



POST-CONVICTION RELIEF IN CALIFORNIA SHOULD BE UNAFFECTED BY *CHAIDEZ v. UNITED STATES*

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In *Chaidez v. United States*, 568 U.S. _____, ____S.Ct.____, 2013 WL 610201, (February 20, 2013) the U.S. Supreme Court held that *Padilla v. Kentucky*, 559 U.S. 356 (2010) was a “new rule” that did not apply retroactively to convictions final before March 31, 2001. In *Padilla*, the Supreme Court held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen about the immigration consequences of a guilty plea.

In California state courts, post-conviction relief based on ineffective assistance of counsel for failure to advise about immigration consequences should be largely unaffected by this opinion. California courts have held for over 25 years that criminal defenders have this obligation under Article I, §15 of the California Constitution as well as the Sixth Amendment to the U.S. Constitution. Since 1987 in California, criminal defense counsel have been obligated to advise noncitizen criminal defendants about the actual and specific immigration consequences of conviction. (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1478-79, 240 Cal.Rptr. 328).

The Supreme Court in *Chaidez* acknowledged that *Padilla*’s ruling answered an open question about the Sixth Amendment’s reach “in a way that *altered the law of most jurisdictions*” and in so doing, broke new ground and imposed a new obligation.” (Emphasis added.) **Since California’s law was not altered by *Padilla*, courts in California must apply its pre-*Padilla* case law which pre-dated *Padilla* by more than 25 years, to claims of ineffective assistance of counsel.**

Following the rule set forth in *People v. Soriano*, a California Court of Appeals panel in 1989 made explicit what was only implicit in *Soriano*: the duty to advise about immigration consequences also includes the duty to defend against those consequences. *People v. Barocio*, (1989) 216 Cal.App.3d 99 (failure to file judicial recommendation against deportation or seek 364 day sentence is ineffective assistance of counsel). This was also the holding in *People v. Bautista* (2004) 115 Cal.App.4th 229 (counsel correctly told the defendant that he “would” be deported for possession of sale conviction, but failure to attempt to plead up to “offer to sell” or “transportation” may be ineffective assistance of counsel).

Since *People v. Soriano* has been binding on criminal counsel and state courts since 1987, the “new rule” announced by *Padilla* for other jurisdictions was already the “rule” in California for the prior 25 years. *People v. Soriano* merely reached the correct result 25 years earlier than *Padilla*. Additionally, *People v. Soriano* was expressly based not only on the Sixth Amendment, but also on Article I, §15 of the California State Constitution. *Id.* at 1478-79. States must enforce minimum federal constitutional standards, but are free to adopt *additional* protections. (*Reynolds v. Superior Court* (1974) 12 Cal.3d 834, 842, 117 Cal.Rptr. 437; Cal.

Const., Art. I, §24 (declaring that “[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.”))

While the California Supreme Court in 2001 stated in *dictum* that it was “unpersuaded” as to whether a failure to advise was ineffective assistance of counsel, that case only addressed affirmative misadvice and expressly stated that “this case does not allege a mere failure to investigate, so the question is not squarely presented.” (*In re Resendiz* (2001) 25 Cal.4th 230, 249-250). ***In re Resendiz* did not overrule *People v. Soriano* or *People v. Barocio*.** Therefore, criminal defense counsel and lower state courts were bound to follow those opinions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456) (“Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.”)

***Chaidez v. United States* only affects the vast majority of jurisdictions—unlike California—which did not have case law requiring criminal defenders to advise noncitizens about the immigration consequences of conviction prior to the *Padilla* decision.**

For jurisdictions other than California, *Chaidez* does not affect affirmative misadvice claims since *Chaidez* distinguished affirmative misadvice claims as not subject to its retroactivity holding since this “separate rule for material misrepresentations” pre-existed *Padilla*. Furthermore, in other jurisdictions, defenders may be able to argue that 1) state retroactivity principles mandate application of *Padilla* to conviction final before March 31, 2010 under *Danforth v. Minnesota*, 552 U.S. 264 (2008), 2) the defense lawyer also violated an established constitutional duty such as failing to negotiate effectively to mitigate harm in the plea, 3) that *Padilla* applies in a first post-conviction proceeding because such a proceeding is the equivalent of a direct appeal for purposes of an ineffective assistance claim, or 4) there are independent state grounds to provide a remedy.

For another article for California post-conviction relief after *Chaidez* see Norton Tooby, “Implications of *Chaidez* for California Defense Counsel” at:
<http://nortontooby.com/pdf/free-newsletter-archives/December%202012.pdf>.

For national strategies, see “Seeking Post-Conviction Relief under *Padilla v. Kentucky* after *Chaidez v. U.S.*” by Immigrant Defense Project and National Immigration Project at:
http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Chaidez%20practice%20advisory%203-1-2013..pdf.

For an examination of *Padilla v. Kentucky* and California case law, see Norton Tooby, “Implications of *Padilla v. Kentucky* for California Defense Counsel” at:
<http://www.capcentral.org/criminal/articles/docs/ImplicationsofPadilla.pdf>

Please contact ILRC if you encounter problems in California state courts concerning *Chaidez v. United States*.