No. 12-391

In the Supreme Court of the United States

MARIO MENDOZA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's coram nobis petition asserting that his attorney provided him with ineffective assistance under *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), is untimely.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 690 F.3d 157. The opinion of the district court (Pet. App. 7a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2012. The petition for a writ of certiorari was filed on September 25, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2006, after entering a guilty plea in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to fraudulently induce the Federal Housing Authority (FHA) to insure mortgage loans, in violation of 18 U.S.C. 371 and 1001. He was sentenced to two years of probation and ordered

to make restitution in the amount of $100,000. In 2011, he filed a petition for a writ of coram nobis seeking to withdraw his guilty plea. The district court denied the petition (Pet. App. 8a-16a), and the court of appeals affirmed. *Id.* at 1a-7a.

1. Petitioner is a native of Ecuador who became a legal permanent resident of the United States in 1992. From approximately 1996 through 2001, he was a licensed realtor in Union, New Jersey. In that job, he assisted borrowers in qualifying for FHA insured mortgages. Gov't C.A. Br. 2.

Between December 1999 and July 2001, petitioner and others engaged in a fraudulent scheme to induce the United States Department of Housing and Urban Development to insure mortgage loans, thereby allowing the conspirators to profit from the sale of the mortgaged residences. Petitioner recruited various persons to pose as purchasers of property and apply for FHA-insured mortgage loans for those sham purchases. He assisted the straw buyers in using false identities to qualify for the loans. He then supplied the straw buyers with funds that the buyers produced at closing for the down-payment, falsely claiming that the funds came from friends and relatives. The buyers also produced false letters purporting to memorialize the "gifts." Gov't C.A. Br. 2-3.

Petitioner and his co-conspirators disguised the transfer of the proceeds of the fraud by depositing attorney trust fund checks into each other's personal bank accounts. Eventually, all the properties went into foreclosure. Petitioners and his co-conspirators split approximately $300,000 in proceeds from the fraudulently obtained loans. Gov't C.A. Br. 3-4.

2. A federal grand jury in the District of New Jersey returned an indictment charging petitioner with conspiring to fraudulently induce the FHA to insure mortgage loans, in violation of 18 U.S.C. 371 and 1001. On March 29, 2006, pursuant to a plea agreement, petitioner pleaded guilty to the charge. Petitioner's lawyer failed to advise petitioner that, as an alien residing in the United States, petitioner would be subject to mandatory removal from the country as a result of his conviction. See 8 U.S.C. 1227(a)(2)(A)(iii). Petitioner first learned from his Presentence Investigation Report before sentencing that his guilty plea might lead to removal. On September 11, 2006, the district court sentenced petitioner to a two-year term of probation and ordered him to pay $100,000 in restitution. As a condition of probation, petitioner was required to cooperate with immigration officials. In late 2006, the government instituted removal proceedings and ordered petitioner to leave the country. Pet. App. 2a-3a; Gov't C.A. Br. 6-7.

On January 14, 2010, after completing his sentence, petitioner filed a motion under 28 U.S.C. 2255 (Supp. IV 2010) and Fed. R. Crim. P. 32(d) to withdraw his guilty plea based on ineffective assistance of counsel. He argued that his lawyer had failed to advise him of the immigration consequences of pleading guilty. On March 31, 2010, this Court held in *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), that defense attorneys have a Sixth Amendment obligation to advise their noncitizen clients of the immigration consequences of conviction. Five months later, petitioner withdrew his Section 2255 motion because, no longer being in custody, he was ineligible for Section 2255 relief. Nine months after that, on June 8, 2011, petitioner renewed the same ineffective-assistance claim in a petition for a writ of coram nobis.

He argued that, if he had known that his guilty plea would subject him to removal, he would have attempted to negotiate a better deal or gone to trial instead of pleading guilty. On September 21, 2011, the district court denied the petition on the alternative grounds that it was untimely and that petitioner had failed to assert his innocence. Pet. App. 3a; 13a-15a.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court agreed with petitioner that his lawyer's performance was deficient under *Padilla*. *Id.* at 4a. The court concluded, however, that petitioner's delay in raising his ineffective-assistance claim barred him from relief. *Ibid.* The court explained that, in order to obtain coram nobis relief, a defendant must show (1) that no remedy was available to him at the time of trial, and (2) that "'sound reasons'" exist for his failing to seek relief earlier. *Id.* at 4a (quoting *United States* v. *Morgan*, 346 U.S. 502, 512 (1954)). The court stated that, while counsel's deficient performance might have prevented petitioner from seeking relief at the time of his plea, he could not show any "sound reason" for his "lengthy delay"—more than four years from the time he first learned of his guilty plea's removal consequences—in filing his motion. *Id.* at 4a-5a.

The court of appeals rejected as unsound petitioner's asserted reasons for the delay: (1) his mistaken belief that he could avoid removal by cooperating with immigration officials, and (2) the absence of Supreme Court precedent, until *Padilla*, establishing the duty of defense counsel to advise their noncitizen clients of the immigration consequences of a guilty plea. Pet. App. 5a. The court explained that petitioner had no reasonable basis for believing that his cooperation was a condition of his remaining in the country, as opposed to a condi-

tion of probation. *Ibid.* Further, the court observed (1) that it had held in *United States* v. *Orocio*, 645 F.3d 630 (3d Cir. 2011), that *Padilla* did not announce a "'new rule' for retroactivity purposes," Pet. App. 5a; (2) that petitioner's Section 2255 motion, filed six months before *Padilla* was decided, "demonstrated that 'he did not need the Supreme Court's clarification to have raised his present contentions,'" *id.* at 6a; and (3) that the "unsettled" state of the law governing an issue does not justify a delay in filing a coram nobis petition, *ibid.*

The court of appeals went on to hold that, even if the petition for a writ of coram nobis had been timely filed, petitioner's effort to withdraw his guilty plea would "almost certainly fail." Pet. App. 6a. The court explained that this was so because, instead of asserting his innocence, petitioner merely claimed that, if he had known that his guilty plea would lead to his removal, he would have sought a more favorable plea bargain or risked trial. *Id.* at 7a. The court noted that no more favorable plea deal was available and that a trial would "[not] have resulted in anything less than a conviction." *Ibid.* The court added that the government "would certainly be unduly prejudiced" by having to reprosecute a case "nearly a decade dormant." *Ibid.*

Finally, the court of appeals observed that this Court's resolution of *Chaidez* v. *United States*, No. 11-820 (argued, Nov. 1, 2012), which presents the question whether the rule announced in *Padilla* was "new" for purposes of retroactivity analysis under *Teague* v. *Lane*, 489 U.S. 288 (1989), will have "no bearing" on this case. Pet. App. 6a n.1. The court explained that, if the Court were to conclude that *Padilla* announced a "new rule" for retroactivity purposes, "such a ruling may strengthen [petitioner's] argument that he was previously una-

ware of the rule, but would also preclude him from invoking Padilla retroactively, effectively foreclosing his claim." *Ibid.*

ARGUMENT

Petitioner contends that the courts below incorrectly denied him coram nobis relief on the grounds that his delay in raising his ineffective-assistance claim was not supported by sound reasons and that he had failed to assert his actual innocence. Petitioner's claims do not warrant this Court's review.

1. After a defendant has served his sentence and is no longer in custody, he cannot assert a claim for collateral relief under 28 U.S.C. 2255 (Supp. IV 2010). Federal courts, however, have found power under the All Writs Act, 28 U.S.C. 1651(a), to grant a writ of coram nobis to vacate a conviction that is invalid because of a fundamental error. See *United States* v. *Denedo*, 556 U.S. 904, 911 (2009); *United States* v. *Morgan*, 346 U.S. 502, 512 (1954); see also, *e.g.*, *United States* v. *Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012); *United States* v. *George*, 676 F.3d 249, 254 (1st Cir. 2012); *United States* v. *Stoneman*, 870 F.2d 102, 105-106 (3d Cir.), cert. denied, 493 U.S. 891 (1989); cf. *Carlisle* v. *United States*, 517 U.S. 416, 424 (1996) (noting that it is difficult to imagine cases in which coram nobis relief "would be necessary or appropriate"). Although Congress has not established a statutory limitations period for coram nobis petitions, an individual may not obtain coram nobis relief if he delayed unreasonably in filing his petition. See *Denedo*, 556 U.S. at 917 (remanding in part for consideration of respondent's "delay in lodging his [coram nobis] petition"); *Akinsade*, 686 F.3d at 252; *George*, 676 F.3d at 254; see also *Morgan*, 346 U.S. at 512.

The court of appeals correctly held that petitioner's coram nobis petition, filed almost five years after he learned that he was subject to removal, is untimely. Petitioner disputes this fact-bound conclusion, arguing (Pet. 9-15) that he had sound reasons for his delay in filing the petition—namely, (1) his earlier motion to vacate under Section 2255, which he withdrew because, no longer being in custody, he was ineligible for Section 2255 relief; (2) his belief that he could avoid removal by cooperating with the government; and (3) the assertedly unsettled state of the law on defense counsels' duty to advise defendants of the immigration consequences of conviction.

a. Petitioner's earlier Section 2255 motion provides no sound reason for the delay. Petitioner did not file that motion until three years after he learned that he might be removed and that his counsel had failed to advise him of that fact before he pleaded guilty. Petitioner then waited nine months after withdrawing his Section 2255 motion to file his coram nobis petition, which was "substantively identical" to the withdrawn motion. Pet. App. 15a. Petitioner offers no justification for that additional delay.

b. Nor does petitioner's belief that he could avoid removal by cooperating with the government provide a justification for the delay. As the court of appeals observed, petitioner's cooperation was a condition of his probation, not of his remaining in the country. Pet. App. 5a. Petitioner does not claim that the government, the district court, or his attorney in any way misled him on that score. In any event, petitioner could have had no reasonable understanding that his cooperation would indefinitely stave off his removal after late 2006, when the government initiated removal proceedings against

him and ordered him to leave the country. Gov't C.A. Br. 7. At that point, petitioner was still on probation and his conviction had been final less than a year, so he could have raised his ineffective-assistance claim by filing a timely motion under Section 2255. See *United States* v. *Span*, 75 F.3d 1383, 1386 n.5 (9th Cir. 1996) (defendant serving a probationary term is in custody for Section 2255 purposes); 28 U.S.C. 2255(f)(1) (Supp. IV 2010). Yet petitioner waited three more years before filing his Section 2255 motion, and another nine months after withdrawing that motion to file his coram nobis petition.

c. Finally, petitioner is incorrect in arguing (Pet. 11) that his delay was justified by the "unsettled" state of the law before *Padilla* on an attorney's Sixth Amendment obligation to give advice about immigration consequences. While nearly all federal courts of appeals had rejected *Padilla*-type claims, pre-*Padilla* Third Circuit precedent did not foreclose petitioner's claim. The court of appeals had noted that a few state courts had held that counsel's failure to advise a defendant about the immigration consequences of pleading guilty constituted ineffective assistance, and it had declined to decide the issue. See *United States* v. *Nino*, 878 F.2d 101, 105 (1989). Petitioner, in the years before *Padilla* was decided, therefore could have pressed an ineffective-assistance claim based on his counsel's failure to advise him. Indeed, petitioner demonstrated as much by raising his ineffective-assistance claim in his Section 2255 motion several months before *Padilla* was decided.

Even if petitioner were correct that he could not reasonably have been expected to bring his claim until *Padilla* was decided, petitioner cannot explain why he did not file until 14 months after *Padilla* was issued. By

comparison, Section 2255 gives a defendant one year to file a collateral challenge based on a decision recognizing a new right. 28 U.S.C. 2255(f)(3) (Supp. IV 2010). Although coram nobis petitions are not subject to Section 2255(f) or any other statute of limitations, in light of the extraordinary nature of the coram nobis remedy and the strong interest in the finality of convictions, petitioner faces an uphill battle in arguing that it was reasonable to wait even longer to file his coram nobis petition than Section 2255(f)(3) would allow. *Stoneman*, 870 F.2d at 106 ("[t]he interest in finality of judgments dictates that the standard for a successful collateral attack on a conviction [via a petition for coram nobis] be * * * even more stringent than that on a petitioner seeking *habeas corpus* relief under [Section] 2255") (citation omitted). Petitioner has not offered any reason for that delay.

Petitioner relies (Pet. 12-13) on two district court decisions that held, based on the circumstances of the cases presented, that the defendants' coram nobis petitions were not untimely even though they were not brought until after *Padilla* was decided. See *Gudiel-Soto* v. *United States*, 761 F. Supp. 2d 234 (D.N.J. 2011); *Cabrera* v. *United States*, No. 10-2713, 2011 WL 2784419 (D.N.J. July 12, 2011). Differing district court conclusions concerning whether particular coram nobis petitions were brought within a reasonable time do not create a conflict warranting this Court's review. In any event, in neither case did the petitioner wait more than a year after *Padilla* was decided to file his claim. See *Gudiel-Soto*, 761 F. Supp. 2d at 237-238 (petition filed seven months after *Padilla*); *Cabrera*, 2011 WL 2784419, at *1 (petition filed "shortly" after *Padilla*).

3. Petitioner also argues (Pet. 13) that the court of appeals erred in stating that even if petitioner's coram nobis petition were timely, it would fail on the merits because petitioner did not assert that he was innocent. Pet. App. 7a. In the courts below, the relief petitioner requested for the alleged violation of his right to effective assistance of counsel included leave to withdraw his guilty plea, see Pet. 6; Pet. C.A. Br. 7; Pet. for Coram Nobis 19, and courts have generally considered an assertion of innocence a relevant consideration in deciding whether to permit withdrawal of a guilty plea, see, *e.g.*, *United States* v. *Osei*, 679 F.3d 742, 746 (8th Cir. 2012). Petitioner correctly points out, however, that a defendant is not required to assert his innocence in order to establish prejudice from a *Padilla* violation; rather, he need only show that, but for counsel's error, he would not have pleaded guilty. See *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1482 (2010); *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985). The Third Circuit has repeatedly so held. See, *e.g.*, *Weeks* v. *Snyder*, 219 F.3d 245, 257, cert. denied, 531 U.S. 1003 (2000); *United States* v. *Nahodil*, 36 F.3d 323, 326 (1994).

To the extent that the court of appeals erred in considering petitioner's failure to assert his innocence, however, that error does not warrant this Court's review because it did not affect the court of appeals' decision. The court's denial of relief rested on its conclusion that petitioner's coram nobis petition was not timely, and the court's discussion of petitioner's failure to assert his innocence was therefore dicta.

4. Petitioner does not ask the Court to hold the petition for a writ of certiorari pending its decision in *Chaidez* v. *United States*, No. 11-820 (argued Nov. 1, 2012), and there is no need for the Court to do so. The

issue presented in *Chaidez* is whether, under the retroactivity framework set forth in *Teague*, *Padilla* announced a new rule that does not apply retroactively on collateral review. The government's position is that *Padilla* announced a new rule because the decision was not dictated by precedent. See U.S. Br. at 7, *Chaidez*, *supra*. Petitioner does not raise the issue of *Padilla*'s retroactivity, and in any event he would not benefit from the decision in *Chaidez*.

Petitioner has already received the benefit of the *Padilla* rule. In accordance with Third Circuit precedent, which holds that *Padilla* did not announce a new rule and is therefore retroactively applicable on collateral review, see *United States* v. *Orocio*, 645 F.3d 630, 635 (3d Cir. 2011), the court of appeals applied *Padilla* to petitioner's claim. The court concluded that petitioner's counsel's failure to advise petitioner of the immigration consequences of his guilty plea was "deficient" performance under *Padilla*. See Pet. App. 4a. Nonetheless, the court upheld the district court's denial of petitioner's coram nobis petition because it concluded that his claim was untimely. Petitioner would therefore not benefit from a holding in *Chaidez* that the *Padilla* rule is not new.

On the other hand, if this Court were to overrule *Orocio* and hold that *Padilla* did announce a new rule, *Padilla* would not apply to petitioner's case unless the rule falls within one of the narrow exceptions to the bar on retroactive application of new constitutional rules. See *Teague* v. *Lane*, 489 U.S. 288, 311-312 (1989) (plurality opinion). Petitioner does not contend that the *Padilla* rule falls within either of the *Teague* exceptions for substantive rules and "watershed rules of criminal procedure." See *Schriro* v. *Summerlin*, 542 U.S. 348,

351-352 (2004) (citation and internal quotation marks omitted). It is unlikely that the *Chaidez* Court will address that question, moreover, as the petitioner in *Chaidez* has conceded that if *Padilla* announced a new rule, the *Teague* exceptions would not apply.* See 11-820 Pet. Br. at 5-6, *Chaidez*, *supra*; U.S. Br. at 46, 48, *Chaidez*, *supra*; *Chaidez* v. *United States*, 655 F.3d 684, 688 (7th Cir. 2011), cert. granted, No. 11-820 (argued Nov. 1, 2012).

Nor will the *Chaidez* decision have any impact on the court of appeals' timeliness ruling. Although Chaidez, like petitioner, brought her *Padilla* claim in a coram nobis petition, Chaidez filed her coram nobis petition in October 2009, shortly after she learned that she might be removed, and before *Padilla* was decided. The district court held that Chaidez had timely filed her petition, Pet. App. at 37a-38a, *Chaidez*, *supra*, and the government did not appeal that ruling. As a result, no timeliness issue is before the Court in *Chaidez*. The Court's consideration of the merits of Chaidez's coram nobis petition therefore does not suggest that the lower courts were wrong to conclude in this case that petitioner, who did not file his petition until years after he learned that he might be removed and almost a year after *Padilla* was decided, failed to file within a reasonable time. In short, as the court below concluded, this Court's pending

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* In *Chaidez*, the petitioner has also asserted that *Teague*'s limitation on the retroactivity of new rules does not apply on collateral review of federal convictions or to claims of ineffective assistance of counsel. See Pet. Br. at 27-39, *Chaidez*, *supra*. It is unclear whether the Court will consider those issues in *Chaidez* because Chaidez failed to raise them in the court of appeals. Even assuming the *Chaidez* Court considers the issues, petitioner cannot benefit from their resolution, as the denial of petitioner's coram nobis petition by the courts below did not rest on *Padilla*'s nonretroactivity.

decision in *Chaidez* will have "no bearing" on the instant case. Pet. App. 6a n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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