NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ANDRE CLARKE,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Maples v. Thomas*, 565 U.S. 266 (2012) requires importation of agency principles into the equitable tolling context, such that it alters this Court's conclusion two years earlier in *Holland v. Florida*, 560 U.S. 631 (2010) that attorney error can constitute extraordinary circumstances allowing for equitable tolling of the one-year limitations period applicable to 28 U.S.C. § 2254 habeas corpus petitions.

2. Whether the Eleventh Circuit's rule that a certificate of appealability cannot be granted where an issue is foreclosed by circuit precedent conflicts with *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017), as well as decisions of the Third and Ninth Circuits holding that a split in the circuits warrants a COA.

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Andre Clarke respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-11499 in that court.

OPINIONS BELOW

The order entered by the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability is unreported and is reproduced in Appendix A-1. The district court's order denying Mr. Clarke's 28 U.S.C. § 2254

petition for writ of habeas corpus and denying a certificate of appealability is unreported and is reproduced in Appendix A-2. The report of magistrate judge following an evidentiary hearing is unreported and is reproduced in Appendix A-3. The district court's order remanding for an evidentiary hearing is unreported and is reproduced in Appendix A-4. The magistrate judge's report recommending denial of the petition without an evidentiary hearing is unreported and is reproduced in Appendix A-5.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On May 23, 2018, the court of appeals denied Mr. Clarke a certificate of appealability to appeal the district court's denial of his § 2254 petition for writ of habeas corpus. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory provisions:

Title 28, U.S.C. § 2244(d)

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

* * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Title 28, U.S.C. § 2253(c)

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken 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;

* * *

(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).

28 U.S.C. § 2253(c).

STATEMENT OF THE CASE

A. State Proceedings.

In the early morning hours of April 26, 2003, Mr. Clarke was at a club in West Palm Beach, Florida, with three of his friends when the club's bouncer, Larry Lark, escorted one of those friends, Joel Colas, out of the club. *Clarke v. State*, 102 So.3d 763, 764 (Fla. 4th Dist. Ct. App. 2012) (*per curiam*).

> The rest of the group followed. Outside the club, Lark and Colas exchanged words and began to have a physical altercation. Another club employee, bartender Rafael Vasallo, entered the fray, taking a swing at Colas. Lark gained the upper hand in the fray and began to beat Colas severely, but no one attempted to pull Lark away from Colas. Colas's beating did not end until Defendant shot Lark in the head and Vasallo in the leg. Lark was pronounced dead at the scene.

Id. Mr. Clarke was arrested and charged with second degree murder with a firearm and aggravated battery with a firearm. *Id.* While Mr. Clarke was in the county jail pending trial on the Florida charges, two Chicago detectives visited him and advised him that he was going to be extradited to Illinois to face charges there. App. A-3 at 11. In April 2005, a Florida jury found Mr. Clarke guilty of both counts as charged. *Id.* The trial court imposed a life sentence.

Mr. Clarke appealed his conviction and sentence to the Florida Fourth District Court of Appeal. A public defender was assigned to handle his Florida appeal, and Mr. Clarke was designated to the Glades Correctional Institution in Belle Glade, Florida. At the time he went to Glades C.I., Mr. Clarke knew that he was going to be extradited to Illinois, but wasn't sure for how long he would be gone.

App. A-2 at 11. Mr. Clarke was not comfortable handling his own legal matters. *Id.* at 12. He also knew that he would need help with his Florida case beyond what his appointed appellate counsel could do for him. *Id.* at 11. But he had no money to hire counsel and no family in the United States to help him. *Id.*

While Mr. Clarke was at Glades C.I., he met an inmate named "St. Pete," who was well-versed in the law and willing to help. *Id.* at 12. St. Pete advised Mr. Clarke that he needed an outside attorney to handle his Florida postconviction matters. *Id.* St. Pete told him he should reach out to Kayo Morgan, a criminal defense attorney known for doing *pro bono* work for prisoners. *Id.* Mr. Clarke agreed and had St. Pete write to Mr. Morgan on his behalf. *Id.* According to Mr. Clarke, Mr. Morgan wrote back to him, stating that if Mr. Clarke sent him a draft postconviction motion for his signature, he would file it *pro bono*. *Id.* It was Mr. Clarke's understanding that St. Pete would draft a postconviction motion for Mr. Clarke, send the motion to Mr. Morgan, and then Mr. Morgan would file the motion immediately upon the conclusion of Mr. Clarke's direct appeal. *Id.*

Mr. Clarke was thereafter extradited to Chicago, and while he was there, the Florida Fourth District Court of Appeal affirmed his Florida convictions and sentence in a *per curiam* decision. *Id.*; *Clarke v. State*, 954 So.2d 36 (Fla. 4th Dist. Ct. App. 2007) (Table). The state appellate court denied rehearing on July 3, 2007, and Mr. Clarke's convictions became final for purposes of the statute of limitations provision governing 28 U.S.C. § 2254 petitions on November 5, 2007, when the time

for filing a petition for writ of certiorari to the United States Supreme Court expired. *See* 28 U.S.C. § 2244(d)(1); *Clay v. United States*, 537 U.S. 522, 537, 123 S. Ct. 1072, 1076 (2003).

While Mr. Clarke was in Chicago, he did not hear anything from either St. Pete or Mr. Morgan, and he did not have access to his Florida legal materials for nearly the entire time he was in Illinois. App. A-2 at 12-13. After spending several years in Chicago, he was returned to Florida and to Glades C.I. *Id.* at 13. When Mr. Clarke returned to Glades C.I. he learned that St. Pete was no longer there, and no one else was willing to help him with his legal matters for free. *Id.*

In spring 2009, Mr. Clarke was transferred to Avon Park Correctional Institution, where he met inmate Frederick Thacker. *Id.* Mr. Thacker offered to assist Mr. Clarke with his legal matters, reviewed Mr. Clarke's legal documents, determined that no postconviction motion had been filed for Mr. Clarke, and immediately filed a postconviction motion pursuant to Fla. R. Crim. P. 3.850 on Mr. Clarke's behalf. *Id.* That motion was filed on July 21, 2009, and was therefore timely under the two-year limitations period applicable to such motions under Florida law, *see* Fla. R. Crim. P. 3.850(b), but was nonetheless more than 8 months beyond the federal one-year limitations period as measured by § 2244(d).

Mr. Clarke's postconviction motion remained pending before the state courts until May 16, 2014, when the Florida Fourth District Court of Appeal issued its mandate following its *per curiam* affirmance of the trial court's denial of Mr.

Clarke's Rule 3.850 motion.

B. Federal Proceedings.

After his state postconviction proceedings became final, Mr. Clarke filed a *pro se* 28 U.S.C. § 2254 petition for writ of habeas corpus in the United States District Court for the Southern District of Florida raising the claims he had exhausted in his state postconviction motion. The petition conceded that it was filed outside the one-year limitations period, but asserted that equitable tolling was warranted because Mr. Morgan had failed to the file a state postconviction motion for Mr. Clarke at the time that they had agreed he would do so – immediately upon the completion of Mr. Clarke's direct appeal.

The State's response argued that Mr. Clarke's equitable tolling claim was insufficient because he failed to show the "extraordinary circumstances" and "diligence" required to demonstrate entitlement to equitable tolling under *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562 (2010). Mr. Clarke filed a *pro se* reply in which he argued that his allegations regarding Mr. Morgan's failure to file a state postconviction motion on his behalf were sufficient to warrant an evidentiary hearing on equitable tolling.

On January 19, 2016, the magistrate judge issued a report recommending that the petition be dismissed as untimely without an evidentiary hearing. App. A-5. Mr. Clarke timely filed *pro se* objections to the report, again asserting that his allegations regarding attorney Morgan's actions warranted an evidentiary

hearing on equitable tolling. On March 28, 2016, the district court rejected the magistrate judge's report, and remanded for an evidentiary hearing on equitable tolling. App. A-4.

On November 8, 2017, the magistrate judge held an evidentiary hearing at which Mr. Clarke was the only witness. In pertinent part, Mr. Clarke testified that Mr. Morgan "wanted a draft of petitioner's [Rule 3.850] motion," and it was his "understanding that the motion was to be filed immediately upon the completion of his direct appeal." App. A-2 at 12. Mr. Clarke did not hear anything from either St. Pete or Mr. Morgan while he was in Chicago. *Id.* Mr. Clarke recalled receiving multiple letters from Mr. Morgan, and testified that if he had any concerns he could write Mr. Morgan and Mr. Morgan would write back. *Id.* at 15. Mr. Clarke also acknowledged that Mr. Morgan wrote him a letter in which he apologized to Mr. Clarke and "stated that he had confused Mr. Clarke's case with another, and that he had filed a 3.850 in another case, instead of Petitioner's case." *Id.*

Following the evidentiary hearing, the magistrate judge issued a second report recommending that the district court dismiss Mr. Clarke's petition as untimely and deny a certificate of appealability. *Id.* The report recommended that the district court conclude that Mr. Clarke failed to demonstrate "extraordinary circumstances" warranting equitable tolling, but made no recommendation with respect to Mr. Clarke's "diligence." *Id.* at 25.

Specifically, the report followed the Eleventh Circuit's decision in *Cadet v.*

Florida Dep't of Corr., 853 F.3d 1216 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1042 (2018), which held that attorney negligence, even gross negligence, can never amount to "extraordinary circumstances" warranting equitable tolling. *Id.* at 22-24 (citing *Cadet*, 853 F.3d at 1233-35). Because the magistrate judge found that "there is simply no evidence that Mr. Morgan's conduct amounted to anything more than attorney negligence," the report concluded that it "does not constitute an extraordinary circumstance for purpose[s] of equitable tolling." *Id.* at 24.

The report also rejected Mr. Clarke's argument that he had been temporarily abandoned by Mr. Morgan and had therefore demonstrated "extraordinary circumstances" under *Cadet*. *Id.* The magistrate judge found "there is no evidence whatsoever that Mr. Morgan ever abandoned Petitioner, even temporarily. Rather, Petitioner admitted at the hearing that Mr. Morgan wrote him several times throughout the proceedings," and also "stated that Mr. Morgan would respond to Petitioner any time Petitioner had a question or concern about this case." *Id.* at 24-25.

Mr. Clarke timely objected to the magistrate judge's report. On March 8, 2018, the district court "affirmed and approved" the magistrate judge's report, and denied Mr. Clarke a certificate of appealability. App. A-2.

Mr. Clarke timely appealed to the United States Court of Appeals for the Eleventh Circuit and moved for a certificate of appealability. On May 23, 2018, the Eleventh Circuit denied a certificate of appealability in a one-judge order. App.

A-1. The Eleventh Circuit, like the district court, concluded that Mr. Clarke's case was controlled by *Cadet*: "Assuming Morgan was supposed to file a [state postconviction] motion on Clarke's behalf, Clarke did not demonstrate that Morgan's conduct amounted to anything greater than negligence. . . . This Court has held that negligence, even gross negligence . . . does not warrant equitable tolling in a federal habeas case." App. A-1 at 2 (citing *Cadet*, 853 F.3d at 1235-36). The Eleventh Circuit also conclude that Mr. Clarke failed to demonstrate that his counsel abandoned him, as is required under *Cadet*. *Id.* at 2-3.

And, because Mr. Clarke failed to demonstrate entitlement to equitable tolling under *Cadet*, the Eleventh Circuit concluded that no COA was warranted. *Id.* at 3.

REASONS FOR GRANTING THE WRIT

I. There is a split in the circuits as to whether *Maples v. Thomas*, 565 U.S. 266 (2012) requires importation of agency principles into the equitable tolling context, such that it alters this Court's conclusion two years earlier in *Holland v. Florida*, 560 U.S. 631 (2010) that attorney error can constitute extraordinary circumstances allowing for equitable tolling of the one-year limitations period applicable to 28 U.S.C. § 2254 habeas corpus petitions.

The Antiterrorism and Effective Death Penalty Act's one-year limitations period for the filing of a 28 U.S.C. § 2254 habeas corpus petition is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). To demonstrate equitable tolling, the petitioner must show both that he pursued habeas relief

diligently and that some extraordinary circumstance prevented timely filing. *Id.* at 649.

In *Holland*, this Court recognized that attorney error can constitute an extraordinary circumstance for purposes of equitably tolling the AEDPA deadline. *Holland*, 560 U.S. at 650-52. Two years later, in *Maples v. Thomas*, 565 U.S. 266 (2012), the Court relied on agency principles to excuse *procedural default* when an attorney abandons her client but not when she is merely negligent, and cited *Holland* as instructive on that issue. *Id.* at 281-82. The Eleventh Circuit relied on *Maples* and its agency rationale to conclude that it modified *Holland* such that attorney negligence, however egregious, can never warrant equitable tolling; rather, a showing of abandonment or some other misconduct by counsel is required to demonstrate extraordinary circumstances. *Cadet v. Florida Dep't of Corr.*, 853 F.3d 1216, 1226-27 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1042 (2018). The Eleventh Circuit applied *Cadet* here to deny Mr. Clarke a COA, concluding that Mr. Clarke had not shown extraordinary circumstances because Mr. Morgan had not abandoned Mr. Clarke and counsel's actions amounted to nothing more than negligence. App. A-2 at 2-3.

The circuits disagree as to whether *Maples* alters *Holland* in the manner postulated by the Eleventh Circuit. The Second Circuit has concluded that *Maples* overrules *Holland*, holding that after *Maples* attorney wrongdoing must rise to effective abandonment – an act that severs the agency relationship – to constitute

extraordinary circumstances in the equitable tolling context. *Rivas v. Fischer*, 687 F.3d 514, 538 n.33 (2d Cir. 2012). The Ninth Circuit has concluded that it is unclear whether this Court intended to hold in *Maples* that attorney misconduct short of abandonment can no longer serve as a basis for equitable tolling. *Luna v. Kernan*, 784 F.3d 640, 648-49 (9th Cir. 2015). It ruled that because *Maples* did not explicitly overrule *Holland*, the latter's holding – egregious attorney acts or omissions of all stripes may serve as a basis for equitable tolling – remains the law. *Id.* at 649. The Fifth Circuit has observed that "the Supreme Court has differentiated between 'garden variety claim[s] of exclusable neglect, such as a simple "miscalculation" that leads a lawyer to miss a filing deadline,' which do 'not warrant equitable tolling,' and 'abandonment by counsel," which does, citing both *Holland* and *Maples*. *United States v. Wheaton*, 826 F.3d 843, 852-53 (5th Cir. 2016) (comparing *Maples*, 132 S. Ct. at 923-24 with *Holland*, 560 U.S. at 651-52). But the Fifth Circuit did not expressly address whether *Maples*'s agency rationale alters *Holland*'s holding on attorney error. *See id.* The Fourth and Seventh Circuits have expressly declined to reach the issue. *See Raplee v. United States*, 842 F.3d 328, 334 (4th Cir. 2016), cert. denied, 137 S. Ct. 2274 (2017); *Lombardo v. United States*, 860 F.3d 547, 554 n.1 (7th Cir. 2017), *cert denied*, 138 S. Ct. 1032 (2018).

This confusion in the lower courts regarding the interplay between *Holland* and *Maples* has not been rectified by the only decision of this Court to mention both

of them, *Christenson v. Roper*, 574 U.S. ___, 135 S. Ct. 891 (2015). There, the Court cited *Holland* for the proposition that "[t]olling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "serious instances of attorney misconduct,'" but said nothing about that standard being modified by *Maples* so as to be satisfied only in cases of attorney abandonment. *Id.* at 894. Accordingly, this conflict in the circuits is ongoing, real, and substantial, and has yet to be addressed by this Court.

Moreover, whether *Holland*'s equitable tolling standard has been modified by *Maples* is an important question meriting this Court's attention. *Holland* has been cited in nearly 10,000 lower federal court equitable tolling decisions in the six years that have passed since the Court decided *Maples*, and 390 of those decisions also cite to *Maples*.[1] Guidance on this issue from the Court at this time will therefore assist the lower courts in a great number of decisions.

Because of the confusion in the circuits regarding the interaction of *Maples* and *Holland* warrants this Court's attention and the importance of the question presented, Mr. Clarke respectfully requests that the Court grant him a petition for writ of certiorari on the first question presented herein.

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1 The cited number of decisions was obtained from the following Westlaw searches in the "All Federal" database: adv:Holland and date(after 01/18/2012) and "equitable tolling" and adv:Holland and date(after 01/18/2012) and "equitable tolling" and Maples.

II. The Eleventh Circuit's rule that a COA may not be granted where binding circuit precedent forecloses a claim conflicts with this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017) and with the decisions of other circuits holding that a split in the lower courts on an issue warrants a COA.

To appeal the denial of a § 2254 habeas corpus petition, a habeas petitioner must obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 773 (2017).

To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). This standard requires the petitioner to "sho[w] 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The ultimate resolution of the issues on appeal is irrelevant. "At the COA stage, the only question is whether the application has shown that 'jurists of reason would 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.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Indeed, this Court has repeatedly admonished the lower courts that it is error to deny a COA upon a finding that the petitioner's claims lack merit. Most recently in *Buck*, this Court reiterated that because "[t]he COA inquiry . . . is not coextensive with a merits analysis[,] . . . [t]his threshold question should be decided 'without full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). To do otherwise risks resolving the merits of an appeal without the jurisdiction to do so. "'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.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336-37).

The Eleventh Circuit has adopted a rule that effectively requires that COAs be adjudicated on the merits where there is controlling circuit precedent on the issue on which a COA is sought. Under that rule, a COA may not be granted where binding Eleventh Circuit precedent forecloses a claim. *See Hamilton v. Sec'y, Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (holding "no COA should issue where the claim is foreclosed by binding circuit precedent 'because reasonable jurists will follow controlling law.'" (quoting *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007)), *cert. denied*, 136 S. Ct. 1661 (2016). The Eleventh Circuit holds this to be true even where there is a split in the circuits on the question on which a COA is sought. *See id.* (rejecting circuit-split argument and writing that "we are

bound by our Circuit precedent, not by Third Circuit precedent."); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1171 (11th Cir.), *cert. denied*, 138 S. Ct. 217 (2017) (holding that despite split in the circuits on the issue on which a COA was sought it "need not evaluate that circuit split because [the petitioner's] argument is foreclosed by our binding [precedent] and his attempted appeal does not present a debatable question because reasonable jurists would follow controlling law."). It has therefore failed to heed this Court's repeated warnings that a court should not decline a COA simply because it believes that the petitioner will not prevail on the merits.

In sharp contrast to the Eleventh Circuit's "binding circuit precedent" rule, the Third and Ninth Circuits have held adverse circuit precedent does not preclude a COA; to the contrary, both those courts have held that a COA is warranted where there is split in the courts of appeal on the question. *See United States v. Doe*, 810 F.3d 132, 147 (3d Cir. 2015); *Lambright v. Stewart*, 220 F.3d 1022, 1025-36, 1028-29 (9th Cir. 2000). The Fifth Circuit also recently granted a COA on a question on which there is a split in the circuits, albeit in an unpublished decision. *See Busby v. Davis*, 677 F. App'x 884, 890-91 (5th Cir. 2017). And this Court has held that a certificate of probable cause, the pre-AEDPA version of a COA, must be granted where there is a circuit split on the merit of the underlying claim. *Lozada v. Deeds*, 498 U.S. 430, 432 (1991).

To be sure, the Eleventh Circuit framed the decision in Mr. Clarke's appeal using the proper terms – that reasonable jurists could not debate whether Mr.

Clarke was entitled to equitable tolling. But that court reached its conclusion by essentially deciding the merits of the appeal. It concluded Mr. Clarke would be unsuccessful on appeal because *Cadet* is binding circuit precedent rejecting attorney negligence as a basis for equitable tolling, and Mr. Clarke could demonstrate nothing more than attorney negligence. *See* App. A-1 at 2. However, as discussed in § I., above, there is confusion and conflict in the lower courts as to whether *Cadet* states the correct standard. The Eleventh Circuit considered none of those conflicts when it denied Mr. Clarke a COA.

The Eleventh Circuit's reliance on its "binding circuit precedent" rule burdens petitioners too heavily at the COA stage. As this Court recently stated in *Buck*:

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. *Miller–El*, 537 U.S., at 336–337, 123 S. Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*

Buck, 137 S. Ct. at 774 (brackets and ellipses in original). Thus, a COA should be denied only when the resolution of the petitioner's claim is "beyond all debate." *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 1264 (2016).

Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes issuing COAs where reasonable jurists actually have debated the issue presented in a series of conflicting decisions in the lower courts, Mr. Clarke respectfully requests that this Court grant him a petition for writ of certiorari on the second question presented herein.

CONCLUSION

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

Respectfully submitted,

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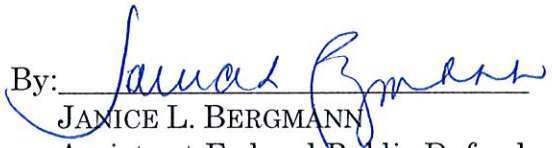
FEDERAL PUBLIC DEFENDER

By: 
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