

No. _____

18-9155

IN THE

SUPREME COURT OF THE UNITED STATES

Robert C. Strocker

(Your Name)

— PETITIONER

vs.

FILED

MAR 11 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert C. Strocker #07560-078

(Your Name)

P.O. Box 2099

(Address)

Pollock, La 71467

(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Where a district Court denies a 2255 petition and denies a certificate of appealability (COA) to the petitioner, the petitioner may seek a COA from the Court of appeals. Such a petitioner need not show that he should prevail on the merits. A claim denied by the district Court on its merits warrants issuance of a COA when it presents a "question of some substance".

1) Where a 2255 petitioners claims "are rejected on the merits" by a district court, may a court of appeals deny a COA based on that rejection on the merits without making its own considered determination that the resolution was not debatable amongst jurists of reason??

LIST OF PARTIES

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

[] 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:

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OTHER

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☒ is unpublished.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☒ is unpublished.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☐ is unpublished.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 12-20-2018.

☐ 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: _____, 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. § 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) This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

"[n]o person shall be... deprived of life, liberty, or property without due process of law."

2) This case also involves 28 U.S.C. § 2253 which provides, in pertinent part that:

"(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--

(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 Constitutional right."

STATEMENT OF THE CASE

To obtain a certificate of appealability, a habeas petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner "need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Instead, the Supreme Court instructs:

[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of 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 claim. In fact, the statute forbids it. When a court of appeals side steps this 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.

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

A claim denied by the district court on its merits warrants issuance of a COA when it presents a "question of some substance." Questions of some substance include those (a) that are "debatable among jurists of reason;" (b) "that a court could resolve in a different manner;" (c) that are "adequate to deserve encouragement to proceed further;" or (d) that are not "squarely foreclosed by statute, rule or authoritative court decision, or ... [that are not]

lacking any factual basis in the record." *Barefoot*, 463 U.S. at 893 n.4, 894;
see also Slack v. McDaniel, 529 U.S. 473 (2000).

A claim denied on procedural grounds "without reaching the prisoner's
underlying constitutional claim," warrants a COA when:

"jurists of reason would find it debatable whether the petition
states a valid claim of the denial of a constitutional right, and
that jurists of reason would find it debatable whether the district
court was correct in its procedural ruling."

Slack, 529 U.S. at 478.

Where the court of appeals states that "where, as here, claims are rejected
on the merits," the burden is on the prisoner to "demonstrate that reasonable
jurists would find the district court's assessment of the constitutional claims
debatable or wrong" the court of appeals has not engaged in the "threshold
inquiry" of looking at the district court's application of AEDPA to
petitioner's constitutional claims" and decide if that resolution "was
debatable among jurists of reason." That was not done here but instead the
court of appeals simply recited the fact that petitioner's claims were rejected
on the merits, thus shifting the burden to petitioner to demonstrate that the
rejection was wrong. The court of appeals should have engaged in an
inquiry to decide if the resolution was debatable. It was debatable as the
history of the *Herrold* case, detailed below, in the Fifth Circuit shows.

Issues Raised in Petitioner's 2255 Motion to Vacate

Petitioner raised four grounds in support of his 2255 motion to vacate, as set forth in the district court's Memorandum Opinion and Order (Appendix A). Those grounds show that petitioner raised the issues of "indivisibility" of the criminal statute as well as the constitutional issues relating to violations of the Fifth Amendment (due process and equal protection) and miscarriage of justice issues.

While it is not necessary to review the merits of the claim, it is useful to look at the history of the case of *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018), as it relates to whether the issues are "debatable among jurists of reason." *Herrold* involved the same Texas burglary statute that is involved in petitioners case. Herrold was convicted in the trial court and enhanced under ACCA based on burglary convictions. Herrold appealed and the Fifth Circuit, after considering the arguments and the "indivisibility" issue, affirmed his sentence on the basis of Fifth Circuit precedent. *United States v. Herrold*, 813 F.3d 595 (5th Cir. 2016). The Supreme Court vacated the Fifth Circuit's judgment and remanded for renewed consideration in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016).

On remand, the Fifth Circuit affirmed Herrold's sentence once again, on the basis of an earlier post-Mathis decision of the Fifth Circuit, *United*

States v. Uribe, 838 F.3d 667 (5th Cir. 2016).

Then, in 2018, the Fifth Circuit reconsidered the argument en banc and, in doing so, revisited *Uribe* as well. In *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018), the Fifth Circuit concluded that Texas Penal Code §§ 30.02 (a)(1) and (a)(3) are indivisible. 883 F.3d at 522-23. The Fifth Circuit overruled its earlier decision in *United States v. Uribe*. In its opinion, the Fifth Circuit discussed a number of Texas decisions from Texas's highest criminal court, and stated that "Texas case law ... points in just one direction--that Texas Penal Code §§ 30.02 (a)(1) and (a)(3) are indivisible." 883 F.3d at 526.

Clearly, the issue of whether those provisions of the Texas burglary statute were indivisible or not, was a "debatable issue" among jurists in 2017 when petitioner filed his 2255 motion to vacate through at least February 2018 when the en banc *Herrold* decision was rendered. In that opinion, the Fifth Circuit noted the split in circuits dealing with these issues, citing cases from the Fourth, Sixth, and Eighth circuits. *See Herrold*, 883 F.3d at 533-536.

The history of the Fifth Circuit's *Herrold* opinion illustrates that the issue of indivisibility of the Texas burglary statute, squarely raised by petitioner in his 2255 motion to vacate, is a question of some substance that is

"debatable among jurists of reason." There can be no doubt that jurists of reason would find it debatable whether the 2255 petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Petitioner should be granted a COA as to this question and a hearing on his claim that he was sentenced in violation of the Constitution, enhanced under a statute that is indivisible and broader than generic burglary and improper to use for enhancement.

REASONS FOR GRANTING THE PETITION

- 1.) There is a conflict Among the lower Courts Regarding the Question Presented and the Question Presented Significantly Impacts the Administration of Criminal Justice.
- 2.) The Fifth Circuits Order Contravenes This Courts Jurisprudence Defining the Standards for Granting Certificates of Appealability.