No. 21-225

IN THE
Supreme Court of the United States

ASHLEY MERE HOWARD,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, Ashley Mere Howard (Howard), contends that the Texas Court of Criminal Appeals (TCCA) erred during state habeas review when it (1) denied her ineffective assistance of trial counsel claim and (2) relied on affidavits rather than a live hearing in doing so. Specifically, Howard first argues that the TCCA's decision to deny relief was contrary to this Court's decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Lafler v. Cooper*, 566 U.S. 166 (2012), because trial counsel failed to advise her about the parole implications of her plea. Second, she claims the state court violated her right to due process by failing to hold a live state habeas hearing, particularly because the judge who presided over the state habeas proceedings and made credibility and factual findings was not the same judge from trial.

Respondent (the "State") objects to Howard's Questions Presented because they ignore a key antecedent legal issue: Whether counsel's failure to advise a defendant about the parole consequences of a guilty plea even falls within the ambit of *Strickland* and its progeny—which alone cautions against granting certiorari. The State suggests the following instead:

I. Should the Court grant certiorari to determine whether the TCCA's denial of relief was contrary to *Strickland* and *Lafler* when no precedent from this Court sets forth a Sixth Amendment requirement that effective counsel advise a defendant about a plea's parole consequences, and any rule

to the contrary would be barred by antiretroactivity principles?

II. Did the state courts deny petitioner procedural due process by failing to hold a live evidentiary hearing when the underlying claim does not even fall within the Sixth Amendment's protection?

RELATED CASES

• *State v. Howard*, No. 1465955, 183rd District Court of Harris County. Judgment entered February 4, 2016.

• *Howard v. State*, No. 01-16-00120-CR, First Court of Appeals of Texas. Judgment entered April 25, 2017.

• *Howard v. State*, No. PD-0939-17, Texas Court of Criminal Appeals. Judgment entered November 15, 2017.

• *Howard v. State*, No. 17-9302, United States Supreme Court. Judgment entered October 1, 2018.

• *Ex parte Howard*, No. 1465955-A, 183rd District Court of Harris County. Recommendations entered December 10, 2020.

• *Ex parte Howard*, No. WR-92,267-01, Texas Court of Criminal Appeals. Judgment denying state habeas relief entered April 14, 2021.

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INTRODUCTION

Howard was convicted of felony murder in Harris County, Texas, and sentenced to thirty-five years' imprisonment. In the instant petition for certiorari review of the TCCA's denial of state habeas relief, she argues that the state court's rejection of her ineffective assistance of trial counsel claim was contrary to *Lafler v. Cooper*. She contends that counsel rendered ineffective assistance by failing to advise her about the differences in parole eligibility for the offenses of theft and murder when she was faced with the choice of pleading guilty to theft or going to trial on a murder charge. Pet. Cert. at 13–22. But no precedent from this Court dictates that counsel has a duty under the Sixth Amendment to advise a defendant about the parole consequences of a guilty plea.

Indeed, lower state and federal courts regularly find that the Sixth Amendment does not require counsel to advise a client about the collateral consequences—such as parole eligibility—of a plea. And although Howard suggests in a footnote, without explanation, that *Padilla v. Kentucky*, 559 U.S. 356 (2010), "leads ineluctably to the conclusion that" counsel must advise a defendant about the parole consequences of a guilty plea, the Court, both in *Padilla* and *Chaidez v. United States*, 568 U.S. 342 (2013), has expressly declined to disavow the distinction between direct and collateral consequences and limited the *Padilla* decision to the unique circumstance of deportation consequences. Pet. Cert. at 16 n.8. Lower state and federal courts, including Texas courts, have adhered to this Court's limitation of the *Padilla* holding, concluding that the Sixth

Amendment does not require counsel to advise a defendant about parole eligibility when discussing a plea.

At bottom, the state court cannot possibly have misapplied *Lafler* in rejecting Howard's claim, given that this Court's existing Sixth Amendment jurisprudence does not require trial counsel to advise a defendant about the collateral consequences of a guilty plea. Furthermore, resultantly, Howard's claim is barred by *Teague v. Lane*, 489 U.S. 288 (1989).

And finally, the TCCA did not need to hold a live evidentiary hearing to resolve factual matters when Howard's underlying claim lacks any legal basis in the Constitution. Accordingly, Howard's complaints do not warrant certiorari review. Sup. Ct. R. 10.

OPINIONS BELOW

The TCCA's denial of Howard's state habeas application without written order (located at Pet. Cert. App. 1) is not reported. Likewise, the state habeas trial court's recommended findings and conclusions (located at Pet. Cert. App. 2–23) are also unreported.

JURISDICTION

The Court has jurisdiction to review the state habeas court's denial of Howard's ineffective assistance of counsel and due process claims under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Questions Presented involve application of the Sixth Amendment right to counsel in criminal

prosecutions and the Due Process Clause in Section I of Fourteenth Amendment.

STATEMENT OF THE CASE

Howard was convicted of felony murder after she and two friends—who were fleeing police after stealing clothing from a department store—ran a red light and crashed their getaway vehicle into the car of Rosalba Quezada, killing her and injuring her three children. *Howard v. State*, 527 S.W.3d 348, 350–351 (Tex. App.—Houston [1st Dist.] 2017). An intermediate appellate court affirmed Howard's conviction and sentence of thirty-five years' imprisonment and, thereafter, overruled her motion for en banc rehearing. *Id*. at 350, 356. Howard filed a petition for discretionary review in the TCCA, but that court refused it on November 15, 2017. *See id*. This Court denied Howard's petition for writ of certiorari on October 1, 2018. *Howard v. Texas*, No. 17-9302.

Howard then sought state habeas relief, but the state habeas trial court entered proposed findings and legal conclusions recommending that habeas relief be denied. *See* Petr's App. 2–22. Regarding Howard's ineffective assistance claim involving the withdrawn guilty plea, the habeas court obtained an affidavit from the attorney who represented her at the time she rejected a plea to theft and found that affidavit credible. *See id*. at 3–5. The court first found that Howard could not raise her ineffective assistance claim concerning the withdrawn plea in a challenge to the subsequent murder conviction. *See id*. at 7–8. But the state habeas trial court went on to find that, even if she could, Howard failed to demonstrate ineffective

assistance of counsel and, rather, had representation sufficient to protect her constitutional rights. *See id*. at 8–10. Particularly, the state court implicitly found that she failed to show that she would have accepted the plea had she understood the parole consequences. *Id.*

The TCCA denied relief based on both the trial court's findings *and* its own independent review. *See id*. at 1. Howard now seeks a writ of certiorari.

SUMMARY OF THE ARGUMENT

Howard's issues are not worthy of grating certiorari. First, Howard cannot possibly show that the TCCA's rejection of her ineffective assistance claim concerning parole consequences was contrary to *Lafler*, because advice about a collateral consequence such as parole eligibility is not required under the Sixth Amendment. And moreover, any claim that counsel had a duty to advise about parole eligibility would require a new rule that would be barred by *Teague v. Lane*. So too, the state habeas court was justified in denying a live evidentiary hearing on her underlying claim because Howard did not even state a valid Sixth Amendment claim of ineffective assistance. Finally, even if the Court were to determine that the Sixth Amendment requires counsel to advise a defendant about parole eligibility with respect to a plea, there are powerful prudential reasons to nevertheless deny certiorari in this case. Compellingly, the record as it exists fails entirely to establish prejudice even in the face of allegedly inadequate advice from counsel regarding collateral consequences. Specifically, Howard failed to show that she would have accepted the plea had she understood the parole consequences.

ARGUMENT

I. The Court Should Deny Certiorari Because the TCCA's Decision Was Not Contrary to *Lafler*, given that the Sixth Amendment Does Not Require Counsel to Advise About a Plea's Parole Consequences.

Howard's claim fails from the outset because the Court has never held that under the Sixth Amendment, effective trial counsel must advise a defendant about collateral consequences like parole when discussing a guilty plea. To the contrary, it has specifically avoided answering that question. In the absence of such a requirement, lower courts have generally concluded that counsel has no duty to advise a defendant about collateral consequence like parole eligibility when advising on a plea.

Indeed, when this Court extended the application of *Strickland* to the plea process, it explicitly left open the question of whether advice concerning collateral consequences must satisfy the Sixth Amendment. *Chaidez*, 568 U.S. at 349. The Court's rulings since have not answered whether an attorney's advice about parole could possibly violate the right to effective assistance of counsel. *Id.* at 350.

In the absence of an opinion imposing an obligation on trial counsel to inform defendant of collateral consequence like parole eligibility, the lower courts "almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation." *Id.* Regarding parole eligibility

specifically, "no Supreme Court precedent establishes that parole ineligibility constitutes a direct, rather than a collateral, consequence of a guilty plea." *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008). The majority of circuits to consider the issue have held parole eligibility is a collateral consequence.[1] *Id.*

The Court has since held that the Sixth Amendment requires trial counsel to advise a defendant about a plea's deportation risk. *Padilla*, 559 U.S. at 374. The decision in *Padilla* breached "the previously chink-free wall between direct and collateral consequences." *Chaidez*, 568 U.S. at 352–53. But in reaching that decision, the Court "did not eschew the direct-collateral divide across the board." *Chaidez*, 568 U.S. at 355; *Padilla*, 559 U.S. at 365 ("Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation."). Rather, the *Padilla* decision was limited to the unique and special nature of deportation consequences. *Chaidez*, 568 U.S. at 352–53, 355. Contrary to Howard's assertion that *Padilla* "leads ineluctably to the conclusion that" counsel must advise a defendant about the parole consequences of a guilty plea, "*Padilla* is rife with indications that the Supreme Court meant to limit its scope to the context of deportation only." *United States v. Reeves*, 695 F.3d 637, 640 (7th Cir. 2012); Pet. Cert. at 16 n.8.

During the years since *Padilla*, lower state and federal courts, including Texas, have continued to hold

[1] Failing to advise a client about a collateral consequence is distinct from misstatements or material misrepresentations. *See Chaidez*, 568 U.S. at 356–57.

that trial counsel has no duty to advise a defendant about collateral consequences such as parole eligibility. *See, e.g., Ex parte Ward*, No. WR-92,193-01, 2021 WL 710485 (Tex. Crim. App. Feb. 24, 2021) (declining to find counsel was deficient for failing to advise a defendant about parole eligibility); *Harris v. State*, 2018 Ark. App. 94, 542 S.W.3d 895, 899 (2018) (same); *Harris v. Kelley*, No. 5:18-CV-00157, 2019 WL 440638, at *6 (E.D. Ark. Jan. 15, 2019) (magistrate judge noting that "[s]uch an error of omission, in failing to advise a client that he will not be eligible for parole if he enters a guilty plea, has never been held to constitute constitutionally ineffective assistance of counsel."); *Velarde v. Archuleta*, No. 14-CV-02356, 2015 WL 3827106, at *24 (D. Colo. June 19, 2015) ("Any failure to inform Applicant of consequences collateral to a plea, such as having to serve 75% of a sentence before being parole eligible, does not render the plea involuntary, does not implicate the Sixth Amendment, and, therefore, cannot be the grounds for a viable ineffective-assistance-of-counsel claim."); *Crews v. Estes*, No. 5:18-cv-01224, 2021 WL 3361693, at *6 (N.D. Ala. July 7, 2021) (magistrate judge recommending denial of relief because counsel was not ineffective for failing to advise the defendant about parole eligibility).

Thus, Howard's assertion that the TCCA's denial of relief is contrary to *Lafler* is illusory because it overlooks the antecedent issue of whether the Sixth Amendment requires defense counsel to advise a defendant about a plea's parole consequences. Given the state of law, Howard's claim does not state a valid ineffective assistance claim that is covered by the Sixth Amendment. Further, the state habeas court did not need to hold a live hearing on a claim that did not come

within the protection of the Sixth Amendment. Accordingly, the TCCA's decision to deny relief on the claim complied with the law and this Court should deny certiorari.

II. The Court Should Deny Certiorari Because Resolution of the Questions Presented in Howard's Favor Would Be Barred by The Antiretroactivity Principles in *Teague*.

A. *Teague*'s legal standard

Justice O'Connor's plurality opinion in *Teague* affirms that Howard cannot obtain relief on her claim of ineffective assistance because this would require a new rule. To begin, "[w]hen a decision of this Court results in a 'new rule,' that rule applies to all criminal cases *still pending on direct review*." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (emphasis added). However, when the Court announces a new rule, "a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding." *Chaidez*, 568 U.S. at 347.

For those convictions that are already final, a new rule can be given retroactive effect only if is substantive. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562 (2021). That is, in *Edwards*, the Court eliminated one of the two *Teague* exceptions when it held that new procedural rules do not apply retroactively on federal collateral review. The remaining antiretroactivity exception relates to "new substantive rules of constitutional law." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). A new rule is *substantive* if it forbids the imposition of a criminal punishment for

certain primary conduct, or if it prohibits a category of punishment for a class of defendants because of their status or offense. *Id*.

Finally, an opinion of this Court announces a new rule "'when it breaks new ground or imposes a new obligation' on the government." *Chaidez*, 568 U.S. at 347 (quoting *Teague*, 489 U.S. at 301). In other words, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. (quoting *Teague*, 489 U.S. at 301). A "holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Id*. (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527–528 (1997)).

B. *Teague*'s antiretroactivity limitation applies to Howard's petition because she seeks a new procedural rule after her conviction became final.

Howard's conviction is final. This Court denied her previous petition for writ of certiorari on direct appeal on October 1, 2018. *See* Petr's App. at 24. Moreover, regarding *Teague*'s remaining antiretroactivity exceptions, Howard's proposed rule is *procedural* (not substantive) because it relates to the protections afforded to a defendant during trial. *See Summerlin*, 542 U.S. at 353 ("[R]ules that regulate only the manner of determining the defendant's culpability are procedural."). Thus, the proposed rule does not meet the remaining *Teague* exception for substantive rules and would not be retroactive. *See Edwards*, 141 S. Ct. at 1562.

Finally, any requirement that counsel has a duty under the Sixth Amendment to advise a client about the collateral consequences of a plea, such as parole eligibility, is plainly "new." Under the law outlined above, such advice was not dictated by precedent existing at the time Howard's conviction became final. *See Chaidez*, 568 U.S. 347. Indeed, "[q]uite the opposite is true: [Howard's] . . . rule is flatly inconsistent with the prior governing precedent." *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007). If the Court were to conclude that trial counsel has a duty under the Sixth Amendment to advise a defendant about parole eligibility in relation to plea, it would break new ground and impose a new obligation by announcing a rule that was not dictated by precedent and not apparent to all reasonable jurists. Because the Court held *Padilla* itself was not retroactive, any similar rule requiring counsel to advise about parole consequences would also be barred by *Teague* and not retroactive. *See Chaidez*, 568 U.S. at 344.

Consequently, any new rule requiring trial counsel to advise a defendant about a plea's parole consequences would not benefit Howard and would be barred by *Teague*. So too, a live hearing on the issue would be useless and not benefit Howard. As such, the Court should deny certiorari.

III. Due Process Does Not Require a Live Evidentiary Hearing for State Collateral Review.

Even if Howard's underlying claim were valid under the Sixth Amendment, due process does not

require a live evidentiary hearing. As Justice O'Conner stated:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem [] that that Constitution requires the States to follow any particular federal role model in these proceedings.

Murray v. Girratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Id.* at 10.

When a state provides post-conviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1989). A state habeas applicant's "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Dist. Attorney's Off. For Third Jud. Dist. V. Osborne*, 557 U.S. 52, 69 (2009). "Federal courts may upset a State's postconviction procedures only if they are

fundamentally inadequate to vindicate the substantive rights provided." *Id*.

Here, during her state habeas proceedings, Howard obtained the core protection of due process—the opportunity to be heard. *See Ford v. Wainwright*, 477 U.S 399, 413 (1986) ("'The fundamental requisite of due process of law is the opportunity to be heard.'") (citation omitted); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (noting that "states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims" and that "'[d]ue process does not require a full trial on the merits; instead, petitioners are guaranteed only the 'opportunity to be heard.'") (footnotes and citations omitted).[2] Thus, Howard's claim concerning Texas habeas procedure lacks merit, and her petition for certiorari review should be denied.

IV. The Court Should Deny Certiorari Because There Are Serious Justiciability Concerns, Which Suggest Judicial Restraint.

Ultimately, Howard has not established that the TCCA's decision conflicted with *Lafler* or any of this

[2] Indeed, in the context of federal habeas review, "a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims." *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000); *Armstead v. Scott*, 37 F.3d 202, 208 (5th Cir. 1994) (finding that a hearing by affidavit was adequate to allow presumption of correctness to attach to the state court's factual findings); *see also Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005) (no due process violation where state habeas judge who issued findings of fact was not the same judge who presided over the petitioner's state habeas hearing).

Court's precedent. Nor has she identified any meaningful or mature circuit split or disagreement among the lower courts regarding the duty of counsel to advise about parole eligibility.

Even if Howard could overcome the lack of a legal basis for her claim that trial counsel was deficient for failing to advise as to the parole implications of her guilty plea—and survive the resulting *Teague* bar—to ultimately prevail, she would still have to overcome the existence of at least one other entirely reasonable basis for the TCCA's denial of relief on this claim. That is, Howard would have to show that TCCA could not possibly have instead reasonably concluded that, counsel's alleged failure to adequately advise as to collateral consequences aside, Howard failed to prove prejudice given the record evidence of her efforts to avoid prison time. In other words, Howard failed to show that she would have accepted the plea had understood parole consequences. Indeed, Howard previously turned down a plea offer of 18 months on a theft conviction to instead plead open to the court in hopes of receiving probation. Pet. Cert. at 5. Further still, Howard withdrew her guilty plea to theft when faced with ten years' prison time decided to go to trial on a *murder* charge in an effort to avoid prison time through a not guilty verdict. *See* Petr's App. 4–5, 7–10; Pet. Cert. at i, 2, 5–6; *Lafler*, 566 U.S. at 163 ("In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice."). Although Howard averred on state habeas review that advice on the difference in parole eligibility would have caused her to go move forward with her ten-year guilty plea, the TCCA was not required to find Howard's post-hoc assertion

credible, particularly given the compelling record evidence of Howard's aversion to *any* prison time and the speculative nature of obtaining parole. *See Merzbacher v. Shearin*, 706 F.3d 356, 366–67 (4th Cir. 2013) ("Accordingly, only if Merzbacher's testimony that he would have accepted the plea was deemed credible could *Frye* and *Lafler* assist him."). After all, state and federal courts recognize that an individual's self-serving assertions that they would have accepted a plea should be subject to heavy skepticism because defendants will always want a chance of acquittal at trial and the chance to plead guilty if later convicted. *Id.* at 367.

Moreover, resolving this issue in Howard's favor and against the TCCA's determination would require making factual determinations not entirely clear on this record. The Court normally does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *accord* Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings"). This general limitation finds application here because the state habeas court's credibility and factual determinations were necessarily premised upon a detailed analysis of the record, conducted pursuant to the parochial manner in which the TCCA resolves such claims in state postconviction review.

As a result, this appeal of the TCCA's state habeas denial is a poor vehicle to analyze the Questions Presented. Indeed, Howard's suggested misapplication of *Lafler* is illusory. Finding that trial counsel was required to advise Howard as to the collateral parole consequences of her plea would require first adopting

a new rule from which *Teague* prevents her from benefitting. Further still, even if the Sixth Amendment did require trial counsel to provide such advice, the record in this case belies a finding that this would *necessarily* have caused Howard to plead guilty—and, in turn, precludes finding that the TCCA's decision necessarily rested on such a determination. At the very least, as Howard implicitly acknowledges in challenging the state court's failure to conduct an evidentiary hearing, prejudice is not established on this record.

Moreover, Rule 10 provides that certiorari review is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. *See* Sup. Ct. R. 10. Certiorari review of state habeas decisions is generally inappropriate where a claim is ripe for federal habeas review. The Court should decline Howard's invitation to do so here:

> [T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1995) (Stevens, J., concurring in denial of a stay).

Furthermore, if the Court were to grant certiorari here, it would effectively allow Howard to bypass the limitations period for federal collateral review, 28

U.S.C. § 2244(d), designed to give finality to state convictions. She could challenge her final conviction with what would otherwise be an untimely claim. Indeed, because this Court denied certiorari on direct appeal on October 1, 2018, any challenge to her conviction was due one year later, on October 1, 2019. 28 U.S.C. § 2244(d); *See* Petr's App. 24. Howard did not file her state habeas application containing her claim until June 5, 2020, so any federal habeas petition challenging her conviction would be untimely. *See* Petr's App. 2; Pet. Cert. at 24 n. 13.

For all these reasons, prudence calls for the Court to deny certiorari. *See* Sup. Ct. R. 10.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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