

**PRACTICE ADVISORY:**

***A Defending Immigrants Partnership Practice Advisory:  
Retroactive Applicability of Padilla v. Kentucky***

June 24, 2010

By Dan Kesselbrenner<sup>1</sup>

**I. Overview**

In *Padilla v. Kentucky*,<sup>2</sup> the Supreme Court held that criminal defense counsel's failure to advise about immigration consequences falls below accepted professional norms. This practice advisory addresses whether a person who files for post-conviction relief after the Supreme Court's decision in *Padilla* can benefit from the Court's decision. The advisory concludes that *Padilla* governs petitions for post-conviction relief that were pending before the Court's decision and those filed after the Court's decision.

The advisory begins by discussing general principles regarding the retroactive applicability of Supreme Court decisions to post-conviction relief and explaining why *Padilla* does not create a new rule of criminal constitutional law. Next, it addresses how *Padilla* applies to post-conviction relief for federal convictions. Then, the advisory discusses how *Padilla* applies to post-conviction relief for state convictions. Finally, it raises certain strategic concerns and suggests arguments for addressing them.

The advisory assumes general familiarity with the Court's decision in *Padilla*. For those seeking more general information about the *Padilla* decision or a list of helpful resources, please see earlier advisories prepared by the Defending Immigrants Partnership.<sup>3</sup> A detailed discussion of eligibility requirements and procedural default rules governing habeas proceedings also is beyond the scope of this advisory.

**II. Retroactivity Principles**

**A. General Rules**

When deciding requests for post-conviction relief, courts generally look to the law that existed when a case became final on direct appeal because the post-conviction petition is

---

<sup>1</sup> Dan Kesselbrenner, of the National Immigration Project of the National Lawyers Guild, wrote this advisory for the Defending Immigrants Partnership. The author thanks Nancy Morawetz, of New York University Law School, Norton Tooby, of the Law Offices of Norton Tooby, Benita Jain and Manuel D. Vargas, of the Immigrant Defense Project, and Trina Realmuto, of the National Immigration Project/NLG, for their invaluable assistance.

<sup>2</sup> 130 S.Ct. 1473 (2010).

<sup>3</sup> *A Defending Immigrants Partnership Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant after Padilla v. Kentucky*, April 6, 2010 (revised April 9, 2010). Please go to [http://www.immigrantdefenseproject.org/docs/2010/10-Padilla\\_Practice\\_Advisory.pdf](http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf) to download a copy.

deciding whether the decision was unfair when initially rendered.<sup>4</sup> If a Supreme Court case creates a new criminal rule after a petitioner's case became final, then the default will be that a petitioner for post-conviction relief cannot benefit from the new rule because it was not the law when the decision became final.

Not all new Supreme Court decisions that expand legal rights of a criminal defendant create new rules, however. If a new Supreme Court case merely applies an existing rule to a different set of facts, then it does not create a new rule, but merely applies correctly the law that existed when a person's case became final.<sup>5</sup> *Padilla* is an example of such a case. And, a Supreme Court decision applying an old rule applies to post-conviction review and cases on direct appeal.<sup>6</sup>

#### B. Case Law Strongly Suggests that *Padilla* Does Not Create a New Rule

The Supreme Court defines a “new rule” as one that was not dictated by precedent that existed when the defendant's conviction became final.<sup>7</sup> The Supreme Court's decision in *Strickland v. Washington*<sup>8</sup> is the default rule for ineffective assistance of counsel claims.

In his opinion concurring in the judgment in *Wright v. West*,<sup>9</sup> Justice Kennedy observed:

If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

In *Williams v. Taylor*,<sup>10</sup> the Court held that applying *Strickland* to a particular set of facts did not constitute a new rule because *Strickland* is the general test governing ineffectiveness assistance claims. A recent New York State decision relied on *Williams* to hold that *Padilla* could be applied retroactively.<sup>11</sup>

---

<sup>4</sup> *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>5</sup> *Williams v. Taylor*, 529 U.S. 362, 390-91(2000).

<sup>6</sup> *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

<sup>7</sup> *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *Saffle v Parks*, 494 U.S. 484, 488 (1990); *Teague v. Lane*, 489 U.S. 288, 301 (1989).

<sup>8</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>9</sup> *Wright v. West*, 505 U.S. 277, 301 (1992) (Kennedy, J, concurring in judgment).

<sup>10</sup> 529 U.S. 362, 390-91 (2000).

<sup>11</sup> *People v. Bennett*, --- Misc.3d ----, 2010 WL 2089266 (Crim Ct, Bx Cty 2010).

The Supreme Court has repeatedly applied the two-part test in *Strickland* for purposes of determining what is “clearly settled” Supreme Court law for purposes of 28 U.S.C. § 2254(d)(1), which provides the standard for granting habeas review.<sup>12</sup>

C. The Language in *Padilla* Strongly Suggests that the Decision Does Not Create a New Criminal Rule

The Court in *Padilla* goes to great pains to advise that its decision will not “open the floodgates” to a significant number of new post-conviction petitions.<sup>13</sup> This extensive discussion would not make sense if *Padilla* only applied prospectively. In addition, it appears the Court is treating *Padilla* as another application of *Strickland* when it discusses “the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage.”<sup>14</sup> Moreover, the Court’s statement that “[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains” also seems to contemplate a retroactive application of the Court’s decision.<sup>15</sup> Finally, the Court’s discussion of the relationship between *Hill v. Lockhart*<sup>16</sup> and *Strickland* reinforces the position that the Court is not articulating a new rule in *Padilla*.<sup>17</sup> In following its approach in not treating applications of *Strickland* as a new rule, the *Padilla* Court does everything short of saying that the decision does not create a new rule.

D. Supreme Court Precedent Explains Why Lower Courts Must Apply *Padilla* Retroactively

The government in opposing post-conviction relief may attempt to attach significance to the *Padilla* Court’s failure to make an explicit retroactivity holding. Court precedent in post-conviction cases provides a powerful rejoinder.

An explicit holding of retroactivity by the Supreme Court has specific meaning in federal habeas review of a state conviction. For example, in determining whether a petitioner can file a second or successive habeas petition under 28 U.S.C. § 2254(b)(2)(A) the Court required that for a decision to apply retroactively, it must be an express holding of retroactivity that cannot be dictum, which must happen in another person’s case on collateral review.<sup>18</sup> Under the Court’s governing test, it could not have held that the *Padilla* decision was retroactive. According to the Court:

The Supreme Court does not “ma[k]e” a rule retroactive when it merely establishes principles of retroactivity and leaves the

---

<sup>12</sup> *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419 (2009); *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007).

<sup>13</sup> *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 (2010).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> 474 U.S. 52 (1985).

<sup>17</sup> *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 n.12 (2010),

<sup>18</sup> *Tyler v. Cain*, 533 U.S. 656, 663 (2001). It may be that the Court in the future applies *Padilla* retroactively to a second or successive habeas petition, but that will have to wait for another day.

application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.<sup>19</sup>

Thus, the Court distinguishes between making an explicit holding of retroactivity that would permit a future petitioner to file a second or successive habeas petition challenging an underlying state conviction on the one hand, and articulating principles of retroactivity on the other. When, as in *Padilla*, the Court invokes language suggesting retroactivity, it is consciously avoiding an explicit determination and expressly intending for lower courts to apply those retroactivity principles.

E. If *Padilla* Creates a New Rule of Criminal Procedure, it is Arguably a Watershed Decision

The government is arguing in post-conviction cases that *Padilla* creates a new constitutional rule. The lead case governing when a new criminal constitutional rule applies retroactively is *Teague v. Lane*.<sup>20</sup> Under *Teague*, new constitutional rules are not retroactive unless they are substantive rules or created pursuant to a watershed decision. If *Padilla* were to create a new criminal rule, it would not apply retroactively to a collateral post-conviction challenge unless *Padilla* was a “substantive rule”<sup>21</sup> or it was “a watershed case.”<sup>22</sup>

An example of a substantive rule is *Lawrence v. Texas*,<sup>23</sup> which held that it was unconstitutional to make same-sex lovemaking criminal.<sup>24</sup> There is no meaningful argument that a court would treat the *Padilla* decision as a substantive rule because the decision does not narrow what a particular criminal statute proscribes.

The test for what constitutes a “watershed decision” is high. In the course of holding that a case is not a watershed decision, the Court has identified only *Gideon v. Wainwright*<sup>25</sup>, as an example of a “watershed case.”<sup>26</sup> This may be a difficult argument however. If *Crawford v. Washington*,<sup>27</sup> which dramatically expands the right to confrontation under the Sixth

---

<sup>19</sup> Ibid.

<sup>20</sup> 489 U.S. 288 (1989).

<sup>21</sup> A substantive rule is one that holds that a statute improperly makes conduct criminal. *Teague v. Lane*, 489 U.S. 289, 301 (1989); *United States v. Bousley*, 523 U.S. 614, 620 (1998).

<sup>22</sup> See, e.g., *Whorton v. Bockting*, 549 U.S. 406, 419 (2006); *Schiro v. Summerlin*, 542 U.S. 348 (2004); *Beard v. Banks*, 542 U.S. 406, 417 (2004).

<sup>23</sup> 539 U.S. 558 (2003).

<sup>24</sup> 539 U.S. 558, 578 (2003).

<sup>25</sup> 372 U.S. 335 (1963).

<sup>26</sup> *Whorton v. Bockting*, 549 U.S. 406, 419 (2006) (rejecting retroactivity of new rule set forth in *Crawford v. Washington*, 541 U.S. 36 (2004) expanding Sixth Amendment right to confront witnesses); *Schiro v. Summerlin*, 542 U.S. 348 (2004) (rejecting retroactivity of *Ring v. Arizona*, 546 U.S. 584 (2002) that prevented trial judge from imposing death penalty, which is a question for jury); *Beard v. Banks*, 542 U.S. 406, 409 (2004) (rejecting retroactivity new rule articulated in *Mills v. Maryland*, 486 U.S. 367 (1988) relating to mitigating evidence in capital case).

<sup>27</sup> 541 U.S. 36 (2004).

Amendment, and *Batson v. Kentucky*,<sup>28</sup> which protects a defendant against prosecution bias in jury selection, do not constitute watershed decisions, it may be difficult for a court to find that *Padilla* is a watershed decision as the Supreme Court uses that term. Nevertheless, given the nature of the decision, it is an alternative argument that counsel should consider. That said, *Padilla* arguably applies retroactively because it is not a new criminal constitutional rule.

### III. Post-Conviction Relief for Federal Convictions

#### A. Federal Habeas Corpus

Congress confers habeas corpus jurisdiction pursuant to 28 U.S.C. § 2255 for a person to challenge the constitutionality of her or his federal conviction. Habeas relief under this section is available for one year after the conviction becomes final. A person who is still in custody, but who did not file a timely habeas petition, may still may have a coram nobis remedy under 28 U.S.C. § 1651, the All-Writs Act. A petition for a writ of coram nobis does not have a filing deadline.<sup>29</sup> Whether a petitioner is eligible for federal habeas corpus relief is properly the subject of a multi-volume treatise, and certainly beyond the scope of this advisory.<sup>30</sup> Subject to satisfying the timing and other requirements for the writ, a person in federal custody may be eligible obtain a writ of habeas corpus to challenge a federal conviction where counsel failed to advise the petitioner about immigration consequences.

#### B. Federal Coram Nobis

Similarly, coram nobis may be available to challenge federal convictions in the wake of the *Padilla* decision. At common law, the writ of coram nobis existed to correct errors of fact or to make technical corrections in a judgment.<sup>31</sup> The modern version of this writ is broader than at common law.<sup>32</sup> Now, the writ of coram nobis is limited to “extraordinary” cases that present compelling circumstances “to achieve justice” where no other remedies are available.”<sup>33</sup> According to the Supreme Court, a coram nobis petition is not a new proceeding, but an extension of the original proceeding for which 28 U.S.C. § 1651, the All-Writs Act, provides jurisdiction to an Article I or Article III court to correct an earlier legal or factual error.<sup>34</sup> United States district courts, circuit courts of appeal, and the Supreme Court are all Article III courts.

---

<sup>28</sup> 476 U.S. 79 (1989).

<sup>29</sup> *United States v. Denedo*, 129 S.Ct. 2213 (2009);

<sup>30</sup> *See, e.g.*, Leibman and Hertz, *Federal Habeas Corpus Practice and Procedure* 5th Ed.

<sup>31</sup> *United States v. Morgan*, 346 U.S. 502, 507 (1954).

<sup>32</sup> *United States v. Denedo*, 129 S.Ct. 2213 (2009).

<sup>33</sup> *United States v. Morgan*, 346 U.S. 502, 510-11 (1954).

<sup>34</sup> *United States v. Morgan*, 346 U.S. 502 (1954) (recognizing Article III court jurisdiction to consider coram nobis to correct deprivation of counsel in violation of Sixth Amendment); *United States v. Denedo*, 129 S.Ct. 2213 (2009) (recognizing Article I court jurisdiction to consider coram nobis petition to correct failure to advise about immigration consequences where court assumed violation of Sixth Amendment for purposes of resolving question before it).

In *United States v. Denedo*,<sup>35</sup> a veteran of the U.S Armed Forces filed a coram nobis petition after DHS initiated removal proceedings against him for a court-martial conviction that had been final for eight years. At the time the petitioner sought a writ of coram nobis, he was neither still serving in the military nor in custody. The Court assumed for purposes of deciding the jurisdictional question presented that defense counsel's representation was ineffective. A practitioner seeking relief for a noncitizen ineligible under 28 U.S.C. § 2255 because custody has expired should investigate whether coram nobis relief is a possible vehicle to obtain a remedy for defense counsel's failure to advise about immigration consequences. Where the petitioner is still in actual or constructive custody (i.e., on supervised release), coram nobis is unavailable until custody has expired.<sup>36</sup>

#### **IV. State Post-Conviction Remedies**

States have various collateral mechanisms to allow a person to challenge a constitutionally defective plea. Eligibility for state post-conviction relief under the various state procedures is beyond the scope of this advisory. Fortunately, a resource already exists that addresses state post-conviction remedies in a variety of state jurisdictions.<sup>37</sup>

Habeas corpus review generally requires that the petitioner is in custody.<sup>38</sup> There are both court-created and statutory bars to pursuing collateral challenges. An individual who is no longer serving a sentence, and is no longer on parole or probation still may have a remedy under state law even though she or he is not in custody. This means that whether an individual noncitizen qualifies for state post-conviction relief will depend on the post-conviction law of the state of conviction. If a suitable vehicle exists, however, a practitioner can use the arguments in this advisory to obtain post conviction relief on the merits for someone who has a remedy under *Padilla*.

A state court defendant may raise a constitutional challenge to her or his conviction by filing for habeas review in state court and then in a federal district court pursuant to 28 U.S.C. § 2254. Unfortunately, Congress has provided a variety of obstacles to such federal challenges.<sup>39</sup> In general, a federal court will not conduct habeas review of the state offense if the petitioner did not first seek review of the issue on direct appeal.<sup>40</sup>

#### **V. Strategic Concerns**

##### **A. General Standards Under *Strickland v. Washington***

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court created a two-prong test to determine whether a person could vacate a conviction for ineffective assistance of

---

<sup>35</sup> 129 S.Ct. 2213 (2009).

<sup>36</sup> *United States v. Morgan*, 346 U.S., 502, 503, 511-12 (1954).

<sup>37</sup> See D. Wilkes, *State Postconviction Remedies and Relief Handbook* (2009) for a state-by-state summary of post-conviction vehicles and procedures.

<sup>38</sup> See, e.g., *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam).

<sup>39</sup> See, e.g. 28 U.S.C. § 2244 which creates complicated timing and numerical bars to such petitions.

<sup>40</sup> *Bousley v. United States*, 523 U.S. 614 (1998).

counsel. The first prong is that the quality of the attorney’s representation fell below professional norms. The second prong is that the defendant suffered prejudice as a result of the deficient performance. A petitioner seeking post-conviction relief must establish both prongs to prevail.

1. Establishing that Attorney’s Representation Fell Below Professional Norms

In *Padilla*, the Supreme Court found that at a minimum “[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.”<sup>41</sup> This means that if a defendant pleaded guilty after March 1995, then criminal defense counsel had the obligation to provide advice about immigration consequences. Thus, any failure to provide such advice falls below accepted professional norms. If the conviction is older than 15 years, then a practitioner would need to show that professional norms in effect on the date of the plea required that defense counsel provide advice about immigration consequences.

2. Establishing Prejudice

A person seeking to vacate her or his plea must show that the outcome would have been different in order to satisfy the second prong in *Strickland*. Moreover, to obtain relief on this type of claim, a petitioner must convince a factfinder that a decision to reject the plea bargain would have been rational under the circumstances.<sup>42</sup>

A petitioner also must be aware that after vacating her or his conviction that the case does not go away, but rather starts all over again. This means that a successful petitioner faces all original charges when the conviction is set aside, even those that were dismissed under a plea bargain. There is also a chance that the petitioner might receive a greater sentence the second time around. Proper post-conviction practice requires advising the client of the possibility of a worse criminal outcome, or a worse immigration outcome, if the conviction is reopened. Before deciding to go forward with the post-conviction petition, counsel also should explore less harmful alternative pleas, the likelihood of success at trial, and the prosecution’s position regarding charge bargaining after a conviction has been vacated.

B. Immigration Impact of Conviction Vacated under *Padilla*

In general, the Board of Immigration Appeals (BIA or Board) will give full faith and credit to state court orders that appear to vacate a noncitizen’s criminal conviction.<sup>43</sup> The Board recognizes an exception to the general rule if a noncitizen obtained a vacatur “solely on the basis

---

<sup>41</sup> *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 (2010).

<sup>42</sup> *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000).

<sup>43</sup> *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Under Fifth Circuit law, a vacated conviction still can be used to establish deportability because the statutory definition of conviction, 8 USC § 1101(a)(48)(A) does not include an exception for a conviction that has been vacated. *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002). The Court’s decision in *Padilla* may supersede the Fifth Circuit’s decision, however.

of immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings.”<sup>44</sup> A conviction vacated for violating a defendant’s Sixth Amendment right to counsel would certainly satisfy the Board’s test. That the underlying nature of the legal defect involves failure to warn about immigration consequences does not change that the court vacated the conviction because of a substantive defect.<sup>45</sup> Even if the state statute that confers jurisdiction provides for a vacatur in the “interest of justice” or some similar language that sounds equitable in nature, a vacated conviction should eliminate the conviction if the underlying writ is granted, even in part, on the basis of a constitutional defect. That is, if the court vacated the conviction, at least in part, on constitutional grounds, then the court did not vacate it solely for equitable reasons and, thus, the Board should give it full faith and credit.<sup>46</sup>

---

<sup>44</sup> *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 273 (BIA 2007). See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

<sup>45</sup> See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (recognizing that conviction vacated because of a violation of a state plea warning about immigration consequences was not a conviction for immigration purposes because failure to notify constituted a substantive defect in the underlying criminal proceedings).

<sup>46</sup> *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 273 (BIA 2007). See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).