No. 11-___

IN THE
Supreme Court of the United States

ROSELVA CHAIDEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. The question presented is whether *Padilla* applies to persons whose convictions became final before its announcement.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Roselva Chaidez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 655 F.3d 684. Two opinions of the United States District Court for the Northern District of Illinois are relevant here. The first (Pet. App. 31a) is published at 730 F. Supp. 2d 896. The second (Pet. App. 39a) is unpublished, but available on Westlaw at 2010 WL 3979664.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. Pet. App. 1a. A timely petition for rehearing was denied on November 30, 2011. Pet. App. 56a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that a criminal defendant receives ineffective assistance of counsel in violation of the Sixth Amendment when her lawyer fails to advise her that a guilty plea may trigger virtually automatic deportation. This case presents the question – over which the circuits are openly divided – whether *Padilla* applies retroactively to persons whose convictions were final before its announcement.

1. This Court has long recognized that the right to counsel is "the right to the effective assistance of counsel," *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), and that this right applies at trial as well as during plea negotiations, *see Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court articulated a two-prong test for assessing when "counsel's assistance was so defective as to require reversal of a conviction." *Id.* at 687. First, "the defendant must show that counsel's performance was deficient." *Id.* Second, the defendant must show that he suffered prejudice, *id.*, which, in the context of having entered a guilty plea, means that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial," *Lockhart*, 474 U.S. at 59.

With respect to the deficient performance prong, this Court has explained that the Sixth Amendment does not "specify[] particular requirements of effective assistance," but "relies instead on the legal profession's maintenance of standards." *Strickland*, 466 U.S. at 688. Thus, "[t]he proper measure of

attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

In the wake of dramatic changes to immigration law in the 1990s that, among other things, made deportation virtually automatic for anyone convicted of crimes classified as "aggravated felonies," *see, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii), and which substantially expanded the list of such offenses, legal authorities of every persuasion recognized that criminal defense lawyers must advise clients of the immigration consequences of guilty pleas. *See, e.g.*, *ABA Standards for Criminal Justice, Pleas of Guilty* 116 (3d ed. 1999); Nat'l Legal Aid and Defender Ass'n, *Performance Guidelines for Criminal Representation* § 6.2 (1995); 2 U.S. Dep't of Justice, Office of Justice Programs, *Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance* D10, H8-H9, J8 (2000). Furthermore, because criminal conduct often provides the basis for multiple charges, only some of which are aggravated felonies or otherwise constitute removable offenses, professional norms required lawyers to pursue several options when representing clients charged with offenses that trigger deportation. Lawyers could (and regularly did) negotiate guilty pleas to alternate, nondeportable offenses; to lesser degrees of the same offenses; or to charged offenses without noting in records relating to the conviction extra factual allegations beyond the offense's elements that, if true, could trigger deportation. *See, e.g.*, 3 Bender's *Criminal Defense Techniques* § 60A.07 (1992); Norton Tooby, *California Post-Conviction Relief for Immigrants* § 8.48 (2009 ed.).

In *Padilla*, an individual who had pleaded guilty to a state offense sought post-conviction relief on the ground that his counsel's failure to advise him that his guilty plea would subject him to virtually automatic deportation constituted "deficient performance" under *Strickland*. This Court held that it did, pointing to the "prevailing professional norms" and "the practice and expectations of the legal community" at the time of the plea. *Padilla*, 130 S. Ct. at 1482 (citing *Strickland*, 466 U.S. at 688).

2. Petitioner Roselva Chaidez was born in Mexico but has lived in the United States since the 1970s. She has been a lawful permanent resident since 1977 and resides in Chicago with her three U.S.-citizen children and two U.S.-citizen grandchildren. Pet. App. 31a.

Several years ago, Chaidez became involved in an insurance scheme. As the Government explained, she was "not aware of the specifics of the scheme," but others persuaded her to falsely claim to have been a passenger in a car involved in a collision. Plea Hr'g Tr. 16:5, Dec. 3, 2003. Chaidez received $1,200 for her minor role. According to the Government, however, the insurance company paid a total of $26,000 to settle the claims that Chaidez and others made.

In 2003, the Government charged Chaidez with two counts of mail fraud for two separate mailings related to collecting her settlement. Since 1996, a federal statute has expressly classified "an[y] offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" as an "aggravated felony." 8 U.S.C. § 1101(a)(43)(M)(i); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 321,

110 Stat. 3009-546, 3009-627 (amending definition of "aggravated felony" by lowering loss threshold for acts of "fraud or deceit" from $200,000 to $10,000).

By the time the Government indicted Chaidez, it had long been standard practice for attorneys to advise their clients of the immigration consequences of potential criminal convictions. Nonetheless, Chaidez's counsel gave her no such advice. Pet. App. 36a. Nor did her counsel attempt to negotiate a plea agreement in which the stipulated loss for which she was responsible was below the $10,000 threshold for aggravated felonies. Nor did her attorney consider whether Chaidez might have been able to plead guilty to a different offense that would not have triggered mandatory removal. Instead, the attorney simply recommended accepting the Government's offer of a probationary sentence in exchange for her pleading guilty to the two counts and leaving it to the district court to determine the amount of loss and appropriate restitution.

It is undisputed that "had Chaidez known of the immigration consequences" of pleading guilty to fraud involving more than $10,000, she would not have pleaded guilty under these circumstances. *Id.* 36a. Yet because her lawyer provided no such information, Chaidez followed her attorney's recommendation and accepted the plea. After a hearing, the district court sentenced her to four years' probation and ordered restitution in the amount of $22,500. Her conviction became final in 2004. *Id.* 2a.

3. Having paid restitution and almost completed her probation, Chaidez applied in 2007 to obtain United States citizenship. *Id.* 32a. After questioning her about her fraud conviction, immigration

authorities initiated deportation proceedings against her. *Id.* 32a.

Shortly thereafter, Chaidez filed a petition in the U.S. District Court for the Northern District of Illinois for a writ of *coram nobis* under 28 U.S.C. § 1651(a), which "provides a method of collaterally attacking a criminal conviction when a defendant is not in custody." Pet. App. 3a. Seeking to vacate her fraud conviction, Chaidez contended that her defense counsel rendered ineffective assistance by failing to advise her that her guilty plea would subject her to deportation.

While that petition was pending, this Court decided *Padilla*, making it clear that the Sixth Amendment basis for her argument is meritorious.

In order to determine whether *Padilla* applies to Chaidez's case, the district court turned to the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989).[1] Under *Teague*, a decision that merely applied an established rule to the facts of a particular case applies retroactively to already final

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[1] *Teague* itself involved collateral review of a state conviction. This Court has never held that *Teague*'s retroactivity framework extends to collateral review of federal convictions. *See Teague*, 489 U.S. at 327 n.1 (Brennan, J., dissenting) ("The plurality does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners."); *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008) (reserving the question "whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255"). But Seventh Circuit precedent holds that *Teague* applies to post-conviction challenges to federal as well as state convictions. *See Van Daalwyk v. United States*, 21 F.3d 179, 183 (7th Cir. 1994).

convictions. By contrast, save exceptions not relevant here, a rule of criminal procedure that "breaks new ground or imposes a new obligation on the States or the Federal Government" will not be given retroactive effect on collateral review. *Id.* at 301.

The district court concluded that the holding in *Padilla* was merely an application of *Strickland* to a new set of facts. Pet. App. 44a. It further supported this conclusion with the fact that Padilla himself had "brought a collateral challenge to his conviction." *Id.* 48a. If "Chaidez's claim [were] barred by *Teague*," the court reasoned, "Padilla's claim should have been barred as well." *Id.* 48a-49a.

Following an evidentiary hearing on the facts, the district court confirmed that both prongs of the *Strickland* test were satisfied here. Chaidez's attorney was ineffective because she failed to advise her of the immigration consequences of her plea. And that failure was prejudicial because Chaidez would not have accepted the Government's offer had she been properly advised of the immigration consequences. *Id.* 36a. The court thus granted a writ of *coram nobis,* vacating Chaidez's conviction.

4. The Government appealed, challenging only the district court's holding that *Padilla* applies retroactively here. *Id.* 6a. While acknowledging that the Third Circuit and the Massachusetts Supreme Judicial Court had recently held – like the district court – that *Padilla* is retroactive, *id.* 6a, 11a (citing *United States v. Orocio*, 645 F.3d 630, 640-42 (3d Cir. 2011), and *Commonwealth v. Clarke*, 949 N.E.2d 892, 898 (Mass. 2011)), a divided panel of the Seventh Circuit disagreed with these holdings and reversed.

The majority did not dispute that, long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements. Nor did the majority dispute that "the application of *Strickland* to unique facts generally will not produce a new rule." Pet. App. 15a; *see also Williams v. Taylor*, 529 U.S. 362, 391 (2000) (same observation). But the majority "believe[d] *Padilla* to be the rare exception," Pet. App. 15a-16a, owing to the judicial disagreement prior to *Padilla* and in *Padilla* itself over whether the Sixth Amendment should apply to advice regarding "collateral" consequences of guilty pleas. In particular, the concurrence and dissent in *Padilla* characterized certain aspects of the majority opinion as a substantial extension of existing precedent, and some lower courts had previously held that the Sixth Amendment did not cover failures to give advice concerning the "collateral" consequences of guilty pleas. *Id.* 8a-9a. Accordingly, the majority concluded that although the question was a "challenging" one, "the scales [tip] in favor of finding that *Padilla* is a new rule." *Id.* 18a.

Judge Williams dissented. She emphasized that the test for whether a holding is a new rule remains whether the holding broke new ground; and that test is an objective one. That being so, she reasoned, the existence of conflicting authority prior to *Padilla* "cannot change" the decisive fact that "*the Supreme Court itself* 'never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*.'" *Id.* 26a (emphasis added) (quoting *Padilla*, 130 S. Ct. at 1481). To the contrary, Judge Williams emphasized, this Court

recognized years before *Padilla* that, at least in the context of advice regarding deportation, "[p]reserving the client's right to remain in the United States may be *more important* to the client than any potential jail sentence." Pet. App. 23a (emphasis added) (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)) (quotation marks omitted).

5. Citing Seventh Circuit Rule 40(e) – which provides that a panel opinion that would "create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear [the case] en banc" – the Seventh Circuit panel distributed the majority and dissenting opinions to the entire bench before publishing it. Over four dissenting votes, the court of appeals declined at that time to hear the case en banc. Pet. App. 1a n.1.

After the panel issued its decision, Chaidez requested rehearing en banc, urging the court of appeals to reconsider the issue. The Government opposed rehearing, contending, among other things, that no matter what the Seventh Circuit decided here, a circuit split would persist. The court of appeals refused to rehear the case. *Id.* 56a.

REASONS FOR GRANTING THE WRIT

Federal and state courts are openly and intractably divided over whether this Court's holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), applies retroactively to convictions that became final before its announcement. This Court should use this case to resolve that conflict. As the Government itself has explained, the question of *Padilla*'s retroactivity is one of "exceptional importance." Gvt's

Pet. for Reh'g En Banc 4, *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011). It also is outcome-determinative here, for it is undisputed that if *Padilla* applies to Chaidez's case, she is entitled to relief. Finally, the Seventh Circuit's holding that *Padilla* is not retroactive is incorrect.

I. Courts Are Intractably Divided Over Whether *Padilla* Applies Retroactively On Collateral Review.

The retroactivity framework of *Teague v. Lane*, 489 U.S. 288 (1989), establishes a dichotomy. When one of this Court's criminal procedure decisions "dictate[s]" the result in a subsequent case, the holding in that subsequent case applies retroactively on collateral review. *Id.* at 301. By contrast, when this Court issues a ruling that "breaks new ground or imposes a new obligation on the States or the Federal Government," that "new rule" does not (save exceptions not relevant here) apply to challenges to convictions that became final before the holding's announcement. *Id.* And while the government in a habeas case can waive *Teague*'s bar against retroactively applying "new rules," courts may also invoke it *sua sponte*. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Indeed, this Court stated in *Teague* itself that it should "refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." 489 U.S. at 316; *see also Penry v. Lynaugh*, 492 U.S. 302, 350-51 (1989) (Scalia, J., concurring in part and dissenting in part) ("*Teague* . . . precludes collateral relief that would establish a new rule.").

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), a state prisoner sought state post-conviction relief on the ground that his attorney had failed to advise him that pleading guilty to a certain criminal charge would subject him to virtually automatic deportation. In order to resolve that claim, this Court turned to its prior decision in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland*, the Court explained, had long ago established that a criminal defendant receives ineffective assistance of counsel when his attorney's performance falls below a reasonable level of competence, as measured by "prevailing professional norms." *Id.* at 688. Applying that established standard to the facts before it, this Court held that the failure of Padilla's counsel to advise him of the deportation consequences of his plea constituted ineffective assistance of counsel because prevailing norms required such advice. Although Kentucky follows *Teague*'s prohibition against granting such relief when doing so would establish a new rule, *see Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009), this Court did not suggest that ruling in Padilla's favor raised any retroactivity issue.

In the wake of *Padilla*, federal and state courts have struggled to determine whether – in the words of *Teague* – *Padilla* was "merely an application of the principle that governed" *Strickland*, or whether it is somehow a "new rule" that applies retroactively only to Padilla himself. 489 U.S. at 307 (quotation marks and citation omitted). Courts are now squarely and openly divided over the issue.

1. The Seventh and Tenth Circuits have held that *Padilla* does not apply retroactively on collateral review because it is a new rule under *Teague*. In its

divided decision here, the Seventh Circuit held that the "scales [tipped] in favor of finding that *Padilla* announced a new rule" because it marked the first time that this Court had applied *Strickland* in the specific context of "advice about matters not directly related to the[] client's criminal prosecution." Pet. App. 16a. In so holding, the Seventh Circuit refused to ascribe any "significance to *Padilla*'s procedural posture," asserting it was "more likely that th[is] Court considered *Teague* to be waived, than that it silently engaged in a retroactivity analysis." *Id.* 17a-18a.

While likewise calling the issue a "close[] question," the Tenth Circuit has also held that "*Padilla* is a new rule of constitutional law" within the meaning of *Teague.* *United States v. Chang Hong*, ___ F.3d ___, 2011 WL 3805763, at *3 (10th Cir. 2011).[2]

In addition, twelve federal district courts in circuits yet to weigh in on the issue,[3] as well as three

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[2] *Hong* considered the question presented in a different procedural context than this case. There, the habeas petitioner, unlike the petitioner here, argued that *Padilla* is a new rule, attempting to trigger an exception to the habeas statute's limitations period. But the same *Teague* analysis applies in both situations.

[3] *See United States v. Perez*, 2010 WL 4643033 (D. Neb. Nov. 9, 2010); *United States v. Bacchus*, 2010 WL 5571730 (D.R.I. Dec. 8, 2010); *Mendoza v. United States*, 774 F. Supp. 2d 791, 798 (E.D. Va. Mar. 24, 2011); *Dennis v. United States*, 787 F. Supp. 2d 425 (D.S.C. 2011); *Mathur v. United States*, 2011 WL 2036701 (E.D.N.C. May 24, 2011); *Ellis v. United States*, 2011 WL 3664658 (E.D.N.Y. June 6, 2011); *Llanes v. United States*, 2011 WL 2473233 (M.D. Fla. June 22, 2011); *United*

state intermediate appellate courts,[4] have held that *Padilla* is a new rule that does not apply on collateral review.

2. In reaching their decisions, both the Seventh and Tenth Circuits acknowledged that they were reaching "the opposite conclusion" from decisions from the Third Circuit and the Massachusetts Supreme Judicial Court. *Chang Hong*, ___ F.3d ___, 2011 WL 3805763, at *7; *accord* Pet. App. 14a.

In particular, the Third Circuit has held that "because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule' for *Teague* purposes and is retroactively applicable on collateral review." *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011).

In a unanimous decision, the Massachusetts Supreme Judicial Court similarly held that *Padilla* is not a new rule under *Teague*, but rather is "the definitive application of" *Strickland* "to new facts." *Commonwealth v. Clarke*, 949 N.E.2d 892, 903 (Mass. 2011).[5] The court accordingly concluded that

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States v. Chapa, 2011 WL 2730910 (N.D. Ga. July 12, 2011); *Zoa v. United States*, 2011 WL 3417116 (D. Md. Aug. 1, 2011); *Emojevwe v. United States*, 2011 WL 5118800 (M.D. Ala. Sept. 29, 2011); *Sarria v. United States*, 2011 WL 4949724 (S.D. Fla. Oct. 18, 2011); *Ufele v. United States*, 2011 WL 5830608 (D.D.C. Nov. 18, 2011).

[4] *See State v. Poblete*, 260 P.3d 1102 (Ariz. Ct. App. 2011); *State v. Barrios*, 2010 WL 5071177 (N.J. Super. Ct. App. Div. Dec. 14, 2010); *Gomez v. State*, 2011 WL 1797305 (Tenn. Crim. App. May 12, 2011).

[5] Although state courts are not bound to follow *Teague*, *see Danforth v. Minnesota*, 552 U.S. 264 (2008), Massachusetts, like

Padilla applies retroactively to "convictions obtained after the effective date of IIRIRA . . . the point at which deportation became 'intimately related to the criminal process' and 'nearly an automatic result for a broad class of noncitizen offenders.'" *Id.* at 904 (quoting *Padilla,* 130 S. Ct. at 1481).[6]

Ten district courts in circuits yet to weigh in on the issue also have held that *Padilla* is an old rule that applies retroactively.[7] Five state appellate

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Kentucky, has adopted the *Teague* framework. *See Commonwealth v. Bray*, 553 N.E.2d 538, 540-41 (Mass. 1990); *see also Clarke*, 949 N.E.2d at 897 n.7. The Massachusetts Supreme Judicial Court's conclusion that *Padilla* applies retroactively on collateral review rested on its application of *Teague*. *Id.* As such, the decision represents a holding on the federal question at issue here. *See St. Louis, Iron Mtn. & S. Ry. v. Taylor*, 210 U.S. 281, 293 (1908) (explaining that a decision rests on federal law when a state court chooses to apply a federal standard and bases its decision upon an interpretation of that standard).

[6] The Maryland Court of Appeals (the highest court in the state) also has held that *Padilla* applies retroactively to all convictions obtained after the effective date of IIRIRA. *See Denisyuk v. State*, ___ A.2d ___, 2011 WL 5042332, at *8 (Md. Oct. 25, 2011). Unlike Massachusetts and Kentucky, however, Maryland does not follow the *Teague* doctrine. *See id.* at *8 n.8. But the Maryland Court of Appeals noted that it agreed with its "sister courts in the Third Circuit, Massachusetts, Illinois, Minnesota, and Texas that . . . *Padilla* is an application of *Strickland* to a specific set of facts," *id.* at *9, and decided that *Padilla* therefore does not "declare a new principle of law," *id.* (quotation marks and citation omitted).

[7] *See United States v. Hubenig*, 2010 WL 2650625 (E.D. Cal. July 1, 2010); *Al Kokabani v. United States*, 2010 WL 3941836 (E.D.N.C. July 30, 2010); *Luna v. United States*, 2010 WL 4868062 (S.D. Cal. Nov. 23, 2010); *United States v. Joong Ral Chong*, 2011 WL 6046905 (S.D. Ga. Jan. 12, 2011); *United*

courts likewise have held that *Padilla* is not a new rule.[8] Most of these other courts have reached this conclusion by applying straightforward *Teague* analyses to the reasoning in *Padilla*. But at least one, following a GVR from this Court for further consideration in light of *Padilla*, felt bound by the fact that "*Padilla* itself was on collateral review" to hold that it therefore *must* apply retroactively. *Santos-Sanchez v. United States*, 2011 WL 3793691, at *10 (S.D. Tex. Aug. 24, 2011), *on remand from* 130 S. Ct. 2340 (2010) (No. 08-9888).

3. The division among federal and state courts is not only widely acknowledged; it is now entrenched. At least sixty-four judges in the federal and state judiciaries have ruled on whether *Padilla* is a new rule. Thirty-six have concluded that *Padilla* is merely an application of *Strickland*, and twenty-eight have held that it announced a new rule. Both sides of this debate have thoroughly ventilated their views, yet the conflict only continues to deepen. Furthermore, courts of appeals on both sides of the conflict have denied petitions for rehearing en banc.

States v. Zhong Lin, 2011 WL 197206 (W.D. Ky. Jan. 20, 2011); *Zapata-Banda v. United States*, 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011); *Amer v. United States*, 2011 WL 2160553 (N.D. Miss. May 31, 2011); *Song v. United States*, 2011 WL 2533184 (C.D. Cal. June 27, 2011); *United States v. Dass*, 2011 WL 2746181 (D. Minn. July 14, 2011); *United States v. Reid*, 2011 WL 3417235 (S.D. Ohio Aug. 4, 2011).

[8] *See People v. Gutierrez*, 954 N.E.2d 365 (Ill. App. Ct. 2011); *Campos v. State*, 798 N.W.2d 565 (Minn. Ct. App. 2011); *People v. Nunez*, 917 N.Y.S.2d 806 (App. Term. 2010); *Ex parte Tanklevskaya*, 2011 WL 2132722 (Tex. App. May 26, 2011); *Ex parte De Los Reyes*, 350 S.W.3d 723 (Tex. App. 2011).

See Pet. App. 56a; *Orocio*, No. 10-1231 (3d Cir. Oct. 11, 2011); *Chang Hong*, No. 10-6294 (10th Cir. Oct. 11, 2011). It is time for this Court to step in.

II. The Retroactive Effect Of *Padilla* Is An Exceptionally Important Issue That This Court Should Resolve Now.

As the Government has emphasized, the question whether *Padilla* has retroactive effect on collateral review is "a question of exceptional importance." Gvt's Pet. for Reh'g En Banc 3-4, *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011). This is so for at least two reasons.

1. As the citations in the previous section demonstrate, the question whether *Padilla* is retroactive is a frequently recurring issue. Indeed, given the recurring nature of retroactivity questions in general, and the fact that they often go to the core of the legitimacy of criminal convictions, this Court has regularly recognized an obligation to decide whether new criminal procedure decisions apply retroactively under the *Teague* doctrine. *See, e.g.*, *Whorton v. Bockting*, 549 U.S. 406 (2007) (considering whether *Crawford v. Washington*, 541 U.S. 36 (2004), was retroactive); *Beard v. Banks*, 542 U.S. 406 (2004) (considering whether *Mills v. Maryland*, 486 U.S. 367 (1988), was retroactive); *Schriro v. Summerlin*, 542 U.S. 348 (2004) (considering whether *Ring v. Arizona*, 536 U.S. 584 (2002), was retroactive). The same should be true here.

Judges in the federal and state judiciaries have spent – and continue to spend – considerable time and resources on the question of *Padilla*'s retroactivity. Meanwhile, petitioners face lingering

uncertainty about their immigration status while appeals are pending in courts across the country. Waiting for a later case to resolve the issue would needlessly increase the expenditure of judicial resources on a question the lower courts have already thoroughly considered. It also would risk harming people in the Seventh Circuit and elsewhere who – in the event this Court confirms that *Padilla* is retroactive – may lose the ability to marshal evidence necessary to prove their cases, as witnesses who could support their claims of ineffective assistance become impossible to locate. Worse yet, such people may be unjustly deported.

2. Whether *Padilla* is retroactive is a question of profound practical significance. Deportation is a "particularly severe penalty." *Padilla*, 130 S. Ct. at 1481 (quotation marks omitted). If Chaidez, for example, were deported, she would not only be uprooted from the country she has called home for over thirty years, but also be separated from her three children and two grandchildren. *See* Pet. App. 31a. On the other hand, if individuals who pleaded guilty before *Padilla* to aggravated felonies due to ineffective assistance of counsel are entitled to have their convictions vacated, they might obtain acquittals or convictions on non-deportable offenses. Alternatively, people facing deportation if convicted of certain charges might also be able to negotiate with the Government to plead to comparable offenses that would not trigger removal (or that would at least enable them to apply for relief from removal). *See INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

The ability to pursue such courses of action to avoid removal should not turn on the mere

happenstance of geography. Indeed, given the intransigence of the circuit conflict and the stakes involved for individuals such as Chaidez, it would be unfair to deny certiorari now, only to grant certiorari on this unavoidable question later.

III. This Case Is An Optimal Vehicle For The Court To Resolve This Issue.

This case is an optimal vehicle for clarifying whether this Court's holding in *Padilla* applies retroactively to persons whose convictions became final before its announcement. The district court wrote a thorough and "thoughtful opinion," Pet. App. 3a, and a divided court of appeals considered and decided only this single question, *id.* 6a.

Furthermore, the question whether *Padilla* applies retroactively is outcome-determinative here. After an evidentiary hearing, the district court found that Chaidez's counsel rendered deficient performance under *Padilla* and that Chaidez's defense was prejudiced as a result. Specifically, the district court observed that although "the standard practice in 2003 was for attorneys to inform their clients of immigration consequences of guilty pleas," Pet. App. 35a, "the unrebutted, credible evidence [was] that [petitioner's counsel] failed to do so in this case," *id.* 36a. And the court found that "had Chaidez known of the immigration consequences, she would not have pled guilty." *Id.*; *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice exists under *Strickland* when "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial"). The Government's appeal to the Seventh Circuit did not challenge these findings.

Rather, it challenged only the district court's judgment that *Padilla* did not announce a new rule under *Teague*.

IV. The Seventh Circuit's Decision Is Incorrect.

1. A decision applies retroactively when it is "merely an application of the principle that governed" a prior Supreme Court decision. *Teague v. Lane*, 489 U.S. 288, 307 (1989). Moreover, as Justice Kennedy has explained, "[w]here the beginning point" for a new decision is a prior, more general holding "designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992) (opinion concurring in the judgment).

Strickland v. Washington, 466 U.S. 668 (1984), which was the beginning point for *Padilla*, is such a general holding designed for fact-specific application. *Strickland* holds that the Sixth Amendment right to counsel requires reasonable attorney performance. The *Strickland* Court declined to list a particular set of obligations for counsel to meet this standard of reasonableness. *Id.* at 688-89. Rather, this Court explained that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Accordingly, "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

While this Court has never directly confronted the question whether one of its *Strickland* decisions

should be given retroactive effect under *Teague*, this Court's jurisprudence under 28 U.S.C. § 2254(d) of the Antiterrorism and Effective Death Penalty Act strongly suggests that applying *Strickland* to a new set of facts does not create a new rule. Section 2254(d) bars granting habeas relief unless a state court "unreasonabl[y]" applied clearly established law. 28 U.S.C. § 2254(d)(1). While this rule is "distinct" from *Teague*'s bar against granting relief unless dictated by prior precedent, *Greene v. Fisher*, 132 S. Ct. 38, __ (2011), this Court has explained that applying *Strickland* to attorneys' failures to perform tasks other than those at issue in *Strickland* itself "can hardly be said" to "'break[] new ground or impose[] a new obligation on the States,'" *Williams*, 529 U.S at 391 (quoting *Teague*, 489 U.S. at 301). Consequently, this Court has granted habeas relief in several contexts beyond the facts of *Strickland*. *Compare Strickland*, 466 U.S. at 699 (failure to present character and psychological evidence at sentencing stage of capital case), *with Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to investigate nature of client's prior conviction), *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure to conduct sufficient investigation concerning client's background), *and Williams*, 529 U.S. 362 (same).

Furthermore, federal appellate courts that have directly addressed the question whether this Court's applications of *Strickland* in *Rompilla*, *Wiggins*, and *Williams* constitute "new rules" under *Teague* have

consistently concluded that they do not.[9] And every federal appellate court to squarely confront the question of retroactivity in the context of this Court's holding in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) – that counsel is ineffective for failing to inform defendants of their appeal rights – has held that the rule is not new for purposes of retroactivity because it flowed from *Strickland*.[10]

2. This Court's decision in *Padilla* was simply another fact-specific application of *Strickland*'s general legal principle that counsel must provide reasonably effective assistance. In *Padilla*, this Court analyzed the lawyer's failure to tell his client that pleading guilty would subject him to deportation, relying on the "practice and expectations of the legal community." 130 S. Ct. at 1482.

Specifically, in 1996, Congress passed IIRIRA, dramatically expanding the number of offenses that trigger automatic removal and effectively eliminating the Attorney General's discretion to grant relief from deportation. The effect was to make the "drastic measure" of deportation – something often more important to noncitizens than the extent of potential criminal punishment itself – "virtually inevitable for a vast number of noncitizens convicted of crimes."

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[9] *See Newland v. Hall*, 527 F.3d 1162, 1197 (11th Cir. 2008) (*Williams*, *Wiggins*, and *Rompilla* were "not new law under *Teague*"); *Smith v. Dretke*, 422 F.3d 269, 278 n.2 (5th Cir. 2005) (*Wiggins* was not a new rule).

[10] *See Tanner v. McDaniel*, 493 F.3d 1135, 1142 (9th Cir. 2007); *Frazer v. South Carolina*, 430 F.3d 696, 704-05 (4th Cir. 2005); *Lewis v. Johnson*, 359 F.3d 646 (3d Cir. 2004).

Padilla, 130 S. Ct. at 1478. Thus, especially in the wake of the new Act, professional norms crystallized requiring counsel to inform defendants about possible deportation consequences of pleading guilty to certain crimes. *Id.* at 1481-82 (citing various sources). As this Court later noted, there could be "little doubt that, as a general matter," at least by the mid-1990s, alien defendants were generally "acutely aware of the immigration consequences of their convictions." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001); *see also id.* ("Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." (quoting 3 Bender's *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999))).

Yet Padilla's counsel did not advise him about such consequences, much less try to negotiate a plea "in order to craft a conviction and sentence that reduce[d] the likelihood of deportation." *Padilla*, 130 S. Ct. at 1486. Thus, the *Strickland* doctrine dictated that at the time of Padilla's conviction in 2003, his counsel was constitutionally deficient in neglecting to advise him about the deportation consequences of his plea.

3. The Seventh Circuit did not dispute that, long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements. Nor did it dispute that "the application of *Strickland* to unique facts generally will not produce a new rule." Pet. App. 15a. The Seventh Circuit majority nevertheless held that *Padilla* is a new rule because its "outcome was susceptible to reasonable debate," *id.* 7a-8a, as evidenced by two things: (a) the "array of views" this Court's justices expressed in deciding the

case; and (b) the existence of three post-IIRIRA federal appellate decisions refusing to apply *Strickland* to the failure to give advice concerning deportation consequences of criminal convictions. *Id.* 7a-8a, 11a.

This reasoning does not withstand close scrutiny. As an initial matter, the Seventh Circuit overstated the extent of the judicial disagreement over applying *Strickland* to the failure to give advice concerning deportation consequences. It is true that the dissent in *Padilla* argued that *Strickland* should not apply to advice concerning deportation or any other purportedly "collateral" consequence of a conviction. *Padilla*, 130 S. Ct. at 1495-96 (Scalia, J., dissenting). But Justice Alito's concurring opinion *accepted* that *Strickland* required attorneys to "advise the defendant that a criminal conviction may have adverse immigration consequences." *Id.* at 1487. He took issue – and characterized as a "dramatic departure from precedent" – only the majority's additional suggestion that *Strickland* requires something more specific than such a general warning. *Id.* at 1487-88. This requirement is not at issue where, as here, the defendant received no warning of any kind with respect to deportation consequences of pleading guilty.

Furthermore, two of the three lower court decisions that, according to the Seventh Circuit, refused before *Padilla* to hold that a failure to advise of deportation consequences violated *Strickland* are distinguishable from the situation here. One emphasized that – unlike in *Padilla* and this case – the defendant's attorney *had* indeed "indicated that deportation was possible." *Santos-Sanchez v. United*

States, 548 F.3d 327, 333 (5th Cir. 2008). Another predated this Court's emphasis in 2001 in that at least after IIRIRA, noncitizen defendants were generally "acutely aware" of deportation consequences of pleas." *St. Cyr*, 533 U.S. at 322-23. *See United States v. Gonzalez*, 202 F.3d 20, 26 (1st Cir. 2000) (reasoning that IIRIRA did not "substantially alter" the need to give deportation advice).

At any rate, "the mere existence of conflicting authority does not necessarily mean a rule is new." *Williams v. Taylor*, 529 U.S. at 410 (quoting *Wright v. West*, 505 U.S. at 304); *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004) (noting that the Court has not "suggest[ed] that the mere existence of a dissent suffices to show that the rule is new"); *see Teague*, 489 U.S. at 307 (explaining that *Francis v. Franklin*, 471 U.S. 307 (1985), did not establish a new rule, even though the dissent in that case argued that it "needlessly extend[ed]" the holding of a prior case, *id.* at 332 (Rehnquist, J., dissenting)). Instead, the test for determining whether a holding was dictated by precedent is an "objective" one. *Williams*, 529 U.S. at 410 (citation omitted). If, in light of prior precedent from this Court, a holding did not "break[] new ground or impose[] a new obligation on the States or the Federal Government," it is not a new rule. *Teague*, 489 U.S. at 301.

In *Padilla* this Court did not break any new ground; it simply held its ground. The *Padilla* Court reaffirmed that *Strickland*'s performance prong is keyed to "prevailing professional norms." 130 S. Ct. at 1482. And at least since IIRIRA's dramatic changes to immigration law went into effect, there

has been no dispute that professional norms require advice on deportation consequences. *See id.*

To be sure, the *Padilla* dissent, like some prior lower court decisions, sought to impose a new limitation on *Strickland*'s professional norms doctrine, limiting it to advice concerning direct consequences of pleas. *See* 130 S. Ct. at 1495 (Scalia, J., dissenting). But this Court rejected that argument, using language emphasizing that it was the dissent – not the majority – that was seeking to make new law. This Court explained that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*," *id.* at 1481 (citation omitted), and it saw no good reason to do so in the context of the failure to warn of deportation consequences.

Indeed, this pattern has played out before, with this Court holding that a new application of *Strickland* did not create a new rule. In *Wiggins*, this Court considered whether *Williams* broke new ground in holding that the failure to investigate the defendant's background in preparation for a capital sentencing hearing amounted to ineffective assistance of counsel. 539 U.S. at 522. *Strickland* itself did not involve a background investigation, so one could have argued that "[t]here was nothing in *Strickland* . . . to support *Williams*' statement that trial counsel had an obligation to conduct" such an investigation. *Wiggins*, 539 U.S. at 543 (Scalia, J., dissenting) (quotation marks omitted). The *Wiggins* Court rejected such a parsing of *Strickland*, explaining that the Court "made no new law in

resolving Williams' ineffectiveness claim." *Id.* at 522 (majority opinion). Rather, the *Williams* Court merely applied *Strickland* in a new setting, holding that counsel's failure to satisfy the requirement in the ABA Standards for Criminal Justice that capital defense counsel conduct background investigations constituted deficient performance. *See id.*

Like the holding in *Williams*, the holding in *Padilla* was dictated by precedent: it was well established long before *Padilla* that the Sixth Amendment's guarantee of effective assistance of counsel turns on the adherence to prevailing professional norms, and it was equally well established by 2003 that those norms required attorneys to advise clients concerning deportation consequences of pleas. Accordingly, the holding in *Padilla* should apply – as in *Padilla* itself – to cases involving convictions that became final before its announcement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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