No. 23-_____

In The
Supreme Court of the United States

ALFREDO NAVARRO HINOJOSA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the Fifth Circuit's harmless-error standard applied to preserved nonconstitutional errors—which asks whether there is a "reasonable probability" the error contributed to the verdict, considers the sufficiency of the evidence without the error, and fails to place the burden on the prosecution to demonstrate lack of harm—conflict with this Court's well-established harmless-error standard set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946)?

II.

If a federal defendant on direct appeal raises a colorable Sixth Amendment claim of ineffective assistance by his prior counsel in the district court, with strong support in the existing record on appeal, should the Court of Appeals remand the case to the district court to conduct an evidentiary hearing on the claim rather than require the defendant to litigate the claim subsequently in a post-conviction proceeding under 28 U.S.C. § 2255, where he has no right to appointed counsel or effective assistance of counsel?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were petitioner, Alfredo Navarro Hinojosa, and respondent, the United States of America.

There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

United States v. Hinojosa, No. 3:16-CR-536-9, U.S. Court of Appeals for the North-ern District of Texas. Judgment entered June 6, 2022.

United States v. Hinojosa, No. 22-10584, United States Court of Appeals for the Fifth Circuit. Judgment entered February 28, 2024.

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OPINION BELOW

The unpublished decision of the Fifth Circuit, which affirmed petitioner's judgment of conviction (App. A1–A33), is available at 2024 WL 841088.

JURISDICTION

The Fifth Circuit, which had jurisdiction over petitioner's direct appeal of the district court's final judgment in his criminal case under 28 U.S.C. § 1291, issued its opinion on February 28, 2024. App. A1. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY AND FEDERAL RULES PROVISIONS INVOLVED

The pertinent statutory and federal rules provisions are: (1) 28 U.S.C. § 2111 ("**Harmless error**. On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."), and (2) Federal Rule of Criminal Procedure 52(a) ("**Harmless Error**. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

STATEMENT OF THE CASE

A. District Court Proceedings

A superseding indictment charged petitioner with 19 substantive counts of managing drug premises, in violation of 21 U.S.C. § 856(a)(2) (Counts 1-

19); one count of conspiracy to manage drug premises, in violation of 21 U.S.C. §§ 846 & 856(a)(2) (Count 20); one count of structuring a financial transaction to evade Internal Revenue Service reporting requirements, in violation of 31 U.S.C. § 5324(a)(2) (Count 21); and one count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a), (b)(1)(A), & 846 (Count 25) (ROA.42-65).[1]

At a trial, the jury convicted petitioner of three charges—Counts 19, 20, and 25—but was unable to reach a verdict on several other charges. (ROA.6573). Regarding Count 25, the jury answered a special interrogatory, finding that the drug-trafficking conspiracy involved at least five kilograms of cocaine (ROA.6573).

On June 3, 2022, the district court sentenced petitioner to 192 months in prison, followed by five years of supervised release, plus a $120,000 fine and a $300 special assessment (ROA.6687-89).

B. The Jury Trial

The Fifth Circuit's opinion succinctly summarizes the evidence presented at the jury trial:

> Alfredo Navarro Hinojosa own[ed] several nightclubs in Dallas and Fort Worth, Texas. Miguel "Mike" Casas and Martin "Chava" Salvador Rodriguez were two of his most trusted managers and advisors. Hinojosa, Casas, and Rodriguez, along with other

[1] The Fifth Circuit's record on appeal is cited as "ROA" followed by the pagination assigned by the clerk.

co-defendants not involved in this appeal, were charged as part of a thirty-three-count indictment related to third-party drug sales that occurred at Hinojosa's clubs between 2009 and 2016. The drugs sales, which occurred in the bathrooms of the clubs, typically consisted of $20 in exchange for a small bag of cocaine for personal use.

The dispute at trial centered around: (1) whether the defendants passively acquiesced to the drug sales occurring in the bathrooms of the clubs or actively allowed those sales; and (2) when the defendants learned that the drug sales were occurring [the latter issue related to the drug quantity relevant to sentencing]. . . .

Evidence was presented indicating that Hinojosa, Casas, and Rodriguez knew about the drug sales for all or most of the period during which the sales occurred. Evidence also showed that the defendants stopped allowing drug sales after the FBI raided the clubs but resumed allowing sales several months later because prohibiting sales hurt attendance and revenue. The defendants presented evidence indicating that the drug dealing did not occur with management's knowledge or approval.

The trial also included testimony . . . about the 2017 arrest of Josephine Hinojosa—Alfredo Hinojosa's niece—and Eric Lee, an expert witness who testified about Hinojosa's business records and noted nu-

> merous red flags indicating that Hinojosa was probably engaged in money laundering.
>
> After a seventeen-day trial, Hinojosa, Casas, and Rodriguez were each convicted on three counts: making a premises available for drug sales (Count 19); conspiracy to make a premises available for drug sales (Count 20); and conspiracy to possess with intent to distribute cocaine (Count 25). The jury also found that the defendants knew or should have known that the conspiracy involved at least five kilograms of cocaine. . . . The jury did not reach a verdict on the remaining counts.
>
> App. A2–A3.

The prosecution's evidence at trial about Alfredo's niece, Josephine Hinojosa, is relevant to the first question presented. A police officer from Pearl, Mississippi (Deputy Easterling) was allowed to testify—over objection—that he stopped Josephine driving on the interstate in Mississippi on February 1, 2017; searched her car and found 14 kilograms of cocaine and $6,200 cash; and she later pled guilty to trafficking the 14 kilograms. (ROA.333–44, 3347–48). Easterling also found a computer in her car, and the district court allowed evidence that Josephine worked as a bookkeeper for petitioner's clubs at the time, and her computer, not surprisingly, had routine payroll and bookkeeping records. But there was no evidence whatsoever connecting petitioner (or any other codefendant) to Josephine's drugs or to anything in Mississippi, or connecting Josephine's drugs to petitioner's nightclubs or anyone who sold drugs

in the nightclubs. The seized computer contained routine business records—but no records of drug ledgers or sales. Furthermore, Josephine's drug-trafficking occurred in 2017, while the conspiracy alleged in this case had ended, and drug sales in the clubs had stopped, in 2016. (ROA.43, 51).

C. Petitioner's Appeal to the Fifth Circuit

1. Harmless-Error Review of Evidentiary Error

On appeal, petitioner contended that the district court erred by admitting the evidence about Josephine and that the error was not harmless concerning any of the three counts of conviction as well as the jury's specific finding that petitioner was responsible for the trafficking of at least five kilograms of cocaine. In contending that the error was not harmless, petitioner cited this Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946). *See* Appellant's Opening Brief, *United States v. Hinojosa*, No. 22-10584, 2023 WL 3152419, at *26 (filed Apr. 19, 2023) ("The government cannot demonstrate that the district court's error was harmless. The standard is whether the Court can be 'sure' that Josephine's arrest and conviction had only a 'very slight [effect] on the jury.' *Kotteakos*[], 328 U.S. [at] 764 . . . .").

Although the Fifth Circuit's opinion briefly cited *Kotteakos* for the proposition that evidentiary errors are subject to harmless-error analysis,[2] the court's

[2] Two of the three members of the Fifth Circuit panel assumed, without deciding, that there was error by the district court in admitting the evidence about Josephine Hinojosa but found it harmless. The third member, in a concurring opinion, (continued)

analysis applied a different—and more demanding—standard than the one set forth in *Kotteakos*. Five different times in its opinion, the Fifth Circuit erroneously stated that a preserved error is harmless unless there is a "reasonable probability" that it contributed to the verdict:

> • "An erroneous evidentiary ruling is harmless unless there is a *reasonable probability* that the improperly admitted evidence contributed to the conviction."
>
> • "Based on that evidence, there is not a *reasonable probability* that the testimony about Josephine contributed to any of the jury's determinations."
>
> • "Given the extensive inculpatory evidence, this contrary evidence does not establish a *reasonable probability* that the testimony about Josephine contributed to the defendants' convictions."
>
> • "We cannot hold that there was a *reasonable probability* that the testimony about Josephine contributed to the Count 25 convictions."

(continued)

concluded that an error occurred but, like the majority, believed it was harmless. App. A6; *see also id.* at A29–A30 (Elrod, J., concurring) ("The relevance of the testimony is tenuous at best . . . [T]he testimony about Josephine should have been excluded because there was a substantial danger that it was more prejudicial than probative.").

> • "We cannot say that there was a *reasonable probability* that the testimony about Josephine contributed to the [jury's] drug quantity finding."

App. A5–A14 (emphasis added).

As discussed below, this formulation of the harmless-error standard contradicts *Kotteakos*. Furthermore, the Fifth Circuit effectively placed the burden on petitioner to prove a "reasonable probability" that the error contributed to the verdict and thus prove harm rather than placing the burden to prove *lack of harm* on the prosecution. This burden-shifting also contradicts *Kotteakos.* In cases of *preserved* error, the burden is on the government to prove harmlessness, whereas the burden is on the defendant only in cases of unpreserved, plain error. *United States v. Dominquez Benitez*, 542 U.S. 74, 81-82 (2004).[3] In effect, the Fifth Circuit applies a version of the plain-error standard—regardless whether the error is preserved or not.

The Fifth Circuit's harmless-error analysis also opined that the error was harmless in view of the "otherwise" sufficient or ample evidence of petitioner's guilt (as well as sufficient evidence of the jury's

[3] Significantly, the Fifth Circuit's harmlessness analysis concerning petitioner (who did preserve the error) occurred simultaneously with its analysis concerning co-appellants Casas and Rodriguez (who did not preserve the error, according to the government in its brief). App. A5–A14. The Fifth Circuit used the "reasonable probability" standard for all three co-appellants without distinguishing between preserved and unpreserved error.

specific finding that petitioner was responsible for at least five kilograms of cocaine):

> • "[W]e will not overturn a jury verdict when aside from the improperly admitted evidence, there is otherwise ample evidence from which the jury could have convicted the defendant."
>
> • "Here, there was extensive evidence supporting each of the convictions . . . . Based on that evidence, there is not a reasonable probability that the testimony about Josephine contributed to any of the jury's determinations."
>
> • "[Harmless-error review concerning the] Count 25 charge for conspiracy to possess with intent to distribute turns on whether there was sufficient evidence from which the jury could have inferred an agreement between the defendants and the drug dealers. . . . There was a variety of evidence from which the jury could have inferred a tacit agreement. . . . We cannot hold that there was a reasonable probability that the testimony about Josephine contributed to the Count 25 convictions."
>
> • "The drug quantity finding turns on when the defendants knew the drug sales were occurring. . . . The defendants contend that the evidence recounted above only shows that they knew about and allowed the drug sales starting in 2014. The defendants ignore two ways in which the jury could have

> determined that the defendants knew about and were liable for drug sales occurring before 2014. . . . We cannot say that there was a reasonable probability that the testimony about Josephine contributed to the drug quantity finding."

App. A6–A13. As discussed below, this standard—no harm if there is sufficient evidence of guilt—also deviates from *Kotteakos*.

Petitioner's Colorable Claim of Ineffective Assistance by His Trial Counsel

On appeal, petitioner also asked the Fifth Circuit to adopt the practice of the D.C. and First Circuits and remand for an evidentiary hearing on the clearly "colorable" claim of ineffective assistance of counsel that petitioner had raised in his brief. *See* Appellant's Opening Brief, *supra*, at *39 ("Mr. Hinojosa is not asking this Court to address the merits of his ineffectiveness claim in this direct appeal. The record is not complete enough for that. Instead, he requests this Court, pursuant to its supervisory authority, to adopt the practice whereby, when a defendant-appellant raises a 'colorable' claim of ineffective assistance for the first time on direct appeal that requires further evidentiary development for a meaningful decision on the merits, this Court will remand to the district court to conduct an evidentiary hearing. Two other federal circuit courts . . . follow this practice.") (citing D.C. and First Circuit decisions, discussed *infra*).

The "colorable" claim that petitioner raised in his brief was based on his trial counsel's advice to peti-

tioner that he withdraw a plea agreement that he had signed (based on the advice of his prior counsel) and, instead, go to trial. At the time that petitioner was represented by his initial counsel, petitioner had met with the prosecutor and agents and admitted in a recorded interview that he had known at some point that drug dealers were in his nightclubs selling cocaine. Petitioner signed an agreement to plead guilty to the charges in Counts 20 and 21, and, in exchange, the prosecution agreed to dismiss the remaining counts—including Count 25, which carried a mandatory minimum of 10 years in prison and a maximum sentence of life without parole (ROA.7629). That plea agreement was filed with the district court on December 6, 2017, the day after the superseding indictment was returned, in anticipation of a re-arraignment at which appellant would plead guilty (ROA.5).

That re-arraignment never happened. One month later, on January 8, 2018, a new defense attorney replaced the initial one (ROA.6). The second attorney filed a motion to withdraw the plea agreement, which the district court granted (ROA.6). The case proceeded to trial, and petitioner was convicted of the charges in Counts 19, 20, and 25. A motion for judgment of acquittal filed by petitioner's trial counsel showed that counsel misunderstood Fifth Circuit precedent about the *mens rea* element required for conviction under 21 U.S.C. § 856(a)(2) (Counts 19 and 20)—by erroneously contending that the required *mens rea* was having the "purpose" of furthering drug sales in the nightclubs.[4] Well-established

[4] Petitioner's trial counsel moved for acquittal on the drug premises charges by arguing that, "[n]one of the evidence in the (continued)

precedent in the Fifth Circuit does not require a defendant to have that "purpose" to be guilty of violating 21 U.S.C. § 856(a)(2). It is enough merely to have *known* that someone was selling drugs on one's premises—even if the proprietor was indifferent. *See United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990).

The evidence at trial—including petitioner's recorded interview by the prosecutor before trial—showed that petitioner *knew* about the sales at least at some point during the time period charged in the superseding indictment. Under *Chen*, petitioner had no viable defense to the charges in Counts 19 and 20, but trial counsel's motion for judgment of acquittal demonstrates that he was unaware of that controlling precedent.

The Fifth Circuit, which did not dispute that petitioner had made out a colorable claim of ineffective assistance, declined petitioner's invitation to adopt the approach of the D.C. and First Circuits and remand for an evidentiary hearing. App. A18–A19 (holding that "the practices of other circuits . . . do not warrant departing from our typical practice" of requiring ineffective-assistance claims to be litigated in § 2255 proceedings except in the rare case when the record on direct appeal is sufficiently developed to permit a ruling on the merits of an ineffective-assistance claim).

(continued)

government's case-in-chief establishes beyond a reasonable doubt that [petitioner's] purpose for having the venues open to the public or bringing in bands was to further illegal drug sales at his venues . . . " (ROA.2169).

REASONS FOR GRANTING THE PETITION

I.

The Fifth Circuit's Harmless-Error Standard for Preserved Nonconstitutional Errors Conflicts with this Court's Harmless-Error Standard.

Nearly eight decades ago, this Court in *Kotteakos v. United States*, 328 U.S. 750 (1946), announced the harmless-error standard applicable to preserved nonconstitutional errors on a federal defendant's direct appeal. This Court held that the harmless-error inquiry "cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.* at 765. Instead, an appellate court must ask whether the error affected the defendant's "substantial rights" by having a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 766, 776. If an appellate court is "sure that the error did not influence the jury [in an injurious manner], or had but a very slight effect, the verdict and the judgment should stand . . . ." *Id.* at 764. Therefore, an appellate court's conclusion that the error likely had more than a "very slight effect" on the verdict requires reversal.

The *Kotteakos* standard is embodied in the subsequently enacted harmless-error statute, 28 U.S.C. § 2111, and the subsequently adopted harmless-error rule, Federal Rule of Criminal Procedure 52(a). *See United States v. Lane*, 474 U.S. 438, 444, 446, 448-49 (1986); *United States v. Rivera*, 900 F.2d 1462, 1469 n.4 (10th Cir. 1990).

Since deciding *Kotteakos*, this Court has expressly held that, on direct appeal, the burden is on the

prosecution to prove that a preserved error was harmless; the burden is *not* on a defendant to prove that an error harmed him. *See, e.g.*, *Molina-Martinez v. United States*, 578 U.S. 189, 203 (2016). In *Molina-Martinez*, this Court specifically contrasted Rule 52(a) with Rule 52(b) (which governs review of unpreserved errors under the "plain-error" standard). The latter places the burden on a defendant to show a "reasonable probability" of a different outcome absent the error, while Rule 52(a) does not (and, instead, puts the burden on the prosecution to show that the error had no more than a very slight effect on the jury's verdict). *See United States v. Ziesel*, 38 F.4th 512, 520 n.5 (6th Cir. 2022) ("In *Molina-Martinez* the Court addressed Rule 52(b) where the burden of proof rests with a defendant who fails to object to the error at sentencing. 578 U.S. at 197. In the present case, Rule 52(a) applies and Ziesel need not show 'reasonable probability of a different outcome absent error.' Rather, the Government bears the burden of establishing that any error was harmless. See *Molina-Martinez*, 578 U.S. at 203."); *see also Dominguez Benitez*, 542 U.S. at 86 (Scalia, J., concurring) (distinguishing between Rule 52(b) plain-error review and the *Kotteakos* standard and noting that the former is a "less defendant-friendly standard" than the latter).

The Fifth Circuit's harmless-error analysis contradicted *Kotteakos* and its progeny in three different ways. First and foremost, the Fifth Circuit erroneously applied the "reasonable probability" standard to petitioner, although it was undisputed that he preserved the district court's error (and, thus, Rule 52(a) rather than Rule 52(b) applied). Second, the court placed the burden on petitioner to show harm

rather than placing the burden on the prosecution to show lack of harm. And, finally, the Fifth Circuit erroneously reasoned that an error was harmless because there was sufficient evidence supporting petitioner's convictions and the jury's special finding of drug quantity (concerning Count 25)—rather than determining whether the error had only a "very slight effect" on the jury's verdict or special finding concerning drug quantity.

A correct application of the *Kotteakos* harmless-error standard would alter the result of petitioner's appeal, particularly concerning Count 25. Concerning both the conviction and the jury's special finding that petitioner has responsibility for at least five kilograms of cocaine (triggering a mandatory minimum prison sentence of 10 years)—the government on appeal cannot establish that the admission of the irrelevant and highly prejudicial evidence about Josephine's drug-trafficking activity did not have at least "a very slight effect" on the jury's verdict or special finding. *Kotteakos*, 328 U.S. at 764.

The Fifth Circuit's error in petitioner's case is not an isolated one. The Fifth Circuit has applied the same flawed harmless-error standard in many published decisions in recent decades. *See, e.g.*, *United States v. Kiekow*, 872 F.3d 236, 251 (5th Cir. 2017) ("For any evidentiary ruling to be reversible error, the admission of the evidence in question must have affected the defendant's substantial rights. . . . FED. R. CRIM. P. 52(a). 'An error affects substantial rights if there is a *reasonable probability* that the improperly admitted evidence contributed to the conviction.'") (emphasis added; quoting *United States v. Sumlin*, 489 F.3d 683, 688 (5th Cir. 2007)); *United States v. Gil-Cruz*, 808 F.3d 274, 276 (5th Cir. 2015)

(same; quoting *Sumlin*); *United States v. Lewis*, 774 F.3d 837, 844 (5th Cir. 2014) (same; quoting *United States v. Heard*, 709 F.3d 413, 422 (5th Cir. 2013); *United States v. Diaz*, 637 F.3d 592, 599 (5th Cir. 2011) (same; quoting *Sumlin*).

No other circuit court applies the Fifth Circuit's erroneous "reasonable probability" standard to preserved nonconstitutional errors raised on direct appeal. Instead, the other circuit courts apply *Kotteakos*' "very slight effect" standard. *See, e.g.*, *United States v. Machado-Erazo*, 47 F.4th 721, 733 (D.C. Cir. 2018); *United States v. Stoney End of Horn*, 829 F.3d 681, 686 (8th Cir. 2016); *United States v. Carnagie*, 533 F.3d 1231, 1244 (10th Cir. 2008); *United States v. Kaplan*, 490 F.3d 110, 122-23 (2d Cir. 2007); *United States v. Doerr*, 886 F.2d 944, 953 (7th Cir. 1989).

This Court should grant certiorari, vacate the Fifth Circuit's judgment, and remand with instructions to apply the "demanding" burden on the prosecution required by *Kotteakos*. *Brecht v. Abrahamson*, 507 U.S. 619, 641 (1993) (Stevens, J., concurring).

Finally, it is noteworthy that this Court has not provided guidance about the *Kotteakos* standard in criminal cases since *United States v. Lane*, 474 U.S. 438 (1986); *cf. Shinseki v. Sanders*, 556 U.S. 396, 407-08 (2009) (providing guidance about the proper application of the harmless-error standard under 28 U.S.C. § 2111 in civil appeals). Petitioner's case presents an excellent vehicle for this Court to provide such guidance.

II.

This Court Should Grant Certiorari in Order to Resolve the Wide Division Among the Federal Circuit Courts Concerning Whether to Remand for an Evidentiary Hearing When a Defendant Raises a "Colorable" Claim of Ineffective Assistance by His Trial Counsel.

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

By contrast, a total of nine circuits as a general rule do not decide ineffectiveness claims raised on direct appeal on their merits, unless the existing trial record conclusively leads to a resolution. Nor do they remand such claims raised on direct appeal for evidentiary development, even when the claims are "colorable" or stronger. And, because the existing trial record is rarely developed fully on an ineffectiveness claim, merits decisions on such claims are also rare on direct appeal in these circuits. This approach relegates virtually all ineffectiveness claims, including "colorable" claims, to be urged later on a

collateral attack by a 28 U.S.C. § 2255 motion, assuming defendants are capable of filing such motions. The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits take this second approach.

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

These three approaches taken by the circuits are irreconcilable. Defendants with colorable claims of ineffectiveness on appeal that require further evidentiary development face sharply different treatment in the different circuits. The timing has profound effects on how such claims are litigated: a defendant proceeding under § 2255 has no right to appointed counsel or effective assistance of counsel.

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

***

In *Massaro v. United States*, 538 U.S. 500 (2003), this Court addressed a related issue: whether a defendant *must* raise an ineffectiveness claim on direct appeal or risk procedurally defaulting that claim in a later § 2255 motion. This Court answered in the negative, rejecting a Second Circuit's requirement. However, the Court did not decide the distinct question presented here, and 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 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."[5]

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[5] *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, 208 L. Ed. 2d 79 (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.

(continued)

The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits fall into this camp.[6] These courts leave ineffective assistance

(continued)

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.35 (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).

[6] The Second and Third Circuits acknowledge their authority to remand for evidentiary development when special circumstances warrant, and they have occasionally exercised that authority. *See, e.g.*, *United States v. Melhuish*, No. 19-485, 2021 WL 3160083, at *14 (2d Cir. July 27, 2021) (remanding ineffectiveness claim when defendant's release from custody raised questions about availability of § 2255 motion); *United States v. Yauri*, 559 F.3d 130, 133 (2d Cir. 2009) (remanding a second ineffectiveness claim when government had already consented to remand of first claim); *Gov't of Virgin Islands v. Vanterpool*, 767 F.3d 157, 163–69, 61 V.I. 817, 825–34 (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 general 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. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006) (Where record on appeal has insufficient facts to adjudicate ineffectiveness claims, "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 assis-

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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 claim 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 Fed. App'x 785, 787-88 (4th Cir. 2021) (agreeing with the government that "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."). However, these courts have not explained why such an explanation could not occur on remand (at an evidentiary hearing) when a defendant raised a colorable claim of ineffective assistance of counsel on direct appeal.

Standing alone among the circuits, 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

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(continued)

tance of counsel to a collateral attack rather [than] direct appeal, unless the record is sufficient to allow a ruling on the issue.").

decide it on its merits, even on an inadequate evidentiary record.[7] *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." *Id.* at 557). And, once an ineffectiveness claim has been rejected on direct appeal, the Seventh Circuit considers that decision binding on the district courts in a

[7] 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." *Id.* at 342.).

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 United States v. Flores*, 739 F.3d 337, 341–42 (7th Cir. 2014) ("[W]hen an ineffective-assistance claim is rejected on direct appeal, it cannot be raised again on collateral review."); *United States v. Wilson*, 240 Fed. 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).

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." *Flores*, 739 F.3d at 342.

Finally, two federal circuit courts—the First Circuit[8] and D.C. Circuit[9]—permit, but do not require, a

[8] *See, e.g.*, *United States v. Márquéz-Perez*, 835 F.3d 153, 165 & n.6 (1st Cir. 2016) (collecting cases where the First Circuit has exercised its discretion to remand when a defendant has raised a "colorable" ineffective-assistance claim, notwithstanding the court's typical rule denying ineffectiveness claims on an insufficient record and leaving them for § 2255 review); *United States v. Ortiz-Ve*ga, 860 F.3d 20, 28-29 (1st Cir. 2017) (where record on direct appeal contains "sufficient indicia of ineffectiveness . . . , we may remand the case for proceedings on the ineffective assistance claim without requiring the defendant to bring a separate collateral attack" under § 2255).

[9] *See, e.g.*, *United States v. Browne*, 953 F.3d 794, 804 (D.C. Cir. 2020) (holding that, because a defendant "raised a colorable claim of ineffective assistance of counsel, we remand 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. 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. Poston*, 902 F.2d 90 (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").

defendant to raise an ineffectiveness claim on direct appeal even if the existing record does not "conclusively" resolve the claim. If a "colorable" claim is raised, the case is remanded for an evidentiary hearing.

The D.C. Circuit's remand practice originally "derive[d] from the perceived unfairness of holding a defendant making a claim of ineffective assistance—for which new counsel is obviously a necessity—to the . . . time limitation . . . for filing a motion for a new trial;" it thus eliminated a "technical barrier" to an ineffectiveness claim, recognizing that trial counsel "cannot be expected to argue his own ineffectiveness in a motion for a new trial." *United States v. Rashad*, 331 F.3d 908, 911 (D.C. Cir. 2003) (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). Although the court does not "reflexively remand," neither does it "hesitate to remand when a trial record is insufficient to assess the full circumstances and rationales informing the strategic decisions of trial counsel." *Id.* at 804 (citations and internal quotation marks omitted).

Like the D.C. Circuit, the First Circuit has remanded for an evidentiary hearing when the defendant "affirmatively makes out a colorable claim of ineffectiveness" or "has identified in the record 'sufficient indicia of ineffectiveness.'" *See, e.g.*, *Márquéz-Perez*, 835 F.3d 153, 165 & n.6.

The three differing approaches that the federal appellate courts take to colorable ineffectiveness claims on direct appeal are irreconcilable. This Court should resolve the conflict. The D.C and First Circuits' rule is the most flexible and thus best situated option—allowing a record to be developed on remand when that is the most appropriate time to do so, while allowing a defendant-appellant to wait longer if utilizing § 2255 is more appropriate.

Not only did the Fifth Circuit perpetuate an existing circuit split when it refused to consider petitioner's colorable ineffective assistance of counsel claims on direct appeal, its decision is in tension with this Court's longstanding Sixth Amendment precedents. This Court has recognized that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). "Indeed, the right to counsel is the foundation for our adversary system." *Id.* It is the most important right that a defendant possesses, as it is "basic to a fair trial" and "affects [the defendant's] ability to assert any other rights he

may have." *Penson v. Ohio*, 488 U.S. 75, 84, 88 (1988). And, critically, this Court has recognized that "mov[ing] trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed . . . significantly diminishes prisoners' ability to file such claims." *Martinez*, 566 U.S. at 13.

This Court has not foreclosed the rule that petitioner proposes here and, indeed, has indicated that petitioner's proposal best promotes the critical right to the assistance of counsel in trial court proceedings. *See United States v. Massaro*, 538 U.S. 500, 508 (2003) ("We do not hold that ineffective-assistance claims must be reserved for collateral review."); *see also Martinez*, 566 U.S. at 13.

That is true for multiple reasons. For one thing, unlike on direct appeal, a defendant filing an ineffective assistance of counsel claim via a § 2255 motion is *not* entitled to appointed counsel to develop or later litigate constitutional claims and also has no right to the effective assistance of counsel at that juncture. *See, e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (per curiam). That rule applies even in circuits where a § 2255 motion is the first and only opportunity for the defendant to raise a constitutional claim of ineffective assistance by his trial counsel (within the one-year limitations period created by the Antiterrorism and Effective Death Penalty Act of 1996).[10] *Mackall v. Angelone*, 131 F.3d

[10] *See, e.g.*, *United States v. Leone*, 215 F.3d 253, 257 (2d Cir. 2000) (explaining that AEDPA "severely restricted the ability of a defendant to file more than one habeas petition").

442, 449 (4th Cir.1997) (en banc); *Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc).

Thus, where, as is true in the Fifth Circuit, a defendant is barred from raising a colorable ineffective assistance of counsel claim on direct appeal (when he still possesses the constitutional right to the assistance of counsel), he is automatically subjected to the "dangers and disadvantages of self-representation" when crafting his claim in the first instance in a § 2255 motion (when he lacks that right). *Faretta v. California*, 422 U.S. 806, 835 (1975); *see also Martinez*, 566 U.S. at 12 ("The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law.").

Those disadvantages are compounded by the realities of a defendant's incarceration. As this Court explained in *Martinez*, "[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." 566 U.S. at 12. Moreover, even if an incarcerated defendant did somehow have the means to develop the facts necessary to pursue his ineffective assistance of counsel claim from prison, he would still need to overcome the hindrances intrinsic in reconstructing the events of his trial years after the fact. *See Carrion v. Smith*, 549 F.3d 583, 584 (2d Cir. 2008) ("This case highlights a difficulty that our courts face in evaluating habeas corpus petitions filed well after the underlying conviction, when memories have faded and witnesses must struggle to reconstruct the relevant events."); *see also Thompson v. State*, 20 A.3d 242, 256 (N.H. 2011) ("[B]y the time a [habeas corpus] proceeding takes place, witnesses may dis-

appear or their memories might fade, causing practical problems for the State in the case of a retrial.").[11] And it is worth noting the obvious point that a defendant who is forced to remain incarcerated while awaiting resolution of a habeas petition that raises a meritorious ineffectiveness claim may end up spending unnecessary time behind bars—an affront to our legal tradition. *See Stutson v. United States*, 516 U.S. 193, 196 (1996) ("When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated.").

Given (1) the absence of constitutionally mandated counsel in investigating and drafting post-conviction motions and (2) the limitations that incarcerated defendants face in developing ineffective assistance of counsel claims, it makes little sense to require a defendant like petitioner to wait until *after* he has exhausted his direct appeal to bring a colorable ineffective assistance of counsel claim. The Justice Department has agreed with the importance of the interests at stake. As the United States Solicitor General has recognized, "[c]hanneling ineffective assistance claims to direct appeal rather than collat-

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

eral review in appropriate situations serves the general societal interests in respecting the finality of criminal judgments and encouraging resolution of legal challenges to convictions at the earliest feasible opportunity." Brief for the United States, *Massaro v. United States*, No. 01-1559, 2002 WL 31868910, at *10 (Dec. 18, 2002).

Finally, it should be noted that a defendant who files a § 2255 motion raising a "colorable" ineffectiveness claim is entitled to an evidentiary hearing on the claim. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam) ("On this record, we cannot conclude with the assurance required by the statutory standard 'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255; accordingly, we vacate the judgment of the Court of Appeals and remand to that court to the end that the petitioner be afforded a hearing on his petition in the District Court."); *United States v. Haisten*, 50 F.4th 368, 373 (3d Cir. 2022) (§ 2255 movant is entitled to an evidentiary hearing when he raises a "colorable" claim of ineffective assistance of counsel"); *Contino v. United States*, 535 F.3d 124, 128 (2d Cir. 2008) (same). It thus makes little sense to postpone an evidentiary hearing on a colorable ineffectiveness claim raised on direct appeal, particularly considering that a defendant does not possess the right to the assistance of counsel to develop and litigate such a claim in a § 2255 proceeding. A defendant's best opportunity to develop and litigate an ineffectiveness claim may be on remand from direct appeal, when a defendant possesses the right to the appointed and effective assistance of counsel. *See Martinez*, 566 U.S. at 12-13.

As noted above, this is not to say that *every* ineffective assistance of counsel claim should or will proceed on direct appeal. Some criminal defendants will need more time—until after appeal—to develop their record. Some claims will find no support whatsoever in the existing record and, instead, will be entirely based on extra-record allegations made in a brief filed on direct appeal. Such claims are, by definition, not "colorable" and must await the post-appeal § 2255 process. And other claims will be conclusively foreclosed by the existing record and, thus, not colorable. *See, e.g.*, *United States v. Marshall*, 946 F.3d 591, 596-97 (D.C. Cir. 2020). But there are other cases "in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal," *Massaro*, 538 U.S. at 508, if for no other reason than to request a remand so that the defendant—represented by constitutionally-mandated counsel—can develop that claim through an evidentiary hearing.

This is such a case, as the record reflects. As discussed above, petitioner's trial counsel appears to have advised petitioner to withdraw a plea agreement that avoided the charge in Count 25 based on counsel's misunderstanding about the viability of a defense to the charges under 21 U.S.C. § 856(a)(2) (in Counts 19 and 20) in view of *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990) (holding that defendant need not have a "purpose" to further drug sales on his premises to be guilty of violating § 856(a)(2)). As the Fifth Circuit noted, there was strong evidence at trial—including the recording of petitioner's admissions in his pretrial interview conducted by the trial prosecutor—that petitioner was

aware of drug sales occurring in his nightclubs at least at some point in time. App. A6-A14. Going to trial thus offered petitioner nothing favorable and, instead, only the extremely unfavorable prospect of a conviction and 10-year mandatory minimum sentence if convicted of the charge in Count 25.

Therefore, petitioner has made out at least a colorable claim of both "deficient performance" and "prejudice" under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Lafler v. Cooper*, 566 U.S. 156 (2012) (holding defense attorney provided ineffective assistance of counsel when he gave the defendant legally erroneous advice about a trial defense that caused the defendant to reject a favorable plea bargain offer and go to trial); *see also United States v. Winstead*, 890 F.3d 1082, 1088 n.10 (D.C. Cir. 2018) ("[T]he very strength of the government's case makes the decision to go to trial rather than accept a plea rather puzzling. . . . Even with no plea offer, acceptance of responsibility alone would have reduced Appellant's sentence significantly.").[12]

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[12] Even assuming the district court found the same drug quantity after a guilty plea (rather than after a lengthy jury trial), petitioner likely would have received credit for acceptance of responsibility under USSG § 3E1.1 and faced a lower guideline range for that reason alone. At the very least, his final offense level would have been 33 rather than 36 (reflecting credit for acceptance of responsibility) – with a corresponding guideline range of 135-168 months rather than 188-235 months (ROA.7657, 7661) [PSR ¶¶ 51-52, 76]. In addition, because there would have been no statutory mandatory minimum sentence of 120 months, the district court could have "varied" below 120 months upon motion of petitioner. The district court would have been more likely to have granted such a downward variance if petitioner had accepted responsibility and not gone to trial.

Because petitioner's claim is at least "plausible" based on the existing record, it is by definition "colorable." *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 122 (1982) (equating "colorable" with "plausible" in a different context in a habeas corpus proceeding); *cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) ("A claim invoking federal-question jurisdiction under 28 U.S.C. § 1331, . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is . . . 'wholly insubstantial and frivolous.'") (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). Confronted with that colorable constitutional claim, the Fifth Circuit should have permitted petitioner to advance his ineffective assistance of claim on direct appeal and remanded to the district court for an evidentiary hearing on that claim, instead of relegating petitioner to a § 2255 motion (when he no longer will possess a constitutional right to the assistance of competent counsel).

* * *

This Court should adopt for all circuits the procedure currently followed by the First and D.C. Circuits and require a remand for an evidentiary hearing when an appellate court determines that the record supports a colorable ineffective-assistance claim.

CONCLUSION

The Court should grant the petition for a writ of certiorari, reverse the Fifth Circuit's judgment, and remand for additional proceedings.

May 14, 2024

Respectfully submitted,

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