No. _____

In The
Supreme Court of the United States

TIMOTHY WADE SAUNDERS,

Petitioner,

v.

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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September 26, 2022

CAPITAL CASE

QUESTION PRESENTED

When a petitioner files a proper application for a certificate of appealability, a single judge grants a defective certificate without objection from the appellee, and the case is fully briefed and set for argument, is 28 U.S.C. §2253's gatekeeping function satisfied and the appeal should continue, as the Second, Third, Fourth, and Sixth Circuits have held, or may the defect in the certificate be raised *sua sponte* and the appeal dismissed as the Fifth, Seventh, Eighth, and Ninth Circuits hold and as the Eleventh Circuit did here?

LIST OF PARTIES

The Petitioner is Timothy Wade Saunders. The Respondent is the Warden of Holman Correctional Facility, a position held by Terry Raybon. Because petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

LIST OF PROCEEDINGS

Federal

Saunders v. Warden, Holman Corr. Facility, 803 F. App'x 343 (11th Cir. 2020).

Saunders v. Warden, Holman Corr. Facility, No. 1:10-cv-00439-KD-C (S.D. Ala. Feb. 1, 2019).

Saunders v. Alabama, 556 U.S. 1258 (2009).

State

Saunders v. State, 249 So. 3d 1153, Ala. Crim. App., Dec. 16, 2016, rehearing denied (May 26, 2017), certiorari denied (Sep 22, 2017).

Saunders v. State, No. CC–04–1741.60 (Feb. 11, 2010).

Saunders v. State, 10 So.3d 53, Ala. Crim. App., Dec. 21, 2007, rehearing denied (Jan 25, 2008), certiorari denied (Nov. 26, 2008).

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PETITION FOR A WRIT OF CERTIORARI

Timothy Saunders requests that this Court grant a writ of certiorari to review the decision of the Court of Appeals for the Eleventh Circuit vacating two certificates of appealability and dismissing his appeal.

OPINIONS BELOW

The Eleventh Circuit's order dismissing Mr. Saunders' appeal is attached at Appendix A. Pet. App. 1a. The opinions of the District Court for the Southern District of Alabama denying Mr. Saunders' Rule 60(b) motions are attached at Appendix B and C. Pet. App. 7a. The Eleventh Circuit's order denying reconsideration is attached at Appendix D. Pet. App. 10a. The Eleventh Circuit's order granting a certificate of appealability is attached at Appendix E. Pet App. 11a.

JURISDICTION

The Eleventh Circuit dismissed Mr. Saunders' appeal on June 28, 2022. Pet. App. 1a. Under Supreme Court Rule 30.1, this petition is due on September 26, 2022. This petition is timely filed under that rule, and the Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

28 U.S.C. § 2253(c) provides that:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

INTRODUCTION

The requirement that a court identify a constitutional issue in the grant of a certificate of appealability ("COA") is mandatory but *not* jurisdictional.[1] This is well-known and understood. However, what is not well-known or understood and what *Gonzalez* did not establish was how Circuit Courts should proceed when a COA has issued without indicating the underlying constitutional issue. In the decade since *Gonzalez*, the Circuit Courts have split and not resolved this question uniformly.

In its brief in opposition in *Gonzalez*, the State argued for the first time that the Circuit Court lacked jurisdiction to adjudicate Gonzalez's appeal because the COA identified only a procedural issue, without also "indicat[ing]" a constitutional issue as required by § 2253(c)(3). This Court granted certiorari to decide whether the Circuit Courts had jurisdiction to adjudicate Gonzalez's appeal, notwithstanding the § 2253(c)(3) defect. *Gonzalez* was different procedurally from the § 2253(c) cases that followed in that the Court considered the fate of an appeal that had already been heard and decided on its merits by the time any litigant or judge raised the issue.

Here, by contrast, a single circuit judge issued the COA, the appellee did not object, and the case was fully briefed and set for oral argument. Only then, after the fact, was Mr. Saunders ordered to file supplemental letter briefing, and subsequently had his appeal dismissed. If Mr. Saunders' appeal had been in a

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[1] *Gonzalez v. Thaler*, 565 U.S. 134 (2012).

different circuit, and depending on when the defect was first detected, and by whom, this issue could have been resolved in a myriad of different ways. Because of the inconsistency in this process, Mr. Saunders' appeal was dismissed even though in every circuit in the country (including within the Eleventh Circuit before a different panel) his appeal *could* have continued despite the defect in the certificate. Indeed, in some circuits, his appeal *would* have proceeded without question once the certificate had been granted. Thus, while *Gonzalez* resolved the jurisdictional question of §2253(c)(1), open questions remain and confound Circuit Courts today—namely, how defective COAs should be treated. Certiorari is appropriate to resolve the question uniformly for habeas petitioners in all circuits.

STATEMENT OF THE CASE

On August 26, 2005, Mr. Saunders was convicted of one count of capital murder during a robbery and one count of capital murder during a burglary in Baldwin County, Alabama. On direct appeal, the Alabama Court of Criminal Appeals ("ACCA") affirmed Mr. Saunders' conviction and sentence. This Court denied Mr. Saunders' petition for writ of certiorari.

On November 24, 2009, volunteer attorneys from Balch & Bingham, LLC, an Alabama law firm, filed Mr. Saunders' initial post-conviction motion under Rule 32 of the Alabama Rules of Criminal Procedure. As this Court is aware, Alabama did not provide counsel for indigent death sentenced inmates seeking collateral review of their convictions.[2] The attorneys representing Mr. Saunders in state post-

[2] *See Maples v. Thomas*, 566 US 266, 271-73 (2012).

conviction, while well-intentioned civil practitioners, had no experience in capital post-conviction work. Mr. Saunders' case was their first and only foray into capital litigation. Fewer than three months after the petition was filed, the state circuit court summarily dismissed it. The ACCA affirmed the dismissal and later, the Alabama Supreme Court denied discretionary review.

While his state petition was pending, Mr. Saunders petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and requested a stay pending resolution of his claims in the state court.[3] In 2014, while the habeas petition was pending, Mr. Saunders' counsel began defending the Alabama Department of Corrections in a class-action lawsuit where Mr. Saunders was also a class member.

Thus, counsel from Balch &Bingham[4] were simultaneously representing Mr. Saunders in his federal habeas proceedings—where the Alabama Department of Corrections was the Respondent—and the Alabama Department of Corrections directly opposing Mr. Saunders' interests in the class action.

Following five additional years of simultaneous representation of both adverse parties, Balch & Bingham moved to withdraw from Mr. Saunders' case, and the Federal Defender's Office accepted the appointment under 18 U.S.C. § 3599 to

[3] Counsel had not received notice of the decision dismissing the state post-conviction petition and filed the habeas corpus petition while they were litigating their right to appeal.

[4] It is noteworthy that it was not the case where there were lawyers within a single law firm representing adverse clients; rather, the identical attorneys were assigned to both matters and providing direct representation to each client simultaneously.

represent Mr. Saunders.[5] On February 21, 2020, the Eleventh Circuit affirmed the denial of federal habeas relief. Mr. Saunders' petition for writ of certiorari to this Court was denied on November 16, 2020.

Prior to the conclusion of Mr. Saunders' federal habeas litigation, he filed two distinct motions for relief from judgment in the United States District Court for the Southern District of Alabama pursuant to Federal Rule of Civil Procedure 60(b) ("Rule 60 motions"). The Rule 60 motions were denied; Mr. Saunders moved the district court to alter or amend its final judgment under Rule 59(e), Fed. R. Civ. P. ("Rule 59 motions"). The Rule 59 motions too were denied. The denials of the Rule 59 motions are the subject of the appeal at issue. The District Court denied COAs as to both motions.

Undersigned counsel filed applications for a COA as to each Rule 59 motion in the Circuit Court. In each, Mr. Saunders specifically identified a valid claim of the denial of a constitutional right. The Circuit Court granted Mr. Saunders a COA as to each Rule 59 motion. Neither COA contained a specific constitutional issue, an oversight unnoticed by both parties. Indeed, the Respondent did not object, seek an amendment or modification, or otherwise notify the Circuit Court of a defect in either COA.

On September 15, 2021, the Circuit Court consolidated the two cases for consideration on appeal. On November 24, 2021, Mr. Saunders filed his merits brief

[5] Because Mr. Saunders' previous counsel did not seek appointment under § 3599, the District Court was not able to evaluate whether counsel were qualified to represent Mr. Saunders in capital habeas corpus proceedings.

and appendix. Without objection or comment as to the propriety of either COA or their content or language, the Respondent filed his merits brief on January 21, 2022. On March 14, 2022, Mr. Saunders replied. On March 29, 2022, the Circuit Court notified both parties it had scheduled oral argument for July 19, 2022. On June 6, 2022, the Circuit Court notified the parties of the perceived defect and ordered the parties to file simultaneous supplemental letter briefs within 14 days. The Order sought a response to three questions: 1) Does the COA specify a constitutional issue; 2) If the COA does not specify a constitutional issue, should it be vacated; 3) If it is vacated, does the application make a substantial showing of the denial of a constitutional right? Pet. App. 8a-9a. Following briefing, the Circuit Court vacated the COA and dismissed the appeal. Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. The writ should be granted because post-*Gonzalez* the circuits split as to how to treat defective certificates of appealability.

This Court has made clear that a COA must specify an underlying constitutional issue even when the primary issue was procedural. A COA that does not specify the constitutional issue involved is "defective" but the defect is not jurisdictional. Since *Gonzalez*, the circuit courts have varied widely on their approach to the dealing with "defective" COAs. Even the Eleventh Circuit itself has not been consistent in its approach to these questions. Certiorari is appropriate under Supreme Court Rule 10(a) to resolve the circuit split on this issue of federal importance.

In *Gonzalez*, this Court held that a "defective" COA is not the equivalent to a lack of a COA, and that failure to obtain a COA is jurisdictional, but failure to identify a constitutional issue is not.[6] In the case at bar, the defect was the single judge who granted the COA failed to identify the specific constitutional issue that jurists of reason would find debatable. Since *Gonzalez*, the circuits have varied in how they have treated "defective" COAs. While every circuit's disposition of a defective COA is nuanced from others, generally, a facial defect is resolved in one of two ways: (1) a Circuit Court *could sua sponte* vacate a defective COA and dismiss an appeal regardless of whether the issue has been fully briefed, or (2) a Circuit Court *should not* review the grant of a COA once the issue has already been briefed and presented on appeal.

THE CIRCUIT SPLIT

Here, the Eleventh Circuit's decision to *sua sponte* dismiss Mr. Saunders' COA deepened an already existing circuit split. Without action from this Court, the split will persist, forcing parties and courts alike to litigate on shifting sands. The Circuit Courts have been split for decades and continue that disparity despite *Gonzalez's* attempt at clarifying the nature of 28 U.S.C. § 2253(c)(3) as *mandatory not jurisdictional*.[7] While *Gonzalez* was concerned with the performance of the federal courts' gatekeeping function, the result was the creation of a system of hoops through which not all litigants must jump.

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[6] *Gonzalez*, 565 U.S. at 143.

[7] *Id.* at 141 (emphasis added).

A. Circuit Courts where Mr. Saunders' appeal *could* have continued despite the defective COA.

The Eleventh and Fifth are the most closely aligned in holding that the discretion to *sua sponte* raise a COA's validity and vacate should be exercised whenever the COA is defective because of the Congressional command of §2253(c)(2) & (3). Theoretically, the Seventh, Eighth, and Ninth take a similar position but consider a *sua sponte* review and vacatur, not as compulsory, affording a wider latitude for circuit judges to review and revoke a defective COA because such power must be used sparingly.

Spencer v. United States[8] controls in the Eleventh Circuit. *Spencer* and its progeny provided the basis for the dismissal of Mr. Saunders' appeal. There, the Eleventh Circuit held that "[g]oing forward, a certificate of appealability, whether issued by this Court or a district court, must specify what constitutional issue jurists of reason would find debatable."[9] But the COA in *Spencer* was not vacated and the appeal was not dismissed.

> A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must specify what issue or issues raised by the prisoner satisfy that requirement. *Id.* § 2253(c)(3). The Supreme Court has held that the issuance a certificate of appealability devoid of an underlying constitutional issue does not constitute a jurisdictional defect. *See Gonzalez v. Thaler*, —— U.S. ——, ——, 132 S.Ct. 641, 649–52, 181 L.Ed.2d 619 (2012). But even so, we cannot ignore the clear command of Congress articulated in subsections 2253(c)(2) and (3).[10]

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[8] 773 F.3d 1132, 1137-38 (11th Cir. 2014).

[9] *Id.* at 1138.

[10] *Id.* at 1137.

Despite this, the court reached the merits of the case.[11]

However, the *Spencer* court cautioned "[w]e will not be so lenient in future appeals when a certificate fails to conform to the gatekeeping requirements imposed by Congress."[12] This promise, while applied to Mr. Saunders, has not always been applied in other cases.[13] Whether the defective COA will be vacated, or the merits of the appeal addressed by the court is not predictable.[14] Such intra-circuit inconsistencies further illustrates why this Court's guidance is warranted.

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[11] *Id.* ("We Exercise Our Discretion to Consider the Merits of this *En Banc* Appeal at this Late Stage").

[12] *Id.*

[13] While some other panels have held that they have a duty to vacate a defective COA, and did so, *see Lambrix v. Sec'y, DOC*, 872 F.3d 1170, 1179 (11th Cir. 2017), other panels have cited *Spencer* and ignored it. *See Negron v. Sec'y, Fla. Dep't of Corr.*, 643 F. App'x 898, 900 (11th Cir. 2016) (COA issued after *Spencer* was defective but, because the parties briefed the merits of the COA issue and Negron's petition had a colorable constitutional claim, the panel considered the merits); *Spears v. Warden*, 605 F. App'x 900, 902 n.1 (11th Cir. 2015) (COA issued pre-*Spencer* was defective, but because neither party addressed the defect and the equitable tolling issue was fully briefed, the panel decided to resolve the issue); *Dauphin v. United States*, 604 F. App'x 814, 816-17 (11th Cir. 2015) (neither party addressed the sufficiency of the COA, yet on its own the court determined that it was undeniably defective; as such, the panel expanded and cured the COA, before hearing the merits of the appeal); *Wert v. United States*, 596 F. App'x 914, 916 (11th Cir. 2015) (COA granted on procedural issues was defective and, while the panel could have *sua sponte* vacated the defective order, it did not do so).

[14] In *Burgess v. United States*, the court declined to address the defective COA because, "under the totality of the circumstances of this particular case, the COA sufficiently indicates that Burgess made a substantial showing of the denial of a constitutional right with the claims raised in his May 2013 amended § 2255 motion." 609 F. App'x 627, 628 (11th Cir. 2015). Similarly, in *Damren v. Florida,* invoking an efficiency rationale, the court chose to decide the merits of a habeas petition certifying only a procedural issue despite acknowledging that it is "generally not free to entertain [ ] an appeal if the COA does not spell out one or more issues on which the petitioner has made a substantial showing of the denial of

The Fifth Circuit recently aligned with the Eleventh Circuit's reasoning in *Spencer* on the resolution of defective COAs. This shift represented an adjustment from its *pre-Gonzalez* precedent. Indeed, *Gonzalez* was a Fifth Circuit case. In *Gonzalez*, this Court unanimously agreed that the COA which did not mention any underlying constitutional right was defective.

Progressing ten years, in *United States v. Castro*, a single circuit judge granted a COA on a purely procedural issue.[15] The case was fully briefed and set for oral argument, but before that argument, the panel asked for supplemental briefing on the validity of the COA and after briefing, vacated the COA and dismissed the appeal:

> The Supreme Court has repeatedly admonished us that procedural only COAs are invalid. **We've refused to follow those instructions before, and we've been reversed for the refusal.** Today we resolve to follow the statute that Congress wrote and to forswear procedural-only COAs.
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> ***
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> Given the plain text of § 2253(c)(2), Supreme Court precedent, and the similarities between the COA requirement and other habeas doctrines, **we hold that our court has the discretion to raise a COA's invalidity sua sponte and vacate the COA.** In so holding, we align our circuit with the strong majority of circuits that have confronted this issue.[16]

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a constitutional right." 776 F.3d 816, 820-21 (11th Cir. 2015). The facts most analogous to Mr. Saunders' case are from *Moore v. Sec'y, Dep't of Corr.*, 762 F. App'x 610, 624 (11th Cir. 2019), where the court exercised its discretion to hear the appeal despite a defective COA.

[15] 30 F.4th 240, 243 (5th Cir. 2022).

[16] *Id.* at 246 (emphases added).

Notably, the Fifth Circuit declined to impose mandatory vacatur, but held that such an action is within its discretion. The Fifth Circuit concluded that even though the Government did not object to the grant of the COA, the court could *sua sponte* consider the validity of the COA, even one entered by a single circuit judge.[17]

In *United States v. Marcello*,[18] a pre-*Gonzalez* decision, the Seventh Circuit held:

> In a situation like this—a bit of a procedural morass—we think the best approach is to say we have discretion to decide the case by reviewing the validity of the CA or by going straight to the issues raised on the appeal. We can do this, of course, because even an unfounded CA gives us jurisdiction. *Young*, 124 F.3d at 799. **However, we will exercise our discretion to review the issuance of a CA only in rare cases** because, as we noted in *Young*, "[a]n obligation to determine whether a certificate should have been issued ... increase[s] the complexity of appeals in collateral attacks and the judicial effort required to resolve them, the opposite of the legislative plan." *Id.* Here, because our motions judge allowed the challenge to the CA to pass without resolution, we go to the issue raised on this appeal.[19]

Similarly, in *Ramunno v. United States*,[20] Judge Easterbrook writing for the court, determined that although the statute required the COA specify a substantial constitutional right, it was not jurisdictional.[21]

> This circuit is among those holding that it is not [jurisdictional] -- that although a certificate of appealability is indispensable, compliance with the substantial-constitutional-issue requirement of paragraph (c)(2) is not. *See, e.g., Owens*, 235 F.3d at 358; *Marcello*, 212 F.3d at 1008; *Romandine v. United States*, 206 F.3d 731, 734

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[17] *Id.* at 247.

[18] 212 F.3d 1005 (7th Cir. 2000).

[19] *Id.* at 1007-08 (emphasis added).

[20] 264 F.3d 723, 725 (7th Cir. 2001).

[21] *Id.* at 725.

> (7th Cir.2000); *Young v. United States*, 124 F.3d 794, 798-99 (7th Cir.1997). But as we remarked in *Young*, reiterated in *Marcello*, and demonstrated in *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir.1998), **the court is prepared to enforce § 2253(c) by dismissing an appeal if the appellee brings the defect to our attention early in the process, as the United States has done before the close of briefing by filing a motion to vacate the certificate.** Vacating a certificate of appealability is an unusual step, *Marcello* emphasizes, but the possibility of review is essential if the statutory limits are to be implemented.[22]

There, the court echoes the concerns of other circuits described herein, that vacating a certificate is an unusual step, but is justifiable when the appeal is in its early stages. After *Gonzalez*, the Seventh Circuit has maintained a discretionary approach but has dispensed with the formality articulated by Judge Easterbrook in *Ramunno*.[23]

Pre-*Gonzalez*, the Eight Circuit examined whether *sua sponte* vacatur of defective COA was an acceptable exercise of discretion:

> A panel of this circuit, with some trepidation but out of an abundance of caution that Khaimov's claims be fully and fairly explored, granted the certificate of appealability. We now hold the certificate was improvidently granted and revoke the certificate.
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> ***
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> We acknowledge that there is no circuit precedent regarding whether we can effectively "unring" this bell and revoke the certificate of appealability. However, in the past, we have expanded or enlarged the certificate of appealability. *See Johnson v. United States*, 278 F.3d 839, 842 (8th Cir. 2002); *Jones v. Delo*, 258 F.3d 893, 900 (8th Cir.

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[22] *Id.* (emphasis added).

[23] *See Welch v. Hepp*, 793 F.3d 734, 737 (7th Cir. 2015) ("While appellate jurisdiction requires a certificate of appealability, *see* 28 U.S.C. § 2253(c)(1); *Gonzalez v. Thaler,* [], a defect in a certificate concerning one claim does not deprive us of jurisdiction over that claim. *Gonzalez,* 132 S.Ct. at 649, and we are not bound to enforce the requirements of 28 U.S.C. § 2253(c) against [petitioner].").

> 2001), cert. denied, 535 U.S. 1066, 122 S.Ct. 1936, 152 L.Ed.2d 841 (2002); *Hunter v. Bowersox*, 172 F.3d 1016, 1019 (8th Cir. 1999). **We think the analogous action of circumscribing, and even revoking, a certificate, especially one we have issued, is therefore well within our authority.**[24]

The Eighth Circuit's post-*Gonzalez* jurisprudence continues to give wide latitude for circuit judges to review and revoke defective COAs, although it is advised that such power be used sparingly much like that of reviewing issues outside the scope of the COA.[25]

Likewise, the Ninth Circuit allows circuit judges to review a COA *sua sponte* or decline to review a potentially defective COA, even at the request of a party.[26] In *Phelps*, a pre-*Gonzalez* case, after a panel granted a COA, the court held that a circuit court panel has the power to examine the propriety of COA after it has been issued and that the COA had been improvidently granted and thus must be vacated.[27]

> Based on our review of the relevant precedent, we are satisfied that although a merits panel generally need not examine the propriety of a COA, it nevertheless retains the power to do so.
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> Moreover, there may be competing concerns involved, and in exceptional circumstances the **vacatur of a COA may be appropriate** regardless of the investment of time and energy into the case.[28]

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[24] *Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir. 2002) (emphasis added).

[25] *See Armstrong v. Hobbs*, 698 F.3d 1063, 1068 (8th Cir. 2012).

[26] *Phelps v. Alameda*, 366 F.3d 722, 729 (9th Cir. 2004).

[27] *Id.* at 729.

[28] *Id.* at 728-29 (emphasis added).

Following *Gonzalez*, the Ninth Circuit continues to allow broad discretion regarding defective COAs.[29]

B. Circuits Courts where Mr. Saunders' appeal *would* have proceeded without question once the certificate had been granted.

The Second, Third, Fourth, and Sixth Circuits take similar positions that differ vastly from the Eleventh Circuit. In these circuits, a defective COA does not bar consideration of the procedural issue on appeal.

Both pre-and post-*Gonzalez*, the Second Circuit has made clear that once a certificate has issued, it is not concerned with the underlying requirements of that certificate which are non-jurisdictional. In *Rosa v. United States*,

> The government argues that we need not reach this issue because Rosa's underlying petition does not present a debatable claim of the denial of a constitutional right. The government therefore urges us to vacate the COA and dismiss the appeal, or summarily to affirm the district court. **The government, however, cites no case in which a subsequent panel of this court has dismissed an appeal after a previous panel has granted a COA.** We need not decide when, if at all, such action might be appropriate.
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> ***
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> Thus, even if the COA here might be considered defective because it did not identify a debatable merits issue, we may nevertheless consider the appeal . . .[30]

Consequently, in the Second Circuit, an appeal proceeds uninterrupted regardless of whether an issued COA contains the underlying requirements.

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[29] *See, e.g., United States v. Major*, 2022 WL 1714290, at *1 (9th Cir. May 27, 2022).

[30] 785 F.3d 856, 858, n.3 (2d Cir. 2015) (emphasis added).

Similarly, the Third Circuit holds that once a judge determines a COA is proper, no more scrutiny is permitted. In *Sistrunk v. Rozum*,[31] the Government objected to the COA on the grounds "that the absence of a constitutional claim renders the COA defective, barring [the court] from considering Sistrunk's claims."[32] The Court rejected this argument:

> We conclude that our exercise of jurisdiction is proper. First, the United States Supreme Court's opinion in *Gonzalez v. Thaler*, ——U.S. ——, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012), destroys the government's attack on the COA. Even a defective COA does not thwart our jurisdiction. Rather, "[o]nce a judge has made the determination that a COA is warranted"—which has happened here—"the COA has fulfilled [its] gatekeeping function." *Id.* at 650. No further scrutiny of the COA is necessary. *See id.* at 652 ("[Section] 2253(c)(3) is a nonjurisdictional rule....").[33]

Thus, in the Third Circuit *sua sponte* reexamination of an issued COA does not occur.

While the Fourth Circuit has not squarely addressed this issue, where the Government did not challenge a defective COA, the court indicated that because the defect is not jurisdictional, an appeal will proceed undisturbed:

> We note that the COA in this case does not mention a "denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2) and (c)(3). However, the Government has not challenged the propriety of the COA, and at this late stage, we will not treat this potential defect as

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[31] *Id.* at 858 n.3 (emphasis added).

[32] 674 F.3d 181, 186 (3d Cir. 2012).

[33] *Id.* (emphasis added). *See also United State v. Doe*, 810 F.3d 132, 145 (3d Cir. 2015) ("One important qualification is in order: even though an appellant must make a substantial showing of the denial of a constitutional right to get a COA, this aspect of our threshold inquiry is satisfied even if the claim is only debatably constitutional.")

> jurisdictional. *See Gonzalez v. Thaler*, —— U.S. ——, 132 S.Ct. 641, 649, 181 L.Ed.2d 619 (2012).[34]

The Sixth Circuit is clear on defective COAs, the court will not revisit the issue once a COA has been issued. In *Rayner*, the court stated succinctly:

> The State argues that the Certificate of Appealability was improvidently granted, and should be revoked by this Court. It is not necessary for this Court to consider the State's claim, as it should have raised this issue on a motion to dismiss. *See*, *e.g.*, *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir.2001). In *Porterfield*, "considerations of judicial economy" did not discourage review of the COA, particularly as the district court had not considered the issue and the parties had yet to brief the merits of the case. *Id.* Such is not the case here, and ***as the issues have already been briefed and presented to this Court, we will not review the grant of the COA.***[35]

This is consistent with the Sixth Circuit's pre-*Gonzalez* jurisprudence, where the court held that it had jurisdiction to - and would - consider a case even if the COA was improvidently granted[36] or defective, if the state did not object.[37]

Because "the habeas petitioner who obtains a COA cannot control how that COA is drafted" it was enough that "a judge's issuance of a COA reflects his or her judgment that the appeal should proceed and supplies the State with notice that the habeas litigation will continue."[38] If the law has changed, then this Court must

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[34] *United States v. Foote*, 784 F.3d 931, 935 at n.4 (4th Cir. 2015) (cleaned up).

[35] *Rayner v. Mills,* 685 F.3d 631, 636, n.1 (6th Cir. 2012).

[36] *Willis v. Jones*, 329 F. App'x 7, 12 (6th Cir. 2009).

[37] *Jefferson v. United States*, 392 F. App'x 427, 430 (6th Cir. 2010).

[38] *Gonzalez*, 565 U.S. at 148.

advise. If it remains, the circuit split must be addressed to ensure uniformity and compliance with this Court's precedent.

II. The writ should be granted because of the pervasive disagreement and inconsistent application of §2253(c)(2) & (3) among the circuits post-*Gonzalez*.

Gonzalez made clear that a failure to specify a constitutional issue in a COA was *not* a jurisdictional defect, but simply a mandatory statutory requirement. Beyond that, no directives exist regarding next steps for when there is a defective COA. As the court, not the petitioner or appellant, is the author of the COA, it is axiomatic that the language used in an order granting a COA is largely out of the litigant's control.[39] Silence from this Court has resulted in fractured results among the Circuit Courts. Clear and consistent § 2253(c) jurisprudence is required. In other words, regardless of the outcome in terms of whether the *sua sponte* vacatur of defective COA and dismissal of an appeal was proper, the Court should provide the circuits with a bright line rule as to whether it was the right procedure. Any resolution by the Court should eliminate unpredictability and arbitrariness, not in the determination of whether the COA is itself defective, but in what to do when a clearly defective COA has been granted. Certiorari is appropriate to correct the lack of standards and vagueness that has plagued the circuits since *Gonzalez.*

[39] *Id.* at 144. (The petitioner has "no control over how the judge drafts the COA and . . . may have done everything required of him by law. That fact would only compound the 'unfai[r] prejudice' resulting from the *sua sponte* dismissals and remands that jurisdictional treatment would entail.").

III. The writ should be granted to provide clarity to litigants and an opportunity to cure prior to dismissal.

This case is the ideal vehicle for addressing the disparity and confusion caused by an inconsistent application of § 2253(c)(2) & (3) within the circuits. Mr. Saunders' claims were fully briefed, and oral argument was scheduled before his COA was subsequently vacated.

Had Mr. Saunders been in another circuit such as the Second, Third, Fourth, or Sixth, his appeal would have continued to oral argument and his appeal would have been considered on its merit.[40] Even though the Seventh and Ninth Circuits allow *sua sponte* vacatur of a defective COA, given how far into the appellate process Mr. Saunders' case was at the time the defect was noted, it is unlikely that his COA would have been vacated in either circuit.[41]

Yet, when the Eleventh Circuit issued Mr. Saunders a COA without referencing the underlying constitutional issues Mr. Saunders *clearly identified* in his COA applications[42], it validated Justice Scalia's cautionary tale in *Gonzalez*. Dissenting, Justice Scalia mused of likely futility and inefficiency resulting from proceeding on a defective COA should that course be discretionary:

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[40] *See Sistrunk*, 674 F.3d at 186 (holding that once the COA is issued the appeal proceeds); *Rayner*, 685 F.3d at 635 n.1 ("[A]s the issues have already been briefed and presented to this Court, we will not review the grant of the COA").

[41] *See Ramunno*, 264 F.3d at 725 (holding that although the Court has the power to vacate a COA, whether the litigant is deep into the appellate process cautions against vacatur); *Phelps*, 366 F.3d at 729 (same).

[42] In his § 2254 petition, Rule 60(b) motions, and applications for COA, Mr. Saunders has consistently asserted the denial of his Sixth Amendment right to the effective assistance of counsel.

> What is the consequence when the issuing judge, over properly preserved objection, produces a COA like the one here, which does not contain the required opinion? None whatever. The habeas petitioner already has what he wants, argument before the court of appeals. The government, for its part, is either confident in its view that there has been no substantial showing of denial of a constitutional right—in which case it is just as easy (if not easier) to win before three judges as it is before one; or else it is not—in which case a crusade to enforce § 2253(c) is likely to yield nothing but additional litigation expenses.[43]

This has proven true in many Circuit Courts and what the Eleventh Circuit (and more recently the Fifth Circuit) seeks to preclude. Although Justice Scalia was also concerned with gamesmanship by a litigant, the message is clear: there is no manageable standard articulated in *Gonzalez's* majority for how a defective COA that does not contain the "mandatory" provision ought to be handled. Justice Scalia suggested, almost by way of mitigation, that when an appellant notices a defect in the COA granted to him, he could move to amend it.[44]

Mr. Saunders was in a position with little recourse and no reason to believe he should (or could) seek amendment. Although he pleaded and filed a claim of constitutional dimension in his application for a COA, the COA issued *to him* was defective. The very day the COA was issued, Mr. Saunders was ordered to file his merits brief within 40 days. A litigant *may* be concerned there is a defect in the COA's text, but having no hand in drafting it, he must simply comply with the briefing schedule as ordered by the judge or panel that issued the COA. Without a directive to the contrary, save for the lone dissent offered by Justice Scalia in

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[43] *Gonzalez*, 565 U.S. at 158 (Scalia, J., dissenting).

[44] *Id.* at 168.

Gonzalez, Mr. Saunders proceeded as directed in reliance on this Court's current jurisprudence which advises him that a COA reflects the circuit judge's judgment that the appeal should proceed.[45] Clearly, should this Court wish to shift the burden to cure a defect not of the petitioner's own making onto the appellant, there should be an explicit statement from this Court doing so. This case is the appropriate vehicle by which to resolve this issue.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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[45] *Id.* at 148.