No. 24-720

IN THE

SUPREME COURT OF THE UNITED STATES

VITALY KORCHEVSKY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Pro se Petitioner

QUESTIONS PRESENTED

1. Did the Court of Appeals err in ignoring a Motion to Strike the affidavit of attorney Steven Brill when that affidavit was submitted contrary to federal statutory and case law and this Court's holdings on evidence in habeas corpus proceedings, and was in no way admissible evidence which the district court also exclusively relied on to deny the habeas motion?

2. Did the Court of Appeals err in rubber-stamping the district court's total ignoring of massive evidence of unconstitutional error in Petitioner's lawyer's conduct, where this Court has specifically and clearly laid out the requirements of examining evidence in habeas matters and where the lower courts ignored these mandates?

3. Did the Court of Appeals err in denying the Petitioner an order for an evidentiary hearing in light of this Court's previous rulings on the requirements of same when certain conditions are clearly met, particularly when the lower courts rely on totally inadmissible evidence from one source: the Petitioner's lawyer and where it is facially clear that the lawyer's claims cannot possibly be true?

PARTIES INVOLVED

The caption contains the entire list of all parties to this Petition and matter. Additionally, pursuant to Supreme Court Rule 29.6, no corporate disclosure statement is required.

RELATED PROCEEDINGS

1. 2nd Circuit Court of Appeals C.O.A. Application Denial: *Korchevsky v. United States*, 23-8107 (2nd Cir., June 12, 2024)

2. 2nd Circuit Court of Appeals Rehearing Denial: *Korchevsky v. United States*, 23-8107 (2nd Cir., Sept. 25, 2024)

3. 28 U.S.C. Section 2255 District Court Denial: *Korchevsky v. United States*, 22-CV-6668 (RJD)(Oct. 26, 2023)

4. Direct Appeal Citation: *United States v. Khalusky and Korchevsky*, Nos. 19-197-cr and 19-780-cr (2nd Cir. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Vitaly Korchevsky petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is reported at *Korchevsky v. United States*, 23-8107 (2nd Cir., June 12, 2024), the order of the circuit court is not reported, and reproduced at App. A. The Second Circuit's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at App. D. The opinion of the District Court for the Eastern District of New York is reproduced at App. B.

BASIS FOR JURISDICTION

The Second Circuit entered its judgement on June 12, 2024. 28 U.S.C. section 1254(1) confers jurisdiction.

(i) The date of the judgment being appealed is June 12, 2024.

(ii) With a decision on a timely filed Rehearing Request entered on September 25, 2024, this was the appeals court's summary ruling related to Korchevsky's 2255 claims, in which the COA was denied. Thus, the present Petition also, necessarily, involves the District Court's ruling on the original 2255 and which decision was entered on October 26, 2023.

(iii) and (v) under section (e) are both inapplicable.

(iv) 28 U.S.C. Section 2253(c)(1) and (2) confers statutory authority to review the lower court's decisions.

AUTHORITIES INVOLVED IN THE CASE

The authorities involved in the case (and set out in the Appendix) are as follows:

1. The 6th Amendment of the United States Constitution
2. 28 U.S.C. Section 1746
3. 28 U.S.C. Section 2253.
4. 28 U.S.C. Section 2255.

STATEMENT OF THE CASE

Korchevsky presents the following facts related to his issues brought in this Petition:

General But Relevant Facts:

Korchevsky was convicted of conspiracy to commit wire fraud, securities fraud, substantive securities fraud and money laundering on July 6, 2018. (Motion for COA, Exh. A, Dist. Court Docket, No. 339). He was sentenced to 60 months confinement. *Id. at 395.* He appealed to the 2nd Circuit under docket no. 19-780. His Appeal was denied on September 22, 2021. This Court denied certiorari on January 10, 2022.

On November 1, 2022, Korchevsky filed a pro se 28 U.S.C. Section 2255 motion seeking to set aside his conviction. *Exh. A of Motion for COA at 494.* The District Court entered a briefing schedule and all parties complied. *Id.* at 495. Korchevsky has completed his prison time and is now home and on supervised release without a single issue with the probation department, having left prison on January 11, 2024.

On October 26, 2023, the District Court entered a final order denying all requested relief and denying a COA. *Id* at 514, and *Exh.B.* Korchevsky timely filed a notice of appeal. Eventually that appellate request for a COA was denied, *Exh. A,* as was a request for reconsideration of that decision *Exh. C.* This Petition for a Writ of Certiorari follows.

Korchevsky was a day trader and investment adviser. He had not a blemish on his record except for one run-in with the KGB, in Russia (Soviet Union), while a citizen there, for possessing Bibles in his car for dissemination. He also had a long and distinguished career on Wall Street. As part of his income, he advised two Dubovoy subjects, father and son, on their trading accounts and strategies. At times, Korchevsky would make trades on behalf of the Dubovoys, at their direction, using the Dubovoy accounts. Unknown to Korchevsky, the Dubovoys were involved in a conspiracy to hack several newswire services, to steal inside information from those services regarding companies the newswires represented, and to fraudulently use that inside information to make trades. Specifically, these newswire services would receive press releases from the companies they represented announcing the companies' earnings for the quarter, or for any other newsworthy information related to the company and its earnings. The newswires would hold these press releases on their servers before releasing them at a time specified by the client companies, usually after the market closed the same day. The Dubovoys and their hackers in Ukraine were getting early access to these press releases, before the public got access. It was Korchevsky's position at trial and to this Day that he is totally innocent, that he knew nothing of the hacking nor of the use of non-public information resulting therefrom.

After being caught, the Dubovoys pled guilty pursuant to a plea agreement, which included a requirement that they both cooperate and testify as government witnesses. They were the only two fact

witnesses, aside from investigating agents of the government, to testify against Korchevsky. As the trial record showed, the Dubovoys had issue upon issue with honesty and veracity.

As evidenced in the 2255 motion, Korchevsky and his lawyer, Steven Brill ("Brill") had issues related to the representation that Korchevsky was given. (Korchevsky produced no less than 45 exhibits, many with numerous sub-parts and five affidavits supporting his contentions related to Brill, the trial and his overall assertions). In response to the 2255 motion, the U.S. produced one affidavit. That of Brill. Nothing else was submitted by the U.S.

1. Material Facts Related to Issue One and Brill's Affidavit

After filing his 2255 motion spelling out issue after issue with Brill, the U.S. produced an affidavit of Brill to oppose any relief for Korchevsky. Nothing else was presented with the exception of a few trial excerpts. No supporting documents were produced or referenced to support the contentions that Brill made in his affidavit. In each and every Circuit in this country, and as laid out below, there is a requirement that affidavits (or "declarations") be notarized or sworn to under oath and/or pursuant to 28 U.S.C. section 1746. This is fact. Brill's affidavit in no way complied with the requirements for an "affidavit" or for a "declaration." This is also fact. Brill's statements were totally inadmissible. This was brought to the attention of the District Court and the

2nd Circuit Court of Appeals, on numerous occasions and in a clear fashion.

Korchevsky filed a motion to strike this unverified hearsay and the Trial Court never ruled on the motion (Motion for COA, Exh. A, Dist. Court Docket, No. 509). It should give the Court pause and raise the question why a member of the bar would not want to swear to, or at least affirm under 28 U.S.C. Section 1746, his statements regarding the reasons for his actions at trial.

This factual argument that the affidavit was inadmissible evidence was ignored. (See relevant opinions of both courts).

Conversely, all five of Korchevsky's affidavits complied with the law in each and every way. And he was a layman proceeding pro se, while Brill is a trained lawyer with the support of the Department of Justice. These also are facts.

2. Material Facts Related to Issue Two and a Court's Responsibility to Consider Evidence Presented

During the post-trial proceedings, in whatever form they took, Korchevsky presented a great deal of evidence to the trial court and the appellate court showing that what he alleged was fully supported by more than supposition and conclusory statements. Mindful of this Court's admonition in Rule 14 (3) that a petition "be stated briefly and in plain terms . . .", Korchevsky will do just that in

stating facts related to what he presented in the form of evidence that showed that his 2255 motion was loaded with iron-clad support for his claims. He presented:

a. Five affidavits spelling out a great amount of testimony supporting his claims.

b. Emails to and from Brill (and co-counsel Healy) both before, during and after trial that totally contradict statements of fact Brill made to the trial court, his client, the U.S. Attorney's Office and of most import, the jury.

c. Emails to and from a fact witness who worked for Korchevsky in trades and who supported the defense claims and later the 2255 claims of Korchevsky against Brill.

d. A 2-26-18 letter from Brill to the U.S. notifying the U.S. of the importance and intention to call two experts (Mayer and Katz) as witnesses. This was never done.

e. A 3-27-18 email from Brill to other defense lawyers related to the U.S.'s prior knowledge of important fact witness Mikhail Zalivchii showing that the U.S. could have investigated this person long before he was named as a witness at trial by Korchevsky and then hounded by the DOJ and FBI and "identified" as a "subject" of interest by the DOJ only to be totally ignored again right after the trial ended, all with the assistance of Brill at trial!

f. Email strings in March, April, and May of 2018, right before the trial, showing, inter alia, an intention not to use, in any manner, exculpatory evidence or to allow Korchevsky access to the experts that were supposedly going to familiarize themselves with his work.

g. A 5-31-18 email between defense counsel noting the trial judge's view that expert witness exchanges were "general" and "generic." And that additions were needed.
h. Emails, charts and commentary, with supporting evidence, from Korchevsky showing that the U.S.'s view on the relevant trades was wrong.
i. An outline created by defense counsel showing the need and intention to call expert witnesses to testify which was never done.
j. An outline created by defense counsel at the insistence of Korchevsky as to his desire to testify, and topics that Korchevsky would testify to, to counter false evidence of the U.S., which was never used.
k. Information on past trading performance of Korchevsky showing that his trade results, long before the "criminal" period were similar, and sometimes better, than during the charged period.
l. 8-22-18 and 8-27-18 emails related to the important "Loscal" login showing that this "damning" and "fateful" evidence (as described by the Government) that was supposed to be in the possession of Korchevsky, and actually admitted to being in Korchevsky's possession, by Brill, to the jury, was never in the possession of Korchevsky and which showed Brill falsely assisting the U.S. AGAINST his client!
m. IP address lookups that showed that what the U.S. proclaimed was evidence against Korchevsky could not even possibly exist, and is actually "fabricated evidence" presented by the Government.
n. Time and location communication information given to Brill by Korchevsky showing that government exhibits GX-6001-02 could not possibly

exist, and is actually "fabricated evidence" presented by the Government.

The case against Korchevsky was entirely built on circumstantial evidence, and U.S., in its summation conceded that the case was Circumstantial in Nature. The Government alleged that Korchevsky knew of the ongoing theft of information, and that he therefore knew that he was trading using stolen non-public information. The government's proof of this was mainly based on an SMS/text "LOSCAL" message allegedly sent by Igor Dubovoy to Lorchevsky. *Tr at 555; Tr. at 617.* This particular evidence the Government categorized as "damning", "fateful", and as being "at the heart of the fraudulent scheme".

But in his 2255 motion Korchevsky presented factual proof, some of which became known to Korchevsky only after the trial, showing that this evidence was simply false.

Part of the Government's evidence included Cellebrite extraction reports from both Igor Dubovoy's phone and Vitaly Korchevsky's phone (though the latter was never introduced into evidence). The Government's digital expert testified that the extraction of Igor Dubovoy's phone reflected the outgoing SMS message with the LOSCAL log in credentials, Government's *Exhibit 417.* However, he did not testify whether the extraction of Korchevsky's phone reflected receipt of this text nor was he cross-examined on this vital issue. The Government maintained, just about every single day, that this was indeed the direct evidence of Korchevsky' guilt!

Korchevsky, during the trial, told his counsel that he never had seen such TXT and begged Brill to use hired technology expert to examine Korchevsky's phone extraction report. In response, Brill claimed to have asked the expert, and that the expert told him that the extraction confirmed the receipt of that "damning" TXT *(Sworn 2255 motion, Page ID# 7385).* Actually, Brill did not call his own expert to rebut the government's digital expert, nor did he even cross examine the Government's expert regarding the extraction of Korchevsky's phone. In fact, he did quite the opposite: he simply admitted (falsely) in closing argument that Korchevsky had received the text with the LOSCAL credentials, and urged the jury to consider instead whether there was evidence on any of Korchevsky's devices that he had ever accessed the LOSCAL email account using those credentials (later part was true and correct, because such evidence could not possibly exist and obviously it was not presented at rial) *Transcript at 3082.* As a result, the jury was left with the unchallenged assumption that Korchevsky had received this text and thus had access to the LOSCAL email account.

In his Sworn 2255 motion, Korchevsky presented 8-22-18 and 8-27-18 emails from Mr. Brill's co-counsel, Mr. Healy, where he admitted, after the trial, that he finally reviewed the Cellebrite extraction of Korchevsky's phone, and admitted to Korchevsky that the LOSCAL email TXT, *Government Exhibit 417,* was not on Korchevsky's phone *(email at PageID#7403).* Furthermore, Brill himself now admits in his unsworn statement that the TXT was not contained on Korchevsky's phone (*Page ID 7586, Par 9*), though does not address Korchevsky's

allegation that Brill lied to Korchevsky about this during trial. These are facts.

It is factual that the district court only discussed the "evidence" presented by the U.S. in its opposition to the 2255 matter. No evaluation, or indeed even discussion, as to the mountains of powerful evidence presented by Korchevsky supporting his claims was ever conducted by the trial court. The appellate court simply ignored the evidence. The opinions of these courts bear this out as facts.

3. Material Facts Related to Issue Three and the Request for an Evidentiary Hearing

28 U.S.C. Section 2255 statutory and caselaw allow, and sometimes dictate an evidentiary hearing when a petitioner's evidence suggests the need for one. Rules Governing 2255 Proceedings, R. 2, 4(b). At each level and time for review, Korchevsky asked for an evidentiary hearing based on the evidence that he presented that his representation was not at the Constitutional level and that he was prejudiced by same. His requests for a hearing were denied, even after showing that Brill's inadmissible affidavit contained statements that could not possibly be true. An evidentiary hearing would have required Korchevsky to either "put up" or "shut up." This, he desired. (Affid. of Korchevsky).

Finally, the basis for federal jurisdiction in the court of first instance, as required by this Court's rules, rests with 28 U.S.C. Sections 1331 and 2255 (a) and (d).

ARGUMENT

When a defendant's livelihood and existence are on the line during a criminal proceeding against him by the awesome power of the United States, that defendant relies on the skill and integrity of his advocate in court. Additionally, he relies on the good will and fairness of the judge overseeing the matter to ensure that any finding of guilt is sure-footed and reasonable while providing the defendant every opportunity to defend himself against the charges. Lastly, if there are errors in the proceedings, the defendant will rely on an appellate court to step back, look hard at the proceedings, evidence and claims of the defendant to see if there is any basis for the objections raised.

When a lawyer shirks his duties, for whatever reason, a judge should step in and inquire why and remedy the situation if he or she can. If this does not happen, an appellate court should examine the matter and take any appropriate measure that is required. When the lawyer, the district court and an appellate court all drop the ball, miss the mark or otherwise make mistakes, then an innocent man can be convicted and sent to prison. Vitaly Korchevsky has done his time in prison and is now out and living his life. Yet he continues this fight at added expense to him and his family. Why? Because he is innocent and what took place does not sit well with him or his idea of "justice."

In this matter, Korchevsky's lawyer has failed him and Korchevsky was unsuccessful in beseeching the district court to look at the lawyer's performance,

some of it absolutely unexplainable and downright weird. The judge in the district court actually insulted Korchevsky for his bringing his 2255 motion. Nevertheless, Korchevsky marched on asking the Court of Appeals for the Second Circuit to review what took place at trial and afterwards. The district court rubber-stamped the misconduct of Brill which contaminated Korchevsky's ability to defend himself under the 5th and 6th Constitutional Amendments. Korchevsky's next stop on this unfortunate road was with the appellate court and his request for a Certificate of Appealability. He was denied.

A COA will issue only if the requirements of Section 2253 have been satisfied. The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal. *Slack v. McDaniel*, 529 U.S. 473 (2000). Section 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." *Id.* This Court recognized that Congress codified the standard, announced in *Barefoot v. Estelle*, 463 U.S. 880 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must show that 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." 529 U.S., at 484.

The COA determination under Section 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their

merits. And this, in Korchevsky's case, was clearly not done. This Court looks to the district court's application of relevant statutory law (AEDPA) to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.

This very Court stated the following:

> [O]ur opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. **The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or for that matter, three judges, that he or she would prevail.** It is consistent with Section 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. **After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor."**
>
> *Barefoot, supra,* at 893 ,n. 4. (*Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003)) (emphasis added).

In order for Korchevsky to have a shot at certiorari, he must realistically present his petition in accordance with instructions from this Court found in

Rule 10. There, the Court strongly suggests that there be three routes to success. Korchevsky submits that his petition here complies with (a) and (c) of that rule. The appellate court in this instance has totally ignored a great amount of evidence presented showing that not only the defense attorney and the U.S. Attorney's Office engaged in a "sham" trial, but that the judge oversaw it. In point of fact, and as cited by Korchevsky in his 2255 motion, the trial judge had to actually stop the trial and ask Brill if he were actually not going to call an important defense witness (Zalivchii) who had been named in a previous witness list. The judge, apparently aghast, asked Brill to swear to him as "an officer of the court" that the decision was appropriate. Brill said it was. (It was not). This alone, to say nothing of the fake evidence of the "Loscal" credentials that Brill engaged in with the U.S. Attorney's Office, or the many other instances of unconstitutional acts or omissions, warrants a decision that Rule 10(a) has been satisfied. Additionally, the district court and appellate court have totally ignored evidence presented by Korchevsky in his attempts at habeas relief. *Miller-El* and *Slack,* having been totally ignored, at least as far as their holdings are concerned, warrant this petition being granted.

As argued below, the absolute lawlessness of the proceedings in the district court and the wink and nods from the appellate court ought to be addressed, and Korchevsky does not write this, to this Court, lightly. But his overwhelming and widespread evidence supporting this contention, ought to be at least looked at. And it was not.

1. Argument Related to Brill's Affidavit

Habeas relief ought not to be denied based on totally inadmissible evidence. When one party is held to the rules in court and another party is not, the proceedings, as one would expect, become farcical. Therefore, the argument for relief in this instance, is rather simple and straightforward.

During the 2255 matter in the district court, Korchevsky filed a "Motion to Strike" the Brill affidavit *(Motion for COA, Exh. A, Dist. Court Docket, No. 509)*. It was totally ignored. He raised the issue again in the 2255 motion. It was ignored. He raised the issue once more with the appellate court. Again, it was ignored. The U.S. presented no other evidence except for the inadmissible affidavit of Brill. Therefore, nothing was presented against Korchevsky that should have negated not just an evidentiary hearing but outright relief for his claims.

Each and every Circuit in this country requires that affidavits or declarations be sworn to in front of a person authorized to administer oaths or they need to be compliant with 28 U.S.C. Section 1746 attesting to the truthfulness of the statements of fact under penalty for perjury. See, *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.*, 982 F.2d 686, 689 (1st Cir. 1993), In re *World Trade Center Disaster Site Litig.*, 722 F.3d 483, 488 (2d Cir. 2013); *United States v. Heart Solution, PC et al.*, 918 F.3d 300 (3rd Cir. 2019); *United States v. Johnson*, 325 F.3d 205 (4th Cir. 2003); *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005); *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993); *Owens v.*

Hinsley, 635 F.3d 950, 954 (7th Cir. 2011); *Elder-Keep v. Aksamit*, 460 F.3d 979 (8th Cir. 2006); *Johnson v. United States*, 606 Fed. Appx. 345 (9th Cir. 2015); *Richardson v. Gallagher*, 553 Fed. Appx. 816 (10th Cir. 2014); *Roy v. Ivy*, 53 F.4th 1338, 1348 (11th Cir. 2022); *Geter v. U.S. Govt. Publishing Ofc.*, 2023 U.S. App. LEXIS 19023 (No. 20-5043, July 25, 2023).

There are additional requirements that the document be dated and signed. Brill's instrument was not dated, it was not notarized, it was not created under penalty for perjury. It in no way comported with law and admissible evidence but the district court and the court of appeals allowed it anyway, thereby putting their stamps of approval on denying habeas relief through totally inadmissible evidence and ignoring rules on reviewing habeas petitions under *Miller-El* and *Slack*. This Court should not allow this to stand. Why should the Department of Justice, at least in the Second Circuit and apparently only in the Second Circuit, not be required to follow the law?

The Petition for Certiorari ought to be granted on this basis alone.

2. Argument Related to Denial of Meaningful Review of Evidence

In his 2255 motion, Korchevsky made credible, detailed and supported claims related to Brill's improper affidavit, the bogus Loscal "evidence", the fact that no fact witnesses and several expert witnesses were not called to testify despite the attorney admitting that they were needed, the

mysterious email that Brill claimed existed (and that no person ever saw) and which prevented Korchevsky and his employee from being called to testify. He also made detailed, credible claims for no exculpatory evidence being presented to the jury as well as a cumulative error effect by Brill's acts and omissions and on prosecutor misconduct. Again, there were dozens of pieces of evidence, including emails from Brill and his law partner admitting that what they told the jury existed against their own client, did not exist! As spelled out in the actual Application for a COA, none of this was used. Additionally, five proper affidavits were submitted, one in excess of 110 pages that provided great and supported detail that the claims presented by Korchevsky were credible and devastating against his efforts at a fair trial. No court, as yet, wanted to hear it. This, however, flies in the face of this Court's precedents, in addition to being "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

A reviewing court, such as the 2nd Circuit or indeed, even this Court, presumes the lower court's findings correct unless "we determine that the findings result in a decision which is unreasonable in light of the evidence presented." *Miller-El, supra* at 330. And in this case, the evidence on one side (the U.S.'s) was one inadmissible affidavit, declaration or whatever it might be generously called. On the other side were five detailed and corroborated affidavits, more than four dozen documents with full explanations as to what they showed, emails where

the defendant's counsel admitted to agreeing to the jury that evidence existed, that was "damning" but that really did not exist. And of course there is much more. But the surprising fact here is really that neither the district court nor the appellate court acted as if all this was put before it. It was just ignored or in the case of the district court, ridiculed and insulted.

In *Miller-El v. Cockrell*, the Supreme Court went into great detail in explaining why the lower courts' review of the evidence related to Miller-El's jury selection was improper. This Court explained that "while a COA ruling is not the occasion for a ruling on the merit of petitioner's claim, our determination to reverse the Court of Appeals counsels us to explain in some detail the extensive evidence concerning the jury selection procedures." *Supra*, at 331. And it should be noted that this Court did note the larger extent of evidence that the state presented in its argument that the denial of the habeas petition was correct at the lower level. And Korchevsky's case is full of un-refuted evidence, some in the hand of the defense lawyer and the U.S. Attorney's office themselves. Yet there was no use of "accepted and usual course of judicial proceedings." Only insults, neglectful avoidance and silence.

A reviewing court, in following 2253(c), is required to embark on an overview of the claims in the habeas petition and a general assessment of their merits. *Miller-El, supra* at 336. Nowhere in Korchevsky's case was this done. Were it so, there would have been at least some discussion about some of the evidence he presented. As it is, there was none. Not a bit, except for what Brill and the U.S.

Attorney stated about it, which the trial court then partially parroted.

Any reasonable jurist could take an honest look at what was presented and resolve the issues differently than what the district court did here. And of course, there was little to no examination of the evidence presented by Korchevsky by the Court of Appeals.

While this pleading is not a brief on the merits, Korchevsky has met his burden related to presenting credible evidence warranting further action. As this Court said in *Miller-El*:

> Applying these rules to Miller-El's application, we have no difficulty concluding that a COA should have issued. We conclude, on our review of the record at this stage, that the district court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. . . . The Court of Appeals evaluated *Miller-El's* application for a COA in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under Section 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence.

> This was too demanding a standard on more than one level. It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of Sections 2254(d)(2) and (e)(1).
> (*Id.* at 341).

Although Korchevsky's case does not have its start in state court, the scenario is similar. And like the lower courts in *Miller-El*, the reviewing process was not constitutionally, or even statutorily, adequate. This Court should act to ensure that federal courts value justice and a thorough review of admissible evidence and the jettison of inadmissible evidence and not the other way around.

3. Argument Related to the Denial of a Hearing

Korchevsky, as outlined above and in the vast materials he presented the courts in his initial 2255 materials, warranted an evidentiary hearing so that he and Brill, his attorney, could explain the actions they took, and did not take.

As one 2nd Circuit Court explained, "The procedure for determining whether a hearing is necessary is in part analogous to, but in part different from, a summary judgment proceeding. The petitioner's motion sets forth his or her legal and factual claims, accompanied by relevant exhibits. . . ." *Puglisi v. United States*, 586 F.3d 209, 212 (2nd Cir. 2008). The court went on to note that the court then "reviews those materials and relevant portions of the record" and goes on to determine whether, "viewing the evidentiary proffers, where

credible, and the record in the light most favorable to the petitioner, the petitioner may be able to establish at a hearing a prima facie case for relief." *Id.* at 213.

Korchevsky's proffers were certainly credible and when viewing the exhibits that he presented in the light most favorable to him, especially the great amount that existed, and the source of most of it, there should be little argument that a hearing was warranted in this case. Similar to the matter of Brill's affidavit, the Second Circuit Court of Appeals should be required to follow the law as set down by this Court. There is nothing ambiguous about the holdings in *Miller-El* or *Slack*.

And in the case of *Blackledge v. Allison*, 431 U.S. 63 (1977) an inmate named Gary Allison, who was serving time in state prison for bank robbery, brought a habeas petition claiming that his guilty plea had been induced by an unfulfilled promise of a ten-year sentence. (He was sentenced to a term of 17-21 years). The district court summarily dismissed the petition for habeas corpus on the basis of the state court record of the pleading proceeding. The Court of Appeals reversed, remanding the case for an evidentiary hearing.

This Court held that the prisoner, although not necessarily entitled to a full evidentiary hearing in the habeas proceedings, was nevertheless entitled to a careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts since his allegations were not vague or conclusory, but instead contained specific factual

allegations as to the issue at hand (the plea agreement and promises made).

In Korchevsky's case, which has common threads running through it, he produced detailed and credible factual allegations, backed up by others, in the form of admissible affidavits, and supporting documents. But there was certainly no "careful consideration" of his claims and he has not been able to fully present the relevant facts because Brill has never been held to explain the unusual, nee bizarre, acts that he undertook. Should Korchevsky be allowed the same careful consideration and processing of his claims, he would be entitled to have Brill explain, under oath this time, the reasons he took or did not take the actions that prevented Korchevsky from testifying as he desired, from presenting documentary evidence which he himself gave to Brill in large amounts, prevented Korchevsky from ever meeting his hired expert witnesses, most of whom never testified, what this mysterious email is and why no person has ever seen it, and certainly why Brill admitted to the jury, to the glee of the DOJ, that the Loscal "damning" evidence existed when it surely did not. To this day, none of this weirdness has been questioned or explained. It is probably time for it to be.

Korchevsky's petition to this Court should be granted.

Respectfully submitted,

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