PRACTICE ADVISORY:

Implications of *Lafler v. Cooper* on Retroactive Application of *Padilla v. Kentucky*

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By Sejal Zota, Dan Kesselbrenner, and Dawn Seibert[1]

I. Introduction

In *Padilla v. Kentucky*,[2] the Supreme Court held that the Sixth Amendment requires defense counsel to advise noncitizen defendants of immigration consequences of a guilty plea. Courts, federal and state alike, have split on whether noncitizens whose convictions became final prior to the date of the decision benefit from *Padilla*. Specifically, since *Padilla,* courts have questioned whether the decision is a new rule of constitutional law or merely an application of *Strickland v. Washington,*[3] for *Teague* retroactivity purposes.[4] Three federal courts of appeals have ruled on this issue, with two finding that *Padilla* is a new rule that does not apply retroactively to collateral review, and one finding that it is an old rule that applies retroactively.[5] Federal and state courts that more recently have examined the issue are trending in favor of no retroactive application.

On March 21, 2012, the Supreme Court reinvigorated the debate over *Padilla* retroactivity in deciding *Lafler v. Cooper*, No. 10–209, 565 U.S. ___, 2012 WL 932019. In *Lafler*, the Court

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[1] Sejal Zota and Dan Kesselbrenner of the National Immigration Project of the National Lawyers Guild and Dawn Seibert of the Immigrant Defense Project wrote this advisory for the Defending Immigrants Partnership.

[2] 559 U.S. ___, 130 S. Ct. 1473 (2010).

[3] 466 U.S. 668 (1984).

[4] This advisory assumes general familiarity with retroactivity principles. For more information about general principles regarding retroactivity and arguments supporting *Padilla* retroactivity, *see* Dan Kesselbrenner, A *Defending Immigrants Partnership* Practice Advisory: Retroactive Applicability of *Padilla v. Kentucky*, March 17, 2011, http://www.nationalimmigrationproject.org/legalresources/practice_advisories/padilla%20retro%20revised%203-2011.pdf.

[5] *United States v. Hong*, --F.3d --, Case No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011) (no retroactive application on collateral review); *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011) (same); *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011) (*Padilla* applies on collateral review). While these courts employed the *Teague* analysis, the Supreme Court has never expressly held that *Teague* applies to §2255 or federal coram nobis motions.

held that the Sixth Amendment applies to plea negotiations, including pleas rejected on the basis of attorney error. The outcome in *Lafler* supports the conclusion that *Padilla* is an old rule and has immediate implications for noncitizens with pending *Padilla* motions or appeals.

This advisory describes: (1) the Court's decision in *Lafler*; (2) arguments that *Lafler* supports *Padilla* retroactivity; (3) steps that lawyers should take immediately in pending *Padilla* motions and appeals; and (4) how lawyers may use *Lafler* to support prejudice and other arguments under *Strickland*. The advisory assumes general familiarity with the Court's decision in *Padilla*. For more general information about the *Padilla* decision, please see earlier advisories prepared by the Defending Immigrants Partnership.[6]

This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice provided by a lawyer familiar with a client's case. Counsel are advised to independently confirm whether the law in their state or circuit has changed since the date of this advisory.

II. Background and Holding in *Lafler v. Cooper*

A. Facts and Holding

Anthony Cooper, a Michigan resident, was charged with assault with intent to murder and three other offenses. The State offered to dismiss two of the charges and to recommend a maximum of seven years and one month in prison in exchange for a guilty plea to the other two. Mr. Cooper's attorney wrongly advised him that he could not be convicted of assault with intent to murder because he had shot the victim below the waist; as a result, Mr. Cooper rejected the plea. He was later convicted at trial and sentenced to term with a maximum of 30 years in prison. On state post-conviction review, the trial court rejected Mr. Cooper's claim that his attorney's advice to reject the plea constituted ineffective assistance.

In a 5-4 opinion by Justice Kennedy, the Supreme Court held that the Sixth Amendment's protections apply to plea negotiations, and a full and fair trial does not remedy a pretrial violation, even where the trial itself was not prejudiced by the error:

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in

[6] A *Defending Immigrants Partnership* Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*, April 6, 2010 (revised April 9, 2010), http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf.

> a conviction on more serious charges or the imposition of a more severe sentence.

Op. at 9.

In applying *Strickland v. Washington* to plea negotiations, and to rejected pleas specifically, the majority focused on the central role played by pleas in today's criminal justice system:

> In the end, [the State's] three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. *See* [*Missouri v. Frye*, No. 10–444, 565 U.S. ___, 2012, Slip Op. at 7 (March 21, 2012)]. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.

Op. at 11.

For a defendant to show he was prejudiced by counsel error during plea bargaining after later being convicted in a jury trial, the Court held that a defendant must show that: (1) but for the ineffective advice there is a reasonable probability that the defendant would have accepted the plea offer and that the prosecutor would not have withdrawn the offer after the acceptance, (2) the court would have accepted the terms of the plea, and (3) and the conviction or sentence, or both, would have been more favorable to the defendant than under the actual judgment and sentence imposed.

B. Dissenting Opinions

Justice Scalia penned a rigorous dissent joined by Chief Justice Roberts and Justice Thomas. Justice Alito filed a separate dissenting opinion. Justice Scalia cast the majority opinion as one that "upends decades of our cases ... and opens a whole new boutique of constitutional jurisprudence"— plea bargaining law — even though there is no legal right to be offered a plea bargain:

> The Court has never held that the rule articulated in *Padilla*, *Tovar*, and *Hill* extends to all aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the defendant rejects a

> plea bargain and stands on his constitutional right to a fair trial. The latter is a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining.

Scalia, Dissenting Op. at 3-4.

III. Arguments That *Lafler* Supports *Padilla* Retroactivity

A. The *Lafler* Court's Treatment of Mr. Cooper's Ineffective Assistance Claim as "Clearly Established Federal Law" Confirms that the Court Intended *Padilla* to Apply Retroactively.

Mr. Cooper's case made its way to the Supreme Court through federal habeas review. After the state court rejected his ineffective assistance of counsel claim, Mr. Cooper brought a federal collateral challenge to the state court conviction. Significantly, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[7] a federal court may not grant federal habeas relief unless the state court's adjudication on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[8] A decision is contrary to clearly established law if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases."[9]

Under this standard, to grant habeas relief to Mr. Cooper, the Supreme Court held that the state court's rejection of his ineffective assistance of counsel claim was "contrary to … clearly established Federal law." The Court did that by finding that *Strickland's* application to plea negotiations, including rejected plea offers, was governing Supreme Court law. It would not have been enough for the state court to have been wrong based on the law in 2012, but rather the court's decision had to be "contradict" Supreme Court law on March 15, 2005, the day the state court decided Mr. Cooper's case.[10] Without having surmounted that significant hurdle, the Supreme Court could not have granted Mr. Cooper relief.

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[7] Pub. L. No. 104-132, 110 Stat. 1214, 1277 (April 24, 1996).

[8] 28 U.S.C. § 2254(d)(1).

[9] *Williams v. Taylor*, 529 U. S. 362, 405 (2000).

[10] When federal courts exercise habeas review of state convictions, the law that existed when the state court decided the issue on the merits controls the federal court's inquiry. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). This is so because the federal court is deciding the lawfulness of the decision at the time the state court decided it on the merits. *Williams v. Taylor*, 529 U.S. 362, 390-91(2000).

Mr. Cooper faced another hurdle to pass the test under 28 U.S.C. § 2254(d)(1), which the Court describes as "difficult to meet."[11] The Court applies a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given "the benefit of the doubt."[12] The majority held that Mr. Cooper cleared this hurdle.
According to Justice Scalia's dissent, however, the majority's opinion in *Lafler* was not supported by prior Supreme Court authority.[13] Perhaps based on this dissent, the media reported the decision as if it were a landmark decision in which the Court ventured into uncharted waters.[14] But even a quick reading of the decision reveals that the outcome was not-at-all a legal novelty, but rather based on settled Supreme Court law.

Media reports notwithstanding, the Court in *Lafler* correctly and straightforwardly found the issue controlled by its decision in *Strickland*.[15] Since *Strickland* governed the case, the Michigan court's failure to apply *Strickland* properly to Cooper's facts made it contrary to Supreme Court law.[16] This is a simple syllogism.

Unlike *Lafler,* a federal habeas case, *Padilla* was decided on certiorari review of a state post-conviction appeal—meaning the Supreme Court directly reviewed the state courts' denial of *Strickland* relief. Because Mr. Padilla's case thus did not require federal habeas review and the concomitant application of AEDPA, the Court had no occasion to determine whether the rule in *Padilla* was "clearly established" or whether the trial court's ruling below was "contrary to" it. Although the test for whether a decision is contrary to Supreme Court law for purposes of 28 U.S.C. § 2254(d)(1) is not coextensive with the *Teague* test, the Supreme Court treats the *Teague* test as a "related inquiry."[17] Moreover, according to the Court, whatever would qualify as an old rule under *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1).[18] The test under *Teague* and § 2254(d)(1) are not identical. This distinction, however, cannot alter the logic that a rule that is settled Supreme Court law will not be a new rule for *Teague* purposes because it will be "dictated by Supreme Court precedent."

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[11] *Harrington v. Richter,* 131 S. Ct. 770, 786 (2011).

[12] *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (*per curiam*).

[13] *Lafler*, Scalia J., dissenting, Op., at 2,4.

[14] *See, e.g.,* Adam Liptak, *Justices' Ruling Expands Rights of Accused in Plea Bargains,* N.Y. Times, March 21, 2012.

[15] 466 U.S. 668 (1984).

[16] *Lafler,* Op. at 14-15.

[17] *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

[18] *Id. at* 412.

The significance of *Lafler* for *Padilla* is that it demonstrates that what may appear to be a novel rule is nothing more than the application of the long-standing *Strickland* rule. It follows that if the Supreme Court's holding in *Lafler* that the rejection of ineffective assistance in plea bargaining was contrary to settled federal law then the *Padilla* Court's reliance on *Strickland* establishes that *Padilla* is an "old rule" for purposes of *Teague*. *Lafler* and *Padilla* then are two of a kind: each a plea case governed by the existing *Strickland* standard.

B. The "Floodgates" Discussion in *Lafler* Confirms That *Padilla* Does Not Create a New Criminal Rule for *Teague* Purposes

In *Lafler*, the State of Michigan urged the Court to deny relief because it would create a potential flood of litigation.[19] In rejecting this contention, the *Lafler* Court cited to *Padilla*, saying that: "Courts have recognized claims of this sort for over 30 years" without being overwhelmed.[20] That the Court cited *Padilla* to support its claim that *Lafler* would not cause a floodgate problem is significant evidence that the *Padilla* Court intended that its decision would apply to earlier cases. In *Padilla*, the Court rejected a similar argument that the decision would result in courts being flooded with new claims. As in *Lafler*, the Court in *Padilla* responded to the concerns by pointing to the many years over which courts have responded to *Strickland* claims.

The Third Circuit concluded that there was no reason to discuss the floodgate issue unless the *Padilla* Court intended its decision to apply retroactively.[21] By citing to *Padilla* and referencing again the lengthy experience that courts have with *Strickland* claims, *Lafler* strongly suggests that the Third Circuit was correct in saying that the Court invoked that language to convey that *Strickland* dictates the outcome and that *Padilla* should apply retroactively.

C. *Lafler* Demonstrates that Seventh and Tenth Circuits Mistakenly Looked to Existence of Dissents in *Padilla* as Evidence that *Padilla* Created a New Rule

The *Lafler* Court was divided about whether counsel's plea bargaining error constituted ineffective assistance. Nevertheless, the majority decided that the Michigan court's opinion was contrary to existing Supreme Court law despite the number of dissenters (4) and the force of the dissent.

In construing whether *Padilla* should apply retroactively to cases already final, the Seventh[22] and Tenth[23] Circuits cited the disagreement among the Justices as evidence that Supreme Court

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[19] *Id.* at 13.

[20] *Id.*

[21] *United States v. Orocio*, 645 F.3d 630, 641; *see also Chaidez v. United States*, 655 F.3d 684, 698 (7th Cir. 2011) (Williams J., dissenting).

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

[23] *United States v. Hong*, --F.3d --, Case No. 10-6294, 2011 WL 3805763 at *6 (10th Cir. Aug. 30, 2011).

precedent did not "dictate" the result in *Padilla* for *Teague* purposes. Those circuits reasoned that the various opinions demonstrated that "reasonable minds could disagree.[24] The *Teague* test, however, is an objective one.[25] *Lafler* holds that *Strickland* long has governed ineffective assistance in plea bargaining. Consequently, a state court's decision ignoring *Strickland* is contrary to Supreme Court law regardless of how many Justices disagree with that view. It follows from *Lafler* then that neither the existence of dissenting opinions nor their (rejected) claims that the majority has forged a novel rule support an argument that *Strickland* did not foreordain the outcome for *Teague* purposes.

IV. Recommended Actions in Cases Involving *Padilla* claims

Lafler reinforces the conclusion that *Padilla* was not a new rule and therefore has retroactive application. This section outlines various procedural strategies, depending on the posture of a case, for putting *Lafler* to good use.

A. Post-conviction Cases

Practitioners should cite to *Lafler* for the points described above regarding *Padilla* retroactivity in post-conviction motions not yet filed. In federal coram nobis and § 2255 cases, if briefing and/or oral argument has already been completed, practitioners should file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Lafler* and its relevance to the case.[26] For state-court cases, the same should be done by writing a post-briefing or post-submission letter, or using the state equivalent of a 28(j) letter.

If a federal court has decided the case recently, *Lafler* provides a strong basis for a petition for panel rehearing or en banc rehearing under Federal Rules of Appellate Procedure 40 and 35, respectively. Depending on state procedures, counsel in state court also should consider filing a motion to reconsider in light of *Lafler.* As explained in section III.C. above, *Lafler* also provides a basis to renew the retroactivity argument in the Tenth and Seventh Circuits, in which the courts have found no retroactive application of *Padilla.*

[24] *Chaidez*, 655 F.3d at 689-90; *Hong*, 2011 WL 3805763 at *6.

[25] *Williams v. Taylor*, 529 U.S. at 410.

[26] Federal Rule of Appellate Procedure 28(j) is titled "Citation of Supplemental Authority." This rule authorizes counsel to send a letter to the clerk of the appellate court "promptly" advising the court of a "pertinent and significant" authority that came to the party's attention after the party's brief was filed or after the case was orally argued.

B. Removal Cases

In jurisdictions that have not yet ruled on retroactivity, counsel representing individuals in removal proceedings seeking a continuance for post-conviction litigation of a *Padilla* claim should cite to *Lafler* as evidence that the client is more likely to succeed on the merits.[27]

V. Other Arguments

A. *Frye* Supports Plea-Bargaining to Avoid Adverse Immigration Consequences

The very recent Supreme Court decisions issued in *Lafler v. Cooper*[28] and its companion case *Missouri v. Frye*[29] reaffirm that defense counsel's duty to provide effective assistance includes plea-bargaining advice. [30] Regarding the prejudice prong of *Strickland*, the Court in *Frye* recognized that a defendant could demonstrate prejudice without stating that she would have gone to trial had she received correct advice, which was the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985).[31] In *Frye*, the Court said: "*Hill* does not, however, provide the *sole* means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations."[32]

A defendant may show prejudice by demonstrating that, had she been advised of the immigration consequences, she would have rejected the disposition and sought an alternative and obtainable plea, which would mitigate immigration consequences. For example, a defendant who receives a one-year suspended sentence for a theft that constitutes an aggravated felony could argue that she suffered prejudice from counsel's failure to seek a one-day reduction in sentence.[33]

A noncitizen seeking post-conviction relief may argue that she should prevail if she demonstrates "a reasonable probability" that:

> a) she would have offered to resolve charge(s) for a plea and sentence w/less severe or no immigration consequences;

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[27] Under 8 C.F.R. § 1003.29, the immigration judge may grant a motion for a continuance for good cause shown. In determining whether good cause exists to continue such proceedings, the immigration judge may consider a variety of factors including the government's response to the request, the noncitizen's statutory eligibility for relief, if the relief is based on discretionary grounds, and other relevant procedural factors. *See Matter of Hashmi*, 24 I&N Dec. 785, 790–91 (BIA 2009); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009).

[28] No. 10–209, 565 U.S. ___, (March 21, 2012).

[29] No. 10–444, 565 U.S. ___, (March 21, 2012).

[30] URL cite to posted *Lafler* advisory

[31] *Frye*, Op. at 11.

[32] *Id.* (Emphasis added).

[33] *See, e.g, Glover v. United States*, 531 U.S. 198, 203 (2001) (treating as ineffective assistance a sentencing error that results in defendant serving one extra day).

b) the prosecutor would have agreed to the proposed resolution; and

c) the court would have accepted it.

A week after issuing *Frye* and *Lafler*, the Court in *Vartelas*[34] commented that:

> Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g*., possession of counterfeit securities—or exercise a right to trial.

Vartelas, Op. at 16, n. 10.

Although note 10 does not expressly cite to *Padilla*, the language in the footnote supports the view that the scope of defense counsel's obligation under the first prong of *Strickland* includes investigating the availability of alternative pleas. In addition, the footnote together with *Frye* suggest that a defendant can establish prejudice to satisfy the second prong in *Strickland* by demonstrating that the defendant would have rejected the disposition and sought an alternative and obtainable plea to avoid adverse immigration consequences.[35]

Post-conviction counsel should keep in mind that a defendant has no right to receive a specific plea offer.[36] What remains a vital argument, however, is that but for defense counsel's ineffective assistance, defendant could have received a plea that would have avoided adverse immigration consequences.

B. Court Warning Does Not Cure *Padilla* Violation

A judge's obligation to ensure that a defendant's plea is voluntary stems from the Fifth Amendment's Due Process Clause.[37] A judge's role is to serve as a neutral arbiter,[38] while counsel's role is to serve as the defendant's advocate—providing competent advice.[39] In addition, the Sixth Amendment requires criminal defense counsel to advise her client regarding the immigration consequences of a guilty plea.[40]

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[34] No. 10–1211 565 U.S. ___, (March 28, 2012).

[35] *See also Commonwealth v. Clarke*, 460 Mass. 30, 47 n. 18 (2011) ("Prejudice may be shown . . . by establishing that had the defendant and counsel properly understood and considered the deportation consequences of guilty pleas to some charges, counsel likely would have been able to negotiate a plea to other charges that would not have carried such a consequence.")

[36] *Id.* at 12.

[37] *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969).

[38] *See Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 2259 (2009); ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004).

[39] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

[40] *Padilla*, 130 S. Ct. at 1483.

Since *Padilla*, some courts have found that a boilerplate judicial warning about immigration consequences cures defense counsel's failure to provide immigration advice or erroneous advice.[41] These courts seemingly have conflated the respective roles of judge and defense counsel in assessing the significance of an immigration warning during the plea colloquy. These courts erroneously assume that a warning given during the plea colloquy may substitute for an informed discussion with counsel of the defendant's specific immigration consequences *before* the defendant decides to enter the guilty plea.

Lafler confirms that a judge's warning, even if specific to the defendant and "knowing and voluntary," does not cure defense counsel's failure to provide correct advice. In rejecting his ineffectiveness claim, the state court concluded that Mr. Cooper's decision to reject the plea was knowing and voluntary.[42] The *Lafler* Court found that the state court incorrectly applied the Fifth Amendment "knowing and voluntary" analysis to Mr. Cooper's Sixth Amendment ineffectiveness claim:

> "An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel."

Op., at 15.

The Court's statement demonstrates that the Michigan Court's "knowing and voluntary" analysis was an improper response to Mr. Cooper's Sixth Amendment claim for ineffective assistance of counsel. The Court's holding, of course, applies whether the ineffectiveness involves faulty advice about the probability of conviction (*Lafler*) or the failure to advise required by *Padilla*.

[41] Lang, Note, *Padilla v. Kentucky*: *The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 Yale L.J. 944, 977 n. 138 (2012) (compiling cases).

[42] *Lafler*, Op. at 15.