No. 11-820

In the Supreme Court of the United States

ROSELVA CHAIDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
GINGER ANDERS
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), this Court held that the Sixth Amendment imposes on attorneys representing noncitizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea.

The question presented is whether, under the retroactivity framework established in *Teague* v. *Lane*, 489 U.S. 288 (1989), *Padilla* announced a new rule that does not apply retroactively to convictions that became final before *Padilla* was decided.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 655 F.3d 684. The memorandum opinion and order of the district court granting petitioner's petition for a writ of coram nobis (Pet. App. 31a-38a) is unpublished but is available at 2010 WL 3979664. The district court's memorandum opinion and order (Pet. App. 39a-55a) concluding that petitioner could benefit from this Court's decision in *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), is reported at 730 F. Supp. 2d 896.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on August 23, 2011. A petition for rehearing was denied on November 30, 2011 (Pet. App. 56a). The petition for a writ of certiorari was filed on Decem-

ber 23, 2011, and granted on April 30, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. She was sentenced to four years of probation and ordered to pay restitution in the amount of $22,500. Pet. App. 31a. After petitioner had completed her term of probation, she filed a petition for a writ of coram nobis seeking to overturn her mail-fraud conviction on the ground that her trial counsel had never informed her that removal was a potential consequence of her conviction.[1] The district court granted petitioner's coram nobis petition and vacated her conviction. *Id.* at 31a-54a. The court of appeals reversed and remanded for further proceedings. *Id.* at 1a-30a.

1. Petitioner was born in Mexico in 1956 and entered the United States without authorization in the 1970s. Pet. App. 31a. She eventually became a lawful permanent resident and now lives in Chicago. *Ibid.*

In 1998, petitioner participated in a scheme to submit fraudulent automobile insurance claims for nonexistent personal injuries. Presentence Investigation Report (PSR) 1-2. On April 14, 1998, petitioner, her son, and two other individuals met with an undercover FBI agent who was posing as an attorney. 12/3/03 Plea Hr'g Tr. 16 (Tr.); PSR 5. At this meeting petitioner and her son signed forms purporting to retain the attorney to pursue

[1] Over the years, Congress has altered the immigration laws' "nomenclature" from "deportation" to "removal." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1480 n.6 (2010). This brief uses those terms interchangeably.

insurance claims for injuries they claimed to have incurred in a car accident on the previous day. Tr. 16. Petitioner and her son later visited a medical clinic, where they signed forms falsely attesting to injuries that did not exist and medical treatment that they did not receive. Tr. 16-17. The insurance company later wrote a check for $11,000 to petitioner and her attorney. Tr. 17. Of this amount, petitioner received $1200 as compensation for her participation in the insurance fraud scheme. *Ibid.* In total, the insurance company paid $26,000 to settle all claims associated with the alleged April 13 accident. *Ibid.*

2. In June 2003, a federal grand jury indicted petitioner for her participation in the insurance-fraud scheme. On December 3, 2003, petitioner pleaded guilty to two counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 2a.

Petitioner was sentenced on April 1, 2004. Petitioner's Sentencing Guidelines range of 0-6 months of imprisonment reflected an offense level increase for the loss associated with the portion of the insurance-fraud scheme in which she participated and a two-level reduction for acceptance of responsibility. PSR 4-5, 11; see Sentencing Guidelines § 2B1.1(b)(1)(C)(2003). The district court sentenced petitioner to four years of probation. 4/1/04 Sentencing Hr'g Tr. 24-25. It also required petitioner to pay restitution in the amount of $22,500. *Id.* at 23, 27. Petitioner did not appeal, and her convictions became final.

3. Because the fraud to which petitioner pleaded guilty involved a loss of more than $10,000 and thus constituted an "aggravated felony" under the Immigration and Naturalization Act, 8 U.S.C. 1101 *et seq.*, her conviction made her removable from the United States.

8 U.S.C. 1101(a)(43)(M)(i), 1227(a)(2)(A)(iii); see 8 U.S.C. 1229b(a)(3) (providing that the Attorney General may not cancel the removal of a permanent resident convicted of an aggravated felony). In July 2007, petitioner submitted a naturalization application in which she indicated that she had never been convicted of a crime. Pet. App. 32a. Immigration officials detected petitioner's misstatement, and on March 26, 2009—after petitioner had completed her four-year term of probation—she was served with a notice to appear for removal proceedings based on her aggravated felony conviction. *Ibid.*

In October 2009, more than five years after her conviction became final, petitioner filed a petition for a writ of coram nobis in district court, seeking to overturn her conviction on the ground that her trial attorney never informed her that removal was a potential consequence of her guilty plea. Pet. App. 32a-33a. The court dismissed the petition—which was not served on the government—because it had been filed as a separate civil proceeding rather than as part of petitioner's original criminal case. *Id.* at 39a. In December 2009, the attorney who represented petitioner in her criminal case died. *Id.* at 34a. In January 2010, petitioner refiled her coram nobis petition in her criminal case. *Id.* at 39a.

On March 31, 2010, this Court issued its decision in *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), which held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel"; that the effective-assistance standard set forth in "*Strickland* [v. *Washington*, 466 U.S. 668 (1984)] applie[d] to Padilla's claim"; and that, under *Strickland*, "counsel must advise her client regarding the risk of deportation." *Id.* at 1482. Petitioner contended that she

was entitled to coram nobis relief from her conviction under *Padilla*. Pet. App. 40a. In response, the government contended, among other things, that *Padilla* had announced a new procedural rule, and that under *Teague* v. *Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion), *Padilla*'s holding should not apply retroactively to collateral challenges to convictions that had already become final when *Padilla* was decided.[2] Pet. App. 40a, 45a.

The district court held that petitioner was entitled to rely on *Padilla* because "[t]he holding in *Padilla* is an extension of the rule in *Strickland*" rather than a new rule within the meaning of *Teague*. Pet. App. 44a; *id.* at 52a. The court then held an evidentiary hearing at which, the court noted, "[n]either side presented much evidence," in part because the government was unable to interview petitioner's deceased criminal defense attorney. *Id.* at 33a-34a. The court concluded that petitioner's attorney had performed deficiently by failing to warn petitioner that conviction could result in removal. The court also determined that petitioner had suffered prejudice. *Id.* at 31a-38a. The court granted petitioner's *coram nobis* petition and vacated her conviction. *Id.* at 38a.

4. The court of appeals reversed and remanded, holding that *Padilla* announced a nonretroactive new rule under *Teague*. Pet. App. 1a-19a. A "new" rule, the court explained, is one that was not "dictated" by existing precedent, such that the outcome was "susceptible to debate among reasonable minds." *Id.* at 6a-7a (quoting

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[2] Although *Teague*'s rule is subject to two limited exceptions for substantive rules and "watershed" procedural rules, see *Saffle* v. *Parks*, 494 U.S. 484, 494-495 (1990), petitioner did not contend that either exception applies here. Pet. App. 6a; see Pet. 10.

Butler v. *McKellar*, 494 U.S. 407, 415 (1990); *Teague*, 489 U.S. at 301). The court of appeals reasoned that, in *Padilla* itself, four Members of the Court characterized the Court's decision as a departure from the Court's Sixth Amendment precedents, demonstrating that reasonable jurists could differ as to whether *Padilla*'s rule was dictated by existing precedent. *Id.* at 8a-9a; *Padilla*, 130 S. Ct. at 1488 (Alito, J., joined by Roberts, C.J., concurring in the judgment); *id.* at 1495 (Scalia, J., joined by Thomas, J., dissenting). The court of appeals noted further that "[e]ven the majority [in *Padilla*] suggested that the rule it announced was not *dictated* by precedent, stating that while *Padilla*'s claim 'follow[ed] from' its decision applying *Strickland* to advice regarding guilty pleas in *Hill* * * * , *Hill* 'does not control the question before us.'" Pet. App. 9a (quoting *Padilla*, 130 S. Ct. at 1485 n.12).

The court of appeals also observed that *Padilla* overturned the near-unanimous view of state and federal courts "that deportation is a collateral consequence of a criminal conviction and that the Sixth Amendment does not require advice regarding collateral consequences." Pet. App. 11a. The court explained that this "distinction between direct and collateral consequences was not without foundation in Supreme Court precedent." *Id.* at 13a.

The court of appeals rejected petitioner's argument that *Padilla* simply applied *Strickland*'s standard for ineffective assistance of counsel to a new factual scenario. Although the court acknowledged that applications of *Strickland* "generally will not produce a new rule," it concluded that *Padilla* was "the rare exception" because the Court had never before held "that the Sixth Amendment requires a criminal defense attorney to

provide advice about matters not directly related to their client's criminal prosecution." Pet. App. 15a-16a.

Judge Williams dissented, taking the view that *Padilla* did not announce a new rule because it merely applied the test for ineffective assistance of counsel established in *Strickland* to attorney advice about immigration consequences. Pet. App. 19a-30a.

SUMMARY OF ARGUMENT

I. In *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), this Court held that the Sixth Amendment imposes on defense attorneys in criminal cases a duty to advise noncitizen defendants about the potential removal consequences of pleading guilty. *Padilla* announced a new constitutional rule of criminal procedure that, under *Teague* v. *Lane*, 489 U.S. 288, 303-310 (1989) (plurality opinion), does not apply retroactively on collateral review of convictions that became final before *Padilla* was decided.

A rule is "new" for *Teague* purposes unless it was so "dictated" by the precedent in effect when the defendant's conviction became final that the unlawfulness of the defendant's conviction would not have been "susceptible to debate among reasonable minds." *O'Dell* v. *Netherland*, 521 U.S. 151, 160 (1997) (citation omitted). The rule must be so clearly compelled that a court considering the defendant's claim at the time his conviction became final "would have acted objectively unreasonably"—not merely erroneously—in declining to grant relief. *Id.* at 156.

Here, there is no need to speculate about how reasonable jurists would have adjudicated a claim that counsel was constitutionally obligated to provide advice about deportation. At the time of petitioner's conviction, all ten federal courts of appeals to consider the issue, as

well as 28 out of 30 state appellate courts and the District of Columbia Court of Appeals, had held that the Sixth Amendment imposed no duty to advise defendants about the removal consequences of conviction. Concluding that *Padilla* did not announce a new rule would require the Court to find that the overwhelming consensus among federal and state courts was not only erroneous, but unreasonable.

The Court's opinions in *Padilla* itself confirm that the decision announced a new rule. The majority did not purport to rely on any controlling authority, 130 S. Ct. at 1485 n.12, and it acknowledged that the Court had not previously considered whether the Sixth Amendment extended to advice about consequences not imposed within the criminal case, *id.* at 1481. And the four concurring and dissenting Justices viewed *Padilla*'s holding as a "major upheaval in Sixth Amendment law," *id.* at 1488, 1491 (Alito, J., concurring), that extended counsel's Sixth Amendment duties well beyond the bounds previously established in the Court's decisions, *id.* at 1495 (Scalia, J., dissenting).

An examination of the Court's pre-*Padilla* precedents explains why reasonable jurists could and did conclude that the Sixth Amendment did not impose a duty to advise noncitizen defendants about the removal consequences of conviction. The Court's decisions on counsel's Sixth Amendment duty in the guilty-plea context had held only that counsel was required to advise the defendant on relevant guilt/innocence and sentencing issues so that the defendant would have a meaningful understanding of a guilty plea's implications for, and the strategic considerations surrounding, the defendant's interests within the criminal case. And the Court had repeatedly described deportation as a collateral conse-

quence of conviction, never suggesting that immigration consequences should be considered "close[ly] connect[ed]" to a defendant's criminal jeopardy for purposes of the Sixth Amendment. *Padilla*, 130 S. Ct. at 1482.

Petitioner's primary argument against recognizing *Padilla* as a new rule is that *Padilla* simply applied the ineffective-assistance standard set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984), in a new factual setting. This Court has stated that "[w]here the beginning point" of the Court's analysis is a rule of "general application" that is designed to apply to varying factual contexts, it is less likely that a decision applying that standard will announce a new rule. *Williams* v. *Taylor*, 529 U.S. 362, 382 (2000) (internal quotation marks and citation omitted). But petitioner cannot avail herself of this principle because *Strickland* was not "the beginning point" of the Court's analysis. Rather, the *Padilla* Court first had to address the antecedent and threshold question of whether the Sixth Amendment extended to advice about removal consequences in the first place. 130 S. Ct. at 1482.

II. Petitioner also asserts two broader arguments against *Teague*'s application, both of which are forfeited and in any event without merit.

Petitioner first argues that *Teague* is inapplicable to collateral review of federal convictions because the comity concerns that form part of *Teague*'s rationale are not present when the underlying conviction is federal. But *Teague* also protects the finality of convictions, and the government's interest in finality justifies applying nonretroactivity principles to collateral challenges to federal convictions. *Teague*, moreover, adopted the retroactivity principles set forth by Justice Harlan in *Mackey* v. *United States*, 401 U.S. 667, 675-702 (1971), a

case involving a collateral attack on a federal conviction. Justice Harlan stated that new rules should not be applicable to collateral attacks on both state and federal convictions, and nothing suggests that *Teague* departed from that unitary approach.

Petitioner next argues that *Teague* does not apply to claims of ineffective assistance of counsel because *Massaro* v. *United States*, 538 U.S. 500 (2003), permits defendants to assert an ineffective-assistance claim for the first time on collateral review under 28 U.S.C. 2255, and because, in her view, defendants lack an opportunity to seek new ineffective-assistance rules on direct review. But *Massaro* does not prevent defendants from seeking to establish new rules on direct review. In any event, petitioner's argument overlooks *Teague*'s rejection of the Court's prior retroactivity framework, which required a case-by-case analysis of the nature of the rule at issue. Taken to its logical endpoint, petitioner's argument would apply equally to other types of claims and reduce *Teague* to a cumbersome case-specific inquiry into whether the defendant had a reasonable basis for failing to seek a new rule on direct review.

ARGUMENT

I. THE RULE ANNOUNCED IN *PADILLA* v. *KENTUCKY* DOES NOT APPLY RETROACTIVELY TO CONVICTIONS THAT BECAME FINAL BEFORE *PADILLA* WAS DECIDED

Under *Teague* v. *Lane*, a new rule of criminal procedure, announced after a defendant's conviction became final, is generally not applicable on collateral review of that conviction. 489 U.S. 288, 303-310 (1989) (plurality opinion); *Penry* v. *Lynaugh*, 492 U.S. 302 (1989). A rule is "new" for *Teague* purposes unless it was so "dictated" by the precedent in effect when the defendant's convic-

tion became final that "*no other* interpretation was reasonable." *Lambrix* v. *Singletary*, 520 U.S. 518, 538 (1997). The rule must be so clearly compelled that a court considering the defendant's claim at the time his conviction became final "would have acted objectively unreasonably"—not merely erroneously—in declining to grant relief. *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997).

Accordingly, a defendant cannot prevail merely by showing that a rule "could be thought to [be] support[ed]" by prior precedent, *Beard* v. *Banks*, 542 U.S. 406, 414 (2004), or even that it represents the "most reasonable" interpretation of prior precedent, *Lambrix*, 520 U.S. at 538. Nor is it sufficient that the Court, in adopting the rule, stated that its decision was "controlled" by prior precedent, for "[c]ourts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990); see also *O'Dell*, 521 U.S. at 161 n.2; *Sawyer* v. *Smith*, 497 U.S. 227, 236 (1990).

Rather, a rule is not "new" under *Teague* only if, given the "legal landscape" when the defendant's conviction became final, "all reasonable jurists" would have concluded that the defendant's conviction was flawed by constitutional error. *Lambrix*, 520 U.S. at 527-528. In this case, there is no need to speculate about how "reasonable jurists" would have interpreted *Strickland* v. *Washington*, 466 U.S. 668 (1984), as applied to advice about deportation: all ten federal courts of appeals to address the issue, the District of Columbia Court of Appeals, and 28 out of 30 state appellate courts held before *Padilla* that no ineffective-assistance claim could be based on defense counsel's failure to advise an alien de-

fendant about the risk of deportation. It is highly unlikely that all of those courts were not just wrong, but unreasonably so. The opinions in *Padilla* itself confirm that the Court's rule was new. The majority did not purport to find any prior decision controlling, see 130 S. Ct. at 1485 n.12, and it acknowledged the need for the Court to be "especially careful about recognizing *new* grounds for attacking the validity of guilty pleas," *id.* at 1485 (emphasis added). And the four concurring and dissenting Justices regarded the decision as a "dramatic departure from precedent" that marked a "major upheaval in Sixth Amendment law," *id.* at 1488, 1491 (Alito, J., concurring in the judgment), and a "significant further extension" beyond both the Court's prior decisions and the Sixth Amendment's "textual limitation to criminal prosecutions," *id.* at 1495 (Scalia, J., dissenting). An examination of the Court's pre-*Padilla* precedents explains why a reasonable jurist could have reached the conclusion that the Court's holding was not compelled by any precedent and why *Padilla* was not simply a fact-specific application of *Strickland*'s general rule.

A. The Overwhelming Majority Of Federal And State Appellate Courts Concluded That Counsel Had No Obligation To Provide Advice About Removal Consequences

In this case, "there is no need to guess" about whether "reasonable jurists could have differed" on whether the *Padilla* ruling was compelled by prior precedent. *Beard*, 542 U.S. at 414, 415; *O'Dell*, 521 U.S. at 166 n.3; *Caspari* v. *Bohlen*, 510 U.S. 383, 393-394 (1994). The lower federal courts of appeals and state appellate courts that considered the issue were in near-unanimous agreement that the Sixth Amendment did not require attorneys to advise defendants about removal consequences.

1. Before *Padilla*, all ten of the federal courts of appeals to address the issue had held that defense counsel have no Sixth Amendment obligation to advise their clients of the immigration consequences of pleading guilty. See, *e.g.*, *Santos-Sanchez* v. *United States*, 548 F.3d 327, 334-336 (5th Cir. 2008) (reaffirming *United States* v. *Banda*, 1 F.3d 354, 356 (5th Cir. 1993)), cert. granted, judgment vacated, 130 S. Ct. 2340 (2010); *Broomes* v. *Ashcroft*, 358 F.3d 1251, 1256 (10th Cir.), cert. denied, 543 U.S. 1034 (2004); *United States* v. *Fry*, 322 F.3d 1198, 1200-1201 (9th Cir. 2003); *United States* v. *Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *United States* v. *Del Rosario*, 902 F.2d 55, 58-59 (D.C. Cir.), cert. denied, 498 U.S. 942 (1990); *United States* v. *George*, 869 F.2d 333, 337 (7th Cir. 1989); *United States* v. *DeFreitas*, 865 F.2d 80, 82 (4th Cir. 1989); *United States* v. *Campbell*, 778 F.2d 764, 768-769 (11th Cir. 1985); *United States* v. *Santelises*, 509 F.2d 703, 704 (2d Cir. 1975) (per curiam); see also *Russo* v. *United States*, 173 F.3d 846, No. 97-2891, 1999 WL 164951, at *2 (2d Cir. Mar. 22, 1999); see also *Ogunbase* v. *United States*, 924 F.2d 1059, No. 90-1781, 1991 WL 11619, at *1 (6th Cir. Feb. 5, 1991).[3]

In general, these courts held that "[w]hile the Sixth Amendment assures an accused of effective assistance of counsel in '*criminal prosecutions*,' this assurance does not extend to collateral aspects of the prosecution" such as removal. *George*, 869 F.2d at 337. These courts explained that removal is "not a part of or enmeshed in the criminal proceeding," but is rather a "collateral consequence" of conviction—*i.e.*, a consequence that may arise from a conviction but is not a component of the de-

[3] The Third Circuit had declined to resolve the question. See *United States* v. *Nino*, 878 F.2d 101, 105 (1989).

fendant's punishment for the offense and will not be imposed by the presiding court. *Ibid.*; see also, *e.g.*, *Fry*, 322 F.3d at 1200; *Gonzalez*, 202 F.3d at 25; *Banda*, 1 F.3d at 356. As a result, these courts held that counsel did not render deficient performance under the Sixth Amendment by failing to advise a defendant about removal consequences. *Ibid.*

The vast majority of state appellate courts to address the issue agreed that defense counsel had no Sixth Amendment obligation to advise their clients about the likelihood of removal. Appellate courts in 28 States and the District of Columbia—18 high courts, and 11 intermediate appellate courts—explicitly so held.[4] Only two

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[4] See *Rumpel* v. *State*, 847 So. 2d 399, 402-405 (Ala. Crim. App. 2002); *Tafoya* v. *State*, 500 P.2d 247, 252 (Alaska 1972), cert. denied, 410 U.S. 945 (1973); *State* v. *Rosas*, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995); *Niver* v. *Commissioner of Corr.*, 919 A.2d 1073, 1075-1076 (Conn. App. Ct. 2007) (per curiam); *State* v. *Christie*, 655 A.2d 836, 841 (Del. Super. Ct.), aff'd, 655 A.2d 306, No. 94-252, 1994 WL 734468, at *1 (Del. Dec. 29, 1994); *Major* v. *State*, 814 So. 2d 424, 426-431 (Fla. 2002); *Matos* v. *United States*, 631 A.2d 28, 31-32 (D.C. 1993) (alternative ground for denying relief); *People* v. *Huante*, 571 N.E.2d 736, 740-742 (Ill. 1991); *State* v. *Ramirez*, 636 N.W.2d 740, 743-746 (Iowa 2001); *State* v. *Muriithi*, 46 P.3d 1145, 1149-1152 (Kan. 2002); *Commonwealth* v. *Fuartado*, 170 S.W.3d 384, 385-386 (Ky. 2005); *State* v. *Montalban*, 810 So. 2d 1106, 1110 (La.), cert. denied, 537 U.S. 887 (2002); *Commonwealth* v. *Fraire*, 774 N.E.2d 677, 678-679 (Mass. App. Ct. 2002); *People* v. *Davidovich*, 618 N.W.2d 579, 582 (Mich. 2000) (per curiam); *Alanis* v. *State*, 583 N.W.2d 573, 579 (Minn. 1998); *State* v. *Clark*, 926 S.W.2d 22, 25 (Mo. Ct. App. 1996); *State* v. *Zarate*, 651 N.W.2d 215, 221-223 (Neb. 2002); *Barajas* v. *State*, 991 P.2d 474, 475-476 (Nev. 1999) (per curiam); *State* v. *Chung*, 510 A.2d 72, 76 (N.J. Super. Ct. App. Div. 1986); *People* v. *Ford*, 657 N.E.2d 265, 268-269 (N.Y. 1995); *State* v. *Dalman*, 520 N.W.2d 860, 863 (N.D. 1994); *Commonwealth* v. *Frometa*, 555 A.2d 92, 93-94 (Pa. 1989); *State* v. *Alejo*, 655 A.2d 692, 692-693 (R.I. 1995); *Nikolaev* v. *Weber*, 705 N.W.2d 72, 75-77 (S.D. 2005); *Bautista* v. *State*, 160

state courts had held that the Sixth Amendment requires advice about immigration consequences, and two more had refused to decide the issue.[5]

2. Petitioner downplays these decisions on the ground that the "mere existence" of contrary lower-court authority does not necessarily establish that a rule is new. Br. 24. But accepting petitioner's argument that *Padilla* was dictated by prior precedent would not simply require this Court to discount the "mere existence" of a few decisions that failed to anticipate the result in *Padilla*. Rather, petitioner's argument is premised on the assertion that *every* federal court of appeals—ten in all—and all but two of the state and District of Columbia appellate courts—29 in all—to address the issue were not only wrong but *unreasonable* in holding that the Sixth Amendment did not require advice about immigration consequences. See *O'Dell*, 521 U.S. at 156, 161 & n.3.

Petitioner also argues (Br. 25) that many of these decisions have "little bearing" on whether *Padilla* was dictated by precedent because they predated the Court's 2001 decision in *INS* v. *St. Cyr*, 533 U.S. 289, 323 n.50, in

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S.W.3d 917, 922 (Tenn. Crim. App. 2004); *Perez* v. *State*, 31 S.W.3d 365, 367-368 (Tex. App. 2000); *State* v. *Rojas-Martinez*, 125 P.3d 930, 934-935 (Utah 2005); *State* v. *Martinez-Lazo*, 999 P.2d 1275, 1279-1280 (Wash. Ct. App. 2000); *State* v. *Santos*, 401 N.W.2d 856, 858 (Wis. Ct. App. 1987).

[5] See *People* v. *Pozo*, 746 P.2d 523, 527-529 (Colo. 1987) (en banc); *State* v. *Paredez*, 101 P.3d 799, 805 (N.M. 2004); see also *In re Resendiz*, 19 P.3d 1171 (Cal. 2001); *State* v. *Arvanitis*, 522 N.E.2d 1089, 1091-1095 (Ohio Ct. App. 1986) (declining to decide whether Sixth Amendment imposes a duty to advise). Two courts held that their state constitutions imposed a duty to advise. See *Gonzalez* v. *State*, 134 P.3d 955, 958 (Or. 2006); *Williams* v. *State*, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994).

which the Court observed that "competent defense counsel, following the advice of numerous practice guides, would" advise a defendant considering a guilty plea about the availability of relief from deportation. For the reasons discussed below, however, see pp. 28-29, *infra*, *St. Cyr*, an immigration decision, did not establish that counsel had a Sixth Amendment duty to advise defendants about the removal consequences of conviction. The lower courts shared that view of *St. Cyr*. No federal or state court decision appears to have relied on *St. Cyr* to abrogate its prior holding that the Sixth Amendment does not impose a duty to advise about removal. To the contrary, many of the decisions rejecting ineffective-assistance claims based on counsel's failure to advise postdated *St. Cyr*. See, *e.g.*, *Santos-Sanchez*, 548 F.3d at 335-336; *Broomes*, 358 F.3d at 1256; n.4, *supra*. And several of the courts that addressed *Padilla* claims after *St. Cyr* either expressly rejected the argument that *St. Cyr* altered Sixth Amendment principles or reaffirmed their prior precedent without discussing *St. Cyr*. See, *e.g.*, *Fry*, 322 F.3d at 1200-1201 ("*St. Cyr* did not involve the effectiveness of counsel's representation."); *State* v. *Rojas-Martinez*, 125 P.3d 930, 937 (Utah 2005) (rejecting reliance on *St. Cyr*'s "aspirational language"); *State* v. *Muriithi*, 46 P.3d 1145, 1149-1150 (Kan. 2002) (rejecting argument based on *St. Cyr*); *Jimenez* v. *United States*, 154 Fed. Appx. 540, 541 (7th Cir. 2005); *People* v. *Bouzidi*, 773 N.E.2d 699, 704-707 (Ill. App. Ct. 2002); *Perales* v. *State*, No. A03-1074, 2004 WL 292073, at *3-4 (Minn. Ct. App. Feb. 17, 2004); *Rubio* v. *State*, 194 P.3d 1224, 1229-1230 (Nev. 2008).

Petitioner also asserts (Br. 25-26) that the fact that three federal courts of appeals had held that affirmative misadvice about removal could be grounds for an inef-

fective-assistance claim demonstrates that these courts "accepted that *Strickland* applied to deportation advice." See Br. 25; *United States* v. *Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005); *United States* v. *Couto*, 311 F.3d 179, 187-188 (2d Cir. 2002); *Downs-Morgan* v. *United States*, 765 F.2d 1534, 1539-1541 (11th Cir. 1985). But these same courts had held, like the other circuit courts, that the Sixth Amendment did not impose a duty to advise about removal consequences. They distinguished affirmative misadvice on the ground that all criminal defense attorneys have a duty not to misrepresent the extent of their expertise about any topic. See *Kwan*, 407 F.3d at 1015; *Couto*, 311 F.3d at 187-188; cf. *Downs-Morgan*, 765 F.2d at 1541 n.15 (misadvice is deficient when defendant faces imprisonment in his home country).[6] Both before and after *St. Cyr*, then, the federal courts of appeals were unanimous in the view that the Sixth Amendment imposed no obligation on counsel to advise defendants of the immigration consequences of conviction.

B. The *Padilla* Opinions Confirm That *Padilla* Announced A New Rule Concerning The Extent Of Counsel's Duties Under The Sixth Amendment

The majority, concurring, and dissenting opinions in *Padilla* confirm that the Court did not view *Padilla*'s holding as dictated by prior decisions. The reasoning of those opinions makes clear that reasonable jurists could differ on the extent to which the *Padilla* rule followed

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[6] The Solicitor General in *Padilla* likewise distinguished between "affirmative misadvice," to which *Strickland* was said to apply, and failure to advise at all about "matters that will not be decided in the criminal case," to which *Strickland* was said not to apply. *Padilla*, 130 S. Ct. at 1484 (rejecting that distinction despite recognizing that "it has support among the lower courts").

from precedent. See, *e.g.*, *Lambrix*, 520 U.S. at 528; *Beard*, 542 U.S. at 414-415.

1. a. In evaluating whether *Padilla* announced a new rule, it is highly "significant" that the Court "itself did not purport to rely upon any controlling precedent." *Lambrix*, 520 U.S. at 528.

Padilla concerned the question whether the Sixth Amendment's guarantee of effective assistance of counsel extends to advice about the potential removal consequences of conviction even though removal has traditionally been understood as a "collateral consequence" of a criminal conviction. 130 S. Ct. at 1481. Before applying *Strickland*'s ineffective-assistance standard to Padilla's claim, the Court had to establish two related premises: first, that the Sixth Amendment duty of effective assistance extends beyond matters related to resolving a defendant's criminal jeopardy; and second, that removal from the country, while traditionally understood not to be part of a defendant's criminal jeopardy, is sufficiently "close[ly] connect[ed] to the criminal process" to fall within the Sixth Amendment's ambit. *Id.* at 1482.

While the Court rejected the Kentucky Supreme Court's holding that "collateral consequences are outside the scope of representation required by the Sixth Amendment," *Padilla* 130 S. Ct. at 1481, this Court did not suggest that the Kentucky court's conclusion was foreclosed—or even addressed—by its precedents. Rather, the Court stated that "[w]e * * * have never applied a distinction between direct and collateral consequences to define the scope" of the Sixth Amendment. *Ibid.* Petitioner reads that statement (Br. 21) to mean that the Court's precedents foreclosed the proposition that the Sixth Amendment duty of advice did

not extend beyond matters necessary to resolve the criminal case. But the Court did not suggest it had ever rejected the direct/collateral distinction or cite any decisions doing so. And the Court immediately followed with the statement that "we need not consider" in *Padilla* "[w]hether that distinction is appropriate." 130 S. Ct. at 1481. These assertions, taken together, reflect the Court's acknowledgement that the Sixth Amendment's extension to advice about consequences that are not imposed as part of the criminal case was an open question under its decisions. Contrary to petitioner's argument, then, the Court did not "easily brush[] aside" (Br. 21) the Kentucky Supreme Court's direct/collateral distinction as foreclosed by Sixth Amendment precedents—rather, the Court expressly acknowledged that it had never before addressed the question.

Instead of resolving that open question, the Court concluded that the "unique nature of deportation" made removal "difficult to classify as either a direct or a collateral consequence" and determined that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right." *Padilla*, 130 S. Ct. at 1481-1482. Here too, the Court did not purport to rely on controlling precedent. The Court acknowledged that it had held that removal was not "a criminal sanction," *id.* at 1481 (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)), but reasoned that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders," *ibid.* As a result, the Court concluded, the "collateral versus direct distinction" on which lower courts had relied was "ill-suited" to the context of removal consequences, *id.* at 1482. Although the Court

drew support for that conclusion from *St. Cyr* and other decisions recognizing that removal is a severe consequence, *id.* at 1481, the Court did not suggest that any decision had ever suggested—much less *established*—that removal's "nearly automatic" character rendered it "close[ly] connect[ed]" to the criminal proceeding for Sixth Amendment purposes. *Id.* at 1482.

Other aspects of the *Padilla* opinion confirm that the Court viewed its decision as extending, rather than applying, existing precedents. The Court explicitly acknowledged that it was "recognizing [a] *new ground*[] for attacking the validity of guilty pleas." 130 S. Ct. at 1485 (emphasis added). In addition, the Court explained that although its holding "follow[ed]" from *Hill* v. *Lockhart*, 474 U.S. 52 (1984), which held generally that the *Strickland* test applies to guilty-plea challenges based on ineffective assistance of counsel, *Hill* did "not control" the decision. 130 S. Ct. at 1485 n.12. Nor did the Court claim that any other decision controlled the outcome. Given that even a claim that a decision was "controlled" by prior opinions is not dispositive under *Teague*, see *Butler*, 494 U.S. at 415, the majority's failure to cite any authority as controlling suggests that the decision announced a new rule.

b. Petitioner argues (Br. 33) that the fact that the Court did not apply *Teague* in *Padilla* itself indicates that *Padilla* did not announce a new rule. But *Teague* had no application in *Padilla* because *Padilla* was on review from a state collateral proceeding. See 130 S. Ct. at 1478. This Court has held that "the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a

remedy for a violation that is deemed 'nonretroactive' under *Teague*." *Danforth* v. *Minnesota*, 552 U.S. 264, 282 (2008). Whether or not the Kentucky courts apply a *Teague*-like doctrine of their own on state collateral review is therefore a matter of *state*, not federal, law. See *id.* at 288-289, 281-282. No federal *Teague* issue was before the Court in *Padilla*. Furthermore, the *Teague* defense "is not 'jurisdictional,'" and the State may waive or forfeit it in individual cases. *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990); see *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994). When a State forfeits the *Teague* bar, the Court may announce a new rule even though the case might otherwise have presented *Teague* issues. The State in *Padilla* did not raise *Teague* as a defense. For both of these reasons, the Court's decision does not imply any conclusion about retroactivity.

Petitioner also argues (Br. 33) that *Padilla* "assumed" that similar claims would arise in habeas proceedings and the Court therefore must have assumed that its decision would have retroactive effect. But the Court's discussion of the likelihood that defendants would "collaterally attack" their guilty pleas based on the *Padilla* decision, 130 S. Ct. at 1485-1486, will not bear that weight. The Court did not discuss *Teague*'s application or suggest that *Teague* would not apply. *Ibid.* And because the vast majority of convictions are imposed by state courts, and those courts may or may not apply a *Teague*-like state-law rule against retroactivity, the Court likely assumed that many defendants would seek to challenge their convictions through state collateral proceedings that would not implicate federal *Teague* issues.[7]

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[7] In 2006, for instance, federal convictions accounted for only six percent of all felony convictions. Sean Rosenmerkel, Matthew

2. The opinions of the four Justices who disagreed with the rule adopted by the *Padilla* Court confirm that *Padilla* announced a new rule. See *Beard*, 542 U.S. at 414-415.

Justice Alito, joined by the Chief Justice, concurred in the judgment, but disagreed with the Court's holding that "a criminal defense attorney [must] * * * be required to provide advice on immigration law." *Padilla*, 130 S. Ct. at 1494. The concurring Justices emphasized that the "Court ha[d] never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice" about the collateral consequences of a conviction. *Id.* at 1488. The Court's decision, in their view, represented a "dramatic departure from precedent," *ibid.*, that "mark[ed] a major upheaval in Sixth Amendment law," *id.* at 1491, as well as a "dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment," *id.* at 1492. The concurring Justices would have held only that the Sixth Amendment requires a defense attorney to "refrain from unreasonably providing incorrect advice." *Id.* at 1487. In addition, "[w]hen [the] attorney is aware that a client is an alien," the concurring Justices would have required counsel to provide a general warning that "a criminal conviction may have adverse consequences under the immigration laws," *id.* at 1494, and an instruction that "if the alien wants advice on this issue, the alien should consult an immigration attorney," *id.* at 1487.

Petitioner argues (Br. 24) that she would have prevailed under the test advocated by the concurring Justices. But the relevant point is that the concurring Justices viewed *Padilla*'s holding—its requirement that

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Durose & Donald Farole, Jr., Bureau of Justice Statistics, *Statistical Tables: Felony Sentences in State Courts, 2006*, at 2 (2009).

counsel provide reasonable advice about immigration consequences—as a departure from the Court's Sixth Amendment precedents. And in any event, the alternative rule proposed by the concurring Justices would likely have been a new rule itself, as the concurring Justices did not suggest that it was "dictated" by any of the Court's prior decisions. See *Lambrix*, 520 U.S. at 528-529.

Justice Scalia, joined by Justice Thomas, dissented on the ground that "[t]he Sixth Amendment guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n]'—not for sound advice about the collateral consequences of conviction." *Padilla*, 130 S. Ct. at 1494 (Scalia, J., dissenting) (quoting U.S. Const. Amend. VI) (second alteration in original). According to the dissenting Justices, the Court's holding broke from the Court's precedents: "We have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions." *Id.* at 1495. The dissenting Justices found "no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand" and concluded that the Court had "never held, as the logic of [its] opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands." *Ibid.*

Petitioner characterizes (Br. 23) the dissenting opinion as attempting to "impose a new limitation" on the Sixth Amendment. But for purposes of the "new rule" analysis, the point is that two Justices—like the overwhelming majority of lower federal and state appellate courts to consider the issue—believed that the Court's decisions had never suggested that the Sixth Amend-

ment duty of advice extended beyond matters necessary to resolve the defendant's criminal jeopardy.

As petitioner observes (Br. 23), the "mere existence of a dissent" does not establish that a rule is new. *Beard*, 542 U.S. at 416 n.5. That is because "the focus of the inquiry is whether *reasonable* jurists could differ as to whether precedent compels the * * * rule." *Ibid.*; see also *Stringer* v. *Black*, 503 U.S. 222, 237 (1992). But here, the four concurring and dissenting Justices did not simply disagree with the rule announced by the Court; rather, they argued that *Padilla*'s holding was a stark departure from prior precedent. In these circumstances, petitioner faces a heavy burden in establishing that no reasonable jurist could differ as to whether *Padilla* was compelled by precedent.

C. Reasonable Jurists Could Have Concluded, Based On The Pre-*Padilla* Legal Landscape, That The Sixth Amendment Did Not Impose An Obligation To Advise Defendants About Removal Consequences

An examination of this Court's Sixth Amendment precedent when petitioner's conviction became final in 2004 reveals why reasonable jurists could have concluded that the Sixth Amendment did not impose an obligation to advise a defendant about the removal consequences of pleading guilty because those consequences are beyond the scope of the criminal prosecution.

1. When petitioner's conviction became final, it was well established that the Sixth Amendment's guarantee of "Assistance of Counsel for [the defendant's] defence," U.S. Const. Amend. VI, conferred the right to *effective* assistance of counsel in defending against a criminal prosecution, including in deciding whether to plead guilty or go to trial. *Strickland*, 466 U.S. at 687-690; *Hill*, 474 U.S. at 56-59. Specifically, the Court had held

that counsel was required to advise the defendant on whether, given the strength of the prosecution and defense cases, the defendant had any realistic opportunity to avoid conviction on some or all charges by going to trial, and so whether pleading guilty would not represent an advantageous resolution of the proceedings. See *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995); *Hill*, 474 U.S. at 59; *Tollett* v. *Henderson*, 411 U.S. 258, 266-268 (1973); *Parker* v. *North Carolina*, 397 U.S. 790, 797-798 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 769-771 (1970); *Brady* v. *United States*, 397 U.S. 742, 748 & n.6 (1970). The Court had also established that counsel must explain the penalties that the defendant faced in the criminal proceeding and the plea's likely effect on the nature and severity of the punishment. See *Hill*, 474 U.S. at 56; *Tollett*, 411 U.S. at 268. And the Court had held that counsel had a duty to ensure that the defendant understood the rights within the criminal process that he would surrender by pleading guilty. *Libretti*, 516 U.S. at 50-51; *Brady*, 397 U.S. at 748 n.6. All of these affirmative obligations promoted the defendant's capacity to intelligently evaluate how to resolve his jeopardy in the criminal proceeding.

Before *Padilla*, the Court had never suggested, let alone held, that the Sixth Amendment required counsel to advise the defendant about matters that are *not* part of the criminal jeopardy that a defendant faces. Indeed, in *Hill*, the Court considered a claim that the defendant had been misadvised concerning parole eligibility, a matter that a panel of the court of appeals had deemed "collateral." 474 U.S. at 55. The Court in *Hill* found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally inef-

fective assistance of counsel" because the defendant in that case could not demonstrate prejudice. *Id.* at 60. *Hill* thus left open whether even misadvice about parole eligibility violated a duty under *Strickland*. That decision hardly established that consequences even more remote from criminal jeopardy might be included in counsel's Sixth Amendment duty. Thus, it would not have been "illogical or even * * * grudging," *Butler*, 494 U.S. at 415, for courts considering this Court's decisions to conclude that counsel's duty to advise a defendant about pleading guilty did not extend to matters that were not part of the adversarial criminal process.

Although petitioner emphasizes that the Court's Sixth Amendment decisions had "never applied" a distinction between direct and collateral consequences, Br. 10 (quoting *Padilla*, 130 S. Ct. at 1481), that fact falls far short of establishing—as petitioner must—that *no reasonable jurist* could have concluded that such a distinction was consistent with existing law. See *Lambrix*, 520 U.S. at 527-528. To the contrary, reasonable jurists could have—and did—conclude that the Court's decisions supported limiting the Sixth Amendment duty of advice to those consequences that are imposed as part of the criminal case. See pp. 12-17, *supra*.

2. The Court's decisions also indicated that the Court viewed removal proceedings as entirely separate from a defendant's criminal jeopardy. Certainly no decision compelled the conclusion that removal was sufficiently "close[ly] connect[ed] to the criminal process" to be treated as falling within the Sixth Amendment's scope, *Padilla*, 130 S. Ct. at 1482, and *Padilla* did not suggest otherwise.

As the Court explained in *Lopez-Mendoza*, 468 U.S. at 1038-1039, "[a] deportation proceeding is a purely civ-

il action" instituted by immigration authorities—now, the Department of Homeland Security—rather than a sentencing court. A removal proceeding "is in no proper sense a trial and sentence for a crime or offence," and an order of removal, though its implications may be severe, "is not a punishment for crime." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893); see also *St. Cyr*, 533 U.S. at 324.

At the time of petitioner's conviction, the Court had also recognized that although removal was a potential consequence of conviction, it was not imposed by the sentencing court, but rather fell in the category of "disabilities and burdens [that] may flow" from a criminal judgment.[8] See *Fiswick* v. *United States*, 329 U.S. 211, 221-222 & n.8 (1946) (explaining that removal consequences, along with the potential loss of civil rights re-

[8] Under 8 U.S.C. 1228(c)(1), a federal district court may enter an order of judicial removal at the time of sentencing in a criminal case, upon the request of the United States Attorney, with the concurrence of immigration officials, and in the discretion of the court. But the Court never suggested that the concomitant entry of a judicial order of removal rendered the prospect of removal part of the criminal jeopardy faced by the defendant in the prosecution, and the *Padilla* Court did not rely on the existence of judicial removal orders in concluding that removal consequences are "close[ly] connect[ed]" to criminal jeopardy. 130 S. Ct. at 1482.

In addition, under prior immigration statutes a sentencing judge could enter a judicial recommendation against deportation (JRAD). See *Padilla*, 130 S. Ct. at 1479-1480. As *Padilla* explained, the Second Circuit had held that a defendant had a right to effective assistance in seeking a JRAD. *Id*. at 1480 (quoting *Janvier* v. *United States*, 793 F.2d 449, 452 (2d Cir. 1986)). But Congress eliminated the JRAD procedure in 1990, and the *Padilla* Court did not rely on it in concluding that removal consequences under current immigration law are "close[ly] connect[ed]" to the criminal process. *Id*. at 1480-1482.

sulting from a conviction, could keep a challenge to a conviction from being moot). The Court thus repeatedly described removal as a "collateral consequence[]" and listed it along with other civil disabilities that may arise from a conviction by operation of law but are not imposed by the sentencing court. See, *e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 54-56 (1968) (listing removal along with use of a conviction to impeach subsequent testimony); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) ("as a collateral consequence" of conviction, government could seek to bar defendants' reentry into the country).

Even after removal became a "nearly * * * automatic" consequence of many criminal convictions, *Padilla*, 130 S. Ct. at 1481, the Court did not, before *Padilla*, extend counsel's Sixth Amendment duty of advice to removal consequences. In 1996, the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, closed off avenues of discretionary relief from removal for noncitizens who committed certain removable offenses. *Padilla*, 130 S. Ct. at 1480. But even after the enactment of IIRIRA and AEDPA in 1996, the Court referred to removal as a "collateral consequence[]" of conviction. *Spencer* v. *Kemna*, 523 U.S. 1, 9 (1998). And the Court continued to cite *Lopez-Mendoza* for the proposition that deportation was not a criminal penalty. See *United States* v. *Balsys*, 524 U.S. 666, 671-672 (1998); *St. Cyr*, 533 U.S. at 324.

3. The only Supreme Court decision on which petitioner relies in arguing (Br. 22) that "creating a categorical distinction between direct and collateral conse-

quences would have been * * * unsupportable" under pre-*Padilla* law is the immigration-law decision in *St. Cyr*. There, the Court applied the civil retroactivity framework set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), to Congress's repeal of certain discretionary relief from removal in IIRIRA. *St. Cyr*, 533 U.S. at 321-323. In considering whether retroactive application of the repeal provision would unfairly upset the legitimate expectations of defendants who might face removal as a result of pleading guilty, the Court stated that alien defendants considering whether to plead guilty are generally "acutely aware of the immigration consequences of their convictions." *Id.* at 322. And, the Court observed, if alien defendants were not already aware of the availability of discretionary relief, "competent defense counsel, following the advice of numerous practice guides, would have advised" them of it. *Id*. at 323 n.50.

These descriptive statements, based as they were on "the advice of numerous practice guides," did not suggest, much less hold, that the *Sixth Amendment* imposed a duty on counsel to advise about removal consequences, or that counsel who failed to provide such advice would not be "competent" for purposes of the Sixth Amendment. To the contrary, the Court took pains to emphasize that it did not question its longstanding understanding that "deportation is [not] punishment for past behavior" and that removal proceedings do not implicate the "various protections that apply in the context of a criminal trial." *St. Cyr*, 533 U.S. at 324 (internal quotation marks and citation omitted). Thus, the Court's observations about counsel's practice are hardly the sort of on-point holding that the Court has required

before concluding that a rule is dictated by prior precedent. Cf. *Lambrix*, 520 U.S. at 530.

4. Petitioner also argues (Br. 20) that the standards set forth by professional associations like the American Bar Association established that when petitioner's conviction became final, it would have been unreasonable under *Strickland* not to advise defendants about removal consequences. But while this Court has treated prevailing professional norms as helpful "guides" to determining what constitutes reasonably effective performance under *Strickland*, it has never suggested that such standards speak to, much less define, the *scope* of the right to counsel under the Sixth Amendment. See *Padilla*, 130 S. Ct. at 1488 (Alito, J., joined by Roberts, C.J., concurring in the judgment). And even with respect to what constitutes reasonable representation in cases in which *Strickland* applies, professional standards are "only guides to what reasonableness means, not its definition." *Bobby* v. *Van Hook*, 130 S. Ct. 13, 17 (2009) (per curiam) (internal quotation marks and citation omitted); see *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000). Significantly, none of the sources of "prevailing professional norms" cited in *Padilla*, 130 S. Ct. at 1482, suggested that defense counsel have a constitutional duty to advise on collateral consequences. Indeed, the commentary following one of the cited standards specifically stated that the standard's imposition of such a duty went beyond any constitutional requirement imposed by the courts. *ABA Standards for Criminal Justice: Pleas of Guilty* 14-3.2(f) cmt. at 126 & n.25 (3d ed. 1999).

Because these aspirational professional guidelines do not define the scope of the Sixth Amendment guarantee of effective assistance, they cannot establish that *Padilla*'s rule was dictated by precedent. Cf. *Sawyer*, 497

U.S. at 238-239 (prior state-law rules did not establish that a rule should be applied retroactively because "the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution") (quoting *Dugger* v. *Adams*, 489 U.S. 401, 409 (1989)).

D. *Padilla*'s Holding Is Not Simply An Application Of *Strickland* To Novel Facts

Petitioner's primary argument against recognizing *Padilla* as a new rule is that *Padilla* simply applied the familiar *Strickland* ineffective-assistance standard in a new factual setting. Pet. Br. 16-19, 21-22. "Where the beginning point" of the Court's analysis "is a rule of * * * general application, a 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." *Williams* v. *Taylor*, 529 U.S. 362, 382 (2000) (quoting *Wright* v. *West*, 505 U.S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment). Petitioner cannot avail herself of this principle, however, because *Strickland* was not "the beginning point" of the Court's analysis.

1. Petitioner argues that *Padilla* "reaffirmed" that "[w]henever a client is a criminal defendant, the Sixth Amendment applies" and counsel "must give reasonable advice according to 'prevailing professional norms.'" Pet. Br. 21-22 (quoting *Strickland*, 466 U.S. at 688). For the reasons discussed above, petitioner's characterization of the *Strickland* rule overlooks both the Court's pre-*Padilla* Sixth Amendment decisions and the Court's reasoning in *Padilla*. Before *Padilla*, the Court had *rejected* the use of professional standards to define the scope of the Sixth Amendment, see p. 30, *supra*, and it had never suggested that the Sixth Amendment re-

quired advice beyond what was necessary to assist the defendant in advantageously resolving the criminal charges against him, see pp. 24-26, *supra*. The *Padilla* Court thus had to address the antecedent and threshold question of the Sixth Amendment's application before deciding how *Strickland*'s standard would apply to advice about immigration consequences—*i.e*, whether and in what circumstances counsel would render deficient performance by failing to give such advice. *Padilla*, 130 S. Ct. at 1482; see pp. 18-20, *supra*.

Petitioner contends that the *Padilla* Court's reliance on "[p]revailing norms of practice as reflected in American Bar Association standards and the like," 130 S. Ct. at 1482 (brackets in original), demonstrates that the Court simply applied *Strickland* to new facts. But the Court did not consult professional standards in answering the antecedent and threshold question whether the Sixth Amendment applied to advice about removal consequences. See *id*. at 1481-1482. Rather, the Court used professional standards as "guides to determining what is reasonable" performance for purposes of *Strickland*'s first prong—a question that it reached only after concluding that "*Strickland* applies to Padilla's claim" in the first place. *Id*. at 1482.

2. The decisions on which petitioner relies (Br. 16-19) in arguing that ineffective-assistance decisions generally do not announce new rules are all distinguishable from *Padilla*. For the most part, the only question in those cases was *how Strickland* applied to a new factual situation clearly within its ambit—not *whether* the advice in question fell outside the Sixth Amendment's guarantee of assistance of counsel in a "criminal prosecution[]." U.S. Const. Amend. VI.

In *Flores-Ortega*, *supra*, the Court addressed "the proper framework for evaluating an ineffective assistance of counsel claim[] based on counsel's failure to file a notice of appeal without respondent's consent." 528 U.S. at 473. The Court's decisions had already established that the Sixth Amendment entitled a defendant to advice concerning whether to file a direct appeal and assistance in doing so, *id.* at 477-478, and so the Court defined the question presented in *Flores-Ortega* as whether "counsel [is] deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other," *id.* at 477. Unlike in *Padilla*, then, *Flores-Ortega* simply considered *how* the *Strickland* test should apply, not whether the Sixth Amendment governed the topic in the first place.[9]

Wiggins v. *Smith*, 539 U.S. 510 (2003), and *Williams*, *supra*, also concerned duties that were already understood as falling within *Strickland*'s ambit.[10] In *Wiggins*, the Court stated that it had not made "new law" in *Williams*, which held that counsel's unreasonable failure to investigate a defendant's background in preparation for a capital sentencing constituted ineffective assistance. *Wiggins*, 539 U.S. at 522. The Court had established in

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[9] Contrary to petitioner's argument (Br. 16-17), the Court did not decide whether *Teague* barred relief, having denied certiorari on that question. See *Roe* v. *Flores-Ortega*, 526 U.S. 1097 (1999).

[10] *Williams* and *Wiggins* were decided pursuant to 28 U.S.C. 2254(d)(1) (2000), which requires habeas petitioners challenging a state-court conviction to demonstrate the state court had "unreasonabl[y]" applied "clearly established Federal law, as determined by the Supreme Court." This Court has indicated that "whatever would qualify as an old rule" under *Teague* would also qualify as "clearly established" under Section 2254(d)(1), with the caveat that Section 2254(d)(1) "restricts the source of clearly established law to this Court's jurisprudence." *Williams*, 529 U.S. at 412.

Strickland itself that counsel had a duty to make reasonable investigations of potential mitigating factors in a capital case. See *Strickland*, 466 U.S. at 690-691. Accordingly, the *Williams* Court explained that the defendant's claims "are squarely governed by our holding in *Strickland*." *Wiggins*, 539 U.S. at 522 (quoting *Williams*, 529 U.S. at 390). *Williams* and *Wiggins* thus merely refined the scope of counsel's duty to investigate under *Strickland* in the context of specific factual circumstances.[11] See *Williams*, 529 U.S. at 390; *Wiggins*, 539 U.S. at 521-522.

Lafler v. *Cooper*, 132 S. Ct. 1376 (2012), is also inapposite. There, the Court considered "how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial," *id.* at 1384, and held that defendants may demonstrate *Strickland* prejudice in such circumstances, even if they were convicted after a fair trial, *id.* at 1386. The State did not raise *Teague* as a barrier to relief, see 10-209 Pet. i, but did rely on AEDPA's requirement that the state-court decision must be contrary to or an unreasonable application of clearly established federal law before relief may be granted, 28 U.S.C. 2254(d)(1). See 10-209 Pet. Br. 26-34. This Court rejected that reliance because the state court had acted "contrary to" federal law by rejecting Lafler's ineffective-assistance claim on the ground that his plea was knowing and voluntary, rather than applying *Strickland*. 132 S. Ct. at 1390. The Court therefore concluded that under AEDPA "the federal courts in this habeas

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[11] *Rompilla* v. *Beard*, 545 U.S. 374 (2005), similarly involved the application of *Strickland* to counsel's failure to investigate in connection with a capital sentencing. But cf. Pet. Br. 18. No question existed in *Rompilla* that the *Strickland* standard applied. See 545 U.S. at 377.

action can determine the principles necessary to grant relief." *Ibid.*

Finally, *Francis* v. *Franklin*, 471 U.S. 307 (1985), and *Stringer*, *supra*, are also distinguishable. But cf. Pet. Br. 13-14. The Court held in *Yates* v. *Aiken*, 484 U.S. 211 (1988), that *Franklin* was an application of the rule against mandatory presumptions against the defendant that was announced in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), because *Franklin* had stated that the question in "this case is almost identical to that before the Court in *Sandstrom*." *Yates*, 484 U.S. at 217. In *Stringer*, 503 U.S. at 228-229, the Court held that the result in *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), was dictated by its earlier decision in *Godfrey* v. *Georgia*, 446 U.S. 420 (1980). *Godfrey* held that States—in that case, Georgia—may not use vague aggravating factors in capital cases, and the Court held in *Clemons* that that principle applied "*a fortiori*" to Mississippi's use of aggravating factors despite immaterial differences in the States' sentencing systems. *Stringer*, 503 U.S. at 228-229. Nothing in *Strickland* or any of the Court's other Sixth Amendment cases similarly compelled *Padilla*'s rule. Rather, that rule broke new legal ground and announced a duty not dictated by precedent. Accordingly, it is a new rule under *Teague*.

II. THE *TEAGUE* FRAMEWORK APPLIES TO COLLATERAL CHALLENGES TO FEDERAL CONVICTIONS BASED ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

In addition to arguing that *Padilla* did not establish a new rule, petitioner asserts two broader arguments against *Teague*'s application: first, that *Teague* is entirely inapplicable to collateral review of federal convictions; and second, that even if the *Teague* framework is

otherwise applicable on collateral review of federal convictions, it does not apply to claims of ineffective assistance of counsel. Petitioner failed to raise these arguments before the lower courts, and this Court should therefore not consider them. In any event, petitioner's arguments are without merit.

A. Petitioner's Argument That The *Teague* Bar On Retroactivity Does Not Apply To Section 2255 Motions Or To Ineffective-Assistance Claims Is Forfeited

Petitioner's challenge to the applicability of the *Teague* framework is not properly before the Court. In the district court and the court of appeals, petitioner did not question *Teague*'s applicability to federal convictions or its applicability to ineffective-assistance claims.[12] The court of appeals accordingly did not address either of those arguments. Pet. App. 6a; *id.* at 19a (Williams, J., dissenting) (agreeing that *Teague* framework applied). Nor did petitioner raise either argument in her petition for a writ of certiorari. See Pet. 6 n.1 (observing that the Court has not held that *Teague* applies to collateral review of federal convictions, without suggesting that the Court should resolve the issue in this case, and without arguing that *Teague* does not apply to ineffective-assistance claims); Br. in Opp. 10 n.2. Petitioner's ar-

[12] Petitioner did raise her claim that *Teague* does not apply on collateral review of federal convictions (but not her claim that *Teague* does not apply to ineffective-assistance claims) in her unsuccessful petition for rehearing en banc, see Pet. for Reh'g & Reh'g En Banc 11, but that was too late to preserve the issue. Although circuit precedent foreclosed petitioner's argument that *Teague* applies to federal convictions, see *Van Daalwyk* v. *United States*, 21 F.3d 179, 183 (7th Cir. 1994), petitioner was required to raise both issues in her opening brief in order to preserve them. See *Logan* v. *Wilkins*, 644 F.3d 577, 583 (7th Cir. 2011).

guments are therefore forfeited, and this Court should not consider them. See *United States* v. *Jones*, 132 S. Ct. 945, 954 (2012) (declining to consider forfeited argument); *Glover* v. *United States*, 531 U.S. 198, 205 (2001); *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976).

B. The *Teague* Rule Applies On Collateral Review Of Federal Convictions

Petitioner argues (Br. 27-33) that *Teague*'s nonretroactivity rule does not apply to collateral challenges to federal convictions because such challenges do not implicate federalism concerns. But *Teague* is not limited to federalism concerns. *Teague* also protects the societal interest in the finality of convictions, and that interest is independently sufficient to justify *Teague*'s application to federal convictions—as Justice Harlan explicitly recognized in the opinion in which he set forth the retroactivity principles that the Court later adopted in *Teague*. See *Mackey* v. *United States*, 401 U.S. 667 (1971).

1. In *Teague*, the Court adopted a retroactivity framework that "focus[ed], in the first instance, on the nature, function, and scope of " collateral challenges to final convictions. 489 U.S. at 305-306 (plurality opinion). The Court explained that because "[h]abeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final," *id.* at 306, limiting the application of new rules in collateral challenges serves the important interest in the finality of convictions, *id.* at 308-309. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our crimi-

nal justice system," *id.* at 309, by "*continually* forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards," *id.* at 310. See also, *e.g.*, *Beard*, 542 U.S. at 413; *Stringer*, 503 U.S. at 228; *Sawyer*, 497 U.S. at 242; *Butler*, 494 U.S. at 413-414.

The *Teague* rule also serves to "foster[] comity between federal and state courts." *Gilmore* v. *Taylor*, 508 U.S. 333, 340 (1993); see *Teague*, 489 U.S. at 308 (plurality op.). Continual application of new constitutional rules to cases on collateral review "may be more intrusive than the enjoining of criminal prosecutions," *id.* at 310 (citing *Younger* v. *Harris*, 401 U.S. 37, 43-54 (1971)), and "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands," *ibid.* (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 n.33 (1982)).

2. As petitioner observes (Br. 29), comity concerns are not implicated by collateral review of federal convictions. Nonetheless, as the Court recognized in *Danforth*, 552 U.S. at 281 n.16, "[m]uch of the reasoning" underlying the *Teague* rule "seems equally applicable in the context of § 2255 motions."

Specifically, the finality concerns that animate the *Teague* rule apply with full force to federal convictions. "[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States* v. *Frady*, 456 U.S. 152, 166 (1982); see *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976). Like state convictions, federal convictions give rise to societal interests "in insuring that there will at some point be the certainty that comes with an end to litigation,"

assuring "that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community," and avoiding resource-intensive retrials, which may be unreliable when evidence has become stale and witnesses unavailable. *Mackey*, 401 U.S. at 690-691 (Harlan, J., concurring in the judgments in part and dissenting in part) (internal quotation marks omitted). In the federal system as well as in the States, moreover, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of [judicial] procedures." *United States* v. *Addonizio*, 442 U.S. 178, 184 n.11 (1979).

Section 2255 motions challenging federal convictions threaten to undermine these finality interests just as surely as habeas petitions challenging state convictions. Section 2255 was "enacted as a functional equivalent for habeas corpus," *Danforth*, 552 U.S. at 281 n.16, in order to "meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts," *United States* v. *Hayman*, 342 U.S. 205, 219 (1952). Congress, in enacting Section 2255, "did not purport to modify the basic distinction between direct review and collateral review," *Addonizio*, 442 U.S. at 184, and Section 2255, like habeas corpus, permits a "collateral inquiry into the validity of the conviction," *Hayman*, 342 U.S. at 222. Because any collateral attack on a conviction "after society's legitimate interest in the finality of the judgment has been perfected" threatens to undermine that interest, *Frady*, 456 U.S. at 164, the Court has recognized that finality concerns justify "narrowly limiting the grounds for collateral attack on final judgments" in federal cases as well as state-court cases. *Addonizio*, 442 U.S. at 184 & n.11, 186-187 (holding that

collateral attack under Section 2255 should be limited to errors of the sort that are cognizable in habeas challenges to state convictions).

For these reasons, the Court has previously held that the interest in finality of federal convictions is sufficient in itself to justify applying to Section 2255 motions the procedural-default rule that protects comity as well as finality in the context of habeas review of state convictions. In *Frady*, the court held that because final federal judgments should not be subject to "a series of endless postconviction collateral attacks," 456 U.S. at 165, the cause-and-prejudice standard that already applied to forfeited claims raised in a federal collateral challenge to a state-court conviction, see *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977), should also apply to forfeited claims asserted in a Section 2255 motion. *Frady*, 456 U.S. at 162-169. The Court explained that the "considerations of comity" that had led it to adopt the cause-and-prejudice standard in the state-conviction context "do not constrain us here." *Id.* at 166. But because the federal government's "interest in the finality of its criminal judgments" was as great as the States' interest, the Court found "no basis for affording federal prisoners a preferred status when they seek postconviction relief." *Ibid.* See also *Francis*, 425 U.S. at 542.

Similarly, finality concerns amply justify applying *Teague* in the context of collateral attacks on federal convictions. Permitting final federal convictions to be overturned based on new procedural rules would undermine confidence in the federal criminal justice system by subjecting federal convictions to perpetual uncertainty. It would also require the federal government continually to devote resources to defending final convictions against later developments in the law and

threaten the government's ability to conduct reliable retrials. See *Teague*, 489 U.S. at 310; *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in the judgments in part and dissenting in part). And it would impede federal rulemakers' ability to frame procedural rules to comply with current constitutional standards and thereby protect the finality of federal convictions.[13]

In addition, allowing federal prisoners to collaterally challenge their convictions based on a new rule of criminal procedure while denying that right to similarly situated state prisoners would create inequities that would further undermine confidence in the criminal justice system. See *Teague*, 489 U.S. at 305 (expressing con-

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[13] Here, for example, before *Padilla*, the Federal Rules of Criminal Procedure did not require a court to advise a noncitizen defendant that he may face removal as a consequence of conviction. "In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla* v. *Kentucky*," however, "the Advisory Committee [on the Federal Rules of Criminal Procedure] concluded that a warning regarding possible immigration consequences ought to be required as a uniform practice." See Memorandum from Hon. Richard C. Tallman, Chair, Advisory Comm. on Fed. R. Crim. P., to Hon. Lee H. Rosenthal, Chair, Standing Comm. on R. of Practice & P. 2 (Dec. 8, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CR_Dec_2010.pdf. A proposed amendment to that effect was published for comment and is now before the Judicial Conference. See Pending Rules Amendments, http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx; Memorandum from Hon. Reena Raggi, Chair, Advisory Comm. on Fed. R. Crim. P., to Hon. Mark R. Kravitz, Chair, Standing Comm. on R. of Practice & P. 2-8 (May 17, 2012), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-06_Revised.pdf#pagemode=bookmarks. Such a procedure would generally protect against after-the-fact claims of prejudice from deficient attorney performance. But until *Padilla*, it was not evident that such a constitutional claim existed and that the federal criminal rules should respond to it.

cern that its prior retroactivity framework "led to unfortunate disparity in the treatment of similarly situated defendants on collateral review"). These concerns establish that *Teague*'s general bar on retroactive application of new rules must apply in challenges to federal convictions.[14]

Accordingly, every court of appeals to consider the issue has concluded that finality and equality-of-treatment concerns mandate applying *Teague* in collateral review of federal convictions. See *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 667-668 (9th Cir.), cert. denied, 537 U.S. 939 (2002); *Daniels* v. *United States*, 254 F.3d 1180, 1193-1194 (10th Cir. 2001); *United States* v. *Martinez*, 139 F.3d 412, 416 (4th Cir. 1998), cert. denied, 525 U.S. 1073 (1999); *United States* v. *Swindall*, 107 F.3d 831, 834 n.4 (11th Cir. 1997); *Van Daalwyk* v. *United States*, 21 F.3d 179, 181-183 (7th Cir. 1994); *Gilberti* v. *United States*, 917 F.2d 92, 95 (2d Cir. 1990).[15]

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[14] Petitioner argues (Br. 29) that *Teague*'s finality concerns do not apply in the Section 2255 context because *Teague* was premised on the assumption that federal habeas review of state convictions would take place only after the prisoner had raised his collateral claims in a state postconviction proceeding. *Teague* contains no such suggestion. Federal convictions, like state convictions, become final upon the conclusion of direct review. *Clay* v. *United States*, 537 U.S. 522, 527 (2003). That status gives rise to *Teague*'s finality concern, which is based on the fact that the prisoner is collaterally attacking "a final conviction, state or federal, [that] has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it," *Mackey*, 401 U.S. at 689-690 (Harlan, J. concurring in the judgments in part and dissenting in part), not on the likelihood that state prisoners have already had their collateral claims adjudicated once by a state court.

[15] The remaining courts of appeals routinely apply *Teague* on Section 2255 review. See, *e.g.*, *United States* v. *Amer*, 681 F.3d 211, 212 (5th Cir. 2012); *Sun Bear* v. *United States*, 644 F.3d 700, 703-704 (8th

3. The origins of *Teague*'s "new rule" principle reinforce the conclusion that *Teague* applies to federal convictions. *Teague* "adopt[ed] Justice Harlan's approach to retroactivity for cases on collateral review," 489 U.S. at 292, which he had laid out in two earlier cases involving *federal* convictions. See *Mackey*, 401 U.S. at 675-702 (Harlan, J., concurring in the judgments in part and dissenting in part) (collateral challenge to federal convictions); *Desist* v. *United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (direct appeal of federal conviction). Justice Harlan explained that retroactivity principles should be adapted to the collateral nature of the proceeding in which they would be applied. *Mackey*, 401 U.S. at 682. Because habeas corpus and Section 2255 motions are "virtually congruent" remedies, Justice Harlan did "not propose to make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief." *Id.* at 681 n.1. Justice Harlan grounded the principle that new rules should not be applicable on collateral review in finality concerns, explaining that because "a final conviction, *state or federal*, has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it," convictions should not be subject to perpetual challenge based on evolving constitutional rules. *Id.* at 689-690 (emphasis added).

Teague itself had no occasion to address federal convictions because the case concerned a collateral challenge to a state conviction. But the plurality defined the

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Cir. 2011); *Valentine* v. *United States*, 488 F.3d 325, 328-331 (6th Cir. 2007), cert. denied, 552 U.S. 1217 and 554 U.S. 904 (2008); *In re Fashina*, 486 F.3d 1300, 1303 (D.C. Cir. 2007); *Owens* v. *United States*, 483 F.3d 48, 70 (1st Cir. 2007); *Lloyd* v. *United States*, 407 F.3d 608, 611-612 (3d Cir.), cert. denied, 546 U.S. 916 (2005).

concept of a "new rule" by noting that one arises when it "imposes a new obligation on the States *or the Federal Government*." *Teague*, 489 U.S. at 301 (emphasis added). And *Teague*'s adoption of Justice Harlan's "general rule of nonretroactivity for cases on collateral review," 489 U.S. at 307, as well as Justice Harlan's emphasis on finality concerns, *id.* at 309-310, suggests that the Court also endorsed his conclusion that the nonretroactivity principle should apply to both federal and state convictions.

Indeed, the Court has subsequently applied the *Teague* framework in a Section 2255 challenge, without any hint that *Teague* might not apply in challenges to federal convictions. In *Bousley* v. *United States*, 523 U.S. 614 (1998), Bousley contended on collateral review that *Bailey* v. *United States*, 516 U.S. 137 (1995), established that he had been misinformed about the elements of his offense and that his guilty plea was therefore not knowing and intelligent. Because *Bailey* was decided after Bousley's conviction became final, the Court considered whether Bousley's claim was *Teague*-barred, and concluded that it was not. *Bousley*, 523 U.S. at 620-621 (stating that *Teague* is inapplicable to the situation in which the Court construes the elements of a criminal statute). The Court would have had no occasion to undertake this inquiry if *Teague* were inapplicable on collateral review of federal convictions.

C. The *Teague* Rule Applies To Ineffective-Assistance-Of-Counsel Claims Raised On Collateral Review Of Federal Convictions

Petitioner next contends (Br. 29-33) that *Teague* should not apply to collateral challenges to federal convictions based on ineffective-assistance-of-counsel

claims because such claims do not implicate the finality concerns that animate the *Teague* nonretroactivity rule.

1. As an initial matter, petitioner's argument that *Teague* should not apply to ineffective-assistance claims, as opposed to other grounds on which convictions may be challenged, overlooks *Teague*'s judgment that retroactivity principles should not vary based on the characteristics of the particular rule at issue.

Before *Teague*, the Court decided if a new rule should be applied retroactively by considering its purpose, law-enforcement reliance on the old rule, and the effect of applying a new rule on judicial administration. See *Desist*, 394 U.S. at 249 (quoting *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967)); *Linkletter* v. *Walker*, 381 U.S. 618, 636-640 (1965). That approach led to unpredictable and inequitable results, as defendants whose cases were in the same procedural posture would be treated differently based on the rule they sought to invoke or the fact that the new rule happened to be announced in their case. See *Danforth*, 552 U.S. at 273-274; *Teague*, 489 U.S. at 302-303.

Teague adopted Justice Harlan's view that retroactivity principles should be based on the finality-disrupting nature of the collateral proceeding, rather than a case-by-case inquiry into the nature and purpose of the new rule itself. *Mackey*, 401 U.S. at 682-683 (Harlan, J., concurring in the judgments in part and dissenting in part); *id.* at 681; *Teague*, 489 U.S. at 306. Under the *Teague* approach, all new rules are presumptively inapplicable on collateral review unless they satisfy *Teague*'s narrow exceptions for watershed procedural rules and rules that

place primary conduct beyond the power of criminal law to proscribe.[16] 489 U.S. at 311.

Notwithstanding this framework, petitioner would have the Court examine the nature of the *Padilla* rule—the fact that it concerns counsel's duty of effective assistance, which is normally litigated in a collateral attack—in determining whether *Teague*'s nonretroactivity rule applies in the first place. But *Teague*'s finality concerns arise from the nature of a collateral proceeding, and every collateral challenge implicates those concerns, regardless of the grounds of collateral attack.

2. Petitioner argues (Br. 31) that *Teague* should not apply to ineffective-assistance challenges to federal convictions because such claims ordinarily are adjudicated for the first time on collateral review. That consideration, in her view, overrides the finality concerns that normally justify *Teague*. Petitioner is incorrect.

a. Petitioner's argument is based primarily on *Massaro* v. *United States*, 538 U.S. 500, 504-505 (2003). There, the Court overturned the Second Circuit's application of procedural-default rules to ineffective-assistance claims raised for the first time in a Section 2255 motion. Under the Second Circuit's regime, federal prisoners ordinarily were excused from raising ineffective-assistance claims on direct appeal because determining the adequacy of trial representation often requires factual findings based on evidence outside the trial record. But if the ineffective-assistance claim could have been raised and resolved on direct appeal, the Second Circuit required the prisoner to demonstrate cause and prejudice before raising the claim for the first time on collateral review. *Id.* at 502-503. In overturning

[16] Petitioner does not contend that either exception applies here. Pet. Br. 5-6; Pet. App. 6a.

that approach, this Court explained that while the procedural-default rule is designed to promote finality and conserve judicial resources, the Second Circuit's regime did neither. *Id.* at 506-507. Given that most ineffective-assistance claims would end up being adjudicated for the first time on collateral review anyway—and the district court was the most suitable forum for resolving fact-specific claims—applying the procedural-default rule to ineffective-assistance claims on collateral review created additional litigation while "produc[ing] no benefit." *Id.* at 507. The Court therefore concluded that "[i]t is a better use of judicial resources to allow the district court on collateral review to turn at once to the merits." *Ibid.*

Petitioner argues (Br. 31) that because the Court held that the procedural-default doctrine does not bar ineffective-assistance claims raised for the first time in Section 2255 motions, *Teague* should not apply to ineffective-assistance claims. As petitioner observes, the procedural-default doctrine, like *Teague*, is rooted in finality concerns. But the two doctrines address distinct aspects of the general interest in the finality of convictions. The procedural-default doctrine prevents the harm to finality and judicial economy that would result from resurrecting forfeited claims without justification, and it ensures that courts can correct their own errors at the earliest opportunity. *Massaro*, 538 U.S. at 504; *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991). In contrast, the *Teague* rule reflects a categorical judgment that convictions should not be perpetually open to challenge based on new developments in the law, except in the narrow circumstances delineated by the *Teague* exceptions. See *Mackey*, 401 U.S. at 688-692 (Harlan, J., concurring in the judgments in part and dissenting in

part). The *Massaro* Court's practical conclusion about the inefficiencies generated by applying the procedural-default doctrine to ineffective-assistance claims does not suggest that *Teague*'s finality concerns are inapplicable to such claims. As with other nonwatershed procedural new rules, *Teague* is necessary to protect final judgments of conviction against continual reexamination for attorney ineffectiveness under "intervening changes in constitutional interpretation." *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in the judgments in part and dissenting in part); see also *id.* at 309 ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.") (quoting *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in the judgments in part and dissenting in part). The problem is exacerbated when, years after a judgment has become final and a sentence served, a conviction is subject to perpetual uncertainty and challenge in *coram nobis* proceedings—long after the federal government may be able to defend the conviction or reprosecute the offense.

Petitioner also relies (Br. 31) on the Court's statement in *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), that where a state-court collateral proceeding is "the first designated proceeding" for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317. The point of the analogy between direct review and initial collateral review, however, was to demonstrate why, "[w]ithout the help of an adequate attorney,"

a prisoner will have "difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim" in an initial-review collateral proceeding. *Ibid.* The Court therefore held that ineffective assistance of counsel in state "initial review" collateral-review proceedings "may establish cause for a prisoner's procedural default" of a claim of ineffective assistance at trial. *Id.* at 1315. Nothing in *Martinez* suggests that the *Teague* framework is inapplicable to ineffective-assistance claims.

b. Petitioner also contends (Br. 30) that because *Massaro* holds that ineffective-assistance claims are most naturally brought on collateral review, a defendant lacks a "full and fair opportunit[y]" to assert an ineffective-assistance claim relying on a novel rule before his conviction has become final. Therefore, petitioner argues, *Teague* should not bar the assertion of ineffective-assistance claims based on new rules on collateral review of federal convictions. *Ibid.*

The premise of petitioner's argument is incorrect. *Massaro* does not prohibit a federal defendant from bringing his ineffective-assistance claim on direct review. 538 U.S. at 508. To the extent that a defendant seeks to establish a new rule in the course of challenging his conviction on ineffective-assistance grounds, he has the opportunity to bring the claim on direct review. While courts of appeals considering a direct appeal may ordinarily "prefer" to dismiss ineffective-assistance claims in favor of allowing the defendant to raise them on collateral review, they "may choose to entertain these claims on direct appeal" if doing so "would be in the interest of justice." *United States* v. *Hasan*, 586 F.3d 161, 170 (2d Cir. 2009); *United States* v. *Cook*, 356 F.3d 913, 919-920 (8th Cir. 2004). A defendant's assertion that he seeks to rely on a new rule that *Teague* would bar on

collateral review would provide ample justification for considering the claim on direct review. And when a court of appeals believes that factual development would benefit an ineffective-assistance claim raised on direct appeal, it may remand to the district court for that purpose. See, *e.g.*, *Hasan*, 586 F.3d at 170; *United States* v. *Burroughs*, 613 F.3d 233, 238 (D.C. Cir. 2010).

In any event, petitioner is wrong in arguing that *Teague*'s operation turns on the extent to which the prisoner could have or would have sought application of the relevant new rule on direct review. Petitioner appears to argue that if a defendant did not have a "fair opportunity" to raise a claim seeking a new rule on direct appeal, the claim should be exempt from *Teague*'s bar on retroactivity when it is raised on collateral review.[17] Pet. Br. 30-31. That is a sweeping contention, because it could not be limited to ineffective-assistance claims. A defendant may equally assert that he lacked a "fair opportunity" to raise a claim on direct appeal if the factual premise of, or the motivation to bring, the claim did not arise until after the conclusion of direct review. Other types of claims besides ineffective-assistance claims may be just as susceptible to that possibility—for instance, claims that the government suppressed exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), or legal claims based on newly discovered evidence. Petitioner would thus reduce *Teague* to a var-

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[17] Petitioner relies (Br. 30) on Justice Harlan's reference to a defendant's "fair opportunity to raise his arguments" in *Mackey*. 401 U.S. at 684. But the passage on which petitioner relies concerned only the historical scope of habeas corpus, under which "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original criminal proceeding." *Ibid.*

iant of the procedural-default doctrine, permitting retroactive application of a new rule on collateral review if the defendant demonstrates a reasonable basis for failing to raise the claim seeking a new rule on direct appeal.

That regime is directly contrary to *Teague*'s holding that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated." 489 U.S. at 316. *Teague* reflects a judgment that for all prisoners, the purposes of federal collateral review are fully served if the prisoner has a full opportunity to challenge his conviction based on the law that existed at the time the conviction became final, unless an exception applies. *Mackey*, 401 U.S. at 687; *Teague*, 489 U.S. at 306. For all prisoners, moreover, once the conviction has become final, the government's interest in finality outweighs any interest in "continually litigat[ing] the current constitutional validity of the basis for" the conviction, regardless of the ground for the challenge. *Mackey*, 401 U.S. at 689.

Indeed, the Court has indicated that *Teague* applies regardless of whether a defendant might be able to demonstrate an external cause justifying his failure to raise the claim earlier. In *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam), the Court held that the defendant had procedurally defaulted his claim by failing to raise it in state court. The Court rejected the defendant's argument that he should be excused for failing to develop the factual basis of his claim in state court because "his Vienna Convention claims were so novel that he could not have discovered them any earlier." *Id.* at

377. "Assuming that were true," the Court stated, "such novel claims would be barred on habeas review under *Teague*." *Ibid.*; cf. *Zant*, 499 U.S. at 495 ("Application of the cause and prejudice standard in the abuse-of-the-writ context does not mitigate the force of *Teague* v. *Lane*, * * * which prohibits, with certain exceptions, the retroactive application of new law to claims raised in federal habeas."); *Lambrix*, 520 U.S. at 525, 528-529 (applying *Teague* without deciding whether the claim was procedurally defaulted, despite acknowledging that the prisoner's grounds for not raising the claim earlier "seem to us insubstantial but may not be so").

c. Petitioner also contends (Br. 31-32) that ineffective-assistance claims should be exempt from any *Teague* bar because the *Strickland* inquiry is "expressly designed" to protect finality. To be sure, the prejudice requirement serves finality interests, *Hill*, 474 U.S. at 58, by ensuring that attorney errors that did not affect the outcome of the proceeding do not serve as a basis for overturning a conviction. But the prejudice prong does not address the interest in ensuring that final convictions are not perpetually subject to challenge based on new rules. It focuses solely on whether the attorney's errors may have affected the outcome of the proceeding, *id.* at 58-59, and thus provides no basis for distinguishing between attorney conduct that is deficient under the law existing during direct review proceedings and attorney conduct that is deficient under an extension of Sixth Amendment doctrine announced after the conviction became final.

d. Finally, petitioner contends (Br. 34-39) that applying *Teague* to ineffective-assistance claims would force federal defendants to bring all ineffective-assistance claims on direct review, thereby returning to the ineffi-

cient system disapproved in *Massaro*. But typical ineffective-assistance claims rely on the established scope of the Sixth Amendment and simply seek application of the *Strickland* standard. See Pet. App. 15a-16a; *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment). Given that principle, the vast majority of *Strickland* claims plainly will not implicate the *Teague* rule, and federal defendants will continue to assert them for the first time on collateral review. In the highly unusual circumstance in which a defendant wishes to assert an ineffective-assistance claim that requires extending Sixth Amendment rights to create a new rule, the defendant may raise that claim on direct review. See *Massaro*, 538 U.S. at 508; pp. 49-50, *supra*. *Massaro*'s concern about the inefficiencies created when defendants are effectively required to bring *all* ineffective-assistance claims on direct appeal, 538 U.S. at 507, is not implicated by the limited use of direct appeal to raise the exceptional ineffective-assistance claim that would rely on a new rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
GINGER ANDERS
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

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