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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-820, Roselva Chaidez v. United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

In the more than 20 years since this Court decided Teague v. Lane, it's had more than a dozen cases in which people have sought habeas relief based on ineffective assistance of counsel, but this Court has never once held that applying Strickland in those divergent actual settings constituted a new rule.

For two reasons, this Court should reject the government's argument to do so for the first time here.

First, Padilla was dictated by precedent; that is, like other Strickland cases that came before it, this Court in Padilla simply applied Strickland's formula of assessing attorney performance according to prevailing professional norms to a new set of facts.

The second --

1 CHIEF JUSTICE ROBERTS: It's a surprise to
2 the, what, ten courts of appeals who came out the other
3 way?

4 MR. FISHER: No, I don't think so,
5 Your Honor. Two -- two things about the lower courts.

6 The first is, there are only three lower
7 court decisions that postdate the 1996 act that the
8 government can cite that came out the other way in terms
9 of the question presented here.

10 And the second thing is, even within those
11 cases and within those courts, they didn't distinguish
12 between deportation advice and other kinds of advice.
13 They distinguished between acts and omissions; that is
14 to say, it was a uniform rule in the lower courts at the
15 time this Court decided Padilla that misadvice
16 concerning the right to -- I'm sorry, concerning
17 deportation consequences of a plea did violate
18 Strickland.

19 So the distinction in lower courts was not
20 between deportation advice and other kinds of advice;
21 the distinction was between acts and omissions.

22 And in Padilla itself --

23 CHIEF JUSTICE ROBERTS: So maybe it
24 was -- maybe it was a surprise to the members of this
25 Court that disagreed with that --

1 MR. FISHER: No --

2 CHIEF JUSTICE ROBERTS: -- with the ruling
3 in Padilla.

4 MR. FISHER: Well, obviously, there was a
5 dissent in Padilla, but this Court has held before that
6 new applications of Strickland did not constitute a new
7 rule, even though there were dissents.

8 JUSTICE GINSBURG: Mr. Fisher --

9 MR. FISHER: In Williams --

10 JUSTICE GINSBURG: -- what -- what about the
11 argument that Strickland doesn't come into play unless
12 the Sixth Amendment includes the collateral consequences
13 in counsel's obligation to defend a defendant in a
14 criminal case under the argument that up to -- up to
15 Padilla, only advice relevant to guilt or innocence and
16 sentencing was required, not collateral consequences?

17 MR. FISHER: Well, that was obviously the
18 argument that the State of Kentucky made in that case,
19 and this Court dealt with it in part two of Padilla.

20 Now, remember, Justice Ginsburg, the Court
21 did not extend Strickland to collateral consequences in
22 Padilla. It actually reserved that question. What it
23 held is that deportation consequences are not removed
24 from the ambit of the Sixth Amendment.

25 So, remember, Strickland --

1 JUSTICE GINSBURG: So it's also a question
2 if -- if conviction meant loss of a professional
3 license, that would be an open question?

4 MR. FISHER: I think -- I think that's an
5 open question after Padilla.

6 What this Court held in Padilla -- and this
7 is the second to last sentence in part two -- is that
8 advice concerning deportation consequences of a guilty
9 plea are not categorically removed from the Sixth
10 Amendment.

11 So what I understood the Court to do in
12 Padilla was take the ordinary Strickland formula of
13 prevailing professional norms and simply apply it to
14 this criminal case. Remember, Padilla itself was a
15 criminal case.

16 JUSTICE SCALIA: Well, it's always the case.
17 I mean, we -- we never come out with a decision that
18 doesn't rely upon some preexisting principle. We always
19 cite some preexisting principle. Does that mean that
20 every case of ours is -- is not new law?

21 MR. FISHER: Of course not. The question
22 this Court asked under Teague is whether it broke new
23 ground. And I think what this Court said in Padilla is,
24 we reject the artificial restriction on Strickland that
25 the lower courts have created; so, therefore, this Court

1 simply reaffirmed Strickland. It didn't --

2 JUSTICE KAGAN: Well, Mr. Fisher, think
3 about this in an AEDPA context. I mean, assume that you
4 have these ten circuit courts all going in the way that
5 the Chief Justice said, and then one court came along
6 and said, you know, we think that they -- in an AEDPA
7 context, a habeas consideration of a state conviction --
8 we think that this is all wrong, and, in fact, the law
9 is exactly the opposite of what ten circuits have held.

10 Wouldn't we think that that's a very easy
11 case that the AEDPA standard had not been met?

12 MR. FISHER: I think you -- you may well
13 find that, Justice Kagan, but the reason why is because
14 you'd find that there was not an unreasonable
15 application of preexisting law. What you would not say
16 is that the clearly established law is any different.

17 So, remember, this Court -- this case,
18 because it's a Federal case, raises only the first
19 question under AEDPA, in a sense, which is what's the
20 clearly established law? And this is the Chief -- I
21 think this is responsive to the Chief Justice's question
22 about the dissent.

23 There was a disagreement on this Court about
24 how to apply Strickland, but the question's whether a
25 new legal rule was created, not whether there was an

1 unreasonable application --

2 JUSTICE SCALIA: Why pick on Strickland? I
3 mean, you could say that about any principle of law that
4 we rely on: The dissent thought that that principle
5 applied a different way here.

6 What is different about Strickland that it
7 enables you to appeal to that, as opposed to appealing
8 to any principle of law?

9 MR. FISHER: Well, I think the best response
10 is what this Court said in Williams, which is Strickland
11 provides sufficient guidance to resolve virtually every
12 ineffective assistance claim.

13 So what this Court said in Williams is we do
14 not make new law when we apply Strickland.

15 I think Justice Kennedy --

16 JUSTICE GINSBURG: Is there
17 any -- Mr. Fisher, is there any application, application
18 of Strickland, that would qualify as a new rule, any
19 application at all, or is just Strickland never a new
20 rule?

21 MR. FISHER: I think so long as you simply
22 applied Strickland, you wouldn't create a new rule.

23 If you for example, said, a certain kind of
24 claim does not need to have a prejudice showing, that
25 would be a new rule.

1 JUSTICE KENNEDY: Well, suppose that a
2 really skilled attorney, after negotiating a plea
3 bargain, or even representing a client at trial but then
4 losing, is very skilled in ensuring that the defendant
5 can go into the general population, not into solitary
6 confinement; but also a skilled trial attorney, he's
7 just not very good at that, so the defendant goes to
8 solitary.

9 Could -- if there was an evolution of the
10 law of adequate assistance of counsel so that this Court
11 later held, oh, conditions of confinement have to be a
12 part of the attorney's -- skill and competence in
13 representation, that that would be retroactive?

14 MR. FISHER: Justice Kennedy, it wouldn't be
15 enough to have a later evolution of prevailing norms
16 because Strickland is a backward-looking device.

17 JUSTICE KENNEDY: So that there are then, in
18 answer to Justice Ginsburg's question, some cases in
19 which there could be a new rule of ineffective
20 assistance of counsel under Strickland?

21 MR. FISHER: Well, I think the answer to
22 that question is yes, and, as I said, something like a
23 scenario where this Court --

24 JUSTICE KENNEDY: Well, I don't understand
25 how that works with my hypothetical.

1 MR. FISHER: Well, let me -- let me try to
2 work with your hypothetical. I think what I hear your
3 hypothetical to say is that prevailing norms change, and
4 they evolve to a certain point where certain kinds of
5 advice is required, which is much what this Court said
6 in Padilla about -- about deportation advice.

7 You would have -- you would not have a new
8 rule to simply recognize that at the time that attorney
9 gave advice, that -- that Strickland was violated.

10 It would be a new rule, I think,
11 Justice Kennedy, to say that Strickland requires relief,
12 even though at the time the advice was given the
13 prevailing norm had not yet crystalized into the degree
14 that this Court requires.

15 JUSTICE SCALIA: The only new law is not a
16 new pronouncement which nobody had ever thought of
17 before, but only a pronouncement that rests upon an
18 evolution of mores; is that it?

19 MR. FISHER: No, I think what I'm trying to
20 say is --

21 JUSTICE SCALIA: That's what I thought you
22 said.

23 MR. FISHER: -- Strickland -- Strickland
24 sets up a two-part test, and we're only talking about
25 the first part, which is attorney performance. And

1 that -- that question is keyed to attorney performance
2 at the time judged by reasonableness according to
3 prevailing professional norms.

4 Now, those prevailing professional norms
5 are, in a sense, a factual question, an empirical
6 question that --

7 JUSTICE KAGAN: Mr. Fisher, it would seem to
8 me that this case presents a kind of threshold question.
9 Before you get to the question of what are prevailing
10 professional norms and whether they have been complied
11 with, there is the question of whether the Sixth
12 Amendment applies to collateral consequences at all and,
13 if so, which collateral consequences.

14 And that is the question on which Padilla
15 opines, and that's the question that seems, you know,
16 very different from anything that Strickland discussed,
17 not just an application of Strickland.

18 MR. FISHER: Well, let me give you two
19 answers to that, because I think that's the government's
20 main argument here.

21 First is, as I've tried to say before,
22 simply saying that an exception that the lower courts
23 created doesn't exist -- doesn't create a new rule.
24 Imagine this Court said -- laid down a rule that covered
25 all cars, and the lower courts devised an exception to

1 that rule for convertibles. And when the Court -- when
2 the issue came to this Court, this Court said, well, no,
3 when we said all cars, we meant all cars.

4 To me, that doesn't create a new rule. And
5 I think that's what this Court said in part two of
6 Padilla, is that this artificial restriction that the
7 lower courts have devised simply can't be grounded in
8 Strickland --

9 JUSTICE BREYER: How many had?

10 MR. FISHER: Pardon me?

11 JUSTICE BREYER: How many had? I mean, I
12 would have thought it was common sense that a lawyer
13 should tell the client the terrible things that are
14 going to happen to him if he pleads guilty, those things
15 that the lawyer knows or should know about and the
16 client may not. All right. That's a very general rule
17 at that level.

18 But some courts have said, no, that isn't
19 true. That isn't true unless -- if it's -- as Justice
20 Kagan said, if it's a collateral exception, if it's a
21 collateral consequence. How many had? Was it only
22 Kentucky, or was it fairly widespread, this exception?

23 MR. FISHER: Only three Federal circuits
24 have had a ruling like that after the 1996 act --

25 JUSTICE BREYER: Well, there aren't that

1 many. There are eleven, and two of them are
2 specialized.

3 MR. FISHER: Well, if I can finish my
4 answer, only three had rulings like that after the 1996
5 act, and all three of those relied on pre-'96 act
6 rulings. And as court of appeals judges said, that's
7 just not quite enough for us to be entitled to overturn
8 our prior circuit precedent.

9 But while the government comes here today
10 and suggests that ten circuits and all these state
11 courts had ruled, in a sense, in its favor, you know,
12 it's almost more accurate to say none had had this issue
13 cleanly presented to them after the 1996 act.

14 And, Justice Kagan, if I --

15 JUSTICE KAGAN: Well, but even before the
16 1996 act, deportation -- there were deportation
17 consequences. Those consequences were enhanced by the
18 1996 act; but, even before that, a reasonable lawyer,
19 you might think, would have a conversation with his
20 client about the deportation consequences of a
21 conviction.

22 MR. FISHER: That may well be true, Justice
23 Kagan, but I'm saying in the '96 act, as this Court said
24 in Padilla, whatever prevail -- whatever doubt there may
25 have been about prevailing professional norms

1 crystallized at that time because of the severity.

2 And I think that's the second answer I
3 wanted to give to your question about this so-called
4 threshold question in Padilla, is that even if there is
5 some question as to whether the Sixth Amendment applies
6 beyond, as the government puts it, criminal jeopardy,
7 this Court had answered that question in St. Cyr, where
8 this Court said, in the text around footnotes 48 and 50,
9 that any competent lawyer would give his client advice
10 and a warning about deportation consequences of a plea.

11 So even if you needed more than Strickland
12 itself, St. Cyr gave that to you in 2001, which is
13 enough to decide this case; it was enough to decide
14 Padilla.

15 JUSTICE ALITO: If a court -- if this Court
16 were to decide in a future case that effective
17 assistance of counsel requires an attorney to advise the
18 client of all collateral consequences, potential loss of
19 a professional license, etc., would that be a rule that
20 was dictated by precedent?

21 MR. FISHER: I think it would -- I doubt it,
22 Justice Alito. I think it would depend on what the
23 prevailing professional norms looked like.

24 I take it what this Court said in Strickland
25 and what it reaffirmed in Padilla is, we're not going

1 to -- we're not going to micromanage effective
2 assistance of counsel. We're going to leave it to
3 prevailing professional norms.

4 I seriously doubt that prevailing
5 professional norms would require the holding that you
6 described; but, to the extent they did, I don't think it
7 wouldn't be a new rule. To the extent they didn't and
8 this Court said, we're going to push the Sixth Amendment
9 beyond that, you would have a new rule.

10 JUSTICE SCALIA: Mr. Fisher, I suppose you
11 are right, I'm sure you're right that the mere fact that
12 there was a dissent in the case that adopted the rule
13 does not necessarily make it a new rule. But you, on
14 the other hand, would agree, would you not, that those
15 who dissented from that case would regard it as a new
16 rule?

17 MR. FISHER: That's a tricky question to
18 answer, Justice Scalia.

19 JUSTICE SCALIA: Well, I think it's an easy
20 question to answer.

21 MR. FISHER: Well, I think I could answer it
22 one of two ways. One is I could say yes, they did -- to
23 the extent they did regard it as a new rule, I think the
24 dissent was, with all due respect, slightly mistaken
25 about what the holding in Padilla was, which was not

1 to --

2 JUSTICE SCALIA: That's fair. That's fair.
3 The dissenters ought to reconsider, you're saying.

4 MR. FISHER: Well, I think that the way the
5 dissent put it was -- is that advice is now required
6 beyond criminal cases and criminal jeopardy.

7 The way that I think Padilla -- the majority
8 described its holding was that this is a criminal
9 defendant in a criminal case entitled to advice from his
10 criminal lawyer, and the most important piece of advice
11 as to whether to take a plea or not involves deportation
12 consequences.

13 And, Justice Scalia, I think --

14 JUSTICE KENNEDY: Well, it just seems to me
15 that the predicate question we decided in Padilla was
16 that Strickland applies to matters not within the
17 control of the trial judge. That it seems to me was a
18 holding the Court had not addressed before and that
19 other courts had not addressed before.

20 MR. FISHER: Well, it had to be more than
21 that, Justice Kennedy, because, of course, there is lots
22 of --

23 JUSTICE KENNEDY: No, this is --

24 MR. FISHER: -- ineffective assistance
25 cases --

1 JUSTICE KENNEDY: -- a predicate question.

2 MR. FISHER: Well, no, no. But I'm saying
3 there are lots of ineffective assistance cases before
4 Padilla that involved matters beyond the judge, that
5 turned on what the jury did, of course. And I could --
6 I may be able to think of others beyond those two
7 scenarios, but there's no language to that effect in
8 Padilla.

9 What the Court said is that we have never
10 created artificial distinctions about what an attorney
11 has to do. As this Court put it in Strickland,
12 Strickland itself, the client is advised of his lawyer's
13 advice about all important decisions. And as this Court
14 said in St. Cyr and other cases, the most important
15 consideration as to whether to plead guilty is whether
16 somebody will be deported.

17 And so you put that together and you had all
18 of the law you needed, certainly by 2001.

19 CHIEF JUSTICE ROBERTS: I think you've
20 been -- you've been asked this, and I'm not sure I got
21 your answer. Give me an example of something that --
22 like the consequences in Padilla that would not be
23 covered by your argument?

24 MR. FISHER: Well, some sort of consequences
25 that -- that prevailing norms didn't require a lawyer to

1 advise his client on.

2 So, for example, I would expect that a
3 lawyer is not necessarily required to give detailed
4 advice about future employment opportunities to a client
5 depending on whether he pleads guilty.

6 JUSTICE GINSBURG: You answered that
7 question when I asked it, you said that removal of a
8 professional license would not fall under -- wouldn't --
9 would be at least an open question.

10 MR. FISHER: It -- I think it would be an
11 open question as to how Strickland would apply.

12 CHIEF JUSTICE ROBERTS: If you had --

13 MR. FISHER: I simply don't know what the
14 prevailing professional norms are in that situation.

15 CHIEF JUSTICE ROBERTS: If you had that
16 case, what would you rely on in arguing in favor of the
17 habeas petition?

18 MR. FISHER: Well, I would start with --

19 CHIEF JUSTICE ROBERTS: You would start with
20 Strickland, and you would talk with -- Padilla, right?

21 MR. FISHER: Yes, that's what I would do.
22 And I would look to prevailing professional norms.

23 And I think, if I could give a generic
24 answer, the question would be whether or not that kind
25 of advice is so important to the client's decision

1 making -- and that's the word the Court used in
2 Strickland -- that prevailing norms require the lawyer
3 to give that kind of advice.

4 If the answer to that was yes --

5 JUSTICE KENNEDY: Do you want us to write
6 this opinion in support of your position, and to begin
7 by saying, prevailing professional norms do not change?

8 MR. FISHER: No, no, Justice Kennedy.

9 JUSTICE KENNEDY: It seems to me that
10 you're -- that the defense bar generally would want to
11 say that prevailing professional norms change, but
12 that -- that hurts you in this case.

13 MR. FISHER: No, I don't think it does,
14 Justice Kennedy. I agree with your premise, I think,
15 that prevailing professional norms can and do evolve.
16 And so the question this Court asked in Strickland is,
17 as of the time the advice was given, did the prevailing
18 norms require that?

19 The advice was given in this case almost at
20 the identical time of the advice in Padilla and, indeed,
21 far after St. Cyr.

22 JUSTICE KENNEDY: I notice -- I'm not sure
23 it was cited in the brief, but the ABA comment in 1999
24 said, now the ABA standard applies to professional
25 standards, and that goes beyond the constitutional

1 minimum. So that doesn't seem to me to help you,
2 either.

3 MR. FISHER: Well, I'm not sure that's what
4 the ABA said. I believe the ABA, quite rightly, said,
5 we don't make constitutional law in this body; we leave
6 that to the courts.

7 JUSTICE KENNEDY: It said, it should be
8 stated that these standards do more than enforce the
9 constitutional minimum.

10 MR. FISHER: Well, I think there may be
11 elements of the standards that did.

12 But, remember, we're not just talking about
13 the ABA here. As this Court noted in Padilla and as one
14 of the amicus briefs from NACDL notes in this case,
15 there's a wide --

16 JUSTICE KENNEDY: Well, I'm talking about
17 the -- I'm talking about the ABA here, if you want to
18 give some other authority; but, I say that, it seems to
19 me, does not help you.

20 MR. FISHER: Well, then I'll rely on just
21 the overall body of professional norms, which is what
22 this Court looked to in Padilla and what it's always
23 said it has to look to under Strickland cases.

24 If I could return -- if I could transition
25 to talking about the -- the nature of the

1 backward-looking effect of Strickland, I think there is
2 an important second question in this case, that if this
3 Court were inclined to hold that there was a new rule,
4 you'd be forced to confront. And it's a very serious
5 question involving this Court's administration of
6 criminal appellate procedure. And that is whether
7 Teague ought to apply at all in this context.

8 We believe that under the system this Court
9 established in Massaro for handling IAC claims, it
10 simply doesn't make any sense to apply Teague here and,
11 indeed, would throw a gigantic monkey wrench into the
12 way things are -- have been done for the last decade
13 after that decision.

14 And -- and for two reasons: One, in
15 theory --

16 JUSTICE KAGAN: Mr. Fisher, before you get
17 to the reasons --

18 MR. FISHER: Yes.

19 JUSTICE KAGAN: -- the government says that
20 you forfeited this argument. Could you address that?

21 MR. FISHER: Sure. We didn't forfeit this
22 argument. It's fairly included within our question
23 presented. We raised it at the first available
24 opportunity in the Seventh Circuit because we were
25 foreclosed by circuit precedent from raising it. So we

1 raised it before an en banc court.

2 And in our cert reply brief, lest there be
3 any doubt, when the government suggested that we would
4 be restricted to arguing the new rule question in this
5 case, we put a footnote in our cert reply brief which
6 expressly told the Court, no, we view this question
7 presented as including this additional argument, whether
8 Teague applies or not.

9 So I think we gave fair notice to the Court.
10 And if you have any doubt --

11 JUSTICE KAGAN: But you haven't presented
12 this argument to any court before; is that right?

13 MR. FISHER: We made the argument in an
14 en banc petition to the Seventh Circuit, which we
15 couldn't make it to a panel because Seventh Circuit law
16 had already held that Teague applied in this context.

17 JUSTICE ALITO: Is it relevant that this is
18 a coram nobis proceeding, rather than a habeas
19 proceeding?

20 MR. FISHER: No. I think we agree with the
21 government that it doesn't -- matter.

22 The way we see this is it's a first Federal
23 filing. It's a first post-conviction filing, and it's a
24 timely filing. The government is not challenging the
25 timeliness of this filing.

1 So the question you have to ask yourself is,
2 under a system where this Court has said that IAC claims
3 should not be brought on direct review, but rather
4 should be brought on collateral review, whether you can
5 apply Teague at the very first instance that somebody
6 has to make a constitutional claim, and we think not.
7 On theory --

8 JUSTICE ALITO: On that question, before
9 you -- not in relation to the Massaro argument, but in
10 relation to the Teague argument, you think the rule in
11 coram nobis is the same, that the Teague rule applies
12 fully in coram nobis in the same way that it applies in
13 habeas?

14 MR. FISHER: Well, that's the way the whole
15 case has been litigated, and I think that's a fair
16 assumption.

17 The reason that we're on coram nobis instead
18 of --

19 JUSTICE ALITO: Have we ever held that?

20 MR. FISHER: No, you haven't. So if you
21 want to be extra careful, you can -- you can say the
22 parties haven't challenged that.

23 Remember, the reason that we're on coram
24 nobis is Ms. Chaidez was not in custody. And so if
25 somebody -- so it's, in a sense, interchangeable with a

1 2255.

2 JUSTICE ALITO: Well, yes, I understand
3 that, but the consequences of a retroactive application
4 in coram nobis are more severe than they are in habeas,
5 aren't they, because of the lack of a statute of
6 limitations?

7 MR. FISHER: More severe in the sense -- I'm
8 not sure I understand in what sense.

9 JUSTICE ALITO: You -- well, in -- under --
10 under the current Federal habeas statute, you have a
11 rather short statute of limitations to file the habeas
12 petition.

13 Under coram nobis, if you prevail, then
14 people who were -- who were convicted of offenses
15 decades ago can raise the Padilla claim, can they not?

16 MR. FISHER: I'm not sure they -- I'm not
17 sure they could, Justice Alito. At Pet. App. 38, you'll
18 see the district court dealing with the timeliness of
19 this petition. And the district court finds that Ms.
20 Chaidez could proceed because she used all reasonable
21 diligence in bringing this claim.

22 And the government can make laches
23 arguments, can make other arguments to defeat that. The
24 government has renounced those -- I mean, they let those
25 arguments go in the Seventh Circuit and don't raise them

1 again here.

2 But I think that, at a minimum, it would be
3 fair to say that somebody needs to bring a petition as
4 soon as the government advises them they're going to
5 seek deportation.

6 I'm not even sure, Justice Alito --

7 JUSTICE ALITO: What if someone -- if there
8 is an attempt to -- a notice of removal for someone
9 based on a conviction that occurred a long time ago,
10 then that would be --

11 MR. FISHER: You could -- you could have a
12 time lag, but there is two things to remember. First
13 is, you might have a timely 2255 in that circumstance,
14 too, because, remember, in *Holland v. Florida*, this
15 Court held that equitable tolling is available for
16 people with IA -- with ineffective assistance that leads
17 to them not being able to make the claim earlier.

18 And the second thing is, as I was discussing
19 with Justice Kennedy, the backward-looking aspect of
20 *Strickland* would -- would require the party -- once you
21 get more than a little while back, the prevailing norms
22 may not -- may not be there for that kind of a claim.

23 JUSTICE GINSBURG: Mr. Fisher --

24 MR. FISHER: And so that's --

25 JUSTICE GINSBURG: Mr. Fisher, are

1 you -- you're not making any argument that Teague is
2 inapplicable because this -- the underlying conviction
3 here is a Federal conviction, not a state conviction,
4 and Teague emphasized comity to the states; you're not
5 making that argument?

6 MR. FISHER: No, I think you could hold
7 that, and that is -- that is within our argument. I
8 don't think you need to go that far, Justice Ginsburg.
9 As you said, this Court has said time and again that
10 Teague relies on comity. That's not present in this
11 case.

12 But we think a narrower way to decide this
13 case, and I think the appropriate way to decide this
14 case, is to say, at least for ineffective assistance
15 claims, when you're bringing -- with a Federal prisoner,
16 or somebody who has been convicted of a Federal crime,
17 that's bringing their first petition, that Teague can't
18 apply.

19 And what I was just trying to say is
20 Strickland itself --

21 JUSTICE KENNEDY: Well, except -- except
22 that -- and I'm interrupting, in a sense, but it's on
23 the same track -- except that it seems to me that Teague
24 does serve the interest of repose, quite apart from
25 interference with a Federal proceeding, and that

1 interest is surely sacrificed by the holding you wish us
2 to make here.

3 MR. FISHER: Well, Justice Kennedy, I'm glad
4 you asked because that was what I was going to say.

5 In Strickland, this Court dealt with
6 finality very explicitly and said, we're creating this
7 standard which is different than other constitutional
8 standards because we're concerned about finality. And,
9 as this Court said at pages 697 and 98, so, therefore,
10 no different rules ought to apply in collateral
11 proceedings as in direct review, because this Court
12 assumed in Strickland itself and it assumed expressly
13 again in Padilla that all of these claims would be on
14 collateral review.

15 So in all these cases the Court has said
16 finality -- the concern -- the very concern you
17 mentioned, Justice Kennedy, is already baked into the
18 Strickland formula.

19 JUSTICE SOTOMAYOR: Mr. Fisher, I'm
20 concerned that creating exceptions to exceptions in
21 Teague is just a throwback to Linkletter standard --

22 MR. FISHER: Well --

23 JUSTICE SOTOMAYOR: -- where we're making
24 choices among situations and saying, these will be
25 retroactive, these won't.

1 MR. FISHER: Yes.

2 JUSTICE SOTOMAYOR: Answer that concern on
3 my part.

4 MR. FISHER: Yes.

5 JUSTICE SOTOMAYOR: And then answer -- the
6 next step is the Martinez type case --

7 MR. FISHER: Yes.

8 JUSTICE SOTOMAYOR: -- which is what happens
9 with state reviews that are -- that channel IAC claims
10 to their habeas processes. So what trumps what in that
11 situation?

12 MR. FISHER: Okay. Let me answer both those
13 things. First, we are not asking this Court to create
14 an exception to Teague. We are simply asking this Court
15 to say Teague doesn't apply when a claim is, quote, "on
16 the equivalent of direct review," which is what this
17 Court said in Martinez v. Ryan. This Court has already
18 held with respect to IAC that habeas rules, like the
19 procedural default rule and like the Stone v. Powell bar
20 against Fourth Amendment claims, do not apply in the IAC
21 context. So this follows exactly from those previous
22 holdings.

23 Now, let me say two other things and then I
24 can hopefully reserve my time. To answer your question
25 about Martinez in state cases, it would depend on what

1 the state system looked like, and I think states have
2 their own decision to make as to whether they want a
3 system like Arizona's, where these have to be brought in
4 collateral proceedings, or whether, as I understand at
5 least a couple of States do, say, we're going to stay
6 and delay the entire direct review process, for years
7 often, to allow the IAC claim to be brought then.

8 Now, that's exactly what this Court rejected in
9 Massaro, and the government asked this Court to reject
10 that in Massaro; said we don't want that kind of a
11 system. I don't know why the government is asking for
12 it for the first time today.

13 And finally remember, the last thing I would
14 like to say is, all these problems raise not only
15 finality concerns about the stay and remand procedures
16 the government suggests; they also raise insoluble
17 conflicts of interest problems for Federal defender
18 offices, who would have to bring IAC claims against
19 themselves on direct review in order to preserve their
20 ability to -- to get full relief for their client.

21 JUSTICE KENNEDY: Perhaps on rebuttal -- I
22 recognize the white light's on -- you could address what
23 is -- what is the standard you want me to apply to
24 determine retroactivity? The recess, oh, well, it's
25 just new facts applying to the same general rule. Well,

1 danger invites rescue; the assault on privacy is
2 proceeding apace; MacPherson v. Buick and the Erie
3 Railroad case -- it seems to me that those were probably
4 new rules, but there -- it's because the facts told us
5 what should be negligent. If at some point you could
6 address that, I don't --

7 MR. FISHER: Justice Kennedy, what I would
8 like to do, and I am happy to elaborate, if the
9 formulation as I think you yourself put it in Wright v.
10 West, which is that a rule that is -- that is applied to
11 a new set of facts does not create a new rule; but if
12 you advance the law in some way you do create a new
13 rule.

14 The last thing I would like to say about
15 consequences is: Remember, the government doesn't even
16 have any answer for what is going to be half or more of
17 the situations where people have Padilla-type claims,
18 which is when they have a guilty plea and waive their
19 right to direct appeal. So there the collateral filing
20 like this is -- is absolutely the equivalent of direct
21 review. And so I think this Court ought to be very wary
22 of going down that road.

23 If I could reserve the time I have left.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Dreeben.

1 ORAL ARGUMENT OF MICHAEL R. DREEBEN

2 ON BEHALF OF THE RESPONDENT

3 MR. DREEBEN: Mr. Chief Justice, and may it
4 please the Court:

5 In Padilla v. Kentucky this Court announced
6 a new rule within the meaning of Teague v. Lane.

7 Because --

8 JUSTICE SOTOMAYOR: Do you think that's true
9 with respect to both components of the advice, the
10 omission and commission? I mean, it does appear that
11 every court who dealt with the commission-type claim,
12 the fraud, the misrepresentation of consequences, said
13 it's clear you can't lie to your client. Now, is Teague
14 now going -- is our ruling here going to depend on the
15 type of claim that's raised, with respect to IAC?

16 MR. DREEBEN: Well, Justice Sotomayor, this
17 Court in Padilla didn't distinguish between misadvice
18 and omissions to give advice. And it therefore
19 adopted --

20 JUSTICE SOTOMAYOR: At least one of our
21 concurrences did, or talked to. So assuming --
22 assuming -- is your position that is on the
23 retroactivity, that it applies to both kinds, omissions
24 and commissions, and neither is retroactive?

25 MR. DREEBEN: As for -- as for Padilla's

1 rationale, the answer is yes, but there is a rationale
2 that governed, in our view, misadvice claims that
3 existed before Padilla. It wasn't addressed or embraced
4 in Padilla. It was addressed in Justice Alito's
5 concurring opinion. Justice Alito gave two reasons
6 which essentially mirrored the reasons that had been
7 given in the lower courts for treating misadvice
8 differently. And that is, affirmative misadvice
9 violated a more basic duty of counsel that was well
10 established, which is not to represent that you're
11 competent on a matter that you are not competent.

12 And the second distinction between misadvice
13 and failure to give any advice is that a client has a
14 constitutional right to make his or her own decision
15 about whether to plead guilty; and a lawyer has a
16 constitutional duty not to get in the way of that by
17 affirmatively skewing the client's ability to make that
18 choice.

19 And so I would probably not disagree that
20 misadvice claim was not new before Padilla and it's not
21 really addressed by Padilla's rationale. It has its own
22 independent sources, and the courts that had adopted
23 that --

24 JUSTICE SOTOMAYOR: I'm not sure. Are those
25 sources -- when you say sources, it's professional norm

1 sources?

2 MR. DREEBEN: It's a different professional
3 norm and it's a different aspect of the Sixth Amendment
4 right. And all of the courts that had adopted
5 misadvice -- there were three of them that had done it
6 in the removal context; there were three more that had
7 done in the parole eligibility context -- they all
8 simultaneously adhered to the view that as a general
9 matter there is no obligation to give advice about
10 collateral consequences.

11 And they did this, I might add, despite the
12 fact that, as Justice Kennedy alluded, the ABA, which
13 was cited as one of the key sources of prevailing
14 professional norms, stated in Standard 14.3.2, in the
15 criminal justice pleas of guilty standards: "To the
16 extent possible, defense counsel should determine and
17 advise the defendant sufficiently in advance of any plea
18 as to the possible collateral consequences that might
19 ensue from entry of the contemplated plea."

20 So there was an aspirational professional
21 norm that collateral consequences would be on the table,
22 but all Federal courts that had looked at this question
23 before Padilla had concluded that collateral
24 consequences are outside of the duty of criminal defense
25 counsel.

1 JUSTICE SOTOMAYOR: Could you tell me
2 where -- my colleagues were asking about hypothetical
3 future cases -- I'm asking, do you think that every
4 evolving professional norm, no matter how well
5 established it becomes, would never be subject to the
6 Teague rule because -- would always be a retroactive
7 application or a new rule?

8 MR. DREEBEN: No, Justice Sotomayor.

9 JUSTICE SOTOMAYOR: Are we frozen in time to
10 whatever the professional standards are that exist today
11 that the Court has recognized so far?

12 MR. DREEBEN: No, Justice Sotomayor. And I
13 think this is the key point about Strickland.
14 Justice Kennedy made this point in a concurrence in
15 Wright v. West, and it was later cited by the Court
16 as -- as reflecting an accurate understanding of
17 Strickland. It is a basic norm of professional
18 competence, and it does not turn on professional --
19 prevailing professional norms in publications such as
20 the ABA. They are informative.

21 And those norms can evolve. The Court can
22 then announce Sixth Amendment applications of them that
23 will be not -- not new rules. This Court has decided
24 close to 30 Strickland cases, according to our count
25 since the 1984 decision in Strickland.

1 JUSTICE SCALIA: What's -- what's the sense
2 of that? Why -- why -- let's assume, you know, at the
3 time the guilty plea or whatever occurred, it was not
4 the professional norm, and then later the professional
5 norms change and he makes the argument that -- that he's
6 entitled to relief, and you say yes, because --

7 MR. DREEBEN: No, I say no, Justice Scalia,
8 because professional norms are judged as of the time of
9 the attorney's action. So although the professional
10 norms can evolve, Strickland always looks to an actor at
11 the time of the decision.

12 JUSTICE SCALIA: Is that what your opponent
13 contends as well?

14 MR. DREEBEN: I think you probably should
15 ask my opponent what he contends, but Strickland is
16 fairly clear that professional norms at the time of the
17 attorney's action are what govern.

18 JUSTICE BREYER: All right, so given the ABA
19 and everything else, why doesn't that apply here?

20 MR. DREEBEN: Well, the ABA doesn't state
21 this Court's interpretation of the Sixth Amendment.
22 This Court made that very clear in Roe versus --

23 JUSTICE BREYER: No, but I mean if the
24 general rule is that Strickland evolves to pick up
25 changing professional norms, and that -- you looked at

1 30 cases and that's what you get out of them -- and then
2 it turns out that at the time this case began, there was
3 such a professional norm; and all that happened in
4 Padilla is that the Court following its general practice
5 said apply that professional norm; then why doesn't the
6 other side win?

7 MR. DREEBEN: Well, first of all,
8 Justice Breyer, that's not what the Court did in
9 Padilla. What the Court did in Padilla, as Justice
10 Kagan explained, in section two of its opinion was first
11 to address the question whether a criminal defense
12 lawyer had any obligation to give advice about a
13 consequence that would not be administered in the
14 criminal case itself.

15 No decision of this Court had ever held that
16 the obligations of a criminal defense lawyer under the
17 Sixth Amendment extended to that.

18 JUSTICE BREYER: That, of course, is true,
19 but the professional norm had evolved by the time of the
20 proceeding here that they would.

21 MR. DREEBEN: That was not the basis of the
22 Court's decision. The Court --

23 JUSTICE BREYER: No, but -- in the other --
24 in the other, by the way, in the other 29 cases, did the
25 court specifically say in each of those 29 cases that

1 the basis of our decision is that the professional norm
2 has evolved and we apply the new professional norm as of
3 the time?

4 MR. DREEBEN: Most of the cases involved
5 well-settled duties, like the duty to investigate,
6 applied to particular sets of facts. That doesn't
7 generate a new rule.

8 What was unique in Padilla is that the Court
9 had to address something that it had never done before,
10 whether the criminal defense lawyer had to give advice
11 about a consequence that the sentencing court had no
12 control over.

13 And in resolving that question, this Court
14 did not cite professional norms. It did not cite the
15 ABA. It did not cite any of the defense manuals that
16 recommend that lawyers advise aliens about the
17 possibility of deportation.

18 It instead traced the statutory evolution of
19 the relationship between deportation and criminal
20 justice, it examined its own cases that had discussed
21 what a competent defense lawyer ought to think about,
22 and it discussed statutory evolution. And it drew from
23 that the principle that deportation is uniquely tied to
24 the criminal prosecution in a way that no other
25 collateral consequence possibly is, and, therefore, the

1 Court did not decide any other collateral consequence.

2 JUSTICE KENNEDY: Well, as I recall, correct
3 me if I'm wrong, one of the principal sources the Court
4 cited in Padilla was common sense.

5 MR. DREEBEN: Yes.

6 JUSTICE KENNEDY: Does common sense change?

7 MR. DREEBEN: Common sense may evolve --

8 JUSTICE KENNEDY: I mean, Tom Paine wrote
9 about it, so, you know, since its original.

10 MR. DREEBEN: Justice Kennedy, I think the
11 Court relied on the idea that any lawyer worth his salt
12 would inform a defendant about a particularly important
13 consequence, a momentous consequence of pleading guilty.

14 You probably would say the same thing to
15 somebody who you knew was an avowed hunter and would
16 lose the right to have firearms, or a politician that
17 would lose the right to hold office, or a doctor who
18 would lose a medical license, all of which can be
19 automatic consequences of a conviction; actually, more
20 automatic than deportation, because deportation is
21 administered by a separate body, oftentimes by a
22 separate sovereign that has discretion whether to even
23 institute deportation proceedings.

24 And so the fact that we might all share an
25 intuition that good lawyers should advise their clients

1 about the panoply of consequences that they will
2 experience by pleading guilty, the reality is that until
3 Padilla, the Court had never veered from the track of
4 saying the lawyer's duty is to help the client figure
5 out what his odds are of prevailing at trial, what the
6 sentencing consequences are, whether there are any
7 affirmative defenses, and what the rights are that the
8 client would give up by pleading guilty.

9 JUSTICE GINSBURG: Mr. Dreeben, Padilla
10 itself was a collateral proceeding. And if the state
11 can argue in Padilla itself that a new rule was being
12 sought and that that was permissible only on direct
13 review, should the state have prevailed?

14 MR. DREEBEN: No, Justice Ginsburg, because
15 this Court held in Danforth v. Minnesota that Teague is
16 an interpretation of the Federal habeas statute. It's
17 an implied delegation to the Court to frame appropriate
18 rules for Federal collateral review.

19 JUSTICE GINSBURG: But this Court is a
20 Federal court, so --

21 MR. DREEBEN: Well, this --

22 JUSTICE GINSBURG: -- if your concern of
23 Teague is comity, concern about -- the states running
24 their own system, I understand the different -- the
25 state collateral and the Federal collateral view; but,

1 if the idea of Teague is we don't want the Federal court
2 to come in there and overlook what the state court did,
3 why wouldn't that apply to this court reviewing a state
4 court decision as much as it would apply to a Federal
5 district court at a hearing habeas from a state
6 conviction?

7 MR. DREEBEN: Well, Danforth made clear that
8 states have discretion whether to adopt Teague-like
9 rules. They do not have to. They can allow their
10 citizens to have the benefit of new rules in state
11 convictions. And this Court is doing nothing other than
12 honoring the state's own policy choice.

13 JUSTICE GINSBURG: Well, do we know that
14 that's true in Kentucky?

15 MR. DREEBEN: I think Kentucky does have a
16 Teague-type rule, but the Kentucky Supreme Court decided
17 the issue on the merits. The state never raised Teague
18 here. Teague is waivable. So even if you do not agree
19 with me, Justice Ginsburg, that Danforth means that
20 Teague had no relevance whatsoever, Teague was waived by
21 the state. The state never addressed it. And this --

22 JUSTICE GINSBURG: And this Court could not
23 have raised it on its own?

24 MR. DREEBEN: Could have, but didn't. There
25 is nothing in the majority opinion that says that Teague

1 is an issue.

2 Now, again, when I say could have, but
3 didn't, that reflects the -- the reality that this Court
4 can do certain things sua sponte. I do not think that
5 in a case coming from a state system Teague has anything
6 to do with it. Whether this Court is reviewing the case
7 on direct review from a state system or reviewing a
8 state collateral proceeding, Teague is not an issue.
9 It's solely an issue when you have a 2254 proceeding or
10 a 2255 proceeding.

11 JUSTICE KENNEDY: What is -- what is the
12 standard that you wish us to apply? A new rule is
13 announced when -- when you fill in the blank. And after
14 you fill in the blank, is your principal argument that
15 here the distinction is between the direct consequences
16 of the conviction that are under the control of the
17 Court and collateral consequences? Two different
18 questions.

19 MR. DREEBEN: Justice Kennedy, my test is
20 not a new rule. My test for Teague new rules is this
21 Court's test: Whether the decision was dictated by
22 precedent so that any reasonable jurist would have
23 reached that result, or, to put it another way, that no
24 reasonable jurist could not have.

25 JUSTICE KENNEDY: That's a little bit like

1 the AEDPA standard.

2 MR. DREEBEN: It's similar. I think the
3 Court has said that things that don't count as new rules
4 under Teague can also be cognizable under AEDPA. AEDPA
5 has a contrary to provision, as well as an unreasonable
6 application provision, as Mr. Fisher pointed out; but,
7 as far as the contrary to provision works, it parallels
8 Teague.

9 So we're not asking the Court to make any
10 new rules up about Teague. We're asking the Court to --
11 to apply Teague.

12 And in the application of Teague, the
13 government is relying on this Court's form of analysis,
14 which is you look at the state of the law at the time of
15 the decision in question, when the decision became
16 final, and you ask whether precedent compelled the
17 result that a later decision reached. And --

18 JUSTICE GINSBURG: Have we applied -- have
19 we applied Teague to Federal convictions before?

20 MR. DREEBEN: This Court has not, except in
21 the sense that in *Bousley v. United States*, the Court
22 ran through a Teague analysis before holding that a
23 substantive interpretation of a Federal statute is not
24 captured by Teague. So, in that sense, the Court has
25 presumed the applicability, but it hasn't squarely held

1 it.

2 JUSTICE GINSBURG: It hasn't.

3 And at least one important basis for the
4 Teague rule is the comity to the state court system,
5 which you don't have when the underlying conviction is a
6 Federal conviction.

7 MR. DREEBEN: True, Justice Ginsburg, but
8 this Court has also recognized that Federal courts have
9 an interest in the finality of Federal convictions
10 that's every bit as strong as state courts.

11 And so, for example, in
12 United States v. Frady, the Court applied the procedural
13 default rule exactly the same as it applies in state
14 cases to Federal 2255 proceedings.

15 JUSTICE KENNEDY: But the second part of my
16 question that you were about to answer was whether or
17 not it's dictated by precedent, and in this case, it was
18 not dictated by precedent because it applied to
19 collateral consequences; or, what's the because?

20 MR. DREEBEN: Well, there are two becauses.
21 One is no court had held, as this Court did in Padilla,
22 that deportation, though not administered by the
23 sentencing court, was so intimately tied to the criminal
24 case that the direct collateral distinction was not
25 useful in this context. There was no precedent that

1 dictated that.

2 And then, more generally, as you're
3 suggesting, Justice Kennedy, the lower courts had all
4 adopted the direct collateral reviews. Ten courts of
5 appeals in published decisions, the Sixth Circuit in an
6 unpublished decision, 28 states and the District of
7 Columbia had all adhered to that line.

8 JUSTICE SOTOMAYOR: So unanimous error makes
9 right?

10 I'm not being -- I'm not trying to be
11 sarcastic. I'm trying to see -- in almost every case we
12 get here, there are split opinions below. Sometimes the
13 split is significant or closer than other times. The --
14 where do we draw that line? Where in the next case is
15 any time there is a split below or where there's an
16 unanimity of opinion below, it won't fall under -- it
17 will automatically create a new rule?

18 MR. DREEBEN: I would not suggest that the
19 Court adopt a mechanical approach. Here, all of the
20 factors that the Court has looked at all align in the
21 same direction. The lower courts, Federal courts, had
22 all agreed that deportation was not the subject of a
23 duty of advice. The majority of the States had held the
24 same.

25 This Court's decision in Padilla was

1 significantly splintered, with four justices challenging
2 the majority's rule as a dramatic expansion and upheaval
3 in Sixth Amendment law. And then when you actually look
4 at the Court's Sixth Amendment jurisprudence, Padilla
5 did not claim that any decision was controlling of its
6 holding.

7 The closest case was the Hill case,
8 Hill v. Lockhart, and in that case the Court approached
9 a collateral consequence, namely, parole eligibility
10 dates, and it said: We don't have to decide that issue
11 on whether parole eligibility dates can be the subject
12 of a Strickland claim, because Hill had failed to show
13 prejudice. And therefore, it was recognized as an open
14 issue whether a consequence that's not administered by
15 the sentencing court could be within Strickland.

16 So when you have the coalescence of all of
17 those factors, I don't think that's a case where the
18 Court has to draw a fine line between when a sufficient
19 split below is enough to --

20 JUSTICE BREYER: Can you go back for a
21 second to Justice Ginsburg's question? I'd like -- I
22 just don't want you to leave without -- without
23 answering the following: Normally a new rule that this
24 Court announces would apply to cases on direct review.

25 MR. DREEBEN: Correct.

1 JUSTICE BREYER: Right. In the case of
2 inadequate assistance of counsel, without being picky,
3 the place where that claim is best developed, in my view
4 is first collateral, because for reasons we both
5 understand. All right. So given the fact that by and
6 large it is, and I think should be, developed in that
7 way, why not treat in the case of an inadequate
8 assistance claim the first collateral as in other claims
9 you treat direct review?

10 MR. DREEBEN: Justice Breyer, let me give
11 you a merits answer to that question, and then an answer
12 on why I do not think Petitioner has fairly preserved or
13 presented that issue to this Court.

14 The merits answer is that Teague reflects a
15 fundamental judgment that when a case is final on its
16 direct review, society has a strong interest in
17 protecting that judgment. And the exception to that is
18 when the state or the Federal government has not
19 conformed to existing constitutional law.

20 Now, bringing that down to earth for
21 ineffective assistance claims, at the time that Ms.
22 Chaidez's conviction became final, and all convictions
23 that became final before Padilla, jurisdictions had no
24 reason to think that they needed to protect against the
25 possibility that a criminal defense lawyer would not

1 have advised about deportation, because the unanimous
2 view was that's not something that's the Sixth Amendment
3 duty.

4 Immediately after Padilla came down
5 reflecting that it was, the Criminal Rules Committee
6 began considering an amendment to Rule 11, which is now
7 pending before the Judicial Conference, that would
8 require judges to advise defendants about the
9 possibility of deportation consequences. In other
10 words --

11 JUSTICE GINSBURG: It was -- it was approved
12 by the Judicial Conference in September.

13 MR. DREEBEN: I will accept that, if that's
14 correct, Justice Ginsburg.

15 The point is that as soon as Padilla made it
16 clear that a constitutional rule about defense counsel
17 could threaten the finality of guilty pleas, the Rules
18 Committee has taken steps to protect the integrity of
19 federal judgments through a Rule 11 amendment. It had
20 no opportunity or reason to do that -- I can't say no
21 opportunity, but it had no reason to do that as a
22 constitutional matter until the Court decided Padilla.
23 And so there is a logical relationship between --

24 JUSTICE BREYER: You could say that, you
25 could say that same thing precisely about the cases on

1 direct review which have not been completed. I mean,
2 you could give all those arguments exactly the same. If
3 you're worried about the time, you could have time
4 limits on the first Federal -- the first Federal habeas
5 or state habeas.

6 There are time limits there. You could add
7 to those. And the -- the -- the direct review is itself
8 a balance. It's a balance between the surprise and need
9 to complicate the case, and it hasn't really finished
10 and da, da, da, versus the problem of giving a person a
11 chance to raise this argument even for a new rule.

12 MR. DREEBEN: Yes. I --

13 JUSTICE BREYER: And so all those -- those
14 are the -- when you look at the functional factors, it
15 looks quite similar to me and I'm trying to --

16 MR. DREEBEN: I don't think that it's quite
17 identical, Justice Breyer, but there are additional
18 considerations that are at stake here, too. First of
19 all, Massaro, which Mr. Fisher relies on, doesn't
20 preclude a defendant from raising a claim on direct
21 review. It says that it's not a procedural default if
22 he does not do that. A criminal defendant will probably
23 not be in great shape to raise a -- a new rule claim on
24 direct review, but he also will not be in great shape to
25 raise it on collateral review.

1 Unless this Court alters its Sixth Amendment
2 holdings, such a defendant will be pro se, they will not
3 have a lawyer, they will be pretty much in the same fix
4 that they are in on direct review.

5 Now, if this Court announces that new rules
6 under Strickland are not going to be applied to
7 defendants whose convictions became final, then those
8 defendants who want to raise a new rule claim are on
9 notice that they'll need to do it on direct review.
10 Courts of appeals will be on notice that if someone
11 raises such a claim, the appropriate thing to do is to
12 adjudicate it or remand for its adjudication.

13 Now, right now the D.C. Circuit doesn't
14 follow Massaro. It does remand ineffective assistance
15 claims. Mr. Fisher said he was unable to locate any
16 cases where this actually happened. You don't have to
17 look any further than down the road to the arguments
18 next week in Smith v. United States, which involves a
19 different issue, but the D.C. Circuit remanded an
20 ineffectiveness claim in that case to the district court
21 in direct review. It has a practice of doing that.

22 This is actually a much easier process to
23 administer than a general exception to Massaro,
24 because --

25 JUSTICE SOTOMAYOR: We -- we're seeming to

1 go backwards. You -- you seem to be arguing against
2 something that you didn't want previously, that there
3 should be a stay and determine these IAC claims on
4 direct appeal. It seems to be your argument that that's
5 the preferred process now.

6 MR. DREEBEN: It's not a preferred process
7 for ineffectiveness claims generally. I think Massaro
8 makes that clear. But you have to understand how rare a
9 new rule under Strickland really is, the way that the
10 Court has administered Strickland to date.

11 Applications of the existing Strickland
12 standard to particular sets of facts are not new rules.
13 That's why in the 28 years since Strickland none of this
14 Court's decisions, and there are about 30 of them, under
15 Strickland added up to a new rule. Padilla broke ground
16 because it answered the question, not how does
17 Strickland apply, but whether it applies at all to
18 something outside the compass of the sentencing court.

19 And so in that respect, there's no reason
20 why the standard practice under Massaro should change if
21 this Court were to address the issue and make clearer
22 that new rules are not going to be applied on collateral
23 review.

24 JUSTICE KAGAN: Mr. Dreeben, if
25 Justice Breyer were right, that there should be sort of

1 one run -- run up the flagpole and that Teague doesn't
2 kick in until that one run up the flagpole and here
3 because of Massaro the one run should include collateral
4 review of IAC claims, if that's right, what are the
5 costs of that? Is that an extra year to the statute of
6 limitations for bringing a collateral claim or is it
7 something more than that?

8 MR. DREEBEN: It could be something more
9 than that, because if the Court announces a new rule and
10 makes it retroactive to a case on collateral review,
11 (f)(3) of the statute of limitations provision gives the
12 defendant another 1 year. And I think this case
13 actually illustrates the mischief of that. This case
14 doesn't arise on collateral review. It arises on coram
15 nobis 5 years after the conviction became final.

16 Now, if Petitioner were really serious that
17 this Court should carve out from Teague ineffectiveness
18 claims and adopt a rule just like the one that it did in
19 Martinez v. Ryan, which is what he says on page 31 of
20 his brief, then the Court should not give him the
21 benefit of that rule, because Ms. Chaidez was on
22 probation for 4 years after her conviction, she could
23 have raised this claim after her conviction and sued.
24 She did not do that. She had her opportunity. She
25 didn't take advantage of it. And I think this helps

1 underscore why, if I can turn to this issue not being
2 properly presented in the Court.

3 Petitioner did not raise the ineffective
4 assistance of counsel type carve-out from Teague that
5 Mr. Fisher raises in this case.

6 That debuted for the first time in his
7 merits brief after certiorari was granted. The
8 government acquiesced to get resolution of the new rule
9 question that had divided the circuits and that will
10 exist. However this Court resolves this case, if it
11 chooses to resolve it on the Massaro grounds, the new
12 rule issue will still be salient for the States, it's
13 still a circuit conflict that the Court needs to
14 address. It was not raised below, it wasn't raised in
15 the certiorari petition.

16 The en banc petition raised a very general
17 argument that Teague should not apply to federal
18 convictions along the lines of what Justice Ginsburg
19 asked me about, whether comity concerns and their
20 absence meant there should be a difference.

21 So you've got an argument that, so far as I
22 can tell, has never been made to any Federal court
23 before it's been made to this Court, and it would be
24 remarkable for the Court to adopt that and then have to
25 figure out, how does it apply. Does Teague ever kick

1 in? Is it a permanent exemption for ineffective
2 assistance claims?

3 Lots of questions that no lower court has
4 looked at, and that I would suggest this Court should
5 not be the first to answer.

6 It also raises an entirely new set of
7 questions about whether Brady -- which also are kinds of
8 claims that are typically raised on collateral review --
9 should now be exempt from Teague jurisprudence?

10 I think the Court would really be engaging
11 in kind of a sort of examination of Teague that had
12 never happened before. It's sort of like experimental
13 surgery on Teague. Shouldn't really happen in this
14 Court in the first instance.

15 JUSTICE GINSBURG: Although you said you
16 recognize that we have not had a Teague case involving a
17 Federal conviction, I mean, there is lots of language in
18 Teague cases about the Federal courts not interfering
19 with state courts, that Teague was intended to minimize
20 Federal intrusion into state criminal proceedings, to
21 limit the authority of the Federal courts to overturn
22 state convictions. I mean, we have really pressed
23 that -- that basis.

24 MR. DREEBEN: True, but Petitioner is not
25 pressing that basis on this Court. He's all but

1 disavowed it. He's not seriously argued it in response
2 to our brief that opposed his brand new ineffectiveness
3 carveout from Teague. What he has done instead is
4 concentrated much more on an analogy to Massaro.

5 If I could give one more reason why I think
6 the Court should refrain from entertaining that
7 Massaro-based analogy here, the Court has just begun to
8 embark in the Martinez v. Ryan line of cases on trying
9 to figure out how ineffectiveness claims should be
10 handled on collateral review.

11 It grants its certiorari on Monday in
12 Trevino v. Thaler, where it's going to explore how does
13 Martinez apply in a jurisdiction that may be more like
14 the Federal system in that ineffective assistance of
15 counsel claims aren't channeled only to direct review,
16 they can be asserted on direct -- I'm sorry -- only to
17 collateral review, they can be asserted on direct
18 review. They are channeled largely to collateral
19 review, but not as a matter of law.

20 So the Court has a lot of work to do in
21 figuring out what that decision means. And I think
22 rather than embark on a brand new process of applying
23 that kind of reasoning in a case where it was never
24 raised below, where the government never really had the
25 opportunity to counter any of those arguments, and the

1 lower court never had the opportunity to consider them,
2 it's not a wise use of the Court's resources.

3 Instead, resolving the new rule question
4 that has divided the circuits would provide an answer
5 for us and the 28 states that filed an amicus brief that
6 supported the United States on the new rule question,
7 and would result, I think, appropriately, in concluding
8 that Padilla was a new rule, unique among this Court's
9 Strickland jurisprudence up to that time, and is not
10 available to cases on collateral review.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Fisher, you have two minutes remaining.

13 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

14 ON BEHALF OF THE PETITIONER

15 MR. FISHER: Thank you.

16 I'd like to make two points.

17 The first is, picking up where Mr. Dreeben
18 left off, I'm not asking for any anything that is
19 difficult.

20 Mr. Dreeben referred to the Frady case,
21 where this Court held that there is enough of an
22 interest in finality to have procedural default apply to
23 federal post-conviction review. Yet, in Massaro, this
24 Court carved out IAC claims.

25 Exactly the same analysis applies here, and

1 I do think the Court really ought to answer that
2 question in this case because, if you hold that Padilla
3 is a new rule and that Teague now applies to IAC claims,
4 rest assured the Federal courthouses are going to be
5 flooded, flooded with Federal -- with Federal defenders
6 and other criminal lawyers raising IAC claims on direct
7 review. There'd be nothing else a responsible lawyer
8 could do, because if you say Teague applies on -- if you
9 wait until collateral review, but it doesn't apply on
10 direct review, any responsible lawyer seeking to protect
11 his client has to bring it on direct review. It's going
12 to absolutely change the way criminal procedure and
13 criminal appellate procedure happens in the Federal
14 court system.

15 The second point I wanted to make is back to
16 the new rule question. I think I heard Mr. Dreeben say
17 that the lower courts that had said that misadvice about
18 deportation consequences violated Strickland had said
19 something that was within Strickland that didn't
20 constitute a new rule. So it can't be that Strickland
21 broke new ground, if he's correct, by saying deportation
22 advice falls within the ambit of the Sixth Amendment in
23 a guilty plea context.

24 The only thing he relies on in the end is
25 this distinction the lower courts had drawn between acts

1 and omissions. And that's exactly the distinction in
2 Strickland that this Court rejected.

3 And in Padilla itself, this Court used the
4 word absurd. And I think, Justice Kennedy, when you
5 mentioned commonsense, I think we could throw that in,
6 too.

7 And so to the extent that the argument, at
8 the end of the day when everything's stripped away, is
9 that the lower courts were reasonable in saying that
10 failing to advise about the most important thing a
11 client would have been thinking as to whether to plead
12 guilty is not ineffective assistance of counsel, whereas
13 giving bad advice is, that's a line that Strickland
14 itself rejected, that Flores-Ortega rejected when it
15 came to the right to appeal and whether the lawyer ought
16 to give advice; and, it's a line that this Court in
17 Padilla had no difficulty whatsoever rejecting and
18 called it absurd.

19 JUSTICE SOTOMAYOR: Mr. Fisher, can I go
20 back to one of your points? Your red light is on, but
21 it is important. The floodgate issue.

22 MR. FISHER: Yes.

23 JUSTICE SOTOMAYOR: I'm not sure about the
24 floodgates for the following reason. Once we announce
25 Padilla, any pending direct claim and any pending

1 collateral claim that arises after Padilla for something
2 that happened after Padilla would be covered by the
3 rule, so there'd be no bar to those claims. So the
4 floodgate is temporary, if there is --

5 MR. FISHER: No, it's not,
6 Justice Sotomayor.

7 The issue arises because Teague ordinarily
8 comes into play when somebody asks the Court to create a
9 new rule and apply it to him. So all the hypotheticals
10 we've talked about today, about would Strickland apply
11 here, would Strickland apply there, to parole advice, to
12 professional license, all of those claims would be
13 asking, if the government's correct, for a new rule.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. FISHER: And so all of those claims
16 would have to be brought.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: The case is
19 submitted.

20 (Whereupon, at 11:02 a.m., the case in the
21 above-entitled matter was submitted.)

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23

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25

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