

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Abraham Estremera — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals, Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

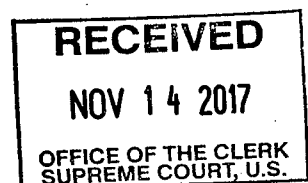
PETITION FOR WRIT OF CERTIORARI

Abraham Estremera
(Your Name)

Post Office Box 26030
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Beaumont, Texas 77720
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

Whether 28 USC § 2253(c)(2) requirement conflicts with § 2255 Rule 11(a) because it prevents a habeas applicant from making the requisite showing necessary to obtain a COA in violation of due process principles.

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

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION.....	11

INDEX TO APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Buck v Davis</u> , 580 US — (2017)	6
<u>Estremara v U.S.</u> , 724 F3d 773 (7th Cir. 2013)	4
<u>Jefferson v Welborn</u> , 222 F3d 286 (7th Cir. 2000)	10
<u>Lambright v Stewart</u> , 220 F3d — (9th Cir. 2000)	10
<u>Lindh v Murphy</u> , 521 US 320 (1996)	7
<u>Mathews v Eldridge</u> , 424 US 319 (1976)	7
<u>Muller-El v Cockrell</u> , 537 US 322 (2003)	6, 7, 9

STATUTES AND RULES

28 USC § 2253(c)(2)

5, 6

§ 2255 Rule 11(c)

6

OTHER

FRAP 22(b) - Advisory Committee Notes, 1967

8

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 judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 24, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 10, 2017, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V

- Due Process of Law

28 U.S.C. § 2253(c)

28 U.S.C. § 2255

STATEMENT OF THE CASE

Following remand to the district court for an evidentiary hearing on petitioner's § 2255 claim based on the ineffective assistance of his trial counsel; see Estremera v. U.S., 724 F3d 773 (7th Cir. 2013), the district court denied petitioner's § 2255 motion.

Petitioner sought reconsideration of the district court's denial given counsel's testimony at the evidentiary hearing was permeated with his inability to recall pertinent matters in his representation of this petitioner. Following an unprompted or ordered response by the government, the district court filed an order several months later denying petitioner's motion for reconsideration.

Petitioner filed a timely notice of appeal seeking review in the appellate court because the district court did make a determination a certificate of appealability was not warranted.

After some difficulties with filing in the appellate court, petitioner's case was dismissed then reinstated. Thereafter, the denial of a certificate of appealability (COA) was denied by a two-judge panel in the appellate court. In the order denying a COA, the panel stated it "reviewed the final order of the district court and the record on appeal (and found) no substantial showing of the denial of a constitutional right," citing § 2253(c)(2).

Petitioner filed for rehearing with suggestion for rehearing en banc based on the clear intent of Congress in enacting § 2253(c), and the conflict that is caused by the applicable rule governing issuance of a COA, which vices a habeas petitioner's due process rights. The petition for rehearing was denied and this petition for certiorari review follows that decision.

REASONS FOR GRANTING THE PETITION

When collateral relief is denied a habeas applicant in federal district court, he may not obtain appellate review of that denial unless he is issued a COA. See 28 USC § 2253(c).

Significantly, a COA may not be issued until

"the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2)

(Emphasis mine). Consequently, before a habeas

applicant has the opportunity to make the requi-

site showing, the § 2253 rule directs a district

Judge who adversely rules on the habeas matter

to address whether a COA should issue without

the applicant having the opportunity to meet the

requirement. See § 2253 Rule 11(a).

This Court has recently reaffirmed that a

"COA inquiry... is not coextensive with a merits

analysis." Buck v Davis, 580 U.S. —, — (2017)

(quoting Miller-El v Cockrell, 537 U.S. 322 (2003)).

This recognition and reaffirmation speaks volumes to petitioner's present claim, and not only effects him but all prisoners who are subject to the fundamentally unfair procedure spawned by the § 2255 Rule 11(a). Especially since, it not only eviscerates the well established fundamental requirement of one having an opportunity to be heard; see Mathews v Eldridge, 424 U.S. 319, 333-34 (1976), it also cuts directly across the statutory requirement that a habeas applicant "make" a substantial showing that he has been denied a constitutional right in the proceedings being challenged. See Miller-El v Cockrell, 537 U.S. 322 (2003); see also 28 USC § 2253(c)(2).

This Court has previously acknowledged that the AEDPA was hastily passed, questioning its application in certain instances. See Lindh v Murphy, 521 U.S. 320, 336 (1996) (recognizing "the AEDPA is no silk purse in the art of statutory construction").

Therefore, for courts to continue to completely ignore such a glaring usurpation of the rights of habeas applicants simply seeking appellate review must be halted.

Clearly, even before the enactment of the AEDPA, a habeas applicant seeking the precursor of a COA (i.e., CPC) were not disallowed the opportunity for appellate review by demonstrating an entitlement to the certificate. See FRAP 22(b) - Advisory Committee Notes, 1967 Adoption (stating "in the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial").

Consequently, this apparent safeguard of a habeas applicant's due process rights has been incapable overwritten with no clear purpose. For

instance, when a habeas applicant is denied a COA in the district court, simultaneously with the denial of his habeas petition - he is left with no opportunity to meet the requisite showing at a later stage.

As in this case, as in most habeas cases - reviews of "the final order of the district court and the record on appeal[s]" (see Appendix A), is how the higher court determines whether the habeas applicant has satisfied the requisite showing.

Such actions are starkly identical to the wrongs addressed in Miller-El, *supra* at p. 336-37 where an appellate court is essentially "deciding [the] appeal without jurisdiction." There is no distinguishing difference between a court of appeals deciding a COA is not warranted based on adjudicating the actual merits of an appeal, or it reviewing the lower court's final order and the record on appeal to find the requisite showing has not been made. The fact of the matter is, as this court has made crystal clear - the "threshold hold inquiry does not require

full consideration of the factual or legal bases adduced in support of the claims." Id.

The purpose of the COA inquiry is to afford a habeas applicant the opportunity to convince a reasonable jurist that his claim which may at first glance appears to lack merit, is in fact meritorious.

See Lambright v Steward, 220 F3d 11028 (9th Cir. 2000); see also, Jefferson v Welborn, 222 F3d.

286 (7th Cir. 2000) (explaining that a COA should issue unless the claims are "utterly without merit").

Given the clear usurpation of petitioner's due process rights to an opportunity to be heard according to the statutory requirements of §2253(c)(2), by the offending §2255 Rule - this Court should GVR the matter to the appellate court so it can allow this habeas applicant the opportunity to demonstrate his entitlement to a COA by satisfying the requisite showing. Or, this Court should grant certiorari in order to

determine the constitutionality of § 2285 Rule 11(a) in light of its corresponding counterparts which oppose its requirements of district judges to rule on the COA matter in the first instance when they make an adverse ruling in a habeas case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Abraham Estremera

Date: November 3, 2017