No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISRAEL ERNESTO PALACIOS

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

This case presents a question on which the circuit courts are split: to what extent must a claim to be "sufficiently foreshadowed in existing case law," *United States v. Morris*, 917 F.3d 818, 823 (4th Cir. 2019), such that counsel's failure to raise that claim constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984)?

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Petition for Writ of Certiorari

Petitioner Israel Ernesto Palacios respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the U.S. Court of Appeals for the Fourth Circuit appears at Appendix page 1a and is reported at 982 F.3d 920. The unpublished opinion of the United States District Court for the District of Maryland is available at Appendix page 13a, and the related order executing that opinion is available at Appendix page 34a.

Statement of Jurisdiction

The Fourth Circuit entered judgment on December 15, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The relevant federal statute (18 U.S.C. § 924) is set forth on Appendix page 35a.

Introduction and Statement of the Case

A. Background on Mr. Palacios's Case. In 2007, a federal grand jury indicted Mr. Palacios on several counts related to his involvement with the La Mara Salvatrucha gang. App. at 3a. Among those counts were charges under 18 U.S.C. § 924(c), for the use of a firearm during a crime of violence, and 18 U.S.C. § 924(j), for murder resulting from the use of a firearm during that crime of violence. Both charges were for the same underlying crime. *Id.*

At the end of Mr. Palacios's trial in 2008, the district court instructed the jury members that convicting Mr. Palacios of the § 924(j) offense required that they convict him of the § 924(c) offense, too. *Id.* at 4a. The jury subsequently convicted Mr. Palacios of both the §§ 924(c) and 924(j) charges. *Id.* The district court then sentenced him to life in prison for the § 924(j) conviction, followed by a successive 120-month term for the conviction under § 924(c). *Id.* Mr. Palacios was also charged a separate $100 special assessment for the § 924(c) conviction. His counsel did not object that he was convicted and sentenced under both statutory provisions. *Id.*

Mr. Palacios subsequently moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his counsel was ineffective for failing to raise a double jeopardy challenge to his convictions under both §§ 924(c) and 924(j). *Id.* at 4a–5a. The district court denied his motion because "given the state of the law at the time of [Mr.] Palacios's trial, 'it was not unreasonable for his attorneys to fail to object to his sentence on double jeopardy grounds.'" *Id.* at 5a.

The U.S. Court of Appeals for the Fourth Circuit affirmed. The court assessed Mr. Palacios's ineffective assistance of counsel claim under *Strickland v. Washington*'s two-prong test, which requires the defendant to show that he was prejudiced by his counsel's objectively unreasonable performance. 466 U.S. 668, 687–88 (1984). The Fourth Circuit found that Mr. Palacios's counsel was not deficient under *Strickland* when he failed to raise the double-jeopardy claim. App. at 11a. Despite the existence of jury instructions stating that §§ 924(c) and 924(j) are lesser- and greater-included offenses, and despite the existence of cases at the time of Mr. Palacios's trial "hold[ing] that § 924(c) defines a lesser-included offense of § 924(j)," the court held that Mr. Palacios's double jeopardy claim was not "sufficiently foreshadowed at the time of trial to render his counsel's failure to raise it constitutionally deficient representation." *Id.* at 10a, 11a.

B. Disagreement over "Sufficiently Foreshadowed" Claims. The Sixth Amendment requires counsel "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Because of that, most circuits require counsel to make material objections and arguments "[e]ven where the law is unsettled" as long as "'there is relevant authority strongly suggesting' that it is warranted." *Morris*, 917 F.3d at 824 (noting that counsel is obliged to make arguments "'that are sufficiently foreshadowed in existing case law'"); *see also Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir. 1999) (explaining that "counsel's failure to raise an issue whose resolution is clearly foreshadowed by existing decisions might constitute ineffective assistance of

counsel"). Yet the federal circuit courts disagree on what it means for a claim to be "sufficiently foreshadowed" such that counsel's failure to raise that claim constitutes constitutionally deficient performance. Some require the claim to be definitively answered, while others find that persuasive authority addressing the claim can be enough. This Court's guidance is necessary to clarify that disagreement.

Reasons for Granting the Petition

This Court should grant the petition for three reasons. First, the circuit courts are divided on the degree to which a claim must be "sufficiently foreshadowed" by existing precedent such that failure to raise that claim constitutes deficient performance. Second, the Fourth Circuit's decision that Mr. Palacios's double jeopardy claim was not sufficiently foreshadowed is inconsistent with this Court's precedent, namely the nearly ninety-year-old double jeopardy principle set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). Finally, the "sufficiently foreshadowed" issue arises frequently in ineffective assistance of counsel claims. Clarifying what constitutes deficient performance in this context will assist lower courts to justly and efficiently resolve those disputes.

I. The circuit courts are split on the extent to which a claim must be "sufficiently foreshadowed" such that counsel's failure to raise that claim is constitutionally deficient performance.

Review by this Court is necessary because the circuit courts are divided over what it means for a claim to be sufficiently foreshadowed by existing law. Some require the claim to be, in effect, definitively answered for it to be foreshadowed. Others say that persuasive authority supporting the claim can be enough. On top of that, different courts frame the foreshadowing question in different ways,

contributing to these inconsistent results. That is why we respectfully ask this Court to address what the appropriate standard should be.

A. Some courts require the unraised claim to be definitively answered for it to be foreshadowed by existing law.

Some circuit courts require a claim to be plainly addressed and answered in existing law for it to be sufficiently foreshadowed. The Fourth Circuit, for example, found that Mr. Palacios's double jeopardy claim was not sufficiently foreshadowed at the time of his trial even though the following was available to Mr. Palacios's counsel at that time: (1) the plain text of §§ 924(c) and 924(j) showed that the former is a lesser-included offense of the latter; (2) the jury instructions in Mr. Palacios's case stated that § 924(c) was a lesser-included offense of § 924(j), App. at 4a; (3) the other circuits that had addressed the question had all concluded that § 924(c) is a lesser-included offense of § 924(j), App. at 10a; and (4) Fourth Circuit precedent had suggested that the claim was possible. App. at 9a. Even with all of this available to counsel at the time of Mr. Palacios's trial, the Fourth Circuit still found that the double jeopardy claim was not sufficiently foreshadowed, largely because one unpublished Fourth Circuit decision implicitly questioned the likelihood of that claim's success. *Id.* at 9a; *U.S. v. Drayton*, 267 F. App'x 192, 196–97 (4th Cir. 2008).

The Sixth Circuit similarly requires a clear answer. In *Bullard v. United States*, 937 F.3d 654, 662 (6th Cir. 2019), for instance, the defendant claimed that his trial and appellate counsel were deficient for failing to challenge his career-offender designation, arguing that his prior state conviction did not qualify as a federal controlled-substance offense because the state-criminalized substances were not

criminalized federally. The Sixth Circuit acknowledged that this argument was supported by case law in four sister circuits prior to the defendant's plea and appeal. *Id.* (citing cases from the Second, Fifth, Ninth, and Eighth Circuits "support[ing] part of Bullard's argument"). Despite that, the Sixth Circuit found that counsel was not deficient for failing to raise this argument because "the law did not plainly support [the defendant's] position." *Id.* The court explained that it "remained conflicted" about whether a controlled substance offense could be predicated on substances that were not criminalized federally, that this Court had not weighed in, and that several district courts in a sister circuit were conflicted on the issue at the time of the defendant's conviction and sentencing. *Id.* at 662–63.

Similarly, the Eighth Circuit recently found that counsel was not constitutionally deficient for failing to raise a Fourteenth Amendment due process claim based on a ten-year delay between conviction and sentencing because the law was "unsettled." *Deck v. Jennings*, 978 F.3d 578, 583 (8th Cir. 2020). Citing a D.C. Circuit opinion that collected cases, the court acknowledged the suggestion from other courts that a constitutional claim of this nature could work. *Id.* But the court discounted persuasive authority from other circuits because the "cases were not controlling" and "did not reflect a single unified framework," even though the court cited at least one case that adopted a due process framework for this kind of constitutional claim. *Id.* at 583–84 (comparing cases relying on the Speedy Trial Clause with those relying on the Due Process Clause); *see also Anderson v. United States*, 762 F.3d 787, 793–94 (8th Cir. 2014) (holding that, even with contradictory

precedent from other circuits, counsel was not deficient for "'fail[ing] to object to the correct application of settled law'" within the Eighth Circuit (quoting *Hamberg v. United States*, 675 F.3d 1170, 1172–73 (8th Cir. 2012))).

In short, even where abundant persuasive authority supports a claim, these circuit courts will not find a claim to be sufficiently foreshadowed unless the claim is, in effect, definitively settled in existing law.[1] *See also United States v. Davies*, 394 F.3d 182, 190–91 & n.7 (3d Cir. 2005) (holding that even though the Third Circuit's own precedent "foreshadow[ed]" an argument, that decision did not expressly adopt that argument and thus the precedent did "not alter the legal landscape on the basis of which reasonable counsel . . . would have pursued an appeal"); *United States v. Parker*, 173 F. App'x 582, 587 (9th Cir. 2006) (recognizing that this Court's *Jones* decision "foreshadowed . . . *Apprendi*'s ultimate holding," but still finding that because virtually all courts treated § 841's drug quantity as a sentencing factor, "it would be too high a standard to hold that . . . counsel's inability to predict *Apprendi* represented ineffective assistance of counsel").

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[1] The Sixth Circuit has found counsel deficient for failing to raise a "clearly foreshadowed" claim, but only where this Court had directly answered the question. *Chase v. MaCauley*, 971 F.3d 582, 594 (6th Cir. 2020) (finding that counsel was obligated to raise a constitutional challenge to Michigan's sentencing scheme because this Court's precedent made it clear that the sentencing scheme was unconstitutional). Similarly, the D.C. Circuit has held that an evidentiary claim should have been raised where the error was already foreclosed by the text of the relevant evidence Rule and the related Advisory Committee Notes but at the same time denied relief for failing to raise a wiretap standing challenge where there was "deeply unsettled law" across the circuits. *United States v. Glover*, 872 F.3d 625, 631–34 (D.C. Cir. 2017).

B. Some courts only require the existence of persuasive authority to find a claim sufficiently foreshadowed.

In contrast, other circuits do not require the unraised claim to be settled. *See, e.g., United States v. Phea*, 953 F.3d 838, 842 (5th Cir. 2020) ("[T]he absence of directly controlling precedent does not preclude a finding of deficient performance . . . ." (citing *United States v. Juarez*, 672 F.3d 381, 387 (5th Cir. 2012))). Rather, in these circuits, the mere existence of persuasive authority is sufficient to put counsel on notice that a claim should be raised.

For example, the Fifth Circuit has recognized that a claim or defense is sufficiently foreshadowed when it is "plausible" based on persuasive authority. *See, e.g., Juarez*, 672 F.3d at 387 (concluding that a derivative citizenship defense was plausibly foreshadowed by: a Second Circuit opinion that did not expressly interpret the relevant statute, but "express[ed] a belief" about what the statute required; an unpublished Ninth Circuit opinion observing that the omission of certain statutory language supported a derivative citizenship defense; and an immigration law sourcebook); *Phea*, 953 F.3d at 842 (finding that a jury-instruction challenge was plausibly foreshadowed by the charging statute's plain language).

Similarly, in the Tenth Circuit, persuasive authority suggesting that a claim is viable is enough to find the claim sufficiently foreshadowed. *See, e.g., United States v. Cuthbertson*, 833 F. App'x 727, 731 (10th Cir. 2020) (finding that counsel was required to challenge whether the defendant's prior Hobbs Act robbery conviction constituted a crime of violence based on the relevant sentencing guideline's text and that court's prior "strong[] suggest[ion]" about the nature of generic robbery (quoting

United States v. O'Connor, 874 F.3d 1147, 1154 (10th Cir. 2017)); *Heard v. Addison*, 728 F.3d 1170, 1180 (10th Cir. 2013) (finding that counsel was deficient for failing to raise a defense that "minimally competent counsel would have recognized" based on the statute's text and the state court's "failure to provide a permissible narrowing construction in its published cases"); *United States v. Demeree*, 108 F. App'x 602, 605 (10th Cir. 2004) (finding that the court's own silence on a jury unanimity issue, coupled with a circuit split, was sufficient to find counsel ineffective for failing to request a unanimity instruction).

These courts stand in sharp contrast to courts requiring the claim to be definitively settled. The Fifth Circuit's *Phea* decision, and the Tenth Circuit's *Heard* decision, for example, directly conflict with the Fourth Circuit's decision in Mr. Palacios's case. Specifically, the jury instructions in Mr. Palacios's case and the plain text of § 924 both stated that subsection (c) was a lesser-included offense of subsection (j). Also, at the time of Mr. Palacios's trial, every sister circuit that had addressed subsections (c) and (j) had concluded that the former was a lesser-included offense of the latter. Yet the Fourth Circuit found, unlike in *Phea* and *Heard*, that Mr. Palacios's double jeopardy claim was not sufficiently foreshadowed. Review by this Court is necessary to resolve this circuit split.

C. Courts lack a uniform standard for analyzing when counsel is required to raise an argument based on unsettled law.

This Court should grant this petition to articulate a uniform standard for determining when counsel is required to raise a claim based on unsettled law. No such uniform standard currently exists, and the treatment of the issue by circuit

courts "has been, at best, patchwork." Ruth Moyer, *Counsel as "Crystal Gazer": Determining the Extent to which the Sixth Amendment Requires that Defense Attorneys Predict Changes in the Law*, 26 GEO. MASON U. CIV. RTS. L.J. 183, 195 (2016) (quoting Richard P. Rhodes, Strickland v. Washington*: Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 130 (1992)).

Here, for example, the Fourth Circuit said that counsel must raise claims that were "sufficiently foreshadowed." App. at 8a (quoting *Shaw v. Wilson*, 721 F.3d 908, 916–17 (7th Cir. 2013), among others). In comparison, the Sixth Circuit requires claims to be "clearly foreshadowed." *Lucas*, 179 F.3d at 420 (citing *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989)). The Eighth Circuit, on the other hand, has indicated that a failure to raise an argument would be constitutionally deficient only if the argument was "dictated by precedent existing at the time." *Driscoll v. Delo*, 71 F.3d 701, 713 (8th Cir. 1995). And the Fifth Circuit has required that that the claim be "plausible" based on "the legal authority available" at the time of the representation. *Juarez*, 672 F.2d at 387.

These differences matter because using inconsistent standards to measure the total weight of existing authority yields inconsistent results. *Compare* App. at 9a–11a (the Fourth Circuit finding, in Mr. Palacios's case, that counsel *was not* required to raise an argument even though it was supported by the jury instructions at trial, sister circuit precedent, and Fourth Circuit precedent) *and Bullard*, 937 F.3d at 662 (finding that counsel *was not* required to raise an argument even though it was

supported by persuasive authority in the sister circuits) *with Juarez*, 672 F.2d at 387 (finding that counsel *was* required to raise an argument when it had been acknowledged by two sister circuits). This Court should grant this petition to articulate a uniform standard for analyzing when, based on existing law, counsel is constitutionally required to raise a potential argument.

II. The Fourth Circuit's decision conflicts with this Court's long-established precedent on the Double Jeopardy Clause.

In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), this Court explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." This *Blockburger* test has, for almost 90 years, guided courts in assessing whether convicting or sentencing defendants for multiple charges for the same conduct violates the Double Jeopardy Clause. *See, e.g.*, *Ball v. United States*, 470 U.S. 856, 861 (1985) ("This Court has consistently relied on the test of statutory construction stated in *Blockburger v. United States* to determine whether Congress intended the same conduct to be punishable under two criminal provisions." (citation omitted)). That matters here because, based on that test, it was clear at the time of Mr. Palacios's trial that convicting him under both §§ 924(c) and 924(j), based on the same underlying conduct, punished him twice for the same offense. Because of that, the Fourth Circuit's finding that his double jeopardy claim was not sufficiently foreshadowed at that time was inconsistent with *Blockburger*, too.

Section 924(c) penalizes "any person who, during and in relation to any crime of violence . . . uses or carries a firearm." 18 U.S.C. § 924(c). Section 924(j) then penalizes "[a] person who, *in the course of a violation of subsection (c)*, causes the death of a person through the use of a firearm." 18 U.S.C. § 924(j) (emphasis added). Convicting a defendant under § 924(j) requires proof of the same elements required to convict him under § 924(c), except that it also requires proof of a resultant fatality. That is, § 924(c) is a lesser included offense of § 924(j). In fact, in Mr. Palacios's case, the jury instructions explicitly made this point, and the Government has now conceded it on appeal. *See* App. at 4a ("The district court had instructed the jury that, to convict [Mr.] Palacios of the § 924(j) offense, the jury would have to find that he committed the § 924(c) offense."); *see also id.* at 7a ("The parties agree that § 924(c) is a lesser-included offense of § 924(j)."). That is presumably why the Fourth Circuit had "no trouble" in agreeing "that the Double Jeopardy Clause prohibits imposition of cumulative punishments for § 924(c) and § 924(j) convictions based on the same conduct." *Id.* at 7a–8a.

Despite this, the Fourth Circuit found that Mr. Palacios's counsel did not render deficient performance by failing to raise the double jeopardy claim. *Id.* at 11a. But the court narrowly focused on whether case law existed to support Mr. Palacios's precise double jeopardy argument—that is, a double jeopardy challenge to §§ 924(c) and 924(j). Instead, it should have read the statutes' plain texts in light of this Court's precedent on the Double Jeopardy Clause and lesser-included offenses. *See Rutledge v. United States*, 517 U.S. 292, 297 (1996) (noting that the Court "ha[s] often

concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other"); *Ball*, 470 U.S. at 862 (applying *Blockburger* and finding that, because "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon," Congress did not intend to punish a defendant for both receiving and possessing a firearm); *Brown v. Ohio*, 432 U.S. 161, 168 (1977) (holding that joyriding was a lesser included offense of auto theft and that convictions for both for the same conduct violated the Double Jeopardy Clause); *see also Whalen v. United States,* 445 U.S. 684, 691–92 (1980) ("The assumption underlying the [*Blockburger*] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes."). That precedent, in existence long before Mr. Palacios's trial, showed that he should not have been charged and convicted under both §§ 924(c) and 924(j).[2] The fact that he was, coupled with the Fourth Circuit's finding that his Double Jeopardy claim was not "sufficiently foreshadowed" at that time, belies this longstanding precedent.

III. Setting the standard for "sufficiently foreshadowed" is important because the success of ineffective assistance of counsel claims frequently depends on it, and lower courts lack guidance on how to apply it.

This case presents the Court with an opportunity to clarify a muddled area of the law concerning what constitutes constitutionally adequate counsel: What and

[2] In Mr. Palacios's case, the Fourth Circuit found "no evidence" of legislative intent to impose cumulative punishments for convictions under both §§ 924(c) and 924(j). *See* App. at 7a ("[I]n a number of cases before appellate courts since at least 2014, the Government has argued or conceded, that the imposition of punishments for such convictions would violate the Double Jeopardy Clause.").

how much legal authority is sufficient to foreshadow a claim such that failing to raise it would fall outside what is reasonable performance or "'sound trial strategy'"? *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). This question arises frequently in all of the circuits. *See, e.g.*, *United States v. Palacios*, 982 F.3d 920, 924–26 (4th Cir. 2020); *Deck*, 978 F.3d at 583 (Eighth Circuit); *Cuthbertson*, 833 F. App'x at 731 (Tenth Circuit); *Phea*, 953 F.3d at 842 (Fifth Circuit); *Ramirez v. Tegels*, 963 F.3d 604, 614 (7th Cir. 2020); *Bullard*, 937 F.3d at 662 (Sixth Circuit); *Glover*, 872 F.3d at 631–34 (D.C. Circuit); *Johnston v. Mitchell*, 871 F.3d 52, 60–63 (1st Cir. 2017); *Aller v. U.S.*, 646 F. App'x 21, 24 (2d Cir. 2016); *Geter v. United States*, 534 F. App'x 831, 836–37 (11th Cir. 2013); *Davies*, 394 F.3d at 190–91 & n.7 (Third Circuit); *Parker*, 173 F. App'x at 587 (Ninth Circuit). Left unanswered, it leaves room for confusion and incoherence in the lower courts' handling of ineffective assistance of counsel claims. Clarifying to what degree an argument must be "foreshadowed" by precedent, such that failing to raise it constitutes constitutionally inadequate representation, will facilitate the just resolution of these claims and provide much-needed guidance to lower courts. Because of that, we respectfully ask this Court to grant this petition.

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