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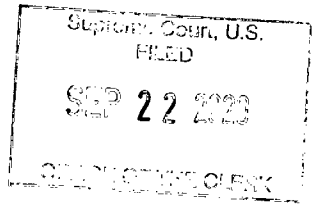

In the
Supreme Court of the United States

ALEX McCOY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Alex McCoy
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QUESTIONS PRESENTED FOR REVIEW

Over the yearts, this court has issued several ineffective assistance of counsel claims addressing counsel's failure to prepare and misadvise to a defendant resulting Sixth Amendmend due process violations; *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), *Porter v. McCollum*, 558 U. S. 30 (2009) (counsel's failure to review a defendant's background), *Rompilla v. Beard*, 545 U. S. 374 (2005) (failure to learn all related to an offense); and recently in *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (failure to prepare for sentencing in capital cases). In this trend should this court grant certiorari on a failure to properly advise McCoy of the facts of the government's charges with the following questions:

1. Was trial counsel ineffective in his directive to advise McCoy to plead guilty by failing to review the government's discovery in violation of this court's decision in *Andrus v. Texas*, 140 S. Ct. 1875 (2020)?

2. Should the order of the court of appeals denying a certificate of appealability be reversed and remanded because it is manifestly incorrect to suggest that no reasonable jurist could disagree with a district court order summarily denying a motion under 28 U.S.C. § 2255, where that order directly conflicts with the controlling decisions of this Court and the plain language of § 2255?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the Unite States Court of Appeals for the Fourth Circuit and the United States District, Western District of North Carolina.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Alex McCoy ("McCoy"), the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision entered on June 23, 2020, in *United States v. McCoy*, 810 F. App'x 223 (4th Cir. 2020) and is reprinted in the separate Appendix A to this petition.

The denial of Petitioner's Title 28 U.S.C. § 2255 in the Western District of North Carolina, *McCoy v. United States,* 2020 U.S. Dist. LEXIS 18172 (W.D.N.C. Feb. 3, 2020) was denied on February 3, 2020, and is reprinted as Appendix B to this petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on June 23, 2020.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1654(a) and 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Id. Fifth Amendment U.S. Constitution

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

Chapter 153 of Title 28, U.S. Code ("Habeas Corpus"), provides, in pertinent part:

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) * * * *

(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).

§ 2255. Federal custody; remedies on motion attacking sentence:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) * * * *

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

* * * *

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE CASE

McCoy was charged on October 17, 2015, via criminal complaint alleging a violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A) and with one count of conspiracy to traffic controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment alleged in additional counts that McCoy distributed and possessed with intent to distribute cocaine base on or about, July 31, 2015, and two charges of distributing cocaine base on August 4, 2015. (Counts 6 and 7). (Dkt. 38). McCoy was approached with a plea agreement to plead guilty to Count 1 of the indictment. Although McCoy was incarcerated during a majority of time alleged in Count 1, McCoy agreed to plead guilty in exchange for dismissal counts 5, 6, and 7. The government agreed to dismiss any § 851 prior filings. (Dkt.71 at 2).

McCoy eventually filed several letters with the court after noting his displeasure with trial counsel. (Dkt. 104, 107, 113). The Court addressed the matter on September 6, 2016, and October 19, 2016, and where new counsel was appointed. (10/25/2016 Journal Entry). Sentencing was held on January 23, 2017. After addressing several sentencing objections, the court sentenced McCoy to 292 months of incarceration. (Dkt. 118). An appeal ensued and on July 13, 2018, the

Fourth Circuit Court of Appeals affirmed McCoy's sentence and conviction. *United States v. McCoy*, 895 F.3d 358 (4th Cir. 2018). This court denied a writ of certiorari on November 13, 2018. Post-conviction motions and appeals were denied as well as noted herein. This timely petition for writ of certiorari followed.

STATEMENT OF THE RELEVANT FACTS

McCoy was incarcerated until January 4, 2013. The conspiracy in his case occurred between on or about 2013 and June 2015. (Dkt. 38) Most of the time the government alleged the conspiracy was active, McCoy was in federal custody. The government did not allege (nor can they allege) and counsel did not raise the defense that McCoy was not involved in the conspiracy while in prison. While issues exist regarding the exact nature of the conspiracy, McCoy cannot separate himself from ***his*** drug transactions. This is a classic case of an attorney's failure to review the government's discovery before advising his client.

On December 23, 2013, the law enforcement team utilized a confidential source to purchase 2 grams of crack cocaine from the McCoy at his residence. There another purchase of 6.9 grams on February 10, 2014. There were no further purchases directly with McCoy. On July 6, 2015, law enforcement seized approximately 25 grams of crack cocaine from co-defendant Mickey Burris who admitted that it belonged to him. Burris then changed is the story and said he acquired the crack cocaine from McCoy. After the conspiracy ended (as per the

indictment), there were four additional purchases from co-defendant Eric Briggs, who resided at McCoy's residence on July 7, 2015 (12.6 grams), July 13, 2015 (12.9 grams), July 31, 2015 (41 grams), and August 4, 2015 (41 grams). McCoy was not involved in those transactions. That was the extent of involvement with crack cocaine and McCoy. On November 3, 2015, McCoy was arrested and 2 ounces of cocaine base were seized from the residence.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FOUTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

> (b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

1. Was trial counsel ineffective in his directive to advise McCoy to plead guilty by failing to review the government's discovery in violation of this court's decision in *Andrus v. Texas*, 140 S. Ct. 1875 (2020).

To assess whether counsel exercised objectively reasonable judgment under prevailing professional standards, this court first asks "whether the investigation supporting counsel's decision was itself reasonable." *Id.* , *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), *see also Id.* , at 528 (considering whether "the scope of counsel's investigation into petitioner's background" was reasonable); *Porter v. McCollum*, 558 U. S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009). "It is unquestioned that under prevailing professional norms at the time of [McCoy's] case, counsel had an 'obligation to conduct a thorough investigation of the defendant's case.'" *Id. Porter* at 39 (quoting *Williams v. Taylor*, 529 U. S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). Counsel has 'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id. Wiggins* at 521. "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." *Wiggins,* 539 U. S., at 521-522. Here all these fundamental principles were ignored.

With the foundation of counsel's responsibilities laid out, the assessment of trial counsel's performance in McCoy's case comes into clear focus. The errors of this case are straightforward, counsel provided erroneous advice that severely prejudiced McCoy. McCoy is only requesting one relief, to "be placed back pre-trial where he was before he was misled into pleading guilty:"

> "[T]he goal of § 2255 review is to place the defendant in exactly the same position he would have been had there been no error in the first instance." *United States v. Hadden*, 475 F.3d 652, 665 (4th Cir. 2007).

Id. Boyd v. United States, No. 3:16-cv-328-MOC, 2019 U.S. Dist. LEXIS 193493, at *4-5 (W.D.N.C. Nov. 6, 2019).

The sentence was violative of his right to effective assistance of counsel. As in *Andrus*, there was no preparation by counsel before advising McCoy on how to proceed. In the affidavit supporting 2255, he provided how he never saw the factual basis before having trial counsel execute it. The factual basis was executed 14-days after the plea agreement was executed. (D/E 70). McCoy was advised by counsel that the factual basis supported a plea of 240 grams of crack cocaine, however, counsel had not seen the factual basis before advising McCoy. To complicate matters, any changes that were made in the plea agreement were never explained nor noted by McCoy. When the plea agreement was modified to include "crack cocaine" instead of powder cocaine, McCoy did not execute the changes so

he was not aware of the "840 – 2800" gram quantity as alleged. To the contrary, the government alleged that the crack cocaine attributable to McCoy was only 240 grams of crack cocaine:

> MR. KAUFMAN: So, Your Honor, going back to – all right, Your Honor. So going back to paragraph 8, the amount of a mixture and substance containing a detectable amount of cocaine base that was known to or reasonably foreseeable by the defendant was at least 240 grams but less than 2,800 grams.

Id. (Dkt. 126 at 9).

Deficient performance having been shown, the question remains whether counsel's deficient performance prejudiced McCoy. *See Strickland v. Washington,* 466 U.S. 668, 692 (1984). Here, prejudice exists since there is a reasonable probability that, but for his counsel's ineffectiveness, McCoy would not have pled guilty. That claim is supported by the affidavit provided with the 2255 petition. In assessing whether McCoy has made that showing, a reviewing court must consider "the totality of the available evidence - both that adduced at trial, [here at the change of plea] and the evidence adduced in the habeas proceeding" - and "reweig[h] it against the evidence in aggravation." *Sears v. Upton*, 561 U. S. 945, 956, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010) (per curiam) ("A proper analysis of prejudice under *Strickland* would have taken into account the facts uncovered, to assess whether there is a reasonable probability that [the defendant] would have received a different sentence" (citing cases)). And since McCoy's plea was involuntary based on misadvise, prejudice only requires a reasonable *probability* of

at least a different sentence existing. The failure to present McCoy's non-involvement in this offense and directing McCoy to accept a guilty plea without reviewing the factual proffer until 14-days post plea agreement execution establishes a lack of preparation. This failure, too, reinforces counsel's deficient performance. See *Rompilla* v. *Beard*, 545 U. S. 374, 385, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) ("counsel ha[s] a duty to make all reasonable efforts to learn what they c[an] about the offense[s]".) "On a claim of ineffective assistance of counsel in preparation for sentencing, a standard of reasonableness applies as if one stood in counsel's shoes." *Id. Rompilla* at 377. "The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 American Bar Association Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). *Id.* , 377.

In this case, there was no investigation whatsoever. At least none that would lead counsel to advise McCoy to plead guilty to drug quantities alleged in the factual basis that was not read at the time. Having read the factual basis 14-days after the execution of the plea agreement can hardly be said to meet the minimum expectations of efficient assistance of counsel as explained in *Strickland, Andrus, Wiggins, Porter* or *Rompilla*. A writ of certiorari should be granted in this matter.

2. Should the order of the court of appeals denying a certificate of appealability be reversed and remanded because it is manifestly incorrect to suggest that no reasonable jurist could disagree with a district court order summarily denying a motion under 28 U.S.C. § 2255, where that order directly conflicts with the controlling decisions of this Court and the plain language of § 2255?

This Court has been called upon repeatedly to reverse the courts of appeals' failure to apply the well-established standard for issuance of a certificate of appealability. The present case is another, calling for a summary grant of certiorari, vacatur of the order below, and remand with directions to apply the governing standard and grant the requested certificate of appealability ("COA").

This Court's cases clearly and firmly establish that a COA must be allowed pursuant to 28 U.S.C. § 2253(c)(1)(B) and Fed.R.App.P. 22(b)(1) whenever the correctness of the district court's disposition is at least "debatable" among jurists of reason. *See Buck v. Davis*, 580 U.S. —, 137 S.Ct. 759, 773–75 (2017) (reiterating and applying governing standard for issuance of COA); *Tennard v. Dretke*, 542 U.S. 274, 282–83 (2004) (denouncing court of appeals' "paying lipservice" to COA standard while improperly prejudging the merits); *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003) ("threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it"); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (if "reasonable jurists could debate whether (or, for that matter, agree that) the petition

should have been resolved in a different manner"), reaffirming *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (former "certificate of probable cause" standard).

To obtain a COA, the showing of possible error need not be conclusive. Far from it. As explained in *Miller-El*, a "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. In short, § 2253(c) establishes a low threshold for granting a COA. *Buck v. Davis,* 137 S.Ct. at 773–75. "We reiterate what we have said before: 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.'" *Id.* 774 (bracketed insertions original), quoting *Miller-El*, 537 U.S. at 327, 348. Despite binding Circuit precedent acknowledging the proper standard, see, e.g., *Lambrix v. Sec'y, Dept. of Corrections*, 872 F.3d 1170, 1179 (11th Cir. 2017) (per curiam); *Gonzalez v. Sec'y, Dept. of Corrections*, 366 F.3d 1253, 1267–68 (11th Cir. 2004). Because his § 2255 motion more than sufficiently alleged that petitioner McCoy sentence was imposed in violation of his constitutional rights and because reasonable jurists could (to say the least) disagree with the district court's summary disposition of the procedural ground of statute of limitations/equitable tolling, the court of appeals was bound by law to grant the

requested certificate of appealability. *Putman v. Head*, 268 F.3d 1223, 1227–29 (11th Cir. 2001), the lesson taught by this Court's cases remains unlearned in practice, as the present case illustrates. No new law needs be established to resolve this case. The Fourth Circuit simply refused to follow controlling precedent concerning Certificates of Appealability, instead "paying lip service" to those standards as articulated by this Court. See *Tennard v. Dretke*, 542 U.S. at 283. To enforce the binding effect of its precedent, the Court should grant the writ, summarily reverse the order of the court below, and remand with directions to issue a COA on the constitutional issues identified above in the Statement of the Case.

CONCLUSION

For the foregoing reasons, petitioner McCoy prays that this Court grant his petition for a writ of certiorari, reverse the order of the court of appeals, and remand for further proceedings

Done this 18, day of September 2020.

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