No. 01-1559

In the Supreme Court of the United States

JOSEPH MASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of petitioner's motion to vacate his conviction under 28 U.S.C. 2255 on the basis of ineffective assistance of counsel because petitioner did not demonstrate cause and prejudice for his failure to raise that claim on direct appeal of his conviction.

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A3-A10) is unreported. The opinion of the district court (Pet. App. A16-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2001. A petition for rehearing was denied on January 14, 2002 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on April 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner

was convicted of conspiracy to conduct and participate in the conduct of the affairs of a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d); participating in the conduct of the affairs of the racketeering enterprise, in violation of 18 U.S.C. 1962(c); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); three counts of conspiracy to commit extortion, in violation of 18 U.S.C. 1951; conspiracy to make extortionate extensions of credit and to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 892, 894; loansharking, in violation of 18 U.S.C. 893; and traveling interstate in aid of the extortion counts, in violation of 18 U.S.C. 1952. Pet. App. A31. Petitioner was sentenced to life imprisonment and a $240,000 fine, and was ordered to pay $104,100 in restitution. *Id.* at A6, A18. The court of appeals affirmed. *United States* v. *Massaro*, 57 F.3d 1063 (2d Cir.) (Table) (*reprinted in* Pet. App. A30-A37), cert. denied, 516 U.S. 933 (1995).

Petitioner then filed a motion under 28 U.S.C. 2255 challenging his convictions. The district court denied the motion. Pet. App. A16-A26. The court of appeals affirmed. *Id.* at A3-A10.

1. From at least the late 1970s until his arrest on June 24, 1992, petitioner was a "soldier" in the Luchese Organized Crime Family and actively participated in its various illicit affairs. As a Luchese soldier, petiioner's racketeering activity included using threats, violence, extortion and arson to secure and expand his control over Long Island's topless bar industry, extorting several other business establishments, and operating a loansharking business throughout Long Island, Brooklyn, and Queens, as well as a horse betting parlor in Queens. Gov't C.A. Br. 4-6; Pet. App. A4-A5, A31-A33.

On September 20, 1990, petitioner murdered his racketeering associate, Joseph Fiorito, because of Fiorito's failure to remit gambling proceeds and other monies. Gov't C.A. Br. 5; Pet. App. A33. Petitioner had Patrick Esposito, another racketeering associate, lure Fiorito to a vacant house in Hauppauge, Long Island, by telling Fiorito that they were going to commit an arson at the home. Gov't C.A. Br. 14; Pet. App. A33. Petitioner was waiting in the basement of the house and shot Fiorito in the head. Petitioner and Esposito then carried Fiorito's body up the stairs and through the first floor into the garage. They placed the body in a sitting position in the rear passenger seat of Fiorito's car, leaning across the seat with the head resting just past the transmission hump. Gov't C.A. Br. 14-15; Pet. App. A18-A19, A33.

As petitioner and Esposito drove away from the murder site in Fiorito's car, petitioner expressed concern that Fiorito was not dead and shot him a second time. Petitioner instructed Esposito to park Fiorito's car in a residential area in Queens, and to pull Fiorito's body across the back seat so that Fiorito would appear to be asleep. Petitioner and Esposito then got into a car driven by Joseph Kern, another of petitioner's associates. Gov't C.A. Br. 15; Pet. App. A33. Later that day, Kern and another man returned to the vacant house at petitioner's direction and recovered the shell casing from the first shot. Esposito confessed to his girlfriend on returning home that "they" had just killed Fiorito. Gov't C.A. Br. 16; Pet. App. A19, A33.

In the early morning of September 21, 1990, a New York City Police Officer discovered Fiorito's body in his parked car. When the police removed the body, they discovered a spent shell casing on the floor behind the passenger seat but did not find a bullet. Later that

same day, the police, alerted by Esposito's girlfriend, arrested Esposito outside his home and recovered his bloodstained clothing from a dumpster. Esposito agreed to cooperate with police and implicated petitioner in the crime. Gov't C.A. Br. 16-17; Pet. App. A19, A33.

2. On September 6, 1993, the day before opening statements in petitioner's trial, the new owner of Fiorito's car notified the government that, while removing the carpet in the rear of the car, he had discovered a bullet, as well as a hole in the carpet near the transmission hump. The government informed petitioner's counsel of that development by a faxed letter on Saturday, September 11, 1993. Gov't C.A. Br. 18, 30-31; Pet. App. A19, A34. In the meantime, defense counsel had delivered an opening statement arguing that Esposito had murdered Fiorito alone and that no physical evidence linked Massaro to the crime. Gov't C.A. Br. 30-31; Pet. App. A5.

On Thursday, September 23, 1993, defense counsel first raised the issue of the bullet with the district court (Cedarbaum, J.) and sought to expedite the government's ballistics tests. Before trial resumed on Monday, September 27, 1993, the government informed defense counsel that the ballistics expert had concluded that the bullet matched the shell fragments found in Fiorito's head and had probably been fired from the same gun. Gov't C.A. Br. 31-33; Pet. App. A34. On the following day, defense counsel moved for a mistrial, or, in the alternative, to preclude the admission of the bullet into evidence, on the basis of the government's late disclosure of the bullet. In connection with that motion, counsel claimed that the new evidence severely undermined the defense theory chosen in advance of trial. That strategy, aimed at discrediting Esposito's

account of the murder, was based in part on the lack of blood spatter in Fiorito's car or any scientific evidence indicating that a shot had been fired there. The district court denied the motion for a mistrial. It also concluded that the bullet evidence would be admissible because the government's delay did not irreparably prejudice petitioner's defense. Gov't C.A. Br. 33-34; Pet. App. A20, A35.

At the same time, the district court offered defense counsel a continuance to examine the evidence and adjust his defense strategy if necessary, and ruled that petitioner could recall any of the witnesses who had previously testified. Gov't C.A. Br. 34; Pet. App. A35. Petitioner's counsel declined a continuance, noting that a continuance was not necessary for the defense ballistics expert to examine the bullet.[1] Petitioner's counsel also argued that there was no use in a continuance, because the damage to his defense theory that the shooting had not taken place in the car was irreparable. Defense counsel did elect, however, to recall one of the crime scene investigators. Gov't C.A. Br. 34-35.

3. On appeal, petitioner retained new counsel, who argued, *inter alia*, that the district court erred in admitting the bullet into evidence. The court of appeals affirmed in an unpublished opinion only addressing that claim. Pet. App. A30-A37. Like the district court, the court of appeals concluded that "the government's conduct [in waiting five days before disclosing the discovery of the bullet] did not irreparably damage Massaro's strategy." *Id.* at A36. In particular, "[n]othing in his opening statement * * * was

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[1] As the trial proceeded, petitioner's ballistics expert examined the bullet and determined that it matched the shell fragments that had been recovered from Fiorito's head. Gov't C.A. Br. 34.

rendered false by the bullet evidence" and "the defense had ample other detrimental information with which to attack Esposito's credibility." *Ibid.* The court added that its conclusion was supported by trial counsel's decision to decline a continuance, explaining that "Massaro's decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim" of prejudice. *Id.* at A37.

4. On April 24, 1997, petitioner filed a motion under 28 U.S.C. 2255 seeking to vacate his conviction. The motion claimed, *inter alia*, that trial counsel rendered ineffective assistance by failing to seek a continuance upon learning of the bullet's discovery. After the district court determined that the motion was timely, Pet. App. A11-A13, the government filed an opposition arguing that petitioner's claims of ineffective assistance of counsel were procedurally barred because they had not been raised on direct appeal. Gov't Mem. of Law in Opp. to Joseph Massaro's Mot. for a New Trial and for Relief Under 28 U.S.C. § 2255, at 109-110 (Gov't Mem. of Law). In addition, the government argued that defense counsel's decision not to pursue a continuance was a reasonable trial strategy that did not irreparably prejudice the defense. *Id.* at 123-124.[2]

The district court denied petitioner's Section 2255 motion. Pet. App. A16-A26. The court found that peti-

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[2] The government also explained in its memorandum that petitioner erred in contending that the bullet directly linked him to the crime. Gov't Mem. of Law 123; see Pet. 5 ("This bullet was the only physical evidence that connected the Petitioner to the murder."). In fact, the bullet did not directly link petitioner to the crime; instead, it merely provided corroborating evidence of Esposito's version of events, including his claim that Fiorito was shot a second time in the car.

tioner's claims of ineffective assistance of counsel, including his claim that counsel should have sought a continuance once the bullet was discovered, were procedurally barred under *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993), because the claims could have been raised on direct appeal and petitioner had failed to establish cause or prejudice for his default. Pet. App. A24-A25. The district court then granted petitioner a certificate of appealability limited to that issue. *Id.* at A27.[3]

5. The court of appeals affirmed in an unpublished summary order. Pet. App. A3-A10. The court concluded that petitioner could have raised on direct appeal his claim that trial counsel rendered ineffective assistance by failing to accept a continuance, noting that new counsel represented petitioner on direct appeal and that the claim was "based solely on the record adduced at trial and available to Massaro's appellate counsel on direct appeal." *Id.* at A7. The court explained that, although "a new set of experts allegedly reached different conclusions after trial" on whether the bullet found in Fiorito's car came from the same gun as the fragments recovered from his body, that "does not render the basis for Massaro's ineffective assistance claim outside the scope of the record adduced at trial." *Ibid.* "Moreover," the court added, "each of the issues raised by Massaro's most recent forensic analysis—the absence of blood in the vehicle, the absence of blood 'spatter' or other remnants, the belated discovery of the bullet after several searches—all were extensively addressed at trial." *Id.* at A7-A8. As a result, "the record available to Massaro's appellate

[3] The court of appeals subsequently expanded the certificate of appealability to include a second issue. Pet. App. A28-A29.

counsel fully revealed the implications of the failure to accept a continuance." *Id.* at A8. Because petitioner was unable to demonstrate cause for his default, the court found his ineffective assistance of counsel claim to be procedurally barred. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-16) that this Court should grant review to resolve a conflict among the courts of appeals on the question whether claims of ineffective assistance of counsel must be raised on direct appeal. It is true that courts differ slightly in their procedural rules for asserting claims of ineffective assistance of counsel. Nevertheless, this Court's plenary review is not warranted because a uniform national rule is not required for this procedural issue.

1. This Court has "long and consistently affirmed that a collateral challenge may not do service for an appeal." *United States* v. *Frady*, 456 U.S. 152, 165 (1982) (citing cases). When a defendant has failed to raise a claim both in the trial court and on direct appeal, he "must clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. To obtain relief on collateral attack, the defendant must show both "cause" for failing to raise the issue before his conviction became final and "actual prejudice" resulting from the alleged error. *Id.* at 168; *Wainwright* v. *Sykes*, 433 U.S. 72, 84, 87 (1977).

Claims of ineffective assistance of counsel, however, often cannot be expected to be raised and disposed of on direct appeal. That is because the record on appeal typically does not permit the reviewing court to make an informed decision on a claim of ineffectiveness raised for the first time at that stage. In addition, if the same lawyer represents the defendant at trial and appeal, it

is unrealistic to expect that lawyer to argue on appeal that his own trial performance was ineffective. Accordingly, the courts of appeals have expressed a strong preference (or in some cases required) that ineffective assistance claims be presented to the district court in the first instance in a motion under Section 2255.[4]

The Second and Seventh Circuits have expressed a limitation on that general rule. Those courts require a defendant who is represented by new counsel on appeal and whose ineffective assistance claim can be decided on the trial record to raise that claim on direct appeal. If the defendant does not do so in that situation, those courts of appeals hold that principles of procedural default ordinarily bar the assertion of the ineffectiveness claim on collateral attack. See *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993); *Guinan* v. *United States*, 6 F.3d 468, 472 (7th Cir. 1993); but cf. *Duarte* v. *United States*, 81 F.3d 75, 77 (7th Cir. 1996) (defendant may raise all of his ineffective assistance of counsel claims in a Section 2255 motion "whenever any important element of the challenge to counsel's performance could not have been presented on the original record").

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[4] See, *e.g.*, *United States* v. *Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), cert. denied, 511 U.S. 1086 (1994); *Billey-Elko* v. *United States*, 8 F.3d 111, 114 (2d Cir. 1993); *United States* v. *DeRewal*, 10 F.3d 100, 103-104 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); *United States* v. *Smith*, 62 F.3d 641, 651 (4th Cir. 1995); *United States* v. *Sevick*, 234 F.3d 248, 252 (5th Cir. 2000); *United States* v. *Pruitt*, 156 F.3d 638, 646 (6th Cir. 1998), cert. denied, 525 U.S. 1091 (1999); *United States* v. *Kellum*, 42 F.3d 1087, 1094-1095 (7th Cir. 1994); *United States* v. *Thompson*, 972 F.2d 201, 203-204 (8th Cir. 1992); *United States* v. *Mal*, 942 F.2d 682, 689 (9th Cir. 1991); *United States* v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc); *United States* v. *Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989); *United States* v. *Richardson*, 167 F.3d 621, 626 (D.C. Cir.), cert. denied, 528 U.S. 895 (1999).

In prior cases, the government has suggested that claims of ineffective assistance of trial counsel ordinarily should be raised in a motion under Section 2255 rather than on direct appeal, and that the failure to raise an ineffectiveness claim on direct appeal should not trigger a "cause and prejudice" inquiry. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984); see also *Billy-Eko* v. *United States*, 509 U.S. 901 (1993); *Diaz-Albertini* v. *United States*, 498 U.S. 1061 (1991); *Chappell* v. *United States*, 494 U.S. 1075 (1990).[5] The Third and Tenth Circuits have adopted that position, allowing defendants to raise a claim of ineffective assistance of counsel for the first time on collateral attack without requiring a showing of cause and prejudice, even though they might have been able to bring the claim on direct appeal. See *United States* v. *Galloway*, 56 F.3d 1239, 1242-1243 (10th Cir. 1995) (en banc); *United States* v. *DeRewal*, 10 F.3d 100, 103-105 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); see also *Knight* v. *United States*, 37 F.3d 769, 774 (1st Cir. 1994) ("[T]he failure to bring a claim of ineffective assistance of counsel on direct appeal is not subject to the cause and prejudice standard.").

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[5] In *Billy-Eko*, *Diaz-Albertini*, and *Chappell*, the courts had applied the cause and prejudice test to decline to entertain ineffective assistance claims not brought on direct appeal. In each of those cases, this Court granted the petition, vacated the judgment, and remanded for further consideration in light of the position asserted by the United States. Following those remands, the Second Circuit adhered to its limited application of the cause-and-prejudice rule in *Billy-Eko*, 8 F.3d at 114-116. The Tenth Circuit, since the remand in *Diaz-Albertini*, has adopted the government's suggested approach. The Seventh Circuit, since the remand in *Chappell*, has adhered to its version of the cause-and-prejudice test in this setting.

Other courts, while generally preferring that ineffectiveness claims be raised for the first time in a motion under Section 2255, allow review of such claims on direct appeal in some cases. Those courts have not made clear whether they would require a showing of cause and prejudice to excuse the failure to raise an ineffectiveness claim on direct appeal. See, *e.g.*, *United States* v. *Smith*, 62 F.3d 641, 651 (4th Cir. 1995); *United States* v. *Sevick*, 234 F.3d 248, 251 (5th Cir. 2000); *United States* v. *Pruitt*, 156 F.3d 638, 646 (6th Cir. 1998), cert. denied, 525 U.S. 1091 (1999); *United States* v. *Thompson*, 972 F.2d 201, 203-204 (8th Cir. 1992); *United States* v. *Mal*, 942 F.2d 682, 689 (9th Cir. 1991).

2. Although the courts of appeals differ in their procedural rules in this area, review by this Court is not warranted. As an initial matter, the result in this case is not unfair to petitioner. By the time of petitioner's direct appeal, the Second Circuit had made clear that a claim of ineffective assistance of trial counsel must be raised on direct appeal when the defendant has new appellate counsel and the claim does not require factual development, and that if the claim is not raised it will be subject to cause and prejudice analysis on collateral attack. See *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993). Petitioner's new counsel on appeal thus was on notice of that rule. Counsel's decision to omit an ineffectiveness claim from the direct appeal, even though the basis for the claim was apparent from the trial record, thus constituted a waiver, absent a showing of cause and prejudice.

Nor is this Court's review required to formulate a uniform procedural rule for the courts of appeals on this issue. Although the courts of appeals do not follow a single approach, each of the competing rules has advantages, and none forecloses litigation over poten-

tially meritorious claims. As the government has argued, a rule allowing a defendant to raise a claim of ineffective assistance of counsel on collateral review without being required to show why the claim could not have been raised on direct appeal is easy to administer and avoids time-consuming litigation over issues of cause and prejudice. It also ensures that the district court has an opportunity to pass on all ineffectiveness claims under 28 U.S.C. 2255 before their presentation to an appellate court. But the rule in the Second and Seventh Circuits, which imposes a procedural default in a limited class of cases, has its own advantages. When a defendant is represented by different counsel on direct appeal and there is no need for record development on the ineffectiveness claim, it is not unfair to expect the defendant to raise the claim of ineffective assistance at that time. Nor is it unfair for the courts to apply the cause and prejudice test if such a defendant, having notice of the general requirement to raise an ineffectiveness claim on direct appeal in those circumstances, fails to raise the claim. Such an approach accelerates the resolution of some ineffectiveness claims, and thereby hastens the resolution of the legal challenges to a conviction.

The choice of which procedural rule to adopt is not an issue requiring a uniform national solution. See *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993); *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985). The issue does not ultimately affect the merits of an ineffectiveness claim. Once a circuit has established a procedural rule, defendants are on notice of the appropriate time to present an ineffectiveness claim. And regardless of the precise procedure adopted, a defendant has at least one opportunity to raise an ineffectiveness claim in an appellate court. Accordingly, this

Court has repeatedly declined to grant review in similar cases presenting the same issue. See *Moghal* v. *United States*, cert. denied, 519 U.S. 835 (1996) (No. 95-9027); *Velasquez* v. *United States*, cert. denied, 516 U.S. 1160 (1996) (No. 95-6925); *Sprecher* v. *United States*, cert. denied, 516 U.S. 913 (1995) (No. 95-82). There is no reason for a different result here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2002

[6] Petitioner notes that in *Sprecher*, the Solicitor General argued against certiorari review on the ground that the district court had actually considered each aspect of the defendant's ineffective assistance of counsel claim. Pet. 12 n.7. No such argument was made, however, in response to the *Velasquez* and *Moghal* certiorari petitions. See Br. in Opp. 6-11, *Velasquez* v. *United States*, cert. denied, 516 U.S. 1160 (1996) (No. 95-6925); Br. in Opp. 5-11, *Moghal* v. *United States*, cert. denied, 519 U.S. 835 (1996) (No. 95-9027) (available at 1996 WL 935681, at *3-*5).