No. 12-439

In the Supreme Court of the United States

SHAHZAD MATHUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH 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 on collateral review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 685 F.3d 396.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2012. The petition for a writ of certiorari was filed on October 9, 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 Eastern District of North Carolina, petitioner was convicted of conspiring to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846. He was sentenced to 20 years of imprisonment. Pet. App. 2a. In 2011, petitioner filed a motion under 28 U.S.C. 2255 (Supp. V 2011) challenging his conviction.

The district court denied the motion. *Id.* at 19a-28a. The court of appeals affirmed. *Id.* at 1a-18a.

1. From approximately 1999 until January 2006, Lacy Tate and Shannon Bullard operated a large-scale heroin-, marijuana- and cocaine-trafficking enterprise in Wilmington, Delaware. Petitioner, a native of India residing in the United States, was the primary source of cocaine for the enterprise. Between May 2004 and November 2005, the Tate organization purchased approximately 200 kilograms of cocaine from petitioner. The enterprise also purchased about 200 pounds of marijuana from petitioner. Presentence Investigation Report ¶¶ 9-15.

2. In December 2007, pursuant to a plea agreement, petitioner pleaded guilty to conspiring to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846. He was sentenced to 20 years of imprisonment. After petitioner pleaded guilty, the Department of Homeland Security commenced removal proceedings against him based on his conviction. Pet. App. 2a.

3. In March 2011, more than three years after his conviction, petitioner filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255 (Supp. V 2011). Pet. App. 2a. 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 as time-barred under the limitations periods provided in 28 U.S.C. 2255(f) (Supp. V 2011). The court explained that petitioner acknowledged that his motion was untimely

under Section 2255(f)(1) because he had not filed it within one year of the date on which his conviction became final. See 28 U.S.C. 2255(f)(1) (Supp. V 2011). The court rejected petitioner's argument that his motion was timely under 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. V 2011). The court reasoned that although petitioner had filed the motion within one year after the *Padilla* decision, that decision is not retroactively applicable on collateral review. Pet. App. 20a-25a.

Finding that reasonable jurists could debate the correctness of its timeliness ruling, the district court granted petitioner a certificate of appealability under 28 U.S.C. 2253(c)(2). Pet. App. 25a-27a.

4. The court of appeals affirmed. Pet. App. 1a-18a. The court observed that, in order to obtain the benefit of the limitations period stated in Section 2255(f)(3), petitioner was required to show "(1) that the Supreme Court recognized a new right; (2) that the right 'has been . . . made retroactively applicable to cases on collateral review'; and (3) that he filed his motion within one year of the date on which the Supreme Court recognized the right." Pet. App. 4a (quoting 28 U.S.C. 2255(f)(3) (Supp. V 2011)).

The court of appeals found that petitioner clearly satisfied the third requirement, as he filed his Section 2255 motion within one year of the date of the *Padilla* decision. Pet. App. 4a.

With respect to the first requirement—that *Padilla* recognized a new right—the court of appeals explained

that lower courts had reached differing conclusions on whether *Padilla*'s rule is new for purposes of the retroactivity analysis set forth in *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. App. 5a (citing cases). Because both petitioner and the government agreed that *Padilla* announced a new rule under *Teague*, the court of appeals assumed, without deciding, that *Padilla* recognized a new right. *Id*. at 6a.

Turning to the question whether the new rule announced by *Padilla* is retroactively applicable on collateral review, the court explained that *Teague* holds that a new constitutional rule of criminal procedure may be applied retroactively only if it falls within one of *Teague*'s narrow exceptions for substantive rules and "watershed" rules of criminal procedure. Pet. App. 7a; *Teague*, 489 U.S. at 311-312 (plurality opinion).

The court of appeals rejected petitioner's argument that *Padilla* announced a "watershed" rule that should apply retroactively. The court explained that to qualify as watershed, a new rule "cannot just be an important or even a 'fundamental' right; it must be an important right in the specific service of enhancing the 'accuracy of the factfinding process.'" Pet. App. 8a (quoting *Whorton* v. *Bockting*, 549 U.S. 406, 419 (2007)). The court observed that the only decision that this Court has suggested might qualify for "watershed" status is *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which incorporated the Sixth Amendment right to counsel against the States and held that the right is violated when a State fails to appoint a lawyer for a defendant who cannot afford representation. Pet. App. 7a.

The court of appeals concluded that the right recognized in *Padilla* "has little, if anything, to do with accuracy in the factfinding process." Pet. App. 8a. The

court explained that when a defendant who has pleaded guilty and been sentenced "is surprised at a later date 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." *Id.* at 8a-9a. Accordingly, the court held that "the impact of a *Padilla* violation is different in kind and substantially less in degree than the impact of a *Gideon* violation." *Id.* at 9a.

The court of appeals also rejected petitioner's argument that *Padilla* itself held that the new right it announced should be applied retroactively. The court explained that the opinion in *Padilla* did not mention *Teague* or retroactivity and that "[t]he only way to make a new rule retroactive 'is through a *holding*,' not through dictum, * * * and *Padilla* made no such *holding*." Pet. App. 11a. (quoting *Tyler* v. *Cain*, 533 U.S. 656, 663 (2001)). The court also reasoned that *Padilla*'s statement that the decision would not undermine the "finality of convictions obtained through guilty pleas," 130 S. Ct. at 1484, did not indicate that the *Padilla* Court assumed that its decision would apply to already-final convictions. Pet. App. 11a-12a. Rather, the court stated, the statement could be read as referring to guilty pleas that had been entered but were not yet final because they were still on direct review.[1]

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[1] Judge Niemeyer, who authored the panel's opinion, also wrote separately to suggest that Section 2255(f)(3) may have required petitioner "to show that at the time he filed his § 2255 motion, *some prior court* had held that *Padilla* recognized a new rule that was retroactively applicable to cases on collateral review." Pet. App. 14a-15a (emphasis in original). Under this view, he noted, the court of ap-

DISCUSSION

Petitioner contends (Pet. 8-12) 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 correctly rejected this claim, and its decision creates no conflict with any other court of appeals. Petitioner's claim therefore does 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 (argued Nov. 1, 2012), and then dispose of the petition as appropriate in light of that decision.

1. a. 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. V 2011); see *Dodd* v. *United States*, 545 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*, *supra*—and that has been found to be retroactively applicable under *Teague*. See *Figuereo-Sanchez* v. *United States*, 678 F.3d 1203, 1207 nn.4-5 (11th Cir. 2012), petition for cert.

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peals' Section 2255(f)(3) inquiry would have been limited to determining whether "a prior court has held" that *Padilla* should be applied retroactively. *Id*. at 15a.

pending, No. 12-164 (filed July 27, 2012); *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 (plurality opinion). 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 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.'" *Ibid.* (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 (internal quotation marks omitted). *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 overall interests would be better served by acknowledging guilt or by putting the government to its burden of proof at a trial. But a defendant's lack 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).

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; citation omitted). Rather, in order to meet the requirement, "a new rule must *itself* constitute a previously unrecognized bedrock procedural element." *Ibid.* (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. *Ibid.* (quoting *Banks*, 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. *Banks*, 542 U.S. at 419-420. Before *Padilla*, defense counsel was already obligated to assist defendants in deciding whether to plead guilty by providing 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); see also *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 *Banks*, 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. 10) that *Padilla* altered our conception of fundamental fairness because counsel's failure to advise a defendant of removal consequences "undermines the plea process itself." But the error at issue in *Gideon*—the complete absence of counsel—pervasively affects all aspects of the trial, such that a fair and reliable trial 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. See *Hill*, 474 U.S. at 58-59.

c. Petitioner argues (Pet. 10-12) that "simple fairness" requires that he receive the benefit of the *Padilla* rule on collateral review because the Court applied its ruling to the petitioner in *Padilla* despite the state postconviction context in which the case arose. Petitioner's argument is based on an incorrect legal premise—namely, that his case and *Padilla* "are in the same procedural posture." Pet. 12.

Because *Padilla* was on review from a state collateral proceeding, *Teague* had no application there. 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 state courts apply a *Teague*-like doctrine of their own on collateral review is therefore a matter of state, not federal, law. See *id*. at 281-282, 288-289. And this Court has never suggested that its own review on certiorari of a state collateral proceeding, in which the state court reached the merits without citing retroactivity concerns, implicates the *Teague* doctrine. Accordingly, 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) (internal quotation marks omitted); 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.

Thus, *Padilla*'s omission to apply or even address *Teague* does not suggest that *Padilla* applies retroactively in federal collateral proceedings or, in particular, that *Padilla* announced a watershed rule for *Teague* purposes. Although Padilla was entitled to the benefit of the Court's ruling and petitioner is not, that is a consequence of the nature and scope of the *Teague* rule itself, rather than any inequitable treatment of similarly situated defendants.

d. 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 to address the issue agree with the Fourth Circuit that Padilla did not announce a watershed rule. See *Figuereo-Sanchez*, 678 F.3d at 1208-1209; *Chang Hong*, 671 F.3d at 1157-1159. Plenary review of the question presented is therefore unwarranted.

2. Petitioner does not ask the Court to hold the petition pending its decision in *Chaidez* v. *United States*, *supra*, but the Court may nonetheless wish to do so.

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*, 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. See Pet. App. 4a. 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. Pet. App. 6a. 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." 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* v. *United States*, 655 F.3d 684, 688 (7th Cir. 2011), cert. granted, No. 11-820 (argued Nov. 1, 2012).

Conversely, if the Court holds in *Chaidez* that *Padilla* did not announce a new rule, that outcome would abrogate the Fourth Circuit's assumption in this case that *Padilla* announced a new rule. But petitioner would not benefit from a remand to the Fourth 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 would be 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, if *Padilla* did not announce

a new rule, petitioner's ineffective-assistance claim would be time-barred under Section 2255(f)(1) because it was not filed within one year after his conviction became final. Pet. App. 3a-4a, 6a.

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 Fourth Circuit would allow petitioner to benefit from any favorable ruling on those issues in any event.[2] But because the decision in *Chaidez* could have some bearing on the proper disposition of this case, the Court may wish to hold the petition pending *Chaidez*.

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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 Fourth Circuit law he may not be able to raise those new issues for the first time even on remand from this Court. See, *e.g.*, *United States* v. *Winfield*, 665 F.3d 107, 111 n.4 (2012) (issues not raised in an opening brief are deemed waived); cf. *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir.) (declining to apply normal rule that issues not raised in opening brief are abandoned after remand from the Supreme Court in light of *United States* v. *Booker*, 543 U.S. 220 (2005), after concluding that the Supreme Court's opinion specifically directed lower courts to apply *Booker* to all cases on direct review), cert. denied, 545 U.S. 1109 (2005).

CONCLUSION

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

Respectfully submitted.

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