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IN THE SUPREME COURT OF THE UNITED STATES

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ROSELVA CHAIDEZ, :

Petitioner : No. 11-820

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Thursday, November 1, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, California; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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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 factual 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 any -- Mr.  
17 Fisher, is there any application, you call it 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's the question on which Padilla  
15 opines, and that's the question that seems, you know,  
16 very different from anything that Strickland's 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. Alright. 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 had 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 So 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 already answered that question in St. Cyr,  
8 where this Court said, in the text around footnotes 48  
9 and 50, that any competent lawyer would give his client  
10 advice and a warning about deportation consequences of a  
11 plea.

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

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

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

25           I take it what this Court said in Strickland

1 and what it reaffirmed in Padilla is, we're not going  
2 to -- we're not going to micromanage effective  
3 assistance of counsel. We're going to leave it to  
4 prevailing professional norms.

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

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

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

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

22 MR. FISHER: Well, I think I could answer it  
23 one of two ways. One is I could say yes, they did -- to  
24 the extent they did regard it as a new rule, I think the  
25 dissent was, with all due respect, slightly mistaken

1 about what the holding in Padilla was, which was not  
2 to --

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

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

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

14 And, Justice Scalia, I think --

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

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

24 JUSTICE KENNEDY: No, this is --

25 MR. FISHER: -- ineffective assistance



1 cases --

2 JUSTICE KENNEDY: -- a predicate question.

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

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

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

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

25 MR. FISHER: Well, some sort of consequences

1 that -- that prevailing norms didn't require a lawyer to  
2 advise his client on.

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

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

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

13 CHIEF JUSTICE ROBERTS: If you had --

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

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

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

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

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

24 And I think, if I could give a generic  
25 answer, the question would be whether or not that kind

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

5 If the answer to that was yes --

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

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

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

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

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

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

1 standards, and that goes beyond the constitutional  
2 minimum. So that doesn't seem to me to help you,  
3 either.

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

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

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

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

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

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

25 If I could return -- if I could transition

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

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

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

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

19 MR. FISHER: Yes.

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

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

1 foreclosed by circuit precedent from raising it. So we  
2 raised it before an en banc court.

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

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

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

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

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

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

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

1 timeliness of this filing.

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

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

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

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

20           JUSTICE ALITO: Have we ever held that?

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

24           Remember, the reason that we're on coram  
25 nobis is Ms. Chaidez was not in custody. And so if

1 somebody -- so it's, in a sense, interchangeable with a  
2 2255.

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

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

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

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

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

23 And the government can make laches  
24 arguments, can make other arguments to defeat that. The  
25 government has renounced those -- I mean, they let those



1 arguments go in the Seventh Circuit and don't raise them  
2 again here.

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

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

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

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

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

24 JUSTICE GINSBURG: Mr. Fisher --

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

1 JUSTICE GINSBURG: Mr. Fisher, are  
2 you -- you're not making any argument that Teague is  
3 inapplicable because this -- the underlying conviction  
4 here is a federal conviction, not a state conviction,  
5 and Teague emphasized comity to the states; you're not  
6 making that argument?

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

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

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

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

1 interference with a federal proceeding, and that  
2 interest is surely sacrificed by the holding you wish us  
3 to make here.

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

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

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

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

23 MR. FISHER: Well --

24 JUSTICE SOTOMAYOR: -- where we're making  
25 choices among situations and saying, these will be

1 retroactive, these won't.

2 MR. FISHER: Yes.

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

5 MR. FISHER: Yes.

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

8 MR. FISHER: Yes.

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

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

24 Now, let me say two other things and then I  
25 can hopefully reserve my time. To answer your question

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

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

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

22 JUSTICE KENNEDY: Perhaps on rebuttal -- I  
23 recognize the white light's on -- you could address what  
24 is -- what is the standard you want me to apply to  
25 determine retroactivity? The brief says, oh, well, it's

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

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

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

24 If I could reserve the time I have left.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Dreeben.

2 ORAL ARGUMENT OF MICHAEL R. DREEBEN

3 ON BEHALF OF THE RESPONDENT

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

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

8 Because --

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

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

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

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

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

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

25           JUSTICE SOTOMAYOR: I'm not sure. Are those



1 sources -- when you say sources, it's professional norm  
2 sources?

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

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

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

1 counsel.

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

9 MR. DREEBEN: No, Justice Sotomayor.

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

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

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

1 since the 1984 decision in Strickland.

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

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

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

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

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

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

24 JUSTICE BREYER: No, but I mean if the  
25 general rule is that Strickland evolves to pick up

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

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

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

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

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

24 JUSTICE BREYER: No, but -- in the other --  
25 in the other, by the way, in the other 29 cases, did the

1 court specifically say in each of those 29 cases that  
2 the basis of our decision is that the professional norm  
3 has evolved and we apply the new professional norm as of  
4 the time?

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

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

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

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

1 collateral consequence possibly is, and, therefore, the  
2 Court did not decide any other collateral consequence.

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

6 MR. DREEBEN: Yes.

7 JUSTICE KENNEDY: Does common sense change?

8 MR. DREEBEN: Common sense may evolve --

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

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

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

25 And so the fact that we might all share an

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

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

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

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

22 MR. DREEBEN: Well, this --

23 JUSTICE GINSBURG: -- if your concern of  
24 Teague is comity, concern about -- the states running  
25 their own system, I understand the different - the

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

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

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

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

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

25 MR. DREEBEN: Could have, but didn't. There



1 is nothing in the majority opinion that says that Teague  
2 is an issue.

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

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

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

1 JUSTICE KENNEDY: That's a little bit like  
2 the AEDPA standard.

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

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

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

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

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

1 presumed the applicability, but it hasn't squarely held  
2 it.

3 JUSTICE GINSBURG: It hasn't.

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

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

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

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

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

1 useful in this context. There was no precedent that  
2 dictated that.

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

9 JUSTICE SOTOMAYOR: So unanimous error makes  
10 right?

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

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

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

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

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

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

1 MR. DREEBEN: Correct.

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

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

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

21 Now, bringing that down to earth for  
22 ineffective assistance claims, at the time that Ms.  
23 Chaidez's conviction became final, and all convictions  
24 that became final before Padilla, jurisdictions had no  
25 reason to think that they needed to protect against the

1 possibility that a criminal defense lawyer would not  
2 have advised about deportation, because the unanimous  
3 view was that's not something that's the Sixth Amendment  
4 duty.

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

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

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

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

25                   JUSTICE BREYER: You could say that, you

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

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

13           MR. DREEBEN: Yes. I --

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

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



1 raise it on collateral review.

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

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

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

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

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

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

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

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

25 JUSTICE KAGAN: Mr. Dreeben, if

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

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

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

1 didn't take advantage of it. And I think this helps  
2 underscore why, if I can turn to this issue not being  
3 properly presented in the Court.

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

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

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

22           So you've got an argument that, so far as I  
23 can tell, has never been made to any Federal court  
24 before it's been made to this Court, and it would be  
25 remarkable for the Court to adopt that and then have to

1 figure out, how does it apply. Does Teague ever kick  
2 in? Is it a permanent exemption for ineffective  
3 assistance claims?

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

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

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

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

25 MR. DREEBEN: True, but Petitioner is not

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

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

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

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

1 opportunity to counter any of those arguments, and the  
2 lower court never had the opportunity to consider them,  
3 it's not a wise use of the Court's resources.

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

12           CHIEF JUSTICE ROBERTS: Thank you, counsel.

13           Mr. Fisher, you have two minutes remaining.

14           REBUTTAL ARGUMENT OF JEFFREY L. FISHER

15           ON BEHALF OF THE PETITIONER

16           MR. FISHER: Thank you.

17           I'd like to make two points.

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

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

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

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

25           The only thing he relies on in the end is



1 this distinction the lower courts had drawn between acts  
2 and omissions. And that's exactly the distinction in  
3 Strickland that this Court rejected.

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

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

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

23 MR. FISHER: Yes.

24 JUSTICE SOTOMAYOR: I'm not sure about the  
25 floodgates for the following reason. Once we announce

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

18 Thank you.

19 CHIEF JUSTICE ROBERTS: The case is  
20 submitted.

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

23

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