No. 11-820

IN THE

# Supreme Court of the United States

ROSELVA CHAIDEZ,

*Petitioner*,

*vs.*

UNITED STATES OF AMERICA,

*Respondent*.

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

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

In *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), this Court held (1) that the Sixth Amendment imposes on attorneys representing noncitizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea, and (2) that a criminal judgment may be overturned for a breach of that duty.

The question presented is whether, under the retroactivity framework established in *Teague* v. *Lane*, 489 U. S. 288 (1989), *Padilla* announced a new rule that does not apply retroactively to convictions that became final before *Padilla* was decided.

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## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The petitioner in the present case seeks to open new avenues for challenging criminal judgments entered

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

long ago by creating new exceptions to this Court's jurisprudence on the retroactivity of new rules of criminal procedure. These rules protect the interests of victims of crime in finality by preventing the overturning of convictions that were properly obtained under the rules in effect at the time of the original trial based on later developments in case law. This body of law has been established over many years to provide the correct balance between the rights of defendants and those of victims. Unsettling this law and creating new exceptions is unnecessary and is contrary to the rights of victims of crime that CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Petitioner Roselva Chaidez is a citizen of Mexico and was granted legal permanent resident status in the United States in 1977. See Brief for Petitioner 2. In 1998, she engaged in a scheme to defraud an insurance company by falsely claiming to have been injured in an automobile accident. See Brief for the United States 2-3. The company paid a total of $26,000 on claims in the scheme, including an $11,000 check to petitioner and her attorney. See *id*., at 3.

Petitioner pleaded guilty to two counts of mail fraud in December 2003 and was sentenced to four years probation. See Pet. App. 31a (District Court opinion). In 2009, after petitioner filed a naturalization petition stating she had never been convicted of a crime, the government commenced removal proceedings. Pet. App. 32a. On October 11, 2009, petitioner filed a petition for writ of error coram nobis claiming that her trial counsel, Kaaren Plant, had not informed her of the immigration consequences of her plea. Pet. App. 32a-33a. Plant died two months later, before the government could interview her. Pet. App. 34a.

Although the petition was filed five years after the judgment became final, the District Court stated summarily that a petition for writ of error coram nobis was not subject to a statute of limitations, citing pre-AEDPA[2] authority. Pet. App. 34a-35a.

The District Court found that *Padilla* v. *Kentucky*, 559 U. S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), was not a "new rule" barred from retroactive application by the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989). See Pet. App. 52a. Following an evidentiary hearing, the District Court granted relief and vacated the conviction. See Pet. App. 38a.

The government appealed only on the retroactivity holding. See Brief for Petitioner 6. The Court of Appeals for the Seventh Circuit reversed on this ground in a split decision. Pet. App. 18a-19a.

## SUMMARY OF ARGUMENT

The rule of *Teague* v. *Lane*, limiting the retroactivity of new rules of criminal procedure in cases already final, applies equally to state and federal judgments. The *Teague* opinion expressly defines "new rules" as those placing new burdens on the Federal Government as well as the States. It endorsed the view of retroactivity first advanced by Justice Harlan, which expressly applied to both. It has been regularly applied in federal cases in the Federal Courts of Appeals and once in this Court.

Determining whether a rule is new for the purpose of *Teague* requires a survey of the legal landscape before the case announcing the rule. When this Court has not squarely ruled on an issue, the required survey

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2. The Antiterrorism and Effective Death Penalty Act of 1996.

must include decisions of state courts and lower federal courts. Prior to *Padilla* v. *Kentucky*, the precedents were overwhelmingly contrary. The *Padilla* rule is a discrete question of law, not a fact-intense examination of a particular case, and therefore different in kind from prior ineffective assistance cases that were applications of *Strickland* v. *Washington* rather than new rules.

The American Bar Association is a private organization with no authority to change the requirements of the Sixth Amendment. Its views are entitled to little or no weight when there is ample judicial authority to the contrary.

The government did not appeal the decisions of the District Court that coram nobis is available in the circumstances of this case and, implicitly, that it can be used when a § 2255 motion would be barred by the statute of limitations. These important questions should be expressly reserved for a case where they are properly presented.

No exception to the *Teague* rule should be made for ineffective assistance claims. The vast majority of such claims seek to apply *Strickland*, not make or apply new rules, and the *Teague* rule is not an obstacle. For the rare case where a defendant seeks to make or apply a new rule, a § 2255 motion should be permitted concurrently with the appeal.

## ARGUMENT

### I. This Court's retroactivity jurisprudence applies equally to state and federal cases.

*A. The Teague Opinion and the Harlan Foundation.*

"In general, . . . , a case announces a new rule when it breaks new ground or imposes a new obligation on

the States *or the Federal Government*." *Teague* v. *Lane*, 489 U. S. 288, 301 (plurality opinion) (emphasis added).[3] "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id*., at 310. Neither exception draws any distinction between state and federal cases. See *id*., at 311.

In the present case, petitioner and supporting *amici* make the remarkable assertion that the *Teague* opinion does not mean what it plainly said.[4] *Padilla* imposed on the Federal Government a new obligation to ensure that the defendant has received adequate legal advice regarding collateral immigration consequences before pleading guilty, and petitioner argues that rule will apply to overturn convictions that became final at a time when the law was almost universally understood to be contrary. The understanding of two decades of retroactivity jurisprudence, uniformly followed to that point in every Federal Court of Appeals and implicitly recognized in this Court, see *infra* at 10, is said to be

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3. Parts IV and V of Justice O'Connor's opinion in *Teague*, the parts relevant to this case, are a plurality opinion because Justice White chose to make one last stand on behalf of the prior approach to retroactivity, discussed below, which by then had already been abandoned for direct review. See *id*., at 316-317 (opinion concurring in part and concurring in judgment). He came on board four months later. See *Penry* v. *Lynaugh*, 492 U. S. 302, 313 (1989) (opinion of the Court by O'Connor, J., joined in Part II-A by Rehnquist, C. J., and White, Scalia, and Kennedy, JJ.). The *Teague* plurality opinion has been treated as the definitive precedent ever since.

4. Petitioner seems to start off arguing that *Teague* does not apply at all to federal collateral challenges, see Brief for Petitioner 27, and then slides into a more nuanced argument that an exception should be made for this particular type of challenge. See Brief for Petitioner 30-33. See also *infra*, at 12.

unsettled by *dicta* in one opinion where the question was not presented by the case then before the Court. See *Danforth* v. *Minnesota*, 552 U. S. 264, 269, n. 4 (2008). *Stare decisis* should be made of sterner stuff.

To understand how far-fetched petitioner's position is, it is important to place *Teague* in its context in the development of the law of retroactivity. Nonretroactivity in constitutional criminal procedure made its debut during the Warren Court era, when this Court was rapidly creating rules that certainly were not in the Bill of Rights as originally understood. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In *Linkletter* v. *Walker*, 381 U. S. 618, 622-627 (1965), the Court rejected the Blackstonian view that retroactivity was required because judges only discover, not make, law. Instead, *Linkletter* held "that in appropriate cases the Court may in the interest of justice make the rule prospective." *Id.*, at 628.

Under the *Linkletter* scheme, the criteria for deciding whether a new rule would apply retroactively did not differ between state and federal courts, although the determination of whether the rule was actually new might be different in the "incorporation" era. In *Linkletter*, the nonretroactivity of *Mapp* was limited to the States because the Fourth Amendment exclusionary rule was not new for federal courts. See *Linkletter*, 381 U. S., at 619, 639. In *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), on the other hand, the rules of *Miranda* and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), were new for both state and federal courts, and the retroactivity problem was the same for both. The same day the Court decided *Johnson*, it denied certiorari in a list of *Miranda* cases, state and federal alike, over Justice

Douglas's retroactivity-based dissent. See, *e.g.*, *Robinson* v. *United States*, 384 U. S. 1024 (1966).[5]

Justice Harlan originally concurred in this approach, "because I thought it important to limit the impact of constitutional decisions which seem to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. 'Retroactivity' must be rethought." *Desist* v. *United States*, 394 U. S. 244, 258 (1969) (dissenting opinion). His thesis was that new rules should be fully retroactive on direct review, see *ibid*., while on collateral review, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Id*., at 263. Justice Harlan expanded on his thesis in *Mackey* v. *United States*, 401 U. S. 667, 675-702 (1971) (opinion concurring in the judgment in two cases and dissenting in one).

*Desist* and *Mackey*, as their names imply, were federal-prisoner collateral reviews under 28 U. S. C. § 2255. In both cases, the opinion of the Court applied the *Linkletter* and *Johnson* precedents to these federal prisoners with no indication of any distinction on that basis. See *Desist*, 394 U. S., at 248-254 (applying *Linkletter* and *Stovall* v. *Denno*, 388 U. S. 293 (1967)); *Mackey*, 401 U. S., at 674-675 (applying *Johnson*). Justice Harlan was even more explicit on this point:

> "I realize, of course, that state prisoners are entitled to seek release via habeas corpus under 28 U. S. C. § 2241, while federal prisoners technically utilize what is denominated a motion to vacate judgment under 28 U. S. C. § 2255. However, our cases make these remedies virtually congruent and

5. The full list with the dissent is on pages 1020-1025.

> the purpose of substituting a motion to vacate for the traditional habeas action in the federal system was simply to alter one minor jurisdictional basis for the writ. See *United States* v. *Hayman*, 342 U. S. 205 (1952). *As I do not propose to make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief*, I shall refer throughout this opinion to both procedures as the writ of habeas corpus, and cases before us involving such judgments as *cases here on collateral review*." *Mackey*, 401 U. S., at 681-682, n. 1 (emphasis added).

In *Danforth*, the opinion of the Court notes that Justice Harlan's opinions in *Desist* and *Mackey* "provided the blueprint for [Justice O'Connor's] entire analysis" in the *Teague* plurality opinion. See 552 U. S., at 277. That is correct. Justice Harlan is mentioned 17 times in Part IV of *Teague*, and the conclusion of that part is "we now adopt Justice Harlan's view of retroactivity for cases on collateral review." *Teague*, 489 U. S., at 310. That view is based entirely on finality, not federalism, applies equally to state and federal prisoners, and expressly uses the term "collateral review" to include motions under § 2255.

Yet two pages later, the *Danforth* opinion incorrectly and inexplicably states "the text and reasoning of Justice O'Connor's opinion also illustrate that the rule was meant to apply only to federal courts considering habeas corpus petitions *challenging state-court criminal convictions*," 552 U. S., at 279 (emphasis added), apparently unaware of the contradiction. But the text and reasoning do not by any means exclude application to federal prisoners.

Part IV-A of *Teague* traces the criticisms of the *Linkletter* rule, including its inconsistency and "disparate treatment of similarly situated defendants,"

leading to its rejection for direct review in *Griffith* v. *Kentucky*, 479 U. S. 314, 323 (1987). See *Teague*, 489 U. S., at 302-305. These considerations are the same for state and federal cases. Then in Part IV-B, the *Teague* plurality discussed and "agree[d] with Justice Harlan's description of the function of habeas corpus." *Id*., at 305-308. As noted in the passage from *Mackey* quoted above, that description was exactly the same for state and federal prisoners. In this context, the plurality discusses the importance of finality in terms that make no distinction between state and federal cases. "Without finality, the criminal law is deprived of much of its deterrent effect." *Id*., at 309. The opinion quotes from Judge Friendly's famous article, see *ibid*., the "chief concern" of which "is about the basic principle of collateral attack, rather than with the special problem of federal relief for state prisoners . . . ." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970).

The opinion mentions costs imposed on the States from retroactive application of new rules, see *Teague*, 489 U. S., at 310, but those same costs are borne by the Federal Government. The mere fact that the opinion does not expressly say "or the Federal Government" every time, having already said it once, cannot plausibly be read to exclude federal cases that are so clearly in the body of jurisprudence on which the opinion is based. Cf. *Holland* v. *Jackson*, 542 U. S. 649, 654-655 (2004) (*per curiam*). The problem of continually marshaling resources to defend old judgments noted by *Teague*, see *ibid*., is illustrated by the present case. The District Court suggested that the government could have spent investigative resources to find alternatives to the testimony of the deceased trial attorney. See Pet. App. 38a. Those resources are limited and needed for new cases.

Petitioner claims that the *Teague* rule "is motivated in part by 'comity' considerations," Brief for Petitioner 28, but in fact *Teague* only mentions comity once in a paragraph about limitations on habeas relief generally. See 489 U. S., at 308. Again, this passing mention cannot plausibly be construed to limit *Teague* to state cases in light of the fact that it is expressly based on a theory that expressly includes federal cases.

In summary, both the *Teague* opinion itself and its antecedents clearly indicate that its rule applies equally to state-prisoner and federal-prisoner collateral attacks in federal courts. There was little doubt of that at the time *Teague* was decided, and prior to *Danforth*'s ill-considered *dicta* both this Court and the Federal Courts of Appeals so understood it.

*B. Bousley.*

Petitioner claims that "this Court thus far has applied *Teague* only to state convictions . . . ." Brief for Petitioner 5, citing *Danforth*, 552 U. S., at 269, n. 4. The *Danforth* footnote does not say that, and in fact it is not true.

In *Bousley* v. *United States*, 523 U. S. 614 (1998), this Court granted certiorari to consider the retroactivity on collateral review of *Bailey* v. *United States*, 516 U. S. 137 (1995), regarding what it means to "use" a firearm. See *Bousley*, *supra*, at 617-618. The *amicus* appointed by this Court to defend the judgment below argued that Bousley's "motion for relief under § 2255 is barred by the doctrine of *Teague* v. *Lane*, 489 U. S. 288 (1989), which precludes application of new criminal rules on collateral review of convictions that became final before the rules were announced." See Brief *Amicus Curiae* in Support of the Judgment in *Bousley* v. *United States*, No. 96-8516, Summary of the Argument. The claim that *Teague* applies only to state

prisoners and not to federal prisoners' petitions under § 2255 was made to the Court in two *amicus* briefs. See Brief *Amicus Curiae* for American Civil Liberties Union in *Bousley* v. *United States*, No. 96-8516, p. 16; Brief for National Association of Criminal Defense Lawyers and Families against Mandatory Minimums Foundation as *Amici Curiae* in *Bousley* v. *United States*, No. 96-8516, p. 11.

The *Bousley* Court applied the *Teague* jurisprudence exactly as it would have in a state-prisoner case. Bousley's claim was not *Teague*-barred because of the "distinction between substance and procedure . . . ." 523 U. S., at 620. A decision of this Court narrowing the scope of a federal criminal statute applies retroactively under the *Teague* rule for the same reason that a decision declaring a substantive statute unconstitutional would apply retroactively. See *ibid*. (quoting *Teague*, 489 U. S., at 311, in turn quoting *Mackey*, 401 U. S., at 692).[6] That is, there is "a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Ibid*. (quoting *Davis* v. *United States*, 417 U. S. 333, 346 (1974).) In other words, the *Bailey* rule qualified for the "first exception" to the *Teague* rule. See *Penry* v. *Lynaugh*, 492 U. S. 302, 329-330 (1989) (expanding the first exception). This discussion would have been completely superfluous if the *Teague* rule did not apply to federal prisoners at all. The *Bousley* Court evidently considered the applicability of *Teague* to § 2255 petitions generally to be so clear as to not even require discussion, even though the argument had been placed before the Court.

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6. *Bousley* quotes *Teague* quoting the same passage of *Mackey* twice on page 620. Justice Harlan's examples of substantive rules included *Griswold* v. *Connecticut*, 381 U. S. 479 (1965) (contraceptives) and *Loving* v. *Virginia*, 388 U. S. 1 (1967) (interracial marriage). See *Mackey*, 401 U. S., at 692, n. 7.

*C. Universal Application in the Courts of Appeals.*

Multiple briefs have been submitted to this Court arguing that the *Teague* rule does not apply to collateral reviews of federal convictions. See Brief for Petitioner 27-30;[7] Brief *Amici Curiae* of Habeas Scholars[8] and Constitutional Accountability Center 6-8; Brief *Amicus Curiae* of National Association of Federal Defenders 7-8. Curiously absent from these briefs is any citation of a single court of appeals opinion so holding. That is because the cases are uniformly to the contrary.

The language and lineage of *Teague*, discussed above, makes its application to § 2255 cases so obvious that little discussion has been needed. While pro-petitioner commentators may lament that the issue has been "ignored by most courts and commentators," see 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 25.6, p. 1381 (6th ed. 2011), the reality is simply that the question is straightforward. See, *e.g.*, *Gilberti* v. *United States*, 917 F. 2d 92, 94-95 (CA2 1990) (dispatching the question in two paragraphs, based on language of opinion, descent from *Mackey*, and inadequacy of prior *Linkletter* approach).

The clarity of the understanding that *Teague* applies to § 2255 cases can be seen in the Courts of Appeals' reactions to the upending of federal sentencing in *United States* v. *Booker*, 543 U. S. 220 (2005). Within months, Federal Courts of Appeals applied a straightforward *Teague* analysis—new rule, neither exception—to find *Booker* not retroactive to cases already

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7. See *supra* note 4.

8. The fashion in recent years of groups of *amici* filing under self-important, ad hoc group names warrants some kind of corrective action from the Court.

final. See, *e.g.*, *Humphress* v. *United States*, 398 F. 3d 855, 860-863 (CA6 2005); *Guzman* v. *United States*, 404 F. 3d 139, 141-144 (CA2 2005). This Court did not decide whether *Teague* barred *Booker* claims in cases already final because it did not need to. The Federal Courts of Appeals were unanimous. See *United States* v. *Cruz*, 423 F. 3d 1119, 1120 (CA9 2005) (*per curiam*) ("We now join every other circuit . . .").

The notion that a question of this magnitude has simply been overlooked all these years, while *Teague* has been routinely applied to deny § 2255 claims, is absurd on its face. The applicability of *Teague* to federal collateral attacks is settled law.

*D. Absence of an Alternative.*

While claiming that *Teague* does not apply to collateral attacks on federal convictions, petitioner and supporting *amici* fail to offer any alternative. If not *Teague*, then what? Given *Teague*'s scathing review of the *Linkletter* jurisprudence, see 489 U. S., at 302-305, the Court surely could not have intended to keep that line of cases in force. No one could seriously propose going all the way back to the situation before *Linkletter*, with full retroactivity on collateral review of every new rule. Congress clearly expected a limit on retroactivity, and a stringent one at that, when it created an alternate starting date for the collateral review statute of limitations in 28 U. S. C. § 2255(f)(3) (2006 ed. Supp. IV 2010). If any and all new rules of criminal procedure were going to be retroactive to final judgments, Congress would surely have limited the new rules that could restart this clock.

*Teague* is a settled body of jurisprudence applied by the federal courts in federal prisoner cases for 23 years now. If it is suddenly held not to apply and if neither of the prior approaches is viable, then the only alternative

would be to establish a whole new retroactivity scheme from scratch. There is no justification for such a wholesale unsettling of the law. Collateral attack on a final conviction is a drastic measure, and *Teague* appropriately reserved the application of new rules in such circumstances to the cases where they are most necessary. This body of jurisprudence should stand as it has been understood for two decades. *Teague* applies to collateral attacks on federal judgments exactly as it applies to collateral attacks on state judgments.

## II. The required "survey of the legal landscape" before *Padilla* demonstrates conclusively that *Padilla* is a "new rule" for the purpose of *Teague*.

*A. The Newness of Padilla.*

This Court's jurisprudence on what constitutes a "new rule" for the purpose of *Teague* has not been a model of clarity or consistency. For example, looking back at *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), through the lens of the stricter definitions of "new rule" in later cases such as *Butler* v. *McKellar*, 494 U. S. 407 (1990) (quoted below), it is apparent that the four dissenters had the better of the argument. See *Penry*, *supra*, at 355-356 (Scalia, J., dissenting). Indeed, the difficulty of distinguishing new rules from applications of old rules in the *Teague* cases was very likely one of the reasons that Congress expressly included applications when it drafted 28 U. S. C. § 2254(d)(1). This case, however, is not difficult. The *Teague* line of cases does have some guideposts and methods, and they readily resolve the "new rule" question in this case.

The simplest case of a new rule under *Teague* is when this Court overrules its own precedent. Such an

overruling creates a new rule beyond any doubt. See *Whorton* v. *Bockting*, 549 U. S. 406, 416 (2007).

The evolution of the law does not always come from explicit overrulings of decisions on point, however. Change also comes when this Court rules on a point of law that it has not expressly addressed but which has been actively considered in the other courts of the country. The question under *Teague* is whether the result was "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U. S., at 301 (emphasis in original). "[T]he court must '[s]urve[y] the legal landscape as it then existed,' " *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994) (quoting *Graham* v. *Collins*, 506 U. S. 461, 468 (1993)), and when this Court's precedents are not squarely on point, the opinions of other courts must be included in the survey.

> "But the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*. Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In *Roberson*, for instance, the Court found *Edwards* controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. 486 U. S., at 679, n. 3. That the outcome in *Roberson* was *susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits* noted previously. It would not have been an illogical or even a grudging application of *Edwards* to decide

> that it did not extend to the facts of *Roberson*. We hold, therefore, that *Roberson* announced a 'new rule.' " *Butler* v. *McKellar*, 494 U. S., at 415 (emphasis added).

*Butler* involved the extension of an existing rule into new territory, *i.e.*, the application of the "don't ask again" rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981), to the case of a person who has invoked his right to counsel during questioning with regard to a different offense. See *Arizona* v. *Roberson*, 486 U. S. 675, 682 (1988). *Caspari*, 510 U. S., at 386, involved a similar extension, whether the double-jeopardy rule of *Bullington* v. *Missouri*, 451 U. S. 430 (1981), should be extended to noncapital sentencing. The survey showed that state courts of last resort and the Federal Courts of Appeals were deeply divided. *Caspari*, *supra*, at 393-394. "Because that conflict concerned a 'developmen[t] in the law over which reasonable jurists [could] disagree,' *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990), the Court of Appeals erred in resolving it in [the habeas petitioner's] favor." *Id.*, at 395.

In other words, if this Court has not decided whether precedent X extends to new situation Y, the issue has been considered in many courts at the next level down, and those courts are deeply divided, the extension is (or would be) a new rule. Petitioner cites *Beard* v. *Banks*, 542 U. S. 406, 416, n. 5 (2004), for the proposition that the "mere existence of a dissent" is not conclusive, but that case holds that a 5-4 division and strong dissent in the precedent establishing the rule was strong evidence that the rule was not dictated by precedent. See *id.*, at 415. Similarly, petitioner criticizes the Court of Appeals' reference to "the state of the law in the lower courts" in the present case. See Brief for Petitioner 22. Under *Butler*, *Graham*, *Caspari*, and *O'Dell* v. *Nether-*

*land*, 521 U. S. 151, 166, n. 3 (1997), that reference was not only proper, it was mandatory.

The *Teague* test is objective, and even reasonable jurists occasionally render decisions that appear unreasonable in retrospect.[9] But as the number holding a particular view grows, the probability that the contrary view is "dictated by precedent" shrinks inverse-exponentially to infinitesimal. If the survey shows many opinions and a deep division, the rule is new. *A fortiori*, if the survey shows many opinions and the overwhelming weight of authority *against* the rule in question, the rule is certainly new.

The survey result in the present case is clear.

> "The Supreme Court created the rule that the Due Process Clause requires the trial court to explain only the direct consequences of conviction. [Footnote: See *Brady* v. *United States*, 397 U. S. 742, 755 (1970).] The extension of this principle to defense counsel's duties under the Sixth Amendment, although never passed upon by the Supreme Court, is nevertheless *among the most widely recognized rules of American law*." Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 706 (2002) (emphasis added).

Chin and Holmes count all but one of the Federal Courts of Appeals and courts in 35 states and the District of Columbia in support of this rule. *Id*., at 707-708; see also *id*., at 699. Only four state court decisions were contrary, "some possibly on state law grounds."

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9. " 'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.' " *McGrath* v. *Kristensen*, 340 U. S. 162, 178 (1950) (Jackson, J., concurring) (quoting Lord Westbury).

*Id*., at 708. Updating the survey to the time of the *Padilla* certiorari petition, Professor Stephanos Bibas, representing *amici* supporting Padilla, could muster only three cases for an affirmative constitutional duty to advise, and the overwhelming weight of authority remained to the contrary. See Brief for Capital Area Immigrants' Rights Coalition et al. as *Amici Curiae* in Support of the Petition for Certiorari in *Padilla* v. *Kentucky*, No. 08-651, Part I-A.[10]

In an attempt to avoid the obvious result of the required survey of the legal landscape, petitioner relies on Justice Kennedy's concurrence in the judgment in *Wright* v. *West*, 505 U. S. 277, 309 (1992): "Where the beginning point is a rule of this general application, a rule 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." That is indeed true, and *Strickland* v. *Washington*, 466 U. S. 668 (1984), is indeed such a rule, but Justice Kennedy said "infrequent," not "nonexistent." *Padilla* is the infrequent case.

All of the other *Strickland* cases cited by petitioner, see Brief for Petitioner 15-19, involved attacks on the performance of trial or appellate counsel which the habeas petitioner claimed resulted in a conviction he should not have received or a sentence more harsh than he should have received. Collateral consequences are different in kind, not just in degree.

Certainly one could not plausibly argue that a convicted felon could have his guilty plea and judgment set aside for failure to advise him of any and all collat-

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10. The government compiles a slightly different count, but the difference is not material. See Brief for United States 12-17.

eral consequences. Could a son who murdered his rich father and plea-bargained down to manslaughter have that plea overturned because his lawyer misadvised him that he could thereby inherit the estate? See 14 B. Witkin, Summary of California Law, Wills and Probate § 293, pp. 380-381 (10th ed. 2005). Could a guilty plea in a murder case be overturned for counsel's failure to tell the defendant he would not be able to vote in prison? See *Hayden* v. *Pataki*, 449 F. 3d 305, 309 (CA2 2006) (en banc).

Before *Padilla*, the rule in most jurisdictions was to draw a bright line between collateral and direct consequences. See Chin & Holmes, *supra*, 87 Cornell L. Rev., at 699. *Padilla* moved the line to include what is probably the most severe collateral consequence known to American law: deportation. This is a discrete change in the territory covered by the *Strickland* rule. It is quite unlike *Wiggins* v. *Smith*, 539 U. S. 510 (2003). See Brief for Petitioner 18. Petitioner claims *Wiggins* "broke new ground" by applying *Strickland* to counsel's duty to investigate background evidence for the penalty phase as opposed to failure to present character and psychological evidence in the penalty phase in *Strickland*. But this was nothing new. Courts throughout the country had been applying *Strickland* to failure-to-investigate claims for many years. See, *e.g.*, *Buenoano* v. *Singletary*, 963 F. 2d 1433, 1437-1438 (CA11 1992); *Siripongs* v. *Calderon*, 35 F. 3d 1308, 1313-1314 (CA9 1994). Unlike the amorphous question of whether counsel's efforts to avoid a death sentence in a particular case were adequate, *Padilla* involved the discrete question of law regarding whether misadvice or failure to advise on a particular collateral consequence was a ground to set aside a guilty plea.

Petitioner asks this Court to revisit an argument it rejected 22 years ago. She asks the Court to define

"new rule" at such a high level of generality as to render *Teague* meaningless. See *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990). The Court rejected that argument then, and it should reject that argument again.

*B. ABA Standards.*

Against the overwhelming weight of pre-*Padilla* judicial authority, an *amicus* brief puts forth professional standards of the American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA). See Brief for *Amici Curiae* National Association of Criminal Defense Lawyers et al. 6-18. Statements in opinions of this Court referring to such standards as "guides," even with the caveat that they are "only guides," have been the source of much mischief. See, *e.g.*, *Bobby* v. *Van Hook*, 558 U. S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255, 259 (2009) (*per curiam*); *id*., 130 S. Ct., at 20, 175 L. Ed. 2d, at 262-263 (Alito, J., concurring). It is time to reconsider and disclaim them.

The people of the United States have not delegated to the ABA the power to amend the Sixth Amendment or to review the decisions of the Courts of Appeals construing that amendment. The first power is reserved to the people through the amendment process, see U. S. Const., art. V, and the second is reserved to this Court. See 28 U. S. C. § 1254 (2006 ed.).

As the government has explained, these kinds of standards are often "aspirational." Brief for the United States 30. There is considerable difference between the standard that a professional organization aspires to and the minimum acceptable under the Constitution. Indeed, it would be a sad commentary on an organization if it did not aspire to better than the minimum.

Allowing a private organization of lawyers to change the constitutional minimum is especially problematic when that minimum involves the expenditure of government resources. Given the reality that a large portion of defendants are indigent and entitled to appointed counsel, any rule that expands what counsel must do necessarily transfers funds from the public at large into the pockets of lawyers. The ABA has no responsibility for the myriad other demands on the limited resources of government, and it is free to promulgate aspirational standards without fiscal consequences. Legislatures do not have that luxury. If a requirement is read into the Constitution, then the cost of complying with it moves to the head of the line, ahead of other important but nonconstitutional government functions. An organization of lawyers has a conflict of interest with regard to the question of whether funding legal services is more important than funding education, police, national defense, health care, or other priorities.

The California Supreme Court, in a recent, unanimous decision, rejected use of ABA guidelines for capital cases where they were not consistent with the controlling judicial precedents, including *Jones* v. *Barnes*, 463 U. S. 745 (1983). See *In re Reno*, No. S124660 (Cal. Aug. 30, 2012) (slip op., at 36-40). This Court should similarly reject the notion that the ABA could change the constitutional minimum in force before *Padilla* when the overwhelming weight of *judicial* authority was to the contrary. *Padilla* was "new" based on the survey of the legal landscape, as described in the previous section, and statements of private organizations cannot change that status.

## III. The coram nobis and statute of limitations questions lurking in this case should be expressly reserved.

Petitioner's conviction became final in 2004, and she moved to set it aside in 2009. Congress thought it precluded such actions, with rare exceptions, when it enacted the collateral review statute of limitations in 1996, 28 U. S. C. § 2255(f).[11]

Petitioner could not proceed under § 2255 if she were still in custody. If *Padilla* is a new rule, the claim is *Teague*-barred.[12] If *Padilla* is not a new rule, paragraph (3) of § 2255(f) is inapplicable, paragraph (1) has expired, and there is no claim that paragraphs (2) or (4) applies. Because she is not in custody, however, petitioner filed a petition for writ of error coram nobis.

Whether the writ of error coram nobis can be used at all in this situation and whether it can be used to make an end-run around the § 2255(f) statute of limitations are important questions. These questions should be decided on full consideration, but the Government did not challenge the District Court's decision on these grounds in the Court of Appeals, see Brief for Petitioner 6, and the statute of limitations is not jurisdictional. See *Day* v. *McDonough*, 547 U. S. 198, 205 (2006).

Cases are not authority for questions which merely lurk in the record, of course. See *Webster* v. *Fall*, 266 U. S. 507, 511 (1925). Even so, it is better not to leave the issue to implication. These questions should be expressly reserved for future resolution.

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11. The subdivision designations were added to § 2255 in 2008. See Pub. L. 110-177, § 551, 121 Stat. 2545.

12. Petitioner concedes neither *Teague* exception applies. See Brief for Petitioner 5-6.

## IV. No exception need or should be made for ineffective assistance claims.

In *Teague v. Lane*, 489 U. S. 288, 311 (1989), the plurality opinion recognized two exceptions to its general rule of nonretroactivity.[13] Petitioner now proposes that a third exception be made, exempting ineffective assistance of counsel claims, at least for federal cases. See Brief for Petitioner 34. The proposal to add a new exception to a sound and established body of jurisprudence should be rejected.

The argument that *Massaro* v. *United States*, 538 U. S. 500 (2003), somehow changed the law of ineffective assistance litigation so as to require this change reflects a misunderstanding of *Massaro*. That case did not make a rule forbidding ineffective assistance claims on direct review like the Arizona rule at issue in *Martinez* v. *Ryan*, 566 U. S. ___, 132 S. Ct. 1309, 1313, 182 L. Ed. 2d 272, 280 (2012). Quite the contrary. "We do *not* hold that ineffective-assistance claims *must* be reserved for collateral review." *Massaro*, *supra*, at 508 (emphasis added). The Court recognized that practical realities will prevent raising ineffective assistance claims on direct review in most cases, see *id*., at 508-509, but the holding of the case is purely for the benefit of defendants, carving out a safe harbor from the procedural default rule. See *id*., at 509.

With regard to those practical realities, a more precise definition of the *Teague* rule is required. While it is sometimes loosely said that *Teague* limits the retroactivity of new rules on collateral review, the more precise rule is that *Teague* limits retroactivity in "cases

13. The first exception has since been recharacterized as a limit on the scope of the rule rather than an exception to the rule. See *Schriro* v. *Summerlin*, 542 U. S. 348, 352, n. 4 (2004). The difference is not material to the present discussion.

already final on direct review." *Whorton* v. *Bockting*, 549 U. S. 406, 409 (2007). Cases on collateral review are usually "already final on direct review" because the collateral petition is not usually filed until after the appeal is completed, but that is not universally true, and making an exception to that practice would be far less disruptive than poking a hole in the *Teague* doctrine.

Petitioner's argument that ineffective assistance claims seeking to make new rules or relying on new rules could never be successful if *Teague* applied is based on an assumption that such review is always conducted after direct appeal. See Brief for Petitioner 37-38. It need not be. The Advisory Committee Note to Rule 5 of the Rules Governing § 2255 Proceedings for the United States District Courts, 28 U. S. C. foll. § 2255, p. 1268 (2006 ed.), quotes *Womack* v. *United States*, 395 F. 2d 630, 631 (CA DC 1968) for the proposition that the rule against a § 2255 petition in a case not yet final on appeal is not jurisdictional, but such petitions are reserved for "extraordinary circumstances." Such circumstances were found for an ineffective assistance claim in *United States* v. *Prows*, 448 F. 3d 1223, 1228-1229 (CA10 2006), where the defendant wanted to attack his lawyer's representation while the government pursued an unrelated appeal of the sentence.

A defendant seeking to make or take advantage of a "new rule" on an ineffective assistance claim is also an extraordinary circumstance. As noted *supra* at 18, the vast majority of ineffective assistance claims come within the "myriad of factual contexts" rubric and neither make nor rely on new rules. *Padilla* claims are an exceptional case. Since *Strickland* itself, no other ineffective assistance case in this Court has made a "new rule" for the purpose of *Teague* or 28 U. S. C.

§ 2244(b)(2), not even the dubious *Rompilla* v. *Beard*, 545 U. S. 374 (2005). See *In re Hutcherson*, 468 F. 3d 747, 749 (CA11 2006). The *Padilla* rule is different in kind, not just in degree, from other *Strickland* cases. *Padilla* expanded the scope of the representation subject to scrutiny into new territory.

The exceptional claim that seeks to expand ineffective assistance scrutiny into new territory can be made in a § 2255 motion brought before the case becomes final on direct appeal. Such a procedure will not raise the administrative problems that petitioner warns of, see Brief for Petitioner 37, because it will be exceptional and not "routine." If appellate counsel is trial counsel, he might have to move for a different attorney to be appointed to make the claim, see Federal Defender Brief 15-16, but again that is not an excessive burden given the rarity of claims raising such an issue.

Expansion of the scope of ineffective assistance claims which may be used to attack a final conviction does not impact defense counsel alone. It also impacts what prosecutors and trial courts must do to defend their judgments. Judges go through colloquies with guilty-pleading defendants, and prosecutors stand ready to remind them to do so. No such requirement was in effect for immigration consequences before *Padilla*, and rules and practices must be changed to accommodate the new requirement. See Brief for the United States 41, n. 13. Should a judgment entered many years ago, agreed upon by the parties, be overturned because the judge's colloquy did not include a subject that nearly universal precedent said did not need to be included?

Petitioner claims unfairness of the failure to apply *Padilla* retroactively, but the unfairness to the government and the people must also be considered. Did petitioner's attorney, in fact, advise her of the immigration consequences of her plea or not? We do not know

and probably will never know. One of the principals involved is a convicted and admitted fraudster with a strong interest in the outcome. The other is dead. See Brief for the United States 5. The fraudster's word may be the preponderance of the evidence when the other side of the scale is empty, but it may well be empty because of the six-year delay between conviction and petition. See Pet. App. 33a-34a. The District Court's suggestion that it might be possible to track down the translator (and, implicitly, that the translator might remember a conversation translated years ago) is pure speculation.

Further, when a plea-bargained conviction is overturned on collateral review, the government must either retry a case on stale evidence or agree to a plea bargain even more favorable than the first one. In the present case, the petitioner completed her sentence before filing her petition, but that will not always be true.

As the Court considers the fairness argument in this case, it is also important to note the absence of any claim of innocence. Petitioner admits that she voluntarily engaged in fraud, and that the loss to the victim was $26,000. See Brief for Petitioner 2-3. Congress has decided, as a matter of policy, that aliens who engage in frauds over $10,000 should be removed, and it chose to gauge the size of frauds by damage to victim, not benefit to the fraudster. To be sure, there are some aspects of removal law that seem harsh, but those arguments must be addressed to Congress, not the courts. With no claim that she does not fall within the class of criminal aliens that Congress has decided should be removed, petitioner's fairness argument is a weak one, at best.

## CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit should be affirmed.

September, 2012

Respectfully submitted,

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