Sixth Amendment — Assistance of Counsel — Retroactivity — Chaidez v. United States

The jurisprudence that governs ineffective assistance of counsel dictates a conclusive if imprecise timestamp when attorney deficiency outstrips constitutional bounds: the very moment prevailing norms of professional conduct deem it so.[1] To exactly which defendants — and in cases how far back — the fruits of these constitutional rules extend is an altogether different matter. Under *Teague v. Lane*,[2] Court decisions on criminal procedure that are novel — those that break new ground, impose a new obligation, or produce a result not dictated by precedent as "apparent to all reasonable jurists"[3] — cannot retroactively apply to persons whose convictions are already final.[4] Last Term, in *Chaidez v. United States*,[5] the Supreme Court declined to apply retroactively the edict in *Padilla v. Kentucky*[6] requiring that attorneys counsel defendants, however cursorily,[7] on the deportation consequences of guilty pleas because it constituted a new rule.[8] In its close reading of *Padilla*, the *Chaidez* majority mistook mere argument by refutation as proof of *Padilla*'s novelty, relegating the discernment of retroactivity to a debate over argumentative style and inverting the ordinary incentives of Court opinion writers. As any "reasonable jurist"[9] would, Justice Stevens in the *Padilla* majority addressed the leading counterargument of courts below, expressly not because he found it particularly persuasive or applicable. Conventions of rhetoric dictated he do so.

Roselva Chaidez, a Mexican native who became a legal U.S. permanent resident in 1977, pleaded guilty to two counts of mail fraud for

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[1] *See* Strickland v. Washington, 466 U.S. 668, 690 (1984); Bobby v. Van Hook, 130 S. Ct. 13, 18–19 (2009) (finding that 2003 guidelines on appropriate attorney conduct could not apply retroactively to a 1985 trial); Gary Feldon & Tara Beech, *Unpacking the First Prong of the* Strickland *Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 U. FLA. J.L. & PUB. POL'Y 1, 4 (2012) ("Identifying the professional norms that prevail at the specific time of representation is inherently problematic because norms . . . constantly evolve . . . .").

[2] 489 U.S. 288 (1989).

[3] Lambrix v. Singletary, 520 U.S. 518, 527–28 (1997).

[4] *Teague*, 489 U.S. at 310.

[5] 133 S. Ct. 1103 (2013).

[6] 130 S. Ct. 1473 (2010).

[7] If deportation is unambiguously a consequence, an attorney must inform her client of that fact. *Id.* at 1483. If the law is not "succinct and straightforward," an attorney discharges her duty by noting merely that deportation "may" result. *Id.*

[8] *Chaidez*, 133 S. Ct. at 1113.

[9] Lambrix v. Singletary, 520 U.S. 518, 528 (1997).

her role in fleecing an automobile insurance company of $26,000.[10] As an aggravated felony, her offense — in addition to carrying a sentence of four years' probation and payment of restitution[11] — subjected her to mandatory deportation for a fraud involving at least $10,000.[12] Chaidez was reportedly unaware of the risk of removal at the time of her plea, and she alleged that her attorney failed to inform her of it.[13] The government did not initiate removal proceedings until 2009, five years after her conviction became final and when the fifty-five-year-old Chaidez — a U.S. resident of nearly forty years with three citizen children and two citizen grandchildren[14] — disclosed the conviction in her citizenship interview.[15] In an effort to avoid removal, Chaidez petitioned for a writ of *coram nobis*,[16] arguing that she had been deprived of effective assistance of counsel as safeguarded by the Sixth Amendment.[17] With her petition pending, the Supreme Court in *Padilla* vindicated the substance of her underlying claim.[18]

The U.S. District Court for the Northern District of Illinois, in an admittedly close call by Judge Gottschall, found *Padilla* not to constitute a new rule but rather a mere application of *Strickland* to new facts.[19] Under *Teague*, new rules of criminal procedure cannot be applied to cases already final on direct review,[20] but the district court's determination allowed the *Padilla* holding to apply retroactively to

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[10] *Chaidez*, 133 S. Ct. at 1105.

[11] *Id.* at 1106.

[12] Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011). Chaidez personally earned only $1,200 for her role in the scheme, in which she falsely claimed to have been a passenger in a car involved in a collision. Chaidez v. United States, NAT'L IMMIGRANT JUST. CENTER (Feb. 20, 2013), http://www.immigrantjustice.org/court_cases/chaidez-v-united-states [hereinafter Chaidez, NAT'L IMMIGRANT JUST. CENTER].

[13] *Chaidez*, 133 S. Ct. at 1106.

[14] Chaidez, NAT'L IMMIGRANT JUST. CENTER, *supra* note 12.

[15] *Chaidez*, 133 S. Ct. at 1106; Elizabeth B. Wydra, *Supreme Court Considers Important Case for Immigrants' Constitutional Rights in Rare Thursday Hearing*, CONST. ACCOUNTABILITY CENTER (Nov. 1, 2012), http://theusconstitution.org/text-history/1667/supreme-court-considers-important-case-immigrants'-constitutional-rights-rare.

[16] This petition allows a person no longer in custody to collaterally attack a criminal conviction. *Chaidez*, 133 S. Ct. at 1106 n.1.

[17] *Id.* at 1106.

[18] *Id.*

[19] United States v. Chaidez, 730 F. Supp. 2d 896, 902 (N.D. Ill. 2010).

[20] Teague v. Lane, 489 U.S. 288, 310 (1989). Two exceptions allow new rules to nonetheless apply retroactively: rules placing primary conduct beyond government proscription and "watershed rules . . . implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 494–95 (1990) (quoting *Teague*, 489 U.S. at 311) (internal quotation mark omitted). Chaidez did not argue, and the Court accordingly declined to consider, either exception, *see Chaidez*, 133 S. Ct. at 1107 n.3, and in fourteen opportunities, the Court has never found a rule to be watershed, Jennifer H. Berman, Padilla v. Kentucky*: Overcoming* Teague*'s "Watershed" Exception to Non-Retroactivity*, 15 U. PA. J. CONST. L. 667, 685 (2012).

Chaidez.[21] On the merits, the judge ruled that Chaidez's counsel had been deficient, that the attendant error resulted in prejudice, and ultimately, that her conviction be vacated.[22]

The Seventh Circuit reversed and remanded, holding that *Padilla* announced a new rule — "susceptible to reasonable debate"[23] — that could not be deployed in Chaidez's favor.[24] Judge Flaum, joined by Judge Bauer, stressed the splintered "array of views"[25] within the *Padilla* Court, in which a concurrence dubbed the majority decision "dramatic" and "a major upheaval"[26] and a dissent argued that the ruling had no "basis in text or in principle."[27] Court precedent had, in fact, pointed in the other direction, he argued: pleas were deemed sufficiently voluntary when defendants were made aware of *direct* consequences.[28] State and federal courts before *Padilla* had uniformly declined to extend a Sixth Amendment right to be advised of *collateral* consequences, like deportation.[29] The nuance in the *Padilla* holding itself, requiring greater specificity of advice for simple immigration matters over more complicated ones, lent it greater claim to newness.[30] Judge Williams dissented, arguing that the prevailing professional norms had long coalesced in favor of mandating advice on the risks of deportation, and that lower courts relied on a direct/collateral dichotomy that the *Padilla* Court explicitly rejected.[31]

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[21] Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011).

[22] *Chaidez*, 133 S. Ct. at 1106.

[23] *Chaidez*, 655 F.3d at 689.

[24] *See id.* at 694.

[25] *Id.* at 689 (quoting O'Dell v. Netherland, 521 U.S. 151, 159 (1997)) (internal quotation marks omitted).

[26] *Id.* (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1488, 1491, 1492 (2010) (Alito, J., concurring in the judgment)) (internal quotation marks omitted).

[27] *Id.* (quoting *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting)) (internal quotation marks omitted).

[28] *Id.* at 691 (citing Brady v. United States, 397 U.S. 742, 747 (1970)).

[29] *Id.* Although the dividing line between consequences direct and collateral is not altogether sharp, *see* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (2008), collateral consequences are generally "those matters not within the sentencing authority of the state trial court," *Padilla*, 130 S. Ct. at 1481. Following *Padilla*, courts have required that constitutionally competent attorneys make their clients aware of certain collateral consequences. *See, e.g.*, Taylor v. State, 698 S.E.2d 384 (Ga. 2010) (sex offender status); Commonwealth v. Abraham, 996 A.2d 1090 (Pa. Super. Ct. 2010) (vested pension benefits); Calvert v. State, 342 S.W.3d 477 (Tenn. 2011) (lifetime community supervision).

[30] *Chaidez*, 655 F.3d at 693.

[31] *Id.* at 694, 697 (Williams, J., dissenting).

The Supreme Court affirmed.[32] Writing for the Court, Justice Kagan[33] held that, although "garden-variety applications" of *Strickland* beget no new rules,[34] *Padilla* "did something more" in that it contemplated a threshold question.[35] Before discerning *how Strickland* applied, the *Padilla* Court had to grapple first with *whether* it applied at all, a determination the Court had never before settled.[36] Lower courts had filled that gap, almost unanimously concluding that the ambit of Sixth Amendment protection excluded advice on a conviction's collateral consequences.[37] *Padilla* upended that trend. At least for the special case of deportation, the *Padilla* Court collapsed the entrenched distinction between direct and collateral consequences.[38] Although case law had already settled that affirmative misrepresentations surrounding deportation consequences *do* count as deficient attorney performance, that rule "co-existed happily with precedent" as ancillary to the direct/collateral debate.[39] Dicta in *INS v. St. Cyr*[40] asserting generally that competent attorneys ought to speak to deportation risks[41] — but nowhere directly implicating the Sixth Amendment — may have proven instructive but, as Justice Kagan noted for the Court, relaying "what is common sense"[42] is not a constitutional mandate.[43] It was *Padilla* — and it alone — that demanded as a matter of constitutional law that attorneys vocalize deportation consequences.[44]

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[32] *Chaidez*, 133 S. Ct. at 1107.

[33] Justice Kagan was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito.

[34] *Chaidez*, 133 S. Ct. at 1107. In fact, Justice Kagan conceded that applying a general standard to factual circumstances rarely states a new rule, and *Strickland* itself "'provides sufficient guidance for resolving virtually all' claims of ineffective assistance." *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 391 (2000)).

[35] *Id.* at 1108.

[36] *Id.* In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court extended ineffective assistance of counsel claims to the plea bargaining stage. *Id.* at 58. It stopped short of including advice on the collateral consequence of parole eligibility within the scope of Sixth Amendment protection, instead disposing of the case on the petitioner's failure to show prejudice. *Id.* at 60.

[37] *Chaidez*, 133 S. Ct. at 1109. All ten federal appellate courts that considered it and appellate courts in almost thirty states prior to *Padilla* held as much. *Id.*

[38] *Id.* at 1110. Deportation is — as a particularly severe penalty that is "civil in nature" but "nevertheless intimately related to the criminal process" and "nearly an automatic result for a broad class of noncitizen offenders," Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) — "uniquely difficult to classify as either a direct or a collateral consequence," *id.* at 1482.

[39] *Chaidez*, 133 S. Ct. at 1112.

[40] 533 U.S. 289 (2001).

[41] *See id.* at 323 n.50.

[42] *Chaidez*, 133 S. Ct. at 1112.

[43] *See id.* at 1112–13.

[44] *Id.* at 1113.

Justice Thomas concurred in the judgment, penning separately his unaltered belief that *Padilla* had been wrongly decided.[45] Resolute that it ought to apply neither retroactively nor prospectively, he deemed the *Teague* analysis altogether unnecessary.[46]

In dissent, Justice Sotomayor, joined by Justice Ginsburg, argued that *Strickland* had purposely left the content of deficient performance subject to change, supplying justification for the Court's thus far unfettered history of applying *Strickland* retroactively.[47] She cast the *Padilla* Court's express concern over the increasingly grave and automatic consequence of deportation as a product of the professional norms that had come to fruition before *Padilla*, not as the exclusive motivating force behind scrapping the direct/collateral fault line.[48] The Court had not exactly discarded the distinction, she noted, but had cast it aside as irrelevant.[49] The distinction had, furthermore, "already been dealt a serious blow" by the lower courts, which had made an exception for affirmative misstatements that relate to deportation.[50] The near unanimity in the lower courts cited by the majority incorporated cases across a thirty-year span — many of them decided before immigration consequences had become more draconian and before the Court had suggested, in *St. Cyr*, that competent attorneys warn their clients about deportation.[51] Attributing the driving force behind the majority's analysis to the charges of upheaval leveled by the critics of *Padilla*, Justice Sotomayor noted that only objective assessments of precedent, rather than subjective perceptions, ought to hold sway for *Teague* purposes.[52]

The majority's *Teague* analysis yielded too much determinative power to the argumentative choices of an opinion's author. By merely taking the opposing argument as a serious one, even in rejecting it, Justice Stevens's words — as well as their order — were construed by Justice Kagan in *Chaidez* to close the door to retroactive application, a perversion of *Teague* that trained too closely on linguistic form, not substance. *Chaidez* ultimately produced dueling incentives that counsel writers for the Court, as a matter of argument, to bolster their positions by charitably responding to contrary points and, conversely, to refrain from elevating unpersuasive arguments that may be used to decry their opinions as marked breaks with the past.

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[45] *Id.* at 1114 (Thomas, J., concurring in the judgment).

[46] *Id.*

[47] *Id.* at 1114–15 (Sotomayor, J., dissenting) ("[D]espite the many different settings in which it has been applied, we have never found that an application of *Strickland* resulted in a new rule.").

[48] *Id.* at 1116–17.

[49] *Id.* at 1117.

[50] *Id.* at 1119.

[51] *Id.* at 1118.

[52] *Id.* at 1120.

Justice Kagan in *Chaidez* converted a logically unnecessary discussion of the direct/collateral distinction by Justice Stevens in *Padilla* into the crux of the case against *Padilla*'s retroactivity. First, Justice Kagan held Justice Stevens firmly to the order of his words. Justice Kagan noted that the threshold question dispositive against retroactivity in *Padilla* — even though Justice Stevens rejected the very applicability of the question — came "[b]efore"[53] and "prior"[54] to his treatment of the *Strickland* test. The temporal allusion was not merely figurative. She pointed to the structure of the *Padilla* decision — the fact that the question was featured "in a separately numbered part of the opinion"[55] — to highlight its preeminence.[56] She reduced the retroactivity test of newness in *Teague* to a gauge of exposition, not precedent: describing the *Chaidez* dissent's "story line" as wrong and as a "different account"[57] that "picks up in the middle"[58] of *Padilla*. Had Justice Stevens debunked the direct/collateral divide in a later segment of *Padilla*, the ruling in *Chaidez* may have lost some of its claim to nonretroactivity.

Second, Justice Kagan found that even "in refusing" the distinction, "the *Padilla* Court did something novel."[59] That novelty cannot have sprung from prior Supreme Court precedent, as none exists.[60] Justice Kagan readily admitted that "no decision of our own committed [the Court] to" the distinction.[61] The categories had been lent power only by lower courts, and the Supreme Court — as the final arbiter of the

[53] *Id.* at 1110 (majority opinion).

[54] *Id.* at 1108.

[55] *Id.* at 1110.

[56] Judge Williams, dissenting in the Seventh Circuit case and objecting to a similarly mechanical approach to the panel's close reading of *Padilla*, argued that it "is of no consequence" that the Court "began" where it did and dismissed the chronology as the mere "analytical mechanism" by which the Court arrived at a *Strickland* violation. Chaidez v. United States, 655 F.3d 684, 696 (7th Cir. 2011) (Williams, J., dissenting).

[57] *Chaidez*, 133 S. Ct. at 1111.

[58] *Id.* at 1112 n.13.

[59] *Id.*

[60] The Court has before distinguished awareness of the direct consequences of guilty pleas, in particular, as paramount. *See* Brady v. United States, 397 U.S. 742, 747 (1970). In that case, the Court insisted that a defendant be "fully aware of the direct consequences" of a guilty plea — in judging a separate criterion (its voluntariness), in relation to a different Amendment (the Fifth), in a different context (under false police threat of capital punishment). *Id.* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on confession of error on other grounds*, 356 U.S. 26 (1958)). Justice Scalia, in fact, suggested in his *Padilla* dissent that a defendant's claim of involuntariness is a wholly separate due process claim, not a right to counsel claim, and that therefore "we should not smuggle [this] claim into the Sixth Amendment." Padilla v. Kentucky, 130 S. Ct. 1473, 1496 (2010) (Scalia, J., dissenting).

[61] *Chaidez*, 133 S. Ct. at 1110.

law — is not bound by the precedent of those courts.[62] The Court has nonetheless previously allowed lower court disagreement to *inform Teague* analysis, as long as the determinations of those courts were reasonable.[63] Justice Stevens in *Padilla*, however, had eschewed the distinction as irrelevant, one the Court "need not consider . . . because of the unique nature of deportation,"[64] which cannot be perfectly "classif[ied] as either a direct or a collateral consequence."[65] In striving to dispel the persuasiveness of the lingering direct/collateral categories the Court itself had not developed, Justice Stevens counterintuitively elevated the argument as worthwhile, to the aid of a *Chaidez* Court dissecting his words three years later.

Detractors may yet argue that Justice Stevens had no leeway in the matter. It was not by choice or design that he even entertained the question, the argument goes: it was itself compelled, a powerful indicator that the direct/collateral distinction had so taken root that it *had* to be excised to reach the *Padilla* result. *Chaidez* did not prioritize the language in *Padilla* over precedent in finding nonretroactivity; the precedent itself, first and inexorably, dictated the language in *Padilla*. In that way, the language in *Padilla* was the effect, not the cause. Justice Kagan intimated as much, noting that the *Padilla* Court "*had* to develop new law" and that its "first order of business" was to consider the aptness of the distinction.[66] Indeed, whatever the tally in the lower courts as a whole, the Kentucky Supreme Court (from which the *Padilla* petition for certiorari came) relied principally on the distinction.[67] Aside from the argumentative impulse, Justice Stevens may have borne a more formal obligation to refute the leading justification in opposition, an obligation that itself reflects the groundbreaking nature of what *Padilla* achieved.

But Justice Stevens arguably had no obligation to address the direct/collateral distinction developed by the lower courts. Judges often engage in the art of minimalism, making "deliberate decisions about what should be left unsaid," "doing and saying as little as necessary to

[62] In dissent, Justice Sotomayor implied as much in claiming "there is no reason to put these lower court cases . . . ahead of this Court's simple and clear reasoning in *Padilla*." *Id.* at 1120 (Sotomayor, J., dissenting).

[63] *See, e.g.*, Sawyer v. Smith, 497 U.S. 227, 234 (1990); Saffle v. Parks, 494 U.S. 484, 490 (1990); Butler v. McKellar, 494 U.S. 407, 415 (1990); *The Supreme Court, 1989 Term — Leading Cases*, 104 HARV. L. REV. 308, 312 (1990).

[64] 130 S. Ct. at 1481.

[65] *Id.* at 1482.

[66] *Chaidez*, 133 S. Ct. at 1111 (emphasis added).

[67] *See Padilla*, 130 S. Ct. at 1478.

justify an outcome."[68] One scholar, in full-throated defense of the practice, has termed it "the *constructive uses of silence*."[69] Indeed, by deeming the distinction immaterial, Justice Stevens engaged in that longstanding practice of judicial economy to "not decide issues unnecessary to the resolution of a case."[70] He did not take up the substance of the distinction — its benefits or drawbacks, its origins or rationale — but merely noted that it would play no role whatsoever in the case's disposition.

Yet the *Chaidez* version of the *Teague* analysis of newness construed the mere mention of the direct/collateral distinction as a contributing factor to the *Padilla* holding. The logical progression of the *Chaidez* reasoning would have had Justice Stevens ignore the distinction altogether if it had done absolutely no work in his analysis. The *Chaidez* Court offered an alternative that closely tracks the actual *Padilla* holding: "*Padilla* would not have created a new rule . . . had [it] merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent."[71]

Minimalism is not always preferable, but in cases of inordinate controversy — as the concurring and dissenting opinions in *Padilla* depicted the case — saying less may do more. Silence may promote deferring to the democratic process, putting theoretical disagreement aside, rallying around an outcome, or supplying "a relatively modest rationale on its behalf."[72] That is not to say that Justice Stevens *ought* to have elected silence over refutation. The latter contributes to the persuasiveness of an opinion, and Justice Stevens ultimately needed at least five votes to bring his words into force. The legitimacy of minimalism suggests, instead, that Justice Stevens *could* have said less, that he was not bound by precedent or Supreme Court convention to address the direct/collateral divide. The *Padilla* treatment of the threshold question was a veritable rejection, but *Chaidez* motivates judges to take minimalism a step further and disregard leading but ultimately unconvincing counterarguments wholesale.

The ordinary incentives of opinion drafters point in the opposite direction. A Justice is impelled to justify her position — to engage in the "logic of exposition,"[73] to bolster its standing "as the best resolution

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[68] Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996).

[69] *Id.* at 7.

[70] *Id.*

[71] *Chaidez*, 133 S. Ct. at 1108.

[72] Sunstein, *supra* note 68, at 21.

[73] Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 752 (1988) (quoting John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924)).

among competing alternatives."[74] The Court's argumentative practice demands reasoning by refutation, resulting in the inclusion of "[l]ogically unnecessary and redundant argument" for the plain purpose of persuasion.[75] Justices are to "fairly meet[] opposing arguments"[76] in an effort to secure popular acceptance, "for failure to defend against contrasting arguments raises an inference that no adequate defense exists."[77] The dissenting views — from both within and without the Court — therefore merit serious treatment.[78]

A *Teague* retroactivity test that places its locus on determinations of novelty — and additionally, post-*Chaidez*, allows the opposing side to set the terms of the debate[79] — cheapens the exercise into one of choosing among conflicting argumentative principles. By casting an objective dividing line — retroactive application for matters pending on direct review, finality of convictions for matters pending on collateral review, barring certain exceptions[80] — *Teague* sought to stem the vagaries of retroactivity.[81] But the *Chaidez* gloss on *Teague* injects additional arbitrariness into the process, which is now less tied to the

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[74] *Id.* at 753.

[75] *Id.* at 754.

[76] *Id.* at 786.

[77] *Id.* at 786–87.

[78] Justice Powell remarked that he "prefer[red] 'lean' opinions, but [that] it is important to meet honestly and fairly the serious arguments advanced by the losing side or by a dissenting opinion." Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 629 (2008).

[79] Dissents and concurrences seek to shape future cases in directions necessarily dissimilar from the majority. Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2031 (2002). They are prone to "hyperbole," McClurg, *supra* note 73, at 822, and are often "sarcastic" and written with a "poison pen," Chemerinsky, *supra*, at 2021. That phenomenon made for strange allies in *Chaidez*: Justices fully against *Padilla* and Justices in the difficult position of upholding the virtues of a rule while simultaneously renouncing its claim to precedent. Justices Kennedy and Breyer, who signed on to a *Padilla* majority that stated "[o]ur longstanding Sixth Amendment *precedents* . . . demand no less" than requiring deportation warnings, 130 S. Ct. 1473, 1486 (2010) (emphasis added), three years later signed on to a *Chaidez* majority finding that *Padilla* had not been dictated by precedent, *see Chaidez*, 133 S. Ct. at 1107–08. The task endorsed by *Teague* of finding newness in a rule already made law is one of subverting the holding's very justifications, such that Justice Kagan felt it incumbent to insist that "we do not cast doubt on, or at all denigrate, *Padilla*. . . . [A] decision can be right and also be novel." *Id.* at 1111.

[80] *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

[81] *See id.* at 302–03. The *Teague* doctrine, and its recent development, has drawn its share of criticism for imposing an impossibly high bar on retroactivity and parsing similarly situated defendants in ways unmoored from practical considerations. *See, e.g.*, Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 195 (2005); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1816–17 (1991); Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 423–24 (1994).

substance of retroactivity policy than to the minutiae of opinion language, structure, and argumentation.

Defense attorneys before *Padilla* faced the perverse incentive to remain silent as to collateral consequences for fear that affirmative misstatements might risk *Strickland* violations.[82] Analogously, *Chaidez* motivates opinion writers invested in the longevity of their decisions — and, perhaps, in their retroactive application — to remain silent in disposing of counterarguments that they outright reject. Conventions on making the strongest case in support push the Court in the opposite direction. The tension that results is counterintuitive and unwise, failing to serve the goal of clarity that originally animated retroactivity doctrine.

[82] *See* Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 123–24 (2009).