

No. 12-588

In the Supreme Court of the United States

JULIO GUERRERO-CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH 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), is retroactively applicable on collateral review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unreported but is available at 2012 WL 2688810.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2012. On October 3, 2012, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 6, 2012, and the petition was filed on that date. 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 District of New Mexico, petitioner was convicted of possessing with intent to distribute 100 kilograms or more of marijuana, in violation of 21

U.S.C. 841(a). He was sentenced to 60 months of imprisonment, to be followed by a four-year term of supervised release. Pet. App. 1-2. Five years after he was convicted, petitioner challenged his conviction via a “Petition for Relief From Judgment Pursuant to N.M. Dist. Ct. P.C.P. 1-060B(6).” The district court dismissed the motion. *Id.* at 39-41. Petitioner then reasserted the same claim in a petition for a writ of *coram nobis*. The district court denied the motion, *id.* at 7-10, 20-38, and the court of appeals affirmed, *id.* at 1-6.

1. Petitioner, an alien residing in the United States, was arrested when New Mexico Motor Transportation Division officers discovered marijuana in the truck petitioner was driving. Petitioner admitted to the officers that a friend had hired him to transport the marijuana to St. Louis, Missouri. In all, the tractor trailer contained 171.46 kilograms of marijuana. Gov’t C.A. Br. 5-6.

2. On December 8, 2005, pursuant to a plea agreement, petitioner pleaded guilty to possessing with intent to distribute at least 100 kilograms of marijuana, in violation of 21 U.S.C. 841(a). He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. After petitioner’s release from prison in February 2010, the Immigration and Customs Enforcement Agency took him into immigration custody, and the Department of Homeland Security initiated removal proceedings against him under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 2.

3. In November 2010, petitioner filed a “Petition for Relief From Judgment” pursuant to N.M. R. Civ. P. for the Dist. Cts. 1-060B(6). He argued that his attorney had provided ineffective assistance by failing

to advise him of the immigration consequences of his guilty plea. 1:05-cr-02366 Docket entry No. 30 (D.N.M. Nov. 8, 2010). He relied on *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that, in cases involving noncitizen defendants, defense counsel have a constitutional obligation to give such advice. On April 4, 2011, the district court dismissed the petition. The court explained that petitioner should have brought his collateral challenge in a motion to vacate his conviction under 28 U.S.C. 2255 (Supp. IV 2010). The court declined to construe the petition as a Section 2255 motion because it was filed “more than three years after expiration of the one-year limitation period in [Section] 2255,” which began running on the date that petitioner’s conviction became final. Pet. App. 39-41; see 28 U.S.C. 2255(f)(1) (Supp. IV 2010).

4. a. On March 31, 2011, petitioner renewed his ineffective-assistance-of-counsel claim in a petition for a writ of *coram nobis*. The district court referred petitioner’s petition to a magistrate judge, who recommended that the motion be denied. Pet. App. 20-38. The magistrate judge first held that the petition was timely because it was filed “a little more than one year” after petitioner claimed to have learned that he faced deportation and exactly one year after the *Padilla* decision was issued. *Id.* at 22, 26-28. The magistrate judge further concluded that *Padilla* applies retroactively because it did not announce a “new rule, but instead * * * merely extended the rule in *Strickland* [v. *Washington*, 466 U.S. 668 (1984),] regarding ineffective assistance of counsel.” Pet. App. 29-30.

Turning to the merits, the magistrate judge held that counsel’s failure to advise petitioner of the immi-

gration consequences of his plea amounted to deficient performance under *Padilla*, Pet. App. 31-33, but that petitioner had failed to establish that he was prejudiced by counsel's error, *id.* at 33. The magistrate judge explained in light of the "substantial" evidence of petitioner's guilt, the risk of receiving a higher sentence following a trial, and the fact that petitioner would still have been "mandatorily deportable" after such a conviction, it was "highly unlikely" that petitioner would have chosen to go to trial even if he had been made aware by his counsel of the immigration consequences of conviction. *Id.* at 34-36.

b. The district court adopted the magistrate judge's report and recommendation and denied the petition for a writ of *coram nobis*. Pet. App. 7-10. The court rejected petitioner's argument that he had established prejudice resulting from his lawyer's *Padilla* error. *Id.* at 8. The court also explained that, in any event, the Tenth Circuit had recently held that the rule announced in *Padilla* was a "new rule of constitutional law [that] does not apply retroactively to cases on collateral review," so petitioner could not benefit from that rule. *Id.* at 9 (quoting *United States v. Chang Hong*, 671 F.3d 1147, 1148 (10th Cir. 2011)).

5. The court of appeals affirmed. Pet. App. 1-6. The court observed that the exclusive remedy for testing the validity of a judgment of conviction on collateral review, unless the remedy is "inadequate or ineffective," is a motion under 28 U.S.C. 2255 (Supp. IV 2010). Pet. App. 4 (quoting *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996)). The court saw "no reason" that a motion under Section 2255 would not have provided petitioner with an adequate and effective remedy for his ineffective-assistance claim. *Ibid.* The

court stated that it was “irrelevant” to the adequacy or effectiveness of Section 2255 that a Section 2255 motion would have been untimely. *Ibid.* (quoting *United States v. Payne*, 644 F.3d 1111, 1113 (10th Cir. 2011)). The court further explained that because petitioner was subject to supervised release when he filed his *coram nobis* petition, he was still in custody for purposes of Section 2255’s requirement that the defendant challenging his conviction be “in custody.” *Id.* at 5.

The court of appeals next held that, even if it were to construe petitioner’s *coram nobis* petition as a Section 2255 motion, the motion would be barred as untimely. Pet. App. 5-6. The court explained that under Section 2255(f)(3), a defendant may file a Section 2255 motion 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 on collateral review.” *Ibid.* (quoting 28 U.S.C. 2255(f)(3) (Supp. IV 2010)). Because the Tenth Circuit had recently held in *Chang Hong* that *Padilla* does not apply retroactively, however, the court of appeals held that Section 2255(f)(3) was not available to petitioner. *Id.* at 6 (citing *Chang Hong*, 671 F.3d at 1150). The court accordingly held petitioner was required to file his challenge within one year of the date his conviction became final. *Ibid.*; see 28 U.S.C. 2255(f)(1) (Supp. IV 2010). Because he had failed to do so, his challenge was untimely.

DISCUSSION

Petitioner contends (Pet. 7-20) that this Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), is retroactively applicable on collateral review because

Padilla applied existing precedent rather than announcing a “new” rule for purposes of *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion). Even if petitioner were correct, however, that would not establish that the court of appeals erred in holding that petitioner could not seek *coram nobis* relief and that petitioner’s ineffective-assistance claim would be untimely if it were construed as a motion to vacate his conviction under Section 2255. 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*, No. 11-820 (argued Nov. 1, 2012), and then dispose of the petition as appropriate in light of that decision.

1. The federal courts have power under the All Writs Act, 28 U.S.C. 1651(a), to grant a writ of *coram nobis* to vacate a conviction after sentence has been served. See *United States v. Morgan*, 346 U.S. 502, 506-510 (1954). This Court has indicated that “litigation after final judgment * * * should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.” *Id.* at 511; see also *United States v. Denedo*, 556 U.S. 904, 911 (2009). A person seeking *coram nobis* relief must show (1) that his conviction is invalid because of an error of the most fundamental character; (2) that he is no longer in custody and therefore that relief under Section 2255 is no longer available to him; and (3) that serious adverse consequences from his conviction persist. See, 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).

The court of appeals correctly held that petitioner “cannot challenge his conviction in a *coram nobis* proceeding because he was still ‘in custody’ when he filed his petition” and he therefore could have used Section 2255 to assert his ineffective-assistance claim. Pet. App. 4-5. When petitioner filed his *coram nobis* petition in March 2011, he was still subject to supervised release. *Id.* at 5. It is well established that supervised release constitutes custody for purposes of Section 2255(a)’s requirement that the defendant be “in custody.” See, e.g., *United States v. Scruggs*, 691 F.3d 660, 662 n.1 (5th Cir. 2012) (citing cases); see also *Jones v. Cunningham*, 371 U.S. 236, 242-243 (1963) (parole constitutes custody for purposes of habeas corpus relief). The court of appeals therefore correctly held that petitioner could have brought his claim in a motion under Section 2255, and that he was accordingly barred from seeking *coram nobis* relief. Petitioner does not challenge that ruling or assert that it conflicts with any decision of this Court or another court of appeals. See Pet. 7-20.

2. a. The court of appeals declined to construe petitioner’s *coram nobis* petition as a Section 2255 motion, explaining that such a motion would be untimely. Because petitioner’s motion was filed more than one year after his conviction became final, the only basis on which the motion could be 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*, 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*—and that has been found to be retroactively applicable under *Teague*. See *Howard v. United States*, 374 F.3d 1068, 1074 (11th Cir. 2004); see also *United States v. Mathur*, 685 F.3d 396, 398 (4th Cir. 2012), petition for cert. pending, No. 12-439 (filed Oct. 9, 2012); *Figueredo-Sanchez v. United States*, 678 F.3d 1203, 1207-1208 & n.4 (11th Cir. 2012), petition for cert. pending, No. 12-164 (filed July 27, 2012). *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 “watershed” procedural rules and substantive rules. See *Saffle v. Parks*, 494 U.S. 484, 494-495 (1990); *Teague*, 489 U.S. at 300, 311-312 (plurality opinion).

In holding that petitioner could not avail himself of the extended limitations period in Section 2255(f)(3), the court of appeals relied on its decision in *United States v. Chang Hong*, 671 F.3d 1147, 1158 (10th Cir. 2011), which held that *Padilla* announced a new rule that does not apply retroactively because it does not fall into either of the *Teague* exceptions. Petitioner contends (Pet. 8, 16) that *Hong* is incorrect because the *Padilla* rule does not qualify as a new rule for *Teague* purposes. That argument, however, would establish that petitioner’s collateral challenge is *not* timely under Section 2255(f)(3), which requires that the right asserted qualify as new under *Teague*. See *Howard*, 374 F.3d at 1074. By arguing that the *Pa-*

dilla rule is not new, petitioner effectively has conceded that his claim, construed as a Section 2255 motion, was untimely.

b. Petitioner does not contend that the *Padilla* rule is a new rule that qualifies as “watershed” rule or a substantive rule, as would be necessary to satisfy Section 2255(f)(3). In any event, the court of appeals’ conclusion that *Padilla* falls into neither *Teague* exception is correct, and it is in accord with the unanimous view of the courts of appeals to address the issue. See *Mathur*, 685 F.3d at 399-401; *Figuereso-Sanchez*, 678 F.3d at 1208-1209.

To qualify as a “watershed” rule, the rule must (1) “be necessary to prevent an impermissibly large risk of an inaccurate conviction,” *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal quotation marks and citation omitted), and (2) “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)). *Padilla*’s holding that defense counsel must inform his client about the immigration consequences of pleading guilty satisfies neither requirement. The *Padilla* rule is not directed to enhancing the accuracy of the fact-finding process; rather, 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 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. *Chang Hong*, 671 F.3d at 1158.

Nor did the *Padilla* rule “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” *Bockting*, 549 U.S. at 418 (citation omitted). The *Padilla* rule does not “itself constitute a previously unrecognized bedrock procedural element,” *id.* at 421 (emphasis added); rather, *Padilla* simply worked an “incremental change” in the scope of advice that defense counsel was already required to provide under the Sixth Amendment. *Beard v. Banks*, 542 U.S. 406, 419-420 (2004). 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 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). *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. See *Banks*, 542 U.S. at 420.

The *Padilla* rule is also not a substantive rule that is retroactively applicable under *Teague*. See *Teague*, 489 U.S. at 311 (plurality opinion). The Court has described a substantive rule to include one that “alters the range of conduct or the class of persons that the law punishes.” *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). The *Padilla* rule does neither. Ra-

ther, it regulates the advice that a defendant must be given when he is deciding whether to plead guilty. See *Chang Hong*, 671 F.3d at 1157.

3. Petitioner does not ask the Court to hold the petition pending its decision in *Chaidez*, *supra* (No. 11-820). 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 Pet. Br. at 9, *Chaidez*, *supra* (No. 11-820). The government contends that *Padilla* announced a new rule because the decision was not dictated by precedent. See U.S. Br. at 7, *Chaidez*, *supra* (No. 11-820).

The Court's resolution in *Chaidez* of the question whether *Padilla* announced a new rule would not have any impact on the court of appeals' decision not to construe petitioner's *coram nobis* petition as a Section 2255 motion because such a motion would be untimely. If the Court holds that *Padilla* announced a new rule, that resolution will vindicate the Tenth Circuit's holding in *Chang Hong*, 671 F.3d at 1155, on which the court below relied. See Pet. App. 6. Having so held, it is unlikely that the *Chaidez* Court will go on to address the question, which petitioner does not raise here, whether the *Padilla* rule is nonetheless retroactively applicable under the *Teague* exception for watershed rules. The petitioner in *Chaidez* has conceded that if *Padilla* announced a new rule, the *Teague* exceptions would not apply. See Pet. Br. at 5-6, *Chaidez*, *supra* (No. 11-820); U.S. Br. at 46, 48, *Chaidez*, *supra* (No. 11-820); see also *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 Tenth Circuit’s holding that *Padilla* announced a new rule. But petitioner would not benefit from a remand to the Tenth Circuit on that ground, because that court has already held that, if *Padilla* did not announce a new rule, Section 2255(f)(3)’s limitations period does not apply. See *Chang Hong*, 671 F.3d at 1150 (explaining that Section 2255(f)(3) requires a “newly recognized” right) (quoting 28 U.S.C. 2255(f)(3) (Supp. IV 2010)); see Pet. App. 5-6. In that case, 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.

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, at least to claims of ineffective assistance of counsel. See Pet. Br. at 27-39, *Chaidez, supra* (No. 11-820). It is unclear whether the Court will consider those issues in *Chaidez* and whether the Tenth Circuit would allow petitioner to benefit from any favorable ruling on those issues in any event.¹ But

¹ These arguments are not properly before the Court in *Chaidez* because *Chaidez* failed to raise them in the court of appeals. See U.S. Br. at 36-37, *Chaidez, supra*, (No. 11-820). Even assuming that the Court considers these arguments in *Chaidez*, petitioner has not questioned *Teague*’s applicability to federal ineffective-assistance claims, and under settled Tenth Circuit law he may not

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*.²

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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be able to raise new issues for the first time on remand from this Court. See *United States v. Cooper*, 654 F.3d 1104, 1128 (2011) (“It is well-settled that arguments inadequately briefed in the opening brief are waived”) (quotation marks, brackets and citation omitted); *United States v. Holtz*, 285 Fed. Appx. 548, 550 n.2 (2008) (declining to consider procedural-reasonableness argument raised for the first time after this Court remanded for further consideration in light of *Gall v. United States*, 552 U.S. 38 (2007)).

² Even if the *Padilla* rule is held to be retroactively applicable and petitioner’s challenge is found to be timely, petitioner may still not be entitled to relief. If the court of appeals were to consider the merits of petitioner’s *Padilla* claim, it would need to address the district court’s holding that petitioner could not establish prejudice. The government argued below that the district court’s denial of relief should be affirmed on that basis, but the court of appeals did not consider the issue in light of its procedural rulings.