20-7437

NO.:

IN THE

SUPREME COURT OF THE UNITED STATES

FREDERICO RAMSEY,
PETITIONER,

ORIGINAL

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

Federico Ramsey
USMCFP-Springfield
Reg. No.: 12070-031
P.O. Box 4000
Springfield, Mo 65801

QUESTION PRESENTED

I. WHETHER THE DISTRICT COURT AND THE TENTH CIRCUIT DECISIONS DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT IN MAYLE V. FELIX, 545 U.S. 644,664, 125 S.Ct. 2562, 162 L.ED.2d 582 (2005), WHEN THE DISTRICT COURT ERRED IN DENYING PETITIONER THE OPPORTUNITY TO PRPERLY AMEND HIS BURRAGE V. UNITED STATES 571 U.S. 204, 134 S.Ct. 881, 887, 187 L.Ed.2d 715 (2014); AND THE PENAL DECISIONS DIRECTLY CONFLICT WITH THE DECISION IN MILLER-EL V. COCRELL, 537 U.S. 322, 336-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), WHEN THE TENTH CIRCUIT FAILED TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE THE RECORDS AND FILES SUPPORTED THE FACTS THAT THE DISTRICT COURT ERRED IN NOT PERMITTING HIM TO AMEND HIS BURRAGE CLAIM UNDER FED.CIV. P. 15(C)(1)(B)?

II. WHETHER THE DISTRICT COURT AND THE TENTH CIRCUIT DECISIONS DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT IN MAYLE V. FELIX, 545 U.S. 644, 664, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), WHEN THE DISTRICT COURT ERRED IN DENYING PETITIONER THE OPPORTUNITY TO PROPERLY AMEND HIS LAFLER V. COOPER, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); AND THE PENAL DECISION DIRECTLY CONFLICT WITH THE DECISION IN MILLER-EL V. COCKRELL, 537 U.S. 322, 336-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), WHEN THE TENTH CIRCUIT FAILED TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE THE RECORDS AND FILES SUPPORT THE FACTS THAT THE DISTRICT COURT ERRED IN NOT PERMITTING HIM TO AMEND HIS LAFLER CLAIM UNDER FED.R.CIV. P. 15(C)(1)(B)?

INTERESTED PARTIES

Carlos Murguia, District Couirt Judge

Catherine A. Zigtema, § 2255 Counsel

Dionna M. Scherff, § 2255 Counsel

Frederico Ramsey, Petitioner

Jerome A. Holmes, Circuit Judge

John E. Counles, § 2255 Counsel

Nancy L. Martintz, Circuit Judge

Robert E. Bacharach, Circuit Judge

Sheri Catania, Assistant U.S. Attorney

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STATEMENT OF JURIDICTION

On October 21, 2020 the Tenth Circuit Court of Appeals entered its mandate denying Petitioner's Application for issuance of a Certificate of Appealability. Certiorari juridiction of this Court is invooked pursuant to 28 U.S.C. § 1254(i); Sup.Ct.R. 13.1.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V:

> No person shall be held to answer for a capital or otherwise infomous 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 be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy 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.

STATEMENT OF THE CASE

SUMMARY OF THE PROCEEDING BELOW:

Petitioner was convicted in 2010 of four charges related to the possession and distribution of heroin, including conspiracy charge where a drug-death resulted. In July 2011, he was sentenced to 292 months' imprisonment. Petition appealed from his convictions, and in 2013, the Tenth Circuit affirmed both his convictions and sentences.

On December 4, 2014, Petitioner filed a pro se motion, pursuant to 28 U.S.C. § 2255 to vacate his sentences, based on twenty-two claims that his court appointed attorney was ineffective both before and during his trial and sentencing, and appeal. In a September 16, 2015 order, the district court denied nearly all of Petitioner's claims, but took three claims under advisement. Eventually, in November 2019, the district court denied the three remaining claims. The court also decliened to issue a COA.

REAON FOR GRANTING THE WRIT

This case asks a question of exceptional importance that has never heretofore been answered by this Court that is whether the district court and the Tenth Circuit Court of Appeals denied him Due Process of Law in his intial § 2255 filings by denying him an opportunity to amend his claim pursuant to Federal Rule of Civil procedure (Fed.R.Civ.P.) 15(c)(1)(B) to (i) clarifies or amplifies the claims or theory in the original motion by way of additional fact and law; and (ii) he did not seek to add a new claim or insert a new theory into the case. Claims 1,13, 14, A, E, i and ii and that the **Burrage** decision was retroactive to his case See **Appenmdix: B.** additionally, may the district court and the Tenth Circuit Court of

Appeals evaded constitutional requirement simply by declaring that he never raised them before the district court in the § 2255 proceeding. See **Appendix:** B, at 4, but the record contradict this conclusions. See **Appendix:** A, at 8. As a result, both the District Court and the Tenth Circuit had jurisdiction to permit the amended Rule 15(c) motion and had jurisdiction to consider those two amended claims, and therefore, had authority to resolve them--it is respectfully submitted that this petition present an important and recurring question of Due Proces, and constitutional law warranting review by this Honorable Court pursuant to Sup.Ct.R. 10(c).

I. WHETHER THE DISTRICT COURT AND THE TENTH CIRCUIT DECISIONS DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT DECION IN **MAYLE V. FELIX**, 545 U.S. 644, 664, 125 S.Ct. 2562, 162 L.Ed.-2d 582 (2005), WHEN THE DISTRICT COURT ERRED IN DENYING PETITIONER THE OPPORTUNITY TO PROPERLY AMEND HIS **BURRAGE V. UNITED STATES**, 571 U.S. 204, 134 S.Ct. 881, 887, 187 L.Ed.2d 715 (2014); AND THE PENAL DECISION DIRECTLY CONFLICT WITH THE DECISION IN **MILLER-EL V. COCKRELL**, 537 U.S. 322, 336-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), WHEN THE TENTH CIRCUIT FAILED TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE THE RECORDS AND FILES SUPPORTED THAT FACTS THAT THE DISTRICT COURT ERRED IN NOT PERMITTING HIM TO AMEND HIS BURRAGE CLAIM UNDER FED.R.CIV.P. 15(C)(1)(B)?

The record demonstrate that Petitioner filed a motion to amend two claims based on relation back theory under Rule 15(c)(1)(B). See **Appendix:** B. Petitioner was denied an opportunity to establish both cause and prejudice, and that Burrage was retroactive to his case by both the district court and the Tenth Circuit denial of his Rule 15(c)(1)(B) and issuance of a COA that related back to claims 1, 13, 14, A, E, i and ii, and that Burrage was applicable to his § 2255. See **Appendixs: A, B, and C.** It denied him his constitutional right to demonstrate cause and prejudice, retroactive of his Burrage claim See **Appendixs B and C.** via an evidentiary hearing.

The district court erred in not permitting Petitioner an opportunity to amend his petition pursuant to Rule 15(c)(1)(B), provide him an opportunity to demonstrate cause and prejudice, and demonstrate retroactivety on his Burrage claim, and failing to convene an evidentiary hearing to fully develop the record.

Amendments releate back when "the amendment asserts a claim or defense that arose out of conduct, transaction or occurrence set out." Fed.R.CIV.P. 15(c)(1)(B). The Supreme Court has interpreted this language to require "original and amended petitions [to] state claims that are tied to a common core of operative facts." **Mayle v. Felix**, 545 U.S. 644, 125 S.Ct. 2362, 162 L.Ed.2d 582 (2005). The Court may exercise discretion to permit the argument as "relating back" to the original motion pursuant to Fed.-R.Civ.P. 15(c)(1)(B). See **United States v. Espinoza-Saenz**, 235 F.3d 501, 505 (10th Cir. 2000)(explaining Rule 15(c) as its applies to untimely proposed amendment to § 2255 motion). A Court has discretion to permit an untimely amendment to a § 2255 where the proposed amendment (1) clarifies a claim or theory in the original motion by way of additional facts; and (2) does not seek to add a new claim or insert a new theory into the case. Id.

The common core of operative for thes claims are the same claims raised in his initial § 2255 motion that Burrage apply to his initial § 2255 and that it was retroactive. He was entitled to amend his § 2255 motion because the key consideration was the factual facts and binding presendent, and they share a common core of operative under Burrage.

It is well-settled that substantive decision that "narrow the scope of a criminal statute by interprecting its terms" apply retroactively to case on collateral review. **Schriro v. Summelin**, 523 U.S. 348, 351, 124

S.Ct. 2519, 159 L.Ed.2d 442 (2004)(citing Bousley v. United States, 523 U.S. 614, 620-21 (1998). One such circumstance is when the new rule is substantive. **Welch v. United States**, 136 S.Ct. 1257, 1264, 194 L.Ed.2d 1387 (2016)(citing Schriri, 542 U.S. at 351). As noted by the Fifth, Sixth, Seventh and Eight Circuits, Burrage fits the bill because "but for" causation is a stricter requirement that the "contributing-cause" standard rejected by the Supreme Court. Consequently, some conduct that was punishable under 21 U.S.C. § 841(b)(1) pre-Burrage is no longer covered. See **Santillana v. Upton**, 846 F.3d 779, 783-84 (5th Cir. 2017); **Harring v. Ormona**, 900 F.3d 246, 249 (6th Cir. 2018); **Gaylord v. United States**, 829 F.3d 500, 505 (7th Cir. 2016); **Kieger v. United States**, 842 F.3d 490, 499-500 (7th Cir. 2011); **Ragland v. United States**, 784 F.3d 1213, 1214 (8th Cir. 2015)(holding that Burrage narrowed the "death results" enhancement of § 841(b)(1)(C) and, thus, applies retroactively).

The determination of how and when the Supreme Court decision is retroactively applied to aptly described by the Seventh Circuit panel in Kieger as follows:

> A new rule announced by the Supreme Court applies to all cases still pending on direct review, but for cases such as this one, on collateral review where a final judgment has been issued, the rule applies only in certain circumstances. **Schriro v. Summerlin**, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). One such circumstances is when the new rule is substantive. **Whelth v.United States** U.S. , 136 S.Ct. 1257, 1264, 194 L.Ed.2d 387 (2016)(citing Schriro, 542 U.S. at 351, 124 S.Ct. 2519). Rule that "narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the states's power to punish" are substantive and thus apply retroactively. **Schriro**, 542 U.S. at 351-52, 124 S.Ct. 2519 (internal citations omitted). "Such rules apply retroactively because they necessarily carry signifficent risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Id. at 352, 124 S.Ct. 2519 (internal quotations omitted). In other words, "a rule is substantial rather than procedural if it alter the range of

of conduct or the class of persons that the law punishes." Id. at 353, 124 S.Ct. 2519, 842 F.3d at 497.

Burrage substantively changed the law with respect to the causation standard that applies to the statutory death enhancement under 21 U.S.C. § 841(b), and Burrage is retroactive to cases on collateral review. The district court concluded that court have decided that Burrage didnot announce a new rule of constitutional law and that, even if it had, the Supreme Court did not make Burrage retroactively applicable. The Court finds Burrage is inapplicable to defendant's case. See **Appendix: C, at** 4-5, 10-12, and 13-14.

Petitioner was not precluded from attempting to establish cause and prejudice in his Rull 15(c) motion. See **United States v. Challoner**, 583 F.3d 745, 748 (10th Cir. 2009)(noting that § 2255 movant first raised claim of ineffective assistance of counsel in response to district court's order to show cause for procedural default thus indicating that a § 2255 movant may attempt to show cause and prejudice after the motion is filed); **United States v. Harfst**, 168 F.3d 398, 401 (10th Cir. 1999)(allowing § 2255 movant to argue for the first time in his objections to the magistrate judge's recommendation that counsel's failure to raise issue before the district court or on direct appeal constituted ineffective assistance of counsel); c.f. **United States v. Wiseman**, 297 F.3d 975, 979-80 (10th Cir. 2002)(recognizing that appellate court may raise procdural default sue sponte, and if it does so must afford the § 2255 movant a reasonable opportunity to respond).

Petitioner was denied an opportunity to establish both cause and prejudice, and demonstrate that Burrage was retroactive by the district court denial of his Rule 15(c)(1)(B) motion that related back. See **Appendix: B**, at 1-10.

"When a crime requires not merely conduct-but-also a specified result of conduct, a defendant generally may not be convicted unless his conduct is both (1) the actual cause, and (2) the legal cause (often called proximate cause) of the result." **Burrage**, 571 U.S. at 204. Accordinly, the Government has to prove beyond a reasonable doubt that the Petitioner's conduct was "independently sufficient "cause of the victim death. **Gaylor**, 829 F.3d at 505 (Burrage narrowed the scope of the "death results" enhancement and is thus substantive and applies retroactively); **Regland**, 784 F.3d 1214 (the government conceed ... Burrage applies retroactively); **Harrington**, 900 F.3d 249 (same); **Santillana**, 846 F.3d at 783-84 (same); **Krieger**, 842 F.3d 497-500(same); see also **Weldon v. United States**, No. 14-06691-DR-14, 2015 U.S. Dist. Lexis 50959, 2015 WL 1804253, at *3 (S.D. Ill. Apr. 17, 2015)(The Government conceeded that Burrage is substantive in nature and is retroactive....), vacated on other grounds No. 15-1994, 840 F.3d 865, 2016 U.S. App. Lexis 15626, 2016 WL 4468077 (7th Cir. Aug. 24, 2016); **United States v. Schneider**, 112 F.Supp.3d 1197, 1207 (D.Kan. 2015)("The government conceedes and the court agrees, that Burrage announces a new substantive rule of law applicable to cases on initial collateral review."), aff'd, No. 15-3247, 665 Fed. Appx. 668, 2016 U.S. App. Lexis 19932, 2016 WL 6543342 (10th Cir. Now. 4, 2016); **United States v. Snider** No. 3:07-Cr-124-SI, 180 F.Supp.3d 780, 2016 U.S. Dist. Lexis 49420, 2016 WL 1453878, at *10 (D. Or. Apr. 13, 2016)(accepting government's concession that Burrage standard applies); **Terry v. Shorttly**, 2017 U.S. Dist. Lexis 78282 (D. Arizona May 23, 2017)(finding that Burrage applies retroactively to Terry's § 2241 petition).

The decision in Burrage is a decision which would apply to initial habeas petitions, i.e. whether it is substantive or procedural. See

Regland, 756 F.3d at 601-02 (remanding to the district court to determine if Burrage is applicable to the petitioner initial § 2255 motion).

In **Browning v. United States**, 241 F.3d 1262, 1264 (10th Cir. 2001) the Tenth Circuit held that an analysis under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989), is "applicable to initial habeas applications raising new rules of constitutional law under § 2255."

The district court abused its discretion in denying Petitioner an opportunity to demonstrate cause, prejudice, and retroactivety pursuant to Rule 15(c)(1)(B). It should had convene an evidentiary hearing. See **United States v. Barrett**, 797 F.3d 1207, 1213 (10th Cir. 2015)(quoting United States v. Rushin, 647 F.3d 1299, 1302 (10th Cir. 2011).

Petitioner has clearly demonstrated that he had sustain his burden as described above in the issue raised.

Petitioner is entitled to issuance of a COA.

The record demonstrate that Petitioner sustain his burden entitlment to issuance of a COA.

The Tenth Circuit mandate concluded that Mr. Ramsey's initial § 2255 motion raised twenty-two claims of ineffective assistance of counsel. Mr. Ramsey even later supplemted his initial motion with several additional claims. Yet, he never raised the precise two claims presented in his COA request. In light of our "general rule against considering issues for the first time on appeal," even in the habeas context, we will not consider these two claims now as grounds for a COA. See **Appendix: A**, at 4-5.

The filings in the district court demonstrated that the Burrage claims was raised in the initial § 2255. See **Appendix: B**, at 13-14.

A COA should be issued "only if the applicable has made a substantial

showing of the denial of a constitutional right. The United States Supreme Court has recently reemphasized that "[t]he COA inquiry ... is not coexensive with a merits analysis." **Buck v. Davis**, 137 U.S. 759, 773, 197 L.Ed.2d 1 (2017). Rather, at this stage, "the only question is whether the applicant has shown that juris of reason could disagree with the district court's resolution of the constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. (internal quotation marks and citation omitted).

With respect to the latter requirement, Courts donot "delve into the merits of the claims" at the certificate stage. **Fleming v. Evens**, 481 F.3d 1249, 1259 (10th Cir. 2007). Instead, Courts "simply take a quick look at the face of the [motion]" to determine whether the movant "has facially alleged the denial of a constitutional right." **Paredes v. Atherton**, 224 F.3d 1160, 1161 (10th Cir. 2000)(per curiam)(bracket and internal quotation marks omitted); **Miller-El; v. Cockrell**, 537 U.S. 322, 335-336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The Tenth Circuit erred in failing to issue a COA, where the records and files demonstrated that Petitioner was denied due process of law, his Fifth and Sixth Amendment rights where violated by the district court failured to rendered a decision on the issues presented on its merits. The Tenth Circuit erred in its decision not to issue a COA, conflict with clearly established binding precedents from the Honorable court.

II. WHETHER THE DISTRICT COURT AND THE TENTH CIRCUIT DECISIONS DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN **Mayle v. FELIX**, 545 U.S. 644, 664, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), WHEN THE DISTRICT COURT ERRED IN DENYING PETITIONER THE OPPORTUNITY TO PROPERLY AMEND HIS **LAFLER V. COOPER**, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); AND THE PENAL DECISION DIRECTLY CONFLICT WITH THE DECISION IN **MILLER-EL V. COCKRELL**, 537 U.S. 322, 336-38,

123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), WHEN THE TENTH CIRCUIT FAILED TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE THE RECORDS AND THE FILES SUPPORTED THE FACTS THAT THE DISTRICT COURT ERRED IN NOT PERMITTING HIM TO AMEND HIS LAFLER CLAIM UNDER RULE 15-(c)(1)(B)?

The record demonstrate that Petitioner filed a motion to amend two claims based on relation back theory under Rule 15(c)(1)(B). See **Appendix: B.** Petitioner was denied an opportunity to establish his Lafler claim. Both the district court and the Tenth Circuit denial of his Rule 15(c)(1)(B) and issuance of a COA that related back. See **Appendixs; A, B, and C.** It denied him his constitutional right to demonstrate entitlement to relief, and not ordering an evidentiary hearing.

The district court erred in not permitting Petitioner an opportunity to amend his petition pursuant to Rule 15(c)(1)(B), provide him an opportunity to demonstrate entitlement to relief, and failing to convene an evidentiary hearing to fully develop the record.

Amendments relate back when "the amendment asserts a claim or defense that arose out of the conduct, transaction or occurrence set out." Fed.-R.Civ.P. 15(c)(1)(B). The Supreme Court has interpreted this language to require "original and amended petition [to] state claims that are tied to a common core of operative facts." **Mayle v. Felix**, 545 U.S. 644, 125 S.Ct. 2362, 162 L.Ed.2d 582 (2005). The Court may exercise discretion to permit the argument as "relating back" to the original motion pursuant to Fed.-R.Civ.P. 15(c)(1)(B). See **United States v. Espinoza-Saenz**, 235 F.3d 501, 505 (10th Cir. 2000)(explaining Rule 15(c) as its applies to untimely proposed amendment to § 2255 motion). A Court has discretion to permit an untimely amendment to a § 2255 where the propsed amendment (1) clarifies a claim or theory in the original motion by way of additional facts; and (2) does not seek to add a new claim or insert a new theory into the case. Id.

The common core of operative for these claim is the same as the claim raised in his initial § 2255 motion. He was entitled to amend his § 2255 motion because the key consideration was the factual facts and binding precedent, and they share a common core of operative under Lafler.

In the plea context ... Petitioner must show that the outcome of the plea process would have been different, i.e., that he would have received a more favorable sentence. See **Missouri v. Frye**, 566 U.S. 134, 148, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012)(holding that where plea offer has lapsed or been rejected due to ineffective assistance of counsel, defendant must show the end result would have been favorable); **Lafler v. Cooper**, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)("In the context a defendent must show the out come of the plea process would have been different with comptent advice.")

Counsel neglected to apprise Petitioner concerning the possibility of entering an open plea in a timely manner, which would have result in a sentence of 210 months--this calculation was based on the lower end setence imposed. Petitioner arrives at the 210-262 months by departing three (3) levels for acceptance of responsibility from the total offense level of 40, criminal history category 1 calculation. Counsel's failure to apprise him of this favorable option caused him prejudice and ultimately, receiving a 292--month sentence, instead of a 210--month sentence. Petitioner's 3 level reduction would have resulted in a guideline range of 210-262 months.

Counsel rendered ineffectiveness for neglecting to apprise Petitioner of this favorable option and benefits associated with timely entering an open guilty plea. The different in sentencing was subtaintion-210 months sentence for example--he was prejudiced because "any amount of actual jail time has Sixth Amendment significance." **Glover v. United States**, 531 U.S.

198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). As a result he satisfied the requirement that he show a reasonable probability that his sentence would have been shorter had he entered an open plea.

The undisputed factual facts support a finding that Petitioner was prejudiced by counsel's omitted advice on entering an open plea option. This favorable option was not considered nor utilized that would have provided a reduce sentence. Petitioner was in a position to avoid an increase sentence and an opportunity for the court to sentence him accordingly, he had been represented effectively by competent counsel. Thus it is reasonably probable that he would have received a less severe sentence than the 292 months ultimately imposed. This ommission significantly undermine his ability to make a knowingly and intelligently decision on the best resolution of his case.

The district court abused its discration in denying Pettioner an opportunity to prove his claim. It should had convene an evidentiary hearing. See **United States v. Barrett**, 797 F.3d 1207, 1213 (10th Cir. 2015)(quoting United States v. Rushin, 647 F.3d 1299, 1302 (10th Cir. 2011)).

Petitioner is entitled to relief, he has sustain his burden in the issue presented. Petititoner is entitled to issuance of a COA.

The record demonstrate that Petitioner sustain his burden entitled to issuance of a COA.

The Tenth Circuit mandate concluded that Mr. Ramsey's initial § 2255 motion raised twenty-two claims of ineffective assistance of counsel. Mr. Ramsey even later supplemented his initial motion with several additional claims. Yet, he never raised the precise two claims presented in his COA request. In light of our "general rule against considering issues for the first time on appeal," even in the habeas context, we

will not consider these two claims now as grounds for a COA. See **Appendix: A**, at 4-5.

The filing in the district court demonstrate that the plea claim was raised in the initial § 2255 motion. See **Appendix: B**, at 13-14.

A COA should be issue "only if the applicant has made a substainial showing of the denial of a constitutional right. The United States Supreme Court has recently reemphasized that "[t]he COA inquiry ... is not coexensive with a merits analysis." **Buck v. Davis**, 137 S.Ct. 759, 773, 197 L.Ed.2d 1 (2017). Rather, at this stage, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of the constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragment to proceed further." Id. (internal quotation marks and citation omitted).

With respect to the latter requirement, Courts donot "delve into the merits of the claim" at the certificate stage. **Fleming v. Evans**, 481 F.3d 1249, 1259 (10th Cir. 2007). Instead, Courts "simply take a quick look at the face of the [motion]" to determine whether the movant "has facially alleged the denial of a constitutional right." **Paredes v. Atherton**, 224 F.3d 1160, 1161 (10th Cir. 2000)(per curiam)(bracket and internal mark omitted); **Miller-El v. Cockrell**, 537 U.S. 322, 335-36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The Tenth Circuit erred in failing to issue a COA where the record and files demonstrate that Petitioner was denied due process of law, his Fifth and Sixth Amendment rights, where the district court failed to rendered a decision on the issue presented on its merits. The Tenth Circuit erred in its decisions not to issue a COA, conflict with clear established binding precednet for this Court.

The district court and the Tenth Circuit actions leads to an "oburd" result contrary to this Court's precedents, it has departed from accepted and usual course of judicial proceedings. For these reasons, review should be granted.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted to avoid an unjust result.

CERTIFICATE OF SERVICE

I certify that on this 21th day of January, 2021, in accordance with Supp.Ct.R. 29, copies of the following: (i) Petition for writ of certiorari; (ii) Motion for leave to proceed in forma pauperis; and (iii) Appendixs: A-C, were served by U.S. mail upon the Solicitor General of the United States, room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20153-0001.

Respectfully submitted,

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