No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISIAH PIERCE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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QUESTION PRESENTED

Does the presumption of *Massaro v. United States,* 538 U.S. 500 (2003) that ineffective assistance of counsel claims should be litigated in collateral proceedings under 28 U.S.C. § 2255 rather than brought on direct appeal apply where the claim was first litigated and decided in a considered, post-trial, prejudgment motion in the district court?

Through newly assigned counsel after trial, petitioner and the government litigated whether trial counsel had been ineffective, leading to a fully briefed post-trial motion and considered denial by the district court. Citing its "baseline aversion" to reviewing ineffective assistance claims on direct appeal, the court of appeals declined to review this claim, and refused to remand for further proceedings with assigned counsel, instead leaving petitioner to pro se, prisoner re-litigation under 28 U.S.C. § 2255. This placed the court below in conflict with other courts of appeal that do not apply the *Massaro* presumption where the issue was litigated and decided in posttrial motions in the district court, and with courts that would remand to allow the defendant to retain the right to counsel.

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

The names of all parties to this petition appear in the caption of the case on the cover page. The parties have no parent or subsidiary companies and do not issue stock. The proceedings directly related to this case are as follows:

- *United States v. Pierce,* No. 17-cr-00032 (LJV), U.S. District Court for the Western District of New York. Judgments entered November 20, 2018 and April 17, 2019.
- *United States v. Willis,* Nos. 18-3617-cr and 19-1051-cr, U.S. Court of Appeals for the Second Circuit. Judgments entered September 20, 2021.

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OPINIONS BELOW

The September 20, 2021 opinion, as amended, of the court of appeals affirming the judgment of the district court as to petitioner Isiah Pierce may be found at *United States v. Willis,* 14 F.4th 170 (2d Cir. 2021), and is reproduced at Appendix A. The October 19, 2021 order of the court of appeals denying the petition for rehearing is reproduced at Appendix D. *United States v. Willis,* 18-3617; 19-1051 (2d Cir. October 19, 2021). The February 21, 2018 decision and order of the district court denying defendant's motion for judgement of acquittal may be found at *United States v. Pierce,* 2018 WL 991793 (W.D.N.Y. 2018) and is reproduced at Appendix B. The February 6, 2019 decision and order of the district court denying

defendant's post-trial motion for a new trial based on ineffective assistance of counsel may be found at *United States v. Pierce,* 2019 WL 468124 (W.D.N.Y. 2019) and is reproduced at Appendix C.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2021. App. A. The order denying the petition for rehearing was entered on October 19, 2021. App. D. This Court granted petitioner's motion to extend the time within which a petition for certiorari could be filed until March 18, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"In all criminal prosecutions," the Sixth Amendment guarantees that "the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI

Rule 33(a) of the Federal Rules of Criminal Procedure provides in pertinent part: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."

Title 28, Section 2255(a) provides in pertinent part: "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."

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[1] Occasional references are made to the Second Circuit appendix filed by petitioner ("PA__"), and filings in the district court ("WDNY#__") and circuit court ("CTA2#__"). Internal quotes and citations in case citations are eliminated unless otherwise noted.

STATEMENT OF THE CASE

A. District Court Proceedings

1. Petitioner Isiah Pierce along with co-appellant Willis were tried together in a multi-count indictment on a circumstantial theory that they were both criminally responsible for narcotics and weapons apprehended at 70 Henrietta Avenue, Buffalo, New York. The focus was necessarily on the question of dominion and control, by Willis of the lower apartment, and by Pierce of the upper apartment. No witness observed Willis or Pierce undertake any activity related to drugs or weapons. App.A. at 2-3.

On December 1, 2016, the Erie County Sheriff's Office Narcotics Unit was conducting surveillance of 70 Henrietta related to suspected drug activity by Willis. During the course of that surveillance, a Dodge Charger driven by Petitioner Pierce and a Chevy Equinox driven by Tanzie Fuller pulled up at 70 Henrietta. Pierce and Fuller went inside for 20-30 minutes and were not observed. They left together in the Equinox, with Pierce driving. App.A. at 2.

The surveilling officer "called out" the Equinox which was pulled over for a pretextual stop concerning excessive "tint." Based on a claimed odor of marijuana, Pierce and Fuller were subjected to searches and arrested. In the car, five phones were seized as well as apprehension of a "violation" (non-criminal) amount of never-tested and unlit vegetable matter for which no charges were ever made. Pierce had $1700 cash. A set of keys were also seized but it was unclear whether left in the car or from Pierce. App.A. at 2.

Among these keys – actually multiple rings of keys attached together (PA72-76)– were keys to the Equinox as well as keys later determined to open the upper apartment at 70 Henrietta as well as a locked closet. The key set also had a "Tops Bonus Card" registered in the name of Courtney Brouse, Pierce's girlfriend and mother of his child. App.A at 2-3. Brouse also had an uncertain relationship with Tanzie Fuller who had driven the Equinox to 70 Henrietta. Indeed, Fuller was hiding in the attic of Brouse's residence when it was subsequently searched by the police.

Following the arrests of Pierce and Fuller (and the separate arrest of Willis), a subsequent search of 70 Henrietta resulted in seizure of drugs and weapons in both the downstairs and upstairs apartments, including in the upstairs closet unlocked by the keys that had been seized during the automobile search. A gun was also found in the upper with DNA that contained a mix of five people, and it was deemed highly likely that one of them was Pierce. App.A. at 3,5. Although documents, clothing and other evidence linked Willis to the downstairs apartment, no such linkage apart from the DNA evidence linked Pierce to the upstairs apartment.

The government also introduced evidence of text messages on a phone attributed to Pierce with messages said to use references commonly employed in heroin trafficking such as "buns" and "stamps." Also, a recorded call from jail by Pierce to Brouse said "they have my keys." App.A. at 5.

The jury returned a mixed verdict. Both Pierce and Willis were convicted of substantive drug and weapons charges and with maintaining a drug premises.

They were acquitted of conspiring with each other as well as with possessing drugs "found" in the interview rooms where they were following their arrests. App.A at 3.

2. After the verdict, both defendants renewed motions for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which motions were denied. App.B. Thereafter, Petitioner Pierce asked for replacement counsel who was appointed and filed a motion under Rule 33 for a new trial due to ineffective assistance of trial counsel. The motion cited trial counsel's failure to file a suppression motion directed at the car stop and search and arrest of Pierce rather than the motion that was filed regarding the search of 70 Henrietta. New counsel argued that the original suppression motion directed to 70 Henrietta was misguided since no claim was made that Pierce had a privacy interest there, and indeed was denied on that basis. *See* WDNY#40 at 2-3. Instead on the posttrial motion, it was urged that a motion to suppress should have been directed to the unreasonable car stop, suppressing the keys and other evidence directly seized, as well as the fruits of that search at 70 Henrietta. The motion was litigated fully. *See* PA85-125 (motion with exhibits); PA126-32 (opposition); PA133-37(reply). And it was denied in written decision. App.C (opinion and order denying motion).

In denying the claim, the district court held the evidence suggested a valid initial stop for overly tinted glass even if the reason for the stop was pretextual, and that probable cause existed for the further search because of the smell of marijuana. Finally, the court held that the search of the car was a valid inventory search in light of the probable cause furnished by the marijuana smell. App.C.

B. Decision of the Court of Appeals

On appeal, the Court affirmed other than to remand for resentencing as to Willis. *See* App.A.

1. Pierce made an overarching claim applicable to all counts of conviction that based on the government's entirely circumstantial case, a reasonable jury could not have concluded beyond a reasonable doubt without engaging in speculation that he held sufficient dominion and control over the upper apartment at 70 Henrietta to be convicted of drug trafficking and weapons offenses associated with what the search revealed there. At some length, Pierce argued that the key evidence of the keys seized at the traffic stop that opened the doors at the upper apartment at 70 Henrietta was subject to competing inferences, particularly that it was equally likely that the keys belonged to Tanzie Fuller who used the keys to drive the Equinox to 70 Henrietta, making the fact that Pierce drove afterwards random. Although the set of multiple keys had a Tops Card registered to Pierce's girlfriend, Fuller had an unspecified relationship to her also, and was found hiding in her attic when her residence was searched. *See* CTA2#118 at 22-37; #189 at 1-13 (appeal briefs).

Rejecting these arguments, the Panel held that "it is true that the evidence produced at trial connecting Pierce to 70 Henrietta—and consequently to the drugs and weapons which were recovered—did not rule out an inference that others were involved in the drug trafficking at that location." The Court held, however, that

"the government was not required to prove that the contraband was not subject to the control of others, because possession need not be exclusive, and the jury was not required to accept Pierce's alternative explanation of innocence." App.A. at 5.

Acknowledging that the keys were the key piece of evidence, the court said "the government's evidence that the keys belonged to Pierce was compelling." The court cited that the keys included the Tops bonus card belonging to Courtney Brouse, and that Pierce was recorded saying from prison that "they have my keys." App.A. at 5.

2. Pierce also appealed the district court's denial of his ineffective assistance of counsel claim in connection with the car stop and arrest of Pierce which had not been challenged before trial. As described, the issue had been litigated at some length below, and resulted in a lengthy written denial. On appeal, *inter alia,* Pierce stressed that although this Court has permitted pretextual searches, the search below was unreasonable because (i) it far exceeded the time necessary to issue a ticket for tinted windows (ii) the claimed probable cause to search and arrest was entirely lacking because the officer admitted the never tested "vegetable matter" was of a violation or non-criminal weight. *See* CTA2 #118 at 43-51; #189 at 16-20 (appeal briefs).

The court of appeals, however, disposed of this issue on a ground never argued in any of the proceedings in the district or appellate courts. Citing a "baseline aversion" to deciding ineffective assistance claims on direct appeal and without explanation a lack of a "sufficiently developed" record, the court dismissed

the claim, leaving petitioner only to a motion under 26 U.S.C. § 2255:

> Pierce also raises various issues relating to the effectiveness of his trial counsel. Though it is not a rigid rule, this circuit has a "baseline aversion to resolving ineffectiveness claims on direct appeal." *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). We do not believe that the record is sufficiently developed for us to appropriately assess Pierce's ineffective assistance of counsel claim. We thus refrain from deciding it and Pierce is free to raise the claim in a petition for habeas corpus under 28 U.S.C. § 2255. *See United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006).

App.A. at 11n.6.

Petitioner filed a petition for rehearing to the panel that decided the case, arguing that under circuit precedent, since the ineffective assistance claim had already been litigated and ruled upon by the district court, even if the record was insufficiently developed the case should be remanded to the district court. This would allow petitioner to benefit from assistance of counsel to remedy the deficiencies in the record and to avoid petitioner having to redress this matter pro se from his place of incarceration far removed from Buffalo where any such unidentified evidence would be. *See* CTA2 #250. The petition was denied without explanation . App.D.

REASONS FOR GRANTING THE PETITION

The Second Circuit's Dismissal of An Ineffective Assistance of Counsel Claim Decided By Posttrial Motion Conflicts With Other Circuits and This Court's Decision in *Massaro v. United States,* 538 U.S. 500 (2003).

Although petitioner timely and thoroughly challenged his trial lawyer's effectiveness in a posttrial motion decided by the district court, the court of appeals, summarily invoked its "baseline aversion" to deciding such claims on direct appeal, leaving petitioner to a pro-se collateral remedy under 28 U.S.C. § 2255. The courts are not in agreement about this approach, specifically, whether the aversion to deciding ineffective assistance claims on direct appeal applies where the district court has considered the issue on posttrial motions, and whether, even if the record is deficient, whether the matter should be remanded so defendants in this position can retain the right to counsel rather than be forced to litigate from prison. Beyond the conflicting approaches in the courts of appeal, the approach of the court below frustrates the right to counsel and to appeal, and is at odds with central authority of this Court.

A. *Massaro v. United States,* 538 U.S. 500 (2003) and Claims of Ineffective Assistance of Counsel Raised For the First Time on Appeal.

1. In *Massaro v. United States,* 538 U.S. 500 (2003) this Court addressed whether a criminal defendant should or must raise claims of ineffective assistance of trial counsel on direct appeal. The Court held failure of a defendant to raise such a claim on direct appeal could not be held against him, as a procedural default, in any subsequent collateral proceedings under 28 U.S.C. § 2255. *Massaro* abrogated

a decision of the court below,[2] which had held that petition raising ineffective assistance of counsel under 28 U.S.C. § 2255 could be deemed procedurally defaulted where it could have been but was not raised by new appellate counsel on direct appeal. 538 U.S. at 502-03.

In explaining this decision, *Massaro* effectively established a presumption that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance." *Id.* at 504. Importantly, the Court was focused on ineffective assistance claims brought for the first time on direct appeal. The Court discussed the situation where the parties "must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* at 505. Rather, *Massaro* reasons, the district court is "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial," and that "ineffective-assistance claims ordinarily will be litigated in the first instance" and "often will be ruled upon by the same judge who presided at trial." *Id.* at 505-06.

2. *Massaro,* of course, put an end to courts defaulting collateral petitions raising ineffective assistance of counsel on a Section 2255 application. And, the courts of appeals are generally following the advice that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." *Id.* at 504. All courts of appeal have adopted rules in words or

[2] *Billy-Eko v. United States,* 8 F.3d 111 (2d Cir. 1993), *abrogated Massaro v. United States,* 538 U.S. 500 (2003).

substance disfavoring claims of ineffective assistance of counsel raised for the first time on direct appeal.[3]

These same courts recognize *Massaro's* caveat that "we do not hold that ineffective-assistance claims must be reserved for collateral review." 538 U.S. at 508. The Court noted that "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.* Likewise, the Court noted, "[t]here may be instances, too, when serious deficiencies in representation will be addressed by an appellate court *sua sponte*." *Id. See, e.g., United States v. Freeman*, 24 F.4th 320, 331 (4th Cir. 2022); *United States v. Ortiz-Vega*, 860 F.3d 20 (1st Cir. 2017); *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014); *United States v. Wells,* 623 F.3d 332, 347–48 (6th Cir.2010) ; *United States v. Khedr,* 343 F.3d 96, 100 (2d Cir.2003) ;*United States v. Rashad*, 331 F.3d 908, 909 (D.C. Cir. 2003).

[3] *See, e.g.,United States v. Rashad*, 331 F.3d 908, 909 (D.C. Cir. 2003); *United States v. Ortiz-Vega*, 860 F.3d 20, 28-29 (1st Cir. 2017); *United States v. Gaskin*, 364 F.3d 438, 467–68 (2d Cir. 2004); *United States v. Thornton*, 327 F.3d 268, 271-72 (3d Cir. 2003); *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991); *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014); *United States v. Hynes*, 467 F.3d 951, 969 (6th Cir. 2006); *United States v. Cates*, 950 F.3d 453, 457 (7th Cir. 2020); *United States v. Sanchez–Gonzalez*, 643 F.3d 626, 628 (8th Cir. 2011); *United States v. Steele*, 733 F.3d 894, 897 (9th Cir. 2013); *United States v. Erickson*, 561 F.3d 1150, 1170 (10th Cir. 2009); *United States v. Patterson*, 595 F.3d 1324, 1328-29 (11th Cir. 2010).

B. Appeals Raising Ineffective Assistance of Counsel Claims Already Decided In the District Court on Posttrial Motions Involve Multiple Conflicting Approaches in the Courts of Appeal.

This case raises a much different situation not addressed in *Massaro* but impacted by its reasoning. Here, the claim of ineffective assistance of counsel had been well-considered in posttrial motions before direct appeal. But the courts of appeal have divergent approaches to this situation, including whether *Massaro's* presumption against reviewability on direct appeal applies, and even if the record is deficient, whether the court should remand or dismiss in favor of a Section 2255 petition.

1. In the district court, petitioner was assigned new counsel under the Criminal Justice Act who filed a posttrial motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. The issue was briefed by both sides at length, with relevant document filings, producing a considered opinion by the district court. App.C. On appeal both sides briefed the issue at length and there was no suggestion that the issue was inappropriate for decision.

In an otherwise lengthy published opinion, the court of appeals, in a single footnote, dispatched petitioner to a future pro se Section 2255 motion. Citing a "baseline aversion to resolving ineffectiveness claims on direct appeal," and adding without explanation that "that the record is sufficiently developed," the court invoked the "usual practice" of leaving a defendant to remedies under 28 U.S.C. § 2255. App.A. at 11n.6. When a petition for rehearing asked the court to at least remand under circuit authority so that petitioner could have counsel to address the

mysterious deficiency in the record, the petition was denied without explanation. App.D.

2. Other courts identify an exception where the ineffective assistance of counsel claim was litigated and decided in a posttrial motion. Rather than invoke a "baseline aversion," they effectively reverse the presumption in favor of review. The Seventh Circuit deems direct appeals raising ineffective assistance "almost always imprudent," that is, "[u]nless the issue was raised and a full record developed in the trial court." *United States v. Cates*, 950 F.3d 453, 457 (7th Cir. 2020). The Eleventh Circuit "will not … consider [a] claim[ ] of ineffective assistance of counsel raised on direct appeal where the district court did not entertain the claim nor develop a factual record." *United States v. Patterson*, 595 F.3d 1324, 1328 (11th Cir. 2010). The Fourth Circuit deems review of ineffective assistance of counsel on direct review "improper[]" where "[t[he issue was not preserved on the record below." *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991). Although considered a rare exception, the Tenth Circuit will undertake review on direct appeal "where the issue was raised before and ruled upon by the district court *and* a sufficient factual record exists." *United States v. Battles*, 745 F.3d 436, 457 (10th Cir. 2014).

It makes sense to reverse the presumption. Although appellate courts always retain discretion to remand to develop the record, where an issue is properly preserved and reviewed by the district court there should be no baseline aversion to reviewability. Arguably, applying the *Massaro* presumption to a situation it never

discussed – properly preserved rulings on ineffective assistance of counsel – has the effect of denying the right to appeal on a constitutionally based issue.

3. The courts of appeal are also not in accord on the related doctrine, of how district courts should handle ineffective assistance of counsel questions that *are* the subject of posttrial motions. A lead decision of the Second Circuit holds that a district court hearing such a motion should not apply the *Massaro* presumption, which is for appellate courts, but rather should exercise discretion in weighing pros and cons to ruling on the issue before judgment – all subject to abuse of discretion review. *United States v. Brown*, 623 F.3d 104, 112-14 (2d Cir. 2010). The First and Ninth Circuits have adopted this approach. *United States v. Ortiz-Vega*, 860 F.3d 20, 29-32 (1st Cir. 2017); *United States v. Steele*, 733 F.3d 894, 897 (9th Cir. 2013).

Oddly enough, the case below is in considerable tension with circuit precedent *Brown.* Indeed, the district court explicitly concluded that the issue was appropriate for decision under *Brown.* App.C at 2. But the court of appeals made no abuse of discretion finding, reverting simply to the "baseline aversion" to ruling on any ineffective assistance issue on appeal.

The Sixth Circuit appears to disagree with *Brown.* The Sixth Circuit instructs district courts to apply the *Massaro* presumption against direct review. *See United States v. Johnson*, 627 F.3d 578, 584-85 (6th Cir. 2010)(declining to follow *Brown* because application made before verdict); *United States v. Lee*, 834 Fed.Appx. 160 (6th Cir. 2020)(upholding district court's refusal to consider posttrial motion under *Massaro* and circuit precedent).

4. The courts of appeal are also in conflict whether to remand in a case like this, where the district court ruled on an ineffective assistance motion but the court of appeals deems the record insufficient. Whether the appeal is remanded or dismissed in favor of Section 2255 proceedings matters a great deal because on a Section 2255 remand, the defendant would not have the right to counsel. *See Pennsylvania v. Finley,* 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions ... Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further").

In the case below, the court of appeals dismissed the ineffective assistance of counsel claim in a footnote and denied a petition for rehearing urging the court to at least remand the case, so that petitioner would have counsel. After all, his assigned counsel presumably was responsible for the undefined inadequacy in the record. Petitioner argued that it was most unfair to put him in this position from prison in New Jersey, when his assigned counsel was in Buffalo where the underlying documents and witnesses related to the issue would be located. *See* CTA2 #250.

The court below had clear authority to treat petitioner fairly and remand with assigned counsel. In *United States v. Levy*, 377 F.3d 259 (2d Cir. 2004), like here, the ineffective assistance claim had been presented to the district court but the court of appeals found the record deficient. *Levy* remanded explaining:

> While we have expressed a "baseline aversion to resolving ineffectiveness claims on direct review," *United States v. Morris,* 350 F.3d 32, 39 (2d Cir.2003) (internal quotation marks omitted), that general preference is largely rooted in the difficulty a court of

> appeals faces when resolving an ineffective assistance claim without the benefit of district court factfinding. The rationale is less applicable where, as here, a defendant has already presented a claim of ineffective assistance to the district court prior to direct appeal. [*Id.* at 265-66]

See also Brown, 623 F.3d at 113-14(remanding and rejecting government argument for dismissal to force appellant to utilize 28 U.S.C. § 2255).

The Second Circuit's inconsistency is part of a larger pattern of confusion among the courts of appeal as to whether remand or dismissal in deference to Section 2255 is the proper remedy. In all cases, the D.C. Circuit, for example, "remands colorable and previously unexplored claims of ineffective assistance rather than dismissing in favor of collateral review under 28 U.S.C. § 2255." *United States v. Marshall*, 946 F.3d 591, 596 (D.C. Cir. 2020) (explaining that it regards the *Massaro* comments favoring Section 2255 resolutions as non-mandatory).[4]

At the other end of the spectrum, the Seventh Circuit has held that on a direct appeal of an issue concerning ineffective assistance "we do not have the option of remanding to the district court." *United States v. Holman,* 314 F.3d 837, 843 n.4 (7th Cir.2002). That court subsequently observed that after *Massaro,* the court had not remanded a single such case. *See United States v. Wilson*, 240 Fed.Appx. 139 (7th Cir. 2007).

In between are other potential formulations. The Second Circuit's inconsistent approach is one. The First Circuit requires that the "typical" case be

[4] The Second Circuit has specifically disagreed with this approach. *See United States v. Doe*, 365 F.3d 150, 155 n.2 (2d Cir. 2004)(noting disagreement with *United States v. Rashad*, 331 F.3d 908, 911 (D.C. Cir. 2003)).

filed under Section 2255, while only rare cases should result in an appellant ruling. In between is a "gray area" where if there are "sufficient indicia of ineffectiveness" the court will "remand[] for an evidentiary hearing on the issue without requiring defendant to bring a collateral attack instead." *United States v. Colon-Torres*, 382 F.3d 76, 84-85 (1st Cir. 2004).

* * *

As in *Massaro,* this Court can and should provide meaningful guidance. Vital principals are at stake. Petitioner here, through assigned counsel, timely and properly filed a detailed motion for a new trial based on ineffective assistance of counsel, and received a considered denial from the district court. Finding the record insufficient – but declining to say why – the court dispatched petitioner to a Section 2255 petition. He has arguably had his claim extinguished. Despite having the right to counsel when he filed the posttrial motion, he will have no right to counsel on a Section 2255 petition that he will have to file while in prison without access to whatever evidence is missing. In addition to being denied fundamental fairness and the right to counsel, he has arguably been denied his right to appeal an issue he properly preserved in the district court. Situations like this would benefit from national clarity provided by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 18, 2022

Respectfully submitted,

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