No. 22-1059

In The Supreme Court of the United States

JORGE MARC GONZALEZ-BETANCOURT,

Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS AND ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Jorge Marc Gonzalez-Betancourt
D.O.C. #486637
Desoto Annex
13617 S.E Highway 70
Arcadia, Florida 34266-7800

December 20, 2022 *PRO SE*

QUESTIONS PRESENTED

After losing their civil forfeiture appeal, the City of Tampa turned over the exact same evidence to the State of Florida in a successful attempt to circumvent Petitioner's Fifth Amendment right against double jeopardy since the same facts were already decided by a trier of fact on a lower threshold. The jury was instructed against this Court's ruling in *Xiulu Ruan v. United States*, 597 U.S.___ (2022).

Petitioner was allowed to join in on co-defendant's arguments and objections during trial and state court appeals but was denied joining in the appellate brief's federal claims including collateral estoppel. Further, Petitioner's requests for certificates of appealability have all been denied.

The questions presented to this country's highest court are:

1. Is Florida violating federal rights of its prisoners by preventing a defendant from arguing collateral estoppel, claiming exhaustion?

2. Does this court's recent decision in *Ruan* extend to a principal who hired a physician alleged to have prescribed controlled substances outside the usual course of professional practice?

3. Does this court's recent decision in *Ruan* extend to Florida's state law equivalent to Section 841?

LIST OF PARTIES

The Petitioner in this case is Jorge Marc Gonzalez-Betancourt ("Gonzalez"). The Respondent in this case is the Secretary, Florida Department of Corrections and the Attorney General of the State of Florida ("State"). There are no parties to this proceeding other than those listed in the caption.

The parties to the civil forfeiture which resulted in a final judgment in favor of the Petitioner were: Michelle Gonzalez, Jorge Marc Gonzalez Betancourt, 1st Medical Group, LLC, and the City of Tampa, by and on behalf of the Tampa Police Department.

The parties to the criminal prosecution which resulted in the per curiam affirmance of the judgment of conviction and sentence, from which this petition arises, were Michelle Gonzalez, Jorge Marc Gonzalez Betancourt, Maureen Altman, Kimberly Daffern, William Pernas, and the State of Florida.

LIST OF PRIOR RELATED PROCEEDINGS

Jorge Marc Gonzalez-Betancourt v. Secretary, Florida Department of Corrections, et al, No. 22-11428, United States Court of Appeals for the Eleventh Circuit. Judgment entered September 21, 2022.

Gonzalez-Betancourt v. Secretary, Department of Corrections, et al, Docket No: 8:18-cv-02916-WFJ-SPF

Relevant Opinions of Prior Civil Forfeiture Case:

In re Forfeiture of Two Hundred Twenty-One Thousand Eight Hundred Ninety-Eight Dollars ($221,898) in United States Currency: City of Tampa v. Jorge Gonzalez-Betancourt, et al., Case No. 2D10-4339.

In re Forfeiture of Two Hundred Twenty-One Thousand Eight Hundred Ninety-Eight Dollars ($221,898) in United States Currency: City of Tampa v. Jorge Gonzalez-Betancourt, et al., 106 So.3d 47 (Fla. 2d DCA Feb. 1, 2013)

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OPINIONS AND RULINGS BELOW

The opinion of the court of appeals is found on 8:18-cv-02916-WFJ-SPF. *See, infra,* Petitioner's Appendix ("App.") A. The order of the Eleventh Circuit denying COA and reconsideration is not reported. *See, infra,* App. B and C.

JURISDICTION

The court of appeals' judgment was entered on September 21, 2022. *See* App. 1. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth Amendment, Fourteenth Amendment; Section 841 of the Federal Code and the equivalent Florida version of that statute, found in §893.135; 28 U.S.C. §2253(c)(2) and §2254. The relevant text of each of these provisions is contained in App. 4.

STATEMENT OF THE CASE

1. Introduction

This petition arises from an effort by a state prisoner sentenced to 30 years in prison after a four-and-a-half-month trial, the longest trial in Hillsborough County's history, who has been consistently denied by the Florida courts to be heard on the issues of insufficiency of evidence, collateral

estoppel, and actual innocence. COAs have been consistently denied after the district court found the claims unexhausted. However, these claims were in fact raised before the state trial court and the Supreme Court's intervention is needed so as to not allow Florida to continue denying prisoners the ability to be heard. All references to the record on appeal are to the District Court's docket entry followed by the appropriate page number or paragraph number, where applicable (e.g., DE-1, p. 4 indicates that the citation is located in the document found at docket entry 1 on page 4 of that entry).

2. ***Prior Proceedings leading up to the request for COA*: After Petitioner's first appeals counsel directly appealed the sentence, there was an attempt at joining in on co-defendant and Petitioner's wife's direct appeal arguments. But although Petitioner had been allowed throughout trial to join in on arguments and objections, the appellate court denied Petitioner the chance to join in on his wife's appeal, even though the same facts and defenses applied to both parties. Petitioner's § 2254 motion was denied without a hearing.**

Petitioner legally operated a medical clinic in Tampa, Florida and hired medical professionals licensed to prescribe medication and handle all medical decisions including what patients to see or reject. The medical clinic was routinely checked by federal and state health officials and had all

documents up to date. There were never any prescriptions filled at the clinic. Nevertheless, the police raided the clinic and did not charge anyone of a crime but did retain all money found claiming them to be tied to criminal activity. Petitioner sued to get his money back after no charges were filed. The trial court agreed with Petitioner and stated there was insufficient evidence of ANY criminal activity and ordered the City to return all seized funds. The case was appealed and affirmed. Weeks later, charges by the State were filed and after the longest trial court case in the history of Hillsborough County, Petitioner along with his wife and office manager were sentenced to a mandatory-minimum 30-year sentence on an entirely circumstantial case filled with witnesses that were provided lower sentences in exchange for their testimony. Even though the case included evidence of out-of-state patients, the case was denied from movement to federal court and defendants were not charged with federal crimes. In November of 2018, after his state court plenary appeal and petition to the United Supreme Court were denied, Petitioner, timely filed his counseled petition for habeas corpus challenging his state convictions.

The district court entered an order requiring Petitioner' counsel to amend his petition, using a form provided by the clerk, because, in the district court's estimation, Petitioner's 52-page petition contained "excruciating detail" of all the facts and citations to the state record supporting his position, which, in the district court's opinion, was not appropriate for a non-capital case. [DE-2]. Petitioner's counsel failed to

include federal claims in the direct appeal so before Petitioner amended his petition, Petitioner's counsel moved to transfer and consolidate his petition with a previously-filed petition of a co-defendant, Petitioner's wife, who was also convicted in the same state court proceedings as Petitioner and whose conviction also traveled together with hers through the state court appellate process and to the United States Supreme Court on Petition for Writ of Certiorari. [DE-5]. It was argued that transfer and consolidation was appropriate because the petitioners were tried in the same trial on the same charges, they prosecuted their appeals together, and the issues raised in their respective petitions for habeas corpus before the district court were identical. [DE-5].

The district court denied the motion to transfer and consolidate and reiterated its order requiring Petitioner to file an amended petition. [DE-6]. Petitioner thereafter amended his petition, raising the same six grounds [DE-7] and included a memorandum of law in support of the amended petition [DE-7-1], a copy of his initial brief in the state appellate proceedings [DE-7-2], and a copy of his petition for writ of certiorari to the United States Supreme Court [DE-7-3].

Petitioner's amended petition raised the following grounds: 1) Ground one of the amended petition raised insufficiency of the evidence under *Jackson v Virginia,* 443 U.S. 307, 322 (1979); 2) Ground two raised collateral estoppel under *Ashe v. Swenson,* 397 U.S. 436 (1970); and Ground six raised a freestanding actual innocence claim under *McQuiggen v. Perkins,* 559 U.S. 383 (2013) and,

alternatively, that his actual innocence claim qualified as the miscarriage of justice exception to overcome any exhaustion or procedural bars for the constitutional claims raised in his petition.

On Petitioner's amended petition, the district court issued its order requiring the Secretary to respond to show cause why the petition should not be granted. [DE-8]. With the Secretary's response, the Secretary also included the record of proceedings in both the state trial courts and appellate courts, including partial transcripts of Petitioner' trial. [DE-11-1, 1-29]. Petitioner thereafter replied. [DE-15].

On March 31, 2022, the district court entered its order denying Petitioner' petition. [DE-24]. While the district court's order addressed all six grounds in Petitioner' amended petition, finding that all were unexhausted, not cognizable, or procedurally defaulted, only three grounds are relevant for this motion—Ground One (insufficiency of the evidence); Ground Two (collateral estoppels); and Ground Six (Actual Innocence).

For Ground One—insufficiency of the evidence—the district court held that "although [Petitioner] raised [insufficiency of the evidence] in the state courts, he argued only a violation of state law and did not assert a federal constitutional violation." [DE-24, p. 11]. The district court found that, because "Petitioner did not cite a federal constitutional amendment or federal constitutional law nor did he label the ground 'federal'" in his appellate brief, Petitioner "fail[ed] to present his federal insufficiency of the evidence claim to the state court" and, as a result, failed to "properly exhaust his

federal claim," resulting in a "procedural default." [DE-24, pp. 11-12].

For Ground Two—collateral estoppel—the district court held that, although Petitioner adopted his co-defendant's pretrial motions, moved to adopt those arguments on appeal, and presented the ground to the United States Supreme Court in a petition for certiorari, the state appellate court, Petitioner "fail[ed] to properly exhaust" his federal collateral estoppel claim resulting in a "procedural default." [DE-24, pp. 13-14]. The district court found that because the state appellate court denied Petitioner' motion to adopt the argument of the co-defendant Petitioner did not "raise this ground in his own direct appeal" and, citing a Ninth Circuit case, that raising it in a subsequent Petition to the United States Supreme Court, after the per curiam affirmance by Florida's appellate court, "is simply not an application for state review." [DE-24, p. 14]. Consequently, the district court found Ground Two to be unexhausted. [DE-24, p. 14].

In denying Ground Six—actual innocence—the district court found that a freestanding claim of actual innocence is not cognizable in a first-time habeas petition and that "actual innocence" was only a gateway through which Petitioner could pass to the merits of his constitutional claims. The district court further held that a "gateway' actual innocence/miscarriage of justice exception required Petitioner, in his first petition, to present "new evidence" to be credible. Finding that a first petition claim of actual innocence required Petitioner to provide "new evidence," finding that Petitioner did

not provide any "new evidence," and finding that a free-standing claim of actual innocence is not cognizable, the district court found Petitioner could not state a claim for "actual innocence" or that it did not permit him to pass through the "gateway" to a merits' decision on his other constitutional claims. [DE-24, pp. 20-21].

Finally, in its order denying Petitioner' petition for habeas corpus, the district court judge denied Petitioner a COA and leave to appeal *in forma pauperis*. [DE-24, p. 22]. On March 31, 2022, the district court entered judgment against Petitioner. [DE-25]. On April 27, 2022, Petitioner filed his notice of appeal. [DE-27].

3. *The Court of Appeals' Decision*: Without explanation, the Court of Appeals denied Petitioner's requests for COAs and did not explain why Petitioner did not meet the *Slack* standard.

On July 21, 2022 Petitioner timely filed a request for a COA on three issues: (1) whether the district court erred in finding "insufficiency of the evidence" unexhausted and procedurally defaulted when the federal claims were in fact raised before the state trial court; (2) whether the district court erred in finding Petitioner's "collateral estoppel" claims unexhausted and procedurally defaulted, when Petitioner was procedurally precluded from raising the arguments on direct appeal through joining his co-defendant's arguments that were properly exhausted; (3) whether Petitioner made a sufficient showing of actual innocence to overcome any exhaustion or

procedural bars to his 2254 petition for insufficiency of the evidence and collateral estoppel; and (4) whether the district court erred in denying freestanding "actual innocence" claim and denying it as a gateway through which Petitioner's unexhausted and defaulted claims could pass.

The Eleventh Circuit denied COA on August 15, 2022, and denied rehearing on September 21, 2022. *See* Petitioner's Petition for Panel's Reconsideration reproduced for your consideration in Appendix D. Florida courts have denied granting Petitioner a hearing on the issues nor even a written opinion as to why COAs are denied, only that *Slack* standard was not met.

REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to provide further guidance.

A. This Court's intervention is warranted because the court below continues to apply an unfairly steep COA standard in prisoner habeas cases and does so (as here) in cases where the factual record is inadequately developed.

This Court has emphasized that the COA inquiry is not coextensive with a merits analysis.

> "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented

> are adequate to deserve encouragement to proceed further.' *Id,* at 327, 123 S.Ct. 1029. This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.' *Id.,* at 336, 123 S.Ct. 1029. 'When a court of appeals side steps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'" *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017) citing *Miller-El v. Cockrell*, 537 U.S. 322, 336-337, 123 S.Ct. 1029.

This Court has twice said that the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus. *Wallin v. Miller*, 661 F.App'x 526-534. In other words, a claim may be debatable, and thus deserving of a COA, "even though every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." *Miller-El,* 537 U.S. at 338.

The Circuit Court can issue a certificate of appealability only if the underlying rulings are at least reasonably debatable. *United States v. Timly*, 686 F. App'x 558 (10th Cir. 2017). For applications denied on procedural grounds, courts can grant a certificate of appealability only if reasonable jurists could debate (1) the applicability of procedural default and (2) the merits. *See Frost v. Pryor,* 749 F.3d 1212,

1230 n.11 (10th Cir. 2014) (procedural default); *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct 1595, 146 L.Ed.2d 542 (2000) (merits). *See Laurson v. Leyba,* 507 F.3d 1230, 1232 (10th Cir. 2007) (holding that when the district court denies a habeas petition based on timeliness, the court of appeals can issue a certificate of appealability only if the district court's ruling on timeliness is at least reasonably debatable). The 10th Circuit has denied certificates of appeal when the motion seeks to apply precedents that could not apply and thereby jurists could not reasonably debate the correctness of the district court's disposition. *See United States v. Pitt*, 672 F. App'x 885 (2017).

Here, the Eleventh Circuit Court did not specify why the petition for COA did not meet the *Slack* standard nor which issues the COA was rejected on and clarification is needed for Petitioner to be guaranteed due process. The petition for COA laid out arguments as to why the applicability of procedural default and the merits were both debatable by reasonable jurists. Reasonable jurists could find it debatable whether the insufficiency of evidence claim, collateral estoppel claim, and actual innocence claims were fairly presented as well as the procedural default and the merits. Since the precedents cited in the petition for COA are applicable to Petitioner, and the procedural defaults and merits are debatable, this Court should make clear that a COA under these circumstances should be granted.

B. This Court's recent decision in *Ruan* should extend to principals charged with the prescriptions originating from the physicians they hired and to state laws equivalent to Section 841.

This Court's decision in *Ruan v. United States*, recently held that Section 841's "knowingly or intentionally" *mens rea* applies to the statute's "except as authorized" clause. Once a defendant meets the burden of producing evidence that his or her conduct was "authorized," the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.

Similar to *Ruan*, the present case deals with doctors prescribing controlled substances not "as authorized" and the principals of the business were convicted. This Court in *Ruan,* held that once a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so. Both of the doctors in *Ruan* possessed licenses permitting them to prescribe controlled substances. The Government separately charged them with unlawfully dispensing and distributing drugs in violation of §841. Each proceeded to a jury trial, and each was convicted of the charges. At their separate trials, Ruan and Kahn argued that their dispensation of drugs was lawful because the drugs were dispensed pursuant to valid prescriptions. As noted above, a regulation provides that, "to be effective," a

prescription "must be issued for a legitimate medical purpose by an in-dividual practitioner acting in the usual course of his professional practice." 21 CFR §1306.04(a). This Court assumed that a prescription is "authorized" and therefore lawful if it satisfies this standard. At Ruan's and Kahn's trials, the Government argued that the doctors' prescriptions failed to comply with this standard. The doctors argued that their prescriptions did comply, and that, even if not, the doctors did not knowingly deviate or intentionally deviate from the standard. Ruan, for example, asked for a jury instruction that would have required the Government to prove that he subjectively knew that his prescriptions fell outside the scope of his prescribing authority. The District Court, however, rejected this request. The court instead set forth a more objective standard, instructing the jury that a doctor acts lawfully when he prescribes "in good faith as part of his medical treatment of a patient in accordance with the standard of medical practice generally recognized and accepted in the United States." App. to Pet. for Cert. in No. 20–410, p. 139a. The court further instructed the jury that a doctor violates §841 when "the doctor's actions were either not for a legitimate medical purpose or were outside the usual course of professional medical practice." Ibid. The jury convicted Ruan, and the trial court sentenced him to over 20 years in prison and ordered him to pay millions of dollars in restitution and forfeiture.

In this case, similar arguments were made by defense regarding the standard to be used, see

Appendix D. Ultimately, the jury instructions, located at Appendix E, defined a "principal" as:

> "If a defendant helps another person or persons commit a crime, then the defendant is a principal and must be treated as if he or she had done all the things the other person did if: (1) the defendant had a conscious intent that the criminal act be done; and (2) the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit the crime. To be a principal, a defendant does not have to be present when the crime is committed." Page 12272 – 12273, Appendix E below.

The instructions later included further instruction as to physicians, including:

> "The defendants have raised the claim of the practitioner's privilege in issuing prescriptions involved in this case. It is not necessary for the State to negative any exemption of exception set forth in this chapter and any information, and the burden of going forward with the evidence with respect to any exemption or exception is upon the person claiming the benefit of the exemption or exception. A practitioner cannot prescription controlled III, IV, or V narcotic controlled substance for the use in maintenance or detoxification treatment without first being registered as a qualifying physician and notifying the Secretary of Health and Human

> Services of the practitioner's intent to prescribe controlled III, IV, or V narcotic controlled substances for the use in maintenance or detoxification treatment." Page 12279-12280.

After some mention of the type of drugs and schedules therein, the instructions continue:

> "There are no specific guidelines concerning what is required to support a conclusion that a physician acted outside the usual course of professional practice and for other than a legitimate medical purpose. In making a medical judgment concerning the right treatment... physicians have discretion... Therefore, in determining whether a physician acted without a legitimate medical purpose, you should examine all of a physician's actions and the circumstances surrounding the same. If a doctor **dispenses** a drug in good faith...then that doctor has...a legitimate medical purpose....You must determine that the State has proven beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice...Put another way, the State must prove as to each count beyond a reasonable doubt that the doctor prescribed the specific controlled substance other than for a legitimate medical purpose, and not within the bounds of professional medical practice. A physician's own methods do not themselves establish what constitutes medical practice. In determining whether the doctor's conduct was within the

bounds of professional practice, you should... consider the testimony of her relating to what has been characterized during the trial as the norms of professional practice. You should also consider the extent to which, if at all, any violations of professional norms your find to have been committed by the doctors interfered with their treatment of patients and contributed to an over-prescription and/or excessive dispensation of controlled substances. You should consider the doctors' actions as a whole and the circumstances surrounding them. A physician's conduct may constitute a violation of applicable professional regulations as well as applicable criminal statutes.

...

"In this case, you have heard evidence that these defendants were principals to drug trafficking through prescriptions for controlled substances issued by physicians who held a valid license, medical license, and valid federal controlled substances registration numbers. The defendants have raised as a defense the practitioner's privilege. [They] are not practitioners. None of them are accused of writing any prescriptions in this matter.

In determining whether any particular prescription was illegally written, you may consider the following statements from the Florida Administrative Code regarding standards for the use of controlled substances for the treatment of pain." Pages 12280-85.

Similar to *Ruan*, the jury instructions go on to talk about pain management options outside of prescriptions and go on to discuss Board of Medicine guidance for the next 4 pages of jury instructions on what the Board considers to be within the boundaries of professional practice. Finally we reach the point where, just like in *Ruan*, "good faith" is discussed.

> "A physical, in good faith and in the course of professional practice only, may prescribe a controlled substance. [This is] an objective standard that is applicable to all doctors. That is, the prescription has been prescribed lawfully. Good faith in this context means good intentions and the honest exercise of professional judgment as to the patient's needs. It means the physician acted in accordance with what he or she reasonably believed to be proper medical practice. In making a medical judgment concerning the right treatment for an individual patient, physicians have discretion to choose among a wide range of options. Thus, it would not be legally sufficient to prove a criminal prescription for the State to show that the prescribing physician's conduct constituted medical practice or that they acted negligently. ... If, however, you find that the defense has not proved by a preponderance of the evidence that any of the prescriptions issued in the remaining counts were not criminal, then you must next determine whether the defendants acted as a principal to the issue of that criminal prescription."

An excerpt of the jury instructions are included in Appendix E. The jury instructions span 63 pages. The same "good faith" instructions at issue in *Ruan* were at issue in this case. The main difference is that the State chose not to prosecute any of the physicians at issue here, only the "principals." Which begs the question, did the jury have a fair chance at even considering the defendants in this case as anything but principals? Regardless, it seems that this Court's decision in *Ruan* expressly covers the jury instructions in this case and many other cases in Florida that deal with the state equivalent of Section 841.

C. This Court may soon consider another petition raising the same issues presented here; if it grants review there, it should hold this Petition pending its decision.

As noted, Petitioner's codefendant, and wife, has also been pursuing similar relief based on the same concerns. The Court of Appeals has allowed the case to continue as they deemed the claims exhausted. However, the chance remains that Petitioner's codefendant will need to seek certiorari review on whether *Ruan* is applicable to these facts. If the Court ultimately grants certiorari in that case, Petitioner urges the Court to grant review here and consolidate the cases for decision, or, in the alternative, to hold his case pending its decision.

CONCLUSION AND PRAYER FOR RELIEF

The Circuits need guidance about how to apply *Ruan* and under what circumstances to grant COA. At present, the Eleventh Circuit has a significantly narrower view of what should be granted a COA. Absent this Court's intervention, the Eleventh Circuit's misapplication of *Slack* standards means that Petitioner and other minimum sentenced defendants will never get an appropriate chance at appellate review of substantial legal and factual disputes in their post-conviction proceedings.

This Court should grant certiorari to review the Eleventh Circuit's judgment refusing to grant COA on the issues raised in the Petitioner's motion, summarily reverse the decision below, hold this case as it considers the scope of *Slack* and *Ruan* in another case, or grant such other relief as justice requires.

Respectfully submitted,
Jorge M. Gonzalez-Betancourt
D.O.C. #486637
Desoto Annex
13617 S.E Highway 70
Arcadia, Florida 34266-7800
PRO SE

December 20, 2022