No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

DANIEL NEPOMUCENO,

Petitioner,

v.

ERIN REYES,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Shortly before trial, Daniel Nepomucino entered guilty pleas with an agreed disposition characterized on the record as life with a 300-month minimum and lifetime post-prison supervision. In state post-conviction proceedings, Mr. Nepomucino asserted that his plea was not voluntary, knowing, and intelligent, and that he received ineffective assistance of counsel, testifying at a hearing that his attorney did not explain that he would remain in custody after 25 years if the parole board chose not to release him. He stated that, if he had understood the meaning of his agreed sentence correctly, he would not have pleaded guilty. Based on a written declaration of defense counsel, without the opportunity for the judge to observe the witness and for the petitioner to cross-examine him, the state court found that the petitioner was not credible and that the prior attorney was credible. The question presented is:

> Could reasonable jurists debate whether a state court's dispositive credibility determination regarding federal constitutional rights, based on a written statement being credited over the petitioner's live testimony regarding controverted facts, with no good cause for relying on an out-of-court writing, constituted an unreasonable application of this Court's authority under 28 U.S.C. § 2254(d)(1) and an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

PARTIES TO THE PROCEEDINGS

The petitioner, Daniel Nepomuceno, is an Oregon state prisoner serving the life sentence imposed in the underlying case. Erin Reyes is the Superintendent of the Two Rivers Correctional Institution and is substituted as successor custodian in her official capacity.

RELATED PROCEEDINGS

There are no related proceedings.

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The petitioner, Daniel Nepomucino, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 16, 2022, denying the certificate of appealability necessary to challenge the decision of the district court denying federal habeas corpus relief under 28 U.S.C. § 2254.

Opinions Below

The magistrate judge entered amended findings and recommendation on November 1, 2021 (Appendix 5). After the petitioner filed objections, the district court entered an

opinion adopting the findings and recommendation, denying the petition for habeas corpus relief, and declining to issue a certificate of appealability on January 18, 2022 (Appendix 2). After the petitioner filed a timely notice of appeal, the Ninth Circuit denied the request for a certificate of appealability on September 16, 2022 (Appendix 1).

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Statutory And Constitutional Provisions

The full text of 28 U.S.C. §§ 2253 and 2254 are set out in the appendix. The relevant parts of the statute on the certificate of appealability state:

> (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).

28 U.S.C. § 2253(c). The habeas corpus statute states in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Sixth Amendment guarantee of effective assistance of counsel states:

> 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.

U.S. Const. amend. VI. The Fifth and Fourteenth Amendments assure that persons shall not be deprived of liberty "without due process of law." U.S. Const. V and XIV.

Statement Of The Case

A. Trial and Direct Appeal

In October 2012, the state indicted Mr. Nepomuceno for murder with a firearm, felon in possession of a firearm, and two counts of unlawful use of a weapon with a firearm in connection with the death of Michael McGovern on September 18, 2012. Respondent's Exhibits to Answer, *Nepomuceno v. Cain*, Case No. 2:19-cv-00920-AC, ECF 17-1 at 25 (D. Or. filed Nov. 12, 2019) (hereinafter ECF and docket number). All counts were charged as part of the same act and transaction. The state accused Mr. Nepomuceno of firing two or more shots at Michael McGovern, a member of a rival gang, who later died at Salem

Hospital from a gunshot wound. ECF 17-1 at 200-01. Jeffrey Jones represented Mr. Nepomuceno, first retained by his family, then appointed by the court. *Id*. at 223, 230.

On October 4, 2013, Mr. Nepomuceno pleaded guilty as charged to murder with a firearm and being a felon in possession of a firearm, with the prosecutor agreeing to dismiss the two counts of unlawful use of a firearm. ECF 17-1 at 28-29, 45. The plea petition described the mandatory sanction for murder as "Life with a 300 month minimum," and the prosecutor's recommendation as "stipulate to Life sentence with 25 year minimum," with concurrent time on the felon-in-possession charge. *Id*. at 28-29. During the guilty plea colloquy, the trial judge reviewed the trial rights that Mr. Nepomuceno waived and accepted his plea, but did not address the potential punishment beyond asking if he read and understood the written plea petition. ECF 17-1 at 48-51.

After the judge accepted the guilty plea, the prosecutor recommended a life sentence with a mandatory minimum of 25 years with lifetime post-prison supervision:

> Your Honor, on Count 1 the Defendant is a 11-E which is a grid block sentence of 149 to 163. However the charge being murder there is life sentence with 300 month minimum pursuant to Ballot Measure 11. We're asking the Court to impose the life sentence with the mandatory minimum 300 sentence. A period of post prison supervision will be for the rest of his life.

ECF. 17-1 at 51. Defense counsel began his recommendation, stating, "[t]here is obviously mandatory minimums here." *Id*. at 54. After Mr. Nepomuceno allocuted, the court imposed a "lifetime sentence with a minimum of 300 months," again without any reference to or explanation of the parole board process:

> The attempt, or the MURDER WITH A FIREARM you are an 11-E under Ballot Measure 11 it is a life time with a mandatory minimum of 300 months. I will impose the lifetime sentence with a minimum of 300 months. There is lifetime post prison supervision, the 60 month. Gun minimum applies and no 936 programming.

ECF 17-1 at 56. Thereafter, Mr. Nepomuceno pursued a direct appeal on claims that are not at issue in this federal habeas corpus case.

B. State Post-Conviction Proceedings

Mr. Nepomuceno timely petitioned for post-conviction relief in state court, raising two interrelated claims: first, that his guilty pleas were not knowing, voluntary, or intelligent; and second, that Mr. Jones did not provide Mr. Nepomuceno with effective assistance of counsel. ECF 17-1 at 158. Mr. Nepomuceno asserted that, as a result of trial counsel's advice, he believed that, among other things, "his plea agreement ensured that he would be released from prison after serving 25 years." *Id.* at 163. Because his attorney provided incorrect advice that led him to plead guilty when he otherwise would not have done so, his guilty plea resulted from violations of his rights to due process and effective assistance of counsel. *Id*. at 163-65.

Mr. Nepomuceno submitted a declaration in support of his petition. ECF 17-1 at 230. In the declaration, he stated, in part, that up until October 3, 2013, he intended to proceed to trial. *Id.* On October 3, 2013, however, he had a meeting with Mr. Jones during which Mr. Jones advised him that he had "no defense to [the] charges and needed to plead guilty. [Mr. Jones] told me that I could not go to trial on a theory that I had fired shots towards Mr. McGovern but did not intend to kill him because . . . we did not have time to

prepare that theory [before the December 16th trial date]." *Id.* at 231. Mr. Nepomuceno also stated that he did not receive correct advice regarding the consequences of a guilty plea:

> He never explained to me how I would end up with a sentence of that amount and never told me that by pleading guilty, I could literally spend the rest of my life in prison. Mr. Jones never told me that after serving 25 years I would have to prove I was capable of rehabilitation and the parole board would have to unanimously agree I had met my burden or I would not be released and it could be up to ten years before I had another opportunity to try and convince the board that they should release me on parole.

ECF 17-1 at 231. Mr. Nepomuceno stated that, if he had known that he could potentially be serving the rest of his life in prison by accepting the state's plea offer, he would not have agreed to plead guilty. *Id.* at 232.

In response to the allegations of ineffectiveness, the state submitted an affidavit from Jeffrey Jones. ECF 17-1 at 256. Mr. Jones stated that he did not advise Mr. Nepomuceno that there was insufficient time to prepare the lack of intent defense, as "[i]t is not a complicated defense." *Id.* at 257. Mr. Jones further stated that he advised Mr. Nepomuceno that, if he were found guilty after trial, he could receive a five-year sentence for one of the unlawful use of a weapon counts to run consecutively to the murder sentence. *Id.* at 258. He stated that he did not remember whether there had been a settlement conference in the case. *Id*.

With regard to the plea agreement, Mr. Jones contradicted Mr. Nepomucino's declaration regarding the potential punishment, but provided no documentary support for his claims:

> 10. I explained to petitioner that he would receive a sentence of imprisonment for life for the murder conviction. I told him it may be that he could get out after 25 years, but that was up to the parole board to decide if he should be released. I told him that he should consider it to be a life sentence, because he could not predict what would happen with him in prison, and that he could not predict what the parole board may do with his sentence.
>
> 11. I told petitioner that the 25-year minimum sentence did not mean that he would simply be released after 25 years, but that it was up to the parole board. I did not try to explain to him why the parole board would decide to let him out, or not let him out, 25 years from his date of sentencing. I did not, and do not, feel I can predict what the parole board could do in 25 years, or on what grounds they would make their decision.

ECF 17-1 at 258-59.

At the state post-conviction hearing, Mr. Nepomuceno testified consistently with the statements in his declaration. ECF 17-1 at 306. He stated he made a "last minute plea agreement," despite definitely wanting to go to trial. *Id*. at 308. After having discussed trial defenses previously, Mr. Jones met with him on October 3, 2013, and told him that he would not be able to present a manslaughter defense at trial because Mr. Jones did not have sufficient time to prepare that defense. *Id*. at 310-11. Mr. Nepomuceno testified that Mr. Jones told him that, if he proceeded to trial, he "would be convicted and would end up getting a life sentence with a minimum of 35 years in prison." *Id.* at 312.

Mr. Nepomuceno testified directly regarding the advice regarding the life sentence and 25-year minimum as meaning he would serve 25 years in prison and no more:

> Q. Did he tell you that by pleading guilty to murder, that you were actually looking at the possibility of spending the remainder of your natural life in prison?

A. No, never.

Q. What did he tell you?

A. He told me I would serve 25 years.

Q. On the murder?

A. Yes.

Q. Were you aware from any other source that if you were convicted of murder, that the sentence was life in prison with a 25-year minimum, but theoretically you could be in prison for the remainder of your life?

A. No.

ECF 17-1 at 312. Mr. Nepomuceno explained to the post-conviction court that, if he had known that the agreed-upon sentence was life in prison with a minimum twenty-five years but could be prison until his death, he would not have pleaded guilty and would have continued on to trial:

Q. If Mr. Jones had explained that to you or if you were aware of that, would you still have pled guilty?

A. Absolutely not.

Q. And why not?

A. Because that was the same sentence as my deal.

ECF 17-1 at 312-13. The state declined to cross-examine Mr. Nepomuceno regarding the conflict between his testimony and his former attorney's affidavit, askingly only two questions unrelated to the potential sentence. *Id*. at 315-16. Nor did the state present testimony from Mr. Jones at the hearing.

Mr. Nepomuceno's post-conviction attorney stated at the hearing that accepting the plea offer "would only make sense to the extent that there was consecutive sentencing exposure," which counsel asserted was not a risk. ECF 17-1 at 327. Counsel argued that "the worst Mr. Nepomuceno could have received lawfully, if he were convicted after a trial, is the same sentence that he received as a result of these pleas." *Id.* at 319. The state argued that Mr. Nepomuceno did not establish a consistent theory of the defense with trial counsel and that he received dismissal of counts as a benefit from the deal. *Id* at 324-25. On credibility regarding the meaning of the sentence, the state reframed the question, asserting that Mr. Nepomuceno was asking trial counsel to be able to predict what the parole board would do in 25 years, "[s]o petitioner knew full well that he could potentially be facing an actual life sentence, because that's what he was sentenced to." *Id*. at 326.

The post-conviction court denied relief, finding: "The petitioner's testimony at this hearing was not credible. Trial counsel's testimony by affidavit, on the other hand, is credible." ECF 17-1 at 333. The court found that Mr. Nepomuceno had made inconsistent statements to his attorney regarding defenses and that his plea petition "acknowledged that the court would sentence him to a life term with the possibility of parole after 25 years on the Murder charge." *Id*. at 334. The plea petition in fact did not reference parole, only using the term "minimum." *Id.* at 28-29. The court concluded that Mr. Nepomuceno did not prove by a preponderance of the evidence that his guilty pleas were not knowing, voluntary, or intelligent, or that his trial counsel was ineffective. *Id.* at 334-35.

Mr. Nepomuceno appealed the post-conviction court's decision. ECF 17-1 at 337. He combined the argument that his trial counsel was ineffective and that his guilty pleas were not knowing, intelligent, and voluntary, citing the Fifth, Sixth, and Fourteenth Amendments. ECF 17-1 at 343-44, 350-52. He asserted that the evidence at the hearing did not support the adverse findings:

> Neither the plea petition nor the transcript of the sentencing hearing indicate that petitioner was informed of the likely actual minimum sentence he would serve, given the parole board process. The state submitted a declaration from trial counsel, who stated, "I told petitioner that the 25-year minimum sentence did not mean that he would simply be released after 25 years, but that it was up to the parole board." That, too, fails to sufficiently explain that the minimum incarceration term was likely between 27 and 35 years and fails to explain that it would be petitioner's burden to prove that he was eligible for release. Therefore, the post-conviction court erred in concluding that the record supported a finding of a knowing and voluntary waiver. Because the court's dispositive fact finding is erroneous and not supported by the record, this court should reverse and remand for the court to reconsider its conclusion.

ECF 17-1 at 357 (citations omitted). "The record does not disclose—and therefore does not support a finding of—a knowing, intelligent, or voluntary waiver of petitioner's rights." *Id*. Mr. Nepomuceno stated that he had presented sufficient evidence to the post-conviction court that he would have rejected the plea offer and proceeded to trial had trial counsel accurately advised him regarding the terms of his plea offer. *Id.* at 358.

The state moved for summary affirmance of the post-conviction court's judgment. ECF 17-1 at 389. The Court of Appeals granted the motion based on the post-conviction court's dispositive findings on the lack of evidence regarding ineffectiveness of counsel. *Id*. at 420. Mr. Nepomuceno petitioned the Oregon Supreme Court for review, relying on

the arguments in his Court of Appeals brief. *Id*. at 401. The Oregon Supreme Court denied review. *Id*. at 418.

C. Federal Habeas Corpus Petition

On June 12, 2019, Mr. Nepomuceno filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. ECF 2. After appointment of counsel, the issues were narrowed to focus on the failure to accurately advise Mr. Nepomuceno regarding the sentence that he would receive upon entry of guilty pleas. ECF 21. After further briefing from the parties, the magistrate judge filed an amended findings and recommendation, recognizing the preference for live testimony but finding the cold record regarding controverted matters sufficed:

> To be sure, live testimony is generally preferable to a written record. *See, e.g. United States v. Yida*, 498 F.3d 945, 950 (9th Cir. 2007). That does not mean, however, that a credibility determination may never be based on written testimony or that such a finding is necessarily unreasonable. *See, e.g.*, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"); *see also Exum v. Hoefel*, 495 Fed. Appx. 852 (9th Cir. 2012) (where petitioner's deposition testimony directly contradicted her counsel's affidavit and original plea petition state court was not objectively unreasonable in making a credibility determination without hearing live testimony).

ECF 31 at 11. The magistrate judge found no violation of the habeas corpus statute based on the plea petition, defense counsel's declaration, and the post-conviction judge's opportunity to observe the petitioner's testimony. *Id*.

The petitioner filed objections to the findings and recommendation, asserting that the magistrate judge erroneously discounted the importance of live testimony and

inadequately addressed the objection under 28 U.S.C. § 2254(d)(2). ECF 28 at 2. On January 18, 2022, the district court adopted the findings and recommendations, dismissed the habeas corpus petition, and declined to issue a certificate of appealability. ECF 35 at 3.

On January 19, 2022, the petitioner filed his notice of appeal, triggering review of the denial of a certificate of appealability. ECF 37. On September 16, 2022, the Ninth Circuit entered an order denying the request for a certificate of appealability because the petitioner "has not shown 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." ECF 39.

I. The Court Should Grant Certiorari On An Important Question Regarding The Adequacy Of The State Hearing Regarding Federal Constitutional Rights Where Credible Live Testimony Was Disregarded In Favor Of A Witness Who Only Provided A Written Declaration.

This Court has set a standard for issuance of certificates of appealability that balances the need for finality against the appropriateness of review where reasonable jurists could differ over non-frivolous constitutional claims. In the present case, the courts below declined to issue a certificate of appealability regarding the reliability of factual determinations in a credibility dispute where, in determining alleged violations of the Due Process Clause and the Sixth Amendment right to counsel, the state court relied on a written declaration of the state's witness as credible, while finding not credible the petitioner's live testimony, which was consistent with his written declaration and not impeached by cross-examination, inconsistencies, or any indicia of incredibility from the transcript.

The state court credibility determination is inconsistent with this Court's repeated emphasis on the importance of both seeing the demeanor of witnesses during testimony and testing credibility through cross-examination. By rubber-stamping out-of-court statements of the state's witness that were never subjected to cross-examination, the state courts failed to provide the review necessary to protect the basic interests that this Court has protected under the Due Process Clause in *Boykin v. Alabama*, 395 U.S. 238, 244 (1969), and its progeny, and under the Sixth Amendment in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. The Court should grant certiorari, vacate the decision below denying issuance of the certificate of appealability, and remand for the Ninth Circuit to address the merits of the appeal in the first instance.

A. The Habeas Petition Raised Fundamental Questions Regarding The Constitutionality Of The Proceedings Below.

For a plea of guilty to murder and a life sentence, the record is extraordinarily bare of the basics for a knowing, intelligent, and voluntary plea. This Court has long recognized that guilty pleas involve waivers of the protection against self-incrimination, the right to jury trial, and the right to cross-examine witnesses, requiring that trial courts assure, on the record, "a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 244 (1969). The Sixth Amendment requires that defense counsel provide clear and accurate advice regarding the consequences of a guilty plea. *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012); *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). Here, the record at the time of the guilty plea is bereft of

anything more than the telegraphic message that lawyers may understand better than laypersons: life with a minimum 25 years and lifetime post-prison supervision. Neither the plea petition nor the plea colloquy even mentions parole. ECF 17-1 at 28-29, 48-51.

Mr. Nepomuceno provided a written sworn declaration and testified under oath, explaining the last-minute plea, his understanding that he would be released to post-prison supervision after 25 years, and the lack of incentive to plead if he could be held to his death. No cross-examination impeached a word he said about the lack of advice regarding the meaning of his agreed sentence. Nothing from the post-conviction transcript of Mr. Nepomuceno's testimony indicates hesitation, uncertainty, or inconsistency that could provide a basis for an adverse credibility determination.

In contrast, the trial lawyer's written statements left wide gaps for questioning credibility:

- No written or other contemporaneous evidence supported his claims.
- His memory of events did not even include whether or not there had been a settlement conference.
- He would have potential civil liability and other negative professional consequences if he had provided defective representation.

Most importantly, the trial lawyer was never subjected to the basics of what should be required where serious matters are controverted and must be resolved through a credibility determination:

- The substance of the written declaration was never subjected to cross-examination, the greatest legal engine ever invented for the discovery of truth (*California v. Green*, 399 U.S. 149, 158 (1970)).

- The fact-finder never had the opportunity to observe the trial lawyer's demeanor in making his statement, losing the fairness protected by requirements of face-to-face confrontation (*id*.; *Coy v. Iowa*, 487 U.S. 1012, 1017-18 (1988)).

Although this Court emphasizes cross-examination and observation of demeanor in the trial context, the importance of live testimony applies to hearings during which federal constitutional rights, including trial rights, will be lost forever.

Further, the Court in *Coy* expressed the importance "both to appearances and to reality" in requiring confrontation. 487 U.S. at 1017. Here, the appearance from the state post-conviction proceeding, which decided fundamental federal constitutional rights, is that the petitioner always loses. His former lawyer wrote a simple denial of ineffectiveness that effectively ended any ability to vindicate federal constitutional rights. The post-conviction court's statement reduces protection of federal constitutional rights to a Potemkin village, with the superficial adherence to the rule of law but lacking substantive consideration of the petitioner's unimpeached testimony:

> The petitioner's testimony at this hearing was not credible. Trial counsel's testimony by affidavit, on the other hand, is credible.

ECF 17-1 at 333. "Particularly where credibility and veracity are at issue, . . .written submissions are a wholly unsatisfactory basis for decision." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

This Court has expected greater protection for fact-finding in probation violation and prison disciplinary proceedings than the state court provided for a determination regarding federal constitutional rights, even without the added factor of live and

unimpeached testimony contradicting the written statement. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (listing among due process rights "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). In supervised release violation hearings, where the underlying facts have been controverted, federal courts routinely reject mere reliance on written hearsay reports as a violation of procedural due process, after balancing the reliability of the hearsay and the reason for no live witness. *See, e.g.*, *United States v. Lloyd*, 566 F.3d 341, 344 (3d Cir. 2009); *United States v. Taveras*, 380 F.3d 532, 537 (1st Cir. 2004); *United States v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir.1994).

Even in adverse actions for public entitlements, the Court recognizes that credibility disputes must generally include confrontation of adverse witnesses. *Goldberg*, 397 U.S. at 267-68 (1970) (due process required "an effective opportunity to defend by confronting any adverse witnesses"); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55 (1986) (summary judgment is not appropriate where evidence has been presented sufficient for a contrary finding). As important as such civil rights are, the stakes for a sentence to life imprisonment are much higher.

Resolution of a post-conviction claim of federal constitutional violations requires more than a witness's written declaration to resolve factual disputes against the petitioner's live and unimpeached testimony. Even where only writings are at issue, the credibility question determined on paper is generally inadequate. *See Buffalo v. Sunn*, 854 F.2d 1158,

1165 (9th Cir. 1988) (finding that court should not pass upon the credibility of opposing affidavits); *United States v. 1998 BMW "I" Convertible*, 235 F.3d 397,400 (8th Cir. 2000) (court could not resolve factual disputes and make credibility determinations "simply by relying on a warring paper record consisting of conflicting affidavit and deposition transcripts"); *Castillo v. United States*, 34 F.3d 443, 445 (7th Cir.1994) ("[A] determination of credibility cannot be made on the basis of an affidavit."); *United States v. Witherspoon*, 231 F.3d 923,927 (4th Cir. 2000) (holding that the prisoner was entitled to an evidentiary hearing on his claim that his attorney was ineffective where there was conflicting evidence as to whether the attorney failed to consult with him regarding the decision to appeal).

To be clear, this case does not involve competing written claims, which can be resolved by a finder of fact and receive deference, as in *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). This case involves a narrower rule: where, in live testimony, the petitioner asserts non-frivolous violations of federal constitutional rights, the state court's determination of credibility, to be reasonable, must consider more than an out-of-court writing to contradict the petitioner's claims, absent a showing of good cause. The determination regarding credibility should include an opportunity for the fact-finder to observe the witness's demeanor and responses as tested by cross-examination. The written affidavit provides no such testing by presence and confrontation in front of the fact-finder.

B. Protection Of Federal Constitutional Rights During State Post-Conviction Proceedings Involves Important Questions Warranting This Court's Attention.

Where the petitioner asserted claims establishing Due Process Clause and Sixth Amendment violations, the courts below should have granted relief from the state procedure that resolved the credibility dispute based on a written, out-of-court statement that was deemed to govern over sworn, live testimony. The lower courts upheld credibility findings based on an affidavit, with no live adverse testimony and no opportunity to cross-examine. Where a habeas corpus petitioner testifies live and makes non-frivolous claims that his constitutional rights were violated, written denials are not enough to protect the important constitutional interests protected by the federal habeas corpus statute. The need for more than perfunctory state protections for federal constitutional rights is especially acute given this Court's jurisprudence strictly relying on the state factual record.

The petitioner fully acknowledges that, in safeguarding federal constitutional rights, the state court proceedings are the "main event, so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing." *Shoop v. Twyford*, 142 S. Ct. 2037, 2043-44 (2022) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). "The federal habeas scheme leaves primary responsibility with the state courts[.]" *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)). But here, while the state had "the first opportunity to review this claim and provide any necessary relief[,]" *Williams v. Taylor*, 529 U.S. 420, 437 (2000), the state proceedings were profoundly defective. Not only did the state court judge blatantly favor a written

declaration over unimpeached testimony, the post-conviction judge – as well as the federal judge – described the plea petition as having referenced parole, when in reality the document itself shows that premise to be false.

Just as this Court recognizes the primacy of state courts in protecting federal constitutional rights, the Court should also recognize the reciprocal duty to assure that the state court processes are effective to protect habeas petitioners' rights. 28 U.S.C. § 2254(b)(1)(B)(ii). In the present case, the petitioner asserts that, by crediting a writing over unimpeached live testimony, the state court rulings "involved an unreasonable application of" law and were "based on an unreasonable determination of the facts" in light of the record before the state court, in violation of 28 U.S.C. §§ 2254(d)(1) and (2). *See Harrington v. Richter*, 562 U.S. 86, 100 (2011). The state post-conviction judge's preference for the written declaration over live testimony contravenes this Court's jurisprudence in both civil and criminal contexts for controverted facts to be resolved with an opportunity both for witnesses' demeanor to be observed and for their testimony to be subjected to cross-examination.

The requirements of § 2254(d) "pose no bar to granting petitioner habeas relief" where the legal standard for the determination on the validity of the plea and the effectiveness of counsel were based on an objectively unreasonable application of this Court's precedent and the factual determinations were unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003). This Court should grant the writ because the petitioner's claims are meritorious, and because the lower courts' decisions are inconsistent with the reasoning

underlying this Court's precedent. The defective state court procedure failed to protect the fundamental federal interest in assuring that plea negotiations and guilty pleas can only be adequately conducted by defense attorneys who provide clear and accurate advice to their clients during this critical stage of criminal proceedings. *Lee*, 137 S. Ct. at 1964 (citing *Lafler*, 566 U.S. at 165); *Hill*, 474 U.S. at 58-59. "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). The value of the bargain and the consequences of the guilty plea are essential to effective representation by defense counsel and a valid guilty plea.

C. The Ninth Circuit's Failure To Issue A Certificate Of Appealability Regarding The Adequacy Of The State Post-Conviction Proceedings Regarding Credibility Is Inconsistent With This Court's Precedent On Issuance Of Certificates Of Appealability.

"At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). "[A] COA should issue when 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[.]" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Ninth Circuit's denial of a certificate of appealability in the present case runs contrary to this Court's holding in *Miller-El*, where the Court addressed the denial of a certificate of appealability in a case involving the standards for assuring racial fairness in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court fully recognized the deference owed to the state court findings: "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Id*. at 340. Even so, the Court found "no difficulty concluding that a COA should have issued," even with credibility determinations regarding the prosecutor's motive. *Id*. at 341.

The Court placed strong reliance not only on the need for effective state court processes but on the difference between the standard for relief and for issuance of the certificate of appealability:

> [T]he District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence.
>
> This was too demanding a standard on more than one level. It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not

> require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief rather than to the granting of a COA.

Id. at 341-42. However, at the certificate of appealability stage, "a court need not make a definitive inquiry into" whether the standards for §§ 2254(d)(2) and (e)(1) have been met. *Id*. at 142. "[A] COA determination is a separate proceeding, one distinct from the underlying merits." *Id*. (citing *Slack*, 529 U.S. at 481).

In this case, the petitioner has raised meritorious claims regarding the adequacy of the state court proceedings in protecting his federal constitutional rights. At the very least, he has raised questions that reasonable jurists could debate, which requires issuance of a certificate of appealability under 28 U.S.C. § 2253(a). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Indeed, a prisoner need not "show[] that the appeal will succeed[,]" only "something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El*, 537 U.S. at 337-38 (citation and internal quotation marks omitted). "[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." *Miller-El*, 537 U.S. at 338.

The Ninth Circuit denied a certificate of appealability based on its ruling that no jurist of reason would find debatable either the substantive claim of a constitutional

violation or "whether the district court was correct in its procedural ruling." Appendix 1. The court should have issued a certificate of appealability because this case involves a substantial claim of ineffective assistance of counsel based on the petitioner's unimpeached testimony that resulted in an involuntary, unknowing, and unintelligent guilty plea. "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and 'a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief.'" *Welch v. United States*, 578 U.S. 120, 127 (2016) (quoting *Miller-El*, 537 U.S. at 337). Under this Court's controlling precedent, the Ninth Circuit should have issued a certificate of appealability.

D. The Rulings Below Are Not Only Debatable, They Are Wrong.

To establish *Strickland* prejudice in the guilty plea context, "a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163. Without impeachment, Mr. Nepomuceno testified and swore in his declaration that, if he had correctly understood the consequences of his plea, he would have gone to trial, which establishes prejudice under the Sixth Amendment. *Lee*, 137 S. Ct. at 1964-65 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 482-83 (2000)). When counsel error affected defendants' understanding of the consequences of pleading guilty, as in Mr. Nepomuceno's case, federal courts grant relief. *See*, *e.g.*, *United States v. Bui*, 795 F.3d 363, 367-68 (3d Cir. 2015) (granting a writ where trial counsel provided the petitioner with incorrect advice regarding the availability of a sentencing reduction); *Pidgeon v. Smith*, 785 F.3d 1165, 1174 (7th Cir. 2015) (affirming a district court's grant of a writ where

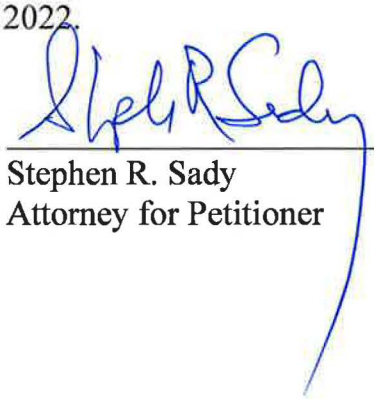
counsel provided the petitioner with incorrect information regarding his exposure at trial); *Tovar Mendoza v. Hatch*, 620 F.3d 1261, 1272 (10th Cir. 2010) (reversing a district court's denial of a writ where the petitioner's no contest plea was the result of counsel's "blatant and significant misrepresentations about the amount of time [petitioner] would spend in prison" upon his change of plea); *Iaea v. Sunn*, 800 F.2d 861, 864-65 (9th Cir. 1986) (counsel was constitutionally ineffective when she provided the petitioner with erroneous advice regarding the expected result of pleading guilty). Because Mr. Nepomuceno's attorney misadvised him regarding the consequences of the sentence that he would receive under the plea agreement, he received constitutionally ineffective assistance of counsel.

Similarly, this Court requires that, for a guilty plea to be voluntary under the Due Process Clause, the petitioner must enter the plea knowing the consequences of the waiver of rights. *Boykin*, 395 U.S. at 244; *see Brady v. United States*, 397 U.S. 742, 755 (1970) (a voluntary plea is entered "by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel[.]") (citation omitted). The record in the present case makes no mention of the operation of a life sentence with a minimum plus lifetime post-prison supervision. With correct explanation of the consequences of his plea – potentially dying in prison – Mr. Nepomuceno would not have pleaded guilty. Under the circumstances of his case, his guilty plea was not voluntary, knowing, and intelligent.

Conclusion

For the foregoing reasons, we respectfully request that the Court issue a writ of certiorari, or, in the alternative, that Circuit Justice Kagan issue a certificate of appealability pursuant to 28 U.S.C. § 2253(a).

Dated this 14th day of December, 2022.



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