Case No. 9-5374 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

BENSON CORIOLANT,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
(USDC No. 2:16-CV-17262 (E.D. Louisiana); USCA No. 17-30736)**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE FIFTH CIRCUIT'S HOLDING THAT THE PRO SE LITIGANT HAS ABANDONED ANY CLAIM(S) NOT RAISED IN AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY — EXTENDING AND CONFLATING F.R.A.P. 28 APPLICABLE TO THE ACTUAL APPEAL BRIEF CONTEXT — IS IN CONFLICT WITH THE SUPREME COURT'S DECISIONS EMPHASIZING THAT THE PROCEDURES AND CONSIDERATIONS AT THE COA STAGE ARE TO BE DISTINGUISHED FROM AN ACTUAL APPEAL?

II.

WHETHER THE FIFTH CIRCUIT IMPROPERLY REFUSED TO CONSIDER AN ACTUAL INNOCENCE CLAIM RAISED FOR THE FIRST TIME IN AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY?

III.

WHETHER THE FIFTH CIRCUIT RENDERED LESS THAN A FULL AND FAIR CONSIDERATION OF PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY BY FAILING TO RECOGNIZE THAT THE SUPREME COURT STANDARDS AUTHORIZE THE ISSUANCE OF A COA EVEN WHEN THE ISSUE(S) ARE NOT NECESSARILY DEBATABLE?

IV.

WHETHER THE UNITED STATES SUPREME COURT MAY CONSIDER PETITIONER'S CLAIM THAT HIS CRIMINAL JUSTICE ACT APPOINTED COUNSEL FAILED TO ADVISE HIM OF THE TIME TO SEEK SUPREME COURT REVIEW, FOLLOWING HIS DIRECT CRIMINAL APPEAL, RAISED FOR THE FIRST TIME IN THE INSTANT PETITION FOR A WRIT OF CERTIORARI?

LIST OF PARTIES

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

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DECISIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit denying Mr. Coriolant's Application for a Certificate of Appealability appears at **Appendix A**, and is unpublished.

The Judgment of the United States District Court for the Eastern District of Louisiana denying Mr. Coriolant's 28 U.S.C. §2255 motion appears at **Appendix B**, and is unpublished.

STATEMENT OF JURISDICTION [1/]

The Decision of the United States Court of Appeals for the Fifth Circuit denying Mr. Coriolant's Application for a Certificate of Appealability was filed on **December 18, 2018.** SEE: **Appendix A.**

The instant Petition for a Writ of Certiorari is timely filed because, prior to the 90-day deadling to seek certiorari review from the Supreme Court, Mr. Coriolant filed a Motion for Extension of Time to File Petition for a Writ of Certiorari with the Supreme Court that granted by Justice Alito ... requiring Coriolant to file his petition on or before **MAY 17, 2019.** SEE: **Appendix C.** Mr. Coriolant affirms that he timely mailed the instant Petition for a Writ of Certiorari on **MAY 16, 2019.** SEE: PROOF OF SERVICE

This Honorable Court has jurisdiction to entertain this cause pursuant to 28 U.S.C. §1254(1).

1/ Coriolant, proceeding pro se, respectfully requests that the Court would liberally construe his pleadings so as to best achieve substantial justice. HAINES v. KERNER, 404 U.S. 519, 520-521 (1972); PEREZ v. UNITED STATES, 312 F.3d 191, 194-195 (5th Cir. 2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, as well as the statutory provision of 28 U.S.C. §2253(c)(2). Each of which, state:

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

28 U.S.C. §2253(c)(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."

STATEMENT OF THE CASE [2/]

A.) Nature of the Case.

This case involves important constitutional questions related to a pro se litigant's ability to obtain judicial review at the COA ("certificate of appealability") stage following the denial of a 28 U.S.C. §2255 motion in the District Court. Specifically, Petitioner asks this Court to decide whether the Fifth Circuit Court of Appeals is erroneously conflating the "**application**" for a certificate of appealability under 28 U.S.C. §2253(c)(2) with the content requirements of "**appellant's brief**" under Fed.R.App.P. **28(a)(4)** so that any claim(s) below that do not appear in the "application" for a COA are deemed abandoned. The Fifth Circuit's holding that Petitioner's claim(s) in the District Court are deemed **abandoned** for failure to include them in an "**application**" for a COA based upon its precedent of abandoning a claim(s) from below that are not contained in the "**appellant's brief**" is indirect conflict with this Supreme Court's precedents recognizing the differences that distinguish the COA stage from an actual appeal. Indeed, the COA stage of a mere "**application**" for a COA and an actual appeal are also distinguished in Fed.R.App.P. **22(b)(1)** ... and under subsection **(b)(2)** of that rule the appellate court will review all claims from below for purposes of a COA based merely upon a Notice of Appeal alone. Petitioner submits that the Fifth Circuit is wrongly applying its precedent that a claim(s) from below that is not raised in an actual "**appellant's brief**" under Fed.R.App.P. **28(a)(4)** is deemed "**abandoned**" to the COA stage of an application. Petitioner urges that this prevents pro se litigants from the

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2/ Coriolant, for the sake of brevity, asks the Court to fully incorporate into its considerations the entirety of the record(s) below. SEE: UNITED STATES v. CORIOLANT, Case No. 2:11-CR-00241 (E.D. La.); UNITED STATES v. CORIOLANT, Case No. 2:16-CV-17262 (E.D. La.)(§2255 motion); Appeal No. 17-30736 (COA)(5th Cir.).

full, fair, and meaningful ability to obtain review from the Fifth Circuit at the COA stage and prevents the same ability to seek Supreme Court review. The Fifth Circuit is not only applying the rules applicable to the actual appeal to the COA stage application in violation of this Court's previous emphasis that these circumstances are distinguishable, but the Fifth Circuit is also violating this Court's well established precedents requiring courts to liberally construe pro se pleadings and hold them to less stringent standards than those required in formal pleadings of counsel. Because the Fifth Circuit does not give any notice to pro se litigants at the **"application"** for a COA stage that the rules of an actual appeal brief is what is meant or expected ... and the **"application"** and an **"appellant's brief"** are clearly distinguishable in Supreme Court precedent and the language of §2253(c)(2) and Fed.R.App.P. 22, many pro se litigants are experiencing the abandonment of substantive claims without fair notice. A vast number of COAs are filed pro se.

Secondly, Petitioner asks this Court to determine whether the Fifth Circuit Court of Appeals denial of a COA is in conflict with the applicable precedents of this Court setting forth the COA standards. Because the Fifth Circuit wrongly determined that Petitioner did not meet the standard(s) for the issuance of a COA — but he actually did — the Fifth Circuit's application of this Court's COA standard(s) has misapplied. Petitioner asks the Court to review the Fifth Cricuit's determination that a COA was not warranted, for the reasons set forth herein.

This case is compelling because it raises significant questions of federal law, as well as issues of importance beyond the particular facts and parties involved, that touch closely the fair administration of justice. Criminal defendants and other litigants in pro se capacity have a reasonable

expectation that the due process protections afforded them by the United States Constitution and this Court's precedents will be abided by and enforced. Both the public and pro se criminal defendants alike have a substantial interest in the congruent and consistent application of this Court's precedents and statutory interpretations, establishing federal law, amongst our domestic courts. Based upon the points and authorities set forth herein, Petitioner respectfully beseeches this Honorable Court to grant certiorari review and vacate the prior judgment.

B.) Salient summary of background facts.

Petitioner Coriolant's troubles began in 2010 when law enforcement in Louisiana received information that a prostitute was working out of a hotel in Kerner, Louisiana. Following an investigation that implicated Coriolant, a federal grand jury in the Eastern District of Louisiana ultimately returned a **superseding** indictment charging Coriolant with: COUNT 1: Conspiracy to commit sex trafficking, in violation of 18 U.S.C. §1594(c); COUNT 2: Commission of sex trafficking, in violation of 18 U.S.C. §§1591(a) and 2; COUNT 3: Coercion and enticement to travel from Florida to Louisiana to engage in sexual activity that is illegal under Louisiana law, in violation of 18 U.S.C. §§2422(a) and 2; and, COUNT 4: Using facilities and means of interstate commerce to coerce and entice "R.V." to engage in sexual activity that is illegal under Louisiana law, in violation of 18 U.S.C. §§2422(b) and 2. The indictment additionally contained notices of forfeiture under 18 U.S.C. §§1594(d) and 2428. U.S. v. CORIOLANT, Crm. Case No. 2:11-CR-000241(E.D. La.).

Trial and Sentencing

Mr. Coriolant elected to proceed to trial. Following a multiple-day

trial, the jury convicted Coriolant on September 20, 2012, finding him guilty of all 4-Counts of the **superseding** indictment. Thereafter, on February 7, 2013, the Court sentenced Mr. Coriolant to an aggregate term of 480-months imprisonment, consisting of 480-months each as to COUNTS 1, 2, and 4, and 240-months as to COUNT 3; all to be served concurrently. The District Court had also imposed a term of supervised release and an assessment fee.

Direct Appeal

Coriolant filed a timely Notice of Appeal. On appeal to the Fifth Circuit Court of Appeals Coriolant argued, inter alia, that the Court had interfered in the plea negotiations. Following oral argument, the Fifth Circuit denied Coriolant's appeal on September 8, 2015, AFFIRMING his convictions and sentence. SEE: UNITED STATES v. CORIOLANT, 624 Fed. Appx. 868 (5th Cir. 2015).

No petition for a writ of certiorari was filed. As explained herein, infra at page 24, Coriolant was never advised of the time limitations to file a Petition for a Writ of Certiorari to the Supreme Court. Appointed counsel never properly advised Coriolant of either the availability of Supreme Court review or the applicable time to do so. Coriolant did not become aware of this circumstance until after his Section 2255 motion and Application for a Certificate of Appealability were denied.

28 U.S.C. §2255 Motion

On December 8, 2016, Mr. Coriolant filed a pro se 28 U.S.C. §2255 Motion in the District Court. Coriolant argued, inter alia, that his counsel had rendered ineffective assistance. Coriolant additionally argued the Court's participation in the plea negotiation process — despite the

issue having been decided against him on the direct appeal — because he sought to emphasize the ineffectiveness of his counsel in relation to that matter. The District Court found the claim to be non-cognizable based solely on the similar facts having been considered by the Fifth Circuit Court of Appeals, although counsel's ineffectiveness was considered on direct appeal. Coriolant additionally claimed that counsel failed to object to jury instructions, testimony of non-expert witnesses, and that for various reasons counsel's trial strategy was unreasonable and deficient, prejudicing his defense. On July 10, 2017, the District Court summarily denied Coriolant's Section 2255motion. SEE: **Appendix B** (Order).

Fifth Circuit Application for a Certificate of Appealability

Following the denial of his Section 2255 motion, Coriolant filed a timely Notice of Appeal on August 7, 2017. Thereafter, despite several unforseen mailing circumstances and irregularities, Coriolant successfully file an Application for a Certificate of Appealability with the Fifth Circuit Court of Appeals. UNITED STATES OF AMERICA v. BENSON CORIOLANT, Appeal No. 17-30736 .

In the Application for a Certificate of Appealability ("COA"), Mr. Coriolant claimed that he was entitled to a COA because the District Court's denial of his §2255 motion was wrong or debatable, and that the issues were deserving of encouragement to proceed further on an actual appeal. In the COA, Coriolant pointed out several issues as examples of why the outcome of his Section 2255 was wrong or debatable within the meaning of the applicable standards for the issuance of a COA. **Notably,** Coriolant never conceded nor abandoned any of his issues raised below. Instead he tried to focus on the

issues he thought might best meet the COA standards, and those issues that he had sufficient time to prepare and understood as a pro se litigant. Coriolant never expressed any intent to abandon all of his issues from below that he did not focus on in the COA. Coriolant was never noticed that he was required to raise every issue from below in the COA brief.

In his COA application, Coriolant demonstrated, inter alia, that the District Court's resolution of his §2255 was wrong or debatable because: (1) his claim that the Court had participated and interfered with the plea negotiations process was denied **solely** because the similar facts were considered on direct appeal ... but in the §2255 motion Coriolant clearly differentiated the matter as relating to an ineffective assistance of counsel issue. Coriolant made clear this distinction, but the District Court **only** addressed the matter as having already been decided and did not ever consider the ineffective assistance aspect. (2) The District Court also went to great lengths to imagine and hypothetize strategic reasons for counsel's actions or inactions from Coriolant's ineffective assistance claims ... and never even cared to find out what counsel **himself** would have stated the **actual** reasons were for his decisions, and then evaluate whether **counsel's** own reasons constituted effective or ineffective trial strategy. Moreover, many of the facts related to counsel's decisions were outside of the trial record and not reasonably known to the District Court at all, warranting an evidentiary hearing or at least an affidavit of counsel on the substantive issues Coriolant raised. As such, Coriolant explained in his COA that the denial by the District Court of many of his ineffective assistance of counsel claims based **entirely** upon its own self-satisfying hypotheticals of strategic reasons for counsel's performance — rather than assessing counsel's **own**

stated reasons for a particular course of action was debatably unfair and wrong. The District Court accorded deference in a measure that it invented for itself and counsel. (3) The District Court's ruling that certain witness testimony was properly considered, and that counsel was not ineffective for failing to object was debatable or wrong since it involved unqualified expert testimony that interpreted certain evidence to the jury. (4) The District Court finding that a certain jury instruction was proper was debatable or wrong since other courts have issued opinions that are in disagreement ... and that the existence of a general verdict precluded a harmlessness finding. (5) The District Court's calculation of Coriolant's applicable guideline range was wrong or debatable, and the contrary determination is in conflict with Fifth Circuit precedent and amounted to double-counting under the Sentencing Guidelines. (6) Despite not being raised in the §2255 motion, Coriolant asked the Fifth Circuit Court of Appeals to expand the scope of the COA considerations in light of the Supreme Court's decision in ROSEMOND v. UNITED STATES, 134 S.Ct. 1240 (2014), arguing that the aiding and abetting theory of liability annexed to COUNTS 2, 3, 4 rendered his convictions fundamentally defective for lack of an essential element of "advance knowledge." Coriolant explained that, although ROSEMOND was initally decided in the context of a firearms case, he urged that the implications of ROSEMOND to the aiding and abetting theory of liability in other contexts was just now beginning to be understood. Coriolant again emphasized the fact that the jury had rendered a general verdict bolstered his claim and the importance of consideration even at the COA stage.

To Coriolant's dismay, on December 18, 2018, the Fifth Circuit denied him the issuance of a COA. The Fifth Circuit held that: (1) Coriolant had

"abandoned" all of his claims from his §2255 below that he did not set out in his application for a COA. (2) That Coriolant's claim in reliance upon the Supreme Court's decision in ROSEMOND would not be considered since it is raised for the first time in his COA application. (3) That Coriolant had not made the necessary showing for a COA, but without addressing **any** of the claims in the COA. SEE: **Appendix A** (Order); UNITED STATES v. CORIOLANT, Appeal No. 17-30736 (5th Cir. 2018).

The instant Petition for a Writ of Certiorari now timely follows.

Law and Argument in Support of Granting Certiorari

QUESTION ONE

WHETHER THE FIFTH CIRCUIT'S HOLDING THAT THE PRO SE LITIGANT HAS ABANDONED ANY CLAIM(S) NOT RAISED IN AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY — EXTENDING AND CONFLATING F.R.A.P. 28 APPLICABLE TO THE ACTUAL APPEAL BRIEF CONTEXT — IS IN CONFLICT WITH THE SUPREME COURT'S DECISIONS EMPHASIZING THAT THE PROCEDURES AND CONSIDERATIONS AT THE COA STAGE ARE TO BE DISTINGUISHED FROM AN ACTUAL APPEAL?

If a defendant wishes to appeal a District Court's denial of their 28 U.S.C. §2255 motion they may only do so by first obtaining a Certificate of Appealability ("COA") pursuant to 28 U.S.C. §2253(c)(2). Although not a requirement, defendants generally seek to persuade either the District Court or the Court of Appeals through the filing of an **Application** for a Certificate of Appealability ("COA"). Notably, a vast numbers of these applications for a COA are filed by pro se litigants to the respective court of appeals. The Supreme Court has established the standards that a

applicant must meet to warrant the issuance of a COA by the court. SEE: MILLER-EL v. COCKRELL, 537 U.S. 322, 336-337, 342 (2003); SLACK v. MCDANIEL, 529 U.S. 473 (2000). **CF. ALSO:** BUCK v. DAVIS, 137 S.Ct. 759 (2017)(citing MILLER-EL to explain the limited nature of the inquiry at the COA stage).

Subsequent to the denial of his Section 2255 motion in the District Court,(**Appendix B**), Petitioner Coriolant filed a pro se Application for a Certificate of Appealability ("COA") to the Fifth Circuit Court of Appeals. UNITED STATES v. CORIOLANT, Appeal No. 17-30736 (5th Cir.). Although he did not set out every issue from below, he focused on the claim(s) that were believed to be most important. On December 18, 2018, the Fifth Circuit denied Coriolant's pro se application for a COA. SEE: (**Appendix A**). The Fifth Circuit held that any of the claims from the Section 2255 motion in the District Court that were not set out in Coriolant's **application** for a COA were deemed to have been abandoned by the appellate court. The Court's Order cited as support HUGHES v. JOHNSON, 191 F.3d 607, 613 (5th Cir. 1999) ("Issues not raised in the brief filed in support of Hughes's COA application are waived."). (Order, at 2).

Petitioner Coriolant respectfully submits that the Fifth Circuit, and apparently other courts of appeals, are wrongly and unfairly conflating the content requirements of an actual appellate brief — in the context of an actual appeal — with the intended purposes of a mere **application** for a COA. By holding that Petitioner Coriolant abandoned any unraised claim in an **application** for a COA based upon rules that apply only to an actual appeal brief results in an apparent conflict with the Supreme Court's decisions emphasizing that the COA stage and an actual appeal are to be distinguished, as well as undermined by the language of 28 U.S.C. §2253(c)(2)

(referring to "**applicant**" as opposed to "appellant" under Federal Rules of Appellate Procedure) and Fed.R.App.P. 22(b)(1)(same).

The Fifth Circuit precedent relied upon to hold that Coriolant had abandoned any unraised claim in his **Application** for a COA is in direct conflict with the Supreme Court's recent decision in BUCK v. DAVIS, 137 S.Ct. 759 (2017). In BUCK, the Court relied upon its previous decision in MILLER-EL v. COCKRELL, 537 U.S. 322, 327, 348, 336-337 (2003) to emphasize and reaffirm the distinctions between the application for a COA stage and an actual appeal are to be recognized. BUCK, 137 S.Ct. at 773-774. The Fifth Circuit precedent and practice of applying a procedural claim abandonment rule that applies to an actual appeal brief on appeal to deem as abandoned claims not set out in an **application** for a COA contravenes the teachings of BUCK. Moreover, the Fifth Circuit development of its precedent is indicative of its having conflated a rule that applies to an actual appeal brief on appeal with the COA application stage. Specifically, in Coriolant's denial order, the Fifth Circuit's citation to HUGHES, supra, leads to the HUGHES citation to MOAWAD v. ANDERSON, 143 F.3d 942, 945 n. 1 (5th Cir. 1998). In turn, MOAWAD itself then cites to the precedents origin in UNITED STATES v. PIERCE, 959 F.2d 1300 n. 5 (5th Cir. 1992)(holding that **Fed.R.App.P. 28(a)** supports the finding that unraised issue(s) are deemed abandoned). This establishes that the claim abandonment being applied to uraised issue(s) in an **Application** for a COA under HUGHES, as the Fifth Circuit did in Coriolant's case, is derived from a rule(s) that are applicable to an actual appeal ... "**appellant's brief.**" CF. Fed.R.App.P. **28(a)**.

Although the rules pertaining to the content requirement or other expectations of an actual brief in the appeal context always refer to "**appellant**,"

as in **Fed.R.App.P. 28** cited by the Fifth Circuit in PIERCE, supra, the procedures that address an **Application** for a COA only refer to "**applicant,**" as in 28 U.S.C. §2253(c)(2) and **Fed.R.App.P 22.** The distinction that is applied between a pro se defendant who files only a Notice of Appeal and one who also files an actual **Application** for a COA serves to further undermine the Fifth Circuit's applying a claim abandonment rule from the appeal context to the COA **application** stage. When a pro se defendant files only a Notice of Appeal to initiate the COA stage to the court of appeals, it is required by **Fed.R.App.P. 22(b)(2)** that the notice itself may be construed as a request for a COA which triggers the appellate court's review of **all** claims below in consideration of the record for the COA determination. SEE: UNITED STATES v. KIMLER, 150 F.3d 429 (5th Cir. 1998)(holding that the Fifth Circuit construes a Notice of Appeal as an **Application** for a COA); MILLER v. DRETKE, 4040 F.3d 908 (5th Cir. 2005)(same). **Significantly, there is no application of any claim abandonment consequence for failure to raise any claim(s) whatsoever, let alone in an Application for a COA.** However, if as in Petitioner Coriolant's case, the pro se defendant files a Notice of Appeal **and** an actual COA **Application,** he will be deemed to have abandoned any claim(s) from below that are not set out in the **application.** It would seem that the pro se litigant is not only being made subject to the claim abandonment consequences that apply to an "**appellant's brief**" in the actual appeal context, but is incurring consequences by the filing of an **Application** for a COA that he otherwise would not without it. The Fifth Circuit's applying of claim abandonment consequences intended for "**appellant's brief**" in the context of an actual appeal ... to the mere **Application** for a COA ... wrongly conflates matters that have been well recognized as being distinguishable by the Supreme Court in BUCK/MILLER-EL and goes against the grain of the

distinctions in language and scope that are apparent from those rules, statute(s), and emphasized distinctions of the Supreme Court in BUCK/MILLER-EL referenced herein, producing odd and peculiar results. Besides the distinguishing factors forementioned, the Supreme Court has long maintained that the proper assessment at the COA stage — notwithstanding the particular claim(s) a pro se litigant might choose to focus on in his application — is that any determination must be based on "an overview of the claims **in the habeas petition** and a general assessment of their merits." MILLER-EL, 537 U.S. at 336 (emphasis added). SEE ALSO: BUCK, 137 S.Ct. at 773 (same); SLACK, 529 U.S. at 484 (holding, in part, whether "jurists of reason would find it debatable whether **the [habeas] petition** states a valid claim of the denial of a constitutional right.")(emphasis added). The Supreme Court's standards, as well as §2253(c)(2) and Fed.R.App.P. 22(b)(1)-(2), have required the courts of appeals to undertake a consideration of **all** the claims raised **in** the habeas or Section 2255 petition whether all the claims are focused on by the pro se litigant in the application for a COA, or whether only a Notice of Appeal is filed. Fed.R.App.P. 22(b)(2). Indeed, citing to MILLER-EL, 537 U.S. at 336, the Fifth Circuit itself has stated that, "When 'reviewing a request for a COA, we only conduct a threshold inquiry into the merits of the claims [...] raise[d] **in his underlying habeas petition**." SEE: REED v. STEPHENS, 739 F.3d 753, 764 (5th Cir. 2014)(emphasis added). The Fifth Circuit's having applied a claim abandonment rule to Coriolant's **Application** for a COA by treating it as it would an **"appellant's brief"** in the context of an actual appeal erroneously conflated the content and context and considerations of an appeal with the mere **application** for authorization to appeal with a COA. This resulted in the Fifth Circuit's unwillingness to have

even considered a great many of Coriolant's pro se Section 2255 claims, occasioning the possibility that any one of the unconsidered claims "**in the habeas petition**" may have warranted the issuance of a COA.

Here, the Fifth Circuit's applying the claim abandonment rule that is applicable to an actual appeal to Coriolant's case is of much greater importance than just his case since a vast number of pro se litigants will or have experienced the loss of the court of appeals' considerations of claims at the COA stage, and may have been denied COA's that were otherwise warranted. Indeed, when the Fifth Circuit, as well as other courts of appeals, refuse to consider a claim(s) not raised in the **Application** for a COA based on content requirements applicable to an actual appeal brief in the appeal context a pro se litigant more often than not suffers the unintentional and unknowing abandonment of a claim(s) simply because he has no reasonable idea from the rules and statute(s) that an **application** is susceptible to the abandonment of claim(s) potential in an "**appellant's brief**" of an **actual** appeal. **CF.** Fed.R.App.P. 28(a) and Fed.R.App.P. 22(b)(1)-(2); §2253(c)(2). No rule or otherwise warrants conflating the filing of an "**application**" with the filing of an "**appellant's brief.**" Context, content, purpose and this Supreme Court's decisions emphasizing the essential importance of the distinctions to be recognized between the considerations at the COA stage and an actual appeal, as in BUCK/MILLER-EL, supra, call into serious question the Fifth Circuit's practice of deeming claims abandoned at the COA stage based upon the requirements of an appeal. Claims that are suppose to be taken into consideration at the COA stage clearly have not been as Coriolant's case demonstrates. The Fifth Circuit's inviting of the unintentional abandonment of a claim(s) is inherently unfair because the pro se litigant

lacks notice that he must raise everysingle claim from the underlying habeas petition in his **Application** for a COA. All of the foregoing points and authorities counsel against the Fifth Circuit approach. The Fifth Circuit's practice is also inconsistent with the Supreme Court's mandate that pro se pleadings are to be liberally construed, and held to less stringent standards than formal pleadings drafted by attorneys. SEE: HAINES v. KERNER, 404 U.S. 519, 520-521 (1972).

For all of the foregoing reasons, Petitioner Coriolant respectfully submits that this Court should direct a portion of its valuable time to this issue in consideration of the importance of the matter to so many pro se defendant. Because the law strictly limits the availability to obtain review for pro se defendants it is essential that such opportunities occur meaningfully and fairly. Claims that are erroneously deemed abandoned in the COA stage unfairly stymies and prevents the pro se litigant's ability to seek Supreme Court review. It is submitted that the Court should grant certiorari based upon the apparent and compelling circumstances of this case.

QUESTION TWO

WHETHER THE FIFTH CIRCUIT IMPROPERLY REFUSED TO CONSIDER AN ACTUAL INNOCENCE CLAIM RAISED FOR THE FIRST TIME IN AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY?

Mr. Coriolant respectfully submits that the Supreme Court's guidance is essential to establish whether an actual innocence claim raised for the first time in an Application for a Certificate of Appealability ("COA") is properly refused consideration when, as here, it is debatable whether the

claim was nevertheless reviewable on an appeal under the plain-error standard of Fed.R.Crim.P. 52(b). It is submitted that the Fifth Circuit's refusal to consider an actual innocence (or other) claim raised for the first time in an Application for a COA contravenes the decisions of the Supreme Court allowing for limited review of plain error, and unfairly prevents **any** potential for appellate review of the particular claim. The Fifth Circuit's refusal to consider a claim raised for the first time in an Application for a COA creates a harsher standard than that applicable to an actual appeal.

In Mr. Coriolant's Application for a COA to the Fifth Circuit Court of Appeals, he presented a claim that he was actually innocent of COUNTS 2, 3 and 4 in light of the Supreme Court's decision in ROSEMOND v. UNITED STATES, 134 S.Ct. 1240 (2014). Coriolant explained in his COA application, at pages 23-25, that he was convicted based on a general verdict jury finding that necessarily rests upon a defective aiding & abetting theory of liability. Each of COUNTS 2-4 permitted for conviction based on mere aiding & abetting and the jury instructions failed to require the jury to unanimously agree as to a mens rea element of "advance knowledge." Coriolant explained that the Supreme Court's decision in ROSEMOND held categorically that an aiding & abetting theory of liability requires proof beyond a reasonable doubt that the defendant had "advance knowledge." Id., 134 S.Ct. at 1248-1252. Although ROSEMOND was a firearms case, he urged that the Supreme Court's having construed the aiding & abetting liability element under 18 U.S.C. §2 necessarily applied to other aiding & abetting contexts like his own. Coriolant claimed that he was actually innocent of the aiding & abetting convictions because the jury was permitted to convict him without finding the requisite intent element mandated under ROSEMOND. Coriolant included the claim that his appellate

counsel rendered ineffective assistance of counsel by failing to bring to the attention of the Fifth Circuit the significance of ROSEMOND during the direct criminal appeal. SEE: (Application for a COA, at p. 25).

In the Fifth Circuit's Order denying Coriolant's Application for a COA, the Court stated, "Coriolant's arguments relying upon [ROSEMOND] will not be considered since they are raised for the first time in his COA motion." SEE: (**Appendix A**, Order, at 2). In support of its determination, the Fifth Circuit cited HENDERSON v. COCKRELL, 333 F.3d 592, 605 (5th Cir. 2003). In turn, the HENDERSON decision cites to ROBERTS v. COCKRELL, 319 F.3d 690, 694 (5th Cir. 2003)(holding, "We generally will not consider a claim raised for the first time in a COA application.").

The Fifth Circuit's refusal to consider Corilant's ROSEMOND claim, and in the broader context the claims of defendant's that are raised for the first time in an Application for a COA, effectively eliminates **any** potential for appellate review by employing a standard that is greater than the standard that would apply to unraised or unpreserved claims on appeal. This is totally inconsistent with the well-settled availability of "plain error" review which, although a limited form of review for claims that were not previously raised or preserved, does not result in a summary refusal of consideration. A reviewing court may grant relief for "plain error" even if the error was not raised and preserved previously. SEE: Fed.R.Crim.P. 52(b); UNITED STATES v. OLANO, 507 U.S. 725, 731 (1993)(plain error review provides the court of appeals limited power to correcterrors that were not timely raised previously); PUCKETT v. UNITED STATES, 556 U.S. 129, 135 (2009) (holding that Fed.R.Crim.P. 52(b) recognizes a limited exception to the preclusion of claims raised for the first time: "A plain error that affects

substantial rights may be considered even though it was not brought to the court's attention."). **Significantly,** the Fifth Circuit recognizes this well-settled exception. SEE: UNITED STATES v. PENA, 2019 U.S. App. LEXIS 682, at 3 (5th Cir. 2019)(citing PUCKETT, 556 U.S. at 135).

In Coriolant and other criminal defendant's Applications for a COA the Fifth Circuit's refusal to consider a previously unraised claim (including an actual innocence case) is not only at odds with the availability of "plain error" review on appeal, but also fails to properly take into account that an error can be "plain" at the time of appeal although it was not previously. If the law changed by the time of the appeal (or COA stage) plain error review is deemed appropriate because a defendant is not expected to object to law that is correct based on the chance that it might change by the time of the appeal (or COA). SEE: JOHNSON v. UNITED STATES, 520 U.S. 461, 468 (1997); HENDERSON v. UNITED STATES, 568 U.S. 266, 274-279 (2013)(citing JOHNSON, and recognizing that an error may be "plain" based on settled law as of the time of appellate review, and that this approach treats **all cases alike**). Notably, although the HENDERSON case was originally a Fifth Circuit case, and the Fifth Circuit now correctly follows the Supreme Court's decision in the actual appeal context, **it has excluded this potential from any consideration when a claim is raised for the first time in an Application for a COA. CF.** UNITED STATES v. MEDINA-MENDOZA, 2018 U.S. App. LEXIS 33147, at 2 (5th Cir. 2018)(citing HENDERSON, supra, explaining that an error is plain based on the law at the time of appeal); UNITED STATES v. SANJAR, 876 F.3d 725, 750 (5th Cir. 2017)(same, citing HENDERSON, supra). Beyond the Supreme Court's prior correction of the Fifth Circuit's plain error review in HENDERSON, supra, the Supreme Court has recently issued yet another decision correcting the

Fifth Circuit's application of the plain error standards in ROSALES-MIRELES v. UNITED STATES, 138 S.Ct. 1897, 1906-1911 (U.S. June 18, 2018).

That the Fifth Circuit's refusal to consider Coriolant's ROSEMOND claim for the first time in his COA application wrongly prevents even plain error review is all the more compelling in light of the fact that it is an actual innocence claim (involving the ineffectiveness of appellate counsel), since actual innocence itself is an exception that can excuse purported procedural defaults. SEE: BOUSLEY v. UNITED STATES, 523 U.S. 614, 622-623 (1998); SCHLUP v. DELO, 513 U.S. 298, 324-327 (1995). **CF.** MCQUIGGIN v. PERKINS, 569 U.S. 383, 386 (2013)(recognizing generally that actual innocence serves as a gateway allowing a habeas petitioner to overcome procedural default).

Based upon the foregoing points and authorities, Coriolant submits that this Court's discretionary review is properly utilized in this instance to ensure that the Fifth Circuit Court of Appeals does not continue to refuse to consider criminal defendant's claims raised for the first time in an Application for a COA. This Court's review is critically important to criminal defendants in the Fifth Circuit because it is employing a heightened standard to claims raised for the first time in a COA application than would occur to first time claims on appeal. The Fifth Circuit's refusal to consider such claims at the COA stage prevents **any** potential for plain error appellate review that would otherwise be available under the same circumstances on appeal. Criminal defendants, like Mr. Coriolant, are wrongly being refused consideration of potentially meritorious claims and entitlement to relief as a result of the Fifth Circuit's heightened standard at the COA application stage. The inherent unfairness of this process and the conflict with this Court's precedents are submitted to be sufficiently compelling so as to warrant certiorari review.

QUESTION THREE

WHETHER THE FIFTH CIRCUIT RENDERED LESS THAN A FULL AND FAIR CONSIDERATION OF PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY BY FAILING TO RECOGNIZE THAT THE SUPREME COURT STANDARDS AUTHORIZE THE ISSUANCE OF A COA EVEN WHEN THE ISSUE(S) ARE NOT NECESSARILY DEBATABLE?

Coriolant submits that the guidance of this Court is essential to the Fifth Circuit Court of Appeals's application of the standards that governing the considerations for the issuance of a Certificate of Appealability ("COA"). Coriolant submits that the Fifth Circuit's denial of his Application for a COA is indicative of less than a full and fair consideration of pro se criminal defendants' issues in a COA because it is apparently excluding application of a specific standard set by the Supreme Court's precedents. As a result, criminal defendants, like Mr. Coriolant, may have been wrongly denied the issuance of a COA and appellate review. As explained here, Coriolant's case presents with an issue that is ripe for this Court to articulate a pertinent portion of its previous COA standards for the lower courts.

In Coriolant's Application for a COA, at pages 5-7, he set out the law in general pertaining to the standards governing the considerations for the issuance of a COA. When the Fifth Circuit issued its Order denying Coriolant's COA application, it did so by first quoting the Supreme Court's standards, citing MILLER-EL v. COCKRELL, 537 U.S. 322, 336 (2003) and SLACK v. MCDANIEL, 529 U.S. 473, 484 (2000). The Fifth Circuit then summarily stated that Coriolant had failed to make the necessary showing. **Significantly,** the Court did not make **any** statement of the reasons supporting its decision.

SEE: (**Appendix A**, Order, at 2-3).

Coriolant submits that a careful scrutiny of the stated standards in the Fifth Circuit's Order specifically excludes a pertinent and substantial portion of the Supreme Court's standards it cited to in MILLER-EL and SLACK. Under the specific standard that the Fifth Circuit stated as having guided its considerations, and standard that it held Coriolant had failed to meet, it deliberately excluded from consideration the disjunctive standard that could have warranted the issuance of a COA in and of itself, notwithstanding the portion of the COA standard it says it considered. The portion that was excluded states, in pertinent part:

> "**[...] or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.**"

SEE: MILLER-EL, 537 U.S. at 327; SLACK, 529 U.S. at 484 (emphasis added). SEE ALSO: COBLE v. DAVIS, 682 Fed. Appx. 261, 274 (5th Cir. 2017)(citing this MILLER-EL standard in full).

Coriolant respectfully urges that this disjunctive portion of the Supreme Court's previously articulated COA standard in MILLER-EL/SLACK sets out a standard and reason in an of itself that could warrant a court's issuace of a COA in a particular circumstance. Although courts generally focus on the "debatability" of an issue in determining whether or not a COA is warranted, it is submitted that the disjunctive nature of the MILLER-EL and SLACK standard apparently recognize instances where an issue(s) is "adequate to deserve encouragement to proceed further." It would appear that the Fifth Circuit does not apply this disjunctive standard, and did not consider whether Coriolant's issue(s) might warrant a COA on this ground

even if it might not have under the portion of the COA standard actually reflected in the Fifth Circuit's denial Order.

Beyond the Supreme Court's articulation of the COA standards that are set forth in MILLER-EL and SLACK, it appears that there exists little if any guidance on this clearly disjunctive standard. Coriolant submits that this disjunctive standard would be properly utilized in cases where the "debatability" is not necessarily the appropriate standard. For instance, as set out under QUESTION TWO, supra, Coriolant's actual innocence claim in reliance upon ROSEMOND v. UNITED STATES, 572 U.S. 65 (2014) that was raised for the first time in his COA application was categorically refused consideration by the Fifth Circuit. However, under the disjunctive standard at issue herein, it would appear apparent that "jurists could conclude the issue[] presented [was] adequate to deserve encouragement to proceed further." MILLER-EL, 537 U.S. at 327; SLACK, 529 U.S. at 484; BUCK v. DAVIS, 137 S.Ct. 759, 773-774 (2017)(citing MILLER-EL, 537 U.S. at 327). It would seem apparent that the MILLER-EL and SLACK COA standards provide for those particular instances when the issue or issues presented are deemed "adequate to deserve encouragement to proceed further" ... notwithstanding the "debatability" standard that could also warrant the issuance of a COA in an appropriate case. Coriolant's case demonstrates that the Fifth Circuit, as well as other courts, may be wrongly denying Applications for COAs for failure to fully appreciate this disjunctive standard as itself warranting the issuance of a COA in an appropriate case. Coriolant's case reflects no such consideration of this apparently independent COA standard.

Because it is essential that the lower courts properly apply the Supreme Court's COA standards, and criminal defendants are not wrongly

denied the issuance of a COA and appellate review based on less than a full and fair consideration, it is respectfully submitted that this matter is worthy of this Court's review and guidance.

QUESTION FOUR

WHETHER THE UNITED STATES SUPREME COURT MAY CONSIDER PETITIONER'S CLAIM THAT HIS CRIMINAL JUSTICE ACT APPOINTED COUNSEL FAILED TO ADVISE HIM OF THE TIME TO SEEK SUPREME COURT REVIEW, FOLLOWING HIS DIRECT CRIMINAL APPEAL, RAISED FOR THE FIRST TIME IN THE INSTANT PETITION FOR A WRIT OF CERTIORARI?

For purposes of Coriolant's direct criminal appeal, he was represented by appellate counsel that was appointed to represent his interests in accord with the Criminal Justice Act ("CJA"), 18 U.S.C. §3006A. SEE: UNITED STATES v. CORIOLANT, 624 Fed. Appx. 868 (5th Cir. 2015). Coriolant's counsel did not seek Supreme Court review via a Petition for a Writ of Certiorari, nor did counsel ever advise Coriolant of this potential and the limitations period within which he must do so.

Coriolant would affirm that it was only after the Fifth Circuit's most recent denial of his Application for a COA that he discovered his appellate counsel's obligation to have filed a Petition for a Writ of Certiorari and/or advised him of the time he had to seek such a review according to the CJA plan for appointed appellate counsel. Moreover, the fact that Coriolant did not discover counsel's breach of the CJA obligation until after his Section 2255 proceeding and the denial of his COA application should not preclude the Supreme Court's notice of the error because the Court has previously held that allegations of an attorney's ineffective

assistance surrounding the failure to seek certiorari are **not** cognizable in a habeas proceeding because the Sixth Amendment right to counsel does not extend to discretionary review proceedings. **CF.** ROSS v. MOFFITT, 417 U.S. 600 (1974); WAINWRIGHT v. TORNA, 455 U.S. 586 (1982). Coriolant's failure to have raised the issue previously should be deemed to be without consequence to this Court's instant considerations. The correctness of this is further demonstrated by this Court's precedents addressing the failure of a CJA appointed counsel to fulfill certiorari obligations under the CJA plan.

The Supreme Court has previously considered the very issue now raised by Coriolant. In WILKINS v. UNITED STATES, 441 U.S. 468 (1979)(per curiam), the Court agreed that the criminal defendant had appropriately presented his CJA appointed counsel's failure to abide by the certiorari obligations in his own pro se petition to the Court. Further, as to the merits, the Court ultimately vacated and remanded to the court of appeals in order to allow the defendant to seek certiorari with the appointment of new counsel. The Supreme Court concluded that the attorney's failure to fulfill certiorari obligations violated the duties of appointed counsel under the CJA plan. **Notably,** the Fifth Circuit Court of Appeals has issued decisions in accord with WILKINS. SEE: ORDONEZ v. UNITED STATES, 588 F.2d 448, 449 (5th Cir. 1979)(recalling mandate after counsel failed to seek certiorari to allow appellant to seek Supreme Court review); UNITED STATES v. JAMES, 990 F.2d 804, 805 (5th Cir. 1993)(same).

For the foregoing reasons, Coriolant submits that the interests of fairness and justice compel the same outcome here. Coriolant respectfully beseeches the Court to grant the instant petition and remand this matter to

the Fifth Circuit with instructions that the decision in Coriolant's direct appeal be vacated and reinstated so that he may seek to file a Petition for a Writ of Certiorari with the assistance of newly appointed counsel.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner Coriolant respectfully prays this Honorable Court grants his Petition for a Writ of Certiorari.

I, BENSON CORIOLANT, declare under the penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is both true and correct.

Dated this **16th** day of **May**, 2019.

Respectfully Submitted,

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