No. 21-____

IN THE

# Supreme Court of the United States

DAVON NELSON,

*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


Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY
COLLEGE OF LAW
U.S. SUPREME COURT
LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

Brent E. Newton
*Counsel of Record*
Attorney at Law
19 Treworthy Road
Gaithersburg, MD 20878
(202) 975-9105
brentevannewton@gmail.com

Lawrence D. Rosenberg
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

*Counsel for Petitioner*

## QUESTION PRESENTED

The record below raises serious questions about whether Petitioner—an individual whose exposure to lead paint poisoning as a child has had a significant and harmful impact on his cognitive abilities—received the effective assistance of counsel that he is guaranteed by the Sixth Amendment. Among other problems, the record indicates that Petitioner's attorney failed to explain to Petitioner the terms of his plea agreement, leading Petitioner, who ended up with a sentence of 132 months in prison, to honestly but mistakenly believe that he instead had entered into a plea bargain for only 72 months in prison.

Yet when Petitioner—represented by different counsel—raised that colorable ineffective assistance of counsel claim on direct appeal and requested a remand to develop that claim through an evidentiary hearing, the Fourth Circuit rejected it out of hand, holding instead that Petitioner must wait to raise that colorable claim in a collateral proceeding. In doing so, the Fourth Circuit, like eight other circuits, declined to follow the lead of the First and D.C. Circuits, each of which authorizes defendants to raise colorable Sixth Amendment ineffectiveness claims on direct appeal, at which point they are remanded for evidentiary hearings.

The question presented by this case is thus: If a federal defendant on direct appeal raises a colorable Sixth Amendment claim of ineffective assistance by his counsel in the district court, with support in the existing record on appeal, should the Court of Appeals remand the case to the district court to conduct an evidentiary hearing on

the claim rather than require the defendant to wait until a collateral proceeding to raise the claim?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Davon Nelson and Respondent United States of America. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

## RELATED PROCEEDINGS

*United States v. Nelson*, No. 20-4494 (4th Cir.) (judgment entered June 28, 2021).

*United States v. Nelson*, No. 1:18-cr-00592 (D. Md.) (judgment entered September 14, 2020).

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

CASES

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

## OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit affirming the Petitioner's judgment of conviction is reported at 850 F. App'x 865 (4th Cir. 2021), and reproduced at Pet.App.1a–3a. The district court's judgment of conviction and sentence is unreported, and is available at CA4.JA.37–38.

## JURISDICTION

The court of appeals entered judgment on June 28, 2021. Pet.App.3a. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

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

> [T]he accused shall enjoy ... to have the Assistance of Counsel for his defen[s]e.

U.S. Const. amend. VI.

## INTRODUCTION

This case presents the straightforward and important question of whether a criminal defendant is entitled to a remand for an evidentiary hearing when he raises an ineffective assistance of counsel claim on direct appeal and the existing record demonstrates that claim is "colorable" but an evidentiary hearing is needed before that claim can be adjudicated on the merits. Nothing in this Court's precedents requires a criminal defendant to wait until collateral proceedings to raise a colorable Sixth Amendment claim. To the contrary, this Court has expressly *declined* to "hold that ineffective-assistance claims must be reserved for collateral review," *Massaro v. United*

*States*, 538 U.S. 500, 508 (2003), and has recognized that "mov[ing] trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed ... significantly diminishes prisoners' ability to file such claims," *Martinez v. Ryan*, 566 U.S. 1, 13 (2012).

Notwithstanding those precedents, several courts of appeal—including the Fourth Circuit—have held that a defendant *cannot* raise on direct appeal ineffective assistance of counsel claims that are colorable but which require further record development before they can be resolved. The First and D.C. Circuits, by contrast, *do* allow a defendant to raise such claims on direct appeal, holding that when presented with a "colorable" ineffectiveness claim that would benefit from an evidentiary hearing, a remand to the district court is warranted. And the Seventh Circuit takes yet another approach, permitting defendants to raise colorable ineffective assistance of counsel claims on direct appeal at defendants' own risk, and then rejecting those claims on the merits (thus foreclosing the defendants from litigating them on collateral review), even though the evidentiary record necessary to adjudicate that claim has yet to be developed. Those varied approaches to addressing (or not addressing) colorable ineffective assistance of counsel claims on direct appeal have a significant, disparate impact on criminal defendants, as this case demonstrates.

The record here paints a compelling picture of an intellectually disabled defendant represented by an attorney who lacked the time and patience to ensure that his client understood the plea-bargaining system that the client faced in the federal court sys-

tem. There are numerous indications in the record that petitioner honestly but mistakenly believed that he was entering into a plea bargain for 72 months in prison and that defense counsel was responsible for that mistaken belief. Yet when Petitioner—represented by different counsel—raised that colorable Sixth Amendment claim on direct appeal and requested a remand for an evidentiary hearing, the Fourth Circuit refused to consider the claim, instead informing Petitioner that he must wait to raise it through a collateral proceeding, during which the Sixth Amendment right to counsel will not apply. If Petitioner had raised this same colorable ineffective assistance claim in the First or D.C. Circuits, he would have received a remand to the district court, where his constitutionally mandated attorney could have developed the record necessary to vindicate petitioner's fundamental right to the effective assistance of counsel.

This Court should grant this petition to make uniform this current split of authority by instructing all courts of appeal to follow the procedure currently utilized by the First and D.C. Circuits when confronted with a colorable ineffective assistance of counsel claim on direct appeal: that is, the appellate court should remand the case back to the district court so that the defendant, with the assistance of constitutionally required counsel, can develop the evidentiary record necessary to adjudicate that colorable claim. That procedure not only best guarantees that all defendants are afforded the effective assistance of counsel necessary to protect against government overreach, it also serves interests of judicial economy and ensures that the most vulnerable defendants in our criminal justice system—like the Petitioner here, a victim

of lead paint poisoning who suffers from significant cognitive disabilities—are not forced to try to vindicate their constitutional rights *pro se* from the confines of prison through a post-conviction petition.

## STATEMENT OF THE CASE

**A.** [redacted]

[redacted]

**B.** This petition centers on Petitioner's attorney's failure to convey to Petitioner—a semi-literate individual who suffers from significant cognitive disabilities—the terms of his plea agreement. On November 29, 2018, a federal grand jury in the District of Maryland returned a two-count indictment against Petitioner and a codefendant, Terrell Perry. CA4.JA.13–15. Count One of the indictment charged Petitioner with conspiring to distribute and possess fentanyl with the intent to distribute

in violation of 21 U.S.C. § 846; Count Two charged him with possession of fentanyl with intent to distribute in violation of 21 U.S.C. § 841(b).

Following that indictment, the lead federal prosecutor repeatedly offered Petitioner a plea bargain, conveyed through Petitioner's defense counsel. The prosecution initially offered Petitioner 78 months in federal prison and eventually improved the offer to only 72 months, the latter of which was conveyed to defense counsel on multiple occasions. CA4.JA.17–20. On two different occasions when the prosecutor made offers to Petitioner's defense counsel, however, the prosecutor did not receive any acknowledgement from defense counsel. CA4.JA.18.

As a result of defense counsel's non-responsiveness, the prosecutor filed a motion for a "*Lafler/Frye* hearing," to make sure that defense counsel actually was conveying the plea offers to Petitioner and providing him meaningful advice about them.[1] At that hearing, when asked by the Court whether Petitioner's attorney had conveyed to him the October 29 plea offer from the prosecution, Petitioner replied, "I ain't seen it." CA4.JA.19–20. Petitioner and his attorney subsequently conferred privately in the courtroom, after which Petitioner informed the court that he had "review[ed] the letter," and then answered "yes" when the Court asked whether he "wish[ed] to reject [the] plea agreement." CA4.JA.21.

[1] This type of pretrial hearing is named after the Court's holdings in *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), which hold that a defense attorney has an obligation to convey all plea offers to a defendant and to provide competent advice about whether to accept the offers.

One month later, Petitioner entered a guilty plea pursuant to an 11-page written plea agreement prepared by the prosecutor, which contained many high-level vocabulary words and legalese. CA4.JA.27–37. That document did not contain an explicit agreement by the government for a specific prison sentence, instead containing only advisory sentencing guideline stipulations—stipulating that Petitioner was a "Career Offender" with a base offense level of 32 and Criminal History Category VI under USSG § 4B1.1, with a two-level increase for obstruction of justice (pursuant to USSG § 3C1.1) and a two-level decrease for acceptance of responsibility (pursuant to USSG § 3E1.1(a)).[2] Although the written plea agreement did not specify a corresponding guideline range, it provided that the government could appeal if Petitioner received a sentence of less than 72 months. CA4.JA.32. As noted above, 72 months was the final plea offer made to Petitioner.

On December 13, 2019, the Honorable Catherine C. Blake, United States District Judge for the District of Maryland—filling in for the Honorable George Levi Russell, United States District Judge for the District of Maryland, to whom Petitioner's case was assigned—presided over the hearing regarding Petitioner's guilty plea. [redacted]

[2] This calculation was incorrect. The plea agreement's two-level enhancement for obstruction reflected a mistaken view of the guidelines by counsel for both parties. In fact, upward adjustments in Chapter Three of the *Guidelines Manual*, including for obstruction, do not apply where, as here, a defendant is sentenced as a career offender. *See United States v. Cashaw*, 625 F.3d 271, 274 (5th Cir. 2010). Because of this mistaken belief, counsel for both the government and the defense incorrectly told the district judge at the guilty plea hearing that the corresponding advisory guideline range would be 210–262 months. Pet.App.26a.

[redacted]

[redacted]

C. [redacted]

[redacted]

**D.** Petitioner timely filed a notice of appeal on September 24, 2020. CA4.JA.44. On appeal, represented by new counsel, Petitioner argued that he received ineffective assistance of counsel when his attorney failed to adequately explain the terms of the plea agreement. *See generally* Opening Brief of Appellant, *United States v. Nelson*,

No. 20-4494 (4th Cir. Jan. 28, 2021), 2021 WL 416200. Petitioner acknowledged that the existing record did not "conclusively" establish his ineffectiveness claim but contended that the record at least supported a "colorable" claim. *Id.* at *14–15. He asked the Fourth Circuit panel to find that the record supported a "colorable" ineffectiveness claim and to remand his case for an evidentiary hearing. *Id.* at *25–27.

To support his argument that he had a "colorable" ineffectiveness claim on the grounds that he believed he was being promised a 72-month sentence as a result of the ineffectiveness of his defense counsel, Petitioner argued that the record reflected that he suffers from cognitive deficits and could not read the plea agreement, that his attorney displayed a lack of seriousness concerning the prosecutor's plea offers (including by failing to respond to several plea offers and failing to adequately explain the plea deal to Petitioner), and that immediately after the district court imposed a 132-month sentence Petitioner asserted that he had been promised a 72-month sentence. *Id.*

On June 28, 2021, the United States Court of Appeals for the Fourth Circuit issued a per curiam opinion affirming Petitioner's conviction. Pet.App.1a–3a. Relevant here, the Fourth Circuit explicitly refused Petitioner's invitation to adopt the practice of the First and D.C. Circuits, which remand for an evidentiary hearing when a federal defendant on direct appeal raises a "colorable" ineffective assistance claim with some support in the existing record. Yet the Fourth Circuit recognized a widespread division among the circuits exists on the issue:

> It is well established that, "[u]nless an attorney's ineffectiveness conclusively appears on the face of the record, such claims are not addressed on direct appeal."

*United States v. Faulls*, 821 F.3d 502, 507–08 (4th Cir. 2016). Absent clear-cut evidence, we have determined that any claims of ineffective assistance "should be raised, if at all, in a 28 U.S.C. § 2255 motion." *Id.* at 508. Here, Nelson concedes that the record does not conclusively support his assertions.

Nonetheless, Nelson urges this court to adopt the holdings of the First and D.C. Circuits that, on direct appeal, "colorable" claims of ineffective assistance may be remanded to the trial courts for an evidentiary hearing. *See United States v. Marquez-Perez*, 835 F.3d 153, 165 & n.6 (1st Cir. 2016); *United States v. Knight*, 824 F.3d 1105, 1112 (D.C. Cir. 2016). However, the majority of other circuits have rejected this approach and found that "post-conviction proceedings are generally the proper avenue for ineffective assistance claims." *United States v. Gooding*, 594 F. App'x 123, 131 (4th Cir. 2014) (citing cases). We decline to alter our long-standing practice of requiring that, absent "conclusive evidence," ineffective assistance claims be brought in a § 2255 motion in the first instance. *See United States v. Jordan*, 952 F.3d 160, 163 n.1 (4th Cir. 2020).

Pet.App.2a–3a.

This petition follows.

## REASONS FOR GRANTING THE PETITION

Review is warranted for the following three reasons:

*First*, the decision below perpetuates an entrenched, three-way division among the federal circuit courts concerning whether a federal criminal defendant on direct appeal is entitled to a remand for an evidentiary hearing if he raises a "colorable" claim of ineffective assistance by his trial-court counsel based on the existing record. Two circuits—the First and D.C. Circuits—remand "colorable" claims of ineffective assistance to the district court for further development of the evidentiary record and a decision in the first instance, thus allowing resolution of "colorable" claims on their merits on direct appeal after remand.

By contrast, a total of nine circuits as a general rule do not decide ineffectiveness claims raised on direct appeal on their merits, unless the existing trial record conclusively leads to a resolution. Nor do they remand such claims raised on direct appeal for evidentiary development, even when the claims are "colorable" or stronger. And, because the existing trial record is rarely developed fully on an ineffectiveness claim, merits decisions on such claims are also rare on direct appeal in these circuits. This approach relegates virtually all ineffectiveness claims, including "colorable" claims, to be urged later on a collateral attack by a 28 U.S.C. § 2255 motion, assuming defendants are capable of filing such motions. The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits take this second approach.

The Seventh Circuit takes a third approach. It actively encourages defendants to abandon an ineffectiveness claim raised on direct appeal in favor of a later collateral attack in a § 2255 motion. But if a defendant nonetheless presses the ineffectiveness claim on direct appeal, the Seventh Circuit issues a merits decision on the existing record, even if that record is inadequately developed. In the Seventh Circuit, a merits decision so issued forecloses a later § 2255 motion on any ineffectiveness claim, even on a theory never raised on direct appeal.

These three approaches taken by the Circuits are irreconcilable. Defendants with colorable claims of ineffectiveness on appeal that require further evidentiary development face sharply different treatment in the different Circuits.

*Second*, by refusing to consider Petitioner's colorable ineffective assistance claim on direct appeal, the Fourth Circuit flouted this Court's longstanding Sixth Amendment precedents. Both the hindrances faced by defendants raising ineffective assistance of counsel claims on collateral review and principles of judicial economy weigh in favor of further evidentiary development of colorable ineffective assistance of counsel claims raised on direct review.

*Third*, this case presents the ideal vehicle for this Court to address the inherent unfairness in the rule followed by the Fourth and other circuits that requires indigent and intellectually disabled defendants like Petitioner to wait to raise colorable ineffective assistance of counsel claims until after they are no longer guaranteed counsel and are confined in prison.

## I. The Decision Below Perpetuates a Three-Way Split Among the Circuit Courts Concerning Whether a Defendant on Direct Appeal Should Receive a Remand for an Evidentiary Hearing Upon Showing a "Colorable" Ineffectiveness Claim.

In *Massaro v. United States*, 538 U.S. 500 (2003), this Court addressed a related issue: whether a defendant *must* raise an ineffectiveness claim on direct appeal. This Court rejected the Second Circuit's requirement that a federal defendant must raise an ineffectiveness claim on direct appeal, if possible to do so, or risk procedurally defaulting that claim on a § 2255 motion for post-conviction relief, the equivalent of habeas review for federal defendants. However, the Court did not decide how a Court of Appeals should approach a colorable ineffectiveness claim raised on direct appeal when the record offered some support for the claim but was insufficiently developed for a merits-based decision. Since *Massaro*, the federal circuit courts' positions on the

treatment of "colorable" ineffectiveness claims raised on direct appeal have hardened into an entrenched three-way split.

**A.** Nine federal circuit courts maintain the general rule of refusing to address the merits of ineffectiveness claims raised on direct appeal unless the existing record is "fully developed" or resolves the claim "conclusively," "obviously," or "beyond any doubt."[3] The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits fall into this camp.[4] These courts leave ineffective assistance claims that

---

[3] *See, e.g.*, *United States v. Griffiths*, 750 F.3d 237, 241 n.4 (2d Cir. 2014) ("fully developed" record); *United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003) ("beyond any doubt"); *United States v. McLaughlin*, 386 F.3d 547, 555–56 (3d Cir. 2004) (general prohibition without "fully developed" record); *United States v. Faulls*, 821 F.3d 502, 507-08 (4th Cir. 2016) ("conclusively appears"); *United States v. Benton*, 523 F.3d 424, 435 (4th Cir. 2008) (same); *United States v. Jones*, 969 F.3d 192, 200 (5th Cir. 2020), *cert. denied*, No. 20-6802, 2021 WL 2194880 (U.S. June 1, 2021) (general prohibition); *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987) (same); *United States v. Small*, 988 F.3d 241, 256 (6th Cir. 2021) (general prohibition); *United States v. Richardson*, 906 F.3d 417, 424 (6th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 2713 (2019), *on remand*, 948 F.3d 733, 740 (6th Cir.), *cert. denied*, 141 S. Ct. 344 (2020) (general prohibition in both circuit-court opinions); *United States v. Adkins*, 636 F.3d 432, 434 (8th Cir. 2011) (general prohibition); *United States v. Jones*, 586 F.3d 573, 576 (8th Cir. 2009) (same); *United States v. Shehadeh*, 962 F.3d 1096, 1102 (9th Cir. 2020) (general prohibition); *United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000) ("obviously" inadequate representation or record "sufficiently developed to permit ... determination"); *United States v. Battles*, 745 F.3d 436, 457–58 (10th Cir. 2014) (general prohibition); *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (general prohibition, but claims on "fully developed" record may be brought on direct appeal or collateral review); *United States v. Hill*, 643 F.3d 807, 880 n.38 (11th Cir. 2011); (general prohibition unless record "sufficiently developed" and claim already decided by district court); *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002) (same).

[4] The Second and Third Circuits acknowledge their authority to remand for evidentiary development when special circumstances warrant, and they have occasionally exercised that authority. *See, e.g.*, *United States v. Melhuish*, No. 19-485, 2021 WL 3160083, at *14 (2d Cir. July 27, 2021) (remanding ineffectiveness claim when defendant's release from custody raised questions about availability of § 2255 motion); *United States v. Yauri*, 559 F.3d 130, 133 (2d Cir. 2009) (remanding a second ineffectiveness claim when government had already consented to remand of first claim); *United States v. Levy*, 377 F.3d 259, 264–66 (2d Cir. 2004) (remanding after counsel affiant was criminally indicted for fraud on the court); *United States v. Leone*, 215 F.3d 253, 255–57 (2d Cir. 2000) (remanding ineffectiveness claim given its simplicity, when dismissal would force the defendant to "use up his only habeas petition"); *Gov't of Virgin Islands v. Vanterpool*, 767 F.3d 157, 163–69 (3d Cir. 2014) (remanding in "unique circumstances" where Virgin Islands defendant was unlikely to qualify as "in custody" for collateral habeas petition under 28 U.S.C. § 2254).

These circuit courts have not, however, adopted a practice of remanding when the defendant has presented a colorable claim of ineffective assistance of counsel that would benefit from evidentiary

require factual development to collateral review on a § 2255 motion, often citing this Court's *Massaro* decision as this Court's stamp of approval for such an approach. *See, e.g., United States v. Adams*, 768 F.3d 219, 226 (2d Cir. 2014) (pointing to *Massaro's* statement that, "in most cases," a § 2255 motion "is preferable to direct appeal for deciding claims of ineffective assistance" (quoting *Massaro*, 538 U.S. at 504)).

These circuit courts' rule was intended to give the defendant an opportunity to develop the record on ineffectiveness fully on collateral review, rather than limiting him to a record on direct appeal that was not developed for the purpose of assessing the adequacy of his district court counsel's representation. *See, e.g., United States v. Walden*, 625 F.3d 961, 967 (6th Cir. 2010) (explaining that, "on direct appeal ... the record is not developed for the purpose of litigating an ineffective assistance claim and is often incomplete"); *United States v. Morena*, 547 F.3d 191, 198 (3d Cir. 2008) ("The

---

development. *See, e.g., United States v. DeLaura*, 858 F.3d 738, 743–44 (2d Cir. 2017) (declining to remand ineffectiveness claim that could not be "reliably decided" on the present record, even though same claim "would merit searching evaluation" on collateral review); *United States v. Adams*, 768 F.3d 219, 226 (2d Cir. 2014) (recognizing § 2255 proceeding as the "generally preferred" option); *United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006) (Where record on appeal has insufficient facts to adjudicate ineffectiveness claim, "our usual practice is ... to leave ... the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255"); *United States v. Mills*, No. 18-3736, 2021 WL 2351114, at *2 (3d Cir. June 9, 2021) ("[O]rdinarily, we defer issues of ineffective assistance of counsel to a collateral attack rather [than] direct appeal, unless the record is sufficient to allow a ruling on the issue.").

The Fifth Circuit has sometimes remanded ineffectiveness claims alleging an attorney's conflict of interest, notwithstanding the Circuit's general rule that ineffectiveness claims are not reached on direct appeal unless the issue was raised in the district court and a sufficient record was developed there. *See United States v. Reyes*, 609 F. App'x 260, 261 & n.1 (5th Cir. 2015) (mem.) (declining to reach conflict-of-interest claim on direct appeal when record was insufficiently developed but noting that such claims are "not always relegated to post-conviction proceedings"); *United States v. Reyes*, 606 F. App'x 177, 178–79 & n.2 (5th Cir. 2015) (mem.) ("Although Sixth Amendment claims of ineffective assistance ... are generally resolved on collateral review," court has "previously vacated a conviction and remanded to the district court on direct appeal where the record demonstrated that counsel had an actual conflict of interest but was insufficient to determine whether such conflict adversely impacted the proceedings." (citing *United States v. Infante*, 404 F.3d 376, 390–93 (5th Cir. 2005))).

rationale ... is that collateral review allows for adequate factual development ..., because ineffective assistance claims frequently involve ... conduct that occurred outside the purview of the district court." (citations and internal quotation marks omitted)); *United States v. Houtchens*, 926 F.2d 824, 828 (9th Cir. 1991) ("The rationale for this rule is that such a claim cannot be advanced without the development of facts outside the original record." (citation and internal quotation marks omitted)).

These circuit courts observe that their rule allows trial counsel to explain the strategic decisions that the defendant has questioned, potentially benefitting the government as well as the defendant. *See, e.g.*, *United States v. Sturdivant*, 839 F. App'x 785, 787–88 (4th Cir. 2021) (agreeing with the government that ordinarily, "the appropriate time to address whether ... counsel was ineffective is in a habeas proceeding ... [which] provides an opportunity for counsel to explain otherwise-unexplained actions.").

Unlike the First and D.C. Circuits, these circuit courts do not remand a case for an evidentiary hearing when the record establishes a "colorable" ineffectiveness claim on direct appeal.

The rule of these circuits thus sharply curtails ineffectiveness claims on direct appeal, since it is "rare" that the record on a direct appeal is developed with the intent to document a conclusive claim that the attorney developing the record was ineffective. *See* 9 Barbara J. Van Arsdale et al., FED. PROC., L. ED. § 22:704 (June 2021 update).

**B.** The Seventh Circuit has taken a different approach: it strongly admonishes defendants to not to raise—or, if raised, to withdraw—ineffectiveness claims on direct appeal, but, if a defendant elects to raise an ineffectiveness claim on direct appeal, then the Seventh Circuit will decide it on its merits, even on an inadequate evidentiary record.[5] *See, e.g.*, *United States v. Harris*, 394 F.3d 543, 555–59 (7th Cir. 2005) (denying ineffectiveness claim on the merits after cautioning against raising such claim "on direct appeal rather than bringing it on collateral review where a complete record can be made to support the claim."). And, once an ineffectiveness claim has been rejected on direct appeal, the Seventh Circuit considers that decision binding on the district courts in a later collateral review through the law of the case doctrine. *Id.* at 558. For that reason, the Seventh Circuit has deemed a defendant's decision to raise an ineffectiveness claim on direct appeal as "foolish." *United States v. Flores*, 739 F.3d 337, 342 (7th Cir. 2014).

---

[5] The Seventh Circuit actively discourages a defendant from pressing an ineffectiveness claim on direct appeal by warning that if the claim is rejected the defendant would be foreclosed from re-litigating it, or any other ineffectiveness claim, more fully on § 2255 review. *See, e.g.*, *United States v. Cates*, 950 F.3d 453, 457–58 (7th Cir. 2020) ("[W]e have repeatedly warned defendants against bringing ineffective-assistance claims on direct appeal," including "sometimes even going so far as to give appellate counsel one last opportunity after oral argument to dissuade defendants from pursuing [the] strategy."); *United States v. Flores*, 739 F.3d 337, 340–42 (7th Cir. 2014) ("Ever since *Massaro* the judges of this court have regularly asked counsel at oral argument whether the defendant is personally aware of the risks of presenting an ineffective-assistance argument on direct appeal and, if so, whether defendant really wants to take that risk.").

Pursuing an ineffectiveness claim on direct appeal is particularly perilous in the Seventh Circuit, because in that circuit the court's decision on direct appeal essentially forecloses any ineffectiveness claims in a later § 2255 motion. *See Flores*, 739 F.3d at 341–42 ("[W]hen an ineffective-assistance claim is rejected on direct appeal, it cannot be raised again on collateral review."); *United States v. Wilson*, 240 F. App'x 139, 143 (7th Cir. 2007) (observing that law of the case doctrine prevents a defendant from asserting counsel's other errors in a later collateral attack).

The Seventh Circuit has apparently abandoned its former occasional practice of remanding strong, but not conclusive, claims of ineffective assistance for further fact-finding. *See United States v. Wilson*, 240 F. App'x 139, 142–46 (7th Cir. 2007) (declining remand but also declining a merits decision on direct appeal when defendant had never requested merits resolution on the existing record).

**C.** In contrast, two federal circuit courts—the First and D.C. Circuits—have permitted a defendant to raise an ineffectiveness claim on direct appeal even if the existing record does not "conclusively" resolve the claim, and these circuit courts have remanded for an evidentiary hearing when the record supports a "colorable" ineffectiveness claim.

The D.C. Circuit has a long-established practice of remanding "colorable" claims for further evidentiary development. *See, e.g.*, *United States v. Browne*, 953 F.3d 794, 804 (D.C. Cir. 2020) (because defendant "raised a colorable claim of ineffective assistance of counsel," remanding to the district court "to develop a record and assess those claims in the first instance"); *United States v. Norman*, 926 F.3d 804, 812 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 2555 (2020) ("[W]hen a defendant makes a colorable claim ... for the first time on direct appeal, the proper practice is to remand the claim for an evidentiary hearing unless the record shows that the defendant is not entitled to relief." (citing *United States v. Rashad*, 331 F.3d 908, 909–10 (D.C. Cir. 2003))); *United States v. Haight*, 892 F.3d 1271, 1278 (D.C. Cir. 2018) (Kavanaugh, J.), *abrogated on other grounds by Borden v. United States*, No. 19-5410, 2021 WL 2367312 (U.S. June 10, 2021) ("[B]ecause ineffective assistance claims typically require factual

development, we ordinarily remand those claims to the district court 'unless the trial record alone conclusively shows that the defendant either is or is not entitled to relief.'" (citing *Rashad*, 331 F.3d at 909–10)); *United States v. Knight*, 824 F.3d 1105, 1112 (D.C. Cir. 2016) (Kavanaugh, J.) ("This Court's typical practice on direct appeal ... is to remand 'colorable' claims of ineffective assistance to the district court."); *United States v. Williams*, 784 F.3d 798, 804 (D.C. Cir. 2015) (Kavanaugh, J.) ("[O]ur typical practice on direct appeal is to remand 'colorable' claims of ineffective assistance to the district court without first substantially analyzing the merits."); *United States v. Bell*, 708 F.3d 223, 225 (D.C. Cir. 2013) ("[W]here a defendant raises a 'colorable and previously unexplored' ineffective assistance claim on appeal ... we remand unless the 'record alone conclusively shows that the defendant either is or is not entitled to relief.'"); *United States v. Mohammed*, 693 F.3d 192, 204 (D.C. Cir. 2012) (remanding on direct appeal because defendant "has raised colorable claims ... and the trial record does not conclusively show whether he is entitled to relief" (citing *Rashad*, 331 F.3d at 908–10)); *United States v. Williams*, 358 F.3d 956, 962 (D.C. Cir. 2004) ("[T]he record before us does not establish conclusively whether defense counsel's performance was unconstitutionally deficient or prejudicial. We therefore follow our general practice and remand the case for an evidentiary hearing on that issue."); *United States v. Poston*, 902 F.2d 90, 100 n.3 (D.C. Cir. 1990) (Thomas, J.) (observing that "this court has ... remanded claims of ineffective assistance of counsel that were raised for the first time on appeal, [when] those claims alleged specific deficiencies and presented substantial factual issues that might establish a violation of the right to counsel").

The D.C. Circuit's remand practice originally "derive[d] from the perceived unfairness of holding a defendant making a claim of ineffective assistance—for which new counsel is obviously a necessity—to the ... time limitation ... for filing a motion for a new trial"; it thus eliminated a "technical barrier" to an ineffectiveness claim, recognizing that trial counsel "cannot be expected to argue his own ineffectiveness in a motion for a new trial." *Rashad*, 331 F.3d at 911 (citations and internal quotation marks omitted).

The D.C. Circuit's practice also allows the district court to develop a full record and to decide ineffectiveness claims in the first instance. Indeed, as *Rashad* explained, the circuit court's practice is founded on the same consideration that motivated this Court's decision in *Massaro*, "namely, that the trial record [cannot] normally be expected to contain the evidence necessary to resolve an ineffective assistance claim upon direct appeal." *Id.* *Rashad* thus concluded that the D.C. Circuit's approach was "entirely consistent" with *Massaro*. *Id.*

As Justice (then-Judge) Kavanaugh further explained in *United States v. Williams*, the D.C. Circuit's practice of remanding colorable claims for litigation in the district court in the first instance follows the Supreme Court's admonition in *Massaro* that the district court is "the forum best suited" to the task of "developing the facts necessary to determine the adequacy of representation." 784 F.3d 798, 803–04 (D.C. Cir. 2015) (quoting *Massaro*, 538 U.S. at 505).

Remand of a claim that is colorable also obviates the need for the circuit court to make a substantial analysis of an ineffectiveness claim on the merits at the outset of

the appeal. *See id.* at 804. Although the court does not "reflexively remand," neither does it "hesitate to remand when a trial record is insufficient to assess the full circumstances and rationales informing the strategic decisions of trial counsel." *Id.* at 804 (citations and internal quotation marks omitted).

Like the D.C. Circuit, the First Circuit has remanded for an evidentiary hearing when the defendant "affirmatively makes out a colorable claim of ineffectiveness" or "has identified in the record 'sufficient indicia of ineffectiveness.'" *See, e.g., United States v. Márquéz-Perez*, 835 F.3d 153, 165 & n.6 (1st Cir. 2016) (collecting cases where the First Circuit has exercised its discretion to remand, notwithstanding the court's typical rule denying ineffectiveness claims on an insufficient record and leaving them for § 2255 review).

The three approaches that the federal appellate courts take to colorable ineffectiveness claims on direct appeal are irreconcilable. This Court should resolve the conflict.

## II. The Fourth Circuit's Decision Is Inconsistent With This Court's Sixth Amendment Precedents.

Not only did the Fourth Circuit perpetuate an existing circuit split when it refused to consider Petitioner's colorable ineffective assistance of counsel claims on direct appeal, that decision is in tension with this Court's longstanding Sixth Amendment precedents. This Court should intervene to correct that error and ensure that defendants like Petitioner with colorable ineffective assistance of counsel claims need not wait until they have exhausted their direct appeal options before they can vindicate their constitutional rights.

**A.** "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). "Indeed, the right to counsel is the foundation for our adversary system." *Id.* It is the most important right that a defendant possesses, as it is "basic to a fair trial" and "affects [the defendant's] ability to assert any other rights he may have." *Penson v. Ohio*, 488 U.S. 75, 84, 88 (1988). As this Court recognized nine decades ago, without "the guiding hand of counsel at every step in the proceedings against him," a defendant, "though he be not guilty ... faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Given the importance of this constitutional right, it is unsurprising that this Court has never held that a defendant with a colorable ineffective assistance of counsel Sixth Amendment claim may not raise it on direct appeal. *Cf. Massaro*, 538 U.S. at 508 ("We do not hold that ineffective-assistance claims must be reserved for collateral review."). To the contrary, this Court has recognized that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal." *Id.* Indeed, as this Court recognized in *Martinez*, "mov[ing] trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed ... significantly diminishes prisoners' ability to file such claims." 566 U.S. at 13.

That is true for multiple reasons. For one thing, unlike on direct appeal, a defendant filing an ineffective assistance of counsel claim via a § 2255 motion is *not* entitled

to appointed counsel to develop or later litigate constitutional claims. *See, e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam). That rule applies even though—under the Fourth Circuit's current precedent—the § 2255 habeas petition is the first opportunity for the defendant to raise a constitutional claim of ineffective assistance by his trial counsel. *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc); *accord Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc). And it applies even though, in the post-AEDPA era, that post-conviction motion likely will be the defendant's *only* opportunity to bring that claim. *See, e.g.*, *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000) (explaining that AEDPA "severely restricted the ability of a defendant to file more than one habeas petition"). Thus, where, as here, a defendant is barred from raising a colorable ineffective assistance of counsel claim on direct appeal, he is automatically subjected to the "dangers and disadvantages of self-representation" when crafting his claim in the first instance. *Faretta v. California*, 422 U.S. 806, 835 (1975); *see also Martinez*, 566 U.S. at 12 ("The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law.").

Those disadvantages are compounded by the realities of a defendant's incarceration. As this Court explained in *Martinez*, "[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." 566 U.S. at 12. Moreover, even if an incarcerated defendant did somehow have the means to develop the facts

necessary to pursue his ineffective assistance of counsel claim from prison, he would still need to overcome the hindrances intrinsic in reconstructing the events of his trial years after the fact. *See Carrion v. Smith*, 549 F.3d 583, 584 (2d Cir. 2008) ("This case highlights a difficulty that our courts face in evaluating habeas corpus petitions filed well after the underlying conviction, when memories have faded and witnesses must struggle to reconstruct the relevant events."); *see also State v. Thompson*, 20 A.3d 242, 256 (N.H. 2011) ("[B]y the time a [habeas corpus] proceeding takes place, witnesses may disappear or their memories might fade, causing practical problems for the State in the case of a retrial.").[6] And it is worth noting the obvious point that a defendant who is forced to remain incarcerated while awaiting resolution of a habeas petition that raises a meritorious ineffectiveness claim may end up spending unnecessary time behind bars—an affront to our legal tradition. *See Stutson v. United States*, 516 U.S. 193, 196 (1996) ("When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated.").

Given (i) the absence of constitutionally mandated counsel in investigating and drafting post-conviction motions and (ii) the limitations that incarcerated defendants face in developing ineffective assistance of counsel claims, it makes little sense to

[6] Similarly, the government has a strong interest in the courts expeditiously resolving a meritorious ineffectiveness claim because the passage of time can prejudice the government at a retrial. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (citation and internal quotation marks omitted)).

require a defendant like Petitioner to wait until *after* he has exhausted his direct appeal to bring a colorable ineffective assistance of counsel claim. The United States agrees with the importance of the interests at stake. As the United States Solicitor General has recognized, "[c]hanneling ineffective assistance claims to direct appeal rather than collateral review in appropriate situations serves the general societal interests in respecting the finality of criminal judgments and encouraging resolution of legal challenges to convictions at the earliest feasible opportunity." Brief for the United States at *10, *Massaro v. United States*, 538 U.S. 500 (2003) (No. 01-1559), 2002 WL 31868910.

Finally, it should be noted that a defendant who files a § 2255 motion raising a colorable ineffectiveness claim is entitled to an evidentiary hearing on the claim. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam) ("On this record, we cannot conclude with the assurance required by the statutory standard 'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255; accordingly, we vacate the judgment of the Court of Appeals and remand to that court to the end that the petitioner be afforded a hearing on his petition in the District Court."). It thus makes little sense to postpone an evidentiary hearing on a colorable ineffectiveness claim raised on direct appeal, particularly considering that a defendant does not possess the right to the assistance of counsel to develop and litigate such a claim in a collateral proceeding. A defendant's best opportunity to develop and litigate an ineffectiveness claim is on direct appeal, when a

defendant possesses the right to the appointed and effective assistance of counsel. *See Martinez*, 566 U.S. at 12–13.

**B.** This is not to say that *every* ineffective assistance of counsel claim should be permitted to proceed on direct appeal. Some such claims will have no record support whatsoever at the time of direct appeal, and are therefore not colorable. And other claims will be conclusively foreclosed by the existing record and, thus, not colorable. *See, e.g.*, *United States v. Marshall*, 946 F.3d 591, 596–97 (D.C. Cir. 2020). But there are other cases "in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal," *Massaro*, 538 U.S. at 508, if for no other reason than to request a remand so that the defendant—represented by constitutionally mandated counsel—can develop that claim through an evidentiary hearing.

This is such a case. As detailed above, the record here reflects that the Petitioner—a semi-literate individual with severely reduced cognitive capabilities due to his exposure to lead paint as a child—was not sufficiently advised by his trial counsel of the terms of the plea agreement that he ultimately signed. Even if the current record, standing alone, does not conclusively establish that Petitioner did not receive the effective representation to which he is constitutionally entitled, it shows that it is at least plausible that Petitioner's Sixth Amendment right to the effective assistance of counsel was violated. *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (providing that a defendant may "attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not ... 'within the range

of competence demanded of attorneys in criminal cases.'" (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))); *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005) ("[A] decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside the range of competence demanded of attorneys in criminal cases." (citation and internal quotation omitted)); *see also Blackledge v. Allison*, 431 U.S. 63, 75 n.8 (1977). Petitioner's attorney in the district court appears to have performed deficiently in explaining the plea agreement to Petitioner. *See* American Bar Association, *Criminal Justice Standards for the Defense Function*, Standard 4-3.1(d) (2017) ("In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is ... suffering from a mental impairment or other disability.").

Because Petitioner's claim is at least "plausible" based on the existing record, it is by definition "colorable." *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 122 (1982) (equating "colorable" with "plausible" in a different context in a habeas corpus proceeding); *cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) ("A claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 ... may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is ... 'wholly insubstantial and frivolous.'" (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946))). Confronted with that colorable constitutional claim, the Fourth Circuit should have permitted Petitioner to advance his ineffective assistance claim on direct appeal and remanded his case to the district court for an evidentiary hearing on that claim, instead of telling Petitioner,

who is indigent, that he must wait to raise that claim *pro se* and from the confines of prison at a later date. This Court should intervene to reject that inefficient and unfair sequencing.

## III. This Case Presents the Ideal Vehicle for This Court to Address an Important Question Concerning the Sixth Amendment Right to Counsel.

The critical importance of a defendant's constitutional right to effective assistance of counsel is beyond dispute. *See supra* Part II. But that fundamental right takes on even greater importance where, as here, the defendant—like the Petitioner in this case—lacks the cognitive abilities to appreciate the consequences of a plea agreement he is entering into with the Government.

**A.** "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell*, 287 U.S. at 69). The unfortunate reality, however, is that a significant number of defendants in our nation's criminal justice system are *not* educated and otherwise suffer from significant mental disabilities.

As this Court recognized in *Halbert v. Michigan*, 545 U.S. 605 (2005) when reaffirming that the Sixth Amendment right to counsel extends to a defendant's direct appeal, "[s]ixty-eight percent of the state prison population did not complete high school, and may lack the most basic literacy skills." *Id.* at 620–21 (alterations omitted). Worse still, "seven out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument

made in a lengthy newspaper article." *Id.* And "[m]any ... have learning disabilities and mental impairments." *Id.*

The same is true of defendants incarcerated in the federal system. According to the 2020 United States Sentencing Commission's *Sourcebook of Federal Sentencing Statistics*, 48.6% of federal prisoners do not have a high school degree. U.S. Sent. Comm'n, Sourcebook of Federal Sentencing Statistics 54 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf. And mental illness also plagues federal inmates, with the Bureau of Justice Statistics reporting that 45% of federal prisoners suffer from a "mental health problem." Bureau of Justice Statistics, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf.

Those unfortunate realities pose a significant hurdle for the indigent and mentally disabled accused of crimes. As this Court has explained, "without a lawyer's assistance," it "is a perilous endeavor for a layperson, and well beyond the competence of individuals, like [Petitioner], who have little education, learning disabilities, and mental impairments" to navigate the legal system. *Halbert*, 545 U.S. at 621. And while a lawyer's assistance is critical at all phases of a criminal prosecution, it is particularly crucial at the plea bargain stage, given that plea bargaining "is an essential component of the administration of justice," *Santobello v. New York*, 404 U.S. 257, 260 (1971), and that plea bargains remain the most likely outcome of all criminal proceedings in this country. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-

seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." (citations omitted)); *see also id.* ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.").

**B.** This case highlights those disparities and demonstrates how the Fourth Circuit's blanket refusal to consider colorable ineffective assistance of counsel claims on direct appeal directly disadvantages the most vulnerable criminal defendants. As explained above, Petitioner, like many defendants in the criminal justice system, is semi-literate and suffers from significant cognitive disabilities stemming from his exposure to lead paint as a child and lack of adequate academic, social, and familial opportunities growing up. Yet under the Fourth Circuit's current rule, he is unable to press his colorable Sixth Amendment claim on direct appeal while represented by counsel. Instead, he must wait until he is no longer entitled to counsel to raise that claim *pro se* from the confines of prison. This case therefore presents the ideal vehicle for this Court to address the unjustness that can result from blanket prohibitions against considering colorable ineffective of assistance of counsel claims on direct appeal.

* * *

If our legal system takes the constitutional right to the effective assistance of defense counsel seriously, as it must, the procedure currently followed by the First and

D.C. Circuits should be adopted by this Court and made applicable to all federal circuits. Doing so would have salutary ripple effects because defense counsel in federal district court would be on notice that their acts and omissions evident in the record created in the district court will be subject to review on direct appeal. If an appellate court determines that the record supports a colorable ineffectiveness claim, trial court counsel's performance will be subject to further review at an evidentiary hearing on remand—which will enable meaningful appellate review of the claim after the district court makes factual findings.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

August 10, 2021

Respectfully submitted,

Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY
COLLEGE OF LAW
U.S. SUPREME COURT
LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

Brent E. Newton
*Counsel of Record*
Attorney at Law
19 Treworthy Road
Gaithersburg, MD 20878
(202) 975-9105
brentevannewton@gmail.com

Lawrence D. Rosenberg
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

*Counsel for Petitioner*