NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE IVORY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

While pursuing habeas relief on an ineffective-assistance-of-counsel theory, George Ivory learned that the Government materially misrepresented the strength of its case to him during plea negotiations.

Upon making that discovery, he moved to amend his habeas petition under Federal Rule of Civil Procedure 15 to add a claim that the guilty plea he entered in the underlying criminal case was induced by government misconduct, rendering it involuntary under *Brady v. United States*, 397 U.S. 742 (1970).

But the district court denied his Rule 15 motion, reasoning that the claim he sought to add via amendment—i.e., a *Brady* claim—was barred by the statute of limitations and that, consequently, allowing him leave to amend would be futile.

Ivory then moved the Sixth Circuit for a Certificate of Appealability (COA) concerning the district court's procedural ruling, but the Sixth Circuit denied that motion too, reasoning that Ivory was not entitled assert his *Brady* claim because (in the court's view) all reasonable jurists would agree that that claim "lack[ed] merit."

The question presented is whether the Sixth Circuit misapplied Rule 15 in denying Ivory's motion for a COA such that its denial order should be summarily reversed and remanded so that the Sixth Circuit can apply the correct standard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited — **Page No. (s)**

Statutes — **Page No. (s)**

Other — **Page No. (s)**

PETITION FOR WRIT OF CERTIORARI

Petitioner George Ivory respectfully petition for a writ of certiorari to review the order of the Sixth Circuit Court of Appeals denying a certificate of appealability.

OPINIONS BELOW

1. The *en banc* Order of the Sixth Circuit Court of Appeals denying Ivory's petition for rehearing *en banc* was entered on October 16, 2024. The *en banc* Order of the Sixth Circuit Court of Appeals is available at Appendix A of this Petition.

2. The Order & Judgment denying Ivory's motion for a certificate of appealability, issued by the Honorable Richard A. Griffin, United States Circuit Judge on the Sixth Circuit Court of Appeals, was entered August 19, 2024. Judge Griffin's Order & Judgment is available at Appendix B of this Petition.

3. The District Court's Memorandum Opinion denying Ivory's motion for leave to amend his habeas petition and renewed motion for discovery was entered on February 13, 2023. The Memorandum Opinion is at Appendix C of this petition.

JURISDICTIONAL STATEMENT

The Sixth Circuit Court of Appeals denied Ivory's petition for rehearing *en banc* on October 16, 2024, and Ivory filed this Petition for Certiorari within ninety-days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254.

RELEVANT STATUTORY & CONSTITUTIONAL PROVISIONS

Pertinent here, 28 U.S.C. § 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The [COA] under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The Fifth and Sixth Amendments to the United States Constitution provide:

> 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 actual service in time of War or public danger; nor shall any person be subject for the same offence 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.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Ivory pleads guilty to weak charges because the government represented to his trial counsel that it had a strong case.

On May 1, 2015, Claude Grissette was shot (nonfatally) during a drug-deal-gone-wrong in Nashville, Tennessee. Police responded to the shooting, and, upon arrival, they interviewed a witness named Laquinta Thomas who stated that, although she saw the shooting, she did not know the suspect and had never seen him before. Later, however, Thomas changed her story, reporting that Ivory was the shooter and that he shot Grissette because Grissette would not buy drugs from him but instead wanted to buy from a drug-dealer known as "White Boy."

On July 30, 2015, the Government indicted Ivory on drug-and-gun crimes arising from the May 1 incident. Apparently, its theory was that Ivory must have possessed a gun and drugs because he shot Grissette while trying to sell drugs to him.

But the Government's case was inherently weak because no physical evidence tied Ivory to the scene of the crime, he never made any incriminating statements, and Thomas—the only eyewitness who spoke and revealed her name to police immediately after the shooting occurred—made inconsistent statements about whether she knew the shooter's identity and whether she had seen the shooter before.

In light of the obvious proof issues the Government faced, and anticipating acquittal, Ivory and his trial counsel began preparing the case for trial.

Trial counsel's opinion about the strength of the Government's case changed when the prosecutor, former Assistant United States Attorney Sunny Koshy, represented to her: (1) that the Government planned to call the drug-dealer known

as "White Boy" and Donta Waggoner as witnesses, (2) that he "had Waggoner in Kentucky," which counsel understood as meaning that Waggoner was jailed in Kentucky and being held as a witness for trial such that his testimony against Mr. Ivory was all but guaranteed,[1] and (3) that White Boy had testified during grand jury proceedings and had "made quite an impression" on the grand jurors.

AUSA Koshy made these representations to Ivory's counsel during a conversation in which he offered a plea deal of 25 years to resolve the case.

The day after hearing the offer, counsel recommended to Ivory that he accept the deal. Part of the reason counsel made that recommendation was because the Government apparently had secured three witnesses—Thomas, Waggoner, and White Boy—who would tell the same story. Further, as trial counsel later explained, it was particularly "important" to that Waggoner was certain to testify because Waggoner and Ivory are cousins—i.e., counsel believed that, due to their relationship, the jury would give significant weight to Waggoner's testimony. After consulting with counsel about AUSA Koshy's representations, Ivory pled guilty.

B. Ivory learns during post-conviction litigation that the government misrepresented the strength of its case to induce him to plead guilty.

In June 2018, Ivory timely filed a petition for post-conviction relief in which he "reserved" "all rights" that he had "due to lack of effective assistance of counsel," and, following the appointment of counsel, he properly amended his petition to assert a claim that trial counsel was ineffective during plea-bargaining.

[1] At the time AUSA Koshy represented that he "had Waggoner in Kentucky," federal detainees in the Middle District of Tennessee were often jailed by the U.S. Marshals at facilities in Kentucky.

More specifically, Ivory claimed that trial counsel failed to give him reasonable professional guidance as to whether to accept the 25-year plea bargain.

In developing that claim, counsel learned about AUSA Koshy's representation that he "had Waggoner in Kentucky" and also discovered that this statement was false because records showed that Waggoner had never been jailed in Kentucky.

To that end, it appeared to post-conviction counsel that AUSA Koshy made a false statement to Ivory (through his trial attorney) with hopes of convincing him that the Government case was stronger than it was so that he would plead guilty.

C. Ivory seeks but is denied an opportunity to pursue his claim that his plea was induced by government misconduct.

Based on this new information, Ivory moved the court to amend his petition under Rule 15 to add a claim that his plea was induced by Government misconduct, rendering it involuntary under *Brady v. United States*, 397 U.S. 742 (1970).

But the district court denied his motion, reasoning that, although Ivory had produced facts in support of "his assertion that [AUSA] Koshy misrepresented Waggoner's custodial status," his *Brady* claim was barred by the statute of limitations such that it would be futile to allow him leave to assert it. (App. C, pg. 11).

On January 10, 2024, the district court entered a final judgment, so Ivory moved the Sixth Circuit for a COA concerning the district court's order denying his motion for leave to amend to add his newly discovered *Brady* claim.

As support, Ivory pointed out that his *Brady* claim related back to his timely asserted ineffective-assistance claim (or that reasonable jurists could debate that proposition) pursuant to Federal Rule of Civil Procedure 15(c)(1)(B), which provides

that"[a]n amendment to a pleading relates back to the date of the original pleading" as long as "the amendment asserts a claim [arising from] the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."

And, since reasonable jurists could debate whether his *Brady* claim related back to the claims set forth in his earlier pleading, Ivory concluded, reasonable jurists could debate the correctness of the court's conclusion that the claim was time-barred.

But the Sixth Circuit, in a single-judge order authored by the Honorable Richard A. Griffin, Circuit Judge, disagreed and thus declined to issue a COA. In his order, Judge Griffin observed that "it [was] possible that [AUSA Koshy] misspoke" when he said that he "had Waggoner in Kentucky." (App. B, pg. 4). Notwithstanding that possibility, however, Judge Griffin found that Ivory's *Brady* claim "lack[ed] merit." (*Id.)*. And based on that finding, Judge Griffin concluded that all reasonable jurists would agree that the district court correctly denied Ivory's Rule 15 motion. (*Id.*). In other words, Judge Griffin ruled that a court may deny a litigant's pre-discovery Rule 15 motion for leave to amend to add a claim as long as the court believes that the claim to be added via amendment will ultimately fail on the merits.

Thereafter, Ivory sought panel rehearing and rehearing *en banc*. In his petition, he pointed out that a court is not allowed to consider the substantive merits of a claim when deciding whether a litigant is entitled to leave to amend his petition. To that end, he concluded, Judge Griffin's order denying him a COA was seriously flawed insofar as Judge Griffin held that the district court was correct to deny Ivory's motion for leave to amend because the claim he sought to add lacked merit.

But the Sixth Circuit was not persuaded. A three-judge panel affirmed Judge Griffin's ruling on September 30, 2024. (App. A). On October 16, 2024, all active members of the Sixth Circuit declined to hear his case *en banc*. (*Id.*).

REASONS FOR GRANTING THE WRIT

In recent years, this Court has granted certiorari and reversed in cases (such as this one) where a lower court's "den[ial] [of] a COA" is based on "flawed" legal reasoning. *See, e.g.*, *Ayestas v. Davis*, 584 U.S. 28, 38 (2018) ("When the lower courts deny a COA and we concluded that their reason for doing so is flawed, we may reverse and remand so that the correct legal standard may be applied"); *Tharpe v. Sellers*, 583 U.S. 33, 35 (2018) (summarily vacating order denying COA); *Buck v. Davis*, 580 U.S. 100, 128 (2017) (reversing misapplication of COA standard).

It should do so again here because the Sixth Circuit's denial of Ivory's request for a COA: (1) rests on a serious misapplication of Rule 15, (2) reflects an unduly restrictive view of the COA process, and (3) robs Ivory of his best and last shot at relief from what may very well be an unconstitutional conviction.

I. THE SIXTH CIRCUIT'S RULING RESTS ON A SERIOUS MISAPPLICATION OF FRCP 15.

The Sixth Circuit denied Ivory's request for a COA concerning the district court's denial of his Rule 15 motion for leave to add a *Brady* claim to his petition because it believed that his *Brady* claim "lack[ed] merit." (App. B, pg. 3-4).

In doing so, the Sixth Circuit assumed that Rule 15 allows a court to deny a petitioner's motion to for leave to amend his petition to add a new claim as long as the court believes that the claim to be added via amendment will fail on the merits.

That assumption is so obviously wrong (and so clearly inconsistent with this Court's precedent interpreting Rule 15) that this Court's intervention is warranted. *See* Sup. Ct. R. 10(b) (providing that certiorari may be warranted where a "court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers").

To explain: Federal Rule of Civil Procedure 15 authorizes a party to amend a pleading at any time (to, for instance, add a claim) with leave of court and further instructs courts to "freely give leave when justice so requires." Fed. R. Civ. P. 15.

A court may deny leave to amend in certain narrow and well-defined circumstances, such as when the amending party has acted in bad faith or with a dilatory motive or when the proposed amended claim is "futile" (i.e., incapable of surviving a motion to dismiss). *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).

But the law is clear that a court cannot deny leave simply because it believes the proposed amended claim will fail on the merits. Wright & Miller, Federal Practice & Procedure, § 1487 (3d ed.) (collecting cases in support of the proposition that "the substantive merits of a claim . . . should not be considered" when determining whether leave is warranted); *see also Saint Anthony Hosp. v. Eagleson*, 40 F.4th 492, 518 (7th Cir. 2022) (ruling that court abused its discretion when it denied a proposed claim simply because it had "[d]oubts" about the claim's "merits"); *Rose*, 203 F.3d at 421 (observing that a party is entitled to leave to amend even if the proposed amended claim "could potentially be dismissed on a motion for summary judgment"); *Davis v.*

Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980) ("[C]onjecture about the merits of the litigation should not enter into the decisions whether to allow amendment."); *S.S. Silberblatt, Inc. v. E. Harlem Pilot Block--Bldg. 1 Hous. Dev. Fund Co.*, 608 F.2d 28, 42 (2d Cir. 1979) (holding that district court erred when it denied leave to amend based on its belief that plaintiff's claim would ultimately fail at trial); *Breier v. N. Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 790 (9th Cir. 1963) (same).

If it could, then a habeas petitioner who seeks leave to amend to add a claim would have to show at the pleading stage (and without the benefit of the discovery) that he will ultimately win relief on the claim he seeks to add.

And that outcome defies common-sense (how can a petitioner prove he'll win on his proposed amended claim before he's had a chance to develop it?) and contradicts this Court's precedent, *see Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that a petitioner should be given leave to amend if the claim he seeks to add via amendment is one that *could* (if proven after discovery) entitle him to relief).

In this way, the Sixth Circuit's denial of Ivory's request for a COA rests on seriously flawed application of Rule 15: The Sixth Circuit held that the district court correctly denied his Rule 15 motion because the *Brady* claim he sought to add via amendment "lack[ed] merit," when, in reality, the law is clear that "the substantive merits of a claim . . . should not be considered" when determining whether leave is warranted. Wright & Miller, Federal Practice & Procedure, § 1487 (3d ed.).

To that end, this Court should grant certiorari and "reverse and remand so that the correct legal standard may be applied." *Ayestas*, 584 U.S. at 38, n.1.

II. THE SIXTH CIRCUIT'S RULING REFLECTS AN UNDULY RESTRICTIVE VIEW OF THE COA PROCESS.

Further, given the abundance of law—including Sixth Circuit precedent, *see Rose* 203 F.3d at 421—holding that Rule 15 does not authorize a court to deny a motion for leave to add a claim simply because it believes the claim is meritless, the Sixth Circuit's misapplication of Rule 15 below can only be described as deliberate.

This, in turn, gives rise to a second reason certiorari is warranted in this case: namely, to remind lower courts not to unduly restrict the COA process.

To put this in context: "[T]he COA procedure" is supposed to "facilitate, not *frustrate*, fulsome review of potentially" laudable habeas claims. *McGee v. McFadden*, 139 S. Ct. 2608, 2611 (2019) (Sotomayor, J., dissenting from denial of certiorari) (emphasis added). For that reason, any judge evaluating a COA request is required to "carry out [the] COA review with [an] open mind" and with awareness of the fact that reviewing COA requests is a "vitally important task." *Id.*

Here, however, the Sixth Circuit approached Ivory's COA motion with so much disdain and reluctance that it intentionally misapplied settled law so that it would have a reason to deny his request and put an end to his case.

To that end, this case presents an excellent opportunity for this Court to remind lower courts as it has done in the past that the COA procedure must be applied flexibly and taken seriously so as to ensure that potentially meritorious constitutional claims are not improperly rejected. *See, e.g.*, *Tharpe*, 583 U.S. at 35 (reversing denial of a COA); *Davis*, 580 U.S. at 128 (reversing denial of a COA).

III. BUT FOR THE SIXTH CIRCUIT'S MISAPPLICATION OF LAW, IVORY WOULD HAVE RECEIVED A COA ON HIS *BRADY* CLAIM.

Finally, certiorari is warranted because Ivory's COA request—which, at this time, represents his "last, best shot at relief from an" unconstitutional conviction, *see McGee*, 139 S. Ct. at 2611 (Sotomayor, J., dissenting from denial of certiorari)—would have been granted but for the Sixth Circuit's misapplication of Rule 15.

Indeed, when (as here) a district court denies a habeas petitioner's valid constitutional claim on procedural grounds, the petitioner is entitled to a COA as a means to challenge the district court's procedural decision if he can show that reasonable jurists could debate whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); 28 U.S.C. 2253(c).

And here, Ivory made that showing. The district court denied Ivory's Rule 15 motion because it believed the claim Ivory sought to add via amendment (namely, a *Brady* claim) was time-barred. (App. C). But as Ivory pointed out below, both his *Brady* claim and the ineffective-assistance claim asserted in his timely-filed habeas petition arise from the same operative fact—namely, the fact that AUSA Koshy made representations to Ivory's attorney to induce him to plead guilty. To that end, surely a reasonable jurist could find that Ivory's *Brady* claim relates back to his earlier-filed habeas petition under Rule 15(c)(1)(B)—particularly given the flexibility and permissiveness of the relation-back standard more generally. And that being the case, a reasonable jurist could also find that that Ivory's *Brady* claim was timely.

In this way, the Sixth Circuit's misapplication of Rule 15 not only defies precedent, common-sense, and the spirit of the COA process, but also worked to deny him a COA that (but for the Sixth Circuit's error) he would have otherwise received.

Under these circumstances, this Court should grant certiorari, summarily reverse the Sixth Circuit's decision, and remand so that the Sixth Circuit can correctly apply Rule 15, which, in turn, will result in the issuance of a COA.

CONCLUSION AND PRAYER FOR RELIEF

In light of the foregoing, Ivory respectfully requests that this Court grant a writ of certiorari to resolve the question presented.

January 14, 2025

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