INCENTIVIZING INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS RAISED ON DIRECT APPEAL: WHY APPELLATE COURTS SHOULD REMAND "COLORABLE" CLAIMS FOR EVIDENTIARY HEARINGS

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I. INTRODUCTION

The constitutional right to the assistance of counsel, including the subsidiary rights to *appointed*[1] and *effective*[2] assistance of counsel, unquestionably is a criminal defendant's most important right. The Supreme Court has long recognized that the right is "basic to a fair trial" and "affects [the defendant's] ability to assert any other rights he may have."[3] The right to counsel applies not only during a trial itself,[4] but also during critical pretrial proceedings,[5] plea bargaining and guilty plea proceedings,[6] and sentencing hearings.[7]

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1. *See* Gideon v. Wainwright, 372 U.S. 335, 340–41 (1963).

2. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984).

3. Penson v. Ohio, 488 U.S. 75, 84, 88 (1988) (first quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956), then quoting Chapman v. California, 386 U.S. 18, 23, n.8 (1967)).

4. *See, e.g.*, Hinton v. Alabama, 571 U.S. 263 (2014) (per curiam).

5. Kimmelman v. Morrison, 477 U.S. 365, 385 (1986).

6. *See, e.g.*, Lafler v. Cooper, 566 U.S. 156, 162 (2012).

7. *See, e.g.*, Glover v. United States, 531 U.S. 198, 203–04 (2000). For simplicity's sake, this article will refer to attorneys representing criminal defendants in any of these proceedings in a trial court as "trial court counsel."

Despite its importance, in the vast majority of American jurisdictions today, a claim of ineffective assistance of trial counsel cannot be raised on direct appeal,[8] yet there is no constitutional right to the assistance of counsel in state or federal habeas corpus proceedings.[9] That means that prisoners—the vast majority of whom are indigent[10] and many of whom lack significant education or have mental or intellectual disabilities[11]—typically are forced to develop and litigate ineffectiveness claims without the assistance of an attorney, assuming they are even able to identify such claims without such assistance. As a result, after their direct appeals are over, the overwhelming majority will be unable to raise a viable ineffectiveness claim, assuming one exists.

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8. *See, e.g.*, Commonwealth v. Grant, 813 A.2d 726, 734–36 (Pa. 2002) (noting the vast majority of state and appellate courts refuse to hear ineffective assistance of trial counsel claims on direct appeal).

9. Coleman v. Thompson, 501 U.S. 722, 752–53 (1991) (no constitutional right to the assistance of counsel in habeas corpus proceedings); *see also* Halbert v. Michigan, 545 U.S. 605 (2005) (constitutional right to the assistance of counsel exists on a defendant's first appeal in the direct appeal process).

10. *See, e.g.*, Free v. United States, 879 F.2d 1535, 1539 (7th Cir. 1989) (Coffey, J., concurring) (noting "the vast majority of prisoners are indigent").

11. *See, e.g.*, *Halbert*, 545 U.S. at 620–21 ("[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills. . . . [S]even out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article.") (citation and internal quotation marks omitted); *see also id.* at 621 ("Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments."). In *Halbert*, the Court held that an indigent criminal defendant has a constitutional right to the assistance of counsel on a direct appeal in which, under state law, the defendant does not possess the right to appeal as a matter of right (and, instead, must seek leave of court to appeal). *Id.* at 622–23.

Although the Court in *Halbert* cited state prison statistics, federal prison data does not significantly differ. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 54 (2020) (noting 48.6% of federal prisoners did not have a high school degree), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf; BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006) (reporting that 45% of federal prisoners "had a mental health problem"), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf.

In 2012, in *Martinez v. Ryan*, the Supreme Court, recognizing that most state prisoners without the assistance of counsel are unable to meaningfully investigate or litigate an ineffectiveness claim on state habeas corpus review, made it easier for them to raise an ineffectiveness claim on federal habeas corpus review.[12] The Court held that, as an equitable matter in federal habeas corpus proceedings, "a procedural default [during state habeas corpus proceedings] will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [state's habeas corpus] proceeding, there was no counsel or counsel in that proceeding was ineffective."[13]

In creating that equitable exception to the traditional procedural-default rule applicable to federal habeas proceedings, the Court in *Martinez* relied on three key premises:

- The constitutional right to the effective assistance of counsel in the trial court is the most fundamental right that a criminal defendant possesses, and our legal system thus should encourage the vindication of that essential right.[14]
- A pro se defendant, particularly one who is incarcerated, typically cannot develop and file a viable claim of ineffective assistance of trial counsel.[15]

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12. 566 U.S. 1 (2012).

13. *Id.* at 17. The Court referred to state court "initial-review collateral" proceedings. *Id.* This article uses the term "state habeas corpus" proceedings instead of "initial-review collateral" proceedings because a majority of states refer to such collateral-review proceedings as "habeas corpus" proceedings. For consistency's sake, I likewise refer to federal collateral-review proceedings under 28 U.S.C. § 2255 (2018) as "habeas corpus" proceedings commenced in federal court.

14. *Id.* at 12 ("A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the foundation for our adversary system.").

15. *Id.* ("To present a claim of ineffective assistance at trial, . . . a prisoner likely needs an effective attorney. . . . The prisoner, unlearned in the law, may not comply with the [applicable] procedural rules or may misapprehend the

- A jurisdiction with procedural rules that prevent a defendant from raising a claim of ineffective assistance of trial court counsel on direct appeal, when the defendant still possesses the constitutional right to the assistance of counsel, significantly decreases the odds of the successful vindication of the constitutional right to the effective assistance of trial counsel.[16]

For these reasons, the Court in *Martinez* necessarily recognized that it is fundamentally unfair and denigrates the right to effective assistance of trial court counsel to apply a procedural default bar on federal habeas corpus review to an ineffectiveness claim when the state prisoner lacked counsel (or lacked effective counsel) during initial state habeas corpus proceedings.[17] At least for state defendants, who represent the bulk of all felony defendants in the United States,[18] *Martinez* offers them some hope of raising an ineffectiveness claim on federal habeas corpus review—although they lack a constitutional or statutory right to the assistance of counsel on federal habeas corpus review (save in death penalty cases, in which there is a statutory right)[19] and still face the many substantive and procedural hurdles created by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[20]

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substantive details of federal constitutional law. While confined in prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.").

16. *Id.* at 13 ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims.").

17. *Id.*

18. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

19. *See* Post v. Bradshaw, 422 F.3d 419, 423 n.1 (6th Cir. 2005) (noting that "a [federal habeas] petitioner does not have a constitutional right to habeas counsel, much less a right to the effective assistance of counsel"). Indigent capital habeas petitioners possess a *statutory* right to appointed counsel. *See* McFarland v. Scott, 512 U.S. 849, 854 (1994).

20. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 163 (2021) ("[B]ecause of the 'restraints imposed by the Antiterrorism and

Although *Martinez* is an important decision that helps protect the "bedrock" right to effective assistance of counsel in trial court proceedings for a select few state criminal defendants, there is an additional way to protect that right even more vigorously: state and federal appellate courts should allow ineffectiveness claims to be raised on direct appeal and remand "colorable" claims for an evidentiary hearing, thereby allowing the claim to be addressed while a defendant still possesses the constitutional right to the appointed and effective assistance of counsel. This article describes that procedure, which a handful of state and federal courts already follow, and recommends that the Supreme Court of the United States and state appellate courts adopt it pursuant to their supervisory authority over criminal procedure.[21]

Such a procedure, together with *Martinez*'s equitable exception, would help vindicate the fundamental right to counsel in the trial court at both the front end of the appellate process (i.e., the direct appeal) and the back end (i.e., federal habeas corpus review). Creating this procedure also would incentivize criminal defendants' direct appeal counsel to identify and raise colorable ineffectiveness claims—an incentive that currently is absent in the vast majority of American jurisdictions. Such a procedure also would incentivize better trial court representation because defense counsel would be on notice that their performances might be reviewed for effectiveness on direct appeal. Currently, defense counsel in American trial courts are well aware that, except in the rare case in which a pro se defendant can effectively raise

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Effective Death Penalty Act of 1996 (AEDPA)—the federal habeas statute—robust review is no longer viable in federal habeas proceedings.'") (quoting Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring)). Of particular note concerning ineffectiveness claims, under the AEDPA, a federal court reviewing a state prisoner's claim that was rejected by the state courts on the merits, the federal must apply a "doubly deferential" standard—first to trial counsel's "strategic" decisions (assuming the challenged acts or omissions were genuinely strategic and not the result of incompetence) and then to the state courts' ruling that trial counsel acted reasonably and not deficiently. *See* Cullen v. Pinholster, 563 U.S. 170, 190 (2011).

21. An appellate court's "supervisory authority" over criminal cases is discussed further below in *infra* Part VII.

an ineffectiveness of counsel claim in habeas corpus proceedings or the even rarer case in which the defendant can afford to retain habeas corpus counsel to investigate prior counsel's performance, trial counsel's performance will never be reviewed. This article therefore proposes an approach that will give greater expression to the foundational right to counsel and that, in practice, will promote meaningful representation of criminal defendants in trial courts.

II. SURVEY OF AMERICAN JURISDICTIONS' PROCEDURES FOR DEFENDANTS WHO WISH TO RAISE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COURT COUNSEL ON DIRECT APPEAL

Wide variation exists among state and federal appellate courts with respect to the procedures for raising claims of ineffective assistance of trial court counsel on direct appeal. There are five main approaches:

1) a categorical prohibition on a defendant's raising an ineffectiveness claim on direct appeal (thus always relegating the defendant to raising the claim in habeas corpus proceedings);[22]
2) a rule permitting a defendant to raise the claim on direct appeal only if the existing record "conclusively" shows ineffectiveness of trial court counsel (and, if not, relegating the defendant to raising the claim in habeas corpus proceedings);[23]
3) a rule permitting an ineffectiveness claim to be raised on direct appeal if the record conclusively establishes the ineffectiveness of trial court counsel or, if a claim is at least "colorable" or "plausible" based on the

22. *See, e.g.*, State v. Spreitz, 130 P.3d 525, 527 (Ariz. 2002).
23. *See, e.g.*, United States v. King, 119 F.3d 290, 295 (4th Cir. 1997).

existing record, remanding the case for an evidentiary hearing on the claim in the trial court;[24]

4) a rule requiring a defendant to raise an ineffective assistance claim on direct appeal or risk procedurally defaulting the claim in a subsequent habeas corpus proceeding;[25] and

5) a procedure permitting direct appeal counsel to file a motion for a remand (typically attaching extra-record materials such as affidavits or at least making a factual proffer of the new evidence that appellate counsel intends to offer) for an evidentiary hearing on an ineffectiveness claim or permitting direct appeal counsel to simultaneously litigate a habeas corpus petition raising the ineffectiveness claim.[26]

Since 2003, when the Supreme Court decided *Massaro v. United States*,[27] most federal circuit courts have refused to address the merits of claims of ineffective assistance of trial counsel raised for the first time on direct appeal unless the existing record "conclusively," "obviously," or "without a doubt" supports the claim without further evidentiary development.[28] Such claims are rare

24. *See, e.g.*, United States v. Burroughs, 613 F.3d 233, 238 (D.C. Cir. 2010).

25. *See, e.g.*, Brechen v. State, 835 P.2d 117, 119 n.1 (Okla. Crim. App. 1992).

26. *See, e.g.*, State v. Van Cleave, 716 P.2d 580, 583 (Kan. 1986). *See generally* WAYNE R. LAFAVE ET AL., 3 CRIM. PRO. § 11.7(e) (4th ed. 2020) (discussing the different approaches); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 710–13 (2007) (same).

27. 538 U.S. 500 (2003) (rejecting the Second Circuit's requirement that a federal defendant must raise an ineffectiveness claim on direct appeal, if possible to do so, or risk procedurally defaulting the claim on habeas corpus review). The Supreme Court's decision in *Massaro* is discussed in *infra* Part VI.

28. *See, e.g.*, United States v. Khedr, 343 F.3d 96, 99–100 (2d Cir. 2003); Government of Virgin Islands v. Vanterpool, 767 F.3d 157, 163 (3d Cir. 2014); United States v. Faulls, 821 F.3d 502, 507–08 (4th Cir. 2016); United States v. Higdon, 832 F.2d 312, 314 (5th Cir.1987); United States v. Richardson, 906 F.3d 417, 424 (6th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 2713 (2019); United States v. Flores, 739 F.3d 337, 340–41 (7th Cir. 2014); United States v. Adkins, 636 F.3d 432, 434 (8th Cir. 2011); United States v. Ross, 206 F.3d 896, 900 (9th Cir. 2000); United States v. Galloway, 56 F.3d 1239, 1242 (10th Cir. 1995); United States v. Bender, 290 F.3d 1279, 1284 (11th Cir. 2002).

because a record on a direct appeal was not developed with an ineffectiveness claim in mind,[29] except in the exceedingly rare case in which a defendant, following conviction at trial, managed to obtain a new attorney who was able to file an ineffectiveness claim in a timely motion for a new trial.[30] Some federal appellate courts actively discourage defendants from raising ineffectiveness claims on direct appeal. For example, the Seventh Circuit has strongly cautioned defendants not to be "foolish" and raise an ineffectiveness claim for the first time on direct appeal, lest it be rejected at that juncture and foreclosed from being relitigated in a more fulsome manner on habeas corpus review.[31]

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29. BARBARA J. VAN ARSDALE ET AL., FED. PROC., L. ED. § 22:704 (June 2021 update) ("Cases where the record is sufficiently developed to enable a fair evaluation of the ineffectiveness claim on direct appeal are rare.").

30. Unless motions for a new trial are filed within the strict time limits set forth in the applicable rule, courts are generally unwilling to permit such motions to be used to litigate ineffectiveness claims. *See, e.g.*, United States v. Medina, 118 F.3d 371, 373 (5th Cir. 1997) ("[R]aising an ineffectiveness claim through the mechanism of a new trial motion based on newly discovered evidence is wholly impermissible.").

31. United States v. Flores, 739 F.3d 337, 342 (7th Cir. 2014). Judge Easterbrook's opinion for the court was adamant:

> On direct appeal, . . . the record lacks evidence on these issues [concerning trial counsel's challenged acts and omissions] and any findings about where the truth lies. A court of appeals is not about to assume that the accused is telling the truth and condemn counsel's choices on that basis. The best that could come of an appeal (from the defendant's perspective) would be a remand for a hearing—duplicating the process initiated by a motion under § 2255—and the worst that could come of it would be an affirmance observing that an empty record is fatal to the appeal.
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> Lack of an adequate record is not the defendant's only problem. Lack of a decision by the district judge is another. Flores never asked that judge to give him a new trial on the ground that his counsel had furnished ineffective assistance. This means that appellate review is limited by the plain-error standard of Fed. R. Crim. P. 52(b). . . . And even if the appellant [satisfied the plain error standard], reversal is discretionary: a plain error permits, but never compels, appellate correction.

Id. at 340–41. Judge Easterbook was blunt in his characterization of raising an ineffectiveness claim on direct appeal as not merely "imprudent" but "foolish":

> Raising ineffective assistance on direct appeal is imprudent because defendant paints himself into a corner. . . . For we held . . . that, when an ineffective-assistance claim is rejected on direct appeal, it cannot be raised again on collateral review. A litigant gets to argue ineffective assistance, and for that matter any other contention, just once. A

In contrast, two other federal circuit courts—the First and D.C. Circuits—permit a defendant to raise an ineffectiveness claim on direct appeal even if the existing record does not "conclusively" establish the claim and will remand for an evidentiary hearing so long as the record supports a "colorable" ineffectiveness claim.[32] Notably, the many D.C. Circuit decisions recognizing this procedure include those authored by Justices Kavanaugh and Thomas when they formerly were members of the D.C. Circuit,[33] as well as a decision also joined by Chief Justice Roberts when he formerly was a member of that court.[34] Some state appellate courts also follow this

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> collateral attack cannot be used to obtain a second opinion on an argument presented and decided earlier. By arguing ineffective assistance on direct appeal the defendant relinquishes any opportunity to obtain relief on collateral review, even though a motion under § 2255 affords the only realistic chance of success.
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> 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. We encourage counsel to discuss that subject with the defendant after argument and to consider withdrawing the contention. We asked that question at oral argument of this appeal, and counsel assured us that Flores is aware of the risks and wants the contention resolved now. That is his prerogative, foolish though the choice seems to the judiciary.

Id. at 341–42.

32. *See* United States v. Marquez-Perez, 835 F.3d 153, 165 & n.6 (1st Cir. 2016); United States v. Knight, 824 F.3d 1105, 1112 (D.C. Cir. 2016) (Kavanaugh, J.).

33. *Knight*, 824 F.3d at 1112 ("This Court's typical practice on direct appeal . . . is to remand'colorable' claims of ineffective assistance to the district court."); United States v. Williams, 784 F.3d 798, 804 (D.C. Cir. 2015) (Kavanaugh, J.); United States v. Poston, 902 F.2d 90, 99 n.9 (D.C. Cir. 1990) (Thomas, J.).

34. *Williams*, 358 F.3d at 962.

practice,[35] although most follow the same rule as the majority of federal circuit courts.[36]

III. FEDERAL AND STATE APPELLATE COURTS SHOULD ADOPT THE PROCEDURE PERMITTING "COLORABLE" INEFFECTIVENESS CLAIMS TO BE RAISED ON DIRECT APPEAL

Particularly after the Supreme Court's 2012 decision in *Martinez v. Ryan*, there are at least five reasons why, if a defendant represented by new counsel on direct appeal[37] identifies a colorable claim of ineffective assistance of counsel by his trial court counsel, an appellate court should remand for an evidentiary hearing rather than relegate the defendant to raising the claim in habeas corpus proceedings.

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35. *See, e.g.*, McLeod v. State, 627 So.2d 1065, 1066 (Ala. 1993) (holding that an appellate court has discretion to remand to trial court for evidentiary hearing in the interests of justice when a defendant raises an ineffective assistance of counsel claim for the first time on appeal); Tazruk v. State, 67 P.3d 687, 688 (Alaska Ct. App. 2003) ("Normally, an appellate court will not consider claims of ineffective assistance for the first time on appeal—because, in most instances, the appellate record is inadequate to allow us to meaningfully assess the competence of the attorney's efforts. But Tazruk's case is atypical. As we explain . . . , the record of the proceedings in the superior court establishes a prima facie case that Tazruk received ineffective assistance.").

36. *See* LAFAVE ET AL., supra note 26, at § 11.7(e) & n.77 ("Most jurisdictions prefer not to disrupt the normal processing of appeals to await a trial court evidentiary hearing on an ineffectiveness claim that was not presented in a motion for a new trial."); Primus, *supra* note 26, at 710–13.

37. If a defendant on direct appeal is represented by the same counsel who represented the defendant in the trial court, that counsel will be ethically prohibited from raising an ineffectiveness claim concerning her own performance in the trial court. *See* Fautenberry v. Mitchell, 515 F.3d 614, 640 (6th Cir. 2008) ("[I]t would be unreasonable to expect counsel to raise an ineffective assistance claim against himself."). For that reason, if an appellate court adopts the procedure proposed in this article, a corollary procedure would prohibit a trial attorney from also representing the defendant on direct appeal (unless the defendant knowingly and voluntarily waives the right to have a different attorney handle the direct appeal). Such a procedure would only be required when defendant has retained counsel, as the constitutional right to counsel of choice only exists for retained (and not appointed) counsel. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006).

First, and foremost, a defendant possesses a constitutional right to the *effective* assistance of counsel—and *appointed* assistance of counsel in the event of indigency—on direct appeal but *not* in habeas corpus proceedings.[38] That limitation on the right to counsel applies even if a habeas corpus proceeding is the first opportunity for the defendant to raise a constitutional claim of ineffective assistance by his trial counsel.[39] In addition, in most states and also in federal court, there is no guaranteed statutory right to the assistance of counsel to investigate, prepare, and litigate a habeas corpus petition, at least in a non-capital case.[40] Only after an unrepresented (and typically indigent and incarcerated) defendant has filed a pro se habeas corpus petition does a state or federal trial court even consider whether to appoint counsel.[41] And, of course, the likelihood of a defendant who files a habeas petition actually receiving an evidentiary hearing is much greater if a licensed attorney investigated the case and then prepared the habeas petition on behalf of the defendant. Yet, because there is no statutory or constitutional right to the assistance of appointed or effective counsel in habeas corpus proceedings, a defendant without resources to hire his or her own counsel to prepare and litigate a petition faces dim prospects of developing an ineffectiveness claim in a pro se petition that will secure the appointment of counsel and, ultimately, an evidentiary hearing.[42]

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38. 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).

39. Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir.1997) (en banc); *accord* Jeffers v. Lewis, 68 F.3d 299, 300 (9th Cir. 1995) (en banc).

40. Martinez v. Ryan, 566 U.S. 1, 14 (2012) (surveying states laws and practices concerning the appointment of counsel in non-capital post-conviction proceedings).

41. *See, e.g.*, RULES GOVERNING SECTION 2255 CASES IN THE UNITED STATES DISTRICT COURTS R. 2, 6 (effective Feb. 1, 1977).

42. *See Martinez*, 566 U.S. at 13 ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims."); State v. Thompson, 20 A.3d 242, 256 (N.H. 2011) ("[T]here is no right to counsel in a [habeas corpus] proceeding and litigants are often left to

Conversely, a defendant on direct appeal has a constitutional right to the assistance of appointed and effective counsel both to identify a colorable ineffectiveness of trial counsel claim and to develop the factual basis for such a claim (in the event of a remand to the district court). Accordingly, allowing a defendant who still possesses the right to appointed and effective assistance of counsel to raise a colorable claim of ineffectiveness concerning trial counsel's performance and to receive a remand for an evidentiary hearing best promotes the all-important right to the effective assistance of trial court counsel.

Second, affording a defendant the right to a remand on direct appeal if the defendant raises a "colorable" claim avoids "the perceived unfairness of holding a defendant making a claim of ineffective assistance—for which new counsel is obviously a necessity—to" the limited period for a motion for a new trial (typically within ten to thirty days following a conviction).[43]

Third, potential witnesses and evidence will be "fresher" at a hearing on a remand from a direct appeal than potentially many years later at a hearing on habeas corpus petition.[44] Similarly, if ineffectiveness is found on remand from a direct appeal, a retrial necessarily would occur earlier than one ordered after successful litigation of an ineffectiveness claim in habeas corpus proceedings. In the event that a new trial ultimately is ordered based on trial counsel's ineffectiveness, it is better for society to have that retrial occur sooner rather than later.[45] As a

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investigate and supplement the trial record without the assistance of legal counsel.").

43. United States v. Rashad, 331 F.3d 908, 911 (D.C. Cir. 2003).

44. *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.").

45. 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); *Thompson*, 20 A.3d at 256 ("[B]y the time a [habeas

former United States Solicitor General recognized, "[c]hanneling ineffective assistance claims to direct appeal rather than collateral review in appropriate situations serves the general societal interests in respecting the finality of criminal judgments and encouraging resolution of legal challenges to convictions at the earliest feasible opportunity."[46]

Fourth, a defendant on direct appeal and on remand from direct appeal (in the event he or she raises a "colorable" claim) does not face the potential hurdles that exist on habeas corpus review, such as the one-year statute of limitations under the AEDPA or the habeas nonretroactivity doctrine created in *Teague v. Lane*.[47]

Fifth and finally, if an incarcerated defendant ultimately wins the ineffectiveness claim, depending on the resolution of a retrial, a prison sentence may be decreased or avoided all together (in the event of acquittal or case dismissal). However, if a defendant is forced to remain incarcerated while awaiting resolution of habeas petition raising a meritorious ineffectiveness claim, he or she would end up spending unnecessary time behind bars—an affront to our legal tradition.[48]

For these five reasons, it promotes fundamental fairness and the all-important right to the effective assistance of trial court counsel—the very same reasons supporting the equitable exception created in *Martinez v.*

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corpus] proceeding takes place, witnesses may disappear or their memories might fade, causing practical problems for the State in the case of a retrial.").

46. Brief for the United States, Massaro v. United States, 538 U.S. 500 (2003) (No. 01-1559), 2002 WL 31868910, at *10.

47. Although "garden-variety applications of the test in *Strickland v. Washington*, 466 U.S. 668 (1984), for assessing claims of ineffective assistance of counsel do not produce new rules" under *Teague*, *see Chaidez v. United States*, 568 U.S. 342, 348–49 (2013), certain other types of ineffectiveness claims could involve application of "new rules." *Id.* at 349 (holding that the rule governing ineffectiveness claims announced in *Padilla v. Kentucky*, 559 U.S. 356 (2010), was "new" for purposes of *Teague*).

48. As the Supreme Court has recognized: "[I]t is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." Stutson v. United States, 516 U.S. 193, 196 (1996) (per curiam).

Ryan for habeas corpus petitioners—for an appellate court on direct appeal to remand for an evidentiary hearing on a colorable ineffectiveness claim rather than require a defendant to raise the claim in habeas corpus proceeding and seek an evidentiary hearing at that juncture. On remand, the defendant would be represented by counsel (either direct appeal counsel or some other attorney) and have the ability to subpoena witnesses and otherwise develop evidence in support of the ineffectiveness claim.

IV. AN ADDITIONAL REASON FOR FEDERAL DEFENDANTS TO BE ABLE TO RAISE "COLORABLE" INEFFECTIVENESS CLAIMS ON DIRECT APPEAL

In addition to these five reasons, there is yet another reason supporting the implementation of the proposed procedure for federal defendants who raise colorable ineffectiveness claims on direct appeal: the same "colorable" claim standard applies in post-conviction proceedings.

The federal statute governing habeas corpus proceedings instituted by federal defendants, 28 U.S.C. § 2255, itself requires an evidentiary hearing when a federal defendant raises a colorable constitutional claim.[49] Even a state prisoner who files a section 2254 habeas corpus petition is entitled to a federal evidentiary hearing on a "colorable" claim if the state courts did not make

49. *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. Ray, 547 Fed. App'x 343, 345 (4th Cir. 2013) ("In § 2255 proceedings, '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.' 28 U.S.C.A. § 2255(b). An evidentiary hearing in open court is required when a movant presents a colorable Sixth Amendment claim showing disputed facts beyond the record or when a credibility determination is necessary in order to resolve the issue.").

factual findings that foreclosed the claim (albeit a rare occurrence).[50] This "colorable" claim standard repeatedly has been applied to claims of ineffective assistance of counsel in habeas corpus proceedings by those federal circuits courts that have refused on direct appeal to remand for evidentiary hearings in the district court when a defendant raises a colorable ineffectiveness claim.[51]

Therefore, it makes no sense whatsoever, at least on a federal direct appeal, to refuse to remand for an evidentiary hearing and, instead, relegate a federal defendant who raises a colorable ineffectiveness claim with at least some plausible support in the existing record to a section 2255 motion. If the defendant would be eventually entitled to an evidentiary hearing down the road in a section 2255 proceeding, what possible reason justifies not remanding for an evidentiary hearing sooner rather than later—particularly when the defendant has a constitutional right to the assistance of counsel on direct appeal (and on remand to the district court from direct appeal) but not in section 2255 proceedings?

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50. *See, e.g.*, West v. Ryan, 608 F.3d 477, 485 (9th Cir. 2010) ("To obtain an evidentiary hearing in [federal] district court, a habeas petitioner must, in addition to showing diligence in state court, allege a colorable claim for relief. *See [Schriro v.] Landrigan*, 550 U.S. [465,] 474–75 [(2007).] . . . To allege a colorable claim, he must allege facts that, if true, would entitle him to habeas relief. *Landrigan*, 550 U.S. at 474. Thus, '[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations,' and whether those allegations, if true, would entitle him to relief. *Id.* '[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.'" *Id.*).

51. *See, e.g.,* Contino v. United States, 535 F.3d 124, 128 (2d Cir. 2008) ("[T]he district court did not abuse its discretion in declining to hold an evidentiary hearing on the issue of whether Contino's trial counsel explained the RICO offense elements to him because Contino did not demonstrate a colorable claim of ineffective assistance."); Becton v. Barnett, 920 F.2d 1190, 1194 (4th Cir.1990) ("[The defendant] has established that counsel's performance may well have fallen below the level of competence, and that he was likely prejudiced by such deficient performance. Therefore, [the defendant] has presented a colorable claim that counsel was ineffective based on the failure to investigate his competence.").

V. TO JUSTIFY A REMAND FOR AN EVIDENTIARY HEARING, AN INEFFECTIVENESS CLAIM RAISED ON DIRECT APPEAL MUST BE AT LEAST "COLORABLE"

The proposed procedure governing ineffectiveness claims raised on direct appeal is not one that would require automatic remands when a defendant on direct appeal has raised an ineffectiveness claim. A remand would be required only if the defendant has raised a "colorable" claim—an ineffectiveness claim that has some support in the existing record and that, if the factual allegations are proved true on remand, would establish a Sixth Amendment violation. As then-D.C. Circuit Judge Clarence Thomas observed about that court's definition of a "colorable" claim:

> This court has never held that *any* claim of ineffective assistance of counsel, no matter how conclusory or meritless, automatically entitles a party to an evidentiary remand. . . . [A claim that] fail[s] to raise any factual allegations that, if true, would establish a violation of his sixth amendment right to counsel . . . fails as a matter of law and a remand would be superfluous.[52]

Nevertheless, assuming the existing record offers at least some support for the claim, the "colorable" standard is not a high bar. The Supreme Court has used term "colorable" claim in a wide variety of other legal contexts.[53]

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52. United States v. Poston, 902 F.2d 90, 99 n.9 (D.C. Cir. 1990).

53. *See, e.g.*, 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)); Harrison v. Chamberlin, 271 U.S. 191, 194 (1926) ("[T]he court [in bankruptcy proceedings] is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding.").

"Colorable" refers to a claim that is not "wholly insubstantial" or "frivolous"—that is, is at least "plausible."[54]

The D.C. Circuit has identified three situations when a defendant on direct appeal does not raise a "colorable" ineffectiveness claim warranting a remand for an evidentiary hearing:

> Three types of ineffective assistance claims are generally not "colorable" and are therefore amenable to resolution as a matter of law. First, claims that are vague, conclusory, or insubstantial fail to present an issue worthy of remand. . . . Second, when the record conclusively shows the defendant was not prejudiced [by his trial counsel's deficient performance], no factual development could render the claim meritorious. . . . Third, when the record conclusively shows counsel did not err by falling below an objective standard of reasonableness, there is no deficient performance to form the basis of a Sixth Amendment violation under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)].[55]

A determination of whether a defendant on direct appeal has raised a "colorable" ineffectiveness claim with support in the existing record is a case-specific inquiry.[56] For instance, in *United States v. Pole*, the D.C. Circuit found such a colorable ineffectiveness claim and remanded for an evidentiary hearing.[57] The defendant, Pole, was late Senator Ted Kennedy's office manager who was charged with fraud and theft for awarding himself large bonuses. At trial, the prosecution alleged that Pole awarded himself the bonuses without approval of either the senator or the senator's chief of staff.[58] On direct appeal, Pole claimed that his trial counsel should have (1) introduced Pole's budget memos and other evidence demonstrating that Pole routinely gave bonuses [to other staff members] without the chief of staff's

54. Engle v. Isaac, 456 U.S. 107, 122 (1982) (equating "colorable constitutional claim" with "plausible constitutional claim").

55. United States v. Marshall, 946 F.3d 591, 596 (D.C. Cir. 2020).

56. *See, e.g.*, United States v. Pole, 741 F.3d 120, 126–27 (D.C. Cir. 2013).

57. *Id.* at 123.

58. *Id.*

approval; (2) proved that one of the senator's chiefs of staff had instructed Pole to exhaust the entire annual budget; and (3) impeached another chief of staff who testified for the prosecution by introducing evidence about bonuses that she had issued (but denied in her testimony at trial).[59]

The D.C. Circuit, in a panel decision joined by then-Judge Kavanaugh, concluded that Pole had raised a "colorable" ineffectiveness claim requiring remand under the court characterized as a "forgiving standard":

> Had Pole's counsel introduced unredacted memos demonstrating that Pole kept Cahill informed about surpluses, the jury might have found Pole a more credible witness. Had Pole's counsel been able to demonstrate that Pole had authority to issue exit bonuses without prior approval, Pole might have avoided conviction on the wire fraud count arising from his exit bonus and even convinced the jury that he reasonably believed he had authority to award himself unapproved annual bonuses. Had Pole's counsel successfully impeached Cahill and Petroshius, Pole might have undermined their testimony that he needed their approval before making salary adjustments.[60]

The D.C. Circuit then added:

> To be clear, we conclude only that Pole's claims of ineffective assistance are colorable, not that he has likely demonstrated ineffective assistance. Indeed, the government offers several plausible arguments suggesting that Pole has shown neither error nor prejudice. But given Pole's allegations, and given that the trial record neither indicates why trial counsel made particular strategic decisions nor refutes the possibility that Pole suffered prejudice, we believe that the safest course of action is to allow the district court to address the claims—and the government's responses—in the first instance. We leave it

59. *Id.* at 126.
60. *Id.* at 126–27.

> to the wise judgment of the district court to decide whether to hold an evidentiary hearing.[61]

Conversely, in another case, *United States v. Marshall*, the D.C. Circuit rejected an ineffectiveness claim where the existing record clearly foreclosed the claim that the defendant's counsel in the district court performed ineffectively.[62] Marshall pleaded guilty to sex trafficking minors and on direct appeal argued that her counsel in the district court was ineffective by failing to exclude a prosecution expert witness, Dr. Cooper, whom the prosecutor had proposed to offer as an expert if the case were to have gone to trial.[63] The D.C. Circuit concluded that Marshall's prior attorney did not perform deficiently because there was no basis to exclude Dr. Cooper's testimony:

> We resolve this challenge without remand because Marshall has not raised any substantial issue that requires a determination of facts regarding the performance of counsel. . . . Counsel's performance was not deficient because an objection to Dr. Cooper's qualifications would have been meritless under the applicable legal standard. . . . Dr. Cooper's curriculum vitae lists extensive medical training in pediatrics, decades of on-the-job experience, and specialized knowledge reflected in peer-reviewed publications, other publications and expert reports, and dozens of lectures on the dynamics of child sex trafficking and victimization. Our cases clearly support qualifying an expert witness on these facts. . . . Objecting to Dr. Cooper's qualifications would have been meritless under applicable law. . . . Marshall fails as a matter of law to raise a colorable claim of ineffective assistance of counsel. Accordingly, we resolve this appeal without remand.[64]

By no means will a majority, or likely even a substantial minority, of appeals present sufficient indications of trial counsel's ineffectiveness to raise a colorable

61. *Id.* at 127.
62. 946 F.3d 591 (D.C. Cir. 2020).
63. *Id.* at 594.
64. *Id.* at 596–97.

claim warranting a remand for a hearing. Instead, a remand will be required only in cases when the existing record itself demonstrates some plausible basis supporting an ineffectiveness claim. Accordingly, this procedural approach provides courts with a familiar, reasoned, and easily administrable standard, and yet one that will not lead to a flood of remands for evidentiary hearings.

VI. THE SUPREME COURT'S 2003 DECISION IN *MASSARO* DOES NOT FORECLOSE OR EVEN MILITATE AGAINST THIS PROCEDURE

Some lower appellate courts are under the mistaken belief that the Supreme Court's 2003 decision in *Massaro v. United States*[65] prevents or at least weighs against the procedure advocated in this article.[66] In *Massaro*, the Court disagreed with the Second Circuit's requirement that a federal defendant must raise an ineffectiveness claim on direct appeal or be foreclosed from raising the claim in a subsequent habeas corpus proceeding.[67]

Nothing in the Court's *Massaro* decision addressed the distinct issue of whether a defendant is entitled to a remand for an evidentiary hearing if he raises a "colorable" ineffectiveness claim on direct appeal.[68] In *Massaro*, the Court simply held that an appellate court on direct appeal cannot *require* that an ineffectiveness claim be raised at that juncture.[69] And, although the Court noted that it ordinarily is "preferrable" for a defendant to raise an ineffectiveness claim in post-conviction habeas corpus proceedings, the Court merely was contrasting that scenario to the one then in effect in the Second Circuit *requiring* a defendant to raise an ineffectiveness claim on direct appeal (or waive the right to raise it in a

65. 538 U.S. 500 (2003).

66. *See, e.g.*, United States v. Doe, 365 F.3d 150, 152–53 (2d Cir. 2004).

67. 538 U.S. at 508–09.

68. *See* United States v. Rashad, 331 F.3d 908, 911 (D.C. Cir. 2003) ("The Court [*in Massaro*] had no occasion to address our practice of remanding such a case, but our approach is entirely consistent with its opinion.").

69. *Massaro*, 538 U.S. at 504–09.

subsequent habeas corpus proceeding).[70] The Supreme Court by no means foreclosed or even discouraged an appellate court on direct appeal faced with a "colorable" claim based on the existing record from remanding to the district court to conduct an evidentiary hearing rather than relegating the claim to a potential section 2255 motion.[71] Notably, neither the Court's opinion nor the parties' briefs[72] discussed the reasons supporting the procedure employed by the First and D.C. Circuits. The issue simply was not raised by the facts or procedural posture of *Massaro.*

Support for the procedure is evident in the Supreme Court's earlier decision in *Wood v. Georgia*—a case in which the Court *sua sponte* identified a colorable claim of ineffective assistance by a criminal defendant's trial counsel (in the form of a conflict of interest) and remanded for an evidentiary hearing to flesh out the factual basis of the claim in the interests of justice.[73]

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70. *Id.* at 500.

71. *See id.* at 508 ("We do not hold that ineffective-assistance claims must be reserved for collateral review.").

72. *See* Brief for Petitioner, Massaro v. United States, 538 U.S. 500 (2003) (No. 01-1559), 2002 WL 31624607; Brief for Respondent, Massaro v. United States, 538 U.S. 500 (2003) (No. 01-1559), 2002 WL 31868910'; Reply Brief for Petitioner, Massaro v. United States, 538 U.S. 500 (2003) (No. 01-1559), 2002 WL 183798.

73. 450 U.S. 261, 272–74 (1981) ("On the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him. . . . Nevertheless, the record does demonstrate that the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further. . . . The judgment below is vacated and the case remanded with instructions that . . . [the trial] court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier.").

The statutory font of appellate jurisdiction permitting a remand for an evidentiary hearing an partially undeveloped ineffectiveness claim raised on appeal is 28 U.S.C.A. § 2106 (West, Westlaw through Pub. L. No. 117-39) ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); *see also Wood*, 450 U.S. at 265 n.5.

VII. THIS PROCEDURE SHOULD BE ADOPTED AS A MATTER OF APPELLATE COURTS' "SUPERVISORY AUTHORITY" OVER CRIMINAL PROCEDURE

This article does not contend that an appellate court on direct appeal is required, as a constitutional imperative, to remand for an evidentiary if a defendant raises a colorable ineffectiveness claim based on the existing record. Instead, this article contends that appellate courts should adopt this procedure under their supervisory authority to promote the essential constitutional right to the effective assistance of trial counsel.

An appellate court's supervisory authority is an inherent power that the court possesses to create procedural rules that protect or promote important rights when no existing procedural rule, statute, or constitutional provision addresses the issue.[74] Although the creation of new procedural rules pursuant to a court's supervisory authority must be done cautiously and must consider competing interests in the justice system (such as costs and administrative burdens),[75] a criminal defendant's constitutional right to the effective assistance of trial counsel is undoubtedly one of the most important interests in the criminal justice system justifying such an exercise of a court's supervisory authority.[76] Any

74. *See, e.g.*, Carlisle v. United States, 517 U.S. 416, 425–26 (1996) ("We have recognized that federal courts 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.' United States v. Hasting, 461 U.S. 499, 505 (1983)."); State v. Lockhart, 4 A.3d 1176, 1199 (Conn. 2010) ("Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process.").

75. *See, e.g.*, Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 809 n.21 (1987) ("We are mindful that reversals of convictions under the court's supervisory power must be approached with some caution and with a view toward balancing the interests involved. . . . Where the interest infringed is sufficiently important, however, we have not hesitated to find actual prejudice irrelevant when utilizing supervisory authority.") (citations and internal quotation marks omitted).

76. Martinez v. Ryan, 566 U.S. 1, 12 (2012) ("A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the

additional financial costs or use of judicial resources is justified for that reason alone. In addition, because a defendant would be entitled to an evidentiary hearing if he or she raises a colorable ineffectiveness claim in a habeas petition,[77] the remedy of remand on direct appeal is simply an earlier expenditure of the financial and judicial recourses that would be justified at a later point in the case.[78]

My proposal—which is based on existing practices by a handful of federal and state appellate courts—should be contrasted with the more elaborate procedure proposed by Professor Primus in 2007.[79] She proposed creating a new procedure whereby direct appeal counsel would be able to file a "modified version of the motion for a new trial" within six months of receiving the transcripts of the trial court proceedings, supplement the existing record with extra-record materials such as affidavits, and be entitled to an evidentiary hearing if the allegations, if true, would demonstrate ineffective assistance of counsel.[80] Although her proposal undoubtedly would vindicate the right to counsel in a sweeping manner, it would require the states and federal system to amend their rules of procedure or statutory provisions governing motions for a new trial.[81] Conversely, while my proposal likely would affect fewer cases on direct

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foundation for our adversary system."). The Court's equitable exception to its normal procedural default rule created in *Martinez v. Ryan* was tantamount to an exercise of the Supreme Court's supervisory authority.

77. *See supra* Part V.

78. The creation of this procedure on direct appeal may cause some defendants whose attorneys did not raise a "colorable" ineffectiveness claim on direct appeal to contend in a subsequent habeas corpus petition that appellate counsel rendered ineffective assistance by failing to do so. *See* Smith v. Robbins, 528 U.S. 259, 285–86 (2000) (holding that a direct appeal attorney who omits a winning claim from a brief denies the defendant the effective assistance of counsel). Yet such an ineffectiveness claim raised on habeas corpus review necessarily would be superfluous because, by identifying such a colorable claim of trial counsel's ineffectiveness in the habeas petition, the defendant would be entitled to the remedy denied on direct appeal—an evidentiary hearing on the trial counsel ineffectiveness claim (in the habeas corpus proceedings).

79. Primus, *supra* note 26.

80. *See id.* at 706–09.

81. *See id.* at 707–09.

appeal than Professor Primus's proposal in that my proposed procedure limits an appellate court's review to the existing record on direct appeal, I advocate that appellate courts' exercise of their supervisory authority is more economical and feasible to achieve because it does not require formal amendments to rules of procedure or statutes. Depending on courts' experience with my more limited proposal, additional procedures such as the one that Professor Primus proposes, could be adopted as well.

VII. CONCLUSION

In *Martinez*, the Supreme Court, in recognition of the critical importance of the constitutional right to the effective assistance of trial court counsel and the difficulty convicted persons face in raising an ineffectiveness claim in habeas corpus proceedings, created a new procedural rule that promotes the vindication of that right in the habeas corpus context. This article proposes the nationwide creation of a procedure that promotes that fundamental right at an earlier juncture in a criminal case, the defendant's first appeal in the direct appeal process. If an appellate court on direct appeal determines that the record supports a colorable ineffectiveness claim, trial court counsel's performance would be subject to further review at an evidentiary hearing on remand, which will enable meaningful appellate review of the claim after the trial court makes factual findings. This procedure would have salutary ripple effects because trial court counsel would be on notice that their acts and omissions evident in the record created in the trial court could be subject to review on direct appeal. If our legal system takes the constitutional right to the effective assistance of trial court counsel seriously, as we must, this practice should be adopted by state and federal appellate courts throughout the country.