No. _____

In the Supreme Court of the United States

EDUARDO MASFERRER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD C. KLUGH
Counsel for Petitioner
Ingraham Building
25 S.E. 2nd Avenue, Suite 1100
Miami, Florida 33131
Tel. (305) 536-1191
klughlaw@gmail.com

QUESTIONS PRESENTED

1. Did the court of appeals err in denying a certificate of appealability on whether fundamental errors in an FDIC investigation of Hamilton Bank's asset valuation and accounting – leading to an overstated of loss, rather than the gain resulting from the petitioner bank president's actions – was material to the 30-year sentence imposed, such that denial of post-conviction relief due to violation of petitioner's due process rights and counsel's ineffective assistance should receive appellate review?

2. Does the death of a petitioner's counsel prior to his filing of a motion for certificate of appealability in the court of appeals warrant granting petitioner leave to obtain replacement counsel and to file a counseled motion for certificate of appealability from the denial of relief under 28 U.S.C. § 2255?

3. Does the appellate practice of permitting only one circuit judge to consider *de novo* the merits of a certificate of appealability, such that on panel reconsideration of a COA denial, only new arguments can be considered, violate the right of a petitioner to a determination by any circuit judge that the COA application is meritorious?

PARTIES TO THE PROCEEDINGS BELOW

There are no other parties to the proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Eduardo Masferrer respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 11-15849 in that Court on March 8, 2013, *United States v. Masferrer*, which denied petitioner a certificate of appealability from the judgment of the United States District Court for the Southern District of Florida and denied petitioner's motion for leave to filed a counseled motion for certificate of appealability.

OPINIONS BELOW

A copy of the original decision of the United States Court of Appeals for the Eleventh Circuit, denying petitioner a certificate of appealability, is contained in the Appendix (27a), along with a copy of the district court's order denying petitioner's motion for Certificate of Appealability (29a), the Final Judgment and Order Denying Motion to Vacate Sentence Under 28 U.S.C. § 2255 (32a), the report of the magistrate judge recommending denial of the § 2255 motion (36a), and the decision of the United States Court of Appeals for the Eleventh Circuit, denying petitioner's motion for leave to file a counseled motion for certificate of appealability and denying reconsideration of the original denial of a certificate of appealability (1a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on March 8, 2013. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 because petitioner was charged with violating federal criminal law. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for review of all final decisions of United States district courts; and 18 U.S.C. § 3742(a), which provides jurisdiction for review of criminal sentences upon appeal by defendants.

PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. amend. V

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

U.S. Const. amend. VI

> In all criminal prosecutions, the accused

shall enjoy the right ... to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(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).

Fed. R. App. P. 22. Habeas Corpus and Section 2255 Proceedings:

...

(b) Certificate of Appealability:

...

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. ...

11th Cir. R. 22-1. Certificate of Appealability:

...

(c) An application for a certificate of appealability may be considered by a single circuit judge. The denial of a certificate of appealability, whether by a single circuit judge or by a panel, may be the subject of a motion for reconsideration but may not be the subject of a petition for panel rehearing

or a petition for rehearing en banc.

Fed. R. App. P. 35. En Banc Determination:

(a) **When Hearing or Rehearing En Banc May Be Ordered**. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

STATEMENT OF THE CASE

Petitioner was sentenced to 30 years' imprisonment for his actions in 1997 and 1998, as President and Chairman of Hamilton Bank, an FDIC-insured bank, that involved improperly accounting, and failing to recognize losses, for the bank's ratio swaps of foreign debt instruments, where the swaps – exchanges of assets between the bank and other financial entities, in which the

prices of the swapped items are deemed for accounting purposes to be at face value, with the difference between the face and fair market value of the seller's asset offset by a similar disparity in the asset received in return –were not booked as related transactions and where declines in asset valuations were not immediately recognized, as required by FDIC regulations. The district court denied relief under 28 U.S.C. § 2255 as to petitioner's claims of constitutional error in the imposition of his 30-year sentence where petitioner contended that newly discovered evidence, and the ineffective assistance of counsel in failing to discover that evidence, showed that contrary to the government's theory of an $11 million loss to the bank and to the FDIC from the ratio swaps, the government failed to include $30 million of additional assets created by the relevant transactions, such that the FDIC actually profited by nearly $20 million due to its erroneous decision to intervene in the bank's operation and that this ***gain*** to the bank on transactions that petitioner had authorized indicated that federal regulators' actions in shutting down Hamilton Bank based on insolvency were unreasonable and misguided. The government's own accounting and regulatory errors led to a misleading and highly prejudicial presentation of loss causation and asset valuation that adversely influenced the district court's exercise of discretion in the imposition of a sentence of 30 years' imprisonment. Petitioner, who had no criminal record and was a successful

banker and employer, is scheduled for release in 2032 at the age of 83. *See* www.bop.gov.

On May 9, 2012, the court of appeals denied a certificate of appealability (COA) and treated the order of denial as the court's mandate. However, unbeknownst to the court of appeals and to petitioner, his attorney, Thomas Puccio, had died prior to the filing of any motion for COA. When he discovered that his attorney had died and that a document filed under Puccio's name was improperly presented to the court of appeals, petitioner sought leave to reinstate the appeal and to grant leave to file a counseled motion for COA or, alternatively, a counseled motion for reconsideration of the denial of a COA. The court of appeals, on March 8, 2013, vacated its mandate, reinstated the appeal, treated the motion to reinstate appeal as a merits motion for reconsideration of the COA denial, and in light of the absence of merits arguments for a COA in the motion to reinstate appeal, denied COA reconsideration, ruling that because petitioner "has offered no new evidence or arguments of merit to warrant relief from this Court's order denying his motion for a COA, his construed motion for reconsideration is DENIED." App. 41a.

REASONS FOR GRANTING THE WRIT

1. *Appealability of the issue of fundamental error at sentencing in the government's reliance on a theory that petitioner financially undermined his bank, when newly discovered evidence and evidence that should have been presented but for sentencing counsel's ineffectiveness showed that petitioner did not harm the bank, that it was profitable when taken over by the FDIC, and that investors did not lose money or suffer stock manipulation harm.*

The court of appeals denied a COA, without specifically addressing any aspect of petitioner's § 2255 claim. The district court, in denying a COA, stated:

> At the sentencing hearing, the Court had evidence of losses due to fraud as well as the potential recoveries and offsets. ... During the sentencing hearing the Court stated that it found the calculated loss reflected in the Presentence Investigation Report to be accurate. ... While it recognized the existence of an alternative method of calculating loss, the Court pointed out that the alterative method still resulted in a calculated loss in excess of $20 million, the threshold amount for the guideline range under which Petitioner was sentenced. ... Petitioner has again failed to demonstrate

> that he was denied a constitutional right that would entitle him to a Certificate of Appealability from this Court.

App. 4a-5a. But the district court ignored the standard for relief from a sentencing premised on material misinformation presenting a due process violation. *See Townsend v. Burke*, 334 U.S. 736, 740-41 (1948)(defendant is denied due process if his sentence is based upon a materially false presentence report and the defendant has no meaningful opportunity to rebut the inaccuracies).

And the government's accounting and regulatory errors led to a misleading and highly prejudicial government presentation of loss causation and asset valuation that a reasonable jurist could conclude adversely impacted the district court's exercise of discretion in the imposition of a sentence of 30 years. All of these factors are directly relevant to both loss calculation, *see* U.S.S.G. § 2B1.1, comment. (n. 3(F)) (2012), and the district court's independent determination of the sentence under 18 U.S.C. § 3553. If investors suffered no loss as a result of petitioner's bank management and instead benefitted from his actions in running Hamilton Bank, then the failure of counsel to present such evidence to the district court and the government's failure to produce such evidence to the defense create a constitutional issue that merits being heard on appeal. Perhaps most importantly, the

district court stated at sentencing that these very issues would warrant correction of the sentence: "If the government failed to establish that [securities] loss in excess of $20 million, then I think you would – you might have an argument to correct the sentence if that were the sole basis upon which the Court was relying." DE:539 at 24.

The Sentencing Guidelines now clearly provide what logic suggests, that it is the effect of the fraud on the stock price that damages the interest of investors. Together with the new evidence, the totality of the financial data establishes that there was no significant impact on stock price and that the FDIC action in taking over the bank was responsible for any subsequent losses.

The district court's rejection of a COA on the sole ground that a loss calculation under the former guidelines could still reach the same level as applied at sentencing simply does not encompass all of the relevant sentencing factors and thus does not answer fully the prejudice question of whether there is a reasonable basis to believe that the misinformation caused any additional incarceration. *See Glover v. United States*, 531 U.S. 198, 202-03 (2001).

Because of the significance of these multiple factors, and because of the extreme nature of the sentence for a unique and technical loss calculation, there surely is at least one reasonable

jurist who would find merit in the misinformation at sentencing. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) ("A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part. ... We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.") (internal citations and quotation marks omitted).

2. *Should petitioner have the opportunity to file a counseled motion for certificate of appealability?*

The Court has recognized that abandonment of a habeas petitioner by his attorney of record is cause to excuse a procedural default. *See Maples v. Thomas*, 132 S.Ct. 912, 927 (2012). The Court did not limit its decision to actual abandonment, but rather to circumstances reflecting constructive abandonment by counsel. *See id.* at 923-24 ("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." (internal citation omitted); "[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him."); *see also Martinez v. Ryan,* 132 S.Ct. 1309, 1320 (2012)(where there was no counsel, or counsel was

ineffective, in an initial-review collateral proceeding, a procedural default will not bar the federal habeas court from hearing a claim of ineffective assistance at trial; leaving open issue of attorney errors in appeals from initial-review collateral proceeding).

The abandonment of petitioner by counsel – through death and lapse of representation – constituted good cause to excuse any failure to meet filing deadlines with respect to the making of an application for a certificate of appealability, but the court of appeals did not permit such a new filing, nor did it grant leave for filing a motion to reconsider the COA denial on the merits. Instead, it treated the motion to reinstate appeal as a merits motion for reconsideration of COA denial and, because the reinstatement motion lacked such merits arguments, denied COA reconsideration, foreclosing petitioner's effort to have at least one counseled application for COA presented to at least one circuit judge.

The instant case resembles *Maples v. Thomas* in pertinent regard, while presenting an even more direct abandonment. In *Maples*, the post-conviction litigant's attorneys did not advise him of their changed employment and that they could no longer represent him; nor did any other attorney in their law firm, Sullivan & Cromwell, seek to substitute as counsel or to advise the court of the change to the litigant's representation. Moreover,

the failure of Maples' attorneys to advise the court of their changed status and to seek permission to withdraw caused the court's records to be inaccurate, with the result that orders were sent to the attorneys, rather than to the post-conviction litigant, who was deprived of essential notice. In addition, other Sullivan & Cromwell attorneys who purported to have assisted in legal work on behalf of Maples were not admitted in the Bar of the state in which the post-conviction proceedings were filed and had not entered appearances on Maples' behalf or advised the court they wished to be substituted as Maples' counsel, such that "none of these attorneys had the legal authority to act on Maples' behalf before his time to appeal expired." 132 S.Ct. at 935-36. In light of these lapses, the Court concluded that the applicant's attorneys had abandoned him, leaving him without representation at a "critical time" in his post-conviction proceeding and resulting in a failure to file a timely appeal from the denial of his post-conviction motion. *Id.* at 917.

Even more serious a lapse than in *Maples*, the changed circumstance in petitioner's case was the actual *death* of his counsel, accompanied not only by the failure of anyone in counsel's law firm to notify petitioner or the court of appeals of the death but, additionally, by the misrepresentation that another attorney was counsel on appeal, when he was not, and the further circumstances that no one, including Mr. Puccio, calling into question the

propriety of the COA memorandum that was filed ***one day after*** the attorney identified in the improperly signed (effectively unsigned) had died of leukemia.

As in *Maples*, the absence of notification to the courts that counsel had died deprived petitioner of essential notice of court and a right to proceed with counsel. And as in *Maples* no attorney in fact "had the legal authority to act" on petitioner's behalf. *Maples*, 132 S.Ct. at 136.

The Court has affirmed that "[t]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 834 (1985). The facts in this case demonstrate that petitioner was involuntarily deprived of representation, both following the death of counsel as well as prior to counsel's demise, due to deception and rule violations by his deceased counsel or persons acting in his stead without the consent or knowledge of petitioner. Further, both petitioner and the court of appeals were misled as to the circumstances of this lapse of representation, with the result that petitioner was foreclosed from seeking relief during a critical time in his appeal proceedings.

In the alternative, the representational lapses and improprieties of petitioner's counsel of record

regarding as well as misrepresentations in the district court proceedings warrant a remand to the district court.

3. *Undue appellate constriction of a movant's right under 28 U.S.C. § 2253 to seek a COA from any circuit judge*.

The Eleventh Circuit's practice of restricting plenary merits review of a certificate of appealability to a single circuit judge, such that panel reconsideration of the denial of a COA is limited to only new arguments, violates the right conferred on a habeas petitioner by 28 U.S.C. § 2253 to have any circuit judge determine that his COA application is meritorious.

In precluding *de novo* rehearing of the COA denial, the Eleventh Circuit has effectively transformed the gatekeeping role of courts, as envisioned by § 2253, into an implacable wall. Under the governing statutory framework, a habeas petitioner may not be restricted to a final determination of the merits of his COA by one judge. Full review of that single judge's ruling is warranted, without limiting the scope of reconsideration to new arguments exclusively. Neither § 2253 nor the Federal Rules of Appellate Procedure impose such an onerous restriction.

The anomalous result of the Eleventh Circuit's practice is clear: had the court permitted

de novo review, the substantial abandonment-of-counsel issues raised by the petitioner – which under this Court's precedent excuses any procedural default, *see Maples v. Thomas,* 132 S.Ct. 912, 927 (2012); *Martinez v. Ryan,* 132 S.Ct. 1309*,* 1320 (2012); *Evitts v. Lucey,* 469 U.S. 387, 393, 105 S.Ct. 830, 834 (1985) – would have been addressed. Instead of curing the fundamentally unfair circumstance in which petitioner's claims, as raised in his COA, have never been given a full hearing on appeal, given his abandonment by counsel, the Eleventh Circuit has magnified the constitutional and statutory deprivations raised by petitioner.

The Seventh Circuit has adopted a practice that recognizes the necessity for affording full review of COA determinations. That Court, contrary to the Eleventh Circuit, provides for an initial consideration of a COA by two circuit judges, each of whom assesses the request independently. *Thomas v. United States*, 328 F.3d 305, 307 (7th Cir. 2003)(referencing Seventh Circuit Operating Procedure 1(a)(1)). Where the judges reach different conclusions, the application is then referred to a third circuit judge. Should that result in a denial of COA, or in the alternative event that the initial two judges concur in their independent assessments, the Seventh Circuit affords further review pursuant to a panel rehearing or rehearing *en banc*, neither of which is confined to the new-argument scenario adopted by

the Eleventh Circuit.

The rationale for the Seventh Circuit's more-expansive review procedure is rooted in statutory analysis, reflecting no limitation on *de novo,* full court review under § 2253, consideration of the *en banc* standard of Fed. R. Crim. P. 35 as to whether the presence of an important and controlling issue of law requires resolution by the full court – either to maintain uniformity within the court or to resolve a question of exceptional importance, as well as this Court's recognition of the nature and significance of COA requests:

> A request for a certificate is enough to put the case "in" the court of appeals. *See Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). Denial thus may be reviewed by the Supreme Court on writ of certiorari, as in *Hohn, Miller-El* [*v. Cockrell,* __ U.S. __, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)]*, and Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Any order that terminates the appeal, and may be reviewed by the Supreme Court, also should be eligible for review by the full court of appeals. Occasionally the denial of a request for a certificate of appealability will present the sort of legal question that justifies rehearing en banc; that option should be available, even though the search for a needle in the

> haystack of pro se motions has a potential to tax this court's resources (as the forma pauperis docket taxes the Supreme Court's). Consequently, a document (whether styled "petition for rehearing" or "motion for reconsideration") that seeks review by the court en banc will be distributed to all active judges.

328 F.3d at 308.

The preclusive practice of the Eleventh Circuit, at odds with § 2253 and the rules and underlying principles governing appellate practice, as recognized by the Seventh Circuit as well as by this Court, merits issuance of a writ of certiorari.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Richard C. Klugh
Counsel for Petitioner
25 S.E. 2nd Avenue, Suite 1100
Miami, Florida 33131
Tel. (305) 536-1191

June 2013