No. 19-6550

In the

Supreme Court of the United States

CHRISTIAN GIESEKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When a post-conviction movant proceeding under 28 U.S.C. § 2255 raises claims which, if true, would entitle him to relief, does the fact that movant does not proffer evidence negating possible defenses constitute a basis for denying movant an evidentiary hearing?

2. Does an incarcerated pretrial detainee have a duty to act to mitigate counsel's misfeasance, the failure to perform which serves to waive the post-conviction right to assert a 6th Amendment claim for ineffective assistance of counsel?

PARTIES TO THE PROCEEDING

Petitioner Christian James Gieseke and the United States of America are parties to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christian James Gieseke respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit, so that this Court may review the judgment below.

OPINIONS BELOW

This matter seeks discretionary review of the refusal of the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit to grant Gieseke a certificate of appealability ("COA") to appeal a denial by the District Court of a petition brought pursuant to 28 U.S.C. § 2255. The District Court ruled that Gieseke has failed to show that reasonable jurists would find the Court's "assessment of the constitutional claims debatable or wrong," or that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." The *Findings, Conclusions and Recommendation* of the Magistrate Judge appears at Appendix A, and the *Order Accepting Findings And Recommendation of the United States Magistrate Judge* entered by the District Court appears at Appendix B. The United States Court of Appeals for the Fifth Circuit thereafter issued a *Judgment* also denying Gieseke a COA. That decision, which was unpublished, appears at Appendix C.

These opinions are all unreported.

The *Findings, Conclusions and Recommendation* and the *Order Accepting Findings And Recommendation of the United States Magistrate Judge* are referred to herein jointly as the "*District Court Decision.*"

JURISDICTION

This Court has jurisdiction to hear this *Petition* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment and 28 U.S.C. § 2255(b) are the principal statutory and rules provisions involved in this *Petition,* which are set out in Appendix D.

STATEMENT OF THE CASE

In 2014, Gieseke was convicted in the U.S. District Court for the Northern District of Texas on a guilty plea to a one-count superseding information charging receipt of child pornography pursuant to 18 U.S.C. § 2252A(a)(2) & (b)(1). Gieseke later filed a timely *Motion to Vacate, Set Aside, or Correct Sentence Filed by A Person in Custody Pursuant to 28 U.S.C. § 2255* ("§ 2255 *Motion*"), arguing *inter alia* that defense counsel was ineffective for failing to investigate and interview his family members, failing to object to the admissibility of evidence that was authenticated by perjury, and failing to move to suppress evidence obtained in an illegal search.

The District Court denied the § 2255 *Motion* and denied Gieseke a COA. Gieseke appealed to the U.S. Court of Appeals for the Fifth Circuit, and sought a COA from that Court. The Circuit Court denied the COA.

In 2012, Gieseke was charged by indictment with four counts of production of child pornography in violation of 18 U.S.C. § 2251(a)(3), and two counts of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Pursuant to a plea agreement, the indictment was superseded by a one-count information charging him with receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2), to which he entered a plea of guilty in 2013. Gieseke admitted to downloading visual depictions of minors engaged in sexually explicit conduct, to producing those images with a camera, and to producing and attempting to produce images or videos of other minors. He was sentenced to 240 months of incarceration, the statutory maximum for the offense.

In June 2012, the Garland, Texas, police department received reports that Gieseke had solicited a minor for lewd photographs and that he recorded lewd images or videos of another minor. While investigating this allegation, police questioned Gieseke's stepfather and mother ("the parents"). A police detective told the parents to search their home for any items Gieseke may have left there, including in particular electronic storage devices.

The parents both stated in declarations that Gieseke's mother located a grocery bag containing such items hidden behind some disturbed insulation in the attic of the home. When she and her husband examined the contents, they believed that these

were the types of items the detective had told them to look for. They called the detective, who came by their home to retrieve them. When the detective took the items from them, neither inventoried them nor gave the stepfather and mother a receipt for them.

Separately, Gieseke's mother found a memory device in an automobile that Gieseke's estranged wife had returned (it belonged to Gieseke's father). Believing that this also was the kind of item the detective wanted her to find, she turned that over to law enforcement as well.

Both the items in the bag and the memory device found in the car contained evidence of child pornography.

The parents both averred that the detective returned days later and said that he had examined the devices they gave him, and those devices contained images of child pornography. The detective admitted to them that he had left their house without inventorying the items or leaving them a receipt, and that there was thus no way to prove what he took. He had Gieseke's mother write down the serial numbers of the items he removed from the bag he had brought, and then had them sign predated affidavits affirming that those were the items they had turned over to him.

Gieseke's mother stated that when the detective returned, she could not be certain that the electronic devices that he brought with him was the same as the equipment that he took earlier.

Gieseke reported these facts to his attorney, who subsequently told Gieseke that "[w]e have reached out to your family on a number of occasions to get, as they say, 'straight from the horse's mouth' regarding this issue. To date, your family has been of very little help and has not assisted us by sharing the aforementioned story with us." However, the parents and Gieseke's brother tell a very different story. Each says that he or she recalls no such contact, and that if such had been made, he or she would have related to counsel exactly what had transpired.

Gieseke argued in his § 2255 *Motion* that defense counsel rendered ineffective assistance by failing to investigate the facts and circumstances relating to the police directing the parents to conduct a search for evidence, as well as for the after-the-fact compelled affidavit that purported to establish a chain of custody. He argued that had counsel investigated the matter, he would have moved to suppress the evidence and objected to the admissibility of evidence that was authenticated by perjury suborned by the detective.

The *District Court Decision* held that although Gieseke "claims that the detective had his mother, stepfather, and brother execute affidavits that falsely stated the circumstances surrounding the detective's inventory and receipt of items found in the attic of their house, Gieseke does not assert that the detective testified falsely at the sentencing hearing, and he does not identify any evidence that was admitted through perjury." *Appendix A* at p.6.

The *District Court Decision* further ruled that the evidence supporting Gieseke's claim that defense counsel failed to investigate was insufficient because

while it showed that the parents and brother did not receive phone calls from counsel, the declarations "do not state that counsel did not try to contact them by means other than a phone call, such as by having an investigator go to their residence and attempt to talk with them." *Appendix A* at 8. At any rate, the *District Court Decision* held, Gieseke knew that defense counsel thought the parents and brother were not helpful and had not told counsel about the events surrounding the discovery and disclosure of the bag and its contents. The *District Court Decision* contends that Gieseke failed in his § 2255 *Motion* to explain why he did not ask his parents and brother to contact defense counsel about the matter, if in fact they were willing to tell his attorney about the matters later set out in their declarations.

As for suppression of the evidence turned over by the parents, the *District Court Decision* held that even if defense counsel had investigated the claims, and if the parents would have testified to the statements in their declarations, defense "counsel could have reasonably believed that a motion to suppress would have lacked merit." *Appendix A* at p.9. The *District Court Decision* hypothesized that defense counsel might have believed that the court would hold that the Gieseke's mother "did not act as a government instrument or agent and was not actively searching for the items when she discovered them in the attic while looking for decorations and exploring something unusual about the insulation." *Appendix A* at p.10.

With regard to evidence found by Gieseke's mother in his car, according to counsel, Gieseke's wife wanted his belongings out of the residence and asked his mother to remove them, including his car. Thus, the District Court speculated,

defense counsel "also could have reasonably believed that the court would hold that the mother had the right to search the car because Gieseke's wife released it to her, and it was registered to her husband." *Id.*

REASONS FOR GRANTING THE WRIT

Gieseke raises several questions of substantial procedural significance to the over 5,000 motions pursuant to 28 U.S.C. § 2255 filed annually in United States district courts. Administrative Office of U.S. Courts, *U.S. District Courts–Civil Statistical Tables for the Federal Judiciary (June 30, 2019)* at Table C-3.[1] Resolution of these questions will enable both movants to better assess the merits of their claims prior to filing § 2255 motions and courts to more efficiently and accurately decide such motions.

Over 40 years ago, this Court observed that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often-concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors

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[1] During the 12-month period ending June 30, 2019, 5,335 petitions filed under 28 U.S.C. § 2255 were filed in district courts. *Id.* This report may be found at https://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/-2019/06/30 (last visited August 28, 2019).

conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

At the time *Blackledge* was decided, about 20 percent of federal defendants eschewed negotiated plea deals in favor of trial.[2] As of 2018, that number had dropped by nearly an order of magnitude, with only 2.7 percent of federal defendants electing trial instead of pleas.[3] This Court itself observed in 2012 that the "simple reality," is that "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the results of guilty pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

Increasingly over the past several years, commentators and judges alike have observed with alarm that the adverse sentencing effects of going to trial have become so great that the decision to accept a plea deal becomes a Hobson's Choice. *See, e.g,* Rakoff, *Why Innocent People Plead Guilty,* NEW YORK REVIEW OF BOOKS, Nov. 20, 2014; Hafetz, *The "Virtual Extinction" of Criminal Trials: A Lawyer's View from the Well of the Court,* 31 FED.SENT.RPTR. 4 (Apr. 2019); Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51, 95 (2012) ("At some point, the sentencing differential becomes so large that it destroys the defendant's ability to act freely and decide in a rational manner whether to accept

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[2] Administrative Office of U.S. Courts, *Judicial Business of the U.S. Courts*, Table D-4, 1980 (12-month period ending June 30, 1980).

[3] *Judicial Business of the U.S. Courts, supra.*

or reject the government's offer"); Dripps, *Guilt, Innocence, & Due Process of Plea Bargaining*, 57 WM. & MARY L.REV. 1343, 1360-63 (2016) (Studies examining the "innocence problem" of plea bargaining have estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent); Nat'l Assoc. of Criminal Defense Attys, *The Trial Penalty: The Sixth Amendment Right To Trial on the Verge of Extinction and How To Save It* (July 2018) at 16 ("It may be difficult to calculate how much higher a post-trial sentence would need to be in order to coerce a defendant to plead guilty. But there is strong evidence that these discrepancies can compel even an innocent person to plead guilty").[4]

To be sure, the percentage of defendants entering guilty pleas is so high as to be sobering, providing a substantial asterisk to this Court's long-held belief that "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised [in a post-conviction petition'.]" *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979).

Arrayed against the interest in finality is the very purpose of the writ of habeas corpus – to safeguard individual freedom from imprisonment in violation of the constitution. *Harris* v. *Nelson,* 394 U.S. 286, 290-291 (1969). "The writ of *habeas corpus* has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty." *Price* v. *Johnston,*

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[4] Found at https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it-report-final.pdf (last visited August 26, 2019)

334 U.S. 266, 269 (1948). And now, *habeas corpus* takes on even more importance, as it may be the only opportunity that facts related to the movant's legal guilt are examined in an adversarial evidentiary hearing.

Trials have taken a tertiary role in the federal criminal justice system (behind guilty pleas and outright dismissals) in the disposition of criminal cases.[5] Given that development, the importance of the standards to be met in entitling a post-conviction attack movant to an evidentiary hearing in which his or her claims are proven or disproven is perhaps greater than at any time in history.

(1) When a post-conviction movant proceeding under 28 U.S.C. § 2255 raises claims which, if true, would entitle him to relief, does the fact that movant does not proffer evidence negating possible defenses constitute a basis for denying movant an evidentiary hearing?

Title 28, Section 2255(b) directs in curiously stilted language that "[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." In *Machibroda* v. *United States,* 368 U.S. 487 (1962), this Court sought to define the

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[5] Of 82,440 new federal criminal cases in 2018, 92.2% were convicted by guilty plea, 7.4% of the cases were dismissed, and 2.4% went to trial. *Judicial Business of the U.S. Courts, supra* at Table D-4, 2018 (12-month period ending Mar. 31, 2018).

showing a movant must make in order to cross the intentionally low-set bar to a hearing:

> This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.
>
> We cannot agree with the Government that a hearing in this case would be futile because of the apparent lack of any eyewitnesses to the occurrences alleged, other than the petitioner himself and the Assistant United States Attorney. The petitioner's motion and affidavit contain charges which are detailed and specific. It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and other such sources. "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard."

Id. at 368 U.S. 494-95, quoting *Walker v. Johnston*, 312 U.S. 275, 287 (1941).

In *Machibroda, supra*, the defendant pled guilty to bank robbery charges and was sentenced to 40 years in prison. He later filed a § 2255 motion alleging that his plea had been induced by an Assistant United States Attorney's promises that his sentence would not exceed 20 years, that the AUSA had admonished him not to tell his lawyer about the agreement, and that the trial judge had failed to inquire whether the guilty plea was made voluntarily before accepting it. This Court noted that the

allegations, if proved, would entitle the defendant to relief, and that they raised an issue of fact that could not be resolved simply on the basis of an affidavit from the prosecutor denying the allegations. Thus, the defendant was entitled to an evidentiary hearing.

In Gieseke's case, he provided detailed declarations that contrary to defense counsel's claims, he did not investigate Gieseke's allegation that a police detective demanded and procured back-dated affidavits from the parents attesting that items he showed them had been items he had earlier seized from the home. The parents alleged that defense counsel had not called them, and if he had, they would have recounted the information about the detective's conduct to counsel. Their statements were reasonably detailed and specific. However, the District Court rejected the claim because defense counsel might have contacted them through some means other than a phone call, such as a letter or personal visit.

Likewise, Gieseke provided detailed information that defense counsel, without investigating his claims about the detective's conduct, refused to file any motions testing the admissibility of the evidence allegedly obtained from the parents. The district court guessed that maybe defense counsel had a strategic reason for doing so. But "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must

be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Essentially, the court complained that Gieseke, while providing a reasonably detailed showing that no investigation had been undertaken, failed to speculate what strategic choices defense counsel might have made and failed to refute the reasonableness of those choices.

Such an approach to determining whether a movant has met the initial burden to justify an evidentiary showing is akin to holding a party opposing summary judgment to the proofs it must make to prevail at trial.

This case is an excellent vehicle for this Court to employ in defining the quanta of evidence and argument a § 2255 movant is required to advance in order to justify a hearing, just as the Court defined the quanta needed to justify a certificate of appealability in *Buck v. Davis*. In *Buck*, the Fifth Circuit denied a COA to a movant because he had not "shown extraordinary circumstances" or "shown why [Texas's broken promise] would justify relief from the judgment." *Id.*, at --- U.S. ---, 137 S. Ct. 759, 773-74, 197 L. Ed. 2d 1, 26 (2017). This Court reversed:

> A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." [citation omitted]
>
> The dissent does not accept this established rule, arguing that a reviewing court that deems a claim nondebatable "must necessarily conclude that the claim is meritless." *Post*, at 2, ___, 197 L. Ed. 2d, at 25 (opinion of Thomas, J.). Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is

> meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage. Miller-El* [*v. Cockrell*, 537 U. S. 322 (2003) at] at 336-337, 123 S. Ct. 1029, 154 L. Ed. 2d 931. *Miller-El* flatly prohibits such a departure from the procedure prescribed by §2253. *Ibid.*

Id. at 137 S. Ct. 774. Much as did the Fifth Circuit in *Buck,* the District Court in this case inverted the operations required by 28 U.S.C. § 2255(b). First, the court posited that a defense counsel whose affidavit does not appear in the record contacted the parents in some way other than by phone, notwithstanding their unambiguous representations that if he had done so, they would have "answered the questions honestly and in the manner represented..." in prior declarations. Second, the court imagined – again, without a supporting affidavit of defense counsel that this was so – that perhaps counsel had strategic reasons for not investigating movant's claims that his parents had been coerced into signing a backdated affidavit affirming that the items the detective showed them were the same items he had earlier removed from the home (an assertion about which they were uncertain).

The court thus held movant to a standard of having to negate every conceivable strategy that counsel may have pursued, without any evidence that such strategy was adopted after reasonable investigation, or indeed that the strategy had been adopted at all. *Strickland, supra. Compare Jackson v. Virginia*, 443 U.S. 307, 219 (1979) in which this Court instructed that the question of "whether... *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt" "the evidence in its totality," and did not require the Government to "negate every theory of innocence." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000); *United States v. Tantillo*, Case No. A-15-cr-162 (W.D.Tex. Mar. 14, 2016) 2016 U.S. Dist. LEXIS 32159 at *2-3 (In deciding F.R.Crim.P. 29(c) motion, "[t]he court need not 'analyze the evidence with an eye toward negating every possible inference of innocence'; rather, "if the fact finder was presented with sufficient evidence to support the verdict reached, that verdict must be upheld'," quoting *United States v. Lucio*, 428 F.3d 519, 522 [5th Cir. 2005]).

The proper standard, instead, should be the one cited in *Machibroda, supra*: When a movant's motion and affidavit contain charges which are detailed and specific, the court should reasonably suppose that the material allegations can be corroborated or disproved by competent evidence in a hearing. *Machibroda* holds that "[n]ot by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence." *Id.* at 368 U.S. 495. That the Government might be able to show that defense counsel's refusal to investigate the parents' claims was reasonable, or that a reasonable strategic decision was behind counsel's refusal to file a motion to suppress, or that that parents lacked candor, and counsel had contacted them by non-telephonic means, might be bases for denying the § 2255 motion after a hearing, but they are not reasons to deny Gieseke "an opportunity to support them by evidence." *Id.*

This Court's definition of the appropriate standard of pleading and evidence to justify an evidentiary hearing on a 28 U.S.C. § 2255 motion is a matter of concern not just to Gieseke, but to all of the over 5,000 § 2255 movants who will have their petitions heard this year in federal courts.

(2) Does an incarcerated pretrial detainee have a duty to act to mitigate counsel's misfeasance, the failure to perform which serves to forfeit the post-conviction right to assert a 6th Amendment claim for ineffective assistance of counsel?

The *District Court* decision included a finding that Gieseke failed to urge his parents and brother to contact defense counsel on their own initiative, because – contrary to his representations to Gieseke – defense counsel had not contacted the parents or brother.

> If the family had been willing to tell counsel about the matters set out in their declarations, Movant does not explain why he did not ask them to contact counsel about the matter. According to a declaration from Movant dated November 7, 2017... his mother and brother visited him while he was awaiting trial. He does not allege that he asked them during that visit to contact counsel about the discovery of the bag and its contents, or about the family's interactions with the detective regarding those items before and after they were discovered. No declaration describes any attempt by the family to contact counsel, when it was apparent to Movant that for whatever reason they had not discussed the matter with counsel.

Findings, Conclusions & Recommendation, Appendix A at pp. 8-9. This Court should not let the issue raised by this finding pass without correction.

There is no question that the duty to investigate belongs to counsel. *Strickland, supra* at 466 U.S. 690-92; . *See also Rompilla v. Beard,* 545 U.S. 374 (2005); *Wiggins v. Smith,* 539 U.S. 510 (2003); *Williams v. Taylor,* 529 U.S. 362 (2000). That being

the case, a holding that a movant's failure to take steps to force counsel to discharge his duty serves to act as some sort of forfeiture of the right to assert a 6th Amendment violation impermissibly reassigns the burden of the duty from attorney to client.

For example in *United States v. Herring,* Case No. 18-4023 (10th Cir., Aug. 27, 2019) 2019 U.S. App. LEXIS 25759, the defendant's attorney gave defendant list of appellate attorneys to contact instead of filing notice of appeal, but defendant failed to contact anyone on the list. Later, the defendant filed a § 2255 motion claiming attorney ineffectiveness for failing to file notice of appeal. The 10th Circuit rejected the notion that the defendant's failure to contact other attorneys after being provided with information had anything to do with the ineffective assistance claim: "Trial attorneys cannot outsource their constitutional obligation to advise their clients about filing an appeal nor their duty to make a reasonable effort to discover their clients' wishes. Once the duty to consult is invoked by a defendant expressing interest in appealing, trial attorneys must properly advise their client and assess their client's wishes before withdrawing from the case." *Id.* at 2019 U.S. App. LEXIS 25759, at *12.

Here, the District Court essentially holds that because Gieseke did not attempt to conduct defense counsel's pretrial investigation from his jail cell, he has forfeited his right to proceed on the claim that counsel neglected his duty to investigate. Such a ruling at the initial review stage impermissibly "outsources" counsel's investigation burden to the jailed defendant. While it may be probative of whether Gieseke's representation that he asked defense counsel to pursue the particular investigation – a fair use of the facts – such a finding is properly reserved for the findings and

conclusions after an evidentiary hearing. The District Court does not know whether Gieseke urged his parents to contact defense counsel or not, just that Gieseke did not plead that he did so.

Under those circumstances, the District Court has held that Gieseke must affirmatively plead that he took steps to mitigate his attorney's misfeasance and breach of duty, or forfeit his attorney ineffectiveness claim. If such were the law, it would cause the prudent defendant to constantly second-guess counsel, and to try to run a parallel lay criminal defense. Every decision would belong both to counsel and to the defendant, because the defendant would have a duty to oversee counsel's discharge of his or her duty.

This Court should take this opportunity, while defining the standards for granting an evidentiary hearing to a § 2255 movant, to underscore what obligations, if any, a criminal defendant has to oversee and overrule counsel's decisions as to whether, when and how to discharge his or her professional obligations.

CONCLUSION

This case presents the Court with an excellent opportunity to define the standards of pleading and evidence necessary for a 28 U.S.C. § 2255 movant to meet in order to pass initial review, and to be entitled to an evidentiary hearing. With over 5,000 § 2255 motions adjudicated annually, these standards are matters of considerable importance to thousands of movants, nearly all proceeding *pro se,* across the nation.

Thus, *certiorari* should be granted on the two questions presented, in order to fully address the issues raised.

WHEREFORE, this *Petition for a Writ of Certiorari* should be granted.

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