No. _____

In the

Supreme Court of the United States

_____

Ryder Shane Altman,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTION PRESENTED

Whether federal criminal defendants presenting substantial claims of ineffective assistance of counsel should receive the benefit of additional fact-finding before collateral appeal, or whether, instead, they should be compelled to wait for collateral review, at which point they may be forced to prosecute the claim *pro se*?

PARTIES TO THE PROCEEDING

Petitioner is Shane Ryder Altman, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryder Shane Altman seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Altman,* 849 Fed. Appx. 496 (5th Cir. June 9, 2021)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 9, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Sentencing Guideline 5G1.3 provides:

> (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
> (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction

under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.
(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.
(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Note 4(C) to USSG 5G1.3 provides:

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.--Subsection (d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of § 7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

STATEMENT OF THE CASE

A. Trial Proceedings

After a police officer received illicit images from his file-sharing program, Petitioner Ryder Shane Altman pleaded guilty to one count of distributing child pornography. *See* (Record in the Court of Appeals, 46-50). He did so pursuant to a plea agreement negotiated by private appointed counsel. *See* (Record in the Court of Appeals, 163-170). In this agreement, he agreed to waive appeal in exchange for the government's agreement to withhold further charges. *See* (Record in the Court of Appeals, 163-170). The waiver included an exception, however, for claims of ineffective assistance of counsel. *See* (Record in the Court of Appeals, 168).

A Presentence Report (PSR) calculated a Guideline range of 188-235 months imprisonment, noting a 15-year mandatory minimum. *See* (Record in the Court of Appeals, 190). In the criminal history section, it set forth a prior child pornography conviction for which the defendant had received ten years of probation in state court. *See* (Record in the Court of Appeals, 185). A revocation warrant remained pending on that case through the time of federal sentencing. *See* (Record in the Court of Appeals, 185). The PSR said the following respecting the instant offense and this pending revocation:

> The defendant is subject to a probation revocation hearing under Case Number 12886-D. Federal courts generally have the discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. USSG §5G1.3, comment. (n. *backg'd*); however, the U.S. Sentencing Commission recommends the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation. USSG §5G1.3, comment. (n.4(C)).

(Record in the Court of Appeals, 190)(emphasis added). Counsel objected to the PSR on grounds that did not affect the Guidelines, but did not challenge this statement. *See* (Record in the Court of Appeals, 195-196).

In support of a lesser sentence, retained trial counsel named a series of Guidelines enhancements applied to the defendant's offense level. *See* (Record in the Court of Appeals, 292-298). He argued that these were widely applicable in contemporary child pornography cases, that they therefore failed to distinguish him from other people subject to USSG §2G2.2, and that they were unreflective of his culpability in any case. *See* (Record in the Court of Appeals, 292-298).

After extended colloquy on these points, retained counsel turned to the question of concurrent or consecutive sentencing. *See* (Record in the Court of Appeals, 298). During this argument, retained counsel noted the harsh mandatory minimum on the instant offense. *See* (Record in the Court of Appeals, 298). Further, he argued that the pending revocation case had already affected his sentencing range on the instant case in multiple ways, first by subjecting him to a mandatory minimum, and second by changing his criminal history score. *See* (Record in the Court of Appeals, 298). But the trial court said that it was "a little hesitant" to order a concurrent sentence given the defendant's failure to take advantage of state probation. *See* (Record in the Court of Appeals, 298).

The court imposed sentence of 192 months, to run consecutively to any sentence imposed in the pending probation revocation. *See* (Record in the Court of Appeals, 139). It asserted that any errors calculating the Guideline range did not

affect the sentence, *see* (Record in the Court of Appeals, 308-309), a claim repeated in the Statement of Reasons, *see* (Record in the Court of Appeals, 203).

After sentencing, retained trial counsel successfully moved to withdraw rather than prepare the appeal. *See* (Record in the Court of Appeals, 145-146). He "believe[d that a new attorney is needed for Mr. Altman so that he can effectively argue for ineffective assistance of counsel and other claims related to the performance of his attorneys," and cited a conflict of interest "in pursuing ineffective assistance of counsel or related claims…" (Record in the Court of Appeals, 145-146). The court appointed the Federal Defender, who has represented Mr. Altman since.

B. Court of Appeals

Petitioner appealed, contending that he received constitutionally ineffective assistance of counsel. Specifically, he noted that trial counsel failed to object to the PSR's statement that USSG §5G1.3 called for a consecutive sentence with respect to his pending probation revocation. *See* Initial Brief in *United States v. Altman*, No. 20-10627, 2020 WL 7867860, at *12-35 (5th Cir. Filed December 30, 2020)("Initial Brief"). The Note cited by Probation in support of a consecutive sentence, he noted, *see* Initial Brief, at 9-10, in fact recommends consecutive sentencing when the defendant has an "*undischarged*" term of imprisonment following revocation, that is, "in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and *has had*" -- in the past tense -- "*such probation, parole, or supervised release revoked*." USSG §5G1.3, comment. (n.4(C)). He thus maintained that trial counsel had permitted the court to decide the concurrent/consecutive

question under the erroneous belief that the Guidelines called for a consecutive sentence. *See* Initial Brief, at 9-10.

Petitioner asked the court to vacate the sentence and order resentencing, or, alternatively, "to remand for such proceedings as may be necessary to resolve his claims of ineffective assistance." Initial Brief, at 45. He also asked the court at least to recommend the appointment of counsel in a proceeding under 28 U.S.C. §2255. *See id.*

The court of appeals did none of these things. Instead, it declined to decide a claim of ineffective assistance on direct appeal, and affirmed without prejudice to collateral review. It addressed the issue with the following statement, which is the sum of its comments resolving the issue:

> The record is not sufficiently developed to allow us to make a fair evaluation of Altman's claim of ineffective assistance of counsel; we therefore decline to consider the claim without prejudice to collateral review. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014).

[Appendix A]; *United States v. Altman*, 849 Fed. Appx. 496, 497 (5th Cir. June 9, 2021)(unpublished).

REASONS FOR GRANTING THE PETITION

The federal circuit courts are divided as to the question presented: whether federal criminal defendants presenting substantial claims of ineffective assistance of counsel should receive the benefit of additional fact-finding before collateral appeal, or whether, instead, they should be compelled to wait for collateral review, at which point they may be forced to prosecute the claim *pro se*.

A. An unresolved issue in *Massaro v. United States*, 538 U.S. 500 (2002), has created a clear division of authority between the federal circuits.

The Sixth Amendment to the United States Constitution guarantees to a criminal defendant the right "to have the Assistance of Counsel for his defence." This guarantees effective assistance of counsel, defined as assistance that does not fall prejudicially below prevailing standards of professional conduct. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Often, claims of ineffective assistance appear for the first time in motions or petitions for collateral relief. Indeed, this Court has held that convicted persons bringing claims under 28 U.S.C. §2255 need not first assert the claim in a direct appeal. *See Massaro v. United States*, 538 U.S. 500 , 504 (2002). This distinguishes them from most other claims that sound in §2255, which are defaulted unless raised at the first opportunity. *See United States v. Frady*, 456 U.S. 152, 167-168 (1982); *Bousley v. United States*, 523 U.S. 614, 621-622 (1998). In *Massaro*, this Court reasoned that direct appeal records often contain inadequate information to resolve a claim of ineffectiveness, but that trial courts hearing §2255 motions can undertake the necessary fact-finding. *See Massaro*, 538 U.S. at 506.

The *Massaro* court stopped short of holding, however, that defendants may not raise ineffective assistance of counsel claims on direct appeal. It said:

> We do not hold that ineffective-assistance claims must be reserved for collateral review. There 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. at 508. The courts of appeals have divided as to the proper resolution of this reserved issue, specifically whether defendants raising the claim on direct appeal may sometimes be entitled to a remand for an evidentiary hearing prior to the commencement of collateral review.

The Second Circuit has recognized that *Massaro* expresses a preference for collateral review of ineffectiveness claims. *United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006). Yet it nonetheless offers three options when confronted with ineffectiveness claims on direct appeal, even after *Massaro*. It has said that:

> [w]hen a criminal defendant on direct appeal asserts trial counsel's ineffective assistance to the defendant, as the defendant does here, we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 [motion]; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us."

United States v. Doe, 365 F.3d 150, 152 (2d Cir. 2004)(quoting *United States v. Leone*, 215 F.3d 253, 256 (2d Cir.2000)). It regards all of these choices as consistent with *Massaro*, noting that "[t]he Supreme Court has not squarely addressed, however, the relative merits of resolving ineffectiveness claims by way of remand and direct review or eventual section 2255 motion and appeal." *Doe*, 365 F.3d at 153.

In the Second Circuit, moreover, the choice to remand the case for further development, rather than relegate a claim to a §2255, is not merely theoretical. Indeed, that court has repeatedly taken remanded for an evidentiary hearing when presented with ineffectiveness claims. *See United States v. Pena*, 233 F.3d 170, 174 (2d Cir.2000); *Leone*, 215 F.3d at 257; *United States v. Cox*, 245 F.3d 126, 132 (2d Cir.2001). *United States v. Salameh*, 152 F.3d 88, 161 (2d Cir.1998). It persuasively reasons that the limitations on §2255 petitions in the Antiterrorism and Effective Death Penalty Act (AEDPA) might make it unfair to compel presentation of the issue through a §2255 action. *See Pena*, 233 F.3d at 174. Further, it has reaffirmed its "discretion to hear an ineffective assistance of counsel claim on direct appeal, or, when appropriate, to remand such a claim for further fact-finding," as recently as 2019. *See United States v. Gotti*, 767 Fed. Appx. 173, 176 (2d Cir. 2019)(unpublished)(quoting *Leone*, *supra*)(cleaned up).

The First Circuit has taken a similar approach. Like, the Second Circuit, it outlines three possible responses to an ineffective assistance claim. *See United States v. Colon-Torres*, 382 F.3d 76, 84–85 (1st Cir. 2004)("When we receive ineffective assistance of counsel claims on direct appeal, we have three options."). Presented with an insufficiently developed record, the First Circuit will relegate the claim to a collateral attack. *See Colon-Torres*, 382 F.3d at 84–85; *United States v. Gonzalez–Vazquez*, 219 F.3d 37, 41–42 (1st Cir.2000) (collecting cases). With a sufficiently developed record, it will decide the claim on the merits. *See id.*; *United States v. Downs–Moses*, 329 F.3d 253, 264–265 (1st Cir.2003). Finally, in a third class of cases,

it will remand to the trial court "for an evidentiary hearing on the issue without requiring defendant to bring a collateral attack instead." *Id*. This final option is reserved for cases where the record does not support a conclusive resolution of the ineffectiveness question, but where the record does contain "indicia of ineffectiveness." *Id.*; *Unites States v. Theodore*, 354 F.3d 1, 3 (1st Cir. 2003). That treatment addresses "the gray area" between a fully developed record and one that triggers no real suggestion of a valid claim. *Id*. In opting for this three-part framework, the First Circuit expressly followed the Second. *See id*. (citing *Leone*, supra).

Significantly, the First Circuit has adhered to this framework well after it was announced. *See United States v. Kenney*, 756 F.3d 36, 48-49 (1st Cir. 2014)("Faced with ineffective assistance of counsel claims on direct appeal, we have resorted to three distinct options.")(citing *Colon-Torres*, *supra*). Indeed, it found sufficient "indicia of ineffectiveness" to merit a remand as recently as 2016. *See United States v. Constant* 814 F.3d 570, 578 (1st Cir. 2016)("In special circumstances, we have stated that where the record is embryonic but contain[s] sufficient indicia of ineffectiveness, we may opt to remand for an evidentiary hearing without requiring the defendant to bring a collateral challenge. For three reasons, we opt for such a remand in this case.")(quoting *United States v. Vega Molina*, 407 F.3d 511, 531 (1st Cir.2005), *Kenney*, 756 F.3d at 49, and *Colón–Torres*, 382 F.3d at 85)(cleaned up)).

The D.C. Circuit takes a similar approach, but one that is more generous to criminal defendants. *See United States v. Rashad*, 331 F.3d 908 (D.C. Cir. 2003). That

court of appeals will remand to the district court for fact-finding regarding an ineffectiveness claim "unless 'the trial record alone conclusively shows' that the defendant either is or is not entitled to relief." *Rashad*, 331 F.3d at 909-910. The D.C. Circuit thus agrees with the First and Second in the need to offer plausible ineffectiveness claimants a chance to obtain fact-finding before collateral review. It differs from the First Circuit only in its assignment of a presumption – whereas the First Circuit requires the defendant to show "indicia of ineffectiveness," *Colon-Torres*, 382 F.3d at 84–85, the D.C. Circuit will remand unless the showing of effectiveness is "conclusive," *Rashad*, 331 F.3d at 909-910. Notably, the D.C. Circuit has cited the Second Circuit's opinion in *Leone* with approval. *See id*. at 911 (citing *Leone*, *supra*). Further, it has embraced its holding in *Rashad*, and remanded for additional fact-finding, as recently as four months ago. *See United States v. Johnson*, 4 F.4th 116 (D.C. Cir. July 13, 2021).

The Ninth Circuit, however, has expressly rejected the possibility of a remand for fact-finding. *See United States v. Reyes-Platero*, 224 F.3d 1112, 1116 (9th Cir. 2000), *overruled in other grounds by United States v. Jacobo Castillo*, 496 F.3d 947 (9th Cir. 2007). Presented with a request to follow the Second Circuit's three-category approach in *Leone*, that court said that "[u]nlike the Second Circuit, we do not remand an ineffective assistance claim on direct appeal for further fact-finding." *Reyes-Platero*, 224 F.3d at 1116. Accordingly, the Ninth Circuit thinks that ineffectiveness claims present a binary choice between resolution on direct appeal and deferral to collateral proceedings. *See id.* ("We specifically rejected a defendant's request for a

remand from direct appeal for fact-finding purposes related to an ineffective assistance of counsel claim in *United States v. Johnson*, 820 F.2d 1065, 1073–74 (9th Cir.1987).”). The Ninth Circuit has recently cited *Reyes-Platero* as good law, relegating a defendant’s ineffectiveness claim to collateral review. *See United States v. Katakis*, 796 Fed. Appx. 400, 403 (9th Cir. 2021)(unpublished)(citing *United States v. Rahman*, 642 F.3d 1257, 1260 (9th Cir. 2011), *quoting Reyes–Platero*, *supra*).

The Seventh Circuit has also rejected the three-part approach of the First, Second, and D.C. Circuits, acknowledging that its approach diverges from that of those jurisdictions. *See United States v. Wilson*, 240 Fed. Appx. 139, 144 (7th Cir. 2007)(unpublished)(“He finds support for this approach in cases decided by the First and D.C. Circuits, which will order a limited remand when the record is not developed enough to decide the merits of the claim but there is some evidence of ineffectiveness.”). In the Seventh Circuit’s view, no “workable standard exists for determining how much evidence of attorney error in the appellate record suffices to trigger a limited remand, nor do we see obvious benefits of that method that outweigh its complexity.” *Wilson*, 240 Fed. Appx. at 145. Further, it believes that the “inquiry into the ineffective assistance claim must be confined to facts that appear in the record as it stands at the time of the appeal.” *United States v. Harris*, 394 F.3d 543 (7th Cir. 2005)(citing *United States v. Godwin*, 202 F.3d 969, 973 (7th Cir.2000)). As a consequence of its approach, it has recently reiterated that defendants should simply not raise claims of ineffective assistance on direct appeal. *See United States v. Morgan*, 929 F.3d 411, 433 (7th Cir. 2019).

The court below has taken the approach of the Seventh and Ninth Circuits. In *United States v. Fry*, 51 F.3d 543 (5th Cir. 1995), the defendant asked the court to remand for factual finding regarding a claim of ineffective assistance raised on direct appeal. *See Fry*, 51 F.3d at 545. The court declined – although the defendant cited a Fifth Circuit case that remanded for an evidentiary hearing regarding counsel's effectiveness, the Fifth Circuit confined that precedent to the §2255 context. *See id.* The holding is clear: evidentiary hearings on ineffective assistance must await collateral review.

Since then, the court below has consistently relegated ineffective assistance claims to collateral review. *See United States v. Lampazianie*, 251 F.3d 519, 527 (5th Cir. 2001); *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014); *United States v. Miller*, 406 F.3d 323, 335–36 (5th Cir. 2005); *United States v. Lovato*, 698 Fed. Appx 791, 792 (5th Cir. 2017)(unpublished); *United States v. Blanco-Rodriguez*, 755 Fed. Appx 339, 341–42 (5th Cir. 2018)(unpublished)(citing *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987)). It has addressed such claims on the merits only where they involved a failure to move for directed verdict under Federal Rule of Criminal Procedure 29, *see United States v. Almaguer*, 246 Fed. Appx. 260, 261 (5th Cir. 2007)(unpublished); *United States v. Rosalez-Orozco*, 8 F.3d 198, 199–200 (5th Cir. 1993); *United States v. Laoutaris*, 710 Fed. Appx 215, 215–16 (5th Cir. 2018)(unpublished), and/or where they could be rejected on the merits without record development, *see United States v. Banda*, 157 F.3d 901 (5th Cir. 1998)(unpublished); *United States v. Villegas–Rodriguez,* 171 F.3d 224, 230 (5th Cir.1999). As such,

defendants raising plausible claims of ineffective assistance on direct appeal have no right to further fact-finding before collateral review in the Fifth Circuit. The present case is illustrative. In spite of a plainly overlooked Guideline error, and an explicit request for a remand, the court below simply affirmed the sentence.

B. The division of authority merits this Court's attention.

The division of authority between the federal circuits regarding the proper treatment of ineffective assistance claims on direct appeal is clear, direct, longstanding, and balanced. The Ninth and Seventh Circuits have acknowledged the divergence of their precedent from that of the First, Second, and D.C. Circuits. *See Reyes-Platero*, 224 F.3d at 1116; *Wilson*, 240 Fed. Appx. at 144. The split, in other words, is judicially recognized, not the brain-child of an advocate.

Further, the split is exceedingly unlikely to resolve without this Court's intervention. It has persisted since before *Massaro*, ***compare*** *Leone*, 215 F.3d at 256, ***with*** *Reyes-Platero*, 224 F.3d at 1116, and is reflected in contemporary precedent, compare *Gotti*, 767 Fed. Appx. at 176; *Kenney*, 756 F.3d at 48-49; *Constant* 814 F.3d at 578 with *Katakis*, 796 Fed. Appx. at 403; *Morgan*, 929 F.3d at 433. Both sides of the split count multiple adherents.

The approach of the Fifth, Seventh, and Ninth Circuits, moreover, carries serious risks to the proper administration of justice, owing to the fact that prisoners often do not receive appointment of counsel to prosecute a collateral attack. *See Coleman v. Thompson*, 501 U.S. 722, 753–754 (1991); 18 U.S.C. §3006A(a)(2). As such, defendants with plausible claims of ineffective assistance may, under the view

of the Fifth, Seventh, and Ninth Circuits, be deprived of any chance to litigate the ineffectiveness question *with the benefit of effective assistance*. Perhaps more significantly, they may be denied to chance to litigate *with effective counsel* the underlying substantive issues that trial counsel may have overlooked. That situation invites a serious constitutional question. Specifically, this Court has acknowledged an "open … question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 8 (2012).

The approach of the First, Second, and D.C. Circuits helps avoid this issue. Remand to the district court permits the defendant to make a record of ineffectiveness at a time when his right to counsel has not yet expired. Because this course of action avoids that constitutional problem, it should accordingly be favored. *See Dretke v. Haley*, 541 U.S. 386 (2004). A grant of certiorari could help to head off this weighty constitutional issue for as long as possible. Certainly, it could avoid the serious possibility that criminal defendants serve sentences arising from constitutionally ineffective assistance of counsel.

The Seventh Circuit has resisted the approach of the First, Second, and D.C. Circuits on the ground that there is no "workable standard exists for determining how much evidence of attorney error in the appellate record suffices to trigger a limited remand, nor do we see obvious benefits of that method that outweigh its complexity." *Wilson*, 240 Fed. Appx. at 145. The standards employed by the First,

Second, and Third Circuits do require the court of appeals to draw a line between plausible and unsupported claims of ineffective assistance.

But this line-drawing exercise is no more fraught than that employed by every circuit to decide whether to undertake a merits review: whether the record is sufficiently developed to evaluate the claim of ineffective assistance. Nor is it more difficult even than application of the ineffectiveness standard itself, which requires the court to determine whether counsel's conduct fell below prevailing professional norms. And the benefit it offers – the right to litigate a serious constitutional claim with the benefit of counsel – clearly outweighs what little complexity it adds to the process.

C. The present case is an excellent vehicle to address the division of authority.

This case squarely presents the issue that has divided the courts of appeals. The defendant expressly requested, in the alternative to a merits determination in his favor, that "the Court …remand for such proceedings as may be necessary to resolve his claims of ineffective assistance." Initial Brief, at 42.

Petitioner likely would have received a remand if the case had arisen in another circuit. He presented to the court of appeals an eminently plausible claim of ineffective assistance. The issue pertained to "an isolated and easily analyzed trial decision," *Constant*, 814 F.3d at 579 (quoting *Kenney*, 756 F.3d at 49), namely, the legal interpretation of a Guideline given undisputed facts. The First Circuit would have accordingly favored remand for an evidentiary hearing prior to collateral review.

See Constant, 814 F.3d at 579. Further, trial counsel's failure to object to a prejudicially erroneous interpretation of USSG §5G1.3 easily presented "indicia of ineffectiveness," as the First Circuit requires to obtain a remand for an evidentiary hearing. *Id.* Certainly, the record did not "conclusively show[]" the claim meritless, as the D.C. Circuit requires to deny a remand for further fact-finding. *See Rashad*, 331 F.3d at 909-910.

Put simply, review of Petitioner's ineffective assistance claim shows that it was quite substantial. Citing Application Note 4(C) to USSG §5G1.3, the PSR said that "the U.S. Sentencing Commission recommends the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation." (Record in the Court of Appeals, 190). This was mistaken.

In fact, the Note only recommends consecutive sentencing when the defendant has an "*undischarged*" term of imprisonment following revocation, that is, "in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and *has had*" -- in the past tense -- "such probation, parole, or supervised release *revoked*." USSG §5G1.3, comment. (n.4(C))(emphasis added). This is clear from the very title of the Note, which speaks of "*Undischarged* Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release." USSG §5G1.3, comment. (n. (4)(C))(emphasis added).

Likewise, in USSG §5G1.3(a), the Commission states that:

> [i]f the instant offense was committed while the defendant *was serving* a term of imprisonment (including work release, furlough, or escape status) or *after sentencing* for, but before commencing service of, such

> term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the *undischarged* term of imprisonment.

USSG §5G1.3(a)(emphasis added). So Subsection (a) recommends consecutive sentencing in the case of a defendant who commits a crime while serving a term of imprisonment. Its explicit reference to an "undischarged term of imprisonment," however, makes clear that the recommendation does not extend to anticipated sentences.

Likewise, the Commentary construing Subsection (a) says that the court should:

> impose a consecutive sentence when the instant offense was committed while the defendant *was serving an undischarged term* of imprisonment or *after sentencing* for, but before commencing service of, such term of imprisonment.

USSG §5G1.3, comment, (n. 1)(emphasis added). This language clearly restricts the consecutive recommendation to already imposed, undischarged terms.

And in USSG §7B1.3(f) the Commission says that:

> [a]ny term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant *is serving*, whether or not the sentence of imprisonment being served *resulted* from the conduct that is the basis of the revocation of probation or supervised release.

USSG §7B1.3(f)(emphasis added). Again, the tense of the Guideline speaks clearly. It limits the recommendation for consecutive service to undischarged sentences, those "the defendant is serving" and that "resulted from" the same conduct that gave rise to the revocation.

The plain language of multiple Guideline provisions overwhelmingly contradicts the erroneous interpretation of USSG 5G1.3 offered by the PSR – the

Guidelines simply do not recommend a consecutive sentence. Yet trial counsel did not object to the PSR's misstatement of the Guidelines. The claim of ineffective assistance was eminently plausible, and would have clearly merited a remand in multiple courts of appeals. The division of authority affected the outcome.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 8th day of November, 2021.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner