No. 12-164

In the Supreme Court of the United States

ROGELIO FIGUEREO-SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the rule announced in *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), constitutes a "watershed rule of criminal procedure" under the framework set forth in *Teague* v. *Lane*, 489 U.S. 288 (1989), for determining whether a new procedural rule should be applied retroactively to cases on collateral review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 678 F.3d 1203.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2012. The petition for a writ of certiorari was filed on July 27, 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 Middle District of Florida, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 96 months of imprisonment. Pet. App. 1a. In 2010, petitioner filed this Section 2255 motion challenging his conviction. The district court dismissed the mo-

tion. The court of appeals granted petitioner a certificate of appealability (COA) and affirmed. *Id.* at 1a-12a.

1. a. On January 8, 2004, in Baltimore, Maryland, petitioner arranged with two confidential government informants to purchase 15 kilograms of cocaine for $70,000. After raising the money for the cocaine, petitioner and an accomplice traveled to Tampa, Florida, to consummate the transaction. On January 15, 2004, petitioner and his accomplice met with one of the confidential informants and an undercover Drug Enforcement Agency agent. The agent presented petitioner with a black bag containing the cocaine. Petitioner opened the bag and inspected its contents. Agents then moved in and arrested him and his accomplice. Presentence Investigation Report ¶¶ 8-12.

b. In April 2004, petitioner pleaded guilty to conspiring to possess cocaine with intent to distribute it. He was sentenced to 96 months of imprisonment, and his conviction became final in late 2004. Pet. App. 1a. Petitioner's conviction rendered him removable from the country. See *Figuereo-Sanchez* v. *Attorney Gen.*, 382 Fed. Appx. 211, 212 (3d Cir. 2010). In August 2011, petitioner completed his term of imprisonment, and he was removed to the Dominican Republic shortly thereafter. Pet. 4.

2. In July 2008, petitioner filed a pro se motion to vacate the judgment under Federal Rule of Civil Procedure 60(b). In the motion, he claimed that his counsel provided ineffective assistance by failing to file an appeal and that his guilty plea was not knowingly and intelligently made. Pet. App. 2a. The district court construed the motion as a motion to vacate petitioner's conviction under 28 U.S.C. 2255 (Supp. IV 2010). The court then denied the motion as time-barred because petition-

er had not filed it within one year of the date on which his conviction became final, as required by 28 U.S.C. 2255(f)(1) (Supp. IV 2010). Pet. App. 2a-3a. Both the district court and the court of appeals denied petitioner's motion for a COA. *Id.* at 3a n.1.

3. In July 2010, petitioner filed a motion to vacate his guilty plea and sentence under Section 2255. Relying on this Court's recent decision in *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), which held that defense counsel has a constitutional obligation to advise noncitizen defendants about the immigration consequences of pleading guilty, petitioner asserted that his counsel had provided ineffective assistance in failing to advise him that he would be removed if convicted. The district court dismissed the motion for lack of jurisdiction. The court explained that because it had treated petitioner's prior Rule 60(b) motion as a motion under Section 2255, the present motion was a "second or successive motion" that, under 28 U.S.C. 2244(b)(3)(A), required authorization from the Eleventh Circuit before it could be filed in the district court. Pet. App. 3a. The court also stated that petitioner's motion "failed on the merits," because petitioner's conviction became final before *Padilla* was decided, and *Padilla* "did not announce a rule that should apply retroactively on collateral review." *Id.* at 4a.

4. The court of appeals granted petitioner a COA and affirmed the denial of petitioner's Section 2255 motion. Pet. App. 4a, 12a.

The court of appeals first held that the district court should not have characterized petitioner's Section 2255 as a second or successive motion. Rather, the district court should have adjudicated petitioner's Section 2255 as a "first petition." Pet. App. 4a-7a.

The court of appeals next considered whether petitioner's Section 2255 motion was time-barred under 28 U.S.C. 2255(f). The court explained that although petitioner's motion was not timely under Section 2255(f)(1) because it was filed more than a year after his conviction became final, petitioner might be able to rely on Section 2255(f)(3), which provides a one-year limitations period running from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2255(f)(3) (Supp. IV 2010). Pet. App. 8a.

"In deciding retroactivity issues under [Section] 2255(f)(3)," the court of appeals explained, "we have applied the rubric developed in *Teague* v. *Lane*, 489 U.S. 288 (1989)." Pet. App. 8a. The court observed that Section 2255(f)(3) applies only when the defendant relies on a "newly recognized" right, and a "newly recognized" right is a right that constitutes a "new rule" for purposes of *Teague*'s retroactivity analysis. *Id.* at 8a & n.4. Under *Teague*, a "new rule" is one that was not dictated by precedent. 489 U.S. at 301 (plurality opinion). The court of appeals further explained that Section 2255(f)(3) also requires that the new rule apply retroactively to cases on collateral review, and that under *Teague*, new rules are generally not retroactively applicable unless they fall within one of *Teague*'s narrow exceptions for substantive rules and "watershed rules of criminal procedure." Pet. App. 8a-9a & nn.4-5 (quoting *Teague*, 489 U.S. at 311-312 (plurality opinion)).

In determining whether petitioner's Section 2255 motion was timely under this standard, the court of appeals first assumed that *Padilla* announced a new rule under

Teague, because both petitioner and the government agreed that the *Padilla* rule was new. Pet. App. 9a. The court added that petitioner's position that *Padilla* was a new rule allowed him to argue that he can "avoid the time bar of [28 U.S.C.] § 2255(f)(1)." *Id.* at 9a n.5.

The court of appeals then rejected petitioner's argument that *Padilla* announced a "watershed" rule that should apply retroactively. Pet. App. 9a-12a. The court of appeals explained that the *Padilla* rule lacked both of the characteristics that this Court has held are required of a "watershed" rule. *Id.* at 9a (quoting *Whorton* v. *Bockting*, 549 U.S. 406, 418 (2007)). First, *Padilla* did not "alter[] our understanding of the bedrock procedural elements" essential to the fairness of the proceeding because it "merely defined the contours of deficient and effective representation under *Strickland* [v. *Washington*, 466 U.S. 668 (1984)]." Pet. App. 10a. Second, a violation of *Padilla* "would [not] result in 'an impermissibly large risk of an inaccurate conviction' for the purposes of retroactivity," *ibid.* (quoting *Bockting*, 549 U.S. at 418), because counsel's deficient advice on immigration would not make the risk of an unreliable guilty plea "intolerably high," *id.* at 12a (quoting *Bockting*, 549 U.S. at 419). In reaching that conclusion, the court of appeals reasoned that, in contrast to *Gideon*, prejudice is not presumed from deficient advice by counsel; rather, the defendant must demonstrate prejudice. *Id.* at 11a-12a. Having concluded that *Padilla* could not be applied retroactively to petitioner's ineffective-assistance claim, the court of appeals held that that claim had been untimely filed under Section 2255(f)(3). *Ibid.*

DISCUSSION

Petitioner contends (Pet. 8-17) that *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), announced a "watershed"

new rule of criminal procedure that, under *Teague* v. *Lane*, 489 U.S. 288 (1989), is retroactively applicable to already-final convictions. The court of appeals' decision is correct, and no conflict among the courts of appeals exists on the issue. Petitioner's claims therefore do not warrant review. Nonetheless, the Court may wish to hold the petition pending its decision in *Chaidez* v. *United States*, cert. granted, No. 11-820 (oral argument scheduled for Oct. 30, 2012), and then dispose of the petition as appropriate in light of that decision.

1. a. In July 2010, petitioner moved to vacate his conviction on the ground that his trial counsel had performed deficiently under *Padilla* by failing to inform him of the immigration consequences of pleading guilty. Because petitioner's Section 2255 motion was filed more than one year after his conviction became final, the only basis on which petitioner contends that his motion is timely is Section 2255(f)(3), which provides that a Section 2255 motion may be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. 2255(f)(3) (Supp. IV 2010); see *Dodd* v. *United States*, 534 U.S. 353, 357 (2005). Section 2255(f)(3) requires that the defendant rely on a right that has been "newly recognized" by the Supreme Court—in other words, a right that constitutes a "new rule" under the retroactivity principles set forth in *Teague* v. *Lane*, 489 U.S. 288 (1989)—and that has been found to be retroactively applicable under *Teague*. Pet. App. 8a n.4; see also *Howard* v. *United States*, 374 F.3d 1068, 1074 (11th Cir. 2004); *United States* v. *Shunk*, 113 F.3d 31, 34 (5th Cir. 1997).

Teague holds that a new rule is generally not retroactively applicable on collateral review of a conviction that became final before the new rule was announced, unless the rule falls into one of *Teague*'s narrow exceptions for substantive rules and "watershed" procedural rules. See *Saffle* v. *Parks*, 494 U.S. 484, 494-495 (1990); *Teague*, 489 U.S. at 300, 311-312. Petitioner therefore argues that *Padilla* announced a "new rule" under *Teague* and that the *Padilla* rule is a "watershed rule" that applies retroactively on collateral review. Based on these contentions, petitioner asserts that his Section 2255 motion is timely under Section 2255(f)(3).

b. Petitioner argues (Pet. 12-17) that the court of appeals erred in concluding that the rule announced in *Padilla* was not a "watershed rule." Petitioner is incorrect, and no conflict exists among the courts of appeals on the issue.

In order to qualify as a "watershed" rule, a new rule must meet two requirements. First, the rule "must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction." *Whorton* v. *Bockting*, 549 U.S. 406, 418 (2007) (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 356 (2004)) (internal quotation marks omitted). Second, the rule "must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" *Id.* at 418 (quoting *Tyler* v. *Cain*, 533 U.S. 656, 665 (2001)).

The Court has stated that the *Teague* exception for watershed rules is "extremely narrow." *Bockting*, 549 U.S. at 417. To date the Court has "rejected every claim that a new rule satisfied the requirements for watershed status." *Id.* at 418 (citing cases). In providing guidance as to the sort of decision that might satisfy both requirements of a watershed rule, the Court has identified

the rule of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and "only * * * this rule," as a rule that would qualify as watershed. *Beard* v. *Banks*, 542 U.S. 406, 417 (2004); see also *Saffle*, 494 U.S. at 495. In *Gideon*, the Court held that the Sixth Amendment right to counsel is applicable to the States under the Fourteenth Amendment and that the right is violated when States fail to appoint defense counsel for indigent defendants charged with a felony. 372 U.S. at 344-345; *Bockting*, 549 U.S. at 419. *Padilla* did not effect a change of *Gideon*'s magnitude, and it does not possess either of the attributes of a watershed rule.

First, "[i]nfringement of the [*Padilla*] rule * * * [does not] seriously diminish the likelihood of obtaining an accurate conviction." *Tyler*, 533 U.S. at 665. *Padilla*'s holding that defense counsel must inform his client about the immigration consequences of pleading guilty is not directed to enhancing the accuracy of the fact-finding process. The rule comes into play only when a defendant is considering acknowledging his guilt rather than going to trial, and it is intended to ensure that a defendant is given reasonable advice about one of the civil consequences that may result if he pleads guilty. The *Padilla* rule thus assists the defendant in deciding whether his interests (including his interests in matters beyond the scope of the criminal case) would be better served by acknowledging guilt or by putting the government to its burden of proof at a trial. But the fact that a defendant has decided to admit his guilt without the benefit of advice about potential immigration consequences does not cast doubt on the factual accuracy of the defendant's subsequent admission under oath—"with all the strictures of a Rule 11 plea colloquy"—that he is guilty of the charged offense. *United States* v.

Chang Hong, 671 F.3d 1147, 1158 (10th Cir. 2011). And when such a defendant is later surprised by "the initiation of deportation proceedings that were not forecast by defense counsel, the injustice, while real, nevertheless does not cast doubt on the verity of the defendant's admission of guilt or the propriety of the sentence imposed pursuant to the plea agreement." *United States* v. *Mathur*, 685 F.3d 396, 400 (4th Cir. 2012).

Second, the *Padilla* rule did not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Bockting*, 549 U.S. at 418 (citation omitted). The Court has made clear that this requirement "cannot be met simply by showing that a new procedural rule is *based on* a 'bedrock' right." *Id.* at 420-421. Similarly, "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough." *Id.* at 421 (brackets in original). Rather, in order to meet the requirement, "a new rule must *itself* constitute a previously unrecognized bedrock procedural element." *Id.* at 421 (emphasis added). The Court has identified only one example of such a rule: *Gideon*, which "effected a profound and 'sweeping' change" in the law by recognizing that, absent a waiver of counsel, a felony trial conducted without a defense lawyer is an inherently unfair vehicle for adjudicating the defendant's guilt or innocence. *Bockting*, 549 U.S. at 421 (quoting *Beard*, 542 U.S. at 418).

Padilla did not similarly alter the understanding of the procedures necessary to a fair proceeding. Instead, the rule announced in *Padilla* worked an "incremental change" in the extent of counsel's duties under the Sixth Amendment. *Beard*, 542 U.S. at 419-420. Before *Padilla*, defense counsel was already obligated to assist defendants in deciding whether to plead guilty by provid-

ing advice about a range of topics, including the plea's likely effect on the nature and severity of the punishment, whether the defendant had a realistic possibility of avoiding conviction at trial, and the rights the defendant would waive by pleading guilty. See *Hill* v. *Lockhart*, 474 U.S. 52, 58-59 (1985); *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995); *Tollett* v. *Henderson*, 411 U.S. 258, 266-268 (1973). *Padilla* expanded this universe of plea-related advice by adding immigration consequences to the subjects that defense counsel must cover for noncitizen defendants. But this narrow extension of the scope of the Sixth Amendment's guarantee of effective assistance of counsel cannot be said to have altered our understanding of the requirements of basic fairness or shifted the balance between the defendant and the prosecution. *Padilla* therefore lacks the "'primacy' and 'centrality,'" *Bockting*, 549 U.S. at 421 (quoting *Saffle*, 494 U.S. at 495), necessary to qualify as a watershed rule. See *Beard*, 542 U.S. at 420 (concluding that decision holding that the Eighth Amendment prohibits capital sentencing schemes that require juries to find mitigating factors unanimously did not have the centrality of *Gideon*).

Petitioner contends (Pet. 14-15) that *Padilla* altered our conception of fundamental fairness because removal consequences are extremely important to many defendants, and so "[t]here is little distinction between having counsel" who fails to explain immigration consequences and "having no counsel at all." But the complete absence of counsel pervasively affects all aspects of the proceeding, such that a fair and reliable proceeding is not possible, and prejudice must be presumed. See *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). In contrast, the Court in *Padilla* held that counsel's failure

to advise about immigration consequences is not presumptively prejudicial and that a defendant alleging that his attorney unreasonably failed to advise him about immigration consequences must demonstrate prejudice under the standard set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). See *Padilla*, 130 S. Ct. at 1485. Thus, *Padilla* simply expanded counsel's existing duty to advise about pleading guilty, and it adopted the same prejudice requirement that defendants have long had to satisfy in order to establish that they received ineffective assistance at the plea stage. Unlike *Gideon*, then, *Padilla* does not work a fundamental change in our conception of the procedures necessary to ensure a fair proceeding.[1] See *Hill*, 474 U.S. at 58-59.

c. The circuits are not in conflict on the question whether *Padilla* announced a watershed rule of procedure that is retroactively applicable on collateral review. The only other courts of appeals that have addressed the issue agree with the Eleventh Circuit that *Padilla* did not announce a watershed rule. See *Mathur*, 685 F.3d at 399-401; *Chang Hong*, 671 F.3d at 1157-1159.

Plenary review of the question presented is therefore unwarranted. For the same reasons, the Court should reject petitioner's suggestion (Pet. 11) that the Court grant certiorari in this case in order to consider the "wa-

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[1] Contrary to petitioner's argument (Pet. 16-17), the court of appeals did not categorically hold that "no rule lacking a presumption of prejudice" can ever be a watershed rule. The court of appeals correctly explained that the *Padilla* Court's adoption of the existing *Strickland* framework, with its prejudice requirement, militated against concluding that *Padilla* fundamentally altered the understanding of what constitutes a fair proceeding. Pet. App. 11a-12a. But the court did not suggest that no new rule announced in the future will constitute a "watershed" rule if it includes a prejudice requirement.

tershed rule" issue in tandem with *Chaidez* v. *United States*, 655 F.3d 684 (7th Cir. 2011), cert. granted, No. 11-820 (to be argued Oct. 30, 2012), which presents the question whether *Padilla* announced a new rule.

2. Petitioner also argues (Pet. 10) that the Court should hold the petition pending its decision in *Chaidez* v. *United States*, *supra*.

The question presented in *Chaidez* is whether the rule announced in *Padilla* constitutes a new rule under *Teague*. The petitioner in *Chaidez* contends that *Padilla* represents a novel application of *Strickland* v. *Washington*, 466 U.S. 668 (1984), rather than a new rule under *Teague*. See 11-820 Pet. Br. 9. The government contends that *Padilla* announced a new rule because the decision was not dictated by precedent. See 11-820 U.S. Br. 7. Here, in contrast, petitioner agrees with the government that the court of appeals correctly held that *Padilla* announced a new rule for *Teague* purposes. Pet. 11. The question presented in *Chaidez* is therefore not contested in this case.

The Court's resolution in *Chaidez* of the question whether *Padilla* announced a new rule would not have any impact on the disposition of petitioner's case. If the Court holds that *Padilla* announced a new rule, that resolution will vindicate the premise of the decision below. Having so held, it is unlikely that the *Chaidez* Court will go on to address the question that the court of appeals decided below, and that petitioner raises before this Court—namely, whether the *Padilla* rule is nonetheless retroactively applicable under the *Teague* exception for "watershed rules of criminal procedure." Pet. 3. The petitioner in *Chaidez* has conceded that if *Padilla* announced a new rule, the exception for watershed rules

would *not* apply. See 11-820 Pet. Br. 5-6; 11-820 U.S. Br. 46, 48; *Chaidez*, 655 F.3d at 688.

Conversely, if the Court holds in *Chaidez* that *Padilla* did not announce a new rule, that outcome would abrogate the Eleventh Circuit's assumption in this case that *Padilla* announced a new rule. But petitioner would not benefit from a remand to the Eleventh Circuit on that ground, because the court of appeals has already stated that if *Padilla* did not announce a new rule, petitioner's Section 2255 motion is untimely. The court of appeals explained that Section 2255(f)(3) requires that a defendant seek to avail himself of a "new rule" under *Teague* and that "[i]f [*Padilla*] merely clarifies an old rule * * * petitioner will not be able to take advantage of the extended statute of limitations under [Section] 2255, which requires a newly recognized right by the Supreme Court." Pet. App. 8a n.4.

It is therefore not necessary for the Court to hold the petition pending its decision in *Chaidez* on the new-rule issue. Nevertheless, in *Chaidez*, the petitioner has also asserted that *Teague*'s limitation on new rules does not apply on collateral review of federal convictions and that *Teague* does not apply to claims of ineffective assistance of counsel. See 11-820 Pet. Br. 27-39. It is unclear whether the Court will consider those issues in *Chaidez* and whether the Eleventh Circuit would allow petitioner to benefit from any favorable ruling on those issues in any event.[2] But because the decision in *Chaidez* could

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[2] These arguments are not properly before the Court in *Chaidez* because Chaidez failed to raise them in the court of appeals. See 11-820 U.S. Br. 36-37. Even assuming that the Court considers these arguments in *Chaidez*, petitioner has not questioned *Teague*'s applicability to federal convictions or to ineffective-assistance claims, and under settled Eleventh Circuit law he may not be able to raise

have some bearing on the proper disposition of this case, the Court may wish to hold the petition pending *Chaidez*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Chaidez* and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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those new issues even on remand from this Court. See, *e.g.*, *United States* v. *Higdon*, 122 Fed. Appx. 985 (2004), reh'g en banc denied, 418 F.3d 1136, 1137 (Hull, J., concurring in the denial of rehearing en banc) (declining to consider untimely-raised constitutional claim in light of intervening decision in *United States* v. *Booker*, 543 U.S. 220 (2005), and stating that "[t]his Court has repeatedly followed the prudential rule that new issues not raised in opening briefs will not be considered by the court") (citing cases), cert. granted and case remanded for further consideration in light of *United States* v. *Booker*, *supra*, 546 U.S. 802, on remand, 159 Fed. Appx. 96, 97 (2005) (per curiam) (reinstating opinion denying relief based on "the well-established rule in this circuit" that "issues that are not timely raised in the briefs are deemed abandoned").