No. 18-6983

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

SHOLAM WEISS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

Sholam Weiss # 32610-054
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November 28, 2018

QUESTIONS PRESENTED

1. This Court implicitly held in *Kirby v. Illinois*, 406 U.S. 682 (1972), that the right to counsel can attach before formal charges are made, or before an indictment or arraignment, if the government has crossed the constitutionally significant divide from fact-finder to adversary, and has "committed itself to prosecute," thus solidifying the "adverse positions of the government and defendant." *Id.* at 689. In this case, the government dismissed a first indictment against Mr. Weiss, but made clear that it was "committed to re-indicting" him, and communicated that "commitment to Mr. Weiss' counsel and to the court in unequivocal terms." The question presented is:

Whether Mr. Weiss was denied his right to conflict-free counsel during grand jury proceedings, and a Certificate of Appealability should have issued, where the government had committed itself to prosecute and the adverse positions of the government and Mr. Weiss had solidified?

2. A criminal defendant has a right to one full and fair opportunity to have his first 28 U.S.C. §2255 motion considered by the district court. §2255(a). *See* 141 Cong. Rec. S7803, S7809 (1995) (statement of Senator Kennedy) ("[L]imi[ing] inmates to *one bite at the apple* is sound in principle") (italics added). In this case, Mr. Weiss, through counsel, filed a Section 2255 motion. On the same day, Mr. Weiss filed a pro se motion under 2255, and a motion to file pro se pleadings. As cause, Mr. Weiss, by unsworn declaration, explained that (1) he is financially unable to pay his attorney to perfect any arguments other than those presented in his counseled 2255 motion, and (2) regardless, his attorney informed him that he could not review any additional arguments because there was not enough time for him to due so, considering the voluminous record in his case. Without determining whether Mr. Weiss had stated cause for him to file pro se arguments, the court denied the pro se motion and request to file pro se pleadings. The question presented is:

Whether Mr. Weiss was denied access to the courts, or, appropriate review, and a Certificate of Appealability should have issued, where he could not afford to pay his attorney to perfect his arguments, and, further, where his attorney informed him that, regardless, he could not perfect any other arguments because he would not have time to review the record, thus entitling him to file pro se pleadings?

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INTRODUCTION

Under this Court's precedents, a COA must issue if a petitioner makes a substantial showing of the "denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). One way to make this showing, and by far the most persuasive, is to point to other courts that have resolved the matter differently. *See Lozada v. Deeds*, 498 U.S.430, 432 (1991); *Wade v. Robinson*, 327 F.3d 328, 334-35 (4th Cir. 2003) (Gregory, J., concurring). Debatability does not require a petitioner to show that he will succeed. The question is the debatability of the underlying constitutional claim, "not the resolution of that debate." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). Here, the lower courts paid lip service to this standard, and required more of Mr. Weiss than is required to obtain further review.

The first constitutional question presented in this case is whether Mr. Weiss had a right to counsel during grand jury proceedings. While it is generally true that a defendant does not have a right to counsel during such proceedings, this Court, as well as other federal courts, have held that the right to counsel can attach "before any formal charges are made, or before an indictment or arraignment," if the government has "crossed the constitutionally significant divide from fact-finder to adversary." *Roberts v. State of Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *Kirby*, 406 U.S. at 689. The facts in this case show that the government had "committed itself to prosecute" and the adverse positions of Mr. Weiss and the government had solidified. *Id.* Tellingly, the government did not dispute this fact in their response to Mr. Weiss' Section 2255 motion, nor do they now. This issue warrants the granting of a COA and the court of appeals erred in not granting one.

The second question presented for review not only implicates due process concerns, but, more appropriately, fundamental fairness. Congress has set the limits upon which a convicted defendant can seek leave to have the legality of his criminal conviction challenged. In this case, Mr. Weiss has been sent to the gallows for the remainder of his life for a non-violent white collar crime, and has been denied an opportunity to have the courts consider every argument in support of his claim that his conviction was obtained in "violation of the Constitution or laws of the United States." §2255(a). What is more troubling, is that the lower courts will not even address Mr. Weiss' claim.

The district court framed the issue as whether a defendant has a right to hybrid counsel, and found that he does not. We do not disagree with that general proposition, but that is a red herring and not the correct question. The correct question is whether Mr. Weiss' inability to pay counsel to perfect arguments, and counsel's concession that he could not perfect any other issues, in any event, because of the enormity of the record, was cause for the court to permit *pro se* submissions. The lower courts did not address this question, and instead, applied the wrong legal standard in disposing of Mr. Weiss' request to file pro se pleadings. Applying the wrong legal standard is a paradigmatic example of an abuse of discretion. A COA should issue.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 2018 U.S. App. LEXIS 21332. The order of the district court (Pet. App. 2a-16a) is unreported but is available at Doc. 2457, 6:98-cr-00099-CEM-KRS (March 3, 2018).

JURISDICTION

The court of appeals entered its judgment on July 31, 2018, denying Mr. Weiss' application for COA. *See* Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Sixth Amendments to United States Constitution. Relevant statutory provisions are 28 U.S.C. §2255, 2253(c).

STATEMENT

This case arises out of a scheme to defraud the National Heritage Life Insurance Company (NHLIC). NHLIC was a Delaware corporation based in Orlando that sold and serviced life insurance policies and annuities. The scheme resulted in the failure of NHLIC in 1994. A Receiver was appointed in May 1994.

The government alleged and argued at trial in this case that in the early 1990s, co-conspirators Patrick Smythe, who was the CEO of NHLIC; Michael Blutrich, who was NHLIC's outside counsel; and Lyle Pfeffer, who was a member of NHLIC's investment committee, diverted millions of dollars from NHLIC, creating a $35 million shortfall in the company's assets. These individuals then involved others to cover up this deficit, and to further defraud NHLIC, including Mr. Weiss.

The government argued that the defendants perpetrated several schemes in defrauding NHLIC. The first, involved an agreement that NHLIC entered into with an entity that Mr. Weiss and Mr. Pfeffer created, South Star Management, for South Star to acquire and service mortgages. The government maintained that the purpose of this agreement was to purchase non-performing mortgages at a discount and record them in the NHLIC records at face value in order to help conceal the $35 million deficit. The second scheme involved a company called Solar Financial Services, Inc., which the government alleged agreed to compensate Mr. Weiss to obtain a loan for Solar, and Weiss and others, in turn, bribed Mr. Smythe, the CEO of NHLIC, to have NHLIC make the loan.

In January 1995, Mr. Weiss came to the attention of authorities investigating NHLIC. Mr. Weiss retained Robert Leventhal, to represent him in connection with the investigation. In late 1995 or early 1996, Mr. Leventhal introduced Mr. Weiss to Stephen Calvacca, and told Mr. Weiss that Calvacca would be assisting him with the NHLIC matter. Mr. Weiss did not retain Mr. Calvacca directly, and any charges for Calvacca's work was included in Mr. Leventhal's monthly bill to Mr. Weiss.

The false Statement and Obstruction of Justice charges against Mr. Weiss involved three sets of materials that Mr. Leventhal provided to the government on Mr. Weiss' behalf during the investigation. Initially, Mr. Weiss was a cooperating witness in the NHLIC matter, and the first meeting with investigators took place in January 1995, in which he and Mr. Leventhal had several meetings with investigators. In April 1995, NHLIC investigators met with Mr. Weiss and Leventhal, and by that time Mr. Pond, an alleged co-conspirator, and the NHLIC Receiver had provided the government with a version of the South Star contract in which South Star agreed to sell NHLIC "performing residential mortgages." In may or June 1995, Mr. Leventhal provided investigators with a signed copy a different

version of the South Star contract, as well as two unsigned copies of that version of the agreement marked as drafts. A number of terms differed between the version of the contract that Mr. Leventhal provided to investigators and the one that Mr. Pound and the Receiver provided, including that the former called for the purchase of non-performing mortgages rather than performing residential mortgages. The government alleged that the contract turned over by Mr. Leventhal was a forgery perpetrated by Mr.Weiss, and others.

In June 1995, the government authorized Mr. Weiss to record conversations with other persons who were targets of the investigation. The government alleged that Mr. Weiss staged conversions with his co-conspirators in order to exculpate them, and Mr. Weiss thereafter provided these recordings to Mr. Leventhal. In July 1995, investigators informed Mr. Leventhal that they did not believe that Weiss had been truthful, and that he was now a target of the investigation. The investigators identified, among other transactions, the Solar transaction as a transaction the investigators believed that Mr. Weiss was criminally involved with.

In August 1995, Mr. Leventhal met with one of the NHLIC investigators and provided him with a memo from Mr. Pfeffer to an attorney of Mr. Weiss', Leo Fox, regarding the Solar transaction. The government alleged that the Fox memo was fabricated by Mr. Weiss in order to exculpate himself. Shortly after investigators were provided the memo, they met with Mr. Fox and showed it to him, and Mr. Fox did not recognize the document.

Also during the August 1995 meeting with investigators, Mr. Leventhal played two recordings of conversations between Mr. Weiss and others, which investigators believed were staged. Not long after, the grand jury investigating the NHLIC matter issued a subpoena to South Star to produce the South Star agreement. In response, in February 1996, Mr. Leventhal provided the government with copies of the same version of the agreement, and the two drafts of it, that had been previously provided to investigators. The grand jury also subpoenaed the tape recordings that Mr. Leventhal had played for investigators, and those were also produced.

Mr. Weiss was initially indicted on charges arising out of the collapse of NHLIC in Case no. 97-CR-ORL-22B (M.D. Fla.), which was assigned to the Honorable

Anne Conway. The original indictment in the 1997 case named Mr. Smythe, Blutrich, and Pfeffer as defendants. A superseding indictment was returned in July 1997 adding Mr. Weiss and others as co-defendants. Case No. 97-CR-71-ORL-22B, Doc. 5. The indictment contained seven counts against Mr. Weiss alleging Money Laundering in violation of 18 U.S.C. §§1957 and 2. Mr. Leventhal was counsel of record in the 1997 case. Although the government suspected Mr. Weiss of providing false documents prior to the 1997 indictment, the indictment did not charge any of those counts or obstruction of justice.

At the time the initial indictment was returned in 1997, the government informed the court that the indictment was being filed in order to preserve the statute of limitations, and that the government anticipated filing additional charges. 97-CR-71-ORL-22B, Doc. 152 at 1. The government explained that it had been unable to complete its investigation prior to the return of the indictment due to the complexity of the case, the volume of documents to be reviewed, and litigation regarding grand jury subpoenas. *Id.*

Following the return of the superseding indictment that included Mr. Weiss, the government stated that the superseding indictment was also filed to preserve the statute of limitations, and that the government "anticipated returning another superseding indictment adding additional charges and defendants covering all criminal conduct relating to the failure of [NHLIC]." *Id.* at 2. The government stated that the anticipated "second superseding indictment would include RICO and conspiracy involving essentially the same transactions already charged," as well as additional charges and defendants. *Id.* at 3. As a result, the government sought a trial date in 1999. Judge Conway denied the government's request for additional time, set atrial date in February 1998, and stated that the February trial would be on the existing superseding indictment. *Id.* Consequently, the government sought leave of court to dismiss the 1997 indictment as to Mr. Weiss and another defendant without prejudice. *Id.* at 4; Case No. 97-CR-71-ORL-22B, Doc. 146, 147. In doing so, the government expressly stated to Mr. Weiss' counsel as well as in documents filed with the court that the dismissal was taken "with the full intent to present those acts and others to a grand jury as part of a succeeding prosecution." Doc. 152 at 4-5; Doc. 153 Ex. A.

Within weeks after the dismissal of the 1997 indictment, in January 1998, Mr. Weiss was subpoenaed to appear again before the grand jury investigating the NHLIC matter, which was preparing his re-indictment. According to the government and Mr. Leventhal, before January 1998, the prosecutor had informed Mr. Leventhal and Calvacca that the government believed that Mr. Weiss had obstructed justice and used Mr. Leventhal to do so. Doc. 591 at 56-57. The government also informed Mr. Leventhal that it expected Mr. Leventhal would be a witness against Mr. Weiss regarding the obstruction of justice charges it anticipated bringing. *Id.* Mr. Leventhal did not communicate this information to Mr. Weiss. Moreover, neither Mr. Leventhal, nor Mr. Calvacca, nor anyone else, advised Mr. Weiss before his grand jury appearance of any conflict of interest that might affect the ability of Mr. Leventhal or Mr. Calvacca to represent Mr. Weiss effectively during those proceedings.

On January 21, 1998, Mr. Weiss appeared before the grand jury. Notwithstanding that Mr. Leventhal had been informed that the government viewed him as a witness in the case, Mr. Leventhal represented Mr. Weiss at the grand jury appearance and was stationed outside of the grand jury room to advise him. Neither Mr. Leventhal nor Calvacca, advised Mr. Weiss to assert his Fifth Amendment rights before the grand jury. Instead, Mr. Leventhal instructed Mr. Weiss to answer questions regarding his production of materials to the government through Mr. Leventhal, specifically advising Mr. Weiss that he should not assert his Fifth Amendment rights regarding any "chain of custody" questions.

During the grand jury appearance, Mr. Weiss was asked and answered (Yes), to questions regarding the South Star contract, and whether he had (pursuant to subpoena) produce those documents through his attorney, Mr. Leventhal. He was also asked and answered (Yes) to whether he had produced the alleged fraudulent tape recordings through his attorney to investigators.

The second grand jury returned a new 93 count indictment against Mr. Weiss and others on April 29, 1998. Doc. 1. Count 91 was a False Statement charge regarding the South Star contract, alleging that Mr. Weiss provided those documents to the government (through his attorney) in 1995, and that they were fraudulent. Doc. 1 at 157. Count 92 was a False Statement charge pertaining to the Fox memo, which

was alleged to be fraudulent, and the tape recordings, which were alleged to be manufactured. Count 93 was an Obstruction of Justice charge alleging that Mr. Weiss had obstructed justice by causing his attorney to deliver fraudulent documents to the grand jury, of which he admitted to providing his attorney during his grand jury appearance.

Prior to trial, the government moved to subpoena Mr. Leventhal as a witness in this case, arguing that Mr. Leventhal is "not only helpful, but a necessary, witness in establishing the link between the fraudulent materials and Weiss." Doc. 471 at 4. Mr. Leventhal ultimately testified against Mr. Weiss at trial, and Mr. Weiss was convicted on all counts.

A. Course of Proceedings Below

Judgment was entered in this case on February 22, 2000 (Doc. 1372), and Mr. Weiss was sentenced to 835 years imprisonment on February 15, 2000.[1] The original judgment was later vacated, and an Amended and Reentered Judgment (Doc. 2223) was entered on July 16, 2009. Mr. Weiss conviction was affirmed by *United States v. Weiss*, 539 Fed. Appx. 952 (11th Cir. 2013). A petition for writ of certiorari was denied by this Court, Case No. 13-965 (March 24, 2014).

On March 23, 2015, Mr. Weiss, through counsel, James E. Felman, filed a motion for relief from judgment under 28 U.S.C. §2255. At the same time, Mr. Weiss filed a pro se motion for Section 2255 relief, asserting multiple claims of error and requesting a hearing on the motion. As cause, Mr. Weiss argued that he should be permitted to file pro se submissions because (1) he did not have any more funds to pay his attorney, and (2) regardless, his attorney informed him that he could not prepare any other issues because of time constraints and the voluminous record in the case. The district court denied Mr. Weiss motion for leave to file pro se

[1] Mr. Weiss was sentenced in absentia because he absconded prior to sentencing. Weiss' counsel filed a notice of appeal, which was dismissed on the basis of the fugitive disentitlement doctrine. Doc. 1412. Mr. Weiss was ultimately extradited from Austria to the United States in June 2002, with the condition that he be afforded an appeal and resentencing.

pleadings, and struck the pro se 2255 petition, ruling that Mr. Weiss did not have a right to hybrid representation.

Mr. Weiss filed a timely objection to the Magistrate Judge's finding, arguing that the Magistrate Judge's ruling was in error, and that the correct question is whether not having funds to pay an attorney to perfect arguments, and the attorney's notice that he could not file (or determine the viability) of any other issues because of the size of the record, is sufficient cause to permit pro se filings. The district court overruled Mr. Weiss' objections and did not consider any of the arguments that he presented in this pro se 2255 petition.

On March 25, 2018, the district court denied Mr. Weiss' Section 2255 motion and declined to issue a COA. Mr. Weiss made an application for COA with the Eleventh Circuit Court of Appeals, which was denied on July 31, 2018.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Conflicts with Decisions of this Court on a Fundamental Issue of Constitutional Law

In his application for Section 2255 relief, Mr. Weiss argued that he was denied his Sixth Amendment right to counsel during grand jury proceedings because his trial counsel labored under an actual conflict of interest. The facts giving rise to this claim began in January 1995, when Mr. Weiss hired Mr. Robert Leventhal in connection with this matter. Mr. Weiss was initially a cooperating witness, and had "several meetings with investigators with Mr. Leventhal present." ECF No. 2457 at 4. At Mr. Weiss' direction, Mr. Leventhal provided several "documents and contracts relevant to the investigation" to federal authorities, which were later determined to be "falsified." *Id.* & n.3.

Investigators later informed Mr. Leventhal that Mr. Weiss was now considered a target of the investigation, and as a result, Mr. Weiss' cooperation ceased. Then, in 1996, a grand jury subpoenaed Mr. Leventhal to turn over copies of the documents and an audiotaped recording that he had previously given to investigators. ECF No. 2457 at 4. In January 1998, the Government informed Mr. Leventhal, and other counsel, Mr. Calvacca, that it believed that Mr. Weiss had "obstructed justice" and

"used Leventhal to do so." ECF No. 1 at 20. The Government also informed Mr. Leventhal that it expected him to be a witness regarding the "obstruction of justice charges" that it "anticipated bringing." *Id.* Mr. Leventhal did not communicate this information to Mr. Weiss.

Further, Mr. Leventhal did not advise Mr. Weiss before his grand jury appearance of any conflict of interest that "might affect his ability" to represent Mr. Weiss effectively in the "grand jury proceedings." *Id.* Thus when Mr. Weiss appeared before the NHLIC grand jury on January 21, 1998, he was represented by Mr. Leventhal and Calvacca, despite the fact that the "government viewed [Mr. Leventhal] as a witness in the case." *Id.* Indeed, Mr. Leventhal advised Mr. Weiss from "outside the grand jury room" regarding pertinent matters that were put to Mr. Weiss. *Id.* Neither Mr. Leventhal nor Calvacca, advised Mr. Weiss to assert his Fifth Amendment rights before the grand jury. Instead, Mr. Leventhal instructed Mr. Weiss to answer questions regarding his production of materials to the government through Mr. Leventhal, specifically advising Mr. Weiss that he "should not" not assert his Fifth Amendment rights regarding "any chain of custody" questions. *Id.* at 20.

As a result of his testimony before the grand jury, Mr. Weiss was charged with obstruction of justice and making false statements. *See, esp.*, Grand Jury Testimony, ECF No.1 at 21-23; ECF No. 1 at 24.

A. Resolution of the Claim in the District Court

In the district court, Mr. Weiss argued that, although a criminal defendant usually does not have a right to counsel in "grand jury proceedings," ECF No. 1 at 33, the right to counsel nonetheless attached in this case because the government's conduct "crossed the line into becoming adversarial, and the government had expressly committed itself to prosecute [him] ... before his grand jury appearance'" in 1998. ECF No. 2457 at 5. In support, Mr. Weiss relied upon *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *Roberts v. State of Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992); and *United States v. Wilson*, 719 F. Supp. 2d 1260, 1267 (D. Or. 2010), for the now unremarkable proposition that the right to counsel attaches when the government has "committed

itself to prosecute" and the "adverse positions of the government and [the] defendant have solidified." *Kirby*, 406 U.S. at 689.

Here, not only had the government "committed itself to indict Mr. Weiss," it had already done so, and Mr. Leventhal had appeared on his behalf as counsel of record. ECF No. 1 at 33. The government dismissed the prior indictment only because it wished to obtain more time before trial and file a superseding indictment adding more charges and defendants. In moving to dismiss the case, the government made clear that it was "committed to re-indicting Mr. Weiss," and communicated that "commitment to Mr. Weiss' counsel and to the court in unequivocal terms." *Id.* at 34. That is, the government had committed itself to prosecute and the "adversarial positions" of the government and Mr. Weiss had solidified, making Mr. Weiss' grand jury appearance a "critical stage" in the proceedings. *Kirby*, 406 U.S. at 689.

In disposing of Mr. Weiss' claim, the district court took a fairly restrictive view of the issue and held that the right to counsel does not attach until a criminal defendant is "indicted." ECF No. 2457 at 6, citing an unpublished district court decision, *United States v. Mansfield*, No. 4:14-cr-25-HLM, 2014 WL 68079054, at *5 (N.D. Ga. Dec. 4, 2014); and *United States v. Ingle*, 157 F.3d 1147, 1151 (8th Cir. 1998). But neither of these cases address the exact factual scenario presented by Weiss, nor account for the excepting language of *Kirby*, i.e., where the government has "committed itself to prosecute." 406 U.S. at 689. That the district court's decision in this case is *debatable* is highlighted by the court's acknowledgment that the cases cited by Mr. Weiss in support of his claim are "persuasive." ECF No. 2457 at 7.

Roberts, *Larkin*, and *Wilson*, all hold that the right to counsel can attach "before any formal charges are made, or before an indictment or arraignment," if the government has "crossed the constitutionally significant divide from fact-finder to adversary," *Roberts*, 48 F.3d at 1291. There does not appear to be any Eleventh Circuit decision addressing this issue, making it an issue of first impression in this circuit. For this reason alone, a COA should issue. *See Lozada*, supra, 498 U.S. at 492; *see also Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008) (rejecting the view that "the right to counsel" only attaches when "formal charges are filed").

In addition to the district court's restrictive reading of Mr. Weiss' right to counsel, the court also ruled, in stark contrast to the facts, that Mr. Weiss has not shown that the government's actions "crossed the line from fact-finder to adversary." ECF No. 2457 at 7. But as the record reflects, the government had already informed Mr. Leventhal that it expected for him to be a witness against Mr. Weiss, and that it "anticipated bringing" obstruction of justice charges. ECF No. 1 at 20, and 591 at 56-57. The government informed the court and Mr. Leventhal "in unequivocal terms, that it was "committed to re-indicting Mr. Weiss." ECF No. 1 at 34. On this record, the government's position could have not been more "solidified," and their *open* pronouncement to re-indict was surely a notice of "accusation," *Moran*, 475 U.S. at 430, and not a statement of investigation as the district court believes. See ECF No. 2457 at 7 (No evidence that the "Government was taking an adverse position or had a commitment to prosecute").

In short, the district court's ruling cannot be squared with *Rothgery's* unequivocal pronouncement that "[a]ttachment occurs when the government has used the judicial machinery to **signal a commitment to prosecute**...." 554 U.S. at 211-12 (emphasis added). We cannot see how an open court acknowledgment by the Government that it intends to indict, as happened in this case, does not satisfy this requirement. *See DeAngelo v. Wainwright*, 781 F.3d 1516, 1519 (11th Cir. 1986) (The right to counsel "may attach although no accusatory pleading is pending when the investigation of the crime focuses on that particular person") (citing *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964)).[2] The district court's ruling is therefore debatable, and adequate to deserve "'encouragement to proceed further.'" *Slack*, 529 U.S. at 484.

We cannot make much of the Eleventh Circuit's decision because it does not provide any analysis for the basis of its conclusion that Mr. Weiss has not demonstrated a debatable issue. On this basis alone, the Court erred and a COA should have issued.

[2] The district court cites *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195, 1216 (11th Cir. 2009), for the proposition that the right to counsel is "offense specific." ECF No. 2457 at 7 & n.6. True enough. But as the facts show, when the government moved to dismiss the first indictment in December 1997, they had already informed Mr. Leventhal that they intended on bringing charges regarding Mr. Weiss' alleged obstructive conduct, and alerted the court to the same. They thus clearly signaled a "commitment to prosecute," *Rothgery*, 554 U.S. at 211-12.

The district court did not address the question of whether Mr. Weiss was denied his right to conflict-free counsel, ruling that the attachment question resolved the claim. ECF No. 2457 at 8. There can be little dispute that Mr. Leventhal suffer from an actual conflict of interest. *See Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999). Mr. Leventhal was placed in circumstances where his ability to advise Mr. Weiss regarding his grand jury testimony was hampered by his status as a witness, or even potential subject of the government's investigation. Moreover, the Eleventh Circuit's ruling makes it the law of the case that Mr. Leventhal had an actual conflict of interest in representing Mr. Weiss. *See Weiss*, 539 Fed. Appx. at 955.

It is likewise consistently been the government's position that an actual conflict of interest precluded Mr. Leventhal from representing Mr. Weiss. Recall, the source of the actual conflict was Mr. Weiss' alleged use of Mr. Leventhal to convey allegedly fraudulent materials to the government. *Id.* at 955. The relevant events took place in 1995, and the government had concluded by 1997 that the materials that Mr. Leventhal had provided to them on behalf of Mr. Weiss were fraudulent. Further, the government had advised Mr. Leventhal of its view that he was a witness to Mr. Weiss' alleged obstruction before January 1998, when Mr. Weiss testified before the grand jury.

Given the existence of an actual conflict of interest, Mr. Weiss is not required to show prejudice from Mr. Leventhal's representation of him before the grand jury. *See Cuyler v. Sullivan*, 466 U.S. 335, 349-50 (1980). All that is required is a showing that the conflict adversely affected Mr. Leventhal's performance. *Id.* at 350. Here, Mr. Leventhal did not advise Mr. Weiss to assert his Fifth Amendment rights in response to questions relating to production to the government of the South Star agreement and draft agreements, documents relating to Solar, and tape recordings – that is, the very subject regarding which Mr. Leventhal had an actual conflict. *See Weiss*, 539 Fed. Appx. at 955. Advising Mr. Weiss to assert his Fifth Amendment rights in response to those questions would have been an "alternative defense strategy." *Freund*, 165 F.3d at 860.

Moreover, advising Mr. Weiss to plead the Fifth was "reasonable under the facts." *Freund*, 165 F.3d at 860. Indeed, the government had already announced that it would be indicting Mr. Weiss regarding the obstructive materials, and the subject

of the grand jury testimony was the production of the allegedly fraudulent evidence. Instead, Mr. Leventhal advised Mr. Weiss to respond to the prosecutor's questions – advice that was in Mr. Leventhal's best interests, but not Mr. Weiss'. As a result, Mr. Weiss provided testimony establishing that he was responsible for the allegedly fraudulent materials, giving the government the final *link* in the chain necessary to charge Mr. Weiss in connection with the production of those materials. *Id.*

Accordingly, Mr. Weiss has demonstrated that the conflict of interest issue states a valid claim of the denial of a constitutional right. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1270 (11th Cir. 2014) (equating "substantial showing" test for a COA to the preliminary screening test used by district courts under Habeas Rule 4). A COA should issue.

2. This Case Represents a Question of Exceptional Importance Warranting this Court's Immediate Resolution

The district court erred in its procedural ruling when it refused to consider Mr. Weiss' pro se Section 2255 Petition and Supporting Memorandum. On March 23, 2015, Mr. Weiss, through counsel, Mr. James E. Felman, filed a motion for relief from judgment under 28 U.S.C. §2255 (Doc.1). On the same day, Mr. Weiss filed a pro se Motion for Relief from Judgment under 2255, and a Motion for Leave to File Pro Se Submissions (Docs. 2 & 3). As cause, Mr. Weiss, by unsworn declaration, explained to the court that (1) he is not financially able to pay his attorney to perfect the arguments presented in his *pro se* filing, and (2) regardless, his attorney informed him that he could not review additional arguments outside of those presented in the counseled Section 2255 petition because of time constraints regarding the voluminous record in this case. By Order of April 6, 2015, Magistrate Judge Baker denied the Motion for Leave, and struck Mr. Weiss' *pro se* Section 2255 motion (Doc. 5).

Mr. Weiss filed a timely Objection to the Magistrate Judge's Order, which remained pending until December 19, 2016, when this Court overruled Mr. Weiss' Objections (Doc. 26), ruling that Mr. Weiss "had not demonstrated" his entitlement to make a *pro se* filing, or that the Magistrate's Judge's Order "is clearly erroneous or contrary to law." *Id.* at 2. Specifically, the court ruled that Mr. Weiss does not

"have a right to hybrid representation." *Id.* True enough. But that does not answer the question of whether Mr. Weiss should be permitted to file *pro se* submissions.

As we argued below, two questions dispose of the issue and are relatively straight forward: (1) Does Mr. Weiss' financial inability to pay his counsel to perfect the arguments raised in his *pro se* motion constitute "good cause" for him to be allowed to submit pro se submissions, and (2) Whether counsel's decision that he could not timely review the voluminous trial record in order to determine the viability of any other potential arguments, constitute "good cause" to allow Mr. Weiss to submit pro se submissions?[3] Neither of these questions where answered in the Magistrate Judge's Order (Doc. 5), nor in the district court's Order overruling Mr. Weiss' Objections (Doc. 26).

To be clear, the relevant question in this case is not, as the district court's ruling suggests, whether Mr. Weiss has the *right* to hybrid representation. Doc. 26 at 2. Indeed, the Eleventh Circuit has already held that he does not. *United States v. Tannehill*, 305 Fed. Appx. 612, 614 (11th Cir. 2008). Rather, the relevant question is whether Mr. Weiss has demonstrated "good cause" sufficient enough for the court to waive the provisions of Local Rule 2.03(d). Thus, the district court applied the wrong legal standard in adjudicating Mr. Weiss' Objections to the Magistrate Judge's Order. *See United States v. Toll*, 804 F.3d 1344, 1353 (11th Cir. 2015) ("A district court abuses its discretion if it applies an incorrect legal standard").

Local Rule 2.03(d), like other local rules for the Middle District of Florida, requires a showing of "good cause" in order for the Rule to be waived. *See, e.g., Johnson v. Sea Court Mgmt, LLC*, No. 2:15-cv-329-Ftm-29CM, 2016 U.S. District LEXIS 19670 (M.D. Fla. Feb. 18, 2016) (applying good cause standard to application of Local Rule 2.03(b)); *Ferentinos v. Kissimmee Util. Auth.*, No. 6:13-cv-1728-Orl-36DAB, 2014 U.S. Dist. LEXIS 90171 (M.D. Fla. July 2, 2014) (Local Rule 2.03(d)); *Martinez v. La Bazenne USA, Inc.*, No. 2:16-cv-614-Ftm-38CM, 2016 U.S. Dist. LEXIS 121155 (M.D. Fla. Sept. 8, 2016) (Local Rule 2.03(e)).

[3] We believe that either of these arguments, standing alone, are sufficient to establish good cause. Together, they are overwhelming.

The district court's Order, however, is devoid of any particularized finding that Mr. Weiss' *good cause* showing (i.e., his inability to pay counsel, and his counsel's insistence that he did not have the time to review the entire record in this case and would thus not be able to perfect any pleadings) is not sufficient, nor does the Order undertake any *good cause* analysis whatsoever. Cf. *Milbauer v. United States*, 587 Fed. Appx. 587, 592 (11th Cir. 2014) (district court's failure to conduct any analysis of whether plaintiff had provided sufficient information under Burchfield to overcome FTCA's bar to unexhausted claims inhibited meaningful appellate review); *see also Danley v. Allen*, 480 F.3d 1090, 1091 (11th Cir. 2007) (per curiam) (district court orders should contain sufficient explanations of their ruling so as to provide meaningful appellate review).

This is not simply a case where counsel disagrees with his client about what arguments to make. Here, counsel has attested by affidavit that he could not review the voluminous record in this case to determine whether other viable issues where available. Should Mr. Weiss not then be able to defend himself? Should the doors of the courthouse be shut to an individual who cannot afford to pay his counsel to make arguments in his first Section 2255 proceeding? These are the important questions that the district court failed to answer, *see* ECF No. 35 at 4 (Reconsideration), and which the court of appeals essentially rubber stamped.

It is also noteworthy to mention that the district court did not take issue with the truthfulness of Mr. Weiss' allegations in support of his showing of good cause, and they therefore stand unrefuted. *See Indigo Am., Inc. v. Big Impressions, LLC*, 597 F.3d 1, 3-4 (11th Cir. 2010) (finding record evidence (in the form of an affidavit) to support defendant's showing of *good cause*).[4]

Whether Mr. Weiss' showing of *good cause* is sufficient for him to be permitted to file pro se pleadings is a question that must be answered. It is not enough to say

[4] In at least two pleadings before the district court, Mr. Weiss pleaded with the court for direction, asking the court to inform him of whether the court would accept his pro se filings if he terminated his counsel of record. Mr. Weiss informed the court that he intended to do so but wanted an assurance that relieving counsel would not be in vain, such that even in relieving counsel the court would not accept his pro se filing. The court never responded.

that Mr. Weiss does not have a right to hybrid representation. A good cause analysis is required.[5] *See United States v. Jimenez-Antunez*, 820 F.3d 1267, 1272 (11th Cir. 2016) (reversible error for court to base its judgment on incorrect legal standard). Otherwise, the district court would be free to exercise its discretion in contravention of well settled legal standards, which would promote inefficiency in our system and substantially impair justice. As this Court recently reminded us, "[d]iscretion is not a whim, and limiting discretion according to legal standards helps promote the basic principle of justice that cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

This legal precept is apt here, in that Local Rule 2.03 is governed by a *good cause* analysis in determining whether the Rule should be waived in a particular case. A *good cause* analysis was undertaken in *Johnson, Ferentinos, Martinez*, supra, and others. It should be applied here. *Martin*, 546 U.S. at 139 ("[C]ases should be decided alike").

The writ of habeas corpus is a traditional bulwark which stands in defense of those who are imprisoned on the basis of a fundamentally unjust incarceration. Mr. Weiss is not asking for anything extra in this matter. He is only asking that he be afford, as Congress has designated, one full and fair opportunity to have the courts determine the legality of his imprisonment. If the great writ cannot provide even that, then the purpose and the protection that it once afforded is truly dead.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

November 28, 2018

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[5] It is just as much an error for the court to *fail to exercise its discretion* when required, as it is for a court to apply an incorrect legal standard. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954).