# WHY *PADILLA* DOES NOT APPLY RETROACTIVELY IN NEW JERSEY: UNDERSTANDING THE "NEW RULE" FOR ADVISING NON-CITIZEN DEFENDANTS ABOUT THE DEPORTATION CONSEQUENCES OF PLEADING GUILTY — *STATE V. GAITAN*, 37 A.3D 1089 (N.J. 2012).

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## I. INTRODUCTION

In the companion cases of *State v. Gaitan* and *State v. Goulbourne*,[1] the New Jersey Supreme Court reversed the court of appeals judgments, denying the defendants the right to post conviction relief.[2] The court held 5–2 that the holding of the United States Supreme Court in *Padilla v. Kentucky*,[3] is not entitled to retroactive application on collateral review because it represents a new constitutional rule of law, for Sixth Amendment purposes, which imposes an affirmative obligation on defense attorneys to advise their clients of the deportation consequences of pleading guilty.[4] Although the New Jersey state standard of *State v. Nuñez-Valdéz* [5] applies, the court also held that the defendants were not entitled to relief because neither was given false or affirmatively misleading advice regarding the deportation consequences of their guilty pleas.[6] In arriving at these holdings, the court carefully reviewed the existing body of state and federal law.

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1. State v. Gaitan, 37 A.3d 1089 (N.J. 2012). These companion cases were consolidated by the New Jersey Supreme Court. *See infra* Part II.

2. *Id.* at 1114.

3. 130 S. Ct. 1473 (2010).

4. *Gaitan*, 37 A.3d at 1109.

5. 975 A.2d 418 (N.J. 2009).

6. *Gaitan*, 37 A.3d at 1110, 1112.

This Comment will provide a short account of the facts of *State v. Gaitan* and *State v. Goulbourne*, an overview of the changing landscape of immigration law, a history of New Jersey precedent, and a look at the federal approach. This comment will also argue that the reasoning of the majority of the New Jersey Supreme Court was sound, and the decision properly aligns with New Jersey's precedent and the protections afforded by article 1, paragraph 10 of the state's constitution. Finally, this comment contends that state supreme courts should interpret their own constitutions independent of federal precedents.

## II. STATEMENT OF THE CASE

The facts of *State v. Gaitan* and *State v. Goulbourne* provide an important context for understanding the court's legal analysis.[7] These companion cases were completely distinct and unrelated from each other until the time that the New Jersey Supreme Court decided this opinion. *Gaitan* originated as a Camden County case and *Goulbourne* originated as a Passaic County case. The cases are factually similar because the defendants, Frensel Gaitan and Rohan Goulbourne, were both lawful permanent residents,[8] both pled guilty to a drug offense in 2005,[9] and neither pursued a direct appeal. After sentencing, both defendants were charged with removal[10] from the

7. State v. Gaitan, 37 A.3d 1089, 1092-93 (N.J. 2012).

8. Under the definitions section of the Immigration and Nationality Act (INA), a lawful permanent resident is a person who has "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(20) (2006).

9. Defendant Gaitan pled guilty to third-degree distribution of a controlled dangerous substance ("CDS") within one thousand feet of a school on June 27, 2005, and was sentenced on October 7, 2005, to five years' probation. *Gaitan*, 37 A.3d at 1093. Defendant Goulbourne pled guilty to one count of possession of a CDS with intent to distribute within one thousand feet of a school, and was sentenced three years' imprisonment with a fifteen-month period of parole ineligibility. *Id.* at 1094.

10. The majority opinion of the New Jersey Supreme Court uses the word "removal" rather than "deportation," "exile," or "banishment" because "removal" is the current statutory term. *Id.* at 1092 n.1 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1480 n.6 (2010)). Since the earliest immigration decisions, the term a court chooses to describe the process by which the federal government sends a noncitizen out of the country is often associated with the court's ruling. The use of more negative phrases indicate that a court will grant relief to the noncitizen. *See, e.g.*, People v. Correa, 485 N.E.2d 307, 311 (Ill. 1985) (likening deportation to banishment and stating that it is a "drastic consequence"); Commonwealth v. Wellington 451 A.2d 223, 225 (Pa. Super. Ct. 1982) (stating deportation "has been likened to a life sentence of exile"). However, the use of more neutral phrases indicate that a court will deny relief to the noncitizen. *See, e.g.*, Tafoya v. Alaska, 500 P.2d 247, 251 (Alaska 1972) (holding "the possibility of deportation is a collateral consequence of conviction"); Villavende v. State, 504 So. 2d

United States because the crimes to which they pled, constituted "aggravated felonies," which rendered them removable under the Immigration and Nationality Act ("INA").[11]

Defendant Gaitan pled guilty on June 27, 2005 and was removed from the United States to his native country of Nicaragua. On May 28, 2008, he filed a Post-Conviction Relief ("PCR") petition alleging ineffective assistance of counsel.[12] The basis for Gaitan's petition was that his attorney completely failed to warn him that his plea carried with it potential immigration consequences.[13] Defendant Gaitan's petition was denied by the PCR court on March 20, 2009. The PCR court found that when Defendant Gaitan answered "yes" to Question 17 on the plea form, it implied that he was aware of his plea's possible impact on his immigration status, in spite of his attorney's silence.[14] Question 17 asked, "Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?"[15] The Appellate Division reversed, and held that, regardless of whether the *Padilla* standard of attorney deficiency constituted a new rule, Defendant Gaitan was entitled to an evidentiary hearing on his claim.[16]

By contrast, the record of Defendant Goulbourne's plea hearing reflected that both defense counsel and the trial judge informed Defendant Goulbourne that he "may very well" be deported as a result of pleading guilty.[17] The judge extensively questioned him on the deportation issue.[18] The judge specifically stated on the record that Defendant Goulbourne answered Question 17 on the plea form and that he signed the plea form after reviewing it with his attorney.[19] After sentencing, Goulbourne was paroled to Immigration

455, 456 (Fla. Dist. Ct. App. 1987) (pointing out that that deportation is merely a collateral consequence of a guilty plea). *See also* Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Misrepresentation, or Failure to Advise, of Immigration Consequences of Guilty Plea—State Cases*, 65 A.L.R.4th 719 (1988).

11. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii) (2006). Under these provisions of the INA, when a defendant is convicted of a crime that is classified as an "aggravated felony," he or she is automatically subject to removal and there is no right to appeal.

12. *Gaitan*, 37 A.3d at 1093. The post-conviction relief rules constitute "New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 609 A.2d 1280, 1284 (N.J. 1992). *See also* State v. Echols, 972 A.2d 1091, 1098 (N.J. 2009).

13. *Id.*

14. *Id.*

15. *Id.*

16. State v. Gaitan, 17 A.3d 227, 232-33 (App. Div. 2011), *rev'd*, 37 A.3d 1089 (N.J. 2012).

17. *Gaitan*, 37 A.3d at 1094.

18. *Id.*

19. *Id.*

and Customs Enforcement ("ICE") pending a final decision on his removal.[20] He filed a PCR petition in September 2009, alleging that his counsel was ineffective for failing to explain that he would be deported if he pled guilty and also for neglecting to advise him of his right to speak with an immigration attorney.[21]

Unlike Defendant Gaitan, Defendant Goulbourne was granted an evidentiary hearing, which took place on April 8, 2010.[22] At the hearing, the PCR court reviewed the testimony and found that Defendant Goulbourne was primarily focused on the amount of jail time he would have to serve during the plea hearing, and not removal. Nonetheless, the PCR court determined that it would give Goulbourne "the benefit of the doubt" that he would not have pled guilty had he been better advised of the certainty of deportation, and specifically, his right to consult an immigration attorney.[23] Therefore, the PCR court granted Goulbourne's petition and allowed him to withdraw his plea.[24] The Appellate Division affirmed the judgment.[25]

In the five years since the defendants pled guilty, changes in state and federal case law caused the New Jersey Supreme Court to consider first, whether the 2010 United States Supreme Court case of *Padilla v. Kentucky*[26] is entitled to retroactive application on collateral review; and second, whether the defendants' counsel was ineffective under the New Jersey Supreme Court's 2009 holding in *State v. Nuñez-Valdéz*.[27]

## III. BACKGROUND OF THE AREA

### *A. State v. Nuñez-Valdéz*

In 2009, four years after Defendants Gaitan and Goulbourne entered their respective guilty pleas, the New Jersey Supreme Court decided *Nuñez-Valdéz*. *Nuñez-Valdéz* held that "when counsel provides false or affirmatively misleading advice about the deportation consequences of a guilty plea, and the defendant

20. *Id.* "Pursuant to the INA, on July 11, 2008, Goulbourne was charged with removal based on his conviction for a [drug] offense, which qualifie[s] as an aggravated felony." *Id.* (citing 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii) (2006)).

21. *Id.*

22. *Id.* "A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief." N.J. Ct. R. 3:22-10(b) (2010).

23. *Gaitan*, 37 A.3d at 1094.

24. *Id.*

25. *Id.*

26. 130 S. Ct. 1473 (2010).

27. 975 A.2d 418 (N.J. 2009).

demonstrates that he would not have pled guilty if he had been provided with accurate information, an ineffective assistance of counsel claim has been established."[28] The court also ordered a change to the plea form to state that if the crime is considered an aggravated felony under federal law then a guilty plea may lead to deportation.[29]

In *Nuñez-Valdéz*, the defendant, a lawful permanent resident, pled guilty to an aggravated felony which required mandatory removal.[30] The PCR court found that the first prong of the *Strickland* test[31] was met because counsel affirmatively misadvised the

28. State v. Gaitan, 37 A.3d 1089, 1096 (N.J. 2012) (quoting State v. Nuñez-Valdéz, 975 A.2d 418, 419 (N.J. 2009)).

29. *See Gaitan*, 37 A.3d at 1110. In response to the order by the Supreme Court of New Jersey in *Nuñez-Valdéz*, the plea form was amended to "ensure that defendants understand that they have an opportunity to seek consultation with an attorney about the immigration consequences of a plea, should they choose to do so." New Jersey Courts Administrative Directive #05-11, Criminal Plea Form—Question Regarding the Immigration Consequences of a Guilty Plea (Aug. 1, 2011), *available at* http://www.judiciary.state.nj.us/directive/2011/dir_05_11.pdf. Question 17 states as follows:

| | | | |
|---|---|---|---|
| 17. | a. | Are you a citizen of the United States?<br>If you have answered "No" to this question, you must answer Questions 17b–17f. If you have answered "Yes" to this question, proceed to Question 18 | [Yes] [No] |
| | b. | Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States? | [Yes] [No] |
| | c. | Do you understand that you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status? | [Yes] [No] |
| | d. | Have you discussed with an attorney the potential immigration consequences of your plea? If the answer is "No," proceed to question 17e. If the answer is "Yes," proceed to question 17f. | [Yes] [No] |
| | e. | Would you like the opportunity to do so? | [Yes] [No] |
| | f. | Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences, do you still wish to plead guilty? | [Yes] [No] |

*Id.*

30. *Nuñez-Valdéz*, 975 A.2d at 419.

31. Under the two-part test established in *Strickland*, a defendant must establish that his "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

defendant that a guilty plea would not have any immigration consequences.[32] As to the second prong, the PCR court accepted that if the defendant had known his plea would result in mandatory deportation, he would have proceeded to trial instead.[33]

The New Jersey Supreme Court decision in *Nuñez-Valdéz* was made while *Padilla v. Kentucky* was pending. To the extent that *Padilla* might involve a determination as to "whether immigration consequences were regarded as 'penal' or 'collateral,'"[34] the court rooted its holding in the state constitutional right to counsel.[35] Therefore, *Nuñez-Valdéz* "established that under the state constitutional right to counsel, an ineffective assistance of counsel claim could be based on the provision of false and affirmatively misleading advice about a plea to an offense that constituted an aggravated felony under federal immigration law that therefore

32. *Nuñez-Valdéz*, 975 A.2d at 421, 424.

33. *Id.* at 425. The Appellate Division reversed the PCR judgment, but the New Jersey Supreme Court reversed the Appellate Division's judgment. *See Gaitan*, 37 A.3d at 1097.

34. *Gaitan*, 37 A.3d at 1097 (quoting *Nuñez-Valdéz*, 97 A.2d at 139-40). It is argued that one of the strongest and most successful arguments against creating a duty to advise noncitizen defendants about the immigration consequences of a criminal conviction is the "collateral consequences" doctrine. *See* Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 37-38 (2010) (summarizing the doctrinal argument). Under the collateral consequences doctrine, courts are obligated to inform a defendant of only the "direct" consequences of a plea, not any consequences that the court deems to be "indirect" or "collateral." *See* Brady v. United States, 397 U.S. 742, 758 (1970) (holding that defendant's failure to properly assess every factor relevant to his case is not reason enough to vacate plea, since defendant understood the direct consequences of his conviction). Direct consequences are defined as those that have a "definite, immediate, and largely automatic effect on the . . . defendant[]." Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973). The United States Supreme Court has long declared that the immigration consequence of deportation was not a form of criminal punishment, but rather a civil remedy aimed at excluding noncitizens from the country. Fong Yue Ting v. United States, 149 US. 698, 730 (1893) (stating "[an] order of deportation is not a punishment for crime"). Therefore, the majority of lower federal and state courts have found that deportation is a collateral consequence, and therefore, attorneys are not obligated to advise on it. Vazquez, *supra* note 34, at 38. However, several courts have differed with the finding that immigration is not punishment. For a more detailed analysis, see Stephen H. Legomsky, *The Alien Criminal Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105, 121-27 (1977); Stephen H. Legomsky, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment:* Lieggi v. United States Immigration and Naturalization Service, *389 F. Supp. 12 (N.D. Ill. 1975)*, 13 San Diego L. Rev. 454, 456-64 (1976).

35. *Gaitan*, 37 A.3d at 1097.

would trigger mandatory deportation."[36]

*B. Padilla v. Kentucky*

In 2010, the Supreme Court of the United States decided *Padilla v. Kentucky*,[37] which held, more broadly than New Jersey's *Nuñez-Valdéz*,[38] that in order to satisfy a defendant's Sixth Amendment right to effective assistance of counsel, counsel has an affirmative obligation to inform a client-defendant when a plea places the client at risk of deportation.[39] In *Padilla*, the Court created a two-tiered structure for assessing the duty of effective assistance to distinguish cases where it is clear that deportation is certain,[40] from cases where the immigration consequences of a plea are less clear, such that "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."[41]

Notably, the Court did not distinguish between providing affirmative misadvice and providing no advice, as did New Jersey.[42] Rather, the Court reasoned that to limit the holding to affirmative misadvice would absurdly give counsel "an incentive to remain silent on matters of great importance, even when answers are readily available."[43]

In a concurring opinion, Justice Alito disagreed with the majority's conclusion that a defense attorney must affirmatively explain what the deportation consequences of a plea will be.[44] He described that requirement as a "dramatic departure from precedent," one that "mark[ed] a major upheaval in Sixth

36. *Id.*

37. 130 S.Ct. 1473 (2010).

38. State v. Nuñez-Valdéz, 975 A.2d 418 (N.J. 2009).

39. *Padilla*, 130. S.Ct. at 1486.

40. The defendant in *Padilla* was a lawful permanent U.S. resident and a Vietnam veteran who pleaded guilty to a drug offense. Padilla alleged that his counsel advised him that his 40 years as a U.S. resident would likely preclude any detrimental immigration consequences resulting from his plea of guilty. Padilla's drug conviction however, was a ground for mandatory deportation, and was therefore certain. *Id.* at 1477-78.

41. *Id.* at 1483 (footnote omitted).

42. *See Nuñez-Valdéz*, 975 A.2d at 419.

43. *Padilla*, 130 S.Ct. at 1484.

44. *Id.* at 1487 (Alito, J., concurring).

Amendment law."[45]

In a dissenting opinion, Justice Scalia, joined by Justice Thomas, expressed the view that "[t]he Sixth Amendment guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n]'—not for sound advice about the collateral consequences of a conviction."[46] The dissent asserted that because deportation is a collateral consequence,[47] and is therefore categorically outside the scope of the Sixth Amendment's right to counsel, even affirmative misadvice about immigration consequences could not constitute ineffective assistance of counsel.[48]

## IV. THE NEW JERSEY SUPREME COURT'S RETROACTIVITY ANALYSIS

### *A. The Majority's Rationale*

In light of the legal developments that had occurred in the time since the defendants pled guilty, the first issue before the New Jersey Supreme Court was whether *Padilla* applied retroactively on collateral review.[49] The State argued that *Padilla* represented a new rule and a clear break from precedent;[50] and as such, should be given

45. *Id.* at 1488, 1491.

46. *Id.* at 1494 (Scalia, J., dissenting).

47. For a discussion of the collateral consequences doctrine's impact on the Sixth Amendment right to counsel, see Gabriel J. Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 697 (2002) (arguing that the "'collateral consequences' rule is inconsistent with the Supreme Court's decision in *Strickland v. Washington*, which held that ineffective assistance of counsel consists of performance below a minimum standard of competence and resulting prejudice").

48. *Padilla*, 130 S.Ct. at 1494-95 (Scalia, J., dissenting).

49. State v. Gaitan, 37 A.3d 1089, 1093 (N.J. 2012); *see* State v. Afanador, 697 A.2d 529, 536 (N.J. 1997) (citing State v. Burnstein 427 A.2d 525, 529 (N.J. 1981)) (summarizing the Supreme Court of New Jersey's analytical approach to retroactivity). Specifically: "[B]efore the Court chooses from among the varied [retroactivity] options, it customarily engages in the threshold inquiry of whether the rule at issue is a 'new rule of law' for purposes of retroactivity analysis . . . . Our cases have recognized that if a ruling does not involve a 'departure from existing law,' the retroactivity question never arises and our power to limit the retroactive effect of a decision is not implicated." *Id.* (citation omitted).

50. Under New Jersey precedent, if a rule constitutes a new rule of law, then "three factors generally are considered to determine whether the rule [should] be applied retroactively: '(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice.'" State v. Knight, 678 A.2d 642, 651-52 (N.J. 1996) (quoting State v. Nash, 317 A.2d 689, 692 (N.J. 1974)). Although those three factors have received detailed attention in retroactivity law, New Jersey cases also indicate that the retroactivity determination often turns more generally on "the court's view of what is just and consonant with public policy in the particular situation presented." *Id.* at 652

pipeline retroactivity[51] to all cases on direct review and all future cases, but not to cases on collateral review.[52] The defendants failed to engage in a new rule/old rule argument.[53] In fact, the court observed that Defendant Goulbourne "seemingly assume[d] that *Padilla* represent[ed] a new rule."[54] To address the issue, the New Jersey Supreme Court analyzed retroactivity under the federal standard.

*B. Federal retroactivity standard*

The court properly looked for guidance under the *Teague* retroactivity standard. In *Teague v. Lane*, the Supreme Court of the United States make clear that whether a rule is applied retroactively depends on whether the rule is considered old or new.[55] "[A]n old rule applies both on direct and collateral review."[56] By contrast, a "new rule" generally does not apply on collateral review.[57] A rule of law is a "new rule" for *Teague* purposes "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[58] An outcome is not dictated by precedent if it is "susceptible to debate among reasonable minds."[59] Evidence of debate among reasonable minds includes: "[d]isagreement among federal courts . . . [and] Supreme Court justices."[60]

*Teague* held that a "new rule" is retroactively applicable to cases on collateral review only if one of two exceptions apply: (1) the new rule places certain kinds of criminal conduct beyond the power of the criminal law-making authority to proscribe; or (2) the new rule is a "watershed rule[ ] of criminal procedure"[61] that "alter[s] our

(quoting *Nash*, 317 A.2d at 691).

51. Pipeline retroactivity means that a rule of law is applicable on direct appeal but not for purposes for post-conviction relief. *See* State v. Yanovsky, 773 A.2d 711, 716 (N.J. Super. Ct. App. Div. 2001). *See also* State v. Rountree, 906 A.2d 1124, 1132-33 (N.J. Super. Ct. App. Div. 2006) (declining to expand the definition of "pipeline retroactivity" to include cases seeking post-conviction relief).

52. *Gaitan*, 37 A.3d at 1103.

53. *Id.* (stating that "Gaitan resists the argument that *Padilla* represents a new rule . . . . Goulbourne, on the other hand, seemingly assumes that *Padilla* represents a new rule of law").

54. *Id.*

55. 489 U.S. 288, 305-06 (1989).

56. Whorton v. Bockting, 549 U.S. 406, 416 (2007).

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

58. *Teague*, 489 U.S. at 301 (emphasis in original).

59. *Gaitan*, 37 A.3d at 1107 (quoting Butler v. McKellar, 494 U.S. 407, 415 (1990)).

60. *Id.*

61. *Teague*, 489 U.S. at 311; *see* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461, 1467, 1491 (2011) (arguing that Padilla "might well be seen as a 'watershed' in the sense of Gideon v. Wainwright, 372 U.S. 335

understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[62]

The majority of the New Jersey Supreme Court declared that because neither of the exceptions applied,[63] the federal retroactivity issue was simply whether *Padilla* represents a new rule or not.[64] Thus, if *Padilla* did not announce a "new rule," then defendants Gaitan and Goulbourne would not be entitled to invoke the protection of *Padilla* even though their convictions had achieved finality prior to *Padilla.* The New Jersey Supreme Court analyzed the newness of *Padilla* under the existing bodies of federal and state law.

*C. Circuit split in Federal retroactivity analysis*

The court's federal retroactivity analysis began by identifying an emerging split among federal circuit courts.[65] The Tenth and Seventh[66] Circuit Courts of Appeals concluded that *Padilla* announced a new rule, but the Third Circuit concluded that it did not.[67] Rather than align itself with the position of the Third Circuit—which includes the State of New Jersey—the majority was persuaded that "*Padilla* represents a new rule of law that, under federal law, is not retroactive and is therefore inapplicable to cases on collateral review."[68]

The majority asserted that arguments against retroactivity, which succeeded in the Tenth Circuit case of *United States v. Chang Hong*[69] and in the Seventh Circuit case of *Chaidez v. United States*,[70] were simply "stronger."[71] These "stronger" arguments were tightly anchored to the fact that that there existed reasonable disagreement

(1962)"); *see also Whorton*, 549 U.S. at 419; Schiro v. Summerlin, 542 U.S. 348, 348 (2004); Beard v. Banks, 542 U.S. 406, 417 (2004); *Teague*, 489 U.S. at 301. *But see* Danforth v. Minnesota, 552 U.S. 264, 275-77 (2008) (indicating that *Teague* should not necessarily constrain the authority of state courts to give broader effect to new rules of criminal procedure).

62. *Teague,* 489 U.S. at 311 (emphasis in original) (internal quotation marks omitted).

63. There is no dispute between the majority and the dissent as to this issue. Both agree that neither exception applies.

64. *Gaitan*, 37 A.3d at 1103-04.

65. *Id.* at 1104.

66. United States v. Chang Hong, 671 F.3d 1147, 1150 (10th Cir. 2011), *as amended* (Sept. 1, 2011); Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 132 S. Ct. 2101 (U.S. 2012).

67. United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011).

68. *Gaitan*, 37 A.3d at 1105.

69. 671 F.3d 1147.

70. 655 F.3d 684.

71. *Gaitan*, 37 A.3d at 1105.

among the Supreme Court justices in *Padilla*'s concurring and dissenting opinions that "the *Padilla* decision was not dictated by precedent and that it represents a new and novel rule, notwithstanding" that it is couched in the holding of *Strickland*.[72]

In arriving at this conclusion, the majority explicitly rejected the argument that no case applying the *Strickland* standard can announce a new rule.[73] Although the case of *Hill v. Lockhart* held that the *Strickland* standard of ineffectiveness applies to the guilty plea phase of a criminal proceeding in 1985,[74] "the [Supreme Court of the United States] had never held that the Sixth Amendment requires a to provide advice about matters not directly related to their client's criminal prosecution."[75] *Padilla* now requires counsel to "provide affirmative advice on a subject not formerly required, and importantly, ineffective assistance [of counsel] claims" may now be based on grounds other than giving misinformation.[76] The majority added that uncertainty in the legal community as to what advice *Padilla* specifically requires counsel to give, contributed to its determination that *Padilla* is a new rule of law.[77] "[T]he Tenth Circuit emphasized that . . . '*Padilla* is a new rule of constitutional law not because of *what* it applies—*Strickland*—but because of *where* it applies—collateral immigration consequences of a plea bargain.'"[78]

The majority rejected the notion that developments in professional standards could ever outweigh case law in a *Teague* newness analysis because "[p]rofessional standards cannot themselves establish a rule of law; only a court holding can accomplish that."[79] The majority stated that prior to *Padilla*, defense counsel would not have known that "the constitutional benchmark for effective assistance of counsel required that they advise noncitizen clients of the risk of immigration consequences, and further that they must do so even when the risk of those consequences is not clearly predictable."[80]

72. *Id.*

73. *Id.*

74. 474 U.S. 52, 60 (1985).

75. *Gaitan*, 37 A.3d at 1105-06 (quoting *Chaidez*, 655 F.3d at 693) (internal quotation marks omitted).

76. *Gaitan*, 37 A.3d at 1106.

77. *Id.*

78. *Id.* (quoting United States v. Chang Hong, 671 F.3d 1147, 1156 (10th Cir. 2011), *as amended* (Sept. 1, 2011)).

79. *Id.* (citing Bobby v. Van Hook, 130 S. Ct. 13, 17 (2009) (per curiam)) (highlighting that under *Strickland*, professional standards from organizations like the "ABA serve as guides, not definitions, of reasonable performance").

80. *Id.* at 1107.

*D. State retroactivity analysis*

New Jersey's retroactivity analysis mirrors *Teague*'s "new law" standard.[81] Therefore, the majority further held that "*Padilla* is not entitled to retroactive application based on . . . state law."[82] The court compared the law that existed in 2008, at the time of the defendants' guilty pleas,[83] with the rule of law established by *Padilla*.[84] The court found that *Padilla* was considerably broader than the standard of *Nuñez-Valdéz*. In *Nuñez-Valdéz*, the majority stated that the holding proscribed only affirmatively misleading information about immigration consequences.[85] The court recognized that prior to *Nuñez-Valdéz*, "immigration consequences had been categorized as collateral consequences . . . to which there was no obligation to warn defendants."[86] The court recognized that *Padilla* went further than *Nuñez-Valdéz* because it imposed a duty on counsel to provide affirmative advice on deportation.[87] The majority reasoned that "additional affirmative obligation requires a new, and nuanced, analysis that also was never before articulated in our case law."[88] Therefore, the majority found *Padilla* to be a new rule under state law analysis. In so finding, the court stated that its holding in *Nuñez-Valdéz* would govern the defendants' ineffective assistance of counsel claims on collateral review.[89]

*E. Analysis under State v. Nuñez-Valdéz*

The majority proceeded to analyze the defendants' petitions under the standard of *Nuñez-Valdéz.* With regard to defendant Gaitan, the court distinguished his claim from that of *Nuñez-Valdéz*. Unlike the defendant in *Nuñez-Valdéz* who received affirmatively misleading information, Gaitan was, at a minimum, put on notice of potential immigration consequences through Question 17 on the plea form.[90] The majority also found that Gaitan had not proved that he would not have pled guilty had he known of the deportation

81. *Id*. at 1108; *see also* State v. Cummings, 875 A.2d 906, 914 (2005).

82. *Id.*

83. In this section, the court only analyzed defendant Goulbourne's claim under state law retroactivity analysis, because it was unclear to the court whether Goulbourne was asserting a claim under state law. *Id.* at 1108-09.

84. *Id.* at1092-93.

85. *Id*. at 1108-09.

86. *Id.* at 1108 (citing State v. Heitzman, 527 A.2d 439, 440 (N.J. 1987) (per curiam)).

87. *Id.* at 1109.

88. *Id.*

89. *Id.*

90. *Id.*

consequences.[91] Because *Padilla* did not retroactively increase counsel's affirmative obligation, Gaitan failed to make out a *prima facie* case and was therefore not entitled to have an evidentiary hearing.

With regard to defendant Goulbourne, who was granted an evidentiary hearing, the majority found that the PCR court applied the wrong standard when it granted him relief.[92] Specifically, the majority chided the PCR court for applying a "benefit of the doubt" standard rather than "a preponderance of the evidence" standard.[93] Given the fact that the trial judge extensively questioned the defendant about deportation consequences during the plea hearing, the majority was more than satisfied that Goulbourne failed to meet his burden of proof.[94] Perhaps most compelling to the majority was the fact that, on the record, Goulbourne "admitted that he recognized deportation was a possibility but that it was not his concern at the time. His priority was in minimizing the amount of jail time."[95]

*F. The Dissent's Rationale*

In a dissenting opinion, Justice Albin, who was joined by Justice Long, addressed two primary areas of contention with the majority opinion: (1) Padilla is not a new rule; and (2) New Jersey should have followed the holding of the Third Circuit which held that *Padilla* applies retroactively. Ultimately, the dissent concluded that the constitutionally sound decision would have been to apply *Padilla* retroactively, as the Third Circuit had.[96]

The dissent first argues that *Padilla* is not a new rule and that a lot of evidence exists to support the conclusion that prior to 2005, defense counsel were on notice that they were required to inform their clients about the deportation consequences of pleading guilty.[97] *Padilla* held that "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[98] The dissent declared that "[a]ny minimally adequate criminal defense attorney" has long known to advise the client of the immigration consequences

91. *Id.* at 1110.

92. *Id.*

93. *Id*. (internal quotation marks omitted); *see also* N.J. CT. R. 3:22–1, –2.

94. *Id.* at 1111-1112.

95. *Id.* at 1112.

96. *Id.* at 1115–16 (Albin, J., dissenting).

97. *Id.* at 1117.

98. *Id.* at 1114 (alteration in original) (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010)).

of conviction of a crime.[99]

*Strickland* stated that "[t]he proper measure of attorney performance remains simply reasonableness under *prevailing* professional norms."[100] The dissent argued that in 2005, at the time of Gaitan's guilty plea, "the prevailing professional norms required counsel to advise a client entering a guilty plea to an aggravated felony that he was facing probable, if not mandatory, deportation."[101] Numerous professional performance guidelines issued prior to 2005 supported this point, including the American Bar Association ("ABA") standards for guilty pleas.[102] For instance, ABA standard 14-3.2(f), adopted in 1992, required defense attorneys to inform noncitizen clients of the immigration consequences of a guilty plea.[103] In addition, through professional seminars and legal periodicals, defense attorneys in New Jersey were instructed, prior to 2005, "to advise noncitizen clients that a guilty plea to particular offenses carried the risk of almost certain deportation."[104] Unlike the majority, who concluded that the Supreme Court established the now prevailing professional norm to give advice about potential deportation consequences, the dissent asserted that "the bar does not await pronouncements from the United States Supreme Court before establishing minimally acceptable codes governing the professional conduct of attorneys."[105]

The dissent also stated that a trial court's decision in *State v. Vieira*,[106] should have put defense attorneys on notice of their obligation to advise a noncitizen client of the deportation consequence of a guilty plea.[107] In *Vieira*, the court wrote that an attorney's representation "is constitutionally deficient if the attorney

99. *Id.*

100. Strickland v. Washington, 466 U.S. 668, 688 (1984) (emphasis added).

101. *Gaitan*, 37 A.3d at 1116 (Albin, J., dissenting).

102. *See Pleas of Guilty*, *in* ABA STANDARDS FOR CRIMINAL JUSTICE14-3.2(f) (3d ed. 1999); *see, e.g.*, *Gaitan*, 37 A.3d at 1116 (citing NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2 (1995); G. NICHOLAS HERMAN, PLEA BARGAINING 20-21 (2d ed. 1997);Chin, *supra* note 47, at 713-18); ARTHUR W. CAMPBELL, LAW OF SENTENCING 555, 560 (3d ed. 2004); 2 DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: A RESOURCE GUIDE FOR PRACTITIONERS AND POLICYMAKERS: STANDARDS FOR ATTORNEY PERFORMANCE, at D10, H8-H9, J8 (2000); *Prosecution Function and Defense Function*, *in* ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.1(a) (3d ed. 1993)).

103. *See Gaitan*, 37 A.3d at 1116 (Albin, J., dissenting).

104. *Id.* at 1115.

105. *Id.* at 1117.

106. 760 A.2d 840, 843 (N.J. Super. Ct. Law Div. 2000).

107. *Gaitan*, 37 A.3d at 1115.

does not address the issue of deportation with the [noncitizen] defendant and the defendant is not aware of the risk of deportation."[108]

According to the dissent, the court-mandated plea form, which addressed the potential issue of deportation, since 1988, is another indication that professional norms in 2005 required counsel to provide advice on immigration consequences. [109]

The second issue raised by the dissent was that the majority's decision is in direct conflict with the holding of the Third Circuit in *United States v. Orocio.*[110] In *Orocio*, the Third Circuit Court of Appeals, which was the first to address the retroactivity of *Padilla*, held that "*Padilla* broke no new ground in holding the duty to consult also extended to counsel's obligation to advise the defendant of the immigration consequences of a guilty plea and did not yield[ ] a result so novel that it forge[d] a new rule."[111] As the Third Circuit framed the issue, *Padilla* followed directly from *Strickland* and long-established professional norms, and therefore applied retroactively on collateral review.[112] Although the dissent acknowledged that the state court is not bound by the rule established by the federal court of appeals,[113] the conflict creates an issue whereby New Jersey state courts will deny PCR in cases in which federal district courts, relying on *Orocio*, will grant habeas corpus relief. Therefore, state criminal proceedings will be overridden.[114]

## V. ANALYSIS

### *A. Soundness of the Majority's Retroactivity Analysis*

Retroactivity analysis on the criminal side generally is made more complex by the due process protections accorded to defendants in criminal cases, as well as by the burdens imposed by new rules on the criminal justice system.[115] State and lower federal courts have

108. *Vieira*, 760 A.2d at 844.

109. *Gaitan*, 37 A.3d at 1115 (Albin, J., dissenting).

110. 645 F.3d 630, 641 (3d Cir. 2011).

111. *Id.* at 639-400 (alterations in original) (internal quotation marks omitted).

112. *Id*. at 641.

113. *See generally* Ryan v. Am. Honda Motor Co., 896 A.2d 454, 457 (N.J. 2006). Although federal opinions are not binding, they may have significant persuasive effect. For example, as a matter of comity, a state court may give weight to a lower federal court's interpretation of federal law. *See, e.g.*, *Id.* ("federal interpretations of federal enactments are entitled to our respect); Bustamante v. Borough of Paramus 994 A.2d 573, 580 (N.J. Super. Ct. App. Div. 2010) (stating Third Circuit's interpretation of United States Supreme Court case is persuasive, not binding).

114. *Gaitan*, 37 A.3d at 1116 (Albin, J., dissenting).

115. *See e.g.* Bunkley v. Florida, 538 U.S. 835 (2003) (allowing the lower court to

split on the issue of whether *Padilla* applies retroactively.[116] This Comment argues that the Supreme Court of New Jersey arrived at a fair and logical conclusion when it held that *Padilla* is not entitled to retroactive application because it is a new rule.[117] The *Padilla* Court itself did not specifically address whether its decision should be applied retroactively. If the Court had intended for *Padilla* to apply retroactively, it should have clearly said so.[118] In the absence of a clear directive from the Supreme Court of the United States, states and lower federal courts have come to diametrically opposing conclusions.

1. Lack of textual evidence

The strongest evidence that the *Padilla* Court evaluated retroactivity on collateral review is in the context of its consideration of the "floodgates" argument,[119] and that the evidence does not hold water. Specifically the Court stated:

> We confronted a similar "floodgates" concern in *Hill* . . . . A flood did not follow in that decision's wake. . . . It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. . . . We should, therefore, presume that counsel satisfied their obligation to render competent advice at

decline application of the new law retroactively and instead remanding the case because to hold otherwise, based on these facts, would violate Defendant's due process rights).

116. Rachel E. Rosenbloom, Will Padilla Reach Across the Border?, 45 New Eng. L. Rev. 327, 331 n.23 (2011) (listing the cases in the split).

117. *Gaitan* at 37 A.3d at 1107. According to State v. Knight, 145 N.J. 233, 249 (1996), if a decision announces a new rule, the Supreme Court has enumerated at least four options with respect to the retroactive impact of opinions: The Court may decide to apply the new rule purely prospectively, applying it only to cases in which the operative facts arise after the new rule has been announced. Alternatively, the Court may apply the new rule in future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is set forth. A third option is to give the new rule "pipe retroactivity," rendering it applicable in all future cases, the case in which the rule is announced, and any cases still on direct appeal. Finally, the Court may give the new rule complete retroactive effect, applying it to all cases, including those in which final judgments have been entered and all other avenues of appeal have been exhausted. (citations omitted).

118. It is basic that when it comes to any such question of federal law, it is "the province and duty" of this Court "to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803).

119. *Gaitan*, 37 A.3d at 1107; *see also* Brief for National Immigration Project of the National Lawyers Guild, et. al. as Amici Curae Supporting Petitioner, United States v. Chang Hong, No. 10-6294 (Sept. 27, 2011).

> the time their clients considered pleading guilty. . . . Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial.[120]

Although the Third Circuit relied on this discussion to support its holding that the Court did intend for *Padilla* to be applied retroactively,[121] this reliance is misplaced. The paragraphs above are too unclear to predict how the Supreme Court will eventually rule. For instance, in the first paragraph, the Court references professional norms that have existed for fifteen years, but in the second paragraph the Court expresses concern about recognizing "new grounds" for appeal.

Next, the *Padilla* Court makes the assumption that the counsel of other defendants subject to deportation provided competent advice.[122] This is a questionable assumption to make, considering that the court found Defendant Padilla's counsel to be incompetent. Exactly what floodgates the Court is concerned about keeping closed is especially unclear if, as it assumes, counsel have known to advise defendants about deportation for years.

Finally, the Court suggests that its holding will not give rise to many petitions for collateral review.[123] This is also a suspect assumption because Padilla brought his own claim before the Court by way of collateral review.[124] Perhaps the Court meant for Padilla to have some effect on convictions already obtained, albeit a small effect.[125] The internal confusion conveyed in this section of the *Padilla* Court's opinion is in no way sufficient to say with certainty that the Court implicitly intended its rule to be applied retroactively. If the *Padilla* Court had intended retroactivity, it should have said so.

The National Immigration Project came to the opposite conclusion from the majority in *Gaitan*, and argued that *Padilla* only implicitly references retroactivity on purpose.[126] Retroactivity is

120. *Padilla v. Kentucky,* 130 S. Ct. 1473, 1484-86 (2010)(emphasis added).

121. *See Orocio*, 645 F.3d at 641.

122. *Padilla*, 130 S. Ct. at 1484-86.

123. *Id.*

124. Commonwealth of Kentucky v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

125. *Gaitan*, 37 A.3d at 1097.

126. Dan Kesselbrenner, *A Defending Immigrants Partnership Practice Advisory: Retroactive Applicability of Padilla v. Kentucky,* National Immigration Project, March 17,2011,http://www.nationalimmigrationproject.org/legalresources/

important in the context of federal habeas review of state convictions because in determining whether a petitioner can file a second or successive habeas petition under 28 U.S.C. § 2254(b)(2)(A) the Court required that for a decision to apply retroactively, it must be an express holding of retroactivity that cannot be dictum, which must happen in another person's case on collateral review.[127] The National Immigration Project suggests that under the Court's "governing test, it could not have held that the Padilla decision was retroactive," because retroactivity must come from an application of legal principles by the states.[128] Therefore, "[w]hen, as in *Padilla*, the Court invokes language suggesting retroactivity, it is consciously avoiding an explicit determination and expressly intending for lower courts to apply those retroactivity principles."[129] However, due to the federal nature of deportation proceedings, it would have made more sense for the Court to have explicitly decided the retroactivity issue, rather than to have some state defendants entitled to collateral relief from the federal removal procedure but not others.

2. Disagreement among reasonable minds

Using the proper analytical framework, the *Gaitan* majority correctly determined that the rule of *Padilla* was a new rule.[130] A law is new if it was not dictated by precedent and if it is "susceptible to debate among reasonable minds."[131] The majority thoroughly evaluated the *Padilla* decision in the context of the body of pre-existing law and rightly rejected the argument that *Padilla* was merely an extension of *Strickland*.[132]

First, the majority considered the changing landscape of immigration laws. *Padilla* strongly emphasized that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders,"[133] and the Court outlined those changes. The majority conducted a careful evaluation of those legal changes.[134] The majority also analyzed the concurring and dissenting opinions in *Padilla* and found them to be "significant" because they both place "emphasis on the change the *Padilla* decision wrought on the landscape of ineffective assistance of counsel

practice_advisories/padilla%20retro%20revised%203-2011.pdf.

127. Tyler v. Cain, 533 U.S. 656, 663 (2001).

128. Kesselbrenner, supra n. 126 at 3-4.

129. *Id.* at 4.

130. *Gaitan,* 37 A.3d at 1107.

131. *Id.* at 1104.

132. *Id.* at 1107.

133. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

134. *Gaitan,* 37 A.3d at 1098.

claims."[135] This supported the majority's view that with all of the recent changes in immigration law, it was unreasonable to suggest that uniform advice was the standard, in spite of ABA recommendations.[136]

Second, the majority found considerable disagreement among reasonable legal minds as to whether *Padilla* was a new rule. In Justice Scalia's strongly worded dissent, he argues that the *Padilla* majority stretched the Sixth Amendment beyond the point of recognition[137]:

> There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand . . . .We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Debate among reasonable minds is sufficient to hold that a rule of law is new.[138] The Supreme Court Justices debated *Padilla*: the majority drew a concurrence from Justice Alito and Chief Justice Roberts and there was a dissent by Justice Scalia. "That the members of the *Padilla* Court expressed such an 'array of views' indicates that *Padilla* was not dictated by precedent."[139] Pre-*Padilla* opinions of the lower federal courts were also divided, including nine circuit courts and many state courts that had concluded that there was no Sixth Amendment duty to warn clients about the risk of a

135. *Id*. at 1099-1100.

136. *Id*. at 1106 (stating that "[t]he weight of that precedent is not overridden by the *Padilla* majority's resort to developments about professional standards, as salutary as they undoubtedly are. Professional standards cannot themselves establish a rule of law; only a court holding can accomplish that.")

137. *Padilla*, 130 S. Ct. at 1495.

138. Chaidez v. United States, 655 F.3d 684, 689 (7th Cir. 2011). *See* Beard v. Banks, 542 U.S. 406, 414–15 (2004) (concluding that a rule was new where, in the case announcing the rule, four Justices dissented, expressing the view that the Court's outcome was not controlled by precedent); Sawyer v. Smith, 497 U.S. 227, 236–37 (1990) (concluding that *Caldwell v. Mississippi,* 472 U.S. 320 (1985), announced a new rule, in part based on the views of the *Caldwell* dissenters). *See also Butler,* 494 U.S. at 415 ("That the outcome in *[Arizona v.] Roberson* [, 486 U.S. 675 (1988) ] was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits"); O'Dell v. Netherland, 521 U.S. 151, 166 n. 3, (1997) (finding support for its conclusion that a case announced a new rule "in the decisions of the state courts and the lower federal courts," none of which previously had adopted the rule).

139. *Chaidez*, 655 F.3d at 689 (quoting *O'Dell,* 521 U.S. at 159).

collateral consequence, including deportation, from a guilty plea.[140]

The dissent's statement, that defense attorneys would be surprised to know about the new rule,[141] understates the confusion and dispute among state and lower federal courts that existed prior to *Padilla*. Prior to *Padilla*, there was a 27-5 split on whether defense counsel had a duty to advise noncitizen clients on the immigration consequences of a criminal conviction.[142] The majority of courts held that an attorney had no duty to advise a client on the immigration consequences of a criminal conviction under the Sixth Amendment.[143] Therefore, the majority correctly found that professional standards alone could not outweigh the dispute that existed among reasonable minds in the courtrooms prior to *Padilla*.

The *Strickland* reasonableness standard of attorney conduct had been applied to the plea phase since the Supreme Court's 1985 holding in *Hill v. Lockhart*,[144] but "even the majority suggested that the rule it announced was not *dictated* by precedent, stating that while *Padilla*'s claim 'follow[ed] from' its decision applying *Strickland* to advice regarding guilty pleas in *Hill v. Lockhart*,[145] *Hill* 'does not control the question before us.'"[146]

Case law reflected an "abiding concern about affirmative misinformation from counsel to a pleading client that could undercut a knowing and voluntary plea."[147] But never before had the Supreme Court of the United States placed an affirmative obligation on criminal defense attorneys to inform noncitizen defendants about the civil deportation consequences of pleading guilty. Therefore, the

140. *Chaidez*, 655 F.3d at 690. Courts in at least thirty states and the District of Columbia had reached the conclusion that counsel did not have an affirmative duty to advise about the collateral deportation consequences of a guilty plea. Chin, *supra* note 47, at 699. According to the Seventh Circuit, "[S]uch rare unanimity among the lower courts is compelling evidence that reasonable jurists reading the Supreme Court's precedents in April 2004 could have disagreed about the outcome of *Padilla*." *Chaidez*, 655 F.3d at 690. *See also* Lambrix v. Singletary, 520 U.S. 518, 538 (finding it "plain . . . that a jurist considering all the relevant material . . . could reasonably have reached a conclusion contrary to our holding in" *Espinosa v. Florida,* 505 U.S. 1079, (1992) (*per curiam*), where "both before and after [petitioner's] conviction became final, every court decision we are aware of did so").

141. *Gaitan,* 37 A.3d at 1114. (Albin, J., dissenting).

142. Vazquez, *supra* note 34, at 36 n.17 (2010) (citing cases that had decided the issue of ineffective assistance of counsel for failure to advise of deportation consequences).

143. *Id*.

144. 474 U.S. 52 (1985).

145. *Id*.

146. *Chaidez v. United States*, 655 F.3d 684, 689 (7th Cir. 2011) (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1485, n. 12 (2010).

147. State v. Gaitan, 37 A.3d 1089, 1096 (N.J. 2012).

majority correctly held that *Padilla* was a new rule that was not entitled to retroactive application on collateral review.[148]

Despite the doctrinal logic supporting the majority's decision, the outcome of *Gaitan* is, perhaps, surprising. The New Jersey Supreme Court has a history of providing criminal defendants with greater procedural protections under the state constitution than those afforded to them under the Federal Constitution.[149] Granting greater protection can be appropriate because the protections in the Federal Constitution merely provide a constitutional floor, such that the Federal Constitution establishes a minimum level of protection to citizens of all states.[150] Nothing prevents a state court from exceeding the federal standard. Absent a clear directive from the *Padilla* Court to the contrary, The New Jersey Supreme Court could have exercised its authority to apply *Padilla* retroactively.

The Supreme Court of the United States recently addressed a similar retroactivity issue in *Danforth v. Minnesota*.[151] In *Danforth*, the Court stated that *Teague* does not "explicitly or implicitly constrain[] the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas."[152] In interpreting *Teague*'s retroactivity rule, the *Danforth* Court highlighted that the fact that the *Teague* case arose on federal habeas "ma[de] clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own post-conviction proceedings than required by that opinion."[153]

Nevertheless, the *Gaitan* majority effectively predicted that, when given the opportunity, The Supreme Court of the United States will not apply *Padilla* retroactively. If the prediction is incorrect, then New Jersey will have to fall in line with the Third Circuit case of *Orocio*.[154] In the meantime, however, nonuniformity is unavoidable. Although there is a federal interest in procedural uniformity among the states in the application of federal law, the *Danforth* Court stated that it is outweighed by the fundamentals of federalism.

148. *Id.* at 1107.

149. *See e.g.* Robert F. Williams, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE (revised ed., Trenton, N.J.: Rutgers University Press 1997).

150. *See* George Blum, et. al, *Federal Constitution as Providing a Floor for State Constitutional Rights*, 16 Am. Jur. 2d Constitutional Law § 88 (2012).

151. 552 U.S. 264 (2008).

152. *Id.* at 275.

153. *Id.* at 277.

154. 645 F.3d 630 (3d Cir. 2011).

*B. Implications*

Following the rulings in *Nuñez-Valdéz* and *Padilla*, many New Jersey defendants subject to deportation filed for post-conviction relief.[155] According to the Administrative Office of the Courts, 257 cases[156] were stayed while the New Jersey Supreme court considered the consolidated cases of *Gaitan* and *Goulbourne*.[157]

As a result of the court's February 28, 2012 decision, the stay has been lifted. Courts are now in the process of dismissing the PCR petitions that have been bound by the Appellate Division's embrace of "pipeline" retroactivity.[158] The convictions have now been reinstated and "deportations will inevitably follow for defendants like Goulbourne, who is free on bail."[159]

Due to the tension between the Third Circuit's holding in *Orocio*, which applies *Padilla* retroactively on collateral review, and the New Jersey Supreme Court's holding in *Gaitan*, which does not, it is likely that state defendants facing deportation will seek federal habeas corpus review. In his dissent in *Gaitan* Justice Albin warned of precisely this problem.[160] Justice Albin argued that the practical effect of the holding of the New Jersey Supreme Court would be minimal, given the federal relief that is available to state defendants.[161] Deportable defendants that exhaust their state remedies can pursue relief on habeas review.

Like the pre-*Padilla* cases, the issue of whether *Padilla* applies retroactively on collateral review has divided state courts and lower federal courts. For instance, New Jersey's neighbors in the Third Circuit, the Commonwealth of Pennsylvania[162] and Maryland,[163] have both decided, at least at the appellate level, that *Padilla* applies retroactively. Rather than create a new rule, the Pennsylvania court

155. *See* Editorial, N.J L.J., March 12, 2012, at 26.

156. Mary Pat Gallagher, *Rule Requiring Advice on Guilty Plea's Deportation Effect is Prospective Only*, N.J. L.J., March 5, 2012, at 4. *See also* State v. Bellamy, 178 N.J. 127, 142 (2003) (declining to apply full retroactivity because of the lack of data on the number of cases that would be affected and the disruption to the administration of justice). *See also* State v. Johnson, 166 N.J. at 547 (declining to apply decision retroactively because such a ruling would result in a large number of petitions by inmates for post-conviction relief).

157. Editorial, N.J. L.J., March 12, 2012, at 26.

158. *Id*.

159. *Id*.

160. State v. Gaitan, 37 A.3d 1089, 1118 (N.J. 2012)(Albin, J., dissenting).

161. *Id*.

162. *See* Commonwealth of Pennsylvania v. Garcia, 23 A.3d 1059 (Pa. Super. Ct. 2011) *appeal denied*, 2012 WL 165069 (Jan. 20, 2012).

163. *See* Denisyuk v. State, 30 A.3d 914, 923-24 (2011).

stated: "*Padilla* clarified and refined the scope of the criminal defendant's long-standing constitutional right to the effective assistance of counsel during the plea process."[164]

Ultimately, the Supreme Court of the United States will have to decide the issue. In the interim, state defendants want to extend the stays on their PCR petitions in order to avoid deportation. According to a recent report in the *New Jersey Law Journal*, "the state attorney general will not oppose an application to extend the stays . . . while defendants await the inevitable decision . . . to resolve the conflict among the circuits."[165]

In the meantime, the decision in *Gaitan* will keep many New Jersey defense attorneys from being labeled "ineffective counsel." This is because the court rejected the petitioners' ineffective assistance of counsel claims based upon the content of the plea form and the plea colloquy delivered by the judge. After rejecting the retroactivity of *Padilla*, the majority applied the *Nuñez-Valdéz* standard to the facts of the defendants' plea hearings. For Defendant Gaitan, the court highlighted that the content of Question 17 on the standardized plea form provided sufficient notice that deportation was a definite possibility. For Defendant Goulbourne, the majority highlighted the fact that the trial judge extensively questioned him about his knowledge of the deportation consequences of pleading guilty.

In so doing, the court found that both defendants were sufficiently aware of the deportation consequences of pleading guilty so as to meet the constitutional requirement. However, it has been argued that this type of analysis denies defendants the counsel guaranteed by the Sixth Amendment. In this regard, it is thought that a plea form is an administrative document produced by the executive/legislative branch. In New Jersey, the Administrative Office of the Courts ("AOC") crafts the plea form. Also, it is the judge who administers the plea colloquy. The Sixth Amendment guarantees effective counsel. Using the judiciary and the AOC to cure possible defects in the lack of advice provided by counsel may be a way of side-stepping the Sixth Amendment to clear PCR petitions off the dockets.[166] Both *Padilla* and *Nuñez-Valdéz* seem to envision the granting of deportation advice as a private exchange between the defendant and his attorney, and not on the record in front of a judge.

164. Gallagher, *supra* note 156, at 4.

165. *Id.*

166. Danielle M. Lang, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 Yale L.J. 944, 964-65 (2012).

However, if the point is to ensure that defendants make informed, voluntary decisions about pleading guilty, the criminal justice system is served notwithstanding the source of the information.

At oral argument before the Supreme Court of New Jersey, Defendant Gaitan's attorney, Assistant Deputy Public Defender Mark Friedman, argued that the plea form was inadequate. Because the crime to which Defendant Gaitan pled guilty is considered an aggravated felony, the defendant should have been told "You will go," the phrase "may" on the plea form was inadequate.[167] In light of this decision, it seems likely that the AOC will have to consider amending Question 17 to reflect the reality of automatic deportation for those convicted of aggravated felonies.

Although there is no replacement for one-on-one consultation, the overriding concern expressed by noncitizen defendants is their lack of awareness of deportation prior to pleading guilty. Functionally, however, it should not matter how a defendant comes into knowing about the deportation consequences. The plea form clearly explains the consequences and so does the judge. If counsel forgets to mention to the defendant the possibility of deportation prior to the plea hearing, the information is provided to them in the plea hearing in written and oral form. For noncitizens, especially those who are illegally in the country, deportation is a constant fear. Likewise, if the defendant says that he was not informed of the deportation consequences, his signature is on the plea form, which is printed in both English and Spanish.

The reality is that many noncitizens who commit crimes classified as "aggravated felonies" get a windfall. They enter the United States, through legal or illegal means, commit one or more crimes in the United States, benefit from the due process afforded to them in the American criminal justice system, and instead of having to serve the sentence imposed upon them, they are returned to their native country, often at the expense of the American taxpayer.

The procedural timing of when a convicted defendant is deported can vary widely depending on a number of factors, including the jurisdiction of the court, the crime charged, and the applicable immigration policies.[168] In federal court, if a defendant is subject to deportation, it will occur after the federal sentence is served.[169] However, in state court, deportable defendants who have committed

167. Michael Booth, *Justices Ponder Duty to Advise About Guilty Plea's Deportation Consequence*, N.J. L.J., November 14, 2011, at 6.

168. The federal program that currently allows for early release is called Rapid REPAT (Removal of Eligible Parolees Accepted for Transfer).

169. *See* Federal Defender Sentencing Guidelines, *available at* http://www.fdsdi.com/pdf/Client_Sentencing.pdf.

non-violent crimes may be released early from state custody and transferred into the custody of ICE so that they can be deported to their country of origin. In these cases, there is no guarantee that the defendant's country of origin will incarcerate them for the remainder of their sentence.

Financial cost is the driving force behind early release and deportation initiatives.[170] Although the expense of incarceration is a significant consideration,[171] early release from incarceration may contravene the purposes of criminal punishment.[172] If deportation is classified as a "collateral" consequence, then defendants who are deported before completing their sentence are relieved of direct or penal consequences of their criminal behavior. In that vein, civil deportation proceedings may usurp a major function of the criminal justice system. It seems unjust that an alien defendant would serve less time in prison for committing the same crime as a citizen defendant. Society is no less offended because of the defendant's citizenship status.

Going forward, all members of the New Jersey criminal justice system should proceed at a newly heightened level of caution with noncitizen defendants. These are uncertain times for the criminal bar because the division between criminal law and immigration law has been permanently blurred.[173] The standards that Justice Albin argues should have been clear for the past decade,[174] are now unclear for everyone. The guidance provided by *Padilla* is scant. Exactly what defense attorneys need to tell defendants is a hot topic of current debate.

It is controversial to require criminal law attorneys to have immigration law expertise. Immigration law and the process of deportation is complex and involves federal civil proceedings.[175]

170. *See e.g.* Peter H. Schuck, *Deportation Before Incarceration*, Policy Review No. 171, February 1, 2012, *available at* http://www.hoover.org/publications/policy-review/article/106616.

171. *See* John Schmitt, Kris Warner, and Sarika Gupta, Center for Economic and Policy Research, *The High Budgetary Cost of Incarceration*, June 2010, *available at* http://www.cepr.net/documents/publications/incarceration-2010-06.pdf.

172. *See* Francis C. Amendola, et. al., *Judgment, Sentence, and Punishment Generally*, 24 C.J.S. Criminal Law § 1997.

173. *See* Kanstroom, *supra* note 61, at 1468.

174. State v. Gaitan, 37 A.3d 1089, 1114 (N.J. 2012)(Albin, J., dissenting).

175. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (discussing the complexities of immigration law: "Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such

Removal of criminal aliens takes many forms. In the context of Defendants Gaitan and Goulbourne, removal is a form of post-entry social control, which regulates the conduct of those who have been legally admitted into the country but then engage in prohibited behaviors. Immigration statutes and policies are in a constant state of flux. In recent years, the Supreme Court has decided cases involving the immigration consequences of crimes.

The more knowledge that attorneys are required to know about this complicated topic outside their practice area, the more potential malpractice liability exists. Many criminal defense attorneys work in understaffed public defender's offices. Burdening them with the additional demands of navigating the ever-changing immigration laws creates a resource allocation problem: they cannot handle the same number of cases if they have to be abreast of another set of laws. Nonetheless, deportation would understandably become part of the plea bargain calculus for noncitizen defendants.[176]

Some advocates propose that "regardless of the current Sixth Amendment holdings, an attorney's ethical and moral duty is to advise his client about the immigration consequences of a criminal conviction."[177]

Criminal deportation is a huge issue in the United States. Nearly 55 percent, or 216,698, of the people removed in FY 2011 were convicted criminal aliens – an 89 percent increase in the removal of criminals from FY 2008, and the largest number of criminal aliens removed in agency history.[178] Therefore it is likely that the Supreme Court will decide the issue of retroactivity in the near future.

## VI. CONCLUSION

Ultimately, by looking to the text of *Padilla* and the disagreement among "reasonable minds" that existed prior to *Padill*a, the majority properly concluded that *Padilla* announced a new rule of law. Therefore, Defendants Gaitan and Goulbourne were not entitled to retroactive application of *Padilla*. Because both

cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear").

176. Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequence of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 57-58 (2010).

177. Vazquez, *supra* note 34, at 37.

178. Kanstroom, *supra* note 61, at 1465-66; United States Immigration and Customs Enforcement, Removal Statistics for Criminal Aliens 2011, *available at* http://www.ice.gov/removal-statistics.

defendants had been informed of the deportation consequences of a guilty plea through the plea form and by the judge's colloquy, the majority properly denied them relief under the *Nuñez-Valdéz* misinformation standard. In the absence of clearly expressed Supreme Court intent to the contrary, the Supreme Court of New Jersey arrived at a fair and logical conclusion. New Jersey state courts are not required to follow the precedent set by lower federal courts on matters of constitutional interpretation.