No. 11-820

In the Supreme Court of the United States

ROSELVA CHAIDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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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 published at 655 F.3d 684. The memorandum opinion and order of the district court granting petitioner's petition for a writ of error 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 App. 31a-38a) is unpublished but is available at 2010 WL 3979664.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 published at 730 F. Supp. 2d 896.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. Pet. App. 1a. A petition for rehearing was denied on November 30, 2011. *Id.* at 56a. The petition for a writ of certiorari was filed on December 23,

2011. 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 error coram nobis seeking to overturn her mail-fraud convictions on the ground that her trial counsel had never informed her that removal was a potential consequence of her conviction. The district court granted petitioner's coram nobis petition and vacated her convictions. *Id.* at 31a-54a. The court of appeals reversed and remanded the case for further proceedings. *Id.* at 1a-30a.

1. Petitioner was born in Mexico in 1956 and came to the United States as an undocumented alien in the 1970s. Pet. App. 31a. She eventually became a permanent legal resident and now lives in Chicago. *Ibid.*

In 1998, petitioner participated in a scheme to submit fraudulent automobile insurance claims for non-existent 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. At this meeting, petitioner and her son signed forms purporting to retain the attorney to pursue insurance claims for injuries that they claimed to have incurred in a car accident on the previous day. *Ibid.* 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. *Id.* at 16-17. Petitioner knew that these forms would be used to support her fraudulent insurance claim. *Id.* at 17. The insurance company eventually wrote a check for $11,000 to petitioner and her attorney. *Ibid.* 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. On June 26, 2003, a federal grand jury indicted petitioner based on 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; 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. 25. It also required petitioner to pay restitution in the amount of $22,500—the total amount that the insurance company paid to petitioner and her son based on their fraudulent claims. *Id.* at 23, 27. Petitioner did not appeal, and her conviction became final. Pet. App. 2a.

3. Because the fraud to which petitioner pleaded guilty involved a loss of more than $10,000 and thus constituted an "aggravated felony," her convictions 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 before an immigration judge for removal proceedings based on her aggravated felony convictions. *Ibid*.

In October 2009, petitioner filed a petition for a writ of error coram nobis in district court, seeking to overturn her convictions 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 had represented petitioner in her criminal prosecution 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 ineffective-assistance standard set forth in "*Strickland* [v. *Washington*, 466 U.S. 668 (1984)] applies to Padilla's claim"; and that under *Strickland*, "an attorney must advise her client regarding the risk of deportation." *Id*. at 1482. Petitioner asserted

that she was entitled to relief under *Padilla*. 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 be given retroactive effect in collateral challenges to convictions that had already become final when *Padilla* was decided. Pet. App. 40a.

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 41a-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 suffered prejudice because if she had been properly advised, she could rationally have decided to go to trial and risk prison rather than entering a guilty plea that would make her removal from the country a near certainty. *Id.* at 31a-38a. Accordingly, the court granted petitioner's coram nobis petition and vacated petitioner's convictions.[1] *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

[1] The district court also rejected the government's arguments that petitioner's claim should be barred by laches, Pet. App. 37a-38a, and that coram nobis relief was not available for petitioner's claim, *id.* at 52a. The government did not renew those arguments on appeal.

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 *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 controlled 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); *O'Dell* v. *Netherland*, 521 U.S. 151, 159 (1997).

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." *Ibid.* It could be traced, the court stated, to the Supreme Court's decisions holding that a guilty plea is "voluntary where the defendant is 'fully aware of the direct consequences'" of conviction, *id.* at 13a (quoting *Brady* v. *United States*, 397 U.S. 742, 747 (1970)), and that "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases,'" *ibid.* (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 56 (1984)).

The court of appeals also rejected petitioner's argument that *Padilla* was simply an application of *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," the court 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, arguing that *Padilla* did not announce a new rule because it merely applied the ineffective-assistance test established in *Strickland* to attorney advice about immigration consequences. Pet. App. 19a-30a. In her view, the pre-*Padilla* consensus among state and federal courts that attorneys had no duty to advise their clients about immigration consequences was unpersuasive in light of recent changes in immigration law that made removal an often-automatic consequence of conviction. *Id.* at 25a-26a. Judge Williams also observed that the *Padilla* Court had stated that its decision would not lead to a flood of litigation because prevailing professional norms already required advice on removal consequences; she would have inferred from that statement that the Court expected its holding to be applied retroactively. *Id.* at 19a-30a.

5. Because the panel's decision conflicted with the Third Circuit's decision in *United States* v. *Orocio*, 645 F.3d 630 (2011), the panel circulated it to all active Seventh Circuit judges prior to publication. A majority voted against rehearing the case en banc, with Judges Rovner, Wood, Williams, and Hamilton voting in favor of rehearing. Pet. App. 1a n.1. Petitioner's later petition for rehearing en banc was also denied. *Id.* at 56a.

DISCUSSION

Petitioner contends (Pet. 9-26) that this Court's review is warranted to resolve whether *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), which held that defense attorneys may provide ineffective assistance of counsel under the Sixth Amendment by failing to advise noncitizen defendants about the immigration consequences of pleading guilty, applies retroactively to individuals whose convictions became final before the decision was issued. The court of appeals correctly held that *Padilla* announced a new rule and, therefore, is not retroactive to cases on collateral review. The United States agrees with petitioner, however, that this case presents a recurring question of substantial importance on which there is a direct conflict among the courts of appeals. Review by this Court is therefore warranted.

1. The court of appeals correctly concluded that *Padilla* announced a new rule that does not apply retroactively to final convictions. *Padilla*'s holding that the Sixth Amendment's guarantee of effective assistance of counsel extends to advice about a matter beyond the scope of the criminal case and requires attorneys to warn noncitizen defendants about the risk of removal arising from conviction was not "dictated" by precedent within the meaning of *Teague* v. *Lane*, 489 U.S. 288, 301 (1989) (plurality opinion). To the contrary, *Padilla* overturned the overwhelming consensus among federal and state courts, and, in the view of four Members of the Court, significantly extended the Court's Sixth Amendment precedents. Pet. App. 4a-18a.

a. *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 tradition-

ally been understood as a "collateral consequence" of a criminal conviction—a consequence that may arise from a conviction but is not a component of the defendant's punishment for the offense and will not be imposed by the presiding court. The Kentucky Supreme Court had concluded that "collateral consequences are outside the scope of the representation required by the Sixth Amendment" and that as a result, the "'failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.'" *Padilla*, 130 S. Ct. at 1481 (quoting *Commonwealth* v. *Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (*Commonwealth*)).

In reversing that decision, this Court acknowledged that the Kentucky Supreme Court was "far from alone" in holding that the Sixth Amendment did not extend to advice about collateral consequences. *Padilla*, 130 S. Ct. at 1481 & n.9 (citing decisions from the First, Fourth, Tenth, Eleventh, and D.C. Circuits, as well as several state cases). But because "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders," *id.* at 1481, the Court concluded that the "collateral versus direct distinction" on which lower courts had relied was "ill-suited" to the context of removal consequences, *id.* at 1482. The Court therefore held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel" and that the ineffective-assistance standard set forth in "*Strickland* [v. *Washington*, 466 U.S. 668 (1984),] applies to Padilla's claim." *Ibid.*

In so holding, the Court rejected the argument that "*Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice" because

"counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case." *Padilla*, 130 S. Ct. at 1484 (quoting U.S. Amicus Br. 10, No. 08-651). The Court concluded that "although [such a rule] has support among the lower courts," there "is no relevant difference between an act of commission and an act of omission" in view of the importance of removal consequences to alien defendants. *Ibid.* (citing cases) (citation omitted).

Having determined that counsel's constitutional obligation to provide effective assistance extended to potential immigration consequences, the Court drew "support[]" from "prevailing professional norms" to conclude that failing to advise a noncitizen defendant about the risk of removal could be deficient performance under *Strickland*. *Padilla*, 130 S. Ct. at 1482. The Court explained, however, that the "scope and nature" of the advice required of competent counsel depends on the "clarity" of the immigration-law provisions at issue. *Id*. at 1483 & n.10.

b. Under the retroactivity framework set forth in *Teague*, 489 U.S. at 299-316, new constitutional rules of criminal procedure are generally inapplicable to convictions that became final before the rule was announced.[2]

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[2] As petitioner notes (Pet. 6 n.1), this Court has not squarely held the *Teague* framework, which was articulated in the context of federal habeas review of state convictions under 28 U.S.C. 2254, extends to collateral review of federal convictions. See *Danforth* v. *Minnesota*, 552 U.S. 264, 269 n.4 (2008). In *Danforth*, however, the Court observed that the lower federal courts have consistently applied *Teague* to federal prisoners' motions for post-conviction relief under 28 U.S.C. 2255, and it explained that "[m]uch of the reasoning applicable to applications for writs of habeas corpus filed pursuant to § 2254 seems equally applicable in the context of § 2255 motions." 552 U.S. at 281 n.16. Petitioner does not challenge *Teague*'s applicability in this case, see Pet. 6 n.1, and this

That general bar on retroactivity recognizes that "[a]pplication 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 criminal justice system." *Id.* at 309. 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), neither exception applies here. Pet. App. 6a; see Pet. 10. The question whether *Padilla*'s rule may serve as the basis for collateral challenges to convictions that had already become final when *Padilla* was decided therefore turns on whether the rule is "new" within the meaning of *Teague*.

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 "*no other* interpretation was reasonable." *Lambrix* v. *Singletary*, 520 U.S. 518, 538 (1997); see *Beard* v. *Banks*, 542 U.S. 406, 413 (2004) (citation omitted); *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997). It is thus not sufficient that a rule "could be thought to [be] support[ed]" by prior precedent, *Beard*, 542 U.S. at 414, or even that it represents the "most reasonable" interpretation of prior precedent, *Lambrix*, 520 U.S. at 538. In determining whether a rule was "susceptible to debate among reasonable minds" in light of the Court's precedent, *O'Dell*, 521 U.S. at 160 (citation omitted), relevant considerations include

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case would not be a suitable vehicle to consider the question. Petitioner did not raise the question of *Teague*'s applicability below, see Pet. C.A. Br. 5-10, and this Court does not ordinarily consider questions that have not been properly preserved. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (The Court does not ordinarily decide "questions neither raised nor resolved below.").

whether the decision announcing the rule at issue purported to rely on "controlling precedent," *Lambrix*, 520 U.S. at 528; whether there was a "difference of opinion on the part of * * * lower courts that had considered the question," *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990); and whether the Justices expressed an "array of views," *O'Dell*, 521 U.S. at 159.

c. The court of appeals correctly held that *Padilla* announced a new rule that was "susceptible to debate among reasonable minds" rather than dictated by precedent. *O'Dell*, 521 U.S. at 160 (citation omitted). As the court of appeals explained, Pet. App. 16a, before considering the nature and scope of any duty to advise noncitizen defendants concerning immigration consequences, *Padilla* had to address an antecedent question: whether "the scope of representation required by the Sixth Amendment" extends to advice about the immigration consequences of pleading guilty, 130 S. Ct. at 1481 (quoting *Commonwealth*, 253 S.W.3d at 483), such that "*Strickland* applies to Padilla's claim," *id.* at 1482. In answering that question in the affirmative, the Court acknowledged that it was "recognizing [a] new ground[] for attacking the validity of guilty pleas." *Id.* at 1485. Moreover, although the Court observed that its holding "follows" from *Hill* v. *Lockhart*, 474 U.S. 52 (1984), which generally held that defendants are entitled to effective assistance of counsel in considering whether to plead guilty, *id.* at 1485 n.12, the Court also acknowledged that *Hill* did "not control" the decision. See *Lambrix*, 520 U.S. at 529 (decision announced a new rule where it relied on supporting authority, rather than a precedent that "controls or dictates the result") (internal quotation marks omitted).

Indeed, *Padilla* departed markedly from the "legal landscape" extant when petitioner's conviction became final in April 2004. *Beard*, 542 U.S. at 413. Every federal court of appeals to decide the issue—nine in all—held that the Sixth Amendment did not impose any duty to advise noncitizen defendants of the immigration consequences of pleading guilty. See Pet. App. 10a; *Santos-Sanchez* v. *United States*, 548 F.3d 327 (5th Cir. 2008); *Broomes* v. *Ashcroft*, 358 F.3d 1251 (10th Cir.), cert. denied, 534 U.S. 1034 (2004); *United States* v. *Fry*, 322 F.3d 1198 (9th Cir. 2003); *United States* v. *Gonzalez*, 202 F.3d 20 (1st Cir. 2000); *United States* v. *Del Rosario*, 902 F.2d 55 (D.C. Cir.), cert. denied, 498 U.S. 942 (1990); *Santos* v. *Kolb*, 880 F.2d 941 (7th Cir.), cert. denied, 493 U.S. 1059 (1989); *United States* v. *Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States* v. *Santelises*, 509 F.2d 703 (2d Cir. 1975); *United States* v. *Campbell*, 778 F.2d 764 (11th Cir. 1985).[3] These courts reasoned that the Sixth

[3] Petitioner does not address the unanimity among the federal courts of appeals. Rather, she asserts (Pet. 23) that only three federal appellate decisions reaffirmed that the Sixth Amendment does not extend to advice about removal after Congress expanded the grounds for removal and curtailed the Attorney General's authority to grant discretionary relief from removal in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. But see Pet. App. 11a-12a (citing five, not three, such decisions from the First, Fifth, Seventh, Ninth, and Tenth Circuits); see also *Creary* v. *Mukasey*, 271 Fed. Appx. 127, 128 (2d Cir. 2008). But AEDPA and IIRIRA did not vitiate the precedential force of the numerous decisions that rejected a duty of advice because those cases held categorically that removal consequences were outside the scope of counsel's affirmative duty to give advice about the defendant's criminal jeopardy. Petitioner points to no court that suggested that AEDPA and IIRIRA required previous decisions to be reaffirmed, reconsidered, or overruled. And in any

Amendment did not require advice about collateral consequences because such consequences are not imposed within the criminal proceeding and the Supreme Court had observed in *Brady* v. *United States*, 397 U.S. 742, 755 (1970), "that the accused must be 'fully aware of the *direct* consequences' of a guilty plea."[4] *United States* v. *Banda*, 1 F.3d 354, 356 (5th Cir. 1993); see also Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 726 (2002). Similarly, numerous state appellate courts held that counsel had no affirmative duty to advise about potential removal, reasoning in parallel to the federal courts. See *id.* at 699; see also, *e.g.*, *Commonwealth* v. *Fuartado*, 170 S.W.3d 384 (Ky. 2005); *People* v. *Davidovich*, 618 N.W.2d 579, 582 (Mich. 2000); *People* v. *Ford*, 657 N.E.2d 265, 268 (N.Y. 1995); *People* v. *Huante*, 571 N.E.2d 736, 740-741 (Ill. 1991).[5]

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event, for purposes of the *Teague* analysis, the relevant question is not whether AEDPA and IIRIRA might have spurred some courts to reexamine their reasoning; rather, the question is whether doing so would have been *dictated* by Supreme Court precedent. Petitioner rightly does not so contend.

[4] A few courts of appeals had held that while counsel had no duty to give advice about immigration consequences, affirmative misadvice could constitute ineffective assistance because all criminal attorneys have a duty not to misrepresent the extent of their expertise—about any topic—and because misadvice undermines the fairness of the guilty plea process. See *Padilla*, 130 S. Ct. at 1492-1493 & n.3 (Alito, J., joined by Roberts, C.J., concurring in the judgment) (citing *United States* v. *Kwan*, 407 F.3d 1005, 1015-1017 (9th Cir. 2005); *United States* v. *Couto*, 311 F.3d 179, 188 (2d Cir.), cert. denied, 544 U.S. 1034 (2002); *Downs-Morgan* v. *United States*, 765 F.2d 1534, 1540-1541 (11th Cir. 1985)).

[5] A small minority of state courts reached a contrary holding. See *People* v. *Pozo*, 746 P.2d 523 (Colo. 1987); *State* v. *Paredez*, 101 P.3d 799 (N.M. 2004).

Because *Padilla* abrogated the near-universal position of the lower state and federal courts, it cannot be said that *Padilla*'s holding would have been "apparent to all reasonable jurists" at the time that petitioner's convictions became final. *Beard*, 542 U.S. at 413 (citation omitted); see *O'Dell*, 521 U.S. at 166 n.3; *Lambrix*, 520 U.S. at 538.

The novelty of the rule announced in *Padilla* is underscored by the "array of views" expressed by the Justices in that case. *O'Dell*, 521 U.S. at 159; see *Sawyer* v. *Smith*, 497 U.S. 227, 236-237 (1990); *Beard*, 542 U.S. at 415-416. Justice Scalia, joined by Justice Thomas, dissented in *Padilla* on the ground that the 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." 130 S. Ct. at 1494 (Scalia, J., dissenting) (quoting U.S. Const. Amend. VI) (alterations in original). In the dissenting Justices' view, the Court's holding represented a break from the Court's precedents: "We have until today * * * retained the Sixth Amendment's textual limitation to criminal prosecutions." *Id.* at 1495. Similarly, Justice Alito and the Chief Justice, concurring in the judgment, observed that the "Court ha[d] never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice" about collateral consequences of conviction.[6] *Id.* at 1488. The concurring

[6] In the concurring Justices' view, while the Sixth Amendment does not require attorneys to advise on immigration consequences, affirmative misadvice could give rise to an ineffective-assistance claim because misadvice "distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." *Padilla*, 130 S. Ct. at 1493. Such a dual rule, they noted, "appears faithful to the scope and nature of the Sixth Amendment duty

Justices, like the dissenters, viewed the Court's decision as a "dramatic departure from precedent" and a "major upheaval in Sixth Amendment law." *Id.* at 1491-1492.

d. Petitioner contends (Pet. 21), that *Padilla* did not announce a new rule because the decision was "simply another fact-specific application of *Strickland*'s general legal principle that counsel must provide reasonably effective assistance." In support, petitioner argues that "long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements." Pet. 22.

Contrary to petitioner's argument, *Padilla* did not simply represent a fact-specific application of the *Strickland* principle in a setting that the Court had not previously considered. Before deciding how *Strickland* would apply to advice about immigration consequences—*i.e.*, whether it would be deficient performance to fail to give such advice—the Court first had to resolve an antecedent and more fundamental question: whether "'collateral consequences are outside the scope of representation required by the Sixth Amendment,' and, therefore, the 'failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.'" *Padilla*, 130 S. Ct. at 1481 (quoting *Commonwealth*, 253 S.W.3d at 483). Only once the Court had concluded that the Sixth Amendment imposed an obligation of effective assistance with respect to a consequence that is beyond the scope of the criminal proceeding in this "unique[]"

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this Court has recognized in its past cases." *Id.* at 1492. It would also, "unlike the Court's approach, not require any upheaval in the law," as the general rule among the lower courts was that although nonadvice was not actionable, misadvice was. *Id.* at 1493.

context could it then determine how *Strickland*'s familiar standard would apply in this novel situation. *Id.* at 1482.

The presence of this antecedent question distinguishes *Padilla* from the ineffective-assistance decisions on which petitioner relies. Pet. 20-21 (citing *Rompilla* v. *Beard*, 545 U.S. 374 (2005), *Wiggins* v. *Smith*, 539 U.S. 510 (2003), *Williams* v. *Taylor*, 529 U.S. 362 (2000), and *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000)). *Williams*, *Wiggins*, and *Rompilla* concerned counsel's "duty to make reasonable investigations" within the criminal case, which the Court had established in *Strickland*, 466 U.S. at 690-691; each decision simply refined the scope of that duty in the context of specific factual circumstances. *Williams*, 529 U.S. at 390; *Wiggins*, 539 U.S. at 521-522; *Rompilla*, 545 U.S. at 380-381. Similarly, in *Flores-Ortega*, 528 U.S. at 477-478, it was already established that the Sixth Amendment entitled a defendant to advice concerning whether to file a direct appeal and assistance in doing so; the decision merely clarified the standards for evaluating counsel's performance. 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.

Petitioner's reliance on pre-*Padilla* professional standards requiring attorneys to advise their clients on the immigration consequences of conviction is thus misplaced. Pet. 3, 21-22. While this Court has treated "[p]revailing norms of practice as reflected in American Bar Association standards and the like" as helpful "guides" to determining what constitutes reasonably

effective performance under *Strickland*, 466 U.S. at 688, it has never suggested that such standards speak to, much less define, the scope of the right to counsel guaranteed by the Sixth Amendment. See *Padilla*, 130 S. Ct. at 1482 (consulting American Bar Association (ABA) standards in considering what constitutes reasonable performance only after determining that the Sixth Amendment applied to immigration advice). 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). Indeed, the commentary following one of the professional standards cited in *Padilla*, 130 S. Ct. at 1482, and by petitioner here, Pet. 3, specifically stated that its imposition of a duty to advise on collateral consequences went beyond any constitutional duty imposed by the courts. *ABA Standards for Criminal Justice, Pleas of Guilty* 14-3.2(f) cmt. at 126 & n.25 (3d ed. 1999).

Petitioner also seems to suggest (Pet. 10-11) that in holding that Padilla might be entitled to relief even though Padilla's claim arose in a state court post-conviction proceeding, the Court must have implicitly concluded that it was not announcing a new rule under *Teague*. But *Teague* had no application in *Padilla* because that case was on review from a state collateral proceeding. 130 S. Ct. at 1478. In *Danforth* v. *Minnesota*, 552 U.S. 264, 282 (2008), this Court 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*." Accordingly, no federal *Teague* issue was before the Court, and the Court's resolution of *Padilla* did not implicate that doctrine.[7] In any event, 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 therefore 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, Pet. App. 17a, and the Court's ruling thus does not imply any conclusion about retroactivity.[8]

2. As petitioner argues (Pet. 11-16), the federal courts are divided on the question of whether *Padilla* announced a new rule under *Teague*. The Third Circuit

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[7] It is irrelevant whether Kentucky applies a *Teague*-like doctrine on state collateral review. See Pet. 11. If Kentucky does so, it is applying *state*, not *federal* law. See *Danforth*, 552 U.S. at 289; see *id.* at 281-282.

[8] In *Lafler* v. *Cooper*, No. 10-209 (Mar. 21, 2012), and *Missouri* v. *Frye*, No. 10-444 (Mar. 21, 2012), this Court recognized ineffectiveness claims concerning negotiation and consideration of plea offers and remanded for application of its standards. *Lafler*, slip op. 15-16; *Frye*, slip op. 13-15. Neither case addressed *Teague* issues. *Frye* was a state case and therefore implicated no issues under *Teague*. See *Danforth*, *supra*. *Lafler* arose on federal habeas corpus review but the State did not raise *Teague* as a barrier to relief. See 10-209 Pet. i. The State did raise AEDPA's requirement that a 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), but this Court rejected that argument because the state court had failed to apply *Strickland* at all to assess the defendant's ineffective assistance claim. *Lafler*, slip op. 15. That failure meant the federal habeas courts could "determine the principles necessary to grant relief." *Ibid.* The Court said nothing about whether the "principles" it "determine[d]" were new under *Teague*.

has held that *Padilla* did not announce a new rule, see *United States* v. *Orocio*, 645 F.3d 630, 641 (2011), while the Tenth Circuit has followed the Seventh Circuit in holding that *Padilla* announced a new rule that does not apply retroactively, *United States* v. *Chang Hong*, No. 10-6294, 2011 WL 3805763, at *2-*10 (10th Cir. Aug. 30, 2011). The question is also currently pending before other courts of appeals. See, *e.g.*, *United States* v. *Morales*, No. 11-16656 (9th Cir.) (argument not yet scheduled); *Llanes* v. *United States*, No. 11-13338 (11th Cir.) (argument not yet scheduled); *United States* v. *Amer*, No. 11-60522 (5th Cir.) (argument scheduled for Apr. 4, 2012); *Mathur* v. *United States*, No. 11-6747 (4th Cir.) (argued Jan. 26, 2012); *Haddad* v. *United States*, No. 10-2079 (6th Cir.) (oral argument waived). In addition, although state courts are free to accord procedural rules greater retroactive effect than the *Teague* standard would mandate, see *Danforth*, 552 U.S. at 266, state courts that employ the *Teague* standard have also divided on the question whether *Padilla* announced a new rule. See, *e.g.*, *State* v. *Gaitan*, Nos. 067613, 068039, 2012 WL 612311, at *11-*16 (N.J. Feb. 28, 2012) (new rule); *Commonwealth* v. *Clarke*, 949 N.E.2d 892, 903 (Mass. 2011) (not a new rule).

The question of *Padilla*'s application to convictions that became final before the decision was announced is significant. As the number of cases raising the *Padilla* retroactivity issue (Pet. 12-16) demonstrate, many noncitizens are now attempting to overturn their long-final convictions based on this Court's decision in *Padilla*. These collateral proceedings threaten society's interest in the finality of criminal convictions. See *Teague*, 489 U.S. at 309 ("[T]he principle of finality * * * is essential to the operation of our criminal justice system.").

That interest is heightened when convictions are based on guilty pleas. See *Custis* v. *United States*, 511 U.S. 485, 497 (1954) ("When a guilty plea is at issue, the concern with finality * * * has special force.") (internal quotation marks and citation omitted). They also will have a significant impact on the federal government's efforts to enforce this Nation's immigration laws against those who have become removable as a result of pre-*Padilla* criminal convictions.

This case is a suitable vehicle for the Court to resolve the question of *Padilla*'s retroactivity. The question is squarely presented and determinative of petitioner's right to relief. See Pet. 18-19; Pet. App. 3a. Accordingly, this Court's review is warranted to resolve the division of authority among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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