No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AUGUSTIN ZAMBRANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court grant *certiorari* to make explicit that in ruling on a request for certificates of appealability, an appellate court must apply the appropriate COA standard, and direct that appellate courts employ the proper phrasing of that standard in such rulings?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were Petitioner Augustin Zambrano and Respondent United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Augustin Zambrano petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 754 F.3d 460. The district court's opinion denying Petitioner's 2255 (App. 2-36) is unreported.

JURISDICTION

The court of appeals denied a petition for rehearing on January 3, 2019. (App. 37) The time for filing a petition for writ of certiorari was extended by order of this Court until May 31, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2253, provides in relevant part:

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

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

This case affords the Court an opportunity to provide clear direction to circuit courts of appeals regarding how they are to rule on requests for certificates of appealability ("COA") resulting from § 2255 or § 2254 petitions. This Court's intervention is

necessary to put an end to *pro forma* rulings in which an appellate court either skips the necessary analysis of whether reasonable jurists could disagree with the district court's decision, or leaves the litigants and this Court in the dark regarding whether the appropriate analysis was conducted.

Petitioner Augustin Zambrano was convicted by a jury in the United States District Court for the Northern District of Illinois for racketeering conspiracy (18 U.S.C. § 1962(d)), assault with a deadly weapon in aid of racketeering (18 U.S.C. § 1959 (a)(3)), and conspiracy to commit extortion (18 U.S.C. § 1951). (App. 2-3) Following a joint trial with three codefendants, Mr. Zambrano was convicted on each of the three counts and a total sentence of 60 years' imprisonment (20 years on each count, ordered to run consecutively) was imposed. On direct appeal, the appellate court affirmed Mr. Zambrano's conviction and sentence. *United States v. Garcia, et al.*, 754 F.3d 460 (7th Cir. 2014).

Mr. Zambrano filed a petition pursuant to 28 U.S.C. § 2255 on January 11, 2016. On December 14, 2017, the District Court denied the petition. Pursuant to Rule 11 (a) of the Rules Governing § 2255 Proceedings for the United States District Courts, the district court also declined to issue a COA. (App. 35)

Mr. Zambrano appealed the district court's decision and requested a COA from the Seventh

Circuit on two issues: "1) Whether trial and appellate counsel rendered ineffective assistance of counsel for failing to object to the government's constructive broadening of the superseding indictment in violation of the Fifth Amendment and where that constructive broadening likely resulted in the jury reaching a guilty verdict based on a legally insufficient ground in violation of the Sixth Amendment? 2) Aside from ineffective assistance of counsel, whether the constructive broadening of the superseding indictment and the jury's likely reaching a guilty verdict based on a legally insufficient ground resulted in a conviction for conduct that did not constitute a crime?"

The Seventh Circuit denied the request for a COA, stating only that, "[w]e have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2)." (App. 1)

Mr. Zambrano filed a petition for rehearing arguing that the blanket denial of a COA violated the procedural requirement that COA requests must be ruled on prior to a merits determination and under a lesser standard as explained by this Court in *Buck v. Davis*, 137 S. Ct. 759 (2017) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Seventh Circuit denied the petition for rehearing without explanation. (App. 37)

REASON FOR GRANTING THE WRIT

The Court should grant the writ to make clear that in ruling on a COA, appellate courts must first determine whether reasonable jurists could disagree rather than rendering an apparent merits determination.

The right to appeal a district court's denial of a § 2255 petition (or for a state prisoner to appeal the denial of a §2254 petition) is not unqualified. Pursuant to 28 U.S.C. § 2253(c)(1), a petitioner must first obtain a COA. A COA is to issue only where the "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1).

Despite this language from § 2253, in determining whether to grant a COA, the appellate court is not to make a merits determination. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) and *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court has made explicit that there is only one question to be addressed at the COA stage and that a merits determination *cannot* come first:

> At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are

> adequate to deserve encouragement to proceed further.
>
> This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims.
>
> When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Buck, 137 S.Ct. at 773. (internal quotations and citation omitted)

The COA inquiry is, of course, a less demanding standard than determining whether a petitioner's appeal will ultimately be successful. The question at the COA stage is "only if the District Court's decision was debatable." *Miller-El*, 537 U.S. at 327. Where a reviewing court decides the merits of an appeal first, denying a COA on that basis, "it has placed too heavy a burden on the prisoner *at the COA stage*." *Id*. at 336-37. (emphasis in original)

This Court has not only emphasized that the less rigorous COA inquiry must come before a merits determination, but has also suggested that the proper way for an appellate court to phrase its determination

is in language of the lower standard. In *Buck*, the Court noted that "[t]he court below phrased its determination in proper terms – that jurists of reason would not debate that [the applicant] should be denied relief." *Buck*, 137 S.Ct. at 773. Despite the proper phrasing, the Court determined that the appellate court's analysis had put the merits determination before the COA analysis. *Id*.

Here, the Seventh Circuit unquestionably did not phrase its ruling in the proper terms. There is no mention of "jurists of reason" or "debate" anywhere in the court's perfunctory order. (App. 1) Based on the plain language of the order, it appears the Seventh Circuit made a merits determination, "[w]e have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2)." (App. 1)

Alternatively, in the event the Seventh Circuit actually employed the appropriate COA standard, it gave no indication that it had done so. Without an explanation of the basis for the decision, and an explanation of what standard was employed, the court's decision is all but unreviewable. How is a litigant, or this Court for that matter, to address the Seventh Circuit's decision without knowing whether the appropriate standard was employed? At a minimum, therefore this Court should grant

certiorari in this case and remand for a fuller explanation from the appellate court.

The phrasing employed by the Seventh Circuit in this case also appears to be consistent with the majority of orders denying COAs issued by the Seventh Circuit. Since this Court decided *Buck* on February 22, 2017, counsel's research has uncovered seventy-two (72) denials of COA issued by the Seventh Circuit.[1] Although some of the orders are

[1] *Harris v. United States*, No. 16-3287, 2017 WL 3971443 (7th Cir. Feb. 23, 2017); *Archambault v. United States*, No. 16-3000, 2017 WL 3221998 (7th Cir. Mar. 3, 2017); *Lewis v. Neal*, No. 16-3142, 2017 WL 3597066 (7th Cir. Mar. 3, 2017); *Demarco v. United States*, No. 16-1604, 2017 WL 4216593 (7th Cir. Mar. 6, 2017); *Bostic v. United States*, No. 16-3379, 2017 WL 4050409 (7th Cir. Mar. 9, 2017); *Harrison v. Butler*, No. 16-3242, 2017 WL 3725364 (7th Cir. Mar. 21, 2017); *Rushing v. United States*, No. 16-3491, 2017 WL 4326382 (7th Cir. Mar. 22, 2017); *Fluker v. United States*, No. 16-2182, 2017 WL 5952276 (7th Cir. Mar. 22, 2017) *McGuire v. United States*, No. 16-3362, 2017 WL 4003685 (7th Cir. Mar. 22, 2017); *Huber v. United States*, No. 16-3075, 2017 WL 3391716 (7th Cir. Mar. 22, 2017); *Sarno v. United States*, No. 16-3365, 2017 WL 4570522 (7th Cir. Mar. 24, 2017); *Colin v. Melvin*, No. 16-3094, 2017 WL 3397347 (7th Cir. Mar. 24, 2017); *Simon v. United States*, No. 16-3101, 2017 WL 3397345 (7th Cir. Mar. 30, 2017); *Moore v. United States*, No. 16-3089, 2017 WL 3391744 (7th Cir. Mar. 30, 2017); *Bryant v. United States*, No. 16-3073, 2017 WL 3391724 (7th Cir. Mar. 30, 2017); *Johnson v. Pfister*, No. 16-3679, 2017 WL 4785961 (7th Cir. Mar. 30, 2017); *Ceja v. United States*, No. 16-3046, 2017 WL 3254922 (7th Cir. Mar. 30, 2017); *Randall v. Lamb*, No. 16-3828, 2017 WL 5186375 (7th Cir. Apr. 13, 2017); *Nides v. United States*, Nos. 16-3659 & 16-3852, 2017 WL 4676297 (7th Cir. Apr. 19, 2017); *Williford v. Christianson*, No. 16-3698, 2017 WL 4842573 (7th Cir. Apr. 19, 2017); *Hoult v. United States*, No. 16-3699, 2017 WL 4844529 (7th Cir. Apr. 25, 2017); *Carter v. Pfister*, No. 16-3865, 2017 WL 5479604 (7th Cir. Apr. 25, 2017); *Black v. Neal*, No. 16-2354, 2017 WL 6003502 (7th Cir. May 2,

2017); *Stewart v. Lamb*, No. 16-3945, 2017 WL 5897586 (7th Cir. May 3, 2017); *Hamilton v. Strahota*, No. 16-3859, 2017 WL 5479605 (7th Cir. May 3, 2017); *Jenkins v. Zatecky*, No. 17-1128, 2017 WL 3136029 (7th Cir. May 12, 2017); *Freytes-Torres v. Eckstein*, No. 16-3835, 2017 WL 5201935 (7th Cir. May 15, 2017); *Howard v. United States*, No. 16-3816, 2017 WL 5180081 (7th Cir. May 15, 2017); *Fargo v. Strahota*, No. 16-3776, 2017 WL 5197149 (7th Cir. May 15, 2017); *Hollis v. Pfister*, Nos. 16-4040 & 17-1129, 2017 WL 3136053 (7th Cir. May 16, 2017); *Taylor v. United States*, No. 17-1219, 2017 WL 3400018 (7th Cir. May 23, 2017); *Estremera v. United States*, No. 16-3614, 2017 WL 4582178 (7th Cir. May 24, 2017); *Henyard v. Lashbrook*, No. 16-3633, 2017 WL 4574641 (7th Cir. May 24, 2017); *Groves v. United States*, No. 17-1118, 2017 WL 3124055 (7th Cir. May 31, 2017); *Davis v. Strahota*, No. 17-1288, 2017 WL 3444047 (7th Cir. May 31, 2017); *Suding v. Knight*, No. 17-1167, 2017 WL 3224657 (7th Cir. June 2, 2017); *Salim v. Richardson*, No. 17-1433, 2017 WL 3865720 (7th Cir. June 6, 2017); *Villanueva v. Brown*, No. 17-1364, 2017 WL 3631069 (7th Cir. June 9, 2017); *Santiago v. Pfister*, No. 17-1339, 2017 WL 3630996 (7th Cir. June 9, 2017); *Dixon v. United States*, No. 17-1374, 2017 WL 3631261 (7th Cir. June 12, 2017); *White v. Neal*, No. 16-3947, 2017 WL 5891698 (7th Cir. June 12, 2017); *Ford v. Lamb*, No. 17-1240, 2017 WL 4174943 (7th Cir. June 21, 2017); *Borchert v. United States*, No. 17-1764, 2017 WL 4574825 (7th Cir. June 28, 2017); *Martin v. United States*, No. 17-1390, 2017 WL 3658858 (7th Cir. July 11, 2017); *McGregory v. Lashbrook*, No. 17-1637, 2017 WL 4358950 (7th Cir. July 11, 2017); *Smith v. United States*, No. 17-1922, 2017 WL 5157747 (7th Cir. Aug. 1, 2017); *Williamson v. Lamb*, No. 17-1719, 2017 WL 4857583 (7th Cir. Aug. 1, 2017); *Montgomery v. Brown*, No. 17-1548, 2017 WL 4083599 (7th Cir. Aug. 1, 2017); *Forbes v. United States*, No. 17-1669, 2017 WL 4404717 (7th Cir. Aug. 9, 2017); *Tijerina v. Lashbrook*, No. 17-1919, 2017 WL 5158698 (7th Cir. Aug. 10, 2017); *Jenkins v. United States*, No. 17-1987, 2017 WL 5301885 (7th Cir. Aug. 11, 2017); *Collins v. United States*, No. 16-3606, 2017 WL 4541725 (7th Cir. Aug. 11, 2017); *Ozuna v. United States*, No. 17-1544, 2017 WL 4083724 (7th Cir. Aug. 22, 2017); *Cameron v. Butts*, No. 17-1670, 2017 WL 4404720 (7th Cir. Aug. 22, 2017); *Golden v. Pfister*, No. 16-3264, 2017 WL 3725363 (7th Cir. Aug 23, 2017); *Mey v. Richardson*, No. 17-2006, 2017 WL 5485461 (7th Cir. Aug. 23, 2017); *Young v. Varga*, No. 17-1408, 2017 WL 3747270 (7th Cir. Aug. 23, 2017);

somewhat longer than the order at issue here (indicating that a petition was time barred for example), the vast majority contain the same relevant language; that is, "[t]his court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2)."

Notably, however, in a handful of the seventy-two orders issued since *Buck*, the Seventh Circuit has employed the proper phrasing, indicating in one way or another that the issues raised are not debatable. *See*, *Martin v. United States*, 2017 WL 3658858 (7th Cir. June 22, 2017) ("We conclude that the district court's decision is not debatable as to any of Martin's

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Curry v. Neal, No. 16-3759, 2017 WL 5079189 (7th Cir. Aug. 23, 2017); *Cole v. United States*, No. 16-1258, 2017 WL 3894996 (7th Cir. Aug. 23, 2017); *Dickerson v. United States*, No. 17-2545, 2017 WL 7116975 (7th Cir. Aug. 24, 2017); *Johnson v. United States*, No. 17-1783, 2017 WL 4772540 (7th Cir. Aug. 31, 2017); *McGee v. United States*, No. 17-1850, 2017 WL 5054215 (7th Cir. Sept. 19, 2017); *Pickett v. United States*, No. 17-2110, 2017 WL 5899317 (7th Cir. Sept. 21, 2017); *Foster v. Smith*, No. 17-1908, 2017 WL 5197490 (7th Cir. Sept. 29, 2017); *Rosales v. United States*, No. 17-2144, 2017 WL 5899313 (7th Cir. Oct. 6, 2017); *Kafer v. Smith*, No. 17-1948, 2017 WL 5185376 (7th Cir. Oct. 11, 2017); *Ohlinger v. Pollard*, No. 17-1942, 2017 WL 5185361 (7th Cir. Oct. 12, 2017); *Culver v. Zatecky*, No. 17-2065, 2017 WL 5899311 (7th Cir. Nov. 6, 2017); *Berry v. Pfister*, No. 17-2468, 2018 WL 6016837 (7th Cir. Mar. 20, 2018); *Cuesta v. Richardson*, No. 17-3342, 2018 WL 2229336 (7th Cir. May 8, 2018); *McCurtis v. Burke*, No. 17-3362, 2018 WL 2670627 (7th Cir. May 18, 2018); *Dickinson v. United States*, No. 18-1220, 2018 WL 7020142 (7th Cir. Aug. 24, 2018)

numerous claims."); *Cameron v. Butts*, 2017 WL 4404720 (7th Cir. August 22, 2017) ("There is no reasonable dispute that Cameron's petition is barred by the one year statute of limitations in 28 U.S.C. § 2244(d)(1)."); *Johnson v. United States*, 2017 WL 4772540 (7th Cir. August 31, 2017) ("It is beyond reasonable debate that direct-appeal counsel did not wholly abandon Johnson . . . ")

The Seventh Circuit's phrasing of its analysis in the proper terms one some occasions reflects that the appropriate COA inquiry was employed in those cases. By omitting the proper language in the other cases, including Mr. Zambrano's, however, the vast majority of orders can only be viewed as the appellate court placing the cart before the horse and deciding the merits prior to engaging in the COA inquiry. That there are orders employing the proper phrasing also demonstrate that it should not be presumed that the correct standard was employed in the others.

This Court should grant *certiorari* and remand to the appellate court with directions to conduct its analysis under the proper COA standard and render its decision in the language of that standard. The Court's intervention is required to address what appears to be a systemic flaw in the appellate court's decision-making regarding requests for COAs; that is, applying the incorrect standard, or not making apparent whether the correct standard was applied. Applying the incorrect standard, of

course, means that the appellate court has essentially acted without jurisdiction. *Buck,* 137 S.Ct. at 773.

In an analogous situation also involving jurisdictional issues, this Court has directed lower courts to avoid ambiguity by making their reasoning explicit. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court wrestled with a question commonly occurring in its review of state court decisions; that is, where a state court opinion cites to both federal and state precedents, whether the state court judgment rests on an adequate and independent state law ground. *Id*. at 1041. To resolve this "vexing issue," the Court imposed a "plain statement" rule, requiring a state court to indicate "that a decision rests upon adequate and independent state grounds." *Id*. at 1042. One of the reasons the Court believed a "plain statement" rule was important was so that "ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Id*. at 1043, *citing*, *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

The same principle is applicable here. Without an unambiguous explanation that the proper COA standard was applied, this Court is in no position to determine whether the lower court acted without jurisdiction by jumping ahead to a merits determination. The Court should impose a plain statement requirement directing lower courts to

explicitly state the standard under which they have ruled on a petitioner's request for a COA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2019