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No. 11 OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EMMANUEL MORRIS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473 (2010), is retroactively applicable to ineffective assistance of counsel claims raised on collateral review.

2. Whether Virginia fails to provide the constitutionally required adequate postconviction remedy where, through a combination of strict time limits on collateral review and in-custody requirements, Petitioner and others similarly situated are precluded from vindicating violations of the right to effective assistance of counsel under *Padilla*.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding below are identified in the caption.

The judgment sought to be reviewed is pursuant to a consolidated opinion addressing two separately litigated appeals. *Commonwealth of Virginia v. Emmanuel Morris* (Record No. 092163) and *Commonwealth of Virginia v. Wellyn Flores Chan* (Record No. 092346).

Wellyn Flores Chan is not joining Petitioner Emmanuel Morris in this Petition for a Writ of Certiorari. Chan is being served as a Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Virginia (App. 1a-17a) is reported at 705 S.E.2d 503 (Va. 2010). The final order of the Circuit Court for the City of Alexandria (App. 18a-19a) incorporates by reference two unreported letter opinions dated July 27, 2009 (App. 20a-30a) and June 26, 2009 (App. 31a-40a).

JURISDICTION

The Circuit Court for the City of Alexandria had jurisdiction to review Petitioner's Motion for Writ of Coram Nobis or, in the Alternative, Writ of Audita Querela, pursuant to Virginia Code section 8.06-677 and Virginia common law. *See Dobie v. Commonwealth*, 96 S.E.2d 747, 752 (Va. 1957) (discussing application of coram nobis).

The Supreme Court of Virginia had jurisdiction of the Commonwealth of Virginia's direct appeal pursuant to Virginia Code section 17.1-310. Judgment was entered on January 13, 2011.

This Court has jurisdiction under 28 U.S.C. § 1257(a). On March 16, 2011, the Chief Justice granted Petitioner's application to extend the time to file this Petition for a Writ of Certiorari to and including June 10, 2011. No. 10A906.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Article VI of the United States Constitution provides, in pertinent part:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution states:

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Regarding the writ of error Coram Nobis,¹ section 8.01-677 of the Virginia Code states:

For any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court.

Regarding the writ of Habeas Corpus, section 8.01-654(A)(2) of the Virginia Code states, in relevant part:

A habeas corpus petition attacking a criminal conviction or sentence, except . . . for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

Additionally, section 19.2-95 of the Virginia Code states, in relevant part:

When [habeas corpus] is applied for, notice thereof and of the time and place of hearing thereon shall be given to the attorney for the Commonwealth of the county or city in which the arrest is made and in which the accused is in

¹ Virginia refers to the writ of error as "coram vobis." For the purpose of this petition, the more common term "coram nobis" is used.

custody, and to the agent of the
demanding state.

STATEMENT OF THE CASE

Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality, once granted, shall not be subject to meaningless and irrational hazards.

Rosenberg v. Fleuti, 374 U.S. 449, 455 (1963).

This case presents two important issues. First, whether this Court's mandate that constitutionally competent counsel must advise clients of the immigration consequences of a criminal plea applies retroactively. Second, whether Virginia must comply with the Fourteenth Amendment's requirement that persons prejudiced by deficient convictions be accorded adequate postconviction procedures. The consequence of delay by this Court in answering these questions is that Petitioner—and those similarly situated—are at risk of deportation while being excluded from judicial review by a combination of fixed time and in-custody rules.

Petitioner is a lawful permanent resident of the United States. App. 24a. He faces deportation because of a 1997 conviction for petit larceny, for which he was sentenced to 365 days in prison but required to serve less than one month in community service. Petitioner's counsel advised him to enter a guilty plea without informing him that his conviction

and sentence are considered an “aggravated felony” under the Immigration & Nationality Act (“INA”). The consequence of counsel’s misadvice is severe. A conviction for an aggravated felony subjects a noncitizen to removal from the United States. 8 U.S.C. § 1101(a)(43)(G).

If this Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), does not apply retroactively, Petitioner faces deportation to a country he has not seen for more than seventeen years, separation from his wife and four children, and a life of exile. But for the erroneous advice of his counsel, Petitioner would not have pled guilty and would have sought immigration advice. App. 27a-28a. Indeed, the sentencing judge later acknowledged “I am confident that if his immigration status had been made known to me by either him or his attorney, I would have most assuredly sentenced him to the 364 days which he is requesting in his petition for writ of coram nobis.” App. 29a.

If this Court does not review the decision of the Supreme Court of Virginia, habeas corpus will remain the exclusive state postconviction remedy for any person asserting a *Padilla* claim in Virginia state court. Yet a petition for habeas corpus in Virginia has a custody requirement and a strict two-year statute of limitations. For persons like Petitioner—who are not in custody and are unaware that they have been denied effective assistance of counsel until two years or more have passed—the constitutional right recognized by this Court in *Padilla* is rendered meaningless.

Immigration Regulatory Framework

The INA has steadily expanded the list of criminal convictions that form the basis for removal, otherwise known as deportation, from the United States. A “theft offense . . . for which the term of imprisonment [is] at least one year” is considered an aggravated felony. 8 U.S.C. § 1101(a)(43)(G). Aggravated felonies carry a penalty of deportation. *See id.* § 1227(a)(2)(A)(iii).

Very limited relief from removal is available for a foreign national convicted of an aggravated felony. *See, e.g., id.* § 1229a(a)(3) (cancellation of removal for certain lawful permanent residents not available to persons who have been convicted of an aggravated felony); *id.* § 1158(b)(2)(B)(i) (asylum unavailable to a refugee convicted of an aggravated felony). An aggravated felony conviction also is a permanent bar to becoming a U.S. citizen. *Id.* § 1101(f)(8) (conviction for an aggravated felony bars otherwise eligible applicants from establishing the requisite good moral character to qualify for naturalization).

In *Padilla*, this Court held that the right to effective assistance of counsel includes being advised of the immigration consequences of a guilty plea. “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal guilty plea, and the concomitant impact of deportation on families living in this country demand no less.” *Padilla*, 130 S. Ct. at 1486.

Petitioner’s Conviction

Petitioner Emmanuel Morris fled the civil war in Liberia and came to the United States as a refugee in August 1993. App. 22a. In 1997, he was employed by Sears Roebuck in Alexandria, Virginia. App. 23a. He

became involved, along with other employees, in a scheme to return items purchased on sale to obtain a full-value refund. App. 32a. Petitioner was charged with grand larceny in the Circuit Court for the City of Alexandria. During his proceedings, he was represented by an assistant public defender. App. 33a. After asking about Petitioner's citizenship status and examining his green card, the assistant public defender remarked: "good, then [I] can pursue [sic] the Judge to give [you] a lesser sentence based upon [your] pleading Guilty to the charge instead of prolonging the trial." App. 2a.

On July 15, 1997, Petitioner pled guilty to the lesser charge of petit larceny. *Id.* He was sentenced to twelve months incarceration, all but thirty days suspended (which he was allowed to complete as modified work release), and ordered to pay restitution of \$15,000 to Sears. App. 32a. Petitioner fulfilled his obligations and was granted early termination of his probation on August 28, 1997. App. 32a.

Petitioner had no further dealings with the law until more than seven years later, when a "Notice to Appear" ("NTA") was issued to him on January 26, 2005. An NTA is a charging document and order to appear for removal proceedings in immigration court. The NTA was prompted by Petitioner's application for naturalization to U.S. citizenship. The naturalization application, which disclosed Petitioner's past conviction, put the United States Citizenship and Immigration Services on notice of Petitioner's past aggravated felony offense. Only at this point did Petitioner learn the immigration consequences of the advice he received from criminal counsel more than seven years earlier. App. 24a.

On December 15, 2008, Petitioner was informed during his removal hearing that the 1997 petit larceny conviction qualified as an “aggravated felony,” as defined by the immigration statute, and he was ordered deported. App. 24a. Petitioner learned further that had he been sentenced to 364 rather than 365 days of imprisonment, his conviction would not be considered an aggravated felony and he would be eligible for relief from removal.

Postconviction Proceedings

After he was ordered deported, Petitioner filed a Motion for Writ of Error Coram Vobis or, in the Alternative, Writ of Audita Querela or Nunc Pro Tunc Order with the Circuit Court for the City of Alexandria, Virginia. Petitioner sought to reduce his original sentence to 364 days based on ineffective assistance of counsel by the assistant public defender, specifically, her affirmative advice that a conviction for petit larceny would not have any adverse immigration consequences. App. 27a. Petitioner testified that had he known of the adverse immigration consequence of the crime, he would not have pled guilty. App. 27a-28a.

The circuit court concluded that counsel’s “affirmative misguidance constitutes ineffective assistance of counsel and that [Petitioner] was in fact prejudiced thereby.” App. 27a. To afford relief for this constitutional violation, the court reasoned that (1) ineffective assistance of counsel is properly cognizable under the writ of coram vobis in Virginia, and (2) “the previous availability of a habeas proceeding now expired should not eliminate the availability of the writ of coram vobis when the petitioner for the writ had no reason to be aware that

his situation called for the filing of a writ of habeas corpus.” App. 33a. Accordingly, the court vacated Petitioner’s July 15, 1997 sentence and imposed a reduced sentence of 364 days. App. 18a-19a.

The court’s final order adopted the findings it had made in two previous letter opinions, both of which relied on this Court’s precedents in *United States v. Morgan*, 346 U.S. 502 (1954) and *United States v. Denedo*, 129 S. Ct. 2213 (2009). The circuit court observed that the writ of coram nobis is to be granted only in extraordinary cases. “In my view, Mr. Morris’ situation is such an extraordinary case. His exemplary life, his wife and four children, . . . and justice demand the granting of Morris’ petition.” App. 29a-30a.

On March 25, 2010, the Supreme Court of Virginia granted the Commonwealth of Virginia’s petition for appeal and consolidated Petitioner’s case with a similar case, which likewise involved a request for writs of error coram vobis and audita querela to remedy the postconviction discovery of ineffective assistance of counsel pertaining to immigration consequences. *Padilla* was issued by this Court less than one week later.

The Supreme Court of Virginia conceded that although the petitioners “may have suffered ineffective assistance of counsel according to *Padilla*, and may have been successful had they timely filed petitions for writs of habeas corpus,” ultimately their reliance on *Padilla* was misplaced because “ineffective assistance of counsel does not constitute an error of fact for the purpose of coram vobis.” App. 13a.

REASONS FOR GRANTING THE WRIT

Padilla held that the failure of criminal counsel to advise a noncitizen of the immigration consequences of a guilty plea constitutes ineffective assistance of counsel in violation of the Sixth Amendment. The first question presented is whether *Padilla* applies retroactively to cases on collateral review. To date, over forty conflicting decisions have been issued by state and federal courts grappling with this issue.

A decision by this Court is retroactively available to criminal cases on collateral review if the decision applies settled precedents to new facts. *See Yates v. Aiken*, 484 U.S. 211, 216-17 (1988). Retroactive application is inappropriate, however, if this Court creates a “new rule” that does not fall within one of two exceptions. *Teague v. Lane*, 489 U.S. 288, 310-11 (1989); *see also Griffith v. Kentucky*, 479 U.S. 314, 324 (1987). The exceptions are that the new rule must either address a “substantive categorical guarantee accorded by the Constitution” or be considered a “watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990) (internal quotation marks omitted) (citing *Teague*, 489 U.S. at 311).

If *Padilla* is retroactive, Virginia fails to provide an adequate remedy to vindicate the violation. In the decision below, the Supreme Court of Virginia held that habeas corpus is the exclusive postconviction collateral remedy to redress a Sixth Amendment claim of ineffective assistance of counsel. Virginia strictly enforces its two-year statute of limitations for habeas corpus and restricts this remedy to persons in

custody. The effect of these restrictions is to deprive Petitioners and others similarly situated of an adequate post-conviction remedy for *Padilla* violations.

I. FEDERAL AND STATE COURTS HAVE ISSUED CONFLICTING DECISIONS ON THE RETROACTIVITY OF *PADILLA V. KENTUCKY*.

This Court decided *Padilla* on March 31, 2010. New lower court decisions have been issued every month since, continually adding to the lower courts' confusion regarding the scope of *Padilla*. To date, more than twenty federal courts and sixteen state courts have reached opposing conclusions concerning whether *Padilla* is retroactively applicable to claims of ineffective assistance of counsel brought on collateral review.

Federal Court Split

To date, at least twelve district courts have held that *Padilla* is retroactively applicable to claims of ineffective assistance of counsel. See *Amer v. United States*, No. 1:06 CR 118-GHD, 2011 U.S. Dist. LEXIS 58062 (N.D. Miss. May 31, 2011); *United States v. Krboyan*, No. 1:02-cr-05438 OWW, 2011 U.S. Dist. LEXIS 57073 (E.D. Cal. May 27, 2011); *United States v. Diaz-Palmerin*, No. 08-cr-777-3, 2011 U.S. Dist. LEXIS 37151 (N.D. Ill. Apr. 5, 2011); *United States v. Chavarria*, No. 2:10-cv-191 JVB, 2011 U.S. Dist. LEXIS 38203 (N.D. Ind. Apr. 4, 2011); *Zapata-Banda v. United States*, No. B 10-256, 2011 U.S. Dist. LEXIS 36739 (S.D. Tex. Mar. 3, 2011); *Marroquin v. United States*, No. 7:10-cv-156, 2011 U.S. Dist. LEXIS 11406 (S.D. Tex. Feb. 4, 2011), *appeal docketed*, No. 11-

40256 (5th Cir. Mar. 9, 2011); *United States v. Zhong Lin*, No. 3:07-CR-44-H, 2011 U.S. Dist. LEXIS 5563 (W.D. Ky. Jan. 19, 2011); *United States v. Joong Ral Chong*, No. CR 101-078, 2011 U.S. Dist. LEXIS 2923 (S.D. Ga. Jan. 12, 2011); *Luna v. United States*, No. 10CV1659 JLS (POR), 2010 U.S. Dist. LEXIS 124113 (S.D. Cal. Nov. 23, 2010); *Martin v. United States*, No. 09-1387, 2010 U.S. Dist. LEXIS 87706 (C.D. Ill. Aug. 25, 2010); *United States v. Chaidez*, 730 F. Supp. 2d 896, (N.D. Ill. Aug. 11, 2010), *appeal docketed*, No. 10-3623 (7th Cir. Nov. 9, 2010); *Al Kokabani v. United States*, No. 5:06-CR-207-FL, 2010 U.S. Dist. LEXIS 110724 (E.D.N.C. July 30, 2010); *United States v. Hubenig*, No. 6:03-mj-040, 2010 U.S. Dist. LEXIS 80179 (E.D. Cal. July 1, 2010); *United States v. Obonaga*, No. 07-CR-402 (JS), 2010 U.S. Dist. LEXIS 63872 (E.D.N.Y. June 24, 2010); *United States v. Millan*, No. 3:06cr458/RV, 2010 U.S. Dist. LEXIS 62351 (N.D. Fla. May 24, 2010); *United States v. Guzman-Garcia*, No. CR F 06-0390 LJO, 2010 U.S. Dist. LEXIS 42930 (E.D. Cal. Apr. 30, 2010), *vacated & remanded on other grounds*, No. 10-15854, slip op. (9th Cir. Oct. 14, 2010) .

Conversely, to date, at least thirteen district courts have ruled that *Padilla* is not retroactively applicable to claims of ineffective assistance of counsel. See *Mathur v. United States*, No. 7:07-CR-92-BO, 2011 U.S. Dist. LEXIS 56801 (E.D.N.C. May 24, 2011), *appeal docketed*, No. __ (4th Cir. June 8, 2011); *United States v. Correa-Gutierrez*, No. 8:08CR267, 2011 U.S. Dist LEXIS 53017 (D. Neb. May 17, 2011), *appeal docketed*, No. __ (8th Cir. May, 27, 2011); *Gonzalez v. United States*, No. 5:11-cv-197-OC-36 DNF, 2011 U.S. Dist. LEXIS 50922 (M.D. Fla. May 12, 2011); *Hamad v. United States*, 10-CV-5829

(JG), 2011 U.S. Dist. LEXIS 45851 (E.D.N.Y. Apr. 28, 2011); *Dennis v. United States*, No. 3:08-cr-889-JFA, 2011 U.S. Dist. LEXIS 42488 (D.S.C. Apr. 19, 2011); *United States v. Laguna*, No. 10 CR 342, 2011 U.S. Dist. LEXIS 38856 (N.D. Ill. Apr. 11, 2011); *Mendoza v. United States*, No. 1:01cr214, 2011 U.S. Dist. LEXIS 35331 (E.D. Va. Mar. 24, 2011); *United States v. Nelson*, No. 1:08-cr-068, 2011 U.S. Dist. LEXIS 24370 (S.D. Oh. Jan. 4, 2011); *United States v. Hough*, No.2:02-cr-00649-WJM-1, 2010 U.S. Dist. LEXIS 133703 (D.N.J. Dec. 16, 2010), *aff'd*, No. 11-1062, slip op. (3d Cir. Apr. 21, 2011); *United States v. Macedo*, No. 1:03-cr-00055-MP-AK, 2010 U.S. Dist. LEXIS 136571 (N.D. Fla. Dec. 15, 2010); *United States v. Bacchus*, CR No. 93-0835, 2010 U.S. Dist. LEXIS 139583 (D.R.I. Dec. 8, 2010); *Thai Hong Doan v. United States*, No. 1:06cr463, 2010 U.S. Dist. LEXIS 139902 (E.D. Va. Dec. 7, 2010), *appeal docketed*, No. 11-6171 (4th Cir. Feb. 4, 2011); *United States v. Perez*, No. 8:02CR296, 2010 U.S. Dist. LEXIS 119665 (D. Neb. Nov. 9, 2010); *United States v. Gilbert*, No. 2:03-cr-00349-WJM-1, 2010 U.S. Dist. LEXIS 110997 (D.N.J. Oct. 13, 2010); *United States v. Aguilar-Lopez*, No. CR-09-6045-FVS-1, 2010 U.S. Dist. LEXIS 76537 (E.D. Wash. July 29, 2010); *Haddad v. United States*, No. 07-12540, 2010 U.S. Dist. LEXIS 72799 (E.D. Mich. July 20, 2010), *appeal docketed*, No. 10-2079 (6th Cir. Aug. 20, 2010); *Gacko v. United States*, No. 09-CV-4938 (ARR), 2010 U.S. Dist. LEXIS 50617 (E.D.N.Y. May 20, 2010).

The U.S. Courts of Appeals for the Fourth and Ninth Circuits have both touched on *Padilla*, without substantively discussing whether it applies retroactively. Compare *United States v. Hernandez-Montreal*, No. 10-4777, 2010 U.S. App. LEXIS 24917

at *3 [unnumbered footnote] (4th Cir. Dec. 6, 2010) (“[N]othing in the *Padilla* decision indicates that it is retroactively applicable to cases on collateral review.”) *with United States v. Bonilla*, 637 F.3d 980 (9th Cir. 2011) (noting without further discussion the district court’s comment that “even if *Padilla* were retroactively to render the performance of Bonilla’s counsel deficient for Sixth Amendment purposes,” counsel’s failure to advise Bonilla did not give rise to prejudice under Strickland) (citation omitted).

In short, *Padilla* is being inconsistently applied by the federal courts and it is not likely that consistent application will occur in the near future. With the exception of the Tenth Circuit, at least one district court in every federal circuit has spoken on the issue. Moreover, opposing views have been expressed by district courts *within* each of the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. The two Courts of Appeals that briefly discussed *Padilla* did not mention the split of authority within their own jurisdictions.

State Court Split

To date, at least ten state courts in Kansas, Minnesota, New Jersey, New York, and Texas have determined that *Padilla* is retroactively applicable to collateral claims of ineffective assistance of counsel. *See Ex Parte Yekaterina Tanklevskaya*, No. 01-10-00627-CR, slip op. (Tex. App. May 26, 2011); *Campos v. State*, No. A10-1396, slip op. (Minn. Ct. App. May 16, 2011); *State v. Golding*, No. 01-10-00685-CR, 2011 Tex. App. LEXIS 3616 (Dist. Ct. App. May 12, 2011); *State v. Sandoval*, 249 P.3d 1015 (Wash. 2011); *People v. De Jesus*, 30 Misc. 3d 1203A (N.Y. Sup. Ct. Dec. 24, 2010); *State v. Duroseau*, No. A-1740-08T4,

2010 N.J. Super. Unpub. LEXIS 2765 (App. Div. Nov. 16, 2010); *People v. Paredes*, 29 Misc. 3d 1202A (N.Y. Sup. Ct. N.Y. Co. Sept. 21, 2010); *People v. Ramirez*, 29 Misc. 3d 1201A (Crim. Ct. N.Y. Co. Sept. 17, 2010); *People v. Garcia*, 907 N.Y.S.2d 398 (N.Y. Sup. Aug. 26, 2010); *State v. Limarco*, 235 P.3d 1267 (Kan. Ct. App. Aug. 6, 2010); *People v. Bennett*, 903 N.Y.S.2d 696 (Crim. Ct. May 26, 2010); *People v. Ortega*, 29 Misc. 3d 1023A (N.Y. Crim. Ct. N.Y. Co. 2010).

At least seven state courts in Florida, Maryland, New Jersey, New York, and Tennessee have held that *Padilla* is not retroactively applicable to collateral claims of ineffective assistance of counsel. See *Diaz v. State*, No. 3D10-2563, 2011 Fl. App. LEXIS 7576 (Dist. Ct. App. May 25, 2011); *Gomez v. State*, No. E2010-01319-CCA-R3-PC, 2011 Tenn. Crim. App. LEXIS 339 (Crim. App. May 12, 2011); *Hernandez v. State*, No. 3D10-2462, 2011 Fl. App. LEXIS 4787 (Dist. Ct. App. Apr. 6, 2011); *Miller v. State of Maryland*, 11 A.3d 340 (Md. Ct. Spec. App. Dec. 29, 2010); *State v. Barrios*, No. A-2686-09T3, 2010 N.J. Super. Unpub. LEXIS 2987 (App. Div. Dec. 14, 2010); *People v. Sanchez*, 2010 N.Y. slip op. 51952U (Sup. Ct. Queens Co. Nov. 10, 2010); *People v. Kabre*, 905 N.Y.S.2d 887 (N.Y. Crim. Ct. July 22, 2010).

The highest state courts to address *Padilla* likewise have been unclear as to its scope. For example, the Supreme Court of Washington appears to have assumed that *Padilla* is retroactively available. *State v. Sandoval*, 249 P.3d 1015 (Wash. 2011) (applying *Padilla* to a personal restraint petition brought to address a 2006 conviction). On the other hand, the Supreme Court of Virginia noted that Petitioner in this case “may have suffered ineffective assistance of counsel according to *Padilla*”

without explicitly commenting on whether *Padilla* even applied to Petitioner's 1997 conviction. App. 13a. *But see Commonwealth of Virginia v. Cabrera*, No. GC04005749-00, slip op. at 4 (Va. Cir. Ct. Jan 31, 2011) (declining to follow the Supreme Court of Virginia because it "is at odds with longstanding precedent and jurisprudence").

In the absence of review from this Court, individuals asserting *Padilla* claims will continue to be treated differently based upon the arbitrary and irrelevant circumstance of geography.

A. Padilla Does Not Articulate a "New Rule" and Thus Should Apply Retroactively to Postconviction Claims.

Requests for postconviction relief generally are reviewed according to the law that existed when the petitioner's case became final on direct appeal. If this Court creates a new constitutional rule of criminal procedure after a petitioner's case becomes final, the petitioner cannot benefit from the new rule. *Teague* 489 U.S. at 310. But, if this Court merely applies an existing rule to a different set of facts, the existing rule applies both to cases on direct appeal and to postconviction review. *Williams v. Taylor*, 529 U.S. 362, 380-81 (2000) (a decision may be given retroactive effect when it does not announce a new rule but "simply applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), is the default rule for ineffective assistance of counsel claims. *Strickland* holds that a

conviction can be vacated for ineffective assistance of counsel if: (1) the quality of the attorney's representation fell below professional norms; and (2) the defendant suffered prejudice as a result of the deficient representation. *Id.* at 687-96.

Padilla did not announce a new rule—or even a novel concept—that competent counsel must properly advise his or her client of the impact that a guilty plea may have on a client's immigration status. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001) (“Even if the defendant were not initially aware of [the provision of the INA concerning deportation and aggravated felonies] competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance.”). *Padilla* merely applied the well-settled rule in *Strickland* to a particular set of facts.

Indeed, the language in *Padilla* strongly suggests that it was meant to apply retroactively. This Court gave “serious consideration” to the “floodgates” argument raised by *amici* and the Solicitor General concerning the effect of *Padilla*'s holding on the finality of convictions. 130 S. Ct. at 1484-85. This Court's response was that “[i]t seems unlikely that our decision today will have a significant effect on those convictions *already obtained* as the result of plea bargains.” *Id.* at 1484-85 (emphasis added). “*Strickland*'s high bar” would “separate specious claims from those with substantial merit.” *Id.* at 1485.

This Court should grant certiorari to resolve this important question of constitutional law. Further delay will only lead to additional confusion in the

lower federal and state courts rather than sharpen consideration of this important question.

II. UNTIL THIS COURT INTERVENES, A CLASS OF INDIVIDUALS IS LEFT WITHOUT A MEANINGFUL STATE REMEDY TO VINDICATE VIOLATIONS OF FEDERAL CONSTITUTIONAL RIGHTS.

Generally, it is for a State and not for this Court to provide state remedies for the vindication of federal rights. *Carter v. Illinois*, 329 U.S. 173, 175-76 (1946). Serious due process concerns arise, however, when a state fails to provide any remedy. The Supreme Court of Virginia's decision below deprives an entire class of persons from the opportunity to raise a postconviction claim of ineffective assistance of counsel. Two weeks after the Supreme Court of Virginia issued its decision, a lower state court boldly refused to follow the ruling on the ground that:

If this Court were to abide by the [Supreme Court of Virginia's decision], a constitutional violation will stand uncorrected, as the remedy of habeas corpus is not available to the Defendant in this case. For the reasons stated . . . the Court will not allow this to happen.

Commonwealth of Virginia v. Cabrera, No. GC04005749-00, slip op. at 12 (Va. Cir. Ct. Jan. 31, 2011) (relying on *Padilla*, granting defendant's petition for writ of error coram nobis, and withdrawing defendant's 2005 guilty plea to remedy a Sixth Amendment violation).

A. Virginia's Decision Is Not Supported by an Independent and Adequate State Ground.

Significant federal issues were raised below with respect to what remedy—if any—is available to Petitioner to assert his postconviction Sixth Amendment claim of ineffective assistance of counsel. The Circuit Court of Alexandria relied on federal case law to determine that *coram nobis* is an appropriate vehicle to challenge a conviction collaterally, “[o]therwise a wrong may stand uncorrected which the available remedy would correct.” App. 39a.

Yet the Supreme Court of Virginia was silent as to the constitutional ramifications of its decision, focusing instead on the procedural aspect of Petitioner’s claim under Virginia state law.

The failure of a state’s highest court to pass upon properly asserted federal claims is ground for this Court’s review. See *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930) (“a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it”); *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (if state courts “withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination”).

That a right should be followed by a remedy has strong roots in our history. The Supremacy Clause demands that “judges in every state shall be bound”

by the Constitution notwithstanding anything to the contrary under state law. U.S. Const. art. VI, cl. 2; *see also Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (“[I]t does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.”); *Frank v. Mangum*, 237 U.S. 309, 335 (1915) (“if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment . . . the State deprives the accused of his life or liberty without due process of law”).

**B. State Postconviction Relief
Historically Has Been Prompted by
Decisions of this Court.**

Several decisions by this Court in the 1940s, 1950s, and 1960s prompted states to reexamine their postconviction procedures. *See, e.g., Marino v. Ragen*, 332 U.S. 561, 569-70 (1947) (Rutledge, J., concurring) (“If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court.”). *Young v. Ragen* declared that “[i]t is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right.” 337 U.S. 235, 238 (1949). The Court elaborated:

[T]hat is the effect of the denials of habeas corpus in a number of cases now before this Court, *for in none of the cases does the Attorney General suggest that either of the other two Illinois post-trial remedies, writ of error and coram nobis,*

is appropriate. Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind.

Id. at 238 (emphasis added). In response, Illinois enacted the groundbreaking 1949 Post Conviction Hearing Act. 38 Ill. Comp. Stat. Ann. 122-1 *et seq.* The National Commissioners on Uniform State Laws followed in 1966 with the Uniform Post-Conviction Procedure Act. The current version, published in 1980, specifically contemplates that remedies should be available “whether or not the applicant is in custody under the sentence challenged.” Criminal Law and Procedure, 11 Uniform Laws Annotated Comm. to § 1(a)(b) (master ed. 2003); *see also* ABA Minimum Standards Relating to Postconviction Remedies, Standard 22-2.3 (same).

Nonetheless, the invitation for reform was not accepted nationwide. In *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (per curiam), this Court granted certiorari specifically “to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees.” The Nebraska state legislature immediately responded by enacting a statute providing for postconviction procedure.

Although the case was remanded in light of the supervening statute, two forceful concurrences accompanied the opinion. Justice Clark flatly declared that “the great variations in the scope and availability of [state] remedies result in their being entirely inadequate.” *Id.* at 338 (Clark, J.,

concurring). He was joined by Justice Brennan, who believed that “[s]tate statutes should provide a postconviction process at least as broad in scope as existing Federal Statutes” *Id.* at 346 (Brennan, J., concurring).

The “merry-go-round of habeas corpus, coram nobis, and writ of error” that Justice Rutledge found so disturbing in Illinois, 332 US at 569-70, also was formerly commonplace in New York. In *People ex. rel. Whitman v. Wilson*, a state prisoner sought a writ of habeas corpus on the ground that the prosecution used perjured testimony. 32 N.Y.S.2d 29 (3d Dep’t 1942). The New York state courts denied the writ and this Court granted certiorari. Meanwhile, another case was brought on a writ of coram nobis on the same facts. It too was denied by the New York trial court. It became apparent that if neither prisoner had chosen the proper remedy, New York had no remedy. The New York Court of Appeals thus held that in the circumstances presented, state courts had the power to employ coram nobis. *Lyons v. Goldman*, 47 N.E.2d 425 (N.Y. 1943). This Court then remanded *Whitman* for the New York courts to resolve. 318 U.S. 688 (1943). Ultimately, in response to the 1966 Uniform Postconviction Procedure Act and newly adopted ABA standards, New York reformed its entire postconviction machinery in 1970.

C. All States Today Have Remedies But Not All Remedies Are Adequate.

In Virginia, habeas corpus is the exclusive state remedy to assert a postconviction claim of ineffective assistance of counsel. However, for many defendants, like the petitioner in *Padilla* and Petitioner here, the immigration consequences of a guilty plea that is

based on attorney misadvice are initially unknown. Nor will this knowledge always conveniently fall within the statute of limitations to bring a habeas corpus action and pursue postconviction relief. Even if it does, a petition for habeas corpus is limited to persons who are in custody, precluding many—like Petitioner—from relief.

Since this Court's decision in *Young v. Ragen*, 69 postconviction statutes or court rules have been adopted in 46 states. Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook* § 2.5 at 43 (2010 ed.) ("Postconviction Handbook"). As in Virginia, not all of these states contemplated a remedy for postconviction claims where the defendant is no longer in custody or does not discover the constitutional violation until the statute of limitations has expired. This Court should grant certiorari to address whether states must provide an adequate remedy for the following reasons.

First, 26 states and the District of Columbia have a custody requirement for the principal postconviction remedy. *Postconviction Handbook* § 1.3 at 5. In these states, lack of custody may be a complete bar to postconviction relief unless a secondary postconviction remedy is available. Virginia has a custody requirement for habeas corpus. Va. Code Ann. § 8.01-654(A)(1). The remaining secondary forms of relief are unavailable to Petitioner.

Second, a person cannot bring a federal application for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act ("AEDPA") unless the applicant is in custody

pursuant to a state court judgment. 28 U.S.C. § 2244(d)(1).

Third, unless a state equitably tolls its statute of limitations, a person is precluded from filing for state habeas corpus if the harm is not timely discovered. In Virginia, a habeas corpus petition attacking a criminal conviction or sentence *must* be filed within two years from the date of final judgment in the trial court. Va. Code. Ann. § 8.01-654(A)(2). Once the habeas window closes, no other forum exists in Virginia to bring a constitutional claim.

The Supreme Court of Virginia's ruling also arguably contravenes this Court's instruction that equitable procedures should be flexibly applied to enable courts "to accord all the relief necessary to correct . . . particular injustices." *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2009) (holding that in certain "extraordinary circumstances," a court may relax the statute of limitations for the filing of habeas corpus petitions).

Fourth, the District of Columbia and 38 states employ a modern remedy in the nature of coram nobis as their principal postconviction remedy. Postconviction Handbook § 1.3 at 5. The remaining states either do not recognize the writ of coram nobis or, like Virginia, limit the writ's application to *factual* or *clerical* error. *See, e.g.*, App. 13a ("a claim of ineffective assistance of counsel does not constitute an error of fact for which coram vobis will lie under Code § 8.01-677"). The Supreme Court of Virginia reversed the Circuit Court of Alexandria's determination that ineffective assistance of counsel based on misunderstanding of immigration law *is* an error of fact. App. 36a. As such, those similarly

situated to Petitioner who are convicted in state court and precluded from both habeas corpus and coram nobis, have no remedy at all.

Fifth, conversely, had Petitioner been convicted of a federal crime with access to federal court, a collateral hearing on his constitutional claim would have been guaranteed under a Section 2255 motion to vacate. Importantly, this federal remedy is also subject to equitable tolling. 28 U.S.C. § 2255 (“The limitation period shall run from the latest of . . . the date on which the facts supporting the claim or claims *could have been discovered through the exercise of due diligence.*”) (emphasis added).

Additionally, if Petitioner had been convicted under federal law but was no longer in custody, the writ of coram nobis would be available to assert constitutional claims in federal district court.² *United States v. Denedo*, 129 S. Ct. 2213 (2009) (coram nobis may be employed in appropriate situations “when habeas relief is no longer available through no fault of the defendant”); *United States v. Morgan*, 346 U.S. 502, 506 n.4 (1954) (dubbing coram nobis “of the same general character as one under 28 U.S.C. § 2255” and effectively making it a companion writ for persons not in federal custody). In *Morgan*, this Court recognized that coram nobis is available for “errors of the most fundamental character” when “no other remedy [is] then available” and “sound reasons [exist] for failure to seek appropriate earlier relief.” *Morgan*, 346 U.S. at 511-12. Underpinning the Circuit Court of Alexandria’s decision to grant Petitioner’s writ of

²It is settled law that coram nobis cannot be sought in federal court to attack a state criminal conviction. See, e.g., *Finkelstein v. Spitzer*, 455 F.3d 131 (2d Cir. 2006).

error coram nobis was this Court's guidance on the common law writ in *Denedo* and *Morgan*.

Certiorari should be granted in this case to provide guidance on a question that the Court intended to answer in 1965, but was unable to decide on the merits in light of a supervening state statute. *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (per curiam) (certiorari granted "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees").

Unless this Court affirmatively requires states to provide adequate postconviction remedies, there is no guarantee that states will do so. *See, e.g., Smith v. State*, 697 S.E.2d 177, 188 (Ga. 2010) (admitting that for persons asserting *Padilla* claims who "seem to be without any remedy" the "law sometimes requires such a harsh result when defendants fail to assert their claims in both proper and timely fashion"); *People v. Carrera*, 940 N.E.2d 1111, 1120-21 (Ill. 2010) ("We do not agree with defendant that *Padilla* confers standing for him to proceed with his postconviction petition . . . as we held [previously], a postconviction remedy is available only to those that are actually being deprived of their liberty, and not to those who have served their sentences and might wish to purge their records of past convictions"); *State v. Chavez*, 246 P.3d 1219, 1220 (Utah App. 2011) ("Although *Padilla* imposes a duty on counsel to advise a defendant of the immigration consequences of his or her guilty plea, it does not displace state jurisdictional requirements").

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

State courts bear the greater number of criminal cases. As demonstrated by the history of state postconviction regulations, without this Court's intervention to protect constitutional rights, no method exists to compel systemic change nationwide. Until this Court steps in, an uncertain number of individuals will continue to be precluded from raising Sixth Amendment constitutional claims because of arbitrary disparities in jurisdiction and geography.

Foreign nationals who are at the intersection of criminal and immigration law are in particular need of protection. An attorney's mistake as to the immigration consequences of a criminal plea can render a defendant an "aggravated felon" subject to near-certain removal. For crimes such as larceny, of which Petitioner was convicted, this amounts to a particularly harsh penalty. Petitioner was sentenced to serve only one month of community service for his offense and he paid the required restitution. Nevertheless, he faces deportation to a country that he has not seen for more than seventeen years, separation from his wife and four children, and a life of exile.

If *Padilla* is not retroactively applicable, individuals such as Petitioner will be gravely prejudiced—in a manner that would not have resulted had criminal counsel properly advised the defendant and the court of the immigration consequences of a guilty plea. The Circuit Court judge determined that Petitioner was prejudiced.

But Petitioner has no effective remedy under state or federal law.

Until this Court (1) provides guidance on the retroactive application of *Padilla* to collateral attacks and (2) requires states to afford *adequate* postconviction procedures to vindicate constitutional claims, a grave injustice will go unremedied for Petitioner and an entire class of noncitizens who are similarly situated. The division of authority on this issue justifies review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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