No. 11-820

IN THE

Supreme Court of the United States

ROSELVA CHAIDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONER

Gerardo S. Gutierrez
53 W. Jackson Boulevard
Suite 1651
Chicago, IL 60604

Claudia Valenzuela
Chuck Roth
Sarah Rose Weinman
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle
Suite 1818
Chicago, IL 60604

Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue, NW
Suite 404
Washington, DC 20015

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Valerie Marsh
Kathleen Sanderson
Angela Vigil
BAKER & MCKENZIE LLP
1111 Brickell Avenue
Suite 1700
Miami, FL 33131

QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. The question presented is whether the principle articulated in *Padilla* applies to persons whose convictions became final before its announcement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AUTHORITY

STATUTES

OTHER AUTHORITIES

BRIEF FOR PETITIONER

Petitioner Roselva Chaidez respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 655 F.3d 684. Two opinions of the United States District Court for the Northern District of Illinois are relevant here. The first (Pet. App. 31a) is unpublished, but available on Westlaw at 2010 WL 3979664. The second (Pet. App. 39a) is published at 730 F. Supp. 2d 896.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. Pet. App. 1a. A timely petition for rehearing was denied on November 30, 2011. Pet. App. 56a. This Court granted certiorari on April 30, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

In the 1990s, dramatic changes to immigration law both made deportation almost automatic for anyone convicted of crimes classified as "aggravated felonies," *see, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii), and substantially expanded the list of such offenses. In the wake of these changes, this Court and other authorities recognized that criminal defense lawyers had a professional obligation to advise clients of the immigration consequences of guilty pleas. *See INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001). In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court applied the framework established in *Strickland v. Washington*, 466 U.S. 668 (1984), to confirm that a criminal defendant receives ineffective assistance of counsel in violation of the Sixth Amendment when her lawyer fails to take even the basic step of advising her that a guilty plea may trigger deportation. This case presents the question whether that principle applies to persons whose convictions were final before *Padilla* was announced.

1. Petitioner Roselva Chaidez was born in Mexico but has lived in the United States since the 1970s. She has been a lawful permanent resident since 1977 and resides in Chicago with her three U.S.-citizen children and two U.S.-citizen grandchildren. Pet. App. 31a.

Several years ago, Chaidez became involved in an insurance scheme. As the Government explained, she was "not aware of the specifics of the scheme," but others persuaded her to falsely claim to have been a passenger in a car involved in a collision. Plea Hr'g Tr. 16, Dec. 3, 2003. Chaidez received $1,200 for

her minor role. According to the Government, however, the insurance company paid a total of $26,000 to settle the claims that Chaidez and others made.

In 2003, the Government charged Chaidez with two counts of mail fraud for two separate mailings related to collecting her settlement. These charges implicated the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, 110. Stat. 3009-546, which expressly classifies as an "aggravated felony" "an[y] offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i).

Chaidez's attorney knew that she was not a U.S. citizen, and "it would have been rational under the circumstances for Chaidez to insist on a trial." Pet. App. 37a. It also may well have been possible for the attorney to negotiate a plea to the charges in which the stipulated loss for which Chaidez was responsible was below the $10,000 threshold for aggravated felonies or in which Chaidez pleaded guilty to different charges that would not have triggered mandatory removal. *Cf. St. Cyr*, 533 U.S. at 322-23 (describing the common practice of negotiating pleas to avoid deportation). But contrary to then-prevailing professional norms, Chaidez's attorney "did not provide advice about the immigration consequences of a guilty plea." Pet. App. 35a.

No one disputes that "had Chaidez known of the immigration consequences" of being convicted of fraud involving more than $10,000, she would not have pleaded guilty to the Government's charges. *Id.* 36a. Indeed, Chaidez "would have done everything

possible to remain in the United States," including accepting "harsher punishment" than she stood to receive by obtaining an "acceptance of responsibility" adjustment for pleading guilty to the Government's precise charges. *Id.* 34a, 36a. Yet because her lawyer provided no such information, Chaidez entered a guilty plea to the Government's charges "without the benefit of a[ny] plea agreement," leaving it to the court to determine the amount of loss and appropriate restitution. *Id.* 36a. After a hearing, the district court sentenced her to four years' probation and ordered restitution in the amount of $22,500. Her conviction became final in 2004. *Id.* 2a.

Having completed her probation and most of her restitution payments, Chaidez applied in 2007 for United States citizenship. *Id.* 32a. Chaidez, who speaks limited English, received assistance from non-lawyers in filling out her application. *Id.* The application did not mention her criminal conviction, but Chaidez disclosed it when asked about the subject in her immigration interview. *Id.* Following the interview, authorities initiated deportation proceedings. *Id.*

2. Shortly thereafter, Chaidez filed a petition in the U.S. District Court for the Northern District of Illinois for a writ of coram nobis under 28 U.S.C. § 1651(a), which "provides a method for collaterally attacking a criminal conviction when a defendant is not in custody, and thus cannot proceed under 28 U.S.C. § 2255." Pet. App. 3a. Seeking to vacate her fraud conviction, Chaidez contended that her defense counsel rendered ineffective assistance under *Strickland* by failing to advise her that her guilty plea would subject her to deportation. Under

Strickland, a lawyer renders ineffective assistance of counsel in connection with a guilty plea if (1) counsel's representation fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defendant, 466 U.S. at 688, 694, insofar as "there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty" to the charges at issue. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

While that petition was pending, this Court decided *Padilla*, making clear the merit of Chaidez's Sixth Amendment claim.

In order to determine whether Chaidez was entitled to the benefit of *Padilla*, the district court turned to the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989). While this Court thus far has applied *Teague* only to state convictions, *see Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008), the Seventh Circuit has held that it applies to federal convictions as well, *Van Daalwyk v. United States*, 21 F.3d 179, 180 (7th Cir. 1994).

Under *Teague*, a decision that merely applied an established rule to the facts of a particular case governs already final convictions. By contrast, a new rule of criminal procedure – that is, a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government" – will not be given retroactive effect on collateral review, save

under certain exceptions not relevant here. *Teague*, 489 U.S. at 301.[1]

In this case, the district court concluded that the holding in *Padilla* was merely an application of *Strickland* to a new set of facts. It thus applied *Padilla* retroactively to Chaidez's ineffective-assistance claims. Pet. App. 44a.

Following an evidentiary hearing on the facts, the district court found that both prongs of the *Strickland/Padilla* test were satisfied. Counsel's performance was deficient because counsel "did not warn Chaidez that her guilty plea could carry immigration consequences." *Id.* 36a. And that failure was prejudicial because, "had Chaidez known of the immigration consequences, she would not have pled guilty" to the Government's charges. *Id.* 36a. The court thus granted a writ of coram nobis, vacating Chaidez's conviction.

3. The Government appealed, challenging only the district court's holding that *Padilla* applies retroactively here. *Id.* 6a. The court of appeals acknowledged that the Third Circuit and the Massachusetts Supreme Judicial Court – like the district court in this case – had held that *Padilla* applies to convictions that became final before its pronouncement. *Id.* 6a, 14a (citing *United States v. Orocio*, 645 F.3d 630, 640-42 (3d Cir. 2011), and

---

[1] Unless otherwise noted, citations to *Teague* in this brief are to the plurality opinion, which a majority of this Court subsequently formally adopted as the law. *See Penry v. Lynaugh*, 492 U.S. 302 (1989); *Butler v. McKellar*, 494 U.S 407 (1990).

Commonwealth v. Clarke, 949 N.E.2d 892, 898 (Mass. 2011)). Nonetheless, a divided panel of the Seventh Circuit disagreed with these holdings and reversed.

The majority did not dispute that, long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements. Nor did the majority dispute that "the application of *Strickland* to unique facts generally will not produce a new rule." Pet. App. 15a; *see also Williams v. Taylor*, 529 U.S. 362, 391 (2000) (same observation). But the majority "believe[d] *Padilla* to be the rare exception," Pet. App. 15a-16a, owing to the judicial disagreement prior to *Padilla* and in *Padilla* itself over whether the Sixth Amendment should apply to advice regarding so-called "collateral" consequences of guilty pleas. In particular, some lower courts had previously held that the Sixth Amendment did not cover failures to give advice concerning such consequences, and the concurrence and dissent in *Padilla* characterized certain aspects of the majority opinion as substantial extensions of existing precedent. *Id.* 8a-9a. Accordingly, the majority concluded that although the question was a "challenging" one, "the scales [tip] in favor of finding that *Padilla* announced a new rule." *Id.* 18a.

Judge Williams dissented. She emphasized that *Teague*'s test is an objective one and asks only whether the holding broke new ground. That being so, she reasoned, the existence of conflicting authority prior to *Padilla* "cannot change" the decisive fact that "*the Supreme Court itself* 'never applied a distinction between direct and collateral

consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*.'" *Id.* 26a (emphasis added) (quoting *Padilla*, 130 S. Ct. at 1481). To the contrary, Judge Williams emphasized, this Court recognized years before *Padilla* (and years before the plea in this case) that, at least in the context of advice regarding deportation, "preserving the client's right to remain in the United States may be *more important* to the client than any potential jail sentence." Pet. App. 26a (emphasis added) (quoting *St. Cyr*, 533 U.S. at 323).

4. Chaidez requested rehearing en banc, arguing in part that even if the court of appeals were disinclined to revisit the panel's holding that *Padilla* were a new rule, it should rehear the case to reconsider its prior holding in *Van Daalwyk* that *Teague* governs retroactivity with respect to challenges to federal – as opposed to state – convictions. Pet'n for Reh'g En Banc 10-14. In particular, Chaidez contended that *Teague*'s concern with federalism does not apply in this context, nor should its concern with finality prevent her from obtaining relief. The court of appeals, however, denied rehearing en banc. Pet. App. 56a.

5. This Court granted certiorari. *Chaidez v. United States*, 132 S. Ct. 2101 (2012).

SUMMARY OF ARGUMENT

The holding of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that criminal defense attorneys render ineffective assistance of counsel when they fail to advise their clients that pleading guilty may subject them to deportation applies to persons, such as

petitioner, whose convictions became final before its pronouncement.

I. *Padilla* did not announce a "new rule" under the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989). As Justice Kennedy has explained, "[w]here the beginning point" for a new decision is a preexisting standard "designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule." *Wright v. West*, 505 U.S. 277, 309 (1992) (opinion concurring in the judgment). Such is precisely the case here. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that attorneys render ineffective assistance when the attorneys unreasonably fail to advise clients according to prevailing professional norms. This flexible standard "provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims," *Williams v. Taylor*, 529 U.S. 362, 391 (2000) – and, indeed, this Court has repeatedly applied this standard to grant persons relief on collateral review in factual circumstances different than in *Strickland*.

Padilla did nothing more than follow this established pattern. "For at least [] 15 years" prior to *Padilla*'s announcement, "professional norms ha[d] generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Padilla*, 130 S. Ct. at 1485. Accordingly, a straightforward application of the *Strickland* standard dictated that the failure to give such advice constitutes ineffective assistance of counsel.

Contrary to the Seventh Circuit's view, it makes no difference that the advice at issue in *Padilla*

involved immigration consequences of a criminal conviction instead of one of the kinds of more "direct" consequences involved in prior cases. As the *Padilla* Court emphasized, this Court had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." 130 S. Ct. at 1481. Nor in *Padilla* would there have been any sound legal basis for doing so. *Strickland* imposes upon counsel a "dut[y] to consult with the defendant on *important decisions*," 466 U.S. at 688 (emphasis added), and this Court had long since made clear that deciding whether to plead guilty to a deportable offense is unquestionably an important decision.

It is likewise immaterial that some Justices in *Padilla* and lower court judges in pre-*Padilla* cases were reluctant to apply *Strickland* to deportation advice. The test for whether a holding established a new rule is an objective one that does not depend on vote counting. And the reasoning advanced in the *Padilla* dissent and the pre-*Padilla* lower court opinions rejecting such claims was simply inconsistent with *Strickland* and this Court's prior recognition of the centrality of deportation considerations to noncitizen criminal defendants.

II. Even if *Padilla* did announce a new rule, it would still apply to persons challenging federal convictions in initial post-conviction filings. *Teague*'s ban against applying new rules on collateral review is based on comity and finality. But no comity interests are at stake when a federal court reviews the legitimacy of a federal, as opposed to state, conviction. And no finality considerations need to be

accommodated by a separate nonretroactivity rule when – as is also the case here – the claim at issue is designed be brought on collateral, as opposed to direct, review and the substantive doctrine already accounts for that reality.

Applying *Teague* to ineffective-assistance claims such as petitioner's would not only lack any theoretical basis, but it would also generate profound administrative problems. This Court held a decade ago in *Massaro v. United States*, 538 U.S. 500 (2003), that ineffective-assistance claims challenging federal convictions should generally be brought on collateral instead of direct review because the former provides a better setting in which to litigate such claims. Since that decision, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record have been litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review, courts have universally declined to consider them, instead dismissing such claims *without prejudice* to defendants' ability to present those claims collateral review.

Holding here that *Teague* applies to ineffective-assistance claims brought in first federal post-conviction review proceedings would upend this system. Because direct review would be the only time defendants could be assured of having their claims assessed without respect to whether they were seeking new rules, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review. In other words, holding that *Teague* applies in this context would reintroduce all of the practical difficulties that this

Court sought to prevent in *Massaro* and leave federal courts no legitimate way of mitigating the resulting inefficiencies, increased burdens, and procedural unfairness. There is no good reason for going back down that abandoned road.

ARGUMENT

Applying the well-settled framework established in *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that a lawyer renders ineffective assistance of counsel when he fails to tell his client that pleading guilty may subject the client to deportation. Because Chaidez's counsel failed to provide her such advice, Chaidez seeks a writ of coram nobis vacating her conviction. Coram nobis "affords the same general relief as a writ of habeas corpus" and is therefore governed by the same retroactivity principles. Pet. App. 3a.

Those principles compel relief here. Under the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* is not a "new rule" and thus applies to convictions that became final before its pronouncement. And even if *Padilla* were a new rule, it would still apply to persons challenging federal – as opposed to state – convictions in first post-conviction filings.

I. *Padilla* Did Not Announce A New Rule Of Constitutional Law.

A. A Decision That Applies A Rule Formulated In An Earlier Case To New Facts Does Not Announce A New Rule.

1. In *Teague v. Lane*, 489 U.S. 288 (1989), this Court established a dichotomy governing whether state prisoners seeking federal habeas relief are entitled to the benefit of decisions announced after their convictions became final. Under *Teague*, federal courts may not announce or apply "new rules" of criminal procedure on collateral review. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* at 301 (citations omitted). By contrast, courts in collateral proceedings may grant relief that is "*dictated* by precedent" at the time the conviction at issue became final. *Id.* A decision is "dictated by precedent" when it is "merely an application of the principle that governed" a prior Supreme Court case. *Id.* at 307 (citation omitted).

Teague itself provided an example of a decision that did not announce a new rule but rather was dictated by precedent: *Francis v. Franklin*, 471 U.S. 307 (1985). *See Teague*, 489 U.S. at 307. *Francis* involved an application of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which this Court had held that jury instructions that "ha[ve] the effect of relieving the State of the burden of proof" regarding *mens rea* violate due process. *Id.* at 521. The instruction invalidated in *Sandstrom* had created a *mandatory* presumption concerning *mens rea*, while the instruction in *Francis* merely *allowed* the jury to

presume *mens rea*. Consequently, the *Francis* dissent argued that applying *Sandstrom* to the instruction in *Francis* would "needlessly extend our holding in [*Sandstrom*] to cases where the jury was not required to presume conclusively an element of a crime under state law," 471 U.S. at 332 (Rehnquist, J., dissenting). But the *Francis* Court rejected such a limitation on the general principle announced in *Sandstrom*. This Court explained that the "distinction" between the instructions in the two cases "d[id] not suffice" to call for a qualification of "the rule of *Sandstrom* and the wellspring due process principle from which it was drawn." *Id.* at 316, 326. In the parlance of *Teague*, *Francis* shows that rejecting an untenable distinction does not announce a new rule; it simply enforces an old one in a different context.

Numerous post-*Teague* decisions reinforce that a decision applying a general rule announced in an earlier Supreme Court decision does not create a new rule, even when that rule is applied in a different context. *See, e.g.*, *Stringer v. Black*, 503 U.S. 222, 229 (1992) (holding that, even though there were "differences in the use of aggravating factors under the Mississippi capital sentencing system [at issue in *Clemons v. Mississippi*, 494 U.S. 738 (1990)] and their use in the Georgia system in *Godfrey* [*v. Georgia*, 446 U.S. 420 (1980)]," *Clemons* did not announce a new rule because "those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final."). As Justice Kennedy has summarized, "[w]here the beginning point" for a new decision is an earlier, more general rule "designed for the specific purpose of evaluating a myriad of factual

contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992) (opinion concurring in the judgment).

2. *Strickland v. Washington*, 466 U.S. 668 (1984), established precisely such a general rule designed for fact-specific application. Accordingly, as this Court has recognized, "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

a. In *Strickland*, this Court fashioned a two-part standard for evaluating claims of ineffective assistance of counsel across the "variety of circumstances" in which such claims arise. 466 U.S. at 689. According to this "now-familiar test[, a] defendant claiming ineffective assistance of counsel must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' and (2) that counsel's deficient performance prejudiced the defendant." *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000) (quoting *Strickland*, 466 U.S. at 688). This two-part standard applies to all ineffective-assistance claims, including those that arise out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

With regard to the performance prong – the only part of the *Strickland* rule at issue here – the *Strickland* Court declined to formulate "detailed guidelines for representation," and instead adopted a flexible reasonableness standard. *Strickland*, 466 U.S. at 688-89. The Court explained that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Under this standard, counsel has

a "dut[y] to consult with the defendant on *important decisions* and to keep the defendant informed of *important developments* in the course of the prosecution." *Id.* (emphasis added).

b. In the three decades since *Strickland* was decided, this Court has applied its standard in a multitude of settings, but it has *never* held that applying *Strickland* in new circumstances announced a new rule.

i. For instance, in *Flores-Ortega*, a state prisoner sought habeas relief, claiming that his attorney's failure to advise him of the right to appeal his conviction after pleading guilty constituted ineffective assistance of counsel. 528 U.S. at 474. The warden, echoing holdings from three courts of appeals, argued that "trial counsel ha[d] no Sixth Amendment duty to advise a defendant of his appeal rights following a guilty plea." Petr. Br. 7; *see also Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) ("The Constitution does not require lawyers to advise their clients of the right to appeal."); *Morales v. United States*, 143 F.3d 94, 97 (2d Cir. 1998) (same); *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) (same). As a fallback, the warden suggested, in accordance with the district court's ruling, that *Teague* barred relief, Petr. Br. 6 & 9 n.6, and an *amicus* amplified that argument, Br. of Criminal Justice Legal Found. 18-20.

This Court, however, simply applied *Strickland* to the lawyer's omission, holding that counsel *is* deficient for failing to inform a defendant of his appeal rights following a guilty plea when a rational defendant would want to appeal or the defendant reasonably demonstrated to counsel that he was interested in appealing. *Flores-Oretga*, 528 U.S. at

480. Then, having noted the suggestion that *Teague* barred relief, *id.* at 475, this Court implicitly rejected it, remanding the case for an application of its refinement of *Strickland*, *id.* at 487. On remand, the Ninth Circuit employed that refinement and granted habeas relief. *Flores-Ortega v. Roe*, 39 F. App'x 604 (9th Cir. 2002).[2]

ii. In the related context of 28 U.S.C. § 2254(d) – part of the Antiterrorism and Effective Death Penalty Act (AEDPA) – this Court likewise has strongly indicated that applying *Strickland* to new circumstances does not create a new rule. Section 2254(d) bars habeas relief unless a state court "unreasonabl[y]" applied "clearly established" law. 28 U.S.C. § 2254(d)(1). Temporal differences aside, *see Greene v. Fisher*, 132 S. Ct. 38 (2011), that test is at least as demanding as *Teague*'s "dictated by precedent" test, which this Court has described as precluding relief unless any "reasonable jurist[]" would have perceived the merit of the claim, *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). *See also Schwab v. Crosby*, 451 F.3d 1308, 1323 (11th Cir. 2006) ("The content of the Section 2254(d) unreasonable application test is drawn in large part from the *Teague v. Lane* nonretroactivity doctrine and the decisions explicating it."). As a result, if Section 2254(d) permits relief on the ground that this

---

[2] The Ninth Circuit later explicitly held that *Flores-Ortega* did not announce a new rule. *Tanner v. McDaniel*, 493 F.3d 1135, 1142 (9th Cir. 2007). Every other federal appellate decision on the subject is in accord. *See, e.g.*, *Lewis v. Johnson*, 359 F.3d 646, 655 (3d Cir. 2004); *Frazer v. South Carolina*, 430 F.3d 696, 704-05 (4th Cir. 2005).

Court is simply applying "clearly established law" to a new factual setting, then there is no basis to claim that this Court's decision granting relief establishes a "new rule" under *Teague*.

This Court has repeatedly held that Section 2254(d) does not preclude relief that depends upon applying *Strickland* in new contexts. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court considered whether *Williams v. Taylor*, 529 U.S. 362 (2000), broke new ground in holding that the failure to investigate the defendant's background in preparation for a capital sentencing hearing amounted to ineffective assistance of counsel. *Strickland* itself did not involve a background investigation (rather, it involved the failure to present character and psychological evidence), so one could have argued that "[t]here was nothing in *Strickland* . . . to support *Williams*'s statement that trial counsel had an obligation to conduct" such an investigation. *Wiggins*, 539 U.S. at 543 (Scalia, J., dissenting) (quotation marks omitted). The *Wiggins* Court rejected this parsing of *Strickland*, explaining that the Court "made no new law in resolving Williams's ineffectiveness claim." *Id.* at 522 (majority opinion). Indeed, the Court had emphasized in *Williams* itself that applying *Strickland* to attorneys' failure to perform tasks other than those at issue in *Strickland* itself "can hardly be said" to "'break[] new ground or impose[] a new obligation on the States.'" *Williams*, 529 U.S at 391 (quoting *Teague*, 489 U.S. at 301); *see also Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to examine the file regarding client's prior conviction prior to capital sentencing hearing warranted habeas relief under *Strickland*).

Last Term, this Court yet again held that *Strickland* dictated habeas relief for another kind of deficient performance. In *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012), the defendant's attorney, acting on a misinterpretation of state law, advised the client to reject a plea deal. The defendant followed that mistaken advice and was convicted at trial, and received a harsher sentence than the original plea offer. *Id.* He then sought federal habeas relief, arguing that he had suffered ineffective assistance of counsel under *Strickland*. *Id.* The state argued – as did the dissent in this Court – that attorney "error that does not impact a trial's reliability does not implicate the Sixth Amendment." Petr. Br. 11, *Lafler v. Cooper*, No. 10-209; *accord Lafler*, 132 S. Ct. at 1392-93 (Scalia, J., dissenting). This Court held, however, that *Strickland* so plainly encompassed the prisoner's claim that "[b]y failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." *Lafler*, 132 S. Ct. at 1390.

B. This Court's Decision In *Padilla* Was Simply Another Fact-Specific Application Of *Strickland*'s General Rule That Counsel Must Provide Reasonably Effective Assistance.

Padilla is simply another instance of this Court applying *Strickland* in a new factual setting. Adhering to *Strickland*'s requirement that lawyers "consult with the defendant on important decisions," *Strickland*, 466 U.S. at 688, this Court held in *Padilla* that criminal defense lawyers render ineffective

assistance if they neglect to advise their clients that pleading guilty might subject them to deportation.

1. The Seventh Circuit did not dispute that "prevailing professional norms" at the time Padilla (and Chaidez) pleaded guilty – the touchstone of reasonableness under *Strickland*, 466 U.S. at 688 – obligated criminal defense lawyers to advise clients of the deportation consequences of a plea. Nor could it have done so. "*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." *Padilla*, 130 S. Ct. at 1485 (emphasis added); *see also INS v. St. Cyr*, 533 U.S. 289, 322, 323 n.50 (2001) (noting that "competent defense counsel" would "follow[] the advice of numerous practice guides" and ensure that clients were "aware of the immigration consequences of their convictions"). Accordingly, at the time Chaidez's conviction became final, it was plainly unreasonable under *Strickland*, for an attorney to fail to advise her client that pleading guilty would subject the client to deportation.

2. The Seventh Circuit nonetheless held that *Padilla* "br[oke] new ground," *Teague*, 489 U.S. at 301, because "th[is] Court had never held that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to their client's criminal prosecution" – that is, regarding so-called "collateral" consequences. Pet. App. 16a; *see also id.* 12a. That reasoning is flawed. Differences between a new case and prior ones do not generate a new rule when, at the time the defendant's conviction became final, "those differences could not have been considered a basis for denying relief." *Stringer*, 503 U.S. at 229; *see also*

Abdul-Kabir v. Quarterman, 550 U.S. 233, 258 (2007) (differences between a new case and prior ones do not generate a new rule when "the fundamental principles established by our most relevant precedents" dictate relief). And here, the precedent existing at the time of the guilty plea in this case foreclosed the notion of categorically carving out a deportation-consequences exception to *Strickland*.

From its inception, the *Strickland* test has eschewed categorical rules, insisting instead that "[t]he proper measure of attorney performance remains simply reasonableness *under prevailing professional norms*." *Strickland*, 466 U.S. at 688 (emphasis added); *see also Flores-Ortega*, 528 U.S. at 478 (rejecting "per se rule[s] as inconsistent with *Strickland*'s holding). Thus, in *Padilla*, this Court easily brushed aside the suggestion that advice regarding "collateral consequences [fell] outside the scope of representation required by the Sixth Amendment." *Padilla*, 130 S. Ct. at 1481 (quoting opinion below). As this Court emphasized, it has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Id.* There was no basis, therefore, for holding that advice concerning "collateral" consequences was "categorically removed from the ambit of the Sixth Amendment right to counsel." *Id.* at 1482.

In other words, *Padilla* simply reaffirmed that when a court confronts a claim of ineffective assistance, there is no "antecedent" question, U.S. Br. at Cert. 16, concerning whether the advice that the lawyer failed to give falls within the scope of the Sixth Amendment. Whenever a client is a criminal

defendant, the Sixth Amendment applies. *Strickland*, 466 U.S. at 688. And whenever the Sixth Amendment applies, the lawyer must give reasonable advice according to "prevailing professional norms," *id.*, regardless of whether those norms concern direct or collateral consequences of following a particular course of action.

The notion of creating a categorical distinction between direct and collateral consequences would have been especially unsupportable in the context of deportation advice. "[F]or nearly a century" leading up to *Padilla*, this Court had stressed that deportation is "a particularly severe 'penalty,'" *Padilla*, 130 S. Ct. at 1481 (citation omitted) – "the equivalent of banishment or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). Indeed, "preserving [a] client's right to remain in the United States may be *more* important to the client than any potential jail sentence." *St. Cyr*, 533 U.S. at 322 (quotation marks and citation omitted, and emphasis added). Consequently, this Court recognized years before *Padilla* that any "competent defense counsel" would ensure that clients were "aware of the immigration consequences of their convictions." *Id.* at 322, 323 n.50. *Padilla* did nothing more than apply these "fundamental principles" in the context of an ineffective-assistance claim. *Abdul-Kabir*, 550 U.S. at 258.

3. Contrary to the Seventh Circuit's reasoning, neither the "[l]ack of unanimity on the Court in deciding" *Padilla*, Pet. App. 8a, nor the state of the law in lower courts before that decision indicates that *Padilla* is a new rule.

a. The "array of views" that the various Justices on this Court expressed in *Padilla* does not signal

that the holding in that case was new. As an initial matter, "the mere existence of a dissent" or other separate opinion does not "suffice[] to show that the rule [announced in a decision] is new." *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004). For example, even though *Francis* was a five-to-four decision in which the lead dissent argued that the majority "needlessly extend[ed]" the holding of a prior case, 471 U.S. at 332 (Rehnquist, J., dissenting), this Court explained in *Teague* itself that *Francis* did not establish a new rule. *Teague*, 489 U.S. at 307. Similarly, this Court held in *Rompilla* that Section 2254(d)'s unreasonable application rule did not preclude relief, even though a four-Justice dissent argued that the Sixth Amendment had not even been violated. *Compare* 545 U.S. at 377 (majority opinion), *with id.* at 396-97 (dissenting opinion). The test for whether a rule is new, then, does not amount to a tallying of dissents and concurrences; rather, it is an objective test that assesses the actual substance of the majority decision.

At any rate, the content of neither the dissent nor of the separate concurrence indicates that the majority's holding was new. The dissent sought to impose a new limitation on *Strickland*'s professional norms doctrine, narrowing it to advice concerning the direct consequences of pleas. *See Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting). But this Court rejected that argument, emphasizing that it was the dissent – not the majority – that was seeking to make new law. Not only had this Court "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*," but the Court found it especially

inappropriate to do so in this context, given the Court's prior recognition that deportation is a severe penalty. *Padilla*, 130 S. Ct. at 1481; *see also supra* at 21-22.

For its part, the concurrence agreed that "a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland*" when he does not "advise the defendant that a criminal conviction *may* have adverse immigration consequences." *Id.* at 1487 (Alito, J., concurring) (emphasis added). The concurrence characterized the majority's holding as "new" insofar as it "would not just require defense counsel to warn the client of a general risk of removal; it would also require counsel in at least some cases, to specify what the removal consequences of a conviction would be." *Id.* at 1488 (emphases removed). But as the majority explained, "when the deportation consequence [of a guilty plea] is truly clear . . . the duty to give correct advice is equally clear." *Id.* at 1483. In any event, Chaidez would have prevailed even under the test advocated by the concurrence because her attorney gave her no advice at all: the attorney "did not warn Chaidez that her guilty plea could carry immigration consequences." Pet. App. 36a.

b. Similarly, the state of the law in the lower federal courts at the time *Padilla* was decided does not transform *Padilla*'s holding into a new rule of criminal procedure.

As with dissents and other separate writings in this Court, the "mere existence of conflicting authority" in the lower courts prior to a decision from this Court "does not necessarily mean a rule is new." *Williams v. Taylor*, 529 U.S. at 410 (quoting *Wright v. West*, 505 U.S. at 304); *see also supra* at 16-17.

(noting that this Court's holding in *Flores-Ortega* that an attorney's failure to give a particular kind of advice did not announce a new rule, even though three federal circuits had held that *Strickland* did not require that advice). Rather, the test for determining whether a holding was dictated by precedent remains an "objective" one. *Williams*, 529 U.S. at 410 (citation omitted).

In any event, many of the lower-court decisions that had rejected *Padilla*-type claims have little bearing on whether *Padilla* was dictated by precedent as of the time Chaidez's conviction became final because the cases predate this Court's decision in *St. Cyr*. *See United States v. Orocio*, 645 F.3d 630, 640 (3d Cir. 2011) (sorting these cases). In *St. Cyr*, this Court expressly recognized that relief from deportation is "one of the principal benefits sought by [non-citizen] defendants deciding whether to accept a plea offer or instead to proceed to trial." 533 U.S. at 323. Accordingly, citing numerous professional guidelines that had been in place for several years, this Court noted that it expected noncitizen defendants, by way of their attorneys' advice, to be "acutely aware of the immigration consequences of [potential] convictions." *Id.* at 322. The need for such assistance of counsel, this Court further noted, had only intensified after IIRIRA eliminated the possibility of discretionary relief from deportation. *Id.* at 325.

The circuit court cases decided after *St. Cyr* but before *Padilla* actually accepted that *Strickland* applied to deportation advice. Each circuit to confront the issue in this timeframe held that misadvising a client regarding the deportation consequences of a guilty plea constituted ineffective

assistance under *Strickland*. *See United States v. Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002); *see also Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985) (recognizing prior to *St. Cyr* that "certain [deportation] considerations are so important that misinformation from counsel may render the guilty plea constitutionally uninformed"); *Santos-Sanchez v. United States*, 548 F.3d 327, 333-34 (5th Cir. 2008) (accepting these holdings but finding no ineffective assistance because the lawyer, among other things, "gave Santos-Sanchez the name of an immigration attorney that he could contact").

To be sure, some courts of appeals also held that the failure to give any advice regarding potential deportation consequences did not constitute ineffective assistance. *See Jimenez v. United States*, 154 F. App'x 540, 541 (7th Cir. 2005); *Broomes v. Ashcroft*, 358 F.3d 1251, 1256 (10th Cir. 2004); *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003). The Ninth Circuit, for example, reasoned that even though *Strickland* applied to advice regarding deportation consequences, giving bad advice was different than giving no advice. *See Kwan*, 407 F.3d at 1015.

But distinguishing between misadvice and no advice flatly contravened *Strickland*'s instruction that counsel's "acts *or omissions*" can fall outside the "range of professionally competent assistance." *Strickland*, 466 U.S. at 690 (emphasis added); *see also St. Cyr*, 533 U.S. at 322, 323 n.50 (noting that "competent counsel" would make their clients "*aware* of the immigration consequences of their convictions") (emphasis added). That is, *Strickland* itself clearly imposed upon counsel an affirmative

"dut[y] to *consult* with the defendant on important decisions." 466 U.S. at 688 (emphasis added). Lower courts, therefore, did not have to wait for *Padilla* to learn that when, as here, the Sixth Amendment applies, clients are entitled to more than their lawyers' silence.

II. Even If *Padilla* Were A New Rule, It Would Apply In The First Post-Conviction Proceeding Of A Person Challenging A Federal Conviction.

Teague did not present, and this Court did not resolve, the question whether its retroactivity regime applies to post-conviction filings challenging federal, as opposed to state, convictions. *See Teague*, 489 U.S. at 327 n.1 (Brennan, J., dissenting) (noting that the Court "does not address whether the rule it announces today extends to claims brought by federal, as well as state, prisoners"). Years later, this Court expressly reserved the issue. *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008). Here, for the first time since *Teague*, this Court faces the question whether its decision in a prior case should apply to a petition for collateral relief from a federal conviction. This Court should hold, at least with respect to claims of ineffective assistance of counsel that depend on evidence outside the trial record, that *Teague* does not apply to such filings.

A. *Teague*'s Comity And Finality Concerns Do Not Apply In This Context.

Teague's bar against the retroactive application of new constitutional rules of criminal procedure rests on two bases: comity and finality. *Teague*, 489 U.S. at 308. Neither of these interests justifies applying

Teague to a person seeking collateral relief from a federal conviction due to ineffective assistance of counsel. Comity considerations are absent when a federal court is reviewing a federal conviction, and *Strickland*'s highly deferential framework already accommodates the finality interest at stake when a court adjudicates an ineffective-assistance challenge to a federal conviction on collateral review.

1. *Comity. Teague*'s bar against applying new rules to cases on collateral review is motivated in part by "comity" considerations – that is, the reluctance federal courts should have to upset state convictions. *Teague*, 489 U.S. at 308; *see also Danforth*, 552 U.S. at 280 (*Teague* is intended to "minimiz[e] federal intrusion into state criminal proceedings" – that is, "to limit the authority of federal courts to overturn state convictions"); *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing "[t]he comity interest served by *Teague*"). Federal review of state convictions is highly "intrusive" because it "forces the States to marshal resources" to keep convicted inmates locked up, even when the state trial "conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310.[3]

---

[3] For further expressions of this comity interest, see *Stringer v. Black*, 503 U.S. 222, 235 (1992) (federalism is "one of the concerns underlying the nonretroactivity principle"); *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) ("The 'new rule' principle . . . fosters comity between federal and state courts."); *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (Stevens, J., concurring in part and concurring in the judgment) ("*Teague*

This comity interest is not implicated when, as in this case, the challenged judgment was issued by a federal rather than a state court.

2. *Finality.* Nor do *Teague* concerns about preserving the finality of criminal judgments pertain here, where petitioner's claim could not have been raised on direct review of her federal conviction and the constitutional law under which she seeks relief already accounts for the fact that the claim must be pressed on collateral review.

a. In *Teague*, the petitioner "repeated" – as all state habeas petitioners must – a claim that he had already raised in state court. *Id.* at 293.[4] In other words, the petitioner was attempting to use collateral review to obtain a second bite at the judicial apple: he wanted a federal court to entertain a constitutional claim that a state court had rejected previously. This Court held that in that context, respect for the finality of state-court judgments allows federal courts to apply only "old rules" on collateral review. *Teague*'s nonretroactivity principle thus relies on a

---

established . . . that a federal habeas court operates within the bounds of comity and finality" if it follows the "dictated by precedent" standard); *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) ("Comity interests and respect for state autonomy" support *Teague.*).

[4] Of course, state prisoners sometimes *try* to press claims for the first time in federal habeas proceedings. But when they do so, federal courts must either dismiss those claims for failure to exhaust the prisoner's state-court remedies or deny them as procedurally defaulted. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982) (exhaustion); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (procedural default).

critical assumption: namely, that habeas petitioners have already had full and fair opportunities to raise their constitutional claims. 489 U.S. at 308-09; *see also Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., dissenting) (restrictions on retroactivity presume that the defendant "had a fair opportunity to raise his arguments in the original criminal proceeding").

This assumption does not apply to *Padilla*-type challenges to federal convictions. In *Massaro v. United States*, 538 U.S. 500, 508 (2003), this Court instructed that ineffective-assistance challenges to federal convictions must be raised for the first time on collateral review – at least when they depend on evidence outside of the trial record. *Padilla* claims fit that mold. Specifically, trial records generally do not include evidence as to whether defense attorneys advised their clients that pleading guilty would have deportation consequences. *See Padilla*, 130 S. Ct. 1473, 1483 (2010). Even in the rare instances in which a trial record does include such information, it does not provide the evidence necessary to show – as required by the prejudice prong of the *Strickland/Padilla* test – that if the defendant had received such advice, she would not have pleaded guilty. *See id.*. Accordingly, *Padilla*-type claims must be litigated in what this Court has called "initial-review collateral proceedings." *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). As such, there is no basis for applying *Teague* in this context.

Indeed, this Court has already recognized that another judicially created equitable doctrine governing the availability of habeas relief, the procedural default doctrine, should not apply in these circumstances. The procedural default doctrine

precludes a federal court from granting habeas relief when the defendant "fail[ed] to raise a claim on [direct] appeal." *Murray v. Carrier*, 477 U.S. 478, 491 (1986). Just like *Teague*, this doctrine is designed to "respect the law's important interest in the finality of judgments," *Massaro*, 538 U.S. at 504. Yet in *Massaro*, this Court held that the procedural default doctrine does not apply to ineffective assistance challenges to federal convictions that are raised for the first time on collateral review. *Id.* at 509. And last Term in *Martinez*, this Court reaffirmed that "the first designated proceeding for a [defendant] to raise a claim of ineffective assistance," is, for purposes of the procedural default doctrine, the "equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez*, 132 S. Ct. at 1317.

The same reasoning applies here. Because *Padilla*-type claims must be raised for the first time on collateral review, such "initial-review collateral proceedings" are the "equivalent of a [defendant's] direct appeal." As such, there is no basis for applying *Teague* in this context.

b. To be sure, some interest in repose exists respecting any federal judgment "that has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." *United States v. Frady*, 456 U.S. 152, 164 (1982). But *Strickland*'s constitutional formula already fully protects that interest when someone raises an ineffective-assistance claim on collateral review.

Recognizing that ineffective-assistance claims are almost always brought on collateral review, and therefore almost always implicate finality interests of

the "strongest" order, 466 U.S. at 697, this Court has structured the *Strickland* test to protect legitimate finality interests. Thus, the Court has stressed that because final judgments carry a "strong presumption of reliability," *id.* at 696, the inquiry into an attorney's performance is "highly deferential," *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). In particular, that inquiry turns not on whether the attorney made errors (even "significant errors," *Lockhart v. Fretwell*, 506 U.S. 364, 379 (1993) (Stevens, J., dissenting)), but rather on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

Strickland's prejudice prong is also expressly designed to protect "the fundamental interest in the finality of" convictions and "guilty pleas." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In contrast to typical constitutional claims, in which the prosecution bears the burden of showing that any procedural impropriety was harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18, 24 (1967), ineffective-assistance claims require the defendant to show that he was prejudiced by his counsel's deficient performance. *Strickland*, 466 U.S. at 694.[5] That prejudice requirement is "highly demanding," *Kimmelman*, 477 U.S. at 382: the

[5] The only other frequently litigated constitutional claim that requires a demonstration of prejudice is a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed exculpatory evidence. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999). Such claims are also typically brought for the first time on collateral review.

defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Accordingly, as this Court noted in *Strickland*, the "principles governing ineffectiveness claims should apply in federal collateral proceedings" just as they would "on direct appeal." *Id.* at 697.

The Court's treatment of the ineffective-assistance claim in *Padilla* itself illustrates this reality. *Padilla* arose on state collateral review, and this Court expressly assumed that other similar claims would arise in "habeas proceeding[s]" or otherwise in "collateral challenges." 130 S. Ct. at 1485-86. This Court, therefore, was careful to "give[] serious consideration" to "the importance of protecting the finality of convictions obtained through guilty pleas." *Id.* at 1484. Yet even though Kentucky has adopted the *Teague* doctrine, *see Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009), and even though this Court has the authority to raise *Teague* sua sponte, *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), this Court did not feel the need to consider whether *Teague* might bar relief. Instead, this Court simply asked whether Padilla's ineffective-assistance claim "surmount[ed]" *Strickland*'s already "high bar." *Padilla*, 130 S. Ct. at 1485. Finding that it did, there was no need for additional analysis.[6]

---

[6] Similarly, in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), another case arising on state collateral review, this Court did not consider whether *Teague* affected the availability of relief, but simply applied *Strickland* directly to respondent's ineffective-assistance claim. If the Government is correct that

B. Applying *Teague* In This Context Would Cause Administrative Problems And Be Fundamentally Unfair.

Not only is there no theoretical reason to apply *Teague* to ineffective-assistance claims challenging federal convictions, but doing so would trigger serious practical difficulties and threaten profound unfairness.

1. "Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." *Massaro*, 538 U.S. at 504 (quotation marks and citation omitted); *see also Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). Accordingly, in *Massaro*, this Court refused to apply the procedural default doctrine to ineffective-assistance challenges to federal convictions because doing so "would have the opposite effect." 538 U.S. at 504. Namely, "defendants would feel compelled to raise [ineffective-assistance claims] before there has been an opportunity fully to develop the factual predicate[s] for the claim[s]," and such claims "would be raised for the first time in a forum not best suited to assess those facts." *Id.*

Teague applies to ineffective assistance claims such as *Padilla*, then the only reasons this Court was able to adjudicate *Padilla* – and possibly *Frye* as well – are because the states in the cases each forfeited *Teague* objections and this Court declined to raise them *sua sponte.* That seems very unlikely – and would be a very strange set of preconditions upon which to advance Sixth Amendment law in future cases.

Since *Massaro*, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record have been litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review, courts have universally declined to consider them, instead dismissing such claims "without prejudice to [defendants'] ability to present those claims properly in the future." *United States v. Wilson*, 240 F. App'x 139, 145 (7th Cir. 2007) (quotation marks and citation omitted).[7] This system – just as this Court expected – has promoted the efficient disposition of direct appeals and has ensured that federal defendants are treated fairly because, as the Government itself said in *Massaro*, defendants raising ineffective-assistance claims for the first time on collateral review are able to obtain "the same relief" that they could have obtained had the claims been adjudicated on direct review, U.S. Br. 34, *Massaro v. United States*.

Applying *Teague* to ineffective-assistance claims brought in first federal post-conviction review

---

[7] *See also, e.g.*, *United States v. Huard*, 342 F. App'x 640, 643-44 (1st Cir. 2009); *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003); *United States v. King*, 388 F. App'x 194, 198 (3d Cir. 2010); *United States v. Brooks*, 444 F. App'x 629, 629 (4th Cir. 2011); *United States v. Fearce*, 455 F. App'x 528, 530 (5th Cir. 2011); *United States v. Allen*, 254 F. App'x 475, 478 (6th Cir. 2007); *United States v. Cameron*, 302 F. App'x 475, 476 (7th Cir. 2008); *United States v. Kottke*, 138 F. App'x 864, 866 (8th Cir. 2005); *United States v. Carney*, 65 F. App'x 255, 257 (10th Cir. 2003); *United States v. Bolden*, 343 F. App'x 574, 577 (11th Cir. 2009).

proceedings would upend this system, reintroducing all of the administrative difficulties that this Court sought to prevent in *Massaro*. Direct review would become the only setting in which a defendant could be assured of having a legal argument adjudicated on its merits without regard to whether the claim might be considered "new." Under such a regime, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review.

Faced with an onslaught of ineffective-assistance claims on direct review and an inability to adjudicate them properly, federal courts would have three basic choices, each of them deeply flawed.

First, federal courts might try to adjudicate ineffective-assistance claims as part of direct review. But, as this Court explained in *Massaro*, such claims – at least when, as here, they depend on facts beyond the trial record – cannot be properly litigated on direct review because the trial record will not "disclose the facts necessary to decide either prong of the *Strickland* analysis." 538 U.S. at 505. Without a fully developed factual record (like the kind that, as this case shows, can be developed on collateral review), even meritorious ineffective-assistance claims will fail. *Id.* at 506.

Furthermore, litigating ineffective-assistance claims on direct review would put appellate counsel "into an awkward position vis-à-vis trial counsel." *Id.* When appellate counsel also served as trial counsel, he would be understandably reluctant – if not unable – to bring a claim about his own ineffectiveness. Even when different attorneys handled district court and appellate proceedings, tension would arise

between the two that would impede litigation of an ineffective-assistance claim and bleed over into other issues on appeal as well. As this Court has noted, "[a]ppellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline," and such assistance may be less forthcoming if appellate counsel will also be using that information to assess "trial counsel's own incompetence." *Id.*

Second, appellate courts might – as they sometimes did before *Massaro* – stay appellate proceedings whenever defendants raise ineffective-assistance claims and remand the cases to the trial courts for evidentiary hearings to develop the records necessary to decide such claims. *See, e.g.*, *United States v. Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001); *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). But, as the Government explained in *Massaro*, this practice is undesirable because "[a] routine resort to remand would delay imposition of a final judgment and would have the effect of undermining AEDPA's strict limitations on the filing of successive [post-conviction] motions." U.S. Br. 30 n.14; *see also Wilson*, 240 F. App'x at 145 ("Since *Massaro*, we have not remanded any case [on direct review] for an evidentiary hearing of an attorney's effectiveness."). Far from protecting society's interest in the finality of criminal judgments, forcing ineffective-assistance claims into direct review would actually impede it.

Third, federal courts could continue dismissing ineffective-assistance claims whenever they were brought on direct review, thereby forcing defendants to bring them subject to *Teague* on collateral review.

But under this scenario, defendants would suffer a fundamental injustice: they would *never* be able to obtain unfiltered review of ineffective-assistance claims that depend (as nearly all do) on introducing evidence outside the trial record. If defendants on direct review pressed such claims, courts of appeals would dismiss the claims with instructions to raise them on collateral review. And if defendants brought such claims on collateral review, and those claims required a federal court to create a "new rule" to grant relief, *Teague* would prevent the court from doing so. Just as Major Major had a policy of never seeing anyone in his office while he was in his office and would accept visitors into his office only when he was not there,[8] so applying *Teague* in this context would leave defendants without any appropriate time to raise ineffective-assistance claims that depend on creating a "new rule." Such claims would always be either too early or too late.

Such a state of affairs would be not only unfair but it would contravene "the general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . , whenever that right is invaded." 3 William Blackstone, Commentaries on the Laws of England *23 (1768). It bears remembering that *Teague* is really a doctrine about "redressability." *Danforth*, 552 U.S. at 271 n.5. The doctrine is not premised on the view that this Court's decisions themselves create new constitutional rights that did not exist before. Instead, *Teague* provides that even when a conviction has been secured in

---

[8] *See* Joseph Heller, Catch-22, p. 106 (1961).

violation of the Constitution, a federal court cannot remedy that violation if the error was not clear at the time the defendant's conviction became final. *Id.* at 271. This non-redressability principle is perfectly acceptable against the backdrop of a regime in which defendants have opportunities prior to collateral review to ask courts to announce and to apply new rules. It cannot be justified, however, when no prior opportunity exists.

Preserving the possibility of a remedy when a defendant has been denied effective assistance of counsel – even when affording relief requires the articulation of a new rule – is especially important because "it is through counsel that the accused secures his other rights." *Kimmelman*, 477 U.S. at 377. In other words, "the fairness and regularity" of the criminal justice system depends upon ensuring that lawyers live up to their Sixth Amendment obligations, and upon this Court's ability to refine those obligations in light of ever-evolving circumstances in the criminal justice system. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The *Teague* doctrine should not hamstring this Court's ability to define and enforce those obligations.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Gerardo S. Gutierrez
53 W. Jackson Boulevard
Suite 1651
Chicago, IL 60604

Claudia Valenzuela
Chuck Roth
Sarah Rose Weinman
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle
Suite 1818
Chicago, IL 60604

Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Avenue, NW
Suite 404
Washington, DC 20015

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Valerie Marsh
Kathleen Sanderson
Angela Vigil
BAKER & MCKENZIE LLP
1111 Brickell Avenue
Suite 1700
Miami, FL 33131

July 16, 2012