No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID CALHOUN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

(REDACTED VERSION)

David Calhoun, Register #59771-066
(Your Name)

FSL Elkton, P. O. Box 10
(Address)

Lisbon, OH 44432
(City, State, Zip Code)

(Phone Number)

PUBLIC COPY - SEALED MATERIALS REDACTED

QUESTION(S) PRESENTED

I. Could jurists of reason debate the district court's resolution, or conclude the issue presented is adequate to deserve encouragement to proceed further, with respect to the denial of Petitioner's Fifth Amendment right to due process where the district court found the government committed multiple breaches of but had found the errors harmless under the standard set forth in Kotteakos v. United States, 328 U.S. 750 (1946)?

Suggested Answer: Yes.

II. Is a Sixth Amendment claim of denial of counsel of choice subject to procedural default where the trial court fails to hold a hearing on the issue prior to the denial?

Suggested Answer: No.

III. Where the Court of Appeals conceded that the record was not developed as to the reason why the trial court denied Petitioner his right to his chosen counsel, was it error for said Court of Appeals to find that Petitioner procedurally defaulted his Sixth Amendment claim of denial of counsel of choice?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Calhoun, Case No. 06-3794, U.S. Court of Appeals for the Third Circuit. Opinion at 276 Fed. Appx. 114 (3rd Cir. 2008). Judgment entered May 1, 2008.

United States v. Calhoun, Case No. 13-1901, U.S. Court of Appeals for the Third Circuit. Opinion at 600 Fed. Appx. 842 (3rd Cir. 2015). Judgment entered January 29, 2015.

In re: David Calhoun, Case No. 20-1088, U.S. Court of Appeals for the Third Circuit. Opinion unpublished. Judgment entered April 6, 2020.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished. And, a copy of the order from said United States Court of appeals denying expansion of COA appears at Appendix B to the petition;

The opinion of the United States district court appears at Appendix D to the petition and the associated Order appears at Appendix C and

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished. And, a copy of said District Court's Order denying Petitioner's Motion to Alter Judgment Under Fed. R. Civ. Proc. 59(e) appears at Appendix E.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was November 30, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in service in time of war or public danger; nor shall any person be subject to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. 5.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall be 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 defence.

U.S. Const., Amend. 6.

Other provisions of law involved in this petition include:

28 U.S.C. § 2253;

28 U.S.C. § 2255; and,

Federal Rules of Criminal Procedure 16.

Pursuant to Rule 14.1(f) of the Supreme Court of the United States, the pertinent text of said provisions are set out in an appendix hereto. See Appx. G.

STATEMENT OF THE CASE

The instant petition arose from proceedings under 28 U.S.C. § 2255 where Petitioner collaterally attacks his criminal conviction out of the United States District Court for the Eastern District of Pennsylvania. In denying relief, said district court had granted certificate of appealability (COA) for just one of Petitioner's claims—i.e., that the trial court had erroneously denied him his counsel of choice in violation of the Sixth Amendment of the United States Constitution.

On appeal to the United States Court of Appeals for the Third Circuit, Petitioner moved to expand the scope of certificate of appealability by considering two additional claims that had been presented in his § 2255 petition. Said appellate court denied Petitioner's application to expand the scope of COA.

Subsequently, said appellate court eventually affirmed the District Court's denial of relief on grounds that Petitioner had procedurally defaulted his counsel-of-choice claim. Both judgments (i.e., denial of expansion of scope of COA and affirmation of denial of habeas relief) are subject of the claims in this instant petition.

BACKGROUND

On June 29, 2005, a grand jury sitting in the Eastern District of Pennsylvania indicted Petitioner and seven co-defendants on multiple counts in violation of federal drug laws. Petitioner was charged as to two counts: Count One (conspiracy to distribute five kilograms of cocaine in violation of 21 U.S.C. § 841(b)(1)(A))

and Count Thirteen (possession of 500 grams of cocaine in violation of 21 U.S.C. § 841(b)(1)(A)). Appx. F, pp. 1-11, 23.

Petitioner has included at Appendix H a copy of his opening brief filed by habeas counsel in the court of appeals below primarily for the purpose of demonstrating that certain arguments had been raised that were not addressed in the opinion issued by the court of appeals. Herein, Petitioner provides a summary of the most relevant procedural history of the case; but, should this Court be inclined to explore a more detailed description thereof, it may examine the Statement of the Case section of said document. See Appx. H, pp. 2-8 (brief pagination).

Prior to to being indicted, Petitioner had retained Nino Tinari, Esq. to represent him and, just after the indictment issued, Mr. Tinari entered his notice of appearance on Petitioner's behalf. At some point prior to trial, Mr. Tinari had submitted to the trial court a Rule to Show Cause as to why he should not be permitted to withdraw as counsel. Said document was never filed on the District Court's docket. Without holding a hearing or otherwise affording Petitioner an opportunity to respond to the Rule to Show Cause, the trial court issued an order granting Mr. Tinari's withdrawal.

Two days later, the trial court appointed substitute counsel, William Cannon, Esq., to represent Petitioner. Trial commenced on April 17 and ended on April 20, 2006. The jury found Petitioner guilty as to both counts for which he was charged.

On August 11, 2006, the District Court sentenced Petitioner to 240 months incarceration followed by 10 years supervised release.

On direct appeal, the United States Court of Appeals for the Third Circuit affirmed Petitioner's conviction and sentence. See United States v. Calhoun, 276 Fed. Appx. 114 (3rd Cir. 2008).

On March 9, 2010, Petitioner filed a timely Motion to Vacate his conviction pursuant to 28 U.S.C. § 2255 raising 19 claims for relief.

On October 3, 2012, after appointing counsel to represent Petitioner in the habeas proceedings, the District Court held the first hearing of said proceedings, but had limited the scope of said hearing to address only one of Petitioner's claims of ineffective assistance of counsel. At said hearing, the District Court, anticipating the need for additional hearings based upon habeas counsel's Motion for Partial Reconsideration, expanded its scope of habeas review.

Discovery ensued thereafter, whereupon the Government provided habeas counsel a copy of

appearing in the last two pages of Appendix I.

On February 28, 2013, the District Court granted Petitioner a new trial based solely upon one of his ineffective-assistance-counsel claims and consequently determined all other claims moot.

The Government appealed the order granting a new trial and the United States Court of Appeals for the Third Circuit overturned said order. See United States v. Calhoun, 600 Fed. Appx. 842 (3rd Cir. 2015). Said court remanded the matter for consideration of Petitioner's previously mooted claims. Id., at 847.

Shortly thereafter, the District Court ordered Petitioner's bail revoked sans hearing (having been released on his own recognizance throughout the majority of the Government's appeal).

On January 6, 2017, the District Court held another hearing with respect to the remaining claims that were previously mooted due to the grant of a new trial. One of the issues addressed at said hearing concerned the aforementioned

provided by the Government as part of discovery for the habeas proceedings. At said hearing, the District Court had specifically asked the Government whether, pursuant to a provision set forth in , Petitioner had overt acts occurring after January 11, 2005

. The dialog between the Court and the Assistant United States Attorney (AUSA) assigned to the case follows:

> THE COURT: Can you tell me when exactly the into effect?
> [AUSA]: January 11.
> THE COURT: January 11th of 2005?
> [AUSA]: Correct.
> THE COURT: So any act after that ... ?
> [AUSA]: Correct. [...]

Tr. 1/6/17, pp. 67-68; Appx. L, at 67-68.

The Government's only defense to the claim that Petitioner was wrongfully charged with overt acts occurring after January 11, 2005 as charged in the conspiracy in Count One was that Petitioner acts charged where persons other than him are named in the acts. Id., at 68-69.

Shortly after said hearing, Petitioner filed to the District Court a request pro se to expand the record based upon what he perceived to be deficiencies in habeas counsel's performance at said hearing. Said filing prompted the District Court to hold another hearing on March 2, 2017.

One of the issues addressed at said hearing was Petitioner's request to set the matter straight as to whether either of his defense counsel received a copy of To this point, the District Court asked the Government's position, whereupon the Government submitted a stipulation that neither pre-trial counsel nor trial counsel could have received a copy of

> [AUSA]: ... I would state it this way. I [first] got access to] during the course of the 2255 proceedings by going to the DEA and they opened [] a separate file that they maintained.
> [...] I have no reason to believe that [pre-trial prosecutor for the Governemnt] obtained that file[] or turned over those document. So, based on the available evidence, I agree that the Court should find that it was not turned over.

Tr. 3/2/2017, p. 6; Appx. M, at 6. The District Court then admitted into evidence as "Court Exhibit 1" (prompted in part by Petitioner's complaint that habeas counsel had failed to admit said document into evidence at the prior hearing) and acknowledged the Government's stipulation that "the prosection [] never provided] to either trial counsel or prior counsel, Mr. Tinari or [...] Mr.Cannon." Id., at 7. Notably, the District Court had stated "and that should satisfy any confusion on the issues relating to]." Id., at 6.

Another problem that Petitioner attempted to address at said hearing was his complaint that "there was no foundation laid for the admission of]." Id., at 29-30. The District Court apparently thought that such a complaint was pointless on grounds that was "in the record." Id. at 30. Yet, the record is bereft of any testimony as to who had or as to the context of its

On March 20, 2019, the District Court denied all remaining claims in Petitioner's § 2255 Motion, but granted Certificate of Appealability as to his claim for denial of counsel of choice. Appx. C. Said court also issued an opinion accompanying said order. Appx. D.

The District Court's opinion did acknowledge multiple violations of on the part of the Government. As to the Government's violation with respect to the charging of Petitioner, the District Court correctly states:

> Beginning with the indictment, Petitioner and his [] co-conpirators were all charged with conspiracy, and the February 3[2005] cocaine seizure was included among the overt acts of the conspiracy, which not only occurred after the conspiracy, but also was on that date. This was a violation of .

Appx. D, at 27.

The District Court also correctly acknowledged at least two other overt acts—i.e., the January 14, 2005 seizure of cocaine and the January 26, 2005 sale of cocaine— are "significant" in that both appear and that "[w]ithout them, the quantity of cocaine that can be attributed to the conspiracy falls well below five kilograms" that trigger the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). Id., at 25.

The District Court also acknowledged trial testimony and the Government's closing arguments that attributed to Petitioner and stated:

> Each of these references to Petitioner's February 2005 involvement in the conspiracy , since in the conspiracy at that point was in .

Id., at 29.

Despite charging Petitioner with innocent conduct and and submitting to the jury testimony and argument to attribute said conduct to Petitioner at trial, the District Court denied Petitioner relief stating:

> Because the jury was made aware of the risk that played a role in Petitioner's conviction was minimal, and the Court must conclude that the Governemnt's breaches of were harmless.

Id., at 30. This was found despite the fact the jury had never been instructed as to what constitues sufficient to acquit.

Furthermore, contrary to the District Court's prior effort to "satisfy any confusion" with respect to whether defense counsel had received a copy of back at the March 2, 2017 habeas hearing, the District Court's opinion erroneously noted that "It appears that his retained counsel, Tinari, had copy of , but that no copy was ever provided to Cannon." Id., at 31, n. 114. Given the Government's prior stipulation otherwise, it is not discernable whether this error on the part of the District Court had played a role in its analysis.

Notably, the District Court also inaccurately describes the testimony of DEA Agent Hodnett as "describing execution of ." Id., at 30, n. 111. Agent Hodnett had never testified to the existence of and the referenced testimony was so devoid of legal implications in this regard that even the prosecutor never bothered to investigate or follow-up in any way on the subject until prompted by detailed discovery requests under his own admission that occurred "during the course of the 2255 proceedings." Appx. M, at 6.

With respect to Petitioner's claim that the trial court had denied him his right to counsel of choice, the District Court conducted a fairly thorough assessment of the circumstances and concluded:

> In short, the record strongly suggests the Petitioner was denied his counsel of choice, and there appear to be no countervailing justifications to support the decision to permit retained oucnsel to withdraw. This violation of Petitioner's Sixth Amendment rights, if timely asserted, would rise to the level of structural error and warrant reversal of Petitioner's conviction.

Appx. D, at 12. Nevertheless, said court denied relief on grounds that Petitioner had procedurally defaulted the claim where substitute counsel failed to raise the issue. Id., at 12-17. Yet, the District Court granted Certificate of Appealability because reasonable jurists could disagree "and conclude that the nature of [substitute counsel's] appointment left Petitioner with no real opportunity to raise his counsel-of-choice claim until the present proceedings." Id., at 17.

Petitioner thereafter filed a timely Motion to Alter Judgment pursuant to Federal Rules of Civil Procedure 59(e). Therein, Petitioner had reminded the District Court he had raised the argument that the aforementioned due-process/ claim was subject to analysis under Santobello v. New York, 404 U.S. 257 (1971), but the court's March 20, 2019 opinion never addressed this point. On September 24, 2019, the District Court denied said motion, inter alia, holding that Petitioner was precluded from such a claim on grounds that the case of Puckett v. United States, 556 U.S. 129 (2009) had "explained that Santobello's holding requiring reversal when Government only applies when the contemporaneous objection rule is followed." Appx. E, at 3.

On October 4, 2019, Petitioner filed a timely Notice of Appeal with respect to the District Court's order denying the § 2255 Motion and the order denying the Rule 59(e) motion.

The United States Court of Appeals for the Third Circuit assigned to said appeal Case No. 19-3310. On December 19, 2019, Petitioner filed under seal his Application to Expand the Scope of Certificate of Appealability. Said application appears at Appendix I for the sole purpose of verifying to this Court that the issue presented therein is properly raised before this Court.

On December 9, 2020, the Court of Appeals denied said application to expand the scope of COA. Appx. B.

Within days of said order, Petitioner, who had been incarcerated at the same prison since 2015, was transferred by the Federal Bureau of Prisons for no apparent reason. As said transfer necessitated separating Petitioner from all of his legal materials, he then moved for an extension of time to file his opening brief. The clerk for said Court of Appeals granted Petitioner's extension; but ordered that no further extensions were permitted.

As Petitioner was stuck in transit with no ability to access legal materials for months, he resorted to filing a Motion for Appointment of Counsel. On April 2, 2021, the Court of Appeals granted said motion.

On March 31, 2022, habeas counsel filed an opening brief and said document appears at Appendix H.

On November 30, 2022, said Court of Appeals issued an opinion affirming the District Court's denial of § 2255 Motion.

The instant petition followed.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

If there was ever a formula for convicting the innocent in federal courts today the instant case can well serve as a paragon for such a repugnant device. According to the District Court's findings, the Government had charged Petitioner for acts it knew he could not be legally held responsible (because he was actually innocent). Indeed, the Government has conceded Petitioner's innocence for all overt acts charged to him in the conspiracy in Count One of the indictment occurring

But, the charging of innocent conduct is only the first step to achieving a wrongful conviction. This is so because there are protections within the United States Constitution and those protections would have to be cast aside somehow in order for the formula to succeed. Thus, when Petitioner's retained counsel submitted a Rule to Show Cause as to why he should remain as Petitioner's attorney, without notice to respond nor otherwise affording Petitioner an opportunity to contest the loss of his counsel of choice, the District Court issued an order permitting counsel to withdraw. As this Court has previously acknowledged, the right to counsel of choice is the root meaning of the right to counsel as guaranteed by the Sixth Amendment.

The penultimate step in the formula for convicting the innocent is the Government's suppression of evidence so favorable that, had it been provided to the defense prior to trial, it would have been unassailable grounds for a motion to dismiss the indict-

ment. Just such a due process violation occurred in the instant matter.

The final step in assuring the conviction of an innocent person is what occurs when the accused lauches a collateral attack upon the conviction and raises claims associated with the aforementioned constitutional infirmities. The courts that are in place to safeguard against such infirmities would have to devise standards that contravene both their own precedent and that of this Court in order to assure that no relief can be had for the hapless accused. Again, this is precisely what transpired in the courts below.

With respect to this final phase of judicially-fashioned obstruction to stare decisis, this Court may consider whether the fairness, integrity, and public reputation of the proceedings will be preserved absent correction. Where the courts below permitted the Government to charge Petitioner with

and said charging was further tainted in that it was done in in which Petitioner , this is but one factor. The Government then failed to disclose to Petitioner's defense counsel ; but, according to the courts below, said suppression placed the Government in a more favorable position because said courts held Petitioner to a more onerous standard than he would have been entitled to had been disclosed prior to trial. Couple this with the fact that the trial court had never placed on record its reasons for permitting Petitioner's retained counsel to withdraw and the result is the failure of safeguard for the constitution

errors result in constitutional infirmities of the highest magnitude.

Should this Court be inclined to exercise its discretion to take this matter up for review, Petitioner presents the following three arguments for consideration. Each of the claims relating to the aforementioned errors highly suggest that the decisions below impugn the fairness, integrity, and public reputation of the proceedings as to warrant correction.

ARGUMENT

I. JURISTS OF REASON COULD DEBATE THE DISTRICT COURT'S RESOLUTION, OR CONCLUDE THE ISSUE PRESENTED IS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER, WITH RESPECT TO THE DENIAL OF PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WHERE THE DISTRICT COURT FOUND THE GOVERNMENT COMMITTED MULTIPLE

BUT HAD FOUND THE ERRORS TO BE HARMLESS UNDER THE STANDARD SET FORTH IN KOTTEAKOS V. UNITED STATES, 328 U.S. 750 (1946).

The Government conceded that it failed to disclose the existence of to Petitioner's defense counsel. The Government also conceded that Petitioner had, pursuant to

The District Court agreed with Petitioner that the Government upon both charging him in the conspiracy in Count One of the indictment with acts occurring and upon presenting testimony at trial as to Petitioner's involvement in the conspiracy

Nevertheless, the District Court applied what equates to the harmless-error test of Kotteakos v. United States, 328 U.S.

750 (1946) and found to be harmless.

In multiple aspects of the District Court's reasoning with respect to said claim, the District Court contravened the precedent of its own circuit as well as precedent of this Court. The District Court's opinion is also in tension with precedent from other circuits. Each aspect that is contrary to these precedents, in turn, support the position that jurists of reason would debate the District Court's resolution of the claim. To hold otherwise would be the equivalent to suggesting that decisions from other federal courts are pronounced by unreasonable jurists. As a result, Petitioner is entitled to have a Certificate of Appealability issue with respect to his underlying claim.

A. The Government's failure to disclose material to preparing a defense.

Although the District Court cast Petitioner's claim as constituting "a Brady violation," see Appx. D, at 31, Petitioner never mentions Brady in his amended § 2255 Motion. Rather, his claim is simply described as prosecutorial misconduct for failure to disclose to defense counsel appears in the last two pages at Appendix I. Indeed, the Government has entered into the record a stipulation that was not turned over to either of Petitioner's defense counsels. See Appx. M, at 6. But, the problem with casting the claim strictly as a Brady violation is problematic here because the standard set forth in Brady v. Maryland, 373 U.S. 83 (1963) is one of evidence that was unavailable to the defense for purposes of presentment to the jury, whereas materiality

with respect to preparing a defense lies in its potency as the focal point in a pre-trial motion to dismiss the indictment or as a means to equitably estop the Government's introduction at trial of evidence or testimony immunized under the . Hence, the Government's failure to disclose violates Federal Rules of Criminal Procedure 16 and, in turn, the due process clause of the Fifth Amendment. This point was apparently lost on the courts below.

Part of the confusion arose upon Petitioner's reply to the Government's claim that Petitioner himself "was obviously of ." See Appx. D, at 31. The only analogous case from the Third Circuit to refute such an assertion by the Government is Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 291-92 (3rd Cir. 2016) (en banc)(holding that the proper inquiry is not one of due diligence by the defense, but "whether the government has unfairly 'suppressed' the evidence in question in derogation of its duty of disclosure"). The District Court agreed with Petitioner that said standard applies in the instant matter, but apparently restricted its entire analysis thereafter to the standard in Brady on grounds the Dennis case involved a Brady violation. Appx. D, at 31.

The distinction above is emphasized for the additional purpose of identifying to this Court that, should this Court exercise its discretion to review this issue, it would not be deciding the circuit split identified by the Dennis court pertaining to the role that due diligence plays with respect to a Brady claim.

B.

and

relevant part:

Appx. I, second-to-last page.

The District Court held that assured at least the following:

> Petitioner was , but not for any , or any

Appx. D, at 24. However, although the District Court states the provisions assurances with respect to the it did not explore whether the disjunction carried any additional . Petitioner urges that the concept within the term therein is sufficiently broad enough to include against evidence of being presented to either a grand jury or petit jury. This additional is significant on account that, prior to the hearings where the details of were addressed, the manner by which the courts had previously decided other claims within Petitioner's § 2255 Motion is now called into question in light of . This point will be expanded upon later in this petition.

The Government has conceded that Petitioner . See Appx. L, at 67-68.

C. The Government occurring in the charging process.

As correctly found by the District Court, the Government violated upon inclusion in the indictment in the conspiracy at Count One "the February 3, 2005 seizure of two kilograms of cocaine —

." Appx. D, at 27, see also Appx. F, at 11.

Yet, the District Court left open the question as to whether other acts constituted a violation of the CSA, stating:

> In addition, the indictment listed the January 14 and January 26, 2005 cocaine transactions as overt acts in furtherance of the conspiracy, which, as previously discussed, occurred . While these transactions, strictly speaking, may not have been , it was nevertheless error for the Government to charge Petitioner with transactions that it knew occurred

Appx. D, at 28, see also Appx. F, at 10-11. Apparently, the District Court had a very narrow interpretation of the term "

" as that is used in the aforementioed

With a little introspection, it becomes clearer that Petitioner was in fact —

The concept of persistence that typically defines a conspiracy has been expressed by this Court in a prior decision:

> Since a conspiracy is a continuing offense, [] a defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence, [] and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot.

Smith v. United States, 568 U.S. 106, 111 (2013). Even though

In this regard,

from this perspective, all overt acts

. Cf. United States v. Moscalaidis, 868 F.2d 1357, 1361 (3rd Cir. 1989) ("the government cannot resort to a rigidly literal approach to the construction of language"). Thus, the District Court's failure to apply such introspection inhibited any finding that

The District Court declined to find error at the Grand Jury stage, but a reasonable jurist could debate the point. The Government purported to have provided the only minutes of Grand Jury testimony and the two days of testimony appear at Appendix J and K herein. It should be noted that nowhere in these transcripts does there appear any testimony pertaining to the seizure of cocaine on February 3, 2005. Yet, this begs the question as to how the Grand Jury was able to charge two of Petitioner's co-defendants with the substantive charge of possession in Count 17. See Appx. F, at 27. The following dialog is revealing:

MS. MANN: Does anyone have any questions right now for Agent Mueller?

THE JUROR: I do have one question. It's probably I am just curious.
On the Overt Acts for the conspiracy count on page eight, the December 13th sale, No. 14, that doesn't seem to be connected to any further counts in this indictment, and I am wondering why it -- I mean it's just my curiosity why wasn't there a count for possession?

MS. MANN: I'll refer the count to the agent.
BY MS. MANN:
Q. Agent, are you looking at paragraph fourteen on page eight?

[Agent Mueller:] Yes.

Q. Was that overt act based on an intercepted phone call?

A. Yes, it was.

Q. So there was no kilogram seized?

A. There was no kilogram seized based on the intercepted phone call.

Q. And that's based on Agent Hodnett and the other agent's training and experience?

A. That's correct.

Appx. K, at 22-23.

It is clear from the juror's question that the members of the Grand Jury has a copy of the indictment on hand. A review of the entire Grand Jury transcripts reveals that at no time was the Grand Jury ever instructed not to consider the indictment as evidence. With no other reference to the events of February 3, 2005 before them other than what appears in the indictment, the only way for the Grand Jury to have found probable cause to indict as to the substantive charge in Count 17 was to extrapolate from Agent Mueller's testimony that all substantive counts (including Count 17) were occasions where the agents had actually seized the cocaine alleged. Although the Grand Jury was not specifically

presented with testimony as to said count, it was presented with contextual information that permitted the Grand Jury to infer that not only was there cocaine seized on said occasion but said transaction was part and parcel to the continuing conspiracy. And, based upon Petitioner's earlier contention herein, that

should be construed to afford

such presentation before the Grand Jury on grounds that the activity described in Count 17 and its corresponding overt act within the conspiracy count was in fact

. In short, the Government's contextual presentation with reference to

By extension of the introspective reading regarding

, The presentation to the Grand Jury of testimony pertaining to the overt acts of January 14 and January 26, 2005, see Appx. K, at 9-10 and Appx. J, at 14, respectively, these presentments also

The District Court applied the wrong standard to the resolution of the errors occurring before the Grand Jury. The error appears in a footnote:

> Estevez [a co-defendant who testified on behalf of the Government] confirmed [the drug quantity] at trial, meaning that any error in the grand jury's determination was rendered harmless by the jury's later guilty verdict. See United States v. Mechanik, 475 U.S. 66, 70 (1986)("[T]he petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendant's were guilty as charged, but also that they were in fact guilty as charged beyond a reasonable doubt.").

Appx. D, at 27, n. 102.

The District Court's reliance on Mechanik is misplaced. The distinction was noted in Third Circuit precedent:

> The grand jury abuses in the present case ... are different from the violation that was at issue in Mechanik, which at worst, was technical, and, at most, could have affected only the grand jury's determination of probable cause. ... The case before us raises the question of whether the government violated the defendant's right to fundatmental fairness. ... A petit jury determination of guilt will not moot these issues because they go beyond the question of whether the grand jury had sufficient evidence upon which to return the indictment, and implicate issues that go to the fundamental fairness of the criminal proceedings.

United States v. Johns, 858 F.2d 154, 159 (3rd Cir. 1988).

The Third Circuit eventually adopted the substantial influence test set forth in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) for non-technical forms of prosecutorial misconduct:

> To find prejudice, the district court must establish that "the violation substantially influenced the grand jury's decision to indict, or ... there is grave doubt that the decision to indict was free from substantial influence of such violations."

United States v. Soberon, 929 F.2d 935, 939 (3rd Cir. 1991) (quoting Nova Scotia, 487 U.S. at 256).

Reasonable jurists could debate the District Court's failure to apply said substantial influence test. The District Court's acknowledgement that, without the transactions of January 14, January 26, and February 3, 2005, "the quantity of cocaine falls well below [the] five kilograms" necessary to trigger the statutory mandatory minimum sentence that Petitioner received. Appx. D, at 25. Although the grand jury may have indicted with respect to a conspiracy charge, it was indeed substantially influenced by said to charge the enhanced statutory penalties.

Thus, a reasonable jurist could find "grave doubt" that the Grand Jury's decision to indict as to the drug quantity was hardly free from the substantial influence of the aforementioned

with respect to the charging by and the presentment to the Grand Jury.

It should also be noted that, despite Petitioner's urging, the District Court declined to conduct any analysis as to whether the doctrine of applied to these Grand Jury proceedings or the indictment itself.

D. The Government's multiple at trial.

Petitioner did not proceed to trial alone. Pedro Risquet was the only other co-defendant who invoked his right to a trial by jury. As Risquet was charged both in the conspiracy in Count One and the possession charge in Count 17, this necessitated testimony and evidence presented at trial with respect to the seizure of cocaine on February 3, 2005. The District Court has acknowledged said presentation of evidence, but only mentions two instances of testimony and argument (there were more) in its opinion of March 20, 2019. Appx. D, at 29. The District Court's main purpose of identifying these occasions was to counter the Government's claim that "it never intended to attribute criminal activity ." Id.

The District Court eventually found the errors to be harmless. Id., at 29-30. But, as indicated in the language used, the District Court had applied the harmless-error test of Kotteakos v. United States, 328 U.S. 750 (1946). For example, the District Court's conclusion of its first ground for finding

the error harmless states: "even absent reference to Petitioner's , the jury reasonably could have found Petitioner guilty of that offense." Id., at 30. There is no way this test meets the harmless-beyond-a-reasonable doubt standard of Chapman v. California, 386 U.S. 18 (1967), thus (at best) it might be construed as equivalent to the Kotteakos test.

Reasonable jurists could debate whether the District Court's adoption of the Kotteakos standard, as opposed to the Chapman standard, was appropriate. See United States v. Jimenez-Bencevi, 788 F.3d 7, 20 (1st Cir. 2015) (holding that the Government's failure to adhere to a binding agreement is "perforce of constitional dimension" and thus "the stricter harmless-error standard of harmless beyond a reasonable doubt" applies). Interestingly, the District Court identified the correct standard of "harmless beyond a reasonable doubt" when it cited to United States v. Schmidgall, 25 F.3d 1523, 1529 (11th Cir. 1994), see Appx. D, at 23 n. 89, but failed to apply it.

Moreover, had the Chapman test been applied, there could be no finding of harmlessness. This is evident from the fact that a prior panel of the Third Circuit had already found that it was permissible for the jury to consider Petitioner's as the following passage highly suggests:

> [Petitioner] was later surveilled making the $1,300 payment to Estevez and setting up a new transaction that confirmed the workings of their prior dealings.

United States v. Calhoun, 600 Fed. Appx. 842, 846 (3rd Cir. 2015). This was a clear green-light for the jury to consider

. See United States v. Calhoun, 2012 U.S. Dist. LEXIS 90110

*7-8 (E.D.Pa. June 28, 2012) (summarizing the most significant parts of).

The District Court's second ground for finding the errors harmless also fails to apply the Chapman test:

> Because the jury was made aware of Petitioner's cooperation, the risk that played a role in Petitioner's conviction is minimal, and the Court must conclude that the Government's were harmless.

Appx. D, at 30. The main problem with this analysis is that the jury was never instructed as to what constitutes Thus, the District Court's conclusion flies in the face of the following general rule:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

Griffin v. United States, 502 U.S. 46, 56-57 (1991).

Most circuits have applied this general rule. See United States v. Miller, 84 F.3d 1244, 1257-58 (10th Cir. 1996) (applying the concept in Griffin to vacate a defendant's conviction); United States v. Garcia, 992 F.2d 409, 415-16 (2nd Cir. 1993) (same); United States v. Kurlemann, 708 F.3d 722, 732 (6th Cir. 2013)(same); United States v. Fuchs, 218 F.3d 957, 962-63 (9th Cir. 2000)(same); United States v. Schmitz, 634 F.3d 1247, 1263-64 (11th Cir. 2011)(same).

Reasonable jurists could debate the applicability of the Griffin-rule upon observation that nearly every circuit has a

model jury instruction that includes an explanation as to what constitutes See Third Circuit Model Jury Instruction (2018) 6.18.371J-1; Fifth Circuit Pattern Criminal Jury Instruction 2.18; Sixth Circuit Pattern Criminal Jury Instruction 3.11A; Eighth Circuit Model Jury Instruction 5.06C; Tenth Circuit Pattern Jury Instruction 2.22; Eleventh Circuit Pattern Crim. Jury Instructions, Offense Instruction 13.4.

In order to adopt the District Court's analysis as non-debatable we would have to accept that there is no need for the portions of these model instructions that describe what constitutes

E. The District Court's failure to analyze the rule of Santobello.

After the District Court issued its opinion of March 20, 2019, Petitioner filed a Motion to Alter Judgment pursuant to Federal Rule of Civil Procedure 59(e) wherein he reminded the court that he had specifically requested it to rule as to whether the policy interests set forth in Santobello v. New York 404 U.S. 257 (1971) warrant automatic reversal when applied to the instant claim. The District Court's response states:

> Petitioner's citation to the Supreme Court's opinions in Santobello v. New York and Puckett v. United States [556 U.S. 129 (2009)] is unavailing since the Court in Puckett explained that Santobello's holding requiring reversal when the Government only applies when the contemporaneous objection rule is followed. Here, Petitioner did notraise this claim until habeas review. Therefore, applying the harmless error test was not a "clear error of law."

Appx. E, at 3.

The District Court's reasoning is deeply flawed. Justice

Scalia circumscribed from the outset the limited nature of the ruling in Puckett:

> The question presented by this case is whether a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review set forth in Rule 52(b) of the Federal Rules of Criminal Procedure.

Puckett, 556 U.S. at 131.

Having identified the decision in Puckett as applying to these rules, it is inappropriate to extend its reach to proceedings under 28 U.S.C. § 2255. See United States v. Frady, 456 U.S. 152, 163-64 (1982) ("[T]he plain error standard is out of place when a prisoner launches a collateral attack against a criminal conviction."); United States v. Pelullo, 399 F.3d 197, 221 (3rd Cir. 2005) (same); Toua Hong Chang v. Minnesota, 521 F.3d 828, 832 n. 3 (8th Cir. 2008) (declining to apply the state's request for the plain error standard on writ of habeas corpus). Thus, reasonable jurists have already debated the District Court's resolution of this point and have ruled the reverse.

Furthermore, the District Court's eschewing of analysis under the principles of Santobello actually places the Government in a more favorable position than it would have been had it fulfilled its obligation to disclose to the defense prior to trial. Therefore, the standard set by the District Court has the absurd effect of encouraging the Government never to disclose to defense counsel because it would both avoid the rule of Santobello and its . The Government's windfall for its malfeasance should never be countenanced by any court.

F. and Supreme Court Rule 10.

The relevant portion of Rule 10 of the Supreme Court of the United States identifies the compelling reasons the writ should be granted:

> [A] United States Court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; [...] or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of this Court's supervisory power[.]

Supreme Court Rule 10(a).

The United States Court of Appeals for the Third Circuit adopted the District Court's opinion in full. Appx. B, at 1-2. Petitioner has presented herein several examples of where said opinion conflicts with precedent in other circuits and opinions from this Court (i.e., departures from the usual course). But, the worst departure has yet to be described.

is a doctrine expressly adopted by several circuits. In cases where the Government , the application of would force the Government . In the instant case, Petitioner a conviction for a conspiracy that 's . Other circuits have overturned convictions upon applying to See Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982); United States v. Carter, 456 F.2d 426 (4th

Cir. 1972)(en banc); United States v. Mark, 795 F.3d 1102, 1105 (9th Cir. 2015); United States v. Carillo, 709 F.2d 35, 37 (9th Cir. 1983).

In the bigger picture, review by this Court is warranted so that the Court might exercise its supervisory powers not just to correct the judgment but to save the public reputation and integrity of the courts and the institutional standards that allow effective criminal prosecutions. The Seventh Circuit has stated that

are

but will be useful

The courts below have eroded that principle more perniciously than most other cases where the Government was permitted to

because, as noted by the District Court, Petitioner was charged and convicted of innocent conduct.

As noted by at least one former justice of this Court, "imposing criminal sanctions for non-proscribed conduct has always been considered a hallmark of tyranny— no matter how reprehensible the party." United States v. Marcus, 560 U.S. 258, 268 (2010) (Stevens, J., dissenting).

G. Conclusion

Wherefore, having demonstrated the complete erosion by the lower courts of the policy interests set forth by this Court in Santobello v. New York, supra, that hold the Government

, Petitioner urges this Court to exercise its discretion and grant the writ of certiorari.

II. PROCEDURAL DEFAULT DOES NOT APPLY TO A SIXTH AMENDMENT CLAIM OF DENIAL OF COUNSEL OF CHOICE WHERE THE TRIAL COURT FAILED TO HOLD A HEARING PRIOR TO THE DENIAL.

Prior to trial, Petitioner's retained counsel submitted to the trial judge a Rule to Show Cause as to why he should not be permitted to withdraw his representation. The Rule to Show Cause never appeared on the trial court's electronic docket. Without hearing or opportunity for Petitioner to object, the trial court issued an order permitting retained counsel to withdraw and no reason for denying Petitioner's counsel of choice appears on record.

Petitioner raised a claim of denial of counsel of choice in a § 2255 Motion. The District Court denied and the Court of Appeals affirmed on grounds stating Petitioner procedurally defaulted the claim. However, this Court has acknowledged that the right to counsel of choice is the "root meaning" of the Sixth Amendment right to counsel. Every court that has decided the question has held that denial of counsel excuses procedural default; therefore, the equivalent ("root meaning") denial of counsel of choice must necessarily excuse said default as well.

As a result of the unfairness and integrity erosion of the proceedings, a writ of certiorari is warranted and should issue.

A. No hearing or opportunity to object.

Prior to being indicted, Petitioner had retained counsel who entered his appearance before arraignment. Prior to trial, retained counsel sent a letter to Petitioner asking for additional funds, but the letter was addressed to the wrong prison. Appx. A, at 2. Not hearing back from Petitioner, retained counsel submitted

to the trial judge a Rule to Show Cause as to why he should not be permitted to withdraw his representation. Appx. H, at 3. As acknowledged by the Court of Appeals, on "[t]he same day, without holding a hearing or permitting [Petitioner] to object, the [trial] Court granted the motion to withdraw[.]" Appx. A, at 2.

B. Counsel of choice is the "root meaning" of right to counsel.

This Court has stated that the "right to select counsel of one's choice" is so synonymous with the Sixth Amendment right to counsel that it "has been regarded as the root meaning of the constitutional guarantee." United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006) (citing Wheat v. United States, 486 U.S. 153, 159 (1988)).

Furthermore, the same court acknowledged:

> Deprivation of the right is "complete" when the defendant is erroneaouly prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.

Gonzalez-Lopez, at 148.

C. Denial of counsel (chosen) excuses procedural default.

The Third Circuit has held "that the constitutionally erroneous denial of counsel to [the defendant] constitutes cause sufficient to excuse his procedural default[.]" Fischetti v. Johnson, 384 F.3d 140, 154 (3rd Cir. 2004). See also, Shayesteh v. City of S. Salt Lake, 217 F.3d 1281, 1283 (10th Cir. 2000) (denial of counsel "constitutes cause sufficient to overcome procedural default").

It follows from the holding in Gonzalez-Lopez equating the right to counsel with the right to counsel of one's choice that the reasons for excusing procedural default as to the denial of counsel apply equally to that of denial of chosen counsel.

In the instant case, it even extends to the direct appeals in light of 3rd Cir. LAR Misc. 109.1 which instructs that counsel at trial continue representation on appeal. As Petitioner argued in the court below, had the trial court not have erroneously denied retained counsel, retained counsel "would have been obligated to continue representing [Petitioner] on appeal." Appx. H, at 23.

Thus, the denial of counsel of choice pervaded all stages of the criminal process. Moreover, the Court of Appeals agreed to presume prejudice:

> Assuming the Sixth Amendment claim has merit, we presume prejudice because [Petitioner was "erroneously deprived of the right to counsel of choice."

Appx. A, at 4 (quoting Gonzalez-Lopez, 548 U.S. at 150).

Yet, said court failed to appreciate the reasons for this presumption. Said presumption is grounded on the premise "that erroneous deprivation of the right to counsel of choice [has] consequences that are necessarily unquantifiable and indeterminate." Gonzalez-Lopez, at 150. Something so unquantifiable and indeterminate must entail "some external impediment preventing counsel from constructing or raising the claim" as a cause to excuse procedural default. Murray v. Carrier, 477 U.S. 478, 488 (1986).

D. Conclusion

Wherefore, the lower courts departed from the usual practice of aligning denial of counsel of choice with that of denial of counsel in wuch a way as to warrant correction by this Court.

III. WHERE THE TRIAL RECORD WAS DEVOID AS TO THE REASONS WHY THE TRIAL COURT DENIED PETITIONER HIS RETAINED COUNSEL, PETITIONER COULD NOT HAVE PROCEDURALLY DEFAULTED HIS CLAIM OF DENIAL OF COUNSEL OF CHOICE.

The trial court record is completely devoid as to why Petitioner was denied his retained counsel. The right to counsel of choice is circumscribed such that there exists valid reasons why the right may be denied. Raising the issue on direct appeal with such an undeveloped record would require appellate counsel to speculate. Regardless, had the issue been raised on direct appeal, the most that would have occurred is a remand back to the trial court to hold a hearing as to the validity of the denial of retained counsel.

The procedural default doctrine is based upon the principle that contentions should be raised in the proper tribunal at the proper time. To hold that Petitioner should have raised an issue on appeal that would at best result in a remand to the lower court cuts against this guiding principle that animates the doctrine and is inconsistent with this Court's decisions.

As a result, Petitioner should be excused from procedural default and this Court should take up review by granting the writ.

A. The undeveloped record in the trial court.

Prior to trial, Petitioner's retained counsel sent a letter to Petitioner asking for additional funds, but the letter was addressed to the wrong prison. Appx. A, at 2. Not hearing back from Petitioner, retained counsel submitted to the trial judge a Rule to Show Cause as to why he should not be permitted to withdraw his representation. Appx. H, at 3. "The same day, without holding a hearing or permitting [Petitioner] to object, the [trial]

Court granted the motion to withdraw[.]" Appx. A, at 2. The trial court placed no reason on record for the denial of Petitioner's counsel of choice.

The Court of Appeals summarized the obscurity of events:

> [The trial court's] docket did not include [retained counsel's] request for withdrawal because he faxed the request to, rather than filing it with, the Court. Though [Petitioner] had no notice of the motion to withdraw before the Court decided it, he eventually became aware when new counsel started representing him.

Appx. A, at 5. Yet, for clarity purposes, it must be acknowledged that Petitioner had never seen the Rule to Show Cause (motion to withdraw) until the habeas proceedings.

B. Shifting the burden to Petitioner (pro se).

This Court has held that "the District Court must recognize a presumption in favor of petitioner's counsel of choice" even though there are reasons that might overcome that presumption later. Wheat v. United States, 486 U.S. 153, 164 (1988). Yet, the Court of Appeals below stated, "[Petitioner] could have requested why [retained counsel] was no longer representing him and asked the Court to reconsider its order." Appx. A, at 5. Said court failed to explain how or why Petitioner had to remind the district court as to what must be presumed.

The Court of Appeals also stated, "Indeed, [Petitioner] confirmed to the [trial] Court that he needed appointed counsel because he was 'indigent with absolutely no funds available in his inmate account.'" Id. Yet, Petitioner never actually said he needed appointment of counsel and given that he had recently "been transferred to the Federal Detention Center in Philadelphia," Id. at 2, his funds did not follow him. It should be noted that at

no point in the hearings did the Government question Petitioner about said representation to the trial court, thus Petitioner never had the opportunity to explain, under oath, exactly what he meant. Regardless, the findings of the Court of Appeals cuts against its own precedent which has held:

> When there is representation by privately retained, non-appointed counsel ... the defendant himself achieves the precise objective set forth in the cases proclaiming that an indigent is entitled to have the state furnish that which he cannot afford: counsel to represent him.

United States ex rel. O'Brien v. Maroney, 423 F.2d 865, 869 (3rd Cir. 1970).

C. Requirement to raise an issue on an undeveloped record.

The Court of Appeals held Petitioner did not excuse himself from failure to raise his claim on direct appeal, stating:

> The District Court correctly held that [Petitioner] "knew of the basis for this claim" at least by the time of direct appeal, so his "lack of establishing cause for his procedural default forecloses a grant of relief."

Appx. A, at 5. Yet, the right to counsel of choice has limits where a court might properly deny counsel of choice. See Gonzalez-Lopez, supra, 548 U.S. at 151-52. Thus, the trial court may have had good reason to deny counsel of choice (without a developed record to indicate otherwise).

This Court has held that awareness of a claim of ineffective assistance of counsel claim is not a valid stand-alone reason to force appellate counsel to raise the claim on appeal because, "[w]ithout additional factual development, [] an appellate court may not be able to ascertain whether the alleged error was prejudicial." Massaro v. United States, 538 U.S. 500, 505 (2003).

Analogously, the same may be said where Petitioner was aware his counsel of choice was denied, but did not know whether, for example, a conflict of interest existed was determined by the trial court.

The Massaro court explained why forcing appellate counsel to speculate by raising an undeveloped claim is not appropriate:

> Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time. [A rule should not create] the risk that defendants would feel compelled to raise the issue before there has been an opportunity to develop the factual predicate for the claim. [On appeal], the issue would be raised for the first time in a forum not suited to assess those facts.

Massaro, 538 U.S., at 504 (quotation marks and citation omitted).

More recently, this Court analogously stated it would not subject a petitioner to procedural default "[i]f [the petitioner's] claims went undeveloped in [] court not through his own fault." Thompson v. Lumpkin, — U.S. —, 209 L.Ed.2d 497, 498 (2021); accord Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997) ("To be attributable to a 'failure' under federal law the deficiency in the record must reflect something the petitioner did or omitted ... We think the word 'fail' cannot bear a strict-liability reading, under which a federal court would disregard the reason for the shortcomings of the record.").

D. Conclusion

Wherefore, having demonstrated that the Court of Appeals has departed from the accepted and usual course of judicial proceedings as articulated by this Court, Petitioner urges this Court to exercise its discretion by granting the writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David Calhoun

Date: July 6, 2023