Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellant

against

ROMAN BARET,

Defendant-Appellee

BRIEF OF NEW YORK LEGAL ACADEMICS
AS AMICI CURIAE
IN SUPPORT OF DEFENDANT-APPELLEE

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PRELIMINARY STATEMENT

*Amici curiae*, New York legal academics, submit this brief in support of Defendant-Appellee Roman Baret to assist the Court by making three points relevant to the questions presented that are not addressed or fully addressed in the parties’ briefs. The *amici* hope to assist the Court in determining what retroactivity rule should be applied to Mr. Baret’s claim of ineffective assistance of trial counsel, a claim Mr. Baret properly raised for the first time in postconviction proceedings pursuant to N.Y. Crim. Proc. Law § 440.10.

First, the *amici* demonstrate that applying the anti-redressability rule of *Teague v. Lane*¹ in Mr. Baret’s case will actually undermine, rather than promote, the policy interests sought to be advanced by the *Teague* rule. The *amici* scrutinize the foundations of the United States Supreme Court’s redressability jurisprudence, revealing the policy considerations underlying the rules.² The Supreme Court has fashioned a rule of redress for cases on direct review,³ and an anti-redress rule for cases reviewing a state-court criminal judgment in federal habeas corpus proceedings.⁴ Because state postconviction proceedings share attributes of both direct and collateral review, it is necessary to examine the type of claim presented to select the appropriate rule to advance the policy concerns of the redressability regime.⁵ Applying the *Teague* rule to Mr. Baret’s claim is not only inappropriate but unnecessary. New York procedural law ensures that claims are properly channeled to the proper forum at the proper time, and *Ineffective assistance of counsel* claims are properly channeled to postconviction proceedings for initial

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² Section I(A), infra.
⁵ Section I(B), infra.
adjudication. The finality interest with respect to such claims is no greater than the finality interest with respect to claims on direct review, and the substantive law governing ineffective assistance of counsel claims is carefully calibrated to serve the state's interest in finality. In the specific circumstances presented by this case, then, New York's interest in finality is overcome by its interests in providing an initial forum for constitutional claims, in which New York courts can discharge their duty to say what the law is and develop constitutional doctrine. This Court should conclude that the redressability rule of Griffith v. Kentucky, and not the Teague anti-redressability rule, applies to claims like Mr. Baret's.

While amici urge this Court to refrain from applying Teague to claims like Mr. Baret's, in the second point raised amici alternatively propose the Teague framework should at least be modified, to mitigate three of the persistent criticisms of the Teague rule. First, Teague's threshold inquiry—whether a constitutional rule is a "new rule"—is indeterminate and unpredictable, as exemplified by the divergent conclusions of the New York courts as to whether Padilla v. Kentucky announced a "new rule." This Court can tailor the "new rule" analysis to the lessened finality concerns presented by claims like Mr. Baret's. Second, the selection of the end of direct review as the "trigger point" for the shift from a redressability regime to an anti-redressability regime has been criticized as generating unfairness, and this is particularly so when Teague is applied to claims like Mr. Baret's which are properly brought for the first time in postconviction proceedings. Adopting the end of postconviction review as the "trigger point" for

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6 Section I(C)(1) and I(C)(2), infra.
7 Section I(D), infra.
8 Section I(E), infra.
9 Section I(F), infra.
12 Section II(A), infra.
claims like Mr. Baret's is much more appropriate in light of the interests to be served by the Teague rule.\textsuperscript{13} Third, Teague has been criticized for its overly narrow definition of “watershed” rules which require redress in all instances, and this Court can modify the “watershed” rule definition to account for the lessened finality interests at stake when considering a claim properly first raised in postconviction proceedings.\textsuperscript{14}

Finally, the Padilla rule ought to be considered a “watershed” rule even under Teague’s restrictive definition. The rule concerns the scope of the constitutional right to counsel, and the Court has always valued this right as a bedrock procedural guarantee.\textsuperscript{15}

\textsuperscript{13} Section II(B), infra.
\textsuperscript{14} Section II(C), infra.
\textsuperscript{15} Section III, infra.
INTEREST OF THE AMICI CURIAE

Amici curiae are New York legal scholars who teach, research and write about criminal law, criminal procedure, immigration law, constitutional law, and access to justice.16 (See below for a complete list of amici). As teachers, practitioners, and scholars, the proposed amici have an interest in the proper resolution of the issue addressed by this brief. This is particularly so because the proposed amici include clinical faculty who, in addition to lecturing and researching, are also actively engaged in supervising law students in the practice of law in New York.

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ISSUE PRESENTED

What rule should New York courts apply in postconviction proceedings brought pursuant to N.Y. Crim. Proc. Law § 440.10 to determine whether redress will be available for violations of the constitutional right recognized in Padilla v. Kentucky,\textsuperscript{18} to be adequately advised by counsel as to the immigration consequences of a criminal conviction?

\textsuperscript{18} 559 U.S. 356 (2010).
ARGUMENT

In Danforth v. Minnesota, the Supreme Court explained that because the Teague anti-redress rule was fashioned to address comity and finality concerns specific to federal habeas review of state-court criminal judgments, Teague does not bind state postconviction courts. This Court must now determine whether, under New York law, redress should be available to a litigant who properly raises for the first time in state postconviction proceedings his claim of constitutionally ineffective assistance of trial counsel. The federal rules are not binding, but the principles underlying them compel an affirmative answer.

This case presents the Court squarely with the opportunity—indeed, the necessity—to revise its pre-Danforth adherence to Teague. In People v. Eastman, this Court was faced with the question of whether a new constitutional rule should be applied in state postconviction proceedings where the constitutional question at issue had been unsuccessfulty litigated by the defendant on direct review. This Court concluded in that context that the finality concerns

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21 The Court explained that “redressability,” rather than “retroactivity,” is the appropriate term because the use of “retroactivity” terminology falsely implies that the right at issue was not in existence prior to the date the “new rule” was announced. Danforth, 552 U.S. 271 & n.5. The question Teague addresses is whether a violation of the new rule prior to its announcement is subject to redress in a particular proceeding. Id.
22 See Danforth, supra. Thus, although the United States Supreme Court held in Chaidez v. United States, 133 S.Ct. 1103 (2013), that Padilla was a “new rule” that should not be applied retroactively, this Court is not bound by that decision.
23 In People v. Eastman, 85 N.Y.2d 265 (1995), this Court applied federal redressability jurisprudence in evaluating a defendant’s Confrontation Clause claim. Id. at 375 (citing Teague, supra; Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting)).
underlying the Teague rule were fully present and would ordinarily militate against granting redress pursuant to a constitutional rule announced after the conclusion of direct review. 25

Here, however, Mr. Barett’s claim of ineffective assistance of counsel was properly brought for the first time in state postconviction proceedings. While the policy concerns underlying the Teague rule are advanced by Teague’s application to the claim in Eastman that was re-litigated in postconviction proceedings, they are undermined by Teague’s application to Mr. Barett’s claim, properly brought for the first time in state postconviction proceedings.

I. APPLYING THE TEAGUE ANTI-REDRESS RULE TO A CLAIM OF TRIAL COUNSEL INEFFECTIVENESS PROPERLY BROUGHT FOR THE FIRST TIME IN STATE POSTCONVICTION PROCEEDINGS RUNS CONTRARY TO THE PRINCIPLES UNDERLYING THE FEDERAL REDRESSABILITY REGIME.

A. The federal redressability rules are premised on state courts applying and developing federal constitutional law.

The United States Supreme Court’s rules for deciding whether a litigant may obtain redress26 for the violation of a newly announced constitutional rule stem from two seminal decisions. Griffith v. Kentucky27 established a rule of full redressability in proceedings on direct review, and Teague v. Lane28 established a rule of non-redressability (with two narrow exceptions, for rules placing conduct “beyond the power of the criminal law-making authority to

25 Id. The Court held the “new” constitutional rule at issue was a “watershed” rule that should be applied in postconviction proceedings.
26 In Danforth, the United States Supreme Court explained that it “may ... make more sense to speak in terms of the ‘redressability’ of violations of new rules, rather than the ‘retroactivity’ of such rules.” 552 U.S. at 271 n.5. The use of “retroactivity” terminology, the Court said, falsely “suggests that when we declare that a new constitutional rule of criminal procedure is ‘nonretroactive,’ we are implying that the right at issue was not in existence prior to the date the ‘new rule’ was announced.” 552 U.S. at 271. New constitutional rules, the Court explained, are discovered — not created. The question of whether a new rule is “retroactive” is more properly considered as whether a particular defendant who suffered a violation of the new rule prior to its announcement is entitled to redress for the violation. Id.
proscribe” and “watershed” rules implicating a trial’s fundamental fairness) in federal habeas corpus proceedings to review a state-court criminal conviction.

The roots of the Court’s redressability rules lie in the expansion of federal habeas corpus review of state criminal judgments. In two influential opinions (his dissent in Desist v. United States, and his separate opinion in Mackey v. United States), Justice Harlan outlined what would later be adopted nearly wholesale as establish the current federal redressability regime—a rule of full redress (the “Griffith rule”) for cases on direct review, and a general rule of no redress (the “Teague rule”) for federal habeas corpus review of state-court judgments. Together, these two rules establish a regime that not only accords state courts the opportunity and responsibility for developing federal constitutional law, but also restrains federal courts from undermining the constitutional decisionmaking of state courts by imposing later-developed constitutional rules where the state courts have already rendered a constitutional decision subject to review by the United States Supreme Court.

Griffith’s rule of redressability for cases on direct review was grounded in Justice Harlan’s conclusion that “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.” First, the Griffith Court noted, “the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule.” In particular, Justice Harlan

29 Danforth, 552 U.S. at 272-73.
32 See Eastman, 85 N.Y.2d at 275 (1995) (noting that the “Supreme Court ... embraced Justice Harlan’s approach to retroactivity for cases on collateral review”).
33 See Danforth, 552 U.S. 273-75.
34 Griffith, 479 U.S. at 322.
35 Id.
had feared that allowing new rules to justify redress only prospectively would eliminate the
obligation of lower courts to decide claims and eviscerate their “responsible for developing or
interpreting the Constitution.” 36 This, Justice Harlan believed, would effectively freeze
constitutional doctrine and render the lower courts “automatons.” 37 Second, and equally
importantly, a system of less than full redressability would produce intolerable inequalities. To
give redress to one litigant and deny it to others on direct review would be treating “similarly
situated defendants” differently without a principled reason for doing so. 38

*Teague*’s rule of non-redressability for cases on federal habeas corpus review, on the
other hand, was grounded in Justice Harlan’s concerns for comity and respect for the finality of
state-court judgments. 39 The premise upon which both interests were implicated was that a
federal habeas court reviews claims that have already been adjudicated in state court and exposed
to Supreme Court review. Justice Harlan recognized that relitigation of constitutional issues in
federal habeas proceedings might serve a “deterrence function,” 40 “forcing trial and appellate
courts in both the federal and state system to toe the constitutional mark.” 41 But this function
might be adequately served (and tempered by comity), Justice Harlan believed, by limiting
federal habeas courts to applying constitutional rules in effect at the time of the state-court
adjudication. 42 *Teague* similarly counted among the “costs imposed upon the State[s] by
retroactive application of new rules of constitutional law on habeas corpus” the
“understandabl[e] frustrat[ion]” of state courts that “faithfully apply existing constitutional law

36 Mackey. 401 U.S. at 680.
37 Id.
38 Griffith. 479 U.S. at 323 (citing Desist. 394 U.S. at 258-59 (Harlan, J., dissenting)).
39 See Demforin. 552 U.S. at 279.
40 Desist. 394 U.S. 262-63 (Harlan, J., dissenting).
41 Mackey. 401 U.S. 687.
42 Id.
only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.43 Comity was thus deployed in Teague to protect the ability of state courts to adjudicate federal constitutional issues and to incentivize them to do so faithfully.

The finality interest served by Teague was similarly premised on an initial adjudication of constitutional claims in state court. Justice Harlan relied on articles by Harvard law professor Paul Bator and by Second Circuit Judge Henry Friendly discussing the finality interests implicated by relitigating claims on collateral review.44 Importantly, neither Bator nor Friendly embraced finality to curtail collateral review without qualification. Both recognized the existence of “general categories where ... the first go-around ... should not count”—where constitutional claims were not in fact subject to litigation on direct review.45 And both suggested that the absence of a forum for claims “which could not fairly be raised at all until after final judgment” could amount to a due process violation.46

Bator explicitly extolled the capacity of state-court judges to determine federal constitutional issues. “[D]eciding federal questions is an intrinsic part of the business of state judges,” Bator wrote,47 and for him permitting relitigation of constitutional claims anew on

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43 Teague, 489 U.S. 310 (citations omitted).
44 Mackey, 401 U.S. 690 (citing Paul Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) and Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146-151 (1970)). These sources were in turn relied upon in Teague. 489 U.S. at 309 (citing Bator, supra, and Friendly, supra).
45 Bator, supra, 76 Harv. L. Rev. at 454; Friendly, supra, 38 U. Chi. L. Rev. at 152 (explicitly excepting from finality’s ambit on collateral attack constitutional claims, the factual bases of which “are dehors the record and their effect on the judgment was not subject to consideration and review on appeal”).
46 Bator, supra, 76 Harv. L. Rev. at 459-60; Friendly, supra, 38 U. Chi. L. Rev. at 168.
47 Bator, supra, 76 Harv. L. Rev. at 510-11.
federal habeas would squander “all of the intellectual, moral, and political resources involved in the legal system”—including any “sense of responsibility” among state judges.  

Whether cast in terms of comity or finality, the premise of Teague is the availability of a state forum for adjudicating in the first instance the merits of constitutional issues presented, subject to review by the United States Supreme Court. Both Justice Harlan and Bator justified limiting federal habeas review by emphasizing that such review always occurs after a round of litigation in which the state courts have had the opportunity to apply federal constitutional law, subject to review by the United States Supreme Court. Teague’s deference to state courts is premised on state courts’ faithful discharge of this obligation, and upon the existence of a full round of unrestricted review, as the Griffith rule establishes, in which constitutional innovation is permitted and even required.

“Federalism and comity considerations,” of course, “are unique to federal habeas review of state convictions,” and need not concern this Court in considering what redressability rules should govern New York postconviction proceedings. Finality, on the other hand, is “implicated in the context of state [postconviction proceedings] as well as federal habeas ... [and] is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts.”  

Considering the logical underpinnings of Griffith and Teague, even while

48 Id. at 451; see also id. at 506 (“The crucial issue is the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of his business: the decision of federal questions properly raised in state litigation.”).  
49 Mackey, 401 U.S. 682-83 (Harlan, J., dissenting); see also, e.g. Bator, 76 Harv. L. Rev. at 512 (referring to “federal questions already adjudicated by state courts and subject to Supreme Court review”).  
50 Danforth, 552 U.S. at 279.  
51 Id. at 280.
recognizing the finality interest present in state postconviction proceedings, should cause this Court to reject the application of Teague’s anti-redressability rule to cases like Mr. Baret’s, and should inform this Court’s fashioning of an appropriate redressability regime for the New York courts considering such cases.

B. The federal redressability rules require unrestricted review of a federal constitutional claim when it is first raised in state court proceedings.

The logic of Griffith (holding that federal constitutional claims must be afforded an unencumbered round of review during which constitutional innovation can occur), and not the logic of Teague (holding that once such an unencumbered review has taken place, innovation in federal habeas corpus proceedings is inconsistent with comity and finality), pertains here. To be sure, state postconviction review shares characteristics of both federal habeas proceedings (governed by Teague) and direct review proceedings (governed by Griffith). On the one hand state postconviction proceedings, like federal habeas proceedings, are a form of “collateral review.” To some degree, then, the finality interests at stake in federal habeas corpus proceedings can be present in state postconviction proceedings. The Eastman case, in which this Court adhered to Teague’s framework in the state postconviction context, is an example. In Eastman, the claim raised in postconviction proceedings was capable of resolution on direct review. State postconviction proceedings in Eastman were a forum for relitigation and the finality concerns underlying Teague were therefore implicated.

But on the other hand, state postconviction proceedings, unlike federal habeas proceedings, can in some instances be more akin to direct review proceedings—a first forum in

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53 Id.
54 Id. at 275. The Court nonetheless found any finality concerns overcome because the constitutional rule at issue was a “watershed” rule. Id. at 275-76.
which to litigate constitutional claims (and to develop facts pertaining to those claims). Because
a claim of trial counsel ineffectiveness typically relies on facts outside the record, a
postconviction proceeding is the appropriate forum for first raising such a claim.\textsuperscript{55}

Where a litigant properly brings a claim (such as Mr. Baret’s \textit{Padilla}\textsuperscript{56} claim) for the first
time in state postconviction proceedings, applying the \textit{Teague} anti-redress rule, designed to
address comity and finality concerns present when claims are \textit{relitigated} on federal habeas
review, has serious adverse consequences. The \textit{Teague} rule takes as a given the existence of a
state-court forum for adjudicating a constitutional claim, and strives to incentivize state courts to
faithfully adjudicate constitutional claims by limiting federal review.\textsuperscript{57} Applied in the context of
a claim properly raised for the first time in postconviction proceedings, the \textit{Teague} rule deprives
litigants of a forum for their claims and denies New York courts a role in the ongoing dialogue
over the proper scope and substance of rights guaranteed by the United States Constitution.\textsuperscript{58}

\textbf{C. Ineffective assistance of trial counsel claims do not raise the finality concerns served by \textit{Teague}, because they are properly brought for the first time in postconviction proceedings.}

The \textit{Teague} rule’s concern with finality cannot be divorced from the precise context in
which it was forged. Federal habeas review of state-court judgments subjects claims that have
already been subject to one full round of litigation in state court, typically including adjudication

\textsuperscript{55} See Sections I(C) and I(D), \textit{infra}; \textit{Martinez v. Ryan}, 132 S. Ct. 1309, 1317 (2012)
(“Where, as here, the initial-review collateral proceeding is the first designated proceeding for a
prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many
ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.”) (emphasis added).
\textsuperscript{57} See Section I(A), \textit{supra}.
\textsuperscript{58} See Section I(F), \textit{infra}.
in a trial court as well as one or more appellate courts.\(^{59}\) But New York has rules in place to ensure that postconviction proceedings are not a forum for *relitigation* of constitutional claims.\(^{60}\) Ineffective assistance of counsel claims like that raised by Mr. Baret are properly brought in postconviction proceedings for an initial round of adjudication.\(^{61}\)

1. **New York has finality-serving doctrines that channel claims to the right forum at the right time.**

New York has sufficient finality-serving doctrines to ensure that claims are raised at the appropriate time and by the appropriate procedural vehicle. Claims must be brought in a timely manner and are not subject to endless relitigation.

Generally the failure to bring a constitutional claim at the earliest possible moment can result in waiver. Constitutional claims that could have been, but were not, raised on direct appeal may be dispensed with in postconviction proceedings under this waiver rule.\(^{62}\) This Court has repeatedly enforced this procedural requirement.\(^{63}\) The purpose of the waiver rule “is to prevent CPL 440.10 from being employed as a substitute for direct appeal when defendant was in a position to raise an issue on appeal ... or could readily have raised it on appeal but failed to do so ....”\(^{64}\)

\(^{59}\) The doctrines of exhaustion and procedural default, both referenced in *Teague*, 489 U.S. at 297-99, generally require that a habeas petitioner have subjected his or her constitutional claims to a full round of review in the state courts before bringing them in a habeas petition.

\(^{60}\) Section I(C)(1), *infra.*

\(^{61}\) Section I(C)(2), *infra.*

\(^{62}\) CPL § 440.10(2)(b) and (c) (postconviction court “must deny” CPL § 440.10 motion when the issue raised therein can be or could have been raised on direct appeal).

\(^{63}\) See, e.g., *People v. Cuadrado*, 9 N.Y.3d 362, 364-65 (2007) (claim that information was jurisdictionally defective should have been raised on direct appeal); *People v. Stewart*, 16 N.Y.3d 839, 840 (2011) (claim of defective plea colloquy should have been raised on direct appeal); *People v. Cooks*, 67 N.Y.2d 100 (1986) (same).

\(^{64}\) *Cooks*, 67 N.Y.2d at 103-04 (citations omitted).
The waiver principle also prevents successive postconviction petitions raising claims in a piecemeal fashion.65

A claim that has in fact been raised and decided on direct appeal (or a prior postconviction motion) may not be reheard in postconviction proceedings.66 This rule is enforced even where a litigant attempts to revive a claim litigated on direct appeal because the record was not adequately developed on appeal.67

Together, these doctrines result in a finely calibrated set of procedures to channel constitutional claims to the proper forum at the proper time. While the waiver doctrine forces claims to be brought as early as possible, the res judicata doctrine prevents relitigation, generally ensuring that postconviction proceedings are not a second round of litigation for claims raised in earlier direct review or postconviction proceedings. The finality concerns underlying Teague are amply, precisely and completely served by these doctrines, which embody New York’s balancing of the state interest in correcting constitutional error against the state interest in finality.

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65 See CPL § 440.10(3)(c) (permitting a postconviction court to deny relief on the ground that “[u]pon a previous [postconviction] motion ... the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so).

66 CPL § 440.10(2)(a) (stating the court “must deny” a claim “previously determined on the merits upon an appeal from the judgment”): see People v. Sayles, 17 A.D.3d 924, 924 (3d Dep’t 2005), lv. denied 5 N.Y.3d 794 (2005); People v. Lindsey, 302 A.D.2d 128, 130 n. 1 (3d Dep’t 2003), lv. denied 100 N.Y.2d 583 (2003); CPL § 440.10(3)(b) (permitting postconviction court to deny relief where claim was decided in a previous postconviction motion).

67 See People v. Carter, 105 A.D.3d 1149, 1150 (3d Dep’t 2013) (rejecting, in CPL § 440.10 proceedings, ineffective assistance of counsel claim that had been raised on direct appeal).
Some jurisdictions have addressed finality concerns by placing a time limit on when a first postconviction action can be brought. 68 While such time limits certainly serve the state interest in finality, they are by nature blunt instruments. Accordingly, most time limitations contain explicit exceptions to allow claims to be brought where delay is not attributable to the defendant. 69

The absence of a statute of limitations on New York postconviction actions is reasonably interpreted as indicating the state’s interest in finality of criminal judgments does not sufficiently outweigh the need to correct constitutional error through the postconviction process to justify a fixed statute of limitations. Even if this Court deemed the absence of a statute of limitations to be represent an insufficient attention to finality, importing the Teague anti-redressability rule is not the solution. Under the Teague rule, finality is the dominant concern once direct review is complete. As is shown here, the Teague rule is not calibrated to consider claims properly raised in postconviction proceedings, and results in the denial of a forum and elimination of New York courts’ participation in shaping federal constitutional doctrine. 70

2. **Ineffective assistance of counsel is properly raised for initial adjudication in postconviction proceedings.**

The claim Mr. Baret makes—that his trial counsel was ineffective by failing to advise Mr. Baret of the adverse immigration consequences attendant to his guilty plea—is among the

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69 E.g. Id. § 9545(b)(1)(ii) (allowing exception to one-year time limit where “the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence”); Ky. R. Crim. P. 11.42(10)(a) (allowing similar exception to three-year statute of limitations for postconviction action).
70 See Sections I(D), I(E), I(F), infra.
class of claims which cannot normally be adjudicated on direct review.\textsuperscript{71} The United States Supreme Court has similarly determined that ineffective assistance claims are properly brought for the first time in postconviction proceedings.\textsuperscript{72} Noting that “[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time,” the Court held that penalizing litigants for not raising ineffectiveness on direct appeal “would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim.”\textsuperscript{73}

In short, an ineffectiveness claim typically relies on facts that “are dehors the record and their effect on the judgment was not subject to consideration and review on appeal.”\textsuperscript{74} Both Professor Bator and Judge Friendly, whose views on finality were ultimately enshrined in \textit{Teague}, excluded such claims from their broader view that finality should foreclose collateral review of criminal judgments. Professor Bator specifically excluded claims involving denial of the right to counsel,\textsuperscript{75} of which a claim of ineffective assistance is a subspecies. Both Professor

\textsuperscript{71} See \textit{People v. Peque}, 22 N.Y.3d 168, 202 (2013) (noting that where an ineffectiveness claim is “predicated on factors such as counsel’s strategy, advice or preparation that do not appear on the face of the record, the defendant must raise his or her claim via a CPL § 440.10 motion”) (citing \textit{People v. Denny}, 95 N.Y.2d 921, 923 (2000); \textit{People v. Love}, 57 N.Y.2d 998, 1000 (1982)); see also \textit{People v. Gravino}, 14 N.Y.3d 546, 558 (2010) (holding that “ineffective assistance of counsel [claim] bring[ing] up matters not apparent from the face of the record” should be “properly fleshed out by affidavit in support of a CPL 440.10 motion rather than raised on direct appeal”). As noted above, New York employs a “waiver” doctrine to prevent litigants from first raising claims in postconviction proceedings that should have been raised on direct review. See Section I(C)(1), supra.

\textsuperscript{72} \textit{Massaro v. United States}, 538 U.S. 500 (2003).

\textsuperscript{73} 538 U.S. at 504 (citation omitted).

\textsuperscript{74} Friendly, supra, 38 U. Chi. L. Rev. at 152; see also \textit{People v. Simon}, 196 A.D.2d 851, 852 (2d Dep’t 1993) (holding that “since the defendant’s claim of ineffective assistance of counsel appears to rest on matters dehors the record” claim should have been brought by CPL 440.10 motion and not by direct appeal); \textit{People v. McDonald}, 255 A.D.2d 688 (4\textsuperscript{th} Dep’t 1998) (same).

\textsuperscript{75} Bator, supra, 76 Harv. L. Rev. at 454.
Bator and Judge Friendly excluded claims involving defects in a guilty plea. A claim that a guilty plea was caused by ineffective assistance of counsel is a claim that the plea was rendered involuntary by virtue of counsel’s deficient performance, and such ineffectiveness claims are properly brought in postconviction proceedings.

D. The United States Supreme Court has recognized that for purposes of finality, ineffectiveness claims properly brought for the first time in postconviction proceedings should be treated as though on direct appeal.

The United States Supreme Court recently recognized, in Martinez v. Ryan, that in assessing the finality interest owing to a state-court adjudication challenged on federal habeas review, claims of ineffective assistance of counsel brought properly for the first time in post-conviction proceedings should be treated as though they were being pursued on direct review.

Martinez concerned the application of the procedural default doctrine, which—like Teague—serves interests in comity and finality that arise when a federal court reviews a state-court judgment in habeas proceedings. In Martinez, the Court considered whether the procedural default of failing to raise a claim of ineffective assistance of trial counsel could be excused by the absence or ineffectiveness of postconviction counsel. Ordinarily the absence or deficiency of counsel is recognized as “cause” to excuse a procedural default in state court proceedings only if it amounts to a denial of the constitutional right to counsel. And because generally there is no constitutional right to counsel in state postconviction proceedings, the Court had held previously

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76 See Bator, supra, 76 Harv. L. Rev. at 458 (indicating claims involving coerced guilty pleas could properly be brought in postconviction proceedings); Friendly, supra, 38 U. Chi. L. Rev. at 152 (same for guilty plea procured by improper means).

77 See Hill v. Lockhart, 474 U.S. 52 (1985) (holding that where defendant enters a plea upon the advice of counsel the voluntariness of the plea is determined by the test for ineffective assistance of counsel).


that the absence or deficiency of postconviction counsel would not constitute “cause” for a procedural default.\(^{80}\)

But in *Martinez v. Ryan* the Court reassessed this calculus. The *Martinez* Court began by noting that the procedural default rule is among those rules, specific to federal habeas corpus review of state-court judgments, “designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism.”\(^{81}\) Nonetheless, finality did not carry the day—precisely because Martinez’s claim of ineffective trial counsel would have been properly brought for the first time in post-conviction proceedings. “Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial,” wrote the Court, “the collateral proceeding is in many ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.”\(^{82}\)

In light of the similarities between direct review proceedings and “initial-review collateral proceedings” presenting the first opportunity to raise a claim, the Court essentially imported the rules for direct review proceedings. Thus, because absent or ineffective counsel on direct review will constitute “cause” to excuse a procedural default, the same rule applies to absent or ineffective counsel on post-conviction review of a claim properly brought for the first time in post-conviction proceedings—even though the absence or ineffectiveness does not in that instance amount to a constitutional denial of counsel.

\(^{80}\) *Id.* at 752-53.

\(^{81}\) 132 S.Ct. at 1316.

\(^{82}\) *Id.* at 1317 (emphasis added). In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Court held that the *Martinez* rule applies in jurisdictions that do not require ineffectiveness claims to be brought in post-conviction proceedings, if the “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal ....” *Id.* at 1921.
Martinez confirms that claims of ineffective assistance like that raised by Mr. Baret, that are properly raised for the first time in postconviction proceedings, do not implicate finality any more than claims raised on direct review. Finality, the principle policy consideration that might support application of the Teague rule here, is absent. Instead, Martinez demonstrates that because claims of ineffectiveness are generally encouraged to be brought in postconviction proceedings for the first time, it is the policy reasons underlying the Griffith rule of retroactivity that are implicated—"the opportunity to ... obtain an adjudication on the merits of his claims."  

As the Court wrote in Griffith, "the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule." This "basic norm[] of constitutional adjudication," supported the Griffith Court's determination that a rule of redressability must apply to cases on direct review, and is no less applicable to cases like Mr. Baret's. Just as absent or ineffective postconviction counsel in Martinez was deemed "cause" to excuse a procedural default because it threatened the opportunity for "an adjudication on the merits," even so would applying Teague's anti-redressability rule in postconviction proceedings render the New York courts powerless to reach the merits of many ineffectiveness claims. The Griffith redressability rule is appropriate in this instance, to ensure that claims properly brought for the first time in postconviction proceedings are brought in a forum capable of reaching the merits.

83 See Section I(C)(2), supra.
84 Martinez, 132 S.Ct. at 1317.
85 Griffith, 479 U.S. at 322.
86 Id.
E. New York's interest in additional rules serving finality is minimal, given the finality protections embodied in the substantive law governing ineffective assistance of counsel claims.

The Teague antiredressability rule is superfluous given the particular claim at issue here, ineffective assistance of counsel, which has built in safeguards to protect the finality of criminal judgments. Both the deficient performance and prejudice components of the legal standard safeguard the finality interest New York has in criminal judgments. A Teague redressability analysis is unnecessary given these protections.

Strickland v. Washington\textsuperscript{87} established the now-familiar two-part test for ineffective assistance of counsel. Padilla relies on Strickland, which requires a defendant to prove not only that trial counsel’s performance was deficient, but also that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”\textsuperscript{88}

Both prongs of the Strickland test protect finality. In evaluating whether counsel’s performance was constitutionally deficient, Strickland eschews a post hoc judgment: “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”\textsuperscript{89} Reviewing courts are thus explicitly instructed not to judge counsel’s conduct by standards of performance that evolve later—by this requirement, ineffective assistance of counsel claims are already frozen in amber.

\textsuperscript{87} 466 U.S. 668 (1984).
\textsuperscript{88} Id. at 694.
\textsuperscript{89} 466 U.S. at 689 (emphasis added); see also id. at 690 (instructing postconviction courts to “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct” and measured against “prevailing professional norms”) (emphases added).
The *Strickland* Court’s discussion announcing the standard for assessing deficient performance indicates the Court was motivated by its concern with the finality of judgments:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense.90

*Teague*’s anti-redressability rule is not required to serve finality concerns where the legal standard by which claims are tested is specifically linked to the time of the alleged error.

The *Strickland* Court also included a prejudice component in announcing the test for ineffective assistance of counsel. Here the Court explicitly considered finality. The Court rejected the idea that counsel’s deficient performance should merit automatic reversal, with no prejudice requirement, and instead sought to fashion a test that would identify errors of counsel “sufficiently serious to warrant setting aside the outcome of the proceeding.”91 The Court also rejected a prejudice test that would require a defendant to demonstrate prejudice by a preponderance of the evidence. The Court noted that such a test would “reflect[] the profound importance of finality in criminal proceedings.”92 but decided that “[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower.”93

Thus, in calibrating the prejudice prong of the *Strickland* test, the Court explicitly considered the finality owed to state-court judgments. In essence, the *Strickland* rule was designed for postconviction proceedings. Superimposing a second finality-serving doctrine, the

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90 *Id.* at 690.
91 *Id.* at 693.
92 *Id.*
93 *Id.* at 694.
Teague anti-redressability rule, on ineffective assistance of counsel claims properly brought for the first time in postconviction proceedings, skews the fine balance struck by the Court in Strickland. This is particularly so given that Teague gives overwhelming voice to finality, denying redress in nearly all claims brought after the conclusion of direct review. The Strickland Court rejected this overemphasis on finality in fashioning its prejudice prong.

This Court has previously recognized that requiring a showing of prejudice such as that required by the Strickland test is, in and of itself, an adequate safeguard of the state’s interest in finality that naturally arises in postconviction proceedings. In People v. Jackson, this Court articulated the finality concerns present in postconviction proceedings, and determined that imposing a prejudice requirement in postconviction proceedings is “directly related to society’s interest in the finality of judgments.” The Court held that a defendant prevailing on a Rosario claim in postconviction proceedings would not be entitled to automatic reversal without demonstrating prejudice. The prejudice test the Court adopted, to “strik[e] a ... balance” both “fair to the defendant” but also taking “into account the nature of the collateral remedy and the interests implicated by that remedy,” was the prejudice test embodied in Brady v. Maryland—a reasonable probability of a different outcome. This prejudice test, this Court held, was “the most equitable standard”—indeed, “[a]ny other standard would create too great a disparity between the treatment of these claims on direct appeal, where a per se error rule continues to apply, and on postconviction motion ....”

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95 Id. at 646.
97 Jackson, 78 N.Y.2d at 648.
98 Id. at 649.
The *Strickland* prejudice test is identical to the *Brady* test. This Court, then, has already concluded that the *Strickland* prejudice test is “the most equitable standard” for “balanc[ing] the rights of the defendant against the interests of society” implicated by postconviction review.  

The additional protection of finality offered by the *Teague* rule upsets this delicate balance.

F. **New York has an interest in developing constitutional law concerning claims properly brought for the first time in postconviction proceedings.**

New York’s courts, no less than federal courts, have the duty to adjudicate federal constitutional claims.  

This Court’s obligation to interpret the federal constitution binds it, as part of a larger judicial system embracing not only New York but the Nation as a whole. When Federal questions are presented, its institutional functions are subordinated to the Supreme Court and it acts, in effect, as an intermediate court. Notwithstanding this different role, it is important that State courts participate in the Nation’s court structure. They have much to contribute to the Supreme Court’s determination of Federal law by addressing the issues thoroughly and persuasively and providing local perspectives for the development of constitutional rules …

*Teague* and *Griffith* were meant to ensure this principle.  

But importing *Teague* in the context presented by Mr. Baret’s claim would undermine it, denying New York courts the important opportunity to discharge their constitutional obligation. It would prevent New York courts from developing federal constitutional law concerning ineffective assistance of counsel.

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99 Id. at 650.
100 See U.S. Const. Art. VI, cl. 2 (“This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby ...”); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is.”); *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution.”); *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (“Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States ... for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it ...”).
102 See Section I(A), supra.
(and all other claims that are properly first brought in postconviction proceedings), realizing Justice Harlan’s fear that a rule of prospectivity would reduce the lower courts “largely to the role of automatons, directed by [the Supreme Court] to apply mechanistically all then-settled federal constitutional concepts to every case before them.”\footnote{Mackey, 401 U.S. at 680 (Harlan, J.).}

*Teague*, when applied in federal habeas corpus proceedings, “eliminates a previously available federal forum in which state prisoners may argue for new federal procedural rules.”\footnote{Lyn S. Entzeroth, Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court’s Doctrine, 35 N.M. L. Rev. 161, 191 (2005).} Applying *Teague* to claims properly initially brought in New York postconviction proceedings eliminates a state forum for doing so—a state forum that is all the more important for constitutional development given *Teague*’s removal of a federal forum.

The importance of New York’s voice in developing federal constitutional law should not be underestimated. The Supreme Court relies on state courts to serve as proving grounds for constitutional arguments.\footnote{See *Johnson* v. Texas, 509 U.S. 350, 379 (1993) (O’Connor, J., dissenting) (referring to the Supreme Court’s practice of allowing “emerging constitutional issues” to “percolate” in the state courts); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (noting the Supreme Court may deny certiorari to allow constitutional issues to be “further illumined by the lower courts”).} Application of *Teague* to claims properly presented initially in postconviction proceedings would effectively remove this Court’s voice from the important ongoing dialogue over the shape and scope of federal constitutional rights.

G. Conclusion

Because Mr. Baret’s claim of ineffective assistance of trial counsel was properly brought initially in postconviction proceedings, it should be subject to the principles supporting
redressability articulated in *Griffith v. Kentucky* and not the anti-redressability principles behind *Teague*.

II. NEW YORK CAN AVOID THE PROBLEMS THAT HAVE PLAGUED THE *TEAGUE* RULE.

As is shown above, the *Teague* rule is both inappropriate and unnecessary when applied to claims properly brought for the first time in New York postconviction proceedings. By eschewing the *Teague* rule or modifying its application to such claims, this Court can avoid the three principle problems that have plagued administration of the *Teague* rule.

A. Avoiding the *Teague* anti-redressability rule eliminates the intractable “new rule” inquiry.

The very first step of the *Teague* inquiry—determining whether a constitutional rule is a “new rule” that triggers *Teague*’s anti-redressability rule—has drawn scathing criticism for its unpredictability. According to the authors of the seminal work on federal habeas corpus, “[t]he inherent ambiguity of the term ‘new rule’ and the Court’s repeated changes of direction in

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106 See Section I, supra.

107 See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1742 (1991) (describing the “new rule” inquiry as a “threshold uncertainty” contributing to the unpredictability of the *Linkletter* era); John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 UMKC L. Rev. 581, 588 (1990) (noting that *Teague* defines a “new rule” in two contradictory ways, each representing one end of the “newness” spectrum); see also *People v. Favor*, 82 N.Y.2d 254, 263 n.3 (1993) (criticizing as overly broad the Supreme Court’s definition of a “new rule” as one “not ‘dictated by precedent,’” because “few decisions made by an appellate court … are truly ‘dictated’ or compelled by precedent”) (citation omitted).
defining it have left the lower courts floundering.” 108 Some have claimed the “new rule” test has served as little more than “a screen for covert rulings on the merits.” 109

This Court, of course, need look no further than opinions of New York’s trial courts to appreciate the indeterminacy of Teague’s “new rule” inquiry. In these decisions, the courts spent considerable intellectual resources attempting to determine whether Padilla announced a “new rule” of constitutional criminal procedure. The first of these decisions analyzed the “new rule” jurisprudence of Teague and its progeny, the substantive law of Strickland and its progeny, this Court’s jurisprudence, and the Padilla decision itself, in concluding that Padilla did not announce a “new” rule. 110 The second such decision, equally searching, produced a contrary result. 111 New York courts continued to divide on the “new rule” issue until the decision of the First Department below bound New York trial courts. 112

It is fortunate, then, that this Court is not required to follow Teague. The indeterminacy of the Teague “new rule” inquiry has brought the courts into disrepute for employing “a screen

108 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 25.5.

109 Id.; see also Tung Yin, A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996, 25 Am. J. Crim. L. 203, 287 (1998) (“Teague and its progeny have failed to provide sufficient guidance for determining when a rule is new, thus leaving federal courts a zone of discretion with which they can make outcome determinative decisions without necessarily reaching the merits of the claims.”).


for covert rulings on the merits.”\textsuperscript{113} New York can avoid the indeterminacy of the “new rule” test by declining to apply \textit{Teague} to claims properly first raised in postconviction proceedings.

Alternatively, in applying the \textit{Teague} framework to such claims, this Court should adhere to a definition of “new rule” that recognizes the lesser finality interests at stake. This Court should not focus on whether a potentially “new” rule is “dictated by precedent.”\textsuperscript{114} Instead, this Court should focus on whether \textit{Padilla} overturned past precedent or applied a general constitutional rule in a new context.\textsuperscript{115}

\textbf{B. Avoiding the \textit{Teague} anti-redressability rule allows selection of an appropriate “trigger point” for determining questions of redressability.}

The \textit{Teague} rule has also been criticized for the arbitrariness of using the conclusion of direct review as a “trigger point” to separate those who will receive redress for a constitutional violation from those who will not. As Justice White put it, “otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-

\textsuperscript{113} Hertz & Liebman, supra.

\textsuperscript{114} See Chaidez, 133 S.Ct. at 1110-11 (holding \textit{Padilla} announced a “new rule” because “[n]o precedent of our own dictated the [result]” and the result “would not have been—in fact, was not—‘apparent to all reasonable jurists’ prior to our decision.”) (citations omitted).

\textsuperscript{115} See Eastman, 85 N.Y.2d at 275 (noting that “when a Supreme Court decision applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an ‘old’ rule, and is always retroactive”) (citations omitted); People v. Baret, 99 A.D.3d 408, 409 (1\textsuperscript{st} Dep’t 2012) lv. granted, 21 N.Y.3d 1002 (2013) (holding that \textit{Padilla} did not “overrule a clear past precedent” but rather “followed from the clearly established principles of the guarantee of effective assistance of counsel under \textit{Strickland}, and ‘merely clarified the law as it applied to the particular facts’”) (citations omitted); see also Commonwealth v. Sylvain, 995 N.E.2d 760, 769, 770-71 (2013) (holding “a case announces a ‘new’ rule only when the result is ‘not dictated by precedent’” and holding \textit{Padilla} was not a “new” rule but rather a decision “appl[yi]ng a general standard [announced in \textit{Strickland}—designed to change according to the evolution of existing professional norms—to a specific factual situation”).
unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system.\footnote{Griffith, 479 U.S. at 331 (White, J., dissenting); see also Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (Breyer, J., dissenting) (criticizing use of Teague trigger point in determining which death-row inmates would benefit from the Court’s decision in Ring v. Arizona, 536 U.S. 584 (2002)).}

Of course, any anti-redressability rule requires a “trigger point—a way of separating those who will benefit from a new decision from those who will not” and any trigger point “creates distinctions that are subject to serious fairness objections; the only question is which method has the fewest shortcomings.”\footnote{Toby J. Heytens, Managing Transitional Moments in Criminal Cases, 115 Yale L.J. 922, 987-90 (2006).} Teague’s selection of the close of direct review as a “trigger point” has a certain logic for claims brought in federal habeas corpus proceedings challenging a state-court judgment: Teague gives effect to comity and finality concerns by preventing relitigation in federal court, based on a (presumably more favorable) “new” constitutional rule, of claims already decided in state court. This Court’s application of Teague in Eastman similarly relied, correctly, on the close of direct review as the “trigger point”—the claim in Eastman (that the defendant’s Confrontation Clause rights were violated by the introduction of a non-testifying codefendant’s redacted confession) had been raised and adjudicated on direct appeal.\footnote{Eastman, 85 N.Y.2d at 273 (1995).}

But applying Teague’s direct review “trigger point” to claims properly brought for the first time in postconviction proceedings (like Mr. Baret’s claim of ineffective assistance of counsel) makes no sense at all. Such claims are not ordinarily properly brought on direct review,\footnote{See Section I(C)(2), supra.} and the close of direct review proceedings is a “trigger point” that is on the one hand completely unrelated to the claims to be decided, and on the other hand guaranteed to deny
litigants bringing these claims even one forum in which the constitutional doctrine at stake may be developed. The *Teague* "trigger point" applied to these claims is, to put it mildly, "subject to serious fairness objections."\textsuperscript{120}

Applying the *Teague* rule, with its "trigger point" at the close of direct review proceedings, to claims properly brought first in New York postconviction proceedings, makes no sense and works a positive unfairness on the litigants. If the Court retains the *Teague* framework for such claims, it should do so with a modification of the trigger point for such claims. Because claims properly brought for the first time in postconviction proceedings are analogous to those brought on direct review,\textsuperscript{121} the finality concerns animating *Teague* are not triggered until the close of postconviction review. The proper "trigger point" for an anti-redressability rule like *Teague*'s, applied to such claims, would be the close of postconviction review.

Such a "trigger point" would also ensure that the policies underlying the *Griffith* rule of redressability are given effect throughout the first full round of litigation of such claims. Just as the policies underlying *Griffith* require redress for claims through the direct review track, even so do they require redress for claims properly brought for the first time in postconviction proceedings through the postconviction review track. Modifying the "trigger" point for applying *Teague* to such claims is the only way to fulfill *Teague*’s premise—that all federal constitutional claims are subject to one unrestricted adjudication in state court, followed by the potential of review by the United States Supreme Court.\textsuperscript{122}

\textsuperscript{120} Heytens, \textit{supra}.

\textsuperscript{121} See Section I(D), \textit{supra} (discussing the reasoning of \textit{Martinez v. Ryan}).

\textsuperscript{122} See Section I(A), \textit{supra}.
C. Avoiding the *Teague* anti-redressability rule escapes *Teague*'s overly narrow definition of “watershed” rules and allows New York’s courts to weigh the state’s interest in finality against the state’s interest in correcting constitutional errors.

Applying the *Teague* rule in New York postconviction proceedings imports a third much-criticized aspect of *Teague*: its overly narrow exception for “watershed” rules of constitutional criminal procedure. In theory, *Teague* allows full redressability for such “watershed” rules. But in practice, the Court has not recognized a single “watershed” rule since *Teague* was announced.\(^{123}\) *Teague*’s “watershed” exception has been criticized as being so narrow as to be “virtually non-existent,”\(^ {124}\) and has been assailed as relying upon “a deeply flawed epistemology.”\(^ {125}\)

In applying the *Teague* framework as a matter of state law, this Court should expand the “watershed” exception. A broader watershed exception would reflect the difference between the balance of comity and finality concerns in the federal habeas setting in which *Teague* was forged and the state postconviction setting in which Mr. Baret’s claim was raised. The *Teague* rule, as noted above,\(^ {126}\) was designed to serve interests in comity and finality. Nonetheless *Teague* recognized that violations of “watershed” rules are so unjust as to outweigh not only the finality concerns underlying *Teague* but the comity concerns as well.\(^ {127}\) In state postconviction

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\(^{123}\) As is discussed more fully below, see Section III, *infra*, the Court has repeatedly pointed to expansion of the right to counsel as the “paradigmatic example of a watershed rule of criminal procedure.” *Gray v. Netherland*, 518 U.S. 152, 170 (1996) (citation omitted).

\(^{124}\) Entzeroth, 35 N.M. L. Rev. at 195-96; see also Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 Cal. L. Rev. 1677, 1694 (2007) (“[N]o new procedural rule has yet satisfied the *Teague* exception, and the Court has strongly intimated that none shall.”)


\(^{126}\) Section I(A), *supra*

\(^{127}\) *See Teague*, 489 U.S. at 311-13.
proceedings, where comity is not an issue and finality concerns are lessened, a different balance must be struck.

The Teague “watershed” exception has two requirements—a new rule must not only be “implicit in the concept of ordered liberty,” it must also be a rule that promotes the accuracy of the fact-finding process. This Court can broaden Teague’s watershed exception as a matter of state law either by eliminating one of these requirements or by construing those requirements as more easily met.

The Teague decision imported the accuracy requirement despite the expressed views of Justice Harlan, whose opinions on retroactivity were so influential with the Court. Justice Harlan endorsed the first “watershed” requirement—that a new constitutional rule be “implicit in the concept of ordered liberty,” but not the accuracy requirement. Although he had earlier favored an accuracy requirement, in Mackey Justice Harlan explicitly rejected it, in part because Justice Harlan found “inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values.”

Eliminating the accuracy requirement of the Teague “watershed” exception, and adopting the “watershed” exception as proposed by Justice Harlan in his Mackey opinion, accommodates the lessened interest in finality present in state postconviction proceedings, while eliminating the watershed rule’s “inherently intractable” indeterminacy.

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128 See Section I, supra.
129 Teague, 489 U.S. at 311-12.
130 Cf. Sylvain (interpreting the “new rule” component of Teague differently from the Supreme Court, resulting in greater redressability of Padilla violations).
131 Mackey, 401 U.S. at 693-95 (Harlan, J.); see also Bator, supra, 76 Harv. L. Rev. at 449 (urging a focus “not so much [on] the substantive question whether truth prevailed” but on whether fair process had been afforded for determining the facts).
As is shown more fully below, the right to counsel has always been considered a “bedrock procedural element” that is “implicit in the concept of ordered liberty.” It has been on the second of Teague’s requirements—the accuracy requirement criticized by Justice Harlan—that some federal courts have grounded the conclusion that Padilla is not a “watershed” rule. Eliminating the accuracy requirement is one path to granting redress for Padilla violations in state postconviction proceedings.

Relaxing Teague’s accuracy requirement is another way for New York to accommodate Teague to the state postconviction context presenting a lack of comity concerns and lessened finality concerns. While federal courts have suggested the Padilla rule does not meet the accuracy component of Teague’s watershed requirement, New York has traditionally accorded greater weight to the right to counsel than have federal courts. This Court has heralded the right to counsel as being “of singular concern” in New York courts and its protection under state law as “far more expansive than [under] the Federal counterpart.” New York’s heightened interest in ensuring the right to counsel supports the conclusion, as a matter of state law, that Padilla satisfies the watershed exception when applying the Teague framework in New York postconviction proceedings.

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132 See Section III, infra.
133 The United States Supreme Court has yet to address the question of whether Padilla is a “watershed” rule. See Chaidez, 133 S. Ct. 1103, 1107 n.3 (2013) (noting Chaidez did not argue Padilla was a “watershed” rule).
134 See, e.g. United States v. Chang Hong, 671 F.3d 1147, 1158 (10th Cir. 2011),reh’g and reh’g en banc denied (holding “Padilla does not concern the fairness and accuracy of a criminal proceeding, but instead relates to the deportation consequences of a defendant’s guilty plea”); United States v. Mathur, 685 F.3d 396, 397 (4th Cir. 2012), cert. denied, 133 S.Ct. 1457 (2013) (holding Padilla does not “enhance the ‘accuracy of the factfinding process’”).
135 See Chang Hong, supra; Mathur, supra.
Applying the Teague framework as modified to eliminate or lessen the accuracy requirement, then, this Court should hold that the Padilla rule, defining the scope of this most essential constitutional right, is a “watershed” rule when applied to claims of ineffective assistance of counsel properly raised for the first time in state postconviction proceedings.

III. THE PADILLA RULE IS A "WATERSHED" RULE OF CONSTITUTIONAL CRIMINAL PROCEDURE.

Even if this Court declines to modify the Teague “watershed” exception as applied to claims properly raised for the first time in state postconviction proceedings,\(^{137}\) this Court should conclude that the Padilla rule would satisfy the Teague definition of a “watershed” rule.

Justice Harlan used the Gideon decision extending the right to counsel to all felony cases as an example of a decision that “alter[ed] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.”\(^{138}\) And United States Supreme Court cases applying the Teague “watershed” exception repeatedly reference Gideon as the paradigmatic “watershed” rule.\(^{139}\) In Strickland, the Court specifically linked the effective assistance of the counsel to the reliability of the outcome, and in doing so explicitly addressed the finality concerns which serve as a counterweight to declaring any rule a “watershed” rule: “An ineffective assistance claim asserts the absence of one of the crucial assurances that the

\(^{137}\) See Section II(C), supra.

\(^{138}\) Mackey, 401 U.S. at 693-94 (Harlan, J.) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."\(^{140}\)

In a *per curiam* decision in 1968 the Court held that the right to counsel at sentencing must be given retroactive effect. The Court did not distinguish between the right to counsel at sentencing and the right to counsel at any other critical juncture in a criminal case:

This Court's decisions on a criminal defendant's right to counsel at trial, at certain arraignments, and on appeal, have been applied retroactively. The right to counsel at sentencing is no different. As in these other cases, the right being asserted relates to "the very integrity of the fact-finding process." ... The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication.\(^{141}\)

The Supreme Court’s recent decisions concerning the Sixth Amendment right to effective counsel during plea negotiations—including *Padilla*—reaffirm the Court’s commitment to the right to counsel as a "bedrock procedural element." Just as it did in *McConnell v. Rhay*, the Court has rejected in these recent cases a concern with accuracy that focuses only on the result of the criminal trial, and recognized the reality of today's criminal justice system:

Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system." ... In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.\(^{142}\)

The line of Supreme Court cases described above, culminating in *Frye* and *Cooper*, suggest it is reasonable to believe the Court will treat the expanded scope of the Sixth

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\(^{140}\) *Strickland*, 466 U.S. at 694.

\(^{141}\) *McConnell v. Rhay*, 393 U.S. 2, 3-4 (1968) (per curiam) (citations omitted).

\(^{142}\) *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (citations omitted); see also *Lafler v. Cooper*, 132 S.Ct. 1376, 1385-85 (2012) (reaffirming that the Sixth Amendment does not exist solely to guarantee a fair trial, but extends its scope to pre-trial and post-trial proceedings).
Amendment in *Padilla* as a “watershed” constitutional rule requiring retroactive application.\(^{143}\) While *Teague*’s “watershed” exception has been excoriated by commentators who have criticized Justice O’Connor’s narrowing of Justice Harlan’s formulation of the “watershed” exception in *Mackey*,\(^{144}\) one consistency between Justice Harlan’s *Mackey* opinion and the *Teague* formulation is clear: An expansion of the right to counsel clearly qualifies at a “watershed” rule no matter what test is used.

**CONCLUSION**

The People urge this Court to apply *Chaidez v. United States*\(^{145}\) to Mr. Baret’s case,\(^{146}\) even arguing that “as a matter of federal law” *Chaidez* dictates the result.\(^{147}\) This Court should not be troubled by *Chaidez*—the Supreme Court’s decisions under *Teague* do not “as a matter of federal law” bind this Court.\(^{148}\) To the extent this Court follows *Teague*, it does so as a matter of state law and can modify the *Teague* framework accordingly.\(^{149}\)

The federal redressability regime embodied in *Griffith* and *Teague* was meant to encourage state courts to interpret the federal constitution, and to establish state courts as coequal developers of federal constitutional law by limiting federal review of their interpretations.

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\(^{143}\) In *Chaidez*, the Court noted that the question of whether *Padilla* was a “watershed” exception to the *Teague* rule was not before the Court. 133 S.Ct. at 1107 n.3.

\(^{144}\) *E.g.*, *Roosevelt*, supra, 95 Cal. L. Rev. at 1694 (“*Teague* combined the two Harlan formulations *[from Desist and Mackey]*, an innovation with little obvious justification other than, perhaps, that a conjunction is harder to satisfy than either element alone.”).


\(^{146}\) *Id.* at 10.

\(^{147}\) Brief for Respondent-Appellant at 9-10.

\(^{148}\) *Danforth*, supra.

\(^{149}\) *Danforth*, supra; see *Sylvain*, 466 Mass. 422, 995 N.E.2d 760 (adapting *Teague* framework but modifying oft-criticized “new rule” test). Alternatively, the arguments raised here (that the procedural posture and nature of the claim should alter the *Teague* analysis) were explicitly avoided in *Chaidez*, 133 S. Ct. 1113 n.16, giving this Court a principled basis for distinguishing *Chaidez*. 
Applying a rule of redress to claims like Mr. Baret's that are properly raised for the first time in state postconviction proceedings furthers these goals.

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