No. 21-225

In The
Supreme Court of the United States

ASHLEY MERE HOWARD,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent's Brief in Opposition (BIO) makes four primary arguments opposing certiorari. First, respondent contends that the decision of the Texas Court of Criminal Appeals (TCCA) was not contrary to any decision of this Court interpreting the Sixth Amendment right to counsel while acknowledging that this Court has noted, without deciding, two related Sixth Amendment issues directly relevant to petitioner's case. BIO at 5-8. Second, respondent contends that, because this Court has not resolved the relevant Sixth Amendment issues, petitioner's Sixth Amendment claim is barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). BIO at 8-10. Third, respondent contends that petitioner is not entitled to a live evidentiary hearing to resolve genuine disputes of material fact concerning her Sixth Amendment claim. BIO at 10-12. And, finally, respondent contends that petitioner's case does not present a good vehicle for the Court to address these important, unresolved Sixth Amendment issues. BIO at 12-16.

As discussed below, respondent's arguments demonstrate why petitioner's case is worthy of the Court's review.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DECIDE (1) WHETHER THERE IS A DISTINCTION BETWEEN "DIRECT" AND "COLLATERAL" CONSEQUENCES OF A GUILTY PLEA IN THE CONTEXT OF THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL; (2) WHETHER PAROLE ELIGIBILITY IS A DIRECT OR COLLATERAL CONSEQUENCE; AND (3) WHETHER, IF PAROLE ELIGIBILITY IS A COLLATERAL CONSEQUENCE, DEFENSE COUNSEL HAS A DUTY TO ADVISE THE DEFENDANT ABOUT IT.

Petitioner's primary complaint is that her original counsel, David Rushing, failed to advise her about the significant difference in parole eligibility between prison sentences for a theft conviction and a murder conviction. Respondent contends that parole eligibility is a "collateral" – as opposed to a "direct" – consequence of a guilty plea and, for that reason, Rushing had no obligation to inform petitioner about parole eligibility. BIO at 5.

Respondent acknowledges that the Court "explicitly left open the question of whether advice concerning collateral consequences must satisfy the Sixth Amendment" in *Chaidez v. United States*, 568 U.S. 342, 349 (2013). BIO at 5. In addition, the Court previously addressed this issue, without deciding it, in *Padilla v. Kentucky*, 559 U.S. 356 (2010):

> We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonably professional assistance" required under *Strickland* [*v. Washington*, 466 U.S. 668, 689 (1984)]. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

Id. at 365.

Previously, in *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court assumed, without deciding, that the *Strickland* standard, which requires the defendant to prove deficient performance and prejudice, governs the determination of whether counsel performed deficiently by failing to advise the defendant about parole eligibility before a guilty plea. *Id.* at 60. The Eighth Circuit had held that parole eligibility is a "collateral" rather than "direct" consequence of a guilty plea and, for that reason, counsel was not deficient in failing to advise Hill about it. *Id*. at 55. This Court assumed that parole eligibility is a "direct" consequence but denied relief because Hill did not prove prejudice. *Id.* at 60.

Respondent also acknowledges that appellate courts around the country are divided on whether parole eligibility is a "direct" or "collateral" consequence but have "generally concluded that counsel has no duty

to advise a defendant about collateral consequence like parole eligibility when advising on a plea." BIO at 5.[1]

Petitioner contends that a defendant's parole eligibility, whether it is deemed a "direct" or "collateral" consequence, is as significant as a noncitizen's deportability upon conviction – which, under *Padilla*, counsel must discuss before the defendant pleads guilty. Pet. at 14, 16 & n.8. Respondent counters that *Padilla* is limited to counsel's failure to advise the defendant about the deportation consequences of a guilty plea. BIO at 6. Respondent cites lower state and federal court cases, including some decided after *Padilla*, holding that counsel has no duty to advise the defendant about parole eligibility. BIO at 6-7. Yet courts around the country are divided on this issue. *See Kennedy v. Kohnle*, 810 S.E.2d 543, 548 n.4 (Ga. 2018) (citing cases).[2]

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[1] The TCCA has held that parole eligibility is a "direct" consequence because it is "a definite and largely automatic result of a guilty plea." *Ex parte Moussazadeh*, 361 S.W.3d 684, 690-91 (Tex. Crim. App. 2012); *see also Alexander v. State*, 772 S.E.2d 655, 659 (Ga. 2015) (when a defendant seeks to withdraw a guilty plea based on counsel's failure to provide accurate advice about parole eligibility, an ineffectiveness claim must be evaluated under *Strickland*).

[2] Respondent also asserts that, even if the Sixth Amendment requires that counsel not provide *erroneous* advice about parole eligibility, counsel's complete failure to advise a defendant about parole eligibility "is distinct from misstatements or material misrepresentations." BIO at 6, n.1. The Court rejected this distinction in *Padilla*, 559 U.S. at 369-71 (holding that there is no relevant difference "between an act of commission and an act of omission" and that a "holding limited to affirmative misadvice . . . would give counsel an incentive to remain silent on matters of great importance" and "would deny a class of clients least able to

Padilla held that counsel performed deficiently by failing to advise the defendant that his guilty plea made him subject to automatic deportation. The Court's holding was based, in part, on the fact that the relevant immigration statute was "succinct, clear, and explicit in defining the removal consequence" and, when the deportation consequence is so clear, "the duty to give correct advice is equally clear." *Padilla*, 559 U.S. at 368-69. Similarly, the TCCA has held that the Texas parole eligibility statute governing the offense of murder is "succinct and clear with respect to the consequences of a guilty plea." *Moussazadeh*, 361 S.W.3d at 691. In granting habeas corpus relief to Moussazadeh because counsel provided deficient advice about parole eligibility, the TCCA concluded, "Applicant's counsel could have easily determined the applicable parole-eligibility requirements simply by reading the text of the statute. Instead, applicant's counsel failed to inform him of changes in the parole-eligibility statutes that essentially doubled the length of time he must serve before becoming eligible for parole." *Id*. Petitioner's decision to withdraw her guilty plea to theft to risk going to trial on a murder charge suffered from precisely the same flaw, as Rushing failed to advise her about the parole consequences of that decision.

Petitioner's case presents this Court with an excellent vehicle to address the important, related Sixth Amendment questions reserved in *Hill, Padilla*, and *Chaidez*. These questions affect countless guilty pleas

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represent themselves the most rudimentary advice on deportation even when it is readily available.").

occurring daily in the United States. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Thus, the questions are worthy of the Court's review as subsidiary issues encompassed within the first question presented in the petition. Pet. at i.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE NONJURISDICTIONAL BAR ESTABLISHED BY *TEAGUE V. LANE* APPLIES TO AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT A STATE PRISONER COULD NOT HAVE RAISED ON DIRECT APPEAL AND, THUS, NECESSARILY HAD TO RAISE FOR THE FIRST TIME IN A STATE HABEAS CORPUS PROCEEDING.

Respondent acknowledges that petitioner's case raises important, unresolved Sixth Amendment issues but asserts that the Court should deny certiorari because a decision in her favor would be barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). BIO at 8-10. Respondent contends that, because the Court held in *Chaidez* that *Padilla* is not retroactive, a Sixth Amendment rule requiring counsel to advise the defendant about parole eligibility

likewise would be "new" and, thus, barred by *Teague*. BIO at 10.[3]

Superficially, *Teague* appears to create a conundrum concerning the Sixth Amendment issues raised in petitioner's case. On the one hand, an ineffective assistance of counsel claim ordinarily cannot be raised on direct appeal because the record has not been adequately developed in the trial court. *Massaro v. United States*, 538 U.S. 500, 508 (2003). Thus, petitioner could not have raised her Sixth Amendment claim in a certiorari petition filed on direct appeal (thus avoiding a *Teague* bar). On the other hand, *Teague* (and the restrictive standard of review of the Antiterrorism and Effective Death Penalty Act (AEDPA)) would bar relief on federal habeas corpus review because this Court's precedent does not clearly establish that parole eligibility is a "direct," rather than "collateral," consequence of a guilty plea. *See Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008).

The resolution of this conundrum follows from a recognition of the difference between this Court's review of a **state** habeas proceeding and a **federal** habeas proceeding. Because a state habeas proceeding is a prisoner's first opportunity to raise an ineffectiveness claim, *Teague* should not bar consideration of the merits. *State v. Lagundoye*, 674 N.W.2d 526, 533 (Wisc. 2004) ("[T]his court can create a new rule of criminal

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[3] The State did not invoke the *Teague* bar in the lower courts, which decided the merits of petitioner's Sixth Amendment ineffectiveness claim without mentioning *Teague*.

procedure on habeas corpus review and apply the new rule to the case before it . . . if that case could have come to this court only on collateral review."); *see also Jackson v. Johnson*, 217 F.3d 360, 364 (5th Cir. 2000) (refusing to apply *Teague* to bar a claim that could not have been raised on direct appeal). *Cf. Martinez v. Ryan*, 566 U.S. 1 (2012) (state habeas court's procedural default ruling did not foreclose federal habeas corpus review of a state prisoner's ineffectiveness claim that could not have been raised on direct appeal, as the state habeas proceeding was the first opportunity to raise the claim); *Trevino v. Thaler*, 569 U.S. 413, 425-26 (2013) ("[W]ere *Martinez* not to apply, the Texas procedural system would create significant unfairness. That is because Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review[.]").

Moreover, applying *Teague* to an ineffectiveness claim that must be raised for the first time in a state habeas proceeding would effectively freeze the development of case law interpreting the Sixth Amendment as it pertains to the issue of ineffective assistance of counsel. *See* Rebecca Sharpless & Andrew Stanton, *Teague New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of Padilla, Chaidez, and Martinez*, 67 U. MIA. L. REV. 795, 819-20 (2013).

For these reasons, the Court should reject respondent's invitation to apply *Teague* to an ineffective assistance of counsel claim that, under state law, must

be raised for the first time in a habeas corpus proceeding.

III. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A STATE HABEAS PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING TO RESOLVE DISPUTED FACTS.

Respondent asserts that petitioner was not entitled to an evidentiary hearing because she had the opportunity to be heard in the courts below, albeit only "on paper." BIO at 10-12. Respondent errs. The state habeas trial court adopted the State's proposed findings of fact and conclusions of law verbatim without hearing any testimony. This so-called "paper hearing" was grossly inadequate to resolve petitioner's claims – especially when the judge did not preside over the original proceedings and did not observe petitioner or Rushing in court. *Cf. Perillo v. Johnson*, 79 F.3d 441, 447 (5th Cir. 1996) (refusing to afford a presumption of correctness to findings of fact made by state habeas trial court after a "paper hearing" when the state habeas judge did not preside over the trial). Furthermore, as petitioner noted in her petition, this Court's well-established precedent requires an evidentiary hearing in a state post-conviction proceeding when there is a genuine dispute about material facts relevant to a substantial federal constitutional claim. Pet. at 25-26.

Therefore, petitioner is entitled to a live evidentiary hearing on her Sixth Amendment claim. The

Court, at the very least, should grant certiorari and remand for such a hearing.

IV. JUSTICIABILITY CONCERNS DO NOT WARRANT DENYING CERTIORARI.

Respondent asserts that the TCCA could have concluded that petitioner failed to prove *Strickland* prejudice "given the record evidence of her efforts to avoid prison time." BIO at 13. Specifically, respondent contends that petitioner failed to prove a reasonable probability that, if Rushing had informed her of the difference in parole eligibility between a theft conviction and a murder conviction, she would have accepted a ten-year sentence for felony theft, as she previously had rejected a plea bargain offer of 18 months for state jail felony theft. *Id*. However, respondent ignores the dramatic difference in parole eligibility between these distinct theft offenses.

Petitioner rejected an offer of 18 months for "state jail felony" theft. A person convicted of a state jail felony in Texas is not eligible for parole **and must serve the sentence day-for-day**.[4] However, a person convicted of third-degree felony theft is eligible for parole after serving one-fourth of the sentence under Section 508.145(f) of the Government Code and can receive

[4] The law in effect at the time of petitioner's offense provided that a defendant confined in a state jail felony facility does not earn good conduct time for time served in the facility. TEX. CRIM. PROC. CODE. art. 42.12, § 15(h)(1) (West 2014). That statute was repealed in 2015, and this provision was moved to article 42A.559(b) of the Code of Criminal Procedure.

two days of good conduct time credit for each day served under Section 498.003. Petitioner had virtually no jail-time credit when she rejected the 18-month offer. Conversely, she had 15 months of jail-time credit when she moved to withdraw her guilty plea and rejected the ten-year sentence. She made this decision in the absence of advice from Rushing that she would be eligible for parole in just five months if she accepted the ten-year sentence. *See* Pet. at 4-5, 19.

Respondent also asserts that the TCCA (and, presumably, the state habeas trial court) did not have to believe petitioner's declaration that, if Rushing had informed her of the significant difference in parole eligibility between a theft conviction and a murder conviction, she would have accepted the ten-year sentence for theft. BIO at 13-14. Respondent erroneously asserts that petitioner, by challenging the state court's failure to conduct an evidentiary hearing, "implicitly acknowledges" that prejudice was not established on this record. BIO at 15. Petitioner made no such concession. Rather, she contended that an evidentiary hearing was required because Rushing failed to address in his affidavit whether he advised petitioner of the parole consequences of withdrawing her guilty plea to theft and risk being prosecuted for murder. Neither the state habeas trial court nor the TCCA addressed prejudice. Pet. at App. 7-10.

The TCCA has expressly relied on a habeas applicant's declaration at a "paper hearing" in holding that he demonstrated that he was prejudiced by counsel's inadequate advice about parole eligibility. *See Ex parte*

Moussazadeh, 361 S.W.3d 684, 692 (Tex. Crim. App. 2012) ("Based on applicant's affidavit . . . , we also conclude that applicant would not have pled guilty if he had known the actual time he would have to serve, and thus prejudice is shown.").[5] There would be no principled basis for the TCCA to believe Moussazadeh's declaration and disbelieve petitioner's.

Respondent also cites Justice Stevens' opinion concurring in the denial of a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990), for the proposition that certiorari review of a state habeas decision "is generally inappropriate where a claim is ripe for federal habeas review." Respondent ignores that Justice Stevens' statement was made before the AEDPA was enacted in 1996 to limit a federal habeas court's ability to grant relief from a state conviction. For this reason, the Court has shown a greater willingness during the past decade to grant review to decide federal constitutional issues raised in state post-conviction proceedings. See Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 163-64 (2021) ("Although the Supreme Court originally hewed to its presumption against conducting direct collateral review, granting cases in only the rarest of circumstances, by the 2015 Term, the Court silently reversed course and exhibited the exact opposite preference: a propensity for

[5] Moussazadeh's affidavit provided that, if the judge, prosecutor, or defense counsel "told me that a murder conviction would require me to serve aggravated time of one-half of my sentence, up to a maximum of 30 years, even without a deadly weapon finding, I would not have accepted the plea bargain." *Moussazadeh*, 361 S.W.3d at 692, n.5.

granting cases from state collateral review as against federal habeas review.") (discussing several of this Court's recent cases). In addition, as discussed above, *Teague* and the AEDPA would bar relief on petitioner's ineffectiveness claim on federal habeas review but would not bar relief on *de novo* state habeas review.

Finally, respondent asserts that, if the Court were to grant certiorari, it would effectively allow petitioner "to bypass the limitations period for federal collateral review," as she filed her state habeas application after the deadline had expired to file a federal habeas corpus petition. BIO at 15-16. Respondent fails to cite any authority holding that a state prisoner must file a state habeas application within the federal AEDPA deadline in order to obtain certiorari review from this Court following the denial of state habeas relief. Respondent's invitation to the Court to create out of whole cloth this barrier to certiorari review should be soundly rejected.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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