No. 11-820

IN THE

Supreme Court of the United States

ROSELVA CHAIDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the years before *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), every lower court to consider the issue had held that misadvising a criminal defendant concerning the deportation consequences of a potential guilty plea constituted ineffective assistance of counsel. *See* Petr. Br. 26; *infra* at 10-11. Nevertheless, some lower courts erected an artificial barrier to relief in cases where an attorney failed to notify the defendant in any way that a plea might subject her to deportation. In *Padilla*, a seven-Justice majority rebuffed the lower courts' purported distinction, calling it "absurd" to distinguish giving bad advice concerning the deportation consequences of guilty pleas from giving no advice whatsoever. 130 S. Ct. at 1484; *see also id.* at 1487 (Alito, J., concurring in the judgment). As this Court explained, *id.*, it had made clear in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), not only that the Sixth Amendment imposes upon criminal defense lawyers a "dut[y] to consult with the defendant on important decisions" but that there is no difference in this respect between "acts and omissions," *Strickland*, 474 U.S. at 688, 690.

The Government nevertheless argues – relying largely on the lower court decisions that this Court repudiated in *Padilla* – that *Padilla* created a new rule. This argument cannot withstand scrutiny. Each legal principle necessary to hold in *Padilla* that lawyers must give at least some warning that pleading guilty might subject a defendant to deportation was clearly established in this Court's precedent long before *Padilla* was decided.

But even if *Padilla*'s holding were somehow new, it still would be improper to refuse to apply it here. *Strickland* and *Padilla* already account for the finality interests at stake in cases such as this one. And introducing the retroactivity framework of *Teague v. Lane*, 489 U.S. 288 (1989), into the realm of federal prisoners seeking relief in first federal habeas motions would wreak havoc on criminal appellate procedure. While the Government halfheartedly attempts to shrug off these consequences, a moment's reflection makes clear that they would be serious and inescapable.

ARGUMENT

I. *Padilla* Did Not Announce A New Rule Of Constitutional Law.

The Government does not dispute that prevailing professional norms at the time Chaidez pleaded guilty had long required criminal defense lawyers to advise their clients on the deportation consequences of a conviction. The Government nevertheless contends, for three reasons, that *Padilla*'s holding that the Sixth Amendment requires such advice announced a new rule of constitutional law. First, the Government notes that professional norms are "only guides" to attorney obligations under the Sixth Amendment. Resp. Br. 30. Second, the Government asserts that the Court considered a serious antecedent argument in *Padilla* concerning "whether the Sixth Amendment extended to advice about removal consequences in the first place." *Id.* at 9. Third (and most fervently), the Government maintains that the *Padilla* opinions and the "pre-*Padilla* legal landscape" in the lower courts suggest

Padilla is a new rule because they refused to apply *Strickland* to the failure to advise regarding deportation consequences. *Id.* at 12-24. None of these arguments is persuasive.

A. It Required No New Rule For *Padilla* To Recognize Failing To Follow The Pertinent Professional Norms Constituted Ineffective Assistance Of Counsel.

The Government's assertion (Resp. Br. 30) that the obligations announced in *Padilla* were new because "professional guidelines do not define the scope of the Sixth Amendment guarantee" misses the mark. In *Strickland*, this Court held in no uncertain terms that "[t]he *proper measure* of attorney performance" under the Sixth Amendment is "reasonableness under prevailing professional norms." 466 U.S. at 688 (emphasis added). Indeed, because "[the Sixth Amendment] relies on the legal profession's maintenance of standards," *id.* at 688, this Court has never looked to any other metric.

To be sure, this Court has explained that published professional guidelines are not "inexorable commands" and that the ultimate touchstone remains "reasonableness." *Bobby v. Van Hook*, 558 U.S. 13, 17 (2009). This is because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89.

But those realities are of no help to the Government here. When counsel has contravened directly applicable – and widely accepted – professional standards without any plausible strategic justification, this Court has repeatedly held that *Strickland* not only allows, but *dictates*, relief. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court held that it "made no new law" when it applied the *Strickland* formula "to the ABA Standards for Criminal Justice" and found a violation because the lawyer had failed to follow those standards. *Id.* at 522. Similarly, in *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court concluded that counsel's performance violated clearly established law in large part because it flouted the ABA Standards and there was "no reason to think the [relevant] standard impertinent." *Id.* at 387

This Court simply followed that well-settled approach again in *Padilla*. To use this Court's words in *Wiggins*: by "highlighting counsel's duty to [properly advise her client], and in referring to the ABA Standards for Criminal Justice as guides, [the Court] applied the same 'clearly established' precedent of *Strickland*" it had applied so often before. 539 U.S. at 522. Indeed, in *Padilla*, this Court pegged its holding not only to ABA Standards but also to numerous other practice guides that, without exception, required criminal defense counsel to give the kind of advice at issue. *See* 130 S. Ct. at 1482-83; *see also* Br. of NACDL 6-18 (setting forth the depth and breadth of longstanding professional norms in this area).

B. *Padilla*'s Rejection Of The "Antecedent Question" The Kentucky Supreme Court Had Invented Made No New Law.

The Government contends that *Padilla* announced a new rule because this Court had not previously "required counsel to advise the defendant about matters that are *not* part of the criminal jeopardy that a defendant faces." Resp. Br. 25. The Government's argument, just like the state's argument to this effect in *Padilla*, ignores the plain meaning of *Strickand.*

1. Ever since this Court decided *Strickland*, it has been clear that the only antecedent question when a court confronts a claim of ineffective assistance is whether the case at issue is a *criminal* one. If so, a court must assess whether the attorney's conduct was reasonable according to prevailing professional norms. *Strickland*, 466 U.S. at 688. The Government's observations (Resp. Br. 26-27) that immigration proceedings are civil in nature are thus entirely irrelevant. Padilla was a *criminal* defendant being prosecuted in a *criminal* case. He thus was entitled to effective assistance of counsel in considering whether to plead guilty to those charges.

Notwithstanding that reality, the Supreme Court of Kentucky in *Padilla* had rejected Padilla's ineffectiveness claim "on the ground that the advice he sought about the risk of deportation concerned only collateral matters." 130 S. Ct. at 1481. But this Court dismissed that argument as baseless. The 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.* Accordingly, the only genuine legal question in *Padilla* was whether reasonableness, measured by professional norms, required criminal defense lawyers to warn their clients of deportation consequences of guilty pleas. *See id.* at 1482. No other inquiry was necessary.

2. Even if a legitimate antecedent question might sometimes exist when advice beyond "criminal jeopardy" is at issue, pre-*Padilla* law dictated that *Strickland* applied at least to advice regarding immigration consequences of criminal convictions. *See* Petr. Br. 20; Br. of NACDL 6-18. That is, far from "view[ing] removal proceedings as entirely separate from a defendant's criminal jeopardy," Resp. Br. 26, this Court had recognized long before *Padilla* that the penalty of deportation is "intimately related to the criminal process," *Padilla*, 130 S. Ct. at 1481.

Nearly a century ago, this Court noted that removal from the United States could result "in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see also Costello v. INS*, 376 U.S. 120, 128 (1964) (stressing that the "stakes" are "considerable" when deportation is potentially a consequence); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile.") (internal quotation marks and citation omitted). This Court thus observed prior to *Padilla* that "competent defense counsel" "would . . . advise[]" clients of possible deportation consequences of their convictions. *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2003). Indeed, this Court noted that "remain[ing] in

the United States" is often "*more important* to [a defendant] than any potential jail sentence." *Id.* at 322 (quotation marks and citation omitted) (emphasis added).

The Government's only real response to these pre-*Padilla* recognitions is that *St. Cyr* did not hold "that the *Sixth Amendment* imposed a duty on counsel to advise about removal consequences." Resp. Br. 29 (emphasis in original). But that should not make any difference to the *Teague* inquiry. As Justice Breyer explained in *Tyler v. Cain*, 533 U.S. 656 (2001):

> The matter is one of logic. If Case One holds that all men are mortal and Case Two holds that Socrates is a man, we do not need Case Three to hold that Socrates is mortal. It is also a matter of law. If Case One holds that a party's expectation measures damages for breach of contract and Case Two holds that Circumstances X, Y, and Z create a binding contract, we do not need Case Three to hold that in those same circumstances expectation damages are awarded for breach.

Id. at 672-73 (dissenting opinion); *see also id.* at 666 (majority opinion) (agreeing with this logical formula but holding that the "combination of holdings" at issue in that case did not satisfy the formula); *cf. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-65 (2007) (holding that a combination of prior cases clearly established that habeas petitioner was entitled to relief).

Although the situation here involves a prior holding and empirical recognition (instead of two legal holdings), the syllogism applies just as well in this context. *Strickland* held that the Sixth

Amendment requires effective assistance of counsel, measured by prevailing professional norms. *St. Cyr* (as well as previous cases) recognized that attorneys had an obligation under prevailing professional norms to advise their clients regarding deportation consequences. Together, these precedents dictated the holding in *Padilla.* It is irrelevant that *Padilla* was the first decision to combine these principles to state explicitly that the *Sixth Amendment* requires attorneys to provide advice concerning the deportation consequences of a criminal conviction.

C. Neither The *Padilla* Opinions Nor Pre-*Padilla* Lower Court Decisions Indicate That *Padilla* Announced A New Rule.

The Government does not dispute that the test for determining whether a holding was dictated by precedent is an "objective" one that depends not on the existence of any divergent judicial votes but rather on whether those contrary views were reasonable. *See* Petr. Br. 15, 24. The Government nevertheless argues that the "*Padilla* opinions" and "pre-*Padilla* legal landscape" in the lower courts indicate that the decision announced a new rule. *See* Resp. Br. 12-24. These arguments are unconvincing.

1. The *Padilla* opinions largely speak for themselves.

a. *Majority opinion.* The Government asserts that *Padilla* announced a new rule because the Court "did not purport to rely upon any controlling precedent." Resp. Br. 18. But the Government ignores what this Court wrote: "[L]ongstanding Sixth Amendment precedents . . . demand[ed]" the outcome *Padilla*

reached. 130 S. Ct. at 1486. The Government also contends that *Padilla* announced a new rule because the Court noted that it should use caution in "recognizing new grounds for attacking the validity of guilty pleas." *Id.* at 1485; *see also* Resp. Br. 20. In referencing "new grounds," however, the Court was referring simply to new *applications* of *Strickland* – not suggesting that it was minting any new constitutional *rule*. *See Padilla*, 130 S. Ct. at 1485; *see also Wiggins*, 539 U.S. at 522 (applying *Strickland* in new settings does not create new rules).

b. *Concurring opinion.* The Government does not dispute that petitioner "would have prevailed under the test advocated by the concurring Justices" (Resp. Br. 22) – namely that competent counsel must, at the very least, "advise the defendant that a criminal conviction may have adverse immigration consequences." *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring in the judgment). Strictly speaking, then, this Court need only determine here whether *that* standard announced a new rule.

The Government asserts that the concurrence's standard would "likely have been a new rule itself, as the concurring Justices did not suggest that it was 'dictated' by any of the Court's prior decisions." Resp. Br. at 23. On the contrary, the opening sentence of the concurrence makes clear that defense counsel "fails to provide effective assistance *within the meaning of Strickland* if the attorney misleads a noncitizen client regarding the removal consequences of a conviction." *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring in the judgment) (emphasis added) (internal citations omitted). And as the concurrence explained, a lawyer misleads her noncitizen client

whenever she "provid[es] incorrect advice" or fails to "advise the defendant that a criminal conviction may have adverse immigration consequences." *Id.*

c. *Dissenting opinion.* The Government also contends that *Padilla* announced a new rule because the dissenting Justices characterized *Padilla* as holding that the Sixth Amendment "extend[s] beyond defense against the prosecution." Resp. Br. 23 (quoting *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting)). But this mischaracterizes *Padilla*'s holding. The Court held that an important *part* of defending against the prosecution includes advising a client that conviction may trigger deportation – not that the Sixth Amendment requires something more than such a defense.

In short, as petitioner described in her opening brief, the dissent in *Padilla* was not resisting an expansion of *Strickland*; it was advocating a limitation on *Strickland*. *See* Petr. Br. 23-24. The majority's rejection of that argument did not create any new constitutional rule; it merely held the line.

2. Nor did the pre-*Padilla* legal landscape in the lower courts render *Padilla*'s holding a new rule. The Government relies on various pre-*Padilla* cases holding that *Strickland* was not violated when attorneys failed to warn their clients that pleading guilty would subject them to deportation. Resp. Br. 13-15. But even if lower court case law were relevant to *Teague*'s objective inquiry, these cases cannot obscure the fact that lower courts recognized well before *Padilla* that *Strickland* actually *did* apply to advice concerning deportation consequences. In fact, every state and federal appellate court to confront the issue before *Padilla* held that attorneys violated

Strickland when they misadvised their clients concerning such consequences. *See* Petr. Br. 25-26 (citing federal appellate cases); *see also Rubio v. State*, 194 P.3d 1224, 1230-32 (Nev. 2008); *State v. Rojas-Martinez*, 125 P.3d 930, 934-35 (Utah 2005); *Alguno v. State*, 892 So. 2d 1200, 1201 (Fla. Dist. Ct. App. 2005); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *People v. McDonald*, 802 N.E.2d 131, 134-35 (N.Y. 2003); *In re Yim*, 989 P.2d 512, 516 (Wash. 1999); *State v. Garcia*, 727 A.2d 97, 100-01 (N.J. Super Ct. App. Div. 1999); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *People v. Correa*, 485 N.E.2d 307, 310-12 (Ill. 1985).

The Government attempts to brush aside these cases "on the ground that all criminal defense attorneys have a duty not to misrepresent the extent of their expertise about *any* topic." Resp. Br. 17 (emphasis added). But that is not how these courts generally explained their rulings. Rather, citing *St. Cyr* and earlier cases that recognized the severity of deportation, the lower courts grounded their insistence that attorneys give accurate advice on the fact that deportation is such a "harsh consequence[]" that a client's misunderstanding of the potential for deportation "may have [a] significant impact on a client's decisions concerning plea negotiations." *People v. Pozo*, 746 P.2d 523, 528-29 (Colo. 1987); *see also Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985) (deportation is "so important that misinformation from counsel may render the guilty plea constitutionally uninformed"); *Rubio v. State*, 194 P.3d 1224, 1230 (Nev. 2008) (relying on the "harshness of deportation"); *State v. Rojas-Martinez*, 125 P.3d 930, 934-35 (Utah 2005) (relying on the "gravity of the consequences of deportation");

People v. Correa, 485 N.E.2d 307, 311 (Ill. 1985) (deportation is a "drastic consequence" – "more severe than the penalty imposed by the court").

In light of this recognition concerning the importance of deportation to a client's decision whether to plead guilty, lower courts simply had no warrant to distinguish misadvice in this setting from failing to give any advice at all. *Strickland* imposed upon counsel a "dut[y] to consult with the defendant on important decisions." 466 U.S. at 688. And it expressly refused to distinguish between "acts or omissions." *Id.* at 690. Accordingly, it required no new law for this Court to abrogate the decisions that the Government extols as reasonable. In the words of *Padilla*, the distinction those decisions drew was "absurd" – indeed, "fundamentally at odds with the obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla*, 130 S. Ct. at 1484 (quoting *Libretti v. United States*, 516 U.S. 29, 50-51 (1995)).[1]

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[1] Several states as amici argue that deeming *Padilla* an old rule would burden them with having to reopen numerous cases that became final before *Padilla* was decided. *See* Br. of New Jersey et al. 1. But this argument ignores the states' overwhelming acknowledgement prior to *Padilla* that it constituted ineffective assistance to misadvise a client regarding deportation consequences of a plea. *See supra* at 10-11. It also overlooks many states' longstanding statutory requirements before that decision "that trial judges advise defendants that immigration consequences may result from accepting a plea agreement." *St. Cyr*, 533 U.S. at 322 n.48. Indeed, if anything, a holding that *Padilla* does *not* apply retroactively would burden states more than the converse, for it would require them to deal with the "devastating" consequences of a greater number of

II. Even If *Padilla* Were A New Rule, It Would Apply To A Federal Defendant Seeking Its Benefit In Her First Post-Conviction Filing.

The Government advances two objections against petitioner's argument that *Teague*'s retroactivity framework does not apply to a federal defendant making an ineffective assistance claim in a first post-conviction filing. First, the Government suggests that this argument is not properly before the Court. Second, the Government argues that *Teague* should apply not only as a general matter to federal convictions but also specifically to ineffective-assistance claims raised for the first time on collateral review. Each of these arguments is misguided.

A. The Argument That *Teague* Is Inapplicable Is Properly Before This Court.

It is well settled that a petitioner may advance any argument that is "fairly included" in the claim that the question presented brings before this Court. *See* S. Ct. R. 14(1)(a); *Gross v. FBL Fin. Srvcs.*, 557 U.S. 167, 173 & n.1 (2009). That is, "[o]nce a claim is properly presented . . . parties are not limited to the precise arguments they made below." *Harris Trust &*

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deportations – for example, more single-parent households, the children of which face "significantly increased risks of incarceration and illegal behavior." *See* Br. of Active and Former State and Federal Prosecutors 16-22.

Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

The Government does not dispute that the argument that *Teague*'s retroactivity framework is inapplicable to petitioner's case is fairly included in her question presented: "[w]hether the principle articulated in *Padilla* applies to persons whose convictions became final before its announcement." Pet. i. Nevertheless, citing its own reframing of the question presented, which asks only whether *Padilla* constitutes a "new rule" under *Teague*, the Government asserts that petitioner's "challenge to the applicability of the *Teague* framework is not properly before the Court." Resp. Br. 36 (citing BIO 10 n.2); *see also id.* at I.

The Government's assertion ignores a fundamental rule of practice in this Court: When, as here, the Court grants a writ of certiorari without further comment, the petitioner's formulation of the question presented – not any formulation that the respondent chooses to advance – controls. *See Yee*, 503 U.S. at 535. Petitioner thus may argue here that *Teague*'s "new rule" framework is inapplicable.

Even if it were necessary for petitioner to have expressly preserved this specific argument, she did so both in the court of appeals and during the certiorari proceedings in this Court. First, petitioner argued in her petition for rehearing en banc that *Teague*'s retroactivity framework should not apply to her case. Citing *Logan v. Wilkins*, 644 F.3d 577 (7th Cir. 2011), the Government contends that this argument came too late. Resp. Br. 36 n.12. But *Logan* merely states the familiar principle that a party that fails to raise

an argument in its initial brief to an appellate panel has generally waived the right to raise that argument later. *Id.* at 583. That principle is inapposite when binding circuit precedent makes raising an argument before an appellate panel, rather than to the full court, futile. *See, e.g.*, *United States v. Kasvin*, 757 F.2d 887, 891 (7th Cir. 1985); Pet. Reply at Cert. 2 n.1.

Second, petitioner noted during the certiorari stage of proceedings before this Court that she intended to argue that *Teague* should not apply to her case. In its acquiescence to certiorari, the Government claimed – as it does now – that petitioner "does not challenge *Teague*'s applicability in this case." U.S. Br. at Cert. 10-11 n.2. Petitioner responded by clarifying that "[t]he 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." Pet. Reply at Cert. 2 n.1. In order to be absolutely clear, petitioner added: "holding that a less restrictive retroactivity regime governs in this setting would be one way of resolving the circuit split at issue." *Id.* The Government now turns a deaf ear to this exchange, but it cannot erase its occurrence or the notice it provided.

B. Applying *Teague* In This Context Would Be Theoretically And Practically Untenable.

The Government spills much ink arguing as a general matter that, even though this Court has repeatedly insisted that the *Teague* framework is designed to serve comity interests, that framework should nonetheless apply to federal convictions.

While this Court could reject that argument *in toto*, it need not address that general issue here. This Court need only recognize that *Teague* does not apply in the specific context in which a federal defendant challenges her conviction on ineffective-assistance grounds in her first post-conviction filing.

When the Government finally addresses that narrower issue, it suggests that *Teague* should apply as a theoretical matter and that the practical problems such a holding would raise are manageable. The Government is mistaken on both counts.

1. *Theory.* The Government recognizes that it was procedurally proper for Chaidez to raise her ineffective-assistance claim for the first time on collateral review. Resp. Br. 4. And the Government does not dispute – nor could it – that where a collateral proceeding is the first opportunity for a prisoner to raise a claim of ineffective assistance at trial, "the collateral proceeding is in many ways the equivalent of a [defendant's] direct appeal as to the ineffective-assistance claim." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). The Government nevertheless argues that *Teague* should apply to petitioner's ineffective-assistance-of-counsel claims for two reasons. Neither is persuasive.

a. Although the Government acknowledges that *Strickland* and *Padilla* expressly account for society's interest in the finality of criminal convictions, it argues that the finality interest that *Teague* protects is somehow different. Resp. Br. 52. The Government's hairsplitting eludes petitioner; no one has ever previously claimed that finality is anything other than an indivisible interest in repose. But even if there were more than one kind of finality,

Strickland and *Teague* undeniably accommodate the same interest. *Teague*, as the Government notes, "ensur[es] that final convictions are not perpetually subject to challenge" based on new developments in the law. *Id.* Similarly, *Strickland* protects the "fundamental interest in the finality of [convictions]" by limiting the circumstances in which "new grounds for setting aside guilty pleas are approved," *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (internal quotation marks and citations omitted); *see also* Petr. Br. 31-33 (noting similar language in *Strickland* and *Padilla*). This Court's ineffective-assistance jurisprudence, therefore, fully respects the only governmental interest even arguably at stake here.

b. Second, the Government claims that petitioner "overlooks *Teague*'s judgment that retroactivity principles should not vary based on the characteristics of the particular rule at issue." Resp. Br. 45. But there are already two situations in which *Teague* does not apply, each of which depends on the characteristics of the particular rule at issue. *Teague*'s bar does not apply (1) "to rules forbidding punishment of certain primary conduct" or (2) to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard v. Banks*, 542 U.S. 406, 416-17 (2004) (internal quotation marks and citations omitted).

There is nothing problematic about recognizing that *Teague* similarly does not apply to federal defendants raising ineffective-assistance claims in initial post-conviction filings. This Court has already held that the procedural default doctrine does not apply in this context. *See Massaro v. United States*,

538 U.S. 500 (2003). And as the Government itself explained in that case, a "bright-line rule" deeming these claims beyond the scope of a bar against habeas relief is "straightforward to administer." U.S. Br. 15, *Massaro v. United States*, 538 U.S. 500 (2003). Indeed, such a rule would involve a far less fact-intensive inquiry than enforcing the two other rules deeming certain kinds of claims outside the boundaries of *Teague*. *See, e.g.*, *Bousley v. United States*, 523 U.S. 614 (1998) (primary conduct); *Shriro v. Summerlin*, 542 U.S. 348 (2004) (watershed rule).

2. *Practice.* Applying *Teague* to federal defendants' ineffective-assistance claims raised at the first opportunity on collateral review would not only be theoretically unjustified, but also practically disastrous. The Government acknowledges that applying *Teague* to federal defendants raising ineffective-assistance claims would compel at least some of them to raise these claims on direct review. Resp. Br. 53. Yet the Government asserts for two reasons that this development would not create significant problems. First, it argues that the "vast majority of *Strickland* claims plainly will not implicate the *Teague* rule." *Id.* Second, the Government suggests that when defendants raise ineffective-assistance on direct review, appeals can be stayed while the case is remanded to the trial court for fact-finding as necessary to resolve the claim. *Id.* at 50. Neither of these suggestions comes to grips with reality.

a. It is immaterial whether or not ineffective-assistance claims "typical[ly]" require a court to announce and apply a new rule. *Id.* at 53. If this Court holds that *Teague*'s framework applies to such

claims, ethical criminal defense attorneys will – "to avoid procedural or substantive bars, criticism, or even disciplinary charges" – feel compelled to "raise ineffective-assistance claims on direct review." Br. of Nat'l Ass'n of Fed. Defenders 8-9. There is no other course for these attorneys to pursue: Given that the Government presumably will raise *Teague* on collateral review whenever it is plausibly implicated – and that, even if the Government fails to raise *Teague*'s bar, a federal court may do so *sua sponte*, *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) – attorneys simply will not be able to run the risk that *Teague* might later prevent their clients from obtaining relief. Thus, holding that *Teague* applies in this context would steer virtually all of the ineffective-assistance litigation that currently occurs on collateral review into direct review.

b. The Government's second contention – that when defendants press ineffective-assistance claims on direct review, courts of appeals can simply stay proceedings and remand those claims for further factual development – is untenable.

As an initial matter, the Government's proposed stay-and-remand procedure would severely undercut its own asserted interest in the finality of criminal convictions. As the Government itself explained in *Massaro*, staying and remanding appeals "delay[s] imposition of a final judgment" and thus has "the effect of undermining AEDPA's strict limitations on the filing of successive [post-conviction] motions." *See* U.S. Br. at 30 n.14, *Massaro v. United States*, 538 U.S. 500 (2003) (No. 01-1559). In a case in which a defendant appeals multiple claims, only one of which relates to ineffective assistance of counsel,

proceedings on all the remaining claims would have to be stayed if the ineffective-assistance issue were remanded. Resolution of that issue – and thus the defendant's entire direct appeal – would take several extra months and sometimes even years. *See* Br. of Nat'l Ass'n of Fed. Defenders 12.

The Government offers no explanation why it now advocates the very procedure it condemned in *Massaro*. Instead, it simply cites two post-*Massaro* cases that supposedly stand for the proposition that courts of appeals may stay and remand cases in order to develop and decide ineffective assistance claims on direct review. Resp. Br. 50 (citing *United States v. Burroughs*, 613 F.3d 233 (D.C. Cir. 2010), and *United States v. Hasan*, 586 F.3d 161 (2d Cir. 2009)). But neither case involved such a remand. In each instance, the court of appeals merely cited in passing one of the very decisions the Government criticized in *Massaro*, *see* U.S. Br. at 30 n.14, stating that such remands are theoretically available. *See Burroughs*, 613 F.3d at 238 (citing *United States v. Geraldo*, 271 F.3d 1112, 1115-16 (D.C. Cir. 2001)); *Hasan*, 586 F.3d at 170 (citing *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000)).[2] The fact that the Government

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[2] In *Burroughs*, the D.C. Circuit rejected the defendants' ineffective-assistance claim on the ground that the facts alleged, even if true, would not make out a constitutional violation. 613 F.3d at 239. In *Hasan*, the Second Circuit "decline[d] to hear" the defendant's potentially meritorious claim because "the record on appeal [did] not include facts necessary to adjudicate a claim of ineffective assistance of counsel." 586 F.3d at 171 (internal quotation marks and citation omitted). The court explained that it was following its "usual practice" of refusing to consider such a claim on direct appeal, instead "leav[ing] it to

cannot cite (and petitioner's own research has not revealed) a single case in the decade since *Massaro* in which a remand has occurred speaks volumes about the degree to which the Government's proposal here would upend current practice.

Even if this Court were willing to accept the substantial delays that the Government's proposed stay-and-remand procedure would generate, the procedure would still be unworkable. Whenever a defendant raised a potentially meritorious ineffective-assistance-of-counsel claim, the court of appeals would need to determine whether it implicated *Teague*. If so, then the court would need to hear the claim on direct review. *See* Petr. Br. 36; Resp. Br. 53. But a court generally cannot know exactly what a defendant's legal claim is until the underlying facts are discerned. Such factual development would necessitate a remand. In other words, the Government tries to solve one Catch-22 (*see* Petr. Br. 38 & n.8) by introducing another one into its proposed framework for adjudicating federal prisoners' ineffective-assistance claims: It asks the court of appeals to resolve a threshold question to determine whether the case requires a remand, but that question will generally be unanswerable until a remand has occurred.

Finally, even if the Government's stay-and-remand proposal were respectful of finality interests and were procedurally coherent, its proposal would *still* provide no answer to the slew of other practical

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the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255." *Id.*

problems that the National Association of Federal Defenders and petitioner have outlined. *See* Br. of Nat'l Ass'n of Fed. Defenders 8-18; Petr. Br. 34-39. Given the importance of these matters, petitioner briefly highlights them here.

First of all, the Government's proposal does not even begin to address a large category of criminal cases: those that end in guilty pleas with appeal waivers. *See* Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 Vt. L. Rev. 149, 150-151 (2003) (noting that "many – if not most" guilty pleas include such waivers). When defendants agree to waive their right to appeal, they must, by definition, raise any challenges to the conviction in collateral proceedings. If *Teague* applies to ineffective-assistance claims raised in these circumstances, then such defendants who plead guilty and waive their rights to appeal would *never* have any opportunity to ask courts to announce and apply new ineffective-assistance rules to their cases.

Even where defendants retain the right to appeal their convictions and take such appeals, significant complications will inevitably arise. In such circumstances, when (as is often the case) trial counsel continues as appellate counsel, it is unreasonable to expect that lawyer to be aware of, let alone challenge, his own effectiveness. *See* Br. of Nat'l Ass'n of Fed. Defenders 15-16. Worse yet, applying *Teague* here would yield intractable conflicts of interest for federal public defenders. In any case where "the constitutional adequacy of the assistance provided by one of [a Federal Defender] Office's [trial] lawyers is called into question, and as a practical matter must be raised on direct review,"

the Office would be unlikely to be able to retain the appeal of a case. *Id.* at 18. The withdrawal of trial counsel from appellate proceedings due to such conflicts of interest would impair clients' prospects on appeal. Given that the Federal Defender Offices represent roughly thirty percent of federal felony defendants each year, this potential problem is a profound one.

Even when trial counsel are not conflicted out of appellate proceedings, requiring appellate counsel to raise ineffective-assistance claims on direct review will also hinder working relationships between trial and appellate counsel. As this Court noted in *Massaro*: "Appellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence." 538 U.S. at 506. Without a good working relationship with trial counsel, appellate counsel will be less proficient at representing their clients, and meritorious claims of ineffective assistance of counsel are more likely to fail.[3]

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[3] The Criminal Justice Legal Foundation suggests, as an alternative to the Government's stay-and-remand proposal, that ineffective-assistance claims that require evidentiary development and require a court to announce and apply a new rule "can be made in a § 2255 motion brought before the case becomes final on direct appeal." Br. of CJLF 25. But this approach is at best equivalent to the Government's proposal: in order to forestall finality while the ineffective-assistance claim is litigated, appellate proceedings would have to be stayed, just as under the Government's approach, until the ineffective-

Given these unavoidable and intractable administrative problems, the *Teague* doctrine should not apply where federal defendants bring ineffective-assistance claims in first post-conviction proceedings. To hold otherwise would be to recognize federal defendants' constitutional right to effective assistance in principle but largely to withhold that protection in fact.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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assistance claim is adjudicated in the district court (and perhaps on appeal as well). Moreover, CJLF's proposal does nothing to resolve the conflict-of-interest problems inherent in litigating ineffective-assistance claims on direct review.

Respectfully submitted,

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