No. 11-820

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

REPLY BRIEF FOR PETITIONER

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The Government's acquiescence makes clear that certiorari should be granted: "this case presents a recurring question of substantial importance on which there is a direct conflict among the courts of appeals." U.S. Br. 8. Even on the merits, the Government concedes that this Court's analysis in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), of "*how*" *Strickland v. Washington*, 466 U.S. 668 (1984), applies with respect to deportation advice did not break any new ground. U.S. Br. 16-17. The Government nonetheless argues, for three reasons, that *Padilla* should not apply to convictions that became final before its announcement. Petitioner files this reply brief to clarify her position in response to these arguments.

First, the Government contends that even though there is nothing new in *Padilla* concerning "*how*" *Strickland* applies to claims of deficient assistance of counsel, *Padilla* broke new ground concerning an "antecedent question" – namely, "*whether*" the Sixth Amendment applies to assistance regarding deportation consequences of guilty pleas. U.S. Br. 17. This purported distinction is unpersuasive. *Strickland* explained that the adequacy of an attorney's performance during a criminal proceeding should be judged "under prevailing professional norms," 466 U.S. at 688, and this Court made clear long before *Padilla* that this rule applies to advice relating to guilty pleas, *see Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The *Padilla* Court merely applied this law to the professional norms that obligated defense counsel to advise clients when pleading guilty might trigger deportation. *See*

130 S. Ct. at 1481-82. As this Court explained, the question of whether a plea will lead to deportation is central to a client's decision making, and this Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Padilla*, 130 S. Ct. at 1481. *Padilla*, in other words, simply declined to create an exception to *Strickland*'s prior rule requiring reasonable professional assistance in connection with guilty pleas; it did not impose any "new obligation" on states or the federal government. *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion).[*]

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[*] The Government's suggestion that this Court will have to assume at the merits stage that *Teague* governs here (U.S. Br. 10 n.2) is incorrect. The question whether *Teague*'s framework applies when a person challenges a *federal* conviction based on ineffective assistance of counsel is fairly included within the question presented, *see* Pet. i, and holding that a less restrictive retroactivity regime governs in this setting would be one way of resolving the circuit split at issue. Given these circumstances, it is unnecessary for petitoner to have pressed this specific argument below. *See, e.g.*, *Martinez v. Ryan*, No. 10-1001 (March 20, 2012), at 1-2, 5-6; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). But, in fact, petitioner did raise this argument in a timely manner, contending in her petition for rehearing en banc that even if *Padilla*'s holding constitutes a new rule, *Teague*'s "new rule" regime is too strict in this context. Pet'n for Reh'g En Banc 10-14. That argument could be raised only pursuant to en banc procedures because the Seventh Circuit – like every other court of appeals – had previously held that *Teague* applies to federal prisoners. *See Danforth v. Minnesota*, 552 U.S. 264, 281 n.16 (2008); *Van Daalwyk v. United States*, 21 F.3d 179, 183 (7th Cir. 1994).

Second, the Government argues that *Padilla* should not apply retroactively because there was a dissent in that case and two Justices in the seven-Justice majority called the majority opinion a "dramatic departure from precedent." U.S. Br. 16 (quoting 130 S. Ct. at 1488 (Alito, J., concurring in the judgment)). But "the mere existence of a dissent" does not "suffice[] to show that the rule is new." *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004); *see also* Pet. 24. Furthermore, the concurrence's characterization of the majority's opinion was directed at an aspect of the opinion that is irrelevant here – the requirement that attorneys give *detailed* or *definitive* advice concerning immigration consequences. *See Padilla*, 130 S. Ct. at 1483; *id.* at 1487 (Alito, J., concurring in the judgment). The specificity of advice required under *Padilla* is not at issue in this case (nor in the others like it in the circuit split); this case turns on *Padilla*'s more basic holding that "silence alone is not enough to satisfy counsel's duty to assist the client." *Id.* at 1494 (Alito, J., concurring in the judgment). The concurring Justices, as the foregoing quotation indicates, did not describe that holding as a departure from prior precedent. To the contrary, they agreed that, under *Strickland*, counsel must at least "advise[] the client that a criminal conviction may have adverse consequences under immigration laws." *Id.*

Third, the Government asserts that *Padilla* rejected a substantial body of precedent in the courts of appeals. U.S. Br. 13 (citing cases). Not so. Only three of the cases the Government cites postdated both the enactment of IIRIRA and this Court's holding in *INS v. St. Cyr*, 533 U.S. 289 (2001), which were critical to the *Padilla* Court's analysis. *See* Pet.

23-24. On the other hand, three courts of appeals had held as of the time of *Padilla* that immigration advice concerning the effect of a guilty plea fell within the scope of *Strickland*, at least insofar as such advice was incorrect. *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005); *United States v. Cuoto*, 311 F.3d 179 (2d Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534 (11th Cir. 1985). That view was so well grounded in law that the Government, when given the opportunity, did not even challenge it. *See* Br. for U.S. as Amicus Curiae 25, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (agreeing that "misadvice on immigration consequences can rise to the level of deficient performance under *Strickland*").

Accordingly, *Padilla* did not extend the scope of *Strickland* beyond any meaningful boundaries that existed in the lower courts. Instead, *Padilla* simply insisted that a couple of stray courts of appeals (as well as the Kentucky Supreme Court) comply with the Sixth Amendment's "fundamental principle[]" that a criminal defendant may be entitled to more than his lawyer's silence before accepting a guilty plea. *Desist v. United States,* 394 U.S. 244, 263 (1969) (Harlan, J., concurring). In light of that unremarkable holding, persons such as petitioner should be able to benefit from *Padilla*'s holding.

CONCLUSION

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

Respectfully submitted,

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April 2012