No. _____

In the Supreme Court of the United States

ARKADIY BANGIYEV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), this Court held that trial counsel may not concede the defendant's guilt over the defendant's objection. In petitioner's case, defense counsel conceded applicability of a sentencing guideline enhancement despite petitioner's having specifically negotiated for the right to object to the enhancement as part of his plea bargain and despite the absence of evidence to support the enhancement.

Did the court of appeals err in denying petitioner's motion for a certificate of appealability to review the denial of an evidentiary hearing on petitioner's 28 U.S.C. § 2255 claim that counsel improperly stipulated to a severe increase in punishment?

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those listed in the style of the case.

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OPINION BELOW

The opinion of the Fourth Circuit, *United States v. Bangiyev,* No. 17-6814, is unpublished and is attached as App. 1–3.

STATEMENT OF JURISDICTION

The Fourth Circuit issued its decision denying petitioner's motion for certificate of appealability on January 30, 2018. App. 1. Chief Justice Roberts granted the Application to extend the time to file a petition for a writ of certiorari until June 29, 2018. No. 17A1166. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS

Petitioner intends to rely upon the following Constitutional and other provisions:

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253(c)

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention

complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

INTRODUCTION

The courts below denied petitioner a certificate of appealability without explanation. In the unusual circumstances of petitioner's case, where his counsel abandoned a concession petitioner obtained in his plea agreement (the ability to argue for a lower sentencing guideline than that argued by the government) jurists of reason could debate whether petitioner could show at a hearing that if his counsel had litigated the specially-preserved guideline issue, the sentencing outcome would have been different.

STATEMENT OF THE CASE

Petitioner was charged by federal indictment with participating in a RICO conspiracy (18 U.S.C. § 1962(d)). The government alleged that petitioner was

associated with a criminal organization that manufactured and distributed counterfeit United States currency. Petitioner pleaded guilty in January 2015 to the RICO conspiracy. His primary role in the organization consisted of being one of the persons who distributed counterfeit currency manufactured by others.

Even before petitioner entered his guilty plea, a disagreement about the amount of loss to be attributed to him for sentencing purposes was flagged in his plea agreement. The agreement provided that the government would recommend that the district court find a loss amount in the range of $7 million to $20 million, while petitioner reserved the right to argue the loss amount was between $2.5 million and $7 million. In a sentencing hearing focused on the loss issue petitioner had preserved, petitioner's counsel, despite having negotiated for petitioner's right to challenge the loss amount advocated by the government, surprised petitioner by announcing a concession that petitioner was accountable for a loss of more than $7 million.

Petitioner's counsel's concession preceded any presentation of evidence, and counsel presented no evidence at the hearing. The government presented two witnesses on the issue of loss, but the testimony did not support a finding that petitioner, one of many distributors, was responsible for, or even aware of, losses exceeding $7 million. Nevertheless, the district

court found the loss range to be $7 million to $20 million and imposed a guideline sentence of 108 months imprisonment (a sentence beyond the range that would have applied if the loss were less than $7 million).

Petitioner filed a timely 28 U.S.C. § 2255 motion in which he asserted that his attorney rendered ineffective assistance of counsel when he abandoned a meritorious argument by making an unwarranted concession that he was responsible for losses exceeding $7 million. The district court denied relief without conducting a hearing and then denied a certificate of appealability without addressing the applicable standard under 28 U.S.C. § 2253.

In denying relief, the district court focused on the evidence presented at the hearing at which counsel abandoned the issue of loss that was preserved in the plea agreement, concluding that counsel's concession was not the deciding factor and that the evidence was sufficient to show that even though evidence of petitioner's distribution activities may not have exceeded $2.6 million, the evidence convinced the court that petitioner was "reasonably aware" of at least $7 million. App. 8. The district court did not how the relevant conduct test under the sentencing guidelines, U.S.S.G. § 1B1.3, would be affected by the finding of reasonable awareness of the activity of other RICO conspirators. The district court further concluded that petitioner's counsel's stipulation to a higher guideline,

contrary to the plea agreement provision, was "a strategic decision to influence the court" to impose a downward variance from the guideline range. App. 14.

Petitioner filed a notice of appeal and sought a certificate of appealability in court of appeals on the question of whether the district court erred in denying relief without an evidentiary hearing on petitioner's well-founded challenge to the loss amount attributed to him, which resulted in the calculation of an unduly harsh sentencing guidelines range.

The Fourth Circuit denied the motion, without specifically addressing the facts or legal issues in petitioner's case, but by citing the applicable standard and stating:

> When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

> We have independently reviewed the record and conclude that [petitioner] has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

App. 2–3.

REASONS FOR GRANTING THE WRIT

The courts below denied petitioner a certificate of appealability without explanation. But this Court's recent decision in *McCoy v. Louisiana*, 138 S.Ct. 1500, 1506 (2018), calls into question the decision of the district court to discount petitioner's counsel's abandonment of the right won by petitioner in his plea agreement to challenge a significant sentencing guideline enhancement, which had both incarceration and financial punishment consequences.

The district court failed to analyze the constitutional violation from the standpoint of this Court's analysis in *McCoy* of the autonomous rights of the accused. *Id*. (holding that defense counsel may not concede the defendant's guilt over the defendant's objection). In *McCoy*, this Court explained that where counsel abandons the defendant's trial rights, the prejudice is in the deprivation of the defendant's

autonomy over a decision to plead guilty or go to trial:

> Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective- assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), to McCoy's claim. ... To gain redress for attorney error, a defendant ordinarily must show prejudice. *See Strickland*, 466 U.S., at 692, 104 S.Ct. 2052. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.

McCoy v. Louisiana, 138 S.Ct. 1500, 1510–11 (2018).

In petitioner's case, his plea bargain was, in part, to preserve his right to limit his financial and sentencing exposure. That was a core component and specific benefit of his plea agreement, consideration for his waiver of the right to go to trial. The analogy in petitioner's case to the rights waived by unilateral action of counsel in *McCoy* is clear.

Only with an evidentiary hearing could the district court determine if the hard-won rights preserved in a plea agreement were validly abandoned by counsel. Nor, even if the district court's reliance on the evidence presented at the loss hearing were sufficient—and not

merely speculative and inapposite to the individualized offender analysis called for by the relevant conduct guideline, U.S.S.G. § 1B1.3—that court's reasoning in denying petitioner an evidentiary hearing would still be debatable, because counsel's abandonment of the adversarial rights garnered by petitioner in his plea agreement included foreclosing the presentation of competing or explanatory evidence.

Reasonable jurists could debate whether an evidentiary hearing would show that the reasonable-awareness test employed by the district court in the absence of adversarial representation by counsel would be sufficient to warrant the substantial guideline enhancement.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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