No. 23-7436

IN THE SUPREME COURT OF THE UNITED STATES

EAGLES DENASHU BEGAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly deferred consideration of petitioner's ineffective assistance of counsel claim from direct appeal to potential collateral review, where the court found the current evidentiary record insufficient to evaluate the claim.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is available at 2024 WL 1253784.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2024. A petition for rehearing was denied on April 30, 2024 (Pet. App. 8). The petition for a writ of certiorari was filed on May 7, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Arizona, petitioner was convicted of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 2. He was sentenced to 105 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 54. The court of appeals affirmed in part and vacated in part, and remanded to the district court for clarification or to refashion certain conditions of petitioner's supervised release. Pet. App. 1-5.

1. In 2019, petitioner was convicted of involuntary manslaughter, in violation of 18 U.S.C. 1112, after he shot and killed a person whom he claimed was attempting to rob him. Presentence Investigation Report (PSR) ¶¶ 15, 42. Later, while on supervised release for that offense, petitioner sold drugs and guns on his property on the Navajo reservation in Arizona. PSR ¶¶ 8-13, 44.

In May 2021, authorities executed a search warrant on petitioner's property. PSR ¶ 14. Among other things, they found 32 kilograms of marijuana with packaging; 93.7 grams of cocaine with packaging, 38.9 grams of LSD with packaging; 7419 rounds of ammunition; four ballistic vests and plates; a riot-control hand grenade; two loaded 9mm handguns with no serial numbers; and 11

AR-style rifles, seven of which were short-barreled. Ibid. Petitioner claimed to have manufactured seven of the 14 firearms that were found in his possession. PSR ¶ 19; C.A. E.R. 151.

2. A grand jury in the District of Arizona returned a superseding indictment charging petitioner with four counts of possessing a mixture and substance containing detectable amounts of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); two counts of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); one count of possessing a short-barreled rifle in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(B); and one count of possessing an unregistered rifle with a barrel less than 16 inches in length, in violation of 26 U.S.C. 5861(d) and 5871. C.A. E.R. 189-191.

Pursuant to a plea agreement, petitioner pleaded guilty to one count of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and one count of possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 2. Petitioner's plea agreement contained an appeal waiver with an exception for ineffective assistance of counsel claims. C.A. E.R. 95.

The Probation Office subsequently calculated a base offense level of 20 under the Sentencing Guidelines. PSR ¶ 26. It also determined that he was subject to a four-level enhancement under Sentencing Guidelines § 2K2.1(b)(1)(B), because his possession offense involved 14 firearms. PSR ¶ 27. In his written objections to the presentence report, petitioner's counsel asserted that seven of the firearms should not have counted for that purpose, on the theory (inter alia) that they had not moved in interstate commerce within the meaning of Section 922(g)(1). C.A. E.R. 150-153.

At the sentencing hearing, petitioner's counsel did not repeat that objection, and the sentencing court rejected the challenges that counsel did advance. C.A. E.R. 62-66. The court calculated petitioner's advisory guidelines range as 84 to 105 months of imprisonment and sentenced petitioner to 105 months of imprisonment, to be followed by three years of supervised release. Id. at 54, 71.[1]

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[1] In both the written objections and at the sentencing hearing, petitioner also challenged the determination that the allegedly self-manufactured guns qualified as "firearm[s]" under 26 U.S.C. 5845(a)(3). See C.A. E.R. 151; id. at 66. The district court rejected that challenge, id. at 66, and petitioner did not appeal on that ground. See Pet. C.A. Br. Thus, while the petition's statement highlights the Section 5845(a)(3) challenge, Pet. 5-8, the argument was not omitted from the sentencing hearing and is not relevant to his preserved ineffective assistance of counsel claim relating to that hearing. Garland v. VanDerStok, No. 23-852 (oral argument scheduled for Oct. 8, 2024), accordingly has no bearing on the proper disposition of this petition.

3. On appeal, petitioner raised an ineffective assistance of counsel claim based on his attorney's conduct at the sentencing hearing. Pet. C.A. Br. 11-18. Petitioner claimed that his trial counsel should have argued that the seven firearms he claimed to have manufactured had not moved in interstate commerce and should not be counted under Sentencing Guidelines § 2K2.1(b)(1)(B). Pet. C.A. Br. 12-13. Petitioner requested that the court decide the issue on direct appeal because, according to him, the record was sufficiently developed and his counsel's representation was "obviously" deficient. Id. at 16. In the alternative, he asked the court to remand the issue to the district court for an evidentiary hearing. Id. at 16-17. Petitioner also separately asserted that two of the supervised release conditions imposed by the district court were invalid. Id. at 19-21.

The court of appeals affirmed in part and vacated and remanded in part. Pet. App. 1-5. The court "decline[d]" to consider petitioner's ineffective assistance of counsel claim on direct appeal because the record was "not sufficiently developed" and counsel's representation was not "'obviously'" deficient. Id. at 3-4 (citation omitted). It also declined to remand the claim for an evidentiary hearing, citing circuit precedent for the proposition that "absent * * * 'extraordinary exceptions' ineffective-assistance claims are inappropriate on direct appeal." Id. at 3 n.1 (quoting United States v. Liu, 731 F.3d 982, 995 (9th

Cir. 2013)). But the court agreed with petitioner's distinct argument that two of his supervised release conditions were invalid, and it remanded so that the district court could "clarify" or "refashion" those conditions. Id. at 5.

ARGUMENT

Petitioner contends (Pet. 11-29) that the court of appeals should have remanded his ineffective assistance of counsel claim for further factual development. The court's unpublished and nonprecedential decision permissibly declined to remand, allowing the ineffective-assistance claim to be raised in a motion for postconviction relief under 28 U.S.C. 2255. That approach was consistent with this Court's recognition in Massaro v. United States, 538 U.S. 500 (2003), that it is generally "preferable" for ineffective-assistance claims to be decided through Section 2255 motions. Id. at 504. And while Massaro left the courts of appeals with discretion to decide how to handle ineffective-assistance claims raised on direct appeal, and the circuits have sometimes exercised that discretion differently, the various approaches do not reflect a disagreement regarding the governing law and therefore do not warrant this Court's intervention. This Court has recently and repeatedly denied petitions for certiorari raising similar issues.[2] It should follow the same course here.

[2] Pierce v. United States, 142 S. Ct. 2660 (2022) (No. 21-7420); Altman v. United States, 142 S. Ct. 728 (2021) (No. 21-6252); Nelson v. United States, 142 S. Ct. 505 (2021))No. 21-

1. In Massaro, this Court held that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255," even if the defendant could have, but did not, raise the ineffective-assistance claim on direct appeal. 538 U.S. at 504. The Court noted that the "general rule" is that "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." Ibid. But the Court reasoned that the "general rule" should not be applied to ineffective-assistance claims, observing that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." Ibid. And the Court provided several reasons why it is generally "preferable" to raise ineffective-assistance claims through Section 2255 motions. Id. at 504-508.

The Court observed, for example, that on direct appeal, the trial record often will not include the evidence that the appellate court needs to assess whether the allegedly ineffective attorney "had a sound strategic motive" underlying "a seemingly unusual or misguided action," or whether the alleged misconduct "was prejudicial." See Massaro, 538 U.S. at 504-505. Deferring the resolution of ineffective-assistance claims to collateral review

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5883); Senke v. United States, 142 S. Ct. 367 (2021) (No. 21-5453); Garcia v. United States, 141 S. Ct. 1436 (No. 20-6831); Carrasco v. United States, 141 S. Ct. 1279 (2021) (No. 20-6619); Harmon v. United States, 141 S. Ct. 435 (2020) (No. 20-5385); Smiley v. United States, 140 S. Ct. 505 (2019) (No. 19-6185); Hicks v. United States, 140 S. Ct. 306 (2019) (No. 19-5624); Blanco-Rodriguez v. United States, 139 S. Ct. 648 (2018) (No. 18-7900).

through a Section 2255 motion avoids that problem because the motion is heard by the district court, which is "best suited to developing the facts necessary" to resolve those claims. Id. at 505. The Court also observed that advancing an ineffective-assistance claim on direct appeal may put appellate "counsel into an awkward position vis-à-vis trial counsel." Id. at 506. "Appellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence." Ibid.

Massaro did "not hold that ineffective-assistance claims must be reserved for collateral review." 538 U.S. at 508. The Court noted that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal." Id. at 508. And in the wake of Massaro, courts of appeals have sometimes resolved ineffective assistance of counsel claims on the merits, see, e.g., United States v. Messner, 37 F.4th 736, 742 (1st Cir. 2022), or remanded to the district court for additional evidentiary proceedings, see, e.g., United States v. Williams, 784 F.3d 798, 803-804 (D.C. Cir. 2015). But in most cases, courts have declined to address the claim on the ground that it is "preferable" to resolve ineffective-assistance claims through a Section 2255 motion. Massaro, 538 U.S. at 504; see 3

Wayne R. LaFave, et al., Criminal Procedure § 11.7(e) (4th ed. 2023 update) (describing courts of appeals' general practices).[3]

2. The court of appeals appropriately deferred the ineffective-assistance claim in this case to collateral review, explaining that the "record is not sufficiently developed to allow us to review this claim on direct appeal." Pet. App. 3. The court observed that petitioner's trial counsel "may have had reasonable strategic reasons, not reflected in the record, for failing to raise the interstate nexus objection at sentencing." Ibid. And it therefore found that further record development was "necessary to determine whether the omission was a strategic choice." Id. at 4. That reasoning accords fully with Massaro, which recognized that most claims should be resolved through Section 2255 proceedings because the trial record often will not reveal critical facts, such as whether trial counsel "had a sound strategic motive" for an allegedly erroneous action. 538 U.S. at 504-505.

Petitioner nonetheless contends (Pet. 19-25) that the courts of appeals should generally be required to address ineffectiveness claims on direct review when they are "colorable," with remands to the district court for whatever further factual development may be necessary. Such an approach is difficult to square with Massaro's recognition that collateral review is "preferable" to direct

[3] A defendant may also raise an ineffective-assistance claim by filing a motion for a new trial within 14 days of the verdict. See Fed. R. Crim. P. 33(b)(2); United States v. Gahagen, 44 F.4th 99, 107 (2d. Cir. 2022), cert. denied, 143 S. Ct. 1069 (2023).

review in this context, for reasons that include record development, but are not limited to it. See 538 U.S. at 504; see id. at 504-508.

The difficulties of having trial counsel responsible for unearthing evidence of his own potential ineffective assistance, see Massaro, 538 U.S. at 506, and working with appellate counsel on an ineffectiveness claim, see ibid., are "awkward" to navigate even in the best of circumstances. Relatedly, the possibility of fully litigating ineffective-assistance claims on direct appeal might discourage defendants from retaining the same attorney for both the trial and appeal, even in situations where the defendant would otherwise be well-served by continuity of representation. See, e.g., United States v. Rashad, 331 F.3d 908, 911 (2003) ("[N]ew counsel is obviously a necessity" to raise ineffective assistance of counsel claim under Fed. R. Crim. P. 33). Christeson v. Roper, 574 U.S. 373, 378 (2015) (per curiam) (observing that trial counsel cannot be expected to "denigrate [his or her] own performance"); Lesko v. Secretary Pennsylvania Dep't of Corr., 34 F.4th 211, 226 (3d Cir. 2022) (collecting cases).

Petitioner attempts to justify his rule through a policy argument, asserting (Pet. 20) that courts should generally resolve ineffective-assistance claims through the direct appeal process to ensure that indigent defendants have the assistance of court-appointed counsel in litigating those claims. But defendants who press claims under Section 2255 and are "financially eligible"

"may be provided" with counsel when the "interests of justice so require[.]" 18 U.S.C. 3006A(a)(2)(B); see 28 U.S.C. 2255(g); Rules for Proceedings under 28 U.S.C. 2255 Rule 8(c). The same framework for obtaining appointed counsel existed when Massaro was decided in 2003. See 18 U.S.C. 3006A(a)(2)(B) (2000). And since Massaro, the Court has reiterated the benefits of collateral review for ineffective-assistance claims in the analogous context of state postconviction relief.

In particular, Martinez v. Ryan, 566 U.S. 1 (2012), explained that States do not "act[] with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding." Id. at 13. Citing Massaro, the Court explained that "[i]neffective-assistance claims often depend on evidence outside the trial record," and -- even when courts permit the expansion of the record on direct appeal -- the "[a]bbreviated deadlines" that typically apply "may not allow adequate time for an attorney to investigate the ineffective-assistance claim." Ibid. Martinez also observed that "[m]ost [state] jurisdictions have in place procedures to ensure counsel is appointed for substantial ineffective-assistance claims," id. at 14, and when they do not, federal habeas may serve as a backup, id. at 15. Those considerations are not unique to the state context, but instead apply with equal force here.

3. Ultimately, petitioner himself recognizes (Pet. 25-26) that it would not be appropriate to have a true bright-line rule requiring courts of appeals to decide or remand ineffective-

assistance claims raised on direct appeal. Petitioner's argument therefore boils down to an assertion that in his case, an evidentiary remand would have been preferable. But petitioner's case-specific preference for litigating his claims now rather than through Section 2255 is not an adequate basis for this Court's intervention. And in any event, petitioner has not explained why he cannot adequately litigate his ineffective-assistance claim through Section 2255. He does not, for example, provide any reason why he would not be able to meet the requirements for obtaining court-appointed counsel under 18 U.S.C. 3006A(a)(2)(B).

Petitioner errs in suggesting (Pet. 15-19) that the court of appeals' approach in this case conflicts with the practices of other circuits. Petitioner cites (Pet. 16-18) particular cases in which some courts of appeals have, on direct appeal, remanded ineffectiveness claims for further factual development. But such instances do not show any error in the decision below. The courts of appeals have "significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); see Fed. R. App. P. 47(b). The circuits therefore have the discretion to decide how to approach ineffective-assistance claims raised on direct appeal. And petitioner has not established any disagreement regarding the governing legal standards. Instead, the decisions that petitioner cites demonstrate only that circuits sometimes exercise their

discretion differently in deciding whether or how to address an ineffective-assistance claim raised on direct appeal.

As petitioner acknowledges (Pet. 13-15), most circuits, absent unusual circumstances, dismiss ineffective-assistance claims on appeal so that they can be raised in a Section 2255 motion.[4] But a few circuits are more open to deciding cases on direct appeal through the use of remands. The First Circuit, for example, "commonly" dismisses ineffective assistance of counsel claims on direct appeal without prejudice but "in special circumstances -- such as when the record is embryonic but contains sufficient indicia of ineffectiveness" -- it may remand to the

[4] See Government of Virgin Islands v. Vanterpool, 767 F.3d 157, 164 (3d Cir. 2014) (explaining the court's "general aversion" to addressing ineffective assistance of counsel on direct appeal); United States v. Faulls, 821 F.3d 502, 507 (4th Cir. 2016) (explaining that ineffective assistance of counsel claims are generally "not addressed on direct appeal"); United States v. Jones, 969 F.3d 192, 200 (5th Cir. 2020), cert. denied, 141 S. Ct. 2706 (2021) (declining to remand ineffective assistance of counsel claim and dismissing without prejudice); United States v. Zheng, 27 F.4th 1239, 1240, 1243 (6th Cir. 2022) (noting "general practice" of declining to consider ineffective assistance of counsel claim on direct appeal); United States v. Adkins, 636 F.3d 432, 434 (8th Cir. 2011) (explaining that it does not "ordinarily" address ineffective assistance of counsel claims on direct appeal) (internal quotation marks omitted); United States v. Onciu, 590 Fed. Appx. 703, 704 (9th Cir. 2015) ("[T]his circuit does not remand ineffective assistance of counsel claims on direct appeal."); United States v. Liu, 731 F.3d 982, 995 (9th Cir. 2013) (noting "general rule" against reviewing ineffective assistance of counsel claims on direct appeal); United States v. Galloway, 56 F.3d 1239, 1241 (10th Cir.), cert. denied, 113 S. Ct. 418 (1995) (circuit "will not" remand ineffective assistance of counsel claims on direct appeal); United States v. Patterson, 595 F.3d 1324, 1328-1329 (11th Cir. 2010) (declining to consider ineffective assistance of counsel claim on direct appeal even where record contains "some indication" of deficient performance).

district court. Messner, 37 F.4th at 742 (internal quotation marks omitted); see United States v. Colón-Torres, 382 F.3d 76, 84-85 (1st Cir. 2004) (same).

The Second Circuit's "aversion" to considering ineffective assistance of counsel claims on direct appeal is also "not a rigid rule" and the circuit sometimes remands. United States v. Gotti, 767 Fed. Appx. 173, 176 (2d Cir. 2019), cert. denied, 140 S. Ct. 1104 (2020); see United States v. Doe, 365 F.3d 150, 153 (2d. Cir.), cert. denied, 543 U.S. 975 (2004) (collecting cases). And the District of Columbia Circuit frequently, but not "reflexively," remands ineffective assistance of counsel claims. United States v. Sitzmann, 893 F.3d 811, 831 (2018), cert. denied, 140 S. Ct. 1551 (2020); see United States v. Green-Remache, 97 F.4th 30, 34 (D.C. Cir. 2024); United States v. Thomas, 999 F.3d 723, 735 (D.C. Cir. 2021).[5]

[5] The Seventh Circuit generally will not order remands, but it has sometimes suggested that it is more open to deciding ineffective-assistance claims based on the record on appeal, often to the defendant's detriment. See, e.g., United States v. McClinton, 23 F.4th 732, 737 (7th Cir. 2022), cert. denied, 143 S. Ct. 2400 (2023). And it is not clear that it is bound to choose one of those two options. See United States v. Wilson, 240 F. App'x 139, 145 (7th Cir. 2007) (finding that the facts did not warrant a departure from the court's "typical approach of deciding ineffective-assistance claims either on direct review using the record as it stands, or on appeal from the denial of a motion under [Section] 2255"). In any event, the Seventh Circuit's practices do not warrant further review in this case, where petitioner does not contend that he would have obtained a better (from his perspective) result had this case arisen in that circuit.

These approaches represent various ways that the courts of appeals have exercised the discretion that Massaro allows them. Courts have repeatedly recognized that both remanding and declining to remand can be "consistent" with Massaro. Doe, 365 F.3d at 153 n.2; compare, e.g., Rashad, 331 F.3d at 911 (observing that remanding is "consistent" with Massaro), with United States v. Kim, 270 Fed. Appx. 74, 75 (2d Cir.), cert. denied, 555 U.S. 826 (2008) (observing that declining to remand is "[c]onsistent" with Massaro). And petitioner does not point to any evidence that the circuits regard their differing approaches as reflecting different understanding of Massaro or the law regarding ineffective-assistance claims more generally, rather than permissible circuit-specific tendencies on a matter left to the sound discretion of each court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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