No. _____

IN THE

Supreme Court of the United States

CHRISTOPHER WHITE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit's denial of a Certificate of Appealability (COA) in this case conflict with Supreme Court precedent, warranting correction by this Court?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Christopher White*, No. 2:13-cr-00101, U.S. District Court for the Eastern District of Louisiana. Judgment entered February 22, 2022 (22a-45a).
- *United States v. Christopher White*, No. 22-30097, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 21, 2022 (46a-47a). Petition for Rehearing En Banc denied on December 20, 2022 (48a).

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On Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully asks this Court to review the denial of a Certificate of Appealability (COA) by the U.S. Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

The Fifth Circuit denied Mr. White a COA on his ineffective assistance of counsel claim on October 21, 2022. That order is attached as part of the Appendix (46a-47a), along with the underlying district court order denying his claim (22a-45a).

JURISDICTION

The Fifth Circuit issued its COA denial October 21, 2022 (46a-47a). Mr. White timely petitioned for reconsideration or rehearing en banc. Those petitions were denied December 20, 2022 (48a). This petition is filed within 90 days of the rehearing denial. *See* Sup. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c) provides, in relevant part:

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

The Sixth Amendment of the U.S. Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right enjoy the right . . . to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE AND PROCEEDINGS

In the early 2000s, Petitioner Christopher White worked as an independent accountant providing a variety of services to multiple clients. One of his clients was a man named Mark Morad, who owned several companies for which Mr. White provided accounting services, including managing payroll, preparing tax returns, and generating cost reports and other financial statements. Among Mr. Morad's businesses were home healthcare agencies as well as non-healthcare-related entities, including a company called Goldwell Investments.

In 2011, federal agents began receiving information that Mr. Morad was paying "marketers" illegal kickbacks to recruit patients for home health services and also had doctors certifying non-homebound patients for such services, enabling his companies to submit fraudulent bills to Medicare for reimbursement. Following a lengthy federal investigation, Mr. Morad and several other individuals—including physicians, managers of the home health agencies, and patient recruiters—were charged and convicted of conspiring to defraud Medicare, conspiring to pay and receive healthcare kickbacks, and related substantive offenses.

As Mr. Morad's accountant, Mr. White had no involvement in providing medical services, certifying patients, billing Medicare, hiring employees, hiring contractors, or making personnel decisions for any of Mr. Morad's companies. His affiliation with Mr. Morad and his companies was limited to providing accounting services based on information he obtained from Mr. Morad and his office managers regarding their revenue, expenses, employee pay rates, billed hours, etc. Nonetheless,

Mr. White became a target of the federal investigation after he voluntarily met with federal agents in 2013 and told them he assisted Mr. Morad in compiling financial documents in response to a grand jury subpoena issued to Goldwell Investments.

That subpoena had requested various corporate records, tax returns, and personnel records for Goldwell, including "Internal Revenue Service Forms W-2, W-4, 1099" for a list of specific individuals—documents that fell within the purview of Mr. White's accounting work. Mr. Morad instructed Mr. White to compile the requested documents for the subpoena return, most of which Mr. White was able to locate in his electronic files. However, while compiling the requested income tax documents, Mr. White realized that a few people who were paid for contract services in past years were not issued Form 1099s—the IRS tax document used to report money paid to non-employees for services rendered. The contract service payments were made by Mr. Morad by checks drawn from the Goldwell account. Mr. White notified Mr. Morad of the issue, and Mr. Morad provided him with the addresses and social security numbers for those individuals so that Mr. White could generate late 1099s for those people. Mr. White used that information along with the company's past bank statements and tax returns to prepare accurate 1099s reflecting the amounts each individual was paid for contract services in previous years.

Mr. White never tried to conceal the timing or manner in which he prepared the 1099s. Quite the opposite, he agreed to meet with federal agents within weeks of the subpoena return and explained exactly when, how, and why he prepared them. However, from that moment on, the agents and prosecutors were convinced—and

consistently told Mr. White—that he "falsified" the 1099s and committed fraud by generating them in response to a federal grand jury subpoena. Mr. White, on the other hand, repeatedly explained that he prepared the late 1099s at his client's instruction and in accordance with standard accounting practices, based on the actual amounts that each individual was paid for contract services in previous years. Mr. White also told agents that, around the time of the subpoena, Mr. Morad told him to add Demetrias Temple (one of the people for whom Mr. White prepared late 1099s) as a payroll employee, so Mr. White provided her with a W-4 form and explained to her how to fill it out so she could be added to payroll.

Mr. White met with the agents and prosecutors several times in 2013 and, in September 2013, agreed to testify before a grand jury about the 1099s. Following Mr. White's testimony, the grand jury returned a superseding indictment against Mr. Morad, which added a charge for conspiracy to falsify records in violation of 18 U.S.C. §§ 1519 and 371. The charge alleged a single "overt act" in furtherance of the conspiracy—namely, that Mr. Morad "instructed Unindicted Coconspirator 1 to fabricate tax records pertaining to Goldwell Investments, Inc. for purposes of providing such fabricated records to a federal grand jury."

About a year later, a new prosecutor took over the case and obtained a second superseding indictment adding Mr. White as a named defendant in the conspiracy to falsify records charge *as well as* in Mr. Morad's conspiracy to commit Medicare fraud. The former conspiracy now alleged a second overt act—namely, that Mr. White "fraudulently created and caused to be created false Internal Revenue Service Forms

1099 and falsely back-dated employment applications for Demetrias Temple." Mr. White pled not guilty to both charges and retained attorney John Craft to represent him in the case.

Within a few months, and pursuant to his lawyer's advice, Mr. White agreed to plead guilty to both conspiracy charges. However, soon thereafter (and prior to sentencing), Mr. White notified Mr. Craft that he wanted to withdraw his plea because he realized the government's entire theory of his guilt was based on a fundamental misunderstanding of 1099s. The Presentence Investigation Report's description of his "offense conduct" stated that he prepared the 1099s to give the "false impression" that Ms. Temple was a "paid contractor." Mr. White explained that she *was* a paid contractor and thus was properly issued 1099s—the nature of the services she provided was irrelevant. He firmly maintained that he did not falsify any documents, had no intent to deceive anyone in preparing the forms after the subpoena issued, and had no knowledge of or involvement in any Medicare fraud conspiracy.

Mr. Craft filed a motion to withdraw the guilty plea, asserting Mr. White's "reasonable" belief that he was "not guilty of the offense[s] to which he pled guilty" because "he did not personally have any nefarious intent" and merely "fulfill[ed] his professional responsibilities as an account[ant]." The district court denied the motion based primarily on Mr. White's admission of guilt in his plea colloquy, which the court deemed "inconsistent" with his assertion of innocence. Mr. Craft then withdrew as Mr. White's lawyer because Mr. White intended to raise a claim that he received ineffective assistance from Mr. Craft in connection with his guilty plea.

Mr. White, through new counsel, filed an amended motion to withdraw his plea, alleging ineffective assistance of counsel by Mr. Craft and requesting an evidentiary hearing. He argued that Mr. Craft did not investigate the validity of the prosecution's allegations or any potential defenses, instead simply accepting the government's assertions about the 1099s as true. Mr. White also asserted that he was "led to believe that simply because he provided accounting services to Mark Morad's companies, he was guilty of participating in a conspiracy to commit healthcare fraud." In support of his motion, Mr. White cited IRS rules establishing that Ms. Temple was properly classified as a 1099 contractor, regardless of whether the contract services she provided were legal, and he attached Goldwell records showing that the 1099s he prepared in response to the subpoena accurately reflected the amounts she was paid each year—belying the government's claim that he "falsified" tax records. Mr. White also attached an affidavit signed by Mr. Craft stating that he agreed with the contents of the motion and "would testify consistently with the statements contained" therein. Mr. White insisted he was innocent of the charges and only pled guilty based on his lawyer's incorrect and uninformed advice.

The district court denied Mr. White's amended motion, again based solely on his admissions of guilt during his guilty plea proceeding, ignoring Mr. Craft's affidavit entirely. The court later sentenced Mr. White to 48 months in prison. On November 22, 2017, Mr. White filed a *pro se* motion to vacate his convictions pursuant to 28 U.S.C. § 2255 based on ineffective assistance of plea counsel. Mr. White again urged that deficiencies in Mr. Craft's advice and investigation led him to incorrectly

believe that he was guilty of the charged conspiracies, despite lacking any knowledge of criminal activity or any intent to deceive anyone in preparing the 1099s. That filing spurred five more years of litigation over Mr. White's desire to withdraw his plea and go to trial—efforts that he continued to pursue long after he finished serving his prison sentence, and which have culminated in the filing of this petition.

The district court denied Mr. White's § 2255 without an evidentiary hearing—again relying solely on his plea colloquy to find a lack of prejudice, regardless of any deficient performance by counsel (3a-8a). The court also denied Mr. White's motions for a COA and to proceed *in forma pauperis*, stating that his "arguments do not have an arguable basis either in law or in fact and are therefore frivolous" (15a-16a).

Mr. White obtained a COA and permission to proceed *in forma pauperis* from the Fifth Circuit (17a-18a). The three-judge panel granting the COA found White's allegations of ineffective assistance "extensive, specific, and pertinent to the validity of the plea," satisfying the COA threshold (17a-18a). Following the issuance of the COA, a three-judge merits panel determined that the district court abused its discretion by declining to hold an evidentiary hearing in light of Mr. Craft's admissions and vacated the judgment, remanding the § 2255 for a hearing (19a-21a). Nearly six months later, the district court set the ordered hearing.

The testimony at the hearing confirmed the facts upon which Mr. White's ineffective assistance of counsel claim relied. Most critically, Mr. Craft testified: (1) that he advised Mr. White to plead guilty because he believed Mr. White "had already admitted to his guilt" and "to criminal intent" during pre-indictment

meetings with the government, and (2) that he did not do "any investigation beyond reviewing the government's discovery" before advising Mr. White to plead guilty, stating that his investigation was limited to reviewing "what the government was saying was going to be its case."

Records (including the federal agents' summaries of their pre-indictment interviews with Mr. White) and witness testimony clearly showed that Mr. Craft's beliefs about Mr. White's pre-indictment admissions were simply wrong. Mr. White consistently *denied* any wrongdoing or criminal intent and, up until the day he pled guilty, maintained that the 1099s he prepared were not falsified or fraudulent. Indeed, emails between Mr. White and Mr. Craft—which were introduced as exhibits during the evidentiary hearing—showed that Mr. White repeatedly asserted his innocence to Mr. Craft, asking Mr. Craft to investigate information related to the tax documents and telling Mr. Craft in no uncertain terms that he wanted to go to trial.

Additionally, testimony from a federal tax law expert at the hearing demonstrated what a reasonable investigation would have revealed: that Mr. White's defense of his conduct in preparing the 1099s was valid and consistent with standard accounting practices. The expert testified that a 1099 "is simply an information return that documents the fact that a payment was made," which "is required to be issued any time a person pays taxable income to anyone over $600 in a year"—noting that "taxable income includes illegal income." She further testified that it is the payor's (*i.e.*, the company owner's) responsibility to issue 1099s, and civil penalties can accrue for late 1099s. Thus, if she learned that a client had not issued 1099s to

people who were paid income in previous years, she would advise the client that the 1099s should be "completed and sent out as soon as possible." The tax expert also testified that the payor's obligation to the IRS to issue late 1099s exists regardless of whether a subpoena for those documents has been issued. Toward the end of her testimony, the expert witness began testifying that an accountant would not typically be involved in a client's employment or payroll decisions. However, the district court cut her off, proclaimed that the line of questioning was irrelevant, and declared that the court had "heard enough of this."

Notably, when Mr. Craft was asked at the hearing if he agreed with the contents of Mr. White's motion to withdraw his guilty plea (to which Mr. Craft's affidavit was originally affixed), Mr. Craft testified that he "agree[d] with some of the factual allegations made in there." He did not identify any factual allegation that he disputed, and the only aspects with which he expressly *disagreed* were "the conclusions about what kind of representation [he] provided"—*i.e.*, the allegations of deficient performance. Mr. Craft also testified that he had suffered a brain injury that prevented him from recalling the guilty plea itself or specific details about the case.

The government's sole witness at the hearing was Ms. Temple, to whom Mr. Morad paid kickbacks to recruit patients. She claimed that Mr. White knew she was being paid to recruit patients, but she could not provide any specific basis for that belief, ultimately conceding that she simply "feel[s] he knew what [she] was doing." Ms. Temple also testified that she had minimal interaction with Mr. White prior to the federal investigation and only worked directly with him when she had to

go to his office to complete a W-4 to be added to payroll. And while Ms. Temple testified that Mr. White was present in Mr. Morad's office suite when she falsified employment applications—which Mr. White denied having ever seen, and which were not the focus of the government's allegations against Mr. White—she testified that she completed the applications on her own "outside the office," that there was "no discussion about the application itself" in the office, and that she did not "talk directly" with Mr. White during that time. Notably, her testimony was not known or available to the defense prior to the plea, making it irrelevant to the § 2255 inquiry.

Following the hearing, the district court denied White's § 2255 motion, again relying heavily on the plea colloquy that served as the sole basis for its previous denials of relief (32a-35a, 38a-39a). In finding a lack of deficient performance by counsel, the court also relied on Mr. Craft's personal beliefs that he "provided the best representation he could" and that pleading guilty was in Mr. White's "best interest" (35a-36a). Finally, the court stated that it found Mr. White's assertion that he would have gone to trial "unworthy of belief" based on the court's personal view that the government's case was "strong" and "compelling" (40a). As in its previous ruling, the district court denied Mr. White a COA to challenge its ruling on appeal (44a-45a).

Mr. White petitioned the Fifth Circuit for a COA on his ineffective assistance of counsel claim. A single judge denied his request with no explanation (46a-47a). Mr. White moved for reconsideration of the denial by a three-judge panel and simultaneously petitioned for rehearing en banc. A three-judge panel denied the motion, and the court denied rehearing en banc, all still without explanation (48a).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for a writ of certiorari because the Fifth Circuit's denial of a COA in Mr. White's case directly conflicts with multiple decisions of this Court. *See* Sup. Ct. R. 10(c). Additionally, the Fifth Circuit's continued misapplication of the COA standard, despite repeated correction by this Court, constitutes such a severe departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *Id.* Indeed, the Fifth Circuit's denial of a COA in this case is irreconcilable with its own previous three-judge order remanding the case for an evidentiary hearing based on the finding that Mr. White's allegations—which Mr. Craft's hearing testimony confirmed true—were "extensive, specific, and pertinent to the validity of the plea" (17a).

The Fifth Circuit's denial of a COA also sanctioned the district court's severe departure from the accepted and usual course of judicial proceedings, further warranting this Court's intervention. The district court's orders from the last seven years—since the time Mr. White first sought to withdraw his guilty plea—have shown its unwillingness to even consider the possibility that Mr. White received ineffective assistance of counsel in connection with his plea. The court repeatedly has refused to engage with the facts and relevant law, denying relief based on the improper conclusion that Mr. White's guilty plea colloquy was insurmountable, in clear violation of this Court's holding in *Blackledge v. Allison*, 431 U.S. 63 (1977).

For all of these reasons, this Court should exercise its supervisory power to, once again, correct the Fifth Circuit's misapplication of the COA standard.

I. The Fifth Circuit's denial of a COA conflicts with decades of this Court's caselaw.

This Court long has emphasized that the threshold for granting a COA is low. As the Court has repeatedly held, a COA petitioner need only show "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) (emphasis added); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). That analysis does not require—and, in fact, forbids—"full consideration of the factual or legal basis adduced in support of the claims." *Miller–El v. Cockrell*, 537 U.S. 322, 336-38, 342 (2003); *see also Buck*, 137 S. Ct. at 773 (reemphasizing that the COA inquiry "is not coextensive with the merits analysis"). Thus, in conducting a COA assessment, courts must only ask themselves "whether that resolution was debatable amongst jurists of reason"—*not* whether "the appeal will succeed." *Miller-El*, 537 U.S. at 336-37.

Notably, Congress's original reason for imposing a "threshold, or gateway, test" as a "prerequisite for appealability" of habeas denials was to help confront an influx of "frivolous" petitions challenging capital sentences. *Miller-El*, 537 U.S. at 337. The purpose of COAs is thus to simply differentiate "those appeals deserving of attention from those that plainly do not." *Id.* And while a petitioner seeking a COA "must prove something more than the absence of frivolity or the existence of mere good faith on his or her part," this Court does *not* require the petitioner to prove "that some jurists would *grant* the petition[.]" *Id.* at 338 (emphasis added) (alterations, quotation marks, and citation omitted). "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.*

Mr. White's ineffective assistance of plea counsel claim easily met the low COA threshold, and the Fifth Circuit's summary denial of a COA shows that it either applied the wrong standard or was "too demanding in assessing whether reasonable jurists could debate" the district court's ruling. *See Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., Ginsburg, J., and Kagan, J., dissenting from the denial of certiorari). Mr. White argued that he was denied his constitutional right to effective assistance of plea counsel because his lawyer inadequately advised him about pleading guilty and failed to investigate the relevant facts and law before advising him to do so. Those allegations were confirmed by the lawyer's testimony at the evidentiary hearing. Mr. Craft testified that he believed that Mr. White had already admitted his guilt in pre-indictment disclosures to agents (apparently based on Mr. White's statements about preparing the 1099s after the subpoena issued), that he never even considered the possibility of going to trial, and that he never conducted any investigation of the relevant facts or law before advising Mr. White to plead guilty—despite Mr. White repeatedly and vehemently denying the allegations against him and asserting his desire to go to trial, as proven by emails exchanges between the two as well as testimony from a witness to the pre-indictment meetings. Thus, the district court's denial of Mr. White's claim was *at least* debatable because counsel's testimony proved that his incorrectly assessed the evidence, misadvised Mr. White about what it showed, and failed to investigate his asserted defense.

What is more, the Goldwell financial records and tax expert testimony proved that an adequate investigation of the relevant facts and law would have shown that Mr. White's defense—that he prepared the late 1099s accurately and properly—was valid. The financial records proved that the 1099s were *not* falsified and accurately reflected the amounts each individual was paid by Goldwell for contract services during the relevant years. Additionally, the tax expert testified unequivocally that 1099s must be issued to non-employees who are paid more than $600 in a given year, regardless of what services that person provided (even if the work was not legal), and that late 1099s should be issued as soon as a company owner discovers that contract payments were not reported in previous years, regardless of whether a federal subpoena has issued. This evidence further showed that Mr. White's ineffective assistance claim was *at least* reasonably debatable, especially given his lawyer's admission that he did not do any independent investigation and, instead, simply accepted "what the government was saying was going to be its case."

Importantly, the Fifth Circuit's own rulings in this case prove that jurists of reason could debate the district court's resolution of Mr. White's constitutional claim. The district court initially denied Mr. White an evidentiary hearing on his § 2255 petition, but two separate three-judge panels found potential merit in his ineffective assistance of counsel claim. One panel granted a COA on the question of whether the district court abused its discretion by denying a hearing, finding that Mr. White's "allegations of constitutional ineffectiveness . . . were extensive, specific, and pertinent to the validity of the plea" (17a). A second, merits panel then vacated the

district court's judgment and ordered it to hold an evidentiary hearing on the ground that Mr. Craft's affidavit admissions "indicate[d] the potential merit" of Mr. White's claim (##). At the evidentiary hearing, Mr. Craft's testimony confirmed the accuracy of the factual allegations that the Fifth Circuit had said "indicate[d] . . . potential merit." Indeed, Mr. Craft explicitly "agree[d] with some of [Mr. White's] factual allegations" and only disputed the *legal conclusion* that he performed deficiently. Thus, to permit this COA denial to stand would be to accept the illogical conclusion that the same factual allegations that indicated potential merit in Mr. White's initial § 2255 appeal somehow failed to demonstrate, after corroboration at the hearing, that jurists of reason could debate the merits of Mr. White's claim. The only explanation for this inconsistency is the Fifth Circuit's misapplication of the COA standard in its latest denial.

II. The district court's ruling conflicts with this Court's precedent, further proving that Mr. White's claim deserved a COA.

In denying Mr. White's ineffective assistance of counsel claim, the district court plainly misapplied this Court's precedent. In particular, the district court did not engage with the correct inquiries under *Strickland v. Washington*, 466 U.S. 668 (1984), and treated Mr. White's plea colloquy as insurmountable proof of his guilt, in clear violation of this Court's decision in *Blackledge v. Allison*, 431 U.S. 63 (1977). Accordingly, there is no question that reasonable jurists could debate the district court's resolution of Mr. White's constitutional claim.

To succeed on an ineffective assistance of counsel claim, a petitioner must show (1) "that counsel's representation fell below an objective standard of reasonableness,"

and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. The district court must judge the reasonableness of counsel's conduct based on "the facts of the particular case, viewed as of the time of counsel's conduct," keeping in mind "that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690. When the ineffective assistance of counsel claim relates to a defendant's decision to plead guilty, the prejudice prong requires showing "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Lee v. United States*, 137 S. Ct. 1958, 1965 (2017).

In concluding that Mr. White failed to show "that his counsel's performance fell below an objective standard of reasonableness," the district court disregarded entirely Mr. Craft's admissions that proved he provided incorrect and uninformed legal advice and did not conduct an adequate investigation of the facts and law. Instead of addressing the reasonableness of counsel's assessment, advice, and conduct, the court relied on improper factors to reject Mr. White's arguments—namely, the district court's unwavering belief that Mr. White's admissions of guilt during his plea colloquy must be true (32a-33a), Mr. Craft's subjective belief that he "provided the best representation that he could" and that pleading guilty was in Mr. White's "best interest" (34a-36a), and the district court's conclusion that Mr. White *should have* pled guilty (36a).

As this Court made clear in *Blackledge*, "the barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable," and courts "cannot fairly adopt a per se rule excluding all possibility that the defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment." 431 U.S. at 74-75. That is precisely what the district court did here (*see* 32a-33a). Moreover, contrary to the district court's reasoning, Mr. Craft's opinion about the quality of his own representation is irrelevant, as is the district court's opinion about whether Mr. White *should have* pled guilty. That is particularly true given that the district court's assessment of the evidence relied on testimony from Ms. Temple, which was not known to Mr. Craft or Mr. White prior to the guilty plea and thus had no bearing on either the reasonableness of Mr. Craft's conduct or Mr. White's decision-making. And, notably, the district court's assessment of the evidence incorporated the exact same error Mr. Craft made in advising Mr. White to plead guilty—the belief that the 1099s were "falsified" (36a).

Under *Strickland*, Mr. White's counsel performed deficiently by incorrectly advising Mr. White that his admitted conduct—*i.e.*, his preparation of 1099s after the federal subpoena issued—made him guilty of the charged conspiracies and unreasonably refusing to conduct any investigation of the relevant facts and law, including Mr. White's asserted defense. The decision not to investigate clearly was

not a "strategic choice," taking it far outside the realm of reasonable professional judgment. *See Strickland*, 466 U.S. at 690-91. As this Court explained in *Strickland*:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. Counsel's deficiencies were particularly glaring given the evidence and testimony showing that Mr. White repeatedly defended his conduct, asserted his innocence, denied knowledge of wrongdoing, and urged counsel to investigate further. *See id.* at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," and "what investigation decisions are reasonable depends critically on such information.").

With respect to prejudice, the evidence showed that Mr. White pleaded guilty based on Mr. Craft's incorrect and uninformed advice regarding his guilt. In finding this prong unsatisfied, the district court misstated the inquiry entirely, repeatedly asserting that Mr. White had to definitively prove "that he would not have pleaded guilty but for the error" and "would have insisted on proceeding to trial." (31a, 32a, 43a). That plainly is not the inquiry. *Strickland* only requires establishing a "reasonable probability" that Mr. White would have chosen a different path but for his counsel's deficient performance. Mr. White testified definitively that he would have gone to trial if counsel had not convinced him that he committed a fraudulent act when he prepared the 1099s during a federal investigation and, in doing so, became part of the Medicare fraud conspiracy as well. And that assertion was

bolstered by the emails between Mr. White and Mr. Craft during that time period, as well as the testimony of the witness to Mr. White's pre-indictment meetings with the government. The district court did not find Mr. White's testimony incredible but concluded that it was "*unworthy* of belief" based on the court's own assessment of the government's evidence (40a). The district court's misapplication of *Strickland* and misapprehension of the facts further show that its resolution of Mr. White's claim was at least reasonably debatable.

III. The Fifth Circuit and district court have so severely departed from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervisory power.

Mr. White sought to withdraw his guilty plea almost immediately after he pled guilty to participating in conspiracies to falsify documents and defraud Medicare. For seven years, the district court refused to consider the possibility that he pled guilty based on his lawyer's incorrect and uninformed advice. When finally confronted with testimony and evidence proving true Mr. White's allegations of deficient performance, the district court still disregarded the evidence and relevant inquiries under *Strickland*, denying Mr. White's claim based solely on his plea colloquy and improper, subjective considerations. Critically, there has never been a shred of evidence suggesting that Mr. White knew about, let alone participated in, Mr. Morad's conspiracy to bill Medicare for unnecessary home health services—*i.e.*, the healthcare fraud conspiracy to which Mr. White pled.

The district court's and Fifth Circuit's denials of a COA in this case fly in the face of this Court's precedent and represent such a severe departure from the accepted and usual course of judicial proceedings as to call for an exercise of this

Court's supervisory power. "Despite the reiteration by [this] Court over the course of nearly 20 years that it must follow the standard set forth in § 2253 and in *Slack*, the Fifth Circuit has continued to ignore [this] Court's COA standard, testing the limits of how long the system can tolerate open defiance by an inferior court." Kevin Trahan, *A Shortcut to Death: An Analysis of the Fifth Circuit's Refusal to Adopt the Supreme Court's Certificate of Appealability Standard in Capital Cases*, 48 AM. J. CRIM. L. 1, 16 (2020). "While *Buck* and the cases before it should have caused the Fifth Circuit to reevaluate its approach to COA requests, particularly when considering the denial rates of other circuits, the court has dug its feet in the sand, continuing to impose a harsh, unfounded standard and short-circuiting the federal habeas process to more quickly dispose of cases." *Id.* at 18.

"When a court of appeals sidesteps [the COA] process … it is in essence deciding an appeal without jurisdiction." *Buck*, 137 S. Ct. at 773. That is exactly what happened in this case. Mr. White's ineffective assistance of counsel claim was based on allegations of deficient performance that were "extensive, specific, and pertinent to the validity of [his] plea" (17a), and those allegations were proven true at the evidentiary hearing. Mr. White was entitled to have his guilty plea vacated based on his lawyer's indisputably inadequate and uninformed advice, and all of the evidence pointed to the conclusion that he would have gone to trial if his lawyer had not convinced him that his preparation of the 1099s made him guilty of the charged conspiracies. At the very least, there is no question that jurists of reason could disagree with the district court's resolution of his claim, which relied on improper

considerations and misapplications of law. And Mr. White's claim certainly deserved encouragement to proceed further, given the overwhelming evidence that supported and corroborated his assertions of ineffective assistance of plea counsel—evidence that included his lawyer's own admissions. This Court's intervention is warranted.

CONCLUSION

Petitioner Christopher White respectfully requests that this Court grant this petition for a writ of certiorari. Alternatively, because the Fifth Circuit's denial of a COA in this case so clearly violated the standard set forth by this Court's precedent, the Court should summarily reverse the Fifth Circuit's ruling and remand to the Fifth Circuit with an instruction that Mr. White's appeal proceed to the merits stage.

Respectfully submitted,

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