Criminal Law & Procedure

Chaidez v. United States and the Non-Retroactivity of New Rules in Criminal Law

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Note from the Editor:

This article is about the Supreme Court's 2013 decision in *Chaidez v. United States*. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about this case and the Sixth Amendment. To this end, we offer links below to other perspectives on the case, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Chaidez v. United States, 133 S. Ct. 1103 (2013): http://www.supremecourt.gov/opinions/12pdf/11-820_j426.pdf
- Brief for Active and Former State and Federal Prosecutors as Amici Curiae Supporting Petitioner, Chaidez v. United States, 133 S. Ct. 1103 (2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-820_petitioneramcuactiveandfmrstateandfedprosecutors.authcheckdam.pdf
- Brief for National Association of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Petitioner, Chaidez v. United States, 133 S. Ct. 1103 (2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-820_petitioneramcunacdletal.authcheckdam.pdf
- Allison C. Callaghan, Padilla v. Kentucky*: A Case for Retroactivity*, 46 U.C. Davis L. Rev. 701 (2012): http://lawreview.law.ucdavis.edu/issues/46/2/Comment/46-2_Callaghan.pdf

In *Chaidez v. United States*,[1] the United States Supreme Court was tasked with deciding whether its prior holding in *Padilla v. Kentucky*[2]—that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea—should apply retroactively, such that a person whose conviction became final before the Court decided *Padilla* could benefit from that decision. The ultimate ruling in *Chaidez* consisted of a smorgasbord of typically ideologically-opposed Justices holding that *Padilla* had announced a new procedural rule in criminal proceedings which would not be applied retroactively. The two-Justice dissent declared multiple times the majority's holding was wrong because the holding of *Padilla* was not the announcement of a "new" rule but rather nothing more than the application of an old rule to a new set of facts.

However, because the Court failed to directly address and resolve the previous dichotomy of "collateral consequences versus direct consequences," practitioners should probably expect more litigation and lower court confusion in sorting out the classifications of consequences and the ultimate application of *Chaidez* and *Padilla*.

I. Factual Background

Roselva Chaidez came to the United States illegally from Mexico in the 1970s, later becoming a U.S. Lawful Permanent Resident in 1977. In 1998, Chaidez participated in an insurance fraud scheme and was subsequently indicted by the U.S. Attorney's Office for the Northern District of Illinois in 2003 for mail fraud. Chaidez pled guilty to two counts of mail fraud later that same year. Chaidez was sentenced to four years probation in April 2004, and was required to pay restitution in the amount of $22,500. Chaidez did not appeal her conviction which subsequently became final.

In July 2007, Chaidez filed an application for citizenship with the United States, and indicated on her application that she had never been convicted of a crime. After it was determined by immigration officials that she in fact had been previously convicted of not just a felony, but an aggravated felony under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[3] deportation proceedings were initiated against Chaidez in March 2009.

II. Procedural Background of Chaidez's Lawsuit

In January 2010, Chaidez filed a petition for a writ of error *coram nobis* in her criminal case in U.S. District Court, seeking to vacate her fraud conviction by arguing that her trial attorney had rendered ineffective assistance of counsel in violation of her Sixth Amendment rights by failing to inform her that deportation was a potential consequence of her guilty plea. According to Chaidez, "[u]nder *Strickland* [*v. Washington*, 466 U.S. 668 (1984)], a lawyer renders ineffective assistance of counsel in connection with a guilty plea if (1) counsel's representation fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defendant . . . insofar as 'there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty' to the charges at issue."[4]

On March 31, 2010, while Chaidez's petition was pending, the United States Supreme Court issued its decision in *Padilla v. Kentucky*. The Court held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel[;]" that "the ineffective

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assistance standard set forth in *Strickland* applies to Padilla's claim[;]" and that under *Strickland*, "an attorney must advise her client regarding the risk of deportation."[5]

Chaidez subsequently argued that *Padilla* should apply retroactively to her case, while the government asserted that "*Padilla* had announced a new procedural rule, and that under *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion), *Padilla's* holding should not be given retroactive effect in collateral challenges to convictions that had already become final when *Padilla* was decided."[6] However, the district court was persuaded by Chaidez and found that she was entitled to relief, holding that *Padilla* should be applied retroactively because "the holding in *Padilla* is an extension of the rule in *Strickland*"[7] and Padilla did not announce a new rule for *Teague* purposes.[8] Based upon its decision, the district court subsequently granted Chaidez's petition for writ of error *coram nobis* and vacated her conviction.[9]

The government appealed the district court's ruling to the Seventh Circuit, which ultimately reversed and remanded the lower court's decision. The Seventh Circuit held that *Padilla* had announced a nonretroactive, new rule under *Teague*, reasoning that a "new" rule is one that was not "dictated" by existing precedent at the time the defendant's conviction became final.[10] The court described the relevant analysis as whether *Padilla*'s outcome was "susceptible to debate among reasonable minds" and noted that the Supreme Court had "looked to both the views expressed in the opinion itself and lower court decisions."[11] Based on the fact that the members of the *Padilla* Court expressed such an "array of views" coupled with the fact that, prior to *Padilla*, all federal courts (including nine appellate courts) as well as thirty state courts (and the District of Columbia) had held that "the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea[,]" the Seventh Circuit concluded that this was "compelling evidence that reasonable jurists reading the Supreme Court's precedents in April 2004 could have disagreed about the outcome of *Padilla*."[12]

III. U.S. Supreme Court's Decision

A. Majority Opinion

Justice Kagan wrote the opinion for the majority, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito. The Court held that it had in fact announced a new rule in *Padilla* and therefore defendants whose convictions became final prior to *Padilla* could not benefit from that decision.

The Court first noted a split which had developed among federal and state courts as to the question of *Padilla* retroactivity.[13] The Court thereafter began its analysis by noting that its prior decision in *Teague* "makes the retroactivity of our criminal procedure decisions turn on whether they are novel."[14] Thus, a person may benefit on collateral review only from the Court's application of settled rules, not new rules. Under *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation" on the government and when "the result was not dictated by precedent existing at the time the defendant's conviction became final."[15] After *Teague*, the Court explained that a holding is not so dictated unless it would have been "apparent to all reasonable jurists."[16] The flipside, the Court explained, is where a principle from a previous decision is simply applied to a different set of facts. For this reason, the Court "will rarely state a new rule for *Teague* purposes."[17]

Next, the Court stated that if it were applying the standard *Strickland* test of determining ineffective assistance of counsel ("performance and prejudice")[18] to just another factual situation, it would not produce a new rule. However, according to the majority opinion, the Court had done more than simply apply the *Strickland* test in the *Padilla* case. In *Padilla*, the Court considered a threshold question: "Was advice about deportation 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction, rather than a component of the criminal sentence."[19] As the Court further explained, it first asked *whether* the Strickland test applied ("Should we even evaluate if this attorney acted unreasonably?") before it asked *how* the *Strickland* test applied ("Did this attorney act unreasonably?").[20] Because that preliminary question about the applicability of *Strickland* came to the *Padilla* Court unsettled, the Court's affirmative answer to that question ("Yes, *Strickland* governs here") required a new rule.[21]

It should also be noted that the Court at this point acknowledged that it had never attempted to set forth the sphere of "collateral consequences" and it continued to refuse to do so in *Padilla*. However, the Court did recount other effects of convictions that were commonly viewed as "collateral," such as civil commitment, civil forfeiture, sex offender registration, disqualification from public benefits, and disfranchisement.[22] The Court went on to provide background on its precedent, stretching back some twenty-eight years, where the Court had left open the issue of whether advice concerning a collateral consequence must satisfy Sixth Amendment requirements.[23] In this context, the Court boasted that its "non-decision left the state and lower federal courts to deal with the issue; and they almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation."[24] According to the Court's survey of the legal landscape at the time, including all ten federal appellate courts that had considered the question and almost thirty state appellate courts, an attorney's failure to inform a client of collateral consequences of a guilty plea does not violate the Sixth Amendment.[25]

With this background in mind, the Court noted that in deciding *Padilla* it had "answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions."[26] It did this because *Padilla* had *a different starting point*—instead of being a normal *Strickland* case where the Court would have begun evaluating the reasonableness of an attorney's performance followed by an assessment of prejudice, the Court began in *Padilla* by asking whether *Strickland* applied at all. By not having addressed the distinction between collateral and direct consequences and their effect on the right to counsel, the Court defined deportation as "unique" and special and outside this dichotomy, thus "resolv[ing] the threshold question before us by breaching the previously chink-free wall between direct and collateral consequences: Notwith-

standing the then-dominant view, '*Strickland* applies to Padilla's claim.'"[27] According to the Court, "if that does not count as 'break[ing] new ground' or 'impos[ing] a new obligation,' we are hard pressed to know what would."[28] "Before *Padilla*, we had declined to decide whether the Sixth Amendment had any relevance to a lawyer's advice about matters not part of a criminal proceeding. . . . No precedent of our own 'dictated' the answer."[29] In fact, the Court noted that the lower court had filled that vacuum and had almost uniformly and categorically removed advice about a conviction's non-criminal consequences from the scope of the Sixth Amendment. It was the *Padilla* Court's rejection of that categorical approach and the fact that such a decision would not have been—in fact—"apparent to all reasonable jurists" prior to that decision that made the *Padilla* decision a "new rule."[30]

Finally, the majority opinion notes that Ms. Chaidez and the dissenting justices have a different account of *Padilla*—that it "did no more than apply *Strickland* to a new set of facts."[31] However, the majority opinion debunks that argument by noting that *before* it could even begin applying the *Strickland* test, the *Padilla* Court had to establish that the Sixth Amendment even applied at all. It is very interesting to note that, in this part of the opinion, the Court specifically said that it had not eschewed the direct-collateral divide across the board but rather had relied on the special nature of deportation to show that the categorical approach was not well suited to address Padilla's claim.[32] It was "in refusing to apply the direct-collateral distinction that the *Padilla* Court did something novel."[33] The cases cited by Mr. Chaidez for the proposition that *Strickland* applied to deportation advice was misplaced, as those few cases concerned material misrepresentations by an attorney [not Chaidez's situation], whether concerning deportation or another collateral matter. Further, such cases co-existed happily with other precedent from the same jurisdictions that held deportation was not so unique that it warranted an exception to the general rule that an attorney need not advise a criminal defendant of collateral consequences stemming from a guilty plea.

B. Justice Thomas's Concurrence

Justice Thomas concurred in the judgment only, articulating that the analysis under *Teauge* was unnecessary because *Padilla* had been decided incorrectly. According to Justice Thomas, "the Sixth Amendment does not extend—either prospectively or retrospectively—to advice concerning the collateral consequences arising from a guilty plea."[34]

C. Dissenting Opinion

Justice Sotomayor, joined by Justice Ginsburg, dissented in the case, arguing that "*Padilla* did nothing more than apply the existing rule of *Stickland* . . . in a new setting."[35] According to the dissent, the *Strickland* test requires that the reasonableness of an attorney's performance be measured by ever-changing standards of professional conduct, and "apply[ing] *Strickland* in a way that corresponds to an evolution in professional norms . . . make[s] no new law."[36]

In the dissent's view, the *Padilla* decision was "built squarely on the foundation laid out by *Strickland*" and "relied upon controlling precedent."[37] The dissent went on to describe the substantial changes in immigration laws over the years, as well as the more demanding standards which had evolved relating to immigration. Thus, according to the dissent, "[i]t was only because those norms reflected changes in immigration law that *Padilla* reached the result it did, not because the Sixth Amendment right had changed at all."[38]

The dissent then argued that the majority opinion claims *Padilla* broke new ground by "addressing the threshold question of whether advice about deportation is a collateral consequence of a criminal conviction that falls within the scope of the Sixth Amendment."[39] However, this is a mischaracterization of the majority opinion, as the Court's opinion clearly and directly set forth the fact that the *Padilla* decision had eschewed that specific categorical distinction and had held that deportation was unique and special, lying outside of that dichotomy. Rather, as the majority explained and it appears the dissent chose to ignore, the ground-breaking rule was the threshold question of whether *Strickland* applied at all, not considering at the beginning how it applied.

Finally, the dissent makes a last-ditch effort to negate the majority's finding that the legal landscape "before *Padilla* was nearly uniform in its rejection of *Strickland's* application to the deportation consequences of a plea."[40] However, according to the dissent, the cases relied upon by the majority were all mostly old and the more recent cases (that just happened to favor the dissent's opinion) were more in line with the most recently evolved standards of professional conduct requiring attorneys to provide advice about deportation consequences.[41] Based upon the dissent's reasoning, the most recent cases concerning affirmative misstatements by attorneys about immigration consequences of a guilty plea created an exception to the collateral/direct consequences distinction, and thus dealt a serious blow to that "wall between direct and collateral consequences" that the lower courts had erected and upon which the majority opinion had relied.[42]

IV. Legal Implications of *Chaidez* and *Padilla*

The implications and fallout from the decisions in *Padilla* and *Chaidez* are uncertain. One obvious question is whether other types of previously-considered collateral consequences akin to deportation will be interpreted to evolve into more "unique" or "special" consequences that require courts to make more exceptions to the traditional direct/collateral consequences dichotomy and set forth bright-line rules.[43] Another long-term question is whether this dichotomy is even still workable, or should we expect these categorical distinctions to eventually disappear, requiring defense counsel to perform Herculean feats of advocacy by advising clients of all consequences of pleading guilty (including previously heretofore collateral consequences). As one commentator put it:

> This liberal expansion of the type of advice that criminal defense attorneys are required to provide leads us down a path where legal professionals who were trained to navigate the criminal court system and negotiate plea deals for lesser charges and lower sentences are instead acting as therapists and life coaches, discussing with their clients all the social repercussions of committing a crime. While

> it may be admirable to try to provide a client with all the information that could possibly be relevant to him, it is simply impractical in the real world of limited financial and human resources.[44]

Further, if new consequences are found to be unique or special, outside the traditional direct/collateral dichotomy, will such consequences continue to be categorized as "new rules" and therefore not applied retroactively, when the Supreme Court has said that establishing new rules will be the exception and rare? Will the non-retroactivity holding of *Chaidez* be applied throughout the states or will states rely on their own laws to apply *Padilla* retroactively, as the Supreme Judicial Court of Massachusetts recently held?[46] There are many questions that await the continuing development and interpretation of these cases, with potentially huge repercussions for defense counsel, criminal defendants, and the government. We will have to wait and see if further bright-line rules will emerge and whether defendants will be given the opportunity to afford themselves of these future new rules through retroactive application.

Endnotes

1 133 S. Ct. 1103 (2013).

2 559 U.S. 356 (2010).

3 Pub.L. 104-208, 110 Stat. 2009-546 (Sept. 30, 1996)

4 Brief of Petitioner, On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Chaidez v. United States, 2012 WL 2948891 (July 17, 2012).

5 *Id*. at 1482.

6 Brief for the United States, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at *4, Chaidez v. United States, 2012 WL 1097108 (Mar. 30, 2012).

7 United States v. Chaidez, 730 F.Supp.2d 896, 900 (N.D.Ill. 2010).

8 *Id.* at 904.

9 United States v. Chaidez, 2010 WL 3979664 (N.D. Ill. Oct. 6, 2010).

10 Chaidez v. United States, 655 F.3d 684, 688-690 (7th Cir. 2011).

11 *Id.* at 689.

12 *Id.* at 689-690.

13 The Court noted that the Fifth, Seventh, and Tenth Circuits, as well as the Supreme Court of New Jersey, had previously held that *Padilla* did not apply retroactively, while the Third Circuit and the Supreme Judicial Court of Massachusetts found that *Padilla* should apply retroactively. *Compare* Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011); United States v. Amer, 681 F.3d 211 (5th Cir. 2012); United States v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011); State v. Gaitan, 37 A.3d 1089 (N.J. 2012) *with* United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011).

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

15 *Id*.

16 *Id.* (citing Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997)).

17 *Id.*

18 In *Strickland*, the Court held that legal representation violates the Sixth Amendment if an attorney's *performance* falls "below an objective standard of reasonableness," as indicated by "prevailing professional norms," and the defendant suffers *prejudice* as a result. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

19 *Chaidez*, 133 S. Ct. at 1108.

20 *Id.*

21 *Id.*

22 *Id.* at 1108, n. 5 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1487-88 (2010) (Alito, J., concurring in judgment)).

23 *Id.* at 1108 (citing Hill v. Lockhart, 474 U.S. 52 (1985) (where defendant pled guilty to murder after attorney misinformed defendant about parole eligibility, Court avoided question of whether advice about parole could possibly violate Sixth Amendment and whether such advice was collateral because defendant had not alleged prejudice).

24 *Id*. at 1109.

25 *Id.* According to the Court, only two state courts had held that an attorney could violate the Sixth Amendment by failing to inform a client about deportation risks or other collateral consequences stemming from a guilty plea.

26 *Id.* at 1110.

27 *Id.*

28 *Id.* (citing Teague v. Lane, 489 U.S. 288, 301 (1989).

29 *Id.*

30 *Id.* at 1110-111.

31 *Id.* at 1111.

32 *Id.* at 1112.

33 *Id.* at 1112, n. 13.

34 *Id.* at 1114 (Thomas, J., concurring).

35 *Id.* (Sotomayor, J., dissenting).

36 *Id.* at 1115.

37 *Id.*

38 *Id.* at 1116.

39 *Id.* at 1117.

40 *Id.* at 1118.

41 *Id.*

42 *Id.* at 1119.

43 One commentator has noted that *Padilla* set forth a bright-line rule, one imposing an affirmative obligation on counsel, regardless of the specific circumstances of each individual case, which is an anomaly among *Strickland*-analyzed cases and in direct contravention of the Supreme Court's holding in *Roe v. Flores-Ortega*, 528 U.S 470, 478 (2000). *See* Derek Wikstrom, *No Logical Stopping-Point: The Consequences of* Padilla v. Kentucky*'s Inevitable Expansion*, 106 Nw. U. L. Rev. 351, 358-359(2012).

44 Colleen A. Connolly, *Sliding Down the Slippery Slope of the Sixth Amendment: Argument for Interpreting* Padilla v. Kentucky *Narrowly and Limiting the Burden it Places on the Criminal Justice System*, 77 Brook. L. Rev. 745, 779 (2012).

45 Commonwealth v. Sylvain, 2013 WL 4849098 (Mass. Sept. 13, 2013) ("as a matter of Massachusetts law and consistent with our authority as provided in *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (*Danforth*), that the Sixth Amendment right enunciated in *Padilla* was not a "new" rule and, consequently, defendants whose State law convictions were final after April 1, 1997, may attack their convictions collaterally on Padilla grounds.").