in immigration enforcement).

419. Arizona v. United States, 132 S. Ct. 2492 (2012).

420. *See* Lasch, *Detainers After* Arizona, *supra* note 34, at 700–02.

crisis"—the disparate racial impact and racial profiling embedded in the crimmigration system.[421]

Indeed it is precisely these aspects of crimmigration that have spurred some jurisdictions down a path sharply different from Arizona's. In response to concerns that the crimmigration system, and particularly the "Secure Communities" program,[422] engenders racial profiling and disparate racial impact, a wave of jurisdictions has begun to actively resist participation in immigration enforcement.[423]

The question of *Padilla* retroactivity may ultimately prove to be another battlefield in the ongoing war over crimmigration, as states' dispositions toward, or against, the crimmigration system find expression in answering the question whether their courts will provide redress for *Padilla* violations. If so, Connecticut and New York, whose highest courts will soon consider *Padilla* retroactivity, seem likely to afford greater redress than the *Teague* rule would permit. Resistance to crimmigration has been present in both states: the governor of New York sought to "opt out" of Secure Communities in 2011,[424] and Connecticut in 2013 became the first state to enact legislation restricting

421. *See supra* notes 40–47 and accompanying text (noting racial profiling and disparate impact concerns); *see also* Lasch, *Detainers After* Arizona, *supra* note 34, at 700 (noting the Court's avoidance of these issues in *Arizona*); Lasch, *Preempting Detainers*, *supra* note 34, at 291–93 (noting the "road not taken" in *Arizona*).

422. *See supra* Part II.A.

423. I have documented this phenomenon elsewhere at length, finding parallels between the current wave of resistance to immigration detainers and the antebellum history of jurisdictions resisting fugitive slave rendition. *See generally* Lasch, *Rendition Resistance*, *supra* note 34. In 2014, federal court decisions indicating that localities could be held liable for Fourth Amendment violations caused by prolonged detention pursuant to federal immigration detainers have resulted in a spate of jurisdictions opting out of the crimmigration enforcement regime. *See, e.g.*, *SoCal Counties Halt Immigration Detainers After Court Ruling*, CBS LOS ANGELES (June 2, 2014), http://losangeles.cbslocal.com/2014/06/02/socal-counties-halt-immigration-detainers-after-court-ruling/.

424. *See* Editorial, *Resistance Grows*, N.Y. TIMES, (June 7, 2011), http://www.nytimes.com/2011/06/08/opinion/08wed1.html. The same occurred in Massachusetts, *see id.*, where the Supreme Judicial Court ultimately found *Padilla* applies retroactively. *See supra* notes 376–382 and accompanying text.

the use of immigration detainers,[425] the key enforcement tool of Secure Communities.[426]

Civil rights issues are not the only state interests at stake where *Padilla* retroactivity is concerned. Prosecutors and police alike have raised the concern that victim and community safety will be casualties of the crimmigration system, as crime victims and witnesses are discouraged from reporting crime for fear of being ensnared in immigration proceedings.[427] And prosecutors[428] and judges lament the disproportionate outcomes caused by crimmigration. The New Mexico trial judge, for example, who found himself bound by precedent to deny redress for the admitted *Padilla* violation in Mr. Ramirez's case, expressed "a great deal of sadness" in issuing his ruling.[429] "I am deeply troubled given what we see on a daily basis," he said, "not just in this building, but the fact that something as minor as a possession of

425. An Act Concerning Civil Immigration Detainers, Pub. Act. No. 13-155, 2013 Conn. Legis. Serv. 13-155 (West), *available at* http://www.cga.ct.gov/2013/ACT/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf; *see also* Luther Turmelle, *Islas Freed Pending Deportation Appeal; 'Double Victory' as Malloy Signs TRUST Act into Law*, NEW HAVEN REG., (July 19, 2013), http://www.nhregister.com/general-news/20130719/islas-freed-pending-deportation-appeal-double-victory-as-malloy-signs-trust-act-into-law. The California TRUST (Transparency and Responsibility Using State Tools) Act, aimed at limiting the state's compliance with federal immigration detainers, was signed into law by the California governor on October 5, 2013. *See* Assemb. B. 4, 2013–2014 Leg., Reg. Sess. (Cal. 2013), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20131005_chaptered.pdf (text of bill). Similar legislation has been proposed in Florida, *see* S.B. 730, 2013 Leg., Reg. Sess. (Fla. 2013), Massachusetts, *see* H.B. 1613, 188th Gen. Ct., Reg. Sess. (Mass. 2013), and Washington, *see* H.B. 1874, 63rd Leg., Reg. Sess. (Wash. 2013).

426. *See supra* notes 32–34 and accompanying text. Detainer resistance was present in New Mexico as well, where the supreme court found the right to effective crimmigration counsel applies retroactively. *See* Ramirez v. State, No. 33,604, 2014 WL 2773025 (N.M. June 19, 2014). The New Mexico counties of Taos and San Miguel were among the earliest jurisdictions to adopt policies that limit compliance with federal immigration detainers. *See* MELISSA KEANEY ET AL., ISSUE BRIEF: IMMIGRATION DETAINERS AND LOCAL DISCRETION Exhibit E (2011), *available at* http://www.nilc.org/document.html?id=103 (San Miguel County Detention Center Policies and Procedures) (limiting compliance to cases where the prisoner targeted by an immigration detainer has been convicted of at least one felony or two misdemeanors); *Id.* Exhibit F (Taos County Adult Detention Center Policies and Procedures) (same).

427. *See* Brief for Active and Former State and Federal Prosecutors, *supra* note 209, at 16–24; *see also* Chris Burbank et al., *Policing Immigration. A Job We Do Not Want*, HUFFINGTON POST, (June 7, 2010), http://www.huffingtonpost.com/chief-chris-burbank/policing-immigration-a-jo_b_602439.html (arguing that requiring state law enforcement involvement in immigration enforcement would "institutionalize racial profiling and biased policing—while depriving the public of their safety").

428. *See* Brief for Active and Former State and Federal Prosecutors, *supra* note 209, at 11–15 (arguing that failing to afford redress for *Padilla* claims denies prosecutors the opportunity to serve "the State interest in a proportionate outcome" by agreeing to postconviction relief).

429. *See* Transcript, *supra* note 247, at 9–10.

marijuana charge could result in a man's deportation. That just, frankly, blows my mind, in plain English."[430]

Ultimately, then, it may be dissatisfaction with the states' involvement in the crimmigration system that provides the impetus for states to move away from the *Teague* antiredressability rule in state postconviction proceedings.

430. *Id.*