NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

RAMON ACOSTA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***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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QUESTION PRESENTED FOR REVIEW

Whether reasonable jurists could debate the district court's determination that trial counsel was not constitutionally ineffective with respect to the government's plea offer.

INTERESTED PARTIES

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

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Ramon Acosta v. United States, No. 18-20053-Civ-Moore
(March 31, 2019)

United States v. Ramon Enrique Acosta, No. 12-20157-Crim-Moore
(October 17, 2014)

United States Court of Appeals (11th Cir.):

Ramon Acosta v. United States, No. 19-12057-F
(January 3, 2020)

United States v. Ramon Enrique Acosta, No. 14-14928
(August 23, 2016)

United States Supreme Court

Ramon Enrique Acosta v. United States, No. 16–7149
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Ramon Acosta respectfully petitions the Supreme Court of the United States 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 19-12057-F in that court on January 3, 2020, denying Petitioner a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence.

OPINIONS BELOW

The Eleventh Circuit's unpublished order denying a certificate of appealability is included in the Appendix at A-1.

The District Court's unpublished order denying a certificate of appealability is included in the Appendix at A-2. The district court's unpublished order adopting the magistrate judge's report and denying Petitioner's 28 U.S.C. § 2255 motion is included in the Appendix at A-3. The magistrate judge's unpublished report recommending denial of Petitioner's § 2255 motion is included in the Appendix at A-4.

The Eleventh Circuit's unpublished opinion affirming Petitioner's conviction and sentence on direct appeal is reported at 660 F. App'x. 749 (11th Cir 2016), and included in the Appendix at A-5.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 decision of the court of appeals denying a certificate of appealability to appeal the district court's denial of Petitioner's 28 U.S.C. § 2255 motion was entered on January 3, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Title 28, U.S.C. § 2253(c)(2) provides: "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

I. Trial and Direct Appeal.

On March 8, 2012, a grand jury in the Southern District of Florida charged Mr. Acosta and seven other individuals in a twelve-count indictment. The lead defendant, Paul Cordoba, was an experienced airplane pilot who headed a drug trafficking operation that smuggled drugs from Venezuela to Florida aboard his planes. Mr. Acosta was a Federal Aviation Administration-certified airplane mechanic who performed general maintenance and repair work on private aircraft. The indictment charged that Mr. Acosta conspired with Cordoba and others in Cordoba's operation to import and possess with intent to distribute large quantities of cocaine into the United States.

Of the seven individuals indicted with Mr. Acosta, four were declared fugitives, two pled guilty, and the government dismissed the charges against one, so Mr. Acosta was tried alone. Following a three-day trial at which Mr. Acosta testified, the jury convicted him on all counts. Mr. Acosta's principle defense was that he was unaware of and uninvolved in any of Paul Cordoba's criminal ventures, and that the government witnesses who testified regarding his involvement in the conspiracy were former co-defendants or participants in the conspiracy who were admitted liars.

Although the then-51-year old Mr. Acosta had never before been arrested, due primarily to the large quantity of drugs involved, his initial post-trial advisory

guideline range was calculated to be 360 months to life imprisonment. Upon learning that he faced such significant time in prison, Mr. Acosta fired his trial counsel and new counsel to represent him at sentencing. Arguments made by new sentencing counsel, unusual intervention by the government with the Probation Office, and various adjustments allowed by the District Court ultimately resulted in a revised advisory guideline range of 135 to 168 months. The district court sentenced Mr. Acosta to the low end of the advisory range – 135 months. The Eleventh Circuit affirmed Mr. Acosta's conviction and sentence, describing the government's evidence against Mr. Acosta as "ample." *United States v. Acosta*, 660 F. App'x 749, 755 (11th Cir. 2016); *see* App. A-5. This Court denied *certiorari* review. *Acosta v. United States*, 137 S. Ct. 706 (2017).

II. District Court Proceedings on 28 U.S.C. § 2255 Motion.

Thereafter, Mr. Acosta filed a *pro se* 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence alleging that trial counsel rendered ineffective assistance when he failed to advise Mr. Acosta of the extent of the evidence against him and the potential sentencing range he faced under the United States Sentencing Guidelines, causing Mr. Acosta to be unable to make an informed decision regarding whether to plead guilty or proceed to trial.

An evidentiary hearing was held at which Mr. Acosta, trial counsel, and sentencing counsel testified. Critically, sentencing counsel testified that when he first met with Mr. Acosta, it was clear that Mr. Acosta had no understanding of the

Sentencing Guidelines, or the implications of the Guidelines for his sentence, until sentencing counsel explained them. App. A-4 at 24. Sentencing counsel testified that "it was apparent to him during his meeting with Movant that he was 'clueless,' 'was totally lost,' and 'didn't seem to know much about the guidelines or safety valve of really much about anything.'" *Id.* Sentencing counsel testified further that Mr. Acosta was "'surprised'" that he was looking at a 30-year sentence, *id.*, and that Mr. Acosta "did not understand" that "just because you don't do certain acts and you don't purchase drugs and you don't sell drugs doesn't mean you cannot be convicted as being part of a drug conspiracy," DE51:18-19. Finally, sentencing counsel testified that Mr. Acosta "said, 'if I would have understood all of this I would never have gone to trial.'" *Id.*

Mr. Acosta testified he had never before been arrested before the charges in this case. *Id.* at 28. He was released on bond and never held in custody before trial, and prior to trial never spoke with another attorney about his case. *Id.* at 29. He was very trusting of trial counsel, and all of the information Mr. Acosta knew about the criminal justice system and his case at the time was what he was told by trial counsel.

Mr. Acosta testified that before trial, he and trial counsel met with the trial prosecutor and two agents at the United States Attorney's office. *Id.* at 33. At the meeting, the prosecutor went through the government's evidence against Paul Cordoba, told Mr. Acosta that the government had enough evidence to convict him,

and advised that Mr. Acosta that he was looking at 20 years in prison if he were convicted at trial. *Id*. at 31. The prosecutor further told Mr. Acosta that if he helped the government, he might get a much shorter sentence, maybe two to five years. *Id*. The government's offer would have allowed Mr. Acosta to plead guilty to an offense under the Travel Act, 18 U.S.C. § 1952, with a 5-year statutory maximum. App. A-4 at 6. The prosecutor did not discuss the Sentencing Guidelines with Mr. Acosta. DE 51:31-32.

Mr. Acosta testified that after he and trial counsel discussed the plea offer, he decided to reject it. *Id*. at 36. Mr. Acosta testified that before he made his decision, trial counsel never explained to him the pros and cons of going to trial versus pleading guilty. *Id*. at 35. The fact that Mr. Acosta was not a citizen did not affect his decision: he has a large family in Venezuela, and as an airplane mechanic, could easily get a job there. *Id*. at 36. According to Mr. Acosta, trial counsel didn't explain to him that most people who are charged with federal crimes plead guilty, how very hard it is to win a case against the federal government, nor that because he was charged in a conspiracy, all of the evidence against his co-defendants could be used to convict him at trial. *Id*. at 39-40.

Mr. Acosta testified further that trial counsel also didn't explain the Sentencing Guidelines to him. *Id*. at 37. According to Mr. Acosta, it wasn't until after trial that he first saw the chart that tells you how long your sentence will be under the Sentencing Guidelines, when sentencing counsel showed it to him. *Id*. at

38-39. He testified that trial counsel never explained to him that, under the Guidelines, his sentence could be increased based on the drug quantity found, the use of an airplane in the offense, his "special skill" as an airplane mechanic, and if he went to trial. *Id.* Mr. Acosta was shocked when his Probation Officer said that his sentencing range under the Guidelines was 30 years to life. *Id.* Mr. Acosta testified that if trial counsel had explained to him about how the system works and the evidence against him, and that he was looking at a possible life sentence, he would have helped the government and pled guilty. But, Mr. Acosta testified, he never thought about pleading guilty because trial counsel never explained these things to him, and trial counsel was so confident he could show at trial that the government witnesses were liars.

Mr. Acosta testified that he decided to hire sentencing counsel to handle his sentencing rather than continuing to have trial counsel continue to represent him. DE 51:30, 42. Mr. Acosta testified that sentencing counsel really opened his eyes, telling him things that he had never heard from trial counsel in the two years that trial counsel represented him. *Id.* at 43. Sentencing counsel explained conspiracy law, and told him that the government had a strong case against him. *Id.* Sentencing counsel also explained to Mr. Acosta how the Sentencing Guidelines helped him if he pled guilty and cooperated with the government, and how they hurt him if he went to trial. Mr. Acosta testified that had trial counsel explained the system and the Sentencing Guidelines in the same way, he would have worked with

the government and pled guilty to the Travel Act offense rather than going to trial. *Id*. at 43-46.

The government presented only trial counsel's testimony. Trial counsel testified that he did not advise Mr. Acosta of his exposure under the Sentencing Guidelines because he did not know the quantity of drugs that could be attributed to Mr. Acosta's conduct. Instead, he told Mr. Acosta that his statutory sentencing range was ten years to life. *Id*. at 73-74, 89. In addition, trial counsel testified that the government conducted a "reverse proffer" where it explained its theory of the case and urged Mr. Acosta to take a plea offer and cooperate. *Id*. at 77-78. Trial counsel testified that Mr. Acosta "went berserk" when he learned that he was facing a sentence of 30 years to life. App. A-4 at 24. Finally, trial counsel testified that Mr. Acosta stressed his innocence throughout the proceedings, was concerned about being deported were he to plead guilty, and told him many times that he would rather spend the rest of his life in an American prison than free in Venezuela. DE 51:69-70.

The district court first determined that trial counsel's performance was not deficient even though there "may have been a 'wide discrepancy' between the *initial* sentencing range suggested within the PSI (360 months to life) and counsel's initial hypothetical range (ten years to life)," because "Petitioner's *final* Sentencing Guidelines range was 151 to 188 months, and Petitioner's actual sentence, 135 months, was ultimately closer to counsel's hypothetical range than the range within

the PSI." App. A-3 at 4. Thus, the district court determined, because trial counsel "explicitly communicated to his client that his sentencing exposure without a plea agreement was ten years to life," and "Petitioner's actual sentence – 135 months – fell towards the very bottom of this range," counsel's performance was not deficient. *Id*.

Next, the district court held that Mr. Acosta was not prejudiced by counsel's actions, determining that "Petitioner's claims of innocence and fear of deportation supported a finding that Petitioner would have nonetheless rejected the plea and gambled on a favorable verdict at trial" even if counsel had fully explained Mr. Acosta's sentencing exposure to him. *Id*. at 3.

The district court denied a certificate of appealability by separate order. App. A-2. Mr. Acosta then moved the United States Court of Appeals for the Eleventh Circuit for a certificate of appealability, but a certificate was summarily denied. App. A-1.

REASON FOR GRANTING THE WRIT

I. Reasonable jurists could debate the district court's determination that trial counsel was not constitutionally ineffective with respect to the government's plea offer.

"One of the most precious applications of the Sixth Amendment may well be in affording counsel to advise the defendant concerning whether he should enter a plea of guilty." *Reed v. United States*, 354 F.2d 227, 229 (5th Cir. 1965). A critical aspect of counsel's advice with respect to a plea offer is a comparison of the potential term of imprisonment the defendant would serve pursuant to the offer, versus the possible sentence that would be imposed following a guilty verdict at trial. "The basic minimum amount of time that a defendant will have to serve is an integral factor in the plea negotiation; it is a direct, not a collateral consequence of the sentence." *Hill v. Lockhart*, 877 F.2d 698, 703 (8th Cir. 1989). For this reason, the law is clear that "counsel owes a duty to provide accurate information about his client's earliest release date." *Id.* "A reasonably competent counsel will attempt to learn all the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis" to the client. *Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003).

For this reason, if an attorney fails to advise a defendant regarding the sentencing ramifications of going to trial or pleading guilty, his performance falls below the objective standard required by *Strickland v. Washington*, 466 U.S. 668

(1984). *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004); *United States v. Day*, 969 F.2d 39, 42-43 (3d Cir. 1992). "When a defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court." *Grammas*, 376 F.3d at 436 (internal quotation marks omitted).

In evaluating counsel's performance under *Strickland*, a court must "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.* "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Here, trial counsel did not even undertake to estimate Mr. Acosta's sentencing exposure under the Sentencing Guidelines were he to go to trial. The district court found that counsel "explained it is nearly impossible to predict sentencing prior to trial given all of the variables but was certain he explained to Movant that the 'range' was 'ten years to life.'" App. A-4 at 21-22. But "ten years to life" was only the statutory sentencing range. Counsel utterly failed to provide Mr. Acosta with any information regarding what sentence he might actually receive within this statutory range. Sentencing counsel, whom Mr. Acosta hired prior to sentencing, testified that when he first met with Mr. Acosta and reviewed the PSI with him, Mr.

Acosta was not at all familiar with the Sentencing Guidelines or their implications for his sentence. *Id*, at 26. Indeed, sentencing counsel testified that when he took over Mr. Acosta's case, Mr. Acosta "was 'clueless,' 'was totally lost,' and 'didn't seem to know much about the guidelines or safety valve or really much about anything' about his case. *Id.*

But trial counsel not only failed to provide Mr. Acosta with any information regarding Mr. Acosta's potential Guidelines sentence himself. He fully abdicated his role as advisor to Mr. Acosta when he allowed the prosecutor to tell Mr. Acosta during the government's reverse proffer that his rejection of the plea offer would result in a 20-year sentence. App. A-4 at 20-21. Without any additional guidance from trial counsel, it is not surprising that Mr. Acosta viewed this sentencing advice from the prosecutor to be a "threat" that overestimated his potential sentencing exposure in order to convince him to plead rather than a number based in reality. *Id*. at 20. Ironically, however, even the prosecutor's 20-year "threat" grossly underestimated Mr. Acosta's potential sentencing exposure under the Guidelines, given the Probation Officer's initial calculation of the advisory Guidelines range to be 360 months to life.

But because trial counsel never discussed the Sentencing Guidelines with Mr. Acosta, Mr. Acosta was unaware of their implications for his sentence. Because trial counsel refused to estimate the drug quantity for which Mr. Acosta could be held accountable, he never explained where in the statutory range of 10 years to life

Mr. Acosta's sentence might fall. Trial counsel also failed to explain clearly-applicable Guidelines enhancements to Mr. Acosta, such as the two-point increase for use of an airplane under U.S.S.G. § 2D1.1(b)(3)(A), and the two-point enhancement for obstruction of justice under U.S.S.G. § 3C1.1 due to Mr. Acosta's testimony at trial. Given the lack of information that trial counsel provided, it is not surprising that, according to counsel, Mr. Acosta "went berserk" when he learned that he was facing a sentence of 30 years to life. App. A-4 at 24. Mr. Acosta's reactions demonstrate the utter lack of guidance trial counsel provided him regarding his sentencing exposure following trial. In light of trial counsel's failure to provide Mr. Acosta with a "full understanding of the risks of going to trial," *Grammas*, 376 F.3d at 436, reasonable jurists could debate whether his performance was deficient under *Strickland*.

"By grossly underestimating [the defendant's] sentencing exposure . . . , [counsel] breache[s] his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable." *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (internal quotation marks omitted). *See Grammas*, 376 F.3d at 436. This is so because such information is critical: a criminal defendant's "[k]nowledge of the comparative sentencing exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992).

In *Gordon*, the defendant rejected a pretrial plea offer of 84 months in part because counsel informed him that he faced only 120 months were he to go to trial. 156 F.3d at 377. In fact, the defendant's sentencing range was 262-327 months. *Id*. Similarly, in *Day*, the defendant rejected a plea offer of 5 years because counsel informed him that he faced an 11-year sentence if he went to trial. 969 F.2d at 42. In fact, because the defendant was classified as a career offender, his sentencing range was 262-327 months. *Id*. at 41. Finally, in *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005), counsel mistakenly advised the defendant that his maximum exposure following trial was only 9 years and, as a result, the defendant rejected the State's plea offer of five years. However, the defendant's actual exposure was 25 years-to-life. *Id*. In each of these cases, the courts held that counsel's underestimation of the defendant's sentencing exposure following trial fell below the prevailing professional norms for advising the client during plea negotiations. *See id*. at 1183; *Gordon*, 156 F.3d at 380; *Day*, 969 F.2d at 42-43.

Even worse than counsel in *Gordon*, *Day*, and *Riggs*, trial counsel never advised Mr. Acosta regarding his potential advisory Sentencing Guidelines range were he to go to trial. Therefore, the only information Mr. Acosta had regarding the sentence he was facing following trial was *from the government* – an estimate of 20 years – when the original PSI returned an advisory Guidelines range of 30 years to life. Reasonable jurists could debate whether this total lack of information, like the gross underestimation of the defendants' sentencing exposure in *Gordon*, *Day* and

Riggs "'fell below the prevailing professional norms' for advising a client during plea negotiations." *Gordon*, 156 F.3d at 380.

The district court concluded that trial counsel's performance was not deficient under *Strickland* because counsel "explicitly communicated to his client that his sentencing exposure without a plea agreement was ten years to life" and "Petitioner's actual sentence – 135 months – fell towards the very bottom of this range." App. A-3 at 4. Reasonable jurists could debate whether, by so concluding, the district court engaged in the very type of backward-looking analysis *Strickland* prohibits.

Strickland requires a court to "eliminate the distorting effects of hindsight, . . . and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Trial counsel had no idea that Mr. Acosta would end up with a 135-month sentence. Indeed, it was only due to a series of fortunate events – including a highly unusual intervention by the government on Mr. Acosta's behalf with the probation officer prior to sentencing – that Mr. Acosta's offense level dropped, thereby reducing his advisory Guidelines range to a range of 135 to 168 months from the original PSI's range of 360 months to life. Because the district court relied on the very "distorting effects of hindsight" when it reconstructed counsel's conduct rather than viewing that conduct from trial counsel's perspective at the time, reasonable jurists could debate whether the district court erred in

relying on Mr. Acosta's ultimate sentence to conclude that trial counsel's performance was not deficient.

Reasonable jurists could also debate whether the district court erred in determining that Mr. Acosta could not demonstrate *Strickland* prejudice. It found that "even if [trial counsel] advised Petitioner of every potential sentencing enhancement or reduction applicable under the Sentencing Guidelines, Petitioner's claims of innocence and fear of deportation supported a finding that Petitioner would have nonetheless rejected the plea and gambled on a favorable verdict at trial." App. A-3 at 4.

First, reasonable jurists could debate whether a protestation of innocence is dispositive of whether Mr. Acosta would have accepted the Government's plea offer. "[R]epeated declarations of innocence do not prove . . . that [defendant] would not have accepted a guilty plea." *Griffin v. United States*, 330 F.3d 733, 738 (6th Cir. 2003) (emphasis added). "Though [a defendant's] insistence on his innocence is a factor relevant to any conclusion as to whether he has shown a reasonable probability that he would have pled guilty, it is not dispositive[;] . . . if he had been properly informed . . . [defendant] might well have abandoned his claim of innocence." *Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999) (emphasis added).

Moreover, a "significant" discrepancy between the sentence offered by the Government as part of a plea offer and that faced by the defendant after trial, when

combined with a "strong" prosecution case against the defendant, provides objective evidence that the defendant would have accepted the plea offer had counsel's advice been constitutionally adequate. *Riggs*, 399 F.3d at 1183. *See also Gordon*, 156 F.3d at 381.

For example, in *Riggs*, the defendant testified that he would have accepted a five-year plea offer had counsel adequately advised him that his maximum exposure was a sentence of 25 years-to-life. *Id.* The court found that this testimony was supported by "the significant discrepancy" between the two sentences, concluding that "[s]uch a discrepancy between the two sentences would compel any reasonable person to take the deal offered by the prosecution." *Id.* Moreover, the record indicated that the case against Riggs was "strong." *Id.* Under these circumstances, "it [did] not stretch credulity to conclude" that Riggs would have accepted the plea offer had counsel's advice been constitutionally adequate, and Riggs demonstrated prejudice under *Strickland*. Similarly, in *Gordon*, the court concluded that the defendant's statement that she would have accepted a plea offer, when combined with the "great disparity" between the actual maximum sentencing exposure and the sentence exposure represented by defendant's attorney, "provides sufficient objective evidence . . . to support a finding of prejudice under Strickland." 156 F.3d at 381.

Reasonable jurists could debate whether the same is true here. Sentencing counsel credibly testified at the evidentiary hearing that after he explained to Mr.

Acosta that the government's case against him was overwhelming and about the workings of the Sentencing Guidelines, Mr. Acosta told him that "if I would have understood all of this I would never have gone to trial." App. A-4 at 24. Mr. Acosta testified similarly at the evidentiary hearing. DE51:43-44 ("Q: If [trial counsel] had explained things to you the way [sentencing counsel] had, would that have changed your mind about going to trial or pleading guilty? A. Definitely, yes."). As in *Riggs* and *Gordon*, this testimony is supported by the significant discrepancy between the Government's plea offer and the sentencing range Mr. Acosta faced following trial. Moreover, as in *Riggs*, Mr. Acosta's testimony is also supported by the fact the Government's case against him at trial was, in this Court's estimation, "ample." *Acosta*, 660 F. App'x at 755. Under these circumstances, "it does not stretch credulity to conclude" that Mr. Acosta would have accepted the Government's pretrial plea offer. *Riggs*, 399 F.3d at 1183. Thus, reasonable jurists could debate whether he demonstrated prejudice under *Strickland* notwithstanding his protestations of innocence.

Accordingly, reasonable jurists could debate whether the district court erred in its conclusion that Mr. Acosta failed to demonstrate *Strickland* prejudice as well as deficient performance. A certificate of appealability (COA) is warranted where the applicant shows "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). This Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Court explained, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Here, Mr. Acosta has shown that reasonable jurists could debate the district court's determination that trial counsel was not constitutionally ineffective with respect to the government's plea offer. A COA is therefore warranted on the question presented, and the Eleventh Circuit's failure to grant a COA is contrary to this Court's jurisprudence governing certificates of appealability.

CONCLUSION

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

Respectfully submitted,

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