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The Impact of Padilla v. Kentucky on the Immigration Courts: Does the Potential for Vacating a Criminal Plea Effect Removal/ Deportation Proceedings?

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THE IMPACT OF *PADILLA V. KENTUCKY* ON THE IMMIGRATION COURTS: DOES THE POTENTIAL FOR VACATING A CRIMINAL PLEA EFFECT REMOVAL/DEPORTATION PROCEEDINGS?

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INTRODUCTION

When a non-U.S. citizen is a defendant in a criminal proceeding, the results can have legal consequences beyond the criminal sentence. Essentially, if a non-U.S. citizen (including those with Lawful Permanent Resident "LPR" status) pleads guilty to or is found guilty of certain criminal offenses, he or she is subject to removal/deportation from the United States. Since federal and state criminal courts are separate from the immigration courts, many times criminal lawyers may not have been aware of the immigration consequences of certain types of judgments of conviction ("JOC") and may not have advised such clients of the immigration consequences of guilty pleas or findings of guilt.

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Recently, in *Padilla v. Kentucky*,[1] the United States Supreme Court, as well as various other federal and state courts, has examined the impact of ineffective assistance of counsel ("IAC") on criminal defendants who are not United States citizens and who may be subject to removal/deportation as a result of criminal convictions. This same issue was reviewed nine months prior to *Padilla* when the New Jersey Supreme Court decided *State v. Nuñez-Valdéz*.[2] However, *Padilla* still left many questions unanswered. The Second Circuit's decision in *U.S. v. Cerna* analyzed whether IAC alone could excuse an alien's failure to exhaust his administrative remedies.[3] The State Supreme Court of Georgia tackled the unanswered question in *Padilla* of whether removal/deportation is a direct or collateral consequence of a criminal conviction. Finally, the Northern District of Illinois decision in *U.S. v. Chaidez* is the only reported case to date dealing with whether *Padilla* should be applied retroactively.[4]

How, and in what way, will *Padilla* and its progeny impact removal/deportation proceedings before the already burdened immigration courts? This article will attempt to answer that in four parts. The first part introduces the *Padilla* analysis and how other federal and state courts have further expanded different components of *Padilla*. The second part discusses the effect *Padilla's* holding may have on immigration proceedings. The third part discusses whether *Padilla* or its state counterpart, *State v. Nuñez-Valdéz*, may be applied retroactively. The article concludes with a reflection on the consequences that the immigration courts will likely face as a result of recent case law.

I. *PADILLA V. KENTUCKY* AND ITS PROGENY

[1] Padilla v. Kentucky, 130 S.Ct. 1473 (2010). *See generally* Michael Vomacka, Current Developments: Judicial Branch, *Supreme Court Decision in* Padilla v. Kentucky *States Affirmative Duty to Inform Client of Risk Guilty Plea May Result in Removal*, 25 GEO. IMMIGR. L.J. 233 (2010).

[2] State v. Nuñez-Valdéz, 975 A.2d 418 (N.J. 2009). *See also* United States v. Gilbert, 2010 WL 4134286 (D.N.J. 2010) (expressing an interesting dichotomy, in which a post-*Padilla* decision of the U.S. District Court in New Jersey reviewed a plea agreement in a New York state criminal matter and declined to apply *Padilla* retroactively, relying instead on the reasonableness of counsel at the time the plea was entered into).

[3] United States v. Cerna, 603 F.3d 32, 42–43 (2d Cir. 2010) (holding that ineffective assistance of counsel can be grounds to excuse an alien's failure to exhaust his administrative remedies against a deportation order).

[4] United States v. Chaidez, 730 F. Supp. 2d 896 (N.D. Ill. 2010) (reasoning that since *Padilla* did not establish a new rule, no retroactivity problems exist).

A. The Supreme Court of the United States: Padilla v. Kentucky *and the Direct and Collateral Consequences of Criminal Adjudication*

The *Padilla* court examined whether the Sixth Amendment's protection against ineffective assistance of counsel applied to a criminal defense attorney's misadvice regarding the immigration consequences of an alien's guilty plea to an aggravated felony. After finding that misadvice could theoretically affect the alien-defendant's immigration status, the Supreme Court remanded the matter back to the trial court for fact-finding on the practical aspects, applying the first part of the *Strickland* two-part test.

Under *Strickland*, the petitioner must show both that his counsel's conduct "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[5]

Jose Padilla ("Padilla"), a legal permanent resident and a native from Honduras, came to the U.S. in the 1960s and served as a member of the U.S. Armed Forces. In August 2002, pursuant to a plea agreement, Padilla pled guilty to possession of marijuana, possession of drug paraphernalia, and marijuana trafficking.[6] These crimes are all removal/deportable offenses under 8 USC § 1227(a)(2)(B)(i), thus making his deportation virtually inevitable.[7]

Padilla maintained that prior counsel affirmatively mislead him by advising that Padilla's immigration status was not in danger due to his long duration as a legal permanent resident of the U.S. In August 2004, Padilla

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[5] Strickland v. Washington, 466 U.S. 668, 694 (1984); *see also* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel"); *see also* Aparico v. Artuz, 269 F.3d 78, 95 (2d Cir. 2001) (declaring that there is a strong presumption that counsel provided reasonable professional assistance under the first prong of the *Strickland* test).

[6] *See* Padilla v. Commonwealth, No. 2004-CA-001981-MR, 2006 Ky. App. LEXIS 98, at *2 (Ky. Ct. App. Mar. 31, 2006), *rev'd,* 253 S.W.3d 482 (Ky. 2008).

[7] *See* Immigration and Nationality, 8 U.S.C. § 1227 (2011) (declaring that

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable).

filed for post conviction relief ("PCR") in the criminal court alleging he received ineffective assistance of prior counsel when he pled guilty. The Hardin Circuit Court denied Padilla's motion, finding the guilty plea valid. The Court ultimately found that defendants need not be informed of all possible consequences resulting from a guilty plea. The Court of Appeals reversed the lower court's decision and remanded the case holding that "an affirmative act of 'gross misadvice' relating to collateral matters can justify post-conviction relief."[8]

The Supreme Court of Kentucky subsequently reversed the Court of Appeals and reinstated the ruling by the Hardin Circuit Court. The Kentucky Supreme Court maintained that prior counsel's failure to advise Padilla of the collateral consequences was not a basis for PCR. The U.S. Supreme Court disagreed with the Kentucky Supreme Court, and held that the Sixth Amendment's guarantee of effective assistance of counsel required criminal defense counsel to advise alien that pleading guilty to an aggravated felony will trigger automatic deportation. The *Padilla* court further held that if misadvice about deportation results in a misinformed guilty plea, then the misadvice could amount to ineffective assistance of counsel and warrants the vacation of an alien's guilty plea.

Although the U.S. Supreme Court departed from the strict rule applied by the Kentucky Supreme Court, *Padilla* did not express that deportation was a **direct** consequence of a conviction due to ineffective counsel. Rather, the Court commented:

> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral vs. direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.[9]

However, the Court also recognized that deportation is a "particularly severe 'penalty'…intimately related to the criminal process."[10] Thus, the

[8] Commonwealth v. Padilla, 253 S.W.3d 482, 483–84 (Ky. 2008).

[9] Padilla v. Kentucky, 130 S.Ct. 1473, 1482 (2010).

[10] *Id.* at 1481.

Court determined that removal has practically become an **automatic** result for a broad class of noncitizen offenders.[11]

Critically, *Padilla* held the two-pronged test in *Strickland* was appropriate to determine ineffective assistance of counsel.[12] As Padilla satisfied the first-prong, the Court remanded the matter back to Kentucky for a factual hearing to determine whether Padilla also satisfied the fact-dependent second prong.[13]

B. The United States Court of Appeals: U.S. v. Cerna *and the Post*-Padilla *Application*

In *Cerna*, the Second Circuit rendered the first published post-*Padilla* decision on whether ineffective assistance of immigration counsel could excuse an alien's failure to exhaust administrative remedies. The Court vacated the trial court's order and held:

> [t]hat ineffective assistance of counsel may be grounds for excusing the requirement of [8 U.S.C.] § 1326(d)(1) that an alien in an illegal reentry case in bringing a collateral challenge to the prior order of deportation must have exhausted all administrative remedies in the prior proceeding.[14]

The *Cerna* court did not examine a scenario similar to *Nuñez-Valdéz* and *Padilla*. The facts did not pertain to a well-informed guilty plea, but instead focused on the conduct of the alien-attorney's negligent failure to file a waiver application. The Immigration Judge ("IJ") found the alien eligible for a waiver of admissibility under the former Immigration and

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[11] *See id.* at 1481 (discussing the integration of criminal convictions and the penalty of deportation for "nearly a century" and asserting that recent changes in immigration law have made removal a nearly "automatic result").

[12] *See id.* at 1477; *see also* Berghuis v. Thompkins, 130 S.Ct. 2250, 2264 (2010) (applying the *Strickland* test to assess the defendant's claim for ineffective assistance of counsel).

[13] *See* Padilla v. Kentucky, 130 S.Ct. 1473, 1487 (2010). Additionally, subsequent to the Padilla ruling, the U.S. Supreme Court has remanded at least two cases "for further consideration" in light of Padilla. *See* Chapa v. United States, 2010 U.S. LEXIS 5340, 130 S.Ct. 3504 (June 28, 2010) (direct appeal from a conviction resulting from a guilty plea); *see also* Santos-Sanchez v. United States, 2010 U.S. LEXIS 3004, 130 S.Ct. 2340 (Apr. 5, 2010) (appeal from a *writ of coram nobis*, an application to withdraw a guilty plea, which may be filed under limited circumstances).

[14] United States v. Cerna, 603 F.3d 32, 43 (2d Cir. 2010).

Nationality Act ("INA") § 212(c). The *Padilla* precedent was reflected in the Second Circuit's rationale:

> For non-citizens at risk of deportation the consequences of inadequate counsel can be devastating, because such incompetence undermines the fair and effective administration of justice, courts must be ever vigilant. We cannot countenance the circumstance in which the failure of counsel to meet the most basic professional standards denies the alien meaningful opportunity for judicial review. *Cf. Padilla v. Kentucky* [citation omitted] ("The importance of accurate legal advice for noncitizens accused of crimes has never been more important.")[15]

In May 1996, the IJ found Jose Ricardo Cerna ("Cerna") deportable as charged, but also found Cerna was eligible for waiver relief under the former INA § 212(c). The IJ granted counsel's adjournment request and was provided forty-five days to file the required documents. Counsel never filed the requisite documents, and sixteen days after the agreed-upon filing deadline, the IJ issued a deportation order. The order informed the parties of their appeal rights and the filing period for the appeal. The order was served separately on Cerna and counsel. No appeal was filed, and Cerna was deported to El Salvador. On December 13, 2000, Cerna returned to the U.S. without consent or permission from immigration officials. On that date, Cerna was arrested, and later pled guilty to the possession of a controlled substance. In July 2004, Cerna was also indicted for unlawfully re-entering the U.S., and he was arrested on that indictment in June 2007. The district court denied Cerna's motion to dismiss the indictment on various grounds, yet it made no findings as to whether counsel had been ineffective. Although Cerna alleged he was unlawfully deported, the district court stated that even assuming that counsel was "unacceptable," Cerna had "knowingly and intelligently waived" his right to any administrative remedies as evidenced by the inaction to contest his deportation during the year that elapsed between the issuance of the deportation order and his deportation.[16]

The central issue before the Second Circuit was whether ineffective assistance of counsel can excuse a failure to exhaust administrative

[15] *Id.* at 35–36.

[16] *Id.* at 38.

remedies under 8 U.S.C. § 1326(d)(1).[17] In prior decisions, the Second Circuit held that the second and third requirements under section 1326(d) may be met when the alien received ineffective assistance of counsel.[18] The Second Circuit also held that the administrative exhaustion requirement was excusable when the waiver of the right to administrative remedies was invalid.[19]

C. State Supreme Courts: Smith v. State *and a Post-*Padilla *Determination of Direct versus Collateral Consequences in Georgia*

About three months after *Padilla,* the Supreme Court of Georgia decided in *Smith v. State* that the defendant was not entitled to direct appeal of his convictions despite his assertion that the trial court failed to advise him that his guilty pleas may impact his immigration status.[20]

On April 25, 2003, Lawrence Rupert Smith ("Smith") pled guilty but mentally ill to several child molestation offenses. More than five years later, on October 15, 2008, he filed a motion for out-of-time appeal asserting that the trial court violated state rules when it failed to advise him about the potential consequences his guilty pleas would have on his immigration status. The trial court denied the motion, and the Court of

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[17] *Id.* at 42. Under 8 U.S.C. § 1326(d), a criminal alien may not challenge the validity of a deportation order made against him unless the alien can show that (1) he exhausted all available administrative remedies, (2) the deportation proceedings improperly deprived the alien of the opportunity for judicial review, and (3) the entry of the deportation order was fundamentally unfair. The opinion focuses primarily on the first prong as the court held that the determinations on the second and third prongs were based on the erroneous conclusion of the first prong. *See* Immigration and Nationality, 8 U.S.C. § 1326(d) (2011).

[18] *See* United States v. Cerna, 603 F.3d 32, 42 (2d Cir. 2010) (holding that ineffective assistance of counsel can be grounds for excusing the administrative exhaustion requirement of 8 U.S.C. § 1326(d)(1)); *see also* United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) (holding that defendant satisfied the exhaustion requirement of 8 U.S.C. § 1326(d) even though he did not file a § 212(c) waiver because of the ineffective assistance of his lawyer); *see also* Spaulding v. Mayorkas, 725 F. Supp. 2d 303, 309 (D. Conn. 2010) (recognizing that the Second Circuit, under certain circumstances, has been willing to overlook exhaustion requirements in situations involving ineffective assistance of counsel).

[19] United States v. Cerna, 603 F.3d 32, 42 (2d Cir. 2010) (citing United States v. Sosa, 387 F.3d 131, 136 (2d Cir. 2004)) (stating that it would be contradictory to admit that attorney incompetence can deprive an alien of judicial review, but disallow the incompetence to excuse the alien's failure to seek review); *see* United States v. Calderon, 391 F.3d 370, 371–72 (2d Cir. 2003) (holding that a defendant can be excused from the administrative exhaustion requirement when his waiver of administrative remedies was unknowing).

[20] Smith v. State, 697 S.E.2d 177, 180–81 (Ga. 2010).

Appeals affirmed, holding that "the effect of a guilty plea on a resident alien's immigration status is a 'collateral consequence' of the plea, and a guilty plea will not be set aside because [Smith] was not advised of such a possible collateral consequence."[21]

On appeal, the Georgia Supreme Court analyzed the effect of the *Padilla* holding, which was decided after the Court of Appeals rendered their decision. The Georgia Supreme Court did not challenge that deportation is "intimately related to the criminal process" and that the consequences of deportation based on a guilty plea would be of tremendous concern to a defendant.[22] However, the Georgia Supreme Court made the point that such consequences were beyond the sentencing court, as were other consequences that are of concern to defendants, such as parole eligibility and related criminal or civil proceedings. The Georgia Supreme Court hesitated to apply the direct consequence doctrine to immigration issues out of concern of the unrealistic burden that would be placed on sentencing courts to determine all potential consequences of a guilty plea to a particular defendant.[23]

The Georgia Supreme Court noted that the U.S. Supreme Court specifically declined to rely on the direct versus collateral consequences doctrine and alternatively applied *Strickland's* two-pronged test to determine whether a defendant had a claim for ineffective assistance.[24] The Georgia Supreme Court found that, absent a binding directive from the U.S. Supreme Court, the Georgia Supreme Court would also decline to apply the direct consequences doctrine to the issue of whether an alien received ineffective assistance and concluded that the Court of Appeals did not err in finding that negative immigration findings are collateral consequences of a guilty plea.[25]

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[21] Smith v. State, 680 S.E.2d 516, 517 (Ga. Ct. App. 2009).

[22] Smith v. State, 697 S.E.2d 177, 184 (Ga. 2010) (stating that even though a guilty plea could result in deportation, that fact is beyond the authority of the court to consider).

[23] *Id.* (explaining that it is unclear where the line would be drawn if the direct consequence doctrine was extended).

[24] *Id.* at 182–83 (stating that the proper analysis is whether the attorney acted reasonably and in accordance with professional norms).

[25] *Id.* at 184 (explaining that the Court did not extend the direct consequences doctrine despite its discussion of the risks of deportation).

D. State v. Nuñez-Valdéz *and New Jersey's Interpretation of the Sixth Amendment*

Prior to the U.S. Supreme Court's ruling in *Padilla*, the New Jersey Supreme Court decided *State v. Nunez-Valdez* in July 2009. The New Jersey Supreme Court held that an alien's guilty plea was invalid because he was not informed that his guilty plea would result in deportation.[26] In June 1997, Jose Nuñez-Valdéz ("Nuñez-Valdéz") pled guilty to fourth-degree criminal sexual contact in exchange for a probationary sentence of five years. As a result of conviction, Nuñez-Valdéz was ordered removed by the Immigration Court in September 2000.[27]

In August 2002, the BIA affirmed the removal order and Nuñez-Valdéz was removed from the U.S. In October 2002, Nuñez-Valdéz filed a PCR petition asserting that defense counsel misinformed him about the immigration consequences of his guilty plea. Defense counsel told him there were no immigration consequences. At the PCR hearings in June 2002, Nuñez-Valdéz testified that when he was charged with sexual assault in 1998, he retained counsel Aaron Smith ("Counsel Smith"). When Counsel Smith, through an interpreter, told Nuñez-Valdéz to plead guilty in exchange for a five-year probationary sentence, Nuñez-Valdéz inquired about the immigration consequences. Counsel Smith responded that "nothing like that" would result.[28] At the plea hearing, new counsel, Troy A. Archie ("Counsel Archie") informed Nuñez-Valdéz that if he did not plead guilty then he would go to jail for ten years. Nuñez-Valdéz, again, through an interpreter, raised the issue of his immigration status with Counsel Archie. Counsel Archie informed Nuñez-Valdéz that his immigration status had "no part in this case."[29]

Nuñez-Valdéz further testified that neither counsel nor the interpreter reviewed the plea form with him. He was unaware that Question 17 on the plea form stated that a non-citizen defendant may be deported based on a

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[26] State v. Nuñez-Valdéz, 975 A.2d 418, 419 (N.J. 2009) (holding that there was sufficient evidence to suggest that if defendant had received complete information, he would not have entered a guilty plea).

[27] *Id.* at 419 (stating that defendant was deported to the Dominican Republic as a result of his guilty plea and subsequent conviction).

[28] *Id.* at 420, 430.

[29] *Id.* at 420.

guilty plea or criminal conviction of an aggravated felony.[30] In New Jersey, Nuñez-Valdéz's statement about the plea form is significant. Perhaps as early as 2002, the standard criminal plea form used in New Jersey superior courts contained a question on the immigration consequences of guilty pleas. Generally, the New Jersey court rules require that the **first** PCR petition must be brought within five years of the conviction.[31] However, the PCR petition may be brought beyond the five-year period if the defendant showed excusable neglect and there is reasonable probability that if the defendant's factual assertions were found to be true, then enforcing the time bar would result in fundamental injustice.[32] The court rules also provide a one-year filing deadline for a second or subsequent PCR petitions under certain circumstances.[33]

At the PCR hearings Nuñez-Valdéz maintained his innocence, asserting that he would not have pled guilty to sexual assault were he aware of the immigration consequences. His sworn statements were false because counsel pressured him. Counsel Archie testified that he did not inform Nuñez-Valdéz of deportation if Nuñez-Valdéz pled guilty. The trial court found Nuñez-Valdéz's testimony to be credible and Nuñez-Valdéz had reasonable belief that his guilty plea would not result in deportation based on counsel's legal advice. The trial court noted Nuñez-Valdéz's primary concern was on deportation and considered his lack of education and sophistication when determining his credibility.[34]

The New Jersey Appellate Division reversed the trial court's findings on "the lack of factual foundation."[35] The New Jersey Supreme Court reaffirmed the trial court's findings that Nuñez-Valdéz received ineffective assistance of counsel when defense counsel informed him that his guilty plea would not affect his immigration status. The New Jersey Supreme Court held that but for counsel's ineffective assistance, Nuñez-Valdéz would not have pled guilty, and defense counsel's ineffective assistance and

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[30] *Id.* at 420 (noting that Defendant claimed to be unaware of question seventeen on the plea form and the risk of deportation associated with pleading guilty).

[31] *See* N.J. CT. R. 3:22-12(a)(1), -12(c) (2011).

[32] *Id*.

[33] *Id.* at 3:22-12(a)(2).

[34] *See* State v. Nuñez-Valdéz, 975 A.2d 418, 421–22 (N.J. 2009).

[35] *Id*. at 422 (quoting State v. Nuñez-Valdéz, 2008 WL 2743963, at *7 (N.J. Super. Ct. App. Div. July 16, 2008)).

misleading material information resulted in Nuñez-Valdéz's misinformed guilty plea. The case was remanded to the trial court.[36]

Similarly to *Padilla*, *Nuñez-Valdéz* did not express that the immigration consequences were a **direct** result of ineffective counsel. Generally, the "established formulation" with regard to the penal (or direct) versus collateral consequences was that the defendant needed only to be informed of the penal consequences of a plea.[37] However, *Nuñez-Valdéz* discarded this notion by opining, "whether a defendant should be advised of 'certain consequences of a guilty plea should not depend on ill-defined and irrelevant characterizations of those consequences.'"[38]

II. STATUTORY AND REGULATORY FRAMEWORK

There is an attenuated relationship between a criminal conviction and the immigration consequences. The conditions and factors affecting the relationship include: (1) the criminal court must grant the PCR petition pursuant to court rules and procedures (considering whether *Padilla* has retroactive applications on convictions, and in New Jersey, whether *Nuñez-Valdéz* can be applied retroactively); (2) the evidence must demonstrate ineffective assistance of counsel under the *Strickland v. Washington*[39] two-prong test, and relevant case law; (3) the alien's guilty plea must be rescinded/set aside; (4) the indictment/charging document must be dropped; (5) the alien's conviction must be vacated based on the merits of the charge or on a defect in the underlying criminal proceedings; and (6) the Immigration Courts must find that the alien was not convicted for immigration purposes or that the conviction was not modified solely for immigration purposes.

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[36] *Id*. at 427.

[37] *See* State v. Heitzman, 527 A.2d 439, 440 (N.J. 1987) (holding that the court does not have a duty to inform defendant of possible collateral consequences of his plea, such as the loss of public employment or impact on immigration status).

[38] State v. Nuñez-Valdéz, 975 A.2d 418, 423 (N.J. 2009) (quoting State v. Bellamy, 835 A.2d 1231, 1237 (N.J. 2003)).

[39] Strickland v. Washington, 466 U.S. 668 (1984).

A. Pending Motions/Petitions for PCR Based on a Collateral Consequence of Ineffective Assistance of Counsel Does Not Effect Removal/Deportation Hearings

Section 237(a)(2)(A)(iii) of the INA states that a conviction does not become final for immigration purposes until direct appellate review has been exhausted or waived. The Third Circuit, in deciding whether an IJ's order of removal was proper while an alien's petitions for *writ of error coram nobis* were pending, specifically held:

> [that] pendency of post-conviction motions or other forms of collateral attack . . . . does not vitiate finality [of convictions for immigration removal purposes], unless and until the convictions are overturned as a result of the collateral motions.[40]

The *Paredes* court noted the alien's time for direct appeal had expired and that a *writ of error coram nobis* was not a direct appeal of, but rather is a collateral attack on, a conviction.[41]

B. Requests for Adjournments and Motions for Continuance

Under 8 C.F.R. § 1003.29, the IJ may grant a motion for a continuance for good cause shown.[42] In determining whether good cause exists to continue such proceedings, a variety of factors include an opposing response for the request; the alien's statutory eligibility for relief; if the relief is based on discretionary grounds; and other relevant procedural factors.[43] The IJ may grant a "reasonable adjournment" either at his or her

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[40] Paredes v. Att'y Gen., 528 F.3d 196, 198 (3d Cir. 2009); *see also* United States v. Garcia-Echaverria, 374 F.3d 440, 445–46 (6th Cir. 2004) (relying on the same premise).

[41] Paredes v. Att'y Gen., 528 F.3d 196, 198 (3d Cir. 2009) (affirming that a *writ of error coram nobis* constitutes a collateral attack on a conviction and can be differentiated from a direct appeal.)

[42] 8 C.F.R. § 1003.29 (2011); *see also* Matter of Hashmi, 24 I&N Dec. 785, 788 (BIA 2009), *rev'd*, 531 F.3d 256 (3d Cir. 2009); *see also* Matter of Rajah, 25 I&N Dec. 127, 129–30 (BIA 2009), *aff'd*, Rajah v. Holder, No. 09-5146-AG, 2011 U.S. App. LEXIS 159 (2d Cir. Jan. 4, 2011); *see also* Matter of Perez-Andrade, 19 I&N Dec. 433, 434 (BIA 1987).

[43] *See* Matter of Hashmi, 24 I&N Dec. 785, 790–91 (BIA 2009), *rev'd*, 531 F.3d 256 (3d Cir. 2009); *see also* Subhan v. Ashcroft, 383 F.3d 591, 595 (7th Cir. 2004) (concluding that a "continuance for good cause" requires a reason consistent with the given statute).

own instance or for "good cause shown" by the alien.[44] Yet, such requests should not be denied solely for an agency's case completion goals.[45]

As it is within the IJ's sound discretion, "[t]he alien at least must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable to the alien."[46] The IJ must execute his or her duty to determine whether the requisite evidence sustains a charge of removability/deportation in an expeditious manner.[47]

Furthermore, an IJ's denial of a motion for a continuance will not be overturned on appeal unless the alien demonstrates that the denial deprived him of his due process right to a full and fair hearing.[48] Specifically, the alien must show that the denial resulted in actual prejudice that materially affected the outcome of the case.[49] Generally, an IJ is not required to suspend removal proceedings based upon the mere possibility that a collateral criminal proceeding could have a future impact on the alien's immigration status. An alien's conviction and his collateral attack upon that conviction does not negate its validity until it is in fact overturned or materially amended.[50]

C. Conviction for Immigration Purposes

Generally, the Board of Immigration Appeals ("BIA") gives full faith and credit to state court actions that purport to vacate a non-citizen's

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[44] 8 C.F.R. § 1240.6 (2011).

[45] *See* Hashmi v. Att'y Gen., 531 F.3d 256, 261 (3d Cir. 2009).

[46] *See* Matter of Sibrun, 18 I&N Dec. 354, 356 (BIA 1983).

[47] *See* Matter of Quintero, 18 I&N Dec. 348, 350 (BIA 1982); *see also* Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT'L L.J. 515, 526–27 (2002) (discussing an understanding that immigration judges are to use their discretion in a way that promotes fair and expeditious trials).

[48] *See* Matter of Luviano-Rodriguez, 21 I&N Dec. 235, 237 (BIA 1996) (citing Matter of Perez-Andrade, 19 I&N Dec. 433 (BIA 1987)).

[49] *See* Matter of Sibrun, 18 I&N Dec. 354, 356–57 (BIA 1983).

[50] *See* Matter of Madrigal-Calvo, 21 I&N Dec. 323, 327 (BIA 1996).

criminal conviction.[51] On the other hand, "[i]f a court vacates an alien's criminal conviction solely on the basis of immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes and will continue to serve as a valid factual predicate for a charge of removability despite its vacatur."[52]

Although *Padilla* held that counsel's failure to advise an alien of the immigration consequences when pleading guilty constituted ineffective counsel, it is not within the Immigration Court's authority to determine whether alien's counsel provided ineffective assistance in a criminal proceeding.[53] In a pre-*Nuñez-Valdéz* and pre-*Padilla* framework, the Court of Appeals for the Third Circuit did not disturb the BIA's statutory interpretation.[54]

D. Practical Implications?

Adjournment requests and motions for continuance asserted under *Padilla* or *Nuñez-Valdéz* should be carefully considered. Unless proven otherwise, PCR petitions are generally speculative and premised on

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[51] *See* Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378, 1380 (BIA 2000); *see also* Matter of Chavez-Martinez, 24 I&N Dec. 272, 273 (BIA 2007) (asserting that as a general rule, the BIA gives "full faith and credit to State court actions that purport to vacate an alien's criminal conviction").

[52] Matter of Chavez-Martinez, 24 I&N Dec. 272, 273 (BIA 2007); *see* Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003) (interpreting "conviction" under INA § 101(a)(48)(A)); *see also* 8 U.S.C. § 1101(a)(48)(A) (2011) (stating that

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed).

[53] *See* Matter of Roberts, 20 I&N Dec. 294 (BIA 1991) (finding that it is well-settled that neither the BIA nor the IJ is permitted to look behind the conviction record and re-litigate the ultimate question on the alien's guilt or innocence).

[54] *See* Pinho v. Gonzales, 432 F.3d 193, 206–08 (3d Cir. 2005) (citing Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003)); *see also* Cruz v. Att'y Gen., 452 F.3d 240, 245 (3d Cir. 2006) (upholding the BIA's distinction in *Matter of Pickering* and finding the distinction to be a reasonable interpretation of the statute). *See generally* Matter of Roldan-Santoyo, 22 I&N Dec. 512 (BIA 1999).

attenuated conditions. As discussed above, convictions based on guilty pleas are final for immigration purposes.[55] For immigration purposes, it does not matter if the alien criminal defendant pled guilty at, or is found guilty after, a trial in order for immigration consequences to be triggered.

The probability that a PCR petition will overturn a conviction for immigration purposes is speculative. As expressed earlier, the probability is contingent on non-exhaustive conditions and factors: (1) the criminal court must grant the PCR petition pursuant to the court rules and procedures (considering retroactivity in *Padilla*, and in New Jersey, the retroactivity in *Nuñez-Valdéz*); (2) evidence must demonstrate ineffective assistance of counsel under *Strickland*'s two-prong test and relevant case law; (3) the alien's guilty plea must be set aside; (4) the indictment/charging document must be dropped; (5) the alien's conviction must be vacated; and (6) the Immigration Court's must find that the alien was not convicted for immigration purposes, nor the conviction modified for immigration purposes.

Assuming these non-exhaustive conditions and factors are met, the alien can file a motion to reopen with the Immigration Court. If the Immigration Court grants the motion to reopen, then the alien will be provided the opportunity to present his or her forms of relief.

III. RETROACTIVITY

A. Generally

The Supreme Court of the United States has previously held that convicted criminal defendants are generally unable to take advantage of any new rules that are decided after a conviction becomes final.[56] The Supreme

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[55] On the specific issue of a continuance based on a pending PCR motion, *see* Cabral v. Holder, 632 F.3d 886, 890 (5th Cir. 2011) (The Circuit Court held that the BIA did not abuse its discretion in declining to hold immigration proceedings in abeyance while alien pursued a post-conviction relief motion to vacate New York state criminal convictions). This matter was not premised on a claim of ineffective counsel and does not analyze *Padilla.* *See also* Paredes v. Att'y Gen., 528 F.3d 196 (3d Cir. 2009); *see also* Matter of Ozkok, 19 I&N Dec. 546, 551 (BIA 1988) (stating that one of the elements necessary for an immigration conviction is that "a judge or jury has found the alien guilty or he has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilty").

[56] Teague v. Lane, 489 U.S. 288, 310 (1989); *see* 28 U.S.C. § 2254(e)(2)(A)(i) (2011) (noting that the court shall not hold an evidentiary hearing a failed claim unless the claim

Court declares a new rule "when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . . To put it differently, ... if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[57]

However, not all Supreme Court decisions create new rules of law. Rather, the Court may merely be applying an existing rule to a new set of facts. If that is the case, then a new rule is not created and a criminal defendant is free to use the decision when seeking post-conviction relief in the form of a collateral attack.

B. Retroactive Application of Padilla

It is significant to point out that the discussed cases do not explicitly mandate retroactive application and do not expressly categorize removal/deportation consequences as a direct consequence of ineffective assistance of counsel.[58] Although the U.S. Supreme Court did not express retroactive application to collateral attacks on guilty pleas entered prior to *Padilla*, the Court's inference appears to be against retroactivity, except in exceptional circumstances:

> It seems unlikely that our decision today will have a significant effect on those convictions already obtained as a result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on deportation consequences of a client's guilty plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.[59]

The *Padilla* court anticipated that its decision would prompt new or subsequent filings of PCR petitions asserting ineffective assistance of counsel. Nevertheless, retroactivity is not automatic; rather, it is the

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relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court).

[57] Teague v. Lane, 489 U.S. 288, 301 (1989) (emphasis in original) (internal citations omitted); *see* 28 U.S.C. § 2254(e)(2)(A)(i) (2011) (noting that the applicant may receive an evidentiary hearing if the rule was previously unavailable and applies retroactively to cases on collateral review).

[58] *But see* United States v. Chaidez, 730 F. Supp. 2d 896, (N.D. Ill. 2010).

[59] Padilla v. Kentucky, 130 S.Ct. 1473, 1485 (2010).

exception and not the rule. Generally, the Supreme Court assumes non-retroactivity of its holdings when raised on collateral review.[60] However, *Padilla* may fall within an exception to non-retroactivity since it "requires the observance of 'those procedures that . . . . are 'implicit in the concept of ordered liberty.'"[61]

The U.S. District Court of the Eastern District of California recently addressed the issue of *Padilla's* retroactive application in *United States v. Hubenig*.[62] The *Hubenig* court began its analysis by reviewing the holding in *Teague v. Lane*:

> *Teague*'s general principle is that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[63]

The *Hubenig* court determined that the Supreme Court did not declare a new rule for the purposes of *Teague*. Further, the Hubenig court stated that the *Padilla* holding would apply retroactively based on the U.S. Supreme Court's "floodgates" analysis.[64] Specifically, the court stated:

> The [U.S. Supreme] Court stated that it had "given serious consideration" to the argument that its ruling would open the "floodgates" to new litigation challenging prior guilty pleas. The Court minimized the "floodgates" concern by stating that a petitioner would have to show not only that his counsel's

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[60] *See generally* Yates v. Aiken, 484 U.S. 211, 216 (1988). *See also* Tyler v. Cain, 533 U.S. 656, 665 (2001) (stating that retroactivity is not applicable unless it falls within two narrow exceptions).

[61] Teague v. Lane, 489 U.S. 288, 307 (1989) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also* MASS. COMM. FOR PUB. COUNS. SERVS., PRACTICE ADVISORY ON PADILLA V. KENTUCKY 4–5 (2010), http://www.publiccounsel.net/Practice_Areas/immigration/pdf/Padilla%20v.%20Kentucky%20-%20CPCS%20advisory%204-8-10.pdf.

[62] *See* United States v. Hubenig, No. 6:03-MJ-040, 2010 WL 2650625, at *5 (E.D. Cal. July 1, 2010).

[63] *Id.* (quoting Teague v. Lane, 489 U.S. 288, 310 (1989)); *see also* People v. Valestil, No. 2007KN010757, 2010 WL 2367351, at *3–4 (N.Y. Crim. Ct. June 14, 2010) (rationalizing that Padilla could be utilized since the decision did not set a new constitutional rule).

[64] *See* United States v. Hubenig, No. 6:03-MJ-040, 2010 WL 2650625, at *7 (E.D. Cal. July 1, 2010).

> performance fell below professional standards, but also that he was prejudiced by the deficient performance.[65]

The court opined that the U.S. Supreme Court would not have discussed the "floodgates" issue had they intended *Padilla* to be applied only prospectively.[66] As a result, the *Hubenig* court ultimately granted the petitioner's *writ of error coram nobis* and vacated his convictions, which were finalized nearly seven years before *Padilla* was decided.

In *U.S. v. Chaidez,* the U.S. District Court for the Northern District of Illinois reviewed a petition for *writ of error coram nobis* and addressed the issue of whether *Padilla* should be applied retroactively.[67] The *Chaidez* court explained that "*Padilla* could be described as establishing a *per se* rule that counsel must inform a client of immigration consequences before an informed guilty plea may be entered.[68] Alternatively, the case can be read as a straightforward application of *Strickland*: the petitioner's attorney 'fell below an objective standard of reasonableness,' because, as a factual matter, the professional standards at the time of the client's plea required counsel to inform of potential immigration consequences."[69]

Ultimately, the Northern District of Illinois Court held that *Padilla* may be applied retroactively. That conclusion is based generally on the court's finding that the rule that came out of the *Padilla* decision, *i.e.*, that a *Strickland* IAC claim lies in situations where counsel fails to inform a client of the immigration consequences of a criminal conviction, is not considered

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[65] *Id.* (internal citations omitted) (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1484–85 (2010)).

[66] *Id*.

[67] *See* United States v. Chaidez, 730 F. Supp. 2d 896, 896, 904 (N.D. Ill. 2010) (holding that *Padilla* could be applied retroactively and thus does not pose a problem to petitioner's claim). *But see* United States v. Bacchus, No. 93-083S, 2010 WL 5571730, at *1 (D.R.I. Dec. 8, 2010) (deciding that *Padilla* cannot be applied retroactively to a final conviction which was not before under collateral attack); *see* United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010) (stating that *Padilla* produced a new rule that does not apply retroactively); *see also* Haddad v. United States, No. 07-12540, 2010 WL 2884645, at *6 (E.D. Mich. July 20, 2010) (finding that it would be unlikely that *Padilla* will be applied retroactively).

[68] United States v. Chaidez, 730 F. Supp. 2d 896, 901 (N.D. Ill. 2010) (explaining that *Padilla* can be interpreted to require criminal defense counsel to inform clients of possible immigration repercussions by pleading guilty).

[69] *Id.* at 901.

a "new rule" for postconviction retroactivity purposes because it addresses an obligation that existed at the time of the original plea.

The Court based this conclusion on two grounds: first, that the Supreme Court itself decided the *Padilla* matter on its merits rather than on retroactivity procedural grounds which it could very well have done; and second, that *Padilla* was really an extension of *Strickland* that highlighted the importance of counsel informing a client of immigration consequences from a criminal conviction, a practice that has long been advocated by the ABA and other bar associations.[70]

Due to the recentness of *Padilla*, the federal circuit courts of appeal have yet to issue a decision on this matter. To date, there is one reported federal district court decision on this issue. That decision, *U.S. v. Chaidez*, favors retroactivity.[71] For now, state courts differ on whether to apply *Padilla* retroactively, though a trend toward retroactive application is developing, at least in New Jersey and New York.[72]

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[70] *See id.* at 902–04.

[71] *See generally id.* 902–03 (concluding *Padilla* should be applied retroactively based on two reasons: 1) the criminal defendant brought a collateral challenge to his conviction and 2) "[a] post-conviction court applying *Strickland* is bound to consider whether counsel's assistance was effective with reference to professional standards *as they existed at the time of the conviction*" (emphasis in original) (internal citations omitted)). *But see* United States v. Perez, No. 8:02CR296, 2010 WL 4643033, at *2 (D. Neb. Nov. 9, 2010) (positing that it is unclear as to whether *Padilla* is retroactive); *see* United States v. Hernandez-Monreal, No. 1:10cv618, 2010 WL 2400006, at *1 (E.D. Va. June 14, 2010) (stating that "nothing in the *Padilla* decision addresses whether it is retroactively applicable to cases on collateral review"); *see* Gacko v. United States, No. 09-CV-4938, 2010 WL 2076020, at *3 (E.D.N.Y. May 20, 2010) (holding that *Padilla* has no retroactive effect).

[72] *Compare* People v. Nuñez, 2010 WL 5186602, at *2 (N.Y. App. Term Dec. 15, 2010) (favoring retroactive application of rule), People v. Garcia, 907 N.Y.S.2d 398, 404–05 (N.Y. Sup. Ct. 2010) (same), People v. Cristache, 907 N.Y.S.2d 833, 837 n.2 (N.Y. Crim. Ct. 2010) (same), *and* People v. Bennett, 903 N.Y.S.2d 696, 700 (N.Y. Crim. Ct. 2010) ("if the Supreme Court did not intend for *Padilla* to be retroactively applied, that would render meaningless the majority's lengthy discussion about concerns that *Padilla* would open the 'floodgates' of challenges to guilty pleas"), *with* People v. Kabre, 905 N.Y.S.2d 887, 890 (N.Y. Crim. Ct. 2010) (*Padilla* is not to be retroactively applied).

C. Retroactive Application of Nuñez-Valdéz[73]

In New Jersey, the question on whether there is retroactivity involves multiple levels of analyses. The threshold inquiry is if there is a "new rule of law."[74] If a ruling does not involve a "departure from existing law," then retroactivity analysis is not required.[75]

In a case where a decision involves an accepted legal principle, then a new rule exists when "the decision's application of [the] general principle is 'sufficiently novel and unanticipated.'"[76] In other words, there must be a "sudden and generally unanticipated repudiation of a long-standing practice."[77] On the other hand, a new rule of law is not subject to automatic retroactive application since it may be disruptive and upset long-accepted conventions and widely used practices. This may lead to confusion and disorder to the criminal justice system.[78]

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[73] To date, there are no reported cases addressing the retroactive application of *Nuñez-Valdéz*. There are three unreported cases. *See* State v. Delgado, No. A-3276-08T4, 2010 WL 4642989, at *5–6 (N.J. Super. Ct. App. Div. Nov. 18, 2010) (specifically allowing retroactive application, reversing the trial court's denial of the PCR motion and remanding the matter to trial court for a factual hearing on whether the criminal defendant was adequately advised of the immigration consequences of his guilty plea); *see also* State v. Duroseau, No. 07-05-0796, 2010 WL 4608249, at *4–5 (N.J. Super. Ct. App. Div. Nov. 16, 2010) (finding that defendant's appeal was pending when *Padilla* and *Nuñez-Valdéz* were decided, and therefore choosing not to address retroactivity but to remand the case to trial court to hear defendant's claims pursuant to *Padilla* and *Nuñez-Valdéz*); *see also* State v. Ambroise, No. 07-01-00007-SGJ, 2010 WL 841170, at *1 (N.J. Super. Ct. App. Div. Mar. 11, 2010) (applying "pipeline retroactivity" to an IAC claim since the Ambroise appeal of the PCR motion denial was pending at the time *Nuñez-Valdéz* opinion was issued).

[74] State v. Dock, 2011 WL 781035, at *7–8 (N.J. Mar. 8, 2011) (reasoning that the first step in analyzing whether a rule should be applied retroactivity is whether there is a "new rule of law"); *see also* State v. Burstein, 427 A.2d 525, 529–30 (N.J. 1981) (discussing the standard for retroactivity analysis and finding that the first step is deciding whether the court announced the new law).

[75] State v. Burstein, 427 A.2d 525, 529–30 (N.J. 1981); *see also* State v. Chirokovskcic, 860 A.2d 986, 989 (N.J. Super. Ct. App. Div. 2004) (emphasizing that retroactivity only becomes an issue if a new law is established).

[76] *See* State v. Cummings, 875 A.2d 906, 914 (N.J. 2005) (quoting State v. Knight, 678 A.2d 642, 651 (N.J. 1996)).

[77] State v. Purnell, 735 A.2d 513, 517–18 (N.J. 1999) (quoting State v. Afanador, 697 A.2d 529, 537 (N.J. 1997)).

[78] *See* State v. J.A., 942 A.2d 149, 155 (N.J. Super. Ct. App. Div. 2008) (quoting State v. Burstein, 427 A.2d 525, 532 (N.J. 1981)) (describing the disruption that may result from

As noted above, the first PCR motion should be brought within five years of the date of the conviction; however, N.J. Court Rules state that a **second or subsequent** PCR petition shall not be filed more than one year after the latest of:

> (A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or
>
> (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or
>
> (C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.[79]

Thus, complete retroactivity should be granted when constitutional implications are raised, especially when the new rule is meant to "'overcome an aspect of the criminal trial that *substantially impairs* its truth-finding function' and [sic] raises 'serious question [sic] about the accuracy of guilty verdicts in past trials.'"[80] Put differently, complete retroactivity is proper where the issue strikes "at the heart of the truth-seeking function."[81]

Critically, in the recent case of *State v. Gaitan*, the New Jersey Appellate Division held that *Nuñez-Valdéz* should be applied retroactively as the decision did not establish a new rule.[82] The State primarily argued that *Nuñez-Valdéz* applied only when counsel rendered incorrect advice, as opposed to when counsel remained silent regarding the immigration

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applying new laws retroactivity); *see also* State v. Chirokovskcic, 860 A.2d 986, 989 (N.J. Super. Ct. App. Div. 2004).

[79] N.J. Ct. R. 3:22-12(a)(2) (2011).

[80] State v. Feal, 944 A.2d 599, 608–09 (N.J. 2008) (emphasis in original) (quoting State v. Burstein, 427 A.2d 525, 531 (N.J. 1981)).

[81] *Id.* at 607–08.

[82] State v. Gaitan, 2011 WL 350505, at *2–3 (N.J. Super. Ct. App. Div. Feb. 7, 2011).

consequences of a guilty plea.[83] The State further argued that this "no advice" scenario constituted a new rule that should only be applied prospectively.[84] The court in *Gaitan* rejected the State's argument and reiterated the analysis in *Padilla*:

> [a] holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamen-tally [sic] at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis."[85]

Furthermore the *Gaitan* court addressed the State's argument that *Nuñez-Valdéz*'s rejection of the direct versus collateral methodology constituted a new rule. The court agreed that the rule would be considered "new" in state court proceedings, but that "the rejection of the direct/collateral methodology [was] not a new federal concept."[86] The court held that *Padilla* had also rejected the direct/collateral argument as the distinction was not necessary "to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[87]

CONCLUSION

It is still premature to predict the number of possible claims that may arise post-*Padilla* and post-*Nunez*. While *Padilla* recognized that deportation is an extreme penalty and that noncitizens have a constitutional

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[83] *Id.* at *3.

[84] *Id*.

[85] *Id.* (internal citations omitted) (quoting Padilla v. Kentucky, 130 S.Ct. 1473, 1484 (2010)).

[86] *Id.* at *4.

[87] *Id.* at *3.

right to legal advice about the immigration consequences of pleading guilty, there are still many unanswered questions that will complicate and delay future proceedings before an already burdened immigration court. Nevertheless, in light of the case law developing post-*Padilla* and post-*Nunez*, it is likely that an alien can successfully terminate removal/deportation proceedings if his vacatur in criminal court as a result of such PCR is due to a constitutional defect in his prior representation. As for those JOCs handed down prior to *Padilla/Nunez*, whether or not *Padilla* or *Nunez* can be applied retroactively is still up in the air, though it seems likely that courts will follow the *Chaidez* analysis and favor retroactivity.

Consequently, Immigration Courts will likely see an increase in the number of adjournment requests by aliens in removal/deportation proceedings, *pro se*, or with counsel, who have filed or will be filing petitions for post-conviction relief ("PCR") before the criminal courts that issued the original JOCs. The filing of a PCR petition in a criminal court does not stay removal/deportation. The Immigration Courts will treat a JOC as a final judgment unless and until it is vacated for a non-immigration purpose by the originating criminal court.

Since PCR petitions may be filed in criminal courts, it is anticipated that aliens placed into removal/deportation proceedings may seek to continue their cases, pending the resolution of their PCR petitions. As these aliens also include those detained by immigration officials, the Immigration Courts must address requests to continue the immigration proceedings pending any such PCR petitions or the pursuit of such relief.

Concerning the validity of a subject conviction, the fact (or speculation) that an alien may be pursuing PCR in the form of a collateral attack (for immigration purposes) on a conviction in state criminal court does not affect the conviction's finality for federal immigration purposes.[88] Absent proof of actual *vacatur* of the criminal conviction, there is no change in the

[88] Matter of Polanco, 20 I&N Dec. 894, 895–96 (BIA 1994) (explaining that a conviction subject to collateral attack is still considered final for immigration purposes); *see* Matter of Adetiba, 20 I&N Dec. 506, 508 (BIA 1992) (holding that it is well-established that when appellate review of a conviction has been exhausted, the conviction is final for immigration purposes).

finality of the conviction for immigration purposes. The conviction is final, unless and until it is overturned by the criminal court.[89]

[89] *See* Matter of Morel, 2010 WL 4822993 (BIA 2010) (denying respondents motion to reconsider a decision finding him removable based on a felony conviction since a conviction is final for deportation purposes); *see also* Matter of Ponce de Leon-Ruiz, 21 I&N Dec. 154, 156–57 (BIA 1996) (stating that it is well established that for deportation purposes, a conviction is final unless it is overturned).