No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

EAGLES DENASHU BEGAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If an indigent, incarcerated federal defendant, for the first time on direct appeal, raises a colorable claim of ineffective assistance by his district court counsel, with support in the record but requiring additional factual development, should the U.S. Court of Appeals remand the case to the district court to conduct an evidentiary hearing on the claim rather than require the defendant to raise a *pro se* ineffective-assistance claim in a future proceeding under 28 U.S.C. § 2255?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Eagles Denashu Begay*, Nos. 3:17-cr-08180 & 3:21-cr-08065, United States District Court for the District of Arizona. Judgment entered on December 16, 2022.

- *United States v. Eagles Denashu Begay*, Nos. Nos. 22-10344 & 22-10345, United States Court of Appeals for the Ninth Circuit. Judgment entered on March 25, 2024.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Federal Sentencing Guidelines

PETITION FOR WRIT OF CERTIORARI

Petitioner Eagles Denashu Begay petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion (App. A) is unreported but is available at 2024 WL 1253784 The Court of Appeals' order denying rehearing *en banc* (App. B) is unreported.

JURISDICTION

The Court of Appeals entered its opinion and judgment on March 25, 2024. The Court of Appeals denied rehearing *en banc* on April 30, 2024. This petition has been filed within 90 days of the latter date. *See* Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The Sixth Amendment to the U.S. Constitution provides in pertinent part: "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

A. Procedural History

On August 24, 2021, a federal grand jury in the District of Arizona returned a superseding indictment charging petitioner with several firearms and drug offenses. ER-221.[1] Because he is indigent, petitioner had the assistance of court-appointed counsel in the district court and also on appeal.

On March 21, 2023, pursuant to a plea agreement, petitioner pleaded guilty to possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1),[2] and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841. The district court sentenced petitioner to a total sentence of 105 months in federal prison to be followed by a three-year term of supervised release. ER-83.[3]

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[1] "ER" refers to the "excerpts of record" filed in the Court of Appeals.

[2] Petitioner admitted to possessing ammunition that affected interstate commerce but did not admit to possessing any firearm that affected interstate commerce. ER-175–179.

[3] At the same time the district court sentenced petitioner to 105 months in prison for his §

For the first time on direct appeal, petitioner claimed that his appointed counsel at sentencing provided petitioner with ineffective assistance by failing to object to the district court's misapplication of a sentencing guideline enhancement (USSG § 2K2.1(b)(1)(B)) and asserted that the existing record at least demonstrates a "colorable" ineffective-assistance claim warranting a remand for an evidentiary hearing. The Ninth Circuit refused to address the merits of that ineffective-assistance claim because it concluded that "[t]he record is not sufficiently developed to allow us to review this claim on direct appeal." App. A at 2. Noting that it was bound by prior Ninth Circuit precedent that limited the court's ability on direct appeal to remand for an evidentiary hearing on an ineffective-assistance claim raised for the first time on appeal when relevant facts were undeveloped, the panel declined petitioner's request to remand for a hearing on his claim. App. A at 3 n.1 (citing *United States v. Liu*, 731 F.3d 982, 995 (9th Cir. 2013), and *United States v. Daychild*, 357 F.3d 1082, 1095 (9th Cir. 2004)). The Ninth Circuit's decision thus requires petitioner, who is indigent and incarcerated, to pursue his ineffective-assistance claim in a future *pro se* § 2255 motion.

922(g)(1) and § 841 convictions, the court also separately sentenced petitioner to a consecutive 18-month prison sentence after revoking petitioner's term of supervised release in a prior, unrelated case. That earlier case is not at issue in this petition.

B. Relevant Facts

The relevant facts concern what occurred after petitioner was convicted – in particular, the probation officer's preparation of the presentence report (PSR) and petitioner's counsel's written objections to the PSR and his oral arguments at the sentencing hearing.

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When law enforcement officers arrested petitioner, a registered member of the Navajo Nation,[4] and searched his residence – which was located on the Navajo Nation Reservation[5] – they discovered 13 firearms (11 AR-15 rifles and two 9-mm pistols) as well as ammunition. In addition, petitioner previously had possessed a third 9-mm pistol at the same location. PSR ¶¶ 12, 14.

In the PSR, the probation officer applied USSG § 2K2.1 as the sentencing guideline yielding the highest offense level and corresponding sentencing range. PSR ¶ 25. Based on a finding that petitioner possessed a total of 14 firearms, the PSR added four offense levels pursuant to USSG § 2K2.1(b)(1)(B). PSR ¶ 27. The PSR also found that seven of those firearms were short-barrel rifles prohibited by 26 U.S.C. § 5845(a), which required the base offense level

[4] ER-194.

[5] PSR ¶ 14 (noting the firearms were sold or possessed "within the confines of the Navajo Nation Indian Reservation").

to be 20, under § 2K2.1(a)(4)(B). PSR ¶¶ 19, 26. However, based on the PSR's findings, the remaining seven firearms – the three 9-mm pistols and the four AR-15 rifles (without illegal short barrels) – were not prohibited by § 5845(a).

In his written objections to the presentence report, petitioner's appointed counsel in the district court, Philip Seplow, objected to the calculation of 14 firearms for purposes of the four-level enhancement § 2K2.1(b)(1)(B). He wrote: "If the seven (7) firearms [i.e., the four AR-15 rifles without short barrels and the three 9-mm pistols] were not firearms as described in [§] 5845(a), then the extra offense levels would only be two (2) [based on between 3-7 firearms, *see* § 2K2.1(b)(1)(A).]." ER-153. That objection referred back to a prior objection that Seplow had made. That prior objection contended that none of the eleven AR-15 rifles were "firearms" under § 5845(a) because they all had been manufactured by petitioner himself and, thus, lacked manufacturers' serial numbers. Seplow also argued that the frames or receivers in the AR-15 rifles did not qualify as "frames" or "receivers" under federal law – and, therefore, those rifles were not "firearms" subject to federal regulation at all.[6] That prior objection was made to the PSR's higher starting

[6] Concerning the weapons' frames or receivers, Seplow contended that "because the AR-15s here did not contain a singular component that would constitute a frame or receiver, it would have been illegal or impossible to serialize the AR-15s for the purpose of registration under the NFA." ER-63.

offense level of 20, under § 2K2.1(a)(4)(B) based on petitioner's possession of at least one firearm prohibited under § 5845(a). ER-150–152.

In addition, in his objections to the PSR's application of the higher base offense level under § 2K2.1(a)(4)(B), Seplow also briefly made the distinct argument that none of the 14 firearms possessed by petitioner were illegally possessed because they all were manufactured (and possessed) in Arizona (by petitioner himself) and, thus, did not affect interstate commerce as required to constitute a violation of 18 U.S.C. § 922(g)(1). ER-152–153.[7] That separate

[7] That objection contended:

> The base offense level should be 14 because the Defendant, Eagles [Begay], was not subject to penalties under 922(g)(1) and cannot be considered a prohibited person for the purpose of 2K2.1(a)(4) for his firearms possession rather the defendant was only subject to violations of 922(g)(1) for his ammunition possession.
>
> It is a vital requirement that 18 USC 922(g) provides that the interstate commerce element must be met. The Government in the case before the bench cannot prove that any of the firearms traveled in interstate commerce as all of the firearms are (were) privately manufactured and contain(ed) no serial numbers or manufacture markings, and as noted by the PSR, a box of manufacturing tools was seized. This provides further evidence that the firearms were manufactured in Arizona, and without more, Begay's firearms were simply not possessed in violation of 922(g). Therefore, as to the firearms, Begay was not a prohibited person.

ER-152–153. That objection, although inartful (in that the issue actually was not whether petitioner was a "prohibited person" under 18 U.S.C. § 922(g)(1), but, instead, whether the firearms affected interstate commerce), contended that none of the 14 firearms (as opposed to the ammunition) were illegally possessed under § 922(g)(1). As noted, that objection was distinct from Seplow's objection that the AR-15 rifles were not illegally possessed under 26 U.S.C. § 5845(a).

written argument did not depend on whether *§ 5845(a)* prohibited petitioner's possession of any of the 14 weapons. Instead, the argument solely turned on the fact that none of the firearms were illegally possessed *under § 922(g)(1)* because they did not affect interstate or foreign commerce. *See* 18 U.S.C. § 921(a)(2) ("The term 'interstate or foreign commerce' includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, *but such term does not include commerce between places within the same State* . . . .") (emphasis added); *cf. Scarborough v. United States*, 431 U.S. 563 (1977) (holding that the interstate commerce element is satisfied if a firearm possessed within a state ever crossed state lines in the past).[8]

At sentencing, the district court overruled both Seplow's objection to USSG § 2K2.1(a)(4)(B)'s higher offense level and his related objection to the four-level enhancement under § 2K2.1(b)(1)(B). The court found that all 11 of the AR-15 rifles qualified as "firearms," thus meeting the threshold of eight firearms for the enhancement under § 2K2.1(b)(1)(B). ER-64, ER-66 ("It seems

[8] Although Arizona law prohibits a felon from possessing a firearm, regardless whether it previously had traveled in interstate commerce, *see* Arizona Revised Statutes, § 13-3102(A)(4), that Arizona law does not apply on the Navajo Indian Reservation. *See State v. Flint*, 756 P.2d 324, 328 (Ariz. App. 1988), *cert. denied*, *Arizona v. Flint*, 492 U.S. 911 (1989). Therefore, petitioner did not possess any of the firearms in violation of state law. In addition, there is no Navajo Nation tribal law against convicted felons' possession of firearms, so federal law is the sole source of law relevant here.

like the purpose of this [higher base offense level] and the guideline itself is to consider firearms, and I don't care whether it has a serial number or not. This acts like a firearm, exactly – and, in fact, you admit it's a firearm [in that it expels a projectile through an explosion] . . . I'm going to find that pursuant to 18 USC Section 921(a)(3), this [a homemade, nonserialized type of weapon] is a firearm.").

Inexplicably, during the sentencing hearing, Seplow did not mention his separate objection about the *intrastate* manufacture of the firearms. Instead, he discussed only the objection about the federal government's supposed lack of authority to regulate the AR-15 rifles that lacked serial numbers and had non-qualifying "frames" and "receivers" – an objection that the district court overruled without ever mentioning the commerce-related objection. Seplow even erroneously agreed with the district judge when the latter commented that the sole basis for the objection to the § 2K2.1(b)(1)(B) enhancement was the same as Seplow's overruled objection to the higher offense level under to § 2K2.1(a)(4)(B).[9]

[9] The following exchange occurred between the district judge and Seplow:

> And I'm going to overrule Objection No. 1, objection to paragraph 26. Your second objection is objection to paragraph 27. ***I think it's basically the same objection, isn't it***?
>
> MR. SEPLOW: ***Yes. It's based on objection 26, Your Honor***.

Therefore, at the sentencing hearing, the district court was not meaningfully presented with – and thus never ruled on – the distinct issue of whether the three 9-mm pistols and the four AR-15 rifles without illegal short-barrels were *legally possessed* by petitioner in view of the fact that they were manufactured and possessed solely within Arizona (and thus did not affect interstate commerce within the meaning of 18 U.S.C. §§ 921(a)(2) & 922(g)(1)).[10] If Seplow had called that issue to the district court's attention at the sentencing hearing, the court presumably would have granted the objection because it was meritorious. If the objection had been sustained, it would have reduced petitioner's final offense level from 25 to 23 and, thus, reduced his corresponding guideline sentencing range from 84-105 months (ER-71) to 70-

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> THE COURT: ***And for the same reasons as stated as to the objection to paragraph 26***, the objection to paragraph 27 is overruled.

ER-66 (emphasis added).

[10] The district court articulated that objection as follows: "Defendant's objection is that these firearms should not be counted as firearms under that statute or under the guidelines because they were privately manufactured firearms [without serial numbers] and the ATF does not regulate the self-making of firearms [under § 5845(a)]." ER-61–62. The government's written response to defense counsel's PSR objections likewise focused solely on the objection related to § 5845(a). ER-108 ("Begay's objection to the number of firearms should similarly be overruled. This argument likewise relies on his argument that 'the seven (7) firearms were not firearms as described in [§] 5845(a).'").

87 months (the sentencing range corresponding to offense level 23 and Criminal History Category IV).

On appeal to the Ninth Circuit, the court refused to rule on the merits of the ineffective-assistance claim or remand to the district court for an evidentiary hearing:

> Begay argues that he received ineffective assistance of counsel because his attorney failed to argue at sentencing that Begay did not "illegally possess" seven of the fourteen privately manufactured firearms the district court found that he possessed, because those firearms had not been in nor affected interstate commerce within the meaning of Section 922(g)(1). Begay contends that, as a result, the district court erroneously found that he unlawfully possessed a total of fourteen guns at the time of the offense and imposed a four-level sentencing enhancement pursuant to U.S.S.G. § 2K2.1(b)(1)(B).
>
> The record is not sufficiently developed to allow us to review this claim on direct appeal. Counsel may have had reasonable strategic reasons, not reflected in the record, for failing to raise the interstate nexus objection at sentencing, *[s]ee Massaro v. United States*, 538 U.S. 500, 505 (2003) ("The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them."). This possibility is bolstered by the fact that counsel initially did set forth the interstate nexus argument in his written objections despite not raising the issue at sentencing. Further development of the record is thus necessary to determine whether the omission was a strategic choice. *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). Similarly, defense counsel's representation cannot be characterized as "so inadequate that it obviously" denied Begay his right to counsel. [*United States v.*] *Liu*, 731 F.3d [982,] 995 [(9th Cir. 2013)]. We therefore decline to address Begay's ineffective assistance of counsel claim on direct appeal. *Id*.

> . . . Begay argues that this Court should create a[n] exception [to the Ninth Circuit's general rule against addressing ineffective-assistance claims on direct appeal] that would remand to the district court with directions to conduct an evidentiary hearing on a "colorable" ineffective assistance claim. But this Court is bound by its precedent, which holds that, absent these "extraordinary exceptions," ineffective assistance claims are inappropriate on direct appeal. *Liu*, 731 F.3d at 995; *United States v. Daychild*, 357 F.3d 1082, 1095 (9th Cir. 2004).

App. 3-4 & n.1.

REASONS FOR GRANTING THE PETITION

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 on Direct Appeal Raises a "Colorable" Claim of Ineffective Assistance by His Trial Counsel.

The Ninth Circuit's decision perpetuates an entrenched, three-way division among the federal circuit courts concerning whether a federal 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. As discussed below, these three approaches taken by the U.S. Courts of Appeal are irreconcilable. Defendants with colorable ineffective-assistance claims raised on appeal that require further evidentiary development face sharply different treatment in the different circuits. The timing – when a defendant can raise an ineffective-

assistance-of-counsel claim – has profound effects on how such claims are litigated: unlike a defendant on direct appeal, 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 Ninth Circuit failed to honor this Court's longstanding Sixth Amendment precedents, which have gone to great lengths to assure that a defendant's right to effective assistance is protected. *See, e.g.*, *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). As discussed below, both the hindrances faced by federal defendants litigating ineffective-assistance claims raised in *pro se* § 2255 motions and principles of judicial economy weigh in favor of further evidentiary development of "colorable" ineffective assistance of counsel claims raised on direct review (when a federal defendant still possess the constitutional right to appointed and effective counsel).

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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 left unresolved 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, including the Ninth Circuit, maintain the general rule of refusing to address the merits of an ineffective-assistance claim raised on direct appeal unless the existing record is "fully developed" and resolves a claim "conclusively," "obviously," or "beyond any doubt."[11] The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits fall into this camp.[12] These courts leave ineffective-assistance claims

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[11] *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. 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).

[12] The Second and Third Circuits acknowledge their authority to remand for evidentiary development when special circumstances warrant, and they have occasionally exercised that

that require factual development to collateral review on a § 2255 motion, often citing this Court's *Massaro* decision as this Court's purported 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

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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). However, these circuit courts have not, like the First and D.C. Circuits, 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 assistance of counsel to a collateral attack rather [than] direct appeal, unless the record is sufficient to allow a ruling on the issue.").

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 has 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 – ineffective-assistance claims on direct appeal. Yet, if a defendant nevertheless 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.[13] *See, e.g.*, *United States v. Harris*, 394 F.3d 543, 555–59

[13] The Seventh Circuit actively discourages a defendant from raising an ineffective-assistance claim on direct appeal by warning that if the claim is rejected the defendant would be foreclosed from re-litigating it, *or any other ineffective-assistance 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).

(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 ineffective-assistance 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." *Flores*, 739 F.3d at 342.

Finally, two federal circuit courts – the First Circuit[14] and D.C. Circuit[15] – permit, but do not require, a defendant to raise an ineffective-assistance

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[14] *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).

[15] *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)

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, on remand, 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.*

(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").

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 a defendant on direct appeal "affirmatively makes out a colorable claim of ineffectiveness" or "has identified in the record 'sufficient indicia of ineffectiveness,'" even if the existing record is not fully developed. *See, e.g.*, *Márquéz-Perez*, 835 F.3d 153, 165 & n.6.

The three differing approaches that the federal circuit 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 Ninth Circuit perpetuate an existing circuit split when it refused to consider petitioner's clearly colorable ineffective assistance of counsel claim 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 implied that petitioner's proposal best promotes the critical right to the assistance of counsel in district 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 who raises an ineffective-assistance claim in § 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 the federal circuits where a § 2255 motion is the first and only opportunity for the defendant to raise a "colorable" 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).[16] *Mackall v. Angelone*, 131 F.3d 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 Ninth Circuit, a defendant is barred from raising a colorable ineffective-assistance claim on direct appeal – when he still

[16] *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").

possesses the constitutional right to the appointed and effective 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.").

As this Court has recognized, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (citation and internal quotation marks omitted). The unfortunate reality, however, is that a significant number of defendants in our prisons are *not* sufficiently "educated" and otherwise suffer from significant mental or intellectual disabilities – which this Court further recognized in *Halbert v. Michigan*, 545 U.S. 605, 620–21(2005). Indeed, according to the 2023 United States Sentencing Commission's *Sourcebook of Federal Sentencing Statistics*, 75.7% of federal prisoners either have only a high school diploma or did not even finish high school. U.S. Sent. Comm'n, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2020) (Table 10).[17] Mental

[17] Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf.

illness also plagues many federal inmates. *See* Laura M. Maruschak *et al.*, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS: SURVEY OF PRISON INMATES (Bureau of Justice Statistics, 2016) (noting 8% of federal prisoners suffered from current "serious psychological distress" and 23% of federal prisoners had a history of a mental illness).[18] Petitioner did not graduate from high school, having completed only the ninth grade. PSR ¶ 65. And the district court imposed condition of mental health assessment and treatment in petitioner's conditions of supervised release, as a result of petitioner's mental health history. ER-57.

The stark realities of lack of sufficient education and mental illness and intellectual disability pose a significant hurdle for many federal defendants who wish to challenge their former attorneys' representation on the ground of ineffective assistance. 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

[18] Available at: https://bjs.ojp.gov/library/publications/indicators-mental-health-problems-reported-prisoners-survey-prison-inmates#:~:text=About%2043%25%20of%20state%20and,most%20common%20mental%20disorder%20reported.

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 district court proceedings 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 disappear or their memories might fade, causing practical problems for the State in the case of a retrial.").[19] And it is worth noting the obvious point that a defendant who is forced to remain incarcerated while awaiting resolution of a § 2255 motion 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

[19] 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).

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 § 2255 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 collateral 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 automatically 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); *cf. Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir. 1994) ("A petitioner in a [§ 2254] capital case is entitled to an evidentiary hearing where there has been no state court evidentiary hearing and the petitioner raises a 'colorable' claim of ineffective assistance.") It thus makes little sense to postpone an evidentiary hearing on a colorable ineffective-assistance 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 his direct appeal, when a defendant still possesses the right to the appointed and effective assistance of counsel. *See Martinez*, 566 U.S. at 12-13.

This is not to say that *every* ineffective-assistance 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 based entirely 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.

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As discussed above, petitioner has raised *at least* a "colorable" claim of ineffective assistance by his former counsel at the sentencing hearing. *See Glover v. United States*, 531 U.S. 198 (2001) (holding that a federal defendant has a Sixth Amendment right to effective assistance concerning application of the sentencing guidelines). If Seplow had properly articulated the objection that seven of the 14 firearms possessed by petitioner were legally possessed by him under 18 U.S.C. §§ 921(a)(2) & 922(g)(1) because petitioner manufactured

them on the Navajo Nation Reservation, then there is a "reasonable probability" that petitioner's guideline range would have been significantly less (70-87 months) than the range that the district court used at sentencing (84-105 months) – which establishes "prejudice." *Glover*, 531 U.S. at 204.

The Ninth Circuit refused to address this ineffective-assistance claim because it believed that Seplow "may have had reasonable strategic reasons, not reflected in the record, for failing to raise the interstate nexus objection at sentencing." App. A at 3; *see also id.* at 4 ("Further development of the record is thus necessary to determine whether the omission was a strategic choice.").[20] Clearly, based on the Ninth Circuit's view, petitioner raised a "colorable" claim warranting further factual development. Yet the Ninth Circuit has relegated petitioner (who is indigent, incarcerated, and has a ninth-grade education) to raising the claim in a *pro se* § 2255 motion and seeking an evidentiary during a post-conviction proceeding at which he will lack the constitutional right to the appointed and effective assistance of counsel.

[20] The Ninth Circuit's assumption – that Seplow could not have performed deficiently if he had a "strategic" reason for not articulating the interstate commerce objection at sentencing – appears mistaken. A defense attorney's failure to raise a clearly *meritorious* objection at sentencing (when the district judge clearly had failed to address that objection, despite counsel's having raised it, albeit briefly and unartfully, in prior written objections) cannot qualify as genuinely "strategic." *See Mack v. United States*, 782 Fed. App'x 789, 793 (11th Cir. 2019) ("[T]here would have been little strategic value in not pursing a meritorious objection in comparison to the substantial benefit Mack would have received if the court had not applied the [sentencing] enhancement.").

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 a colorable constitutional claim, the Ninth Circuit should have 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 appointed, competent counsel).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari; adopt the rule of the First and D.C. Circuits; vacate the Ninth Circuit's judgment; and remand for the district court to conduct an evidentiary hearing on petitioner's colorable claim of ineffective assistance of counsel.

Respectfully submitted,

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