No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN DE DIOS ALVAREZ-ROMERO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner is an indigent federal defendant serving a 168-month prison sentence. He obtained only a sixth-grade education in Mexico and does not comprehend English. On direct appeal to the Fifth Circuit, with the assistance of appointed counsel, he raised a claim of ineffective assistance of counsel, alleging that his former appointed counsel misrepresented petitioner's plea agreement – written in English – that caused petitioner's guilty plea to be involuntary. In his Fifth Circuit brief, although petitioner pointed to portions of the record supporting his claim, he acknowledged the resolution of his claim would require further factual development at an evidentiary hearing. He thus requested a remand to the district court for an evidentiary hearing at which he would be represented by his new counsel on appeal (but acknowledged that Fifth Circuit precedent foreclosed his request).

The question presented is:

> Whether, if an indigent and incarcerated defendant with minimal education and no ability to comprehend English, for the first time on direct appeal with the assistance of appointed counsel, raises a colorable claim of ineffective assistance by his former counsel, should the U.S. Court of Appeals remand the case to the district court to conduct an evidentiary hearing on the claim (where the defendant would be represented by appointed counsel) rather than require the defendant to assert his claim in a future *pro se* motion under 28 U.S.C. § 2255.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Alvarez-Romero*, No. 4:22-CR-370-3, United States District Court for the Southern District of Texas. Judgment entered on August 2, 2024.

- *United States v. Alvarez-Romero*, No. 24-20344, United States Court of Appeals for the Fifth Circuit. Judgment entered on July 2, 2025.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Juan De Dios Alvarez-Romero, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, which dismissed petitioner's appeal because he raised a claim of ineffective assistance of counsel on direct appeal that could not be resolved without further factual development and refused to remand for a requested evidentiary hearing.

ORDER BELOW

The Court of Appeals' order granting respondent's motion to dismiss petitioner's appeal (**Appendix**) is unreported. The Court of Appeals did not issue any separate opinion.

JURISDICTION

The Court of Appeals entered its order and judgment on July 2, 2025. No petition for rehearing was filed. This petition has been filed within 90 days of the date of the Court of Appeals' order. *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 September 7, 2023, a federal grand jury returned a multi-count superseding indictment charging petitioner and several codefendants with various drug-trafficking offenses. ROA.73.[1]

On December 4, 2023, pursuant to a plea agreement (written solely in English), ROA.438-49, petitioner pleaded guilty to Count Five, as orally amended at the rearraignment. ROA.357, 362-63. As amended, Count Five charged petitioner with possession with intent to distribute less than 500 grams of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C). ROA.362-63. The Honorable Ewing Werlein, Jr., U.S. District Judge, presiding, accepted petitioner's guilty plea and adjudged him guilty of Count Five as amended.

[1] "ROA" is the record on appeal filed in the Court of Appeals.

ROA.377. Judge Werlein dismissed the remaining charges against petitioner. ROA.229.

On July 16, 2024, Judge Werlein sentenced petitioner to 168 months in federal prison to be followed by three years of supervised release, as well as a $100 special assessment. ROA.399-400.

B. Relevant Facts

1. Factual Basis for the Guilty Plea

At the rearraignment, the prosecutor provided the following factual basis for petitioner's guilty plea:

> There was an investigation by the Federal Bureau of Investigation where they identified a stash house operating in Katy, Texas, within the Southern District of Texas. The stash house was being run by Co-defendant Rosalio Ramirez-Alvarez. On June 30th, 2022, agents of the FBI obtained a residential search warrant for that stash house. The address is 6326 Nullarbor Court in Katy, Texas, within the Southern District of Texas. 6326 Nullarbor has been identified through an investigation to be utilized as a narcotics stash house where controlled substances were being housed and methamphetamine was manufactured.
>
> On July 1, 2022, agents with the FBI Houston Coastal Safe Streets Task Force executed a search warrant at the 6326 Nullarbor Court address. During the execution of the search warrant, Alvarez-Romero and two others were found hiding in the attic area of the residence and refused to come down after receiving several commands from FBI agents. After approximately 20 minutes, FBI agents were able to place Mr. Alvarez-Romero and others into custody. At the time of the search, July 1, 2022, Alvarez-Romero lived at 6326 Nullarbor Court and was aware that controlled substances

> were being stored at the residence. While staying at the residence, Alvarez-Romero packaged a popcorn box with 995 grams of cocaine, which was discovered during the search. During the search of 6326 Nullarbor, agents located controlled substances in various locations within the residence.

ROA.374-75.

2. Facts Relevant to Petitioner's Claim of Ineffective Assistance of Counsel

When he pleaded guilty, petitioner was a 40-year-old Mexican citizen with a sixth-grade education (attended in Mexico), who required an interpreter to understand English. ROA.356 (showing need for an interpreter); ROA 585, 596 (showing age and education level). In a *pro se* submission clearly written by another, English-speaking inmate, petitioner informed the district court that, "he does not understand English" and cannot "read or write anything in English" without assistance of someone fluent in English. ROA.237.

At the rearraignment, Judge Werlein also went over some of the provisions of the written plea agreement, including the government's agreement that petitioner receive credit for "acceptance of responsibility" under the sentencing guidelines. ROA.367; *see also* USSG § 3E1.1. Concerning petitioner's understanding of the plea agreement, Judge Werlein engaged in the following colloquy with petitioner (using an interpreter):

THE COURT: Now, I have been provided a copy of a plea agreement that your lawyer has negotiated with the government lawyer. Have you received a copy of this plea agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Has it been read to you in Spanish from beginning to end?

THE DEFENDANT: Yes, sir.

THE COURT: And have you talked about it with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Has your lawyer been able to answer, to your satisfaction, all of your questions about this written plea agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything you want to ask me about it?

THE DEFENDANT: No, sir.

THE COURT: Do you feel that you understand it?

THE DEFENDANT: Yes.

***

THE COURT: Well, I haven't been over all of this plea agreement but there is – is there any other part of it that you want me to explain to you?

THE DEFENDANT: No, your Honor. I – everything is understood.

THE COURT: Do you believe you have any other agreement with

> the government other than what is set forth in this written plea agreement?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has anyone else made any kind of promise to you or assurance of any kind in order to persuade you to plead guilty in this case?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has the government or anybody else coerced you or threatened you or in any way attempted to force you to plead guilty in this case?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: So, if you plead guilty, if I understand what you're saying to me, it is completely voluntary on your own part. Is that correct?
>
> THE DEFENDANT: Yes, sir.

ROA.361, 368. Notably, Judge Werlein did not mention how many pages the written plea agreement comprised.

Judge Werlein also discussed the sentencing guidelines with petitioner:

> THE COURT: Now, have you talked with your lawyer about the sentencing guidelines, that is, the sentencing guidelines that a judge consults in determining what will be an appropriate sentence?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: Do you understand that those sentencing guidelines are not mandatory? They are advisory; and, therefore, the judge may impose a sentence that is more severe or that is less severe than what is called for by the guidelines. Do you understand?
>
> THE DEFENDANT: Yes, sir. . . .
>
> THE COURT: Now, if the government should make a recommendation for leniency in your case in the sentencing and I do not follow their recommendation, you understand that you would still have to stand by your plea of guilty and would not have the right to withdraw it?
>
> THE DEFENDANT: Yes, sir.

ROA.371-72.

After the rearraignment but before sentencing, the probation officer prepared the presentence report (PSR), which was disclosed to the parties. The PSR's guideline calculations – primarily applying USSG § 2D1.1 – did not find that petitioner was entitled to a 2-level "minor participant" reduction under USSG § 3B1.2.[2] ROA.592 (PSR ¶ 30).

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[2] Section 3B1.2 provides:

> Based on the defendant's role in the offense, decrease the offense level as follows:
>
> > (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
> > (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
>
> In cases falling between (a) and (b), decrease by 3 levels.

At a subsequent court hearing before sentencing, conducted in response to a letter[3] that petitioner had sent to the court, petitioner complained to Judge Werlein that petitioner's defense attorney had represented to petitioner that, if he pleaded guilty, he would receive a "minor participant" adjustment under § 3B1.2 as part of the written plea agreement. The following colloquy then occurred (again through an interpreter):

> THE COURT: You write some things that – where you say that you signed a minor participant agreement. What are you talking about? What is a minor participant agreement that you have signed?
>
> THE DEFENDANT: My attorney told me that we were – that we were negotiating with the government a deal for a minor participant role.
>
> THE COURT: Are you referring to the plea agreement?
>
> THE DEFENDANT: I suppose so.
>
> THE COURT: The plea agreement that you signed that I explained to you?
>
> THE DEFENDANT: Yes, yes, yes, yes.
>
> THE COURT: That consisted of 11 pages?
>
> THE DEFENDANT: I don't know how many pages or –
>
> THE COURT: But it was long, wasn't it? Do you remember me explaining it to you?

[3] That letter, written in English, clearly was written by another inmate.

THE DEFENDANT: Yes, yes, yes, yes.

THE COURT: And you remember you told me you understood it?

THE DEFENDANT: Yes.

THE COURT: Well, one of the things you believe – apparently you signed something that was entitling you to a more lenient sentence.

THE DEFENDANT: That's what I was – Your Honor, that's what I was going to be signing, Your Honor, a minor participant agreement.

THE COURT: What?

THE DEFENDANT: A minor participant agreement.

THE COURT: There is no reference in this entire plea agreement to a minor participant that I have been able to find. What is in this plea agreement that I went over with you, it says: "Defendant is aware that a sentence has not yet been determined by the Court. The Defendant is also aware that any estimate of the possible sentencing range under the sentencing guidelines that he may have received from his counsel" – that is, his lawyer – "the United States or the probation office is a prediction and not a promise, did not induce his guilty plea and is not binding on the United States, the probation office or the Court." That is in the agreement you signed and that I explained to you. Do you remember?

THE DEFENDANT: Yes, yes, yes.

THE COURT: Do you remember that I also asked you if you were acquainted with the – had been told about the United States sentencing guidelines and discussed that with your lawyer?

THE DEFENDANT: I think so.

THE COURT: And I told you then that the sentencing guidelines are the important beginning point for a judge to determine what a

> proper sentence is; but because the sentencing guidelines are not mandatory, the Court may impose a sentence that is more severe or that is less severe than what is called for by the guidelines. Do you remember that?
>
> THE DEFENDANT: Oh, yes.
>
> THE COURT: And so that's why it's important that you understood what the maximum possible sentence could be; and I explained that to you, that the offense that was charged – and this is with some reduction that was agreed by the parties with respect to Count 5 – that offense carries with it a maximum term in prison of not more than 20 years, a fine not to exceed $1 million, a term of supervised release of at least three years and a special assessment; and I asked if all of that had been explained to you and you said, "Yes." Do you remember that?
>
> THE DEFENDANT: Your Honor, the – my lawyer told me about that minor participant agreement so as I would not have to take the 20 years.
>
> THE COURT: Well, the guidelines are not proposing 20 years either; but that's the maximum possible sentence. Do you understand?
>
> THE DEFENDANT: Yes.

ROA.418-20.

Judge Werlein then asked petitioner's appointed counsel to respond to petitioner's statements:

> MR. MARTINEZ: . . . As far as the minor participant agreement, I don't know if there's some confusion about that, but as the Court probably knows, I did file an objection [to the PSR] that he should be labeled as a minor participant. So I think I may have – I did say I will advocate for him about that. So that's all I have to say.

THE COURT: All right. Was there anything in writing where – did you have any [plea] agreement about a minor participant –

MR. MARTINEZ: No, Your Honor.

THE COURT: – with the government?

MR. MARTINEZ: No, Your Honor.

THE COURT: And it's not in the plea agreement?

MR. MARTINEZ: Correct, it's not.

THE COURT: The government made no agreement that it would recommend a minor plea agreement, and of course, even if the parties agree, that isn't binding upon the judge. The judge still makes that independent determination.

MR. MARTINEZ: Correct, Your Honor. There's nothing in the plea agreement other than writing.

ROA.422-23.

Petitioner then responded to his counsel's statements:

THE DEFENDANT: Let me explain a little of what I've seen, Your Honor. A little of what I've seen. I personally had agreed that it was a 5-to-40-year agreement, and I told [defense counsel] I didn't want that. Then he told me about an agreement of between zero to 20. I said, "No." I told him it was too long of a time for such a small mistake that I made of being in the wrong place at the wrong time and at the wrong moment. And I ended up being involved against my will, and I think it's – frankly it's too long, too much time. Then that's – that's when I said, "Minor role agreement." And he said, "Minor role agreement." And that's when I said, "Yes, minor role agreement." And unfortunately, I made a mistake. You know, my mistake was to go temporarily in that house [where the drugs were located]. The reason I went temporarily in that house was my mother was sick and I needed to save money to go back to

Mexico.

MR. MARTINEZ: May I have just a moment?

(Brief pause in the proceedings.)

THE DEFENDANT: And Your Honor, if I may – if I may be so bold, I would just want that I get a minimum sentence for my minimal participation and what I did.

THE COURT: Then your lawyer has made an objection to the finding of the probation office [in the PSR] that you are not entitled to a minor role adjustment. Your lawyer has filed an objection, and I will need to rule on that objection at the time of sentencing, if that objection is continued to be made. And I'll determine whether you get a minor role adjustment or not based upon the evidence that I have, from a preponderance of the evidence. That's the way it works. And as I explained to you before and as your plea agreement said, there was no promise or assurance that you could rely on from your lawyer or from the probation officer, from the government or anybody else as to what your sentence will be.

THE DEFENDANT: Your Honor, when I signed that, I thought I was signing up for the minor role agreement.

THE COURT: It was not in the written agreement that you said you had read from start to finish that you understood and that I explained to you and that at the end of my explanation I asked if you needed to have any other explanation and I asked if there was any part of my explanation that needed clarification and you said, "No," you understood it all.

THE DEFENDANT: Yes. That was my mistake, Your Honor, because you see, Your Honor, he read to me a one-page document in the back room, Your Honor, here in the jail – in the jail behind the courtroom and it was just one page that he read to me then and then I asked him for copies and he gave me 13 pieces of paper, you know, and I didn't know what was going on.

ROA.424-26.

At the subsequent sentencing hearing, Judge Werlein overruled defense counsel's objection to the PSR's finding that petitioner was not entitled to a minor role adjustment, ROA.390, and proceeded to sentence petitioner to 168 months of imprisonment – the low-end of the applicable guideline range (as set forth in the PSR, based on a final offense level of 35 and a Criminal History Category (CHC) of I). ROA.401, 597. If Judge Werlein had reduced petitioner's offense level by two additional offense levels under USSG § 3B1.2, petitioner's guideline range would have been 135-168 months. *See* USSG, Sentencing Table (for offense level I and CHC I).

In a *pro se* notice of appeal, petitioner stated that he wished to appeal "for review of an Involuntary Guilty plea due to Ineffective Assistance of Counsel. . . ." ROA.233. Undersigned counsel was then appointed to replace petitioner's appointed counsel in the district court. *See* Fifth Circuit ECF Nos. 13 & 20 (No. 24-20344).

Petitioner, with new counsel's assistance, filed a brief in the Fifth Circuit that raised a single issue: "Whether, because appellant has raised a colorable claim of ineffective assistance of counsel, this Court should remand for an evidentiary hearing." Opening Brief of Appeal, at 1 (Fifth Circuit ECF No. 37), at 1. That brief included the relevant facts set forth above and contended that

the existing record made out a "colorable" claim of ineffective assistance of counsel but acknowledged that additional factual development would be required to resolve the claim. The brief asked the Fifth Circuit to remand the case for an evidentiary hearing on that claim but further acknowledged that binding Fifth Circuit precedent foreclosed the relief sought by petitioner. *Id.* at 12-21, citing *United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987) ("The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations."), and *United States v. Gulley*, 526 F.3d 809, 821 (5th Cir. 2008) ("If [this Court] cannot fairly evaluate the [ineffective-assistance] claim from the record, [it] must decline to consider the issue without prejudice to a defendant's right to raise it in a subsequent [§ 2255] proceeding."). Petitioner explained that he was raising the issue in an adversarial manner on appeal in order to preserve the issue for a potential petition for writ of certiorari to be filed with this Court. Opening Brief of Appeal, at 18 (Fifth Circuit ECF No. 37). Respondent then filed a motion to dismiss petitioner's appeal – noting the same Fifth Circuit precedent requiring dismissal of an ap-

peal that raised an ineffective-assistance-of-counsel claim which required further factual development to resolve. *See* United States' Motion to Dismiss Appeal (Fifth Circuit ECF No. 45), at 1-3. Respondent additionally cited *United States v. Jones*, 969 F.3d 192, 200 (5th Cir. 2020) (dismissing ineffective assistance of counsel claim "without prejudice to [Jones's] right to raise the issue in a proper proceeding pursuant to 28 U.S.C. § 2255") (brackets original). United States' Motion to Dismiss Appeal (Fifth Circuit ECF No. 45), at 10.

A three-judge panel of the Fifth Circuit granted respondent's motion and dismissed petitioner's appeal. **Appendix.**

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 District Court Counsel.

A. Introduction

The Fifth 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. *See, e.g.*, *United States v. Nelson*, 850 Fed. App'x 865, 866

(4th Cir. 2021) (discussing the wide division among the circuits concerning this issue), *cert. denied*, 142 S. Ct. 505 (2021); *see also* Wayne R. LaFave, CRIMINAL PROCEDURE § 11.7(e) n.75 (4th ed. Nov. 2024 update) (noting the "differing views" among the federal circuit courts); 3 Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 627 n.3 (5th ed. Aug. 2024 update).

This wide division is at least in part the result of uncertainly after this Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003). The 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 fundamentally different treatment in the different circuits. The timing – when a defendant can raise an ineffective-assistance-of-counsel claim – has profound effects on whether and how such claims are litigated: unlike a defendant on direct appeal (and on remand from direct appeal), a defendant proceeding under § 2255 has no right to appointed counsel or effective assistance of counsel and may not even be able to identify a viable ineffective-assistance-of-counsel claim (and, even if he could identify such a claim, likely would face difficulty litigating the claim without an attorney's assistance).

By refusing to consider the merits of petitioner's colorable ineffective-assistance claim on direct appeal and remand for further factual development, the Fifth 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 appeal (when a federal defendant still possesses the constitutional right to appointed and effective counsel).

B. The Development of the Circuit Split After *Massaro*

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 related but 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 based on their differing views of *Massaro*. For example, the D.C. Circuit deems its routine remand practice (discussed below) "entirely consistent with *Massaro*." *United States v. Rashad*, 331 F.3d 908, 911 (D.C. Cir. 2003) (citations and internal quotation marks omitted). By contrast, the Seventh Circuit says that *Massaro* mandates "aggressive[ly]" limiting ineffective-assistance claims on direct appeal to "only the rarest and most patently egregious." *United States v. Harris*, 394 F.3d 543, 558 (7th Cir. 2005). And the Second Circuit reads *Massaro* "to support a choice to decline to remand for a hearing on an ineffectiveness claim." *United States v. Doe*, 365 F.3d 150, 152 (2d Cir. 2004). Until this Court steps in, identically situated defendants facing imprisonment are subject to different rules based on the arbitrary happenstance of where they were prosecuted.

Nine federal circuit courts, including the Fifth 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."[4] The Second,

[4] *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

Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits fall into this group.[5] These courts leave ineffective-assistance claims that require factual development to potential collateral review on a § 2255 motion, often

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).

[5] 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). 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.").

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 a 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 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 (without prejudice) – 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.[6] *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 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

[6] 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).

to raise an ineffectiveness claim on direct appeal as "foolish." *Flores*, 739 F.3d at 342.

Finally, two federal circuit courts – the First Circuit[7] and the D.C. Circuit[8] – permit, but do not require, a defendant to raise an ineffective-assistance claim on direct appeal even if the existing record does not "conclusively" resolve the claim. If a "colorable" ineffective-assistance claim is raised on direct appeal in those circuits, the case will be remanded for an evidentiary hearing.[9]

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[7] *See, e.g.*, *United States v. Ortiz-Ve*ga, 860 F.3d 20, 28-29 (1st Cir. 2017) (holding that, when the 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 28 U.S.C. § 2255).

[8] *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").

[9] The First Circuit has cited D.C. Circuit precedent with approval. *United States v. Márquéz-Perez*, 835 F.3d 153, 165 & n.6 (1st Cir. 2016) (noting the First Circuit's practice of "remand[ing] for an evidentiary hearing when the defendant affirmatively makes out a colorable claim of ineffectiveness") (citing not only First Circuit precedent but also *United States v. Bell*, 708 F.3d 223, 225 (D.C. Cir. 2013) (remanding for an evidentiary hearing on a "colorable" ineffective-assistance claim)).

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.* *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. The circuits' contrasting approaches reflect *different legal rules*, not case-by-case discretionary choices. This Court should resolve that deep and entrenched conflict. As explained below, 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.

Significantly, the government repeatedly has recognized this circuit split: on several occasions, it has pointed out to the D.C. Circuit that its rule whereby "colorable" ineffective-assistance claims raised on direct appeal are remanded for evidentiary hearings "is inconsistent with the majority of the federal courts of appeals," and twice (unsuccessfully) urged the D.C. Circuit to use its en banc procedures to overrule panel precedent.[10]

3. The Approach of the Fifth Circuit (and Other Circuits Taking the Same Approach) Is in Tension with this Court's Precedent.

Not only did the Fifth Circuit in petitioner's case perpetuate an existing circuit split when it refused to consider his colorable ineffective-assistance 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

[10] U.S. Br. 24, *United States v. Thompson*, 721 F.3d 711 (D.C. Cir. 2013), 2013 WL 503273; *see id.* at 26-27, 30-32 (cataloging split); *id.* at 40 (requesting en banc procedure); U.S. Br. 3, *United States v. Anderson*, 632 F.3d 1264 (D.C. Cir. 2011) (No. 05-3100) (same); *see also id.* ("[T]he Court's practice is clearly inconsistent with . . . the procedures followed by a majority of other circuits."); *id.* at 4-6 (cataloging split); U.S. Br. 36, *United States v. James*, 719 F. App'x 17 (D.C. Cir. 2018), 2017 WL 4997712 ("Unlike other circuits, it is this Court's 'general practice' to remand for an evidentiary hearing ineffective assistance of counsel claims raised for the first time on direct appeal."); U.S. Br. 39 n.10, *United States v. Bell*, 708 F.3d 223 (D.C. Cir. 2013), 2012 WL 4042230 ("Unlike all other federal courts of appeal, this Court currently allows ineffective-assistance claims to be raised on direct appeal.").

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).

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 ("[M]ov[ing] trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed . . . significantly diminishes prisoners' ability to file such claims.").

Refusing to remand a case on direct appeal for an evidentiary hearing on a colorable ineffective-assistance claim will "significantly diminish[]" a defendant's ability to litigate such claims for multiple reasons. First and foremost, unlike on direct appeal, a defendant who raises an ineffective-assistance

claim in a § 2255 motion is *not* entitled to *appointed* counsel to identify, investigate, and 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 when 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).[11] *See Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc) (holding that "a defendant has no Sixth Amendment right to counsel during his [post-conviction] proceedings even if that was the first forum in which he could challenge constitutional effectiveness on the part of trial counsel"); *accord Martinez v. Johnson*, 255 F.3d 229, 240-41 (5th Cir. 2001); *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc).

[11] *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").

Therefore, assuming petitioner was even capable of filing a *pro* se § 2255 motion, he would have no guarantee of the appointed and effective assistance of counsel to litigate an ineffective-assistance claim. As respondent has recognized in a prior case, although district courts possess discretion to appoint counsel under the Criminal Justice Act *after* the filing of a *pro se* § 2255 motion, district courts appoint counsel only "in relatively few postconviction proceedings, and thus the bulk of federal prisoners pursue collateral relief *pro se*." U.S. Br. at 32, *Martinez*, 566 U.S. 1 (No. 10-1001).

Thus, where, as is true in the Fifth Circuit, a defendant is barred from raising a colorable ineffective-assistance claim on direct appeal – when he still 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 raising his claim in the first instance in a § 2255 motion. *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 . . . procedural rules or may misapprehend the substantive details of federal constitutional law."). The assistance of counsel in identifying, investigating, and ultimately litigating an ineffective-assistance claim is critically important, as this Court has recognized. *Martinez*, 566 U.S. at 11 (recognizing that "[c]laims of

ineffective assistance at trial often require investigative work and an understanding of trial strategy" and are unlikely to be properly raised "[w]ithout the help of an adequate attorney"). And it must be remembered that prisoners like petitioner will have only one year to prepare and file a § 2255 motion after the direct appeal process is over.

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 2024 United States Sentencing Commission's *Sourcebook of Federal Sentencing Statistics*, 75% 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 28 (2024) (Table 10).[12] Mental illness also plagues many federal inmates. *See* Laura M. Maruschak *et al.*, INDICATORS OF

[12] Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024_Sourcebook.pdf

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).[13] Although petitioner does not suffer from mental illness, he clearly will be severely disadvantaged if he has to represent himself after his direct appeal is over: he only has a sixth-grade education (obtained in Mexico) and does not comprehend English. ROA 585, 596. He also is indigent and thus lacks the resources to hire an attorney to prepare and litigate a § 2255 motion in the future.

The stark realities of poverty, lack of sufficient education (including, in many cases, the inability to understand English), and mental illness or intellectual disability pose significant and often insurmountable hurdles for countless federal defendants who wish to challenge their former attorneys' representation on the ground of ineffective assistance. Those disadvantages are made even worse by 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

[13] 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

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 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.").[14] 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

[14] 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).

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 a right to appointed and effective counsel in investigating and drafting § 2255 motions and (2) the limitations that incarcerated defendants face in developing ineffective-assistance claims, it makes little sense to require defendants like petitioner to wait until *after* they have exhausted their direct appeals to bring a colorable ineffective-assistance claim. In the past, respondent has agreed with the importance of the interests at stake, stating that: "Channeling 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 evi-*

dentiary hearing on the claim.[15] It thus makes little sense to postpone an evidentiary hearing on a colorable ineffective-assistance claim raised on direct appeal. A defendant's best opportunity to develop and litigate a colorable ineffectiveness claim will 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 the direct appeal – to develop their record. Some claims will find no support whatsoever in the existing record and, instead, would be based entirely on extra-record allegations. 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.*,

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[15] *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"); *United States v. Allen*, 918 F.3d 457, 460 (5th Cir. 2019) (holding that a defendant seeking relief under § 2255 is entitled to an evidentiary hearing on his claims "unless either (1) the movant's claims are clearly frivolous or based upon unsupported generalizations, or (2) the movant would not be entitled to relief as a matter of law, even if his factual assertions were true") (citation and internal quotation marks omitted).

United States v. Marshall, 946 F.3d 591, 596-97 (D.C. Cir. 2020). However, some defendants on direct appeal – like petitioner – can raise "colorable" claims that find support in the existing record and warrant further factual development.

4. Petitioner Has Raised a Clearly Colorable Claim of Ineffective of Assistance by His District Court Counsel.

As reflected in the existing record and petitioner's Fifth Circuit brief, he has raised a colorable claim of ineffective assistance by his former counsel. 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)).

Although, at the rearraignment, petitioner told Judge Werlein that the written plea agreement had been read to petitioner in Spanish (presumably by his counsel), that petitioner understood it, and he had not been made any promises other than those in the plea agreement, ROA.361, 368, petitioner

later stated to Judge Werlein that:

> • "My attorney told me that we were – that we were negotiating with the government a deal for a minor participant role." (ROA.418);
>
> • "That's what I was – Your Honor, that's what I was going to be signing, Your Honor, a minor participant agreement." (ROA.418).
>
> • "I was told I was going to be signing, Your Honor, a minor participant agreement [as part of the plea agreement]." (ROA.418-19);
>
> • "Then [defense counsel] told me about an agreement of between zero to 20 [years]. I said, "No." I told him it was too long of a time for such a small mistake that I made of being in the wrong place at the wrong time and at the wrong moment. . . . Then that's – that's when I said, "Minor role agreement." And he said, "Minor role agreement." And that's when I said, "Yes, minor role agreement." (ROA.424-25);
>
> • "Your Honor, when I signed that [plea agreement], I thought I was signing up for the minor role agreement." (ROA.426);
>
> • "[Defense counsel] read to me a one-page document in the back room, Your Honor, here in the jail – in the jail behind the courtroom and it was just one page that he read to me then and then I asked him for copies and he gave me 13 pieces of paper, you know, and I didn't know what was going on." (ROA.426)

As set forth *supra*, record reflects that petitioner, who had only a sixth-grade education (in Mexico) and who could not understand English, told Judge

Werlein after the rearraignment that (1) his defense counsel had not interpreted the 12-page[16] plea agreement (written in English) into Spanish, and, instead, only had interpreted a one-page document; (2) his defense counsel had assured petitioner before he pleaded guilty that the plea bargain with the government included a "minor participant agreement"; and (3) petitioner pleaded guilty because of his belief that the plea agreement contained a "minor participant agreement."

Significantly, the record does not contain any statement from petitioner's defense counsel directly contradicting petitioner's representations (even though counsel clearly heard petitioner's allegations and was given the opportunity to respond). Instead, defense counsel stated that the plea agreement with the prosecution did not contain a "minor participant agreement" and that, "[a]s far as the minor participant agreement, I don't know if there's some confusion about that" on petitioner's part. ROA.422.

Furthermore, during the rearraignment, although there was a general discussion of the sentencing guidelines, no one discussed the issue of the "minor participant" adjustment. And, although Judge Werlein at the rearraignment asked petitioner whether any promises not contained in the written plea

[16] *See* ROA.438-449.

agreement had been made to petitioner – to which petitioner responded, "[n]o," (ROA.368) – petitioner was not asked whether he then understood that the plea agreement (written in English) did not contain a "minor participant agreement." Furthermore, at the rearraignment, Judge Werlein did not mention the length of the plea agreement (in particular, did not mentioning the total number of pages (12) it comprised) and did not ask petitioner whether his counsel had interpreted all 12 of those pages from English to Spanish. ROA.361. Whether petitioner's counsel translated the entire plea agreement into English before petitioner pleaded guilty was disputed by petitioner (who contended that only one page was translated). And, notably, petitioner's counsel did not contradict petitioner at a hearing after the rearraignment when petitioner stated that counsel had told him that the plea agreement included a "minor role adjustment" and had only translated one page of what petitioner described as 13 pages. ROA.426-31.

These facts, especially when viewed in a light most favorable to petitioner,[17] support a colorable claim of ineffective assistance of counsel warranting an evidentiary hearing. *See Tollett v. Henderson*, 411 U.S. 258, 266-67

[17] The record should be viewed in such a light. *Cf. United States v. Hashimi*, 110 F.4th 621, 627 (4th Cir. 2024) ("Where, as here, the district court denies a § 2255 motion without an evidentiary hearing, we treat the district court's decision like a grant of summary judgment, which means that we view the facts in the light most favorable to the § 2255 movant . . . and

(1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he . . . may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not . . . 'within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (same); *see also Brady v. United States*, 397 U.S. 742, 755 (1970) ("For a plea to be knowing and voluntary, a defendant must be aware of the consequences of his plea, including the actual value of any commitments made to him by the court, prosecutor, *or his own counsel*.") (emphasis added; citation and internal quotation marks omitted); *Laycock v. State of New Me*x., 880 F.2d 1184, 1186 (10th Cir. 1989) ("A plea may not be voluntary when an attorney materially misinforms the defendant of the consequences of the plea or the court's probable disposition.") (citing *Blackledge v. Allison*, 431 U.S. 63,75 n.8 (1977)); *Mosher v. Lavallee*, 491 F.2d 1346, 1348 (2d Cir. 1974) (holding that a "a false statement by defense counsel to Mosher that a promise of a minimum sentence

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draw reasonable inferences in his favor.")); *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991) ("Where, as here, the allegations in the § 2255 motion are not negated by the record, the district court must hold an evidentiary hearing to decide all of these unresolved factual allegations which, if true, might support [his] constitutional claim . . . .") (citation and internal quotation marks omitted).

had been made by the judge" – which rendered the defendant's guilty plea involuntary – was "ineffective assistance of counsel").[18]

The Fifth Circuit simply refused to address petitioner's ineffective-assistance claim in view of petitioner's acknowledgment that the claim requires further factual development to resolve. The Fifth Circuit thus has relegated petitioner to raising the claim in a *pro se* § 2255 motion and seeking an evidentiary hearing during a post-conviction proceeding at which he will lack the constitutional right to the appointed and effective assistance of counsel.

5. Petitioner's Case Provides an Excellent Vehicle to Decide the Question Presented

Petitioner's case provides an excellent vehicle to decide the Question Presented. Petitioner raised the issue in the Fifth Circuit, and that court granted the government's motion to dismiss the appeal based on well-established precedent of that court foreclosing petitioner's argument in the Fifth Circuit. Furthermore, as discussed above, petitioner raised a colorable ineffective-assistance claim requiring further evidentiary development for judicial resolution. Finally, petitioner is precisely the type of federal defendant who would benefit most from the rule adopted by the First and D.C. Circuits: he is

[18] *See also Johnson v. Massey*, 516 F.2d 1001, 1002-03 (5th Cir. 1974) (citing *Mosher* and similar cases).

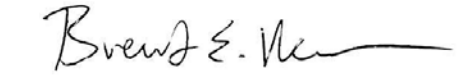
indigent, incarcerated, has a mere sixth-grade education (from Mexico), and cannot comprehend English. Defendants like petitioner face the highest hurdles in attempting to litigate an ineffective-assistance claim in a *pro se* § 2255 motion.

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; and vacate the Fifth Circuit's judgment with instructions to remand for the district court to conduct an evidentiary hearing on petitioner's colorable claim of ineffective assistance of counsel.

September 16, 2025

Respectfully submitted,



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