CASE No. ____

In The Supreme Court of the United States

POPPI METAXAS,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Brandon Sample
Brandon Sample PLC
P.O. BOX 250
Rutland, Vermont 05702
Tel: 802-444-4357
Fax: 802-779-9590
Email: Brandon@brandonsample.com

Counsel for Petitioner

I. QUESTIONS PRESENTED

1. Whether the petitioner was denied effective assistance of counsel with respect to the plea process by counsel's failure to discuss with and inform the petitioner of possible defenses to petitioner's charges? If counsel had done so, there was a "reasonable probability" the petitioner would have insisted on going to trial instead of pleading guilty.

2. Did the district court and court of appeals fail to comply with the applicable standard when denying the petitioner a certificate of appealability ("COA").

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IV. PETITION FOR A WRIT OF CERTIORARI

Poppi Metaxas respectfully petitions for a writ of certiorari to review the e Second Circuit Court of Appeals judgment denying a Certificate of Appealability ("COA").

V. OPINIONS BELOW

The district court's denial of Petitioner's § 2255 Motion and the Second Circuit's decision denying a Certificate of Appealability are included in the Appendix.

VI. JURISDICTION

The order of the court of appeals denying Petitioner a COA was entered September 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

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[1] Petitioner's term of supervised release expired prior to the filing of this petition for writ of certiorari. Although this Court has jurisdiction under 28 U.S.C. § 1254(1), these 28 U.S.C. § 2255 proceedings now appear to be moot because Petitioner is no longer "in custody" for § 2255 purposes. Because Petitioner is not able to complete the appeals process tied to her § 2255 motion, a motion requesting this Court dismiss the petition for writ of certiorari as moot, along with

instructions for the lower courts to do so as well will be submitted.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. § 2255(a)

(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.

28 U.S.C. § 2253(c)

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

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

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

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

VIII. STATEMENT OF THE CASE

Petitioner Poppi Metaxas is the former president of Gateway Bank ("Gateway"), a minority-owned thrift institution with its headquarters in Oakland, California. Gateway's primary business involved "warehouse lending," i.e., providing financing to retail mortgage lenders.

The Indictment in this case arose from Gateway's difficulties following the economic downturn of 2008. In the wake of the Great Recession, the Office of Thrift Supervision ("OTS") became concerned about the volume of non-performing loans and real estate owned assets, which it described as "toxic assets," on Gateway's books. As a result of meetings with OTS, Gateway began looking for buyers of its non-performing assets.

During February and March 2009, a series of transactions, dubbed the "round trip" in the Indictment against Metaxas, took place with respect to the non-performing assets. Specifically, Gateway made a $3.64 million loan to Ideal Mortgage Bankers, Ltd. ("Ideal"), which was then Gateway's largest warehouse lending client. Ideal, in turn, lent the $3.64 million to three other corporations owned by the associates of its chief strategist Michael Ashley ("the Purchasers") via promissory notes providing 6 percent interest over a five-year term. The Purchasers then entered into an agreement with Gateway to purchase the

assets. This money formed the bulk of the Purchasers' $3 million down payment to Gateway, which represented 25 percent of the $15.3 million purchase price. Six bulk sales transactions followed which effectuated the sale of the assets.

As carefully documented in a recent report by banking expert Joseph Anastasi in connection with related civil litigation, Gateway's agreement with the Purchasers was carefully structured to avoid any possibility of loss to Gateway. In particular, Gateway *did not transfer title* to the assets at the time of closing, resulting in the Purchasers "not bear[ing] the risks or rewards associated with actually owning these assets."(Statement of Gateway CFO Tim Green). "In summary, after entering into the Troubled Asset Sale, Gateway Bank continued to service the [assets] and . . . [pay] the costs of servicing these assets." (Green, *supra*). The non-transfer of title appears to have been by mutual agreement with the Purchasers themselves refusing to take title as well as Gateway declining to transfer it. (CFO Tim Green Statement *id*.).

In addition to the down payment, the Purchasers made approximately $468,752 in payments to Gateway before defaulting. Ideal, too, defaulted on its loan to Gateway due to a series of events in late 2009 and early 2010 in which it was sued with respect to abusive lending practices (in which Ms. Metaxas was not alleged to be involved) and ultimately ceased operations and lost its

license. The total amount paid by Ideal on the loan was $164,543, and Gateway was able to collect further assets totaling $1,809.970 via seizure of funds in various Ideal accounts.

However, because Gateway Bank never actually transferred title to the assets that were ostensibly "sold," there was nothing Gateway had to do to regain title after the default. Gateway was instead able to resell all the assets as if the sale to the Purchasers had never happened, and to keep the payments previously made by the Purchasers and Ideal *as well as* the full proceeds of the new sales. This resulted in Gateway receiving a total of $6,586,649 in ultimate proceeds with respect to the assets at issue.

Mr. Anastasi noted that, at the time of the agreement with the Purchasers, Gateway had received an offer from Waterfall Asset Management, LLC ("Waterfall") to purchase the troubled assets for $5 million, which represented the assets' market value at the time. Consequently, the proceeds ultimately realized by Gateway were more than $2.0 million *greater* than if it had never made the sale to the Purchasers and had accepted the Waterfall offer instead. Had the sale to the Purchasers never taken place, Gateway would have continued to attempt to liquidate these assets *in the same manner that it actually did, resulting in no loss from the ultimate disposition* of the assets in arm's-length transactions with third parties.

On March 31, 2014 some five years after the asset sale — the Government lodged a three-count Indictment against petitioner (Doc. 1) charging conspiracy to commit bank fraud, bank fraud, and perjury. It was not alleged in the Indictment that the "round trip" transaction was facially illegal. Instead, the Government alleged that Ms. Metaxas defrauded her own board by not disclosing to them that the transaction was a "round trip" and that the loan to Ideal was related to the funds used by the Purchasers to make the $3.85 million down payment. Notably, in a recent deposition taken during related civil litigation, the then-board chairman, Laurence Wang, testified that he *did not* have the opinion that Ms. Metaxas misled the board regarding the true nature of the transactions.

The perjury charge related to testimony given by Ms. Metaxas to the OTS on or about October 21, 2009, in which she stated that "one of the things that we did not do is verify source of down-payment [sic]."

Ms. Metaxas retained Cooley, LLP ("Cooley"), which had represented her in connection with the OTS investigation, to represent her on the instant charges. A total of seven (7) attorneys from Cooley's San Francisco offices were involved in the case, with the lead counsel being Laura Grossfield Birger, Esq., of the New York office.

On April 30, 2015, Ms. Metaxas entered into a plea agreement with the Government. . Under the agreement, petitioner agreed to plead guilty to Count One of the Indictment charging conspiracy to commit bank fraud. The parties stipulated to a Sentencing Guideline loss calculation of $1,840,000, but petitioner "reserve[d] the right to argue for a downward departure under the Guidelines or lesser sentence pursuant to 18 U.S.C. § 3553 based on the claim that the loss amount substantially overstates the seriousness of the offense."

The agreement contained a waiver of the right to appeal and/or collaterally attack the conviction and sentence, but it further provided that "[n]othing in the foregoing waiver . . . shall preclude the defendant from raising a claim of ineffective assistance of counsel in an appropriate forum." On the same date, petitioner entered a plea of guilty before this Court.

Subsequently, counsel did file a sentencing memorandum (Doc. 59) which, *inter alia,* argued persuasively that Gateway had sustained no loss from the troubled asset sale. On December 2, 2015, the district court imposed a below-Guideline sentence of 18 months' imprisonment followed by three years of supervised release.

On May 16, 2016, judgment was entered against Ms. Metaxas (Doc. 81). No notice of appeal was filed from the judgment; accordingly,

Petitioner's conviction became final 14 days later on May 30, 2016.

IX. REASONS FOR GRANTING THE PETITION

A. PETITIONER IN ENTITLED TO VACATUR OF HER PLEA AND SENTENCE ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner submits that she did not enter a knowing, voluntary and intelligent plea in this case because she was misadvised by her attorneys, and that had she been properly advised, she would have declined to plead guilty and would have contested her guilt at trial. It is acknowledged that counsel and the other attorneys who worked on the case performed admirably in many aspects, especially with respect to sentencing. But it is well settled that counsel's creditable performance in certain areas does not excuse its errors in others, and that even a single error that rises to the requisite level of prejudice results in ineffective assistance even if counsel's representation was "competent in all other respects." *Henry v. Poole,* 409 F.3d 48, 61 (2d Cir. 2005); *see also Rosario v. Ercole*, 601 F.3d 1, 18, 126 (2d Cir. 2010) ("look[ing] past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial . . . would produce an absurd result inconsistent with

. . . the mandates of *Strickland* "); *Rosario v. Ercole,* 617 F.3d 683, 685, 687-88 (2d Cir. 2010).

Here, as set forth below, Ms. Metaxas' counsel did *e*rr in failing to inform her that, under Second Circuit law at the time of her plea and sentencing, she had a complete defense to bank fraud, and in failing to develop exculpatory evidence and/or inform her accurately about the strength of the evidence they *had* developed as well as the strengths and weaknesses of the Government's case.

1. Ineffective Assistance Standard.

It is beyond doubt that the Sixth Amendment entitles criminal defendants the right to effective assistance of counsel at all critical stages of the proceedings. *See Strickland v. Washington,* 466 U.S. 668, 686 (1984). Under *Strickland* and its progeny, a defendant who claims that he or she was denied the effective assistance of counsel must show two things: (1) counsel performed deficiently and (2) prejudice flowing from the deficient performance.

The critical stages at which effective assistance is constitutionally mandated include the plea process. See *Hill v. Lockhart*, 474 U.S. 52, 56-59 (1985); *see also Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) ("During plea negotiations defendants are 'entitled to the effective assistance of competent counsel"). "Where, as here, a

defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56.

The accepted professional standards for defense counsel during the pre-plea stage the 'range of competence" referred to in *Hill* — requires that "[a]s part of [his or her] advice, counsel must communicate to the defendant the terms of the plea offer, and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." *Purdy v. United States*, 208 F.3d 41, 45 (2d Cir. 2000). It is counsel's duty to make "an independent examination of the facts, circumstances, pleadings and laws involved and then ... offer his informed opinion as to what plea should be entered." *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996). In addition, counsel should inform the defendant of possible defenses that can be invoked against the charges in the indictment. *See Hill*, 474 U.S. at 59-60.

Notably, *Strickland* and its progeny have indicated that the ABA Criminal Justice Standards for the Defense Function are relevant to whether an attorney's conduct falls within acceptable professional norms. *See, e.g.*, *Padilla v Kentucky*, 559 U.S. 356, 367 (2010) (discussing

ABA standards in connection with effective assistance during plea process for non- citizen defendants).

These standards provide, *inter alia:*

Defense counsel should ensure that the client understands any proposed disposition agreement, including its direct and possible collateral consequences.

Defense counsel should not recommend to a defendant acceptance of' a disposition without appropriate investigation. Before accepting or advising a disposition, defense counsel should request that the prosecution disclose any information that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

Defense counsel may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision. *See* Defense Function Standard 4-6.2(c)-(e) (emphasis added).

Further,

defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion

with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences.
Standard 4-6.1(b).

The second prong of *Strickland*, prejudice, is satisfied where there is a "reasonable probability" that "counsel's errors . . . 'undermine[d] the confidence in the outcome'" of the proceeding. *Lindstadt v. Keane*, 239 F. 3d 191, 204 (2d Cir. 2001), quoting *Strickland*, 466 U.S at 694. In the plea context, this means that the "defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S.Ct at 1354.

However, to satisfy the prejudice standard, a defendant need not show that counsel's deficient conduct *more likely than* not altered the outcome in the case. *Henry v. Poole*. 409 F. 3d 48, 63 (2d Cir. 2005) (quoting *Strickland,* 466 U.S. at 693 (emphasis added). Moreover, "[the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be shown by a preponderance of the evidence* to have determined the outcome."' *ld*. at 64 (quoting *Strickland* 466 U.S. at 694 (emphasis added).

Notably, a reasonable probability is "a fairly low threshold." *Riggs v. Fairman*, 399 F 3d 1179 (9th Cir. 2005). In particular, the reasonable probability standard does not require that

prejudice be demonstrated by a preponderance of the evidence. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Courts have accordingly held that a reasonable probability may be less than fifty percent." *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002); *United States v. Bowie*, 198 F.3d 905, 908-09 (D.C. Cir. 1999) (same); *United States v. Vargas*, 709 F. Supp. 2d 48, 50 (D.D.C. 2010) (same); *United States v. Nelson*, 921 F. Supp. 105, 120 (E.D.N.Y. 1996) (finding that 33 percent chance amounted to a reasonable probability). Indeed, it has been held that a reasonable probability exists whenever the chances of a different outcome are "better than negligible," *United States ex. rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003), or put another way, if they are "more than mere speculation." *United States v. Berryman*, 322 Fed. Appx. 216, 222 (3d Cir. 2009).

Thus, a defendant need not show that she *certainly* would have gone to trial and/or been acquitted had her counsel not erred, but only that her counsel's performance undermines confidence in the outcome when considered as part of the entire case. Moreover, the prejudice prong of *Strickland*, as opposed to the deficient-representation prong, may be adjudicated with the benefit of hindsight. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

2. Petitioner Received Ineffective Assistance During the Plea Process.

Under the above standard, petitioner submits that her plea was the result of ineffective assistance by Cooley in several respects. The foremost of these is that Cooley did not inform her that, under Second Circuit law at the time, she had a complete defense to the bank fraud charge because the ostensible round trip" transaction was carefully structured to prevent not only loss to Gateway but even the *potential* for loss.

At the time of the plea — and at the time that any trial would have been held— the elements of bank fraud in the Second Circuit were as defined in *United States v. Rodriguez,* 140 F.3d 163 (2d Cir. 1998). In *Rodriguez*, the Second Circuit held that no proof of actual loss was required to sustain a bank fraud conviction, but that nevertheless, more than deception alone was necessary; instead, there must be "intent to victimize the institution by exposing it to actual or potential loss." *Id.* at 167 (emphasis added). Where "there was no evidence presented at trial that Rodriguez intended to victimize Chemical Bank by exposing it to an actual or potential loss," reversal was required. *United States v. Calabrese*, 660 Fed. Appx. 97, 102 (2d Cir. 2016) (describing elements of bank fraud as stated in *Rodriguez*).

Concededly, on December 12, 2016, this Court held in *Shaw v. United States*, 137 S. Ct.

462, 464 (2016), that the bank fraud statute "demands neither a showing that the bank suffered ultimate financial loss nor a showing that the defendant intended to cause such loss." The *Shaw* decision did not decide, however, whether an intent to at least expose a bank to potential loss was required, so it is debatable whether *Shaw* actually overruled *Rodriguez* and its progeny. But even if *Shaw* did overrule *Rodriguez*, the fact remains that under well-settled precedent, ineffective assistance is evaluated based on the law as it existed at the time of the representation rather than any changes to the law that might occur at a later date. *See, e.g., Duarte v. United States*, 137 Fed. Appx. 423 (2005) (evaluating ineffective assistance "[g]iven the state of the law at the time" of counsel's alleged deficiency"); *Muniz v. United States*, 360 F. Supp. 2d 574, 580 (S.D.N.Y. 2005) (weighing claim of ineffective assistance at sentencing "[u]nder the governing law at the time").

At the time of Ms. Metaxas' guilty plea trial was soon to begin, with a pretrial conference set for May 12, 2015 (see Doc. 42). The trial would have been held under *Rodriguez* and the jurors would have been instructed under *Rodriguez*, and *thus, the jury would perforce have had to acquit Ms. Metaxas if it determined that she did not intend to expose the bank to potential loss.* Indeed, it is likely that even an appeal, in the event that Ms. Metaxas were convicted, would have been litigated and decided under *Rodriguez.*

To be sure, under *Hill* an attorney's failure to advise a defendant concerning a complete defense prior to a guilty plea constitutes ineffective assistance only if such defense would have had a reasonable probability of succeeding at trial. *See Hill*, 474 U.S. at 59-60. All this means, however, is that there is a reasonable probability that a jury would have found reasonable doubt, and such a probability — and indeed far more — plainly exists here. As noted above, the "sale" of the troubled assets was highly unusual in that Gateway did not transfer title at the time of closing, and indeed kept title throughout the period between the closing and the Purchasers' default. This unusual condition of sale could have been proposed and implemented for only one reason: to protect Gateway from even the potential of loss by allowing it. In the event of default, to re-sell the assets as if the sale to the Purchasers had never occurred. Indeed, Gateway was doubly protected because, in the event of default, it could not only re-sell the assets but keep the payments that had been made by the Purchasers and Ideal prior to defaulting.

In fact, that is precisely what happened. When the Purchasers and Ideal defaulted, Gateway did not have to take any steps to regain title to the assets, because it had never transferred title in the first place and thus still owned them. It was able to put the assets on the market as if the prior sale had never happened, and between the proceeds of the re-sale and the proceeds it retained

from the Purchasers' pre-default payments, Gateway in fact realized $2.0 million *more* than it would have obtained in proceeds if it had accepted the alternative offer from Waterfall. In other words, the retention of title worked exactly as it was supposed to, and shielded Gateway from even the potential that it might have lost money on the sale.

Had a jury been presented with the facts and circumstances of the sale, there is far more than a reasonable probability that it would have found, as required under *Rodriquez*, that Ms. Metaxas did not intend to expose Gateway to either actual or potential loss. Such a finding would be even more likely given that, as the president of Gateway, Ms. Metaxas had no motive to defraud her own bank. This is not a case where a bank president diverted the bank's funds to her personal use; instead, it is undisputed that Ms. Metaxas never sought or obtained a dime over and above her own salary. Moreover, in addition to being the president, Ms. Metaxas was also a significant shareholder and, just 30 days prior to the alleged fraud, she had borrowed $500,000 against her house and made a capital contribution to Gateway with the loan proceeds. What possible reason would a bank president have to expose her own bank, in which she was a shareholder, to financial loss *without any corresponding prospect of gain to herself*. A jury asked this question, and confronted with the way the transaction was structured to protect Gateway from even the possibility of loss,

could only answer it in one way, and accordingly, it was ineffective assistance for Cooley not to advise Ms. Metaxas of this complete defense prior to her entering her plea.

Indeed, Petitioner submits that the ineffective assistance in this regard was so egregious that it requires dismissal of the bank fraud and bank-fraud conspiracy charges rather than merely a new trial. A remedy for ineffective assistance should restore the movant to the position she would have been in had the ineffective assistance never occurred.

To be sure, *Rodriguez* would have provided a defense only to Counts One and Two of the indictment and not to Count Three charging perjury. However, it was already known that she had a good defense to that charge, for the reasons stated in her motion to dismiss (Doc. 36). Her statement that Gateway didn't *verify* the source of the Purchasers' funding is not tantamount to a denial of knowledge concerning that source, and was indeed literally truthful given that Gateway did not conduct a verification process concerning the source of funding. Thus, there is a reasonable probability that Ms. Metaxas would have secured an acquittal had she gone to trial on the perjury charge. Had she known that she had a complete defense to the bank fraud charges as well, she would have gone to trial and defended herself against the entirety of the indictment. *See, Keys v. United States*, 545 F.3d

644, 648 (8th Cir. 2008) (remedy should "restore[] the defendant to the position he would havoc occupied had he been competently counseled"); *see generally Lafler*, 566 U.S. at 170-74 (discussing remedies for ineffective assistance in the plea process and observing that the remedy should "neutralize the taint of the constitutional violation").

Now because of *Shaw* Ms. Metaxas can never be put in the position she was in had she not received ineffective assistance from Cooley. Even if her plea is vacated at this time, she will not be able to assert a trial defense under *Rodriquez* as she would have been able to do in 2015. Given the overwhelming likelihood that such a defense would have succeeded, her loss of the defense due to a subsequent change in decisional law is irreparable. This Court should accordingly find, not only that Ms. Metaxas' plea should be vacated, but that Counts One and Two of the indictment should be dismissed and a trial scheduled on Count Three only.

Additionally, as a separate and independent ground of ineffective assistance of counsel, Ms. Metaxas contends that Cooley failed to properly inform her of the strengths and weaknesses of the Government's case as well as the strengths and weaknesses of her own case. In particular, counsel overstated the strength of the Government's proof, failed to discover certain exculpatory evidence that could have supported Ms. Metaxas' defense, and

underestimated the strength of the exculpatory evidence that it did develop.

At the outset of the case, the Government's claim that petitioner intended to defraud her own bank relied strongly on two sets of documents. First, it claimed that Ms. Metaxas entered into an alleged "confidential understanding" with cooperating witness Ashley (the principal of Ideal) promising favorable treatment to Ideal in exchange for services rendered in regard to the non-performing assets. Between the original draft of the March 26, 2009 Gateway board meeting at which the asset sale and the Ideal loan were approved and a subsequent final draft, claiming that these differences were proof that Ms. Metaxas had a guilty conscience and was attempting to cover her tracks.

However, the IRS conducted a forensic analysis of the "confidential understanding" which proved that it was a forgery. In particular, Ms. Metaxas' fingerprints appeared nowhere on the document while the fingerprints of Robert Savitsky, Esq., an attorney for Ashley who subsequently pled guilty before Judge Feuerstein to *inter* alia forging signatures, were all over it. Moreover, the IRS forensic examiner could not conclude that Ms. Metaxas' purported signature was in fact written by her, and concluded instead that it was likely the product of Mr. Savitsky attempting to imitate her writing style. And, just as notably, despite threats of litigation between

Ideal and Gateway during September 2009, at no time did Ideal's attorneys ever allege a breach of this "understanding" which they would have done had it in fact existed.

Likewise, the original draft of the March 26, 2009 board meeting was prepared by an inexperienced individual and contained errors. The corrected draft was circulated to the Board for approval in early April 2009 and was at the April board meeting. While the Government still contended, as late as the time of sentencing, that Ms. Metaxas had doctored the March 26 minutes to cover her tracks, what are the odds that the entire board, many of whom were attorneys, CPAs or both, and at least one of whom was an experienced auditor, would have approved the revisions so soon after the meeting and without a single murmur if this were so? Any jury would understand that, if the final draft of the minutes had in fact been doctored and if the Board had in fact been deceived about the relationship between the Ideal loan and the troubled-asset purchase money (which, though not explicitly stated in the final draft, is strongly suggested), then at least one of the directors would have made a fuss.

The existence of this exculpatory evidence was known to counsel, but nevertheless, counsel continued to minimize its significance and characterize the Government's case as overwhelming. In fact, it was anything but. Without the documents in question, the

Government's case against Ms. Metaxas would have consisted primarily of the testimony of Ashley, who was the only one who could testify to her alleged knowledge of the 'round trip" (the Board members might have testified that they were not informed of the round trip but not that Ms. Metaxas knew of it and/or had helped set it up), and Mr. Ashley was a very unreliable witness. His unreliability stemmed not merely from the fact that he was a cooperator, but from (a) the fact that he had initially told the Government that Ms. Metaxas was not aware of the round trip, and (b) the fact that his associate, Robert Savitsky, had *probably* created a document that falsely implicated Ms. Metaxas. A jury would certainly have understood that Mr. Savitsky would not have created such a document on behalf of Ideal without checking with Mr. Ashley. and therefore, would have understood that Mr. Ashley's testimony was part and parcel of a scheme to gain favorable treatment by blaming Ms. Metaxas for his own crimes.

Furthermore, there is additional exculpatory evidence that Cooley could have developed, including evidence that the Gateway Board was strongly pushing for both the Ideal loan and asset sale to be closed and the fact that the Executive Loan Committee of the Board had "extensive discussions" regarding both. A board consisting of CPAs, attorneys and auditors could hardly have failed to grasp the significance of a loan being granted in tandem with a sale that called for a

down payment of a similar amount which included, among the Purchasers, entities owned by an individual whose been developed through CFO Tim Green and directors Jessica Wang, and James E. Baxter II, as well as through former Gateway employee Eileen Doherty who could have provided evidence concerning the approval of the revised set of minutes and the Board's knowledge of the relationship between the Ideal loan and the asset sale. Moreover, former Board Chair Laurence Wong testified that he *did not* believe Ms. Metaxas misled the Board, and there is no reason to believe that he would have stated differently had Cooley held discussions with him before the plea.

Accordingly, this Court should find that, however commendable Cooley's representation was in other respects, it failed in its duty to discover and develop exculpatory evidence and to accurately inform Ms. Metaxas of the strengths and weaknesses of both the Government's case and her own. Simply put, Cooley treated this case from its inception as one that was likely to result in a guilty plea and advised petitioner accordingly. Had petitioner been properly advised, she would not have pled guilty. Hence, this Court should find that she received ineffective assistance and that her plea must be vacated.

Here, petitioner's allegations are of precisely the kind referenced in *Pham*, *Chang* and *Armienti*, i.e., facially valid claims that hinge on off-the-

record interactions with trial counsel. The case docket does not permit the Court to determine, much less "conclusively" determine, that petitioner is not entitled to relief.

B. THE DISTRICT COURT AND COURT OF APPEALS ERRED IN NOT GRANTING COA

This claim is easily resolved. As this Court has opined:

Under the controlling standard, a petitioner must sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 US 322, 336 (2003) (citations omitted, internal quotations omitted).

"Reasonable jurist" could have resolved this matter in a different matter, for example, by applying *Rodriguez* differently. In addition, considering the tension that seemingly exists between *Rodriguez* and this Court's opinion in *Shaw*, "the issues presented were adequate to deserve encouragement to proceed further." *Id*.

X. CONCLUSION

WHEREFORE, Poppi Metaxas respectfully asks this Court to grant this Petition for Writ of Certiorari, vacate the denial of a COA by the court of appeals and district court and remand this case to the Second Circuit for further proceedings.

Respectfully submitted,

/s/Brandon Sample
Brandon Sample
Brandon Sample PLC
P.O. BOX 250
Rutland, Vermont 05702
Tel: 802-444-4357
Fax: 802-779-9590
Email: Brandon@brandonsample.com

Counsel for Petitioner