No. _____

In the Supreme Court of the United States

FABIO OCHOA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. On review of petitioner's claim of ineffective assistance based on counsel's conflict of interest in plea negotiations, the Eleventh Circuit concluded that petitioner's contemporaneous retention of other, non-conflicted counsel categorically precluded a showing of adverse effect under *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Does the Eleventh Circuit's categorical rule barring a showing of adverse effect in the multiple-counsel context adequately protect defendants from the harms of conflicted counsel or, as other Circuits have concluded, are factual findings on the conflicted representation needed where the government relies on multiple-counsel representation to dispute adverse effect?

2. Where *Brady* and *Giglio* material that the government suppressed until after trial consists of undisputed evidence that its chief witness made bizarre, false allegations against petitioner that called into question his credibility and mental health, *see Mesarosh v. United States*, 352 U.S. 1, 8 (1956), and where the witness offered uncontradicted sworn post-trial allegations that he was coached to provide false testimony to defeat a motion to suppress and to establish U.S. jurisdiction for the prosecution, should the petitioner be granted a certificate of appealability on his claim of erroneous denial of an evidentiary hearing on the due process violations?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States v. Ochoa, 428 F.3d 1015 (11th Cir. 2005)

United States v. Ochoa, 179 Fed.Appx. 572 (11th Cir. 2006)

Ochoa v. United States, No. 07-22659-CIV, 2010 WL 11694501 (S.D. Fla. Apr. 9, 2010)

Ochoa v. United States, No. 07-CV-22659-KMM, 2011 WL 1103774 (S.D. Fla. Mar. 24, 2011)

Ochoa v. United States, No. 07-CV-22659-KMM, 2012 WL 13188535 (S.D. Fla. Apr. 23, 2012)

Ochoa v. United States, 569 Fed.Appx. 843 (11th Cir. 2014), *cert. den.* 574 U.S. 976 (Nov. 3, 2014)

Ochoa v. United States, No. 07-CV-22659-KMM, 2016 WL 11659199 (S.D. Fla. Dec. 9, 2016)

Ochoa v. United States, No. 07-CV-22659-KMM, 2017 WL 11486424 (S.D. Fla. July 26, 2017)

Ochoa v. United States, No. 07-CV-22659-KMM, 2017 WL 11486425 (S.D. Fla. Dec. 27, 2017)

Ochoa v. United States, No. 07-CV-22659-KMM, 2017 WL 11486425 (S.D. Fla. Dec. 27, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Fabio Ochoa petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in *Ochoa v. United States*, No. 18-10755 (Aug. 18, 2022).

OPINION BELOW

A copy of the decision is contained in the Appendix (App. 1) and is published at 45 F.4th 1293.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 18, 2022. App. 1. The Eleventh Circuit denied a petition for panel rehearing on October 18, 2022. App. 98. Petitioner's application (22A605) to extend until February 15, 2023, the time to file the petition was granted by Justice Thomas on January 9, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. § 2255.

STATUTORY AND OTHER PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part: "No person shall … be deprived of life, liberty, or property, without due process of law ... ."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy

the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This appeal results from the denial of petitioner Fabio Ochoa's 28 U.S.C. § 2255 motion to vacate his conviction and 365-month prison sentence, and specifically the denial of petitioner's requests for an evidentiary hearing and limited discovery. Petitioner's § 2255 motion asserted Fifth and Sixth Amendment grounds on claims of ineffective assistance based on his plea counsel's direct conflict of interest and government misconduct in failing to disclose that its key trial witness was suffering from bizarre thinking regarding petitioner that led him to commit perjury regarding a jurisdictional connection to the United States and to falsify evidence to counter a potential motion to suppress evidence obtained by means of illegal recordings.

Petitioner was arrested in Colombia in October 1999 on an extradition warrant for a federal indictment charging him with one count of conspiracy to import, and one count of conspiracy to distribute, cocaine. App. 3. He retained Miami attorney Joaquin Perez to negotiate a plea agreement and separately retained Miami attorney Jose Quiñon to challenge grounds asserted by the government in its extradition request; sometime after Perez left the case, Quiñon also entertained plea offers from the government. App. 4. Throughout Perez's representation, which was limited to plea negotiations, Perez operated under multiple conflicts of interest and sought only to

further an illegal effort to demand that petitioner pay exorbitant amounts of money to participate in a purportedly DEA-sanctioned plea-and-cooperation plan—a pay-to-plead arrangement, by which defendants in petitioner's case could fund setting up drug deals for the express purpose of DEA interdiction, for which the paying defendant participants would be credited to justify their lower sentences. App. 3 ("Perez met with prosecutors, who suggested the possibility of a global plea deal if Ochoa agreed to cooperate with the government and forego the extradition process. Ochoa contends that Perez also tried to convince him to pay a thirty-million-dollar bribe or kickback as part of the plea negotiations."); App. 5 ("According to Ochoa, [Nicolas] Bergonzoli and Perez tried to convince him to pay thirty million dollars in exchange for a plea agreement as part of a fraudulent scheme that would benefit Bergonzoli. Ochoa alleged that Perez did not pursue a legitimate plea agreement with the government to further the scheme. Ochoa also alleged that he had refused to cooperate with the government and pleaded not guilty solely based on the outlandish price tag attached to the offer. In his motion, Ochoa requested an evidentiary hearing.").

Perez, as petitioner's counsel from October 1999 to early 2000, improperly tried to convince petitioner to accept what the government later acknowledged was a scam. That initial period of representation was critical to petitioner's ability to work a true plea deal with the government, because multiple co-defendants who were not faced with the same financial demands

for the pay-to-plead scheme were able to make true plea deals that involved providing evidence against petitioner, thereby fatally undermining petitioner's ability to pursue a favorable plea offer. The pay-to-plead scheme consequently functioned in a carrot-and-stick extortive manner. When replacement counsel thereafter sought a plea offers from the government, the government proposed a 20-year sentence, not the lesser sentence available at early stages of the case. Thus, petitioner proceeded to trial.

Perez's conflicts went well beyond merely a financial interest in the pay-to-plead scam. Nicholas Bergonzoli, whom Perez was secretly representing in a sealed U.S. prosecution as to which Bergonzoli had reached a plea and cooperation deal, was at Perez's side, assisting in advancing the scam proposal to petitioner because Bergonzoli had a financial interest in extorting the funding. Also, the central designer of the scam, Baruch Vega, was linked to Perez and Perez's associates as were other defendants who were able to enter cooperation agreements without the payment demanded of petitioner. App. 18. The government subsequently admitted that the Perez-proposed plea deal was a fraud, but continued to deal with Perez on plea negotiation for at least two months after learning of the scam.

Alejandro Bernal, the lead defendant in petitioner's indictment, was a major Colombian drug trafficker who entered into a plea arrangement with the government while petitioner still remained in Colombia. App. 89. Bernal became the government's chief trial witness. He was also the chief witness in

the government's defense against a motion to suppress surreptitious recordings, purportedly of petitioner, that were obtained in violation of the Fourth Amendment.

The government's theory of prosecution was that petitioner sold land in Colombia to Nicolas Bergonzoli, who was owed money by Bernal. Bergonzoli paid petitioner for the land by assigning to him the right to recover on Bernal's debt. The government theorized, and obtained Bernal's testimonial support for the theory, that Bernal, now owing a large amount of money to petitioner, convinced petitioner to increase or reduce the amount of Bernal's repayment obligation based on Bernal's success or failure, respectively, in shipping cocaine to Mexico.

Bernal, testifying for the government at trial, asserted that as to a handful of drug shipments that he conducted with other conspirators, petitioner had essentially wagered his right to collect part of Bernal's land-sale debt on the success of the drug enterprise, with a bonus to be paid to petitioner if those shipments were successfully exported to Mexico. Because this theory of petitioner's involvement in a drug conspiracy was novel and because the government needed Bernal to verify both the terms of this alleged wager and that the drugs were destined for the United States (in order to implicate U.S. drug laws), Bernal's testimony was critical to the government's case.

Bernal also provided testimony supporting the government's claims regarding placement of a listening device in Bernal's office, and this testimony

served to defeat possible suppression of the recordings and bolstered Bernal's interpretation of the recorded conversations as proving petitioner's financial interest in the success of Bernal's ventures.

Bernal presented a problem for the government, however. He insistently claimed to have proof that petitioner was responsible for the September 11 attack committed by Al Qaeda. Bernal's bizarre claim of having evidence that petitioner was behind the 2001 terrorist attack on this country was carefully hidden from petitioner and was revealed only after the filing of the § 2255 motion when Bernal revealed falsified elements of his testimony against petitioner, including how he was led to lie about the manner in which the recordings of conversations with petitioner were obtained—in order to overcome Fourth Amendment concerns—and to craft his testimony to create the appearance of United States jurisdiction over drug shipments to Mexico.

Bernal's post-trial revelation of *Brady* and *Giglio* violations[1] and his explanation of critical false testimony about jurisdiction and concealment of constitutional violations regarding the recordings on which the government had founded their case were material to virtually every aspect of petitioner's prosecution, where the few other government witnesses offered testimony at the margins of the conspiracy allegations and suffered from deep credibility problems. The government offered no

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[1] *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

affidavit to contradict Bernal and admitted concealing Bernal's bizarre claims of petitioner's responsibility for 9/11, but labeled him "actually delusional" and mentally ill. Govt. Resp. to § 2255 Motion at 12. Based on all of this, petitioner repeatedly requested discovery and an evidentiary hearing. App. 69–70, 80.

Because Bernal's delusions and the government's multiple *Brady* and *Giglio* violations fit the pattern that this Court previously held meets a fundamental error standard, *see Mesarosh v. United States*, 352 U.S. 1, 4 (1956) (holding that post-trial disclosure of terrorism fantasies and perjury on the part of a key government trial witness required required relief from the conviction), petitioner sought discovery and an evidentiary hearing on the Bernal claims.

Despite the fundamental nature of the violations at issue, the district court summarily denied relief in 2011. App. 11. The district court concluded that the still-incompletely exposed revelations regarding witness Bernal were either suspicious, because they involved recantation of some his trial testimony and because Bernal was alleging that the government had lied to him to cause him to provide untrue testimony, or of no significant force regarding his credibility. App. 85–87; *see* App. 88 (district court concludes: "Simply stated, the recantation letters are worthless as new evidence.").

The district court denied the conflict-of-interest claim based on the district court's conclusion that the claim was resolved on direct appeal. App. 97.

Petitioner appealed and moved for a certificate of appealability, including as to the Bernal-related

claims, about which petitioner argued the district court erred in summarily denying, without an evidentiary hearing, claims of governmental misconduct in the failure to disclose significant *Brady* and *Giglio* material concerning Bernal, the manipulation of trial testimony by Bernal, and presentation of false evidence to the trial and grand juries. Petitioner argued that the district court erroneously rejected or failed to weigh sworn and other statements by Bernal made post-trial; mistakenly determined the statements were merely unsworn recantations and that Bernal had recanted his recantations; and erroneously denied motions for discovery and for supplementation of the record.

The Eleventh Circuit denied the certificate of appealability as to the Bernal claims, but granted the certificate as to the claim of plea counsel's conflict of interest. *See* App. 75. After briefing, the Eleventh Circuit reversed the denial of § 2255 relief and remanded for further proceedings on the conflict-of-interest claims, concluding that the district court erred in finding that the claim had been previously resolved on direct appeal. App. 77–78.

On remand from the court of appeals, the district court referred the case to a magistrate judge who denied petitioner's requests for discovery and an evidentiary hearing. App. 70. The magistrate issued a report recommending denial of relief. App. 72; *see* App. 60 (concluding: "On this record, it is clear that Ochoa has not established that Perez' representation of Bergonzoli in Colombia created a conflict of interest that adversely affected his performance as Ochoa's

lawyer."). The district court adopted the magistrate's report and denied relief. App. 32 (concluding: "[E]ven if Ochoa could demonstrate inconsistent interests, there is no evidence that he was adversely affected by Perez's representation of Bergonzoli. ... Ochoa does not explain how Perez might have obtained a more favorable plea agreement on his behalf. In fact, this argument is undercut by the evidence that Ochoa's other lawyers also tried to negotiate a plea agreement, yet Ochoa would not agree to one.").

The Eleventh Circuit again granted a certificate of appealability. App. 6 ("We granted a certificate of appealability limited to the issue of '[w]hether the district court erred in denying under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), without an evidentiary hearing and without allowing discovery, [petitioner]'s claim that his attorney failed to pursue a legitimate plea agreement due to a conflict of interest.'").

Petitioner argued on appeal that Perez's months-long plea representation created an impediment to obtaining an acceptable plea offer in the period before the government obtained cooperating witnesses and that under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), an evidentiary hearing was necessary to determine whether the action of any other attorney somehow cured the adverse effect.

In affirming the district court's denial of the § 2255 motion, the Eleventh Circuit assumed the truth of petitioner's allegations of an extortion plot against him by his own attorney, but found that the presence of other attorneys hired by petitioner meant that petitioner could not prove at an evidentiary hearing

that the extorting attorney's actions adversely affected petitioner's ability to reach an acceptable plea agreement. App. 9 ("Even assuming a conflict of interest existed, Ochoa's claim ultimately fails because he does not sufficiently allege that the [conflict] adversely affected his [representation.] ... Other attorneys represented Ochoa during and after Perez represented him, so it is not enough to allege that Perez alone operated under a conflict of interest. Because the record establishes that Ochoa was represented by other attorneys who Ochoa does not allege were conflicted, the district court did not err by denying Ochoa's motion.").

REASONS FOR GRANTING THE WRIT

This Court should grant the petition because the issues—concerning the need for an evidentiary hearing to address an egregious conflict of interest undermining the integrity of the plea process and the government's suppression of significant material facts, including the delusional ideation of its chief witness and his carefully-crafted perjury—present opportunities for the Court to offer important guideposts to courts facing misconduct by both defense and government counsel and to preserve the integrity of the criminal justice system.

I. The Court should grant the petition because the decision below was wrong on the conflict-of-interest question and conflicts with decisions of other Circuits.

The decision below is at odds with the reasoned decisions of other Circuits confronting the issue of a

representation team of which one member is compromised by a conflict of interest. Contrary to the view of the Eleventh Circuit—the only Circuit to have adopted a categorical rule that the presence of non-conflicted counsel defeats any claim of adverse effect of the conflicted attorney's representation—the other Circuits that have considered whether the presence of non-conflicted counsel cures or obviates any *Cuyler* adverse effect have resolved the issue on the basis of an evidentiary hearing to determine the specific facts of the various actions taken by multiple attorneys before determining that any adverse effect of one attorney was overcome by the supervening representation of another attorney. *See United States v. Logan*, 910 F.3d 864, 870 (6th Cir. 2018); *United States v. Stoia*, 109 F.3d 392, 398 (7th Cir. 1997).

In *Stoia*, the Seventh Circuit affirmed denial of *Cuyler* relief based on factfinding by the district court following an evidentiary hearing on the § 2255 motion. In *Stoia*, the district court, *after* conducting an evidentiary hearing, found the actions of a *fourth* trial lawyer added to a trial counsel team late in the case did not cause any lapse in trial representation. 109 F.3d at 397 ("An 'adverse effect' occurs when a lawyer's actual conflict of interest causes a 'lapse in representation contrary to the defendant's interests.'") (quoting *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994); *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985)). Importantly, where conflicted counsel in *Stoia* had failed to perform the tasks he agreed to work on, his failure was *not* the result of the conflict—unlike Perez. *See id*. at 397 (counsel's "failure to prepare his

... motions could not have resulted from his" conflict of interest). And in *Stoia*, lead counsel testified at the evidentiary hearing that conflicted counsel's actions had no effect on the case, showing that an evidentiary hearing can ultimately benefit the government while revealing the truth. *Id*.

In *Logan*, although the Sixth Circuit excoriated the conflicted counsel for failing to honor a subpoena to appear at the § 2255 evidentiary hearing, 910 F.3d at 869 n. 1, the Sixth Circuit relied on the district court's factfinding from that hearing to conclude that a non-conflicted attorney timely and "adequately assisted Logan at the plea-bargain stage," thus obviating any effect from conflicted counsel's "subsequent, contradictory advice." *Id*. at 870. *Logan* shows that the mere existence of lawyers on a would-be team is not what matters in analyzing plea representation effectiveness; instead, if the record, after a hearing, shows that in the crucial window for reaching a plea agreement, the only advice the defendant receives about a plea is bad advice as the adverse result of a conflict of interest, the *Cuyler* test is satisfied. In petitioner's case, petitioner first met with Quiñon only after Perez had left the case; there was no record basis for finding, as in *Logan*, supervening good advice during the crucial window for obtaining a favorable plea offer. *See also United States v. Gambino*, 864 F.2d 1064, 1071 (3d Cir. 1988) (on direct appeal challenging counsel's conflict of interest, Third Circuit resolves issue of actual conflict by relying on district court credibility findings following evidentiary hearing on conflict issue, where district court found no impact of

the conflict after "listening to [counsel']s testimony and observing his demeanor at the hearing"); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993) (basing determination of absence of adverse effect on fact that after an evidentiary hearing, habeas "court found credible trial counsel's testimony" refuting allegation that trial decisions were affected by conflict).

Unlike the fact-based, hearing-tested analysis used by other Circuits to address curing conflicted counsel's role by relying on the supervening adequacy of a non-conflicted attorney, the categorical rule announced by the Eleventh Circuit in petitioner's case so waters down the requisite adverse effect analysis of *Cuyler* as to render it of no meaning if any other lawyer is in the case when the conflicted lawyer deprives the defendant of a timely opportunity for a favorable plea bargain.

The governing statute, 28 U.S.C. § 2255, states that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." The Rules Governing § 2255 Proceedings make clear that this language is intended to incorporate the standards governing evidentiary hearings in habeas corpus cases articulated by this Court in *Townsend v. Sain*, 372 U.S. 293, 312 (1963). *See* Advisory Committee Notes to Rule 8, Rules Governing § 2255 Proceedings (incorporating Advisory Committee Notes to Rule 8 of the Rules Governing § 2254 Cases).

In *Townsend*, the Court held that the district court must hold an evidentiary hearing (1) if the prisoner

alleges facts that, if true, would entitle her to relief; and (2) the relevant facts have not yet been reliably found after a full and fair hearing. 372 U.S. at 312–13.

Because the precedential decision by the Eleventh Circuit in petitioner's case creates a circuit conflict on the fundamental statutory right to a fact-based determination of conflict-of-interest claims raised in a § 2255 motion, the petition should be granted. The Court should grant the petition to again require courts to follow § 2255's directive to conduct an evidentiary hearing on issues of disputed fact, including where questions concerning the impact of constitutional violations turn on the specific facts of multiple-counsel representation.

II. The Court should grant the petition to afford petitioner a certificate of appealability on the need for a hearing on *Brady*/*Giglio* claims supported by the record.

The Court should also grant certiorari to reverse the Eleventh Circuit's denial of a certificate of appealability on the question of whether an evidentiary hearing on petitioner's *Brady*/*Giglio* claims was erroneously denied. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973) (relying upon § 2255's language to reverse summary dismissal and remand for a hearing because the record of the case did not "'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255").

Defendants must be "'acquitted or convicted on the basis of all the evidence which exposes the truth.'"

United States v. Leon, 468 U.S. 897, 900–01 (1984) (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)). "'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Brady*, 373 U.S. at 87). The "rule stated in *Brady* applies to evidence undermining witness credibility." *Id.* (citing *Giglio*, 405 U.S. at 153–54). "Evidence qualifies as material when there is 'any reasonable likelihood'" it could have "'affected the judgment of the jury.'" *Wearry*, 577 U.S. at 392 (quoting *Giglio*, 405 U.S. at 154, and *Napue v. Illinois*, 360 U.S. 264, 271 (1959) (prosecution's knowing presentation of false testimony violates due process)). Trial error does not require that the undisclosed evidence actually affected the verdict. *Id.* & n.6.

In *Wearry*, the Court found withheld impeaching evidence sufficiently important to warrant a new trial even though the evidence related to only one of the prosecution's witnesses and even though the witness's "credibility [was] already impugned by his many inconsistent stories," because that lack of credibility "would have been further diminished had the jury learned" of the suppressed facts, including that the witness "may have implicated Wearry to settle a personal score." *Id.* at 393.

In *Mesarosh v. United States*, 352 U.S. 1 (1956), involving another Miami investigation in which the perjury and delusions of the witness called into question the reliability of the prosecution, the Court

recognized that where a key witness's delusions relating to the subject matter of the case come to light, a hearing on the matter is the minimal relief that should be afforded. *Id.* at 13–14 (relief was required "even though the judge might believe that Mazzei's bizarre testimony in 1956 concerning plans for the assassination of other officials, the destruction of bridges, training in sabotage and handling arms, and the poisoning of water in reservoirs, all to destroy the Government of the United States, was the product of a mental or emotional condition that had developed only after the time of this trial").

Evidence of Bernal's delusions about petitioner was known to and suppressed by the government until years after trial. The similarities between Bernal's 9/11 delusions regarding petitioner and the terrorism delusions of the chief witness in *Mesarosh* are telling.

The evidence of *Brady* violations and suppression of the key witness's delusional thinking, that he used to self-justify committing perjury to prejudice petitioner, was supported by multiple affidavits and other assertions made both privately in communications with the government and counsel and direct submissions to the district court, by government investigative reports, and by direct admissions by counsel for the government. Bernal—the linchpin to the government's case—fits exactly the mold addressed in *Mesarosh* in that the perjury and delusions of the witness call into question the reliability of the prosecution.

Perhaps most importantly, the government never submitted a single affidavit or even factual proffer in opposition to what Bernal admitted and documents

corroborated concerning his delusional state and false statements at trial inculpating petitioner. In that context, denial of any discovery or hearing presents a substantial issue for appeal. *See also Wearry*, 577 U.S. at 394 (habeas "court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively" and "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not") (citing *Kyles v. Whitley*, 514 U.S. 419, 441 (1995) (requiring a "cumulative evaluation" of the materiality of wrongfully withheld evidence)).

A certificate of appealability must issue upon a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and the standard for issuance is met when "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation omitted). When a certificate is sought on procedural grounds, it must issue when "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." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

Courts must resolve doubts about whether to permit an appeal in favor of the movant, and may consider the severity of the penalty in making the decision. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997). Petitioner clearly met the governing standard.

Petitioner's case warrants at a minimum appellate review, where the government offered no merits response as to the perjury, no explanatory affidavits from the prosecutors or agents, and no reasoned explanation for fooling the grand jury into indicting petitioner on a false premise.

In *Mesarosh*, the Court unanimously recognized that the government's concession of the need for an evidentiary hearing on the matter was well founded, although the Court determined, over the dissenting opinions of Justices Frankfurter and Harlan, that the need for relief from the conviction was shown even absent a hearing. 352 U.S. at 13–14 (relief was required "even though the judge might believe that Mazzei's bizarre testimony in 1956 concerning plans for the assassination of other officials, the destruction of bridges, training in sabotage and handling arms, and the poisoning of water in reservoirs, all to destroy the Government of the United States, was the product of a mental or emotional condition that had developed only after the time of this trial"); *id.* at 15 (Harlan, J., dissenting) (concluding the case should be remanded for an evidentiary hearing, as was conceded by the Solicitor General); *Mesarosh v. United States*, 352 U.S. 808, 811 (1956) (Frankfurter, J.) (mem. op.) (same; "This Court should not even hypothetically assume the trustworthiness of the evidence in order to pass on other issues.").

Evidence of Bernal's delusions about petitioner existed and was intentionally suppressed by the government, and the witness was instructed not to reveal anything about it. The similarities between Bernal's delusions regarding petitioner and the events of 9/11 and the terrorism delusions of the chief witness

in *Mesarosh* are remarkable, with the difference here being the government's direct involvement in suppressing, for years, the damaging information. The government's belated argument that Bernal became delusional only after petitioner's conviction cannot support denial of a certificate of appealability.

On the extraordinary record of this case, denying a certificate of appealability to consider the district court's denial of an evidentiary hearing warrants granting the petition.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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February 2023