18-7952

NO:

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Stanley D. Partman,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Is the Fourth Circuit Court of Appeal's Standard of Determination for Issuance of a Certificate of Appealability in Essence Decides an Appeal Without Jurisdiction in Violation of **28. U.S.C §2253(c)(1)?**

II.

Whether the C.O.A Inquiry in **28 U.S.C §2253(c)(2)** is Unconstitutionally Vague in All of its Applications?

LIST OF PARTIES

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

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

The Fourth Circuit Court of Appeals.

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TABLE OF AUTHORITIES

Cases:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 18, 2018.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 20, 2018, and a copy of the order denying rehearing appears at Appendix C.

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

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

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Fifth Amendment--Due Process

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(2) Anti Effective Death Penalty Act--"AEDPA"

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(3) 28 U.S.C §2253(c)(2)--"Only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

Petitioner was charged in five counts of a voluminous counts indictment. Count One charged Conspiracy to Possess with Intent to Distribute and to Distribute Cocaine, in violation of **21 U.S.C §§841(a)(1), and (b)(1)(A), and 846(b)(1)(C);** Count Two charged Possession with Intent to Distribute Cocaine, in violation of **21 U.S.C §§841(a)(1) and 841(b)(1)(C);** Count Thirty Seven charged Using a Telephone to Distribute and Possess with Intent to Distribute Cocaine and Cocaine Base, and Aiding and Abetting, in violation of **21 U.S.C §843(b) and 18 U.S.C §2;** Count Seventy charged Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of **18 U.S.C §924(c);** and Count Seventy One charged Using a Telephone to Distribute and Possess with Intent to Distribute Cocaine and Cocaine Base, and Aiding and Abetting, in violation of **21 U.S.C §843(b) and 18 U.S.C §2.** Following a Jury Trial, Petitioner was convicted of Counts 1, 2, 3, 70, and 71 of the Amended Second Superseding Indictment.

The Court sentenced Petitioner to a total term of 396 months--336 months each as to Counts 37 and 71, to run concurrently; and 60 months on Count 70, to run consecutively to all other terms. An appeal was filed to the Fourth Circuit Court of Appeals. **See United States v. Partman, 568 F.App'x 205 (4th Cir. 2014).** However, the Fourth Circuit affirmed. A petition for writ of certiorari was filed and the Court denied the petition on November 17, 2014. **See Partman v. United States, 135 S.Ct. 690(2014).**

On November 9, 2015, Petitioner filed a timely MOTION to VACATE, pursuant to **28 U.S.C §2255**, raising numerous Ineffective Assistance of Counsel issues. .The Government filed MOTIONS for Summary Judgment. The Petitioner responded in opposition to the Government's motion for summary judgment.

On February 9, 2018, the District Court denied Petitioner's **§2255** MOTION and dismissed with prejudice, and granted the Government's motion for summary judgment. The District Court also denied a Certificate of Appealability.

The Petitioner then sought a Certificate of Appealability to the Fourth Circuit Court of Appeals, but the Fourth Circuit denied a C.O.A and dismissed the appeal.

The Petitioner filed a Petition for Rehearing and Rehearing En Banc, which the Fourth Circuit also denied.

This Petition follows:

REASONS FOR GRANTING THE WRIT

I.

The Fourth Circuit has continued to Improperly assess the merits of appeals without a C.O.A. that's inconsistent with applicable decisions of this Court in **Miller-El v. Cockrell, 537 U.S. 322 (2003)**; and **Buck v. Davis, 137 S.Ct. 759 (2016).**

Petitioner asserts, pursuant to **28 U.S.C. §2253(c)(1),** unless a circuit justice or judge issues a Certificate of Appealability an appeal may not be taken to the Court of Appeals. **28 U.S.C. §2253(c)(1); Buck v. Davis, 137 S.Ct. 759, 773 (2016)**("Until the prisoner secures a C.O.A, the Court of Appeals may not rule on the merits of his case.") In order to obtain a C.O.A, Petitioner must make "a substantial showing of the denial of a constitutional right." **Id.** (quoting **§2253(c)(2).**)

Pursuant to the Fourth Circuit Court of Appeals' (herein **"Court below"**) order the Petitioner filed an "Informal Brief", wherein Petitioner raised numerous issues for a C.O.A, pursuant to **Buck, supra.** However, the Court below declared that "[W]hen the District Court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the District Court's assessment of the constitutional claim is debatable or wrong." **See Appendix "A" at 2** (citing **Slack v. McDaniel, 529 U.S. 437, 484 (2000); Miller-**

-El v. Cockrell, 537 U.S. 322, 336-38 (2003)).

To the contrary, Petitioner argues the Court below declaration that Petitioner must demonstrate that reasonable jurists would find that the District Court's "assessment" of the constitutional claim is "debatable or wrong", is inconsistent with this Court's decision in **Miller-El, supra,** and **Buck, supra.**

Historically, this Court in **Slack** interprets **§2253(c),** under the AEDPA. The Court explained: "Except for substituting the word 'constitutional' for the word 'federal', §2253 is a codification of the CPC standard announced in **Barefoot v. Estelle, 463 U.S. at 894, 77 L.Ed. 2d 1090, 103 S.Ct. at 3383." Slack, 529 U.S. at 483.** The Court further reasoned because "Congress had before it the meaning **Barefoot** had given to the words it selected", the Court gives the language found in **§2253(c)** the meaning ascribed it in **Barefoot** with due note for the substitution of the word 'constitutional."" **Id.** Consequently, "[t]o obtain a C.O.A under **§2253(c),** a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under **Barefoot,** includes showing 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, 529 U.S. at 483-84** (quoting **Barefoot, supra, at 893, and n.4, 77 L.Ed. 2d 1090, 103 S.Ct. 3383** ("'sum[ming] up the substantial showing standard."')).

However, this Court has also stated "where a District Court has rejected the constitutional claims on the merits, the showing required to satisfy §2253 is straight forward: The petitioner must demonstrate that reasonable jurists would find the District Court's assessment of constitutional claims debatable or wrong." **Id.**

Its from this nub, the Court below relies to decide Petitioner's appeal without a C.O.A and to deny Petitioner a C.O.A and dismissed his appeal.

But in contrast, in **Miller-El, supra,** this Court examined "when a prisoner can appeal the denial or dismissal of his petition for writ of habeas corpus." **Id at 326.**

The issue argued in **Miller-El** were "the standards AEDPA imposes before a court of appeals may issue a C.O.A to review a denial of habeas relief in the District Court. **Id. at 327.** In resolving **Miller-El**, this Court decided "when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." **Id.** The Court also reiterated that "[c]onsistent with our prior precedent and the text of the habeas corpus statute, we reiterated that a prisoner seeking a C.O.A need only demonstrate 'a substantial showing of the denial of a constitutional right.' A petitioner satisfies this standard by demonstrating that jurists of reason could 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." Id. (quoting **Slack, supra, at 484)).**

This is what Petitioner did-"demonstrat[ed] that jurists of reason could disagree with the District Court's resolution of his constitutional claims." Thus, its within this vein Petitioner's argument flows, because "[t]he C.O.A determination under **§2253(c)** requires an overview of the claims in the habeas petition and a general assessment of their merits." In other words, the Court below is required to "look to the District Court's application of AEDPA to petitioner's constitutional claims and asks whether that resolution was debatable **amongst** jurists of reason. This threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact, the statute forbids it." **Miller-El 537 U.S. at 336-37.**

Concurrent, in Petitioner's case, the District Court denied his **§2255 MOTION** and dismissed it with prejudice. The Court also denied a C.O.A. Petitioner filed a timely Notice of Appeal. Pursuant to the "Court below" practice, it entered a preliminary briefing order directing Petitioner to file a brief addressing the merits of his claims he wishes to raise. To that order, Petitioner raised numerous issues for "C.O.A" that challenged the District Court's "resolution" of his constitutional claims.

But on review, for the issuance of a Certificate of Appealability, "a substantial showing of the denial of a constitutional right", the Court below declared that when the District Court denied relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the District Court's **"assessment"** of the constitutional claim is debatable or wrong. The Court then "independently reviewed the record and concluded that Partman has not made the requisite showing. Accordingly, we deny a Certificate of Appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this Court and arguments would not aid the decisional process. **See Appendix "A".**

Petitioner argues, in fact, the Court below in essence decided the appeal without jurisdiction, when the Court sidestepped the C.O.A process. **See Miller-El, 537 U.S. at 336-37.** Indeed, the Court did not ask "whether the District Court's resolution of [Petitioner's] claims was debatable." **Buck v. Davis, 137 S.Ct. 759, 773 (2017).** The Court instead asked whether the District Court's "assessment" of the constitutional claims is "debatable or wrong." Petitioner argues, this standard requires the Court to ascertain the District Court's decision. Clearly an approach this Court has rejected. **See Miller-El v. Cockrell, 537 U.S. 322, 348-49 (2000)**("Many Court of Appeals decisions have denied applications for a C.O.A only after

concluding that the applicant was not entitled to habeas relief on the merits, without even analyzing whether the applicant had made a substantial showing of a denial of a constitutional right. The Court today disapproves this approach, which improperly resolves the merits of the appeal during the C.O.A stage")(Justice **Scalia**, concurring)(citing **Kasi v. Angelone, 300 F.3d 487 (CA4, 2002); Wheat v. Johnson, 238 F.3d 357 (CA5, 2000);** and noting that: "In what can be regarded as a logical development from the error of analyzing a request for a C.O.A like a merits appeal, some courts have simply allowed merits appeals to be taken without a C.O.A--in flat contravention of **28 U.S.C §2253(c)(1)(A)." Miller-El, 537 U.S. at 348-49, n*,** (citing **Bates v. Lee, 308 F.3d 411 (CA4, 2002)).** Therefore, the "Court below's" decision being in error , the Petitioner decided to move the Court for re-hearing and re-hearing en-banc, thus, raised the issue that "[t]he Court's determination for issuance of a Certificate of Appealability violates [this Court's] decision in **Buck v. Davis, supra,** that overruled or abrogated the Court's decision in **Reid v. True, 342 F.3d 327 (4th Cir. 2003)." See Petition for** Rehearing **and Rehearing En banc.** But the Court below denied the petition.

Petitioner argues the Court below's decision for the denial of a C.O.A, is inconsistent with this Court's decision in **Buck**, wherein this Court has held a court will grant a "C.O.A" if Petitioner made a substantial showing of the denial of a

constitutional right. That Petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the District Court's resolution of his constitutional claims." **Sammons v. United States, 2017 U.S. App. LEXIS 18118 (6th Cir. 2017)**(quoting **Buck v. Davis, 137 S.Ct. 759, 773 (2017)**(quoting **Miller-El v. Cockrell, 536 U.S. 322, 327-36 (2003)); See also Rodrigues v. Davis, 2018 U.S. App. LEXIS 14376 (9th Cir. 2017)**("Rodrigues fails to demonstrate that jurists of reason could disagree with the District Court's resolution of his claim based on the trial record")(quoting **Buck v. Davis, 137 S.Ct. 759, 773 (2017))**.

Notably, in **Devoe v. Davis, 717 Fed. App'x. 419, 423 (5th Cir. 2018)**(per curiam), the Fifth Circuit declared that "[i]n order to obtain a Certificate of Appealability, a petitioner must make 'a substantial showing of the denial of a constitutional right.' This requirement is 'not co-extensive with a merits analysis,' but rather the Court of Appeals must decide only whether 'jurists of reason could disagree with the District Court's resolution of the [petitioner's] constitutional claims....'Put differently, a Court of Appeals should limit it's examination at the C.O.A stage to a threshold inquiry into the underlying merits of the claims, and ask only if the District Court's decision was debatable."' Id., (quoting **Buck, 137 S.Ct. at 773-74 (2017)**(quoting **Miller-El, 537 U.S. at 327))**.

Interestingly, the Tenth Circuit in **Daniel v. Dowing, 2018**

App. LEXIS 15619 (10th Cir. 2018), a panel of the Court decided that when "the District Court rejected petitioner's constitutional claim on the merits, the showing required to satisfy **§2253(c)** is straight forward: The petitioner must demonstrate that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong."Id., (quoting **Slack, supra**)). But the Court continued that "[a]t this 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."Id., (quoting **Buck, supra**)).

Accordingly, Petitioner respectfully argues this Court's intervention needed **§2253(c)** is being construed in the wrong way, and the Court below--The Fourth Circuit Court of Appeals--has continued to enforce/order merits appeals without a C.O.A that's clearly inconsistent with this Court's decision in **Miller-El, supra, and Buck, supra.**

II.

The text of **§2253(c)(2)** lacks Fair Notice and Encourages Arbitrary Enforcement because it does not make the Substantial Showing of the Denial of a Constitutional Right a sufficient condition for a C.O.A.

Petitioner asserts, 28 **U.S.C. §2253(c)(2)** provides that an applicant seeking a Certificate of Appealability in a §2255 proceeding must make "a substantial showing of the denial of a constitutional right." 28 **U.S.C. §2253(c)(2).**

In the Court below, Petitioner alleged in a Petition for Rehearing En banc, that "the Court's C.O.A inquiry violated his Due Process Rights because of 28 **U.S.C. §2253(c)(2)'s** substantial showing of the denial of a constitutional right is unconstitutionally vague in all its application."

But the Court below denied the Petition for Rehearing and Rehearing En banc.

To the contrary, Petitioner asserts that the Due Process guarantee of the Fifth Amendment prohibits "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of Law." Smith v. Goguen, 415 U.S. 566, 572, n.8 (1974)(quoting Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926)). Thus, the vagueness "doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement."' Parker v. Levy, 417 U.S. 733, 752, 41 L.Ed. 2d 439, 94 S.Ct. 2547 (1974)(quoting Smith v. Goguen, 415 U.S. 566, 572-73 (1974)).

Petitioner, therefore argues the text of §2253(c)(2) that provides "[a] Certificate of Appealability may issue.... only if the applicant has made a substantial showing of the denial of a constitutional right", violates Due Process because it lacks fair notice. See Miller-El v. Cockrell, 537 U.S. at 349 ("A 'substantial showing' does not entitle an applicant to a C.O.A; it is a necessary and not a sufficient condition.")(J. Scalia, concurring)). It also encourages arbitrary and discriminatory enforcement because "[n]othing in the text of §2253(c)(2) prohibits a circuit justice or judge from imposing additional requirements, and one such additional requirement has been approved by this Court." Id. (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)("holding that a habeas petitioner seeking to appeal a District Court's denial of habeas relief on procedural grounds must not only make a substantial showing of the denial of a constitutional right but also demonstrate that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling")).

However, this Court grappled with this statute, 28 U.S.C. §2253(c)(2), from the time it was changed from a "federal" right to a "constitutional" right. Slack, 529 U.S. at 483 ("Except for substituting the word 'constitutional' for the word 'federal', §2253 is a codification of the CPC standard announced in Barefoot v. Estelle[.] Congress had before it the meaning Barefoot had given to the word it selected, and we give the language found

in §2253(c) the meaning ascribed to it in Barefoot, with due notice for the substitution of the word 'constitutional."').

In Slack, the Court explained that "[b]efore AEDPA,... 28 U.S.C. §2253--Act of June 25, 1948, 62 Stat. 967, the statute provided an appeal could be taken from the final order in habeas corpus proceedings unless the justice or judge who rendered the order or a circuit justice or judge issues a Certificate of Probable Cause. The statute did not explain the standards for the issuance of a CPC, but the Court established what a prisoner must show to obtain a CPC in Barefoot, supra: 'a substantial showing of the denial of a federal right."' Id. at 480.

The Court then rejected the respondent's argument that the Certificate of Appealability requirements makes a habeas petition's dismissal on procedural grounds simply unappealable. Slack, 529 U.S. at 483. The Court found that under such a view, a state prisoner who can demonstrate he was convicted in violation of the constitution and who can demonstrate that the District Court was wrong to dismiss the petition on procedural grounds would be denied relief. The Court rejected this "interpretation," finding that "the writ of habeas corpus plays a vital role in protecting constitutional rights," and that "in setting forth preconditions for issuance of a C.O.A under §2253(c), Congress expressed no intention to allow a trial court's procedural error to bar vindication of substantial constitutional rights on appeal."Id.

Subsequently, in Miller-El, supra., this Court addressed the issue where "[m]any Court of Appeals decisions have denied applications for a C.O.A only after concluding that the applicant was not entitled to habeas relief on the merits--without even analyzing whether the applicant had made a substantial showing of a denial of a constitutional right." See Miller-El, 537 U.S. at 348. The Court disapproved this approach, which improperly resolves the merits of the appeal during the C.O.A stage. **Miller, 537 U.S. at 349.** In reaching its decision, the Court counseled that "a Court of Appeals should not decline the application for a C.O.A merely because it believes the applicant will not demonstrate an entitlement to relief." **Miller-El, 537 U.S. at 337.** The Court further clarified that a habeas petitioner need not "prove before the issuance of a C.O.A, that some jurists would grant the petition for habeas corpus" because "a claim can be debatable even though every jurist of reason might agree, after the C.O.A has been granted and the case has received full consideration, that petitioner will not prevail."**Id. at 338.**

However, relevant here, in Justice Scalia's concurring opinion in Miller-El, he questions the Court's opinion --is "why a 'circuit justice or judge,' in deciding whether to issue a C.O.A, must 'look to the District Court's application of AEDPA to [a habeas petitioner's] constitutional claims and ask whether that resolution was debatable amongst jurists of reason.' How the District Court applies AEDPA has nothing to do with whether

a C.O.A applicant has made 'a substantial showing of the denial of a constitutional right,' as required by **28 U.S.C. §2253(c)(2)**, so the AEDPA standard should seemingly have no role in the C.O.A inquiry." **Miller-El, 537 U.S. at 349.** Justice Scalia, also opined that: "Section **2253(c)(2)**, however, provides that '[a] Certificate of Appealability may issue... only if the applicant has made a substantial showing of the denial of a constitutional right." But "[a] 'substantial showing' does not entitle an applicant to a C.O.A; it is a necessary and not a sufficient condition. Nothing in the text of **§2253(c)(2)** prohibits a circuit justice or judge from imposing additional requirements, and one such additional requirement has been approved by this Court."**Id.**

Moreover, recently, this Court provided further guidance on 'a substantial showing of the denial of a constitutional right.' **§2253(c)(2).** In Buck, supra, the Court explains that under **§2253(c)(2)**, "[t[he C.O.A inquiry, we have emphasized, is not coextensive with a merits analysis. At the C.O.A 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 claim, 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, supra)). The Buck Court also explained "[t]his threshold question should be decided without 'full

consideration of the factual or legal basis adduced in support of the claims."' Id. But the Court has not specified "what procedures may be appropriate in every case," but "any procedures" employed at the C.O.A stage should be consistent with the limited nature of the inquiry." Buck, 137 S.Ct. at 774.

Petitioner, therefore argues based on the above, §2253(c)(2)'s "a substantial showing of the denial of a constitutional right" is unconstitutionally vague in all its application because it authorizes or even encourages arbitrary and discriminatory enforcement. Hill v. Colorado, 530 U.S. 703, 732 (2000).

Petitioner asserts, in fact, without notice from either the District Court or the "Court Below" to "explicitly request" for a C.O.A, the Petitioner filed a timely "Notice of Appeal," the Court below then entered a preliminary briefing order directing the Petitioner to file a brief addressing the merits of the claims he wishes to raise. The Petitioner filed his brief for a C.O.A.

Subsequently, a three judge panel entered an "unpublished opinion", concluding "[w]e have independently reviewed the record and concluded that Partman has not made the requisite showing. Accordingly, we deny a Certificate of Appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this Court argument would not aid the

decisional process. Id.

Petitioner argues, §2253(c)(2) failed to give proper notice for the Court's C.O.A inquiry. For example, in **Rowsey v. Lee**, 327 F.3d 335, 341 (4th Cir. April 24, 2003), he argued that due process rights were violated by the trial judge's bias and partiality against him. The Court below found that both the MAR Court and the District Court denied his claim. The Court below then stated that "[i]n order to determine whether a C.O.A should issue, we ask whether jurists of reason could have resolved this claim differently. Id. (citing **Miller-El**, 123 S.Ct. at 1039.)) The Court then concluded "[w]hile we grant the C.O.A, we affirm the District Court judge's dismissal of the claim." Id.

Subsequently, in **Reid v. True,** 342 F.3d 327 (4th Cir. Aug. 26, 2003), the Court adopted Local Rule 22(a)-that divides appeals in collateral review cases into three categories. Relevant here, is the second category

> The second category consists of cases in which the District Court did not issue a C.O.A and the appellant has not **explicitly requested** one from this Court. In such case, the notice of appeal will be treated as a request for a C.O.A. To guide its inquiry into whether to grant a C.O.A, the Court will enter a preliminary briefing order addressing the merits of the claims the appellant wishes to raise. The Court will then review that brief and determine whether to grant a C.O.A as to any of the issues raised in the brief. Upon

> -determining that the appellant has made the showing required by §2253(c) at to any issue, the Court will grant a C.O.A as to that issue and enter a final briefing order directing the parties to complete the briefing process. If the appellant fails to make the required showing, the Court will deny a C.O.A and dismiss the appeal.
>
> Id.

The Court below then declared that "[r]egardless of the category into which a case falls, matters concerning the grant or expansion of a C.O.A will be referred to a three-judge panel. The panel will review the request to determine whether the appellant has made the showing required by §2253(c) but will not consider the ultimate question of whether the claim has merit. If any member of the panel determines that the appellant has made the requisite showing as to any issue, the Court will grant a C.O.A as to that issue." **Reid, supra.**

In contrast, Petitioner argues §2253(c)(2) contains no ascertainable standard--thus, it cannot be determined with any degree of certainty what constitutes **"a substantial showing"** of the denial of a constitutional right. This critical element is left to be supplied by the court. Notably, the court's new Rule 22(a) that's not in "conformity with §2253(c)", in cases falling into the **second or third categories,** the court's decision respecting a C.O.A is informed by the court's "review of the Appellant's brief on the merits, rather than separate

request for a C.O.A." **Reid, supra.**

Notably the court encourages the Petitioner to file a brief addressing the merits of the claims the Petitioner wishes to raise." **Reid, supra.** Thus, Petitioner argues **§2253(c)(2)** lacks notice and it encourages courts to decide an appeal without jurisdiction. Moreover, **§2253(c)(2)** encourages discriminatory enforcement by judges "[i]n examining the brief at the C.O.A stage, the Court will not engage in full consideration of the factual or legal basis adduced in support of the claims, but will instead conduct the cursory review necessary to identify those appeals deserving of attention while dismissing claims that plainly do not deserve further review." **Reid, Supra.**

Clearly, **§2253(c)(2)'s** substantial showing of the denial of a constitutional right presents a double uncertainty that's fatal to its validity. In the first place, the words "substantial showing" is too broad, the critical element is left to be supplied by the court--thus it denies fair notice. Second, "a denial of a constitutional right" is not simple, but progressive as to where did it occur--at the trial court in the criminal proceedings; in the collateral proceedings, in the district court--where including all in between.

Here, the Petitioner was denied his Sixth Amendment right to a fair trial in the criminal proceedings and his Fifth Amendment right to Due Process in the collateral proceedings.

Therefore, 28 **U.S.C §2253(c)(2)** denies Due Process by failing to give proper notice and it also encourages arbitrary enforcement by denying Petitioner the right to appeal the district court's denial of his §2255 motion.

Consequently, **§2253(c)(2)** is vague in all its applications, thus denies Due Process.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Stanley Baxter

Date: 2-6-2019