No. 10-1498

In The Supreme Court of the United States

EMMANUEL MORRIS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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August 3, 2011

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QUESTIONS PRESENTED

Is a federal question presented when a decision by a state's highest court determines that, as a matter of state law, the writ of *coram nobis* and *audita querela* are not available to modify a defendant's criminal sentence?

Are Virginia's post-conviction remedies constitutionally defective if they do not afford a post-conviction remedy to an individual who seeks to reopen his criminal case more than ten years after fully serving it?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Kenneth T. Cuccinelli, II on behalf of the Commonwealth of Virginia, submits this Brief in Opposition to the Petition for Certiorari.[1]

INTRODUCTION

In an effort to avoid deportation, the petitioner sought to reopen his criminal case, even though he had completed his sentence over ten years ago. Rather than seeking relief through the conventional means of a habeas petition, he sought to retroactively modify his sentence by filing a petition for a writ of *audita querela* or *coram vobis*. The Supreme Court of Virginia, after carefully analyzing Virginia law, held that the ancient writs of *audita querela* and of *coram vobis* were not available under state law to address claims of ineffective assistance of counsel. The court did not reach the question of whether this Court's decision in *Padilla v. Kentucky,* 130 S. Ct. 1473 (2010) applies retroactively. The holding below dealt solely with a question of state law. If this Court wishes to reach the question of *Padilla*'s retroactivity, it will have ample opportunities to do so through cases that properly present the issue.

[1] On July 6, 2011, this Court extended the time for such filing to and including August 15, 2011.

The petitioner's second question presented also is not appropriate for certiorari review. He never argued below that any holding that the trial court lacked authority to modify his sentence could render Virginia's post-conviction remedies inadequate. The petitioner also *assumes* that Virginia law would deny him post-conviction relief through the writ of habeas corpus, but the Supreme Court of Virginia has never addressed whether Virginia's habeas corpus statute allows for equitable tolling, nor has it addressed the custody requirement for individuals like the petitioner, *i.e.*, persons who have fully served their sentences but now face deportation. If a state's post-conviction scheme is to be tested against Fourteenth Amendment requirements, such review should be done based on the known boundaries of state law, not suppositions about state law. Moreover, the petitioner does not argue that a split exists among the lower courts with respect to what the Fourteenth Amendment requires of States in matters of post-conviction relief. Should this Court be inclined to address Fourteenth Amendment requirements for state post-conviction procedures, it should do so in a case where the litigant afforded the state courts an opportunity to address the issue, where the requirements of state law are known, and where the issue has been more fully developed in the lower courts.

STATEMENT OF THE CASE

1. Emmanuel Morris was charged with grand larceny, a felony. Pet. App. 23a. The charges stemmed from a scheme to steal from his employer, Sears. Pet. App. 23a. On July 15, 1997, pursuant to a plea agreement, he pled guilty in the Circuit Court for the City of Alexandria to a misdemeanor charge of petit larceny, in violation of Virginia Code § 18.2-96. Pet. App. 2a. The public defender who represented Morris did not inform him of the immigration consequences of his plea. Pet. App. 24a. On July 22, 1997, he was sentenced to serve twelve months in jail, with 11 months suspended for the period of one year. Pet. App. 2a. The sentencing order also reflects that he was further placed on probation for a period of one year, and that he was allowed to serve his sentence under a modified work release program. Morris was ordered to make restitution of the stolen $15,000. Pet. App. 23a.

Morris served his sentence, made the required restitution, and evidently has had no further brushes with the law. Pet. App. 23a. Morris, who had a "green card," became subject to removal proceedings because his crime constitutes an "aggravated felony." *See* 8 U.S.C. §§ 1101(a)(43)(G) and 1227(a)(2)(A)(iii).

2. In 2009, more than 10 years after fully serving his sentence, and never having exercised the conventional habeas corpus remedies, Morris filed a petition for a writ of error *coram vobis*, or in the alternative a writ of *audita querela*, asking the court

to modify his sentence. Pet. App. 3a. The trial court granted the writ, and reduced Morris's sentence by one day, to 364 days. Such a modification meant he was not convicted of an "aggravated felony" for purposes of the Immigration and Nationality Act. Pet. App. 3a.

3. The Commonwealth appealed this ruling, and the Supreme Court of Virginia granted the petition for appeal. The Court consolidated the case with another case raising the same issue. Pet. App. 3a.

4. The Supreme Court of Virginia reversed. The court began by analyzing the scope of *coram vobis* under Virginia law.[2] The court noted that Virginia law attaches "a high degree of finality to judgments." Pet. App. 7a. There are exceptions, however, to finality. *Id.* One of those is the writ of *coram vobis*. This writ is statutorily codified, and it allows a trial court to correct a "clerical error or error in fact." Pet. App. 10a. *See* Virginia Code § 8.01-677. The principal function of *coram vobis*, the court explained, is

> [t]o afford to the court in which an action was tried an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered, and which could not have been presented by

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[2] *Coram nobis* and *coram vobis* "are considered to be the same proceeding in modern [Virginia] pleading and practice." Pet. App. 2a n.1 (quoting *Neighbors v. Commonwealth*, 650 S.E.2d 514, 517 n.5 (Va. 2007)). Therefore, this brief in opposition will refer to them interchangeably.

> a motion for a new trial, appeal or other existing statutory proceeding. It lies for an error of fact not apparent on the record, not attributable to the applicant's negligence, *and which if known by the court would have prevented rendition of the judgment.* It does not lie for newly-discovered evidence or newly-arising facts, or facts adjudicated on the trial. It is not available where advantage could have been taken of the alleged error at the trial, as where the facts complained of were known before or at the trial, or where at the trial the accused or his attorney knew of the existence of such facts but failed to present them.

Pet. App. 8a-9a (emphasis in original) (quoting *Dobie v. Commonwealth*, 96 S.E.2d 747, 752 (Va. 1957)). The error of fact "must prevent rendition of the judgment," such as "where judgment is rendered against a party after his death, or who is an infant." Pet. App. 10a.

The error of fact alleged by Morris, the court noted, was that counsel misinformed Morris about the immigration consequences of his guilty plea. Pet. App. 12a (emphasis in original). This is not the type of error for which the writ of *coram vobis* will lie, the court concluded, because it would not have prevented rendition of the judgment. Pet. App. 12a. "While ineffective assistance of counsel *may* render a judgment voidable upon the necessary showing, it does not render the trial court incapable of rendering judgment." Pet. App. 12a (emphasis in original).

The court acknowledged that Morris may have suffered ineffective assistance of counsel according to the holding in *Padilla*, but "[i]neffective assistance of counsel does not constitute an error of fact for the purposes of *coram vobis* under Virginia Code § 8.01-677." Pet. App. 13a.

The Supreme Court of Virginia then turned to the availability of the writ of *audita querela* to address ineffective assistance of counsel claims under Virginia law. The court noted that *audita querela* "originated in England in the early 14th Century to provide relief to civil judgment debtors." Pet. App. 13a (quoting Ira P. Robbins, *The Revitalization of the Common-Law Civil Writ of Audita Querela as a Post-Conviction Remedy in Criminal Cases: The Immigration Context and Beyond*, 6 Geo. Immigr. L.J. 643, 646 (1992)). By statute, the common law of England, unless modified by the General Assembly or unless repugnant to the Constitutions of Virginia and the United States, remains in force in Virginia. Pet. App. 14a-15a. *See* Virginia Code § 1-200.

After examining its own precedents, the court concluded that "what is certain is that the writ of *audita querela* has never been applicable to modify a criminal sentence in Virginia. The only cases in which this Court has considered *audita querela* have involved civil judgments." Pet. App. 16a. The use of the writ in Virginia was "the same as it was in England. The writ was only available at common law in England for use by civil judgment debtors." Pet. App. 16a (quoting *Turner v. Davies*, 85 Eng. Rep. 871,

878-79 (1670)). The court held that "based upon the purpose and history of *audita querela* at common law in both England and Virginia, we hold that the writ of *audita querela* is not available to seek post-conviction relief from criminal sentences in Virginia." Pet. App. 17a.

REASONS FOR DENYING THE PETITION

First, the court below plainly did not answer any federal question. It simply decided that, as a matter of *state law*, ineffective assistance of counsel claims could not be reached through the ancient common law writs of *audita querela* and *coram vobis*. This Court does not sit to resolve questions of state law. Even if this Court were inclined to resolve growing division among the nation's *trial* courts about the retroactivity of *Padilla v. Kentucky*, this case does not present the issue. Moreover, there will be no shortage of suitable vehicles to address that question.

Furthermore, as the petitioner acknowledges, there is no split among state supreme courts and the United States Courts of Appeals. Given the complexity of the issue, the Court should allow the issue to percolate in the lower courts.

The petitioner alternatively asks this Court to find "inadequate" Virginia's post-conviction remedy scheme. The petitioner never made this argument in state court. The Supreme Court of Virginia never addressed the issue because the petitioner never

raised it. The petitioner should not be allowed to raise it for the first time in this Court. Moreover, the petitioner's assumption that a habeas petition would be foreclosed in state court rests on assumptions rather than settled Virginia law. The Supreme Court of Virginia has never decided whether an individual like the petitioner is in "custody" for purposes of habeas corpus, nor has it decided whether the state statute of limitations can be equitably tolled. For these reasons, assuming this Court were inclined to evaluate state post-conviction schemes in light of Fourteenth Amendment requirements, this case would be a poor vehicle for that purpose.

I. THE COURT CANNOT REACH THE FIRST QUESTION PRESENTED BECAUSE THE DECISION BELOW SIMPLY HELD THAT, AS A MATTER OF STATE LAW, THE PETITIONER COULD NOT RELY ON *AUDITA QUERELA* OR *CORAM VOBIS* TO REDUCE HIS SENTENCE.

It is patent that the Supreme Court of Virginia's decision rests exclusively upon state law. The court simply held as a matter of state law that the writs of *coram nobis* and *audita querela* did not authorize a court to reopen a concluded criminal case. Because the decision below is one of state law, it rests upon an adequate and independent—indeed, an exclusive—state ground. It is not clear how this Court could overrule the Supreme Court of Virginia on a point of Virginia law. The views of the State's highest court

with respect to state law are binding on the federal courts, except in extreme circumstances not present here. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

It cannot seriously be maintained that the state court was distorting state law in novel ways so as to evade this Court's authority to review federal questions. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), cited by the petitioner, is readily distinguishable. Pet. 20. In *Brinkerhoff-Faris*, the plaintiff filed a legal action to correct a tax assessment. *Id.* at 674. In filing a lawsuit rather than seeking administrative relief, the plaintiff was doing exactly what Missouri law called for at the time. *Id.* at 677. On appeal, the Supreme Court of Missouri overruled itself and held that the petitioner's only remedy was to petition the Tax Commission for relief—even though by then it was too late to do so, and even though the court had only a few years before held it was "preposterous" and "unthinkable" that the Tax Commission had such a power. *Id.* at 676-77. It was against that backdrop that this Court stated that "a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

The backdrop of this case could not be more different. Until recently, *audita querela* mattered only to persons interested in Virginia legal history. For example, in *Windrum v. Parker*, 29 Va. (2 Leigh) 361, 367 (1830), Justice Carr, writing for Virginia's highest

court, noted that "[w]ith us, the *audita querela* is intirely [sic] superseded in practice, the proceeding by motion being considered as the cheaper and more convenient mode." *Audita querela* was *never* until recent years considered an option for reopening a long concluded criminal case. Similarly, *coram vobis*, a remedy limited by statute, has not in contemporary practice or historically served as a substitute for the writ of habeas corpus.

To be sure, in recent years, a few Virginia trial courts used the writs of *audita querela* or *coram nobis* to reduce a sentence, *see, e.g.*, *Commonwealth v. Mubarak*, 68 Va. Cir. 422 (Va. Cir. Ct. Fairfax County 2005) (granting writ of *audita querela*). Other courts refused to grant the writ. *See Commonwealth v. Sharma*, 58 Va. Cir. 460 (Va. Cir. Ct. Fairfax County 2002) (*audita querela* not available when criminal sentence has been fully served). Anecdotal evidence suggests most Virginia courts refused to substitute *audita querela* or *coram vobis* for the writ of habeas corpus. At any rate, the Supreme Court of Virginia conclusively answered the question as a matter of state law, and answered it in a manner consistent with longstanding Virginia practice.[3]

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[3] The petitioner cites a Virginia general district court case, *Commonwealth v. Cabrera*, No. GC04005749-00 (Loudoun Gen. Dist. Jan. 31, 2011), for the proposition that the decision of the Supreme Court of Virginia is contrary to "longstanding precedent and jurisprudence." Pet. 17. *Cabrera* is a traffic/small claims court case in which the judge purported to take the

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Furthermore, this is not a situation where Virginia law is "withhold[ing] or deny[ing] rights, privileges, or immunities secured by the Constitution or laws of the United States." Pet. 20 (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). Virginia law allows persons who are confined to challenge the fact or duration of their confinement through a petition for a writ of habeas corpus. For persons who are convicted of felonies and who have not pled guilty, Virginia law affords such persons the chance to file a writ of actual innocence—a remedy that goes well beyond available federal remedies and for which there is neither a statute of limitations nor a custody requirement. *See* Virginia Code § 19.2-327.2 *et seq.*

Should the Court wish to address the question of *Padilla*'s retroactivity even in the absence of any split among the United States Courts of Appeals or the state supreme courts, it should do so using a vehicle that properly presents the issue. From the wealth of cases that are percolating—the petitioner cites no fewer than 32 cases in federal court and 19 cases in state court—it should not be difficult to locate in short order a case that, unlike the case at bar,

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Supreme Court of Virginia to task. To greatly understate the matter, that statement does not represent the law of Virginia. The petitioner also is mistaken when he claims it is a circuit court case. Pet. 17. Moreover, the decision of the traffic/small claims court was *reversed* on appeal by the circuit court, a fact the petitioner neglects to mention. *See Commonwealth v. Cabrera*, Law No. 65919 (Loudoun Cir. Ct., April 19, 2011) (unpublished).

properly presents the discrete issue of *Padilla*'s retroactivity.

II. GRANTING CERTIORARI AT THIS TIME WOULD BE PREMATURE GIVEN THE ABSENCE OF A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS OR THE STATE SUPREME COURTS.

Although the petitioner cites a broad array of state and federal trial court decisions that examine whether *Padilla v. Kentucky* should be retroactively applied, he does not offer a single decision from a United States Court of Appeals, or from a State supreme court, squarely adjudicating whether *Padilla* applies retroactively. The petitioner notes that the "Fourth and Ninth Circuits have both *touched* on *Padilla*," but he concedes that they have not "substantively discuss[ed] whether it applies retroactively." Pet. 14 (emphasis added). He further notes that the Supreme Court of Washington "appears to have assumed that *Padilla* is retroactively available." Pet. 16 (citing *State v. Sandoval*, 249 P.3d 1015 (Wash. 2011)). Although a number of courts have addressed the question of *Padilla*'s retroactivity, most of the authorities cited by the petitioner give the issue cursory treatment, or assume the answer and dispose of the case on alternative grounds, such as the absence of prejudice.

Nor is the question of *Padilla*'s retroactivity a simple one. This Court has acknowledged that it is

"often difficult to determine when a case announces a new rule." *Teague v. Lane*, 489 U.S. 288, 301 (1989). To determine whether a holding from this Court should be given retroactive effect, courts have looked to whether a holding "breaks new ground" or was "*dictated* by precedent existing at the time the defendant's conviction became final," *id.* (emphasis in original). Courts also examine whether the error "was apparent to all reasonable jurists," *Beard v. Banks*, 542 U.S. 406, 413 (2004). *See also O'Dell v. Netherland*, 521 U.S. 151, 159-60 (1997).

If ordinary retroactivity analysis is difficult, it is even more so in this context. An assessment of whether an attorney's performance was constitutionally defective requires that counsel's performance be "viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The vast majority of court decisions—which counsel are expected to rely upon in advising their clients—did not require of them to advise their clients of the immigration consequences of criminal pleas. *See Padilla,* 130 S. Ct. at 1487 (Alito, J., concurring) (noting that "virtually all jurisdictions"—including "eleven federal circuits, more than thirty states, and the District of Columbia"—"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). That was the case in Virginia. *See Zigta v. Commonwealth*, 562 S.E.2d 347 (Va. Ct. App. 2002) (deportation a collateral consequence of conviction) (citing cases). To declare an attorney

ineffective after-the-fact when her actions conformed to binding precedent at the time would be to stand *Strickland* on its head.

An additional complication is *Padilla*'s reasoning that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." *Padilla*, 130 S. Ct. at 1482. It is not clear to what extent that status impacts retroactivity analysis.

There is no reason for this Court to grant review until the United States Courts of Appeals and state supreme courts have been afforded at least *some* opportunity to develop the law with respect to *Padilla*'s retroactivity.

III. THE COURT SHOULD DECLINE THE INVITATION TO REVIEW IN SWEEPING FASHION STATE COLLATERAL REVIEW.

The second question presented is of immense consequence to the States. The petitioner asks this Court to "provide guidance on the question of . . . 'whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees.'" Pet. 27. This question presented is problematic on a number of grounds.

A. The petitioner never raised an argument before the state courts that the remedies provided by state law are inadequate.

The petitioner argues in the alternative that the Court should grant certiorari to determine what "adequate corrective remedies" States should provide inmates. Pet. 27. The petitioner never raised an argument in the trial court or in the Supreme Court of Virginia that, should relief be denied to him, Virginia's collateral relief procedures would be inadequate under the Fourteenth Amendment. As a matter of state law, in the absence of an assignment of error or argument in the appellate brief, the issue was not before the Supreme Court of Virginia. *See Johnson v. Commonwealth*, 529 S.E.2d 769, 786 n.6 (Va. 2000) ("We do not consider this argument on appeal because [the appellant] failed to raise it in the trial court or in his brief filed with the court."). *See also Knewstep v. Jackson*, 523 S.E.2d 505, 508 (Va. 2000) (refusing to consider arguments based on legal memoranda filed in the trial court but not argued on appeal). This Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Consistent with these holdings, Virginia should not have to defend against such a claim for the first time in this Court.

B. Examining the adequacy of Virginia remedies under the Fourteenth Amendment would be premature because the Supreme Court of Virginia has never addressed the custody requirement in this context nor has it addressed whether Virginia's habeas statute of limitations allows equitable tolling.

The petitioner's argument that Virginia's collateral review procedures are inadequate is further problematic because it rests on assumptions. Morris assumes that a habeas petition would be barred because he is no longer in custody. Pet. 20. Although Virginia law requires custody as a prerequisite to habeas relief, Virginia Code § 8.01-654(A)(1), the Supreme Court of Virginia has never addressed whether an individual who, like the petitioner, faces deportation, is in custody for purposes of state habeas corpus law. The Supreme Court of Virginia has noted that "[a] court does not have jurisdiction to determine the validity of a sentence under which the prisoner is not being detained." *Smyth v. Midgett*, 101 S.E.2d 575, 578 (Va. 1958). The court, however, further held that a petitioner "may attack in a *habeas corpus* proceeding the validity of a sentence he has completely served when he is detained . . . as a repeater." *Id.* It is not clear whether the Supreme Court of Virginia would extend that holding to individuals who face deportation.

The petitioner also assumes that his claim of ineffective assistance would be barred by the state habeas statute of limitations. *See* Virginia Code § 8.01-654(A)(2) (requiring habeas petitions to be "filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later."). The Supreme Court of Virginia, however, has not addressed whether equitable tolling is available and, if it is, the standard for such tolling.[4] Finally, even if equitable tolling were available under Virginia law, this case would likely constitute an unattractive candidate: the petitioner waited more than 10 years after he was convicted to seek collateral relief.

Federalism considerations support allowing Virginia to develop its own post-conviction law before it is measured against an as of yet undeveloped Fourteenth Amendment standard. Moreover, should this Court wish to assess the constitutional adequacy

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[4] The position of the Commonwealth has been and is that the state habeas statute does not allow equitable tolling, and that an individual who has fully served his sentence is not in "custody" merely because he faces deportation. Those views, of course, are not binding on Virginia courts. One circuit court has ruled, over the objection of the Attorney General's Office, that the state habeas statute of limitations *does* allow equitable tolling in certain situations. *See Boyce v. Braxton*, CR70H34158 (Newport News Cir. Jan. 30, 2006) (tolling the habeas statute of limitations for newly discovered evidence).

of a state's post-conviction procedures, surely a better vehicle could be found for that purpose.

C. The petitioner does not point to any division among the courts on the question of the adequacy of remedies under the Fourteenth Amendment.

The petitioner does not claim that there is a division among the lower courts with respect to what the Fourteenth Amendment requires of the States with respect to collateral relief. This Court has held that whatever collateral review procedures a state provides must "compor[t] with fundamental fairness." *Dist. Atty's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987)). Lower courts generally have rejected the argument that collateral relief is inadequate simply because a habeas petition would not be *presently* available due to a bar such as lack of custody and/or a statute of limitations. For example, in *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079-80 (9th Cir. 2001), the petitioner contended that he must be allowed to avail himself of the writ of *audita querela* because a habeas petition would be barred by the prohibition on filing a successive petition. The court rejected this argument, reasoning that "[a] prisoner may not circumvent valid congressional limitations on collateral attacks by asserting that those very limitations create a gap in the post-conviction remedies that must be filled by the common law

writs." *Id.*[5] Before assessing the outer reach of the Fourteenth Amendment in this context, the issue should be allowed to develop in the lower courts.

It should also be noted that the petitioner had an available habeas remedy under state law. He was sentenced to serve one year in prison, with eleven months suspended, and he was subject to probation supervision for a full year. He certainly could have raised the ineffectiveness of his attorney during this time. This is not, therefore, an instance where the petitioner had no avenues at all to raise allegations of ineffective assistance of counsel.

There is nothing remarkable about foreclosing claims, even constitutional claims, after the passage of time. Plaintiffs in § 1983 cases, for example, find their constitutional claims barred if they do not file them in a timely fashion. *Wilson v. Garcia*, 471 U.S. 261, 275 (1985). Even inmates with meritorious habeas claims can forfeit those claims if they do not

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[5] *See also Persico v. United States*, 2011 U.S. App. LEXIS 7307 (2nd Cir. April 8, 2011) (unpublished) ("the fact that the limitations period under the [AEDPA] bars appellant from obtaining relief on his claims in a § 2255 motion is insufficient to render § 2255 an 'inadequate or ineffective' remedy."); *United States v. Frank*, 414 Fed. Appx. 252, 253 n.1 (11th Cir. 2011) (*per curiam*) (fact that § 2255 petition would be barred by the statute of limitations did not mean that he lacked cognizable relief.); *Cradle v. United States ex rel. Miner*, 290 F.3d 536, 539 (3rd Cir. 2002) ("Section 2255 is not inadequate or ineffective merely because . . . petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255.").

timely raise the claims or fail to show cause and prejudice for the default. The consequence for these individuals is continued incarceration, perhaps for a lengthy period of time. It would be remarkable if immigrants facing deportation, uniquely among constitutional litigants, were able to evade any meaningful time limitation on the actions they might bring.

Moreover, the purpose of collateral review has been to release a person from illegal confinement, not to right all wrongs that might flow from an improperly counseled conviction. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973) (noting that the "traditional purpose of habeas corpus" is to address "the fact or length of . . . confinement."). In other words, the right of effective assistance of counsel is designed to ensure an individual is not subject to unmerited confinement. Requiring collateral review of actions filed by persons not in custody would represent a significant expansion of due process requirements.

Such an expansion would present considerable difficulties for the States. Over time, memories fade, witnesses move or die, and evidence is lost or destroyed. For cases that are resolved by guilty plea, which constitute the vast majority of criminal dispositions, there generally is no trial record of consequence. Many defendants, including individuals convicted of very serious crimes, would simply walk away scot free if allowed to reopen their cases more than 10 years after a guilty plea.

Given the high stakes, the issue of the adequacy of state post-conviction procedures should be addressed by this Court only in a case where the litigant afforded the state courts the opportunity to address the issue, when the boundaries of state law are clear, and only after the issue has been fully vetted in the lower courts.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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August 3, 2011

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