21-5070

ORIGINAL

No. _____

In the Supreme Court of the United States

CALVIN BERNHARDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CALVIN BERNHARDT
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QUESTIONS PRESENTED

Whether the Eight Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion in denying the Motion to Vacate where Mr. Bernhardt made a *prima facie* showing of prosecutorial misconduct is irreconcilable with this Courts' precedent, such that this Court should remand to the United States Court of Appeals for the Eighth Circuit with instructions to issue a certificate of appealability?

Whether the Eight Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion in denying the Motion to Vacate where Mr. Bernhardt made a *prima facie* showing that he was deprived of the effective assistance of counsel in connection with his trial is irreconcilable with this Courts' precedent, such that this Court should remand to the United States Court of Appeals for the Eighth Circuit with instructions to issue a certificate of appealability?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

RELATED CASES

- *United States v. Calvin Bernhardt*, No. 1:16-cr-80, U.S. District Court for North Dakota. Second Amended Judgment entered Feb. 26, 2019.

- *United States v. Calvin Bernhardt*, No. 17-1325, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Sept. 12, 2018.

- *United States v. Calvin Bernhardt*, No. 19-1158, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Sept. 6, 2019.

- *Calvin Bernhardt v. United States*, No. 1:20-cv-113, U.S. District Court for North Dakota. Judgment entered Nov. 18, 2020.

- *Calvin Bernhardt v. United States*, No. 20-3715, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Apr. 15, 2021.

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The Judgment of the United States Court of Appeals for the Eighth Circuit denying Petitioner's motion for certificate of appealability is unpublished and may be found at USCA Case No. 20-3715; *Calvin Bernhardt v. United States of America* (Apr. 15, 2021) (*Appendix - A1*).

The Order of the United States District Court for North Dakota denying Petitioner's motion to vacate and denying him a certificate of appealability is unpublished and may be found at USDC Case No. 1:20-cv-113; *Calvin Bernhardt v. United States of America* (Nov. 18, 2020) (*Appendix - A2*).

STATEMENT OF JURISDICTION

The judgment denying Petitioner's motion for certificate of appealability was issued on April 15, 2021. This petition is timely filed pursuant to Sup. Ct. R. 13 and this Court's Order dated March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, in light of the ongoing public health concerns relating to COVID-19. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Fifth and Sixth Amendments. The Fifth Amendment provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c) provides that:

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

STATEMENT OF THE CASE

On June 30, 2020, Mr. Bernhardt, proceeding *pro se*, initiated the underlying proceeding in the district court by filing a timely collateral attack on the judgment of that court, via the provisions of 28 U.S.C. § 2255(f)(1) ("§2255"). Mr. Bernhardt's §2255 presented two claims. First, Mr. Bernhardt argued – and supported that argument with facts set forth under penalty of perjury in his declaration and a supporting exhibit which accompanied his §2255 motion, and by reference to relevant portions of the record – that he was deprived of a fair trial by the decision of the prosecution to withhold information favorable to the defense, in violation of Mr. Bernhardt's due process rights. Specifically, Mr. Bernhardt demonstrated that the prosecution withheld critical impeachment evidence against their star witness, Jean Olivar Boston – including that she had been arrested for "allegedly pimping her 15-year-old daughter to a foreigner online" but was granted use immunity to testify against Mr. Bernhardt at his trial – with the intention of manipulating the jury into believing that Boston expected no benefit from her testimony. The prosecution's suppression of impeachment evidence against Boston and their corrupt silence in the face of her false testimony led to a conviction based on false evidence and a breakdown in the trial's truth seeking function.

Mr. Bernhardt's second ground for relief was based on his deprivation of the effective assistance of counsel due to his trial counsel's failure to conduct adequate pre-trial investigation or to adequately cross-examine the

prosecution's star witness. Mr. Bernhardt argued that but for these failures there was a reasonable probability that the outcome of the trial would have been different.

On August 21, 2020, the United States opposed the motion and suggested that the district court should deny Mr. Bernhardt's motion to vacate. The United States argued that Mr. Bernhardt's claim of prosecutorial misconduct failed on the facts and was procedurally defaulted and that his claim of ineffective assistance of counsel was lacking in merit.

On November 9, 2020, Mr. Bernhardt filed his reply arguing that, because the United States failed to conclusively establish that his legal arguments were wholly foreclosed or unreasonable or the factual record before the court absolutely precluded the lower court from finding facts that would support the claim, the motion for summary judgment must be rejected.

On November 18, 2020, the district court denied Mr. Bernhardt's §2255 motion and denied a certificate of appealability ("COA"). [*App. B, A15*]. The district court found that Mr. Bernhardt's prosecutorial misconduct claim was procedurally barred and failed on its merits and that Mr. Bernhardt's claim of ineffective assistance was contrary to the record. *Id.* On December 28, 2020, Mr. Bernhardt timely filed his notice of appeal.

On April 15, 2021, the United States Court of Appeals for the Eighth Circuit denied COA. [*App. A, A1*]. This petition is timely submitted, within 150 days of the Eighth

Circuit's April 15, 2021 judgment denying COA. [*App. A*].

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of *certiorari*. At a minimum, this Court should order summary reversal because in denying a certificate of appealability, the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This is true because the district court's procedural ruling, finding that Petitioner's claim of prosecutorial misconduct was procedurally defaulted, and that court's substantive rulings that Mr. Bernhardt's claims of prosecutorial misconduct and ineffective assistance of counsel failed on their merits are irreconcilable and in direct conflict with this Court's holdings in *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), *Bousley v. United States*, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984), and their respective progeny and was thus clearly debatable amongst jurists of reason under controlling precedent. Additionally, Petitioner's claims of prosecutorial misconduct and ineffective assistance of counsel provided the required constitutional dimension for a certificate of appealability.

Specifically, Mr. Bernhardt made a substantial showing of the denial of his constitutional rights with respect to his claims of prosecutorial misconduct and ineffective assistance of counsel. In the district court, Mr.

Bernhardt submitted allegations which were not refuted by the record – to the contrary, they enjoyed support from the record and exhibits attached to Mr. Bernhardt's motion to vacate and reply to the United States' response to his motion to vacate – and which entitled him to relief based on the prosecution's suppression of impeachment evidence against its star witness and the deprivation of the effective assistance of counsel at trial.

In his first ground for relief, Mr. Bernhardt presented a facially valid claim that the prosecution failed to disclose evidence which Mr. Bernhardt could have used to impeach their star witness, Jean Olivar Boston ("JOB"), and on information and belief appears to have knowingly offered perjured testimony from JOB in its case-in-chief. Mr. Bernhardt further demonstrated that the withheld evidence was favorable in that it would have provided the defense with the opportunity to effectively impeach JOB to the jury. Finally, Mr. Bernhardt established that the withheld evidence was material under the applicable standard. This claim is of constitutional dimension as it states a denial of Mr. Bernhardt's Fifth Amendment right to due process. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104.

In his second claim, Mr. Bernhardt presented a facially valid claim of ineffective assistance of counsel based on: 1) counsel's failure to conduct minimally adequate pre-trial investigation; 2) counsel's failure to utilize available evidence to effectively cross-examine JOB; and 3) the reality that the impact the available impeachment evidence, ignored by former counsel, would

have made on the jury's assessment of the credibility of JOB is sufficiently outcome determinative to undermine confidence in the jury's verdict on counts one, two, four, and five.

Mr. Bernhardt's claim of ineffective assistance of counsel at trial is of constitutional dimension as it states a violation of the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984).

The lower courts' resolution of Mr. Bernhardt's claims are debatable amongst reasonable jurists, as shown herein. Specifically, the district court's decision(s): 1) to deny Mr. Bernhardt's ground one claim, where he made a *prima facie* showing of prosecutorial misconduct; and 2) to deny Mr. Bernhardt's ground two claim, where he made a *prima facie* showing of ineffective assistance of counsel, are debatable amongst jurists of reason and deserve encouragement to proceed further. The Eighth Circuit's cursory adoption of the district court's rationale to deny Mr. Bernhardt the COA to which he is entitled should be summarily reversed by this Court.

A. <u>The Certificate of Appealability Standard</u>.

To obtain a certificate of appealability, a *habeas* petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must '[s]how 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 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

"[A] COA does not require a showing that the appeal will succeed." *Id.* at 337. As this Court has explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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." *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

> when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Reasonable jurists could debate the merits of Petitioner's prosecutorial misconduct and ineffective assistance of counsel claims. The legal arguments, set forth below, demonstrate that Petitioner has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are "debatable among jurists of reason." *Miller-El,* 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

B. Reasonable Jurists Could Debate or, for that Matter, Agree that Relief is Appropriate on Petitioner's Prosecutorial Misconduct Claim.

The district court based its decision to deny Mr. Bernhardt's ground one claim on two findings, both of which are debatable amongst reasonable jurists. First, the lower court concluded that, "Bernhardt failed to raise any *Brady* claims on his previous appeals; therefore, Bernhardt's claim is procedurally barred." Second, the lower court found that "Bernhardt's assertions are speculative at best, and do not establish that the government suppressed evidence nor offered perjured testimony at trial. Accordingly, the Court finds Bernhardt is not entitled to relief on these claims."

With respect to the lower court's finding that Mr. Bernhardt's prosecutorial misconduct claim was procedurally barred for failure to have been raised on direct appeal, precedent and the record establish that this finding is at least debatable amongst reasonable jurists. This is true because absent the *Giglio* error, there is a

reasonable probability that Mr. Bernhardt would have been acquitted.

While it's axiomatic that movants ordinarily are precluded from asserting claims that they failed to raise on direct appeal, *See McNeal v. United States*, 249 F.3d 747, 749 (8th Cir.2001); *see also Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir.1993) (per curiam) (citing *Frady,* 456 U.S. at 167–68, 102 S.Ct. 1584, for the proposition that a movant is not able to rely on 28 U.S.C. § 2255 to correct errors that could have been raised at trial or on direct appeal); *United States v. Samuelson*, 722 F.2d 425, 427 (8th Cir.1983) (concluding that a collateral proceeding is not a substitute for a direct appeal and refusing to consider matters that could have been raised on direct appeal), "[a movant] who has procedurally defaulted a claim by failing to raise it on direct review may raise the claim in a [28 U.S.C. §]2255 proceeding [] by demonstrating cause for the default and prejudice or actual innocence." *McNeal*, 249 F.3d at 749 (citing *Bousley v. United States*, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)); *see also Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). Actual innocence under the actual innocence test "means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623–24, 118 S.Ct. 1604; *see also McNeal*, 249 F.3d at 749 ("[A movant] must show factual innocence, not simply legal insufficiency of evidence to support a conviction."). To establish actual innocence, a movant "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623,

118 S.Ct. 1604 (citation omitted) (internal quotation marks omitted).

The debatability of the district court's finding that Mr. Bernhardt's claim of prosecutorial misconduct was procedurally barred is established by the impact that the underlying *Giglio* error had, and the reasonable probability that absent that error, Mr. Bernhardt would have been acquitted by the jury.

The second rationale for the lower court's denial of Mr. Bernhardt's claim of prosecutorial misconduct, that no such misconduct occurred, is more than debatable amongst reasonable jurists, it is quite simply a clear error. To meet constitutional due process requirements, it is clear that the government is obligated to protect the integrity of proceedings that are commenced against accused persons. *See generally Giglio v. United States*, 405 U.S. 150, 153–54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (describing conduct by the government that is incompatible with the rudimentary demands of justice). Indeed, the law prohibits conduct and imposes affirmative duties: (1) the government may not knowingly present false evidence, *see United States v. West*, 612 F.3d 993, 996 (8th Cir.2010) (laying out factors that the court must consider when a due process violation is based on the prosecution's use of false evidence, which includes false testimony); (2) the government must correct false evidence that it did not solicit, *see United States v. Foster*, 874 F.2d 491, 494–95 (8th Cir.1988) (emphasizing that due process requires the prosecutor to correct false testimony) (citing *Napue v. Illinois*, 360 U.S. 264, 269, 79

S.Ct. 1173, 3 L.Ed.2d 1217 (1959)); and (3) the government must not suppress material evidence, *see United States v. Whitehill*, 532 F.3d 746, 753 (8th Cir.2008) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)) and *United States v. Heppner*, 519 F.3d 744, 750 (8th Cir.2008) (discussing the government's affirmative duty to disclose evidence that is both favorable to the accused and material to either guilt or punishment).

There is no doubt that, if the government knows that false evidence is being used to obtain a conviction or is being presented, the trial cannot in any real sense be termed fair. *See Napue*, 360 U.S. at 269, 79 S.Ct. 1173; *see also Banks v. Dretke*, 540 U.S. 668, 694, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (reiterating that the presentation of known false evidence is incompatible with the rudimentary demands of justice). With respect to the government's affirmative duty to correct false evidence when it appears, it does not matter that the false evidence pertains only to a witness's credibility. *Napue*, 360 U.S. at 269, 79 S.Ct. 1173. It is impermissible for the government to rely on false credibility testimony to obtain a conviction because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.* Consequently, it is the government's responsibility to elicit the truth when a falsehood is in any way relevant to the case. *Id.* at 269–70, 79 S.Ct. 1173 (observing that the government's affirmative duty to correct what it knows to be false applies to evidence that goes to the witness's

credibility as well as evidence that goes to the defendant's guilt). "[I]f 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury,' " relief is warranted. *Giglio*, 405 U.S. at 154, 92 S.Ct. 763 (quoting *Napue*, 360 U.S. at 271, 79 S.Ct. 1173).

In the instant case, the prosecution failed to disclose evidence which Mr. Bernhardt could have used to impeach their star witness, Jean Olivar Boston ("JOB"), and on information and belief appears to have knowingly offered perjured testimony from JOB in its case-in-chief. Mr. Bernhardt further demonstrated that the withheld evidence was favorable in that it would have provided the defense with the opportunity to effectively impeach JOB to the jury. Finally, Mr. Bernhardt established that the withheld evidence was material under the applicable standard and moreover, it appears that had Mr. Bernhardt enjoyed the benefit of the suppressed evidence at trial, no reasonable juror would have convicted him.

As the foregoing demonstrates, the district court's decision to deny Mr. Bernhardt's ground one claim is at least debatable, as the *Giglio* violation is clear and the procedural default excused by the outcome determinative nature of that violation by the prosecution.

The Eighth Circuit denied Petitioner a COA in a cursory three sentence judgment. [*App. A, A1*]. Both the district court's erroneous ruling and the Eighth Circuit's cursory denial of COA are unsupportable on the record and under this Court's holdings in *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104

(1972), *Bousley v. United States*, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), and the progeny thereof. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to this question.

C. Reasonable Jurists Could Debate or, for that Matter, Agree that Relief is Appropriate on Petitioner's Ineffective Assistance of Trial Counsel Claim.

The district court rejected Mr. Bernhardt's claim of ineffective assistance of counsel based on its finding that "Bernhardt's assertions are contrary to the record." This finding is debatable amongst jurists of reason because, contrary to the lower court's assessment, the record does not refute or even speak directly to the specific allegations of deficient performance which Mr. Bernhardt raised. Mr. Bernhardt argued that counsel was deficient for failing to conduct minimally adequate pre-trial investigation and for failing to utilize available evidence to effectively cross-examine JOB. Mr. Bernhardt alleged in his verified declaration that counsel told him "all I need is the page before and the page after any evidence the prosecutor introduces during trial," to justify his failure to engage in any pre-trial investigation whatsoever in this case.

Under controlling precedent, counsel's explicit announcement that he did not need or intend to conduct pre-trial investigation deprives his subsequent failures of any possible reasonable strategic underpinnings. "'[S]trategic choices made after a thorough investigation

of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *United States v. Orr*, 636 F.3d 944, 952 (8th Cir.2011) (quoting *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052). "On the other hand, strategic choices 'resulting from lack of diligence in preparation and investigation [are] not protected by the presumption in favor of counsel.'" *Armstrong v. Kemna*, 534 F.3d 857, 864–65 (8th Cir. 2008) (quoting *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir.1991), and also citing *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), as stating, "Strickland does not establish that a cursory investigation automatically justifies a tactical decision.... Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."); *Kenley*, 937 F.2d at 1304 ("The Supreme Court requires that counsel make a reasonable investigation in the preparation of a case or make a reasonable decision not to conduct a particular investigation." (citing *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052)). "In other words, the strength of the general presumption that counsel engaged in sound trial strategy 'turns on the adequacy of counsel's investigation.'" *Francis v. Miller*, 557 F.3d 894, 901 (8th Cir.2009) (quoting *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005), in turn relying on *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052).

Mr. Bernhardt further demonstrated that counsel was deficient for failing to utilize the available evidence –

including information provided by Mr. Bernhardt indicating that JOB had been arrested and charged with attempted sex trafficking of a minor, in her home country in connection with Mr. Bernhardt's case and information indicating the JOB was the beneficiary of use immunity in connection with her testimony against Mr. Bernhardt – to effectively cross-examine JOB and undermine her credibility to the jury. It should be noted that contrary to the lower court's order, which mistakenly states that Mr. "Bernhardt has failed to point to evidence his counsel should have found," Mr. Bernhardt's declaration described the evidence, how he obtained it, and a true and correct copy of that evidence was attached to Mr. Bernhardt's declaration, submitted to the district court.

Courts have recognized that where "[t]rial counsel had in his hands material for a devastating cross-examination" and failed to utilize such evidence, counsel performed deficiently within the meaning of *Strickland*'s first prong. *Steinkuehler v. Meschner*, 176 F.3d 441, 445 (8th Cir. 1999). Similarly, in *Driscoll v. Delo*, a panel of the Eighth Circuit Court of Appeals "conclude[d] that there [wa]s no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a state's eyewitness whose testimony" was critical to the prosecution, where strong impeachment evidence was available. 71 F.3d 701, 710 (8th Cir. 1995).

Contrary to the district court's finding, where counsel, by his own admission, failed to conduct any pre-trial investigation, his failure to utilize the available evidence

to undermine the testimony of JOB cannot be considered a reasonable strategic decision. In *White v. Roper*, a panel of the Eighth Circuit Court of Appeals found that "the record establishes that counsel's investigation was too superficial [and] the presumption of sound trial strategy founders in this case on the rocks of ignorance." 416 F.3d 728, 732 (8th Cir. 2005). Mr. Bernhardt's counsel was every bit as unprepared and deficient for failing to utilize the available evidence to cross-examine JOB. As in *White,* the record will not support a finding that counsel made an informed strategic decision, rather, counsel was constitutionally deficient.

The district court's decision to deny Mr. Bernhardt's ground two claim is at least debatable amongst reasonable jurists. *See, e.g., Steinkuehler v. Meschner*, 176 F.3d 441, 445 (8th Cir. 1999). This is particularly true because Mr. Bernhardt's declaration was the only evidence offered which could speak to the out-of-court communications between Mr. Bernhardt and his former counsel, as the United States elected to forego input from Mr. Bernhardt's former counsel.

The Eighth Circuit denied Petitioner a COA in a cursory three sentence judgment. [*App. A, A1*]. Both the district court's erroneous ruling and the Eighth Circuit's cursory denial of COA are unsupportable on the record and under this Court's holding in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984) and the progeny thereof. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to

this question.

D. <u>This Court Should Summarily Reverse the Eighth Circuit's Order Denying COA</u>.

This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. Summary reversals are "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was "contrary to" established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was "plainly wrong"). The Eighth Circuit's order denying Petitioner's motion for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Eighth Circuit, vacate the Eighth Circuit's order denying COA and remand the matter to the Eighth Circuit with instructions to grant COA.

Respectfully submitted,

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JUNE 17th, 2021