No. 21-

IN THE

Supreme Court of the United States

PAUL E. PAVULAK,

Petitioner,

vs.

WARDEN OF FEDERAL MEDICAL CENTER-BUTNER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal prisoner seeking review of a defaulted claim of ineffective assistance of trial counsel seek postconviction review under 28 U.S.C. § 2241, through the escape hatch in 28 U.S.C. § 2255(e), when either the absence or ineffective assistance of postconviction counsel before the sentencing court is the reason for the default?

Put another way, may federal prisoners take advantage of the equitable exception described for state prisoners in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), on the ground that absence or ineffective assistance of postconviction counsel renders the § 2255 remedy "inadequate or ineffective to test the legality of" a federal prisoner's detention?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this petition. The unnamed (and unknown) warden of Federal Medical Center-Butner is substituted as respondent in place of Barbara von Blanckensee pursuant to Rule 35.3, Rule 35.4, and *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004).

RELATED PROCEEDINGS

- *United States v. Paul Pavulak*, No. 21-1571 (3d Cir.)
- *In re Paul Pavulak*, No. 20-1640 (3d Cir.)
- *Paul Pavulak v. Barbara von Blanckensee*, No. 19-16314 (9th Cir. Aug. 4, 2021)
- *Paul Pavulak v. Barbara von Blanckensee*, No. 4:19-cv-274-TUC-RM (D. Ariz. May 31, 2019)
- *United States v. Paul Pavulak*, No. 17-1878 (3d Cir.)
- *Paul Pavulak v. United States*, No. 1:14-cv-290-LPS (D. Del.)
- *Paul Pavulak v. United States*, No. 12-9526 (U.S. Apr. 29, 2013)
- *United States v. Paul Pavulak*, No. 11-3863 (3d Cir.)
- *United States v. Paul Pavulak*, No. 1:09-cr-43-LPS (D. Del.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Other Authorities

Petitioner Paul Pavulak respectfully asks the Court to review the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

PROCEEDINGS BELOW

The court of appeals's decision is reproduced in the appendix at page 1a and reported at 14 F.4th 895 (9th Cir. 2021) (per curiam). The district court's decision denying Mr. Pavulak's *pro se* petition for a writ of habeas corpus is reproduced in the appendix at page 6a and is not reported.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion in this case on August 4, 2021. The court of appeals denied a timely filed petition for rehearing on October 1, 2021. By order of December 6, 2021 (No. 21A208), Justice Kagan extended the time for filing the petition to and including January 31, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2241:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may

transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him

and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without

jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court

which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

In 2009, a grand jury in the District of Delaware indicted Mr. Pavulak on five counts, including attempted production of child pornography, in violation of 18 U.S.C. § 2251(a) and (e). He took his case to trial, and was convicted on all five counts. Under 18 U.S.C. § 3559(e), and in light of Mr. Pavulak's two prior convictions for second-degree unlawful sexual conduct with a minor, in violation of Del. Code tit. 11, § 768, the sentencing judge imposed a mandatory life sentence. *See United States v. Pavulak*, 819 F. Supp. 2d 386, 388 (D. Del. 2011). The Third Circuit affirmed the sentence on direct appeal, holding that § 768 did not "necessarily constitute a federal sex offense" under § 3559(e)(1), but that the sentence did not violate the jury-trial right as set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because his sentence did not exceed the maximum set forth in 18 U.S.C. § 2251(e). *United States v. Pavulak*, 700 F.3d 651, 672–75 (3d Cir. 2012), *cert. denied*, 569 U.S. 968 (2013).

In March 2014, Mr. Pavulak filed a *pro se* motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 with the sentencing court. Three years later, the court denied the motion without a hearing and without appointing counsel to assist him. *See Pavulak v. United States*, 248 F. Supp. 3d 546, 551 (D. Del. 2017).

As relevant here, the sentencing court denied Mr. Pavulak's claim that his trial counsel was ineffective for persuading him to stipulate to his two prior convictions under § 768 at trial. "This argument is unavailing, because it is premised on movant's erroneous assumption that he would not have been subjected to a life sentence but for his stipulation to his prior qualifying convictions. The sentencing transcript shows that the court found that a life sentence was appropriate under the § 3553(a) factors even without applying § 3559(e)." *Pavulak*, 248 F. Supp. 3d at 562.

On May 13, 2019, Mr. Pavulak filed the *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2241 that is involved here. In this petition, he contended that his mandatory life sentence under § 3559(e) was illegal because his prior convictions under § 768 did not qualify as state sex offenses. He asserted that the district court could consider this argument under the escape hatch of 28 U.S.C. § 2255(e) because it was not reasonably available to his prior counsel, as demonstrated by the Third Circuit's decision in *United States v. Dahl*, 833 F.3d 345 (3d Cir. 2016). And he asserted that he was innocent of the mandatory life sentence for the reasons set forth in *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018).

Nearly three weeks later, without calling for a response from the warden, the district court dismissed Mr. Pavulak's habeas petition, finding that he did not qualify for the escape hatch. In the district court's view,

Mr. Pavulak failed to show that he had not had an unobstructed procedural shot at raising his claim before the sentencing court because "the purported legal basis for his claim was available during his first § 2255 proceeding." The court observed that *Dahl* was decided in August 2016, but the sentencing court did not dismiss his § 2255 motion until March 2017. It further observed that Mr. Pavulak had asked to supplement his § 2255 motion to include arguments based on *Dahl*. The court read the sentencing court's order denying Mr. Pavulak's § 2255 motion as having rejected those arguments, even though that order refers to neither *Dahl* nor to 18 U.S.C. § 2426, as the district court said. Accordingly, the court concluded, Mr. Pavulak had had an unobstructed procedural shot at raising his claim before the sentencing court, and so it lacked jurisdiction to entertain his § 2241 petition. The court dismissed Mr. Pavulak's petition with prejudice. It declined to issue a certificate of appealability.

Mr. Pavulak filed a *pro se* notice of appeal in the district court and a motion for a certificate of appealability with the court of appeals. In the wake of its decision in *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020), the court of appeals certified the questions "whether the petition filed by appellant in the district court is a legitimate 28 U.S.C. § 2241 petition brought pursuant to the escape hatch of 28 U.S.C. § 2255 and, if so, whether appellant is entitled to relief." (CA9 No. 19-16314 Dkt. #8) The court invited Mr. Pavulak to apply for leave to proceed *in forma pauperis* and for appointment of counsel. Mr. Pavulak did so, and the court granted both requests.

With the assistance of appointed counsel, Mr. Pavulak asked the court of appeals to vacate the dismissal without prejudice and remand with instructions to grant leave to amend. He asserted that his prior convictions did not qualify him for the mandatory life sentence under

§ 3559(e) or for enhanced punishment under § 2251(e), such that he met the actual-innocence prong of the escape hatch under *Allen*. And he asserted that he could have demonstrated to the district court, if it had notified him of its intent to summarily dismiss his petition, that he had not had an unobstructed procedural shot at raising his sentencing challenge because the sentencing court did not appoint counsel to assist him in litigating his § 2255 motion. That assertion asked the court to apply this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), to allow a federal prisoner to raise defaulted claims in a habeas petition when either the district court declined to appoint postconviction counsel for him, or postconviction counsel rendered ineffective assistance. *Cf. Martinez*, 566 U.S. at 12 ("To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney. The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. 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.") (citing *Halbert v. Michigan*, 545 U.S. 605, 620–21 (2005)).

The court of appeals affirmed the district court in a *per curiam* opinion. Citing *Buenrostro v. United States*, 697 F.3d 1137 (9th Cir. 2012), in which the court had held that *Martinez* did not furnish a basis for filing a second or successive § 2255 motion, the court said that it had "already held that *Martinez* does not apply to federal convictions." (App. 3a) "Federal prisoners are not entitled to counsel in postconviction proceedings," the court added. (App. 3a–4a) For a federal prisoner to use *Martinez* to pass through the escape hatch would, the court said, "open the door for virtually every unsuccessful pro se petitioner under § 2255 to" seek habeas relief, and

thus "effectively overrule our precedent that there is no right to counsel in federal post-conviction proceedings." (App. 4a) The court agreed with the Seventh Circuit's conclusion that *Martinez* is not available in § 2241 proceedings, and implicitly concluded that *Martinez* was not available to any federal prisoner under Rule 60(b) of the Federal Rules of Civil Procedure because "*Martinez* does not apply to federal prisoners" at all. (App. 3a)

This timely petition followed.

REASONS FOR GRANTING THE WRIT

In fiscal year 2020, the federal district courts received a total of 49,701 *pro se* prisoner petitions.[1] They received 6,834 motions to vacate sentence under 28 U.S.C. § 2255.[2] And they received 2,702 petitions for writs of habeas corpus under 28 U.S.C. § 2241 from federal prisoners.[3] It is safe to say that the vast majority of these postconviction filings come from *pro se* prisoners—between 2000 and 2019, 91% of prisoner petitions filed in the district courts were not prepared by a lawyer.[4] The Criminal Justice Act

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[1] Administrative Office of the U.S. Courts, *Judicial Business 2020*, Table C-13: Civil Pro Se and Non-Pro Se Filings, at <https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2020.pdf>

[2] *Id.*, Table C-2A: Civil Cases Filed, by Nature of Suit, at <https://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2020.pdf>.

[3] *Id.*, Table C-2: Civil Cases Filed, by Jurisdiction and Nature of Suit, at <https://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2020.pdf>.

[4] Administrative Office of the U.S. Courts, *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, Fig. 5, at <https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019>, then click on Fig. 5.

of 1964 gives the district courts the discretion to appoint counsel for any indigent prisoner who is seeking postconviction relief under both § 2241 and § 2255. *See* 18 U.S.C. § 3006A(a)(2)(B). They should do so whenever there is some likelihood of success on the merits and the *pro se* litigant appears unlikely to be able to articulate his claims on his own in light of the complexity of those claims. *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam). But if 91% of these litigants are proceeding without counsel, either very many of their claims are frivolous, or the district courts are routinely denying federal prisoners seeking postconviction relief the ability to present meritorious claims by failing to appoint counsel to assist them as the Criminal Justice Act allows. This petition thus presents the important and recurring question about how to ensure that the federal district courts do not allow meritorious postconviction claims brought by federal prisoners to slip through the cracks by being too stingy in exercising the discretion they enjoy under the Criminal Justice Act to appoint counsel for them.

1. The circuits are divided on whether federal prisoners whose substantial claims of ineffective assistance of trial counsel were defaulted by the absence of postconviction counsel may obtain review of those claims, and on what the appropriate procedural vehicle for doing so might be.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that an attorney's negligence does not qualify as cause to excuse a procedural default in state postconviction proceedings. In *Martinez v. Ryan*, 566 U.S. 1 (2012), however, this Court recognized an equitable exception to that holding. The Court held that where, by virtue of the structure of a state's procedural framework, "claims of ineffective assistance of trial counsel must be

raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17. The Court recognized that because many state-court systems "move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, those states significantly diminish prisoners' ability to file such claims" and that a defendant's constitutional right to counsel—a "bedrock principle in our justice system"—will be difficult, if not impossible, to vindicate "[w]ithout the help of an adequate attorney." *Id.* at 11–13. But in *Martinez* the Court limited its holding to state jurisdictions where ineffective assistance claims are *required* to be raised during initial collateral proceedings rather than on direct appeal.

The following year, the Court explained that *Martinez*'s holding applied equally to jurisdictions in which ineffective assistance of trial counsel claims were not prohibited outright during direct appeal proceedings, but where the state-court procedures made it "'virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim' on direct review." *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (citations omitted; cleaned up). The *Martinez* exception to procedural default also applies where "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 429. As in *Martinez*, in *Trevino* the Court focused on the centrality of the effective assistance of trial counsel to our criminal justice system and, correspondingly, the importance of permitting prisoners a meaningful opportunity to develop and present substantial claims of

ineffective assistance of trial counsel. *See id.* at 422–423; *see also Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017) ("[T]he Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel.").

But *Martinez* and *Trevino*, by their own terms, apply only to ineffective-assistance-of-trial-counsel claims brought by *state* prisoners. This Court has never applied that framework to *federal* prisoners, let alone explained what the proper procedural vehicle for airing such issues might be. In the absence of guidance from this Court, the courts of appeals have reached divergent answers to the question.

In this case, the Ninth Circuit held that *Martinez*'s equitable exception is simply not available to federal prisoners. *Martinez*, the court of appeals said, "does not apply to federal convictions." (App. 3a (citing *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012))) Because federal prisoners are not entitled to counsel in postconviction proceedings under § 2255, applying *Martinez* to federal prisoners would "open the door for virtually every unsuccessful pro se petitioner… to argue that his lack of counsel in his original § 2255 petition meant that he did not have an unobstructed procedural shot at presenting his claim." (App. 4a)

The Ninth Circuit's rigid and inflexible rule would prevent a *pro se* federal prisoner from seeking review in a different forum (under § 2241) not only of the sentencing court's decision to deny postconviction relief on the merits but also of any failure on its part to exercise statutory discretion to appoint counsel to assist the prisoner in litigating potentially meritorious claims. Not only that, but it would likewise prevent the prisoner from seeking review in the *same* forum (under Rule 60(b) of the Federal

Rules of Civil Procedure) of the sentencing court's failure to exercise statutory discretion to appoint counsel. Failing even to exercise this statutory discretion undermines the fundamental fairness of the § 2255 proceeding and thus amounts to a structural defect in that proceeding. *Cf. United States v. Davila*, 569 U.S. 597, 611 (2013); *Martinez*, 566 U.S. at 14 (noting that absence of postconviction counsel may not make the proceeding "sufficient to ensure that proper consideration was given to a substantial claim"). By asserting "some defect in the integrity of" the previous § 2255 proceedings, seeking such review under Rule 60(b) would not count as a forbidden second or successive § 2255 motion. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

The Ninth Circuit implicitly acknowledged that its holding conflicts with the Seventh Circuit's holding that Rule 60(b) furnishes an adequate vehicle for testing the sentencing court's failure to exercise its statutory discretion to appoint postconviction counsel. The court below said that its decision was in line with decisions of the Third and Seventh Circuits that prevented federal prisoners from relying on *Martinez*'s equitable exception in § 2241 habeas proceedings. (App. 4a (citing *Lee v. Watson*, 964 F.3d 663, 667 (7th Cir. 2020); *Purkey v. United States*, 964 F.3d 603, 617–18 (7th Cir. 2020); *Jackman v. Shartle*, 535 F. App'x 87, 89 n.5 (3d Cir. 2013))) But by foreclosing federal prisoners from relying on *Martinez* in a Rule 60(b) motion, the court below diverged from the Seventh Circuit's holding in *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), that allowed federal prisoners to use *Martinez* in that way. (App. 4a) In *Ramirez* the court saw no reason to treat federal prisoners worse that state prisoners by affording the latter a path around procedural default based on absence of postconviction counsel but not the former. *Id.* at 854. The Ninth Circuit's decision in this case, by contrast,

makes federal prisoners worse off than their state counterparts.

The Ninth Circuit's decision is, however, in accord with the Eighth Circuit's decision in *United States v. Lee*, 792 F.3d 1021 (8th Cir. 2015). In that case, the Eighth Circuit refused to permit a federal prisoner resort to Rule 60(b) under analogous circumstances. There, a federal capital prisoner filed an initial § 2255 petition asserting that his trial counsel was ineffective. His court-appointed § 2255 counsel, however, failed to present available evidence to support his claim, and his petition was dismissed for lacking evidentiary support. Lee filed a *pro se* motion under Rule 60(b), arguing that under *Martinez* and *Trevino*, he was entitled to one opportunity to present his substantial claim of ineffective assistance of trial counsel, but had been denied it by ineffective assistance of § 2255 counsel. The district court treated Lee's Rule 60(b) motion as a second or successive habeas petition and dismissed it. The Eighth Circuit affirmed, holding that *Martinez* and *Trevino* were "inapposite" to Lee, a federal prisoner, because those cases "involved federal habeas review of state court decisions under § 2254." *Id.* at 1024.

2. The Ninth Circuit's decision here conflicts with *Martinez* and *Trevino*.

The Ninth Circuit's decision contravenes this Court's decisions in *Martinez* and *Trevino*. Prisoners must have at least one reasonable opportunity to challenge the effectiveness of their trial counsel, especially where they are serving illegally harsh sentences. Where a prisoner must wait until initial-review collateral proceedings to pursue an ineffective assistance of trial counsel claim that has "some merit," and where counsel at those initial-review proceedings is absent, the constitutional right to effective assistance of trial counsel—"a bedrock principle

in our justice system"—will be difficult, if not impossible, to vindicate. *Martinez*, 566 U.S. at 12–14; *see also Trevino*, 569 U.S. at 428–429. That is the central premise of this Court's decisions in *Martinez* and *Trevino*.

A federal prisoner with substantial claims of ineffective assistance of trial counsel, who lacked effective assistance of initial-review collateral counsel, is in the exact same position as the state prisoners in *Martinez* and *Trevino*. In order to seek review of a conviction and sentence in the customary manner, a federal prisoner first files a direct appeal, where he is entitled to counsel. See 18 U.S.C. § 3006A(c); 9th Cir. R. 4-1(a); *Menendez v. Terhune*, 422 F.3d 1012, 1027 (9th Cir. 2005) (citing *Douglas v. California*, 372 U.S. 353 (1963)). But the structure of the federal system precludes prisoners from bringing adequately developed claims of ineffective assistance of trial counsel on direct appeal. Indeed, the federal courts of appeals have actively discouraged federal prisoners from bringing those claims on direct appeal. *See United States v. Singh*, 979 F.3d 697, 731 (9th Cir. 2020) ("Generally, we will not entertain ineffective assistance of counsel claims on direct appeal because the record is often undeveloped 'as to what counsel did, why it was done, and what, if any, prejudice resulted.'") (quoting *United States v. Andrews*, 75 F.3d 552, 557 (9th Cir. 1996)).

A motion pursuant to § 2255 thus amounts to a federal prisoner's first real opportunity to raise claims of ineffective assistance of trial counsel. *See Massaro v. United States*, 538 U.S. 500, 508 (2003). But where that proceeding is "undertaken without counsel," the collateral review proceeding "may not [be] sufficient to ensure that proper consideration was given to a substantial claim" of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 14. That is because, as this Court recognized in

Martinez, ineffective assistance of trial counsel claims are difficult if not impossible to mount "[w]ithout the help of an adequate attorney." *Id.* at 11–13. Yet, under the constraints of § 2255, that is the only chance a federal prisoner will get to present substantial claims of ineffective assistance of trial counsel.

In the Antiterrorism and Effective Death Penalty Act of 1996, Congress restricted the availability of "second or successive" habeas petitions under § 2255 to situations where the movant can point to either "newly discovered evidence" that would undermine his conviction, or a new, retroactive "rule of constitutional law… that was previously unavailable." 28 U.S.C. § 2255(h). But, in doing so, Congress did not alter the escape hatch of § 2255(e)—an implicit acknowledgment that § 2241 would be available in some situations other than the two circumstances identified in § 2255(h).

For a federal prisoner whose substantial claim of ineffective assistance of trial counsel was not presented in his § 2255 petition due to the absence of § 2255 counsel, § 2241 must be available. Under those circumstances, because the court did not appoint counsel in § 2255 proceedings, the prisoner was denied "an opportunity to bring his argument," and thus the "'remedy by motion'" under § 2255 is "'inadequate or ineffective'" to test the legality of his detention. *Prost v. Anderson*, 636 F.3d 578, 584–585 (10th Cir. 2011) (Gorsuch, J.). This is not to say, as the court below seemed to believe, that because the prisoner was denied *relief*, § 2255 is *ipso facto* inadequate or ineffective. Rather, denying the prisoner the assistance of counsel at all means the denial even of an *opportunity* to present substantial claims of ineffective assistance of trial counsel. *That* is what renders the § 2255 *remedy* inadequate or ineffective to test the legality of the conviction and sentence. *See id.* Indeed, under those

circumstances (as here), no court will ever review the prisoner's substantial claims of ineffective assistance of trial counsel, and he will die in prison despite having a substantial claim that his mandatory life sentence is illegally harsh.

Thus the Ninth Circuit incorrectly concluded that *Martinez*'s equitable exception to procedural default, as a gloss on the escape hatch's statutory language in § 2255(e), is always unavailable to federal prisoners, no matter what procedural vehicle they might try. Without the assistance of counsel, it is impossible for *pro se* prisoners to present substantial claims of ineffective assistance of trial counsel in § 2255 proceedings. The Criminal Justice Act of 1964 affords district courts the discretion to appoint counsel to assist them in presenting such claims. The principles articulated in *Martinez* and *Trevino* require that federal prisoners have an opportunity to seek review of the failure to exercise that discretion in front of a judge who did not previously deny them the assistance of counsel. *Cf. United States v. Baptiste*, 8 F.4th 30, 35 (1st Cir. 2021) (explaining that it is "especially difficult" to show an abuse of discretion when the same judge hears a posttrial motion and the trial itself because "*substantial deference* is due to" the judge's ruling); *In re Marshall*, 721 F.3d 1032, 1041–45 (9th Cir. 2013) (finding no abuse of discretion in a trial judge's decision not to recuse based on the judge's own assessment of an appearance of impropriety).

3. The question presented is important and deserves this Court's attention.

The effective result of the circuits' disparate approaches is that federal prisoners in some jurisdictions who are denied the assistance of § 2255 counsel to assist in presenting substantial claims of ineffective assistance

of trial counsel have no reasonable opportunity at all to present those claims. Whether and by what procedural mechanism such prisoners can press their ineffective assistance of trial counsel claims is important and worthy of this Court's review, for at least three reasons: (1) the importance of the right at stake; (2) the creation of an unwarranted disparity between state and federal prisoners; and (3) this issue is likely to recur in contexts similar to how it arose here. *See* Sup. Ct. R. 10(c).

1. The right to effective assistance of trial counsel is the "bedrock" of our criminal justice system. *Martinez*, 566 U.S. at 12; *see also Davila*, 137 S. Ct. at 2066–2067. Without effective assistance of trial counsel, no defendant can receive a fair trial. *See generally Gideon v. Wainwright*, 372 U. S. 335, 344 (1963) (characterizing as an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"); *see also Martinez*, 566 U.S. at 12 ("[T]he right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.").

Equally true is the proposition that "the initial-review collateral proceeding, if undertaken without counsel…, may not [be] sufficient to ensure… proper consideration [of] a claim of ineffective assistance of trial counsel." *Martinez*, 566 U.S. at 14. That is because "[c]laims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." *Id.* at 11. Accordingly, as this Court has recognized, "[t]o present a claim of ineffective assistance at trial…, a prisoner likely needs an effective attorney." *Id.* at 12. In the Criminal Justice Act, Congress vested the district courts with the discretion to appoint counsel to assist federal prisoners in

litigating postconviction cases. 18 U.S.C. § 3006A(a)(2)(B). In so doing, Congress believed that the courts would exercise their discretion to do so in appropriate case. But if, as the statistics suggest, 91% of prisoner petitions filed in federal district courts are prepared without the assistance of counsel, there is reason to believe that this discretion is systematically abused.

Without appointment of counsel to assist federal prisoners in litigating substantial claims of ineffective assistance of trial counsel, there is a serious risk that those claims will never be reviewed by any court at all. It was this very concern that motivated this Court in *Martinez* and *Trevino* to create an equitable exception to *Coleman* for state prisoners. Such a rule will result in federal defendants serving illegally harsh sentences without ever having a meaningful opportunity to test the legality of their conviction and sentence, when that conviction and sentence was tainted by the ineffective assistance of trial counsel.

2. Federal prisoners who have been denied the assistance of § 2255 counsel are in the exact same position as the state prisoners who benefit from *Martinez* and *Trevino*, as § 2255 proceedings are federal prisoners' first opportunity to raise ineffective assistance of trial counsel claims. *See Massaro*, 538 U.S. at 508. Denying resort to § 2241 under analogous circumstances, then, creates an unjustified distinction between state and federal prisoners that unjustifiably disfavors the latter. Such a distinction is particularly unwarranted because Congress provided with respect to state prisoners that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254," 28 U.S.C. § 2254(i), but did not include any such limitation in § 2255 for federal prisoners. And, unlike

federal habeas review of state prisoners' defaulted claims, permitting federal prisoners to raise in a § 2241 petition substantial ineffective assistance of trial counsel claims defaulted by ineffective § 2255 counsel presents no intergovernmental comity concerns. *Cf. Coleman*, 501 U.S. at 726 ("This is a case about federalism.").

3. This issue is important, given the number and variety of recidivist sentence enhancements sprinkled throughout the federal criminal code. Some of them are generally applicable to all persons charged with federal crimes, such as the three-strikes law that imposes a mandatory life sentence for a third conviction for "2 or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. § 3559(c)(1)(A)(i)–(ii). Others apply to certain categories of offenders, but nevertheless constitute a significant fraction of the criminal charges brought in federal district courts throughout the country. Think of the Armed Career Criminal Act, 18 U.S.C. § 924(e), a frequent subject of litigation before this Court. *E.g. Borden v. United States*, 141 S. Ct. 1817 (2021); *Johnson v. United States*, 576 U.S. 591 (2015); *Begay v. United States*, 553 U.S. 137 (2008); *Taylor v. United States*, 495 U.S. 575 (1990). Or of the multifaceted definition of the term "aggravated felony," 8 U.S.C. § 1101(a)(43), which includes a "crime of violence," *see* 8 U.S.C. § 1101(a)(43)(F) (incorporating the definition of the term at 18 U.S.C. § 16), a prior conviction for which increases the maximum punishment for illegal reentry from 2 to 20 years in prison, 8 U.S.C. § 1326(b)(2). Large classes of federal prisoners are subject to these kinds of sentence enhancements; those prisoners are entitled to the effective assistance of sentencing counsel, *see Glover v. United States*, 531 U.S. 198, 202–04 (2001); and, no less than state prisoners, they should have at least one forum

open to hearing any substantial claim of ineffective assistance of sentencing counsel that they might have.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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