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Retro is Back: Padilla Meets Gideon

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RETRO IS BACK: \textit{PADILLA MEETS GIDEON}

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INTRODUCTION

It is hard today to turn on the television or read the news and not see a story on immigration, especially against the backdrop of the upcoming 2012 Presidential elections. Most of the stories deal with illegal immigrants and how the states and the federal government are or are not dealing with that issue; however, forgotten in that discussion on illegal immigrants is the fact that in the last ten years there have been over ten million new immigrants who have received lawful permanent resident (LPR) status in the United States.\(^1\) These LPRs have integrated themselves into society as productive citizens, paying taxes, and some even taking an oath to defend the Constitution of the United States of America by serving honorably in its armed forces.\(^2\)

Against this backdrop of immigration, the Supreme Court decided \textit{Padilla v. Kentucky},\(^3\) which involved an LPR whose counsel had not advised him that pleading guilty to a felony would most likely lead to deportation, even though he had lived in the United States as an LPR for over forty years and had served honorably in its armed forces.\(^4\) In what many scholars and

\(^1\) \textit{OFFICE OF IMMIGRATION STATISTICS, 2010 IMMIGRATION YEARBOOK OF STATISTICS} 10 (2011) (Table 2. Persons Obtaining Legal Permanent Resident Status by Region and Selected Country of last Residence: fiscal years 1820 – 2010). A Lawful Permanent Resident Status is “any person not a citizen of the United States who is residing the in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as ‘Permanent Resident Alien,’ ‘Resident Alien Permit Holder,’ and ‘Green Card Holder.’” http://www.uscis.gov/portal/site/uscis (follow “RESOURCES” hyperlink; then follow “Glossary” hyperlink; then follow “L” hyperlink; then follow “Lawful Permanent Resident (LPR)” hyperlink).

\(^2\) 10 U.S.C § 502(a) (2006) (“Enlistment Oath. - Each person enlisting in an armed force shall take the following oath: I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.”).


\(^4\) \textit{Padilla}, 130 S. Ct. at 1477–78.
lawyers consider a groundbreaking decision, the Court ruled that the Sixth Amendment protects non-citizens by guaranteeing them effective counsel on the risks of deportation. The question that remained unanswered from that decision is: does Padilla apply retroactively on collateral review? This question has not been answered as of yet, with three different Appellate Courts weighing in, and each coming up with a different answer. However, in April of 2012, the Supreme Court granted certiorari to Chaidez v. United States and will hear the case during its 2012-2013 term to decide whether or not the Padilla rule applies retroactively.

This article argues that on the question of retroactivity, all three Appellate Courts answered it incorrectly. The correct answer is that Padilla does apply retroactively, but not as an old rule. Padilla is actually a new rule, and it is the first rule to ever meet the watershed requirement of Teague v. Lane. What does retroactive application of Padilla mean to an LPR?

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6 Kanstroom, Challenging, supra note 5, at 1467.

7 Gray Proctor and Nancy King, Post Padilla: Padilla’s Puzzles for Review in State and Federal Courts, 23 FED SENT R. 239, 240 (2011) (“Because the Supreme Court in Padilla had no need to discuss retroactivity, the issue remains open.”).

8 Wall v. Kholi, 131 S. Ct, 1278, 1285 (2011) (defining collateral review as a “form of review that is not direct”).

9 See Orocio v. United States, 645 F.3d 630 (3d. Cir. 2011) (holding that Padilla is an old rule and applies retroactively); Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) (holding that Padilla is a new rule and does not apply retroactively, however the Seventh Circuit never made a determination as to the two Teague exceptions for a new rule); United States v. Chong, 2011 U.S. App. LEXIS 18034 (10th. Cir. 2011) (holding that Padilla is a new rule, and it does not meet either of the two Teague exceptions, so it does not apply retroactively).


11 http://www.supremecourt.gov/qp/11-00820qp.pdf (“QUESTION PRESENTED: In Padilla v. Kentucky, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. The question presented is whether Padilla applies to persons whose convictions became final before its announcement.”).

It means that on habeas corpus review, cases that were final before Padilla can now use the new Padilla rule and have their cases reviewed to determine whether they received ineffective counsel in making a plea agreement that affected their deportation status.

This comment will first look at the history of retroactivity in the United States. It will track how retroactivity has changed over time and developed into today’s Teague standard. From there, it will look at the Padilla decision by the Supreme Court, and how three Appellate Courts applied the Padilla rule under Teague. This comment will then look at whether Padilla is an old or new rule under Teague, and if it is a new rule determine if either of the two Teague exceptions applies to it. To determine that, the comment will compare Padilla with the only case according to the Supreme Court that could have ever met the second Teague exception, Gideon v. Wainwright. From there, it will analyze how the new Padilla rule is different from the fourteen cases that the Supreme Court has said do not apply retroactively under the second Teague exception. Finally, this comment will show that Padilla does apply retroactively as a new rule, since it meets the watershed requirement of the second Teague exception and then look at the impact that the application of Padilla will have on both immigration and retroactivity.

II. BACKGROUND

While modern rules of retroactivity come from Supreme Court Justice Harlan’s dissents in Desist v. United States and Mackey v. United States, to fully understand retroactivity

13 28 U.S.C. § 2255 (2006) (“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”).
14 Proctor, supra note 7, at 240.
requires looking at how it developed to where it is today. Retroactivity in the United States has its beginnings in early-American jurisprudence based upon British influence,\(^9\) and went through a development phase from the 1950s through 1989,\(^{20}\) and then came into its own in 1989 with the plurality decision in \textit{Teague}.\(^{21}\)

\textbf{A. An Early History of Retroactivity}

Retroactivity of court decisions is a long standing operation of American jurisprudence.\(^{22}\) According to Sir William Blackstone, the famous British judge and author, the purpose of a court is to interpret the law not to create new law; thus, when a court announces a legal decision, that decision applies retroactively to cases already decided since it interpreted an already existing law.\(^{23}\) This ties in with the theory that legislatures create laws through statutes, which are prospective, and courts interpret those laws through judicial decisions which are retroactive.\(^{24}\)

The possibility of change began building in the 1950s, though the early view of retroactive application of court decisions stayed the norm until the 1960s.\(^{25}\) In 1953, the Supreme Court decided \textit{Brown v. Allen}.\(^{26}\) This decision “authorized federal courts to engage in complete relitigation [on habeas corpus] of federal claims previously adjudicated in state court criminal proceedings.”\(^{27}\) This case was followed by a series of Supreme Court decisions in the

\(^{19}\) Allen, \textit{supra} note 16, at 107 (“The concept of the retroactive operation of court decisions derives from the fundamental principle of Anglo-American jurisprudence that courts have jurisdiction only to declare the law [and] not an authority to make it.”) (alteration in original) (internal quotation marks omitted).


\(^{22}\) Allen, \textit{supra} note 16, at 107.

\(^{23}\) \textit{Id.; see also} Blume, \textit{supra} note 21, at 584–85; Roosevelt, \textit{supra} note 20, at 1082–83 (noting that a new judicial decision is not a change in the law).

\(^{24}\) Blume, \textit{supra} note 21, at 585 (“[S]tatutes operate only prospectively, while judicial decisions operate retrospectively . . . .”).


\(^{27}\) Lasch, \textit{supra} note 25, at 9.
1960s that incorporated various amendments from the Bill of Rights creating a whole new series of “cognizable federal habeas petitions.” This series of activity set the stage for the Supreme Court to make changes to its view on retroactivity.

B. The Reigning in of Retroactivity

The Supreme Court, in deciding *Mapp v. Ohio*, fully incorporated the Fourth Amendment into the Fourteenth Amendment holding that evidence from unconstitutional searches and seizures could not be used in state courts. This new development laid the groundwork for the first major shift in retroactivity that occurred in the *Linkletter v. Walker* decision. In *Linkletter*, the Court held that in a habeas corpus proceeding, the *Mapp* rule did not apply retroactively. The Court reasoned that there had been a reliance on the Court’s decisions prior to the *Mapp* rule and retroactive application would be a burden on the justice system. The Court found no constitutional requirement that “neither prohibits nor requires retrospective effect.” The Court then formulated a case-by-case rule “weigh[ing] the merits and demerits in each case” separately by (1) the prior history of the rule being reviewed; (2) the effect and purpose the rule serves; and (3) if retroactive application of the rule would help or hinder the rule.

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28. The Supreme Court made a series of rulings in the 1960s that incorporated various parts of the Fourth, Fifth, Sixth and Eighth Amendments, see Allen, supra note 19, at 113.
29. For a more in-depth understanding of the early history of retroactivity, see e.g., Blume, supra note 21, at 584–85; Roosevelt, supra note 20, at 108–90; Lasch, supra note 25, at 8–11; Allen, supra note 16, at 107–13.
31. *Id.* at 655.
33. *Id.* at 640.
34. *Id.* at 637.
35. *Id.* at 629 (“As Justice Cardozo said, ‘We think the federal constitution has no voice upon the subject.’”) (quoting Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932)) (referring to state court’s prospective overruling of prior decision)).
36. *Id.*; see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738–42 (1991) (outlining the Warren Court’s development and application of a retroactivity doctrine); Roosevelt, supra note 20, at 1089–91 (“revolutionary change in retroactivity analysis”);
The *Linkletter* decision allowed the Court to “tailor the retroactive application of each new rule” which led to arbitrary results based upon how fast a case moved through the system rather than whether someone was deprived of a right.\(^38\) This decision garnered a lot of criticism that persists still today with Professor Paul Mishkin\(^39\) leading the charge.\(^40\) Professor Mishkin stated:

> When a constitutional guarantee is heightened or added to in a manner calculated to improve the reliability of a finding of guilt, the new interpretation essentially establishes a new required level of confidence as the condition for criminal punishment. When such a new higher level is established as the current standard, there is certainly substantial justification for the position that no one shall thereafter be kept in prison of whom it has not been established by processed embodying essentially that new degree of probability that he is in fact guilty.\(^41\)

Professor Mishkin believes the Court should focus on the reliability of the process to determine guilt or innocence under a habeas corpus review and whether or not a rule applies retroactively should be based upon this concern.\(^42\)

Only two years after deciding *Linkletter*, the Court expanded its attack on retroactivity in its decision in *Stovall v. Denno*.\(^43\) In *Stovall*, the Court concluded that the rule created by two recent Supreme Court cases\(^44\) would only apply retroactively to those two cases, and not to any cases that had already been made final, or cases that were currently in the trial or appellate

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\(^38\) Allen, *supra* note 16, at 113–14 (addressing for the first time the question of habeas corpus and retroactivity).

\(^39\) Allen, *supra* note 16, at 114; see also Fallon, *supra* note 37 at 174–41 (noting that *Linkletter* made the speed of the case through the court system and not the date of the issue being challenged the deciding factor); Roosevelt, *supra* note 20, at 1091 (pointing to an incoherent approach by the court).

\(^40\) Lasch, *supra* note 4, at 12.


\(^42\) *Id.* at 85–86. For a full analysis and criticism of the *Linkletter* decision and its effects see Mishkin, *supra* note 41. For Christopher Lasch’s great synopsis of Mishkin’s position see Lasch, *supra* note 25, at 12–16.


\(^44\) The Supreme Court decided United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) on the same date as, but just prior to *Stovall*. 
process. The Court realized that denying retroactivity to both collateral review and direct review cases was unfair to “similarly situated” litigants, but saw that “as an insignificant cost for adherence to sound principles of decision making.” Additionally, Stovall adjusted the criteria that courts should use in determining whether a decision is retroactive. Post-Stovall courts were required to consider “(a) the purpose to be served by the new standards, (b) the extent of the reliance of law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.”

C. Justice Harlan’s Dissent

Stovall created a lot of uncertainty about retroactivity and how to apply its three-part test. Even with this uncertainty, the Supreme Court kept Stovall as the legal standard in over twenty-five cases. Over the next twenty years, Stovall remained the standard though many judges defected from its ranks of supporters, and the most important, if not most critical, being Supreme Court Justice Harlan. Just four years after the decision in Linkletter, and two years after Stovall, Justice Harlan, a part of the Stovall majority, switched sides and voiced a strong dissent against affirming the Stovall three-part test in Desist.

Desist, decided that Katz v. United States was not retroactive and reaffirmed the Stovall rule that allowed the “[c]ourt to apply a ‘new’ constitutional rule entirely prospectively.” Justice Harlan felt that Linkletter correctly decided that cases subject to direct review must have

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45 Stovall, 388 U.S. at 300–01.
46 Id. at 301.
47 Id. at 297.
48 Id.; see also Fallon, supra note 37, at 1741.
49 Fallon, supra note 37, at 1742.
50 Id. at 1743.
51 Id.; see also Lasch, supra note 25, at 18; Allen, supra note 16, at 115.
52 Desist, 394 U.S. at 256–69 (Harlan, J., dissenting) (“Upon reflection, I can no longer accept the rule first announced two years ago in Stovall v. Denno, supra, and reaffirmed today . . . .”).
54 Desist, 394 U.S. at 258 (Harlan, J., dissenting).
new rules of constitutional law applied to them. For cases on collateral review, Justice Harlan felt that if the rule simply expanded upon “a well-established constitutional principle” then it should apply retroactively. However, if it was a new rule, the law applied should usually be the law that was in effect at the time of the trial, unless it was a “new constitutional rule[] which significantly improve[d] the pre-existing fact-finding procedures [which] are to be retroactively applied on habeas.”

Justice Harlan continued to be a voice against the Stovall test, and once again spoke strongly on that subject in Mackey. There, Justice Harlan was very clear on his approach to retroactivity and his disdain of the Stovall test, referring to it as “considerations that are appropriate enough for a legislative body.” Breaking the process down into two views, he affirmed his position in Desist that “new” rules of constitutional law should be applied to all cases on direct review. He reasoned that “simply fishing one case from the stream of appellate review . . . and then permitting a stream of similar cases . . . to flow by unaffected by that new rule constitute[s] an indefensible departure from . . . judicial review.”

While Justice Harlan affirmed his position on direct review cases, he retreated somewhat on his position for cases on collateral review. His new position centered more on his view of the functions of habeas corpus than just a pure retroactive analysis. He stated that on collateral review; a new rule should not to be applied retroactively unless it meets one of two exceptions. First, if it was a new substantive due process rule which “place[d], as a matter of constitutional

55 Id. at 259-60 (Harlan, J., dissenting).
56 Id. at 263 (Harlan, J., dissenting).
57 Id. at 262 (Harlan, J., dissenting).
58 Mackey, 401 U.S. at 675–702 (Harlan, J., concurring in judgments in part and dissenting in part).
59 Id. at 677 (Harlan, J., concurring in judgments in part and dissenting in part).
60 Id. at 679 (Harlan, J., concurring in judgments in part and dissenting in part).
61 Id. (Harlan, J., concurring in judgments in part and dissenting in part).
62 Lasch, supra note 25, at 20.
63 Id. at 21.
64 Mackey, 401 U.S. at 692 (Harlan, J., concurring in judgments in part and dissenting in part).
interpretation, certain kinds of primary, private individual conduct beyond the power of the
criminal law-making authority to proscribe,” then it applies retroactively. Second, in
“procedures that . . . are ‘implicit in the concept of ordered liberty.’ . . . [that] alter our
understanding of the bedrock procedural elements that must be found to vitiate the fairness of a
particular conviction,” it would also apply retroactively. He then pointed out that Gideon was
the type of case that would meet the standards of his second exception. He felt that the Palko
test, as put forth in Palko v. Connecticut, provides the appropriate guidelines to determine
which cases meet this second exception. Palko stated specifically that the First and Sixth
Amendments “ha[d] been found to be implicit in the concept of ordered liberty” and thus
mandated that Gideon apply retroactively.

D. Griffith, Teague and the New Rules

The Supreme Court began to accept Justice Harlan’s position in 1987 with its decision in Griffith v. Kentucky. In Griffith, the Court looked at the retroactive application of the Batson v. Kentucky rule “that a defendant in a state criminal trial could establish a prima facie case of racial discrimination violative of the Fourteenth Amendment, based on the prosecution’s use of preemptory challenges to strike members of the defendant’s race from the jury” in a direct review case. The Court adopted Justice Harlan’s view that new rules apply retroactively in direct review cases and “instruct[ed] the lower courts to apply the new rule retroactively to cases

65 Id. at 692–93 (Harlan, J., concurring in judgments in part and dissenting in part).
66 Id. at 693 (Harlan, J., concurring in judgments in part and dissenting in part).
67 Mackey, 401 U.S. at 694 (Harlan, J., concurring in judgments in part and dissenting in part).
69 Mackey, 401 U.S. at 694 (Harlan, J., concurring in judgments in part and dissenting in part).
70 Palko, 302 U.S. at 325 & n.2.
71 Mackey, 401 U.S. at 694 (Harlan, J., concurring in judgments in part and dissenting in part).
72 Fallon, supra note 37, at 1744.
75 Griffith, 479 U.S. at 316; see also Lasch, supra note 25, at 24–25 (noting that the court had previously decided
“that the Batson rule would not be given retroactive effect to cases on federal habeas corpus review”).
not yet final.” This case clearly represented Justice Harlan’s “fish in the stream” analogy since both Griffith and Batson had come out of the same local court with the Supreme Court deciding Batson only months before Griffith.

The full transition away from Stovall came in Teague where a plurality opinion written by Supreme Court Justice O’Connor accepted most of Justice Harlan’s views on retroactivity. The Teague Court held that “the principle of habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions.” Justice O’Connor’s plurality opinion took the first exception directly from Justice Harlan’s dissenting opinions in Mackey and Desist. The first Teague exception for a new rule to be applied retroactively became: “if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’

The second exception that Justice Harlan espoused did not come out of Teague unscathed, but with some modifications, which were more limiting. Under Teague, for a new rule to meet the second exception it has to be “implicit in the concept of ordered liberty and contributed to the accuracy of the verdict.”

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76 Griffith, 479 U.S. at 323.
77 Lasch, supra note 25, at 25 (“Griffith put a knife in the heart of the Linkletter-Stovall doctrine . . . .”).
78 Id. (“[T]he corpse [of the Linkletter-Stovall doctrine] was officially put to rest with the rest of the Court’s decision . . . .”).
79 Teague, 489 U.S. at 316.
80 Lasch, supra note 25, at 25 (“[T]he first identical to Justice Harlan’s exception for ‘substantive’ changes in the law . . . .”).
81 Teague, 489 U.S. at 311 quoting Mackey, 401 U.S., at 692 (citing Justice Harlan’s opinion concurring in judgments in part and dissenting in part).
82 Fallon, supra note 37 at 1747 (noting that the second exception was a “narrow reformulation” of Mackey); see also Roosevelt, supra note 20, at 1096 (noting that the Teague decision combined Justice Harlan’s second exception from Desist and Mackey); Lasch, supra note 25, at 25 (noting the second exception was defined more narrowly by the Teague court).
83 Roosevelt, supra note 20, at 1096.
exception be reserved for watershed rules of criminal procedure." 84 This watershed rule denoted a turning point, or a crucial dividing point in criminal procedure. 85 What the Teague ruling left unanswered was what constitutes a new rule? The Court answered that question in a series of three decisions that followed Teague. 86 In those decisions, 87 the Court determined that a rule is “new” under Teague when it is “not dictated by precedent.” 88

E. Application of Teague

Teague has been the standard for retroactivity for twenty-two years, and not once has the Supreme Court held that the second Teague exception applies. 89 Of the fourteen decisions from 1989 to 2009, in which the Supreme Court decided that the second Teague exception did not apply, nine were new sentencing rules; 90 one was a new police interrogations rule; 91 one was a

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84 Teague, 489 U.S. at 311.
86 Lasch, supra note 25, at 27 (“Teague made matters worse, according to its critics, by defining a ‘new rule’ in two contradictory ways . . . .”).
88 Lasch, supra note 25, at 27.
89 Teague itself did not apply the second exception. See Ezra D. Landes, A New Approach to Overcoming the Insurmountable “Watershed Rule” Exception to Teague’s Collateral Review Killer, 74 Mo. L. Rev. 1, 10 n.67 (2009).
90 In order of decision, the cases are: (1) Sawyer, 497 U.S. at 242 (sentencing case, to qualify as a second exception to Teague, a new rule “must not only improve accuracy, but also ‘alter our understanding of the bedrock procedural elements’ essential to the fairness of a proceeding,” and the Caldwell rule does not do that); (2) Saffle, 494 U.S. at 495 (sentencing case, a new rule for a jury to avoid any influence of sympathy “has none of the primacy and centrality of the rule adopted in Gideon or other rules which may be thought to be within the exception”); (3) Graham v. Collins, 506 U.S. 461, 478 (1993) (sentencing case, that for a new rule that forbids “denying . . . special jury instructions concerning . . . mitigating evidence of youth, family background, and positive character traits . . . . [The Court found] the second Teague exception to be inapplicable as well”); (4) Caspari v. Bohlen, 510 U.S. 383, 396 (1994) (sentencing case, “[a]pplying the Double Jeopardy Clause to successive noncapital sentencing is not such a ground breaking occurrence” that it meets the watershed standard of the second Teague exception); (5) Gray v. Netherland, 518 U.S. 152 (1996) (sentencing case, a new rule that states provide notice of new evidence would not meet the second exception of Teague as a watershed rule); (6) Lambrix, v. Singletary, 520 U.S. 518 (1997) (sentencing case, the Espinoza v. Florida, 505 U.S. 1079 (1992) new rule that disallows a judge or jury from weighing aggravated circumstances was not a watershed rule under the second Teague exception); (7) O’Dell v. Netherland, 521 U.S. 151, 167 (1997) (sentencing case, the Simmons v. South Carolina, 512 U.S. 154 (1994) new rule that a defendant has a right to inform a sentencing jury of his ineligibility for parole “possesses little of the "watershed" character envisioned by Teague's second exception”); (8) Schiro v. Summerlin, 542 U.S. 348, 358 (2004) (sentencing case, that the new rule of Ring v. Arizona, 536 U.S. 584 (2002), that certain factors making one eligible for the death penalty must be proved to a jury instead of a judge is “a new procedural rule that does not
new rule on jury instructions for a mental state element;\(^{92}\) one was a new right to appeal rule;\(^{93}\) one was a new confrontation clause rule;\(^{94}\) and \textit{Teague} itself was a new jury selection rule.\(^{95}\)

In all fourteen cases, the requirement that the rule meet Justice Harlan’s watershed standard of \textit{Gideon} for the second \textit{Teague} exception was upheld by the Supreme Court.\(^{96}\) For example in \textit{Whorton}, a confrontation clause case, the court did not allow the father to confront his step-daughter who accused him of sexual molestation but let the mother and police officer testify as to what the daughter had said.\(^{97}\) The Supreme Court noted that even though this was a Sixth Amendment case, “the question [to ask] is whether the new rule remedied ‘an impermissibly large risk’ of an inaccurate conviction” and in this case it did not.\(^{98}\) The Supreme Court went on to explicitly state that \textit{Gideon} was the only case it had ever identified that could qualify as a second \textit{Teague} exception.\(^{99}\) The Supreme Court believed that \textit{Gideon} eliminated the

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91 Butler, 494 U.S. at 409 (interrogation case, it was not established that the police interrogation new rule of Roberson was a watershed rule).

92 Gilmore v. Taylor, 508 U.S. 333, 345 (1993) (jury instruction on mental state element case, the Falconer v. Lane, 905 F.2d 1129 (1990) rule was a new rule, and it did not meet the watershed standards of \textit{Teague} since it did not “implicat[e] the fundamental fairness and accuracy of the criminal proceeding.” \textit{Saffle}, 494 U.S. at 495 (quoting \textit{Teague}, 489 U.S. at 311)).

93 Goeke v. Branch, 514 U.S. 115, 120 (1995) (per curiam) (recaptured fugitive new right to appeal case, “a former fugitive's right to appeal . . . [does not] fall within this [second] exception to the \textit{Teague} bar” since due process requirement for States to provide appellate process).

94 Whorton v. Bockting, 549 U.S. 406, 419 (2007) (confrontation clause case, the new rule in Crawford v. Washington, 541 U.S. 36 (2004), that a defendant has a right to confront his accuser when that testimony could result in a life prison sentence and the Court held that “[t]he \textit{Crawford} rule is in no way comparable to the \textit{Gideon} rule. [Since] [t]he \textit{Crawford} rule is much more limited in scope, and the relationship of that rule to the accuracy of the factfinding process is far less direct and profound”).

95 Landes, supra note 89, at 10; see also supra note 89.

96 Landes, supra note 89, at 11.

97 Whorton, 549 U.S. at 408–11.

98 \textit{Id.} at 418 (quoting \textit{Summerlin}, 542 U.S. at 356).

99 \textit{Id.} at 419.
intolerably high risk that a verdict would be wrong when an indigent was denied representation. 100

F. The 2010 Padilla Decision

Against this backdrop of Teague and Gideon, the case of an immigrant facing deportation after pleading guilty to a drug felony came before the Supreme Court. 101 Padilla claimed that he received ineffective counsel who had advised him to plead guilty since it would not affect his immigration status. 102 Padilla, an LPR for forty years and an honorably discharged United States Army veteran, now faced deportation for his felony drug conviction. 103

The Court recognized Padilla as a unique case because of the severity of the penalty—deportation. 104 It held that “counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demands no less.” 105 The Court reasoned that deportation constitutes a particularly severe penalty because of its connection to the criminal process, so that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.” 106 It went on to say: “[p]reserving the client’s right to remain in the United States may be more important than any potential jail sentence” and that when the consequence is clear,

100 Id. (“[T]he Court held that counsel must be appointed for any indigent felon charged with a felony. [And when denied] . . . the risk of an unreliable verdict is intolerably high . . . [and] Gideon eliminated this risk.”).
102 Id. at 1478 (“[Counsel] told him that he ‘did not have to worry about immigration status since he had been in the country so long.’”) (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).
103 Id. at 1477 (noting that Padilla would not have pled guilty if he had known about the deportation, and that he would have “insisted on going to trial”).
104 Id. at 1481 (discussing the severity of deportation, and the fact that even though it is not a criminal sanction, that it is tied so closely to the criminal process, and the need for effective counsel, especially for immigrants and their families).
105 Id. at 1487 (remanding the case for Padilla to prove if he could demonstrate prejudice because of his counsel had been “constitutionally deficient”).
106 Padilla, 130 S. Ct. at 1481–82.
counsel has a duty to provide his client with the correct advice. Finally, the Court noted it had “long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective counsel.” In that statement itself, the Supreme Court referred to the two things that make Gideon a watershed case: the “required observance of procedures implicit in the concept of ordered liberty[, such as the Sixth Amendment,] and contributed to the accuracy of the verdict.”

G. The Circuit Split on The Application of Padilla

The lower courts have been extremely active since the Padilla decision, with three of the circuit courts rendering decisions on its application. Their decisions, instead of providing clear guidance, actually muddied the waters with three differing interpretations of Padilla.

1. The Third Circuit

The Third Circuit became the first circuit to review a case based upon Padilla in United States v. Orocio. The court held that Padilla extended an “old” rule—Strickland—and applied retroactively under collateral review.

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107 Id. at 1483.
108 Id. at 1486 (answering the Solicitor General’s concern about “protecting the finality of convictions obtained through guilty pleas” and their fear that this ruling would open a floodgate of claims. The Court then went on to talk about how in the 25 years since Strickland v. Washington, 466 U.S. 668 (1984) was first applied, that pleas are generally not challenged by a habeas petition to the extent that non pleas are. It recognized that a habeas challenge to a plea could result in a less favorable outcome, but more importantly, felt that unlike the Solicitor General, there would not be a flood of habeas petitions based upon the Padilla ruling.).
109 Roosevelt, supra note 20, at 1096.
110 The Third Circuit decided United States v. Orocio, 645 F.3d 630 (3d Cir. 2011) in June of 2011. This was followed by the Seventh Circuit’s decision in Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) on the 23rd of August and finally the Tenth Circuit’s ruling in United States v. Hong, 2011 U.S. App. LEXIS 18034 (10th Cir. 2011) on the 30th of August.
111 The Third Circuit decided Padilla was an old rule and thus applied retroactively on collateral review. Orocio, 654 F.3d at 634. The Seventh Circuit decided it was a new rule, did a critical analysis of the Third Circuit’s decision, but never analyzed whether either of the two exceptions applied to Padilla. Chaidez, 655 F.3d at 686. Finally, the Tenth Circuit did agree with the Seventh Circuit that it was a new rule but only decided that it did not apply retroactively after it determined that it did not meet either of the Teague exceptions. Hong, 2011 U.S. App. LEXIS 18034 at 2.
112 United States v. Orocio, 645 F.3d 630 (3d. Cir. 2011).
113 See generally, Strickland, 466 U.S. at 671 (laying out the framework under which courts would analyze an ineffective counsel claim under the Sixth Amendment).
In its *Teague* analysis of *Padilla*, the court reasoned that a “plea agreement’s immigration consequences” comes within the duties required of counsel under *Strickland*.\(^{115}\) It further reasoned that “every *Strickland* claim requires a fact-specific inquiry, but it [wa]s not the case that every *Strickland* ruling on new facts requires the announcement of a ‘new rule.’”\(^{116}\) It concluded that the application of *Strickland* in each separate factual scenario was a “new application of an ‘old rule’ in a manner dictated by precedent.”\(^{117}\)

2. The Seventh Circuit

Less than two months after the Third Circuit decided *Orocio*, the Seventh Circuit came in with a completely different conclusion in *Chaidez v. United States*.\(^{118}\) The court held that *Padilla* announced a new rule and never considered the question of an exception since the parties agreed neither exception applied.\(^{119}\)

The Seventh Circuit looked at the *Teague* definition of a new rule to determine if *Padilla* was following already established precedent.\(^{120}\) The court followed “the [Supreme] Court’s retroactivity jurisprudence guidance” and determined that the Supreme Court’s split with a concurrence by two justices and a dissent by two other justices met the definition of a new rule.\(^{121}\) Finally, the Seventh Circuit looked at rulings prior to *Padilla* and found that lower courts

\(^{114}\) *Id.* at 634.

\(^{115}\) *Id.* at 638.

\(^{116}\) *Id.* at 640.

\(^{117}\) *Id.* at 641.

\(^{118}\) *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011)

\(^{119}\) *Id.* at 687–90.

\(^{120}\) *Id.* at 688 (“A rule is said to be new when it was not ‘dictated by precedent existing at the time the defendant’s conviction became final.’”) (quoting *Teague*, 489 U.S. at 301).

\(^{121}\) *Id.* at 688–90 (“[T]he Court has looked to both the views expressed in the opinion itself and lower court decisions. Lack of unanimity on the Court in deciding a particular case supports the conclusion that the case announced a new rule.”); see also *Beard*, 542 U.S. at 414–15; *Sawyer*, 497 U.S. at 236–37.
had consistently ruled against *Padilla*-type cases, thus making the Supreme Court’s decision in *Padilla* a new rule since the lower courts could not have predicted it.\textsuperscript{122}

3. The Tenth Circuit

Only a week after the Seventh Circuit’s decision, the Tenth Circuit added its voice to the mix by doing a full *Teague* analysis, including both exceptions, in its interpretation of *Padilla* in *United States v. Hong*.\textsuperscript{123}

In its analysis as to whether *Padilla* was an old or a new rule, the Tenth Circuit followed the same process as the Seventh Circuit and found that “*Padilla* announced a new rule of constitutional law.”\textsuperscript{124} The court found *Padilla* to be a new rule and then went on to determine if either of the two *Teague* exceptions applied.\textsuperscript{125} The court determined that the rule in *Padilla* was procedural and not substantive, so only the second *Teague* exception could apply.\textsuperscript{126} In looking at the second *Teague* exception, the court held *Padilla* up to the standard of *Gideon* and found that *Padilla* was not “a watershed rule of criminal procedure and does not fall within *Teague*’s second exception.”\textsuperscript{127} Finally, the Tenth Circuit determined that the Supreme Court’s discussion

\textsuperscript{122} Id. at 690 (“[T]he lower federal courts, including at least nine Courts of Appeals, had uniformly held that the *Sixth Amendment* did not require counsel to provide advice concerning collateral (as opposed to direct) consequences of a guilty plea.”).

\textsuperscript{123} United States v. Hong, 2011 U.S. App. LEXIS 18034 (10th Cir. 2011).

\textsuperscript{124} Id. at 18–22 (noting that the Tenth Circuit also looked at the pre-*Padilla* history and came to the same conclusion as the Seventh Circuit that because of that strong history, and because of the Court’s mixed decision, that *Padilla* was a new rule).

\textsuperscript{125} Id. at 25.

\textsuperscript{126} Id. at 29; see also id. at 27 n.11 (noting that the Tenth Circuit explained the changes in the verbiage of the first *Teague* exception in that “recently, however, the Court explained ‘[r]ules that fall within what we have referred to as *Teague*’s first exception ‘are more accurately characterized as substantive rules not subject to [*Teague*’s] bar.’”’ quoting *Beard*, 542 U.S., at 411 n.3).

\textsuperscript{127} *Hong*, 2011 U.S. App. LEXIS 18034, at 30; see also id. at 31 (“The rule does not affect the determination of a defendant’s guilt and only governs what advice defense counsel must render when his noncitizen client contemplates a plea bargain.”).
on “collateral attacks on guilty pleas” did not amount to the Supreme Court implying that Padilla applied retroactively.\textsuperscript{128}

III. Analysis

The Third Circuit found that Padilla applied retroactively, not because it was a watershed rule but because it was an old rule.\textsuperscript{129} The Seventh and Tenth Circuits disagree with that, finding that Padilla was not only a new rule but that it had no retroactive application because it had not met either of the Teague exceptions.\textsuperscript{130} If the Third Circuit is correct, then Padilla is an old rule that applies retroactively, if the Seventh and Tenth Circuits are correct, then Padilla is a new rule that does not apply retroactively because it meets neither Teague exception. However, there is a third possibility: that the Third Circuit is correct—Padilla does apply retroactively; and that the Seventh and Tenth Circuits are correct—Padilla is a new rule; but that all are wrong because Padilla does meet one of the two Teague exceptions and is therefore retroactive.

A. Old Rule or New Rule?

One determines if a rule is an old rule or a new rule under Teague by evaluating whether or not the “result [was] dictated by the precedent existing at the time the defendant’s conviction has become final.”\textsuperscript{131} In other words, could someone in trying to determine the outcome in Padilla, “have felt compelled by existing precedent to conclude that [the Padilla decision] was

\textsuperscript{128} Id. at 34–35 (“[W]e think it unwise to imply retroactivity based on dicta--and [sic] abandon the Teague analysis entirely. The Teague framework exists to promote the finality of convictions . . . [t]o imply retroactivity from an isolated phrase in a Supreme Court opinion would completely ignore this goal.”).

\textsuperscript{129} Orocio, 645 F.3d at 641.

\textsuperscript{130} Hong, 2011 U.S. App. LEXIS 18034, at 34 (“Therefore, Padilla is a new rule of constitutional law but does not apply retroactively to cases on collateral review.”); Chaidez, 655 F.3d at 688 (“The parties [had] agree[d] that if Padilla announced a new rule neither exception to non-retroactivity applie[d].”).

\textsuperscript{131} Glenda K. Harnad, Construction and Application of Teague Rule Concerning Whether Constitutional Rule of Criminal Procedure Applies Retroactively to Case on Collateral Review—Supreme Court Cases, 44 A.L.R. Fed. 2d 557, § 8 (2010); see also Hong, 2011 U.S. App. LEXIS 18034 at 11; Chaidez, 655 F.3d at 688; Orocio, 645 F.3d at 12–13; Teague, 489 U.S. at 301.
required by the Constitution.” The Supreme Court looks at the views expressed in its own opinions and at the prior decisions of lower courts to determine if a rule is old or new. When the Supreme Court splits on a case, it is generally a strong indicator that the Court has announced a new rule. Additionally, in looking to the lower courts’ prior decisions, if they had reached the opposite conclusion of the Supreme Court, it “is compelling evidence that reasonable jurists reading the Supreme Court’s precedents [at that time] . . . could have disagreed about the outcome” and it was open to reasonable debate, meaning that the Supreme Court announced a new rule in its decision.

So, is Padilla an old rule or a new rule? “The central holding of Padilla is that defense counsel ‘must inform her client whether his [guilty] plea carries a risk of deportation’ if those consequences are clear.” The Seventh and Tenth Circuits reasoned that Padilla met the Supreme Court’s standards to be considered a new rule because it was decided by a split court that had both a concurrence and a strong dissent which both declared the decision to be groundbreaking. Additionally, the lower courts were nearly unanimous in their decisions “that the Sixth Amendment did not require counsel to provide advice concerning collateral (as opposed to direct) consequences of a guilty plea,” the Supreme Court’s decision indicated that it

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132 Saffle, 494 U.S. at 488.
133 Chaidez, 655 F.3d at 689.
134 Id.; see also Beard, 542 U.S. at 414–15 (noting that Mills was a new rule since there was no existing precedent and four Justices dissented in the ruling).
135 Chaidez, 655 F.3d at 690.
137 Id. at 19–20 (noting that the 7–2 decision “generated both a strong concurrence and dissent” with both the concurrence and dissent noted the extension of the Sixth Amendment, and specifically that the majority did not cite to any precedent that would support their decision); Chaidez, 655 F.3d at 689–90 (noting that Justice Alito’s concurrence, joined by Chief Justice Roberts, and Justice Scalia’s dissent, joined by Justice Thomas, held very strong views that Padilla was groundbreaking because it dramatically expanded the Sixth Amendment into groundbreaking territory that was not covered by any existing precedent.).
was not dictated by precedent. The arguments from the Seventh and Tenth Circuits create a strong case for Padilla being considered a new rule, however, the Third Circuit saw otherwise.

In its Teague analysis, the Third Circuit viewed Padilla as an extension of “Strickland’s Sixth Amendment analysis to a non-criminal setting—namely, the failure of criminal defense counsel to advise a client of the mandatory civil removal consequences of pleading guilty.” It looked more closely at Strickland to determine if Padilla, as applied under that standard, would be a new rule. Under this analysis, the Third Circuit found that “Padilla followed directly from Strickland” and was an “old rule” which must be applied retroactively on collateral review.

Unfortunately, the Third Circuit was wrong in deciding that it was an old rule and thus applied retroactively. Both the Seventh and Tenth Circuits acknowledged the Third Circuit’s compelling argument that Padilla is an extension of Strickland, but noted that just because Padilla had to be analyzed under Strickland, that alone did not make it an old rule. They believed that Padilla, by requiring counsel to provide effective assistance on the civil penalty of deportation, that the Supreme Court had announced a new rule, even if that rule then had to be analyzed under Strickland to determine if the counsel we effective or not. The Third Circuit’s decision that Padilla was an old rule relied too heavily upon considering it an extension of

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138 Chaidez, 655 F.3d at 690 (citing Padilla, 130 S. Ct. at 1487) (Alito J., concurring in judgment) (“Until today, the longstanding and unanimous position of the federal courts was that reasonable counsel generally need only advise a client about the direct consequences of a criminal conviction, not collateral consequences such as deportation”) (internal quotations omitted).
139 Orocio, 645 F.3d at 637.
140 Id. at 640 (“Every Strickland claim requires a fact-specific inquiry, but it is not the case that every Strickland ruling on new facts requires the announcement of a ‘new rule.’”).
141 Id. at 641.
142 Chaidez, 655 F.3d at 692 (“The fact that Padilla is an extension of Strickland says nothing about whether it was new or not.”); Hong, 2011 U.S. App. LEXIS 18034 at 24 (noting that Padilla extended the Sixth Amendment right to effective counsel and applied it to an aspect of a plea bargain previously untouched by Strickland).
Strickland. The Third Circuit failed by not continuing the analysis required under Teague—analyzing the views expressed by the Supreme Court in Padilla and the outcomes of the lower courts prior to Padilla to determine if it was a new rule or not. The Seventh and Tenth Circuits were correct, and Padilla is a new rule under Teague that does not apply retroactively on collateral review unless it meets one of its two exceptions.

B. The First Teague Exception

The first Teague exception looks at the new rule announced by the Supreme Court to determine if it is substantive or procedural. The new rule will apply retroactively under the first Teague exception only if it is a substantive rule. A new rule is substantive if it “narrow[s] the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place a particular conduct or persons covered by the statute beyond the State’s power to punish.” A new procedural rule on the other hand only “raises[s] the potential that a defendant who was convicted under improper procedure may have been otherwise acquitted.” The new rule announced in Padilla is not substantive because it does not place any conduct or person

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145 See id. at 22 (“We find a reasonable jurist . . . would not have considered Supreme Court precedent to compel the application of Strickland to the immigration consequences of a guilty plea.”); Chaidez, 655 F.3d at 692 (“We consequently remain persuaded by the weight of lower court authority that . . . a jurist could reasonably have reached a conclusion contrary to the holding in Padilla, such that Padilla announced a new rule for purposes of Teague.”).
147 Schriro, 542 U.S. at 353.
148 Whorton, 549 U.S. at 416; see also Hong, 2011 U.S. App. LEXIS at 27–28 n.11 (noting that the Supreme Court in Beard and Schriro changed the terminology of the first Teague exception to mean substantive rules).
149 Hong, 2011 U.S. App. LEXIS at 28 n.12 quoting Schriro, 542 U.S. at 351–52 (citation omitted).
150 Id. at 28–29 n.13 citing Schriro, 542 U.S. at 352 (“[T]he Supreme Court gives retroactive effect to a very small set of procedural rules that ‘implicat[e] the fundamental fairness and accuracy of the criminal proceeding’ as represented in Teague’s second exception.”) (alteration in original).
“beyond the State’s power to punish.”\textsuperscript{151} \textit{Padilla} is a procedural rule, so Teague’s first exception does not apply.\textsuperscript{152}

\textbf{C. The Second Teague Exception}

The second Teague exception applies to a new procedural “rule [that] is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”\textsuperscript{153} To meet this watershed standard, “a new rule (1) must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and (2) must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”\textsuperscript{154} This bedrock procedural element must be one that was previously unrecognized.\textsuperscript{155} In the entire history of Teague, no new rule has met the second exception.\textsuperscript{156} In fact, the only case that the Supreme Court has stated could meet the standard of Teague’s second exception is \textit{Gideon}.\textsuperscript{157}

\textit{1. Comparing Padilla and Gideon}

To properly analyze \textit{Padilla} under the second Teague exception, it must be compared to the rules that the Supreme Court has already determined did not meet that exception and define why it is different. However, before that can be done, \textit{Padilla} must first be compared with the only case that the Supreme Court has stated would meet the second Teague exception and determine why \textit{Padilla} meets \textit{Gideon}.

\begin{flushleft}
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 29 (“The rule in \textit{Padilla} is procedural, not substantive. It regulates the manner in which a defendant arrives at a decision to plead guilty.”).
\textsuperscript{153} Id. at 27 (quoting \textit{Whorton}, 549 U.S. at 416) (quotation and alteration omitted).
\textsuperscript{154} \textit{Hong}, 2011 U.S. App. LEXIS at 29 (quoting \textit{Whorton}, 549 U.S. at 418) (internal quotation marks omitted).
\textsuperscript{155} \textit{Whorton}, 549 U.S. at 420–421.
\textsuperscript{156} Allen, supra note 19, at 128 (“It has not recognized any \textit{post-Teague} case as meeting the standard.”).
\textsuperscript{157} \textit{Hong}, 2011 U.S. App. LEXIS 18034 at 30; see \textit{Whorton}, 549 U.S. at 418–19; \textit{Beard}, 542 U.S. at 417–18; Allen, supra note 6 at 128.
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a. *Gideon*

In *Gideon*, Gideon was accused of a felony in Florida for breaking and entering.\(^{158}\) Being indigent, Gideon requested the state provide him with counsel, which the trial judge denied.\(^{159}\) He later filed a habeas corpus petition with the Florida Supreme Court on the grounds that because the trial court refused to appoint him counsel, it denied him of his rights protected under the Constitution and the Bill of Rights.\(^{160}\) The Florida Supreme Court denied all relief, and the U.S. Supreme Court granted certiorari.\(^{161}\)

The Supreme Court had to decide if its holding in *Betts v. Brady*\(^{162}\) was still valid and should be applied to *Gideon*, or if it should overturn *Betts*.\(^{163}\) The Supreme Court decided *Gideon* based on the Sixth Amendment’s guarantee of counsel being a right that “is ‘fundamental and essential to a fair trial’ [and] is made obligatory upon the States by the *Fourteenth Amendment*.\(^{164}\) The Supreme Court relied upon what it said in *Johnson v. Zerbst*\(^{165}\)

> [The assistance of counsel] is one of the safeguards of the *Sixth Amendment* deemed necessary to insure fundamental human rights of life and liberty . . . . The *Sixth Amendment* stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done’.\(^{166}\)

In deciding *Gideon*, the Supreme Court overturned *Betts* and made it clear that the Sixth Amendment’s guarantee of counsel was fundamental and essential to a fair trial.\(^{167}\)

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\(^{158}\) *Gideon*, 372 U.S. at 336.

\(^{159}\) *Id.* at 337.

\(^{160}\) *Id.*

\(^{161}\) *Id.* at 337–338.


\(^{163}\) In *Betts*, the Supreme Court had decided in a habeas corpus petition that it did not violate the Constitution or *Bill of Rights* to deny an indigent person the right to assistance of counsel at the state level when charged with a felony. *Gideon*, 372 U.S. at 338–39 (“[T]he Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so ‘offensive to the common and fundamental ideas of fairness’ as to amount to a denial of due process.”).

\(^{164}\) *Gideon*, 372 U.S. at 342.


\(^{166}\) *Gideon*, 372 U.S. at 343 quoting *Johnson*, 304 U.S. at 462.

\(^{167}\) *Id.* at 344; see *id.* at 344–45 (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no
b. Padilla

In Padilla, the Supreme Court once again faced a Sixth Amendment issue when the Kentucky Supreme Court held that “collateral consequences are outside the scope of representation required by the Sixth Amendment, and therefore the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel” when the defendant pled guilty. The Supreme Court saw it the opposite way and held that “counsel must inform her client whether his plea carries a risk of deportation.”

In deciding Padilla, the Supreme Court looked to the Sixth Amendment. It found that because deportation is such a severe and nearly automatic punishment, that it did not matter that deportation was a collateral consequence since “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.” The Supreme Court noted that it had long recognized that the Sixth Amendment required counsel to be effective. It further noted that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment.” Finally, the Court stated that the Constitution requires it “to ensure skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)) (internal quotation marks omitted).

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168 Padilla, 130 S. Ct. at 1481 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)) (internal quotation marks omitted).
169 Id. at 1486 (“Our long standing Sixth Amendment precedents, the seriousness of deportations as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”).
170 Id. at 148–82, 86.
171 Id. at 1481–82.
172 Id. at 1486.
that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’”

c. Comparison

The Supreme Court decided both *Padilla* and *Gideon* under the ambit of the Sixth Amendment. Each also applied to a whole class of people, *Padilla* to immigrants and *Gideon* to indigents. The Supreme Court noted in *Gideon* that the assistance of counsel is such an essential element of the Sixth Amendment, that if the Sixth Amendment is not upheld, justice is not done. In *Padilla*, the Supreme Court noted that the Sixth Amendment’s requirement for effective assistance of counsel included the critical phase of negotiating a plea bargain. It stated that because deportation is such an extreme punishment for an immigrant, amounting basically to banishment or exile, the need for effective assistance of counsel is even more critical. Finally, just as it found the appointment of counsel in *Gideon* restored “constitutional principles established to achieve a fair system of justice,” the Supreme Court found in *Padilla* that it was the Court’s “responsibility under the Constitution to ensure” immigrants have effective assistance of counsel as prescribed by the Sixth Amendment.

2. Differentiating *Padilla* from the Other Teague Rulings

As mentioned earlier, the Supreme Court has made fourteen decisions regarding the second *Teague* exception, and not once has the Court held that it applies. For *Padilla* to be covered by the second *Teague* exception, it must not only show that it is similar to *Gideon*, but it

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174 *Id.* (quoting Richardson, 397 U.S. at 771).
175 See *Padilla*, 130 S. Ct. at 148–82, 86; *Gideon*, 372 U.S. at 344.
177 See supra note 166 and accompanying text.
178 See supra note 173 and accompanying text.
179 *Padilla*, 130 S. Ct. at 1486.
180 *Gideon*, 372 U.S. at 344.
181 *Padilla*, 130 S. Ct. at 1486.
182 See supra note 89 and accompanying text.
must show why it stands out differently from the other fourteen rulings and meets the watershed rule requirement. These fourteen Teague rulings will be reviewed by the ruling classification provided earlier in the background—sentencing rules; police interrogations rule; jury instruction on a mental state element rule; a new right to appeal rule; jury selection rule; and confrontation clause rule.183

a. Sentencing Rules

The largest group of cases that has been reviewed under the Teague rule by the Supreme Court is the sentencing rule cases.184 These cases all dealt with new rules that affected the sentencing portion of the trial, which means post-conviction.185 The second Teague exception is based on Justice Harlan’s view in Desist that accuracy in the process is critical to ensure that the innocent are not convicted, and his view in Mackey that “the procedure must implicate the fundamental fairness of the trial.”186 A post-conviction sentencing rule may meet the fairness element of the test, but it does not meet the accuracy element since it applies after a person was convicted and deals with the sentencing portion of a trial and not the conviction portion.187

Unlike the post-conviction sentencing rules, the Padilla rule focuses on the effectiveness of counsel at the pleading stage.188 To meet the watershed requirement of Teague, a new rule must “prevent[.] an impermissibly large risk of an inaccurate conviction.”189 A sentencing rule does not meet this requirement since it is post-conviction by its very nature. The Padilla rule, on the other hand, deals with the effective assistance of counsel at the pleading stage of a trial which

183 Id.
184 Id.
185 Id.
186 Teague, 489 U.S. at 312 (“[A]ll ‘new’ constitutional rules which significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas.”) (quoting Desist, 394 U.S. at 262) (Harlan, J., dissenting) (internal quotation marks omitted).
187 Id.
188 Padilla, S. Ct. at 1486.
189 See supra note 154 and accompanying text.
the Supreme Court considers “a critical phase of litigation for the purposes of the Sixth Amendment.”190 Since the Padilla rule applies before the conviction phase of a trial, this new rule, unlike the sentencing rules, may prevent an inaccurate conviction.191

b. Police Interrogation Rules

The Roberson police interrogation rule “barr[ed] police-initiated interrogation following a suspect’s request for counsel in a separate investigation.”192 Unlike the sentencing rules, this new rule did have an impact on the conviction phase of a trial since it applied during police interrogation prior to the trial. However, the second Teague exception requires that “the likelihood of an accurate conviction is seriously diminished.”193 In Butler, the Supreme Court noted that instead of diminishing the accuracy of the conviction, the violation of this specific rule actually increased the accuracy and thus did not meet the second Teague exception.194

Padilla is distinguishable from the police interrogation rule because the police rule did not meet the standard for fairness and accuracy under the second Teague exception.195 The Supreme Court noted in the police interrogation rule that in lieu of decreasing the accuracy, violation of the rule actually increased the accuracy of a conviction.196 In Padilla, on the other hand, the Supreme Court felt that the pleading stage has a major impact on the fairness of the outcome of the trial for a noncitizen facing the risk of deportation.197

c. Jury Instruction on a Mental State Element Rule

In Gilmore, the Supreme Court had to decide whether a new rule stating that when a court gives:

190 Padilla, 130 S. Ct. at 1486.
191 Id.
192 Harnad, supra note 131, at § 9.
193 Teague, 489 U.S. at 313.
194 Butler, 494 U.S. at 416.
195 Id.
196 Id.
197 Padilla, 130 S. Ct. at 1486.
murder instructions preceding the voluntary-manslaughter instructions, but did not expressly direct the jury that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state, it was possible for a jury to find that a defendant was guilty of murder without even considering whether he was entitled to a voluntary-manslaughter conviction instead.\textsuperscript{198}

In this specific case, the defendant admitted his guilt, but argued that he was guilty only of manslaughter instead of murder.\textsuperscript{199} After determining that it was a new rule and did not meet the first \textit{Teague} exception, the Supreme Court found that even though the jury instructions may have been confusing, the new rule did not “implicate the fundamental fairness and accuracy of the criminal proceeding” and the second \textit{Teague} exception did not apply.\textsuperscript{200}

\textit{Padilla} on the other hand, did have a major impact on fairness, since the outcome in his trial could determine whether he was deported or not—a punishment the Supreme Court equated to exile.\textsuperscript{201} Additionally, the Supreme Court in \textit{Padilla} viewed “the negotiation of [his] plea bargain [as] a critical phase of litigation”\textsuperscript{202} striking at the heart of the second \textit{Teague} exception since it created an “impermissibly large risk for an inaccurate conviction.”\textsuperscript{203}

d. New Right to Appeal Rule

In \textit{Goeke}, the respondent had been convicted of killing her husband, had fled, and was re-captured.\textsuperscript{204} Her appeal was dismissed under the state’s fugitive-dismissal rule which allowed the court to dismiss an appeal of someone who tries to flee justice.\textsuperscript{205} The Eighth Circuit held that “dismissal of an appeal where preappeal flight had no adverse effect on the appellate process violated the defendant’s substantive rights under the \textit{Fourteenth Amendment}.”\textsuperscript{206} The Supreme

\textsuperscript{198} \textit{Gilmore}, 508 U.S. at 339.
\textsuperscript{199} Id. at 336.
\textsuperscript{200} Id. at 345.
\textsuperscript{201} \textit{Padilla}, S. Ct. 1473 at 1486.
\textsuperscript{202} Id.
\textsuperscript{203} \textit{Whorton}, 549 U.S. at 418.
\textsuperscript{204} \textit{Goeke}, 514 U.S. at 116.
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 117.
Court held that this was a new rule and that it did not meet the second Teague exception because due process does not require a state to provide any sort of appellate process.207

Padilla is distinguishable from the right to appeal rule in that states are not required by due process to provide an appellate process under the Constitution.208 In Padilla, however, the Supreme Court noted that “the advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment” and would thus be eligible for review as a new rule under Teague.209

e. Jury Selection Rule

In Teague itself, the petitioner contended “that the Sixth Amendment’s fair cross section requirement applies to the petit jury.” 210 The petitioner asked the Supreme Court to announce a new rule from its decision in Taylor v. Louisiana211 “that the ratio decidendi212 of Taylor cannot be limited to the jury venire.” 213 The Supreme Court determined that since this would be a new rule, for it to apply retroactively the rule must meet the second exception that it developed.214 Applying its new Teague analysis to the Taylor rule, it determined that the rule proposed by the petitioner “would be a far cry from the kind of absolute prerequisite to fundamental fairness that is ‘implicit in the concept of ordered liberty.’”215

207 Id. at 120 (“[A] former fugitive's right to appeal cannot be said to be so central to an accurate determination of innocence or guilt as to fall within this exception to the Teague bar.”) (quoting Graham v. Collins, 506 U.S. 461, 478 (1993)) (internal quotation marks omitted).
208 Id.
209 Padilla, 130 S. Ct. at 1482.
210 Teague, 489 U.S. at 299.
212 See, BLACK’S LAW DICTIONARY 1376 (9th ed. 2009) (“1. The principle or rule of law on which a court’s decision is founded.”).
213 Teague, 489 U.S. at 299. See also Taylor, 419 U.S. at 538 (“It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”).
214 Id. at 316.
215 Id. at 314.
Padilla is distinguishable from the jury selection rule in that the jury selection rule did not meet the fairness element of the second Teague exception.216 The Supreme Court, on the other hand, noted in Padilla that because the penalty of deportation was so severe, it “only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation”217 and “long standing Sixth Amendment precedents” demanded that the Supreme Court ensure they have competent counsel.218

f. Confrontation Clause Rule

In Whorton, the step-father was convicted of sexual assault of his step-daughter.219 At the trial, the step-daughter was unable to testify due to distress, so the court allowed the mother and a police officer to testify to out of court statements made by the child.220 The step-father claimed that the court’s action violated the Confrontation Clause, even though the law allowed such hearsay testimony at the time.221 The Supreme Court had to determine if its ruling in Crawford that “[t]estimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]”222 applied retroactively or not.

The Supreme Court found the Crawford rule to be a new procedural rule, so it would only apply retroactively if it met the second Teague exception.223 The Court noted that it had never found a rule that met the watershed requirement of the second Teague exception and then

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216 Id.
217 Padilla, 130 S. Ct. at 1486; see also id. at n.15.
218 Id. at 1486.
219 Whorton, 549 U.S. at 411–12.
220 Id. at 411.
221 Id. at 412.
222 Id. at 413 (alteration in original) (quoting Crawford, 541 U.S. at 59) (internal quotation marks omitted).
223 Id. at 417 (“Because Crawford announced a new rule and because it is clear and undisputed that the rule is procedural and not substantive, that rule cannot be applied in this collateral attack on respondent’s conviction unless it is a watershed rule[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”) (alteration in original) (quoting Saffle, 494 U.S. at 495) (internal quotation marks omitted) .
proceeded to explain why *Crawford* did not meet it either. The *Crawford* rule did not meet the accuracy part of the second *Teague* exception because it had to do more than just improve the accuracy of a trial; it had “to prevent an impermissibly large risk of an inaccurate conviction.”

Once again, the Supreme Court pointed to *Gideon* as the standard of such a risk and *Crawford* did not meet that standard. Additionally, “the *Crawford* rule did not alter [the Court’s] understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.”

The Supreme Court noted that while *Crawford* was an important rule, it did not have the same “profound and ‘sweeping’ change[s]” that *Gideon* did so it did not meet the second element of the exception.

Unlike the confrontation clause case, *Padilla* meets both the accuracy requirement and the altering of “the bedrock procedural elements” of fairness requirements of *Teague*. The confrontation clause case only dealt with the inadmissibility of hearsay evidence and the Supreme Court held it did not necessarily prevent “an impermissibly large risk” as opposed to just a risk of an inaccurate conviction. In *Padilla*, however, the Supreme Court noted that since the plea bargain phase is such a critical phase of litigation and because the risk of deportation is so severe a punishment, it had the responsibility to ensure that an LPR had effective counsel who informed him of deportation risks when pleading, since an error in the plea

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224 *Id.* at 418 (“[W]e have rejected every claim that a new rule satisfied the requirements for watershed status.”).
225 *Whorton*, 549 U.S. at 418 (quoting *Summerlin*, 542 U.S. at 356) (internal quotation marks omitted).
226 *Id.* at 419 (“In *Gideon*, the only case that we have identified as qualifying under this exception, the Court held that counsel must be appointed for any indigent defendant charged with a felony. When a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high. The new rule announced in *Gideon* eliminated this risk.”).
227 *Id.* at 420 (quoting *Sawyer*, 497 U.S. at 242) (internal quotation marks omitted).
228 *Id.* at 421 (citing *Beard*, 542 U.S. at 418).
229 See supra notes 153–155 and accompanying text.
230 See supra note 225 and accompanying text.
231 *Padilla*, 130 S. Ct. at 1486.
bargain phase could be equated to “an ‘impermissibly large’ risk of an inaccurate conviction.”

In addition, Padilla is distinguishable from the confrontation clause rule because Padilla was viewed as “mark[ing] a major upheaval in Sixth Amendment law.”

3. Watershed

Does Padilla meet the watershed requirement of the second Teague exception? Padilla is not only to Gideon, it is more similar than any of the other Teague cases that the Supreme Court has reviewed. Padilla meets both elements of the second Teague exception in that it “prevent[s] an impermissibly large risk of an inaccurate conviction,” and it “alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”

The Supreme Court, in noting the severity of deportation and the importance of the plea bargaining stage under the Sixth Amendment’s requirement for effective assistance of counsel, shows how the Padilla rule prevents the large risk of an inaccurate conviction. Additionally, Supreme Court Justice Alito, in his concurring opinion, underscores how the Padilla decision made a “major upheaval” to the understanding of the Sixth Amendment law—one of “the bedrock procedural elements essential to the fairness of a proceeding.”

Most importantly, Padilla stands up to the Palko test which Justice Harlan pointed to as the appropriate guide to

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232 Padilla, 130 S. Ct. at 1481–82.
233 Padilla, 130 S. Ct. at 1491–92 (Alito, J., concurring) (“The Court's decision marks a major upheaval in Sixth Amendment law. This Court decided Strickland in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel. As noted above, the Court’s view has been rejected by every Federal Court of Appeals to have considered the issue thus far. The majority appropriately acknowledges that the lower courts are now quite experienced with applying Strickland, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.”) (internal citations and quotations omitted).
234 See supra notes 182–233 and accompanying text.
235 Hong, 2011 U.S. App. LEXIS at 29 (quoting Whorton, 549 U.S. at 418) (internal quotation marks omitted).
236 Padilla, 130 S. Ct. at 1486.
237 Id. at 1491 (Alito, J., concurring).
238 Whorton, 549 U.S. at 418.
use in determining which cases meet the second exception.\textsuperscript{239} The \textit{Palko} test which according to Justice Harlan mandated \textit{Gideon}, now mandates \textit{Padilla}, which is key because under Justice Harlan’s analysis the “\textit{Palko [test]} more correctly marks the tipping point of finality interests, . . . in terms of divining which new rules should apply on habeas.”\textsuperscript{240} When this is all added up, the \textit{Padilla} rule “prevents an impermissibly large risk of an inaccurate conviction,”\textsuperscript{241} it “alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding” because it is a “major upheaval” of the Sixth Amendment\textsuperscript{242} making it a procedure that is “implicit in the concept of ordered liberty”\textsuperscript{243} and meets the \textit{Palko} test, the “tipping point of finality interests in determining which new rules should apply on habeas”\textsuperscript{244} corpus review. Thus \textit{Padilla}, like \textit{Gideon}, is a watershed rule that meets the second \textit{Teague} exception and applies retroactively on collateral review.

IV. IMPACT

The new \textit{Padilla} rule, meets the watershed requirement of the second \textit{Teague} exception and when applied retroactively, could have a direct impact upon two critical areas of the law. First, it will have a direct impact on immigration law, specifically on cases currently in the criminal system or already decided that involve LPRs. Additionally, \textit{Padilla} could signal a shift in allowing LPRs to have a right to counsel for deportation proceedings.\textsuperscript{245} The second area of law that \textit{Padilla} will impact upon is how the Supreme Court will view retroactivity going forward since the \textit{Gideon} watershed rule has finally been met.

\textit{A. Immigration}

\textsuperscript{239} See \textit{supra} notes 69–71 and accompanying text.
\textsuperscript{240} \textit{Mackey}, 401 U.S. at 694 (Harlan, J., concurring in judgments in part and dissenting in part).
\textsuperscript{241} \textit{Hong}, 2011 U.S. App. LEXIS at 29 (quoting \textit{Whorton}, 549 U.S. at 418) (internal quotation marks omitted).
\textsuperscript{242} \textit{Padilla}, 130 S. Ct. at 1491 (Alito, J. concurring).
\textsuperscript{243} \textit{Mackey}, 401 U.S. at 692–93 (Harlan, J., concurring in judgments in part and dissenting in part).
\textsuperscript{244} \textit{Mackey}, 401 U.S. at 694 (Harlan, J., concurring in judgments in part and dissenting in part).
\textsuperscript{245} See generally \textit{Kanstroom}, \textit{Watershed, supra} note 5, at 314–20; \textit{Rosenbloom, supra} note 5, at 330–31; \textit{Kanstroom, Challenging, supra} note 5, at 1509–10; \textit{Proctor, supra} note 7, at 239.
What will happen when Padilla is applied retroactively and LPRs are able to attack their guilty plea in a habeas petition? The Supreme Court in its *Padilla* decision tackled this issue directly and said “[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains.”246 This may seem unrealistic at first blush when in 2009 over 128,000 noncitizens (both LPRs and illegal immigrants) were deported for criminal convictions and another 95,000 noncitizens were in prison.247 The Supreme Court foresaw this issue in its *Padilla* decision, and noted that while “[p]leas account for 95% of all criminal convictions . . . . they account for only approximately 30% of the habeas petitions filed.”248 The Court felt that the risk of opening a floodgate of habeas petitions was offset by petitioners not wanting to lose the deal they had already struck which could result in a “less favorable outcome.”249 Additionally, the Court noted that many states now either use plea forms that “provide notice[] of possible immigration consequences” or have passed laws that “require the trial courts to advise defendants of possible immigration consequences.”250 Finally, the Court felt that the requirements of *Strickland*, which had been in place for over twenty-five years requiring effective counsel, would be a large hurdle for most *Padilla* claims to overcome.251

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246 *Padilla*, 130 S. Ct. at 1485.
248 *Padilla*, 130 S. Ct. at 1485; see also DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS: SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, p. 418 (31st ed. 2005) (Table 5.17) (noting only approximately 5%, or 8,162 out of 68,533, of federal criminal prosecutions go to trial); *id.* at 450 (Table 5.46) (noting only approximately 5% of all state felony criminal prosecutions go to trial); V. FLANGO, NATIONAL CENTER FOR STATE COURTS: Habeas Corpus in State and Federal Courts 36–38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).
249 *Padilla*, 130 S. Ct. at 1485–86.
250 *Id.* at 1486 n.15.
251 *Id.* at 1485.
The more critical impact that retroactivity of Padilla could provide to immigration law is its effect in potentially providing LPRs the right to deportation counsel. Immigrants (both LPRs and illegal) have never had any right to counsel in deportation proceedings until Padilla. Though Padilla does not directly provide an LPR the right to counsel in deportation proceedings, the fact that the Supreme Court recognized “the seriousness of deportation as a consequence of a criminal plea” and gave LPRs a constitutional right to competent counsel regarding the risk of deportation in criminal proceedings is a great step forward. However, this ruling also created an interesting dichotomy, in that those involved in criminal proceedings have a constitutional right to effective counsel regarding the criminal behavioral impact on deportation but, because deportation is a civil issue, other LPRs facing deportation outside of criminal proceedings do not have any constitutional right to counsel at all. Padilla could be the beginning of granting those constitutional rights to all LPRs in deportation proceedings. Once the Supreme Court makes Padilla retroactive, it will become the Gideon for immigration law.

B. Retroactivity

The unknown impact that a retroactive application of Padilla as a new rule based on the second Teague exception is on retroactivity itself. Courts and scholars, in most cases, have all been quick to state that Padilla is a new rule and the second Teague exception does not apply. But what if they are wrong? What if this is the watershed case that meets the standard of

252 Kanstroom, Watershed, supra note 5, at 319.
253 Id.
254 Padilla, 130 S. Ct. at 1486; see also Kanstroom, Watershed, supra note 5, at 319–20.
255 Kanstroom, Challenging, supra note 5, at 1473.
256 Id. at 1473–78 (arguing that the Supreme Court created a new constitutional norm, the Fifth-and-a-Half Amendment which “embodies both the flexible due process guarantees of the Fifth Amendment and—at least for certain types of deportation—the more specific protections of the Sixth Amendment”).
257 Id. at 1478.
258 Chaidez, 655 F.3d at 694 (holding that Padilla is a new rule and does not apply retroactively); Chong, 2011 U.S. App. Lexis 18034 at 2 (holding that Padilla is a new rule, and does not meet either of the two Teague exceptions, so it does not apply retroactively); Proctor, supra note 7, at 241 (“If Padilla is a new rule of criminal procedure under Teague, it almost certainly falls outside the extremely narrow exception for watershed rules . . . . [and] [t]he Supreme Court has never found a new rule to be of this magnitude.”).
Gideon? The question that comes from that is, if it is, and the Supreme Court states that it meets the second Teague exception, will this open the door to more such exceptions, or a change to the way the Supreme Court views retroactivity? Is the Supreme Court in a position to make another shift on retroactivity as it did with Stovall and then Teague? Or is Padilla the rare Gideon that will come up under Teague but not have any direct impact on retroactivity outside its own area of the law? That is a question that only the Supreme Court can answer by its own actions.

V. Conclusion

In conclusion, the three Circuit Courts that have had a chance to make a decision based upon the new Padilla rule have not gotten it correct. As shown, Padilla meets the standard of Gideon that the Supreme Court laid out for a new rule to pass the second Teague exception and apply retroactively. Padilla, like Gideon, extended Sixth Amendment protections to a whole new class of people, and was a watershed development in both criminal and immigration law, and will prevent inaccurate convictions and deportation of LPRs. The long-term impact of the Supreme Court declaring Padilla a new rule that applies retroactively could have far reaching implications in immigration law. The extension of constitutional protections to LPRs in deportation proceedings, especially the right to counsel, if it develops, could be the most long lasting and positive impact that Padilla will effect. This extension could help change the current climate of deportation and exile that the Supreme Court noted exists in its Padilla opinion. What it will do to retroactivity, and how it will affect future rules being viewed under the second Teague exception is uncertain. Scholars and courts have not asked that question, assuming that after more than twenty years the Supreme Court will not find an exception to Teague. However, they are wrong, and Padilla does meet that exception, potentially opening up once again the discussion on when retroactivity should apply—but that is a question for the Supreme Court to
answer. What we do know for now is that the question of retroactivity is back and it has a new name: *Padilla*. 