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The Supreme Court's Ruling in *Chaidez v. United States*: Averting a Flood of *Padilla* Litigation by Former Prisoners

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The U.S. Supreme Court often uses the image of a ''flood'' when it predicts that a rule will cause an increase in lawsuits, especially prisoner suits.[1] On Feb. 20, the court decided *Chaidez v. United States*.[2] Applying the retroactivity doctrine of *Teague v. Lane*[3] and its progeny, the court held that the rule in *Padilla v. Kentucky* does not apply retroactively to cases on collateral review. *Padilla* held that the Sixth Amendment guarantees noncitizens a right to a reasonable level of advice about the immigration consequences of a guilty plea. Thus, *Chaidez* means that federal habeas corpus petitioners and 28 U.S.C. § 2255 movants[4] do not receive the benefit of *Padilla* unless their conviction became final after that case was decided on March 31, 2010.[5]

Chaidez promotes the finality of criminal convictions just as any application of *Teague* on post-conviction review. But federal post-conviction relief usually extends only to individuals who are ''in custody.'' *Chaidez* is different because it involved the denial of a petition for a writ of coram nobis—a relatively obscure vehicle available to challenge an unlawful conviction when its effects linger after the sentence is completed.[6] Coram nobis definitely applies to immigration consequences and grants individuals in U.S. Immigration and Customs Enforcement custody after release, or already deported, a vehicle to challenge their conviction. Given that most convictions carry some lingering civil consequence,[7] coram nobis may be available to most ex-offenders, although it remains to be seen whether *Padilla* will be applied beyond immigration consequences.

Where it is available, coram nobis relief sidesteps many of the procedural difficulties faced by offenders still in custody. Unlike more common forms of post-conviction relief, the various procedural limitations on post-conviction review (most importantly, the statute of limitations) generally do not apply to coram nobis petitions. Thus, *Chaidez* may be the only procedural device federal courts can use to turn aside challenges to very old convictions.

In this article, I review retroactivity jurisprudence and the rule in *Padilla* before moving on to *Chaidez*. I then examine some of the procedural hurdles faced by offenders still in custody, concluding that for them

[1] See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1484-85, 87 CrL 3 (2010) (discussing the court's ''floodgates'' concern with respect to the decision in *Hill v. Lockhart*, 474 U.S. 52 (1985)); see also Adam Liptak, ''Fearing Deluge of Litigation, Supreme Court Works the Floodgates,'' N.Y. Times, March 4, 2013, available at http://www.nytimes.com/2013/03/05/us/supreme-court-justices-worry-about-a-flood-of-cases.html?_r=0.

[2] 2013 BL 44424, 92 CrL 609 (U.S. 2013).

[3] 489 U.S. 288 (1989). The *Teague* doctrine was accepted by a majority of the court in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[4] Although the court did not decide whether *Teague* applies to federal post-conviction review under Section 2255, every circuit court of appeals has held that it does. State collateral relief may be available, as the *Teague* doctrine does not preclude more generous retroactivity.

[5] States may apply a more generous retroactivity standard than *Teague*, so *Padilla* eventually may apply retroactively in some state courts.

[6] See *United States v. Morgan*, 346 U.S. 502 (1954) (holding that the All Writs Act, 28 U.S.C. § 1651, grants federal courts the power to issue writs of coram nobis).

[7] For a relatively complete catalog, visit http://www.abacollateralconsequences.org.

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Chaidez is not very important. For the flood of ex-offenders who could have proceeded in coram nobis, however, *Chaidez* means that the effects of convictions no longer considered constitutionally sound will linger forever.

The *Teague* Doctrine and *Padilla*

Before *Teague*, the inquiry to determine whether a new Supreme Court decision on criminal procedure applied retroactively depended on the purpose of the new rule, the reliance interest on the pre-existing law, and the overall effect of retroactive application of the new rule on the administration of justice.[8] This inquiry applied to all post-trial new rules, whether they were announced during direct appeal or after its conclusion. Shortly before *Teague* was decided, however, the Supreme Court held that defendants would receive the benefit of all decisions announced while their direct appeal was pending.[9]

Teague did not go so far with respect to decisions announced after direct appeal was finished. It did, however, create a new inquiry informed by the structural function of federal habeas corpus review. According to *Teague* (and drawing on the reasoning of John Marshall Harlan II in various dissents[10]), federal habeas review serves two main purposes: first, ''to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted''; and second, to ensure ''the fundamental fairness of the trial.''[11] Only new rules of criminal procedure[12] that create principles so central to justice that they are ''implicit in the concept of ordered liberty'' are exempt from *Teague*'s general rule that new constitutional rules of criminal procedure are not retroactive on collateral review.[13] The Supreme Court has suggested that only rules so basic as *Gideon v. Wainwright* itself may qualify.[14]

Perhaps unsurprisingly given that high threshold, retroactivity cases often turn on whether a rule is ''new.'' Justice Sandra Day O'Connor wrote, ''A case imposes a new rule when it breaks new ground or imposes a new obligation on the States of the Federal Government . . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.''[15] Later decisions have gone so far as to classify as ''new'' decisions that resolve any issue ''susceptible to debate among reasonable minds.''[16] An exception of sorts exists for *Strickland* claims, however; these cases reason that *Strickland* is such a general rule that most specific applications will not be ''new.''

The rule in *Padilla*—that criminal defendants are entitled to a reasonable level of advice about the immigration consequences of a guilty plea—had characteristics of both old rules and new rules. Aside from the fact that it was an application of the general rule in *Strickland*, the Supreme Court had earlier observed that competent counsel would offer noncitizens a reasonable level of advice about the consequences of accepting a guilty plea.[17] Essentially, *Padilla* makes clear that no shorthand version of *Strickland* that depends on the direct/collateral consequences distinction can replace *Strickland* itself. On the other hand, *Padilla* expanded *Strickland* beyond advice about direct consequences, which could be interpreted as changing the scope of the Sixth Amendment—as opposed to other *Strickland* decisions, which made relatively minor, predictable changes to the content of the duty to advise. And although ''the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new,''[18] it is significant that only three state courts (and no federal court) had adopted the rule in *Padilla* (although some would grant relief for affirmative misadvice by counsel).[19]

Those (including this author[20]) who predicted that *Padilla* would apply retroactively were disappointed. The majority in *Chaidez* framed the question as whether advice about deportation was '' 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction, rather than a component of the criminal sentence.''[21] Stating the new rule inquiry as whether the rule ''would have been 'apparent to all reasonable jurists,' ''[22] the court observed, ''When we decided *Padilla*, we answered a question about the Sixth Amendment's reach that we had left open, in a way that

[8] *Linkletter v. Walker*, 381 U.S. 618 (1965).
[9] *Griffith v. Kentucky*, 479 U.S. 314 (1987).
[10] *Sanders v. United States*, 373 U.S. 1 (1963).
[11] *Teague*, 489 U.S. at 312.
[12] Rules of constitutional law that decriminalize proscribed conduct are also applied retroactively.
[13] *Mackey v. United States,* 401 U.S. 667, 693 (1971).
[14] *Whorton v. Bockting,* 549 U.S. 406, 418-21, 80 CrL 591 (2007).

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[15] *Teague*, 489 U.S. at 301.
[16] *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)); see also *Beard v. Banks*, 542 U.S. 406, 413, 75 CrL 288 (2004) (applying *Teague* and stating that the issue is whether, at the time of the conviction, the ''unlawfulness of [defendant's] conviction was apparent to all reasonable jurists'').
[17] *INS v. St. Cyr,* 533 U.S. 289, 323 n. 50, 69 CrL 369 (2001) (''Even if the defendant were not initially aware of [a subsequently excised provision affording the attorney general discretion to allow deportable aliens to remain], competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance.'').
[18] *Williams v. Taylor,* 529 U.S. 362, 410 67 CrL 59 (2000) (O'Connor, J., for the court).
[19] *Padilla* 130 S. Ct. at 1481, 1487-88.
[20] See Gray Proctor and Nancy King, ''Post *Padilla*: *Padilla*'s Puzzles for Review in State and Federal Courts,'' 23 FED. SENT'G REP. 239, 240 (2011).
[21] *Chaidez*, slip op. at 5-6.
[22] *Chaidez*, slip op. at 4 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).

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altered the law of most jurisdictions.''[23] The court explained that, in so doing, it had ''resolved the threshold question before us by breaching the previously chink-free wall between direct and collateral consequences.''[24] And the pre-*Padilla* state of law was not objectively unreasonable; the court had left the question open, and lower courts had uniformly decided the issue contrary to *Padilla*.

The dissenters contended that ''where we merely apply *Strickland* in a way that corresponds to an evolution in professional norms, we make no new law.''[25] As for whether the Sixth Amendment extends to advice about collateral consequences, they pointed to the fact that lower courts had already answered in the affirmative by creating an exception for misadvice. When framed this way, the majority's ''threshold issue'' has already been answered. Nevertheless, this analysis did not carry the day, and *Padilla* is unavailable to litigants whose convictions were final before the decision issued.

Chaidez Prevents a Potential Flood of *Padilla* Claims

If the metaphor is to be a flood, then for most post-conviction review proceedings federal courts are well protected by the levees of statutes of limitations and restrictions on successive habeas filings. These procedural restrictions, enacted nearly 20 years ago in the Antiterrorism and Effective Death Penalty Act,[26] leave petitioners with a very narrow window of opportunity to raise claims found retroactive under *Teague*. Offenders generally have only one opportunity to press their claims for post-conviction relief, which must be brought at the earliest possible opportunity. Moreover, a one-year statute of limitations exists for both state and federal prisoners.[27] There is an exception to both rules for claims that are based on a new rule of law declared retroactive by the Supreme Court. The statute of limitations for bringing a ''new rule'' claim, however, begins to run when the new rule is announced, *not* when it is declared retroactive.[28] Because the court's practice is to leave the question of retroactivity for successive cases, *every single case to which Padilla could have applied was already in the pipeline when Chaidez was decided*. Anyone who waited until *Chaidez* to challenge a conviction was already out of luck. Based on my anecdotal experience as a pro se law clerk in federal district court and a staff attorney for a federal court of appeals, I believe many prisoners would not raise their *Padilla* claims in time. Thus, I doubt *Chaidez* made much difference to anyone still in custody pursuant to a plea of guilty.

Because *Padilla* is about a collateral consequence of conviction, however, the relatively obscure writ of error coram nobis offers a procedural vehicle to litigants who have been released from state custody. This could slow down the removal process greatly.[29] Those already subject to immigration restrictions due to long-expired sentences would also be able to challenge their convictions. Additionally, courts would have to deal with litigation by citizens using coram nobis to expand the scope of *Padilla* beyond immigration consequences—for example, where a defendant was not advised that he would forfeit his pension upon conviction. *Chaidez* disposed of these potential litigants in one fell swoop, preventing federal courts from having to face what could have been a real deluge of litigation. Although the court did not mention any water-based disaster that would ensue if *Padilla* had been held retroactive, the justices were surely aware of the possibility.

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[23] *Chaidez*, slip op. at 9.

[24] Id.

[25] *Chaidez* dissent, slip op. 3.

[26] The bar on successive petitions was already a prudential doctrine; AEDPA took from the courts the power to make equitable exceptions. AEDPA's one-year statute of limitations was more of a sea change, replacing the laches-style limitation period.

[27] 28 U.S.C. § § 2244, 2255.

[28] See *Dodd v. United States,* 545 U.S. 353, 358, 77 CrL 321 (2005).

[29] According to ICE, 225,390 people were removed from the United States due to a criminal conviction in 2012.