No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARVEZ BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a federal district court possess meaningful discretion to define "proof beyond a reasonable doubt" in jury instructions upon request of a criminal defendant?

II. If a federal defendant for the first time on direct appeal raises a colorable claim of ineffective assistance by his trial counsel, with support in the existing record, should a Court of Appeals remand the case to the district court to conduct an evidentiary hearing rather than require the defendant to wait until a post-conviction proceeding under 28 U.S.C. § 2255, when he has no right to the assistance of counsel, to raise the claim?

III. In order to convict a defendant of robbery of a business establishment under the Hobbs Act, 18 U.S.C. § 1915(a), must the prosecution prove beyond a reasonable doubt that the charged robbery itself had a "substantial" effect on interstate commerce – without considering the "aggregate" effect on interstate commerce of other robberies of similar business establishments?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Charvez Brooks, aka Vito*, No. 1:18-cr-00408, United States District Court for the District of Maryland. Judgment entered on October 15, 2021.

- *United States v. Charvez Brooks*, *aka Vito*, No. 21-4569, United States Court of Appeals for the Fourth Circuit. Judgment entered on January 3, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Charvez Brooks petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion (Pet. App.) is unreported but is available at 2023 WL 20874.

JURISDICTION

The Court of Appeals entered its opinion and judgment on January 3, 2023. Pet. App. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Congress may "regulate [c]ommerce . . . among the several [s]tates."

U.S. Const., Art. I, § 8, cl. 3.

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defen[s]e."

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

On August 28, 2019, a federal grand jury in the District of Maryland returned a superseding indictment charging three defendants – petitioner, Jesse James Elder, and Levon Butts with – conspiracy to commit a robbery in violation of 18 U.S.C. § 1951(a) (count one) and robbery in violation of 18 U.S.C. § 1951(a) (count two). 4th Cir. App. 30. Petitioner pleaded not guilty and, on August 25, 2020, he had a jury trial, with Chief United States District Judge James K. Bredar presiding. 4th Cir. App. 33 *et seq*. On August 31, 2020, the jury convicted petitioner of the charge in count one but acquitted him of the charge in count two. 4th Cir. App. 1017.

On October 15, 2021, the district court sentenced petitioner to 124 months of imprisonment, to be followed by a three-year term of supervised release. 4th Cir. App. 1104. The court also imposed a $100 special assessment but waived a fine. 4th Cir. App. 1107. The court entered its written judgment on the same day. 4th Cir. App. 1141.

On January 3, 2023, the United States Court of Appeals for the Fourth Circuit

affirmed petitioner's conviction. *United States v. Brooks*, No. 21-4569, 2023 WL 20874 (4th Cir. Jan. 3, 2023) (Pet. App 1a.) Petitioner did not file a petition for rehearing in the Court of Appeals.

The Fourth Circuit's opinion summarized the evidence at trial:

> Brooks was charged with conspiracy and substantive robbery based on his alleged participation in the robbery of an Exxon gas station in Baltimore, Maryland, on January 16, 2018. The evidence at trial showed that coconspirator Jesse Elder alerted the third coconspirator, Levon Butts, when the victim – the gas station's owner – left the station with a bag of money to bring to the bank. Butts and another man, alleged to be Brooks [both wearing masks], then approached the victim, snatched the bag, shoved the victim to the ground, and fled. The victim suffered serious physical and emotional trauma from the incident.
>
> Butts and Elder were tied to the crime through DNA and cell-phone records, and both pleaded guilty. The case against Brooks rested on Elder's testimony implicating him alongside circumstantial evidence that Brooks was the owner of the getaway car; that he received a phone call from Elder after Elder's arrest warning him and asking him to warn Butts; that he fit the general physical description of the man who assisted Butts; and that Brooks allegedly posted a video on Instagram the day after the robbery showing him with significant amounts of cash.

Brooks, 2023 WL 20874, at *1.

REASONS FOR GRANTING THE PETITION

Petitioner's case raises three important issues, each independently worthy of review by this Court. Two issues implicate widespread, entrenched circuit splits (both involving every circuit), and the third is an issue specifically reserved by this Court in 2016 for a decision in a future case. Petitioner's case is an excellent vehicle for this Court to decide all three questions. Each issue was addressed on the merits by the Fourth Circuit, and no procedural or jurisdictional hurdles exist concerning any of the three questions.

I.
This Court Should Grant Certiorari to Resolve the Widespread Circuit Split Concerning the Degree of Discretion that a Federal District Court Possesses to Define "Proof Beyond a Reasonable Doubt" in Jury Instructions.

At trial, petitioner requested that the district court give the jury a widely used definition of "beyond a reasonable doubt"[1] that has been endorsed by this Court. *See Baker v. Corcoran*, 220 F.3d 276, 292-93 (4th Cir. 2000) (noting that this Court gave its imprimatur to the "hesitate to act" definition in *Holland v. United States*, 348 U.S. 121, 140 (1954)).[2]

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[1] Petitioner's requested definition was as follows:

> [P]roof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decision in your own lives. If you're convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you're not convinced, say so by returning a not guilty verdict.

4th Cir. App. 730.

[2] This Court in *Holland* stated:

The district court in petitioner's case, expressing its disagreement with what it considered to be a clear mandate from the Fourth Circuit that denied district courts in the circuit any meaningful discretion, refused to submit the proposed instruction. The district court, noting that the Fourth Circuit position was in conflict with a clear majority of U.S. Courts of Appeals, stated:

> I decline to give the instruction following the directions in [several Fourth Circuit] cases. The 4th Circuit has repeatedly held that it is ill-advised to give an instruction on the definition of reasonable doubt. I happen to personally disagree with that view. I think it would be better if our practice was to attempt to define reasonable doubt for jurors. But when the circuit goes as far as they have, and even though they're an outlier, and it's a very unusual situation, and the rest of the country, most circuits, embrace the notion and the wisdom of defining reasonable doubt, it's still our circuit, and it's still their guidance, and I am obligated to faithfully follow that guidance. And so, in light of their affirmation of that view . . . [which] th[e] [Fourth] [C]ircuit has held for a long time, I will not attempt to define reasonable doubt. And, Mr. Murtha [petitioner's trial counsel], you've got your record. And if some day you can convince the Court of Appeals that they should revise that advice, you're not going to run into any disagreement or criticism from me, but I don't think that's the law. I think a judge's first responsibility is to follow the law.

4th Cir. App. 561-62.

> Even more insistent is the petitioners' attack . . . on the charge of the trial judge as to reasonable doubt. He defined it as "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, *see Bishop v. United States*, 71 App. D.C. 132, 107 F.2d 297, 303, rather than the kind on which he would be willing to act.

Holland, 348 U.S. at 140.

On petitioner's appeal, the Fourth Circuit concluded "that the district court clearly recognized that, while we have stopped short of actually forbidding district courts from defining 'reasonable doubt,' we have repeatedly warned them away from doing so. . . . The district court's evaluation of Brooks's request was consistent with our precedent." *Brooks*, 2023 WL 20874, at *2 (citing *United States v. Hawkins*, 776 F.3d 200, 213 n.9 (4th Cir. 2015), and *United States v. Lighty*, 616 F.3d 321, 380 (4th Cir. 2010)).

As the district court noted, the Fourth Circuit's approach – strongly discouraging, to the point of effectively prohibiting, district courts from defining the reasonable-doubt standard in jury instructions[3] – conflicts with the decisions of the vast majority (nine) of the other U.S. Courts of Appeals. Those circuit courts either afford district courts meaningful discretion to define (or not define) "reasonable doubt," actually encourage definitions, or approvingly note that their circuits' pattern jury instructions include a definition (most of which include the "hesitate to act" definition proposed by petitioner at his trial). *See, e.g.*, *United States v. Herman*, 848 F.3d 55, 57 (1st Cir. 2017) ("The district court . . . retains significant discretion in formulating its instructions [defining 'reasonable doubt']."); [4] *United States v. Shamsideen*, 511 F.3d 340, 343-44 (2d Cir. 2007) (approving

[3] Indeed, in petitioner's case, the district judge strongly wished to give the requested definitional instruction but believed that he could not do so without failing to follow the "law" laid down by the Fourth Circuit. 4th Cir. App. 561-62 ("I think a judge's first responsibility is to follow the law.").

[4] The First Circuit's pattern jury instructions note that:

> The First Circuit has approved the following formulation by Judge Keeton:

As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions-one that a defendant is guilty as charged, the other that the defendant is not guilty- you will find the defendant not guilty.

It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

United States v. Cleveland, 106 F.3d 1056, 1062-63 (1st Cir. 1997), *aff'd sub nom. Muscarello v. United States*, 524 U.S. 125 (1998), *recognized as abrogated on other grounds by Brache v. United States,* 165 F.3d 99 (1st Cir. 1999).

First Circuit Judicial Conference, *Pattern Criminal Jury Instructions for the District Courts in the First Circuit* 3.02, available at: https://www.mad.uscourts.gov/resources/pattern2003/; *see also United States v. Soto*, 799 F.3d 68, 96-97 (1st Cir. 2015) (approving of the same definition given in *Cleveland*).

"hesitate to act" definition);[5] *United States v. Hernandez*, 176 F.3d 719, 728 (3d Cir. 1999) (affording district courts discretion to define reasonable doubt);[6] *United States v. Williams*, 20 F.3d 125, 129 n.2 (5th Cir. 1994) ("Although we do not require the use of this instruction [the 'hesitate to act' definition], we have encouraged the district courts in this Circuit to adopt this instruction."); *United States v. Stewart*, 306 F.3d 295, 306-07 (6th Cir. 2002) (approving the "hesitate to act" definition "taken verbatim from this Circuit's Pattern Jury Instructions"); *United States v. Spires*, 628 F.3d 1049, 1054 (8th Cir. 2011) ("We continue to uphold this instruction and find that the district court did not abuse its discretion when it used [Eighth Circuit Model Jury] Instruction 3.11 [the 'hesitate to act' definition] to advise the jury regarding 'reasonable doubt.'"); *United States v. Nolasco*, 926 F.2d 869,

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[5] The Second Circuit, which does not have pattern jury instructions, repeatedly has recommended that district courts use the definition of "reasonable doubt" taken from Leonard B. Sand *et al.*, 1 *Modern Federal Jury Instructions-Criminal* P4.01 ("hesitate to act" definition). *See Shamsideen*, 511 F.3d at 343-44; *accord United States v. Delibac*, 925 F.2d 610, 614 (2d Cir. 1991); *United States v. Birbal*, 62 F.3d 456, 458-59 (2d Cir. 1995).

The other leading privately-published federal pattern jury instructions include the "hesitate to act" definition. *See* Kevin F. O'Malley *et al.*, 1A FED. JURY PRAC. & INSTR. § 12:10 (6th ed. Aug. 2022 update); 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 11.14 (3d ed. 1977).

[6] The Third Circuit's pattern jury instructions provide:

> Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

Committee on Model Criminal Jury Instructions for the Third Circuit, *Model Criminal Jury Instructions for the Third Circuit* 3.06, available at: https://www.ca3.uscourts.gov/sites/ca3/files/2021%20Chapter%203%20for%20posting%20final.pdf.

872 (9th Cir. 1991) (en banc) ("We . . . hold that an appropriate instruction defining reasonable doubt is permissible but not necessarily required.");[7] *United States v. Conway*, 73 F.3d 975, 981 (10th Cir. 1995) ("[T]rial courts retain considerable latitude in instructing juries on reasonable doubt.");[8] *United States v. Hansen*, 262 F.3d 1217, 1249-50 (11th Cir.

[7] The Ninth Circuit's pattern jury instructions include the following definition:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt. A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* 6.05, available at: https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2022_3.pdf.

[8] Noting *United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974) ("A defendant is entitled . . . to have the meaning of reasonable doubt explained to the jury."), the Tenth Circuit's pattern jury instructions provide:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, *Criminal Pattern Jury Instructions* 1.05, available at: https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20Version.pdf

2001) (appearing to review district court's decision whether to define "reasonable doubt" for abuse of discretion); *see also United States v. Montgomery*, 631 Fed. App'x 666, 668 (11th Cir. 2015) (approving of the Eleventh Circuit's pattern jury instruction, which adopted the "hesitate to act" definition).

Conversely, only the Seventh Circuit – and, in dicta, the D.C. Circuit – have sided with the Fourth Circuit. *See, e.g.*, *United States v. Langer*, 962 F.2d 592, 600 (7th Cir. 1992) ("It has been, and continues to be, our opinion that . . . defining reasonable doubt presents a situation equivalent to playing with fire.") (citation and internal quotation marks omitted);[9] *United States v. Taylor*, 997 F.2d 1551, 1558 (D.C. Cir. 1993) ("[W]e are . . . of the opinion that the greatest wisdom may lie with the Fourth Circuit's and Seventh Circuit's instruction [to district courts] to leave to juries the task of deliberating the meaning of reasonable doubt.").[10]

Although this Court has held that, "[t]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course," *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), this Court since *Victor* has not addressed whether federal district courts possess meaningful discretion to define reasonable doubt. In view of the wide division on this important issue among all of the circuits, this Court should grant

[9] Accordingly, the Seventh Circuit's pattern jury instructions provide that: "The Committee recommends that no instruction be given defining "reasonable doubt." Committee on Federal Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* 2.04, available at https://www.ca7.uscourts.gov/pattern_jury_instr/pjury.pdf.

[10] Like the Second Circuit, the D.C. Circuit does not have pattern jury instructions.

certiorari and, as matter of this Court's supervisory authority, decide whether federal district courts possess meaningful discretion to define "proof beyond a reasonable doubt."[11]

II.

This Court Should Grant Certiorari to Resolve the Widespread Circuit Split Concerning Whether a Federal Criminal Defendant on Direct Appeal Is Entitled to Remand for an Evidentiary Hearing if He Raises a Colorable Claim of Ineffective Assistance by His Trial Counsel.

Represented by a different appointed attorney than his appointed trial counsel, petitioner, on direct appeal to the Fourth Circuit, for the first time raised a claim that his trial counsel had provided ineffective assistance. Petitioner contended that, because the existing record demonstrates that his claim is at least "colorable" – that is, a plausible claim worthy of appellate review after further factual development[12] – the Fourth Circuit should remand to the district court for an evidentiary hearing on the claim. The Fourth Circuit refused to do so but recognized that "some of our sister circuits would . . . remand for an

[11] There is good reason to define "reasonable doubt," even if the Constitution does not require it. Recent empirical studies have shown that lay jurors do not understand the concept of "reasonable doubt" and often mistakenly believe that a conviction can occur based on evidence clearly insufficient under the Due Process Clause. *See, e.g.*, White & Cicchini, *Is Reasonable Doubt Self-Defining*?, 64 VILLANOVA L. REV. 1, 2 (2019) ("[T]here is now strong empirical support for a conclusion that reasonable doubt is not self-defining."); *id.* at 24 ("The empirical evidence has repeatedly demonstrated that reasonable doubt is not self-defining; instead, jurors need assistance in understanding and appreciating the high burden of proof that the government must meet when it attempts to deprive a person of life, liberty, and property."); *see also* Shapiro & Muth, *Beyond a Reasonable Doubt: Juries Don't Get It*, 52 LOY. U. CHI. L.J. 1029 (2021).

[12] *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 122 (1982) (equating "colorable" with "plausible" in a different context in a habeas corpus proceeding); *cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) ("A claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 … may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is … 'wholly insubstantial and frivolous.'") (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)).

evidentiary hearing" when a federal defendant raises a "colorable" ineffectiveness claim for the first time on direct appeal. *Brooks*, 2023 WL 20874, at *2; *see generally* Brent E. Newton, *Incentivizing Ineffective-Assistance-of-Counsel Claims Raised on Direct Appeal: Why Appellate Courts Should Remand "Colorable" Claims for Evidentiary Hearings*, 22 J. APP. PRAC. & PROCESS 107, 113-15 & nn.28-34 (2022) (discussing the widespread circuit split concerning this issue).

That circuit split is further discussed below. First, however, petitioner will demonstrate why he has raised a "colorable" claim of ineffective assistance by his trial counsel.

A. Petitioner's "Colorable" Ineffectiveness Claim

After the jury convicted petitioner of the charge in count one (conspiracy) but acquitted him of the charge in count two (actually committing the robbery at the gas station), petitioner's trial counsel had 14 days in which to file a motion for a new trial. Fed. R. Crim. P. 33. The jury's split verdict, combined with the fact that a single prosecution witness, Jesse James Elder, was essential to petitioner's conviction, strongly militated in favor of filing a motion for a new trial on the ground that the jury's verdict was against the weight of the evidence. Yet petitioner's trial counsel inexplicably failed to do so. Trial counsel's failure was the basis of petitioner's ineffectiveness claim raised on direct appeal.

Concerning a motion for a new trial under Rule 33, the Fourth Circuit has held that:

> Rule 33 allows a district court to grant a new trial in the interest of justice. When the motion attacks the weight of the evidence, the court's authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence. In deciding a motion for a new trial, the district court is not constrained by the requirement that it view the evidence in the light most favorable to the government. Thus, it may evaluate the credibility of the witnesses. When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial.

United States v. Arrington, 757 F.2d 1484, 1485 (4th Cir. 1985).

As the Sixth Circuit has further explained, in contrasting a district court's assessments of the evidence under Federal Rule of Criminal Procedure 29 with Rule 33:

> Rule 29 asks whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) – not whether the trial judge himself believes the manifest weight of the evidence supports the verdict . . . So while Rule 29 requires the court to view the evidence in a light most favorable to the prosecution, . . . Rule 33 does not. . . . In the end, the manifest weight of the evidence may support the verdict. But as an appellate court, this is not for us to say. The judge that saw the witnesses and sat with the evidence at trial must make that call.

United States v. Mallory, 902 F.3d 584, 586-87 (6th Cir. 2018).

Because it is very arguable that the "manifest weight" of the evidence at petitioner's trial did not support the jury's guilty verdict – when viewed through the prism of the reasonable-doubt standard, as Rule 33 requires[13] – there was no downside

[13] *See United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) ("We are convinced that the court weighed the evidence and assessed the credibility of the witnesses in reaching its conclusion that the jury verdict was contrary to the weight of the evidence. The court simply considered Robertson's guilty verdict in light of all of the evidence adduced at trial *and concluded that the government did not satisfy the standard of proof beyond a reasonable doubt.* Thus, after carefully reviewing the record, we are convinced that the district court did what it said it would do – rule on a motion for new trial.") (emphasis added).

whatsoever in filing a motion for a new trial. And there was a great deal to gain for petitioner – namely, a potential new trial on the sole remaining charge. For that reason, the record presents at least a colorable claim that petitioner's trial counsel was "deficient" under *Strickland v. Washington*, 466 U.S. 668 (1984). *Cf. Henry v. Scully*, 78 F.3d 51, 53 (2d Cir. 1996) (finding deficient performance in a case where defense "counsel should have made . . . a request [for a jury instruction] because there was no downside to doing so and there was a potential benefit to be gained").[14] The Fourth Circuit assumed *arguendo* that petitioner had demonstrated deficient performance. *Brooks*, 2023 WL 20874, at *2.

The existing record supports petitioner's further argument that he had made out a colorable claim that trial counsel's deficient performance "prejudiced" petitioner within the meaning of *Strickland* – i.e., that there is a "reasonable probability" that the district court would have granted a motion for a new trial if such a motion had been filed. *Strickland*, 466 U.S. at 691-94. At the sentencing hearing, the district court stated it was a "very close call" but found that petitioner was one of the two masked robbers (along with Butts) by a "preponderance of the evidence" after carefully studying the transcript of the trial. 4th Cir. App. 1069. Significantly, the district court also stated that *if*, contrary to the court's finding, petitioner had not been one of the two masked robbers, then the remaining evidence linking petitioner to Elder and Butts – namely, the robbers' use of petitioner's

[14] Petitioner's claim does not contend merely that there was "nothing to lose" in filing a motion for a new trial. *Cf. Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). Instead, he contends that there is at least a colorable argument that there is a reasonable probability that, if a motion had been filed, the district court would have granted a new trial on the conspiracy charge.

vehicle as the getaway car and petitioner's cryptic May 2018 cell phone call with Elder when he was in jail – would have been insufficient evidence to convict petitioner of conspiracy. 4th Cir. App. 1033-35.

These two findings by the district court, considered together, support petitioner's colorable claim of *Strickland* "prejudice." If the district court believed (based on its own view of the evidence) that the evidence merely satisfied the preponderance standard in a "very close" case, that belief appears to foreclose the conclusion that the "manifest weight of the evidence supports the verdict." *Mallory*, 902 F.3d at 586-87. *Cf. United States v. Hilliard*, 392 F.3d 981, 986-87 (8th Cir. 2004) (finding *Strickland* prejudice in a case where the federal defendant's attorney had failed to file a motion for a new trial; there was a reasonable probability the district court would have granted it despite constitutionally sufficient evidence supporting the jury's verdict).[15]

B. The Widespread, Three-Way Circuit Split

In *Massaro v. United States*, 538 U.S. 500 (2003), this Court addressed a related issue to the one raised by petitioner: whether a defendant *must* raise an ineffectiveness claim on direct appeal. This Court rejected the Second Circuit's requirement that a federal defendant must raise an ineffectiveness claim on direct appeal, if possible to do so, or risk procedurally defaulting that claim on a § 2255 motion for post-conviction relief, the

[15] The Fourth Circuit's statement that "Brooks cannot conclusively establish from the trial record that he was prejudiced by that performance" – because "in discussing the jury's guilty verdict on Count 1, the district court made plain that it agreed with that verdict," *Brooks*, 2023 WL 20874, at *2 – did not rule on whether petitioner had made out a "colorable" showing of *Strickland* prejudice. That statement instead was made in deciding whether the record "conclusively" established such prejudice.

equivalent of habeas review for federal defendants. However, the Court did not decide how a Court of Appeals should approach a colorable ineffectiveness claim raised on direct appeal when the record offered some support for the claim but was insufficiently developed for a merits-based decision. Since *Massaro*, the federal circuit courts' positions on the treatment of "colorable" ineffectiveness claims raised on direct appeal have hardened into an entrenched three-way split.

Nine federal circuit courts, including the court below, maintain the general rule of refusing to address the merits of ineffectiveness claims raised on direct appeal unless the existing record is "fully developed" or resolves the claim "conclusively," "obviously," or "beyond any doubt."[16] In addition to the Fourth, the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits fall into this group.[17] These courts leave ineffective

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

[17] The Second and Third Circuits acknowledge their authority to remand for evidentiary development when

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

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

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

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

for the purpose of litigating an ineffective assistance claim and is often incomplete"); *United States v. Morena*, 547 F.3d 191, 198 (3d Cir. 2008) ("The rationale … is that collateral review allows for adequate factual development . . . , because ineffective assistance claims frequently involve . . . conduct that occurred outside the purview of the district court." (citations and internal quotation marks omitted)); *United States v. Houtchens*, 926 F.2d 824, 828 (9th Cir. 1991) ("The rationale for this rule is that such a claim cannot be advanced without the development of facts outside the original record." (citation and internal quotation marks omitted)).

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

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

The Seventh Circuit has taken a different approach: it strongly admonishes defendants not to raise – or, if raised, to withdraw – ineffectiveness claims on direct appeal, but, if a defendant elects to raise an ineffectiveness claim on direct appeal, then the Seventh

Circuit will decide it on its merits, even on an inadequate evidentiary record.[18] *See, e.g.*, *United States v. Harris*, 394 F.3d 543, 555-59 (7th Cir. 2005) (denying ineffectiveness claim on the merits after cautioning against raising such claim "on direct appeal rather than bringing it on collateral review where a complete record can be made to support the claim."). And, once an ineffectiveness claim has been rejected on direct appeal, the Seventh Circuit considers that decision binding on the district courts in a later collateral review through the law of the case doctrine. *Id*. at 558. For that reason, the Seventh Circuit has deemed a defendant's decision to raise an ineffectiveness claim on direct appeal as "foolish." *United States v. Flores*, 739 F.3d 337, 342 (7th Cir. 2014).

In stark contrast, two federal circuit courts – the First and D.C. Circuits – have permitted a defendant to raise an ineffectiveness claim on direct appeal even if the existing

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

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

record does not "conclusively" resolve the claim, and these circuit courts have remanded for an evidentiary hearing when the record supports a "colorable" ineffectiveness claim.

The D.C. Circuit has a long-established practice of remanding "colorable" claims for further evidentiary development.[19] The D.C. Circuit's remand practice originally "derive[d] from the perceived unfairness of holding a defendant making a claim of ineffective assistance – for which new counsel is obviously a necessity – to the . . . time limitation . . . for filing a motion for a new trial"; it thus eliminated a "technical barrier" to an ineffectiveness claim, recognizing that trial counsel "cannot be expected to argue his

[19] *See, e.g.*, *United States v. Browne*, 953 F.3d 794, 804 (D.C. Cir. 2020) (because defendant "raised a colorable claim of ineffective assistance of counsel," remanding to the district court "to develop a record and assess those claims in the first instance"); *United States v. Norman*, 926 F.3d 804, 812 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 2555 (2020) ("[W]hen a defendant makes a colorable claim … for the first time on direct appeal, the proper practice is to remand the claim for an evidentiary hearing unless the record shows that the defendant is not entitled to relief." (citing *United States v. Rashad*, 331 F.3d 908, 909–10 (D.C. Cir. 2003))); *United States v. Haight*, 892 F.3d 1271, 1278 (D.C. Cir. 2018) (Kavanaugh, J.), *abrogated on other grounds by Borden v. United States*, No. 19-5410, 2021 WL 2367312 (U.S. June 10, 2021). ("[B]ecause ineffective assistance claims typically require factual development, we ordinarily remand those claims to the district court 'unless the trial record alone conclusively shows that the defendant either is or is not entitled to relief.'" (citing *Rashad*, 331 F.3d at 909–10)); *United States v. Knight*, 824 F.3d 1105, 1112 (D.C. Cir. 2016) (Kavanaugh, J.) ("This Court's typical practice on direct appeal … is to remand 'colorable' claims of ineffective assistance to the district court."); *United States v. Williams*, 784 F.3d 798, 804 (D.C. Cir. 2015) (Kavanaugh, J.) ("[O]ur typical practice on direct appeal is to remand 'colorable' claims of ineffective assistance to the district court without first substantially analyzing the merits."); *United States v. Bell*, 708 F.3d 223, 225 (D.C. Cir. 2013) ("[W]here a defendant raises a 'colorable and previously unexplored' ineffective assistance claim on appeal … we remand unless the 'record alone conclusively shows that the defendant either is or is not entitled to relief.'"); *United States v. Mohammed*, 693 F.3d 192, 204 (D.C. Cir. 2012) (remanding on direct appeal because defendant "has raised colorable claims … and the trial record does not conclusively show whether he is entitled to relief" (citing *Rashad*, 331 F.3d at 908-10)); *United States v. Williams*, 358 F.3d 956, 962 (D.C. Cir. 2004) ("[T]he record before us does not establish conclusively whether defense counsel's performance was unconstitutionally deficient or prejudicial. We therefore follow our general practice and remand the case for an evidentiary hearing on that issue."); *United States v. Poston*, 902 F.2d 90, 100 n.3 (D.C. Cir. 1990) (Thomas, J.) (observing that "this court has … remanded claims of ineffective assistance of counsel that were raised for the first time on appeal, [when] those claims alleged specific deficiencies and presented substantial factual issues that might establish a violation of the right to counsel").

own ineffectiveness in a motion for a new trial." *Rashad*, 331 F.3d at 911 (citations and internal quotation marks omitted).

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

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

Remand of a claim that is colorable also obviates the need for the circuit court to make a substantial analysis of an ineffectiveness claim on the merits at the outset of the appeal. *See id.* at 804. Although the court does not "reflexively remand," neither does it "hesitate to remand when a trial record is insufficient to assess the full circumstances and rationales informing the strategic decisions of trial counsel." *Id.* at 804 (citations and internal quotation marks omitted).

Like the D.C. Circuit, the First Circuit will remand for an evidentiary hearing when the defendant "affirmatively makes out a colorable claim of ineffectiveness" or "has identified in the record 'sufficient indicia of ineffectiveness.'" *See, e.g.*, *United States v. Márquéz-Perez*, 835 F.3d 153, 165 & n.6 (1st Cir. 2016) (citing cases).

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

C. This Court Should Endorse the Position of the D.C. and First Circuits

There is a strong reason for this Court to endorse the practice of the D.C. and First Circuits and thereby not relegate federal defendants who raise colorable ineffectiveness claims on direct appeal to litigating such claims in subsequent § 2255 motions: criminal defendants possess no *constitutional* right to the appointed and effective assistance of counsel on post-conviction review under § 2255. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991). In addition, in non-capital federal cases, there is no guaranteed *statutory* right to the assistance of counsel to prepare and litigate a § 2255 motion.[20]

For that reason, undoubtedly many federal defendants, left unrepresented, fail to file meritorious ineffectiveness claims after their cases become final on direct appeal. And those who attempt to litigate ineffectiveness claims in § 2255 proceedings often fail to do

[20] A district court has discretion whether to appoint counsel to represent a § 2255 movant under the Criminal Justice Act, but no such appointment is guaranteed (and, in any event, there is no right to the effective assistance by such appointed counsel). *See* 18 U.S.C.A. § 3006A(a)(2)(B); *Hollinger v. United States*, 391 F.2d 929, 929 (5th Cir. 1968).

so because of the high hurdles that they face. Most are unrepresented, indigent, and often mentally and educationally-challenged.[21] Even if they are able to prepare and file a *pro se* § 2255 motion, a district court is not required to appoint counsel to represent them (in contrast to such a requirement at trial and on direct appeal). For these reasons, the practice of refusing to remand colorable ineffectiveness claims raised for the first time on direct appeal – and, instead, relegating defendants who raise such ineffectiveness claims to future § 2255 proceedings – significantly diminishes the ability of federal defendants to litigate ineffectiveness claims. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012) ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, [a court] significantly diminishes prisoners' ability to file such claims.").

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

The statistics are similar in the federal system. According to the 2021 United States Sentencing Commission's *Sourcebook of Federal Sentencing Statistics*, 43.5% of federal prisoners do not have a high school degree and another 33.5% have only a high school degree. U.S. Sent. Comm'n, *Sourcebook of Federal Sentencing Statistics* 54 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf. And mental illness also plagues federal inmates, with the Bureau of Justice Statistics reporting that 45% of federal prisoners suffer from a "mental health problem." Bureau of Justice Statistics, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf.

For that reason, allowing a defendant who still possesses the right to appointed and effective assistance of counsel to raise a colorable ineffectiveness claim concerning trial counsel's performance and receive a remand for an evidentiary hearing promotes the bedrock right to counsel at trial. *See Martinez*, 566 U.S. at 12 ("A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the foundation for our adversary system.").

Therefore, if a federal defendant's ineffectiveness allegation has sufficient support in the existing record on direct appeal to qualify as "colorable," he should be afforded the benefit of the constitutionally-guaranteed assistance of effective and appointed counsel to develop such an ineffectiveness claim – both initially in his appellate brief and subsequently in the district court in the event of a remand for an evidentiary hearing. Because petitioner has made out a colorable claim of ineffective assistance of counsel, petitioner's case should be remanded to the district court for an evidentiary hearing.

III.

This Court Should Grant Certiorari to Address the Important Question Reserved in *Taylor v. United States*, 579 U.S. 301, 310 (2016).

Count one of the superseding indictment charged that petitioner conspired "to obstruct, delay, and affect commerce, and attempt to obstruct, delay, and affect commerce . . . by robbery . . . in that the defendants agreed to take and obtain money and property from the person and in the presence of an employee at the Exxon gas station [located at 10540 Reistertown Road, Baltimore, Maryland], against his will by means of actual and threatened force, violence, and fear and injury . . . , " in violation of 18 U.S.C. § 1951(a). 4th Cir. App. 30. Count one also alleged that the gas station was then "engaged in interstate and foreign commerce." 4th Cir. App. 30.

On appeal, the Fourth Circuit recognized that petitioner had "argue[d] that the Government failed to properly establish the interstate-commerce element of Count 1" but also had "concede[d] that the evidence was sufficient to show the 'minimal effect' on interstate commerce necessary to support a Hobbs Act conviction under [Fourth Circuit] precedent." *Brooks*, 2023 WL 20874, at *2 (citing *United States v. Tillery*, 702 F.3d 170, 174 (4th Cir. 2012)).

A. Evidence of the Exxon Station's Effect on Interstate Commerce Offered at Trial

At trial, the sole evidence that the Exxon gas station affected interstate commerce was the station owner's one-word affirmative answer to the prosecutor's question whether the gas station sold an unspecified amount of products that were produced in other states:

> Q. [by prosecutor]: Does that Exxon station operate in interstate commerce, meaning, does it sell items that were produced outside of the state of Maryland?
>
> A. Yes.

4th Cir. App. 102-03. No other testimony or evidence at trial concerned the gas station's effect on interstate commerce. Nor did the prosecution offer any evidence of the aggregate effect of other robberies of similar business establishments (retail gas stations) on interstate commerce.

The Hobbs Act prohibits a robbery that "in any way or degree obstructs, delays, or affects commerce . . . ." 18 U.S.C. § 1951(a). Sixty years ago, this Court stated that § 1951(a) "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215 (1960).

In the decades following *Stirone*, this Court clarified Congress's authority to regulate intrastate activities under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Although Congress may "regulate [c]ommerce . . . among the several [s]tates," U.S. Const. art. I, § 8, cl. 3, this Court has recognized that there are "outer limits" to its authority to do so. *Lopez*, 514 U.S. at 556-57; *see also Morrison*, 529 U.S. at 608 (Congress's "regulatory authority [under Commerce Clause] is not without effective bounds]"). In particular, for Congress to regulate economic activity occurring within a single state, that activity must have a "substantial" effect on interstate commerce, at least when the activity does not implicate

"the use of the channels of interstate commerce" or "the instrumentalities of interstate commerce." *Lopez*, 514 U.S. at 558-59.

The jurisdictional element in § 1951(a) only states that the federal statute reaches those robberies (and conspiracies to commit robbery) that affect interstate commerce but says nothing about how significant an effect that the Constitution requires. *See United States v. Bishop*, 66 F.3d 569, 594 (3d Cir. 1995) (Becker, J., dissenting) (noting that "a jurisdictional element functions only to limit the regulation to interstate activity or to ensure that the intrastate activity which is regulated satisfies" the constitutional requirements). As this Court recognized in *Lopez*, the purpose of a jurisdictional element is to "ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." 514 U.S. at 561. *Lopez* does not permit the conclusion that Congress has "the power to provide for a lesser relation to interstate commerce . . . simply by including a jurisdictional provision." *United States v. McFarland*, 311 F.3d 376, 395-96 (5th Cir. 2002) (en banc) (Garwood, J., dissenting, joined by seven other circuit judges); *see also Morrison*, 529 U.S. at 616 ("Under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace[.]").

To satisfy the jurisdictional element of a statute, the prosecution's evidence must show that the effect on interstate commerce from an economic activity occurring within a single state must be "substantial." *Lopez*, 514 U.S. at 558-59; *see also United States v. Baylor*, 517 F.3d 899, 903-04 (6th Cir. 2008) (Suhrheinrich, J., concurring) ("By continuing

to allow a *de minimis* standard for individual violations of the Hobbs Act, we are essentially nullifying the 'substantial effect' test of *Lopez* and *Morrison*.").

Considering these principles, the prosecution's evidence at petitioner's trial failed to prove that the alleged robbery (and related conspiracy) had a *substantial* effect on interstate commerce. In particular, the evidence that the Exxon station sold an unspecified quantity of items that were produced outside of the State of Maryland failed to prove a substantial effect on interstate commerce. Therefore, petitioner's conviction should be reversed based on insufficient evidence of an essential element of the charged offense. *Cf. United States v. Rivera-Rivera*, 555 F.3d 277, 293-98 (1st Cir. 2009) (Lipez, J., dissenting) (contending the evidence was insufficient to prove the interstate commerce element of § 1951(a)); *United States v. McFarland*, 311 F.3d 376, 377-410 (5th Cir. 2002) (en banc) (Garwood, J., dissenting, joined by seven other circuit judges) (same); *United States v. Harrington*, 108 F.3d 1460, 1473-77 (D.C. Cir. 1997) (Sentelle, J., dissenting) (same).

The Fourth Circuit in Hobbs Act cases, including petitioner's, has held that only a "minimal" or "*de minimis*" effect on interstate commerce need be shown concerning any given robbery because it is sufficient to take judicial notice of the "aggregate" effect on interstate commerce of all robberies of similar business establishments. *See, e.g.*, *United States v. Lopez*, 850 F.3d 201, 214 (4th Cir. 2017) ("A reasonable jury could find from that evidence that robbery of the Langley Park brothel would have at least a *de minimis* effect on interstate commerce – and, aggregated with other similar acts, a measurable impact on commerce.").

This Court in 2016 agreed with the Fourth Circuit's "aggregation" sufficiency analysis of an intrastate robbery of a drug dealer based on this Court's decision in *Gonzales v. Raich*, 545 U.S. 1, 32 (2005) (holding that Congress has authority to regulate intrastate drug possession based on the "aggregate impact" of illegal drug production, possession, and trafficking throughout the country). Yet this Court expressly reserved the question of whether there is sufficient evidence under the Hobbs Act concerning a robbery of "some other type of business" where only a minimal effect on interstate commerce, along with "aggregation," is shown. *Taylor v. United States*, 579 U.S. 301, 310 (2016).[22]

Petitioner's case presents this Court with an excellent vehicle to decide that open question. At petitioner's trial, the government's evidence proved nothing more than a minimal effect of the specific Exxon station on interstate commerce – the mere fact that the station sold an *unspecified amount* of "items that were produced outside of the state of Maryland." 4th Cir. App. 102-03. That evidence failed to prove – beyond a reasonable doubt – a "substantial" effect on interstate commerce. *Cf. Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) ("The District Court expressly found that a *substantial* portion of the food served in the restaurant had moved in interstate commerce.") (emphasis added).

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[22] This Court in *Taylor* specifically stated:

> Our holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds. We do not resolve what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted. See, *e.g., Stirone* . . . (Government offered evidence that the defendant attempted to extort a concrete business that actually obtained supplies and materials from out of State).

Taylor, 579 U.S. at 310.

On direct appeal, the sole basis for the Fourth Circuit's finding a *substantial* effect on interstate commerce was the Fourth Circuit's practice in Hobbs Act cases of taking judicial notice of the "aggregate" effect on interstate commerce of *other* robberies of similar business establishments. *Brooks*, 2023 WL 20874, at *2 (citing *Tillery*, 702 F.3d at 174). Furthermore, at petitioner's trial, the government offered no evidence of an "aggregate" effect on interstate commerce from other robberies of similar business establishments.

This Court should grant certiorari to decide whether evidence of a "minimal" effect on interstate commerce in a given case is sufficient to satisfy the interstate-commerce element of the Hobbs Act – and thereby Article I, section 8, clause 3 – when "aggregation" is the only manner of finding a "substantial" effect.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the Fourth Circuit's judgment. Alternatively, this Court should vacate the judgment and remand with instructions for the district court to conduct an evidentiary hearing on petitioner's claim of ineffective assistance by his trial counsel.

Respectfully submitted,

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