

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Anthony W. Accurso — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

the Eighth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony W. Accurso
(Your Name)

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(none)
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QUESTION(S) PRESENTED

Anthony Accurso's case raises a pressing issue of national importance: whether and to what extent the criminal justice system tolerates obfuscation and misconduct by prosecutors in the decision-making process surrounding motions for downward departure. Specifically, did the United States Court of Appeals for the Eighth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent when it denied Mr. Accurso a COA on his motion to reopen the judgement and obtain merits review of his claim that the prosecution committed misconduct by knowingly and vindictively refusing to file a downward departure motion for assistance on the basis that a downward departure wouldn't reflect the seriousness of Petitioner's offense in relation to assistance provided to law enforcement?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
INDEX TO APPENDICES.....	iv
TABLE OF AUTHORITIES CITED.....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
A. Introduction.....	3
B. Pre-Sentencing History.....	4
C. At Sentencing.....	5
D. Habeas Corpus.....	6
REASONS FOR GRANTING THE PETITION.....	8
A. COA Standard.....	8
B. Denial Of a Constitutional Right.....	9
C. Debatable By Reasonable Jurists.....	10
1. Substantial Showing Of Misconduct.....	10
2. Ambiguity Inquiry Improper and Improperly Conducted.....	11
D. The Significance Of Issues Raised.....	14
CONCLUSION	15

INDEX TO APPENDICES

- Appendix A: Order of the United States District Court for the Western District of Missouri, denying a motion under 28 USC §2255 and COA, dated June 10, 2015
- Appendix B: Order of the Eighth Circuit Court of Appeals, denying COA, dated September 4, 2015
- Appendix C: Order of the Eighth Circuit Court of Appeals, denying panel rehearing, dated October 21, 2015
- Appendix D: Order of the United States District Court for the Western District of Missouri, denying a motion under Fed.R.Civ.P. Rule 60(b), dated March 28, 2017
- Appendix E: Order of the United States District Court for the Western District of Missouri, denying COA, dated April 20, 2017
- Appendix F: Order of the Eighth Circuit Court of Appeals, denying COA, dated August 23, 2017
- Appendix G: Order of the Eighth Circuit Court of Appeals, denying panel rehearing, dated October 20, 2017
- Appendix H: Relevant portion from Petitioner's sentencing hearing, dated March 18, 2014
- Appendix I: Emails between Defense Counsel and the Prosecutor, relevant to departure consideration, dated January 8, 2014 to March 16, 2014
- Appendix J: Government's Response In Opposition To Request For Discovery, relevant to departure consideration, dated May 19, 2015

TABLE OF AUTHORITIES CITED

Cases	Page Number
Buck v. Davis, 580 US ____ (2017).....	9
Fla. Power & Light Co. v. Lorion, (470 US 729 (1985)).....	12
Gonzalez v. Crosby, 545 US 524 (2005).....	8
Mistretta v. US, 504 US 181 (1992).....	9,10
Puerto Rico v. Franklin Cal. Tax-Free Trust, 579 US ____ (2016).....	13
Schweiker v. Hansen, 450 uS 785 (1981).....	8
Slack v. McDaniel, 529 US 473 (2000).....	8,9
US v. Concha, 861 F.3d 116 (4th Cir. 2017).....	14
US v. Doe, 934 F.2d 353 (D.C. Cir. 1990).....	15
US v. Doe, 870 F.Supp 702 (Dist. E. VA 1994).....	13
US v. Harrington, 834 F.3d 733 (7th Cir. 2016).....	14
US v. Lander, 900 F.Supp.2d 934 (N.D. Iowa 2012).....	12,13
US v. Oetken, 241 F.3d 1057 (8th Cir. 2001).....	13
US v. Scarpa, 861 F.3d 59 (2nd Cir. 2017).....	14
Wade v. US, 504 US 181 (1992).....	9,10,12,15
Wayte v. US, 470 US 598 (1985).....	11

Statutes & Other Authorities	Page Number
United States Consitution, Amendment V.....	2,10
18 USC § 2252(a)(2).....	4
§ 3553(a).....	6
§ 3553(e).....	2,5,6,11-13
28 USC § 2253(c).....	2,8
§ 2255.....	3,6,8,11,14
Federal Rules Of Civil Procedure, Rule 60(b).....	7-10,14
Federal Rules Of Criminal Procedure, Rule 35(b).....	13,14

Statutes & Other Authorities (Cont.)

Page Number

United States Sentencing Guidelines § 2G2.2(b)(3)(B).....	10
§ 2G2.2(b)(3)(F).....	10
§ 5K1.1.....	5,13
Amendment 801.....	10

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The decision of the Eighth Circuit Court of Appeals denying panel rehearing appears at Appendix G, and is reported at 2017 U.S. App. LEXIS 20729 (8th Cir. 2017). The decision of the Eighth Circuit Court of Appeals denying petition for COA appears at Appendix F. The decision of the United States District Court for the Western District of Missouri denying COA appears at Appendix E. The decision of the United States District Court for the Western District of Missouri denying Petitioner's motion under Rule 60(b) appears at Appendix D. The decision of the Eighth Circuit Court of Appeals denying panel rehearing appears at Appendix C, and is reported at 2015 U.S. App. LEXIS 18417 (8th Cir. 2015). The decision of the Eighth Circuit Court of Appeals denying petition for COA appears at Appendix B. The decision of the United States District Court for the Western District of Missouri denying Petitioner's motion under §2255 appears at Appendix A, and is reported at 2015 U.S. Dist. LEXIS 74742 (W. Dist. MO 2015).

JURISDICTION

The date on which the Eighth Circuit Court of Appeals denied Petitioner's request for COA was August 23, 2017. A timely petition for panel rehearing was denied by the United States Court of Appeals on October 20, 2017. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Fifth Amendment to the Constitution Of The United States. The Fifth Amendment provides in relevant part:

"No person shall be... deprived of life, liberty, or property, without due process of law..."

This case involves the application of 28 USC §2253(c), which states:

- (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 [28 USCS §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).

This case also involves the application of 18 USC §3553(e), which states:

"Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

STATEMENT OF THE CASE

A. Introduction

Anthony W. Accurso's case is, by any measure, extraordinary. Mr. Accurso assisted state authorities in the prosecution of another unrelated crime without threats or promises by the government, totally unprompted by his own legal troubles, a decision described by the district court alternately as "unusual" and "worthy of praise" (MEMORANDUM AND ORDER pg. 1 and pg. 2, attached as Appendix A). The government considered Accurso's request for a downward departure for assistance to authorities for over two months, even postponing the initial sentencing hearing to consider this issue (Appendix I, pg. 4), only to reverse without a stated reason at the last moment. The United States Probation Office was also made aware of Accurso's assistance when it conducted the PSIR interview. Yet no party raised the issue of defendant's assistance during Accurso's sentencing hearing, despite a duty to do so. During post-sentencing habeas proceedings, both Defense Counsel (Mr. Larry Pace, Assistant Public Defender for Western Missouri) and the Prosecutor (Ms. Christine Kenney, Assistant United States Attorney for the District of Kansas) denied that the district court could possibly review the government's denial of a downward departure motion, despite the Defense's request for such a motion and the government's intense and lengthy consideration of it. Later, after Accurso filed a motion under 28 USC §2255 to vacate his sentence, the Prosecutor admitted during discovery that her motive for denying the departure was not based on the assistance issue alone, but rather on her belief that a downward departure would not reflect the seriousness of Accurso's criminal conduct, an unconstitutional consideration. Also during habeas proceedings, the district court sidestepped Accurso's claims of ineffective assistance of counsel and prosecutorial misconduct to instead declare that his assistance was not eligible for

consideration because it was offered outside of a binding plea agreement and prior to Accurso's own indictment (MEMORANDUM AND ORDER pg. 3, attached as Appendix A), an argument not raised by either party during briefings. While denying the motion, the district court also denied COA, without explanation.

For the coup de grace, the Eighth Circuit Court of Appeals refused Accurso's request for COA, also without an explanation, despite a substantial showing of the denial of a constitutional right and a decision by the court with which reasonable jurists could disagree (Appendix B). The Court of Appeals also denied a panel rehearing without explanation (Appendix C).

B. Pre-Sentencing History

Mr. Accurso plead guilty to possession of child pornography in 2002, was sentenced to 27 months in federal prison, and was released in 2004 to supervised release. He violated special conditions of supervision in 2006, was remanded to federal prison for a period of 24 months with supervision to follow, and was released in 2008.

In April 2011, the FBI detected an IP address registered to Accurso that was sharing child pornography using P2P software. The following September, the FBI and local police executed a warrant on his residence, seizing his computer equipment after detecting illegal images were present. A warrant for his arrest was issued in June 2013. He was arrested and entered a guilty plea as soon as the plea deal was brokered in October 2013. He was ultimately sentenced in March 2014 to the mandatory minimum of 180 months for a violation of 18 USC §2252(a)(2) with a prior qualifying conviction, followed by a term of supervision of 10 years.

After the investigation began, but before the search warrant was executed, Accurso notified the local police that a crime had been committed. Acting with law enforcement, he lured the suspect to a meeting location where the suspect was arrested and charged with a felony in the state of Missouri, resulting in a five year prison sentence. Based on this significant assistance in the

prosecution of another individual, Defense Counsel requested the government submit a motion for downward departure to relieve application of the mandatory minimum (under 18 USC §3553(e)) and possibly depart below the guidelines (under §5K1.1). The government knew the assistance involved state authorities, involved a property crime, and occurred prior to Accurso being aware of his own pending charges, and it still considered the downward departure for almost two months before ultimately rejecting the request, seemingly without reason. Defense counsel notified Accurso of this denial moments before his sentencing hearing, and counseled that nothing could be done (including an appeal). Counsel also said that raising the issue during the hearing would be useless because the decision of the government was final and not reviewable by the district court.

C. At Sentencing

During sentencing, neither Defense counsel, nor the government, nor the USPO raised the issue of Accurso's assistance to authorities despite all three knowing about it and having a duty to present all information about such deliberations. The court did mention an ex parte memo (alleging uncharged conduct from a decade before, without any new evidence) by the USPO that was sent to the district court and the government (and not Defense counsel), but the district court stated that it was applying the mandatory minimum, thereby mitigating the memo's direct effect on Accurso's sentencing. No discussion was had about how the memo might have affected the government's decision not to file the downward departure. (Later, during habeas discovery, the timeline would reveal that the government's denial directly followed the receipt of the memo alleging this uncharged conduct.)

The district court applied the mandatory minimum while remarking that, while several arguments existed for a lower sentence because the calculated guidelines range was 151-188 months, the district court was bound by the mandatory minimum. The effective guidelines range being 180-188 months, Mr. Accurso received the shortest sentence the district court thought it was authorized to give.

D. Habeas Corpus

In February 2015, Mr. Accurso filed a motion under 28 USC §2255 to vacate his sentence. He raised several issues of ineffective assistance of counsel and prosecutorial misconduct surrounding the issue of the downward departure motion, as well as a miscalculation of the guidelines. The district court ordered the government to respond to Accurso's claims and authorized limited discovery.

At this point, both Defense counsel and the Prosecutor claimed that the government's denial of the departure relieved both parties of any obligation to notify the district court that such a motion was sought because the government claimed to enjoy unfettered discretion in such matters, a patently untrue statement. Later, when responding to Accurso's requests for discovery about her motive for denying the motion, the Prosecutor stated she denied it because "those facts and circumstances [of Accurso's assistance] would not outweigh the seriousness of [Accurso's] crimes...", essentially stating that Accurso was ineligible for consideration under §3553(e) because of the nature of his crime, a factor already considered by the district court under 18 USC §3553(a).

In its MEMORANDUM AND ORDER dated June 10, 2015, the district court stated that Accurso's assistance was ineligible for consideration because it occurred several months before Accurso knew he was under investigation and was volunteered without the benefit of an agreement that he would benefit from it, neither of which is stipulated in the text of §3553(e), and neither of which was an argument raised by either party at any time prior. In support of this decision, the district court cited another similar case (involving third party assistance) where the court found that third party assistance wasn't prohibited by the language of §3553(e) for the intent of Congress, and then applied the Rule of Lenity. Despite being faced with similar circumstances and citing another court that applied the Rule of Lenity, the district court did not do so itself. It further denied COA without any explanation, despite the uniqueness of Accurso's situation. Accurso then sought COA from the Eighth Circuit Court of Appeals, but

was rejected without explanation. The panel rehearing was also rejected without explanation.

Accurso then filed a motion under Fed.R.Civ.P. Rule 60(b)(6) because the district court failed to address the issue of prosecutorial misconduct in its decision, a defect in the fundamental proceedings because it did not answer one of his original claims. The district court decided that the issue of misconduct was "dealt with in substance" by its prior ruling dismissing Accurso's other claims (Appendix D); and then denied COA (Appendix E) again without stating any reason for doing so. Again, the Eighth Circuit Court of Appeals denied COA (Appendix F) without explanation, and then denied panel rehearing (Appendix G). Mr. Accurso now seeks redress from the Supreme Court in a timely fashion.

REASONS FOR GRANTING THE PETITION

The decision of the Eighth Circuit Court of Appeals to allow the district court's opinion to stand without further comment contravened this Court's precedent, contravened its own precedent, and deviated from the precedent of other circuit courts on an important national issue: whether and to what extent the criminal justice system tolerates obfuscation and abuse by prosecutors in the decision-making process surrounding downward departure motions for assistance to authorities.

Summary reversal is usually reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Schweiker v. Hansen, 450 US 785, 791 (1981). Mr. Accurso is requesting that this Court grant certiorari, vacate the decision of the circuit court to deny certificate of appealability, and remand for a hearing on the merits. The arguments that follow will show that Accurso's case meets the requirements under Schweiker for summary reversal, and that the injustice perpetrated indeed demands it.

A. COA Standard

Accurso sought to reopen his 28 USC §2255 case under Fed.R.Civ.P. Rule 60(b) because the district court failed to address his claim of prosecutorial misconduct in the order dismissing the original petition. This failure constituted a "mistake" under Gonzalez v. Crosby, 545 US 524, 528 (2005). "Rule 60(b) allows a party to seek relief from a final judgement, and requesting reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." Id. The district court dismissed Accurso's Rule 60(b) motion (Appendix D) by stating its earlier decision (Appendix A) "remains dispositive." Despite meeting the COA standards asserted by this Court in Slack v McDaniel, 529 US 473, 484 (2000), the district court denied COA (Appendix E). "To obtain COA under §2253(c), a habeas prisoner must make a

substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner..." *Id.* This was similarly addressed more recently in *Buck v. Davis*, 580 US ____ (2017), where this Court remanded Buck's case after the Fifth Circuit Court of Appeals conducted a merits review at the COA stage. In the instant case, at no point did the district court or the circuit court of appeals comment on the merits of Accurso's COA requests, despite his meeting the standard of review as outlined below.

B. Denial Of a Constitutional Right

In his original petition (and later reiterated in his petition under Rule 60(b)), Accurso asserted that the government's analysis of his assistance to authorities was flawed by the inclusion of unconstitutional considerations. This Court has ruled in *Wade v. US*, 504 US 181, 185 (1992), that "a prosecutor's discretion when exercising that power is subject to constitutional limitations that district courts can enforce... we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." Mr. Accurso alleged the government's decision was not based on the assistance alone, but rather tainted by the prosecutor's opinions of the seriousness of Accurso's indictment and allegations of uncharged criminal conduct by the USPO arising from supervised release violations attached to a previous conviction. These considerations were to be considered by the district court at sentencing, not by the government during its assistance analysis, according to *Mistretta v. US*, 488 US 361, 390-391 (1989). "... federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case." In Accurso's case, the government not only improperly

exercised its authority by considering factors unrelated to the assistance issue, but also deprived the district court of any information pertaining to decisions that significantly affected sentencing by withholding that an assistance motion was even considered. This violation of the separation of powers was a constitutional violation unto itself, but further denying that 18 USC §3553(e) was available to Accurso because of the seriousness of his crime denied him access to equal protection under the Fifth Amendment. These violations led to a significantly higher sentence than would have otherwise been imposed, as is shown below.

C. Debatable By Reasonable Jurists

The decision of the district court denying Accurso's motion under 28 USC §2255 is flawed and debatable for the following reasons:

- having made a substantial showing of the prosecutor's misconduct, the district court failed to remedy the situation,
- and the district court improperly conducted a review of the intent of Congress when faced with an unambiguous statute, an argument not raised during proceedings.

1. Substantial Showing Of Misconduct

In the GOVERNMENT'S RESPONSE IN OPPOSITION TO MOVANT'S REQUEST FOR DISCOVERY (Appendix J), the government stated "those facts and circumstances [of Accurso's assistance to authorities] would not outweigh the seriousness of Movant's crimes, including the fact that this was his second federal conviction for the same offense, and the fact that Movant attempted to destroy evidence during the execution of the search warrant at his residence." (pg 2-3). This admission of the government's motives in the assistance analysis was highly extraordinary because it was not only an inadvertent admission of misconduct, but because it was disclosed at all. However, this is exactly the kind of threshold showing of a discriminatory motive required to demonstrate misconduct under Wayte v. US, 470 US 598, 608 (1985) (requiring petitioner to show the prosecutor's decision

had "a discriminatory effect and that is was motivated by a discriminatory purpose." The discriminatory effect was, in addition to a violation of the separation of powers under Mistretta and denial of access to equal protection under the Fifth Amendment, that Accurso was subject to a prejudicially higher sentence than otherwise would have been imposed.

During sentencing the judge said the following:

"There may be some arguments, if -- if I had the freedom to do so, to go lower than the -- the mandatory minimum. But, of course, I don't have that -- I don't have that liberty." (Appendix H).

The calculated guidelines range was 151-188 months, with an effective range of 180-188 because of the mandatory minimum. Both Defense counsel and the government agreed that the bottom of the guidelines would be appropriate, as there were no aggravating factors considered. Without the mandatory minimum, the bottom of the guidelines would have been a full 29 months less.

Further, the United States Sentencing Commission has clarified (in amendment 801) that Mr. Accurso would have only qualified for the 2 point distribution enhancement under §2G2.2(b)(3)(F) instead of the 5 point enhancement under §2G2.2(b)(3)(B) that was used to calculate his guidelines. A recalculation of the guidelines would result in a new range of 108-135 months (Category 2, Level 30), the top of which is nearly four years less than the applied sentence.

The remedy under Wade for this misconduct is for the district court to grant the relief sought in this case, which is a new sentence below the mandatory minimum and under the advisement of a properly calculated guidelines range.

2. Ambiguity Inquiry Improper and Improperly Conducted

In denying Mr. Accurso's 60(b) motion, the district court stated "My prior ruling remains dispositive." (Appendix D). This prior ruling (Appendix A) indicated that any failures on the part of Defense Counsel or the government were irrelevant because a downward departure for the assistance provided "is legally unauthorized" (pg. 2). The court reached this conclusion stating "the fact that assistance to Missouri authorities was volunteered without an agreement

that [Accurso] would benefit disqualifies [Accurso] from claiming entitlement to relief" and "the fact that the assistance occurred at least several months before the investigation was known to [Accurso] emphasizes [Accurso's] disqualification." (pg. 3). Thus the district court reads into the language of 18 USC §3553(e) a requirement of a plea agreement with the government authorizing a downward departure in exchange for substantial assistance, and a requirement that the assistance was provided in the entirely arbitrary timeframe of prior to sentencing, yet after the defendant is aware of the investigation which may lead to his sentencing. (It should be further noted that the assistance occurred after the investigation began, but before the search warrant was executed, making this requirement even more arbitrary.) Neither of these requirements is supported by the language of the statute.

Addressing the requirement for an agreement, this Court's decision in Wade stated that an agreement wasn't necessary for a defendant to benefit from a motion for downward departure for assistance, but rather faulted Wade for not making a threshold showing of an unconstitutional motive behind the government's decision. Mr. Accurso has made such a threshold showing, relying on the government's own admission of its motives.

Addressing the arbitrary time window, the district court, being faced with a somewhat novel situation, appears to have decided §3553(e) was ambiguous without outright stating so, because it proceeded to investigate the intent of Congress in passing the statute. "Because we find the statute ambiguous on its face, we seek guidance in the statutory structure, relevant legislative history, congressional purposes expressed..., and general principles respecting the proper allocation of judicial authority to review..." Fla. Power & Light Co. v. Lorion, 470 US 729, 735 (1985). The district court entirely avoided an analysis of the statute's text, and proceeded to divine the will of Congress from the dicta of US v. Lander, 900 F.Supp.2d 934 (N.D. Iowa 2012) (where the court considered assistance provided by a third party, an issue of first impression for the Eighth

Circuit). The district court, citing Lander, cherry-picked the dicta of another court and used it to exclude Accurso's assistance:

"It is plain, then, that the central goal of §5K1.1 is to encourage defendants to provide effective assistance in the government's investigation and prosecution efforts, not to reward a defendant's good intentions." citing US v. Doe, 870 F.Supp. 702, 707 (Dist. E. VA 1994).

However, taken in context, the Doe court was merely making the distinction between "effective assistance" and a defendant's mere willingness, but inability, to provide assistance. Ultimately, the Lander court decided that the statute was capable of being interpreted to allow for third party assistance and that Congress did not specifically intend to disallow it, and applied the Rule of Lenity. The district court, faced with a similar circumstance, misconstrued the dicta of another court, and refused to apply the Rule of Lenity.

This decision, however, is at odds with the plain language of §3553(e). "Resolving the meaning of a statutory provision begins with the language of the statute itself, and that is also where the inquiry should end when the statute's language is plain." Puerto Rico v. Franklin Cal. Tax-Free Trust, 579 US ____ (2016). The language is expansive, but specifically silent as to the details of the assistance (including its timing). This supports its use in conjunction with downward departures for assistance provided prior to sentencing (under §5K1.1 of the guidelines) and after sentencing (Fed.R.Crim.P. Rule 35(b)). In the absence of evidence that Congress intended to prohibit this timing of assistance, the district court should have applied the Rule of Lenity (as did the Lander court) under Eighth Circuit precedent: "[w]here there are two plausible readings of a guideline provision, we apply the rule of lenity and give the defendant the benefit of the reading that results in the shorter sentence." US v. Oetken, 241 F.3d 1057, 1060 (8th Cir. 2001).

Finally, this issue was not raised by the government (and certainly not by Mr. Accurso) during briefings on Accurso's habeas motion (or elsewhere). That this issue was resolved without affording Accurso the opportunity to brief the

district court amounts to a trial by ambush, denying Accurso due process. Further, at no time did the district court address the merits of appealability given that it resolved a similar conflict differently from another court, a de facto showing of how a reasonable jurist could disagree with its decision. The Eighth Circuit also denied COA without comment, thereby sanctioning this departure from the accepted and usual course of judicial proceedings.

D. The Significance Of Issues Raised

The issue of what factors are relevant to the consideration of a downward departure for substantial assistance is a significant one that is frequently raised in courts around this country. Mr. Accurso is a pro se litigant without access to court statistics, but the following recent decisions highlight the prevalence of this issue:

- In US v. Concha, 861 F.3d 116 (4th Cir. 2017), the Fourth Circuit said it was improper to consider a defendant's criminal culpability when determining the amount of departure for assistance.
- In US v. Scarpa, 861 F.3d 59 (2nd Cir. 2017), the Second Circuit approved the government's refusal to file a downward departure because Scarpa had often provided unreliable and inaccurate information in prior attempts to secure a Rule 35(b) motion.
- In US v. Harrington, 834 F.3d 733 (7th Cir. 2016), the Seventh Circuit reversed the district court's decision to reduce the downward departure from 25% to 14% because the assistance did not ultimately result in a conviction (finding the lack of conviction not Harrington's fault).

All of these cases represent the Circuit Courts of Appeal conducting meaningful review of cases in pursuit of an application of justice. They differ significantly from Accurso's case because the Eighth Circuit twice refused to grant COA and further refused to elucidate why. This was even more mysterious because the district court, in its ruling on the original §2255 motion and the subsequent motion under Rule 60(b), failed to state why it was refusing to grant COA. At no

time, did any court conduct a review on the merits of granting or denying COA.

In 1990, then Circuit Justice Ginsburg addressed the constitutionality of vesting the decision-making power regarding downward departures in the hands of prosecutors. She stated that it is constitutional, if it is, because "(1) it involves a very narrow delegation of 'sentencing' authority to the prosecutor... (2) he has a strong incentive not to abuse that authority; and (3) he would likely be unable or unwilling to use the authority at all if his decisions were ordinarily subject either to judicial review or to the due process protections applicable to court proceedings." US v Doe, 934 F.2d 353 (D.C. Cir. 1990)(from the concurring opinion). It is this very logic that underpinned this Court's decision in Wade two years later. But this constitutionality is jeopardized when, as in the instant case, the prosecutor commits misconduct, admits to it while claiming unfettered discretion, and the courts fail to address such abuses. Addressing this issue on the 25th anniversary of Wade would remind prosecutors of their duty to protect the integrity of legal proceedings, and would remind courts that they cannot simply take a pass on their responsibility to provide a check on such blatant abuses.

CONCLUSION

For all of the foregoing reasons, reasonable jurists could conclude that the decision of the district court was debatable and resulted in a deprivation of constitutionally guaranteed rights. For this reason, COA must issue. This Court's review is warranted to correct the district court's departure, and the Eighth Circuit's sanction, for the accepted and usual course of judicial proceedings, a decision which conflicts with the relevant decisions of this Court.

Respectfully Submitted,

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