No. 20-

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IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE GEORGIOU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the order of the court of appeals denying a certificate of appealability should be reversed and remanded, because it is manifestly incorrect to suggest that no reasonable jurist could disagree with the district court's conclusions:

a. That the government did not violate petitioner's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), by nondisclosure of material information concerning the principal prosecution witness and by failing to correct false trial testimony of which it had or should have had knowledge; and

b. That Rule 8(c) of the Rules Governing Proceedings Under 28 U.S.C. § 2255, making appointment of counsel mandatory when an evidentiary hearing is granted, allows the court to refuse to reconsider a defendant's waiver of such counsel after new developments, months prior to the scheduled hearing, lead the defendant to seek withdrawal of the initial waiver.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Georgiou and respondent United States). There were no co-defendants at trial and no co-appellants.

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

George Georgiou petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit denying a certificate of appealability, on appeal from the denial of his motion to vacate sentence.

OPINIONS BELOW

The Third Circuit's order (per Shwartz, J., with McKee & Phipps, JJ.), filed May 4, 2020, is Appendix A. It is not published. The United States District Court for the Eastern District of Pennsylvania (R.F. Kelly, Sr.J.) wrote a memorandum opinion, filed June 19, 2018, denying relief under 28 U.S.C. § 2255. That opinion is not published in the Federal Supplement but is available at 2018 WL 9618008; a copy is Appx. B. The district court's order regarding prehearing discovery, filed June 7, 2017, is available at 2017 WL 11428699. The opinion of the Third Circuit affirming petitioner's convictions and sentence on direct appeal is published as *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015), *cert. denied*, 577 U.S. 954 (2015) (No. 14-1535).

JURISDICTION

On May 4, 2020, the United States Court of Appeals for the Third Circuit filed its final order refusing a certificate of appealability. Appx. A. On June 9, 2020, the court of appeals denied petitioner's timely application for rehearing. Appx. C, App. A184.

As a result, pursuant to this Court's Rules 13.1 and 13.3 and this Court's Order of March 19, 2020, this petition for certiorari is due not later than 150 days thereafter, that is, on or before November 6, 2020. This petition is timely filed on or before that date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). See *Hohn v. United States*, 524 U.S. 236 (1998) (confirming certiorari jurisdiction following denial of certificate of appealability in § 2255 case).

TEXT OF CONSTITUTIONAL PROVISION, FEDERAL STATUTES, AND FEDERAL RULE INVOLVED

The **Fifth Amendment to the Constitution of the United States** provides, in pertinent part: "nor shall any person … be deprived of life, liberty, or property, without due process of law; …."

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) * * * *; 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) * * * *

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) * * * *

(f) A 1-year period of limitation shall apply to a motion under this section. * * * *

28 U.S.C. § 2255.

The **Federal Rules Governing Section 2255 Proceedings** provide, in pertinent part:

Rule 8. Evidentiary Hearing

* * * *

(c) Appointing Counsel; Time of Hearing. If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

* * * *

STATEMENT OF THE CASE

In early 2017, petitioner George Georgiou filed a timely first motion under 28 U.S.C. § 2255 to challenge the 25-year sentence imposed on him on account of convictions for fraud in the sale of securities. The motion advanced numerous instances of the prosecutors' failure to correct false testimony and of failure to disclose favorable information, amounting to a denial of due process, as well as instances of ineffective assistance of trial counsel. After a complex evidentiary hearing on certain of these claims, for which the court refused to reconsider its earlier acceptance of a waiver of counsel, relief was denied with a lengthy opinion. App. A3. On appeal, following extensive briefing, the court of appeals summarily denied a certificate of appealability. App. A1.

Petitioner Georgiou, a Canadian citizen, was convicted following a 13-day jury trial in the U.S. District Court for the Eastern District of Pennsylvania on nine counts of securities fraud, wire fraud and attempted wire fraud, and a related conspiracy charge. 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. §§ 2, 371, 1343, 1349. The charges arose out of a stock manipulation scheme alleged to have existed from 2004 through 2008. On November 19, 2010, the court imposed a prison sentence of 300 months, along with more than $55 million in restitution pursuant to 18 U.S.C. § 3663A and a $26 million "money judgment" forfeiture.[1] As of the present filing, petitioner has

[1] No pertinent statute authorizes the entry of a criminal forfeiture in the form of a "money judgment," in contrast with a forfeiture of specified tainted assets or property derived from such assets. No objection was lodged to the

been incarcerated for nearly eleven years, since the return of the verdict on February 12, 2010.

On direct appeal, following post-judgment *Brady* litigation in the district court, the court of appeals upheld the convictions and sentence. *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015), *cert. denied*, 577 U.S. 954 (Nov. 2, 2015) (No. 14-1535).[2]

Following appeal, petitioner developed additional information suggesting that the key trial witness, alleged co-conspirator turned informant Kevin Waltzer, had testified falsely, yet government counsel had remained silent despite knowledge of the falsity. Similarly, petitioner was able to obtain substantial evidence which he claimed showed numerous instances of failure by the government to disclose materially favorable information affecting Waltzer's credibility. These points formed the bulk of the § 2255 motion which petitioner then filed *pro se*.[3]

_____(cont'd)

forfeiture in this case on that ground, so petitioner notes the point here without further comment. *But see* note 3 *infra*.

[2] One key basis on which petitioner's conviction was upheld on appeal, notwithstanding his initial *Brady* claims, and which had been the subject of his certiorari petition from that affirmance – a purported lack of diligence by the defense in seeking out independently the information withheld by the government, with the result that the material was deemed not to have been "suppressed," 777 F.3d at 140–41 – was disavowed as erroneous barely a year later by the Third Circuit sitting *en banc*. See *Dennis v. Sec'y, Pa. Dep't of Corrections*, 834 F.3d 263, 290 (3d Cir. 2016) (en banc).

[3] While his direct appeal was pending, and continuing into the same time frame when the § 2255 motion was being

Petitioner requested discovery, which the district court granted in part and denied in part. The court determined that an evidentiary hearing was warranted on several claims, but not others. More than six months prior to the date set for hearing, the court accepted an in-person waiver, after colloquy, of petitioner's right under Rule 8(c) of the Federal Rules Governing 2255 Proceedings to the appointment of counsel. Based on continuing disclosures of pertinent information prior to the hearing, however, petitioner asserted, in writing, that he wished to reconsider his waiver of counsel. Although the hearing date was then still four months off, the court refused to entertain a withdrawal of the waiver.

An evidentiary hearing ensued, at which 19 witnesses testified, and dozens of exhibits were admitted. The hearing extended over seven days in late 2017. After the hearing, the parties submitted proposed findings and conclusions.

On June 19, 2018, the district court issued a 186-page memorandum and order denying relief. App. B.[4] Without first inviting submissions on whether a

(cont'd)

litigated, petitioner filed several *pro se* motions challenging the criminal forfeiture (under this Court's decision in *Honeycutt v. United States*, 581 U.S. —, 137 S.Ct. 1626 (2017), *inter alia*) and restitution (as impermissibly extra-territorial). Those motions were also denied. Represented by undersigned counsel, petitioner took timely appeals, but the court of appeals affirmed. See *United States v. Georgiou*, 800 F. App'x 136 (3d Cir. 2020). Earlier this Term, the Court denied certiorari in that matter. No. 20-280 (Oct. 13, 2020).

[4] Much of the court's memorandum decision was copied verbatim from the government's post-hearing submission.

reasonable jurist might disagree with any of its key findings or determinations, the court also preemptively refused issuance of a certificate of appealability ("COA"). Appx. A184. The district court offered multiple reasons for its adverse ruling, both procedural and on the merits. Upon consideration of petitioner's timely motion under Fed.R.Civ.P. 59(e),[5] the court denied any modification of that order.

Petitioner filed a timely notice of appeal from the denial of his post-conviction motion. Under Third Circuit local rules, an application for COA is treated as a motion, and is thus ordinarily limited under the Rules of Appellate Procedure to 5200 words (less than 20 pages). *See* Fed.R.App.P. 27(d)(2); 3d Cir. LAR 22.1(b). The government rarely files a response. Nevertheless, the court in this case allowed petitioner – now represented by retained, experienced habeas corpus counsel – to file an application more than four times that long, totaling almost 22,000 words (some 92 pages, plus numerous exhibits). Moreover, the court rejected the government's declination to respond, requiring an answer. The government's response was even more lengthy – 142 pages. To complete the briefing, petitioner was granted leave to file a detailed and fact-specific reply of 50 pages.

In these filings, petitioner's counsel substantially narrowed the more numerous claims that had been advanced in the *pro se* 2255 proceedings below. Petitioner's appellate submissions detailed how the record developed in discovery and at the hearing

[5] Petitioner's invocation of Rule 59(e) in this context was appropriate. See *Banister v. Davis*, 590 U.S. —, 140 S.Ct. 1698 (2020).

demonstrated eight substantial violations of *Napue v. Illinois*, 360 U.S. 264 (1959), five *Brady v. Maryland*, 373 U.S. 83 (1963), violations, three instances of ineffective assistance of counsel, and an arbitrary denial of his Rules-guaranteed right to counsel at the evidentiary hearing. This course of briefing, if nothing else, demonstrated that many issues raised by the district court's opinion were eminently debatable.

Barely ten weeks after petitioner filed his reply, a three-judge panel of the court of appeals issued a purely conclusory one-page denial of COA, addressing none of petitioner's arguments. The court held, in full:

> To the extent a COA is required under 28 U.S.C. § 2253(c)(1)(B), Georgiou's application for a COA is denied. Jurists of reason would not debate the District Court's conclusion that Georgiou did not show that the Government failed to correct false testimony and evidence at his trial, see Napue v. Illinois, 360 U.S. 264 (1959), or that the Government failed to disclose evidence as required by Brady v. Maryland, 373 U.S. 83 (1963). Jurists of reason likewise would not debate the District Court's conclusion that Georgiou failed to show that his Sixth Amendment right to the effective assistance of counsel was violated. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). The District Court did not abuse its discretion in denying the discovery requests that Georgiou mentions in his application for a COA, and to the extent a COA is not required, we summarily affirm those denials. See Williams v. Beard, 637 F.3d 195, 209 (3d Cir. 2011). We also summarily affirm the District Court's denials of Georgiou's

post-waiver requests for appointment of counsel. See United States v. Leveto, 540 F.3d 200, 207 (3d Cir. 2008).

App. A1. The court below likewise summarily denied rehearing. App. A186. This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231 and 28 U.S.C. § 2255. The court of appeals had jurisdiction under 28 U.S.C. § 2253.

REASONS FOR GRANTING THE PETITION

1. In holding that no reasonable jurist could disagree with a district court opinion that is patently at least debatable, the court of appeals' order disregards this Court's consistent precedent enforcing the standard for allowing a certificate of appealability.

This Court has been called upon repeatedly to reverse circuit courts' failures 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 ("GVR") 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) (COA is required whenever "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) (pre-AEDPA "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.*, *United States v. Doe*, 810 F.3d 132, 143–46 (3d Cir. 2015); *Wilson v. Secretary,* 782 F.3d 110, 115 (3d Cir. 2015), the lesson

taught by this Court's cases remains unlearned (or at least unenforced) in practice, as the present case illustrates.

Although the district court had purported to find various procedural defects in petitioner's claims (see, *e.g.*, App. A52, A65), the court below pretermitted those questions. Instead, it denied his application for a COA by addressing only the merits of his underlying issues. That is, the appellate panel asserted (in one sentence) that no reasonable jurist could disagree whether the government did in fact violate petitioner's due process rights:

> Jurists of reason would not debate the District Court's conclusion that Georgiou did not show that the Government failed to correct false testimony and evidence at his trial, see Napue v. Illinois, 360 U.S. 264 (1959), or that the Government failed to disclose evidence as required by Brady v. Maryland, 373 U.S. 83 (1963).

Appx. A1. This conclusory determination cannot be reconciled with the established standard and therefore warrants summary reversal. See, *e.g.*, *Tharpe v. Sellers*, 583 U.S. —, 138 S.Ct. 545 (2018) (per curiam).

a. With respect to petitioner's *Brady* claims, for example, by asserting that there had not been, even arguably, any failure "to disclose evidence as required" by due process, the court below cannot have been suggesting that the information about Waltzer of which petitioner complained was in fact timely disclosed; it is undisputed that it was not. The court below therefore can only have meant by this cryptic holding that such disclosure was not "required by" *Brady*, that is, either that despite nondisclosure there was some justification for withholding it, or that the

undisclosed information was immaterial. See *Strickler v. Greene*, 527 U.S. 263, 289–91 (1999) (emphasizing low threshold for materiality standard under *Brady*). Neither conclusion could survive a fair application of this Court's COA test. See *Banks v. Dretke*, 540 U.S. 668, 703–05 (2004) (reiterating application of correct COA standard to *Brady* claim with antecedent procedural issue).

To begin with one example of the error below with respect to *Brady* material: Kevin Waltzer was a longtime, accomplished conman. The government agreed to use him as an active cooperator and witness against some four dozen co-conspirators in various schemes, the great majority of them his underlings. *See* App. A118. In early 2006, when his lawyers brought Waltzer to the government as a potential informant, he had recently garnered some $45 million as the "mastermind" of a scheme to defraud class action settlement funds by the systematic submission of false claims. App. A64–65.[6] But Waltzer did not come forward to disclose this activity, nor that he was supposedly engaged in fraudulent stock-trading activity with petitioner Georgiou. Rather, Waltzer claimed to have "national security" information based on business contacts in the Middle East, and to be motivated only by "tax problems." App. A108–A110.

At petitioner's trial, Waltzer testified – and the government argued to the jury – that from 2004 into 2007 Waltzer was an active criminal co-conspirator and co-schemer with petitioner in securities fraud.

[6] The trial prosecutor's concession, at the sentencing of one of the class-action fraudsters, of Waltzer's role as such was not disclosed until long after trial.

Only in June 2007 (and continuing into September 2008), the government claimed, did Waltzer become a cooperator, recording conversations and collecting emails and other documents for the FBI and prosecutors' use. App. A112. Petitioner's defense was that he was himself a victim of another of Waltzer's scams, having advanced $6 million to Waltzer to resolve his IRS problems, which Waltzer neither used for that purpose nor returned.

Had the government disclosed prior to trial that Waltzer was in fact informing with the FBI from October 2006, but had lied to the agents and withheld critical information during that time, the jury could at the very least have entertained a reasonable doubt about he actually shared a criminal intent to agree with petitioner in a fraud scheme in the 2006–2007 time period (which was critical to the charges), and might have come to an entirely different conclusion about his general credibility. A reasonable jurist could (to say the least) therefore conclude that this information was "material" under *Brady*. See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (undisclosed information need not be sufficient to generate an acquittal but only enough to undermine confidence in the verdict). Contrary to the order of the court below, pretrial disclosure of information about Waltzer's pre-June-2007 informant status was therefore at least arguably "required by" *Brady*. And because the district court invoked a far more onerous and inapplicable standard, taken from a non-*Brady* context, A139 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)), *see* App. A30, A139, a reasonable jurist could necessarily disagree with its ruling.

Because Waltzer testified falsely at trial that he had "no contact" with the government between June 2006 and June 2007, *see* App. A137, the failure to disclose his earliest attempts to become an informant at least arguably constituted *Brady* material for a second reason: it would have provided additional strong ammunition for cross-examination on credibility. Petitioner's trial counsel so testified at the 2255 hearing. This, too, constitutes *Brady* material, contrary to the Third Circuit's COA decision in this case. See *United States v. Bagley*, 473 U.S. 677, 683 (1985) (undisclosed information is material if it affects "preparation or presentation of the defendant's case"). A reasonable jurist could therefore readily disagree with the district court's conclusion to the contrary. *See* App. A146–A147. The same is true of the government's failure to reveal all the information in its possession about Waltzer's history of serious mental illness and of drug abuse. App. A65 & n.41. The information withheld was much greater in quantity and seriousness than the minimal evidence disclosed. A reasonable jurist could therefore disagree with the district court on the question whether disclosure was required by *Brady*.

The final major category of *Brady* material that the district court denied and the court below discounted was information regarding the mysterious and atypical failure of Waltzer to record conversations with petitioner during a critical week, the time of the "test trade." A "test trade" is apparently a device employed by securities fraudsters to evaluate their scheme's potential for success; if executed under the government's control and monitoring, it can be used to generate evidence to incriminate the suspects. *See* App. A8 nn. 6–7. Evidence of a "test trade" was used

as a significant part of the government's case at trial, but conversations with Waltzer that petitioner claimed were exculpatory (showing him to be a dupe who was being "set up") were not recorded. Information in the form of FBI memoranda and other records as to whether Waltzer had recording equipment available to him during that period, and if not, why not, was not disclosed, if at all, until well after trial. The government claimed that Waltzer did have such equipment but merely neglected to use it, and (quite implausibly) that the unrecorded conversations, by lucky happenstance, were insignificant. The undisclosed evidence cast doubt on that assertion and thus on Waltzer's *bona fides* as an informant, while supporting petitioner's good faith defense. It also bore on the "process by which the [prosecution team] gathered evidence and assembled the case." *Kyles*, 514 U.S. at 449 n.19. A reasonable jurist could therefore find its disclosure to be "required by" *Brady*, further establishing the clear error in the decision of the court below.

b. The patent departure of the Third Circuit in petitioner's case from this Court's governing standards for issuance of a COA is further demonstrated by its summary disposition of the *Napue* claims. In *Napue v. Illinois,* 360 U.S. 264 (1959), even before *Brady*, this Court held that the due process clause is violated when a witness for the prosecution offers false testimony, the prosecutors know or should know of the falsity, and the government fails to take affirmative measures to ensure that the jury is disabused of the false information. Relief is required when there is any reasonable likelihood of an effect on the outcome of the proceedings. *Giglio v. United States*, 405 U.S. 150, 154 (1972); see also *Strickler v.*

Greene, 527 U.S. at 298–99 (Souter, J., concurring). The court below held summarily that no reasonable jurist could find any violation of that principle here. A GVR is called for on that aspect of the determination as well. See, *e.g.*, *Wearry v. Cain*, 577 U.S. 385 (2016) (per curiam).

Notwithstanding the summary denial of COA, a reasonable jurist could disagree with the district court's entire analysis of the *Napue* claim simply because of the judge's characterization of the issue as presenting the question whether the prosecutors "suborned perjury." App. A26; *see* App. A50-A56. The real issue, of course, is not whether the prosecutors committed a federal crime, but rather whether the actions of the government had the effect of depriving petitioner of liberty without due process, as defined in this Court's precedent. Nothing in the cases suggests that a district judge cannot find a constitutional violation under *Napue* and *Giglio* without accusing the prosecutors of committing a felony. A reasonable jurist could therefore disagree with the denial of petitioner's 2255 motion for this reason alone.

Even applying the correct standard, a COA was required.[7] The first significant falsehood in Waltzer's testimony at trial was his assertion that there was a "[one] year gap" from June 2006 to June 2007 during which he had no contact with the government and was not cooperating. As confirmed at the 2255 hearing, this was utterly untrue. It was instead during this year that he presented himself to the FBI as a concerned and patriotic citizen source for

[7] A list of the Waltzer falsehoods that petitioner invoked in support of his *Napue* claim appears at App. A153–A154.

counter-terrorism tips, while concealing his active engagement as the leader of a multi-million dollar fraud scheme. (This coincides with the first *Brady* point already discussed, as to when Waltzer was an alleged co-schemer with petitioner who may have had shared criminal intent, and when an informant, who could not as a matter of law conspire with petitioner.) While the FBI knew the "gap" testimony was false, and the prosecutors therefore at least should have known, no correction was made before the jury.

Waltzer also testified that he received operational instructions "solely" from the FBI, when in fact (as he and the prosecutors were forced later to admit) he also met frequently with the Assistant U.S. Attorneys assigned to the case, even as the investigation continued. *See* App. A140. Yet those very prosecutors said and did nothing to correct him. Waltzer also testified at trial that all his undercover techniques and actions were designed and supervised by the government, which at the 2255 hearing the agents had to admit was also untrue. That a reasonable jurist could disagree with the district court, and thus find fault with court below on issuance of a COA on the *Napue* question, is self-evident.

For all of these reasons, and others, it is patently incorrect to say, as did the court below, that no reasonable jurist would disagree with the district court's disposition of petitioner's *Napue* claim.

c. The application for COA before the Third Circuit also presented an important procedural question regarding petitioner's statutory right to counsel, but that, too, was summarily rejected. App. A1. Because the right-to-counsel issue "deserve[d] encouragement to proceed further," *Slack v.*

McDaniel, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893 n.4), a GVR is warranted on this point as well.

On April 17, 2017 – about two weeks after the government answered petitioner's motion under 28 U.S.C. § 2255, revealing for the first time, *inter alia*, that Waltzer had been an FBI informant in 2006 (a year earlier than previously revealed) – the district judge advised petitioner in open court that he would be allowing an evidentiary hearing on several of the claims presented in the § 2255 motion. The court also informed petitioner of his right to appointment of counsel under Rule 8(c) of the Rules Governing § 2255 Proceedings. That Rule provides, in pertinent part: "If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed …." The court refused petitioner time to allow his family to raise funds to engage counsel of choice and insisted that then and there would be petitioner's one and only opportunity to receive the benefit of the Rule. In response, petitioner at that time declined appointment of counsel.[8]

In May and June, 2017, the government provided discovery, including redacted copies of many previously withheld FBI and IRS memoranda. Based on the volume and nature of disclosures, petitioner on July 12, 2017, moved for reconsideration of the court's acceptance of his waiver of counsel. In response, the government agreed that the counsel issue should be addressed anew. But at the status conference

[8] The court did at that time appoint an Assistant Federal Public Defender to act as standby counsel, whose role was limited to giving petitioner legal advice.

conducted a few days later, on July 19, the court did not address or act on petitioner's request and set the hearing to begin in 60 days. As a result, petitioner was forced to appear *pro se* at the evidentiary hearing held over four days in September and three additional days in November and December, 2017.

On appeal from the court's rejection of his § 2255 motion, petitioner raised the denial of counsel as one of his issues in the COA application. The court rejected it in a sentence. The panel apparently viewed this matter as outside the scope of a COA, stating: "We also summarily affirm the District Court's denials of Georgiou's post-waiver requests for appointment of counsel. See United States v. Leveto, 540 F.3d 200, 207 (3d Cir. 2008)." App. A1. As the court below should have granted a COA and allowed the matter to proceed to full briefing, this order, too, should be a subject of the requested GVR.

The case relied on by the court of appeals, *Leveto*, holds that even under the Sixth Amendment a court has broad discretion whether to allow rescission of a defendant's valid waiver of the right of to be represented by counsel. The court of appeals did not articulate a conclusion that that no reasonable jurist could conclude that the district court had abused its discretion in refusing even to address the petitioner's request to rescind his waiver. As previously noted, that request came after the scope of discovery became clear, and long before the hearing was to begin.[9] This was unlike *Leveto*, where the defendant sought to

[9] Moreover, the terms of Rule 8(c) make clear that the scheduling of the hearing must yield to the need for counsel to prepare. *See* Statutes Involved, *ante*.

retract his voluntary *pro se* status, as is typical in such cases, just as trial was about to commence.

If anything, the district court's insistence, on April 17, 2017, that the court was giving petitioner only that one chance to accept or waive his right to the appointment of counsel, coupled with its silence on July 19, 2017, with respect to petitioner's unopposed request to revisit the waiver, would support a reasonable jurist in drawing the inference that the court felt that petitioner's initial waiver, once accepted, was set in stone and not subject to rescission or review.[10]

The court below appeared to misapprehend or overlook the rule that the COA standard applies to procedural question on appeal in § 2255 cases, such as the court's application here of Rule 8(c), just as it does to the merits of the ultimate issues. See *Slack v. McDaniel*, *supra*. The issue before the panel was not whether *it* perceived an abuse of discretion in the lower court's failure to reopen the issue of waiver of counsel, as its order suggests, App. A1, but rather whether any reasonable jurist might find such abuse. Upon granting certiorari and vacating the order of the court below, this issue, too, should be opened for full briefing on remand in the court of appeals.

[10] The succinct words of the district judge when denying petitioner's *post-hearing* requests for appointment of counsel, lodged in January and February 2018, to assist him with the required briefing and other matters are also most consistent with this "one-and-done" interpretation.

2. The clear errors in the court of appeals' summary COA order make this an appropriate case for an order granting certiorari, vacating the judgment, and remanding for adjudication of the merits of petitioner's appeal.

As explicated under Point 1, the undefended conclusion of the appellate panel in the court below cannot be squared with this Court's settled standards for issuance of a certificate of appealability. It is therefore an appropriate case for the exercise of this Court's discretion to grant the petition, vacate the order of the court of appeals, and remand with instructions to issue a COA and set the case for briefing and disposition on the merits.

For this reason as well, the petition should be granted with a GVR disposition.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the order of the court of appeals, with directions on remand to grant a COA and proceed to the merits.

Respectfully submitted,

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