No. _____

IN THE

Supreme Court of the United States

CALS C. IFENATUORA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the non-retroactivity principle announced in *Teague v. Lane*, 489 U.S. 288 (1989), should apply to ineffective-assistance of counsel claims raised in a federal defendant's first post-conviction challenge.

2. Whether the rule established in *Padilla v. Kentucky*, 559 U.S. 356 (2010), is a "watershed" rule of criminal procedure exempt from *Teague*.

PARTIES TO THE PROCEEDING

The petitioner in this case is Cals C. Ifenatuora.

The respondent is the United States.

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OPINION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit (Pet.App. 1a) is reported at 528 F. App'x 333.

JURISDICTION

The Fourth Circuit issued its opinion denying rehearing and rehearing en banc on September 9, 2013. Pet.App. 7a. On December 6, 2013, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari until February 6, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. On April 27, 2010, Mr. Ifenatuora filed a petition for an extraordinary writ in the Court of Appeals for the Fourth Circuit under Federal Rule of Appellate Procedure 21. Pet.App. 8a; CA4 J.A. 6-7. In his petition, Mr. Ifenatuora sought to vacate his January 1992 conviction for mail fraud in the United States District Court for the District of Maryland. Pet.App. 8a-9a. As the basis for the writ, Mr. Ifenatuora relies upon *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that it is ineffective assistance of counsel for an attorney not to inform an immigrant of the potential adverse immigration consequences of his conviction or guilty plea. Pet.App. 8a. Mr. Ifenatuora was not informed of the immigration consequences of his Maryland Conviction by his criminal attorney and this conviction was one of the reasons the government sought to remove him. CA4 J.A. 11.

B. Mr. Ifenatuora and his family have suffered persecution and torture at the hands of the Nigerian government. Mr. Ifenatuora, who is from Nigeria,

immigrated to the United States in May of 1982 to attend college, and he obtained a degree from Shaw University in North Carolina. Pet.App. 2a; CA4 J.A. 148. In 1983, Mr. Ifenatuora became a lawful permanent resident. CA4 J.A. at 165. He and his wife have three children, all of whom are U.S. citizens. *Id.* at 165-66. From 1999 until being confined in a detention center in June of 2009, Mr. Ifenatuora worked two jobs to support his family.

Mr. Ifenatuora is a member of the Ogoni tribe in Nigeria. *Id.* at 166. For years, Nigeria had been controlled by a dictatorial regime that persecuted the people of the Ogoni tribe of the River Delta Region in Nigeria. *Id.* at 146-48. The Ogonis reside in an oil-producing area of the country and have been subjected to continued persecution by the government for access to and ownership of those lands. *Id.* at 153. While in Nigeria, Mr. Ifenatuora belonged to the Nigerian People's Party, where he was president of the student wing, the National Democratic Coalition, and a human rights organization called the Movement of the Suffering Ogoni People. *Id.* at 149, 152.

In removal proceedings in 1999, Mr. Ifenatuora testified that his father was one of the chiefs of the Ogoni people. *Id.* at 168. In the 1980s, his father began to speak out against the torture of the Ogoni people. *Id.* at 168-70. His father was arrested in 1984 for these political activities, and two years later he was publicly hanged by the government. *Id.* Shortly after his father was killed, Mr. Ifenatuora's mother was arrested, imprisoned for ten years, and eventually hanged in 1997. *Id.* at 170-71. One of Mr. Ifenatuora's brothers was hanged at the same time as his mother. *Id.* at 172. Another brother was impris-

oned for two years because he wrote politically-motivated articles against the Nigerian government. *Id.* at 174-75. This brother left Nigeria for several years, but was shot and killed at a Nigerian airport when he attempted to re-enter the country in 1998. *Id.* at 175-76.

Mr. Ifenatuora's mother was the sister of Ken Saro-wiwa, who was a well-known Nigerian civil rights activist. *Id.* at 178. Mr. Saro-wiwa was hanged in 1995 along with eight other Nigerian activists. *Id.* at 178-79. Mr. Ifenatuora returned to Nigeria in 1995 to attend his uncle's funeral. *Id.* at 187-89. During the funeral, the Nigerian military security forces raided the family house, arrested one of Mr. Ifenatuora's uncles, and raped two of his younger cousins. *Id.* at 150, 155, 187-89. They also stabbed Mr. Ifenatuora multiple times in the back and left him in a pool of his own blood to die. *Id.* at 155, 187-89. Mr. Ifenatuora survived, managed to escape, and fled to nearby Cameroon, where he received medical treatment, including over thirty stitches for his wounds. *Id.* at 189-90. Since 1995, Mr. Ifenatuora has not returned to Nigeria. *Id.* at 184.

C. In January 1992, Mr. Ifenatuora was convicted of mail fraud in the United States District Court for the District of Maryland ("Maryland Conviction") and was sentenced to twenty-four months in prison. *Id.* at 129-30. Mr. Ifenatuora's counsel advised him to plead guilty to this charge. *Id.* at 11, 648. Mr. Ifenatuora was not advised what adverse consequences this Maryland Conviction would have upon his immigration status. *Id.* Mr. Ifenatuora served twenty-four months in prison for his Maryland Con-

viction and was released on parole in 1994. *Id.* at 129-30.

Then, in June 1997, Mr. Ifenatuora was convicted of unauthorized use of an access device with loss to the victim exceeding $10,000 in the United States District Court for the Eastern District of California ("California Conviction"). *Id.* at 386-87. Again, Mr. Ifenatuora's counsel advised him to plead guilty to this charge. *Id.* at 301. And, again, Mr. Ifenatuora was not advised that this California Conviction alone, or in combination with his Maryland Conviction, would have adverse consequences upon his immigration status. *Id.* He served his sentence and was released on parole in 1999.

Because of the government's conduct, Mr. Ifenatuora's immigration proceedings have been lengthy and convoluted. In November 1998, INS (now DHS) instituted removal proceedings against Mr. Ifenatuora. *Id.* at 138-42. Mr. Ifenatuora was charged removable because he had been convicted of two crimes of moral turpitude not arising out of a single scheme (the Maryland and the California Convictions) and because he had been convicted of a crime that constituted an aggravated felony (the California Conviction). *Id.* at 138. A hearing was held on June 28, 1999. *Id.* The IJ found Mr. Ifenatuora removable, but also concluded that Mr. Ifenatuora should be granted deferral of removal under the Convention Against Torture ("CAT"). *Id.* at 198.

At the hearing, Mr. Ifenatuora testified in detail about his own and his family's persecution at the hands of the Nigerian government. *Id.* at 159-98. In his decision, the IJ concluded that Mr. Ifenatuora's testimony was credible. *Id.* at 198. The IJ personally

examined Mr. Ifenatuora's scars from his 1995 stabbing in Nigeria. *Id.* at 189. After hearing all of the evidence, the IJ concluded that the case was "one of the clearest cases for relief the Court has seen in sometime [sic]." *Id.* at 230. He stated that it would be simply "beyond unconscionable" to remove Mr. Ifenatuora to Nigeria. *Id.*

On January 24, 2003, the DHS filed a motion to terminate the withholding of removal, claiming that Mr. Ifenatuora submitted fraudulent evidence during his 1999 hearing. *Id.* at 205. The alleged evidence of fraud consisted of a one-page fax of hearsay statements from the American Embassy in Nigeria, claiming that some unidentified lawyers in Nigeria informed an embassy agent that the Nigerian government does not produce death certificates when an individual is executed. *Id.* at 201. During his hearing, Mr. Ifenatuora had produced death certificates for his father and mother who were hanged by the Nigerian government. *Id.* at 168-72.

On January 31, 2003, Mr. Ifenatuora's then-immigration counsel, John Crow, asked for the hearing to be continued because he did not know Mr. Ifenatuora's then-current location. *Id.* at 205. Eventually, Mr. Crow asked the venue to be changed to New York, New York. *Id.* That motion was granted, but Mr. Crow withdrew as counsel. *Id.* A hearing in New York was scheduled for March 20, 2003. *Id.* at 206. On March 19, 2003, Mr. Ifenatuora requested a change of venue to Sacramento, California, where he was living at the time. *Id.* This second motion to change venue was never adjudicated, but the hearing nevertheless occurred on March 20, 2003. *Id.* Essentially, an entirely new removal proceeding was held,

in violation of immigration removal procedures, and Mr. Ifenatuora was found removable in absentia. *Id.* The January 24, 2003 motion to terminate his removal proceedings was never addressed at this new hearing. *Id.*

Mr. Ifenatuora appealed the removal ruling. *Id.* The Board of Immigration Appeals ("BIA") returned the record of proceedings to the IJ for preparation of a separate oral or written decision. *Id.* Instead of abiding by the BIA's order, the IJ simply scheduled a new removal hearing in New York City. *Id.* Mr. Ifenatuora was not provided notice of this hearing, and he was again removed in absentia. *Id.*

Mr. Ifenatuora then filed an appeal to the BIA. *Id.* On May 1, 2006, the BIA concluded that the September 30, 2004 Order was inappropriate, as the issues of removability and relief were previously adjudicated by the IJ in June 1999. *Id.* at 205-07. Moreover, there had never been a hearing on the merits of the DHS's January 24, 2003 motion. *Id.* As a result, the BIA re-opened Mr. Ifenatuora's case. *Id.*

In July 2006, an IJ in Atlanta, Georgia found Mr. Ifenatuora removable, again in absentia. *Id.* at 218-19. In the Order of the Atlanta IJ, there is no finding that Mr. Ifenatuora was properly served and notified of this hearing. *Id.* In fact, Mr. Ifenatuora was never informed of this hearing. Mr. Ifenatuora, who was living in South Carolina at this time, was unaware that he has been ordered removable in absentia until later in 2006 when he contacted the immigration authorities about getting a new Green Card. *Id.* at 589.

Mr. Ifenatuora, acting pro se, once again filed a motion for the BIA to re-open his case. *Id.* at 242. The BIA referred Mr. Ifenatuora's request to re-open

back to the IJ on July 3, 2007. *Id.* The IJ, however, did not act upon, or even acknowledge, this request to re-open Mr. Ifenatuora's immigration proceedings. During the time frame, Mr. Ifenatuora was not arrested, detained, or generally bothered by the DHS. *Id.* at 589. In fact, from the 1999 hearing until 2009, Mr. Ifenatuora was living as a free man and was working to support his family.

In June 2009, Mr. Ifenatuora was arrested and detained by the DHS in North Carolina. *Id.* Since that time, Mr. Ifenatuora has been detained under the purported authority of Section 236(c) of the Immigration and Nationality Act, which provides for mandatory detention of aliens who have been convicted of certain offenses. *See* 8 U.S.C. § 1226(c).[1]

Following his 2009 arrest, Mr. Ifenatuora again filed a Motion to Reopen In Absentia Removal Proceedings and to Stay the Removal Order with the Atlanta Immigration Court on March 18, 2011. CA4 J.A. at 215-45. The IJ granted this Motion on May 2, 2011. *Id.* at 279. In 2013, an IJ terminated Mr. Ifenatuora's grant of deferral of removal and ordered him removed, based in part on the conviction at issue in this proceeding. Mr. Ifenatuora's appeal from that

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[1] There is a substantial argument that mandatory detention does not apply to those aliens who, like Mr. Ifenatuora, were taken into immigration custody after being released from state custody. *See, e.g.*, *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) (holding that section 236(c)(1) of the Immigration and Nationality Act does not authorize the mandatory detention of an alien who was taken into immigration custody two years after he completed his state sentence).

determination is presently pending. Therefore, if Mr. Ifenatuora prevailed here, then he would be entitled to a re-determination of his removability. Meanwhile, Mr. Ifenatuora remains detained indefinitely.

D. After he was detained by the DHS, Mr. Ifenatuora received a copy of a warrant for his arrest issued by the Nigerian authorities on March 23, 2009. *Id.* at 14, 589-90. Mr. Ifenatuora did not receive a copy of his arrest warrant until March 2010. *Id.* at 589-90. Shortly thereafter, and having been detained for a few months, Mr. Ifenatuora, acting pro se, began to research his options with the help of other inmates and the law librarian at his jail. *Id.*

First, on April 26, 2010, Mr. Ifenatuora filed a petition for writ of *coram nobis* in the Eastern District of California challenging his California Conviction on the basis that he was not informed of the immigration consequences of his conviction prior to pleading guilty. *Id.* at 298. On September 23, 2013, the district court dismissed the petition. *See* Order, *United States. v. Ifenatuorah*, No. 96-cr-0088 (E.D. Cal. Sept. 23, 2013). Mr. Ifenatoura's appeal from that decision is pending in the Ninth Circuit. *See United States v. Ifenatuorah*, No. 13-16991.

Second, on April 27, 2010, Mr. Ifenatuora filed a petition for writ of *coram nobis* in the Court of Appeals for the Fourth Circuit challenging his Maryland Conviction on the basis that he was similarly not informed of the immigration consequences of the Maryland Conviction prior to pleading guilty. Pet. App. 8a. The Court of Appeals denied this petition, which is now the subject of the present petition for certiorari. *Id.* at 1a-6a.

Additionally, on April 28, 2010, Mr. Ifenatuora filed a petition for a writ of *coram nobis* in the District of Maryland, also challenging his Maryland Conviction. CA4 J.A. 640. The District of Maryland stayed any decision on Mr. Ifenatuora's writ pending the outcome of his proceedings to challenge the California Conviction. *Id.* at 740-42. As of the filing of this petition, the case remains stayed. *Ifenatuora v. United States*, No. 8:10-cv-01091-PJM (D. Md.).

E. Mr. Ifenatoura now seeks review of the Court of Appeals decision denying his April 27, 2010 petition for writ of *coram nobis*.

In the Court of Appeals, Mr. Ifenatuora contended that he was entitled to relief under *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that the right to counsel is violated when a defendant is not informed of the immigration consequences of entering a guilty plea. Pet'r CA4 Br. 30-34. After briefing was submitted, this Court decided *Chaidez v. United States*, 133 S. Ct. 1103 (2013), which held that *Padilla* established a new rule of the kind not normally retroactive. The Court of Appeals allowed supplemental briefing concerning the impact of *Chaidez*.

In supplemental briefing, Mr. Ifenatuora emphasized arguments that this Court has reserved, including in *Chaidez* itself. *See Chaidez*, 133 S. Ct. at 1113 n.16 (reserving whether "*Teague*'s bar on retroactivity does not apply when a petitioner challenges a federal conviction, or at least does not do so when she makes a claim of ineffective assistance"); *id.* at 1107 n.3 (noting that the petitioner did not argue that *Padilla* was a "[w]atershed rule of criminal procedure" under *Teague*).

First, Mr. Ifenatuora argued that this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), "does not apply to federal convictions." Pet.App. 4a. The Court of Appeals rejected that claim based on circuit precedent squarely holding that "*Teague* applies to federal convictions." *Id.* (citing *United States v. Martinez*, 139 F.3d 412 (4th Cir. 1998)).

Mr. Ifenatuora further emphasized that "*Teague* does not apply to ineffective assistance of counsel claims," but the Court of Appeals rejected that claim as well. *Id.* at 5a n.3. According to the Court of Appeals, *Teague* "created two limited exceptions—watershed rules of criminal procedure and substantive rules," and the Court of Appeals declined to "create a third exception." *Id.*

Moreover, relying on binding circuit precedent, the Court of Appeals rejected Mr. Ifenatuora's additional argument that *Padilla* was a "watershed" rule of criminal procedure. *Id.* at 5a-6a (citing *United States v. Mathur*, 685 F.3d 396 (4th Cir. 2012)). The Court of Appeals subsequently declined rehearing and rehearing en banc. *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

1. Whether *Teague* applies to federal defendants, particularly when raising ineffective-assistance claims, is perhaps the most important open question in habeas jurisprudence. This Court has reserved judgment on that far-reaching issue at least three times: in *Teague* itself, in *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008), and—just last Term—in a case raising the exact merits claim through the same procedural vehicle at issue here, *see Chaidez*, 133 S. Ct. at 1113 n.16. Moreover, a number of federal judges have concluded that the normal *Teague* prin-

ciple should not apply in cases involving federal defendants.

But while this Court recognizes that the proper scope of *Teague* is an open and important question, the courts of appeals have applied *Teague* to federal defendants raising post-conviction challenges. Thus, more than twenty years after *Teague*, there is no reasonable prospect of a circuit split or of any benefit resulting from further percolation on this issue. Moreover, this case, unlike *Chaidez*, poses no vehicle difficulties, as *Teague*'s applicability to federal defendants was squarely raised and decided below. The time has come for this Court to answer the decades-old question reserved first in *Teague*.

2. This Court should also grant certiorari to review whether the rule established in *Padilla* is a "watershed" rule of criminal procedure exempt from *Teague*. This Court reserved this issue in *Chaidez*, and its importance warrants certiorari. Indeed, numerous commentators have recognized that this Court's decision in *Padilla*—which extended the right to counsel to advice concerning immigration—is essentially *Gideon v. Wainwright*, 372 U.S. 335 (1963), in the immigration context.

I. WHETHER *TEAGUE* APPLIES TO FEDERAL DEFENDANTS, PARTICULARLY WHEN RAISING INEFFECTIVE-ASSISTANCE CLAIMS, IS AN IMPORTANT QUESTION WARRANTING CERTIORARI

Whether *Teague* applies to federal defendants, particularly when raising ineffective-assistance claims in their first post-conviction proceeding, is a question that is both important and unsettled in this Court.

Every year, hundreds if not thousands of federal defendants raise constitutional claims that are rejected based on the rule of non-retroactivity that this Court established in *Teague*. Indeed, most if not all federal courts of appeals that hear post-conviction motions have applied *Teague* to federal convictions. *E.g.*, *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-68 (9th Cir. 2002); *Daniels v. United States*, 254 F.3d 1180, 1193-94 (10th Cir. 2001) (en banc); *Martinez*, 139 F.3d at 416; *United States v. Swindall*, 107 F.3d 831, 834 n.4 (11th Cir. 1997) (per curiam); *Van Daalwyk v. United States*, 21 F.3d 179, 181-183 (7th Cir. 1994); *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990).

Yet this Court has repeatedly taken care to reserve whether *Teague*'s principle of non-retroactivity applies to federal defendants, particularly when raising ineffective assistance of counsel claims. *See Chaidez*, 133 S. Ct. at 1113 n.16 (reserving the question whether "*Teague*'s bar on retroactivity does not apply when a petitioner challenges a federal conviction, or at least does not do so when she makes a claim of ineffective assistance"); *Danforth*, 552 U.S. at 269 n.4 (reserving "whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255"); *Teague*, 489 U.S. at 327 n.1 (Brennan, J., dissenting) (noting that the Court "does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners").

Moreover, this Court's descriptions of *Teague* have increasingly suggested that the non-retroactivity principle does *not* apply in cases involving federal convictions. Most saliently, this Court stated in *Danforth* that "the text and reasoning of Justice

O'Connor's opinion [in *Teague*] also illustrate that the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions." 552 U.S. at 279. That statement followed naturally from *Danforth*'s explication of *Teague* as a doctrine primarily concerned with the preservation of comity between the federal and state sovereigns. *See id.*

Confirming the difficulty of this issue, a number of federal judges have concluded that *Teague* should not apply to federal defendants in the way it applies to state defendants. For example, the District of Massachusetts declined to apply *Teague* to a federal defendant in *United States v. Payne*, 894 F. Supp. 534, 542 (D. Mass. 1995). As *Payne* pointed out, § 2255 proceedings are continuations of prior federal criminal proceedings. Elaborating on the continuous nature of § 2255 proceedings, *Payne* quoted from a leading habeas treatise:

> "In contrast to the 'civil' and 'collateral' section 2254 remedy for state prisoners, the section 2255 remedy for federal prisoners bears the markings of an integral part of a continuous criminal proceeding that is segmented by no event or condition decisive of finality. This characteristic of section 2255 proceedings creates the possibility, ignored by most courts and commentators that have faced the issue, that *Teague* does not apply in section 2255 proceedings . . . ."

Id. at 543 (quoting James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 22A.6, at 272-74 (Supp. 1993)); *see also* Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," after* Danforth v. Minnesota*: Why*

Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings, 46 Am. Crim. L. Rev. 1, 66 & n.456 (2009) (favorably discussing *Payne*).

In addition, some federal judges would modify the normal *Teague* inquiry in cases concerning federal defendants. *See, e.g.*, *Valentine v. United States*, 488 F.3d 325, 342 (6th Cir. 2007) (Martin, J., concurring in part and dissenting in part) ("Because concerns with comity are reduced—if not nonexistent—in the context of section 2255, however, it would seem to me that a bit more scrutiny is warranted in determining what the legal landscape actually was, and whether a given rule was 'dictated by precedent existing at the time the defendant's conviction became final.'") (quoting *Teague*, 489 U.S. at 301) (emphasis omitted). That disagreement over *Teague*'s proper application further supports the need for this Court's review of this important question.

Even courts applying *Teague* to federal convictions have expressed serious doubts about *Teague*'s application in this context. *See, e.g.*, *Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th Cir. 2009) ("It is not entirely clear that *Teague*'s framework is appropriate for federal habeas petitions under 18 U.S.C. § 2255 because many of the comity and federalism concerns animating *Teague* are lacking. But it has been this Court's practice to apply *Teague* to § 2255 petitions, and we adhere to it today.") (citation omitted); *Santos-Sanchez v. United States*, No. 5:06-cv-153, 2011 U.S. Dist. LEXIS 95442, at *8-9 (S.D. Tex. Aug. 24, 2011) (expressing "serious doubts" and "strong reservations" about *Teague*'s application to federal convictions). Still other courts have recog-

nized the uncertainty surrounding this question. *See, e.g.*, *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1190 (9th Cir. 2011) (explaining that after *Danforth*, "there is now some doubt as to whether *Teague* applies to federal-prisoner petitioners").

In prior cases, even the United States has recognized that *Teague*'s application to federal defendants remains an open and important question. Indeed, when the petitioner in *Chaidez* raised this issue for the first time after certiorari was granted, the United States devoted seventeen pages of merits briefing to the subject. *See* Br. of the United States at 37-53, *Chaidez*, 133 S.Ct. 1103 (No. 11-820). The United States also argued that the issue had been forfeited, *see id.* at 35-37, and it was on that ground that this Court again postponed resolution of the question presented. *See Chaidez*, 133 S. Ct. at 1113 n.16.

Here, unlike *Chaidez*, there are no vehicle problems, as *Teague*'s applicability was squarely raised and resolved below. In his appellate briefs, Mr. Ifenatuora clearly argued "that *Teague* does not apply to federal convictions." Pet.App. 4a. The Court of Appeals addressed this claim and rejected it based on binding circuit precedent that "*Teague* applies to federal convictions." *Id.* (citing *Martinez*, 139 F.3d 412). This case is thus an appropriate vehicle for resolving the important question that this Court recently left open in *Chaidez*.

In sum, *Teague*'s applicability to federal defendants is a question of longstanding and major importance, and there is no basis for postponing resolution of this issue. Certiorari is therefore warranted. *See* Sup. Ct. Rule 10(c) (providing for certiorari where "a United States court of appeals has decided

an important question of federal law that has not been, but should be, settled by this Court").

II. *TEAGUE* SHOULD NOT APPLY TO FEDERAL DEFENDANTS, AT LEAST WHEN RAISING INEFFECTIVE-ASSISTANCE CLAIMS IN THEIR FIRST POST-CONVICTION ACTION

In cases involving state-court convictions, *Teague* is grounded in "interests of comity and finality." 489 U.S. at 308 (plurality). But there is no comity interest when federal courts review federal convictions. And finality interests alone cannot support application of *Teague* to defeat Mr. Ifenatuora's claim.

A. Federal Review Of Federal Convictions Does Not Implicate Comity Interests

Teague's concern for "interests of comity" has no application to federal review of federal convictions. *Id.* As Justice O'Connor's plurality opinion made clear, *Teague* sought to minimize federal courts' intrusion into state criminal proceedings. The justices were troubled by the "'costs imposed upon the States by retroactive application of new rules of constitution law on habeas corpus,'" *id.* at 310 (quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment)); the "intrusive" nature of applying new rules to state cases on collateral review, *id.* (citing *Younger v. Harris*, 401 U.S. 37, 43-54 (1971)); the problem of "continually forc[ing] the States to marshal resources" to defend their judgments, *id.* (emphasis omitted); and the "understandabl[e] frustrat[ion]" of state courts whose convictions are overturned by a federal court, *id.* (citing *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982)). These concerns were central to *Teague*, and they apply only to review of a state—not a federal—conviction.

This Court has subsequently recognized the comity interests underlying *Teague*. In *Gilmore v. Taylor*, 508 U.S. 333 (1993), for example, this Court observed that *Teague* "effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts." *Id.* at 340. And more recently in *Danforth*, this Court explained that *Teague* was "justified … in part by reference to comity and respect for the finality of state convictions." 552 U.S. at 279; *see also id.* at 280 ("It is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings."). Relying on these comity interests, the *Danforth* Court concluded that *Teague* "was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions." *Id.* at 279.

Teague's concern with federal courts intruding on state court convictions simply does not apply when federal courts review judgments from their own courts. On federal collateral review, there is no risk that a federal court will second-guess a state court conviction. Therefore, "concerns with comity are reduced[,] if not nonexistent." *Valentine*, 488 F.3d at 342 (Martin, J., concurring in part and dissenting in part). Given the absence of comity interests on federal collateral review, applying *Teague* to federal collateral review is "highly questionable" at best. *Santos-Sanchez*, 2011 U.S. Dist. LEXIS 95442, at *6. Because finality is the only rationale for applying *Teague* to federal convictions, courts have a duty to ensure that applying *Teague* to a particular claim actually furthers an interest in finality. As discussed below, however, finality interests alone cannot justify

applying *Teague* to ineffective-assistance claims, particularly when collateral review is a defendant's first realistic opportunity to raise the claim.

B. Finality Interests Do Not Support *Teague*'s Application To Ineffective-Assistance Claims, At Least When First Raised On Collateral Review

For three independent reasons, finality interests alone cannot support application of *Teague* to ineffective-assistance claims, especially where, as here, a federal defendant first raises an ineffective-assistance claim on federal collateral review.

1. When a defendant first raises an ineffective-assistance claim on collateral review, adjudication of the claim is, in effect, a continuation of the direct review process. *See, e.g.*, *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (holding that a prisoner's first opportunity to raise an ineffective-assistance claim is "equivalent," for finality and procedural-default purposes, to the prisoner's direct appeal on that issue). In these "direct review" cases, *Teague*'s interest in finality does not apply because the proceedings are not yet truly final.

Normally, defendants who seek review of state or federal convictions have taken advantage of one full round of direct review, including not just an opportunity to raise their claim at the trial level, but also at the appellate and even Supreme Court levels. In those circumstances, the claim is finally adjudicated and there is a strong interest in finality. *See Teague*, 489 U.S. at 308-09 (plurality). But ineffective-assistance claims are unique because a federal defendant's first realistic opportunity to raise an ineffective-assistance claim is on collateral review. *See*

Massaro v. United States, 538 U.S. 500, 504 (2003) ("In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance."). As a result, post-conviction review of a defendant's first ineffective-assistance claim is effectively a component of the direct review process. *See, e.g.*, *Martinez*, 132 S. Ct. at 1317. Three recent decisions of this Court illustrate these principles and demonstrate that *Teague* has no more application to a federal prisoner's first opportunity to raise an ineffective-assistance claim on collateral review than to the prisoner's direct appeal.

a. In *Massaro*, this Court held that ineffective-assistance claims typically should not be raised on direct review. 538 U.S. at 504 (explaining that a § 2255 motion "is preferable to direct appeal for deciding claims of ineffective assistance"); *id.* at 507 ("For the reasons discussed[,] we think few [ineffective-assistance] claims will be capable of resolution on direct appeal . . . ."). Instead, ineffective-assistance claims against federal convictions should typically be raised for the first time in a post-conviction proceeding such as § 2255 or *coram nobis*. *Id.* at 504-08. The primary reason for this principle is that it is unrealistic to expect direct-review counsel to have either the ability or, in many cases, an adequate interest in pursuing a claim that ineffective assistance occurred at trial. *Id.* at 504-05 ("When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.").

This result gives rise to an important qualification on the finality of federal convictions: a federal conviction is not final, even after the conclusion of direct review, insofar as it has not yet been—indeed, could not possibly have been—tested for ineffective assistance. In recognition of this principle, *Massaro* held that perhaps the single most important guarantor of finality—namely, the principle of procedural default—did not apply to ineffective-assistance challenges that had been raised for the first time in the defendant's post-conviction claim. *Id.* at 509.

b. This Court's 2012 decision in *Martinez* applied *Massaro*'s reasoning in the context of collateral review of state convictions. In particular, *Martinez* held that, for purposes of evaluating a state's assertion of procedural default, "the first designated proceeding for a [criminal defendant] to raise a claim of ineffective assistance" is to be treated as the "equivalent of a prisoner's direct appeal." *Martinez*, 132 S. Ct. at 1317. In arriving at this holding, this Court described a defendant's first opportunity to raise an ineffective-assistance claim as his "initial-review collateral proceeding." *Id.* at 1315. So, even in a context where comity interests reinforce the interest of finality, this Court has held that finality concerns do not favor repose where a defendant raises his first ineffective-assistance claim. Instead, the defendant's first reasonable opportunity to allege an ineffective-assistance claim is treated, in effect, as a displaced component of the direct-review process.

c. This Court's very recent decision in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), bolsters the conclusion that a defendant's first ineffective-assistance claim—even if brought on collateral review—should be treat-

ed as part of the direct review process. *Trevino* emphasized that "the inherent nature of most ineffective assistance of trial counsel claims means that the trial court record will often fail to contain the information necessary to substantiate the claim." *Id.* at 1918 (internal quotation marks and alteration omitted); *see also Massaro*, 538 U.S. at 504-05 (similarly describing ineffective-assistance claims by federal defendants). Where "collateral review normally constitutes the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim," *Trevino* held that such collateral review should be treated as the equivalent of a non-final direct appeal. 133 S. Ct. at 1920.

Trevino confirms that there is no finality interest in applying *Teague*'s retroactivity principle to federal prisoners' first post-conviction ineffective-assistance claim. The key question is not whether Mr. Ifenatuora theoretically could have raised a trial-level ineffective-assistance claim on direct appeal. Rather, the key question is whether collateral review is the "preferred" or, "as a practical matter, the only" means of raising ineffective-assistance claims like Mr. Ifenatuora's. *Id.* The answer is yes. Federal ineffective-assistance claims are almost invariably raised in collateral proceedings. *See, e.g., United States v. Wyatt*, 561 F.3d 49, 52 (1st Cir. 2009) ("We have consistently maintained that ineffective assistance of counsel claims should ordinarily be litigated in the first instance in district court."); *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003) (noting "baseline aversion to resolving ineffectiveness claims on direct review") (quotation omitted); *United States v. Thornton*, 327 F.3d 268, 271 (3d Cir. 2003) ("It has long been the practice of this court to defer the issue

of ineffectiveness of trial counsel to a collateral attack."); *United States v. Brooks*, 444 F. App'x 629, 629 (4th Cir. 2011) (per curiam) ("'[I]in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance.'") (quoting *Massaro*, 538 U.S. at 504); *United States v. Gordon*, 346 F.3d 135, 136 (5th Cir. 2003) (per curiam) ("As a general rule, we decline to review claims of ineffective assistance of counsel on direct appeal."); *United States v. Martinez*, 430 F.3d 317, 338 (6th Cir. 2005) ("As a general rule, a defendant may not raise ineffective assistance of counsel claims for the first time on direct appeal . . . .") (quotation omitted); *United States v. Harris*, 394 F.3d 543, 558 (7th Cir. 2005) ("After *Massaro*, only the rarest and most patently egregious of ineffective assistance claims are appropriately brought on direct appeal . . . ."); *United States v. Lopez*, 431 F.3d 313, 318 (8th Cir. 2005) ("[W]e do not, absent the rarest of circumstances, address the merits of a defendant-appellant's ineffective assistance of counsel claim on direct review."); *United States v. Lillard*, 354 F.3d 850, 856 (9th Cir. 2003) ("Ineffective assistance of counsel claims are generally inappropriate on direct appeal."); *United States v. Trestyn*, 646 F.3d 732, 740 (10th Cir. 2011) ("[I]t is well established that ineffective assistance of counsel claims should generally be brought in collateral proceedings, not on direct criminal appeal."); *Thomas v. United States*, 572 F.3d 1300, 1304-05 (11th Cir. 2009) ("Generally, claims of ineffective assistance of counsel are not considered for the first time on direct appeal.") (quotation omitted). It is clear that, "as a practical matter," collateral review is the "preferred" and, in most cases, "the only" means of raising ineffective-assistance claims.

Trevino, 133 S. Ct. at 1920. Therefore, a federal prisoner's collateral ineffective-assistance claim is the equivalent of a direct appeal for finality purposes. *See id.*

Here, Mr. Ifenatuora is raising his ineffective-assistance claim with regard to his Maryland conviction for the first time in a writ of *coram nobis*. Therefore, under *Massaro*, *Martinez*, and *Trevino*, the present claim should be treated as a component of direct review. As a result, *Teague*'s bar on retroactive application should not apply.

2. If *Teague* applied to ineffective-assistance claims, the result would place federal criminal-defense counsel and their clients in a classic Catch-22.

On the one hand, this Court has required that typical ineffective-assistance claims cannot be raised on direct appeal. As noted above, *Massaro* authorized ineffective-assistance claims to be raised for the first time on collateral review, without risk of procedural default. *See Massaro*, 538 U.S. at 505-06. And, in the wake of that decision, the courts of appeals routinely dismiss ineffective-assistance claims brought on direct review. *See, e.g.*, *Wyatt*, 561 F.3d at 52; *Morris*, 350 F.3d at 39; *Thornton*, 327 F.3d at 272; *Brooks*, 444 F. App'x at 629; *Gordon*, 346 F.3d at 137; *Martinez*, 430 F.3d at 338; *Harris*, 394 F.3d at 558; *Lopez*, 431 F.3d at 318; *Lillard*, 354 F.3d at 856; *Trestyn*, 646 F.3d at 741; *Thomas*, 572 F.3d at 1305. Indeed, courts of appeals have warned that "it borders if it does not enter the arena of the frivolous to assert the issue for the first time on direct appeal." *Thomas*, 572 F.3d at 1305 (quotation omitted). They have thus advised litigants that "when brought on

direct appeal," ineffective-assistance claims are "presumptively dismissible, and virtually all will be dismissed." *Trestyn*, 646 F.3d at 741 (quotation omitted). Therefore, as a general matter, ineffective-assistance claims cannot realistically be raised on direct appeal. *See Trevino*, 133 S. Ct. at 1920.

On the other hand, the threat of *Teague*'s nonretroactivity principle will compel criminal defendants and their counsel to attempt to raise ineffective-assistance claims on direct review. After all, an attorney who waited until post-conviction proceedings to bring an ineffective-assistance claim would be placing his or her client at risk of losing her ineffective-assistance claim—even if the claim is meritorious on its face—simply because the claim relied on a "new" rule of criminal procedure.

The obvious solution to this "heads you lose, tails I win" conundrum is to exempt from *Teague* review all ineffective-assistance challenges to federal convictions. Under that approach, criminal-defense counsel and their clients would know exactly when to raise ineffective-assistance claims in order to obtain a single, full, and fair hearing: in post-conviction proceedings.

3. More broadly, the test from *Strickland v. Washington*, 466 U.S. 668 (1984), already fully accounts for the finality interests underlying *Teague*'s applicability to federal convictions, making it unnecessary to apply *Teague* to ineffective-assistance claims. *Strickland*'s stringent requirements for establishing both defective performance and prejudice, *see* 466 U.S. at 687, fully protect any conceivable interest in the finality of federal criminal convictions. Indeed, *Strickland* itself indicated that its test for in-

adequate representation was designed to accommodate the bedrock "presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Id.* at 697 (emphasis added).

First, *Strickland* imposes a high threshold for establishing defective performance. *See Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("[T]he standard for judging counsel's representation is a most deferential one."). The defendant's counsel must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. And, as an additional nod to the importance of finality, courts are to examine the standard of professional practice that already prevailed at the time of the alleged constitutional violation. *See id.* at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). As *Strickland* and later cases have made clear, the resulting inquiry is whether "the fundamental fairness of the proceeding" has been undermined. *Id.* at 696; *see also Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (noting that *Strickland* standard is "highly deferential" to trial counsel).

Second, *Strickland* additionally protects finality by reversing the normal burden of proof in cases involving unconstitutional trial practices. Normally, the government has the burden of showing that an identified constitutional violation is not prejudicial beyond a reasonable doubt. *See, e.g., Chapman v. California*, 386 U.S. 18, 24 (1967). By contrast, *Strickland* requires that the defendant demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different." *Strickland*, 466 U.S. at 694. That "highly demanding" prejudice showing, *Kimmelman*, 477 U.S. at 382, must be made before a defendant can even establish a violation of the Sixth Amendment. *Strickland*, 466 U.S. at 694; *cf. Chapman*, 386 U.S. at 24. Confirming that this special burden to show prejudice substantially protects finality interests, *Strickland* held that the same rule "should apply in federal collateral proceedings" as "on direct appeal." 466 U.S. at 697.

Mr. Ifenatuora's ineffective-assistance claim is predicated on *Padilla*, and that decision reconfirmed and illustrates that the *Strickland* standard fully accounts for finality interests. In particular, the *Padilla* Court acknowledged that many ineffective-assistance claims of the type at issue in that case (that is, claims alleging a failure to disclose the immigration consequences of conviction) would arise in post-conviction proceedings. 559 U.S. at 372-73. The *Padilla* Court therefore gave "serious consideration" to the government's concerns "regarding the importance of protecting the finality of convictions obtained through guilty pleas." *Id.* at 371. Given that "serious consideration," *id.*, application of *Teague*'s retroactive application-bar to *Padilla* claims would be redundant.

In light of *Strickland*'s stringent standards, applying *Teague* to ineffective-assistance claims would serve no independent interest in finality. Furthermore, *Teague*'s interest in finality does not apply where, as here, an ineffective-assistance claim is brought for the first time on federal collateral review. Any other result would create an unworkable Catch-22 for federal defendants. Nor does federal review of

a federal conviction implicate *Teague*'s comity concerns. Absent any finality or comity interest, there is no justification for applying *Teague* when a federal defendant brings his first ineffective-assistance claim on collateral review.

This Court should grant certiorari to resolve the important question that it has reserved not once, but three times. Until this Court addresses the applicability of *Teague* to federal convictions—and to ineffective-assistance claims in particular—federal defendants with *Padilla* claims will continue to suffer adverse immigration consequences stemming from their guilty pleas, and many of them will remain detained indefinitely as a result. *See* 8 U.S.C. § 1226(c).

III. *PADILLA* ESTABLISHED A "WATERSHED" RULE OF CRIMINAL PROCEDURE AND SO SHOULD NOT BE SUBJECT TO *TEAGUE*

This Court should also grant certiorari to review a second question of exceptional importance that this Court reserved in *Chaidez*—namely, whether the rule established in *Padilla* is a "watershed" rule exempt from *Teague*. *See Chaidez*, 133 S. Ct. at 1107 n.3 (declining to address this issue based on the petitioner's forfeiture).

Teague held that its non-retroactivity principle does not apply to "watershed rules of criminal procedure"—that is, to rules that "implicate the fundamental fairness" of a conviction. *Teague*, 489 U.S. at 312 (plurality) (quotation omitted). This Court has made clear that the "watershed" exception is reserved for rules that, like the Sixth Amendment right-to-counsel rule first established in *Gideon v. Wainwright*, 372 U.S. 335, "alter our understanding of the bedrock procedural elements essential to the fairness

of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (quoting *Tyler v. Cain*, 533 U.S. 656, 665 (2001)).

Here, the decision below held that *Padilla* did not establish a watershed rule. Pet.App. 5a (citing *Mathur*, 685 F.3d at 398-99). But the rule announced in *Padilla* is essentially *Gideon* for deportation-related cases and so qualifies under *Teague*'s "watershed" exception. By all accounts, *Padilla* was a landmark decision that fundamentally changed the nature of Sixth Amendment rights in immigration proceedings. Scholars have called it a "watershed," *see* Stephanos Bibas, *Regulating The Plea-Bargaining Market: From Caveat Emptor To Consumer Protection*, 99 Cal. L. Rev. 1117, 1118 (2011), and noted that "*Padilla* may turn out to be the most important right to counsel case since *Gideon*," Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 Crim. Just. 36, 37 (2010).

Padilla's own reasoning provides the best evidence of the decision's importance. As the Court explained, "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Padilla*, 559 U.S. at 366. And the "severity of deportation" is extreme. *Id.* at 373. Indeed, the Court has repeatedly called it "the equivalent of banishment or exile." *Id.* (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947)). Thus, "accurate legal advice for noncitizens accused of crimes has never been more important." *Id.* at 364. Notably, deportation can often be "the most important part" of a criminal's punishment. *Id.*

As a number of commentators have highlighted, *Padilla* dissolved the longstanding dividing line between criminal proceedings, where the Sixth Amendment and other constitutional rights are applicable, and deportation proceedings, where those rights were often thought not to apply. Viewed in that light, *Padilla*'s decision to expand effective-assistance rights to include advice regarding deportation-consequences represented nothing less than the extension of *Gideon* to the immigration context. *See* Jennifer H. Berman, Comment, Padilla v. Kentucky*: Overcoming* Teague*'s "Watershed" Exception to Non-Retroactivity*, 15 U. Penn. J. Const. L. 667, 700-02 (2012) (collecting sources); Duncan Fulton, Comment*, Emergence of a Deportation* Gideon*?: The Impact of* Padilla v. Kentucky *on Right to Counsel Jurisprudence*, 86 Tul. L. Rev. 219 (2011).

Padilla also "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Whorton*, 549 U.S. at 417 (internal quotation marks and citation omitted). As this Court recently held, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)); *see also Lafler v. Cooper*, 132 S. Ct. 1376 (2012). Indeed, in 2010, 97.4% of federal criminal convictions—that is, 87,418 out of 89,741 convictions—were disposed of pursuant to pleas of guilty or *nolo contendere.* U.S. Department of Justice, *Sourcebook of Criminal Jus-*

tice Statistics, Table 5.22.2010.[2] This is a marked increase from 1984 (the year *Strickland* was decided), when 87.14% of federal convictions were secured pursuant to pleas. *Id.* There is no question that "[i]n today's criminal justice system," plea negotiations are "almost always the critical point for a defendant." *Frye*, 132 S. Ct. at 1407.

After *Padilla*, innocent noncitizen defendants armed with full and accurate information will be more likely to turn down plea agreements and defend their innocence at trial. Clearly, giving defendants accurate information promotes accurate criminal judgments. To quote *Padilla*, "accurate legal advice for noncitizens accused of crimes has never been more important." *Padilla*, 559 U.S. at 364.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] *Available online* at http://www.albany.edu/sourcebook/pdf/t5222010.pdf.